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PARTIAL EXCHANGE GUIDANCE KEEPS IMPROVING

*By Bryan W. Keene and John T. Adney**

On June 28, 2011, the Internal Revenue Service (the "Service") issued Rev. Proc. 2011-38,[1] which provides guidance on the tax treatment of a partial exchange of a non-qualified deferred annuity contract for another annuity contract.[2] The new revenue procedure is the latest—and best—in a series of pronouncements in which the Service has attempted to walk the line between allowing legitimate partial exchanges of deferred annuities to occur while discouraging those perceived as abusive.[3] To that end, Rev. Proc. 2011-38 borrows concepts that worked well from earlier rulings and jettisons those that created confusion and complexity.

In particular, it eliminates the approach in Rev. Proc. 2008-24 of automatically and retroactively treating certain partial exchanges as tax-avoidance devices. Instead, the new guidance restores and improves upon the approach in Notice 2003-51 of identifying certain partial exchanges that the Service will scrutinize more closely using general tax principles. The new guidance also shortens (from 12 to six months) the window following a partial exchange in which the transaction could be called into question, and simplifies the regime by de-linking it from the exceptions to the section 72(q) penalty tax.[4] Finally, the guidance provides coordination with recent partial annuitization legislation and answers to other open issues. The result is the clearest and most workable pronouncement to date on the tax treatment of partial exchanges.

This article begins with an overview of how the tax treatment of partial exchanges has evolved over the last decade or so, including the concerns that led the Service to resist giving taxpayers *carte blanche* on such transactions. The article then summarizes Rev. Proc. 2011-38 and elaborates on why the features outlined above are important and helpful improvements over prior guidance.

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BACKGROUND

1. The Basic Transaction and the Service's Concerns

The question of how partial exchanges of non-qualified annuities should be treated for tax purposes involves the interaction of sections 72 and 1035. Under section 72(e), a withdrawal from a deferred annuity is taxable using an "income-first" ordering rule, meaning that all income on the contract must be distributed before any investment in the contract can be recovered. The income thus received is taxed at ordinary rates, and a 10 percent penalty tax applies under section 72(q) unless an exception is available.

Section 1035 provides nonrecognition treatment for "an exchange of an annuity contract for an annuity contract." In other words, the exchange does not trigger tax on any gain in the contract. Rather, such tax is triggered only when a withdrawal or other distribution subsequently occurs under the contract. If an exchange would qualify for nonrecognition treatment under section 1035 but for the fact that the property received in the exchange consists not only of property described in that section but also of other property or money (commonly called "boot"), then gain will be recognized to the extent of the boot.[5]

In most exchanges of a deferred annuity, a contract's entire cash value is transferred to another annuity contract, and the original contract terminates. In a *partial* exchange, only some (not all) of the cash value is transferred, and the original contract remains in force with the remainder of the cash value. As recounted in prior issues of *Taxing Times*,[6] the hubbub about partial exchanges arose because the Service was concerned that taxpayers might use the treatment of such exchanges under section 1035 to circumvent section 72. This potential can be illustrated by a simple example.

Assume that a deferred annuity has a $200 cash value, which is comprised of an $80 investment in the contract and a $120 tax-deferred gain. The owner needs $100 in cash. If he or she takes a $100 withdrawal from the contract, it will be taxable in full and a $10 penalty tax may apply. Instead, the owner decides to partially exchange half of the contract for a new one, resulting in two contracts with a $100 cash value and $60 tax-deferred gain each. The owner then surrenders one of the contracts for $100, with only $60 being taxable and a maximum penalty tax of $6.[7] Obviously, the Service had a strong interest in discouraging the use of partial exchanges as a planning tool to achieve these types of results.

2. Conway v. Commissioner

In *Conway*, the Service disallowed nonrecognition treatment under section 1035 for a partial exchange upon an audit of Ms. Dona Conway for the 1994 tax year.[8] Ms. Conway appealed the Service's disallowance and represented herself in the Tax Court. The Service argued that section 1035 does not apply to an exchange of annuity contracts unless the entire original contract is replaced by a new contract. The Tax Court disagreed and held that section 1035 applied. In so holding, the court observed that nothing in the statute or regulations conditions nonrecognition treatment on the entire contract being exchanged, either expressly or by any necessary implication, and that Ms. Conway's partial exchange was consistent with the legislative intent of section 1035.[9]

The Service acquiesced to the *Conway* decision in 1999, but not without including a caveat hinting at the nature of future guidance on partial exchanges.[10] In particular, the Service said it would follow *Conway* as long as the funds in the original contract remained invested in annuity contracts after and during the transaction, but that it would continue to challenge partial exchanges that are entered into as part of a design to avoid the section 72(q) penalty tax or other limitations imposed by section 72. In such cases, the Service indicated that it "will rely upon all available legal remedies to treat the original and new annuity contracts as one contract."

3. Notice 2003-51: The Rebuttable Presumption and Subjective Intent

Following the *Conway* decision and the Service's acquiescence, questions remained about which partial exchanges the Service would respect and which it might attack as tax avoidance devices. For example, when would a partial exchange be "old and cold" enough that a subsequent withdrawal would not risk the Service disputing the transaction's treatment under sections 72 and 1035? The Service responded to these and other questions in Notice 2003-51.[11]

The Notice announced that the Service was considering publishing regulations addressing the question of when a partial exchange followed by a withdrawal or surrender should be presumed to have been entered into for tax avoidance purposes. Under the contemplated regulations, this negative presumption would be triggered by any surrender or distribution occurring within 24 months of a partial exchange. Taxpayers could rebut the presumption "by demonstrating that the surrender or withdrawal was not contemplated at the time the partial exchange was completed." For this purpose, the Notice said that the Service was considering whether to treat any surrender or distribution that is not subject to the section 72(q) penalty tax as successfully rebutting any presumption of a tax avoidance intent, and whether to provide additional exceptions tied to certain life events (divorce, job loss, *etc*.).

Pending the issuance of any regulations, Notice 2003-51 provided interim guidance on when the Service would respect a partial exchange and when it might view the transaction as a tax-avoidance device. Consistently with the regulations the Service was considering, the guidance established a safe harbor under which the Service would not challenge the treatment of a partial exchange as long as the taxpayer did not surrender or take a withdrawal from either contract within 24 months after the exchange. This effectively set the "old and cold" standard at two years.

If a withdrawal or surrender occurred during the 24-month window, the Service would consider all the facts and circumstances and apply general principles of tax law (presumably the step transaction or economic substance doctrine) to determine whether the partial exchange and subsequent distribution should be recast as an "integrated transaction." In that case, the two contracts would be viewed as a single contract for purposes of determining the tax treatment of the distribution under section 72(e).

Notice 2003-51 also provided that taxpayers could avoid elevated scrutiny of partial exchanges that were followed by distributions within the ensuing 24 months if the transaction met a two-part test. In particular, such transactions would be respected if the taxpayer could demonstrate that (a) one of the conditions of section 72(q)(2) (providing exceptions to the section 72(q) penalty tax), or any similar life event, such as a divorce or job loss, "occurred between" the partial exchange and the surrender or distribution, *and* (b) the surrender or distribution was not contemplated at the time of the partial exchange. Thus, the first prong of the test was an objective standard based on the exceptions to the section 72(q) penalty tax or similar life events, and the second prong was a subjective standard based on the taxpayer's actual intent.

While Notice 2003-51 helped clarify how the Service intended to treat partial exchanges, several questions remained unanswered and the Notice received some criticism.

The implication of this two-part test was that the safe harbor was not available unless an exception to the section 72(q) penalty tax (or something similar) also applied, even if the taxpayer lacked any actual intent to use the transaction as a tax avoidance device. Likewise, the safe harbor was not available if the taxpayer entered into the transaction to avoid tax, even if an exception to the section 72(q) penalty tax (or similar exception) was available. Of course, the loss of the safe harbor for any reason meant only that the Service might scrutinize the transaction more closely and apply general tax principles to determine whether it should be recharacterized for tax purposes. In other words, unlike subsequent guidance (discussed below), Notice 2003-51 did not establish a bright line rule under which transactions falling outside its scope would be automatically and retroactively recharacterized for tax purposes.

While Notice 2003-51 helped clarify how the Service intended to treat partial exchanges, several questions remained unanswered and the Notice received some criticism. Many thought the 24-month period was too long and that transac-

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tions should be deemed old and cold long before then. Others observed that the subjective prong of the two-part test described above was impossible for life insurers to administer in accordance with their tax reporting obligations because they would almost never know their customers' true intentions. Still others raised questions about how the Service would treat a "failed" partial exchange, *e.g.*, whether the partial exchange would be ignored so that the old and new contract would continue to be treated as one integrated contract, or whether the partial exchange would be recharacterized as a taxable withdrawal followed by the purchase of a second contract with after-tax monies. In light of these and other questions, the guidance was extremely difficult for insurers and individual taxpayers to administer.

4. Rev. Proc. 2008-24: A Harsher Presumption but Broader Safe Harbor

In 2008, the Service attempted to address some of the criticisms of the 2003 guidance by publishing Rev. Proc. 2008-24.[12] Perhaps most significantly, it clarified how the Service would treat a partial exchange followed by a withdrawal or surrender that did not meet the requirements of the available safe harbor. Under the earlier 2003 guidance, such a transaction simply might trigger elevated scrutiny by the Service, with the possibility (but not certainty) that the Service would apply general principles of tax law to recharacterize the transaction in light of all the facts and circumstances.

Rev. Proc. 2008-24 provided a harsher, albeit clearer, result. It established a conclusive presumption that any partial exchange followed by a withdrawal or surrender that did not meet the available safe harbor was effectively an abusive tax avoidance device. Rev. Proc. 2008-24 said that the Service would recharacterize any such transaction as a taxable withdrawal from the source contract followed by the payment of an after-tax premium for the second contract. Taxpayers were not afforded an opportunity to rebut this presumption, making it all the more important to fall within the safe harbor provided by Rev. Proc. 2008-24.

In that regard, Rev. Proc. 2008-24 generally retained the same standards as the safe harbor in Notice 2003-51, but modified them in several ways to make them easier to meet. First, it shortened (from 24 to 12 months) the window following a partial exchange in which a withdrawal or surrender could cause a loss of the safe harbor. Second, it eliminated the subjective intent prong of the two-part test for determining whether a withdrawal or surrender during the 12-month window would make the safe harbor unavailable. This change, in particular, was met with applause because it removed insurers from the mind-reading business.

In light of these and other changes, the new standard under Rev. Proc. 2008-24 can be summarized as follows. Partial exchanges would be respected if there were no withdrawal or surrender from either contract within 12 months of the exchange. If there were a withdrawal or surrender in that window, the transaction would still be respected if an objective test was met. That test would be met if certain events or conditions enumerated in the list of statutory exceptions to the section 72(q) penalty tax (or any similar life event) "occurred between" the date of the partial exchange and the distribution. The test could not be met, however, by relying on the exceptions to the penalty tax for "substantially equal periodic payments" or "immediate annuities,"[13] because the Service was separately considering guidance on partial annuitizations and wanted to keep its powder dry on those issues. If a withdrawal or surrender occurred within the 12-month window and did not meet the foregoing test, the Service would recharacterize the transaction as described above.[14]

This latter point—the consequences of falling outside the safe harbor—drew considerable criticism from the life insurance industry. In particular, insurers expressed concern that the new regime imposed rules that were extremely difficult or impossible to administer from a tax reporting perspective. The difficulty related primarily to the retroactive nature of the recharacterization of a prior partial exchange as a taxable withdrawal. Such retroactivity raised questions about the need to file amended information returns. It also would affect the investment in the contract and income on the contract records for both contracts involved in the transaction, which would lead to ongoing reporting problems for future distributions if the records were not adjusted to reflect the exchange transaction's recharacterized nature. Making matters worse, insurers might not even have the information needed to properly adjust their records or tax report. For example, they might not know that an incoming exchange was a *partial* exchange for which they needed to monitor compliance with the 12-month rule, or they might not know that a withdrawal from another carrier's contract resulted in a recharacterization of a prior partial exchange involving their own contract. These and other potential reporting difficulties caused much confusion and dissatisfaction with the 2008 guidance.

Another significant question that arose under Rev. Proc. 2008-24 was how to interpret the requirement that certain events must "occur between" the date of a partial exchange

and a withdrawal or surrender in order for the safe harbor to apply to transactions that failed the 12-month rule. This question was not necessarily new, as Notice 2003-51 used the same "occurred between" language in the objective prong of its two-part test. The language received more attention, however, under Rev. Proc. 2008-24. This renewed focus may have been attributable to the fact that the new guidance eliminated the subjective intent component of the safe harbor and clarified the consequences of falling outside the safe harbor, making it more important for insurers to ensure that they were properly interpreting the objective standard so they could meet their tax reporting and withholding obligations.

