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Date:  
April 25, 2018

Legend

Foundation =  
Year 1 =  
B =  
C =  
Firm =

Dear :

This letter responds to Foundation’s ruling request dated October 31, 2017 submitted by its authorized representative for discretionary relief under Treas. Reg. § 301.9100-3 for an extension of time to make the election under Treas. Reg. § 53.4942(a)-3(c)(2)(iv).

**FACTS**

Foundation is recognized as an organization described in § 501(c)(3) of the Internal Revenue Code<sup>1</sup> and classified as a private foundation under I.R.C. § 509(a). Foundation provides grants to further the charitable purposes of organizations described in I.R.C. § 501(c)(3).

During Year 1, Foundation received stock contributions with a fair market value of B dollars from four individuals who are substantial contributors to Foundation, and as such, are disqualified persons under I.R.C. § 4946.

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<sup>1</sup> The Internal Revenue Code of 1986, as amended, to which all subsequent I.R.C. § references are made unless otherwise indicated.

Foundation distributed qualifying distributions in Year 1 in the amount of C dollars, an amount less than 100 percent of the contributions received in Year 1. Foundation engaged Firm to prepare Foundation's Year 1 Form 990-PF, Return of Private Foundation. Foundation relied on Firm to advise Foundation on the proper completion of the Form 990-PF. Firm handles the Foundation's taxes as well as the individual tax returns of its officers and related donors. Foundation's original 990-PF for Year 1 was filed timely.

In connection with the preparation of the Year 1 Form 990-PF, Firm states that it calculated the excess distribution carryovers in a manner that was not consistent with having made a valid election under Treas. Reg. § 53.4942(a)-3(c)(2)(iv) by not reducing the carryover from the Year 1 Qualifying Distributions. The election to apply distribution carryovers to meet the conduit foundation requirement should have been made when the Year 1 Form 990-PF was prepared and filed.

Firm discovered Foundation's failure to make the election for Year 1 in April, 2017, as a result of an officer of Firm reading an article which addressed this election. Upon this discovery, Firm notified Foundation and filed an amended Form 990-PF for Year 1 in May, 2017. Foundation was under the mistaken belief that there was an automatic extension for a period of six months from the extended due date of the return.

Foundation now seeks permission from the Service to make a late election using the amended Form 990-PF for Year 1 already filed with the Service. Foundation has submitted a sworn affidavit from an officer of Firm. The affidavit declares that the officer of the Firm was unaware of the election until reading the article related to the election.

The information returns prepared by Firm meet the requirement to make the election. Foundation asserts that none of the excess qualifying distributions were used for any other purpose, and there was no intention to use them for any other purpose.

Foundation discovered the failure to make the regulatory election and submitted a request for relief before the failure to make the regulatory election was discovered by the Service. Foundation also states that it is not under examination by the Service, and as of the date of the ruling request has not received any communication from the Service regarding the Foundation's omission to make the election.

## **LAW AND ANALYSIS**

I.R.C. § 170(b)(1)(F)(ii) provides, in part, that contributions by an individual to a private foundation that makes qualifying distributions that are treated as distributions out of corpus in an amount equal to 100 percent of the contribution within three months and 15 days of the end of the private foundation's taxable year, are deductible at 50 percent of the Foundation's contribution base for the taxable year.

I.R.C. § 4942(a) provides for the imposition on the undistributed income of a private foundation for any taxable year, which has not been distributed before the first day of the second (or any succeeding) taxable year following such taxable year (if such first day falls within the taxable period), a tax equal to 30 percent of the amount of such income remaining undistributed at the beginning of such second (or succeeding) taxable year.

I.R.C. § 4942(d) defines a private foundation's "distributable amount" for any taxable year as an amount equal to (1) the sum of the minimum investment return plus the amounts described in subsection (f)(2)(C), reduced by (2) the sum of the taxes imposed on such private foundation for the taxable year under subtitle A and I.R.C. § 4940.

I.R.C. § 4942(h) provides rules as to the treatment of "qualifying distributions" made during a taxable year. Generally, qualifying distributions for a taxable year are treated as made (A) first out of the undistributed income of the immediately preceding taxable year (if the private foundation was subject to tax imposed by this section for the preceding year) to the extent thereof, (B) second out of undistributed income for the taxable year to the extent thereof, and (C) then out of corpus.

