Table of Contents

CHAPTER 1. AN OVERVIEW OF THE REAL ESTATE INVESTMENT TRUST INDUSTRY

I. IN GENERAL

§ 1:1 Introduction—Overview of REITs
§ 1:2 Real estate investment trust terminology
§ 1:3 —Types of REITs
§ 1:4 —Capital structure terms
§ 1:5 —REIT investment terms
§ 1:6 The real estate cycle

II. HISTORY OF REITS

§ 1:7 Prior to 1960
§ 1:8 First REIT boom
§ 1:9 Second REIT boom: FREITs
§ 1:10 —FREITs versus limited partnerships
§ 1:11 Third REIT boom
§ 1:12 —REITs use of rated debt
§ 1:13 —Positive spread investing
§ 1:14 —Divided yields, leverage and interest rates
§ 1:15 —UPREIT
§ 1:16 —DOWNREIT
§ 1:17 —Valuation of real estate securities
§ 1:18 — —Leverage
§ 1:19 — —Are REITs primarily growth stocks or income stocks?
§ 1:20 — —Value investing
§ 1:21 — —Impact of dividend tax cut and tax reform
§ 1:22 — —Rate of earnings growth
§ 1:23 — —Sources of earnings growth
§ 1:24 — —FFO multiples
§ 1:25 —Effect of interest rates
§ 1:26 —Mutual funds and closed-end funds
§ 1:27 —Forward equity sales
§ 1:28 —Taxable REIT Subsidiaries
§ 1:29 —Commercial mortgage and hybrid REITs—The latest evolution
§ 1:30 —Commercial mortgage REITs
§ 1:31 — —Affiliation of real estate finance companies
§ 1:32 — —Servicing capabilities
§ 1:33 — —Mezzanine financing
§ 1:34 —Joint ventures
§ 1:35 Public versus private market valuation of real estate—Direct ownership by institutional investers vs REIT ownership
§ 1:36 —Which valuation is correct?
§ 1:37 —Premium over net asset value
§ 1:38 Commercial mortgage-backed securities and commercial debt obligations
§ 1:39 REIT public offering information

§ 1:40 REIT indices
§ 1:41 —Inclusion of REITs in S&P 500 Index
§ 1:42 Early predictions on REIT growth—1994/1995
§ 1:43 Dedicated REIT mutual fund growth
§ 1:44 REIT cycle
§ 1:45 —Phase 1—Early expansion
§ 1:46 —Phase 2—Moderating growth
§ 1:47 —Phase 3—Slow/no growth
§ 1:48 —Where we are in the cycle
§ 1:49 —Expectation that cycle is more muted
§ 1:50 Equilibrium and REIT management
§ 1:51 REITs in 2022
§ 1:52 —REITs in the first half of 2022
§ 1:53 What to look for in the REIT market
§ 1:54 REITs and inflation
§ 1:55 Haves and have nots
§ 1:56 REITs and e-commerce
§ 1:57 Consolidation of the REIT industry
§ 1:58 Summary of REIT M&A and going private activity
§ 1:59 How have REITs performed during recessions?

III. STRUCTURE OF A REIT

§ 1:60 Types of REITs
§ 1:61 —Mortgage REITs
§ 1:62 —Equity REITs—Types of equity REITs
§ 1:63 — — —Residential sector
§ 1:64 — —Types of equity REITs
§ 1:65 — — —Self storage sector
§ 1:66 — — —Healthcare sector
§ 1:67 — — —Diversified/Specialty sector
§ 1:68 — — —Equity REIT sector performance
§ 1:69 —Hybrid REITs
§ 1:70 —Healthcare REITs
§ 1:71 REIT preferred stock
§ 1:72 REIT assets and dividends
§ 1:73 Trust versus corporation
§ 1:74 —Shareholder liability
§ 1:75 —State taxation
§ 1:76 —Flexibility of operations
§ 1:77 —Doing business issues
§ 1:78 Management of a REIT—Externally managed REITs
§ 1:79 —Internally managed REITs
§ 1:80 Satisfying the 100 shareholder test
§ 1:81 Anti-takeover provisions
§ 1:82 Illustration of REIT taxation and distribution requirements
§ 1:83 —REIT dividends/the return of capital element
§ 1:84 Proposed Amendments to Delaware LLC and Partnership Acts
§ 1:85 REITs Outperform Broader Markets Through July 2026, Led by Lodging/Resorts

CHAPTER 2. FEDERAL SECURITIES, FINRA, INVESTMENT COMPANY AND ERISA ISSUES IN CONNECTION WITH REIT PUBLIC OFFERINGS

I. APPLICABLE FEDERAL REGISTRATION PROVISIONS

§ 2:1 Generally
§ 2:2 Revisions to the registration process
§ 2:3 Summary of 2005 offering reform modifications
§ 2:4 Sarbanes-Oxley Act of 2002
§ 2:5 The Sarbanes-Oxley Act and the SEC actions
§ 2:6 —Section 906 Certification
§ 2:7 —Section 302 certification
§ 2:8 —Prohibition on loans to directors and officers
§ 2:9 —Whistleblower protection
§ 2:10 —Officer and director bars and penalties
§ 2:11 —Audit committee
§ 2:12 —Audit committee financial experts
§ 2:13 —Code of ethics
§ 2:14 —Electronic filing and website posting of Section 16(a) reports
§ 2:15 —Improper influence on audits
§ 2:16 —Insider trades during pension fund blackout periods
§ 2:17 —Internal controls and procedures
§ 2:18 Dodd-Frank Wall Street Reform and Consumer Protection Act
§ 2:19 The JOBS Act and public offerings of REITs
§ 2:20 —Emerging Growth Companies
§ 2:21 —Other amendments to the 1933 Act applicable to Emerging Growth Companies
§ 2:22 —Other amendments to the 1934 Act applicable to Emerging Growth Companies
§ 2:23 —Opt-In Compliance for Emerging Growth Company status
§ 2:24 SEC makes nonpublic review process for draft IPOs and initial registration statements available to all companies

II. SPECIFIC DISCLOSURE ISSUES

§ 2:25 Contents of the prospectus
§ 2:26 —Cover page
§ 2:27 —Table of contents and forward-looking statements
§ 2:28 —Suitability standards
§ 2:29 —Summary of REIT and use of proceeds
§ 2:30 —Compensation and fees to the REIT sponsor and affiliates
§ 2:31 —Conflicts of interest
§ 2:32 —Fiduciary responsibility of the sponsor and/or adviser
§ 2:33 —Risk factors
§ 2:34 —Prior performance of sponsor and affiliates
§ 2:35 —Prior performance tables
§ 2:36 — —Table I: Experience in raising and investing funds (on a percentage basis)
§ 2:37 — —Table II: Compensation to sponsor
§ 2:38 — —Table III: Operating results of prior programs
§ 2:39 — —Table IV: Results of completed programs

§ 2:40 — —Table V: Sales or disposals of properties
§ 2:41 — —Table VI: Acquisition of properties by program
§ 2:42 —SEC Staff Guidance on Prior Performance Tables
§ 2:43 —Management
§ 2:44 —Investment objectives and policies
§ 2:45 —Description of real estate investments
§ 2:46 —Federal taxes
§ 2:47 —Summary of REIT organization documents
§ 2:48 —Reports to shareholders
§ 2:49 —Plan of distribution
§ 2:50 —Use of promotional and sales material
§ 2:51 — —Legal issues
§ 2:52 — —Guide 5 requirements
§ 2:53 — —FINRA rules on communications with the public
§ 2:54 —Policies with respect to certain activities
§ 2:55 —Investment policies of registrant
§ 2:56 —Selection, management, and custody of registrant's investments
§ 2:57 —Dealing with affiliates
§ 2:58 —Incorporation by Reference
§ 2:59 —Other form S-11 requirements
§ 2:60 —Plain English rules
§ 2:61 — —Principles
§ 2:62 — —Standards
§ 2:63 — —Other plain English changes—Front cover
§ 2:64 — — —Inside/front and outside/back cover
§ 2:65 — — —Summary information
§ 2:66 — — —Risk factors
§ 2:67 — — —Requests for acceleration
§ 2:68 — — —Effective date
§ 2:69 — —Some SEC "plain English" experiences—General—Eliminate parenthetical phrases
§ 2:70 — — — —Use non-justified rights margins
§ 2:71 — — — —Avoid defined terms
§ 2:72 — — — —Cross references
§ 2:73 — — — —Limit the scope of the cover page to required information only
§ 2:74 — — — —Legends, etc
§ 2:75 — — —Risk factors—Indicate in the caption for each risk factor the nature and effect of the risk
§ 2:76 — — — —Avoid generic risk factors
§ 2:77 — — — —Describe the risk in the first few sentences of the risk factor and with just enough detail to place it in context
§ 2:78 — — — —Do not include mitigating language in the risk factor discussion
§ 2:79 — — — —Group similar risks together
§ 2:80 Categories of issuers
§ 2:81 2005 communications reforms for specific issuers
§ 2:82 Regulation FD modifications
§ 2:83 Well-known reasoned issuers
§ 2:84 Attorney reporting obligations under SOX
§ 2:85 *COVID-19:* Disclosure and Capital Markets Considerations for REITs
§ 2:86 SEC guidance on disclosures in light of COVID-19
§ 2:87 Merger & acquisition rules
§ 2:88 —Shareholder communications

§ 2:89 —Commencement of tender/exchange offers
§ 2:90 —Tender/exchange offer antifraud provision—Rule14e-8
§ 2:91 —Subsequent offering period for tender offers
§ 2:92 —Prospectus delivery for early commencement
§ 2:93 —Regulation M-A & Schedule TO
§ 2:94 —Target's response
§ 2:95 —Plain English summary term sheet for cash tenders and cash mergers
§ 2:96 —No safe harbor for tender offer communications
§ 2:97 Mini-tender offers
§ 2:98 SEC adopts new climate change disclosure requirements
§ 2:99 Part II of the registration statement
§ 2:100 SEC interpretive release on real estate offerings
§ 2:101 —Presentation of information—Readability
§ 2:102 — —Captions and headings
§ 2:103 — —Format of the prospectus—Cover page
§ 2:104 — — —Table of contents
§ 2:105 — — —Summary
§ 2:106 — — —Risk factors
§ 2:107 — — —Income tax considerations
§ 2:108 — — —Prior performance
§ 2:109 —Quality of disclosure—Rollup transactions
§ 2:110 — —Effects on different partnerships
§ 2:111 — —Effects of participation in a rollup by less than all partnerships
§ 2:112 — —Allocation of interests in the successor
§ 2:113 — —Trading market
§ 2:114 — —Reports, opinions and appraisals
§ 2:115 — —Rollup transactions, limited partnership and REIT offerings
§ 2:116 — —Compensation to general partner and its affiliates—Sponsor compensation
§ 2:117 — —Conflicts of interests
§ 2:118 — —Fiduciary responsibility of the general partner
§ 2:119 — —Management
§ 2:120 — —Investment objectives and policies
§ 2:121 — —Summary of organizational documents
§ 2:122 — —Distributions and allocations
§ 2:123 — —Sales literature
§ 2:124 — —Limited partnership and REIT offerings
§ 2:125 — —Estimated use of proceeds
§ 2:126 — —Prior performance
§ 2:127 —Updating of information
§ 2:128 Matching services and crossing arrangements
§ 2:129 SEC Staff Guidance Pursuant to the JOBS Act
§ 2:130 SEC finalizes rules to modernize Regulation S-K
§ 2:131 SEC Staff Issues Guidance on Non-Traded REIT Disclosures
§ 2:132 SEC Issues Guidance on the Use of Key Performance Indicators and Metrics in MD&A and adopts an amendment to Simplify and Modernize other Financial Disclosure Requirements

III. SECURITIES COMPLIANCE AFTER EFFECTIVENESS

§ 2:133 Generally
§ 2:134 Updating prospectus by supplements

§ 2:135 Acquisition supplements
§ 2:136 Post-effective amendment requirements
§ 2:137 Amendments to Form S-11 and Guide 5 policy changes
§ 2:138 Publicity during an offering of a Non-Traded REIT
§ 2:139 Acquisition control provisions
§ 2:140 Reporting use of proceeds
§ 2:141 1934 Act compliance—Section 12(g) registration
§ 2:142 Section 16 reporting
§ 2:143 —Recapture of "short-swing" profits
§ 2:144 —Short sales of REIT shares
§ 2:145 Insider securities reporting requirements
§ 2:146 Rules restricting insider trading during pension fund blackout periods
§ 2:147 Electronic filing and website posting of Forms 3, 4 and 5
§ 2:148 Proxy rules
§ 2:149 Annual reports to stockholders
§ 2:150 Electronic proxy delivery
§ 2:151 1934 Act continuous reporting requirements
§ 2:152 —Quarterly report on Form 10-Q
§ 2:153 —Form 8-K
§ 2:154 —Annual report on Form 10-K
§ 2:155 Late filing of 1934 Act periodic reports
§ 2:156 Forward-looking disclosure
§ 2:157 Private Securities Litigation Reform Act
§ 2:158 Supreme Court clarifies liability for statements of opinion in registration statements
§ 2:159 Securities Class Actions
§ 2:160 Press releases
§ 2:161 Prohibition against trading on inside information
§ 2:162 —Rule 10b5-1
§ 2:163 Regulation FD
§ 2:164 —Overview of Regulation FD
§ 2:165 — —Selective disclosure
§ 2:166 — —Applicability of Regulation FD
§ 2:167 — —Materiality
§ 2:168 — —Culpability standard
§ 2:169 — —"Acting on behalf of"
§ 2:170 — —Market professionals
§ 2:171 — —Public v. nonpublic
§ 2:172 — —Intentional v. unintentional
§ 2:173 — —Methods of dissemination
§ 2:174 — —Promptly
§ 2:175 — —Exceptions to Regulation FD
§ 2:176 — —Remedies
§ 2:177 — —1933 Act issues
§ 2:178 —Modification to Regulation FD
§ 2:179 —Providing or Confirming Guidance
§ 2:180 Current reporting of earnings releases
§ 2:181 —REIT blackout periods
§ 2:182 Regulation G and REIT earnings calls
§ 2:183 REIT disclosure policy and investor relations practices
§ 2:184 Rules requiring codes of ethics for chief executive officers and senior financial officers

§ 2:185 CEO/CFO certification and internal procedures requirements
§ 2:186 Annual report by management regarding internal control over financial reporting
§ 2:187 Due diligence for SOX and SEC compliance
§ 2:188 —Due diligence by company's disclosure committee and by CEO and CFO
§ 2:189 —Suggested steps in establishing and evaluating disclosure controls and procedures
§ 2:190 Reporting requirements of the New York Stock Exchange
§ 2:191 Purchase by the REIT of its outstanding common stock
§ 2:192 Schedule 13G and 13D filings by 5 percent stockholders
§ 2:193 Use of Rule 144 for sales of the REIT's securities
§ 2:194 Minimum audit committee requirements
§ 2:195 Corporate governance listing standards of the New York Stock Exchange and Nasdaq
§ 2:196 Director independence
§ 2:197 Applicability of Swap Rules to REITs
§ 2:198 Dividend reinvestment plans and direct stock purchase plans—Overview of the plans
§ 2:199 —Types of plans
§ 2:200 — —Registered plans
§ 2:201 — —Bank plans
§ 2:202 —Applicability of the Securities Act of 1933
§ 2:203 —Securities Exchange Act of 1934 issues—Regulation M
§ 2:204 — —Employee shareholder plans
§ 2:205 — —Open market plans
§ 2:206 — —Direct issuance plans
§ 2:207 — —Broker-dealer issues
§ 2:208 — —Transfer agents
§ 2:209 —Investment Company Act of 1940
§ 2:210 Use of electronic media—REIT website content
§ 2:211 —Issuer responsibility for hyperlinked information
§ 2:212 — —Context of the hyperlink
§ 2:213 — —Risk of confusion
§ 2:214 — —Presentation of the hyperlinked information
§ 2:215 —Issuer communications during a registered offering
§ 2:216 Effect of Supreme Court decision on Section 10(b) litigation
§ 2:217 Interpretative release on the use of corporate websites
§ 2:218 FINRA Releases Guidance on Social Media and Digital Communications
§ 2:219 California Corporate Disclosure Act
§ 2:220 SEC Proposes Regulation E-Delivery

IV. FINRA CONSIDERATIONS

§ 2:221 Overview of the FINRA
§ 2:222 Review of underwriting compensation in public offerings
§ 2:223 —Documents to be filed with the FINRA
§ 2:224 —FINRA Rule 5110—Corporate Financing Rule—Firm commitment offerings
§ 2:225 —Organization and offering expenses—Maximum underwriting and organization and offering expenses—Best efforts offerings
§ 2:226 Limits on underwriting compensation under FINRA Rule 2310

V. INVESTMENT COMPANY AND INVESTMENT ADVISERS ACT CONSIDERATIONS

§ 2:227 Generally
§ 2:228 SEC concept release regarding mortgage REITs and the Investment Company Act of 1940
§ 2:229 Applicability of the Investment Advisers Act of 1940 to advised REITs

VI. ERISA CONSIDERATIONS

§ 2:230 Background
§ 2:231 Publicly offered securities
§ 2:232 Operating company
§ 2:233 Insignificant participation
§ 2:234 Department of Labor final definition of ERISA fiduciary and related conflict of interest rules
§ 2:235 SEC adopts best interest standard for broker-dealers

