Internal Revenue Service

Department of the Treasury

Washington, DC 20224

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Person to Contact:

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Legend

Taxpayer =
Parent =
Contract 1 =
Rider 1 =
Rider 2 =
Certificate =
Contract Owner =

Participant =
Separate Account =
State A =
State B =
Territory D =
X =
Y =

Dear :

This ruling responds to a letter dated January 29, 2002, submitted on behalf of Taxpayer requesting rulings under section 817(h) of the Internal Revenue Code ("Code") and section 1.817-5(f)(3)(iii) of the regulations. In a subsequent letter dated July 12, 2002, Taxpayer withdrew one of its ruling requests.

FACTS

Taxpayer is a stock life insurance company originally incorporated in State A and presently domiciled in State B. Taxpayer is licensed to engage in the life insurance business in X states and Territory D. Taxpayer is an indirectly wholly owned subsidiary of Parent. Taxpayer files a consolidated federal income tax return with Parent and other affiliated corporations on a calendar year basis utilizing the accrual method of accounting.

Taxpayer will issue Contract 1 to Contract Owners for use in connection with annuity plans offered to Participants, as described in section 403(a). Contract 1, as amended by Rider 1, will be issued to organizations described in section 403(b)(1)(A) for use as an annuity contract described in section 403(b). Contract 1, as amended by Rider 2 will be issued to States, political subdivisions of States, or agencies or instrumentalities of States or political subdivisions of States and 501(c)(3) tax exempt organizations for use in connection with deferred compensation plans described in section 457(f). Contract 1 will also be issued to employers for use in connection with other government plans within the meaning of section 414(d), e.g., section 415(m) plans. Taxpayer may, depending on the type of plan, provide each Participant with Certificate, which outlines the contract terms.

Contract 1 will be available to Contract Owners with at least $Y of aggregate Participant accounts at the time of purchase. Contract 1 will be funded with one or more premiums. Contract Owners will remit premiums to Taxpayer annually before the annuity commencement date. Taxpayer will apply the premiums among Contract 1's investment options as directed by the Contract Owners or, with the Contract Owners' consent, the Participants.

The variable investment option of Contract 1 will be supported by Separate Account. Separate Account was established as a segregated asset account under the insurance laws of State B. Separate Account is only subject to the claims of contracts participating in the Separate Account. Accordingly, the assets of Separate Account are segregated from all other assets of Taxpayer, and may not be charged with any liabilities arising out of any other business of Taxpayer. Separate Account is registered with the Securities and Exchange Commission ("SEC") as a unit investment trust under the Investment Company Act of 1940 (the "1940 Act"). Allocations to Separate Account will be held in sub-accounts, which invest exclusively in shares of mutual funds.

LAW AND ANALYSIS

Section 414(d) defines the term "governmental plan" as a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Section 415(m) provides that in determining whether a governmental plan (as defined in section 414(d)) meets the requirements of section 415, benefits provided under a qualified governmental excess benefit arrangement shall not be taken into account. Income accruing to a governmental plan (or to a trust that is maintained solely for the purpose of providing benefits under a qualified governmental excess benefit arrangement) in respect of a qualified governmental excess benefit arrangement shall constitute income derived from the exercise of an essential governmental function upon which such governmental plan (or trust) shall be exempt under section 115.

Section 415(m)(3) provides that the term “qualified governmental excess benefit arrangement” means a portion of a governmental plan if: (i) that portion is maintained solely for the purpose of providing participants in the plan that part of the participant’s annual benefit otherwise payable under the terms of the plan that exceeds the limitations on benefits imposed by this section, (ii) no election is provided at any time to the participant (directly or indirectly) to defer compensation under that portion of the plan, and (iii) benefits described in subparagraph (A) are not paid from a trust forming part of such governmental plan unless such trust is maintained solely for the purpose of providing such benefits.

Section 415(m)(2) provides that both the taxable year or years for which amounts in respect of a qualified governmental excess benefit arrangement are includible in gross income by a participant, and the treatment of such amounts when so includible by the participant, shall be determined as if such qualified government excess benefit arrangement were treated as a plan for the deferral of compensation which is maintained by a corporation that is not exempt from income tax and which does not meet the requirements for qualification under section 401.

Section 457(b) defines an eligible deferred compensation plan. Section 457(f) provides rules for plans that do not meet all the requirements of section 457(b). Section 457(f) provides generally that if a deferred compensation plan of an eligible employer is not an eligible deferred compensation plan, then: (i) the compensation shall be included in the gross income of the participant or the beneficiary for the first taxable year in which there is no substantial risk of forfeiture of the rights to such compensation; and (ii) the tax treatment of any amount made available under the plan to a participant or beneficiary shall be determined under section 72 (relating to annuities).

Under section 817(h), a segregated asset account upon which a variable annuity or life insurance contract (other than a pension plan contract) is based must be adequately diversified in accordance with the regulations prescribed by the Secretary in order for the variable contract to be treated as an annuity under section 72 or a life insurance contract under section 7702.

Section 818(a)(1)-(6) defines a “pension plan contract” for purposes of sections 801-817. Under section 818(a)(4) a pension plan contract includes contracts purchased to provide retirement annuities for its employees by an organization described in section 501(c)(3) which was exempt from tax under section 501(a) (or was an organization exempt from tax under section 101(6) of the Internal Revenue Code of 1939, or the corresponding provisions of prior revenue laws), or purchased to provide retirement annuities for employees described in section 403(b)(1)(A)(ii) by an employer which is a State, a political subdivision of a State, or an agency or instrumentality of any one or more of the foregoing. Section 818(a)(6) provides that a pension plan contract also includes a contract purchased by a governmental plan (under section 414(d)) or an eligible deferred compensation plan (under section 457(b)), or the Government of the United States, the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing or any tax exempt organization, for use in satisfying an obligation of such government, political subdivision, agency or instrumentality, or organization, to provide a benefit under a governmental plan.

Section 1.817-5(e) states that a “segregated asset account” consist of all assets the investment return and market value of each of which must be allocated in an identical manner to any variable contract invested in any such assets.

Section 817(h)(4) and section 1.817-5(f) of the regulations provide, in certain situations, a “look-through” rule for meeting diversification requirements. Section 1.817-5(f)(1) provides that, if the look-through rule applies, a beneficial interest in a regulated investment company, a real estate investment trust, a partnership, or trust will not be treated as a single investment of a segregated asset account for purposes of testing diversification. Instead, a pro-rata portion of each asset of the investment company, partnership, or trust will be treated as an asset of the segregated asset account. Section 1.817-5(f)(2)(i) provides that the look-through rule of section 1.817-5(f) applies to a regulated investment company, partnership, or trust only if: (a) all the beneficial interests in the investment company, partnership, or trust (other than those described in section 1.817-5(f)(3)) are held by one or more segregated asset accounts of one or more insurance companies, and (b) public access to such investment company, partnership, or trust is available exclusively (except as otherwise permitted in section 1.817-5(f)(3)) through the purchase of a variable contract.

Section 1.817-5(f)(3)(iii) provides that satisfaction of the ownership conditions of section 1.817-5(f)(2)(i) will not be prevented if beneficial interests in a regulated investment company, partnership, or trust are held by the trustee of a qualified pension or retirement plan.

Rev. Rul. 94-62, 1994-2 C.B. 164, provides a list of various arrangements that will be treated as a “qualified pension or retirement plan” for purposes of section 1.817-5(f)(3)(iii). Specifically, for purposes of section 1.817-5(f)(3)(iii), the term “qualified pension plan” includes the following two (of 9 arrangements): (6) a governmental plan

within the meaning of section 414(d) or an eligible deferred compensation plan within the meaning of section 457(b) and (9) any other trust, plan, account, contract, or annuity that the Internal Revenue Service has determined in a letter ruling to be within the scope of section 1.817-5(f)(3)(iii).

HOLDING

Based solely on the information and representations made by Taxpayer in its ruling request, we conclude the following:

1) That the trustee of any section 415(m) plan that is also a "governmental plan" within the meaning of section 414(d) will be considered a trustee of a qualified pension or retirement plan within holding (6) of Rev. Rul. 94-62 and section 1.817-5(f)(3)(iii);

2) That the trustee of any section 457(f) plan that is also a "governmental plan" within the meaning of section 414(d) will be considered a trustee of a qualified pension or retirement plan within holding (6) of Rev. Rul. 94-62 and section 1.817-5(f)(3)(iii); and

3) That the trustee of any plan that is described in section 457(f) and which has as its sponsor either (i) a charitable organization described in section 818(a)(4) or (ii) a governmental organization described in section 818(a)(4), whose employees are described in section 403(b)(1)(A)(ii), will be considered a trustee of a qualified pension or retirement plan within holding (9) of Rev. Rul. 94-62 and section 1.817-5(f)(3)(iii).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

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

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

/S/

DONALD J. DREES, JR.
Senior Technician Reviewer, Branch 4
Office Associate Chief Counsel
(Financial Institutions & Products)