

TABLE OF CONTENTS

CHAPTER 1

Introduction

§ 1.01	Introduction—Real Estate Meets M&A.	1-1
§ 1.02	The REIT Revolution—Background	1-3
§ 1.03	Trends	1-6
§ 1.04	REIT, UPREIT and DownREIT Basics.	1-9
§ 1.05	Clashes of Culture, Custom and Deal Structures at the Crest of the Revolution.	1-12
	[1] Cultural Differences	1-12
	[2] Structural Differences	1-13

CHAPTER 2

Structural Considerations in Consensual REIT M&A Transactions

§ 2.01	Overview	2-2
§ 2.02	Transaction Structures.	2-3
	[1] Conventional REIT Combinations	2-3
	[2] UPREIT Combinations	2-7
	[3] Mismatch Combinations—Combining a REIT with an UPREIT or Non-REIT Real Estate Operating Company.	2-10
§ 2.03	Unique Structural Considerations in REIT M&A Transactions	2-11
	[1] Overview	2-11
	[2] A REIT Cannot Be Closely Held— The Five/Fifty Rule	2-12
	[a] Beneficial Ownership	2-15
	[b] Derivative Ownership	2-16

REITs

	[3]	A REIT Must Be Owned by 100 or More Persons	2-19
	[4]	Charter Restrictions that Preserve a REIT's Status as a "Domestically Controlled" REIT	2-20
	[5]	Charter Restrictions that Prevent Related Tenant Rent Income	2-21
	[6]	How Far Can a REIT Go in Limiting Share Ownership?—Transferability Issues	2-24
§ 2.04		Gremlins in REIT Transactions	2-29
§ 2.05		Issues Relating to Tax Indemnities in Favor of OP Unitholders	2-31

CHAPTER 3**Directors' Duties in REIT
and UPREIT M&A Transactions**

§ 3.01		Introduction	3-2
§ 3.02		Basic Duties of Directors of Corporate REITs	3-4
	[1]	Business Judgment Rule	3-8
	[2]	Enhanced or Intermediate Scrutiny	3-10
		[a] The <i>Unocal/Unitrin</i> Standard	3-10
		[b] The <i>Revlon</i> Test	3-15
	[3]	Entire Fairness	3-16
	[4]	Duties in Change of Control Transactions	3-22
		[a] Delaware	3-22
		[b] Maryland	3-25
	[5]	Fiduciary Duties of LLCs and LPs Under Delaware Law	3-27
		[a] Fiduciary Duties of LLCs	3-27
		[b] Fiduciary Duties of LPs	3-31
§ 3.03		Duties to OP Unitholders and Other REIT Complications	3-34
	[1]	Resolving Conflicts of Interests Between REIT Shareholders and OP Unitholders	3-34
	[2]	Dealing with Potential Internal Board Conflicts Arising from Board Composition in UPREITs and DownREITs	3-38

TABLE OF CONTENTS

xiii

	[3]	Negotiating with Unitholders in Structuring Deals	3-39
	[4]	Potential Anti-Takeover Effects of the Operating Partnership Structure	3-40
	[5]	Fiduciary Duties and Charter Ownership Limitations	3-40
§ 3.04		The Use of Procedural Protections in REIT and UPREIT Sale of Control Transactions.	3-41
	[1]	When Should a Special Committee Be Formed?	3-43
	[2]	Transactions Involving Conflicted Controllers or Differential Consideration	3-47
	[3]	Disinterestedness and Independence of Committee Members	3-49
	[4]	The Committee's Role and Process	3-52
	[5]	Selection of the Committee's Advisors	3-56
	[6]	Standard of Review in Squeeze-Out Mergers	3-57
	[7]	Shareholder Approval and Shifting the Standard of Review.	3-59
	[a]	Standard-Shifting in Non-Control Transactions	3-60
	[b]	Standard-Shifting in Controlling Shareholder Transactions	3-65
§ 3.05		Principles of Good Governance in REITs.	3-68
	[1]	General Considerations	3-68
	[2]	Special REIT Considerations.	3-69

CHAPTER 4

Selling a REIT

§ 4.01		Deciding to Sell	4-2
	[1]	When to Sell	4-3
	[2]	Whom to Consult.	4-4
	[3]	Takeover Preparedness.	4-4
§ 4.02		Legal Considerations.	4-5
	[1]	Directors' Fiduciary Duties	4-5
	[2]	The Importance of Informed, Good-Faith Decision Making	4-12
	[3]	Third-Party Overbids	4-17
	[4]	The Use of a Special Committee	4-19

	[5]	Applicable State Statutory Requirements	4-19
		[a] Delaware	4-20
		[b] Maryland	4-21
	[6]	Antitrust Laws	4-23
	[7]	Applicable Stock Exchange Requirements	4-23
§ 4.03		The Auction Process	4-24
	[1]	Preparing to Sell	4-24
		[a] Due Diligence	4-24
		[b] Confidentiality Agreements	4-26
		[c] Letters of Intent	4-31
	[2]	Choice of Sale Process: Auctions and Market Checks	4-34
		[a] Auction	4-34
		[b] Market Check	4-35
		[c] Costs of the Auction Process	4-39
	[3]	Valuing Stock Considerations in Acquisition Proposals	4-39
		[a] Short- and Long-Term Values	4-39
		[b] Stock Options	4-42
		[c] Low-Vote or No-Vote Stock Consideration	4-42
		[d] Social Issues and Other Constituencies	4-43
	[4]	Protecting the Deal	4-44
		[a] No-Shop and Window-Shop Provisions	4-45
		[b] “Don’t Ask, Don’t Waive” Provisions	4-47
		[c] Stock Options, Break-Up Fees, and Share Issuances	4-49
		[d] Board Recommendations, Fiduciary Outs and “Force-the-Vote” Provisions	4-56
		[e] Stockholder Commitments	4-58
		[f] Information Rights, Advance Notice Provisions and Matching Rights	4-60
		[g] Committed Deal Structures and Optionality	4-62
		[h] Crown Jewels	4-66
	[5]	Preemptive Bids and Attempts to Derail a Process	4-67
	[6]	Timing	4-67

TABLE OF CONTENTS

xv

	[a] Sequence of Events	4-68
	[b] Board Deliberations and Decisions	4-69
	[c] Federal Laws and Regulations	4-69
§ 4.04	Confidentiality	4-70.1
	[1] Secrets and Leaks	4-70.1
	[2] Duty to Disclose	4-71
§ 4.05	The Role of Advisors	4-72
	[1] Financial Fairness Opinions	4-72
	[2] Advice of Legal Counsel	4-81
§ 4.06	The Art of Running and Winning an Auction	4-83

CHAPTER 5

Acquisition Agreements

§ 5.01	Introduction	5-2
§ 5.02	Structure and Pricing	5-3
	[1] Types of Structures; Key Advantages and Disadvantages	5-3
	[a] Mergers	5-3
	[b] Stock Purchases	5-8
	[c] Tender Offers	5-9
	[i] Speed	5-11
	[ii] Dissident Shareholders	5-12
	[iii] Controller Transactions	5-13
	[iv] Top-Up Options	5-15
	[v] Dual-Track Tender Offers	5-16
	[vi] Subsequent Offering Periods	5-17
	[d] Asset Purchases	5-17
	[e] UPREIT and DownREIT Structural Issues	5-19
	[2] Pricing	5-20
	[a] Currency, Collars and Exchange Ratios	5-20
	[b] Other “Walk-Away” Rights	5-20.2
	[c] Contingent Value Rights	5-20.4
	[d] Factors Influencing Choice of Pricing Structure	5-20.6
§ 5.03	Representations and Warranties	5-21
§ 5.04	Covenants	5-27
	[1] Conduct of Business Covenants	5-27
	[2] Covenants Necessary to Effect Closing	5-28

	[3] Covenants Relating to Post-Closing Actions	5-31
§ 5.05	Closing Conditions	5-32
	[1] General Closing Conditions	5-32
	[2] REIT Qualification Opinion	5-36
	[3] Due Diligence Out	5-36
§ 5.06	Indemnification and Termination Provisions	5-38
	[1] Indemnification	5-38
	[2] Termination	5-39
§ 5.07	Miscellaneous Provisions	5-41
	[1] Anti-Assignment	5-41
	[2] Exclusivity, No-Shops and Fiduciary Outs	5-41
	[3] Break-Up Fees	5-43
	[4] Material Adverse Effect	5-46
	[5] Transactions in Stock by Affiliates	5-52
	[6] Management/Stockholder Support Agreements	5-54
	[7] Confidentiality Agreements	5-55

CHAPTER 6

Tax Considerations in REIT Mergers and Acquisitions

§ 6.01	REITs: Background and Qualification Issues	6-2
	[1] Asset Requirements	6-4
	[2] Income Tests	6-5
	[3] Distribution Requirement	6-11
§ 6.02	M&A Tax Considerations—Introduction	6-13
§ 6.03	Acquisition Structures—General Considerations	6-18
	[1] Tax-Free Reorganizations	6-18
	[a] Direct Merger	6-20
	[b] Forward Triangular Merger	6-23
	[c] Reverse Triangular Merger	6-24
	[d] Stock-for-Stock Exchange	6-27
	[e] Stock-for-Assets Exchange	6-28
	[2] Transactions that Are Wholly or Partly Taxable	6-29
	[a] Cash Option Merger	6-30
	[b] Acquisitions Involving Predominantly Cash Considerations	6-31

TABLE OF CONTENTS

xvii

	[i] Recapitalization Coupled with a Freezeout Merger . . .	6-32
	[ii] Merger of the Acquiror into the Target	6-32
	[c] Section 351 Transactions	6-33
[3]	Taxable Acquisitions	6-37
	[a] Asset Acquisitions	6-37
	[b] Stock Acquisitions	6-37
[4]	Net Operating Losses and Other Carryovers	6-40
	[a] In General	6-40
	[b] Section 382	6-40
	[c] Special NOL Rules Relating to REITs	6-41
§ 6.04	UPREIT Mergers and Related Partnership Issues	6-42
	[1] UPREITs—General Background	6-42
	[2] Overview of UPREIT Mergers	6-44
	[3] Disposition of Partnership Properties and Code Section 704(c) Issues	6-45
	[4] Debt Pay Down and Reallocation of Partnership Liabilities	6-47
	[5] Disguised Sales Issues	6-50
§ 6.05	Tax Issues If the Target Is a C Corporation . . .	6-52

CHAPTER 6A

Cross-Border Acquisitions by REITs

§ 6A.01	General Background	6A-3
	[1] Characterization of a Subsidiary as a Taxable REIT Subsidiary	6A-4
	[2] Characterization of a Subsidiary as a Qualified REIT Subsidiary (or Other Disregarded Entity)	6A-5
§ 6A.02	Acquisition Structures	6A-7
	[1] Taxable Asset Purchase	6A-7
	[2] Taxable Stock Purchase	6A-7
	[a] Acquisition of Less than 100% of the Stock of a Foreign Target Corporation	6A-7
	[b] Acquisition of 100% of the Stock of a Foreign Target Corporation	6A-7

