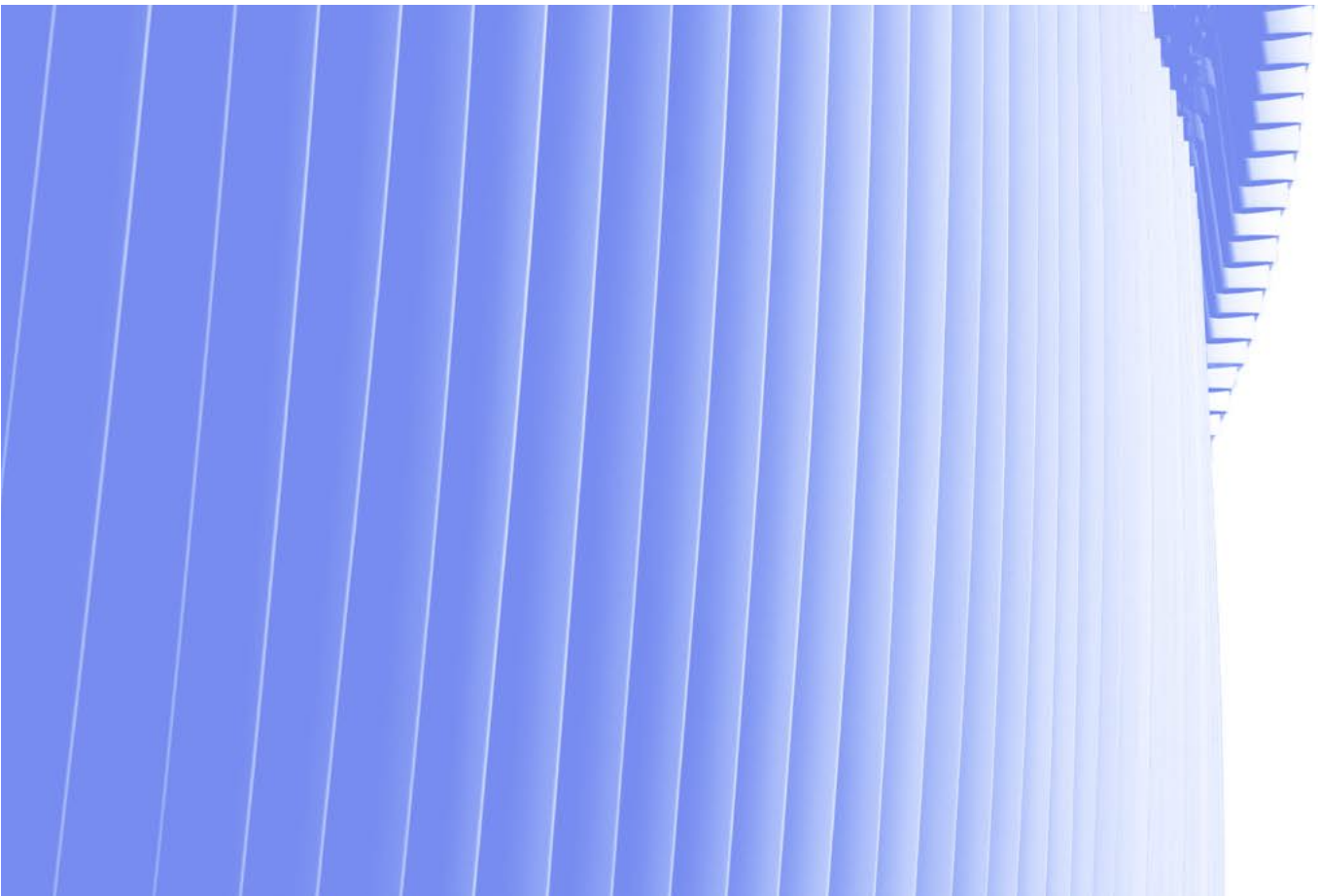




**HORRISON  
FOERSTER**

# **An Analysis of 2021 and 2022 SEC Comments Issued to REITs**



# SEC Review Process

For the past several years, fewer and fewer reviews of filings by the Securities and Exchange Commission (“**SEC**”) have resulted in comments being issued to public reporting companies; however, sources reveal that trend reversed in 2022, indicating the possibility of increased SEC scrutiny of disclosure made in public filings. Reinforcing the prospect of the SEC’s enhanced review of company filings, news sources have cited the growing number of SEC comments issued to companies within the first two months of 2023 regarding calculation of non-GAAP measures. Given this seemingly global trend of increased SEC scrutiny, and with REITs being the subject of headlines over the past few months, we expect the SEC to keep a close eye on the disclosure that REITs make.

In this client alert, we (1) summarize the SEC’s review process for filings that REITs make under the Securities Act of 1933, as amended (the “**Securities Act**”), and the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”), and (2) explore SEC comments issued to REITs during 2021 and 2022.

The SEC’s Division of Corporation Finance (the “**Division**”) reviews filings made under the Securities Act and Exchange Act to monitor compliance with applicable disclosure and accounting requirements. The Division assigns filings made by companies in a particular industry to one of nine industry offices whose staff members have specialized review expertise. The staff of the Office of Real Estate & Construction (the “**Staff**”) review filings made by REITs.

## Review of Registration Statements

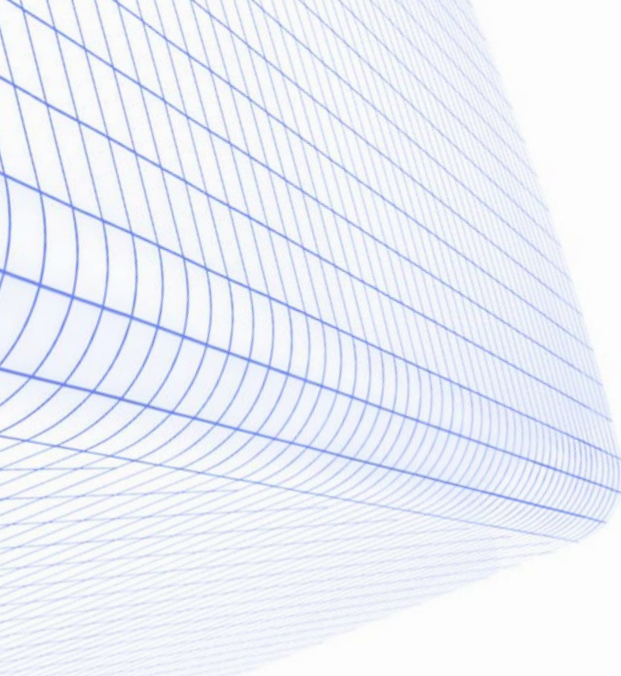
A registration statement filed by a company for an offering of securities is subject to review by the SEC before the offering can commence. Note that the discussion below does not extend to automatic shelf registration statements and registration statements on Form S-8 as these registration statements automatically become effective.

### Review of S-11

For initial Securities Act registration statements, a company may confidentially submit its draft registration statement (“**DRS**”) for Staff review provided that the company confirms in a cover letter that it will publicly file the registration statement and nonpublic draft submissions at least 15 days prior to any road show or the requested effective date of the registration statement.

Once the DRS has been submitted, the Staff will determine whether the registration statement should be reviewed in depth, receive a limited review, or be cleared without review. The Staff usually determines within two to five business days after the date of the filing whether the DRS will be reviewed. If the Staff decides not to review, they can make the S-11 effective within 48 hours after notifying the registrant of their decision not to review. However, it is rare that an initial registration statement would not be reviewed by the Staff. Full review of the S-11 entails a thorough review of the registration statement by an examiner and a staff accountant. The examiner reviews all aspects of the registration statement other than the accounting aspects while the staff accountant reviews the financial statements and accounting-related issues.

The Staff generally tries to issue an initial comment letter within 30 days of the date of the initial confidential submission or public filing.



### Review of S-3

A Form S-3 registration statement is a short-form registration statement available to eligible companies. To be able to use Form S-3, a registrant must:

- Be organized under the laws of the United States;
- Have a class of securities that is registered pursuant to Section 12(b) or 12(g) of the Exchange Act;
- Have been subject to Section 12 or 15(d) of the Exchange Act for the past 12 months and has filed all Exchange Act filings required to be filed for at least the past 12 months;
- Have timely filed all Exchange Act reports required to be filed during the past 12 months and any portion of the month before filing the registration statement, including the registrant's:
  - Proxy statement or information statement; and
  - Reports on Form 10-K, Form 10-Q and Form 8-K.

When a Form S-3 registration statement is filed, the Staff will first screen the Form S-3 to ensure the registrant's eligibility to use the form. Once the registrant is confirmed to be eligible to use Form S-3, similar to other registration statements, the Staff will determine whether the registration statement should be reviewed (and, if so, whether the filing will be subject to a full or a limited review). The Staff's decision typically will be relayed to the registrant within two to five business days. Unlike long-form registration statements on Form S-11, the Staff is much more likely to decide not to review a Form S-3.

## Review of Exchange Act Reports

The Sarbanes-Oxley Act of 2002 ("**SOX**") requires the Division to undertake some level of review of each reporting company at least once every three years. In addition to the required review, the Division selectively pulls certain filings for evaluation. The Division does not set forth the criteria used for determining which companies to selectively review, but Section 408 of SOX sets forth several factors that may be considered, including:

- whether the company has issued material restatements of its financial results;
- whether the company has experienced significant volatility in its stock price;
- the company's market capitalization;
- whether the company is an emerging company with a disparity in its price to earnings ratio;
- whether the company's operations significantly affect any material sector of the economy; or
- any other factor the Division considers relevant.

If the Division selects a company or a filing for review, the extent of that review will depend on many factors, including the criteria set forth above. The scope of a review may be:

- A full cover-to-cover review;
- A financial statement review in which the Staff will examine the financial statements and related disclosures, such as Management's Discussion and Analysis of Financial Condition and Results of Operations ("**MD&A**"); or
- A targeted-issue review in which the Staff will examine the filing for one or more specific items of particular focus for the SEC.

## Receiving Staff Comments

Most commonly, the Staff provides a company with comments where it believes a company has not complied with the SEC's rule requirements, should enhance its disclosures and/or can provide additional information.

There are generally three types of comments issued:

- Substantive comments requesting revisions to the disclosure to provide clarity with regard to language that is ambiguous or that is inconsistent with other disclosure included or incorporated by reference in the filing;
- Comments requesting supplemental information to assist the Staff in assessing the company's disclosure; and
- Comments regarding technical or procedural deficiencies, such as the inclusion of certain required exhibits and the appropriateness of adjustments to non-GAAP measures.

Generally, comments are provided to the company in the form of a written comment letter. In certain circumstances, the Staff may provide oral comments in addition to (and occasionally in lieu of) a written comment letter. If a company receives oral comments, the company should ask the Staff examiner how he or she would like to receive the company's response. Best practice is to respond to oral comments with a written letter to document formally the oral comment that was conveyed and the company's response.

It is possible that Staff review may involve multiple rounds of comments and responses. When all issues relating to a review are resolved to the Staff's satisfaction, the SEC advises the company by letter, often preceded by a phone call from the Staff examiner, that it has no further comments, and that the Staff's review is complete. All comment letters and related responses are posted to SEC's EDGAR website approximately 20 business days after the review has been completed. However, a company can request confidential treatment of portions of its response letters. If this request is granted, only the non-confidential portions of a response letter are made publicly available.

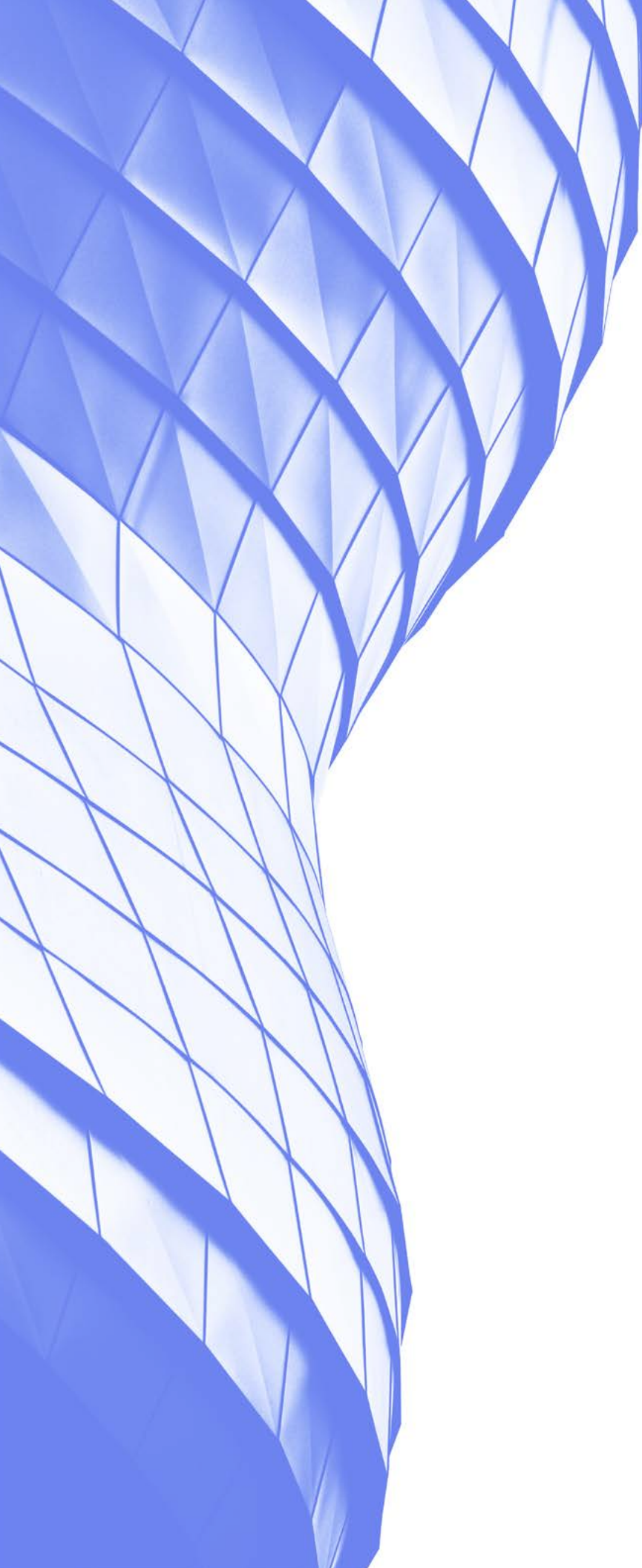
**PRACTICE NOTE:** The best way to avoid drawing comment is to be prepared. Registrants should understand the regulations and keep apprised of developments in SEC rules and disclosure practice. For instance, COVID-19, inflation and the war in Ukraine have all resulted in the Staff pushing for enhanced disclosures. Due to the global implications of such topics, the SEC's focus was, frankly, predictable and understandable. Being prepared also means reviewing relevant comment letters and responses—as well as any disclosure changes that resulted from the comment letters—to discern what topics are of particular interest to the SEC and how the comments ultimately were resolved, all of which should inform the Company's disclosures in periodic reports and registration statements, as applicable.

## Responding to Staff Comments

Most comment letters request that the recipient reply with a written response to the comments therein within 10 business days. If the company believes it needs more time to respond to the Staff's comments, the company should contact the Staff to request additional time as soon as possible or seek clarification on any of the comments.

Key considerations and best practices for drafting a response letter include:

- Assess the nature of the comment(s) and allocate responsibility to address each comment. In some cases, it may be necessary or advisable to seek input from outside legal counsel and auditors.
- Prepare a shell response letter as soon as possible. The shell response should include an introductory paragraph explaining that the correspondence is being submitted in response to a comment letter received by the company regarding the applicable filing (or, if applicable, that the company is responding to an oral comment) as well as a reproduction of each of the Staff's comments, each of which would be followed by a space for the company's responses. This will ensure that you clearly and directly address every comment issued.



- Receipt of a comment does not necessarily mean that the Staff has reached a final conclusion on the topics addressed in the comment. For that reason, if the company does not agree with the Staff's request for suggested or amended disclosure, the company should feel free to identify the points raised by the Staff with which it respectfully disagrees. When explaining such divergence of opinion, the company should provide the Staff with any bespoke facts and circumstances and provide as much insight as possible into the judgments it made in applying the relevant regulations or guidance.
- Best practice is to review recent comment letters and responses to keep apprised of trends relating to SEC comments issued to peer companies before a comment letter has been received. Reviewing publicly available correspondence can also prove useful when weighing how to respond to a comment letter; however, companies should be careful not to rely too heavily on previously published correspondence when crafting their response letters. For a stronger, more compelling response, registrants should cite authoritative literature and SEC guidance whenever possible.
- If the comment requests additional or revised disclosure in future filings, consider including the proposed additional or revised disclosure in the response letter, and identifying the page in the filing where the revised or additional disclosure appears, to minimize the chances of receiving future comments relating to the applicable disclosure.
- Remember that comments and responses are made public on the SEC's EDGAR website after the review process has ended. While this may be helpful in terms of reviewing responses to comments from similarly situated companies, it also means that your responses ultimately will be publicly available. Accordingly, be mindful of what you provide in response and consider ahead of responding whether to request confidential treatment.

# Overview of SEC Comments Issued to REITs in 2021 and 2022

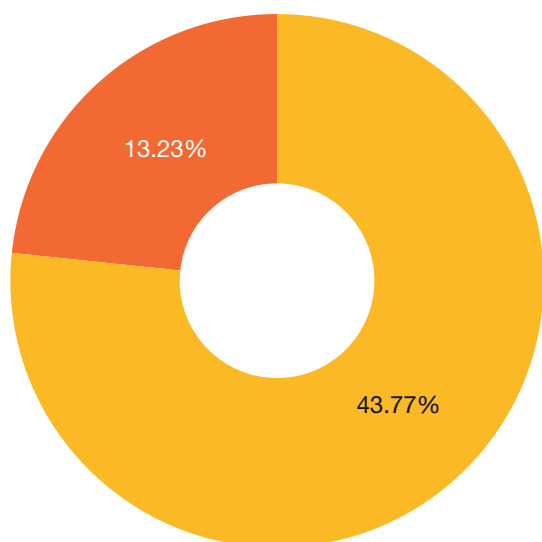
Below, we summarize key findings of our review of SEC comments issued to REITs during 2021 and 2022.

In the 24-month review period, 186 comments were issued to 56 companies. 43 of these companies are, or were at the time the comment was issued, REITs whose securities are listed on the New York Stock Exchange or NASDAQ (“**listed REITs**”). 13 of these companies are, or were at the time the comment was issued, registered with the SEC, but have shares that do not trade on a national securities exchange (“**non-listed REITs**”).

Each non-listed REIT received more comments on average than each listed REIT. 73 of the 186 comments, or approximately 39%, were issued to the 13 non-listed REITs, while 113 comments or approximately 61%, were issued to the 43 listed REITs. Consequently, on average, 5.62 comments were issued to each non-listed REIT and 2.63 comments were issued to each listed REIT. One explanation for the disparity in the number of comments issued to listed REITs as compared to those issued to non-listed REITs is that non-listed are in continuous offering.

## Listed vs. Non-Listed REITs Receiving Comments

■ Listed REITs ■ Non-Listed REITs



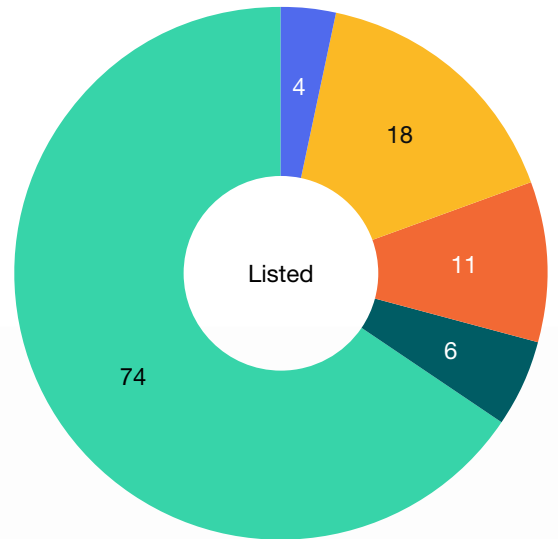
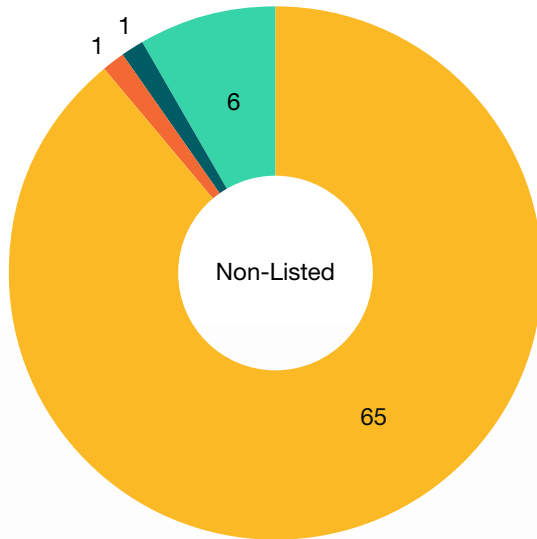
The majority of comments issued to non-listed REITs related to registration statements. Of the 73 comments issued to non-listed REITs, approximately 89%, or 65 comments, related to registration statements on Form S-11. The remaining 11%, or eight comments, related to Forms 10-K, 10-Q and 8-K.

Conversely, the majority of the 113 comments issued to listed REITs, 91 comments, or approximately 80.5%, were directed at periodic reports, with Annual Reports on Form 10-K garnering the most comments.

Unsurprisingly, non-listed REITs received the most comments regarding valuation and calculation of net asset value as well as their share repurchase and redemption programs. The majority of comments issued to listed REITs related to financial statements and metrics. See below for a further breakdown of comment categories and for a deeper dive into comment trends for both listed and non-listed REITs.

### Comments by Filing Type

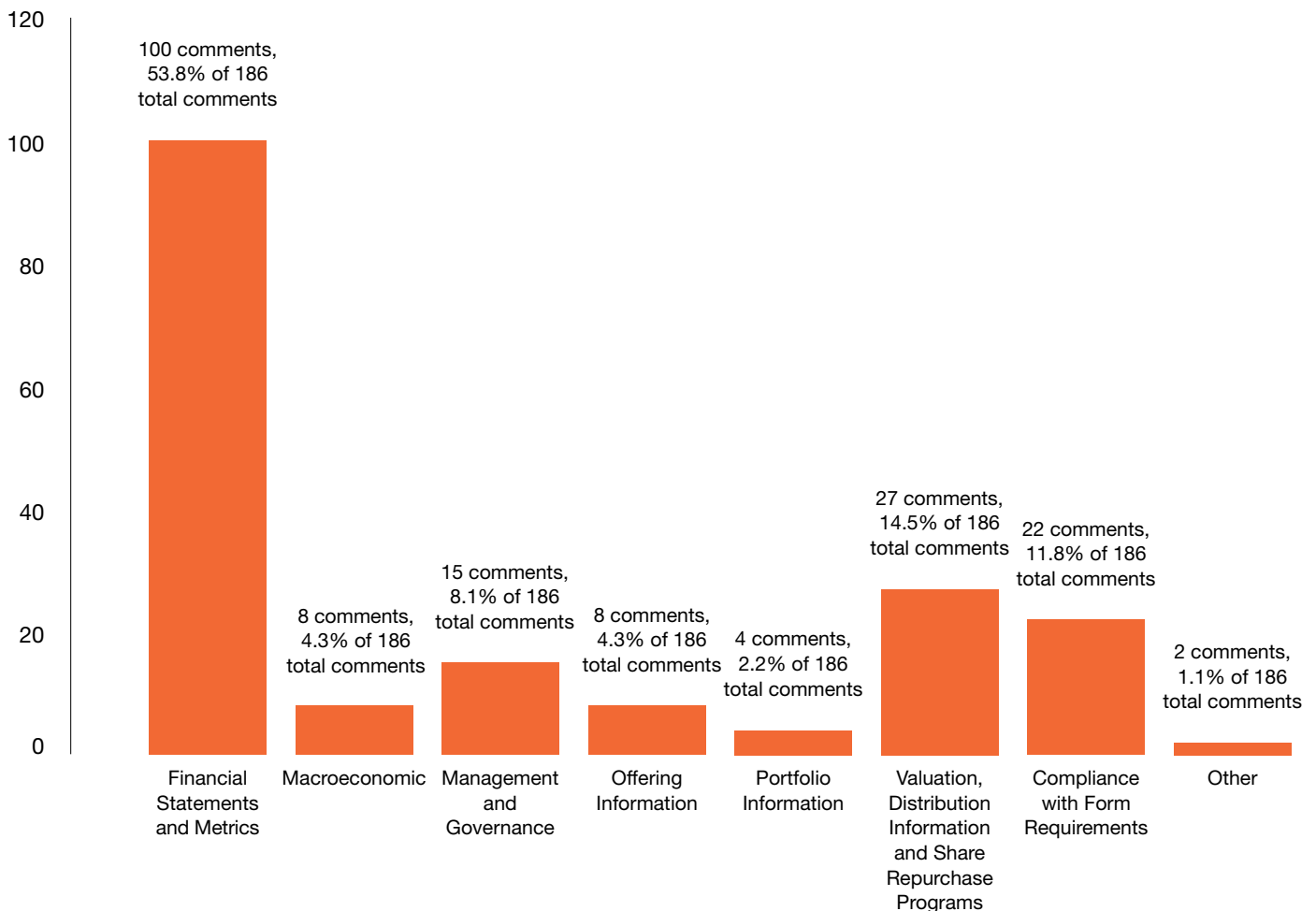
■ S-3 ■ S-11 ■ 8-K ■ 10-Q ■ 10-K



# Comment Categories

There are seven broad categories into which the comments issued fall:

## Comments by Category



\*Due to rounding, percentages may not total 100%.



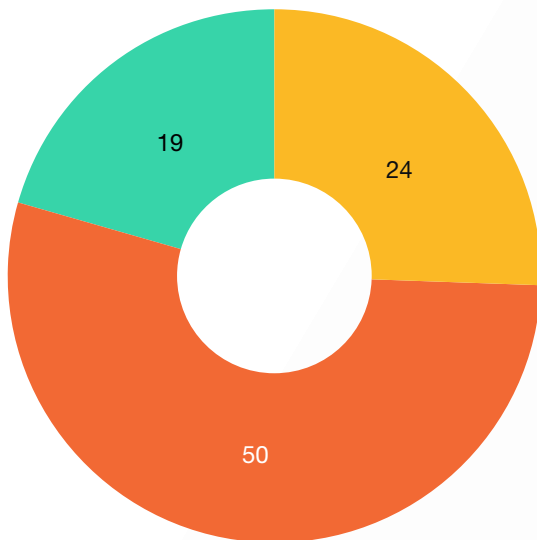
## Financial Statements and Metrics

This category includes comments relating to financial statements and related notes as well as other performance metrics used by registrants. 84 of the 100, or 84%, of the comments in this category were issued to listed REITs.

Within this category, there are three major sub-categories: comments related to the company's accounting treatment; comments related to the use of non-GAAP financial measures; and comments related to providing the relevant information required under Regulation S-X.

### Financial Statements and Metrics Comments by Sub-Category

Accounting Non-GAAP Regulation S-X



## Accounting

The Staff is often focused on how the Accounting Standards Codification (“ASC”) has been interpreted and applied as well as financial statement presentation and footnote disclosure. Frequent topics of comment include:

- Variable Interest Entity and Joint Venture accounting in accordance with ASC 10 and 323; and
- Segment reporting under ASC 280.

### Sample Comments

- Describe how the Company considered the variable interest guidance in ASC 810-10-15-14 and whether the acquisition resulted in an acquired VIE.
- We note your recent increase in your portfolio of consolidated joint ventures equity investments in multi-family properties. In light of that increase, please tell us if you continue to have only one reportable segment and tell us how you made your determination. Within your response, please refer to ASC 280.

## Non-GAAP

The use of non-GAAP measures frequently results in comments from the SEC regarding compliance with Regulation G and Item 10(e) of Regulation S-K.

Areas of focus have included:

- presenting the most directly comparable GAAP measure with equal or greater prominence;
- reconciliation of the most comparable GAAP financial measure; and
- disclosure of why the issuer believes the non-GAAP presentation provides information that will be useful to investors.

### Sample Comments

- We note your reconciliation of Total NOI to Net loss attributable to common stockholders for the interim periods presented. In future periodic filings, please disclose the most directly comparable GAAP measure with equal or greater prominence to the non-GAAP measure by reconciling from Net loss attributable to common stockholders to calculate Total NOI. Refer to Question 102.10 of the Division's Compliance and Disclosure Interpretations for Non-GAAP Financial Measures.
- We note that you reconcile [Net Operating Income] attributable to common stockholders, a non-GAAP measure, from net income (loss) on your net leased and other real estate portfolios attributable to common stockholders, which also appears to represent a non-GAAP measure. Please reconcile your [Net Operating Income] measure to the most directly comparable financial measure calculated and presented in accordance with GAAP pursuant to Item 10(e)(1)(i)(B) of Regulation S-K.
- Please tell us, and expand your disclosure to describe, how average yield on invested capital is used by management and why you believe this metric provides useful information to investors. Given you are a self managed REIT, explain to us how you considered the need to provide a metric that includes the cost of managing your portfolio.

## Regulation S-X

When a REIT acquires or disposes of a business or a significant amount of assets, the transaction may trigger financial disclosure under Regulation S-X. The SEC has issued multiple comments to ensure potential investors are able to assess the financial impact of certain real estate acquisitions such that they are able to make an informed investment decision.

### Sample Comment

- Please confirm for us whether you believe it is probable that you will acquire the property and tell us whether the property will have any rental operations prior to acquisition. If acquisition of the property is probable, and the property has a rental history, please tell us how you considered (i) including an audited Statement of Revenues and Certain Operating Expenses in accordance with Rule 8-06 of Regulation S-X and (2) giving pro forma effect to the probable acquisition in your pro forma financial statements in accordance with Rule 8-05 of Regulation S-X.

## Macroeconomic

The SEC expects companies to keep an eye on changing macroeconomic conditions and to disclose how such conditions may affect the business of the registrant. During the applicable period, the SEC demonstrated increased interest in the following areas:

- COVID-19; and
- the transition away from the London Interbank Offered Rate (“LIBOR”).

### Sample Comments

- We note the statement that although you have not seen a material impact on the demand for self storage space resulting from the COVID-19 outbreak, your results of operations could be adversely impacted. Please revise to further clarify the anticipated impact and the ways in which it could affect your operations.
- Please clarify if the company has material exposure to risks associated with the expected discontinuation of LIBOR based on debt or assets that do not have robust fallback language.

**PRACTICE NOTE:** It is expected that COVID-19 and LIBOR comments will be replaced in the future with comments related to other market trends and areas of SEC interest, such as Russia’s invasion of Ukraine, inflation and rising interest rates, climate related disclosure and cybersecurity. We have seen an increase in inflation related comments issued to companies across substantially all industries and expect the SEC to continue to raise the topic in 2023 filings.

**SAMPLE INFLATION COMMENT:** Please disclose any known trends or uncertainties that have had or are reasonably likely to have a material impact on your cash flows, liquidity, capital resources, cash requirements, financial position, or results of operations arising from, related to, or caused by the inflation. Trends or uncertainties may include the impact of inflation on cost of sales, gross profit, inventory and taxes. Also, please update your disclosure to identify actions planned or taken, if any, to mitigate inflationary pressures. Refer to Item 303(b)(2) of Regulation S-K.

## Management and Corporate Governance

The SEC pays special attention to externally managed REITs and frequently issues comments to ensure investors are given all relevant information about potential conflicts of interests and that there are adequate policies in place to align the external manager or advisor with stockholders. Areas of frequent comment were:

- management's compensation and fees;
- management and affiliates' prior experience and involvement in other programs;
- allocation of investment opportunities; and
- exclusive forum.

### Sample Comments

- Please describe any termination fees that may be payable to your adviser, dealer manager or any of their affiliates.
- Given your disclosure regarding your sponsor's assets under management and experience in real estate investing and your references to other sponsor accounts, please provide the disclosure referenced in Item 8 of Industry Guide 5, including any relevant prior performance tables, or provide us with a detailed analysis of why you believe it is not required. Please also refer to CF Disclosure Guidance: Topic No. 6 for guidance.
- We note your disclosure that there may be overlap of investment opportunities with the Sponsor's other accounts. Please consider expanding your disclosure to provide insight into the size of any competing funds, and any additional procedures you have to allocate opportunities.
- We note that your Amended and Restated Bylaws filed as exhibit includes an exclusive forum provision for certain derivative actions other than those arising under the federal securities laws. Please revise your prospectus to clearly and prominently describe these provisions, including any risks or other impacts on investors and any uncertainty about enforceability. Please also state that investors cannot waive compliance with the federal securities laws and the rules and regulations thereunder.

## Offering Information

The Staff often asks clarifying questions regarding the mechanics of the REIT offering. Comments received in this category were focused on:

- whether an offering qualifies as delayed or must comply with requirements applicable to blind pools; and
- requests for supplemental information.

### Sample Comments

- We note that you have elected to be taxed as a REIT and you do not appear to have identified uses for the proceeds of this offering. Please revise your disclosure to identify this offering as a blind pool and include the disclosure required by Industry Guide 5, as applicable, or provide us with a detailed legal analysis explaining why you do not believe Guide 5 is applicable to your offering.
- Please submit all written sales material proposed to be transmitted to prospective investors, orally or in writing, including that intended for broker-dealer use only. Please be aware that we will need time to review such material. In addition, note that sales material must set forth a balanced presentation of the risks and rewards to investors and should not contain any information or disclosure that is not contained in or derived from the prospectus. For guidance, please refer to Item 19.D of Industry Guide 5. Please also confirm that you will continue to provide us sales material prior to use for the duration of the registered offering.

## Portfolio Information

The Staff issues comments regarding portfolio information in order to ensure that potential investors receive all relevant property information and disclosure necessary to understand the REIT's specific investment strategy. Comments issued to REITs during the review period requested additional information related to:

- tenants and tenant selection criteria; and
- rental metrics.

### Sample Comments

- We note that this risk factor discloses, among other items, that you may be unable to adequately monitor and evaluate tenant credit quality. In an appropriate section of your prospectus, please discuss in more detail how you monitor for tenant credit quality.
- To provide further clarity and context for investors, particularly as it relates to capital investments, please revise your tabular portfolio data to provide annual rental information or explain to us in detail why you believe such information would not be relevant to investors.

## Valuation, Distribution Information and Share Repurchase Programs

For non-listed REITs, the SEC is, unsurprisingly, concerned about investors receiving transparency regarding valuation, the fact that distributions are often paid in excess of funds from operations and the lack of liquidity. Therefore, the Staff comments are focused on:

- NAV calculation;
- sources of funds available for distribution;
- risks associated with perpetual life REITs; and
- share repurchase programs.

### Sample Comments

- We note your disclosure of the value of your real estate properties in Exhibit 99.1. Please tell us what consideration you gave to disclosing the valuation methodologies used, to disclosing significant assumptions and inputs that were used in your valuation, and to providing a sensitivity analysis for such assumptions and inputs.
- We note your disclosure that until you generate operating cash flows sufficient to pay distributions, you may pay distributions from financing activities, which may include borrowings in anticipation of future cash flows or the net proceeds of your offerings (which may constitute a return of capital). Please revise to clarify whether proceeds from other offerings may be used to fund distributions and, if so, how you would account for such distributions.

- We note your disclosure that you are a perpetual-life REIT and that while you may consider a liquidity event at any time in the future, you are not obligated by your charter or otherwise to effect a liquidity event at any time. Please disclose this in your risk factor bullet points on the cover page.
- We note that you may conduct the share repurchase program during the offering period of the shares being registered under this registration statement. Please be advised that you are responsible for analyzing the applicability of Regulation M to your share repurchase program. We urge you to consider all the elements of your share repurchase program in determining whether the program is consistent with the class relief granted by the Division of Market Regulation in the class exemptive letter. To the extent you have questions as to whether the program is entirely consistent with that class exemption you may contact the Division of Trading and Markets.

## Compliance with Form Requirements

The Staff often issues comments regarding inconsistent disclosures and/or deficiencies related to compliance with the instructions or item requirements applicable to registration statements (i.e., Forms S-3 and S-11) and Exchange Act reports (i.e., Forms 10-K, 10-Q and 8-K). These comments are typically more administrative and formulaic. The majority of the 23 form comments were issued on registration statements. Comments are often focused on the following:

- failure to provide an exhibit;
- staleness of financial statements and other information provided; and
- incorrect formatting or presentation.

**PRACTICE NOTE:** From the number of Form comments issued, it is clear that REITs have an opportunity to significantly reduce the likelihood of SEC comments by carefully checking filings to ensure the requirements of the applicable Form and regulations are met. We are here to help.

### Sample Comment

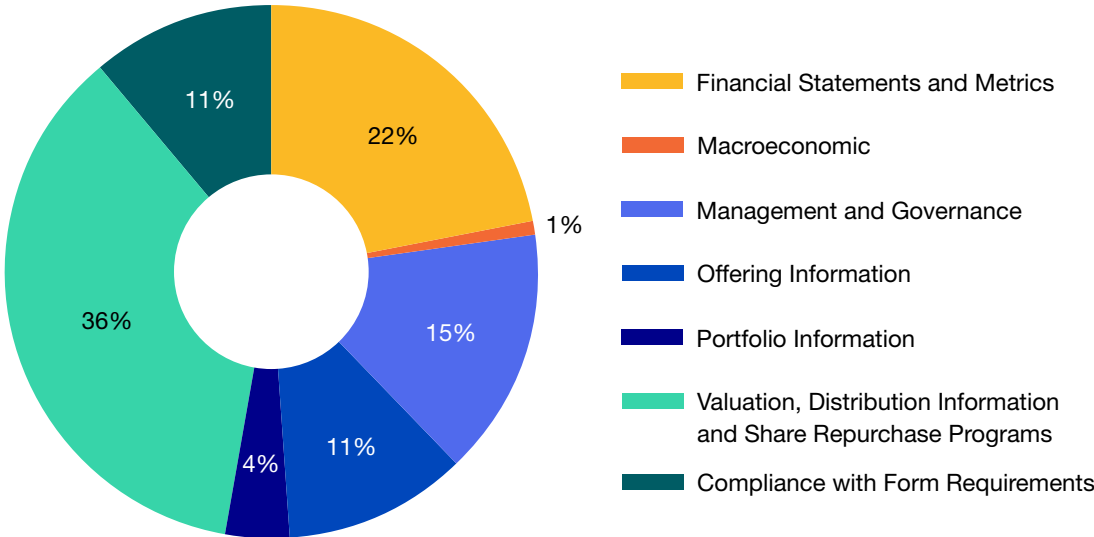
- We note the risk factor that discloses the company has entered into two tax protection agreements. Please provide clear disclosure of the material terms of the agreements and file as exhibits.
- We note that your summary risk factors are now six pages in length. Please revise to limit to two pages and disclose only the principal factors that make an investment in the registrant or offering speculative or risky, as required by Item 105(b) of Regulation S-K.
- It appears that your Section 10(a)(3) update for December 31, 2021 financial statements was required by April 30, 2022. Please provide us with a legal analysis of your compliance with Section 10(a)(3) of the Securities Act of 1933. Please also advise whether you engaged in sales of your securities in the interim, and, to the extent you made such sales, please advise what consideration you have given to including disclosure regarding the potential violation of Section 5 of the Securities Act.

# Comments Based on Listing Status

## Comments Issued to Non-Listed REITs

As is to be expected, the data indicates that non-listed REITs are more likely to receive comments regarding Management and Governance, Offering Information and Valuation, Distribution Information and Share Repurchase Programs than listed REITs. Financial statements and metrics remained one of the top categories of comments by number, with the most frequent topic related to property acquisitions and the requirements under Regulation S-X.

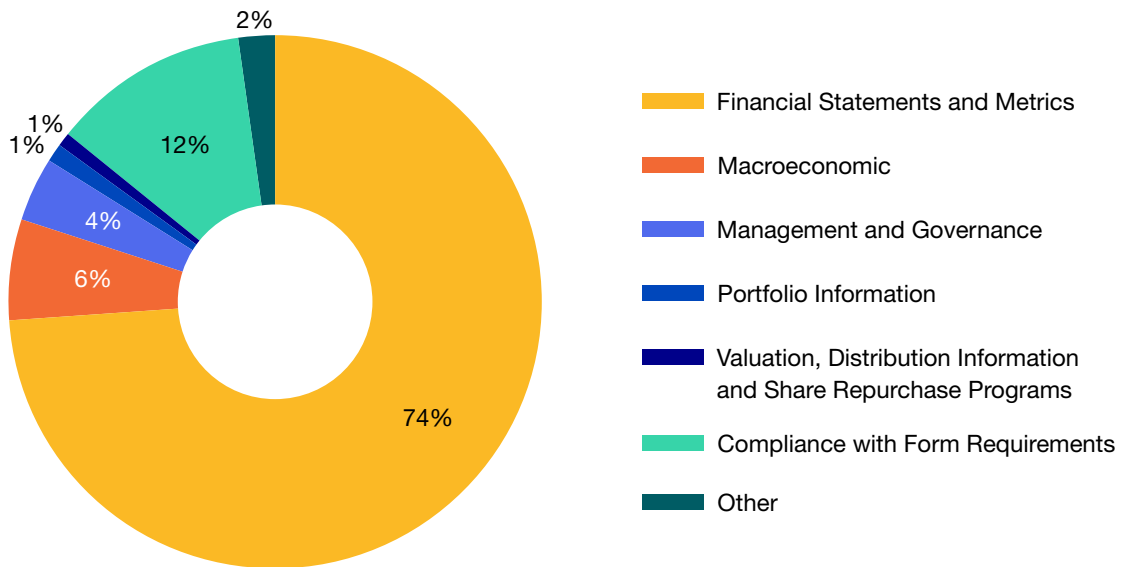
Non-Listed REITs' Comments by Category





## Comments Issued to Listed REITs

Listed REITs' Comments by Category



Listed REITs' top category of comments by number is overwhelmingly Financial Statements and Metrics. Within the broader category of Financial Statements and Metrics, comments regarding non-GAAP measures were the most common, demonstrating the need for thoughtful consideration of and compliance with Regulation G and Item 10(e) of Regulation S-K. Similarly, the majority of total macroeconomic comments were issued to listed REITs. For each substantive category other than Financial Statements and Metrics and Macroeconomic, non-listed REITs received more comments than listed REITs.

### A Note on Methodology

Review was limited to comments issued on Forms S-3, S-11, 10-K, 10-Q and 8-K. The analysis is based on SEC uploads and does not include registrant response letters or SEC "closing review" letters. To maintain a consistent methodology, only comments received on or after January 1, 2021 were included in the review, regardless of when the forms were filed or whether the SEC had issued prior comments. Further, note that the analysis extends only to information related to reviews that have been closed and subsequently posted to EDGAR. Therefore, the statistics presented below may be affected by reviews that are still ongoing or have recently been closed but not yet publicly released.

Some of the SEC comments reproduced in this client alert were edited in the interest of anonymity, clarity and brevity.

# About MoFo

Morrison Foerster's REIT practice is a collaborative, integrated, multi-office practice involving capital markets, corporate, finance, M&A, investment management, real estate, tax, and other attorneys throughout the firm. Attorneys in the REIT practice area are actively involved in advising listed public REITs, non-traded public REITs, private REITs and REIT sponsors, contributors, investors, investment advisers, underwriters, and institutional lenders on all aspects of REIT activity.

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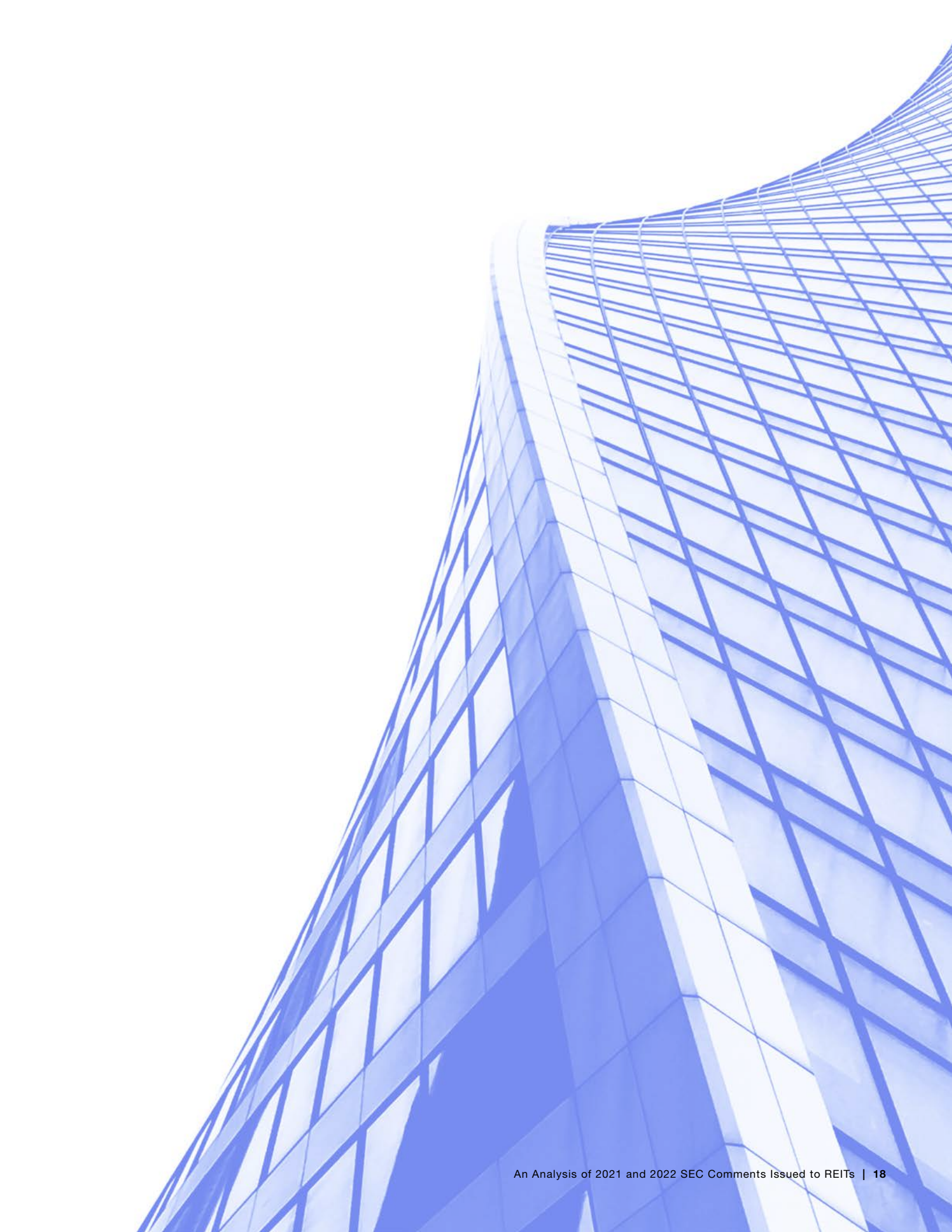


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