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NATIONAL ASSOCIATION OF
REAL ESTATE INVESTMENT TRUSTS®

November 14, 2006

Office of Regulations & Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington D.C. 20210

Attn: <u>Default Investment Regulation</u>

Dear Ladies & Gentlemen:

NAREIT is the worldwide representative voice for U.S. real estate investment trusts (REITs) and U.S. publicly traded real estate companies. Members include REITs and other businesses that own, operate, and finance income-producing real estate[1], as well as those firms and individuals who advise, study, and service those businesses.

I. INTRODUCTION & SUMMARY

A REIT is a company that owns and usually operates income-producing real estate, or finances income-producing real estate, and that meets certain requirements under the Internal Revenue Code. REITs are often publicly traded (currently, about 190 REITs trade on one of the major stock exchanges), and these REITs have the same corporate governance structures as other publicly traded companies. REIT investment returns are comprised of dividend income and moderate, long-term capital appreciation.

REITs issue shares of stock or shares of beneficial interest depending on their structure as corporations or business trusts, and consequently a REIT investor acquires an equity interest through its investment. Investing in a REIT is an indirect investment in real estate, and provides the investor with the investment diversification benefits of real estate but with greater market liquidity than direct real estate investments. REIT investments are a particularly convenient form of real estate investing for participant-directed, individual account pension plans.

[1] For purposes of these comments the term "real estate" means all real estate with the potential to generate income and/or revenue from unrelated parties, including many property types such as office buildings, retail properties, apartment communities and industrial facilities.

Indeed, individual-account pension plans often invest in publicly-traded REITs either directly or through REIT mutual funds. As of September 30, 2006, Morningstar tracked 341 public mutual funds devoted to or significantly invested in REITs, and at least four investment companies offer REIT index or exchange-traded funds.

The recently enacted Pension Protection Act of 2006[2] adds new section 404(c)(5) to ERISA. This section provides that a participant in an individual account plan shall be treated as exercising control over the assets in his or her account, and therefore fiduciaries will be eligible for ERISA section 404(c) relief, even in the absence of an investment election by the participant, if such assets are invested in accordance with regulations promulgated by the Secretary of Labor. The Department's proposed regulation[3] (Proposed Default Investment Regulation) would implement the relief afforded by new section 405(c)(5) with respect to assets that the plan invests in a "qualified default investment alternative." In order for an investment to constitute a "qualified default investment alternative," it must fall within one of three types of investment products, portfolios, or services. All three forms of accepted products, portfolios, or services have a single common denominator: they must each be "designed to provide varying degrees of long-term appreciation and capital preservation through a mix of equity and fixed income exposures."[4]

NAREIT recognizes that a central objective of the Proposed Default Investment Regulation is to move the default investment paradigm from short-term, low-risk allocations to a diversified portfolio with a mix of long-term and short-term investment exposures. NAREIT believes that for a default investment paradigm to provide an effective opportunity to achieve an efficiently diversified portfolio, all generally recognized assets classes must be mandated in the mix of investment exposures. NAREIT further believes that real estate is one of the four core asset classes, and is an essential form of investment for the diversified portfolio investor. Accordingly, NAREIT makes the following requests:

1. NAREIT requests that the Proposed Default Investment Regulation acknowledge the status and importance of real estate as a separate asset class, and as a necessary investment element in any efficiently diversified portfolio.

2. NAREIT also requests that the Proposed Default Investment Regulation provide that each of the three types of investment products, portfolios, and investment services that comprise a "qualified default investment alternative" must include real estate in their "mix of equity and fixed income exposures."

3. NAREIT further requests that the Proposed Default Investment Regulation recognize that each of the three accepted types of investment products, portfolios, and services can satisfy a requirement to include real estate in the "mix of equity and fixed income exposures" by investing in a real estate, or REIT, securities investment option.

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2 Pub. L. No. 109-280

3 71 Fed. Reg. 65,806 (Sept. 27, 2006)

4 Proposed Default Investment Regulation § 2550.404c-5(e)(5).

II. DISCUSSION

A. In light of the Congressional & Regulatory Objective That Default Investments Provide An Effective Opportunity For An Efficient, Diversified Portfolio, A "Qualified Default Investment Alternative" Should Include Exposure To Each Generally-Accepted Asset Class

The preamble to the Proposed Default Investment Regulations makes clear that a key congressional objective behind section 404(c)(5) is to move the default investment paradigm from short term, low risk allocations to a diversified portfolio with a mix of investments that will achieve long-term capital growth with appropriate pension plan investor risk.[5] The proposed regulations further recognize that, although investment products such as money market funds can be one component of a diversified portfolio, it is unlikely that those types of investments are sufficient to generate adequate retirement savings.[6] Historically, over long time horizons, diversified portfolios have outperformed those consisting only of very low risk, short term debt instruments, and only efficiently diversified portfolio investment have provided adequate growth and return within acceptable long-term investor risk.[7] Accordingly, the Department intends that for purposes of the Proposed Default Investment Regulation, a "qualified default investment alternative" must afford plan participants a sufficient range of investment alternatives to achieve a diversified portfolio with aggregate risk and return characteristics at any point within the range normally appropriate for the pension plan or beneficiary.[8]

NAREIT believes that to achieve this objective of requiring a "qualified default investment alternative" to afford a diversified portfolio, each such default alternative must include exposure to all generally-recognized asset classes. The fundamental precept of modern portfolio theory is that investors should diversify among each and every asset class in order to maximize risk-adjusted return over the long term. *See* Harry M. Markowitz, "Portfolio Selection: Efficient Diversification of Investments" (John Wiley & Sons, 1959); Roger . C. Gibson, "Asset Allocation: Balancing Financial Risk" (Irwin Pub. 2d ed. 1996); Richard A. Ferri "All About Asset Allocation," (McGraw Hill 2005)("[o]ne of the great insights of modern portfolio theory is that holding low-correlated asset classes in a portfolio . . . reduces total portfolio risk and increases long-term return").

It is a common portfolio design practice in defined benefit plans to allocate assets to each generally-recognized asset class, in recognition that such allocations are the only effective

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[5] Default Investment Alternatives under Participant Directed Individual Account Plans, 71 Fed. Reg. 56806 (proposed September 27, 2006) (to be codified at 29 C.F.R. pt. 2550). *See also* S. Rep. No. 174, 109th Cong., 1st Sess. at 9 and 30 (2005). In the hearings on the PPA, the Senate Committee on Finance recognized that "diversification of assets is a basic principle of sound investment policy," and that there was a clear link between investment advice and the need for individual account plan participants to efficiently diversify their portfolios. The Committee noted that "awareness of investment principles, including the need for diversification, is fundamental to making investment decisions consistent with long-term retirement income security."

[6] *Id.* at 56807.

[7] *See generally Id.* at 56817.

[8] *Id.* at 56809. Indeed, the proposed regulations require that a qualified default investment alternative be diversified so as to minimize the risk of large losses. *Id.* at 56810.

method to achieve efficient portfolio diversification. *See generally* Z. Bodie, A. Kane and A.J. Marcus, "Investments" (McGraw Hill, Irwin Pub. 6th ed. 2005)(noting that institutional investors routinely invest in the four major asset classes to increase overall return and reduce overall portfolio risk). In fact, Stephen Utkus, whose scholarship was significantly commented and relied upon by the Department in developing the Proposed Default Investment Regulation, has noted that the common investment practice for defined benefit plans is to apply a balanced investment strategy that includes allocations to equities, real estate and other asset classes, and that it is desirable for defined contribution plan default funds to adopt this practice.[9]

B. Real Estate Is A Separate Asset Class Under Generally Accepted Investment Theory

According to any generally-accepted investment theory, a separate asset class is determined by its pattern of investment returns. A form of investment is considered a distinct asset class if its expected level of return and volatility of returns are sufficiently different from those other investments, and its sequence of returns has a low enough covariance with the returns of other asset classes in the portfolio, to yield overall portfolio gains from diversification.[10] A portfolio with appropriate allocations to each of the generally accepted investment asset classes is *efficient* in the sense that risk-averse investors can expect to maximize their portfolio returns at the low level of portfolio risk that they prefer, while risk-tolerant investors can expect to minimize the volatility of returns in their investment portfolio at the high level of returns that they seek.

The four asset classes that are generally accepted as the fundamental building blocks of a well-diversified investment portfolio are: 1) *cash*; 2) *bonds*; 3) *equities*; and, 4) *real estate*. The importance of real estate as one of the four fundamental asset classes stems from the low correlation of its investment returns with the returns of other asset classes as well as its average return and volatility:[11]

- Over the last 30 years the coefficient of correlation between real estate and the other asset classes has been just 0.49 with equities, 0.19 with bonds, and -0.06 with cash.

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[9] Stephen P. Utkus, *Selecting a Default Fund for a Defined Contribution Plan,* (Vanguard Center for Retirement Res.), Volume 14, June 2005 at 11.

[10] As one author explains, "Modern portfolio theory…shifted the focus of attention away from individual securities and toward a consideration of the portfolio as a whole. The notion of diversification had to be simultaneously reconsidered. Optimal diversification goes beyond the idea of simply using a number of baskets in which to carry one's eggs. *Major emphasis must also be placed on finding baskets that are distinctly different from one another*. That is important because each basket's unique pattern of returns partially offsets the others, with the effect of smoothing overall portfolio volatility. … (M)odern portfolio theory stresses that it is wise to invest in a broad array of diverse instruments. These concepts were later given legislative endorsement in the Employee Retirement Income Security Act of 1974, which stressed the importance of diversification within a broad portfolio context." Roger C. Gibson, *Asset Allocation: Balancing Financial Risk*, (emphasis added).

[11] These figures reflect the following indexes: 1) Real estate returns are represented by the FTSE NAREIT Equity REIT Index; 2) Equity returns are represented by the Standard & Poor's 500® index; 3) Bond returns are represented by the Merrill Lynch Corporate/Government Master index; and, 4) Cash returns are represented by 30-day U.S. Treasury bills.

- The average annual return on real estate investments over the same 30-year period has been 15.6 percent compared to 12.3 percent for equities, 8.5 percent for bonds, and 6.0 percent for cash.
- The standard deviation of annual returns on real estate investments over those 30 years has been 12.9 percent compared to 14.8 percent for stocks, 5.9 percent for bonds, and 0.9 percent for cash.

The strong returns on real estate investments and the low correlations between real estate and other asset classes mean that portfolios with appropriate allocations to real estate can be expected to produce higher returns with no increase in portfolio risk compared to portfolios with no real estate component. According to Ibbotson Associates and Morningstar, for example, adding real estate to portfolios of stocks, bonds, and cash improved returns by an average of almost 20 percent (11.77 percent per year with real estate compared to 9.86 percent per year without real estate) without increasing portfolio risk at all.[12]

Princeton University Professor Burton G. Malkiel sums up the importance of real estate as one of the four fundamental asset classes and as a critical part of any well-diversified investment portfolio: "I believe in broad diversification, not only *in* a stock portfolio, but I also think that investors need to diversify *among asset categories*. I suggest that you not only buy stocks, but you want bonds, you want *real estate* and you want cash."[13] This position is supported by countless other academic economists and investment industry professionals.[14]

Many other academic economists also have emphasized the role of real estate as a distinct asset class deserving a significant share in an optimal investment portfolio:

- "First, … real estate constantly had positive allocations over time periods ranging from 5 to 25 years, and for most levels of portfolio return, irrespective of whether real estate is used to enhance returns or reduce risk. Secondly, *the benefits from including*

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[12] "Commercial Real Estate: The Role of Global Listed Real Estate Equities in a Strategic Asset Allocation," prepared by Thomas Idzorek (Ibbotson Associates)(2004); Michael Barad and Steve Meier (Morningstar Financial Communications) (2006). Figures are from Table 5, based on historical returns during the period 1990-2005.

[13] Interview with *Registered Rep—The Source for Investment Professionals*, May 1, 2003 (emphasis added).

[14] For example, Nobel Prize-winning economists such as Robert F. Engle III, Robert C. Merton, Harry M. Markowitz, and William F. Sharpe, as well as path-breaking finance economists such as Eugene Fama and Kenneth French, have all recognized real estate as a separate asset class. Engle, for example, excluded real estate investment trusts from a study of equity prices, "Impacts of Trades in an Error-Correction Model of Quote Prices" (Robert F. Engle and Andrew J. Patton), *Journal of Financial Markets* 7:1-25 (2004). Fama and French do the same in numerous papers including "Common Risk Factors in the Returns on Stocks and Bonds," *Journal of Financial Economics* 33:3-56 (1993). Merton distinguished real estate from stock and bond investments in "On Estimating the Expected Return on the Market," *Journal of Financial Economics* 8:323-361 (1980). Markowitz characterized "stocks, bonds, cash items and real estate [other than the family's home(s)]" as a "sufficient" list of assets in "Individual versus Institutional Investing," *Financial Services Review* 1:1-8 (1991). Sharpe distinguished real estate from equities, fixed income instruments (bonds), and cash equivalents in "Budgeting and Monitoring Pension Fund Risk, *Financial Analysts Journal* 58:74-86 (2002).

real estate in the mixed-asset portfolio tend to increase as the investment horizon is extended."[15]

- "Real estate's role extends from the lowest-risk end of the efficient frontier to just past the midpoint of the mixed-asset efficient frontier. This makes sense, as *real estate is both a low-risk asset itself and an excellent risk reducer (when added to) a stock and bond portfolio*."[16]
- "If the characteristics of real estate…are expected to continue in the future, this study shows they can make *a major risk adjusted return contribution to a mixed-asset portfolio*."[17]
- "We find that the correlations between property share returns and common stock returns show a similar declining trend in both (the U.S. and the United Kingdom), indicating *increased mixed-asset diversification potential for property shares*."[18]
- "Overall, *including real estate in the mixed-asset portfolio appears to offer an improvement in terminal wealth* and a reduction in terminal wealth standard deviation (*i.e.*, risk) compared with the base portfolio [without real estate]."[19]

These findings of investment industry professionals and academic economists respecting the investment characteristics of real estate emphasizes the importance of real estate as a distinct asset class, one whose inclusion in the investment portfolio may dramatically improve risk-adjusted returns. This is particularly true for the investor seeking a reasonable measure of "long-term appreciation and capital preservation," which is precisely what the Department's proposed definition of "qualified default investment alternative" is intended to achieve. In short, the weight of the accumulated evidence supports the conclusion that real estate is a separate and fundamental asset class.

C. Real Estate Should Be Included In The "Mix of Equity and Fixed Income Exposures" Required Of Any Qualified Default Investment Alternative

Because real estate is deemed a separate asset class under any reasonable recognition of generally accepted investment theory, NAREIT requests that the Proposed Default Investment Regulation make clear that real estate should be included as a discrete option in the "mix of equity and fixed income exposures" necessary for an investment to be considered a "qualified default investment alternative." Given that real estate is one of the four main asset classes and an essential building block for an efficiently diversified portfolio, it is eminently sensible for the Department to mandate that the qualified default investment alternative mix include real estate.

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[15] Stephen Lee and Simon Stevenson, "Real Estate in the Mixed-Asset Portfolio: The Question of Consistency," *Journal of Property Investment and Finance* 24:123-135 (2006) (emphasis added).

[16] Susan Hudson-Wilson, Frank J. Fabozzi, and Jacques N. Gordon, "Why Real Estate?" *Journal of Portfolio Management* special real estate issue:12-27 (2003) (emphasis added).

[17] Andrew G. Mueller and Glenn R. Mueller, "Public and Private Real Estate in a Mixed-Asset Portfolio," *Journal of Real Estate Portfolio Management* 9:193-203 (2003) (emphasis added).

[18] Dirk Brounen and Piet Eichholtz, "Property, Common Stock, and Property Shares," *Journal of Portfolio Management* special real estate issue:129-137 (2003) (emphasis added).

[19] Peter Byrne and Stephen Lee, "The Impact of Real Estate on the Terminal Wealth of the UK Mixed-Asset Portfolio," *Journal of Real Estate Portfolio Management* 11:133-146 (2005) (emphasis added).

In light of Congressional intent respecting diversification, it would be inappropriate for the Department to leave a key diversification building block out of the mix of investment exposures that must be taken into account by a qualified default investment alternative.[20]

D. Qualified Default Investment Alternatives Can Satisfy Exposure Requirements Respecting Real Estate by Including Publicly-Traded Real Estate Securities in the Mix of Equity and Fixed Income

Although the current draft of the Proposed Default Investment Regulation requires that each of the three types of "qualified default investment alternative" include exposure to a "mix of equity and fixed income" investments, the Department would not need to alter that requirement if it were to agree with NAREIT's suggestion that each such type of product, portfolio or service include exposure to real estate as an asset class. As demonstrated below, REIT securities, while technically constituting "equity" or "fixed income" are a form of real estate investment. REIT-issued securities, or other forms of real estate securities, offer a liquid form of real estate investing. When publicly-traded, they also offer true and objective capital market pricing. Therefore, real estate securities have been the primary form of real estate investing made available by individual account plan fiduciaries to participants who direct the investment of their accounts.[21]

In light of the suitability and popularity of real estate securities as a form of real estate investing for participant-directed account plans, NAREIT believes that the Proposed Default Investment Regulation should make clear that the three types of "qualified default investment alternatives" could satisfy any requirement to include exposure to real estate as part of the necessary "mix of equity and fixed income" by including real estate securities. Moreover, the Proposed Default Investment Regulation should be clear that if the exposure to real estate securities is to be the avenue in which the qualified default investment alternative fulfills the requirement for real estate exposure, a discrete real estate securities investment option should be included in the "mix of equity and fixed income." Without such a requirement, real estate exposure could be so limited that the policy goal of diversification and efficient exposure to all fundamental asset

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[20] NAREIT recognizes that the concept of "broad range of investment alternatives" within the meaning of 29 C.F.R. § 2550.404c-1(b)(3) does not require that each fundamental asset class be represented among the alternatives. But that earlier decision does not foreclose the Department, in the 404(c)(5) regulations, from imposing such a requirement as part of a qualified default investment's "mix of equity and fixed income exposures." The 404(c)(5) regulations provide a safe harbor distinct from the ERISA 404(c) plan safe harbor. Indeed, the Department has recognized that the relief afforded under section 404(c)(5) "is not contingent on a plan being an ERISA 404(c) plan," (71 Fed. Reg. at 56807), and the concept of a "broad range of investment alternatives" clearly permits a real estate option to be included in the necessary range of alternatives. Moreover, the continued application of modern portfolio theory since 1992 – the year of the 404(c) regulations – provides a sound theoretical underpinning for the Department to now require that, in order for a "mix of equity and fixed income exposures" to provide an efficient diversification opportunity, such mix must include exposure to all fundamental asset class building blocks, including real estate.

[21] In recognition of the accessibility of real estate securities, David Swensen, Chief Investment Officer overseeing more than $18 billion in endowment assets at Yale University, recommends a "basic formula" for individual investors that allocates 20 percent of the investment portfolio to real estate, specifically in the form of REITs. *See* Interview on National Public Radio's "All Things Considered," October 5, 2006. *See also Unconventional Success: A Fundamental Approach to Personal Investment*, Free Press, 2005 (page 34).

classes would not be achieved (*e.g*., modest indirect real estate exposure through investment in a stock index fund that may include a REIT security would not allow for efficient diversification across asset classes).

First, academic economists and industry professionals recognize that real estate securities are not merely an industrial sector within the category of stock investment, but rather a form of real estate investment. They also recognize that real estate securities—generally in the form of REIT shares—provide liquidity and pricing characteristics that make it an eminently suitable form of real estate investing for accounts in a defined contribution plan, which often are not sufficiently large in size to allow easy access to this distinct asset class.

- IBM, the largest private-sector 401(k) plan provider in the United States, says "*We are committed to REITs* as a core asset class for defined contribution plans…."[22]
- Barclays Global Investors emphasizes that "*REITs offer two major advantages* to the institutional investor constructing a portfolio: the diversification that real estate offers as an asset class, along with sufficient liquidity to gain access to that asset class easily.[23]
- The best-selling investment guide *Investing for Dummies* recommends that "quality real estate investment trusts (REITs)…are infinitely better alternatives (than direct real estate investment through limited partnerships). REITs, unlike limited partnerships, are also completely liquid."[24]

Second, real estate securities possess low correlation attributes similar to direct real estate investments, and provide a natural form of investment portfolio diversification for the long-term investor, such as an individual account pension plan investor. Every asset class displays unique return characteristics and price volatility, and correlation measures the extent to which different asset class returns move together over time. Diversifying across different asset classes with relatively low correlations means that as certain asset classes under-perform the market, the less correlated alternative asset classes will typically outperform the market or at least stabilize the portfolio. Investment attributes of REITs include long term performance, reliable and significant current income which grows over time, and protection from inflation in addition to mere portfolio diversification.

As a result, numerous studies show that real estate securities are a particularly attractive form of real estate investment to increase return when added to a portfolio, because they are relatively uncorrelated with the returns of other stocks and bonds. Morningstar, Inc. Senior Analyst Meg Ryan, for example, notes that "Real estate stocks do not move in lockstep with the rest of the

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[22] R.L. Vivian, Managing Director, IBM, letter to Congressman Jon Porter contained in "H.R. 1578, Real Estate Investment Trusts [REITs]: Can They Improve the Thrift Savings Plan?", Hearing before the Subcommittee on the Federal Workforce and Agency Organization, 1st Sess., 109th Cong. at 116 (April 19, 2005 (emphasis added).

[23] Corin Frost, Amy Schildager, and Scott, "Real Estate Investing the REIT Way: A Guide to REIT Benchmarks and Investing," *Investment Insights* 8 (2005) (emphasis added).

[24] Eric Tyson, *Investing for Dummies* (3rd edition), page 245.

market, and that makes them good portfolio diversifiers."[25] Numerous academic researchers reach the same conclusion:

- "REITs compare favorably with stocks. Our findings suggest that *equity REITs can enhance the risk-return relationship of an investment portfolio* and should be considered as a major asset class just like stocks or bonds."[26]
- "There is a significant component of REIT returns unrelated to stock and bond factors. As a result, … we conclude that there is a unique element to REITs, which implies it *offers significant diversification benefits* beyond those of small capital value stocks."[27]
- "Diversification opportunities are maintained and *REITs would provide additional benefits to a portfolio already containing value stocks*…the two can not be viewed as substitutable."[28]

Because real estate securities are a form of real estate investing that is technically equity or fixed income, mandating that such securities be included as a "qualified default investment alternative" would not disrupt the Department's judgment that a "mix of equity and fixed income" investments is the best method to achieve portfolio diversification (as opposed to holding direct real estate, for example). NAREIT requests therefore that the Proposed Default Investment Regulation make clear that a "qualified default investment alternative" must take real estate into account, and may do so by including a discrete real estate securities option in the mix of mandated equity and fixed income exposures.

III. CONCLUSION

In order to ensure efficient diversification for participant-directed, individual account plan participants who do not affirmatively make an investment option, qualified default investment alternatives should have exposures across all recognized asset classes, in order to achieve the congressional and regulatory objective of moving to a diversified portfolio paradigm. As real estate is a separate asset class under generally accepted investment theory, the Proposed Default Investment Regulation should require that a "qualified default investment alternative" include exposure to all asset classes, including real estate.

Furthermore, real estate securities are a form of real estate investment that is well suited for participant-directed individual account plans, offering the opportunity for reduced overall portfolio correlation and enhanced risk-adjusted, long-term capital appreciation. Consequently, the Proposed Default Investment Regulation also should clarify that a "qualified default

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[25] "Real Estate Trusts Keep Winning: Analysts Still Counsel Using Them for Portfolio Diversity," *Washington Post* January 15, 2006.

[26] Jorg Bley and Dennis Olson, "An Analysis of Relative Return Behavior: REITs vs. Stocks," working paper (2003) (emphasis added).

[27] Randy Anderson, Jim Clayton, Greg MacKinnon, and Rajneesh Sharma, "REIT Returns and Pricing: The Small Cap Value Stock Factor," *Journal of Property Research* 22:267-286 (2005) (emphasis added).

[28] Stephen Lee and Simon Stevenson, "The Substitutability of REITs and Value Stocks," working paper (2005) (emphasis added).

investment alternative" can satisfy its obligation to include exposure to real estate by including as part of the "mix of equity and fix-income exposures" investment in a discrete real estate securities investment option.

If you would like to discuss these issues in greater detail, feel free to contact me or Evan Miller of Hogan & Hartson at (202) 739-9408 or (202) 637-5776, respectively.

Respectfully submitted,

Tony M. Edwards
Executive Vice President & General Counsel