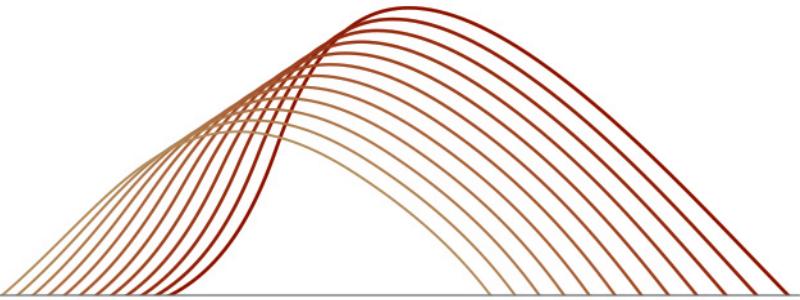


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March 2016

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SEC No-Action Letter Allows Immediate Resale of REIT Shares Received in Exchange for OP Units

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On March 14, 2016, the staff of the Division of Corporation Finance of the SEC (the "Staff") issued a no-action letter to Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated¹ (the "BofA No-Action Letter") that should significantly lessen the need to provide recipients of operating partnership units ("OP Units") with registration rights in connection with their contribution of real estate assets to the operating partnership of a real estate investment trust ("REIT"). The BofA No-Action Letter allows a person that receives shares of REIT common stock ("REIT Common Stock") in connection with the redemption of such person's OP Units to "tack" the holding period of the OP Units to the holding period of the shares of REIT Common Stock received for purposes of Rule 144, which will facilitate the immediate resale of those shares of REIT Common Stock without registration in most circumstances.

UPREIT Structure to Which the BofA No-Action Letter Relief Applies

The following describes a typical umbrella partnership, or UPREIT, structure that is the subject of the BofA No-Action Letter:

- A publicly traded REIT's assets are owned directly by its umbrella partnership, which is organized as a limited partnership and is typically referred to as an operating partnership (the "OP"), as it is the vehicle through which the REIT operates its business.
- The REIT owns OP Units, and these interests are the only material assets of the REIT.
- The REIT is the general partner of the OP or otherwise controls the OP.
- OP Units are also owned by other investors ("Unit Holders"), who frequently receive their OP Units in non-public offerings, pursuant to which OP Units are issued in exchange for real estate assets contributed to the OP. By exchanging real estate assets for OP Units, Unit Holders are generally able to defer taxes.
- OP Units are fully paid for at the time they are acquired from the OP.

- One OP Unit is the economic equivalent of one share of REIT Common Stock (or such other fixed number of shares that maintains the economic equivalence between the OP Units and the REIT Common Stock).
- An OP Unit represents the same right to the same proportional interest in the same underlying pool of assets as a share of REIT Common Stock.
- The REIT Common Stock is registered with the SEC under Section 12 of the Securities Exchange Act of 1934, as amended (the "Exchange Act") and is publicly traded on a national securities exchange, such as the New York Stock Exchange or the Nasdaq Stock Market.
- The OP Units do not trade on a public market and the agreement governing the OP contains significant restrictions on the ability of Unit Holders to transfer their OP Units.
- Unit Holders may, after an initial one-year holding period, request that the OP redeem OP Units for cash. Instead of paying the Unit Holder cash, the REIT has the option of assuming the OP's redemption obligation and redeeming the OP Units in exchange for shares of REIT Common Stock.
- No additional consideration is required from Unit Holders at the time they redeem the OP Units for REIT Common Stock. To the extent a REIT redeems a Unit Holder for cash, the cash value of the OP Unit directly corresponds to the market value of the REIT Common Stock at the time of the redemption.

BofA No-Action Letter Alleviates Need to Provide Registration Rights to Unit Holders

As OP Units are usually issued in non-public offerings, they are "restricted securities"² and may not be resold unless they are registered under the Securities Act of 1933, as amended (the "Securities Act") or an exemption from registration is available. In addition, unless the REIT Common Stock issued in exchange for OP Units is registered under the Securities Act, those shares will also be "restricted securities." Rule 144 provides a safe harbor, which, if complied with, permits the sale of "restricted securities" pursuant to an exemption from the registration requirements of the Securities Act. One of the requirements of Rule 144 is that "restricted securities" have to be held for a minimum holding period before they can be resold under Rule 144. The length of the holding period depends on whether the REIT has been subject to the reporting requirements of Section 13 or 15(d) of the Exchange Act (*i.e.*, whether it has been required to file 10-Ks, 10-Qs and 8-Ks) for at least 90 days before the sale (a "Reporting Company"). If the REIT is a Reporting Company, a minimum of six months must elapse between the date of the acquisition of the restricted securities and the date of their resale. If the REIT is not a Reporting Company, a minimum of one year must elapse between the date of the acquisition of the restricted securities and the date of their resale.

Rule 144(d)(3) provides that if "restricted securities" of an issuer are exchanged for different "restricted securities" of the *same issuer* and no additional consideration is paid, then the holder of those securities can "tack" the holding period of the security exchanged to the holding period of the security received in the exchange (*i.e.*, the holder can aggregate the time it held the exchanged security and the time it held the security received in the exchange) in determining whether the six month or one year Rule 144 holding period has been met. Where OP Units are exchanged for REIT Common Stock, the requirements of Rule 144(d)(3) are not met because the OP and the REIT are different issuers. Accordingly, prior to the BofA No-Action Letter, it has been customary to provide Unit

Holders with registration rights to facilitate their trading in REIT Common Stock following the exchange of their OP Units for REIT Common Stock. Alternatively, Unit Holders have waited the applicable six month or one year holding period from the date the Unit Holder received the REIT Common Stock before selling under Rule 144. The BofA No-Action Letter provides that, for purposes of determining compliance with the six-month or one year holding period set forth in Rule 144, the holding period of REIT Common Stock commences at the time of acquisition of the OP Units that get exchanged into that REIT Common Stock.

While, as per usual, the Staff stated that any different facts than those contained in the BofA No-Action Letter might require the Staff to reach a different conclusion, the Staff placed particular emphasis on the

representations that the Unit Holders paid the full purchase price for the OP Units at the time they were acquired from the OP; an OP Unit is the economic equivalent of a share of REIT Common Stock, representing the same right to the same proportional interest in the same underlying pool of assets; the exchange of REIT Common Stock for OP Units is entirely at the discretion of the REIT; and no additional consideration is paid by the Unit Holders for the shares of REIT Common Stock.

Registration Rights Are Now Much Less Important to Most Holders of OP Units

The BofA No-Action Letter provides welcome relief for REITs and will, in many cases, eliminate the need to provide registration rights to persons that exchange real estate assets for OP Units, as Unit Holders may obtain freely tradable REIT Common Stock without registration immediately upon the exchange of their OP Units for REIT Common Stock. Accordingly, the BofA No-Action Letter should save many REITs the considerable time and expense necessary to provide Unit Holders with registration rights.

The BofA No-Action Letter May Extinguish a REIT's Current Registration Obligations

Not only will the BofA No-Action Letter decrease the need to provide registration rights in the future, it may also have the effect of terminating the registration obligations that REITs may currently have, as registration obligations frequently terminate if the securities that are the subject of a registration rights agreement are freely tradable under Rule 144. Given that the BofA No-Action Letter will, in many circumstances, render the REIT Common Stock to be received in exchange for OP Units freely tradable under Rule 144, the registration obligations with respect to that REIT Common Stock may terminate under many existing registration rights agreements.

Registration Rights Still May Be Necessary in Certain Instances

To the extent that the number of OP Units issued to a person would cause that person to be deemed to be an affiliate of the REIT upon exchange of that person's OP Units for REIT Common Stock, that person would be subject to sales volume restrictions³ of Rule 144 when their OP Units are redeemed for REIT Common Stock, regardless of whether that person has held their OP Units for the applicable Rule 144 holding period. In that case, the potential affiliate may require the REIT to provide it with registration rights before agreeing to contribute its real estate assets in exchange for OP Units. In addition, persons acquiring OP Units may desire registration rights to facilitate the orderly sale of the REIT Common Stock they receive upon the redemption of their OP Units in a registered underwritten public offering, especially if they will have a large equity position in the REIT.

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Registration may also be required with respect to the issuance of REIT Common Stock upon exchange of OP Units, if an applicable registration exemption is not available. Normally, this issuance is conducted via private placement in compliance with Section 4(a)(2) of the Securities Act, which is usually easy to accomplish, as the Unit Holder will have met the requisite investor qualifications for a private placement when it acquired its OP Units. However, in the remote case where the Unit Holder no longer meets the requisite investor qualifications for a private placement at the time of the Exchange of OP Units for REIT Common Stock, Section 4(a)(2) would not be available for the issuance of REIT Common Stock and registration may be required for such issuance.

In addition, to the extent a REIT is structured in a manner inconsistent with the UPREIT structure set forth in the BofA No-Action Letter (e.g., where an OP Unit is not the economic equivalent of a share of REIT Common Stock), registration rights will still likely need to be provided to holders of OP Units.

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¹ Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated, SEC Staff No-Action Letter (March 14, 2016).

² The term "restricted securities" is defined under Rule 144 to include "[s]equities acquired . . . from the issuer . . . in a transaction or chain of transactions not involving any public offering."

³ Generally, affiliates may only sell in any three-month period the greater of (i) 1% of the outstanding REIT Common Stock or (ii) the average of the weekly trading volume for the REIT Common Stock, calculated over a four-week period.

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