

Andrew R. Sanderford
Virginia Polytechnic Institute and State University
Department of Urban Affairs and Planning
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Sanderford@VT.edu

REITs: Applying REIT Corporate Structure to Non-Traditional Projects and Engaging
New Investors

Abstract

Regulation D of the 1933 Securities Act essentially excludes most typical (non-accredited) investors from participating in commercial real estate investment and limits their investment influence over their built to common stock ownership of Real Estate Investment Trusts (REITs) or other publicly traded real estate firms. As REITs provide a corporate format that has been used to create value across a broad range of firm sizes, they offer opportunities to engage a new group of investors and to raise equity for non-traditional project types. This paper investigates the implications of using the REIT structure on a small scale as a method of raising equity from non-accredited investors for affordable housing development, single asset firms, and public private partnerships. It examines the academic literature and market data from both established and recently IPO'ed firms (CY: 2010), discusses implications of the data, and seeks to identify opportunities for further research on the topic.

Purpose and Methods

The purpose of this exploratory paper is to examine the implications of applying the Real Estate Investment Trust (REIT) corporate format on a small scale as a method of raising equity from typical (non-accredited) investors for affordable housing, public-private partnerships, and other non-traditional REIT project types. This exploration will rely on current academic literature and data from REITs that recently began trading on public exchanges as well as established REITs. The research questions address: implications of firm size, the opportunities and risks of engaging non-accredited investors, and the potential implications of applying REIT corporate format to firms or projects focusing on non-traditional assets such as affordable housing or energy infrastructure.

The paper investigates the research questions using two methods. It conducts brief literature reviews to frame each section and then examines market and other data, including those that raised equity via Initial Public Offerings in 2010, to describe the implications of the question and identify opportunities for additional research.

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Implications of Engaging Non-Accredited Investors

In the wake of the stock market collapse and the start of the Great Depression, Congress passed the Securities Act of 1933 regulating disclosures of securities offerings (Landis, 1959). The intent of the legislation was to ensure financial information disclosures by requiring registration of securities offerings with the Securities and Exchange Commission (SEC). The theory was that “if investors are given all of the necessary information they will make wise investment decisions” (Landis, 1959). Amended in 1982, Regulation D of the Securities Act of 1933 exempted the registration of securities offerings provided the securities were offered to a special class of firm or individual known as an accredited investor and to a small number of non-accredited investors depending on the size of the offering (SEC, 2010b; Warren III, 1983). As the primary method of raising equity for private partnerships to acquire, develop, and operate commercial real estate is conducted via private placement under Regulation D, all but a very small number of non-accredited investors are precluded from owning commercial real estate outside of shares of Real Estate Investment Trusts, or in some instances through limited partnerships (SEC, 2010a; "Regulation d," 1989; Warren III, 1983).¹

Created in 1960 by the REIT Act and modified by the Tax Reform Act of 1986, a REIT is ostensibly a mutual fund that invests in real property, other REITs, mortgage instruments or some combination of these elements (Chan, Erickson, & Wang, 2003; Langbein, 1997; McIntosh, Officer, & Born, 1989). Publicly traded REITs provide opportunities for all types of investors to passively participate in commercial real estate ownership. REIT investors enjoy benefits such as liquidity, professional management, wealth creation, and substantial dividends (Geltner, Miller, Clayton, & Eichholtz, 2007; Poorvu & Cruikshank, 1999). Additionally, the REIT enabling legislation (and its modification in the 1986 Tax Reform Act) created opportunities for entrepreneurial investors, developers and public agencies to innovate by applying the corporate format to their business needs so long as specific tax and income rules are followed.

