

Reg § 301.9100-1. Extensions of time to make elections.

(a) Introduction. The regulations under this section and §§301.9100-2 and 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make a regulatory election. The regulations under this section and §301.9100-2 also provide an automatic extension of time to make certain statutory elections. An extension of time is available for elections that a taxpayer is otherwise eligible to make. However, the granting of an extension of time is not a determination that the taxpayer is otherwise eligible to make the election. Section 301.9100-2 provides automatic extensions of time for making regulatory and statutory elections when the deadline for making the election is the due date of the return or the due date of the return including extensions. Section 301.9100-3 provides extensions of time for making regulatory elections that do not meet the requirements of §301.9100-2.

GTT Observation: MTM elections are due by 4/15 of the current tax year, so they do not qualify for Section 301.9100-2 "Automatic extensions." Therefore, Section 301.9100-3 "Other Extensions" applies. See Section 301.9100-3 below

(b) Terms. The following terms have the meanings provided below— *Election* includes an application for relief in respect of tax; a request to adopt, change, or retain an accounting method or accounting period; but does not include an application for an extension of time for filing a return under section 6081. *Regulatory election* means an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter). *Statutory election* means an election whose due date is prescribed by statute. *Taxpayer* means any person within the meaning of section 7701(a)(1).

GTT Observation: IRC 475(f) elections are prescribed by Revenue Procedure 99-17 and not by statute; the election rules are not part of IRC 475f. Therefore, MTM elections are "regulatory elections" and not "statutory elections."

(c) General standards for relief. The Commissioner in exercising the Commissioner's discretion may grant a reasonable extension of time under the rules set forth in §§301.9100-2 and 301.9100-3 to make a regulatory election, 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.

GTT Observation: Notice the 6 month maximum period for extension relief. This rules out relief for most traders. Consider this example. A trader missed the MTM election date of April 15, 2001 for 2001. That trader may file for relief under Section 301.9100-3, but the maximum extension period would be October 15, 2001, which is 6 months from April 15, 2001. Most traders don't realize they missed MTM for 2001 until they work on their 2001 tax returns in 2002.


So if you missed MTM for 2001, and you are wondering about this relief now in 2002,

you missed the boat on Section 301.9100-3 relief.

If you missed MTM for 2002 (by 4/15/02), you can still file for this relief by 10/15/02. Contact us ASAP at help@greencompany.com or call us at 212-658-9502.

(d) Exceptions. Notwithstanding the provisions of paragraph (c) of this section, an extension of time will not be granted—

 (1) For elections under section 4980A(f)(5); or

 (2) For elections that are expressly excepted from relief or where alternative relief is provided by a statute, a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter).

GTT Observation: *We don't know of any exception that applies to IRC 475(f).*

(e) Effective dates. In general, this section and §§301.9100-2 and 301.9100-3 apply to all requests for an extension of time submitted to the Internal Revenue Service (IRS) on or after December 31, 1997. However, the automatic 12-month and 6-month extensions provided in §301.9100-2 apply to elections for which corrective action is taken on or after December 31, 1997. For other requests for an extension of time, see §§301.9100-1T through 301.9100-3T in effect prior to December 31, 1997 (§§301.9100-1T through 301.9100-3T as contained in the 26 CFR part 1 edition revised as of April 1, 1997).

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Reg § 301.9100-3. Other extensions.

(a) In general. Requests for extensions of time for regulatory elections that do not meet the requirements of §301.9100-2 must be made under the rules of this section. Requests for relief subject to this section will be granted when the taxpayer provides the 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.

(b) Reasonable action and good faith.

(1) *In general.* Except as provided in paragraphs (b)(3)(i) through (iii) of this section, a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer—

(i) Requests relief under this section before the failure to make the regulatory election is discovered by the Internal Revenue Service (IRS);

(ii) Failed to make the election because of intervening events beyond the taxpayer's control;

(iii) 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;

- (iv) Reasonably relied on the written advice of the Internal Revenue Service (IRS); or
- (v) Reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

GTT Observation: Traders should be able to meet the above "general" conditions. The IRS will not notify a taxpayer that they should have elected MTM. MTM is a complex issue and most traders are unaware of it, as shown on our [tax advocacy](#) pages. Most CPAs just did not know about MTM being available to traders, as the rules were just passed in 1997.

- (2) *Reasonable reliance on a qualified tax professional.* For purposes of this paragraph (b), 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—
- (i) Competent to render advice on the regulatory election; or
 - (ii) Aware of all relevant facts.

GTT Observation: Most CPAs know how to handle investors and many told their trader clients they could take care of their needs. This condition may be troublesome for some traders.

