

Relief for Late S Corporation Elections: Revenue Procedures 2013-30 and 2022-19, Reasonable Cause, and Form 2553

MONDAY, JUNE 12, 2023, 1:00-2:50 pm Eastern

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June 12, 2023

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RELIEF FOR LATE S CORPORATION ELECTIONS: REV. PROCS. 2013-30 AND 2022-19, REASONABLE CAUSE

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Agenda

- S Corporation Elections
- Late and Ineffective Elections
 - Improperly Prepared Elections
 - Untimely Filed Elections
- Revenue Procedure 2013-30
 - Scope of the Procedure
 - Procedural Requirements
- Private Letter Ruling Requests
- Revenue Procedure 2022-19
- LLCs Electing S Corporation Status
- Best Practices



Late S Corporation Elections

Biographical Information

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Relief for Late S Corporation Elections

S Corporation Elections, Generally



S Corporation Election

- Good Reasons for S Corporation Election
 - Reduction of self-employment (SE) taxes in LLC
 - Avoidance of double-taxation with corporations
 - Corporate governance structure with (mostly) pass-through taxation
- But consider:
 - BIG tax
 - Not 'Qualified Small Business Stock' for purposes of Section 1202



S Corporation Election

- Reduction of SE Tax in LLC setting
 - S election can be used to limit the amount of Social Security and Medicare taxes (the components of SE tax) levied on income (15.3%)
 - Consider passive vs. active income determination
 - Consider 199A deduction
 - Income reported on (K-1) is generally not subject to SE taxes
 - Amounts paid as salary remains subject to SE taxes



S Corporation Election

- Avoidance of Double Taxation with corporations
 - Shareholder distributions replace dividends
 - Shareholder distributions are not generally taxed provided not in excess of basis, but ordinary business income is taxed as ordinary income
- Distributable amounts rarely equal ordinary business income
 - Depreciation, accruals, accounting method can result in timing disparities



S Corporation Election

- When does it make economic sense to cause an LLC to be taxed as an S Corporation?
 - Short answer: when the tax savings exceeds the additional administrative costs
 - Consider savings is only applicable to net income (i.e., after payment of reasonable salary, other expenses)
 - Consider also other business taxes like California's 1.5% franchise tax or other similar "corporate" taxes (NYC, NJ, etc.)

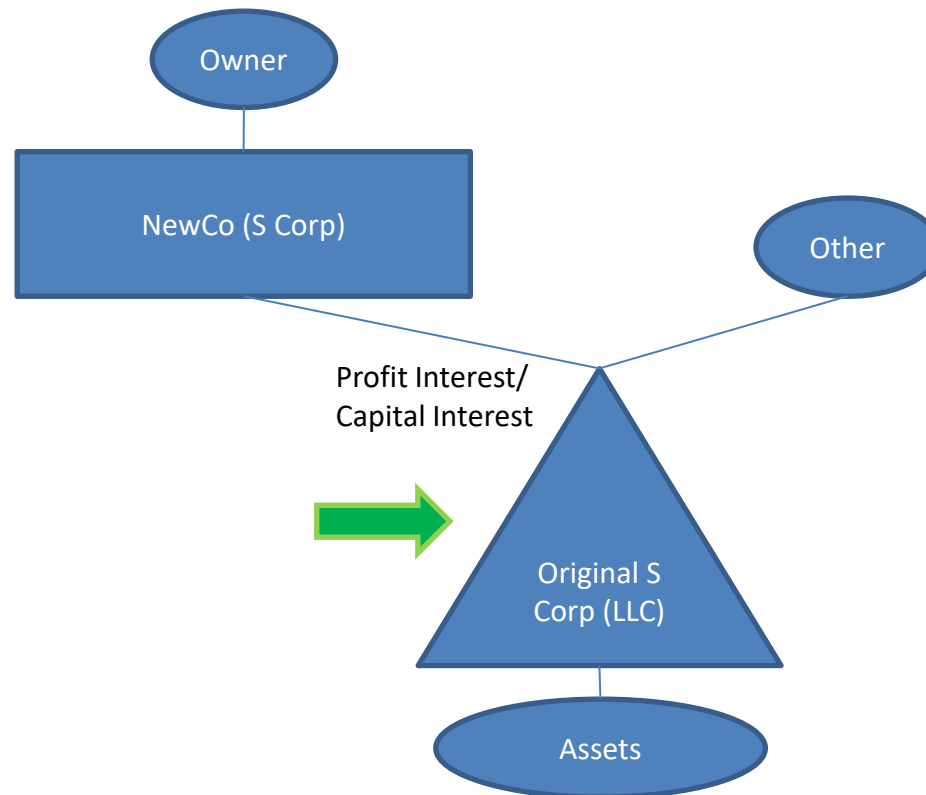


S Corporation Election

- Downsides to S Corp Election
 - Additional Costs (administration, taxes)
 - Trapped Assets (consider appreciation)
 - Distributions (basis limitation)
 - No debt-financed distributions
 - Gain triggered on certain property distributions
 - Ownership and financing limitations
 - C Corp Matters (BIG tax, NOLs, no QSBS)

S Corporation Election

- Creative planning opportunity – the S Corp inversion





S Corporation Election

- More on Qualified Subchapter S Subsidiaries (QSubs)
 - Eligibility requirements are similar to S Corp
 - QSubs are treated as disregarded entities for U.S. federal income tax purposes
 - Can be used to isolate liability, achieve accounting objectives



S Corporation Election Eligibility

- Business Entities (Treas. Reg. § 301.7701-2)
 - Any recognized entity for federal tax purposes including any entity with a single owner that may be disregarded
 - Two or more owners is classified for federal tax purposes as a corporation or a partnership
 - One owner is classified as a corporation or is disregarded
 - Corporation defined under Treas. Reg. § 301.7701-2(b)



S Corporation Election Eligibility

- Eligibility requirements for the S election generally:
 - Entity must be a domestic corporation (or an entity eligible to elect such status)
 - Have 100 or fewer shareholders
 - Have shareholders who are only individuals, certain estates and trusts
 - no partnership, corporate, or non-resident alien shareholders permitted
 - Have only one class of stock (voting and non-voting is OK and still considered one class).



S Corporation Election Mechanics

- Timely Elections (LLC, Corporation)
 - Within 15 days and two months of January 1 or entity “activation”
 - Activation date is earliest date of (i.e., maybe not formation date)
 - a) has shareholders / members (owners – consider SoS position upon filing articles of incorporation),
 - b) acquires assets or
 - c) begins conducting business



S Corporation Election Mechanics

- Form 8832 & Form 2553
 - LLC classified as an association, taxable as a corporation
 - Deemed to have
 - a) transfer assets and liabilities for stock (assets-over)
 - b) stock distributed to owners in liquidation
 - Tax-free provided:
 - a) IRC 351(a) applies, and
 - b) liabilities are less or equal to basis of assets (IRC 357)



S Corporation Election Mechanics

- Form 8832 not strictly required
- An LLC filing Form 2553 is deemed to make the election:

“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,” (Treas. Reg. § 301.7701-3(c)(1)(v)(C))



S Corporation Election Mechanics

- Possible Form 2553 Issues
 - Dates are incorrect or don't follow rules
 - Improper mailing address
 - Signatures are not “wet” (no DocuSign, AdobeSign, etc.)
 - COVID relief did not include Form 2553



S Corporation Election

- States
 - Most states follow the federal election
 - Arkansas, New York, New Jersey, Ohio and Wisconsin
 - Consider supplemental filing obligations (e.g., Utah)
 - Generally nothing needs to be done with Secretary of State
 - In community property states, non-owner spouse should sign



Relief for Late S Corporation Elections

Revenue Procedure 2013-30

Rev. Proc. 2013-30

Scope of Available Relief

- In general, Rev. Proc. 2013-30 provides an expeditious procedure to make certain late S corporation and related elections, without using the private letter ruling request process, within three years and 75 days of the intended effective date.
- The procedure is available for the following elections:
 - S corporation elections;
 - Qualified subchapter S subsidiary (“QSub”) elections;
 - Qualified subchapter S trust (“QSST”) elections;
 - Electing small business trust (“ESBT”) elections; and
 - Entity classification (check-the-box) elections made in connection with an S corporation election.
- The procedure does not apply to ineffective S corporation elections or inadvertent terminations, except in the case of QSST and ESBT elections.

