

## Internal Revenue Service

Department of the Treasury

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### LEGEND:

Purchaser =

Target =

Sellers =

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Company Official =

Tax Professional =

Authorized  
Representatives =

Date A =

Date B =

Date C =

Date D =

Business A =

Dear

This is in response to your letter dated September 13, 1999 requesting, on behalf of the above referenced taxpayers, an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Sellers are requesting the extension of time to file a “section 338(h)(10) election” under § 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 of the stock of Target (sometimes hereinafter referred to as the “Election”), on Date B. Additional information was received in letters dated March 6, 24 and 28, 2000. The material information submitted is summarized below.

Purchaser is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Target was an S corporation, within the meaning of § 1361, and was wholly owned by Sellers (individuals and electing small business trusts, within the meaning of §§ 1361(c)(2)(v) and (e); the various individuals, trusts and beneficiaries, and their ownership interests, are identified

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in the above redacted legend, and at times referred to in the aggregate as the Sellers or individually as the "individual sellers" or "electing small business trusts sellers." Purchaser and various subsidiaries (which are not relevant to this transaction), and Target are engaged in Business A. Target has no subsidiaries for which an election under § 338(h)(10) was, or is being, made. On Date A, the "individual sellers" transferred certain shares of Target to the "electing small business trusts sellers."

On Date B, Sellers and Purchaser entered into a Stock Purchase Agreement for Purchaser to acquire all of Sellers' Target stock. Also on Date B, Purchaser acquired all of Sellers' Target stock, pursuant to the Stock Purchase Agreement, for cash and an "earn out," in a fully taxable transaction (under the "earn out" only additional cash may be paid, and it contains a "collar" and fixed "measurement" period). Following the acquisition, "new" Target was included in Purchaser's consolidated group, as a subchapter C corporation. It is represented that: (1) Purchaser was not related to Sellers within the meaning of § 338(h)(3); (2) no stock has been, or may be, received under the "earn out"; and (3) Purchaser's acquisition of the Target stock qualified as a "qualified stock purchase" within the meaning of § 338(d)(3).

Purchaser and Sellers intended to file the Election. The Election was due on Date C, but for various reasons it was not filed. On Date D (which is after the due date for the Election), Company Official, Tax Professional, Sellers, and Authorized Representatives discovered that a valid Election had not been filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Election. The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Target's, or Sellers' taxable year(s) in which the acquisition occurred, 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.

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 1 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 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

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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 elect jointly to treat the target corporation as deemed to sell all of its assets and distribute the proceeds in complete liquidation. The sale of 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). Gain or loss on the deemed sale is included in the consolidated return of the selling group (unless the target corporation is a member of a selling affiliated group filing separate returns or an S corporation). 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.

More specifically, old target recognizes gain or loss as if, while old target was a member of the selling consolidated group (or owned by the selling affiliate or S corporation shareholders), it sold all of its assets in a single transaction at the close of the acquisition date (but before the deemed liquidation). Section 1.338(h)(10)-1(e)(1). Then old target is treated as if, while a member of the selling consolidated group (or owned by the selling affiliate or S corporation shareholders), it distributed all of its assets in complete liquidation. If target is an S corporation immediately before the acquisition date, nothing in the § 338 provisions prevents a holder of target stock from taking deemed sale gain into account under §§ 1366 and 1367. See § 331 or 332 for gain or loss recognized by the old target shareholders as a result of the deemed liquidation. Section 1.338(h)(10)-1(e)(2)(ii). No gain or loss is recognized on the sale or exchange by the selling consolidated group (or the selling affiliate or an S corporation shareholders) of target stock included in the qualified stock purchase. If target is an S corporation immediately before target's acquisition date, the sale or exchange of old target stock does not result in a termination of the § 1362(a) election for the S corporation. Section 1.338(h)(10)-1(e)(2)(iv).

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 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 persons authorized to act on behalf of each corporation must sign the form, and if it is made for an S corporation it must be signed by each S corporation shareholder who

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sells target stock in the qualified stock purchase. The instructions further provide that the signatures, dates and titles (if applicable) of those persons who must sign the election must be provided on the form or on a "signature attachment," and the instructions provide specific details as to the preparation of the "signature attachment" and its attachment to Form 8023.

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.

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.

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 the 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 Purchaser and Sellers to file the Election, provided that Purchaser and Sellers show that 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.

Information, affidavits and representations submitted by Sellers, Purchaser, Company Official, 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 Purchaser and Sellers relied on the tax professionals to timely make the Election, and that the interests of the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(1)(v).

Based on the facts and information submitted, the representations made and the conditions in the following paragraph, we conclude that Purchaser and Sellers have

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shown that 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 Purchaser and Sellers to file the Election with respect to the acquisition of Target, as described above.

The above extension of time is conditioned on: (1) the “electing small business trusts” Sellers constituting, for tax purposes, “sellers” of the Target stock they received on Date A from the “individual” Sellers (see the above redacted legend for the identification of the specific “sellers” and shares involved); (2) Purchaser and each of the Sellers signing the Election; (3) Purchaser and each of the Sellers treating the acquisition/sale of Target stock as a § 338(h)(10) transaction, and each of the Sellers not using the installment method to report income recognized on the transaction or, as necessary, filing amended returns that are consistent with not reporting such income under § 453; and (4) the taxpayers’ (Sellers’, Purchaser’s and Target’s) tax liability (if any) 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 made (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 Directors’ offices upon audit 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 taxpayer’s liability is lower. Section 301.9100-3(c).

Purchaser and the Sellers must file the Election in accordance with § 1.338(h)(10)-1(d). That is, 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. See Announcement 98-2, 1998-1 C.B. 282. A copy of this letter should be attached to the election form. Purchaser, Target and Sellers must also amend their returns to treat the transaction as a § 338(h)(10) transaction, and to attach thereto a copy of the Election and a copy of this letter. Pursuant to § 1.338(h)(10)-1(e)(2)(iv), Target’s S election is not terminated. Accordingly, Target is not required to file an S short year return (i.e., a year that ended the day before the acquisition) nor a one day short return as a non-affiliated C corporation.

We express no opinion as to: (1) whether the “electing small business trusts sellers” or the “individual sellers” are, for tax purposes, the “sellers” of the Target stock that the “electing small business trusts sellers” received on Date A from the “individual sellers” (see the above redacted legend for the specific identity regarding the sellers and shares); (2) whether the acquisition/sale of Target stock qualifies as a “qualified stock purchase” under § 338(d)(3); (3) whether the acquisition/sale of Target stock qualifies for § 338(h)(10) treatment; or (4) if § 338(h)(10) is applicable, as to the amount and character of gain or loss, if any, recognized by Target (and, thus, by Sellers) on Target’s deemed asset sale and deemed liquidation.

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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 as to the tax treatment of any conditions existing at the time of, or resulting from, filing the Election late that are not specifically set forth in the above ruling. For the purposes of granting relief under § 301.9100-1, we relied on certain statements and representations made by the taxpayers. 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 taxpayer(s) who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to powers of attorney on file in this office, we are sending a copy of this letter to the Company official and to the Sellers' Authorized Representative (who should distribute a copy to each of the Sellers).

Sincerely yours,

By: Philip J. Levine

Philip J. Levine  
Assistant Chief Counsel (Corporate)