NATIONAL ASSOCIATION OF
REAL ESTATE INVESTMENT TRUSTS®

March 28, 2011

VIA E-MAIL

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: *Security Ratings*
File No. S7-18-08
Release No. 33-9186

Dear Ms. Murphy:

This letter is submitted in response to the solicitation of comments by the Securities and Exchange Commission (Commission) with respect to its proposed rulemaking (Proposal) published in *Security Ratings*, Release No. 33-9186 (File No. S7-18-08; February 9, 2011) (Proposing Release).

The National Association of Real Estate Investment Trusts® (NAREIT) is the worldwide representative voice for U.S. real estate investment trusts (REITs) and publicly traded real estate companies with an interest in U.S. real estate and capital markets. Members are REITs and other businesses throughout the world that own, operate and finance income-producing real estate, as well as those firms and individuals who advise, study and service these businesses. NAREIT welcomes the opportunity to respond to the Proposal and is submitting its comments below.

Executive Summary

While Section 939A of the Dodd-Frank Wall Street and Reform Consumer Protection Act (Dodd-Frank Act) requires the removal of references to credit ratings from the rules and regulations of the Securities and Exchange Commission (Commission), including the “investment grade rating” transaction eligibility standards of I.B.2 and I.C.2 of the General Instructions to Form S-3, NAREIT believes that the $1 billion / three-year replacement standard for I.B.2 and I.C.2 eligibility contemplated by the Proposal would create unintended roadblocks to widely followed REITs’ continued access to the public debt capital markets. In summary, NAREIT believes that if the

Proposal were adopted in its current form, many REITs that enjoy a broad market following and have a class of equity securities registered under the Securities Exchange Act of 1934 (1934 Act) with a "float" greatly in excess of $75 million would lose the ability they currently have under General Instructions I.B.2 and I.C.2 to access the public debt capital markets in an efficient manner through use by their operating partnership (OP) subsidiaries of the short-form shelf registration process under the Securities Act of 1933 in reliance on Form S-3 for primary offerings.

This would result from: 1) the inability of most REIT OP subsidiaries to qualify under the proposed $1 billion/three-year transaction eligibility standard; and 2) a variety of legal, financial and tax constraints applicable to REITs that limit the ability of REIT OP subsidiaries to qualify for use of Form S-3 under other existing transaction eligibility standards. How counterproductive a result this would be can best be highlighted by reference to the way in which REITs were able to withstand successfully the extraordinary pressures created by the turmoil in the economy during the 2008-2010 "Great Recession." When traditional secured credit became largely unavailable to them and deep declines in the share price of most REITs caused their debt as a percentage of total market capitalization to rise significantly above sustainable levels, the REIT sector reacted by first issuing significant amounts of new equity at the REIT level using the shelf registration process to re-equitize their balance sheet, and then issuing considerable amounts of non-convertible debt securities, often through their OP subsidiaries, to raise proceeds needed to refinance maturing loans, thereby restoring liquidity, extending their average debt maturities and strengthening their balance sheets. This "virtuous cycle" resulted in most large REITs ending 2010 with strong balance sheets, large amounts of liquidity available for the next real estate cycle and fully recovered share prices. This success story would have been severely hampered had REITs not had easy access to the debt capital markets, including in many cases through their OP subsidiaries being eligible to issue non-convertible debt securities through the shelf registration process in reliance on their S-3 eligibility under General Instruction I.B.2. Should the Proposal be adopted in its current form, NAREIT believes there will be a substantial increase of non-convertible debt securities offerings by REIT OPs in the unregistered markets (either in reliance on the Rule 144A exemption or through traditional private placements), contrary to the Commission's long term goal of increasing the attractiveness of registered offerings by reducing the time needed to access public markets and making short-form registration available to a greater number of issuers.

As the Proposing Release notes, the legislative history of the Dodd-Frank Act does not indicate that Congress intended to change the types of issuers and offerings that could rely on Form S-3, and the Commission has accordingly considered several mechanisms to avoid this consequence for issuers believed to be widely followed in the market. NAREIT believes, however, that the Commission's proposal that eligibility under both I.B.2 and I.C.2 incorporate the same method and threshold by which the Commission defined an issuer of non-convertible securities, other than common equity, as a WKSI is unduly restrictive and not consistent with the Commission's stated objective of identifying those debt-only issuers that "generally have their Exchange Act filings broadly followed and scrutinized by investors and the markets." Only the OP subsidiaries of the very largest of REITs, which NAREIT believes to be very limited in number, could ever hope to qualify as WKSIs by having issued more than $1 billion of non-convertible debt in registered offerings over the most recent three years. In addition, NAREIT respectfully points out that the logic of adopting for debt-only issuers the same test for S-3 eligibility as for WKSI status is inconsistent with the logic that applies to issuers of common equity, where the general eligibility threshold under General Instruction I.B.1 ($75 million in aggregate market value of equity held by non-affiliates) is only one-ninth of the $700 million necessary to qualify as a WKSI.

With all above considerations in mind, NAREIT respectfully requests that the Commission consider and adopt several changes to the Proposal, which are discussed in detail in Section IV below, to provide continued access to Form S-3 for the issuance of non-convertible debt securities by widely followed REITs and their OP subsidiaries. Briefly stated, NAREIT proposes that:

1. the new I.B.2 test for S-3 eligibility identify debt-only issuers that have a wide following in the marketplace and information about which is generally readily available by reference to a significant (such as $250 million) aggregate principal amount of non-convertible debt securities ***outstanding***, rather than by satisfying the WKSI test in paragraph (1)(i)(B) of the definition in Rule 405. NAREIT believes this amount is sufficient to ensure that a debt-only issuer is subject to the level of scrutiny, market coverage and analysis cited in the Commission's proposing release as the proper substitute for securities ratings issued by a NRSRO as a transaction requirement to permit issuers to register primary offerings of non-convertible securities for cash;

2. a new I.C.2 test permit a majority-owned subsidiary of a parent that is S-3 eligible under General Instruction I.B.1 (over $75 million of equity held by non-affiliates) to register non-convertible debt securities if the public equity float of the parent combined with the outstanding aggregate principal amount of non-convertible debt securities of the parent and/or the majority-owned subsidiary registrant exceeds $700 million. NAREIT believes that this level of combined investment from the public debt and equity capital markets is significant enough, regardless of the relative size of the two components separately, to ensure that both the parent and the majority-owned subsidiary enjoy a broad market following. NAREIT believes that this element of its proposal for majority-owned subsidiaries that are debt-only issuers is logically consistent with current General Instructions I.C.2, I.C.3, I.C.4 and I.C.5; and

3. the Commission consider revising paragraph (1)(ii)(C) of the definition of WKSI in Rule 405 to include the securities of the majority-owned subsidiary of a parent that is a well-known seasoned issuer pursuant to paragraph (1)(i) of the definition of a WKSI, if the majority-owned subsidiary has at least $500 million in aggregate principal amount of non-convertible debt securities outstanding (i.e. twice the amount needed under new I.B.2 to be eligible to use Form S-3 for issuing non-convertible debt securities and half the amount needed for a standalone debt-only WKSI pursuant to paragraph (1)(i)(B) of the definition in Rule 405).

In the following sections of this letter, we 1) describe the typical REIT/OP structure, 2) analyze the problems created by the Proposal in its current form and explain why these problems arise, and 3) suggest how the Commission could modify the existing Proposal to avoid limiting REITs' access to debt capital markets via Form S-3.

I. Overview of the Legal and Financial Structure of REITs

In order to understand the impact of the Proposal, it is helpful to describe the typical legal and financial structure of publicly traded REITs. The prevalent corporate structure of these REITs is the so-called "umbrella partnership REIT" or "UPREIT" structure, in which a REIT (organized either as a business corporation or a business trust) is the general partner of an OP. The REIT indirectly owns all or substantially all of its properties and conducts substantially all of its business, directly or indirectly, through a single OP subsidiary. In all but exceptional situations the REIT owns a majority of the equity of the OP (denominated as "OP units") and has full control of the OP as general partner under the terms of the OP partnership agreement. OP units are usually exchangeable for common shares of the REIT, subject to some conditions, on a one-for-one basis, effectively making common shares of the REIT and OP units economic equivalents. The OP's business is managed by the same Board of Directors as the REIT for the benefit both of REIT shareholders and OP minority partners. Whether the REIT is internally managed or externally advised, a single management team is generally charged with managing the business and affairs of the entire enterprise, consisting of the REIT, its OP subsidiary and downstream property-owning subsidiaries. In the great majority of cases, and in all cases with which NAREIT is concerned for purposes of this letter, the REIT's common equity securities are listed on a national securities exchange. The OP units, however, are not and, for reasons summarized in Section II below, cannot be exchange-listed.

These key features of the UPREIT structure can be summarized as "substantially similar assets, operations and management" as between the REIT and its OP subsidiary and have been viewed by the Commission's Staff as the basis for permitting a REIT parent and its OP subsidiary who are both subject to the reporting requirement of the 1934 Act to file joint periodic and other reports because "there are only limited differences between the information required to be disclosed, such that the differences can be highlighted in an easy to understand manner." It follows that UPREITs, consisting of the parent REIT and its OP subsidiary, generally fall into the category of issuers for whom information is broadly and easily available to market participants regardless of the fact that the REIT and the OP are technically separate registrants and OP units are not listed on a national exchange.

In many cases, UPREITs borrow at the OP level, rather than at the REIT level. These borrowings are comprised of all or some of the following: 1) non-convertible debt securities, 2) debt securities of the OP exchangeable for common equity of the REIT, 3) secured and unsecured bank loans from banks and other financial institutions and 4) other forms of debt financing provided by institutional investors to fund real estate acquisition and development activities. Creditors generally prefer that the OP be the primary obligor on indebtedness because, although the OP is only partially owned by the REIT, 100% of the cash flow from the operating assets of the whole enterprise is available to satisfy the creditors' claims. It is also important to many creditors that different series or issues of senior recourse debt enjoy *pari passu* status both contractually and structurally, resulting in the OP subsidiary being the issuer of the REIT enterprise's debt securities generally. If the REIT were to issue debt securities itself, the portion of the cash flow from the underlying assets that is attributable to the minority equity interests in the OP not owned by the REIT would not be available to service that debt. For the same reason, incurring debt obligations at the REIT level would interfere with preserving the pro rata liability of minority partners of the OP and undermine the effective economic equivalency of REIT shares and OP units.

OP debt securities are structurally one step closer to the actual revenue-producing real estate assets to which creditors ultimately look for repayment. Being creditors at the OP level alleviates "structural subordination" concerns from a general credit underwriting point of view. Structural subordination arises in a parent-subsidiary organizational structure regardless of whether the subsidiary is wholly or partially owned. Creditors of the parent whose claims for principal and interest should, as a business matter, rank *pari passu* with claims of creditors of a subsidiary for principal and interest do not actually rank on a parity basis with those claims because the subsidiary's creditors can exercise their remedies against the subsidiary and its assets, while the parent company's creditors cannot and thus are effectively "equity" *vis-à-vis* the subsidiary's creditors. In the UPREIT context, banks and institutional real estate lenders typically require the OP to be their borrower. If debt securities were to be issued in capital markets transactions by the REIT, rather than the OP, those securities would be structurally junior to bank and other loans, and the market may demand increased compensation for the structural risk in the form of a higher yield.

While upstream guaranties by the OP of debt securities issued by the REIT might alleviate some of these concerns, they typically present enforceability / equitable subordination and other legal issues. Although downstream guaranties by the REIT of debt securities issued by the OP might be thought to reduce some of the adverse effects of the Proposal on REITs because of the eligibility standard for majority-owned subsidiaries described in I.C.3 of the General Instructions to Form S-3, in practice these guaranties pose a variety of practical, legal and tax issues that would make general use of them problematic. For example, a REIT may prefer not to guaranty debt issued by its OP subsidiary, principally in order to afford minority OP partners who contribute properties to the OP a tax basis proportionate to their equity interests in the OP through a variety of tax techniques including so-called "bottom-dollar guaranties" of OP debt. The fact that many REITs do not guaranty indebtedness of their OP subsidiaries is an integral aspect of the UPREIT structure that supports the operating and growth strategies of the REIT's real estate business as a whole. This structure is unlike many other parent / subsidiary relationships, where downstream guaranties are not problematic.

In addition, NAREIT believes that non-convertible debt securities issued by an OP subsidiary that are guarantied by the REIT parent do not enjoy any wider or different following in the marketplace than equivalent securities would without such a guaranty. Moreover, in both cases the same information is available to investors and other market participants and it does not seem any more or less appropriate to allow incorporation by reference of subsequently filed 1934 Act reports of the REIT into registration statements of the OP and delayed offerings of non-convertible debt securities by the OP off the shelf. As a practical matter, it is widespread current practice for UPREITs to have in place a single "universal" shelf registration statement with two different registrants (the REIT and its OP subsidiary) whereby 1) equity securities can be issued off the shelf by the REIT and 2) non-convertible debt securities can be issued off the shelf by the OP. Therefore, NAREIT believes that effectively requiring downstream guaranties by a REIT as a condition to eligibility for Form S-3 by the OP to issue non-convertible debt securities, as the Proposal would effectively do, is unnecessary in light of the corporate and structural relationship between the REIT and its OP subsidiary and detrimental to REITs' ability to take full advantage of the UPREIT structure.

For all the above reasons, NAREIT proposes adding to General Instruction I.C.2 a new eligibility test as follows:

> ***"the parent of the registrant-subsidiary meets the Registrant Requirements and the conditions of Transaction Requirement B.1 (Primary Offerings by Certain Registrants), the securities to be offered for cash are non-convertible securities, other than common equity, and the sum of (i) the aggregate market value of the voting and non-voting common equity of the parent of the registrant-subsidiary held by non-affiliates, plus (ii) the aggregate principal amount of non-convertible debt securities of the parent of the registrant-subsidiary and the registrant-subsidiary outstanding exceeds $700 million in the aggregate."***

As a general matter, exchange-listed REITs seek to maintain a consolidated debt-to-total-market-capitalization ratio (*i.e.*, financial leverage) below 50%. That would mean that an OP subsidiary of a listed REIT with $200 million of non-convertible debt securities outstanding and $400 million of secured and/or unsecured loans would typically have at least $600 million of outstanding equity securities. If affiliates held $100 million of equity securities, the combined UPREIT group would satisfy the new proposed I.C.2 test with $700 million of "combined debt and equity float." Based on conversations with market participants, this threshold would seem adequate. to identify UPREIT structures with a sufficient capitalization to justify giving the OP subsidiary access to the shelf offering process for its non-convertible debt securities consistently with the goals articulated by the Commission in its Proposing Release.

The rationale for this proposal is discussed in detail in section IV.B below.

II. REIT OPs Have Limited Eligibility for Form S-3

Eligibility to use Form S-3 depends on an interplay of the registrant and transaction requirements in the General Instructions to Form S-3. Many REITs whose common equity securities are listed on a national securities exchange not only satisfy the registrant requirements of General Instruction I.A., but also satisfy the transaction requirements for primary offerings without limitation as to amount in General Instruction I.B.1. The largest REITs are also "well known seasoned issuers" (WKSIs) under Commission rules. Their subsidiary OPs, however, generally can only use Form S-3 pursuant to the eligibility standard found in General Instruction I.B.2 for offerings of investment grade rated non-convertible debt securities that the Proposal will eliminate. As discussed above, REIT OPs in practice need to be able to issue securities in the debt capital markets. Access to Form S-3 is therefore extremely important because it enables a

REIT, through its OP, to use the shelf registration process to access the public debt capital markets efficiently, both from a timing/process perspective and from a cost perspective. Preserving the eligibility of OP subsidiaries of S-3 eligible REITs to access Form S-3 is of vital importance to REITs, which rely on frequent issuances of debt securities to fund their operations and growth.

OP subsidiaries of REITs satisfy neither the registrant requirements of General Instruction I.A. nor the transaction requirements for primary offerings of securities generally under General Instruction I.B.1. OPs do not have a class of equity securities registered under the 1934 Act that is listed for trading on a national securities exchange and therefore cannot meet the $75 million public float requirement, which is based on trading prices as reported by an exchange. The "unlisted status" of OP equity securities results principally from the adverse effects of becoming publicly-traded partnerships (and therefore taxed as corporations) under the Internal Revenue Code. OP subsidiaries of REITs cannot satisfy the transaction requirements for "limited primary offerings" under General Instruction I.B.6. because OP units are not listed for trading on any exchange. Further, even in the case of secondary sales, OP subsidiaries of REITs cannot satisfy the transaction requirements of General Instruction I.B.3. to cover secondary sales (resales) of securities sold in unregistered private offerings because General Instruction I.B.3. requires that securities of the same class must be listed and registered on a national securities exchange. Finally, only the OP subsidiaries of the very largest of REITs, which NAREIT believes to be very limited in number, could ever hope to qualify as WKSIs by having issued more than $1 billion of non-convertible debt in registered offerings over the most recent three years.

Therefore, to be able to launch and price a public offering of non-convertible debt securities on short notice using Form S-3, with the speed and efficiency necessary to take advantage of favorable market conditions, REITs and their OP subsidiaries have generally relied on one of two approaches, both of which are currently based on the issuance of non-convertible investment grade debt securities.

First, many REIT OPs have issued investment grade non-convertible debt securities under Form S-3 General Instruction I.B.2 (*Primary Offerings of Non-convertible Investment Grade Securities*). To qualify to issue non-convertible investment grade debt securities under Form S-3, these REIT OPs have chosen to register a class of equity securities under the 1934 Act on a voluntary basis by filing a Form 10 registration statement. This permits a REIT OP to use Form S-3 and the shelf registration process of Rule 415 to register debt securities for issuance off the shelf as soon as it obtains an investment grade rating.

As an alternative, other REIT OPs have issued debt securities in registered offerings, including shelf registrations, under Form S-3 General Instruction I.C.2 as majority-owned subsidiaries of REITs that were transaction-eligible for use of Form S-3. General Instruction I.C.2, however, incorporates the investment grade non-convertible debt requirement currently found in General Instruction I.B.2. As a result, this eligibility to use Form S-3, like the direct eligibility described in the preceding paragraph, will no longer be available when the Commission eliminates the "investment grade rating" transaction eligibility standard from Form S-3.

As a further alternative, REITs can choose to provide full and unconditional guaranties of the payment obligations on non-convertible debt securities issued by their OP subsidiaries to take advantage of General Instruction I.B.3. to issue the securities off the shelf. As discussed above, however, NAREIT does not see a strong rationale for treating OP subsidiaries of otherwise similarly situated REITs differently as to eligibility to use Form S-3 depending on the presence or absence of a downstream guaranty, particularly when weighed against the problems such guaranties can create for UPREITs.

If the Proposal is adopted in its current form, it follows that the significant number of REIT OPs that could no longer qualify under General Instruction I.B.2 or I.C.2 would increase their issuances of debt securities in unregistered offerings (generally private placements structured to take advantage of the Rule 144A and Regulation S resale exemptions). This structure allows for speed comparable to a "shelf takedown" when marketing an offering, but involves complexity associated with unregistered offerings of securities and creates additional expense, as the issuer is typically required to exchange registered notes for privately issued notes at a later date (the so-called "A/B exchange" structure contemplated in a number of Commission no-action letters) and/or incur increased interest expense. Registered public offerings of debt securities do not face the same drawbacks, and the easy public access to the documentation for registered offerings through the EDGAR system also increases the level of transparency in the market.

III. The Impact of the Commission's Proposal

The Proposal Will Significantly and Adversely Affect REITs' Access to Debt Capital

The Proposal would for all practical purposes disqualify a significant number of OP subsidiaries of REITs from using Form S-3 and the shelf registration process. By replacing the investment grade standard in General Instruction I.B.2 and I.C.2 with the $1 billion/three year test, REIT OPs would only be able to use Form S-3 and the shelf registration process for the issuance of debt securities if they satisfy the WKSI standard, which NAREIT believes is extremely unlikely except for a limited number of the largest REIT OPs. As a result, NAREIT believes such REIT OPs may choose to turn to the unregistered debt securities market, which, as discussed above, is both more expensive for issuers and less transparent to market participants.

The Proposal is Inconsistent with Commission Goals and Prior Rulemaking

NAREIT believes that the Proposal is, both in its effects and in its structure, inconsistent with Commission goals and prior rulemaking. We believe that the Proposal's effect of essentially eliminating the ability of REIT OPs to conduct streamlined public offerings of non-convertible debt securities is inconsistent with a long series of Commission actions that have steadily expanded cost-effective, regular and transparent access to the capital markets for an increasingly large segment of U.S. reporting companies over the last 18 years. Starting with the change from three years to one year of status as a reporting company under the 1934 Act, the Commission has consistently made Form S-3 available to an increasing number of companies, including companies with smaller capitalization.

We also believe that the Proposal is fundamentally inconsistent with the legislative history of the Dodd-Frank Act, which does not indicate that Congress intended to change the types of issuers and offerings that could rely on Form S-3. NAREIT welcomes the Commission's stated goal of lessening the drastic impact that the Proposal will have on REIT OPs as a discrete but very important segment of companies subject to the reporting requirements of the 1934 Act.[1]

NAREIT believes that the Proposal is also structurally inconsistent with the Commission's past rulemaking and current policy goals when considered from a technical perspective. Adopting the same standard for S-3 eligibility as the test for WKSI status [2] for debt-only issuers seems inconsistent with the Commission's goal of establishing a "graduated" system in which registrants are allowed progressively easier access to the capital markets depending on the depth and breadth of their following in the market.[3] We note that adoption of such a high standard would appear to be a significant departure from current standards for Form S-3 use, which do not require issuers to satisfy a WKSI-type test, and we believe that this change is not required to achieve the goals articulated by the Commission in the Proposing Release. It is also unclear why equity issuers should be eligible to use Form S-3 based on $75 million of public equity float without regard to how or when those securities were issued, while debt-only issuers would be required to have issued $1 billion or more of non-convertible debt securities in registered offerings during the last three years in order to be eligible to use Form S-3.

IV. NAREIT's Proposal

A. General Instruction I.B.2 to Form S-3

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[1] As discussed in NAREIT's comment letter on the Commission's 2008 proposal, REITs were not associated with perceived abuses in the marketplace. OPs generally are controlled subsidiaries of publicly-traded REITs operating as a single well capitalized real estate enterprise. They are different from issuers of structured finance instruments or special purpose vehicles created for the sole purpose of issuing asset-backed securities. Elimination of REIT OPs' ability to use Form S-3 would not only have an adverse effect on their ability to efficiently and cost-effectively raise debt capital in the public markets, but it would do so at a time when the effects on financial and real estate markets would be both inopportune and undesirable because of ongoing efforts to refinance outstanding debt. The resulting contraction of capital resources and liquidity may in turn have serious effects on the real estate activities of OPs and their publicly-traded REIT parents. We believe that this is an unintended consequence of the Proposal, especially in light of the fact that REITs and their OP subsidiaries that issue non-convertible debt securities are in nearly every instance moderately leveraged, financially stable and widely followed in the securities markets. This is in sharp contrast with well-publicized problems associated with structured securities that are difficult to analyze in terms of risk and reward parameters and often involve complex financial instruments rather than direct obligations of operating businesses with tangible assets. Further, we note that access to efficient debt capital is supremely important to commercial real estate given continued difficulties in the commercial mortgage backed securities (CMBS) market.

[2] See Proposing Release at p.14: "We are proposing to revise the form eligibility criteria using the same method and threshold by which the Commission defined an issuer of non-convertible securities, other than common equity, that does not meet the public equity float test as a 'well-known seasoned issuer.' Similar to our approach with WKSIs, we believe that having issued $1 billion of registered non-convertible securities over the prior three years would generally correspond with a wide following in the marketplace. These issuers generally have their 1934 Act filings broadly followed and scrutinized by investors and the markets."

[3] It would also limit the ability of REIT OPs to qualify as WKSIs by eliminating one of the three ways in which a majority-owned subsidiary can obtain WKSI status – by meeting the transaction requirement of General Instruction I.B.2. which the Commission is proposing to change.

NAREIT respectfully submits for consideration by the Commission a modified standard for use of Form S-3 by debt-only issuers pursuant to General Instruction I.B.2 that would ensure that issuers, including REIT OPs, that enjoy a broad following in the marketplace continue to have the same access to the public debt capital markets that they have today. Specifically, NAREIT proposes that eligibility for use of Form S-3 by debt-only issuers pursuant to General Instruction I.B.2 should be based on:

1) the amount of non-convertible debt securities ***outstanding*** and held by non-affiliates of the issuer, rather than the amount issued in the last three years in registered primary offerings for cash;

2) a significant dollar threshold, measured by the aggregate principal amount of non-convertible debt securities outstanding and held by non-affiliates of the issuer, of $250 million, which, while lower than that required by paragraph (1)(i)(B) of the definition of WKSI in rule 405, is large enough to ensure wide market coverage and to create an efficient market for the debt securities to be issued; and

3) inclusion in the test of all non-convertible debt securities of the registrant outstanding, whether issued in registered or exempt offerings[4], rather than only those issued in registered primary offerings.

NAREIT believes that its proposal is consistent both with past Commission rulemaking and with the Commission's long-standing objective to facilitate and expand capital market access for issuers with a broad market following. NAREIT also believes that its proposal is consistent with the stated objectives of the Proposing Release. Modification of the eligibility criteria contained in Form S-3 General Instruction I.B.2 as proposed by NAREIT would avoid the unintended elimination of use of Form S-3 by widely followed debt-only issuers, including REIT OPs.

In the alternative, if the Commission is not willing to modify the Proposal as suggested above, NAREIT proposes that the Commission modify its Proposal to reduce the $1 billion threshold to $350 million, which is approximately one-third of the aggregate principal amount necessary to qualify as a WKSI.

Each element of NAREIT's proposal and alternative proposal is discussed separately below.

Test Outstanding Debt Securities, Rather Than Debt Securities Issued During Prior Three Years

As the first element of its proposal for a revised transactional eligibility standard for use of Form S-3 by debt-only issuers, NAREIT proposes that the Commission base Form S-3 access for these issuers on the aggregate principal amount of debt securities that are ***outstanding*** at the time eligibility is tested, rather than the amount of debt securities *issued* during the prior three years.

[4] In the alternative, at least those non-convertible debt securities that have been issued in registered A/B exchange offers for securities previously issued in exempt primary offerings for cash should be included in the test, although limiting I.B.2 in such manner would seem to create unnecessary difficulties in terms of requiring registrants to distinguish between "eligible" and "ineligible" securities even though they are part of the same class or series and they are otherwise homogeneous and available in the market to the typical debt securities investor.

NAREIT believes that debt capital markets participants, including investors and research analysts, focus on the aggregate principal amount of an issuer's debt securities that are outstanding in the market and available for trading as the test for whether the issuer deserves their interest or the commitment of resources to begin or continue research coverage, not on the amount that has been issued in a relatively recent period. Debt securities outstanding at any particular time may have been, and often were, issued more than three years before such time, because: 1) the average maturity of debt securities is in the five-ten-ten year range; and 2) debt securities typically have three or four year "no call" periods after the issue date. If an issuer continues to have a significant amount of debt securities outstanding at a given date, regardless of when the securities were originally issued, then buy side and sell side market participants will follow the issuer and provide the level and sophistication of analysis that the Commission cites in the Proposing Release as an appropriate basis for Form S-3 eligibility.

This component of our proposal for debt-only issuers is also consistent with General Instruction I.B.1. to Form S-3, which requires for general Form S-3 eligibility a minimum aggregate market value of its voting and non-voting common equity held by non-affiliates (public float) in excess of $75 million, regardless of when or how the equity securities were issued. For a debt-only issuer, the principal amount of debt securities outstanding is the functional equivalent of public float for an issuer whose equity securities are listed for trading on an exchange, insofar as both parameters test the "market weight" of the issuer in the relevant sector of the capital markets.

Set the Threshold at $250 Million of Outstanding Debt Securities

Second, NAREIT proposes that the Commission set the threshold to an amount lower that the minimum issuance level ($1 billion) contained in the Proposal, such as $250 million of outstanding debt securities. In comparison to every other threshold for use of Form S-3, the proposed $1 billion threshold is exceptionally high and well in excess of what can reasonably be thought necessary to ensure a wide following of the issuer in the marketplace. Moreover, using the same threshold for Form S-3 eligibility as for WKSI status appears to be contrary to the policy of creating a graduated system in which issuers of increasing sizes enjoy a progressively leaner regulatory regime based on their following in the marketplace and the level of access to their information based on the 1934 Act reporting regime.

Issuers with only $75 million of public equity float are eligible for unlimited use of Form S-3. Even "smaller reporting companies" (companies with less than $75 million of public equity float or less than $50 million of revenue if they have no determinable public equity float) are eligible for limited use of Form S-3. In this light, NAREIT respectfully submits that the proposed $1 billion threshold is disproportionately high.

NAREIT believes that $250 million in non-convertible debt securities outstanding is an amount sufficient to ensure that a debt-only issuer is subject to the level of scrutiny, market coverage and analysis cited in the Proposing Release as the proper substitute for securities ratings issued by a NRSRO as a transaction requirement to permit issuers to register primary offerings of non-convertible securities for cash. We believe that a $1 billion threshold could be met by only a very small segment of the largest domestic public companies even if the amount was for debt securities outstanding at any given date (regardless of the years in which the debt securities were issued). According to conversations that we have had with investment bankers and underwriting syndicate desks, a threshold of $250 million would be sufficient to ensure that an issuer of debt securities attracts significant investor and analyst attention based on the trading activity necessary to justify debt capital markets research coverage.

Include Debt Securities Sold in Unregistered Offerings

Third, NAREIT proposes that the Commission modify the Proposal to allow issuers to take into consideration not only debt securities issued in primary *registered* offerings for cash, but also those issued in *exempt* offerings (such as, for example, so-called "Rule 144A" offerings) when determining the amount of debt securities outstanding for purposes of Form S-3 eligibility. This element of the proposal is based on NAREIT's understanding from conversations with various market participants that market following for debt securities does not distinguish between debt securities issued in Rule 144A and similar private placements and those issued in registered offerings. This is because debt capital markets participants consist principally of institutional investors, such as mutual funds and large private funds that qualify as "qualified institutional buyers" (QIBs) under Rule 144A, rather than retail investors. Trading in non-convertible debt securities occurs in essentially the same manner and among the same participants whether the securities were issued in registered offerings or exempt transactions, in large part because privately placed securities are available for trading by QIBs and other institutional investors, which constitute the vast majority of buyers and sellers of non-convertible debt securities, under various Commission rules, including Rule 144A, immediately after issuance.[5]

NAREIT understands that in the trading market, non-convertible debt securities that contractually and structurally rank *pari passu* are regarded as homogeneous regardless of whether they were issued in exempt or registered offerings. The same investors purchase and sell these securities in primary offerings and then trade them in secondary transactions regardless of how they were originally issued. For the same reason, both buy-side and sell-side analysts write research on all outstanding debt securities of an issuer. It seems counterintuitive to craft a General Instruction I.2.B that would require registrants to distinguish between "eligible" and "ineligible" securities for purposes of the "outstanding" test depending on how they were issued when in the market the securities are otherwise homogeneous. For example, outstanding non-convertible debt securities issued for cash in a primary offering exempt from registration as part of the same class or series may have a different status under the 1933 Act: some may be held by original purchasers and still bear restrictive legends; some may have been transferred among QIBs several times since issuance in reliance on Rule 144A or otherwise under Rule 144; and some may have been cleansed of restrictions through a registered A/B exchange offer. The policy underlying treating these securities differently as to whether they should or should not count as outstanding under the I.B.2 test NAREIT proposes does not seem compelling.

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5 Transaction structures such as a 144A-eligible offering followed by a registered A/B exchange offer serve the principal purpose of simplifying investors' portfolio construction in recognition of the fact that securities that are technically "restricted" as to resale have a different status for most investment funds, both registered investment companies and unregulated hedge or other open-ended funds. Moreover, privately placed debt securities also become freely tradable by non-affiliates under Commission rules within a short period of time after they are initially sold.

NAREIT believes that this element of its proposal for debt-only issuers is consistent with General Instruction I.B.1 to Form S-3, which requires a minimum public equity float in excess of $75 million, regardless of whether the securities originally were restricted, so long as the securities are held by non-affiliates of the issuer. For many Form S-3 eligible companies, the public equity float includes significant amounts of pre-IPO equity securities that were privately placed and/or were issued in merger-and-acquisition transactions in exchange for equity securities of the target. Allowing debt-only issuers to count the aggregate principal amount of debt securities issued in transactions exempt from registration towards their outstanding debt is entirely consistent with General Instruction I.B.1 for equity issuers.

At a minimum, if for issuers of non-convertible debt the Commission decides to continue to differentiate between securities issued in registered and unregistered offerings for S-3 eligibility, we propose that debt securities issued in registered A/B exchange offers in exchange for privately placed debt securities that were originally issued for cash be included in the measurement because 1) they are unrestricted, and therefore indistinguishable from other debt securities issued in registered offerings from the perspective of analyzing the market following of an issuer and its debt securities in the marketplace and 2) the original offering (whether 144A eligible or a traditional private placement) consisted of an offering for cash and therefore homogeneous in nature and purpose with primary registered offerings for cash.

Commission's Proposal with a Modified Threshold

Finally, if the Commission does not see fit to modify the Proposal to reflect NAREIT's proposal summarized above, NAREIT strongly believes that the $1 billion threshold for debt-only issuers is simply too high. Again, adopting the same test for eligibility to use Form S-3 for shelf offerings as for WKSI status runs counter to the logic of prior Commission rulemakings and to the policy of instituting a graduated system in which issuers enjoy a progressively leaner regulatory regime based on their following in the marketplace and the level of access to their information based on the 1934 Act reporting regime. For the reasons discussed above, NAREIT believes that $250 million, which is one-quarter of the aggregate principal amount necessary for a debt-only issuer to qualify as a WKSI, is a sufficiently high threshold.

This seems reasonably proportional when compared to the regime for equity issuers where 1) a registrant with a $75 million public equity float is Form S-3 eligible for the issuance of all securities in any amount, and 2) this amount is roughly one-ninth of the $700 million of public equity float necessary to meet the WKSI definition in paragraph (1)(i)(A) of Rule 405. As previously discussed, only the largest REIT OPs, which NAREIT believes to be extremely limited in number, could ever hope to qualify for use of Form S-3 if a $1 billion issuance threshold over the most recent three years is adopted. Restricting Form S-3 eligibility for debt-only issuers to those that meet the definition of WKSI does not seem necessary to achieve the goals articulated by the Commission in the Proposing Release.

B. General Instruction I.C.2 to Form S-3

NAREIT respectfully submits for consideration by the Commission an additional standard to be inserted in General Instruction I.C.2 for eligibility to use of Form S-3 by a majority-owned subsidiary of a parent that meets the Registrant Requirements of Form S-3. As discussed above in Section II, in the context of joint reporting under the 1934 Act the Commission's Staff has recognized that holding company structures characterized by "substantially similar assets, operations and management" can be viewed as a single enterprise where the parent and a majority-owned subsidiary are both subject to the reporting requirement of the 1934 Act because "there are only limited differences between the information required to be disclosed, such that the differences can be highlighted in an easy to understand manner." General Instructions I.C.3, I.C.4 and I.C.5 also effectively recognize the unifying effect of a full and unconditional guaranty of the payment obligations on non-convertible debt securities as among members of a single consolidated corporate group. NAREIT believes that, where downstream REIT guarantees of the OP's debt securities can have a negative impact on the UPREIT structure, creating a framework where eligibility of the OP subsidiary for Form S-3 effectively requires such a guaranty does not serve any policy purpose. The test for whether the OP subsidiary should be allowed to register non-convertible debt securities on Form S-3 should be whether the parent REIT and its OP subsidiary together fall into the category of issuers for whom information is broadly and easily available to market participants regardless of the fact that the REIT and the OP are technically separate registrants and OP units are not listed on a national exchange.

