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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

TD 9139

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Deemed Election To Be an Association Taxable as a Corporation for a Qualified Electing S Corporation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulation.

SUMMARY: This document contains a temporary regulation that deems certain eligible entities that file timely S corporation elections to have elected to be classified as associations taxable as corporations. This regulation affects certain eligible entities filing timely elections to be S corporations on or after July 20, 2004. The text of this temporary regulation also serves as the text of the proposed regulations set forth in a notice of proposed rulemaking (REG-131786-03) on this subject published elsewhere in this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective July 20, 2004.

FOR FURTHER INFORMATION CONTACT: Rebekah A. Myers,  
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SUPPLEMENTARY INFORMATION:

**Background**

Section 301.7701-3(a) provides that an eligible entity with two or more owners may elect to be classified as an association (and thus a corporation under §301.7701-2(b)(2)) or a partnership, and an eligible entity with a single owner may elect to be classified as an association or to be disregarded as an entity separate from its owner. Section 301.7701-3(b) provides that, unless the entity elects otherwise, a domestic eligible entity is a partnership if it has two or more owners or is disregarded as an entity separate from its owner if it has a single owner. Section 301.7701-3(c) describes the time and place for filing an entity classification election. Section 301.7701-3(c)(1)(i) provides that an eligible entity may elect to be classified as other than its default classification or to change its classification by filing Form 8832, "Entity Classification Election", with the service center designated on the form.

A taxpayer whose default classification is a

partnership or a disregarded entity may seek to be classified as an S corporation. In these cases, the taxpayer must elect to be classified as an association under §301.7701-3(c)(1)(i) by filing Form 8832 and must elect to be an S corporation under section 1362(a) by filing Form 2553, "Election by a Small Business Corporation." In some cases, an entity may timely file the Form 2553 but fail to file the Form 8832. The entity must then submit a letter ruling request for an extension of time under §301.9100 to file a late entity classification election. The temporary regulation provides relief for these entities. In other cases, the Form 2553 and the Form 8832 are filed late, and the entity must submit a ruling request under §301.9100 to file a late entity classification election and under section 1362(b)(5) to file a late S corporation election. Rev. Proc. 2004-48, I.R.B. 2004-32, provides relief for these entities.

**Explanation of Provisions**

Requiring eligible entities to file two elections in order to be classified as S corporations creates a burden on those entities and on the Internal Revenue Service (IRS). The temporary regulation simplifies these

paperwork requirements by eliminating, in certain cases, the requirement that the entity elect to be classified as an association. Instead, an eligible entity that makes a timely and valid election to be classified as an S corporation will be deemed to have elected to be classified as an association taxable as a corporation.

The temporary regulation amends §301.7701-3(c)(1)(v) to provide that, if an eligible entity makes a timely and valid election to be an S corporation under section 1362(a)(1), it is treated as having made an election to be classified as an association under §301.7701-3. However, if the eligible entity's election is not timely and valid, the default classification rules provided in §301.7701-3(b) will apply to the entity unless the Service provides late S corporation election relief or inadvertent invalid election relief. If the late or invalid election is not perfected, the default rules will maintain the passthrough taxation treatment by classifying the entity as a partnership or a disregarded entity.

**Effective Date**

The regulations apply to elections to be an S corporation filed on or after July 20, 2004. However,

eligible entities that timely filed S elections July 20, 2004 may also rely on the provisions of the regulation.

**Special Analysis**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore a regulatory assessment is not required. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analysis section of the preamble to the Notice of proposed rulemaking on this subject published elsewhere in this issue of the **Federal Register**.

**Drafting Information**

The principal author of this regulation is Rebekah A. Myers, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

**List of Subjects in 26 CFR Part 301**

Employment taxes, Estate and excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 \*\*\*

Par. 2. Section 301.7701-3 is amended by adding paragraphs (c)(1)(v)(C) and (h)(3) to read as follows:

§301.7701-3 Classification of certain business entities.

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(c) \*\*\*

(1) \*\*\*

(v) \*\*\*

(C) S corporations. [Reserved] For further guidance, see §301.7701-3T(c)(1)(v)(C).

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(h) \*\*\*

(3) Deemed elections for S corporations. [Reserved] For further guidance, see §301.7701-3T(h)(3).

Par. 3. Section 301.7701-3T is added to read as follows:

§301.7701-3T Classification of certain business entities (temporary).

(a) through (c)(1)(v)(B) [Reserved] For further guidance, see §301.7701-3(a) through (c)(1)(v)(B).

(c)(1)(v)(C) S corporations. 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, provided that (as of the effective date of the election under section 1362(a)(1)) the entity meets all other

requirements to qualify as a small business corporation under section 1361(b). Subject to §301.7701-3(c)(1)(iv), the deemed election to be classified as an association will apply as of the effective date of the S corporation election and will remain in effect until the entity makes a valid election, under §301.7701-3(c)(1)(i), to be classified as other than an association.

(c)(2) through (h)(2)(iii) [Reserved] For further guidance, see §301.7701-3(c)(2) through (h)(2)(iii).

(h)\*\*\*

(3) Deemed elections for S corporations. Paragraph (c)(1)(v)(C) of this section applies to timely S corporation elections under section 1362(a) filed on or after July 20, 2004. Eligible entities that filed timely S elections before July 20, 2004 may also rely on the provisions of the regulation.

Deputy Commissioner for Services and  
Enforcement.

Assistant Secretary of the Treasury