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Dear Messrs. West, Bailey, Seitz & McCarty:

The Council of Insurance Agents and Brokers (The Council) appreciates this opportunity to comment on an issue of particular import to our members in the recently-enacted Tax Cuts and Jobs Act (TCJA). 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.

By way of background, 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.

#### **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, Council 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) The nature and primary value of Council members’ businesses clearly distinguishes them from the service businesses Congress did exclude from § 199A; specifically, the primary function of Council members is to sell insurance policies, not to provide services independent of those sales, and their principal asset is not the skill or reputation of individual employees or owners, but rather, the tangible insurance assets sold through any of their licensed professionals.

We therefore encourage the Treasury Department to:

- (1) Draft implementing regulations confirming that “insurance businesses” are “qualified trades or businesses” under § 199A; and
- (2) Define “insurance businesses” under such implementing regulations to include all businesses licensed/regulating by state insurance authorities that derive a majority of their qualified business income (as defined in § 199A) from licensed insurance-related activities.

#### ARGUMENT

#### ***Council 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 Council 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.

***Council Member Firms are Primarily Insurance Sales Businesses, not Service Businesses, and Are Properly Excluded from the Definition of “Specified Service Trade or Business”***

Council member firms and their licensed employees sell tangible assets—insurance coverages—to consumers. They operate as the day-to-day sales force for insurance companies. The services they provide are incidental to and/or in support of their core sales function. Ultimately, the primary value they provide to their customers derives from the insurance products sold by their licensed professionals, not from the reputation or skills of particular owners or employees.

Notably, as mentioned above, Council members (and insurance agents and brokers more generally) are licensed and regulated first and foremost as sellers 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.

Finally, unlike traditional brokerage services—in the investment industry, for instance—Council members are not traders. Instead, these insurance businesses sell generally long-term, one-time insurance coverages to individuals or groups. They do not execute high volumes of transactions, fulfill frequent buy/sell orders on behalf of their customers, or provide any similar transactional services.

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In sum, Council member firms and other insurance businesses were not captured under the TCJA’s definition of “service trades or businesses,” nor do they embody the characteristics of traditional service businesses that *were* included under that definition. Therefore, we respectfully request that the Treasury Department:

- (1) Draft implementing regulations stating that “insurance businesses” are “qualified 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. The Council looks 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,



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