

April 1, 2019

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BY ELECTRONIC SUBMISSION

**SECURITIES EXCHANGE ACT OF 1934
SECTION 16(c)
RULE 16c-4**

David Fredrickson
Chief Counsel, Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Bank of America Merrill Lynch: Request for Section 16(c) Interpretive Guidance

Dear Mr. Fredrickson:

On behalf of our clients, Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated and their affiliates (collectively, "**Bank of America Merrill Lynch**"), we submit this letter to request interpretive guidance concerning Section 16(c) of the Securities Exchange Act of 1934 (the "**Exchange Act**") and Rule 16c-4 thereunder. Specifically, we respectfully request that the staff of the Division of Corporation Finance (the "**Staff**") confirm our opinion that, under the facts described below, a person subject to Section 16 of the Exchange Act (each such person, an "**Insider**") will be considered, for purposes of Section 16(c) and Rule 16c-4 thereunder, to own the shares of common stock underlying units in certain umbrella tax partnerships. We are not requesting interpretive guidance with respect to the Securities Act of 1933 (the "**Securities Act**") or any other provisions of the federal securities laws.

I. SUMMARY

Bank of America Merrill Lynch proposes to enter into derivative hedging transactions with Insiders of one or more publicly traded U.S. companies structured as umbrella tax partnerships to enable the Insiders to limit their exposure to fluctuations in the trading price of the company common stock underlying partnership units in the company's operating subsidiary. Although we understand that it is generally the Staff's view that securities underlying derivative securities are not owned for purposes of Section 16(c) and Rule 16c-4, it is our opinion that an Insider should be deemed to own the shares of common stock underlying umbrella partnership units for purposes of Section 16(c) and Rule 16c-4 because the proposed derivative hedging transactions ensure that: (i) the Insider will receive no net economic or other benefit if the price of common stock falls during the term of the derivative hedging transaction; (ii) the Insider will at all times have the ability to cover its delivery obligations; and (iii) the Insider's settlement method will match the outcome of any relevant exchange of partnership units.

II. BACKGROUND

A. Umbrella Tax Partnership Structure

Each hedging transaction will involve the common stock of a publicly traded U.S. company, either a traditional operating business or a real estate investment trust, that is structured as an umbrella tax partnership (generally known as an “**UP-C**” and an “**UPREIT**”, respectively, and collectively referred to herein as an “**UP-C**”). Businesses that are taxed as partnerships for U.S. federal income tax purposes frequently employ the UP-C structure when they elect to conduct a public offering of their common equity securities. Rather than offering 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 form a separate entity that is treated as a corporation for U.S. federal income tax purposes (the “**Corporation**”) which publicly offers shares of its common stock (“**Corporation Shares**”) to 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 a traditional 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 underlying operating partnership (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 (“**OP Units**”), and the OP in turn 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.

OP Units are also held by persons other than the Corporation, including Insiders of the Corporation (“**OP Unitholders**”). OP Unitholders are often the pre-IPO owners of the business or other persons that elected to contribute assets to the OP in exchange for OP Units (such as in connection with a business combination transaction).

There is no public market for OP Units; they are restricted securities for purposes of Rule 144 and their transfer is generally subject to significant contractual restrictions. OP Units are, however, exchangeable at the option of the OP Unitholders for Corporation Shares on a one-for-one basis (or at a ratio that maintains economic parity between OP Units and Corporation Shares), although, in certain structures, the Corporation may instead in its sole discretion elect to deliver cash in an amount equal to the market value of the Corporation Shares otherwise deliverable in exchange for the OP Units.

When an OP Unitholder exchanges OP Units for Corporation Shares, the transaction generally subjects the OP Unitholder to current year taxation. OP Unitholders therefore often elect to defer the exchange of OP Units and hold OP Units indefinitely for various reasons, including furthering tax or estate planning goals or objectives, and generally exercise their exchange rights only to liquidate their long economic position in the OP Units (and in the underlying Corporation Shares).

In short, an UP-C structure 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 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 Units represent the same right to the same proportional interest in the same underlying pool of assets as Corporation Shares and OP Units are the economic equivalent of Corporation Shares;
- The Corporation Shares are registered under Section 12 of the Exchange Act and are publicly traded on a national securities exchange;
- OP Units are not registered under Section 12 of the Exchange Act and are not publicly traded on a national securities exchange;
- 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, for cash equal to the market value of the Corporation Shares; and
- The exchange of OP Units for Corporation Shares (or their equivalent in cash) generally subjects OP Unitholders to current year taxation; many OP Unitholders therefore elect to hold the OP Units until such time as the OP Unitholder desires to liquidate their long economic exposure to the financial results of the Corporation and the trading price of the Corporation Shares underlying the OP Units.

B. Derivative Hedging Transaction Structure

Because Insiders of the Corporation may elect to retain OP Units indefinitely and because OP Units are the economic equivalent of Corporation Shares, Insiders may from time to time desire to hedge the economic value of the OP Units and limit their exposure to fluctuations in the trading price of the Corporation Shares underlying the OP Units. And because there is no public market for OP Units, derivative hedging transactions with respect to the OP Units directly are not economically feasible and Insiders seeking to hedge the value of OP Units may instead elect to enter into derivative hedging transactions that relate to the liquid Corporation Shares underlying the OP Units. Such transactions would involve option-based derivative contracts between Bank of America Merrill Lynch and the Insider and would be structured to ensure that the Insider will receive no net economic or other benefit if the price of Corporation Shares falls during the term of the hedging transaction.

One potential hedging transaction is an option-based contract (a “**Collar Contract**”), the terms of which are substantially similar to the terms of the contracts described in the Staff’s March 18, 2004 guidance to Credit Suisse First Boston (the “**CSFB Guidance**”). On the date the Insider and Bank of America Merrill Lynch enter into the Collar Contract (the “**Commencement Date**”), the Insider will sell Bank of America Merrill Lynch a call option (the “**Call Option**”) on a fixed number of Corporation Shares exercisable at a price (the “**Call Price**”) either at or above the market price of the Corporation Shares on the Commencement Date (or the date on which the

Call Price and Put Price are fixed, if later) (the “**Reference Price**”), and the Insider will purchase from Bank of America Merrill Lynch a put option (the “**Put Option**”) on the same fixed number of Corporation Shares exercisable at a price (the “**Put Price**”) either at or below the Reference Price. The Call Price will in all cases be greater than the Put Price, although the “spread” between these prices will depend on the particular circumstances of each Collar Contract, and the premium income attributable to the Insider’s writing of the Call Option will not exceed the purchase price attributable to the Put Option. In some cases, the Insider may also elect to pledge its rights under the Collar Contract to Bank of America Merrill Lynch to secure a loan from Bank of America Merrill Lynch. Under such circumstances, Bank of America Merrill Lynch would require that the loan be secured with the OP Units subject to the Collar Contract and a lien on any payments to be received by the Insider from Bank of America Merrill Lynch under the Collar Contract.

A Collar Contract may be “European” style, where each of the Call Option and the Put Option may only be exercised on a fixed date (the “**Maturity Date**”), or “American” style, where the Insider may exercise the Collar Contract on any date within a period specified in the Collar Contract.¹ As described in further detail below, the distinction between “European” and “American” Collar Contracts is of no consequence to (i) whether the Insider will receive any net economic or other benefit from a decrease in the price of Corporation Shares during the term of the Collar Contract, or (ii) whether the Insider will at all times have the ability to cover its delivery obligations under the Collar Contract.

In a “European” style Collar Contract, if the market price of Corporation Shares on the Maturity Date (the “**Settlement Price**” for purposes of a Collar Contract) is below the Put Price, the Insider will be deemed to automatically exercise the Put Option and will be entitled to, depending on the terms of the Collar Contract, (i) put the Corporation Shares to Bank of America Merrill Lynch at the Put Price, or (ii) receive, for each Corporation Share underlying the Collar Contract, a cash settlement equal to the difference between the Put Price and the Settlement Price. The Call Option would expire worthless. In contrast, if the Settlement Price is above the Call Price, Bank of America Merrill Lynch will be deemed to automatically exercise the Call Option and will be entitled to, depending on the terms of the Collar Contract, (i) buy the Corporation Shares from the Insider at the Call Price, or (ii) receive, for each Corporation Share underlying the Collar Contract, a cash settlement equal to the difference between the Settlement Price and the Call Price. The Put Option would expire worthless. If the Settlement Price is above the Put Price but below the Call Price, both options would expire worthless and no exchange of Corporation Shares or cash would occur.

A hypothetical illustration is as follows:

- An Insider desires to hedge the value of 100 Corporation Shares underlying OP Units. On the Commencement Date, the price of Corporation Shares is \$10 per share (the Reference Price is \$10 per share).
- The Insider and Bank of America Merrill Lynch agree to the following terms:
 - The Collar Contract will consist of two options, a Call Option and a Put Option.
 - The Insider agrees to sell Bank of America Merrill Lynch a Call Option on 100 Corporation Shares and Bank of America Merrill Lynch agrees to sell the Insider a

¹ Although, as a technical matter, the options are deemed to “expire” on the exercise date, we use the term “Maturity Date” for ease of reference.

Put Option on 100 Corporation shares, typically documented as a single transaction.

- The Put Price is \$9.
- The Call Price is \$11.
- The Maturity Date for the Collar Contract is fixed (i.e., the Call Option and the Put Option expire on the same date and either one or none of the Call Option or the Put Option will be automatically exercised that fixed date).

There are three potential outcomes on the Maturity Date of the Collar Contract:

- If the Settlement Price of the Corporation Shares is at or above the Call Price, either:
 - If the Collar Contract is physically settled, the Insider delivers 100 Corporation Shares to Bank of America Merrill Lynch and Bank of America Merrill Lynch delivers \$1100 in cash to the Insider, or
 - If the Collar Contract is cash settled, the Insider retains the 100 Corporation Shares and the Insider delivers cash to Bank of America Merrill Lynch in an amount equal to (i) the value of the 100 Corporation Shares at the Settlement Price *minus* (ii) \$1100 and, typically, *plus* (iii) a small pricing adjustment in favor of Bank of America Merrill Lynch reflecting estimated trading risks to Bank of America Merrill Lynch resulting from termination of its hedge position in connection with cash settlement of the transaction.
- If the Settlement Price of the Corporation Shares is below the Call Price and above the Put Price, no deliveries occur and the Collar Contract expires worthless.
- If the Settlement Price of the Corporation Shares is at or below the Put Price, either:
 - If the Collar Contract is physically settled, the Insider delivers 100 Corporation Shares to Bank of America Merrill Lynch and Bank of America Merrill Lynch delivers \$900 in cash to the Insider, or
 - If the Collar Contract is cash settled, the Insider retains the 100 Corporation Shares and Bank of America Merrill Lynch delivers cash to the Insider in an amount equal to (i) \$900 *minus* (ii) the value of the Corporation Shares at the Settlement Price and, typically, *minus* (iii) a small pricing adjustment in favor of Bank of America Merrill Lynch reflecting estimated trading risks to Bank of America Merrill Lynch resulting from termination of its hedge position in connection with cash settlement of the transaction.

In addition, depending on the outcome of negotiations between the Insider and Bank of America Merrill Lynch, under certain circumstances the Collar Contract may also be “net-share” settled, whereby the party that owes the other party a net delivery obligation under the Collar Contract may deliver a number of Corporation Shares equal to (i) the cash amount the party would owe pursuant to cash settlement, *divided by* (ii) the Settlement Price.

In an “American” style Collar Contract, the Insider would have discretion to exercise the Collar Contract at any time during a period specified in the Collar Contract. The date on which the Insider elected to exercise the Collar Contract would become the Maturity Date because the Put Option and the Call Option are inextricably linked by the terms of the Collar Contract such that,

upon exercise of one option, the other option would be automatically cancelled. Depending on the outcome of negotiations between the parties to the Collar Contract, such cancellation could result in a payment obligation in favor of Bank of America Merrill Lynch (the holder of the cancelled Call Option) reflecting the residual time-value of the Call Option that is lost upon cancellation. Other than the cancellation payment, an exercise of the Collar Contract in an “American” style Collar Contract would result in the same economic outcomes described above. Moreover, as explained in Section III below, the potential for a cancellation payment would not result in the Insider receiving any net economic or other benefit if the price of Corporation Shares falls after the Commencement Date.

The terms of the “American” style Collar Contract are therefore identical to the terms of a “European” style Collar Contract, except that (i) the Insider may elect to exercise the Collar Contract on a date prior to the Maturity Date, within a prescribed window, and (ii) if the Insider elects to exercise (or otherwise terminate) the Collar Contract on any date other than the Maturity Date, the Insider may also be required to compensate Bank of America Merrill Lynch for the lost time-value of the Call Option as of that date by paying cash or other consideration to Bank of America Merrill Lynch (depending on the outcome of negotiations between the Insider and Bank of America Merrill Lynch).

Whether European or American style, the Call Option and Put Option will have an identical Maturity Date and the Call Price and Put Price structured so that, at the Maturity Date, only one of the options will expire “in the money” and, when exercised, the other option automatically will be cancelled. Also in either case, the number of Corporation Shares subject to each of the Call Option and the Put Option would not exceed the number of Corporation Shares underlying the OP Units subject to the Collar Contract (thus ensuring that the Insider will at all times have the ability to cover its delivery obligations under the Collar Contract). Moreover, in order to secure the Insider’s obligations under the Collar Contract, Bank of America Merrill Lynch may require the Insider to pledge to Bank of America Merrill Lynch the Insider’s rights to the number of OP Units that are subject to the Collar Contract.² The Corporation would acknowledge Bank of America Merrill Lynch’s security interest and agree to act on Bank of America Merrill Lynch’s instruction in the event of default and foreclosure. Accordingly, the Insider will not have the ability to exchange the pledged OP Units (or otherwise transfer, rehypothecate or dispose of the OP Units) until after the Maturity Date has elapsed, the economic outcome of the Collar Contract is fixed and the put equivalent position no longer exists.³ If the OP Units are certificated, the Insider will deposit the

² Pursuant to the terms of the Collar Contract, either (i) the Insider would pledge its rights to the OP Units to Bank of America Merrill Lynch, or (ii) if the Insider is not required to pledge its rights to the OP Units to Bank of America Merrill Lynch (for example, because the Insider has arranged an alternative method to satisfy Bank of America Merrill Lynch that the Insider will have the means necessary to satisfy its delivery obligations under the Collar Contract), the Insider would be required to agree as part of the Collar Contract that it will not exchange the OP Units representing the Corporation Shares that are the subject of the Collar Contract until after the Maturity Date has elapsed and the economic outcome of the Collar Contract is fixed.

³ Under certain circumstances and pursuant to the terms of the Collar Contract, the Insider may have the ability to exchange the pledged OP Units shortly before the Maturity Date to facilitate prompt and orderly settlement of the Collar Contract. Under no circumstances would the Insider have the ability to exchange the pledged OP Units other than for purposes of settlement of the Collar Contract until after the Maturity Date has elapsed. Further, the terms of the Collar Contract would ensure that the Insider would not receive any net economic or other benefit from such exchange if the price of the Corporation Shares falls during the term of the Collar Contract.

pledged OP Units into a pledge account with Bank of America Merrill Lynch. In no case would the Insider or Bank of America Merrill Lynch have any right to transfer, rehypothecate or otherwise dispose of the OP Units (or rights in or to them) until or unless: (i) with respect to the Insider, (a) the Collar Contract terminates without a delivery obligation by the Insider and the OP Units (or any pledged rights to them) are returned (or released) to the Insider, (b) the Collar Contract terminates, the Insider elects to satisfy its delivery obligations without exchanging the OP Units (i.e., by delivery of other assets of the Insider) and the OP Units are returned to the Insider, or (c) the Insider exchanges the OP Units to effect a delivery pursuant to the Collar Contract; and (ii) with respect to Bank of America Merrill Lynch, the Insider defaults on the Collar Contract and Bank of America Merrill Lynch forecloses on the pledged OP Units in satisfaction.

The Collar Contract will also ensure that the Insider will at all times have the ability to cover its delivery obligations under the Collar Contract, regardless of whether the Insider receives Corporation Shares or cash upon exchange of the pledged OP Units, because the Collar Contract will specifically provide that Insider's settlement method pursuant to the Collar Contract will match the result of the OP Unit exchange (i.e., a delivery of Corporation Shares by the Insider if the Insider receives Corporation Shares, and a delivery of cash by the Insider if the Insider receives cash).⁴ The Collar Contract will therefore be designed to ensure that, regardless of the manner in which the Collar Contract is settled and regardless of the outcome of any exchange of the pledged OP Units, (i) the Insider will receive no net economic or other benefit from any decrease in the price of Corporation Shares during the term of the Collar Contract, and (ii) the Insider will at all times have the ability to cover its delivery obligations under the Collar Contract.

III. DISCUSSION

A. Section 16(c) and Rule 16c-4

Section 16(c) of the Exchange Act prohibits Insiders from selling any equity security of the issuer, if the Insider does not "own" the security sold. Rule 16c-4 thereunder further provides that establishing or increasing a put equivalent position (e.g., writing or selling a call option or buying a put option) is exempt from the Section 16(c) prohibition, so long as the amount of securities underlying the put equivalent position does not exceed the amount of such securities "otherwise owned" by the Insider. Although neither the term "own" in Section 16(c)(1) nor the phrase "otherwise owned" in Rule 16c-4 are defined by rule or statute, the Commission has recognized that the fundamental purpose of Section 16(c) is to preclude Insiders from taking "short positions in conflict with their fiduciary duties, because insiders could use short positions *to manipulate a stock price or to profit by a fall in the price of the company's stock.*" (emphasis added).⁵ The Rule 16c-4 proposing release also discussed the legislative history of Section 16(c), stating that Congress was "concerned about the manipulative effect of short selling" and appeared to be "troubled that insiders were taking positions that would benefit by an adverse movement in the price of the company's stock." The release further noted that "[t]he proposed rule thus would ensure that an insider does not have an economic interest in the poor performance of the issuer's stock," and that "[u]nder the proposal, insiders could establish put equivalent positions as a hedge

⁴ The Collar Contract may also provide that the Insider may make any election with respect to settlement of the Collar Contract if the Insider is able to satisfy its delivery obligations without exchanging the pledged OP Units (i.e., by delivery of other cash or Corporation Shares held by the Insider).

⁵ Release No. 34-26333.

against underlying stock positions.” In a footnote, the release defined the term “hedging” to mean “lessening the risk of loss by offsetting the risk of a securities position with an opposite position in a related security.”⁶

The Commission guidance in the proposing release makes clear that the express purpose of Section 16(c) and Rule 16c-4 is the prevention of speculation in downward price movements by corporate insiders, while simultaneously preserving the ability of those insiders to engage in legitimate hedging activity to protect assets from a decline in value. Prior Staff guidance further supports the distinction between speculation and legitimate hedging: for example, the CSFB Guidance stands for the proposition that, under certain circumstances, an Insider may be deemed to own securities underlying an exchangeable instrument for purposes of Section 16(c) and Rule 16c-4, as long as the structure of the put equivalent derivative hedging transaction with respect to such underlying securities eliminates any opportunity for the Insider to receive any net economic or other benefit from a fall in the price of the underlying security. Similarly, the Staff’s 1997 interpretive guidance to Berkshire Hathaway Inc. (the “**Berkshire Guidance**”) indicates that, under certain circumstances, an Insider may be deemed to own shares of common stock underlying a convertible instrument of a different issuer, also taking particular note of the fact that the Insider would receive no net economic or other benefit if the price of common stock fell during the term of the put equivalent derivative transaction.

It is our opinion that, for purposes of Section 16(c) and Rule 16c-4, Insiders should also be deemed to own the Corporation Shares underlying OP Units during the term of the hedging transactions described above (or other substantially similar hedging transactions that ensure that the Insider will receive no net economic or other benefit from a fall in the price of Corporation Shares during the term of the transaction, such as the purchase of a put option without the corresponding sale of a call option). Like the derivative contracts described in the CSFB Guidance and the Berkshire Guidance, the Collar Contract is structured such that (i) the Insider will not receive any net economic or other benefit if the price of Corporation Shares falls over the course of a transaction, and (ii) the Insider will at all times have the ability to cover its delivery obligations under a transaction. And because the Insider will pledge its right to the OP Units to Bank of America Merrill Lynch (or will otherwise contractually agree not to exchange the OP Units) during the full term of the hedging transaction, the Insider will not have the ability to exchange any OP Units that are the subject of a hedging transaction until after the transaction has concluded, the economic outcome of the transaction is fixed and the put equivalent position no longer exists.

B. No Net Economic or Other Benefit

The structures of the hedging transactions illustrated above ensure that the Insider will receive no net economic or other benefit from a decrease in the price of Corporation Shares over the course of each hedging transaction because, if the price of Corporation Shares falls, there are no circumstances under which the Insider will be entitled to receive more value at the conclusion of the hedging transaction than the Insider held at the onset. Under a Collar Contract, if the price of Corporation Shares is below the Put Price on the Maturity Date, the Insider would automatically exercise the Put Option and would be entitled to (i) put its shares to the Dealer at the Put Price, or (ii) receive, for each share underlying the Collar Contract, a cash settlement equal to the difference between the Put Price and the Settlement Price (in either case receiving no more value than the position was worth at the onset of the transaction). If the price of Corporation Shares

⁶ Release No. 34-26333.

risers, there is also no scenario under which the Insider will be entitled to receive more value at the conclusion of the transaction than it held at the onset of the transaction, because (i) if the Settlement Price is at or below the Call Price, both options expire worthless,⁷ and (ii) if the Settlement Price is above the Call Price, either (a) Bank of America Merrill Lynch would exercise the Call Option and the Insider would receive less cash than the market value of the Corporation Shares it is required to deliver (if the option is physically settled) or (b) the Insider would pay cash to Bank of America Merrill (if the Call Option is cash settled). In either case, the Put Option would expire worthless. The Insider will therefore recognize no net economic or other benefit if the price of Corporation Shares falls after the Commencement Date; the Insider will instead incur a loss that is limited to the difference between the Reference Price and the Put Price.

Similarly, the potential for a cancellation payment under an “American” style Collar Contract would not cause the Insider to receive any net economic or other benefit if the price of Corporation Shares falls between the Commencement Date and the Maturity Date. If the Insider elects to exercise the Put Option before the option expires, the Settlement Price of Corporation Shares will have declined from the Commencement Date and the Insider will *pay* Bank of America Merrill Lynch for the cancellation of the Call Option.

C. The Insider’s Delivery Obligations

The structures of the hedging transactions illustrated above also ensure that the Insider will at all times have the ability to cover its delivery obligations thereunder, regardless of whether the Insider receives Corporation Shares or cash upon an exchange of pledged OP Units, because: (i) for the duration of the hedging transactions, the Insider is not permitted to exchange, transfer or otherwise dispose of the relevant OP Units; and (ii) the terms of the derivative contracts will specifically provide that the Insider’s settlement method pursuant to the contract will match the result of any relevant OP Unit exchange by the Insider (if any). The fact that the Insider may elect to exchange the OP Units *after* the hedging transaction is completed (i.e., after the Insider’s delivery obligations, if any, are satisfied and when the put equivalent position no longer exists) is no different for Section 16(c) or Rule 16c-4 purposes than the ability of a holder of freely tradable Corporation Shares to sell that stock for cash on the open market.

The OP Unit and derivative hedging transaction structures discussed herein are also distinguishable from Commission guidance in the context of security futures products. In Question 15 of Release No. 34-46101, the Commission concluded that Insiders who are long a security future do not “otherwise own” the underlying securities for purposes of Rule 16c-4 until the Insider is obligated to accept delivery under the security future (i.e., at the close of trading for that security future on the last trading day). That conclusion follows from the fundamental structure of security futures, which are obligations and not assets. Indeed, a futures contract is only an obligation to purchase (or sell) a specific quantity of securities at a certain price in the future; it generally cannot be disposed of or liquidated (and must instead be “offset” with an opposite contract) and generally has no value as collateral for a loan.⁸ Moreover, unlike leveraged assets (such as margin stock), security futures contracts are marked-to-market and require settlement

⁷ Because under a Collar Contract the premium received by the Insider for selling the Call Option would be offset by the premium paid by the Insider to purchase the Put Option, the Insider would receive no economic benefit if the options expire worthless.

⁸ National Futures Association, Risk Disclosure Statement for Security Futures Contracts (April 2014).

of gains and losses in holder accounts on a daily basis. Because the holder of a long security future cannot predict the daily settlement amounts in advance, it also cannot be certain that its assets will be sufficient to satisfy its obligations under the contract until after the close of trading on the last trading day. In contrast, under the structure described herein, the OP Units are assets owned by the Insider and are pledged for the duration of the derivative hedging transactions; the Insider can be sure that the OP Units will be available for exchange at the conclusion of the derivative contract and will be exchanged for the same asset that the Insider is required to deliver under such contract (if any).

IV. CONCLUSION

For the reasons set forth above, we hereby respectfully request that the Staff confirm our opinion that, under the facts described in this letter, an Insider will own the Corporation Shares underlying OP Units for purposes of Section 16(c) and Rule 16c-4. Our request for guidance is limited to the UP-C structure and the derivative hedging transactions described above and does not extend generally to other situations involving securities underlying a derivative security.

If you have any questions or otherwise require additional information, please contact Robert Plesnarski (202.383.5149) of O'Melveny & Myers LLP or Glen Rae (646.855.2556) of Bank of America Merrill Lynch. Thank you for your attention to this matter.

Sincerely,

/s/ Robert Plesnarski

Robert Plesnarski
of O'Melveny & Myers LLP

/s/ Glen Rae

Glen Rae
Bank of America Merrill Lynch

cc: Robert J. Dilworth
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