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January 24, 2011

VIA E-MAIL (rule-comments@sec.gov)

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

Re: SEC Release No. IA-3111, File No. S7-37-10 (the "Exemptions Release"), SEC Release No. IA-3110, File No. S7-36-10 (the "Implementing Release"), and the Application of the Investment Advisers Act of 1940 to Public REITs

Dear Ms. Murphy:

This letter is being submitted in response to the request of the Securities and Exchange Commission (the "Commission") for comment on proposed regulations set forth in the Exemptions Release and the Implementing Release (together, the "Releases"). We support the Commission's efforts in the Releases to provide guidance to certain investment advisers previously exempt from registration with the Commission under the Investment Advisers Act of 1940, as amended (the "Advisers Act"), and we request that the Commission provide additional guidance to self-managed and internally operated public real estate investment trusts ("REITs")[1] regarding the scope of the proposed regulations and the registration requirements under the Advisers Act.

We do not believe it was Congress's intent in passing the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") to require public REITs to register under the Advisers Act, and we observe that in the Exemptions Release the Commission specifically noted that "[t]he primary purpose of Congress in repealing section 203(b)(3) was to require advisers to 'private funds' to register under the Advisers Act." (Footnote omitted.) For the reasons described below, certain public REITs make investments that may cause ambiguity regarding the status of the REIT itself under the Advisers Act. However, public REITs are not generally regarded as advising "private funds" and are transparent with respect to their business and operations under the registration and periodic reporting requirements of the Securities

[1] In referring to REITs in this letter, we refer to entities that qualify as real estate investment trusts under the Internal Revenue Code of 1986, as amended (the "Code"), which are public and hold themselves out as internally managed real estate operating companies.

Exchange Act of 1934, as amended (the "Exchange Act"). We therefore request that the Commission reduce the burden on its staff and on the REIT industry by clarifying the application of the Advisers Act to public REITs.

1. Industry Background

Self-Managed and Internally Operated REITs. The generic modern REIT is an integrated operating business that directly or indirectly owns, at times develops, and leases real property for a profit. REITs are often combined with an operating partnership--see below. To qualify as a REIT under the Code, the entity is required to distribute a specified amount of its taxable income each year to its stockholders. Modern public REITs employ many individuals in their fully integrated businesses, and, in fact, their enterprise values range in size from tens of millions of dollars to tens of billions of dollars. Although REITs are not required to be internally operated, in the modern REIT industry the vast majority of public REITs that are registered under the Exchange Act are in fact internally managed and operated just like any other operating business.

UPREITS. Since the early 1990s, many public REITs have been structured to invest through and control, directly or indirectly, an entity taxable as a partnership (generally referred to as "Umbrella Partnership REITs" or as "REITs with operating partnership subsidiaries"). Operating partnership subsidiaries are frequently organized as a limited partnership for state law purposes, but they can also be limited liability companies. The public REIT almost always serves as the general partner of the operating partnership. An UPREIT generally conducts all or substantially all of its operations through its operating partnership subsidiary. Accordingly, under the UPREIT structure all or substantially all of the assets of the REIT consist of interests in the operating partnership and the operating partnership in turn owns direct and indirect interests in real property. This structure provides the opportunity for tax deferral in structuring transactions by allowing persons who contribute real property to the operating partnership to defer the built-in gain in the contributed assets until the operating partnership sells those assets. Generally, the employees of an UPREIT are employed by the operating partnership or its wholly owned master payroll subsidiary rather than by the parent REIT. The operating partnership of a public REIT may also be an Exchange Act registrant if it has public debt issued and outstanding.

Structures for REITs. REITs (or operating partnership subsidiaries if used in the structure) frequently hold each of their investments in a special purpose entity, frequently for liability insulation, or to comply with the requirements of debt financing arrangements. For federal income tax purposes, these special purpose entities are generally either disregarded entities under the Code, taxable as partnerships, taxable as separate real estate investment trusts, or in the case of REITs that do not hold their assets through operating partnerships, taxable as qualified REIT subsidiaries that are treated under the Code as identical to the REIT that owns all of their stock. Entities that are disregarded for federal income tax purposes are frequently single member limited liability companies, although they may be structured as limited partnerships with a single member limited liability company as the general partner.

REITs may also hold certain assets in subsidiaries that are taxable as corporations under subchapter C of the Code, referred to as taxable REIT subsidiaries. Taxable REIT subsidiaries are generally organized as corporations under applicable state law.

The preceding discussion is intended to provide a flavor for the considerations involved in designing the legal structures of REITs and is by no means exhaustive. It is also intended to demonstrate that many of the legal structures may involve the issuance of economic interests that constitute "securities" under various definitions, although public REITs generally hold themselves out to the public (and in their Exchange Act filings and other public documents) as being engaged in the real estate business, including by investing directly and indirectly in, and operating, real estate assets. We believe it would be inappropriate as a substantive matter to conclude that REITs advise with respect to investments in securities, or purchase or sell securities, merely because their legal structures, as a technical matter, involve the ownership of securities as a means of indirectly investing in real estate and real estate operations. However, we do not believe it is necessary to reach a definitive conclusion as to the specific legal structures or the definition of a "security" to determine whether a public REIT is an investment adviser, in light of the definition of "investment adviser" in Section 202(a)(11) of the Advisers Act.

2. Definition of Investment Adviser

The following portion of the definition of "investment adviser" in Section 202(a)(11) of the Advisers Act is most relevant to REITs:

> a person who, *for compensation*, engages *in the business* of advising *others*, either directly or through publications of writings, as to the value of *securities* or as to the advisability of investing in, purchasing or selling *securities*, or who, *for compensation* and *as part of a regular business*, issues or promulgates analysis or reports concerning *securities*. (italics added)

Prior to the adoption of Dodd-Frank, a REIT generally did not need to address whether its legal structure satisfied the elements of this definition because even if it did the REIT generally had fewer than fifteen "clients" and was therefore exempt from registration under Section 203(b)(3) of the Advisers Act. As a result of the repeal of Section 203(b)(3) by Dodd-Frank, REITs will be required to apply the elements of the definition set forth above to their businesses and to the various entities that comprise their legal structures.[2]

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[2] Our comments are not intended to address situations where a REIT acts as an investment adviser to independent third parties. We are addressing only situations in which the persons comprising a public REIT manage entities wholly or partially owned by the REIT for the purpose of directly or indirectly investing in real estate.

It is useful to review briefly the authorities that interpret the three essential elements of the definition of investment adviser: (i) for compensation (ii) engaging in the business of (iii) advising others with respect to securities.

"For compensation." In Investment Advisers Act Release No. 1092 (October 8, 1987) ("Release 1092") the Commission published the views of the staff of the Division of Investment Management (the "Staff") on the applicability of the Advisers Act to financial planners and other persons who provide investment advice as a component of other financial services. In Release 1092 the Commission sets forth the Staff's view that the "compensation" element is satisfied by the receipt of "any economic benefit" regardless of the form of the compensation. Subsequent positions taken by the Staff in various no-action letters have resulted in a broad interpretation of the "compensation" element of the definition. However, Release 1092 also notes that the fact that no separate fee is charged for the investment advisory portion of the service could be relevant to whether the person is "in the business" of giving investment advice. Public REITs do not charge fees for advisory services with respect to securities (and, in fact, the Code would likely impose limitations on them should they wish to do so), supporting the position that they are not "in the business" of giving investment advice.

The "in the business" requirement. In Release 1092 a person is considered to be "in the business" of providing advice if the person (i) holds itself out as an investment adviser with respect to securities or as one who provides investment advice with respect to securities, (ii) receives any separate or additional compensation that represents a clearly definable charge for providing advice about securities, regardless of whether the compensation is separate from or included within any overall compensation, or receives transaction-based compensation if the client implements the investment advice, or (iii) on anything other than rare, isolated and non-periodic instances, provides specific investment advice with respect to securities.

As noted above, public REITs generally hold themselves out to the public as integrated operating businesses that directly or indirectly own, at times develop, and lease real property for a profit. They do not generally hold themselves out as being engaged in the business of providing investment advice to third parties with respect to securities, and because they are filing disclosure documents under the Exchange Act and have specific obligations to describe their business, operations and financial position, it is reasonable to conclude that those statements generally are an accurate characterization of their basic business activity. Accordingly, public REITs generally would not fit the first criterion of being in the business of providing investment advice with respect to securities.

Public REITs also do not generally charge fees for providing investment advice with respect to securities even to affiliated entities, although they may be reimbursed for expenses. Such reimbursement would not constitute a "clearly definable charge" but would vary depending upon the expenses incurred. Moreover, as noted above, under the Code, REITs would have

limitations on their ability to receive fees for investment advice with respect to securities or transaction-based fees, and such fees are not an element of the typical REIT business plan.

As to the third criterion, in Release 1092 the Commission describes the Staff view that the giving of advice in this context does not have to constitute a principal business activity of a person to meet the "in the business" standard of Section 202(a)(11) of the Advisers Act. It "need only be done on such basis that it constitutes a business activity occurring with some regularity. The frequency of the activity is a factor, but is not determinative." In this context, it is important to note that REITs are not trading in investments on a regular basis. While they may make an investment decision to acquire an asset, and make a subsequent decision to sell it, in the interim they tend to hold their assets long-term and, as noted above, are most often developing or leasing their property assets. In this context, the Code also limits the ability of a REIT to be paid income as a "dealer" in real estate investments and, therefore, public REITs generally do not engage in such activity.

