



DAVIS &
HARMAN LLP



Committee of Annuity Insurers
Joseph F. McKeever, III
Davis & Harman LLP
1455 Pennsylvania Avenue, NW, Suite 1200
Washington, DC 20004
(202) 347-2230

American Council of Life Insurers
Walter C. Welsh
Executive VP, Taxes & Retirement Security
101 Constitution Avenue, NW, Suite 700
Washington, DC 20001
(202) 624-2157

May 19, 2008

VIA ELECTRONIC MAIL

Mr. Mark S. Smith
Attorney-Advisor
Office of Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Ms. Sheryl Flum
Chief, Branch 4
Office of Associate Chief Counsel (FI&P)
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Re: Committee of Annuity Insurers and ACLI Comments on Revenue Procedure 2008-24

Dear Mark and Sheryl:

On behalf of the Committee of Annuity Insurers and the American Council of Life Insurers, we are writing to express our appreciation to the Treasury Department and the Internal Revenue Service for issuing Rev. Proc. 2008-24, and to respectfully request additional clarification on one important aspect of the guidance.¹ Rev. Proc. 2008-24 provides much needed guidance on the tax consequences of a partial exchange involving non-qualified annuity contracts and significantly improves upon the interim guidance of Notice 2003-51. In particular, by eliminating the “subjective” component of the interim guidance regarding whether a post-exchange distribution was contemplated at the time of the exchange, the new guidance provides annuity owners, life insurers, and the Service with much greater certainty regarding the tax consequences of partial exchange transactions. Likewise, the reduction of the “waiting period” for post-exchange distributions from 24 months to 12 months and the clarification that the same rules apply to partial exchanges involving the same or different insurers are very positive developments that we believe are grounded in sound tax policy. We also are pleased that Rev. Proc. 2008-24 provides additional clarity on the tax consequences of a transaction that falls outside the scope of the guidance. All of these changes to the interim guidance help achieve the right policy result and provide clear standards that will help taxpayers and the Service better understand and implement the rules governing partial exchanges.

¹ The Committee is a coalition of 33 life insurance companies representing more than two-thirds of the annuity business in the United States. A list of the Committee’s member companies is attached. The ACLI represents 373 member companies accounting for 93 percent of the life insurance industry’s total assets, 91 percent of the life insurance premiums, and 95 percent of annuity considerations in the United States.

There is one particular aspect of Rev. Proc. 2008-24, however, for which we believe additional clarification is needed in order to provide annuity owners and life insurers with the guidance they need to properly structure and report their transactions, as well as for the Service to administer the applicable rules. This need for clarification relates to section 4.01(b) of the revenue procedure, which addresses circumstances where a distribution occurs during the 12-month waiting period described above, but the taxpayer demonstrates that any “condition” described in section 72(q)(2), other than subparagraph (D) or (I) thereof, “occurred between” the date of the partial exchange and the date of the distribution.

Some of the conditions set forth in section 72(q)(2) could literally “occur between” the date of a partial exchange and a distribution. For example, an individual could attain age 59½ or become disabled during that period. However, other conditions described in section 72(q)(2) appear to be unable to “occur between” the date of a partial exchange and a distribution. For example, one of the conditions referenced in the guidance is section 72(q)(2)(F), which describes distributions “allocable to investment in the contract before August 14, 1982.” Seemingly, this “condition” would “occur” on the date the investment in the contract was made, *i.e.*, sometime before August 14, 1982. Thus, because the revenue procedure is effective only for partial exchanges completed on or after June 30, 2008, it appears that the section 72(q)(2)(F) condition can only occur *prior to* any partial exchange covered by the revenue procedure, and that the condition could never “occur between” the date of such a partial exchange and a subsequent distribution.

In that regard, it is possible to interpret the “incurred between” language in the guidance to mean that only those “conditions” that first arise after the partial exchange will permit a taxpayer to receive a post-exchange distribution within the waiting period without triggering adverse tax consequences. However, we believe that the more reasonable interpretation is that the reference to section 72(q)(2) “conditions” that “occurred between” the date of the partial exchange and the date of the distribution means simply that the condition *must be present* as of the time of the distribution, irrespective of whether the condition first arose prior to or after the partial exchange.

We believe that resolution of this ambiguity is critical, especially for individuals who would like to rely upon the section 72(q)(2)(A) “condition” of attaining age 59½ in taking a distribution during the 12-month waiting period. Such individuals who turn age 59½ prior to their partial exchange transactions will need to know whether they can take distributions from their contracts within the 12-month waiting period or whether they need to wait until the end of that period. In light of the fact that the average non-qualified annuity owner is 66 years old, the answer to this question could affect a significant number of the more than 9 million owners of non-qualified annuity contracts. For the reasons summarized below, we respectfully submit that Rev. Proc. 2008-24 should be clarified to indicate that the enumerated “conditions” of section 72(q)(2) need only exist as of the date of a distribution:

