

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **202340007**
Release Date: 10/6/2023

Third Party Communication: None
Date of Communication: Not Applicable

Index Number: 9100.00-00, 851.00-00,
851.01-00, 852.00-00,
855.00-00, 988.00-00,
1272.05-00, 1278.02-00,
1283.03-01

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:FIP:B01
PLR-100898-23
Date: July 10, 2023

Fund =
Trust =
Accounting Firm =
Fund2 =
State A =
Month =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 19 =

Dear :

This is in reply to a letter dated December 23, 2022, requesting an extension of time under sections 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations for Fund to make an election under each of the following: sections 851(b)(1), 852(b)(8)(A), 855(a), 1278(b), and 1283(c)(2) of the Internal Revenue Code, (the "Code"), section 1.1272-3 of the Income Tax Regulations, and section 1.988-7 of the Proposed Income Tax Regulations, published in the Federal Register on December 19, 2017 (82 F.R. 60135).

FACTS

On Date 1, Fund was formed and commenced operations as a separate series of Trust, a statutory trust organized in State A in the year ending Date 2. Fund is registered as a diversified, open-end management investment company under the Investment Company Act of 1940, as amended.

In Month, which is more than 75 days after Date 1, Fund filed a Form 8832, *Entity Classification Election*, on which it elected to be classified as an association taxable as a corporation, effective Date 1. On Date 3 (which is after Date 4), Fund filed a second Form 8832 that was identical to the previously filed Form 8832, except the second Form 8832 requested late-election relief pursuant to Rev. Proc. 2009-41, 2009-39 I.R.B. 439.

Fund represents that Fund has, from its inception, intended to make the following elections (the "Elections") on its tax return for its first taxable year ending Date 5 ("Year 1"):

- (1) an election under section 851(b)(1) to treat Fund as a regulated investment company ("RIC") under subchapter M of chapter 1 of the Code beginning with Year 1;
- (2) an election under section 852(b)(8)(A) to defer a portion of Fund's "qualified late-year loss" (as defined in section 852(b)(8)(B)) for Year 1;
- (3) an election under section 855(a) to treat certain distributions paid after Year 1 as paid during Year 1;
- (4) an election under Prop. Reg. § 1.988-7(a) to use a mark-to-market method of accounting for section 988 gain or loss with respect to section 988 transactions except as described in Prop. Reg. § 1.988-7(b);
- (5) an election under section 1.1272-3(a) to treat all interest (as defined in section 1.1272-3(a)) on debt instruments as original issue discount;
- (6) an election under section 1278(b) to include market discount in income currently; and
- (7) an election under section 1283(c)(2) to accrue acquisition discount, instead of original issue discount, on nongovernmental short-term obligations for purposes of complying with the requirements of section 1281.

Fund represents that other series of Trust routinely make similar elections on their first tax return.

Fund prepared documents in anticipation of Fund timely making the Elections for Year 1. Fund represents that, by Date 6, Fund had: (1) prepared its initial year tax provision, tax footnotes, and audited financial statements that reflected Fund's election to be a RIC and were in accordance with RIC rules and regulations; and (2) timely filed a Form 7004, *Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns*, for Fund's Form 8613, *Return of Excise Tax on Undistributed Income of Regulated Investment Companies*, which would otherwise have been due on Date 6.

Fund engaged Accounting Firm to prepare, act as electronic return originator, and timely file a Form 1120-RIC, *U.S. Income Tax Return for Regulated Investment Companies*, for Fund's Year 1 (the "Tax Return"). At all relevant times, Fund intended to make the Elections on the Tax Return, which was prepared as if the Elections were timely made thereon.

The Elections were not timely made, because the Tax Return was not timely filed. Fund represents that the Tax Return was filed after its original due date of Date 7, but before Date 4 (the date on which the Tax Return would have been due had Fund timely filed a Form 7004 for Year 1). Fund did not file a Form 7004 for an income tax return for Year 1.

Fund represents that a Form 7004 was not filed for Fund's income tax return for Year 1 due to an administrative oversight. Fund represents that a Form 7004 was prepared for Fund by Date 6 and that Fund's name was included on a list of calendar-year clients for whom Forms 7004 were to be filed (in bulk) by Accounting Firm's centralized processing team on Date 8. Due to an oversight, however, the centralized processing team filed the Form 7004 for the similarly named Fund2, instead of Fund.

Accounting Firm discovered the mistake on Date 9, after noticing that a Form 7004 had been unexpectedly filed already for Fund2. Accounting Firm promptly informed Fund that the Elections could not be timely made on the Tax Return (which could no longer be timely filed), but Fund could request an extension of time to make the Elections. Immediately upon learning this, Fund authorized Accounting Firm to prepare and submit the request for relief to which this letter responds. Thereafter, the request for relief was prepared and submitted as soon as practical.

Fund makes the following additional representations:

1. The request for relief was filed before the failure to make the elections was discovered by the Internal Revenue Service (the "Service").
2. Granting the relief requested will not result in Fund having a lower tax liability in the aggregate for all years to which the Elections apply than it would have had if the Elections had been timely made.

3. Fund does not seek to alter a return position for which an accuracy-related penalty has been or could have been imposed under section 6662 at the time it requested relief, and the new position requires or permits the Elections.

4. Being fully informed of the required elections and related tax consequences, Fund did not choose to not file the Elections.

5. Fund is not using hindsight in requesting relief. No facts have changed since the due date for making the Elections that make the Elections more advantageous to Fund.

6. The period of limitations on assessment under section 6501(a) has not expired for Fund for Year 1 or for any taxable year that would have been affected by the Elections had they been timely filed.

In addition, affidavits on behalf of Fund and Accounting Firm have been provided as required by section 301.9100-3(e).

LAW AND ANALYSIS

Section 851(b) provides that a corporation shall not be considered a RIC for any taxable year unless it files with its return for the taxable year an election to be a RIC or has made such election for a previous taxable year. Section 1.851-2(a) provides that the taxpayer shall make its election to be treated as a RIC by computing taxable income as a RIC on its federal income tax return for the first taxable year for which the election is applicable. No other method of making such election is permitted.

Section 852(b)(8)(A) provides that a RIC may elect for any taxable year to treat any portion of any qualified late-year loss for such taxable year as arising on the first day of the following taxable year. The term "qualified late-year loss" means (i) any post-October capital loss, and (ii) any late-year ordinary loss. The term "post-October capital loss" means (i) any net capital loss attributable to the portion of the taxable year after October 31, or (ii) if there is no such loss, (I) any net long-term capital loss attributable to such portion of the taxable year, or (II) any net short-term capital loss attributable to such portion of the taxable year.

Notice 2015-41, 2015-24 I.R.B. 1058, provides that, pending further guidance, a RIC makes a section 852(b)(8)(A) election for a taxable year by giving effect to its elective deferral in computing its capital gains and losses for that taxable year and by completing its income tax return (including any necessary schedules) for the taxable year in accordance with the instructions for those items applicable to the election.

Section 855(a) provides, in relevant part, that if a RIC declares a dividend by the extended due date for filing the company's tax return for a taxable year and distributes the amount of such dividend to shareholders in the 12-month period following the close

of such taxable year and not later than the date of the first dividend payment of the same type of dividend made after such declaration, then the amount so declared and distributed shall, to the extent the RIC elects in such return in accordance with regulations prescribed by the Secretary, be considered as having been paid during such taxable year, except as otherwise provided in section 855(b) and (c).

Section 1.855-1(b)(1) provides that a section 855(a) election must be made in the return filed by the RIC for the taxable year. The election shall be made by the RIC by treating the dividend (or portion thereof) to which such election applies as a dividend paid during the taxable year in computing its investment company taxable income, or if the dividend (or portion thereof) to which such election applies is to be designated by the RIC as a capital gain dividend, in computing the amount of capital gain dividends paid during such taxable year.

Prop. Reg. § 1.988-7(a) permits a taxpayer to elect to use a mark-to-market method of accounting for section 988 gain or loss with respect to section 988 transactions, except as described in Prop. Reg. § 1.988-7(b). The election applies for the year in which the election is made and all subsequent taxable years unless it is revoked by the Commissioner or the taxpayer or, in the case of a CFC, the controlling domestic shareholders of the CFC. A taxpayer may revoke the election at any time; however, a subsequent election cannot be made until the sixth taxable year following the year of revocation and (once made) cannot be revoked until the sixth taxable year following the year of such subsequent election.

Where otherwise permitted, a taxpayer makes the election under Prop. Reg. § 1.988-7(a) by filing a statement that clearly indicates that such election has been made with the taxpayer's timely-filed original federal income tax return for the taxable year for which the election is made. Where otherwise permitted, a taxpayer revokes the election by filing a statement that clearly indicates that such election has been revoked with its original or amended federal income tax return for the taxable year for which the election is revoked. A taxpayer may rely on Prop. Reg. § 1.988-7 before those rules are finalized, provided the taxpayer consistently applies the proposed regulations for all taxable years that end before the first taxable year ending on or after the date the proposed regulations are published as final regulations in the Federal Register. 82 FR 60135, 60141 (Dec. 19, 2017).

