MULTISTATE TAX COMMISSION

Resolution Adopting the Model Uniform Statute Addressing Captive Real Estate Investment Trusts as a Multistate Tax Commission Uniformity Recommendation to the States

Whereas, Real Estate Investment Trusts ("REITs") are often employed as a means of pooling funds for real estate investment purposes; and

Whereas, Section 857 of the Internal Revenue Code (26 U.S.C.A. § 857) allows a REIT to take a deduction for dividends paid to its shareholders; and

Whereas, Captive Real Estate Investment Trusts ("Captive REITs") are majority-owned by an entity subject to federal income tax; and

Whereas, Captive REITs can be used as a vehicle for shifting taxable profits from operating companies to related-party REIT shareholders, who are ostensibly located beyond the reach of the states' taxing authority; and

Whereas, the Uniformity Committee has developed a Model Uniform Statute Addressing Captive Real Estate Investment Trusts (Exhibit A) and further recommends its adoption as a Multistate Tax Commission Uniformity Recommendation to the States; and

Whereas, the model statute would deny the "dividends-paid" deduction allowed by the Internal Revenue Code for Captive REITs, thereby allowing states to capture the income at the REIT level before it is shifted to entities which may not subject to tax or apportionment; and

Whereas, a public hearing on the Model Uniform Statute addressing Captive Real Estate Investment Trusts was held on October 26, 2007; and

Whereas, the Executive Committee approved the model statute and regulation for the MTC Bylaw 7 survey on January 3, 2008; and

Whereas, a majority of affected states that responded to the survey indicated that they would consider adopting the Model Uniform Statute addressing Captive Real Estate Investment Trusts; now, therefore, be it

RESOLVED, that the Compact Member States adopt the Model Uniform Statute Addressing Captive Real Estate Investment Trusts as a Multistate Tax Commission uniformity recommendation to the States.

MULTISTATE TAX COMMISSION

PROPOSED MODEL STATUTE FOR TAXATION OF CAPTIVE REAL ESTATE INVESTMENT TRUSTS

A. The purpose of this statute is to address the taxation of captive real estate investment trusts. This statute shall not be interpreted as precluding the right of a state to tax the income earned by any type of real estate investment trust as source income in computing net income by measures including, but not limited to, the disallowance of, or required add back of, the dividends paid deduction otherwise allowed by federal law.

B. The term "real estate investment trust" (REIT) shall have the meaning ascribed to such term in Section 856 of the Internal Revenue Code of 1986, as amended.

C. The term "captive real estate investment trust" shall mean a real estate investment trust the shares or beneficial interests of which are not regularly traded on an established securities market and more than fifty percent of the voting power or value of the beneficial interests or shares of which are owned or controlled, directly or indirectly, or constructively, by a single entity that is:

   1. treated as an association taxable as a corporation under the Internal Revenue Code of 1986, as amended, and

   2. not exempt from federal income tax pursuant to the provisions of Section 501(a) of the Internal Revenue Code of 1986, as amended.

D. For purposes of applying subsection C.1, the following entities are not considered an association taxable as a corporation:

   1. any real estate investment trust as defined in Section B. other than a "captive real estate investment trust;" or

   2. any qualified real estate investment trust subsidiary under Section 856(i) of the Internal Revenue Code of 1986, as amended, other than a qualified REIT subsidiary of a "captive real estate investment trust"; or

   3. any Listed Australian Property Trust (meaning an Australian unit trust registered as a "Managed Investment Scheme" under the Australian Corporations Act in which the principal class of units is listed on a recognized stock exchange in Australia and is regularly traded on an

established securities market), or an entity organized as a trust, provided that a Listed Australian Property Trust owns or controls, directly or indirectly, seventy-five percent or more of the voting power or value of the beneficial interests or shares of such trust; or

4. any Qualified Foreign Entity, meaning a corporation, trust, association or partnership organized outside the laws of the United States and which satisfies the following criteria:

   (a) at least 75 percent of the entity's total asset value at the close of its taxable year is represented by real estate assets (as defined at Section 856(c)(5)(B) of the Internal Revenue Code of 1986, as amended, thereby including shares or certificates of beneficial interest in any real estate investment trust), cash and cash equivalents, and U.S. Government securities;

   (b) the entity is not subject to tax on amounts distributed to its beneficial owners, or is exempt from entity-level taxation;

   (c) the entity distributes at least 85 percent of its taxable income (as computed in the jurisdiction in which it is organized) to the holders of its shares or certificates of beneficial interest on an annual basis;

   (d) not more than 10 percent of the voting power or value in such entity is held directly or indirectly or constructively by a single entity or individual, or the shares or beneficial interests of such entity are regularly traded on an established securities market; and:

   (e) the entity is organized in a country which has a tax treaty with the United States.

E. The dividends paid deduction otherwise allowed by federal law in computing net income of a real estate investment trust that is subject to federal income tax shall be added back in computing the tax imposed by this [state income tax statute] if the real estate investment trust is a captive real estate investment trust.

F. A real estate investment trust that is intended to be regularly traded on an established securities market, and that satisfies the requirements of Section 856(a)(5) and (6) of the U.S. Internal Revenue Code by reason of Section 856(h)(2) of the Internal Revenue Code shall not be deemed a captive real estate investment trust within the meaning of this section.

G. A real estate investment trust that does not become regularly traded on an established securities market within one year of the date on which it first becomes a real estate investment trust shall be deemed not to have been regularly traded on an established securities market, retroactive to the date it first became a real estate