Treas. Reg. § 53.4942(a)-3(c)(2)(iv) provides that a donee organization may elect to treat as a current distribution out of corpus any amount distributed in a prior taxable year which was treated as a distribution out of corpus under paragraph (d)(1)(iii) of this section provided that (a) such amount has not been availed of for any other purpose, such as a carryover under paragraph (e) of this section or a redistribution under this paragraph for a prior year, (b) such corpus distribution occurred within the preceding 5 years, and (c) such amount is not later availed of for any other purpose. Such election must be made by attaching a statement to the return the foundation is required to file under I.R.C. § 6033 with respect to the taxable year for which such election is to apply. Such statement must contain a declaration by an appropriate foundation manager (within the meaning of I.R.C. § 4946(b)(1) that the foundation is making an election under this paragraph and it must specify that the distribution was treated under paragraph (d)(1)(iii) of this section as a distribution out of corpus in a designated prior taxable year (or years). This election is permissible in order to satisfy distribution requirements under I.R.C. § 170(b)(1)(F)(ii).

Furthermore, for purposes of making the election, an extension of time for making the election may be available under the relief provisions found in Treas. Reg. § 301.9100-1. Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in Treas. Reg. §§ 301.9100-2 and 301.9100-3 to make certain regulatory elections. Treas. Reg. § 301.9100-1(b) defines a "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Treas. Reg. §§ 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 an election. Treas. Reg. § 301.9100-2 provides automatic extensions of time for making certain elections. Treas. Reg. § 301.9100-3 provides extensions of time for making elections that do not meet the requirements of Treas. Reg. § 301.9100-2.

Treas. Reg. § 301.9100-3(a) provides that requests for extensions of time for regulatory elections may be granted when a foundation provides evidence to establish to the satisfaction of the Commissioner that a foundation acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government.

Treas. Reg. § 301.9100-3(b)(1) provides that a foundation is deemed to have acted reasonably and in good faith if the foundation:

- (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 foundation's control;
- (iii) Failed to make the election because, after exercising reasonable diligence (taking into account the foundation's experience and the complexity of the return or issue), the Foundation 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 foundation, and the tax professional failed to make, or advise the foundation to make the election.

Treas. Reg. § 301.9100-3(b)(2) provides that a foundation will not be considered to have reasonably relied on a qualified tax professional if the foundation knew or should have known that the professional was not:

- (i) Competent to render advice on the regulatory election; or
- (ii) Aware of all relevant facts.

Treas. Reg. § 301.9100-3(b)(3)(ii) provides, in part, that a foundation is deemed to have not acted reasonably and in good faith if the foundation was informed in all material respects of the required election and related tax consequences, but chose not to file the election.

Treas. Reg. § 301.9100-3(c)(1) provides that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief.

Treas. Reg. § 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the foundation would have had if the election had been timely made.

Treas. Reg. § 301.9100-3(d)(2) provides, in part, that for relief to be granted, the Service may require the foundation to consent under I.R.C. § 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made.

Treas. Reg. § 301.9100-3(e)(2) & (3) specifies evidence which must be provided when a foundation requests relief under this section which includes (a) affidavit and declaration from foundation and (b) affidavits and declarations from other parties.

Treas. Reg. § 301.9100-3(e)(4) further requires additional information to support request for relief under Treas. Reg. § 301.9100-3(a) which includes:

- (i) The foundation must state whether the foundation's return(s) for 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 is being examined, or is being considered by an appeals office or a federal court. The foundation must notify the Service office considering the request for relief if the Service starts an examination of any such return while the foundation's request for relief is pending;
- (ii) The foundation must state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;
- (iii) The foundation must submit a copy of any documents that refer to the election;
- (iv) When requested, the foundation must submit a copy of the foundation's return for any taxable year for which the foundation requests an extension of time to make the election and any return affected by the election; and
- (v) When applicable, the foundation must submit a copy of the returns of other foundations affected by the election.