Under section 1.1272-3(a) a holder of a debt instrument may elect to include in gross income all interest that accrues on the instrument by using the constant yield method. Under section 1.1272-3(d), a holder makes the election by attaching to the holder's timely filed Federal income tax return a statement that the holder is making an election under this section and that identifies the debt instruments subject to the election.

Under section 1278(b), a taxpayer may elect to include accrued market discount in income currently, in lieu of including accrued market discount in income as described

in section 1276(a). This election applies to all market discount bonds acquired by the taxpayer on or after the first day of the first taxable year to which the election applies.

Section 3.02 of Rev. Proc. 92-67 provides the procedures for making a section 1278(b) election. An otherwise qualified taxpayer makes a section 1278(b) election by attaching to the taxpayer's timely filed income tax return for the election year a statement that market discount has been included in the gross income of the taxpayer under section 1278(b) of the Code. The statement must also describe the method used by the taxpayer to determine the market discount attributable to the taxable year covered by the tax return.

Under section 1283(c)(2) a holder of a nongovernmental short-term debt obligation may elect to include in gross income all interest that accrues on the obligation by taking into account acquisition discount, in lieu of OID, on the instrument. This election applies to the taxable year for which it is made and for all subsequent taxable years (unless the taxpayer secures the consent of the Secretary to the revocation of such election). Section 301.9100-6T provides procedures for making the election under section 1283(c)(2), which shall be made by no later than the due date (taking extensions into account) of the tax return for the first taxable year for which the election is to be effective.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Code except subtitles E, G, H, and I. Section 301.9100-1(b) defines a regulatory election as an election whose due date is prescribed by regulations or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(b) provides that the term *election* includes an application for relief in respect of tax; a request to adopt, change, or retain an accounting method or accounting period; but does not include an application for an extension of time for filing a return under section 6081.

Section 301.9100-3(a) through (c)(1) sets forth rules that the Service generally will use to determine whether, under the particular facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of section 301.9100-2. Section 301.9100-3(a) provides that requests for relief subject to this section will be granted when the taxpayer provides the evidence (including affidavits described in section 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.

Section 301.9100-3(b) provides that a taxpayer generally is deemed to have acted reasonably and in good faith if the taxpayer (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 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 Service; 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. A taxpayer will be deemed to have not acted reasonably and in good faith, however, 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 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.

Section 301.9100-3(c)(1) provides that a reasonable extension of time to make a regulatory election will be granted only when the interests of the Government will not be prejudiced by the granting of relief. Section 301.9100-3(c)(1)(i) provides 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). Section 301.9100-3(c)(1)(ii) provides that the interests of the Government are ordinarily prejudiced if 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 are closed by the period of limitations on assessment under section 6501(a) before the taxpayer's receipt of a ruling granting relief under this section.

Section 301.9100-3(c)(2) provides special rules for accounting method regulatory elections. Under these rules, the interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested (i) is subject to the procedure described in section 1.446-1(e)(3)(i) (requiring the advance written consent of the Commissioner); (ii) requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made); (iii) would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or (iv) provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

Each of the Elections is a regulatory election, because it is an election for which the due date is prescribed by regulations or by a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin. Accordingly, the

Commissioner has the discretion under sections 301.9100-1 and 301.9100-3 to grant a reasonable extension of time to file the Elections.

Granting reasonable extensions for the Elections that are accounting method regulatory elections for purposes of section 301.9100-3(c)(2) does not prejudice the interests of the Government in these circumstances. Fund has filed its first and only income tax return in a manner consistent with the Elections and before the date that the return would have been due if Fund's Form 7004 had been timely filed.

CONCLUSION

Based upon the facts and representations submitted, we conclude that Fund has satisfied the requirements for granting a reasonable extension of time to make the Elections. Thus, these elections will be treated as having been timely made even though the Tax Return was not mailed to the Service (or otherwise filed) until Date 6.

This ruling is limited to the timeliness of the filing of the Elections. This ruling's application is limited to the facts, representations, Code sections, and regulations cited herein. Except as specifically provided otherwise, no opinion is expressed on the federal income tax consequences of any transaction or item discussed or referenced in this letter. Specifically, no opinion is expressed regarding any material item or representation on the Tax Return. Additionally, no opinion is expressed with regard to whether Fund otherwise qualifies to make the Elections or whether Fund has made or could make any of Elections without this ruling.

The ruling contained in this letter is based upon information and representations submitted by Fund and accompanied by penalty of perjury statements, each executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for ruling, it is subject to verification on examination.

This ruling is directed only to the taxpayer that 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, a copy of this letter is being sent to Fund's authorized representative.

Sincerely,

Steven Harrison
Branch Chief, Branch 1
Office of Associate Chief Counsel
(Financial Institutions and Products)

cc: