CASE NO. 14-5019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the United States Court of Federal Claims
in Case No. 07-648T
The Honorable Marian B. Horn

BRIEF OF APPELLEE
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CERTIFICATE OF INTEREST

Counsel for the Plaintiff-Appellee certifies the following:

1. The full name of every party or amicus represented by me is:

   Massachusetts Mutual Life Insurance Company, on its own behalf and as successor to Connecticut Mutual Life Insurance Company

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   Massachusetts Mutual Life Insurance Company ("MassMutual"), on its own behalf and as successor to Connecticut Mutual Life Insurance Company ("ConnMutual"), is a mutual life insurance company formed under the laws of Massachusetts, its primary regulator. It has no parent corporation, and no publicly-traded corporation owns 10% or more of its stock.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

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TABLE OF CONTENTS

Page

CERTIFICATE OF INTEREST i

TABLE OF AUTHORITIES iv

STATEMENT OF RELATED CASES ix

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND OF THE FACTS 2

A. MassMutual's Policyholder Dividend Practices Before 1995 3

B. The Change in Law that Created the Accounting Mismatch 5

C. MassMutual's 1995, 1996 and 1997 Board of Directors Resolutions 8

D. Notification to State Insurance Commissioners 12

E. MassMutual's Tax Reporting and the IRS Challenge 14

F. The Opinion of the Court of Federal Claims 18

SUMMARY OF THE ARGUMENT 24

ARGUMENT 25

Standard of Review 25

I. MassMutual's Board of Directors' Guarantee Fixed Its Liability To Pay a Minimum Amount of Policyholder Dividends to the Defined Class of Post-1983 Policyholders the Following Year. 25

A. The Board's Dividend Guarantees Established the Fact of Liability. 26

1. Liability to an Existing Class Is Fixed Even Though the Class Composition May Change. 26

2. Remote Possibilities that the Class May Not Survive Are Disregarded. 30

B. The Government's Arguments that Liability Was Not Fixed Are Based on Distorting the Guarantee. 33

1. There Is No Requirement that any Individual Liability Be Fixed for a Group Liability To Be Fixed. 34

2. The Court of Federal Claims Correctly Held that the In-Force Requirement for Individuals Was Not a Condition Precedent to the Group Liability. 35

3. The Second Circuit's *New York Life* Decision, Like *General Dynamics*, Did Not Address a Group Liability. 37

C. The Court of Federal Claims Correctly Found that "Plaintiff's Dividend Guarantees Created an Unconditional Obligation." 41

II. MassMutual's Liability for the Guaranteed Minimum Amount of Policyholder Dividends Satisfied the Recurring Item Exception to the Economic Performance Requirement. 44

A. The Only Sound Interpretation of the Regulation Is that Policyholder Dividends Are Rebates, Refunds, or Other Similar Payments. 45

B. The Government Waived Its Deference Argument. 53

C. The Government's Litigating Position Deserves No Deference. 55

CONCLUSION AND STATEMENT OF RELIEF SOUGHT 60

CERTIFICATE OF SERVICE 62

CERTIFICATE OF COMPLIANCE 63

TABLE OF AUTHORITIES

Cases **Page**

AT&T Co. v. United States, 307 F.3d 1374 (Fed. Cir. 2002) 25

Abbott Laboratories v. United States, 84 Fed. Cl. 96 (2008), *aff'd*,
573 F.3d 1327 (Fed. Cir. 2009) 54

Abbott Laboratories v. United States, 573 F.3d 1327 (Fed. Cir. 2009) 58

Adair v. United States, 497 F.3d 1244 (Fed. Cir. 2007) 55, 56

American Airlines, Inc. v. United States, 551 F.3d 1294
(Fed. Cir. 2008)..46

American Express Co. v. United States, 262 F.3d 1376 (Fed. Cir. 2001) 57

Auer v. Robbins, 519 U.S. 452 (1997) ....*passim*

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)...........................55

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)..................................55

Burnham Corp. v. Commissioner, 90 T.C. 953 (1988), *aff'd*,
878 F.2d 86 (2d Cir. 1989) 19, 35, 36

Burnham Corp. v. Commissioner, 878 F.2d 86 (2d Cir. 1989) 36

CUNA Mutual Life Insurance Co. v. United States, 169 F.3d 737
(Fed. Cir. 1999)..48

Caltex Oil Venture v. Commissioner, 138 T.C. 18 (2012) 47

Cathedral Candle Co. v. United States International Trade Commission,
400 F.3d 1352 (Fed. Cir. 2005) 58

Champion Spark Plug Co. v. Commissioner, 30 T.C. 295 (1958),
nonacq. 1958-2 C.B. 3, *aff'd*, 266 F.2d 347 (6th Cir. 1959).......19, 41, 42, 43

Case: 14-5019 Document: 21 Page: 6 Filed: 05/02/2014

Charles v. Shinseki, 587 F.3d 1318 (Fed. Cir. 2009)..53

Commissioner v. Champion Spark Plug Co., 266 F.2d 347
(6th Cir. 1959) 42

Commissioner v. Soliman, 506 U.S. 168 (1993)...46

Commodity Futures Trading Commission v. Erskine, 512 F.3d 309
(6th Cir. 2008) 53

DaimlerChrysler Corp. v. United States, 361 F.3d 1378
(Fed. Cir. 2004)..46

Decker v. Northwest Environmental Defense Center,
133 S. Ct. 1326 (2013)...60

Deutsche Bank AG v. United States, 742 F.3d 1378 (Fed. Cir. 2014).......................5

Eastman Kodak Co. v. United States, 534 F.2d 252 (Ct. Cl. 1976) 19

Gevyn Construction Group v. United States, 827 F.2d 752
(Fed. Cir. 1987)..26

Gulf Life Insurance Co. v. United States, 118 F.3d 1563
(Fed. Cir. 1997)..22, 48

In re Harvard Industries, Inc., 568 F.3d 444 (3d Cir. 2009)...................................25

Investment Co. Institute v. Camp, 401 U.S. 617 (1971) 55

John Hancock Financial Services, Inc. v. United States,
57 Fed. Cl. 643 (2003), *aff'd*, 378 F.3d 1302 (Fed. Cir. 2004).....................49

John Hancock Financial Services, Inc. v. United States,
378 F.3d 1302 (Fed. Cir. 2004) 22, 48, 51, 52

Kern v. John Hancock Mutual Life Insurance Co., 186 N.Y.S.2d 992
(App. Div. 1959), *aff'd*, 168 N.E.2d 532 (N.Y. 1960) 49

Kershaw Manufacturing Co. v. Commissioner, 313 F.2d 942 (5th Cir. 1963) 18

Lengerich v. Department of the Interior, 454 F.3d 1367 (Fed. Cir. 2006)..25

Lighting Ballast Control LLC v. Philips Electronics North America Corp., 744 F.3d 1272 (Fed. Cir. 2014) (en banc) 46

New York Life Insurance Co. v. United States, 780 F. Supp. 2d 324 (S.D.N.Y. 2011), *aff'd*, 724 F.3d 256 (2d Cir. 2013)....................................38

New York Life Insurance Co. v. United States, 724 F.3d 256 (2d Cir. 2013)...37, 38, 39, 40

Principal Mutual Life Insurance Co. v. United States, 295 F.3d 1241 (Fed. Cir. 2002)..22, 48

Produce Reporter Co. v. Commissioner, 18 T.C. 69 (1952), *aff'd*, 207 F.2d 586 (7th Cir. 1953) 19, 28, 42

Rauenhorst v. Commissioner, 119 T.C. 157 (2002) 29

San Carlos Apache Tribe v. United States, 639 F.3d 1346 (Fed. Cir. 2011)..53

Talk America, Inc. v. Michigan Bell Telephone Co., 131 S. Ct. 2254 (2011)..59

Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994)................................60

United States v. Allegheny Ludlum Corp., 366 F.3d 164 (3d Cir. 2004)..53

United States v. General Dynamics Corp., 481 U.S. 239 (1987)....................*passim*

United States v. Hughes Properties, Inc., 476 U.S. 593 (1986) ....*passim*

Van Alen v. Commissioner, T.C. Memo. 2013-235..29

Washington Post Co. v. United States, 405 F.2d 1279 (Ct. Cl. 1969)............*passim*

Willoughby Camera Stores, Inc. v. Commissioner, 125 F.2d 607
(2d Cir. 1942)..19, 42, 43

Statutes

26 U.S.C. § 61 52

26 U.S.C. § 461(h) 1, 6, 15, 26

26 U.S.C. § 805(a) 5

26 U.S.C. § 808(f) 7

26 U.S.C. § 809 ....22, 49, 51, 52

26 U.S.C. § 6110(k) 57

Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 7

Job Creation Worker Assistance Act of 2002, Pub. L. No. 107-147,
116 Stat. 21 51

Regulatory Materials

26 C.F.R. § 1.461-4..*passim*

26 C.F.R. § 1.461-5..16, 50, 51

Legislative History

H.R. Rep. No. 426, 99th Cong., 1st Sess. 946 (1985), 1986-3 C.B. (Vol. 2)
946 7

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Miscellaneous Authorities

I.R.M. 4.8.8.12.1.3(1) 58

IRS Field Service Advisory, 1994 WL 1865978 (Apr. 28, 1994) 57

IRS Field Service Advisory 2411, 1998 WL 1984267 (Aug. 24, 1998) 57

http://www.naic.org/index_about.htm 4

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 59

Rev. Rul. 76-345, 1976-2 C.B. 134, *revoked*, Rev. Rul. 2011-29, 2011-49 I.R.B. 824 28

Rev. Rul. 2011-29, 2011-49 I.R.B. 824 ....*passim*

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for the Appellee states that (1) no other appeal in or from the same civil action or proceeding in the lower court has previously been before this Court or any other appellate court; and (2) counsel is not aware of any case pending in this Court or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

STATEMENT OF THE ISSUES

MassMutual, a mutual life insurance company, guaranteed a minimum amount of policyholder dividends to a class of its policyholders. As it must, the Government concedes that MassMutual is entitled to deduct the policyholder dividends; the parties disagree only about timing.

This appeal presents a single issue: whether, as a matter of federal income tax accounting, MassMutual can deduct an amount of guaranteed policyholder dividends in the year its Board of Directors adopted the guarantee. The Court of Federal Claims held for MassMutual on this issue. The Government contends that the policyholder dividends should not be deducted until the following year. The single issue presented here turns on two questions:

1. Was the Court of Federal Claims correct in holding that MassMutual's guarantee to pay a minimum amount of dividends to a class of policyholders was a "fixed" liability, as required by the "all events" test that governs the timing of deductions, as set forth in 26 U.S.C. § 461(h)(4)?

2. Was the Court of Federal Claims correct in holding that policyholder dividends are rebates, refunds, or payments or transfers in the nature of a rebate or refund under 26 C.F.R. § 1.461-4(g)(3), thus qualifying for the "recurring item" exception in 26 U.S.C. § 461(h)(3) to the general rule requiring economic performance as a condition of deductibility?

STATEMENT OF THE CASE AND OF THE FACTS

MassMutual sets the premiums its policyholders must pay on their insurance policies. MassMutual, like other mutual insurance companies, sets premiums using conservative assumptions to ensure MassMutual collects enough money and earns enough income to pay all expenses and benefits in the future, even under adverse financial scenarios. Surplus results when overall actual experience is more favorable than initially assumed in setting the premiums. In the fall of each year, MassMutual determines what portion of this surplus should be paid to policyholders as a rebate of premium and what portion, if any, should be added to accumulated surplus. The portion paid to policyholders is known as "policyholder dividends."

In the mid-1990s, MassMutual sought to align its tax reporting with the required financial accounting for its revenue. For financial accounting purposes, the Commonwealth of Massachusetts required MassMutual to offset its revenue by the amount of policyholder dividends in the year they were declared. For tax accounting purposes, however, MassMutual deducted those policyholder dividends only in the following year when payment was made. Starting in 1995, MassMutual's Board of Directors annually determined a minimum aggregate amount of policyholder dividends that MassMutual would pay the following year under all circumstances to a class of policyholders, and adopted a resolution

guaranteeing payment of that amount (the "Dividend Guarantee"). The class existed before year's end in each of the years at issue. As detailed below, the federal income tax consequences of the MassMutual Board's guarantees are the subject of this appeal.

A. MassMutual's Policyholder Dividend Practices Before 1984

MassMutual is a mutual life insurance company.[1] (A4.) As is typical for mutual life insurance companies, MassMutual issues two types of policies: participating policies, which are eligible to receive a rebate of the premiums paid annually out of surplus as declared by MassMutual's Board of Directors, and non-participating policies, which are not. (*Id.*)

Stakeholders in the insurance industry treat a distribution out of surplus as a rebate or refund of premiums that participating policyholders have paid. As MassMutual explained to its policyholders in 1996, "[i]n a sense, dividends are the return of a portion of premium resulting from experience that is more favorable than was assumed in setting the premium." (A317.) Like MassMutual, the

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[1] For 1995, the guarantees of both MassMutual and ConnMutual are at issue. For 1996 and 1997, following MassMutual's merger with ConnMutual, only MassMutual's guarantees are at issue. For simplicity, because MassMutual's and ConnMutual's guarantees in 1995 were substantially similar, references to MassMutual include ConnMutual except as noted.

National Association of Insurance Commissioners,[2] leading textbook authors, and other companies in the mutual insurance industry all consider policyholder dividends to be returns of premiums that participating policyholders have paid. (A352-A359, A1485-A1491.)

MassMutual long ago established an annual process for calculating and paying policyholder dividends.[3] In the fall of each year, MassMutual calculated its surplus: the excess of its assets over its reserves and other liabilities. (A4-A5.) The Board of Directors then determined the portion of the surplus, if any, that should be paid to eligible participating policyholders in the form of policyholder dividends. (A5.) MassMutual allocated this amount among eligible participating policyholders using a set of complex formulas known as the dividend scale ("Dividend Scale"), which MassMutual's management and actuaries developed each year and MassMutual's Board subsequently adopted. (*Id.*) The Board

[2] "The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories." *About the NAIC*, http://www.naic.org/index_about.htm (last visited May 1, 2014).

[3] Instead of receiving an annual dividend check, policyholders may have their policyholder dividends applied to the next year's premium, used to purchase additional insurance, or left with MassMutual to accumulate interest. (A462.) These dividends are credited or applied to the policyholder's account, rather than paid to the policyholder. (A1383-A1384, A1387.) References herein to dividends "paid" or "payable" include dividends credited or applied.

declared dividends near the end of each calendar year; MassMutual paid them the following year on policies that remained in force on the policyholder's policy anniversary date (the month and day on which the policy was originally purchased). (*Id.*) Policies remained in force provided policyholders paid all premiums due on or before the anniversary date. (*Id.*)

Once MassMutual declared its annual policyholder Dividend Scale, Massachusetts insurance accounting rules required it to set as a liability on its books the amount of dividends it expected to pay the following year, and to report that amount on the annual statement it filed with state regulators. (A454-A455, A456-A459, A1294.) This mandatory financial accounting matched MassMutual's dividend expense with the income that generated that expense. (A1300-A1301.) The matching reflected the economic substance of policyholder dividends, which are rebates of premiums previously paid, as well as the true financial position of MassMutual, as its state regulator required. (A1294, A1301.)

B. The Change in Law that Created the Accounting Mismatch

The Internal Revenue Code has always allowed mutual insurance companies to deduct dividends paid on life insurance policies for purposes of calculating their taxable income. *See* Code § 805(a)(3).[4] Prior to 1984, life insurance companies

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[4] "The Internal Revenue Code (I.R.C. or the 'Code') is codified in Title 26 of the United States Code." *Deutsche Bank AG v. United States*, 742 F.3d 1378, 1381 *(cont'd)*

accounted for policyholder dividends for federal income tax purposes on a "reserve" method, meaning that the dividends were deductible in the year they were declared out of reserves. Effective January 1, 1984, Congress required life insurance companies to deduct the dividends on an accrual method, meaning that the dividends were deductible when they accrued under the all-events test of Code section 461(h). Applying the accrual method to MassMutual's dividend declarations did not permit MassMutual to deduct dividends in the year it declared them. Accordingly, a mismatch arose between the way that MassMutual reported its policyholder dividends for financial accounting purposes and for tax accounting purposes. (A8.)

Congress recognized that this change in tax accounting would pose a special problem for insurance companies in 1984: Under the new tax accounting regime, the only dividends that accrued in 1984 had already been deducted under the reserve method in 1983. Because the Code generally forbids deducting the same amount more than once, insurance companies would not have been able to take any deduction for policyholder dividends in 1984. To avoid this problem, Congress included in the bill a "fresh start" provision that ensured that these companies

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n.1 (Fed. Cir. 2014). Treasury regulations are likewise codified in Title 26 of the Code of Federal Regulations.

would be able to take a one-time deduction in 1984 for policyholder dividends on pre-1984 policies. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 216(b), 98 Stat. 494, 758-61 (the "1984 Act"). The fresh start provision allowed taxpayers affected by the change in law to deduct dividends paid in 1984 twice: once in 1983 when they accrued under the reserve method, and once in 1984 when they accrued under the all-events test required by an accrual method.

The benefit offered by the fresh start, however, was restricted. If a company later accelerated its deductions *on policies issued in 1983 or earlier*, Code section 808(f) recaptured part of the fresh start benefit. Because the fresh start provision affected only policies on which dividends were deducted both in 1983 and 1984, Congress exempted any policy issued after 1983 from the restriction of Code section 808(f).[5] Code § 808(f)(7)(A).

[5] Congress was concerned only with acceleration of dividends with respect to policies that could benefit from the "fresh start" provision. *See* H.R. Rep. No. 426, 99th Cong., 1st Sess. 946 (1985), 1986-3 C.B. (Vol. 2) 946 (stating that the recapture provision is intended to apply only "to the extent the *detriment caused by the statutory change* is mitigated in fact by a company's own changed business practices" (emphasis added)); S. Rep. No. 313, 99th Cong., 2d Sess. 966 (1986), 1986-3 C.B. (Vol. 3) 966 (same language as House Report); Staff of the Joint Comm. on Taxation, 98th Cong., 2d Sess., General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984, 611 (JCS-41-84) (Comm. Print 1984) (same language as Senate and House reports).

Only policies issued after 1983 are at issue in this case.[6]

MassMutual had designed its policyholder dividend practices before the 1984 Act, when it was required to use the reserve method of tax accounting. Under this method, its accounting for both tax and financial purposes was the same and matched the deduction for rebating premiums with the revenue generated by the premiums. However, application of the 1984 Act to MassMutual's existing dividend practices disconnected the rebates from the premiums for tax accounting purposes. Accordingly, MassMutual began evaluating ways to align its tax and financial accounting in a manner that better matched the income from premiums and the return of premiums as rebates, while at the same time not triggering the recapture provision for pre-1984 policies because of the harm that the recapture provision would have imposed on all of its policyholders. (A1300, A1328.)

C. MassMutual's 1995, 1996 and 1997 Board of Directors Resolutions

Prior to 1995, the year in which it first guaranteed dividends, MassMutual concluded that federal income tax law after the 1984 Act did not allow it to deduct these policyholder dividends on its federal income tax return in the same year it

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[6] The Government's veiled suggestion that the fresh start recapture provision applies to the Dividend Guarantees is incorrect. (*See, e.g.*, GBr. 7-8.) The fresh start recapture provision does not apply to the Dividend Guarantees, which cover only post-1983 policies.

took them into account for financial accounting purposes. (A1294.) Although the amount of dividends was reasonably estimable, MassMutual's liability to pay any of the unpaid dividends was not fixed at year's end. (A1295.) Thereafter, MassMutual formulated a solution to resolve the mismatch in timing. Specifically, MassMutual determined that guaranteeing a fixed minimum dividend amount to a defined class of eligible participating policyholders whose policies were issued after 1983 (the "post-1983 policyholders") would fix its liability for the guaranteed policyholder dividends in the year they were declared. (A8.) As before, each fall in 1995, 1996, and 1997, MassMutual's Board of Directors approved resolutions setting dividend scales for 1996, 1997, and 1998, respectively (the "Dividend Scale Resolutions"), declaring the aggregate amount of dividends that would be paid in the following year to eligible participating policyholders. (A5, A12, A14-A15.) Then, in December of each year, MassMutual's Board supplemented the Dividend Scale Resolution with a Dividend Guarantee that guaranteed payment of a minimum amount of dividends to a defined class of participating post-1983 policyholders. (A5-A6, A12, A14-A16, A204, A215-A217, A231-A232, A244-A245.)

In the Dividend Guarantees, MassMutual's Board did not guarantee payment of any amount to any particular policyholder. Instead, the Dividend Guarantees committed MassMutual to pay a minimum fixed aggregate amount of policyholder

dividends to the class of post-1983 policyholders over the course of the next year. (A5-A6, A12, A14-A16, A204, A215, A231, A244.) The class existed at year's end: As of December 31 of each of the years at issue, over one hundred thousand of those policyholders had paid their premiums through their next anniversary date in the year before the anniversary date occurred. (A423-A424, A1434.) And there were thousands of post-1983 policies whose owners had paid all of the premiums they were ever going to have to pay. (A34, A423-A424, A1434.)

After dividends were guaranteed, class membership would change, both because individual paid-up policyholders retained the right to cash out before their policy anniversary dates and because many other policyholders would join the class the following year by paying premiums through their anniversary dates. As the Government concedes, the changing composition of the class did not prevent year-end accrual of a group obligation. (GBr. 36 n.10.)

The Board set the minimum fixed amount of the Dividend Guarantee at approximately 85% of the amount it expected to pay to the class based on the particular year's Dividend Scale Resolution. (A10, A13-A14, A16.) MassMutual was comfortable guaranteeing a large minimum payment because it could forecast accurately the amount of policyholder dividends it would actually pay in the coming year. The number of participating policies in force on their anniversary date in the year following the Board's adoption of the Dividend Scale Resolution

historically had been very stable and, thus, highly predictable. (A34, A287.) Accordingly, MassMutual expected to pay, and historically paid, nearly all of the total divisible surplus authorized by its Board each year, an amount well in excess of the Dividend Guarantees. (A287, A1294-A1295.) Nevertheless, only amounts guaranteed to the class were deducted in the year of the Dividend Guarantees.

MassMutual set the Dividend Guarantee minimum amounts at a level that it was virtually certain to pay in the normal course of business. (A287.) MassMutual committed to monitor the amount of dividends that it paid the following year to post-1983 policyholders. The Dividend Guarantee Resolutions established a process for monitoring throughout the year how much of the guaranteed amount MassMutual had paid. (A206, A216, A232, A245, A1310.) In the highly unlikely event the monitoring process revealed that the total amount actually paid during the year was going to be less than the guaranteed amount, MassMutual committed in the Dividend Guarantee Resolutions to make a second round of dividend payments to remaining class members to comply with the guarantee. (A206-A207, A216-A217, A232, A245, A1308-A1309.) Although MassMutual expected that it would never have to make the second round of payments, it stood ready to do so if necessary and possessed the financial ability to pay the guaranteed minimum amounts in each of the years at issue in this case. (A1290, A1404-A1405, A1642-A1643.)

D. Notification to State Insurance Commissioners

Both MassMutual and ConnMutual informed their primary regulators, the Massachusetts Division of Insurance ("Insurance Division") and the Connecticut Insurance Department, respectively, of the adoption of their Dividend Guarantees in 1995. (A8-9, A12.) In each subsequent year, MassMutual notified the Insurance Division in writing of its adoption of a Dividend Guarantee. (A14-A16.) MassMutual contacted the Insurance Division to ensure its primary regulator did not object to the minimum Dividend Guarantee plan, and to protect the interests of MassMutual policyholders. (A1323, A1325.)

In November of 1995, representatives of MassMutual met with the senior representatives from the Insurance Division. (A8.) During that meeting, the MassMutual representatives detailed the plan to implement, annually, a dividend guarantee with regard to post-1983 policies, including its purpose and the fact that it was an aggregate guarantee to a class and not to any individual policyholder. (A8-A9, A1335.) The Insurance Division raised no objections. (A9.) During the meeting, the Commissioner of the Insurance Division directed the Assistant Commissioner to instruct the examiners who performed MassMutual's examination to verify that MassMutual paid the guaranteed minimum in accordance with the terms of the annual Dividend Guarantee Resolutions. (A1339.)

After that meeting, MassMutual sent a letter informing the Insurance Division of its intent to adopt the Dividend Guarantee. (A8-A9.) On the advice of its government relations staff, who gave input on the protocol of communications with the Insurance Division, MassMutual also provided, as a courtesy to save the Insurance Division the time of drafting its own letter, a draft letter the Insurance Division could sign and return to MassMutual expressing the Insurance Division's approval of and intent to enforce the proposed guarantee. (A223, A1338.) Subsequently, the Assistant Commissioner signed and sent the letter to MassMutual reaffirming the Insurance Division's intent, originally expressed at the November meeting, to "instruct the examiners who perform MassMutual's Examination to verify that the guaranteed aggregate amount is paid." (A9.)

As the Government's expert conceded at trial, however, the Insurance Division would not have needed to enforce the Dividend Guarantee unless MassMutual failed to pay it and then also failed to make a second round of payments to make up for the shortfall. (A1629-A1630.) MassMutual expected that it would pay policyholder dividends in excess of the guaranteed minimum in each of the years at issue, and thus a second round of payments would not be necessary. (A10, A287.) This expectation was borne out: In each of the years before the Court, MassMutual more than satisfied the guaranteed minimum amounts to post-1983 policyholders. (A12, A15, A17.)

Case: 14-5019 Document: 22 Page: 24 Filed: 05/02/2014

In 1995, ConnMutual undertook similar action with its primary regulator, the Connecticut Insurance Department. (A12.) In November, ConnMutual sent a letter to the Connecticut Insurance Department outlining its plan to supplement its 1996 dividend scale with a dividend guarantee. (A12.) ConnMutual further stated that it would include appropriate disclosure on its Annual Statement explaining the scope and nature of the guarantee. (A12.) As promised, ConnMutual disclosed in its Annual Statement that the Board of Directors had "guaranteed that in 1996, a total of no less than $97.0 million will be paid or applied in the aggregate as annual dividends on certain life insurance and annuity contracts." (A13, A210.)

In each of December of 1996 and 1997, following the 1996 merger, MassMutual sent a letter to the Insurance Division informing it that MassMutual's Board of Directors had again voted to adopt guarantees similar to the ones adopted in 1995. (A14-A16.) In 1996, the Assistant Commissioner approved the letter and sent it back to MassMutual. (A15.)

E. MassMutual's Tax Reporting and the IRS Challenge

MassMutual has used an accrual method of accounting with respect to policyholder dividends since 1984, which means that the Code generally allows it to deduct a liability when the liability satisfies three requirements:

Case: 14-5019 Document: 22 Page: 25 Filed: 05/02/2014

1. All the events have occurred that establish the fact of the liability;
2. The amount of the liability can be determined with reasonable accuracy; and
3. Economic performance has occurred with respect to the liability.

Code § 461(h)(1), (4).

MassMutual believed that as a result of the Dividend Guarantees, all events had occurred that established its liability for federal income tax purposes for those amounts. The parties are agreed that the amounts could be determined with reasonable accuracy. (A44.)

With respect to the third requirement, Treasury Regulations section 1.461-4 provides rules for determining when economic performance has occurred, depending on the type of liability in question. Certain liabilities are considered "payment liabilities" for purposes of the economic performance rules, and for such liabilities, economic performance generally occurs no earlier than when the taxpayer actually pays the liability.[7] However, Treasury Regulations create an exception (the "recurring item exception") to this general rule for payment liabilities like the guaranteed minimum dividends. Specifically, Treasury

[7] The parties stipulated that MassMutual's liabilities to pay policyholder dividends were payment liabilities. (A1000.)

Regulations section 1.461-5 provides that a liability accrues prior to actual payment if it meets three additional requirements:

1. Payment of the liability must occur on or before the earlier of (a) the date the taxpayer files a timely (including extensions) return for the year of the accrual; or (b) 8 ½ months after the close of the taxable year of the accrual;
2. The liability must be recurring in nature; and
3. Either of the following must be true: (a) the amount of the liability is not material; or (b) the accrual of the fixed and determinable liability results in a better matching of that liability with the income to which it relates.

Treas. Reg. § 1.461-5(b)(1). Liabilities meeting these requirements are deductible when they become fixed and determinable with reasonable accuracy.

The types of payments that are eligible for the recurring item exception include "rebate[s], refund[s], or similar payment[s]." Treas. Reg. § 1.461-4(g)(3). The regulations explain that the exception applies to "all rebates, refunds, and payments or transfers in the nature of a rebate or refund." *Id.* The regulations further provide that the third requirement of the recurring item exception is deemed satisfied for a payment that is treated under Treasury Regulations section 1.461-4(g)(3) as "a rebate, refund, or similar payment." Treas. Reg. § 1.461-5(b)(5)(ii). The catch-all language "similar payment" and "payments or transfers *in the nature*

of a rebate or refund" makes clear that the recurring item exception applies broadly not only to payments that strictly qualify as rebates or refunds, but also to other payments that have some similar characteristics. Treas. Reg. § 1.461-4(g)(3) (emphasis added).

MassMutual concluded that it met the requirements of the recurring item exception because the portion of the Dividend Guarantees that it expected to pay in the first 8 ½ months of the following year were payment liabilities that were recurring in nature and qualified as refunds of premiums that the policyholders had paid.[8] Thus, in each year at issue, it accrued and deducted that portion for federal income tax purposes. (A461.)

While agreeing that MassMutual's policyholder dividends were deductible, the IRS challenged the timing of those deductions. MassMutual paid the additional taxes that resulted from the IRS challenge, and it then sought a refund. The IRS took no action on its refund claims. MassMutual then sued the Government for a refund in the Court of Federal Claims. Following discovery, the parties entered into stipulations with respect to nearly all of the relevant facts. (A450-A465,

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[8] Thus, for every $100 of dividend declared by MassMutual, it guaranteed it would pay approximately $85 to the class. It determined that approximately 71% (8 ½ / 12) of this guaranteed amount met the recurring item exception. MassMutual deducted the 71% in the year of the Dividend Guarantee and the remaining 29% in the year following the Dividend Guarantee.

A1000-A1001.) Judge Horn conducted a two-day trial on the remaining factual issues in December 2009. (A91.) Judge Horn received two rounds of post-trial briefing from the parties, and while writing her opinion, she ordered the parties to address additional issues. (A94-A95, A890-A891, A1002-A1014.)

F. The Opinion of the Court of Federal Claims

The Court of Federal Claims issued an 83-page opinion holding that the portions of the Dividend Guarantees that MassMutual deducted satisfied all of the requirements of the "all events" test and the recurring item exception to the economic performance requirement. (A3-A85.) The court also rejected the Government's contention that the Dividend Guarantees must be disregarded because they lacked economic substance. (A81, A84.) Accordingly, the court entered judgment in MassMutual's favor. (A84.)

Applying the "all events" test, the court first rejected the Government's claim that the Dividend Guarantees failed to establish the fact of liability. (A20-A42.) The court invoked three key cases holding that liabilities to a class of recipients were fixed: *Washington Post Co. v. United States*, 405 F.2d 1279 (Ct. Cl. 1969), *United States v. Hughes Properties, Inc.*, 476 U.S. 593 (1986), and *Kershaw Manufacturing Co. v. Commissioner*, 313 F.2d 942 (5th Cir. 1963). Each of those cases permitted a taxpayer to deduct currently a liability to a defined and extant group even though at the time of deduction none of the ultimate recipients

of the payments could be identified with certainty. (A24-A25.) The court also summarized authority holding that "a liability need not be legally enforceable under the 'all events' test," (A25 (citing *Eastman Kodak Co. v. United States*, 534 F.2d 252, 257 (Ct. Cl. 1976)) and that "Board resolutions can fix liability for purposes of the 'all events test.'" (A26 (citing *Champion Spark Plug Co. v. Commissioner*, 30 T.C. 295 (1958), *nonacq.* 1958-2 C.B. 3, *aff'd*, 266 F.2d 347 (6th Cir. 1959); *Willoughby Camera Stores, Inc. v. Commissioner*, 125 F.2d 607 (2d Cir. 1942); and *Produce Reporter Co. v. Commissioner*, 18 T.C. 69 (1952), *aff'd*, 207 F.2d 586 (7th Cir. 1953)).)

The court made a factual finding that "Plaintiff's Dividend Guarantees created an *unconditional obligation* to pay *an aggregate group* of policyholders the following year." (A40 (emphasis added).) The court found that on December 31, 1995, there were over 100,000 MassMutual policyholders who had paid their premiums through their policy anniversary date in the following year. The court explained that this fact "refutes the defendant's argument that there were not a *group of identifiable policyholders* already eligible for the guarantee[d] minimum amount of dividends." (A33-A34 (emphasis added).) The court also pointed to the roughly 2,000 policyholders who had paid all premiums that would ever be due on their policies, whom the court referred to as "paid-up policyholders." (A34-A35.) Citing the discussion of conditions precedent and subsequent in the Tax Court's

decision in *Burnham Corp. v. Commissioner*, 90 T.C. 953, 956 (1988), *aff'd*, 878 F.2d 86 (2d Cir. 1989), the court held that "if any event prevented the paid-up policyholders from receiving their policyholder dividends or rendered the paid-up policyholders ineligible for receiving the minimum guaranteed dividends, it would not be a condition precedent, rather a condition subsequent, which would not prevent liability from being fixed." (A35.) The court concluded that "[f]or the *identifiable group* of post-1983 policyholders with paid-up policies, no events other than the passage of time and payment of the policyholder dividend were required." (A35 (emphasis added).)

Having concluded that the Dividend Guarantees established the fact of a group liability, the court observed that IRS authority published after the trial directly supported its conclusion. (A40-A42.) In Revenue Ruling 2011-29, 2011-49 I.R.B. 824, the IRS concluded that an employer may deduct a guaranteed aggregate employee bonus amount in the year before the bonuses are paid, even though the employer does not know which employees will receive bonuses, and how much any particular employee will receive, if any (in part, because any particular employee might no longer be an employee when the bonus was paid). As the court explained, the IRS' position in the ruling "is consistent with the court's conclusion that plaintiff's Dividend Guarantees established the fact of liability even though the Dividend Guarantees did not identify which policyholders

would receive the minimum amount of guaranteed dividends or what amount each individual policyholder would receive under the Dividend Guarantees." (A42.)

After observing that the Government conceded that the amount of the liability could be determined with reasonable accuracy (A40-A42), the court turned to the economic performance requirement. (A44-A75.) Relying on numerous sources of authority, the court held that MassMutual's policyholder dividends were rebates, refunds, or similar payments that therefore qualified for the recurring-item exception to the economic performance requirement.

The court noted that the Code and Treasury Regulations offered no definition of "rebate or refund" that applied to the present circumstances. (A60.) The court thus looked to the ordinary meaning of the terms "rebate" and "refund" as set forth in Black's Law Dictionary and the Random House Unabridged Dictionary at the time the relevant regulation was enacted. For example, Random House defined rebate as "a return of part of [an] original payment." (A60-A61.)

In determining whether the policyholder dividends were "rebates," "refunds," or "payments or transfers in the nature of a rebate or refund" under the plain meaning of the words in the regulation, the court further took into account that standard insurance industry practice was to view policyholder dividends as refunds of premium. (A61-A62.) The court next observed that MassMutual itself considered policyholder dividends to be a return of premium, a view supported by

the Government's own experts.[9] (A62-A63.) The court then pointed to numerous academic sources stating that policyholder dividends were, in fact, rebates of premium. (A63-A64.) Next, the court evaluated a large body of precedent, including the Federal Circuit cases *John Hancock Financial Services, Inc. v. United States*, 378 F.3d 1302 (Fed. Cir. 2004), *Principal Mutual Life Insurance Co. v. United States*, 295 F.3d 1241 (Fed. Cir. 2002), and *Gulf Life Insurance Co. v. United States*, 118 F.3d 1563 (Fed. Cir. 1997), all of which acknowledged that policyholder dividends could be treated as rebates or refunds of premium. (A64-A67.) Following this examination of caselaw, the court observed that Code section 809 treated the policyholder dividends like those at issue here as rebates or refunds of premium. (A67-A71.)

Applying these authorities, the court concluded, "the policyholder dividends constitute rebates, refunds, or similar payments." (A75.) Because no other requirements of the recurring-item exception were in dispute, the court held that MassMutual's Dividend Guarantees satisfied the economic performance requirement of the "all events test." (A47, A75.)

[9] The court observed that the Government's expert attempted to make a fine distinction between a "return" of premium and a "refund" of premium. The court did not accept this distinction. (A62-A63 & A62 n.27.)

Finally, the court rejected the government's claim that MassMutual's Dividend Guarantees lacked economic substance. The court held that the economic substance doctrine applies to determine only whether a deduction is allowable, not when an admittedly allowable deduction may be taken. (A81, A84.) The Government does not challenge this holding on appeal.

Therefore, the court held that "Plaintiff should not be precluded from accounting for the Dividend Guarantees in the years in which they were enacted." (A84.) The court thereafter issued judgment for MassMutual. (A1-A2.)

SUMMARY OF THE ARGUMENT

MassMutual's Board of Directors fixed the company's liability by adopting resolutions guaranteeing payment of a minimum aggregate amount to a defined class of post-1983 policyholders the following year. *Washington Post Co. v. United States*, 405 F.2d 1279 (Ct. Cl. 1969), and other authorities establish that a company can fix a liability to an existing class of beneficiaries, even though the class composition may change before the liability is ultimately satisfied. The Dividend Guarantees fall squarely within this line of authority, which is consistent with *United States v. Hughes Properties, Inc.*, 476 U.S. 593 (1986), and *United States v. General Dynamics Corp.*, 481 U.S. 239 (1987).

The Government's hollow attacks on the Court of Federal Claims' holding that MassMutual's liability was fixed all flow from its attempt to wring numerous, discrete, individual guarantees out of MassMutual's unitary class guarantee. Long ago the Court of Claims rejected a similar argument in *Washington Post*, and the Government's rehashed argument here fails for the same reasons. As the Court of Federal Claims correctly found in this case, the "Dividend Guarantees created an unconditional obligation to pay an aggregate group of policyholders the following year." (A40.)

Further, the Court of Federal Claims correctly held that MassMutual's policyholder dividends were "rebates," 'refunds," or "payments or transfers in the

nature of a rebate or refund" within the meaning of Treasury Regulations section 1.461-4(g)(3). The text of the regulation applies to policyholder dividends, and the structure of the relevant provisions, the economic substance of policyholder dividends as set forth by industry usage and experts, and relevant precedents reinforce this interpretation of the text. Aside from the fact that it has waived any argument it may have had that this Court should defer to a litigating position not previously expressed, the Government's litigating position merits no deference under existing principles in governing precedents.

ARGUMENT

Standard of Review: "This court sustains the Court of Federal Claims' fact finding unless 'clearly erroneous.'" *AT&T Co. v. United States*, 307 F.3d 1374, 1377 (Fed. Cir. 2002). This Court reviews de novo the Court of Federal Claims' interpretation of the law, and its application of the law to the facts. *See In re Harvard Indus., Inc.*, 568 F.3d 444, 450 (3d Cir. 2009) ("all events" test); *Lengerich v. Dep't of the Interior*, 454 F.3d 1367, 1370 (Fed. Cir. 2006) (construction of a regulation).

I. MassMutual's Board of Directors' Guarantee Fixed Its Liability To Pay a Minimum Amount of Policyholder Dividends to the Defined Class of Post-1983 Policyholders the Following Year.

Since 1984, the Code has allowed accrual method taxpayers to deduct a liability when three requirements are satisfied:

(1) All events have occurred that establish the fact of liability;

(2) The amount of the liability can be determined with reasonable accuracy; and

(3) Economic performance has occurred with respect to the liability.

Code § 461(h)(1), (4).

The first and third elements of this "all events" test are at issue; the second is not.

A. The Board's Dividend Guarantees Established the Fact of Liability.

1. *Liability to an Existing Class Is Fixed Even Though the Class Composition May Change.*

In this circuit, a guarantee made to a defined, existing class fixes the liability in the year of the guarantee. In *Washington Post Co. v. United States*, 405 F.2d 1279 (Ct. Cl. 1969),[10] the Washington Post (the "Post") voluntarily adopted a plan to pay bonuses to a group of circulation dealers that bought its newspapers wholesale and then resold them to the public. However, if a dealer did not meet certain conditions, a portion of the dealer's bonus would be reallocated to other dealers in the group. The Post did not sign any contract with the dealers, either individually or as a group. *Id.* at 1281. The Post reserved the right to discontinue

[10] Decisions of the Court of Claims are binding on the Federal Circuit. *See Gevyn Constr. Corp. v. United States*, 827 F.2d 752, 754 n.2 (Fed. Cir. 1987).

or alter the plan at any time, but it stated that it was irrevocably obligated to distribute to the group all amounts accrued at the time of discontinuance or alteration. *Id.*

The Government challenged the Post's deduction of the full amount of the bonuses in the year it adopted the bonus plan, relying on the "theoretically possible" event that "given a sufficiently high turnover in dealers," no dealer in the group would receive the full bonus payment. *Id.* at 1283. The court explained that the Government's position turned on its "contention that what we have here is a series of unilateral offers to individual dealers, and that viewed singly, no one 'offer' ever becomes a liability to the Post except to the extent it results in 'acceptance'" and compliance with the specified conditions. *Id.* The Government also argued that "neither the ultimate recipients . . . nor the time of distribution can be ascertained in the year of accrual." *Id.*

The Court of Claims squarely rejected the Government's arguments and held that the taxpayer's plan fixed its liability in the year the plan was adopted:

> [W]e view this Plan for what it functionally is: a continuing liability on the part of the Post to compensate a group of dealers, the amount of compensation being fixed as of the end of each fiscal year, but the ultimate recipients, and the time of actual payout, undetermined, at least in part. We think the indeterminacy involved does not make the liability any less real, or any less fixed.

Id. Therefore, the court explained, "when a 'group liability' is involved, it is the certainty of the liability which is of utmost importance in the 'all events' test, and

not necessarily either the certainty of the time over which payment will be made or the identity of the payees." *Id.* at 1284.[11]

In an act of administrative defiance, since abandoned, the IRS announced in Revenue Ruling 76-345, 1976-2 C.B. 134, that it "will not follow the decision in the *Washington Post Company* case as a precedent in the disposition of similar cases." However, as the Court of Federal Claims observed (A40-41), after the trial in this case, the IRS in fact revoked the 1976 ruling in Revenue Ruling 2011-29, 2011-49 I.R.B. 824.

Revenue Ruling 2011-29 addressed an employee bonus program in which a taxpayer promised to pay a fixed aggregate bonus amount to a class of employees the following year. The employer deducted the aggregate amount in the year the bonus was declared. Although the group of employees that could receive a bonus existed, no liability to any particular employee was fixed: An employee who quit before the company paid the bonus the following year was ineligible for the bonus, and the bonus amount was reallocated to the other employees in the group. The IRS ruled that "[a]n employer can establish the 'fact of the liability' under § 461

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[11] *Washington Post* is not the first declaration of this principle. *See Produce Reporter Co. v. Commissioner,* 18 T.C. 69, 77 (1952), *aff'd*, 207 F.2d 586 (7th Cir. 1953) (aggregate amount of employee bonuses declared by the employer by year end was held to be a fixed liability even though, for any individual employee to be entitled to a bonus, the individual had to be an employee on the date the bonus was paid in the following year).

for bonuses payable to a group of employees even though the employer does not know the identity of any particular bonus recipient and the amount payable to that recipient until after the end of the taxable year." Rev. Rul. 2011-29, 2011-49 I.R.B. at 825. Accordingly, the IRS ruled that the company had fixed the liability with respect to the aggregate bonus payment.[12]

The Government's brief does not discuss *Washington Post* or Revenue Ruling 2011-29 except in passing, and then to concede begrudgingly "[t]hat the number and identities of the group members were likely to change over the course of the following year would not prevent the year-end accrual of the group obligation." (GBr. 36 n.10.) *Washington Post* and Revenue Ruling 2011-29 undoubtedly require that minimal concession. That a taxpayer's liability is not fixed for any identified class member has no bearing on whether it is fixed for the class.

[12] Like the Tax Court, this Court should "treat revenue rulings as concessions by the Commissioner where those rulings are relevant to our disposition of the case. *Rauenhorst v. Commissioner*, 119 T.C. 157, 171 (2002)." *Van Alen v. Commissioner*, T.C. Memo. 2013-235, at *20. Nevertheless, because Revenue Ruling 2011-29 is a straightforward application of the longstanding principles set forth in *Washington Post*, the Court need not rely on the Government's concession in the Revenue Ruling to decide this case.

2. *Remote Possibilities that the Class May Not Survive Are Disregarded.*

Washington Post established a broader principle that answers any question of whether the fixed liability element of the all events test is met in this case: A company's directors can voluntarily fix a liability by resolving that the company will make a payment to a class even if (a) no individual member of the class has a legally enforceable right to the payment before year's end and (b) any individual member of the class at year's end must survive as a member of that class to remain eligible for payment.

The Supreme Court's opinions addressing the fixed liability element of the "all events" test in *United States v. Hughes Properties, Inc.*, 476 U.S. 593 (1986), and *United States v. General Dynamics Corp.*, 481 U.S. 239 (1987), confirmed that theoretical possibilities that the class may not exist are disregarded. In *Hughes Properties*, the Supreme Court addressed a casino's liability to pay the annual incremental obligation for "progressive" jackpots that, under Nevada law, it was required to pay out eventually.[13] On each machine, the required payout increased

[13] Although *Hughes Properties* involved a situation in which the liability arose by operation of state law, the Supreme Court did not require legal enforceability as a condition of accrual. The Court of Federal Claims correctly held that the Government "acknowledged" that "a liability need not be legally enforceable to be fixed under the 'all events test.'" (A40.)

each time a gambler paid to pull the lever, but no one could know which lucky gamblers would someday win the jackpots. *Hughes Props*., 476 U.S. at 595.

In *Hughes Properties*, the Supreme Court explicitly rejected the argument that the casino's liability was not fixed because the casino would not owe the jackpots if it went out of business, was sold, ceased gaming operations, went into bankruptcy, or stopped attracting customers to its slot machines. *Id.* at 605-06. The Court held that the "potential nonpayment of an incurred liability exists for every business that uses an accrual method, and it does not prevent accrual." *Id*. at 606. Remote contingencies such as those identified in *Hughes Properties* are disregarded in determining whether a liability is fixed.

As distinguished from the fixed minimum jackpot amount in *Hughes Properties*, *General Dynamics* involved a statistical *estimate* of liabilities to numerous individuals. In that case, General Dynamics adopted an employee health plan that required employees to submit claims for reimbursement to company personnel. *General Dynamics*, 481 U.S. at 241. There was no certainty that employees who received health services ever would submit claims for reimbursement or that General Dynamics would approve any particular claims even though General Dynamics could accurately estimate its aggregate liability for claims that ultimately would be approved. *Id.* at 242.

The Supreme Court explained that a taxpayer may not "deduct an estimate of an anticipated expense, no matter how statistically certain, if it is based on events that have not occurred by the close of the taxable year." *Id.* at 243-44. The Supreme Court held that the final event necessary to fix liability did not occur until "properly documented claim forms were filed." *Id.* at 244. "Some covered individuals, through oversight, procrastination, confusion over coverage provided, or fear of disclosure to the employer of the extent or nature of the services received, might not file claims for reimbursement to which they are plainly entitled." *Id*. The Supreme Court held that "[m]ere receipt of services for which, in some instances, claims will not be submitted does not, in our judgment, constitute the last link in the chain of events creating liability for purposes of the 'all events' test." *Id.* at 245.

As the Court of Federal Claims explained, MassMutual's liability to the class of its policyholders is governed by *Washington Post* and *Hughes Properties*, not *General Dynamics*. The Court of Federal Claims found that MassMutual's "Dividend Guarantees created an *unconditional obligation* to pay *an aggregate group* of policyholders the following year." (A40 (emphasis added).) That factual

finding is correct.[14] The Dividend Guarantees established a specific minimum amount of policyholder dividends that MassMutual was unconditionally obligated to pay in the following year. Moreover, the Dividend Guarantees defined a class of more than 100,000 policyholders that, in the aggregate, was entitled to receive the minimum amount in the following year regardless of which individuals composed the class. That no member of the class at year's end would remain to receive a share of the MassMutual guaranteed amount is absurdly remote. MassMutual's liability for the guaranteed minimum was fixed for tax accounting purposes.

B. The Government's Arguments that Liability Was Not Fixed Are Based on Distorting the Guarantee.

The relevant precedents differentiate between a liability to a class (even where membership in the class can change before payment) and liabilities to numerous individuals. This distinction is fatal to the Government's arguments that MassMutual's liability to a class of its policyholders was not fixed.

[14] Not only does the Government fail to allege the finding is clearly erroneous, it "[a]ssume[s] that the dividend guarantees gave rise to 'obligations'" for purposes of most of its argument. (GBr. 35.)

1. *There Is No Requirement that Any Individual Liability Be Fixed for a Group Liability to be Fixed.*

The Government first argues that the Dividend Guarantees fixed MassMutual's obligation to pay the guaranteed amount only "if the annual-dividend obligation with respect to at least one post-1983 policy was also fixed at that time." (GBr. 35.) As explained above, this position simply retreads the argument that *Washington Post* rejected forty-five years ago and that the IRS recently and formally abandoned in Revenue Ruling 2011-29.

The Government then contends that "the group obligation under each dividend guarantee was entirely derivative of the company's obligation under individual post-1983 policies to pay declared annual dividends in the following year." (GBr. 35.)[15] Apparently wanting to re-argue *Hughes Properties* or perhaps dismiss it, "the Government's grounds for disputing the fact of the annual-dividend obligation with respect to paid-up policies do not include the factors addressed in

[15] MassMutual did not concede this point below. (GBr. 35-36.) MassMutual argued repeatedly in its post-trial brief (including in a section heading), that "[t]he Dividend Guarantee Resolutions Fixed [Its] Liability for the Purposes of the All Events Test." (A657; *see also* A657-A667.) MassMutual's objections to the Government's proposed findings of fact merely addressed the Government's faulty argument about the circumstances in which a second set of payments would be needed to ensure MassMutual had paid the minimum aggregate amount. The Government's proposed findings were unsupported by the Dividend Guarantees they cited. In any event, MassMutual advanced its legal arguments in its briefs, not in responses to proposed findings of fact.

Hughes Properties – viz., the lack of an identifiable obligee or the possibility of default by the obligor." (GBr. 40) The Government is wrong—its argument *does* turn on what it claims is the lack of an identifiable obligee: The Government contends that "[t]he obligations under the guarantees could be fixed at year-end only if the annual-dividend obligation with respect to at least one post-1983 policy was also fixed at that time." (GBr. 35.) In other words, the Government demands, just as it did in *Washington Post*, identification of an obligation on a particular policy owned by an individual policyholder.

2. *The Court of Federal Claims Correctly Held that the In-Force Requirement for Individuals Was Not a Condition Precedent to the Group Liability.*

The Government's next argument—that each individual policyholder's decision not to cash out the policy before its anniversary date was a condition precedent to liability (GBr. 40-46)—is a different twist on the same rejected theme: the Government's attempt to transmute the liability to a class into "a series of unilateral offers to individual[s]." *Washington Post*, 405 F.2d at 1283. MassMutual guaranteed a minimum payment to a defined class, the existence of which did not depend on any particular policyholder's decision to cash out or not.