Advice to "Others" with respect to "Securities." As noted above, we do not believe that it is necessary to reach a definitive conclusion as to the specific legal structures employed by REITs or the definition of a "security" and, for purposes of this analysis, we assume that certain REITs do in fact act with respect to "securities." However, we suggest that it was not the intent of Congress, either in adopting the Advisers Act or in expanding its application through the amendments included in Dodd-Frank, to require the registration under the Advisers Act of an entity that receives compensation for managing another entity that invests in securities if one of the entities is substantially wholly-owned by the other or they are both directly or indirectly substantially wholly-owned by a common parent, except if the investing entity is a registered investment company or business development company.[3] Therefore, subject to such exception, entities with substantially identical direct or indirect common ownership should not be treated as "others" for purposes of the definition of investment adviser, regardless of the nature of the assets held by one as to which the other provides advice.[4] A contrary approach would mean that payments by one wholly owned subsidiary to another designed to serve legitimate tax planning, employee compensation or other business purposes could trigger regulation as an investment adviser for certain subsidiaries of businesses across a wide range of industries.

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[3] Publicly traded REITs avail themselves of exclusions from the definition of "investment company" under the Investment Company Act of 1940, as amended (the "1940 Act"). One common exclusion is under Section 3(a) which does not treat the holding of most "majority-owned subsidiaries" as "investment securities"; and a second common exclusion is under Sections 3(c)(5) and (6), which together provide an exemption for a company "purchasing or otherwise acquiring mortgages and other liens on and interest in real estate" directly or through majority owned subsidiaries.

[4] This position is similar to the position taken by the Staff in a No-Action Letter issued to Lockheed Martin Investment Management Company (June 5, 2006), in which the Staff did not recommend enforcement in the context of an adviser to benefit plans of its affiliates, which was not required to be registered, notwithstanding an expense reimbursement arrangement.

In addition, even if a public REIT is advising with respect to investments that technically constitute "securities" it makes investment decisions based primarily on the characteristics of the underlying interest in real estate. Moreover, a REITs representations to the public and the activities and expertise of its directors, officers and employees focus primarily on real property, development and leasing activities. Accordingly, even when a REIT is providing advice to other affiliated entities, the advice may relate to securities but is directed primarily at the analysis of an investment in interests in real estate.

3. Needed Clarifications and Rational

We believe that Congress did not intend to apply the definition of investment adviser to internally managed and operated public REITs that solely invest directly or indirectly in real property, such as apartments, office buildings or other rental real estate, even if they do so through an organizational structure involving tiers of wholly or partially owned subsidiaries the interests in which may be "securities" under prevailing authorities. Looking at the typical public REIT enterprise as a whole, it certainly does not appear to be an investment adviser with respect to securities. However, if one looks for the elements of the definition of investment adviser in each entity within the enterprise, admittedly the question becomes more complex and uncertain and may turn on decisions regarding the REIT's choice of entity for subsidiaries, the capitalization of subsidiaries with debt, and intercompany compensation and reimbursement arrangements - all of which are generally designed for valid business and legal reasons unrelated to the Advisers Act and have no apparent bearing on the policy objectives intended to be accomplished by regulating investment advisers. We suggest that in the context of a public REIT where the underlying assets are real estate these differences in structure (and the decisions that lead to them) are not at all relevant to the objectives of the Advisers Act.

We respectfully request that the Commission take action to eliminate this potential ambiguity and the unnecessary cost and uncertainty for public REITs (and their shareholders). There are several means by which this goal could be accomplished. One suggestion is that the Commission clarify that where the underlying assets held indirectly through one or more substantially or wholly owned subsidiaries are real property (or other assets that are not "securities"), the entity providing advice may look through other entities, the interests in which may be "securities" under prevailing authority, or intra company debt in the capital structure of the subsidiaries, for purposes of calculating the value of any "securities portfolio" as described in Form ADV included in the Implementing Release. As an alternative, the Commission may wish to provide a specific clarification for public REITs based on the manner in which they hold themselves out to the public in disclosure documents filed under the Exchange Act, and allow those public REITs to be treated as being "in the business" of providing investment advice with respect to real estate, not with respect to securities portfolios, to the extent their public documents describe a strategy that focuses on the characteristics of the underlying assets as the key element of their investment decisions.

We appreciate the opportunity to share our views with respect to the application of the Advisers Act to public REITs and would welcome the opportunity to discuss these comments with you.

Respectfully submitted,

Gilbert G. Menna

cc: Elizabeth Shea Fries, Esq.
Paul D. Schwartz, Esq.

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