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Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103-7018
215.564.8000 Telephone
215.564.8120 Facsimile
www.stradley.com

With other offices in:
Washington, D.C.
New York
New Jersey
Illinois
Delaware

IRS Extends Loosened Safe Harbor for RIC and REIT Stock Distributions

The IRS issued Revenue Procedure 2021-53, which temporarily modifies the safe harbor for stock distributions by "publicly offered" regulated investment companies (RICs) and "publicly offered" real estate investment trusts (REITs). The Revenue Procedure provides that when a publicly offered RIC or REIT allows its shareholders to elect to receive a portion of a distribution in cash or stock, then any stock received under the election will be treated as a dividend under Sections 301 and 305 provided that the amount of cash to be distributed in the aggregate to all shareholders under the election is not less than 10% of the aggregate declared distribution. (Section references are to the Internal Revenue Code of 1986, as amended.) Under Revenue Procedure 2017-45, which provides the above-referenced safe harbor for stock distributions, at least 20% cash must be offered to shareholders as part of the distribution. (See our prior coverage here.) The IRS originally issued Revenue Procedure 2020-19, which modified Revenue Procedure 2017-45, in recognition of the need for enhanced liquidity during the economic disruption caused by the outbreak of the coronavirus, but the modification to the safe harbor for stock dividends was temporary and effective solely with respect to distributions declared by a publicly offered REIT or publicly offered RIC on or after April 1, 2020, and on or before Dec. 31, 2020. Revenue Procedure 2021-53 is effective solely with respect to distributions declared by a publicly offered REIT or publicly offered RIC on or after Nov. 1, 2021, and on or before June 30, 2022. (A publicly offered RIC is a RIC the shares of which are continuously offered pursuant to a public offering, regularly traded on an established securities market, or held by or for no fewer than 500 persons at all times during the taxable year. A publicly offered REIT is a REIT that is required to file annual and periodic reports with the Securities and Exchange Commission under the Securities Exchange Act of 1934.) None of the Revenue Procedures mentioned above apply to RICs or REITs that are not publicly offered, which creates uncertainty for private RICs and REITs. Additional information about the RIC and REIT distributions requirements and the requirements and history of Revenue Procedure 2017-45 follows below.

RICs and REITs each must satisfy an annual distribution requirement. In order to keep their tax-advantaged status, RICs must distribute at least 90% of their investment company taxable income, while REITs must distribute 90% of their real estate investment trust taxable income. RICs also must make a distribution of at least 98.2% of their ordinary income and net capital gain income to avoid excise tax. Similarly, to avoid excise tax, REITs must make a distribution of 85% of their ordinary income and 95% of their capital gain net income. Generally, if a RIC or a REIT credits shareholders with a dividend, rather than making an actual distribution of the dividend, no dividends paid deduction can be claimed by the RIC or the REIT. Also, certain kinds of distributions of stock do not qualify as a dividend for purposes satisfying the foregoing of distribution requirements. Generally, for example, a pro-rata distribution that is sole of stock to existing shareholders is not treated as a distribution of property that qualifies as a dividend for tax purposes. This means that the distribution could not be included for purposes of satisfying the RIC and REIT distribution requirements.

A RIC or a REIT with liquidity issues could face concerns with maintaining its status as a RIC or a REIT because of the annual distribution requirement. In 2017, the IRS released

Revenue Procedure 2017-45, which allows a publicly offered RIC or REIT to pay a stock distribution that satisfies the annual distribution requirements if the following requirements are satisfied:

- The distribution must be made to shareholders with respect to the RIC's or REIT's stock.
- Each shareholder must receive a cash-or-stock election with respect to all or part of the distribution.
- At least 20% cash must be offered to shareholders as part of the distribution.
- Each shareholder, other than those that request a cash percentage exceeding the cash limitation set forth in the dividend declaration, must receive cash equal to the amount that such shareholder elected to receive.
- If the aggregate of all the shareholders' elected cash amounts does not exceed the cash limitation amount set forth in the dividend declaration, then each shareholder that requested a cash percentage exceeding the limit must receive cash equal to their elected cash amounts.
- If the aggregate of all the shareholders' elected cash amounts exceeds the cash limitation amount set forth in the dividend declaration, then each shareholder that elected to receive a cash percentage exceeding the limit must receive an amount that is calculated based on a formula that generally reduces the cash distributed to those that elected more than the minimum percentage of cash so as to provide a pro rata reduction for all excess cash claimants based on each excess cash claimant's share of the total excess claims of all shareholders.
- The calculation of the number of shares to be received by a shareholder is determined based on a formula that: (a) utilizes the market price of shares, (b) is designed so that the value of the number of shares to be received in lieu of cash corresponds to the amount of cash to be received with respect to that share and (c) uses data from a period of not more than two weeks ending as close as practicable to the payment date of the distribution.

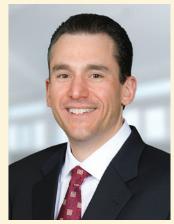
Revenue Procedure 2017-45 is similar to Revenue Procedures 2008-68, 2009-15 and 2010-12 that were released by the IRS in light of the Great Recession to assist RICs and REITs facing a liquidity crunch.

Fifth Circuit Holds FBAR Penalties Apply on a Per-Account Basis Thereby Splitting with the Ninth Circuit

The Fifth Circuit Court of Appeals in *Bittner* held that, for purposes of the FBAR penalty, each failure to report a qualifying foreign account is a separate reporting violation. The decision splits with the Ninth Circuit in *Boyd*, which adopted a per-form interpretation.

IRS Issues Comparison of Rehabilitation and Low-Income Housing Credits

The IRS has prepared a table that compares the Section 47 rehabilitation credit and the Section 42 low-income housing credit.



Christopher C. Scarpa **Jacquelyn Gordon**

For more information, contact Christopher C. Scarpa at 215.564.8106 or cscarpa@stradley.com *or Jacquelyn Gordon at 215.564.8176 or* jgordon@stradley.com.