REITs

	[c]	Characterization of a Foreign Target Corporation as a Taxable REIT Subsidiary	6A-8
	[d]	Characterization of a Foreign Target Corporation as a Qualified REIT Subsidiary	6A-9
	[i]	Inheritance of Non-REIT Earnings and Profits	6A-9
	[ii]	Recognition of Taxable Income	6A-11
	[iii]	Code Section 1374 Treatment	6A-15
	[e]	Code Section 338(g) Election	6A-15
[3]		Tax-Free Reorganizations	6A-16
	[a]	Characterization of a Foreign Target Corporation (or Foreign Corporation that Will Hold the Target Corporation's Assets After the Reorganization) as a Taxable REIT Subsidiary	6A-18
	[b]	Characterization of a Foreign Target Corporation (or Foreign Corporation that Will Hold the Target Corporation's Assets After the Reorganization) as a Qualified REIT Subsidiary	6A-18
	[i]	Inheritance of Non-REIT Earnings and Profits	6A-19
	[ii]	Recognition of Taxable Income	6A-19
	[iii]	Code Section 1374 Treatment	6A-21
§ 6A.03		Post-Acquisition Structure and Operations	6A-23
	[1]	Characterization of a Foreign Target Corporation as a Taxable REIT Subsidiary	6A-23
	[a]	Impact on REIT Gross Income Tests	6A-25
	[i]	Subpart F Income	6A-26
	[ii]	Code Section 956	6A-27
	[iii]	GILTI	6A-27
	[b]	Impact on REIT Distribution Requirement	6A-28
	[c]	Impact on REIT Asset Tests	6A-28

TABLE OF CONTENTS

xix

[2]	Characterization of a Foreign Target Corporation as a Qualified REIT Subsidiary	6A-29
[a]	Impact on REIT Gross Income Tests	6A-29
	[i] Code Section 987 Gains	6A-30
	[ii] Code Section 988 Gains	6A-32
[b]	Impact on REIT Distribution Requirement	6A-33
[c]	Impact on REIT Asset Tests	6A-33
[3]	Foreign Tax Credit Considerations	6A-33

CHAPTER 6B

Cross-Border Acquisitions of REITs: Selected U.S. Federal Income Tax Issues Arising From Foreign Acquisition of REITs or Interests in REITs

§ 6B.01	Introduction	6B-3
§ 6B.02	Acquisition Structures	6B-6
[1]	Overview of Code Section 367 as Applicable to Stock Transfers	6B-6
[2]	Overview of FIRPTA as Applicable to Nonrecognition Transactions Involving United States Real Property Interests	6B-8
§ 6B.03	Special Tax Considerations Regarding the Ownership and Disposition of REIT Shares	6B-13
[1]	Overview of the U.S. Federal Tax Regimes Applicable to Foreign Persons	6B-13
[2]	Sale of REIT Shares by Foreign Shareholders	6B-17
[a]	U.S. Federal Income Tax and FIRPTA	6B-19
[b]	U.S. Real Property Holding Corporation	6B-21
	[i] Publicly Traded Exception	6B-23
	[ii] Domestically Controlled REIT Exception	6B-27
	[iii] Qualified Shareholder Exception	6B-34

REITs

	[iv]	Exception for Interests Held by Foreign Retirement or Pension Funds	6B-34
	[c]	U.S. Federal Withholding Tax and Information Reporting	6B-34
	[d]	U.S. Federal Withholding Tax and Information Reporting Under the Foreign Account Tax Compliance Act	6B-37
	[e]	U.S. Tax Treaties	6B-37
[3]		Distributions by REITs to Foreign Shareholders	6B-39
	[a]	Ordinary Distributions	6B-40
		[i] U.S. Federal Income Tax and FIRPTA	6B-40
		[ii] U.S. Federal Withholding Tax	6B-43
		[iii] Information Reporting	6B-45
		[iv] U.S. Tax Treaties	6B-46
	[b]	Capital Gain Dividends and Section 897(h)(1) Distributions	6B-48
		[i] Overview of Capital Gain Dividends by REITs	6B-49
		[ii] U.S. Federal Income Tax and FIRPTA	6B-51
		[iii] U.S. Federal Withholding Tax	6B-62
		[iv] Information Reporting	6B-66
		[v] U.S. Tax Treaties	6B-66
	[c]	Liquidating Distributions	6B-67
		[i] Overview of the U.S. Federal Income Tax Treatment of Complete Liquidations	6B-68
		[ii] U.S. Federal Income Tax Treatment of Distributions by REITs to Foreign Shareholders in Complete Liquidation	6B-71
		[iii] U.S. Federal Withholding Tax	6B-76
		[iv] Information Reporting	6B-78
		[v] U.S. Tax Treaties	6B-79

CHAPTER 6C

**Cross-Border Acquisitions Involving REITs:
Selected Corporate and Regulatory Issues**

§ 6C.01	Overview	6C-2
§ 6C.02	Completing a Cross-Border Deal	6C-4
	[1] Political Considerations	6C-4
	[a] Committee on Foreign Investment in the United States	6C-6
	[b] Sovereign Wealth Funds	6C-11
	[2] Antitrust/Competition Review	6C-14
	[3] Deal Consideration and Transaction Structures	6C-15
	[a] All Cash	6C-17
	[b] Equity Consideration	6C-17
	[c] Depository Receipts and Global Shares	6C-18
	[d] Dual Listed Company Structures	6C-19
	[e] Joint Ventures	6C-19
	[f] Minority Stake	6C-20.1
	[4] Takeover Regulation	6C-21
	[a] U.S. Tender Offer Rules	6C-21
	[i] Tier I Exemption	6C-23
	[ii] Tier II Exemption	6C-24
	[b] State Regulation	6C-24.1
	[c] Foreign Regulation of Takeovers	6C-24.1
	[d] Fiduciary Duties of the Target's Board	6C-24.3
	[5] Litigation	6C-24.4
§ 6C.03	Special Considerations Post-Consummation	6C-25
	[1] Securities Laws Applicable to the Surviving Entity	6C-25
	[a] U.S. Securities Laws Applicable to Foreign Acquirors	6C-25
	[b] Foreign Securities Laws Applicable to U.S. Acquirors	6C-29
	[2] Stock Exchange Listing Requirements	6C-29
	[3] Integration Planning	6C-30
	[4] Deal Techniques and Cross-Border Practice	6C-33

CHAPTER 6D

**Special Tax Considerations Regarding
the Acquisition, Ownership and Disposition
of REIT Shares by Foreign Governments
and Their Sovereign Wealth Funds**

§ 6D.01	Introduction	6D-2
§ 6D.02	Sovereign Wealth Funds	6D-3
§ 6D.03	Overview of the U.S. Federal Income Tax Regime Applicable to Foreign Governments and Their Sovereign Wealth Funds	6D-7
	[1] Advantages of Code Section 892	6D-8
	[2] Foreign Governments	6D-9
	[a] “Integral Parts”	6D-9
	[b] “Controlled Entities”	6D-9
	[c] Sovereign Wealth Funds	6D-10
	[d] Political Subdivisions and Transnational Entities	6D-11
	[3] Types of Exempt Income	6D-11
	[4] Commercial Activities Exception	6D-13
	[a] “Commercial Activities”	6D-13
	[b] “Controlled Commercial Entity”	6D-16
	[c] Commercial Activities Attribution	6D-20
	[d] U.S. Real Property Holding Corporation Attribution	6D-22
§ 6D.04	Special Structuring Considerations for the Acquisitions of REIT Shares by Foreign Governments and Their Sovereign Wealth Funds	6D-26
	[1] General Structuring Considerations	6D-26
	[2] Special U.S. Real Property Holding Corporation Structuring Considerations	6D-30
§ 6D.05	Special Tax Considerations Regarding the Ownership and Disposition of REIT Shares by Foreign Governments and Their Sovereign Wealth Funds	6D-32
	[1] Sale of REIT Shares by Foreign Governments	6D-32
	[2] Distributions by REITs to Foreign Governments	6D-33
	[a] Ordinary Distributions	6D-33

TABLE OF CONTENTS

xxiii

[b] Section 897(h)(1) Distributions (Including Liquidating Distributions Attributable to Gain on the Sale or Exchange of U.S. Real Property Interests)	6D-33
---	-------

