Internal Revenue Service

Number: **200938018**
Release Date: 9/18/2009

Index Number: 61.00-00, 817.00-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:FIP:B04
PLR-142785-08
PLR-142786-08
PLR 142788-08
PLR 142789-08

Date:
June 29, 2009

Legend

Company A:
Company B:

Company C:

Company D:

Subparent E:
SubParent F:
Trust:
State G:
State H:
Investment Manager
Sub-Advisor
J
K

Dear :

This is in response to the letter submitted by your authorized representative dated October 2, 2008, requesting rulings concerning the tax ownership of Upper-Tier Fund shares (defined below).

Facts:

Each of Company A, Company B, Company C and Company D (each a “Company” and together, the “Companies”) is a stock life insurance company organized under the laws

of a state. Each of the Companies is a life insurance company within the meaning of § 816(a) of the Internal Revenue Code of 1986, as amended (the "Code"). The Companies are part of an affiliated group of companies. Company B and Company C join in the filing of a consolidated return with Subparent E on an accrual accounting, calendar year basis while Company A and Company D join in the filing of a consolidated return with Subparent F on an accrual accounting, calendar year basis. Subparent E and Subparent F are both ultimately owned by a common parent.

Each Company issues variable annuity and life insurance contracts (the "Contracts") that are based on a separate account maintained by the issuing Company (each a "Separate Account"). Each Separate Account is divided into sub-accounts that correspond with the variable investment options offered under the Contracts (each a "Sub-Account). Each Sub-Account invests all of its assets in shares of a corresponding series of the Trust (each series, an "Insurance Fund"). Each Insurance Fund is (a) a regulated investment company (a "RIC") or (b) a partnership. Each Insurance Fund qualifies for "look-through" treatment under Treas. Reg. § 1.817-5(f).

Certain existing Insurance Funds and certain Insurance Funds that the Companies plan to establish (collectively the Upper-Tier Funds) are or will be "funds of funds" that invest primarily in the shares of RICs. Currently, the other RICs in which the Upper-Tier Funds may invest (all funds in which Upper-Tier Funds invest, hereinafter, the "Lower-Tier Funds") are limited to other Insurance Funds. The Companies plan to expand the discretion of the investment managers of these Upper-Tier Funds to allow them to invest not only in other Insurance Funds, but also to invest some or all of their assets in shares of RICs and so called "exchange traded funds" ("ETFs") that are available for direct purchase by members of the general public ("Public Mutual Funds"). Any investments in Public Mutual Funds will be made in accordance with the requirements of section 817(h) and the regulations thereunder. The percentages of an Upper-Tier Fund's assets invested in the various Public Mutual Funds will not be pre-set and, as described in more detail below, can be changed at any time based on the investment manager's assessment of market conditions. It is possible that at times up to one hundred percent (100%) of an Upper-Tier Fund's total assets may be invested in Public Mutual Funds. Under normal market conditions, no Upper-Tier Fund will invest more than thirty percent (30%) of its total assets in any single Public Mutual Fund. If fluctuations in the market values of an Upper-Tier Fund's assets cause the Upper-Tier Fund's investment in any Public Mutual Fund to exceed the thirty percent (30%) limit as of the last day of any calendar quarter, the Upper-Tier Fund's investments will be reallocated to comply with this limit within thirty (30) days of the end of such quarter.

The Contracts are variable contracts within the meaning of section 817(d) and are registered with the Securities and Exchange Commission ("SEC") under the Securities Act of 1933 (the "1933 Act"). Each Contract offers various investment options to which the owner may allocate net premiums (*i.e.*, premiums less applicable state and local taxes) and earnings thereon. Only the issuing Company may add or remove investment

options under the Contracts. Each Company holds amounts allocated to variable investment options in its Separate Account. Each Separate Account is registered with the SEC as a unit investment trust under the Investment Company Act of 1940 (the "1940 Act"). The assets of each Separate Account are allocated among various sub-accounts that correspond to the variable investment options offered under the Contracts.

At issuance of a Contract, the owner selects the amount of net premiums to be allocated to each investment option and, thus, to each sub-account. A Contract owner may change the allocation of future premium payments among the available investment options at any time by notifying the issuing Company. Generally, each Company permits Contract owners to change their investment selection(s) in the separate account(s) during the calendar year, subject to limitations and/or fees.[1]

Each sub-account of each Separate Account invests all of its assets in shares of a corresponding Insurance Fund, *i.e.*, a corresponding series of the Trust. The Trust is currently organized as a State G business trust. The Trust and each Insurance Fund are registered with the SEC under the 1940 Act as open-end management investment companies, and the shares of each Insurance Fund are registered with the SEC under the 1933 Act. Each Insurance Fund qualified as a RIC under Subchapter M of the Code in its most recent taxable year and qualifies for look-through treatment under Treas. Reg. section 1.817-5(f). Pursuant to such look-through treatment, the investments of the sub-accounts of each Separate Account are adequately diversified within the meaning of section 817(h) and Treas. Reg. section 1.817-5(b).[2]

As described above, the Insurance Funds include the Upper-Tier Funds. Because the Upper-Tier Funds are "funds of funds," they invest primarily in shares of other RICs (*i.e.*, the Lower-Tier Funds). Currently, the Lower-Tier Funds consist only of certain other Insurance Funds offered under the Trust. The Companies plan to expand the discretion of the investment managers of certain existing and new Upper-Tier Funds to allow them to invest not only in other Insurance Funds, but also to invest some or all of their assets in shares of Public Mutual Funds.

The Contracts currently offer a variety of variable investment options from which the owner can choose in implementing an asset allocation model. Such a "manual" approach to asset allocation under the Contracts requires the Contract owner to make decisions regarding which Insurance Funds to include in his or her particular model, monitor the allocations to those Insurance Funds, and decide if and when to alter the allocations. Alternatively, an owner can use the Upper-Tier Funds. For example, five of the Upper-Tier Funds are designed to correspond to particular investment risk tolerance levels exhibited by Contract owners: aggressive, growth, balanced, moderate, or

---

[1] A limited number of "legacy" contracts do not contain express limitations on such transfers.

[2] All statements herein regarding the structure and federal regulatory treatment of the existing Upper-Tier Funds apply equally to the new Upper-Tier Funds that the Companies plan to establish.

conservative. The investment manager of each of these "lifestyle" Upper-Tier Funds chooses which Insurance Funds to include in the Upper-Tier Fund's investments in accordance with the particular risk tolerance level. The particular asset allocation model and investment goals of the lifestyle Upper-Tier Funds do not change over time.

Because some Contract owners may not want to manually reallocate their Contract values among the available Insurance Funds as they grow older, the Companies currently plan to offer a series of new Upper-Tier Funds that will automate this process by following a "target date" investment strategy. Under such a strategy, the Contract owner will only need to select the target-date Upper-Tier Fund that corresponds most closely to her anticipated retirement date (*e.g.*, 2040), and the investment manager of that Upper-Tier Fund will automatically change the asset allocation model from more aggressive (equity-based) to more conservative (fixed income-based) as the target date approaches.

In addition to the foregoing, the Companies currently plan to or already have established Upper-Tier Funds that pursue an absolute return strategy and an index allocation strategy.

The Investment Manager, which is an affiliate of the Companies, serves as the investment advisor for the Trust and each Insurance Fund thereunder, including the Upper-Tier Funds. The Investment Manager administers the business and affairs of the Trust and retains and compensates the investment sub-advisors that manage the assets of the Insurance Funds.

Currently, the Investment Manager retains the Sub-Advisor, which also is an affiliate of the Companies, as the primary sub-advisor for the Upper-Tier Funds. The Sub-Advisor formulates investment programs for the Insurance Funds that are consistent with their investment goals and policies, and generally manages the investments of the Insurance Funds on a day-to-day basis. The Sub-Advisor retains certain consultants (each, a "Consultant") to perform financial analysis and to provide advice with respect to the investment management of the Upper-Tier Funds, which the Sub-Advisor then takes into account when making investment decisions. The Consultants may or may not be affiliates of the Companies.[3]

Other than a Contract owner's ability to allocate premiums and transfer Contract values among the various Upper-Tier Funds, all investment decisions regarding the Upper-Tier Funds are and will be made by the Investment Manager in its sole and absolute discretion. Each Company reserves the right to change or substitute Upper-Tier Funds, and there will be no guarantee by the Company to a Contract owner that a particular

[3] References hereinafter to management functions performed by the Investment Manager include those performed by the Sub-Advisor and the Consultants, unless otherwise specifically indicated.

Upper-Tier Fund will always be available. A Contract owner will have no legal, equitable, direct, or indirect ownership interest in any of the assets held by an Upper-Tier Fund. Rather, the Contract owner will have only a contractual claim against the issuing Company to collect cash under the terms of the Contract.

Neither any Company nor the Investment Manager solicits or will solicit Contract owners or prospective Contract owners to communicate about the selection, quality, or rate of return of any specific investment or group of investments held in any Insurance Fund, including any Upper-Tier Fund. While nothing prevents a Contract owner or prospective Contract owner from attempting to initiate such communications with a Company or the Investment Manager, if such an unsolicited communication is made, it will not result in discussions with the Contract owner regarding the items listed above and any such communication will be disregarded when making any investment decisions.

An unsolicited communication from a Contract owner or prospective Contract owner regarding the selection, quality, or rate of return of any specific investment or group of investments will never affect the decisions of the Investment Manager with respect to such matters. In no circumstance would a Contract owner be able to direct the investment of an Upper-Tier Fund in particular Lower-Tier Funds (including Public Mutual Funds), and there neither can be nor will be any arrangement or plan between the Investment Manager and a Contract owner or a Company and a Contract owner regarding such specific investments. The Investment Manager will retain absolute and complete discretion over these decisions, and a Contract owner will be able to decide only whether or not to allocate Contract values to or from an investment option under the Contract that invests in an Upper-Tier Fund.

In accordance with federal securities law, a prospectus for each Upper-Tier Fund will be provided to each Contract owner. The investment option corresponding to each Upper-Tier Fund also will be described in the Contract. Periodically, a Contract owner will be able to obtain a list of an Upper-Tier Fund's most recent holdings, including the percentage allocated to each such holding; however, this list will only be available 30 days after the fact. In addition to the foregoing, the Companies provide periodic reports to insurance brokers. Those reports typically include information on the investment performance of the Upper-Tier Funds. Such information may include an explanation of reallocation decisions that were completed during the period to which the report relates, but information regarding such decisions that are still pending or in the process of being implemented is not shared.

Each Upper-Tier Fund will be a mutual fund that is registered with the SEC under the 1940 Act as an investment company. The 1940 Act and rules thereunder impose certain requirements and restrictions that apply to mutual funds and, thus, that apply in connection with all variable annuity and life insurance contracts supported by separate account investments in mutual funds. For example, even though shares of such a mutual fund may be purchased exclusively by insurance company segregated asset

accounts in support of variable contracts and certain other eligible investors, the 1940 Act requires that the owners of "registered" variable contracts (such as the Contracts involved here) be given the right to instruct the issuing insurance company how to vote the shares of the mutual fund(s) supporting their contracts.[4] In addition, certain fundamental investment restrictions of a mutual fund (such as the fund's policies towards concentrating investments in a particular industry or group of industries, borrowing money, and issuing senior securities) generally cannot be altered without an approving vote of those persons with voting rights.[5] Consistently with these legal requirements, an Upper-Tier Fund must obtain the consenting vote of the Contract owners before any of these fundamental investment restrictions may be changed. However, no single Contract owner will have the ability to alter the investment strategy of an Upper-Tier Fund. These requirements are no different than those that apply under federal securities laws to any mutual fund that is the underlying investment vehicle for registered variable annuity and life insurance contracts.

As a general matter, the general investment strategies used by the Upper-Tier Funds are well-known and widely utilized in the context of variable insurance products, taxable investments in publicly-available mutual funds, and qualified retirement plans. The Investment Manager also serves as the investment manager of certain publicly-available mutual funds (the "Public Funds of Funds") that follow these strategies. The Public Funds of Funds invest substantially all of their assets in shares of Public Mutual Funds. The Upper-Tier Funds and the Public Funds of Funds could have some degree of overlap in their lower-tier investments. However, the Upper-Tier Funds will be eligible to invest in Insurance Funds as well as Public Mutual Funds, whereas Public Funds of Funds are unable to invest in Insurance Funds. In addition, timing differences due to rebalancing, incoming cash flows, and fees create differences between the amount and type of investments held in the Public Funds of Funds and the Upper-Tier Funds.

Representations

In addition to the facts presented above, the Companies have also made the following representations:

(a) The Contracts do not currently provide any Contract owner with investment control or sufficient other incidents of ownership over the Separate Account assets to be considered the owner of those assets for federal income tax purposes;
(b) The Trust and each Upper-Tier Fund is (or, in the case of Upper Tier Funds that have not yet been established, will be) registered under the 1940 Act as an open-end management investment company;

[4] *See* 15 U.S.C. § 80a-12(d)(1)(E)(iii)(aa). *See also* 17 C.F.R. § 270.6e-3(T).
[5] *See* 15 U.S.C. §§ 80a-8(b) and 13(a) (regarding registration of investment policies and rules for changes thereto).

(c) Each Upper-Tier Fund is (or, in the case of Upper Tier Funds that have not yet been established, will be) a regulated investment company or partnership that qualifies for "look through" treatment under Treas. Reg. § 1.817-5(f);
(d) Each Upper-Tier Fund will satisfy the diversification requirements of § 817(h) and § 1.817-5(b) of the Treasury Regulations;
(e) There is not, and there will not be, any arrangement, plan, contract, or agreement between the Investment Manager, the Sub-Advisor, or a Consultant and a Contract owner regarding the availability of an Upper-Tier Fund as a sub-account under the Contract, or the specific assets to be held by an Upper-Tier Fund or any Lower-Tier Fund;
(f) Other than a Contract owner's ability to allocate premiums and transfer dollars among the various Upper-Tier Funds, all investment decisions regarding the Upper-Tier Funds are and will be made by the Investment Manager, Sub-Advisor, and the Trust's board of trustees in their sole and absolute discretion. The percentage of an Upper-Tier Fund's assets invested in a particular Lower-Tier Fund will not be fixed in advance of any Contract owner's investment and will be subject to change by the Investment Manager or Sub-Advisor at any time;
(g) A Contract owner cannot, and will not be able to, direct an Upper-Tier Fund's investment in any particular asset, and there will be no agreement or plan between the issuing Company, the Investment Manager, Sub-Advisor, or Consultant and a Contract owner, regarding such an investment;
(h) Neither any Company nor the Investment Manager solicits or will solicit Contract owners or prospective Contract owners to communicate about the selection, quality, or rate of return of any specific investment or group of investments held in any Insurance Fund, including any Upper-Tier Fund. While nothing prevents a Contract owner or prospective Contract owner from attempting to initiate such communications with a Company or the Investment Manager, if such an unsolicited communication is made, it will not result in discussions with the Contract owner regarding the items listed above and any such communication will be disregarded when making any investment decisions;
(i) A Contract owner does not have, and will not have, knowledge of the present assets invested by an Upper-Tier Fund and does not have, and will not have, knowledge of the specific investment techniques of the Investment Manager. A Contract owner does not have, and will not have, any legal, equitable, direct or indirect ownership interest in any of the assets of an Upper-Tier Fund. A Contract owner only has, and will only have, a contractual claim against the issuing Company to receive cash under the terms of the Contract; and
(j) The Contracts are variable contracts within the meaning of section 817(d).

Ruling Requested:

An Upper-Tier Fund's investment in Public Mutual Funds will not cause the Contract owners to be treated as the owners of the Upper-Tier Fund's shares for federal income tax purposes.

Law and Analysis:

Section 61(a) provides that the term "gross income" means all income from whatever source derived, including gains derived from dealings in property, interest and dividends.

A long standing doctrine of taxation provides that “taxation is not so much concerned with the refinement of title as it is with actual command over the property taxed – the actual benefit for which the tax is paid.” *Corliss v. Bowers*, 281 U.S. 376 (1930). The incidence of taxation attributable to ownership of property is not shifted if the transferor continues to retain significant control over the property transferred, *Frank Lyon Company v. United States*, 435 U.S. 561 (1978); *Commissioner v. Sunnen*, 333 U.S. 591 (1948); *Helvering v. Clifford*, 309 U.S. 331 (1940), without regard to whether such control is exercised through specific retention of legal title, the creation of a new equitable but controlled interest, or the maintenance of effective benefit through the interposition of a subservient agency. *Christoffersen v. U.S.*, 749 F.2d 513 (8th Cir. 1984).

Revenue Ruling 77-85, 1977-1 C.B. 12, considers a situation in which the individual purchaser of a variable annuity contract retained the right to direct the custodian of the account supporting that variable annuity to sell, purchase and exchange securities or other assets held in the custodial account. The purchaser also was able to exercise an owner’s right to vote account securities either through the custodian or individually. The Internal Revenue Service (the “Service”) concluded that the purchaser possessed “significant incidents of ownership” over the assets held in the custodial account. The Service reasoned that if a purchaser of an “investment annuity” contract may select and control the investment assets in the separate account of the life insurance company issuing the contract, then the purchaser is treated as the owner of those assets for federal income tax purposes. Thus, any interest, dividends or other income derived from the investment assets are included in the purchaser’s gross income.

In Revenue Ruling 80-274, 1980-2 C.B. 27, the Service, applying Revenue Ruling 77-85, concluded that, if a purchaser of an annuity contract may select and control the certificates of deposit supporting the contract, then the purchaser is considered the owner of the certificates of deposit for federal income tax purposes.

Similarly, Revenue Ruling 81-225, 1981-2 C.B. 12, concludes that investments in mutual fund shares to fund annuity contracts are considered to be owned by the purchaser of the annuity contract if the mutual fund shares are available for purchase by the general public. Revenue Ruling 81-225 also concludes that, if the mutual fund shares are available only through the purchase of an annuity contract, then the sole function of the fund is to provide an investment vehicle that allows the issuing insurance company to meet its obligations under its annuity contracts and the mutual fund shares

are considered to be owned by the insurance company. Finally, in Revenue Ruling 82-54, 1982-1 C.B. 11, the purchaser of certain annuity contracts could allocate premium payments among three funds and had an unlimited right to reallocate contract value among the funds prior to the maturity date of the annuity contract. Interests in the funds were not available for purchase by the general public, but were instead only available through the purchase of an annuity contract. The Service concludes that the purchaser's ability to choose among general investment strategies (for example, between stock, bonds or money market instruments) either at the time of the initial purchase or subsequent thereto, did not constitute control sufficient to cause the contract holders to be treated as the owners of the mutual fund shares.

In *Christoffersen v. U.S.*, *supra*, the Eighth Circuit considered the federal income tax consequences of the ownership of the assets supporting a segregated asset account. The taxpayers in *Christoffersen* purchased a variable annuity contract that reflected the investment return and market value of assets held in an account that was segregated from the general asset account of the issuing insurance company. The taxpayers had the right to direct that their premium payments be invested in any one of six publicly traded mutual funds. The taxpayers could reallocate their investment among the funds at any time. The taxpayers also had the right upon seven days notice to withdraw funds, surrender the contract, or apply the accumulated value under the contract to provide annuity payments.

The Eighth Circuit held that, for federal income tax purposes, the taxpayers, not the issuing insurance company, owned the mutual fund shares that funded the variable annuity. The court concluded that the taxpayers surrendered few of the rights of ownership or control over the assets of the subaccount that supported the annuity contract. According to the court, "the payment of annuity premiums, management fees and the limitation of withdrawals to cash [did] not reflect a lack of ownership or control as the same requirements could be placed on traditional brokerage or management accounts." Thus, the taxpayers were required to include in gross income any gains, dividends or other income derived from the mutual fund shares.

Section 817, which was enacted by Congress as part of the Deficit Reduction Act of 1984 (Pub. L. No. 98-369) (the "1984 Act"), provides rules regarding the federal income tax treatment of variable life insurance and annuity contracts. Section 817(d) of the Code defines a "variable contract" as a contract that provides for the allocation of all or part of the amounts received under the contract to an account that, pursuant to state law or regulation, is segregated from the general asset accounts of the company and that provides for the payment of annuities, or is a life insurance contract. In the legislative history of the 1984 Act, Congress expressed its intent to deny life insurance treatment to any variable contract if the assets supporting the contract include funds publicly available to investors:

The conference agreement allows any diversified fund to be used as the basis of variable contracts so long as all shares of the funds are owned by one or more segregated asset accounts of insurance companies, but only if access to the fund is available exclusively through the purchase of a variable contract from an insurance company. . . . In authorizing Treasury to prescribe diversification standards, the conferees intend that the standards be designed to deny annuity or life insurance treatment for investments that are publicly available to investors. . . .

The legislative history further provides that "[t]he fact that a similar fund is available to the public will not cause the segregated asset fund to be treated as being publicly available."

H.R. Conf. Rep. No. 98-861, at 1055 (1984).

Section 817(h)(1) of the Code provides that a variable contract based on a segregated asset account shall not be treated as an annuity, endowment, or life insurance contract unless the segregated asset account is adequately diversified in accordance with regulations prescribed by the Secretary of the Treasury. If a segregated asset account is not adequately diversified, income earned by that segregated asset account is treated as ordinary income received or accrued by the policyholders.

Approximately two years after the enactment of § 817(h), the Treasury Department issued proposed and temporary regulations prescribing the minimum level of diversification that must be met for an annuity or life insurance contract to be treated as a variable contract within the meaning of § 817(d). The preamble to the temporary regulations stated as follows:

The temporary regulations… do not provide guidance concerning the circumstances in which investor control of the investments of a segregated asset account may cause the investor, rather than the insurance company, to be treated as the owner of the assets in the account. For example, the temporary regulations provide that in appropriate cases a segregated asset account may include multiple sub-accounts, but do not specify the extent to which policyholders may direct their investments to particular sub-accounts without being treated as owners of the underlying assets. Guidance on this and other issues will be provided in regulations or revenue rulings under § 817(d), relating to the definition of variable contracts.

51 Fed. Reg. 32633 (Sept. 15, 1986).

The final regulations adopted, with certain revisions not relevant here, the text of the temporary regulations.

In Revenue Ruling 2003-91, 2003-33 I.R.B. 347, a variable contract holder did not have control over segregated account assets sufficient for the Service to deem the variable

contract holder the owner of the assets. The variable contracts at issue were funded by a separate account that was divided into twelve (12) subaccounts. The issuing insurance company could increase or decrease the number of subaccounts at any time, but there would never be more than twenty (20) subaccounts available under the contracts. Each subaccount offered a different investment strategy. Interests in the subaccounts were available solely through the purchase of a variable life or variable annuity contract that qualified as a variable contract under § 817(d). The investment activities of each subaccount were managed by an independent investment adviser. There was no arrangement, plan, contract, or agreement between the contract holder and the issuing insurance company or between the contract holder and the independent investment adviser regarding the availability of a particular subaccount, the investment strategy of any subaccount, or the assets to be held by a particular subaccount. Other than a contract holder's right to allocate premiums and transfer funds[6] among the available subaccounts, all investment decisions concerning the subaccounts were made by the issuing insurance company or the independent investment adviser in their sole and absolute discretion. A contract holder had no legal, equitable, direct or indirect interest in any of the assets held by a subaccount but had only a contractual claim against the issuing insurance company to collect cash in the form of death benefits or cash surrender values under the contract. The Service concluded that, based on all the facts and circumstances, the contract holder did not have direct or indirect control over the separate account or any subaccount asset, and therefore the contract holder did not possess sufficient incidents of ownership over the assets supporting the variable contracts to be deemed the owner of the assets for federal income tax purposes.

