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REIT Roll-Up and M&A Transactions

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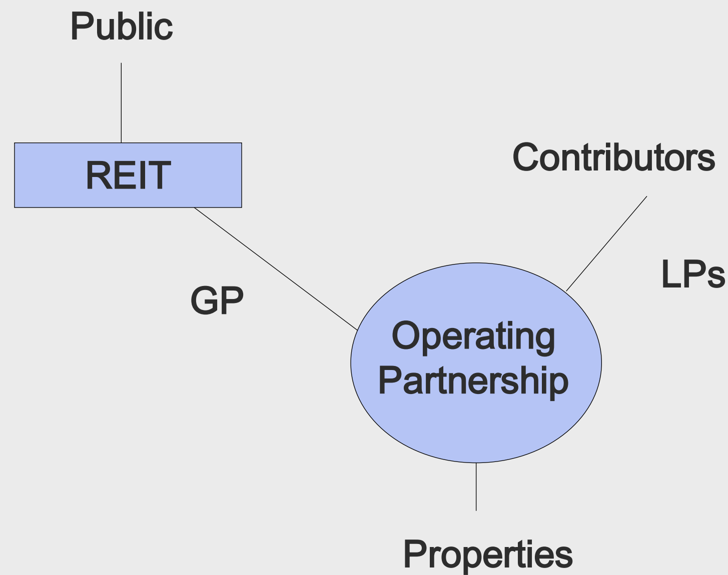
What is a Roll-up?

- In a typical REIT IPO, a sponsor creates a new UPREIT structure, including a REIT parent and an operating partnership (“OP”) subsidiary through which it will own substantially all of its assets and conduct substantially all of its business.
- The OP or an affiliate acquires the sponsor’s management business and properties through a series of merger or contribution transactions, referred to as a roll-up. In addition, the operating partnership may acquire outstanding minority interests in its properties or properties owned by unaffiliated third parties.
- Participants in the roll-up receive cash, REIT stock in the new REIT or OP units in the new OP. The REIT simultaneously completes an IPO.
- The result is a typical public UPREIT structure.

UPREIT Roll-ups

Typical UPREIT Structure



UPREITs

- UPREIT Structure Attributes
  - Assuming the REIT is not permitted to own material assets outside of its interest in the OP, the economic fungibility between a share of REIT stock and an OP unit will continue indefinitely. As a result, subsequent contributions by property owners (“Unitholders") to the OP may be made in exchange for OP units based on the then trading price of the REIT's stock.
  - The REIT is typically the general partner of the OP and the property contributors (or Unitholders) are typically limited partners.
- Distributions
  - Distributions by the OP are generally made proportionately to its Unitholders, including the REIT.
  - If the OP distributes $1/unit to its partners, the REIT would use its share of the distribution to pay a dividend of $1/share to its shareholders.
  - As a result, REIT shares and OP units are typically entitled to identical distributions.

UPREITs

- Liquidity
  - OP Units have redemption rights typically commencing 12-14 months after IPO. Thereafter, under most circumstances, an OP unit is liquid, similar to REIT stock.
  - If an OP Unitholder wishes to sell its OP units, it has the right to put some or all of its OP units to the OP in exchange for cash based on the current REIT stock price.
  - However, in lieu of the OP’s cash payment, the REIT typically has the right to acquire the OP units in exchange for its stock on a one share for one unit basis (subject to the stock ownership limits in the REIT’s charter).
  - After the Unitholder’s exchange of it’s OP units for REIT stock, it may sell that stock.
  - Assuming the REIT’s shares are listed on a national stock exchange, the REIT is typically required, pursuant to a registration rights agreement with the contributor, to file and maintain a shelf registration statement for the shares issuable in this exchange.
  - This registration statement will allow the holder to sell such shares on the REIT’s stock exchange.

