

COMMENT LETTER

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Institute Letter Seeks Clarification of Tax Reporting Obligations by Business Trusts to Massachusetts (pdf)

By Electronic Delivery June 25, 2009 Commonwealth of Massachusetts Department of Revenue 100 Cambridge Street Boston, Massachusetts 02114
rulesandregs@dor.state.ma.us RE: Entity Classification Filings by Regulated Investment Companies Dear Sir or Madam: The Investment Company Institute,¹ on behalf of publicly-traded regulated investment companies ("RICs") organized as Massachusetts business trusts, requests guidance clarifying how the Commonwealth's new "check-the-box" rules will be applied to these RICs.² The guidance requested would: • clarify the scope of the "publicly-traded RIC" exemption from the annual accounting of earnings and profits; and • clarify these RICs' filing requirements, if any, on Form 355 (the Business or Manufacturing Corporation Excise Return) or Form 355SC (the Domestic or Foreign Security Corporation Return). Background Reporting Prior to Chapter 173 of the Acts of 2008. Prior to the statutory changes made in 2008, a RIC organized as a Massachusetts business trust was exempt from Massachusetts income tax (under MGL Ch. 62, sec. 8) as a corporate trust. The reporting rules for these RICs were 1 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 \$10.18 trillion and serve over 93 million shareholders. 2 These new rules are effective for an entity's first taxable year beginning on or after January 1, 2009. ICI Letter on Entity Classification Filings by Regulated Investment Companies June 25, 2009 Page 2 of 3 straightforward; a RIC filed informational returns on Massachusetts Form 3F for the year in which it elected RIC status and in its final year.³ The Form's instructions provided that the RIC was to enter "0" on specified lines (for items such as "income before deductions" and "tax due") and write "RIC- Informational Return" across the front of the return.⁴ Changes Made by Chapter 173 of the Acts of 2008. In 2008, the Commonwealth enacted legislation conforming its entity classification rules to those of federal law.⁵ Thus, effective for tax years beginning on or after January 1, 2009, a RIC previously treated as a corporate trust now will be treated as a corporation – although it will be exempt from the Massachusetts corporation excise tax.⁶ Recently-proposed regulations provide guidance on the new reporting requirements arising from this change. Requested Guidance First, we request clarification regarding the scope of the "publicly-traded RIC" exemption from the annual accounting of earnings and profits that is provided by Proposed Regulation 830 CMR 63.30.3(3)(d).⁷ Specifically, we urge that the definition of "publicly-traded" be based, with

one clarification, on the definition of a “publicly offered regulated investment company” in section 67(c) of the Internal Revenue Code. This section defines a “publicly offered regulated investment company” as “a [RIC] the shares of which are (I) continuously offered pursuant to a public offering . . . (II) regularly traded on an established securities market, or (III) held by or for no fewer than 500 persons at all times during the taxable year.” The section 67(c) definition is well understood by the industry and could be easily administered by the DOR. One clarification should be made to the section 67(c) definition. Specifically, the definition should include a RIC that issues its shares only to one or more publicly-offered RICs. This 3 Massachusetts Department of Revenue (“DOR”) 03-13; Instructions to 2008 Form 3F. 4 If a RIC were organized as a state-law corporation, it could satisfy its information return filing obligation by filing Form 355, Business or Manufacturing Corporation Excise Return or Form 355SC (the Domestic or Foreign Security Corporation Return). Instructions for the Form 355 provided that the excise, balance due and refund lines should be left blank and “RIC-Informational Return” must be written across the front of the return. The DOR’s directive that permitted RICs to file Form 3F only for their initial and final years, however, did not apply expressly to the Forms 355 and 355SC. 5 St. 2008 Ch. 173, Sec. 38. 6 63 MGL sec. 68C(8) as enacted by St. 2008 Ch. 173, Sec. 89 provides in part that “the excise under section 39 shall not apply in the case of a business corporation that is . . . a regulated investment company under section 851 of the Code.” 7 Under this exemption, a publicly-traded RIC that has distributed annually to its shareholders all of its earnings and profits (“E&P”), and therefore has no accumulated E&P, is exempt from filing the accounting statement; instead, the RIC must file a statement identifying itself and attesting to its qualification for the exemption. ICI Letter on Entity Classification Filings by Regulated Investment Companies June 25, 2009 Page 3 of 3 clarification would eliminate any uncertainty regarding the status of tiered-RIC structures. In these structures, the RIC holding the portfolio securities is available to the public indirectly -- through the widely-held and publicly-available RICs and insurance-dedicated products that hold the RIC’s shares. It would seem peculiar if one RIC in the tiered-RIC structure -- which was created to satisfy legal requirements or investor needs and that offers to investors the opportunity to invest in the shares of another RIC -- is exempt, while the RIC in which it invests -- which holds the portfolio securities -- is not exempt. Our suggested definition of “publicly-traded” should be adopted promptly. Second, we request clarification regarding these RICs’ filing requirements, if any, on Form 355 or Form 355 SC. Specifically, we urge that the instructions to the Forms 355 and 355 SC provide (as did the instructions for the Form 3F) that the form need be filed only for a RIC’s first and last year. If the exemption provided by TIR 03-13 is not extended to RICs filing Forms 355 or 355SC, the number of RICs that file informational returns annually will increase dramatically; an increased workload would be imposed on DOR , RICs, and the RICs’ tax service providers. The rationale leading the DOR to conclude previously that the Commonwealth’s interests were served adequately by informational filings for only a RIC’s first and last years remains applicable. * * * Please do not hesitate to contact me (at 202-326-5832 or lawson@ici.org) if we can provide you with any additional information. Sincerely, /s/ Keith Lawson Keith Lawson Senior Counsel – Tax Law