

November 16, 2016

SEC Issues Interpretive Guidance for Up-C Structures Permitting Holding Period Tacking under Rule 144 for Unit-for-Share Exchanges

On November 1, 2016, the staff of the Securities and Exchange Commission (the “SEC”) issued interpretive guidance¹ concluding that in Up-C structures the holding period of LLC units or other partnership interests (the “OP Units”) in the subsidiary operating entity (“OP”) exchanged for publicly traded shares (the “Pubco Shares”) of the parent corporation (“Pubco”) may, under certain circumstances, be tacked for the purposes of compliance with the holding period requirements of Rule 144 (the “Up-C Letter”). The Up-C Letter is consistent with the SEC staff’s position in the recent *Bank of America, N.A.* letter from March 2016,² where the staff reached a substantially similar conclusion in the context of an UPREIT structure (the “UPREIT Letter”). However, unlike the guidance provided by the UPREIT Letter, the Up-C Letter does not require that the governing documents establishing the Up-C structure (the “Governing Documents”) include a cash exchange option, but rather that if there is one, the option must be exercisable at Pubco’s or OP’s discretion and not the unit holder’s.

Those hoping to take advantage of this interpretive guidance will need to plan accordingly at the time of acquisition of the original OP units. In issuing the Up-C Letter, the staff relied on certain representations in the request letter, including that:

- OP unit holders paid the full purchase price for the OP Units at the time they were acquired from OP;
- the Governing Documents contemplate and provide the terms for the exchange of OP Units for Pubco Shares such that each OP unit holder has the same economic risk as if it were a holder of the Pubco Shares during the entire period it holds the OP Units; and
- the OP Units were fully paid for at the time of acquisition thereof and no additional consideration is paid by the OP unit holders for the Pubco Shares.

While the staff’s conclusion may have been expected based on the recently issued UPREIT Letter, the staff’s guidance in the Up-C Letter provides further clarity to sponsors and unit holders considering the use of an Up-C structure. As a result of this SEC staff guidance, and, provided that the holding period under Rule 144 applicable to the OP Units has already been satisfied, unit holders will be able to mitigate the upfront tax consequences associated with exchanging OP Units due to the ability to sell the resulting Pubco Shares immediately without waiting for the expiration of a new holding period under Rule 144. Additionally, the applicable Pubco may no longer feel compelled to file an exchange or resale shelf registration statement with respect to the OP Units to allow unit holders to avoid the holding period requirements of Rule 144.

Please feel free to contact any member of Ropes & Gray’s [securities & public companies](#) practice group or your usual Ropes & Gray contact with any questions about this Alert.

¹ The request can be found [here](#) and the staff’s interpretive guidance is [here](#).

² *Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated*, SEC No-Action Letter (March 14, 2016).