

**IRS PROVIDES RELIEF FOR “CHECK-THE-BOX”  
ELECTIONS THAT ARE UP TO THREE YEARS LATE**

On September 3, 2009, the Internal Revenue Service released Revenue Procedure 2009-41 which provides a procedure for IRS approval of requests for the late filing of entity classification (“check-the-box”) elections if such requests are made within three years and 75 days of the requested effective date of the election and certain eligibility criteria are met.

Treasury Regulations allow certain “eligible” entities to elect to be classified for federal income tax purposes as corporations, as partnerships, or, if there is a sole owner, as disregarded entities. To be effective as of a certain date, the election must be filed no later than 75 days after that date, and no earlier than 12 months prior to the date, among other requirements. Failure to file an election generally subjects the entity to a default classification, which might not be the desired classification. A copy of the election must be filed with the entity’s tax return, or if no such return is required, then by the entity’s direct or indirect owners with their returns.

The IRS, however, has in the past approved many late-filed check-the-box elections by way of private ruling and has in earlier guidance allowed certain entities that were newly formed under local law to obtain approval of requests to file late initial classification elections without the need for private rulings but only if the requests were made by the due date for the first tax return (excluding extensions) of the entity’s desired classification for the year of formation.

This Revenue Procedure extends the time for obtaining approval without the need for a private ruling to three years and 75 days after the requested effective date, if certain conditions are met. The Revenue Procedure also extends relief to entities that are not newly formed but had intended to change their entity classification by means of election.

To be eligible under the Revenue Procedure for relief, an entity must meet certain requirements. First, the entity must have failed to obtain its desired entity classification solely because the entity did not timely file Form 8832. Second, the entity, or in certain circumstances the entity’s owners, must have timely filed all tax returns and information returns that are due for the years in which the requested election is intended to be effective, and all such returns must be consistent with the requested election classification. For this purpose only, a return filed within six months of its original due date without regard to extensions will be regarded as timely filed. If an eligible entity itself is not required to file a federal tax return or an information return, each “affected person” that is required to file such a return must have timely filed all such returns consistently with the requested classification for the entire time period since the requested effective date of the election, with no returns filed inconsistently. “Affected persons” are generally direct or indirect owners of the entity that under the check-the-box regulations would have had to file copies of the original election with their returns in lieu of the entity’s needing to file returns. Third, the entity must have reasonable cause for its failure to timely file the entity classification election. Finally, the request for relief must be made no later than three years and 75 days after the requested effective date.

The Revenue Procedure is the sole means for entities that meet the eligibility requirements described above to obtain relief for a late check-the-box election. To request relief for a late check-the-box election, an entity must file a completed Form 8832 with the IRS. The form must include both a declaration that the entity is eligible for relief under the Revenue Procedure and a statement explaining why the election was not timely made. If the IRS determines that the entity qualifies for relief under the Revenue Procedure, the entity will be treated as having made a timely check-the-box election as of the requested effective date. An entity that does not satisfy the Revenue Procedure's eligibility requirements for approval of a late check-the-box election may request relief by applying for a private letter ruling from the IRS.

The Revenue Procedure is effective September 28, 2009, and applies to pending requests for relief made under earlier guidance and to requests made after that date. If an entity has filed a request for a letter ruling with the IRS that is pending on September 28, 2009, the entity may rely on the Revenue Procedure, withdraw its ruling request, and be refunded its user fee. The IRS, however, will process such ruling requests unless prior to the earlier of November 12, 2009, or the issuance of the letter ruling, the entity notifies the IRS that the entity will rely on the Revenue Procedure and withdraw its letter ruling request.

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