

May 15, 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:

Thank you again for taking the time to speak with the undersigned insurance producer trade associations on April 25. As a follow-up to that meeting, this letter provides additional information as to why the activities undertaken by insurance producers and intermediaries (i.e. the sale and servicing of insurance) are not “brokerage services” under Internal Revenue Code section 199A.

The sale and servicing of insurance is part of the “business of insurance,” and therefore should be excluded from the definition of a “specified services trade or business” in any regulations or guidance for purposes of section 199A. Furthermore, the sale and servicing of insurance is not “brokerage services” under Internal Revenue Code section 199A because:

1. The regulatory regime for insurance producers is separate from the governing regime for broker-dealers and clearly treats producers as insurance businesses for licensing, examination, and compensation purposes;
2. Unlike broker-dealers, insurance producers have a unique legal agency relationship with the insurance companies (i.e., product manufacturers) for which they sell products; and
3. The plain-language meaning and everyday connotation of “brokerage services” is generally understood to refer to broker-dealers and investment services, not insurance.

1. *The regulatory regime for insurance producers is distinct from broker-dealers' governing regime and clearly treats producers as insurance businesses for licensing, examination, and compensation purposes.*

Insurance producers are licensed as insurance businesses by state insurance regulators.¹ Every state requires individuals to obtain an insurance license to sell and service insurance products. The National Association of Insurance Commissioners' (NAIC) producer licensing model act (attached for your reference) serves as the basis for insurance producer licensing in the states.

The model does not differentiate between agents and brokers but focuses on the sale and placement of insurance as the trigger for licensure obligation. Federal law, including the National Association of Registered Agents and Brokers Reform Act of 2015, also parallels the licensing construct of the NAIC model law (i.e., it collapses agents and brokers into a single "producer" definition). Finally, even in states that have not yet adopted the NAIC model, a similar licensing scheme is in place for persons who are involved in these activities.

To receive an insurance producer license, the model law requires applicants to pass an examination that "test[s] the knowledge of the individual concerning the lines of authority for which application is made, the duties and responsibilities of an insurance producer and the insurance laws and regulations of [the] state." State insurance commissioners develop and administer these examinations. Insurance commissioners may also revoke producer licenses for, *inter alia*: violating any insurance laws or orders of an insurance commissioner; misrepresenting the terms of an insurance contract; committing any insurance unfair trade practice or fraud (generally treated separately in state codes from other business-related unfair or deceptive practices); or accepting insurance business from unlicensed individuals.

Insurance producers' compensation also is strictly regulated by insurance authorities. They must be licensed to receive any compensation for selling insurance, and state insurance laws prescribe for what, from whom, and in what circumstances they may receive commissions, fees, or other valuable consideration. In many states, if producers receive commissions for the placement of insurance, they are prohibited from receiving fees or other compensation for other services they may provide, unlike brokers.

Furthermore, it is well settled law at the federal level (in statute and judicial decisions) that the sale and servicing of insurance is considered part of the "business of insurance." Multiple federal statutes, including the Gramm Leach Bliley Act of 1999 and the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, include the sale and servicing of insurance as part of the "business of insurance."

¹ The McCarran Ferguson Act, 15 U.S.C. §§ 1011-1015, leaves regulation of the "business of insurance" to the States, unless preempted by a federal law that "specifically relates to the business of insurance." *See generally, Barnett Bank of Marion Cnty. v. Nelson*, 517 U.S. 25 (1996) (finding federal law permitting certain banks to act as insurance agents and sell and solicit insurance products "specifically related to the business of insurance").

Finally—compared to that described above for insurance producers--there is an entirely different licensing and regulatory regime for broker-dealers in the financial services context. Brokers are primarily regulated by the Financial Industry Regulatory Authority (FINRA) and the Securities and Exchange Commission (SEC), as well as the states. An insurance producer cannot broker FINRA/SEC regulated financial services (i.e. non-insurance) products under the purview of his or her insurance license.

2. *Unlike broker-dealers, insurance producers have a unique business relationship—including a legal agency connection—with the insurance companies (i.e., product manufacturers) for which they sell products.*

Insurance producers generally work in some fashion as agents of insurance carriers, and they operate under and are compensated via legal contract(s) with their carrier partners. Insurance producers are the distribution force of the company or companies with which they have contracted to sell and service insurance products, and they are compensated for most transactions in the form of commissions payments from insurance companies.

Furthermore, a unique feature of the insurance business is the appointment process. Insurance producers are appointed by carriers in all states and most states require companies to provide state insurance regulators notice of the producers with whom they contract. These producers become legal extensions of the insurers to the public.

This business relationship is different from, say, a broker-dealer who executes transactions on a platform that offers numerous securities products. Broker-dealers receive compensation from customers and products' manufacturers (sometimes getting paid from both sides for the same transaction), and they do not have the same legal, binding agency relationship with those manufacturers as appointed producers have with insurance companies—in fact, unlike insurance producers, broker-dealers do not work “for” the product manufacturers at all.

Insurance producers, moreover, have obligations to their clients and business dealings with the carriers that extend beyond the sale of an insurance product. For instance, producers: provide the carriers with detailed information to assist in underwriting and smooth submissions of insurance contracts; work to help research and develop new insurance and risk financing products; collect risk-specific and/or general information for insurers to assist in marketplace competitiveness; provide periodic feedback on quality, service and cooperation in underwriting and client-service processes; perform technical services related to claims processing and risk control; assist with policy documentation; and develop distribution networks and analyses of the business submitted to the insurer for underwriting considerations. Broker-dealers, on the other hand, typically play a more transactional, sales-only role for both clients and product manufacturers. Again, these business functions and relationships signal that insurance producers are “insurance businesses,” not “brokerage service businesses.”

3. *The plain-language meaning and everyday connotation of “brokerage services” is generally understood to refer to broker-dealers and investment services, not insurance services.*

The way section 199A was drafted indicates that “brokerage services” is reasonably read to include broker-dealers in the investment context, not insurance producers. As noted in our April 23 letter, “investing” and “investment management” were purposefully added *into* the definition of “specified services trades or businesses,” while “insurance businesses” were intentionally excluded. Moreover, references to the term “broker” or “brokerage services” in federal regulation and statute generally refer to persons engaged in the business of effecting transactions in securities. Federal regulations and statutes do not define brokerage to include insurance.

The plain and everyday usage of the term “brokerage services” by the public normally refers to a financial institution or individual that facilitates the buying and selling of securities. The use of the term “brokerage services” unlike the term “business of insurance” does not commonly assume the sale and service of insurance products.

* * *

For the reasons stated above, the sale and servicing of insurance is part of the “business of insurance,” not “brokerage services,” for purposes of section 199A. Thank you again for your time and attention to this important issue. We look forward to being a resource to you as you draft regulations and guidance in this area.

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