NATIONAL ASSOCIATION OF
REAL ESTATE INVESTMENT TRUSTS®

October 9, 2012

VIA E-MAIL [rule-comments@sec.gov]

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

Re: File No. SR-NYSE-2012-43, Release No. 34-67847: Proposed Rule to Amend Sections 902.02 and 902.03 of Listed Company Manual of New York Stock Exchange LLC

Dear Ms. Murphy:

This letter is submitted in response to the solicitation of comments by the Securities and Exchange Commission (Commission) with respect to the "Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Sections 902.02 and 902.03 of the Listed Company Manual of the New York Stock Exchange LLC," Release No. 33-9186 (File No. SR-NYSE-2012-43), published in the *Federal Register*, September 18, 2012) (Proposed Rule).

On August 12, 2012, the New York Stock Exchange LLC (the NYSE or the Exchange) field with the Securities and Exchange Commission (the Commission) the Proposed Rule to amend Sections 902.02 and 902.03 of the Listed Company Manual (the Manual) to provide that, when both of the companies that form an umbrella partnership real estate investment trust (UPREIT) structure are listed on the Exchange, Listing and Annual Fees for the two related listed issuers will be subject to a single fee cap at the time of original listing and on an annual basis.

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 Proposed Rule and is submitting its comments below.

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EXECUTIVE SUMMARY

NAREIT appreciates the issuance and encourages the Commission to finalize the Proposed Rule**.** With that said, NAREIT respectfully requests that, if and when the Proposed Rule is finalized, the discussion corrects certain factual inaccuracies concerning REITs and operating partnerships set forth in the discussion of the Proposed Rule. Most importantly, while many REITs own and operate their properties through majority-owned operating partnerships (OPs), the REIT and OP should be viewed as separate and distinct entities.

Furthermore, while the incidents of ownership in a REIT and its affiliated OP are similar, they are not identical. For example, REIT shareholders may vote on matters relating to the REIT, but OP unit holders are not entitled to do so with respect to such matters.

DISCUSSION

I. Proposed Rule

As noted above, the Exchange proposes to amend the Manual to provide that, when both of the companies that form an UPREIT structure are listed on the Exchange, Listing and Annual Fees for the two related listed companies will be subject to a single fee cap at the time of original listing and on an annual basis. The discussion to the Proposed Rule notes that: "the [typical] Operating Partnership has no employees of its own…", the OP Units and shares of common stock of the REIT effectively have the same economic rights…", and "[t]he Exchange believes that the REIT and the Operating Partnership in an UPREIT structure are effectively a single entity, as they represent economic interests in the same enterprise and have a single management and board of directly, with the Operating Partnership relying entirely on the REIT for its management and corporate governance." As a result, the discussion concludes that "[c]onsequently, there are significant efficiencies for the Exchange in the listing and regulation of the two listed entities that constitute an UPREIT structure." *Federal Register* p. 57628 (Sept. 18, 2012).

NAREIT does not disagree that there is substantial similarity between the economic interests in an operating partnership and the economic interests in that operating partnership's affiliated REIT, but NAREIT would like to clarify that the two entities are in fact two separate entities.

II. Overview of Legal and Financial Structure of REITs

NAREIT made a submission to the Commission on March 28, 2011 (2011 Submission) concerning the proposed rulemaking (2011 Proposal) published in *Security Ratings*, Release No. 33-9186 (File No. S7-18-08; February 9, 2011) (2011 Proposing Release). The 2011 Proposal addressed the use of Form S-3 for the issuance of non-convertible debt securities by widely-followed REITs and their OP subsidiaries. Ultimately, on July 26, 2011, the Commission unanimously voted to adopt new rules (2011 New Rules), that, among other things, allow a majority-owned operating partnership of a REIT that qualifies as a well-known seasoned issuer (WKSI) to use Form S-3 for offerings of non-convertible debt securities under the Securities Act of 1933 (the Securities Act).

In the 2011 Submission, NAREIT noted that:

> [t]he prevalent corporate structure of publicly traded 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.

With that said, NAREIT also noted that:

> 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 [Securities Exchange] 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."

(Emphasis added).

III. Despite "Substantially Similar Assets, Operations and Management," REITs and Affiliated OPs Should Not Be Viewed as a Single Entity

As noted above, there is substantial similarity between a REIT and its affiliated OP in terms of assets, operation, and management. With that said, NAREIT would like to clarify the following with respect to these entities.

A. *Separate and Distinct Entities with Separate Employees and Owners*

First, a REIT and its affiliated OP are separate and distinct entities. The REIT is formed under a particular state law as a corporation or business trust, and taxed as a corporation for federal income tax purposes. The REIT files a Form 1120-REIT with the Internal Revenue Service (IRS) in connection with its income tax obligations and sends its shareholders dividend information on Form 1099-DIV. The OP is formed as a partnership or limited liability company under a particular state law and taxed as a partnership for federal income tax purposes. The OP files a

Form 1065 with the IRS to report its income, and it sends its owners a Schedule K-1 with respect to their interests in the OP. These two entities are separately formed, maintain separate bank accounts and, while there may be overlap of employees, in many cases, the OP has employees.

B. *OP Unit holders and REIT Shareholders Do Not Have Identical Interests with respect to the REIT*

Second, OP unit holders and REIT shareholders do not have identical interests with respect to the REIT. In some cases, a REIT may form an OP, and the REIT will hold all directly or indirectly of the general and limited partnership interests in the OP. However, in many other cases, the REIT will hold the general partnership interest in the OP (and possibly certain limited partnership interests), but unrelated third parties will own limited partnership interests in the OP, either at the time of formation or through later contributing properties to the OP in exchange for OP units. In these cases, these unrelated third parties may have contributed appreciated properties to the OP in a tax-deferred transaction (similar to that described in Treas. Reg. §1.701-2(d), Example 4, cited in footnote 4 of the discussion of the Proposed Rule). After some period of time, these unrelated third parties may require the REIT or the OP to redeem their units for a cash amount equal to the then market price of the REITs common stock (or equivalent amount of the REIT's common stock. However, until these unrelated third party OP unit holders actually convert their OP units into REIT shares, they have no voting rights with respect to the REIT. Thus, it is inaccurate to say that there is complete identity in control between the REIT and the OP.

CONCLUSION

NAREIT appreciates that, just as the Commission recognized the similarities of interests between a REIT and its affiliated OP in connection with the 2011 New Rules, the Commission similarly recognizes that similarity of interest in connection with the Proposed Rule so as to provide a single fee cap at the time of original listing and on an annual basis for a REIT and its affiliated OP.

While NAREIT appreciates the Commission's issuance of the Proposed Rule, and NAREIT urges the Commission to finalize the Proposed Rule, NAREIT respectfully requests that the Commission clarify that, in doing so, the Commission recognizes that despite "**substantially similar** assets, operations and management" as between the REIT and its OP subsidiary, the REIT and the OP subsidiary are in fact separate and distinct entities.

Thank you again for the opportunity to submit these comments.

Sincerely,

Tony M. Edwards
Executive Vice President and General Counsel