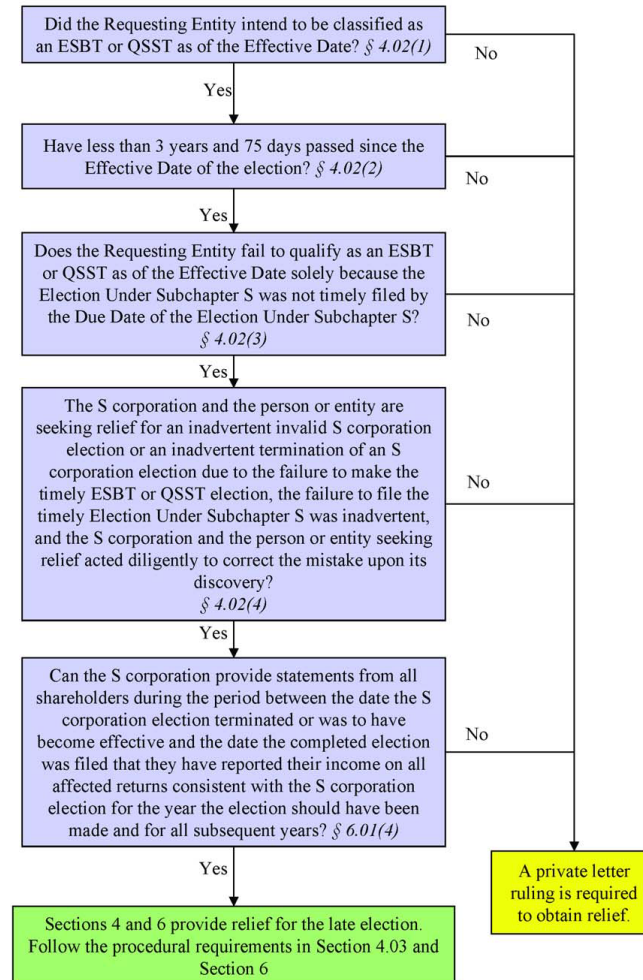
Rev. Proc. 2013-30

Statutory and Regulatory Authority

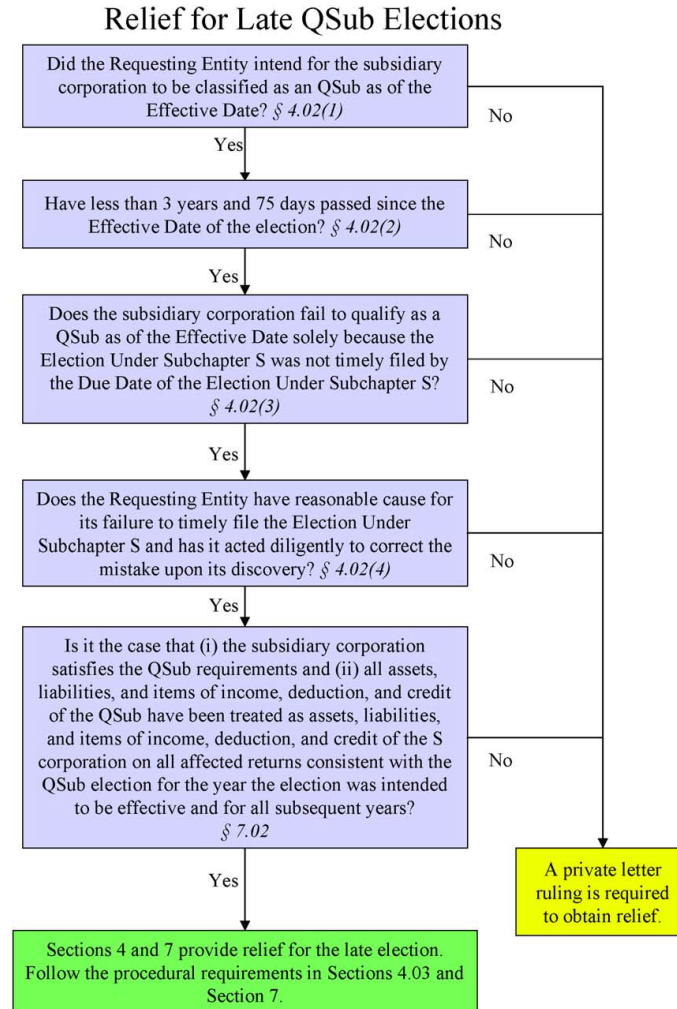
- The procedural requirements set forth in Rev. Proc. 2013-30 vary and are based on the underlying statutory and regulatory authority applicable to each type of election.
- The authority for each late election is as follows:
 - S corporation elections are made pursuant to section 1362(b)(5);
 - QSub elections are made pursuant to section 1361(b)(3)(B) and Treas. Reg. § 301.9100-3;
 - QSST elections are made pursuant to section 1362(f) (ineffective elections and inadvertent terminations);
 - ESBT elections are made pursuant to section 1362(f); and
 - Entity classification elections are made pursuant to Treas. Reg. §§ 301.7701-3 and 301.9100-3.

