Internal Revenue Service

Number: **200443029**
Release Date: 10/22/04
Index Number: 817.08-04

Department of the Treasury
Washington, DC 20224

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CC:FIP:4 / PLR-161647-03
Date:
June 28, 2004

Legend:

Trust 1 =
Trust 2 =
Trust 3 =
State A =
State B =
Advisors =

Date 1 =
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Dear :

This is in response to the letter of your authorized representative dated October 16, 2003, and a supplementary submission, requesting rulings concerning the look-through rule of § 1.817-5(f) of the Income Tax Regulations for satisfying the diversification requirements of § 817(h) of the Code.

FACTS

Each Trust was organized as a business trust under the laws of State A, is registered with the Securities and Exchange Commission, and is classified as an open-end, registered management investment company under the Investment Company Act of 1940, as amended (the 1940 Act). Because each Trust consists of several separate investment portfolios, each Trust is considered a series company. Each portfolio of

each Trust constitutes a Fund. Each Fund is registered (or is a series of a mutual fund that is registered) as an open-end management investment company under the 1940 Act. Pursuant to section 851(g)(1) of the Code, each Fund is treated as a separate corporation for federal income tax purposes and each has elected status as a regulated investment company under Part I of Subchapter M of the Code.

Each Trust is authorized to issue an unlimited number of shares of beneficial interest with respect to each of its Funds. However, the par value of those shares of beneficial interest varies by Trust. The shares of beneficial interest issued by the Trusts are registered pursuant to the Securities and Exchange Act of 1933, as amended. Each fund, with limited exceptions, offers Class A and Class B shares. Class A shares are offered at net asset value and are not subject to a Rule 12b-1 plan and, therefore, are not subject to a Rule 12b-1 fee. Class B shares are offered at net asset value and are subject to a Rule 12b-1 fee together with, in most cases, a separate record keeping fee.

The Funds are designed to serve as investment options for variable annuity contracts and variable life insurance policies offered by various life insurance companies. Currently, shares of each Fund are sold only to separate accounts of unaffiliated insurance companies (except as otherwise permitted under Treas. Reg. §1.817-5(f)(3)). The separate accounts serve as investment vehicles for variable annuity and variable life insurance policies and are registered as unit investment trusts under the 1940 Act. The separate accounts place orders to purchase and redeem shares of a Fund that corresponds with the investment objective of such separate account. Public access to the Funds currently is available exclusively through the purchase of a variable annuity or variable life insurance policy (except as otherwise permitted under Treas. Reg. § 1.817-5(f)(3)).

The Advisors are both State B corporations that, pursuant to an investment management agreement with each Fund, and under the supervision of the Boards of Trustees of the Trusts, manage each Fund's investments, administer each Fund's business affairs, furnish office facilities and equipment, and provide clerical and administrative services to the Funds. Moreover, the Advisors may permit each Fund's officers and employees to serve without compensation as trustees or officers of one or more of the Funds and, to the extent permissible by law, may appoint certain of their affiliates as sub-advisors to perform the Advisors' duties. The Advisors may also appoint unaffiliated third parties to serve as sub-advisors. With two exceptions resulting from the investment of seed money, the Advisors do not possess an ownership interest in any Fund greater than a%.

The Advisors have developed and propose to implement four fund-of-funds portfolios within Trust 2 (First Tier Portfolios) that will invest in shares of certain other Funds offered by the Trusts (Second Tier Portfolios). The First Tier Portfolios will provide an investment alternative that provides for long-term growth of capital through investment in a diversified portfolio that invests in a wide range of asset classes. The First Tier Portfolios will follow specific asset allocation models and will address a range

of investment objectives from conservative to aggressive. Moreover, the use of the fund-of-funds structure avoids significant administrative costs that would otherwise arise if the First Tier Portfolios had to mirror the direct investment of the Second Tier Portfolios.

On Date 1, the Board of Trustees of Trust 2 approved the creation of the First Tier Portfolios that consists of four Funds under Trust 2. Each First Tier Portfolio will be classified as an open-end, diversified management investment company under the 1940 Act. Trust 2 will be authorized to issue an unlimited number of shares of beneficial interest in each First Tier Portfolio that will have no par value. Each First Tier Portfolio will offer Class B shares (subject to a Rule 12b-1 fee) that will invest only in Class A shares of the Second Tier Portfolios. The Second Tier Portfolios include b Funds offered by Trust 1, all c Funds offered by Trust 2 and d Fund offered by Trust 3. The First Tier Portfolios will invest primarily in shares of the Second Tier Portfolios, but will also have the ability to invest in other securities which may include derivatives and Treasury bills. The Advisors have received an exemptive order from the Securities and Exchange Commission regarding the implementation of the fund-of-funds structure.