- (3) *Taxpayer deemed to have not acted reasonably or in good faith.* For purposes of this paragraph (b), 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 section 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of §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.** If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such a case, the IRS will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

GTT Observation: Consider the following example for (iii) above. A trader is profitable in commodities trading on 4/15/02 and decides to skip the MTM election for commodities in order to benefit from the "capital gains" rate advantages on commodities. 60% long-term capital gain and 40% short-term capital gain. By October 1, 2002, this commodities trader has a significant loss and plans to exit the trading business. This commodities trader is much better off in hindsight electing IRC 475(f) for commodities trading in 2002, to convert capital losses (subject to the annual \$3,000 limitation) into "ordinary losses." The IRS would see these facts and deny the request

for election extension based on the benefit of hindsight.

Many traders did not know about MTM for 2001, but many more did for 2002. Many traders may have trouble showing they meet the conditions of (ii) above.

(c) Prejudice to the interests of the Government.

(1) *In general.* The Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief. This paragraph (c) provides the standards the Commissioner will use to determine when the interests of the Government are prejudiced.

(i) **Lower tax liability.** 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). Similarly, if the tax consequences of more than one taxpayer are affected by the election, 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.

GTT Observation: Most traders are interested in MTM election after the due date because they have large trading losses and they want “ordinary loss” treatment with MTM. So they will prejudice the Government’s case by seeking a lower tax liability with this extension. Luckily for traders, they qualify for the special rule (2)(ii) below.

(ii) **Closed years.** 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 under this section. The IRS may condition a grant of relief on the taxpayer providing the IRS with a statement from an independent auditor (other than an auditor providing an affidavit pursuant to paragraph (e)(3) of this section) certifying that the interests of the Government are not prejudiced under the standards set forth in paragraph (c)(1)(i) of this section.

(2) *Special rules for accounting method regulatory elections.* The interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if the accounting method regulatory election for which relief is requested—

(i) Is subject to the procedure described in §1.446-1(e)(3)(i) of this chapter (requiring the advance written consent of the Commissioner);

(ii) Requires an adjustment under section 481(a) (or would require an adjustment under section 481(a) if the taxpayer changed to the method of accounting for which relief is requested in a taxable year subsequent to the taxable year the election should have been made);


GTT Observation: MTM elections require section 481(a) adjustments, so this type of regulatory election qualifies for this special rule. That means eve


(iii) Would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or more favorable terms and conditions than if the change were made as part of an examination; or

(iv) Provides a more favorable method of accounting or more favorable terms and conditions if the election is made by a certain date or taxable year.

(3) *Special rules for accounting period regulatory elections.* The interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances if an election is an accounting period regulatory election (other than the election to use other than the required taxable year under section 444) and the request for relief is filed more than 90 days after the due date for filing the Form 1128, Application to Adopt, Change, or Retain a Tax Year (or other required statement).

(d) Effect of amended returns.

 (1) *Second examination under section 7605(b).* Taxpayers requesting and receiving an extension of time under this section waive any objections to a second examination under section 7605(b) for the issue(s) that is the subject of the relief request and any correlative adjustments.

 (2) *Suspension of the period of limitations under section 6501(a).* A request for relief under this section does not suspend the period of limitations on assessment under section 6501(a). Thus, for relief to be granted, the IRS may require the taxpayer to consent under section 6501(c)(4) to an extension of the period of limitations on assessment for the taxable year in which the regulatory election should have been made and any taxable years that would have been affected by the election had it been timely made.

GTT Observation: Amended returns are not a factor in MTM elections, since a late election from 4/15 of the current tax year, must be fixed under this relief within 6-months, which is 10/15 of the current tax year. Well before the return is filed, let alone an amended tax return.

(e) Procedural requirements.

(1) *In general.* Requests for relief under this section must provide evidence that satisfies the requirements in paragraphs (b) and (c) of this section, and must provide additional information as required by this paragraph (e).

(2) *Affidavit and declaration from taxpayer.* The taxpayer, or the individual who acts on behalf of the taxpayer with respect to tax matters, must submit a detailed affidavit describing the events that led to the failure to make a valid regulatory election and to the discovery of the failure. When the taxpayer relied on a qualified tax professional for advice, the taxpayer's affidavit must describe the engagement and responsibilities of the

professional as well as the extent to which the taxpayer relied on the professional. The affidavit must be accompanied by a dated declaration, signed by the taxpayer, which states: “Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request, and such facts are true, correct, and complete.” The individual who signs for an entity must have personal knowledge of the facts and circumstances at issue.

(3) Affidavits and declarations from other parties. The taxpayer must submit detailed affidavits from the individuals having knowledge or information about the events that led to the failure to make a valid regulatory election and to the discovery of the failure. These individuals must include the taxpayer's return preparer, any individual (including an employee of the taxpayer) 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. An affidavit must describe the engagement and responsibilities of the individual as well as the advice that the individual provided to the taxpayer. Each affidavit must include the name, current address, and taxpayer identification number of the individual, and be accompanied by a dated declaration, signed by the individual, which states: “Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and, to the best of my knowledge and belief, the request contains all the relevant facts relating to the request, and such facts are true, correct, and complete.”

