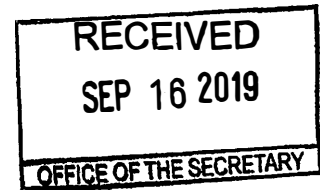


UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION



In the Matter of:

The Application of TREEHOUSE REAL  
ESTATE INVESTMENT TRUST,

For Review of Action Taken by New York  
Stock Exchange

Admin. Proc. File. No. 3-19192.

BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW OF ACTION BY THE  
NEW YORK STOCK EXCHANGE

John Carey  
NYSE Regulation  
New York Stock Exchange  
11 Wall Street  
New York, NY 10005  
(212)656-5640  
john.carey@theice.com

## **PRELIMINARY STATEMENT**

New York Stock Exchange LLC (“NYSE” or the “Exchange”) respectfully submits this brief in opposition to the application submitted by Treehouse Real Estate Investment Trust (“TREIT” or the “Company”) for review of the NYSE’s decision to deny TREIT’s application to list its securities on the NYSE. In declining to list TREIT, the Exchange engaged in a reasonable exercise of its discretion as provided for explicitly in its listing rules. This decision was a necessary and appropriate response on the part of the NYSE to the Company’s application, in light of the Company’s business strategy of leasing real estate to entities for the production of marijuana in violation of federal criminal law. Any potential inconsistency between the Exchange’s treatment of TREIT and that of another company with a similar business strategy results from a reasonable assessment of the changed legal environment for the U.S. cannabis industry between the times of the making of the two listing determinations, rather than reflecting an unfairly arbitrary approach on the part of the NYSE.

## **BACKGROUND**

Representatives of TREIT initially approached the NYSE in March 2019 to discuss the possibility of the Company listing on the Exchange. NYSE staff had conversations with representatives of the Company and reviewed documents from the Company describing its business strategy. TREIT is a real estate investment trust (“REIT”) whose business is to acquire, own and manage real estate subject to long-term leases with state-licensed cannabis operators engaged in the growth and sale of both medical and adult use, recreational marijuana. The Exchange was concerned about the legal and public policy implications of the fact that TREIT’s business was to lease real estate to counterparties who are engaged in businesses that are clearly

violating federal criminal law. Consequently, NYSE staff informed the Company on April 30, 2019, that the Exchange was not willing to list the Company at that time. In taking this action, the Exchange was utilizing discretion provided for explicitly in its initial listing rules. The Company has appealed this decision by the NYSE to the Securities and Exchange Commission.

## **ARGUMENT**

NYSE's action in declining to list TREIT is consistent with its own rules and Section 19(f) of the Exchange Act in that TREIT's business strategy presented significant legal and public policy concerns and the Exchange's rules explicitly provide it with the discretion to decline to list a company where appropriate even if that company meets all of the enumerated listing requirements.

### **A. NYSE Rules Provide the Exchange with Discretion to Decline to List a Company Even if the Company Meets All of the Enumerated Listing Requirements**

The Exchange's rules provide it with broad discretion as to whether it deems a listing applicant suitable for listing on the Exchange. Specifically, Section 101.00 of the NYSE Listed Company Manual (the "Manual") provides as follows:

The Exchange has broad discretion regarding the listing of a company. The Exchange is committed to list only those companies that are suited for auction market trading and that have attained the status of being eligible for trading on the Exchange. Thus, the Exchange may deny listing or apply additional or more stringent criteria based on any event, condition, or circumstance that makes the listing of the company inadvisable or unwarranted in the opinion of the Exchange. Such determination can be made even if the company meets the standards set forth below.

Consequently, the Exchange acted within its explicit authority under its rules in declining to list TREIT.

The Exchange takes care not to exercise its rule-based discretion with respect to initial listings in an arbitrary fashion and did not do so in this instance. Rather, the Exchange's decision was related to the unusual nature of the Company's business activities. TREIT's sole disclosed business is to acquire, own and manage real estate for the purpose of leasing it to cannabis operators engaged in the growth and sale of marijuana in the United States for both medical and recreational use. Cannabis is a Schedule I controlled substance under the Controlled Substances Act ("CSA"). The Exchange is not qualified to reach conclusions with respect to the legality of TREIT's business. However, in light of the status of cannabis as a Schedule I controlled substance under the CSA, in making its listing decision, the Exchange had a reasonable concern about whether TREIT's activities could be found to violate the CSA or other federal criminal laws and give rise to a risk that the company might be subject to criminal prosecution. Even absent these possible risks, the fact that the Company's business is entirely devoted to serving customers who unquestionably violate the CSA raises concerns as to whether the listing of such a company is consistent with the public interest. It was because of these risks and legitimate public interest concerns that the Exchange reached its decision not to list the Company.

**B. The Exchange's Decision not to List the Company Was not Unfairly Discriminatory**

The Company points to the Exchange's continued listing of Innovative Industrial Properties ("IIPR") as presenting an inconsistent approach to that applied to the Company itself. Based on IIPR's public disclosures and the Company's description of its own business strategy, the Exchange agrees that the Company may be correct in its assertion that its own business objectives are substantially the same as those of IIPR. However, the Company is wrong in asserting that the Exchange's decision to list IIPR and not the Company is arbitrary or

unjustifiably discriminatory. In fact, the legal and regulatory landscape was markedly different at the time at which the Exchange decided to accept IIPR's initial listing application than it was at the time it declined to list the Company. Specifically, at the time of IIPR's initial listing in 2016, the Department of Justice was operating under a set of principles in relation to enforcement of the CSA as set forth in a memorandum issued by the agency in 2013 (the "Cole Memorandum"). Under the Cole Memorandum, the DOJ stated it would focus its cannabis-related enforcement activities and prosecution on eight categories of activities outside of state-legal programs.<sup>1</sup> In determining to list IIPR, the Exchange gave significant weight to the reduced enforcement risk faced by IIPR as a consequence of the fact that its disclosed business strategy would not implicate any of the foregoing areas of enforcement concern.

However, subsequent to the listing of IIPR, there was a significant change in the legal environment with respect to cannabis law enforcement. On January 8, 2018, then-attorney general Jeff Sessions issued his own memorandum in which he effectively retracted the guidance previously provided by the DOJ in the Cole Memorandum and stated that henceforth federal prosecutors "should follow the well-established principles that govern all federal prosecutions" in making prosecutorial decisions with respect to cannabis-related cases arising under the CSA. The Exchange is not aware of any subsequent formal statement of policy from the DOJ that contradicts Attorney General Session's position in this memorandum. As a consequence of this change in approach at the DOJ, the Exchange reviewed its approach to the listing of companies that conduct business with entities engaged in the production or distribution of cannabis products in the United States. The Exchange decided that it would generally not accept such companies

---

<sup>1</sup> Distribution of marijuana to minors; marijuana proceeds funding criminal enterprises; transport of marijuana to other states; trafficking of other illegal drugs or illegal activity; violence and the use of firearms; drugged driving and other adverse public health consequences; growing marijuana on public lands; and marijuana possession on federal property.

for initial listing unless and until there were further material developments in the legal and regulatory environment. In fact, Exchange staff had a conversation with staff from the SEC on September 6, 2018, in which the Exchange staff outlined this approach to new listings in this area.

While the Exchange did change its approach to listing companies with an indirect connection to the U.S. cannabis industry in response to the evolution of the DOJ's guidance on the subject, it was decided at that time that this change in policy did not necessitate the delisting of IIPR. In fact, the Exchange shared this decision with the SEC staff during their call on September 6, 2018. In reaching this conclusion, the Exchange took into account, among other things, that IIPR had been transparent in disclosing its business strategy at the time it applied to list on the Exchange and that the Exchange had deemed its application acceptable at that time, substantially in reliance on the guidance provided in the Cole Memorandum. The Exchange also considered the fact that a delisting would cause harm to shareholders in IIPR who had acquired their shares on the basis that IIPR was listed on the Exchange.

The decision to delist a company from the Exchange is different in nature from the exercise of discretion with respect to an initial listing. The Exchange must specify a specific continued listing rule which is the basis for the delisting and be prepared to provide on appeal facts sufficient to support that determination. By contrast, Section 101.00 of the Manual explicitly provides the Exchange with broad discretion to decline to list a company for reasons other than failure to meet one of the listing standards. As such, it is not inconsistent for the Exchange to decline to list a new applicant on the basis of concerns that would be potentially insufficient to meet the burden for the delisting of a company already on the Exchange. Therefore, the Company's arguments with respect to its disparate treatment compared to

companies already listed on the Exchange are based on a misunderstanding of how initial listing and delisting rules are intended to operate.

**C. The Exchange's Decision not to List the Company Did not Impose Any Burden on Competition Which Was not "Necessary and Appropriate"**

The Company argues that the Exchange's determination not to list the Company places the Company at a competitive disadvantage to IIPR and that, in doing so, the Exchange is applying its rules in a manner that places a burden on competition that is "not necessary or appropriate," as prohibited by Section 19(f) of the Exchange Act. The Exchange does not express any view as to the effect of its listing determination on the Company's competitive position. However, the Exchange does note that it does not need to demonstrate that its application of its rules imposes no burden on competition whatsoever, but rather that it must not impose any burden that is "unnecessary or inappropriate." The Exchange believes that the risks associated with listing a company whose business serves the U.S. cannabis industry make its decision not to list a company engaged in such activities a necessary and appropriate exercise of discretion. Nor, the Exchange believes, should the statutory language be read as providing that the promotion of competition requires the Exchange to accept a listing applicant that presents genuine legal and public policy concerns simply because it has a similar company already listed.

## CONCLUSION

Accordingly, the NYSE requests that the Commission uphold the NYSE's determination to deny TREIT a listing on the Exchange, as the Exchange's determination was consistent with its own rules and Section 19(f) of the Exchange Act.

Dated September 13, 2019

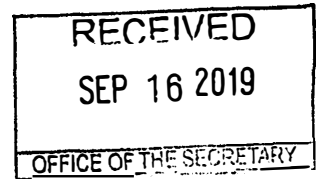
Respectfully submitted,

A handwritten signature in blue ink, appearing to read "John Carey", is written over a horizontal line.

John Carey  
NYSE Regulation  
New York Stock Exchange  
11 Wall Street  
New York, NY 10005  
(212)656-5640  
john.carey@theice.com



UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION



In the Matter of:

The Application of TREEHOUSE REAL  
ESTATE INVESTMENT TRUST,  
For Review of Action Taken by New York  
Stock Exchange

Admin. Proc. File. No. 3-19192.

**CERTIFICATE OF SERVICE**

I, Amy Mauro, hereby certify that on September 13, 2019, I caused a copy of the foregoing Brief in Opposition to Application for Review of Action by the New York Stock Exchange, to be served upon the parties listed below via Federal Express overnight delivery service.

Vanessa Countryman, Acting Secretary  
Office of the Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-1090

Carmen J. Lawrence, Esq.  
King & Spalding LLP  
1185 Avenue of the Americas  
New York, New York 10036

Richard H. Walker  
King & Spalding LLP  
1185 Avenue of the Americas  
New York, New York 10036

Dated: September 13, 2019

  
\_\_\_\_\_  
Amy Mauro