

April 23, 2018

VIA ELECTRONIC MAIL – bradley.bailey@treasury.gov; daniel.mccarty@treasury.gov

Thomas C. West, Jr.
Tax Legislative Counsel
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220-0002

Bradley Bailey
Deputy Assistant Secretary for Tax and Budget
Office of Legislative Affairs
U.S. Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220-0002

Steven Seitz
Deputy Director
Federal Insurance Office
U.S. Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220

Daniel McCarty
Policy Advisor
Federal Insurance Office
U.S. Department of the Treasury
1500 Pennsylvania Ave, NW
Washington, DC 20220

Dear Messrs. West, Bailey, Seitz & McCarty:

The Council of Insurance Agents and Brokers (The Council), the Independent Insurance Agents and Brokers of America (IIABA), and the National Association of Insurance and Financial Advisors (NAIFA) appreciate this opportunity to comment on an issue of particular import to our members in the recently-enacted Tax Cuts and Jobs Act (TCJA).¹ Specifically, we urge Treasury officials to clarify via implementing regulations that insurance businesses, including those engaged in sales and placement of insurance products, are “qualified trades or businesses” under new Internal Revenue Code (IRC) § 199A.

The Council represents the most successful employee benefits and property/casualty agencies and firms in the U.S. Our member firms annually place more than \$300 billion in commercial insurance business in the United States and abroad, and they employ upward of 350,000 people worldwide. The products sold by Council members provide vital security and benefits to countless employees and businesses across the country.

IIABA is the nation’s oldest and largest trade association of independent insurance agents and brokers, representing a nationwide network of approximately a quarter of a million agents, brokers, and employees. IIABA represents independent insurance agents and brokers in all 50

¹ Pub. L. No. 115-97 (2017).

states that offer customers a choice of policies from a variety of insurance companies across all lines of insurance—property, casualty, life, health, employee benefit plans and retirement products.

Founded in 1890, NAIFA is the oldest, largest and most prestigious association representing the interests of insurance professionals from every Congressional district in the United States. NAIFA’s mission – to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members – is the reason NAIFA has consistently and resoundingly stood up for agents and called upon members to grow their knowledge while following the highest ethical standards in the industry.

EXECUTIVE SUMMARY

As you are aware, specific “services” businesses are excluded under the TCJA from much-needed tax relief for pass-thru entities (i.e., they are not treated as “qualified trades or businesses” under the new law). As explained in further detail below, our member firms and other insurance businesses should not be treated as excluded service businesses for two primary reasons:

- (1) Congress notably did not include insurance businesses within the TCJA’s definition of non-qualified/excluded service businesses; instead, Congress chose a specific part of a pre-existing definition of “service business” from which insurance businesses are excluded; and
- (2) Excluding our members and other insurance businesses from the benefits of § 199A’s pass-thru provisions runs counter to sound public policy, including the policy objectives underpinning the TCJA.

We therefore encourage the Treasury Department to:

- (1) Draft implementing regulations confirming that “insurance businesses” are not “specified service trades or businesses” (i.e., are “qualified trades or businesses”) under § 199A; and
- (2) Define “insurance businesses” under such implementing regulations to include all businesses licensed/regulated by state insurance authorities that derive a majority of their qualified business income (as defined in § 199A) from licensed insurance-related activities.

ARGUMENT

Our Member Firms and other Insurance Businesses are Excluded from the TCJA's Definition of "Specified Service Trade or Business" and Therefore Should be Treated as "Qualified Trades or Businesses" under § 199A.

Generally, "qualified trades or businesses" may take advantage of the TCJA's new treatment of pass-thru entity income. Certain "specified service trade[s] or business[es]," however, are not considered "qualified trades or businesses." Section 199A defines "specified service trade or business" as any trade or business:

(A) which is described in section 1202(e)(3)(A) (applied without regard to the words "engineering, architecture,") or which would be so described if the term "employees or owners" were substituted for "employees" therein, or

(B) which involves the performance of services that consist of investing and investment management, trading, or dealing in securities (as defined in section 475(c)(2)), partnership interests, or commodities (as defined in section 475(e)(2)).

Notably, Congress chose to use IRC § 1202(e)(3)(A) as its baseline for excluded service businesses. That provision reads:

any trade or business involving the performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade or business where the principal asset of such trade or business is the reputation or skill of 1 or more of its employees.

The law modifies the above baseline in three respects:

- (1) Excludes "engineering" and "architecture;"
- (2) Refers to the reputation or skill of "employees or owners," instead of just "employees;" and
- (3) Adds investing and investment management as specified service businesses.

