HUSCH BLACKWELL

October 21, 2025

Schafer Richardson, LLC
c/o SR DST Trustee, LLC
900 North Third Street
Minneapolis, Minnesota 55401
Attn: Steven G. Norcutt

Re: Tax Opinion

You have requested our opinion as to certain U.S. federal income consequences in connection with the proposed transactions described in the Private Placement Memorandum of SRRT Square 2 DST, dated October 2025, as supplemented or amended (the "PPM"). More specifically, you have requested our opinion as to whether a purchase by an investor (a "Beneficiary") of a beneficial interest (an "Interest") in SRRT Square 2 DST, a Delaware statutory trust (the "Trust") described in Chapter 38 of Title 12 of the Delaware Code (the "Act"), should be treated for U.S. federal income tax purposes as a direct purchase of an undivided interest in all of the assets of the Trust for purposes of Section 1031 of the Internal Revenue Code of 1986, as amended.[1]

In formulating our opinion, we have reviewed the following documents: (i) the Trust Agreement of the Trust, dated August 21, 2025, made by and among SRRT Properties, LP, a Delaware limited partnership, as the initial beneficiary of the Trust (the "Initial Beneficiary"), The Corporation Trust Company, a Delaware corporation, as co-trustee of the Trust (the "Delaware Trustee"), SR DST Trustee, LLC, a Minnesota limited liability company, as co-trustee of the Trust (the "Signatory Trustee," and together with the Delaware Trustee, the "Trustees") (the "Trust Agreement"), (ii) the Ground Lease, dated as of August 6, 2025 (the "Lease" or "Ground Lease"), entered into and between the Trust and SRRT Square 2 GL, LLC, a Minnesota limited liability company (the "Tenant" or "Ground Lessee"); (iii) the Form of Investor Questionnaire & Purchase Agreement; (iv) the PPM; and (v) the form Asset Management Agreement. We have also assumed that the representations set forth in the letter addressed to us and signed on behalf of the Trustees on October 21, 2025 (the "Tax Certificate" and collectively with items (i) through (v), the "Transaction Documents")), are true, complete and correct in all respects as of the date hereof. Unless otherwise indicated, all capitalized terms used herein and not otherwise defined have the meanings set forth in the PPM.

Executive Summary

Based on our review of the Transaction Documents and the facts and assumptions described below, we are of the opinion that (i) from and after the time there is more than one Beneficiary of the Trust, the Trust should be treated as an investment trust described in Treasury Regulation section 301.7701-4(c) that is classified as a "trust" under Treasury Regulation section

[1] Unless otherwise specified, all Section references provided hereinafter are to the Internal Revenue Code of 1986, as amended.

301.7701-4(a), and (ii) the Beneficiaries should be treated as owning an undivided fractional interest in the assets of the Trust for U.S. federal income tax purposes.

Our opinion does not address, and should not be viewed as expressing any opinion concerning, whether the acquisition of an Interest will, in light of the facts and circumstances applicable to a specific Beneficiary, constitute an acquisition of like-kind replacement property by any Beneficiary in a transaction that qualifies for nonrecognition of gain or loss under Section 1031.

The opinion set forth herein is based upon our interpretation of existing statutes, Treasury Regulations and administrative rulings and procedures, and the judicial and administrative interpretations of the foregoing as of the date hereof. Such statutes, Treasury Regulations, rulings, procedures, and interpretations are subject to change, and such changes could result in different tax consequences than those set forth herein. This opinion does not address any state or local tax consequences of the transactions described herein.

This opinion is limited to the legal matters stated herein and no opinion is implied or may be inferred beyond the matters expressly stated. The Internal Revenue Service ("IRS") may challenge the conclusion herein stated, and there is no assurance that any such challenge will not be successful.

In providing the opinion expressed herein, we have relied as to the accuracy and truthfulness of various questions of fact material to our opinion, and upon the accuracy and truthfulness of the representations and warranties made in the respective Transaction Documents, and, except as otherwise stated herein or as required by Circular 230, have not undertaken any independent investigation to determine the existence or absence of such facts and no inference to the contrary should be drawn from our representation. However, in the course of our representation, nothing has come to our attention that would cause us to question the accuracy thereof.

This opinion is provided solely for your benefit in connection with the proposed transaction as described herein. This letter may be used and relied upon by each of the addressees and the direct members and partners of such parties and may neither be used nor relied upon by any other person without our prior written consent. Notwithstanding the foregoing, nothing contained herein shall be deemed to limit in any way the disclosure of the tax treatment or the tax structure of the transaction discussed herein to third parties. This opinion is rendered as of the date hereof. We assume no responsibility or obligation to withdraw or to update or revise this opinion or to notify any party if, at any time hereafter, there is a legal or factual change which in any manner affects any aspect of this opinion.

Background

The Trust is offering for sale Interests in the Trust, which owns the Real Estate.[2] The Initial Beneficiary has represented in the PPM that it may retain an Interest.[3] The purposes of the Trust are (i) to lease and operate the Real Estate and any related personal property; (ii) to enter into or assume and comply with, as necessary and appropriate, the terms of the Transaction Documents (as defined in the Trust Agreement); (iii) to conserve, protect, manage and dispose of the Real Estate; and (iv) to take such other actions as the Trustees deem necessary or advisable to carry out the foregoing.[4] All material duties under the Trust Agreement reside with the Signatory Trustee,[5] who will act on behalf of the Trust and is responsible for the operation of the Trust.[6] Such duties include (but are not limited to) (a) conserving, protecting and selling Trust assets (including the Real Estate), (b) collecting rents and making distributions (less expenses and reserves) to the Beneficiaries, (c) entering into any agreement for the purposes of completing a tax-free exchange of real property (pursuant to Section 1031) for the Beneficiaries with each such Beneficiary's qualified intermediary, (d) notifying the relevant parties of any default under the Transaction Documents (as defined in the Trust Agreement), (e) solely to the extent necessitated by the default, bankruptcy or insolvency of a tenant, including the Ground Lessee, of an underlying parcel of Real Estate, renegotiating the Lease and entering into new leases with respect to the Real Estate, and (f) consenting to the exercise of any right held by the Ground Lessee with respect to the Real Estate (to the extent to maintain the value of the Trust assets, including the Real Estate).[7] However, the Signatory Trustee is prohibited from taking certain specified actions if any such action would constitute a power to "vary the investment of the certificate holders" as defined by Treasury Regulation section 301.7701-4(c)(1) or taking any other action that could cause the Trust to be treated as a "business entity" for U.S. federal income tax purposes.[8] Many of the prohibited activities are factual in nature. We are relying on the Tax Certificate regarding certain factual matters and will not independently verify the accuracy of the matters included therein.

The Trust shall dissolve and wind up at the earlier of August 1, 2074 and the sale of the Real Estate.[9] On August 6, 2025, the Trust and the Ground Lessee (an affiliate of the Initial Beneficiary) entered into the Ground Lease pursuant to which the Ground Lessee is leasing the underlying Real Estate for an original term of 50 years (plus five separate options to extend the term, each by an additional 10-year period).[10] The Tenant will construct and develop an

[2] As defined in the Trust Agreement. Hereinafter, the terms "Real Estate" and "Property" shall be used interchangeably.
[3] *See* PPM, Conflicts of Interest.
[4] Trust Agreement, section 2.03.
[5] The duties of the Delaware Trustee are limited to acting as a trustee to satisfy the requirement of the Act that at least one trustee has a principal place of business in Delaware. Trust Agreement, section 7.01(b).
[6] *See, e.g.,* PPM; Trust Agreement, sections 7.01 and 7.02.
[7] Trust Agreement, section 7.02.
[8] Trust Agreement, section 7.03.
[9] *See* PPM.
[10] Trust Agreement, Article I, section 2.01; Lease, sections 2.01, 26.01.

apartment building (the "Facility" or the "Project") on the Real Estate.[11] The Trust will have certain approval rights during the development and construction phase. The Lease is a net lease in which the Ground Lessee shall pay to the Trust an annual base rent plus all other expenses arising from the leasing, operation, management, construction, maintenance, repair, use, and occupancy of the Property.[12] The base rent shall increase annually by two percent.[13] The rent is not contingent on the Tenant's ability to lease the Facility or on Tenant's gross sales or net profits derived from the lease of the Facility.[14] The Trust will pay certain expenses as set forth in the Lease.[15] Following completion of construction and development of the Facility on the Real Estate, (i) the Ground Lessee will engage a third party property management company to manage and lease to residential tenants the Facility, and (ii) the Signatory Trustee and the Trust will enter into the Asset Management Agreement.[16] The Ground Lessee will receive rent from the residential tenants, net of the amount paid to the third property management company.[17] Under the Asset Management Agreement, (i) the Trust will pay the Signatory Trustee an annual fee equal to 0.4% of the Contributed Value (the "Asset Management Fee") as compensation for the Signatory Trustee managing the day to day operations of the Trust, and (ii) upon the sale of the Real Estate, the Signatory Trustee is entitled to receive a disposition fee equal to 3.0% of the gross sale price (the "Disposition Fee" and collectively with the Asset Management Fee, the "AMA Fees").[18]

