

Treas. Reg. § 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)).