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PROPOSED FATCA REGULATION PROVIDES SPECIFIC GUIDANCE TO INSURANCE COMPANIES REGARDING APPLICATION AND IMPLEMENTATION

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Editor's Note: This article provides excerpts from a recent Ernst & Young LLP Tax Alert, authored by Howard and Chris, which focused on the newly released FATCA proposed regulations. The article ties in with the one written by Frederic J. Gelfond and Mary M. Gillmarten and published in the September 2011 issue of *Taxing Times*, titled "FATCA AND INSURANCE: Fundamental Questions Remain Unanswered as Compliance Deadline Approaches."

BACKGROUND

On Feb. 8, 2012, Treasury and the Internal Revenue Service ("IRS") released proposed regulations that provide guidance on the application and implementation of the information withholding and reporting regime contained in the Foreign Account Tax Compliance Act (FATCA) provisions of the Hiring Incentives to Restore Employment (HIRE) Act (P.L. 111-147). The proposed regulations are in excess of 350 pages in length and incorporate, with significant modifications, much of the guidance provided in the three IRS Notices issued in 2010 and 2011.

The guidance provided by the proposed regulations specifically related to insurance is the first detailed set of rules provided under FATCA and incorporates many of the topics identified as issue areas in the comment letters received by Treasury from domestic and foreign

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insurance companies and trade associations over the past two years. This article focuses on the provisions that apply specifically to insurance companies.

It is evident from reading the proposed regulations that Treasury put a lot of thought and effort into the drafting of the proposed regulations, listened to the comments provided and attempted to reflect those comments in the proposed rules. The insurance provisions are a solid start to providing guidance the global insurance industry can rely upon to develop the necessary administrative processes and procedures and make changes to software systems to accumulate, analyze and store the data required to achieve and maintain ongoing compliance with the FATCA rules. There are a number of areas where further dialogue and detailed commentary from the insurance industry to Treasury should help to refine the proposed regulations and further reduce the administrative burdens, including:

- Further refinements to the definitions of life insurance and annuity contracts to eliminate the need for foreign insurance companies to become proficient with US tax law definitions of these contracts;
- Expand the definition of local foreign financial institutions (FFI) so that insurance companies that meet the requirements can avoid the administrative compliance related to documentation of certain individual accounts;
- Clarify definition of forms of life insurance and annuity contracts eligible for the Grandfathered Obligations exception to withholding on contracts in force on Jan.1, 2013;
- Provide a definitive statement that indemnity reinsurance not involving administrative services is excluded from the reporting, documentation and withholding rules; and
- Modify the relationship manager definitions (entity and individual) under the pre-existing contract rules to align the concept with the various distribution system formats utilized to market insurance and annuity contracts around the world.

The proposed regulations reflect significant modifications or elaborations in several key areas that are critical to FFI and to US financial institutions, which are no longer referred to as "USFIs," but rather are referred to as part of the larger population of "withholding agents." The account identification requirements set forth in the proposed regulations incorporate substantial changes that are consistent with the extensive comments received. For pre-existing accounts, the proposed regulations include enhanced de minimis exceptions, eliminate the controversial "private banking" rules proposed in Notice 2011-34, and generally allow an FFI to rely on an electronic review of its existing records for pre-existing accounts with a balance or value of $1 million or less. For new accounts, the proposed regulations reflect a greater reliance on documentation gathered for other purposes. These rules reflect an intention to minimize the circumstances in which FFIs would need to go back to account holders for additional documentation or modify account opening procedures on a going-forward basis.

The proposed regulations extend qualification as a grandfathered obligation (which is not subject to FATCA withholding) to obligations outstanding on Jan. 1, 2013. The proposed regulations also expand the categories of FFIs that will be deemed compliant with FATCA's requirements. In addition, the proposed regulations provide greater flexibility in the treatment of FFIs in an affiliated group so that barriers to compliance by one affiliate will not taint the whole FFI group.

The proposed regulations reflect a phase-in of dates for FATCA reporting requirements applicable to FFIs as follows:

- The identity of US account holders must be reported starting in 2014 (for the 2013 calendar year);
- Information about income on US accounts must be reported starting in 2016 (for the 2015 calendar year); and
- Full information on US accounts, including information about gross proceeds, must be reported starting in 2017 (for the 2016 calendar year).

In addition, the FATCA withholding rules for FFIs will not apply to certain payments made before Jan. 1, 2015, except for payments made to payees with certain indicia that they might in fact be FFIs (prima facie FFIs). However, nonfinancial foreign entities (NFFEs) remain subject to potential FATCA withholding on US-source fixed or determinable income paid by US financial institutions beginning Jan. 1, 2014, and on gross proceeds beginning Jan. 1, 2015. Furthermore, US financial institutions must still begin to look at new, nonresident alien entity accounts differently, starting Jan. 1, 2013. The proposed regulations reserve on the definition of foreign "passthru" payments and provide that withholding will not be required on such payments before Jan. 1, 2017.

In general, for the majority of US insurance companies, which will be considered withholding agents, the proposed regulations contain a demarcation line of Jan. 1, 2013, for purposes of distinguishing between "new" and "pre-existing" accounts. Withholding agents must generally consider all documentation obtained for know-your-customer/anti-money-laundering (KYC/AML) purposes from an account holder for new accounts when determining the account holder's status for FATCA purposes. US withholding agents will be required to withhold on payments of US-source fixed or determinable annual payments (FDAP) paid to new accounts held by nonparticipating and presumed FFIs (*i.e.*, entity account holders for which appropriate FATCA certifications have not been received) and pre-existing prima facie FFI accounts starting Jan. 1, 2014, and on gross proceeds paid to nonparticipating and presumed FFIs starting Jan. 1, 2015. While participating FFIs have a phase-in period for reporting under FATCA, US withholding agents that are not FFIs will apparently be required to begin reporting information about substantial US owners of NFFEs as early as March 15, 2014, for the calendar year 2013, on a form yet to be published.

In addition, the preamble to the proposed regulations indicates that the existing Chapter 3 (*i.e.*, nonresident alien withholding and reporting) and Chapter 61 (*i.e.*, Form 1099 reporting) regulations will be amended effective Jan. 1, 2014, to conform to the FATCA provisions. As a result, in addition to the existing "reasons to know," withholding agents will be deemed to have reason to know a withholding certificate (*e.g.*, Form W-8BEN) is unreliable if the withholding agent has a US telephone number on file for the account holder, or information indicating that an account holder was born in the United States. In such a case, the withholding agent would be required to obtain additional documentary evidence in order to rely on the Form W-8BEN. Conformity also means that, under the proposed regulations, withholding agents can only rely on a Form W-8 received more than one year after a payment is made if they also obtain documentary evidence as to the nonresident alien's status. Finally, when the IRS conforms the existing regulations under chapters 3 and 61 to the FATCA provisions after Dec. 31, 2013, a withholding agent will be able to rely on a faxed withholding certificate if the withholding agent confirms that the person furnishing the form is the person named on it. Currently, this is not permitted.

In addition, the FATCA withholding rules for FFIs will not apply to certain payments made before Jan. 1, 2015.

At the same time as the proposed regulations were released, Treasury released a **joint statement** from the United States, France, Germany, Italy, Spain and the United Kingdom announcing an agreement to explore an intergovernmental approach to FATCA implementation that would allow FFIs in each country to provide the information required under FATCA to that country's tax authorities rather than to the IRS, and generally relieve FFIs in those countries from significant compliance burdens, including the need to sign an FFI Agreement. While few details are available today, the development of the intergovernmental approach is clearly a development all companies impacted by FATCA must stay abreast of as it likely will significantly impact how companies approach their compliance obligations over time.

GENERAL DESCRIPTION OF FATCA'S IMPACTS ON US AND FOREIGN INSURANCE COMPANIES

While the proposed regulations make great strides in providing guidance and reducing administrative burdens, the application of FATCA is still complex. Before launching into a discussion of the provisions specific to insurance companies,

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the following is intended to provide a quick glance at how FATCA applies to US and foreign insurance companies:

US-Based Insurance Companies

- A USFI is no longer a separate category under FATCA; instead, US financial institutions are considered withholding agents under Chapter 4.
- Companies may have withholding obligations related to insurance contracts held by foreign entities that have US owners (regardless of type of contract).
- Indemnity reinsurance assumed, other than transactions where administrative services are transferred, will generally not require the assuming company to perform withholding under FATCA on the underlying contracts even if they would otherwise meet the definition of a financial account.
- Any insurance company making payments for financial services to FFIs and NFFEs will need to establish procedures regarding potential for withholding.
- Investment funds and other non-insurance products offered by the insurance company and/or its affiliates may have FATCA withholding obligations depending upon whether the company maintains records and is handling cash flows or has outsourced those to a third-party vendor to perform.
- Cash value insurance and annuity contracts funding qualified pension plans are generally out of scope.

Foreign-Based Insurance Companies

- If foreign insurers sell any cash value insurance or annuity contracts, the company and its holding company will be classified as an FFI.
- FFIs are also withholding agents; however, withholding is generally delayed until 2017 for most payments made by foreign companies.
- Existing cash value insurance and annuities are "financial accounts" for purposes of FATCA—pure protection contracts such as term, disability, health or property and casualty insurance are out of scope.
- Cash value insurance and annuity contracts need to be identified; however, contracts in existence pre Jan. 1, 2013 can generally be treated as foreign accounts if the company has not previously classified the account as a US account and the contract is under $250,000; some aggregation rules may apply.
- Private banking rules no longer apply; however, cash value insurance and annuity contracts in excess of $1 million in value as of Jan. 1, 2013 and each calendar year-end thereafter will require more extensive electronic and manual US indicia search.
- Information collected at time of account opening largely follows AML/KYC criteria, and the IRS is modifying W-8 and W-9 forms to correspond with FATCA requirements.
- Cash value insurance and annuity contracts funding foreign pension and savings plans which meet a number of conditions are out of scope.

The remainder of this article will focus on a number of key issues that have arisen as the global insurance industry has analyzed the provisions of Chapter 4, taking into account the limited guidance provided in the legislative history and Notice 2010-60 for application to insurance companies, their products, and the affiliated groups of which they are members.

General Comment on Approach of the Proposed Regulations

The proposed regulations provide a number of specific rules across Chapter 4 that define insurance companies, and those insurance products that are financial accounts. The proposed regulations also provide guidance on reporting and withholding. For the most part, the proposed regulations rely upon existing insurance-related definitions in Chapter 1 of the Internal Revenue Code (the "Code"), such as sections 72, 101(f), 816(a), 817(h) and 7702. While it is helpful in one sense for the proposed regulations to have relied upon these existing rules, in many cases, as will be discussed below, they also create uncertainty and complexity to implement and administer. Moreover, many of the provisions of the proposed regulations—both insurance and non-insurance specific—will require foreign companies to reach conclusions about how to deal with particular fact patterns based upon a US tax law with which they may be unfamiliar.

For example, under the general definitions, annuities are defined by reference to section 72; however, section 72 has no specific definition of what is an annuity contract. Domestic life insurance companies in the normal course of developing new products sometimes struggle to determine whether new products are annuities and may request a private ruling from the IRS. Application of such rules to a foreign designed insurance or annuity contract may in many cases prove difficult. Accordingly, although insurance companies, especially those that are foreign-based, will find that many of the provisions of these proposed regulations provide welcome guidance, the application of this guidance may not be straightforward. Applying this guidance, which tends to be based on multiple

US tax law sections with many exceptions and caveats rather than bright-line tests, will require significant analysis that will then need to be standardized within systems and operational procedures. This will make implementation and ongoing compliance more complex and costly, and require extensive knowledge of US tax law and operational activities to address the proposed requirements. The discussion below summarizes the guidance provided in the proposed regulations related specifically to insurance companies and their products, and provides our observations on the business implications.

DEFINITION OF FINANCIAL INSTITUTION

Are Insurance Companies Included in the Definition of a Financial Institution?

The proposed regulations clarify that an insurance company can be classified as a financial institution for purposes of FATCA. The proposed regulations define an insurance company as a company where more than half of its business activities during the year relate to issuing insurance or annuity contracts or the reinsuring of such contracts. In order for the insurance company to be considered a financial institution, it has to issue a single cash value insurance or annuity policy. Whether an insurance company is a financial institution or not is a seminal question for foreign insurance companies under the FATCA rules. US insurance companies are not required to make this determination for FATCA purposes.

General insurance and life insurance companies issuing pure protection (term life, disability, health or property and casualty) are excluded from the definition of a financial institution. If an insurance company issues pure protection along with cash value insurance or annuities, it will be treated as a financial institution; however, as described below, only the cash value insurance or annuity contracts will be subject to the account reporting and withholding provisions of Chapter 4. (Additional withholding rules may go into effect on Jan. 1, 2017, which could result in additional withholding obligations for companies.) In effect, the burden of Chapter 4 compliance has been focused only on contracts meeting the definition of a financial account.

As an ongoing compliance matter, insurance companies that are not considered financial institutions will need to monitor development of new products and reinsurance activities to ensure they do not inadvertently issue or reinsure contracts that could cause them to be classified as a financial institution. What may be a problem for some foreign insurance companies that are primarily focused on issuing contracts not meeting the definition of an annuity under section 72, is the company may not qualify as an insurance company for Chapter 4 purposes. In such case, the company will most likely be considered a depository institution under Chapter 4 since the funds under the contracts would be treated as amounts held at interest by an insurance company. While depository institutions are treated similarly in many respects to insurance companies, the problems arise in the insurance company maintaining administration systems and procedures to track different contracts and their eligibility for a variety of exceptions under the FATCA rules. Accordingly, insurance companies issuing annuity contracts will need to assess their ability to qualify as an insurance company at the effective date of the FFI Agreement and in future years.

How Are Holding Companies of Insurance Companies Classified?

The definition of financial institution discussed above also includes a holding company of an insurance company. The proposed regulations provide a number of exclusions from the definition of a financial institution, including certain nonfinancial holding companies that have no financial institution subsidiaries. As a result of these rules working in tandem, affiliated groups that include insurance companies may find it advantageous from a compliance perspective to consider realigning the ownership structure, if possible, to minimize the number of holding companies subject to treatment as a financial institution. Any such restructuring alternatives will have to be weighed against the ability of the affiliated group of FFIs to centralize their compliance obligations at the holding company level under Chapter 4 as compared to the cost associated with such a restructuring. For multinational companies, this may be an advantage as it allows the group holding company to be the "lead FFI" for purposes of the group members' FFI application process.

The proposed regulations clarify that an insurance company can be classified as a financial institution for purposes of FATCA.

Does an Insurance Company, Which Only Issues or Reinsures Pure Protection Insurance Contracts, Have Any Responsibilities under Chapter 4?

The definition of financial institution excludes insurance companies that only issue or reinsure pure protection insurance such as term life, disability, health or property and casualty insurance. Accordingly, these companies are considered nonfinancial entities and classified as either domestic, with minimal impact of Chapter 4, or an NFFE, which may be

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subject to the withholding and reporting rules of Chapter 4 related to other payments the company receives. However, exceptions (discussed below), including active business income, may apply.

Pure protection insurance contracts are not financial accounts for Chapter 4 purposes; however, the payments under such contracts for premiums and benefits generally fall into the US tax law definition of fixed or determinable annual or periodic income (FDAP) and may qualify as withholdable payments. However, if premiums paid to a foreign insurance company relate to US risks that are subject to the US excise tax under section 4371, the premiums are not considered FDAP and would not be considered a withholdable payment for Chapter 4 purposes. Term life insurance death benefits are also excluded from FDAP, as are most insurance settlement payments under property and casualty insurance contracts and health and disability payments since these are reimbursements for a loss and not considered gross income. An NFFE may also be required to perform documentation, reporting and withholding responsibilities on other financial services payments such as gross proceeds paid on purchasing US financial instruments from other NFFEs or non-participating FFIs. Payments under reinsurance contracts (see discussion below) may also generate obligations under Chapter 4, depending upon the responsibilities of the reinsurer and the cash flows under the reinsurance agreement.

If a Company's Primary Business Activity Is To Purchase Insurance and Annuity Contracts as Investments, How Is the Company Treated under Chapter 4?

An entity whose primary business is investing in insurance or annuity contracts (a viatical or life settlement provider), whether directly or through a partnership, will be considered a financial institution. As a result, a non-US entity will be required to enter into an FFI Agreement and comply with the other reporting and withholding obligations of Chapter 4. If the investing in insurance or annuity contracts combined with other activities would not rise to the level of treating the entity as a financial institution, then the entity will be considered an NFFE if it is non-US income from investments in insurance contracts and annuities is considered passive income in determining whether the company meets the active business exception for NFFEs. Viaticals and other life settlement investors in cash value insurance and annuity contracts, including special purpose entities set up in non-US jurisdictions, may find themselves subject to the reporting and withholding compliance requirements as an FFI.

Are Foreign Affiliates of US-Domiciled Parent Companies, Commonly Referred to as CFCs, Subject to Chapter 4? How Are Disregarded Entities (Such as Single Member LLCs), Branches and US-Owned Foreign Insurance Companies Electing under Section 953(d) Treated?

CFCs are treated as FFIs with no special relief provided in the proposed regulations. The proposed regulations do not address the treatment of section 953(d) companies. Entities that are disregarded for US federal income tax purposes are similarly disregarded for Chapter 4 purposes, and the owner will be considered as the entity and payee. In Notice 2010-60, the Treasury stated that a CFC that is a financial institution is an FFI and this would appear to be the case currently. Under the subpart F rules of US tax law, the income of a CFC may be currently included in the taxable income of the US parent. However, this inclusion of the foreign entity's income has no effect on the application of Chapter 4. A CFC that is not a financial institution will be treated as an NFFE. Foreign insurance companies that have made a section 953(d) election should be treated as domestic insurance companies since section 953(d) provides such treatment for all purposes of the Code. Accordingly, a section 953(d) company would be treated as a US company and subject to the withholding agent requirements of Chapter 4. In the case of single member limited liability companies (LLCs), the owner of the LLC, not the LLC, is considered the entity for purposes of classification under Chapter 4. Accordingly, the business activities of LLCs need to be considered in determining the primary business activity of their owner. A similar rule applies to branches.

How Are Affiliated Groups Treated, Which Include FFIs Located in Jurisdictions That Have Local Laws That Currently Do Not Allow for Their Compliance with the Reporting and Withholding Aspects of FATCA?

A limited relief provision is provided for affiliated groups that have branches and affiliates located in jurisdictions that will not be able to comply with certain reporting and withholding aspects of FATCA due to conflicts with local country law. The proposed regulations provide FFIs with the ability to become participating FFIs even though they have affiliates and branches with limitations due to existing local country laws. The affiliates and branches with limitations must register as "limited FFIs" and "limited branches" for a period of up to two years ending no later than Dec. 15, 2015. During this period, the limited FFIs and limited branches must perform the due diligence requirements of the proposed regulations, as well as agree to not open new US account or accounts held by non-participating FFIs. In addition, such limited FFIs and limited branches must identify themselves as nonparticipating FFIs to withholding agents.

For insurance companies in jurisdictions that fail to change their laws in a timely manner, the two-year deadline may be problematic, as their entire affiliated group will become non-participating at the end of that deadline. As insurance companies will find it difficult to move accounts out of those jurisdictions, close accounts, or withhold on payments relating to insurance contracts to become participating FFIs, this deadline may be particularly problematic. Treasury should consider ways to clarify and eliminate the "cliff" effect if affiliated groups have FFIs in jurisdictions that do not modify their laws in a timely manner.

DEFINITION OF FINANCIAL ACCOUNT AND EXCLUDED CONTRACTS

What Forms of Insurance Are Considered Financial Accounts for Chapter 4 Purposes?

Cash value insurance and annuity contracts are considered financial accounts. Cash value insurance is defined by reference to section 7702 with modifications that eliminate all of the testing provisions, including section 101(f) and the diversification requirements under section 817(h). Annuities are defined as contracts that meet the requirements of section 72 without regards to subsections (s) and (u) and section 817(h). Term life insurance is specifically excluded from the definition of financial account if it has equal periodic premiums and the amount paid upon termination of contract before death cannot exceed premiums paid as adjusted for mortality and expense charges. However, any amount held by an insurance company under an agreement to pay or credit interest thereon is treated as a depository account and included in the definition of financial account.

Defining cash value insurance by reference to section 7702 while eliminating the cash value accumulation and guideline premium testing provisions leaves the focus on treatment of the contract as life insurance under local law and treating endowment contracts as life insurance. Though, technically, section 7702 does not apply to contracts sold pre-1984, the inclusion language to disregard section 101(f) makes it more likely the intent of the statute is to cover all life insurance contracts. By defining annuities with reference to section 72, eliminating the required distributions rule under subsection (s) and the prohibition on non-natural persons owning annuities under subsection (u), the definition becomes very expansive.

Deferred annuities and payout annuities all are encompassed under section 72; however, neither the Code nor regulations contain a definitive definition of what is an annuity contract. With the proposed regulations' modifications to section 72, it is likely that many—if not most—"annuity like" contracts will qualify as an annuity for purposes of Chapter 4. This is especially true of payout annuities that generally meet the requirements of an annuity. However, US-based life insurance companies sometimes struggle to determine if new contract forms—especially with a deferral period involved—will qualify as an annuity under section 72. So, it is very likely foreign life insurance companies will face similar challenges in determining if their contracts qualify as annuities. If the contracts do not qualify under section 72 as an annuity, such contracts should be classified as amounts held at interest by an insurance company and treated as depositary accounts. However, depository contracts are eligible for a lower threshold de minimis rule for due diligence purposes. In either case, the contract should be classified as a financial account for FATCA purposes.

For both cash value insurance and annuity contracts, the requirements of section 817(h) related to diversification of the investment portfolio of variable contracts is waived for Chapter 4 purposes. Accordingly, cash value insurance and annuity contracts issued by foreign insurance companies that are funded by separate accounts will not need to meet the diversification of investments requirements in order to meet the definitions provided in section 7702 or section 72. However, if the owners of the annuity contracts issued by foreign insurance companies have too much control over the underlying assets, the IRS might be inclined to apply the investor control rules to deem the underlying assets as owned by the contract owner. This is just one of many uncertainties that come into play with the current definitions of life insurance and annuity contracts for Chapter 4 purposes. Also, if annuity contracts are used as the funding source for a pension or savings plan, such contracts may qualify for one of the exceptions to reporting and withholding (see discussion below) and avoid the administrative burden of identifying whether the account is owned by a US person.

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What Requirements Must a Contract Meet in Order To Be Classified as an Annuity under Chapter 4?

The definition of an annuity, as discussed above, is linked to section 72 with modifications to eliminate subsection (s), dealing with required distribution rules; subsection (u), which provides a prohibition on non-natural owners; and section 817(h), requiring investments held under variable life or variable annuity contracts to meet certain diversification requirements.

Code section 72(a) provides that gross income includes any amount received as an annuity (whether for a period certain or during one or more lives) under an annuity; however, there is no definition of an annuity contract or "any amount received as an annuity." The accompanying regulations generally provide contracts will be covered under section 72 in accordance with customary practices of life insurance companies. The IRS, in a variety of private letter rulings spanning several decades, refers to numerous textbook definitions of an annuity along with a description from a Senate report in 1982, which described a commercial annuity as "… a promise by a life insurance company to pay the beneficiary a given sum for a specified period, which period may terminate at death. Annuity contracts permit the systematic liquidation of an amount consisting of principal (the policyholder's investment in the contract) and income…." The IRS rulings and case law generally focus on the annuitant/owner having an interest in only the periodic payments and not any principal fund or source from which they are derived. However, US courts have distinguished between periodic payments under an annuity versus periodic payments of interest.

For foreign life insurance companies in particular, the determination of whether a contract is an annuity or a contract held at interest may not make much difference for Chapter 4 reporting purposes. In determining if a company is an insurance company for Chapter 4 purposes, more than half of the business during the calendar year must be from issuing or reinsuring insurance or annuity contracts. For this purposes, it appears the company must first determine if its contracts meet the requirements of an insurance or annuity contract.

The term "insurance" is not defined in the regulations; however, using a general definition would likely encompass most forms of life, health or general insurance. The more difficult analysis may be related to contracts that qualify or fail to qualify as annuity contracts for the reasons mentioned above. If the number of contracts that fail treatment as annuity contracts is large enough, the company may not be able to meet the definition of an insurance company; in which case it seems such entity would be best classified as a financial institution that accepts deposits in the ordinary course of business. In either case, an FFI Agreement will likely be required. However, as discussed below, depository accounts in effect as of Jan. 1, 2013 may receive more generous treatment under the grandfather provisions than most annuity contracts other than those that have a term certain. The determinations made by the foreign insurance company must be based upon the facts related to each contract form issued and how section 72 applies to the terms of the contract.

Are Pure Insurance Contracts Issued by an Insurance Company That Also Issues or Reinsures Cash Value Insurance or Annuity Contracts Subject to Treatment as a Financial Account?

The preamble to the proposed regulations provides that pure insurance protection contracts such as term life, disability, health, and property and casualty insurance are not financial accounts; however, there is currently no definitive statement in Chapter 4 to this effect. An insurance company issuing cash value insurance, annuities and pure insurance protection products will be treated as a foreign institution since it only takes one cash value insurance or annuity contract to cross the line. However, if the business is dominated by selling contracts that fail to qualify for treatment as an annuity and, thus, are treated as depository accounts, the company may not be able to demonstrate that more than half of its business activity is issuing insurance contracts and could be treated as a depository institution. This outcome may not be all bad since, as written, the proposed regulations contain a few benefits which are not readily available to insurance companies.

Does the Depository Account Exception to the Term "US Account" Maintained by an FFI During a Calendar Year Apply to Cash Value Insurance or Annuity Contracts?

An exception to the term "US account" is provided for depository accounts that do not exceed a $50,000 threshold, taking into account certain aggregation rules. Cash value insurance and annuity contracts are not eligible for this exception; however, contracts that fail treatment as an annuity and are treated as amount held at interest by an insurance company are treated as depository accounts and may take advantage of this exception. As discussed below, other rules may provide for grandfathering of certain contracts from reporting and/or withholding.

How is Reinsurance Treated under Chapter 4?

The definition of an insurance company includes the reinsuring of insurance or annuity contracts, although the term "reinsurance" is not defined. The definition of a financial account includes any cash value insurance contract or annuity contract issued or maintained by a financial institution, but provides no specific reference to reinsurance. And, as discussed below, a withholding agent is any person who has control, custody, disposal or payment of a withholdable payment. While Notice 2010-60 referred specifically to reinsurance, the proposed regulations provide no guidance related to reinsurance other than to include it in the definition of an insurance company. Since the definition of a financial account refers to contracts issued or maintained by the financial institution, the reference to the latter condition appears to be a vague reference to reinsurance. Assumption reinsurance of cash value insurance or annuity contract should cause the assuming insurance company to become the future withholding agent and subject it to Chapter 4 requirements on the reinsured contracts.

However, indemnity reinsurance contracts covering cash value insurance or annuity contracts, although considered financial accounts, should not cause the assuming company to have Chapter 4 responsibilities for documenting, reporting or withholding on the underlying insurance risk reinsured, unless the reinsurer steps into the shoes of the direct writer for all purposes, including administrative tasks such as collecting premiums and paying claims. For many indemnity reinsurance contracts, the reinsurer is assuming mortality or longevity risk, not the future payment of cash value. Short of the reinsurance company replacing the direct writer, the reinsurance contract should not be considered a financial account. In most reinsurance, the reinsuring company's obligation is to the ceding insurance company; it has neither the control over payments to the policyholders, nor the information on the underlying policies to perform any of the Chapter 4 requirements. Treasury should consider adding a definitive statement to the regulations to clarify treatment of reinsurance in order to simplify compliance efforts.

Are Pension and Other Retirement Contracts Classified as Financial Accounts?

Two broad categories of savings accounts, regardless of the type of financial product used to fund the account, are excluded from the definition of financial account. The first category relates to retirement and pension contracts that are either (i) held by certain retirement or pension funds or (ii) subject to government regulation as a personal retirement account or registered or regulated as an account for the provision of retirement or pension benefits under the laws of the country in which the FFI that maintains the account is established or in which it operates. The second category relates to tax-favored savings vehicles for purposes other than retirement established in the jurisdiction in which the FFI that maintains it is established or in which it operates. Both categories of savings accounts must also meet certain criteria in the jurisdiction in which the account is maintained, including having tax-favored status, contributions limited to earned income, annual contributions not exceeding $50,000, and penalties applicable to withdrawals made prior to specified age requirements. See discussion below for certain retirement funds that are deemed to have met the FFI reporting requirements without formally entering into an FFI Agreement.

The definition of retirement-type contracts is very similar to the broad range of tax-favored plans provided under US tax law, which include separate pension and profit-sharing plans that hold assets and individual retirement accounts where individuals establish accounts to hold tax-deferred contributions and the earnings thereon. Interestingly, the rules do not place limits on the type of funding contract; so cash value insurance or annuities held in this type of account fall within this exception to the definition of financial account even though there are restrictions on the use of such contracts under US pension plans. While the rules are not clear, we believe this exception should also be available to contracts used to pay a pension benefit. This would be similar to the common practice in the United States for retirees to transfer their balance form a pension or other retirement contract into an individual retirement annuity, in order to pay benefits. The second type of exempted program, the non-retirement savings vehicle, seems to have been formulated with products such as UK ISAs or Canadian government-regulated savings account in mind. It remains to be seen whether the litany of rules established to exempt foreign pension and saving plans from Chapter 4 compliance are flexible enough in practice. For instance, in the United Kingdom, the limitation on pension contributions is currently £50,000, which would fail the limitations provided under the exemption.

For many indemnity reinsurance contracts, the reinsurer is assuming mortality or longevity risk, not the future payment of cash value.

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Is Cash Value a Defined Term under Chapter 4?
A cash value insurance contract is defined as an insurance contract with a cash value greater than zero. Cash value is defined as the greater of (i) the amount the policyholder is entitled to receive upon surrender or termination of the contracts without reduction for surrender charges or policy loans, or (ii) the amount the policyholder can borrow under the contract. Cash value does not include (A) personal injury or sickness benefits or a benefit providing indemnification of an economic loss incurred upon the occurrence of the event insured, (B) refunds of premiums to policyholders, or (C) policyholder dividends other than termination dividends on term insurance, personal injury or sickness, or other pure insurance contract.

Ultimately, cash value is an amount that the owner of a policy can get before death. The determination of cash value should be consistent with how most insurance companies maintain their policyholder account or accumulation values related to cash value insurance and annuity contracts. Companies may be able to simplify the process if they can validate that the loan amount is never greater than the account or accumulation value. The exclusion of return premiums and policyholder dividends also serves as a further clarification of the definition of which insurance products are subject to Chapter 4 documentation and reporting requirements. Likewise, while buried in the definition of cash value, the exclusion for personal injury and indemnification payments on economic loss incurred is a further clarification that disability, health, and property and casualty insurance benefits do not constitute cash value and, thus, such insurance contracts are not subject to Chapter 4. However, based upon the rules contained in the proposed regulations, the addition of a return-of-premium benefit may cause a term insurance contract to be treated as having a cash value and thus treated as a financial account.

Are Insurance Companies Eligible for Any of the Deemed-Compliant Exceptions to Registering as a Participating FFI?
Two categories of FFI may be able to qualify as a deemed-compliant FFI and, thus, be exempt from withholding: registered and certified FFIs. Registered deemed-compliant FFIs must register with the IRS to declare their status and attest to certain procedural requirements. Certified deemed-compliant FFIs are not required to register with the IRS, but must certify to withholding agents that they meet the relevant requirements through the use of Form W-8. Registered deemed-compliant FFIs are broken into four sub-categories, of which only two may apply to insurance companies: local FFIs and nonreporting members of participating FFI groups. However, the list of entities that can qualify as local FFIs does not mention insurance companies; thus, they are not eligible for this exception. The nonreporting member exception requires the FFI to transfer any pre-existing accounts that are identified as US accounts to a participating FFI in the expanded affiliated group. The certified deemed-compliant exception has five subcategories; however, only one is likely to apply to insurance companies dealing with low-value accounts. To qualify for the low-value account exception, the affiliated group cannot have assets greater than $50 million.

The current deemed-compliant provisions do not provide much administrative relief to insurance companies as currently written. The local FFI exception would be the most advantageous exception for insurance companies; however, insurance companies are not a covered organization. Treasury has asked for comments on applying the local FFI deemed-compliance status to insurance companies. The exception for nonreporting members could apply to insurance companies; however, the requirement to transfer accounts identified as US accounts to another FFI is problematic because under most countries' insurance laws, it is difficult to quickly terminate a policyholder's insurance contract. In some instances the only way to terminate a contract is through a novation or assumption reinsurance of the insurance contracts that are difficult to implement under regulatory rules—especially cross-border. Even if this were practical, the $50 million affiliated group asset limitation would severely limit its applicability.

REPORTING REQUIREMENTS

Do Specific Rules Apply to Insurance Contracts Issued or Maintained by an Insurance Company Subject to an FFI Agreement?
The general FFI Agreement rules for determining the status of an account holder, and identifying and documenting whether an account is a US account, apply to insurance companies and their products. There are several specialized provisions related to the due diligence for pre-existing entity and individual accounts as of Jan. 1, 2013 for cash value insurance and annuity contracts. In particular, if an entity or individual holds cash value insurance or annuity contracts issued before the effective date of the FFI Agreement, and their aggregate value is less than $250,000 as of that date, the FFI is not required to document the accounts as a US account subject to review, although the insurance company

may choose to do so. Accordingly, payments made on these pre-existing accounts are not considered reportable as a US account. However, if the insurance company elects to apply the $250,000 pre-existing contract exception, it will need to track the cash value of the affected accounts since it is required to document and report the account in the year after its year-end cash value exceeds $1 million.

To determine these various thresholds, the FFI is required to aggregate all cash value insurance and annuity contracts maintained by members of an affiliated group or individual, but only to the extent computerized systems link the accounts by reference to a common data element, such as a client number or taxpayer identification number, and allow account values to be aggregated. The FFI will also be required to aggregate accounts held by entities and/or individuals that a relationship manager has the ability to aggregate. The relevant account value is the balance or value of the aggregated accounts as determined for purposes of reporting to the account holder. For insurance companies, the ability to exclude pre-existing contracts from the documentation requirements for both entity and individual accounts is a significant reduction in administrative burden related to these contracts. The initial threshold of $250,000 will exclude a significant portion of pre-existing contracts, and the requirement that the status of the account does not change until it reaches $1 million provides additional relief from administrative burden, although it will require account balance monitoring capabilities to ensure compliance.

The vast majority of affiliated groups of insurance companies generally do not have computer systems that are capable of combining policy-level details across entities and often, due to differences in products or acquisitions, within entities. As a result, the pre-existing account exclusions for insurance companies are likely to be determined on an account-by-account basis; however, some companies may have the ability to aggregate contracts. Accordingly, insurance groups will need to determine their ability to aggregate information and document their findings. In addition, these groups must put in place monitoring systems to retest each pre-existing account on subsequent calendar year-end and be able to move an account to reportable status should its value exceed $1 million.

The requirement to aggregate contracts by a relationship manager may be more difficult to apply. A relationship manager must be an officer or employee of the company who advises account holders on an ongoing basis on matters such as fiduciary, estate planning or philanthropic needs, among others. However, a person is only a relationship manager if, taking into consideration the aggregation rules, the value of the accounts the relationship manager works on exceeds $1 million. For many insurance companies which rely upon third-party agents and brokers to market their products, there may be no relationship managers since those individuals would not be an officer or employee of the company. Insurance companies with employee sales forces must review their service provisions to determine whether the relationship manager definition applies to them. Under the regulation, a relationship manager is an employee who provides ongoing services on a wide range of financial issues. It is unlikely that retail insurance arrangements would fall within the definition. Conversely, insurance companies that market cash value insurance and annuity products to affluent markets through employees as their distribution source may find the aggregation requirement for relationship managers to be a major administrative hurdle to overcome.

Do the General Rules for Determining a Substantial US Owner Apply with Regards to Cash Value Insurance and Annuity Contracts?

Withholding agents, including participating FFIs, must determine if the owners of a financial account such as a cash value insurance or annuity contract are US persons. For payments to NFFEs, the withholding agent must determine if there are any substantial US owners of the payee. Substantial US owner is generally defined as ownership of 10 percent or more of the stock, profits interest or capital in a partnership or a portion of a trust. For insurance companies and certain investment vehicles, the 10 percent ownership percentage is reduced to zero so that any US ownership of the stock of a corporation (vote or value), profits or capital interest in a partnership or any interest in a trust will require the entity to be considered related to a substantial US owner. In some ways, this rule simplifies the analysis for withholding agents as they do not need to ascertain the level of ownership, only the fact that a US person or owner has some level of ownership. One area of concern is that AML and KYC rules in many jurisdictions require entities to disclose owners at a higher threshold than 10 percent, so modifications to these processes may be required in order to capture the information needed to comply with the FATCA reporting requirements.

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How Does an FFI Determine Who Is the Owner of a Cash Value Insurance or Annuity Contract?

A person or entity treated by the financial institution as owning an account is generally considered the holder of the account for purposes of determining if it is a US account. For cash value insurance and annuity contracts owned by an entity, the general ownership rules apply. An individual who owns a cash value insurance or annuity contract and is able to access the cash value or change beneficiaries will be considered the holder. Otherwise, the beneficiary is considered the holder. In the case of a grantor trust under which an individual is treated as the owner of the trust, the account will be treated as held by the owner of the trust. As foreign companies develop systems and procedures to implement the Chapter 4 requirements, the procedures and documentation related to determining the holder of financial accounts for purposes of the FFI Agreement may need to be configured with logic to identify and track the payee on a withholdable payment payable to an NFFE. For example, while an insurance company may have on its books and records limitations on the holder of a policy to the cash value (such as in the case when an irrevocable beneficiary is named), the trust provisions technically require the insurance company to make a determination of ownership applying relevant trust law and US tax law, a difficult matter for an insurance company located in a different jurisdiction.

How are the General Information Reporting Requirements for FFIs And NFFEs Modified by Any of the Specialized Insurance Rules?

Information reporting is required for financial accounts related to US persons maintained by FFIs and withholdable payments made to NFFEs with substantial US owners. Rules related to determining the holder of cash value insurance and annuity contracts as financial accounts, the definition of cash value, and the identification and documentation procedures for pre-existing accounts related to cash value insurance and annuity contracts are all taken into account in applying the general information reporting requirements for FFIs. In regards to payments to NFFEs, there are no specialized insurance rules that apply other than in the determination of the amount of an NFFE's passive gross income. Annuity payments, death benefits, and amounts received from a pool of insurance contracts are all taken into account as passive income. Accordingly, the application of the information reporting rules should be relatively uniform across an affiliated group that includes insurance companies.

How are Mutual Insurance and Other Non-Stock Insurance Organizations Treated for the Exceptions to Reporting for NFFEs?

A withholding agent is not required to withhold on a withholdable payment if the withholding agent can determine the payee is an excepted NFFE. An excepted NFFE means a publicly traded corporation on one or more established securities markets and its affiliated entities, certain territory entities and certain other specialized entities, and active NFFEs. An active NFFE, as discussed above, has less than 50 percent of its income from passive sources or less than 50 percent of its assets from the production of passive income. The global insurance industry has many organizations that are owned by policyholders, such as mutual insurance companies, non-stock health insurance companies and risk retention groups. While these organizations, if not otherwise classified as an FFI, should qualify under the active NFFE exception, it is interesting that these organizations that are public by their ownership structure are not included in the definition of a publicly traded company since they do not have stock traded on an established securities market. The compliance burden associated with demonstrating the company's compliance with the active NFFE rule is more burdensome than being exempted due to the ownership structure of the company. Hopefully, Treasury will be willing to consider some form of administrative relief for these types of organizations to further reduce the compliance burden.

WITHHOLDABLE PAYMENTS INCLUDING PASSTHRU PAYMENTS

How Do Premiums and Benefit Payments Impact the Computation of FDAP Used To Determine a Withholdable Payment?

The term "withholdable payment" is a defined term in the

FATCA statute and is a key term in the sections of the proposed regulations related to withholding agents. For instance, a withholding agent must generally withhold on a withholdable payment to an FFI that is not participating, or on a withholdable payment to an NFFE that fails to provide the proper documentation on owners or prove its status as excepted. Both situations depend upon the definition of a withholdable payment that is defined as any payment of US source FDAP income (fixed or determinable annual or periodic income) and gross proceeds from certain sales and dispositions of property that can produce US-sourced interest or dividend income. FDAP is defined by reference to the regulations under section 1441. If the source of a payment cannot be determined at the time of payment, it must be treated by the withholding agent as US-sourced.

The definition of FDAP under section 1441 includes premium income; however, certain exclusions under the Code apply that do not depend upon the US versus foreign status of the payee. These include life insurance death benefits under section 101, the return of basis component of annuity payments, and withdrawals from life insurance contracts from the cash value to the extent they do not exceed premiums paid under section 72. FDAP does, however, include the taxable portion of annuity payments or the taxable portion of partial or full surrenders from annuities and life insurance contracts. In addition, FDAP does not include premiums that are subject to the US excise tax under section 4371. While it is hoped that withholding will only be required on a small percentage of what would otherwise be withholdable payments, those payments that are subject to withholding may require the insurance company to compute the amount subject to withholding, which will likely become a manual process due to the infrequency and uniqueness of each payment. The mere crediting of amounts to cash value by the insurance company should not be considered a withholdable payment as it is not considered an FDAP payment to the policyowner. This suggests that passthru payment withholding on recalcitrant policyowners can be deferred until payment, when the insurance company should have greater contact with the customer.

Do Foreign Insurance Companies Treated as Participating FFIs Have Any Withholding Obligations Prior to Jan. 1, 2017, When the Passthru Payment Rules Become Effective?

The FFI Agreements treat the company as a US withholding agent and responsible for withholding on withholdable payments and foreign passthru payments as required under Chapter 4. Withholding on withholdable payments to FFIs is effective Jan. 1, 2014, and on foreign passthru payments is effective Jan. 1, 2017. There are certain exceptions to the withholdable payment effective date that may delay withholding until Jan. 1, 2015. Withholding on withholdable payments to an NFFE is required after Dec. 31, 2014. Generally, participating FFIs (other than custodial institutions, other intermediaries and flow-thru entities) will not have to deal with withholding until the passthru payment rules become effective Jan. 1, 2017; however, some situations may exist where an insurance company issues cash value insurance or annuity contracts that are funded directly by investments in US-sourced investments. In this situation, the participating FFI may have a withholding requirement under Chapter 4 as a withholding agent on a withholdable payment when withdrawals or surrenders are paid since the amount would be US-sourced and considered FDAP.

Are US Insurance Companies Subject to New Withholding Requirements as a Result of FATCA?

US insurance companies are treated as withholding agents under FATCA in a manner similar to their role under section 1441. FATCA expands the withholdable payments to include payments by US insurance companies to foreign entities with substantial US owners who do not provide the required documentation and nonparticipating FFIs. FDAP payments made with respect to any type of insurance contract to such an entity could be subject to withholding. Under section 1441, only payments to US individuals located outside the US are subject to withholding. The new withholding obligation takes effect for payments made beginning Jan. 1, 2014. US withholding agents will also begin to report information about substantial US owners of NFFEs in 2014 for the 2013 calendar year.

> The term "withholdable payment" is a defined term in the FATCA statute and is a key term in the sections of the proposed regulations related to withholding agents.

US insurance companies generally have processes in place to identify life insurance and annuity contracts with individual owners located in a foreign jurisdiction and apply withholding as appropriate on withdrawals and benefit payments. The FATCA expansion will involve companies searching for foreign entities, including trusts, who own contracts and/or to whom withholdable payments are made in order to determine if the entities have any US ownership (and

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then obtaining documentation); or, if a financial entity, to determine whether they are a participating FFIs. The rules regarding grandfathered obligations discussed above apply to exclude payments related to life insurance contracts and term certain annuities outstanding as of Jan. 1, 2013 from the new withholding rules. Insurance companies will need some way to identify within their policy administration systems or manual payment processes contracts that are subject to the grandfather rule.