VII. ROLLUP LEGISLATION

§ 2:236 Generally
§ 2:237 Limited Partnership Rollup Reform Act of 1993—S. 422
§ 2:238 —Definition of rollup
§ 2:239 —Proxy rules
§ 2:240 —Dissenters' rights in rollup transactions
§ 2:241 SEC rules for rollup transactions
§ 2:242 —Introduction
§ 2:243 —Application of the rules
§ 2:244 —Disclosure requirements—Summary
§ 2:245 — —Risk factors and effects of the transaction
§ 2:246 — —Comparative information
§ 2:247 — —Allocation of rollup consideration
§ 2:248 — —Background of, reasons for and alternatives to the rollup transaction
§ 2:249 — —Conflicts of interest
§ 2:250 — —Fairness of the rollup transaction
§ 2:251 — —Reports, opinions and appraisals
§ 2:252 — —Source and amount of funds and transactional expenses
§ 2:253 — —Pro forma financial statements and selected financial data
§ 2:254 — —Federal income tax consequences
§ 2:255 — —Other provisions of the transaction
§ 2:256 —Supplemental disclosure documents
§ 2:257 Retaining the security in rolledup entity
§ 2:258 California Rollup Legislation—S.B. 1753
§ 2:259 —Background on S.B. 1753
§ 2:260 —Regulation of limited partnership rollup transactions—Definition of "rollup participant"
§ 2:261 — —Definition of "rollup transaction"
§ 2:262 —Eligible rollup transactions
§ 2:263 — —Dissenters' rights
§ 2:264 — —Voting rights
§ 2:265 —Management, equity ownership, compensation and fees
§ 2:266 — —Allocation of solicitation and transaction costs
§ 2:267 — —Notice to be given by general partners and sponsors

§ 2:268 —No de minimis exemption for rollup transactions
§ 2:269 —Effect of National Securities Markets Improvement Act of 1996
§ 2:270 —Coordination with federal regulation of rollup transactions, FINRA rules, and New York and American stock exchange rules
§ 2:271 FINRA rollup rules on member participation in rollups—Previous NASD rules
§ 2:272 —FINRA rollup rules—Application of the rollup rules and exclusions
§ 2:273 — —Operation of the FINRA rollup rules
§ 2:274 —Comparison of California bill and FINRA rollup rules

VIII. SOME KEY ASPECTS OF AN INITIAL PUBLIC OFFERING

§ 2:275 Introduction
§ 2:276 REIT pricing
§ 2:277 Key factors for an IPO
§ 2:278 IPO valuation methodology
§ 2:279 REIT distributions
§ 2:280 IPO corporate governance issues
§ 2:281 Pricing of IPO partner contribution of interests
§ 2:282 Preformation private offerings
§ 2:283 —Changing from public offering to private placement
§ 2:284 —Shelf registrations
§ 2:285 —Convertible securities and warrants
§ 2:286 —Lockup period prior to exchange of REIT shares for OP units
§ 2:287 —Exchange of REIT shares for OP units and subsequent resale
§ 2:288 Post IPO private offerings
§ 2:289 Integration safe harbor—Rule 155
§ 2:290 —Private offerings to registered offering
§ 2:291 —Registered offering to private offering
§ 2:292 Private offering concurrent with public offering
§ 2:293 Integration safe harbor—Registration statement withdrawal
§ 2:294 —Offset of filing fees
§ 2:295 Significant accounting issues involved in the IPO
§ 2:296 SEC warns investors of risks associated with private placements

CHAPTER 3. ACCOUNTING CONSIDERATIONS

I. FINANCIAL STATEMENTS, GENERALLY

§ 3:1 Accounting issues affecting REITs
§ 3:2 Financial statements—Required in prospectus—General financial statement requirements
§ 3:3 —Sponsor financial statements—Predecessor entities
§ 3:4 — —Multiple sponsors
§ 3:5 — —Planning for gathering of financial information
§ 3:6 — —Pro forma financial statements
§ 3:7 —Financial statements of acquired properties
§ 3:8 SEC simplifies financial statement requirements for real estate acquisitions and dispositions
§ 3:9 Financial statements—Financial statements of acquired properties—Special REIT financial statement provisions
§ 3:10 Summary of the financial statement requirements for real estate—SEC Division of Corporate Finance Financial Reporting Manual

§ 3:11 Financial statements—Financial statements for mortgage loans
§ 3:12 —Substantial equity investment by borrower
§ 3:13 —Qualifying personal guarantee and lease accounting
§ 3:14 —Other substantial security
§ 3:15 —Take-out commitment
§ 3:16 —Sufficient net cash flow
§ 3:17 —FASB ASC Topic No. 310, Receivables (previously AICPA Statement of Position 97-1 re. mortgage loan borrowers)
§ 3:18 —Mortgage REIT securitizations—Accounting issues/treatment in accordance with FASB ASC 860
§ 3:19 FASB Statement No. 166, Accounting for Transfers of Financial Assets, an amendment of FASB ASC 860
§ 3:20 Financial statements—Accounting for beneficial interests in securitized financial assets
§ 3:21 Comfort letters
§ 3:22 SEC adopts (and courts stay) climate change requirements

II. FUNDS FROM OPERATIONS AND NON-GAAP FINANCIAL INFORMATION

§ 3:23 Use of cash flow data—Funds from Operations ("FFO")—Introduction
§ 3:24 —Intended use of FFO
§ 3:25 —NAREIT white paper on FFO
§ 3:26 — —Depreciation and amortization
§ 3:27 — —Nonrecurring items
§ 3:28 — —Entities addressed in the FFO definition
§ 3:29 — —Disclosure of FFO
§ 3:30 — —Gains and losses on property sales
§ 3:31 — —Supplemental disclosures relating to FFO—Capital expenditures
§ 3:32 — —Straight-line rents
§ 3:33 — —White paper supplemental disclosures
§ 3:34 —Modifications to FFO definition
§ 3:35 —October 1999 modifications to FFO definition
§ 3:36 "Best practices" disclosure models
§ 3:37 Lease accounting issues
§ 3:38 "Best practices" disclosure models—FFO from income producing property held for sale—April 2002 NAREIT National Policy Bulletin
§ 3:39 NAREIT Funds From Operations White Paper—2018 Restatement
§ 3:40 Effect of Non-GAAP financial information rules on REITs
§ 3:41 Funds (cash) available for distribution ("AFFO", "FAD" and "CAD")
§ 3:42 Modified Funds from Operations ("MFFO")
§ 3:43 NAREIT adopts supplemental measure of performance—EBITDA for real estate
§ 3:44 Summary of Applicability and Requirements of Regulation G and Regulation S-K, Item 10(e)
§ 3:45 SEC Rules governing "pro forma" financial measures and non-GAAP financial measures

III. FASB STATEMENTS AFFECTING REAL ESTATE AND REITS

§ 3:46 FASB ASC No. 280 and FFO
§ 3:47 Significant accounting developments

§ 3:48 FASB ASC Topic No. 105, Generally Accepted Accounting Principles—The Codification
§ 3:49 Significant accounting developments—Staff Accounting Bulletin 101
§ 3:50 —Contingent rent
§ 3:51 —Multiple fee arrangements
§ 3:52 —Topic D-96, accounting for management fees based on a formula, an SEC staff announcement
§ 3:53 —Acquisitions of advisor or management company
§ 3:54 —Redeemable securities of the operating partnership
§ 3:55 —Redeemable securities of the REIT
§ 3:56 —Joint ventures
§ 3:57 — —Accounting for joint ventures—FASB ASC 320, EITF Issue No. 04–5, and FASB ASC Topic No. 323
§ 3:58 — —NAREIT best financial practices disclosure for joint ventures
§ 3:59 —Staff Accounting Bulletin 99 on "materiality" in preparing financial statements
§ 3:60 — —Qualitative measures of materiality
§ 3:61 — —Aggregating and netting misstatements
§ 3:62 — —Intentional, immaterial misstatements
§ 3:63 — —The auditor's response to intentional misstatements
§ 3:64 — —Qualitatively assessing "materiality"
§ 3:65 —Statement of Auditing Standards 99, Consideration of Fraud in a Financial Statement Audit
§ 3:66 —Statement of Auditing Standards 100, Interim Financial Information
§ 3:67 —FASB ASC Topic No. 360, Property, Plant and Equipment and FASB ASC Topic No. 205, Presentation of Financial Statements
§ 3:68 —FASB ASC Topic No. 360, Property, Plants and Equipment FASB ASC Topic No. 205, Presentation of Financial Statements—Dispositions of investment properties
§ 3:69 —Extinguishment of debt
§ 3:70 —FASB ASC Topic No. 460, Guarantees
§ 3:71 —FASB ASC Topic No. 810, Consolidation
§ 3:72 — —Certain requirements of FIN 46(R) defined
§ 3:73 FASB ASC Topic No. 410, Asset Retirement and Environmental Obligations
§ 3:74 FASB ASC Topic No. 740, Income Taxes
§ 3:75 FASB ASC Topic No. 815, Derivatives and Hedging
§ 3:76 FASB ASC Topic No. 815, Derivatives and Hedging and ASC Topic No. 860, Transfers and Servicing
§ 3:77 FASB issues targeted improvements to hedge accounting
§ 3:78 Summary of FASB ASC Topic No. 860, Transfers and Servicing
§ 3:79 FASB ASC Topic No. 805, Business Combinations and Topic No. 350, Intangibles—Goodwill and Other (previously FASB Statement Nos. 141 and 142, Accounting for Business Combinations and Goodwill and Other Intangible Assets—Purchase accounting)
§ 3:80 FASB ASC Topic No. 805, Business Combinations
§ 3:81 FASB clarifies definition of a business in ASU 2017-01—The ASU provides guidance to assist entities with evaluating when transferred assets and activities are a business
§ 3:82 FASB ASC Topic No. 420, Exit or Disposal Cost of Obligations
§ 3:83 FASB ASC Topic No. 718, Compensation—Stock Compensation
§ 3:84 FASB ASC Topic No. 480, Distinguishing Liabilities from Equity

§ 3:85 EITF 01-14, Income Statement Characterization of Reimbursements Received for "Out-of-Pocket" Expenses
§ 3:86 EITF 05–6, Determining the Amortization for Leasehold Improvements Purchased after Lease Inception or Acquired in a Business Combination
§ 3:87 EITF 07-6, Accounting for buy-sell clauses and FASB ASC Topic No. 360
§ 3:88 EITF 08-3, Accounting by Lessees of Non-refundable deposits
§ 3:89 FASB ASC Topic No. 845, Nonmonetary Exchanges
§ 3:90 FASB ASC Topic No. 820, Fair Value Measurements and Disclosures
§ 3:91 Staff Accounting Bulletin No. 74—Disclosures related to FASB Statement No. 157
§ 3:92 Application of FASB ASC Topic No. 820, Fair Value Measurements and Disclosures to FASB ASC Topic No. 840, Leases
§ 3:93 Recognition and presentation of other-than-temporary impairments of debt and equity securities
§ 3:94 ASU No. 2011-04, Fair Value Measurement (Topic 820): Amendments to Achieve Common Fair Value Measurement and Disclosure Requirements in U.S. GAAP and IFRSs
§ 3:95 FASB ASC Topic No. 825, Financial Instruments (previously FASB Statement No. 159, The Fair Value Option for Financial Assets and Financial Liabilities)
§ 3:96 Accounting for deconsolidation of a subsidiary that is in-substance real estate
§ 3:97 FASB amends its Consolidation Guidance for General Partners' Interests in Limited Partnerships and makes other changes to its variable interest model
§ 3:98 FASB ASC Topic No. 250, Accounting Changes and Error Corrections
§ 3:99 FASB ASC Topic No. 855, Subsequent Events
§ 3:100 FASB ASC Topic No. 470
§ 3:101 Accounting Standards Update No. 2013-08 Financial Services—Investment Companies—Amendments to the Scope, Measurement, and Disclosure
§ 3:102 SEC reporting using extensible business reporting language
§ 3:103 FASB simplifies the accounting for measurement-period adjustments for business combinations
§ 3:104 FASB issues Going-Concern Guidance
§ 3:105 FASB ASU Topic No. 2016-07, simplifying the equity method of accounting
§ 3:106 FASB ASC Topic No. 220, Comprehensive Income and IASB IAS 1, Presentation of Financial Statements
§ 3:107 FASB issues new balance sheet offsetting disclosure requirements
§ 3:108 FASB presentation of debt issuance costs
§ 3:109 Significant accounting developments—FASB ASC Topic No. 606, Revenue Recognition
§ 3:110 FASB Proposal on Debt Exchange
§ 3:111 FASB eliminates reporting of extraordinary items
§ 3:112 Development Stage Entities (Topic 915), Elimination of Certain Financial Reporting Requirements.
§ 3:113 Lease accounting—FASB, Accounting Standards Update, Leases (Topic 842)
§ 3:114 LIBOR reform guidance
§ 3:115 PCAOB changes to standards for auditors' reports on audited financial statements
§ 3:116 Auditing standard No. 18 on related parties
§ 3:117 SEC Staff Accounting Bulletin 108

§ 3:118 Disclosing taxable income and income taxes
§ 3:119 Accounting for stock dividends
§ 3:120 SEC Staff Comments
§ 3:121 ESG and financial statements

IV. MD&A DISCLOSURE ISSUES

§ 3:122 MD&A disclosure
§ 3:123 Annual and quarterly disclosure of off-balance sheet arrangements and contractual obligations
§ 3:124 Overview of additional guidance regarding MD&A
§ 3:125 —Form of MD&A content and focus
§ 3:126 —MD&A content and focus
§ 3:127 —Topic-specific MD&A guidance
§ 3:128 —Critical accounting estimates on MD&A
§ 3:129 Critical accounting policies

V. INTERNAL CONTROL REPORTING AND AUDIT COMMITTEES

§ 3:130 Auditor independence rules
§ 3:131 New PCAOB audit standard for audit reports
§ 3:132 Rules prohibiting improper influence by corporate executives and third parties on conducts of audits
§ 3:133 Standard for auditing internal control over financial reporting
§ 3:134 Auditing Standard No. 5—An Audit of Internal Control Over Financial Reporting That Is Integrated With An Audit of Financial Statements—Overview of Changes
§ 3:135 Overview of the Audit Under AS 5
§ 3:136 Standard for auditing internal control over financial reporting—Requirement for adverse opinion when a material weakness exists
§ 3:137 COSO releases updated Internal Control—Integrated Framework and related illustrative documents
§ 3:138 The audit committee
§ 3:139 —Audit committee financial experts
§ 3:140 —SEC audit committee disclosure rules
§ 3:141 — —Pre-filing review of quarterly financial statements
§ 3:142 — —Audit committee report
§ 3:143 — —Audit committee charters
§ 3:144 — —Audit committee members' independence
§ 3:145 — —Safe harbors
§ 3:146 —Self regulatory organization audit committee rules
§ 3:147 — —Composition and qualification
§ 3:148 — —Independence
§ 3:149 — —Audit committee charter

CHAPTER 4. STATE BLUE SKY PROVISIONS AFFECTING REITS

I. IN GENERAL

§ 4:1 Introduction

II. REVIEW OF SPECIFIC PROVISIONS

§ 4:2 Definition of a REIT

§ 4:3 Restrictions in the issuance of REIT securities
§ 4:4 Suitability of investors
§ 4:5 Trustees—Initial actions—Ratification of declaration of trust
§ 4:6 —Number, election, and removal
§ 4:7 —Independent trustees
§ 4:8 —Responsibilities and experience
§ 4:9 Conflicts of interest
§ 4:10 Investment policies
§ 4:11 The Advisor—Advisory contract
§ 4:12 —Advisor compensation
§ 4:13 Annual review of compensation and expenses
§ 4:14 Compensation and expenses—Organization, offering, and acquisition fees and expenses
§ 4:15 —Total operating expenses
§ 4:16 —Real estate brokerage commissions
§ 4:17 —Incentive fees
§ 4:18 —Comparison of the NASAA REIT and RELP compensation and expense provisions
§ 4:19 Minimum capital
§ 4:20 Leverage limitations
§ 4:21 Distributions
§ 4:22 Administration (reports, meetings, records, and termination)—Annual reports and annual meetings
§ 4:23 —Special meetings
§ 4:24 —Inspection of records
§ 4:25 —Termination
§ 4:26 Liability of shareholders
§ 4:27 Repurchase of shares
§ 4:28 Indemnification
§ 4:29 Rollup provisions
§ 4:30 —Definition of rollup
§ 4:31 —"No" votes
§ 4:32 —Appraisal rights
§ 4:33 —Voting rights and access to records
§ 4:34 Miscellaneous provisions—Appraisals
§ 4:35 —Change in declaration of trust
§ 4:36 —Use of forecasts
§ 4:37 —Provisions of declaration of trust
§ 4:38 Proposed Amendments to NASAA REIT rules

III. COORDINATED REVIEW PROCEDURES

§ 4:39 Generally
§ 4:40 —Overview of CR-DPP
§ 4:41 —Candidates for CR-DPP
§ 4:42 —Required documents
§ 4:43 —Role of the coordinating state
§ 4:44 —Selection of the lead jurisdiction
§ 4:45 —Timing of the CR-DPP process
§ 4:46 —Adding jurisdictions to the Form CR-DPP
§ 4:47 —The comment letter

IV. AN OVERVIEW OF THE NATIONAL SECURITIES MARKETS IMPROVEMENT ACT OF 1996

§ 4:48 Generally
§ 4:49 Covered securities/Listed securities
§ 4:50 Investment company securities
§ 4:51 Qualified purchasers
§ 4:52 Exempt offerings
§ 4:53 Preservation of authority
§ 4:54 Enforcement of requirements
§ 4:55 Comparison of stock exchange listing and maintenance requirements
§ 4:56 Generally

CHAPTER 5. TAXATION OF REITS

I. IN GENERAL

§ 5:1 Introduction

II. STRUCTURE OF A REIT

§ 5:2 Summary of requirements
§ 5:3 Trustee or director
§ 5:4 Transferable shares or certificates
§ 5:5 Taxable as domestic corporation
§ 5:6 100 Shareholders
§ 5:7 Non-closely held—General
§ 5:8 —Excess share provisions
§ 5:9 Earnings and profits—Pre-REIT years—Distribution
§ 5:10 Taxable year

III. ELECTION, TERMINATION AND REVOCATION

§ 5:11 Generally

IV. INCOME TESTS

§ 5:12 Generally
§ 5:13 75% income test; goodwill; reimbursements
§ 5:14 95% income test; foreign currency gains and losses; IRS authority/Subpart F/Exclusion From Income
§ 5:15 Timber REITs
§ 5:16 Special rules for REIT qualifying income—"Rents from real property"—Generally
§ 5:17 — —Rents from interests in real property
§ 5:18 — —Charges for customary services
§ 5:19 — — —Personal property rents
§ 5:20 — —Exclusions—Rents based on net profits
§ 5:21 — — —Participation in gross receipts or sales exception
§ 5:22 — — —Tenant share of subtenant profits exception
§ 5:23 — — —Tenant's receipt of qualifying rents exception
§ 5:24 — —Related party rents; TRS exception
§ 5:25 — —Impermissible tenant service income

§ 5:26 — — —"Customary services" and fiduciary duties exception; non-convenience of tenant
§ 5:27 — — —Property management and leasing
§ 5:28 — — —Repairs, maintenance & cleaning
§ 5:29 — — —Common area maintenance
§ 5:30 — — —Construction & rehabilitation
§ 5:31 — — —Marketing funds
§ 5:32 — — —Parking facilities
§ 5:33 — — —Cable television, telephone, internet
§ 5:34 — — —"Courtesy" services provided to tenants; Food service; Electric vehicle charging
§ 5:35 — —Independent contractor exception
§ 5:36 — —*De minimis* provision
§ 5:37 — —Taxable REIT subsidiary
§ 5:38 — — —Election
§ 5:39 — — —Asset limitation
§ 5:40 — — —Rents paid to REIT
§ 5:41 — — —Lodging and healthcare facilities
§ 5:42 — — —Interest payments
§ 5:43 — — —TRS as a partner
§ 5:44 — — —Redetermined items
§ 5:45 — — —"Separately Stated" requirement
§ 5:46 — — —Treasury Department study
§ 5:47 — — —Grandfather rules
§ 5:48 — —REITs as partners—Look-through rule
§ 5:49 — — —"Self-charged" rule
§ 5:50 Interest on obligations secured by mortgages; Distressed debt
§ 5:51 Mitigation
§ 5:52 Shared appreciation provisions
§ 5:53 Mortgage REITs; Taxable Mortgage Pools; REMIC Residuals

V. ASSET TESTS

§ 5:54 Generally
§ 5:55 75% assets test
§ 5:56 —Cash or cash items
§ 5:57 —Government securities
§ 5:58 —Real estate assets, Non-core REITs
§ 5:59 Loan secured by interest in partnership
§ 5:60 75% assets test—Real estate assets—Interests in REMICs
§ 5:61 — —New capital
§ 5:62 — —Qualified REIT subsidiary
§ 5:63 — —Management companies
§ 5:64 Compliance with 75% assets test
§ 5:65 —Additional collateral
§ 5:66 —Transfer of mortgage
§ 5:67 —Borrower to revalue assets
§ 5:68 25% assets test; mitigation

VI. DISTRIBUTION TEST

§ 5:69 Deductible distributions
§ 5:70 90% distribution requirement—General rules

§ 5:71 —Consent dividends
§ 5:72 —Earnings and profits
§ 5:73 —Taxable stock distributions
§ 5:74 —Fast-pay stock
§ 5:75 Problems of mortgage REITs in meeting the 90% distribution test
§ 5:76 Dividend reinvestment plans
§ 5:77 Capital gains
§ 5:78 —NOLs
§ 5:79 —Capital losses
§ 5:80 —Shareholder credit for REIT capital gains
§ 5:81 Timing of dividends paid deduction
§ 5:82 —"January dividends"
§ 5:83 —Election to deduct dividends paid in subsequent year—"Relation Back Rule"
§ 5:84 Deficiency dividends
§ 5:85 Excise tax

VII. TAXATION OF REITS

§ 5:86 REIT taxable income, *net operating loss deduction*; *interest deduction*; *qualified opportunity zone*
§ 5:87 REIT level taxation
§ 5:88 —Foreclosure property
§ 5:89 —Prohibited transactions
§ 5:90 —Residual interests in REMICs
§ 5:91 —Distributions of United States Real Property Interests
§ 5:92 E&P
§ 5:93 Taxation of built-in gains—Background
§ 5:94 —IRS Notice 88-19
§ 5:95 —Final regulations—Introduction
§ 5:96 —Net built-in gain on deemed sale
§ 5:97 —Section 1374 Election
§ 5:98 —Determining the tax and the distribution requirement
§ 5:99 —Effect on earnings and profits
§ 5:100 —Character of gain
§ 5:101 —Use of net operating loss or other attributes
§ 5:102 —Tacking of predecessor's holding period; re-elections
§ 5:103 —Anti-stuffing rule
§ 5:104 —Partnership look-through
§ 5:105 —Application of prior regulations
§ 5:106 —Prior legislative proposals
§ 5:107 Liquidating distributions
§ 5:108 —Accumulated earnings and profits rule
§ 5:109 —Twenty-four month liquidation rule
§ 5:110 —80-percent-owned REITs
§ 5:111 REITs, Foreclosure and COD
§ 5:112 REITs; alternative minimum tax; credits

VIII. TAXATION OF SHAREHOLDERS OF A REIT

§ 5:113 U.S. shareholders—General rules
§ 5:114 —Capital gain dividends
§ 5:115 —Estimated tax rules

§ 5:116 Tax-exempt shareholders
§ 5:117 Foreign shareholders—U.S. taxation of REIT distributions
§ 5:118 —Distribution of operating income
§ 5:119 — —Capital gain distributions
§ 5:120 —U.S. taxation on sales of REIT shares
§ 5:121 —Interests in a REMIC; FATCA

IX. RECORD-KEEPING REQUIREMENTS AND REPORTABLE TRANSACTIONS

§ 5:122 Shareholder demand letter
§ 5:123 Reportable transactions
§ 5:124 Uncertain tax positions
§ 5:125 Organizational actions

Appendix 5A. Private Letter Rulings Addressing REIT Services (through PLR 202530005)