(4) Other information. The request for relief filed under this section must also contain the following information—

(i) The taxpayer must state whether the taxpayer's return(s) for 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 is being examined by a district director, or is being considered by an appeals office or a federal court. The taxpayer must notify the IRS office considering the request for relief if the IRS starts an examination of any such return while the taxpayer's request for relief is pending;

(ii) The taxpayer must state when the applicable return, form, or statement used to make the election was required to be filed and when it was actually filed;

(iii) The taxpayer must submit a copy of any documents that refer to the election;

(iv) When requested, the taxpayer must submit a copy of the taxpayer's return for any taxable year for which the taxpayer requests an extension of time to make the election and any return affected by the election; and

(v) When applicable, the taxpayer must submit a copy of the returns of other taxpayers affected by the election.

(5) Filing instructions. A request for relief under this section is a request for a letter

ruling. Requests for relief should be submitted in accordance with the applicable procedures for requests for a letter ruling and must be accompanied by the applicable user fee.

GTT Observation: See our separate Web page for Private Letter Rulings at <http://www.greencompany.com/privateletteruling.htm>



(f) Examples. The following examples illustrate the provisions of this section:

Example (1). Taxpayer discovers own error. Taxpayer A prepares A's 1997 income tax return. A is unaware that a particular regulatory election is available to report a transaction in a particular manner. A files the 1997 return without making the election and reporting the transaction in a different manner. In 1999, A hires a qualified tax professional to prepare A's 1999 return. The professional discovers that A did not make the election. A promptly files for relief in accordance with this section. Assume paragraphs (b)(3) (i) through (iii) of this section do not apply. Under paragraph (b)(1)(i) of this section, A is deemed to have acted reasonably and in good faith because A requested relief before the failure to make the regulatory election was discovered by the IRS.

Example (2). Reliance on qualified tax professional. Taxpayer B hires a qualified tax professional to advise B on preparing B's 1997 income tax return. The professional was competent to render advice on the election and B provided the professional with all the relevant facts. The professional fails to advise B that a regulatory election is necessary in order for B to report income on B's 1997 return in a particular manner. Nevertheless, B reports this income in a manner that is consistent with having made the election. In 2000, during the examination of the 1997 return by the IRS, the examining agent discovers that the election has not been filed. B promptly files for relief in accordance with this section, including attaching an affidavit from B's professional stating that the professional failed to advise B that the election was necessary. Assume paragraphs (b)(3) (i) through (iii) of this section do not apply. Under paragraph (b)(1)(v) of this section, B is deemed to have acted reasonably and in good faith because B reasonably relied on a qualified tax professional and the tax professional failed to advise B to make the election.

Example (3). Accuracy-related penalty. Taxpayer C reports income on its 1997 income tax return in a manner that is contrary to a regulatory provision. In 2000, during the examination of the 1997 return, the IRS raises an issue regarding the reporting of this income on C's return and asserts the accuracy-related penalty under section 6662. C requests relief under this section to elect an alternative method of reporting the income. Under paragraph (b)(3)(i) of this section, C is deemed to have not acted reasonably and in good faith because C seeks to alter

a return position for which an accuracy-related penalty could be imposed under section 6662.

Example (4). Election not requiring adjustment under section 481(a). Taxpayer D prepares D's 1997 income tax return. D is unaware that a particular accounting method regulatory election is available. D files D's 1997 return without making the election and uses another permissible method of accounting. The applicable regulation provides that the election is made on a cut-off basis (without an adjustment under section 481(a)). In 1998, D requests relief under this section to make the election under the regulation. If D were granted an extension of time to make the election, D would pay no less tax than if the election had been timely made. Assume that paragraphs (c)(2)(i), (iii), and (iv) of this section do not apply. Under paragraph (c)(2)(ii) of this section, the interests of the Government are not deemed to be prejudiced because the election does not require an adjustment under section 481(a).

Example (5). Election requiring adjustment under section 481(a). The facts are the same as in Example 4 of this paragraph (f) except that the applicable regulation provides that the election requires an adjustment under section 481(a). Under paragraph (c)(2)(ii) of this section, the interests of the Government are deemed to be prejudiced except in unusual or compelling circumstances.

Example (6). Under examination by the IRS. A regulation permits an automatic change in method of accounting for an item on a cut-off basis. Taxpayer E reports income on E's 1997 income tax return using an impermissible method of accounting for the item. In 2000, during the examination of the 1997 return by the IRS, the examining agent notifies E in writing that its method of accounting for the item is an issue under consideration. Any change from the impermissible method made as part of an examination is made with an adjustment under section 481(a). E requests relief under this section to make the change pursuant to the regulation for 1997. The change on a cut-off basis under the regulation would be more favorable than if the change were made with an adjustment under section 481(a) as part of an examination. Under paragraph (c)(2)(iii) of this section, the interests of the Government are deemed to be prejudiced except in unusual and compelling circumstances because E seeks to change from an impermissible method of accounting that is an issue under consideration in the examination on a basis that is more favorable than if the change were made as part of an examination.