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Prop. Reg. 1.6011-10

Micro-captive listed transaction

(a) Identification as listed transaction. Transactions that are the same as, or substantially similar to, transactions described in paragraph (c) of this section are identified as listed transactions for purposes of §1.6011-4(b)(2), except as provided in paragraph (d) of this section.

(b) Definitions. The following definitions apply for purposes of this section:

(1) Captive means any entity that:

(i) Elects under section 831(b) of the Internal Revenue Code (Code) to exclude premiums from taxable income;

(ii) Issues a Contract to an Insured, reinsures a Contract of an Insured issued by an Intermediary, or both; and

(iii) Has at least 20 percent of its assets or the voting power or value of its outstanding stock or equity interests directly or indirectly owned, individually or collectively, by an Insured, an Owner, or persons Related to an Insured or an Owner. For purposes of this paragraph (b)(1)(iii), the following rules apply to the extent application of a rule (or rules) would increase such direct or indirect ownership:

(A) A person that holds a derivative is treated as indirectly owning the assets referenced by the derivative; and

(B) The interest of each beneficiary of a trust or estate in the assets of such trust or estate must be determined by assuming the maximum exercise of discretion by the fiduciary in favor of such beneficiary and the maximum use of the trust's or estate's interest in the company to satisfy the interests of such beneficiary.

(2) Computation periods.

(i) Financing Computation Period. The Financing Computation Period is the most recent five taxable years of Captive (or all taxable years of Captive, if Captive has been in existence for less than five taxable years).

(ii) Loss Ratio Computation Period. The Loss Ratio Computation Period is the most recent ten taxable years of Captive. A Captive that does not have at least ten taxable years cannot have a Loss Ratio Computation Period, and therefore is not described in paragraph (c)(2) of this section.

(iii) Rules for computation periods. This paragraph (b)(2)(iii) applies for purposes of determining the Financing Computation Period and the Loss Ratio

Computation Period. Each short taxable year is a separate taxable year. If Captive is a successor to one or more other Captives, taxable years of each such other Captive are treated as taxable years of Captive. A successor is any of the following:

(A) A successor corporation as defined in §1.382-2(a)(5);

(B) An entity that, directly or indirectly, acquires (or is deemed to acquire) the assets of another entity and succeeds to and takes into account the other entity's earnings and profits or deficit in earnings and profits; or

(C) An entity that receives (or is deemed to receive) any assets from another entity if such entity's basis is determined, directly or indirectly, in whole or in part, by reference to the other entity's basis.

(3) Contract means any contract that is treated by a party to the contract as an insurance contract or reinsurance contract for Federal income tax purposes.

(4) Insured means any person that conducts a trade or business, enters into a Contract with a Captive or enters into a Contract with an Intermediary that is directly or indirectly reinsured by a Captive, and treats amounts paid under the Contract as insurance premiums for Federal income tax purposes.

(5) Intermediary means any entity that issues a Contract to an Insured, or reinsures a Contract that is issued to an Insured, and such Contract is reinsured, directly or indirectly, by a Captive. A transaction may have more than one Intermediary.

(6) Owner means any person who, directly or indirectly, holds an ownership interest in an Insured or its assets. For purposes of this paragraph (b)(6), the following rules apply to the extent application of a rule (or rules) would increase such direct or indirect ownership:

(i) The interest of a person that holds a derivative must be determined as provided in paragraph (b)(1)(iii)(A) of this section; and

(ii) The interest of each beneficiary of a trust or estate in the assets of such trust or estate must be determined as provided in paragraph (b)(1)(iii)(B) of this section.

(7) Recipient means any Owner, Insured, or person Related to an Owner or an Insured engaged in a transaction described in paragraph (c)(1) of this section.

(8) Related means having a relationship described in one or more of sections 267(b), 707(b), 2701(b)(2)(C), and 2704(c)(2) of the Code.

(9) Seller means a service provider, automobile dealer, lender, or retailer that sells products or services to Unrelated Customers who purchase insurance contracts in connection with those products or services.

(10) Seller's Captive means a Captive Related to Seller, an owner of Seller, or individuals or entities Related to Seller or owners of Seller.

(11) Unrelated Customers means persons who do not own an interest in, and are not wholly or partially owned by, Seller, an owner of Seller, or individuals or entities Related to Seller or owners of Seller.

(c)Transaction description. A transaction is described in this paragraph (c) if the transaction is described in paragraph (c)(1) of this section, paragraph (c)(2) of this section, or both.

(1) The transaction involves a Captive that, at any time during the Financing Computation Period, directly or indirectly made available as financing or otherwise conveyed or agreed to make available or convey to a Recipient, in a transaction that did not result in taxable income or gain to the Recipient, any portion of the payments under the Contract, such as through a guarantee, a loan, or other transfer of Captive's capital, or made such financings or conveyances prior to the Financing Computation Period that remain outstanding or in effect at any point in the taxable year for which disclosure is required. Any amounts that a Captive made available as financing or otherwise conveyed or agreed to make available or convey to a Recipient are presumed to be portions of the payments under the Contract to the extent such amounts when made available or conveyed are in excess of Captive's cumulative after-tax net investment earnings minus any outstanding financings or conveyances.

(2) The transaction involves a Captive for which the amount of liabilities incurred for insured losses and claim administration expenses during the Loss Ratio Computation Period is less than 65 percent of the amount equal to premiums earned by Captive during the Loss Ratio Computation Period less policyholder dividends paid by Captive during the Loss Ratio Computation Period.

(d)Exceptions. A transaction described in paragraph (c) of this section is not classified as a listed transaction for purposes of this section and §1.6011-4(b)(2) if the transaction:

(1) Provides insurance for employee compensation or benefits and is one for which the Employee Benefits Security Administration of the U.S. Department of Labor has issued a Prohibited Transaction Exemption under the procedures provided at 76 FR 66637 (Oct. 27, 2011) (or subsequent procedures); or

(2) Is an arrangement in which a Captive meets all of the following requirements:

(i) Captive is a Seller's Captive,

(ii) The Seller's Captive issues or reinsures some or all of the Contracts sold to Unrelated Customers in connection with the products or services being sold by the Seller,

(iii) 100 percent of the business of the Seller's Captive is insuring or reinsuring Contracts in connection with products or services being sold by the Seller or persons Related to the Seller, and

(iv) With respect to the Contracts issued or reinsured by the Seller's Captive, the fee, commission, or other remuneration earned by any person or persons, in the aggregate, for the sale of the Contracts, described as a percentage of the premiums paid by the Seller's customers, is at least equal to the greater of:

(A) 50 percent; or

(B) The unrelated commission percentage (which is the highest percentage fee, commission, or other remuneration known to the Seller that is earned by any person or persons, in the aggregate, for the sale of any extended warranty, insurance, or other similar Contract sold to a customer covering products or services sold by the Seller.

(e)Special participation rules.

(1)In general. Whether a taxpayer has participated in the listed transaction identified in paragraph (a) of this section will be determined under §1.6011-4(c)(3)(i)(A). Participants include, but are not limited to, any Owner, Insured, Captive, or Intermediary with respect to the transaction whose tax return reflects tax consequences or a tax strategy described in paragraph (a) of this section, except as otherwise provided in paragraph (e)(2) of this section.

(2)Disclosure safe harbor for Owners. An Owner who, solely by reason of the Owner's direct or indirect ownership interest in an Insured, has participated in the listed transaction described in this section will not be required to disclose participation in the transaction under section 6011(a), notwithstanding §1.6011-4(c)(3), if the Owner receives an acknowledgement, in writing or electronically, from the Insured that the Insured has or will comply with the Insured's separate disclosure obligation under §1.6011-4 with respect to the transaction and the Insured discloses the transaction in a timely manner. The acknowledgment can be a copy of the Form 8886, Reportable Transaction Disclosure Statement (or successor form), filed (or to be filed) by the Insured and must be received by the Owner prior to the time set forth in §1.6011-4(e) in which the Owner would otherwise be required to provide disclosure. Owners who meet the requirements of this safe harbor will not be treated as having participated in an undisclosed listed transaction for purposes of § 1.6664-2(c)(3)(ii) or as having failed to include information on any return or statement with respect to a listed transaction for purposes of section 6501(c)(10).

(f)Disclosure requirements.

(1)Information required of all participants. Participants must provide the information required under §1.6011-4(d) and the Instructions to Form 8886 (or successor form). For all participants, describing the transaction in sufficient detail includes, but is not limited to, describing on Form 8886 (or successor form) when, how, and from whom the participant became aware of the transaction, and how the participant participated in the transaction (for example, as an Insured, a Captive, or other participant). Paragraphs (f)(2) and (3) of this section describe information required of a Captive and an Insured, respectively.

(2)Information required of a Captive. For a Captive, describing the transaction in sufficient detail includes, but is not limited to, describing the following on Form 8886 (or successor form):

(i) All the type(s) of policies issued or reinsured by Captive during the year of participation or years of participation (if disclosure pertains to multiple years);

(ii) The amounts treated by Captive as premiums written for coverage provided by Captive during the year of participation or each year of participation (if disclosure pertains to multiple years);

(iii) The name and contact information of each and every actuary or underwriter who assisted in the determination of the amounts treated as premiums for coverage provided by Captive during the year or each year of participation (if disclosure pertains to multiple years);

(iv) The total amount of claims paid by Captive during the year of participation or each year of participation (if disclosure pertains to multiple years); and

(v) The name and percentage of interest directly or indirectly held by each person whose interest in Captive meets the 20 percent threshold or is taken into account in meeting the 20 percent threshold under §1.6011-10(b)(1)(iii).

(3) Information required of Insured. For Insured, describing the transaction in sufficient detail includes, but is not limited to, describing on Form 8886 (or successor form) the amounts treated by Insured as premiums for coverage provided to Insured, directly or indirectly, by Captive or by each Captive (if disclosure pertains to multiple Captives) during the year or each year of participation (if disclosure pertains to multiple years), as well as the identity of all persons identified as Owners to whom the Insured provided an acknowledgment described in paragraph (e)(2) of this section.

(g) Applicability date.

(1) In general. This section identifies transactions that are the same as, or substantially similar to, the transactions described in paragraph (a) of this section as listed transactions for purposes of §1.6011-4(b)(2) effective the date the regulations are published as final regulations in the Federal Register.

(2) Obligations of participants with respect to prior periods. Pursuant to §1.6011-4(d) and (e), taxpayers who have filed a tax return (including an amended return) reflecting their participation in transactions described in paragraph (a) of this section prior to the date these regulations are published as final regulations in the Federal Register, who have not otherwise finalized a settlement agreement with the Internal Revenue Service with respect to the transaction, must disclose the transactions as required by §1.6011-4(d) and (e) provided that the period of limitations for assessment of tax (as determined under section 6501 of the Code, including section 6501(c)) for any taxable year in which the taxpayer participated has not ended on or before the date the regulations are published as final regulations in the Federal Register.

(3) Obligations of material advisors with respect to prior periods. Material advisors defined in §301.6111-3(b) of this chapter who have previously made a tax statement with respect to a transaction described in paragraph (a) of this section have disclosure and list maintenance obligations as described in §§301.6111-3 and 301.6112-1 of this chapter, respectively. Notwithstanding §301.6111-3(b)(4)(i) and (iii) of this chapter, material advisors are required to disclose only if they have made a tax statement on or after the date that is six years before the date the regulations are published as final regulations in the Federal Register. Material advisors that are uncertain whether the transaction they are required to disclose should be reported under this section or §1.6011-11 should disclose under this section, and will not be required to disclose a second time if it is later determined that the transaction should have been disclosed under §1.6011-11.