

I Missed a Tax Election...Now What? Requesting 9100 Relief



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What do we, as tax professionals, do when we discover (or our clients discover) that a tax election has been inadvertently missed? There may be a solution for some missed elections. Regulations §§ 301.9100-1 through 301.9100-3 contain rules permitting extensions of time for certain late tax elections. A grant of Section 9100 relief only forgives the late filing of the election and is not a determination that the taxpayer is otherwise eligible to make the election.

There are regulatory and statutory elections. Recognizing the distinction between the two is the first step in understanding when and how late-filed elections will be permitted. A regulatory election is an election whose due date is prescribed by regulation or other published guidance, and a statutory election is one in which the due date is prescribed by statute.

Automatic Relief under Reg. § 301.9100-2

The rules and requirements for automatic relief are set forth in Reg. § 301.9100-2, which includes two types of automatic extensions, 12-month extensions and 6-month extensions.

In order to be eligible for either type of extension, the taxpayer must take “corrective action.” Corrective action means taking the steps required to file the election in accordance with the statute or the regulation published in the Federal Register, or the revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin. For those elections required to be filed with a return, corrective action includes filing an original or an amended return for the year the regulatory or statutory election should have been made and attaching the appropriate form or statement for making the election. Taxpayers who make an election under an automatic extension must file their return in a manner that is consistent with the election and comply with all other requirements for making the election for the year the election should have been made and for all affected years; otherwise, the IRS may invalidate the election.

The procedures for obtaining an automatic extension are fairly straightforward. Any return, statement of election, or other form of filing that must be made to obtain an automatic extension must be sent to the same address that the filing to make the election would have been sent had the filing been timely made. In addition, any filing made to obtain the automatic extension should state at the top of the document that it is **“FILED PURSUANT TO SECTION 301.9100-2”**. Because a request for automatic extension does not require a private letter ruling, there is no user fee.

The following regulatory elections are eligible for the automatic 12-month extension:

- i. The election to use other than the required taxable year under § 444;
- ii. The election to use last-in, first out (LIFO) inventory method under § 472;

- iii. The 15-month rule for filing an exemption application for a § 501(c)(9), § 501(c)(17) or § 501(c)(20) organization under § 505 or for a § 501(c)(3) organization under § 508;
- iv. The election to be treated as a homeowners organization under § 528;
- v. The election to adjust basis on partnership transfers and distributions under § 754;
- vi. The estate tax election to specially value qualified real property (where the IRS has not yet begun an examination of the filed tax return) under § 2032A(d)(1);
- vii. The chapter 14 gift tax election to treat a qualified payment right as other than a qualified payment under § 2701(c)(3)(C)(i); and
- viii. The chapter 14 gift tax election to treat any distribution right as a qualified payment under § 2701(c)(3)(C)(ii).

An automatic extension of 6 months from the due date of a tax return excluding extensions is granted to make regulatory or statutory elections whose due dates are the due date of the return or the due date of the return including extensions provided the taxpayer timely filed its return for the year the election should have been made and the taxpayer takes corrective action within the 6-month extension period. The automatic 6-month extension does not apply to regulatory or statutory elections that must be made by the due date of the return excluding extensions.

Non-Automatic Extensions under Reg. § 301.9100-3

The rules and requirements for non-automatic extensions are set forth in Reg. § 301.9100-3. Non-automatic relief applies only to regulatory elections (i.e., this relief does not apply to statutory elections). In order to receive relief, it must be shown that the taxpayer acted reasonably and in good faith and that granting relief will not prejudice the interests of the government. If the taxpayer meets these criteria to the satisfaction of the IRS, relief may be granted.

A taxpayer is deemed to have acted **reasonably** and in **good faith** if the taxpayer:

- i. Requests relief before the failure to make the regulatory election is discovered by 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 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.

A taxpayer is deemed **not** to have acted reasonably or 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 at the time the taxpayer requests relief, 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.

A request for relief will be deemed to **prejudice** the interest of the government if:

- i. 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.
- ii. 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 statute of limitations for assessment before the taxpayer's receipt of a ruling granting relief.

Requests for non-automatic relief must follow the procedures for requesting a private letter ruling (PLR), including paying a user fee. The procedures for requesting a letter ruling are described in the first revenue procedure each year (Rev. Proc. 2018-1).

As part of the ruling request, there are required affidavits that must be submitted by the taxpayer, which detail the events and circumstances the failure to timely make the election and the discovery of the failure, in addition to other affidavits by individuals having information about events leading to the failure to make the timely election, such as any tax professionals whose advice that the taxpayer may have relied on during the time period. All affidavits must be signed under penalties of perjury.