I. Public company structure vs. private equity fund model

A. REITs Generally [1]

Real estate investment trusts (REITs) are entities that satisfy certain U.S. federal income tax requirements and elect to be taxed as REITs. In general, the tax requirements ensure that the REITs (a) are passive investors in real estate (and related assets), (b) do not retain their earnings, and (c) are beneficially owned by a diversified stockholder base.

REITs can be publicly traded or privately held as long as they satisfy the organization and operational requirements for REIT status, as described below. The three general types of REITs are:

- publicly traded REITs
- public non-traded REITs and
- private REITs.

The Internal Revenue Code sets forth the requirements for each type of REIT.

B. Public REITs[2]

REITs become public companies in the same way as non-REITs, although there are additional disclosure obligations for REITs and compliance with certain rules regarding roll-ups may be required. Public REITs (both traded and non-traded) are subject to reporting and other requirements of public companies under the federal securities laws. Publicly traded REITs are subject to additional regulatory requirements of their exchanges, such as the NYSE. Some REITs also may be able to take advantage of more lenient requirements available to emerging growth companies under the Jumpstart Our Business Startups (JOBS) Act of 2012.

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[1] Matthew Hudson. Funds: Private Equity, Hedge and All Core Structures, (John Wiley & Sons) (2014).
[2] Nilene R. Evans et al., Frequently Asked Questions About Real Estate Investment Trusts, Morrison& Foerster LLP (2013), *available at* http://www.mofo.com/files/Uploads/Images/FAQ_REIT.pdf.

1. Publicly Traded REITs[3]

Publicly traded REITs must comply with securities laws and regulations that apply to all public companies, as well as the disclosure requirements of Form S-11 and SEC Industry Guide 5 of the Securities Act of 1933, as amended (the "Securities Act"), and in some cases, Section 14(h) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").

Securities and Exchange Commission ("SEC") rules specify the disclosures to be made in a prospectus for a public offering of securities, as well as for ongoing disclosures once an issuer becomes a public company. For most initial public offerings by a U.S. domestic entity, Form S-1 sets forth the required disclosures. REITs, however, must use Form S-11 and include information responsive to SEC Industry Guide 5. In addition to the same kinds of disclosures required by Form S-1, Form S-11 sets forth the following additional disclosure requirements:

- Investment policies regarding investments in real estate, mortgages and other real estate interests based on the REIT issuer's prior experience in real estate;

- Location, general character and other material information regarding all material real properties held or intended to be acquired by or leased to the issuer or its subsidiaries ("material" is defined in this case as any property whose book value is 10% or more of the total assets of the consolidated issuer or the gross revenues from which is at least 10% of aggregate gross revenues of the consolidated issuer for the last fiscal year);

- Operating data of each improved property, including the occupancy rate, number of tenants and principal lease provisions; and

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[3] *Id.*

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- Arrangements with respect to the management of the REIT's real estate and the purchase and sale of mortgages for the REIT issuer.

SEC Industry Guide 5 contains the following additional requirements:

- Disclose risks relating to (i) REIT management's lack of experience or lack of success in real estate investments, (ii) uncertainty if a material portion of the offering proceeds is not committed to specified properties, and (iii) real estate limited partnership offerings in general;

- Disclose the general partner's or sponsor's prior experience in real estate; and

- Disclose risks associated with specified properties, such as competitive factors, environmental regulation, rent control regulation, fuel or energy requirements and regulations.

REITs listed on a securities exchange are generally subject to the same rules as non-REITs. For a REIT that does not have a three-year operating history, however, the NYSE typically will permit listing if the REIT has at least $60 million in stockholders' equity, including the funds raised in any IPO related to the listing.

Publicly traded REITs have historically exhibited price volatility in correlation with broader equity markets.[4] Similarly, distribution yields paid by traded REITs vary with the movement in stock price in addition to the value of the assets held by the REIT itself.[5]

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[4] Dr. Randy Anderson, Investing in Non-Traded REITs (Investment Program Association) (June, 2013), *available at:* http://www.ipa.com/?wpdmact=process&did=MzQzLmhvdGxpbms=.
[5] *Id.*

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2. Public Non-Traded REITs[6]

Public non-traded REITs have offered securities to the public pursuant to the Securities Act and are subject to the ongoing disclosure and other obligations under the Exchange Act, but are not listed on a stock exchange. According to Blue Vault Partners, which tracks non-traded REITs, there were 69 non-traded REITs with an estimated $78.60 billion in assets as of June 30, 2013. Through the first eight months of 2014, non-traded REITs had raised in excess of $10 billion.[7] Shares of non-traded REITs generally are sold directly or through brokers and their prices are set by the REIT sponsor or may be based on net asset value as determined by independent valuation firms. Shares in non-traded REITs are available only to qualified investors, and the success of a non-traded REIT is measured by total return, including cash distributions during the lifespan of the REIT and any appreciation of principal realized as the result of a liquidity event.[8] Up-front fees for non-traded REITs range from 12% to 15%.[9]

As described above, exchange-traded REITs and non-traded REITs are both publicly registered, but shares of non-traded REITs are not listed and do not trade on a national securities exchange. As a result, shares of non-traded REITs typically have limited secondary markets and generally are significantly less liquid than exchange-traded REIT securities. As a result, investors can typically expect to hold shares in a non-traded REIT for the lifespan of the REIT, which is typically seven to ten years.[10] The life cycle of a non-traded REIT consists of four distinct phases: capital raising, property acquisition, asset management, and disposition (which may include a decision to list the REIT on a

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[6] Evans et al., Frequently Asked Questions About Real Estate Investment Trusts.
[7] Robbie Whelan, Report Finds Non-Traded REITs Trail Publicly Listed Peers, The Wall Street Journal (Sep. 4, 2014), *available at:* http://blogs.wsj.com/developments/2014/09/04/report-finds-non-traded-reits-trail-publicly-listed-peers/.
[8] Dr. Randy Anderson, Investing in Non-Traded REITs.
[9] *Id.*
[10] *Id.*

public exchange).[11] Non-traded REITs are obligated to execute an exit strategy to return invested capital and any appreciation to investors, which also poses a unique risk.[12]

Because of the limited market in securities of non-traded REITs, the industry standard in the past was to set the initial offering price at $10 per share and to maintain it at that level, sometimes for many years, irrespective of the operating performance of the issuer. The Financial Industry Regulatory Authority, Inc. ("FINRA") also recently proposed revisions to Rule 2340 regarding per share estimated valuations for unlisted REITs, which were approved by the SEC on October 10, 2014, as described below.[13] In some cases, non-traded REITs may have limited annual redemption programs to provide some liquidity to investors. Such redemption programs are costly to investors in that they always are at a discount from the purchase price, and they also are typically limited by the number of shares that may be redeemed and may be suspended if market conditions dictate.[14]

The SEC, FINRA and others have scrutinized non-traded REITs because of allegedly high upfront and continuing fees paid to the sponsor and its affiliates, as well as the fact that the share price (which is based on the net asset value calculated by the REIT sponsor) generally does not change even with changes in the issuer's operating results or related matters, such as calculation of dividend yields and appreciation.[15] For example, some non-traded REITs have paid dividends out of proceeds from issuing debt without correspondingly decreasing net asset values in their holdings, giving an illusion of a stable price.[16] Critics of non-

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[11] *Id.*
[12] *Id.*
[13] SEC Release No. 34-73339; File No. SR-FINRA -2014-006 (October 10, 2014).
[14] *Id.*
[15] *See also* FINRA Regulatory Notice 09-09 (Feb., 2009), *available at*: http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117795.pdf.
[16] Tim Husson, PhD et. al., A Primer on Non-Traded REITs and Other Alternative Real Estate Investments (Securities Litigation & Consulting Group) (2012), *available at:*

traded REITs claim that positioning them as investments that don't have volatility is also misleading to investors because they are not traded and therefore volatility cannot be measured.[17] Additionally, it is not uncommon for non-traded REITs to have conflicts of interest due to commonalities of key individuals and entities.[18]

In October 2011, FINRA issued an investor alert[19] to warn investors of certain risks of publicly registered non-traded REITs, including:

- Distributions are not guaranteed and may exceed operating cash flow (the REIT's board of directors, in its discretion in exercising its fiduciary duties, decides whether to pay distributions and the amount of any distribution);
- Investors may suffer adverse tax consequences resulting from distributions and REIT status;
- There is no public trading market, which results in illiquidity and valuation complexities;
- Early redemption features often are restrictive and may be expensive;
- Fees may be significant;
- REIT's properties may not be specified; and
- Possible lack of diversification.

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http://www.slcg.com/pdf/workingpapers/Non%20Traded%20REITs%20White%20Paper.pdf.

[17] Robbie Whelan, Non-Traded REITs Trail Publicly Listed Peers.

[18] Tim Husson, PhD et. al., A Primer on Non-Traded REITs and Other Alternative Real Estate Investments.

[19] Public Non-Traded REITs—Perform a Careful Review Before Investing, (Financial Industry Regulatory Authority, Inc.), *available at:* http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/REITS/P124232.

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In August 2012, FINRA reissued an alert to inform investors of the features and risks of publicly registered non-traded REITs.[20] FINRA also provides investors with tips to deal with these risks. On July 16, 2013, the SEC also issued guidance regarding disclosures by non-traded REITs on distributions, dilution, redemptions, estimated value per share or net asset value, supplemental information, compensation to sponsor, and prior performance, among other things.[21]

C. Private REITs[22]

Like other companies, REITs may issue equity securities without registration under the Securities Act if there is an available exemption from registration, such as Section 4(a)(2) of the Securities Act (often in accordance with Regulation D) or Regulation S or Rule 144A under the Securities Act.

Unlike public REITs, private REITs are subject to restrictions on how many shareholders they may have, although they must have at least 100 holders. Section 12(g) of the Exchange Act requires a company to register under the Exchange Act and be subject to its periodic reporting and other obligations if it has at least 2,000 shareholders of record or 500 shareholders who are not accredited investors, and the Investment Company Act requires registration of investment companies that have more than 100 holders who are not qualified purchasers unless another exemption is available. In addition, the equity securities of private REITs are not traded on public stock exchanges, and generally have less liquidity than those of publicly traded REITs.

To satisfy ownership and holder requirements, a typical private REIT structure has one or a handful of shareholders who may own

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[20] *Id.*

[21] SEC Staff Observations Regarding Disclosures of Non-Traded Real Estate Investment Trusts, CF Disclosure Guidance: Topic No. 6 (July 16, 2013), *available at*: http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic6.htm.

[22] Evans et al., Frequently Asked Questions About Real Estate Investment Trusts.

all the common stock, along with a special class of preferred shares owned by at least 100 holders in order to satisfy the requirement of having at least 100 shareholders. A private REIT also must satisfy the "not closely held" requirement. In most cases, however, the "not closely held" requirement is not an issue because the holders of shares in a private REIT will be corporations or partnerships with many investors. The "not closely held" rule is applied by looking through those entities to their investors. In some cases, special considerations may apply when direct or indirect shareholders are tax-exempt.

Alternatively, some companies provide services to help a private REIT fulfill the 100 shareholder requirement. Such companies also may provide administrative service relating to ownership and holder requirements, including maintaining the shareholder base, creating and maintaining shareholder records and keeping records of the ownership changes.

II. Recent SEC staff guidance and areas of focus, including implications for capital raise transactions

A. Valuation Rules Change for Non-Listed REITs

On October 10, 2014, the SEC approved a FINRA-proposed revision to NASD Rule 2340 regarding per share estimated valuations for unlisted REITs.[23] FINRA first submitted the proposed rule changes in January 2014. The rule will become effective 18 months after the approval date (April 10, 2016). Key rule changes include:[24]

- Firms must include a per-share estimated value for an unlisted direct participation program or a REIT on customer statements using one of two methodologies presumed to be reliable: (1) net investment methodology (reflecting the "net investment" disclosed in the issuer's

[23] SEC Release No. 34-73339; File No. SR-FINRA-2014-006 (October 10, 2014).
[24] "SEC Valuation Rule Changes for Non-Listed REITS," Duff & Phelps (October 2014).

most recent periodic or current report, based on the amount available for investment percentage shown in the offering prospectus), or (2) appraised value methodology (consisting of the appraised valuation disclosed in the issuer's most recent periodic or current report). Under the net investment methodology, firms also have to spell out to customers in a statement that part of their distribution includes a return of capital, and any distribution that represents a return of capital reduces the estimated per-share value shown on the customer's account statement.

- Non-listed REIT issuers must include general disclosures: (1) there is no liquid market for the REIT securities; (2) even if a shareholder is able to sell the security, the price received may be less than the per share estimated value provided in the customer statement; (3) what methodology was used to calculate the value reported, and (4) that the value reported was based on a reliable methodology.

- Net investment may not be used for more than two years plus 150 days after breaking escrow. Firms may not include an over distribution deduction in net investment methodology.

- Independent valuation methodology requires the firm to retain a third-party, independent valuation expert to perform or provide material assistance in the valuation beginning at a minimum of two years plus 150 days after breaking escrow. Firms also must update the valuation annually thereafter.

- The independent valuation must be accompanied by a written opinion or report by the issuer delivered annually to the broker-dealer that explains the scope of the review, the methodology used and the basis for the values reported.

B. SEC Guidance on Real Estate Acquisitions

On July 16, 2013, the SEC's Division of Corporation Finance posted an updated Financial Reporting Manual on the SEC's website. The Financial Reporting Manual reflects numerous substantive updates to the Staff's guidance on REIT disclosure issues related to real estate acquisitions. Effective immediately upon release, the Manual guidance includes updates regarding the application of Rule 3-14 of Regulation S-X, as well as confirmation that Rule 3-14 financials are not triggered at the time of a shelf takedown. The SEC also stated that in some cases, a REIT issuer may use pro forma assets to measure the significance of an acquisition for Rule 3-14 purposes.

C. SEC Guidance on Public Non-Listed REIT Disclosures

The SEC's Division of Corporation Finance also released guidance on non-traded REIT disclosures on July 16, 2013.[25] The guidance encourages non-traded REITs to streamline prior performance disclosure so that potential investors can accurately evaluate the business characteristics and economic position of the non-traded REIT. The Staff explains that prior performance disclosure should reflect "an appropriate balance between the benefits of providing investors useful prior performance disclosure and the risk that voluminous and complex prior performance disclosure may obscure other material information about the registrant."

According to the guidance, a non-traded REIT is required to disclose its ability to maintain or increase its historical distribution yield and the source of funds used to cover a shortfall if the cash flow cannot cover distributions. Newly formed non-traded REITs that have no distribution history should disclose estimated distribution yield, share values, and assets values in SEC filings, as well as the basis for their estimates. In addition, non-traded REITs should disclose any potential dilution that could affect the value of

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[25]SEC Staff Observations Regarding Disclosures of Non-Traded Real Estate Investment Trusts, CF Disclosure Guidance: Topic No. 6 (July 16, 2013), *available at*: http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic6.htm.

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shares and explain the dilutive impact of aggregate distributions paid in excess of earnings.

The guidance also indicates that non-traded REITs should disclose information about their redemption programs. Because investments in non-traded REITs are generally illiquid, many non-traded REITS provide investors with limited liquidity through their redemption programs. But such programs always have restrictions on the number of the shares that could be redeemed per year and the source of funds that could be used for redemptions. Therefore, the guidance asks the non-traded REITs to summarize their redemption history with a description of the number of requests honored, the number of requests deferred and the source of funds used to honor these request.

D. SEC Guidance on Conflict Minerals May Impact REITs

In May 2013, the SEC provided guidance on the new conflict minerals disclosure requirements that apply to public companies if conflict minerals are necessary to the production of a product that the company manufactures.[26] The guidance clarifies that the equipment used to provide services and retained by or returned to the company or intended to be abandoned by the customer following the term of the service is not "product" under the rule. This interpretation supports the conclusion that the development or redevelopment of real estate assets that are primarily held for lease are not subject to the conflict mineral disclosure requirements.

E. SEC Accounting Guidance Affecting REITS

In August 2013, the SEC published amendments to its Financial Reporting Manual to clarify and modify certain requirements related to the filling of financial statements by REITs.[27] The

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[26] Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions, *available at* http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm.
[27] Financial Reporting Manual, *available at* http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.shtml.

amendments generally reduced the required financial statement disclosures. Key provisions include:

- "*Significant in the Aggregate*" *Acquisitions*: For purposes of evaluating individually insignificant acquisitions, REITs need only file the acquisitions since the latest audited year-end, not the acquisitions made during the last audited fiscal year.[28]

- *Triple Net Lease Properties*: If a REIT acquires a property subject to a triple net lease and such property represents a significant portion of the REIT's assets, the REIT must provide full audited financial statements of the lessee, co-lessee or guarantor. The term "significant portion" means a property exceeds 20% of the REIT's total assets as of the most recent balance sheet date. [29]

- *Shelf Takedowns*: The SEC clarified that Rule 3-14 financial statements are not triggered at the time of shelf takedown.[30]

- *Equity Investment*: If a REIT acquires an equity interest in a pre-existing legal entity that holds only real estate under lease/debt and the acquisition is significant, then the REIT needs to provide Rule 3-14 financial statements. If the pre-existing legal entity engages in other activities, however, then Rule 3-05 financial statements are required if the acquisition is significant.[31]

- *Real Estate Operations*: For purposes of Rule 3-14, "real estate operations" refer only to properties that generate revenue solely through leasing.[32]

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[28] *Id.* § 2320. 2.
[29] *Id.* § 2340.
[30] *Id.* § 13110.2.
[31] *Id.* § 2305.3.
[32] *Id.* § 2305.2.

- *Pro Forma Financials*: The guidance permits REITs to use pro forma financial information to calculate the significance of a real estate acquisition made after the filling of a Form 8-K that includes historical audited financial statements for a prior significant acquisition.[33]

- *Rental History Less Than Nine Months*: The staff will accept unaudited financial statement if the REIT acquired operating property that has rental history of more than three months but less than nine months.[34] No financial statements are required if the leasing history is less than three month.[35]

- *Blind Pool Offering*: In determining significance for property acquired during the distribution period of a blind pool offering, the guidance is revised to allow a REIT to compare its investment in the property to total assets as of the date of the acquisition plus the proceeds (net of commissions) it expects to raise in the registered offering over the next 12 months.[36]

E. SEC Areas of Focus

Based on a review of various publicly available SEC comment letters issued to REITs regarding their SEC periodic and other filings during 2014, the Staff most frequently sought additional disclosure or explanation concerning:

- Use of non-GAAP financial measures;
- Related party/affiliate transactions;
- Leasing activity generally, including a comparison of rates on new or renewed leases to prior rates;
- MD&A disclosure regarding trends and recent market impacts, including the interest rate environment; and

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[33] *Id.* § 2025.3.
[34] *Id.* § 2330.8.
[35] *Id.* § 2330.10.
[36] *Id*. § 2305.5.

- Assumptions used in arriving at certain financial statement amounts, including depreciation, amortization, interest expense, asset management fees, deferred financing costs, cash, accounts payable and accrued expenses, and due to affiliates.

F. Auditing Estimates and Fair Value Measurements

On October 31, 2014, the National Association of Real Estate Investment Trusts ("NAREIT") issued a letter in response to the solicitation for public comment by the Public Company Accounting Oversight Board ("PCAOB") with respect to the Staff Consultation Paper*, Auditing Estimates and Fair Value Measurements, August 19, 2014* (the "Staff Paper").[37]

NAREIT suggests that a change to the existing audit framework for auditing estimates is not proper for two reasons. First, a single standard for auditing estimates and fair value measurement will not work because of the multiple iterations of GAAP accounting estimates. Second, the change will expand audit work without increasing the reliability or credibility of the audited financial statements. In NAREIT's view, the PCAOB fails to specify the underlying problem that would warrant a change in auditing standards. While NAREIT admits that there are shortcomings in the audit work surrounding estimates, it argues that those shortcomings could be caused by "auditor shortcomings relative to existing standards rather than problems with the auditing standards themselves."

NAREIT also objects to expanding the scope of audit work where a third party specialist or pricing service is used. In particular, NAREIT disagrees with the requirement that the auditor needs to test and evaluate the information or audit evidence obtained from third-party sources as if it were produced by the company. NAREIT argues that neither management of the company nor the

[37] A Letter to the PCAOB on the Staff Consultation Paper Auditing Estimates and Fair Value Measurements, National Association of Real Estate Investment Trusts, *available at* http://www.reit.com/nareit/policy-issues/financial-standards.

external auditor is able to evaluate third parties' processes and controls because (1) the third party specialists and pricing services are independent from the company, and (2) the estimates are based on many subjective factors that are not testable. In general, companies hire third parties to provide estimates because (a) the company does not have the time or expertise to perform the work, and/or (b) estimates of the third parties are more reliable and objective than the internal estimates. Requiring company management and the auditor to evaluate the third parties' processes and controls is not feasible, given the reasons above.

Finally, preparers, auditors and investors all understand that the estimates are not accurate and are based on the management's "knowledge and experience about past and current events and its assumptions about conditions it expects to exist and courses of action it expects to take." The auditor's responsibility is to evaluate the reasonableness of the estimates, rather than to determine whether the estimates are correct or wrong.

NAREIT instead urges PCAOB, when considering changes to existing auditing framework, to use a targeted approach to address specific sections of audit guidance, rather than wholesale changes to the entire audit framework.

III. From private to public: considerations in planning an IPO

Like most companies, REITs must make legal and operational changes before moving forward with an initial public offering ("IPO") to sell securities to the public. The majority of corporate governance policies and procedures, federal securities law requirements and securities exchange requirements must be in place when the IPO registration statement is filed, as described below.

A. Why Go Public?

The primary reasons that REITs move from private to public companies include:

- Ability to raise money to expand operations

- Deleverage financing on existing property portfolios
- May increase market value
- Enables REIT to acquire other companies/properties
- Helps attract and retain employees
- Allows founders/shareholders to diversify personal holdings and provides exit strategy
- Provides liquidity for existing owners/shareholders
- Typically enhances REIT's reputation and business profile in the market

B. Disadvantages of Going Public

If a REIT has another way to raise capital, it may opt not to go public. An IPO is very expensive and there is no guarantee it will be successful. Typical IPO expenses include legal fees and accounting fees, filing fees, travel costs, printing costs and underwriters' discount and commission, among other things. The IPO process is also very disruptive to the REIT's day-to-day business.

Once the REIT is public, it will be subject to scrutiny from securities regulators and investors, particularly in the areas of executive compensation and related party transactions, among other things. Public REITs also must comply with securities law reporting requirements, which can be time-consuming and expensive. Public company officers and directors face increased liability risks for false or misleading statements in securities filings.

Another disadvantage is the potential for loss of some control. Ownership limitation provisions are common for REITs in order to protect REIT tax status. These provisions reduce the likelihood of hostile transactions; however, there is still a reduction in management’s control when operating in the public market.

Public REIT directors and officers also face a loss of privacy. The registration statement and subsequent reports require disclosure of

many facets of the REIT's business, operations, and finances that may never before have been known outside the company. Sensitive Information will be available to competitors, customers, and employees, such as: (1) director and officer compensation; (2) security holdings of officers, directors, and major shareholders; (3) details of transactions, including filing of material contracts; and (4) extensive financial information (such as financial position, operating revenue, operating costs, net operating income, net income, segment data, related-party transactions, borrowings, cash flows, major tenants/customers, and assessment of internal controls).

Public companies also face constant pressure to increase earnings. Many investors have a short-term focus, hoping to sell stock quickly if the price increases. Shareholders expect steady growth in areas such as leasing, profits, market share and innovation. Management is under constant pressure to balance short-term demands for growth with strategies that achieve long-term results. If management is unable to meet analysts' expectations of short-term earnings, the marketplace's long-term valuation of the REIT will be diminished.

Directors and officers of public companies must balance this earnings pressure, along with the risk of takeover attempts by unhappy investors or rivals.

C. Key Issues to Consider With Advisers

When considering an IPO, a REIT's directors and officers should discuss the following types of key issues with their legal, financial and accounting advisers:

- Does our REIT have an attractive earnings and growth track record?
- Does our REIT have the necessary financial processes, internal controls and financial statement integrity to support Sarbanes-Oxley reporting obligations?
- When and on which exchange to launch the IPO?

- What are the relevant regulatory requirements for an IPO on the desired exchange and can the REIT meet them?
- Will the REIT need to change its corporate structure, its capital structure and/or its management team?
- What are the chances of a successful IPO?
- Will selling stockholders be allowed to participate in the IPO and/or in the over-allotment option?
- Will the REIT qualify as an emerging growth company (EGC)?
- If the REIT is an EGC, what exemptions and scaled disclosure accommodations may apply?