In Rev. Rul. 2003-92, 2003-2 C.B. 350, a life insurance company issues variable life insurance and annuity contracts that are funded by a segregated asset account. The segregated asset account is divided into 10 sub-accounts. Each sub-account invests in a partnership, none of which are publicly traded partnerships (as defined under section 7704). Each partnership has an investment manager that selects such partnership's specific investments. In addition, contract holders will not have any voting rights with respect to any partnership interests held by any of the sub-accounts. Each sub-account will meet the asset diversification test of section 1.817-5(b)(1) of the Income Tax Regulations at all times. In example 1, variable annuity contracts are funded by sub-accounts that invest in partnerships that are available to qualified purchasers and accredited investors in private placement offerings. In example 2, life insurance contracts are funded by sub-accounts that invest in partnerships that are available to qualified purchasers and accredited investors in private placement offerings. In example 3, both life insurance contracts and an annuity contracts are funded by sub-accounts that invest in partnerships that are only available through the purchase of an

[6] In Rev. Rul. 2003-91, Holder may change the allocation of premiums at any time, and Holder may transfer funds from one Sub-account to another. Holder is permitted one transfer between Sub-accounts without charge per thirty-day period. Any additional transfers during this period are subject to a fee assessed against the cash value of LIC.

annuity contract, life insurance contract or other variable contracts from insurance companies. The ruling holds that the holder of a variable annuity or life insurance contract will be considered the owner, for federal income tax purposes, of the partnership interests that fund the variable contracts if interests in the partnerships are available for purchase by the general public. The ruling further holds that if the holder of a variable annuity is considered to be the owner of the partnership interests that fund the variable contracts, the contract holder must include interest, dividend or other income derived from the partnership interests in gross income in the year in which the income is earned.

ANALYSIS

In the revenue rulings discussed above, the Service took the position that if the holder of a variable life insurance policy or variable annuity contract possesses sufficient incidents of ownership over the assets supporting the policy or contract, the contract holder is viewed for federal income tax purposes as the owner of the underlying assets and, as a result, is currently taxed on any income and gains attributable to the underlying assets. The Service stated in Revenue Ruling 2003-91 that the determination of whether the holder of a variable life insurance policy or variable annuity contract possesses sufficient incidents of ownership over the assets of the separate account underlying the variable life insurance contract or variable annuity contract depends on all the relevant facts and circumstances.

In the instant case, the fact that the Upper-Tier Funds may invest in Public Mutual Funds does not cause the Contract owner to be treated as the owners of the Public Mutual Funds shares for federal income tax purposes. In Revenue Ruling 82-54, the amounts held in the segregated asset account underlying a variable contract were invested as the contract holder directed in shares of any or all of three open-end investment companies (“mutual funds”). Each mutual fund represented a different broad, general investment strategy. Shares of the mutual funds were available only to insurance company segregated asset accounts. While the mutual funds themselves were not available to the general public, the mutual funds held common stocks, bonds and money market instruments, all of which were available for purchase by members of the general public. The public availability of the assets held by the mutual funds did not lead to the conclusion that the issuing insurance company was simply a conduit between the contract holders and their mutual funds or the underlying assets of the mutual funds. Revenue Ruling 82-54 held that the insurance company, not the contract holders, was the owner of the mutual fund shares.

Similar to the mutual funds in Revenue Ruling 82-54, the Upper-Tier Funds are, or will be, available only to insurance company segregated asset accounts and will invest in assets that are available to the general public. In the current case, instead of investing in common stocks, bonds and money market instruments that are available to the general public, the Upper-Tier Funds will also invest in RICs and ETFs that are

available to the general public. Based on the representations and facts presented by the taxpayer, the Contract owner in this case does not appear to have any more control over the assets held under their contract than was the case in Revenue Ruling 82-54. Based on the representations presented by the taxpayer, the Upper-Tier Funds are not an indirect means of allowing a Contract owner to invest in a Public Mutual Fund.

Conclusion:

Based on the authority cited above and the representations and facts presented by the taxpayer, an Upper-Tier Fund's investment in Public Mutual Funds will not cause the Contract owners to be treated as the owners of the Upper-Tier Fund's shares for federal income tax purposes.

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, including any other facts and circumstances that might be pertinent to the treatment of the Contracts under the investor control doctrine.

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

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not yet been adopted. Therefore, this ruling will be modified or revoked by the adoption of temporary or final regulations, to the extent the regulations are inconsistent with any conclusion in the letter ruling. See § 11.04 of Rev. Proc. 2008-1, 2008-1 I.R.B. 1, 50. However, when the criteria in § 11.06 of Rev. Proc. 2008-1, 2008-1 I.R.B. 1, 51 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

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

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/

Sheryl B. Flum
Branch Chief, Branch 4
(Financial Institutions & Products)