SOCIETY OF ACTUARIES

Article from:

Taxing Times

May 2008 – Volume 4 - Issue No. 2

On Grandfathers and Adjustments: New IRS Chief Counsel Advice Memo Blurs Lines

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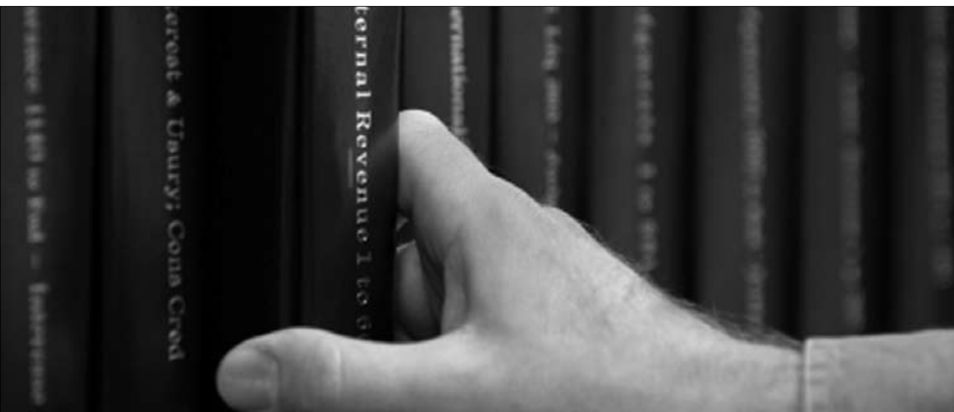

In general terms, a "grandfather clause" is a provision of law that creates an exemption from the law's effect for transactions that existed before the law was passed.[1] Such provisions are common in federal tax legislation, reflecting a congressional intent to avoid changing the rules of the game on taxpayers after the game has begun, as well as the practical difficulties of applying new rules to old transactions that might need to be "unwound" if the new law applied to them. Of course, Congress is not obligated to include grandfather clauses when enacting new tax legislation, and it can (and has) passed new tax laws without grandfathering prior transactions, particularly when the new law addresses a perceived abuse of the system.[2] However, in virtually all cases of new tax laws altering the federal income tax treatment of life insurance contracts, Congress has found it appropriate to include grandfather clauses to avoid inequitable results for taxpayers and insurers alike. This is especially true in the context of section 7702[3] of the Internal Revenue Code and subsequent amendments thereto, which Congress explicitly chose to apply on a prospective basis.

As with many provisions of the tax law, there is not always perfect clarity on how the various grandfather clauses applicable to life insurance contracts should be applied in practice. The courts have never ventured into this territory, and the Internal Revenue Service (the "Service") has issued little guidance,[4] leaving taxpayers largely on their own over the past three decades to interpret the statutory language of the grandfather provisions and their accompanying legislative histories. However, the Service recently released a chief counsel advice memorandum that provides insight into the Service's thinking on certain aspects of the grandfather clauses applicable to section 7702.[5] In Chief Counsel Advice Memorandum 200805022 (Aug. 17, 2007) (the "CCA"), the Service essentially concludes that two common occurrences under a typical universal life insurance contract—the addition of a qualified additional benefit rider and a change in death benefit options—will cause a loss of grandfathering under the effective date provisions that govern the applicability of section 7702 and the 1988 amendments thereto in cases where such changes are not pursuant to a right in the contract.

Unfortunately, the analysis that the CCA presents in support of these conclusions suffers from certain inadequacies, particularly by failing to address (1) the interaction between the relevant effective date provisions and the so-called "adjustment rules" of sections 101(f) and 7702, and (2) the absence of a "material change" rule in the context of the effective date provisions governing the 1988 amendments to section 7702. These deficiencies, as well as others, call into question the accuracy of the conclusions that the CCA reaches. This article summarizes the applicable grandfather clauses and the Service's interpretation of them as expressed in the CCA, and it then offers an alternative analysis that the authors believe represents a better reasoned (or at least a reasonable) approach to applying the grandfather rules.

Grandfathered Life Insurance Contracts

Section 101(f) was added to the tax code by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).[6] The provision was the first-ever definition of a "life insurance contract" to appear in the tax code, and required "flexible premium life insurance contracts" to satisfy one of two alternative tests in order to be afforded the favorable tax treatment that accompanies a characterization as life insurance. Section 101(f) applies only to flexible premium life insurance contracts issued before Jan. 1, 1985.[7]

Section 7702 was added to the Code by the Deficit Reduction Act of 1984 (DEFRA).[8] It provides a definition of a "life insurance contract" for all purposes of the Code, under which any life insurance contract (not just a flexible premium contract) must satisfy one of two alternative tests that are similar to the alternative tests under section 101(f). Certain computational rules apply for purposes of these tests, including rules relating to

the mortality and expense charges that can be taken into account in applying the tests. In 1988, section 7702 was amended by the Technical and Miscellaneous Revenue Act of 1988 (TAMRA)[9] to impose more restrictive rules with respect to the mortality and expense charges that can be assumed under section 7702 (the "Reasonable M&E Rules").

Section 7702 generally applies to "contracts issued after Dec. 31, 1984, in taxable years ending after such date" (the "DEFRA Effective Date").[10] In other words, contracts issued on or before Dec, 31, 1984, are grandfathered so that section 7702 does not apply to them. In regard to this statutory rule, the explanation of DEFRA by the Senate Finance Committee states that:

> Contracts issued in exchange for existing contracts after December 31, 1984 are to be considered new contracts issued after that date. For these purposes a change in an existing contract will not be considered to result in an exchange, if the terms of the resulting contract (that is, the amount or pattern of death benefit, the premium pattern, the rate or rates guaranteed on issuance of the contract, or mortality and expense charges) are the same as the terms of the contract prior to the change. Thus, a change in minor administrative provisions or a loan rate generally will not be considered to result in an exchange.[11]

The description of the DEFRA Effective Date by the staff of the Joint Committee on Taxation expanded on this, stating that:

> For purposes of applying the effective date provisions ... the issue date of a contract is generally the date on the policy assigned by the insurance company, which is on or after the date the application was signed. ... Contracts issued in exchange for existing contracts after December 31, 1984, are to be considered new contracts issued after that date. ... In addition, a change in an existing contract will not be considered to result in an exchange, if the terms of the resulting contract (that is, the amount or pattern of death benefit, the premium pattern, the rate or rates guaranteed on issuance of the contract, or mortality and expense charges) are the same as the terms of the contract prior to the change. Thus, a change in minor administrative provisions or a loan rate generally will not be considered to result in an exchange.[12]

Section 5011(d) of TAMRA states that the Reasonable M&E Rules apply to "contracts entered into on or after Oct. 21, 1988" (the "TAMRA Effective Date"). In other words, contracts entered into before Oct. 21, 1988, are grandfathered from application of the Reasonable M&E Rules. The effective date of these amendments, as originally proposed as part of the Miscellaneous Revenue Act of 1988 (the "1988 Bill"),[13] which later became TAMRA, was phrased quite differently. Specifically, section 346(c) of the 1988 Bill provided as follows:

> (1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to contracts issued on or after July 13, 1988.
>
> (2) TREATMENT OF MATERIAL CHANGES.—The rules of section 7702A(c)(3) of the 1986 Code (as added by this Act) [relating to material changes] shall apply in determining whether a contract is issued on or after July 13, 1988.

The explanation of the 1988 Bill by the House Ways and Means Committee restated this rule as follows:

> The provision generally is effective for all life insurance contracts issued on or after July 13, 1988, and for all life insurance contracts that are materially changed on or after July 13, 1988. A material change for this purpose has the same meaning as a material change under the provisions relating to modified endowment contracts. …[14]

In the conference agreement for TAMRA, the effective date rule was modified to reference "contracts entered into on or after October 21, 1988." The language addressing material changes was deleted. The conference report for TAMRA provides no explanation for the change, simply stating that "[t]he conference agreement follows the House bill, with modifications. … The provision is effective with respect to contracts entered into on or after October 21, 1988."[15]

The CCA

The CCA addresses the application of the DEFRA and TAMRA grandfather clauses just described in the context of two specific types of changes to existing flexible premium universal life insurance contracts that the taxpayer life insurance company had issued. Some of the contracts were issued before Jan. 1, 1985 (the "Pre-DEFRA Contracts"), and, accordingly, were subject to the requirements of section 101(f), rather

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than the requirements of section 7702, absent an event that caused a loss of grandfathering under the DEFRA Effective Date. Other contracts were issued after Dec. 31, 1984, but before Oct. 21, 1988 (the "Pre-TAMRA Contracts"), and, accordingly, were subject to section 7702 but not the Reasonable M&E Rules, absent a loss of grandfathering under the TAMRA Effective Date.

The taxpayer life insurance company requested rulings that a change from an "option 2" or increasing pattern of death benefit to an "option 1" or level death benefit pattern (a "DBO Change") or the addition of a rider that provided a qualified additional benefit (a "QAB Rider") would not cause a loss of grandfathering under these provisions. With regard to DBO Changes, the CCA states that the contracts as originally issued provided only for an option 2 death benefit and, significantly to the CCA's reasoning, did not expressly provide contract owners with the ability to obtain an option 1 death benefit. Similarly, the CCA states that the express terms of the contracts did not address QAB Riders, although the taxpayer had a practice of allowing contract holders to add them with evidence of insurability.

The analysis provided in the CCA is somewhat elliptical in that it appears to omit several key points. …

The Service reached an adverse conclusion on the taxpayer's request for rulings, concluding that a DBO Change or the addition of a QAB Rider would trigger a loss of grandfathering under the DEFRA Effective Date and the TAMRA Effective Date, as applicable. This conclusion prompted the taxpayer to exercise its procedural right to withdraw the request before a negative ruling was issued. The CCA was issued when the National Office of the Service (which handles ruling requests) exercised its own procedural right to notify the operating division of the Service with examination jurisdiction over the taxpayer's tax return that the ruling request had been withdrawn and to give its views on the issues presented in the request.[16]

In explaining its views on the issues presented in the request, the Service quoted the Joint Committee on Taxation's explanation of the DEFRA Effective Date and concluded that it established a "negative inference" that a DBO Change or the addition of a QAB Rider would cause a loss of grandfathering under the facts presented. With regard to the TAMRA Effective Date, the Service cited the House Ways and Means Committee report on the 1988 Bill, which, as quoted above, refers to an effective date provision in terms of contracts "issued" or "materially changed" on or after a certain date.[17] The Service acknowledged that the TAMRA conference report stated that the conference agreement followed the 1988 Bill "with modifications," but the Service did not discuss the fact (noted above) that one of those "modifications" was to eliminate all references to "material changes" to contracts. Rather, the Service concluded that the "material change" language in the 1988 Bill "will cause a life insurance contract to be entered into anew (for purposes of [the Reasonable M&E Rules]) if there is an increase in future benefits." In that regard, the Service stated that:

> We read the intent expressed in the House Report together with the acquiescence of the Conference Agreement to follow the House Bill, with modifications, to trigger the loss of grandfathering on the facts presented by the Taxpayer. To do otherwise would virtually eliminate the ability to lose grandfathered status except in the clearest of circumstances (new contracts actually issued after the effective date or tax avoidance) and does not follow the intent of Congress.

Alternative Analysis

The analysis provided in the CCA is somewhat elliptical in that it appears to omit several key points that could be considered persuasive in arguing for a conclusion contrary to that reached in the CCA—that the DBO Change or addition of a QAB Rider addressed therein does not trigger a loss of grandfathering under the DEFRA Effective Date or the TAMRA Effective Date. Perhaps most significantly, the CCA does not address the interaction between the relevant effective date provisions and the so-called "adjustment rules" under sections 101(f) and 7702.

In that regard, section 7702(f)(7)(A) provides that "[i]f there is a change in the benefits under (or in other terms of) the contract which was not reflected in any previous determination or adjustment made under this section, there shall be proper adjustments in future determinations made under this section." The legislative history of this provision elaborates as follows:

> Changes in the future benefits or terms of a contract can occur at the behest of the company or the policyholder, or by the passage of time. However, proper adjustments may be different for a particular change, depending on which alternative test is being used or on whether the changes result in an increase or decrease of future benefits. In the event of an increase in current or future benefits, the limitations under the cash value accumulation test must be computed treating the date of change, in effect, as a new date of issue for determining whether the changed contract continues to qualify as life insurance under the definition prescribed in the Act. … Under the guideline premium limitation, an adjustment is required under similar circumstances, but the date of change for increased benefits should be treated as a new date only with respect to the changed portion of the contract.[18]

In this connection, the legislative history also explains the interaction between the adjustment rule and the DEFRA Effective Date in the context of a particular type of change to a contract as follows:

> [F]or purposes of the adjustment rules, any change in the terms of a contract that reduces the future benefits under the contract will be treated as an exchange of contracts (under sec. 1035). Thus, any distribution required under the adjustment rules will be treated as taxable to the policyholder under the generally applicable rules of section 1031 [regarding taxable "boot" treatment of cash or other property received in a like-kind exchange]. This provision was intended to apply specifically to situations in which a policyholder changes from a future benefits pattern taken into account under the computational provision for policies with limited increases in death benefits [*i.e.*, an "option 2" death benefit pattern] to a future benefit of a level amount [*i.e.*, an "option 1" death benefit pattern] (even if at the time of the change the amount of the death benefit is not reduced). … The provision that certain changes in future benefits be treated as exchanges was not intended to alter the application of the transition rules for life insurance contracts. … Thus, section 7702 will not become applicable to a contract that was issued before January 1, 1985, because a reduction of the contracts [sic] future benefits resulted in the application of this adjustment provision.[19]

Like section 7702, section 101(f) includes a rule requiring adjustments to be made to determinations thereunder in the event of a change in the future benefits of a life insurance contract subject to section 101(f). Specifically, section 101(f)(2)(E) states that "[t]he guideline single premium and guideline level premium shall be adjusted in the event of a change in the future benefits or any qualified additional benefit under the contract which was not reflected in any guideline single premiums or guideline level premium previously determined."

DEFRA Effective Date. Turning first to the application of the DEFRA Effective Date, the adjustment rule in section 101(f)(2)(E) would appear to apply, by its terms, to any Pre-DEFRA Contract "in the event of a change in the future benefits or any qualified additional benefit under the contract. …" In this regard, a DBO Change would appear to be a change in the future benefits of a Pre-DEFRA Contract, and the addition of a QAB Rider would appear to be a change in the QABs under a Pre-DEFRA Contract. It would also seem clear that only one result—either the application of the adjustment rule, or else the "new contract" treatment brought about by the application of the DEFRA Effective Date—could apply in the case of a DBO Change or the addition of a QAB Rider. While the Service apparently would contend that the latter result would apply in such a case, such a position seemingly conflicts with principles of statutory construction.

When a conflict arises between two statutory rules, principles of statutory construction adopted by the Supreme Court dictate that the specific governs the general.[20] Section 101(f)(2)(E) provides a very specific,

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statutory rule that, on its face, would appear to apply to the changes that were made to the flexible premium universal life insurance contracts involved in the CCA (section 101(f) applies solely to flexible premium contracts like the Pre-DEFRA Contracts). In contrast, the DEFRA Effective Date provides only a briefly stated, general rule, and one that is applicable to *all* forms of life insurance (flexible premium or not). Moreover, the section 101(f)(2)(E) adjustment rule is itself a material change rule, and to the extent that the DEFRA Effective Date also represents a rule addressing material changes in contracts, the adjustment rule is the more specific statutory provision.

In contrast, the DEFRA Effective Date provides only a briefly stated, general rule, and one that is applicable to *all* forms of life insurance (flexible premium or not).

Furthermore, the notion that a change in the "amount or pattern of death benefit" under a contract (such as a DBO Change) results in the application of the DEFRA Effective Date derives solely from the legislative history of section 7702. It arises by negative implication, as the Service recognized in the CCA, for the legislative history merely says that if there is no change in, *inter alia,* the amount or pattern of a contract's death benefit, the contract will *not* be treated as issued after the DEFRA Effective Date. Prior to the CCA's release, in no guidance whatsoever—no regulation (proposed or final), no notice, no revenue ruling, and not even a private letter ruling—had the Service ever described a circumstance in which grandfathering under DEFRA (or TAMRA) was forfeited due to contract changes, or what the result would be. For that matter, the DEFRA legislative history does not even mention the addition of a QAB. If, as advanced above, a specific statutory rule governs a general statutory rule, then arguably a specific statutory rule—the section 101(f)(2)(E) adjustment rule—governs a non-statutory, general concept that arises only by negative inference. And absent guidance from the Service to the contrary (at least up to the point when the CCA was released), there has been no reason for a taxpayer familiar with the adjustment rule to think otherwise.

Moreover, if, through negative implication, the DEFRA legislative history is read to result in a loss of grandfathering upon a change in, *inter alia*, a contract's "amount or pattern of death benefit," then section 101(f)(2)(E) will never apply to any change in the "future benefits" of a contract, absent an express right in the contract to make the change. This follows from the fact that the change in the "amount or pattern of death benefit" referenced in the DEFRA legislative history is also a change in the "future benefits" under a contract described in the section 101(f)(2)(E) adjustment rule. In enacting both section 101(f) and section 7702, Congress was arguably aware of the flexible nature of universal life insurance contracts and, in particular, that future benefits can be changed and that riders can be added and dropped. Indeed, flexible premium contracts—presumably such as those involved in the CCA—make provisions in their cash value computations for the addition and deletion of rider charges, even if there is no express "right" to do so. It was for this reason that the adjustment rule was created, thereby ensuring that the limitations on investment orientation imposed under the new statutes would continue to apply in an effective manner after such changes occurred. Since Congress, in enacting DEFRA (including, obviously, the DEFRA Effective Date), left section 101(f) and its adjustment rule in place rather than repealing them, and such rule applies to all changes in future benefits and QABs (even if there is no preexisting right to make the change), it seemingly would make little sense to construe section 101(f)'s adjustment rule as having no meaning after Jan. 1, 1985, for many common changes to contracts.

On the other hand, if the adjustment rule applies in the case of changes in Pre-DEFRA Contracts, the DEFRA Effective Date still retains significant meaning. Unlike section 101(f), which governs only flexible premium contracts, section 7702 governs all types of life insurance contracts (issued after 1984). For contracts other than universal life, which were not subject to any limits on investment orientation but which comprised the vast majority of in-force contracts on Jan. 1, 1985, Congress intended to apply section 7702 prospectively, including after material changes were made to such contracts following the DEFRA Effective Date. Interpreting the section 101(f)(2)(E) adjustment rule as continuing to apply to Pre-DEFRA Contracts after the DEFRA Effective Date is fully consistent with this structure, enabling such contracts to be governed by the adjustment rule while applying the DEFRA Effective Date in all other appropriate contexts.[21]

Finally, the DEFRA legislative history provides support for the use of the adjustment rule in this context. As

originally enacted, section 7702(f)(7)(B) provided that a reduction in future benefits subject to the section 7702(f)(7)(A) adjustment rule would be treated as an "exchange" of contracts, giving rise to "boot" treatment for amounts that the adjustment rule required to be distributed from a contract to maintain compliance with the contract's guideline premium limitation. Even so, the DEFRA legislative history made it clear that such a change in benefits was not intended to impair grandfathering of Pre-DEFRA Contracts.[22] Moreover, when section 7702(f)(7)(B) was amended in 1986 (retroactively to Jan. 1, 1985) to replace the boot treatment with the so-called "recapture" rules of section 7702(f)(7)(B)-(E), the legislative history again explained that "exchange" treatment for contract changes under the adjustment rule does not result in "new contract" treatment for purposes of the DEFRA Effective Date. Specifically, the 1986 legislative history stated that "[t]he provision that certain changes in future benefits be treated as exchanges … only applies with respect to such changes in contracts issued after December 31, 1984."[23]

We recognize that the legislative history relating to the DEFRA Effective Date includes discussion confirming that a contract change that represents the exercise of an option in a contract does not cause the contract to be newly issued for purposes of this effective date rule. This, in turn, may imply that a change not made pursuant to an option does cause the contract to be newly issued. Again, while this result may make some sense in some contexts—such as for Pre-DEFRA Contracts that are not subject to section 101(f)—as a matter of statutory interpretation the more specific adjustment rule of section 101(f)(2)(E) seemingly should govern the treatment of all changes to a contract that is subject to section 101(f).

TAMRA Effective Date. Turning next to the application of the TAMRA Effective Date, the fact that the transition rule is based on the date that a contract is "entered into" supports the proposition that a DBO Change or the addition of a QAB Rider does not cause a loss of grandfathering. Although TAMRA does not define "entered into" or elaborate in any way on its meaning in the context of the TAMRA Effective Date (a point the Service itself has recognized),[24] the plain meaning of the term, as evidenced by its dictionary definition and the Service's statements in other contexts, is that "entered into" is the action by the owner and the insurance company to become parties to a binding contractual relationship. Arguably, a DBO Change or the addition of a QAB Rider to a Pre-TAMRA Contract does not alter that action or the date on which it occurred, and thus does not alter the date that the Contract was "entered into" for purposes of the TAMRA Effective Date.

Additional support for a continuation of grandfathering can be drawn from the statutory structure itself and the related legislative history. The modified endowment contract ("MEC") rules of section 7702A were enacted contemporaneously with the Reasonable M&E Rules, and both sets of rules apply to contracts "entered into" after a specified date in 1988. For purposes of the MEC rules, TAMRA included a number of special provisions that modified the normal meaning of "entered into," including a rule that certain death benefit increases or additions of QABs would cause a loss of grandfathering. Congress could have added similar special provisions to modify the meaning of "entered into" for the Reasonable M&E Rules, but it chose not to do so. One might point to principles of statutory construction adopted by the Supreme Court for the proposition that when Congress includes special rules in one part of a statute but omits them from another, it must be presumed to have done so intentionally.[25] On this basis, one might conclude that Congress did not intend to include the special rules modifying the normal meaning of "entered into" for purposes of the Reasonable M&E Rules. Also, this action by Congress in the context of the MEC effective date provision offers strong evidence that the normal meaning of "entered into," as described above, is correct, because if changes in benefits or QABs in and of themselves caused a contract to be newly entered into, there would have been no need to include the special rules under the MEC effective date provision that treat these types of changes as resulting in a newly entered into contract.

Moreover, the TAMRA legislative history shows that Congress rejected a previously proposed "material change" rule in the context of the TAMRA Effective Date. As described above, prior to modification by the conference committee, the House version of TAMRA stated that the Reasonable M&E Rules were to be effective for contracts "issued" on or after July 13, 1988, and that a contract that was materially changed (within the meaning of then new section 7702A(c)(3)) on or after that date was to be treated as newly issued. In enacting TAMRA, Congress not only changed the TAMRA Effective Date from "contracts issued" to "contracts entered into," but it also dropped the rule that "material changes" would trigger the effective date. This arguably shows that Congress did not intend for changes

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in existing contracts to trigger the TAMRA Effective Date, a point that the Service did not address in the CCA when it noted that the conference agreement adopted the House bill "with modifications." Here, again, principles of statutory construction adopted by the Supreme Court would seem to suggest that where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.[26] Thus, one might conclude that Congress intended to impose the Reasonable M&E Rules only on a *fully prospective* basis, and that a DBO Change or the addition of a QAB Rider to a Pre-TAMRA Contract does not affect the date the Contract was "entered into" for purposes of the TAMRA Effective Date.

Conclusion

The analysis that the CCA presents in support of the conclusions that a DBO Change or the addition of a QAB Rider triggers a loss of DEFRA or TAMRA grandfathering suffers from certain inadequacies. In particular, the CCA fails to address the interaction between the DEFRA Effective Date and the adjustment rules of section 101(f), and it also fails to address the absence of a material change rule in the context of the TAMRA Effective Date. At a minimum, these deficiencies call into question the accuracy of the conclusions that the CCA reaches, and leave open the possibility that other reasonable conclusions might be drawn. Unless the Service issues guidance in a form that is more definitive than a chief counsel advice memorandum (which carries no precedential weight as far as taxpayers generally are concerned), these questions likely will continue to be the subject of debate. ◂

End Notes

[1] Black's Law Dictionary (8th ed. 2004). Of course, "grandfather clauses" earned their name from the dishonorable practice in the post-Civil War south of states enacting constitutional provisions that exempted from suffrage restrictions the descendants of men who voted before the Civil War. *See id.* The phrase has since lost its pejorative connotations, at least for those who benefit from such provisions in the tax law.

[2] *See, e.g.*, Pub. L. No. 104-191 § 501 (1996) (applying amendments to section 264(a)(4) that eliminated interest deductions for so-called "leveraged COLI" to contracts issued after the original enactment of section 264(a)(4) in 1986).

[3] Unless otherwise indicated, each reference to a "section" means a section of the Internal Revenue Code of 1986, as amended (the "Code").

[4] Some guidance has been issued with respect to the transition from one prevailing mortality table to another under the reasonable mortality and expense charge rules of section 7702(c)(3)(B)(i). *See, e.g.*, Notice 2006-95, 2006-45 I.R.B. 848. Other guidance from the Service has appeared in the form of private letter rulings that address only a handful of situations: (1) modifications to a life insurance contract to provide that policy loan interest is payable in arrears, rather than in advance (*see, e.g.*, PLR 9737007 (June 11, 1997)); (2) contract changes resulting from an assumption reinsurance transaction, reorganization, and/or demutualization (*see, e.g.*, PLR 200002010 (Sept. 30, 1999)); (3) the assignment of a life insurance contract to a trust and subsequent return of the contract to the taxpayer (PLR 9033023 (May 18, 1990)); (4) an amendment to a contract to allow additional investment options (PLR 8648018 (Aug. 27, 1986)); and (5) the addition of a rider to a life insurance contract that offered an option 2 death benefit that was not available, under the express terms of the contract, as originally issued (PLR 9853033 (Sept. 30, 1998)). *See also* Rev. Proc. 92-57, 1992-2 C.B. 410, providing that certain modifications and restructurings of life insurance contracts issued by a financially troubled insurance company do not upset grandfathers under section 7702.

[5] "Chief counsel advice" is written advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel that is issued to field or service center employees of the Service (or regional or district employees of the Office of Chief Counsel) and conveys (1) any legal interpretation of a revenue provision, (2) any IRS or Office of Chief Counsel position or policy concerning a revenue provision, or (3) any legal interpretation of federal, state, or foreign law relating to the assessment or collection of any liability under a revenue provision. Section 6110(i). Chief counsel advice generally may not be used or cited as precedent. *See* section 6110(k) and section 6110(b)(1)(A).

[6] Pub. L. No. 97-248.

[7] Originally, section 101(f) applied to flexible premium life insurance contracts entered into before January 1, 1984. Section 221(b)(2) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369 (1984), amended section 101(f) to make it applicable to contracts issued before Jan. 1, 1985.

[8] Pub. L. No. 98-369 (1984).

[9] Pub. L. No. 100-647.

[10] DEFRA section 221(d)(1).

[11] S. PRT. NO. 98-169, VOL. I, at 579 (1984). The conference report for DEFRA states that, "[w]ith respect to the effective date, the conference agreement follows the Senate amendment, adopting a general effective date that makes the new definitional provisions applicable to contracts issued after Dec. 31, 1984...." H.R. CONF. REP. NO. 98-861, at 1076 (1984).

[12] STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 655-56 (Comm. Print 1984) ("DEFRA Bluebook").

[13] H.R. 4333, 100TH CONG. (reported July 26, 1988).

[14] H.R. Rep. No. 100-795, at 545-46 (1988).

[15] H.R. CONF. REP. NO. 100-1104, VOL. I, at 108 (1988).

[16] The revenue procedure governing private letter ruling requests states that "[i]f a taxpayer withdraws a letter ruling request …, the Associate office generally will notify, by memorandum, the appropriate Service official in the operating division that has examination jurisdiction of the taxpayer's tax return and may give its views on the issues in the request to the Service official to consider in any later examination of the return…. If the memorandum to the Service official … provides more than the fact that the request was withdrawn and the Associate office was tentatively adverse, or that the Associate office declines to issue a letter ruling, the memorandum may constitute Chief Counsel Advice, as defined in § 6110(i)(1), and may be subject to disclosure under § 6110." Section 7.07 of Rev. Proc. 2007-1, 2007-1 I.R.B. 1 (which applied at the time the CCA was issued). *See also* Rev. Proc. 2008-1, 2008-1 I.R.B. 1 (which includes an identical provision with respect to ruling requests filed in 2008).

[17] *See* text accompanying note 14, *supra.*

[18] DEFRA Bluebook, *supra* note 12, at 653-54.

[19] *Id.* at 654.

[20] *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-85 (1992) ("it is a commonplace of statutory construction that the specific governs the general.") (citing Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 445 (1987)); NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, Vol. 3A § 66.03, at 17 (5th ed. 1992) ("[w]here there is a conflict in taxing statutes, the specific controls the general.") (citing State v. Franco Novelty Co., Inc., 299 So. 2d 737 (Ala. 1974)).

[21] It is also noteworthy that treating a contract as newly issued rather than applying the adjustment rule at the time of a change in the contract's benefits can have potentially unwarranted results by increasing the contract's guideline premium limitation due to the insured's increased age at the time of the change. This can result, in turn, in an unwarranted increase in a contract's allowable investment orientation. Applying the adjustment rule would preclude such results; at minimum, in view of the fact that new contract treatment could lead to such results whereas application of the adjustment rule would not, it would be reasonable to conclude that the adjustment rule should apply.

[22] See text accompanying note 19, *supra.*

[23] STAFF OF THE J. COMM. ON TAX'N, 99TH CONG., EXPLANATION OF TECHNICAL CORRECTIONS TO THE TAX REFORM ACT OF 1984 AND OTHER RECENT TAX LEGISLATION, at 107 (Comm. Print 1987).

[24] *See* PLR 9150045 (Sept. 17, 1991).

[25] Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)); see also City of Chicago v. Environmental Defense Fund, 511 U.S. 328, 338 (1994); Keene Corporation v. United States, 508 U.S. 200, 208 (1993); United States v. Naftalin, 441 U.S. 768, 773-74 (1979); United States v. Wooten, 688 F.2d 941, 950 (4th Cir. 1982).

[26] Russello v. United States, 464 U.S. at 23-24.