CHAPTER 6E

Tax Protection Agreements

§ 6E.01	Introduction	6E-2
§ 6E.02	The Rationale behind Tax Protection Agreements	6E-3
§ 6E.03	Preliminary Considerations	6E-5
	[1] Ambiguity	6E-5
	[2] Prospective Acquirors	6E-5
§ 6E.04	Covered Transactions	6E-8
	[1] Period of Protection	6E-10
	[2] Rollover Interests	6E-11
	[a] Character of Interest	6E-11
	[b] Economic Considerations	6E-13
	[3] Deemed Sales	6E-15
	[4] Debt Guarantees	6E-17
	[5] Amount of Indemnity Payment	6E-21
	[6] Code Section 704(c) Allocations	6E-24
§ 6E.05	Special Considerations	6E-28
	[1] Private REITs	6E-28
	[2] Troubled REITs	6E-29
	[3] Fiduciary Duties	6E-30

CHAPTER 7

Contests for Control: Enforcing Ownership Limits and Excess Share Provisions as Defensive Measures

§ 7.01	Introduction	7-2.1
	[1] Tender Offers	7-3
	[2] Proxy Contests	7-4
	[3] Other Considerations	7-4
§ 7.02	Ownership Limitation Provisions and Excess Share Provisions as Defensive Measure.	7-6
	[1] Excess Share Provisions	7-6

	[a]	Beneficial Ownership	7-7
	[b]	<i>Chateau/Roc</i>	7-8
	[2]	Waiver as a Defensive Vulnerability	7-10
§ 7.03		The Uncertainties Surrounding Enforcement of Ownership Limitation and Excess Share Provisions in REIT Charters as Defensive Measures	7-12
§ 7.04		Shareholders' Rights Plans and Excess Share Provisions Compared	7-18
	[1]	Prevalence of Poison Pills	7-18
	[2]	The Advantages of Poison Pills Over Ownership Limitations and Excess Share Provisions	7-21
	[3]	Tension Between the REIT Rules and the Mechanics of Poison Pills	7-23
	[a]	Poison Pills; Adoption and Mechanics	7-23
	[b]	Impact on a REIT's Nonclosely Held Status of a Distribution of Rights, a Flip-In or Flip-Over of Rights	7-25
	[c]	Impact of a Separation of Rights on the REIT Income Distribution Requirement	7-29
	[4]	Case Law Regarding Rights Plans	7-31
	[5]	Rights Plans and Economics	7-34
	[6]	"Dead Hand" Pills and "Shareholder Rights" Bylaws	7-34.1
	[a]	"Dead Hand" Pills	7-34.1
	[b]	"Shareholder Rights" Bylaws	7-34.2
§ 7.05		UPREIT Takeovers and Governance	7-34.4
	[1]	UPREIT Structures	7-34.4
	[2]	Tender Offers	7-34.4
§ 7.06		Empty Voting, Hidden Ownership, and Problems of Disclosure	7-36
	[1]	Empty Voting and Hidden Ownership	7-36
	[2]	Potential Abuses in Disclosing Beneficial Ownership	7-38
	[a]	Historical Purpose of the 13(d) Reporting Rules	7-38
	[b]	Ten-Day Reporting Window	7-39
	[c]	Derivatives and Beneficial Ownership	7-41
§ 7.07		Other Advance Takeover Preparedness Measures and Responding to Unsolicited Offers	7-45

TABLE OF CONTENTS

xxv

[1]	Other Defensive Charters and Bylaw Provisions	7-45
	[a] Nominations and Shareholder Business	7-47
	[b] Meetings	7-49
	[c] Vote Required	7-50
	[d] Action by Written Consent	7-50
	[e] Staggered Boards	7-51
	[f] Forum Selection Provisions	7-52
	[g] Fee-Shifting Bylaws and Mandatory Arbitration Provisions	7-55
	[h] Board-Adopted Bylaw Amendments	7-56
[2]	Change-of-Control Employment Arrangements	7-57
[3]	“Poison Puts”	7-61
[4]	Defending Against an Unsolicited Offer—“Just Say No”	7-64
[5]	Active Responses to Unsolicited Offers	7-65
	[a] White Knights and White Squires	7-66
	[b] Restructuring Defenses	7-68
	[c] Making an Acquisition and the “Pac-Man” Defense	7-69
	[d] Corporate Spin-Offs, Split-Offs and Split-Ups	7-69
	[e] Regulatory Action	7-70
	[f] Litigation Defenses	7-71