Specifically, NAREIT proposes that, in addition to current General Instruction I.C.2 (parent meets the conditions of Transaction Requirement B.2), a majority-owned subsidiary should be eligible for use of Form S-3 by to register its non-convertible debt securities if:

1) the parent meets the Registrant Requirements of Form S-3 and the conditions of Transaction Requirement B.1 (Primary Offerings by Certain Registrants) (i.e., over $75 million of equity held by non-affiliates); and

2) the sum of (i) the aggregate market value of the voting and non-voting common equity of the parent of the registrant-subsidiary held by non-affiliates, plus (ii) the aggregate principal amount of non-convertible debt securities of the parent of the registrant-subsidiary and/or the registrant-subsidiary outstanding exceeds $700 million in the aggregate;

In measuring the principal amount of non-convertible debt securities outstanding for purposes of this new I.C.2 test the same rules would apply as to the measurement under NAREIT's new proposed I.B.2 test (inclusion of all non-convertible debt securities issued in both registered and exempt offerings) for the reasons described in Section IV.A. above. Based on conversations with market participants NAREIT believes that a combined $700 million in public equity float and outstanding aggregate principal amount of non-convertible debt securities is significant enough, regardless of the relative size of the two components separately (so long as the parent's equity float equals or exceeds the $75 million required for S-3 eligibility under I.B.1), to ensure that both the parent and the majority-owned subsidiary enjoy a broad market following. NAREIT believes that this element of its proposal for majority-owned subsidiaries that are debt-only issuers is consistent with current General Instructions I.C.2, I.C.3, I.C.4 and I.C.5.

While current General Instruction I.C.2 is parallel to General Instruction I.B.2 (*i.e.,* provides for offerings of non-convertible investment grade securities), the reason for the parallel structure appears to be based on the use of investment grade ratings as a criterion. Following the rationale set forth in the Proposing Release, if Form S-3 eligibility is to be based on market coverage of the registrant rather than on the rating of the securities, NAREIT submits that logic does not require that the same test should apply to both stand-alone debt-only issuers and debt-only issuers that are controlled by an S-3 eligible parent company. In the case of majority-owned subsidiaries of parent entities that are eligible for general use of Form S-3 under current General Instruction I.B.1., consideration should be given to the fact that market participants follow the consolidated enterprise as a whole - in this context, the REIT and its OP subsidiary. NAREIT believes that in the case of an exchange-listed REIT and its OP subsidiary, market participants cover both entities as one enterprise. The fact that the REIT conducts substantially all of its business through the OP and controls it, both by virtue of its ownership of a majority of its voting securities, its status as general partner and the same board of directors and management team overseeing the entire business, means that the REIT and the OP are, from a capital markets perspective, the same enterprise.

The Proposal in its current form would create a framework in which a REIT with a $75 million pubic equity float would be eligible to use Form S-3 to issue an unlimited amount of equity or debt securities, while an OP subsidiary of a REIT with a $1 billion public equity float would almost never be eligible to use Form S3 to issue non-convertible debt securities unless the parent REIT provided a full and unconditional guarantee. As discussed in Section II above, NAREIT believes that a guaranty by a parent REIT of its OP subsidiary's debt securities has no real bearing on the market following or investor coverage of the debt securities themselves because the OP is the direct owner of substantially all of the enterprise's assets and 100% of its cash flow is available for debt service. Therefore requiring a downstream guaranty for the OP's access to Form S-3 for issuances of its debt securities (General Instruction I.C.3) does not seem to serve any purpose when compared to the fact that the guaranty may be problematic for an UPREIT structure.

We understand, however, that not all parent and majority-subsidiary relationships are similar to those found in the UPREIT structure, and therefore recommend use of our proposed General Instruction I.C.2 be limited to majority-owned subsidiaries that would be permitted by the Commission to file reports under the 1934 Act jointly with their parent. As we understand it, the Commission will permit joint filing when there are only limited differences between the information required to be disclosed, such that the differences can be highlighted in an easy to understand manner, and that generally this mean that there must be substantially similar assets, operations and management.

C. General Instruction I.D.1(c) (iv) to Form S-3 and paragraph (1)(ii)(C) of the definition of WKSI in Rule 405

The revisions to General Instruction I.B.2 to Form S-3 may make it advisable to consider a modified paragraph (1)(ii)(C) of the definition of WKSI in Rule 405. Currently OP subsidiaries of REITs that qualify as WKSIs under paragraph (1)(i)(A) of the definition of WKSI in Rule 405 are able to simultaneously qualify for use of Form S-3 to issue non-convertible debt securities under General Instruction I.B.2 and for automatic shelf offerings under General Instruction I.D.1.(c)(iv) to Form S-3. To be consistent with the Commission's goal of establishing a "graduated" system in which registrants are allowed progressively easier access to the capital markets depending on the depth and breadth of their following in the market, if the Commission accepts NAREIT's proposal that the I.B.2 test require a minimum of $250 million in aggregate principal amount of non-convertible debt securities outstanding and held by non-affiliates of the issuer, a greater amount (for example $500 million) would be appropriate for access to the automatic shelf process by a majority-owned subsidiary of a WKSI parent.

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NAREIT thanks the Commission for this opportunity to comment on the Proposal. Please do not hesitate to contact Tony Edwards, NAREIT's Executive Vice President and General Counsel, at (202) 739-9408, or the undersigned at (202) 739-9432 if you would like to discuss our comments and proposal.

Respectfully submitted,

George L. Yungmann
Senior Vice President, Financial Standards
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