No. 19-930

In the Supreme Court of the United States

CIC SERVICES, LLC, *Petitioner*,

v.

INTERNAL REVENUE SERVICE, ET AL., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE ALABAMA CAPTIVE INSURANCE ASSOCIATION, INC., ARIZONA CAPTIVE INSURANCE ASSOCIATION, INC., CAPTIVE INSURANCE COMPANIES ASSOCIATION, INC., CONNECTICUT CAPTIVE INSURANCE ASSOCIATION, DELAWARE CAPTIVE INSURANCE ASSOCIATION, INC., CAPTIVE INSURANCE COUNCIL OF THE DISTRICT OF COLUMBIA, INC., GEORGIA CAPTIVE INSURANCE ASSOCIATION, INC., HAWAII CAPTIVE INSURANCE COUNCIL CORPORATION, KENTUCKY CAPTIVE ASSOCIATION, INC., MISSOURI CAPTIVE INSURANCE ASSOCIATION, MONTANA CAPTIVE INSURANCE ASSOCIATION, INC., NEVADA CAPTIVE INSURANCE COUNCIL, CAPTIVE INSURANCE GROUP OF NEW JERSEY, NORTH CAROLINA CAPTIVE INSURANCE ASSOCIATION, OKLAHOMA CAPTIVE INSURANCE ASSOCIATION, PUERTO RICO INTERNATIONAL INSURERS ASSOCIATION, SELF-INSURANCE INSTITUTE OF AMERICA, INC., SOUTH CAROLINA CAPTIVE INSURANCE ASSOCIATION, INC., TENNESSEE CAPTIVE INSURANCE ASSOCIATION, INC., TEXAS CAPTIVE INSURANCE ASSOCIATION, UTAH CAPTIVE INSURANCE ASSOCIATION, U.S. VIRGIN ISLANDS CAPTIVE INSURANCE ASSOCIATION, AND VERMONT CAPTIVE INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The above captive insurance associations (collectively, the "Captive Associations") submit this brief as *amici curiae* in support of the Petitioner, CIC Services, LLC.[1]

STATEMENT OF INTEREST

The aforementioned Captive Associations (the *"Amici"*) are unaffiliated trade organizations representing the interests of their respective members regarding the captive insurance industry. The membership of the Captive Associations primarily includes captive insurance companies and related cells (each being referred to herein as a "captive") and their owners, captive insurance managers, attorneys, actuaries, investment managers, certified public accountants, banks, financial institutions, and others. Together, these Captive Associations have thousands of members, including over 3,200 captive insurance companies and over 1,800 related cells (for a total of over 5,000 captives). See "*U.S. Domestic Captive Domiciles as of Year-End 2018*," attached hereto as **Appendix A**; and *"SRS Charts the Total Number of Active Captives for 2018,"* available at www.captive.com/news/2019/02/25/srs-charts-the-total-number-of-active-captives-for-2018. All of these

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[1] Pursuant to Rule 37.6, counsel for the *Amici* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel for the *Amici* provided timely notice of the *Amici's* intent to file this brief, and all parties have consented to its filing.

Captive Associations promote the compliant and solvent operation of captives through professional education, networking events, and engagement in legislative and regulatory affairs.

In addition to the state and United States territory based Captive Associations, two members of the *Amici*, the Captive Insurance Companies Association, Inc. ("CICA"), and the Self-Insurance Institute of America, Inc. ("SIIA"), are national, not for profit, member-based trade associations. Like the other *Amici*, CICA and SIIA are dedicated to the advancement of the captive insurance industry, and their membership includes self-insured entities, third-party administrators, captives, captive owners and managers, excess/stop-loss insurance carriers, and industry service providers (ranging from small professional firms to large commercial insurers and brokers). These members develop industry best practices, receive and disseminate education on industry issues, and engage policymakers and regulators on a range of subjects relevant to the effective functioning of captive insurance programs and the nation's self-insurance systems, including self-funded health plans, workers' compensation plans, and property and liability programs.

The *Amici* file this brief to request that the Court overturn the decision from the Sixth Circuit Court of Appeals. At a minimum, the *Amici* ask the Court to consider what the Internal Revenue Service ("IRS") did not address, namely the detrimental impact of IRS Notice 2016-66 ("Notice 2016-66") on captives making the election under 26 U.S.C. § 831(b) ("§ 831(b)") and the captive insurance industry as a whole. The Administrative Procedures Act ("APA") requires an agency to allow interested persons an opportunity to participate in the rulemaking through the submission of written data, views, or arguments. *See* 5 U.S.C. § 553(c). Further, this Court has held that an agency is obligated to respond to significant comments. See *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 135 S. Ct. 1199, 1203 (2015). However, the IRS did not allow interested persons a meaningful opportunity to participate in the making of Notice 2016-66, as required by the APA. Although Notice 2016-66 included a mechanism for the public to comment on how micro-captive transactions "might be addressed in [future] published guidance," those comments were requested on or before the day taxpayers originally were required to report under Notice 2016-66. Thus, any future published guidance would be of no use to taxpayers required to comply before that deadline. Further, the IRS did not respond to any significant comments or concerns.

Finally, the *Amici* contend that Notice 2016-66 relates to the reporting of tax-related information, and not the assessment or collection of a tax. Therefore, the Anti-Injunction Act ("AIA") should not apply and prohibit the *Amici* from pursuing the relief set forth herein.

Consequently, the *Amici* request the Court to consider the following:

I. Impact of Notice 2016-66 on the Captive Insurance Industry:

A. Notice 2016-66 imposes a heavy burden on the public and causes ongoing irreparable harm to the captive insurance industry and its stakeholders; and

B. Notice 2016-66 has a chilling effect on the captive insurance industry.

II. The APA should apply to Notice 2016-66, and because there was no meaningful opportunity to comment on the proposed rule through the submission of written data, views, or arguments, Notice 2016-66 should be declared invalid.

A. The APA serves as a conduit for public input that permits agencies to craft the wisest rules; and

B. While recognizing that not all § 831(b) transactions are abusive, Notice 2016-66 arbitrarily and capriciously applies to essentially all § 831(b) transactions, even though the IRS admits its lack of information regarding the captive insurance industry.

III. Information gathering is a phase of tax administration procedure that occurs before the assessment of a tax, and the AIA should not apply.

The *Amici* offer no opinion on any other particular facts or structure of any insurance program at issue or otherwise, and fully support appropriate efforts by the IRS to curtail those transactions which are actually abusive that serve to undermine the industry.

BACKGROUND ON INSURANCE REGULATION AND CAPTIVE INSURANCE COMPANIES

Insurance Regulation

State-based insurance regulation has a more than 100-year history of success in the United States. Congress, in passing the McCarran-Ferguson Act of 1945, exclusively reserved to the States the power to regulate insurance. The States, the District of Columbia, and several territories each participate in this national system of state-based regulation.

The McCarran-Ferguson Act states that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012. Since its passage, Congress has concluded that "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012. As a result, every State has comprehensive insurance regulation and oversight capabilities.

At least 35 United States jurisdictions, including States, territories, and the District of Columbia permit licensing and regulation of captives. In each of these domiciles, the applicable regulator has the authority to grant an insurance license to a company, after regulatory review and subject to ongoing oversight. Many States have dedicated professional staff that exclusively regulate captive insurance.

Robust Regulatory Standards

All domestic domiciles that regulate captive insurance require each applicant for a license to complete background checks, maintain certain capital levels, and provide financial information on demand. The vast majority also require annual review by independent actuaries, as well as annual audits by independent CPAs and/or examinations by the regulator, among other requirements.

The standards and requirements that domestic regulators impose on insurance companies, and on captives in particular, are intended to protect policyholders by ensuring solvency. The standards and requirements are remarkably consistent across the country, and address all aspects of insurance company operation, including the subject of the insurance, the characteristics of the insurance policies, and the structure of reinsurance arrangements.

In the various United States captive jurisdictions, the insurance regulators play a very active role in regulating the captive insurance industry. *See* "Letter from Utah Insurance Commissioner Todd E. Kiser to the IRS Commissioner, dated January 27, 2017" (attached hereto as **Appendix B**). For example, in order to gain licensure in any United States captive jurisdiction, every captive must submit an application and a feasibility study prepared by a credentialed actuary. Each jurisdiction's insurance regulator closely reviews and monitors each captive to determine whether it is properly funded, has the necessary liquidity, insures only appropriate risks, and prices its premiums appropriately.

Captive Insurance Companies

Captive insurance is a highly regulated and formalized type of risk management that has existed for over 50 years, allowing companies, or groups of companies, to better manage their own risk. It is a common risk management tool utilized by a wide range of public, private, and not-for-profit entities, including colleges and universities, Fortune 500 companies, local businesses, hospitals, manufacturers, religious and community organizations, and virtually every other type of business. Captive insurance covers an equally diverse and important set of business risk profiles, from property, general liability, product liability, workers' compensation, and medical stop loss insurance, to business and supply chain interruption and many other coverages.

Nearly 5,000 captives are domiciled in and regulated by at least 35 States, demonstrating a healthy and material industry in the United States. By definition, a captive is a type of insurance company formed under applicable state law that provides insurance coverage to its owners and affiliates. Captives can either be owned by one company or by numerous unrelated entities, similar to a mutual insurance company. Many of the aforementioned 5,000 captives are group captives or protected cell captives, each of which houses the captive insurance programs of any number of unrelated businesses. Indeed, there are thousands of unique business organizations that participate in captives.

Captives may take many forms. The simplest structure is a "pure" or single-owner captive created by a parent company to provide insurance to itself and its affiliates. *See* C. Anastopoulo, *"Taking No Prisoners: Captive Insurance as an Alternative to Traditional or Commercial Insurance,"* 8 Ohio St. Entrep. Bus. L.J. 209, 213, 221-23 (2013). Even in this "pure" captive arrangement, like third-party insurers, the captive receives premiums from its parent company in exchange for coverage. The only difference is that the insured (the parent) controls the insurer (the captive). *Id.,* at 221-25 (outlining the various types of captives).

Captives provide several benefits over third-party commercial insurers. In addition to more affordable coverage, a captive can underwrite more customized policies than those available on the open market. *Id.,* at 216. With actuarial support, captives can tailor deductible and premium amounts, coverage scope, and risk tolerance because these insurers "address risk positions for the parent based solely on the parent's actual risk exposure and history, rather than an industry-wide calculation." *Id.* This is especially important for industries where ordinary commercial insurers have a hard time evaluating the relevant risks. *Id.*, at 213-14, 216.

Captives also offer a more responsive claims process. *Id.*, at 216-17. Submitting claims to a commercial insurer that has "the incentive to deny claims or delay in paying claims" is time-consuming, adversarial, and litigious. *Id.*, at 217. By contrast, the parent and captive have "the same incentive to pay the claim from the captive's reserves." *Id.*, at 216.

SUMMARY OF ARGUMENT

First, the *Amici* ask this Court to consider the written data, views and arguments of the *Amici* that Notice 2016-66 imposes a heavy burden on the public and causes ongoing irreparable harm to the captive insurance industry and its stakeholders.

Second, the APA requires an agency to allow for a meaningful opportunity for public comment on the proposed rule through the submission of written data, views, or arguments. *See* 5 U.S.C. § 553(c). Further, this Court has held that an agency is obligated to respond to significant comments. *See Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 135 S. Ct. 1199, 1203 (2015). However, the Issuance of Notice 2016-66 by the IRS did not comply with the APA. Such a result is particularly concerning to the *Amici*, as this Court has made clear that tax rules are subject to the same types of review as other administrative regulations. *See, e.g., Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011).

Had the IRS followed the APA, the concerns of the *Amici* regarding the impact of Notice 2016-66 would have been addressed. Because the IRS failed to follow the APA, the *Amici* ask this Court to overturn the decision of the Sixth Circuit.

Third, the AIA prohibits suits brought "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a), and this Court recently explained that the terms "assessment" and "collection" do not extend to mere reporting requirements. *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 8 (2015). The *Amici* urge this Court to determine that the AIA does not prevent pre-enforcement challenges to tax rules not involving the assessment or collection of taxes.

ARGUMENT

I. Impact of Notice 2016-66 on the Captive Insurance Industry:

A. Notice 2016-66 imposes a heavy burden on the public and causes ongoing irreparable harm to the captive insurance industry and its stakeholders.

The IRS claims that Notice 2016-66 is necessary to identify which § 831(b) arrangements should be identified specifically as tax "avoidance" transactions.[2] In reality, however, Notice 2016-66 appears to be designed to burden the industry and thereby diminish its size and scope. Notice 2016-66 requires essentially all captives making the § 831(b) election, their owners, the insured operating entity(ies) and owners, and any reinsurer, to submit IRS Form 8886, Reportable

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[2] It has long been accepted that taking advantage of the tax code to lower one's taxes is perfectly acceptable. "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." *Gregory v. Helvering*, 69 F.2d 809, 810 (2d Cir. 1934). Further, the Sixth Circuit rejected the IRS's substance-over-form doctrine to restructure a transaction where the Internal Revenue Code sections at play had the sole purpose of tax avoidance. See *Summa Holdings, Inc. v. Commissioner of Internal Revenue,* 848 F.3d 779, 789 (6th Cir. 2017). The Sixth Circuit also stated that if such results were unintended, it was within Congress' power to correct it. *Id.*, at 789-90.

Transaction Disclosure Statement. In addition, so-called "material advisors," like the Petitioner, must file Form 8918, Material Advisor Disclosure Statement. Although blank copies of Form 8886 are a mere two pages in length, the completed form can be extremely long and complicated. In fact, by the IRS' own estimate, Form 8886 takes more than twenty-one hours, *i.e.,* over half of a standard workweek, to complete. *See* IRS, *Instructions for Form 8886,* at 7, *available at https://www.irs.gov/pub/irs-pdf/i8886.pdf*. For some businesses, including many of the *Amici's* members, this presents a very heavy new paperwork expansion. If each of the estimated 5,000 captive members of the *Amici* spent 21.5 hours preparing Form 8886, they would collectively spend over 100,000 hours per year complying with Notice 2016-66. And these figures do not include all of the multiple owners, individuals and holding companies that must fill out Form 8886. With them included, the amount of time to complete all of the Form 8886's would double or triple. Additionally, these numbers do not include Form 8918 to be prepared and submitted by advisors, such as captive managers, CPAs and lawyers, on whom the burden is potentially prohibitive. At the IRS' estimated rate, an advisor who provides material advice to only 52 captives would spend the equivalent of approximately *six months* each year preparing the paperwork associated with Notice 2016-66. For example, SIIA surveyed hundreds of its captive members and found that they had filed over 15,000 forms at a collective cost of $22,186,800, to comply with Notice 2016-66. *See* "June 15, 2017 letter from SIIA to Treasury Secretary Mnuchin," available at http://files.constantcontact.com/9d218c3c001/05dafb54-5f9b-4fba-b08e-512c318af2cb.pdf.

In contrast with this onerous burden, the actual benefits of Notice 2016-66 to the IRS are likely to be minimal when compared to the amount of information gathered through the IRS audit process. The *Amici* are aware of an extensive series of audits that the IRS is conducting and has conducted over the last several years.[3] There are more than 500 docketed captive insurance cases in Tax Court involving § 831(b). *See* "Abusive tax shelters, trusts, conservation easements make IRS' 2019 'Dirty Dozen' list of tax scams to avoid," (March 19, 2019), *available at www.irs.gov/newsroom/abusive-tax-shelters-trusts-conservation-easements-make-irs-2019-dirty-dozen-list-of-tax-scams-to-avoid*. It is also estimated that there are, or soon will be, several thousand captive insurance arrangements under audit by the IRS. *See IRS update on "micro-captive insurance transactions,"* available at *home.kpmg/us/en/home/insights/2020/01/tnf-irs-update-on-micro-captive-insurance-transactions.html.*

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[3] On January 31, 2020, the IRS Commissioner stated that the IRS will "vigorously pursue those involved in these and other similar abusive transactions going forward. . . Enforcement activity in this area is being significantly increased. To that end, the IRS is deploying additional resources, which includes setting up 12 new examination teams . . . that will be working to address these abusive transactions and open additional exams." *See* IRS takes next step on abusive micro-captive transactions; nearly 80 percent accept settlement, 12 new audit teams established, *available at www.irs.gov/newsroom/irs-takes-next-step-on-abusive-micro-captive-transactions-nearly-80-percent-accept-settlement-12-new-audit-teams-established.*

Further, at the end of 2018, it was estimated that there were more than 3,200 active captive insurance companies and 1,800 cells formed in the United States, and more than 6,600 active captive insurance companies and 3,200 cells formed in key jurisdictions worldwide. See *"U.S. Domestic Captive Domiciles as of Year-End 2018,"* attached hereto as **Appendix A**; and *"SRS Charts the Total Number of Active Captives for 2018,"* available at *www.captive.com/news/2019/02/25/srs-charts-the-total-number-of-active-captives-for-2018*. This means that there are approximately 5,000 active captive risk bearing entities (captives including cells) formed in United States jurisdictions, and approximately 10,000 active risk bearing entities, not all of which make the § 831(b) election, formed in key jurisdictions worldwide as of 2018, the most recent year for which data is currently available. *Id.* Assuming, on the low end, that the several thousand captives currently or soon to be under audit is approximately 2,000, the IRS is auditing an estimated number of captive insurance arrangements equivalent to 40% of the active captive risk bearing entities formed in the United States, or 20% of the active captive risk bearing entities formed in key worldwide jurisdictions. These audits produce information on § 831(b) insurers at a painstaking level of detail. *See* **Appendix C** (redacted copy of an IRS Information Document Request form). Further, it also should be noted that most, if not all, of the information that the IRS seeks through compliance with Notice 2016-66 is already available by virtue of IRS Form 1120-PC, which each § 831(b) captive and other property & casualty insurance companies are presently required to file annually. See *SIIA Letter to Treasury Secretary Mnuchin Regarding Executive*

Order 13789 –Identifying & Reducing Tax Regulatory Burdens, Dated June 15, 2020, available at http://files.constantcontact.com/9d218c3c001/05dafb54-5f9b-4fba-b08e-512c318af2cb.pdf.

The level of information required in these audit request forms and 1120-PC Forms produces a far more detailed and intricate level of information than must be provided on the Form 8886. These audits ultimately led to three decisions in the United States Tax Court that decided against the taxpayer.[4] Simply put, if the IRS has not learned sufficient information to identify an abusive transaction from its widespread audits of a large percentage of the active captives formed worldwide, from the 1120-PC Forms and from Tax Court litigation, Notice 2016-66 will not make any material difference in its regulatory efforts and amounts to nothing more than an open-ended fishing expedition.

In light of the extreme burden on the public and the minimal benefit to the IRS, the *Amici* believe that the actual purpose of Notice 2016-66 is not information gathering, but rather to deter taxpayers from participating in a lawful and beneficial industry. To further bolster this argument, the *Amici* would point to the timing of the Notice 2016-66 release. On December 18, 2015, the Protecting Americans from Tax Hikes Act

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[4] See *Avrahami v. Commissioner*, 149 T.C. 7 (T.C. Aug. 21, 2017), *Reserve Mechanical Corp. v. Commissioner*, T.C. Memo. 2018-86 (T.C. June 18, 2018), and *Syzygy Insurance Co., Inc., et al. v. Commissioner*, T.C. Memo. 2019-34 (April 10, 2019). *Reserve Mechanical Corp. v. Commissioner* is currently under appeal to the Tenth Circuit Court of Appeals.

(the "PATH Act") was enacted.[5] The PATH Act included revisions to § 831(b) to increase the premium threshold to qualify for the § 831(b) deduction from $1,200,000 to $2,200,000, with annual inflation adjustments. The PATH Act also included revisions to § 831(b) to add two specific ownership diversification requirements. These new provisions went into effect for tax years beginning after December 31, 2016. In the wake of this expansion of the § 831(b) premium threshold, the IRS response was to issue Notice 2016-66 on November 1, 2016, in an effort to discourage captives from taking advantage of the then soon to be effective newly congressionally authorized expanded deduction. Indeed, notwithstanding that Congress gave the IRS the authority through the PATH Act to issue guidance to help prevent abuse, the IRS has failed to do so more than four (4) years later, despite repeated good faith requests from the captive industry for such guidance.

Since taking effect, Notice 2016-66 has inflicted immediate and irreparable harm on the captive insurance industry. Apart from the substantial burden of compliance discussed above, Notice 2016-66 threatens to stigmatize the *Amici* and their members, and intimidate legitimate businesses and citizens from engaging in activity that Congress has expressly declared lawful, most recently in the PATH Act and the

[5] Joint Committee on Taxation, *Technical Explanation of the Revenue Provisions of the Protecting Americans from Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to H.R. 2029 (Rules Committee Print 114-40), (JCX-144-15)*, December 17, 2015 (hereinafter, "PATH Act").

Consolidated Appropriations Act of 2018, Pub. L. 115–141. *See* the PATH Act, 129 Stat. 3106-08. The IRS has long cast aspersions on § 831(b) captives by including them on its annual "Dirty Dozen" list of supposed "tax scams." *See "Internal Revenue Service, Abusive tax shelters, trusts, conservation easements make IRS' 2019 'Dirty Dozen' list of tax scams to avoid"* (March 19, 2019), available at *www.irs.gov/newsroom/abusive-tax-shelters-trusts-conservation-easements-make-irs-2019-dirty-dozen-list-of-tax-scams-to-avoid*. Presumably, Congress would not have authorized § 831(b) if it thought that all or most uses of that section would amount to a tax scam.[6]

The IRS has explained that the problem lies with "abusive" uses of § 831(b), under which insureds pay inappropriately high premiums or receive insurance for harms that have little or no risk of materializing. *Id.* Under Notice 2016-66, however, the IRS has declared that essentially every captive making the § 831(b) election, including legitimate non-abusive captives, are subject to the reporting requirement and present "the

[6] Approximately two months after the Supreme Court granted *certiorari* to hear this case, on July 16, 2020, the IRS removed micro-captive insurance transactions from its annual "dirty dozen" list while promising that an upcoming series of press releases will emphasize the illegal schemes and techniques businesses and individuals use to avoid paying their lawful tax liability, including such scams as abusive micro captives. See *"IRS unveils 'Dirty Dozen' list of tax scams for 2020; Americans urged to be vigilant to these threats during the pandemic and its aftermath,"* available at https://www.irs.gov/newsroom/irs-unveils-dirty-dozen-list-of-tax-scams-for-2020-americans-urged-to-be-vigilant-to-these-threats-during-the-pandemic-and-its-aftermath.

potential for tax avoidance or evasion." *Id.* In other words, Notice 2016-66 casts a cloud of suspicion over every entity insured by a § 831(b) captive, even when it is clear that the captive provides appropriate insurance at actuarially-justified premiums. Because Notice 2016-66 implicates legitimate captives, it continues to provide a clouded view of what the IRS would consider to be proper versus improper structures. Because of this stigma, Notice 2016-66 has intimidated, and will continue to intimidate, taxpayers to forego lawful activity out of fear of reprisals from the IRS.

To compound the issue, on March 20, 2020, the IRS sent Letter 6336 to at least fifty thousand (50,000) taxpayers, and maybe many more. See "*SIIA calls for review of IRS' 'activities' in response to Executive Order for regulatory relief,"* available at *http://www.captiveinsurancetimes.com/captiveinsurancenews/article.php?article_id=6905.* Letter 6336 requires anyone who has taken a deduction or other tax benefit related to micro-captive insurance on a prior tax year return to report to the IRS, under penalty of perjury, whether the taxpayer is still engaged in a micro-captive insurance transaction, the last year for which a deduction was taken and the date participation ceased. In this letter, the IRS warned taxpayers that it is increasing enforcement activity and that it would take into account the taxpayer's response, or lack thereof, when considering future compliance-related activity related to micro-captive insurance. Further, the information that the IRS sought to obtain from this Letter 6336 was duplicative and already in its possession through the routine filing of 1120-PC Forms.

Moreover, this Letter 6336 was issued four (4) days into the National COVID-19 Emergency Declaration, at a time when many businesses that own captives were inaccessible or operating at a diminished capacity because of the pandemic crisis. Even worse, the IRS Letter originally required taxpayers to access and report information about their captive insurance programs by May 4, 2020, or face repercussions on future compliance related activity for failing to comply. After much pushback to Treasury Secretary Mnuchin, the IRS extended the time to respond to Letter 6336 by one month to June 4, 2020. With stay-at-home and shelter-in-place orders in place for many cities and states until the end of May or later, many of these taxpayers may not have even been able to access their records or professional advisors in order to comply with the requirement within the short one-month extension, not to mention risking their health and safety because of the pandemic.

And perhaps most significantly, captives actually have helped businesses by providing coverage for business interruption claims caused by the pandemic. While virtually all business interruption insurance policies written in the traditional insurance marketplace contain exclusions for COVID or similar viruses, captives have the flexibility of designing coverages to help businesses respond to this crisis. And indeed, many captives have paid such claims in the last few months, and numerous claims filings are predicted. See *"Post-COVID-19, Some Businesses May*

Look to Captives for BI Solutions, Observers Say," available at https://media.cicaworld.com/wp-content/uploads/2020/05/Post-COVID-19-Some-Businesses-May-Look-to-Captives-for-BI-Solutions-Observers-Say.pdf. See also *"Once Scrutinized, an Insurance Product Becomes a Crisis Lifeline,"* available at *https://www.nytimes.com/2020/03/20/your-money/coronavirus-insurance-small-business.html.*

Collectively, the stigma and fear engendered by Notice 2016-66, along with the substantial costs of compliance, threaten to stifle the captive insurance industry in many states with captive insurance laws. The *Amici* estimate that a significant percentage of the stand-alone captives licensed by the states and ancillary jurisdictions qualify to file under § 831(b). Consequently, if the IRS succeeds in its apparent goal of discouraging the use of § 831(b), a significant percentage of the captive insurance industry would be threatened. This would not only be against the interest of the *Amici* and their members, preventing businesses from using captives as a legitimate risk management tool; it would also be against the intent of Congress, which passed § 831(b) and reaffirmed its use in the PATH Act and the Consolidated Appropriations Act of 2018.

B. Notice 2016-66 has a chilling effect on the captive insurance industry.

It appears that the actions of the IRS have started to have their intended effect, as reports indicate that Notice 2016-66 already has begun to affect the captive insurance market negatively in the United States. For example, in 2018, captives making the § 831(b) tax election remained under the microscope, resulting in a continued reduction in their numbers and a significant drop in formation activity. See "*SRS Charts the Total Number of Active Captives for 2018*," available at *www.captive.com/news/2019/02/25/srs-charts-the-total-number-of-active-captives-for-2018*. Many of the *Amici's* members report that their clients have abandoned or plan to abandon existing captives and/or forego the creation of new ones since Notice 2016-66 took effect. Other members of the *Amici* have ceased formation of any captives that utilize § 831(b) because of the heightened scrutiny and regulatory burden imposed by Notice 2016-66. The *Amici* are also aware of multiple audits of captives or owners, many of which can cost in excess of $250,000 to defend, especially if litigation ensues. In light of these risks and the clouded view of what the IRS would consider to be a legitimate § 831(b) captive, many insurance professionals can no longer recommend the formation of § 831(b) captives in good faith unless their clients are willing to embrace the substantial costs of complying with Notice 2016-66 and the risk associated with an audit.

II. The APA should apply to Notice 2016-66, and because there was no meaningful opportunity to comment on the proposed rule through the submission of written data, views, or arguments, Notice 2016-66 should be declared invalid.

A. The APA serves as a conduit for public input that permits agencies to craft the wisest rules.

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA further empowers this Court to "hold unlawful and set aside agency action, findings, and conclusions found to be ... without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Pursuant to the APA, "rules" promulgated by an agency must be published in accordance with notice-and-comment procedures. 5 U.S.C. § 553. An agency's failure to comply with notice-and-comment procedures is grounds for invalidating the rule.[7]

A "rule," for purposes of the APA, is defined so broadly as to include virtually any statement an agency may make. A "rule" is created when an agency makes

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[7] Neither exception to the APA's notice-and-comment provision applies here. The so-called "interpretive rule" and "good cause" exceptions, authorized by 5 U.S.C. §§ 553(b)(A) and (B), (d)(l) and (d)(3), are "narrow," to be used only "sparingly." *Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. at 1203. Moreover, the IRS did not claim any exception with respect to Notice 2016-66.

a statement of "general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4). The APA defines "rule making" as the "process for formulating, amending, or repealing a rule." *Id.*, at § 551(5).

Rules that must be promulgated according to the APA's notice-and-comment process are called "legislative-type rules." *Chrysler Corp. v. Brown*, 441 U.S. 281. 302 (1979) (referring to non- interpretative rules as "substantive" or "legislative-type" rules). For the purposes of the APA, there is a distinction between legislative rules and interpretive rules. Although there is no bright line differentiating legislative from interpretive rules, courts have provided some broad guidance. *See Friedrich v. Secretary of Health & Human Servs.*, 894 F.2d 829, 834 (6th Cir. 1990). "An interpretative rule simply states what the administrative agency thinks the statute means, and only 'reminds' affected parties of existing duties. ... On the other hand, if by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule." *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (as adopted by the Sixth Circuit in Friedrich, 894 F.2d at 834).

Generally, a legislative rule is "one affecting individual rights and obligations," whereas an "interpretive rule is a general statement of policy [that] advise[s] the public of the agency's construction of the statutes and rules which it administers." *Chrysler*

Corp., 441 U.S. at 302, n. 31 (citing the Attorney General's Manual on the APA). "The difference between legislative and interpretative rules has to do in part with the authority (law-making versus law-interpreting) under which the rule is promulgated." *Dismas Charities, Inc. v. United States Department of Justice*, 401 F.3d 666, 679 (6th Cir.2005) (citations omitted). "For purposes of the APA, substantive rules are rules that create law, while in contrast interpretive rules merely clarify or explain existing law or regulations and go to what the administrative officer thinks the statute or regulation means." *Id.* (quoting *First National Bank v. Sanders*, 946 F.2d 1185, 1188-89 (6th Cir. 1991)).

In other words, if the rule has an "actual legal effect," it is a legislative rule. *Ohio Coal Ass'n v. Perez*, S.D. Ohio No. 2: l 4-cv-2646, 2016 U.S. Dist. LEXIS 78655, at *53 (June 16, 2016) (quoting *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014)). A rule has legal effect when, "in the absence of the rule[,] there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties." *Id.* at *54 (quoting *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112, 302 U.S. App. D.C. 38 (D.C. Cir. 1993)).

Interpretive rules are statements as to what an agency thinks a statute or regulation means; it is not binding on a court, only on an agency. *Dismas Charities, Inc.*, at 681. Regardless of the precise language, the basic distinction is this: whereas a legislative rule requires something new of those the rule affects, an interpretive rule merely restates existing duties, albeit slightly differently or clearer than originally stated by the statute or regulation. *Fertilizer Institute v. United States Environmental Protection Agency*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991); *United States v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989) ("rules that merely restate existing duties" are interpretive).

Under the APA, when an agency proposes a new rule that is not merely interpretive in nature, it must comply with a four-step notice-and-comment procedure. *See Perez v. Mortgage Bankers Ass'n,* 135 S. Ct. 1199, 1203 (2015).

The APA's four-step notice-and-comment regime requires the following:

(a) *First,* the agency must issue a "general notice of proposed rulemaking" that shall be published in the Federal Register (5 U.S.C. §553(b)) "not less than 30 days before its effective date." *Id.*

(b) *Second,* "the agency shall give interested persons an opportunity to participate in the rule-making through submission of written data, views or arguments." *Id.* at § 553(c).

(c) *Third,* the agency "must consider and respond to significant comments received during the period for public comment." See *Perez,* at 1203.

(d) *Fourth*, when the agency files the final rule, it shall include in the rule's text "a concise

> general statement of [its] basis and purpose." 5 U.S.C. § 553(c).

Notice 2016-66 is a legislative rule, not an interpretive rule. It does much more than restate existing duties; it creates duties where none existed. Prior to Notice 2016-66, participating in or being a material advisor to a micro-captive transaction did not trigger the duties required of those who engage in reportable transactions. It does not simply "interpret" a statute or regulation. Rather, it imposes substantial new responsibilities upon taxpayers, under penal threat. Only because of Notice 2016-66 do reportable transaction duties fall on those who participate in or are material advisors to § 831(b) captive transactions. Thus, Notice 2016-66 is a legislative rule.

Congress gave the IRS the power to define "reportable transactions," and only through the proper exercise of that power do the duties and potential penalties associated with such transactions apply. Thus, it has legal effect; without it, there would be no reportable transactions due to the government and no basis for enforcement. Stated another way, without Notice 2016-66 "there would not be an adequate legislative basis for enforcement or other agency action" against those who participate in or who are material advisors to § 831(b) captive transactions. *See Id., American Min. Congress,* 995 F.2d at 1112.

Although Notice 2016-66 included a mechanism for the public to comment on how micro-captive transactions "might be addressed in [future] published guidance," those comments were requested "on or before January 30, 2017." Thus, any future published guidance would be of no use to taxpayers required to comply before that deadline. Notice 2017-08, issued on December 29, 2016, extended the filing date to May 1, 2017, but it added nothing further with respect to public comment. Although a number of trade associations and individuals, including several of the *Amici*, submitted comments to the IRS regarding Notice 2016-66, they were not acknowledged, and such comments had no effect whatsoever on the regulatory paradigm outlined therein. As such, the IRS did not follow in any way the APA's public "notice and comment" provisions before issuing Notice 2016-66, making the publication of Notice 2016-66 both arbitrary and capricious.

As courts have made clear, notice-and-comment rulemaking serves a critical purpose in our political system: it serves as a conduit for public input in order for agencies to craft the wisest rules. *Dismas Charities, Inc.,* at 680. That purpose is not served when the agency *unilaterally* decides *what* the rule is; instead, when making a rule, the agency should be trying to determine what the *wisest* rule is. *Id.*

B. While recognizing that not all § 831(b) transactions are abusive, Notice 2016-66 arbitrarily and capriciously applies to essentially all § 831(b) transactions, even though the IRS admits its lack of information regarding the captive insurance industry.

In Notice 2016-66, the IRS acknowledged its lack of information regarding § 831(b) captive transactions: "the Treasury Department and the IRS lack sufficient information to identify which § 831(b) arrangements should be identified specifically as a tax avoidance transaction and may lack sufficient information to define the characteristics that distinguish the tax avoidance transactions from other § 831(b) related-party transactions." *Notice 2016-66*, Introduction. Had the IRS proceeded through the notice-and-comment process, it could have gathered much, if not all, of the information it lacks. Or it would have been alerted to the onerous and unnecessary financial costs associated with, and reputational damage caused by, making virtually all § 831(b) captive dealings reportable transactions. A proper regulatory decision ought to be based upon the comments submitted and the actual facts and information gathered as part of the notice and comment process, as part of a transparent regulatory system. Instead, the IRS chose to act first and ask questions later.

Despite the regulation of captives by the United States captive jurisdictions through numerous insurance industry experts and professionals, and despite failing to proceed through the notice-and-comment process, the IRS stated unequivocally that, with regard to captives making the § 831(b) election, "[t]he manner in which the contracts are interpreted, administered, and applied is inconsistent with arm's length transactions and sound business practices," thereby effectively subjecting all captives making the § 831(b) election subject to Notice 2016-66. *See* Notice 2016-66. This type of broad, blanket aspersion about captives making the § 831(b) election completely supplants the judgment of numerous insurance industry experts and professionals in the United States captive jurisdictions when licensing and regulating captives.

Members of the captive industry submitted substantial comments on the PATH Act and Notice 2016-66, both before and after the issuance of Notice 2016-66. See, e.g., *Letter from SIIA to the IRS, dated October 17, 2016,* available at *https://www.siia.org/files/0f5af4a0-5c12-4dc5-aa0e-b3cd6d9cfd08.pdf*, which requested guidance on the PATH Act; and the *SIIA Comment Letter to the Acting Secretary of the Treasury and the IRS Commissioner, dated January 30, 2017,* available at *https://www.siia.org/files/News/Notice_2016-66_-_SIIA_Comment_Letter_-_Final_.pdf*. Even captive insurance regulators submitted comments on Notice 2016-66. *See* **Appendix B**, in which the Utah Insurance Commissioner submitted comments to the IRS regarding the burden of Notice 2016-66 on the captive insurance industry. Unfortunately, these comments, along with those of many other interested taxpayers, did not become a part of any rule-making process; they simply fell upon deaf ears. The IRS failed to respond to any of these comments. Had the IRS gone through the notice-and-comment process, the IRS would have had the opportunity to engage with the captive insurance industry to acquire the information the IRS admits that they lack.

Interestingly, in issuing Notice 2015-74, the IRS recognized the value of state regulators. *See* Notice 2015-74, available at www.irs.gov/pub/irs-drop/n-15-74.pdf. In Notice 2015-74, the IRS stated that certain exotic financial arrangements designed to convert short-term capital gain and/or ordinary income into long-term capital gain through contractual manipulations ("basket contracts") were "transactions of interest." However, Notice 2015-74 excluded basket contracts that are "subject to regulations by a comparable regulator." *Id.* By issuing Notice 2016-66, the IRS essentially disregarded the comments of state insurance commissioners and supplanted the role of the state Departments of Insurance as regulators of the captive industry. Notwithstanding that Notice 2015-74 excluded "transactions of interest" that were otherwise subject to regulation, by issuing Notice 2016-66, the IRS seemingly chose to act in a completely arbitrary and capricious manner by admitting that it did not have sufficient information to identify which § 831(b) arrangements should be identified specifically as tax avoidance transactions, while ignoring comments from the captive insurance industry and state insurance commissioners and simultaneously targeting all captives making the § 831(b) election.

III. Information gathering is a phase of tax administration procedure that occurs before the assessment of a tax, and the AIA should not apply.

The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). This statute "protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes.

Because of the AIA, taxes can ordinarily be challenged only after they are paid, by suing for a refund." *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 543 (2012), citing *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7–8 (1962).

The present challenge to Notice 2016-66 by the Petitioner seeks to restrain the requirement to report information to the IRS before a taxpayer or material advisor has become subject to any civil or criminal penalties simply for failure to comply with Notice 2016-66. The District Court and the Sixth Circuit Court of Appeals ruled that the Internal Revenue Code treats the penalty for not complying with Notice 2016-66 as a tax, and that the AIA therefore bars this suit. *See CIC Services, LLC v. IRS*, 2017 WL 5015510 (E.D. Tennessee), *CIC Services, LLC v. IRS*, 925 F.3d 247 (6th Cir. 2019); *CIC Services, LLC v. IRS*, 936 F.3d 501 (6th Cir. 2019).

The *Amici* believe that the text of the case law on the pertinent statutes suggests otherwise. The AIA applies to suits "for the purpose of restraining the assessment or collection of any tax." 26 U.S.C. § 7421(a). In the present case, the Plaintiff does not seek to enjoin the enforcement of a tax, but rather to enjoin the IRS from information gathering pursuant to the requirements of 26 U.S.C. §§ 6111 and 6112 of the Internal Revenue Code. 26 U.S.C. §§ 6111 and 6112 cannot rightly be described as either a tax or a penalty, but as statutes requiring the gathering of information.

Congress can describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the AIA. *See Sebelius*, 567 U.S. at 544. For example, 26 U.S.C. § 6671(a) provides that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by" subchapter 68B of the Internal Revenue Code. *Id*. "Penalties in subchapter 68B are thus treated as taxes under Title 26, which includes the Anti-Injunction Act." *See id.,* at 544-545. However, the requirement to gather information found in 26 U.S.C. §§ 6111 and 6112 is not in subchapter 68B of the Code. Nor does any other provision state that references to taxes in Title 26 shall also be deemed to apply to the requirement to gather information pursuant to 26 U.S.C. §§ 6111 and 6112. As the Supreme Court explained in *Direct Marketing*, "information gathering" such as the requirement to provide information pursuant to Notice 2016-66 is "a phase of tax administration procedure that occurs before assessment … or collection." *See Direct Mktg.* 135 S. Ct. at 1129-31 (2015).[8]

The *Amici* urge the Court to rule in favor of the Plaintiff on the basis Judge Nalbandian stated in his dissent in *CIC Services, LLC v. IRS*, 925 F.3d 247 (6th Cir. 2019). "[A] suit to enjoin the enforcement of a reporting requirement is not a 'suit for the purpose of restraining the assessment or collection of any tax,' 26 U.S.C. § 7421(a), … because the tax does not result

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[8] To support this narrow reading of the AIA, the *Amici* draw an analogy between this situation and the one presented in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. ___ (2020). In that recent case, the Court narrowly construed 8 U.S.C. § 1252(b)(9) and (g) to allow review of an agency action under the APA.

from the reporting requirement per se." *CIC Services, LLC v. IRS*, 925 F.3d 247, 259-261 (6th Cir. 2019) (Nalbandian, J., dissenting). "The only way for the IRS to assess and collect the tax is for a party to violate the [reporting] requirement. So enjoining the [reporting] requirement only stops the assessment and collection of the tax in the sense that a party cannot first violate the [reporting] requirement and then become liable for the tax." *See id.*, at 261. To add to this point, the *Amici* are unaware of any captive or material advisor being penalized for failing to comply with Notice 2016-66. As such, there are currently no known penalties owing to the IRS that could be enjoined.

CONCLUSION

For the foregoing reasons, the *Amici* urge the Court to review closely the validity of the issuance of Notice 2016-66. The *Amici* filing this brief, while offering no opinion on any other particular facts or structure of any insurance program at issue or otherwise, believe the IRS did not allow a meaningful opportunity to comment on Notice 2016-66 and failed to respond to the following significant industry concerns:

I. Impact of Notice 2016-66 on the Captive Insurance Industry:

A. Notice 2016-66 imposes a heavy burden on the public and causes ongoing irreparable harm to the captive insurance industry and its stakeholders; and

B. Notice 2016-66 has a chilling effect on the captive industry.

II. The APA should apply to Notice 2016-66, and because there was no meaningful opportunity to comment on the proposed rule through the submission of written data, views, or arguments, Notice 2016-66 should be declared invalid:

A. The APA serves as a conduit for public input that permits agencies to craft the wisest rules; and

B. While recognizing that not all § 831(b) transactions are abusive, Notice 2016-66 arbitrarily and capriciously applies to essentially all § 831(b) transactions, even though the IRS admits its lack of information regarding the captive insurance industry.

III. Information gathering is a phase of tax administration procedure that occurs before the assessment of a tax, and the AIA should not apply.

Respectfully submitted,

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Dated: July 22, 2020

APPENDIX

APPENDIX

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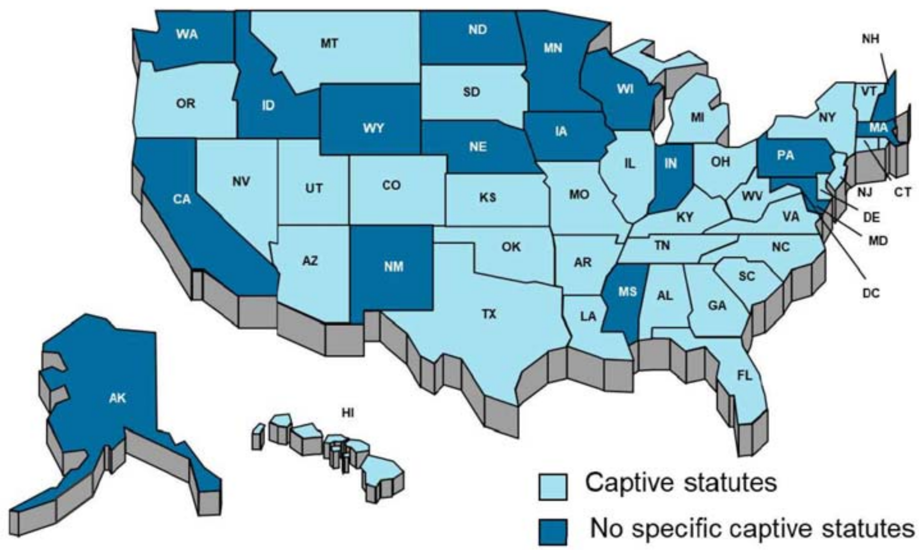
APPENDIX A

See Image Next Page

US Domestic Captive Domiciles
As of Year-End 2018



Source: Business Insurance, 2019 Captive Managers & Domiciles, Rankings + Directory: 6 and governmental websites.

Captive Domicile, Number of Captives	
Alabama	44
Arizona	124
Arkansas	6
Colorado	7
Connecticut	15
Delaware	421
Wash., D.C.	105
Florida	0
Georgia	20
Hawaii	231
Illinois	5
Kansas	1
Kentucky	64
Louisiana	0
Maine	3
Michigan	23
Missouri	54
Montana	129
Nebraska	4
Nevada	184
New Jersey	23
New York	55
North Carolina	240
Oklahoma	66
Ohio	8
Oregon	0
Rhode Island	0
South Carolina	171
South Dakota	15
Tennessee	169
Texas	42
USVI	5
Utah	443
Vermont	580
Virginia	0
West Virginia	0

APPENDIX B

State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

Insurance Department

TODD E. KISER
Insurance Commissioner

January 17, 2017

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1500 Pennsylvania Avenue, NW
Washington, D.C. 20224

Dear Mr. Koskinen,

I write today regarding IRS Notice 2016-66 ("the Notice") issued on November 1st of this year. The Notice labels most captive insurance arrangements that make the tax § 26 U.S.C. 831(b) election as "transactions of interest" and subject to new requirements and penalties. Because of the increased burden on small business, statutory ambiguity, absence of regulatory guidance and negative impacts the Notice has on taxpayers in Utah, we respectfully request the Notice be retracted.

The captive industry is an important industry for Utah. Utah regulates over 500 captive insurance entities, many of which take the §831(b) election and would be subject to the Notice. The Utah Insurance Department follows the captive regulatory framework standards set out by the National Association of Insurance Commissioners. Each Utah captive must meet and maintain State-established capital, surplus, and reserve requirements, and is required to have an annual audit by an approved independent CPA firm and an annual actuarial review by an approved independent actuary. Additionally, Utah domiciled captive insurers are required to be managed only by approved management firms, and prides itself on having a tough but fair regulatory environment for all businesses.

I believe the Notice will negatively affect well-intentioned taxpayers that are trying to follow all of the rules. The Notice will have a chilling effect on small businesses that wish to manage their risks through a captive insurer, just like their larger Fortune 500 sized competitors do. While we understand the IRS' need to identify and stop tax avoidance schemes, it is our hope that the Service can collect this information in a less burdensome manner or retract this Notice entirely and use the significant amount of data it has already collected.

In December 2015, I was fortunate to work with Senator Hatch's Office when Congress changed the §831(b) tax law by increasing the premium threshold and adding new requirements aimed at restricting ownership options and limiting estate planning. As part of this, Congress specifically requested Treasury and the IRS write reporting guidance so the captive insurance industry will be able to comply with the new requirements, which took effect January 1, 2017. Nearly a year later, no such guidance was issued. While the captive industry has yet to receive this guidance, it concerns us even more that the IRS took the additional step of issuing the Notice without gauging the impact of the recent legislative changes or providing guidance.

The immediate issue is that thousands of taxpayers who are owners of small and medium-sized business will be subjected to additional financial and regulatory burdens under the Notice's required compliance filings with significant non-compliance penalties. Furthermore, the vast majority of data requested has already been reported to the IRS through the normal tax filing process and other Information Document Requests (IDRs). Requesting duplicative information already in the IRS's possession through multiple sources, and in such a short timeframe, seems unreasonable to my constituents, and other taxpayers.

Since the Service needs to update the annual insurance company tax return forms anyway to collect the ownership information required as part of the December 2015 law change, I suggest that the better solution is that the Service considers using this opportunity to request on the updated tax return any additional information that it deems necessary to identify abuse. This approach avoids taxpayers having to provide the same information twice to the Service, avoids subjecting rule abiding business owners to arduous new requirements, and allows the Service to collect any information it deems needed to identify abuse. After the Service reviews the tax return information, if further action is warranted, then that is a more appropriate time to issue a narrowly tailored Notice focused on specific abuses.

On behalf of impacted business owners, I respectfully request retraction of Notice 2016-66.

Thank you in advance for your consideration, please contact Travis Wegkamp, Captive Insurance Director, in my office should you wish to discuss further. He may be reached directly by phone at 801-537-9294 or email at twegkamp@utah.gov.

Sincerely,

s/__________________________

TODD E. KISER
Insurance Commissioner

cc: Sen. Orrin Hatch
Sen. Mike Lee
Rep. Rob Bishop
Rep. Jason Chaffetz
Rep. Mia Love
Rep. Chris Stewart

APPENDIX C

Form 4564 (Rev. September 2006)	Department of the Treasury – Internal Revenue Service **Information Document Request**		Request Number 4-0004
To: *(Name of Taxpayer and Company Division or Branch)* [redacted]		Subject 2012 Pick Up & Add'l Info	
		SAIN number	Submitted to: [redacted]
Please return Part 2 with listed documents to requester identified below		Dates of Previous Requests (mmddyyyy)	

Description of documents requested

Tax Period(s): 201112

Please be advised that the 2012 tax return has been picked up for exam

Provide the following documentation for tax years 2011 and 2012.

<u>Part I – Instructions and Definitions</u>

<u>Instructions</u>

In responding to this Information Document Request ("IDR"), all requests for documents should be construed expansively rather than narrowly. All documents produced should include all attachments, exhibits, addendums, and appendices.

If [redacted] does not produce a requested document, it should state the efforts made to locate the requested document. In addition, [redacted] must state whether the requested document ever existed, existed but was destroyed, or existed but was misplaced.

Please provide all hard copy documents and Electronically Stored Information (ESI) formatted for Concordance/Opticon. All documents originating from hard copy should be produced as TIFF or JPG named and branded with the Bates number. All ESI sourced documents (e.g. Email, Microsoft Word, Excel, PowerPoint, etc.) should be provided as both Bates branded TIFF or JPG and in "native" format named according to Bates number. Provide E-mails or other documents with embedded attachments linked in a way that makes it clear that the documents are related. Documents should be de-duplicated and produced in color where necessary, with custodian, source and other information included as described in the attached addendum. Please remove any password protection or encryption from the individual files, or provide any passwords, encryption keys or certificates necessary to view the files.

These documents may be produced in read-only form on CD, DVD, or hard drive. To ensure readability of any requested document in electronic format, provide the PDF or TIFF files with an image resolution of at least 300 dots per inch (dpi). To the extent that any electronic indexes or other listings relating to the requested documents are created in preparation for submitting them to the Internal Revenue Service, please provide that information with your response to assist in organizing and reviewing the documents.

The attached addendum provides additional guidelines.

Definitions

The following definitions apply to this IDR:

a. For the purpose of this request, the words "documents," "records" or "data" refer to any materials of any kind that are written, printed, typed, reproduced graphically, visually, aurally, electronically, or by any other means, including but not limited to:

- Contracts, agreements, plans, papers, summaries, opinions, reports, commentaries, communications, correspondence, memoranda, minutes, notes, comments, messages, studies, graphs, diagrams, photographs, charts, projections, tabulations, analyses, questionnaires and responses, work papers, data sheets, statistical or informational accumulations, computer databases, computer disks and formats, data processing cards or worksheets, telexes, telegrams, teletypes, cables, facsimiles, instant messages, voice mail, and similar and related documents, data, and materials;

- Video and/or audio tapes, cassettes, films, microfilm, video files, sound files, and all other information stored or processed by means of data processing equipment and capable of being retrieved in electronic, printed, or graphic form;

- Computer stored and generated documents or data, including but not limited to, electronic mail (commonly referred to as "email") and attachments, word processing documents, and spreadsheets;

- Computer database information (including metadata) from document management programs or systems that track or control electronic documents described above.

b. [redacted] includes any current or former employee, officer, principal, director, shareholder, partner, member, consultant, manager, associate, staff employee, independent contractor, agent, attorney, or other representative.

c. [redacted] Insurance Company, Ltd. includes any current or former employee, officer, principal, director, shareholder, partner, member, consultant, manager, associate, staff employee, independent contractor, agent, attorney, or other representative.

d. [redacted] means [redacted] Law Offices [redacted] and [redacted] includes any current or former employee, officer, principal, director, shareholder, partner, member, consultant, manager, associate, staff employee, independent contractor, agent, attorney, or other representative.

e. "Fronting Carrier #1" means [redacted] a company licensed in [redacted] "Fronting Carrier #1" includes any trust in which [redacted] is the grantor or beneficiary, and any current or former employee, officer, principal, director, shareholder, partner, member, consultant, manager, associate, staff employee, independent contractor, agent, attorney, or other representative.

f. "Fronting Carrier #2" refers to [redacted] a company licensed in the state of [redacted] "Fronting Carrier 2" also includes any trust in which [redacted] is the settlor, grantor, or beneficiary, and any current or former employee, officer, principal, director, shareholder, partner, member, consultant, manager, associate, staff employee, independent contractor, agent, attorney, or other representative.

g. "Captive Insurance Program" means the program pursuant to which (1) Fronting Carrier #1 or Fronting Carrier #2 ("Insurers) issued terrorism insurance to [redacted] and other insured parties, each of which had one or more related captive insurance companies; and (2) insurers ceded all risks of said terrorism insurance to [redacted] and captive insurance companies related to other insured parties. The Captive Insurance Program also includes transactions in which [redacted] issued insurance policies directly to [redacted]

h. "Captive" means an insurance company or captive insurance company to whom risks were ceded by Fronting Carrier #1 or Fronting Carrier #2 under the Captive Insurance Program and who directly insured a related Insured Participant.

i. "Insured Participant" means a party that purchased one or more terrorism insurance policies from Fronting Carrier #1 and/or Fronting Carrier #2 under the Captive Insurance Program. To the extent that Insured Participant has affiliates, subsidiaries, brother/sister companies, or other similar entities that were also parties to Insured Participant's insurance policies described above, such affiliates, subsidiaries, brother/sister companies, or other similar entities are also included in the term "Insured Participant." "Insured Participant" includes any current or former employee, officer, principal, director, shareholder, partner, member, consultant, manager, associate, staff employee, independent contractor, agent, attorney, or other representative.

j. The term "person" has the meaning as defined in section 7701(a)(1) of the Internal Revenue Code but also includes all of the person's representatives.

k. The term "related" person or entity includes the persons specified in sections 267(b), 267(c), 318 and 707(b) of the Internal Revenue Code.

l. The term "identify" when used in connection with a person means provide the name, title, TIN (as defined in I.R.C. §7701(a)(41)), and current or last known business and residential addresses and telephone numbers.

m. The term "risk management" means all activities relating to identifying, calculating, mitigating, reducing, or planning for potential financial, business, or other risk or risk exposure.

n. **<u>Part II - Documents/Information to be produced</u>**:

1. Produce all insurance policies and contracts for insurance that [redacted] purchased from [redacted] Fronting Carrier #1 and/or Fronting Carrier #2 for any insurance period(s).

   a. For each such insurance policy or contract specify the amounts each party insured under the policy paid toward the premium cost.

   b. For each such insurance policy or contract produce documentation of [redacted] payments of premiums, including checks or records of wire transfers, to [redacted] Fronting Carrier #1, and/or Fronting Carrier #2.

2. Produce all insurance binders relating to insurance that [redacted] purchased from [redacted] Fronting Carrier #1 or Fronting Carrier #2 for any insurance period(s).

3. Produce all agreements between or among [redacted], [redacted], [redacted] and/or Fronting Carrier #1 or Fronting Carrier #2.

4. Produce all agreements between [redacted] and [redacted] including, but not limited to, engagement letters and contracts.

5. Produce documentation of all payments [redacted] made to [redacted] under the agreements referenced in the preceding request, including checks and records of wire transfers.

6. Describe how [redacted] first was introduced to or learned about:

   a. [redacted]

   b. Fronting Carrier #1;

   c. Fronting Carrier #2; and

   d. the Captive Insurance Program.

7. If [redacted] first learned about any of the above entities or program from one or more persons, identify each such person and provide the following:

   a. Describe the nature of [redacted] relationship with such person;

   b. Describe the communications [redacted] had with such person regarding [redacted] Fronting Carrier #1, Fronting Carrier #2, and/or the Captive Insurance Program;

   c. Provide all documents reflecting or related to the communications referenced in the preceding request, No. 7. b., above;

d. State whether such person receives or received compensation from [redacted] Fronting Carrier #1, and/or Fronting Carrier #2.

8. Describe all documents that mentioned [redacted], Fronting Carrier #1, and/or Fronting Carrier #2 that [redacted] was provided or otherwise obtained before [redacted] began buying insurance from [redacted] Fronting Carrier #1 and/or Fronting Carrier#2, including, but not limited to, program descriptions, circulars, brochures, handouts, advertisements, educational materials, marketing materials, sample contracts, sample policies, data or statistical compilations, graphs, and/or charts. For each such document:

a. Provide the document;

b. Describe the circumstances under which [redacted] obtained the document;

c. Identify the person who provided the document to [redacted]

d. State when the document was provided to [redacted]

9. Provide each insurance policy, including riders and any other attachments, which provided insurance coverage to [redacted] that was issued by a company other than [redacted] Fronting Carrier #1 or Fronting Carrier #2 for any insurance period or periods that began on or after January 1, 2007.

10. Provide the name and address of each insurance broker with whom [redacted] consulted or had business dealings during the period from January 1, 2007 through December 31, 2012.

11. Describe [redacted] risk management during 2007 and each subsequent year through December 31, 2012.

12. Provide all documents outlining or describing any aspect of [redacted] risk management during 2007 and each subsequent year through December 31, 2012.

13. Identify each employee, contractor, and advisor who contributed to [redacted] risk management during the period from January 1, 2007 through December 31, 2012, and for each such individual, describe:

    a. The individual's relationship with [redacted] e.g., employee or contractor;

    b. The individual's role and functions related to risk management for [redacted]

    c. The time frame during which the individual fulfilled the specified risk management roles and functions;

    d. The approximate amount of time per month the individual spent performing the risk management roles and functions;

    e. Provide all documents related to or reflecting each individual's contributions to [redacted] risk management during the above-stated period.