CHAPTER 8

Taking REITs Private

§ 8.01	Overview	8-2
	[1] Why Go Private?	8-2
	[2] Structuring the Transaction	8-4
§ 8.02	Financial Considerations	8-7
	[1] Pricing	8-7
	[2] Source of Funds	8-7
	[3] Stapled Financing	8-8
	[4] Debt and Equity Bridges	8-8
§ 8.03	Managing Conflicts of Interest	8-9
§ 8.04	Other Considerations	8-10.2
	[1] Market Checks	8-10.2

REITs

	[2] Executive Compensation and Retention	8-10.2
	[3] Change of Control Employment Arrangements	8-10.3
	[4] Club Deals	8-10.3
	[5] Reverse Break-Up Fees and Capped Guarantees	8-10.3
	[6] Strategic vs. Financial Bidders	8-10.4
§ 8.05	Treatment of Unitholders in UPREIT Going Private Transactions	8-10.5
	[1] The Hometown-Chateau Transaction	8-10.5
	[2] The Arden-GE-Trizec Transaction	8-10.7
§ 8.06	Implications of the REIT Rules	8-13
§ 8.07	Applicable Federal and State Law	8-14
	[1] Federal Securities Law	8-14
	[2] State Law	8-16
	[a] Delaware	8-16
	[b] Maryland	8-19

CHAPTER 9**Financing the Deal**

§ 9.01	Introduction	9-1
§ 9.02	Financing Options	9-3
§ 9.03	Due Diligence	9-5
§ 9.04	Dealing with Conditionality (The “Financing Contingency”)	9-8
§ 9.05	Establishing a Debt Strategy and Making a “Wish List”	9-10
§ 9.06	Securing a Commitment Letter	9-12
§ 9.07	Closing the Deal	9-15

CHAPTER 10**Spin-Offs of REITs
by Operating Businesses**

§ 10.01	Overview	10-1
§ 10.02	Formation of “Linked” REITs	10-5
§ 10.03	Addressing Conflicts of Interest	10-7
§ 10.04	Tax-Free Spin-Offs of REITs	10-8
	[1] In General	10-8
	[2] REIT Specific Spin-Off Issues	10-11

TABLE OF CONTENTS

xxvii

[a] Active Trade or Business Issue....	10-11
[b] Corporate Business Purpose	10-13
[c] Not a Device	10-14

CHAPTER 11

Compensation Issues in REIT Mergers and Acquisitions

§ 11.01	In General	11-2
§ 11.02	Change of Control Definitions	11-4
	[1] Triggering Events	11-4
	[2] Objective Criteria	11-4
	[3] Impact of Section 409A	11-5
	[4] Transaction Structure	11-5
§ 11.03	“Golden Parachute” Arrangements	11-6
	[1] Adoption of Golden Parachute Arrangements	11-6
	[2] Structure of Golden Parachute Arrangements	11-7
	[a] Triggering Events	11-7
	[b] Amount of Severance	11-8
	[c] Golden Parachute Excise Tax	11-9
	[d] Other Important Golden Parachute Arrangement Provisions	11-13
§ 11.04	Stock-Based and Other Incentive Compensation Plans	11-14
	[1] Treatment of Equity Awards	11-14
	[2] Accelerated Vesting	11-15
	[3] Performance-Based Awards	11-16
	[4] Annual Bonuses	11-17
	[5] LTIP Units	11-17
§ 11.05	Broad-Based Employee Benefit Plans	11-19
	[1] “Full-Company” Transactions vs. Asset/Subsidiary Transactions	11-19
	[2] Employee Treatment Covenants	11-20
	[a] Benefit Continuation Covenant	11-20
	[b] Service Credit Covenant	11-21
	[c] Severance Covenant	11-21
	[d] Covenants Generally	11-22
	[3] Qualified Retirement Plans	11-22
	[a] Qualification Issues	11-23
	[b] Transfers of Assets and Liabilities	11-24