UPREITs

- The exchange of OP units for REIT stock is a taxable transaction in which gain or loss (subject to certain limitations) is recognized by the Unitholder.
  - Although this exchange is taxable, it's expected that the Unitholder will immediately sell the stock it receives in the exchange and typically use the sales proceeds to pay its taxes.
  - Also, depending on the tax law at the time of the Unitholder's death, it's possible that the Unitholder's estate would receive a step up in basis to the then fair market value of the OP units, allowing the Unitholder's estate to exchange the OP units for REIT stock without the recognition of any gain.
  - A redemption of a contributor's OP units in exchange for cash paid by the OP may have the same or a similar consequence, depending on the facts.

Benefits to Contributors Arising from an UPREIT Roll-up

- Structured properly, the roll-up may be accomplished on a tax deferred basis.
- In an UPREIT, the contributor will diversify its investment, participating in the performance of a larger pool of properties.
- Assuming the REIT's shares are listed on a national stock exchange, the contributor obtains a liquid investment, which it may dispose of in whole or in part, on short notice and at the time it chooses.
- The contributor also has transparency as the value of its investment due to the exchangeability into listed common stock of the REIT.

Risks to the Contributor Arising in an UPREIT Roll-up

- Loss of control is the primary risk. OP units typically do not have voting rights at the REIT level and have only limited voting rights at the OP level. In addition, the REIT can incur leverage, sell properties, or suffer a change of control or an insolvency without contributor consent.
- Liquidity is not guaranteed. The REIT could be delisted from the exchange or not have an effective registration statement (including as a result of a sale of the REIT to a private buyer), in which case there would be little or no liquidity.
- If the contributor becomes an “affiliate” of the REIT, though board membership or a large ownership of common stock, the contributor may be subject to liquidity traps under insider trading prohibitions or the short swing profits rule of Section 16 of the Exchange Act.
- If the contributor is relying on the contribution to defer tax obligations, loss of control can be a particularly sensitive issue because it may lose control of future events that would cause it to incur a tax liability.

UPREIT Roll-ups - General

- The primary transaction documents required include –
  - A series of contribution or merger agreements;
  - A disclosure document (either a consent solicitation or a merger proxy);
  - A partnership agreement of the OP to reflect the UPREIT structure and the admission of the contributors as new partners;
  - A registration rights agreement (relating to the stock issuable to the Unitholders upon any exchange of OP units for REIT stock);
  - A REIT charter and bylaws; and
  - A tax matters agreement.

UPREIT Roll-ups - Economic Issues

- Determining the exchange ratio between REIT stock/OP units and of each separate partnership interest being contributed to the REIT/OP requires an agreement on how to determine the value of the entire portfolio to be acquired as well as of the management business of the sponsor.
- Moreover, because the UPREIT roll-up transaction is an affiliate transaction, it may be subject to particular scrutiny. Under these circumstances, third party valuation experts are often used, and fairness opinions are often sought.
- If a target property has little or no equity value, its equity holders may have no interest in participating in the roll-up, or they may require a “tip” that comes out of the equity value of other stakeholders.
- The value of each partnership will typically be subject to pricing adjustments (i.e., for the liabilities to which the underlying properties are subject at closing) and potentially prorations (rent, utilities, property taxes, etc.).

UPREIT Roll-ups - Economic Issues

- The aggregate inside equity percentage of the sponsor and all other roll-up participants will be fixed based upon determination of the IPO price range.
- The formula for allocation of the total available inside equity among roll-up participants can be complicated by several factors:
  - Do contributors other than the sponsor want a fixed value or want to take pricing risk together with the sponsor?
  - Will promoted interests or other waterfall allocations in the contributed partnerships be fixed at the time of the agreement to make the contribution, or will they be allowed to float until the date of red herrings or closing?
  - How will debt amortization payments in the pre-closing period, pre-payment penalties for debt, defeasance costs, loan assumption costs and other transaction expenses be handled?
  - How will capital expenditures and new leases be handled in the pre-closing period?
  - How will closing proration adjustments be handled?
  - How will equity incentive plans be handled – fixed value or fixed share count?
- A good formula will allow aggregate total REIT share and OP Unit count to be fixed at the time of red herrings, with any fluctuation resulting only in a shift of equity between roll-up participants. This often requires a post-closing pro-ration adjustment payable in cash.

UPREIT Roll-ups - Certain Legal Issues

- In order to consummate the UPREIT Roll-up, **each holder** of an interest in a participating partnership must agree to contribute its interests to the operating partnership, **OR** the transactions must be consummated through a series of merger transactions pursuant to which non-consenting holders can be dragged along.
- The organizational documents of each participating partnership must be reviewed to determine whether it is possible to drag along minority holders, and if so, what threshold of approval must be obtained from such holders.
- In addition, lender consents may be required to consummate the UPREIT roll-up, and a review of the underlying debt documents should be conducted.
- Other major contracts should also be reviewed for consent issues.

UPREIT Roll-ups - Certain Legal Issues

- The issuance of REIT stock/OP Units to holders of contributed interests is a private placement transaction to which securities law liability attaches.
  - An exemption from the registration requirements of the Securities Act is necessary – typically Regulation D. This requires that each REIT stock/OP Unit recipient be an “accredited investor.” Non-accredited investors are typically squeezed out for cash.
  - The consent solicitation or merger proxy will likely contain disclosure about the valuation of the various partnership interests, how the valuation was arrived out, the level of approvals required to consummate the transaction, the tax consequences of the transaction, risk factors, benefits to related parties, the terms of the major transaction documents and other matters. The disclosure will generally be subject to federal anti-fraud rules, including Rule 10b-5.
  - Consideration should be given as to whether the consent solicitation/merger proxy constitutes a tender offer.
  - Financial statements of the partnerships in which interests are being acquired or pro forma financial statements showing the effects of the transaction may be required.
  - Subject to limited exceptions, all required investor consents must be obtained before the REIT files an S-11 registration statement with the Securities and Exchange Commission.

UPREIT Roll-ups - Certain Legal Issues

- Control Issues are usually of paramount importance to the Sponsor.
  - Consider structures to maximize the portion of the consideration that can be payable in REIT stock (including higher excepted holder limits)
  - Consider change of control protections in the OP's partnership agreement.
  - Consider tax protection
    - Indemnity for sale of properties where built-in gain is triggered (formula for damages can make a big difference)
    - Debt guarantee opportunities
    - Typically, ongoing obligations are set forth in a tax matters agreement.
  - Consider change-of-control protections in employment arrangements
  - Consider Green Street's scorecard for corporate governance issues.

UPREIT Roll-ups - Certain Legal Issues

- Shares of REIT stock issuable to a Unitholder upon an exchange of its OP units must be registered with the Securities Exchange Commission before the holder may sell them on a national securities exchange.
  - The Unitholder and the REIT will enter into a registration rights agreement, obligating the REIT to register these shares.
  - Typically, the REIT is obligated to file the shelf registration statement with the SEC after a fixed period of time, typically 12 months after the closing of the contribution transaction.
  - The REIT is also obligated to keep the shelf registration statement effective, so the Unitholders who receive REIT stock may promptly sell the stock on the stock exchange on an ongoing basis.
  - The REIT may be unable to comply with this obligation in some circumstances.

UPREIT Roll-ups - Certain Tax Issues

- General
  - The contribution of property to a partnership in exchange for a partnership interest may be structured as a tax deferred transaction, in which the contributor recognizes no gain or loss for income tax purposes.
  - The partnership acquires the contributed property with a carryover tax basis and the contributor's initial tax basis in its partnership interest is initially equal to the tax basis it had in the contributed property.
  - The partnership's carryover basis raises certain tax issues, discussed in “Sale Limitations" below.
  - There are a handful of exceptions to the tax deferred nature of this contribution. Two of these exceptions relate to the liabilities associated with the underlying contributed property which are transferred to the partnership and are discussed in “Debt Limitations" below.
  - A contributor’s receipt of cash or REIT shares from the OP will generally be taxable, but there are limited exceptions allowing for tax deferral.

UPREIT Roll-ups - Certain Tax Issues

- Debt Limitations
  - Each partner in a partnership is allocated a share of partnership debt.
  - If a partner's share of partnership debt is reduced, or if a partner contributes property and liabilities to a partnership, and its share of such liabilities after the contribution is reduced, such reductions are treated the same as a distribution of cash by the partnership to the partner.
  - Treasury Regulations set forth rules regarding the allocation of partnership debt among partners. The allocation method may be chosen by the partners, and will affect the amount of debt allocable to the partners. However, there are limitations on these alternatives.
  - For example, if a property owner contributes property with a value of $100 to an OP that is subject to debt of $70, and some or all of that debt is either allocated to other partners, or is repaid by the partnership, that reduction is treated as a cash distribution to the contributor.

