

October 28, 2016

Mr. Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

**Delivered Electronically**

**Re: Proposed Rule on Disclosure Update and Simplification; 17 CFR  
Parts 210, 229, 230, 239, 240, 249, and 274; Release No. 33-10110, 34-78310;  
IC-32175; File No. S7-15-16; RIN 3235-AL82**

NATIONAL

ASSOCIATION

Dear Mr. Fields:

OF

This letter is submitted by the National Association of Real Estate Investment  
Trusts<sup>®</sup> (NAREIT) in response to the Securities and Exchange Commission's  
(SEC) Proposed Rule on *Disclosure Update and Simplification (17 CFR Parts  
210, 229, 230, 239, 240, 249, and 274; Release No. 33-10110, 34-78310; IC-  
32175; File No. S7-15-16; RIN 3235-AL82)* (the Proposed Rule or Proposal).

REAL ESTATE

INVESTMENT

NAREIT is the worldwide representative voice for real estate investment trusts  
(REITs) and publicly traded real estate companies with an interest in U.S. real  
estate and capital markets. NAREIT's 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 those  
businesses.

TRUSTS<sup>®</sup>

REITs are generally deemed to operate as either Equity REITs or Mortgage  
REITs. Our members that operate as Equity REITs acquire, develop, lease and  
operate income-producing real estate. Our members that operate as Mortgage  
REITs finance housing and commercial real estate, by originating mortgages or  
by purchasing whole loans or mortgage backed securities in the secondary  
market.

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A useful way to look at the REIT industry is to consider an index of stock  
exchange-listed companies like the FTSE NAREIT All REITs Index, which  
covers both Equity REITs and Mortgage REITs. This Index contains 221  
companies representing an equity market capitalization of \$1.052 trillion as of  
September 30, 2016. Of these companies, 181 were Equity REITs representing  
94.5% of total U.S. listed REIT equity market capitalization (amounting to \$994

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billion)<sup>1</sup>. The remainder, as of September 30, 2016, was 40 publicly traded Mortgage REITs with a combined equity market capitalization of \$58 billion.

NAREIT and its members have long understood the critical importance of communicating accurate and material business and financial information to REIT investors and appreciate the opportunity to participate in this phase of the SEC's Disclosure Effectiveness Initiative. NAREIT fundamentally believes that eliminating redundant and outdated disclosure requirements improves the effectiveness and usefulness of the information presented to investors and analysts while also decreasing the costs of preparing that information, which ultimately benefits shareholders.

To that end on July 21, 2016, NAREIT submitted [a comment letter](#) responding to the SEC's *Concept Release on Business and Financial Disclosure Required by Regulation S-K*. In NAREIT's July 21, 2016 comment letter we emphasized that NAREIT strongly believes that materiality, as evaluated through the eyes of a "reasonable investor" under the prevailing Supreme Court<sup>2</sup> standard, should continue to be the guidepost of the SEC's disclosure regime and that we believe that a "Principles-based" approach to disclosure is best suited to the constantly evolving business environment in which REITs and other businesses operate.

NAREIT's comment letter on the Proposed Rule was developed by a task force of NAREIT members, including members of NAREIT's Best Financial Practices Council. Members of the task force include financial executives of both Equity and Mortgage REITs, representatives of major accounting firms, institutional investors and industry analysts.

In analyzing the Proposed Rule, NAREIT considered the following guiding principles that we suggest should guide the SEC's efforts to update and simplify SEC disclosures:

- Simplification efforts should rigorously maintain the long-standing distinction between historical information and forward-looking disclosures. Forward-looking information (subject to safe-harbor protections) should continue to be set forth in Management's Discussion and Analysis (MD&A) and historical data and related disclosures should be reported in the footnotes to the annual or interim financial statements;
- The SEC should maintain the existing division of oversight duties between the FASB and the SEC by maintaining the FASB's role in developing accounting standards and related disclosure guidance for financial statements and the SEC's charge of developing and reviewing MD&A disclosure requirements;

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<sup>1</sup><https://www.reit.com/sites/default/files/returns/FNUSIC2016.pdf>.

