

## Internal Revenue Service

## Department of the Treasury

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Date:  
May 30, 2002

re:

### LEGEND

Purchaser =

Parent =

Seller =

Target =

Target Affiliate #1 =

Target Affiliate #2 =

Date A =

Date B =

Date C =

Company Officials &  
Tax Professionals =

Dear

This letter responds to a letter dated December 8, 2000, submitted on behalf of Purchaser and Parent, requesting an extension of time under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations to file an election. Purchaser and Parent are requesting an extension to file a “§ 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 of the stock of Target,

and the deemed acquisition of the stock of Target Affiliate #1 and Target Affiliate #2 (sometimes hereinafter referred to in the aggregate as the "Election"), on Date B. (All citations in this letter to regulations under § 338 are to regulations in effect on Date B.) Additional information was received in letters dated July 31, 2000, March 19, 2001, and November 8, 2001. The material information is summarized below.

Parent was the common parent of a consolidated group that included Seller, Target, Target Affiliate #1, and Target Affiliate #2. Target Affiliate #2 was a subsidiary of Target Affiliate #1, which was a subsidiary of Target, which was a 95% owned subsidiary of Seller (5% was owned by Purchaser).

On Date A, Purchaser, Parent and Seller entered into a letter of intent for Purchaser to acquire all of Seller's Target stock. On Date B, Purchaser acquired all of Seller's Target stock. It is represented that Purchaser's acquisition of the stock of Target qualified as a "qualified stock purchase," as defined in § 338(d)(3).

Purchaser and Parent intended to file the Election. The Election was due on Date C, but for various reasons a valid Election was not filed. After the due date for the Election, it was discovered that the 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 assessment under § 6501(a) has not expired for Parent's consolidated group's, Purchaser's, Target's, Target Affiliate #1's, or Target Affiliate #2's taxable years in which the acquisition occurred, the taxable years in which the Election should have been filed, or 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 "§ 338 election" or a "§ 338(h)(10) election"; and (2) the acquisition is a "qualified stock purchase."

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. A § 338(h)(10) election may be made for target only if purchaser acquires stock meeting the requirements of § 1504(a)(2) from a selling consolidated group, a selling affiliate, or the S corporation shareholders in a qualified stock purchase. Section 1.338(h)(10)-1(d).

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.

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. 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 Parent to file the Election, provided Purchaser and Parent show 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 Purchaser, Parent, and Company Officials & Tax Professionals explain the circumstances that resulted in the failure to timely file a valid Election. The information establishes that Purchaser and Parent reasonably relied on a qualified tax professional who failed to make, or advise Purchaser and Parent to 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, including the representations made, we conclude that Purchaser and Parent 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 on this letter, for Purchaser and Parent to file the Election with respect to the acquisition of the stock of Target (i.e., the direct acquisition of the stock of Target), and the deemed acquisition of the stock of Target Affiliate #1 and Target Affiliate #2, as described above.

The above extension of time is conditioned on (1) the filing, within 60 days of the date on this letter, of all returns and amended returns (if any) necessary to report the transaction in accordance with the Election, and (2) the taxpayers' (Parent's consolidated group's, Purchaser's, Target's, Target Affiliate #1's, and Target Affiliate #2'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 applicable Director's office 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 taxpayers' tax liability is lower. Section 301.9100-3(c).

Purchaser and Parent 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 on this letter, which grants an extension, and filed in accordance with the instructions to the form. A copy of this letter must be attached to the election form. Purchaser and Parent must file or amend, as applicable, their returns to report the transaction as a § 338(h)(10) transaction for the taxable year in which the transaction

was consummated (and for any other affected taxable year), and to attach to the returns a copy of this letter and a copy of the Election.

We express no opinion, and make no assumptions, as to: (1) whether the "acquisition/sale" of Target stock (i.e., the direct acquisition of the stock of Target, and/or the deemed acquisition of the stock of Target Affiliate #1 and/or Target Affiliate #2) qualifies as a "qualified stock purchase" under § 338(d)(3); (2) whether the "acquisition/sale" of Target stock qualifies for § 338(h)(10) treatment; or (3) any other tax consequences arising from the Election.

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 purposes of granting relief under § 301.9100-1, we relied on certain statements and representations made by the taxpayers. However, the Director 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.

Sincerely yours,  
Ken Cohen  
Senior Technician Reviewer, Branch 3  
Office of Associate Chief Counsel (Corporate)

cc: