



February 15, 2012

*Submitted via E-mail to [director@fasb.org](mailto:director@fasb.org)*

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File Reference No. 2011-200  
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**Re: File Reference No. 2011-200; Comments on Financial Services—Investment Companies (Topic 946)**

Ladies and Gentlemen,

Annaly Capital Management, Inc. (Annaly) is pleased to submit these comments to the Financial Accounting Standards Board (FASB) on the above-referenced Exposure Draft regarding a proposed Accounting Standards Update on Topic 946. The Exposure Draft proposes to amend the guidance for determining whether an entity qualifies as an investment company and establishes new provisions for reporting. We appreciate the opportunity to participate in this process.

The Exposure Draft sets forth that an entity is generally “required to consider its purpose and design when determining whether it is an investment company.” According to the Exposure Draft, an investment company is one that (i) is regulated under the Investment Company Act of 1940 (the 1940 Act) or (ii) meets all of six enumerated criteria related to (a) the nature of its investment activities, (b) its express business purpose, (c) unit ownership, (d) pooling of funds, (e) fair value management and (f) its status as a reporting entity.

The main thrust of our response is that mortgage real estate investment trust (REITs) are not investment companies, should maintain their exemption from reporting as investment companies, and should not be required to change from current reporting practices and adopt investment company reporting. Our comment letter is organized to directly address the six criteria that are set forth in the Exposure Draft, and to address certain general issues about the “purpose and design” of mortgage REITs that differentiate them from investment companies. While we discuss why we believe the six criteria are overly broad, we focus on the fact that Mortgage REITs do not manage and evaluate their assets on a fair value basis. Thus, mortgage REITs do not satisfy all six of the criteria.

Additionally, we will address certain general issues about mortgage REITs’ “purpose and design” that are raised in the Exposure Draft from Annaly’s perspective. In summary:

- They do not manage to fair value; rather, they manage to yield and as such their returns to investors are predominantly driven by dividend income as opposed to realized gains
- They do not operate as investment companies
- They are not regulated as investment companies

- REITs execute transactions that investment companies do not
- They are not evaluated by investors like investment companies
- They do not have the same investor base as investment companies
- Requiring an entity that is not an investment company to report like one would create confusion in the marketplace, particularly among unsophisticated investors
- Requiring complete disclosure of investments is a competitive disadvantage versus other investors in mortgage-backed securities
- There is no obvious benefit to investors for requiring REITs to use investment company reporting
- There is a growing interest in REITs around the world, and despite FASB's desire to have international accounting standards converge, this Exposure Draft would represent a divergence from international standards
- The potential for misconceptions may have an effect on capital raising for mortgage REITs, which would have a negative impact on capital formation in the residential and commercial mortgage market

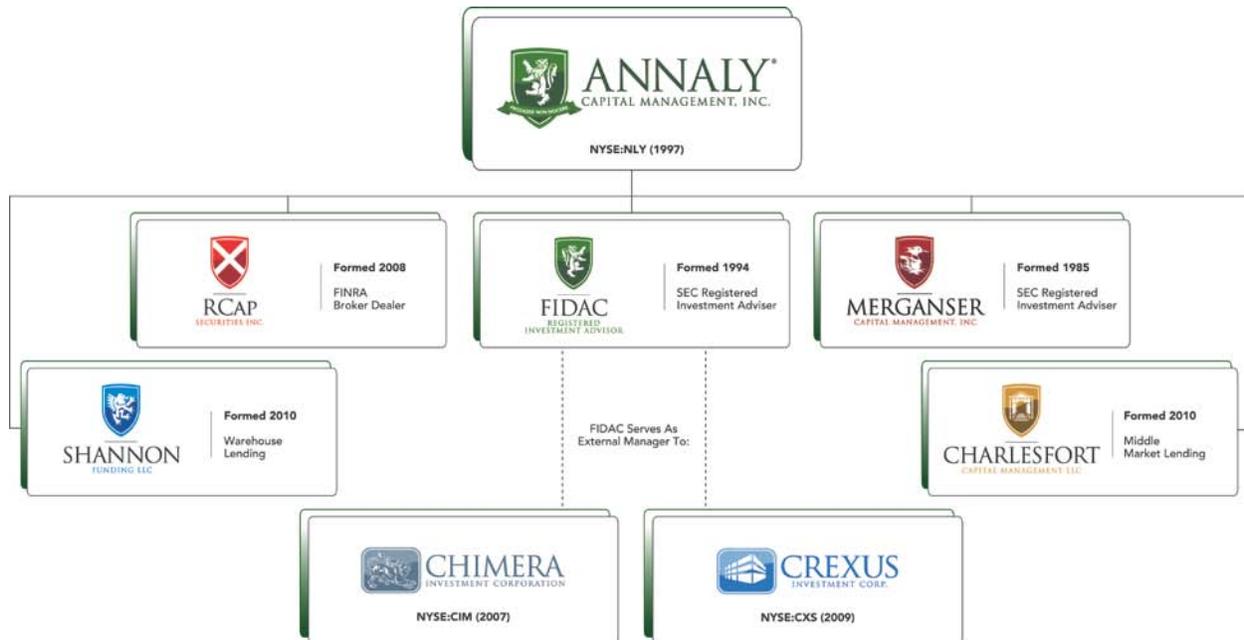
### **Background**

Annaly (NYSE:NLY) commenced operations on February 18, 1997 and is now the largest mortgage REIT in the country by assets and the fifth largest by market capitalization.<sup>1</sup>

Annaly is an operating company that analyzes, purchases and finances a portfolio of primarily Agency mortgage-backed securities and operates a number of lines of business through our operating subsidiaries: RCap Securities (RCap), a broker-dealer; Fixed Income Discount Advisory Company (FIDAC), a registered investment advisor that, among other things, serves as the external manager of two other NYSE listed mortgage REITs—Chimera Investment Corporation (Chimera), which acquires primarily residential whole loans and non-Agency mortgage-backed securities and residential mortgage loans, and CreXus Investment Corp. (CreXus), which acquires primarily commercial real estate debt and equity; Merganser Capital Management (Merganser), a registered investment advisor that manages fixed income portfolios for institutional accounts; Shannon Funding, a residential mortgage warehouse provider; and CharlesFort Capital Management, a middle-market lending operation. Thus, through our offices, we are engaged in a number of business activities. The chart below sets forth our corporate structure, which clearly does not resemble that of an investment company.

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<sup>1</sup> We are members of industry trade groups that are involved in the mortgage and real estate markets, including the National Association of Real Estate Investment Trusts (“NAREIT”), the Securities Industry and Financial Markets Association (“SIFMA”), the Commercial Real Estate Finance Council (“CREFC”), the American Securitization Forum (“ASF”) and the Mortgage Bankers Association (“MBA”).



Mortgage REITs have flourished as operating companies and are an established, accepted and desirable investment asset class for a wide range of individual and institutional investors. Mortgage REITs have also become a critically important source of capital formation in the residential and commercial real estate markets. We have only achieved this because we complied with all relevant laws, regulations and guidelines, including the guidance provided by FASB related to our accounting policies and procedures, and delivered compelling investment returns to our shareholders. Moreover, we firmly believe our shareholders have made their investment decisions based upon information provided by our current disclosures, have exhibited no confusion about the fact that we are not an investment company, and have made no suggestion that they require investment company accounting in order to make their investment decisions relating to mortgage REITs. We will discuss investment valuation later in our letter.

There are two fundamental organizing principles that enable Annaly—and Chimera and CreXus—to operate as we do: First, we have elected to be taxed as a REIT, which enables us to pass-through our income free of corporate taxes to our shareholders and, second, we are exempt from registering as an investment company with the Securities and Exchange Commission (SEC) under Section 3(c)(5)(C) of the 1940 Act. We continually monitor and test to ensure we comply with both our REIT tax regulations and our Section 3(c)(5)(C) exemption. Indeed, based on our tests, we publicly disclose in the appropriate filings that we are in compliance with the relevant regulations (the excerpt below is from the Annaly 2010 Annual Report on Form 10-K):

We calculate that at least 75% of our assets were qualified REIT assets, as defined in the [Internal Revenue] Code for the years ended December 31, 2010 and 2009. We also calculate that our revenue qualifies for the 75% source of income test and for the 95% source of income test rules for the years ended December 31, 2010, 2009 and 2008 and for each quarter therein. Consequently, we met the REIT income and asset tests. We also met all REIT requirements regarding the ownership of

our common stock and the distribution of our net income. Therefore, for the years ended December 31, 2010, 2009, and 2008, we believe that we qualified as a REIT under the Code.

We at all times intend to conduct our business so as not to become regulated as an investment company under the Investment Company Act of 1940, or the Investment Company Act. If we were to become regulated as an investment company, then our use of leverage would be substantially reduced. The Investment Company Act exempts entities that are “primarily engaged in the business of purchasing or otherwise acquiring mortgages and other liens on and interests in real estate” (qualifying interests). Under current interpretation of the staff of the Commission, in order to qualify for this exemption, we must maintain at least 55% of our assets directly in qualifying interests and at least 80% of our assets in qualifying interests plus other real estate related assets. In addition, unless certain mortgage securities represent all the certificates issued with respect to an underlying pool of mortgages, the Agency mortgage-backed securities may be treated as securities separate from the underlying mortgage loans and, thus, may not be considered qualifying interests for purposes of the 55% requirement. We calculate that as of December 31, 2010 and December 31, 2009, we were in compliance with this requirement.

These are clearly important disclosures for us to make to our investors, and we have tested for these items continuously since we began our operations. Maintaining our REIT tax status and our section 3(c)(5)(C) exemption are not only critical components of our operations, but they are primary differentiators between REITs and investment companies.

Historically, FASB has made an exception for mortgage REITs reporting as investment companies. It is not clear why FASB is now seeking to require entities that are, by law, not investment companies to utilize investment company accounting.

#### **Specific Issues Regarding the Six Criteria**

The six criteria listed in the exposure draft are meant to be taken together, but many of them are overly broad. They could apply to virtually every shareholder-owned for-profit company. For example, all for-profit businesses invest for positive returns from capital appreciation or income. Ownership of all companies, other than perhaps sole proprietorships, is reflected on a unit basis, whether shares of stock or other ownership interests. All for-profit companies exist to earn those returns for their shareholders whose capital has been pooled for that purpose, and regularly report their results to their shareholders. Indeed, all public companies are required by law to provide their shareholders with financial results about their investment activities.

Since the six criteria are so overbroad and conceivably apply to almost every public company, Annaly believes these criteria are irrelevant in determining whether a company is an investment company. Rather, the determinative factor of whether a company should be required to use investment company accounting is whether a company is registered under the 1940 Act as an investment company. It is registered entities that the public would expect to use investment company accounting, not mortgage REITs.

In any event, Annaly and other mortgage REITs are not regulated under the 1940 Act. Accordingly, we must meet all of the six criteria enumerated in the Exposure Draft in order to be required to adopt

investment company reporting. We believe that Annaly and other mortgage REITs do not meet all six criteria. Specifically, we do not meet the criterion related to fair value management, which states that “[s]ubstantially all of the investment company’s investments are managed, and their performance evaluated, on a fair value basis.”

Mortgage REITs do not manage their investments to fair value; rather, the purpose and design of mortgage REITs is to manage their assets for the purpose of collecting contractual cash flows. The performance of mortgage REITs is not evaluated on a fair value basis; rather, they are evaluated based on their dividend paying ability. Listed mortgage REITs do not transact with their investors on a fair value basis; rather, their investors buy and sell shares based on market prices. In most instances, market prices may be higher or lower than the mortgage REITs’ per share fair value.

Paragraph 946-10-55-16 describes the implementation guidance on the scope of fair value management, and paragraphs BC26 through BC29 provide background information on the basis for conclusions related to fair value management. The paragraphs however, do not provide a clear definition of what it means to manage to fair value.

Absent a clear definition under GAAP, we reviewed International Financial Reporting Standard 9 (IFRS 9), Appendix B, which provides application guidance for entities’ business models for managing financial assets for classification purposes. In this guidance, distinction is made between classifying financial assets as measured at amortized cost or at fair value on the basis of the entity’s business model (i.e., purpose and design) for managing those assets. Several points are made that would result in classifying the business model of mortgage REITs as holding financial assets for the purpose of collecting contractual cash flows. Mortgage REITs typically are what is referred to as “buy and hold” investors, who are managing the assets for purposes of collecting contractual cash flows. These cash flows are then distributed to shareholders as dividends, and not held in retained earnings.

Additionally, if an entity’s business model is to hold financial assets in order to collect contractual cash flows, the entity need not hold all of those assets until maturity. IFRS reviews the example of an entity that holds investments to collect their contractual cash flows but in particular circumstances would sell an investment. IFRS concludes that this entity would still be deemed to hold financial assets for the purpose of collecting contractual cash flows: “Although an entity may consider, among other information, the financial assets’ fair values from a liquidity perspective (i.e., the cash amount that would be realized if the entity needs to sell assets), the entity’s objective is to hold the financial assets and collect the contractual cash flows. Some sales would not contradict that objective.”

Thus, a mortgage REIT is expressly not a business model where an entity actively manages a portfolio of assets in order to realize fair value gains arising from changes in credit spreads and yield curves. As IFRS 9 states, “A portfolio of financial assets that is managed and whose performance is evaluated on a fair value basis... is not held to collect contractual cash flows. Also, a portfolio of financial assets that meets the definition of held for trading is not held to collect contractual cash flows. Such portfolios of instruments must be measured at fair value through profit or loss.”

Furthermore, in the Paragraph B17 of the IFRS Exposure Draft on Investment Entities, IFRS provides guidance that in order to evaluate whether or not the controlled investments of an investment entity are managed on a fair value basis, the evaluation is “based on how the investment entity manages and evaluates performance, rather than on the nature of its investments. The entity’s activities must demonstrate that the fair value is the primary measurement attribute used to make a decision about the financial performance of those assets.” Again, in our experience managing our business, we evaluate the performance of our assets primarily on the basis of their expected cash flows in a wide range of interest rate and credit environments.

On a related note, Paragraph BC28 states that FASB should consider how the entity transacts with its investors. “For example, some open-ended funds transact with investors on the basis of a net asset value per share, which is calculated using the fair value of the entity’s underlying investments.” As discussed below, publicly-traded mortgage REIT investors do not evaluate their investment on a fair value basis, nor do they transact on that basis. For publicly-traded mortgage REITs, their shareholders transact in two different ways, either directly with the company through share offerings or through the open market. In both cases, the transactions occur at a price that is based on the prevailing market price, which is generally determined by the REIT’s dividend yield, not its book value per share.

As a result, FASB should consider adding a 7<sup>th</sup> criterion that states: “An entity must transact with investors on the basis of a net asset value per share or, in the case of money market funds or other similar funds, a constant NAV.”

### **General Issues Regarding the Purpose and Design of Mortgage REITs**

The following discussion addresses certain issues related to the “purpose and design” of mortgage REITs that are inconsistent with investment companies:

#### ***Mortgage REITs Don’t Operate Like Investment Companies***

Mortgage REITs are not investment companies under the 1940 Act and therefore do not restrict their substantive business activities to those of investment companies; rather, as discussed elsewhere in this letter as it relates to Annaly, mortgage REITs can and do engage in other operating businesses so that the express business purpose of the mortgage REITs can include deriving income from these other businesses.

REITs are not managed like investment companies, and we believe there is no confusion in the marketplace among investors that when an investor purchases shares in a REIT that they may be buying an investment company and vice versa. In fact, because REITs are specifically exempted from registering as an investment company under the 1940 Act, and make such disclosure in their relevant filings, investors are specifically instructed that REITs are not investment companies.

Investment companies, according to the 1940 Act, are entities that (a) are engaged primarily in the business of investing, reinvesting or trading in securities (securities being essentially defined as corporate stocks and bonds, not government securities or loans), (b) are engaged in issuing redeemable securities, and (c) are engaged in the business of having more than 40% of their assets in investment securities. REITs do not fit these criteria, and are further exempted from being defined as an investment company due to Section 3(c)(5)(C) of the 1940 Act, which exempts specifically any entity that is not an issuer of redeemable securities and is primarily engaged in “purchasing or otherwise acquiring mortgages on and interest in real estate”.<sup>2</sup> It is a strange result that mortgage REITs, which by law are exempt from regulation under the 1940 Act, would be required by FASB to apply accounting standards for companies which are registered under the 1940 Act.

The 1940 Act exempts other entities from being characterized and regulated as an investment company, including banks, insurance companies, commodity royalty trusts or lease partnerships. These entities do not operate as investment companies and FASB is not suggesting that these other entities should report as investment companies. Similarly, mortgage REITs are *not* investment companies, they are engaged in businesses and operations that are not found in investment companies, and should not be required to report as investment companies. In Annaly’s case, many of our lines of business, whether at a subsidiary level or affiliates, are not activities that one would find in an investment company. For example, as discussed above, Annaly owns and operates a broker-dealer, a residential mortgage warehouse funding company, a middle-market lending company and two registered investment advisors.

From an ownership perspective, mortgage REITs have limits on the ownership of their common stock that are not required of investment companies. To maintain their qualification as a REIT for federal income tax purposes, not more than 50% in value of the outstanding shares of our capital stock may be owned, directly or indirectly, by five or fewer individuals. Primarily to facilitate maintenance of this requirement, REIT charters will typically prohibit ownership by any person of more than 9.8% of our common stock. Anyone seeking to exceed this ownership limit would have to receive approval from our board of directors.

From a portfolio management perspective, mortgage REITs and investment companies are fundamentally different. Subject to diversification requirements, investment companies can buy and sell a wide range of assets and securities. REITs, on the other hand, have to manage their assets at all times to make sure they satisfy the 1940 Act exemption requirements and meet the REIT tests for federal income tax purposes. For example, Annaly and other mortgage REITs that invest in Agency MBS must have at least 55% of their assets in whole pools at all times, and 25% of their assets must also be in real-estate related assets to satisfy the 1940 Act exemption requirements. This is a portfolio management

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<sup>2</sup> The SEC has determined that, among other things, mortgages, whole-pool mortgage-backed securities or controlling interests in subordinated tranches, are qualifying interests for purpose of meeting the exemption. Moreover, mortgage-backed securities, which are pools of mortgages, are not considered securities in the sense of the 1940 Act definition of investment securities.

challenge, as it limits to a certain extent the types of assets in which we may invest. Functionally, it is also what keeps REITs as long-term holders of these real estate assets. Investment companies that specialize in mortgage-backed securities, most of which are open-ended, have no such restrictions, must manage to meet redemptions at net asset value and do not provide long-term stable capital for the real estate market.

From a tax perspective, mortgage REITs and investment companies are different. Mutual funds are Regulated Investment Companies or RICs, and under §§851 – 855 of the Internal Revenue Code, at least 90% of a mutual fund's gross income must be derived from dividends, interest, payments from securities loans and gains on securities sales. In addition, at least 50% of the fund's net assets must consist of cash or securities (with concentration limits). To qualify as a REIT under §§856 – 859 of the Internal Revenue Code, at least 75% of our gross income must come from real estate sources and at least 95% of our gross income must come from real estate sources plus dividend and interest, and 75% of our assets must be represented by real estate assets and cash or government securities with not more than 25% in securities (with concentration limits).

From a liability perspective, mortgage REITs and investment companies are different. Investment companies are limited in the amount of leverage they can use, to a maximum asset coverage of 300% (which translates to a debt:equity ratio of 0.5:1). REITs are not restricted by regulation on the amount of leverage they can use. However, their use of leverage is restricted by their counterparties and the market. Although investment companies are not prevented per se from issuing debt, as a practical matter their leverage restrictions prevent them from doing so. As a result, the liability side of the balance sheet can and will look significantly different for a REIT. A REIT, consistent with the design and purpose of its business objective to finance residential and commercial mortgages, may and will issue conventional bonds, convertible notes and preferred equity, issue commercial paper, take advantage of bank lines and warehouse financing, and finance asset acquisitions utilizing securitization technology. Additionally, every quarter we disclose our leverage in our public filings.

As an additional general observation, of course companies that expressly are excepted from the 1940 Act will share some characteristics of registered investment companies – if they did not share some characteristics, there would be no need to except them. According to Congress and the SEC, the point of Section 3(c)(5)(C), and the other exceptions in Section 3(c), is precisely to except from 1940 Act regulation a number of companies that have some or many characteristics of registered funds, but that should nonetheless not be regulated as investment companies. The fact that publicly-traded mortgage REITs that rely on Section 3(c)(5)(C) have some characteristics in common with registered funds therefore cannot be a basis for requiring those REITs to adopt investment company reporting.

In addition, one reason many residential (and some commercial) mortgage REITs acquire these securities – and especially in “agency whole pool” securities – is precisely because for over two decades, the SEC has taken the position that agency whole pool securities are qualifying interests for purposes of Section 3(c)(5)(C). It would be an odd result for the SEC to first approve of mortgage REITs treating agency whole pool securities as qualifying interests for purposes of the investment company exemption in Section

3(c)(5)(C), and then for FASB to say that because REITs hold these assets, they need to adopt investment company reporting.

There are other, specific ways in which mortgage REITs differ from investment companies. From a management and corporate governance perspective, the two are different. In its “Best Practices” memo (see Exhibit A), NAREIT outlined the body of laws, regulations and statutes that apply to mortgage REIT operations and activities, that specifically address mortgage REITs and that govern the preparation and presentation of mortgage REIT financial statements. These regulations make REITs distinct from investment companies.

### ***Mortgage REITs Are Not Regulated as Investment Companies***

Section 3(c)(5)(C) of the Investment Company Act of 1940 (the 1940 Act) states that companies that are “primarily engaged in the business of purchasing or otherwise acquiring mortgages and other liens on and interests in real estate” are exempt from registering as investment companies. Since Congress passed the tax laws which allowed for REITs in 1960, mortgage REITs have claimed this exemption and do not register as investment companies. In other words, according to the 1940 Act and SEC rules and interpretations, a mortgage REIT is not an investment company. The main consequence of this status is that a mortgage REIT does not have the same restrictions on its operations that an investment company has.

A requirement to have a corporation use investment company accounting when it is, in fact, not an investment company is not only misleading as to the purpose and design of that corporation, it also implies that investors in that corporation are afforded the same investor protections as an investment company. This is clearly not the case. In enacting the tax laws that allowed for REITs to exist, Congress was fully aware of the superficial similarities between entities such as REITs and investment companies, and not only did it not seek to subject REITs to 1940 Act regulation, it ultimately refined the regulation to more clearly delineate the differences. As part of the Investment Company Act Amendments of 1970, Congress made the only substantive change to Section 3(c)(5) since the enactment of the 1940 Act: It prohibited companies that issue redeemable securities from relying on Section 3(c)(5). This change followed the recommendation of the Commission in the Report of the Securities and Exchange Commission on the Public Policy Implications of Investment Company Growth, House Report 89-2337 (Dec. 2, 1966) (the “PPI Report”), at 238-239. The basis for this change was the Commission’s concern that companies holding notes, commercial paper or real estate mortgages were attempting to capitalize on the popularity of mutual funds by offering redeemable securities to a group of “unsophisticated investors,” while relying on the exception in Section 3(c)(5) (which was then Section 3(c)(6)). *Id.* at 238. This chapter in the history of Section 3(c)(5) is instructive for several reasons. First, in the past, when the SEC believed that a significant limitation should be imposed under that section, it asked Congress to amend the statute, rather than seeking to limit the statute by rulemaking or interpretation. See, e.g., *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006) (“An agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency’s authority.”); *American Bankers Association v. SEC*, 804 F.2d 739, 752 (D.C. Cir. 1986) (overturning a rule in part

because the Commission cannot issue regulations counter to Congressional intent). Second, the 1970 amendment again shows that Congress is and has been well aware that a REIT shares many superficial characteristics with registered funds. Congress' response, however, was only to prohibit REITs from issuing redeemable securities that could cause them to be confused with mutual funds; Congress did not choose to impose limitations on the mortgage and other investments of REITs. Third, as discussed in Appendix A to this Letter, the significant regulatory regime to which publicly-traded mortgage REITs are now subject greatly reduces the types of investor protection concerns that motivated the Commission to recommend and Congress to enact the change to Section 3(c)(5) in 1970.

Thus, requiring a mortgage REIT, which is not an investment company, to employ investment company accounting, would be inconsistent with the will of Congress when it conceived of and later amended the 1940 Act, and the efforts of the SEC, which regulates investment companies.

***REITs Execute Transactions and are Involved in Businesses that Investment Companies are Not***

By virtue of their corporate structure and their not being regulated as investment companies, mortgage REITs are able to execute transactions that are not typically done by investment companies. Mortgage REITs can sell securities across the capital structure, including common stock, preferred stock, convertible securities and debt securities; investment companies typically only sell common stock and are restricted in the amount of senior securities and debt securities they can issue. Mortgage REITs can originate loans; investment companies typically do not. Mortgage REITs can originate and purchase loans, typically utilizing third party debt financing and then can securitize those loans; investment companies do not engage in this activity due to the leverage restrictions they are subject to. Mortgage REITs can purchase securities and re-securitize them; investment companies do not do this because of leverage restrictions.

Separately, it is unclear how changing to investment company reporting will affect related accounting practices that are familiar to investors in mortgage REITs. It is not clear how the key provisions of ASC 860 and 810 would be applied to an investment company. GAAP requires companies that securitize assets to consolidate certain securitization and re-securitization transactions, to fair value and present those assets even if the company no longer owns them. REITs that securitize or re-securitize assets and are required to consolidate, currently account for senior tranches sold off in a transaction as "non-retained" securities. Running fair value for those assets through the income statement would be misleading. In addition, it is unclear how this proposed change would affect accounting for other-than-temporary impairments. If it is determined by management that the decline in value to below amortized cost for an asset is other than temporary, generally the amount related to the decline in future cash flows from credit loss is recognized in earnings and the amount related to other factors is recognized in other comprehensive income. This information, which may lead to a change in accretable yield, is potentially useful to investors.

There is essentially no business activity that is off limits for a REIT to engage in, as long as they maintain their REIT status for tax purposes and manage their assets so as to maintain their exemption from the

1940 Act. While there are asset and income limits to the extent of these other businesses, as discussed above, Annaly has expanded its operations to a point where it has many substantive activities besides investing in mortgage-backed securities. We have chosen to be involved in these business activities in order to generate income for Annaly shareholders and to increase the market value of our company.

***REITs Are Not Evaluated by Investors as Investment Companies***

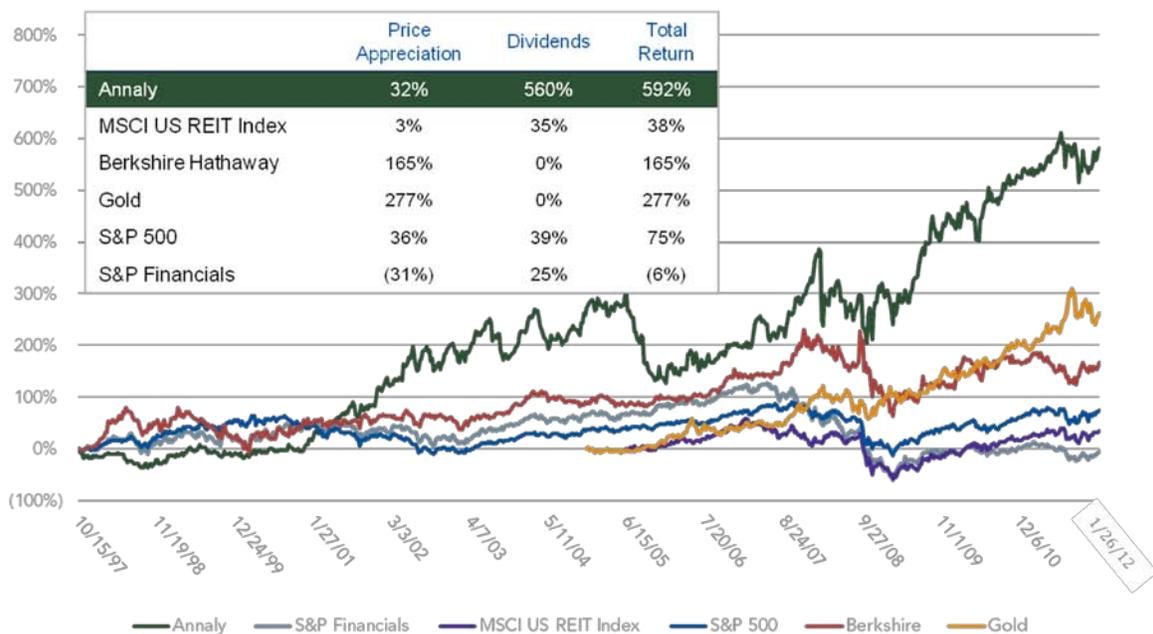
Paragraph 946-10-55-16 states, regarding assets held, that an investment company “must demonstrate that fair value is the primary measurement attribute used to make a decision about the financial performance of those assets.” Annaly is covered by over a dozen sell-side analysts who provide regular research reports and investment analysis of Annaly and other mortgage REITs. The primary metric upon which these analysts base their investment conclusion, and therefore upon which most investors analyze mortgage REITs, is the distributable income divided by the share price, or the dividend yield. Much like any manufacturing company, the market evaluates the investment proposition and attractiveness of a mortgage REIT not by primarily looking at the value of its property, plant and equipment, but by the value of its product. In the case of a mortgage REIT, that product is income and, more specifically, distributable or taxable income.

The investor and analyst community evaluates mortgage REITs based on the distributable or taxable income producing potential of their portfolio, which is a function of many factors beyond just the fair value. The added disclosure that would be required under investment company reporting either has no effect on investors’ ability to evaluate this potential or would actually be ignored in the process of coming to that conclusion, particularly because of the differences in GAAP income and taxable income. As we state in our dividend press releases: “The Company distributes dividends based on its current estimate of taxable earnings per common share, not GAAP earnings. Taxable and GAAP earnings will typically differ due to items such as unrealized and realized gains and losses, differences in premium amortization and discount accretion, and non-deductible general and administrative expenses.” Changes in fair value, which currently flow through Other Comprehensive income, have no bearing on distributable or taxable income. Thus, if changes in fair value of the assets and consolidated entities of a mortgage REIT flowed through the income statement, these changes would be “backed out” in order to arrive at an estimate of distributable income (which is a non-GAAP number). Additionally, it is not particularly useful for investors to recognize changes in fair value in net income because restrictions that are placed on REIT trading activity. We do not believe that FASB should take actions which will result in companies being forced to provide more non-GAAP financial information in order to make their operating results meaningful to investors and analysts.

Moreover, the added disclosure of the entire portfolio at a CUSIP level would also not be useful in this effort. As part of Annaly’s Management Discussion & Analysis in its quarterly and annual reports which are filed with the SEC, we provide aggregate level breakdown of our Agency MBS portfolio, which has proven to be useful for analysts and investors in modeling the future potential distributable income of our portfolio. (See below for a detailed discussion of this disclosure.) CUSIP level data—we have approximately 2,500 CUSIPs in our portfolio—would not assist in this process and, while providing more

data, would not be particularly useful from an analytical perspective. The same logic applies for non-Agency MBS and mortgages.

The importance of a clear perspective on evaluating income potential is evident from the graph below, which provides data on total return since Annaly's inception vs. some other benchmarks (data from Bloomberg, calculated weekly with dividend reinvestment). Returns have been variable in our history, and past performance is no guarantee of future results, but since our inception in October 1997 through January 26, 2012, Annaly has generated cumulative total returns for shareholders of 592%, or over 14% annual equivalent for long-term shareholders through all kinds of different markets and market conditions. As can be seen from the table, since most of that return comes in the form of a cash dividend, clearly investors are not investing in Annaly because of the fair value of our assets.



Source: Bloomberg, weekly, October 10, 1997 through January 26, 2012. SPDR Gold Index begins November 19, 2004. MSCI US REIT Index performance data begins June 17, 2005.  
 (1) Source: Company filings.

***Mortgage REITs Have a Different Investor Base than Investment Companies; Requiring Them to Report as Investment Companies Would Create Confusion in the Marketplace***

Publicly-traded mortgage REITs are typically owned by institutional investors. We estimate that Annaly's shareholder base is 50% institutional, with a significant percentage of those institutional holders being registered investment companies. Chimera and CreXus have shareholder bases that are more than 70% institutions. While there is a smaller portion of our investor base that could be characterized as individual investors, investment companies, on the other hand, particularly mutual funds, are more heavily skewed towards individual investors. We believe that if mortgage REITs were required to report as investment companies, this would cause confusion in the marketplace, particularly among

unsophisticated investors who may not understand the different risks, management, purpose and design inherent in REITs. Moreover, as investment companies like mutual funds typically do not invest in other investment companies, this may also affect the ability of mortgage REITs to raise capital, which would affect their ability to finance residential and commercial mortgages.

There is another potential form of confusion for unsophisticated investors that would arise in the event mortgage REITs had to adopt investment company accounting. As discussed above, investors evaluate mortgage REITs by assessing their dividend-paying ability. The effects of fair value accounting on the reported GAAP earnings of mortgage REITs could be quite significant during volatile markets. For example, in one quarter the positive mark-to-market change in a REIT's assets could result in a sizeable GAAP earnings result, and in the very next quarter a significant negative mark could result in a sizeable GAAP loss, while throughout the REIT's assets continue to generate steady cash flows and thus steady dividends. An unsophisticated investor could be misled about the dividend-paying performance of the REIT.

***Requiring Complete Investment Disclosure Would be a Competitive Disadvantage Versus Other Investors in MBS***

We believe that the additional portfolio disclosure required under investment company accounting would be detrimental to the competitive position of the company and our shareholders. There are approximately 40 different publicly-traded mortgage REITs, and while each has its own investment guidelines and strategic focus, they all compete for the same assets and the same financing. In addition, there are countless other mortgage investors, from domestic and foreign central banks and commercial banks, insurance companies, sovereign wealth funds, hedge funds and investment partnerships that are also competing for those assets and, in many instances, financing. For the types of assets held by Chimera and CreXus, which are generally less liquid than the Agency MBS held by Annaly, the proprietary nature of the execution of investment strategy is even more pronounced.

Not only would the additional disclosure reveal proprietary portfolio management information, we believe it would be unnecessary to disclose Annaly's assets down to the CUSIP level. (In the specific case of Agency MBS, there is homogeneity in pricing for similar securities that would obviate the need for CUSIP level disclosure.) Currently, mortgage REITs like Annaly supply extensive aggregate level portfolio data on the assets we own. The disclosure tables set forth below are excerpted from the Management Discussion & Analysis section of our September 30, 2011 Form 10-Q, and is representative of the disclosure we provide in every filing on Form 10-Q and 10-K (with additional disclosure in the footnotes to the financial statements).

**Agency Mortgage-Backed Securities, Agency Debentures and Corporate Debt**

(dollars in thousands)

	Principal Amount	Net Premium	Amortized Cost	Amortized Cost/Principal Amount	Fair Value	Fair Value/Principal Amount	Weighted Average Yield
At September 30, 2011	\$100,957,108	\$3,394,180	\$104,351,288	103.36%	\$107,440,790	106.42%	3.58%
At June 30, 2011	\$92,465,377	\$2,986,266	\$95,451,643	103.23%	\$97,504,523	105.45%	3.73%
At March 31, 2011	\$90,209,946	\$2,900,102	\$93,110,048	103.21%	\$94,080,293	104.29%	3.96%
At December 31, 2010	\$76,129,522	\$2,307,839	\$78,437,361	103.03%	\$79,570,274	104.52%	3.88%
At September 30, 2010	\$74,084,239	\$2,269,697	\$76,353,936	103.06%	\$78,220,512	105.58%	3.93%
At June 30, 2010	\$67,400,316	\$1,849,585	\$69,249,901	102.74%	\$71,812,829	106.35%	3.69%
At March 31, 2010	\$66,937,615	\$1,309,423	\$68,247,038	101.96%	\$70,171,875	104.83%	3.87%

**Adjustable-Rate Agency Mortgage-Backed Securities, Agency Debentures and Corporate Debt**

**Characteristics**

(dollars in thousands)

	Principal Amount	Weighted Average Coupon Rate	Weighted Average Term to Next Adjustment	Weighted Average Lifetime Cap	Weighted Average Asset Yield	Principal Amount at Period End as % of Total Investment Securities
At September 30, 2011	\$9,917,372	3.85%	40 months	9.63%	2.79%	9.82%
At June 30, 2011	\$10,000,985	4.12%	42 months	10.08%	3.22%	10.82%
At March 31, 2011	\$10,623,084	4.21%	39 months	10.09%	3.02%	11.78%
At December 31, 2010	\$11,011,839	4.28%	39 months	10.16%	3.04%	14.46%
At September 30, 2010	\$11,658,943	4.33%	38 months	10.04%	3.03%	15.74%
At June 30, 2010	\$12,589,813	4.36%	33 months	10.00%	3.21%	18.68%
At March 31, 2010	\$15,366,206	4.55%	32 months	10.09%	2.92%	22.96%

**Fixed-Rate Rate Agency Mortgage-Backed Securities, Agency Debentures and Corporate Debt Characteristics**

(dollars in thousands)

	Principal Amount	Weighted Average Coupon Rate	Weighted Average Asset Yield	Principal Amount at Period End as % of Total Investment Securities
At September 30, 2011	\$91,039,736	4.81%	3.78%	90.18%
At June 30, 2011	\$82,464,392	4.74%	3.83%	89.18%
At March 31, 2011	\$79,586,862	4.80%	4.19%	88.22%
At December 31, 2010	\$65,117,683	4.92%	4.00%	85.54%
At September 30, 2010	\$62,425,285	5.06%	4.10%	84.26%
At June 30, 2010	\$54,810,503	5.35%	4.40%	81.32%
At March 31, 2010	\$51,571,411	5.50%	4.16%	77.04%

**Adjustable-Rate Agency Mortgage-Backed Securities, Agency Debentures and Corporate Debt by Index  
 September 30, 2011**

	One- Month Libor	Six- Month Libor	Twelve Month Libor	12-Month Moving Average	11th District Cost of Funds	1-Year Treasury Index	Other Indexes <sup>(1)</sup>
Weighted Average Term to Next Adjustment	1 mo.	6 mo.	53 mo.	4 mo.	5 mo.	34 mo.	27 mo.
Weighted Average Annual Period Cap	6.42%	1.62%	1.99%	0.03%	0.26%	1.89%	0.95%
Weighted Average Lifetime Cap at September 30, 2011	6.92	11.10%	9.98%	9.46%	10.59%	11.11%	6.55%
Investment Principal Value as Percentage of Investment Securities at September 30, 2011	0.74%	0.45%	6.64%	0.36%	0.34%	0.60%	0.69%

(1) Combination of indices that account for less than 0.05% of total or adjust over time, without a reset index.

***There Is No Obvious Benefit to Investors for Requiring Mortgage REITs to Use Investment Company Reporting***

As stated above, investors in mortgage REITs are primarily focused on the dividend-paying abilities of these companies and GAAP net income does not reflect this characteristic. Rather, investors and management alike focus on non-GAAP measurements such as “core”, “economic” or taxable income to

assess future dividend-paying ability and derive a valuation. Thus it is likely that investors would “back out” the fair value changes that flow through the income statement. As a result, there is no benefit to require mortgage REITs to use investment company accounting; rather, as discussed in this letter, there are only costs.

***There Is a Growing Interest in REITs Around the World; There Should Be Convergence of Accounting Treatment***

The efforts by FASB to potentially require mortgage REITs to adopt investment company accounting comes as different countries around the world are coming to embrace the mortgage REIT model as a solution for private capital formation in the mortgage market. It is imperative that the financial reporting conventions of these efforts be consistent and coordinated. As the FASB notes in the Exposure Draft, IASB decided that just because an entity was registered under local laws as an investment company would not necessarily result in that entity being required to use investment company accounting. Rather, IASB determined that companies that did not manage to fair value would not be considered to be investment companies and therefore would not be required to use investment company accounting. Given FASB’s and IASB’s stated intent to harmonize accounting treatment across countries, it is important that FASB not take actions that result in a divergence of accounting standards.

***The Potential for Market Misconceptions May Have a Negative Economic Impact on Capital Formation for the Residential and Commercial Real Estate Market***

In a sense, a mortgage REIT like Annaly is an economic engine that benefits the American economy. The capital we raise is leveraged in the capital markets to become an important source of capital formation to fund residential mortgages in the United States. We estimate that the mortgages we own in our portfolio fund almost a million American homes which house about three million Americans. Through our investment strategy, we generate dividend income that is then used by our investors to fund their other investments, used for consumption or held in savings. Moreover, that dividend income is taxed at the ordinary income rate, which serves as a significant source of tax revenues that go into our federal and municipal coffers.

In the event mortgage REITs were required to report as investment companies, we are concerned that the potential market confusion would have a negative effect on their ability to access both equity and debt capital. As a result, the consequences to their dividend-paying ability would be significant, and the returns to investors would be reduced.

**Conclusion**

Mortgage REITs are operating companies and not investment companies, and they should continue to be exempted from adopting investment company reporting. They are not managed like investment companies, and we believe there is no confusion in the marketplace among investors that when an investor purchases shares in a REIT that they may be buying an investment company and vice versa. Investors easily distinguish between REITs and investment companies, do not expect the disclosure of an

investment company when they invest in mortgage REITs and should not be misled into thinking that they are protected by the provisions of the 1940 Act. Mortgage REITs do not manage their assets to fair value, and we believe that it is not necessary to apply investment company accounting to mortgage REITs, which would involve running fair market value changes through the income statement and CUSIP-level disclosure of the portfolio. In fact, we believe that investors would reverse out the fair value adjustments to arrive at a non-GAAP evaluation of a mortgage REIT's dividend-paying ability. Moreover, the mortgage REIT sector is a successful vehicle for private capital formation in the mortgage market, and the companies' financial reporting methodology has been accepted by investors as part of this success.

Annaly Capital Management, Inc. very much appreciates the opportunity to provide the foregoing comments in response to the FASB's proposal. Should you have any questions or desire any clarification concerning the matters addressed in this letter, please do not hesitate to contact me via telephone at 212-696-0100 or via email at [kfagan@annaly.com](mailto:kfagan@annaly.com).

Sincerely yours,

A handwritten signature in blue ink that reads "Kathryn Fagan". The signature is written in a cursive, flowing style.

Kathryn Fagan  
Chief Financial Officer

**Exhibit A**

“Best Practices” memo delivered by NAREIT to Andrew J. Donohue, Director of the Division of Investment Management of the Commission on September 30, 2010.



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September 30, 2010

Andrew J. Donohue, Director  
Division of Investment Management  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Dear Mr. Donohue:

In connection with your request, we have attached to this letter the following materials summarizing the regulatory scheme applicable to real estate investment trusts specializing in mortgage finance (“mortgage REITs”):

- a chart describing the body of the laws and regulations applicable to mortgage REIT operations and activities (the “Chart”),
- an exhibit to the Chart listing the statutes that specifically address mortgage REITs or which involve a substantial consideration of mortgage REITs by Congress (“Exhibit 1”), and
- an exhibit highlighting certain key sources of guidance governing the preparation and presentation of mortgage REIT financial statements, including releases by the Financial Accounting Standards Board and the staff of the Securities and Exchange Commission (“Exhibit 2”).

Please do not hesitate to contact us with any questions regarding mortgage REITs, the information in the attached exhibits, or the REIT industry in general.

On behalf of NAREIT and its members, we appreciate your interest in and involvement with REIT issues arising under the securities laws, and we wish you the best in your future endeavors.

Respectfully Submitted.

Tony M. Edwards  
Executive Vice President & General Counsel



## THE BODY OF LAW, REGULATION AND REQUIREMENTS GOVERNING THE OPERATIONS AND ACTIVITIES OF REITS

Public real estate investment trusts (or “**REITs**”) are operating companies active in the real estate industry that are subject to a complex body of laws, regulations, exchange rules, accounting pronouncements and market-driven best practices. In the following chart, we outline some of the key statutes, regulatory provisions, rules, pronouncements and practices that govern the operations and activities of REITs. Many of the provisions discussed are applicable to all public operating companies, and are not specific to REITs. Certain provisions, however, such as the REIT requirements under the Internal Revenue Code of 1986, as amended (the “**Code**”), apply specifically to REITs. Congress has specifically adopted statutes relating to REITs or with REITs in mind, a non-exhaustive list of which is attached as [Exhibit 1](#). Though it has adopted a number of REIT related statutes, Congress has never suggested that the regulation of REITs under the Investment Company Act of 1940, as amended (the “**1940 Act**”), should be modified, including in the Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law on July 21, 2010 (the “**Dodd-Frank Act**”).

<u><b>Applicable Law or Regulation</b></u> <sup>1</sup>	<u><b>Description</b></u>
SARBANES-OXLEY ACT (incorporated into 934 Act (as defined below)	<b>As a public company registered under the Securities Exchange Act of 1934, as amended (the “1934 Act”), a REIT generally is subject to the provisions adopted in the Sarbanes-Oxley Act of 2002, signed into law on July 30, 2002 (“SOX”).</b> <sup>2</sup>
- Code of Ethics	<p>In implementing SOX, the Securities and Exchange Commission (“<b>SEC</b>”) has adopted rules requiring a public company to disclose whether it has adopted a code of ethics for its Chief Executive Officer (“<b>CEO</b>”), Chief Financial Officer (“<b>CFO</b>”), Chief Administrative Officer (“<b>CAO</b>”), controller and other persons performing similar functions and, if not, the reasons why it has not (the “<b>Code of Ethics</b>”). A Code of Ethics is a set of written standards reasonably designed to deter wrongdoing and to promote:</p> <ul style="list-style-type: none"> <li>• Honest and ethical conduct, including ethical handling of conflicts of interest,</li> </ul>

<sup>1</sup> In this chart we are not addressing proposed Regulation AB. Regulation AB, the Dodd-Frank Act and potential rules and regulations stemming therefrom could significantly affect REITs and could impose a variety of additional requirements and restrictions upon or indirectly affect their operation and activities. We have also not included provisions suggested by the North American Securities Administrators Association (or “**NASAA**”) in its “Statement of Policy Regarding Real Estate Investment Trusts,” dated May 7, 2007.

<sup>2</sup> Pub. L. No. 107-204; 116 Stat. 745 (July 30, 2002).

	<ul style="list-style-type: none"> <li>• Full, fair, accurate, timely and understandable disclosure in SEC reports and public communications,</li> <li>• Compliance with applicable law,</li> <li>• Prompt internal reporting of violations, and</li> <li>• Accountability for compliance with the Code of Ethics.</li> </ul>
<p>- Disclosure Controls (Section 404 of SOX; Rule 13a-15)</p>	<p>Companies with securities registered under Section 12 of 1934 Act (such as public REITs) must maintain disclosure controls and procedures with respect to financial information. Disclosure controls and procedures mean controls and other procedures designed to ensure that information required to be disclosed in filings or reports under the 1934 Act are recorded, processed, summarized and reported within the required time periods, including controls and procedures to ensure that information required to be disclosed by an issuer in the reports that it files or submits under the 1934 Act is accumulated and communicated to the issuer’s management, including its principal executive and principal financial officers, or persons performing similar functions, to allow timely decisions regarding required disclosure (collectively, “<b>Disclosure Controls and Procedures</b>”).</p>
<p>- Quarterly Evaluation of Disclosure Controls and Procedures</p>	<p>Each quarter, management must evaluate, with the participation of the principal executive and financial officers, or persons performing similar functions, the effectiveness of the REIT’s Disclosure Controls and Procedures.</p>
<p>- Internal Control Over Financial Reporting (Section 404 of SOX; Rule 13a-15)</p>	<p>Companies that file Form 10-Ks and 10-Qs (such as public REITs) must adopt “internal controls over financial reporting” (“<b>Internal Controls</b>”) which means a process designed by, or under the supervision of, the REIT’s principal executive and principal financial officers, or persons performing similar functions, and effected by the company’s board, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles, including policies and procedures that:</p> <ul style="list-style-type: none"> <li>• Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the REIT;</li> <li>• Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the REIT; and</li> <li>• Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition,</li> </ul>

	use or disposition of the REIT's assets that could have a material effect on the financial statements.
- Quarterly Evaluation of Internal Control changes	Each quarter, management must evaluate, with the participation of the principal executive and financial officers any change in the REIT's Internal Controls that occurred during a fiscal quarter that has materially affected, or is reasonably likely to materially affect, the company's Internal Controls
- Internal Control Report (Section 404 of SOX; Rule 13a-15)	<p>Each year, management must complete and provide as an exhibit to the Form 10-K a report of management on the REIT's Internal Controls (the "<b>Internal Control Report</b>") that contains:</p> <ul style="list-style-type: none"> <li>• A statement of management's responsibility for establishing and maintaining adequate Internal Controls for the registrant;</li> <li>• A statement identifying the framework used by management to evaluate the effectiveness of the company's Internal Controls as required by paragraph;</li> <li>• Management's assessment of the effectiveness of the registrant's Internal Controls as of the end of the registrant's most recent fiscal year, including a statement as to whether or not its Internal Controls are effective, including disclosure of any material weakness in the company's Internal Controls identified by management. Management is not permitted to conclude that the company's Internal Controls are effective if one or more material weaknesses are identified; and</li> <li>• A statement that the registered public accounting firm that audited the financial statements included in the Form 10-K has issued an attestation report on the company's Internal Controls.</li> </ul>
- Internal Control Attestation	A REIT's auditor must attest to management's assessment of the effectiveness of the company's Internal Controls in the Internal Control Report (the " <b>Internal Control Attestation</b> "). The Public Company Accounting Oversight Board (" <b>PCAOB</b> ") has adopted Auditing Standard No. 5 to provide guidance to auditors in conducting an integrated audit of the financial statements of a company and management's assessment of Internal Controls. <sup>3</sup>
- Section 906 Certification	Periodic reports (such as the Form 10-Q and Form 10-K) containing financial statements filed with the SEC must be accompanied by a certification by the REIT's CEO and CFO (the " <b>Section 906 Certification</b> "), stating that (i) the periodic report fully complies with the requirements the 1934 Act and (ii) the information in the report "fairly presents, in all material respects, the financial condition and results of operations of the issuer." Knowingly or willfully filing an incorrect Section 906 Certification is a criminal offense punishable by a large fine and/or imprisonment.

<sup>3</sup> Available at [http://pcaobus.org/Standards/Auditing/Pages/Auditing\\_Standard\\_5.aspx](http://pcaobus.org/Standards/Auditing/Pages/Auditing_Standard_5.aspx).

	SOX provides a form of certification that must be used for the Section 906 Certification.
- Section 302 Certification	In filing a 10-Q or 10-K, the CEO and CFO of a REIT must certify that the financial statements filed with the SEC fairly present, in all material respects, the operations and financial condition of the company, and must attest to the adequacy of the company's Disclosure Controls and Internal Controls.
- Prohibitions on Loans to Insiders (Section 402 of SOX)	Prohibits loans by a public company to its directors or executive officers, subject to very narrow exemptions for certain types of loans made in the course of the company's business.
- Whistleblower protection	SOX protects employees of public companies (and, after the Dodd-Frank Act, certain of public companies' subsidiaries and affiliates) against retaliation for providing information to supervisors, government agencies or Congress regarding violations of securities laws or antifraud laws.
- Audit Committee Requirements (SOX Section 301, SEC Rule 10A-3)	Prohibits national securities exchanges from listing securities of companies that do not comply with certain requirements relating to the company's audit committee.
- Independence	Subject to certain exceptions, each member of the audit committee must be independent, meaning it may not: <ul style="list-style-type: none"> <li>• Accept, directly or indirectly, any consulting, advisory or other compensatory fee from the company or its subsidiaries (other than board and committee fees), or</li> <li>• Be an "affiliated person" of the company or its subsidiaries (as defined in Rule 10A-3)</li> </ul>
- Responsibility for external audit	Audit committee must be directly responsible for the appointment, compensation, retention and oversight of the work of auditors engaged (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the company, and each auditor must report directly to the audit committee
- Complaint process	Audit committee must establish procedures for: <ul style="list-style-type: none"> <li>• The receipt, retention, and treatment of complaints received by the company regarding accounting, internal accounting controls, or auditing matters; and</li> <li>• The confidential, anonymous submission by employees of the company of concerns regarding questionable accounting or auditing matters</li> </ul>
- Advisers	Audit committee must have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.

- Funding	SOX requires companies provide adequate funding to audit committee for hiring of auditor(s) and adviser(s), and for administrative costs
- Financial expert	Company must disclose on Form 10-K whether its audit committee has at least one “audit committee financial expert” meeting certain criteria, and, if not, why it does not have such an expert on its audit committee
<b>NASDAQ GLOBAL MARKET (“NASDAQ”) LISTING REQUIREMENTS</b>	<b>A REIT that is listed on NASDAQ must meet a number of requirements relating to, among other things, market capitalization, number of beneficial owners, share price and governance issues.</b>
- Initial Listing Requirements	In order to be listed on NASDAQ, a REIT must certain shareholder number, liquidity, pre-tax earnings, share price and market maker requirements.
- Ongoing Listing Requirements	In order to remain listed on NASDAQ, a REIT must continuously satisfy certain share price, liquidity and earnings requirements.
- Governance Requirements	A REIT listed on NASDAQ must meet the following governance requirements.
- Independent Directors (Rule 5605(b)(1))	A REIT must have a majority of independent directors. Even if a director is independent under NASDAQ rules, the REIT’s board must determine that there is no other relationship between a purportedly independent director and the company that would preclude that director from acting as an independent director.
- Meetings of Independent Directors (Rule 5605(b)(2))	At least twice a year, a REIT must hold a meeting of independent directors that is attended only by independent directors. This meeting can be held in conjunction with a meeting of directors generally.
- Compensation Committee (Rule 5605(d))	A committee of independent directors must set the compensation of chief executive officer and other executive officers.
- Nominating Committee (Rule 5605(e))	A committee of independent directors must be responsible for nominating director candidates for the REIT’s board
- Audit Committee (Rule 5605(c))	A NASDAQ listed REIT is required to have an audit committee consisting solely of independent directors who have the requisite financial experience and expertise. The audit committee must comply with the requirements of SOX and, particularly, Rule 10A-3.
- Other Requirements	
- Annual Meeting (Rule 5620(a))	A NASDAQ listed REIT is required to hold an annual meeting no more than one year after the end of its fiscal year
- Quorum (Rule 5620(c))	A quorum of shares for purposes of any meeting must mean not less than 33 1/3% of outstanding shares of voting stock
- Voting Rights (Rule 5640)	The voting rights of existing shareholders cannot be disparately reduced or restricted through any corporate action

	or issuance
- Conflict of interest review (Rule 5630)	A NASDAQ listed REIT must conduct a review of all related party transactions for potential conflict of interest situations. The review must be conducted by the audit committee or another independent body of the board
- Shareholder approval of security issuances (Rule 5635)	A NASDAQ listed REIT must obtain shareholder approval of certain securities issuances, including: (i) an issuance that will result in a change of control, (ii) private placements where the issuance (and shares sold by insiders and affiliates) equals 20% or more of the pre-transaction outstanding shares and where the issuance is made at a price less than the greater of book and market value, (iii) issuances related to equity compensation, and (iv) shares issued pursuant to an acquisition where the issuance equals 20% or more of the pre-transaction outstanding shares, or 5% or more of the pre-transaction outstanding shares when a related party has a 5% or greater interest in the acquisition target
- Code of Conduct (Rule 5610)	A NASDAQ listed REIT must adopt a code of conduct applicable to all officers, directors and employees. The code of conduct must satisfy the requirements of a code of ethics under SOX.
<b>NYSE LISTING REQUIREMENTS</b>	<b>A REIT that is listed on NYSE must meet a number of requirements relating to, among other things, market capitalization, number of beneficial owners, share price and governance issues. These requirements are similar to those applicable to NASDAQ listed REITs.</b>
- Initial Listing Requirements	In order to be listed on NYSE, a REIT must certain shareholder number, liquidity, pre-tax earnings, share price and market maker requirements.
- Ongoing Listing Requirements	In order to remain listed on NYSE, a REIT must continuously satisfy certain share price, liquidity and earnings requirements.
- Governance Requirements (Section 303A of the NYSE Rules)	A REIT listed on NYSE must meet the following governance requirements.
- Independent Directors	A NYSE listed REIT must have a majority of independent directors. Even if a director is independent under NYSE rules, the REIT's board must determine that there is no other relationship between a purportedly independent director and the company that would preclude that director from acting as an independent director.
- Meetings of Independent Directors	At least once a year, a REIT must hold a regularly scheduled meeting of independent directors that is attended only by independent directors.
- Compensation Committee	A committee of independent directors must set the compensation of chief executive officer and other executive officers
- Nominating/Corporate Governance Committee	A committee of independent directors must be responsible for nominating director candidates for the REIT's board and for developing and recommending corporate governance principles applicable to the REIT

- Audit Committee	An NYSE listed REIT is required to have an audit committee with at least three members consisting solely of independent directors who have the requisite financial experience and expertise. The audit committee must comply with the requirements of SOX and, particularly, Rule 10A-3.
- Internal Audit Function	An NYSE listed REIT must develop an internal audit function to provide management and the audit committee with an assessment of risk management and systems of internal control
- Corporate governance guidelines	An NYSE listed REIT must adopt and disclose corporate governance guidelines. These may include guidelines on topics including director qualifications and responsibilities, responsibilities of key board committees, director compensation, director orientation and continuing education, management succession planning, and a policy for evaluation of the board's or its committees' performance.
- Code of Business Conduct	An NYSE listed REIT must adopt and disclose a code of business conduct applicable to directors, officers and employees addressing conflicts of interest, corporate opportunities, confidentiality, fair dealing, protection and proper use of assets, compliance with laws rules and regulations and reporting of any illegal or unethical behavior. The code should constitute a code of ethics under SOX.  The REIT must disclose any waivers to provisions of the code for directors and executive officers.
- Annual CEO Certification	The CEO of an NYSE listed REIT must certify each year that he or she is not aware of any violation by the REIT of the NYSE governance requirements.
<b>SECURITIES ACT OF 1933 (THE "1933 ACT")</b>	<b>Many REITs publicly offer their shares and, therefore, are subject to a number of requirements under the 1933 Act, including the registration requirements of Section 5, strict liability for misstatements in a registration statement set forth in Section 11, and the anti-fraud provision of Section 17. The staff of the Division of Corporation Finance makes a detailed review of each IPO registration statement on Form S-11 and regularly refers filings to the Division of Investment Management. The staff also may review and comment upon other registration forms.</b>
- Section 5: Registration of securities on Form S-11	In conducting a public offering of its shares, an entity electing to operate as a REIT must register the offer and sale of its shares to the public under the 1933 Act, using Form S-11. Form S-11 is divided into Part 1 (the prospectus provided to investors) and Part 2 (filed with the SEC and available through EDGAR but not provided directly to investors as part of the prospectus).

<p>- Part 1 of Form S-11 (prospectus)<sup>4</sup></p>	<p>Requires a REIT to provide a wide range of information about the company and the offering, including, among other things:</p> <ul style="list-style-type: none"><li>• <u>Summary</u>. An introductory plain English summary of the information presented by the issuer in the full Form S-11 (Item 3), including:<ul style="list-style-type: none"><li>○ name, address and telephone number of general partner and names of persons making investment decisions</li><li>○ if distributions are an investment objective, the estimated maximum time between closing and first distribution</li><li>○ properties to be purchased or statement that properties have not been identified</li><li>○ depreciation method to be used</li><li>○ maximum leverage as a whole and on individual properties, if different</li></ul></li><li>• <u>Risk factors</u>. A discussion of specific risks applicable to the REIT and the offering, including tax risks, with cross references to additional discussion, when applicable</li><li>• <u>Basic disclosures regarding the REIT and its personnel</u><ul style="list-style-type: none"><li>○ <i>Basic information and terms of governing instruments</i>. Basic identifying information, state and form of organization, term of REIT, a description of provisions of governing instrument dealing with annual or other meetings of security holders, and, if the REIT was organized within 5 years, the name of all promoters and any positions or offices with the issuer held by such promoters (Item 11)</li><li>○ <i>Directors and Executive Officers</i>. Information regarding each director, executive officer and certain significant employees, including, among other things, each such person's name, age, principal occupation and employment for the last five years and any familial relationship between that person and any other director or executive officer (“<b>Biographical Information</b>”).</li></ul></li><li>• <u>Disclosures regarding REIT operation and activities</u><ul style="list-style-type: none"><li>○ <i>Investment policies</i>. A description of the principles and procedures the issuer will employ in the</li></ul></li></ul>
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<sup>4</sup> In addition to the items listed on the Form S-11, additional guidance about the types of information required on the Form is set forth in the SEC's *Industry Guide No. 5: Preparation of registration statements relating to interests in real estate limited partnerships*, available at <http://www.sec.gov/about/forms/secforms.htm>.

	<p>acquisition of assets, including policies regarding the following types of investments, whether the policy may be changed without a vote of security holders, the percentage of assets that may be invested in any one type of investment, any leverage used, and any limitations on concentration in a single issuer:</p> <ul style="list-style-type: none"><li>▪ Investments in real estate or interests in real estate</li><li>▪ Investments in real estate mortgages</li><li>▪ Investments in persons primarily engaged in real estate activities</li><li>▪ Investments in other securities (Item 13)</li></ul> <p>○ <i>Certain other policies.</i> A description of the REIT's policies regarding, and a discussion regarding the extent to which an issuer anticipates engaging in or has in the past three years engaged in, the following types of transactions:</p> <ul style="list-style-type: none"><li>▪ Issuing senior securities</li><li>▪ Borrowing money</li><li>▪ Making loans to other persons</li><li>▪ Investing in securities of other issuers for purpose of exerting control</li><li>▪ Underwriting securities of other issuers</li><li>▪ Engaging in the purchaser and sale of investments</li><li>▪ Offering securities in exchange for property</li><li>▪ Repurchasing or reacquiring the issuer's own shares or other securities</li><li>▪ Making annual or other reports to security holders (Item 12)</li></ul> <p>○ <i>Descriptions of real estate.</i> Description of any materially important real estate properties currently held by the REIT or intended to be acquired by or leased to the REIT or its subsidiaries, along with additional information about the real estate holding and the REIT's plan for its use (Item 14)</p> <p>○ <i>Operating data regarding holdings.</i> Certain information regarding materially important improved property held by the REIT, including, among other things, occupancy rate, principle provisions of tenant leases, average effective annual rent for last five years, and information regarding expiration of leases (Item 15)</p> <p>○ <i>Management and Custody of Investments.</i> Description of arrangements made or proposed to be made regarding management of the REIT's real estate assets or the purchase, sale and servicing of mortgages for the issuer, and information regarding investment advisory services or services related to the foregoing performed for the REIT by affiliated persons (Item 24)</p> <p>○ <i>Tax treatment of issuer and security holders.</i> Description of the material aspects of the REIT's</p>
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	<p>tax treatment under federal tax law and tax treatment of the REIT's investors with respect to distributions, among other things (Item 16)</p> <ul style="list-style-type: none"><li>• <i>Executive compensation.</i> A description of the compensation of the REIT's key executives and directors; description must include all types of compensation (such as pension benefits, incentive plans, awards of stock or other securities, etc.) as well as an analysis of the plans under which such compensation packages or benefits were awarded (Item 22) ("<b>Executive Compensation Disclosures</b>")</li><li>• <u>Financial Disclosures</u><ul style="list-style-type: none"><li>○ <i>Selected Financial Data.</i> In comparative columnar form, selected financial information ("<b>Selected Financial Data</b>") for each of the last five fiscal years of the REIT (or for the life of the registrant and its predecessors, if less), and any additional fiscal years necessary to keep the information from being misleading (Item 9). Selected Financial Data includes, as applicable:<ul style="list-style-type: none"><li>▪ net sales or operating revenues; income (loss) from continuing operations; income (loss) from continuing operations per common share; total assets; long-term obligations and redeemable preferred stock (including long-term debt, capital leases, and redeemable preferred stock; and cash dividends declared per common share</li><li>▪ Any additional information that would enhance an understanding of and highlight trends in the REIT's financial condition and results of operations</li><li>▪ A brief description of factors that materially affect the comparability of the information reflected in selected financial data (such as accounting changes, business combinations or dispositions of business operations)</li><li>▪ A discussion any material that might cause the data presented not to be indicative of the issuer's future financial condition or results of operations</li></ul></li><li>○ <i>MD&amp;A.</i> A discussion of the REIT's financial condition, changes in financial condition and results of operations, including its liquidity, capital resources, results of operations, off-balance sheet arrangements, certain contractual obligations (in tabular form) and other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations (Item 10) ("<b>MD&amp;A Disclosure</b>"). This MD&amp;A Disclosure can relate to the REIT as a whole or, where the issuer deems appropriate for an understanding of its business, relevant, reportable segments or other subdivisions of the REIT</li></ul></li><li>• <u>Disclosures regarding the offering</u><ul style="list-style-type: none"><li>○ <i>Description of Securities.</i> A description of the securities being offered and the material terms applicable to the securities, which vary depending on whether the REIT is offering debt or equity</li></ul></li></ul>
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	<p>(Item 18)</p> <ul style="list-style-type: none"><li>○ <i>Offering price.</i> A discussion of the how the offering price was determined and the factors influencing the price (Item 4)</li><li>○ <i>Plan of distribution.</i> A discussion of the plan of distribution (Item 7), including:<ul style="list-style-type: none"><li>▪ The terms of agreements with underwriter(s) (including the compensation of the underwriters) and a discussion of certain aspects of the relationship between the REIT, its affiliates and the underwriter(s)</li><li>▪ any distribution of securities offered other than through the underwriter(s) and certain terms regarding and details of such other distributions</li></ul></li><li>○ <i>Use of proceeds.</i> A description of the intended use of the proceeds of the offering or, if the REIT has no current specific plan for the proceeds, the principal reasons for the offering (Item 8)</li><li>○ <i>Past experience and performance of sponsor.</i> A narrative summary of the track record or prior performance of programs sponsored by the sponsor and certain of its affiliates, as well as certain information in tabular form.</li><li>○ <i>Fees, costs and compensation.</i> A tabular summary showing estimates of public offering expenses (both organizational and sales), amount available for investment, non-recurring initial investment fees, prepaid items and financing fees, cash down payments, reserves and acquisitions fees, and maximum and minimum proceeds of the offering. The table must show an itemized description of all compensation, fees, profits and other benefits (including reimbursement) that the general partner/sponsor or its affiliates will earn or receive in connection with the offering or operation of the REIT.</li><li>○ <i>Dilution.</i> A discussion of any dilution investors will suffer as a result of insiders' pre-offering holdings purchased at a lower price (Item 5), including a comparison of the public contribution under the proposed public offering and the effective cash contribution of insiders</li><li>○ <i>Selling shareholders.</i> If the offering includes secondary sales by current security holders, information about those security holders, their relationship with the company, and a description of their holdings both pre- and post- offering (Item 6)</li><li>• <u>Disclosures regarding conflicts and policies addressing conflicts (where not addressed elsewhere)</u></li><li>○ <i>Holdings of insiders.</i> A description of the securities of the issue held by certain large investors and</li></ul>
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	<p>management</p> <ul style="list-style-type: none"><li>○ <i>Related Person Transactions.</i> Information regarding:<ul style="list-style-type: none"><li>▪ any transaction, since the beginning of the REIT’s last fiscal year, or any currently proposed transaction, in which the REIT was or is to be a participant and the amount involved exceeds \$ 120,000, and in which any related person had or will have a direct or indirect material interest (a “<b>Related Person Transaction</b>”)</li><li>▪ policies and procedures for the review, approval, or ratification of any Related Person Transaction (Item 23)</li></ul></li><li>○ <i>Policies regarding insiders’ activities.</i> A description of any provisions of the REIT’s constituent documents or a description of any other policies limiting any director, officer, security holder or affiliate, or any other person in his, her or its ability to:<ul style="list-style-type: none"><li>▪ Have any direct or indirect pecuniary interest in investments to be acquired or disposed of by the REIT or its subsidiaries or in any transaction to which the REIT or any of its subsidiaries is a party, or</li><li>▪ Engage for their own account in business activities of the types conducted or to be conducted by the REIT and its subsidiaries (Item 25)</li></ul></li><li>○ <i>Disclosure and Discussion of Conflicts of Interest.</i> A description of each potential transaction which could result in a conflict between the interests of investors and those of the manager/sponsor and its affiliates, and the proposed method of dealing with the conflict</li><li>○ <i>Limitation of liability.</i> A description of the principal provisions of the governing instruments or any contract or arrangement with respect to limitations on the liability of REIT affiliated persons or any directors, officers or employees</li><li>○ <i>Indemnification.</i> A description of any indemnification of REIT affiliated persons or any directors, officers or employees</li><li>• <i>Quantitative and Qualitative Market Risk Factors.</i> An analysis of quantitative and qualitative market risk and its affect on the REIT (“<b>Market Risk Factors</b>”); these Market Risk Factors are intended to clarify the REIT’s exposures to market risk associated with activities in derivative financial instruments, other financial instruments, and derivative commodity instruments. Market risks includes interest rate risk, foreign currency exchange rate risk, commodity price risk, and other relevant market rate or price risks (<i>e.g.</i>, equity price risk) (Item 30)</li></ul>
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	<p>Certain information in the Part 1 of the Form S-11 may be incorporated by reference from an issuer's Form 10-K or other reports filed pursuant to Section 13(a) or 15(d) of the 1934 Act, subject to certain conditions. As discussed below, the Form S-11 and Form 10-K request overlapping information by referencing specific sections of Regulation S-K that describe the types of information required.</p>
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- Part 2 of Form S-11

This portion of the S-11 is not part of the prospectus, but is filed with the SEC and available on the EDGAR system. Part 2 of the S-11 requires a REIT to provide the following information and documents:

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

	<ul style="list-style-type: none"> <li>○ if applicable, a letter from the registrant's former independent accountant regarding its concurrence or disagreement with the statements made by the registrant in the current report concerning the resignation or dismissal as the registrant's principal accountant</li> <li>○ a list of all the REIT's subsidiaries (subject to exceptions) and the jurisdiction of formation of each</li> <li>○ any consents of experts and counsel</li> <li>○ a copy of the relevant power of attorney to the extent any name is signed to the registration statement or report pursuant to a power of attorney</li> <li>○ any document incorporated by reference in the Form S-11 that is not otherwise required to be filed by Item 601 of Regulation S-K</li> </ul>
- Private Rights of Action	A REIT is subject to liability for material misstatements and omissions in its registration statement under (among other provisions) Sections 11 and 12 of the 1933 Act, and Section 10(b) of the 1934 Act.
- Section 17	A REIT also is subject to the anti-fraud provisions of Section 17 of the 1933 Act, which the SEC may enforce (but for which no private right of action exists); the SEC need only show negligence, rather than scienter, in connection with an action under Section 17.
<b>1934 ACT</b> (excluding the portions of SOX discussed above)	<b>Most public REITs are required to register under the 1934 Act as a result of completing a public offering. As a result, REITs are subject to a wide array of disclosure obligations, reporting requirements and substantive restrictions under the 1934 Act.</b>
- Registration Requirement: Form 8-A or Form 10	REITs which are publicly traded, as opposed to private investment vehicles, generally must register under the 1934 Act by filing either Form 8-A or Form 10 with the SEC.
- Independent Auditor Requirement (Rule 10A) / PCAOB registration requirement (SOX)	The auditor to a public company, including public REITs, must be independent (as defined in Rule 2-1 under Regulation S-X). SOX also requires auditors to public companies to be registered with and subject to inspection by the PCAOB.
- Reporting Requirements	As a company registered under the 1934 Act, a REIT is subject to periodic and other ongoing reporting requirements under the 1934 Act. These reports are the subject of review and comment on a period basis by the staff of the Division of Corporation Finance.
- Annual Form 10-K (Section 13 or 15(d))	<p>A REIT registered under Section 12 of the 1934 Act must file with the SEC an annual filing on Form 10-K which is made available to the public through the EDGAR system. The Form 10-K must be filed after the end of each fiscal year. The required deadline for filing a Form 10-K after the end of a fiscal year depends upon the "filer" status of the reporting company.</p> <p>Form 10-K is broken into four parts and requires the following information, among other things:</p>

Part 1

- *Risk Factors.* The REIT must provide the same types of risk factors required under Form S-11, described above (both Form S-11 and Form 10-K reference the same provision of Regulation S-K in describing the required risk factors) (Item 1A)
- *Unresolved Comments.* Certain REITs (based on what type of “filer” the REIT is under the 1934 Act) that have received comments from the staff regarding their periodic or current reports must disclose any unresolved comments in the Form 10-K that it believes are material and discuss the substance of the comment (Item 1B)
- *Legal Proceedings.* A REIT must disclose and describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business of the REIT, to which the REIT or any of its subsidiaries is a party or of which any of their property is the subject. The description must include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. A REIT must include similar information as to any such proceedings known to be contemplated by governmental authorities (Item 3)

Part 2

- *Market Information.* A REIT must disclose and discuss information about the market for its securities, the number of holders of each class of its securities, the frequency and amount of any dividends the REIT has declared, performance of the REIT’s securities, and information about securities available for issuance under equity compensation plans (Item 5)
- *Use of Proceeds.* A REIT must include a discussion on its use of proceeds from the REIT’s public offerings, including an update on any ongoing or terminated offerings and a discussion of how the net proceeds have been applied.
- *Selected Financial Data.* A REIT must disclose in the Form 10-K the same Selected Financial Data that was required under the Form S-11 (both Form S-11 and Form 10-K reference the same provision of Regulation S-K in describing the required Selected Financial Data) (Item 6)
- *MD&A.* A REIT must include in its Form 10-K the MD&A discussion described above and included in the Form S-11 (Item 7)
- *Market Risk Factors.* A REIT must include in its Form 10-K the same type of Market Risk Factors as are described above in connection with the Form S-11 (both Form S-11 and Form 10-K reference the same

provision of Regulation S-K in describing the required Market Risk Factors) (Item 7A)

- *Financial Statements. Interim Financial statements.* A REIT must provide financial statements in prepared in accordance with Regulation S-X (Item 8)
- *Change in accountants.* In the event a REIT changes its accountants, it must disclose material disagreements with the accountant regarding any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure and whether the new accountant dealt with the matter differently than the previous accountant apparently would have concluded was required (Item 9)
- *Effectiveness of disclosure controls and procedures.* A REIT must disclose the conclusions of the REIT's principal executive and principal financial officers, or persons performing similar functions, regarding the effectiveness of the REIT's Disclosure Controls, adopted pursuant to SOX (as defined below), as of the end of the period covered by the report, based on the evaluation of these controls and procedures required by SOX (Item 9A)
- *Report on internal controls over financial reporting.* A REIT must provide the Internal Control Report required by SOX (discussed below) and the Internal Control Attestation from the company's independent public accountant, as well as a description of any change in the REIT's Internal Controls (as defined below) that occurred during the REIT's fourth fiscal quarter that has materially affected, or is reasonably likely to materially affect, the REIT's Internal Controls (Item 9A)
- *8-K Information.* The REIT must disclose any facts or information that would be required to be disclosed in a Form 8-K (discussed below) during the fourth quarter of the fiscal year covered by the Form 10-K (Item 9B)

Part 3

- *Directors, Executive Officers and Corporate Governance.*
  - *Biographical Information.* A REIT must disclose Biographical Information (as defined above) about its officers, directors and key employees (in certain cases)
  - *Section 16(a) Information.* A REIT must disclose failures of its Covered Persons (as defined below in connection with Section 16 reporting) to file a Form 3, 4 or 5
  - *Code of Ethics.* A REIT must disclose whether it has adopted a Code of Ethics (as defined below in the SOX discussion) and, if not, why it has not adopted a Code of Ethics (Item 10)

	<ul style="list-style-type: none"> <li>• <i>Executive Compensation.</i> A REIT must provide the same Executive Compensation Disclosures as required under the Form S-11, discussed above (both Form S-11 and Form 10-K reference the same provision of Regulation S-K in describing the required Executive Compensation Disclosures) (Item 11)</li> <li>• <i>Ownership by Insiders and Related Matters.</i> A REIT must provide:             <ul style="list-style-type: none"> <li>○ Information regarding the holdings of company securities by large beneficial owners, directors and management, and</li> <li>○ The main features of any equity compensation plan adopted without the approval of shareholders, as well as information, in table form, regarding (i) the number of securities to be issued upon the exercise of outstanding options, warrants and rights, (ii) the weighted-average exercise price of the outstanding options, warrants and rights; and, (iii) other than securities to be issued upon the exercise of the outstanding options, warrants and rights, the number of securities remaining available for future issuance under the plan (Item 12)</li> </ul> </li> <li>• <i>Related Person Transactions and Director Independence.</i> A REIT must:             <ul style="list-style-type: none"> <li>○ Disclose any Related Person Transactions (as defined above) since the beginning of the previous fiscal year, as well as policies and procedures for the review, approval, or ratification of any Related Person Transaction, and</li> <li>○ Name all directors that are independent under standards governing independence generally and that are members of a committee or sub-committee and are independent under the relevant standard for such sub-unit of the board (such as the audit committee; see SOX discussion below)</li> </ul> </li> <li>• <i>Accountant and Audit Information.</i> A REIT must provide extensive information about its relationship with and fees paid to its accountant, as well as policies for monitoring that relationship.</li> <li>• <i>Exhibits.</i> The REIT must provide a range of exhibits to each Form 10-K (or must incorporate those exhibits by reference with a cross reference, if permitted), as set forth in Item 601 of Regulation S-K.</li> </ul>
<p>- Quarterly Form 10-Qs (Section 13 or 15(d))</p>	<p>Quarterly 10-Q must be filed within 45 days from the end of the relevant calendar quarter, or 40 days in the case of large accelerated filers and accelerated filers. The Form 10-Q is divided into two parts, and generally requires the following types of information:</p> <p><u>Part 1</u></p> <ul style="list-style-type: none"> <li>• <i>Interim Financial statements.</i> A REIT must provide interim financial statements in prepared in</li> </ul>

accordance with Rule 10-01 of Regulation S-X (Item 1)

- *MD&A Disclosure.* A REIT must include in its Form 10-Q the MD&A discussion described above and included in the Form S-11 and Form 10-Q (Item 2)
- *Market Risk Factors.* A REIT must include in its Form 10-Q the same type of Market Risk Factors as are described above in connection with the Form S-11 and Form 10-K (Form S-11, Form 10-K and Form 10-Q reference the same provision of Regulation S-K in describing the required Market Risk Factors) (Item 3)
- *Effectiveness of disclosure controls and procedures.* A REIT must disclose the conclusions of the REIT's principal executive and principal financial officers, or persons performing similar functions, regarding the effectiveness of the REIT's Disclosure Controls, adopted pursuant to SOX, as of the end of the period covered by the report, based on the evaluation of these controls and procedures required by SOX (Item 4)

Part 2

- *Legal Proceedings.* A REIT must disclose and describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business of the REIT, to which the REIT or any of its subsidiaries is a party or of which any of their property is the subject. The description must include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. A REIT must include similar information as to any such proceedings known to be contemplated by governmental authorities (Item 1)
- *Risk Factors.* The REIT must provide any updates to the risk factors applicable to the REIT since disclosure of risk factors in its previous Form 10-K. (Item 1A)
- *Securities offerings.* The REIT must provide information regarding any securities sold or repurchased during the quarter to which the Form 10-Q corresponds.
- *Defaults and Changes in Dividends.* The REIT must discuss and provide information regarding any material default in the payment of principal, interest, a sinking or purchase fund installment, or any other material default not cured within 30 days, with respect to any indebtedness of the REIT or any of its significant subsidiaries exceeding 5% of the total assets of the REIT and its consolidated subsidiaries. The REIT must also discuss and provide information regarding any material arrearage in the payment of dividends that has occurred or any other material delinquency not cured within 30 days with respect to any class of preferred stock of the REIT which is registered or which ranks prior to any class of registered

	<p>securities, or with respect to any class of preferred stock of any significant subsidiary of the REIT.</p> <ul style="list-style-type: none"> <li>• <i>8-K Information.</i> The REIT must disclose any facts or information that would be required to be disclosed in a Form 8-K (discussed below) during the fourth quarter of the fiscal year covered by the Form 10-K (Item 9B)</li> <li>• <i>Exhibits.</i> The REIT must provide a range of exhibits to each Form 10-Q (or must incorporate those exhibits by reference with a cross reference, if permitted), as set forth in Item 601 of Regulation S-K.</li> </ul>
<p>- Form 8-K (Section 13 or 15(d))</p>	<p>Form 8-K is used to report important current events. The Form 8-K provides that an obligation to file the Form is triggered by the following events, though as noted in Section 8 of the Form, a REIT may choose to file a Form 8-K for other events that it believes are sufficiently significant (the list below is broken down by topic in accordance with the divisions in the Form 8-K):</p> <ul style="list-style-type: none"> <li>• <i>Section 1 -- Registrant's Business and Operations</i> <ul style="list-style-type: none"> <li>○ Item 1.01 Entry into a Material Definitive Agreement</li> <li>○ Item 1.02 Termination of a Material Definitive Agreement</li> <li>○ Item 1.03 Bankruptcy or Receivership</li> </ul> </li> <li>• <i>Section 2 -- Financial Information</i> <ul style="list-style-type: none"> <li>○ Item 2.01 Completion of Acquisition or Disposition of Assets</li> <li>○ Item 2.02 Results of Operations and Financial Condition</li> <li>○ Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant</li> <li>○ Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement</li> <li>○ Item 2.05 Costs Associated with Exit or Disposal Activities</li> <li>○ Item 2.06 Material Impairments</li> </ul> </li> <li>• <i>Section 3 -- Securities and Trading Markets</i> <ul style="list-style-type: none"> <li>○ Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing</li> <li>○ Item 3.02 Unregistered Sales of Equity Securities</li> <li>○ Item 3.03 Material Modification to Rights of Security Holders</li> </ul> </li> <li>• <i>Section 4 -- Matters Related to Accountants and Financial Statements</i> <ul style="list-style-type: none"> <li>○ Item 4.01 Changes in Registrant's Certifying Accountant</li> <li>○ Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>• <i>Section 5 -- Corporate Governance and Management</i> <ul style="list-style-type: none"> <li>○ Item 5.01 Changes in Control of Registrant</li> <li>○ Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers</li> <li>○ Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year</li> <li>○ Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans</li> <li>○ Item 5.05 Amendment to Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics</li> <li>○ Item 5.06 Change in Shell Company Status</li> </ul> </li>   <li>• <i>Section 6 -- Asset-Backed Securities</i> <ul style="list-style-type: none"> <li>○ Item 6.01 ABS Informational and Computational Materials</li> <li>○ Item 6.02 Change of Servicer or Trustee</li> <li>○ Item 6.03 Change in Credit Enhancement or Other External Support</li> <li>○ Item 6.04 Failure to Make a Required Distribution</li> <li>○ Item 6.05 Securities Act Updating Disclosure</li> </ul> </li>   <li>• <i>Section 7 -- Regulation FD</i> <ul style="list-style-type: none"> <li>○ Item 7.01 Regulation FD Disclosure</li> </ul> </li>   <li>• <i>Section 8 -- Other Events</i> <ul style="list-style-type: none"> <li>○ Item 8.01 Other Events (The registrant can use this Item to report events that are not specifically called for by Form 8-K, that the registrant considers to be of importance to security holders.)</li> </ul> </li>   <li>• <i>Section 9 -- Financial Statements and Exhibits</i> <ul style="list-style-type: none"> <li>○ Item 9.01 Financial Statements and Exhibits</li> </ul> </li> </ul> <p>Form 8-Ks relating to events described in Sections 1-6 or Section 9 must be filed within four days of the event.</p>
<p>- Section 16</p>	<p>Because a REIT is registered under Section 12 of the 1934 Act, each officer, director and beneficial owner of more than 10% of any class of the REIT's securities (a "<b>Covered Person</b>") is subject to the filing requirements and substantive restrictions on short-swing trading profits of Section 16.</p>
<p>- Forms 3, 4 and 5 (Section 16(a))</p>	<p>Forms 3, 4 and 5 are filed pursuant to Section 16(a) of the 1934 Act and set forth a Covered Persons ownership of REIT securities (or, as described below, derivatives for which REIT securities serve as the underlier). The forms are publicly available, and an issuer is required to disclose in its Form 10-K and annual proxy statement the names of any Covered Persons who fail to timely submit Forms 3, 4 or 5.</p>

	<p><u>Form 3</u></p> <p>A Covered Person must file a Form 3 at the time the REIT’s registration statement under the 1934 Act becomes effective or within 10 days of the date the Covered Person becomes a Covered Person. In connection with equity securities of a REIT, the Form 3 requires a Covered Person to provide: the title of the equity securities the Covered Person owns, the amount of such securities, whether the Covered Person’s ownership of the equity security is direct or indirect and, if indirect, the form of the indirect ownership. In connection with derivatives for which REIT securities are the underlying security, a Covered Person must provide, as applicable, the exercise date and expiration date of the derivative, the title and amount of the underlying REIT security, the conversion or exercise price of the REIT security, whether the Covered Person’s ownership of the derivative security is direct or indirect and, if indirect, the form of the indirect ownership.</p> <p><u>Form 4</u></p> <p>A Covered Person must file a Form 4, updating its ownership information, before the end of the second business day following any transaction which causes its previously reported ownership to change.</p> <p><u>Form 5</u></p> <p>A Covered Person must file Form 5, setting out its ownership interest in the REIT’s equity securities or in derivatives based on such securities, on an annual basis, no later than 45 days after the end of the REIT’s fiscal year.</p>
<p>- Short swing profit restrictions (Section 16(b))</p>	<p>Under Section 16(b) of the 1934 Act, any profits resulting from a Covered Person’s combination of purchases and sales or sales and purchases of the REIT’s stock (or derivatives, as described above) must be turned over to the REIT. The method of calculating when profit or loss has occurred, as well as the amount of profit and loss, is complex. This rule is a prophylactic measure intended to prevent the misuse of inside information.</p>
<p>- Prohibition on Covered Person short sales (Section 16(c))</p>	<p>Section 16(c) of the 1934 Act prohibits Covered Persons from shorting REIT securities, even if the Covered Person owns the REIT securities and is shorting “against the box.”</p>
<p>- Section 10(b) anti-fraud provision (and the rules thereunder)</p>	<p>A REIT is subject to the anti-fraud provisions of Section 10(b) and the rules thereunder.</p>
<p>- Proxy Rules (Section 14 and the rules thereunder)</p>	<p>As a company registered under the 1934 Act, a REIT is subject to the rules governing the solicitation of proxies and the requirements applicable to proxy solicitation materials.</p>
<p>- Proxy Solicitation Materials</p>	<p>A company subject to the proxy rules cannot solicit a proxy from investors unless it includes a proxy statement containing the information in Schedule 14A. Among other things, Schedule 14A requires a proxy statement to include the following information, where applicable:</p>

- *Revocation.* Whether or not the person giving the proxy has the power to revoke it (Item 2)
- *Dissenter's rights.* The rights of appraisal or similar rights of dissenters with respect to any matter to be acted upon and indicate any statutory procedure required to be followed by dissenting security holders in order to perfect such rights (Item 3)
- *Source and interest.* Information about the persons making the solicitation and their interest in the proposed vote, action or transaction for which the proxy is sought (Items 4 and 5)
- *Information about directors.* If the proxy relates to the election of directors, certain information about the proposed directors and their proposed compensation (Item 7)
- *Information about accountant.* If the proxy relates to the selection, approval or ratification of the company's independent public account, information describing the registrant's relationship with its independent public accountant (Item 9)
- *Compensation plans.* If the proxy relates to actions to be taken with respect to any plan pursuant to which cash or noncash compensation may be paid or distributed, information about the features of the plan, the eligible officers and employees, the basis of participation and whether and how the plan can be amended without shareholder approval (Item 10)
- *Exchange or Modification.* If the proxy relates to the modification or exchange of a company's securities, information about the proposed modification or exchange as well as financial statements and financial information (Items 11-13)
- *Merger or Acquisition.* If the proxy relates to a proposed merger or acquisition, significant information equivalent to what would be required on a registration statement under Form S-4, among other things (Item 14)
- *Acquisition or Disposition of Property.* If the proxy relates to a significant acquisition or disposition of property, a description of the general character and location of the property, the nature and amount of consideration to be paid or received by the company or any subsidiary, an outline of the facts bearing upon the question of the fairness of the consideration, the name and address of the transferor or transferee and the nature of any material relationship of such person to the company or any affiliate of the company, and an outline of the material features of the contract or transaction (Item 15)
- *Restatement.* If the proxy relates to the restatement of any asset, capital, or surplus account of the registrant, information regarding the nature of the restatement and the date as of which it is to be effective,

	<p>the reasons for the restatement and for the selection of the particular effective date, the name and amount of each account (including any reserve accounts) affected by the restatement and the effect of the restatement, and to the extent practicable, a statement of whether and the extent, if any, to which, the restatement will alter the amount available for distribution to the holders of securities (Item 16)</p> <ul style="list-style-type: none"> <li>• <i>Amendments.</i> If the proxy relates to an amendment of the company’s charter, bylaws or other documents as to which information is not required above, information regarding the reasons for and the general effect of the amendments (Item 19)</li> <li>• <i>Voting procedures.</i> Information about the vote required to approve the proposed action and the method of counting votes (Item 21)</li> </ul>
- Pre-filing of Proxy Materials	Any proxy solicitation materials must be filed with the SEC at least 10 calendar days prior to dissemination of the materials, unless the solicitation relates solely to certain routine matters such as election of directors or approval or certification of accountants.
- Filing of Proxy Materials	A definitive proxy statement, form of proxy and all other soliciting materials, in the same form as the materials sent to security holders, must be filed with the SEC no later than the date they are first sent or given to security holders.
- Anti-fraud Provisions of Proxy Rules (Section 14(e) and Rule 14a-9)	REITs are subject to the anti-fraud provisions of Section 14(e) and Rule 14a-9 in conducting a proxy solicitation.
- Section 13(d) and (g)	Investors in public REITs are subject to the reporting obligations of Sections 13(d) and (g) under the 1934 Act if such an investor acquires sufficient ownership to trigger the reporting obligations. Of course, like all market participants, a REIT is also subject to Section 13(d) and (g) reporting requirements if the REIT acquires a sufficient interest in a public company, such as another REIT, though certain asset limitations under the Code applicable to REITs limits a REIT’s ability to make such investments (See the 25% Asset Test and related requirements, below).
- Tender Offer Rules	As public companies, REIT investors are given the protections of the rules governing both third party and issuer tender offers.
- Regulation FD	<p>Public REITs are subject to the selective disclosure regime of Regulation FD. Thus, whenever a REIT, or any person acting on its behalf, discloses any material nonpublic information regarding the REIT or its securities to any Reg FD Covered Person (as defined below), the REIT must make public disclosure of that information:</p> <ul style="list-style-type: none"> <li>• Simultaneously, in the case of an intentional disclosure (meaning the person making the disclosure either knows, or is reckless in not knowing, that the information he or she is communicating is both material and</li> </ul>

	<p>nonpublic); and</p> <ul style="list-style-type: none"> <li>• Promptly, in the case of a non-intentional disclosure.</li> </ul> <p><b>“Reg FD Covered Person”</b> means, generally,</p> <ul style="list-style-type: none"> <li>• a broker or dealer, or a person associated with a broker or dealer as defined in the 1934 Act</li> <li>• an investment adviser, an institutional investment manager required to file a Form 13F with the SEC for the most recent quarter ended prior to the date of the disclosure, or a person associated with either of the foregoing</li> <li>• an investment company or entity that would be an investment company but for Section 3(c)(1) or Section 3(c)(7) of the 1940 Act, or an affiliated person of either of the foregoing</li> <li>• a holder of the REIT’s securities, under circumstances in which it is reasonably foreseeable that the person will purchase or sell the REIT’s securities on the basis of the information.</li> </ul>
<b>INTERNAL REVENUE CODE</b>	<b>An entity that meets the requirements for taxation as a REIT is entitled to a deduction for dividends paid to its shareholders. As a result, a REIT generally distributes annually to shareholders an amount equal to 100% of its taxable income.</b>
<p>- General requirements</p>	<p>For an entity to be treated as a REIT under the Code:</p> <ul style="list-style-type: none"> <li>• it must be managed by one or more trustees or directors</li> <li>• the beneficial ownership of the entity must be evidenced by transferable shares or transferable certificates of beneficial interest</li> <li>• it must otherwise be taxable as a corporation (but for its election to be taxed as a REIT)</li> <li>• it cannot be a financial institution referred to in Section 582(c)(5) of the Code (such as a bank, mutual savings bank, building and loan association or other savings institution) or an insurance company</li> <li>• the beneficial ownership of the entity must be held by 100 or more persons for all years after the first taxable year for which a REIT election is made</li> <li>• it must not be “closely held” for all years after the first taxable year for which a REIT election is</li> </ul>

	<p>made</p> <ul style="list-style-type: none"> <li>• it must meet two annual gross income tests and two quarterly asset tests, and</li> <li>• it must satisfy a dividend distribution requirement.</li> </ul> <p>The “closely held” requirement, the asset and income tests and the dividend distribution requirements are discussed below.</p>
<p>- Closely Held Requirement (Section 856(h)(1)(B) of the Code)</p>	<p>Generally, five or fewer individuals cannot own more than 50% of a REIT’s shares during the last half of the REIT’s taxable year. For purposes of this requirement, attribution rules generally apply under which shares held by a corporation, trust, or partnership are deemed to be owned proportionately by the shareholders, beneficiaries, or partners, as applicable.</p>
<p>- Two income tests (Sections 856(c)(2) and (3) of the Code)</p>	<p>The two annual gross income tests are a 75% test (the “<b>75% Income Test</b>”) and a 95% test (the “<b>95% Income Test</b>”).</p> <p><u>The 75% Income Test</u></p> <p>At least 75% of a REIT’s gross income during a year (excluding income from “prohibited transactions” as defined below and income from qualified REIT hedging transactions) must come from real estate related sources, such as, among other things:</p> <ul style="list-style-type: none"> <li>• rents from real property</li> <li>• interests on obligations secured by mortgages on real property or on interests in real property, including interest on certain types of mortgage-backed securities</li> <li>• gains from sale or disposition of real property, including interests in real property or interests in mortgages on real property, other than in a prohibited transaction</li> <li>• dividends or distributions from shares of other REITs</li> <li>• abatements and refunds of taxes on real property</li> <li>• amounts received or accrued for entering into agreements to make loans secured b mortgages or to purchase or lease real property (such as commitment fees)</li> </ul> <p>“<b>Prohibited transaction</b>” means the sale of property held by the REIT primarily for sale to customers in the</p>

	<p>ordinary course of business. A 100% income tax is applied to net income from prohibited transactions.</p> <p><u>The 95% Income Test</u></p> <p>At least 95% of a REIT’s gross income during a year must be derived from items that qualify under the 75% Income Test or from dividends or interest from any source, which need not be related to real estate activities.</p>
<p>- Two Asset Tests (Section 856(c)(4) of the Code)</p>	<p>The two quarterly asset tests are a 75% test (the “<b>75% Asset Test</b>”) and a 25% test (the “<b>25% Asset Test</b>”).</p> <p><u>The 75% Asset Test</u></p> <p>On the last day of each calendar quarter of a REIT’s taxable year, at least 75% of its assets must constitute “real estate assets,” cash and cash items (including receivables arising in the ordinary course of the REIT’s business) and government securities. “<b>Real estate assets</b>” generally means real property, including interests in real property and interests in mortgages on real property, interests in other REITs and REMICs and property (which need not be a real estate asset) attributable to the temporary investment of new capital.</p> <p><u>25% Asset Test</u></p> <p>On the last day of each calendar quarter of a REIT’s taxable year no more than 25% of the value of the REIT’s total assets can be represented by securities other than government securities and securities, such as certain types of mortgage-backed securities, which are treated as real estate assets. Shares of stock in wholly owned “qualified REIT subsidiaries” are not treated as securities; a qualified REIT subsidiary is ignored as an entity separate from the parent REIT. Also, (i) no more than 25% of the value of a REIT’s total assets can constitute securities issued by one or more taxable REIT subsidiaries; and, except in the case of a taxable REIT subsidiary or a qualified REIT subsidiary, (ii)(A) the securities of a single issuer cannot represent more than 5% of the value of a REIT’s total assets, (B) a REIT cannot own more than 10% of the outstanding voting securities of any one issuer, and (C) other than in the case of certain straight debt securities, a REIT cannot own more than 10% of the total value of the outstanding securities of any one issuer..</p>
<p>- Dividend Distribution Requirements (Section 857(a)(1))</p>	<p>To maintain its status as a REIT under the Code, a REIT’s deduction for dividends paid must equal at least (1) the sum of (a) 90% of the real estate investment trust’s taxable income for the taxable year (determined without deducting for dividends paid and excluding any net capital gain) and (b) 90% of the excess of the net income from foreclosed property over the tax imposed on that income, minus (2) any “excess noncash income” (as defined in the Code). A failure to meet the distribution requirement for a taxable year will cause the REIT to be taxed as a C corporation for that year.</p>
<p><b>MARYLAND CORPORATE LAW</b></p>	<p><b>Many REITs are organized as Maryland corporations. Maryland was one of the first states to adopt a statute specifically addressing REITs. State requirements impose fiduciary and other duties upon directors</b></p>

	<b>and officers of REITs.</b>
- Adherence to Charter and Bylaws	Maryland's corporations law gives its corporations significantly flexibility to organize its internal affairs and adopt guidelines and limitations on virtually any subject, including the corporation's permitted businesses, conditions for issuing securities, voting rights and procedures (e.g., quorum requirements, provisions requiring a vote, etc.), elections and powers of directors and officers, indemnification and limitation of liability of officers and directors (absent required indemnification) as well as conditions thereon. A Maryland corporation must adhere to the provisions of its charter and by-laws, which are filed with the State and are publicly available, along with amendments thereto. These organizational documents are also made publicly available as part of a REIT's 1934 Act filings.
- Standard of Care	<p>As a fiduciary, officers and directors of a corporation are subject to a standard of care in carrying out corporate affairs. An officer or director must perform his or her duties in good faith, in the manner the director reasonably believes to be in the corporation's best interests, and with the care that an "ordinarily prudent person in a like position would use under similar circumstances."<sup>5</sup> In applying the "prudent person" standard, courts use a "gross negligence" standard.<sup>6</sup></p> <p>A director's fiduciary duty and standard of care change and become more complex in the context of a proposed merger or business combination.</p>
- Directors' Limits on Reliance on Others	Directors are entitled to rely on material prepared by opinions, reports or statements prepared by officers or employees of the corporation who the director "reasonably believes to be reliable and competent in the matters presented" or a committee of the board who the director believes "merit[s] confidence." <sup>7</sup> Reliance by a director is not considered in good faith, however, if he or she has knowledge that would cause reliance to be unwarranted. <sup>8</sup>
- Corporate Opportunity	A Maryland corporation's directors, officers and majority stockholders cannot divert for their own purposes opportunities that rightly belong to the corporation. The corporate opportunity doctrine stems from directors', officers' and, to some extent, majority stockholders' duties to the corporation, and is the subject of a great deal of

<sup>5</sup> See Maryland Code Ann., Corporations & Associations § 4-405.1(a).

<sup>6</sup> See, e.g., *NAACP v. Golding*, 679 A.2d 554 (Md. 1996); *Parish v. Md. & Va. Milk Producers Association*, 242 A.2d 512 (Md. 1968).

<sup>7</sup> See Maryland Code Ann., Corporations & Associations § 4-405.1(b)(1)(i) and (ii).

<sup>8</sup> See Maryland Code Ann., Corporations & Associations § 4-405.1(b)(2).

	judicial interpretation and gloss.
- Interested Director Transactions	A contract between the corporation and a director or the corporation and any entity in which a director has a financial interest or for which the director serves also serves as a director must be approved (i) by the disinterested directors or a committee of such directors or (ii) by stockholders. In any event, the contract must be “fair and reasonable to the corporation.” <sup>9</sup>
- Shareholders’ Right to Bring a Derivative Suit	Subject to certain case law imposed procedural requirements and making certain showings, a shareholder may bring an action against officers, directors or third parties on behalf of the corporation.
- Limits on Exculpation and Indemnification	Maryland law imposes limits on a corporation’s statutory obligation and ability to indemnify directors, officers and employees under certain circumstances <sup>10</sup> and circumscribes the extent to which the liability of such persons can be limited.
<b>MARKET-DRIVEN CONSTRAINTS AND PRACTICES</b>	<b>Although not mandated by law or regulation, market practices, including pressures stemming from competition, shareholders and directors, create certain industry standard practices for REITs.</b>
- Custody	Most REITs maintain their assets with large, established financial institutions in order to minimize counterparty risk.
- Affiliated transactions	In addition to state and federal provisions imposing substantive and disclosure obligations in the context of affiliated transactions, investors, directors and competitive pressure impose limits on accepted transactions between a REIT and its affiliates, limiting self-dealing in the REIT industry.
<b>VALUATION AND ACCOUNTING STANDARDS</b>	<b>REITs registered under the 1934 Act are required to prepare and disseminated audited financial statements prepared in accordance with generally accepted accounting principles (“GAAP”), as described above. Even REITs which are not registered under the 1934 Act generally prepare and provide to investors audited financial statements prepared in accordance with GAAP. In preparing GAAP compliant financial statements, REITs must comply with the many sources of GAAP, including standards issued by the Financial Accounting Standards Board (“FASB”) and, in the case of companies registered under the 1934 Act, SEC guidance and regulations governing the preparation of financial statements and accounting.</b>  <b>A few of these SEC and FASB standards are described below. A more complete list, though not exhaustive, is attached as <u>Exhibit 2</u>.</b>

<sup>9</sup> See Maryland Code Ann., Corporations & Associations § 4-419(a).

<sup>10</sup> See Maryland Code Ann., Corporations & Associations § 4-418.

<p>- Financial Accounting Standard 157 (“<b>FAS 157</b>”) – “Determination of Fair Value”</p>	<p>In preparing financial statements in accordance with GAAP, REITs, like all companies seeking a GAAP-compliant audit, must ascertain a “fair value” for various assets and instruments. FAS 157 applies to other Financial Accounting Standards that require a fair value measurement, subject to certain limitations. FAS 157 defines fair value, establishes a framework for measuring fair value in GAAP and requires disclosures about fair value measurements. Generally, FAS 157 defines “fair value” as “the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date.” FAS 157 describes the meaning of the terms used in this general definition and the assumptions and determinations that must be made in applying the definition.</p>
<p>- Financial Accounting Standards 166 (“<b>FAS 166</b>”) – “Accounting for Transfers of Financial Assets”</p>	<p>Securitization is an important part of the real estate industry; because REITs are significant participants in the real estate industry, the accounting pronouncements governing securitization are important to the operation and activities of REITs. FAS 166 was adopted by FASB in June 2009, and amended previous guidance provided in FAS 140. FAS 166 significantly affects the way in which originators account for transfers in securitizations by imposes requirements on when the transfer of an interest in a special purpose vehicle can truly be treated as a sale, and, therefore, affects the accounting for securitized mortgage loans generally. FAS 166 eliminated (1) the exceptions for qualifying special-purpose entities from the consolidation guidance of FASB Interpretation No. 46, as amended (“<b>FIN 46(R)</b>”), which many banks used frequently in securitizations, and (2) the provisions of FAS 140 that permitted sale accounting for certain mortgage securitizations when a transferor has not surrendered control over the transferred financial assets.</p>
<p>- Financial Accounting Standards 167 (“<b>FAS 167</b>”) – “Accounting for Transfers of Financial Assets”</p>	<p>FAS 167, which amends FIN 46(R), also has a significant effect on accounting in the context of securitizations. FAS 167 changes how an enterprise determines when an entity that is insufficiently capitalized or is not controlled through voting, or similar rights, should be consolidated. FAS 167 requires an enterprise to assess on an ongoing basis whether its interest in another entity makes that entity a “variable interest entity,” such that the enterprise must include in its financial statements the assets, liabilities and activities of the entity. FAS 167 amends FIN 46(R) in a number of important ways with significant affects on originators of securitizations, special purpose vehicles and holders of interests in special purpose vehicles used for securitization.</p>

**EXHIBIT 1**

STATUTES ADDRESSING OR RELATING TO REITs

<b>Statute</b>	<b>Description</b>
Investment Company Act of 1940 (the " <u>1940 Act</u> ")	Section 3(c)(5)(C) of the 1940 Act provided the exemption from investment company statutes that REITs rely upon in operating without registration under the 1940 Act.
Real Estate Investment Trust Act of 1960 (the " <u>1960 Act</u> ")	The 1960 Act created the REIT structure.
A bill to amend the Tariff Schedules of the United States to permit the importation of upholstery regulators, upholsterer's regulating needles, and upholsterer's pins free of duty (the " <u>1974 Provisions</u> ")	The 1974 Provisions amended the REIT qualification rules such that (1) a REIT's receipt of income from foreclosure property and (2) the acquisition of real property upon foreclosure would not result in loss of REIT status. Instead of disqualification, the 1974 Provisions require a REIT acquiring real property upon foreclosure to pay corporate income tax on income received from foreclosure property and permit the REIT to elect a two-year grace period to liquidate the foreclosure property without being disqualified for holding property for sale to customers in the ordinary course of business.
The Tax Reform Act of 1976 (the " <u>1976 Act</u> ")	The 1976 Act revised the 1960 Act to (1) provide a REIT the ability to make a "deficiency dividend" distribution to avoid disqualification for not distributing 90% of its annual income in instances where the REIT acted in good faith to satisfy the distribution requirements but failed to do so because of an audit adjustment, (2) impose an excise tax on a REIT for failure to distribute at least 75% of its real estate investment trust taxable income by the close of its taxable year, (3) replace the prohibition against a REIT holding property (other than foreclosure property) for sale to customers in the ordinary course of business with a tax of 100% on the net income from the sale or disposition of such property (the "prohibited transactions" tax), and (4) impose a 100% tax on net income attributable to the amount by which a REIT fails to meet the income source tests in lieu of disqualification.
The Revenue Act of 1978 (the " <u>1978 Act</u> ")	The 1978 Act created a safe-harbor such that the prohibited transactions tax on property held primarily for sale by a REIT would not apply to the sale of property where the following conditions are satisfied: (1) the property has been held by the REIT for at least four years, (2) the total expenditures made by the REIT during the four-year period prior to sale do not exceed 20 percent of the net selling price of the property, (3) the REIT does not sell more than five properties during the taxable year, and (4) if the property is land or improvements not acquired through foreclosure, the property is held by the REIT for rent for a period of at least four years.
Secondary Mortgage Market Enhancement Act of 1984 (" <u>SMMEA</u> ")	SMMEA sought to reduce regulatory barriers preventing private companies from issuing mortgage backed securities. SMMEA added a definition of "mortgage related securities" to the Securities and Exchange Act of 1934 and granted such securities special treatment under several provisions of the federal and state securities laws. In adopting SMMEA, Congress noted the SEC's exemptive authority under Section 6(c) of the

	<p>1940 Act and stated that it expected the SEC to use that power to encourage a vigorous private secondary mortgage market.</p>
<p>Tax Reform Act of 1986 (the “<u>1986 Act</u>”)</p>	<p>The 1986 Act curtailed use of REITs as tax shelters but removed certain restrictions on direct management and operation of properties by REITs as originally set forth in the 1960 Act. The 1986 Act revised the REIT asset requirement rules to permit REITs to hold assets in a wholly owned subsidiary (“qualified REIT subsidiary” or “QRS”) such that a REIT and its QRS are treated as a single taxpayer (i.e., the separate corporate status of the QRS is ignored). The 1986 Act also, among other things, modified the prohibited transactions rules to increase the number of properties that could be sold within the safe harbor from four to seven and increase the amount of expenditures that a REIT may make within the four-year period prior to sale from 20 percent to 30 percent of the net selling price of the property.</p>
<p>Technical and Miscellaneous Revenue Act of 1988 (the “<u>1988 Act</u>”)</p>	<p>The 1988 Act provided rules governing the treatment of interest rate swap or cap agreements (i.e., agreements which protect the REIT from interest rate fluctuations on variable debt incurred to acquire or carry real property) held by REITs. Such agreements are treated as securities for purposes of the three-percent test and payments under them qualify for the 95-percent income test. The 1988 Act also, among other things, provided that dividends declared in October, November, or December and made payable to shareholders of record in such a month are deemed to have been paid by the REIT and received by its shareholders on December 31 of such year, so long as the dividends are actually paid during January of the following year.</p>
<p>Revenue Reconciliation Act of 1993 (the “<u>1993 Act</u>”)</p>	<p>The 1993 Act modified how beneficial owners of a REIT’s shares are counted in determining whether a REIT meets the requirement that no more than 50% of a REIT’s shares may be held by five or fewer beneficial owners. The 1993 Act permitted certain beneficiaries of pension plan participants to be counted as investors, rather than the pension plan itself, making REITs better able to take large institutional investments without the risk of violating the “five or fewer” rule.</p>
<p>REIT Simplification Act, passed as part of the Taxpayer Relief Act of 1997 (the “<u>1997 Provisions</u>”)</p>	<p>The 1997 Provisions, among other things, (1) create a de minimis exception to prior law so that a REIT’s rental income is not disqualified if it performs nominal, although impermissible, services for a tenant, (2) mirror corresponding mutual fund rules governing taxation of retained capital gains by passing through a credit to shareholders for capital gains taxes paid at the REIT level, (3) repeal the 30% gross income test (in conformity with the repeal of the analogous “short-short” test for mutual funds), (4) simplify property foreclosure rules, (5) update the current REIT hedging rule to include income from all hedges of REIT liabilities, (6) create a safe harbor to the shared appreciation mortgage rules that does not penalize a REIT lender for the borrower’s bankruptcy, and (7) codify an IRS ruling position by allowing QRS status for a wholly-owned subsidiary even if the subsidiary previously had been owned by a non-REIT.</p>
<p>REIT Modernization Act (signed into law as part of the Ticket to Work and Work Incentives Improvement Act of 1999 (the “<u>1999 Act</u>”))</p>	<p>The 1999 Act, among other things, (1) allowed REITs to own up to 100% of the securities of a taxable REIT subsidiary (a “TRS”), subject to limitations, including limitations on the value of TRS compared to a REIT’s total assets, (2) lowered the distribution requirement of REITs from 95% to 90%, which had been the requirement applicable between 1960 and 1980, (3) permitted REITs to hire a manager to operate nursing</p>

	homes and other healthcare facilities without a lease for a certain period of time until it can secure a new lease, and (4) made certain technical changes to how a company calculates pre-REIT earnings that it must distribute to investors after electing REIT status or merging with a C Corporation.
Jobs and Growth Tax Relief Reconciliation Act of 2003 (the “ <u>2003 Act</u> ”)	The 2003 Act lowered the tax rates applicable to certain corporate dividends, although REIT distributions generally do not qualify for the reduced rate under the 2003 Act.
REIT Improvement Act (signed into law as part of the American Jobs Creation Act of 2004 (the “ <u>2004 Act</u> ”))	The 2004 Act, among other things, (1) adopted retroactive changes to the Internal Revenue Code of 1986, as amended (the “Code”), to better allow REITs to make certain loans in the ordinary course of business without risking the loss of a company’s REIT status, (2) clarified certain rules intended to prevent a REIT from inappropriately shifting income out of its TRS to the REIT, (3) modifies certain safe harbors under which a REIT may shift income or deductions between the REIT and its TRS, (4) modified the rules governing treatment of REIT hedging income in computing the 95% gross income test, (5) in certain cases imposes monetary penalties for failure to qualify as a REIT for a given period rather than loss of REIT status (amending the “death trap” provisions applicable to REIT status), (6) modifies the treatment of foreign investors in a REIT, and (7) provides for certain deductions and contains other provisions not specifically addressed at REITs, but which affect REITs.
Tax Increase Prevention and Reconciliation Act of 2005 (the “ <u>2005 Act</u> ”)	The 2005 Act modified the treatment of distributions made by REITs and RICs (as defined in the tax code) attributable to foreign investment in real property (or FIRPTA) rules.
Housing and Economic Recovery Act of 2008 (which contained all but one of the titles of the proposed REIT Investment Diversification and Empowerment Act of 2007) (the “ <u>2008 Act</u> ”)	The 2008 Act’s REIT-related provisions include: (1) reducing the holding period under the prohibited transaction safe harbor test from four years to two years, (2) changing the measurement of the 10% of sales permitted under the safe harbor test from current tax basis to either tax basis or fair market value (at the REIT’s annual option), (3) increasing the size ceiling for TRS from 20 percent to 25 percent of assets, (4) permitting health care REITs to use TRS in the same manner as hotel REITs, (5) excluding most real estate-related foreign currency gains from the computation of the REIT income tests; and, (6) providing the Treasury Department with clear authority to rule on whether a variety of items qualify under the REIT gross income tests.

**EXHIBIT 2**

**GUIDANCE AFFECTING PREPARATION AND PRESENTATION OF REIT FINANCIAL STATEMENTS**

REITs, as public companies, are required to include audited financial statements, prepared in accordance with generally accepted accounting principles (“GAAP”), in various annual and periodic disclosures. In preparing and presenting such GAAP-compliant disclosures, REITs are subject to a significant amount of guidance that must be taken into account. This chart lists certain sources of guidance governing REITs’ preparation and presentation of financial statements and financial information.

<b>Guidance</b>	<b>Description</b>
<b>STANDARDS OF THE FINANCIAL ACCOUNTING STANDARDS BOARD (“FASB”)</b>	FASB Standards are a core component of GAAP and serve a key basis for the presentation and preparation of all GAAP-complaint financial statements and materials. A large number FASB Standards and Interpretations apply to the presentation of REITs’ financial statements; some of those FASB Standards are listed below.
- FAS 13	Governs accounting for leases (amended by FAS Nos. 22, 23, 27, 28, 29, 91 and 98)
- FAS 22	Modifies FAS 13 in accounting for provisions of lease agreements resulting from refundings of tax-exempt debt
- FAS 23	Modifies FAS 13; deals with inception of leases
- FAS 27	Modifies FAS 13; relates to classification of renewals or extensions of existing sales-type or direct financing leases
- FAS 28	Modifies FAS 13; relates to accounting for sales with leasebacks
- FAS 29	Modifies FAS 13; deals with contingent rental payments
- FAS 47	Governs accounting for long-term obligations
- FAS 65	Governs accounting for certain mortgage banking activities that may apply to REITs (amended by FAS Nos. 91, and 134)
- FAS 66	Governs accounting for sales of real estate (amended in part by FAS 98 and 152)
- FAS 67	Governs accounting for costs and initial rental operations of real estate projects
- FAS 91	Governs accounting for nonrefundable fees and costs associated with originating or acquiring loans and initial direct costs of leases (amended by FAS No. 98)
- FAS 95	Governs presentation of statement of cash flows (amended by FAS Nos. 102 and 104)
- FAS 98	Modifies certain previous guidance relating to accounting for sale-leaseback transactions involving real estate, sales-type leases of real

	estate, the definition of the lease term, and initial direct costs of direct financing leases
- FAS 102	Amends previous guidance on statement of cash flows by providing certain exemptions and governing classification of cash flows from certain securities acquired for resale
- FAS 104	Amends previous guidance on statement of cash flows by providing for net reporting of certain cash receipts and cash payments and governing classification of cash Flows from hedging transactions
- FAS 134	Governs accounting for mortgage-backed securities retained after the securitization of mortgage loans held for sale by a mortgage banking enterprise
- FAS 140	Governs accounting for transfers and servicing of financial assets (including mortgage servicing) and extinguishments of liabilities
- FAS 152	Governs accounting for real estate time-sharing transactions (amending certain previous guidance)
- FAS 157	Governs fair value measurements
- FAS 166	Governs manner of accounting for certain transfers of financial assets (e.g., when a sale a true sale)
- FAS 167	Amends certain previous guidance on when entities must be consolidated with those of another entity (affects securitizations)
- FAS 168	Provides a hierarchy of FASB guidance
<b>FASB INTERPRETATIONS</b>	FASB publishes interpretive guidance that affects GAAP compliance by modifying or interpreting FASB Standards. Certain of those interpretations are described briefly below.
<b>REGULATION S-X</b>	Regulation S-X sets forth the form and content of and requirements for financial statements required to be filed as a part of registration statements under the Securities Act of 1933, as amended (the " <u>1933 Act</u> "), registration statements under section 12 of the Securities and Exchange Act of 1934, as amended (the " <u>Exchange Act</u> "), annual or other reports under Sections 13 and 15(d) and proxy and information statements under Section 14 of the Exchange Act. Because REITs generally register the offer and sale of shares under the 1933 Act and are registered under the Exchange Act, REITs are subject to Regulation S-X.
<b>STAFF ACCOUNTING BULLETINS</b>	Staff Accounting Bulletins (" <u>SABs</u> ") reflect the Securities and Exchange Commission (" <u>SEC</u> ") staff's views regarding accounting-related disclosure practices. They represent interpretations and policies followed by the Division of Corporation Finance and the Office of the Chief Accountant in administering the disclosure requirements of the federal securities laws. In preparing disclosure materials and financial statements under the 1933 Act and 1934 Act, REITs must take into account SABs.
<b>STAFF COMPLIANCE &amp; DISCLOSURE INTERPRETATIONS ("<u>C&amp;DIS</u>")</b>	Certain SEC staff C&DIs affect the preparation and presentation of financial statements, particularly those issued by the Division of

	Corporation Finance, including, without limitation, the C&DI regarding Non-GAAP Financial Measures and those regarding disclosures on specific forms and schedules under the 1933 Act and 1934 Act.
<b>NAREIT BEST PRACTICES</b>	NAREIT, the primary trade association for REITs, publishes certain best practices regarding the calculation and presentation of supplemental financial disclosures, mainly dealing with funds from operations (often abbreviated as “FFO”).
<b>INDUSTRY AND ANALYST REQUIREMENTS</b>	The demands of the market and REIT analysts often require REITs to provide additional, supplemental financial information and calculations, in addition to that required in GAAP financial statements or forms and disclosures REITs are required to file or make, respectively, under the federal securities laws.