The problem that many observed with the language was that some of the penalty tax exceptions cannot literally "occur between" a partial exchange and a subsequent distribution.[15] This suggested that the Service could not have intended "occurred between" to be interpreted literally, since doing so would render parts of the guidance meaningless. On the other hand, the revenue procedure said what it said, which was "occurred between." Also, the fact that the Service was concerned with taxpayers intentionally using partial exchanges followed by withdrawals to avoid tax under sections 72(e) and (q) suggested that the Service might interpret the language literally. If an event occurred after a partial exchange and changed the taxpayer's circumstances, then a withdrawal taken after that event (and within the 12-month window) might be attributable to the taxpayer's changed circumstances, rather than an original intent to avoid tax. In other words, a literal interpretation of the "occurred between" language arguably instituted an objective way of gauging the taxpayer's intent, which had been at the heart of the Service's concerns with partial exchanges since at least Notice 2003-51.

Not surprisingly then, the Service's initial response to informal inquiries about the intended scope of the "occurred between" language was that it should be read literally, a view that some representatives of the Service repeated during public speaking engagements. The life insurance industry and its representatives argued for a broader interpretation, noting various anomalies and irrational results that might ensue from the literal view the Service suggested. The most discussed of these potential results involved the exception to the penalty tax for distributions made on or after the date an individual attains age 59½. The industry argued that it would be irrational to allow a person who happens to turn age 59½ within 12 months of a partial exchange to take a withdrawal or surrender without adverse tax consequences, but not to allow a person who was already that age to do so. The Service ultimately softened its initial interpretation on this point, as discussed in more detail below.

5. The Great Age 59½ Debate

Based on a plain reading of the "occurred between" language in Rev. Proc. 2008-24 and the Service's initial remarks about the intended scope of that language, many insurers began telling their policyholders that they would interpret the language literally for tax reporting purposes. Meanwhile, the Service appeared to be telling individual taxpayers something different.

In 2010, at least one individual taxpayer approached the Wage and Investment Division of the Service to ask whether a partial exchange occurring after age of 59½ would be recharacterized by Rev. Proc. 2008-24 if the taxpayer took a withdrawal within the ensuing 12 months. The Wage and Investment Division responded with a letter saying that "[a]s the individual was age 68 at the time of the original exchange, obviously he would qualify for the exception of being over the age of 59 and a half and would thus not be treated as doing this exchange for tax avoidance purposes." While this was "obvious" to the Wage and Investment Decision, it was news to the insurance industry, which had only the literal language of Rev. Proc. 2008-24 to rely upon, as colored by the initial, informal statements from the government suggesting a literal intent. The industry pointed out the inconsistent messages to the Insurance Branch at the Service's National Office and urged the prompt issuance of clarifying guidance.

The problem that many observed with the language was that some of the penalty tax exceptions cannot literally "occur between" a partial exchange and a subsequent distribution.

Later in 2010, the Service issued PLR 201038012,[16] which confirmed the view expressed in the Wage and Investment Division letter. The Service reasoned that the exceptions to the 12-month rule in Rev. Proc. 2008-24 incorporate the age 59½ exception of section 72(q)(2)(A) by reference, and that the standard imposed by that section is whether a distribution has occurred "on or after" the date the taxpayer turns age 59½. The ruling concluded that because the withdrawal occurred after the date the taxpayer reached age 59½, the exception to the 12-month rule applied and the Rev. Proc. 2008-24 safe harbor was met.

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Although private letter rulings cannot be cited as precedent,[17] the necessary implication of PLR 201038012 was that any taxpayer who was at least age 59½ could partially exchange a deferred annuity for a new one, immediately surrender either contract, and recover the allocable investment in the contract tax-free. This interpretation arguably protected the Service against taxpayers using partial exchanges followed by withdrawals to circumvent the section 72(q) penalty tax to the extent that it required them to independently meet an exception to the penalty tax at the time of the withdrawal. However, the interpretation appeared to provide the Service with no protection against the other concern it had expressed with partial exchanges, namely, circumvention of the income-first ordering rules of section 72(e). And the fact that about 72 percent of owners of non-qualified deferred annuities are over the age of 64 suggested that many would have at least the opportunity to achieve such results.[18]

Despite this potential risk to the Service, its interpretation of the "occurred between" language was the most reasonable one to make under the circumstances, particularly in light of the consequences that Rev. Proc. 2008-24 assigned to a transaction falling outside its safe harbor. The lack of protection that the interpretation provided against gaming the section 72(e) rules was perhaps more indicative of a flaw in an approach that relied almost exclusively on the exceptions to the section 72(q) penalty tax to provide such protection within the 12-month waiting period. After all, section 72(e) continues to apply even after a taxpayer attains age 59½, so that particular exception is not necessarily the perfect candidate to enforce the intent of section 72(e), if that is what the Service was trying to accomplish. As discussed next, the Service ultimately revamped its approach to eliminate this reliance on the penalty tax exceptions, which did much to rationalize and simplify the entire regime.

REV. PROC. 2011-38

The Service's revamped approach to partial exchanges was published as Rev. Proc. 2011-38 in June of 2011. The new approach incorporates and improves upon aspects of the 2003 and 2008 guidance that worked well and eliminates other aspects that caused confusion and complexity.

Under the new approach, partial exchanges will be respected if there is no withdrawal or surrender from either contract within 180 days of the exchange. Thus, Rev. Proc. 2011-38 shortens the "old and cold" window from 12 to six months. If there is a withdrawal or surrender in this shortened window, the Service will apply general tax principles to determine the substance, and hence the treatment, of the entire transaction. In applying such principles, the Service may recharacterize the transaction as, for example, taxable "boot" that is received in a tax-free exchange or a taxable distribution under section 72(e). This approach is reminiscent of Notice 2003-51, in that transactions falling outside the safe harbor will merely trigger the possibility of elevated scrutiny from the Service, rather than automatic recharacterization as under Rev. Proc. 2008-24.

The new revenue procedure also modifies the safe harbor by eliminating the prior exceptions for withdrawals and surrenders during the post-exchange waiting period. In other words, a partial exchange followed by a withdrawal or surrender within six months could be subject to elevated scrutiny, even if the taxpayer lacks subjective intent to use the transaction as a tax avoidance device and even if an exception to the section 72(q) penalty tax applies to the withdrawal or surrender. As a result, the "occurred between" language in Rev. Proc. 2008-24 that led to much confusion has been eliminated. Likewise, the age 59½ exception to the penalty tax is no longer relevant to the partial exchange analysis.

This latter point could be interpreted as a narrowing of the safe harbor under Rev. Proc. 2008-24, in that the Service had privately interpreted that safe harbor in a way that made it available to anyone over age 59½ (which is most annuity owners), irrespective of the timing of any subsequent withdrawal or surrender. However, the softening of the consequences of falling outside the safe harbor would seem to counterbalance any perceived narrowing of its scope, and de-linking the safe harbor from the penalty tax exceptions arguably simplifies and rationalizes the Service's approach to addressing its concerns with partial exchanges. Moreover, the new approach would seem to eliminate the tax reporting issues that arose under the prior guidance, since the implication of Rev. Proc. 2011-38 is that a partial exchange will be respected in the absence of an affirmative action by the Service to recharacterize it. In other words, insurers generally are no longer responsible for policing which partial exchanges should be disallowed; that burden has been shifted back to the Service to bear on a case-by-case basis. As a result, insurers should be able to apply the same reporting procedures to partial exchanges as they do to full exchanges.

Finally, Rev. Proc. 2011-38 makes two additional helpful clarifications. First, it coordinates the partial exchange rules with the new statutory rules governing partial annuitizations. In 2010, Congress passed legislation allowing partial annuitizations under non-qualified annuities, as long as the payments are life-contingent or scheduled for at least 10 years.[19] Rev. Proc. 2011-38 acknowledges this development by extending its safe harbor to partial exchanges that are followed by distributions in the form of annuity payments, irrespective of when those payments commence, as long as they conform to the partial annuitization legislation. Second, Rev. Proc. 2011-38 clarifies that a partial exchange that occurs within 180 days of another partial exchange is not treated as a withdrawal or surrender for purposes of applying the 180-day requirement. This effectively facilitates a series of partial exchanges without triggering the potential for elevated scrutiny by the Service.

Rev. Proc. 2011-38 is effective for partial exchanges that are completed on or after Oct. 24, 2011. The prior guidance in Rev. Proc. 2008-24 continued to apply to partial exchanges that were completed before that date, with the clarification that the "occurred between" requirement for the safe harbor applicable to withdrawals and surrenders within 12 months of a partial exchange was treated as satisfied if the taxpayer was age 59½ (or met one of the other listed conditions) as of the date of the withdrawal or surrender. Thus, for the interim period before the new guidance became effective, the Service confirmed in published guidance the interpretation it previously adopted in PLR 201038012.

CONCLUSION

Rev. Proc. 2011-38 borrows and improves upon the concepts that worked well from earlier rulings on partial exchanges and jettisons the concepts from those rulings that created confusion and complexity. In doing so, Rev. Proc. 2011-38 provides the clearest and most workable pronouncement to date on the tax treatment of partial exchanges. The latest approach balances the government's interest in curbing perceived abuse while allowing legitimate partial exchanges to occur under a regime that life insurers, policyholders and the Service can easily administer. ◀

END NOTES

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1 2011-30 I.R.B. 66.

2 The partial exchanges discussed in this article are limited to those involving non-qualified deferred annuities. The tax treatment of "qualified" annuities is beyond the scope of this article and Rev. Proc. 2011-38.

3 *See* Rev. Proc. 2008-24, 2008-1 C.B. 684; Notice 2003-51, 2003-2 C.B. 361; Rev. Rul. 2003-76, 2003-2 C.B. 355. *See also* PLR 201038012 (June 22, 2010).

4 Unless otherwise indicated, each reference herein to a "section" means a section of the Internal Revenue Code of 1986, as amended.

5 Sections 1035(d)(1), 1031(b) and 1031(c); Treas. Reg. sections 1.1035-1 and 1.1031(b)-1(a).

6 *See* Kirk Van Brunt, *Revenue Procedure 2008-24 and Partial Annuity Exchanges: Where Are We?* 4 Taxing Times 5 (Sept. 2008) (discussing Rev. Proc. 2008-24 and related authorities); Walter Welsh and Mandana Parsazad, *ACLI Update Legislative and Regulatory Developments,* 7 Taxing Times 26 (Feb. 2011) (discussing PLR 201038012 (June 22, 2010)).

7 This example is based on one in Notice 2003-51.

8 Conway v. Commissioner, 111 T.C. 350 (1998), *acq.*, 1999-2 C.B. xvi.

9 The legislative history of section 1035 states that the provision is intended to apply to individuals "who have merely exchanged one insurance policy for another better suited to their needs and who have not actually realized gain." H.R. Rep. no. 83-1337, at 81 (1954).

10 AOD 1999-16. The Service generally has discretion to issue an Action on Decision (or AOD) on unappealed court cases that were decided against the government. Unlike a revenue ruling or revenue procedure, an AOD is not intended to serve as public guidance and cannot be cited as precedent. Rather, AODs are relied upon within the Service only as conclusions applying the law to the facts in the particular case at hand. "Acquiescence" to a court decision in an AOD generally means that the Service accepts the court's holding in the case and will follow that holding in disposing of cases with the same controlling facts. *See, e.g.*, 1999-2 C.B. xvi (describing the effect of an AOD and acquiescence).

11 2003-2 C.B. 361. In conjunction with Notice 2003-51, the Service also issued Rev. Rul. 2003-76, 2003-2 C.B. 355, which (1) confirms that section 1035 will apply to a partial exchange with facts similar to those in *Conway*, and (2) clarifies that "basis" and "investment in the contract" are each allocated ratably between the contracts involved in a partial exchange, based on the percentages of the cash value retained and transferred (ignoring surrender charges). *See also* PLR 200342003 (July 9, 2003) (applying Rev. Rul. 2003-76).

12 The revenue procedure was effective for partial exchanges completed on or after June 30, 2008.

13 *See* section 72(q)(2)(D) and (I), respectively.

14 Rev. Proc. 2008-24 also clarified that, for partial exchanges falling within the safe harbor, the Service will not require aggregation of the contracts under section 72(e)(12), even if both contracts are issued by the same company, but instead will treat the contracts as separate annuity contracts.

15 For example, one of the conditions referenced in the guidance was section 72(q)(2)(F), which describes distributions "allocable to investment in the contract before August 14, 1982." Seemingly, this "condition" would "occur" on the date the investment in the contract was made, *i.e.*, sometime before Aug. 14, 1982. Thus, because Rev. Proc. 2008-24 was effective only for partial exchanges completed on or after June 30, 2008, it appeared that the section 72(q)(2)(F) condition could only occur *prior to* any partial exchange covered by the revenue procedure, and that the condition could never "occur between" the date of such a partial exchange and a subsequent distribution.

16 June 22, 2010.

17 Section 6110(k)(3).

18 *See* The Committee of Annuity Insurers, Survey of Owners of Non-Qualified Annuity Contracts, at 11 (The Gallup Organization and Mathew Greenwald & Associates, 2009) (available at http://www.annuity-insurers.org/annuities.aspx).

19 Section 72(a)(2), as added by Pub. L. No. 111-240 § 2113(a) (2010), effective for amounts received in tax years beginning after Dec. 31, 2010.