



REIT Pitfalls: Tenant Services, Prohibited Transactions, & Dividends

Real Estate Industry

Craig Stern, Michael Hill, & Patrick Oberlies June 18, 2025

Agenda

1. Tenant Services
2. Prohibited Transactions
3. REIT Dividends
4. Unrecaptured Section 1250 Gain



01

Tenant Services



Navigating REIT Pitfalls

Impermissible Services

- Congressional Intent
 - Shelter investors from risks of owning an active trade or business
 - Provide investors with passive investment income only
 - Risks of “business” operations to be borne by independent contractors (IK)

Navigating REIT Pitfalls

Impermissible Services

- Congressional Intent
 - Shelter investors from risks of owning an active trade or business
 - Provide investors with passive investment income only
 - Risks of “business” operations to be borne by independent contractors (IK)
- IRC 856(d)(1)(B) – determines what charges are customary in the market and will constitute “Rents”
- IRC 856(d)(7)(C) – determines whether the REIT itself may provide the service

Navigating REIT Pitfalls

Impermissible Services

- Impact of ITSI Rules
 - ITSI Income does not qualify as “Rents From Real Property” for the 75% and 95% Tests
 - If ITSI exceeds 1% of all income on a property, none of the income from the property qualifies
 - Property-by-property basis, not lease-by-lease
 - Amount attributed to ITSI cannot be less than 150% of direct costs of providing such services
 - ITSI is included in “Gross Income” for purposes of income tests

Navigating REIT Pitfalls

Impermissible Services

- Classification of Services:
 - Those which a REIT can provide directly (UBTI Exception)
 - REIT income constitutes “Rent”
 - Customary Services which can be provided by an IK or TRS
 - REIT income constitutes “Rent”
 - Non-Customary Services which must be provided by an IK or TRS
 - This is ITSI

Navigating REIT Pitfalls

Impermissible Services

Services Which REIT Can Provide (UBTI Exception)

- Services related to management and operation of real property that would be excluded from UBTI
 - REIT employees can provide services
 - Does not have to be provided by IK or TRS
 - Property Management
 - Lights, heat, etc.
 - Property cleaning & maintenance
 - Building Security
 - Incidental storage
 - Unreserved and common use facilities (conference rooms, gym, pool, etc.)
 - Tenant improvements related to lease negotiation

Navigating REIT Pitfalls

Impermissible Services

Services Which REIT Can Provide Through IK or TRS

- Customary Services for Market
 - Maid services
 - Reserved or managed parking facilities

Navigating REIT Pitfalls

Impermissible Services

Services Which REIT Can Provide Through IK or TRS

- Customary Services for Market
 - Maid services
 - Reserved or managed parking facilities

Impermissible Services Which REIT Can Provide Through IK or TRS

- Non-Customary Services
 - REIT cannot pay for services, nor be compensated as a result of such services

Navigating REIT Pitfalls

Impermissible Services

Independent Contractor Requirements (IK)

- An IK (person or company) may not own more than 35% of REIT
- One or more persons owning more than 35% of REIT cannot own more than 35% of IK
- IK cannot be an employee of the REIT
- REIT cannot have control over how IK performs duties


02

Prohibited Transactions



Prohibited Transactions

A REIT is subject to a 100% tax on net income derived from “Prohibited Transactions” under Sec. 857(b)(6)(A).



A Prohibited Transaction generally means net income produced from the sale or disposition of property as described in Sec. 1221(a)(1) (except foreclosure property).

- Usually referred to as “dealer property”
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Congressional intent was to prevent REITS from profiting from ordinary sales activities or acting as a “dealer” of real property transactions.

1221(a)(1) Dealer Property

- Sec. 1221(a)(1) refers to property held as inventory by the taxpayer or property “held by the taxpayer primarily for sale to customers in the ordinary course of the trade or business.”
- Facts and Circumstances test on whether the property is 1221(a)(1) property in the hands of the REIT.
- The Code does not provide guidance differentiating between dealer property or investment property. However, there are an abundance of cases that have analyzed the dealer/investor issue.
 - In *Malat*, the Supreme Court indicated that the purpose of 1221(a) is to “differentiate between the ‘profits and losses arising from the everyday operation of a business’ and the ‘realization of appreciation in value accrued over a substantial period time.’”
 - In *Graves* the 4th Fourth Circuit formulated eight factors to determine whether dealer property is present:
 1. *The purpose for which the property was acquired*
 2. *The purpose for which the property was held*
 3. *Improvements, and their extent, made to the property by the taxpayer*
 4. *The frequency, number, and continuity of sales*
 5. *The extent and substantiality of the transaction*
 6. *The nature and extent of the taxpayer’s business*
 7. *The extent of advertising or lack thereof*
 8. *The listing of the property for sale directly or through a broker*
 - In *Musselwhite*, the Tax Court held that “no one factor, or group of factors is determinative, and not all factors may be relevant to a particular case.”
 - Here, the Tax Court focused on the first two factors, and how the taxpayer reported the purchase of the initial investment and subsequent reporting of property.
 - The Taxpayer reported the property to governmental authorities as “investment” and reported no inventory. In addition, the Taxpayer reported no previous gross receipts but only capital gains and capital losses.

The Sec. 857(b)(6)(C) Safe Harbor

- Congress believed that REITs should have a safe harbor “within which they can modify the portfolio of their assets without the possibility that a tax would be imposed equal to the entire amount of the appreciation in those assets.”
- A prohibited transaction does not include the sale of real estate if the following are met (“safe harbor”):
 - The REIT must have held the property for at least two years;
 - Aggregate capital expenditures made by the REIT to the property in the two years preceding the sale cannot exceed 30% of the property's sales price;
 - No more than seven sales of property during the year by the REIT (the “seven-sales test”), or if more than seven sales;
 1. The total adjusted basis of the properties sold cannot exceed 10% of the REITs total assets (basis) at the beginning of the tax year;
 2. The total FMV of the properties sold cannot exceed 10% of the REITs total FMV at the beginning of the tax year;
 3. Substituting 20% for 10% in above *and* the three-year average bases of either basis of FMV for the tax year does not exceed 10% of the total basis or FMV.
- If more than seven sales, substantially all marketing and development expenditures must be incurred by an IK that generates no income to the REIT, or a TRS;
- The REIT has held the property for more than two years for production of rental income.

The Sec. 857(b)(6)(D) Safe Harbor – Timber REITs

Timber REITs possess their own Safe Harbor in the Code.

A prohibited transaction does not include the sale of real estate (timber) if the following are met (“safe harbor”):

- The REIT must have held the property for at least two years in connection with the trade or business of producing timber;
- Aggregate capital expenditures made by the REIT to the property in the two years preceding the sale:
 - That are includible in the basis of the timber property (other than timberland acquisition expenditures), and
 - Are directly related to operation of the property for the production of timber or for the preservation of the timberland;
 - Cannot exceed 30% of the property’s net selling price.
- Aggregate capital expenditures made by the REIT to the property in the two years preceding the sale:
 - That are includible in the basis of the timber property (other than timberland acquisition expenditures), and
 - NOT directly related to operation of the property for the production of timber or for the preservation of the timberland;
 - Cannot exceed 5% of the property’s net selling price.
- No more than seven sales of property during the year by the REIT (the “seven-sales test”), or if more than seven sales;
 - 1. The total adjusted basis of the properties sold cannot exceed 10% of the REITs total assets (basis) at the beginning of the tax year;
 - 2. The total FMV of the properties sold cannot exceed 10% of the REITs total FMV at the beginning of the tax year;
 - 3. Substituting 20% for 10% in above *and* the three-year average bases of either basis or FMV for the tax year does not exceed 10% of the total basis or FMV.
- If more than seven sales, substantially all marketing and development expenditures must be incurred by in IC that generates no income to the REIT, or a TRS.
- The sales price is not based on income or profits.

Sec. 857(b)(6)(C)&(D) Safe Harbor Special Rules

- The sale of multiple properties to the same buyer will constitute one sale
- Sales do not include transactions with a net selling price of less than \$10,000
- Mortgage REITs
 - The holding period for property acquired through a deed in lieu or a foreclosure includes the period the REIT held the loan which secured the real estate
 - “Expenditures” in 857(b)(6)(C)&(D) does not include advances on a loan made by the REIT

Considerations

REIT Liquidations

- Generally, the sale of real estate properties by a REIT pursuant to a plan of liquidation will not be a prohibited transaction

Taxable REIT Subsidiaries (TRS)

- While subject to the normal C Corporation tax regime and tax rate, properties sold by a TRS are not prohibited transactions

Interplay With Section 1031

- The IRS has maintained that like-kind exchanges qualifying under Sec. 1031 will generally not be a prohibited transaction nor count towards the seven-sale test
- However, boot generally will be a sale

Mortgage REITs & Prohibited Transactions

- Dealer property in the case of mortgage REITs would generally include sales, exchanges or transfers of debt, equity or hedging asset in the ordinary course of business
- Facts and circumstances test
- Factors to consider:
 - REIT originates the loan or has exclusive sources of loans to invest not available to the public
 - Acquires loans with the intent to resell
 - Regularly sells to customers through marketing the loans
 - Creates a market, *i.e.*, merchandising, to sell the loans
 - Has a fixed place of business and markets itself as a dealer in loans
- Sec. 857(b)(6)(C) safe harbor available
 - Normally, the two-year hold and seven-sales test will be used or sales that don't exceed 10% value or basis

Mortgage REITs & Prohibited Transactions: Considerations

- Many mortgage REITs will wish to originate loans to borrowers
- Many mortgage REITs will wish to collect fee income for originating, servicing, or extending the loan in addition to fees for exiting loans
 - This may generate income test considerations as well as considerations surrounding the mortgage REITs activities as a “dealer”
- Mortgage REITs may wish to syndicate or participate out loans in which they originate or invest
 - Are syndication transactions prohibited transactions?
 - Are participations prohibited transactions?
- Considerations for loan modifications and debt workouts that generate taxable transactions (sales)
 - Occasional defaults probably not “dealer”
- Mortgage REITs may wish to engage in securitization transactions
 - Sale of regular interests by a REMIC
 - CMO Trusts

03

Dividends & Unrecaptured Section
1250 Gain



REIT Dividends

Agenda

- What is a dividend?
- Why do REITs and their shareholders care about dividends?
- How do you calculate the amount of a dividend for C Corporations?
- What special dividend rules are there for REITs and their shareholders?
- What are the timing rules for a REIT dividend paid deduction and Shareholder income?
- What are the various type of REIT dividends and their characterization ?
- What are the penalties for failure to pay sufficient REIT dividends?
- What are the potential remedies for failure to pay sufficient dividends?

Navigating REIT Pitfalls

REIT Dividends

Why do REITs and their Shareholders care about dividends?

- REIT distribution requirements?
- REIT Dividend Paid Deduction
- REIT shareholders' Dividend Income

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REIT Dividends

How do calculate a dividend for a Corporation?

- Section 316 defines a dividend as any distribution of property, including cash, made by a corporation to its shareholders out of its current earnings and profits or out of accumulated earnings and profits
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- Section 301(c) provides that the amount of the distribution which is a dividend as defined in section 316 shall be included in gross income; the portion of the distribution which is not a dividend shall be applied and reduced the adjusted basis of the stock and any amount in excess of the adjusted stock basis shall be treated as gain from the sale or exchange of this stock
- Section 312 provides for special rules for computing earnings and profits of which the most common is section k, the effect of depreciation on earnings and profits

Navigating REIT Pitfalls

REIT Dividends

What are the special rules for REIT dividend paid deduction (DPD) ?

Section 561(a) provides DPD shall be the sum of dividends paid during tax year and consent dividends.

- Section 562 (a) provides dividend shall include only dividends as described in section 316
- PATH ACT changed the E&P rules for purposes of determining REIT's dividend paid deduction (DPD) as well as shareholders' treatment of distributions
- Under section 562 (e)(1), E&P for DPD purposes, for any taxable year, but not accumulated E&P, is increased by the amount of gain on the sale of real property taken into account in determining taxable income for such year. Thus, taxable gain over E&P gain is included in E&P
- Under section 857 (d)(1)(A), REIT's E&P for any taxable year but not its accumulated E&P is not reduced by amounts not allowable for income tax purposes which would otherwise have reduced E&P. Thus, excess of E&P depreciation over tax depreciation, capital loss and permanent tax differences do not reduce E&P. Tax depreciation in excess of E&P depreciation add back difference to E&P

Navigating REIT Pitfalls

REIT Dividends

What are the rules or Section 301 Shareholder dividends?

