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Date:
May 22, 2015

LEGEND:

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Dear :

This is in reply to a letter dated November 29, 2012, and subsequent correspondence, in which Taxpayer requests rulings in connection with its election to qualify for taxation as a real estate investment trust ("REIT") under sections 856-860 of the Internal Revenue Code of 1986, as amended (the "Code").

FACTS:

Currently, Taxpayer is a publicly traded State A corporation that is the common parent of an affiliated group of corporations that files a consolidated Federal income tax return. Taxpayer is a calendar-year, accrual-basis taxpayer that, together with its subsidiaries (together referred to as the "Company"), acquires, leases, purchases, develops, and builds data center buildings throughout the United States and in several foreign countries and then leases space within those buildings to unrelated tenants. Company intends to reorganize so that Taxpayer can elect to be taxed as a REIT under sections 856-860 commencing with the taxable year beginning Date 1. As of Date 1, Taxpayer will no longer be the common parent of a consolidated group for Federal income tax purposes, and Taxpayer will jointly elect with some of its subsidiaries to treat those subsidiaries as taxable REIT subsidiaries ("TRSs"). The TRSs will do business in some or all of the jurisdictions in which Company does business.

Company provides space in colocation data centers for its tenants' information technology systems. In some locations, Company occupies "campuses" consisting of multiple buildings that are close together (although not necessarily adjacent) and connected by dedicated conduits, ducts, or pipes. In other locations, Company leases exclusive space in multi-tenanted buildings, where the other tenants are other data center providers or carriers. These buildings offer "meet me" rooms where Company's tenants can interconnect with other tenants, including tenants of other landlords within

the building. Company's freestanding buildings (including buildings that constitute a campus) and its spaces within multi-tenanted buildings are collectively referred to as "Buildings."

The major components of a Building include the following integrated systems: (1) electrical distribution and redundancy system (the "Electrical Components"), (2) HVAC and redundancy system (the "HVAC Components"), (3) humidification system (the "Humidification Components"), (4) security system (the "Security Components"), (5) fire protection system (the "Fire Protection Components"), and (6) telecommunications infrastructure (the "Telecommunications Components"). Each of these systems and their integrated components (collectively, the "Core Systems") is designed and constructed to remain permanently in place, is integrated into the Building to which it is a part, and is unlikely and not intended to be moved or removed.

The Electrical Components are designed to (i) provide power for use in the tenant space and (ii) ensure uninterrupted power through the use of redundant electrical systems, including battery backup, backup diesel generators, and diesel fuel tanks, so that the system can operate for a minimum of g hours before needing refueling. The HVAC Components are designed to (i) maintain acceptable room temperature levels and (ii) ensure uninterrupted cooling through such components as back-up water chillers and above-ground water storage towers. The Humidification Components are designed to maintain humidity levels in the tenant space. The Security Components are designed to meet the heightened security requirements of data center tenants, by protecting both the Building and the individual tenant spaces from unauthorized access and by monitoring all access. The Fire Protection Components include both detection and suppression systems. The Telecommunications Components provide access and rights of way for tenants to connect to third-party telecommunications providers' equipment and other tenants' equipment through integrated building systems such as conduits and "meet me" rooms. Interconnectivity Assets, as defined below, are not Telecommunications Components. Buildings also contain the following components: doors, walls, building wiring, structural steel support posts, and special flooring (together with the Core Systems, "Components").

Data center buildings differ from ordinary office buildings in the magnitude, reliability, and quality of the Core Systems that are furnished to tenants and the redundancies built into the Core Systems. Each Core System is designed and constructed specifically for the particular Building of which it is a part and is intended to remain in place indefinitely.

Additionally, the Buildings have structural steel support posts permanently affixed to the floors of Buildings. These posts are installed during the build-out of floor space that occurs either during construction of a Building or upon retrofitting an existing Building to be a data center. The posts are among the first components installed in a Building, because they support overhead components of the Core Systems such as overhead cable trays, electrical power conduits, lighting, and security components.

Thus, the structural steel support posts are bolted into the floor in a manner that can support the overhead Core System components. The posts are also used to anchor the mesh panels that form a cage, the perimeter of a tenant's space (as described below), and because the structural steel support posts are installed with the design and intention of remaining in place indefinitely, cages are configured around the existing structural steel support posts. In rare instances when the structural steel support posts are removed, a laborious demolition process is required including bracing or removal of the overhead Core System components, and the steel is not reusable.

Each tenant of Company leases space ranging in size from a cabinet to several cages pursuant to a license and services agreement ("Agreement"). Each tenant space is prepared by Company, or an independent contractor hired by Taxpayer, in accordance with the Agreement terms, including the installation of mesh paneling into the structural steel support posts to set a perimeter around the tenant's leased space for a tenant leasing one or more cages. Individual cages typically enclose between a to b square feet of space, may contain multiple cabinets, and generally employ biometric access controls to ensure that the cages automatically lock and can only be accessed by authorized persons. The Agreements have initial terms that are generally more than c years; thereafter, the contracts typically renew automatically on a d, e, or f basis. Tenants generally use the tenant space to locate telecommunications, computing, and electronic data storage equipment and, occasionally, personnel. Tenants may lease rooftop space on the data center building for placement of antennas or other communication equipment that transmit through satellite, microwave, or other means, or may lease (on either an exclusive basis, or on a shared basis with other building tenants) secure shelf or secure office space or business recovery stations. Taxpayer may also receive additional payments from tenants that opt to reserve square footage within a Building for future expansion of their operations.

Tenants may also lease from Company an incidental amount of personal property under or in connection with their rental of space in a Building. Additionally, tenants may have access to common area space used for staging and storage as well as loading dock space for receipt and shipping of equipment.

The Agreements generally provide for a monthly recurring fee for the use of space in the data center as well as payments for the provision of uninterrupted, stable electrical power. The fee amount includes a tenant's lease of space along with receipt of associated Core Services, discussed below, and a lease of any incidental personal property. Taxpayer represents that the rent attributable to leased cages, cabinets, and any other personal property leased by Taxpayer to each tenant under, or in connection with, a lease of real property for a taxable year will constitute less than 15 percent of the total rent, based on the average fair market values of the real property and personal property, for the taxable year attributable to both the real and personal property leased by Taxpayer to the tenant under, or in connection with, each Agreement.

Taxpayer represents that the services it will provide to tenants under the Agreements consist of ordinary, necessary, usual, and customary services in connection with the operation and maintenance of the Buildings. These services will not include any personal services, noncustomary services, or services that are primarily for the convenience of a particular tenant. These services include controlled utilities (including electrical power and basic telephone); controlled temperature and humidity; security; fire protection; common area maintenance (including cleaning and maintenance of public areas); reservations of space within the Buildings; accepting shipments; landscaping; management, operation, maintenance, and repair of the major building systems and components (including the Core Systems); pest control; unattended parking; and site preparation of tenant space (together with the telecommunications and interconnectivity services described below, the "Core Services").

Taxpayer also offers to connect tenants to telecommunication carriers and other tenants through interconnection. Interconnections use wires, cables, "meet me" rooms, and other transmission components to provide tenants with connectivity to third-party telecommunications providers' equipment, to TRS servers and routers, to other Buildings, to properties owned by third-parties, and to other tenants' equipment. Tenants pay a one-time installation fee for the service of connecting a tenant by setting-up wires or cables to establish an interconnection and a recurring, right-of-way charge to use the corridor through which the dedicated wire or cable connecting tenant equipment travels in the Building. Taxpayer represents that all of its interconnectivity offerings constitute services that are ordinary, necessary, usual, and customary for comparable buildings in the geographic market in which the Buildings are located, and that no interconnectivity offering constitutes personal services, noncustomary services, or services that are primarily for the convenience of a particular tenant. Taxpayer represents that interconnectivity assets that route, logically handle, or control access among tenants' data, including servers, routers, switches, and ports, are owned and operated by a TRS ("TRS Interconnectivity Assets," together with the wires or cables that connect tenant equipment within a Building, the "Interconnectivity Assets"). For those tenants who connect to TRS Interconnectivity Assets, the recurring charge is both for the right-of-way and for the services provided by the TRS through the TRS Interconnectivity Assets. Other tenants may connect only to interconnectivity assets owned by others, to other tenants, or to the tenant's own antenna.

Another service that is provided to Building tenants, particularly in markets outside of the United States, is the resale of telecommunications bandwidth to tenants who prefer to purchase these utilities from Taxpayer in connection with the lease of Building space rather than deal with the local telecommunications utilities. In these situations, Taxpayer will acquire bandwidth from local telecommunications utilities and resell that bandwidth to tenants for a price either less than, equal to, or above that charged to Taxpayer by the local utility. Taxpayer represents that markups average h percent, and any markup for reservation and resale will not exceed i percent. Taxpayer represents that in a Building where Taxpayer offers to resell or reserve bandwidth for

tenants, such resale or reservation of bandwidth or the provision of similar telecommunications utility services constitute services customarily offered to tenants in similar classes of buildings in the geographic location in which such Building is located.

Installation and set-up of Building infrastructure such as installation and set-up of the cage with cabinets and similar items and connection of these items to the Building's Core Systems, as well as physical interconnections, may be performed by Taxpayer, by an independent contractor, or by a TRS, at the determination of Taxpayer. Taxpayer represents that these site preparation services are rendered in connection with the operation and maintenance of the Building or as a service that is ordinary, necessary, usual, and customary for the Buildings, and are not rendered for the convenience of a particular tenant. As part of an Agreement, Taxpayer will charge tenant for these site preparation services. Charges for interconnection will include a one-time set up fee as well as a monthly charge for the right-of-way through the Building and for the services provided by the TRS through the TRS Interconnectivity Assets. Taxpayer will not provide move-in or move-out services for tenants, but may supervise such activities to ensure compliance with building codes and uninterrupted operation of the data center. Services involving tenant equipment, including installation requested by the tenant, will be performed by an independent contractor or a TRS.

Additionally, after receiving specific orders from tenants, a TRS of Taxpayer may provide smart hand services. These smart hand services may include, for example: set up of tenants' telecommunications, computing, and electronic data storage equipment; tape maintenance for tape drives within a cage; emergency maintenance; network management; and various system checks and labeling. In addition, other noncustomary services or personal services requested by tenants will be provided by TRSs (together with the smart hand services, the "TRS-Provided Services") or through independent contractors from whom Taxpayer derives no income. However, Taxpayer expects to collect all or nearly all the amounts owing from tenants, including amounts for services done by a TRS or independent contractor.

Space Rental to TRSs

Some TRSs will rent space in a Building from Taxpayer to use for supplying services to tenants. In such cases, at least 90 percent of the leased space at such Building will be leased to persons other than TRSs and other than related persons described in section 856(d)(2)(B). The rental charge paid by a TRS for rental space will represent an arm's length charge and will be substantially comparable to the rents paid by unrelated tenants for comparable space in the Building or, where no comparable space exists in the Building, for comparable space either in one of Taxpayer's other Buildings, or in other properties, in the same geographic area.

Real Estate Intangibles

Taxpayer will have certain intangible assets recorded on its books resulting from purchase price allocations made under Generally Accepted Accounting Principles ("GAAP") when accounting for acquisitions. Taxpayer's intangible assets are those that relate to Taxpayer's acquisition of real estate assets. Intangibles associated with TRS assets are not assets of the Taxpayer and, therefore, are not Real Estate Intangibles, as defined below. Generally, identifiable intangible assets are recorded under GAAP if they arise from contractual or legal rights, regardless of whether those rights are transferable or separable from the underlying physical business assets. Identifiable intangible assets acquired through these transactions that are related to real estate include customer contracts, favorable leases, and trade names.[1] Taxpayer represents that the remaining amount of the purchase price, after allocation to identifiable tangible and intangible assets, is allocated to goodwill ("residual value goodwill"). Collectively, Taxpayer's customer contracts, favorable leases, and residual value goodwill are referred to herein as "Real Estate Intangibles."

The intangible asset for customer contracts represents the expected value to Taxpayer of the tenant leases in place at the time of an acquisition of another data center lessor, including estimated lease renewals by those tenants. The intangible asset for favorable leases represents the expected value to Taxpayer of acquiring leaseholds that charge Taxpayer, at the time of the acquisition, rent that is less than fair market rental values. Finally, the intangible asset for residual value goodwill represents the difference between the amounts assigned to identified net tangible and intangible assets and the amount that Taxpayer actually paid for the acquired Buildings based on its expectation of being able to lease space within the Buildings at attractive rental rates. Taxpayer represents that for Federal income tax purposes, the value attributable to the residual value goodwill under GAAP is properly included as part of the depreciable tax basis of the acquired Buildings under sections 197(e)(2) and (f)(8). Taxpayer represents that the residual value goodwill is inextricable and inseparable from Taxpayer's underlying physical real estate. Taxpayer further represents that any residual value goodwill of Company that is not inextricably linked to and inseparable from Taxpayer's real estate assets will become an asset of a TRS and is not a Real Estate Intangible.

The amount of Real Estate Intangibles is based upon GAAP principles and is derived from the real property that has been acquired by Taxpayer. Taxpayer represents that the Real Estate Intangibles are inseparable from the Buildings or leases to which they relate, and have no value separate and apart from the value of these assets.

[1] While trade names are an identifiable intangible of Taxpayer, they are not included as part of this ruling request.

Shared Costs

For administrative convenience and to avail itself of economies of scale with respect to employment costs, Taxpayer intends to have certain employees who will perform services both for Taxpayer and for its TRSs. Taxpayer and its TRSs will enter into employee sharing agreements under which these employees will be shared and the employing entity will be reimbursed for an allocable share of the employee costs, including salaries, benefits, and other compensation, costs associated with payroll administration, and allocable overhead costs including office supplies, furniture and equipment. The reimbursement will be solely for costs, determined on the basis of the relative amount of time such employees spend performing services on behalf of each employer or a similar reasonable allocation method.

Taxpayer also contemplates that it and one or more TRSs may share certain equipment. With respect to such shared equipment, Taxpayer and the applicable TRS will enter into an agreement, which will provide that each party pays its allocable share of the costs associated with the shared equipment, based upon the relative use of the equipment.

Reimbursements for shared personnel and equipment will be at cost and will be deducted or capitalized, as applicable, only by the party ultimately bearing such costs under the cost-sharing arrangement. Neither Taxpayer nor any TRS will be in the business of providing to third parties any service or equipment that is the subject of reimbursement at cost.

Domestic and Foreign TRSs

Taxpayer will operate in foreign countries through one or more foreign subsidiaries and associated intermediate holding companies (each, a “Foreign Sub”). A Foreign Sub may either be partially or wholly owned by Taxpayer and its affiliates. Taxpayer is expected to jointly elect TRS status with some Foreign Subs that are corporations for United States Federal income tax purposes (each, a “Foreign TRS”). Taxpayer will make loans to its domestic TRSs and Foreign TRSs that are secured by assets that are “interests in real property” under section 856 and are held by that borrower. When made, the amount of each secured loan will be less than the fair market value of the real property securing such loan, and the applicable security interests will be mortgages or deeds of trust under United States state law or, in the case of foreign real property, comparable to mortgages or deeds of trust under United States state law.

Some Foreign TRSs will be controlled foreign corporations (“CFCs”) within the meaning of section 957(a), with respect to which Taxpayer will be a United States shareholder within the meaning of section 951(b) (a “United States Shareholder”). Additionally, with regard to Foreign TRSs that are CFCs, Taxpayer will occasionally (i) pledge shares of one or more Foreign TRSs, (ii) cause one or more Foreign TRSs to

pledge assets, or (iii) cause one or more Foreign TRSs to guarantee obligations of Taxpayer, in each case as collateral or support for certain debt of Taxpayer incurred to finance Taxpayer's acquisition, improvement, or development of interests in real property that produce qualifying income under section 856(c)(2).

Taxpayer expects that the CFCs with respect to which Taxpayer is a United States Shareholder will earn the following types of income: (a) interest income on working capital; (b) rental income from leasing space in colocation data centers; and (c) interest, dividend, or rental income that is not excepted from foreign personal holding company income within the meaning of section 954(c) ("FPHCI").

Additionally, Taxpayer will own entities treated as passive foreign investment companies under section 1297(a) ("PFICs") with respect to which it is a shareholder. Taxpayer expects that a majority of the income of its PFICs will be passive income as defined in section 1297(b)(1). In some cases, Taxpayer may make an election under section 1295(a) to treat a PFIC as a qualified electing fund ("QEF").

In light of the above, Taxpayer expects to have gross income under sections 951(a), 986(c), 1291(a), and 1293(a).

Depreciation and Earnings & Profits

On Date 2, Taxpayer filed a Form 3115, *Application for Change in Accounting Method*, under Rev. Proc. 2011-14, 2011-4 I.R.B. 330, (automatic change procedures) for the taxable year ended Date 3, to change for Federal income tax purposes (1) its method of depreciating the Core Systems predominantly used in the United States under the general depreciation system ("GDS") in section 168(a) to treat these assets as real property, and (2) its method of depreciating Real Estate Intangibles to treat these assets as real property. Taxpayer's Form 3115 was intended to change to a method of accounting that was consistent with the characterization of these assets as real property and as interests in real property for purposes of section 856.

Under Taxpayer's method of accounting for Federal income tax purposes for taxable years ended before Date 3, Taxpayer classified the Core Systems predominantly used in the United States as 5- or 7- year property, as applicable, under section 168(e)(1), and depreciated the property under the GDS in section 168(a). Also, for Federal income tax purposes, Taxpayer amortized the Real Estate Intangibles under section 197(a).

Under Taxpayer's method of accounting for Federal income tax purposes beginning with taxable years ended Date 3, Taxpayer classifies the Core Systems predominantly used in the United States that were placed in service after 1986 and the Real Estate Intangibles as nonresidential real property under section 168(e)(2) and depreciates the assets under the GDS, using the straight-line method of depreciation, the mid-month convention, and a 39-year recovery period. Sections 168(b)(3)(A), (c),

and (d)(2)(A). The changes in methods of accounting for Federal income tax purposes resulted in net positive section 481(a) adjustments ("Section 481(a) Adjustments") that are taken into account ratably over four taxable years, beginning with the taxable year ended Date 3, in computing Taxpayer's taxable income.

On Date 4, Taxpayer filed a Form 3115 under Rev. Proc. 97-27, 1997-1 C.B. 680, (advance consent procedures) for its taxable year ending Date 3, to change the depreciation for these same items for earnings and profits ("E&P") purposes. The Service declined to rule on this issue because no consent was required, as discussed under Taxpayer's ruling request number ten.

For E&P purposes, for taxable years ended before Date 3, Taxpayer depreciated the Core Systems predominantly used in the United States using the alternative depreciation system under section 168(g) ("ADS") pursuant to section 312(k)(3), and amortized the Real Estate Intangibles using a 15-year period and the straight-line method of depreciation pursuant to section 312(k)(1).

Beginning with its taxable year ended on Date 3, Taxpayer depreciates, for E&P purposes, the Core Systems and Real Estate Intangibles predominantly used in the United States under the ADS in accordance with section 312(k)(3), using the straight-line method of depreciation, a 40-year recovery period, and the mid-month convention.

Stock and Cash Distributions

Taxpayer has one class of voting common stock outstanding ("Taxpayer Stock"), which is publicly traded and listed on the Exchange. As mentioned above, Taxpayer intends to elect under section 856 of the Code to be treated as a REIT, effective Date 1 ("First REIT Taxable Year").

In connection with the REIT election, Taxpayer intends to distribute all of its E&P that were, or will be, accumulated by Taxpayer for all taxable periods ending prior to the First REIT Taxable Year ("C Corporation E&P") as required by section 857(a)(2)(B). These distributions are expected to be made to Taxpayer's shareholders with respect to Taxpayer Stock both before and during the First REIT Taxable Year ("Purging Distributions"). The tax consequences of Purging Distributions to be made during the taxable years prior to the First REIT Taxable Year are the subject of a previously issued private letter ruling (PLR-117298-13). The tax consequences of the Purging Distributions to be made during the First REIT Taxable Year are the subject of this letter ruling.

In its First REIT Taxable year, Taxpayer will have Section 481(a) inclusions related to the depreciation method changes made in anticipation of the First REIT Taxable Year and will have to make a Purging Distribution. Taxpayer expects to make distributions in its First REIT Taxable year to cover both taxable income for that year

and undistributed C Corporation E&P. Such distributions may be made in a combination of stock and cash ("Stock and Cash Distributions").

With respect to each Stock and Cash Distribution, Taxpayer will give each shareholder an election to receive its portion of the distribution (i) entirely in cash (the "Cash Option") or (ii) entirely in Taxpayer Stock (the "Equity Option"). In the event that a shareholder does not make an election, that shareholder will be considered to have chosen the Equity Option.

In no event will the total amount of cash available in a Stock and Cash Distribution (the "Cash Amount") be other than a specified percentage of the aggregate value of the Stock and Cash Distribution or be less than 20 percent of the aggregate value of the Stock and Cash Distribution. If the number of shareholders that elect the Cash Option would result in the payment of cash in an aggregate amount that is less than or equal to the Cash Amount, then all shareholders electing the Cash Option will receive cash equal to the amount elected; if the payment of cash would exceed the Cash Amount, then each shareholder that elects the Cash Option will receive a pro-rated portion of the Cash Amount, which will not be less than 20 percent of its entire entitlement under the distribution, and the remaining balance in Taxpayer Stock. Taxpayer also anticipates paying cash in lieu of fractional shares of Taxpayer Stock, although cash paid in lieu of fractional shares will not count against the Cash Amount.

Taxpayer also has two classes of convertible debentures, one class that was issued on Date 5 (the "Date 5 Convertible Debt") and one class that was issued on Date 6 (the "Date 6 Convertible Debt"). The initial conversion rate for the Date 5 Convertible Debt was w shares of Taxpayer Stock per $y principal amount and for the Date 6 Convertible Debt was x shares of Taxpayer Stock per $y principal amount. In connection with each Stock and Cash Distribution and pursuant to the terms of each of the Convertible Debts, the conversion rates applicable to the Convertible Debts will be increased (the "Adjustments"), which will entitle the holders of Convertible Debt (the "Holders") to receive upon conversion a greater number of shares of Taxpayer Stock than they otherwise would be entitled to receive if the Adjustments to the Convertible Debts' conversion rates were not made. Accordingly, the Adjustments will entitle the Holders to receive upon conversion a greater proportionate interest in the assets or E&P of Taxpayer than they otherwise would receive if the Adjustments were not made.

Taxpayer represents that the calculation of the number of Taxpayer Shares to be received by any shareholder will be determined, over a period of up to two weeks ending as close as practicable to the payment date, based upon a formula utilizing market prices that is designed to equate in value the number of shares to be received with the amount of money that could be received instead. Similarly, Taxpayer represents that the Adjustment to the conversion rate on each class of the Convertible Debt is typical for comparable convertible debt, in accordance with market practices and norms, and designed to adjust the conversion rate so that a Holder of the Convertible Debt receives value comparable to the distribution he would have received had he

previously converted his notes into Taxpayer Stock and thus received the distribution paid on that stock.

Hedging

Prior to the time that Taxpayer becomes a REIT, Taxpayer will have some pre-existing hedges. In addition, prior to the time that Taxpayer converts one or more of its TRSs to either partnerships, qualified REIT subsidiaries ("QRSs"), or other disregarded entities, some of these TRSs will also have entered into hedges. Finally, some entities that Company acquires in merger and acquisition transactions ("M&A Target Entities") also will have entered into hedges prior to acquisition. Such hedges are thus expected to be pre-existing as of the first day that these entities are included as part of Taxpayer for REIT income or asset testing purposes.

Some of the pre-existing hedges will have been clearly identified by the entity that entered into them pursuant to section 1221(a)(7). With respect to any pre-existing hedging transaction that has not been clearly identified prior to the time it becomes part of Taxpayer, Taxpayer represents that it intends to identify each hedge pursuant to section 856(c)(5)(G) on the first day the hedge is included as part of Taxpayer for REIT income or asset testing purposes.

LAW AND ANALYSIS:

Ruling Request #1: *Whether Taxpayer's Buildings, including the Components, will be treated as "real property" for purposes of section 856.*

Section 856(c)(4)(A) provides that at the close of each quarter of its tax year, at least 75 percent of the value of a REIT's total assets must be represented by real estate assets, cash and cash items (including receivables), and Government securities.

Section 856(c)(5)(B) defines the term "real estate assets," in part, to mean real property (including interests in real property and interests in mortgages on real property) and shares (or transferable certificates of beneficial interest) in other REITs.

Section 1.856-3(b)(1) provides that the term "real estate assets" means real property, interests in mortgages on real property (including interests in mortgages on leaseholds of land or other improvements thereon), and shares in other qualified REITs.

Section 1.856-3(d) provides that the term "real property" means land or improvements thereon, such as buildings or other inherently permanent structures thereon (including items that are structural components of those buildings or structures). In addition, real property includes interests in real property. Local law definitions do not control for purposes of determining the meaning of the term real property as used in section 856 and the regulations thereunder. The term includes, for example, the wiring

of a building, plumbing systems, central heating or central air-conditioning machinery, pipes or ducts, elevators or escalators installed in the building, or other items that are structural components of a building or other permanent structure. The term does not include assets accessory to the operation of a business, such as machinery, printing press, transportation equipment which is not a structural component of the building, office equipment, refrigerators, individual air-conditioning units, grocery counters, furnishings of a motel, hotel, or office building, etc., even though those items may be termed fixtures under local law.

Rev. Rul. 75-424, 1975-2 C.B. 269, concerns whether various components of a microwave transmission system are real estate assets for purposes of section 856. The system consists of transmitting and receiving towers built upon pilings or foundations, transmitting and receiving antennae affixed to the towers, a building, equipment within the building, and waveguides. The waveguides are transmission lines from the receivers or transmitters to the antennae, and are metal pipes permanently bolted or welded to the tower and never removed or replaced unless blown off by weather. The transmitting, multiplex, and receiving equipment is housed in the building. Prewired modular racks are installed in the building to support the equipment that is installed upon them. The racks are completely wired in the factory and then bolted to the floor and ceiling. They are self-supporting and do not depend upon the exterior walls for support. The equipment provides for transmission of audio or video signals through the waveguides to the antennae. Also installed in the building is a permanent heating and air-conditioning system. The transmission site is surrounded by chain link fencing. The revenue ruling holds that the building, the heating and air-conditioning system, the transmitting and receiving towers, and the fence are real estate assets. The ruling holds further that the antennae, waveguides, transmitting, receiving, and multiplex equipment, and the prewired modular racks are assets accessory to the operation of a business and therefore not real estate assets.

Rev. Rul. 73-425, 1973-2 C.B. 222, considers whether a mortgage secured by a shopping center and its total energy system is an obligation secured by real property. A total energy system is a self-contained facility for the production of all the electricity, steam or hot water, and refrigeration needs of associated commercial or industrial buildings, building complexes, shopping centers, apartment complexes, and community developments. The system may be permanently installed in the building, attached to the building, or it may be a separate structure nearby. The principal components consist of electric generators powered by turbines or reciprocating engines, waste heat boilers, heat exchangers, gas-fired boilers, and cooling units. In addition, each facility includes fuel storage tanks, control and sensor equipment, electrical substations, and air handling equipment for heat, hot water, and ventilation. It also includes ducts, pipes, conduits, wiring, and other associated parts, machinery and equipment. The revenue ruling holds, in part, that a mortgage secured by the building and the system is a real estate asset, regardless of whether the system is housed in the building it serves or is housed in a separate structure apart from the building it serves. This is because the

interest in a structural component is included with an interest held in a building or inherently permanent structure to which the structural component is functionally related.

Similar to the properties and structural components described in Rev. Rul. 75-424 and Rev. Rul. 73-425 that qualify as real property for purposes of section 856, the Buildings are inherently permanent structures and the Components are structural components of the Buildings. Although the Buildings and Components may facilitate the technology businesses of the tenants of such buildings, the Buildings and Components themselves are not assets accessory to the operation of a business under section 1.856-3(d). Accordingly, based on the information submitted and representations made, we conclude that the Buildings and Components, as described above, constitute real property for purposes of section 856(c)(5)(B).

Ruling Request #2: ***Whether payments received by Taxpayer from tenants under the Agreements will qualify as "rents from real property" under section 856(d). Whether amounts received for the TRS-Provided Services give rise to impermissible tenant service income.***

Section 856(c)(3) provides that at least 75 percent of a REIT's gross income must be derived from, among other sources, "rents from real property." Section 856(c)(2) provides that at least 95 percent of a REIT's gross income must be derived from a broader group of sources which also includes "rents from real property."

Section 856(d)(1) provides that "rents from real property" include (subject to exclusions provided in section 856(d)(2)): (A) rents from interests in real property; (B) charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated; and (C) rent attributable to personal property leased under, or in connection with, a lease of real property, but only if the rent attributable to the personal property for the taxable year does not exceed 15 percent of the total rent, based on the average fair market values of the real property and personal property, for the taxable year attributable to both the real and personal property leased under, or in connection with, such lease.

Section 1.856-4(a) provides, in relevant part, that the term "rents from real property" means, generally, the gross amounts received for the use of, or the right to use, real property of the REIT.

Section 1.856-4(b)(1) provides that, for purposes of sections 856(c)(2) and (c)(3), the term "rents from real property" includes charges for services customarily furnished or rendered in connection with the rental of real property, whether or not the charges are separately stated. Services furnished to tenants of a particular building will be considered customary if, in the geographic market in which the building is located, tenants in buildings of a similar class are customarily provided with the service. In particular geographic areas where it is customary to furnish electricity or other utilities to

tenants in buildings of a particular class, the submetering of those utilities to tenants in the buildings will be considered a customary service.

Section 1.856-4(b)(5)(ii) provides that the trustees or directors of a REIT are not required to delegate or contract out their fiduciary duty to manage the trust itself, as distinguished from rendering or furnishing services to the tenants of its property or managing or operating the property. Thus, the trustees or directors may do all those things necessary, in their fiduciary capacities, to manage and conduct the affairs of the trust itself.

Section 856(d)(2)(C) provides that any impermissible tenant service income is excluded from the definition of "rents from real property." Section 856(d)(7)(A) defines "impermissible tenant service income" to mean, with respect to any real or personal property, any amount received or accrued directly or indirectly by the REIT for services furnished or rendered by the REIT to tenants of such property, or for managing or operating the property.

Section 856(d)(7)(C) provides certain exclusions from impermissible tenant service income. Section 856(d)(7)(C) provides that for purposes of section 856(d)(7)(A), services furnished or rendered, or management or operation provided, through an independent contractor from whom the REIT does not derive or receive any income or through a TRS of the REIT shall not be treated as furnished, rendered, or provided by the REIT, and there shall not be taken into account any amount which would be excluded from unrelated business taxable income under section 512(b)(3) if received by an organization described in section 511(a)(2).

Section 512(b)(3) provides, in part, that there shall be excluded from the computation of unrelated business taxable income all rents from real property and all rents from personal property leased with such real property, if the rents attributable to such personal property are an incidental amount of the total rents received or accrued under the lease, determined at the time the personal property is placed in service.

Section 1.512(b)-1(c)(5) provides that payments for the use or occupancy of rooms and other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, motor courts, or motels, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rent from real property. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas the furnishing of heat and light, the cleaning of public entrances, exits, stairways, and lobbies, and the collection of trash are not considered as services rendered to the occupant.

In Rev. Rul. 2002-38, 2002-2 C.B. 4, a REIT pays its TRS an arm's length rate to provide non-customary services to tenants. The REIT does not separately state charges to tenants for the services. Thus, a portion of the amounts received by the REIT from tenants represents an amount received for services provided by the TRS. TRS employees perform all of the services and TRS pays all of the costs of providing the services. The TRS also rents space from the REIT for carrying out its services to tenants. The revenue ruling concludes that the services provided to the REIT's tenants are considered to be rendered by the TRS, rather than the REIT, for purposes of section 856(d)(7)(C)(i). Accordingly, the services do not give rise to impermissible tenant service income and do not cause any portion of the rents received by the REIT to fail to qualify as "rents from real property" under section 856(d) of the Code.

Under an Agreement, Taxpayer will rent to the tenant physical space, which may include colocation space within a Building for tenant equipment, rights-of-way for the wires or cables needed for the tenant's interconnectivity (including interconnectivity to TRS-operated, logical or managed network systems), office suites, secure shelf space, rooftop space, or business recovery stations within a Building. In conjunction with the rental of physical space within a Building, Taxpayer may also rent to the tenant incidental personal property that satisfies the 15% standard of section 856(d)(1)(C) and provide Core Services to the tenant.

Taxpayer represents that the Core Services Taxpayer will provide to tenants, as described above, are usual or customary services that are rendered in connection with the leasing and maintenance of space in data centers and are not rendered primarily for the convenience of tenants. Taxpayer also represents that rent for personal property leased by Taxpayer to a tenant under, or in connection with, a lease of real property for a taxable year will constitute less than 15 percent of the total rent, based on the average fair market values of the real property and personal property, for the taxable year attributable to both the real and personal property leased by Taxpayer to the tenant under, or in connection with, Taxpayer's Agreement with the tenant.

Accordingly, the rents from interests in real property, charges for Core Services, and amounts for incidental personal property leased under, or in connection with, a lease of real property by Taxpayer, are "rents from real property" under section 856(d).

Other services will be performed by an independent contractor from whom Taxpayer receives no income or by a TRS. Taxpayer (on behalf of itself and its TRSs) will collect all or nearly all the amounts owing from tenants under an Agreement. Some TRS-provided services, such as set-up and installation and smart hands support, may be listed as separate line items on invoices to tenants under the lease. When a TRS performs services for Taxpayer's tenants, the TRS will receive arm's-length fees from Taxpayer for such services.

As noted above, Taxpayer expects to collect all, or nearly all, of the amounts owing from tenants. Some TRS-Provided Services may be listed as separate line items

on invoices to tenants. All TRS-Provided Services will be performed by employees of a TRS and a TRS will pay all costs of providing such services. In addition, the TRS will receive arm's-length fees from Taxpayer for providing TRS-Provided Services. Consequently, the TRS, not the Taxpayer, is the provider of the impermissible services. As a result, the amounts received for the TRS-Provided Services do not give rise to impermissible tenant service income and thus do not cause any portion of the rents received by Taxpayer to fail to qualify as "rents from real property" under section 856(d) of the Code.

Ruling Request #3: ***Whether the Real Estate Intangibles will be treated as real property for purposes of section 856.***

Section 856(c)(5)(C) provides that the term "interests in real property" includes fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon, but does not include mineral, oil, or gas royalty interests.

Section 1.856-2(d)(3) provides that in determining the investment status of a REIT, the term "total assets" means the gross assets of the REIT determined in accordance with GAAP. The customer contracts and favorable lease intangibles recognized as assets by GAAP are attributable to the acquisition of leaseholds on real property with below-market rent and the acquisition of lease contracts. These intangibles must be analyzed to determine whether they qualify as "real property" for purposes of section 856. To qualify as real property for this purpose, the customer contracts and favorable lease intangibles must be inseparable from and inextricably and compulsorily tied to real property or interests in real property.

GAAP requires an allocation of the excess purchase price over the value of the tangible assets to identified intangible assets and then to residual value goodwill. Taxpayer's Real Estate Intangibles arose when Taxpayer acquired other colocation data center lessors. Taxpayer represents that the Real Estate Intangibles are derived from Taxpayer's leases to its tenants or from Taxpayer's leases of Buildings, and in each case are inextricably and compulsorily tied to the Buildings. Taxpayer also represents that the Real Estate Intangibles are inseparable from the Buildings or leases to which they relate, and have absolutely no value separate and apart from the value of these assets. Taxpayer further represents that intangibles associated with TRS assets are not Real Estate Intangibles.

The customer contract intangibles represent tenant leases for space in data centers that are in place at the time of acquisition of a Building. The customer contract intangibles cannot exist without the underlying lease of real property in the data center, supporting Taxpayer's representation that the Real Estate Intangible of customer

contracts are inseparable from and inextricably and compulsorily tied to the real property rental element of the customer contracts.

The favorable lease intangibles represent below-market leases Taxpayer assumes upon acquisition. The favorable lease intangibles cannot exist without the underlying leaseholds, supporting Taxpayer's representation that the Real Estate Intangible of favorable leases are inextricably and compulsorily tied to the below-market leaseholds. Both the customer contract and favorable lease Real Estate Intangibles are derived from interests in real property and are inseparable from, inexplicably tied to, and have no value separate and apart from the interests in real property from which they are derived.

GAAP recognizes residual value goodwill as the excess purchase price over the net tangible and identified intangible assets acquired. This residual value goodwill, which is attributable to the purchase of real property, as opposed to goodwill that may arise from the acquisition of a business, exists only because of the underlying real property, supporting Taxpayer's representation that the Real Estate Intangible of residual value goodwill is inextricably and compulsorily tied to the Buildings.

In the present case, Taxpayer's Real Estate Intangibles are inseparable from and inextricably and compulsorily tied to Taxpayer's real property or interests in real property. Accordingly, we rule that Taxpayer's Real Estate Intangibles (the identifiable intangibles of customer contracts and favorable leases as well as the residual value goodwill attributable to real property of the REIT, and not intangibles associated with TRS assets, as described above) qualify as real property for purposes of section 856(c)(5)(B).

Ruling Request #4: ***Whether a loan by Taxpayer to a TRS that is secured by real property of the TRS that qualifies as an "interest in real property" under section 856 will be treated as an "interest in real property" for purposes of section 856(c)(4)(B)(ii) rather than as a security.***

Under section 856(c)(4)(B)(ii), a REIT is permitted to hold the securities of one or more TRSs as long as such securities do not exceed 25% of the value of the REIT's total assets (the "25% Value Test"). The question presented in this ruling request is whether a loan to a TRS that qualifies as a real estate asset under section 856(c)(5)(B) should be considered a "security" for purposes of the 25% Value Test under section 856(c)(4)(B)(ii).

Section 1.856-3(e) provides that the term "securities" for purposes of subchapter M of the Code does not include "interests in real property" or "real estate assets" as those terms are defined in section 856.

The rule in section 1.856-3(e) applies for purposes of subchapter M, including the 25% Value Test under section 856(c)(4)(B)(ii). Thus, in applying the 25% Value Test, the term “securities” does not include “interests in real property” or “real estate assets” as defined in sections 856 and 1.856-3.

Rev. Rul. 74-191, 1974-1 C.B. 170, holds that foreign real estate acquired by a REIT is a "real estate asset" for purposes of section 856(c) and that the term "mortgages on real property" includes a security interest which, under the laws of the jurisdiction in which the property is located, is the legal equivalent of a mortgage or deed of trust in the United States. The ruling describes an unincorporated domestic trust, otherwise qualifying as a REIT under section 856, that made short term construction loans secured by security interests in real property located outside the United States. Such security interests were legally equivalent to those created by mortgages or deeds of trust in the United States. The trust also had direct interests in real estate located abroad. The ruling reasons that neither section 856 nor the regulations thereunder restrict the term "real estate assets" to those located within the United States.

In the present situation, Taxpayer represents that the loans between Taxpayer and any TRS that are secured by interests in real property owned by that TRS will be adequately secured (based on the loan value of the real property under section 1.856-5(c)(2)) by such interests in real property. Taxpayer has further represented that the loans create a security interest in real property which, under the laws of the jurisdiction in which the property is located, is the equivalent of a mortgage and in all cases includes a traditional right of foreclosure against the real property.

Based on the information provided and the representations made, a loan by Taxpayer to a TRS secured by a section 856 “interest in real property” of that TRS will be treated as an “interest in real property” and will not be treated as a “security” under section 856(c)(4)(B)(ii).

Ruling Request #5: ***Whether rents received by Taxpayer from a TRS for the leasing of space in Taxpayer’s Buildings (where at least 90 percent of the leased space at a Building is leased to persons other than a TRS or related person described in section 856(d)(2)(B)) in connection with the TRS’s provision of services to Taxpayer’s tenants will be treated as rents from real property under section 856(d) through the application of section 856(d)(8)(A).***

Section 856(d)(2)(B) provides that, except as provided in section 856(d)(8), the term "rents from real property" does not include any amount received or accrued directly or indirectly from any person if the REIT owns, directly or indirectly: (i) in the case of any person that is a corporation, stock of such person possessing 10 percent or more of the total combined voting power of all classes of stock entitled to vote, or 10 percent or more of the total value of shares of all classes of stock of such person; or (ii) in the case

of any person that is not a corporation, an interest of 10 percent or more in the assets or net profits of such person.

Section 856(d)(8) provides that amounts received by a REIT from its TRS will not be excluded from rents from real property under section 856(d)(2)(B) if the terms of the limited rental exception of section 856(d)(8)(A) are met. The requirements of section 856(d)(8)(A) are met with respect to any property if at least 90 percent of the leased space of the property is rented to persons other than TRSs of such REIT and other than related parties described in section 856(d)(2)(B), but only to the extent that the amounts paid to the REIT by the TRS as rents from real property (without regard to section 856(d)(2)(B)) are substantially comparable to such rents paid by the other tenants of the REIT's property for comparable space.

