

who were shareholders of the corporation at any time during the period specified by the Commissioner must consent to any adjustments that the Commissioner may require. Each consent should be in the form of a statement agreeing to make the adjustments. The statement must be signed by the shareholder (in the case of shareholder consent) or a person authorized to sign the return required by section 6037 (in the case of corporate consent). See § 1.1362-6(b)(2) for persons required to sign consents. A shareholder's consent statement should include the name, address, and taxpayer identification numbers of the corporation and shareholder, the number of shares of stock owned by the shareholder, and the dates on which the shareholder owned any stock. The corporate consent statement should include the name, address, and taxpayer identification numbers of the corporation and each shareholder.

(f) *Status of corporation.* The status of the corporation after the terminating event and before the determination of inadvertence is determined by the Commissioner. Inadvertent termination relief may be granted retroactive for all years for which the terminating event was effective, in which case the corporation is treated as if its election had not terminated. Alternatively, relief may be granted only for the period in which the corporation again became eligible for subchapter S treatment, in which case the corporation is treated as a C corporation during the period for which the corporation was not eligible to be an S corporation.

[T.D. 8449, 57 FR 55453, Nov. 25, 1992]

§ 1.1362-5 Election after termination.

(a) *In general.* Absent the Commissioner's consent, an S corporation whose election has terminated (or a successor corporation) may not make a new election under section 1362(a) for five taxable years as described in section 1362(g). However, the Commissioner may permit the corporation to make a new election before the 5-year period expires. The corporation has the burden of establishing that under the relevant facts and circumstances, the Commissioner should consent to a new

election. The fact that more than 50 percent of the stock in the corporation is owned by persons who did not own any stock in the corporation on the date of the termination tends to establish that consent should be granted. In the absence of this fact, consent ordinarily is denied unless the corporation shows that the event causing termination was not reasonably within the control of the corporation or shareholders having a substantial interest in the corporation and was not part of a plan on the part of the corporation or of such shareholders to terminate the election.

(b) *Successor corporation.* A corporation is a *successor corporation* to a corporation whose election under section 1362 has been terminated if—

(1) 50 percent or more of the stock of the corporation (the new corporation) is owned, directly or indirectly, by the same persons who, on the date of the termination, owned 50 percent or more of the stock of the corporation whose election terminated (the old corporation); and

(2) Either the new corporation acquires a substantial portion of the assets of the old corporation, or a substantial portion of the assets of the new corporation were assets of the old corporation.

(c) *Automatic consent after certain terminations.* A corporation may, without requesting the Commissioner's consent, make a new election under section 1362(a) before the 5-year period described in section 1362(g) expires if the termination occurred because the corporation—

(1) Revoked its election effective on the first day of the first taxable year for which its election was to be effective (see § 1.1362-2(a)(2)); or

(2) Failed to meet the definition of a small business corporation on the first day of the first taxable year for which its election was to be effective (see § 1.1362-2(b)(2)).

[T.D. 8449, 57 FR 55454, Nov. 25, 1992]

§ 1.1362-6 Elections and consents.

(a) *Time and manner of making elections—(1) In general.* An election statement made under this section must identify the election being made, set forth the name, address, and taxpayer

identification number of the corporation, and be signed by a person authorized to sign the return required to be filed under section 6037.

(2) *Election to be an S corporation*—(i) *Manner of making election.* A small business corporation makes an election under section 1362(a) to be an S corporation by filing a completed Form 2553. The election form must be filed with the service center designated in the instructions applicable to Form 2553. The election is not valid unless all shareholders of the corporation at the time of the election consent to the election in the manner provided in paragraph (b) of this section. However, once a valid election is made, new shareholders need not consent to that election.

(ii) *Time of making election*—(A) *In general.* The election described in paragraph (a)(2)(i) of this section may be made by a small business corporation at any time during the taxable year that immediately precedes the taxable year for which the election is to be effective, or during the taxable year for which the election is to be effective provided that the election is made before the 16th day of the third month of the year. If a corporation makes an election for a taxable year, and the election meets all the requirements of this section but is made during the period beginning after the 15th day of the third month of the taxable year, the election is treated as being made for the following taxable year provided that the corporation meets all the requirements of section 1361(b) at the time the election is made. For taxable years of 2½ months or less, an election made before the 16th day of the third month after the first day of the taxable year is treated as made during that year.

(B) *Elections made during the first 2½ months treated as made for the following taxable year.* A timely election made by a small business corporation during the taxable year for which it is intended to be effective is nonetheless treated as made for the following taxable year if—

(1) The corporation is not a small business corporation during the entire portion of the taxable year which oc-

curs before the date the election is made; or

(2) Any person who held stock in the corporation at any time during the portion of the taxable year which occurs before the time the election is made, and who does not hold stock at the time the election is made, does not consent to the election.

(C) *Definition of month and beginning of the taxable year.* *Month* means a period commencing on the same numerical day of any calendar month as the day of the calendar month on which the taxable year began and ending with the close of the day preceding the numerically corresponding day of the succeeding calendar month or, if there is no corresponding day, with the close of the last day of the succeeding calendar month. In addition, the taxable year of a new corporation begins on the date that the corporation has shareholders, acquires assets, or begins doing business, whichever is the first to occur. The existence of incorporators does not necessarily begin the taxable year of a new corporation.

(iii) *Examples.* The provisions of this section are illustrated by the following examples:

Example 1. Effective election; no prior taxable year. A calendar year small business corporation begins its first taxable year on January 7, 1993. To be an S corporation beginning with its first taxable year, the corporation must make the election set forth in this section during the period that begins January 7, 1993, and ends before March 22, 1993. Because the corporation had no taxable year immediately preceding the taxable year for which the election is to be effective, an election made earlier than January 7, 1993, will not be valid.

Example 2. Effective election; taxable year less than 2½ months. A calendar year small business corporation begins its first taxable year on November 8, 1993. To be an S corporation beginning with its first taxable year, the corporation must make the election set forth in this section during the period that begins November 8, 1993, and ends before January 23, 1994.

Example 3. Election effective for the following taxable year; ineligible shareholder. On January 1, 1993, two individuals and a partnership own all of the stock of a calendar year subchapter C corporation. On January 31, 1993, the partnership dissolved and distributed its shares in the corporation to its five partners, all individuals. On February 28, 1993, the

seven shareholders of the corporation consented to the corporation's election of subchapter S status. The corporation files a properly completed Form 2533 on March 2, 1993. The corporation is not eligible to be a subchapter S corporation for the 1993 taxable year because during the period of the taxable year prior to the election it had an ineligible shareholder. However, under paragraph (a)(2)(ii)(B) of this section, the election is treated as made for the corporation's 1994 taxable year.

(3) *Revocation of S election—(i) Manner of revoking election.* To revoke an election, the corporation files a statement that the corporation revokes the election made under section 1362(a). The statement must be filed with the service center where the election was properly filed. The revocation statement must include the number of shares of stock (including non-voting stock) issued and outstanding at the time the revocation is made. A revocation may be made only with the consent of shareholders who, at the time the revocation is made, hold more than one-half of the number of issued and outstanding shares of stock (including non-voting stock) of the corporation. Each shareholder who consents to the revocation must consent in the manner required under paragraph (b) of this section. In addition, each consent should indicate the number of issued and outstanding shares of stock (including non-voting stock) held by each shareholder at the time of the revocation.

(ii) *Time of revoking election.* For rules concerning when a revocation is effective, see § 1.1362-2(a)(2).

(iii) *Examples.* The principles of this paragraph (a)(3) are illustrated by the following examples:

Example 1. Revocation; consent of shareholders owning more than one-half of issued and outstanding shares. A calendar year S corporation has issued an outstanding 40,000 shares of class A voting common stock and 20,000 shares of class B non-voting common stock. The corporation wishes to revoke its election of subchapter S status. Shareholders owning 11,000 shares of class A stock sign revocation consents. Shareholders owning 20,000 shares of class B stock sign revocation consents. The corporation has obtained the required shareholder consent to revoke its subchapter S election because shareholders owning more than one-half of the total number of issued and outstanding shares of stock

of the corporation consented to the revocation.

Example 2. Effective prospective revocation. In June 1993, a calendar year S corporation determines that it will revoke its subchapter S election effective August 1, 1993. To do so it must file its revocation statement with consents attached on or before August 1, 1993, and the statement must indicate that the revocation is intended to be effective August 1, 1993.

(4) *Rescission of revocation—(i) Manner of rescinding a revocation.* To rescind a revocation, the corporation files a statement that the corporation rescinds the revocation made under section 1362(d)(1). The statement must be filed with the service center where the revocation was properly filed. A rescission may be made only with the consent (in the manner required under paragraph (b)(1) of this section) of each person who consented to the revocation and of each person who became a shareholder of the corporation within the period beginning on the first day after the date the revocation was made and ending on the date on which the rescission is made.

(ii) *Time of rescinding a revocation.* If the rescission statement is filed before the revocation becomes effective and is filed with proper service center, the rescission is effective on the date it is so filed.

(5) *Election not to apply pro rata allocation.* To elect not to apply the pro rata allocation rules to an S termination year, a corporation files a statement that it elects under section 1362(e)(3) not to apply the rules provided in section 1362(e)(2). In addition to meeting the requirements of paragraph (a)(1) of this section, the statement must set forth the cause of the termination and the date thereof. The statement must be filed with the corporation's return for the C short year. This election may be made only with the consent of all persons who are shareholders of the corporation at any time during the S short year and all persons who are shareholders of the corporation on the first day of the C short year (in the manner required under paragraph (b)(1) of this section).

(b) *Shareholders' consents—(1) Manner of consents in general.* A shareholder's consent required under paragraph (a) of this section must be in the form of a

written statement that sets forth the name, address, and taxpayer identification number of the shareholder, the number of shares of stock owned by the shareholder, the date (or dates) on which the stock was acquired, the date on which the shareholder's taxable year ends, the name of the S corporation, the corporation's taxpayer identification number, and the election to which the shareholder consents. The statement must be signed by the shareholder under penalties of perjury. Except as provided in paragraph (b)(3)(iii) of this section, the election of the corporation is not valid if any required consent is not filed in accordance with the rules contained in this paragraph (b). The consent statement should be attached to the corporation's election statement.

(2) *Persons required to consent.* The following rules apply in determining persons required to consent:

(i) *Community interest in stock.* When stock of the corporation is owned by husband and wife as community property (or the income from the stock is community property), or is owned by tenants in common, joint tenants, or tenants by the entirety, each person having a community interest in the stock or income therefrom and each tenant in common, joint tenant and tenant by the entirety must consent to the election.

(ii) *Minor.* The consent of a minor must be made by the minor or by the legal representative of the minor (or by a natural or an adoptive parent of the minor if no legal representative has been appointed).

(iii) *Estate.* The consent of an estate must be made by an executor or administrator thereof, or by any other fiduciary appointed by testamentary instrument or appointed by the court having jurisdiction over the administration of the estate.

(iv) *Trust.* In the case of a trust described in section 1361(c)(2)(A) (including a trust treated under section 1361(d)(1)(A) as a trust described in section 1361(c)(2)(A)(i)), only the person treated as the shareholder for purposes of section 1361(b)(1) must consent to the election. When stock of the corporation is held by a trust, both husband and wife must consent to any

election if the husband and wife have a community interest in the trust property. See paragraph (b)(2)(i) of this section for rules concerning community interests in S corporation stock.

(3) *Special rules for consent of shareholder to election to be an S corporation—*
 (i) *In general.* The consent of a shareholder to an election by a small business corporation under section 1362(a) may be made on Form 2553 or on a separate statement in the manner described in paragraph (b)(1) of this section. In addition, the separate statement must set forth the name, address, and taxpayer identification number of the corporation. A shareholder's consent is binding and may not be withdrawn after a valid election is made by the corporation. Each person who is a shareholder (including any person who is treated as a shareholder under section 1361(c)(2)(B)) at the time the election is made) must consent to the election. If the election is made before the 16th day of the third month of the taxable year and is intended to be effective for that year, each person who was a shareholder (including any person who was treated as a shareholder under section 1361(c)(2)(B)) at any time during the portion of that year which occurs before the time the election is made, and who is not a shareholder at the time the election is made, must also consent to the election. If the election is to be effective for the following taxable year, no consent need be filed by any shareholder who is not a shareholder on the date of the election. Any person who is considered to be a shareholder under applicable State law solely by virtue of his or her status as an incorporator is not treated as a shareholder for purposes of this paragraph (b)(3)(i).

(ii) *Examples.* The principles of this section are illustrated by the following examples:

Example 1. Effective election; shareholder consents. On January 1, 1993, the first day of its taxable year, a subchapter C corporation had 15 shareholders. On January 30, 1993, two of the C corporation's shareholders, A and B, both individuals, sold their shares in the corporation to P, Q, and R, all individuals. On March 1, 1993, the corporation filed its election to be an S corporation for the 1993 taxable year. The election will be effective (assuming the other requirements of section

1361(b) are met) provided that all of the shareholders as of March 1, 1993, as well as former shareholders A and B, consent to the election.

Example 2. Consent of new shareholder unnecessary. On January 1, 1993, three individuals own all of the stock of a calendar year subchapter C corporation. On April 15, 1993, the corporation, in accordance with paragraph (a)(2) of this section, files a properly completed Form 2553. The corporation anticipates that the election will be effective beginning January 1, 1994, the first day of the succeeding taxable year. On October 1, 1993, the three shareholders collectively sell 75% of their shares in the corporation to another individual. On January 1, 1994, the corporation's shareholders are the three original individuals and the new shareholder. Because the election was valid and binding when made, it is not necessary for the new shareholder to consent to the election. The corporation's subchapter S election is effective on January 1, 1994 (assuming the other requirements of section 1361(b) are met).

(iii) *Extension of time for filing consents to an election—(A) In general.* An election that is timely filed for any taxable year and that would be valid except for the failure of any shareholder to file a timely consent is not invalid if consents are filed as required under paragraph (b)(3)(iii)(B) of this section and it is shown to the satisfaction of the district director or director of the service center with which the corporation files its income tax return that—

(1) There was reasonable cause for the failure to file the consent;

(2) The request for the extension of time to file a consent is made within a reasonable time under the circumstances; and

(3) The interests of the Government will not be jeopardized by treating the election as valid.

(B) *Required consents.* Consents must be filed within the extended period of time as may be granted by the Internal Revenue Service, by all persons who—

(1) Were shareholders of the corporation at any time during the period beginning as of the date of the invalid election and ending on the date on which an extension of time is granted in accordance with this paragraph (b)(3)(iii); and

(2) Have not previously consented to the election.

[T.D. 8449, 57 FR 55454, Nov. 25, 1992]

§ 1.1362-7 Effective date.

(a) *In general.* The provisions of §§1.1362-1 through 1.1362-6 apply to taxable years of corporations beginning after December 31, 1992. For taxable years to which these regulations do not apply, corporations and shareholders subject to the provisions of section 1362 must take reasonable return positions taking into consideration the statute; its legislative history; the provisions of §§18.1362-1 through 18.1362-5 (see 26 CFR part 18 as contained in the CFR edition revised as of April 1, 1992). In addition, following these regulations is a reasonable return position. See Notice 92-56, 1992-49 I.R.B. (see § 601.601(d)(2)(ii)(b) of this chapter), for additional guidance regarding reasonable return positions for years to which §§1.1362-1 through 1.1362-6 do not apply.

(b) *Special effective date for passive investment income provisions.* For taxable years of an S corporation and all affected shareholders that are not closed, the S corporation and all affected shareholders may elect to apply the provisions of §1.1362-2(c)(5). To make the election, the corporation and all affected shareholders must file a return or an amended return that is consistent with these rules for the taxable year for which the election is made and each subsequent taxable year. For purposes of this section, *affected shareholders* means all shareholders who received distributive shares of S corporation items in the taxable year for which the election is made and all shareholders of the S corporation for all subsequent taxable years. However, the Commissioner may, in appropriate circumstances, permit taxpayers to make this election even if all affected shareholders cannot file consistent returns.

[T.D. 8449, 57 FR 55456, Nov. 25, 1992]

§ 1.1362-8 Dividends received from affiliated subsidiaries.

(a) *In general.* For purposes of section 1362(d)(3), if an S corporation holds stock in a C corporation meeting the requirements of section 1504(a)(2), the term *passive investment income* does not include dividends from the C corporation to the extent those dividends are attributable to the earnings and profits