

## Internal Revenue Service

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Date:  
June 08, 2011

Re:

### LEGEND:

Domestic Fund =

Foreign Fund =

x% =

PFIC =

Date 1 =

Year 2 =

Year 3 =

Year 4 =

Type A Entity =

Type B Entity =

Stock Exchange =

Firm A =

Firm B =

Tax Advisor =

=

Dear :

This is in response to correspondence submitted on behalf of Domestic 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 with respect to its investment in PFIC.

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

Domestic Fund was formed on Date 1 as a Type A Entity and commenced business activities during Year 2. Domestic Fund is treated as a partnership for U.S. federal income tax purposes. Domestic Fund holds an x% interest in Foreign Fund. Foreign Fund is a Type B Entity that is treated as a partnership for U.S. federal income tax purposes. Foreign Fund's activity consisted of investment in a range of securities and asset classes, including offshore marketable securities of passive foreign investment companies within the meaning of section 1297(a). During Year 2, Foreign Fund held marketable securities of PFIC, a company listed on the Stock Exchange.

The accounting and tax filings of Domestic Fund and Foreign Fund (collectively, the Funds) were both handled by the same firm, Firm A. A Year 2 Form 1065, U.S. Return of Partnership Income, was timely filed for each of the Funds. Employees at Firm A prepared a Form 8621 electing mark to market treatment for the stock of PFIC. However, the Form 8621 was prepared for, and attached to the Form 1065 of, Foreign Fund rather than Domestic Fund.

For independent business reasons, the Funds thereafter changed tax advisors. During Year 4, while preparing the Year 3 Forms 1065 for the Funds, Firm B (the successor tax advisors) found that the Year 2 Form 8621 electing mark to market treatment for the stock of PFIC was erroneously prepared for Foreign Fund instead of Domestic Fund.

Domestic Fund represents that its federal income tax returns have been filed as if it (rather than Foreign Fund) had made the mark to market election with respect to the PFIC stock in a timely manner. Domestic Fund has made the following additional representations with respect to the mark to market election:

1. As of the submission date of its request for relief, Domestic Fund had not been notified (a) of any action taken by the IRS with respect to the election, (b) that the IRS had discovered its failure to properly make the regulatory election, or (c) that the treatment of affected items on the returns filed by Domestic Fund was incorrect.
2. Government interests will not be prejudiced by virtue of granting relief for Domestic Fund to file the election because the late election will not result in a lower, or different, tax liability.

In addition, Tax Advisor from Firm A submitted an affidavit stating that (a) Domestic Fund intended to make a mark to market election under section 1296 for the PFIC stock that Domestic Fund indirectly held through Foreign Fund, and (b) at all times, the Funds accounted for the investments in PFIC as if a mark to market election had been timely and properly made.

## LAW

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

Section 1296(g) provides, in part, that stock owned, directly or indirectly, by a foreign partnership will be considered as being owned proportionately by its partners.

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 Domestic Fund satisfies the requirements for a reasonable extension of time to make the mark to market election under section 1296 of the Code. Accordingly, Domestic 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 PFIC for Year 2.

The granting of an extension of time is not a determination that Domestic 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 Domestic Fund's representative.

Sincerely,

Jeffery G. Mitchell  
Chief, Branch 2  
Office of the Associate Chief Counsel  
(International)

cc: