On point.

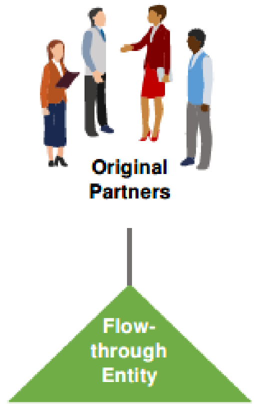
The Up-C Structure in IPOs

Basic Features

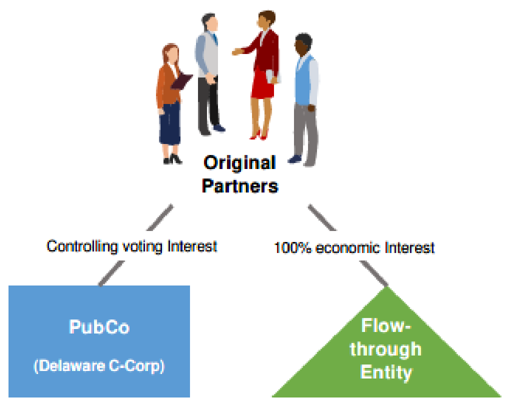
The umbrella partnership - C corporation structure ("Up-C") is an indirect mode for an operating partnership to conduct an initial public offering ("IPO"). It derives its name from the Up-REIT structure, widely used by real estate investment trusts since the 1990s. An Up-C is composed of two entities: the parent company, which is a C corporation ("PubCo"), which will be organized as a holding company, and PubCo's subsidiary, which is the then-existing operating partnership, usually structured as a limited liability company or a limited partnership (a "Flow-through Entity"). The Flow-through Entity's capital structure will be modified by reclassifying the interests of its original owners ("Original Partners") into a new class of interests that is exchangeable for PubCo common stock. The Up-C structure makes it possible for the Flow-through Entity to undertake an IPO while maintaining its partnership status, principal assets and operating business. Private equity-backed and venture capital-backed companies generally favor the Up-C structure because these financial investors often use flow-through entities to hold their interests in portfolio companies. The Up-C structure is a convenient tool to offer the portfolio companies' shares to the public through an IPO.

Structuring the Up-C

1. *Pre-IPO.* The Flow-through Entity begins as a limited liability company or partnership, which is owned by the Original Partners.

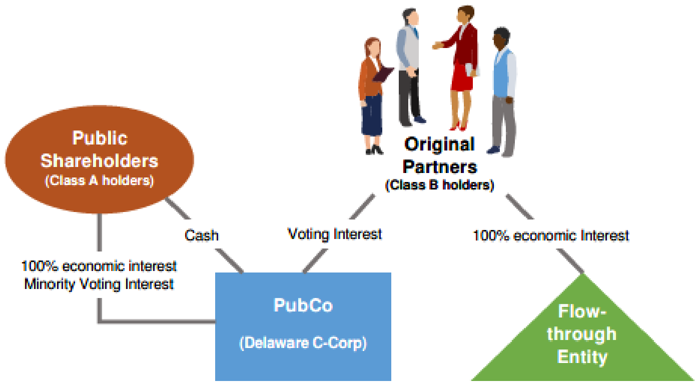


2. *PubCo formation.* The Original Partners incorporate PubCo as a C-corporation. PubCo will have two classes of common stock. PubCo's Class A common stock ("Class A Shares") will be offered in the IPO. PubCo's Class B common stock ("Class B Shares") is held by the Original Partners, and it provides voting rights but no economic rights.

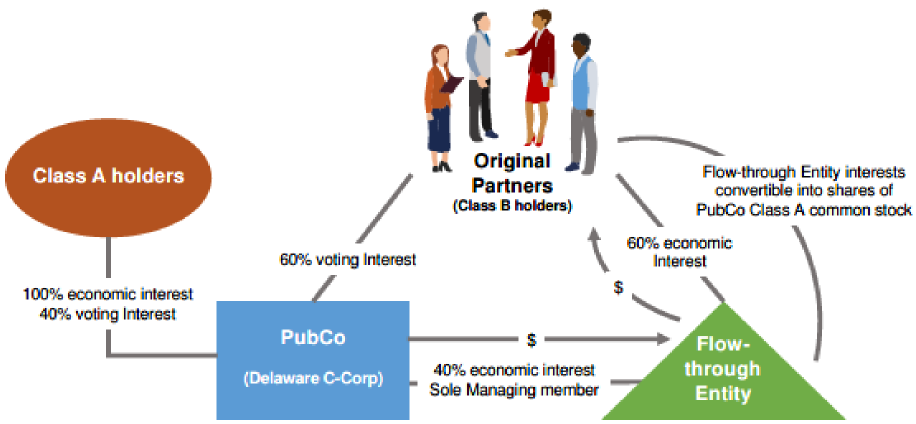


The Original Partners are expected to recapitalize the Flow-through Entity by using a single class of units that can be subsequently exchanged for Class A Shares or redeemed for cash, typically at the option of PubCo. This recapitalization may be through a newly issued class of units or those units held by Original Partners (if they intend to partially exit from their investment in the Flow-through Entity).

3. *Post-IPO*. Class A Shares are sold to the public through an IPO. PubCo is effectively a holding company, which has the Flow-through Entity as its subsidiary. The Flow-through Entity continues to hold the principal assets and operate the business. PubCo's certificate of incorporation and bylaws are amended to provide that each Original Partner will receive one or more of the newly created Class B Shares that will vote along with the Class A Shares. Holders of Class B Shares participate in any stockholder vote on an as-exchanged basis. This enables the Original Partners to continue to exercise control over PubCo commensurate with their economic interests in the Flow-through Entity.



4. *Final structure*. PubCo uses the IPO proceeds to purchase a controlling interest in the Flow-through Entity. The Flow-through Entity, in turn, redeems partnership interests from the Original Partners. For tax purposes, this redemption is treated as a "disguised sale" or a direct purchase of partnership interests by PubCo from the Original Partners.



Rationale and Benefits of the Structure

Prior to the IPO, the entity's business was conducted through the Flow-through Entity, which is a pass-through structure and does not pay entity-level taxes. Through the implementation of the Up-C structure, the pass-through entity remains in place, and PubCo pays the Original Partners for the value of PubCo's tax attributes as those tax attributes are used after the IPO. Each time an Original Partner exchanges Flow-through Entity units for PubCo shares, PubCo will receive a "step-up" in the tax basis of its assets. This tax basis step-up is allocated to PubCo's share of the historic business' assets (based on their fair market value) and any excess is allocated to intangible assets (i.e., goodwill) that are amortizable over a 15-year straight-line basis ("Section 197 intangibles"). In order to implement the Up-C, PubCo, the Original Partners and the Flow-through Entity will have to enter into various agreements, such as a tax receivable agreement ("TRA"), an exchange agreement and a registration rights agreement.

Tax Receivable Agreement

The TRA typically requires PubCo to share tax savings with the Original Partners. The Original Partners and Pubco will customarily share an 85:15 split on the benefits from the tax basis step-up generated by PubCo's purchase of its interest in the Flow-through Entity and any net operating losses incurred. PubCo will pay the negotiated percentage (e.g., 85%) of the value of the actual state and federal income tax savings to the Original Partners.[1] For tax purposes, these payments are treated as contingent installment sale proceeds, generating both additional step-up and deemed interest deductions for PubCo. The additional step-up has the effect of increasing the amounts of subsequent TRA payments.

An illustration of potential TRA economics is as follows:

Amount of PubCo Tax Basis Step-Up*	**$300 million**
Amortization Period	15 years
Annual Amortization	$20 million
PubCo Tax Rate (Federal and State)	25%
PubCo Annual Savings	$5 million
TRA Payout Ratio	85%
Annual Payment to Historic Partners**	$4.25 million

* Any future exchanges of partnership units for Class A shares of PubCo also may give rise to an additional tax basis step-up for PubCo (thereby increasing the amounts payable under the TRA over time).

** Payments under the TRA also give rise to an additional tax basis step-up for PubCo (thereby increasing the amounts payable under the TRA over time).

The TRA may also provide for a lump sum payment to the Original Partners in case of a merger, asset sale or other form of business combination or change in control. The Original Partners are ordinarily not required to remain owners of the Flow-through Entity, and they remain entitled to receive any payments under the TRA should they choose to divest their ownership.[2] The Up-C structure allows the Original Partners to maintain their interests in the Flow-through Entity, with its tax structure, and be subject to only one level of tax. The public stockholders are also benefitted by the Up-C structure through PubCo's resulting increased cash flow.

Exchange Agreement

PubCo's Class B shares will not be offered to the public. The exchange agreement, however, will provide the Original Partners with liquidity through a right to exchange Original Partners interests for the publicly traded Class A Shares on a one-for-one basis. In that case, a corresponding number of Class B shares fall away. In order to minimize any burdens on PubCo, the exchange agreement will specify some limitations for exchanges. The agreement may also limit exchanges in order to limit the effect of such exchanges on the trading market for the Class A Shares.

Registration Rights Agreement

When Original Partner interests are exchanged for Class A Shares, these securities will be "restricted securities" as defined in Rule 144 ("Rule 144") under the Securities Act of 1933, as amended, unless registered pursuant to an exchange registration statement or a resale registration statement. PubCo, the Original Partners, the holders of Class A Shares and those who hold securities that are convertible or exchangeable into Class A Shares may choose to enter into a registration rights agreement. This agreement will enable them to request that PubCo file with the Securities and Exchange Commission either a resale or an exchange registration statement for the sale of the Class A Shares.

Rule 144 Relief

On November 1, 2016, SEC Division of Corporation Finance staff (the "Staff") issued a no-action letter with respect to the required Rule 144 holding period and tacking of an Original Partner's holding period for the Flow-through Entity units.

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[1] The Tax Cuts and Jobs Act reduced the general corporate tax rate from a maximum graduated rate of 35% to a flat rate of 21% for taxable years beginning after December 31, 2017. This lower rate decreases the value of the basis step-up, which, in effect, decreases the amount of TRA payments. Other impacts of tax reform on the Up-C structure include limits on the use of net operating loss carry-forwards, limits on interest deductions and bonus depreciation/expensing provisions.

[2] In implementing the TRA, PubCo will have to make TRA payments and accurately disclose potential liabilities under the TRA. Additional accounting, modeling and compliance work is expected from PubCo.

Rule 144(d)(1)'s holding period for the Class A Shares commences upon the earlier acquisition of the Flow-through Entity units if: (i) the Original Partners paid the full purchase price for the Flow-through Entity units at the time they were acquired from the Flow-through Entity; (ii) the Up-C governing documents contemplate and provide the terms for the exchange of Flow-through Entity partnership interests for PubCo shares such that each Original Partner has the same economic risk as if it was a holder of the PubCo shares during the entire period such Original Partner holds the Flow-through Entity partnership interests; and (iii) no additional consideration is paid by the Original Partners for the PubCo shares. The holding period requirement is either six months or one year depending on the issuer's reporting requirements, and usually commences when a person acquires a security.

In effect, the Original Partners may choose to rely on Rule 144 in reselling their restricted Class A Shares instead of having PubCo file a registration statement.

In Acquisitions and Winding Up

An entity that relies on an Up-C structure can use cash or the PubCo shares as acquisition currencies. It can also use the Flow-through Entity units. The sellers will contribute the target company to the Flow-through Entity in exchange for Flow-through Entity units that may, at some point in the future, be exchanged for PubCo shares. The sellers and PubCo will enter into a TRA. The sellers benefit from this pass-through structure, and the target company becomes a disregarded entity for tax purposes. This mode of acquisition benefits the sellers with tax deferral, a single layer of tax and liquidity through the ability to exchange.

An entity that relies on an Up-C structure may also choose to "unwind" such structure due to a continued decrease of PubCo's stock price, upon weighing the benefits against detriments or for change of control considerations. In doing so, its TRA provisions will often be accelerated and the dual class share structure is eliminated in order to gain full ownership of the Flow-through Entity.

Registration Statement Disclosures

The Up-C structure has to be described in PubCo's registration statement at the time of the IPO. The prospectus cover page will highlight at least two classes of common stock, which will be described in the "Description of Capital Stock" section of the prospectus, which also will specify the rights associated with each class of shares.

The prospectus summary usually will contain a structure diagram. The transactions relating to the PubCo formation and Flow-through Entity reorganization also generally will be discussed in a separate section, often titled "Organizational Structure" or "Formation Transactions."

The "Certain Relationships and Related Party Transactions" section of the prospectus will describe the TRA, exchange agreement, voting agreement (if any) and other agreements entered into in connection with the Up-C structure.

The "Risk Factors" section of the prospectus will highlight certain aspects associated with the Up-C structure that will pose risks related to the ownership of the PubCo shares. These disclosures may mention that the only material asset of PubCo will be its interest in the Flow-through Entity. The disclosures also may underscore the risks on payments to the Original Partners for certain tax benefits and those associated with the classes of common stock, as well as any risks to Class A Shareholders arising if PubCo is a controlled company, which will depend on the particular facts and circumstances.

Sample risk factor disclosures made by companies that used the Up-C structure are provided below.

- **"*We cannot assure you that we will declare dividends or have the available cash to make dividend payments.***

  Because we are a holding company with no material assets other than our ownership of common units of RMCO, we will have no independent means of generating revenue or cash flow, and our ability to pay dividends will be dependent upon the financial results and cash flows of RMCO and its subsidiaries and distributions we receive from RMCO. We expect to cause RMCO to make distributions to fund our expected dividend payments, subject to applicable law and any restrictions contained in RMCO's or its subsidiaries' current or future debt agreements…" Re/Max Holdings, Inc., Form 424(b)(4) filed October 3, 2013 (SIC 6531—Real Estate Agents & Managers (For Others))

- ***"We are required to pay our existing owners for certain tax benefits, which amounts are expected to be material.***

  We will enter into an income tax receivable agreement with our existing stockholders that will provide for the payment by us to our existing stockholders of 85% of the amount of cash savings, if any, in United States federal, state, local and foreign income tax that we and our subsidiaries actually realize (or are deemed to realize in the case of an early termination by us or a change of control, as discussed below under the heading "Certain Relationships and Related Party Transactions—

Income Tax Receivable Agreement") as a result of the utilization of our net operating losses and other tax attributes attributable to periods prior to this offering together with interest accrued at a rate of LIBOR plus 200 basis points from the date the applicable tax return is due (without extension) until paid.

We expect that as a result of entering into the income tax receivable agreement, during its term, the payments that we may make under it could be material. Assuming no material changes in the relevant tax law, and that we earn sufficient taxable income to realize the full tax benefits subject to the income tax receivable agreement, we expect that future payments under the income tax receivable agreement will total between approximately $39.0 million and $41.0 million. Such amounts may differ materially from the amounts presented above based on various items.

These payment obligations are our obligations and not obligations of our subsidiaries. The actual amount and utilization of net operating losses and other tax attributes, as well as the amount and timing of any payments under the income tax receivable agreement, will vary depending upon a number of factors, including the amount, character, and timing of our and our subsidiaries' taxable income in the future.

Our counterparties under the income tax receivable agreement will not reimburse us for any benefits that are subsequently disallowed (although any future payments would be adjusted to the extent possible to reflect the result of such disallowance). As a result, in such circumstances, we could make payments under the income tax receivable agreement that are greater than our actual cash tax savings.

If we undergo a change of control as defined in the income tax receivable agreement, the income tax receivable agreement will terminate and we will be required to make a payment equal to the present value of expected future payments under the income tax receivable agreement, which payment would be based on certain assumptions, including those relating to our future taxable income. Additionally, if we or a direct or indirect subsidiary transfers any asset to a corporation with which we do not file a consolidated tax return, we will be treated as having sold that asset for its fair market value in a taxable transaction for purposes of determining the cash savings in income tax under the income tax receivable agreement. Any such payment resulting from a change of control or asset transfer could be substantial and could exceed our actual cash tax savings." El Pollo Holdings, Inc., Form 424(b)(4) filed July 28, 2014 (SIC 5812—Retail—Eating Places)

- ***"TSG will continue to have significant influence over us after this offering, including control over decisions that require the approval of stockholders, which could limit your ability to influence the outcome of matters submitted to stockholders for a vote.***

  We are currently controlled, and after this offering is completed will continue to be controlled, by investment funds affiliated with TSG. Upon completion of this offering, investment funds affiliated with TSG will control 67.9% of the voting power of our common stock (or 65.9% if the underwriters exercise in full their option to purchase additional shares). As long as TSG owns or controls at least a majority of our outstanding voting power, it will have the ability to exercise substantial control over all corporate actions requiring stockholder approval, irrespective of how our other stockholders may vote, including the election and removal of directors and the size of our board, any amendment of our certificate of incorporation or bylaws, or the approval of any merger or other significant corporate transaction, including a sale of substantially all of our assets. Even if its ownership falls below 50%, TSG will continue to be able to strongly influence or effectively control our decisions.

  Additionally, TSG's interests may not align with the interests of our other stockholders. TSG is in the business of making investments in companies and may acquire and hold interests in businesses that compete directly or indirectly with us. TSG may also pursue acquisition opportunities that may be complementary to our business, and, as a result, those acquisition opportunities may not be available to us." Planet Fitness, Inc., Form 424(b)(4) filed August 6, 2015 (SIC 7997—Services—Membership Sports & Recreation Clubs)

- ***"We are a 'controlled company' within the meaning of the Nasdaq rules and, as a result, will qualify for, and intend to rely on, exemptions from certain corporate governance requirements. You will not have the same protections afforded to stockholders of companies that are subject to such corporate governance requirements.***

Pursuant to the terms of the Stockholders Agreement…our Chief Executive Officer, after the consummation of this offering will, in the aggregate, have more than 50% of the voting power for the election of directors, and, as a result, we will be considered a 'controlled company' for the purposes of the Nasdaq rules. As such, we will qualify for, and intend to rely on, exemptions from certain corporate governance requirements, including the requirements to have a majority of independent directors on our board of directors, an entirely independent nominating and corporate governance committee, an entirely independent compensation committee or to perform annual performance evaluation of the nominating and corporate governance and compensation committees.

The corporate governance requirements and specifically the independence standards are intended to ensure that directors who are considered independent are free of any conflicting interest that could influence their actions as directors. Following this offering, we intend to use certain exemptions afforded to a 'controlled company.' As a result, we will not be subject to certain corporate governance requirements, including that a majority of our board of directors consists of 'independent directors,' as defined under the Nasdaq rules. In addition, we will not be required to have a nominating and corporate governance committee or compensation committee that is composed entirely of independent directors with a written charter addressing the committee's purpose and responsibilities or to conduct annual performance evaluations of the nominating and corporate governance and compensation committees. See 'Management.' Accordingly, you may not have the same protections afforded to stockholders of companies that are subject to all of the corporate governance requirements of the Nasdaq rules." Funko, Inc., Form 424(b)(4) filed November 3, 2017 (SIC 3944—Games, Toys & Children's Vehicles (Except Dolls & Bicycles))

Periodic Reporting Requirements

Following completion of the IPO, PubCo will regularly be required to continue to include disclosure regarding the Up-C structure in its public filings, which may introduce additional complexity to its disclosures. Sample disclosures contained in periodic reports made by companies that used the Up-C structure are provided below.

Item 101(a) (17 C.F.R. § 229.101) of Regulation S-K requires PubCo to describe the general development of its business, including how the Up-C structure could materially impact its businesses, products and services.

- ***Item 1. Business—Initial Public Offering and Organizational Transactions***

  "Pursuant to a Stockholders Agreement, dated as of February 4, 2015, as amended, by and among Daniel H. Meyer and his affiliates (the 'Meyer Group') and other parties thereto, the Meyer Group has the right to cause all of the stock of Union Square Cafe Corp. ('USC') and Gramercy Tavern Corp. ('GT') to be converted into and exchanged for shares of our Class A common stock pursuant to a tax-free reorganization (each, a 'Reorganization'). In December 2015, the Meyer Group exercised their right with respect to USC. The Reorganization of USC was structured as a two-step merger, whereby (i) a newly-formed wholly-owned subsidiary of the Company merged with and into USC, then (ii) USC merged with and into the Company (the foregoing transactions are collectively referred to as the 'USC Merger'). Prior to the USC Merger, USC owned 1,727,804 LLC Interests and an equivalent number of shares of our Class B common stock. In the USC Merger, (i) 1,727,804 shares of Class A common stock were issued to the stockholders of USC, with each stockholder receiving newly-issued shares of Class A common stock in an amount equivalent to the number of shares of USC held by such stockholders; (ii) 1,727,804 shares of Class B common stock held by USC were cancelled; and (iii) 1,727,804 LLC Interests held by USC were transferred to us.
  As of December 26, 2018, we owned 79.6% of SSE Holdings and the non-controlling interest holders own the remaining 20.4% of SSE Holdings." Shake Shack Inc., Form 10-K filed February 25, 2019 (SIC 5810—Retail—Eating & Drinking Places)

Item 503(c) (17 C.F.R. § 229.503) of Regulation S-K requires PubCo to describe the Up-C structure's material risks that impact its business, and how these risks affect PubCo or the securities it offers.

- ***Item 1A. Risk Factors—Risks Related to Our Corporate Structure—The interests of our largest stockholder and NCM LLC's other members may be different from or conflict with those of our other stockholders.***

"Standard General beneficially owns 15.3 million shares of our common stock, and as of December 27, 2018, Cinemark and Regal held NCM LLC membership interests that are convertible into another 80.7 million shares of our common stock. As a result, each of Regal, Cinemark and Standard General is in a position to influence or control to some degree the outcome of matters requiring stockholder approval, including the adoption of amendments to our certificate of incorporation or bylaws and the approval of mergers and other significant corporate transactions. Their influence or control of our company and NCM LLC may have the effect of delaying or promoting a change of control of our company, and may adversely affect the voting and other rights of other stockholders. In addition, each of Regal, Cinemark and Standard General has the right to designate directors to our Board. These directors have the authority, subject to applicable rules and regulations, to issue additional stock, implement stock repurchase programs, declare dividends and make other decisions.

It is possible that the interests of Regal, Cinemark and Standard General may in some circumstances conflict with our interests and the interests of our other stockholders. For example, Cinemark and Regal may have different tax positions from us, especially in light of the TRA we entered into with founding members that provides for the payment by us to the founding members of 90% of the amount of any tax benefits that we actually realize, or in some cases are deemed to realize. This could influence their decisions regarding whether and when we should dispose of assets, and whether and when we or NCM LLC should incur indebtedness. As another example, Standard General in the business of making investments in companies and may hold, and may from time to time in the future acquire interests in or provide advice to businesses that directly or indirectly compete with us." National Cinemedia, Inc., Form 10-K filed February 22, 2019 (SIC 7310—Services—Advertising)

Item 303(a) (17 C.F.R. § 229.303) of Regulation S-K requires PubCo to discuss its financial condition and changes in financial condition and results of operations, and any known trends or factors that its management believes to be important to its results of operations. This includes known Up-C structure-related trends, commitments, events or uncertainties that will likely have a material impact on its business.

- ***Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations—Critical Accounting Policies—Tax Receivable Agreement***

  "Tax Receivable Agreement. In 2017, we recognized a tax receivable agreement gain of $16.4 million primarily as a result of the amendment of the TRA. No such gain occurred in 2016. Also in 2017, we recognized a tax receivable agreement benefit of $25.3 million related to a reduction in the corporate tax rate from the Tax Cuts and Jobs Act. The 2016 expense was recorded to update the initial estimated liability for the filed tax returns and final 2015 tax losses that are included in the amounts payable under the TRA." Surgery Partners, Inc., Form 10-K filed March 15, 2019 (SIC 8062—Services—General Medical & Surgical Hospitals, Not Elsewhere Classified)

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