

# United States

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## THE CORPORATE REAL ESTATE MARKET

### 1. What have been the main trends in the real estate market in your jurisdiction over the last 12 months? What have been the most significant deals?

The US commercial real estate (CRE) market is on a slow but steady path to recovery thanks to increased capital availability, transaction activity, and the re-emergence into the market of sources of debt finance that had been less active in recent years. While the European debt crisis is perceived to have caused consumer confidence in the US economy to decline, the CRE market has experienced an increase in investor confidence, surpassing that of the last several years. This rise in confidence coincides with lenders' growing willingness to provide financing, fuelling investors to expand their real estate holdings.

Foreign investors have demonstrated an interest in US CRE which we expect to continue as a key component to the market's recovery. The market for retail property has seen especially notable growth in the last year, and real estate investment trusts (REITs) continue to perform very strongly due to higher liquidity and investor interest. While the high level of maturing debt remains an obstacle to recovery and commercial lending practices are still characterised by a conservative nature, investors are nonetheless moving to invest before the recovery peaks and prices increase accordingly.

Recent significant deals include:

- In June 2012, a joint venture between Blackstone Real Estate Partners VII and DDR Corp purchased 46 open-air shopping centres in 20 states totalling 10.6 million square feet for US\$1.428 billion (as at 1 September 2012, US\$1 was about EURO.7). The joint venture assumed about US\$635 million of senior non-recourse debt and originated an additional US\$320 million non-recourse loan facility.
- In July 2012, RXR Realty LLC, a New York real-estate firm, agreed to buy a 40-story tower at 450 Lexington Ave, valued in excess of US\$600 million, from Dubai-based Istithmar World Capital. Istithmar paid US\$600 million for the building in 2006 and RXR had previously purchased nearly half of the building's US\$600 million in debt. The debt, which was to mature in mid-July of 2012 during a difficult refinancing climate, gave RXR an advantage in negotiating a deal with Istithmar.
- In July 2012, Vornado Realty Trust agreed to purchase retail and office portions of 666 Fifth Ave in New York for US\$707 million. The purchase will be funded with debt along with proceeds from selling approximately US\$428 million worth of properties across the US and Canada. The deal is expected to close at the end of 2012.

- In July 2012, GE Capital sold its Business Property Lending Inc division to Everbank Financial Corporation for US\$2.51 billion in cash. The acquisition includes approximately US\$2.44 billion of performing commercial loans, the original and servicing platforms, and servicing rights on US\$3.1 billion of loans securitised by GE Capital.
- In August 2012, Health Care REIT Inc, a US-based REIT specialising in senior housing and health-care properties, agreed to purchase Sunrise Senior Living Inc for US\$844.6 million in cash, creating one of the largest owners of nursing homes in the US, Canada and Britain. Health Care REIT will acquire Sunrise's 20 senior housing communities and its joint ventures that own 105 communities. The transaction is expected to close in the first half of 2013.
- In August 2012, Gramercy Capital Corp, a REIT that finances commercial property, formed a joint venture with an affiliate of Garrison Investment Group to purchase 115 office buildings from KBS Real Estate Investment Trust, Inc for US\$470 million in cash plus the issuance of approximately US\$15 million of its common stock. The acquisition is expected to close at the end of 2012.

## REAL ESTATE INVESTMENT

### 2. How is real estate investment carried out in your jurisdiction and what structures do investors use?

#### Common structures

It is possible to acquire US real property in an individual capacity, but the resulting personal liability is usually considered undesirable. It is typical for a prospective buyer to form a corporation, partnership, or limited liability company as an acquisition vehicle. The following factors should be considered when determining the most appropriate type of entity:

- Tax concerns.
- Personal liability of investors.
- Management concerns.
- The transferability of ownership interests.

However, no structure can shelter an investor from potential personal liability for certain acts, including fraud or torts.

Federal and state income tax regimes should be considered when evaluating an acquisition structure. Non-US investors often structure their investment to minimise the impact of the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), which applies to certain



disposals by non-US persons of interests in US real estate. In addition, non-US investors should consider the applicability of any income tax treaty between the US and the home country that may minimise or eliminate the US federal income tax burden.

### REITs

REITs are available and often used in the US. A REIT is an entity that is not generally taxed on its otherwise taxable net income and gains to the extent that it distributes the requisite income and gains to its shareholders. This tax advantage is offset by requirements that a REIT must fulfil in relation to its structure, assets and income.

### Institutional investors

Institutional investors typically include:

- Pension funds.
- Financial institutions.
- Life insurance companies.

All of these invest heavily in real estate, often through joint venture arrangements with private investors and real estate companies.

### Private investors

Private investors in US real estate include:

- High net-worth individuals and funds controlled by them.
- Real estate developers.
- Foreign investors (including sovereign wealth funds).
- Private equity funds.

## REAL ESTATE LEGISLATION

### 3. What is the main real estate legislation that applies in your jurisdiction?

While certain federal laws can apply to transfers of real estate and ownership of real property (particularly under environmental law), real estate ownership and transfer is predominantly regulated by state laws, local laws and regulations. Municipal codes and ordinances generally regulate zoning, building codes, and local property taxes.

## TITLE TO REAL ESTATE

### *Title and registers*

### 4. What constitutes real estate in your jurisdiction? Is land and any buildings on it (owned by the same entity) registered together in the same title, or do they have separate titles set out in different registers?

Real estate is comprised of land, the improvements (buildings) constructed on the land, and the fixtures attached to the land or buildings. If these three elements of a parcel of real estate are owned by the same entity, they are conveyed together in one deed that is recorded in a single register in the applicable public land records (title registry) office. Long-term leasehold interests are also considered real estate, and the leases creating them can be recorded in the land records.

### *Evidencing title*

### 5. How is title to real estate evidenced?

Title to real estate is evidenced by a deed or other written document, which is recorded in the land records at the county or municipality public land register.

### *Information in the public register*

### 6. What are the main information and documents registered in the public register of title?

The following are recorded in the public register of title:

- Deeds.
- Mortgages.
- Easements.
- Tax liens.
- Judgments against owners of the real property and other types of legal proceedings.
- Other documents that affect title to the real property.

These documents typically identify the parties and a legal description of the real estate. Recorded documents are indexed by parcel or tract, or in a grantor/grantee index. The Torrens land registration system, similar to the system in effect in various civil law countries, is also used in a few US jurisdictions (for example, the states of Massachusetts and Hawaii, and certain counties in the states of Ohio and Washington).

### *Protection from disclosure*

### 7. Can confidential information or documents be protected from disclosure in the public register of title?

Confidential information or documents cannot generally be protected from disclosure once recorded in the land records. However, confidential documents can in some cases be redacted and the redacted version recorded. It is also sometimes possible to protect the identity of an investor by creating a holding company to acquire title to real estate.

### *State guarantee of title*

### 8. Is there a state guarantee of title? Is title insurance available? If so, is it commonly used?

There is no state guarantee of title except in the limited instances when property is registered under the Torrens land registration system (see *Question 6*). Title insurance is available from private insurers and widely obtained by buyers and lenders. Title insurance is paid for once, at the time the real estate is acquired. It insures ownership and the owner against past matters that have an adverse effect on its title and result in diminution of the real property's value or actual losses to the insured. The title insurer assumes the risk of improperly executed or delivered documents,



and commonly, of matters arising between the date of closing and the date that the buyer's deed is recorded in the land records. Title insurance policies are personal to the buyer and are not generally transferable to a subsequent buyer.

### Tenure

#### 9. How can real estate be held (that is, what types of tenure exist)?

Property can be:

- Acquired outright.
- Leased under a lease, including long-term leasehold interests and short-term leases.
- Acquired outright and then leased back to the actual user.

Alternatively, an investor can acquire the ownership interests of an entity that owns property in the US.

## SALE OF REAL ESTATE

### Main stages and documents

#### 10. What are the main stages and documents in the sale of real estate?

##### Marketing

A real estate broker, typically acting as the seller's agent (and with its commission to be paid by the seller) lists properties through brokerage networks. For substantial transactions, the seller's broker may publicise an offering package for the property, and then invite bids from prospective buyers.

##### Commercial negotiation

A buyer will sometimes be able to negotiate an off-market transaction (that is, a transaction where a buyer's offer is sufficiently attractive that the seller is willing to forgo the bid or marketing process and proceeds directly to contract negotiations with the buyer). If the seller decides to conduct an auction, the bid process typically includes a first round where the prospective buyer submits a detailed written bid package, including:

- The economic terms of the buyer's offer.
- A description of the buyer's plans for the property.
- The proposed sources of the buyer's equity capital and debt.
- The buyer's experience in the relevant market sector.

The seller then generally selects certain bidders to participate in a second round of bids. In response, a bidder typically submits its:

- Best and final economic offer.
- Written responses to certain questions from the seller.
- Commercial and legal comments on the seller's form of sale contract.

##### Pre-contractual arrangements

A letter of intent (LOI) for the acquisition can be finalised when an offer is accepted (through an auction process or otherwise). However, it is also common to move directly to definitive contract documentation. The LOI can, as a minimum, set out the basic understanding of the parties and a confidentiality provision, and require the parties to negotiate in good faith. However, it may be more comprehensive and cover some or all of the material issues in the transaction. The LOI usually states that it is non-binding until the parties enter into a definitive sale contract. The LOI generally states that each party is solely responsible for its own costs. In contrast to certain other jurisdictions, US sellers can cease negotiations before execution of the contract, when the buyer has already incurred due diligence costs and legal fees.

##### Sale contract

The negotiation and execution of a sale contract occurs simultaneously with (but sometimes before) the buyer's due diligence. The sale contract is generally drafted by the seller's lawyers, and typically includes:

- A legal description of the property.
- The purchase price.
- Any deposit required to be paid on or after the contract's execution.
- Any circumstances under which the deposit (or a portion of it) is refundable to the buyer, and the terms on which the balance of the purchase price is payable to the seller.
- A schedule of all included personal property.
- A description of any included fixtures, service contracts, leases, employee obligations and other material items to be conveyed along with the real estate.
- The timing of fulfilment of any conditions precedent, and the time and date of the closing (including any postponement rights).
- Any remaining due diligence contingency, any financing contingencies and any casualty contingencies.
- A disclosure of any required consents.
- A section regulating the seller's obligations between the contract date and the closing date.
- Representations and warranties, and a provision regulating the consequences of any inaccuracies.
- A description of the documents required at closing.
- A section regulating monetary adjustments (pro-rations) to be made between the seller and the buyer at the closing (such as real estate taxes, present, past-due and future rents, utility charges, lease security deposits, and fees under service contracts).
- A section apportioning closing costs between the seller and the buyer.

##### When legally binding

Subject to any contingencies, a purchase contract becomes legally binding on execution by the parties and delivery to the seller of any consideration required on execution.



## Registration

A deed is generally recorded in the land records immediately after the payment of the purchase price to the seller, with title insurance protecting the buyer from any intervening liens or a competing deed. In some jurisdictions, particularly in western states, it is customary for the purchase price to be placed in an escrow account held by a title insurer or escrow company, with recording of the deed and issue of the buyer's title insurance policy occurring at the same time as the release of the purchase price from escrow.

## When title transfers

Title to real estate transfers on delivery to the buyer of a written deed, the form of which varies by state and is based on the parties' contractual agreement (quitclaim, special warranty and full warranty deeds are commonly used forms). The recording of the deed in the land records is not a condition to the transfer's effectiveness. However, certain formal requirements, generally including notarisation, are required before the deed can be accepted for recording.

### *Seller's liability to the buyer*

#### **11. Does a seller have any statutory or other liability to the buyer in a disposal of real estate?**

Certain federal and state laws require disclosure of the presence of lead paint or other known environmental hazards, and/or the provision of a property condition report to the buyer. These requirements are generally applicable to residential properties but not commercial transactions.

In negotiation of the scope of property-level representations and warranties (disclosure), US sellers of commercial real estate are increasingly likely to consider the transaction an "as is" sale, with the buyer responsible for performing its own due diligence (see *Question 12*) on most property and transactional aspects. In these situations, sellers seek to limit the representations and warranties relating to the property in all areas where the buyer has the ability to conduct its own investigations. This *caveat emptor* (let the buyer beware) philosophy allows the seller to close the transaction with a greater level of comfort that it will be free of post-closing liabilities (other than certain generally inescapable statutory liabilities, such as liability to the government for environmental remediation) (see *Question 14*).

The buyer seeks to include seller representations where the results of due diligence are not conclusive, or where due diligence cannot provide the necessary level of comfort.

### *Due diligence*

#### **12. What real estate due diligence is typically carried out before an acquisition?**

The major substantive areas of due diligence include a review of:

- The public records through a title insurance commitment.
- A land survey.
- Environmental reports and database searches.

- Leases and tenant estoppel certificates.
- Engineering and property condition reports.
- Uniform Commercial Code (UCC) searches.
- Building and zoning code violation searches.

The buyer's lawyer is typically involved in these reviews, except for the engineering and property condition reports, which are generally examined by the buyer or by an independent engineering consultant. Certain aspects of due diligence are sometimes outsourced (for example, a review of leases).

### *Sellers' warranties*

#### **13. What real estate warranties are typically given by a seller to a buyer in the sale of corporate real estate and what areas do they cover?**

Increasingly, purchase agreements do not include extensive warranties and property is instead sold "as is" (see *Question 11*). Many purchase agreements, however, include warranties that are often subject to extensive negotiations between the buyer and seller. Sellers seek to limit warranties (or restrict the warranty to the seller's actual knowledge) in areas where the buyer can conduct its own investigations. Typical representations and warranties include that the:

- Seller owns the property and has the requisite power and authority to sell it.
- Property does not violate any law or regulation, and does not, to the knowledge of the seller, contain environmental contamination.
- Property is not subject to any third party claims, litigation, or eminent domain (see *Question 24*).

### *Inheriting liability*

#### **14. Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before it bought or occupied it?**

A real estate buyer is generally not liable for events occurring before its period of ownership. However, a buyer can potentially inherit liability for pre-existing environmental contamination under federal, state and local laws. Some federal statutes, such as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (and some state environmental laws) impose strict liability for environmental remediation on the present owner of a property, even if that person did not cause the contamination. Other persons may share in that liability, such as prior owners or parties who actually caused (or exacerbated) the contamination.

Real estate buyers can avoid strict liability for pre-existing conditions under CERCLA and some state statutes, if they perform all appropriate inquiry into the property's environmental condition before purchase. The standard for all appropriate inquiry is set out under the All Appropriate Inquiry Rule as promulgated by the US Environmental Protection Agency. The All Appropriate Inquiry Rule essentially prescribes the pre-acquisition performance of a



Phase I Environmental Site Assessment. If real estate is being acquired as part of the acquisition of an ongoing business, the buyer may inherit the seller's responsibility for pre-existing conditions under a de facto merger or mere continuation theory. Any protection obtained pursuant to the All Appropriate Inquiry rule can be lost or reduced in scope if the new owner engages in conduct that exacerbates the pre-existing conditions.

Typically, the current occupiers (that is, tenants) of real estate contaminated by prior owner/occupier activities do not have strict liability for these pre-existing conditions. In some states, tenants are protected from this liability either:

- Expressly by statute.
- Indirectly through third party defences. These defences allow a current owner or occupier, who would otherwise be liable for previous contamination to show that it was caused solely by a third party with whom they have no affiliation or contractual relationship. In principle, this defence is available to both current owners and tenants. However, current owners are deemed to have contractual relationships with all prior owners of the property by virtue of the chain of title, whereas current tenants are not generally considered to have such relationships. Nevertheless, some courts have recently expanded the scope of tenant liability for previous contamination. Therefore, it is prudent for new tenants to seek indemnification from the landlord against pre-existing conditions.

Express or indirect tenant protections can be lost or reduced if the tenant engages in conduct that exacerbates the pre-existing conditions.

#### Retention of liability after disposal

#### 15. Does a seller or occupier retain any liabilities relating to the real estate after it has disposed of it?

A seller may retain liability as a statutory obligation (see Question 14), or as a matter of contract between the parties. Contractual warranties concerning the property's condition can survive the closing, and a seller's liability can extend for a defined number of years and/or up to a specified monetary amount.

#### Seller and buyer costs

#### 16. What costs are usually paid by the buyer? What costs are usually paid by the seller?

##### Buyer's costs

The buyer's costs include:

- **Mortgage recording tax.** If the buyer finances the acquisition with a mortgage, a number of states and municipalities impose a mortgage recording tax. The tax is calculated as a percentage of the principal amount secured by the mortgage, and is payable by the buyer or borrower at the time of recordation of the mortgage.
- **Title, financing and diligence fees.** Although the fee payable to a title company acting as escrow agent for conducting an escrow closing is generally modest and split evenly between

the buyer and seller, the buyer is generally responsible for payment at closing of the:

- title insurance premium (for its own policy and the lender's policy);
- title search fees;
- survey fees;
- cost of an environmental Phase I report (which provides a preliminary assessment into the potential for existing contamination liabilities);
- cost of any engineering or property inspection reports required by the buyer or its lender;
- fees to the lender, if applicable, for an appraisal, loan commitment fee, and establishment of any required debt service, capital improvement, leasing commission and/or other reserves.
- **Legal fees.** The amount a buyer incurs for legal fees depends on the complexity of the transaction and the length of time spent negotiating the closing documents. The buyer will pay its own lawyer's fees and the lender's lawyer's fees. Depending on its bargaining power, the buyer may be able to negotiate a cap on the lender's lawyer's fees.
- **Miscellaneous fees.** Most jurisdictions impose a *de minimis* per-page fee for the recording of documents. The buyer usually pays these recording fees for all recorded documents except the deed.

##### Seller's costs

The seller's costs include:

- **Transfer taxes.** Real estate transfer tax, imposed by many states and municipalities based on the purchase price of the property, is generally payable by the seller (see Question 18).
- **Legal fees.** The seller pays its own legal fees.
- **Miscellaneous fees.** In a commercial acquisition, brokerage commissions for the seller's broker and buyer's broker are generally paid by the seller. However, in some instances, the buyer may have used the services of a real estate finder who is paid separately by the buyer.

#### REAL ESTATE TAXES AND MITIGATION

#### 17. Is value added tax (VAT) (or equivalent) payable on the sale or purchase of real estate?

No VAT or equivalent tax is imposed in the US.

#### 18. Is stamp duty/transfer tax (or equivalent) payable on the sale or purchase and who pays?

Many states, counties and major cities impose a transfer tax based on the purchase price of the property reflected in the deed and/or accompanying tax affidavits. In addition to direct transfers of property, some states impose a tax on transfers of a controlling interest in an entity that owns property located within the state.



Each state and local government sets its own rate of tax and tax basis. Statutory exemptions from transfer tax are available in many jurisdictions. Transactions which are commonly exempt include conveyances:

- Under the federal Bankruptcy Code.
- To governmental agencies.
- Of real estate without consideration.
- That change identity or form of ownership with no change in beneficial ownership.

Most jurisdictions require a transfer tax return to be submitted with the deed of recordation and payment of the applicable tax. Local counsel should be consulted to determine the applicable requirements in a particular jurisdiction.

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**19. Are any methods commonly used to mitigate real estate tax liability on acquisitions of large real estate portfolios?**

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Acquisition costs for a buyer in a transaction involving real estate security may, in some states, include mortgage recording tax (see *Question 16, Buyer's costs*). Some or all of this tax may be avoided by structuring, such as by having the mortgage secure a guarantee rather than a promissory note, or in a refinancing that involves assignment of existing debt and real estate security documents to the new lender. Transfer taxes, whether paid exclusively by the seller or split between the parties, can be avoided in some jurisdictions by structuring a transfer of ownership interests in the entity owning the real property (see *Questions 16 and 18*). These methods vary by state.

**HOLDING BUSINESS PREMISES**

*Climate change targets*

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**20. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria?**

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Individual states have enacted a range of building codes aimed at energy efficiency and the reduction of greenhouse gases. Some of these codes are mandatory, but most are voluntary or use tax incentives to foster compliance. The federal government, through the 1992 Energy Policy Act and more recent legislation such as the 2009 American Recovery and Reinvestment Act, provides federal funding to improve state compliance with progressive building standards. For significant real estate development projects under environmental impact review, some states now require an analysis of greenhouse gas emissions and opportunities to mitigate them. Over the next few years, new federal and state regulations will take effect, requiring the control of greenhouse gas emissions from newly constructed or expanded industrial or commercial facilities that emit large volumes of greenhouse gases (generally more than 100,000 tons per year). Generally, greenhouse gas emissions from conventionally sized, non-industrial building projects in the US (for example, small-scale office developments) are not regulated under the current law.

*Third party outsourcing*

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**21. Is it common for companies to manage their real estate portfolios and their accommodation needs by using third parties through outsourcing transactions?**

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Real estate owners frequently engage a third party asset manager to manage their portfolios. Property managers are employed for on-site management needs, record-keeping and reporting, and sometimes for leasing and construction management activities. Commercial brokers are often employed by both parties in acquisition and leasing transactions, and the larger US real estate brokerage companies include divisions that offer asset management and property management services in addition to customary brokerage services.

*Restrictions on foreign ownership or occupation*

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**22. Are there restrictions on foreign ownership or occupation of real estate, or on foreign guarantees or security for ownership or occupation?**

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There are few restrictions on foreign nationals and entities limiting the ownership, purchase or transfer of real estate, except where the federal government has determined that national security may be at stake or protection of agricultural and natural resources is required. Various federal statutes contain disclosure and filing requirements applicable to foreign investors in US real estate. In addition, a non-US investor may be subject to the rules under FIRPTA. The FIRPTA rules impose a tax on capital gains derived by non-US persons from the disposition of the US Real Property Interests.

Depending on the nature of the property or business being acquired, or the economic size of the transaction, certain legal pre-clearances may also be necessary. This includes pre-clearances required by the Hart-Scott-Rodino Act of 1976, an anti-trust regulation requiring any investor seeking to acquire either a 15% stake or a stake valued at more than US\$15 million in a particular security to file a notification with the federal government. The notification's filing marks the beginning of a 30-day review period. Obtaining deal-specific legal advice on the effect of these statutes is important.

*Issues on change of control*

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**23. Does change of control of a company affect its holdings of real estate?**

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Change of control of a company does not affect title to real estate but can trigger a default under financing documents. In certain corporate transactions such as mergers and stock purchases however, a change of control of a tenant entity can trigger a default and forfeiture under a lease. Often, leases do not allow assignments by change of control without a landlord's consent, and assignment can include a change in beneficial ownership of the tenant.



### Compulsory purchases

#### 24. In what circumstances can local or state authorities purchase business premises compulsorily? Is the purchase price market value?

Local and state governments and the federal government can force the sale of privately owned real property for public purposes, if the compensation paid to the owner is equal to the fair market value of the property. This process is known as eminent domain or condemnation. What constitutes fair market value or a public purpose may be the subject of litigation.

### Municipal taxes

#### 25. Are municipal taxes paid on the occupation of business premises? Are there any exemptions?

The real property tax scheme varies by state and sometimes by local jurisdiction. Generally, local governments are required to comply with the state's tax laws to assess and collect an annual tax (with the rate varying by locality) on the value of land, structures and improvements. Local taxing authorities usually assess taxes based on the fair market value of the real estate, and many assessors then use a stated percentage of fair market value as the assessment basis. Certain types of property are exempt from real property tax in some states, including properties in specified economic development zones. In addition to real property tax, most state tax schemes provide for the taxation of tangible personal property owned by business entities. Commercial rent tax is also imposed in some jurisdictions.

## REAL ESTATE FINANCE

#### 26. How are acquisitions of large real estate portfolios or companies holding real estate generally financed?

Common financing structures include:

- Mortgage loan financing (where the debt is secured by a lien of the real property).
- Mezzanine loan financing (where the debt is secured by a pledge of the ownership interests in the entity owing the real property).
- The issuance of preferred equity.
- A combination of these structures (see *Question 28*).

Development projects are typically financed through construction loan mortgages, which contain specific lender protections in relation to the priority of subsequent advances. Financing is a key factor to consider when determining the most tax-efficient way to structure an investment. The goal is to achieve a financing structure that will reduce the actual taxable income of the investment vehicle in the US. For this purpose, it is important to ensure that the payments of interest are deductible for US federal income tax purposes, since some rules may limit this deductibility.

#### 27. How is real estate commonly used to raise finance?

Real estate is frequently used as security for financing. Property is often used to secure many types of loans, such as purchase-money loans, construction loans and credit lines of equity. As additional security, real estate related security for loans may include an assignment of rents, and a long-term lease can be pledged by a tenant as collateral for its own loan.

#### 28. What are the most common forms of security granted over real estate to raise finance? How are they created and perfected (that is, made valid and enforceable)?

The most common form of real estate security for financing purposes is the mortgage or deed of trust. The legal effect of a mortgage is to grant a lien on the real property to the lender, which is released when the loan is repaid. A deed of trust is a type of mortgage under which title to the encumbered real property is transferred to a trustee for the lender, who holds title until the loan is repaid. Whether a particular state customarily uses a mortgage or a deed of trust depends on the state's legal view of real estate security (that is, lien-theory or title-theory), but the practical difference for the buyer or borrower is negligible, since the primary difference between the two is in the manner of enforcement after default. Mortgages and deeds of trust are perfected by recording in the land records office in the county or municipality where the real property is located.

#### 29. Is real estate securitisation common in your jurisdiction?

Prior to the recession, real estate securitisation was very common and continues to make a significant comeback. It is effected through the creation of a pool of loans, where each pool is transferred to a trust. The trust subsequently issues securities or bonds to third parties, the income stream of which is the payments under the mortgages and the collateral is the security granted by the mortgages. The pools are typically tranching into various risk levels and the securities or bonds issued in relation to these tranches are priced based on the relative risk.

## REAL ESTATE LEASES

### Negotiation and execution of leases

#### 30. Are contractual lease provisions regulated or freely negotiable?

Subject to certain state-specific statutory requirements (generally affecting residential leases), almost every provision of a lease is negotiable.

#### 31. What are the formal legal requirements to execute a lease?

It is essential to the validity of a lease that:

- The landlord and tenant be separate parties.
- The landlord hold the title to the leased property.



- Any necessary third party consents be obtained, and if executed by an agent, the agent have the appropriate authority to execute the lease on the landlord's behalf.

The formalities of execution vary across states but generally notarisational and/or recordation in the land records is not required (except in the case of certain long-term leases and ground leases). In some states, leases are executed as a deed. Local counsel should be consulted to determine the applicable legal requirements in a particular jurisdiction.

#### *Rent levels and reviews*

### **32. How are rent levels usually reviewed and are there restrictions on this? Is VAT (or equivalent) payable on rent?**

Rent levels are negotiated between the landlord and tenant and set contractually within the terms of the lease. Typically, rent increases are specifically set out in the lease either as a percentage increase or based on a referenced index of inflation and are not controlled by statute (other than in the case of certain residential leases). The Consumer Price Index of the US Department of Labor is commonly referenced, although other indices are also used. When a lease includes an extension right, the rent for the extension term is often reset at a fair market rental value, determined by appraisal. VAT is not payable on rent, but certain jurisdictions (such as New York City and Florida) impose a tax on rents in certain circumstances. Certain municipalities impose restrictions on rent levels in relation to certain residential leases.

#### *Length of term and security of occupation*

### **33. Is there a typical length of lease term and are there restrictions on it? Do tenants of business premises have security of occupation or rights to renew the lease at the end of the contractual lease term?**

Commercial occupancy arrangements are typically set out in a lease. There are many types of lease including:

- Triple net leases, where the tenant pays for all real estate taxes, insurance and operating expenses of the real property.
- Gross leases, where the tenant pays rent and the landlord pays the above expenses (although the tenant is often required to pay its share of increases in those expenses over a specified base year).
- Ground leases, which are usually net leases of land intended to be developed by the tenant.

Gross leases generally bear shorter terms than net leases, and may run from two years to 15 years, although five- and ten-year terms are common. Ground leases and some net leases may have terms running from 25 years up to 99 years.

The tenant's right to renew the lease at the end of the term is a matter of contract. If the tenant does not have this right, it must vacate the leased premises at the end of the term of the lease. To encourage the tenant to vacate on time, the lease may specify that if the tenant remains in possession, it will pay an increased rent

(often 200%) until it vacates. Some jurisdictions provide that if the landlord accepts rent from the tenant after expiration of the lease term, a month-to-month tenancy or tenancy at will is created, which gives the tenant certain legal rights despite the lease term expiry. The procedures by which a landlord may evict a tenant remaining in possession after the end of the lease term vary by jurisdiction.

#### *Restrictions on disposal*

### **34. What restrictions typically apply to the disposal of the lease by the tenant?**

Tenants are typically restricted from assigning or subletting their interests under the lease itself. Landlords generally make any assignment or sublet conditional on obtaining their consent. State laws can require that any consent be subject to the reasonable discretion of the landlord, which protects tenants from a landlord acting in an arbitrary or capricious manner (although this protection is more typical in residential leasing). Restrictions on assignment can include the change of control of a corporate entity, but tenants usually negotiate some flexibility concerning this restriction.

#### *Use of premises within a corporate group*

### **35. Can tenants usually share their business premises with companies in the same corporate group?**

Occupancy of leased premises by any third party generally requires landlord consent, although some leases provide that a certain amount of square footage (or desk space) can be occupied by an affiliated company. Subleases or assignments to affiliated companies are often expressly permitted in the lease, sometimes without landlord consent but with specified conditions.

#### *Repair and insurance responsibilities*

### **36. Who is usually responsible for keeping the leased premises in good repair?**

Landlords are typically responsible for all structural repairs, as well as repairs to any building systems such as heating, ventilation and air conditioning (HVAC), and gas, electricity, and water supply. Tenants are generally responsible for all non-structural repairs.

### **37. Who is usually responsible for insuring the leased premises?**

A lease usually requires the tenant to insure against injury to persons on the premises and damage to the building up to specific amounts and to cover its personal property. Landlords typically hold insurance for many contingencies and for structural elements, but the obligation to do so is not typically specified in the lease.



### Grounds for termination

#### 38. On what grounds can the landlord usually terminate the lease? Can the tenant terminate the lease in certain circumstances?

##### Landlord

The grounds on which a landlord can terminate a lease, and the notice and other procedures that apply, vary with the lease. These grounds typically include:

- The tenant's failure to pay rent and other amounts when due.
- Breach by the tenant of its express obligations under the lease (often after a stated notice and cure period).
- The bankruptcy or insolvency of the tenant or a lease guarantor.
- In certain cases (particularly retail leases), abandonment of the leased premises (that is, "going dark").

A landlord (and in some cases a tenant) usually has the right to terminate the lease in the event of certain emergency events or if the leased premises or real property are taken in governmental eminent domain proceedings (see *Question 24*).

##### Tenant

Tenant termination rights are generally limited. The lease can provide that the tenant can terminate the lease if:

- Critical lease services are not provided for a specified period of time.
- The landlord fails to deliver the leased premises to the tenant by a specified outside date.

### Tenant's insolvency

#### 39. What is the effect of the tenant's insolvency under general contract terms and insolvency legislation?

In most leases, a tenant's bankruptcy (whether voluntary, or involuntary after a grace period) or insolvency constitutes an event of default, entitling the landlord to exercise its specified remedies. However, the federal Bankruptcy Code prevents the landlord from exercising those remedies directly against the tenant during a certain period. The landlord is instead required to seek its remedies through bankruptcy proceedings.

## PLANNING LAW

#### 40. What authorities regulate planning control and which legislation applies?

Local zoning regulations dictate the permitted use of the property. The type of property (for example, office building, shopping centre or multi-use building) and relevant zoning laws, can be used to determine the best use of the property. Variation to local zoning regulations may sometimes be obtained, with some effort.

## REAL ESTATE ORGANISATIONS

### Association of Foreign Investors in Real Estate (AFIRE)

**Main activities.** AFIRE represents the foreign real estate industry in the US, and the interests of nearly 200 investing organisations from 21 different countries. AFIRE was founded in 1988 with strong support from Dutch pension funds. German investment firms now constitute the largest nationality of investors.

W [www.afire.org](http://www.afire.org)

### Commercial Real Estate Development Association (NAIOP)

**Main activities.** NAIOP is the leading organisation for developers, owners and related professionals in office, industrial and mixed-use real estate. NAIOP provides industry networking and education, and campaigns for effective legislation on behalf of its members.

W [www.naiop.org](http://www.naiop.org)

### International Counsel of Shopping Centers (ICSC)

**Main activities.** ICSC is the trade association for businesses that develop and manage shopping centres. As the global industry trade association, ICSC links with more than 25 national and regional shopping centre councils throughout the world. Its global retail convention, RECon, held every May in Las Vegas, attracts investors, owners and professionals from throughout the industry.

W [www.icsc.org](http://www.icsc.org)

### National Association of Real Estate Investment Trusts (NAREIT)

**Main activities.** NAREIT is the representative voice for real estate investment trusts (REITs) and publicly traded real estate companies with a focus on US real estate and capital markets. NAREIT's members are REITs and other businesses that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

W [www.nareit.com](http://www.nareit.com)

#### 41. What planning consents are required and for which types of development?

Zoning laws typically set out:

- As of right uses (that is, uses permitted without the consent of a local authority).
- Uses that require consent of a local authority (through a special-use permit or a variation).
- Prohibited uses.

Variation can be applied for when strict compliance with a specific standard (such as a set back or parking requirement) is not feasible for a property or would impose an undue hardship on the owner. Building permits are typically required for most types of construction, and a completed project must obtain a certificate of occupancy before it can operate for its intended use.



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#### 42. What are the main authorisation and consultation procedures in relation to planning consents?

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##### Initial consents

Typically, local or regional planning and zoning boards grant initial consents.

##### Third party rights

Third parties have the right to object to applications for development. Third parties can include neighbours to the proposed development or environmental and citizens groups.

##### Public inquiries

Most jurisdictions mandate open meetings for planning and zoning board meetings, where the application is open for public discussion and there are only limited exceptions for executive (that is, closed) session. Third parties have the right to attend these meetings, and typically, to present studies and findings concerning the proposed development.

##### Initial decision

The time frame for the decision-making process varies by locality and depends on factors such as:

- The complexity of the development.
- The number of entities involved in the review.
- Objections made by third parties.

Time frames are often extended on request of the applicant to obtain additional support.

##### Appeals

Local planning and zoning boards typically have a statutorily mandated appeals process, through which the applicant has a right to appeal the final decision or any conditions imposed on the development. Once this appeals process is exhausted, parties can seek recourse in court. Third parties can also appeal in court but must have standing to object, by showing a potential to be harmed by the proposed development.

## REFORM

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#### 43. Are there any proposals to reform real estate law in your jurisdiction?

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Over the past several years, a number of states and the federal government have passed legislation strengthening consumer (that is, borrower) protection laws in response to the collapse of the sub-prime mortgage market. Foreclosure laws remain under review due to controversy involving recent lender attempts to expedite foreclosure proceedings resulting from the high volume of residential mortgage defaults. Loan servicing laws continue to be scrutinised closely in the residential context to ensure fairness and the protection of consumers. In the environmental context, many state and federal laws continue to strengthen protections of wetlands and waterfront property by restricting development

or conditioning development on more stringent standards. In western states, new incentives are being created to encourage water conservation by operators of commercial real estate. Many states and localities are using their entitlement processes (that is, the legal method of obtaining approval for the right to develop property for a desired use) to encourage or require sustainable design and construction practices, transient-oriented projects, and the redevelopment of abandoned properties rather than the development of greenfields sites.

## ONLINE RESOURCES

**W** [www.irs.gov/irm/part4/irm\\_04-061-012.html](http://www.irs.gov/irm/part4/irm_04-061-012.html)

**Description.** Official, up-to-date Internal Revenue Service's Manual containing the text of the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA).

**W** [www.law.cornell.edu/ucc/ucc.table.html](http://www.law.cornell.edu/ucc/ucc.table.html)

**Description.** Unofficial, up-to-date Cornell University Law School website containing the Uniform Commercial Code.

**W** [www.epa.gov/oecaagct/lcla.html](http://www.epa.gov/oecaagct/lcla.html)

**Description.** Official, up-to-date US Environmental Protection Agency website containing the text of and background on CERCLA.

**W** [www.epa.gov/brownfields/aai/index.htm](http://www.epa.gov/brownfields/aai/index.htm)

**Description.** Official, up-to-date US Environmental Protection Agency website containing the text of and background on the All Appropriate Inquiry Rule.

**W** <http://uscode.house.gov/download/pls/11T.txt>

**Description.** Official, up-to-date US House of Representatives website containing the text of the US Bankruptcy Code.

**W** [www.ferc.gov/legal/maj-ord-reg/epa.pdf](http://www.ferc.gov/legal/maj-ord-reg/epa.pdf)

**Description.** Official, up-to-date Federal Energy Regulatory Commission website containing the text of the Energy Policy Act of 1992.

**W** [www.recovery.gov/About/Pages/The\\_Act.aspx](http://www.recovery.gov/About/Pages/The_Act.aspx)

**Description.** Official, up-to-date government site containing the text of and background on the American and Recovery and Reinvestment Act of 2009.

**W** [www.ftc.gov/bc/hsr/index.shtm](http://www.ftc.gov/bc/hsr/index.shtm)

**Description.** Official, up-to-date Federal Trade Commission website containing the text of and background on the Hart-Scott-Rodino Act of 1976.



## CONTRIBUTOR DETAILS



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**Qualified.** New York, US, 1989

**Areas of practice.** Real estate; commercial finance; capital markets and joint ventures.

#### Recent transactions

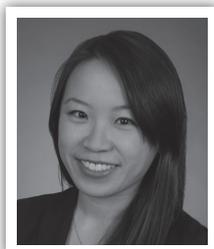
- Representing a global private equity fund in the purchase of distressed loan portfolios valued in excess of US\$1.5 billion.
- Representing a global hedge fund in a joint venture with a New York developer to acquire and finance a Manhattan residential tower.
- Representing a major Middle East-based investor in all its acquisitions, joint ventures and financings throughout the US.
- Representing a UK private equity fund in the joint venture acquisitions of US distressed projects.

**Qualified.** New York, US, 1983

**Areas of practice.** Real estate and commercial finance.

#### Recent transactions

- Representing a group of publicly traded REITs in a series of acquisitions of trophy office and retail properties across the US.
- Representing a global German-based print media company in sale and leaseback (off-balance sheet) financing and debt restructuring of its US regional headquarters.
- Representing a Fortune 500 provider of internet services to the hospitality industry in leasing new headquarters in Manhattan.
- Representing a California-based private equity firm in a series of acquisitions of individual and pooled non-performing loans.



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**Areas of practice.** General corporate.

#### Recent transactions

- Representing a US-based private equity fund in a sale leaseback of a national chain of restaurants.
- Representing US-based companies and global investors in acquisitions, financings and joint venture transactions in the US.
- Representing a US-based private equity fund in the purchase of a portfolio of distressed loans.