**Internal Revenue Service**

Number: **201105004**
Release Date: 2/4/2011

Index Number: 72.00-00, 1011.00-00, 1.11-00, 165.03-00, 1233.02-00, 1092.01-01

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-108216-08
Date:
November 02, 2010

Legend

Taxpayer =

Issuer =

Sponsor =

Group Contract =

Certificate =

Number A =

Number B =

Number C =

Number D =

Dear :

You (Taxpayer) have requested several rulings regarding the application of certain provisions of the Internal Revenue Code to a contemplated transaction.

FACTS:

Taxpayer represents that:

The Issuer is a life insurance company within the meaning of § 816(a) of the Code, files its federal income tax return on a calendar year basis, and reports its income on an accrual method.

Sponsor is a wholly-owned subsidiary of Issuer. Sponsor offers investment advisory services to individuals and entities (Account Owner). Among the investment advisory services are Managed Accounts. With regard to a Managed Account, the amount deposited by the Account Owner is actively managed by Sponsor in a manner consistent with an agreed upon investment strategy. That is, the Account Owner does not direct any specific trading activity but rather that activity is left to the discretion of Sponsor, consistent with the strategy.

Issuer intends to issue Group Contract to Sponsor; the Group Contract authorizes Sponsor to designate certain persons to be eligible to purchase a Certificate. The eligible persons are expected to be certain Account Owners with Managed Account(s). The Group Contract indicates that the Certificate will describe the benefits, and to whom, payable, and applicable limitations and conditions. The Group Contract indicates that the Certificate may be modified by a rider or endorsement attached to the Certificate. After being in effect for one year, the Group Contract can be terminated upon written notice; such termination will not apply to in-force Certificates.

When an eligible Account Owner acquires a Certificate, the Account Owner can select some or all of the assets held in the Managed Account as “Specified Assets.” With the non-discriminatory approval of Issuer, the Account Owner can subsequently select additional assets as Specified Assets.

The Specified Assets will be managed by Sponsor consistent with a “Specified Investment Objective” made available by Sponsor. The Certificate will indicate at issuance the Specified Investment Objective applicable to that Certificate.

After a specified Withdrawal Start Date, the Account Owner may withdraw an amount up to the Annual Withdrawal Amount (described below). In exchange for a Periodic Fee (described below), the Certificate obligates Issuer to provide Account Owner a guaranteed minimum benefit: if the value of the Specified Assets is exhausted through other than Specified Transactions (described below) after the Withdrawal Start Date, Issuer will commence monthly payments to Account Owner, for life, of the Certificate Benefit, which is equal to the Annual Withdrawal Amount.

The Annual Withdrawal Amount is set at issuance of the Certificate to be the lesser of $ Number A[1] or Number B % of the value of the Specified Assets. The Annual

[1] This amount can be changed on a non-discriminatory basis.

Withdrawal Amount will be redetermined on each anniversary to be the greater of the prior year's Annual Withdrawal Amount or Number B % of the value of the Specified Assets on such anniversary. The Annual Withdrawal Amount will be increased by Number B % of the Annual Withdrawal Amount each year during the time beginning on the issuance of the Certificate and ending on the earlier of the Number C anniversary, the anniversary after the Account Owner attains age Number D, or the date the value of the Specified Assets reaches zero because of Specified Transactions (explained next).

Specified Transactions are those in which the Specified Assets are redeemed or transferred for a purpose other than paying the Periodic Fee. If, for example, the Account Owner wishes to reallocate the Specified Assets to an alternative Specified Investment Objective, such reallocation would be a Specified Transaction (unless the reallocation is because the prior Specified Investment Objective is discontinued). Another example of a Specified Transaction is exercise of the Certificate's annuity purchase guarantee.

If a Specified Transaction occurs prior to the Withdrawal Start Date, the Annual Withdrawal Amount is reduced by the ratio that the amount involved in the Specified Transaction bears to the value of the Specified Assets. If a Specified Transaction occurs after the Withdrawal Start Date, there are alternative effects. The Annual Withdrawal Amount is not changed if the amount involved in all Specified Transaction during the year is not greater than the Annual Withdrawal Amount. If the amount involved in all Specified Transactions during the year is greater than the Annual Withdrawal Amount, the Annual Withdrawal Amount is reduced by the ratio that the amount by which the Specified Transactions exceeds the Annual Withdrawal Amount bears to the value of the Specified Assets.

The Certificate is terminated if the value of the Specified Assets is reduced to zero before the Withdrawal Start Date; or, after the Withdrawal Start Date, if the sum of Specified Transactions occurring during a year exceed the Annual Withdrawal Amount and reduces the value of the Specified Assets to zero. Other causes of termination are death of the Account Owner, failure to pay the Periodic Fee, or other disposition of the Specified Assets.

The Certificate can be assigned.

The Periodic Fee is charged quarterly and is a specified percentage of the value of the Specified Assets.

The Certificate will be offered and sold only in states in which it has approved for sale as an annuity contract, and such offer and sale will be pursuant to a registration statement filed with the U.S. Securities and Exchange Commission.

Taxpayer is contemplating purchasing a Certificate.

REQUESTED RULINGS

Taxpayer requests the following rulings:

1. The Certificate will be an annuity contract for federal income tax purposes.
2. The Periodic Fee paid to Issuer will be taken into account in the determination of an Account Owner's "investment in the contract" for the Certificate under § 72 and the Account Owner's adjusted basis in the Certificate under § 1011.
3. The provisions of § 1(h)(11)(B)(iii) will not apply to exclude dividends earned by the Specified Assets from treatment as "qualified dividend income."
4. The deduction of any loss incurred by an Account Owner on a sale or exchange of any of the Specified Assets will not be limited by the provisions of § 165(a).
5. The provisions of § 1233(b) will not apply to the computation of the Account Owner's holding period for the Specified Assets.
6. The deduction of any loss incurred by the Account Owner on a sale or exchange of any of the Specified Assets will not be limited by the provisions of § 1092(a)(1).
7. If Issuer becomes liable to pay Certificate Benefits, such payments will be "amounts received as an annuity" under § 72(a).

LAW AND ANALYSIS

*Requested Ruling #1*

Section 72(a) provides that except as otherwise provided, gross income includes any amount received as an annuity (whether for a period certain or during one or more lives) under an annuity, endowment, or life insurance contract. The Code does not otherwise define an annuity contract or "any amount received as an annuity."

Section 1.72-2(a)(1) of the Income Tax Regulations provides that the contracts under which amounts paid will be subject to the provisions of § 72 include contracts which are considered to be life insurance, endowment, and annuity contracts in accordance with the customary practice of life insurance companies. Under §§ 1.72-1(b) and (c), as a general matter "amounts received as an annuity" are amounts which are payable at regular intervals over a period of more than one full year from the date on which they are deemed to begin, provided the total of the amounts so payable or the period for which they are to be paid can be determined as of that date, a proportionate part of which is considered to represent a return of premiums or other consideration paid. Under § 1.72-2(b), amounts are considered as "amounts received as an annuity"

only if all of the following tests are met: 1) the amounts must be received on or after the annuity starting date, 2) the amounts must be payable in periodic installments at regular intervals over a period of more than one full year from the annuity starting date, and 3) the amounts payable must be determinable either directly from the terms of the contract or indirectly from the use of either mortality tables or compound interest computations, or both (if the contract is a variable contract, § 1.72-2(b)(3) provides an alternative formulation of this requirement). Under § 1.72-4(b)(1), the annuity starting date is the first day of the first period for which an amount is received as an annuity; the first day of the first period for which an amount is received as an annuity shall be the later of 1) the date upon which the obligations under the contract became fixed or 2) the first day of the period which ends on the date of the first annuity payment.

Explaining imposition of an "income-out-first" rule under §72(e) for withdrawals prior to the annuity starting date, the Senate report described a commercial annuity as

> a promise by a life insurance company to pay the beneficiary a given sum for a specified period, which period may terminate at death. Annuity contracts permit the systematic liquidation of an amount consisting of principal (the policyholder's investment in the contract) and income….An individual may purchase an annuity by payment of a single premium or by making periodic payments. A deferred annuity contract may, at the election of the individual, be surrendered before annuity payments begin, in exchange for the cash value of the contract….The committee believes that the use of deferred annuity contracts to meet long-term investment goals, such as income security, is still a worthy ideal.

S. Rep. No. 97-494 at 349-50 (1982)(footnote omitted). The report also explains § 72's utilization of an exclusion ratio regime: "[a] portion of each amount paid to a policyholder as an annuity generally is taxed as ordinary income under an 'exclusion ratio' (§ 72(b)) computed to reflect the projected nontaxable return of investment in the contract and the taxable growth on the investment." Id. As described in Samuel v. Commissioner, 306 F.2d 682, 687 (1st Cir. 1962), aff'g Archibishop Samuel Trust v. Commissioner, 36 T.C. 641 (1961), acq., 1964-2 C.B. 3

> [i]nherent in the concept of an annuity is a transfer of cash or property from one party to another in return for a promise to pay a specific periodic sum for a stipulated time interval….Again, in the normal annuity situation, once the annuitant has transferred the cash or property to the obligor and has received his contractual right to periodic payments,

> he is unconcerned with the ultimate disposition of the property transferred once it is in the obligor's hands.

In Life & Health Insurance, Black and Skipper state that "[i]n the broadest sense, an annuity is simply a series of periodic payments" and while "[l]ife insurance has as its principal mission the creation of a fund [, t]he annuity, on the contrary, has as its basic function the systematic liquidation of a fund." Accordingly,

> [e]ach payment under an annuity may be considered to represent a combination of principal and interest income and a survivorship element. Although not completely accurate, one can view the operation of an annuity as follows: If a person exactly lives out his or her life expectancy, he or she would have neither gained nor lost through utilizing the annuity contract.

Kenneth Black, Jr. and Harold D. Skipper, Jr., Life & Health Insurance 161-62 (13th ed. 2000).

Elsewhere an annuity has been described as "a right to receive fixed, periodic payments, for a specified period of time" and an annuity contract as

> a contract under which, in exchange for the payment of a premium or premiums, the recipient thereof is bound to make future payments, typically at regular intervals, in amounts, to payees, and conditions specified in the parties' agreement. The determining characteristic of an annuity is that the annuitant has an interest only in the periodic payments and not in any principal fund or source from which they may be derived. Although an individual who purchases an annuity remains the technical owner of the asset, he or she does not retain total control over that asset and does not have unfettered access to the full amount of his or her own "property".

4 Am. Jur. 2d Annuities, § 1 (2008). Moreover, "[t]he purchaser of an annuity surrenders all rights to the money paid, and therefore installment payments of a debt, or payments of interest on a debt, do not constitute an annuity." Id., § 2.

Whether an annuity contract allows the owner to access the value of the contract through other than periodic ("annuity") payments is a product of state statute, Appleman on Insurance § 182:05[B][7] and [8] (2d ed. 2008).

Here, on balance the Certificate possess the essential attributes of an annuity. It is true that the Certificate may not, "at the election of the [Account Owner], be surrendered before annuity payments begin, in exchange for the cash value of the contract", S. Rep. No. 97-464 at 349. It is also true that because the annuity starting date is contingent upon the value of the Specified Assets being exhausted while Account Owner is alive, it is not the case that "if [Account Owner] exactly lives out his or her life expectancy, he or she would have neither gained nor lost through utilizing the annuity contract", Life & Health Insurance, at 162, but these conditions are not dispositive.

The Certificate and the amounts paid under the Certificate meet the requirements of §§ 1.72-1(b) and (c), 1.72-2(a)(1) and (b)(3), and 1.72-4(b)(1) as annuity contracts and annuity payments. Additionally, the Certificate is purchased "by making periodic payments" of premium for "a promise by a life insurance company to pay the beneficiary a given sum for a specified period, which period may terminate at death", and is "used to provide long-term income security." S. Rep. No. 97-464 at 349. Moreover, it has "the determining characteristic … that the annuitant has an interest only in the periodic payments and not in any principal fund or source from which they may be derived." 4 Am. Jur. 2d Annuities, §1. The Account Owner will have "surrender[ed] all rights to the money paid", thereby distinguishing the Certificate from "installment payments of a debt, or payments of interest on a debt", which are not annuities. Id.

The Certificate is not a contract to pay interest. See § 1.72-14(a).

Accordingly, the Certificate will be treated as an annuity contract within the meaning of § 72.[2]

*Requested Ruling #2*

Section 72(c)(1) provides that, for purposes of the exclusion ratio under § 72(b), the "investment in the contract" as of the annuity starting date as the aggregate amount of premiums or other consideration paid for the contract, minus the aggregate amount received under the contract before such date, to the extent that such amount was excludable from gross income. Under § 72(c)(2), this amount is then reduced by the value of the refund feature, if any.

Section 72(e)(6) provides that for purposes of § 72(e), the "investment in the contract" as of any date is the aggregate amount of premiums or other consideration paid for the contract before such date, minus the aggregate amount received under the

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[2] The Account Owner will be treated as the owner of the Specified Assets. Rev. Rul. 2003-92, 2003-2 C.B. 350; Rev. Rul. 81-225, 1981-2 C.B. 12. As such, the designation of assets as Specified Assets is not a disposition or other realization event with respect to such assets and the Account Owner remains subject to any federal income tax applicable to the Specified Assets.

contract before such date, to the extent that such amount was excludable from gross income.

Section 1011(a) provides that the adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under § 1012 or other applicable sections), adjusted as provided in § 1016.

Accordingly, The Periodic Fee paid to Taxpayer will be taken into account in the determination of an Account Owner's "investment in the contract" for the Certificate under § 72 and the Account Owner's adjusted basis in the Certificate under § 1011. See, e.g., Rev. Rul. 2003-76, 2003-2 C.B. 355 (addressing the allocation of the investment in the contract and the basis in the contract after the exchange of a portion of an annuity contract under § 1035(a)(3)).

*Requested Ruling #3*

Under § 1(h)(11)(A), for purposes of § 1(h), the term "net capital gain" means net capital gain (determined without regard to § 1(h)(11)) increased by qualified dividend income. In defining qualified dividend income, § 1(h)(11)(B)(iii) provides that the term shall not include any dividend on any share of stock with respect to which the holding period requirements of § 246(c) are not met, determined by substituting in § 246(c) "60 days" for "45 days" each place it appears and by substituting "121-day period" for "91-day period".

Section 246 provides rules applicable to deductions for dividends received, among them a required holding period. See, § 246(c). Under § 246(c)(4), this holding period is reduced for any period (during such periods) in which (A) the taxpayer has an option to sell, is under a contractual obligation to sell, or has made (and not closed) a short sale of, substantially identical stock or securities, (B) the taxpayer is the grantor of an option to buy substantially identical stock or securities, or (C) under regulations a taxpayer has diminished his risk of loss by holding 1 or more other positions with respect to substantially similar or related property.

The applicable regulation is § 1.246-5, which provides that property is substantially similar or related to stock when (i) the fair market value of the stock and the property reflect the performance of (A) a single firm or enterprise; (B) the same industry or industries; or (C) the same economic factor or factors such as (but not limited to) interest rates, commodity prices, or foreign-currency exchange rates; and (ii) changes in the fair market value of the stock are reasonably expected to approximate, directly or inversely, changes in the fair market value of the property, a fraction of the fair market value of the property, or a multiple of the fair market value of the property. Sec. 1.246-5(b)(1). A position is an interest (including a futures or forward contract or an option) in property or any contractual right to a payment, whether or not severable from stock or other property, § 1.246-5(b)(3). Moreover, a taxpayer has diminished its

risk of loss on stock by holding a position in substantially similar or related property if the taxpayer is the beneficiary of a guarantee, surety agreement, or similar arrangement and the guarantee, surety agreement, or similar arrangement provides for payments that will substantially offset decreases in the fair market value of the stock. § 1.246-5(c)(4).

The Conference Report to the Deficit Reduction Act of 1984, H. Rep. No. 98-861, at 818, 1984-3 C.B. (Vol. 2) 1, 72, indicates that "[t]he substantially similar standard is not satisfied merely because the taxpayer … is an investor with diversified holdings and acquires a [regulated futures contract] or option on a stock index to hedge general market risks."

Here, by purchasing the Certificate, the Account Owner will not have entered into an option to sell, is not under a contractual obligation to sell, or has not made (nor closed) a short sale of, substantially identical stock or securities. The Certificate is not substantially similar or related property because the fair market value of the Specified Assets and the Certificate do not reflect the performance of a single firm or enterprise, the same industry or industries, or the same economic factors; because the predominant risk the Certificate protects against is longevity risk (i.e., the benefit under the Certificate is contingent upon the Account Owner's survival), and because the changes in the fair market value of the Specified Assets are not reasonably expected to approximate, directly or inversely, changes in the fair market value of the Certificate, a fraction or multiple thereof. Finally, the benefits that may be ultimately paid under the Certificate are not closely correlated with, and do not substantially offset, decreases in the fair market value of the Specified Assets. Thus, we conclude that the Certificate does not diminish the Account Owner's risk of loss on the Specified Assets for purposes of applying the holding period requirements of § 1(h)(11).

*Requested Ruling #4*

Section 165(a) allows as a deduction any loss not compensated for by insurance or otherwise.

Section 1.165-1(d)(2)(i) provides that if a casualty or other event occurs which may result in a loss, and in that year there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained until it can be ascertained with reasonable certainty whether or not the reimbursement will be received. Whether a reasonable prospect of recovery exists with respect to a claim for reimbursement of a loss is a question of fact to be determined upon an examination of all facts and circumstances.

In Dunne v. Commissioner, 29 B.T.A. 1109 (1934), aff'd, 75 F.2d 255 (2d Cir. 1935), the taxpayer and two others were the beneficial owners of three brokerage

accounts that were opened at the recommendation of a wealthy friend who, desiring to assist them in making money on the stock market, guaranteed the accounts. The court held that the taxpayer's subsequent losses were not deductible because of the guarantee.

In Boston Elevated Rwy v. Commissioner, 16 T.C. 1084, 1111-1112 (1951), aff'd on another issue, 196 F.2d 923 (1st Cir. 1952), the Service argued that loss resulting from the abandonment of an elevated railway structure was compensated for by legislation (the Public Control Act) guaranteeing the taxpayer operating profits sufficient to pay dividends. The court disagreed, stating that "regardless of the amounts of any possible losses sustained by petitioner, no payments would be forthcoming to it if its income were sufficiently high, after absorbing the losses and other charges, to pay the required dividends." 16 T.C. at 1112.

Johnson v. Commissioner, 66 T.C. 897 (1976), aff'd, 574 F.2d 189 (4th Cir. 1978), involved a business partnership formed by the taxpayer and an associate. The taxpayer purchased an insurance policy on his partner's life. After his partner's accidental death, the taxpayer and his partner's widow were unsuccessful in continuing the business and terminated the partnership. The court upheld the disallowance of a loss on the termination because the taxpayer was compensated by the proceeds of the insurance policy. The court pointed out that the amount of the policy was approximately equal to the taxpayer's investment in the partnership. Thus, although it was not the partnership interest itself that was insured, the life insurance acted to compensate the loss of the partnership interest.

In Forward Communications Corp. v. United States, 608 F.2d 485 (Ct. Cl. 1979), the taxpayer, a local television station, claimed a loss based on termination of its affiliation agreement with CBS, the television network. The trial judge upheld disallowance of the deduction on the theory that increased revenues from affiliation with ABC, another television network, compensated taxpayer for loss of the CBS affiliation. Reversing this finding, the Court of Claims stated, "[t]he statute does not bar a deduction for a loss actually incurred merely because the taxpayer is able to effect an offsetting gain on a different although contemporaneous transaction." 608 F.2d at 611-12.

In Shanahan v. Commissioner, 63 T.C. 21 (1974), which involved federal disaster relief payments, the Tax Court, interpreting the words "insurance or otherwise" in § 165, determined that the general term "or otherwise" must be construed consistently with the specific term "insurance." The court stated that the general purpose of insurance is to spread the risk of loss from any peril among a large number of those who are exposed to a similar peril.

In Estate of Bryan v. Commissioner, 74 T.C. 725 (1980), the court, citing Shanahan, determined that the phrase "insurance or otherwise" in an analogous

provision, § 2054, contemplates that the type of compensation received must be such that it was "structured to replace what was lost." 74 T.C. at 727. The court held that a disbursement from a trust fund established by a state bar association, in compensation for losses incurred due to an attorney's unethical behavior, was in the nature of insurance.

Rev. Rul. 87-117, 1987-2 CB 61, involves a regulated public utility that abandons a partially-completed nuclear plant; the ratemaking authority allows a rate increase that takes into account the cost of the abandoned plant. The ruling holds that the rate increase does not reduce the taxpayer's abandonment-loss deduction because the rate increase was structured to serve the utilities' customers at a fair charge and ensure a reasonable return to investors, not to reimburse the loss.

In the present situation, the Certificate may appear to be "structured to replace what was lost," in that the Certificate Benefit takes effect upon the reduction of the overall value of the Specified Assets to zero, and may reflect the highest prior net value of those assets. Similarly, as a case like Johnson illustrates, it is possible for a contractual arrangement to be treated as compensation for § 165 purposes even though it compensates for a loss indirectly, not directly. However, in this case the relationship between any individual market loss on the Specified Assets and any eventual periodic payments under the Certificate is too tenuous and too contingent on a number of factors for the payments to be considered compensation for any given market loss. For example, Account Owner may die before the Specified Assets are depleted, in which case the Certificate Benefit will never take effect. The Specified Investment Objective is intended to minimize the effect of excessive volatility and market risk. There is no close correlation between any given loss and any eventual payments that Taxpayer may make. Moreover, the fact, amount, and timing of the Certificate Benefit depends on market gains as well as losses; similarly, in Boston Elevated Rwy, "regardless of the amounts of any possible losses sustained by petitioner, no payments would be forthcoming to it if its income were sufficiently high, after absorbing the losses … ." 16 T.C. at 1112. Withdrawals after the Withdrawal Starting Date of the Annual Withdrawal Amount, not just investment losses, will contribute significantly to depletion of the Specified Assets; in fact, the arrangement is structured primarily to insure against longevity risk, not market risk, and, should Account Owner live long enough, he could eventually begin to receive the Certificate Benefit whether or not losses were sustained. Finally, the amount of compensation Account Owner may receive under the Certificate depends on how long he lives, and is not tied to the amount of the losses. Thus, the fact, amount, and timing of the Certificate Benefit are contingent on a number of factors, including not only a particular market loss, but also other market losses, offsetting market gains, Account Owner's withdrawal rate, and – most significantly – Account Owner's life span. The contract is structured, not as reimbursement for market losses, but rather as a contingent, deferred annuity that begins to pay benefits on the occurrence of an event the timing of which may be influenced by market performance. The Certificate is not structured to replace or reimburse either individual or overall

market losses on the Specified Assets. Cases such as Dunne and Johnson are distinguishable because the nexus between the losses and the compensation for the losses was more direct than is the case here.

Therefore, the Certificate will not create a right to reimbursement for losses realized on Specified Assets for purposes of § 165(a) and thus will not prevent Account Owner from currently deducting such losses, assuming Account Owner's losses otherwise meet the requirements of § 165.

This holding is based on and limited to the particular contract at issue, and the effect of that contract as represented by Taxpayer; it would not necessarily apply to a similar feature if the terms of the contract were significantly altered.

*Requested Ruling #5*

Section 1233 provides rules as to the tax consequences of a short sale of property if gain or loss from the short sale is considered a gain or loss from the sale or exchange of a capital asset. Section 1.1233-1(c)(1).

Section 1233(b) provides that:

> If gain or loss from a short sale is considered as gain or loss from the sale or exchange of a capital asset under subsection (a) and if on the date of such short sale substantially identical property has been held by the taxpayer for not more than 1 year (determined without regard to the effect, under paragraph (2) of this subsection, of such short sale on the holding period), or if substantially identical property is acquired by the taxpayer after such short sale and on or before the date of the closing thereof--
>
> **(1)** any gain on the closing of such short sale shall be considered as a gain on the sale or exchange of a capital asset held for not more than 1 year (notwithstanding the period of time any property used to close such short sale has been held); and
>
> **(2)** the holding period of such substantially identical property shall be considered to begin (notwithstanding § 1223), relating to the holding period of property) on the date of the closing of the short sale, or on the date of a sale, gift, or other disposition of such property, whichever date occurs first. This paragraph shall apply to such substantially identical property in the order of the dates of the acquisition

> of such property, but only to so much of such property as does not exceed the quantity sold short.
>
> For purposes of this subsection, the acquisition of an option to sell property at a fixed price shall be considered as a short sale, and the exercise or failure to exercise such option shall be considered as a closing of such short sale.

The Certificate is neither a short sale of, nor an option to sell the Specified Assets. No other aspect of the transaction would qualify as a short sale of, or an option to sell, the Specified Assets. Therefore the provisions of § 1233(b) will not apply to the computation of the Account Owner's holding period for the Specified Assets.

*Requested Ruling #6*

Section 1092 imposes special rules that effectively suspend losses with respect to positions that are held as part of a straddle.

A straddle is defined in § 1092(c)(1) as “offsetting positions with respect to personal property.” A taxpayer holds “offsetting positions with respect to personal property” if there is a substantial diminution of the taxpayer’s risk of loss from holding any position by reason of his holding one or more other positions with respect to personal property (whether or not of the same kind). See § 1092(c)(2)(A). Section 1092(d) provides that the term “personal property” means any personal property of a type which is actively traded and that the term “position” means an interest in personal property. The Certificate, however, is not an “offsetting position” with respect to Account Owner’s interest in the Specified Assets. See also § 1092(d)(3). Accordingly, § 1092 does not apply.

*Requested Ruling #7*

For the reasons explained with respect to Requested Ruling #1, if Taxpayer becomes liable to pay Certificate Benefits under the Certificate, such payments will be “amounts received as an annuity” under § 72(a).

RULINGS

Based on the foregoing,

1. The Certificate will be an annuity contract for federal income tax purposes.

2. The Periodic Fee paid to Issuer will be taken into account in the determination of an Account Owner's "investment in the contract" for the Certificate under § 72 and the Account Owner's adjusted basis in the Certificate under § 1011.

3. The provisions of § 1(h)(11)(B)(iii) will not apply to exclude dividends earned by the Specified Assets from treatment as "qualified dividend income."

4. The Certificate will not create a right to reimbursement for losses incurred by an Account Owner on a sale or exchange of any of the Specified Assets, for purposes of § 165(a), and thus will not prevent Account Owner from currently deducting such losses, assuming the losses otherwise meet the requirements of § 165.

5. The provisions of § 1233(b) will not apply to the computation of the Account Owner's holding period for the Specified Assets.

6. The deduction of any loss incurred by the Account Owner on a sale or exchange of any of the Specified Assets will not be limited by the provisions of § 1092(a)(1).

7. If Issuer becomes liable to pay Certificate Benefits, such payments will be "amounts received as an annuity" under § 72(a).

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

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 requesting it. Section 6110(k)(3) 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 your authorized representative.

Sincerely,

/S/

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