Do Payments Made in the Ordinary Course of Business of an Insurance Company Qualify as Withholdable Payments?

Payments in the ordinary course of the withholding agent's business for nonfinancial services, goods and the use of property are excluded from the definition of a withholdable payment. As a result, wages, office equipment leases, awards, prizes, and other tangible and intangible nonfinancial services property are excluded. However, interest and dividends paid and payments for financial services are not considered ordinary course payments. The term "financial services" is not defined. In an insurance context, claims payments by the FFI to policyholders should likely be considered nonfinancial services since they are for reimbursement of an insured event and excluded from FDAP; however, settlement payments under reinsurance contracts are likely to be considered financial services in nature and includible in FDAP. Other types of payments for financial services such as gross settlements with counterparties may be withholdable payments if paid to an NFFE or a non participating FFI. Commissions paid in connection with the sale of cash value insurance and annuity contracts may also be subject to withholding if they are considered as related to a financial service. This is a point that hopefully future guidance will clarify.

Are There Exceptions to the General Withholding Rules That Eliminate the Withholding Requirements for Categories of Insurance Contracts?

The FFI Agreement generally requires withholding on withholdable payments or passthru payments when made; however, payments made under grandfathered obligations are excepted from withholding. A grandfathered obligation means any legal agreement that produces or could produce a passthru payment that is outstanding on Jan. 1, 2013. For purposes of this rule, an obligation includes debt instruments defined in section 1275(a)(1), a life insurance contract payable on the earlier of attaining a stated age or death, or a term certain annuity. However, a grandfathered obligation does not include legal agreements treated as equity or that lack a stated expiration or term such as a savings deposit, demand deposit, brokerage agreement, custodial agreement, or similar agreement to hold financial assets. Any material modification of a grandfathered obligation will result in it being treated as newly issued as of the effective date of such modification.

The grandfathered obligations provision should allow FFIs to exclude endowments and at least some cash value life insurance contracts in existence on Jan. 1, 2013 from future withholding obligations. However, the current wording seems to imply that a life insurance contract must be payable at the earlier of death or a stated age, which would appear to exclude life insurance contracts with no fixed maturity date. Thus, a traditional endowment will qualify, as will a life insurance contract that is payable at the earlier of a stated age (*i.e.*, 100) or at death. This leaves in question the treatment of a life insurance contract that does not "force" the payment of the death benefit at the final age covered by the relevant mortality table. While this approach might be superficially consistent with the general requirement that an obligation must have a "stated expiration or term," it is patently inconsistent with the section's goal of appropriately easing the administrative burden.

This distinction may significantly increase the administrative burden, as most life insurance policy forms will have to be reviewed and only those containing a stated maturity age will be grandfathered. This issue could be rectified by simply stating that the term "payable at death" is a stated term for purposes of the proposed regulations. While it could, perhaps, be argued that this is currently the case, this issue needs to be clarified. Any concerns relative to the inclusion in the definition of a grandfathered obligation of a life contingency as a stated period should be ameliorated by the fact that life insurance companies are generally considered the only companies allowed to provide a mortality risk benefit.

With regards to annuity contracts, the grandfather provision only applies to term certain annuity contracts that are a small subset of the larger annuity population. The proposed regulations do not define what is meant by a term certain annuity contract; however, a general industry definition would include contracts in payout status for a specified number of years, such as structured settlements or lottery annuities. This leaves the proper treatment of payout annuity contracts, for life or life and a period certain, under the grandfathered obligations provision as uncertain. The apparent exclusion of many annuities that qualify under section 72 is even more curious given that annuity contracts that do not meet the definition of section 72 (see discussion above regarding depository contracts) should qualify for the grandfathering provisions as a debt instrument.

The real cause for concern is that, as noted above, the regulation uses the section 1275(a)(1) definition of debt instrument; however; section 1275(a)(1)(B) excludes from the definition of a debt instrument annuity contracts that qualify for section 72 treatment. As a result, deferred annuity contracts and payout annuities for life, which are subject to section 72, do not appear to currently qualify for the exclusion from withholding under the grandfathered obligations provision. One could perhaps argue that the intent was that a life annuity is a term certain annuity since the payments will extend for the life of the annuitant, and since this is the only place in the regulations where this distinction is, perhaps inadvertently, made.

The grandfathering rule will require insurance companies to develop systems and processes to identify contracts as of Jan. 1, 2013 and tag them for future reference. In addition, while the contracts may be exempted from withholding, the contract may still be subject to the due diligence procedures for identification and reporting of US owners. Finally, the potential for a grandfathered contract to be treated as a new contract due to a material modification of the contract terms is another example of where the proposed regulations impose complexity upon the insurance company that will require monitoring systems or procedures to identify and properly handle the situations in order to remain in compliance with FATCA. Hopefully, future guidance will help to clarify this provision as it now appears to create rather than reduce administrative burdens.

When a Cash Value Insurance or Deferred Annuity Contract Is Converted to a Payout Annuity, How Is the New Contract Classified for Chapter 4 Purposes?

If material modifications are made to financial accounts treated as grandfathered obligations for withholding purposes, the contract is considered a new contract as of the effective date of the modifications. There are no specific rules related to the conversion of a cash value insurance or deferred annuity contract to a payout annuity; however, this is likely a material modification of the contract. Accordingly, the grandfathering exception to withholding will not apply to the new contract.

Implications and Final Observations

The proposed regulations are a solid start to providing guidance to the global insurance industry on how FATCA applies to its products and customers. The focus on the use of definitions under existing US tax law to define life insurance and annuity contracts presents considerable hurdles for foreign insurance companies, not familiar with these rules, working through the compliance issues raised. However, it does provide a platform from which the industry can provide detailed comments and proposals to Treasury to refine and focus the rules in order to make the proposed regulations more efficient, clearer, and less burdensome.

The key issue for insurance companies continues to be the overall complexity of the task required in order to be compliant with FATCA. Many insurance companies use a large number of administration systems to manage their in-force contracts that generally do not tie together with other systems. As a result, the burden of searching for US indicia will continue to be a major administrative hurdle. The complexity will carry over to the foreign insurance company's communications plan to employees, agents and brokers to train them on the administrative and systems changes required by FATCA and the impact to policyholders.

The views expressed are those of the authors and not of Ernst & Young LLP.

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