Dechert LLP

1095 Avenue of the Americas
New York, NY 10036-6797
+1 212 698 3500 Main
+1 212 698 3599 Fax
www.dechert.com

March 24, 2020

The Honorable David J. Kautter
Assistant Secretary (Tax Policy)
1500 Pennsylvania Avenue, N.W., Room 3120MT
Washington, D.C. 20220
(david.kautter@treasury.gov)

Re: RIC Partial Stock Dividend Guidance

Dear Mr. Kautter:

This letter is respectfully submitted by Dechert LLP regarding a tax issue that arose for regulated investment companies ("RICs") during the financial crisis starting in 2008 that is also arising now during the current emergency situation presented by COVID-19. As may be seen, the COVID-19 crisis has put severe stress on the financial markets, which is severely impacting investment funds and their portfolio companies. The issue relates to the mix of stock and cash that a RIC must distribute so as to qualify as a dividend under section 301 of the Internal Revenue Code of 1986, as amended (the "Code") that is deductible for purposes of the RIC's distribution requirements and for a dividends paid deduction.

Dechert LLP is an international law firm with wide-ranging federal tax and financial services practices that serve clients in the United States and abroad. In the U.S., we represent a substantial number of funds taxed as RICs under the Code, including mutual funds, closed-end funds, and exchange-traded funds registered under the Investment Company Act of 1940 (the "1940 Act") or electing treatment as business development companies under the 1940 Act.

In developing our recommendations below, we have drawn on our extensive experience relating to tax issues involving RICs. Although we have discussed the matters addressed in this letter with some of our clients, the comments that follow reflect only the views of a group of attorneys in our federal tax practice and financial services practice and do not necessarily reflect the views of our clients, other members of our federal tax or financial services group, or the firm generally.

Generally, in order to avoid liability for corporate-level tax and qualify as a conduit of certain types of income and gain under subchapter M of the Code, a RIC must satisfy numerous requirements, including an annual requirement that the RICs distribute distributions taxed as *dividends* in an amount of at least of 90 percent of the RIC's net income for that year.

A RIC's distribution of solely its own shares of stock without any cash generally will not be considered a *dividend* for this purpose unless shareholders have some right to receive that distribution in cash or in stock, under Code section 305. To conserve cash at certain times, RICs and other investment entities have in the past requested confirmation that limiting the total amount of cash available for any specific dividend would not endanger the taxability of the dividend. Prior to 2008, the Internal Revenue Service (the "Service") issued multiple private letter rulings to certain real estate investment trusts ("REITs") confirming that dividends comprised of at least 80 percent stock and no more than 20 percent cash (at the election of the shareholder) qualified as dividends deductible for purposes of the REIT distribution tests (specifically, PLRs 200832009, 200817031, 200618009, 200615024, 200406031, 200348020, and 200122001). Under these private letter rulings, the shareholders receiving either stock or cash took the distributions into income as taxable dividends. In 2008, the Service began issuing similar private letter rulings to RICs (specifically, PLRs 201552011, PLR 201408021, PLR 201408020, PLR 201404005, PLR 201312028, PLR 201306014, PLR 201306013, PLR 201306012, PLR 201304002, PLR 201252012, PLR 200852020 and PLR 200852007).

As the 2008 global financial crisis unfolded, the Service and the U.S. Department of the Treasury worked quickly to release guidance of general applicability so as to allow RICs and REITs to maintain their operations by conserving significant amounts of cash generated from their investment operations, without the need to request a specific private letter ruling. The Service first issued Revenue Procedure 2008-68, confirming that dividends declared (with respect to a taxable year ending on or before Dec. 31, 2009) comprised of 90 percent stock and no more than 10 percent cash qualified for a publicly-traded REIT's dividends paid deduction. Rev. Proc. 2008-68 was extended to publicly-traded RICs by Rev. Proc. 2009-15. That guidance was extended for two additional years (until Dec. 31, 2011) by Rev. Proc. 2010-12. This guidance of general applicability was of extreme assistance to many RICs at the time. For reasons not specifically clear, the relief for RICs provided in these Revenue Procedures was limited to RICs whose shares were exchange-traded on an established U.S. securities market.

Years later, in 2017, with Rev. Proc. 2017-45, the Service provided permanent guidance that distributions by REITs and RICs with a stock and cash mix of 80 percent stock and no more than 20 percent cash would generally qualify as taxable dividends. The 2017 guidance is not restricted to only to exchanged-traded RICs but is restricted to "publicly-offered" RICs, as defined under Code section 67(c)(2)(B). Publicly-offered RICs are those whose shares are continuously offered pursuant to a public offering within the meaning of section 4 of the Securities Act of 1933, or whose shares are U.S. exchange-traded, or whose shares are held by at least 500 persons.

The current COVID-19 crisis has significantly impacted all RICs, many of whom are anticipating reducing and/or delaying their dividends. To provide the option to conserve capital in these challenging times, we respectfully request that the Treasury Department issue guidance similar to the earlier revenue procedures to allow RICs to use a 90 percent/10 percent combination of stock and cash. We recommend that the guidance begin to be effective upon release or with respect to distributions declared on or after March 13, 2020, the date on which President Trump issued an emergency declaration under the National Emergencies Act in response to the ongoing Coronavirus Disease 2019 (COVID-19) pandemic ("National Emergency"). We recommend that the guidance remain effective for all distributions paid on or before the date which is two years from the termination of the National Emergency.

We recommend that the guidance not be limited to publicly-offered RICs but instead be extended to cover all RICs qualified under section 851(a). RICs that are not publicly-offered are excluded from the 2017 guidance. There is no discernable tax policy or other policy reason for this exclusion, and we recommend that the exclusion be dropped. Non-publicly-offered RICs are commonly managed by asset managers who wish to avoid the expense of maintaining unneeded 1933 Act registration for 1940 Act funds owned solely by large institutional investors. The distinction between publicly-offered RICs and non-publicly-offered RIC is intended to prevent high net worth individuals from using non-publicly-offered RICs to avoid the "miscellaneous itemized deduction" rules of the Code. We agree with that purpose, but the miscellaneous itemized deduction rule has nothing to do with cash dividends and stock dividends, and the guidance we are requesting relates in no way to the miscellaneous itemized deductions rules. As stated above, we recommend that the proposed guidance apply to all RICs qualified under Code section 851(a).

We thank you very much for considering these recommendations. Please feel free to contact Joseph A. Riley at 212-698-3528 (joseph.riley@dechert.com) or Ari M. Zak at 212-698-3655 (ari.zak@dechert.com) with any questions about this submission.

Respectfully submitted,

Joseph A. Riley

Ari M. Zak

Cc:
The Honorable Michael J. Desmond (michael.j.desmond@irscounsel.treas.gov)
Andrea Hoffenson, Esq. (andrea.m.hoffenson@irscounsel.treas.gov)
Helen Hubbard, Esq. (helen.m.hubbard@irscounsel.treas.gov)
Michael S. Novey, Esq. (michael.novey@treasury.gov)
Krishna Vallabhaneni, Esq.(krishna.vallabhaneni@treasury.gov)