Securities Act of 1933
Section 5
Rule 144

October 28, 2016

VIA ELECTRONIC SUBMISSION

David Fredrickson, Chief Counsel
Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Request for Rule 144 Interpretive Guidance

Dear Mr. Fredrickson:

We are seeking interpretive guidance with respect to the application of Rule 144 under the Securities Act of 1933 (the "***Securities Act***") to the exchange of units ("***OP Units***") in an umbrella tax partnership (the "***OP***") for shares ("***Corporation Shares***") of the parent corporation (the "***Corporation***") in an UP-C structure as described below. More specifically, we request that the staff of the Division of Corporation Finance (the "***Staff***") concur with our view that, under the facts described in this letter, the Rule 144(d) holding period for Corporation Shares acquired upon an exchange of OP Units for such Corporation Shares commences upon the holder's acquisition of (including payment of the full consideration for such OP Units under Rule 144(d)(1)) the OP Units.[1] Our request for guidance is limited to the UP-C structure described herein and does not extend generally to other situations where a security is exchangeable for the security of another issuer.

UP-C Structure

[1] Reorganization transactions to implement an UP-C structure frequently include a conversion or exchange of the equity interests in an existing tax partnership into or for OP Units that are exchangeable for Corporation Shares as described herein. We are not seeking interpretive guidance as to whether or in what circumstances any pre-reorganization period prior to the establishment of the UP-C structure described herein may be eligible for inclusion in the OP Unitholder's holding period under Rule 144(d).

Businesses that are taxed as partnerships for U.S. federal income tax purposes frequently employ the Umbrella Partnership – C-Corporation ("***UP-C***") structure described in greater detail below when they determine to conduct a public offering of, and list, their common equity securities. Rather than offer to public investors a direct investment in the existing tax partnership, which would frequently result in adverse federal income tax consequences to the pre-IPO owners of the business, such businesses instead frequently form a separate entity that is treated as a corporation for U.S. federal income tax purposes which publicly offers its common stock to public investors and in turn acquires a corresponding equity interest in the existing tax partnership. As a result, the pre-IPO owners of the business continue to hold their equity interests directly in the tax partnership and public investors hold an indirect equity interest in the tax partnership through the corporation.

In an UP-C structure, the Corporation is an entity organized as a corporation or other legal form that is treated as a corporation for U.S. federal income tax purposes and the OP is organized as a limited partnership, limited liability company or other legal form that is treated as a partnership for U.S. federal income tax purposes. The Corporation is a holding company that has no material assets other than its interests in the OP. The OP in turn itself holds directly or indirectly all of the material assets indirectly held by the Corporation (the "***Company Assets***"). As the Corporation itself holds a number of OP Units that is equal to the number of Corporation Shares it has issued and outstanding, each OP Unit represents the same proportional interest in the Company Assets as a Corporation Share. The Corporation Shares are therefore economically equivalent to the OP Units.

OP Units are also held by persons other than the Corporation ("***OP Unitholders***"), in whose hands they are exchangeable on a one-for-one basis for Corporation Shares (or such other ratio that maintains economic parity between OP Units and Corporation Shares). The initial OP Unitholders are the pre-IPO owners of the business, who may be founders, strategic investors, management or other equityholders. Pre-IPO owners may acquire OP Units through a reclassification or conversion of their interests in an existing tax partnership which becomes the OP or in exchange for their contribution of their interests in the business to a newly-formed OP. The OP Units are issued to OP Unitholders in transactions exempt from registration under the Securities Act.[2]

There is no public market for OP Units. They are restricted securities for the purposes of Rule 144 and their transfer is also frequently subject to contractual restrictions, such as restrictions on the ability to transfer without the consent of the OP's general partner, managing

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[2] We do not seek interpretive guidance as to whether or under what circumstances an exemption from registration under the Securities Act is available for the offer or sale of OP Units at the time of the establishment of an UP-C structure or whether or under what circumstances any such offer or sale may be integrated with any concurrent public offering of Corporation Shares. We believe that the availability of any such exemption, and the analysis as to whether or not any such offers or sales of OP Units would be integrated with any concurrent public offering of Corporation Shares, should be determined in accordance with otherwise generally applicable principles and that the determination of the Rule 144(d)(1) holding period for Corporation Shares acquired upon an exchange of OP Units may appropriately be analyzed separately therefrom.

member or functional equivalent. However, as noted, OP Units are exchangeable at the option of the OP Unitholders on a one-for-one basis for Corporation Shares (or such other ratio that maintains economic parity between OP Units and Corporation Shares). Any exchanges of OP Unit are required to be conducted in this manner as contemplated by and provided for in the original organizational or other documentation establishing the UP-C structure (the "***UP-C Governing Documents***"). In certain structures, the Corporation or the OP may in its sole discretion elect to deliver instead cash equal to the market value of the Corporation Shares otherwise deliverable in exchange for such OP Units.[3] Where this feature is present, any determination to deliver cash in lieu of Corporation Shares is entirely at the discretion of the Corporation or the OP and not the OP Unitholder.

OP Units are exchanged for Corporation Shares at a ratio of one-for-one (or another fixed ratio that maintains economic parity between the Corporation Shares and the OP Units) because, as described above, the resulting Corporation Share represents the same percentage right to the pool of assets held by the OP as does one OP Unit. Indeed, assuming liquidation of the Corporation and the OP, holders of Corporation Shares and OP Units would be entitled to the same percentage right to the distributable profits of the OP upon dissolution of the OP. The Corporation Share received upon exchange is therefore economically equivalent to the exchanged OP Unit.[4] For purposes of this letter, we have assumed that neither the issuance of Corporation Shares upon the exchange of OP Units nor the resale of Corporation Shares issued upon the exchange of OP Units is registered under the Securities Act.

The Corporation controls the OP, typically by serving as its general partner or managing member. It is common in an UP-C structure for OP Unitholders to also hold a separate class of non-economic, voting securities in the Corporation that afford them with voting power in the Corporation. Typically, these voting securities are designed to provide the OP Unitholders with voting power in the Corporation that is commensurate with the voting power they would receive

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3 We note that the redemption feature described in *Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated,* which is customary in UPREITs, contemplates that OP Units are redeemable for cash, subject to the REIT's option to settle the redemption by delivering REIT Common Stock. In a typical UP-C structure, the exchange feature is less uniform. It may be structured similarly to the typical UPREIT where the "default" settlement mechanism is cash unless the company elects to settle with Corporation Shares, it may be that the "default" is that exchanges are settled with Corporation Shares unless the company elects to settle with cash, or it may be that the company must settle with Corporation Shares and has no right to cash settle. We do not believe that the Rule 144 analysis should be impacted by whether the "default" settlement mechanism is cash or stock, or whether alternatively there is no right on the company's part to cash settle as the OP Unitholders have no discretion over the settlement mechanism.

4 As an example, assume the OP has 100 OP Units outstanding, 70 of which are held by the Corporation and 30 of which are held by other OP Unitholders. The Corporation would have 70 Corporation Shares outstanding. Effectively, the holder of each Corporation Share and each OP Unit would have a 1% interest in the Company Assets. If the holders of all 30 OP Units not held by the Corporation were exchanged for Corporation Shares, the Corporation would now hold all 100 OP Units outstanding and there in turn would be 100 Corporation Shares outstanding (70 of which were previously outstanding and 30 of which would now be held by the holders of the 30 OP Units that were exchanged). The holders of the 30 Corporation Shares received upon exchange of the 30 OP Units would still have a 30% interest in the Company Assets, just as they did before such exchange. In the event of a stock split, stock dividend, recapitalization or similar capital adjustment by the Corporation, the exchange ratio is typically adjusted to maintain economic parity between Corporation Shares and OP Units.

if their OP Units were fully exchanged for Corporation Shares. While the precise mechanics vary, this may be accomplished through the redemption from an exchanging OP Unitholder of such non-economic, voting securities at the time OP Units are exchanged, through the concurrent surrender or exchange of such non-economic, voting securities together with the OP Units, or through a formulaic reduction in the voting power such non-economic, voting securities afford the holder.

By design, when a holder of OP Units exchanges such units for Corporation Shares, this transaction may result in increases in the tax basis of the assets of the OP that increase (for tax purposes) depreciation and amortization deductions and therefore reduce the amount of tax that the Corporation is required to pay in the future. It is common in an UP-C structure for the Corporation to share a percentage of any such tax benefits with the exchanging holder. This contractual arrangement (typically set forth in a tax receivable agreement) is separate from such holder's equity ownership and any such tax sharing payments do not depend upon such holder continuing to hold any OP Units or Corporation Shares. We do not believe that the fact that Corporation receives a tax benefit as a result of the exchange of OP Units for Corporation Shares impacts the conclusion that the Corporation has no material assets other than its interest in the OP or the corollary conclusion that each OP Unit represents the same proportional interest in the Company Assets as does a Corporation Share.

Although these provisions are not uniform, many UP-C structures permit the Corporation to limit exchanges in limited circumstances, such as where these would violate applicable law or the company's trading policies. In addition, where there are a large number of OP Unitholders, in order to ensure that the OP is not treated as a "publicly traded partnership" for United States federal income tax purposes, exchanges may be required to comply with certain additional restrictions and procedures, such as a requirement that exchanges may only occur on quarterly exchange dates and upon an OP Unitholder's provision of prescribed advance notice of an election to exchange. All such limitations are provided for in the UP-C Governing Documents and are enforced at the Corporation's sole discretion. In the absence of the requested interpretive advice, it has been customary in UP-C structures for the Corporation to register under the Securities Act the issuance of Corporation Shares to an OP Unitholder upon exchange of OP Units or the OP Unitholder's resale of such Corporation Shares in order to avoid subjecting OP Unitholders to a new holding period under Rule 144.

OP Unitholders generally exercise their exchange rights to liquidate their long position in the Corporation's shares. Because no public market exists for the sale or exchange of OP Units, OP Unitholders seeking to achieve this goal must exercise their exchange rights. An OP Unitholder may decide to defer the exchange of OP Units and hold OP Units indefinitely for various reasons, including furthering tax or estate planning goals or objectives. Where it is present, the right to receive payment under a tax receivable agreement is a separate contractual entitlement from the ownership of OP Units, which may or may not belong to the OP Unitholder, and an exchange gives rise to payments only in the event that the Corporation realizes specified cash tax savings in future periods. Accordingly, the presence or absence of a tax receivable agreement is likely to be ancillary to other considerations in an OP Unitholder's decision of when or whether to exchange.

A diagram depicting a typical UP-C structure is set forth on Annex A.

Accordingly, an UP-C structure as to which we are seeking the Staff's interpretive guidance has the following characteristics:

- All of the Company Assets are owned directly or indirectly by the OP;
- The OP (directly or through its subsidiaries) is the entity through which the Corporation operates its business;
- The Corporation owns OP Units, which OP Units are the only material assets of the Corporation, and the Corporation serves as the general partner, managing member or functional equivalent of the OP (or controls such person);
- OP Unitholders own OP Units that were acquired in non-public offerings and are restricted securities for the purposes of Rule 144;
- One OP Unit is exchangeable for one Corporation Share (or such other fixed number of Corporation Shares that maintains economic parity between Corporation Shares and OP Units);
- OP Units represent the same right to the same proportional interest in the same underlying pool of assets;
- The Corporation Shares are registered under Section 12 of the Securities Exchange Act of 1934 (the "***Exchange Act***") and are publicly traded on a national securities exchange;
- There is no public market for OP Units, which are restricted securities under Rule 144 and which are also frequently subject to contractual restrictions on transferability;
- OP Units held by OP Unitholders are exchangeable on a one-for-one basis for Corporation Shares (or such other ratio that maintains economic parity between OP Units and Corporation Shares) or, in certain structures and in the sole discretion of the Corporation or the OP, for cash equal to the market value of such Corporation Shares;
- The exchange conducted in this manner is contemplated by and the terms are provided for in the original UP-C Governing Documents; and
- OP Unitholders who exchange OP Units for Corporation Shares are not required to pay any additional consideration for Corporation Shares.

Discussion

Rule 144 provides a non-exclusive safe harbor from the definition of "underwriter" in Section 2(a)(11) of the Securities Act. If a person who is not an issuer of securities or a securities dealer is not an "underwriter" in connection with a sale of securities, that person is generally eligible to enter into that sale of securities without registration under the Securities Act in reliance on the exemption from registration found in Section 4(a)(1) of that Act (as that provision exempts "transactions by any person other than an issuer, underwriter, or dealer"). A person

satisfying the conditions of Rule 144 may therefore claim (absent a scheme to evade registration) that the Section 4(a)(1) exemption is available for that sale of securities.

Rule 144(b) provides the conditions that must be met for sales of restricted securities under the Rule 144 safe harbor. Among other requirements (including certain requirements applicable to affiliates of the issuer), Rule 144(b) provides that a person may rely on the safe harbor if the holding period requirement set out in Rule 144(d)(1) has been satisfied. The relevant Rule 144(d)(1) holding periods are as follows: (i) if the Corporation is, and has been for at least 90 days prior to the sale, subject to the reporting requirements of the Exchange Act, a minimum of six months must elapse between the date of the acquisition of the securities and any resale of such securities; and (ii) if the Corporation has not been subject to the reporting requirements of the Exchange Act for at least 90 days prior to the sale, a minimum of one year must elapse between the date of the acquisition of the securities and any resale of such securities. For the reasons set forth below, we believe that an OP Unitholder's Rule 144(d) holding period for Corporation Shares acquired upon an exchange of OP Units for such Corporation Shares commences upon the OP Unitholder's acquisition of (including payment of the full consideration for such OP Units under Rule 144(d)(1) the OP Units rather than at the time the OP Units are exchanged for Corporation Shares.

It is well-settled that the Rule 144(d)(1) holding period generally commences at the time a person acquires and pays the full consideration for a security. And it is similarly well-settled that the holding period requirement is intended to ensure that a holder of restricted securities has assumed the economic risks of an investment, such that the person is not acting as a conduit for the sale to the public of unregistered securities on behalf of the issuer. Because the OP Units and Corporation Shares acquired upon exchange represent the same proportionate right to the assets of the OP, we believe that the exchange does not result in any change to the economic risk of the investment in the underlying assets.[5]

Like the facts presented in *Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated*, the exchange of OP Units for Corporation Shares precisely replicates the proportional share of the assets owned by the OP Unitholder; OP Units are exchanged for Corporation Shares at a ratio of 1:1 (or another fixed ratio that maintains economic parity between the Corporation Shares and the OP Units) because the resulting Corporation Share represents an identical percentage right to the pool of assets held by the OP as does one OP Unit. Because the exchange is contemplated by and the terms are provided for in the original UP-C Governing Documents, the OP Unitholder is at the same economic risk during the entire period it holds the OP Units, and the OP Unitholder retains the same economic risk and the same proportionate share of the underlying assets after the exchange. In other words, from the date that the OP Unitholder pays the full consideration for the OP Units to the date of the exchange of the OP Units for Corporation Shares. Therefore, we believe the Rule 144(d) holding period for Corporation Shares acquired upon an exchange of OP Units for such Corporation Shares should commence upon the OP Unitholder's acquisition of (including payment of the full consideration for such OP Units under Rule 144(d)(1)) the OP Units.

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[5] *See, e.g.*, Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated, SEC No-Action (March 14, 2016) and L. Perrigo Company, SEC No-Action (November 21, 1993); *cf.* Securities Act Rules Compliance and Disclosure Interpretation 132.12 (January 26, 2009).

In contrast to the hypothetical issuer presented in *Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated*, the Corporation in an UP-C structure is not classified for federal income tax purposes as a real estate investment trust (a "***REIT***") and may (indirectly through the OP) be primarily engaged in a business other than the ownership of real estate assets. We do not believe that these distinctions are relevant to the application of Rule 144(d). More specifically, as is the case with the Unit Holder that exchanges OP Units for REIT Common Stock in *Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated*, an OP Unitholder who exchanges OP Units for Corporation Shares in an UP-C Structure assumed the economic consequences of ownership of the Company Assets upon the acquisition of the OP Units and continues to retain the same economic risk and the same proportionate share of the Company Assets following the exchange. The principle reflected in *Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated* is that a new holding period should not be imposed as a consequence of an exchange of OP Units for the corresponding publicly-traded security where, due to the unique characteristics of the umbrella partnership structure, such exchange does not interrupt or change the economic risk of ownership of the Company Assets borne by the holder effecting the exchange. In an UP-C structure, notwithstanding the differences in tax consequences that attend to the ownership of OP Units and Corporation Shares, the fundamental decision of whether and to what extent a holder will assume the economic consequences of ownership of the Company Assets is made upon the holder's acquisition of the OP Units, and a holder of OP Units who exchanges these units for Corporation Shares continues to bear the same economic risk and own the same proportionate share of the Company Assets following the exchange as such holder did prior.

Similarly, we do not believe the presence of a tax receivable arrangement whereby the Corporation may, through the mechanism of contractual payments not tied to continued equity ownership, share with an exchanging OP Unitholder a percentage of any tax benefits it receives as a result of such exchange alters the determination of when the holding period for Corporation Shares received upon such exchange commenced. To the extent such contractual payments may be viewed as additional consideration, they would constitute the payment of additional consideration **by** the issuer **to** the exchanging securityholder (as opposed to the reverse).

We also do not believe that the application of Rule 144(d) is altered by the fact that an OP Unitholder may also hold non-economic voting securities in the Corporation that are redeemed, surrendered or exchanged, or as to which the voting power is formulaically reduced, at the time of an exchange of OP Units for Corporation Shares. In particular, we do not view the presence of voting power at the Corporation in the hands of an OP Unitholder pre-exchange as in any way detracting from the essential conclusion that economic consequences of ownership of Corporation Shares commences upon the acquisition of OP Units by an exchanging OP Unitholder. Indeed, holding an OP Unit together with a non-economic voting security of the Corporation more closely replicates the economic and voting rights of a Corporation Share than holding only OP Units.

Finally, we note that in the REIT structures described in *Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated* the OP is obligated to settle exchanges of OP Units for the cash value of the market price of the REIT Common Stock at redemption and the REIT, at its sole option, has the right to assume this redemption obligation and settle an exchange by delivery of REIT Common Stock. Similarly, in certain UP-C structures the Corporation or the

OP may in its sole discretion elect to deliver cash equal to the market value of the Corporation Shares otherwise deliverable in exchange for such OP Units; similar to the REIT structures, however, any determination to deliver cash in lieu of Corporation Shares is in all events entirely at the discretion of the Corporation or the OP and not the OP Unitholder. In UP-C structures where the Corporation or the OP may elect to settle in cash or stock, such election would be determined by or pursuant to delegated authority from the Corporation's board and not by the Corporation's stockholders. In other UP-C structures the Corporation and the OP do not have the option to cash settle exchanges of OP Units and such exchanges are settled exclusively through delivery of Corporation Shares. Notwithstanding this difference from the REIT structures described in *Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated*, we believe that the absence of a cash-settlement feature in such UP-C structures (with the resultant certainty that an exchanging OP Unitholder will receive Corporation Shares upon an exchange) does not detract in any way from the determination that the Rule 144(d) holding period for Corporation Shares acquired upon an exchange of OP Units should commence upon the OP Unitholder's acquisition of (including payment of the full consideration for such OP Units under Rule 144(d)(1)) the OP Units.

Conclusion

We hereby request that the Staff concur with our view that, under the facts described in this letter, an OP Unitholder's Rule 144(d) holding period for Corporation Shares acquired upon an exchange of OP Units for such Corporation Shares commences upon the OP Unitholder's acquisition of (including payment of the full consideration for such OP Units under Rule 144(d)(1)) the OP Units. We believe that the requested interpretive guidance would provide companies organized in UP-C structures and their owners with significant benefits by alleviating the significant time and expense associated with registering the issuance of Corporation Shares to exchanging holders of OP Units or the resale of Corporation Shares by such exchanging holders. Our request for guidance is limited to the UP-C structure described herein and does not extend generally to other situations where a security is exchangeable for the security of another issuer.

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If you have any questions or otherwise require additional information, please contact Josh Bonnie of Simpson Thacher & Bartlett LLP at (202) 636-5804, John Kennedy of Paul, Weiss, Rifkind, Wharton & Garrison LLP at (212) 373-3025 or Greg Rodgers of Latham & Watkins LLP at (212) 906-2918. Should the Staff disagree with any of the views discussed in this letter, we would appreciate an opportunity to discuss the matter with the Staff before it issues a written response to this letter.

Sincerely,

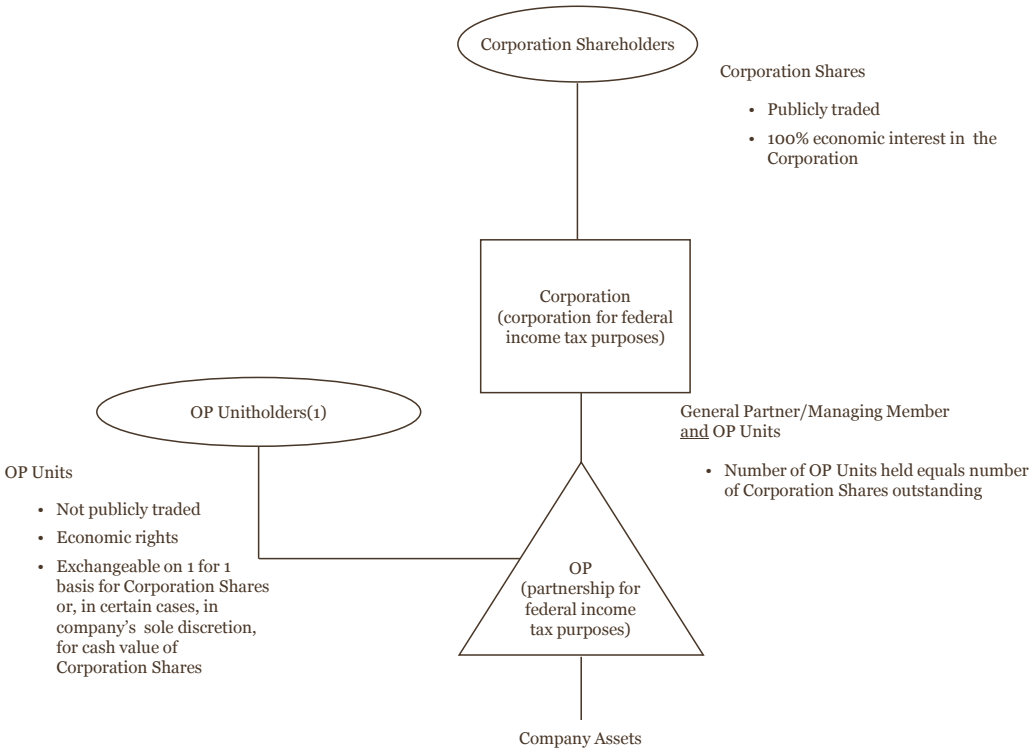
/s/ Joshua Ford Bonnie
Joshua Ford Bonnie
Simpson Thacher & Bartlett LLP

/s/ John C. Kennedy
John C. Kennedy
Paul, Weiss, Rifkind, Wharton & Garrison LLP

/s/ Gregory P. Rodgers
Gregory P. Rodgers
Latham & Watkins LLP

cc: Alexander F. Cohen, Latham & Watkins LLP
Ryan K. deFord, Latham & Watkins LLP
Brendan K. Christian, Paul, Weiss, Rifkind, Wharton & Garrison LLP
Joseph H. Kaufman, Simpson Thacher & Bartlett LLP
William R. Golden III, Simpson Thacher & Bartlett LLP

Annex A



(1) OP Unitholders may also hold a class of security in the Corporation that entitles OP Unitholders to voting power in the Corporation.