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Date: March 13, 2003

Taxpayer1 =
Taxpayer2 =
State X =
S-Firm =
Date1 =
Date2 =
Date3 =
Date4 =
Year1 =
$a =
$b =

Dear :

This responds to your letter of November 19, 2002, on behalf of Taxpayer1 and Taxpayer2 (collectively "Taxpayers") requesting a ruling pursuant to Treas. Reg. §§ 301.9100-1 and -3 for an extension of time to execute a consent dividend election under I.R.C. § 565 for the year ended Date1.

Taxpayer1 is a holding company. Taxpayer1 owns 100% of the shares of Taxpayer2. Taxpayer2 holds, manages and occasionally buys/sells investments in marketable securities. Taxpayer2 also owns, directly or indirectly, 100% of the shares of certain operating subsidiaries. Its primary subsidiary is an

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Taxpayers and their subsidiaries file a consolidated federal income tax return. Taxpayer1 is the common parent of the consolidated group. For the year ended Date1 and for several prior years, both Taxpayers met the definition of a personal holding company in § 542(a). Taxpayer1's consolidated group was considered an ineligible affiliated group under § 542(b)(2). Accordingly, each member of the group was tested separately for purposes of determining personal holding company status. Taxpayers have historically recognized their personal holding company status each year and properly completed and filed Form PH with their federal returns.

Taxpayer1 has engaged S-Firm, a public accounting firm, to prepare its federal income tax returns and advise it on tax matters for many years. As part of its engagement, S-Firm has calculated the amount, if any, of Taxpayers' potential undistributed personal holding company (PHC) income each year. It has been Taxpayers' consistent practice and intention each year to make actual dividends, if such dividends were required, in the full amount necessary to eliminate its estimated undistributed PHC income for the year. It has been Taxpayer2's consistent practice and intention each year to make consent dividends in the full amount that was required to eliminate the excess of any actual undistributed PHC income over estimated undistributed PHC income for the year. All prior consent dividend elections have been timely filed.

S-Firm prepared Taxpayer1's Year1 consolidated federal return, including Schedule PH for Taxpayers, and determined that neither company had any undistributed PHC income as of Date1.

Taxpayer1 timely filed its original Year1 federal return with the I.R.S. in by the extended due date of Date2. Taxpayer1 reported a consolidated net operating loss (NOL) for the year. Taxpayer1 elected to carry back the NOL under § 172 and filed Form 1139 to request a refund of federal income taxes paid in prior years. The refund was received on or about Date3.

Shortly after receiving the refund, Taxpayer1 determined that the consolidated NOL reported in its original Year1 federal return was overstated by $a. Taxpayer1 discovered the overstatement during a post-filing reconciliation of its financial statement tax provision to its tax return.

The overstatement above was caused by the incorrect tax treatment of a loss recorded by Taxpayer2 under Statement of Financial Accounting Standard (SFAS) No. 133, Accounting for Derivative Instruments and Hedging Activities. Taxpayer2 adopted SFAS No. 133 in Year1 and was required to record a book loss related to a decline in value of certain financial instruments. This was an unrealized loss that was not deductible in Year1 for tax purposes. However, S-Firm inadvertently failed to reverse the loss when it prepared the original Year1 federal return.

The primary cause of the oversight by S-Firm was the fact that the type of loss at

issue was new for Year1. Prior to adopting SFAS No. 133, Taxpayer2 did not record book gains and losses related to unrealized changes in the value of its financial instruments. Thus, adjustments were not needed for this in past years.

On Date3, Taxpayer1 voluntarily amended its Year1 federal return via Form 1120X. It also amended its Year1 NOL carryback on Form 1139 and remitted the additional income tax due with the return. The increase to income from the reversal of Taxpayer2's SFAS No. 133 book loss was the only adjustment in the amended return.

The adjustment above caused Taxpayer2 to have $b of undistributed PHC income as of Date1. The Taxpayers were not able to execute a consent dividend election to eliminate this undistributed PHC income because the consent dividend election was required to be made by the Date2 extended due date of the original return.

Accordingly, pursuant Treas. Reg. § 301.9100-1 and § 301.9100-3, the Taxpayers request an extension of time to execute a consent dividend election under § 565(a) for the year ended Date1, in an amount sufficient to eliminate Taxpayer2's $b of undistributed PHC income.

Section 565(a) provides if any person owns consent stock (as defined in subsection (f)(1))in a corporation on the last day of the taxable year of such corporation, and such person agrees, in a consent filed with the return of such corporation in accordance with regulations prescribed by the Secretary, to treat as a dividend the amount specified in such consent, the amount so specified shall, except as provided in subsection (b), constitute a consent dividend for purposes of § 561 (relating to the deduction for dividends paid).

Section 301.9100-3 of the regulations generally provides extensions of time for making regulatory elections. For this purpose, § 301.9100-1(b) defines the term “regulatory election” to include an election whose deadline is prescribed by a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-3(a) provides, in part, that requests for relief will be granted when the taxpayer provides evidence (including affidavits described in paragraph (e) of this section) 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)(1) provides, in part, that except as otherwise provided (in paragraphs (b)(3)(i) through (iii) of that section), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer (i) requests relief under this section before failure to make the regulatory election is discovered by the IRS; or (v) reasonably relied on a qualified tax professional and the tax professional failed to make, or advise the taxpayer to make the election.

The affidavits presented show that Taxpayers acted reasonably and in good faith, having relied on S-Firm to prepare their Year1 federal income tax return and calculate the amount, it any, of their undistributed PHC income for the year. S-Firm was competent to render advice on these matters and was aware of all relevant facts. However, hindsight indicates that the oversight in the original return to the SFAS No. 133 loss was an honest and inadvertent mistake by S-Firm.

Section 301.9100-3(b)(3) provides, in part, that a taxpayer is deemed to have not acted reasonably and 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 § 6662 at the time the taxpayer requests relief (taking into account § 1.6664-2(c)(3) of this chapter) 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. In connection with hindsight, if specific facts have changed since the due date for making the election that make the election advantageous to the taxpayer, the Service will not ordinarily grant relief. In such a case, the Service will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

In the present case, Taxpayers are not attempting to alter a return position taken for which a penalty has been or could be imposed under § 6662. Further, Taxpayers were not informed of the need to make the election under § 565 of the Code and so did not make any conscious choice as to whether or not to make the election. In addition, there is no indication that Taxpayers are using hindsight, as defined above, in requesting this relief. This request for relief was promptly submitted two months after Taxpayers discovered the error in their original return. No facts have occurred or changed since the due date for making the consent dividend election that make the election more advantageous to Taxpayers now.

Section 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). Section 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, 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.

In the present case, granting the relief requested will not prejudice the interests of the government under the given criteria. Taken together, the disclosed circumstances indicate that the omission Taxpayers now seek to correct originated from an honest mistake on the part of their tax advisors, and not from a desire to avoid taxes. Granting this application will not prejudice the interests of the government.

Accordingly, the consent of the Commissioner is hereby granted for an extension of time to file the forms necessary to make the § 565 consent dividend election for the tax year at issue as requested. This extension shall be for a period of 45 days from the date of this ruling. Please attach a copy of this ruling to the returns, schedules and forms filed in connection with making the election under § 565 when such forms are filed.

No opinion is expressed as to the application of any other provision of the Code or the regulations which may be applicable under these facts. This office makes no determination of the Taxpayers' status as PHCs and relies on the determination of status as represented in Taxpayers' application for relief. This ruling is directed only to the Taxpayers who requested it. Section 6110(j)(3) of the Code provides that a private letter ruling may not be used or cited as precedent.

Sincerely yours,

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