14. With regard to each insurance policy or contract referenced in request No. 1, above, describe all losses that occurred during the 10 years preceding purchase of that policy that would have been covered under the policy if it had been effective on the date of loss. For each such loss:

    a. State when the loss occurred;

    b. Specify the total cost of the loss to [redacted];

    c. Identify any insurance policies that paid claims filed by [redacted] with respect to such loss and state the amounts paid;

    d. Specify the amount that the policy [redacted] later purchased under the Captive Insurance Program would have paid if the policy had been effective as of the date of loss;

    e. Provide all records related to each loss.

15. Identify each individual who participated in [redacted] decision to enter the Captive Insurance Program and/or to renew participation in each year subsequent to the initial year.

16. Describe all steps taken by [redacted] to determine whether to enter the Captive Insurance Program and whether to renew participation in each year subsequent to the

initial year, including, but not limited to research, feasibility or other studies, cost-benefit analyses, cash flow analyses, cost comparisons, meetings, consultation and/or hiring of actuaries, brokers, and other specialists and experts, data gathering, and loss projections.

17. Provide all documents reflecting or related to the steps taken by [redacted] to determine whether to enter the Captive Insurance Program and whether to renew participation in each year subsequent to the initial year.

18. Describe all steps taken by [redacted] to determine whether to purchase each policy or contract referenced in request No. 1, above, and/or how much to pay for each policy or contract, including, but not limited to, research, feasibility or other studies, cost-benefit analyses, cost comparisons, meetings. consultation and/or hiring of actuaries, brokers, and other specialists and experts, data gathering, and loss projections.

19. Provide all documents reflecting or related to the steps taken by [redacted] to determine whether to purchase each policy or contract referenced in request No. 1, above, and/or how much to pay for each policy or contract.

20. Provide all documents reflecting communications between or among [redacted] employees, owners, principals, contractors, and/or advisors regarding whether to enter the Captive Insurance Program, whether to renew

participation each year, and/or whether to purchase each insurance policy or contract referenced in request No. 1, above.

21. Describe all oral communications between [redacted] and [redacted] Fronting Carrier #1 and/or Fronting Carrier #2 that preceded [redacted] entering the Captive Insurance Program, including:

    a. When the communications occurred;

    b. the parties to the communications; and

    c. The general subject matter of the communications.

22. Produce all documents related to or reflecting the communications referenced in the preceding request, including, but not limited to, memoranda and notes of meetings or telephone calls.

23. Describe all oral communication between [redacted] and [redacted] Fronting Carrier #1 and/or Fronting Carrier #2 that preceded [redacted] renewing participation in the Captive Insurance Program in each year subsequent to the initial year, including:

    a. When the communications occurred;

    b. the parties to the communications; and

    c. the general subject matter of the communications.

24. Produce all documents related to or reflecting the communications referenced in the preceding request, including, but not limited to, memoranda and notes of meetings or telephone calls.

25. Produce all documents exchanged among [redacted] and [redacted] Fronting Carrier #1 and/or Fronting Carrier#2 preceding [redacted] entering the Captive Insurance Program or renewing participation in the program in each subsequent year. Such documents include, but are not limited to:

    a. Correspondence and e-mails;

    b. records;

    c. computations;

    d. spreadsheets;

    e. forms;

    f. illustrations; and

    g. draft or sample policies or contracts.

26. Provide all applications for insurance [redacted] submitted to Fronting Carrier #1, Fronting Carrier #2, and/or [redacted] for any insurance period.

27. Describe all oral communications between [redacted] and [redacted] Fronting Carrier #1, Fronting Carrier #2, and/or [redacted] that preceded the issuance of each insurance policy referenced in request 1, above, including:

a. When the communications occurred;

b. the parties to the communications; and

c. the general subject matter of the communications.

28. Produce all documents related to or reflecting the communications referenced in the preceding request, including, but not limited to, memoranda and notes of meetings or telephone calls.

29. Produce all documents exchanged among [redacted] and [redacted] Fronting Carrier #1, Fronting Carrier #2 and/or [redacted] preceding the issuance of each insurance policy or contract referenced in request No. 1, above. Such documents include, but are not limited to:

a. Correspondence;

b. records;

c. verification of loss history;

d. forms;

e. illustrations; and

f. draft or sample policies or contracts.

30. Identify each person who played a role in negotiating, reviewing, and/or evaluating [redacted] insurance policies and/or contracts referenced in request No. 1, above, and for each person:

a. State the person's relationship with [redacted] such as employee or contractor;

b. Describe the person's credentials and experience pertinent to insurance, reinsurance, underwriting, and law;

c. Describe specifically the person's role with respect to negotiating, reviewing, and/or evaluating [redacted] insurance policies;

d. State the time frame in which the person provided assistance with respect to negotiating, reviewing, and/or evaluating [redacted] insurance policies;

e. Provide all documents related to the person's negotiating, reviewing, and/or evaluating [redacted] insurance policies.

31. State when each of the policies or contracts referenced in request No. 1, above, was issued and provided to [redacted]

a. Provide all documents related to the issuance and providing of the policies or contracts referenced in request No. 1, above, to [redacted] including, but not limited to, cover letters, correspondence, and emails.

32. Describe all costs paid by [redacted] in conjunction with formation and/or administration of [redacted]

33. Provide documentation, including checks and records of wire transfers, of all payments referenced in the preceding request.

34. Provide all documents related to formation of [redacted] including, but not limited to, correspondence, memoranda, meeting notes, proposals, and applications.

35. Provide all claims, claim forms, and supporting documentation [redacted] submitted under the insurance policies or contracts referenced in request No. 1, above.

36. Provide all documents reflecting or related to payments by Fronting Carrier #1, Fronting Carrier #2, and/or [redacted] to [redacted] for each claim filed under the insurance policies or contracts referenced in request No. 1, above.

37. Describe the Captive Insurance Program's claim adjustment processes.

38. Provide all documents reflecting or related to the claims adjustment process for each claim [redacted] submitted under the insurance policies or contracts referenced in request No. 1, above, including, but not limited to, correspondence, documents exchanged during the claims adjustment process; notes and memoranda; analyses; settlement documents; and documents describing or outlining claims adjustment procedures.

39. Identify all individuals who participated on behalf of [redacted], [redacted] Fronting Carrier #1, Fronting Carrier #2, and/or [redacted] in the claims adjustment procedures under the Captive Insurance Program.

40. For the period from January 1, 2007 through the present, identify all of [redacted] current and former owners and state the percentage ownership of each.

41. For the period from January 1, 2007 through the present, identify all of [redacted] current and former officers, directors, and principals.

42. Provide all tax opinions or other documents on which [redacted] relied in claiming deductions for premium payments under the Captive Insurance Program on its federal income tax returns for the taxable years 2011 and 2012.

43. Identify all persons upon whose advice or statements [redacted] relied in claiming deductions for premium payments under the Captive Insurance Program on its federal income tax returns for the taxable years 2011 and 2012.

    a. Describe the advice or statements rendered by each such person;

    b. Specify the date(s) on which the advice or statements were rendered;

    c. Identify the individual(s) to whom the advice or statements were rendered;

    d. Provide all documents related to or reflecting each such person's advice or statements.

44. Provide copies of all prior and subsequent year Federal Income Tax returns filed by [redacted]

for which it participated in the Captive Insurance Program.

45. For taxable years ended 2011 and 2012 provide the following:

a. Provide complete copy of financial statements (either audited or compiled), including all footnote disclosures.

b. Provide the following accountant's work papers, including but not limited to:

i. Chart of accounts and groupings

ii. Adjusting and closing entries

iii. Year-end working trial balance

iv. Year-end tax return work papers and reconciliation schedules including all Schedule M adjustments (including all of the working papers for these adjustments).

c. Provide the general ledger and/or detailed trial balance. The general ledger details must be complete and show ALL of the activity in each account.

d. Provide an organizational chart. Please include all foreign and domestic subsidiaries, if applicable.

e. Provide corporate minutes.

f. Provide a description of [redacted] activities.

46. Provide [redacted] business plan and other documents related to its goals, objectives, and business strategies.

Information due by [redacted]2014 At next appointment [X] Mail in [ ]

From:	Name and Title of Requester	Employee ID number	Date (mmddyyyy)
	[redacted] Revenue Agent	[redacted]	[redacted]
	Office Location: [redacted]		Phone: [redacted] Fax: [redacted]

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