In addition, in rendering this opinion, we have, with your permission, assumed that: (i) the Interests will be acquired by the Beneficiaries directly from the Trust and the Initial Beneficiary's interest in the Trust will be reduced in proportion to the amount of such acquisitions; (ii) none of the Initial Beneficiary, the Trust, the Trustees, or any Beneficiary has made or will make an election, or has taken or will take any other action, that would cause the Trust to be classified as an association taxable as a corporation or a partnership for U.S. federal income tax purposes; (iii) the Tenant is acting as a principal for its own account and is not acting as an agent for the Trust, Trustee or the Initial Beneficiary, and the Lease does not constitute a partnership, joint venture, or management, agency or nominee agreement; (iv) the Transaction Documents (without modification) are properly executed and delivered, and are enforceable in accordance with their terms; (v) all parties to the Transaction Documents will comply with all provisions of the Transaction Documents, and will take no action inconsistent with the Transaction Documents or any terms of this opinion; (vi) all transactions described in the PPM have occurred or will occur as described in the PPM; and (viii) neither the exchanged property nor the replacement property in any Section 1031 exchange involving the Trust is, or at any relevant time has been or will be, tax-exempt use property within the meaning of Section 470(e)(4)(A). Furthermore, with your permission, the conclusions we have made in this opinion

[11] *See* PPM.
[12] *See* Lease, Article III; PPM, Summary of the Master Lease.
[13] Lease, section 3.01(b).
[14] *See* Lease, section 3.02; Tax Certificate.
[15] Lease, section 3.03.
[16] *See* PPM.
[17] *Id*.
[18] *Id.*

do not take into account the tax consequences of a disposition fee payment made (if any) to the Signatory Trustee upon a disposition of the underlying Trust assets.

We have further assumed the accuracy and completeness of all documents and records that we have reviewed, the genuineness of all signatures, the authenticity of the documents submitted to us as originals, and the conformity to authentic original documents of all documents submitted to us as pro forma or reproduced copies.

Discussion and Analysis

I. Background

Section 1031(a)(1) provides that "[n]o gain or loss [is] recognized on the exchange of real property held for productive use in a trade or business or for investment if such real property is exchanged solely for real property of like kind which is to be held either for the productive use in a trade or business or for investment." Accordingly, a determination has to be made whether a Beneficiary who acquires an Interest will be treated as acquiring an undivided fractional interest in the Trust assets (including the Real Estate) for purposes of Section 1031.

The IRS concluded in Revenue Ruling 2004-86[19] that, under the limited circumstances set forth therein, beneficial owners of a Delaware statutory trust ("DST") that in turn owned real estate would be treated as owning a direct interest in such real estate for purposes of the nonrecognition provisions of Section 1031. In reaching this conclusion, the IRS determined that (i) the DST described therein would be treated as an "investment trust" under Treasury Regulation section 301.7701-4(c), classified as a "trust" under Treasury Regulation section 301.7701-4(a), and (ii) the beneficial owners of the DST were "grantors" of the trust and entitled to distributions of all trust income, and, as such, treated as owning direct, fractional interests in the DST's property for U.S. federal income tax purposes.

II. Treatment of Trust as an "Investment Trust"

In order for a trust to be classified as an "investment trust" under Treasury Regulation section 301.7701-4, the trust must (i) be recognized as an entity separate from the beneficial owners for U.S. federal income tax purposes, and (ii) be treated as an investment trust described in Treasury Regulation section 301.7701-4(c).

A. Separate Entity Treatment

Whether an organization is an entity separate from its owners for U.S. federal income tax purposes is a matter of federal tax law and does not depend on whether the organization is recognized as an entity under local law.[20] An entity that is formed under local law is not always

[19] 2004-2 C.B. 191 (hereinafter, "Rev. Rul. 2004-86").
[20] Treas. Reg. section 301.7701-1(a)(1).

recognized as a separate entity for U.S. federal income tax purposes.[21] When participants in a venture form a state-law entity and avail themselves of the benefits of that entity for a valid business purpose, however, the entity generally will be recognized for U.S. federal income tax purposes.[22]

Separate Entity

The IRS held in Rev. Rul. 2004-86 that a DST was an entity that was recognized as separate from its owners. In reaching this conclusion, the IRS analyzed the powers, limitations and benefits that Delaware law accorded to a DST and its beneficial owners. Under Delaware law, (i) creditors of the beneficial owners of the DST could not assert claims directly against property owned by the DST, (ii) the DST could sue or be sued and the property held by the DST was subject to attachment and execution as if it were a corporation, (iii) the beneficial owners of the DST were entitled to the same limitation on personal liability because of actions of the DST that is extended to stockholders of Delaware corporations, (iv) the DST could merge or consolidate with or into one or more statutory entities or other business entities and (v) the DST was formed for investment purposes. These powers and privileges afforded to a DST and the beneficial owners thereof, as well as the purpose of a DST, led the IRS to conclude that a DST is an entity separate from its owners for U.S. federal income tax purposes.[23]

No Agency

However, an entity formed under state law that acts as a mere agent of its owners will not be treated as an entity separate from its owners for U.S. federal income tax purposes. Whether a trust or its trustee is an agent of a trust's beneficial owners depends upon the agreement between the parties.[24] The IRS concluded in Rev. Rul. 2004-86 that because (i) the DST's beneficial owners did not enter into an agency agreement with the DST or its trustee, and (ii) neither the DST nor its trustee acted as an agent for the DST's beneficial owners, neither the DST nor the trustee was an agent of the DST's beneficial owners.

In contrast, in *Commissioner v. Bollinger*,[25] a corporation was treated as an agent of its owners where the corporation functioned merely as the nominal debtor and record title holder to mortgaged property. The shareholders entered into an agreement providing that (i) the corporation would hold title to the property as the shareholders' nominee and agent solely to secure financing, (ii) the shareholders had sole control and responsibility for the mortgaged property, and (iii) the shareholders were the principals and owners of the property during its financing, construction, and operation. The Supreme Court held that the shareholders, rather than the corporation, were the owners of the property because the relationship between the

[21] Treas. Reg. section 301.7701-1(a)(3).
[22] *See Moline Properties, Inc. v. Commissioner*, 319 U.S. 436 (1943).
[23] Rev. Rul. 2004-86 (citing to Act §§ 3801-3824).
[24] Rev. Rul. 2004-86.
[25] 485 U.S. 340 (1988).

shareholders and the corporation was, in both form and substance, an agency with the shareholders as principals.

Similarly, the IRS concluded in Revenue Ruling 92-105[26] that an Illinois land trust was not to be treated as an entity separate from its owner for U.S. federal income tax purposes. A single taxpayer created an Illinois land trust and named a domestic corporation as trustee. The taxpayer transferred legal and equitable title to real property to the trust, subject to the provisions of an accompanying land trust agreement. Under the agreement, the taxpayer (i) retained exclusive control of the management, operation, rental, and sale of the real property, together with an exclusive right to the earnings and proceeds from the real property, and (ii) was required to file all tax returns, pay all taxes, and satisfy any other liabilities with respect to the real property. Under Illinois law, there was no limitation on liability of a beneficiary of an Illinois land trust. Because the trustee's only responsibility was to hold and transfer title to the property at the direction of the beneficiary, and because the beneficiary (a) retained the direct obligation to pay liabilities and taxes related to the property, and (b) retained the right to manage and control the property as well as any liability with respect to the property, the IRS concluded that the Illinois land trust could not rise to the level of an "entity" separate from the beneficial owner for U.S. federal income tax purposes.

Application of Law to Trust's Facts

Based on the authorities discussed above, the Trust should be recognized as an entity separate from the Beneficiaries.

First, similar to the DST in Rev. Rul. 2004-86, the Trust is organized as a DST and thus the Trust and Beneficiaries may avail themselves only of the limited powers and privileges afforded to them under the Act. The Trust Agreement similarly provides that the Trust shall hold the Trust assets (including the Property) for investment purposes.[27]

Second, neither the Trustee nor the Trust should be viewed as an agent of the Beneficiaries. Similar to Rev. Rul. 2004-86, neither the Trust, nor the Trustees, nor the Initial Beneficiary (i) has entered into a written agreement with any Beneficiary creating an agency relationship, or (ii) will represent itself as an agent of any Beneficiary.[28] Each of the Trustees will, and will cause the Trust, at all times to hold itself out to third parties as a legal entity separate and distinct from any other person (including the Beneficiaries).[29] Unlike the trusts in *Bollinger* and Revenue Ruling 92-105, the Beneficiaries have no right or power to direct in any manner the actions of the Trustees (in connection with the operation of the Trust) or the Ground Lessee (in connection with the management or operation of the Trust or the Project).[30] Additionally, the Trust Agreement requires the Trustees to cause the Trust to (i) observe

[26] 1992-2 C.B. 204.
[27] Trust Agreement, section 2.03.
[28] *See* Trust Agreement, section 2.04; Tax Certificate.
[29] Trust Agreement, section 2.07.
[30] *See*, *e.g.,* Trust Agreement, section 7.02.

statutory formalities with respect to the administration of the Trust and in the conduct of the Trust's activities[31], and (ii) prepare separate financial statements and, if the Trust is not treated for U.S. federal, state or local income tax purposes as a disregarded entity, file its tax returns, if any, separate from those of any other Person, and not file consolidated tax returns with any other Person except to the extent required by law to file such consolidated tax returns.[32] These requirements and prohibitions evidence an intent that the Trust be engaged in activities on its own behalf rather than as an agent of the Beneficiaries.

Accordingly, the Trust should be recognized for U.S. federal income tax purposes as an entity separate from the Beneficiaries, and the Trust and the Trustees should not be viewed as agents of the Beneficiaries for U.S. federal income tax purposes.

B. "Investment Trust" described in Treasury Regulation Section 301.7701-4(c)

A DST that is treated as a separate entity will either be treated as a "trust" or a business entity for U.S. federal income tax purposes.[33] In general, the term "trust" refers to an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries.[34] The beneficiaries of such a trust may be the persons who create it and it will be recognized as a trust if it was created for the purpose of protecting or conserving the trust property for beneficiaries who stand in the same relation to the trust as they would if the trust had been created by others for them.[35] For U.S. federal income tax purposes, a trust arrangement generally will be classified as a "trust" (rather than another form of business entity) if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of a business for profit.[36] On the other hand, arrangements common known as business or commercial trusts, which are generally created by beneficiaries simply as a device to carry on a profit-making business that normally would have been carried on through a corporation or partnership are not classified as trusts for U.S. federal income tax purposes.[37]

An "investment" trust with a single class of ownership interests, representing undivided beneficial interests in the assets of the trust, will be classified as a "trust" for U.S. federal income tax purposes if there is no power under the trust agreement to vary the investment of the certificate holders.[38] As discussed in greater detail below, a power to vary the investment of the certificate holders exists where there is managerial power, under the trust instrument, that

[31] Trust Agreement, section 2.05(d).
[32] Trust Agreement, Section 2.07.
[33] Rev. Rul. 2004-86.
[34] Treas. Reg. section 301.7701-4(a).
[35] *Id*.
[36] *Id*.
[37] Treas. Reg. section 301.7701-4(b)
[38] Treas. Reg. section 301.7701-4(c)(1).

enables a trust to take advantage of variations in the market to improve the investment of the investors.[39] A trust with multiple classes of ownership interests that otherwise meets the description of an investment trust also will be classified as a trust if the existence of multiple classes of ownership interests is incidental to the purpose of facilitating the direct investment in the trust's assets.[40]

i. No Power to Vary Investments of the Trust

Applicable Case Law

Two opinions issued by the Second Circuit on the same day generally are viewed as the leading judicial guidance on the distinction between a trust arrangement that meets the description of an investment trust and a trust arrangement granting the power to vary the investments held therein.

In *Commissioner v. Chase National Bank*,[41] the court addressed whether a state-law trust arrangement should be classified as a "trust" for U.S. federal income tax purposes. The depositor in *Chase National Bank* purchased shares of the common stock of several corporations and made up "units" consisting of a number of shares of the common stock of each corporation. The "units" were deposited in a trust, and then certificates in the trust were sold to investors. The trustee was vested with all of the rights of ownership of the shares except that the depositor controlled the voting rights of the shares and the trust instrument governed and restricted the disposal of the shares. Under the terms of the trust instrument, property deposited into the trust was held until some disposition of it was made consistent with the terms of the trust instrument. Further, distributions of currently available funds were required. No purchases were to be made by the trustee by way of reinvestment of funds or otherwise. The Second Circuit found that the trust instrument "prevented the trusts from being, or becoming, more than what are sometimes called strict investment trusts." The court concluded that the trust required "that the trust property was to be held for investment and not to be used as capital in the transaction of business for profit like a corporation organized for such a purpose. This distinction is what makes the difference tax-wise."[42]

The Second Circuit reached a different result in *Commissioner v. North American Bond Trust*.[43] The court recognized that, although the trust arrangement in the instant case was similar to the trust in *Chase National Bank*, such trust instrument was slightly different because it provided the depositor with the power "in effect to change the investment of certificate holders at his discretion."[44] In making up new units, the depositor was not confined to the same bonds he had selected for the previous units. Additionally, the bonds of all units constituted a single pool

[39] *See Commissioner v. North American Bond Trust*, 122 F.2d 545, 546 (2d Cir. 1941).
[40] Treas. Reg. section 301.7701-4(c)(1).
[41] 122 F. 2d 540 (2d Cir. 1941).
[42] *Id*. at 543.
[43] 122 F.2d 545 (2d Cir. 1941), cert. denied, 314 U.S. 701 (1942).
[44] *Id*. at 545.

in which each certificate holder shared according to his proportion of all the certificates issued. As a result, the money from new investors could be used to purchase new bond issues that would in turn reduce the existing certificate holders' interests in the old bond issues. The depositor thus could "take advantage of market variations" in a manner that could improve the investment of the original investors through dilution of the original investment. Based on these facts, the court held that the depositor "had power, though a limited power, to vary the existing investments of all certificate holders at will ..."[45] and, accordingly, that the trust was treated as taxable as an association rather than as a fixed investment trust.

Rev. Rul. 2004-86

In Rev. Rul. 2004-86, Party A borrowed money, on a nonrecourse basis, from a bank and used the proceeds of the loan to purchase rental real property ("Blackacre"). The note was secured by Blackacre. Immediately following Party A's purchase of Blackacre, Party A entered into a net lease with Party Z for a 10-year term. Under the terms of the lease, Party Z was required to pay all taxes, assessments, fees, or other charges imposed on Blackacre. In addition, Party Z was required to pay all insurance, maintenance, ordinary repairs, and utilities relating to Blackacre. Party Z could sublease Blackacre. Party Z's rent was a fixed amount that could be adjusted by a formula described in the lease agreement that was based upon a fixed rate or an objective index provided that the adjustments to the rate or index were not within the control of any of the parties to the lease. The rent was not contingent on Party Z's ability to lease the property or on Party Z's gross sales or net profits derived from Blackacre.

On the same day as entering into the lease, Party A formed a DST and contributed Blackacre to the DST. The DST assumed Party A's rights and obligations under the note with the bank and the lease with Party Z. Neither the DST nor any of its beneficial owners were personally liable to the bank on the note, which continued to be secured by Blackacre.

The trust agreement provided that interests in the DST were freely transferable. The DST terminated on the earlier of 10 years from the date of its creation or the disposition of Blackacre, but did not terminate on the bankruptcy, death, or incapacity of any owner or on the transfer of any right, title, or interest of an owner. The trust agreement further provided that interests in the DST will be of a single class, representing undivided beneficial interests in the assets of the DST.

Under the trust agreement, the trustee was authorized to establish a reasonable reserve for expenses associated with the holding of Blackacre that may be payable out of trust funds. The trustee was required to distribute all available cash, less reserves quarterly to each beneficial owner in proportion to their respective interests in the DST. The trustee was required to invest cash received from Blackacre between each quarterly distribution and all cash held in reserve in short-term obligations of (or guaranteed by) the United States, or any agency or instrumentality thereof, and in certificates of deposit of any bank or trust company having a minimum stated surplus and capital. The trustee was permitted to invest only in obligations maturing prior to the

[45] *Id.*

next distribution date and was required to hold such obligations until maturity. In addition to the right to a quarterly distribution of cash, each beneficial owner had the right to an in-kind distribution of its proportionate share of trust property.

The trust agreement provided that the trustee's activities were limited to the collection, investment and distribution of income. The trustee could not exchange Blackacre for other property, purchase assets other than the short-term investments described above, or accept additional contributions of assets (including money) to the DST. The trustee could not renegotiate the terms of the debt used to acquire Blackacre and could not renegotiate the lease with Party Z or enter into leases with tenants other than Party Z, except in the case of Party Z's bankruptcy or insolvency. In addition, the trustee could make only minor non-structural modifications to Blackacre, unless otherwise required by law. The trust agreement further provided that the trustee could engage in ministerial activities to the extent required to maintain and operate the DST under local law.

Neither the DST nor its trustee entered into an agreement with the beneficial owners creating an agency relationship, and neither the DST nor its trustee acted as an agent of the beneficial owners.

To determine whether the DST qualified as an investment trust classified as a "trust" for U.S. federal income tax purposes, the IRS analyzed whether the trust agreement granted the power to vary the investment held by the DST. The IRS indicated that the financing and leasing arrangements related to Blackacre were made prior to the inception of the DST and were fixed for the entire life of the DST (*i.e.,* the duration of the trust was the same as the duration of the loan and the lease, that were entered into on the same day as the date of the trust's formation). Further, the trustee was permitted to invest only in short-term obligations that matured prior to the next quarterly distribution date and was required to hold the obligations until maturity. The IRS concluded that because the trust agreement required that any cash from Blackacre, and any cash earned on short term obligations held by the DST between distribution dates, be distributed quarterly and because the disposition of Blackacre resulted in the termination of the DST, no reinvestment of such monies was possible.

The IRS emphasized that the trustee's activities were limited to the collection and distribution of income. The trustee could not exchange Blackacre for other property, purchase assets other than short term investments or accept any additional contributions of assets (including money) for the DST. The trustee could not renegotiate the terms of the loan and could not renegotiate the lease with Party Z or enter into leases with tenants other than Party Z except in the case of Party Z's bankruptcy or insolvency. In addition, the trustee could only make minor non-structural modifications to the property except to the extent required by law. The IRS noted that the trustee had none of the powers which evidence an intent to carry on a profit making business. The IRS concluded that because the trustee had no power to vary the investment of the beneficiaries of the trust, the DST would be classified as a "trust" for U.S. federal income tax purposes.

The IRS indicated that the trust arrangement would not have qualified as an investment trust, and therefore would not have been classified as a "trust," if the trustee had been given the power to do one or more of the following:

- dispose of Blackacre and acquire new property;
- renegotiate the lease with Party Z, or enter into leases with a tenant other than Party (other than in the case of the bankruptcy or insolvency of Party Z);
- renegotiate or refinance the loan used to purchase Blackacre (other than in the case of the bankruptcy or insolvency of Party Z);
- invest cash received to profit from market fluctuations; or
- make more than minor non-structural modifications to Blackacre that were not required by law.

Other Applicable Revenue Rulings

Revenue Ruling 75-192[46] involved a trust agreement that required the trustee to invest cash on hand between quarterly distribution dates only in specified short-term obligations maturing prior to the next distribution date and to hold such obligations until maturity. The IRS concluded that, because the restrictions on the types of permitted investments limited the trustee to a fixed return similar to that earned on a bank account and eliminated any opportunity to profit from market fluctuations, the power to invest in such assets was not a power to vary the trust's investments.

Similarly, the IRS classified the trust arrangement described in Revenue Ruling 79-77,[47] which was formed to hold real property, as a "trust" for U.S. federal income tax purposes. The beneficiaries were required to approve all agreements entered into by the trustee and they were personally liable for the debts of the trust. The beneficiaries directed the trustee to enter into a 20-year lease that required the tenant to pay all taxes, assessments, fees, or other charges imposed on the property by federal, state, or local authorities. In addition, the tenant paid all insurance, maintenance, repairs, and utilities relating to the property. The trustee could determine whether to allow the tenant to make minor nonstructural alterations to the real estate. The trustee further could approve additional alterations, but only if the alterations would protect and conserve the property or were required by law. The trustee was empowered to institute legal or equitable actions to enforce any provisions of the lease. The trust would terminate on the sale of substantially all of its assets or upon unanimous agreement of the beneficiaries. Based upon the above, the IRS classified such trust arrangement as a "trust" for U.S. federal income tax purposes. Similarly, in PLR 7905046,[48] a trustee's powers included entering into a net lease with respect to a building held by the trust, collecting rents and distributing trust income, and determining whether to allow alterations to the building. The IRS ruled that the trust was a trust for U.S. federal income tax purposes because the trust was not carrying on a business and was formed to protect and conserve trust corpus.

[46] 1975-1 C.B. 384.
[47] 1979-1 C.B. 448.
[48] October 31, 1978.

In contrast, the IRS concluded that the trust arrangement described in Revenue Ruling 78-371[49] was classified as a business entity. Unlike the trust arrangement described in Revenue Ruling 79-77 that restricted the trustee to dealing with a single piece of property subject to a net lease, the trust arrangement in Revenue Ruling 78-371 expressly authorized the trustees to purchase and sell contiguous or adjacent real estate, to accept or reject certain contributions of contiguous or adjacent real estate, and to raze or erect any building or other structure or make any improvements to the land contributed to the trust. The trustees were also empowered to borrow money and to mortgage and lease the trust property. The IRS concluded that the trustee's power to engage in extensive real estate operations and to reinvest the sales proceeds in financial products indicated that the trust arrangement was not formed merely to protect and conserve the trust's property and, thus, ruled that the trust was taxable as a business entity treated as a corporation.

However, the existence of a power to sell trust assets does not always give rise to a power to vary the trust's investments.[50] The courts and the IRS have concluded that even though a trustee may possess the power to sell trust assets under certain limited circumstances, such a trust arrangement can still qualify as an investment trust classified for U.S. federal income tax purposes as a trust.[51] These authorities have clarified that, instead of the mere power to sell trust assets, it is the ability of the trustee to substitute new investments in order to take advantage of variations in the market to improve the investment of the investors that prohibits a trust arrangement from being treated as an investment trust classified as a trust for U.S. federal income tax purposes.

Application of Law to Trust's Facts

The powers and authority granted to the Trustees in the Trust Agreement are intended to fall within the limited scope of the powers and authority that may be exercised by a trustee of an "investment trust" and are intended in many respects to mirror the facts of Rev. Rul. 2004-86.

Just as in Rev. Rul. 2004-86, (i) the Lease does not expire before the end of the term of the Trust (*i.e.,* the Lease terms are fixed for the entire duration of the Trust), (ii) the Signatory Trustee is authorized to establish a reasonable reserve for Trust expenses, (iii) all available cash (net of any reserves) is to be distributed quarterly to the Beneficiaries, (iv) retained cash can only be invested in short-term obligations of (or guaranteed by) the United States (or any agency or instrumentality thereof), and in certificates of deposit or interest-bearing bank accounts having a minimum stated capital and surplus of $50,000,000, and (v) all such obligations must mature

[49] 1978-2 C.B. 344.
[50] *Id*.
[51] *See North American Bond Trust*; *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. United States*, 146 F.2d 392 (3rd Cir. 1944); *see also* Rev. Rul. 78-149, 1978-1 C.B. 448; Rev. Rul. 73-460, 1973-2 C.B. 425 (depositor could direct the trustee, under limited circumstances to accept or reject a "substitution" of new bonds for old bonds proposed by the obligor of such bonds, as the depositor may deem proper; held a trust).

prior to the next distribution date and must be held to maturity.[52] Furthermore, similar to the trust agreement in Rev. Rul. 2004-86, the Trust Agreement provides that the Trustee cannot (i) exchange the Real Estate for other property, (ii) purchase assets other than short-term investments as described above, (iii) accept additional contributions of assets, including money, to the DST (other than pursuant to the PPM), (iv) renegotiate the terms of the Lease (except in the case of bankruptcy or insolvency), (v) enter into new financing; or (vi) make other than minor, non-structural modifications to the Real Estate, except as required by law.[53] Furthermore, no agency or nominee agreement between the relevant parties exist in the case at hand and neither the Trust, the Trustees, nor the Initial Beneficiary have acted or will act as an agent on behalf of the Beneficiaries.[54] Many of the prohibited activities are factual in nature. We are relying on the Tax Certificate regarding certain factual matters and will not independently verify the accuracy of the matters subject to such certification.

Additionally, the facts in the case at hand are stronger than in Rev. Rul. 2004-86 in some respects as the Trust Agreement expressly denies the Trustees (and any agent thereof) from (i) taking certain actions if any such action would constitute a power to "vary the investment of the certificate holders" as defined in Treasury Regulation Section 301.7701-4(c)(1), (ii) taking any action that, in the reasoned opinion of tax counsel, should be expected to cause the Trust to be treated as a "business entity" for U.S. federal income tax purposes,[55] or (iii) providing services that are not "customary services" within the meaning of Revenue Ruling 75-374, 1975-2 C.B. 261 ("Customary Services"). In addition, given that the Property is only raw ground and is subject to the Lease for an extended time period, little activity is possible with respect to the Property.

The Beneficiaries' co-ownership of the underlying assets of the Trust should not be viewed as giving rise to a carrying on a profit-making business carried on through a partnership for U.S. federal income tax purposes. The Trust Agreement provides that the parties do not intend create a partnership, joint venture, or other similar relationship between the Beneficiaries, the Beneficiaries do not have any liability for the debts or obligations incurred by any other Beneficiary, and generally no Beneficiary has the authority to act on behalf of any other Beneficiary or to impose any obligation with respect to the assets of the Trust.[56] Furthermore, no Beneficiary or its agent may provide services that are not "customary services".[57]

However, there are certain features of the Trust Agreement and the Lease that are not addressed in Rev. Rul. 2004-86, including (i) the Signatory Trustee's power to sell the Real Estate, (ii) the classification of the Trust immediately prior to and after the first acquisition of Interests, (iii) the power of the Trust to accept multiple contributions over time, and (iv) certain approval rights over construction of the Facility under the Lease. Nonetheless, we believe that

[52] Trust Agreement, section 4.02.
[53] *See, e.g.,* Trust Agreement, section 7.03.
[54] Trust Agreement, section 2.04.
[55] Trust Agreement, section 7.03.
[56] Trust Agreement, section 5.01(a).
[57] Trust Agreement, section 2.03.

none of these features should be viewed as permitting the Trustees to vary the investments of the Trust in a manner that results in the Beneficiaries improving their investment results based on variations in the market.

Sale of Real Estate

The power granted under the Trust Agreement to sell the Real Estate should not be viewed as a power to vary the Trust's investments. Similar to the trust in Rev. Rul. 79-77, the Trust Agreement provides that the Trust shall dissolve and wind up upon the sale of the Real Estate, and the proceeds distributed to the Beneficiaries.[58] Similar to other cases and rulings discussed above, the Signatory Trustee does not have the power to purchase replacement investments with the proceeds from the sale of the Real Estate to take advantage of market variations.[59] Accordingly, the sale of the Real Estate under these circumstances is consistent with the objective of achieving an investment return on the assets comprising the initial Trust estate when the Beneficiaries acquire their Interests. Because the sales proceeds cannot be reinvested (other than in short-term assets) by the Trustees, the Trust Agreement does not confer the power to vary the existing investments of the Trust and take advantage of market variations. The assets that can be held by the Trust are restricted to the Real Estate and incidental additional assets associated with the Real Estate, and the cash reserves that accumulate between quarterly distributions.[60] All cash reserves will be invested only in the types of debt instruments expressly permitted under Revenue Ruling 2004-86.[61] Thus, providing the Signatory Trustee with the discretion concerning the timing and amount of the sale of the Real Estate should not prevent the Trust from being treated as an investment trust that is classified as a "trust" for U.S. federal income tax purposes.

