

## Internal Revenue Service

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Department of the Treasury

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Date:

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### Legend:

Taxpayer =

Sub 1 =

Sub 2 =

X =

Firm 1 =

Firm 2 =

Sponsor =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Month 1 =

Month 2 =

Month 3 =

State =

Year 1 =

Year 2 =

Dear

This is in reply to a letter dated July 12, 2018, submitted on behalf of Taxpayer, requesting an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to make an election under section 856(l) of the Internal Revenue Code ("Code") to treat Sub 1 as a taxable REIT subsidiary ("TRS") of Taxpayer effective Date 2.

## FACTS

Sponsor is an independent alternative investment management firm founded in Year 1. Sponsor's investments include specialized real estate owned through various real estate investment trusts ("REITs"), including Taxpayer, which Sponsor formed to hold real estate used for senior and student housing.

Taxpayer is a limited liability company organized under the laws of State on Date 1. It intends to qualify and elect to be taxed as a REIT under sections 856 through 859 beginning with its taxable year ended Date 5.

Sub 1 is a limited liability company organized under the laws of State on Date 2. It has filed an election under section 301.7701-3(c)(1) of the regulations to be treated as an association taxable as a corporation for federal income tax purposes.

Sub 2 was formed as a limited liability company organized under the laws of State on Date 3. On that date Taxpayer owned all the membership interests in Sub 2, and Sub 2 was a disregarded entity for federal income tax purposes.

On Date 4 Taxpayer assigned all its interest in Sub 1 to Sub 2. Subsequently Taxpayer transferred some of its interest in Sub 2 to a third party, and Sub 2 became a

partnership for federal income tax purposes. Taxpayer owns X percent of the interests in Sub 2, which owns all of the interests in Sub 1.

Sub 1 leases property owned by Taxpayer. Taxpayer represents that the property leased to Sub 1 is qualified health care property as defined in section 856(e)(6)(D)(i), and it is operated on behalf of Sub 1 by eligible independent contractors as defined in section 856(d)(9)(A).

In forming Taxpayer and Sub 1, Sponsor intended Sub 1 to be a TRS of Taxpayer effective Date 2. In order to be effective Date 2, Taxpayer and Sub 1 needed to file a Form 8875, *Taxable REIT Subsidiary Election*, no later than Date 6 ("due date").

Sponsor has an internal tax department but also uses outside tax advisors to assist with tax planning and compliance. Pursuant to an agreement under which Sponsor provides administrative and management services, including tax planning and tax compliance services, to Taxpayer in exchange for a management fee, Sponsor's tax department is responsible for ensuring that desired tax elections are made for Taxpayer. In this case, that included a TRS election for Sub 1 with regard to Taxpayer. At times the tax department will prepare and file an election itself, and at other times it will request an outside advisor to do so.

During the period of time in which the TRS election for Sub 1 could be timely filed, Sponsor was transitioning much of its tax work done by outside advisors from Firm 1 to Firm 2. Sponsor began searching for a new outside tax advisor in Month 1, between Date 2 and Date 3. The search continued through Month 2, around Date 4, when it chose Firm 2 as its new outside tax advisor.

The process of onboarding Firm 2 began in Month 3, which continued through the beginning of Year 2. In addition to the transition to Firm 2, Sponsor acquired a large portfolio of assets prior to Date 3. As part of the asset acquisition, Sponsor restructured pre-existing entities to be held through various holding companies. As a result of the transition and the asset acquisition, and the demands they placed on Sponsor's tax department, the department inadvertently overlooked the filing of the TRS election for Sub 1.

In the beginning of Year 2, after the due date for filing the TRS election for Sub 1 had passed, Firm 2 requested a copy of the Form 8875 on which the TRS election needed to be made. At that time Sponsor's tax department realized it had inadvertently failed to file the Form 8875 for Sub 1. Firm 2 was engaged to file a request for an extension of time to file the election.

Taxpayer and Sub 1 make the following additional representations in connection with their request for an extension of time:

1. The request for relief was filed before the failure to make the regulatory election was discovered by the Internal Revenue Service ("Service").
2. Granting the relief requested will not result in Taxpayer or Sub 1 having a lower tax liability in the aggregate for all years to which the election applies than they would have had if the election had been timely made (taking into account the time value of money).
3. Taxpayer and Sub 1 do not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 at the time they requested relief and the new position requires or permits a regulatory election for which relief is requested.
4. Being fully informed of the required regulatory election and related tax consequences, Taxpayer and Sub 1 did not choose to not file the election.
5. Taxpayer and Sub 1 are not using hindsight in requesting relief. No specific facts have changed since the due date for making the election that make the election more advantageous to the taxpayers.
6. The period of limitations on assessment under section 6501(a) has not expired for Taxpayer and Sub 1 for the taxable year in which the election should have been filed, nor for any taxable year(s) that would have been affected by the election had it been timely filed.

In addition, affidavits on behalf of Taxpayer and Sub 1 have been provided as required by section 301.9100-3(e) of the regulations.

#### LAW AND ANALYSIS

Section 856(l) of the Code provides that a REIT and a corporation (other than a REIT) may jointly elect to treat such corporation as a TRS. To be eligible for treatment as a TRS, section 856(l)(1) provides that the REIT must directly or indirectly own stock in the corporation, and the REIT and the corporation must jointly elect such treatment. The election is irrevocable once made, unless both the REIT and the corporation consent to its revocation. In addition, section 856(l) specifically provides that the election, and any revocation thereof, may be made without the consent of the Secretary.

In Announcement 2001-17, 2001-1 C.B. 716, the Service announced the availability of Form 8875, *Taxable REIT Subsidiary Election*. According to the Announcement, this form is to be used for taxable years beginning after 2000 for eligible entities to elect treatment as a TRS. The instructions to Form 8875 provide that the subsidiary and the REIT can make the election at any time during the taxable year. However, the effective date of the election depends on when the Form 8875 is filed. The instructions further provide that the effective date cannot be more than 2 months

and 15 days prior to the date of filing the election, or more than 12 months after the date of filing the election. If no date is specified on the form, the election is effective on the date the form is filed with the Service.

Section 301.9100-1(c) of the Procedure and Administration Regulations provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 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 a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in section 301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section before the failure to make the regulatory election is discovered by the Service; (ii) failed to make the election because of intervening events beyond the taxpayer's control; (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election; (iv) reasonably relied on the written advice of the Service; or (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election. A taxpayer will be deemed to have not acted reasonably and in good faith if the taxpayer (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested; (ii) was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or (iii) uses hindsight in requesting relief.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides that the interests of the Government are prejudiced if granting relief would result in the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into

account the time value of money). Section 301.9100-3(c)(1)(ii) provides that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

### CONCLUSION

Based upon the facts and representations submitted, we conclude that Taxpayer and Sub 1 have shown good cause for granting a reasonable extension of time to elect under section 856(l) to treat Sub 1 as a TRS of Taxpayer. The extension of time to make this election is 90 days from the date of this letter.

This ruling is limited to the timeliness of the filing of Form 8875. This ruling's application is limited to the facts, representations, and Code and regulation sections cited herein. No opinion is expressed as to whether Taxpayer otherwise qualifies as a REIT or whether Sub 1 otherwise qualifies as a TRS under subchapter M of the Code.

No opinion is expressed with regard to whether the tax liability of Taxpayer and Sub 1 is not lower in the aggregate for all years to which the election applies than such tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the federal income tax returns involved, the director's office will determine such tax liability for the years involved. If the director's office determines that such tax liability is lower, that office will determine the federal income tax effect.

Except as specifically provided otherwise, no opinion is expressed on the federal income tax consequences of the transaction described above.

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

In accordance with the terms of the Power of Attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Andrea M. Hoffenson  
Andrea M. Hoffenson  
Branch Chief, Branch 2  
Office of the Associate Chief Counsel  
(Financial Institutions and Products)