REITs

	[c] Pension Benefit Guaranty Corporation	11-24
[4]	Deferred Compensation and Other Nonqualified Arrangements.	11-25
	[a] In General	11-25
	[b] Code Section 409A	11-25
[5]	Welfare Plans	11-26
[6]	Labor Issues	11-27
[7]	Retention Issues	11-28

CHAPTER 12**Antitrust Issues in
REIT/Real Estate Transactions**

§ 12.01	Overview	12-2
§ 12.02	Procedural Rules: Hart-Scott-Rodino Act	12-3
	[1] Reportable Transactions and Information Required.	12-3
	[2] Waiting Periods and Second Requests	12-4
	[a] Cash Tender Offers	12-5
	[b] Other Tender Offers	12-5
	[c] Open Market Purchases or Other Acquisitions from Third Parties	12-6
	[d] Mergers, Asset Acquisitions and Acquisitions of Securities from the Issuer	12-6
	[e] Joint Ventures	12-6
	[f] Acquisitions in Bankruptcy.	12-6
[3]	REIT Exemption	12-7
[4]	Explicit Exemptions from the HSR Act.	12-8
	[a] 15 U.S.C. § 18a(c)(1) and 16 C.F.R. § 802.1: Acquisitions of Goods and Realty in the Ordinary Course of Business	12-8
	[b] 16 C.F.R. § 802.2: Acquisitions of Certain Real Property Assets	12-9
	[c] 16 C.F.R. § 802.4: Acquisitions of Voting Securities, etc., of Entity that Holds Exempt Assets	12-9

TABLE OF CONTENTS

xxix

	[d]	Section 802.5: Acquisitions of Investment Rental Property Assets	12-10
	[e]	16 C.F.R. § 802.9: Acquisitions Solely for the Purpose of Investment	12-10
§ 12.03	[5]	Gun Jumping Issues	12-10
		Substantive Antitrust Standards	12-11
	[1]	Substantive Antitrust Standards	12-11
		[a] Analytic Framework	12-11
		[b] Parties with Standing	12-13
		[c] Remedies	12-13
	[2]	State Antitrust Laws	12-14

CHAPTER 13

Advantages of Delaware and Maryland as REIT Domiciles

§ 13.01		Introduction	13-2
§ 13.02		Maryland's Advantages as a REIT Domicile	13-4
	[1]	Maryland's Historical Primacy	13-4
	[2]	Statutory Advantages	13-5
	[3]	Procedural Responsiveness	13-7
	[4]	Continuing Popularity	13-9
§ 13.03		Delaware's Advantages as a REIT Domicile	13-10
	[1]	Structural Advantages	13-10
	[2]	Judicial Expertise	13-11
	[3]	Specialized Court System	13-12
	[4]	Responsiveness	13-14
	[5]	Skilled Bar	13-14
	[6]	Statutory Advantages	13-15
	[7]	Continuing Popularity	13-15
§ 13.04		Delaware and Maryland's Common Advantage: Network Effects	13-18
	[1]	Stock of Precedent and Creation of Future Precedents	13-18
	[2]	Development of Common Business Practices	13-19
	[3]	Larger and More Talented Markets for Legal Services	13-20
	[4]	Legal Familiarity and the Pricing of Securities	13-20

§ 13.05	Forum Selection and Mandatory Arbitration Provisions	13-22
[1]	The Multiforum Shareholder Litigation Problem	13-22
[2]	Forum Selection Provisions	13-23
[3]	Mandatory Arbitration Provisions	12-25
[4]	A Note on Provisions Governing Federal Securities Law Claims	12-27

Appendices

APPENDIX A:	Selected REIT M&A Transactions	A-1
APPENDIX B:	Agreement and Plan of Merger	B-1
APPENDIX C:	Sample Operating Partnership Agreement	C-1
APPENDIX D:	Sample Charter	D-1
APPENDIX E:	Sample Commitment Letter	E-1
INDEX	I-1