

Electing Small Business Trusts

Notice 97-12

PURPOSE

Section 1302 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (the Act) amended § 1361 of the Internal Revenue Code to permit an Electing Small Business Trust (ESBT) to be a shareholder of an S corporation. The Department of Treasury and the Internal Revenue Service intend to issue regulations to provide guidance on the application of § 1302 of the Act. This notice provides guidance in advance of the issuance of regulations regarding the ESBT election and the ESBT's consent to the S corporation election.

ESBT ELECTION

The trustee of the ESBT must make the ESBT election pursuant to § 1361(e)(3) by signing and filing with the service center with which the corporation files its income tax return a statement that—

(1) Contains the name, address, and taxpayer identification number of all potential current beneficiaries, the trust, and the corporation;

(2) Identifies the election as an election made under section 1361(e)(3);

(3) Specifies the date on which the election is to become effective (not earlier than 15 days and two months before the date on which the election is filed);

(4) Specifies the date (or dates) on which the stock of the corporation was transferred to the trust; and

(5) Provides all information and representations necessary to show that:

(A) All potential current beneficiaries meet the shareholder requirements of section 1361(b)(1); and

(B) The trust meets the definitional requirements of an ESBT under section 1361(e).

The trustee of the ESBT must file the ESBT election within the time requirements prescribed in regulation section 1.1361-1(j)(6)(iii) for filing Qualified Subchapter S Trust (QSST) elections (generally within the 16-day-and-2-month period beginning on the day that the stock is transferred to the trust). The trustee may attach the ESBT election to the Form 2553 in the case of newly electing S corporations.

ESBT CONSENT TO S CORPORATION ELECTION

Section 1362(a) provides that all shareholders must consent to the S corporation election. Section 1361(c)(2)(B) generally provides that all potential current beneficiaries of the ESBT are treated as shareholders for purposes of determining whether the corporation has eligible shareholders and whether the number of shareholders does not exceed 75, as provided by § 1361(b)(1). For purposes of the ESBT's consent to the S corporation election under § 1362(a), however, because the ESBT is taxed on the S corporation's income and the trustee makes the ESBT election, only the trustee need consent to the S corporation election.

PAPERWORK REDUCTION ACT

The collection of information con-

tained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1523.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in this notice are in the section headed *ESBT Election*. This information is required by the IRS to assure compliance with the new provisions of the Small Business Job Protection Act of 1996. The likely respondents are business or other for-profit institutions.

The estimated total reporting burden is 5,000 hours.

The estimated average burden per respondent is one hour. The estimated number of respondents is 5,000.

The estimated frequency of responses is once.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

DRAFTING INFORMATION

The principal author of this notice is Steven R. Schneider of the Office of Assistant Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice contact Steven R. Schneider at (202) 622-3060 (not a toll-free call).