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FREQUENTLY ASKED QUESTIONS ABOUT

FORM 8-K ITEMS MOST RELEVANT TO PUBLIC REAL ESTATE INVESTMENT TRUSTS

GENERAL DESCRIPTION AND SUMMARY OF 8-K ITEMS

What is Form 8-K?

Form 8-K is the form on which public companies report, on a current basis, the occurrence of significant events. A reportable event is a transaction or occurrence of major significance.

Who must file Form 8-K?

All U.S. "reporting" companies are responsible for filing Forms 8-K. Foreign private issuers that report in the United States use a Form 6-K, which has different requirements.

Under what circumstances must a Form 8-K be filed?

Form 8-K identifies specified events that require the filing of a Form 8-K with the Securities and Exchange Commission (SEC) and provides detailed instructions for filing. Below is a list of the events that trigger a filing, along with the corresponding Section and Item references from Form 8-K.

If a Form 8-K is required, how quickly does it need to be filed?

As discussed below under "Questions and Answers Relevant to Public REITS," subject to certain exceptions, the Form 8-K must be filed within four business days after the occurrence of the triggering event. For instance, if a triggering event occurs on a Tuesday, the Form 8-K would be due no later than the following Monday (assuming there are no intervening holidays).

SECTION 1. — REGISTRANT'S BUSINESS AND OPERATIONS

Item 1.01 Entry into a Material Definitive Agreement.

- See "What makes an agreement "material" and "definitive" for purposes of Items 1.01 and 1.02 of Form 8-K?" below for a discussion of the determination of a "material definitive agreement."
- Filing the agreement itself as an exhibit to the Form 8-K is encouraged but not required. If the agreement is not filed as an exhibit to the Form 8-K, it is required to be filed with the registrant's periodic report (e.g., its Form 10-Q or Form 10-K) relating to the period in which the agreement was entered into.
- Material employment or other compensatory agreements are usually reported under Item 5.02 rather than Item 1.01. Item 5.02 does not require the filing of the applicable agreement, but such agreements may be required to be filed as a material contract with a periodic report pursuant to Item 601(b)(10) of Regulation S-K.

Item 1.02 Termination of a Material Definitive Agreement.

- No Form 8-K needs to be filed if the agreement, even if it is material, is terminated in accordance with its terms.
- For purposes of Item 1.02, "material definitive agreement" has the same meaning as that used in Item 1.01.

Item 1.03 Bankruptcy or Receivership.

Item 1.04 Mine Safety — Reporting of Shutdowns and Patterns of Violations.

SECTION 2. — FINANCIAL INFORMATION

Item 2.01 Completion of Acquisition or Disposition of Assets.

- See the related financial statement requirements under Regulation S-X (historical and/or pro forma financials may be required to be filed).

Item 2.02 Results of Operations and Financial Condition.

- A registrant typically provides its earnings press releases pursuant to this item.

- The material included under Item 2.02 generally should be "furnished," rather than "filed" (see below for the significance of this distinction).

Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-balance Sheet Arrangement of a Registrant.

- This item would typically include instances where a registrant is entering into a material loan agreement such as a credit facility, bond offering, or material mortgage loan.

Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation Under an Off-balance Sheet Arrangement.

- This item would typically include instances where a registrant is no longer in compliance with a covenant under a loan facility or similar agreement and such non-compliance results in an increase in, or acceleration of, amounts subject to the registrant's direct financial obligation.

Item 2.05 Costs Associated With Exit or Disposal Activities.

- This is the item a registrant would use to disclose material restructuring costs or the material costs of layoffs or workforce reductions.
- This item requires an estimate of the dollar amounts of (i) each major cost; (ii) total costs; and (iii) cash expenditures (the estimate portion of the disclosure can be delayed until four business days after estimates are known).

Item 2.06 Material Impairments.

- This item is used to report any material charge for impairment to one or more of a registrant's assets, including, without limitation, impairments of securities or goodwill required under generally accepted accounting principles applicable to the registrant.
- The registrant should disclose: (i) the date of the conclusion that a material charge is required; (ii) a description of the impaired asset or assets; (iii) the facts and circumstances leading to the conclusion that the charge for impairment is required; (iv) the registrant's estimate of the amount or range of amounts of the impairment charge; and (v) the registrant's estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures.
- If the registrant is unable to estimate the amount of the charge or future expenditures related to the charge at the time of the Form 8-K filing, it should file an amended report on Form 8-K under this Item 2.06 within four business days after it makes a determination of such an estimate or range of estimates.
- If the determination is made in connection with the preparation, review, or audit of financial statements required to be included in the registrant's next quarterly or annual report under the Exchange Act, the registrant is permitted to make the disclosure in that periodic report, so long as the report is filed on a timely basis.

SECTION 3. — SECURITIES AND TRADING MARKETS

Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.

- A registrant would use this item to disclose certain events related to its listing on a securities exchange (e.g., the New York Stock Exchange or NASDAQ).
- It includes the receipt of a notice regarding material non-compliance with the listing rules.
- No filing is required if the delisting is the result of a conversion or redemption of a security.
- The registrant would file twice: first, upon receipt of the first notice from the securities exchange, and again upon effectiveness of delisting.
- The filing date is calculated from receipt of notice from the securities exchange.

Item 3.02 Unregistered Sales of Equity Securities.

- If the registrant sells equity securities in a transaction that is not registered under the Securities Act, it would use this item to disclose: (i) the date of the sale; (ii) the title and amount of securities sold; (iii) the consideration paid for the securities; (iv) which exemption from registration the registrant has relied upon; and (v) if the securities are exchangeable or exercisable for equity securities of the registrant, the terms of exchange or exercise.
- The obligation to make a disclosure under this item is triggered when the registrant enters into an agreement enforceable against the registrant, whether or not subject to conditions, under which the equity securities are to be sold. If there is no such agreement, the registrant should file the Form 8-K within four business days after the closing of the transaction.
- The registrant does not need to file a Form 8-K if the equity securities sold, in the aggregate since its

last Form 8-K (if filed under this Item 3.02) or its last periodic report, whichever is more recent, constitute less than 1% of the number of shares outstanding of the class of equity securities sold. This threshold is 5% for smaller reporting companies.

Item 3.03 Material Modification to Rights of Security Holders.

- This includes amendments, changes, or additions to preferred stock preferences, limitations on dividends, or the issuance of senior securities affecting junior securities.

SECTION 4. — MATTERS RELATED TO ACCOUNTANTS AND FINANCIAL STATEMENTS

Item 4.01 Changes in Registrant's Certifying Accountant.

- This item is to be used if the registrant's independent accountant resigns (or indicates that it declines to stand for re-appointment) or is dismissed.
- It requires the registrant to describe the circumstances of the accountant's departure and to make certain statements concerning the work of the registrant's independent accountant during the previous two fiscal years (these are contained in Item 304(a)(i) of Regulation S-K).
- Note that the resignation or dismissal of an independent accountant is reportable separate from the engagement of a new independent accountant. On some occasions, two reports on Form 8-K are required for a single change in accountants – the first on the resignation or dismissal of the former accountant and the second when the new accountant is engaged. Information required in the second Form 8-K need not be provided to the extent that it has been reported previously in the first Form 8-K.
- The former auditor must provide a letter in accordance with Item 601(b)(16) stating its concurrence or disagreement with the statements made in the Form 8-K regarding the dismissal. The letter should be filed as an exhibit to the Form 8-K.

Item 4.02 Non-reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.

- Triggered when management, the board of directors, or a committee of the board reaches the conclusion that the registrant's previously issued financial statements should not be relied upon, or the registrant's receipt of a notice from its independent accountant that the independent accountant is withdrawing a previously issued audit report, or informing the registrant that it may not rely on a previously issued audit report.

SECTION 5. — CORPORATE GOVERNANCE AND MANAGEMENT

Item 5.01 Changes in Control of Registrant.

- If the registrant's board of directors becomes aware that a change in control of the registrant has occurred, the registrant must use this item to disclose: (i) the identity of the person(s) who acquired such control; (ii) the date and a description of the transaction(s) that resulted in the change in control; (iii) the basis of the control, including the percentage of voting securities of the registrant now beneficially owned directly or indirectly by the person(s) who acquired control; (iv) the amount of the consideration used by such person(s); and (v) the source(s) of funds used by the person(s).
- This item must also be used to describe any arrangements that the registrant becomes aware of, including any pledge by any person of securities of the registrant or any of its parents, the operation of which may, at a subsequent date, result in a change in control of the registrant.

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

Item 5.02 requires filing in any of the following situations:

- The resignation or refusal to stand for re-election by a director due to a disagreement with the registrant that is known by an executive officer and that relates to the registrant's operations, policies or practices;
- The election or appointment of a new director (other than at an annual or special meeting of shareholders);
- The departure of any director for any reason;
- The retirement, resignation, or termination of a registrant's principal executive officer, president, principal financial or accounting officer, principal operating officer, or person performing a similar function to any such officers ("Senior Executive Officers"); and
- The appointment of any Senior Executive Officer and the entry into (or amendment of) a compensatory arrangement with a principal

executive officer, principal financial officer, or named executive officer.

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

- This applies only to registrants with a class of securities registered under Section 12 of the Exchange Act, except that issuers of asset-backed securities are required to report under this item regardless of whether they are reporting pursuant to Section 13 or 15(d) of the Exchange Act.

Item 5.04 Temporary Suspension of Trading under Registrant's Employee Benefit Plans.

Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.

- There is no filing requirement under Item 5.05 if the registrant discloses the required information on its website within four business days following the date of amendment or waiver and the registrant has disclosed in its most recently filed annual report its website address and intention to provide disclosure in this manner. In such a case, the required information must remain available on the website for at least a 12-month period.

Item 5.06 Change in Shell Company Status.

Item 5.07 Submission of Matters to a Vote of Security Holders.

- This is filed to report the results of a meeting of security holders.

Item 5.08 Shareholder Director Nominations.

- It is required to disclose the date by which shareholder nominations for directors must be submitted if the registrant did not hold an annual meeting in the previous year or if the date of the annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting.
- The triggering event for this Item is the determination of the annual meeting date by the registrant.

SECTION 6. — ASSET-BACKED SECURITIES

The items in this Section 6 apply only to issuers of asset-backed securities.

Item 6.01 ABS Informational and Computational Material.

Item 6.02 Change of Servicer or Trustee.

Item 6.03 Change in Credit Enhancement or Other External Support.

Item 6.04 Failure to Make a Required Distribution.

Item 6.05 Securities Act Updating Disclosure.

SECTION 7. — REGULATION FD

Item 7.01 Regulation FD Disclosure.

- The material included under Item 7.01 should be "furnished," rather than "filed" (see below for the significance of this distinction).
- This is commonly used for press releases (other than earnings press releases that should be furnished under Item 2.02 of Form 8-K).

SECTION 8. — OTHER EVENTS

Item 8.01 Other Events.

- This item is to be used for voluntary disclosure of any event that the registrant deems of importance to security-holders but that is not otherwise called for by another Form 8-K Item.
- Unlike most Form 8-K filings, there is no requirement that an Item 8.01 Form 8-K be filed within four business days after the occurrence of the triggering event (see below for a further discussion of the relevant timing requirements).
- A registrant will often use an Item 8.01 Form 8-K filing to disclose material information that will be incorporated into its shelf registration statement in connection with an offering of securities.
- Public, non-traded REITs typically report the authorization of distributions under Item 8.01.

SECTION 9. FINANCIAL STATEMENTS AND EXHIBITS

Item 9.01 Financial Statements and Exhibits.

QUESTIONS AND ANSWERS RELEVANT TO PUBLIC REITS

If an event is reportable under more than one item of Form 8-K, must two Forms 8-K be filed?

No. The registrant may include multiple items in a single Form 8-K, and any exhibit may be cross-

referenced within the same Form 8-K. Common instances when this is necessary include:

- Unregistered offerings of securities (Item 1.01 and Item 3.02)
- Financing arrangements (Item 1.01 and Item 2.03)
- Changes to securities (Item 3.03 and Item 5.03)

What are the time limits within which a Form 8-K must be filed?

Subject to certain exceptions described below, a Form 8-K generally must be filed within four business days *after* the occurrence of the triggering event (i.e., the business day after the triggering event is day one).

What are the exceptions to the four-day time limit?

- Forms 8-K that furnish Regulation FD information must be submitted (i) simultaneously with the release of the material that is the subject of the Form 8-K (if such material is intentionally released to the public) or (ii) the next trading day (if the release was unintentional);
- Voluntary disclosures (Item 8.01) have no deadline;
- Forms 8-K that furnish earnings press releases (Item 2.02(b)) must be completed before any associated analyst conference call (otherwise, a transcript of the earnings call must be filed with the SEC);
- It is permissible to delay the filing of an Item 5.02(c) Form 8-K related to the announcement of a new officer until the day on which the registrant makes a public announcement of the appointment by means other than the Form 8-K (e.g., press release or trade conference);
- If a registrant has filed an Item 4.02 Form 8-K relating to non-reliance on previously issued financial statements, it must file an amended Form 8-K within two business days of receipt of any letter from the independent auditor regarding its agreement or disagreement with the statements made in the initial Form 8-K; and
- The financial statements of an acquired business or acquired real estate operations (Item 9.01) must be filed in an amended Form 8-K no later than 71 calendar days after the due date of the initial Form 8-K that reported the consummation of the acquisition (four business days plus 71 calendar days). Note that such 71-day grace period does not apply to dispositions reportable under Item 2.01 of Form 8-K.

What are the penalties for non-compliance with these requirements?

The penalties for non-compliance can be severe and include the registrant's loss of the right to use short-form registration on Form S-3 for both primary and secondary securities offerings (however, failure to file within the required time period with respect to events subject to Items 1.01, 1.02, 2.03–2.06, 4.02(a), and 5.02(e) will not affect a registrant's eligibility to use Form S-3).

The failure to file under the following Items will not be deemed a violation of Section 10 of the Exchange Act and Rule 10b-5: 1.01, 1.02, 2.03–2.06, 4.02(a), 5.02(e), and 6.03.

In addition, SEC guidance makes it clear that the failure to properly file a Form 8-K may be considered *prima facie* evidence of a lack of sufficient disclosure controls and procedures under the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").

Should registrants interpret all Form 8-K items as applying to the registrant and its subsidiaries, other than Items that obviously apply only at the registrant level, such as changes in directors and principal officers?

Yes. Triggering events apply to registrants and their subsidiaries. For example, entry by a subsidiary into a non-ordinary course definitive agreement that is material to the registrant is reportable under Item 1.01.

What makes an agreement "material" and "definitive" for purposes of Items 1.01 and 1.02 of Form 8-K?

An agreement is deemed to be a "material definitive agreement" when the agreement provides for obligations that are material to and enforceable against the registrant or provides for rights that are material to the registrant and enforceable by the registrant against one or more other counterparties to the agreement, in each case whether or not subject to conditions. As a result, non-binding letters of intent and term sheets typically do not need to be disclosed on Form 8-K. However, an agreement can be a material definitive agreement even if the agreement is subject to conditions.

PRACTICE POINT: A purchase and sale agreement for real property may be a "material definitive agreement" when it is signed, even when the acquisition is subject to customary conditions such as the satisfactory completion of due diligence or the receipt of third-party consents. Many REITs take the position that no Form 8-K is triggered until its earnest money deposit becomes non-refundable (i.e., "goes hard") under the theory that, until that time, the seller cannot enforce the agreement against the registrant. However, companies should assess whether their disclosure obligations are triggered prior to "going hard," given its ability to waive the diligence condition and enforce the agreement against the counterparty. Non-binding letters of intent or term sheets typically are not "material definitive agreements" unless they include binding provisions that create material obligations enforceable against the registrant or enforceable by the registrant against the counterparty.

If an agreement that was not material at the time the registrant entered into it becomes material at a later date, must the registrant file a Form 8-K at the time the agreement becomes material?

No. If an agreement becomes material to the registrant but was not material to the registrant when it was entered into, or amended, the registrant need not file a Form 8-K under Item 1.01, unless the agreement is material to the registrant at the time of an amendment to that agreement. However, the issuer must file the agreement as an exhibit to the periodic report relating to the reporting period in which the agreement became material if, at any time during that period, the agreement was material to the registrant.

Some of the Form 8-K triggering items do not require disclosure if the triggering event occurred in the "ordinary course" of business. What does "ordinary course" mean in this context?

For purposes of Form 8-K, "ordinary course" generally means that the event that otherwise would trigger disclosure on Form 8-K relates to activity that ordinarily accompanies the kind of business conducted by the registrant and its subsidiaries. For instance, a material definitive agreement that otherwise would be disclosable might not be required if the agreement is entered into in the "ordinary course" of the registrant's business. However, there are several exceptions to the definition of "ordinary course" that may require disclosure on Form 8-K, notwithstanding that a registrant may view them as customary in its line of business. Examples of contracts that may not be considered to be made in the ordinary course include contracts upon which the business is substantially dependent (even if the type of contract is ordinarily associated with the business, such as particularly significant sales contracts) and contracts relating to the acquisition of property, a plant, or equipment for which the total consideration exceeds 15% of the registrant's fixed assets.

PRACTICE POINT: The SEC has taken the position that the acquisition of real property by a REIT cannot be considered to have occurred in the "ordinary course" of business for purposes of Form 8-K. As a result, the entry into any material agreement for a real estate acquisition or disposition (even if the agreement is subject to termination without cause or loss of deposit) would trigger an Item 1.01 Form 8-K, and the completion of any significant real estate acquisition or disposition would trigger an Item 2.01 Form 8-K.

If a material definitive agreement has an advance notice provision in order to terminate and the counterparty delivers to the registrant written advance notice of termination, is a Form 8-K under Item 1.02 required?

Yes. Once notice of termination pursuant to the terms of the agreement has been received, the Form 8-K is required. *See* Instruction 2 to Item 1.02 of Form 8-K.

PRACTICE POINT: If a registrant has filed an Item 1.01 Form 8-K to disclose entry into a material purchase and sale agreement that subsequently is terminated before closing, the registrant will need to disclose the termination of that agreement under Item 1.02 of Form 8-K within four business days of the termination.

If a registrant enters into a new revolving credit facility or loan agreement, is a Form 8-K required?

Yes, if the agreement creates a material obligation enforceable against the registrant. Item 2.03 of Form 8-K requires a registrant to disclose when it becomes obligated on a direct financial obligation that is material to the registrant. Although the incurrence of mortgage

debt at the property level often is not material to the registrant, larger credit facilities or loans should be analyzed and disclosed to the extent there are material obligations that are enforceable against the registrant. If the obligations are material, the registrant should disclose the material terms of the agreement under Item 1.01 of Form 8-K and satisfy the additional disclosure requirements of Item 2.03 of Form 8-K. In assessing materiality, companies should consider all of the relevant facts and circumstances, including, among others, the impact of the incurrence of new debt on the REIT's financial covenants, liquidity, debt capacity, and cash available for distribution to stockholders.

PRACTICE POINT: Often, a REIT will execute a credit agreement governing a revolving credit facility that provides for commitments from various lenders, but does not draw down on a material amount of debt at the time the agreement is executed. In that case, the REIT should disclose entry into the agreement under Item 1.01 of Form 8-K, but it may determine that disclosure under Item 2.03 of Form 8-K is not required. However, the obligation to file a Form 8-K under Item 2.03 may be triggered if, after the agreement is executed, the REIT incurs a material amount of debt under the credit facility (whether incurred all at one time or when a series of previously undisclosed immaterial liabilities have been incurred).

PRACTICE POINT: REITs should consider whether the refinancing of existing debt triggers a disclosure obligation under Item 2.03 of Form 8-K. Materiality is a facts and circumstances determination. Accordingly, to the extent that the terms of the new debt are substantially similar to the debt being refinanced (i.e., without new material obligations enforceable against the REIT), the REIT may conclude that the refinancing transaction is not material. However, the registrant should assess whether the agreement governing the new debt is a material definitive agreement that must be disclosed under Item 1.01 of Form 8-K.

If a registrant acquires a property, does it need to file financial statements under Items 2.01 and 9.01 of Form 8-K?

It depends. Item 2.01 of Form 8-K is triggered when a registrant completes the acquisition or disposition of a "significant amount of assets," other than in the ordinary course of business. The acquisition or disposition is deemed to involve a significant amount of assets if:

- The registrant's and its other subsidiaries' investments in (including the value of any contingent consideration) and advances to the counterparty to acquire the assets exceeds, equals, or exceeds 20% of either (i) the aggregate worldwide market value of the registrant's voting and non-voting common equity, or (ii) if the registrant has no aggregate worldwide market value (for instance, non-traded REITs or real estate companies undertaking an initial public offering), the value registrant's and its consolidated subsidiaries' total assets as of the end of the most recently completed fiscal year; or
- The acquisition or disposition involved a "business" that is "significant."

If either of the conditions is satisfied, the registrant must disclose the closing of the acquisition under Item 2.01 of Form 8-K and, within 71 calendar days of the due date of the Form 8-K, file an amendment to provide the applicable audited financial statements and unaudited pro forma financial statements in accordance with Item 9.01 of Form 8-K.

PRACTICE POINT: Under Item 2.01 of Form 8-K, no disclosure is required until the acquisition is consummated. However, a registrant may be required to prepare and file the required financial statements prior to the consummation of a significant acquisition if the registrant determines that the significant acquisition is "probable" and the registrant (i) is filing or has filed a new registration statement that is not yet effective, (ii) is filing an amendment to an existing registration statement, or (iii) under certain circumstances, sells securities under an effective registration statement. The determination of whether or not a transaction is "probable" requires the registrant to consider all available facts. The SEC has taken the position that a transaction is "probable" where the registrant's financial statements alone would not provide adequate financial information to make an investment decision.

For most REITs, financial statements of acquired real property operations that are significant must comply with Rule 3-14 of Regulation S-X. In that case, the acquisition of real estate operations that generate revenue

through rental income will be deemed to involve a significant amount of assets if the purchase price is equal to or greater than 20% of the REIT's total assets as of the end of the REIT's most recent fiscal year end (as disclosed in the REIT's most recent audited balance sheet). For certain other REITs (such as lodging and healthcare REITs), audited financial statements of the acquired business must be prepared in accordance with Item 3-05 of Regulation S-X.

PRACTICE POINT: Rule 3-14 of Regulation S-X, which is premised on the continuity and predictability of cash flows ordinarily associated with leasing real property, applies to the acquisition or probable acquisition of real estate operations. For purposes of S-X 3-14, the term "real estate operations" refers to properties that generate revenues solely through leasing. However, the term "real estate operations" excludes properties that generate revenues from operations other than leasing real property, such as nursing homes, hotels, motels, golf courses, auto dealerships, and equipment rental operations, which are more susceptible to variations in costs and revenues over shorter periods due to market and managerial factors. In those cases, Rule 3-05 of Regulation S-X, and not Rule 3-14, is applicable.

PRACTICE POINT: Pursuant to Section 2325.3 of the Division of Corporation Finance's Financial Reporting Manual, during the distribution period of a "blind pool" offering, a registrant can use its total assets as of the date of acquisition plus the proceeds (net of commissions) it expects in good faith to raise in the registered offering over the next 12 months for the 10% significance test.

PRACTICE POINT: To the extent a registrant believes that an acquisition or disposition of assets will trigger the Items 2.01 and 9.01 disclosure obligations under Form 8-K, the registrant should also consider whether or not the agreement pursuant to which the acquisition or disposition will be effected should be disclosed under Item 1.01 of Form 8-K at the time it is signed. While it is often the case that registrants will determine that the acquisition or disposition agreement is material for purposes of Item 1.01 of Form 8-K, the facts and circumstances of a particular transaction may not necessitate disclosure under Item 1.01.

If a REIT's operating partnership issues OP Units, does it need to file an Item 3.02 Form 8-K?

It depends. In cases where the Operating Partnership is itself a registrant because it has offered and issued registered securities (most commonly, debt securities), the Operating Partnership should file an Item 3.02 Form 8-K to the extent that it has entered into an agreement to issue units of limited partnership interest in the Operating Partnership ("OP Units") in a private placement and the OP Units issued, in the aggregate since the REIT/Operating Partnership's last Form 8-K (if filed under Item 3.02) or its last combined periodic report, whichever is more recent, constitute more than 1% of the number of OP Units outstanding. This threshold is 5% for Operating Partnerships that qualify as smaller reporting companies. In cases where the Operating Partnership is not a registrant, the practice of filing an Item 3.02 Form 8-K to disclose the issuance of privately placed OP Units varies greatly.

If a registrant decides not to nominate a director for reelection at its next annual meeting, is a Form 8-K required?

No. That situation is not covered under the phrase "is removed" in Item 5.02 of Form 8-K. However, if the director, upon receiving notice from the registrant that it does not intend to nominate him or her for reelection, then resigns his or her position as a director, then a Form 8-K would be required pursuant to Item 5.02. If the director tells the registrant that he or she refuses to stand for reelection, a Form 8-K is required because the director has communicated a "refusal to stand for reelection," whether or not in response to an offer by the registrant to be nominated.

If a registrant removes all of the duties and responsibilities of its principal operating officer and reassigns them to other personnel in the organization, but the person remains employed by the registrant and retains the title, is the registrant required to file a Form 8-K under Item 5.02 to report the principal operating officer's termination?

Yes. The term "termination" includes situations where an officer identified in Item 5.02 has been demoted or has had his or her duties and responsibilities removed such that he or she no longer functions in the position of that officer.

Item 5.02 will be triggered even if the loss of the officer's duties and responsibilities is only temporary, such as a leave of absence.

Does the restatement of a registrant's articles of incorporation or the agreement of limited partnership of its Operating Partnership, without any substantive amendments to those documents, trigger a Form 8-K filing requirement?

No. A Form 8-K is not required to be filed when the registrant is merely restating its articles of incorporation, the agreement of limited partnership of its Operating Partnership or its other governing documents without making any substantive changes. However, we recommend that registrants refile those documents, if restated, in their next periodic report for ease of reference by investors.

What is the difference between Items that are "filed" and those that are "furnished"?

Section 18 of the Exchange Act imposes liability for material misstatements or omissions contained in reports and other information "filed" with the SEC. By contrast, reports and other information that are "furnished" to the SEC (to the extent expressly permitted under applicable SEC rules, such as earnings press releases under Item 2.02 and Regulation FD disclosures under Item 7.01) do not attract liability under Section 18. In addition, disclosures that are furnished rather than filed will not automatically be incorporated by reference into existing or future registration statements. As a result, unless the registrant specifically states in the Form 8-K that those disclosures (including any exhibits) are "filed" rather than "furnished" or expressly incorporates all or part of those disclosures into a registration statement, those disclosures are not subject to the liability standards that apply to registration statements under Section 11 of the Securities Act. Note, however, that other liability provisions under the Exchange Act may apply that are not dependent on the filing of documents with the SEC but may otherwise be triggered by disclosure made by the registrant to the public. See, e.g., Section 10(b) of the Exchange Act and Rule 10b-5.

PRACTICE POINT: Many REITs regularly provide investors with supplemental materials, which often set forth significant details regarding their property or loan portfolios and disclose non-GAAP measures and/or relevant data that are not included in the REIT's publicly filed reports. Those supplemental materials typically are "furnished" on Form 8-K rather than "filed" to ensure that those materials are not incorporated by reference into the REIT's existing and future registration statements.

Are the registrant's chief executive officer and/or the chief financial officer required to provide a certification with respect to the Form 8-K's accuracy?

No. Sections 302 and 906 of Sarbanes-Oxley require a registrant's principal executive and financial officers to each certify the financial and other information contained in the registrant's periodic reports, which are its quarterly and annual reports. No such certification is required even if the Form 8-K contains financial statements.

What is the purpose of the checkboxes on the cover of Form 8-K?

The cover page of Form 8-K allows the registrant to "check" one or more boxes on the front cover of Form 8-K to indicate that the Form 8-K is being used to satisfy other specified filing requirements or to identify the registrant as an emerging growth company.

If the registrant checks the first box, it is indicating that the Form 8-K is being used to file "written communications pursuant to Rule 425 under the Securities Act." This rule governs communications made with respect to a business combination (e.g., a stock-for-stock merger). For example, if Company A agrees to purchase the common stock of Company B with shares of its own (Company A) stock, then any communication it transmits (a letter to employee shareholders of Company B, for instance) would be considered a prospectus (under Rule 165 of the Securities Act) and must be filed with the SEC. Form 8-K may be used for this purpose. Company A would file the shareholder letter as an exhibit to a Form 8-K, and check the appropriate box on the cover.

The second box indicates that the Form 8-K contains "soliciting material pursuant to Rule 14a-12 under the Exchange Act." Under the proxy rules, a person may not solicit proxies from a shareholder without providing a preliminary or definitive proxy statement prior to or concurrently with the solicitation. Rule

14a-12 is one of the most prevalent exceptions to these rules. Rule 14a-12 provides that solicitations are allowed as long as any written solicitation contains specified information and is filed with the SEC on the first day on which it is used. So Form 8-K can be used to satisfy this requirement as well.

The third or fourth boxes would be checked if the Form 8-K contains "pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act" or "pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act." Under certain circumstances, a tender offeror may communicate with offerees prior to the commencement of a tender offer. One requirement is that the communication be filed with the SEC, including on the Form 8-K.

The fifth box should only be checked if the registrant is an emerging growth company, and, if so, the registrant should check the sixth box if it has elected not to use the extended transition period afforded to emerging growth companies with respect to compliance with new or revised financial accounting standards.

How does a registrant that has undergone a transformative transaction such as a reverse merger use Form 8-K to inform investors of the changes?

Sometimes, as in a reverse merger, a public registrant goes through a transformative transaction such that its prior public disclosures no longer reflect the registrant's circumstances. In such a case, the registrant would prepare a Form 8-K that provides investors with comprehensive information about the registrant's new business, risks, management, beneficial owners, etc. The information typically provided is the information called for by SEC Form 10, which is the disclosure form used by companies that are required to register under the Exchange Act without a related public offering under the Securities Act.

MISCELLANEOUS

The Form 8-K rules are nuanced. Is there any formal guidance available from the SEC regarding items that trigger disclosure on Form 8-K?

Yes. Over the years, the SEC has released guidance to assist public companies in making disclosure determinations for purposes of Form 8-K. Initially, the SEC's guidance was memorialized in the SEC Division of Corporation Finance's Manual of Publicly Available Telephone Interpretations, but the current guidance has been consolidated in the Division of Corporation Finance's Compliance and Disclosure Interpretations (CD&Is), which are available on the SEC's website. Although not all items of Form 8-K are addressed in the CD&Is, the CD&Is are helpful in providing guidance with respect to some of the most commonly used items.

May a registrant include information required by Form 8-K in its next periodic report on Form 10-Q or Form 10-K rather than in a standalone Form 8-K?

Yes, except with respect to filings required to be made under Item 4.01 and Item 4.02 of Form 8-K. A registrant may disclose in its periodic report the disclosures required on Form 8-K as long as the periodic report is filed within four business days of the Form 8-K triggering event. In that case, the registrant could include all of the required disclosures in Item 5 of Part II of Form 10-Q or Item 9B of Form 10-K, as applicable, which will obviate the filing of a separate Form 8-K relating to the triggering event. Note that a registrant cannot amend a previously filed Form 8-K by including the amended disclosure in a periodic report; an amendment to a previously filed Form 8-K must be filed on a Form 8-K/A.

ABOUT MORRISON & FOERSTER

Morrison & Foerster's REIT practice is a collaborative, integrated, multi-office practice involving capital markets, corporate, finance, M&A, investment management, real estate, tax, and other attorneys throughout the firm. Attorneys in the REIT practice area are actively involved in advising listed public REITs, non-traded public REITs, private REITs and REIT sponsors,

contributors, investors, investment advisers, underwriters, and institutional lenders on all aspects of REIT activity.

Because of the generality of this document, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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