Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:
Telephone Number:

Number: **200038006**
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Re:

Refer Reply To:
CC:DOM:FI&P/PLR-101238-00
PLR-101239-00; PLR-101240-00

Date:
June 12, 2000

Legend:

Fund 1	=
Fund 2	=
Fund 3	=
Corporation	=
State	=
Third Party	=
Date 1	=
Date 2	=
Year 1	=
Year 2	=
Accounting Firm	=

Dear :

This is in reply to a letter dated January 10, 2000, and subsequent correspondence, requesting that Fund 1, Fund 2 and Fund 3 (Funds) each be granted an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to make a consent dividend election under § 565 of the Internal Revenue Code.

Corporation is organized under the law of State. Corporation manages investment portfolios within a series of funds that it offers. Each Fund is a registered investment company operating under the Investment Company Act of 1940 and represents a separate investment portfolio for variable annuity and variable universal life products offered by Third Party.

Each Fund is treated as a separate corporation for income tax purposes, maintains its own books and records, and files tax returns on the accrual basis using a Date 1 year end. Each Fund reports its taxable income on Form 1120-RIC, a form used by regulated investment companies (RICs) to report federal taxable income. Fund 1 would have qualified as a regulated investment company under Subchapter M of the Internal Revenue Code as of the end of Year 1 had the consent dividend election been timely made. Fund 2 and Fund 3 qualified as regulated investment companies under Subchapter M of the Internal Revenue Code as of the end of Year 1.

Each Fund has a board of directors, but other activities of the Funds are conducted by employees of Third Party. Third Party's tax department has historically prepared the tax returns for Funds. As in prior years, the tax department prepared proforma returns for Year 1 to calculate the dividends that the tax department believed each Fund needed to declare and distribute to avoid being taxed at the RIC level. Historically, the tax department prepared a schedule showing the dividend amounts that each Fund's board of directors needed to declare so that § 855 spillback dividend elections could be made.

In calculating Fund 1's proforma taxable income for Year 1, the tax department did not take into account that Funds normally elected to defer post-October losses. Fund 1 had such losses which it later elected to defer on its filed Year 1 return. Thus, the tax department understated on the spillover dividend schedule, by the deferred post-October loss amount, the amount of dividends that Fund 1 needed to declare and distribute. Consequently, Fund 1 did not timely declare and distribute sufficient amounts to allow for a spillover dividend election to eliminate, as intended, taxable income in Year 1.

At the time it was preparing the schedule of recommended distributions for Year 1, the tax department did not believe it had sufficient information to calculate proforma taxable income for Fund 2 and Fund 3. Therefore, the tax department did not include a recommended dividend distribution for Fund 2 and Fund 3 on the master schedule. Due to oversight, the tax department failed to follow-up and calculate or recommend the amount of dividends that Fund 2 and Fund 3 needed to declare to allow for a spillover dividend election. Consequently, Fund 2 and 3 did not timely declare and distribute sufficient amounts to eliminate, as intended, taxable income in Year 1.

Accounting Firm was engaged in the fall of Year 2 to review year end distribution calculations of each of the funds of Corporation for Year 2. On Date 2, Accounting Firm

became aware that Funds had not distributed sufficient dividends for Year 1. Accounting Firm advised Corporation that § 9100 relief would not be available to make § 855 spillback dividend elections because of the failure to timely declare such dividends by the time prescribed by § 855. Accounting Firm recommended that the Funds seek § 9100 relief to make late consent dividend elections under § 565. The ruling request was filed shortly thereafter.

Under § 851(b), a RIC's investment company taxable income and capital gain income is generally reduced by the deduction for dividends paid as defined in § 561. The deduction for dividends paid under § 561 includes both dividends paid during the taxable year as well as consent dividends for the taxable year as determined under § 565.

Section 565(a) generally permits any person owning consent stock as defined in § 565(f) in a corporation on the last day of the taxable year, including shareholders in a RIC, to agree, in a consent filed with such corporation's return, to treat as a dividend the amount specified in the consent. A consent dividend is a hypothetical rather than actual distribution. Section 1.565-1(a) of the Income Tax Regulations provides that a consent dividend may be made by certain corporations, including RICs, to any person who owns consent stock on the last day of the taxable year of such corporation and who agrees to treat the hypothetical distribution as an actual dividend, subject to specified limitations, by filing a consent at the time and in the manner specified in the regulation. Section 1.565-1(b)(3) provides that a consent may be filed at any time not later than the due date of the corporation's income tax return for the taxable year for which the dividends paid deduction is claimed.

Section 301.9100-1(c) provides, in part, that the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulations or by a revenue ruling, a revenue procedure, a notice, or an announcement published in the Internal Revenue Bulletin), 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 Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) through (c)(1)(i) sets forth rules that the Internal Revenue Service generally will use to determine whether, under the facts and circumstances of each situation, the Commissioner will grant an extension of time for regulatory elections that do not meet the requirements of § 301.9100-2. Section 301.9100-3(b) provides that subject to paragraphs (b)(3)(i) through (iii) of § 301.9100-3, when a taxpayer applies for relief under this section before the failure to make the regulatory election is discovered by the Service, the taxpayer will be deemed to have acted reasonably and in good faith; and § 301.9100-3(c) 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 years to which the regulatory election applies than the taxpayer would

have had if the election had been timely made (taking into account the time value of money).

Based on the information and representations submitted, we conclude that each Fund has satisfied the requirements for our granting a reasonable extension of time to make the election under § 565. Accordingly, each Fund is granted an extension of time until 60 days after the date of this letter to make its § 565 election for Year 1. Please attach a copy of this ruling to the Forms 972 and 973 (and other returns, schedules and forms) filed in connection with making each Fund's consent dividend election.

Except as specifically ruled upon herein, we express no opinion concerning any federal excise or income tax consequences relating to the facts herein under any section of the Code. We also express no opinion as to whether Funds qualify as RICs under subchapter M of the Code.

Further, no opinion is expressed as to whether each Fund's tax liability is not lower in the aggregate for the year to which the regulatory election applies than each Fund's tax liability would have been if the election had been timely made (taking into account the time value of money). Upon audit of the federal income tax return involved, the district director's office will determine each Fund's tax liability for the year involved. If the district director's office determines a Fund's liability is lower, that office will determine the federal income tax effect.

This ruling is directed only to the taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

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Assistant Chief Counsel
(Financial Institutions & Products)

Enclosures:
Copy of this letter
Section 6110 Copy