

REAL ESTATE CAPITAL MARKETS

NEWSLETTER

FALL
2023

HUNTON
ANDREWS KURTH

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We are pleased to present the Fall 2023 edition of our Hunton Andrews Kurth *Real Estate Capital Markets Newsletter*.

The third quarter of 2023 continued to be choppy in the real estate capital markets, particularly for public companies. Economic conditions continued to be mixed, contributing to swings in the markets, as the Federal Reserve digested economic data points as related to inflation, employment, the housing market, and the like. Despite challenging conditions, NAREIT recently reported that REIT leverage levels remain relatively low with a high percentage of fixed rate and unsecured debt. REIT stock valuations continued to be mixed, depending on the sector/asset class, although overall performance mirrored broader conditions in the capital markets.

With public capital markets activity being scattered, our clients continued to be busy on other fronts, including M&A. We have been active on a number of public REIT M&A transactions this year, particularly in the mortgage REIT space. For example, we are representing AG Mortgage Investment Trust, Inc., a publicly traded residential mortgage REIT managed by an affiliate of Angelo, Gordon & Co., L.P., in its topping bid to acquire Western Asset Mortgage Capital Corporation. Our team advising AG Mortgage includes M&A practice co-head **Steven Haas** and M&A partner **Jim Kennedy** and Real Estate Capital Markets practice head **Rob Smith**. You can read more about the AG Mortgage transaction on [page 4](#). The transaction is the latest in a long line of M&A deals that our team has handled in the space, and you can read more about our M&A practice in our “Practice Group Spotlight” on page 6. In addition to M&A, we have been engaged to assist in a number of private capital raises in various real estate sectors, including with respect to some unique asset classes. We hope to report more on these interesting projects in the coming months.

In our quarterly “Team Member Spotlight” column on [page 5](#), we are thrilled to profile **Mark Wickersham**. In addition to his day-to-day practice, Mark is committed to various pro bono matters and was recently awarded the Pro Bono Hero Award by Legal Aid Works. Please join us in congratulating Mark for this tremendous achievement.

Finally, we endeavor to keep our clients, friends and colleagues across the space apprised of various matters of importance. In the latest installment of our thought leadership activities, we encourage you to read the potential impact of a new FinCEN rule that could impact filing requirements for certain REIT operating partnerships (see [page 8](#)). Please reach out to your contact at our firm if you would ever like to discuss any aspects of this or other rules impacting the industry.

Thank you, again, for your continued confidence in the work that we do together, and we hope to see you all at the annual REITworld conference in Los Angeles this week!



DEAL SPOTLIGHT

AG MORTGAGE INVESTMENT TRUST, INC.

In August, Hunton Andrews Kurth LLP advised AG Mortgage Investment Trust, Inc., a publicly traded residential mortgage REIT managed by an affiliate of Angelo, Gordon & Co., L.P., in its successful topping bid to acquire Western Asset Mortgage Capital Corporation (WMC). WMC had previously entered into a merger agreement with a third party but determined that the AG Mortgage transaction constituted a “superior proposal,” terminated the previous merger agreement, and entered into a new merger agreement with AG Mortgage. At closing, WMC stockholders will receive a combination of AG Mortgage common stock and, from AG Mortgage’s external manager, cash.

This is the firm’s third representation involving a publicly traded mortgage REIT merger this year.

The Hunton team was led by Real Estate Capital Markets practice head **Rob Smith**, M&A partners **Jim Kennedy** and **Steven Haas**, and tax partner **Kendal Sibley**. The team also included corporate associates **Charles Matthews**, **Greta Chwalek**, and **Elizabeth White**, tax counsel **Anna Page**, and tax associate **Patrick Tricker**.



TEAM MEMBER SPOTLIGHT

MARK WICKERSHAM

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We are pleased to announce that partner Mark Wickersham has been awarded the Pro Bono Hero Award by Legal Aid Works® (LAW) to “highlight the extraordinary work done on behalf of the organization’s clients throughout the service region.” In addition to his practice focus on real estate capital markets matters, Mark has dedicated more than 100 hours annually to pro bono work for the last 15 years.

“Handling uncontested divorce cases appeals to me because it makes my clients so relieved and happy and I can do the work concurrently with my corporate matters,” said Wickersham. “LAW has to devote their limited resources to the most immediate needs of folks who cannot afford to pay attorneys, and they are constantly looking for help with divorce cases. Personally, it is extremely gratifying to help people close one chapter of their lives so they can move on to the next.”

In his day-to-day work for the firm, Mark advises executives and board members of public and private REITs on a broad range of capital markets, securities, corporate governance and SEC compliance matters. His clients have been involved in REITs across a wide range of asset classes, including lodging, single-family rental, retail, office, manufactured homes and industrial. Mark has represented both issuers and underwriters in numerous capital markets transactions, whether IPOs, follow-on offerings, or 144A offerings and other private placements. He has also represented both acquirors and targets in mergers and acquisitions.

Prior to practicing law, Mark led large process-reinvention projects at Capital One Financial Corporation (Director/VP), developed strategies for Fortune 500 clients at The Boston Consulting Group (Consultant) and advised Fortune 500 companies at Goldman Sachs & Co. (Financial Analyst). Mark received his JD from Yale Law School where he was a senior editor of the *Yale Law Journal*. He received his AB in Economics from Duke University, *magna cum laude*, Phi Beta Kappa.

“*When I complete a case and call the client with the news, their joy is palpable and gratitude is immense.*”



PRACTICE GROUP SPOTLIGHT

MERGERS AND ACQUISITIONS

Our M&A practice helps senior business leaders navigate the increasingly complex M&A path, from initial consideration and negotiation of a deal, through due diligence and regulatory approvals, to completion of the project and post-closing integration. We pride ourselves on our institutional relationships with longstanding clients, including a particular focus on publicly traded REITs and other industry participants. We have worked with many of our clients for years (and in some cases, decades) as tactical advisors in executing on their strategic acquisition and divestiture programs. Our approach focuses on: responsiveness to clients;

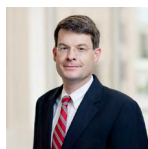
seamless integration with client and in-house teams, and local and foreign counsel; creative, practical solutions based on a common sense approach; and completed transactions consistent with our client's strategic goals.

We have acted as counsel on more than 75 REIT M&A transactions aggregating more than \$115 billion. Our experience includes transactions between publicly owned REITs, transactions between REITs and C corporations, transactions between publicly owned REITs and private companies, as well as transactions involving privately owned REITs.

Our recent experience includes our representation of:

- AG Mortgage Investment Trust, Inc. in its successful topping bid to acquire Western Asset Mortgage Capital Corporation
- Arlington Asset Investment Corp. in its announced merger with Ellington Financial Inc., a deal that will create a mortgage REIT with an expected market capitalization in excess of \$1 billion
- Capstead Mortgage Corp. in its merger with Franklin BSP Realty Trust, Inc., to create the fourth-largest publicly traded commercial mortgage REIT
- Pebblebrook Hotel Trust in its \$5.1 billion takeover of LaSalle Hotel Properties
- Healthcare Realty Trust Incorporated in its \$18 billion combination with Healthcare Trust of America
- Industrial Logistics Properties Trust in its \$4 billion acquisition of Monmouth Real Estate Investment Corp.
- Service Properties Trust in its \$2.4 billion acquisition of Spirit MTA REIT's property portfolio
- NewLake Capital Partners in its merger with GreenAcreage Real Estate Corp.

CONTACTS



Steven Haas
Partner, Richmond



Jim Kennedy
Partner, Richmond

M&A PRACTICE AT A GLANCE

250 lawyers firmwide

Handled **1,000** transactions
worth approximately **\$250 billion**
in the past five years.

Regularly ranked among the
top law firms worldwide for
mid-market deals in *Refinitiv*
league tables, *Chambers USA*
and *The Legal 500*.



THOUGHT LEADERSHIP

FINCEN'S NEW BENEFICIAL OWNERSHIP RULE: NEW PERPETUAL REPORTING OBLIGATION FOR OPERATING PARTNERSHIPS OF PUBLIC UPREITS

by Mark Wickersham, Jim Davidson and Tianlu Zhang

A new rule from the Financial Crimes Enforcement Network (FinCEN) will require most operating partnership subsidiaries (OPs) of public UPREITs to file certain beneficial ownership information with FinCEN as early as January 1, 2024, and not later than January 1, 2025, and perpetually to provide updated information within 30 days of any relevant change thereafter. Although public REITs themselves will be exempt from this filing requirement, we expect that the OPs (and their wholly owned subsidiaries) of any that are UPREITs will not.

The final Beneficial Ownership Information Reporting Rule (the Beneficial Ownership Rule), issued by FinCEN on September 30, 2022, will become effective January 1, 2024.¹ The Beneficial Ownership

Rule requires certain companies to file reports with FinCEN containing information related to each “beneficial owner,” which is an individual who either (1) exercises substantial control over a reporting company² or (2) owns or controls at least 25 percent of the ownership interests of a reporting company. Companies created before January 1, 2024, must file the beneficial ownership report with FinCEN not later than January 1, 2025. Companies created on or after January 1, 2024, must file the beneficial ownership report with FinCEN within 30 days of formation. Once the initial report has been filed, both existing and new reporting companies will have to file updates within 30 days of a change in their beneficial ownership information.

¹ For more information about the Beneficial Ownership Rule, please refer to our earlier [publication](#).

² In general, a person has substantial control over a reporting company if such person is a senior officer, has authority to appoint or remove any of its senior officers or a majority of its board, or has substantial influence over its important decisions. See subsection (d)(1) of the [final rule](#).

Although most public REITs and their wholly owned subsidiaries will be exempt from the Beneficial Ownership Rule under the exemption for “securities reporting issuers” and “subsidiaries of certain exempt entities,” respectively, the OP of public REITs in an UPREIT structure³ may not be exempt and therefore may need to comply with the filing requirements as a reporting company under the Beneficial Ownership Rule.

SECURITIES REPORTING ISSUERS

The “securities reporting issuers” exemption, one of the Beneficial Ownership Rule’s 23 exemptions based on entity type or status, exempts each issuer of a class of securities registered on a national securities exchange or that is required to file periodic reports under Section 15(d) of the Exchange Act due to having conducted a registered offering of securities. This exemption is not applicable to most OPs because OPs are typically not publicly traded.⁴

SUBSIDIARIES OF CERTAIN EXEMPT ENTITIES

The “subsidiaries of certain exempt entities” exemption is available to any entity whose ownership interests are “controlled or wholly owned, directly or indirectly,” by one or more entities exempt from the Beneficial Ownership Rule pursuant to certain of the entity type exemptions, including the “securities reporting issuers” exemption. In the release accompanying the publication of the final rule, FinCEN clarified that “wholly owned” covers the intended concept of control set out in the Corporate Transparency Act (the CTA), the authorizing statute of the Beneficial Ownership Rule, to prevent entities that are only partially owned by exempt entities from shielding all of their ultimate beneficial owners from disclosure. FinCEN expressly declined to extend the exemption to majority-owned subsidiaries because it determined that such extension would include entities unintended by the language of the CTA.⁵ This renders the “subsidiaries of certain exempt entities” exemption largely unavailable to OPs because OPs are typically not wholly owned by public REITs.⁶

³ “UPREIT” stands for “Umbrella Partnership Real Estate Investment Trust,” a structure that provides tax-deferral benefits to property owners. A fundamental problem in many real estate transactions is that, owing to the depreciation required by both tax law and accounting standards, the seller’s tax basis in the real estate is typically much lower than the fair market value of such real estate, resulting in tax gain recognition for the seller upon a sale or other disposition of the real estate. One possibility for the seller to avoid gain recognition is a Section 1031 exchange; another is the contribution of the subject property to an UPREIT. In an UPREIT structure, a property owner contributes property to an OP of a REIT in exchange for OP units (i.e., units of limited partnership interest) in a tax-deferred transaction. The OP units are redeemable for shares of common stock of the REIT, which may be publicly traded, or cash, at the REIT’s election. The property owner can defer the recognition of taxable gain on the contribution transaction until the OP units are redeemed for REIT stock or are sold or otherwise disposed of in a taxable transaction.

⁴ As a common debt offering structure among UPREITs, an OP may issue debt securities guaranteed by the public REIT in public offerings at times, which could make such OP a reporting issuer under Section 15(d), subject to Rule 12h-5 of the Exchange Act. Rule 12h-5 generally provides that an issuer of a guaranteed security is exempt from the periodic reporting requirements under the Exchange Act if such issuer is permitted to omit financial statements by Rule 3-10 of Regulation S-X. Before the amendment of Rule 3-10 in 2020, a subsidiary issuer was required to file its own financial statements unless it was 100 percent-owned by the parent guarantor, in which case the parent guarantor could cover the subsidiary issuer in its own financial statements by providing abbreviated disclosure. Most OPs then would not be exempt from Section 15(d) because OPs are typically not wholly owned by public REITs. However, Rule 3-10 was amended in 2020 to permit an issuer of a guaranteed security to omit financial statements if such issuer is a consolidated subsidiary of a parent company who guarantees the security, and such parent company’s consolidated financial statements have been filed. Accordingly, Rule 12h-5 now exempts an OP from the Section 15(d) reporting requirements to the extent its financials are consolidated with the public REIT that guarantees the debt securities. Taking advantage of this favorable change, however, simultaneously disqualifies an OP from the “securities reporting issuers” exemption under the Beneficial Ownership Rule.

⁵ <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>

⁶ An OP may still qualify for other exemptions from the Beneficial Ownership Rule, such as the “large operating companies” exemption. However, those exemptions have more specific requirements that warrant a case-by-case analysis.

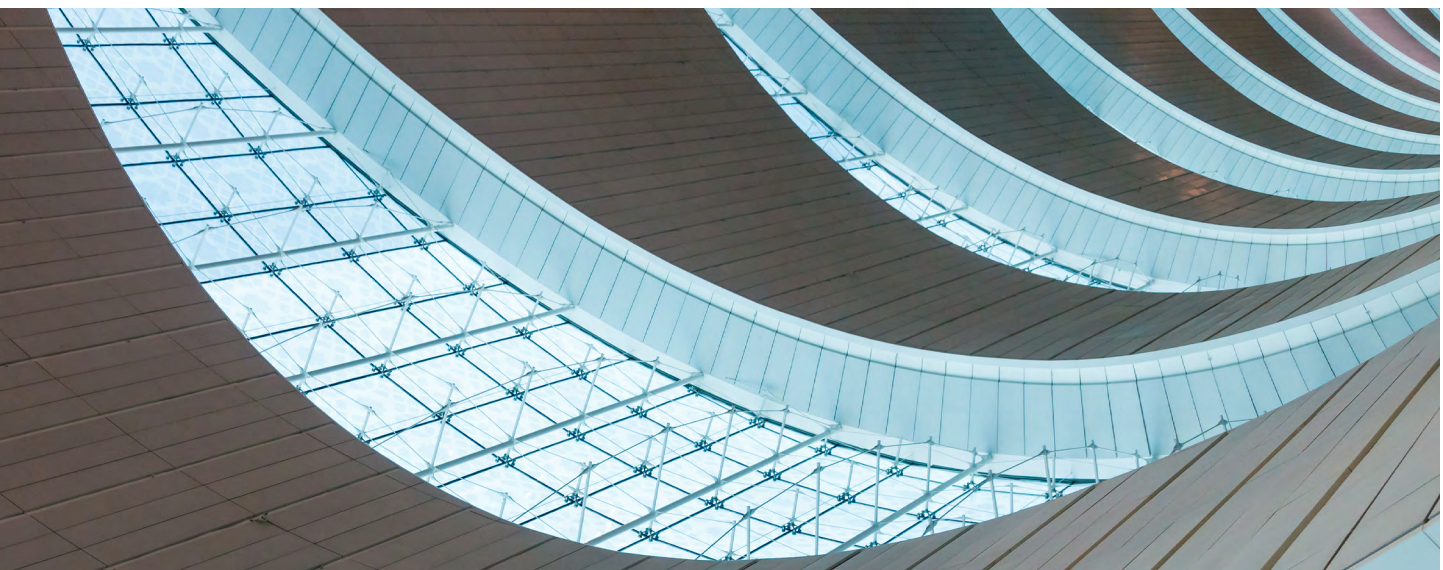
WHAT TO REPORT

Pursuant to a special rule for reporting companies owned by exempt entities (the “Special Rule”), if an exempt entity has a direct or indirect ownership interest in a reporting company, and an individual is a beneficial owner of the reporting company exclusively by virtue of the individual’s ownership interest in such exempt entity, then the reporting company may include the name of the exempt entity in lieu of the information required with respect to the individual owner. This means that an OP, if not exempt under the Beneficial Ownership Rule, can elect to report the public REIT as a beneficial owner, without having to reach the individual owners that own indirect interests in the OP exclusively through the public REIT.⁷ However, to the extent an individual directly owns 25 percent or more of the OP’s ownership interests, such individual still needs to be reported as a beneficial owner.

In addition, the Special Rule does not apply to individuals that substantially control a reporting company through an exempt entity. Commenters observed that ownership through an exempt entity is treated differently from substantial control exercised through an exempt entity and suggested that individuals appointed by an exempt entity to manage a reporting company should be considered an intermediary or agent of the reporting company rather than a beneficial owner of the reporting company. Nonetheless, FinCEN took the position that substantial control raises different concerns from ownership interest “in light of the variety of ways in which such control may be exercised over a reporting company”; as such, FinCEN believes that it would “create opportunities for evasion if beneficial owners who have substantial control over reporting companies through exempt entities do not need to be reported.”⁸

⁷ Additionally, REITs usually have implemented ownership restrictions in their organizational documents that limit each individual owner’s ownership interest to below 10 percent, in order to comply with Section 856 of the Internal Revenue Code of 1986, as amended, which provides that a REIT cannot have 50 percent of the value of its outstanding stock owned directly or indirectly by or for five or fewer individuals at any point during the last half of the taxable year. This means that an individual usually does not have enough percentage ownership interest in an OP through a REIT to trigger the reporting obligation under the Beneficial Ownership Rule.

⁸ <https://www.federalregister.gov/documents/2022/09/30/2022-21020/beneficial-ownership-information-reporting-requirements>.



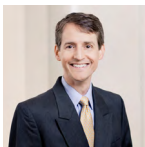
Certain senior officers of a public REIT can exercise substantial control over the business decisions of the OP. Therefore, information related to such senior officers and whoever exercises substantial control over the OP within the meaning of the Beneficial Ownership Rule, whether or not through the public REIT, should be filed with FinCEN. After making the initial report, a reporting company will have a perpetual obligation to report any relevant changes to that information within 30 days of the change.

Practice Tip

When disclosing information about a departure or appointment of an executive officer under Item 5.02 of Form 8-K, a reporting UPREIT should make corresponding updates to the business ownership rule information their OP (and their OP's subsidiaries) filed with FinCEN.

Lastly, to the extent a non-exempt OP conducts its business through wholly owned subsidiaries (typically LLCs), such subsidiaries will also need to file information with FinCEN regarding their beneficial owners through ownership interest or substantial control under the same analysis as above (unless such subsidiaries separately qualify under one or more of the rule's 23 exemptions).

If you have any questions regarding the subject matter of this article, please contact us.



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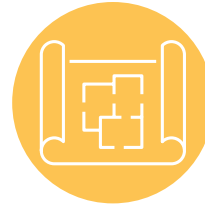


Tianlu Zhang
Associate, Washington, DC

MARKET DATA: TOP 5 REIT SECTORS IN TERMS OF CAPITAL MARKETS DEAL VOLUME (YTD)



**RETAIL
REITS: 110**



**DIVERSIFIED
REITS: 109**



**MORTGAGE
REITS: 93**

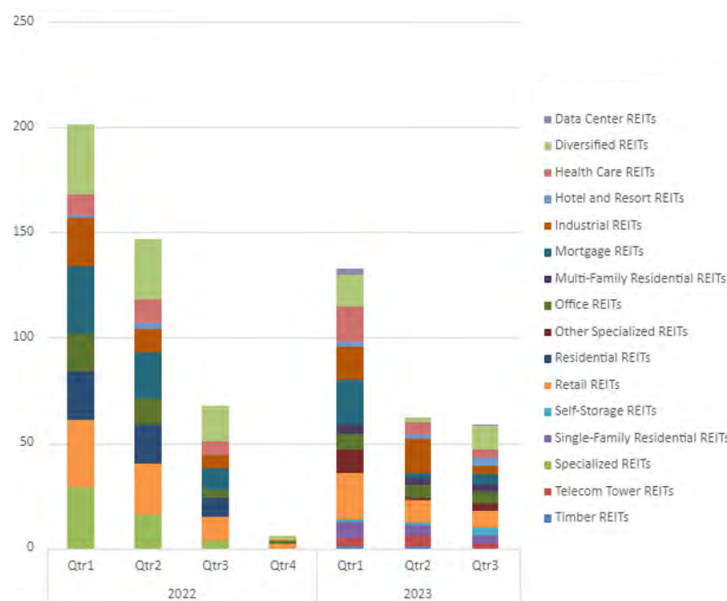


**INDUSTRIAL
REITS: 77**



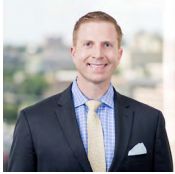
**HEALTH CARE
REITS: 55**

REIT CAPITAL MARKET TRANSACTIONS QUARTERLY DEAL COUNT



Source: S&P Capital IQ Pro

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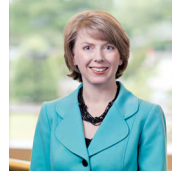
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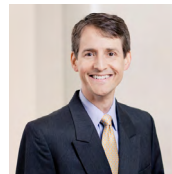
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ABOUT US

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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