

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters.
(Also Part I, §§ 561, 562, 852; 1.561-1, 1.562-2, 1.852-1,
1.852-3)

Rev. Proc. 99-40

SECTION 1. PURPOSE

This revenue procedure describes conditions under which distributions made to shareholders of a regulated investment company (RIC) may vary and nevertheless be deductible as dividends under § 562 of the Internal Revenue Code.

SECTION 2. BACKGROUND

.01 Section 852(b)(2)(D) allows a RIC a deduction for dividends paid (as defined in § 561 with certain modifications). Section 561 defines the deduction for dividends paid and applies the rules of § 562 to determine which dividends are eligible for the deduction for dividends paid. Section 562(c) provides that the amount of any distribution is not considered a dividend for purposes of computing the dividends paid deduction under § 561 unless the distribution is pro rata, does not prefer any share of

stock of a class over any other share of stock of that same class, and does not prefer one class of stock over another class except to the extent that one class is entitled (without reference to waivers of their rights by shareholders) to the preference.

.02 Many RICs have issued groups of shares that represent interests in the same portfolio of securities but have different arrangements for shareholder services or the distribution of shares or both. Because the fees for these arrangements and services may vary, shareholders with equivalent investments in the same fund may receive different distributions. To permit open-end management investment companies to issue these groups of shares, the Securities and Exchange Commission (SEC) has adopted Rule 18f-3, 17 C.F.R. 270.18f-3, under the Investment Company Act of 1940, 15 U.S.C. 80a-1 to -64 (1940 Act).

.03 Rev. Proc. 96-47, 1996-2 C.B. 338, describes conditions under which distributions made to shareholders of a RIC may vary and nevertheless be deductible as dividends under § 562. Rev. Proc. 96-47 does not address the treatment of distributions to shareholders that differ in part as a result of the allocation of the benefit of a waiver or reimbursement of a fee or expense. Furthermore, Rev. Proc. 96-47 does not address variations in distributions that arise as a result of the allocation of performance-based advisory fees.

SECTION 3. SCOPE

This revenue procedure applies to a RIC described in § 851(a) and § 851(b)(1) that issues groups of shares (Qualified Groups) that meet the requirements of this section. The requirements in this section are to be interpreted in a manner consistent with the SEC's interpretation of analogous requirements in the rules under the 1940 Act. See Rule 18f-3(a), 17 CFR 270.18f-3(a), and Exemptions for Open End Management Investment Companies Issuing Multiple Classes of Shares, Investment Company Act Release No. 20,915, 60 Fed. Reg. 11,876 at 11,878 (Mar. 2, 1995).

.01 Each Qualified Group shall have a different arrangement for shareholder services or the distribution of shares or both, and shall be allocated and shall pay the fees and expenses of that arrangement.

.02 Each Qualified Group may be allocated and may pay a different share of other fees and expenses, not including advisory or custodial fees or other fees and expenses related to the management of the RIC's assets, if these expenses are actually incurred in a different amount by that Qualified Group, or if the Qualified Group receives services of a different kind or to a different degree than other Qualified Groups.

.03 Each Qualified Group--

(1) Shall be allocated and shall pay an advisory fee and other fees and expenses related to the management of the RIC's assets (including custodial fees and tax return preparation fees) on the basis of the net asset value of the Qualified Group in

relation to the net asset value of the RIC, except as described in paragraph (2); and

(2) May be allocated and may pay a different advisory fee to the extent that any difference in amount paid is the result of the application of the same performance fee provisions in the advisory contract to the different investment performance of each Qualified Group.

.04 The rights and obligations of the shareholders of each Qualified Group are set forth in the RIC's organizing documents. Except as otherwise provided in this revenue procedure, each Qualified Group is entitled to distributions calculated under those documents in the same manner and at the same time as all other Qualified Groups. For purposes of this calculation, fees and expenses are allocated under those documents to each Qualified Group at the same time as to all other Qualified Groups. Organizing documents are documents of the RIC that fix the rights and obligations between the RIC and the shareholders and that are approved by a majority of the directors of the RIC.

.05 Each Qualified Group separately meets the requirements of § 67(c)(2)(B) (defining the required characteristics of shares of a publicly offered RIC).

SECTION 4. WAIVERS AND REIMBURSEMENTS

Any waiver or reimbursement of a fee or expense incurred by the RIC shall meet the following requirements:

.01 Fees and expenses related to arrangements for shareholder services or the distribution of shares. The benefit

of a waiver or reimbursement of all or part of a fee or expense that is described in section 3.01 of this revenue procedure is allocated to the Qualified Group of shares on behalf of which the fee or expense was incurred. Thus, for example, if a RIC meeting the requirements of this revenue procedure issues Class A shares bearing a Rule 12b-1 fee of .50 percent of net asset value and issues Class B shares bearing a Rule 12b-1 fee of .75 percent of net asset value, a distributor may waive all or part of the Class B Rule 12b-1 fee. Because the Class B Rule 12b-1 fee was allocated to Class B on the basis of the amount incurred by Class B, the benefit of a waiver of the Class B Rule 12b-1 fee is allocated entirely to Class B, and no portion of the waiver may be allocated to Class A.

.02 Other fees and expenses. The benefit of a waiver or reimbursement of all or part of a fee or expense described in section 3.02 of this revenue procedure is allocated in accordance with the method of allocation of the fee or expense pursuant to section 3.02. If pursuant to section 3.02 the fee or expense was allocated on the basis of the amount incurred on behalf of each Qualified Group, the benefit of a waiver or reimbursement of the fee or expense described in section 3.02 is allocated to the Qualified Group of shares on behalf of which the expense was incurred. If pursuant to section 3.02 the fee or expense was allocated on the basis of net asset value, the benefit of a waiver or reimbursement of the fee or expense is allocated by net asset value. Thus, for example, if Class A shares are allocated

a transfer agency fee pursuant to section 3.02 on the basis of the amount incurred by Class A, and Class B shares are allocated a transfer agency fee pursuant to section 3.02 on the basis of the amount incurred by Class B, the transfer agent may waive all or part of the Class B transfer agency fee. Because the Class B transfer agency fee was allocated to Class B on the basis of the amount incurred by Class B, the benefit of a waiver of the Class B transfer agency fee is allocated entirely to Class B, and no portion of the waiver may be allocated to Class A.

.03 Advisory fees and other expenses related to the management of the corporation's assets--(1) General rule. The benefit of a waiver or reimbursement of a fee or expense that is described in section 3.03(1) of this revenue procedure is allocated to all shares by net asset value, regardless of Qualified Group, except as provided in paragraph (2) of this section.

(2) Performance fees. A RIC whose advisory contract contains performance fee provisions described in section 3.03(2) of this revenue procedure shall comply with the requirement in this section 4.03(2) instead of that contained in section 4.03(1) of this revenue procedure. If, under these performance fee provisions, a Qualified Group is allocated an advisory fee that exceeds the advisory fee that would have been allocated to that Qualified Group if its performance were equivalent to that of the index or other measure of performance under these performance fee provisions, then the benefit of a waiver or reimbursement of all

or part of the excess shall be allocated to the Qualified Group to which the excess is allocated. The benefit of any waiver or reimbursement of any other portion of the advisory fee shall comply with section 4.03(1) of this revenue procedure.

SECTION 5. PROCEDURE

If variations in distributions to shareholders of different Qualified Groups exist solely as a result of the allocation and payment of fees and expenses and the allocation of the benefit of waivers and reimbursements of fees and expenses in accordance with the applicable provisions of section 3 and 4 of this revenue procedure, these variations do not prevent the distributions from being dividends under § 562.

SECTION 6. EFFECT ON OTHER REVENUE PROCEDURES

Rev. Proc. 96-47, 1996-2 C.B. 338, is amplified and superseded.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective October 28, 1999.

DRAFTING INFORMATION

The principal author of this revenue procedure is Susan Thompson Baker of the Office of Assistant Chief Counsel (Financial Institutions and Products). For further information regarding this revenue procedure, contact Susan Baker at (202) 622-3940 (not a toll-free call).