To meet the IRS requirements for REIT status and earn the corporate tax exemption, a firm must: have transferable shares of stock or certificates, distribute 90% of its annual income to shareholders, derive 75% of its annual income from and have 75% of its assets in interests in real property, shares of other REITs, mortgages, and or government securities. Additionally, a REIT must have no fewer than 100 shareholders and no more than 50% of the firm’s shares may be owned by 5 or fewer individuals or corporations (Lindemann, 2011; NAREIT, 2011). Provided these rules are met, interested parties may apply this framework to opportunities to attract capital from both accredited and non-accredited investors alike. One potential implication of the tax rules

¹ Under rule 506 of Regulation D, if the disclosure requirements for Private Placement Memorandums are met, up to 35 non-accredited individuals are permitted to buy interests in a firm’s offering. The SEC requires that these 35 investors are ‘sophisticated’. They must “have sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment” ("Regulation d," 1989).

is whether or not small firms may be able to meet the minimum number of shareholders or '5 and 50' rules. On very small projects, these two rules could create a substantial barrier. Based on the literature and review of the law, there does not seem to be any express prohibition against new or existing firms electing to form REITs with the intention of raising capital for projects or portfolios where participation by non-accredited investors might be critical. This lack of prohibition should not be misconstrued to suggest legal permission. However, it does suggest that the opportunity for innovation exists if an entrepreneur is interested in exploring it.

For example, an entrepreneurial developer seeking to gain public support might consider structuring the project as a single-asset REIT and offer shares for sale to area residents as part of the firm's capital structure. The developer would be creating the opportunity for area residents to vote with their dollars and exert a new (to the investor) type of influence on their built environment. Similarly, community development corporations or special purpose vehicles created by public-private partnerships might elect REIT status as a means of augmenting capital raising capacity. One implication of the proposed example is whether or not REITs are appropriate vehicles for physical development. As REITs were originally designed to function as passive rent collection vehicles rather than development companies (though some REITs today engage in development) those considering using this corporate format might consider also creating a taxable REIT subsidiary (TRS) to avoid running afoul of tax law (Lindemann, 2011). The downside of using a TRS for development purposes is that the parent firm loses the tax benefits of the REIT structure for that portion of its income.

One of the primary implications of engaging non-accredited investors is whether or not their purchase of REIT securities constitutes a 'suitable investment' as defined by the Investment Advisers Act of 1940 ("Investment advisers act of 1940," 1940). The Act requires that, prior to purchase, a financial adviser make a determination that an investment meets the client's financial situation and goals. A related additional implication is the risk of the investor losing their invested principal. The intent of the Securities Act of 1933, Investment Advisers Act of 1940, and Tax Reform Act of 1986 was to protect typical investors from information asymmetries, insufficient disclosures, fraud and guidance that does not meet their financial goals. In this context, care should be taken to provide them with a legal and policy framework that ensures access to the appropriate due diligence materials and processes. As the risk of loss of invested principal is a risk of all stock ownership, investors should be reminded or required to seek the advice of qualified financial advisors and determine whether or not investing in a small, local, or special purpose REIT matches their goals or creates unnecessary risks. Further, as these potential new firms may be small, there could be problems with liquidity or transferability of the stock if limitations are too narrowly defined (e.g., Class A Common Stock restricted to residents of County X, in State Y).

While the opportunity to use REIT status to engage typical investors appears plausible, questions remain about the size and desirability of using REITs for non-traditional project types. The following two sections of the paper discuss two of these questions in greater detail: does the size of the firm matter and what are the implications of applying the REIT corporate format to affordable housing or other non-traditional project types.

Size of REITs: Economies of Scale

The opportunity to use the REIT corporate format to engage non-accredited investors revealed the need to explore influence of REIT size and economies of scale. This section will examine whether or not the size of the firm appears to create advantages or disadvantages for investors or managers by reviewing the literature and market data to find clues about whether or not big REITs are better than smaller REITs.

Data from NAREIT indicates slow growth in total industry market capitalization from 1971-1992 when the pace of firm growth began to rise almost geometrically until sometime between 2006 and 2007 (NAREIT, 2010). This dramatic rise in the early 1990's corresponds to the passage (and implementation lag) of the Tax Reform Act of 1986. Similarly, the number of firms roughly tracks this growth in market capitalization but also appears to indicate natural consolidation through mergers, acquisitions, and opening and closing of firms. It would seem, based on the mean firm market capitalization growing from a few tens of millions of dollars in 1970 to approximately \$200M in 2007, that REIT investors and managers likely saw advantages in larger firms.

The rapid growth in firm size suggested that there could be substantial consolidation in the REIT space based on patterns of development in other capital-intensive industries such as oil, automobiles, tires, and steel (Linneman, 1997). Some claimed that larger REITs would be able to create economies of scale with respect to the cost of capital, access to capital, and operations and management (Linneman, 1997). Researchers using a translog model to observe the direct costs of REITs in the categories of general and administrative, operating, and interest found that economies of scale exist within these categories but did not address consolidation (Bers & Springer, 1997). Other researchers identified shortcomings associated with using the translog model and instead observed evidence for economies of scale in general and administrative, operating, and interest using quadratic and semi-log quadratic analyses (Yang, 2001). The strongest evidence in favor of economies of scale comes from a longitudinal sample where researchers observed significant economies of scale relating in general and administrative and operating expenses (Ambrose, Highfield, & Linneman, 2005).

Still, some data did not provide evidence of economies of scale and researchers argued that many of the economies of scale with respect to access to and cost of capital were temporally sensitive and subject to change based on the mood of Wall Street lenders, the yield curve and the macro-economy (Vogel, 1997). Still others created shadow inventory models and found economies of scale absent in their data (Ambrose, Ehrlich, Hughes, & Wachter, 2000; G. Mueller, 1998). Beyond this work, evidence pointed to diminishing returns to scale related to Funds From Operation per share (FFO/share) and also indicated that during some periods of time (e.g, late 1990's), small cap (<\$500M) firms displayed equivalent profitability to large cap firms (G. Mueller, 1998).

While there does not seem to be consensus in the literature on REIT economies of scale or the optimal size, the literature offered some speculation about, though did not establish the correlative or associative nature of, the traits of successful firms. These broad traits were: strength of capital structure and balance sheet, use of conventional levels of leverage, strength of management and existing relationships (Bers & Springer, 1997; Capozza & Seguin, 1999; Gyourko & Sinai, 1999; Poorvu & Cruikshank, 1999; Vogel, 1997).

A review of public marketing materials and investor presentations from the twelve firms that raised equity by selling stock via Initial Public Offerings in calendar year 2010 (Juge, 2011) revealed many of the same traits found in the academic literature. The newly IPO'ed firms tended to suggest that they were structured to take advantage of their strong management teams capable of growing a small new REIT, asset quality in markets with advantageous demographics, strong existing relationships with capital providers and product producers, and ability to exploit market opportunities and grow the size of the firm. These strategies appear to suggest that in spite of the firm's current size, each believes it is positioned well to create value for shareholders and seek growth opportunities (CLT, 2010; PDM, 2010; PEB, 2010; TRNO, 2010).

With respect to the sub-question's focus on size, the literature and the market data appear to suggest that the opportunity to use REITs on a small scale, including a single-asset firm, is plausible. If a firm is structured with strong management, a flexible capital structure, and is capable of capitalizing on market opportunities, then its attractiveness and prospects for success appear to be higher. In the context of the literature and the equity offerings subscribed by the new firms of 2010, it seems that more researchers believe that bigger firms are preferred to smaller firms. However, the literature and market evidence also suggests that if small firms can capitalize on their skills, capital, and opportunities, there does not appear to be any preference against them.

While it appears plausible that the REIT can be a vehicle to engage non-accredited investors and that small firms can thrive amongst large cap and mega-cap firms, questions remain about applying the REIT corporate format to affordable housing and other non-traditional projects.

Using REIT Format For Affordable Housing, Public Private Partnerships, and Infrastructure

The previous sections addressed questions of engaging non-accredited investors and firm size. The sections found evidence that small REITs can be successful in several contexts and that there can be opportunities for firms to use the REIT format to engage non-accredited individuals as a new group of real estate investors. The present section examines the implications of applying the REIT format to non-traditional projects such as affordable housing and infrastructure. To examine these implications, the paper investigates the literature and also market trends relating to timber REITs and comments on emerging trends in energy related REITs. It also suggests potential strategies to adapt to current problems in the regulation relating to the use and sale of tax credits.

NAREIT tracks 153 publicly traded and 38 SEC Registered Non-Exchange Traded and Private REITs.² They divide this group of firms into Equity, Mortgage, and Hybrid (a combination of Equity and Mortgage) REITs. While most REITs tend to be focused on conventional real estate products and assets such as office buildings, apartments, shopping malls, industrial space, or mortgages, they have also grown popular with non-traditional firms specializing in self storage, health care, tower sites, and timber (A. Mueller & Mueller, 2003; Newell & Wen, 2006).

² These figures may not fully represent the total number of fully private REITs as non-exchange traded REITs tend to file with the SEC on a quarterly basis while few private REITs do.

Beginning in the late 1990's, a small number of timber and wood products firms including Plum Creek converted C-Corporation business units into REITs (Rahman, 2010). More recently, in April 2010, shareholders of Weyerhaeuser, one of the largest international paper and wood products firms in the world, elected to convert the firm into a REIT (Newell & Wen, 2006) and Weyerhaeuser). Stock price data suggests that investors viewed the conversions to REITs as desirable. Evidence also indicates shareholders may also have considered land divestiture as a viable alternative to REIT conversion as a method of growing total revenue or earnings per share growth (Mendell, Mishra, & Sydor, 2008; Rahman, 2010).

REITs are substantially less active in affordable housing development and investment than in forest products and timber management. At present, only Community Development Trust (CDT), a private REIT, is active in providing debt and equity financing tools to affordable housing investors and developers (NAREIT, 2011). CDT creates Umbrella Partnership REITs (UPREIT) for property or portfolio acquisitions. The firm uses 1031 tax exchanges to provide sellers the opportunity to contribute to the affordable housing stock while deferring capital gains on the sale of their properties. CDT also serves as a secondary market buyer of mortgages originated by smaller lenders based on affordable housing projects ("Community development trust," 2011).

A REIT thread that warrants substantial attention beyond this paper is the emergence of an energy infrastructure focused REIT in Texas and the Mid-South. In November 2010, Hunt Power, Marubeni Corporation, John Hancock Life Insurance (USA), TIAA-CREF, and OPTrust Private Markets Group formed the Electric Infrastructure Alliance of America (EIAA) and Gas Infrastructure Alliance of America (GIAA) as REITs. Their goal is to invest approximately \$2 billion "to develop and acquire electricity and gas transmission and distribution assets, primarily in Texas, the Great Plains and the desert Southwest" (TIAA, 2010).

While a REIT format may be a useful tool to create pools of existing affordable housing or potentially to own and manage energy infrastructure, one of the potential negative implications is the REIT's inability to pass tax credits and tax losses through to partners during physical development. As the Low Income Housing Tax Credit (LIHTC) is a dominant affordable housing financing tool, it is critical to find a way to address this issue. Additionally, as non-profit institutions are significant owners, investors in, and operators of affordable housing projects, a REIT must create an operating platform that can adapt to the special needs and conditions of their non-profit partner firms. Energy-based firms also need to be structured to take advantage of energy specific tax credits or tax equity investors. One potential method of combining REITs and NGO's is to partner with a newly formed single-purpose entity created specifically as a partnership between a REIT and an NGO that works to market and use tax credits (Travelstead, 2011). Such a partnership would allow the REIT to abide by the tax law and keep 75% of its assets or investments in real estate related activities.

At present, tax law does not allow firms structured as REITs to pass tax losses and tax credits through to partners. A related corporate format, the Master Limited Partnership (MLP), does allow for tax credits and losses to be passed through so long as it abides by restrictions similar to the REIT rules for income and distributions. Used to finance the acquisition and operation of energy transmission infrastructure (among other assets), MLP's can provide many of the same tax, liquidity, and tradability advantages as

the REIT. They should be considered as a viable alternative in cases where tax credits and losses play a dominant role-both in affordable housing and energy. They should be considered as a viable alternative in cases where tax credits and losses play a dominant role-both in affordable housing and energy or where other public benefits are created. At present, the Internal Revenue Code does not recognize renewable energy income as qualifying income available for distribution to MLP investors. In 2009, Senator Klobuchar (D-MN) submitted S826 American Renewable Energy Act of 2009 to add wind energy to the list of terms describing qualifying income. It was referred to the Committee on Finance twice though did not emerge out of committee ("S826," 2011).

Conclusions and Discussion

After investigating the research questions, it appears there is some evidence to support the usage of the Real Estate Investment Trust corporate format on a small scale as a method of raising equity from typical investors (non-accredited) and also for affordable housing or other non-traditional REIT project types. The data suggests that there are fundamental business strategies and other considerations that should be included in the consideration of application of or election of REIT corporate format. There is also evidence that suggests that there are limits to using the REIT format for these goals and that alternative formats such as partnerships with other firms, taxable REIT subsidiaries, and Master Limited Partnership ought to be considered under special circumstances relating to tax law and use of tax credits.

In addition to this finding, there are still a number of specific issues not fully addressed in the sub-sections, including the identification of opportunities for further research. These issues can be grouped broadly into the following themes: risks and obstacles, administrative costs, desirability of the structure suggested by the research questions and potential policy implications of the research questions. Each of these issues will be addressed in the following paragraphs.

One of the major implications of engaging non-accredited investors to participate in ownership of small, potentially private or non-exchange traded REIT stock, is whether or not the associated risks of limited transferability and liquidity are suitable for the individual investor. As REITs have characteristics of both equities and real estate they create a unique risk-return profile correlating with both securities indexes and real estate fundamentals (Corgel, McIntosh, & Ott, 1995; Zietz, Sirmans, & Friday, 2003). In medium to mega-market-cap REITs, liquidity and transferability of securities are relatively high as there are many buyers and sellers in the market place and prices are easy to establish. However, in the situation where the market to trade shares is small, individual investors may not be able to trade shares as easily. One potential solution to this problem of tradability relative to size is for smaller REITs to seek partnerships or lending relationships with larger REITs. These partnerships might allow branding or share issuance under the larger firm's name to increase tradability. These partnerships must be considerate of the needs of larger firms in the context of stock splits or other dilutions that detract from original shareholder value.

The implications of suitability also connect to risks of real estate development and investment. Real estate development involves some degree of speculation, increasing potential risks and returns. Investors and developers must fully disclose their goals and

specific risks as not all opportunities are suitable for all non-accredited investors. Alternatively, small firms responding to market-based opportunities may create lower risk, high quality return prospects for investors. In that case, it is plausible that an investor's stated goals may align with the project opportunity and the investment in a small REIT may qualify as suitable. The bottom line in this area is that any exercise of this concept must be guided by reasonable policy and regulation that protects the non-accredited investor from speculating with money that they cannot afford to lose.

An additional obstacle highlighted by the research is the potential tension between for and non-profit firms working in collaboration. In general, as a for profit firm, a REIT should tend to want to raise rents and increase funds from operations. This goal conflicts with the goal of affordable housing projects to provide below market rental opportunities to low and moderate income families. In the context of a partnership between a for-profit REIT and an NGO, one potential method of mediating the operations goals of the two cross-purposed firms would be to use an operating agreement to allow each firm to bring its resources to bear on the project. For example, a non-profit firm may agree to transfer the accumulation of unspent capital reserves (a typical source of revenue for NGO's) to its for-profit partner in exchange for a higher than normal management fee. Such a swap might create incentives for the for-profit firm that compensate for lack of rental income growth and allow the non-profit partner to achieve its mission without significant sacrifice. At the minimum, any operating agreement should try to keep the profit motives and needs of the private firm in mind while addressing the needs of its not-for-profit partner as well as the needs of the residents served by the firms. More research is needed here to examine how to combine these interests. Perhaps additional tax incentives for participation may be uncovered or suggested.

It is also likely that an NGO may create or partner with a group of socially focused investors (including Socially Responsible Investment Mutual Funds and foundations pursuing Program Related Investments) and conflicting goals may be negotiated in a way that creates new incentives for participation while still providing market acceptable rates of return. Additional research is needed to examine the desirability of partnerships between public and private firms of multiple types.

Small firms may experience tensions or obstacles relating to minimum investment floors of institutional investors-potentially including socially responsible mutual funds (e.g., Domini). Some institutional investors have minimum sized investments that they can make or may only invest in firms with a certain minimum market capitalization; a small REIT may be forced to raise capital outside of these traditional sources. However, in the context of a socially or publicly minded single purpose firm or REIT, this may not serve as such a large obstacle as they will likely attract investment from non-traditional capital sources such as foundations or local lenders. Further, smaller firms may experience difficulty attracting and retaining superior quality professional managers. This is an obstacle for all small firms and can be addressed both through the provision of performance and equity participation incentives. Small, socially or publicly purposed REITs will likely attract management talent in spite of the limitations. It is plausible that the experience of large, traditional, for-profit firms may not provide the best guidance on issues of capital and management attraction and retention. Additional research is needed to investigate whether or not socially or publicly purposed firms track the capital and management trends of traditional firms.

With respect to tax credits and administrative costs, firms analyzing opportunities and selecting a corporate format should also strongly consider the administration costs associated with both MLPs and REITs. In both instances, if levels of equity and debt fluctuate or there is investor turn over, tracking member's basis (both inside and outside) can be cumbersome. One method of mediating some of this potentially substantial cost would be to use single-asset REITs or MLPs to hold individual projects or assets. However, research is needed to examine economies of scale related to accounting and partnership tracking within REITs and MLPs and also to determine whether or not this is simply a problem of perception or of operations. Additional research on other flexible corporate forms should also be undertaken to more fully investigate the realm of alternatives available to firms seeking the benefits of the REIT but that have tax credit based needs. Specifically, one area of research that has significant potential is whether or not the trust format might be applied to projects focusing on payments for eco-system services such as wetlands banking.

Finally, this paper explored the use of a corporate format to engage a type of investor for a specific purpose—including public and merit goods such as housing. The process of conducting the analysis uncovered several policy implications of innovations relating to project finance and whether or not the accredited investor rules might be amended to welcome more interested parties. To the latter, it is plausible to suggest that in lieu of using the REIT format to engage non-accredited parties interested in investing in their community's futures, the accredited investor definition might be expanded to include an education test. This would mean that an accredited investor would either meet the income and asset rules or possess a degree or other certification (e.g., CFA) in a field or from an accredited institution that prepares them to understand the implications of their equity investment in Regulation D style offerings (similar to the definition of a 'sophisticated' investor under Rule 506 of Regulation D). Other tests may be more appropriate than an education based requirement. However, there is room for more investors so long as they are interested and aware of the risks associated with their actions.

In addition to the opportunities to expand the methods of investor engagement, this paper observed the opportunity to establish new methods of capitalizing projects with a social, public or environmental focus. During a period of time when space users, space producers, and financiers are adapting to the market conditions post Great Recession, it seems that there are chances to create new value propositions, engage new investors, and innovate.

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