Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

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LEGEND

Seller =

Target #1 =

Target #2 =

New Parent =

X Corp =

Parent =

Purchaser =

Sub #1 =
Sub #2 =
Son =

Parent's Company Officials
=

Parent's Tax Professionals =

Seller's Official =

Seller's Tax Professional =

Authorized Representatives =

Date A =
Date B =
Date C =
Date D =
Date E =
Date F =
Date G =
X% =
Business A =

Business B =

Condition X =

This is in response to your Authorized Representatives' letter dated Jul 2, 1999 requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations for the above taxpayers to an file election. New Parent (as to common parent of the consolidated group of which X Corp, Parent, and Purchaser (i.e., the latter being the "purchasing" corporation) are members) and Seller are requesting an extension of time to file a "section 338(h)(10) election" under §§ 338(g) and 338(h)(10) of the Internal Revenue Code and § 1.338(h)(10)-1(d) of the Income Tax Regulations with respect to Purchaser's acquisition the stock of Target #1 (sometimes hereinafter referred to as the "Election"), on Date D. An extension is not being requested to make a § 338(h)(10) election with respect to Purchaser's acquisition of the stock of Target #2 on the same date. Additional information was received in letters dated November 24 and 29, and December 1, 1999, and January 31, 2000. The material information is summarized below.

New Parent is the common parent of a consolidated group that presently includes X Corp, Parent, Purchaser, Target #1 and Target #2, and that has a calendar taxable year and uses the accrual method of accounting. Presently, X Corp is wholly owned by New Parent, Parent is wholly owned by X Corp, Purchaser is wholly owned by Parent, and Target #1 and Target #2 are wholly owned by Purchaser. On or around Date A, certain investors formed Purchaser, as a subchapter C corporation, for the purpose of acquiring Target #1 and Target #2. Also, prior to Date A, Target #1 and Target #2 were each S corporations, within the meaning of § 1361, and were wholly owned by Seller (an individual). New Parent, X Corp, Parent, and Purchaser are holding companies; Purchaser is engaged in Business A, and Target #1 and Target #2 are engaged in Business B.

On Date A, Purchaser and Seller entered into a stock purchase agreement for Purchaser to acquire all of Seller's Target #1 stock (i.e., 100% of the Target #1 stock) and all of Seller's Target #2 stock that would not be transferred to his Son prior to consummation of the purchase agreement (i.e., Seller would transfer X% (which is less than 20%) of his Target #2 stock to his Son and, thus, Purchaser would acquire over 80% of the Target #2 stock from Seller). On Date B, Purchaser formed Sub #1 and Sub #2 as transitory special acquisition corporations, solely for the purpose of facilitating the acquisition of Target #1 and Target #2. On Date C, Seller transferred X% of his stock of Target # 2, by gift, to his Son (it is represented that such transfer by "gift" did not terminate Target # 2's S election). On Date D: (1), investors funded Purchaser with the cash acquisition price, and Purchaser, in turn, funded Sub #1 and Sub #2; (2) Son transferred his X% of Target #2 stock to Purchaser (i.e., in exchange solely for a portion of Purchaser's stock in a transaction that is represented to qualify under § 351 and for which such a return position was taken); and (3), Sub #1 and Sub #2 merged into Target #1 and Target #2, respectively, pursuant to applicable state law and the stock purchase agreement, with Seller receiving solely cash in exchange for his stocks, in fully taxable transactions (i.e., again, some portion of the cash "purchase" price is subject to an escrow and "earn out" provision). It is represented that (1) Purchaser was not related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of Target #1 and Target #2 stocks qualified as "qualified stock purchases," as defined in § 338(d)(3). On Date E (in transactions represented to qualify under § 351): (1) investors and Son transferred their Purchaser stock to Parent solely in exchange for all of Parent's stock, and then (2) investors and Son transferred their Parent stock to X Corp solely in exchange for all of X Corp's stock, and then (3) investors and Son transferred their X Corp stock to New Parent solely in exchange for all of New Parent's stock (X Corp and New Parent were newly formed by New Parent and investors, respectfully, with same occurring on Date D and Date E, respectively, all of which is in the same taxable year). Following the acquisitions, "new" Target #1 and "new" Target #2 were included in New Parent's consolidated return).

New Parent and Seller intended to file the Election. The Election was due on Date F, but for various reasons was not filed. On Date G (which is after the due date for

the Election), New Parent, X Corp, Parent, Target #1, Target #2, Seller, Son, Parent's Company Official, Seller's Official, Parent's Tax Professionals, Seller's Tax Professional, and Authorized Representatives discovered that the Election, and a §338(h)(10) election with respect to the acquisition of the Target #2 stock, were not filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election. Again, an extension is not being requested to make a §338(h)(10) election with respect to Purchaser's acquisition of the stock of Target #2. The period of limitations on assessment under § 6501(a) has not expired for the applicable parties' (i.e., New Parent's, X Corp's, Parent's, Purchaser's, Target #1's, Target #2's, Seller's, and Son's) taxable year(s) in which the transactions were consummated, the taxable year in which the Election should have been filed, or for any taxable years that would have been affected by the Election had it been timely filed (e.g., carryback years, if any, etc.). Moreover, it is represented that all returns for the applicable parties (i.e., New Parent, X Corp, Parent, Purchaser, Target #1, Target #2, Seller, and Son) were filed as if a valid Election had been made (and also as if a valid § 338(h)(10) election had been made with respect to the Target #2 stock, notwithstanding that such return was erroneous because Target #2 was treated as an S corporation instead of as a C corporation on its deemed asset sale and deemed liquidation), that is: (1) for their taxable year(s) in which the acquisitions/sales were consummated, (2) for their taxable year(s) in which the Election (and a §338(h)(10) election for the Target #2 stock) should have been filed, and (3) for any taxable years that would have been affected by the Election (and by a §338(h)(10) election for the Target #2 stock) had such been timely filed (e.g., carryback years, if any, etc.). Also, none of such applicable parties have had any such returns examined (and such "audit cycles" have not passed), and the Service has not discovered that the Election (or a §338(h)(10) election for the Target #2 stock) has not been made.

Section 338(a) permits certain stock purchases to be treated as asset acquisitions if: (1) the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g); and (2) the acquisition is a "qualified stock purchase." Section 338(d)(3) defines a "qualified stock purchase" as any transaction or series of transactions in which stock (meeting the requirements of § 1504(a)(2)) of one corporation is acquired by another corporation by purchase during the 12 month acquisition period.

Section 338(h)(3)(A) provides that the term "purchase" means any acquisition of stock, but only of if: (i) the basis of the stock in the hands of the purchasing corporation is not determined (I) in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or (II) under § 1014(a)(relating to property acquired from a decedent): (ii) the stock is not acquired in an exchange to which § 351, 354, 355, or 356 applies and is not acquired in any other transaction described in regulations in which the transferor does not recognize the entire amount of the gain or loss realized on the transaction; and (iii) the stock is not acquired from a

person the ownership of whose stock would, under § 318(a)(other than paragraph (4) thereof), be attributed to the person acquiring such stock.

Section 338(h)(10) permits the purchasing and selling corporations to jointly elect to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. Thus, the sale of target stock included in the qualified stock purchase generally is ignored. A § 338(h)(10) election may be made for target only if it is a member of a selling consolidated group, a member of a selling affiliated group filing separate returns, or an S corporation. Section 1.338(h)(10)-1(a). Section 1.338(h)(10)-1(d) provides that a § 338(h)(10) election may be made for the target corporation if the purchasing corporation makes a "qualified stock purchase" of the target corporation stock. Sections 1.338(h)(10)-1(d)(2) and (3) provide that if a § 338(h)(10) election is made for the target corporation, it is irrevocable and a § 338 election is deemed made for the target corporation.

Section 1.338(h)(10)-1(d)(2) provides that a § 338(h)(10) election is jointly made by a purchaser and the selling consolidated group (or the selling affiliate or the S corporation shareholders) on Form 8023 in accordance with the instructions to the form. The regulations further provide that the election must be made not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. The instructions to Form 8023 provide that if a § 338(h)(10) election must be made jointly by the purchasing corporation and the common parent of the selling consolidated group (or selling affiliate or S corporation shareholders). The instructions provide that the form must be signed by each person authorized to act on behalf of each corporation, and if made for an S corporation it must be signed by each S corporation shareholder who sells target stock in the qualified stock purchase. The instructions further provide that the signatures, dates and titles (if applicable) of those persons must be provided in a "signature attachment," and they provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023.

Section 1.338-2(b)(1), restates the § 338(d)(3) requirement that a corporation must purchase the stock of the target, and provides that facts that may indicate that a newly formed corporation is not considered to be the purchasing corporation for tax purposes include such things as the new corporation's downstream merger into the target following the purported QSP. Moreover, § 1.338-2(b)(2)(ii) Example 2, illustrates a factual situation where a newly formed corporation, that was formed for the sole purpose of acquiring the stock of the target by means of a reverse subsidiary cash merger, and conducted no activities other than the merger, was disregarded and its corporate shareholder was considered to be the purchasing corporation. Section 1.338-2(b)(4) provides that if an election under § 338 is made for target, old target is deemed to sell target's assets and new target is deemed to acquire those assets.

Section 1.1502-77(a) provides that the common parent, for all purposes (other than for several purposes not relevant here), shall be the sole agent for each subsidiary

in the group, duly authorized to act in its own name in all matters relating to the tax liability of the consolidated return year. See also Form 8023 and the instructions thereto.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

(1) The taxpayer acted reasonably and in good faith, and,
(2) Granting relief will not prejudice the interests of the government.

Section 301.9100-1(b) defines the term "regulatory election" as including an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement. Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of § 301.9100-2. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

In this case, the time for filing the Election is fixed by regulations (i.e., § 1.338(h)(10)-1(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-1 to grant an extension of time for New Parent and Seller to file the Election, provided New Parent and Seller show they acted reasonably and in good faith, the requirements §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits, and representations submitted by Seller, Son, New Parent, X Corp, Parent, Purchaser, Parent's Company Official, Parent's Tax Professionals, Seller's Official, Seller's Tax Professional, and Authorized Representatives explain the circumstances that resulted in the failure to file a valid Election. The information establishes that tax professionals were responsible for the Election, that Seller and New Parent relied on them to timely file the Election, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, including the representations made, we conclude that New Parent and Seller have shown they acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, an

extension of time is granted under § 301.9100-1, until 30 days from the date of issuance of this letter for New Parent (as to common parent of the consolidated group of which Purchaser, the "purchasing" corporation, is a member) and Seller to file the Election with respect to the acquisition of Target #1 stock, as described above. Again, an extension is not being requested or granted make a § 338(h)(10) election for Target #2.

The above extension of time is conditioned on: (i) the fulfillment of Condition X (which is fully described in the above redacted legend to prevent the disclosure of taxpayer identifying information); (ii) New Parent and Seller not making a § 338(h)(10) election for Target #2, and New Parent (for Target, "old" Target #2 and "new" Target #2) and Seller filing amended returns to treat the acquisition of Target #2 as a stock acquisition (and not as a deemed asset acquisition); (iii) Son not receiving and/or owning stock (e.g., directly or by applying § 318) of Purchaser (or of X Corp or New Parent), that is equal to 50% or more in value of the stock of Purchaser (or of X Corp or New Parent) or anything else that would cause the subject acquisition not to qualify as QSP (see §§ 338(d)(3) and 338(h)(3)); (iv) both New Parent and Seller signing the Election; (v) both New Parent and Seller treating the acquisition/sale of Target #1 stock as § 338(h)(10) transaction; (iv) Purchaser, in fact, being the purchasing corporation of the Target #1 stock (compare § 1.338-2(b)(1) and (2)(ii) Example 2) and that such acquisition qualify for § 338(h)(10) treatment; and (iiv) the taxpayers' (New Parent's, X Corp's, Parent's, Purchaser's, Target #1's, Target #2's, Seller's, Son's and investor's) tax liability being not lower, in the aggregate, for all years to which the Election applies, than it would have been if the Election had been timely filed (taking into account the time value of money). No opinion is expressed as to the taxpayers' tax liability for the years involved. A determination thereof will be made by the District Director's office upon audit or examination of the federal income tax returns involved. Further, no opinion is expressed as to the federal income tax effect, if any, if it is determined that the taxpayers' liability is lower. Section 301.9100-3(c).

New Parent and Seller must file the Election in accordance with § 338(h)(10)-1(d) (i.e., a new election on Form 8023 must be executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions to the form). A copy of this letter should be attached to the election form. Further, New Parent (for all members of its group, including Target #1 and Target #2) and Seller must amend their applicable returns for the year is which the transactions were consummated, the year in which the Election was due, and for any year(s) that was affected by the "erroneously" reporting or any year(s) that would have been affect had the Election been timely filed, to: **(1)** report the acquisition of the Target #2 stock as stock acquisition, and not as a deemed asset acquisition under § 338(h)(10) (i.e., this is necessary because the acquisition of the Target #2 stock was reported by all parties as a § 338(h)(10) transaction, notwithstanding that the required election was not filed and because all such parties are now maintaining that same was in error and that such should be reported as a stock acquisition); **(2)** to attached to "old" Target #1's final return and "new" Target #1's first return a copy of this letter and a copy of the election form (this is necessary

notwithstanding that they reported report the acquisition of Target #1 stock as § 338(h)(10) transaction); **(3)** Target #2 must file a "S short year" return for that portion of its taxable year ending the day before Date D, because Son's transfer of his X% of Target #2 stock to Purchaser on Date D terminated Target #2's S election effective the day before Date D (i.e., the termination occurred by operation of Son's transfer); and **(4)** Target #2 must file a "S short year" return for that portion of its taxable year beginning the on the date of the Son's transfer, Date D, through the end of the calendar taxable year, but as a subchapter C corporation. See § 1361(d) and (e), and the applicable regulations.

We express no opinion regarding: **(1)** whether the acquisition/sale of Target #1 stock qualifies as a "qualified stock purchase" under § 338(d)(3); **(2)** whether, in fact, Purchaser is the purchasing corporation of the Target #1 stock (compare §§ 1.338-2(b)(1) and 1.338-2(b)(2)(ii), Example 2); **(3)** whether the acquisition/sale of Target #1 stock qualifies for § 338(h)(10) treatment; **(4)** as to the tax consequences, if any, to the Target #2 shareholders on the termination of Target #2's S election; or **(5)** if § 338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target #1 on its deemed asset sale and deemed liquidation (i.e., as an S corporation, and, thus, such gain or loss "passing though" to Seller).

In addition, we express no opinion as to the tax consequences of filing the Election late under the provisions of any other section of the Code and regulations, or the tax treatment of any conditions existing at the time of, or effects resulting from, filing the Election late that are not specifically set forth in the above ruling. For purposes of granting relief under § 301.9100-1, we relied on certain statements and representations made by the taxpayers, its employees and representatives. However, the District Director(s) should verify all essential facts. In addition, notwithstanding that an extension is granted under § 301.9100-1 to file the Election, penalties and interest that would otherwise be applicable, if any, continue to apply.

This letter is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Copies of this letter are being sent to applicable first listed authorized representative of New Parent and Seller, pursuant to the powers of attorney on file in this office.

Sincerely yours,
Assistant Chief Counsel (Corporate)
By: Richard Todd
Counsel to the Assistant Chief Counsel (Corporate)