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Date:  
November 17, 2021

**Legend:**

Taxpayer =  
State =  
Facility(ies) =

Date 1 =  
x =  
y =

Dear :

This responds to a letter dated May 20, 2021, requesting a ruling on behalf of Taxpayer with respect to the qualification of certain income as rents from real property as defined in section 856(d) of the Internal Revenue Code (the "Code").

Taxpayer is a limited liability company formed under the laws of State that elected to be classified as an association taxable as a corporation. Taxpayer intends to make an election to be treated as a real estate investment trust ("REIT") within the meaning of section 856 for its taxable year ending Date 1. Taxpayer conducts its activities through a State limited partnership that is treated as a partnership for U.S. federal income tax purposes (the "Partnership"). The Partnership, through direct and indirect subsidiaries, owns and operates Facilities.

Tenants lease space in a Facility for a period of time that is generally not less than x months. Leases generally renew, on a monthly basis, unless otherwise terminated. The rental price for space depends on a number of factors, including the location of the Facility and the size of the space leased by the tenant.

The standard-form tenant leases for Facilities provide that neither the landlord nor its agents or employees have any liability for damage to the tenant's property located in the leased space, including for damages resulting from "the active or passive acts or omissions or negligence" of the landlord or its agents or employees (the "Liability Shield"). Taxpayer represents that this Liability Shield is broadly consistent with standard leases in the industry.

The relevant landlord of a Facility requires a tenant, at the time the tenant enters into a lease of space, either to present proof of adequate insurance coverage through a third-party insurer (the "Insurance Option"), or, alternatively, to obtain a limited waiver of the Liability Shield (the "Coverage Product").

A tenant that chooses the Insurance Option must present to the landlord, generally within y days following the execution of the lease, proof of adequate insurance (for instance, as part of the tenant's existing homeowner's policy).

Tenants that obtain the Coverage Product must enter into an addendum to the lease that sets forth the terms of the Coverage Product (the "Agreement"). Pursuant to the Agreement, the landlord agrees to a limited waiver of the Liability Shield discussed above. Pursuant to the Agreement, therefore, a tenant can, in certain instances and subject to certain restrictions, bring a claim directly against the landlord for damages (up to a capped amount) that the tenant generally could not otherwise bring absent being a party to the Agreement because of the Liability Shield.

The Coverage Product applies only to damages incurred by the tenant for which the landlord is liable under applicable law by virtue of the existence of the landlord-tenant relationship. These damages would result from (1) a breach of duties otherwise owed by the landlord to the tenant that arise out of the landlord-tenant relationship under common or statutory law (including an intentional tort or negligence) or (2) an event for which the landlord otherwise has strict or vicarious liability to the tenant under local law as a result of the landlord-tenant relationship.

Pursuant to the Agreement, the tenant must make a monthly payment that is separately identified and collected along with the monthly base rent charge (the "Payment"). The Payment is identified in the Agreement as "additional rent" or "additional monthly rent." In some cases, in exchange for a larger Payment, the tenant can obtain a waiver of a greater amount (in dollar terms) of the landlord's liability-limitation. The tenant generally may move from the Coverage Product to the Insurance Option, and vice versa.

Taxpayer represents that the landlords require tenants to obtain the Coverage Product or provide proof of adequate insurance primarily to provide protection from exposure associated with the operation of a Facility, not merely exposure to monetary liability, but also direct costs (attorney's fees) and indirect costs (inefficient use of

employee time, potential brand damage) associated with litigation generally, including nuisance and small-dollar litigation. The Coverage Product provides the tenant with a known potential source of, and regular process for, recovery for damages with respect to the type of claims that, in the absence either of insurance satisfying the Insurance Option or of the Coverage Product, would sometimes be the subject of lawsuits and other sub-litigation disputes with the relevant landlord. Likewise, the Coverage Product provides the landlord a regular process for resolving a potential claim made by a tenant. The Agreement provides that the Coverage Product is not insurance.

Currently, the Coverage Product is provided by various taxable REIT subsidiaries (“TRSs”) of Taxpayer. Upon receipt of this ruling, Taxpayer intends that the Coverage Product will be provided by the landlords or the Partnership, and the relevant legal agreements will be amended so that the Payments would be received and retained by the relevant landlord (and, therefore, by the Partnership for U.S. federal income tax purposes).

#### RULING REQUESTED

Subject to section 856(d)(2)(A) and (B), Taxpayer’s share of the Payment (as determined under section 1.856-3(g)) constitutes rents from real property for purposes of section 856(c)(2) and (3).

#### LAW & ANALYSIS

Section 856(c)(2) provides that at least 95 percent of a REIT’s gross income must be derived from, among other sources, “rents from real property.”

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(d)(1) provides that “rents from real property” includes (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 for the tax year attributable to both the real and personal property leased under, or in connection with, such lease.

Under section 1.856-3(g), a REIT that is a partner in a partnership is deemed to own its proportionate share of each of the assets of the partnership and to be entitled to the income of the partnership attributable to that share. For purposes of section 856 the interest of a partner in the partnership’s assets is determined in accordance with the partner’s capital interest in the partnership. The character of the various assets in the

hands of the partnership and items of gross income of the partnership retain the same character in the hands of the partners for all purposes of section 856.

Section 1.856-4(a) provides that subject to the exceptions in section 856(d) and section 1.856-4(b), 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 real estate investment trust.

Revenue Ruling 75-226, 1975-1 C.B. 199, provides that the receipt by a REIT of a payment for subordinating its fee interest in land leased to a tenant is rents from real property. The tenant obtained a mortgage loan secured by its interest in improvements constructed on the leased land. The REIT, as landlord, subordinated its interest in the land to the mortgagee; the tenant was liable for the mortgage loan. In exchange for subordinating its fee interest in the land to the mortgagee, the REIT received a payment from the tenant in the form of a portion of the proceeds of the mortgage loan. The tenant’s ability to mortgage its improvements was so closely connected with the tenant’s occupation, possession, and enjoyment of the property that the additional consideration paid to the REIT for subordinating its interest in its land was determined to be rents from real property for purposes of section 856.

As discussed above, the standard lease for the use of space in a Facility includes the Liability Shield that generally prevents a tenant from making a claim against the landlord for damages to its property stored in a Facility that would otherwise be payable under local landlord-tenant law. However, a tenant that makes a Payment enters into a lease that includes a waiver of the Liability Shield, which is the ability to make a claim under local landlord-tenant law against the landlord for certain damage to its personal property located in the leased space. This ability to make a claim against a landlord for certain damage to personal property located in the leased space arises out of the landlord-tenant relationship (absent a Liability Shield) and the tenant’s right to use the space in or upon the real property. In this case, paying a separate fee for this right does not change this analysis. Furthermore, as in Rev. Rul. 75-226, the Payment is additional consideration for a right that is so closely connected with the tenant’s occupation, possession, and enjoyment of the real property that it constitutes rents from interests in real property within the meaning of section 856(d)(1)(A).

## CONCLUSION

Taxpayer’s share of the Payment (as determined under section 1.856-3(g)) is rents from real property for purposes of section 856(c)(2) and (3).

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 on whether Taxpayer otherwise qualifies as a REIT under subchapter M of the Code. Further, no

opinion is expressed or implied on whether the Coverage Product is insurance for any purpose.

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 it may not be used or cited as precedent. The ruling contained in this letter is based upon information and representations submitted by Taxpayer under a penalties of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of this ruling request, it is subject to verification on examination.

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

Sincerely,

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Matthew P. Howard  
Senior Counsel, Branch 2  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

Enclosure (1)

cc: