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Taking REITs Private

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With many REITs now trading at meaningful discounts to their net asset value, we are already seeing signs of an increase in REIT buyouts. Many of the drivers of the $100 billion-plus of public-to-private REIT M&A transactions that preceded the financial crisis are apparent again, including higher valuations in the private real estate markets than in the public REIT markets, highly liquid private markets that facilitate wholesale-to-retail executions, debt that is still both cheap and plentiful for certain transactions, large pools of low-cost private equity seeking deals (and willing to accept low cap rates), and a sizeable pipeline of REITs and REIT executives who are seeking a graceful exit. More recent trends such as the increasing interest of sovereign wealth funds and other sources of international capital in the U.S. real estate sector may also drive future REIT privatizations.

In recent months we have dusted off our public-to-private playbook, including some of the lessons from the last privatization wave:

1. Market Checks.

Boards of REITs considering a going-private transaction (or a sale of any kind) should bear in mind that while a pre-market check is not always required as a legal matter—particularly in Maryland, where many REITs are incorporated—the decision of how to conduct a sale process and on what basis to strike a deal is probably the most intensely reviewed decision a board can make. Even when there is no explicit pre- or post-signing market-check or shopping period when selling a public REIT, the sale of every non-controlled public company will include a market test, if only through the absence of preclusive lock-up arrangements. Boards should carefully consider the alternatives—pre-signing full auction, limited auction, accepting a preemptive bid with a subsequent market check, go-shops, low break-fee deals (sometimes viewed as an auction with a floor), full-on accepting a blockbuster bid with a standard fiduciary out and break-fee, or combinations and variations on these options—and determine which course is most likely to enhance shareholder value under the relevant circumstances. Boards should also consider, in evaluating their options, how to best communicate the rationale for their chosen strategy to shareholders in order to facilitate shareholder approval. Courts in both Maryland and Delaware will generally respect the board's decision if an appropriate process was followed (including, as noted below, with regard to any conflicts of interest) and is demonstrable from the record.

2. Executive Compensation and Retention.

It is often important to private equity buyers to retain some or all of the target REIT's senior management. In constructing the best approval process for employment arrangements with the buyer, or retention arrangements with the target, entered into prior to the signing or closing of a transaction, it is important to distinguish between those situations where there is a management conflict of interest necessitating a special committee (discussed below) and routine retention arrangements, which may be approved by the target board or compensation committee in the ordinary course. Employment agreements between executives and a buyer negotiated after the major deal terms have been agreed and which do not affect the price to be paid to shareholders are common and perfectly acceptable, even if executed prior to or simultaneously with the definitive deal documents. From the buyer's standpoint these agreements should be carefully crafted to create the best possible alignment between the buyer and the executives, both on the downside (by requiring a rollover of significant equity and/or a cash investment) and on the upside (through promote structures and other compensation mechanisms). Equity compensation arrangements in a REIT which has been taken private typically will be more heavily weighted than when the REIT was public toward performance-based vesting and payout, and less toward being earned solely based on continued service. On the sell side, consideration should be given to ensuring that any management arrangements are compatible with the fiduciary-out or market-check aspects of a deal.

3. Change of Control Employment Arrangements.

All public companies, including REITS, can and should address "change of control" protections well in advance of any potential transaction, before deal pressures mount, in order to create an environment that is best suited to maximizing shareholder value and retaining executive loyalty and focus when they are needed most. Properly-structured change of control protections are both legal and proper and serve to align the interests of key decision makers with the interests of shareholders. It is not in the interests of public REITs or their shareholders for senior management to have an incentive to avoid shareholder value-creating transactions out of a fear of the impact of those transactions on their own financial situation, or to prefer a transaction involving the opportunity of continued employment over one—perhaps better for shareholders—in which there is no ongoing role for management. However, boards should also be aware of the scrutiny that shareholder advisory groups and activist investors give to change of control employment arrangements which provide for excessive severance, "single-trigger" payments (i.e., those made upon a change of control, irrespective of continued employment), or benefits which are, at the moment, out of public favor generally (such as gross-up payments relating to the "golden parachute" excise tax), and consider how best to balance these concerns with the needs of the company.

4. Special Considerations for UPREIT Transactions.

Acquisitions involving UPREITs present their own unique set of challenges that can make or break the deal. Tax protection agreements (designed to perpetuate a contributing operating partnership unitholder's tax deferral by requiring tax gross-ups if the contributed property is sold), and more general unitholder protections enshrined in the operating partnership's governing documents, can frustrate plans to "slice and dice" the acquired portfolio through rapid sale of some or all of the assets. Careful thought must be given both to any unitholder voting, notice, or consent rights that might be triggered by the acquisition and to the form of consideration to be offered in the transaction to unitholders who prefer to extend their tax deferral by rolling over their equity rather than taking the cash consideration offered to REIT shareholders. In private equity acquisitions, there is no surviving public equity, so the flexibility and protections previously available through conversion of operating partnership units into stock or its cash equivalent often must be replaced with a security that satisfies the unitholders needs. For example, unitholders may be offered a fixed-return preferred security or combination consideration including a mixture of cash and preferred securities. Issues to consider include the yield, windows for puts and calls, voting rights (if any), and continuing tax protection arrangements (no sale or refinancing of certain assets, the ability to guarantee debt, etc.). Along the same lines, if executives and other employees hold equity compensation awards in the form of operating partnership units which are profits interests for tax purposes (commonly known as "LTIP Units"), care must be taken to preserve the favorable tax attributes of those awards for the holders.

5. The CEO, the Board, Special Committees.

Any sale process should be overseen by the board, which should provide management with direction as to any process or potential process. In most circumstances it is proper for the CEO or other senior management to explore whether there are attractive private equity options, among others, that the board should consider, but management should take care not to get out over their skis (as demonstrated by some spectacular recent flameouts). Whenever a buyer seeks to retain some or all of the target REIT's senior management, it will be essential to ensure that critical decisions—including the method of sale, selection of bidders, deal protections, access to due diligence materials, and negotiation of the price and other deal terms—fully involve unconflicted directors. In situations going beyond a straightforward desire by the buyer to retain current senior management (for instance when a management team or affiliated stockholder or unitholder seeks out a private equity buyer to submit a joint bid to acquire the company, or in other circumstances presenting more complicated or extensive conflicts), the best way to address the conflict may be to establish a special committee. In situations where directors are also operating partnership unitholders, the board should consider any possible differing interests as between unitholders and shareholders. When a special committee is formed, it should be firmly in control of the process, retain the services of independent legal and financial advisors, and have a clearly defined role, the ability to negotiate independently, and the power to say no. The best way to address conflicts will always depend on the circumstances, however, and care should be taken not to reflexively establish formalistic special committees or otherwise implement drastic measures that end up hurting the process by, for example, depriving the board and bidders of critical access to key executives and their base of knowledge and experience or creating the impression of conflict where it does not truly exist.

6. Club Deals.

Successful club deals require careful management of a number of buy-side complications, particularly the danger of a club bid being dragged down by its weakest member; defections by renegade club members; lack of alignment with regard to bidding, operating or exit strategies; and excessively complex or impractical governance and bidding arrangements. On the sell-side, careful thought should be given to allowing clubbing with the board's consent, recognizing that, depending on the circumstances, the size of the deal and field of potential acquirors, a club prohibition could hurt as much or more than it helps.

7. Debt and Equity Bridges.

The conditionality of bridge and other financing commitments should be carefully scrutinized by the selling board and the private equity buyer, and should inform negotiations around reverse break fees (discussed below). The goal, of course, is to eliminate any daylight between the closing conditions in the merger agreement and the financing commitments. In light of the strong bargaining power of private equity borrowers and the favorable debt markets, market MACs, diligence conditions, and the usual extensive list of contingencies in lender forms can often be eliminated.

8. Reverse Break Fees and Capped Guarantees.

Reverse break-up fees and caps on guarantees provided by private equity firms are fairly standard in public-to-private REIT deals which typically involve reverse termination fees, or liquidated damages provisions, of roughly 7–10% of overall transaction value. In some ways, these provisions represent a regression to traditional real estate deposits and liquidated damages provisions, but they tend to be far more complicated in operation. Recent reverse break fees have been asymmetrical, exceeding (often substantially) the termination fees payable by the target. From the selling board's perspective, careful thought should be given to the odds and consequences of a failed deal and the limited recourse available in such circumstances. The reputation and track record of the private equity shop will be relevant, as will be the conditionality of the buyer's financing commitment.

9. Strategic v. Financial.

In an auction context, careful consideration should be given to including the right mix of potential bidders to maximize value. Strategic bidders often will have different views of value than financial bidders, since they may be able to capitalize on synergies not otherwise available to financial bidders or because an acquisition fulfills a strategic need or, conversely, because of constraints on their ability to utilize cheap leverage and concerns about dilution. These considerations need to be weighed against concerns with providing confidential information to a competitor and the fact that strategic bidders sometimes need a longer time to conduct diligence and decide on a process.

10. Litigation.

Nearly every REIT deal now attracts shareholder litigation and take-private transactions are an especially attractive target for the stockholder plaintiffs' bar. What this means is that a selling board's actions, including its decisions with respect to all the issues outlined above, are likely to face post-signing scrutiny in court. Careful and well-documented board and committee processes are therefore critical in these deals, because they allow bidders, sellers and trustees to minimize the costs and risks of litigation and in many cases obtain favorable settlements or early dismissal when the inevitable lawsuits materialize.