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Internal Revenue Service  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

June 8, 2023

**Re: IRS Proposed Rule 109309–22**

**Submitted electronically via: <https://www.regulations.gov/commenton/IRS-2023-0017-0001>**

Dear Sir or Madam:

We write to you today regarding IRS Proposed Rule 109309-22 (the Proposed Rule), which we submit clearly violates the McCarran-Ferguson Doctrine, pursuant to 15 U.S.C.A. § 1011 et seq. For the past 78 years, that Doctrine's directive of "the business of insurance shall be regulated by the States" has led to the strongest, safest and most successful insurance market in the world. The Proposed Rule would abrogate the States' authority in a number of ways related to the captive insurance area. Accordingly, we oppose adoption of the Proposed Rule.

The National Council of Insurance Legislators (NCOIL) is a national legislative organization with the nation's 50 states as members, represented principally by legislators serving on their states' insurance and financial institutions committees. NCOIL writes Model Laws in insurance and financial services, works to preserve the State jurisdiction over insurance as established by the McCarran-Ferguson Act over seventy-five years ago, and to serve as an educational forum for public policymakers and interested parties. Founded in 1969, NCOIL works to assert the prerogative of legislators in making State policy when it comes to insurance and educate State legislators on current and breaking insurance issues.



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***Sound Public Policy In 50 States For 50-Plus Years***

A wide range of businesses across America, ranging from small to huge, have established captive insurance companies. A significant subset of these are on the smaller to medium size of the range and are able to make a small insurance company election, known as an 831(b) tax election. These captives mitigate against extremely relevant risks such as business interruption, cyber risk, and other high-severity, low-frequency issues, for their parents and sponsors, which include banks, auto dealers, manufacturers, farmers, and others.

Congress established Section 831(b) of the Internal Revenue Code, (IRC) as is its right. While Congress gave to the States the authority to regulate the "business of insurance" in the McCarran-Ferguson Act of 1945, Congress did reserve for itself the right to pass laws expressly relating to insurance. Section 831(b) of the IRC constitutes such an express Act.

The IRS apparently has some concerns with certain companies' use of Section 831(b). We at NCOIL take no position on those concerns, other than to condemn fraud in all instances.

However, the IRS goes too far in its attempt to deal with its concerns with the Proposed Rule. It seeks to assert itself into captive insurance companies' loss ratios, which it cannot do. Loss ratios constitute the very heart and core of "the business of insurance" and as such shall be "regulated by the States." Congress did not give the IRS the authority to promulgate a rule with the force of law that "specifically relates to the business of insurance," but rather saved such authority for itself via its legislative prerogative.

We at NCOIL urge the IRS to retract the Proposed Rule and return to the drawing board to address its stated concerns with Section 831(b) of the IRC in a way that is narrow, tailored, non-retroactive, and most importantly does not violate the McCarran Ferguson Doctrine by infringing on the Congressionally-delegated rights of the States to regulate the business of insurance. Failing that, we urge the Department of the Treasury to reject the Proposed Rule.

Very truly yours,



Tom Considine  
CEO  
NCOIL



Will Melofchik  
General Counsel  
NCOIL