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Department of the Treasury

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Person to Contact:

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Date:
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Purchaser =

Seller =

Target #X =

Target #1 =

Target #2 =

Sub =

Company
Official =

Outside Tax
Professionals =

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Authorized
Representatives =

Country A =

Country B =

Date A =

Date B =

Date C =

Business A =

Business B =

X % =

Y % =

This letter responds to your Authorized Representative's letter, dated August 18, 1998, requesting 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 a purchasing corporation, and as the United States shareholder of a controlled foreign corporation that is also a purchasing corporation) 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 the acquisition of the stock of Target #1 and Target #2 (sometimes hereinafter collectively referred to as the "Elections" or the "Election") on Date A. Additional information was received in letters dated February 1 and April 8, 1999. The material information submitted for consideration is summarized below.

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Purchaser is the common parent of a consolidated group that has a calendar taxable year and uses the accrual method of accounting. Sub and Target #X are wholly owned subsidiaries of Seller; Target #1 is a wholly owned subsidiary of Sub; and Target #2 is owned X% (*i.e.*, over 80%) by Seller and Y% by Target #X. Seller and Target #X are domestic corporations; Target #1 is a Country A corporation; and Target #2 is a Country B corporation. Purchaser and its subsidiaries are engaged in Business A; and Target #X, Target #1 and Target #2 are engaged in Business B.

On Date A, Purchaser and Seller entered into a Stock Purchase Agreement for Purchaser to acquire all of the stock of Target #X, Target #1 and Target #2 from Seller and Sub. Also on Date A, pursuant to the Stock Purchase Agreement, solely in exchange for cash in a fully taxable transaction: (1) Purchaser acquired from Seller all of the Target #X stock; (2) Purchaser acquired from Sub all of the Target #1 stock; and (3) Target #1 acquired from Seller all of Seller's Target #2 stock (*i.e.*, X%). The Stock Purchase Agreement provides that at closing the acquisitions would occur numerically, in the order listed in the preceding sentence. In connection with the acquisitions, Purchaser incurred debt from third party banks. To secure the debt Target #1 and Target #2 gave guarantees to the third party banks, which consisted of investments in United States property within the meaning of § 956 and § 1.956-2(c) of the Income Tax Regulations. As a result, the untaxed pre-acquisition earning and profits of Target #1 and Target #2 were required to be included in the gross income of the Purchaser, to the extent of earnings and profits.

It is represented that (1) Purchaser was not related to Seller within the meaning of § 338(h)(3), and (2) Purchaser's acquisition of Target #1 stock and Target #1's acquisition of Target #2 stock each constituted a "qualified stock purchase" ("QSP"), as defined in § 338(d)(3).

Purchaser intended to file the Elections. The Elections were due on Date B, but for various reasons were not filed. On Date C (which is after the due date for the Elections), Purchaser, Company Official, Outside Tax Professionals and Authorized Representatives discovered that the Elections were not filed. The period of limitations on assessments under § 6501(a) has not expired for Purchaser's, Target #X's, Target #1's and Target #2's taxable year(s) in which the acquisition(s)/sale(s) was/were consummated, the taxable year in which the Elections should have been filed, and for any taxable years that would have been affected by the Elections had they been timely filed.

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

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corporation is acquired by another corporation by purchase during the 12 month acquisition period.

Sections 1.338-1(g)(1)(i) and (v) provide, inter alia, that a foreign purchasing corporation or deemed foreign purchasing corporation is not eligible for the special rule under § 1.338-1(g)(1) (i.e., which specifies a filing date for the election that is later than the filing date required by § 338(g) and § 1.338-1(d)) if such foreign corporation is considered subject to United States tax (e.g., is a CFC or is required to file a United States income tax return). 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 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 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 1.338-2(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,

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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 1.1502-77(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 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 time for filing the Elections was fixed by the regulations (i.e., § 1.338-1(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 Company Official, Outside Tax Professionals and Authorized Representatives explain the circumstances that resulted in the failure to file the 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)(1)(v).

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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 a purchasing corporation, and as the United States shareholder of a controlled foreign corporation that is also a purchasing corporation) to file Elections with respect to the acquisition of the stock of Target #1 and Target #2, as described above.

The above extension of time is conditioned on: (1) Target #1 not being related to Seller, within the meaning of § 338(h)(3), at the time of Target #1's acquisition of Target #2; and (2) the taxpayers' (Purchaser's and its subsidiaries', Sub's, Target #X's, Target #1's, Target #2's, and Seller's) tax liability being not lower, in the aggregate for all years to which the Elections apply, 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. § 301.9100-3(c).

Purchaser should file the Elections in accordance with §§ 1.338-1(d) and 1.338-1(g). That is, a new election on Form 8023-A 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. A copy of this letter should be attached to the election form. Purchaser must amend its applicable returns (and Target#1 and Target #2 must file a final return, if and as applicable) to report the acquisitions/sales as "section 338 transactions," and attach thereto a copy of this letter and a copy of the election form (also see §§ 1.338-1(g) and 1.338-5). That is, the "old" applicable targets must file separate final returns (if and as applicable) and the "new" applicable 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 following the acquisitions. See §§ 1.338-1(e) and 1.338-1(g), and Announcement 98-2, 1998-2 I.R.B. 38. Also, a single Form 8023-A may be used, and the Target Affiliates should be listed on an attachment thereto (see § 1.338-1(e)(4) and the instructions to the form).

No opinion is expressed as to: (1) whether the acquisitions of Target #1 stock and/or Target #2 stock qualify as a "qualified stock purchase"; (2) whether the acquisitions of Target #1 stock and/or Target #2 stock qualify for § 338(a) treatment; (3) if the acquisitions of Target #1 stock and/or Target #2 stock qualify for § 338(a) treatment, as to the amount of gain or loss recognized (if any) by such targets on their deemed asset sales; or (4) whether Target #1 is related to Seller, within the meaning of § 338(h)(3), at the time of Target #1's acquisition of Target #2 (e.g., whether the acquisitions occurred simultaneously or the contractual acquisition ordering rules are

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effective for federal income tax purposes, whether the date of acquisition can be subdivided, etc.).

In addition, no opinion is expressed as to the tax effects or consequences of filing the Elections 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 Elections 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.

Copies of this letter are being sent to the authorized representatives designated on your power of attorney.

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

Richard Todd
Counsel to the Assistant
Chief Counsel (Corporate)