Disregarded Treatment

Prior to the time that the Initial Beneficiary sells an Interest to a third-party, the Trust will be treated as a disregarded entity for U.S. federal income tax purposes. Accordingly, the conversion of the tax treatment of the Trust from a disregarded entity to an investment trust should be viewed on its own as a mere formation of the Trust as an investment trust in a manner that is not inconsistent with the analysis under Rev. Rul. 2004-86.

Contributions over Multiple Times

Unlike in Rev. Rul. 2004-86, the Trust can accept additional contributions pursuant to the terms of the PPM. However, the ability to accept multiple contributions over time should not be viewed as raising additional capital (which is prohibited under Rev. Rul. 2004-86) because the capital of the Trust is not increasing. Rather, the proceeds of the additional closings will be used to redeem a proportionate share of the Initial Beneficiary's capital contribution to the Trust

[58] Trust Agreement, section 9.01.
[59] *Supra* note 51.
[60] *See* Trust Agreement, sections 2.05(d) and 4.02.
[61] *See* Trust Agreement, section 4.02.

(including certain fees and expenses incurred in connection with the acquisition of the Real Estate and offering of the Interests).[62] Each closing should be treated for U.S. federal income tax purposes as a direct sale of Interests by the Initial Beneficiary. Further, permitting Interests to be sold in multiple closings rather than in a single closing is driven by practical considerations and does not provide a basis for distinguishing a trust from a partnership. In addition, you have represented that if Interests are purchased at various times, the terms of the various offering of Interests will be fixed and pursuant to the terms of the PPM, and accordingly the additional contributions do not enable the Trust to benefit from market fluctuations over time.

Ground Lease

Unlike the lease in Rev. Rul. 2004-86 and the other cited rulings, the Lease is a ground lease under which the Ground Lessee will construct a Facility. While the Tenant is responsible for all aspects of development and construction, and the costs related thereto,[63] the Trust has certain approval rights over the development and construction process of the Facility. These rights include the approval of (i) development and construction agreements entered into between the Ground Lessee and contractors, (ii) all plans related to any excavation, construction, paving, or any other work associated with the Initial Construction, and (iii) Change Orders, provided that in each case, the Trust cannot unreasonably withhold, condition, or delay its approval (the "Approval Rights").[64] Under the Trust Agreement, the Trustee will hold the approval rights, provided that such rights may only be exercised to maintain the value of the Trust assets (including the Property).[65]

We believe the Approval Rights are not broader than the powers granted to the trustees in Revenue Ruling 79-77 and PLR 7905046. Similar to those rulings, the Trustee has the power to approve certain alterations. The Trustee cannot unreasonably withhold, condition or delay approval, and such rights can be exercised only to protect and preserve the value of the Trust assets (including the Property). In addition, the limitation on the Trustee's powers under section 7.03 the Trust Agreement applies to the approval rights contained in the Lease. However, unlike those rulings, the Approval Rights generally do not relate to the Property, but rather to the construction of the Facility, which is not an asset of the Trust. The Trustee has these rights primarily to insure the Ground Lessee can meet its financial obligations under the Ground Lease and to protect the Property from damage during construction of the Facility. Taken together, we believe the Approval Rights should be viewed as merely giving the Trustee the power to conserve and protect the Trust's property.

Furthermore, the facts in the case at hand are distinguishable from those in Revenue Ruling 78-371. The trustee in that ruling had various powers, including the ability to raze or erect any building or other structure or make any improvements to the land that was contributed to the trust. In comparison, the Trust has no ownership interest in the Project. With the length of

[62] *See* PPM, Summary of the Offering; *see also* Purchase Agreement
[63] Lease, section 3.03.
[64] *See* Lease, sections 6.02, 6.05 and 6.06.
[65] Trust Agreement, section 7.02(h).

the Lease being at least 50 years, the Trust will not ever likely benefit from the Project. As discussed above, the Trust's interest in the Project is to insure that the Ground Lessee has sufficient cash flow to service its financial obligations under the Ground Lease. In addition, neither the Trust Agreement nor the Lease provide the Trustees with unfettered power over any aspect of construction of the Facility or the power to engage in extensive real estate operations. The Tenant is responsible for all aspects of development and construction of the Facility, including the costs associated therewith, and the Trustee merely has limited approval rights over agreements and work related thereto, and furthermore such approval cannot be unreasonably withheld, conditioned, or delayed. Furthermore, the Tenant's activities should not be attributed to the Trust because the Tenant is not acting as an agent or nominee on behalf of the Trust. Although not free from doubt, we believe that the Approval Rights should not violate the intent and purpose of Revenue Ruling 2004-86 or the underlying cases and rulings governing whether the Trustees possess an impermissible right to vary the investments of the Trust.

ii. Single Class of Interests

Background

An investment trust with multiple classes of ownership interests ordinarily will be classified as a business entity, and not a trust, for U.S. federal income tax purposes unless the existence of multiple classes of ownership interests is incidental to the trust's purpose to facilitate direct investment in the assets of the trust and not for the purpose of providing investors with diverse interests in the trust assets.[66]

The primary feature of multiple classes is, in substance, that the interests of the beneficiaries are not undivided, but diverse, and such use may indicate the trust serves an additional purpose to provide investors with economic and legal interests that could not be acquired through a direct investment in the trust assets.[67] Investment arrangements with multiple classes of ownership are not investment trusts within the meaning of the Treasury Regulations where such arrangements enable investors to fulfill varying profit-making objectives through the division of rights and the sharing of risks in certain assets, and accordingly such arrangements are considered to have associates and an objective to carry on business and divide the resulting gains.[68]

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[66] Treas. Reg. section 301.7701-4(c)(1); Preamble to TD 8080, 1986-1 CB 371.

[67] Preamble to TD 8080 ("Multiple class trusts depart from the traditional form of fixed investment trust in that the interest of the beneficiaries are not undivided, but diverse. The existence of varied beneficial interests may indicate that the trust is not employed simply to hold investment assets, but serves a significant additional purpose of providing investors with economic and legal interests that could not be acquired through direct investment in the trust assets. Such use of an investment trust introduces the potential for complex allocations of trust income among investors, with correspondingly difficult issues of how such income is to be allocated for tax purposes. These issues are properly foreign to the taxation of trust income, where rules have not developed to accommodate the varied forms of commercial investment, and no comprehensive economic substance requirement governs the allocation of income for tax purposes.")

[68] IRS Announcement 84-62, 1984-24 IRB 29;

Whether the existence of multiple classes is merely incidental generally depends on the extent to which the investment attributes of trust interests differ from direct ownership of the trust assets.[69] The extent of the divergency may be revealed by determining whether the interests of the investors could be reproduced outside the trust without resort to the multiple classes of ownership.[70] The court in *Principal Life Insurance Co. & Subs.* observed that the Treasury Regulations and preamble demonstrate that the existence of multiple classes is not incidental if those interests could not be produced outside of the trust environment.

The Treasury Regulations provide examples of the "incidental" rule. In one example, the trust holds legal title to a pool of mortgages and there are two classes of certificates. Class A certificates are entitled to all payments of mortgage principal until the certificates are retired, and class B certificates receive payments of principal only after class A certificates have been retired. The different rights provide class B holders with call protection. The example concludes that the trust serves to create investment interests that differ significantly from a direct investment in the underlying mortgages, and consequently the "incidental" rule is violated.[71] The Treasury Regulations contain another example of a trust with similar assets to the first example and two classes of interests (class C and class D). However, the rights of the two classes are identical, except that in the event of default of an underlying mortgage, the payment rights of the class D certificates are subordinated to the payment rights of the class C certificates. The example reasons that the interest holders are substantially equivalent to an undivided interest in the pool of mortgages, coupled with a limited recourse guarantee by the holder of the class D certificates to the holders of the class C certificates. Accordingly, the multiple classes are merely incidental the trust is classified as such for U.S. federal income tax purposes.[72]

Application of Law to Trust's Facts

In form, the Trust utilizes only a single class of beneficial interests in its structure as, on its face, the Trust Agreement only provides for a single class of beneficial interests.[73] In this regard, the Trust's structure presents even more favorable facts than a structure utilizing multiple, albeit nominally different, classes that must otherwise rely on principles of law to be characterized as one single class.

It is possible that the IRS may assert that, if the Initial Beneficiary retains an Interest and receives distributions in connection therewith, while at the same time (i) the Ground Lessee, an affiliate of the Initial Beneficiary with 100% common ownership, receives income from subleasing the Project, and (ii) the Signatory Trustee, an affiliate of the Initial Beneficiary, receives compensation in its role as asset manager under the Asset Management Agreement, the

[69] Preamble to TD 8080. *See also, Principal Life Insurance Co. & Subs., et al. v. U.S.,* 116 Fed. Cl. 82 (Ct Fed Cl 2014) (citing the "Sears Regulations" and holding that multiple classes did not satisfy the "incidental" rule where taxpayer retained interest income of underlying assets and residual principal interests were sold to a third party).
[70] *Id.*
[71] Treas. Reg. section 301.7701-4(c)(2), example 1.
[72] Treas. Reg. section 301.7701-4(c)(2), example 2.
[73] Trust Agreement, Article I.

Initial Beneficiary's Interest amounts to a second class of beneficial interests separate and distinct from the Interests of the other Beneficiaries. However, we believe that the facts and circumstances sufficiently support the position that the Trust should be characterized as having only one single class of beneficial interests because the economic interests of the Ground Lessee and the Signatory Trustee are separate and distinct from the Initial Beneficiary's Interest. In particular, as to the Ground Lessee, the Ground Lessee owns totally separate and distinct interests in property with separate risks and opportunities. As to the Signatory Trustee, the Signatory Trustee is performing services for which it is receiving fair market value consideration.

There is no distinction between the Initial Beneficiary's Interest and the Interest of any other Beneficiary, whether by name, rights, economics or otherwise, under the Trust Agreement.[74] The Interest owned by the Initial Beneficiary, if any, is not linked to the Tenant's role as the lessee under the Lease or otherwise. For example, the Trust Agreement does not require that the Initial Beneficiary to alienate its Interest if the Lease or Asset Management Agreement terminates, and there further is no requirement that the Tenant, or any affiliate thereof, own an Interest. Similarly, the Transaction Documents do not restrict the ability of the Initial Beneficiary to own an Interest. In other words, the Initial Beneficiary could dispose of its Interest while the Tenant continues as a tenant under the Lease or the Signatory Trustee remains a party to the Asset Management Agreement, and the Lease or the Asset Management Agreement could be terminated while the Initial Beneficiary continues to hold its Interest.

The Ground Lessee's economic interest should not create a deemed second class of interests in the Trust because the Project, which will generate rental income for the Ground Lessee upon completion of development and construction thereof, is not an asset of the Trust. Accordingly, the Ground Lessee's economic interest (*i.e.*, rent received by leasing the Project to tenants, less all expenses) is separate and distinct from the Initial Beneficiary's economic interest in the Trust (*i.e.,* its allocable share of rental income received under the Lease, net of expenses), and there is no contractual or mechanical correlation between the two. The Trust does not share in any profit generated by the Ground Lessee in connection with leasing the Project, and the Trust is insulated from net losses (if any) incurred by the Ground Lessee. The Ground Lessee's rights and obligations under the Lease and any lease of the Project is completely disconnected from the Initial Beneficiary's Interest. The rent earned by the Trust is not dependent or contingent on the profitably of the operations conducted by the Ground Lessee.[75] The Ground Lessee will incur a construction financing loan to construct and develop the Project, and the loan will be secured by the leasehold interest, but not the underlying Trust assets (including the Property). The loan will be repaid from the rents generated from leasing the Project. In the event of default by the Ground Lessee under the constructing financing loan documents, the lender would only have the right to foreclose on the Ground Lessee's leasehold interest and would step into the shoes of the Ground Lessee.[76] The terms of the Lease, including the amount of rent charged, is set at arm's length rates. Furthermore, you have represented that you have

[74] *See*, *e.g.*, Trust Agreement, section 4.02.
[75] *See* Tax Certificate.
[76] *See* Tax Certificate, Article XII of the Lease, and the PPM.

reviewed the viability of all plans and documents related to the development, construction and rental of the Project, and it is reasonable to expect that the Ground Lessee will realize a commercially reasonable profit from the lease of the Project, taking into account all of the Ground Lessee's anticipated financial obligations (including, but not limited to, rent payments under the Lease, debt service payments and fees paid to the third party property management company). Accordingly, because the property held by the Ground Lessee and all profits realized are distinct and separate from the property held by the Trust and the profits generated by the Trust, the interests of the Ground Lessee and the interests of the Initial Beneficiary should not be collapsed and treated as creating a second class of interests in the Trust.

The AMA Fees earned by the Signatory Trustee should not give rise to a deemed second class of stock because common beneficial ownership between the Signatory Trustee and Initial Beneficiary is less than 50%. Accordingly, more than half of the economics under the Asset Management Agreement inure to different ultimate beneficial owners than the ultimate beneficial owners of the Initial Beneficiary. Second, because the Asset Management Fee (and the Disposition Fee) is determined as a percentage of Contributed Value of the Real Estate (as a percentage of the of the gross sales price received upon sale of the Real Estate), there is (i) no correlation between the profitability of the Trust and the AMA Fees earned by the Signatory Trustee, and (ii) no shifting or extraction of profits generated by the Trust in favor of the Initial Beneficiary (to the extent of the overlap in ownership) and away from the other Beneficiaries. Even if the Ground Lessee defaults on payments under the Ground Lease and the Trust does not generate income in a period, the Signatory Trustee would still be entitled to the Asset Management Fee for such period. Similarly, if the Real Estate hypothetically were sold at a loss in the future, the Signatory Trustee would still be entitled to the Disposition Fee based on the gross sales price. The Asset Management Fee was set at an arm's-length rate and represents an ordinary and necessary expense of the Trust for duties typically performed by a trustee of Trust holding similar assets.[77] The Disposition Fee was also set at an arm's-length rate, is akin to a broker's fee to reasonably compensate the Signatory Trustee for services performed in connection with the sale of the Real Estate in the future, and it is normal and customary for a trustee of a Trust holding similar assets to receive such Disposition Fee.[78] The AMA Fees should be viewed as proper and necessary expenses paid to a third party for customary services required by the Trust, and such fees are borne *pro rata* by each Beneficiary. Because of the lack of common ownership and the fact that the AMA Fees are normal and customary expenses of the Trust, the AMA Fees should not be treated as indirectly (i) stripping profits of the Trust in favor of the Initial Beneficiary and away from the other Beneficiaries through complex allocations or (ii) reallocating risk among the Beneficiaries.

Because the Trust's structure in form utilizes one single class of beneficial interests and because in substance such interests should not be characterized as multiple classes, we believe the Trust should be characterized as having a single class of beneficial interests and is, therefore, consistent with treating the Trust as a fixed investment trust.

[77] *See* Tax Certificate.
[78] *Id*.

iii. Conclusion

Based on the analysis above, the Trust should be treated as an investment trust described in Treasury Regulation Section 301.7701-4(c) that is classified as a "trust" under Treasury Regulation Section 301.7701-4(a).

III. Exchange of Real Property for Interests

A. Background

In Rev. Rul. 2004-86, the IRS held that Party B and Party C owned an undivided fractional interest in Blackacre for U.S. federal income tax purposes. In reaching this conclusion, the IRS determined that (i) Party B and Party C were grantors[79] of the DST when they acquired their interests in the DST from Party A, (ii) they had the right to distributions of all trust income attributable to their undivided fractional interest in the trust, (iii) because of their right to distributions, they owned an aliquot portion of the DST and all income, deductions and credits attributable to that portion were includible[80] in computing their taxable income, and (iv) because they owned an undivided fractional interest of the DST, they were considered to own the DST assets (*i.e.,* real property) attributable to that interest for U.S. federal income tax purposes.

B. Beneficiaries Treated as Grantors of the Trust

A "grantor" of a trust includes any person to the extent such person either creates a trust or directly or indirectly makes a gratuitous transfer of property, including cash, to a trust.[81] A gratuitous transfer to a trust includes a transfer of cash to the trust in exchange solely for an interest in the trust.[82] The term "grantor" also includes any person who acquires an interest in a trust from a "grantor" of the trust if the interest acquired is an interest in an investment trust described in Treasury Regulation Section 301.7701-4(c).[83]

Application of Law to Trust's Facts

Each Beneficiary should be treated as a "grantor" of the Trust. A Beneficiary will transfer cash to the Trust in exchange solely for an interest therein, and the proceeds will be used to redeem a proportionate share of the Initial Beneficiary's capital contribution to the Trust (including certain fees and expenses).[84] The transfer should be treated as an acquisition of an Interest from the Initial Beneficiary (the grantor of the Trust). Accordingly, the Beneficiaries should be treated as "grantors" of the Trust.

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[79] Treas. Reg. section 1.671-2(e)(3).
[80] Section 671.
[81] Treas. Reg. section l.671-2(e)(1).
[82] Treas. Reg. section 1.671-2(e)(2).
[83] Treas. Reg. section 1.671-2(e)(3).
[84] PPM, Summary of the Offering; *see also* Purchase Agreement.

C. Right to Distributions and Ownership of an Undivided Interest in Trust Assets

Under Section 677(a), a grantor is treated as the owner of any portion of a trust whose income, without the approval or consent of any adverse party is, or in the discretion of the grantor or a nonadverse party, or both, may be distributed, or held or accumulated for future distribution to the grantor. Under Section 673, a grantor is treated as owning any portion of a trust in which the grantor has a reversionary interest in either the trust assets or the income therefrom if, as of the inception of that portion of the trust, the value of such interest exceeds 5% of the value of such portion.

A person that is treated as the owner of an undivided fractional interest of a trust under Sections 671 through 679 is considered to own the trust assets attributable to that undivided fractional interest of the trust for U.S. federal income tax purposes.[85]

Application of Law to Trust's Facts

Similar to the beneficial owners in Rev. Rul. 2004-86, the Beneficiaries generally have the right to the distribution of all income received by the Trust without the approval, consent or exercise of discretion by any person.[86] Additionally, the Beneficiaries have a total reversionary interest in the assets of the Trust.[87] Accordingly, the Beneficiaries should be treated as owning an aliquot portion of the Trust.

Because the Beneficiaries should be treated as "grantors" of the Trust and should be treated as owning an aliquot portion of the Trust, the Beneficiaries should be treated as owning direct interests in the Trust's assets under Sections 673 and 677 and therefore for all U.S. federal income tax purposes, including Section 1031.

IV. Treatment of the Ground Lease as a True Lease and not a Financing

A long-term ground lease is generally respected as a true lease and not a financing for U.S. federal income tax purposes.[88] However, if a lease precludes reversion of the property at the end of term and the rent approximates the property value, such lease may not be respected as a true lease.[89]

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[85] *See* Rev. Rul. 88-103, 1988-2 C.B. 304; Rev. Rul. 85-45, 1985-1 C.B. 183; Rev. Rul. 85-13, 1985-1 C.B. 184. *See, also,* Treas. Reg. section 1.1001-2(c), Example 5.
[86] *See, e.g.,* Trust Agreement, Article IX.
[87] *Id.*
[88] *See, e.g., Minneapolis Syndicate v. Commissioner*, 13 B.T.A. 1303 (1928) (holding that a 130-year ground lease was a lease of ground and a building because the tenant had to return the building to the landowner at the end of the lease term); *Duffy v. Central Railroad Co. of New Jersey*, 268 U.S. 55 (1925); Rev. Rul. 61-217, 1961-2 C.B. 49.
[89] *See, e.g.*, *Lieber v. Commissioner*, T.C. Memo. 1993-391; Rev. Rul. 62-82, 1962-1 C.B. 155.

Revenue Procedure 2001-28[90] (the "Revenue Procedure") sets forth guidelines for obtaining an advance ruling that a lease constitutes a true lease (and not a financing) for U.S. federal income tax purposes. While the Revenue Procedure analyzed the facts in the context of a leveraged lease transaction and not a ground lease, analyzing the facts of the Lease in the context of the Revenue Procedure further supports our conclusion that the Lease should be treated as a true lease for U.S. federal income tax purposes. The IRS stated in the Revenue Procedure that it would still consider a ruling even if all of its stated guidelines were not met. The stated guidelines include (i) the lessor must have a minimum unconditional "at risk" investment in the property (at least 20%) at all times during the term of the lease, (ii) no member of the lessee group may have a right to purchase the property at a price less than its fair market value at the time the right is exercised, (iii) the lessee group cannot furnish the cost of the property or cost of improvements, modifications or additions (subject to certain exceptions), (iv) the lessee group cannot lend funds necessary to acquire the property or guarantee indebtedness created in connection with such acquisition, (v) the lessor must expect and demonstrate it intends to receive a profit from the transaction, apart from any tax benefits. This last requirement is met if (a) the aggregate amount paid by the lessee plus the residual value of the investment exceeds the all disbursements required to by paid by the lessor plus its equity investment in the property (plus financing costs, if any) ("Overall Profit Test"), and (b) the aggregate amount to be paid to the lessor exceeds by a reasonable amount the aggregate disbursements to be paid by the lessor in connection with ownership of the property ("Positive Cash Flow Test").

Application of Law to Trust's Facts

The Lease is a standard ground lease. The Lease is for a term of at least 50 years, after which the title to all improvements and personality located on the Property (including the Project to be constructed) shall automatically and immediately vest in the Landlord.[91] However, given the minimum 50 year term of the Lease, the value of the Project upon reversion to the Landlord will not likely be material. Rent payments under the Lease do not approximate the value of the Property. Accordingly, based on the case law addressing ground leases, we believe the Lease should be treated as a true lease and not a financing for U.S. federal income tax purposes.

Furthermore, the Lease should be treated as a true lease based on the guidelines set forth in the Revenue Procedure. You have represented that (a) you have and will have at all times during the term of the Lease at least a 20% equity investment in the Trust assets (including the Property) (based on original cost), (b) neither the Tenant nor any affiliate thereof has a right to purchase the Real Estate at less than fair market value, and (c) the Overall Profit Test and Positive Cash Flow Test will be satisfied. While requirement (iii) described above will not be met, we believe this requirement should be given less weight because the Lease is a ground lease.

V. Ground Lease should be treated as True Lease and not a Deemed Partnership

[90] 2001-1 C.B. 1156.
[91] Lease, sections 6.10, 14.01.

It also is necessary to consider whether the Lease could be recharacterized as a partnership for U.S. federal income tax purposes. If the Trust or the Beneficiaries are treated as partners with the Ground Lessee with respect to the ownership of the Property and the Facility, the Beneficiaries might not be regarded as directly holding interests in the Property.[92] Case law provides that certain factors are indicative that a purported lease may in fact be a partnership for U.S. federal income tax purposes.[93] Such factors include (i) the intent of the parties, (ii) the presence of a joint contribution of capital or services, (iii) the presence of a joint control over the capital and earnings, (iv) whether profits and/or losses were shared as co-proprietors, (v) whether shared control over the business existed, (vi) the parties agreement and conduct, (vii) the maintenance of separate books, and (viii) whether partnership tax returns were filed.

A. Intent

In *Commissioner v. Culbertson*,[94] the Supreme Court indicated that a partnership exists when "considering all the facts – the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent – the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."[95]

Since *Culbertson*, the intent of the parties has been the key factor in determining whether a particular arrangement constitutes a partnership for tax purposes.[96] The requisite intent is not the intent to be treated as a partnership for state law or tax purposes, but the intent to carry on a business or venture for joint economic gain. Thus, a partnership may be found to exist for U.S. federal income tax purposes even where there is an expressed intention not to form a partnership.[97]

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[92] Because the property manager (if one is retained) will not be in privity of contract with the Trust, there should be little doubt that there is no partnership between the property manager and the Trust.

[93] *See Haley v. Commissioner*, 203 F.2d 815 (5th Cir. 1953), *rev'g and rem'g* 16 T.C. 1509 (1951) (citing *Culbertson* and stating that a transaction will be treated as a partnership rather than a lease "if the agreements and the conduct of the parties . . . plainly show the existence of such [a partnership] relationship, and the intent to enter into it"); *Bussing v. Commissioner*, 88 T.C. 449 ("A partnership for U.S. federal income tax purposes is formed when the parties to a venture join together capital or services with the intent of conducting a business or enterprise and of sharing the profits and/or losses of the venture"). In *Bussing*, the parties entered into a multiparty sale lease back transaction intended to qualify under *Frank Lyon*. Rent payments generally offset amounts due under the debt incurred to purchase the asset, giving the purchaser-lessor an interest in the rent. Because of a remarketing agreement that enabled the seller-lessee to share along with the purchaser lessor in the residual value of the leased property. The purchaser-lessee took the property subject to already existing debt and therefore bore a risk of loss if this debt was not repaid.

[94] 337 U.S. 733 (1949); *see, also, Commissioner v. Tower*, 327 U.S. 280 (1946).

[95] *Id*. at 742.

[96] *See, also, Gilford v. Commissioner*, 11 T.C.M. 175 (1952), *aff'd* 201 F.2d 735 (2nd Cir. 1953) and *Coffin v. United States*, 120 F. Supp. 9 (S.D. Ala. 1954).

[97] *See Haley v. Commissioner*, 203 F.2d 815 (5th Cir. 1953).

In the present case, there is no evidence that the Trust and the Ground Lessee intend to form a partnership or carry on a business or venture for joint economic gain. The Lease expressly provides that the parties do not intend to form a partnership or agency relationship between the parties.[98] To our knowledge, the parties have not otherwise expressed an intent to join together as partners. Further, you have represented that the Lease is intended to be characterized as a true lease and that the parties shall reflect the Lease as such in all applicable books, records and reports, including income tax filings.[99] Finally, the Trust only receives its interest in the Ground Lease revenues and does not suffer the risks involved in building and operating the Project or participating in the benefits of such operations.

B. Joint Contribution of Capital or Services

Where persons combine their capital and services together in an enterprise such that they are required to deal with each other to realize the economic benefits from the property, the arrangement generally will be characterized as a partnership.[100]

The Trust and the Ground Lessee do not intend to pool either their capital or services. The parties do not need to join together and contribute capital and/or services in order to realize income. The Trust will make the Property available to the Ground Lessee in exchange for determinable lease payments and will not participate in, or provide services to, the Ground Lessee's business (except to the extent necessary to protect its investment in the Property). Similarly, the Ground Lessee will not provide capital to enable the Trust to acquire or improve the Property and will not provide services to the Trust (except to the extent necessary to comply with its obligations under the Lease).

C. Joint Control of Capital and Earnings

Another factor is whether the participants will have the necessary joint control over the capital and earnings of the venture. Generally, the ability to spend or distribute capital or earnings demonstrates that a participant is actually a partner.[101] The requisite power to spend or distribute earnings generally only occurs if the participant "owns" a portion of the capital and the earnings. Consequently, a participant generally has this "control" if the participant has the power and the authority to take such action.

Here, the Trust and the Ground Lessee will each earn a separate profit. The Ground Lessee will have control over cash generated from leasing the Facility. The Ground Lessee will recognize income or loss based on the difference between the rent it receives on its leases and the

[98] Lease, section 27.10.
[99] *See* Tax Certificate.
[100] *Bussing v. Commissioner*, 89 T.C. 1050 (1987); *Alhouse v. Commissioner*, 62 T.C.M. 1678 (1991).
[101] *Terrell v. Commissioner*, 54 T.C.M. 870 (1987) (partnership existed where each participant could withdraw funds at any time); *Estate of Smith v. Commissioner*, 313 F.2d 724 (8th Cir. 1963) (no partnership because the participant had no right to claim or withdraw any of the cash and all remaining capital belonged to the other participants).

expenses of leasing and operating the Facility. The Trust will receive rent from the Ground Lessee. Neither the Trust nor the Ground Lessee will have, or should be deemed to have, any ownership interest over the profits earned by the other party. Furthermore, neither party will have the power to spend or distribute the capital of or profits earned by the other party (except pursuant to the specific terms provided in the Lease, which generally require reimbursement). In addition, the rental payments under the Lease are not based on expected or actual net operating income or net cash flow generated from the operation of the Facility.[102] Thus, none of these parties will jointly share in profits or losses; rather, each will bear its own separate risk that a profit will be realized.

D. Sharing of Profits as Co-proprietors

A joint sharing of profits will only be treated as a partnership if two or more of the participants have a proprietary interest in the enterprise.[103] A profit sharing arrangement will not be treated as a partnership if only one party has a proprietary interest.[104] Generally, co-proprietors divide the net income generated by a joint participation. As a result, a division of the net profits is a strong indication that an arrangement is a partnership.

As discussed above, the Trust does not share in the gross or net rents generated from leasing of the Facility, and the Ground Lessee does not share in the profits earned by the Trust under the Lease. Thus, the Trust and the Ground Lessee should not be viewed as sharing any net profits.

E. Sharing of Losses

Although a direct and mutual sharing of potential partnership losses is neither necessary nor sufficient for a business to be treated as a partnership,[105] its absence is not generally characteristic of a partnership relationship.[106]

In this case, the Ground Lessee will not share in losses generated from an ownership interest in the Property. Further, in the case of the Lease, the Trust will lease the Property to the

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[102] *See, e.g.,* Lease, Article III.

[103] *See Federal Bulk Carriers. Inc. v. Commissioner*, 66 T.C. 283, (1976), *aff'd*, 558 F.2d 128 (2d Cir. 1977) ("central feature" of joint venture is "a proprietary interest in the net profits of the enterprise coupled with an obligation to share its losses"); Rev. Rul. 75-43, 1975-1 C.B. 383 (cattle operator not a partner even though he received a share of the net income because no intent to form a partnership and operator had no control.)

[104] *See*, *e.g.*, *Estate of Smith v. Commissioner*, 313 F.2d 724 (8th Cir. 1963) (no partnership because the participant had no right to claim or withdraw any of the cash and all remaining capital belonged to the other participants); *Pounds v. United States*, 372 F.2d 342 (5th Cir. 1967); *Luna v. Commissioner*, 42 T.C. 1067 (1964); *Allison v. Commissioner*, 35 T.C.M. 1069 (1976); *Robert W. Ewing*, 17 T.C.M. 626 (1958) (participant who had shares of profits not a partner because no risk of loss and no control); *Paul J. Kelly*, 29 T.C.M. 1090 (1970) (participant who shared in profits was not a partner because no control and no sharing of losses); *Kenneth E. Ronemus*, 28 T.C.M. 799 (1969) (no partnership because no ownership interest and no control); Rev. Rul. 75-43 1975-1 C.B. 383.

[105] *See Pogetto v. United States*, 306 F.2d 76 (9th Cir. 1962).

[106] *See* G.C.M. 36436 (Sept. 25, 1975); *Luna v. Commissioner*, 42 T.C. 1067 (1964); *Miller-Smith Hosiery Mills v. Commissioner*, 22 T.C. 581 (1954); PLR 8046064 (undated).

Ground Lessee, and will not share in losses, if any, sustained by the Ground Lessee with respect to operating and subletting of the Facility. If the losses incurred by the Ground Lessee result in the inability of the Ground Lessee to pay all rent due under the Lease, the Facility would revert to the Trust in accordance with the terms of Lease.

F. Control Over the Business

An arrangement whereby two or more persons share the profits of a common undertaking does not constitute a joint venture in the absence of the power to control.[107] Typically, a lessor does not jointly manage the leased property with the lessee. The right of a lessor to participate in the management of the property, therefore, is an important factor distinguishing leases from partnerships.[108]

Under the terms of the Lease, the Trust will have no rights to participate in the management of the Project and the Trust only has ability to make sure that the Ground Lessee has complied with the terms of the Lease. The Ground Lessee will have the right to manage the day-to-day operation of the Project. Any Sublease (as defined in the Lease) by the Ground Lessee does not require the consent of the Trust so long as the term of such Sublease terminates prior to the term of the Lease.[109] While any decision to sell or refinance the Real Estate will be made by the Signatory Trustee on behalf of the Trust, this right is typical for a lessor to possess as the owner of the Real Estate and, therefore, does not support partnership characterization. As discussed above, the Trust will have certain Approval Rights. However, we view such rights as giving the Trust the power to conserve and protect the Property, and such rights do not give the Trust unfettered control over the activities of the Ground Lessee.

G. Parties' Agreement and Conduct in Executing its Terms

The terms of the agreement between the participants bear on the question of the intent of the participants as set forth in *Culbertson*.[110] Obviously, if the participants have signed a partnership agreement they intend to be partners.[111]

As stated above, the Lease specifically states that the parties do not intend to create a partnership or agency relationship.[112] Accordingly, the parties' agreement and, to our knowledge, their conduct in executing its terms should not be indicative of a partnership for U.S. federal income tax purposes.

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[107] *Joe Balestrieri and Co. v. Commissioner*, 177 F.2d 867 (9th Cir. 1949); *O'Conner v. Commissioner*, 19 T.C.M. 380 (1960) (broker split profits but compensated for losses).
[108] *See, e.g., Grandview Mines v. Commissioner*, 282 F.2d 700 (9th Cir. 1960); *Haley v. Commissioner*, 203 F.2d 815 (5th Cir. 1953).
[109] *See* Lease, section 11.02.
[110] G.C.M. 36436 (Sept. 25, 1975).
[111] *Wheeler v. Commissioner*, 37 T.C.M. 883, 890 (1978). A written partnership agreement is not essential, however.
[112] Lease, section 27.10.

H. Maintenance of Separate Books

A partnership generally maintains separate books and records of its business. Consequently, if separate books and records are maintained the more likely a partnership will be deemed to exist. However, separate books and records may be a non-factor if separate books and records are needed for other business purposes.[113]

The Ground Lessee will not keep books or records on behalf of the Trust, such tasks will be performed by the Trustees on behalf of the Trust.[114]

I. Filing of Tax Returns or Other Partnership Action

Since the existence of a partnership as determined under *Culbertson* is based on the intention of the participants, the fact that the parties have a partnership agreement and represent themselves to third parties and to the IRS as partners can be extremely important. Indeed, if a partnership income tax return is filed by a venture, the members of the venture are virtually precluded from denying their status as partners.[115] Further, if co-owners hold themselves out as partners,[116] filed documents as partners,[117] or operated as a partnership, the requisite intent is likely to be found.[118]

In the present case, the parties are prohibited from filing partnership tax returns or otherwise representing the Lease as creating a partnership, thus no partnership returns will be filed, nor will any party hold themselves out as partners. Furthermore, each party shall specifically reflect the transactions represented by the Lease in all applicable books, records and reports (including, without limitation, income tax filings) in a manner consistent with true lease treatment.[119]

Based on these factors, the arrangement between and among the Trust and the Ground Lessee should not give rise to a deemed partnership for U.S. federal income tax purposes.

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[113] G.C.M. 36961 (Dec. 21, 1976).
[114] *See* Tax Certificate.
[115] *McManus v. Commissioner*, 583 F.2d 443 (9th Cir. 1978) *cert. denied*, 440 U.S. 959 (1979); *Maletis v. United States*, 200 F.2d 97 (9th Cir. 1952) *cert. denied*, 345 U.S. 924 (1953); *Halstead v. Commissioner*, 296 F.2d 61 (2d Cir. 1961) (per curiam); *Smith v. Commissioner*, 37 T.C.M. 1731 (1978); TAM 199907029 (September 30, 1998) (partnership found where parties entered into a partnership agreement and filed partnership tax returns); PLR 9741017 (July 10, 1997) (parties filed partnership tax returns; IRS found intent so no need to look at level of business activity); *c.f. Allison v. Commissioner*, 35 T.C.M. 1069, 1078 (1976) (no partnership existed; failure to file partnership tax returns described as "admission against interest"); *but see Powell v. Commissioner*, 26 T.C.M. 161 (1967) (no partnership even though partnership returns filed).
[116] *Beck Chemical Equipment Corp. v. Commissioner*, 27 T.C. 840 (1957) acq. 1957-2 C.B.3.
[117] *Demirjian v. Commissioner*, 54 T.C. 1691 (1970) aff'd, 457 F.2d 1 (3rd Cir. 1972) (property held as "partners").
[118] *Rothenberg v. Commissioner*, 48 T.C. 369 (1967).
[119] *See* Tax Certificate.

VI. Conclusion

We are of the opinion that (i) from and after the time there is more than one Beneficiary of the Trust, the Trust should be treated as an investment trust described in Treasury Regulation section 301.7701-4(c) that is classified as a "trust" under Treasury Regulation section 301.7701-4(a), and (ii) the Beneficiaries should be treated as owning an undivided fractional interest in the Trust assets for U.S. federal income tax purposes.

Very truly yours,

Husch Blackwell LLP

Husch Blackwell LLP