

***By Electronic Delivery***

December 9, 2010

Deborah Butler  
Assoc. Chief Counsel (Procedure & Administration)  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

David R. Williams  
Director, Return Preparer Office  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

RE: *Application of PTIN Requirements to  
Preparers of IRS Forms 1120-RIC*

Dear Ms. Butler and Mr. Williams:

The Investment Company Institute<sup>1</sup> requests clarification regarding the Preparer Tax Information Number (“PTIN”) requirements for persons employed by fund management companies (defined below) who assist in preparing IRS Forms 1120-RIC (and related RIC-specific forms such as IRS Form 8613 – Return of Excise Tax on Undistributed Income of Regulated Investment Company). The circumstances, discussed below, in which these forms are prepared may cause these persons, to the extent that they prepare, or assist in preparing, all or substantially all of a return (hereafter “prepare”), not to fall neatly within the existing exceptions to the definition of tax return preparer. These persons likewise may not fall neatly within relief – from the PTIN competency-examination and continuing-education requirements – that we understand you are considering. We submit, for the reasons discussed below, that the Service’s objectives are not served by requiring these persons to secure PTINs and meet the general competency and continuing education requirements that are being developed.

Specifically, we request clarification that employees of a fund management company are not required to acquire PTINs if they prepare Form 1120-RIC or another RIC-related form; such clarification will assist those not covered by another exception. Comparable relief already is provided

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<sup>1</sup> The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$12.33 trillion and serve over 90 million shareholders.

for individuals who (1) prepare their employer's tax return (the "employee exception")<sup>2</sup> or (2) are employed by a fiduciary (the "fiduciary exception").<sup>3</sup> We recognize, however, that it may not be possible for the Service to issue this clarification before the PTIN requirements take effect on January 1. Accordingly, we urge – as an interim step – that fund management company employees be included in guidance being developed to address the PTIN requirements for employees of "professional services firms." This guidance, we understand, will provide that employees of professional services firms who do not sign returns need not take competency exams or meet continuing education requirements.

### *The RIC Industry*

IRS Forms 1120-RIC, which are filed by regulated investment companies ("RICs"), are prepared by service providers that typically provide RICs with a wide range of services. The tax return preparation services that are within this request are limited to those tax return preparation services provided by a company only to those RICs for which it provides other administrative services;<sup>4</sup> these companies hereafter are referred to as "fund management companies."

#### *A. Funds Registered Under the 1940 Act*

RICs must register under the Investment Company Act of 1940 (hereafter "the 1940 Act") and hold a diversified pool of investment assets (*e.g.*, stocks, bonds, or other securities) for their investors. While RICs typically have officers and a board of directors or trustees, who oversee the RICs' operations, they do not have employees.

RICs are subject to an extensive regulatory regime under the 1940 Act.<sup>5</sup> In addition, investment advisers, including advisers to funds, are subject to the Investment Advisers Act of 1940 (the "Advisers Act").<sup>6</sup> The Securities and Exchange Commission ("SEC") provides the attendant regulatory supervision under both of these Acts.

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<sup>2</sup> Treas. Reg. § 301.7701-15(f)((1)(ix).

<sup>3</sup> Treas. Reg. § 301.7701-15(f)((1)(x).

<sup>4</sup> Non-administrators (such as accounting firms and law firms) that assist in the preparation of RIC tax returns would not be treated under our proposal as fund management companies.

<sup>5</sup> This statute regulates a RIC's structure and operations by imposing restrictions on the RIC's investments and requiring that the RIC, among other things, maintain detailed books and records, safeguard portfolio securities, and file periodic reports with the SEC.

<sup>6</sup> 15 U.S.C. sections 80b-1 *et seq.*

RICs are required to calculate a net asset value (“NAV”) for their shares. The shares of a mutual fund, the most common type of RIC, are purchased and redeemed each day at the RIC’s NAV, which is determined at the close of each trading day by dividing the RIC’s net assets by the number of shares outstanding. Determining correctly a RIC’s income and potential tax liability is necessary to determining correctly a RIC’s NAV.

*B. Relationship Between Funds and Their Service Providers*

All services provided to a RIC (other than those performed by officers and directors or trustees) are performed by employees of firms that have contracted directly or indirectly with the RIC. These service providers may or may not be affiliated with each other.

The typical RIC is organized by a fund manager to provide investment opportunities for the manager’s current and future customers. The RICs organized by the same manager often are called members of the same “fund family.” The organizing firm or an affiliate may serve as a RIC’s administrator; in other cases, an organizing firm may contract with a third party to serve as a RIC’s administrator.

The fund management company typically employs attorneys and/or certified public accountants (“CPAs”) to manage the tax and accounting functions for the RICs (numbering into the hundreds) to which the fund management company provides administrative services. These attorneys and CPAs, consequently, often manage very large staffs; a significant number of the staff may assist in preparing at least one IRS Form 1120-RIC. Some persons employed by a fund management company who do not sign a RIC return, depending on the nature and extent of the tax return preparation assistance, could be treated as preparing the return. If no PTIN exception clearly is available, persons treated as tax return preparers (including those who sign the returns) would secure PTINs.

*Reasons Clarification is Needed*

The new PTIN requirements appear to arise from concerns regarding certain persons offering tax preparation services to the general public.<sup>7</sup> The preamble to the final regulations, for example, describes the regulations’ “two overarching objectives”<sup>8</sup> in a manner suggesting that the new PTIN requirements should not apply to individuals such as fund management company employees.

The first overarching objective – “to provide some assurance to taxpayers that a tax return was prepared by an individual who has passed a minimum competency examination to practice before the

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<sup>7</sup> The tax return preparation industry, as noted in the IRS’ Return Preparer Review (December 2009), has its own standard industry classification. IRS Pub. 4832, page 7. Fund management companies are not covered by that SIC Code.

<sup>8</sup> 75 Fed. Reg. 60310 (September 30, 2010).

IRS as a tax return preparer, has undergone certain suitability checks, and is subject to enforceable rules of practice”<sup>9</sup> – seems inapposite in the RIC context. The fund management companies hire as employees, and supervise as such, those persons within the scope of our request. These companies take great care, consistent with the stringent federal securities laws to which RICs are subject, to hire qualified individuals, provide them with all necessary training and ongoing education, and supervise them effectively.

The second overarching objective – “to further the interests of tax administration by improving the accuracy of tax returns and claims for refund and by increasing overall tax compliance”<sup>10</sup> – does not seem to be advanced in the fund industry context through the IRS’ current competency-examination and continuing-education initiatives. The two exams that will be given in 2011 are directed exclusively to individual income tax returns – returns that employees of fund management companies never prepare in connection with their RIC-related employment. Even the “business return” exam that IRS contemplates developing three years from now will have little, if any, relevance to RICs. The Internal Revenue Code, in Subchapter M, provides tax rules that apply only to RICs. These rules address qualification requirements, distribution requirements, and a taxation regime that are unique to our industry.

### ***Suggestions for Enhancing Tax Administration in RIC Context***

We submit that the rationale for excluding a taxpayer’s employees from the definition of tax return preparer with respect to the taxpayer’s return, as provided by Treas. Reg. § 301.7701-15(f)((1)(ix), applies equally to the functional equivalent in the RIC context. Since employees of a taxpayer who prepare or sign the taxpayer’s tax return need not acquire PTINs, employees of fund management companies who prepare or sign a RIC’s tax return likewise should not need to acquire PTINs.

A comparable result was announced earlier this year by the Treasury Department’s Financial Crimes and Enforcement Network (“FinCEN”) in a Notice of Proposed Rulemaking regarding Form TD F 90-22.1 – Report of Foreign Bank and Financial Accounts (the “FBAR”).<sup>11</sup> Specifically, FinCEN concluded that the employee exception from filing the FBAR should apply to persons employed by fund management companies registered with the SEC. “This exception has been

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 75 Fed. Reg. 8844 (February 26, 2010). The FBAR instructions generally require that each U.S. person who has a financial interest in or signature authority over foreign accounts report that relationship if the aggregate value of the accounts exceeds \$10,000 at any time during the calendar year.

included,” FinCEN explained, ”to address the fact that mutual funds do not have employees of their own.”<sup>12</sup>

We recognize that it may not be possible for the Service to make our requested clarification before the PTIN requirements take effect on January 1. Accordingly, we urge – as an interim step – that fund management company employees be included in guidance being developed to address the PTIN requirements for employees of “professional services firms.” This guidance, we understand, will provide that employees of professional services firms who do not sign returns need not take competency exams or meet continuing education requirements.

The rationale for these exceptions, we submit, applies with at least equal force to fund management company employees who prepare RIC-specific tax returns. First, the presently-contemplated competency exams have nothing to do with the tax issues that are relevant to IRS Forms 1120-RIC and 8613. Requiring employees of fund management companies to take these exams neither improves the accuracy of tax returns nor increases overall tax compliance; only burdens are increased. Second, fund management companies typically employ attorneys and/or CPAs who supervise the training and continuing education of other employees involved in preparing RIC tax returns. A continuing education requirement seems as unnecessary here as the Service apparently has concluded it is for employees of professional services firms.

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The ICI appreciates your consideration of this request for clarification. Please feel free to contact me at 202-326-5832 or [lawson@ici.org](mailto:lawson@ici.org) for additional information.

Sincerely,

*/s/ Keith Lawson*

Keith Lawson  
Senior Counsel – Tax Law

cc: Steve Larson

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<sup>12</sup> *Id.*, at 8848.