Rev. Proc. 2013-30 Flowchart 1

Relief for Late QSST & ESBT Elections

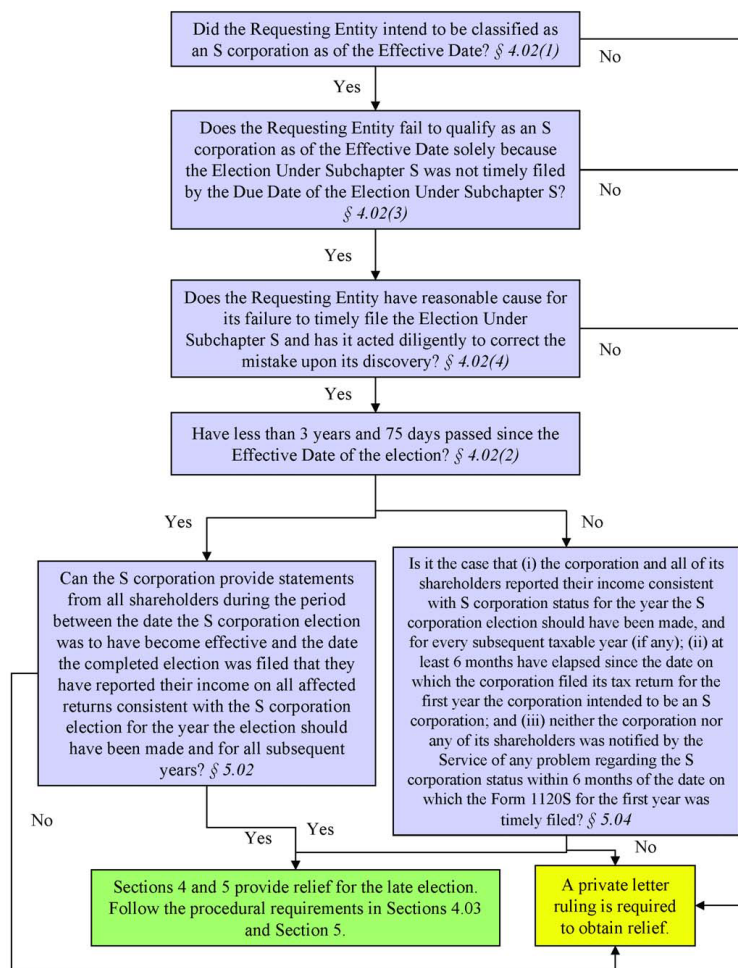


Rev. Proc. 2013-30 Flowchart 2



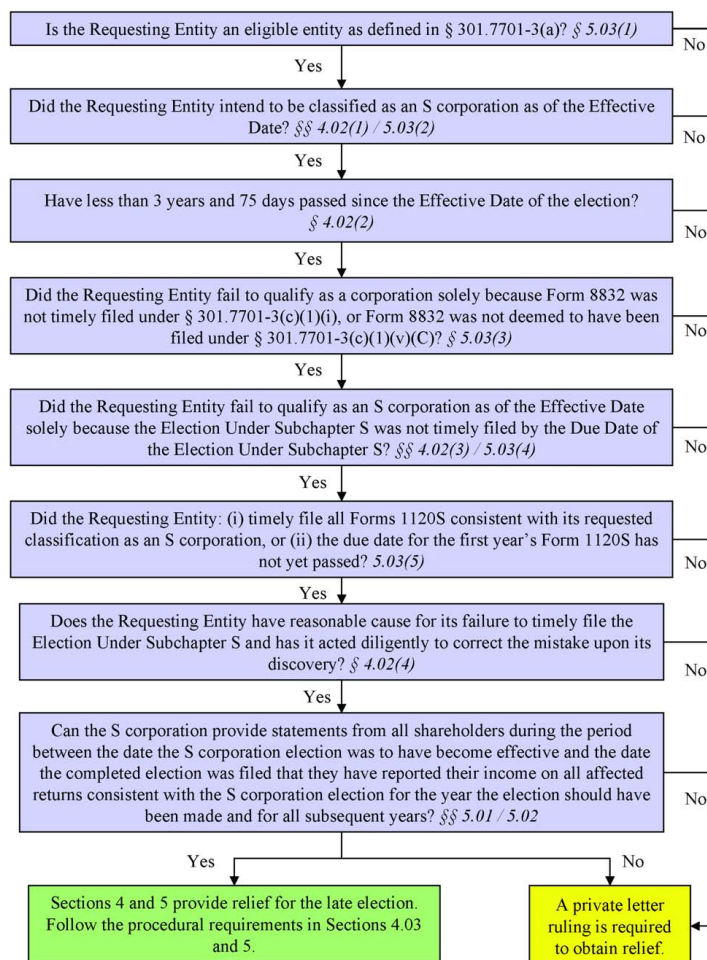
Rev. Proc. 2013-30 Flowchart 3

Relief for Late S Corporation Elections



Rev. Proc. 2013-30 Flowchart 4

Relief for Late S Corporation and Entity Classification Elections for the Same Entity





Late S Corp Election - Mechanics

- Form 2553 Completion
 - Complete 2553 as you normally do
 - Follow/comply with the requirements of Rev. Proc. 2013-30
 - Write “FILED PURSUANT TO REV PROC 2013-30” across the top
 - Add explanation in Section H and attach reasonable cause letter



Late S Corp Election - Mechanics

Filed Pursuant to REV PROC 2013-30

Form **2553**
(Rev. December 2007)
Department of the Treasury
Internal Revenue Service

Election by a Small Business Corporation
(Under section 1362 of the Internal Revenue Code)
▶ See Parts II and III on page 3 and the separate instructions.
▶ The corporation can fax this form to the IRS (see separate instructions).

OMB No. 1545-0146

Note. This election to be an S corporation can be accepted only if all the tests are met under **Who May Elect** on page 1 of the instructions; all shareholders have signed the consent statement; an officer has signed below; and the exact name and address of the corporation and other required form information are provided.



Late S Corp Election - Mechanics

Section H

H Name and title of officer or legal representative who the IRS may call for more information	I Telephone number of officer or legal representative
<input type="text"/>	(<input type="text"/>) <input type="text"/>

If this S corporation election is being filed with Form 1120S, I declare that I had reasonable cause for not filing Form 2553 timely, and if this election is made by an entity eligible to elect to be treated as a corporation, I declare that I also had reasonable cause for not filing an entity classification election timely. See below for my explanation of the reasons the election or elections were not made on time (see instructions).

Filed pursuant to Rev Proc 2013-30. Please see the reasonable cause statement for failure to file a timely election

under subchapter S. The company has acted diligently to correct the mistake upon its discovery.



Late S Corp Election - Mechanics

Reasonable Cause

Please find attached Form 2553. ABC Company LLC is requesting relief under Rev Proc 2013-30 for a late election to be treated as an S-Corporation. The following requirements have been met:

- (1) The entity intended to be classified as an S-Corporation as of the effective date;
- (2) The entity is an eligible entity as described in Reg. Sec. 301.7701-3(a)
- (3) The entity requests relief under this revenue procedure within 3 years and 75 days after the effective date;
- (4) The failure to qualify for its intended status as an S corporation as of the effective date was solely because the Election Under Subchapter S was not timely filed by the due date of the election under subchapter S;
- (5) The entity has reasonable cause for its failure to file a timely Form 2553 and has acted diligently to correct the mistake upon discovery;
- (6) No taxpayer whose tax liability or tax return would be affected by the S corporation election (including all shareholders of the S corporation) has reported inconsistently with the S corporation election, on any affected return for the year the S corporation election was intended.
- (7) The requesting entity has not filed a federal tax or information return for the first year in which the election was intended to be effective because the due date has not passed for that year's federal tax or information return.



Late S Corp Election - Mechanics

- Reasonable Cause (*continued*)
- Examples:
 - The company inadvertently failed to file Form 2553 in a timely manner based on misinformation provided by the company's prior tax professional. The company's current tax professional and accounting firm of record has advised the company to file Form 2553 based on meeting the criteria outlined above. Because ABC Company LLC is an LLC, electing to be taxed as an S-Corp, only Form 2553 is required to be filed and Form 8832 is not required since the election is deemed to have been made.
 - The information necessary to make an informed decision about the entity's status was not available in time to file a timely election, as the taxpayer's accountants did not present it to the taxpayer at that time. As a small business with a single owner, the entity originally was set up as a disregarded entity for administrative convenience. Based on the entity's current business and consultation with the entity's accountants during the current tax year, the taxpayer now intends to elect S corporation status for the entity."



Relief for Late S Corporation Elections

Private Letter Ruling Requests



Private Letter Rulings

General Considerations

- Rev. Proc. 2023-1 (updated annually) sets forth the detailed requirements for requesting letter rulings, determination letters, closing agreements, information letters, and oral advice.
- Rev. Proc. 2023-3 (updated annually) sets forth areas in which the Service will not (or ordinarily will not) issue a private letter ruling.
- Every request for a letter ruling must contain the following detailed segments:
 - Identification of taxpayer;
 - All relevant facts;
 - Specific ruling(s) requested;
 - Statement of authorities;
 - Analysis of authorities and application to facts;
 - Statement of conclusion as to the rulings requested;
 - Approximately 12 specific statements required by Rev. Proc. 2023-1; and
 - Specified administrative statements.



Private Letter Rulings

General Considerations (Cont'd)

- Request package (for 9100 relief) generally consists of the following documents:
 - Ruling request itself;
 - Taxpayer's declaration under penalties of perjury;
 - Required affidavit(s);
 - Form 2848, Power of Attorney;
 - Deletions statement;
 - Detailed checklist; and
 - Applicable user fee (payable only electronically through www.pay.gov).

Private Letter Rulings

Schedule of Relevant 2023 User Fees

Category	User Fee
Relief under Treas. Reg. § 301.9100-3, generally, and late election relief under section 1362(b)(5)	\$ 12,600
Request from a person with gross income of less than \$250,000	3,000
Request from a person with gross income of less than \$1 million and \$250,000 or more	8,500
Requests not seeking relief under Treas. Reg. § 301.9100-3	38,000
Substantially identical ruling requests (after first fee is paid)	Up to \$ 3,800

Private Letter Rulings

Section “9100” Standards

- Pursuant to Treas. Reg. § 301.9100-1(c), the Commissioner in exercising the Commissioner’s discretion may grant a reasonable extension of time under the rules of Treas. Reg. §§ 301.9100-2 and 301.9100-3 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 Code except subtitles E, G, H, and I.
- The two types of elections:
 - The term “statutory election” means an election whose due date is prescribed by statute.
 - The term “regulatory election” means an election whose due date is prescribed by a regulation, a revenue ruling, a revenue procedure, a notice, or an announcement of the Service.
- The excluded subtitles are E (alcohol, tobacco, and certain other excise taxes), G (Joint Committee on Taxation), H (financing of presidential election campaigns), and I (Trust Fund Code).

Private Letter Rulings

Automatic Extensions

- Pursuant to Treas. Reg. § 301.9100-2(a), an automatic 12-month extension from the due date of the election is available for specified elections:
 - Section 444 election to use other than the required taxable year;
 - Section 472 election to use the last-in, first-out method of inventory accounting;
 - The 15-month rule for filing exemption applications under section 505 or 508;
 - Section 528 election to be treated as a homeowners association;
 - Section 754 election to adjust the basis of partnership property;
 - Section 2032A(d)(1) election to specially value qualified real property of an estate;
 - Chapter 14 gift tax election to treat a qualified payment right as other than a qualified payment under section 2701(c)(3)(C)(i); and
 - Chapter 14 gift tax election to treat any distribution right as a qualified payment under section 2701(c)(3)(C)(ii).
- The 12-month extension is available regardless of whether the taxpayer timely filed the return for the year the election should have been made.

Private Letter Rulings

Automatic Extensions (Cont'd)

- Pursuant to Treas. Reg. § 301.9100-2(b), an automatic six-month extension is available from the due date of the return, ***excluding extensions***, for making any statutory or regulatory election whose due date is the due date of the return including extensions.
- The six-month extension is available only where the taxpayer timely filed a return for the taxable year for which the election should have been made.
- In the case of both types of extensions, corrective action is required to be completed within the period of the extension, generally including:
 - Making the election itself;
 - Filing original or amended tax return, in cases where the election must be made with the return;
 - Consistent treatment by all affected taxpayers, *i.e.*, consistent with the intended election; and
 - Inserting at the top of the election “FILED PURSUANT TO § 301.9100-2.”



Private Letter Rulings

Other (Non-Automatic) Extensions

- Pursuant to Treas. Reg. § 301.9100-3(a), requests for extensions of time to make regulatory elections that do not meet the requirements for automatic relief may be granted where the taxpayer establishes to the satisfaction of the Commissioner that:
 - The taxpayer acted reasonably and in good faith; and
 - Granting relief will not prejudice the interests of the Government.
- Except in cases where the Service has provided a means of seeking expeditious relief (usually in a revenue procedure), relief under Treas. Reg. § 301.9100-3(a) is available only through the submission of a request for a private letter ruling.

Private Letter Rulings

Other (Non-Automatic) Extensions (Cont'd)

- Pursuant to Treas. Reg. § 301.9100-3(a), requests for extensions of time to make regulatory elections that do not meet the requirements for automatic relief may be granted where the taxpayer establishes to the satisfaction of the Commissioner that:
 - Requests relief before the failure to make the election is discovered by the IRS;
 - Failed to make the election because of intervening events beyond the taxpayer's control;
 - 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;
 - Reasonably relied on the written advice of the IRS; or
 - Reasonably relied on a qualified tax professional, including one employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.
- As drafted, it is only necessary to demonstrate that one of these conditions is present.

Private Letter Rulings

Other (Non-Automatic) Extensions (Cont'd)

- A taxpayer will not be considered to have reasonably relied on a qualified tax professional if the taxpayer knew or should have known that the professional was not:
 - Competent to render advice on the regulatory election; or
 - Aware of all relevant facts.
- A taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer:
 - Seeks to alter a return position for which an accuracy-related penalty has been or could be imposed at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested;
 - Was informed in all material respects of the required election and related tax consequences but chose not to file the election; or
 - Uses hindsight in requesting relief (particularly where specific facts have changed since the due date for making the election that make the election advantageous).



Private Letter Rulings

Other (Non-Automatic) Extensions (Cont'd)

- The Commissioner will grant a reasonable extension of time to make a regulatory election only where the interests of the Government are not prejudiced by the granting of relief.
- The interests of the Government are prejudiced if granting relief would result in a 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).
 - Where the tax consequences of more than one taxpayer are affected by the election (such as the partners of a partnership or the shareholders of an S corporation), the Government's interests are prejudiced if extending the time for making the election may result in the affected taxpayers, in the aggregate, having a lower tax liability than if the election had been timely made.

Private Letter Rulings

Other (Non-Automatic) Extensions (Cont'd)

- 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.
 - A grant of relief may be conditioned on the taxpayer providing the IRS with a statement from an independent auditor (other than one providing a required affidavit) “certifying” that the interests of the Government are not prejudiced under the “lower tax liability” standard.
- The interests of the Government are deemed to be prejudiced, except in unusual and compelling circumstances, for:
 - Accounting method regulatory elections in four specified cases; and
 - Accounting period regulatory elections filed more than 90 days after the due date.

Private Letter Rulings

Affidavit Requirements for Non-Automatic Extensions

- A detailed affidavit, accompanied by a penalties-of-perjury declaration, must be provided by the taxpayer (including an officer or other agent) describing:
 - The events that led to the failure to make a valid regulatory election;
 - The events that led to the discovery of the failure; and
 - The nature of the engagement and responsibilities of any qualified tax professional and the extent to which the taxpayer relied on the professional.
- A detailed affidavit, accompanied by a penalties-of-perjury declaration, must also be provided by one or more of the following individuals having knowledge or information about the failure to make the election and its discovery:
 - The taxpayer's tax return preparer;
 - Any individual who made a substantial contribution to the preparation of the return; and
 - Any accountant or attorney, knowledgeable in tax matters, who advised the taxpayer with regard to the election.

Private Letter Rulings

Typical Sources of S Corporation Relief

- Section 1362(f) relief is sought by S corporations in the following cases:
 - Late QSST or ESBT elections beyond the Rev. Proc. 2013-30 time periods;
 - Ineffective S corporation elections and inadvertent terminations for reasons other than timely QSST/ESBT elections, *e.g.*, second class of stock, impermissible shareholder, section 1362(d)(3); and
 - Ineffective QSub elections and inadvertent terminations for reasons other than failure of the S corporation to qualify.
- Section 1362(b)(5) relief is sought by S corporations (although rare) beyond the Rev. Proc. 2013-30 time period.
- Late QSub election relief is sought by S corporations, beyond the Rev. Proc. 2013-30 time period, pursuant to Treas. Reg. § 301.9100-3.



Relief for Late S Corporation Elections

Revenue Procedure 2022-19

Revenue Procedure 2022-19

Updated “No-Rule” Policies

- In order to reduce the number of ruling requests involving S corporations, the Service identified several categories of issues not suitable for rulings, including:
 - Questions that are factual and thus not suitable for the process;
 - Circumstances that do not result in termination of an S corporation election;
 - Matters that can be resolved through automatic or expeditious procedures; and
 - Matters involving “non-identical governing provisions.”
- In addition to placing these areas under the new and expanded “no-rule” policy, Rev. Proc. 2022-19 provided additional guidance in these areas:
 - Delineating the Form 2553 errors that adversely affect the election and those that do not;
 - Procedures for addressing Form 2553 minor errors;
 - Procedures for obtaining replacement notices of election acceptance; and
 - Procedures for addressing non-identical governing provisions.

New/Expanded/Clarified No-Rule Areas

Rev. Proc. 2022-19

Qualification Issue	Reason(s) for No-Rule Policy
Agreements and arrangements with no principal purpose to circumvent the one-class-of-stock requirement	Existence of a principal purpose of circumvention is factual, to be resolved by Examination
Governing provisions that provide for identical distributions and liquidation rights (the disproportionate distribution issue)	Existence of disproportionate distributions does not itself violate the single-class-of-stock requirement
Missing shareholder consents	Use Treas. Reg. § 1.1362-6(b)(3)(iii) or Rev. Proc. 2004-35 where applicable
Missing officer's signature	Use Rev. Proc. 2013-30 where applicable
Other inadvertent errors or omissions	May be addressed through correspondence

New/Expanded/Clarified No-Rule Areas (Cont'd)

Rev. Proc. 2022-19

Qualification Issue	Reason(s) for No-Rule Policy
Errors with regard to a permitted taxable year	Use Rev. Proc. 2013-30 where applicable
Verification of S corporation or qualified subchapter S subsidiary (“QSub”) elections	Replacement acceptance letters may be requested with a telephone call
Retroactively correcting one or more non-identical governing provisions—no disproportionate distributions and not discovered by the Service	May be addressed by taking corrective action and preparing corrective relief statements to be retained in the records of the taxpayer



Relief for Late S Corporation Elections

Limited Liability Companies Electing S Corporation Status

LLCs as S Corporations

Introductory Considerations

- In order to a “small business corporation” under section 1361(b)(1), an entity must first be a domestic corporation which is not an ineligible corporation.
 - Section 7701(a)(3) provides that the term “corporation” includes associations, joint-stock companies, and insurance companies.
 - Under the entity classification, or “check-the-box” regulations, the term “corporation” includes a business entity organized under a federal or state statute that describes or refers to the entity as incorporated or as a corporation.
 - Other business entities not on the “per se” list are “eligible entities,” *i.e.*, eligible to choose their classification for federal tax purposes.
- A state-law limited liability company (“LLC”) is a domestic eligible entity, which may be classified in any one of three ways:
 - An association taxable as a corporation (with a check-the-box election);
 - A partnership if it has two or more members (without a check-the-box election); or
 - A disregarded entity if it has a single owner (without a check-the-box election).

LLCs as S Corporations

S Corporation Election Considerations

- Pursuant to Treas. Reg. § 301.7701-3(c)(1)(v)(C), an eligible entity that elects to be an S corporation is treated as having made an election to be classified as a corporation, provided that:
 - The S corporation election under section 1362(a)(1) is timely; and
 - As of the effective date of the election, the entity meets all of the requirements to qualify as a small business corporation under section 1361(b).
- Stated differently, if an S corporation election for an LLC is either not timely or not valid, there is no “deemed” check-the-box election.
- In the case of an S corporation election for an LLC that is late, but otherwise valid, Form 2553 may be used under the authority of Rev. Proc. 2013-30 to make both late elections:
 - Part I, Line I requires an explanation of the reasonable cause and a description of the diligent actions taken to correct the mistake upon its discovery.
 - For the late entity classification election, the entity must also be able to make all five of the representations set forth in Part IV.

LLCs as S Corporations

Single-Class-of-Stock Requirement

- Treas. Reg. § 1.1361-1(l)(1) provides that “a corporation is treated as having only one class of stock if all outstanding shares of stock of the corporation confer identical rights to distribution and liquidation proceeds.”
- A determination as to whether a corporation has only one class of stock is made based on its governing provisions, which consist of the following:
 - Corporate charter, articles of incorporation, bylaws, and applicable state law;
 - Binding agreements relating to distribution and liquidation proceeds; and
 - Commercial contractual agreements, such as a lease, employment agreement, or loan agreement, **but only if** a principal purpose of the agreement is to circumvent the single-class-of-stock requirement.
- Provided that the governing provisions are “clean,” distributions that differ in timing or amount do not adversely affect an entity’s compliance with the single-class-of-stock requirement.



LLCs as S Corporations

Effect of “Bad” Operating Agreement Provisions

- An entity organized as a limited liability company under state law may have an operating agreement that uses subchapter K capital account language, and may have the following key provisions:
 - Maintenance of capital accounts;
 - Special allocations of income or loss;
 - Qualified income offsets; and
 - Liquidating (or non-liquidating) distributions made in accordance with positive balances in capital accounts.
- Provisions for liquidating distributions in accordance with capital account balances are generally inconsistent with the single-class-of-stock requirement.
- Until Rev. Proc. 2022-19 was issued, section 1362(f) relief should have been pursued to remedy the consequences of the ineffective election or inadvertent termination.

LLCs as S Corporations

Section 1362(f) Relief (Where Required)

- Section 1362(f) provides that the Service may grant relief for certain ineffective elections or termination of elections where four requirements are met:
 - An S corporation or qualified subchapter S subsidiary election was ineffective or terminated;
 - The Secretary determines that the circumstances resulting in such ineffectiveness or termination were inadvertent;
 - No later than a reasonable time after discovery of the circumstances resulting in such ineffectiveness or termination, appropriate corrective steps were taken; and
 - The corporation and each shareholder agree to make such adjustments (consistent with the intended treatment) as may be required by the Secretary.
- In general, a request for relief under section 1362(f) is made by filing a request for a letter ruling. Treas. Reg. § 1.1362-4(c).



LLCs as S Corporations

Revenue Procedure 2022-19

- The newly-defined term “non-identical governing provision” means any governing provision that would cause a corporation to have more than one class of stock.
- Corrective relief (not requiring a private letter ruling) is available where four requirements are met:
 - The corporation has or had one or more non-identical governing provisions;
 - The corporation has not made, and is not deemed to have made, a disproportionate distribution to an applicable shareholder;
 - The corporation has timely filed a return on Form 1120-S for all relevant taxable years; and
 - Before any such provision is discovered by the Service, the corporation and its shareholders prepare and complete corrective relief statements.
- Corrective relief statements generally contain much of the same information that would have been included in a request for relief under section 1362(f) through the private letter ruling request process.



Relief for Late S Corporation Elections

Best Practices



Best Practices

Governing Provisions and Other Relevant Documents

- Obtain, review, and retain copies of all applicable “governing provisions,” including:
 - Articles or Certificate of Incorporation
 - Bylaws
 - Binding agreements (if any) regarding distributions and liquidation proceeds
- Consider whether other agreements create second-class-of-stock issues:
 - Contracts, such as leases, employment agreements, and loans
 - Buy-sell and redemption agreements
 - Options and warrants
 - Convertible debt
 - Other instruments purporting to be debt



Best Practices

Shareholder Status

- Obtain, review, and retain copies of all applicable trust agreements where trusts own stock
 - Grantor trust status
 - Qualified subchapter S trust, election, and distribution requirement
 - Electing small business trust and election
- Individual shareholder analysis
 - Members of the same family?
 - Verification of citizen or resident shareholders
- Death of direct individual shareholder or deemed owner of trust



Best Practices

Relating to Annual Tax Return Preparation

- Review shareholder list to determine whether there are persons who first acquired stock during the year
 - Individuals
 - Estates of decedents
 - New trusts
 - Impermissible shareholders (??)
- Review distributions made during the year
 - Proportionate to stock ownership?
 - Modified to take into account changes in stock ownership during the year?

Questions?



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