Foundation is an organization recognized as exempt under I.R.C. § 501(c)(3) and classified as a private foundation under I.R.C. § 509(a). Foundation is a private foundation required to distribute all undistributed income by the close of the following tax year. See § I.R.C. 4942(a); see also I.R.C. § 4942(d) which defines "distributable amount."

Pursuant to Treas. Reg. § 53.4942(a)-3(c)(2)(iv), a private foundation may elect to treat as a current distribution out of corpus any amount distributed in a prior taxable year which was treated as a distribution out of corpus provided that such amount has not been availed of for any other purpose, such as a carryover under paragraph (e) of this section, or a redistribution under this paragraph for a prior year, and such corpus distribution occurred within the preceding five years, and such amount is not later availed for any other purpose. Foundation asserts that it met the requirements in Year 1 to make the election but did not properly make this election when it timely filed its Year 1 Form 990-PF and that it acted reasonably and in good faith at all times because it relied on the experience of a qualified tax professional to properly prepare its returns.

Under Treas. Reg. § 301.9100-3(a), when the foundation is required to make the election under Treas. Reg. § 53.4942(a)-3(c)(2)(iv) but fails to, a request for an extension of time for regulatory election(s) may be granted if the foundation provides evidence (including an affidavit) to establish to the satisfaction of the Commissioner that the foundation acted reasonably and in good faith, and the grant of the relief will not prejudice the interests of the Government. As further explained in Treas. Reg. § 301.9100-3(b)(1), the foundation will be deemed to have acted reasonably and in good faith if, among other things, the foundation requests relief under this section, before the failure to make the regulatory election is discovered by the Service, or if the foundation failed to make the election because of intervening events beyond their control, or failed to make the election because after exercising reasonable diligence (taking into account the foundation's experience and the complexity of the return or issue), the foundation was unaware of the necessity of the election, or the foundation reasonably relied on a qualified tax professional, including a tax professional employed by the foundation, and the foundation failed to make, or advise the foundation to make, the election.

Foundation provided documentation which included an affidavit from Firm, an experienced tax preparation firm, to support the position that it acted reasonably and in good faith as required by Treas. Reg. § 301.9100-3(b)(1). Foundation reasonably relied on Firm to properly advise it about the returns they prepared for Foundation and to explain the technical areas of the Form 990-PF. Foundation did not have any reason to believe that Firm was not competent to render advice about required regulatory elections. In addition, the discovery of the failure to properly make the election on the Form 990-PF for Year 1 was by Firm rather than by the Internal Revenue Service.

In order to qualify for discretionary relief, a foundation must demonstrate that the interests of the Government will not be prejudiced by the granting of relief as required under Treas. Reg. § 301.9100-3(c)(1). Foundation represented and provided support to show that its request for relief for the late filing of an election under Treas. Reg. § 53.4942(a)-3(c)(2)(iv) to treat as current distribution out of corpus the amounts distributed in the prior taxable years, that are available as excess distributions carryovers held in corpus, does not result in it or its grantor(s) having lower tax liabilities than if they had timely properly filed such election. The affidavits and other evidence provided satisfy the requirements of Treas. Reg. § 301.9100-3(b)-(c) and the procedural requirements of Treas. Reg. § 301.9100-3(e). Therefore, to grant Foundation an extension of time to make the election will not prejudice the Government's interest.

## **RULING**

Based solely on the facts and representations submitted by Foundation, we conclude that the requirements of Treas. Reg. § 301.9100-3 have been satisfied. As a result, Foundation is granted an extension of time to make an election under Treas. Reg. §

53.4942(a)-3(c)(2)(iv) in Year 1. The election shall be made by filing an amended Form 990-PF and attaching a statement making the election to the amended return. Foundation shall have 60 days from the date of this letter ruling to file any relevant amended returns. The amended return and any subsequent returns should reflect the revised carryover amounts.

In addition, a copy of this letter must be attached to the relevant returns. If Foundation files electronically it may satisfy this requirement by attaching a statement to the return that provides the date and control number of this letter ruling.

Sincerely,

Andrew F. Megosh, Jr.  
Senior Tax Law Specialist, EO Branch 2  
(Tax Exempt & Government Entities)

Enclosure (1)

cc: