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Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:FI&P:3/PLR-121187-98
Date: February 23, 1999

LEGEND:

Fund =

X Series Fund =
Administrator =
Accountants =

State Y =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =
Date 8 =
Date 9 =

Month =

Year 1 =
Year 2 =
Year 3 =

This responds to your November 2, 1998, letter on behalf of the Fund. The Fund requests that its election under § 851(b)(1) of the Internal Revenue Code to be treated as a regulated investment company (RIC) beginning with its initial taxable year be considered timely filed pursuant to § 301.9100-3 of the Procedure and Administration Regulations. The Fund also requests that its elections under § 855(a) to treat dividends distributed after the close of a taxable

year as having been paid during that taxable year be considered timely filed pursuant to § 301.9100-3.

FACTS

The Fund is a no-load diversified portfolio of the X Series Fund. The X Series Fund is incorporated in State Y and is registered as an open-end management investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1, et seq., as amended. The Fund commenced operations on Date 1. The Fund has a taxable year ending on September 30th.

The Fund intended to make an election under § 851(b)(1) to be treated as a regulated investment company by filing the election with its tax return for the taxable year ending Date 2. Administrator provides certain administrative, clerical, and bookkeeping services for the Fund, including the preparation and filing of all necessary tax returns and extensions. The Treasurer of the Fund is an employee of Administrator and has supervisory responsibility over the preparation and filing of all tax returns and extensions of the Fund.

Because there are numerous funds administered by Administrator, the Treasurer delegates the responsibility of preparing and filing the tax returns and extensions of each RIC to a Client Administrator. A Vice President of Administrator was designated as Client Administrator for the Fund. The Client Administrator prepares the tax returns for each RIC or oversees the preparation of tax returns. A draft of the tax returns is sent to independent accountants for review. The Client Administrator submits a finalized copy of the tax return to the Treasurer for the Treasurer's signature; the Client Administrator is responsible for the filing of the return. Monitoring of the tasks performed by the Client Administrator occurs through the review of an administration and compliance calendar by the Treasurer.

For the taxable year ended Date 5, Form 7004 was timely filed to extend the filing due date of Form 1120-RIC from Date 7 to Date 9. In Month, Year 3, the Fund's Treasurer asked about the filing status of Form 1120-RIC as part of a review of the Year 3 administration and compliance calendar. The Client Administrator made a representation to the Fund's Treasurer that the tax return had been filed prior to the deadline. The Fund's Treasurer did not recall having signed the tax return. As a result, he requested the file containing the tax return for the Fund. The file was not provided by the Client Administrator. The Fund contacted Accountants, who determined that, although Form 7004 was timely filed for the taxable year ended Date 2, Forms 1120-RIC were not filed for Year 1 or Year 2.

The Fund prepared the Year 1 and Year 2 tax returns, analyzed the dividend payments made by the Fund, and reviewed all compliance requirements of the Fund since its inception. At all times since inception, the Fund has been operated in a manner intended to qualify it as a RIC under Subchapter M of the Code.

The Fund intended to make an election under § 851(b)(1) to be treated as a RIC beginning with its initial taxable year ended Date 2. Further, the Fund intended to make elections under § 855(a) to treat certain dividends paid after the close of its taxable year as having been paid during the taxable year, effective for its taxable years that ended Date 2 and Date 5.

In accordance with its intention to make the election under § 855(a), the Fund for the taxable year ended Date 2, declared dividends on Date 3 and Date 4. The dividends were paid to its shareholders on the first business day of the month following each distribution declaration. The Fund represents that the distributions declared on the above dates were from earnings and profits for the year ended Date 2 and were intended to fulfill the requirements of § 855.

In accordance with its intention to make the election under § 855(a), the Fund for the taxable year ended Date 5, declared dividends on Date 6 and Date 8. The dividends were paid to its shareholders on the first business day of the month following each distribution declaration. The Fund represents that the distributions declared on the above dates were from earnings and profits for the year ended Date 5 and were intended to fulfill the requirements of § 855(a).

LAW AND ANALYSIS

Section 851(b)(1) provides that a corporation shall not be considered a RIC for any taxable year unless it makes an election to be a RIC on its federal income tax return for the taxable year or has made an election for a previous taxable year.

Section 1.851-2(a) of the Income Tax Regulations provides that the taxpayer shall make its election to be treated as a RIC by computing taxable income as a RIC on its federal income tax return for the first taxable year for which the election is applicable.

Section 855(a) provides that, if a RIC --

(1) declares a dividend prior to the time prescribed by law for the filing of its return for a taxable year (including the period for any extension of time granted

for filing such return), and

(2) distributes the amount of such dividend to shareholders in the 12-month period following the close of such taxable year and not later than the date of the first regular dividend payment made after such declaration,

the amount so declared and distributed shall, to the extent the company elects in such return in accordance with regulations prescribed by the Secretary, be considered as having been paid during such taxable year, except as provided in subsections (b), (c) and (d).

Section 1.855-1(b)(1) sets forth the method of making the election and provides that the election must be made in the return filed by the RIC for the taxable year.

Rev. Rul. 69-445, 1969-2 C.B. 148, concerns a dividend distributed in three installments by a RIC during the 12-month period after the close of its taxable year. The three distributions were made from income and capital gains received in the prior taxable year. The ruling states that a dividend distributed in installments after the close of the taxable year may be treated as a distribution for the prior year if the distributions are made from income and capital gains for the prior year and made no later than the first distribution from the income and capital gains of the current year.

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.

Sections 301.9100-3(a) through (c)(1)(i) set 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).

HOLDING

Based upon the facts presented and representations made by the Fund, we hold that the Fund has demonstrated good cause for the granting of relief under § 301.9100-3.

Therefore, the Fund is granted an extension of time until 30 days after the date of this letter for making the election under § 851(b)(1) for the tax year that ended Date 2 and the elections under § 855(a) for the tax years that ended Date 2 and Date 5.

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

This ruling is limited to the timeliness of the Fund's elections. This ruling does not relieve the Fund from any penalty that it may owe as a result of its failure to file its federal income tax returns on time. Except as specifically ruled upon above, no opinion is expressed or implied as to any federal excise or income tax consequences regarding the Fund. In particular, no opinion is expressed or implied whether the Fund qualifies as a RIC that is taxable under subchapter M, part 1 of the Code.

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

Sincerely,

Lon B. Smith

Assistant Chief Counsel
(Financial Institutions and Products)

enclosure: Copy of letter for section 6110 purposes