

Internal Revenue Service

Department of the Treasury

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Purchaser =

Shareholder #1 =

Shareholder #2 =

Foreign
Shareholders =

Sellers =

Schedule A =

Schedule B =

Target =

Target Affiliate #1 =

Target Affiliate #2 =

Target Affiliate #3 =

Country X =

Company Official =

Outside Tax
Professional =

Authorized
Representatives =

Business A =

Business B =

Date A =

Date B =

Date C =

Date D =

Date E =

Date F =

Date G =

A% =

B% =

C% =

D% =

E% =

F% =

G% =

Dear

This letter responds to your letter dated July 6, 1998 requesting, on behalf of the above taxpayers, an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations to file elections. The extension is being requested for Purchaser (as the purchasing corporation and the parent of deemed purchasing corporations) to file elections under § 338(g) of the Internal Revenue Code and §§ 1.338-1(d) and 1.338-1(g) of the Income Tax Regulations, with respect to acquisition of the stocks of Target, Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3 on the acquisition dates indicated below (sometimes hereinafter such elections are collectively referred to as the "Elections"). Additional information was received in a letter dated October 1, 1998. The material information submitted for consideration is summarized below.

Purchaser is a Country X corporation that was formed by Shareholder #1, Shareholder #2 and Foreign shareholders to facilitate the acquisition of Target #1 and its subsidiaries. At the time of the below described acquisitions, and until Date E, Purchaser was a controlled foreign corporation ("CFC"), within the meaning of § 951(b), and was owned, within the meaning of § 958, by the persons and percentages set forth in Schedule A.

Prior to Date A: Target Affiliate #3 was owned A% by Target Affiliate #1, B% by Target, and C% by Sellers (i.e., citizens and residents of Country X); Target Affiliate #2 was owned D% by Target and E% by Sellers; Target Affiliate #1 was owned F% by Target and G% by Sellers; and Target was owned 100% by Sellers. Purchaser, Target, Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3 Country X corporations. Target, Target Affiliate #1 and Target Affiliate #2 are engaged in Business A, and Target Affiliate #3 is engaged in Business B.

Prior to the below described acquisitions, Sellers (to the best of management's knowledge), Purchaser, Target, Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3 did not file U.S. income tax returns, and they were not subject to U.S. income taxation. Further, it is represented that neither Target, Target Affiliate #1, Target Affiliate #2, or Target Affiliate #3 was: (1) a controlled foreign corporation within the meaning of § 957(a); (2) a passive foreign investment company for which an election under § 1295 was in effect; (3) a foreign investment company or a foreign corporation the stock ownership of which is described in § 552(a)(2); or (4) required under § 1.6012-2(g) to file a U.S. income tax return.

On Date A, Purchaser acquired from Sellers, for cash in fully taxable acquisitions, (1) all of the stock of Target, and (2) G% of the stock of Target Affiliate #1 (i.e., all of the Target Affiliate #1 stock that was not owned by Target). On Date B (which is several months after Date A, and in a different taxable year) Purchaser acquired from Sellers, for cash in fully taxable acquisitions: (1) E% of the stock of Target Affiliate #2 (i.e., all of the Target Affiliate #2 stock not owned by Target) and (2) C% of the stock of Target Affiliate #3 (i.e., all of the Target Affiliate #3 stock not owned by Target Affiliate #2 or Target). On Date D (which is after the due date for the elections for the Date A acquisitions, but before the due date for the election for the Date B acquisition), Target Affiliate #1 merged into Target. On Date E, Shareholder #2 (a US person) sold an amount of stock in Purchaser to an unrelated foreign party such that Purchaser was no longer a CFC; Purchaser was then owned by the persons and percentages set forth in Schedule B.

It is represented that the acquisition of Target (and deemed acquisition of Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3) constituted a qualified stock purchase within the meaning of § 338(d)(3), and that Purchaser was not related to Sellers within the meaning of § 338(h)(3). The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Target's, Target Affiliate #1's, Target Affiliate #2's, or Target Affiliate #3's taxable years in which the acquisitions occurred, the taxable years in which the Elections should have been filed, or any taxable years that would have been affected by the Elections had they been timely filed.

The elections for Target, Target Affiliate #1 and Target Affiliate #2 were due on Date C, and the election for Target Affiliate #3 was due on Date F. However, for various reasons the Elections were not filed. On Date G (which is after the due dates

for the Elections), Company Official, Outside Tax Professional and Authorized Representatives discovered that the Elections were not filed. Subsequently, this request was submitted, under § 301.9100-1, for an extension of time to file the Elections.

Section 338(a) permits certain stock purchases to be treated as asset purchases if the purchasing corporation makes or is treated as having made a "section 338 election" under § 338(g) and 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 one corporation is acquired by another corporation by purchase during the 12 month acquisition period.

Sections 1.338-1(g)(1)(i) and (v) provide that for purposes of § 1.338-1(g)(1) (*i.e.*, qualifying for the special rule when a foreign purchasing corporation or deemed purchasing corporation must file an election, which is a later filing date than the "ordinary" filing date required by § 338(g)), a foreign corporation is considered subject to United States tax (*i.e.*, not eligible for the special rule) if it is a CFC. Section 338(h)(3)(A)(iii) provides that the term "purchase" means any acquisition of stock, but only if (1) the basis of the stock in the hands of the purchasing corporation is not determined in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or under § 1014(a) (relating to property acquired from a decedent); (2) 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 (3) the stock is not acquired from a person the ownership of whose stock would, under § 318(a), be attributed to the person acquiring such stock.

Section 1.338-1(d) provides that a purchasing corporation makes a "section 338 election" for target by filing a statement of "section 338 election" on Form 8023-A or Form 8023, as applicable, in accordance with the instructions on the form. The "section 338 election" must be filed not later than the 15th day of the ninth month beginning after the month in which the acquisition date occurs. A "section 338 election" is irrevocable.

Section 1.338-1(g)(3) provides that the United States shareholders (as defined in § 951(b)) of a foreign purchasing corporation that is a controlled foreign corporation (as defined in § 957, taking into account § 953(c)) may file a statement of "section 338 election" on behalf of the purchasing corporation if the purchasing corporation is not required under § 1.6012-2(g) (other than § 1.6012-2(g)(2)(i)(b)(2)) to file a United States income tax return for its taxable year that includes the acquisition date. Form 8023-A and Form 8023, as applicable, must be filed as described in the form and its instructions, and also must be attached to Form 5471 (information return with respect to

foreign corporation) filed with respect to the purchasing corporation by each United States shareholder for the purchasing corporation.

Section 1.338-1(c)(14) provides that the term "target affiliate" has the same meaning as in § 338(h)(6), applied without § 338(h)(6)(B)(i), and that if a target affiliate is acquired in a qualified stock purchase, it is also a target. Section 1.338-2(b)(4) provides that if an election under § 338 is made for target, old target is deemed to sell target's assets and new target is deemed to acquire those assets. Under § 338(h)(3)(B), new target's deemed purchase of stock of another corporation is a purchase for purposes of § 338(d)(3) on the acquisition date of target. If new target's deemed purchase causes a qualified stock purchase of the other corporation and if a § 338 election is made for the other corporation, the acquisition date for the other corporation is the same as the acquisition date of target. However, the deemed sale and purchase of the other corporation's assets is considered to take place after the deemed sale and purchase of target's assets.

Section 1.338-2(c)(1) provides that the purchasing corporation may make an election under § 338 for target even though target is liquidated on or after the acquisition date. Section 1.338-2(c)(2) provides that an election may be made for target after the acquisition of assets of the purchasing corporation by another corporation in a transaction described in section 381(a), provided that the purchasing corporation is considered for tax purposes as the purchasing corporation of the target stock. The acquiring corporation in the section 381(a) transaction may make an election under section 338 for target. Section 1.338-2(b)(4)(ii), example 2, illustrates how the purchase of a corporation holding target stock (provided a § 338(g) election is made therefor) and the direct purchase of the remaining target stock can be combined to make a qualified stock purchase.

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. See also Form 8023-A, Form 8023 and the instructions thereto.

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, provided the taxpayer demonstrates to the satisfaction of the Commissioner that:

- (1) The taxpayer acted reasonably and in good faith, and,
- (2) Granting relief will not prejudice the interests of the government.

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 times for filing the Elections were 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 to file the Elections, provided Purchaser shows it 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, Company Official, Outside Tax Professional and Authorized Representatives explain the circumstances that resulted in the failure to file valid Elections. The information establishes that tax professionals were responsible for the Elections, that Purchaser relied on the tax professionals to timely make the Elections, and that the government will not be prejudiced if relief is granted. See § 301.9100-3(b)(v).

Based on the facts and information submitted, including the representations that have been made, we conclude that Purchaser acted reasonably and in good faith in failing to timely file the Elections, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government. Accordingly, we grant an extension of time under § 301.9100-1, until 30 days from the date of issuance of this letter, for Purchaser (as the purchasing corporation and the parent of deemed purchasing corporations) to file the Elections with respect to the acquisition and deemed acquisitions of the stocks of Target, Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3, as described above.

The above extension of time is conditioned on the taxpayers' (Purchaser's, Target's, Target Affiliate #1's, Target Affiliate #2's and Target Affiliate #3's) tax liability being not lower, in the aggregate for all years to which the election applies, than it would have been if the Elections 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 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' liability is lower. Section 301.9100-3(c).

Purchaser (as the purchasing corporation and the parent of deemed purchasing corporations), should file the Elections in accordance with § 1.338-1(d). That is, new elections on Form 8023-A and Form 8023, as applicable, must be executed on or after the date of this letter, which grants an extension, and filed in accordance with the instructions on the election form (together with the information that is required to be attached to the election form). A copy of this letter should be attached to each election form. Purchaser must file or amend its returns (along with the target corporations, if and as applicable), to report the acquisitions as "section 338 transactions," and to attach a copy of this letter, the election forms and the information required therewith (see §§ 1.338-1(g) and 1.338-5). That is, the "old" targets must file separate final returns (if and as applicable) and the "new" targets must be included in Purchaser's return (by being listed on Form 5471, information return with respect to a foreign corporation) for the first year it is required to file a U.S. return following the acquisition. See: (1) Announcement 98-2, 1998-2 I.R.B. 38, and § 1.338-1(g), with regard to which election form to use; (2) § 1.338-1(e) (4) and the instruction to the forms, with regard to filing a combined return and combined election form; (3) § 1.338-1(g) and the instruction to the forms, with regard to the requirement that a separate election form must be filed for each separate taxable year in which an acquisition occurs; and (4) § 1.338-1(g) and the instruction to the forms, with regard to the requirement to notify U.S. shareholders, that certain U.S. shareholders may file the elections for foreign corporations, and for the places that the Elections and returns must be filed.

No opinion is expressed as to (1) whether Purchaser's acquisition of Target stock (and the deemed acquisition of the stocks of Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3) qualifies as a "qualified stock purchase", (2) whether the acquisition of Target stock (and the deemed acquisition of the stocks of Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3) qualifies for § 338(a) treatment, and (3) if the acquisition of Target stock (and the deemed acquisition of the stocks of Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3) qualifies for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by Target (and Target Affiliate #1, Target Affiliate #2 and Target Affiliate #3) on the deemed asset sales.

In addition, no opinion is expressed as to the tax effects or 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 taxpayer, its employees and representatives. However, the District 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 who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

Assistant Chief Counsel (Corporate)

by _____
Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)