REAL ESTATE CAPITAL MARKETS

NEWSLETTER

SUMMER

2022

HUNTON ANDREWS KURTH

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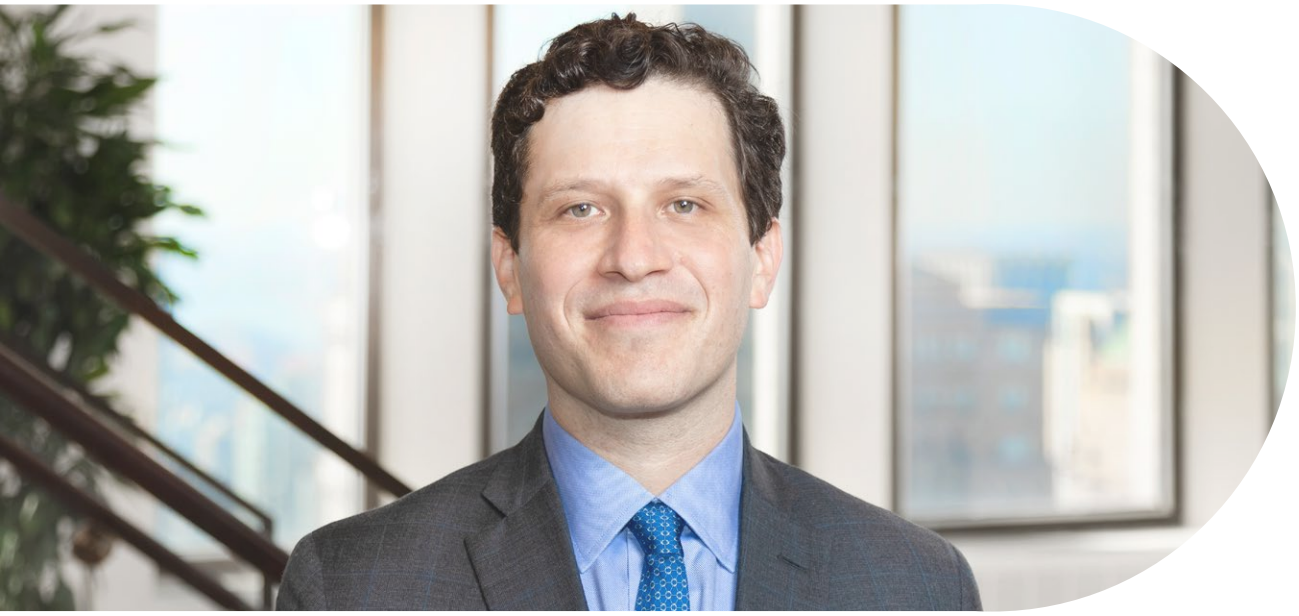
We are pleased to present the Summer 2022 edition of our Hunton Andrews Kurth *Real Estate Capital Markets Newsletter*. We had some very exciting announcements and activity during the second quarter. First, we announced that both *Chambers USA* and *Legal 500 USA* ranked our practice as a leader in advising REITs. In addition to our practice's national recognition, five of our attorneys—**Jim Davidson**, **George Howell**, **Kendal Sibley**, **Rob Smith** and **David Wright—**were named individually as being among the nation's top REIT practitioners by *Chambers USA* and *Legal 500 USA*. We are very thankful to our clients and others in the industry who support our practice and make this recognition possible. In June, our attorneys also participated in the annual REITweek conference in New York City, and we were thrilled to see so many clients and friends at various industry events. In terms of thought leadership, Sam Kardon helped lead the firm's webinar on understanding the SEC's climate proposal for public companies (a very important topic for REITs). Learn more about Sam on page 4 in our "Lawyer Spotlight" column.

Similar to markets generally, the REIT sector continued to be quite choppy in recent months, as inflation, Federal Reserve action and interest rate movements continued to create uncertainty. That said, we actively advised clients on a number of transactions. One transaction of particular note was our representation of Annaly Capital Management, Inc. in its $2.4 billion sale of its middle market lending portfolio to Ares Capital Management LLC, which was announced on April 25. We subsequently advised Annaly on two public offerings of common stock for aggregate proceeds of approximately $1.3 billion, making it a very active time for this client. These transactions are great examples of our multidisciplinary approach to advising REIT clients, and were made possible by the entire team working toward a single goal (read more about these transactions on page 5 in our "Deal Spotlight" column).

Finally, we wanted to say a few words on Diversity and Inclusion, as we celebrated Juneteenth and Pride Month in June. Our mission is to build and leverage a diverse, inclusive professional community that fosters a culture of respect, collaboration, involvement and empowerment. We believe that a diverse, inclusive workforce optimizes the delivery of outstanding client service and creates an innovative, productive community of lawyers and professional staff. We welcome discussing this very important topic with you, and the opportunity to partner with our clients and other industry participants to collectively make a difference.

We are pleased to share some highlights of our recent activity, as well as some thought leadership and information about our team.

Thank you, again, for your continued confidence in the work that we do together.



TEAM MEMBER SPOTLIGHT: SAM KARDON

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In November 2021, we were pleased to add Sam Kardon to our practice as Counsel in New York. Sam advises on all aspects of underwritten public offerings as well as a wide range of other public and private securities offerings, including PIPEs, non-traded REIT IPOs, ATM programs and private fund offerings.

He also advises public companies in connection with ongoing SEC reporting obligations; counsels boards of directors, committees and management teams on corporate governance matters; and advises on mergers, acquisitions, tender offers and a wide range of other transactions.

Since joining us, Sam has also been very active in the firm's interdisciplinary ESG practice group, focusing on helping public companies with voluntary and mandatory ESG-related public disclosures as well as ESG-related corporate governance matters. As part of these efforts, he has authored an article on The SEC's Proposed Mandatory Climate Change Rules and Some Implications for REITs and presented a webinar on Understanding the SEC's Climate Proposal for Public Companies.

Sam joined the firm from Proskauer Rose LLP. Earlier in his career, he was an associate with Skadden, Arps, Slate, Meagher & Flom LLP and Latham & Watkins LLP. Sam earned his undergraduate degree from Dartmouth College and his law degree from Harvard Law School.

> *"Hunton Andrews Kurth is one of the broadest and deepest real estate capital markets platforms in the country and has been a REIT industry leader for decades. We work collaboratively to help our clients navigate the everyday demands of their businesses and also find innovative solutions for their most difficult and unexpected challenges."*
>
> *–Sam Kardon*

DEAL SPOTLIGHT: ANNALY CAPITAL MANAGEMENT, INC.

In April 2022, Hunton Andrews Kurth LLP (Hunton) advised Annaly Capital Management, Inc. (Annaly) on the sale of its middle market lending portfolio to Ares Capital Management LLC. The $2.4 billion transaction represented substantially all of Annaly's middle market lending assets. The portfolio was predominantly comprised of first and second lien loans focused on defensive, counter-cyclical industries.

The transaction highlights the firm's ability to provide service to REIT industry clients through a multidisciplinary team specializing in various practice areas including M&A, capital markets, tax, real estate and lending services. The team advising Annaly included **Rob Smith**, **Brian Clarke**, **Greta Griffith**, **Jim Seevers**, **Eric Nedell**, **Michael Goldman**, **Shelly Anderson**, **Angie Yearick** and **Mark Connolly**.

Hunton subsequently advised Annaly on two public offerings of common stock for aggregate proceeds of approximately $1.3 billion. With these transactions, Hunton is proud to have represented Annaly in 11 capital markets transactions worth nearly $10 billion in the past five years.

The Hunton team for the public offerings was led by **Rob Smith** and included **Kate Saltz**, **Kendal Sibley**, **Amy Williams**, **Mayme Donohue**, **Enyonam Enninful**, **Elizabeth White** and **Joshua Venne**.

Annaly is a leading diversified capital manager with investment strategies across mortgage finance. Annaly's principal business objective is to generate net income for distribution to its stockholders and to optimize its returns through prudent management of its diversified investment strategies.

During 2021, Hunton Andrews Kurth was named counsel on approximately **16%** of all public, underwritten offerings by exchange-listed REITs (and nearly **20%** of all underwritten equity offerings by such REITs), ranking us **second** among all law firms in those categories.

RECENT SEC PROPOSED RULEMAKING ROUND-UP: HOW PROPOSED RULES REGARDING "BENEFICIAL OWNERSHIP," STOCK BUYBACKS AND RULE 10B5-1 TRADING PLANS MAY IMPACT REITS

In recent months, the US Securities and Exchange Commission (the "SEC") has been very active in proposing rules and regulations that will significantly impact publicly-traded companies, including REITs. Indeed, some of these rules and regulations may have unique implications for REITs as compared to companies in other industries, and may require an examination by REITs of current practices. These proposed rules and regulations include, among others, changes in rules related to the reporting of beneficial ownership of equity securities under the Securities Exchange Act of 1934 (the "Exchange Act"), and proposed changes in the permitted structure and reporting of company stock repurchase programs. In this latest publication by our REIT capital markets practice group, we briefly examine these SEC initiatives, the potential implications for REITs, and provide some practical advice on how to plan for and address these matters. We expect to follow up with additional analysis and thoughts on how to tackle the final rules if and when such rules are adopted.

PROPOSED CHANGES TO "BENEFICIAL OWNERSHIP" RULES

On February 10, 2022, the SEC proposed rule amendments that would impact how the "beneficial ownership" of securities is calculated and reported under Section 13 of the Exchange Act. The proposed amendments, if adopted, would (i) expand the scope of when securities are deemed "beneficially owned" and, therefore, reportable, (ii) expand the meaning of "group" for purposes of aggregating the ownership of securities among

different investors for reporting purposes, and (iii) accelerate filing deadlines for reporting beneficial ownership of securities on Schedules 13D and 13G. At this time, it is not clear if or when these amendments will be adopted. However, based on the SEC's published rulemaking agenda, we estimate any final rules could be adopted in the Spring of 2023.

Q: What are the high-level takeaways from the proposed amendments?

A: The proposed amendments could result in more public company equity securities being deemed "beneficially owned" by investors, resulting in reporting and disclosure obligations.

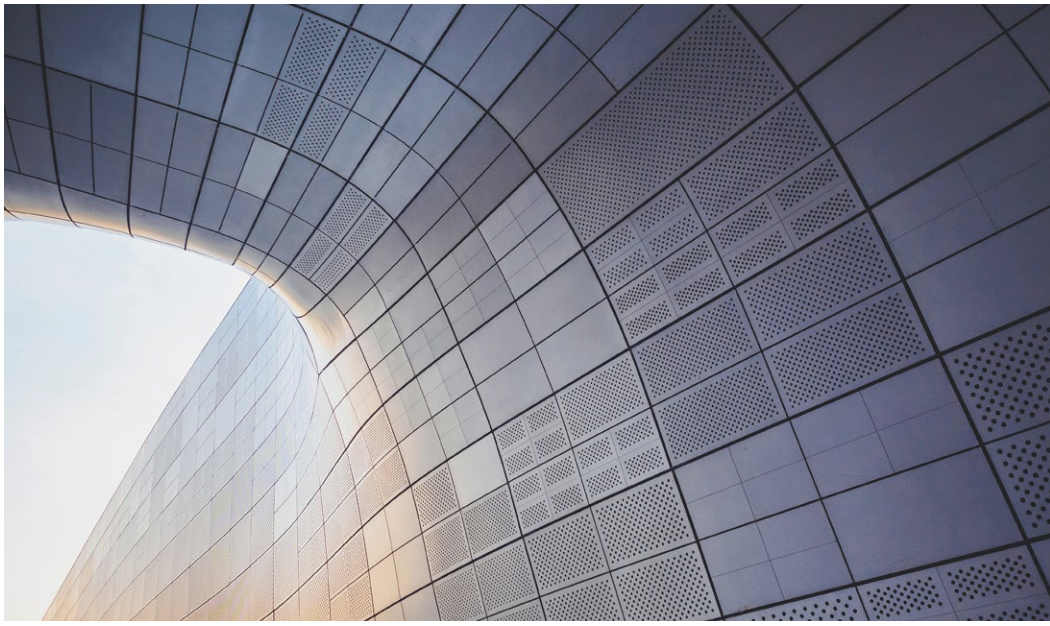
Currently, Section 13(d) of the Exchange Act generally provides that a person who "beneficially owns" more than 5% of a registered class of voting equity securities must publicly file either a Schedule 13D or a Schedule 13G disclosing such ownership. Thus, as a threshold matter, to analyze reporting obligations under Section 13, investors must first determine if they are beneficial owners of an equity security. Rule 13d-3 generally provides that a "beneficial owner" of a security is someone who has (or shares) voting and/or investment power with respect to such security. In addition, if a person owns a right (such as an option or a warrant) to acquire voting and/or investment power over the underlying security within 60 days, the underlying security is considered "beneficially owned" by that person. Under the current Section 13 framework, there also exists a concept of a "group" being formed by different investors; that is, under certain circumstances, a group may be formed by associated investors that would require such investors to aggregate their respective holdings when determining whether the 5% threshold has been crossed.

Broadly speaking, the proposed amendments are designed to modernize and tighten various aspects of reporting under Section 13 of the Exchange Act, and cast a wider net in terms of the types of activities that will result in reportable beneficial ownership. For example, the proposed amendments would expand the definition of "beneficial ownership" to include securities underlying cash-settled derivatives in some specified circumstances. Further, the proposed amendments make clear that a "group" (for purposes of aggregating ownership of securities) can be formed whenever two or more persons take concerted actions in acquiring, holding or disposing of securities, irrespective of any express or implied agreement to do so. These items could cause activity that was previously viewed as being outside of the scope of Section 13(d) of the Exchange Act to now result in potential beneficial ownership of a company's securities. In addition, the proposed amendments would accelerate the filing deadlines for Schedule 13D reports to five calendar days (from 10 calendar days currently) after acquiring beneficial ownership of more than 5% and, for Schedule 13G reports by passive qualified institutional investors, to five business days (from 10 business days currently) after the month-end in which beneficial ownership exceeds 5%.

Q: What should a publicly-traded REIT know about these proposed amendments?

A: The proposed amendments could impact the application of "ownership limits" in REIT charters.

While a full analysis of the proposed amendments is beyond the scope of this alert, there are potential implications for REITs. In particular, if the amendments are adopted by the SEC in their proposed form, it is possible that the broader definition of "beneficial ownership" could impact the application of ownership limit provisions contained in REIT charters.[1] Broadening the application of "beneficial ownership"



1 As most of our readers know, publicly-traded REITs take various measures to protect REIT qualification. The primary method taken by REITs is to implement a so-called "ownership limit" in their charters. For example, a customary ownership would generally prohibit anyone from owning in excess of 9.8% of the REIT's outstanding capital stock (while 9.8% is the more common limit, some charters may have lower limits). These ownership limits are put in place to protect a REIT's ability to meet applicable federal income tax requirements for REITs, primarily the 5/50 test, which generally provides that five or fewer individuals cannot own more than 50% of a REIT's stock during the second half of a calendar year. If a holder exceeds the charter limit (*e.g.*, 9.8%) without an exemption from the REIT, then the shares in excess of the limit are automatically transferred to a trust for the benefit of a charity.

and "group" concepts could cause various associated investors (including large institutional funds) to consider whether they need to aggregate security holdings in a REIT.

- In terms of broadening the concept of a "group," currently the Exchange Act provides that when two or more persons act as a group for the purpose of "acquiring, holding, or disposing" of the relevant securities, such group will be deemed a "person" for Section 13(d) reporting purposes. The obvious purpose of this provision is to prevent investors from evading the Section 13(d) disclosure and reporting requirements by effectively working together even if no individual investor owns more than 5%. The Exchange Act rules state that a group is formed when "two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer." The proposed amendments would remove any inference that group formation is dependent upon the existence of an express or implied agreement. Rather, a group would be formed when two or more persons take concerted actions in acquiring, holding or disposing of securities *regardless of* express or implied agreement. To be sure, whether a group exists will continue to be a facts-and-circumstances analysis. However, the types of actions that could give rise to group status would be expanded under the proposed amendments.
- In addition, under the proposed amendments, the SEC seeks to make clear that a holder of a cash-settled derivative security will be deemed the "beneficial owner" of the underlying security so long as the derivative security is held for the purpose or effect of changing or influencing the control of the issuer or in connection with, or as a participant in, any transaction having such purpose or effect.[2] In effect, a holder of a cash-settled derivative security (like an option or a warrant), other than passive institutional investors, would be deemed to be the beneficial owner of the underlying security even if the holder could never vote and/or dispose of the underlying security.

As noted above, REITs regularly use ownership limitations to help protect REIT status. Thus, as a threshold matter, it is key to determine if one is deemed to be the owner of the REIT's stock. If the expanded concept of "group" is adopted as proposed, that could impact REITs whose charters incorporate Section 13(d)'s "group" concept in determining whether ownership of REIT shares by separate persons should nonetheless be aggregated for purposes of the charter, which is common among REIT charters even where "beneficial ownership" is defined by reference to the federal tax laws.[3] While perhaps less of a concern, if the new rules relating to cash-settled derivatives are adopted by the SEC as proposed, the newly-expanded scope of beneficial ownership could impact the application of the ownership limit provisions if such provisions incorporate the concept of beneficial ownership under Section 13(d).[4]

Because REIT ownership limitations are frequently broader than what would be strictly required under the federal tax laws, REITs are often able to grant "waivers" to non-individual investors from the charter ownership limitations with appropriate representations. We encourage REITs to examine current charter provisions and any existing or potential ownership "waivers" (and related representation letters) for such provisions in light of these proposed amendments. Upon a review of such documents, and an analysis of the REIT's ownership base (including large institutions that may have an existing ownership waiver in place), it could very well be that no action is needed or desired. However, for some REITs, consideration might be given to appropriate modifications to take into account the broader scope of Section 13(d).

2 We note that this is an important distinction. If one is merely a "passive" investor, and not seeking to be in a "control" position, this broader definition would not apply. That said, many REITs have investors, sometimes an insider or sponsor, that file under Schedule 13D, often because the investor is in a "control" position.

3 For example, the following is a relatively customary formulation: "Person" means an individual, corporation, partnership, limited liability company, estate, trust (including a trust qualified under Sections 401(a) or 501(c)(17) of the Code), a portion of a trust permanently set aside for, or to be used exclusively for, the purposes described in Section 642(c) of the Code, association, private foundation within the meaning of Section 509(a) of the Code, joint stock company, or other legal entity ***and also includes a "group" as that term is used for purposes of Section 13(d)(3) of the Securities Exchange Act of 1934, as amended***, and a group to which an Excepted Holder Limit (as defined in Section 5.8(a) hereof) applies." The reference to Section 13(d)(3) of the Exchange Act would need to be considered in light of the more expansive "group" concept under the proposed rules.

4 For many REITs, this may not be an issue. The more modern formulation of this provision is to define "ownership" by reference to applicable tax rules and regulations, rather than by reference to Section 13 of the Exchange Act. For the example, the following definition does not refer to Section 13 of the Exchange Act: "Beneficial Ownership" means ownership of Shares by a Person, whether the interest in the Shares is held directly or indirectly (including by a nominee), and shall include interests that would be treated as owned through the application of Section 544 of the Code, as modified by Section 856(h)(1)(B) of the Code. The terms "Beneficial Owner," "Beneficially Owns," "Beneficially Owning," and "Beneficially Owned" shall have the correlative meanings." In other words, this definition of beneficial ownership references the federal tax code, not the Exchange Act.

PROPOSED CHANGES RELATED TO STOCK REPURCHASES AND RULE 10B5-1 TRADING PLANS

On December 15, 2021, the SEC proposed a new Rule 13a-21 under the Exchange Act regarding the disclosure of a company's repurchases of its equity securities, commonly known as stock "buybacks." The SEC also proposed a number of amendments to Rule 10b5-1 under the Exchange Act (many stock buybacks are effected pursuant to so-called "Rule 10b5-1 trading plans") that, coupled with the amendments regarding stock buybacks, could significantly impact how REITs utilize stock repurchase programs. Similar to the proposed amendments related to beneficial ownership, the comment period for these proposals has passed. Based on the SEC's published rulemaking agenda, we estimate any final rules relating to stock buybacks will be published this fall and final rules relating to Rule 10b5-1 trading plans in the spring of 2023.

Q: What are the high-level takeaways from the proposed amendments?

A: The proposed amendments will result in increased, real-time disclosure related to stock buybacks, and place more conditions on the use of Rule 10b5-1 trading plans to effect such buybacks.

Under current law, public companies (including REITs) are required to periodically report repurchases of their equity securities. This disclosure is typically made in the company's periodic report (*e.g.*, Form 10-K or 10-Q) that relates to the quarter in which the repurchases were made. The proposed rules would significantly change the current disclosure requirements by requiring more robust disclosures regarding stock repurchases on a next-business-day basis. In addition, under the proposed rules, a stock repurchase program that was effected pursuant to a Rule 10b5-1 trading plan would be subject to a number of new conditions and disclosure requirements.

New Form SR and Enhanced Disclosure Regarding Stock Buybacks

The proposed rules would require companies to report any repurchases of equity securities made by, or on behalf of, the company (or any affiliated purchaser) on a new "Form SR" before the end of the first business day after the repurchase is executed. The Form SR would generally be required to provide the following information: the class of securities purchased (common stock, in most cases); the total number of shares purchased; the average price paid per share; the aggregate total number of shares purchased on the open market; the total number of shares purchased in reliance on Exchange Act Rule 10b-18;[5] and the total number of shares purchased pursuant to a Rule 10b5-1 trading plan.

In addition to this data-driven factual disclosure, the company would have to periodically provide information regarding the structure and purpose of its buyback,[6] including:

- the objective or rationale for the program and the process or criteria the company uses to determine the amount of repurchases;
- any policies and procedures relating to purchases and sales of the company's securities by its directors and officers during a repurchase program, including any restriction on trading;
- if the company made its repurchases pursuant to a Rule 10b5-1 trading plan, the date that the plan was adopted or terminated; and
- whether the company made its repurchases in reliance on the nonexclusive safe harbor under Rule 10b-18.

Interplay with Proposed Rule 10b5-1 Amendments

Generally, under the Exchange Act, Rule 10b5-1 provides an affirmative defense to insider trading for individuals and companies that trade stocks under plans entered into in good faith and at a time when the individual or company does not possess material nonpublic information. As noted above, many stock buyback programs are effected through a Rule 10b5-1 trading plan.[7] The proposed amendments to Rule 10b5-1 would add additional conditions that would be required to be met in order to satisfy the conditions of Rule 10b5-1, which would impact the use of such plans when conducting stock buybacks. More specifically, the proposed rules would, among other things:[8]

- Require a minimum cooling-off period between when a plan is adopted or modified and when trading commences (30 days for companies);
- Prohibit having more than one Rule 10b5-1 plan for trading in the same class of securities (in other words, overlapping plans would not be permitted);
- Require that the plan be operated in good faith (not merely entered into in good faith).

5 As many of our readers know, under the Exchange Act, Rule 10b-18 provides an issuer and its affiliated purchasers with a non-exclusive safe harbor from liability under certain market manipulation rules under the Exchange Act (so long as the repurchases of the issuer's common stock satisfy the Rule's conditions).

6 This proposed enhanced disclosure would be required pursuant to an amendment to Item 703 of Regulation S-K under the Exchange Act.

7 Rule 10b5-1 trading plans are used by both companies and company insiders. This alert focuses on the implications for REITs that utilize Rule 10b5-1 trading plans in connection with stock buybacks. We are happy to discuss with you how the proposed amendments may impact company insiders who desire to implement Rule 10b5-1 trading plans.

8 For purposes of this alert, we have focused on the elements of the proposed Rule 10b5-1 amendments that are most likely to impact stock buybacks by companies.

In addition to the conditions described above, the proposed rules would require new disclosure items related to such plans, including that companies would be required to disclose, on an annual basis, the company's insider trading policies and procedures. If no such policies or procedures are in place, the company would need to explain why. Companies would also be required to provide quarterly disclosure of the adoption, modification and termination of the company's Rule 10b5-1 plans and other pre-planned trading arrangements. Companies would need to describe the material terms of each plan; the date the plan was adopted, modified or terminated; the plan's duration; and the total amount of securities to be purchased or sold under the plan. Companies would not be required to disclose pricing terms.

Q: *What should a publicly-traded REIT know about these proposed amendments?*

A: The proposed amendments would significantly impact how REITs utilize stock buybacks, and the disclosure related to such plans.

Many REITs, from time to time, engage in stock buybacks. The vast majority of REIT stock buyback programs are effected through a Rule 10b-18 plan, and many also include a Rule 10b5-1 trading plan component. REITs, in particular, may be more inclined to repurchase shares of their common stock when trading levels are below asset book value. The proposed rules would significantly place more disclosure obligations and conditions on these types of plans. For example, the "real-time" disclosure requirement on Form SR would add a layer of detail and complexity to the execution and reporting of stock buybacks (and would likely require companies to adopt additional disclosure controls and procedures to facilitate timely and accurate reporting). Companies and boards will need to be prepared to articulate the rationale for adopting stock buybacks, and provide that rationale in the context of a publicly-filed SEC disclosure document. If a stock buyback includes a Rule 10b5-1 trading plan component, more thought and analysis will need to be put into adopting such plans. For example, the prohibition on overlapping plans and more stringent cooling-off periods could result in it being more difficult to conduct continuous stock buybacks under Rule 10b5-1. In addition, it may be more challenging to cancel and/or modify plans, in light of the ongoing "good faith" requirements.

We are waiting for the SEC to adopt final rules. However, it seems likely that some form of the proposed amendments will become law, and we encourage you to reach out to us in an effort to plan accordingly.

NEXT STEPS AND HOW WE CAN HELP

Clearly, the SEC is in a period of time of active rule making. Many of these proposed rules may have significant implications for REITs, and companies should become familiar with these regulations now and proactively prepare to address them. In particular, REITs should examine current charter provisions and any existing or potential ownership "waivers" to determine whether the proposed amendments could impact such documents, and evaluate the structure, rationale, and operation of their stock buyback programs. We are happy to assist you in the consideration of these matters, and we encourage you to reach out to your contact at our law firm or otherwise contact one of the attorneys listed below.

Rob Smith

Alice Yao

Market Data: Industry wide

263 REIT capital markets deals

aggregate total **$47.15 billion**

completed thus far in 2022

MARKET DATA:
TOP 5 REIT INDUSTRIES
IN TERMS OF CAPITAL MARKETS DEAL VOLUME

DIVERSIFIED REITS: 48

SPECIALTY REITS: 39

MORTGAGE REITS: 39

RETAIL REITS: 37

RESIDENTIAL REITS: 37

Our Real Estate Capital Markets practice is proud to be ranked among the nation's **top firms** advising REITs in the 2022 *Chambers USA* and *Legal 500* rankings.

We are also excited to have **five partners** individually ranked as leading practitioners by both publications.

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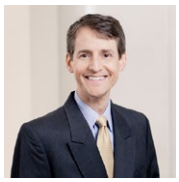

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ABOUT US

Hunton Andrews Kurth LLP consistently ranks as one of the most experienced law firms with respect to real estate capital markets transactions, representing issuers, underwriters, sponsors and lenders in connection with structuring and financing publicly and privately owned real estate companies, including in particular real estate investment trusts (REITs). The firm regularly receives top tier national rankings for its work as both issuer's and underwriter's counsel in *Chambers USA*, *The Legal 500*, *Bloomberg* and *Refinitiv*.

Hunton Andrews Kurth has extensive experience in taking real estate companies public, both as REITs and as C corporations, and in subsequent financing transactions. We have handled approximately 155 IPOs and Rule 144A equity offerings and more than 1,100 capital markets transactions involving more than 210 REITs and other real estate companies. In the course of those and other engagements, we have worked closely with the leading investment banking firms, accounting firms and other professionals active in the real estate finance industry. As a result, our Real Estate Capital Markets Group is particularly well qualified to assist companies accessing the public capital markets as well as private capital sources.

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