

**Internal Revenue Service**

Department of the Treasury  
Washington, DC 20224

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Person To Contact:  
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Date:  
February 22, 2010

TY:

Legend

Fund =

Former Name =  
Trustee =

PFIC 1 =  
PFIC 2 =  
PFIC 3 =  
PFIC 4 =

Location A =  
Location B =  
Location C =

Date 1 =  
Date 2 =  
Date 3 =  
Year X =  
Year Y =

Accounting Firm =

Dear :

This is in response to a letter received by our office on September 24, 2009, submitted on behalf of Fund by its authorized representative, requesting an extension of time under §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration

Regulations to make a mark to market election under section 1296 of the Internal Revenue Code (“Code”).

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for a ruling. Verification of the factual information, representations, and other data submitted may be required as part of the audit process.

## FACTS

Fund is a common trust fund as described in section 584. Fund was established on Date 1 under an Agreement and Declaration of Trust. On Date 3, the name of Fund was changed from Former Name to Fund.

Fund was established with the primary objective of providing total return through investment in a diversified portfolio of equity securities that primarily contain foreign stock. As a result, Fund normally invests a significant portion of its net assets in equity securities of foreign entities. Fund represents that it was always Fund’s intent to make an election to mark to market the stock of each passive foreign investment company (“PFIC”) held by Fund, pursuant to Treas. Reg. § 1.1296-1(h)(1).

For the taxable year ended on Date 2 (Year X), Fund held stock in PFIC 1 and PFIC 2, both of which are organized under the laws of Location A; in PFIC 3, which is organized under the laws of Location B; and in PFIC 4, which is organized under the laws of Location C (PFICs 1, 2, 3, and 4 are collectively referred to as the “PFICs”). Each of these entities is a passive foreign investment company within the meaning of section 1297(a).

Trustee is trustee of Fund and provides administrative services for Fund. For the Year X taxable year, these administrative services included the preparation of Fund’s Form 1041. For the Year Y taxable year, Accounting Firm was engaged to prepare Fund’s federal income tax return and, as part of its review prior to preparing Fund’s Year Y Form 1041, requested a copy of Fund’s Year X Form 1041. Upon inspection of Fund’s Year X Form 1041, Accounting Firm noted that, notwithstanding the fact that Fund held stock in four PFICs within the meaning of section 1297(a), the Year X income tax return did not include any Forms 8621 (Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund). Accounting Firm requested clarification from Fund and Trustee regarding the missing Forms 8621.

According to an affidavit from the vice president and accountant for Trustee who prepared Fund’s Year X tax return, she erroneously assumed that the PFICs themselves were required to file a Form 8621 to make a mark to market election under section 1296, rather than Fund. As a result, no Forms 8621 were prepared with respect

to Fund's investments in the PFICs and the elections under Treas. Reg. § 1.1296-1(h) to mark to market the stock of the PFICs were not timely filed.

However, Fund represents that its federal income tax returns have been filed as if the mark to market elections were timely made, and the schedules provided to participants depicting their proportionate share of Fund's taxable income or loss and gain or loss have been consistent with the elections having been made.

Fund has made the following additional representations with respect to each election:

1. The request for relief was filed by Fund before the failure to make the regulatory election was discovered by the IRS.
2. Granting the relief will not result in Fund being placed in a better tax position than if the election had been made on a timely basis.
3. Fund is not seeking to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 of the Code, nor is Fund using hindsight to the Government's prejudice in requesting this ruling after the due date for the election.
4. No facts have occurred subsequent to the due date of the election that now make it more advantageous for Fund to make the election.
5. It always was, and continues to be, the intent of Fund to make a section 1296 election with respect to the stock of each of the PFICs.

## LAW

Section 1296(a) provides that, in the case of marketable stock in a passive foreign investment company that is owned by a United States person at the close of any taxable year, the person may elect to include in gross income the excess of the fair market value of the stock over its adjusted basis.

Treas. Reg. § 1.1296-1(h) provides that an election under section 1296 for a taxable year must be made on or before the due date (including extensions) of the person's U.S. income tax return for that year.

Treas. Reg. § 301.9100-1(c) provides that the Commissioner has the discretion to grant a taxpayer a reasonable extension of time, under the rules set forth in Treas. Reg. § 301.9100-3, to make a regulatory election under all subtitles of the Code, except subtitles E, G, H, and I.

Treas. Reg. § 301.9100-1(b) provides that an election includes an application for relief in respect of tax, and defines a regulatory election as an election whose due date is prescribed by a regulation, revenue ruling, revenue procedure, notice, or announcement.

Treas. Reg. § 301.9100-3(a) provides that requests for relief will be granted when the taxpayer provides the evidence (including affidavits described in Treas. Reg. §301.9100-3(e)) to establish to the satisfaction of the Commissioner that the taxpayer 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, except as provided in Treas. Reg. § 301.9100-3(b)(3), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer

- (i) requests relief before the failure to make the regulatory election is discovered by the IRS;
- (ii) failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the IRS; or
- (v) reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Treas. Reg. § 301.9100-3(b)(3) provides that a taxpayer is deemed not to have acted reasonably or in good faith if the taxpayer

- (i) seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under section 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of Treas. Reg. § 1.6664-2(c)(3)) and the new position requires or permits a regulatory election for which relief is requested;
- (ii) was informed in all material respects of the required election and related tax consequences but chose not to file the election; or
- (iii) uses hindsight in requesting 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 the taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the

time value of money). Treas. Reg. § 301.9100-3(c)(1)(ii) provides, in part, that the interests of the Government are ordinarily prejudiced if the taxable year in which the regulatory election should have been made is closed, or any taxable years that would have been affected by the election had it been timely made are closed, by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief.

## CONCLUSION

Based on the information and representations submitted, we conclude that Fund satisfies the requirements for a reasonable extension of time to make the mark to market election under section 1296 of the Code. Accordingly, Fund is granted an extension of time of 60 days from the date of this letter to make the election under section 1296, with respect to the stock of each of the PFICs, for Fund's taxable year ending on Date 2.

The granting of an extension of time is not a determination that Fund is otherwise eligible to make the election under section 1296. Treas. Reg. § 301.9100-1(a).

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

In accordance with the Power of Attorney on file with this office, copies of this letter are being sent to Fund's representatives.

Sincerely,

Jeffery G. Mitchell  
Special Counsel  
Office of the Associate Chief Counsel  
(International)