UPREIT Roll-ups - Certain Tax Issues

- Debt Limitations
  - A cash distribution, including a deemed cash distribution arising from a reduction of debt, to a partner may be taxable to the partner, including to the extent:
    - The distribution exceeds the partner's tax basis in its partnership interest;
    - The distribution results in a "disguised sale;" or
    - The distribution causes the contributor to have a negative amount "at risk."
  - Disguised Sale Rules
    - A contribution of property to a partnership, followed by a distribution of cash or other property by the partnership to the contributing partner within two years of the contribution date, are presumed to be a sale of the property to the partnership for income tax purposes (subject to certain exceptions, including an exception for distributions of operating cash flow and the reimbursement of certain capital expenditures).
    - While this is only a presumption, a contrary position requires that the facts and circumstances "clearly establish" that the transfers do not constitute a sale.
    - If a partner takes a tax return filing position which is contrary to this presumption, the partner is required to disclose this position to the Internal Revenue Service.
    - These rules generally apply to deemed distributions attributable to a reduction in a partner's share of partnership liabilities, other than "qualified liabilities."

UPREIT Roll-ups - Certain Tax Issues

- Debt Limitations
  - The “at risk” rules operate in a manner that is similar to the tax basis rules, but should be reviewed independently, since results can vary.
  - To address issues relating to debt maintenance –
    - A tax matters agreement may provide for restrictions on the OP’s ability to repay or refinance the debt to which the contributor's properties are subject; or
    - A tax matters agreement could instead provide the contributor with the right to guarantee a specified amount of debt of the OP, which would cause such debt to be allocated to the contributor for purposes of the above rules, for a specified time period.
      - These guarantees currently may be made on a "bottom dollar" basis, which limits the economic risk to the contributor/guarantor. The tax benefit of a bottom dollar guarantee is under review by the Treasury Department, and may soon change.
      - The time period for debt maintenance frequently overlaps with the time period used for the sale restrictions (discussed below), but could be longer.

UPREIT Roll-ups - Certain Tax Issues

- Ongoing Tax Allocations
  - When contributed property is sold, or depreciation is taken with respect to such property, under Section 704(c), allocations of income and loss must take into account the difference between the book value of the property and its tax basis.
  - Treasury regulations provide for different alternatives to account for these differences. The contribution agreement or tax matters agreement should specify the agreed upon alternative.
  - Typically, the most favorable alternative to the contributor is the "traditional method." Without this alternative, it's more likely that a Unitholder could be allocated phantom income (or more phantom income) on an annual basis.
  - Under any alternative, the built-in gain in the properties at the time of contribution will generally be allocated to the contributors on the OP's subsequent sale of the properties, whether or not any cash distributions are made.

UPREIT Roll-ups - Certain Tax Issues

- Sale Limitations
  - A tax matters agreement typically requires the OP to make a tax indemnity payment to the contributors on a subsequent taxable sale of the contributed properties by the OP.
  - A payment is not required upon a tax free disposition of the property, but the replacement property would be subject to the same indemnity provisions.
  - In an IPO, the duration is frequently 7 to 12 years, but it is negotiable and depends on the circumstances, including -
    - The number and percentage of properties to which the agreement applies.
    - The likelihood of a sale.
    - The amount of gain at issue.
  - Various formulas can be used to determine the amount of the tax indemnity payment.

UPREIT Roll-ups - Certain Tax Issues

- Restrictions on OP Unit Redemptions
  - A Unitholder's exercise of its redemption right within two years of the Unitholder's property contribution date will generally cause all or a portion of the Unitholder's property contribution to be presumed to be a sale for federal income tax purposes under the disguised sale rules.
  - In addition, the REIT stock for which OP units may be exchanged will not be eligible for sale on a public securities exchange until such stock is registered with the SEC, which generally will not occur until at least one year after the property contribution date.
  - In light of these restrictions, some contribution agreements or OP partnership agreements will prohibit Unitholders from putting their OP units to the OP for a period of one or two years from the property contribution date.
  - If a redemption payment is made prior to the second anniversary of the property contribution date, the Unitholder will likely take the position that there was no disguised sale, since the Unitholder had the risks and benefits of OP unit ownership during the time they owned the OP Unit.

Conclusion

- An UPREIT roll-up combined with a REIT IPO may be an attractive alternative for a sponsor seeking to simplify its operating structure and set up a perpetual platform to access public capital. In addition, it may allow contributors to:
  - Diversify their investment, and
  - Obtain increased liquidity and transparency as to value.
- The contributors should be able to accomplish the outcome described above on a tax efficient basis.

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REIT M&A Transactions

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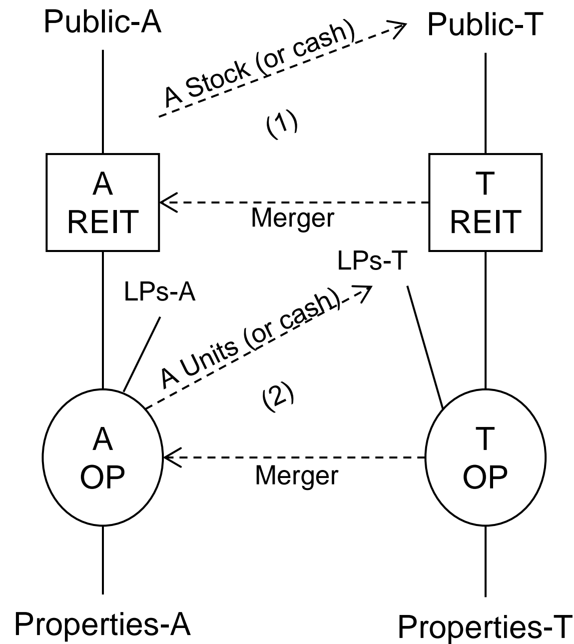
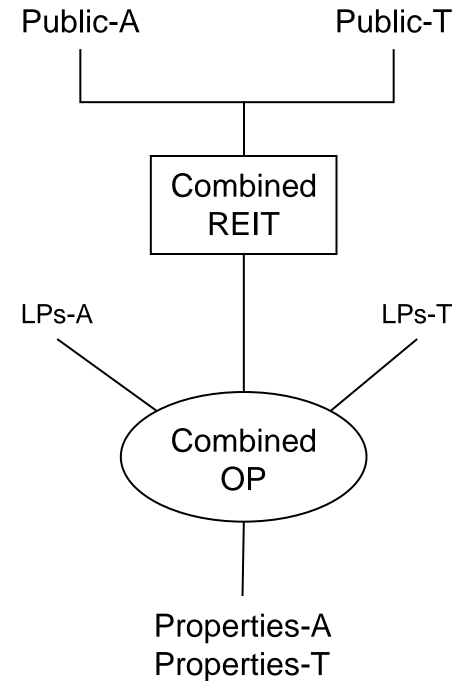
REIT M&A Structures

- Property Acquisition for OP Units (see prior roll-up slides)
- UPREIT to UPREIT Merger
- UPREIT Going Private Transaction
- C Corp Acquisition by OP – Uses New Private REIT
- C Corp Acquisition by REIT

UPREIT to UPREIT MERGER





Advantages

- Public-T may receive A REIT Stock tax-free
- LPs-T may receive A OP units tax-free

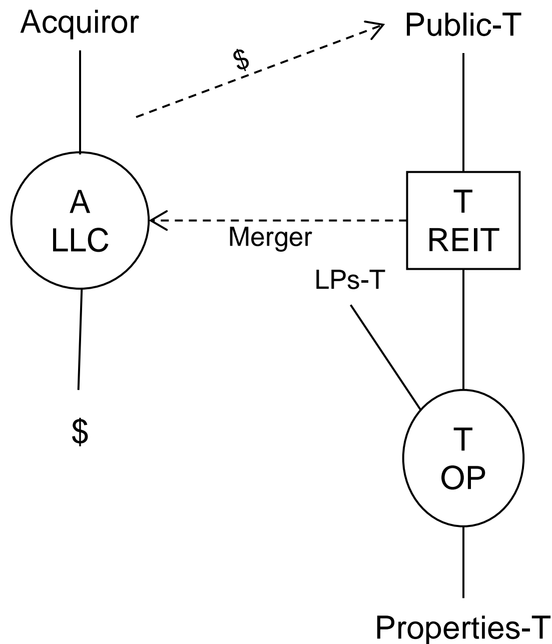
Disadvantages

- Carryover tax basis and tax attributes
- A OP steps into T OP's tax indemnity obligations to LPs-T
- A REIT and A OP acquire T REIT and T OP Liabilities

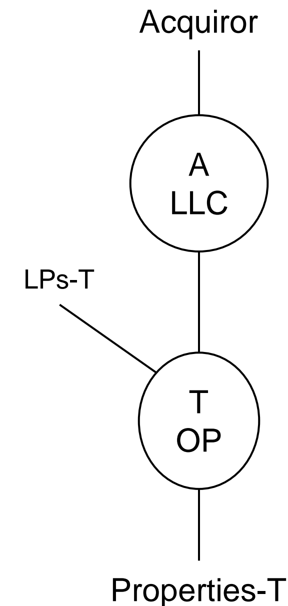
- Requires REIT status and tax-free merger opinions from both REITs.
- Diligence on T REIT and T OP – Since all target liabilities will be acquired by A REIT or A OP, as applicable. This will include diligence regarding T REIT's current and historic REIT status.
- Determine whether T REIT owns any assets subject to built-in gains tax, since such items would carry over to A REIT.
- Confirm A REIT's acquisition of T REIT and T OP will allow A REIT to continue to qualify as a REIT.
- Diligence on A REIT and A OP – T REIT will also want to perform diligence if the T REIT shareholders will receive shares of A REIT
- Review any rights of LPs-T to be indemnified for taxes arising upon sales of property by T OP or for T OP's failure to make debt available for guarantee.
  - Confirm merger (effectively a property contribution for OP units) complies with such obligations (see prior IPO roll-up slides).
  - Confirm A OP is willing and able to comply with such obligations on an ongoing basis.
- Review lender consent issues.

UPREIT GOING PRIVATE TRANSACTION

Proposed Transaction



Final Structure



Advantages

•Public-T receives cash

•LPs-T may elect to retain T OP units (tax free) or to receive cash (taxable)

•Step-up in tax basis of Properties-T to A LLC without tax to T REIT or T OP

Disadvantages

•Debt used to finance transaction, and lack of REIT distribution requirement, may limit future distributions to LPs-T

•LPs-T lose liquidity of REIT stock exchange right and REIT stock valuation mechanism

•T OP units are frequently converted into preferred units

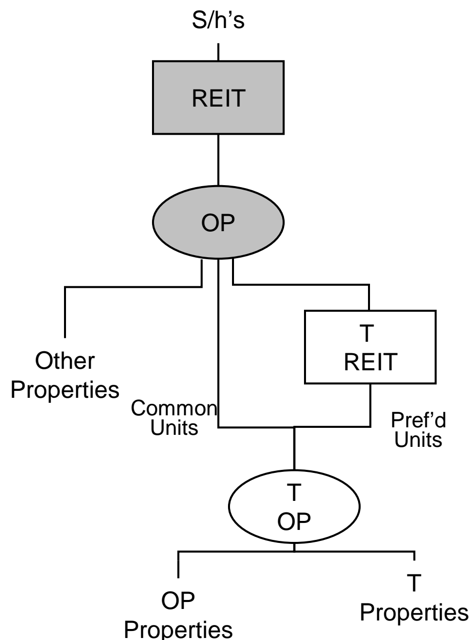
•T OP continues to have tax protection obligations

- Requires REIT status opinion from T REIT.
- Diligence on T REIT and T OP – Since all liabilities are acquired by A LLC or retained by T OP, as applicable. This will include diligence regarding T REIT's current and historic REIT status.
- Determine whether T REIT owns any assets subject to built-in gains tax, since this transaction would trigger such tax.
  - If this tax is material, consider restructuring transaction as a sale of T REIT stock, if T REIT could qualify as a REIT when owned by A LLC
- Review any rights of LPs-T to be indemnified for taxes arising upon sales of property by T OP or for T OP's failure to make debt available for guarantee.
  - Confirm merger (effectively a property contribution for OP units) complies with such obligations (see IPO roll-up slides).
  - Confirm A LLC is willing and able to comply with such obligations on an ongoing basis.

C Corp Acquisition by OP – Uses New Private REIT

Cash acquisition of T corp stock by OP, followed by T corp's REIT election. Optionally followed by T corp's contribution of assets to T OP, and contribution by OP of OP Properties to T OP.

Final Structure



Advantages

- REIT may raise equity funding at REIT level or debt financing at OP level, at or before the closing.
- Preserves tax basis equal to purchase price in OP's stock of T REIT
- T REIT stock may be sold by OP, or REIT may be sold, without corporate-level tax on pre-REIT built-in-gains.
- After 10 years, OP may be able to liquidate T REIT without triggering material tax, and provide OP with a stepped-up basis (to OP's purchase price) in T REIT's assets.

Disadvantages

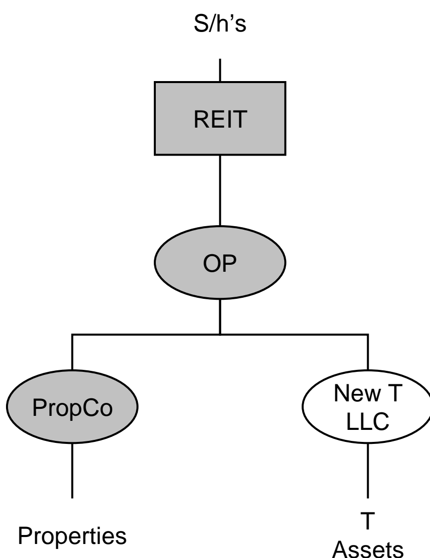
- REIT election may not be available until the year after closing, making T a taxable REIT subsidiary until then.
- Smaller size of T REIT provides less tolerance for REIT non-qualified income and assets (although the contribution of OP Properties to T OP reduces this concern).
- Owning a private REIT subsidiary imposes additional REIT compliance costs.
- T REIT will be subject to full corporate-level taxation on the built-in-gains in its assets if T REIT sells those assets in the 10-year period following the acquisition.

Current REIT entities

C Corp Acquisition by REIT

Cash acquisition of T corp stock by New T LLC, a direct subsidiary of REIT, followed by the liquidation of T corp and REIT's contribution of New T LLC to OP.

Final Structure



Advantages

- Allows for tax-free liquidation of T corp.
- REIT's size provides it with substantial tolerance for assets and income that do not qualify under REIT requirements.
- Ongoing REIT compliance is simpler because T corp's assets and operations will be incorporated into REIT's assets and operations.

Disadvantages

- OP will take a carry-over tax basis in the T corp assets, reducing depreciation deductions and increasing gain on any subsequent sale of former T corp assets, notwithstanding the higher cash purchase price.
- May fund T corp purchase with REIT common or preferred stock, but additional complications if debt financing is necessary.
- Limited ability to raise funds substantially before closing.
- Any disposition of T corp assets in the 10-year period following the acquisition of T corp, would be subject to full corporate-level taxation on the built-in-gains.

Current REIT entities

Discussion Items (for Both C Corp Acquisition Slides)

- E&P distribution requirement – Need to determine amount of T's E&P and distribute prior to year end.
- Built-in gains tax.
- Diligence on T – Since all liabilities will be retained in T REIT or acquired by T LLC (depending on structure).
- REIT compliance diligence on T's assets and income.
- Determine cost of (optional) property contribution of OP Properties to T OP in private REIT structure.
- Determine cost of maintaining private REIT in private REIT structure.
- Determine amount of "lost" tax basis if acquisition is at REIT level.
- Determine whether lender consents are required.

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