Tellingly, when it intentionally altered the 1202(e)(3)(A) framework, **Congress did not add insurance businesses to the list of non-qualified service businesses.** Indeed, adding investing/investment management businesses was necessary because IRC § 1202(e)(3)(B) includes a list of businesses distinct from (e)(3)(A) (i.e., a list of businesses not captured in the non-qualified services definition based on subsection (A) alone). Those businesses in 1202(e)(3)(B) include:

any banking, **insurance**, financing, leasing, investing, or similar business.

Ultimately, Congress could have included within the definition of “specified service trade or business” all of § 1202(e)(3), or (e)(3)(A) and (B)—but it did not. Instead, it selectively expanded the definition of service businesses in (**A**) to include investing businesses, and did not include insurance businesses, banking businesses, leasing businesses, etc.

Moreover, it is clear that our member firms are “insurance businesses” and are regulated as such. They serve as the distribution system for various lines of insurance and are licensed as “insurance producers” (those who sell, solicit or negotiate insurance) by insurance regulators in all states for their placement activities. They also have special examination, appointment, compensation and disclosure requirements (and restrictions) under state insurance laws and regulations by virtue of their role as insurance businesses.

We therefore urge you to follow the text of the statute and effectuate Congress’s intent by clarifying in implementing regulations that “any insurance business” is a “qualified trade or business” under § 199A. We further encourage you to clarify that “insurance businesses” for purposes of § 199A include all businesses that are licensed and regulated (whether directly or through their employees) under state insurance laws by state insurance regulators, and that are deriving their business income primarily from licensed insurance activities.

Our Member Firms and Other Insurance Businesses Are Properly Excluded from the Definition of “Specified Service Trade or Business” for Sound Public Policy Reasons.

Our member firms are not the type of businesses that Congress intended to exclude from receiving the full benefits of § 199A. Our members operate as the day-to-day sales force for the insurance industry. Notably, as mentioned above, our members (and insurance producers generally) are licensed and regulated as distributors of insurance products. Some states even prohibit them from receiving compensation for any services they may provide if they are paid a commission for the sale of insurance. Additionally, many states require them to be appointed as agents with authority to sell on behalf of insurers and deliver binding insurance contracts.

Our members provide protection products that are essential to the economy, individual businesses and American families. Moreover, they employ millions of people across the U.S. and occupy numerous retail locations in every state. Excluding our member firms from receiving the full benefits of § 199A would be contrary to Congress’ broad public policy goals of growing the economy and creating jobs, and—as with any policy development that increases the cost of doing business—would ultimately be detrimental to consumers of vital insurance products.

With the TCJA, Congress enacted and the President signed the broadest changes to the American tax code since the 1980s. The intent of this endeavor was to provide businesses and hard-working individuals across the country with much-needed tax relief. Interpreting the pass-thru provisions in the new tax law in a narrow and exclusionary manner would only undermine these objectives and stunt economic benefits associated with tax reform.

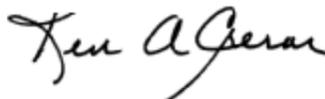
* * *

In sum, our member firms and other insurance businesses were not captured under the TCJA’s definition of “service trades or businesses”—for sound public policy reasons. Therefore, we respectfully request that the Treasury Department:

- (1) Draft implementing regulations stating that “insurance businesses” are not “specified service trades or businesses” under § 199A; and
- (2) Define “insurance businesses” to include all businesses licensed/regulated under state insurance laws that earn a majority of their qualified business income (as defined in § 199A) from licensed insurance-related activities.

Thank you again for your attention to this important issue and for the opportunity to provide our thoughts and recommendations. We look forward to serving as a resource as you continue your work on regulations to implement the TCJA. Please do not hesitate to contact us if we can provide further information or answer any questions.

Respectfully submitted,



Ken A. Crerar
President
The Council of Insurance Agents & Brokers
701 Pennsylvania Avenue, NW
Suite 750
Washington, DC 20004-2608
(202) 783-4400
ken.a.crerar@ciab.com



Bob Rusbult
CEO
Independent Insurance Agents & Brokers of America
20 F Street NW, Suite 610
Washington, DC 20001
(202) 863-7000
Bob.Rusbult@iiaba.net



Kevin M. Mayeux, CAE
CEO
National Association of Insurance and Financial Advisors
2901 Telestar Court
Falls Church, VA 22042
(703) 770-8101
kmayeux@naifa.org