

**Internal Revenue Service**

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Person To Contact:  
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Telephone Number:

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Date:  
June 04, 2013

Fund =  
Trust =  
State A =  
Date 1 =  
Date 2 =  
State B =  
Adviser =  
Fund X =

Dear :

This is in response to the letter submitted by your authorized representative dated December 21, 2012, requesting a ruling concerning the tax ownership of Fund, a series of Trust, so that Fund can determine whether it qualifies for an exception from the excise tax imposed by § 4982 of the Internal Revenue Code (the "Code").

**FACTS**

Trust

Trust is a statutory trust formed under the laws of the State A on Date 1. Trust is registered with the Securities and Exchange Commission (the "SEC") as an open-end management investment company under the Investment Company Act of 1940, as amended (the "1940 Act").

Fund

Fund is a series of Trust. Trust may issue an unlimited number of shares of beneficial interest, no par value per share, in Fund. The shares of beneficial interest of Fund are registered under the Securities Act of 1933, as amended.

Fund is a “fund” as such term is used in § 851(g)(2), and accordingly, it is treated as a separate corporation for federal income tax purposes pursuant to § 851(g)(1).

Fund has elected to be taxed as a regulated investment company under Part I of Subchapter M of the Code. Fund has qualified and intends to continue to qualify for the tax treatment afforded regulated investment companies under the Code for each of its taxable years.

Fund’s annual accounting period is the year ended Date 2, and Fund uses the accrual method of accounting for maintaining its accounting books and filing federal income tax returns.

#### Ownership of Fund

Shares of Fund are offered to insurance company segregated asset accounts to serve as an investment vehicle for variable annuity contracts and variable life insurance policies (“Variable Contracts”) and to “Related Variable Funds.” Related Variable Funds are also regulated investment companies that are offered to insurance company segregated asset accounts to serve as an investment vehicle for Variable Contracts. Both Fund and the Related Variable Funds are advised by Adviser.

Shares of Fund, except as otherwise permitted by § 1.817-5(f)(3) of the Income Tax Regulations, are held by (a) segregated asset accounts underlying Variable Contracts of one or more insurance companies, and (b) Related Variable Funds. Related Variable Funds are also, except as otherwise permitted by § 1.817-5(f)(3) of the Income Tax Regulations, held by (a) segregated asset accounts underlying Variable Contracts and (b) other Related Variable Funds. The Variable Contracts are “variable contracts” within the meaning of § 817(d).

Public access to Fund and the Related Variable Funds is available exclusively through the purchase of a Variable Contract. Although the terms of each Variable Contract may vary, the insurance company will generally hold the premiums paid by a Variable Contract holder, net of any fees or commissions, and any income earned on the net premiums in a segregated asset account. The Variable Contract holder generally will be able to allocate amounts held in the segregated asset account among several different investment options or subaccounts. At least one subaccount will correspond to an investment in Fund.

Each segregated asset account that holds shares of Fund or shares of the Related Variable Funds is a separate account registered with the SEC as a unit investment trust under the 1940 Act. The life insurance companies whose segregated asset accounts hold shares of Fund or shares of the Related Variable Funds are life insurance companies within the meaning of § 816(a).

#### Fund’s Investment Objectives

Fund seeks long-term capital appreciation. It currently invests primarily in equity securities of small cap companies.

#### Adviser and Subadvisers of Fund

Fund has entered into an investment advisory agreement with Adviser. Adviser is a corporation organized under the laws of State B and is a registered investment adviser under the Investment Advisers Act of 1940, as amended. Pursuant to the investment advisory agreement, Adviser is responsible for managing the investment and reinvestment of Fund's assets, and continuously reviewing, supervising and administering Fund's investment programs.

Adviser has entered into investment subadvisory agreements with subadvisers regarding the management of Fund. Pursuant to the investment subadvisory agreements, each subadviser is responsible for making investment decisions, buying and selling securities, and conducting research that leads to purchase and sale decisions for the portion of Fund's portfolio allocated to each subadviser.

Adviser assists and consults with each subadviser in connection with Fund's investment program. Adviser also reviews, monitors and reports to the Board of Trustees of the Trust regarding the investment performance and investment procedures of each subadviser.

Adviser has discretion over the percentage of Fund's assets allocated to each subadviser and, to the extent Adviser deems it appropriate to achieve Fund's investment objective, may reallocate the percentage of Fund's assets overseen by each subadviser. Pursuant to an exemptive order from the SEC, Adviser, without shareholder approval (as normally would be required under the 1940 Act), may replace or remove the subadvisers, or may add subadvisers and enter into subadvisory agreements with such subadvisers with respect to all or a portion of Fund's portfolio upon the approval of the Board of Trustees of the Trust.

#### Change in Fund's Investment Strategy

Fund would like to achieve its investment objective by investing across a wider range of asset classes and utilizing a wider variety of securities and investment styles. In order to gain exposure to these asset classes and investment styles, Fund intends to invest a certain percentage of its assets in other regulated investment companies and other pooled investment vehicles (whether or not such pooled investment vehicles qualify as regulated investment companies), including exchange traded funds that invest in a variety of U.S. and foreign equity, debt, money market securities, futures and other instruments ("Underlying Funds"). In connection with this change in its investment strategy, Fund will change its name to Fund X.

Some of the Underlying Funds in which Fund will invest may be Related Variable Funds. There are currently, however, only a limited number of Related Variable Funds that provide exposure to the asset classes and investment styles that meet Fund's investment needs. To obtain exposure to specific asset classes and investment styles for which Related Variable Funds are not available and to more effectively execute Fund's investment strategy, Fund may invest in Underlying Funds that are available to investors other than through the purchase of a Variable Contract ("Public Funds").

Some of the Public Funds in which Fund may invest are advised by Adviser or an affiliate of Adviser. It is possible that at times up to one hundred percent (100%) of Fund's total assets may be invested in Public Funds.

Adviser will regularly review Fund's investments, including investments in Underlying Funds, and adjust Fund's investments in seeking to take advantage of current or expected market conditions, or to manage risk. The portion of Fund's assets allocated to an Underlying Fund will change over time and there can be no expectation that current or past positions in an Underlying Fund will be maintained in the future.

#### Variable Contract Holders

All investment decisions concerning Fund will be made by Adviser or a subadviser in their sole and absolute discretion. A Variable Contract holder will only be able to allocate premiums and transfer amounts in the insurance company segregated asset account to and from the insurance company subaccount corresponding to a fund. A Variable Contract holder will not be able to direct Fund's investment in any particular asset or recommend a particular investment or investment strategy, and there will be no agreement or plan between Adviser and a Variable Contract holder or between a subadviser and a Variable Contract holder regarding a particular investment. A Variable Contract holder will have no current knowledge of Fund's specific assets. Fund's portfolio holdings, however, will be available in quarterly filings with the SEC, including annual and semi-annual reports to shareholders.

A Variable Contract holder will have no legal, equitable, direct, or indirect interest in any of the assets of Fund. Rather, a Variable Contract holder will have only a contractual claim against the insurance company offering the Variable Contract to receive cash from the insurance company pursuant to the terms of the specific Variable Contract.

#### Fund's Diversification

Fund will comply with the diversification requirements of § 817(h) and § 1.817-5(b) of the Income Tax Regulations.

### **LAW**

#### Investor Control Rules

If the separate account assets underlying the variable contract are considered the assets of the life insurance company that issues the contract and not the property of the contract holder, § 817 governs the tax treatment of the contract. If the separate account assets underlying the contract are considered the assets of the contract holder, the contract holder is taxed on the income derived from the investment assets under § 61.

In general, the holder of legal title is the owner of the property and is taxed on the income derived from the property. However, if a person other than the holder of legal title possesses the "benefits and burdens" of ownership, that person is attributed ownership of property for tax purposes. See, e.g., Frank Lyon Company v. United States, 435 U.S. 561 (1978); Helvering v. Clifford, 309 U.S. 331 (1940). The Supreme

Court summarized this principle in Corliss v. Bowers, 381 U.S. 376, 378 (1930), stating that “taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed - the actual benefit for which the tax is paid.”

The Service applied these general tax ownership principles in a series of “investor control” rulings. Rev. Rul. 77-85, 1977-1 C.B. 12, Rev. Rul. 80-274, 1980-2 C.B. 27, Rev. Rul. 81-225, 1981-2 C.B. 12, Rev. Rul. 82-54, 1982-1 C.B. 11, Rev. Rul. 2003-91, 2003-2 C.B. 347, and Rev. Rul. 2003-92, 2003-2 C.B. 350. The rulings stand for the proposition that contract holders possessing control over the investment of the separate account assets (in addition to the other benefits and burdens of contract ownership) are the owners of separate account assets for federal income tax purposes even if the insurance company retains possession of and legal title to those assets.

In Rev. Rul. 77-85, the Service concluded that if the contract holder of an “investment annuity” contract may select and control the investment assets in the separate account of the life insurance company, then the contract holder is treated as the owner of those assets for federal income tax purposes and is taxed on the income derived from the investment assets. In the ruling, the individual contract holder 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 contract holder also was able to exercise an owner's right to vote account securities either through the custodian or individually. The Service found that the contract holder possessed “significant incidents of ownership” over the assets held in the custodial account, and thus, concluded that the policyholder was the owner of those assets for federal income tax purposes.

In Rev. Rul. 80-274, the contract holder transferred existing investments to an insurance company in return for an annuity contract and could withdraw all or a portion of the cash surrender value of the contract at any time prior to the annuity starting date. The Service, applying Rev. Rul. 77-85, concluded that the contract holder's position was substantially identical to what it would have been had the investment been directly maintained or established, and thus, the contract holder was the owner of the investment for federal income tax purposes.

In Rev. Rul. 81-225, the Service described four situations in which the contract holder is considered the owner of mutual fund shares held by insurance companies in connection with annuity contracts and one situation in which the insurance company is the owner of the mutual fund shares for federal income tax purposes. In the four situations in which the contract holder is considered the owner of the mutual fund shares, the shares are available for purchase other than through the purchase of an annuity contract. In those situations, the Service concluded that the contract holder had investment control over the mutual fund shares and that the contract holder's position in each situation was substantially identical to what it would have been had the mutual fund shares been purchased directly by the contract holders. Conversely, in the situation in which the mutual fund shares were only available through the purchase of an annuity contract, the insurance company was the owner for federal income tax purposes.

In Rev. Rul. 82-54, the contract holder of certain annuity contracts could allocate premium payments among three funds and had an unlimited right to change those allocations 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 concluded 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 for federal income tax purposes.

In 1984, the Eight Circuit addressed the tax ownership issue in the context of a variable annuity contract. Christoffersen v. United States, 749 F.2d 513 (8th Cir. 1984). The taxpayers, upon purchasing the contract, could allocate premiums among mutual funds and could change the allocation at any time. The taxpayers bore the full investment risk and could withdraw any or all of the investment upon seven days notice. In addition, the taxpayer was not required to exercise the annuity feature of the contract. The Eighth Circuit concluded that the taxpayers "surrendered few of the rights of ownership or control over assets of the sub-account." Id. at 515. The court held that, for federal income tax purposes, the taxpayers, not the issuing insurance company, owned the mutual fund shares that funded the variable annuity and, thus, the taxpayers were required to include in gross income any gains, dividends, or other income derived from the mutual fund shares.

In Rev. Rul. 2003-91, the Service concluded that the variable contract holder did not have sufficient control over segregated account assets to be deemed the owner of the assets. The variable contract was funded by a separate account that was divided into twelve subaccounts. 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 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 Revenue Ruling 2003-92, the purchasers of variable annuity and variable life insurance contracts were able to allocate their premiums among ten different sub-accounts. Each sub-account invested in a partnership. In the factual scenario in which the partnership interests were available other than through the purchase of a variable annuity or life insurance contract, the Service concluded that the contract holders were the owners of the interests in the partnerships. In contrast, if the partnership interests were only available through the purchase of a variable annuity or life insurance contract, the Service concluded that the insurance company was the owner of the interests in the partnerships.

#### Section 4982

Section 4982(a) imposes a tax on every regulated investment company for each calendar year equal to 4 percent of the excess (if any) of — (1) the required distribution for such calendar year, over (2) the distributed amount for such calendar year.

Section 4982(f)(2) and (f)(4) provides exemptions from such excise tax for any calendar year if at all times during such calendar year each shareholder in such company was a segregated asset account of a life insurance company held in connection with variable contracts (as defined in § 817(d)) or another regulated investment company described in § 4982(f).

### **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 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. See Rev. Rul. 2003-91.

In the instant case, the Variable Contract holders do not have any control over Fund's investments, including Fund's investments in Public Funds. The investment decisions of Fund are made by Fund's adviser and subadvisers in their sole and absolute discretion and are subject to change without notice to or approval by the Variable Contract holders. The Variable Contract holders in this case do not have any more control over the assets held under their contract than was the case in Rev. Rul. 82-54 or Rev. Rul. 2003-91. Fund is not an indirect means of allowing a Variable Contract holder to invest in a Public Fund.

**CONCLUSION**

Based on the representations and facts presented by the taxpayer, Fund's investments in Public Funds will not cause the Variable Contract holders to be treated as the owners of 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.

This ruling letter is directed only to the taxpayer who requested it. Section 6110(k)(3) 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 rulings. See § 11.04 of Rev. Proc. 2012-1; 2012-1 I.R.B. 1, 50-51. However, when the criteria in § 11.06 of Rev. Proc. 2012-1; 2012-1 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. This office has not verified any of the material submitted in support of the request for rulings and it is subject to verification on examination.

Sincerely,

Donald J. Drees, Jr.  
Senior Technician Reviewer, Branch 4  
(Financial Institutions & Products)

cc: