

## FREQUENTLY ASKED QUESTIONS ABOUT **UPREITs AND OP UNIT TRANSACTIONS**

### GENERAL OVERVIEW

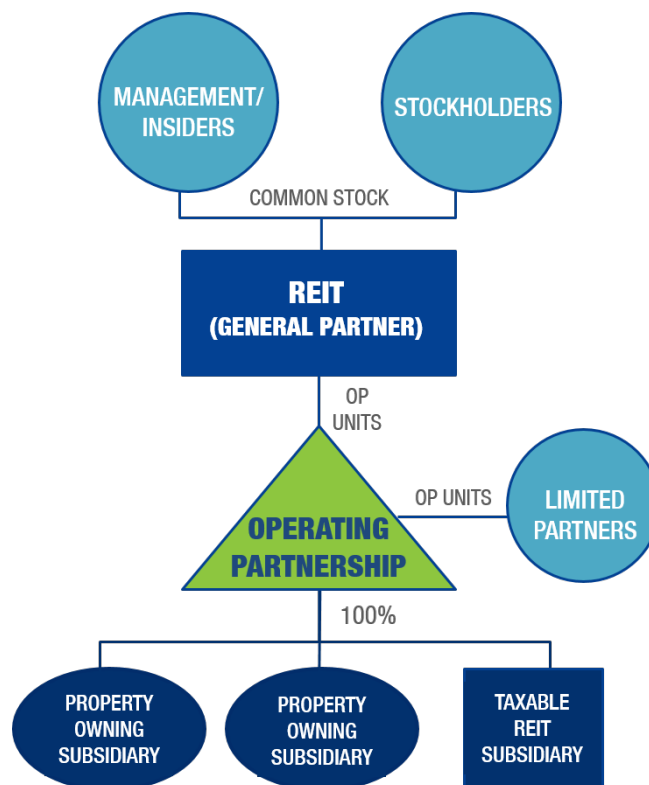
#### What is an UPREIT?

A common operating structure for publicly traded equity REITs is the umbrella partnership real estate investment trust (“**UPREIT**”) structure. In a typical UPREIT structure, the REIT holds substantially all of its assets, and conducts substantially all of its operations, through a single operating partnership subsidiary (the “**Operating Partnership**”). In most cases, the REIT or a wholly owned subsidiary of the REIT serves as the sole general partner of the Operating Partnership and, as a result, the REIT has the exclusive power and authority to manage the Operating Partnership’s business, subject to certain limited rights maintained by holders of units of limited partnership interest (“**OP Units**”) in the Operating Partnership pursuant to the partnership agreement of the Operating Partnership (the “**Partnership Agreement**”).

In addition to controlling the Operating Partnership, the REIT typically owns a majority of the outstanding OP Units. These OP Units were obtained by the REIT in exchange for the contribution by the REIT of the net cash proceeds from the REIT’s IPO or other equity capital raise. The remaining OP Units are ordinarily held by outside limited partners (“**OP Unitholders**”) who received their OP Units by contributing real estate assets that were previously owned by them (or their interests in the entities that previously owned such real estate assets) to the Operating Partnership in exchange for the OP Units. Determining the value of the contributed assets and the allocation of the OP Units being issued as consideration to the property contributors often involves significant analysis and negotiation and, in certain instances, may involve third-party valuation firms.

In the typical UPREIT structure, after an initial holding period, OP Unitholders may tender their OP Units for redemption by the Operating Partnership for cash or, at the option of the REIT, for shares of the REIT, typically on a 1:1 basis. The customary justification for such exchange ratio is that the OP Units and the REIT shares represent interests in essentially the same pool of assets and, therefore, should have the same *pro rata* interest in such assets.

A typical UPREIT structure is depicted in the diagram below:



#### What are the primary benefits of the UPREIT structure and OP Unit transactions?

The UPREIT structure can provide a number of advantages over a typical all-cash real estate transaction, including the following:

- **Tax-Advantaged Consideration** – The most significant benefit of operating through an UPREIT structure is the ability to issue securities (*i.e.*, OP Units) on a tax-deferred basis to sellers of real property in connection with property acquisitions. When contemplating the disposition of real property, sellers who have a low tax basis in the property may be reluctant to sell for cash or REIT shares because the sale would trigger significant tax liability. By accepting OP Units as consideration for the contribution of their properties, sellers can defer the tax on their built-in gains, generally until they elect to tender their OP Units for redemption.

Under certain circumstances, sellers may even be able to extract some cash in the transaction on a tax-deferred basis as well. Furthermore, OP Unitholders may also tender their OP Units over time, thereby spreading out their tax liability. See “[Additional Tax Considerations](#)” below. OP Units also provide favorable tax benefits for estate planning purposes, as discussed below.

- **Enhanced Liquidity** – Unlike real property, for which there is limited liquidity, an OP Unitholder has the ability to obtain liquidity “on demand” by exercising its redemption rights. Pursuant to the Partnership Agreement, OP Unitholders typically have the right to tender their OP Units to the Operating Partnership for redemption. OP Unitholders generally must wait a certain period of time before they can exercise their redemption rights (typically, one year from the date of the issuance), but once the holding period has been satisfied, OP Unitholders generally can tender OP Units at times, and in amounts, of their choosing, subject to applicable limitations set forth in Partnership Agreement. Although the redemption of OP Units will trigger the recognition of the taxable gain that was deferred at the time of the property contribution, OP Unitholders have the flexibility to decide when to monetize their holdings and, accordingly, when the tax liability will be triggered.
- **Current Income Through Distributions** – Holders of common OP Units generally receive the same quarterly distribution payments in respect of their OP Units as stockholders receive in respect of their REIT shares, and the payment dates usually coincide. As a result, the ownership of OP Units generally provides holders with current income in the form of regular (typically quarterly) cash distributions.
- **Liability Allocations** – As a partner in the Operating Partnership, an OP Unitholder will receive an allocation, for income tax purposes, of the liabilities of the Operating Partnership. An OP Unitholder’s adjusted tax basis in his or her OP Units will be increased by the amount of such allocation. Among other things, an increased tax basis from an allocation of liabilities may enhance an OP Unitholder’s ability to (i) receive cash distributions in excess of earnings on a tax-deferred basis and (ii) absorb and use net losses, if any, generated by the Operating Partnership.
- **Investment Diversification** – The UPREIT structure offers property contributors the ability to diversify their holdings. Indeed, by contributing interests in a single property or a small group of properties that are concentrated in terms of geography, asset type or tenants in exchange for OP Units, a seller/contributor receives an interest in an entity (*i.e.*, the Operating Partnership) that owns multiple properties, often in multiple real estate markets, which can diversify the contributor’s investment

holdings and, as a result, mitigate the impact of a decline in the value or performance of any particular property.

- **Depreciation Deductions** – In the case of a newly acquired or developed real estate property, OP Unitholders will receive a share of the depreciation deductions from the depreciable asset in accordance with their respective interests in the Operating Partnership. These depreciation deductions will reduce the taxable income allocated to the OP Unitholders by the Operating Partnership with respect to their OP Units. However, OP Unitholders may be subject to limitations in their ability to use depreciation deductions and to subsequent adverse tax consequences in the future, such as depreciation recapture upon a later disposition of either the depreciated property or their OP Units, including pursuant to a redemption as described above.
- **Estate Planning** – OP Units are helpful for estate planning purposes. For example, an OP Unitholder can transfer OP Units to multiple beneficiaries as part of estate planning, and each beneficiary can choose either to hold his or her OP Units and receive quarterly distributions or tender the OP Units for redemption for cash or, at the REIT’s election, for REIT shares. In addition, when an individual partner holds the OP Units until death, the tax rules generally allow for a “step up” in tax basis of the OP Units, effectively permitting the beneficiaries to subsequently tender the OP Units for cash or REIT shares without incurring tax on the built-in gain in the OP Units at the time of death.

### Are there any drawbacks to the UPREIT structure or engaging in an OP Unit transaction?

Yes, despite the benefits described above, UPREIT structures can have some drawbacks that should be considered by sponsors and property sellers. UPREIT structures introduce a level of complexity that would not otherwise exist within a REIT structure that does not include an Operating Partnership subsidiary. Additionally, the disposition of property by an UPREIT may result in a conflict of interest with the contributing partner because any disposition of that property could result in gain recognition for that partner. As a result, contributing partners often negotiate mandatory holding periods and other provisions to protect the tax deferral benefits they expect to receive through contribution of appreciated property to an UPREIT.

### What agreements are typically entered into in connection with a contribution of properties to the Operating Partnership?

Typical OP Unit transactions are effected through one or more of the following transaction documents:

- **Contribution Agreement** – The Contribution Agreement is the primary agreement pursuant to which

the seller contributes its real estate assets to the Operating Partnership in exchange for OP Units. Much like a Purchase and Sale Agreement for a typical all-cash real estate transaction, the Contribution Agreement will outline the particular real estate assets being contributed, set forth the consideration to be paid (in this case, OP Units and, potentially, cash), and include various customary representations and warranties of the parties and closing conditions. However, because the contributor will be taking back the Operating Partnership's equity securities as consideration for the contribution of its real estate assets, the Contribution Agreement will also include additional representations and warranties that typically would not be included in a Purchase and Sale Agreement. For instance, the Contribution Agreement will also include representations and warranties from the contributor relating to the federal securities laws<sup>1</sup>, which are designed to enable the transaction to be effected in a private placement (*i.e.*, without registration of the issuance of the OP Units with the Securities and Exchange Commission (the "SEC")).

- **Partnership Agreement** – The Partnership Agreement sets forth the rights and obligations of the Operating Partnership and the limited partners. As the general partner of the Operating Partnership, the REIT controls the Operating Partnership and has discretion in the management of the Operating Partnership's business and affairs. Upon the closing of an OP Unit transaction, the property contributor will become a limited partner and, therefore, must enter into a joinder to the Partnership Agreement or another agreement pursuant to which the contributor agrees to be bound by the terms of the Partnership Agreement. The Partnership Agreement will also be updated or amended to reflect the issuance of the OP Units to the contributor and its status as a limited partner.
- **Tax Protection / Tax Matters Agreement** – The main purpose of a tax protection agreement ("TPA") is to protect a contributor of built-in gain property (and/or property encumbered by liabilities in excess of tax basis in the property) from recognizing gain upon the contribution transaction and for a specified period thereafter (typically 7-10 years). This is accomplished by the Operating Partnership agreeing that, for the specified period:
  - (i) there will be sufficient Operating Partnership liabilities allocated, for income tax purposes, to the contributing partner and/or available to be guaranteed by the contributing partner to prevent the recognition of gain;

and (ii) the Operating Partnership will not dispose of the contributed property in a taxable transaction that triggers the taxable built-in gain to the contributing partner. While fairly common, tax protection agreements can be viewed negatively by investors and public market analysts, especially when their terms are "off market." Because the additional costs associated with indemnifying the contributor from tax liabilities resulting from the pay down of debt or sale of the contributed assets, the terms of the tax protection agreement may restrict the REIT's ability to sell one or more properties or pay off indebtedness when it would otherwise be favorable or prudent. See "[Additional Tax Considerations—What Are Some of the Key Terms of Tax Protection Agreements?](#)"

- **Registration Rights Agreement** – As discussed in greater detail below under "[Securities Law Considerations](#)," OP Units are issued in transactions exempt from the registration requirements of the federal securities laws and, therefore, the OP Units issued to contributors are "restricted securities" that are subject to restrictions on transfer or sale. In order to provide contributors with liquidity for the REIT shares they may receive upon redemption of their OP Units, OP Unitholders have historically negotiated for a Registration Rights Agreement that would obligate the REIT to register with the SEC the issuance of the REIT shares that could be issued upon redemption of OP Units and/or the resale of those REIT shares. As a result of guidance released by the SEC in 2016, which allows OP Unitholders to "tack" the period during which they held their OP Units with the period during which they have held the REIT shares received upon redemption, OP Unitholders may freely sell their REIT shares after a six-month holding period and without the need to register the issuance or resale of the REIT shares. As a result of the SEC's guidance, the need for registration rights has diminished significantly. See "[Securities Law Considerations—How Can I Sell the REIT Shares Received upon Redemption of OP Units?](#)" below.

### Do OP Unitholders have voting rights?

In most cases, holders of OP Units do not have voting rights at the REIT level and, therefore, they cannot vote on matters presented to the REIT's stockholders, including the election of directors. In addition, holders of OP Units typically have only limited voting rights at the Operating Partnership level, including the right to vote on amendments to the Partnership Agreement that would adversely affect the interests of the limited partners. As a result, the REIT, as the

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<sup>1</sup> OP Unit transactions typically are structured as private placements under Rule 506 of Regulation D, a safe harbor under the federal securities laws that requires, subject to certain exceptions, that the recipient of the OP Units be an "accredited" investor within the meaning of Rule 501 of Regulation D. Accordingly, the contributor must give representations with

respect to his or her "accredited" investor status and typically must represent that, among other things, he or she is sophisticated in business and financial matters, that he or she understands the risks of acquiring OP Units, including that the OP Units have not been, and will not be, registered with the SEC, and that the OP Units are subject to restrictions on transfer.

general partner of the Operating Partnership, will generally have full, complete and exclusive responsibility and discretion in the management and control of the Operating Partnership, including the ability to cause the Operating Partnership to enter into certain major transactions such as acquisitions and dispositions, the incurrence of debt, distributions to partners and changes in the Operating Partnership's business activities.

In limited circumstances, a REIT may provide voting rights to OP Unitholders with respect to the OP Units issued to them upon closing of formation transactions relating to the REIT's IPO. The purpose of these provisions is to provide those holders with voting rights equivalent to the voting rights they would have received if they received REIT shares rather than OP Units in the formation transactions.

### How are the OP Units valued at the time of the contribution transaction?

In most cases, the value ascribed to each OP Unit issued in a contribution transaction will be equal to the value of one REIT share. However, there is no requirement to issue the OP Units at the same per-unit price as the then-current trading price of one REIT share, and some REITs negotiate for higher per-unit values in certain instances.

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## SECURITIES LAW CONSIDERATIONS

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### What federal securities laws are implicated by OP Unit transactions?

The issuance of OP Units in connection with contribution transactions constitutes the issuance of a security. Under the Securities Act of 1933, as amended (the "**Securities Act**"), securities must be issued pursuant to an effective registration statement that has been filed with the SEC or the issuance of securities must be exempt from the registration requirements. A number of exemptions from the registration requirements are available, based on either the type of security being offered and sold or the type of transaction in which the security is being offered and sold.

Section 4(a)(2) of the Securities Act provides that the registration requirements do not apply to "transactions by an issuer not involving any public offering." Generally speaking, the Section 4(a)(2) exemption is designed to relieve issuers of securities from the extensive regulations applicable to public offerings when the offer and sale of securities is made to a limited number of sophisticated investors that can fend for themselves. However, because the parameters of the Section 4(a)(2) exemption have been developed through judicial and administrative interpretations rather than rules and regulations promulgated by the SEC, Section 4(a)(2) does not provide certainty that the offering satisfies the requirements of the exemption.

As a result of this uncertainty, most issuers seek to satisfy the requirements of Regulation D under the Securities Act, which provides a non-exclusive safe harbor from the registration requirements discussed above. Regulation D is intended to provide issuers with greater certainty than reliance on judicial and administrative interpretations of the Section 4(a)(2) exemption. In most cases, the parties to a contribution agreement will rely on Rule 506 of Regulation D, which allows the Operating Partnership to issue the OP Units to an unlimited number of "accredited investors," subject to compliance with the other conditions of Rule 506. To ensure compliance with Rule 506, property contributors must provide an accredited investor questionnaire and make certain other representations and warranties to the REIT in the Contribution Agreement.

### Are OP Units freely tradeable?

No, OP Units issued in an exempt transaction are deemed to be "restricted securities" under the federal securities laws and are subject to restrictions on resale. In addition, there is typically no public market for OP Units and the Partnership Agreement for most Operating Partnerships imposes significant limitations on ownership and transfer.

### How can I sell the REIT shares received upon redemption of my OP Units?

After a minimum holding period required by the Partnership Agreement (typically one year), a holder of OP Units has the right to tender its OP Units to the Operating Partnership for cash in an amount per OP Unit equal to the market price of one REIT share. However, the REIT may elect, in its sole discretion, to issue REIT shares upon redemption of OP Units in lieu of making a cash payment. In this case, the REIT will issue one REIT share for each OP Unit that is redeemed, subject to adjustment in certain cases.

The REIT shares issued upon redemption are generally issued by the REIT pursuant to an exemption from the registration requirements of the Securities Act. Alternatively, the REIT may register the issuance of the REIT shares that may be issued upon redemption of the OP Units, although this approach has become less prevalent in recent years.

Because the redemption of OP Units will generally trigger any remaining taxable gain that was deferred at the time of the contribution transaction, a holder of OP Units that receives REIT shares upon redemption will generally seek to sell some or all of the REIT shares to monetize its investment and cover the associated tax liabilities. However, because the issuance of the REIT shares upon redemption likely will have been conducted as a transaction exempt from registration, the REIT shares are "restricted securities" within the meaning of the federal securities laws and can only be sold if the resale is registered with the SEC or an exemption or safe harbor is applicable.



In order to ensure that the REIT shares received upon redemption of OP Units could be sold immediately upon receipt, contributors have historically negotiated for registration rights pursuant to which the REIT would agree to file a registration statement with the SEC with respect to the issuance and/or resale of the REIT shares issued upon redemption. In the absence of such a registration statement, holders who received REIT shares upon redemption of their OP Units had to rely on Rule 144 under the Securities Act, which imposes a minimum holding period of 6-12 months before “restricted securities” can be resold. However, in light of guidance issued by the SEC in 2016, the ability to resell the REIT shares issued upon redemption of OP Units has significantly limited the benefit of registration rights in most cases.

As a result of the SEC’s 2016 guidance, a party who has received REIT shares upon redemption of its OP Units is permitted to “tack” the period during which they held the OP Units with the period during which they held the REIT shares for purposes of satisfying the minimum holding period requirement under Rule 144. Consequently, if the holder has held its OP Units for at least six months, it can “tack” that period with the REIT shares received upon redemption, the result of which is that REIT shares will be deemed to have been held for the entirety of the holding period of the OP Units. The SEC’s rationale for its guidance was long advocated by REITs and legal practitioners – that is, in an UPREIT structure, the REIT shares and the OP Units are economically equivalent and relate to the same risks and rewards of ownership and, in many cases, the OP Units may have been held for a significant period of time before redemption.

In addition to the minimum holding period, there are several conditions to Rule 144 that must be satisfied and the SEC’s 2016 guidance is currently limited to shares issued by REITs that utilize the UPREIT structure. For more information regarding Rule 144, see our publications entitled “[SEC Interpretive Guidance Permits Tacking of Rule 144 Holding Period for REIT Common Stock Acquired Upon Redemption of OP Units in an UPREIT Structure](#)” and “[Frequently Asked Questions about Rule 144 and Rule 145](#).”

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## **ADDITIONAL TAX CONSIDERATIONS**

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### **Under what circumstances may property contributions qualify for tax-deferral treatment?**

The most significant tax benefit of an OP Unit transaction is the potential for the contributor to defer its federal income tax liability resulting from the disposition of the asset. The sale of an appreciated real estate asset will generally result in the recognition of gain to the extent the amount realized on the sale (including any debt assumed) exceeds the seller’s adjusted tax basis in the real estate asset. However, by contributing an appreciated real estate asset to the Operating

Partnership in exchange for OP Units, gain attributable to such real estate asset can be deferred for federal income tax purposes until the earlier of (1) the OP Unitholder’s disposition of its OP Units (including upon redemption of OP Units for cash or REIT shares) or (2) the Operating Partnership’s disposition of the contributed real estate asset in a taxable transaction.

In order to qualify for this tax-deferral treatment, the contributor cannot generally receive cash, direct or indirect liability relief or other consideration (other than OP Units) in the OP Unit transaction or within two years thereafter (the “**disguised sale rules**”). If the contributor does receive cash or other consideration, the OP Unit transaction will generally be treated as a taxable exchange to the extent of such cash or other consideration, triggering to the contributor a proportionate amount of taxable built-in gain in the contributed asset. However, there are several exemptions to the application of the disguised sale rules, the most relevant of which are described below.

In addition to the potential application of the disguised sale rules, if the contributor’s debt on the contributed real estate assets exceeds its tax basis in such assets, the contributor must be allocated, for income tax purposes, liabilities from the Operating Partnership sufficient to offset the amount of such excess to avoid the recognition of an equivalent amount of taxable gain. Such excess is commonly referred to as “negative tax basis” or a “negative tax capital account.”

Even if an OP Unitholder is not required to recognize gain at the time of an OP Unit transaction, subsequent events could result in the recognition of the gain that was originally deferred. The most common of such events outside the control of a contributor are (i) a subsequent taxable sale of the contributed asset by the Operating Partnership, (ii) a subsequent taxable exit event with respect to the Operating Partnership (such as a cash merger with an acquirer in an M&A transaction) or (iii) a reduction in Operating Partnership debt that reduces a contributor’s overall share of liabilities of the Operating Partnership.

### **What are some of the exceptions to the disguised sale rules that would allow the contributor to receive consideration other than OP Units without triggering taxable gain?**

In an OP Unit transaction, the most commonly used exceptions to the disguised sale rules are exceptions for (i) reimbursements for “pre-formation capital expenditures,” (ii) assumptions of “qualified liabilities” and (iii) debt-financed distributions.

The first-mentioned exception is for distributions of cash or other consideration by the Operating Partnership to reimburse a contributor for capital expenditures incurred with respect to the contributed real estate asset during the two-year period preceding the contribution to the Operating Partnership. This exception can be very advantageous for developers contributing newly developed property or

contributors that have made recent significant improvements to the contributed real estate asset. In general, the cash reimbursement is limited to 20% of the fair market value of the real estate asset as of the date it was contributed to the Operating Partnership. This exception may enable the contributor of a newly developed or improved real estate asset to receive both cash (subject to the limits discussed above) and OP Units without immediately triggering taxes.

Under the second exception, an Operating Partnership's issuance of OP Units coupled with an assumption of "qualified liabilities" (and no other consideration) will generally will not be treated as a disguised sale. There are a number of types of qualified liabilities under the disguised sale rules, each of which should be evaluated when diligencing an OP Unit transaction. Generally, qualified liabilities would not include recent liabilities incurred by a contributor (or its property-owning entity) for the purpose of distributing cash to the contributor.

That said, the third exception allows a contributor to receive cash financed with debt on a tax-deferred basis, generally limited to the extent of the contributor's allocable share of such debt. In some cases, this may require that the contributor remains economically exposed (often through a guarantee) to the debt that financed the cash distribution.

### What are some of the key terms of tax protection agreements?

TPAs typically address some or all of the issues just discussed and certain other tax matters, particularly to the extent such issues and matters are outside a contributor's control after the OP Unit transaction. For example, a TPA may require the Operating Partnership to indemnify a contributor if the Operating Partnership (i) sells the contributed real estate asset in a taxable transaction, triggering the original built-in gain to the contributor, (ii) engages in certain taxable M&A transactions that trigger such gain, or gain in the OP Units received by the contributor, or (iii) fails to maintain sufficient liabilities so that the contributor is allocated liabilities sufficient to cover its "negative tax basis" or "negative tax capital account." The TPA may require, with varying degrees of exceptions, that the Operating Partnership allocate liabilities under the nonrecourse liability sharing rules (more contributor-favorable) or pursuant to a guarantee of the contributor (less contributor-favorable, particularly given the inability to use "bottom-dollar" guarantees).

Other issues TPAs may cover include the overall tax treatment of the OP Unit transaction and the "Section 704(c) method," which governs how the Operating Partnership will allocate taxable income and loss in relation to the built-in gain in the contributed real estate assets. The "traditional" method is by far the most common, with the "remedial" method generally not used given that it undermines the tax-

deferral purpose of the OP Unit transaction by creating "phantom" income for the contributor.

TPAs are often subject to significant negotiation, especially with respect to (i) length of term, meaning how long the Operating Partnership must indemnify the contributor, which ranges significantly in the market but often falls within the range of 7 to 10 years, and (ii) the nature of protection, if any, with respect to liability allocations, which may require an Operating Partnership to maintain an amount or type of debt that is suboptimal from a business perspective.

The tax rules underpinning OP Unit transactions, such as those governing "disguised sales," the allocation of liabilities and the "Section 704(c) methods," can be dauntingly complex, and contributors and Operating Partnerships typically require significant input from legal counsel and other advisors to understand and negotiate the issues at play.

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*Because of the generality of this guide, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.*

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