

# 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 . . . . .	1-5
§ 1.04	REIT, UPREIT and DownREIT Basics. . . . .	1-8
§ 1.05	Clashes of Culture, Custom and Deal Structures at the Crest of the Revolution. . . . .	1-11
	[1] Cultural Differences . . . . .	1-11
	[2] Structural Differences . . . . .	1-12

## 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 . . . . .	3-9
	[2]	Enhanced or Intermediate Scrutiny . . . . .	3-10
		[a] The <i>Unocal/Unitrin</i> Standard . . . . .	3-11
		[b] The <i>Revlon</i> Test . . . . .	3-15
	[3]	Entire Fairness . . . . .	3-17
	[4]	Duties in Change of Control Transactions . . . . .	3-24
		[a] Delaware . . . . .	3-24
		[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 . . . . .	3-48
	[3]	Disinterestedness and Independence of Committee Members . . . . .	3-50
	[4]	The Committee's Role and Process . . . . .	3-53
	[5]	Selection of the Committee's Advisors . . . . .	3-56
	[6]	Standard of Review in Squeeze-Out Mergers . . . . .	3-58
	[7]	Shareholder Approval and Shifting the Standard of Review. . . . .	3-60
		[a] Standard-Shifting in Non-Control Transactions . . . . .	3-60
		[b] Standard-Shifting in Controlling Shareholder Transactions . . . . .	3-65
	[8]	Buy-Side Claims . . . . .	3-68
§ 3.05		Principles of Good Governance in REITs. . . . .	3-71
	[1]	General Considerations . . . . .	3-71
	[2]	Special REIT Considerations. . . . .	3-72

## 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
		[i] Pre-Signing Market Check . . . . .	4-36
		[ii] Post-Signing Market Check . . . . .	4-36
		[iii] Go-Shops . . . . .	4-39
		[c] Costs of the Auction Process . . . . .	4-40
	[3]	Valuing Stock Considerations in Acquisition Proposals . . . . .	4-40
		[a] Short- and Long-Term Values . . . . .	4-40
		[b] Stock Options . . . . .	4-43
		[c] Low-Vote or No-Vote Stock Consideration . . . . .	4-43
		[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 . . . . .	4-50
		[d] Board Recommendations, Fiduciary Outs and “Force-the-Vote” Provisions . . . . .	4-56
		[e] Stockholder Commitments . . . . .	4-59
		[f] Information Rights, Advance Notice Provisions and Matching Rights . . . . .	4-61
		[g] Committed Deal Structures and Optionality . . . . .	4-63
		[h] Crown Jewels . . . . .	4-67

## TABLE OF CONTENTS

xv

	[5] Preemptive Bids and Attempts to Derail a Process . . . . .	4-68
	[6] Timing . . . . .	4-68
	[a] Sequence of Events . . . . .	4-69
	[b] Board Deliberations and Decisions . . . . .	4-70
	[c] Federal Laws and Regulations . . . . .	4-71
§ 4.04	Confidentiality . . . . .	4-73
	[1] Secrets and Leaks . . . . .	4-73
	[2] Duty to Disclose . . . . .	4-74
§ 4.05	The Role of Advisors . . . . .	4-75
	[1] Financial Fairness Opinions . . . . .	4-75
	[2] Advice of Legal Counsel . . . . .	4-85
§ 4.06	The Art of Running and Winning an Auction . . . . .	4-86

## 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 and Interloper Risk . . . . .	5-11
	[ii] Dissident Shareholders . . . . .	5-12
	[iii] Controller Transactions . . . . .	5-13
	[iv] Top-Up Options . . . . .	5-14
	[v] Dual-Track Tender Offers . . . . .	5-15
	[vi] Subsequent Offering Periods . . . . .	5-15
	[d] Asset Purchases . . . . .	5-16
	[e] UPREIT and DownREIT Structural Issues . . . . .	5-17
	[2] Pricing . . . . .	5-18
	[a] Currency, Collars and Exchange Ratios . . . . .	5-18
	[b] Other “Walk-Away” Rights . . . . .	5-20.1
	[c] Contingent Value Rights . . . . .	5-20.3
	[d] Factors Influencing Choice of Pricing Structure . . . . .	5-20.4
§ 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 . . . . .	5-55
	[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 . . . . .	6-6
	[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

**TABLE OF CONTENTS**

xvii

[b] Acquisitions Involving  
Predominantly Cash  
Considerations . . . . . 6-31

[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

## REITs

	[b]	Acquisition of 100% of the Stock of a Foreign Target Corporation . . . . .	6A-7
	[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



## TABLE OF CONTENTS

xix

	[c] Impact on REIT Asset Tests . . . . .	6A-28
[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] Non-U.S. Regimes . . . . .	6C-11
	[c] Sovereign Wealth Funds . . . . .	6C-13
	[2] Antitrust/Competition Review . . . . .	6C-16
	[3] Deal Consideration and Transaction Structures . . . . .	6C-17
	[a] All Cash . . . . .	6C-19
	[b] Equity Consideration . . . . .	6C-19
	[c] Depository Receipts and Global Shares . . . . .	6C-20
	[d] Dual Listed Company Structures . . . . .	6C-20.1
	[e] Joint Ventures . . . . .	6C-20.2
	[f] Minority Stake . . . . .	6C-20.3
	[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 Custom and Practice . . . . .	6C-34

## 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

## TABLE OF CONTENTS

xxv

§ 7.07	Other Advance Takeover Preparedness Measures and Responding to Unsolicited Offers . . . . .	7-45
[1]	Other Defensive Charters and Bylaw Provisions . . . . .	7-45
[a]	Advance Notice of Nominations and Shareholder Business . . . . .	7-47
[b]	Regulation of Shareholder Meetings . . . . .	7-48
[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
	[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	Obtaining a Commitment Letter . . . . .	9-12
§ 9.07	Closing the Deal . . . . .	9-13

## 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



## TABLE OF CONTENTS

xxvii

§ 10.04	Tax-Free Spin-Offs of REITs . . . . .	10-8
	[1] In General . . . . .	10-8
	[2] REIT Specific Spin-Off Issues . . . . .	10-11
	[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 . . . . .	11-12
§ 11.04	Stock-Based and Other Incentive Compensation Plans . . . . .	11-14
	[1] Treatment of Equity Awards . . . . .	11-14
	[2] Accelerated Vesting . . . . .	11-16
	[3] Performance-Based Awards . . . . .	11-16
	[4] Annual Bonuses . . . . .	11-17
	[5] LTIP Units . . . . .	11-18
§ 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

**REITs**

[3]	Qualified Retirement Plans . . . . .	11-22
	[a] Qualification Issues . . . . .	11-23
	[b] Transfers of Assets and Liabilities. . . . .	11-24
	[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: HSR Act . . . . .	12-4
	[1] Reportable Transactions and Information Required. . . . .	12-4
	[2] Waiting Periods and Second Requests . . . . .	12-5
	[a] Cash Tender Offers . . . . .	12-6
	[b] Other Tender Offers . . . . .	12-7
	[c] Open Market Purchases or Other Acquisitions from Third Parties . . . . .	12-7
	[d] Mergers, Asset Acquisitions and Acquisitions of Securities from the Issuer . . . . .	12-7
	[e] Joint Ventures . . . . .	12-7
	[f] Acquisitions in Bankruptcy. . . . .	12-8
[3]	REIT Informal Exemption . . . . .	12-8
[4]	Explicit HSR Exemptions . . . . .	12-9
	[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 . . . . .	12-9
	[b] 16 C.F.R. § 802.2: Acquisitions of Certain Real Property Assets . . . . .	12-10

## TABLE OF CONTENTS

xxix

	[c]	16 C.F.R. § 802.4: Acquisitions of Voting Securities of Entity that Holds Exempt Assets . . . . .	12-11
	[d]	16 C.F.R. § 802.5: Acquisitions of In-vestment Rental Property Assets . . . . .	12-11
	[e]	Passive Investor Exemptions . . . . .	12-11
	[5]	Gun Jumping Issues . . . . .	12-12
§ 12.03		Substantive Antitrust Standards . . . . .	12-13
	[1]	Substantive Antitrust Standards . . . . .	12-13
	[a]	Analytic Framework . . . . .	12-13
	[b]	Parties with Standing . . . . .	12-15
	[c]	Remedies . . . . .	12-16
	[2]	State Antitrust Laws . . . . .	12-16

## 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

**REITs**

	[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**

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