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"New" IRS Guidance Provides Relief from Dividend Payment Requirement for REITs

Taking a page from its financial-crisis playbook, the Internal Revenue Service has issued a welcome Revenue Procedure temporarily reducing, from 20% to 10%, the minimum required aggregate percentage of cash that publicly traded REITs must distribute to qualify for a 2017 safe harbor that treats an elective cash/stock distribution as a taxable dividend. This timely guidance provides much-needed relief to REITs that are struggling with some combination of sharply reduced income, COVID-19-related spending needs, dividend distribution requirements and debt maturities and other fixed obligations.

In response to the great financial crisis, the IRS created a safe harbor for elective cash/stock distributions paid by publicly traded REITs and RICs, permitting the amount of cash to be capped at 10% of the total dividend. Although this safe harbor was initially limited to distributions for taxable years ending on or before December 31, 2011, the IRS revisited the matter in 2017, when it effectively made the prior safe harbor permanent, albeit with a higher 20% cap and significantly more specific requirements on pro-ration mechanics.

This new guidance retains all of the other mechanical and procedural requirements of the 2017 safe harbor, but lowers the minimum required aggregate percentage of cash back to 10% from 20% for distributions declared on or after April 1, 2020 and on or before December 31, 2020.

While the circumstances facing REITs today vary broadly by property type and capital structure, each REIT is finding its own way through the pandemic and the destruction wrought on patterns of commerce and spending. This new IRS guidance provides another tool in the arsenal to weather the storm.

Adam O. Emmerich   Jodi J. Schwartz
Robin Panovka   Joshua M. Holmes