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Todd Roberts, Vice President
Shea De Lutis, Treasurer
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Jeffrey D. Shoaf, Chief Operating Officer

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

CC:PA:LPD:PR (REG-109309-22)

Re: Proposed Rule by the Internal Revenue Service (IRS) on Micro-Captive Listed Transactions and Micro-Captive Transactions of Interest

To Whom It May Concern:

On behalf of the Associated General Contractors of America (AGC), please consider these comments regarding the IRS proposed rule on Micro-Captive Listed Transactions and Micro-Captive Transactions of Interest. AGC has concerns about the effect of this proposed rule on construction firms, and their ability to appropriately manage risk if this rule were to go into effect without significant changes.

AGC is the nation's leading construction trade association. Founded in 1918, it today represents more than 27,000 member firms including construction contractor firms, suppliers, and service providers. Through a nationwide network of 89 chapters in all 50 states, D.C., and Puerto Rico, AGC contractors are engaged in the construction of the nation's highways, bridges, broadband infrastructure, airports, transit systems, public and private buildings, water works facilities multi-family housing units, and many other types of projects.

Construction is an inherently risky business, and the ability to manage, and price risk is essential to the healthy functioning of construction firms. Any number of risk factors, from natural disasters, to pandemics, to supply chain delays, to complying with the new labor standards in the *Inflation Reduction Act*, can cause a construction project to become unprofitable, and, in extreme cases, jeopardize the viability of a construction firm.

While commercial insurance carriers provide many types of insurance products to AGC members, numerous construction firms make use of captive insurance arrangements to insure against risk that the insurance industry is either unwilling to write a policy for, or where the policies are cost-

prohibitive. This includes many small- to mid-sized construction firms that have formed captive insurance companies and elected to be a small captive under Internal Revenue Code (IRC) Section 831(b).

AGC is very concerned about the impact of this proposed rule on construction firms that utilize small captives that have made this 831(b) election. With this Proposed Regulation, the IRS seems to assume that most captives making the 831(b) election are using the captives in an abusive way and primarily for tax benefit. At least as it pertains to the construction industry, this is not the case. We have heard from numerous AGC member firms and service providers that the effect of this proposed regulation, if adopted as is, would be to force many construction firms to either terminate or severely restrict their use of small captives. This is understandable, considering the substantial increase in reporting requirements that many small captives would be subjected to as a “listed transaction,” and the increased penalties associated with “listed transactions.” While the IRS takes a suspicious view of companies that utilize captive insurance arrangements under IRS Section 831(b), construction firms utilize these arrangements for entirely legitimate business purposes.

AGC is specifically concerned about the effect of the following proposals in the proposed regulation:

65 Percent Loss Ratio

The proposed rule proposes that a small captive with a loss ratio of less than 65 percent, along with some additional criteria, should be “listed” and thus subjected to additional IRS scrutiny and penalties. As outlined above, construction firms will often utilize captives when commercial insurance is either unavailable or cost-prohibitive. This includes insuring for events that are rare in frequency, but high in severity. In talking with members and service providers, AGC believes that a 65 percent loss ratio is far too high, and would instead propose using an “actuarial standard” for evaluating whether a small captive should be “listed.” Many commercial insurance policies used in construction experience loss ratios far less than 65 percent, and the key criterion that should determine whether an 831(b) captive is potentially suspicious or not is whether it is actuarially sound.

Retroactivity

Under the proposed regulations, any small captive insurance company that falls outside the regulation’s prohibitively restrictive criteria is immediately designated as a listed transaction, despite complying with all current regulations and requirements. This is punitive. Any proposed regulation should only apply on a prospective basis and not apply retroactively.

Providing a Transitional “Off-Ramp”

Under current law construction firms that have formed captive insurance companies which elected to be a small captive under 831(b) require private letter ruling make an 831(a) tax election, or to

create an entirely new entity. If the IRS proceeds with the regulatory framework of the proposed regulation, AGC recommends that the IRS create an expedited process for current captives to transition without having to create a new entity or require a private letter ruling.

Captives are a meaningful risk management tool for the construction firms, and it is important to preserve this option for small and mid-sized firms that use small captives. As any construction firm will tell you, they are only one bad project away from bankruptcy, and managing risk through captives is essential to maintaining viability for firms that utilize them. AGC appreciates the opportunity to comment on this proposed regulation, and welcomes the opportunity to provide additional input.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Turkstra". The signature is fluid and cursive, with the first name "Matthew" and last name "Turkstra" clearly distinguishable.

Matthew Turkstra
Sr. Director, Building and Infrastructure Finance
Associated General Contractors of America