

Congress of the United States
Washington, DC 20515

October 18, 2016

The Honorable Jacob Lew
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Re: Temporary Section 337(d) Regulations – T.D. 9770

Dear Secretary Lew:

The temporary and proposed regulations under section 337(d) of the Internal Revenue Code (the Code) appeared in the *Federal Register* on June 8, 2016, which, among other items, provided the built-in gain recognition period for real estate investment trusts (REITs) and regulated investment companies (RICs). As discussed below, we believe that these new regulations are not consistent with congressional intent and longstanding practice that the built-in gain period for S corporations also is to apply to REITs and RICs.

As you know, when a C corporation elects to be an S corporation, or converts to a REIT or a RIC, any gain from the sale of assets held at the time of election are subject to corporate tax if such assets are sold within a specified time period. This rule has applied to S corporations, REITs, and RICs since 1988.¹ The specified built-in gain recognition period for these types of entities has always been identical.

This connection is explicit in long-standing regulations under section 337(d), which references the S corporation built-in gain period under Code section 1374. As the built-in gain recognition period was reduced for S corporations to seven and then five years on a temporary basis, the shorter recognition period also was applied to REITs and RICs by existing regulatory reference to section 1374. In private letter rulings and instructions to the applicable tax forms, the IRS responded to each modification to section 1374 by applying the built-in gain recognition period for REITs and RICs that corresponds with the period applicable to S corporations.²

The PATH Act enacted in December 2015 made the built-in gain recognition period for S corporations five years on a permanent basis. Considering the long-standing link between S corporations, REITs, and RICs on this issue for nearly three decades, the Joint Committee on

¹ Notice 88-19, 1988-1 C.B. 486 (Feb. 4, 1988).

² See e.g., Priv. Ltr. Rul. 200932018 (Aug. 7, 2009), Priv. Ltr. Rul. 201340009 (Oct. 4, 2013); Instructions to IRS Form 1120-REIT for 2009 (7-year period), Instructions to IRS Form 1120-REIT for 2015 (permanent 5-year period).

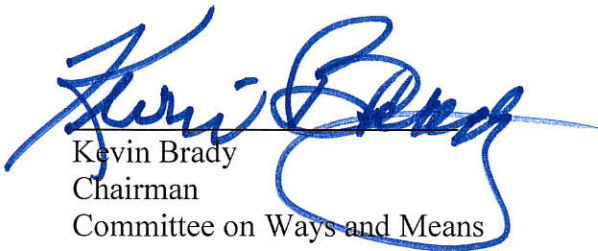
Taxation's technical explanation of the PATH Act indicates that the permanent five-year recognition period would apply to REITs and RICs with equal force.³

We were concerned, therefore, when Treasury released the new section 337(d) regulations in June 2016 that applied a different built-in gain recognition period to REITs and RICs from the new permanent period that applies to S corporations. We believe the new regulations are inconsistent with congressional intent and longstanding practice that REITs, RICs, and S corporations be subject to the same five-year built-in gain recognition period.

Accordingly, we ask that the regulations be modified to provide that REITs, RICs and S corporations are all subject to the same five-year built-in gain recognition period in order to be consistent with congressional intent and longstanding practice.

If you have any questions about this matter, please contact our staff on the House Ways and Means Committee and Senate Finance Committee. Thank you for your attention to this matter.

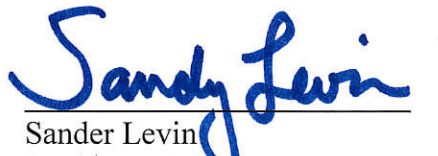
Sincerely,



Kevin Brady
Chairman
Committee on Ways and Means



Orrin G. Hatch
Chairman
Committee on Finance



Sander Levin
Ranking Member
Committee on Ways and Means



Ron Wyden
Ranking Member
Committee on Finance

³ Joint Committee on Taxation, *Technical Explanation of the Revenue Provisions of the Protecting Americans from Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to H.R. 2029 (Rules Committee Print 114-40)*, (JCX-144-15), December 17, 2015, p. 43; Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in 2015 (JCS-1-16)*, March 14, 2016, p. 149.