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June 23, 2020

Dr. Mark A. Calabria
Director, Federal Housing Finance Agency
Federal Housing Finance Agency
400 7th Street SW, 8th floor
Washington, D.C. 20219

Re: FHFA RFI on Federal Home Loan Bank Membership

Dear Director Calabria,

Nareit is the worldwide representative voice for real estate investment trusts (REITs) and publicly-traded real estate companies with an interest in U.S. real estate and capital markets. Nareit's members are REITs and other real estate businesses throughout the world that own, operate and finance residential and commercial real estate. Nareit's Mortgage REIT (mREIT) Council ("mREIT Council" or "Council"), which includes both residential and commercial mREITs, advises Nareit's leadership on mREIT matters.

On behalf of Nareit, I am happy to transmit this Comment from the mREIT Council responding to the Federal Housing Finance Agency's (FHFA) Request for Information (RFI) on Federal Home Loan Bank (FHLBank) Membership.

Publicly traded mREITs, which have deep experience and a proven track record of raising and deploying private capital for housing finance, play an important role today in single and multi-family finance. As of May 31, 2020, there were 42 exchange-listed mREITs in the FTSE Nareit Mortgage REITs Index, including 24 that are predominantly focused on residential housing finance. mREITs have financed millions of single and multi-family homes, year after year, in recent decades.

In the attached Comment, Nareit's mREIT Council sets forth its strong view that publicly traded mREITs can readily demonstrate FHLBank mission alignment. Moreover, mREITs have the potential to be strong contributors to the FHLBank system and to expand the ability of the FHLBanks to finance single and multi-family homes for Americans. The attached comment details the nature of the issues posed by mREIT captive FHLB membership, noting that these issues are far from unique and can be—and indeed have been—readily managed by the FHLBanks. Notably, no FHLBank has suffered losses on advances to any mREIT captive.

mREITs offer significant potential to extend the reach of private capital during this period when there is an urgent need to expand the supply of housing and renewed focus on downsizing the role of the federal government in housing finance. mREITs stand out in their singular focus on housing and related real

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Washington, D.C. 20006-5413
202-739-9400

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estate finance and stand ready to be “part of the solution” to the challenge of bringing sufficient private capital forward to conclude the GSE conservatorships and put U.S. housing finance on a path towards a sustainable future.

Nareit and its mREIT Council members stand ready to assist the FHFA as it moves forward with its review of these important issues related to membership and the future of the FHLB system. Please feel free to contact me (swechsler@nareit.com; (202) 739-9406), or Victoria Rostow, Nareit’s Senior Vice President for Regulatory Affairs & Deputy General Counsel (vrostow@nareit.com; (202) 739-9431) with any further questions that you may have.

Respectfully submitted,

Steven A. Wechsler
President & CEO
Nareit

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Re: FHFA Request for Input (RFI) on Federal Home Loan Bank (FHLBank) Membership

Dear Director Calabria,

Nareit[1] is the worldwide representative voice for real estate investment trusts (REITs) and publicly-traded real estate companies with an interest in U.S. real estate and capital markets. Nareit advocates for REIT-based real estate investment with policymakers and the global investment community. Nareit's Mortgage REIT (mREIT) Council (mREIT Council, or Council), which includes both residential and commercial mREITs, advises Nareit's leadership on mREIT matters.

Today, publicly traded mREITs play an important role in the real estate capital markets by providing financing and liquidity through funding mortgage and mortgage-related loans for residential and commercial real estate borrowers and by acquiring mortgages and mortgage-related loans. mREITs play an important role in the U.S. housing finance sector by investing in, financing, and managing Agency RMBS and non-Agency securities. As of May 31, 2020, there were 42 exchange-listed mREITs in the FTSE Nareit Mortgage REITs Index, including 24 that provide financing for primarily residential real estate with a cumulative equity market capitalization of $28.4 billion. mREITs have enabled home ownership for millions of American families over many years. Nareit estimates that as of Dec. 31, 2019 alone, mREIT investments supported approximately 2.8 million single-family mortgages. Because mREITs typically reinvest principal repayments, the impact of mREIT investment over time is far greater. mREITs are also active in funding multifamily housing and held $35.9 billion of Agency CMBS as of Q1 2020.

Nareit's mREIT Council appreciates the opportunity to respond to the Federal Housing Finance Agency's (FHFA) Request for Input (RFI) on Federal Home Loan Bank (FHLBank) Membership.[2] This comment was developed with the assistance of an mREIT Council task force formed for this purpose, composed of senior executives from mREITs that currently are, or were, FHLBank members through wholly-owned

[1] Through the properties they own, finance and operate, REITs help provide the essential real estate we need to live, work and play. All U.S. REITs own approximately $3 trillion in gross assets, public U.S. REITs account for $2 trillion in gross assets, and stock-exchange listed REITs have an equity market capitalization of over $1 trillion. In addition, more than 87 million Americans invest in REIT stocks through their 401(k) retirement and other investment funds.
[2] FHFA, "Request for Input: Federal Home Loan Bank Membership," Feb. 24, 2020. Available at https://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/RFI-on-FHLBank-Membership.pdf. RIN 2590-AA39.

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Washington, D.C. 20006-5413
202-739-9400

captive insurance subsidiaries. As noted in the RFI, the FHFA's 2016 FHLB membership Rule[3] (FHLBank Membership Rule) eliminated the eligibility of captive insurance members, thereby terminating the FHLBank membership of most mREIT-owned captives as of Feb. 18, 2017.[4]

Nareit has long supported the FHLBank membership eligibility of publicly traded mREITs, through a wholly owned captive insurance subsidiary, or as a distinct congressionally enacted statutory category through amendment to the FHLBank Act of 1932 (FHLBank Act).[5] As set forth in Nareit's Jan 15, 2015 comment (Nareit 2015 FHLB Comment) to the FHFA[6] and reiterated many times since, Nareit believes that mREITs can further the historic housing mission of the FHLBank system and expand the ability of the FHLBanks to meet the increasingly urgent need for housing and housing finance without impairing the safety and soundness of the FHLBank system, or posing risk to current members.

Because the FHFA's RFI is focused on issues related to possible mREIT eligibility under the FHFA's existing regulatory authority, i.e., through a captive insurance subsidiary, this comment does not address possible legislative expansion of FHLBank membership. Rather, we focus primarily on issues related to possible modification or reversal of the FHFA's 2016 FHLBank Membership Rule,[7] which deemed captive insurance not within the definition of insurance in the FHLBank Act, thereby terminating mREIT membership. As an initial matter, we reiterate the concerns set forth in our 2015 FHLB Comment, which were also raised by the Council of FHLBanks,[8] several individual FHLBanks[9] and many others[10] prior to its adoption that the FHLBank Membership Rule may not be consistent with the intent of Congress as reflected in the plain language of the FHLBank Act, which unequivocally states that insurance companies are eligible for membership. Subsequent judicial opinions, including the Supreme Court's recent decision in *Bostock v. Clayton County,* affirming the principles that "[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration" and that "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations", reinforce these concerns.[11]

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[3] FHFA, Members of Federal Home Loan Banks, 81 Fed. Reg. 3246 (Jan. 20, 2016).
[4] The grandfathering provisions of the FHLBank Membership Rule permitted a very limited number of captive insurance members of the FHLBanks, including currently 5 mREIT captives, to retain their membership for five years. The membership of these captives will terminate in February 2021.
[5] Federal Home Loan Bank Act of 1932 12 U.S.C. ch. 11 § 1421 et seq.
[6] Nareit Comment to the FHFA RIN 2590-AA39 (Jan 15, 2015).
[7] 12 CFR Part 1263 Members of Federal Home Loan Banks; Final Rule.
[8] Council of FHLBanks Comment to the FHFA RIN 2590-AA39 (Oct. 8, 2014)); the Council of FHLBanks stated that "[c]aptive insurance companies are "insurance companies" and cannot be removed from the FHLBA by agency fiat." (p. 17) The Council further argued that [t]he FHFA's amendment of the FHLBA through defining captive insurance companies out of the membership eligibility provisions would fail review even under the deferential "arbitrary and capricious" standard of review." (p. 22).
[9] See e.g., Comments of Edward Hjerpe III FHLB-Boston, RIN 2590-AA39 (Jan. 9, 2015);
Comments of W. Wesley McMullan, FHLB-Atlanta, RIN 2590-AA39 (Dec. 24, 2014);
[10] See, e.g., Thomas Vartanian, Dechert LLP, RIN 2590-AA39 (Dec. 31, 2014); J. Kevin A. McKechnie, American Bankers Association Insurance Committee, RIN 2590-AA39 (Jan. 12, 2015); Alston & Bird LLP, RIN 2590-AA39 (Sept 28, 2015).
[11] Bostock v. Clayton County, No. 17-1618 (U.S. Jun. 15, 2020) at 24 and 33.

Because certain distinct features of mREITs may not be broadly understood, Section I of this comment provides background on mREITs and describes how mREITs have become an integral part of the housing finance architecture in the United States. Section II addresses why mREITs and their captives are mission-aligned with the FHLBank system. Section III addresses safety and soundness concerns that have been raised regarding mREIT membership through a captive. Section IV describes the regulatory and reporting framework applicable to publicly-traded mREITs and Section V discusses the opportunities posed by the possible admission of mREIT captives to the FHLBank system.

I. Background on mREITs

REITs were established by Congress in 1960 to enable all American investors to enjoy the benefits of investment in real estate. There are two main types of REITs, generally referred to as equity REITs and mREITs. Equity REITs invest in "bricks and mortar" real estate by acquiring leasable space in properties, such as apartments, shopping malls, office buildings, and other properties, and collecting rents from their tenants. At least 40 countries around the world currently have enacted laws supporting equity REIT structures, which own and operate real estate assets.[12] However, the U.S. mREIT sector is wholly distinctive in its role in supporting residential and commercial real estate debt finance. Nearly all of the mREITs that are members of Nareit's mREIT Council are listed on the NYSE or NASDAQ and are subject to the listing, reporting and corporate governance requirements applicable to listed companies. In this comment, all reference to mREITs pertains to publicly traded mREITs.

mREITs today typically concentrate on either the residential or commercial mortgage markets, although some mREITs operate in both markets and a few REITs own and operate real estate while also holding mortgages. Residential mREITs serve the U.S. housing market by funding the acquisition and financing of mortgages and mortgage-related instruments, while some mREITs also originate mortgages and mortgage-related loans. Commercial mREITs have become increasingly important sources of financing for multifamily housing and other community development activity. Residential mREITs, together with many commercial mREITs, currently play a highly consequential role in the single-family and multifamily mortgage arenas. They efficiently raise private capital for single-family and multifamily housing without reliance on insured deposits, raising more than $111.2 billion in permanent capital for investment in residential real estate between 2005 and 2019.

When evaluating investment opportunities, mREITs employ rigorous quantitative and qualitative underwriting and credit evaluation methodologies, including proprietary models to assess loan characteristics and likely performance under a variety of interest rate and market scenarios. Because investing in mortgages and other residential finance assets involves a variety of market risks, including

[12] EPRA Global REIT Survey (2019) available at https://prodapp.epra.com/media/EPRA_Global_REIT_Survey_2019_v8_1567517134733.0_interactive_FINAL.pdf

interest rate, basis, credit and prepayment risks, risk management is a core function of the mREIT business model. mREITs regularly stress-test their balance sheets, allowing firms to proactively consider and address impacts from changes in economic and interest rate conditions, counterparty credit risk, prepayment risk and liquidity risk on an ongoing basis. mREITs also employ hedging strategies to mitigate a portion of these risks. These strategies vary, based on portfolio composition, liabilities and individual company assessment of the level and volatility of interest rates, expected prepayments, credit and other market conditions. mREITs provide extensive disclosure regarding their hedges and hedging strategy in their public filings with the Securities and Exchange Commission (SEC). Additionally, mREITs are required to clear certain derivative instruments used for hedging purposes through central clearinghouses, including interest rate swaps, further increasing the transparency of their trading operations and liquidity management and supporting broader financial stability.

The leverage levels of mREITs depend on the nature of their business models and portfolios, assessment of risk and returns, interest rates, risk management techniques used, and borrowing conditions. Leverage for Agency MBS is generally higher than other mortgage assets, due to Agency MBS' more favorable liquidity profile and lack of credit risk relative to other mortgage assets, which make the value of Agency MBS less volatile and facilitates higher leverage. Many mREITs operate pursuant to target leverage levels, disclosed to investors in their SEC filings. Generally, the mREIT sector has reduced its leverage following the financial crisis. In 2006, the median debt/equity ratio was 11.9x the amount of tangible stockholders' equity, and in 2019 the median debt/equity ratio was 8.1x.[13] However, under certain market conditions and depending on the evolving mix and nature of their mortgage investments, mREITs may operate at leverage levels outside of this range, and outside their own target leverage levels, for periods of time.

Like virtually every other participant in U.S. capital markets, earlier this year, mREITs experienced the effects of market turbulence triggered by the economic downturn accompanying the global pandemic. As was widely documented in the press, in March, 2020, panic selling across all fixed income asset classes coupled with extraordinary interest rate volatility induced cash demands leading to a rapid fall of asset prices prompting lenders to issue margin calls that in turn prompted additional asset sales.[14] The speed and severity of this market dislocation—perhaps the fastest market decline in U.S. history—hit mortgage investors particularly hard.

Nevertheless, bolstered by lower leverage ratios at the onset of the pandemic, the market turmoil in March largely represented a liquidity crisis, but not a solvency crisis, for mREITs. 18 of 22 mREITs were able to satisfy margin calls and generate liquidity through asset sales, if needed, notwithstanding the rapid decline in mortgage asset prices. Although four public mREITs entered into voluntary forbearance agreements with lenders, no mREIT declared bankruptcy and no lender—including no FHLBank—has

[13] Across the 37 publicly traded mREITs in the Bloomberg mREIT index (BBREMETG Index), the index had a simple leverage multiple of 7.4 in 2019, corresponding to a 13.5% capital ratio.
[14] See e.g., Justin Baer, The Day Coronavirus Nearly Broke Financial Markets, WSJ (May 20, 2020).

suffered losses to date. mREITs began to recover following the Federal Reserve's March 23 announcement that it would greatly expand RMBS purchases and commence purchases of Agency CMBS.[15] Mortgage markets have begun to stabilize and mortgage assets have started to recover in value, and leverage and liquidity levels at many mREITs have also largely recovered. To date, the FTSE Nareit Mortgage REIT index (FNMRTR) has posted a total return of 76.3% from its April 3 low from its April 3 low.

mREITs emerged from the previous financial crisis as well-capitalized vehicles able to access and deploy private capital into the single and multifamily residential mortgage sectors. During the decade 2010-2020, mREITs contributed broadly to housing affordability for consumers by originating mortgage loans, purchasing mortgage-backed securities, and providing first loss capital for new Government Sponsored Enterprises (GSE) and private label securities (PLS). The capital formation facilitated by publicly-traded mREITs is an important contributor to the success and stability of the United States residential real estate market. For decades, mREITs have operated as safe and efficient vehicles for raising private-sector capital for U.S. housing and have proven to be critical to the mortgage markets during recent periods when other traditional holders of mortgages, such as the Federal Reserve, Treasury Department and the GSEs, have reduced support of the secondary mortgage markets.

Residential mREITs

Since 2009, Agency RMBS has overwhelmingly dominated U.S. single family mortgage securitization, and mirroring this development, Agency RMBS comprise the preponderance of mREIT sector investments. These Agency investments consist of residential mortgage pass-through securities and collateralized mortgage obligations for which the principal and interest payments are guaranteed by a U.S. Government-sponsored enterprise, such as the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac, and together with Fannie Mae, the GSEs), or by a U.S. Government agency, such as the Government National Mortgage Association (Ginnie Mae). Some mREITs also have significant investments in PLS where repayment of principal and interest is not guaranteed by a GSE or U.S. Government agency. Some mREITs invest in other assets related to the housing, mortgage or real estate markets, such as individual loans, credit risk transfer securities and mortgage servicing. Today mREITs are an important component of capital for residential mortgages, and currently hold 3.5% of U.S. RMBS.[16] As a permanent source of capital to the housing finance sector, residential mREITs also have the potential to invest in a broad array of mortgages and mortgage related instruments and will play a fundamental role in future reform and evolution of the U.S. housing finance market.

[15] Federal Reserve Board, Press Release (Mar. 23, 2020) available at https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm
[16] Federal Reserve, Financial Accounts of the United States) 2019: Q4.

Commercial mREITs

Commercial mREITs provide financing for many types of commercial real estate, including apartment buildings and other multifamily structures, office buildings and office parks, retail establishments, malls, restaurants, data centers, and industrial facilities. Commercial mREITs support residential and commercial real estate finance by acquiring, financing, and servicing commercial and residential first mortgages, subordinated mortgages, mezzanine loans, preferred equity, commercial mortgage-backed securities (CMBS) and other real estate and real estate-related debt investments. Some commercial mREITs support community development by originating, acquiring, financing, and servicing infrastructure debt investments.

mREIT Participation in CRTs and UMBS Demonstrates Private Capital Potential

Attracting additional private capital to fund U.S. housing has been a widely acknowledged public policy goal for decades and the driver of several significant recent federal housing policy initiatives, such as the FHFA's Single Security Platform and the development of Uniform Mortgage Banked Security (UMBS), and the development of Credit Risk Transfer (CRT) securities. mREITs are active participants in these programs and have the potential to expand their participation.

mREITs have been significant investors in GSE CRTs since the commencement of the program. The importance of mREITs to the CRT market was reflected in the 2017 announcement by Fannie Mae and Freddie Mac that under the FHFA's supervision, they would modify their respective CRT securities programs specifically for the purpose of "…making the program more attractive to REIT investors....". The development of the GSE REMIC CRTs reflects the broad market recognition of the importance of mREITs to the evolving housing finance framework as a source of private capital for single family homes. It is estimated that REITs now account for roughly 7-10% of recent CRT issuance and more than 20% of REMIC CRT issuance.

Nareit also appreciates the FHFA's acknowledgment of the important role of mREITs in in its recent UMBS Pooling RFI, which included commentary acknowledging that pooling arrangements would need to be structured to ensure that "whole loan pools to address the needs of certain investors (such as REITs) would continue to be issued by the Enterprises." The Pooling RFI specifically requested comment on the "…types of pools that are beneficial to stakeholders, including specific market participants such as REITs…"[17]

Current market conditions have heightened the need to expand housing availability. According to recent data, the pandemic has exacerbated previously tight mortgage credit conditions, constraining the ability

[17] RFI at 14.

of Americans to buy homes and hindering the economic recovery.[18] Residential and commercial mREITs, many of which are specialists in RMBS and CMBS and in command of highly sophisticated models, analytics and long institutional expertise, stand ready to provide capital into this changing mortgage market.

mREITs and the FHLBanks

Roughly two dozen mREIT captives, together with captives of other non-depository companies, were admitted as members to FHLBanks prior to the effective date of the FHFA Membership Rule.[19] In many cases, mREITs were actively recruited as members of FHLBanks. As FHLBank members, mREITs, which rely on a combination of equity and debt financing, primarily accessed advances (which typically offer longer terms than repo borrowings) to diversify the duration of their liabilities and to better match certain portfolio investments. No mREIT relied exclusively, or even predominately, on FHLBank financing. All mREIT captive members met the relevant FHLBank membership requirements at the time of their admission and remained members in good standing throughout**.** During this period, the FHLBanks created their own supervisory regimes for mREIT captives, making good use of SEC reports and other financial data that mREITs were asked to provide, which facilitated effective risk management. As noted above, no mREIT captive defaulted on obligations to the FHLBanks, and the FHLBanks suffered no losses on account of the mREIT captives. Moreover, the value of mREIT captive members to the FHLBank system during this period was widely acknowledged. As one Senator commented in 2018:

> *These captive members have proven track records of responsible membership, have contributed to the system, and have invested their capital in the respective FHLBs. Moreover, each and every captive that would be affected by our bill are subsidiaries of financial institutions that are aligned with the overall mission of the FHLBs.*[20]

II. mREITs are Aligned with the Mission of the FHLBanks

As has been recognized by Treasury officials in the current and prior Administrations[21], mREITs are highly aligned with the mission of the FHLBanks. Residential mREITs (as well as many commercial

[18] Urban Institute, Housing Supply Constraints from before the Pandemic Will Worsen Inequality as We Start to Recover (May 27, 2020) available at https://www.urban.org/urban-wire/housing-supply-constraints-pandemic-will-worsen-inequality-we-start-recover.
[19] FHLBank Membership Rule, supra Note 6 at 10.
[20] Senators Duckworth, Scott, Johnson and Baldwin, Statement for the Record, Congressional Record Volume 164, Number 47 (March 19, 2018), at S1785-1786.
[21] See, United States Department of the Treasury, Housing Reform Plan (Sept. 2019) (2019 Treasury Report) available at https://home.treasury.gov/system/files/136/Treasury-Housing-Finance-Reform-Plan.pdf; and Remarks by Counselor to the Secretary for Housing Finance Policy Dr. Michael Stegman before The North Carolina Bankers Association 2014 American Mortgage Conference (September 9, 2014), available at http://www.treasury.gov/press-center/press-releases/Pages/jl2625.aspx.

mREITs) are real estate finance businesses created and operated for the very purpose of funding residential real estate. With their nearly singular focus on mortgage markets, the business objectives and operations of mREITs and their captives are strongly aligned with the mission of FHLBanks—perhaps more so than many other eligible membership categories.

The mREIT Council is confident that most mREITs can meet the current FHLBank mission test for non-depository members, including the current requirement applicable to non-depository members that 10% of its total assets be held in "residential mortgage loans" and that management and financing policies be consistent with sound and economical home financing. Indeed, residential mREITs and most commercial mREITs can likely demonstrate that a much larger percentage of their assets are consistent with this mission test.

The RFI specifically asks whether, if captive members were to be deemed eligible, the FHFA should "limit such arrangements to members whose parent company is actively and substantially engaged in activities that are consistent with the housing finance and community development mission of the FHLBanks?"[22] The mREIT Council recognizes the importance of ensuring that members support the mission of the FHLBanks. As noted above, because mREITs are well aligned with the FHLBanks' mission, the mREIT Council has no objection to conditioning captive membership on meeting a reasonable mission test applicable to a captive parent, or to periodic reporting to ensure ongoing mission compliance. The audited financial statements of mREITs and their annual and periodic reports to the SEC could readily document the nature of mREIT assets necessary to meet such a test.

The 2015 captive insurance membership and lending framework developed by the FHLBank Presidents' Conference (BPC and BPC Captive Framework), which was endorsed and separately submitted for the record by all 11 FHLBanks, sets forth a useful template to assess mission alignment.[23] Under the BPC Captive Framework, each FHLBank would be responsible for ensuring that a captive insurance applicant and "its sponsoring parent, together with their affiliated entities as appropriate, collectively, have a documented and demonstrated nexus between their policies and activities, and the housing and community lending mission of the FHLBanks", based on "one or more of the following representative activities":

[22] RFI at 16.

[23] Comments of Wesley McMullan, FHLBank of Atlanta, RIN 2590-AA39 (July 24, 2015); Comments of W. Wesley McMullan, FHLB-Atlanta, RIN 2590-AA39 (July 24, 2015); Comments of Edward Hjerpe III, FHLB-Boston, RIN 2590-AA39 (July 24, 2015); Matt Feldman, FHLB-Chicago, RIN 2590-AA39 (July 24, 2015); Comments of Sanjay Bhasin, FHLB-Dallas RIN 2590-AA39 (July 23, 2015); Comments of Richard S. Swanson, FHLB-Des Moines RIN 2590-AA39 (July 24, 2015); Comments of Cindy L. Konich, FHLB-Indianapolis, RIN 2590-AA39 (July 24, 2015); Comments of Jose R. Gonzalez, FHLB-New York, RIN 2590-AA39 (July 24, 2015); Comments of Winthrop Watson, FHLB-Pittsburgh, RIN 2590-AA39 (July 24, 2015);Comments of Dean Schultz, FHLB-San Francisco, RIN 2590-AA39 (July 24, 2015); Comments of Andrew J. Jetter, FHLB-Topeka, RIN 2590-AA39 (July 24, 2105); Comments of Andrew S. Howell, FHLB-Cincinnati, RIN 2590-AA39 (July 24, 2015).

- Holding a specified minimum percentage of housing-related assets by the captives, parents or affiliates, which may be required to be met on a continuing basis in order to maintain access to advances;
- Engaging in a range of housing-related or community lending activities that support liquidity and affordability in the housing finance market; or
- Having a principal line of business related to housing or community lending, such as a mortgage REIT or other entity focused on housing or community lending.[24]

The RFI further asks "[w]ould the use of FHLBank advances to finance the purchase of mortgage-backed securities by the conduit entity or its parent, as was the case with mortgage REITs that created captive insurance companies, be consistent with the mission of the FHLBanks, particularly if the mortgage-backed securities have been issued or guaranteed by Fannie Mae or Freddie Mac?"[25] The Council believes that it would be wholly consistent. To date, the investments in Agency and non-Agency RMBS by residential mREITs have channeled private capital to support the purchase of mortgage loans and securities that have funded millions of single and multifamily homes, an activity that is central to the mission of the FHLBs "to provide reliable liquidity to member institutions to support housing finance and community investment."[26] Moreover, Agency MBS and CMOs have long been deemed eligible collateral for FHLB members, and constituted 14.6% of system-wide collateral as of December 2019, among the highest categories.[27] The Council does not believe there would be justification to apply different collateral eligibility requirements to captive insurance members.

Finally, to maintain REIT status, mREITs (and all REITs) must annually satisfy certain rules set forth under the Internal Revenue Code of 1986, as amended, [28] including rigorous asset and income tests that:

- require that at least 75% of the value of a REIT's total assets be represented by real estate assets, cash and cash items and government securities (so-called "qualifying assets"); and;
- require that no less than 75% of a REIT's income be derived from such qualifying assets.[29] Together, these tests ensure that an mREIT, its captive and any other affiliates would continuously support the FHLBank mission well beyond the 10% asset test applied during the FHLBank membership application process

[24] Id.
[25] RFI at 16.
[26] FHLBank Office of Finance, History of Service accessed June 9, 2020 available at http://www.fhlb-of.com/ofweb_userWeb/pageBuilder/mission--history-29#:~:text=Created%20by%20Congress%20in%201932,and%20special%20affordable
[27] FHFA, Report on Collateral Pledged to the FHLBs (Dec. 2019) at 6, available at 3.; available at https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/Collateral-Pledged-Report_Dec2019.pdf.
[28] 26 U.S.C. § 856.
[29] 26 U.S.C. § 856 (a)(7).

The Council is confident that mREITs, with their decades of experience in residential housing finance, can demonstrate strong mission alignment and could be of considerable value in ensuring that the FHLBank system continues to fulfill its historic housing finance mission. Recent research, documenting the shift in residential financing activities from the depository sector, has suggested that there may be "a shrinkage of the role FHLBs play in the mortgage market."[30] Admission of mREIT captives would contribute diversity to FHLB membership and reinforce the ability of the FHLBanks to accomplish their mission.

III. mREIT Captive FHLBank Membership Does Not Pose Safety and Soundness Risks to the FHLBank System

The RFI poses questions regarding possible risks posed by conduit membership, noting that conduit members may not be subject to prudential regulation.[31] Others have raised concerns about captive insurance entities specifically and have questioned whether the FHLBanks would be adequately protected in the event of the insolvency of an mREIT and/or its captive.[32] Below we address some of these issues with respect to mREIT captive insurance membership.

mREITs are Subject to a Comprehensive Body of Federal and State laws

Publicly-traded mREITs are subject to a comprehensive body of federal and state laws, regulations, securities exchange rules, accounting pronouncements and market-driven best practices. As publicly traded and exchange listed companies, mREITs operate with substantial transparency. They file periodic and other current reports (10-Ks,10-Qs and 8-Ks) with the SEC in accordance with the requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and the rules thereunder and they file financial statements audited by registered public accounting firms overseen by the Public Company Accounting Oversight Board. mREITs are also subject to the substantive, reporting, audit and certification requirements of the Sarbanes Oxley Act ("SOX"). The officers, directors, and 10% shareholders of mREITs are subject to the reporting and short swing profit provisions of Section 16 of the Exchange Act; and their large shareholders are subject to the reporting requirements of Section 13(d) and (g).

Moreover, as noted above, under the Internal Revenue Code, to maintain REIT status, mREITs (and all REITs) must annually satisfy the REIT income and asset tests, as described above.[33]

[30] Karen Kaul and Laurie Goodman, Should Nonbank Mortgage Companies Be Permitted to Become Federal Home Loan Bank Members, Urban Institute (June 2020) at 4, available at https://www.urban.org/sites/default/files/publication/102400/should-nonbank-mortgage-companies-be-permitted-to-become-federal-home-loan-bank-members.pdf.
[31] RFI at 15.
[32] Comment of the FHLBanks to FHFA RFI on FHLB Membership (April 22, 2020).
[33] Supra note 22.

A compendium of federal and state laws and related regulatory pronouncements that mREITs are subject to is attached as **Appendix A**.

Captive Insurance Companies are Subject to State Regulation

According to state regulators, each of the roughly 3 dozen states that charter captive insurance entities subject captives to the same, or similar, regulatory framework and supervisory rules as traditional insurance companies.[34] These rules include specific organizational, licensing, reporting, and examination requirements. According to the National Association of Insurance Commissioners (NAIC), the regulation of captive insurance has been strengthened and harmonized across jurisdictions in recent years, following NAIC's issuance of its captive insurance framework.[35] Today, all captive insurance companies are subject to financial reporting rules, requiring audited financial statements and annual third party actuarial certifications regarding the sufficiency of funding and state minimum capital. In most jurisdictions, captives are also required to have at least one independent director serving on their board, engage an independent insurance manager and obtain regulatory approval to distribute assets. Notably, the adequacy of captive insurance supervision was previously endorsed in comments submitted by the Council of FHLBanks and several individual FHLBanks.[36]

mREIT Captive Membership Poses No Unique Insolvency Risks and Risks can be Readily Managed

The RFI poses the question of whether admission of mREITs through captives would pose additional risk to the FHLBank system, "in the event of a default or failure of a member and/or parent institution for which a bankruptcy or similar proceeding would be the resolution regime (as opposed, for example, to an FDIC resolution for an insured depository institution)?"[37]

As the U.S. Treasury Department noted in its 2019 Report, the risks associated with the insolvency of a non-depository member, such as an mREIT, "potentially could be managed through enhanced collateral haircuts, capital requirements, or other counterparty risk management practices (e.g., bankruptcy-remote funding structures)."[38] We agree and note that the FHLBanks can, and indeed already do, operate

[34] See e.g., Comments of the Delaware Department of Insurance, RIN 2590-AA39, at 3-4 (April I, 2011); Comments of the Vermont Department of Banking, Insurance, Securities' and Health Care Administration, RIN 2590-AA39, at 2 (Feb. 23, 2011); Comments of the Captive Insurance Company Association, RIN 2590·AA39, at 1-2 (March 27, 2011); see also NAIC, Captive Insurance Companies (Aug. 5, 2014), http://www.naic.orgicipr_topics/topic_captives.htm ("Once established the captive operates like any commercial insurance company and are subject to state regulatory requirements including reporting, capital and reserve requirements.").
[35] NAIC Captive Insurance Companies (Feb. 27, 2020), available at https://content.naic.org/cipr_topics/topic_captive_insurance_companies.htm.
[36] Council of FHLBanks, supra note 8 at 17; See e.g., Comment of the FHLBank of Chicago, RIN 2590-AA39, (Oct. 10. 2014) at 9; Comment of the FHLBank of Indianapolis, supra note 24 at 10 ("Captive insurance companies are licensed and comprehensively regulated by their state of domicile where formed by the same agencies as other insurance companies.").
[37] RFI at 15.
[38] 2019 Treasury Report, supra note 22 at 44.

pursuant to such collateral management policies to address these very concerns for current non-depository members. All 11 FHLBs currently have policies addressing credit approval, asset valuation and haircuts applicable to non-depository members such as insurance members, CDFIs and non-federally insured credit unions. These policies explicitly take account of the insolvency risks associated with these members in each jurisdiction. In their 2015 submissions to the FHFA endorsing the BPC Captive Framework, discussed above, the FHLBank presidents stated that their existing "prudent credit practices," developed over many years provide the necessary tools to manage captive insurance members.[39] Moreover, these practices have proven sufficient to protect the FHLBanks during historically disruptive market conditions, including the most recent market turmoil associated with the pandemic.

The FHLBanks also have additional tools that protect them and their members. Currently, in the case of an insurance member or other non-depository institution, the FHLBanks can take possession of collateral, or require collateral to be deposited with a custodian or control agent to establish control and they quite experienced at doing so. According to the most recent financial report of the FHLBanks, as of March 31, 2020, FHLBanks were in possession of 10.8% of the collateral securing advances and other Credit Products.[40]

Moreover, as noted by the Treasury Department[41] and at least one FHLBank in a recent comment,[42] to address these insolvency concerns, the FHLBanks can structure advances as repurchase transactions or "qualified financial contracts" to receive "safe harbor" protections under Title II of the United States Code, as amended, (the "Bankruptcy Code"). These safe harbor protections permit a qualifying party to liquidate and close out the protected contract when a counterparty is subject to bankruptcy, free from the automatic stay and certain other significant restrictions of the Bankruptcy Code. Alternatively, the FHLBs could require such borrowers to deploy bankruptcy remote structures, as is common in asset backed lending. Together, prudent credit assessment, collateral management, custody and bankruptcy structuring can provide the FHLBanks substantially the same, if not superior, protection than offered by other non-depository members.

Moreover, the risks posed by mREIT captives are not unique. As one FHLBank observed, that "any incremental risks that captives may pose to the FHLBs currently exist for another eligible member class, non-depository CDFIs, which do not have a prudential regulator.[43] The Council of FHLBanks further noted that "the FHFA's regulations and FHLBanks' internal procedures protect the FHLBanks from

[39] Supra note 24.
[40] Federal Home Loan Banks, Combined Financial Report for the Quarterly Period Ended March 31, 2020, available at http://fhlb-of.com/ofweb_userWeb/resources/2020Q1CFR.pdf.
[41] Supra note 38.
[42] Adrian Nasr, FHLBank-SF, Comment to the FHFA on RFI on FHLBank Membership (May 29, 2020) ("In the absence of such statutory changes, there are still means of addressing safety and soundness concerns such as structuring advances in such a manner so they can be considered as repurchase transactions or "qualified financial contracts" under the Bankruptcy Code and allowing FHLBanks to lend to certain new member types through bankruptcy-remote special purpose vehicles."
[43] Matthew R. Feldman, Comment of the FHLB of Chicago, supra note 36.

accepting unqualified captive insurance companies as members, just as they protect the FHLBanks from any other type of applicant that may meet the facial membership requirements, but lack a focus on the FHLBanks' housing finance goals."[44] Each FHLBank currently has the authority to approve (or deny) membership applications, subject to FHFA requirements.[45] The FHLBanks also have the discretion to determine if applicant information satisfies the membership requirements, including, in the case of non-depositories, a demonstrated commitment to housing finance.[46]

The FHLBanks have Long Experience with Conduit Members, Including Captives

FHLBanks currently have ample authority to conduct diligence to assess the quality of an applicant's parent or affiliates and routinely do so. As others have noted[47], bank holding companies are not eligible for FHLBank membership. Nor are the parents and affiliates of many current credit union and insurance members of the FHLBanks. Indeed, such holding company ownership structures are so common that the membership applications for banks, insurance companies and credit unions at virtually all FHLBanks now require applicants to supply information regarding their (ineligible) holding companies and affiliates, and to authorize the FHLBank to receive any information, including materials provided by "the appropriate State or Federal regulator" regarding "any entity within the same holding company family as the applicant, including the applicant's parent (the "Affiliated Entities")."[48]

Questions have been raised about whether, if granted membership eligibility, mREIT collateral pledged against advances should reside in the captive. As noted above, the FHLBanks currently have the flexibility to take possession of collateral, or require collateral to be deposited with a custodian, which is routinely done with insurance members.[49] Virtually all FHLBanks now permit members to pledge collateral through an affiliate by executing an Affiliate Collateral Security and Pledge Agreement (ACSPA), a practice so common that most of the FHLBanks have standard forms for doing so. Indeed, the 1987 amendment to the FHLBank Act, which addressed the priority of certain secured interests, recognizes the prevalence of affiliate collateral pledges by providing that "any security interest granted to a Federal Home Loan Bank by any member of any Federal Home Loan Bank *or any affiliate of any such member* (emphasis added) shall be entitled to priority over the claims and rights of any party…"[50]

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[44] Council of FHLBanks Comment to the FHFA, supra note 8 at 21.
[45] See 12 CFR §1263.3(a).
[46] 12 CFR §1263.6(c).
[47] See, e.g., Comment of the FHLB of Chicago, supra note 43; and Andrew J Jetter, Comment of the FHLB of Topeka supra note 24.
[48] See e.g., FHLB of Boston, Membership Application for Banks and De Novos (revised July 2019), available at http://www.fhlbboston.com/downloads/members/membership/membership_app_banks.pdf.
[49] Federal Reserve Bank of Chicago, Understanding the relationship between life insurers and the Federal Home Loan Banks (Jan. 2014) ("FHLBs are also more likely to take actual possession of collateral posted by insurers, and some FHLBs may place limits on lending to the insurance industry." at 3).
[50] 12 U.S.C. §1430(e); The super lien, sometimes called the CEBA lien, was originally established by the Competitive Equality Banking Act of 1987 (Pub. Law 100-86).

Accordingly, the mREIT Council believes that these collateral determinations should be left to each FHLBank and be determined through the credit underwriting process.

The mREIT Council is Open to Additional Reporting

Although Nareit's mREIT Council believes that mREITs do not pose risks distinct from some current member categories, which are now routinely managed by the FHLBanks, the Council is open to additional ongoing reporting requirements applicable to captive members and any parent or affiliate guarantor, as a condition to membership,

IV. Publicly Traded mREITs can Demonstrate Financial Soundness and Credit Worthiness

Publicly traded mREITs and their captives offer more transparency and reporting capability than all but the largest publicly traded bank and insurance company members of the FHLBanks. As noted above, publicly listed mREITs, like all public companies, must comply with SEC reporting requirements and the disclosure requirements of the exchanges on which they are listed. In addition to standard financial statements, i.e., statements of income, equity, balance sheets and the statements of cash flow, mREIT SEC reporting includes detailed information about mREIT investments, portfolio metrics, asset valuation, hedging, leverage, repo borrowings and counterparties and other funding arrangements. These reports include content comparable to quarterly bank call reports.

The transparency of mREITs is further enhanced by the IRS rules requiring all REITs to distribute 90% of taxable income annually, a consequence of which is that mREITs are "in the market" frequently. For this reason, mREITs frequently provide additional disclosure to investors, who closely follow their operations and financial performance, and to securities analysts, whose recommendations can immediately impact the value of their stock.

The majority of residential mReit debt finance is raised in the secured repurchase "repo" market that is dominated by large U.S. and international financial institutions. These institutions carefully monitor their credit exposures and typically stay in close touch with requests for current credit information from their borrowers in times of market volatility. As a result, mREITs have a very high level of current and detailed market surveillance from extremely interested counterparties. Under standard repo documentation, the valuation of collateral is assessed daily and adjusted. The amount of excess collateral – "haircut" – can be changed at each of the typically short-term renewals.

V. mREITs Offer the FHLBank System an Opportunity to Expand Private Capital for Housing Finance

Downsizing the role of the federal government in housing finance has been a public policy priority since the end of the Great Recession. The FHFA's current ambitious plans to accelerate this priority will

require significant, some say massive, private capital infusions. mREITs, which can efficiently raise and deploy private capital to support single and multifamily housing and other community development projects have enormous potential to help fill this need. If granted FHLBank eligibility, mREITs can expand their capacity to generate private capital for housing finance, without increasing risk to the FHLBank system, its current members, or U.S. taxpayers.

mREITs would use FHLBank advances to diversify their liabilities and expand their support for housing and economic development, which benefits American families and communities. As detailed at length above, the possible risks associated with mREIT captive FHLBank membership are similar to those posed by some current non-depository members and fewer than those presented by other current and potential membership categories, because of the extraordinary degree mission alignment and transparency afforded by listed mREITs. Moreover, these risks can be readily managed through credit and collateral management policies that are currently fully operational.

The opportunity posed by mREITs as FHLBank members has not escaped the notice of certain Members of Congress from both parties,[51] Treasury officials[52] and other housing policy experts.[53] Prior to the adoption of the 2016 FHLBank Membership Rule, the Council of FHLBanks[54] and each of the individual FHLBank presidents publicly supported the admission of mREIT captives.[55] As one FHLBank then commented, "[a]dmitting MREIT captives into membership creates positive externalities for FHLBanks and their members. MREIT captives allow FHLBanks to grow and diversify their membership. A more diversified member base results in a stronger and more stable capital position. MREITs may opt for advances with longer maturities, which would bolster the stability of the FHLBanks' balance sheet. As the traditional depository industry continues to consolidate, MREIT captives represent an important source for growing and strengthening the FHLBank franchise value."[56] Moreover, as Nareit, the FHLBanks and many others previously argued in comments to the FHFA, the plain language of the FHLBank Act of 1932 strongly supports the eligibility of captive insurance members.[57]

[51] See, supra note 21 and, S. 2361, The Housing Opportunity Mortgage Expansion (HOME) Act, led by Sens. Tammy Duckworth (D-IL), Tim Scott (R-SC), Ron Johnson (R-WI) and Tammy Baldwin (D-WI), to reinstate the eligibility of captive insurers for FHLBank membership;, See also, Senators Kirk, Manchin, Ayotte, Blunt, Baldwin, Cardin, Chambliss, Coburn, Cochran, Coats, Donnelly, Fischer, Hirono, Hoeven, Inhofe, Isakson, Johnson, Johanns, King, Moran, Portman, Roberts, Rubio, Scott, Tester, Thune, Wicker, Barasso, Enzi, Comment on FHLB Membership, RIN 2590-AA39 (Dec. 15, 2014).
[52] Supra note 38.
[53] See, e.g., Laurie Goodman, Jim Parrott, and Karen Kaul, The FHFA Proposal Overshoots its Mark (Jan. 2015), available at https://www.urban.org/sites/default/files/publication/33951/2000064-The-Federal-Housing-Finance-Agencys-Federal-Home-Loan-Bank-Members-Proposal-Overshoots-the-Mark.pdf; and, Edward J. DeMarco and Michael Bright, Towards a New Secondary Mortgage Market (Sept. 2016) available at https://assets1b.milkeninstitute.org/assets/Publication/Viewpoint/PDF/Toward-a-New-Secondary-Mortgage-Market.pdf
[54] Supra note 8.
[55] Supra note 24.
[56] Winthrop Watson, FHLB-Pittsburgh, Comment on FHLB Membership, RIN 2590-AA39 (July 24, 2015) at 11.
[57] Supra notes 5, 8, 9 and 10.

Nareit and the mREIT Council are also aware that in a recent letter, the Council of FHLBanks has reversed course, and currently argues that the FHFA does not have the authority to approve captive membership and should leave this decision to Congress.[58] While we hesitate to speculate about the reasons for this apparent reversal, we believe that this important decision, affecting not only the future and mission of the FHLBank System, but also the ability of private capital to meet the future housing finance needs of Americans, should not be dependent on the state of U.S. mortgage markets at any moment in time, the current interest rate environment, or business concerns arising from the global pandemic economic downturn. mREITs have the extraordinary potential to be "part of the solution" to the challenge of bringing sufficient private capital forward to conclude the GSE conservatorships and put U.S. housing finance on a path towards a sustainable future. This opportunity should not be lost.

The members of Nareit's mREIT Council appreciate the opportunity to express their views on RFI and their continued support for the FHLBank system and its mission. The Council is confident that mREIT captive insurance members would, if deemed eligible for membership, usefully contribute capital, housing finance expertise and diversity to the FHLBanks, helping to sustain the success of the FHLBank system as it adapts, as it must, to an environment becoming progressively less reliant on the historic GSE infrastructure.

We hope that the FHFA will look to Nareit and the members of Nareit's mREIT Council as resources as it moves forward on this and related initiatives. Please do not hesitate to contact us, or Steve Wechsler, Nareit's President & CEO (swechsler@nareit.com; or (202) 739-9406), or Victoria Rostow, Senior Vice President, Regulatory Affairs & Deputy General Counsel (vrostow@nareit.com; or (202) 739-9431).

Respectfully submitted,
Nareit mREIT Council

Co-Chairman, Byron Boston
President, CEO & Co-Chief Investment Officer, Dynex Capital

Co-Chairman, Phil Reinsch
President & CEO, Capstead Mortgage Corporation

[58] Council of FHLBanks, Comment on RFI on FHLB Membership (April 22, 2020) available at https://www.fhfa.gov//AboutUs/Contact/Pages/input-submission-detail.aspx?RFIId=1104.

APPENDIX A
CURRENT LAWS, REGULATIONS and REQUIREMENTS GOVERNING OPERATIONS of MORTGAGE REITS (mREITs)

Below are some of the key statutes, regulatory provisions, rules, pronouncements and practices that govern the operations and activities of public Real Estate Investment Trusts (REITs), including mREITs. Many of the provisions set forth below are applicable to all public companies, and are not specific to REITs. Certain provisions, however, such as the REIT requirements under the Internal Revenue Code of 1986, as amended (the "Code"), apply specifically to REITs.

Applicable Law or Regulation	Description
SARBANES-OXLEY ACT (incorporated into the 1934 Act (as defined below)[1]	**As a public company registered under the Securities Exchange Act of 1934, as amended (the "1934 Act"), a REIT generally is subject to the provisions adopted in the Sarbanes-Oxley Act of 2002 ("SOX").**
- Code of Ethics	In implementing SOX, the Securities and Exchange Commission ("SEC") has adopted rules requiring a public company to disclose whether it has adopted a code of ethics for its Chief Executive Officer ("CEO"), Chief Financial Officer ("CFO"), Chief Administrative Officer ("CAO"), controller and other persons performing similar functions and, if not, the reasons why it has not (the "Code of Ethics"). A Code of Ethics is a set of written standards reasonably designed to deter wrongdoing and to promote: • Honest and ethical conduct, including ethical handling of conflicts of interest; • Full, fair, accurate, timely and understandable disclosure in SEC reports and public communications; • Compliance with applicable law; • Prompt internal reporting of violations; and • Accountability for compliance with the Code of Ethics.

[1] 15 U.S.C. 7201 et. Seq.

- Disclosure Controls (Section 404 of SOX; Rule 13a-15)	Companies with securities registered under Section 12 of 1934 Act (such as public REITs) must maintain disclosure controls and procedures with respect to financial information. These disclosure controls and procedures are intended to ensure that information disclosed in filings or reports under the 1934 Act are recorded, processed, summarized and reported within the required time periods, and that this information is communicated to the REIT's management, including its principal executive and principal financial officers, or persons performing similar functions, to allow timely decisions regarding required disclosure (collectively, "**Disclosure Controls and Procedures**").
- Quarterly Evaluation of Disclosure Controls and Procedures	Each quarter, management must evaluate, with the participation of the principal executive and financial officers, or persons performing similar functions, the effectiveness of the REIT's Disclosure Controls and Procedures.
- Internal Control Over Financial Reporting (Section 404 of SOX; Rule 13a-15)	Companies that file Form 10-Ks and 10-Qs (such as public REITs) must adopt "internal controls over financial reporting" ("**Internal Controls**") which means a process designed by, or under the supervision of, the REIT's principal executive and principal financial officers effected by the company's board, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles, including policies and procedures that: • Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the REIT; • Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the REIT; and • Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the REIT's assets that could have a material effect on the financial statements.
- Quarterly Evaluation of Internal Control changes	Each quarter, management must evaluate, with the participation of the principal executive and financial officers, any change in the REIT's Internal Controls that occurred during a fiscal quarter that has materially affected, or is reasonably likely to materially affect, the company's Internal Controls.

- Internal Control Report (Section 404 of SOX; Rule 13a-15)	Each year, management must complete and provide as an exhibit to the Form 10-K a report of management on the REIT's Internal Controls (the "**Internal Control Report**") that contains: • A statement of management's responsibility for establishing and maintaining adequate Internal Controls for the registrant; • A statement identifying the framework used by management to evaluate the effectiveness of the company's Internal Controls as required by paragraph; • Management's assessment of the effectiveness of the registrant's Internal Controls as of the end of the registrant's most recent fiscal year, including a statement as to whether or not its Internal Controls are effective, including disclosure of any material weakness in the company's Internal Controls identified by management. Management is not permitted to conclude that the company's Internal Controls are effective if one or more material weaknesses are identified; and • A statement that the registered public accounting firm that audited the financial statements included in the Form 10-K has issued an attestation report on the company's Internal Controls.
- Internal Control Attestation	A REIT's auditor must attest to management's assessment of the effectiveness of the company's Internal Controls in the Internal Control Report (the "**Internal Control Attestation**"). The Public Company Accounting Oversight Board ("**PCAOB**") Audit Standard 2201 (formerly Auditing Standard No. 5) provides guidance for an audit of internal controls over financial reporting that is integrated with an audit of financial statements.[2]
- Section 906 Certification	Periodic reports (such as the Form 10-Q and Form 10-K) containing financial statements filed with the SEC must be accompanied by a certification by the REIT's CEO and CFO (the "**Section 906 Certification**"), stating that (i) the periodic report fully complies with the requirements the 1934 Act and (ii) the information in the report "fairly presents, in all material respects, the financial condition and results of operations of the issuer." Knowingly or willfully filing an incorrect Section 906 Certification is a **criminal offense** punishable by a large fine and/or imprisonment. SOX provides a form of certification that must be used for the Section 906 Certification.
- Section 302 Certification	In filing a 10-Q or 10-K, the CEO and CFO of a REIT must certify that the financial statements filed with the SEC fairly present, in all material respects, the operations and financial condition of the company, and must attest to the adequacy of the company's Disclosure Controls and Internal Controls.
- Prohibitions on Loans to Insiders (Section 402 of SOX)	Prohibits loans by a public company to its directors or executive officers, subject to very narrow exemptions for certain types of loans made in the course of the company's business.

[2] Available at https://pcaobus.org/Standards/Auditing/Pages/AS2201.aspx.

- Whistleblower protection	SOX protects employees of public companies (and, after the Dodd-Frank Act, certain of public companies' subsidiaries and affiliates) against retaliation for providing information to supervisors, government agencies or Congress regarding violations of securities laws or antifraud laws.
- Audit Committee Requirements (SOX Section 301, SEC Rule 10A-3)	Prohibits national securities exchanges from listing securities of companies that do not comply with certain requirements relating to the company's audit committee.
- Independence	Subject to certain exceptions, each member of the audit committee must be independent, meaning it may not: • Accept, directly or indirectly, any consulting, advisory or other compensatory fee from the company or its subsidiaries (other than board and committee fees); or • Be an "affiliated person" of the company or its subsidiaries (as defined in Rule 10A-3);
- Responsibility for external audit	Audit committee must be directly responsible for the appointment, compensation, retention and oversight of the work of auditors engaged (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the company, and each auditor must report directly to the audit committee.
- Complaint process	Audit committee must establish procedures for: • The receipt, retention, and treatment of complaints received by the company regarding accounting, internal accounting controls, or auditing matters; and • The confidential, anonymous submission by employees of the company of concerns regarding questionable accounting or auditing matters.
- Advisers	Audit committee must have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.
- Funding	SOX requires companies provide adequate funding to audit committee for hiring of auditor(s) and adviser(s), and for administrative costs.
- Financial expert	Company must disclose on Form 10-K whether its audit committee has at least one "audit committee financial expert" meeting certain criteria, and, if not, why it does not have such an expert on its audit committee.

NASDAQ GLOBAL MARKET ("NASDAQ") LISTING REQUIREMENTS	**A REIT that is listed on NASDAQ must meet a number of requirements relating to, among other things, market capitalization, number of beneficial owners, share price and governance issues.**
- Initial Listing Requirements[3]	In order to be listed on NASDAQ, a REIT must meet requirements regarding number of shareholders, liquidity, pre-tax earnings, share price and market maker requirements.
- Ongoing Listing Requirements[4]	In order to remain listed on NASDAQ, a REIT must continuously satisfy certain share price, liquidity and earnings requirements.
- Governance Requirements	A REIT listed on NASDAQ must meet the following governance requirements.
- Independent Directors (Rule 5605(b)(1)	A REIT must have a majority of independent directors. Even if a director is independent under NASDAQ rules, the REIT's board must determine that there is no other relationship between a purportedly independent director and the company that would preclude that director from acting as an independent director.
- Meetings of Independent Directors (Rule	At least twice a year, a REIT must hold a meeting of independent directors that is attended only by independent directors. This meeting can be held in conjunction with a meeting of directors generally.
- Compensation Committee (Rule 5605(d))	A committee of independent directors must set the compensation of chief executive officer and other executive officers.
- Nominating Committee (Rule 5605(e))	A committee of independent directors must be responsible for nominating director candidates for the REIT's board.
- Audit Committee (Rule 5605(c))	A NASDAQ listed REIT is required to have an audit committee consisting solely of independent directors who have the requisite financial experience and expertise. The audit committee must comply with the requirements of SOX and, particularly, Rule 10A-3.
- Other Requirements	
- Annual Meeting (Rule 5620(a))	A NASDAQ listed REIT is required to hold an annual meeting no more than one year after the end of its fiscal year.
- Quorum (Rule 5620(c))	A quorum of shares for purposes of any meeting must mean not less than 33 1/3% of outstanding shares of voting stock.
- Voting Rights (Rule 5640)	The voting rights of existing shareholders cannot be disparately reduced or restricted through any corporate action or issuance.
- Conflict of interest review (Rule 5630)	A NASDAQ listed REIT must conduct a review of all related party transactions for potential conflict of interest situations. The review must be conducted by the audit committee or another independent body of the board.

[3] Available at https://listingcenter.nasdaq.com/assets/initialguide.pdf.
[4] Available at https://listingcenter.nasdaq.com/assets/continuedguide.pdf.

- Shareholder approval of security issuances (Rule 5635)	A NASDAQ listed REIT must obtain shareholder approval of certain securities issuances, including: (i) an issuance that will result in a change of control, (ii) private placements where the issuance (and shares sold by insiders and affiliates) equals 20% or more of the pre-transaction outstanding shares and where the issuance is made at a price less than the greater of book and market value, (iii) issuances related to equity compensation, and (iv) shares issued pursuant to an acquisition where the issuance equals 20% or more of the pre-transaction outstanding shares, or 5% or more of the pre-transaction outstanding shares when a related party has a 5% or greater interest in the acquisition target.
- Code of Conduct (Rule 5610)	A NASDAQ listed REIT must adopt a code of conduct applicable to all officers, directors and employees. The code of conduct must satisfy the requirements of a code of ethics under SOX.
NYSE LISTING REQUIREMENTS [5]	**A REIT that is listed on NYSE must meet a number of requirements relating to, among other things, market capitalization, number of beneficial owners, share price and governance issues. These requirements are similar to those applicable to NASDAQ listed REITs.**
- Initial Listing Requirements	In order to be listed on NYSE, a REIT must meet requirements regarding number of shareholders. liquidity, pre-tax earnings, share price and market maker requirements.
- Ongoing Listing Requirements	In order to remain listed on NYSE, a REIT must continuously satisfy certain share price, liquidity and earnings requirements.
- Governance Requirements (Section 303A of the NYSE	A REIT listed on NYSE must meet the following governance requirements.
- Independent Directors	A NYSE listed REIT must have a majority of independent directors. Even if a director is independent under NYSE rules, the REIT's board must determine that there is no other relationship between a purportedly independent director and the company that would preclude that director from acting as an independent director.
- Meetings of Independent Directors	At least once a year, a REIT must hold a regularly scheduled meeting of independent directors that is attended only by independent directors.
- Compensation Committee	A committee of independent directors must set the compensation of chief executive officer and other executive officers.
- Nominating/Corporate Governance Committee	A committee of independent directors must be responsible for nominating director candidates for the REIT's board and for developing and recommending corporate governance principles applicable to the REIT.

[5] Available at https://www.nyse.com/publicdocs/nyse/listing/NYSE_Initial_Listing_Standards_Summary.pdf.

- Audit Committee	An NYSE listed REIT is required to have an audit committee with at least three members consisting solely of independent directors who have the requisite financial experience and expertise. The audit committee must comply with the requirements of SOX and, particularly, Rule 10A-3.
- Internal Audit Function	An NYSE listed REIT must develop an internal audit function to provide management and the audit committee with an assessment of risk management and systems of internal control
- Corporate governance guidelines	An NYSE listed REIT must adopt and disclose corporate governance guidelines. These may include guidelines on topics including director qualifications and responsibilities, responsibilities of key board committees, director compensation, director orientation and continuing education, management succession planning, and a policy for evaluation of the board's or its committees' performance.
- Code of Business Conduct	An NYSE listed REIT must adopt and disclose a code of business conduct applicable to directors, officers and employees addressing conflicts of interest, corporate opportunities, confidentiality, fair dealing, protection and proper use of assets, compliance with laws rules and regulations and reporting of any illegal or unethical behavior. The code should constitute a code of ethics under SOX. The REIT must disclose any waivers to provisions of the code for directors and executive officers.
- Annual CEO Certification	The CEO of an NYSE listed REIT must certify each year that he or she is not aware of any violation of the NYSE governance requirements.
SECURITIES ACT OF 1933 (THE "1933 ACT")[6]	**Publicly traded mREITs are subject to a number of requirements under the 1933 Act, including the registration requirements of Section 5, strict liability for misstatements in a registration statement set forth in Section 11, and the anti-fraud provision of Section 17.**
- Section 5: Registration of securities on Form S-11	In conducting a public offering of its shares, an entity electing to operate as a REIT must register the offer and sale of its shares to the public under the 1933 Act, using SEC Form S-11.[7] Form S-11 is specifically designed for the registration under the 1933 Act of (i) securities issued by a REIT, as defined in Section 856 of the Internal Revenue Code, or (ii) securities issued by other issuers whose business is primarily that of acquiring and holding for investment real estate.

[6] 15 U.S.C. § 77a et seq.

[7] Available at https://www.sec.gov/about/forms/forms-11.pdf.

- Part 1 of Form S-11(prospectus)[8]	The SEC's Form S-11 requires a REIT to provide a wide range of information about the company and the offering, including, among other things:
	
	• Summary. An introductory plain English summary of the information presented by the issuer in the full Form S-11 (Item 3), including:
	
	  • name, address and telephone number of general partner and names of persons making investment decisions
	  • if distributions are an investment objective, the estimated maximum time between closing and first distribution
	  • properties to be purchased or statement that properties have not been identified
	  • depreciation method to be used
	  • maximum leverage as a whole and on individual properties, if different
	
	• Risk factors. A discussion of specific risks applicable to the REIT and the offering, including tax risks, with cross references to additional discussion, when applicable.
	
	• Basic disclosures regarding the REIT and its personnel
	
	  • *Basic information and terms of governing instruments*. Basic identifying information, state and form of organization, term of REIT, a description of provisions of governing instrument dealing with annual or other meetings of security holders, and, if the REIT was organized within 5 years, the name of all promoters and any positions or offices with the issuer held by such promoters (Item 11)
	
	  • *Directors and Executive Officers*. Information regarding each director, executive officer and certain significant employees, including, among other things, each such person's name, age, principal occupation and employment for the last five years and any familial relationship between that person and any other director or executive officer.
	
	• Disclosures regarding REIT operation and activities
	
	  • *Investment policies*. A description of the principles and procedures the issuer will employ in the acquisition of assets, including policies regarding the following types of investments, whether the policy may be changed without a vote of security holders, the percentage of assets that may be invested in any one type of investment, any leverage used, and any limitations on concentration in a single issuer:
	
	  • Investments in real estate or interests in real estate
	  • Investments in real estate mortgages

[8] In addition to the items listed on the Form S-11, additional guidance about the types of information required on the Form is set forth in the SEC's Industry Guide No. 5: Preparation of registration statements relating to interests in real estate limited partnerships, available at http://www.sec.gov/about/forms/secforms.htm.

	• Investments in persons primarily engaged in real estate activities • Investments in other securities (Item 13) • *Certain other policies*. A description of the REIT's policies with regard to the following types of transactions, and the extent to which it has engaged in these during the past three years, or anticipates doing so: • Issuing senior securities • Borrowing money • Making loans to other persons • Investing in securities of other issuers for purpose of exerting control • Underwriting securities of other issuers • Engaging in the purchaser and sale of investments • Offering securities in exchange for property • Repurchasing or reacquiring the issuer's own shares or other securities • Making annual or other reports to security holders (Item 12) • *Descriptions of real estate*. Description of any materially important real estate properties currently held by the REIT or intended to be acquired by or leased to the REIT or its subsidiaries, along with additional information about the real estate holding and the REIT's plan for its use (Item 14) • *Operating data regarding holdings*. Certain information regarding materially important improved property held by the REIT, including, among other things, occupancy rate, principle provisions of tenant leases, average effective annual rent for last five years, and information regarding expiration of leases (Item 15) • *Management and Custody of Investments*. Description of arrangements made or proposed to be made regarding management of the REIT's real estate assets or the purchase, sale and servicing of mortgages for the issuer, and information regarding investment advisory services or services related to the foregoing performed for the REIT by affiliated persons (Item 24) • *Tax treatment of issuer and security holders*. Description of the material aspects of the REIT's tax treatment under federal tax law and tax treatment of the REIT's investors with respect to distributions, among other things (Item 16) • *Executive compensation*. A description of the compensation of the REIT's key executives and directors; description must include all types of compensation (such as pension benefits, incentive plans, awards of stock or other securities, etc.) as well as an analysis of the plans under which such compensation packages or benefits were awarded (Item 22).

	Financial Disclosures
	
	• *Selected Financial Data*. In comparative columnar form, selected financial information ("**Selected Financial Data**") for each of the last five fiscal years of the REIT (or for the life of the registrant and its predecessors, if less), and any additional fiscal years necessary to keep the information from being misleading (Item 9). Selected Financial Data includes, as applicable:
	
	  • net sales or operating revenues; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock (including long-term debt, capital leases, and redeemable preferred stock; and cash dividends declared per common share
	  • Any additional information that would enhance an understanding of and highlight trends in the REIT's financial condition and results of operations
	  • A brief description of factors that materially affect the comparability of the information reflected in selected financial data (such as accounting changes, business combinations or dispositions of business operations)
	  • A discussion any material that might cause the data presented not to be indicative of the issuer's future financial condition or results of operations
	
	• *MD&A.* A discussion of the REIT's financial condition, changes in financial condition and results of operations, including its liquidity, capital resources, results of operations, off-balance sheet arrangements, certain contractual obligations (in tabular form) and other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations (Item 10) ("**MD&A Disclosure**"). This MD&A Disclosure can relate to the REIT as a whole or, where the issuer deems appropriate for an understanding of its business, relevant, reportable segments or other subdivisions of the REIT
	
	Disclosures regarding the offering
	
	• *Description of Securities.* A description of the securities being offered and the material terms applicable to the securities, which vary depending on whether the REIT is offering debt or equity (Item 18)
	
	• *Offering price*. A discussion of the how the offering price was determined and the factors influencing the price (Item 4)
	
	• *Plan of distribution.* A discussion of the plan of distribution (Item 7), including:
	
	  • The terms of agreements with underwriter(s) (including the compensation of the underwriters) and a discussion of certain aspects of the relationship between the REIT, its affiliates and the underwriter(s)
	  • any distribution of securities offered other than through the underwriter(s) and certain terms regarding and details of such other distributions

	• *Use of proceeds*. A description of the intended use of the proceeds of the offering or, if the REIT has no current specific plan for the proceeds, the principal reasons for the offering (Item 8)
	
	• *Past experience and performance of sponsor*. A narrative summary of the track record or prior performance of programs sponsored by the sponsor and certain of its affiliates, as well as certain information in tabular form.
	
	• *Fees, costs and compensation*. A tabular summary showing estimates of public offering expenses (both organizational and sales), amount available for investment, non-recurring initial investment fees, prepaid items and financing fees, cash down payments, reserves and acquisitions fees, and maximum and minimum proceeds of the offering.
	
	• *Dilution.* A discussion of any dilution investors will suffer as a result of insiders' pre-offering holdings purchased at a lower price (Item 5), including a comparison of the public contribution under the proposed public offering and the effective cash contribution of insiders
	
	• *Selling shareholders*. If the offering includes secondary sales by current security holders, information about those security holders, their relationship with the company, and a description of their holdings both pre- and post- offering (Item 6)
	
	<u>Disclosures regarding conflicts and policies addressing conflicts (where not addressed elsewhere)</u>
	
	• *Holdings of insiders*. A description of the securities of the issue held by certain large investors and management
	
	• *Related Person Transactions*. Information regarding:
	
	  • any transaction, since the beginning of the REIT's last fiscal year, or any currently proposed transaction, in which the REIT was or is to be a participant and the amount involved exceeds $ 120,000, and in which any related person had or will have a direct or indirect material interest (a "**Related Person Transaction**")
	
	  • policies and procedures for the review, approval, or ratification of any Related Person Transaction (Item 23)

	• *Policies regarding insiders' activities*. A description of any provisions of the REIT's constituent documents or a description of any other policies limiting any director, officer, security holder or affiliate, or any other person in his, her or its ability to:
	
	  • Have any direct or indirect pecuniary interest in investments to be acquired or disposed of by the REIT or its subsidiaries or in any transaction to which the REIT or any of its subsidiaries is a party, or
	  • Engage for their own account in business activities of the types conducted or to be conducted by the REIT and its subsidiaries (Item 25)
	
	• *Disclosure and Discussion of Conflicts of Interest*. A description of each potential transaction which could result in a conflict between the interests of investors and those of the manager/sponsor and its affiliates, and the proposed method of dealing with the conflict
	
	• *Limitation of liability*. A description of the principal provisions of the governing instruments or any contract or arrangement with respect to limitations on the liability of REIT affiliated persons or any directors, officers or employees
	
	• *Indemnification*. A description of any indemnification of REIT affiliated persons or any directors, officers or employees
	
	• *Quantitative and Qualitative Market Risk Factors*. An analysis of quantitative and qualitative market risk and its effect on the mREIT ("**Market Risk Factors**"); these Market Risk Factors are intended to clarify the REIT's exposures to market risk associated with activities in derivative financial instruments, other financial instruments, and derivative commodity instruments. Market risks include interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market rate or price risks (*e.g.*, equity price risk) (Item 30)

- Part 2 of Form S-11	This portion of the S-11 is not part of the prospectus, but is filed with the SEC and available on the EDGAR system. Part 2 of the S-11 requires a REIT to provide the following additional information and documents:
	
	• *Information on recent sales*. Name of person or class of persons to whom securities have been sold (and the consideration paid by such person(s)) within the past six months or are to be sold by the issuer or any selling shareholder at a price different from that offered to the public in the offering
	
	• *Indemnification*. A statement regarding the general effect of any statute, charter provisions, by-laws, contract or other arrangements under which any controlling persons, director or officer of the REIT is insured or indemnified by the REIT
	
	• *Exhibits*. A wide range of items must be filed as exhibits to Part 2 of Form S-11 including, to the extent applicable:
	
	  • underwriting agreement
	  • plan of acquisition, reorganization, arrangement, liquidation or succession (if applicable)
	  • articles of incorporation or trust agreement
	  • current by-laws (if applicable)
	  • all instruments defining the rights of holders of the equity or debt securities being registered
	  • opinion of counsel as to the legality of the securities being registered (stating whether, when sold, the securities, if equity securities, will be legally issued, fully paid and non-assessable, and, if debt securities, whether they will be binding obligations of the registrant
	  • opinion of counsel on tax treatment as a REIT
	  • any voting trust agreement
	  • "material contacts" meaning, with exceptions, (i) every contract not made in the ordinary course of business which is material to the REIT and is to be performed in whole or in part at or after the filing of the registration statement or was entered into not more than two years before such filing and (ii) certain management agreements and compensation plans
	  • a statement setting forth in reasonable detail the computation of per share earnings
	  • a statement setting forth in reasonable detail the computation of any ratio of earnings to fixed charges, any ratio of earnings to combined fixed charges and preferred stock dividends or any other ratios which appear in the registration statement
	  • the REIT's annual report to security holders for its last fiscal year, its Form 10-Q and Form 10- QSB (if specifically incorporated by reference in the prospectus) or its quarterly report to security holders, if all or a portion thereof is incorporated by reference in the filing
	  • if applicable, a letter from the independent accountant which acknowledges awareness of the use in a registration statement of a report on unaudited interim financial information
	  • filed or which is not filed with the SEC or which the REIT otherwise wishes to include

	• if applicable, a letter from the registrant's former independent accountant regarding its concurrence or disagreement with the statements made by the registrant in the current report concerning the resignation or dismissal as the registrant's principal accountant • a list of all the REIT's subsidiaries (subject to exceptions) and the jurisdiction of formation of each • any consents of experts and counsel • a copy of the relevant power of attorney to the extent any name is signed to the registration statement or report pursuant to a power of attorney • any document incorporated by reference in the Form S-11 that is not otherwise required to be filed by Item 601 of Regulation S-K
- Private Rights of Action	A REIT is subject to liability for material misstatements and omissions in its registration statement under (among other provisions) Sections 11 and 12 of the 1933 Act, and Section 10(b) of the 1934 Act.
- Section 17	A REIT also is subject to the anti-fraud provisions of Section 17 of the 1933 Act, which the SEC may enforce (but for which no private right of action exists); the SEC need only show negligence, rather than scienter, in connection with an action under Section 17.
1934 ACT (excluding the portions of SOX discussed above)[9]	**Publicly Traded mREITs are required to register under the 1934 Act, which subjects them to detailed disclosure obligations, reporting requirements and substantive restrictions.**
- Independent Auditor Requirement (Rule 10A) / PCAOB registration requirement (SOX)	The auditor to a publicly traded REIT, must be independent (as defined in Rule 2-1 under Regulation S-X). SOX also requires auditors to public companies to be registered with and subject to inspection by the PCAOB.
- Reporting Requirements	As a company registered under the 1934 Act, REITs are subject to periodic and other ongoing reporting requirements under the 1934 Act. These reports are the subject of review and comment on a period basis by the staff of the Division of Corporation Finance.
- Annual Form 10-K (Section 13 or 15(d))	REITs registered under the 1934 Act must file with the SEC an annual filing after the end of each fiscal year on Form 10-K which is made available to the public through the EDGAR system. The required deadline for filing a Form 10-K after the end of a fiscal year depends upon the "filer" status of the reporting company. Form 10-K is broken into four parts and requires the following information, among other things:

[9] 15 U.S.C. § 78a et seq.

	Part 1 • *Risk Factors*. The REIT must provide the same types of risk factors required under Form S-11, described above (both Form S-11 and Form 10-K reference the same provision of Regulation S-K in describing the required risk factors) (Item 1A) • *Unresolved Comments*. Certain REITs (based on what type of "filer" the REIT is under the 1934 Act) that have received comments from the staff regarding their periodic or current reports must disclose any unresolved comments in the Form 10-K that it believes are material and discuss the substance of the comment (Item 1B) • *Legal Proceedings*. A REIT must disclose and describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business of the REIT, to which the REIT or any of its subsidiaries is a party or of which any of their property is the subject. The description must include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. A REIT must include similar information as to any such proceedings known to be contemplated by governmental authorities (Item 3) Part 2 • *Market Information*. A REIT must disclose and discuss information about the market for its securities, the number of holders of each class of its securities, the frequency and amount of any dividends the REIT has declared, performance of the REIT's securities, and information about securities available for issuance under equity compensation plans (Item 5) • *Use of Proceeds*. A REIT must include a discussion on its use of proceeds from the REIT's public offerings, including an update on any ongoing or terminated offerings and a discussion of how the net proceeds have been applied. • *Selected Financial Data*. A REIT must disclose in the Form 10-K the same Selected Financial Data that was required under the Form S-11 (both Form S-11 and Form 10-K reference the same provision of Regulation S-K in describing the required Selected Financial Data) (Item 6) • *MD&A*. A REIT must include in its Form 10-K the MD&A discussion described above and included in the Form S-11 (Item 7) • *Market Risk Factors*. A REIT must include in its Form 10-K the same type of Market Risk Factors as are described above in connection with the Form S-11 (both Form S-11 and Form 10-K reference the same provision of Regulation S-K in describing the required Market Risk Factors) (Item 7A)

	• *Financial Statements. Interim Financial statements*. A REIT must provide financial statements in prepared in accordance with Regulation S-X (Item 8)
	
	• *Change in accountants*. In the event a REIT changes its accountants, it must disclose material disagreements with the accountant regarding any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure and whether the new accountant dealt with the matter differently than the previous accountant apparently would have concluded was required (Item 9)
	
	• *Effectiveness of disclosure controls and procedures*. A REIT must disclose the conclusions of the REIT's principal executive and principal financial officers, or persons performing similar functions, regarding the effectiveness of the REIT's Disclosure Controls, adopted pursuant to SOX (as defined below), as of the end of the period covered by the report, based on the evaluation of these controls and procedures required by SOX (Item 9A)
	
	• *Report on internal controls over financial reporting*. A REIT must provide the Internal Control Report required by SOX (discussed below) and the Internal Control Attestation from the company's independent public accountant, as well as a description of any change in the REIT's Internal Controls (as defined below) that occurred during the REIT's fourth fiscal quarter that has materially affected, or is reasonably likely to materially affect, the REIT's Internal Controls (Item 9A)
	
	• *8-K Information*. The REIT must disclose any facts or information that would be required to be disclosed in a Form 8-K (discussed below) during the fourth quarter of the fiscal year covered by the Form 10-K (Item 9B)
	
	<u>Part 3</u>
	
	• *Directors, Executive Officers and Corporate Governance*.
	
	  • *Biographical Information*. A REIT must disclose Biographical Information (as defined above) about its officers, directors and key employees (in certain cases)
	
	  • *Section 16(a) Information*. A REIT must disclose failures of its Covered Persons (as defined below in connection with Section 16 reporting) to file a Form 3, 4 or 5
	
	  • *Code of Ethics*. A REIT must disclose whether it has adopted a Code of Ethics (as defined below in the SOX discussion) and, if not, why it has not adopted a Code of Ethics (Item 10)

	• *Executive Compensation*. A REIT must provide the same Executive Compensation Disclosures as required under the Form S-11, discussed above (both Form S-11 and Form 10-K reference the same provision of Regulation S-K in describing the required Executive Compensation Disclosures) (Item 11)
	
	• *Ownership by Insiders and Related Matters*. A REIT must provide:
	
	  • Information regarding the holdings of company securities by large beneficial owners, directors and management, and
	
	  • The main features of any equity compensation plan adopted without the approval of shareholders, as well as information, in table form, regarding (i) the number of securities to be issued upon the exercise of outstanding options, warrants and rights, (ii) the weighted-average exercise price of the outstanding options, warrants and rights; and, (iii) other than securities to be issued upon the exercise of the outstanding options, warrants and rights, the number of securities remaining available for future issuance under the plan (Item 12)
	
	• *Related Person Transactions and Director Independence*. A REIT must:
	
	  • Disclose any Related Person Transactions (as defined above) since the beginning of the previous fiscal year, as well as policies and procedures for the review, approval, or ratification of any Related Person Transaction, and
	
	  • Name all directors that are independent under standards governing independence generally and that are members of a committee or sub-committee and are independent under the relevant standard for such sub-unit of the board (such as the audit committee; see SOX discussion below)
	
	• *Accountant and Audit Information*. A REIT must provide extensive information about its relationship with and fees paid to its accountant, as well as policies for monitoring that relationship.
	
	• *Exhibits*. The REIT must provide a range of exhibits to each Form 10-K (or must incorporate those exhibits by reference with a cross reference, if permitted), as set forth in Item 601 of Regulation S-K.

- Quarterly Form 10-Qs (Section 13 or 15(d))	Publicly traded mREITs must file quarterly 10-Qs within 45 days from the end of the relevant calendar quarter, or within 40 days in the case or large accelerated filers and accelerated filers. The Form 10-Q is divided into two parts, and generally requires the following types of information: <u>Part 1</u> • *Interim Financial statements*. A REIT must provide interim financial statements in prepared accordance with Rule 10-01 of Regulation S-X (Item 1)

	• *MD&A Disclosure*. A REIT must include in its Form 10-Q the MD&A discussion described above and included in the Form S-11 and Form 10-Q (Item 2) • *Market Risk Factors*. A REIT must include in its Form 10-Q the same type of Market Risk Factors as are described above in connection with the Form S-11 and Form 10-K (Form S-11, Form 10-K and Form 10-Q reference the same provision of Regulation S-K in describing the required Market Risk Factors) (Item 3) • *Effectiveness of disclosure controls and procedures*. A REIT must disclose the conclusions of the REIT's principal executive and principal financial officers, or persons performing similar functions, regarding the effectiveness of the REIT's Disclosure Controls, adopted pursuant to SOX, as of the end of the period covered by the report, based on the evaluation of these controls and procedures required by SOX (Item 4) <u>Part 2</u> • *Legal Proceedings*. A REIT must disclose and describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business of the REIT, to which the REIT or any of its subsidiaries is a party or of which any of their property is the subject. The description must include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. A REIT must include similar information as to any such proceedings known to be contemplated by governmental authorities (Item 1) • *Risk Factors*. The REIT must provide any updates to the risk factors applicable to the REIT since disclosure of risk factors in its previous Form 10-K. (Item 1A) • *Securities offerings*. The REIT must provide information regarding any securities sold or repurchased during the quarter to which the Form 10-Q corresponds. • *Defaults and Changes in Dividends*. The REIT must discuss and provide information regarding any material default in the payment of principal, interest, a sinking or purchase fund installment, or any other material default not cured within 30 days, with respect to any indebtedness of the REIT or any of its significant subsidiaries exceeding 5% of the total assets of the REIT and its consolidated subsidiaries. The REIT must also discuss and provide information regarding any material arrearage in the payment of dividends that has occurred or any other material delinquency not cured within 30 days with respect to any class of preferred stock of the REIT which is registered or which ranks prior to any class of registered securities, or with respect to any class of preferred stock of any significant subsidiary of the REIT

	• *8-K Information*. The REIT must disclose any facts or information that would be required to be disclosed in a Form 8-K (discussed below) during the fourth quarter of the fiscal year covered by the Form 10-K (Item 9B) • *Exhibits*. The REIT must provide a range of exhibits to each Form 10-Q (or must incorporate those exhibits by reference with a cross reference, if permitted), as set forth in Item 601 of Regulation S-K.
- 8-K (Section 13 or 15(d))	8-K is used to report important current events that shareholders should know about. An obligation to file Form 8-K within 4 days is triggered by certain enumerated events and developments related to financial, auditing corporate governance and trading matters. Form 8-K also specifies that certain material events and changes related to asset-backed securities trigger this obligation. Additionally, as noted in Section 8 of the form, a REIT may choose to file a Form 8-K for any other event or development that it believes is material to investors.
- Section 16	Each officer, director and beneficial owner of more than 10% of any class of the securities of a REIT registered under the 1934 Act (a "Covered Person") is subject to the filing requirements and substantive restrictions on short-swing trading profits of Section 16.
- Short swing profit restrictions (Section 16(b))	Under Section 16(b) of the 1934 Act, any profits resulting from a Covered Person's combination of purchases and sales or sales and purchases of the REIT's stock (or derivatives, as described above) that occur within six months must be turned over to the REIT. The method of calculating when profit or loss has occurred, as well as the amount of profit and loss, is complex. This rule is a prophylactic measure intended to prevent the misuse of inside information.
- Prohibition on Covered Person short sales (Section 16(c))	Section 16(c) of the 1934 Act prohibits Covered Persons from shorting REIT securities, even if the Covered Person owns the REIT securities and is shorting "against the box."
- Section 10(b) anti-fraud provision (and the rules thereunder)	REITs are subject to the anti-fraud provisions of Section 10(b) and the rules thereunder.
- Proxy Rules (Section 14 and the rules thereunder)	As a company registered under the 1934 Act, a REIT is subject to the rules governing the solicitation of proxies and the requirements applicable to proxy solicitation materials.
- Proxy Solicitation Materials	A company subject to the proxy rules cannot solicit a proxy from investors unless it includes a proxy statement containing the information in Schedule 14A.
- Pre-filing of Proxy Materials	Any proxy solicitation materials must be filed with the SEC at least 10 calendar days prior to dissemination of the materials, unless the solicitation relates solely to certain routine matters such as election of directors or approval or certification of accountants.

- Filing of Proxy Materials	A definitive proxy statement, form of proxy and all other soliciting materials, in the same form as the materials sent to security holders, must be filed with the SEC no later than the date they are first sent or given to security holders.
- Anti-fraud Provisions of Proxy Rules (Section 14(e) and Rule 14a-9)	REITs are subject to the anti-fraud provisions of Section 14(e) and Rule 14a-9 in conducting a proxy solicitation.
- Section 13(d) and (g)	Investors in public REITs are subject to the reporting obligations of Sections 13(d) and (g) under the 1934 Act, which require any person or group of persons who directly or indirectly acquires or has beneficial ownership of more than 5% of a class of an issuer's **s**ecurities (the "5% threshold") to report the transaction to the SEC.
- Tender Offer Rules	As public companies, REITs are subject to the SEC's rules governing both third party and issuer tender offers.
- Regulation FD	Public REITs are subject to the selective disclosure regime of Regulation FD. Thus, whenever a REIT, or any person acting on its behalf, discloses any material nonpublic information regarding the REIT or its securities to any Reg FD Covered Person (as defined below), the REIT must make public disclosure of that information: • Simultaneously, in the case of an intentional disclosure (meaning the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and nonpublic); and • Promptly, in the case of a non-intentional disclosure. **Reg FD Covered Person**" means, generally, • a broker or dealer, or a person associated with a broker or dealer as defined in the 1934 Act • an investment adviser, an institutional investment manager required to file a Form 13F with the SEC for the most recent quarter ended prior to the date of the disclosure, or a person associated with either of the foregoing • an investment company or entity that would be an investment company but for Section 3(c)(1) or Section 3(c)(7) of the 1940 Act, or an affiliated person of either of the foregoing • a holder of the REIT's securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the REIT's securities on the basis of the information.

INTERNAL REVENUE CODE PROVISIONS APPLICABLE TO REITS[10]	
- General requirements	For an entity to be treated as a REIT under the Code: • it must be managed by one or more trustees or directors • the beneficial ownership of the entity must be evidenced by transferable shares or transferable certificates of beneficial interest • it must otherwise be taxable as a corporation (but for its election to be taxed as a REIT) • it cannot be a financial institution referred to in Section 582(c)(5) of the Code (such as a bank, mutual savings bank, building and loan association or other savings institution) or an insurance company • the beneficial ownership of the entity must be held by 100 or more persons for all years after the first taxable year for which a REIT election is made • it must not be "closely held" for all years after the first taxable year for which a REIT election is made • it must meet two annual gross income tests and two quarterly asset tests, and • it must satisfy a dividend distribution requirement. The "closely held" requirement, the asset and income tests and the dividend distribution requirements are discussed below.
- Closely Held Requirement (Section 856(h)(1)(B) of the Code)	Generally, five or fewer individuals cannot own more than 50% of a REIT's shares during the last half of the REIT's taxable year. For purposes of this requirement, attribution rules generally apply under which shares held by a corporation, trust, or partnership are deemed to be owned proportionately by the shareholders, beneficiaries, or partners, as applicable.

[10] 26 U.S.C. § 856.

- Two income tests (Sections 856(c)(2) and (3) of the Code)	The two annual gross income tests are a 75% test (the "**75% Income Test**") and a 95% test (the "**95% Income Test**"). <u>The 75% Income Test</u> At least 75% of a REIT's gross income during a year (excluding income from "prohibited transactions" as defined below and income from qualified REIT hedging transactions) must come from real estate related sources, such as, among other things: • rents from real property • interests on obligations secured by mortgages on real property or on interests in real property, including interest on certain types of mortgage-backed securities • gains from sale or disposition of real property, including interests in real property or interests in mortgages on real property, other than in a prohibited transaction • dividends or distributions from shares of other REITs • abatements and refunds of taxes on real property • amounts received or accrued for entering into agreements to make loans secured by mortgages or to purchase or lease real property (such as commitment fees) "**Prohibited transaction**" means the sale of property held by the REIT primarily for sale to customers in the ordinary course of business. A 100% income tax is applied to net income from prohibited transactions. <u>The 95% Income Test</u> At least 95% of a REIT's gross income during a year must be derived from items that qualify under the 75% Income Test or from dividends or interest from any source, which need not be related to real estate activities.

- Two Asset Tests (Section 856(c)(4) of the Code)	The two quarterly asset tests are a 75% test (the "**75% Asset Test**") and a 25% test (the "**25% Asset Test**"). The 75% Asset Test On the last day of each calendar quarter of a REIT's taxable year, at least 75% of its assets must constitute "real estate assets," cash and cash items (including receivables arising in the ordinary course of the REIT's business) and government securities. "**Real estate assets**" generally means real property, including interests in real property and interests in mortgages on real property, interests in other REITs and REMICs and property (which need not be a real estate asset) attributable to the temporary investment of new capital. 25% Asset Test On the last day of each calendar quarter of a REIT's taxable year no more than 25% of the value of the REIT's total assets can be represented by securities other than government securities and securities, such as certain types of mortgage-backed securities, which are treated as real estate assets. Shares of stock in wholly owned "qualified REIT subsidiaries" are not treated as securities; a qualified REIT subsidiary is ignored as an entity separate from the parent REIT. Also, (i) no more than 25% of the value of a REIT's total assets can constitute securities issued by one or more taxable REIT subsidiaries; and, except in the case of a taxable REIT subsidiary or a qualified REIT subsidiary, (ii)(A) the securities of a single issuer cannot represent more than 5% of the value of a REIT's total assets, (B) a REIT cannot own more than 10% of the outstanding voting securities of any one issuer , and (C)other than in the case of certain straight debt securities, a REIT cannot own more than 10% of the total value of the outstanding securities of any one issuer..
- Dividend Distribution Requirements (Section 857(a)(1))	To maintain its status as a REIT under the Code, a REIT's deduction for dividends paid must equal at least (1) the sum of (a) 90% of the real estate investment trust's taxable income for the taxable year (determined without deducting for dividends paid and excluding any net capital gain) and (b) 90% of the excess of the net income from foreclosed property over the tax imposed on that income, minus (2) any "excess noncash income" (as defined in the Code). A failure to meet the distribution requirement for a taxable year will cause the REIT to be taxed as a C corporation for that year.

KEY ACCOUNTING STANDARDS AND SEC DISCLOSURE REGULATIONS APPLICABLE TO MREITS	**All REITs, including mREITs, which are registered under the 1934 Act, are required to prepare and disseminate audited financial statements prepared in accordance with generally accepted accounting principles ("GAAP"), as described above. In preparing GAAP compliant financial statements, mREITs must comply with standards issued by the SEC and the Financial Accounting Standards Board ("FASB"), a self-regulatory organization (SRO) recognized by the SEC. Key FASB standards and SEC disclosure guidance relevant to mREITs are described below.**
- FASB Accounting Standards Codification (ASC) 820 Fair Value Measurement	In preparing financial statements in accordance with GAAP, REITs, like all companies seeking a GAAP-compliant audit, must ascertain a "fair value" for various financial assets and financial instruments. ASC 820 applies to other Financial Accounting Standards that require a fair value measurement, subject to certain limitations. ASC 820 defines fair value, establishes a framework for measuring fair value in GAAP and requires disclosures about fair value measurements. Generally, ASC 820 defines "fair value" as "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date." ASC 820 describes the meaning of the terms used in this general definition and the assumptions and determinations that must be made in applying the definition.
- FASB ASC 860 Transfers and Servicing	Securitization is an important part of the real estate industry; because REITs are significant participants in the real estate industry, the accounting pronouncements governing securitization are important to the operation and activities of REITs. ASC 860 contains accounting guidance for the transfers and servicing of financial assets (formerly included in FAS 166 and previously in FAS 140). ASC 860 significantly affects the way in which originators account for transfers in securitizations by imposes requirements on when the transfer of an interest in a special purpose vehicle can truly be treated as a sale, and, therefore, affects the accounting for securitized mortgage loans generally. ASC 860 also includes the guidance from FAS 166 that eliminated (1) the exceptions for qualifying special-purpose entities from the consolidation guidance of FASB Interpretation No. 46, as amended ("**FIN 46(R)**"), which many banks used frequently in securitizations, and (2) the provisions of FAS 140 that permitted sale accounting for certain mortgage securitizations when a transferor has not surrendered control over the transferred financial assets.
- FASB ASC 810 Consolidation	FASB ASC 810 Consolidation includes the guidance from FAS 167, which amended FIN 46(R). The guidance from FAS 167 also has a significant effect on accounting in the context of securitizations. FAS 167 changes how an enterprise determines when an entity that is insufficiently capitalized or is not controlled through voting, or similar rights, should be consolidated. FAS 167 requires an enterprise to assess on an ongoing basis whether its interest in another entity makes that entity a "variable interest entity," such that the enterprise must include in its financial statements the assets, liabilities and activities of the entity. FAS 167 amends FIN 46(R) in a number of important ways with significant effects on originators of securitizations, special purpose vehicles and holders of interests in special purpose vehicles used for securitization.
- FASB ASC 948 Financial Services – Mortgage Banking	Provides accounting guidance for certain mortgage banking activities that may apply to mREITs
- FASB ASC 310 – Receivables	Includes accounting guidance for nonrefundable fees and costs associated with originating or acquiring loans.

SEC STAFF ACCOUNTING BULLETINS	Staff Accounting Bulletins ("SABs") reflect the SEC staff's views regarding accounting-related disclosure practices. They represent interpretations and policies followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the federal securities laws. In preparing disclosure materials and financial statements under the 1933 Act and 1934 Act, REITs must take into account SABs.
SEC STAFF COMPLIANCE & DISCLOSURE INTERPRETATIONS ("C&DIS")	Certain SEC staff C&DIs affect the preparation and presentation of financial statements, particularly those issued by the Division of Corporation Finance, including, without limitation, the C&DI regarding Non-GAAP Financial Measures and those regarding disclosures on specific forms and schedules under the 1933 Act and 1934 Act.