CHAPTER 6. MISCELLANEOUS TAX ASPECTS

I. IN GENERAL

§ 6:1 Introduction

II. TAX-FREE TRANSFERS

§ 6:2 Incorporation
§ 6:3 —Transfers of partnership assets, mergers and acquisitions, spinoffs—Contribution of assets by partnership in exchange for REIT shares followed by liquidation of partnership
§ 6:4 — —Liquidation of partnership followed by contribution of partnership assets by former partners in exchange for REIT shares
§ 6:5 — —Partners contribute their partnership interests in exchange for REIT shares
§ 6:6 —Section 351 and related issues—In general
§ 6:7 — —"Investment company" exception
§ 6:8 — —Section 357 and assumption of liabilities
§ 6:9 —Impact of REIT conversion on foreign investors—FIRPTA
§ 6:10 — —Branch profits tax
§ 6:11 —IRS ruling policy
§ 6:12 —Taxable exchanges
§ 6:13 Mergers and acquisitions
§ 6:14 —Statutory mergers
§ 6:15 —Stock-for-stock acquisitions
§ 6:16 —Stock-for-assets acquisitions
§ 6:17 —Special considerations—Asset transfers and "continuity of business enterprise"
§ 6:18 — —Partnership mergers and transfers
§ 6:19 — —Dispositions involving qualified REIT subsidiaries
§ 6:20 — —Investment company exclusion
§ 6:21 — —Planning for state tax considerations
§ 6:22 —Use of a "defensive" F reorganization
§ 6:23 —Consequences of tax-free reorganizations and liquidations
§ 6:24 —Taxable acquisitions

§ 6:25 — —Taxable asset sale and liquidation of target
§ 6:26 — —Taxable stock purchase
§ 6:27 —Target REIT considerations
§ 6:28 Spinoffs

III. INDEPENDENT CONTRACTOR RULES

§ 6:29 Generally

IV. DEBT-EQUITY ISSUES

§ 6:30 Contingent debt
§ 6:31 Shared appreciation mortgages
§ 6:32 Convertible debt

V. NON-REIT PROVISIONS OF THE CODE

§ 6:33 Generally
§ 6:34 Passive activity loss limitations
§ 6:35 Expansion of at-risk rules
§ 6:36 Repeal of capital gains rate for corporations
§ 6:37 Miscellaneous business expense limitations
§ 6:38 Debt modification; REIT as lender
§ 6:39 Taxable mortgage pools
§ 6:40 Like-kind exchanges

VI. COMPARISON TO PUBLICLY TRADED PARTNERSHIPS

§ 6:41 Generally
§ 6:42 Corporate taxation
§ 6:43 Passive loss rule
§ 6:44 Unrelated business income for tax-exempt partners—Repealed
§ 6:45 Analysis of REIT vs. PTP

VII. PARTNERSHIPS AND JOINT VENTURES WITH REITS

§ 6:46 Allocation rules
§ 6:47 Joint ventures with tax-exempt entities; Section 470

VIII. REIT'S EMPLOYEE INCENTIVES

§ 6:48 Generally

IX. PUBLICLY TRADED REITS AND THE RISK OF A HOSTILE TAKEOVER

§ 6:49 Generally
§ 6:50 What is a poison pill plan?
§ 6:51 The tax effects of a poison pill plan
§ 6:52 Effect of a poison pill plan on REIT qualification

X. STATE TAXATION OF REITS

§ 6:53 Introduction
§ 6:54 Power to tax

§ 6:55 Franchise taxes—Capital base
§ 6:56 Franchise and income taxes—Alternative tax base
§ 6:57 — —Planning alternatives
§ 6:58 —Gross Receipts Tax
§ 6:59 —Federal taxable income base
§ 6:60 Income taxes—States' conformity to changes in Internal Revenue Code
§ 6:61 Franchise and income taxes—Income taxes—Dividends paid deduction
§ 6:62 —Apportionment and allocation issues
§ 6:63 —Organization issues—Use of qualified real estate investment trust subsidiaries
§ 6:64 — —Use of LLCs and partnerships
§ 6:65 — —Use of taxable REIT subsidiaries
§ 6:66 — —Need for special purpose entities
§ 6:67 Transfer taxes
§ 6:68 —Controlling interest transfer taxes
§ 6:69 — —Filing requirements
§ 6:70 — —Exemptions
§ 6:71 —Recordation taxes
§ 6:72 —State transfer tax implications of reverse 1031 exchanges
§ 6:73 Other taxes—Sales and use tax issues
§ 6:74 —Property revaluation issues

XI. STAPLED AND "CLIPPED" REITS

§ 6:75 Background
§ 6:76 Paired-share REITs
§ 6:77 Paper-clipped REITs
§ 6:78 Internal Revenue Service Restructuring and Reform Act of 1998

XII. DEREITING

§ 6:79 Generally

XIII. TAX ISSUES OF PRIVATE REITS

§ 6:80 Generally
§ 6:81 100 shareholders
§ 6:82 Tax-free incorporation
§ 6:83 Closely held requirement
§ 6:84 ERISA issues
§ 6:85 Liquidity
§ 6:86 Book-Tax difference

Appendix 6A. REIT DPD Disallowance, Add-back Provisions, Captive REITs

CHAPTER 7. UPREITS AND DOWNREITS

I. UPREITS

§ 7:1 Introduction
§ 7:2 IRS response to UPREITs
§ 7:3 Transfers to, and distributions from, operating partnerships—Transfers—Deed transfer vs. entity interest transfer
§ 7:4 —Merger and consolidation

§ 7:5 —Potential gain on distribution of units
§ 7:6 Contribution of encumbered property—General
§ 7:7 —Allocation of nonrecourse liabilities
§ 7:8 —Using guarantees to maintain basis
§ 7:9 —Section 754 election by operating partnership
§ 7:10 —At-risk basis—Section 465
§ 7:11 Disguised sales issues
§ 7:12 Depreciation and gain allocations—Depreciation
§ 7:13 —Gain
§ 7:14 Operating partnership as publicly traded partnership
§ 7:15 Ownership of subsidiary corporations
§ 7:16 Section 754 election by acquired partnerships
§ 7:17 Treatment of service partners; carried interests
§ 7:18 Converting a "conventional" REIT to the UPREIT structure

II. DOWNREITS

§ 7:19 Generally

III. UPREIT VS. DOWNREIT

§ 7:20 Generally

APPENDICES

Appendix A. NASAA Statement of Policy Regarding Real Estate Investment Trusts

Appendix B. Proposed Amendment to NASAA Statement of Policy Regarding Real Estate Investment Trusts on Concentration Limits

Appendix C. California Rules for Real Estate Investment Trusts

Appendix D. Initial REIT Public Offering Due Diligence Request List

Appendix E. Real Estate Investment Trust Tax Checklist

Appendix F. Table of Frequently Cited Statutes and Acts

Table of Laws and Rules

Table of Cases

Index