

**MEMO# 30281**

September 29, 2016

# **IRS Issues New No-Rule Position Under Sec. 851 and Proposed Regulations on Distributions from CFCs; Conference Call Scheduled**

[30281]

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TO:

TAX COMMITTEE No. 28-16

RE:

IRS ISSUES NEW NO-RULE POSITION UNDER SEC. 851 AND PROPOSED REGULATIONS ON DISTRIBUTIONS FROM CFCS; CONFERENCE CALL SCHEDULED

The Internal Revenue Service (“IRS”) and the Treasury Department have revised their ruling position relating to the determination of what constitutes a security under section 851 ([Rev. Proc. 2016-50](#)). They also released [proposed regulations](#) on whether inclusions from a controlled foreign corporation (“CFC”) or a Qualified Electing Fund (“QEF”) constitutes good income under section 851(b).[\[1\]](#)

## **Rev. Proc. 2016-50**

Rev. Proc. 2016-50 provides that the IRS will no longer issue private letter rulings on any issue relating to the treatment of a regulated investment company (“RIC”) under section 851 and related provisions that requires a determination whether a financial instrument or position is a security as defined in the Investment Company Act of 1940 (the “’40 Act”). Rev. Proc. 2016-50 supplements Rev. Proc. 2016-3, which sets forth the areas of the Internal Revenue Code on which the IRS will not issue letter rulings or determination letters.

The preamble to the proposed regulations (discussed below) address this no-rule area. The IRS and Treasury Department note that any future guidance regarding whether particular financial instruments, including investments that provide RICs with commodity exposure, are securities for purposes of the ’40 Act is solely within the jurisdiction of the Securities

and Exchange Commission (SEC).

The IRS and the Treasury Department request comments as to whether Rev. Rul. 2006-1, Rev. Rul. 2006-31, and other previously issued guidance that involves the determination of whether a financial instrument or position held by a RIC is a security under the '40 Act should be withdrawn.

## **Proposed Regulations**

The IRS and Treasury Department also have released proposed regulations relating to investments in stock and securities under section 851. Specifically, the proposed regulations specify that an inclusion from a CFC under section 951(a)(1)(A)(i) or from a QEF under section 1293(a) is treated as a dividend for purposes of section 851(b)(2) only to the extent that the distribution requirement in section 851(b) is satisfied. In other words, an inclusion from a CFC or a QEF will qualify as good income for the gross income test only to the extent that the RIC receives an actual distribution.

Further, the proposed regulations specify that an inclusion under section 951(a)(1) or 1293(a) does not qualify as other income derived with respect to a RIC's business of investing in stock, securities, or currencies.

The proposed regulations would apply to taxable years that begin on or after the date that is 90 days after the date of publication in the Federal Register of final regulations.

## **Comments Requested**

The IRS and Treasury Department have requested comments on the proposed regulations by December 27, 2016. The government will hold a hearing on the proposed regulations if a request is made in writing by that date. Specifically, the IRS and Treasury Department have requested comments on:

- Whether Rev. Rul. 2006-1, Rev. Rul. 2006-31, and other previously issued guidance that involves determinations of whether a financial instrument or position held by a RIC is a security under the '40 Act should be withdrawn, effective as of the publication of any final regulations;
- The clarity of the proposed regulations and how they can be made easier to understand.

We will have a conference call on **Thursday, October 6, 2016, at 2:30 p.m. ET**, to discuss the guidance. As usual, Ezella Wynn will send a calendar invitation for the call; simply accept the invitation if you plan to participate. The dial-in number for the call is **888-889-2034** and the passcode is **12294**. You also may send comments directly to me ([kgibian@ici.org](mailto:kgibian@ici.org) or 202-371-5432), and we will discuss the guidance at the next Tax Committee meeting in October. In any event, please provide all comments to me no later than November 15, 2016.

Karen Lau Gibian  
Associate General Counsel

### **endnotes**

**[1]** This guidance was included on the IRS and Treasury Department's 2016-2017 Priority Guidance Plan. See Institute [Memorandum](#) No. 30164, dated August 24, 2016.

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