- Under Section 857 (d)(1), for the purposes of determining dividend income to REIT's shareholders, current year E&P, but not accumulating E&P, is not reduced by any amount which is not allowable in computing the REIT's taxable income for the year and was not allowable in computing its taxable income for any prior year
- Thus, if tax gain on sale exceeds E&P gain on sale, use E&P gain. If tax depreciation exceeds E&P depreciation, use E&P depreciation. If E&P gain exceeds tax gain, use E&P gain. If E&P depreciation exceeds tax depreciation, use E&P depreciation. Such amounts also includes deferred items such as capital losses or section 163j interest expense and permanently disallowed items
- Under section 857 (d)(2), a REIT shall be deemed to have sufficient E&P to treat as a dividend any distribution to the extent of any distribution required by section 4981

Navigating REIT Pitfalls

REIT Dividends

Dividend Paid Deduction & Shareholder Dividend Income Difference

- **Example #1:**

- Assume REIT has \$2,000,000 in gross income; bonus, section 179 D and regular depreciation of \$500,000 and E&P deprecation of \$300,000 and distributes \$1.6M
- For DPD purposes, the REIT's E&P is \$1,700,000 even though Taxable income is \$1,500,000. Thus, DPD of \$1.6M zeros out taxable income. REIT will have \$100,000 accumulated E&P
- For Dividend Income purposes, REIT E&P is \$1.7M

- **Example #2:**

- For DPD purposes, REIT has taxable ordinary income of \$2M and taxable capital gain of \$1M. For E&P purposes, the gain is \$500,000 (since E&P basis is higher). Thus, REIT has taxable income of \$3M and E&P of \$2.5M. REIT distributes its taxable income of \$3M. Without the special rule in section 562 (e)(1), REIT would have insufficient E&P to zero out its taxable income. Under section 562(e)(1), the REIT's E&P is \$3M so it zeros out its taxable income
- For Dividend Income purposes, REIT has E&P of \$2.5M and a \$3M distribution will result in a dividend income of \$2.5M and a \$500,000 ROC

Navigating REIT Pitfalls

REIT Dividends

What are the timing rules for a REIT dividend paid deduction?

- Current year distributions – Cash or property paid during the calendar year
- Section 857(b)(9) dividends – Any dividend declared by a REIT in October, November, or December of any calendar year and payable to shareholders of record on a specific date in such a month shall be deemed to have been received by each shareholder on December 31 of such calendar year and shall be deemed to have been paid by such REIT on December 31 of such calendar year, if paid during January of the following year,

Section 858 dividends – If a REIT so elects, on a timely filed return, declares a dividend and distributes the dividend in the 12-month following the prior year-end and not later than the date of the first regular dividend made after such declaration, the dividend will be treated as paid during the prior year. Such dividend will be included in the gross income of the shareholder for the taxable year in which the dividend is received by them.

Consent Dividend – Section 565 – Hypothetical dividend payable only with respect to common stock. Each shareholder must consent to treat the amount as a dividend and is simultaneously treated as a capital contribution of such dividend amounts. Consent dividend must not be preferential, cannot exceed E&P, and is reported on Forms 972 and 973

Navigating REIT Pitfalls

REIT Dividends

What are the various types of REIT dividends and their income characterization?

- Ordinary income dividends
- Capital gains dividends
- Retained capital gains dividends
- Stock dividends
- Preferential dividends

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REIT Dividends

Capital Gains Dividends

- A capital gain dividend is any dividend which is designated by the REIT as such in a written notice to its shareholders within 30 days of year-end, usually by sending out 1099 DIV. The amount of the designated capital gain cannot exceed the total amount of the REIT's capital gain for the year
- Retained Capital Gains – Section 857(b)(3), a REIT may retain its capital gains and pay a corporate tax on such undistributed capital gains. If the REIT pays the tax on the retained capital gains within 30 days of year-end and designate such amounts as undistributed capital gains within 60 days of year-end, every such shareholder shall be deemed to have paid the tax imposed on the undistributed capital gain and shall be allowed a credit or refund for such taxes deemed to have been paid by him
- The shareholders' adjusted basis of such shares shall be increased by the difference between the amount of such gains and the taxes deemed paid by the shareholders with respect to such gains

Navigating REIT Pitfalls

REIT Dividends

Stock Dividends

- Section 305(b) – A distribution of stock to common shareholders will fall under section 305 (b) if such distribution is a distribution in lieu of money, is a disproportionate distribution, the distribution results of the receipt of stock by some shareholders while other shareholders receive cash
- Revenue Procedure 2017-45 provides a safe harbor in which a qualifying elective cash/stock dividend generally is treated as a taxable distribution in its entirety and entitles the REIT to a full dividend paid deduction. The value of the stock received by any shareholder in lieu of cash is deemed to equal the amount of cash for which the stock is substituted so that the special dividend amount is equal on a per share basis regardless of whether the stockholder receives cash or stock
- Some REITs have paired the special dividend with a reverse stock split to mitigate the potential negative market response to having additional shares outstanding E.G. earning per shares dilution. The effect of a reverse stock split is to reduce the number of outstanding shares back to essentially the same number that existed pre-special distribution. Reverse stock split is generally treated as a tax-free recapitalization. if a reverse stock split is to be done, there should be some time between the stock dividend and the declaration of the reverse stock split

Navigating REIT Pitfalls

REIT Dividends

Preferential Dividends

- PATH ACT section 562(c) provides that a dividend that is preferential is not treated as eligible for DPD. A preferential dividend occurs when the dividend is paid such that it is not pro rata within a class on each distribution date. A preferential dividend that is not deductible and will not allow REIT to meet its DPD requirements and thus jeopardizes the ability of a REIT to maintain its REIT status
- PATH ACT section 562 (c)(1) for publicly offered REITs, which provides such REIT is no longer subject to the preferential dividend disallowance. Section 562 (e) provides that with respect to private REITs, Treasury has discretion to provide an appropriate remedy to cure such failure, based on determination such failure was inadvertent or due to reasonable cause and not willful neglect
- There is disagreement as to whether a divergent sharing of certain expenses in a REIT-Fund structure can create preferential dividend. In PLR 2000144022, IRS ruled that a class A/B structure where different classes of REIT stock reflected a different sharing of management fees would result in preferential dividends. IRS disregarded the separate, formal rights of the classes. Similar concerns occur with regards to Fund-REIT structures where partners share burdens of management fees or other REIT expenses differently

Navigating REIT Pitfalls

REIT Dividends

What are the penalties for failure the REIT distribution requirements?

- Failure to meet the 90% Distribution Test
- Failure to distribute 100% of Taxable Income
- Failure to make the required Section 4981 distributions

Navigating REIT Pitfalls

REIT Dividends

Failure to Meet 90% Distribution Requirement

- 857 (a)(1) provides that a REIT does not qualify unless its DPD, excluding capital gains dividends, equals or exceeds the sum of 90% of its taxable income, excluding net capital gains and 90% of its net income from foreclosure property over the tax imposed on the foreclosure property minus any “excess non-cash income”
- Thus, unless a relief provision is available, failure to meet the 90% distribution requirement will cause the loss of REIT status

Navigating REIT Pitfalls

REIT Dividends

Failure to Distribute 100% of REIT Taxable Income

- If a REIT fails to distribute 100% of its taxable income but still meets the 90% distribution requirement, the REIT will be subject to pay regular C corporation tax with respect to the taxable income that it fails to distribute

Navigating REIT Pitfalls

REIT Dividends

Failure to Make Section 4981 Required Distributions

- Section 4981 imposes a non-deductible 4% excise tax on the REIT to the extent of any excess of “required distributions” over the distributed amount for the calendar year
- Required distribution equals the sum of 85% of ordinary income plus 95% of the net capital gain. It is also increased by any excess of their grossed up required distribution for the preceding calendar year over the distributed amount for the preceding calendar year
- The “distributed amount” with respect to any calendar year is the sum of the DPD for such calendar year. For this purpose, section 858 does not apply

Navigating REIT Pitfalls

REIT Dividends

What are the various possible remedies for failure to meet the REIT distribution requirements?

- Section 856(g)(5)
- Deficiency dividends

Navigating REIT Pitfalls

REIT Dividends

Section 856(g)(5) Failure

- 856(g)(5) provides that if a REIT fails to meet dividend requirements and such failure was due reasonable cause and not willful neglect and if the corporation pays a penalty of \$50,000 for each failure, the REITs status will not be terminated
- Reasonable cause occurs if the REIT exercises ordinary business care and prudence in attempting to satisfy the requirement

Navigating REIT Pitfalls

REIT Dividends

Deficiency Dividend

- Under Section 860, if within 90 days of a “determination”, usually the settlement of an IRS audit, that a REIT did not distribute sufficient dividends to meet the 90% distribution requirement, the REIT may make the necessary dividend distribution with respect to the taxable year in which it failed to meet the requirement and are cure the failure
- REIT must file a claim within 120 days of the determination and pay an interest charge

Navigating REIT Pitfalls

REIT Dividends

Unrecaptured Section 1250 Gain

- What is unrecaptured section 1250 gain?
- How is unrecaptured 1250 gain calculated? Section 1(h) provides the calculation for whether the 25% unrecaptured tax rate applies
- What is an example of unrecaptured section 1250 gain?

Navigating REIT Pitfalls

REIT Dividends

Unrecaptured Section 1250 Gain

- Section 1(h) provides for a maximum 25% tax rate on the sale of real estate that has been depreciated under section 1250. The unrecaptured 1250 gain is the part of the gain from the sale of a depreciable property that relates specifically to the depreciation deduction previously claimed

Navigating REIT Pitfalls

REIT Dividends

Unrecaptured Section 1250 Gain

Section 1(h) – Maximum capital gains rate. (1) In general, if a taxpayer has a net capital gain for any taxable year, the tax imposed by this section for such taxable year shall not exceed the sum of –

- (A) a tax computed at the rates and in the same manner as if this subsection had not been enacted on the greater of – (i) taxable income reduced by the net capital gain; or (ii) the lesser of – (I) the amount of taxable income taxed at a rate below 25 percent; or (II) taxable income reduced by the adjusted net capital gain,
- (B) 0 percent of so much of the adjusted net capital gain (or, if less, taxable income) as does not exceed the excess (if any) of – (i) the amount of taxable income which would (without regard to this paragraph) be taxed at a rate below 25 percent, over (ii) the taxable income reduced by the adjusted net capital gain;
- (C) 15 percent of the lesser of – (i) so much of the adjusted net capital gain (or, if less, taxable income) as exceeds the amount on which a tax is determined under subparagraph (B) , or (ii) the excess of – (I) the amount of taxable income which would (without regard to this paragraph) be taxed at a rate below 39.6% over (ii) the sum of the amounts on which a tax determined under subparagraph A and B

Navigating REIT Pitfalls

REIT Dividends

Unrecaptured Section 1250 Gain

- D – 20% of the adjusted net gain or if less taxable income in excess of the sum of the amount on which tax is determined under subparagraphs B&C
- E – 25% of the excess if any of I) the unrecaptured 1250 gain or if less the net capital gain excluding qualified dividends, II) the excess, if any, of the sum of the amount on which tax is determined under subparagraph (A) plus net capital gain over taxable income. Net capital gains includes qualified dividend income

Navigating REIT Pitfalls

Unrecaptured Section 1250 Gain

- **Example**

- Taxable Income – 165,000
- Net Capital Gains – 171,000
- E&P – 162,000
- Unrecaptured Section 1250 gain – 28,000

- 1A (li) greater of taxable income less net capital gains=\$0 or lesser of taxable income taxed at a rate below 25% \$(0) or (ii) taxable income less capital gains=0
- D – 20% of taxable income
- E – 25% of excess of unrecaptured 1250 gain(28,000) over excess if any of net capital gains over taxable income(6000)

- Total tax 25% times 6000 and 20% times 159,000

Contact

Forvis Mazars

Craig Stern

Managing Director, Tax

P: 212.375.6556

craig.stern@us.forvismazars.com

Michael Hill

Managing Director, Tax

P: 601.351.1109

michael.hill@us.forvismazars.com

Howard Landsberg

Partner, Tax

P: 212.375.6604

howard.landsberg@us.forvismazars.com

Patrick Oberlies

Senior Manager, Tax

P: 646.687.0658

patrick.oberlies@us.forvismazars.com

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