Taxpayer represents that the rents paid by the TRS for space in a Building will be arm's length and will be substantially comparable to rents paid by unrelated tenants for comparable space either in the Building itself, if there is comparable space leased to unrelated tenants in such Building or, if there is no such comparable space, in Taxpayer's other Buildings or in properties in the same geographic area. Taxpayer also represents that in substantially all instances in which a TRS enters into a lease with Taxpayer for the occupancy of space within a Building, at least 90 percent of the leased space of the Building will be leased to persons other than TRSs and other than related persons described in section 856(d)(2)(B).

Accordingly, based on Taxpayer's representations, and provided that at least 90 percent of the leased space in a Building is leased to persons other than TRSs or related persons described in section 856(d)(2)(B), rents received by Taxpayer from a TRS for the leasing of space in the Building in connection with the TRS's provisions of services to Taxpayer's customers will be treated as rents from real property under section 856(d) through the application of section 856(d)(8)(A).

Ruling Request #6: ***Any amounts received by Taxpayer as reimbursements under a cost-sharing arrangement will not be included in Taxpayer's gross income for purposes of sections 856(c)(2) and (3).***

In Rev. Rul. 84-138, 1984-2 C.B. 123, a regulated investment company ("RIC") and its wholly owned subsidiary shared facilities and some personnel. It was agreed that the RIC would pay all the expenses for general and administrative overhead, including personnel costs, and the subsidiary would reimburse the RIC for its pro rata share of the expenses on an arm's length basis. The ruling, in distinguishing *Jergens Co. v. Comm'r*, 40 B.T.A. 868 (1939), states that the RIC was not engaged in the business of receiving compensation for services of the type that were reimbursed. Instead, reimbursements to the RIC from the subsidiary were merely repayments of advances made by the RIC on behalf of the subsidiary. Accordingly, the ruling holds

that the reimbursements were not included in the RIC's gross income under section 61, and, therefore, were not subject to the gross income requirement of section 851(b)(2).

In the present case, the reimbursement and cost sharing arrangements to be executed between Taxpayer and its TRS are analogous to the situation in Rev. Rul. 84-138. Taxpayer and the applicable TRS intend to enter into an employee sharing agreement under which certain employees of Taxpayer will be treated as loaned or advanced to the TRS and certain employees of the TRS will be treated as loaned or advanced to Taxpayer. In addition, Taxpayer and a TRS will enter into equipment sharing agreements whereby each party will bear allocable costs based on use and the primary party will be reimbursed for the expenses related to use of the equipment by the other party on an at-cost basis.

Neither Taxpayer nor the TRS will profit under any cost-sharing arrangement. Neither Taxpayer nor the TRS will be in the trade or business of providing to third parties any service or equipment that is the subject of reimbursement under any cost-sharing arrangement. Accordingly, based on the information provided and representations made, reimbursement payments received under cost-sharing arrangements will not be treated as gross income for purposes of sections 856(c)(2) and (3). Additionally, neither Taxpayer nor TRS will be entitled to a deduction for payment of the expenses that are reimbursed.

Ruling Request #7: ***Whether Taxpayer's Subpart F Inclusions, PFIC Inclusions, and Section 956 Inclusions (each defined below), will be treated as qualifying income under section 856(c)(2).***

As noted earlier, Taxpayer intends to own, either partially or wholly, Foreign Subs for which TRS elections will be made. Such Foreign Subs are either CFCs within the meaning of section 957(a) with respect to which Taxpayer is a United States Shareholder within the meaning of section 951(a), PFICs for which Taxpayer intends to make elections under section 1295(a) to treat as QEFs, or PFICs for which Taxpayer has not made a QEF or mark-to-market election.

As a result of being a United States Shareholder with respect to CFCs, Taxpayer is required by section 951(a)(1)(A)(i) to include in its gross income its pro rata share of the subpart F income, as defined in section 952(a), of the CFCs. Taxpayer expects to report section 951(a)(1)(A) inclusions with respect to one or more CFCs as a result of the CFC earning passive rental income, interest, and dividends that constitute FPHCI (the "Subpart F Inclusions").

In addition, as a result of being a United States Shareholder with respect to CFCs, Taxpayer is required by section 951(a)(1)(B) to include in its gross income the amount determined under section 956. Taxpayer expects to report section 951(a)(1)(B) inclusions as a result of its CFCs being pledgors or guarantors of Taxpayer's obligations

within the meaning of section 956(d) and section 1.956-2(c), but the obligations will be limited to debt of Taxpayer that will be incurred to finance Taxpayer's acquisition, improvement, or development of interests in real property that produce qualifying income under section 856(c)(2) (the "Section 956 Inclusions").

As a result of being a shareholder in PFICs for which Taxpayer makes QEF elections, Taxpayer is required under section 1293(a) to include in its gross income its pro rata share of the E&P of each such QEF. Also, as a result of being a shareholder in PFICs for which Taxpayer has not made QEF or mark-to-market elections, Taxpayer is required to include amounts in its gross income (as ordinary income) pursuant to section 1291(a)(1)(B). Taxpayer expects to report section 1293(a) income inclusions attributable to passive income from numerous PFICs for which QEF elections have been made (the "QEF Inclusions"), and include amounts in ordinary income under section 1291(a) attributable to passive income from PFICs for which QEF or mark-to-market elections have not been made (together with QEF Inclusions, the "PFIC Inclusions").

Section 856(c)(5)(J) provides that to the extent necessary to carry out the purposes of Part II of subchapter M of the Code, the Secretary is authorized to determine, solely for purposes of such part, whether any item of income or gain which (i) does not otherwise qualify under sections 856(c)(2) or (3) may be considered as not constituting gross income for purposes of sections 856(c)(2) or (3), or (ii) otherwise constitutes gross income not qualifying under sections 856(c)(2) or (3) may be considered as gross income which qualifies under sections 856(c)(2) or (3).

The legislative history underlying the tax treatment of REITs indicates that a central concern behind the gross income restrictions is that a REIT's gross income should largely be composed of passive income. For example, H.R. Rep. No. 86-2020, 2d Sess. 4, at 6 (1960), 1960-2 C.B. 819, at 822-23 states, "[o]ne of the principal purposes of your committee in imposing restrictions on types of income of a qualifying real estate investment trust is to be sure the bulk of its income is from passive income sources and not from the active conduct of a trade or business."

Subpart F Inclusions

Section 957 defines a CFC as a foreign corporation in which more than 50 percent of the total combined voting power of all classes of stock entitled to vote, or the total value of the stock, is owned by United States Shareholders on any day during the corporation's taxable year. A United States Shareholder is defined in section 951(b) as a United States person who owns 10 percent or more of the total voting power of the foreign corporation. Taxpayer represents that it is a United States Shareholder within the meaning of section 951(b) with respect to certain subsidiaries that are CFCs.

Section 951(a)(1)(A)(i) generally provides that if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during a taxable year, every person who

is a United States Shareholder of the corporation and who owns stock in the corporation on the last day of the taxable year in which the corporation is a CFC shall include in income the shareholder's pro rata share of the CFC's subpart F income for the taxable year.

Section 952 defines subpart F income to include foreign base company income, as determined under section 954. Under section 954(a)(1), foreign base company income includes FPHCI. Section 954(c)(1)(A) generally defines FPHCI to include (among other things) dividends, interest, royalties, rents, and annuities. Section 954(c)(1)(B) also includes gain from the sale or exchange of property which (among other things) gives rise to income described in section 954(c)(1)(A) (after application of paragraph (2)(A)) other than property which gives rise to income not treated as FPHCI by reason of section 954(h) or (i) for the taxable year.

Taxpayer represents that it is a United States Shareholder within the meaning of section 951(b) with respect to certain of its subsidiaries that are CFCs. As Taxpayer's CFCs earn subpart F income attributable to foreign base company income that is FPHCI and such income is generally passive income, treatment of the section 951(a)(1)(A)(i) inclusion attributable to such passive income as qualifying income for purposes of section 856(c)(2) does not interfere with or impede the policy objectives of Congress in enacting the income test under section 856(c)(2). Accordingly, we rule that under section 856(c)(5)(J)(ii), Subpart F Inclusions attributable to the FPHCI that is passive income are considered as gross income that qualifies for purposes of section 856(c)(2).

PFIC Inclusions

Section 1297(a) defines a PFIC as a foreign corporation if either (1) 75 percent or more of the gross income of such corporation for the taxable year is passive income, or (2) the average percentage of assets (as determined in accordance with section 1297(e)) held by such corporation during the taxable year which produce passive income or which are held for the production of passive income is at least 50 percent. Section 1297(b) defines the term "passive income" as income of a kind that would be FPHCI under section 954(c), subject to certain exceptions.

Section 1291(a)(1) provides that if a United States person receives an excess distribution (as defined in section 1291(b)) in respect of stock in a PFIC, then – (A) the amount of the excess distribution shall be allocated ratably to each day in the shareholder's holding period for the stock, (B) with respect to such excess distribution, the shareholder's gross income for the current year shall include (as ordinary income) only the amounts allocated under section 1291(a)(1)(A) to – (i) the current year, or (ii) any period in the shareholder's holding period before the 1st day of the 1st taxable year of the company which begins after December 31, 1986, and for which it was a PFIC, and (C) the tax imposed by chapter 1 of the Code for the current year shall be increased by the deferred tax amount (determined under section 1291(c)). Under section

1291(a)(2), the rules of section 1291(a)(1) apply to any gain recognized on the disposition of stock of a PFIC as if the gain were an excess distribution.

Section 1295(a) provides that a PFIC will be treated as a QEF with respect to a shareholder if (1) an election by the shareholder under section 1295(b) applies to such PFIC for the taxable year; and (2) the PFIC complies with such requirements as the Secretary may prescribe for purposes of determining the ordinary earnings and net capital gains of such company. Section 1293(a) provides that every United States person who owns (or is treated under section 1298(a) as owning) stock of a QEF at any time during the taxable year of such fund shall include in gross income – (A) as ordinary income, such shareholder's pro rata share of the ordinary earnings of such fund for such year, and (B) as long-term capital gain, such shareholder's pro rata share of the net capital gain of such fund for such year.

Taxpayer represents that it is a shareholder of certain subsidiaries that are PFICs and that it intends to make QEF elections with respect to certain of these PFICs, and not make QEF or mark-to-market elections with respect to other of these PFICs. As Taxpayer's PFICs earn income that is FPHCI and such income is generally passive income, treatment of the PFIC Inclusions as qualifying income for purposes of section 856(c)(2) does not interfere with or impede the policy objectives of Congress in enacting the income test under section 856(c)(2). Accordingly, we rule that under section 856(c)(5)(J)(ii), Taxpayer's PFIC Inclusions are considered as gross income that qualifies for purposes of section 856(c)(2).

Section 956 Inclusions

Section 951(a)(1)(B) provides that if a foreign corporation is a CFC for an uninterrupted period of 30 days or more during a taxable year, every person who is a United States shareholder of the corporation and who owns stock in the corporation on the last day of the taxable year in which the corporation is a CFC shall include in gross income the amount determined under section 956 with respect to the shareholder for such year (but only to the extent not excluded from gross income under section 959(a)(2)).

Section 956(a) provides that in the case of a CFC, the amount determined under section 956 with respect to any United States shareholder for any taxable year is the lesser of – (1) the excess (if any) of – (A) such shareholder's pro rata share of the average of the amounts of United States property held (directly or indirectly) by the CFC as of the close of each quarter of such taxable year, over (B) the amount of E&P described in section 959(c)(1)(A) with respect to such shareholder, or (2) such shareholder's pro rata share of the applicable earnings of such CFC. In general, the amount taken into account in the preceding sentence under (1) with respect to any property shall be its adjusted basis as determined for purposes of computing E&P, reduced by any liability to which the property is subject.

Section 956(c) provides that United States property includes an obligation of a United States person. Section 956(d) states that a CFC shall, under regulations prescribed by the Secretary, be considered as holding an obligation of a United States person if such CFC is a pledgor or guarantor of such obligation. Section 1.956-2(c)(1) provides that except as provided in section 1.956-2(c)(4), any obligation (as defined in section 1.956-2(d)(2)) of a United States person (as defined in section 957(d)) with respect to which a CFC is a pledgor or guarantor shall be considered for purposes of section 956(a) and section 1.956-2(a) to be United States property held by such CFC. Section 1.956-2(c)(2) provides that if the assets of a CFC serve at any time, even though indirectly, as security for the performance of an obligation of a United States person, then the CFC will be considered a pledgor or guarantor of that obligation.

As stated earlier, Taxpayer represents that it is a United States Shareholder within the meaning of section 951(b) with respect to certain of its subsidiaries that are CFCs. Taxpayer will recognize Section 956 Inclusions because Taxpayer is a debtor on one or more obligations with respect to which one or more of its CFCs is a pledgor or guarantor (including cases in which the assets of a CFC serve indirectly as security for an obligation). Each of these pledges or guarantees is incurred to finance Taxpayer's acquisition of real property. Taxpayer represents that the Section 956 Inclusions occur as a result of debt of Taxpayer that arose in connection with the acquisition, improvement, or development of interests in real property that produce qualifying income under section 856(c)(2). To the extent Taxpayer recognizes Section 956 Inclusions as a result of (i) the pledge of the assets of a CFC (including through the pledge of CFC shares), (ii) a CFC's pledge of assets, or (iii) a CFC's guarantee of an obligation of Taxpayer, and the pledge or guarantee secures debt of the Taxpayer that is used to finance the acquisition, improvement, or development of real property from which income is derived that qualifies under section 856(c)(2), it would not interfere with or impede the policy objectives of Congress in enacting the income test under that provision to consider the Section 956 Inclusions as gross income that qualifies for purposes of section 856(c)(2). Accordingly, we rule that under section 856(c)(5)(J)(ii), Taxpayer's Section 956 Inclusions are considered as gross income that qualifies for purposes of section 856(c)(2).

Ruling Request #8: ***Whether foreign currency gain with respect to distributions of previously taxed E&P as described in section 986(c)(1) (including Subpart F Inclusions and similar income under sections 951(a) and 1293(a)) will not be taken into account for purposes of section 856(c)(2).***

Sections 959(d) and 1293(c) provide that, when a United States shareholder of a CFC or a United States person owning an interest in a QEF is taxed on undistributed corporate earnings under the subpart F or QEF inclusion rules, subsequent distributions of the previously taxed earnings to the shareholder are not treated as dividends for purposes of chapter 1 of the Code.

Section 986(c)(1) provides that foreign currency gain or loss with respect to distributions of previously taxed E&P (as described in section 959 or section 1293(c)) attributable to movements in exchange rates between the times of the deemed inclusion and the actual distributions shall be recognized and treated as ordinary income or loss from the same source as the associated income inclusion.

Section 856(n)(1)(A) provides that "passive foreign exchange gain" for any taxable year will not constitute gross income for purposes of section 856(c)(2).

Section 856(n)(3) defines passive foreign exchange gain as: (A) real estate foreign exchange gain (as defined in section 856(n)(2)); (B) foreign currency gains (as defined in section 988(b)(1)) which is not described in subparagraph A and is attributable to (i) any item of income or gain described in section 856(c)(2), (ii) the acquisition or ownership of obligations (other than foreign currency gains attributable to any item described in clause (i)), or (iii) becoming or being the obligor under obligations (other than foreign currency gain attributable to any item of income or gain described in clause (i)); and (C) any other foreign currency gains determined by the Secretary.

While section 986(c) gain is not a foreign currency gain defined in section 988(b)(1), such section 986(c) gain is attributable to the Subpart F Inclusions and QEF Inclusions, items of income that are qualifying income for purposes of section 856(c)(2). Section 986(c) gain is substantially similar to passive foreign exchange gain described in section 856(n)(3)(B)(i). Therefore, pursuant to section 856(n)(3)(C), section 986(c) gains are excluded from gross income for purposes of section 856(c)(2) because these currency gains are considered passive foreign exchange gain that is excluded from gross income for purposes of section 856(c)(2).

Ruling Request #9: ***Whether positive Section 481(a) Adjustments will be considered as not constituting gross income under sections 856(c)(2) and (3).***

Taxpayer filed Form 3115 to automatically change its method of depreciating certain assets on Date 2. The automatic change has resulted in positive Section 481(a) Adjustments that will be includible in taxable income over a period of four years. Section 856(c) lists the sources of permissible income under the Income Tests. Income from a Section 481(a) Adjustment is not specifically enumerated in sections 856(c)(2) or (3).

Section 481(a) provides that a taxpayer that changes its method of accounting takes into account necessary adjustments in computing its taxable income.

Section 1.481-1(d) provides that a section 481(a) adjustment must be properly taken into account for purposes of computing gross income, adjusted gross income, or taxable income in determining the amount of any item of gain, loss, deduction, or credit that depends on gross income, adjusted gross income, or taxable income.

The legislative history underlying the tax treatment of REITs indicates that the central concern behind the gross income restrictions is that 95% of a REIT's gross income should be passive income and 75% of a REIT's gross income should be passive real estate income. See H.R. Rep. No. 86-2020, supra, at 6.

Any income resulting from a Section 481(a) Adjustment constitutes gross income that does not qualify under sections 856(c)(2) or (3). Pursuant to section 856(c)(5)(J), that income may be considered either as not constituting gross income under sections 856(c)(2) or (3) or as qualifying gross income under those provisions. Under the facts of the instant case, excluding the Section 481(a) Adjustments from gross income for purposes of sections 856(c)(2) and (3) does not interfere with Congressional policy objectives in enacting the income tests. Accordingly, pursuant to section 856(c)(5)(J)(i), we rule that the Section 481(a) Adjustments will be considered not to constitute gross income for purposes of sections 856(c)(2) and (3).

Ruling Request #10:

(a) A change in Taxpayer's method of accounting for depreciation of the Core Systems and the Real Estate Intangibles for taxable income purposes under sections 446(e) and 481(a), in respect of domestic corporations within the meaning of section 7701(a)(3)-(4), requires a correlative change in computing depreciation of the Core Systems and the Real Estate Intangibles for E&P purposes under section 312(k)(3). Accordingly, consent of the Service is not required to make that change for E&P purposes, separate and apart from the consent required to change Taxpayer's method of accounting for depreciation for taxable income purposes.

(b) Further, because the depreciation deduction for the Core Systems and the Real Estate Intangibles for taxable income purposes is not the same for E&P purposes, additional adjustments are required to account for the change in computing depreciation for E&P purposes, which are made under section 312 and the accompanying regulations. Because Taxpayer must take into account the positive Section 481(a) Adjustments arising from the change in method of accounting for depreciation for taxable income purposes over four years, Taxpayer, in computing E&P, shall take the correlative adjustments arising from the change in computing depreciation for E&P purposes over the same period of time (four years) as it takes into account such Section 481(a) Adjustments.

Section 446(a) generally provides that taxable income shall be computed under a method of accounting on the basis of which the taxpayer regularly computes income in keeping its books. Section 1.446-1(e)(1) provides that a taxpayer filing its first return

may adopt any permissible method of accounting in computing taxable income for the taxable year covered by such return.

Section 446(e) generally provides that a taxpayer who changes the method of accounting on the basis of which the taxpayer regularly computes the taxpayer's income in keeping the taxpayer's books shall, before computing the taxpayer's taxable income under the new method, secure the consent of the Secretary. Section 1.446-1(e)(2)(i) provides that a taxpayer who changes the method of accounting employed in keeping the taxpayer's books shall, before computing the taxpayer's income upon such new method for purposes of taxation, secure the consent of the Commissioner.

A change in method of accounting includes a change in the overall plan of accounting for gross income or deductions or a change in the treatment of any material item used in such overall plan. A material item is any item that involved the proper time for the inclusion of the item in income or the taking of a deduction. Section 1.446-1(e)(2)(ii)(*a*).

In determining whether a taxpayer's accounting practice for an item involves timing, generally the relevant question is whether the practice permanently changes the amount of a taxpayer's lifetime taxable income. If the practice does not permanently affect the taxpayer's lifetime taxable income but does or could change the taxable year in which income is reported, it involves timing and is therefore a method of accounting. *See* Rev. Proc. 91-31, 1991-1 C.B. 566, Rev. Proc. 2011-14, 2011-4 I.R.B. 330.

A change in method of accounting does not include correction of mathematical or posting errors, or errors in the computation of tax liability (such as errors in the computation of the foreign tax credit, net operating loss, percentage depletion, or investment credit). Also, a change in method of accounting does not include adjustment of any item of income or deduction that does not involve the proper time for the inclusion of the item of income or the taking of a deduction. Section 1.446-1(e)(2)(ii)(*b*).

A change in the period of recovery, a change in the convention, or a change in the depreciation or amortization method of a depreciable or amortizable asset generally is a change in method of accounting under section 446(e). *See* section 1.446-1(e)(2)(ii)(*d*)(*2*)*(i).*

Section 481(a) provides that in computing the taxpayer's taxable income for the taxable year (year of change) (1) if such computation is under a method of accounting different from the method under which the taxpayer's taxable income for the preceding taxable year was computed, then (2) there shall be taken into account those adjustments which are determined to be necessary solely by reason of the change in order to prevent amounts from being duplicated or omitted, except there shall not be taken into account any adjustment in respect of any taxable year to which this section does not apply unless the adjustment is attributable to a change in method of accounting initiated by the taxpayer.

Rev. Proc. 2011-14, as modified by Rev. Proc. 2012-39, 2012-41 I.R.B. 470, (automatic consent procedures) and Rev. Proc. 97-27, as amplified and modified by Rev. Proc. 2002-19, 2002-1 C.B. 696, as amplified and clarified by Rev. Proc. 2002-54, 2002-2 C.B. 432, as modified by Rev. Proc. 2007-67, 2007-2 C.B. 1072, as modified by Rev. Proc. 2009-39, 2009-38 I.R.B. 371, as modified by Rev. Proc. 2011-14 and as modified by Rev. Proc. 2012-39, (advance consent procedures) provide the administrative procedures to request consent to change a method of accounting under section 446(e). For the applicable period, Rev. Proc. 2011-14 was the exclusive procedure to request a change in method of accounting that is expressly described in its Appendix.

Section 312(a) generally provides that on the distribution of property by a corporation with respect to its stock, the E&P of the corporation (to the extent thereof) shall be decreased by the sum of: (1) the amount of money, (2) the principal amount of the obligations of such corporation (or, in the case of obligations having original issue discount, the aggregate price of such obligations), and (3) the adjusted basis of the other property, so distributed.

Section 1.312-6 provides that due consideration must be given to the facts, and while mere bookkeeping entries increasing or decreasing surplus will not be conclusive, the amount of the E&P in any case will be dependent on the method of accounting properly employed in computing taxable income (or net income, as the case may be). For instance, a corporation keeping its books and filing its income tax returns on the cash receipts and disbursements basis may not use the accrual basis in determining E&P.

Section 312(k)(1) generally provides that for purposes of computing E&P of a corporation, the allowance for depreciation shall be determined using the straight-line method of depreciation. Section 312(k)(3) generally provides that, in the case of tangible property to which section 168 applies, the adjustment to E&P for depreciation for any taxable year shall be determined under the ADS. Therefore, in the computation of E&P, the recovery period for nonresidential real property is 40 years. Sections 168(g)(2)(C)(iii) and 312(k)(3).

Rev. Proc. 79-47, 1979-2 C.B. 528, provides the procedures outlining the effect on E&P resulting from an adjustment required by section 481(a) for a change in method of accounting for taxable income purposes under section 446(e). In order to prevent distortions, when computing E&P (current and accumulated) available for the payment of dividends, the taxpayer shall follow its new method for reporting taxable income and shall take the applicable Section 481(a) Adjustments into account over the same period as it does for purposes of computing taxable income.

In the instant case, for property subject to section 168, the depreciation deduction for taxable income purposes is not the same as for E&P purposes. When

Taxpayer changes its method of computing depreciation for taxable income purposes, it is required to change its method of computing depreciation for E&P purposes.

(a) Whether separate consent of the Commissioner is required.

On Date 2, Taxpayer filed a Form 3115 under Rev. Proc. 2011-14 to change its method of computing depreciation for the Core Systems and the Real Estate Intangibles predominantly used in the United States for taxable income purposes. The changes in Taxpayer's depreciation method, recovery periods, and convention for the Core Systems for taxable income purposes are changes in methods of accounting under sections 446(e) and 481(a). *See* section 1.446-1(e)(2)(ii)(*d*)(*2*)*(i)* (changes in depreciation method, convention and recovery period to compute taxable income are changes in methods of accounting under section 446(e)). Moreover, the change in Taxpayer's recovery period and convention for the Real Estate Intangibles for taxable income purposes are changes in methods of accounting under sections 446(e) and 481(a). *Id*.

(b) Adjustments to E&P.

When Taxpayer changed its method of accounting for depreciation for the Core Systems and Real Estate Intangibles for taxable income purposes, a correlative change to Taxpayer's method of computing depreciation for E&P purposes for the Core Systems and Real Estate Intangibles was required. Section 312(k)(3) and section 1.312-6. Accordingly, when Taxpayer changed its method of accounting for depreciation for taxable income purposes, no additional consent was required for Taxpayer to make the required correlative change in computing its depreciation for E&P purposes.

Rev. Proc. 79-47 recognizes that the section 481(a) adjustment resulting from a change in method of accounting for taxable income purposes may create a distortion in E&P available for distribution in the year of change, and provides that the required section 481(a) adjustment for taxable income purposes shall be spread, for E&P purposes, over the same adjustment period as that used for taxable income purposes. However, as stated above, section 312(k)(3) requires Taxpayer to use a different method of computing depreciation for the Core Systems and Real Estate Intangibles for E&P purposes than is permitted for taxable income purposes. As such, additional adjustments to E&P under section 312 and the accompanying regulations are necessary to correctly compute Taxpayer's current and accumulated E&P to comply with section 312(k)(3).

In correcting this change in depreciation for E&P purposes, Taxpayer shall take into account the adjustment that must be made to its E&P under section 312(k) due to the change in computing E&P for depreciation of the Core Systems and the Real Estate Intangibles over the same period of time as Taxpayer does for the Section 481(a) Adjustments due to the change in method of accounting for depreciation of the Core

Systems and the Real Estate Intangibles for taxable income purposes under section 446(e).

Ruling Request #11: ***To the extent that the Section 481(a) Adjustments from the change in computing depreciation and amortization for certain assets exceed the correlative E&P adjustments, any distributions of such excess shall be treated as dividends by Taxpayer.***

As referenced above, Taxpayer filed Form 3115 to automatically change its method of depreciating certain assets. As a result of this method change, Taxpayer has positive Section 481(a) Adjustments that have been and will be included in Taxpayer's taxable income ratably over four taxable years, including Taxpayer's First REIT Taxable Year. See Rev. Proc. 97-27, sec. 5.02(3)(a), 1997-1 C.B. 680, 684.

Taxpayer previously received a private letter ruling allowing it to take correlative adjustments arising from the change in computing depreciation for E&P purposes ratably over the same period as the Section 481(a) Adjustments. Due to differences in computing depreciation for E&P purposes versus income tax purposes, Taxpayer's correlative adjustments to its E&P are lower than its Section 481(a) Adjustments.

The Section 481(a) Adjustments are subject to the section 1374 built-in gains tax, which is not eliminated or reduced by the dividends paid deduction. Under section 337(d), Treas. Reg. section 1.337(d)-7, and section 1374 and the regulations thereunder, the Section 481(a) Adjustments are subject to corporate level taxation pursuant to Treas. Reg. section 1.1374-4(b) and (d). The net amount after the application of corporate level taxation is REIT taxable income ("REITTI") subject to the distribution requirements of section 857(a).

Section 561(a) provides that the deduction for dividends paid shall be the sum of the dividends paid during the year and consent dividends for the taxable year.

Section 562(a) provides that the term "dividend" shall include only dividends as described in section 316. Section 316(a) defines the term "dividend" to mean any distribution of property made by a corporation to its shareholders out of either current year or accumulated E&P.

Section 857(a)(1) requires, in part, that a REIT's deduction for dividends paid for a taxable year equals at least 90 percent of its REITTI for the taxable year, determined without regard to the deduction for dividends paid (as defined by section 561) or any net capital gains (such adjusted taxable income, "Pre-Distribution Ordinary Income").

Section 857(a)(2) generally requires that, as of the close of a taxable year, a REIT has no E&P accumulated in any non-REIT year.

Section 857(b)(2)(B) provides that in determining a REIT's taxable income, the deduction for dividends paid (as defined in section 561) shall be allowed.

Section 857(d)(1) provides that the E&P of a REIT for any taxable year (but not its accumulated earnings) shall not be reduced by any amount which is not allowable in computing the REIT's taxable income for such taxable year.

Section 857(d)(2) provides that a REIT is treated as having sufficient E&P to treat as a dividend any distribution that it treats as a dividend to the extent the distribution, when combined with other distributions in the same calendar year, does not exceed the distributions required by section 4981.

Section 4981 generally levies an excise tax on REITs that do not make required distributions during the calendar year. In general, a REIT's required distribution equals at least 85 percent of its current year ordinary income and at least 95 percent of its current year capital gain net income. The remaining percentage of the REIT's current year ordinary income (up to 15 percent) and its current year capital gain net income (up to 5 percent) are included in its required distribution in the following year. For purposes of section 4981, "ordinary income" equals the REIT's taxable income as determined under section 857(b)(2) without regard to the section 857(b)(2)(B) dividends paid deduction.

The House Conference Report for the Tax Reform Act of 1986 states the following in discussing its rejection of a Senate amendment to section 857:

> The conference agreement does not contain a provision from the Senate amendment under which a REIT's E&P for a taxable year would not be less than its real estate [investment] trust taxable income for the taxable year (without regard to dividends paid deduction), since the conferees believe that this provision is a restatement of law.

H.R. Conf. Rep. No. 99-841, at 218 (1986). Therefore, the regime governing the taxation of REITs, which requires distributions of taxable income, is intended to match the REIT's E&P to that income.

Therefore, to the extent that the Section 481(a) Adjustments exceed the correlative E&P adjustments arising from Taxpayer's changes in computing depreciation and amortization, any distributions of such excess (that are distributed and treated as dividends by Taxpayer in the year in which such excess arises) shall be treated as made from E&P.

Ruling Request #12: ***Whether all of the cash and the Taxpayer Stock distributed in any Stock and Cash Distribution will be treated as a distribution of property on the Taxpayer Stock to which section 301 applies. Whether Convertible***

Adjustments shall constitute a deemed distribution of Taxpayer Stock to the holders of the Convertible Debt to which section 301 applies by reason of sections 305(b)(2) and (c), provided at least some cash is distributed in the associated Stock and Cash Distribution. Whether if some shareholders receive a distribution of all cash, all Taxpayer Stock, or a combination of cash and Taxpayer Stock that differs from the distribution received by other shareholders in the same Stock and Cash Distribution, or if the fair market value of the Taxpayer Stock on the date of the Stock and Cash Distribution differs from the amount of cash that could have been received, or if Convertible Adjustments use a different valuation mechanism than that used in the Stock and Cash Distribution, those differences will not cause any such Stock and Cash Distribution and associated Convertible Adjustments to be treated as preferential dividends under section 562(c).

