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DEPARTMENT OF THE TREASURY Corrected January 20, 2006

Internal Revenue Service

26 CFR Part 301

TD 9203

RIN 1545-BC32

Deemed Election To Be an Association Taxable as a Corporation for a Qualified Electing S Corporation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations that deem certain eligible entities that file timely S corporation elections to have elected to be classified as associations taxable as corporations. These regulations affect certain eligible entities filing timely elections to be S corporations on or after July 20, 2004.

DATES: Effective Date: These regulations are effective July 20, 2004.

FOR FURTHER INFORMATION CONTACT: Rebekah A. Myers, (202) 622-3050 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 301. On July 20, 2004, temporary regulations (TD 9139) relating to entity classification elections for entities that elect to be S corporations under section 1362(a) were published in the **Federal Register** (69 FR 43317). A notice of proposed rulemaking (REG-131786-03) cross-referencing the temporary regulations also was published in the **Federal Register** on July 20, 2004. No public hearing was requested or held. No written or electronic comments responding to the notice of proposed rulemaking were received. The proposed regulations are adopted by this Treasury decision, and the corresponding temporary regulations are removed.

Section 301.7701-3(a) provides that an eligible entity with two or more owners may elect to be classified as an association (and thus a corporation under §301.7701-2(b)(2)) or a partnership, and an eligible entity with a single owner may elect to be classified as an association or to be disregarded as an entity separate from its owner. Section 301.7701-3(b) provides that, unless the entity elects otherwise, a domestic eligible entity is a partnership if it has two or more owners or

is disregarded as an entity separate from its owner if it has a single owner. Section 301.7701-3(c) describes the time and place for filing an entity classification election. Section 301.7701-3(c)(1)(i) provides that an eligible entity may elect to be classified as other than its default classification or to change its classification by filing Form 8832, "Entity Classification Election", with the service center designated on the form.

A taxpayer whose default classification is a partnership or a disregarded entity may seek to be classified as an S corporation. For S elections that were filed prior to the effective date of these regulations, the taxpayer was required to elect to be classified as an association under §301.7701-3(c)(1)(i) by filing Form 8832 and to elect to be an S corporation under section 1362(a) by filing Form 2553, "Election by a Small Business Corporation." These regulations simplify these paperwork requirements by eliminating, in certain cases, the requirement that the entity elect to be classified as an association. Instead, an eligible entity that makes a timely and valid election to be classified as an S corporation will be deemed to have

elected to be classified as an association taxable as a corporation.

If the S election and the entity classification election are filed late, the entity may need to submit a ruling request under §301.9100-3 to file a late entity classification election and under section 1362(b)(5) to file a late S corporation election. However, Rev. Proc. 2004-48 (2004-32 I.R.B. 172) provides relief for these entities in some cases.

Effective Dates

These final regulations apply to elections to be an S corporation filed on or after July 20, 2004. However, eligible entities that timely filed S elections before July 20, 2004 may also rely on the provisions of the regulation.

Special Analysis

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of

information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking that preceded these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of this regulation is Rebekah A. Myers, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate and excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 ***

Par. 2. Section 301.7701-3 is amended by revising paragraphs (c)(1)(v)(C) and (h)(3) to read as follows:
§301.7701-3 Classification of certain business entities.

(c) ***

(1) ***

(v) ***

(C) S corporations. An eligible entity that timely elects to be an S corporation under section 1362(a)(1) is treated as having made an election under this section to be classified as an association, provided that (as of the effective date of the election under section 1362(a)(1)) the entity meets all other requirements to qualify as a small business corporation under section 1361(b). Subject to §301.7701-3(c)(1)(iv), the deemed election to be classified as an association will apply as of the effective date of the S corporation election and will remain in effect until the entity makes a valid election, under §301.7701-3(c)(1)(i), to be classified as other than an association.

(h)***

(3) Deemed elections for S corporations. Paragraph (c)(1)(v)(C) of this section applies to timely S

corporation elections under section 1362(a) filed on or after July 20, 2004. Eligible entities that filed timely S elections before July 20, 2004 may also rely on the provisions of the regulation.

§301.7701-3T Classification of certain business entities (temporary).

(a) through (c)(1)(i) [Reserved]. For further guidance, see §301.7701-3(a) through (c)(1)(i).

(ii) Further notification of elections.

An eligible entity required to file a Federal tax or information return for the taxable year for which an election is made under §301.7701-3(c)(1)(i) must attach a copy of its Form 8832 to its Federal tax or information return for that year. If the entity is not required to file a return for that year, a copy of its Form 8832, Entity Classification Election must be attached to the Federal income tax or information return of any direct or indirect owner of the entity for the taxable year of the owner that includes the date on which the election was effective. An indirect owner of the entity does not have to attach a copy of the Form 8832 to its return if an

entity in which it has an interest is already filing a copy of the Form 8832 with its return. If an entity, or one of its direct or indirect owners, fails to attach a copy of a Form 8832 to its return as directed in this section, an otherwise valid election under §301.7701-3(c)(1)(i) will not be invalidated, but the non-filing party may be subject to penalties, including any applicable penalties if the Federal tax or information returns are inconsistent with the entity's election under §301.7701-3(c)(1)(i). In the case of returns for taxable years beginning after December 31, 2002, the copy of Form 8832 attached to a return pursuant to this paragraph (c)(1)(ii) is not required to be a signed copy.

(c)(1)(iii) through (h)(3) [Reserved].

For further guidance, see §301.7701-3(c)(1)(iii) through (h)(3).

Par. 3. Section 301.7701-3T is removed.

Deputy Commissioner for Services and
Enforcement.

Approved:

Acting Deputy Assistant Secretary for Tax
Policy.