- The exceptions to the 12-month waiting period should be interpreted consistently with how those exceptions apply in the context of the section 72(q) penalty tax. In that context, the exceptions apply irrespective of when the “condition” first arose. For example, once a person attains age 59½ or becomes disabled, the penalty tax does not apply to *any* subsequent distributions. Allowing distributions during the 12-month waiting period in these circumstances would be generally consistent with the congressional intent in allowing the penalty-free withdrawal of monies from a non-qualified annuity at any time after an event occurs that gives rise to one of the conditions described in section 72(q)(2).
- To the extent possible, published guidance should be read in a manner that gives meaning to all of its provisions. If section 4.01(b) of Rev. Proc. 2008-24 is read to provide that the conditions enumerated therein must first arise *after* the partial exchange, the exception in section 72(q)(2)(F) would appear to be unavailable in all cases for the reasons discussed above. An interpretation that precludes use of one of the express exceptions provided in the guidance should be avoided.
- Similarly, to the extent possible, published guidance should be read in a manner that does not produce odd results. If Rev. Proc. 2008-24 requires that the conditions set forth in section 4.01(b) literally must occur after the partial exchange and before the distribution, an individual who happens to attain age 59½ within that narrow window can exchange monies from a deferred annuity into an immediate annuity, but a 70-year-old cannot. Likewise, a person who was already disabled at the time of a partial exchange could not rely upon the section 72(q)(2)(C) exception, but an individual who happened to become disabled during the waiting period could. Such results are difficult to rationalize, and would be avoided under the interpretation we support.
- Our interpretation is not inconsistent with the provisions of Rev. Proc. 2008-24 that “carve out” the section 72(q)(2)(D) and (I) exceptions from those that will allow a distribution during the 12 months following a partial exchange. This is because the various exceptions enumerated in the guidance, like the various 10% penalty tax exceptions on which they are based, apply *independently* of one another. Thus, under our interpretation, a taxpayer will not be able to rely upon the section 72(q)(2)(D) exception for substantially equal periodic payments or the section 72(q)(2)(I) exception for immediate annuities. Rather, they will need to meet one of the exceptions explicitly enumerated in the guidance.

We believe that the foregoing considerations support the clarification we have requested. In any event, we believe that additional guidance is needed on this question, and we would welcome any clarification that the Treasury Department or the Service could provide. Given that Rev. Proc. 2008-24 is effective for exchanges completed on or after June 30, 2008, taxpayers will need to know the answer to this question soon so that they can plan their affairs accordingly. Thus, we hope that the Treasury Department and the Service can clarify this issue as soon as possible.

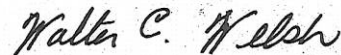
Mr. Mark S. Smith and Ms. Sheryl Flum
May 19, 2008
Page 4 of 4

If you have any questions or if we can be of any assistance, please contact either of the undersigned. Mr. McKeever can be reached *via* telephone at 347-2252 or *via* electronic mail at jfmckeever@davis-harman.com, while Mr. Welsh can be reached *via* telephone at 624-2157 or *via* electronic mail at walterwelsh@acli.com.

Sincerely,



Joseph F. McKeever, III
Committee of Annuity Insurers



Walter C. Welsh
ACLI

Attachment

cc: Donald J. Drees, IRS
John Glover, IRS

The Committee of Annuity Insurers
The Willard Office Building
Suite 1200
1455 Pennsylvania Ave., NW
Washington, D.C. 20004

AEGON USA, Inc., Cedar Rapids, IA
AIG American General, Wilmington, DE
Allstate Financial, Northbrook, IL
AmerUs Annuity Group Co., Topeka, KS
AXA Equitable Life Insurance Company, New York, NY
Commonwealth Annuity and Life Insurance Co.
(a Goldman Sachs Company), Southborough, MA
Conseco, Inc., Carmel, IN
Fidelity Investments Life Insurance Company, Boston, MA
Genworth Financial, Richmond, VA
Great American Life Insurance Co., Cincinnati, OH
Guardian Insurance & Annuity Co., Inc, New York, NY
Hartford Life Insurance Company, Hartford, CT
ING North America Insurance Corporation, Atlanta, GA
Jackson National Life Insurance Company, Lansing, MI
John Hancock Life Insurance Company, Boston, MA
Life Insurance Company of the Southwest, Dallas, TX
Lincoln Financial Group, Fort Wayne, IN
MassMutual Financial Group, Springfield, Massachusetts
Merrill Lynch Life Insurance Company, Princeton, NJ
Metropolitan Life Insurance Company, New York, NY
Nationwide Life Insurance Companies, Columbus, OH
New York Life Insurance Company, New York, NY
Northwestern Mutual Life Insurance Company, Milwaukee, WI
Ohio National Financial Services, Cincinnati, OH
OM Financial Life Insurance Company, Baltimore, MD
Pacific Life Insurance Company, Newport Beach, CA
The Phoenix Life Insurance Company, Hartford, CT
Protective Life Insurance Company, Birmingham, AL
Prudential Insurance Company of America, Newark, NJ
RiverSource Life Insurance Company (an
Ameriprise Financial Company), Minneapolis, MN
Sun Life of Canada, Wellesley Hills, MA
Symetra Financial, Bellevue, WA
USAA Life Insurance Company, San Antonio, TX

The Committee of Annuity Insurers was formed in 1982 to participate in the development of federal tax and securities law policies with respect to annuities. The member companies of the Committee represent over two-thirds of the annuity business in the United States.

01/11/2008