In addressing the condition-precedent/condition-subsequent issue below, the Court of Federal Claims correctly applied the Tax Court's and the Second Circuit's analysis from *Burnham Corp. v. Commissioner*, 90 T.C. 953, 956 (1988), *aff'd*,

878 F.2d 86 (2d Cir. 1989), to the facts of this case. (A32-A35.) In *Burnham*, the courts held that a tort defendant's liability was fixed with respect to a settlement in which payments above a set minimum amount were due only so long as the plaintiff remained alive. 90 T.C. at 954. The defendant sought to deduct the amount that would be paid over the course of the plaintiff's expected life. The Government argued that only the specified minimum amount could be deducted. The Tax Court held that, although "[a] taxpayer is . . . prevented from obtaining the benefit of a deduction for an expense that he has *no* liability to pay until some event, other than the passage of time, occurs," the plaintiff's death was a condition subsequent, which could only serve to cut off Burnham's liability in the future. *Id*. at 956; *see id.* at 956-58. In affirming the Tax Court, the Second Circuit held that the plaintiff's continued survival should not "be viewed as an 'event' for purposes of the all events test" because it was "merely a continuation of the status quo." *Burnham Corp. v. Commissioner*, 878 F.2d 86, 88 (2d Cir. 1989). "Since nothing but a continuation of the status quo was necessary to obligate Burnham to keep making payments to [the plaintiff], . . . the Tax Court properly viewed Burnham's liability as fixed." *Id*.

Here the Court of Federal Claims applied *Burnham* not to *individual* policyholders but to MassMutual's demonstration that the defined class of post-1983 policyholders to which it guaranteed a minimum aggregate amount existed at

the time of the Dividend Guarantees: "For the *identifiable group* of post-1983 policyholders with paid-up policies, no events other than the passage of time and payment of the policyholder dividend were required." (A35 (emphasis added).) The Court of Federal Claims' conclusion here is nearly identical to the holding in *Washington Post* and Revenue Ruling 2011-29, which rejected the Government's argument that additional conditions had to be satisfied for individual beneficiaries to remain in the group (the continued compliance of individual Washington Post newspaper distributors with specified conditions, the continued employment of employees seeking bonuses, and the decision of individual MassMutual policyholders not to cash out). Once the Board adopted MassMutual's guarantees, no conditions preceded payment to the class of post-1983 policyholders the following year.

3. *The Second Circuit's* New York Life *Decision, Like* General Dynamics, *Did Not Address a Group Liability.*

The Government wrongly contends that the Second Circuit's opinion in *New York Life Insurance Co. v. United States*, 724 F.3d 256 (2d Cir. 2013), "squarely rejected the argument advanced by MassMutual." (GBr. 47-55.) Once more, the Government ignores the critical difference between that case and this one: *New York Life* addressed thousands of separate liabilities to individual policyholders, any one of which could cease to be a policyholder at any time. Simply put,

liability to a class of policyholders, like the one created by the Dividend Guarantee in this case, does not depend on identifying individual policyholder liability.

New York Life's complaint, as described in the Second Circuit's opinion, demonstrates that New York Life's dividend policy was different from MassMutual's in that New York Life never made a guarantee. Specifically, New York Life did nothing more than declare policyholder dividends in one year and then pay them in the following year. *New York Life*, 724 F.3d at 259. New York Life argued that its liability for a dividend payment became fixed at the moment the policyholder made the final payment necessary to keep the policy in force through its anniversary date.[16] *Id.* at 263. But, because (1) a policyholder could choose to cash out the policy after paying the final premium but before the policy anniversary date and (2) nothing required New York Life to pay any dividends to a policyholder who chose to cash out before the policy anniversary date, the court

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[16] In the district court, New York Life argued that its practice of crediting dividends to a particular policyholder's account for internal bookkeeping purposes was the event that fixed liability. *New York Life Ins. Co. v. United States*, 780 F. Supp. 2d 324, 328 (S.D.N.Y. 2011), *aff'd*, 724 F.3d 256 (2d Cir. 2013). It credited the policyholder dividend to a policyholder's account on the later of (1) thirty days before the policy anniversary date or (2) payment of the final premium sufficient to keep the policy in force through its anniversary date. *Id.* at 326. The district court rejected this argument, and New York Life abandoned it. *New York Life Ins. Co. v. United States*, 724 F.3d 256, 263 n.10 (2d Cir. 2013). On appeal, New York Life argued that the final required premium payment was the event that fixed liability. *Id.* at 263.

found that no liability was fixed until the policy anniversary date. *Id.* at 263-64. The Second Circuit characterized the decision not to cash out a policy as an affirmative choice made each year by each policyholder. *Id.* at 264. Accordingly, it determined that the decision not to cash out a policy was an "event" that had to occur in order for liability to be fixed. *Id.* at 265-66. The Second Circuit explained that "we see New York Life's case as distinguishable—if perhaps at the margins—from that considered in" the Court of Federal Claims' decision in this case. *Id.* at 265 n.12.[17]

New York Life's declaration of dividends to particular policyholders, however, stands in stark contrast to the class guarantee that MassMutual's Board adopted. Hardly "at the margins," New York Life sought to deduct the sum of thousands of individual liabilities, not a unitary class liability, and the court gave no indication New York Life ever guaranteed a fixed amount to a class. Because each of those individual liabilities depended on the individual policyholder's decision not to cash out the policy before its anniversary date, New York Life

[17] The Second Circuit made the distinction based on the fact that New York Life's dividend policy explicitly required that an individual "not have surrendered her policy for cash prior to the policy's anniversary date." *New York Life*, 724 F.3d at 265 n.12. The Second Circuit observed that MassMutual's dividend policy contained no such requirement. *Id.*

could not establish its liability to pay dividends was fixed until the relevant policy anniversary dates.

By contrast, if any particular policyholder (or group of policyholders) cashed out a MassMutual policy, MassMutual remained obligated to pay a fixed aggregate amount to any remaining members of the class. Under the Dividend Guarantee, as distinguished from the situation in *New York Life*, an individual MassMutual policyholder's decision to cash out the policy would have no effect on MassMutual's liability for the guaranteed amount—just as an individual dealer's decision to quit selling newspapers had no effect on the total bonus liability in *Washington Post*.[18]

[18] In several instances, the Government references "MassMutual's claim that the annual-dividend obligation with respect to paid-up policies was fixed at year-end." (GBr. 48-49; *see also* GBr. 54 (arguing that MassMutual has "concede[d] that the viability of its accrual argument with respect to the dividend guarantees is wholly dependent on the year-end status of the annual-dividend obligation *vis-à-vis* those paid-up policies").) To be clear, MassMutual's position has always been that "[t]he Dividend Guarantee Resolutions Fixed [Its] Liability for the Purposes of the All Events Test." (A657.) Under *Washington Post*, the status of individual policies does not affect the question whether liability is fixed for the defined class of policyholders. The fact that thousands of individual policies were paid up for life reinforces the ironclad effect of the Dividend Guarantees.

C. The Court of Federal Claims Correctly Found that "Plaintiff's Dividend Guarantees Created an Unconditional Obligation."

The Court of Federal Claims found that "Plaintiff's Dividend Guarantees created an unconditional obligation to pay an aggregate group of policyholders the following year." (A40.) The Government challenges this finding by arguing "that the 'obligations' under the dividend guarantees were illusory." (GBr. 55.) Ample evidence in the record supported the Court of Federal Claims' factual finding, and the Government does not even attempt to meet its burden of demonstrating that the finding was clearly erroneous. The Government cannot evade clearly erroneous review through its argument that, even though the Dividend Guarantees created "true obligations" (GBr. 55.), those obligations were not sufficiently meaningful to establish the fact of liability.

As the Court of Federal Claims explained, "Board resolutions can fix liability for the purposes of the 'all events test.'" (A26.) In *Champion Spark Plug Co. v. Commissioner,* 30 T.C. 295 (1958), *nonacq.* 1958-2 C.B. 3, *aff'd*, 266 F.2d 347 (6th Cir. 1959), the company's board of directors resolved to provide sixty semi-monthly payments to a disabled employee (or, upon his death, to his widow) in recognition of the fact that his position with the company, which involved extensive international travel, had prevented the employee from obtaining life insurance. The company had no legal obligation to provide the payments; rather, it did so voluntarily. *Id*. at 297-98. The Tax Court found it "sufficient here that the

petitioner desired to obligate itself to make the payments" and "translated its desire into an unconditional obligation to make the payments." *Id.* at 298. The Sixth Circuit affirmed. *Commissioner v. Champion Spark Plug Co.*, 266 F.2d 347, 347-48 (6th Cir. 1959).

Similarly, in *Willoughby Camera Stores, Inc. v. Commissioner,* 125 F.2d 607 (2d Cir. 1942), the Second Circuit permitted an accrual basis taxpayer to deduct amounts declared in a resolution of the company's board of directors as employee bonuses to be paid in the following year. The court held that "[t]he action of the board of directors . . . must be regarded, in view of the company's custom, as definitely fixing a minimum for the amount to be paid." *Id*. at 609; *see also Produce Reporter Co. v. Commissioner*, 18 T.C. 69 (1952), *aff'd*, 207 F.2d 586 (7th Cir. 1953) (approval by board of directors of bonus payments sufficient for accrual).

The Government contends that *Champion Spark Plug*, *Willoughby Camera*, and *Washington Post* should all be distinguished because MassMutual generally did not announce the guarantees to its policyholders.[19] The Government reasons, without authority, that the Dividend Guarantees "will remain entirely voluntary, as

[19] As noted above, ConnMutual informed policyholders about the 1995 guarantee. (A12-A13, A210.)

there will be no stakeholders to answer to should the endeavor fall short or never materialize." (GBr. 55-56.) This argument is meritless for several reasons.

First, it flatly contradicts the Court of Federal Claims' finding that the Board's Dividend Guarantees created an "unconditional obligation." (A40.) The Court of Federal Claims gave no indication in its finding that it was using the word "obligation" in anything other than "the ordinary sense of the word." (GBr. 56.) Its finding is not clearly erroneous.

Second, no relevant precedent gives any indication that it turned on a board's public announcement of its obligations. Indeed, the Court of Federal Claims observed below that it was not apparent that the beneficiaries in *Champion Spark Plug* and *Willoughby Camera* were aware of the board resolutions, and it noted that neither opinion even suggested that such awareness affected its analysis. (A38.) The Government offers no persuasive explanation why the accrual should turn on announcement of the guarantee. In any event, the Government concedes its argument is nothing but makeweight by immediately "stress[ing] that disclosure of the dividend guarantees to the policyholders" would not have made any difference to the analysis. (GBr. 59.)

Third, the Government's attempt to undermine MassMutual's commitment to its primary regulators, the Massachusetts Division of Insurance and the Connecticut Insurance Department, fails. The Government does not challenge the

court's finding that the regulators intended to instruct insurance examiners to verify that the guaranteed amount was paid. (A39.) The Government instead argues that "the guarantees did not represent a substantive undertaking" because their payment "was already virtually certain to occur." (GBr. 60.) But this observation supports MassMutual's argument. The fact that MassMutual was virtually certain to pay the guaranteed amounts reinforces MassMutual's claim that its liability to pay them accrued in the year of the guarantees. The MassMutual Board's guarantee to pay was real.

The Government thus offers no sound justification for overturning the Court of Federal Claims' finding that "Plaintiff's Dividend Guarantees created an unconditional obligation to pay an aggregate group of policyholders the following year." (A40.)

II. MassMutual's Liability for the Guaranteed Minimum Amount of Policyholder Dividends Satisfied the Recurring Item Exception to the Economic Performance Requirement.

The only other element of the "all events" test at issue is "economic performance." Satisfying the "recurring item" exception to the economic performance rule permits deductibility. The Court of Federal Claims correctly held that MassMutual's liability for the guaranteed minimum amount of policyholder dividends was a "recurring item" as "rebates, refunds, and payments or transfers in the nature of a rebate or refund" within the meaning of the Treasury

regulations. The Government's arguments to the contrary fail for three independent reasons.

First, the Government conceded below that MassMutual's policyholder dividends were "returns" of paid premiums. As such, they must be "rebates," "refunds," and "payments or transfers in the nature of a rebate or refund" under any reasonable construction of that regulatory phrase. Second, the Government failed to raise its deference argument in the Court of Federal Claims, and, consequently, waived it. Third, had the Government preserved its deference argument, which it has not, its position is not entitled to deference. The Government does not demonstrate that its litigating position reflects the considered views of Treasury and the IRS, and the administrative documents that the Government cites do not support its position.

A. The Only Sound Interpretation of the Regulation Is that Policyholder Dividends Are Rebates, Refunds, or Similar Payments.

The Court of Federal Claims correctly held that MassMutual's policyholder dividends are "rebate[s], refund[s], or similar payment[s]" within the meaning of Treasury Regulations section 1.461-4(g)(3). In interpreting the regulation, the Court of Federal Claims carefully considered several appropriate sources of authority: the language of the regulation, dictionary definitions of the word "rebate," the industry understanding of the nature of policyholder dividends,

opinions from this Court and from other courts, and the structure of the regulatory scheme. The Court of Federal Claims correctly determined that all of these sources led to the conclusion that policyholder dividends are "rebate[s], refund[s], or similar payment[s]" within the meaning of the regulation. The Government offers no persuasive argument to reverse the decision below.

"In construing a statute or regulation," this Court "begin[s] by reviewing its language to ascertain its plain meaning." *American Airlines, Inc. v. United States*, 551 F.3d 1294, 1299 (Fed. Cir. 2008). This Court has explained that "[c]ourts routinely look to dictionaries and treatises to determine the meaning of a statute at the time it was written." *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1284 (Fed. Cir. 2014) (en banc) (citing *Commissioner v. Soliman*, 506 U.S. 168 (1993) (interpreting the tax code by looking to dictionary definitions at the time of enactment)); *see also DaimlerChrysler Corp. v. United States*, 361 F.3d 1378, 1384 (Fed. Cir. 2004) (deeming invalid regulation that contravened dictionary definitions of statutory language).

Here, the Court of Federal Claims correctly began its analysis with the dictionary definitions of the words "rebate" and "refund." It applied the dictionary definitions as published when the relevant regulation was promulgated from Black's Law Dictionary and the Random House Unabridged Dictionary. (A60-A61.) Those dictionaries defined a rebate, respectively, as "[a] deduction from a

stipulated premium on a policy of insurance," (A60), and "a return of part of the original payment for some service or merchandise." (A61.) The Court of Federal Claims thus held that "[t]he above dictionary definitions of rebate and refund support [MassMutual's] view that a return of premium would be considered a rebate or return." (*Id.*)

It was likewise appropriate for the Court of Federal Claims to analyze the treatment of policyholder dividends in the insurance industry.[20] The court observed that the American Council of Life Insurers defines a policy dividend as "[a] refund of part of the premium on a participating life insurance policy." (A62.) The Connecticut Department of Insurance adopted a similar definition. (*Id.*) MassMutual's own contemporaneous communications with its policyholders explained that "[i]n a sense, dividends are the return of a portion of premium." (A317.) Experts for both parties, as well as trial counsel for the Government, agreed that policyholder dividends represented a return of premium. The court

[20] The Government contends with a "Cf." citation that *Caltex Oil Venture v. Commissioner*, 138 T.C. 18, 35-36 (2012), supports its argument that the Court of Federal Claims gave undue weight to industry usage of the term "rebate." (GBr. 69.) In *Caltex*, the taxpayer argued that the Tax Court should base its interpretation of a rule applicable to all industries on the effects that its interpretation would have on the oil and gas industry. Here, by contrast, the Court of Federal Claims properly weighed the substance of policyholder dividends, as understood in the mutual insurance industry, to determine whether they were "rebates," "refunds," or "payments or transfers in the nature of a rebate or refund." *See* Treas. Reg. § 1.461-4(g)(3).

also pointed to insurance law treatises that agreed with MassMutual's explanation of the substance of policyholder dividends as refunds of premium. (A63.)

As the Court of Federal Claims observed, multiple opinions from this Court have recognized that policyholder dividends from mutual insurance companies are rebates of premium:

- "Policyholder dividends are price rebates that the company can deduct from its taxable earnings." *John Hancock Fin. Servs., Inc. v. United States*, 378 F.3d 1302, 1303 (Fed. Cir. 2004).
- "Life insurance companies traditionally rebate to their policy holders, as excessive charges, part of the premiums paid and deduct these payments from their income." *CUNA Mut. Life Ins. Co. v. United States*, 169 F.3d 737, 738 (Fed. Cir. 1999).
- "The policyholder receives premium rebates, called dividends." *Gulf Life Ins. Co. v. United States*, 118 F.3d 1563, 1564 (Fed. Cir. 1997).

Other opinions also describe policyholder dividends as rebates. *See Principal Mut. Life Ins. Co. v. United States*, 295 F.3d 1241, 1242 (Fed. Cir. 2002) ("Mutual life insurance companies give premium rebates to their policyholders, but because the policyholders are also the company's owners, payments to policyholders are in part

price rebates, in part policyholder benefits, and in part returns on equity."[21]); *John Hancock Fin. Servs., Inc. v. United States*, 57 Fed. Cl. 643, 644 (2003), *aff'd*, 378 F.3d 1302 (Fed. Cir. 2004) ("Each year, life insurance companies customarily disburse rebates, referred to as 'policyholder dividends,' to their policyholders." (footnote omitted)); *Kern v. John Hancock Mut. Life. Ins. Co.*, 186 N.Y.S.2d 992, 996 (App. Div. 1959), *aff'd* 168 N.E.2d 532 (N.Y. 1960) ("The annual distribution of surplus . . . is not akin to a division of profits among stockholders of record at the year's end. It is in actuality an adjustment of the premium.").

The Government does not address the regulatory language, the dictionary definitions of the words at issue, or the longstanding industry understanding that policyholder dividends are rebates of premium. Nor does it even cite, much less attempt to distinguish, the relevant precedents from this Court on which the Court of Federal Claims relied.

Rather than confronting the authorities that squarely reject its position, the Government relies on what it admits in several instances is "negative inference." (GBr. 67-68.) The Government incorrectly contends that a negative inference should be drawn from language in Treasury Regulations sections 1.461-4(g) and

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[21] No part of MassMutual's policyholder dividends was a "return[] on equity" under former Code section 809. (A69; *see infra* pp. 51-52.) Nor has the Government alleged that MassMutual's policyholder dividends were policyholder benefits.

1.461-5. The language in Treasury Regulations section 1.461-4(g)(3) is expansive, and policyholder dividends fit well within it. For example, the regulation states that it "applies to *all* rebates, refunds, and payments or transfers in the nature of a rebate or refund regardless of whether they are characterized as a deduction from gross income, an adjustment to gross receipts or total sales, or an adjustment or addition to cost of goods sold." Treas. Reg. § 1.461-4(g)(3) (emphasis added). The Government argues that "none" of this language "has any natural application to policyholder dividends." (GBr. 67.) That argument is inconsistent with the Government's footnoted admission that policyholder dividends are "life insurance deductions" from "life insurance gross income." (GBr. 67 n25.) "Life insurance deductions" from "life insurance income" plainly fall within the list of items that "are characterized as a deduction from gross income."

Treasury Regulations section 1.461-4(g)(5) addresses liabilities "aris[ing] out of the provision to the taxpayer of insurance, or a warranty or service contract." The Government contends that the reference in this section to "insurance" implies that the exception for rebates, refunds, or similar payments cannot apply to policyholder dividends. (GBr. 67.) There is no reason to conclude that this rule constricts the plain meaning of the words used in the language of the regulation at issue in this case.

The Government next points to examples of a rebate and a refund in Treasury Regulations sections 1.461-4(g)(8) and 1.461-5, which involve companies that manufacture and sell hardware products and video cassette recorders. According to the Government, those examples must be read to exclude insurance companies from the coverage of the regulation. (GBr. 67-68.) But examples are just that: examples; they cannot constrict the broad definition of covered payments in the regulation itself.[22]

As the Court of Federal Claims explained, there is no merit to the Government's argument that the legislative history of Code section 809 (which is not at issue here and in any event has been repealed[23]) suggests that policyholder dividends are not rebates, refunds, or similar payments. (*See* A67-A70.) That provision applied a formula to determine whether any portion of the policyholder dividends paid by a mutual life insurance company should be treated as a nondeductible return on equity rather than a deductible rebate of premiums paid. *See John Hancock Fin. Servs. v. United States*, 378 F.3d 1302, 1303 (Fed. Cir.

[22] For similar reasons, the Government also misses the mark with its argument that Congress' discussion of the utility industry in the legislative history supports a negative inference that the rebate exception does not apply to the mutual insurance industry. (GBr. 68.)

[23] Following its suspension for tax years beginning in 2001, 2002 and 2003, former Code section 809 was repealed in 2004 and not replaced. Job Creation Worker Assistance Act of 2002, Pub. L. No. 107-147, § 611, 116 Stat. 21, 61; Pub. L. No. 108-218, § 205(a).