D. Key Participants in the IPO Process

The REIT's Board of Directors. SEC rules require that a majority of the REIT's directors sign the registration statement, so directors must be involved in the IPO process from start to finish. If directors are not involved, they may be unable to establish a due diligence defense and may have liability for material errors or omissions in the registration statement. In general, non-employee directors typically are not involved in the working group sessions, but they do review and comment on interim drafts of the registration statement. The REIT board typically forms a pricing committee comprised of one or two directors who have the authority to negotiate with the managing underwriters to establish the terms and conditions of the offering (including pricing terms). In preparing the REIT for an IPO, REIT directors and officers should review current board composition with its attorneys and investment bankers to ensure that the REIT complies with all rules and regulations applicable to public companies.

Investment Banker/ Lead Manager. The lead investment bank manages the IPO process and coordinates with the REIT's other advisers. Depending on the terms of its engagement, the lead investment bank typically assumes some or all of the roles below. The lead manager(s) makes the major decisions regarding the structure, allocation, timing and pricing of the offering, the drafting of the registration statement and the timing and content of the road show. The managing underwriters may coordinate a larger

group of investment banks (referred to as the "underwriting syndicate") to help distribute the stock and bear the risk of the offering. The lead manager and co-managers are the main members of the underwriting syndicate involved in the IPO preparation process, drafting sessions and the road show.

Underwriter. The lead investment bank and one or more other underwriters typically underwrite the offering. The majority of IPOs are made with firm commitment underwriters. In a firm commitment offering, the REIT sells the IPO shares to the underwriters at a discount to the price at which the shares are sold to the public. The underwriters then either sell the stock directly or through other members of a selling group, to investors who subscribe to the offering.

Financial Adviser. Financial advisers work with REIT directors and officers on, among other things, the timing of the IPO, the structure of the offering(s), the REIT's capital structure, the REIT's board composition, corporate governance, the marketing strategy and process, valuation and pricing issues and any arrangements with principal shareholder(s).

Stabilizing Manager. If an offering includes stabilization (a process in which the lead underwriter supports the market price of the securities in order to prevent or slow down a decline in the price of the securities), the lead underwriter typically assists in that process. To accomplish stabilization, the lead underwriter generally buys and sells securities in the open market, normally by means of an over-allocation of the securities. Stabilization creates the impression that there is demand for the securities at a particular price or at various prices. This practice promotes orderly operation of the market, helps reduce investor anxiety, meets demand and counteracts short selling

Counsel for the Company and the Selling Stockholders.
If there are no conflicts of interest, the same law firm may act as securities counsel for the company and any selling stockholders. In many cases, however, selling stockholders require separate legal counsel, especially when there are conflicts of interest between the

REIT and selling stockholder. The REIT's law firm has numerous responsibilities throughout the IPO process, including:

- If necessary, reorganizing the structure of the REIT.
- Coordinating and conducting due diligence.
- Drafting the registration statement and ensuring compliance with the requirements of the securities laws.
- Filing or confidentially submitting the registration statement with the SEC.
- Coordinating, drafting and filing responses to SEC comments on the registration statement.
- Preparing and submitting the securities exchange listing application.
- Negotiating the underwriting agreement.
- Assisting the company with implementing the necessary corporate governance structures.
- Advising the board of directors of their role throughout the IPO process.
- Advising the company about the many on-going reporting and other disclosure obligations imposed by the securities laws and the securities exchanges.

Counsel for the Underwriters. Underwriters' counsel is responsible for:

- Assisting the underwriters in satisfying their due diligence obligations.
- Participating in the drafting process.
- Obtaining FINRA clearance of the underwriting arrangements.
- Complying with applicable state securities laws and regulations.
- Drafting and negotiating the underwriting agreement.
- Coordinating the closing with the REIT's counsel.

Company's Auditors. The REIT's auditors ensure that the financial information included in the registration statement complies with the SEC financial disclosure requirements, which in some cases differ from and are more extensive than US GAAP. Other auditor responsibilities include:

- Providing a comfort letter to the underwriters and the REIT's board of directors confirming that the financial statements contained in the registration statement comply with accounting requirements, and tying the tables and other financial information included in the registration statement to the financial statements and other financial records of the REIT.
- Participating in the due diligence process relating to the financial statements, pro forma financial information (if any) and management's discussion and analysis.
- Identifying significant accounting issues that may warrant a pre-filing conference with the SEC.

Public Relations Consultants. A public relations (PR) firm can play a valuable role in the success of an IPO. By generating positive publicity for the REIT prior to the IPO, PR consultants can help ensure that potential investors are made aware of the REIT and its properties. However, this process must be carefully monitored by legal counsel to avoid violations of the SEC rules. After the IPO, ongoing press interest can help sustain awareness of the REIT and liquidity in its shares.

E. Preparing for the IPO

1. Corporate Structure

Most public REITs are organized in Maryland as either a corporation of a trust because Maryland has a special REIT law and is perceived as business-friendly to REITs. Non-REIT public companies, however, typically incorporate in Delaware if they are preparing for an IPO.

2. Timing Issues

REIT IPOs typically take somewhat longer than other types of IPOs. In general, the IPO process may take between three to eight months, depending on, among other things, the REIT's readiness to go public, market conditions, the time necessary to complete

required audits of the financial statements for property acquisitions, and the availability of the information that must be disclosed in the registration statement. For a successful, orderly IPO, begin planning and acting like a public company at least one and possibly two years before the desired IPO launch date.

3. Corporate Documents

REIT management and legal advisers must examine the company's organizational documents to determine whether they are suitable for a public company, focusing on the following:

- Remove any anachronistic provisions, such as pre-emptive rights and rights of first refusal
- Remove any restrictions on stock transfers
- Delete all unneeded provisions (close corporations)
- Alter special voting provisions, class votes
- Consider anti-takeover provisions (supermajority voting for certain transactions; remove action by written consent or ability to call special meeting; put poison pill in place; ability for board to amend the bylaws without stockholder approval)

4. Corporate Governance

Public companies generally must comply with each provision of the Sarbanes-Oxley Act of 2002. In order to prepare for the IPO, private companies should consider complying with the following provisions of the Sarbanes-Oxley Act several months before launching the IPO:

Internal controls. The public REIT's management (CEO and CFO) must provide certain certifications in SEC periodic filings regarding the company’s internal controls. In addition, on an annual basis, the external auditor is required to audit the company’s internal controls over financial reporting. To prepare for the applicable public company internal controls certifications, REIT management should establish, document, and monitor compliance of executing internal controls at least one year before launching the IPO, if possible.

Board committees. Public companies must have independent audit committee members, including one qualified as a financial expert, as well as compensation committees and nominating committees. REITs considering an IPO should form such committees in advance, prepare committee charters and make certain the members of the committees meet SEC and securities exchange requirements.

Board of directors/trustees. The majority of the directors/trustees must be truly independent, as defined by SEC and securities exchange rules. In addition, at least one board member must have a financial background—either as a CPA or as a previous CFO. The Board also must meet in executive session. A REIT board considering an IPO should evaluate its board membership criteria, policies and practices to ensure that it is functioning as a public company board before launching the IPO.

Independent auditor. A public company's external auditor cannot provide certain nonaudit services, including but not limited to internal audit, legal, and valuation services. In addition, permissible nonaudit services must be preapproved by the audit committee. REITs should evaluate their existing relationship with outside audit firms to ensure compliance and SEC and exchange rules.

Code of ethics. Public companies must establish a code of ethics. A REIT planning an IPO should establish a code of ethics in advance to demonstrate diligence and compliance in preventing corporate misconduct.

Loans to executives. Public companies cannot extend or maintain credit in the form of personal loans to or for any director or executive officer. A REIT planning an IPO should adopt policies to make prohibit such loan arrangements.

5. Director and Officer Insurance/Indemnification

Private company D&O insurance typically does not cover securities offerings, such as an IPO. A REIT considering an IPO

should review its D&O coverage and seek additional coverage for the public offering. In addition, the company should consider a separate form of officer and director indemnification agreement providing that the company will indemnify each of its directors and officers to the fullest extent permitted by its organizational documents and the laws of the state of its incorporation.

6. Management and Employees

Employment arrangements for members of management and key employees must be in a form that is suitable for a publicly listed company. In the months before the IPO, the REIT Compensation Committee should work with management on such employment agreements, as well as incentive compensation plans. Once the REIT is public, certain provisions of the federal securities laws will apply to the REIT's benefit plans. The REIT also should consider setting up an employee stock purchase plan if it has not already done so.

7. Other Corporate Matters

Banking Facilities. Any banking facilities or other financing arrangements of the REIT need to be reviewed to ensure that they are sufficient for its capital requirements as a publicly listed company (taking into account the proceeds of any new issue of shares). The underwriters may suggest that the company enter into a banking facility prior to the IPO to ensure that the company will have sufficient capital following the IPO.

Contracts. Important contracts need to be reviewed to ensure that there are no change of control or other provisions which would be triggered by the IPO and which could have an adverse effect on the business of the company. While conducting due diligence, company counsel should review all contracts to ensure that the company owns all relevant assets and that these are not held, for example, by stockholders. There also may be commercial arrangements to be entered into between the company and its stockholders which may not have been formalized, such as for the provision of services and the use of property.

IV. REIT Spin-offs, Conversions and Alternative Capital Structures

A. REIT Spin-offs/Separation Transactions[38]

Many companies have significant real estate holdings in connection with their businesses. While holding real estate gives a company control over critical operation assets, it also ties up capital and often requires significant management attention. A potential way to tax-efficiently unlock the value of a company's real estate is to separate the company into a REIT that owns the company's real estate and a separate operating company. Contractual relationships including leases can be set up between the operating entity and the REIT to allow the business to continue to utilize the real estate on acceptable terms.

REIT separation transactions can be complicated, especially as a result of the requirements for tax-free treatment and the requirements that the resulting entity must satisfy in order to enjoy treatment as a REIT. To ensure tax-free treatment, the following criteria must be satisfied, among others:

- There must be a non-tax business purpose for the separation.
- Following the spin-off, the REIT has to be involved in an "active trade or business."
- The REIT may not have any earnings or profits from the period prior to becoming a REIT.

Examples of recent REIT separation transactions include: Penn National Gaming's creation of the first-ever casino REIT in 2013; Simon Property's separation of its strip center and smaller enclosed malls businesses into a REIT in 2014; and CBS's 2014 IPO of CBS Outdoor Americas.

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[38] Gregory E. Ostling and David K. Lam, Spin Offs: The Decision to Separate and Considerations for the Board (Practical Law The Journal: Transactions & Business) (Sep. 2014).

A parent (non-REIT) entity that owns a corporate subsidiary that could qualify as a REIT can distribute or spin-off the subsidiary stock to its shareholders.[39] After the distribution or spin-off, the subsidiary can elect to be taxed as a REIT.[40] At least one publicly traded company announced plans to convert to REIT status by spinning off its real estate assets into a publicly traded REIT and at least one other announced plans to explore the possibility of creating a REIT for its real estate assets.[41]

To qualify as a tax-free transaction, a spin-off must meet the following general rules:

- Both parent and the subsidiary must have been engaged in an active trade or business before and after the spin-off ("active business requirement");
- There must be an independent business reason for the spin-off ("business purposes requirement").

Even if the spin-off would otherwise meet the requirements of a tax-free transaction, it should be noted that to qualify as a REIT after a spin-off the subsidiary must disgorge earnings and profits from the time period prior to becoming a REIT. Furthermore, a corporate tax on the excess of the value of assets over their tax basis will apply to the REIT if its sells assets within ten years of the REIT conversion.

If the general spin-off requirements above are met, a REIT can also spin-off a subsidiary to its shareholders in a tax-free transaction. However, the incentive to qualify the spin-off as tax-

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[39] Micah W. Bloomfield and Mayer Greenberg, REITs: Overview (Practical Law Company, Practice Note) (2011).
[40] *Id.*
[41] Cecile Daurat and Caitlin McCabe, Windstream to Spin Off Networks Into Publicly Traded REIT, Bloomberg (Jul. 29, 2014), *available at:* http://www.bloomberg.com/news/2014-07-29/windstream-to-spin-off-telecom-assets-into-publicly-traded-reit.html.; Sara Germano, Gym Owner Life Time Fitness Considers a REIT, The Wall Street Journal (Aug. 25, 2014), *available at:* http://online.wsj.com/articles/gym-owner-life-time-fitness-considers-a-reit-1408998441.

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free may be reduced if the parent was always a REIT, as a REIT is not subject to tax on any gain recognized in the spin-off.

B. Mergers[42]

Two separate REITS can merge in either a taxable or a tax-free transaction. If common stock in the acquiring REIT comprises the sole consideration paid in the merger, the merger will generally qualify as a tax-free. As a result, the target REIT and its shareholders would not recognize any taxable gain or loss.

A merger may still qualify as tax-free if a "substantial portion" (35% to 40%) of the consideration is payable in stock, even if the remainder of the consideration is cash. In this case, shareholders would recognize gain to the extent of the cash consideration. If the stock received does not qualify as a "substantial portion," the merger is generally a taxable event. Therefore shareholders would recognize gain on the amount of cash and the value of stock received.

REIT mergers most commonly take the following forms:

- **Target REIT into acquiror REIT**. Whether the merger is taxable or tax-free depends on the amount of the cash consideration as described above. Because the target does not survive, approval for the transaction is likely required to maintain contractual relationships and regulatory licenses.
- **Target REIT into wholly-owned subsidiary of acquiror REIT**. Whether the merger is taxable or tax-free depends on the amount of the cash consideration as described above. Approval for the transaction is likely required to maintain contractual relationships and regulatory licenses.
- **Subsidiary of acquiror REIT into target REIT**. This is a taxable transaction. At least one industry group has requested a change to the IRS guidance governing this situation, which if adopted would make this the preferred

[42] Bloomfield and Greenberg, REITs: Overview.

form of tax-free merger as it likely would not require approval to maintain the contractual relationships and regulatory licenses.

- **Merger of REITs that are in the UPREIT format**. To qualify as tax-free, the merger must be completed in two steps: (i) a merger of the REITs, and (ii) a combination of the operating partnerships. How the operating partnerships are combined depends in part on whether any unit holders object to the merger and the provisions of the operating partnership agreement governing the approval procedures for mergers or asset sales. Additionally, some unit holders may have acquired units in exchange for contributions of property, which may implicate agreements containing tax protection provisions triggering certain rights upon the disposition of property.

C. REIT conversions[43]

The number of companies pursuing conversions from a regular taxable C-corporation to a REIT structure continues to increase. A REIT conversion can improve a company's tax efficiency as well as provide additional sources of capital. Because most REITs trade at higher multiples than taxable C-corporations a conversion can also increase shareholder value.

Reasons for increased interest in REIT conversions include:

- **Tax Benefits:** Converting to a REIT could avoid corporate-level taxation on REIT earnings that are distributed to shareholders. REITs generally avoid corporation tax because they are entitled to a dividends-paid deduction and must distribute 90% of ordinary income each year. However, unlike other pass-through entities, a REIT cannot pass-through the losses to its shareholders. Additionally, dividends paid by a REIT to an individual are not eligible for the lower rate of qualifying

[43] Micah W. Bloomfield and Daniel Martinez, REIT Conversions (Practical Law The Journal: Transactions & Business) (Oct. 2014).

dividend income, and instead are treated as ordinary income.

- **Relaxed REIT Qualification Requirements:** Over the past years, the general liberalization of the rules and definitions make it feasible for non-traditional real estate companies to consider REIT conversions. For example, the Housing Act of 2008 permitted REITs to engage in a broader range of transactions through the expansion of relevant definitions. The IRS has issued private letter rulings that have broadened the types of real properties to include cold-storage warehouses, telecommunications towers, billboards, data centers, casinos and private prisons. Additionally, the IRS published a proposed regulation in May, 2014 that provides a long non-exclusive list of property that could be considered as real property, including outdoor advertising displays and transmission lines.

- **Higher Valuations for REIT Stocks:** REIT stocks trade at higher multiples than stocks of C-corporations because they provide higher rewards to shareholders due to REIT qualification rules (they must distribute annually at least 90% of their income to shareholders). Therefore, converting to a REIT typically results in meaningful increases in stock prices.

D. REIT Conversion Requirements[44]

1. Organizational and Operational Requirements for REIT Status

To convert to a REIT, a company must meet the following organizational requirements: (a) be managed by trustees or directors; (b) be beneficially owned by 100 or more persons; (c) issue transferable shares or certificates; (d) be taxable as a US corporation; (e) not be a bank or an insurance company; and (f) not be more than 50% owned by five or fewer individuals.

[44] *Id.*

Additionally, the company must satisfy the following operational requirements: (a) 75% of its gross income must be related to real estate; (b) 95% of its gross income must be passive; (c) at least 75% of the value of the REIT's assets must be real estate, cash and government securities; (d) not more than 25% of the value of the REIT's assets can be represented by securities, other than securities included in the 75% asset test; and (e) may not own more than 10% of the total vote or value of the outstanding securities of any one issuer, and not more than 5% of a REIT's assets may be invested in the securities of one issuer.

As a result of the above organizational and operational requirements, a REIT conversion always requires a reorganization that splits the business into two or more parts.

2. Purging Earnings and Profits

A previously taxable corporation with accumulated earnings and profits that converts to a REIT must distribute its accumulated earnings and profits to shareholders before the end of its first taxable year. As a result, it is common for companies undergoing a REIT conversion to declare a special "purging" dividend in the first year of its qualification as a REIT.

The allocation of earnings and profits between the spun-off company and its parent company following a REIT conversion is subject to relevant Treasury regulations. For a newly formed spin-off, the earnings and profits are usually allocated proportionally to the fair market value of the businesses that are spun off and retained. In some cases, however, the allocation is made in proportion to the net tax basis of the assets transferred and retained. Special regulations also apply if the companies are part of a consolidated group. A company's REIT election could be deemed ineffective, making it be subject to corporate-level taxation, for failing to properly purge accumulated earnings and profits.

Because a purging dividend comes out of the company's available cash, it may be difficult for a company to issue an all-cash purging dividend. An alternative approved by the IRS in a private letter

ruling is for the company to issue a taxable stock dividend, offering shareholders the right to elect to receive either cash or REIT shares, subject to a 20% limitation on the aggregate amount of cash distributed to all shareholders. Consequently, a company can purge $100 of accumulated earnings and profits by distributing $20 of cash and $80 of stock. This method of conserving cash has become common in REIT conversions.

3. Built-in Gains Tax

If a REIT acquires property from a C-corporation in a non-taxable transaction (including a non-taxable REIT conversion), the REIT may have to pay taxes on any appreciated assets with built-in gains if those assets are sold within ten years.

4. Other Issues in REIT Conversions

Companies also should consider the following additional impediments to REIT conversions:

- The organizational documents of the company electing REIT status need to be amended to restrict stock ownership to meet the REIT ownership requirements and avoid being closely-held (greater than 50% ownership by five or fewer individuals) and ensure the REIT has 100 or more shareholders. A good number of REITs are incorporated in Maryland to maximize enforceability of these provisions.[45]

- REIT organizational requirements may require that certain debt covenants be modified. Existing debt covenants may restrict dividend distributions, contrary to the requirement that REIT distribute most of its income. Furthermore, the existence of outstanding convertible debt may result in a potential violation of stock ownership requirements.

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[45] Ameek Ashok Ponda, Key REIT Conversion Considerations (Sullivan & Worcester LLP) (2013), *available at:* http://www.sandw.com/assets/htmldocuments/Key%20REIT%20Conversion.pdf.

Making necessary modifications to existing debt arrangements may result in additional expenses to the company.

- Tax considerations accompanying a REIT election often require reclassification of some property from personal property (generally depreciable over five to seven years) to real property (generally depreciable over 39 years). This may result in significant tax liability because of the resulting recapture of depreciation and amortization expenses attendant with the reclassification of real estate.

- Compliance with asset and income tests, limitations on related tenants and independent contractor requirements all require increased recordkeeping and accounting.

- Existing dividend reinvestment plans, share repurchase plans and employee equity incentives may need to be reviewed to ensure compliance with REIT requirements.

- Existing lease agreements should be reviewed to ensure that the rent received qualifies as good rent to meet the REIT income test.

- All services provided should be reviewed to ascertain if they are customary or need to be performed by a taxable REIT subsidiary ("TRS"). TRSs should be adequately compensated at arms-length pricing for services provided to avoid redetermination of rents.[46]

E. REIT Conversion Structures[47]

There are three common ways to structure a REIT conversion.

- Internal restructuring with REIT election by the parent company.

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[46] *Id.*
[47] Bloomfield and Martinez, REIT Conversions.

- Spin-off of REIT or operating subsidiary.
- Stapled ownership.

1. Internal Restructuring with REIT Election

The converting company places non-REIT assets and activities into a new subsidiary that will be classified as a TRS. The TRS will be subject to income taxes, although in its taxable income may be reduced by rent and other payments (including to third parties or to the REIT itself).

This structure is beneficial because the shareholders continue to own the entire business, including the real estate and the operating company. However, limitations on how much stock and debt can be held by the parent REIT restrict the circumstances in which this structure is feasible (the value of the securities of the TRS held by the parent REIT must be 25% or less of the assets of the parent REIT). Restrictions on rent from related parties also makes the structure feasible only for businesses deriving rent from unrelated parties, or for hotels and healthcare facilities that qualify for an exception from the related party rent rules.

2. Spin-off of REIT or Operating Subsidiary (PropCo/OpCo Structure)[48]

A second REIT conversion structure is to have the converting corporation place its assets into newly formed real estate and non-real estate subsidiaries. This can typically be accomplished tax-free, subject to some state and local transfer taxes. Either subsidiary can then be distributed or spun-off to shareholders. Following the spin-off, the real estate entity elects to be taxed as a REIT, and the operating entity ("OpCo") remains a taxable corporation. PropCo will then lease its real estate back to OpCo,

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[48] *See also* Ed Liva and Greg Williams, Unlocking the Value Hidden in Real Estate Holdings: REIT Conversion Benefits (KPMG, LLC) (2013), *available at:* http://www.kpmg.com/US/en/IssuesAndInsights/ArticlesPublications/Documents/unlocking-value-hidden-real-estate-holdings.pdf.

and OpCo will pay tax-deductible rent payments to PropCo. These payments will not be subject to corporate-level tax as long as PropCo qualifies as a REIT. The related party limitations on rent do not apply as long as OpCo and PropCo do not have a shareholder that actually or constructively owns 10% of both companies, making this an advantageous alternative to other structures. However, separating the operations from the real estate assets, may not be the most economically efficient way to use the assets.

A transaction must meet strict requirements under IRC Section 355 to qualify as a tax-free spin-off. One of the requirements of a tax-free spin-off is that both the distributing and the distributed corporations must be engaged in an active trade or business for at least five years before the distribution. Additionally, there must be a valid corporate business purpose is a prerequisite to a tax-free spin-off, even if it is not the main purpose of the transaction. Importantly, a reduction in US federal income taxes does not qualify as a valid corporate business purpose. IRS staff has informally indicated that the intention to make a REIT election may in itself be a sufficient business purpose, particularly if the REIT intends to raise equity capital.

The IRS does not issue private letter rulings on whether there is a valid corporate business purpose, and instead such determination is made upon an examination of the taxpayer's return. Therefore, it is common for a company undergoing a REIT conversion through a spin-off to request a letter from an investment bank that describes the corporate business purpose for the transaction.

3. Stapled Ownership

In the final REIT conversion structure, the REIT is partially owned by a taxable C-corporation ("Parent"), and partially owned by other shareholders who are also the owners of Parent, and shares of the REIT trade together with shares of Parent as one unit. This structure allows Parent to keep assets and operations together and be controlled by the same management team, making it advantageous to the PropCo/OpCo structure. However, the shareholders receive less than half of the benefits of REIT

ownership because more than 50% of the shares of the REIT are owned by a taxable corporation. As a result, this structure makes sense when it is important to keep assets and operations under common control, but where a TRS structure is not possible.

F. Recent Examples - Non-traditional REIT Conversions[49]

- GEO Group Inc. and Corrections Corporation of America, which own and operate correctional and detention facilities, each placed a small portion of their respective businesses not related to real estate into wholly-owned TRSs to achieve REIT status. GEO also had to divest all healthcare facility management contracts because of stringent rules pertaining to the operation and management of healthcare facilities by REITs.

- Penn National Gaming, Inc., which operates gaming and racing facilities, completed a tax-free spin-off of Gaming and Leisure Properties, Inc., which owns the real estate associated with 21 gaming facilities, and became the first REIT focused on gaming facilities.

- Iron Mountain Incorporated, a storage and information management services company received a favorable private letter ruling from the IRS on June 25, 2014 and will proceed with its REIT conversion by making a REIT election as of January 1, 2014.

- Windstream Holdings, Inc., a provider of advanced communications and technology solutions, including cloud computing and managed services, announced plans to separate its business into two publicly traded, independent companies. Windstream will reclassify its copper and fiber optic lines as real property assets and place them with other real property assets into a REIT. Windstream will retain operational control of the network assets via a long-term triple net exclusive master lease agreement.

[49] Bloomfield and Martinez, REIT Conversions.

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