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June 15, 2012

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments on Proposed Regulations Under the Foreign Account Tax Compliance Offset Provisions of the HIRE Act Relating to Insurance Issues

Dear Commissioner Shulman:

Enclosed are comments on proposed regulations under the foreign account tax compliance offset provisions of the HIRE Act relating to insurance issues. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

William M. Paul

William M. Paul
Chair, Section of Taxation

Enclosure

cc: Emily S. McMahon, Assistant Secretary (Tax Policy), Department of the Treasury
William J. Wilkins, Chief Counsel, Internal Revenue Service
Manal S. Corwin, Deputy Assistant Secretary (International Tax Affairs), Department of the Treasury
Michael J. Caballero, International Tax Counsel, Department of the Treasury
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ABA SECTION OF TAXATION COMMENTS ON PROPOSED REGULATIONS UNDER THE FOREIGN ACCOUNT TAX COMPLIANCE OFFSET PROVISIONS OF THE HIRE ACT, P.L. 111-147 RELATING TO INSURANCE ISSUES

These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation (the "Section") and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Craig Springfield, Chair of the Insurance Companies Committee of the Section of Taxation (the "Committee"). Substantive contributions were made by Jean Baxley, Kriss Rizzolo, Christopher Schoen, Susan Seabrook, and Brenda Viehe-Naess. The Comments were reviewed by Sonya S. Jindal of the Section's Young Lawyers Forum, Kirk Van Brunt of the Section's Committee on Government Submissions, Julian Kim, incoming Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date:	June15, 2012

INTRODUCTION

On February 8, 2012, the Internal Revenue Service (the "Service") and the U.S. Department of Treasury (the "Treasury") released Proposed Regulations[1] to implement sections 1471-1474.[2] A number of provisions in the Proposed Regulations are directed specifically at insurance companies, insurance products, and insurance-related definitions, and the Service has requested comments on these insurance-specific provisions. Accordingly, the Section provides the following comments relevant to insurance companies, products, and insurance-related definitions.

EXECUTIVE SUMMARY

Specifically, the comments provide recommendations on:

- revising the timing of the reporting by a foreign financial institution ("FFI") on life insurance and annuity contracts to conform with the natural communication cycle between insurance companies and their policyholders;
- determining when the value of an equity or debt interest in an insurance company is "determined primarily by reference to assets that give rise to withholdable payments";
- the scope of application of the insurance company FFI test;
- providing an exception from cash value for reinsurance;
- simplifying the exclusion from cash value for property and casualty and health insurance;
- clarifying the definitions of the terms "annuity contract" and "life insurance contract";
- defining the term "cash value insurance contract" to better target the types of products that are intended to be treated as financial accounts;
- simplifying the currency translation rules by publishing conversion rates;
- clarifying that property and casualty and reinsurance premiums subject to Federal excise tax are not "withholdable payments"; and
- clarifying the Chapter 4 status of foreign insurance companies electing under Code section 953(d) to be taxed as U.S. insurance companies.

[1] Prop. Reg. §§ 1.1471-0 - 1.1474-7, Prop. Reg. § 301.1474-1, 77 Fed. Reg. 9022 (Feb. 15, 2012).

[2] References to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

COMMENTS

The Section welcomes the opportunity to comment on the proposed regulations issued under the foreign account tax compliance offset provisions of the HIRE Act as they relate to insurance companies, products, and insurance-related definitions. We share the Service's goal of balancing the government's need to prevent tax avoidance by U.S. persons by obtaining information regarding U.S. accounts at FFIs and substantial U.S. owners of nonfinancial foreign entities ("NFFEs"), on the one hand, and the administrative burdens that these provisions place on business entities, including U.S. and foreign entities that engage in the business of insurance, on the other. In considering which provisions of the Proposed Regulations to comment upon, we focused primarily on the provisions that may create ambiguity for business entities that engage in insurance activities, and the provisions that likely will impose substantial compliance burdens on insurance entities and insured parties without producing corresponding benefits to the government. In formulating our comments, we concentrated our efforts on clarifications we believe will result in a more effective and efficient compliance process, and have tried to strike an appropriate balance between meeting the policy objectives of the government and mitigating burdens for insurance businesses and customers.

Our comments are as follows:

1. Require Reporting on Life Insurance and Annuity Contracts Only at Inception and Payment (Proposed Regulation section 1.1471-4(d)(3)).

Proposed Regulation section 1.1471-4(d)(3) requires a participating FFI to report annually the account holder name, address, account balance, and payments for each U.S. account. This provision imposes compliance costs on insurance companies that, for reasons explained in more detail below, will likely yield little valuable data for the Service after the initial report for an account is filed, and we doubt that annual reporting will further the goal of combating tax avoidance by U.S. account holders. In addition, the reporting requirements as currently envisioned require the closure of accounts held by "recalcitrant account holders" in the event a non-U.S. insurance company is unable to comply with the terms of an FFI agreement as outlined in the Proposed Regulations, *e.g.*, due to the inability to receive appropriate responses from customers due to customer inertia. Also, as a result of prohibitions on cancellation, the proposed rule will likely result in an inordinate number of incurable accounts with "recalcitrant account holders" within the meaning of section 1.1471-5(g)(2) ("recalcitrant accounts"), thus rendering many non-U.S. insurance companies unable to comply with the terms of an FFI agreement as outlined in the Proposed Regulations.

The Proposed Regulation has linked reporting requirements for banks and investment funds to their regular points of contact with customers—monthly and annual reporting of account values. We recommend that the compliance requirements for insurers follow the receipt or transmittal of relevant information between insurance companies and their customers, just as it does for banks. Given that insurance companies' contacts with their customers occur almost exclusively at policy inception, upon change of circumstances, and at payment of benefits, withdrawals or termination amounts, it would make sense for insurance company reporting to be matched to these contact points.[3] These points, especially payment points, allow the IRS to track payments that may be taxable in the U.S. and are consistent with required reporting in many European countries. Such revised requirements would minimize recalcitrant accounts which may be merely the by-product of the customary practices for insurance company-to-customer communications.

Insurance companies do not have the regular and frequent contacts with policyholders that banks and investment companies have with their depositors and investors. On the contrary, insurance companies in many cases receive a single premium for many of their cash value life insurance and annuity contracts. Even for policies with annual or monthly premiums, insurers may not receive timely information about changes in address or other circumstances until the claim for benefits is filed. In previous comments, insurers have cited the generally low policyholder response rate to mailings when discussing their expected difficulty in complying with the requirement to terminate recalcitrant accounts.[4] For example, one life insurer in an EU member country sent a mailing to policyholders which had only an 18% response rate after 18 months. Although insurers typically mail annual reports of account value to policyholders of variable life insurance contracts and annuities, these reports do not provide the company with updated information about the policyholder. In summary, it is highly unlikely that annual reporting will provide information with regard to account holders that is different from the information provided at the initial filing, except for possibly changes in account value.

The requirement in the Proposed Regulations that the insurer revalidate a policyholder’s status as a foreign account every three years is problematic. As mentioned in other comments, it is unlikely that such a requirement will elicit a high response rate. Given the history of low response rates, many policyholders that were originally identified as non-U.S. will probably become recalcitrant merely because they do not reply. This creates an untenable situation for insurers, who may face an ever increasing level of recalcitrant accounts, which local law may prohibit them from canceling. To prevent erosion of the insurer’s FFI status due to circumstances that are largely beyond its control, we recommend that the three year revalidation requirement of Proposed Regulation section 1.1471-3(c)(6)(ii) be amended, for insurers, so that no revalidation is due between inception and payment, unless there is a change of circumstances.

Recommendation: In view of the limited value of the additional information produced and the potential for a large number of recalcitrant accounts that the insurer will not be able to close, we recommend that Proposed Regulation section 1.1471-4(d)(3),

[3] Of course, if a non-U.S. insurance company already is required under applicable non-U.S. law to report on account values annually, this practice would continue and the Service might benefit from such reporting under an intergovernmental agreement.

[4] *See* comments of the American Council of Life Insurers (ACLI), pp. 27-29 (Apr. 23, 2012), reprinted at 2012 TAX NOTES TODAY 86-22 (May 3, 2012).

when finalized, contain an exception to the annual reporting requirements so that insurance companies are required to report and revalidate account holder information only (i) at contract inception; (ii) in the event of a change of circumstances communicated to the insurer (new address, beneficiary, etc.); and (iii) at the time of payment of benefits, withdrawal, or surrender of the contract. This exception would eliminate unnecessary compliance costs while still providing the Service with the information needed to prevent tax evasion, as surrender, withdrawal, and other payout points would trigger updates of policyholder information and policyholders would have an incentive to provide required information.

2. Clarify When the Value of an Equity or Debt Interest in an Insurance Company is "determined primarily by reference to assets that give rise to withholdable payments." (Proposed Regulation section 1.1471-5(b)(1)(iii)).

Proposed Regulation section 1.1471-5(b)(1)(iii) provides that the definition of a financial account includes any equity or debt interest (other than interests that are regularly traded on an established securities market) in certain "financial institutions,"[5] including insurance companies, but "only if the value of the debt or equity interest is determined, directly or indirectly, primarily by reference to assets that give rise to withholdable payments."

It is unclear what types of equity and debt instruments Treasury and the Service envisioned by including this provision in the Proposed Regulations. We suspect that the provision is designed to prevent U.S. holders from avoiding the application of Chapter 4 through the use of stock or debt in foreign corporations, the value of which tracks specific assets that would otherwise give rise to withholdable payments. We do not believe that an insurance company would be an effective vehicle for this abuse.

Read broadly, however, the provision could apply to the stock of all foreign insurance companies that issue non-publicly traded stock, because a primary (though by no means the sole) determinant of the value of an insurance company's stock is the value of the investment assets that the insurance company holds. It could also apply to surplus notes issued by a foreign insurer, because a primary determinant of the value of surplus notes is the value of the assets held by the insurer.[6] Separately, we believe the provision might also conceivably apply to insurance companies that have closed blocks or similar arrangements created during demutualizations to protect policyholders.

[5] Prop. Reg. § 1.1471-5(e)(1)(iv). "Financial institution" is defined in Proposed Regulation section 1.1471-5(e)(1).

[6] A surplus note is an instrument issued by an insurance company that generally provides a fixed interest rate and a maturity date but specifies that no interest or principal may be paid unless the insurance company's surplus exceeds a certain amount. Surplus notes are generally subordinated to policyholders and other creditors. Surplus notes are not tied to specific assets of the insurance company; instead, they are valued based upon the value of the investments of the entity as a whole, and the terms of the notes, like any other unsecured corporate debt.

We understand these results were not intended, but a provision drafted in this broad a manner could raise issues as to whether these and other legitimate arrangements are within its purview. At the same time, we suspect that instruments that are designed to circumvent Chapter 4 may be able to be drafted narrowly enough to escape the application of this provision.

Recommendation: We believe insurance companies could be omitted from the types of financial institutions that are subject to this provision. However, if Treasury and the Service determine that this provision is necessary to prevent circumvention of Chapter 4 through the use of insurance companies, we would recommend the provision be drafted narrowly as an anti-avoidance rule that would apply only to situations where it appears the primary purpose for the U.S. holder's ownership of the equity or debt instrument is to avoid the application of Chapter 4.

We would recommend including one or more specific examples that illustrate the abuse that Treasury and the Service desire to prevent. For example, if Treasury and the Service are concerned about a certain type of stock of an insurance company that traces its value to certain of the underlying assets of the company, it could include this situation as an example. As another example, if Treasury and the Service envision a scenario whereby a U.S. holder transfers a financial account to an established insurance company in exchange for stock or debt and the return is based upon the earnings of the transferred account, we would recommend that be included in a specific example.[7]

3. Apply Only the Insurance Company FFI Test to Insurance Companies (Proposed Regulation section 1.1471-5(e)).

Proposed Regulation section 1.1471-5(e) defines four categories of entities as "financial institutions" for purposes of sections 1471 through 1474. One category, described in section 1.1471-5(e)(1)(iv), is any entity that "[i]s an insurance company (or the holding company of an insurance company) that issues or is obligated to make payments with respect to a financial account . . . ."[8] A non-U.S. insurance company must apply Proposed Regulation section 1.1471-5(e)(1)(iv) to determine whether it is an FFI or a NFFE – regardless of whether it qualifies as an "insurance company" for U.S. income tax purposes – but should not have to wonder whether it could unexpectedly be treated as

[7] Although we posit this example as a theoretical point, we doubt that an insurance company would be used as a vehicle for such a transaction, as insurance companies are regulated entities in virtually every jurisdiction worldwide and are subject to substantial restrictions on the types of assets they hold and the types of debt and equity they issue.

[8] The other three categories of FFIs are entities that (1) accept deposits in the ordinary course of a banking or similar business, (2) hold, as a substantial portion of their business, financial assets for the account of others, or (3) are engaged (or hold themselves out as being engaged) primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, notional principal contracts, insurance or annuity contracts, or any interest in such investments. Prop. Reg. §§ 1.1471-5(e)(1)(i), (ii), (iii).

an FFI under the three non-insurance categories, namely, the banking, custodial, and investment fund categories in Proposed Regulation sections 1.1471-5(e)(1)(i) through (iii). Stated differently, a non-U.S. insurance company that does not issue cash value insurance contracts or annuity contracts should not be treated as an FFI.

Proposed Regulation section 1.1471-1(b)(33) defines an "insurance company" as "a company more than half of the business of which during the calendar year is issuing (or being obligated to make payments with respect to) insurance or annuity contracts or the reinsuring of such contracts." This definition of an "insurance company" mirrors, but is not identical to, the Code section 816(a) definition, which is cross-referenced in section 831(c). Proposed Regulation section 1.1471-5(b)(1)(iv) defines "financial accounts" to include, *inter alia*, "cash value insurance contracts," as defined in Proposed Regulation section 1.1471-5(b)(3)(v), and annuity contracts. The insurance company category of FFIs defined in Proposed Regulation section 1.1471-5(e)(1)(iv) is consistent with the Service's stated intent to treat only non-U.S. insurance companies that issue investment-oriented insurance products and annuities as FFIs, as expressed in Notice 2010-60 (the "Notice").[9] Accordingly, a non-U.S. entity that is an insurance company and that issues cash value insurance contracts or annuity contracts is an FFI.[10] Conversely, a non-U.S. entity that is an insurance company and that does not issue cash value contracts is not an FFI.

The Proposed Regulations do not specifically address the Chapter 4 status of certain non-U.S. companies that are licensed and regulated as insurance companies under the laws of their countries of domicile, but that do not meet the definition of an insurance company in Proposed Regulation section 1.1471-1(b)(33). Presumably, such entities are NFFEs. This might occur, for example, when a company's insurance premiums, reserves, and/or insurance claims payments for the year its Chapter 4 status is being determined are minimal as compared to its investment income, or when a company issues a substantial volume of insurance products that qualify as insurance for non-U.S. purposes but that do not qualify as insurance for U.S. Federal income tax purposes.

[9] Notice 2010-60, 2010-2 C.B. 329. The Chapter 4 status of insurance companies was discussed in Notice 2010-60 as follows:

> Treasury and the IRS *do not view the issuance of insurance or reinsurance contracts without cash value as implicating the concerns of chapter 4. This would include, for example, most property and casualty insurance or reinsurance contracts or term life insurance contracts. Accordingly, Treasury and the IRS plan to issue regulations treating entities whose business consists solely of issuing such contracts as non-financial institutions for purposes of chapter 4.* However, other contracts such as life insurance (other than term life insurance contracts without cash value) or annuity contracts typically combine insurance protection with an investment component. Thus, such cash value insurance contracts or annuity contracts may present the risk of U.S. tax evasion that chapter 4 is designed to prevent.
>
> (Emphasis added.)

[10] *See* Preamble to the Proposed Regulations, 77 Fed. Reg. 9022, 9034 (Feb. 15, 2012).

In general, a non-U.S. company that is licensed and regulated as an insurance company under the laws of its country of domicile and that issues insurance contracts and/or reinsures risks operates just as a U.S. "insurance company." It accepts premiums, invests these premiums, and pays claims in accordance with the terms of its insurance contracts on the occurrence of the events insured against.[11] Such an entity is regarded as an insurance company—not a custodial entity or an investment fund. Such an entity might, however, be construed as "holding financial assets," and the gross income attributable to these assets, at least in some years, *could* equal or exceed 20% of its gross income in certain years, potentially making it an FFI under the "custodial" FFI test in Proposed Regulation section 1.1471-5(e)(1)(ii). Whether such assets are held "for the account of others," however, is doubtful. The income on the assets is used to pay claims only if certain insured events occur, and therefore, income on the assets ultimately is retained by the company if these events do not occur and the insurance policy term expires. Simply put, although the non-U.S. insurer collects premiums and invests in assets, it does this to earn income to use to pay claims or retain for itself and, thus, conducts an insurance business—not a custodial-type business—even in years where premiums collected and claims paid are down. Accordingly, such an entity likely is not the type of custodial entity that was intended to fall within the category of FFIs described in Proposed Regulation section 1.1471-5(e)(1)(ii) and is not appropriately captured by the "custodial" definition of an FFI.

An insurance company, by definition, is primarily engaged in issuing or reinsuring insurance contracts. Accordingly, a non-U.S. insurance company would not be established primarily to engage in the business of investing, reinvesting, or trading in securities, partnership interests, commodities, notional principal contracts, insurance or annuity contracts, or any interests in such investments and would not hold itself out as being engaged in such business. It, therefore, does not fall within the intendment of the "investment fund" category of FFIs described in Proposed Regulation section 1.1471-5(e)(1)(iii). But the test for whether an entity is engaged in the type of business described is whether at least 50% of the entity's gross income for the three year test period is from such investing, reinvesting, and trading. For a non-U.S. insurance company that has lower-than-normal insurance premiums in a given period and does not actively trade or change its investments, but earns investment income nonetheless, there may be some uncertainty as to its status as an FFI under this provision. But such an entity is an insurance company that is not appropriately captured by the "investment fund" definition of an FFI.

The uncertainty regarding the Chapter 4 status of a non-U.S. insurance company is compounded by the fact that an entity may qualify as an "insurance company" under

[11] With regard to the banking/depository FFI test in Proposed Regulation section 1.1471-5(e)(1)(i), such a company does not "accept deposits in the ordinary course of a banking or similar business" as described in Proposed Regulation 1.1471-5(e)(2), and, thus, likely is not an FFI. We will not focus on the depository FFI test in these comments. We note, however, that "[a]ny amount held by an insurance company under an agreement to pay or credit interest thereon" is a "financial account." Prop. Reg. § 1.1471-5(e)(3)(i)(B).

the Proposed Regulations in one year, but not the next. Such fluctuations could result in multiple redeterminations of status, that is, to and from FFI and NFFE status from year to year, which would be burdensome both to the non-U.S. insurance company trying to comply with the Proposed Regulations, and to the Service trying to administer the Proposed Regulations.

Recommendation: The Service's stated intent is that entities that are established, regulated, and operated as insurance companies and that do not issue cash value insurance contracts, annuities, or other financial accounts should not be treated as FFIs. Consistent with this, we recommend that the final Regulations clarify that such an insurance company is an NFFE.

The Service could accomplish this clarification by (1) revising the definition of "insurance company" in Proposed Regulation section 1.1471-1(b)(33) to define "insurance company" as "a company that is licensed and regulated as an insurance company under applicable law"; and (2) adding flush language after Proposed Regulation section 1.1471-5 (e)(1)(iv) as follows: "An insurance company is tested for FFI status under paragraph (e)(1)(iv). The tests in paragraphs (e)(1)(i), (ii), and (iii) do not apply to entities that are insurance companies."

In addition to the preceding recommendation, we would suggest inserting the following examples after Proposed Regulation section 1.1471-5(e)(4):

Example 1: Foreign Company is licensed and regulated as an insurance company under the laws of Foreign Country. Foreign Company issues solely property and casualty insurance contracts and health insurance contracts, which are not cash value insurance contracts as defined in paragraph (b)(1)(iv), and indemnity reinsurance contracts. Due to changes in the market and changes in Foreign Company's mix of insurance business, Foreign Company's underwriting/insurance income has been less than 80% of its gross income, and its investment income has been at least 20% of its income, for three years in a row. Foreign Company is an insurance company and is not an FFI.

Example 2: Foreign Company is licensed and regulated as an insurance company under the laws of Foreign Country. Foreign Company issues solely property and casualty insurance contracts and health insurance contracts, which are not cash value insurance contracts as defined in paragraph (b)(1)(iv), and indemnity reinsurance contracts. Due to changes in the market and changes in Foreign Company's mix of insurance business, Foreign Company's underwriting/insurance income has been less than 50% of its gross income, and its investment income has been at least 50% of its income, for three years in a row. Foreign Company is an insurance company and is not an FFI.

A second recommendation that would accomplish the same result as adding the flush language suggested above would be to amend paragraph (e) of Proposed Regulation section 1.1471-5 to add the italicized parenthetical phrases indicated below:

> *(e) Definition of a financial institution*—(1) *In general.* Except as otherwise provided in paragraph (e)(5), the term *financial institution* means

> (i) an entity *(other than an insurance company)* that accepts deposits in the ordinary course of a banking or similar business (as defined in paragraph (e)(2) of this section);
>
> (ii) an entity *(other than an insurance company)* that holds, as a substantial portion of its business (as defined in paragraph (e)(3) of this section), financial assets for the account of others;
>
> (iii) an entity *(other than an insurance company)* that is engaged (or holding itself out as being engaged) primarily . . . ; or
>
> (iv) an insurance company (or the holding company of an insurance company) . . . .

4. Clarify the Exception from Cash Value for Reinsurance (Proposed Regulation section 1.1471-5(b)(3)(v)(C)(1)).

The Service has acknowledged that reinsurance does not present the threat of tax avoidance that is of concern under the Foreign Account Tax Compliance Act of 2009 ("FATCA"). In Notice 2010-60 the Service stated, "Treasury and the IRS do not view the issuance of insurance and reinsurance contracts without cash value as implicating the concerns of chapter 4." Notice 2010-60 provides that the Regulations will treat "entities whose business consists solely of issuing such contracts as non-financial institutions for purposes of chapter 4."

Nonetheless, the Proposed Regulations do not clearly provide an exception from the definition of "cash value" for reinsurance or an exception from FFI status for reinsurance companies. Proposed Regulation section 1.1471-5(b)(3)(v)(C)(1) excludes from the definition of "cash value" an amount payable under an insurance contract as a "benefit providing indemnification of an economic loss incurred upon the occurrence of the event insured against." This definition does not provide needed certainty within the industry regarding the Chapter 4 status of reinsurance and reinsurers. We believe the treatment of reinsurance should be addressed unambiguously in the final Regulations.

The policy rationale for excepting reinsurance from the definition of a "financial account," and therefore creating an exception to the definition of a "financial institution" for reinsurers, is clear. Reinsurance is a sophisticated financial transaction between a ceding insurance company and a reinsurer, subject to well defined regulatory standards. Payments under reinsurance contracts depend upon the ceding company's underwriting experience—the amount of claims and related settlement costs. In indemnity reinsurance, payments are made between the reinsurer and the ceding company; there is no liability between the reinsurer and individual policyholders covered by the reinsurance. Accordingly, reinsurance does not present the opportunity for an individual or entity to make an investment for tax avoidance purposes as contemplated by FATCA.

In public statements, some Service officials have suggested a two part exception for reinsurance. In particular, these officials have suggested that indemnity reinsurance (which constitutes the vast majority of reinsurance) would be subject to the exception, even if it covers cash value life insurance and annuities. However, assumption reinsurance (in which the reinsurer takes on a direct relationship to the ceding company's policyholders—a change that is considered by many reinsurers to be a contract novation) would not qualify for the exception. Such a distinction, if intended, should be stated explicitly in the final Regulations.

Recommendation: We recommend that the final Regulations clearly state that reinsurance contracts are not "financial accounts."

In the alternative, if the Service wishes to make a distinction between indemnity and assumption reinsurance, we recommend that such distinction be clarified in the final Regulations. Although a clear statement of the rule would provide greater certainty, if the Service wishes to provide an example for this exception, we recommend that the following examples be added:

Example 1: A U.S. insurance company obtained reinsurance for cash value life insurance contracts on U.S. citizens and residents from a foreign reinsurer not engaged in a U.S. trade or business. The reinsurance contract with the foreign reinsurer is an indemnity reinsurance contract. The reinsurance contract issued by the foreign reinsurer is not a financial account.

Example 2: A U.S. insurance company obtained reinsurance covering life insurance contracts having no cash value, and property and casualty insurance contracts, from a foreign reinsurer not engaged in a U.S. trade or business. The reinsurance contracts issued by the foreign reinsurer are not financial accounts.

Example 3: A U.S. life insurance company entered into an assumption reinsurance contract with a foreign reinsurer that obligates policyholders to make payments directly to the foreign reinsurer and obligates the foreign reinsurer to make claims payments directly to policyholders or their beneficiaries. The assumption reinsurance contract is a financial account.

5. Simplify the Exclusion from Cash Value for Property and Casualty Insurance and Health Insurance (Proposed Regulation section 1.1471-5(b)(3)(v)(C)(2)).

The Service in Notice 2010-60 stated its position that property and casualty insurance does not implicate the concerns of FATCA.[12] Proposed Regulation section 1.1471-5(b)(3)(v)(C)(2) provides an exclusion from "cash value" for, *inter alia*,

> [a] refund to the policyholder of a previously paid premium under an insurance contract (other than under a life insurance or annuity contract) due to policy cancellation, decrease in risk exposure during the effective period of the insurance contract, or arising from a redetermination of the premium due to correction of posting or other similar error.

[12] *See* fn. 9, above.

This exclusion incorporates the definition of a return premium from Regulation section 1.832-4, which applies to property and casualty insurance companies. The way this limitation is phrased, however, calls into question whether certain experience rating features of property and casualty contracts, such as retrospective credits, could be construed as "cash value."

As a simple example, under certain pure property and casualty coverage such as workers compensation coverage, the policyholder may have the possibility, under the contract, of receiving credit (in the form of decreased premiums) for lower-than-expected losses over a certain coverage period. This credit would be separate from any redetermination of premium based on lower risk exposure, that is, it would be based on loss experience, not risk exposure, and it would not be an investment-oriented feature. Although this loss experience-based credit would be determined after the policy term has ended and would constitute a return of premium, it would be based on the terms of the contract. It would not be based on policy cancellation, or a decrease in risk exposure, or a redetermination due to correction of posting or other error. However, in accordance with the Service's previously expressed intent to exclude property and casualty insurance from the definition of a "financial account," it still should be excluded from cash value and treated as a return premium.

Another example of a return premium that apparently would not be excluded from cash value by Proposed Regulation section 1.1471-5(b)(3)(v)(C)(2) would be medical loss ratio ("MLR") rebates under the Patient Protection and Affordable Care Act,[13] which constitute return premiums and are based in the statute, but are not based on decreased risk exposure or the correction of any error.

The Service has indicated its intent that return premiums on property and casualty and health insurance contracts will not convert what is otherwise pure property and casualty insurance to a "cash value insurance contract." Accordingly, the exclusions from cash value should reflect this intent. To ensure that pure investment returns are not excluded from cash value, we also recommend that the amount of return premiums excluded from "cash value" not exceed the premiums paid on the contract.

Recommendation: To eliminate uncertainty about property and casualty insurance contracts and accident and health insurance contracts on a feature-by-feature basis, and consistent with the expressed intent of the Service to exclude property and casualty insurance and health insurance, which do not include investment-oriented features, from the definition of a "financial account," we recommend that the final Regulations amend Proposed Regulation section 1.1471-5(b)(3)(v)(C)(2) to provide an exclusion from cash value for "a return of premium under an insurance contract described in paragraph (b)(3)(v)(C)(1), but only if such return premium does not exceed the

[13] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

premiums paid under the contract, less any return premiums previously excluded from cash value under this rule."[14]

6. Clarify the Definitions of "Annuity Contract" and "Life Insurance Contract" (Proposed Regulation sections 1.1471-1(b)(4) and (b)(35)).

Proposed Regulation section 1.1471-1(b)(4) provides that the term "annuity contract" means a contract that would be an annuity under section 72 (without regard to subsections (s) and (u) and section 817(h)). Proposed Regulation section 1.1471-1(b)(35) provides that the term "life insurance contract" means a contract that satisfies section 7702 (without regard to subsections (b), (c), and (d) and sections 101(f) and 817(h)). These definitions, along with the definition of "cash value" (discussed separately in other parts of these comments), must serve as the foundation for the application of the FATCA regime to products issued by foreign insurance companies. In our view, the Proposed Regulations do not provide clear definitions of insurance contracts that constitute "financial accounts" for purposes of Proposed Regulation section 1.1471-5(b) sufficient to provide foreign insurance companies the tools necessary for compliance.

As discussed in more detail below, neither proposed definition is sufficiently clear in its present form to facilitate compliance. Given our understanding of the purpose of these Proposed Regulations, we believe that both definitions bring unnecessary complexity to the analysis. For example, although section 72(a) provides that gross income includes any amount received as an annuity under an annuity, endowment, or life insurance contract, neither section 72 nor any other provision of the Code otherwise defines an annuity contract or "any amount received as an annuity." Subsections (s) and (u) of section 72 and section 817(h), which are excised from the Proposed Regulation's definition of an annuity contract, describe circumstances under which a purported annuity contract is not treated as an annuity. As a result, "a contract that would be an annuity under section 72 (without regard to subsections (s) and (u) and section 817(h))"—without more—portends an analysis lacking the prescriptive elements necessary to reach a conclusion.

We note that the guidance necessary to interpret section 72 with respect to U.S. products is plentiful (and thus case law and other authorities might, in our view inappropriately, supply the prescriptive element),[15] but we question the advisability of

[14] As a separate issue, the policyholder dividend exclusion in Proposed Regulation section 1.1471-5(b)(3)(v)(C)(3) is confusing, as it attempts to apply the life insurance policyholder dividend provision (minus excess interest) to accident and sickness insurance and property and casualty insurance. We appreciate the Service's intent to exclude policyholder dividends from cash value, but believe that such a mixed application of a life insurance term of art to nonlife products may complicate the determination of whether a particular product is a "cash value insurance contract." While we make no explicit recommendation as to Proposed Regulation section 1.1471-5(b)(3)(v)(C)(3), we suggest that the Service consider ways to simplify what is meant to be excluded.

[15] Regulation section 1.72-2 defines contracts subject to the provisions of section 72 in part as "contracts which are considered to be life insurance, endowment, and annuity contracts in accordance with the customary practice of insurance companies." There is a large body of published guidance and case law interpreting various aspects of section 72, and taxpayers routinely receive private letter rulings in

incorporating into FATCA definitions the body of guidance applicable to the proper tax consequences of such products, particularly when the FATCA definitions depart from the Code sections from which they are derived. Consistent with some informal comments we have heard from Service professionals, we did not understand the proposed definition to incorporate the body of precedent and guidance applicable to U.S. products. Such an approach would quickly spawn overlapping and ever-evolving—but distinct—bodies of interpretation: one applicable to an intact section 72 in order to determine tax consequences; and one applicable to a truncated version of section 72 for purposes of the Proposed Regulations' definition of an "annuity" under FATCA. More to the point, the tax consequences of the arrangement would ultimately be controlled by U.S. tax law regarding the meaning of an "annuity contract" generally, not the definition applied for purposes of FATCA.[16]

Although not derived from the plain language of the Proposed Regulations, "life insurance contract" appears to be defined as any contract that is a life insurance contract under applicable law. Yet the Proposed Regulations adopt a definition that requires a contract to "satisfy" the remains of section 7702 after a surgical parenthetical removes most of its definitional provisions. Left standing is section 7702(a)'s requirement that a contract be a "life insurance contract under applicable law." The fact that the substantive provisions of section 7702 have been carved out suggests that "applicable law" does not refer to that applicable to section 7702, but tethering this phrase to section 7702 rather than providing it as a stand-alone definition creates ambiguity. We can appreciate that the structure of the Proposed Regulations may be intentional, and that a simple reference to "life insurance under local law" may be disfavored, although we do not understand why this would be the case.[17] Indeed, Congress itself has defined a life insurance contract issued by a controlled foreign corporation (a "CFC") as one "regulated as a life insurance or annuity contract by the corporation's or unit's home country."[18] The Conference Committee Report accompanying the addition of section 7702 to the Code by the Tax Reform Act of 1984 provides that "[a] life insurance contract is defined as any

connection with section 72 issues. For example, in the last year alone, Notice 2011-68, 2011-2 C.B. 205, was issued providing guidance in connection with tax-free exchanges of annuity contracts having a long-term care feature, and Rev. Proc. 2011-38, 2011-2 C.B. 66, updated guidance concerning tax-free partial exchanges of annuity contracts. There are two items on the 2011-2012 Guidance Plan addressing section 72 issues. *Updated 2011-2012 Priority Guidance Plan Contains 14 New Items*, 2012 TAX NOTES TODAY 17-18 (Jan. 26, 2012). At least eight private letter rulings were issued in the last year in connection with the application of section 72.

[16] *Proposed FATCA Regs Not a "Sneak Preview" of Insurance Guidance*, 2012 TAX NOTES TODAY 35-17 (Feb. 22, 2012).

[17] Section 7702(a) includes references to the cash value accumulation test and guideline premium/cash value corridor tests, which the proposed definition purports to remove by indicating that subsections (b), (c) and (d) do not apply. The intended technical effect of simultaneously importing language and removing the related provisions is not clear. Thus, some revision is needed even if the substantive rule should somehow differ from "life insurance under applicable law."

[18] I.R.C. § 953(e)(5)(A).

contract, which is a life insurance contract under the applicable State or foreign law. . . ."[19] Moreover, the Service has, on occasion, provided rulings consistent with the foregoing concerning the proper interpretation of the term "applicable law" for purposes of section 7702(a).[20]

We believe grounding definitions applicable to Chapter 4 determinations with reference to the Code sections applicable to U.S. products—whether by subtracting the core terms of those sections or by incorporating by reference case law and other interpretative authorities—will lead to confusion as foreign insurers attempt to apply final Regulations. Notwithstanding the significant and ongoing interpretive challenges such approaches engender, there are policy implications as well. International information reporting is ultimately a two-way street, and we expect regimes comparable to FATCA to be implemented in other countries. If the rest of the world is being asked to create costly compliance systems to incorporate and apply otherwise irrelevant definitions to sort the products they issue, it is worth considering the results if the corresponding requirements are in kind. U.S. companies could see their compliance burden multiply repeatedly and significantly if every country is encouraged to "return the favor" by adopting unique and otherwise irrelevant definitions applicable to step one of the sorting process. As a result, we conclude that a simple, global and inclusive approach should be used in defining products.[21] This will efficiently identify the targeted products, allow room to grow as insurance products evolve, and eliminate any implication as to the definition's relevance concerning the corresponding U.S. tax consequences.

Recommendation: We recommend that the definitions of "annuity contract" and "life insurance contract" be grounded in the home country law applicable to such products. As such, we further recommend that "annuity contract" be defined as: "a contract regulated as an annuity contract under applicable law," and that "life insurance contract" be defined as "a contract regulated as a life insurance contract under applicable law."

7. Revise the Definition of "Cash Value Insurance Contract" to Better Target the Types of Products That Are Intended to Be Treated as Financial Accounts (Proposed Regulation section 1.1471-5(b)(3)(v)).

Proposed Regulation section 1.1471-5(b)(3)(v)(A) provides that the term "cash value insurance contract" means an insurance contract that has a "cash value" (as defined

[19] H.R. Conf. Rep. No. 98-861, at 1075 (1984); 1984-3 (Vol. 2) C.B. 329.

[20] *See, e.g.*, PLR 200002030 (Jan. 14, 2000) ("The Conference Committee's reference to state or foreign law provides guidance in the vast majority of cases, where there is an applicable state or foreign law.").

[21] We note that it is highly likely that the Service will obtain *more*, rather than less, relevant information if it takes this broader approach.

in paragraphs (b)(3)(v)(B) and (C)) greater than zero.[22] A term life insurance contract described in paragraph (b)(2)(ii) is not a cash value insurance contract.

Proposed Regulation section 1.1471-5(b)(2)(ii) provides that "term life insurance" means a contract with equal periodic premiums that are payable annually or more frequently during the period the contract is in existence, and the amount payable upon termination of the contract prior to the death of the insured cannot exceed the aggregate premiums paid for the contract, less mortality, morbidity, and expense charges (whether actually imposed or not) for the period or periods of the contract's existence.

Proposed Regulation section 1.1471-5(b)(3)(v)(B) provides that the term "cash value" means the greater of the amount the policyholder is entitled to receive upon surrender or termination of the contract (determined without reduction for any surrender charge or policy loan) and the amount the policyholder can borrow under or with regard to the contract. Proposed Regulation section 1.1471-5(b)(3)(v)(C) provides certain exceptions to "cash value," including amounts payable as a personal injury or sickness benefit; certain refunds of premium; and certain policyholder dividends (as defined in section 808 but without regard to paragraph (b)(2) of that section).

The Proposed Regulation's definition of "cash value insurance contract" is too broad in some places and too narrow in others; it does not satisfactorily capture products providing an investment component as described in Notice 2010-60:

> [C]ontracts such as life insurance (other than term life insurance contracts without cash value) or annuity contracts typically combine insurance protection with an investment component. Thus, such cash value insurance contracts or annuity contracts may present the risk of U.S. tax evasion that chapter 4 is designed to prevent.

The term "insurance contract" encompasses a universe whose boundaries are undefined and at times disputed. Neither the Proposed Regulations nor the Code provides a definition of "insurance" or "insurance contract." Moreover, the Proposed Regulations are based on somewhat generic features of products offered in the U.S., without taking into account the diversity of products regulated as "insurance" available in the international market. It is at least theoretically possible for a health or casualty product to incorporate an investment or return feature that does not satisfy the enumerated exceptions to cash value. Notwithstanding that fact, setting the cash value bar at "greater than zero" is excessive; a cash value of one cent causes a contract to be captured. This extraordinarily low threshold is likely to pull in a multitude of products that do not provide significant investment returns and do not implicate the concerns of FATCA. A broad scope coupled with a low bar suggests that a significant amount of unhelpful data would be captured and reported, thus unnecessarily increasing both compliance and enforcement burdens. In our view, a *de minimis* exception to cash value

[22] Please see separate discussion, above, regarding the exclusions from "cash value" outlined in Proposed Regulation section 1.1471-5(b)(3)(v)(C).

would be reasonable and would still allow the Service to obtain relevant information with regard to the types of accounts at which FATCA is aimed.

Similarly, the exclusion of “term life insurance contracts” from the definition of “cash value insurance contracts” is in practice an overly narrow exclusion. There are a myriad of products in the life insurance market today that provide only pure insurance protection but that would fail to satisfy the Proposed Regulations’ requirement of equal periodic premiums payable annually or more frequently during the period the contract is in existence.

We understand that broadening the scope of contracts captured beyond life insurance and annuity contracts is intentional. This leaves the sorting analysis to be performed through the application of the specific, narrow, enumerated exclusions. Our concern is that the approach described in the Proposed Regulations captures the universe and releases an insignificant proportion of the contracts posing little or no risk. We see an opportunity to more efficiently satisfy policy objectives and minimize compliance and enforcement burdens by narrowing the scope of “cash value insurance contract” and broadening the subset of exceptions.

Recommendations: We recommend that the definition of “insurance contract” be grounded in the home country law applicable to such products. As such, we further recommend that “insurance contract” be defined as: “a contract regulated as an insurance contract under applicable law.” We recommend that the definition of “cash value insurance contract” exclude *all* contracts providing traditional term life insurance protection (providing either no cash value or one that in no circumstance can exceed aggregate premiums), regardless of whether premiums are payable annually or more frequently during the period the contract is in existence. Finally, we recommend that the definition of “cash value insurance contract” incorporate a threshold level of “cash value” of greater than $50,000.

8. Simplify the Currency Translation Rules by Instead Publishing Conversion Rates (Proposed Regulations sections 1.1471-4(c)(5), (d)(4)(iii)(B), (d)(4)(iv)(F) and 1.1471-5(a)(4)(iii) and (b)(2)(i)(C)).

The Proposed Regulations require FFIs to determine and report account values at the outset of their FFI agreements and as part of their ongoing reporting requirements. For non-U.S. entities, accounts may be kept in U.S. dollars or another country’s currency.

The rules in the Proposed Regulations for converting the account values of non-U.S. dollar denominated accounts to U.S. dollars vary. One set of rules is applied to determine account values for purposes of initial account due diligence, and another set of rules applies to ongoing reporting. Furthermore, conversion to dollars is required for initial due diligence, and may be optional in other instances.

It would facilitate an FFI’s implementation of the due diligence and reporting requirements if the Service would publish the applicable “spot rate” to be used for converting non-U.S. dollar denominated account balances to U.S. dollars for pre-existing accounts as of an FFI's first year of determination, and periodically thereafter for new FFIs entering the FATCA compliance regime.

Recommendation: We recommend that the Service publish the spot rates to be used for non-optional conversion of account values denominated in a currency other than U.S. dollars, so as to facilitate an FFI's compliance with the due diligence and ongoing reporting requirements. This could be done in the final Regulations with a statement that such rate will be updated annually (or periodically) by published Notices thereafter.

9. Clarify that Property and Casualty and Reinsurance Premiums Subject to Federal Excise Tax Are Not "Withholdable Payments" (Proposed Regulation section 1.1473-1(a)(2)(B)).

Proposed Regulation section 1.1473-1(a)(1)(i) defines a "withholdable payment" to include U.S. source fixed or determinable annual or periodical ("FDAP") income. Proposed Regulation section 1.1473-1(a)(2)(i)(A) defines FDAP income as income that is described in Regulation section 1.1441-2(b)(1) or 1.1441-2(c), which includes, *inter alia*, premiums.[23] Proposed Regulation section 1.1473-1(a)(2)(i)(B) provides:

> [e]xcept as provided in paragraph (a)(4) . . . no exception to withholding on U.S. source FDAP income applies for purposes of determining whether a payment of such income is a withholdable payment. Thus, an exclusion from an amount subject to withholding under § 1.1441-2(a) for purposes of chapter 3 . . . shall not apply for purposes of determining whether income is U.S. source FDAP income . . . .

Regulation section 1.1441-2(a)(7) provides an exception from withholding for Chapter 3 purposes for insurance and reinsurance premiums that are subject to federal excise tax ("FET") under section 4371. This exception applies to property and casualty, life and annuity, and reinsurance premiums paid to foreign insurers and reinsurers. As outlined in the preceding paragraph, however, according to the Proposed Regulations, the exception from withholding in Regulation section 1.1441-2(a)(7) for premiums subject to the FET apparently does not apply in determining whether a premium is a withholdable payment for FATCA purposes.

We can understand the Service's policy reasons for not exempting life insurance and annuity premiums from the realm of "withholdable payments." However, in light of the expressed intent of the Service in Notice 2010-60 to provide a carve out for property and casualty insurance and reinsurance, it would appear that the failure to provide an exception from "withholdable payments" for property and casualty and reinsurance

[23] Whether insurance and reinsurance premiums are FDAP has been debated over the years. The Joint Committee Report states: "Although technically insurance premiums paid to a foreign insurer or reinsurer are FDAP income, they are exempt from withholding under Treas. Reg. sec. 1.1441-2(a)(7) if the insurance contract is subject to the excise tax under section 4371." Joint Committee on Taxation, *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act,*" JCX-4-10, 22, n. 88 (Feb. 23, 2010).

premiums in the Proposed Regulations is inadvertent. We do not think Treasury and the Service intended for property and casualty insurance and reinsurance premiums paid by U.S. insureds or insurers to foreign insurers, which are not subject to withholding under the current regime, to become subject to 30% withholding on top of the already applicable FET.

Recommendation: We believe that property and casualty insurance and reinsurance premiums that are subject to the FET should not become subject to both the FET and 30% FATCA withholding. Accordingly, we recommend that Proposed Regulation section 1.1473-1(a)(4) be amended to include an exception from the definition of a "withholdable payment" for property and casualty insurance and reinsurance premiums as described in Regulation section 1.1441-2(a)(7).

10. Clarify Chapter 4 Status of Foreign Insurance Companies Electing under section 953(d) to be Taxed as U.S. Insurance Companies.

The Code and Proposed Regulations provide that an FFI is any financial institution that is a foreign entity[24] and an NFFE is a foreign entity that is not a financial institution.[25] A foreign entity, as defined under the Code and Proposed Regulations, constitutes any entity that is not a U.S. person.[26] A U.S. person, in turn, is defined by section 7701(a)(30) as including a "domestic corporation." Further, if a controlled foreign corporation insurance company makes an election under section 953(d)(1), "for purposes of [Title 26], such corporation shall be treated as a domestic corporation" (a "section 953(d) company"). As a result, it seems clear under the Code and Proposed Regulations that a section 953(d) corporation is *not* an FFI.

Notice 2010-60 indicates that a controlled foreign corporation within the meaning of section 957(a) (a CFC) that qualifies as a financial institution under section 1471(d)(5) is an FFI. Notice 2010-60 does not include any exception for, or discussion regarding the status of, a section 953(d) company. The Proposed Regulations similarly do not explicitly address the treatment of section 953(d) companies under Chapter 4.

As noted, with a few minor exceptions set forth in section 953(d) itself, a section 953(d) company "shall be treated as a domestic corporation" for all purposes under the Code.[27] It is subject to tax in the United States on its worldwide income but is not subject to the branch profits tax of section 884 or the FET on foreign insurers that insure U.S. risks under section 4371 *et seq*.

[24] I.R.C. § 1471(d)(4); Prop. Reg. § 1.1471-5(d).

[25] I.R.C. § 1472(d); Prop. Reg. § 1.1471-1(b)(36).

[26] I.R.C. § 1473(5); Prop. Reg. § 1.1473-1(e).

[27] I.R.C. § 953(d). While we understand a section 953(d) company is treated as a foreign corporation pursuant to the "FBAR" rules under 31 U.S.C. § 5311 *et seq.*, this is distinguishable because unlike the FBAR rules, Chapter 4 is part of Title 26.

A section 953(d) company files the same federal income tax returns that any other domestic insurance company files (that is, Form 1120-L or Form 1120-PC). The return for a section 953(d) company includes a specially prepared annual statement that discloses the financial condition of the section 953(d) company, the insurance products it sells, and other information about the company. Section 953(d) companies are subject to the record keeping requirements of section 6001 and are examined by the Service; they must provide information responsive to information document requests ("IDRs"), respond to proposed adjustments, and interact with the Service examination function. As such, the imposition of a second layer of reporting is redundant and cannot provide any information that is not already subject to existing requirements. In addition, a section 953(d) company has the same obligation as other domestic insurance companies to report payments it makes to others, including payments to policyholders.[28]

Chapter 4 limits the definition of both FFIs and NFFEs to entities that are not "U.S. persons" under the Code. Since a section 953(d) company is treated as a domestic corporation for all purposes under the Code, and therefore is a U.S. person,[29] it therefore appears that a section 953(d) company could not be an FFI or an NFFE. Exemption from FFI and NFFE status is also appropriate in light of the general treatment of a section 953(d) company under the Code. We recognize that section 1474(f) authorizes the promulgation of regulations as necessary or appropriate to carry out the purposes of Chapter 4. In the case of section 953(d) companies, however, there is no material reason to treat such insurers differently than any other domestic insurer. All of a section 953(d) company's income is reported in the U.S. A section 953(d) company already provides significant amounts of information on its return that other CFCs do not provide, and it is subject to all of the reporting obligations of a domestic insurance company. Accordingly, the stricter rules that apply to foreign entities under Chapter 4 should not apply to section 953(d) companies.

Recommendation: While we do not believe that Notice 2010-60 was intended to create any inference that a section 953(d) company could constitute an FFI or an NFFE,

[28] I.R.C. §§ 6041-6049. We understand that representatives of the Service have informally raised questions about whether tax reporting under section 6047(d) would be required by a section 953(d) company, since life insurance and annuity contracts issued by such companies might not be considered "commercial annuities" within the meaning of section 3405(e)(6). Treatment as other than "commercial annuities" arguably could apply if contracts failed to comply with applicable U.S. tax requirements (*e.g.*, sections 7702 or 72(s)) or because such companies are not "licensed to do business under the laws of any State" within the meaning of section 3405(e)(6). In regard to the substantive question of whether reporting is required, we note that the Service has previously ruled that section 6047(d) reporting is required for non-compliant life insurance contracts. *See* Rev. Rul. 91-17, 1990-1 C.B. 190. We further note that, in the context of section 953(d) companies, the Service has privately ruled that "State" for purposes of section 817(d) includes certain foreign jurisdictions. *See* PLRs 201038008 (June 24, 2010), 200919025 (Jan. 29, 2009), and 200246022 (Aug. 13, 2002). We submit that any reporting concern is best addressed through the issuance of guidance under sections 3405(e)(6) and 6047(d), rather than through the wholesale imposition of the FATCA regime on all section 953(d) companies.

[29] I.R.C. § 7701(a)(30); Prop. Reg. § 1.1471-1(b)(46)(i).

we recommend that the final Regulations clarify that a section 953(d) company is not an FFI or an NFFE for purposes of Chapter 4. This guidance could be in the form of a clarification in the definition of a foreign entity or in the form of an example in the final Regulations.