2004) (explaining that mutual life insurance companies' "policyholder dividends do not distinguish between price rebates and distributions of earnings," and that section 809 attempted to make that distinction using "a complex formula for calculating the portion of the policyholder dividends that a mutual company could deduct").

The Government has conceded that under former Code section 809, none of MassMutual's policyholder dividends in the years at issue was a nondeductible distribution of earnings; with temerity, the Government floats the excuse that the law was a political compromise. (A69; GBr. 70.) Accordingly, the only amounts at issue in this case are those that former Code section 809 would have treated as refunds or rebates of premium. *See John Hancock*, 378 F.3d at 1303-05.

Finally, the Government's argument is inconsistent with its longstanding position that policyholder dividends are not income to the policyholders. Code section 61(a)(7) specifically provides that a taxpayer must include "[d]ividends" in gross income. Policyholder dividends escape inclusion under Code section 61 because they are refunds of premiums that the policyholders have already paid. The Government's position that these payments are not refunds contradicts the appropriate federal income tax treatment of those dividends as non-taxable to policyholders.

In short, the Government's argument has no merit. The regulatory text, the structure of the relevant provisions, the economic substance of policyholder dividends as set forth by industry usage and the experts in this case, and relevant precedents from this Court and other courts all uniformly support the conclusion that MassMutual's policyholder dividends fall well within the broad language of "rebates, refunds, and payments or transfers in the nature of a rebate or refund."

B. The Government Waived Its Deference Argument.

The Government failed to argue below that the Court of Federal Claims should defer to its construction of the regulations governing the recurring item exception. In this Court, if a party "did not raise [an] argument before the Court of Federal Claims, it is waived on appeal." *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1355 (Fed. Cir. 2011). Citizens and their Government alike must raise all their arguments, *see Charles v. Shinseki*, 587 F.3d 1318, 1322 (Fed. Cir. 2009) (finding Government waiver of an argument made for the first time on appeal), including to the Government's arguments that its legal interpretations are entitled to deference. *See Commodity Futures Trading Comm'n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) ("[T]he CFTC waived any reliance on *Chevron* deference by failing to raise it to the district court."); *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 174 n.2 (3d Cir. 2004) (finding Government waiver

of argument that its interpretation of its regulation was entitled to deference).[24]

The Government's brief does not cite any portion of the record to claim it advanced the argument below.[25] And with good reason: Neither the Government's pre-trial memorandum (A486-A488) nor its post-trial brief (A750-A760) asked the Court of Federal Claims to defer to its interpretation of the regulation.[26]

Having eschewed ample opportunity below to seek deference to its litigating interpretation of the regulation, the Government has waived the argument.

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[24] *Auer v. Robbins*, 519 U.S. 452, 461 (1997), involved a situation in which the United States was not a party to the litigation and advanced its interpretation of a regulation for the first time when the Supreme Court invited it to file an amicus brief. Here, the Government had the opportunity to claim deference prior to appellate proceedings; it did not do so.

[25] The Government's contention that "[n]either party claimed below that the plain language of the regulation forecloses the other party's position, nor did the CFC make such a finding" (GBr. 62) is incorrect. MassMutual argued below that "there can be *no doubt* that the policyholder dividends at issue qualify as payments similar to or in the nature of rebates or refunds." (A673 (emphasis added).)

[26] The Government's failure to raise the issue below prevented development of the record on two key points: (1) whether Treasury and the IRS agree with the Government's litigating position in this case and (2) whether that litigating position represents their fair and considered judgment on the issue. As discussed in Part II.C, *infra*, the lack of evidence on these points should be construed against the Government. This case thus contrasts with the *Abbott Laboratories* litigation, in which the deference issue was raised and decided in the Court of Federal Claims. *See Abbott Labs. v. United States*, 84 Fed. Cl. 96, 107-08 (2008), *aff'd*, 573 F.3d 1327 (Fed. Cir. 2009).

C. The Government's Litigating Position Deserves No Deference.

The Government's deference argument should be roundly rejected for several additional reasons.

First, the Government has not established that its position is anything more than a convenient litigating position. Under the doctrine articulated in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer v. Robbins*, 519 U.S. 452 (1997), a court must defer to an agency's reasonable construction of its own regulation, but "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). The Supreme Court explained that:

> We have never applied the principle of those cases to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."

Id. at 212 (quoting *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971)).

Under this standard, this case is an even weaker candidate for *Auer* deference than was *Adair v. United States*, 497 F.3d 1244, 1252 (Fed. Cir. 2007), in which the Justice Department sought deference for what it claimed was the interpretation of the Office of Personnel Management ("OPM"). This Court

rejected the Government's invocation of *Auer* deference because the Government's interpretation was "found solely in the government's brief (signed only by Justice Department attorneys), and not signed by any OPM official, much less one at the policy level, nor, as far as is revealed, circulated through OPM. In fact, only the listing of an OPM attorney as of counsel on the brief reflects any OPM involvement at all." *Id.* (citations omitted). Here, it bears noting that the interpretation the Government advances is found solely in the Justice Department's briefs, and no IRS or Treasury official at any level—policy or otherwise—has signed the brief, even as "of counsel."

Furthermore, the Justice Department can offer no indication that the interpretation advanced here was "circulated through" Treasury or the IRS.[27] Indeed, the Government has not identified any statement from the IRS or Treasury regarding the status of policyholder dividends as rebates or refunds to which this Court should defer. Generally, when requesting deference to a particular position, the Government will point to some expression of that position or a similar position

[27] The lack of evidence about whether Treasury and the IRS previously adopted the position the Justice Department takes here is a direct result of the failure to raise the deference claim below. If the Court decides to address the deference claim in spite of the Government's waiver, any doubt whether the Government's position here "reflect[s] the agency's fair and considered judgment on the matter in question" should therefore be resolved against the Government. *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

by the relevant agency. For example, in *American Express Co. v. United States*, 262 F.3d 1376 (Fed. Cir. 2001), the Justice Department identified a General Counsel Memorandum that agreed with its litigating position. *Id.* at 1381-82. Here, the Government's brief carefully avoids stating exactly what authority—whether a regulation, an administrative ruling, or an informal letter—it wants the Court to defer to. There is none.

Mysteriously, the Government cites two Field Service Advice documents ("FSAs"), *neither of which actually takes the position that the Justice Department advocates here*. To the contrary, both FSAs acknowledge that policyholder dividends could be appropriately classified as rebates. *See* IRS FSA, 1994 WL 1865978 (Apr. 28, 1994) ("[W]e believe that the policyholder dividend liabilities at issue are appropriately classified as § 1.461-4(g)(7) 'other liabilities,' § 1.461-4(g)(3) 'rebates and refunds,' or some combination of the two."); IRS FSA 2411 (Aug. 24, 1998), 1998 WL 1984267 ("[I]t is possible to characterize the liability to pay policyholder dividends either as a rebate or as an 'other' liability.").

Even if either FSA supported the Governments' position, the Government fails to inform the Court that Code section 6110(k)(3) expressly provides that FSAs and similar documents "may not be used or cited as precedent." Indeed, the IRS' own Internal Revenue Manual states that an "FSA does not represent a final determination of the Service's position, even in the case for which it was

requested." IRM 4.8.8.12.1.3(1). These two FSAs, which are non-precedential, internal documents, and which do not take the position advanced here, do not support the Justice Department's deference claims.

Nor can the Justice Department find any support for its position in the precedents it cited from this Court. *Abbott Laboratories v. United States*, 573 F.3d 1327, 1333 (Fed. Cir. 2009), involved a situation where the Government invoked deference at all stages of the litigation, and thus the Court had "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 1331 (quoting *Auer*, 519 U.S. at 462)). Moreover, the Government in *Abbott Laboratories* identified FSAs that "at least suggest[ed] the interpretation now explicitly embraced." *Id.* at 1333. The excerpts from the FSAs cited by the Government here do not suggest the interpretation that the Justice Department advances.

The Government also fails to point to any non-IRS administrative authority supporting its position. In *Cathedral Candle Co. v. United States International Trade Commission*, 400 F.3d 1352 (Fed. Cir. 2005), the Government, arguing on behalf of the International Trade Commission, requested deference to a regulation promulgated by "[an]other agency that Congress ha[d] assigned . . . to administer" the relevant statute. *Id.* at 1364. Here, the Justice Department does not identify

any administrative authority from an agency outside of Treasury that takes the position that policyholder dividends are not rebates of premiums paid.

Finally, deferring to a view of the tax law expressed solely on appeal in a brief by the Justice Department bearing no indicia of Treasury or IRS involvement raises significant policy concerns. As discussed above, MassMutual had no opportunity to test the claimed deference because the Government did not raise it below. The extent and nature of Treasury or IRS involvement are key questions that MassMutual has no opportunity to investigate because the trial is over and fact finding is closed.

Moreover, as Justice Scalia explained in his concurring opinion *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2265-66 (2011), "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Id.* at 2266 (Scalia, J., concurring); *see also* John F. Manning*, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996). Justice Scalia's concerns regarding arbitrary government action are even more pressing when, as here, the Justice Department does not claim deference until appellate proceedings have begun.

More recently, Justice Scalia forcefully explained why *Auer* should be overruled, and Chief Justice Roberts and Justice Alito indicated their willingness to reconsider *Auer* in an appropriate case. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1339 (2013) (Scalia, J. concurring in part and dissenting in part); *id.* at 1338-39 (Roberts, C.J., concurring).[28] *Auer* should be overruled.[29] In any event, for the reasons listed above, there is no reason to extend such deference to the Justice Department's litigating position in this case.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

The minimum amount of policyholder dividends that the MassMutual Board of Directors guaranteed fixed its liability for that amount. Moreover, MassMutual's policyholder dividends were payments in the nature of rebates, refunds, or similar payments, and they thus qualified for the recurring item exception to the general requirement of economic performance. Accordingly, the guaranteed dividends deducted met the requirements of the "all events" test, and MassMutual correctly deducted guaranteed amounts of policyholder dividends in the year that it guaranteed them.

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[28] Justice Thomas has long criticized *Auer* deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 524-25 (1994) (Thomas, J., dissenting).

[29] MassMutual makes this argument to preserve it for potential Supreme Court review.

The judgment of the Court of Federal Claims should therefore be affirmed.

Respectfully submitted,

Dated: May 2, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on May 2, 2014. Counsel for the appellant are registered ECF users and will be served by the ECF system.

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CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 13,764 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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