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The Regulated Investment Company Modernization Act of 2010

by William S. Pilling III and Kristin M. McKenna

On Dec. 8, 2010, the Senate approved H.R. 4337, the Regulated Investment Company Modernization Act of 2010 (the Act), with an amendment to the version approved by the House of Representatives on Sept. 28, 2010. On Dec. 15, 2010, the House also approved the amended version of the Act, clearing the way for President Obama to sign the Act, which he is anticipated to do in due course (the date signed, the date of enactment). The Act is the first meaningful and comprehensive revision to Subchapter M since the adoption of the Internal Revenue Code of 1986 (the Code), and certain provisions dating back more than 60 years.

Once the Act is signed into law, a regulated investment company (RIC or fund) may immediately take advantage of certain new and advantageous rules regardless of its fiscal year-end (e.g. the savings provisions for qualification failures, exchange treatment for distributions in redemption of RIC stock and the modifications related to the excise tax). However, RICs with fiscal year-ends other than Dec. 31, (e.g. June 30 or Oct. 31), will have to wait until their next tax year begins (July 1 or Nov. 1, respectively), to implement certain of the Act's provisions, such as the repeal of the preferential dividend rule and the unlimited capital loss carry forward, for example.

The provisions of the Act, together with the few provisions specific to RICs contained in the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (tax cut bill), are summarized below:

Stripping of the commodity provision. The version of the Act passed by the Senate, and later approved by the House, stripped the provision treating income from commodities and commodity-linked derivatives as qualifying income for purposes of the 90 percent good income test in section 851(b)(2) of the Code. Assuming no negative inference is drawn from such action, and we are aware of no reason for such an inference, RICs will continue to be able to gain exposure to commodities, albeit in a more limited and expensive manner than might have been the case if the commodity provision had survived. In a series of private letter rulings, the IRS has held that income and gains realized from investment in commodity-linked notes and/or a wholly-owned offshore subsidiary that invests in commodity-linked derivatives are qualifying income. Still, the stripping of the commodity provision is disappointing. If you believe that exposure to commodities reduces risk in a diversified portfolio, this puts mutual funds at a competitive disadvantage compared to other investment vehicles such as hedge funds and group trusts.

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Unlimited capital loss carry forward. Under present law, a RIC is permitted to carry forward a net capital loss from any year as a short-term capital loss to offset its capital gains, if any, realized during the eight years following the year of the loss. Under the Act, a capital loss would carry forward indefinitely and retain its character as either short-term or long-term, effective for taxable years beginning after the date of enactment.

Observation: Allowing unlimited capital loss carryovers will mitigate, to some extent, the sting of any section 382 annual limitation on use of capital loss carryovers in the context of fund mergers. Subject to transition rules, it will no longer be the case that capital losses may expire unutilized when a fund experiences a 50 percent change of ownership. However, unlike the capital losses of a hedge fund that pass through to investors, capital losses incurred by a RIC continue to be trapped inside the RIC while capital gains, net of any available capital loss carryovers, are required to be distributed.

Savings provisions for qualification failures. The Act provides two savings provisions for inadvertent failures to meet the RIC qualification tests in section 851 of the Code. The provisions are effective for taxable years with respect to which the due date (determined with regard to any extensions) of the return for such taxable year is after the date of the enactment.

- For asset diversification test failures. For de minimis failures of the asset diversification test, i.e. if the failure is attributable to ownership of assets, the total value of which does not exceed the lesser of: (i) one percent of the value of the RIC's total assets at the end of the quarter; and (ii) \$10 million, the fund has six months to cure the failure. For asset diversification test failures that are not de minimis and due to reasonable cause and not willful neglect, the Act imposes a tax in an amount equal to the greater of: (i) \$50,000; or (ii) the amount determined by multiplying the highest rate of tax specified in Code section 11 (currently 35 percent) by the net income generated during the period of asset test failure, by the assets that caused the RIC to fail the asset test. Such non-de minimis failures must be disclosed and cured within six months.
- For "good income" test failures. Under the Act, failures to satisfy the qualifying income test, due to reasonable cause and not willful neglect, are

excused if the fund discloses the failure and pays a tax equal to the amount of non-qualifying income in excess of 10 percent of the fund's gross income.

Observation: Under current rules, a RIC has only 30 days to identify and cure an asset diversification failure under Subchapter M; a RIC has no statutory remedy for failures to satisfy the 90 percent good income test. The provision under the Act for de minimis diversification failures is particularly attractive because it neither requires reasonable cause nor a monetary sanction. However, the threshold for a de minimis failure is unclear under the Act as it is based, in part, on the value of the assets giving rise to the failure. It is unclear whether that refers to the value of all more than five percent securities or merely the excess value of each such security over five percent of total assets, or the value of the last purchase of a more than five percent security or something else entirely. Because of this ambiguity, a fund relying on the de minimis provision might consider also complying with the requirement for non-de minimis failures of identifying the assets causing the failure in a schedule that is filed with the IRS. However, the computation of the monetary sanction for a non-de minimis failure is similarly ambiguous as it is based, in part, on the net income generated by the net assets causing the failure for the period beginning on the first date the failure occurs and ending on the earlier of the date such assets are sold or the end of the first quarter when there is no longer a diversification failure. Ambiguities abound as to which assets cause the failure, the meaning of net income and for what period of time net income is measured. While the term "net income" is not defined, by reference to the REIT rules on foreclosure property and prohibited transactions, it appears to mean the aggregate of the recognized gains or losses from such assets, plus the ordinary income generated by such assets during the period of the asset failure.

Also, the savings provision for non-de minimis diversification failures and gross income failures is limited to failures "due to reasonable cause and not due to willful neglect." This standard is patterned after the REIT rules which provide that a failure will be considered due to reasonable cause and not due to willful neglect if the REIT exercised ordinary business care and prudence in attempting to satisfy the requirements. In the context of good income

failures, consider a fund that invests in an asset class knowing the income and gains are non-qualifying (e.g., direct investment in a commodity-linked swap) with the intention of not exceeding the 10 percent threshold, but does anyway. Did that fund exercise ordinary business care? The REIT regulations state, “if the [REIT] enters into a lease knowing that it will produce nonqualified income which reasonably can be expected to cause a source-of-income requirement to be failed, the failure is due to willful neglect even if the trust has a legitimate business purpose for entering into the lease.”

Reporting of dividends and distributions to

shareholders. Under present law, the character of dividends and distributions must be designated in a written statement mailed to shareholders within 60 days, following the close of the fund’s fiscal year. In addition, funds must send shareholders Forms 1099 based on dividends and distributions paid during the calendar year even though the character of a fund’s dividends and distributions cannot be determined until the fund’s fiscal year end. This can – and does – lead to errors in Form 1099 reporting.

- **60-day designation rule.** The Act replaces this 60-day designation rule with a requirement to report the character of dividends and distributions in a written statement furnished to shareholders, which committee reports state may be a Form 1099.

Observation. There may still be reasons to continue to report the character of dividends and distributions in annual shareholder reports. For instance, Forms 1099 are not sent to all investors. Also, it might be prudent to wait for additional IRS guidance before relying entirely on Forms 1099 to satisfy these requirements.

- **Excess reported amounts.** For funds with a fiscal year end date other than Dec. 31, the Act allows “excess reported amounts” to be taken into account by the fund in the portion of its fiscal year beginning after Dec. 31 to reduce the need to amend Forms 1099. In general, an excess reported amount is the excess of a type of income reported to shareholders, such as capital gain dividends, over the amount actually earned by the fund. In the event that the post-December reported amount does not exceed the excess reported amount, the excess reported amount will continue to be allocated among all of the reported capital gain dividends for the taxable year.

- **Reduction of earnings and profits by disallowed amounts.** The Act provides that the deductions disallowed in computing investment company taxable income relating to tax-exempt interest are allowed in computing current earnings and profits of a RIC, having the effect of converting a distribution from a muni-bond fund that over-distributes its income from an ordinary dividend to a return of capital. Additionally, as a result of the change to the capital loss carryover rules, the Act requires that the rules applicable to the taxable income treatment of a net capital loss apply for the purposes of determining earnings and profits (both current earnings and profits and accumulated earnings and profits).

- **Pass-through of exempt-interest dividends and foreign tax credits by fund of funds.** Under the Act, a qualified fund of funds is now permitted to pass-through to shareholders exempt-interest dividends and foreign tax credits. A “qualified fund of funds” means a RIC at least 50 percent of the value of the total assets of which – at the close of each quarter of the taxable year – is represented by interests in other RICs.

Observation. In the context of state muni-bond funds, consider whether the character of such exempt-interest dividends paid by an underlying tax-exempt fund to a qualified fund of funds would, in turn, pass-through under state law to resident shareholders in a given state.

These amendments regarding the elimination of the 60-day designation rule and excess reported amounts are effective for distributions in taxable years, beginning after the date of enactment. The provisions regarding earnings and profits and qualified fund of funds apply to taxable years beginning after the date of enactment.

Spillover dividends. The Act modifies the spillover dividend rule by providing that the time for declaring a spillover dividend is the later of the 15th day of the 9th month following the close of the prior taxable year, or the extended due date for filing the return. Also, the requirement that the distribution be paid not later than the date of the first regular dividend payment made after the declaration is amended (some might argue clarified) to state that the distribution be paid not later than the date of the first dividend payment of the same type (e.g. an ordinary income dividend or a capital gain dividend) made after the declaration. For these purposes, a dividend attributable to short-term capital gain, with respect to

which a notice is required under Section 19 of the Investment Company Act of 1940 (1940 Act), shall be treated as the same type of dividend as a capital gain dividend. These amendments are effective for distributions in taxable years beginning after the date of enactment.

Observation. This provision may require a tweak to standard dividend resolutions to incorporate the revised time period for declaring dividends. Also, some funds that currently pay capital gain dividends twice a year might wish to consider whether the fund may now pay capital gain dividends only in December. The rules under Section 19 of the 1940 Act, with respect to providing shareholders notice of the source of dividends, continue to apply.

Return of capital distributions. Under the Act, a non-calendar year RIC that makes distributions of property with respect to the taxable year in an amount in excess of the current and accumulated earnings and profits must allocate the current earnings and profits first to distributions made on or before December 31 of the taxable year. In the case of a RIC with more than one class of stock, the provision applies separately to each class of stock. These changes are effective for distributions made in taxable years beginning after the date of enactment.

Observation. This and other provisions in the Act are intended to reduce the need for funds to file amended Forms 1099 and, in turn, for shareholders to file amended income tax returns.

Distributions in redemption of stock of a RIC. The Act provides that, except to the extent provided in regulations, the redemption of stock of a publicly offered RIC is treated as a sale or exchange if the redemption is upon the demand of the shareholder and the RIC issues only stock that is redeemable upon the demand of the shareholder. A RIC is “publicly offered” if its shares are: (1) continuously offered pursuant to a public offering under the Securities Act of 1933 (1933 Act); (2) regularly traded on an established securities market; or (3) held by or for no fewer than 500 persons at all times during the taxable year. The Act also provides that, except to the extent provided in regulations, the loss deferral rule does not apply to any redemption of stock of a RIC, if the RIC issues only stock that is redeemable upon the demand of the shareholder and the redemption is upon the demand of a shareholder that is another RIC. These amendments are effective for distributions after the date of enactment.

Observation. These provisions will be particularly helpful for many RICs that serve as investment vehicles for separate accounts of life insurance companies because the participating insurance companies and their separate accounts are treated as the shareholders of the fund. These provisions will also be helpful for many fund of funds. Unfortunately, redemptions by feeder funds of shares in a RIC master fund that is not considered publicly offered (because its shares are not registered under the 1933 Act), will continue to be subject to current rules on determining whether a redemption is not essentially equivalent to a dividend.

Repeal of preferential dividend rule for publicly offered RICs. The Act repeals the preferential dividend rule for publicly offered RICs, as defined above, effective for distributions in taxable years beginning after the date of enactment. RICs achieve a single level of taxation by being allowed a deduction for dividends paid to their shareholders. In order to qualify for this deduction under present law, a dividend must not be a “preferential dividend,” meaning it is distributed pro rata to shareholders with no preference to any share of stock compared with other shares of the same class, and with no preference to one class as compared with another.

Observation. The repeal of the preferential dividend rule will eliminate the prospect of disproportionate penalties for multi-class foot faults. Its repeal may facilitate the organization of no-fee funds in the context of wrap-fee products and use of RICs as building blocks for other funds and separate accounts to gain exposure to certain hard-to-manage asset classes. Its repeal might give rise to no-fee money market or index funds offered by a fund sponsor to investors in its other products. Such enhanced and new products would still need to be examined carefully to insure compliance with any limitations on the issuance or sale of “senior securities” under Section 18 of the 1940 Act. The preferential dividend rule will continue, however, for RICs that are not considered publicly offered, including most RIC master funds whose shares are not registered under the 1933 Act.

Repeal of loss disallowance rule for certain municipal bond fund shareholders. The Act repeals the loss disallowance rule on the sale or exchange of RIC stock held for six months or less, to the extent of the amount of any exempt-interest dividends paid by a RIC, which declares dividends daily and pays them monthly.

However, the Act gives the Secretary authority to issue regulations to prescribe a shorter holding period not shorter than the greater of 31 days or the period between the regular distributions. This provision applies to stock for which the taxpayer's holding period begins after the date of enactment.

Coordination of excise tax distribution rules (section 4982) with those for income tax (Subchapter M). Under present law, there are a number of technical issues that arise for RICs in reconciling the distributions required for excise tax purposes with those required for income tax purposes. The Act remedies some of these technical issues in the following ways:

- **Elective deferral of certain late-year losses of RICs for income tax purposes.** The Act provides that, except to the extent provided in regulations, a RIC may elect to “push” to the first day of the next taxable year part, or all, of any post-October capital loss or any late-year ordinary loss. These amendments are effective for taxable years beginning after the date of enactment.
- **Expands list of exempt entities for exception from excise tax.** The Act expands the type of tax-exempt entities that can hold shares of the RIC, without it being subject to excise tax, to include another RIC to which Code section 4982 does not apply and permitted persons under the Code section 817 diversification rules, including Roth IRAs, certain government plans described in section 414(d) or 457, and a pension plan described in section 501(c)(18). This amendment applies to calendar years beginning after the date of enactment.

Observation. In the context of a fund of funds that serves as an investment vehicle for separate accounts of life insurance companies, this provision clarifies that an underlying fund, all of the shares of which are held by separate accounts and other permitted investors, is not subject to excise tax.

- **Deferral of certain gains and losses of RICs for excise tax purposes.** Under the Act, the present-law excise tax “push” rules applicable to foreign currency gains and losses are expanded to include all “specified gains and losses.” This includes ordinary gains and losses from the sale, exchange or

other disposition of (or termination of a position with respect to) property, including foreign currency gain and loss, and amounts marked-to-market under the passive foreign investment company (PFIC) rules. These post-Oct. 31 gains and losses are “pushed” to the next calendar year. The present-law rule treating passive PFIC stock as disposed of on Oct. 31 is made applicable to all property held by a RIC which, under any provision of the Code, is treated as disposed of on the last day of the taxable year. The Act also allows a non-calendar year RIC, except as provided in regulations, to elect to “push” any net ordinary loss to Jan. 1 to offset other income realized after Dec. 31. These amendments are effective for calendar years beginning after the date of enactment.

- **Distributed amount for excise tax purposes.** The Act allows a RIC to increase the distributed amount for the calendar year by the amount on which estimated tax payments are made during that calendar year (e.g. in the case of a RIC investing in muni-bonds that chooses to pay tax on any market discount rather than pass-through ordinary income to shareholders). The distributed amount for the following calendar year is reduced by the amount of the prior year's increase. This amendment is effective for calendar years beginning after the date of enactment.
- **Increase in required distribution for excise tax purposes.** The required distribution for purposes of the excise tax is increased from 98 percent of the capital gain net income for the one-year period ending Oct. 31 of such calendar year to 98.2 percent. This provision applies to calendar years beginning after the date of enactment.

Repeal of penalty on deficiency dividends. Under present law, a RIC making a deficiency dividend is subject to an interest charge as if the entire amount of the deficiency dividend were the amount of the tax deficiency. An additional penalty is also imposed. The Act repeals the additional penalty with respect to deficiency dividends for taxable years beginning after the date of enactment.

Observation. This provision conforms the rules on **deficiency dividends with those applicable to REITs.**

Modification of sales load basis deferral rule for RICs.

The Act limits the applicability of the sales load basis deferral provision to cases where the taxpayer subsequently acquires stock before Jan. 31 of the calendar year following the calendar year the original stock is disposed of, effective for sales load charges incurred in taxable years beginning after the date of enactment.

Observation. This provision is intended to facilitate cost basis reporting by RICs, effective for shares of a fund purchased on or after Jan. 1, 2012.

TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010 – RIC SPECIFIC PROVISIONS

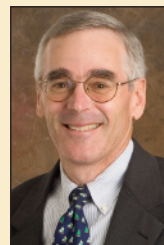
On Dec. 17, 2010, the President signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the Bill), which contained the following RIC-specific provisions:

Qualified dividend income. The Bill extends for two years, through Dec. 31, 2012, the reduced tax rates on qualified dividends paid to noncorporate investors. Thus, qualified dividend income will continue to be taxed to individuals at long-term capital gain rates (currently at a maximum rate of 15 percent).

Interest-related and short-term capital gain dividends.

The Bill extends for two years the exemption from U.S. withholding tax for interest from U.S. sources and short-term capital gains paid by RICs to foreign shareholders, with respect to taxable years of RICs beginning before Jan. 1, 2012.

Observation. Under this provision, a foreign investor in a U.S. money market fund is unlikely to have any U.S. federal income tax withheld on dividends paid to the investor. But interest earned by a RIC from sources outside the United States does not qualify for this exemption, which makes mutual funds non-competitive with hedge funds and separate accounts, as they are not required to withhold U.S. tax on foreign source income.



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Partial exemption from U.S. estate tax for stock in a RIC held by foreign investors. The Bill extends for two years a provision that treats stock in a RIC held by a foreign investor as property held outside of the United States, and therefore not subject to U.S. estate tax, in proportion to the “qualifying assets” held by the RIC. Qualifying assets include, among other things, certain bank deposits, debt obligations that pay portfolio interest and non-U.S. source property. This exemption applies to decedents dying before Jan. 1, 2012.

FIRPTA provisions. The Bill extends for two years a provision that makes a RIC, that is U.S. real property holding corporation or that would be but for certain exceptions, a “qualified investment entity” for purposes of the rules (i.e. so-called FIRPTA provisions) that subject foreign investors to U.S. income tax on sale of U.S. real property interests. Generally, this provision applies to RICs that invest in U.S. REITs. The provision sunsets after Dec. 31, 2011, after which date other FIRPTA provisions go into effect.

For a copy of the Act as passed by the House, see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4337ch.txt.pdf

For a copy of the Bill, see <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4853eas2/pdf/BILLS-111hr4853eas2.pdf>

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