The Trusts make the following representations in connection with this ruling request:

1. Each First Tier Portfolio will be treated for federal income purposes as a separate corporation under §851(g)(1) of the Code and will elect status as a regulated investment company under Part I of Subchapter M of the Code.

2. Each Second Tier Portfolio is treated for federal income tax purposes as a separate corporation under section 851(g)(1) of the Code and each has elected status as a regulated investment company under Part I of Subchapter M of the Code.

3. Shares of each First Tier Portfolio will be held exclusively by one or more segregated asset accounts or sub-accounts of life insurance companies (except as otherwise permitted under Treas. Reg. §1.817-5(f)(3)).

4. Shares of each Second Tier Portfolio are held exclusively by one or more segregated asset accounts or sub-accounts of life insurance companies (except as otherwise permitted under Treas. Reg. §1.817-5(f)(3) and shares that will be held by the First Tier Portfolios after the fund-of-funds structure is implemented).

5. Each segregated asset account or sub-account that holds an interest in any First Tier Portfolio or Second Tier Portfolio is registered as an investment unit trust under the 1940 Act.

6. Public access to each First Tier Portfolio or Second Tier Portfolio will be available exclusively through the purchase of a variable contract (except as otherwise permitted under Treas. Reg. §1.817-5(f)(3)).

7. Currently, the only shareholders of each Second Tier Portfolio are segregated asset accounts or sub-accounts of life insurance companies (except for other shareholders described in Treas. Reg. §1.817-5(f)(3) and this will continue to be true after implementation of the fund-of-funds structure except that one or more First Tier Portfolios will be shareholders of the Second Tier Portfolios.

STATUTORY AND REGULATORY PROVISIONS

For purposes of part I of subchapter L of chapter 1 of the Code (sections 801-818), the term "variable contract" is defined in section 817(d). For an annuity contract to be a variable contract, (1) it must provide for the allocation of all or a part of the amounts received under the contract to an account which, pursuant to state law or regulation, is segregated from the general asset accounts of the issuing insurance company; (2) it must provide for the payment of annuities; and (3) the amounts paid in, or the amounts paid out, must reflect the investment return and the market return of the segregated asset account. See, § 817(d)(1) – (3).

Section 817(h)(1) of the Code provides that, for purposes of subchapter L, § 72 (relating to annuities), and § 7702(a) (relating to the definition of life insurance contract), a variable contract (other than a pension plan contract), which is otherwise described in § 817 and which is based on a segregated asset account, shall not be treated as an annuity, endowment, or life insurance contract for any period (and any subsequent period) for which the investments made by such account are not, in accordance with regulations prescribed by the Secretary, adequately diversified. Section 1.817-5(e) of the regulations provides that a segregated asset account shall consist of all the assets for which the investment return and market value is allocated in an identical manner to any variable contract invested in any of such assets.

Section 1.817-5 of the regulations sets forth the diversification requirements for variable contracts based on segregated asset accounts. Generally, the investments of a segregated asset account will be considered to be "adequately diversified" for purposes of § 817(h) of the Code and § 1.817-5 of the regulations if no more than 55 percent of the value of the total assets of the account is represented by any one investment, no more than 70 percent by any two investments, no more than 80 percent by any three investments, and no more than 90 percent by any four investments. See § 1.817-5(b)(1).

In certain situations, § 817(h)(4) of the Code provides a "look-through" rule for meeting the diversification requirements. If all of the beneficial interests in a regulated investment company are held by one or more (A) insurance companies (or affiliated companies) in their general account or in segregated asset accounts, or (B) fund managers (of affiliated companies) in connection with the creation or management of the regulated investment company, the diversification requirements of section 817(h)(1)

are applied by taking into account the assets held by such regulated investment company.

Section 1.817-5(f) of the regulations further describes the look-through rule for the application of the diversification requirements of § 1.817-5. Section 1.817-5(f)(1) provides that, if the look-through rule applies, a beneficial interest in a regulated investment company will not be treated as a single investment of a segregated asset account; instead, a pro rata portion of each asset of the investment company will be treated, for purposes of § 1.817-5, as an asset of the segregated asset account.

Section 817-5(f)(2)(i) of the regulations provides that the look-through rule of § 1.817-5(f) shall apply to an investment company if:

> (A) All the beneficial interest in the investment company (other than those described in § 1.817-5(f)(3)) are held by one or more segregated asset accounts of one or more insurance companies; and
>
> (B) public access to such investment company is available exclusively (except as otherwise permitted under § 1.817-5(f)(3)) through the purchase of a variable contract. Solely for this purpose, the status of the contract as a variable contract will be determined without regard to § 817(h) of the Code and § 1.817-5 of the regulations.

The beneficial interests described in § 1.871-5(f)(3) are (i) under specified circumstances, the general account of a life insurance company or a corporation related in a manner specified in § 267(b) of the Code to a life insurance company; (ii) under specified circumstances, the manager, or a corporation related in a manner specified in § 267(b) to the manager of the investment company; (iii) the trustee of a qualified pension or retirement plan; and (iv) the public or policyholders that are treated as owners of beneficial interests in the investment company under Rev. Rul. 81-225, 1981-2 C.B. 12, but only if (A) the investment company was closed to the public in accordance with Rev. Rul. 82-55, 1982-1 C.B. 12, or (B) all the assets of the segregated asset account are attributable to premium payments made by policyholders prior to September 26, 1981, to premium payments made in connection with a qualified pension or retirement plan, or to any combination of such premium payments.

Since 1977, the Service has issued a number of requested rulings addressing when the investor in a variable annuity contract has sufficient control over the underlying investments to be treated as the owner of those investments. Rev. Rul. 77-85, 1077-1 C.B. 12, concludes that if a purchaser of an “investment annuity” contract selects and controls the investment assets in the separate account of the issuing life insurance company, then the purchaser is treated as the owner of those assets for federal income tax purposes. Similarly, Rev. Rul. 80-274, 1980-2 C.B. 27 holds that where an S&L depositor transfers a certificate of deposit (C.D.) to a life insurer in exchange for an annuity contract, and the life insurer is expected to continue to hold the

C.D. for the benefit of the depositor, the depositor (not the insurance company) is considered the owner of the D.C. for tax purposes.

Revenue Ruling 81-225, 1981-2 C.B. 12, clarified by Rev. Rul. 82-55, 1982-1 C.B. 12, and Rev. Rul. 2003-92, 2003-2 C.B. 350, describes four situations in which investments in mutual funds to fund annuity contracts are considered to be owned by the policyholder, rather than by the insurance company issuing the annuity contracts, and one situation in which the insurance company is considered the owner of the mutual fund shares. In situation 1, the investment assets in the segregated account supporting the annuity contracts consist solely of shares in a single, publicly available mutual fund managed by an independent investment advisor. Situation 2 is similar to situation 1 except that the mutual fund is managed by the insurance company or one of its affiliates. Situation 3 also is similar to situation 1 except that the segregated asset account supporting the annuity contracts consists of five sub-accounts. The policyholder retains the right to allocate or reallocate funds among the five sub-accounts during the life of the annuity contract. Situation 4 is similar to situation 2, except that the shares of the mutual fund are not sold directly to the public, but are available only through the purchase of an annuity contract or by participation in an investment plan account of the type described in Rev. Rul. 70-525, 1970-2 C.B. 144. Situation 5 also is similar to situation 2, except that the shares in the mutual fund are available only through the purchase of an annuity contract.

Rev. Rul. 81-225 concludes that the policyholders in situations 1 – 4 have sufficient control and other incidents of ownership to be considered the owners of the mutual fund shares for federal income tax purposes. The ruling reaches the opposite conclusion in situation 5, because the sole function of the mutual fund in situation 5 is to provide an investment vehicle to allow the insurance company to meet its obligations under its annuity contracts, and the insurance company possesses sufficient incidents of ownership to be considered the owner of the underlying portfolio of assets of the mutual fund. Thus, the ruling concludes that in situation 5, the insurance company, not the policyholder, is treated as the owner of the mutual fund shares for federal income tax purposes.

In Rev. Rul. 82-54, 1982-1 C.B. 11, the purchasers of certain annuity contracts have the right to direct the issuing insurance company to invest in the shares of any or all of three mutual funds that are not available to the public. One mutual fund invests primarily in common stocks, another in bonds, and a third in money market investments. Policyholders are free to allocate their premium payments among the three funds and have an unlimited right to reallocate contract values among the funds prior to the maturity date of the annuity contract. The ruling concludes that the policyholders' ability to choose among general investment strategies (for example, between stocks, bonds, or money market instruments) either at the time of the initial purchase, or subsequent thereto, does not constitute sufficient control so as to cause the policyholders to be treated as the owners of the mutual fund shares.

In Christoffersen v. United States, 749 F. 2d 513 (8th Cir. 1984), cert. denied 473 U.S. 905 (1985), the court upheld the investor control theory of Rev. Rul. 81-255. The taxpayers in Christoffersen purchased a variable annuity contract that reflected the investment return and market value of assets held in a separate account that was segregated from the general assets of the issuing insurance company. The taxpayers had the right to direct that their premium payments be invested in any one or all of six publicly traded mutual funds. The taxpayers could reallocate their investment among the funds at any time, and had the right to make withdrawals, to surrender the contract, and to apply the accumulated value under the contract to provide annuity payments. The court held that the taxpayers, and not the issuing insurance company, owned the mutual funds for federal income tax purposes.

In Rev. Rul. 2003-91, 2003-2 C.B. 347, holders of variable annuity contracts were not considered the owners of the assets in which the funds invested even though the policyholders had the ability to allocate the premium paid among various sub-accounts, change such allocations at any time and transfer funds from one sub-account to another. The investment in the sub-accounts was available solely through purchase of variable annuity contracts and was not otherwise publicly available. Moreover, the policyholders were not able to communicate directly or indirectly with the investment advisors regarding the investment strategies of the sub-accounts. Rev. Rul. 2003-91 concludes that the policyholders did not have direct or indirect control over any of the assets in the sub-accounts and, therefore, would not be treated as the owners of such assets.

Consequently, assuming that the policyholders in the instant case do not otherwise have investment control over assets of a First Tier Portfolio, and do not possess sufficient other incidents of ownership within the meaning of Rev. Rul. 81-225 with respect to such assets to be considered their owner for federal income tax purposes, the policyholders will not be treated as the owner of such assets under Rev. Rul. 81-225 merely because a First Tier Portfolio acquires shares of a Second Tier Portfolio.

Since all of the shares of the First Tier Portfolios will be held by segregated asset accounts or sub-accounts of life insurance companies and public access to the First Tier Portfolios is available exclusively through the purchase of variable annuity contracts or variable life insurance policies (except as otherwise permitted by Treas. Reg. § 1.817-5(f)(3), the requirements of § 1.817-5(f)(2) of the regulations are satisfied with respect to segregated asset accounts or sub-accounts that invest in the First Tier Portfolios. Pursuant to the look-through rule of §1.817-5(f)(1) a pro rata portion of each asset of the First Tier Portfolio will be treated as an asset of each segregated asset account or sub-account that invests a First Tier Portfolio.

Similarly, the requirements of § 1.817-5(f)(2) of the regulations are satisfied by the indirect investment of segregated asset accounts and sub-accounts in shares of a Second Tier Portfolio through an investment in a First Tier Portfolio. Therefore,

pursuant to the look-through rule of § 1.817-5(f)(1) a pro rata portion of each asset of the Second Tier Portfolio will be treated as an asset of each segregated asset account or sub-account that indirectly invests in a Second Tier Portfolio through investment in a First Tier Portfolio.

HOLDINGS

Based solely upon the information provided and the representations made, we conclude:

1. The look through rule of Treas. Reg. §1.817-5(f) will apply to the direct investment by a segregated asset account or sub-account in a First Tier Portfolio such that the assets of the First Tier Portfolio will be treated as assets of the segregated asset account or sub-account for purposes of applying the diversification test of section 817(h) of the Code.

2. The look through rule of Treas. Reg. §1.817-5(f) will apply to the indirect investment by a segregated asset account or sub-account in a Second Tier Portfolio through a First Tier Portfolio's direct investment in a Second Tier Portfolio such that the assets of the Second Tier Portfolio will be treated as assets of the segregated asset account or sub-account for purposes of applying the diversification test of section 817(h) of the Code.

3. The look-through rule of Treas. Reg. §1.817-5(f) will continue to apply to the direct investment by a segregated asset account or sub-account in a Second Tier Portfolio after a First Tier Portfolio acquires shares of the Second Tier Portfolio.

4. A variable annuity contract or variable life insurance policy that invests in a First Tier Portfolio or a Second Tier Portfolio and otherwise satisfies the investor control requirements of Rev. Rul. 81-225 and Rev. Rul. 82-54 will not fail those requirements merely because a First Tier Portfolio has invested in shares of a Second Tier Portfolio.

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. Specifically, except as provided in Holding 4 above, no opinion is expressed concerning the application of the investor control rules set forth in Christoffersen, or Rev. Ruls. 2003-92, 2003-91, 81-225, 80-274 and 77-85.

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.

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

A copy of this letter must be attached to any income tax return to which it is relevant.

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/

Mark Smith
Chief, Branch 4
Office of Associate Chief Counsel

(Financial Institutions & Products)