

# Memorandum

---

## SEC Issues Favorable Interpretive Guidance on Rule 144 Holding Period in UP-C Structure

November 1, 2016

---

### **SEC Staff's Interpretive Guidance**

On November 1, 2016, the staff of the Division of Corporation Finance of the Securities and Exchange Commission issued interpretive guidance concluding that the Rule 144(d) holding period for corporation shares acquired upon an exchange of partnership units in an UP-C structure commences upon the holder's acquisition of (including payment of the full consideration for such partnership units under Rule 144(d)(1)) the partnership units. The staff's interpretive guidance was issued in response to a request jointly submitted by Simpson Thacher & Bartlett LLP and two other law firms, and expands upon analogous guidance issued earlier this year relating to exchanges in an "UPREIT" structure of partnership units for shares in a parent real estate investment trust.<sup>1</sup> Click [here](#) to access the staff's interpretive guidance and the request.

The UP-C structures as to which the interpretive guidance was sought are described in greater detail in the request, but the guidance is sufficiently broad that it should apply to those UP-C structures employing the customary range of features that have developed in the marketplace to date.

We believe this new interpretive guidance will have significant benefits to companies employing an UP-C structure. The guidance will permit holders of partnership units in an UP-C structure who have held such units for the requisite holding period under Rule 144 to rely on that rule to immediately publicly resell the corporation shares they receive upon an exchange of such units, subject to the limitations of Rule 144 applicable to affiliates of the corporation. As a result, it will ordinarily no longer be necessary for these companies to expend the time and expense associated with filing a registration statement to cover the issuance of corporation shares to exchanging holders of partnership units or the resale of such corporation shares by such exchanging holders – at least for those holders who are not affiliates with significant share

---

<sup>1</sup> Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Inc., SEC No-Action Letter, available at <https://www.sec.gov/divisions/corpfin/cf-noaction/2016/bankofamerica-merrilllynch-pfs-031416-144.htm>.

ownership. We also anticipate that companies employing an UP-C structure may no longer feel the need to preclude exchanges during the first year following the corporation's IPO, which preclusion has frequently been employed historically in order to preserve the ability to eventually register the issuance of corporation shares to exchanging holders of partnership units.

### **UP-C Structure**

Businesses taxed as partnerships for U.S. federal income tax purposes frequently employ an Umbrella Partnership – C-Corporation (UP-C) structure when they conduct an IPO. In an IPO employing an UP-C structure, rather than offering public investors a direct investment in the existing tax partnership, a separate corporation is formed which offers its shares 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 interests directly in the tax partnership and public investors hold an indirect equity interest in the tax partnership through the corporation. When they wish to exit their investment, the pre-IPO owners may exchange their partnership interests for the publicly-traded shares of the corporation. Click [here](#) for additional information regarding the UP-C structure.

---

For further information, please contact one of the following members of the Firm's Corporate Department.

WASHINGTON, D.C.

---

**Joshua Ford Bonnie**  
+1-202-636-5804  
[jbonnie@stblaw.com](mailto:jbonnie@stblaw.com)

NEW YORK CITY

---

**Joseph H. Kaufman**  
+1-212-455-2948  
[jkaufman@stblaw.com](mailto:jkaufman@stblaw.com)

---

*The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, [www.simpsonthacher.com](http://www.simpsonthacher.com).*



UNITED STATES

---

New York  
425 Lexington Avenue  
New York, NY 10017  
+1-212-455-2000

Houston  
600 Travis Street, Suite 5400  
Houston, TX 77002  
+1-713-821-5650

Los Angeles  
1999 Avenue of the Stars  
Los Angeles, CA 90067  
+1-310-407-7500

Palo Alto  
2475 Hanover Street  
Palo Alto, CA 94304  
+1-650-251-5000

Washington, D.C.  
900 G Street, NW  
Washington, D.C. 20001  
+1-202-636-5500

EUROPE

---

London  
CityPoint  
One Ropemaker Street  
London EC2Y 9HU  
England  
+44-(0)20-7275-6500

ASIA

---

Beijing  
3901 China World Tower  
1 Jian Guo Men Wai Avenue  
Beijing 100004  
China  
+86-10-5965-2999

Hong Kong  
ICBC Tower  
3 Garden Road, Central  
Hong Kong  
+852-2514-7600

Seoul  
25th Floor, West Tower  
Mirae Asset Center 1  
26 Eulji-ro 5-Gil, Jung-Gu  
Seoul 100-210  
Korea  
+82-2-6030-3800

Tokyo  
Ark Hills Sengokuyama Mori Tower  
9-10, Roppongi 1-Chome  
Minato-Ku, Tokyo 106-0032  
Japan  
+81-3-5562-6200

SOUTH AMERICA

---

São Paulo  
Av. Presidente Juscelino  
Kubitschek, 1455  
São Paulo, SP 04543-011  
Brazil  
+55-11-3546-1000