Section 561(b) applies the rules of section 562 for determining which dividends are eligible for the deduction for dividends paid under section 561(a).

Section 562(c) provides that the amount of any distribution will not be considered as a dividend for purposes of computing the dividends paid deduction under section 561 unless the distribution is pro rata. The distribution must not prefer any shares of stock of a class over other shares of stock of that same class.

Treas. Reg. section 1.562-2 provides that a corporation will not be entitled to a deduction for dividends paid with respect to any distribution upon a class of stock if there is distributed to any shareholder of such class (in proportion to the number of shares held by him) more or less than his pro rata part of the distribution as compared with the distribution made to any other shareholder of the same class. Nor will a corporation be entitled to a deduction for dividends paid in the case of any distribution upon a class of stock if there is distributed upon such class of stock more or less than the amount to which it is entitled as compared with any other class of stock. A preference exists if any rights to preference inherent in any class of stock are violated. The disallowance, when any preference in fact exists, extends to the entire amount of the distribution and not merely to a part of such distribution.

Based solely on the information submitted and the representations made, we rule as follows:

(1) Any and all of the cash and Taxpayer Stock distributed in a Stock and Cash Distribution by Taxpayer to holders of the Taxpayer Stock using the election described above shall be treated as a distribution of property with respect to the Taxpayer Stock to which section 301 applies (sections 301 and 305(b)(1)).

(2) The Adjustments shall constitute a deemed distribution of Taxpayer stock to the holders of the Convertible Debt to which section 301 applies by

reason of section 305(b)(2) and (c), provided at least some cash is distributed in the associated Stock and Cash Distribution.

(3) The terms of the Stock and Cash Distribution will not cause the Stock and Cash Distribution to be considered preferential under section 562(c). Accordingly, if, under those terms, a stockholder receives a combination of Taxpayer Stock and cash that differs from the combination received by other stockholders, and if the fair market value of the Taxpayer Stock on the date of distribution differs from the amount of money which could have been received instead, or if conversion rates applicable to the Convertible Debts use a different valuation mechanism than that used in the Stock and Cash Distribution, those differences will not cause the distribution to be considered preferential under section 562(c).

Ruling Request #13: ***Whether hedging identifications made by Company prior to the first day of Taxpayer's First REIT Taxable Year, or by a Company entity or M&A Target Entity prior to its inclusion as part of Taxpayer for REIT income or asset testing purposes, will be effective for purposes of section 856(c)(5)(G) to the extent the hedging identifications would have so qualified had they been made by a REIT. In addition, whether Taxpayer's clear identification of an outstanding hedge on the first day that Taxpayer becomes a party of the hedge for REIT income or asset testing purposes, including through conversion of a TRS to a QRS or a partnership of Taxpayer or through acquisition of an M&A Target Entity that becomes a QRS or a partnership of Taxpayer, will be considered timely identification for purposes of section 856(c)(5)(G).***

Section 61(a) of the Code provides that, except as otherwise provided, gross income includes all income from whatever source derived.

Section 856(c)(5)(G)(i) provides that, except to the extent determined by the Secretary, income of a REIT from a hedging transaction (as defined in section 1221(b)(2)(A)(ii) or (iii)) that is clearly identified pursuant to section 1221(a)(7), including gain from the sale or disposition of such a transaction, shall not constitute gross income under section 856(c)(2) or (3) to the extent the transaction hedges indebtedness incurred or to be incurred by the REIT to acquire or carry real estate assets.

Section 856(c)(5)(G)(ii) provides that, except to the extent determined by the Secretary, income of a REIT from a transaction entered into by the REIT primarily to manage risk of currency fluctuations with respect to any item of income or gain described in section 856(c)(2) or (3) (or any property that generates such income), including gain from the termination of such a transaction, shall not constitute gross income under section 856(c)(2) or (3), provided that the transaction is clearly identified as such before the close of the day on which it was acquired, originated, or entered into.

Section 856(i)(1) provides that a corporation which is a QRS shall not be treated as a separate corporation, and all the assets, liabilities, and items of income, deduction, and credit of a QRS shall be treated as assets, liabilities, and such items (as the case may be) of the REIT. Section 856(i)(2) defines QRS as any corporation if 100 percent of the stock of such corporation is held by the REIT. Such term does not include a TRS.

Section 1221(b)(2)(A)(ii) and the regulations thereunder provide that a "hedging transaction" includes any transaction entered into by the taxpayer in the normal course of the taxpayer's trade or business primarily to manage risk of interest rate or price changes or currency fluctuations with respect to borrowings made or to be made, or ordinary obligations incurred or to be incurred, by the taxpayer.

Section 1221(a)(7) and section 1.1221-2(f)(1) require a hedging transaction to be clearly identified as such before the close of the day on which it was acquired, originated, or entered into.

Section 1.1221-2(f)(2) requires a taxpayer that enters into a hedging transaction to make a substantially contemporaneous identification of the item, items, or aggregate risk being hedged, and provides that an identification is not substantially contemporaneous if it is made more than 35 days after entering into the hedging transaction.

Taxpayer will have entered into hedges prior to the commencement of Taxpayer's First REIT Taxable Year. In addition, prior to the time that Taxpayer converts one or more of its TRSs that do business in foreign countries to either QRSs, other disregarded entities, or partnerships, some of these TRSs will have entered into hedges. Finally, some M&A Target Entities will have entered into hedges prior to the acquisition of these M&A Target Entities by the Company. Such hedges will thus be pre-existing as of the first day that Taxpayer is treated as a REIT or when pre-existing hedges entered into by these entities are included as part of Taxpayer's hedges for REIT income testing purposes.

Some pre-existing hedges will have been clearly and timely identified by Taxpayer, the TRS, or the M&A Target Entity pursuant to section 1221(a)(7). These pre-existing hedges will have met the requirements of section 856(c)(5)(G) but for the fact that these hedges were identified by, as applicable, Taxpayer prior to its becoming a REIT, a TRS prior to its becoming a QRS, other disregarded entity, or partnership of Taxpayer, or the M&A Target Entity prior to its becoming a QRS, other disregarded entity, or partnership of Taxpayer.

With respect to any pre-existing hedge that has not been clearly identified prior to the time Taxpayer becomes a REIT or the hedge is included by Taxpayer, Taxpayer intends to identify each such hedge for section 856(c)(5)(G) purposes (i) on the first day that Taxpayer or one of its QRSs, other disregarded entities, or partnerships becomes a party to the hedge (including through conversion of a TRS to a QRS, other disregarded

entity, or a partnership of Taxpayer or through acquisition of an M&A Target Entity that becomes a QRS, other disregarded entity, or partnership of Taxpayer), or (ii) the first day of the First REIT Taxable Year.

Based on the facts above and the representations of Taxpayer, pre-existing hedges that were properly identified by, as applicable, Taxpayer prior to its becoming a REIT, a TRS prior to its becoming a QRS, other disregarded entity, or partnership of Taxpayer, or the M&A Target Entity prior to its becoming a QRS, other disregarded entity, or partnership of Taxpayer will be treated as properly identified for purposes of section 856(c)(5)(G). Accordingly, pursuant to the authority under section 856(c)(5)(J)(i), we rule that the income from these pre-existing hedges will be considered as not constituting gross income under sections 856(c)(2) or (3) provided that such pre-existing hedging transaction was properly identified by the entity that acquired, originated, or entered into the hedge.

Based on the facts above and the representations of Taxpayer, excluding the income with respect to any pre-existing hedge that has not been clearly identified prior to the time Taxpayer becomes a REIT from Taxpayer's gross income for purposes of sections 856(c)(2) and (3) does not interfere with Congressional policy objectives in enacting the income tests under those provisions. Therefore, pursuant to the authority under section 856(c)(5)(J)(i), we rule that the income from a pre-existing hedge that was not previously properly identified will be considered as not constituting gross income under sections 856(c)(2) and (3), provided that Taxpayer clearly identifies such pre-existing hedge (i) on the first day that Taxpayer or one of its QRSs, other disregarded entities, or partnerships becomes a party to the hedge (including through conversion of a TRS to a QRS, other disregarded entity, or a partnership of Taxpayer or through acquisition of an M&A Target Entity that becomes a QRS, other disregarded entity or a partnership of Taxpayer), or (ii) the first day of the First REIT Taxable Year.

CAVEATS:

The rulings contained in this letter are based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. Any of the material submitted in support of this request for rulings is subject to verification on examination.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed or implied as to whether Taxpayer otherwise qualifies as a REIT under subchapter M of the Code. Additionally, no opinion is expressed concerning whether any amounts received by Taxpayer will be redetermined rents under section 857(b)(7)(B)(i). We also express no opinion regarding whether the value that Taxpayer allocated to the Real Estate Intangibles was properly determined or whether some of the value that Taxpayer ascribes to the Real Estate

Intangibles is properly attributable to some other intangible that would not qualify as real property for the purposes of section 856.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax treatment of Taxpayer's proposed distributions under other provisions of the Code and regulations or the tax treatment of any condition existing at the time of, or effects resulting from, these distributions that is not specifically covered by the above rulings. Specifically, rulings concerning Stock and Cash Distributions are void, and we do not express any opinion on the tax consequences of such distributions, if they are not completed during Taxpayer's First REIT Taxable Year. In addition, no opinion is expressed with regard to the validity of the valuation methodology chosen by Taxpayer in determining the number of shares issued in a distribution or any tax consequences resulting from the establishment of a dividend reinvestment plan in the future.

Moreover, no opinion is expressed or implied as to whether: (i) the Core Systems are nonresidential real property under section 168(e)(2)(B) for purposes of computing depreciation under section 168 or 312(k); (ii) the cost of the Real Estate Intangibles is taken into account as part of the basis of the tangible real or personal property under section 1.197-2(c)(8)(i); and (iii) the Taxpayer's method of accounting for depreciation or amortization for any taxable year for the Core Systems or Real Estate Intangibles are permissible for Federal income tax purposes. Further, no opinion is expressed or implied regarding whether the section 481(a) adjustment period reported, or the E&P adjustments made, by Taxpayer at the time of the REIT conversion were proper.

This ruling is directed only to the taxpayer requesting it. Taxpayer should attach a copy of this ruling to each tax return to which it applies. Section 6110(k)(3) of the Code provides that this ruling may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Andrea M. Hoffenson

Andrea M. Hoffenson
Chief, Branch 2
Office of Associate Chief Counsel
(Financial Institutions & Products)