<sup>2</sup>*TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) at 449.



- We endorse efforts to reduce repetitive disclosures in annual and quarterly reports and urge the SEC and FASB to coordinate efforts to ensure that interim disclosures - both in MD&A and in the notes to the financial statements - do not simply repeat annual disclosures, absent a material change; and,
- We urge the SEC to develop and implement an ongoing systematic process (such as FASB's current process) to comprehensively identify and eliminate outdated or redundant disclosure requirements, at regular intervals or upon the issuance of new requirements.

The following is a discussion of NAREIT's recommendations on the Proposed Rule that are relevant to REITs. Our comments below are keyed to the relevant sections of the Proposal, which are referenced by citations in parentheses

## **1. Overlapping Requirements - Proposed Deletions (Proposal, Section III, C)**

### **a. REIT Disclosures (Proposal, Section III, C, 1)**

#### *i. Undistributed Gains or Losses on the Sale of Properties*

NAREIT supports the Proposed Rule's suggestion to delete Rule 3-15(a)(2) of Regulation S-X. NAREIT agrees that Regulation S-X's current requirement that REITs present undistributed gains or losses on the sale of properties on a book basis does not provide meaningful information to investors. Based on discussions with REIT analysts and investors, the disclosures required by Rule 3-15(c) of Regulation S-X of the tax status of distributions provide users of financial statements with the information they need.

#### *ii. Status as a REIT*

NAREIT concurs with the Proposed Rule's conclusion that Regulation S-K and Regulation S-X currently contain overlapping disclosure requirements about an issuer's status as a REIT. NAREIT observes that issuers typically repeat the disclosures of REIT status. We further note that U.S. GAAP, in ASC Topic 740, also requires disclosure when an entity is not subject to entity level income taxes because its income is taxed directly to its owners. Therefore, NAREIT supports the SEC's proposal to eliminate Rule 3-15(b) of Regulation S-X. In our view, deletion of the requirement to disclose the entity's REIT status and the principal assumptions that underlie the decisions regarding the applicability of federal income taxes in the financial statements would not result in a material change in the disclosures provided by REITs, as this information is presented elsewhere in a Form 10-K or registration statement.



**b. Ratio of Earnings to Fixed Charges (Proposal, Section III, C, 18)**

NAREIT concurs with the suggestion set forth in the Proposed Rule to delete the requirement to disclose the historical and pro forma ratios of Earnings to Fixed Charges. Given the often large depreciation charges for REITs and real estate companies, the ratio does not provide meaningful information to investors. In the event that investors are interested in the ratio, NAREIT understands that the financial statements currently disclose many of the components of this ratio, allowing investors to compute this metric. In addition, NAREIT notes that this specific metric predates many of the other ratios, analytical tools and sophisticated financial models that currently are at the financial statement users' disposal and readily calculated based on information in the financial statements. Therefore, NAREIT does not see a continued need for the SEC to require this narrowly focused metric.

**2. Overlapping Requirements – Potential Modifications, Eliminations, or FASB Referrals (Proposal, Section III, E)**

**a. REIT Disclosures – Tax Status of Distributions (Proposal, Section III, E, 1)**

NAREIT suggests that the SEC eliminate the requirement in Rule 3-15(c) of Regulation S-K for REITs to disclose the tax status of distributions as ordinary income, capital gain, or return of capital. This information is provided to shareholders in Form 1099 much earlier than when the Form 10-Ks are filed with the SEC. Additionally, this information is communicated to the general public on NAREIT's website. Therefore, NAREIT does not believe that duplicative disclosure is necessary.

**b. Legal Proceedings (Proposal, Section III, E, 15)**

As noted in the Proposed Rule, issuers frequently repeat or reference the disclosures required by Regulation S-K Item 103 ("Item 103") in their historical financial statements. However, the Proposed Rule also acknowledges that there are several differences in the criteria set forth in Regulation S-K and U.S. GAAP for disclosing legal proceedings. Although NAREIT generally favors streamlining overlapping reporting requirements, we do not believe it would be appropriate to incorporate the requirements of Item 103 into the footnotes to the U.S. GAAP financial statements. In this circumstance, we believe there are different objectives for the respective disclosures, objectives that are best achieved by the existing rules. Further, while it is appropriate for the financial statement disclosures to be covered by the audit opinion of an issuer's independent auditor, NAREIT believes it would be unnecessarily burdensome and costly to expand that audit requirement to address the incremental information required by Item 103 if it was relocated to the financial statements.

As noted in the Proposed Rule, there are many differences between the two disclosure regimes in this regard. For example, Regulation S-K, which focuses on the factual information investors may reasonably require to make an informed investment decision, logically may require an array



of fact-specific material qualitative information regarding legal proceedings, including factual bases and timing of legal actions, and information regarding courts, agencies, parties and allegations. Regulation S-K also exempts some ordinary routine litigation from disclosure, which may not be material. U.S. GAAP, which is concerned with material financial statement consequences of legal proceedings, necessarily applies a different framework to requiring disclosure. As catalogued in the Proposed Rule, Regulation S-K and U.S. GAAP also have different standards of materiality, with Regulation S-K having quantitative disclosure thresholds for certain matters. Relocating Item 103 disclosures into the historical financial statements would subject factual information that may not have direct financial consequences to audit or review, internal controls and XBRL requirements, as well as place it outside the safe harbor protections of the Private Securities Litigation Reform Act of 1995

For these reasons, NAREIT does not believe that wholesale relocation of Item 103 disclosures into the historical financial statements would improve the effectiveness of disclosures, or provide meaningful incremental benefit to investors. However, we would encourage the SEC to reconsider the quantitative disclosure thresholds in Item 103 to determine if those bright lines (either in absolute dollars or percentage terms) remain relevant to investors.

### **3. Superseded Requirements (Proposal, Section V)**

#### **Gain or Loss on Sale of Properties by REITs (Proposal, Section V, B 3)**

Rule 3-15(a)(1) of Regulation S-X has presented a potential conflict between SEC and U.S. GAAP requirements for some time: the SEC's rule requires all gains and losses on the sale of properties to be presented outside of continuing operations, whereas U.S. GAAP does not permit that presentation unless the properties sold meet the definition of a discontinued operation. That conflict was manageable when most sales of properties met the U.S. GAAP definition of a discontinued operation. However, in 2014 the FASB issued new financial reporting guidance narrowing the definition of a discontinued operation<sup>3</sup>. As a result of the FASB's new definition, NAREIT believes that very few sales of properties by REITs are permitted to be presented outside of continuing operations under U.S. GAAP. This creates a clear and frequently occurring conflict between U.S. GAAP and Rule 3-15(a)(1). Therefore, NAREIT welcomes and fully supports the SEC's proposal to eliminate Rule 3-15(a)(1).

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<sup>3</sup>UPDATE NO. 2014-08—PRESENTATION OF FINANCIAL STATEMENTS (TOPIC 205) AND PROPERTY, PLANT, AND EQUIPMENT (TOPIC 360): REPORTING DISCONTINUED OPERATIONS AND DISCLOSURES OF DISPOSALS OF COMPONENTS OF AN ENTITY (April 2014).



We thank the SEC for the opportunity to comment on the Proposed Rule. If you would like to discuss our views in greater detail, please contact George Yungmann, NAREIT's Senior Vice President, Financial Standards, at [REDACTED] or [REDACTED], Victoria Rostow, NAREIT's Senior Vice President, Policy & Regulatory Affairs, at [REDACTED] or 1-[REDACTED], or Christopher T. Drula, NAREIT's Vice President, Financial Standards, at [REDACTED] or [REDACTED].

Respectfully submitted,



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cc: Wesley R. Bricker, Interim Chief Accountant, Office of the Chief Accountant  
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