

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

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Date:

November 3, 2003

## LEGEND

Fund =

State =

Affiliate 1 =

Affiliate 2 =

Auditor =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Year 1 =

Dear :

This is in reply to your letter dated April 25, 2003, submitted on behalf of the Fund by its authorized representative. The Fund requests a ruling granting an extension of time under section 301.9100-3 of the Procedure and Administration Regulations to make an election under section 851(b)(1) of the Internal Revenue Code to be treated as a regulated investment company (RIC) beginning with its initial taxable year ended Date 1. The Fund also requests a ruling granting an extension of time to make an election under section 855(a) to treat dividends distributed after the close of the taxable year ended Date 1 as having been made during that taxable year.

### FACTS

The Fund commenced operations on Date 2 and is organized as a State business trust registered under the Investment Company Act of 1940, 15 U.S.C. section 80a-1, et seq., as amended. The Fund operates as an open-end mutual fund. The Fund's federal income tax return for its taxable year ending Date 1 (initial tax return) was due by Date 3, but a request for an automatic extension was timely filed by Affiliate 1 on behalf of the Fund, thus extending the due date of the return until Date 4. The tax return was prepared in advance of its due date by Affiliate 1 and sent electronically to the Fund's auditor (Auditor) for review and signature and was to be forwarded to Affiliate 2 for signature and filing prior to the extended due date.

Due to administrative errors the Auditor had not included the Fund on its list of monthly filings for Date 5. As a result, the Auditor neither reviewed the return nor forwarded it to Affiliate 2. At the same time, due to personnel changes and administrative errors, Affiliate 1 had not updated its list of monthly filings to include the new fund. As a result, both the Auditor and Affiliate 1 believed that all required filings for Date 5 had been timely made.

During the review of the Fund's Year 1 financial statements, in Date 6, the Auditor noticed that there was no signed tax return for the Fund's initial taxable year in its files and contacted Affiliate 1. After some investigation, it was determined that no return had been filed. The tax return was subsequently filed on Date 7.

The Fund intended to elect under section 851(b)(1) to qualify as a RIC in its tax return for the year ending Date 1. The Fund represents it has met all of the requirements under section 851 to make the election.

The Fund also intended to make an election on its tax return under section 855 to treat certain dividends declared and paid in its second tax year as if paid in its initial tax year. As evidence of this intent, it is the policy of the Fund, as stated in its prospectus and annual report, to generally declare and pay net realized capital gains (including net short-term capital gains) annually and to declare and pay dividends from net investment income annually. In fact, on Date 8, the Board of Trustees for the Fund declared and paid dividends in accordance with the Fund's policy to comply with the requirements of section 852 and to eliminate taxation at the fund level.

The Auditor has provided the Service with a detailed affidavit, consistent with the above facts. In addition, the affidavit describes how the Auditor failed to update its list of new funds from information provided by its audit staff. It further describes that, as a result of this omission, the tax return for the Fund was not reviewed by the Auditor even after it had been timely sent to the Auditor from Affiliate 1. However, the return sent to the Auditor provided that taxable income was computed as if the Fund was electing to be treated as a RIC and as if the Fund was making an election under section 855(a).

Affiliate 2 has provided the Service with an affidavit consistent with these facts, including a detailed description of how it and Affiliate 1 failed to realize that the initial tax return it prepared for the Fund and sent to the Auditor was never filed.

### **LAW AND ANALYSIS**

Section 851(b)(1) provides that a corporation shall not be considered a RIC for any taxable year unless it makes an election to be a RIC on its federal income tax return for the taxable year or has made an election for a previous taxable year. Section 1.851-2(a) of the income Tax Regulations provides, in part, that the taxpayer shall make its election to be treated as a RIC by computing taxable income as a RIC on its federal income tax return for the first taxable year for which the election is applicable.

Section 855(a) provides, in part, that if a RIC declares a dividend prior to the time prescribed by law for the filing of its return for a tax year (including the period of any extension of time granted for filing such return), and distributes the amount of the dividend to shareholders in the 12-month period following the close of such tax year and not later than the date of the first regular dividend payment made after the declaration, the amount so declared and distributed shall, to the extent the RIC elects in such return in accordance with regulations prescribed by the Secretary, be considered as having been paid during such taxable year, except as provided otherwise by section 855.

Section 1.855-1(b)(1) provides that a section 855(a) election must be made in the return filed by the RIC for the taxable year. The election shall be made by the taxpayer by treating the dividend (or portion thereof) to which such election applies as a dividend paid during the taxable year in computing its investment company taxable income, or if the dividend (or portion thereof) to which such election applies is to be designated by the company as a capital gain dividend, in computing the amount of capital gain dividends paid during such taxable year.

Section 301.9100-1(c) provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in section 301.9100-1(b) as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin), 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.

Sections 301.9100-3(a) through (c)(1)(i) set forth rules that the Internal Revenue Service generally will use to determine whether, under the 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(b) provides that subject to paragraphs (b)(3)(i) through (iii) of section 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and section 301.9100-3(c) 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 years to which the regulatory election applies than the taxpayer would have had if the election had been timely made (taking into account the time value of money).

## **CONCLUSION**

Based on the facts and representations submitted, we are satisfied that the Fund has acted reasonably and in good faith, and that the granting of relief will not prejudice the interests of the Government. Accordingly, the Fund is granted an extension until Date 7 to file with its federal income tax return for the year ending Date 1 an election to be a RIC under section 851(b)(1). Further, the Fund is granted an extension until Date 7 to make an election under section 855(a) on its federal income tax return for the year ending Date 1.

This ruling is limited to providing an extension of time for making an election under section 851(b)(1) and for making an election under section 855(a). It does not provide relief from any liability incurred as a result of filing a late return. Except as specifically ruled upon herein, we express no opinion concerning any federal excise or

PLR-129980-03

income tax consequences relating to the facts herein under any other section of the Code. For example, we express no opinion as to whether the Fund, in fact, has satisfied all of the requirements of either section 851 or section 855 and the regulations thereunder. We also express no opinion as to whether the Fund qualifies as a RIC under subchapter M, part I, of Chapter 1 of the Code.

Further, no opinion is expressed as to whether the Fund's tax liability is not lower in the aggregate for the year to which the regulatory election applies than the Fund's 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 return involved, the director's office will determine the Fund's tax liability for the year involved. If the director's office determines the Fund's liability is lower, that office will determine the federal income tax effect.

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

Sincerely,

Elizabeth A. Handler  
Chief, Branch 1  
Office of Associate Chief Counsel  
(Financial Institutions & Products)

Enclosures:

Copy of this letter  
Section 6110 Copy

cc: