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December 19, 2016

CC:PA:LPD:PR (Notice 2016-66)  
Room 5203  
Internal Revenue Service  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

Re: Notice 2016-66  
Comment and Request for Published Guidance  
**IMMEDIATE ACTION REQUESTED**

In Notice 2016-66, the Service has set forth an overview of a particular transaction in Section 1, and has declared certain transactions to be "transactions of interest" in Section 2. The Service has requested comments on how the transaction might be addressed in published guidance.

The purpose of this comment letter is to note that the phrasing of Section 2 of the Notice is so broad that it could be interpreted to include a large number of companies generally classified by the Service as "PORCs," (Producer Owned Reinsurance Companies) that accept unrelated third party risk rather than a parent or sibling company's risk. These companies are in the unique position of having previously been the subject of IRS scrutiny and evaluation. They should not be the subject of this Notice.

Published guidance should be issued quickly to avoid undue burden on taxpayers and waste of time and resources by the Service.

This comment is authored by an attorney who represents several companies involved in the automobile dealer aftermarket financial product industry, which frequently utilizes structures classified as PORCs. Sometimes these companies qualify for, and utilize, the small property and casualty company election allowed by section 831(b).

The automotive aftermarket product industry, and the use of reinsurance structures, has been the subject of IRS scrutiny. See, e.g., the Service's New Vehicle Dealership Audit Technique Guide (ATG), chapters 7 and 8; TAMs 2004-53012 and 53013. More particularly to the point of this letter, in 2002 the Service determined that the reinsurance transactions used by this industry were "listed transactions" in Notice 2002-70. As a result, the participants in these programs submitted Forms 8886, which were reviewed by the Service. In Notice 2004-65, the Service de-listed the transaction, stating, "Since issuing Notice 2002-70, the Service has examined various types of these

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**arrangements. These examinations have revealed fewer abusive transactions than anticipated.”** (Emphasis added.)

In light of this unique background, we believe it would be appropriate for the Service to issue published guidance that Notice 2016-66 is not intended to apply, and does not apply, to the “PORC” type of arrangements set forth in ATG chapter 8, Notice 2002-70, Notice 2004-65, or TAMs 2004-53012 and 53013. We offer the following reasons:

1. The PORCs are not captives; they are not insuring risk of a parent or sibling company. The PORCs reinsure unrelated third party risk<sup>1</sup>, such as vehicle service contracts, GAP coverage, and appearance and anti-theft coverage.
2. PORCs typically do not pose the risks of abuses noted in Section 1.02 of the Notice:
  - a. They do not offer coverage only to the Insured or persons related to the Insured, or promoters of the transaction, but rather to unrelated customers.
  - b. They do not involve implausible risks, but rather involve well-established and recognized risks such as mechanical breakdown, loss of asset value due to collisions, roadside assistance, theft, and damage to appearance.
  - c. The descriptions of coverage in the contracts are not vague, ambiguous, or illusory, but are well-understood, with thousands of claims administered, adjusted, and paid annually.
  - d. The coverage is not artificially inflated, but is set by market dynamics; consumers have options for this coverage and would not pay an artificially inflated price.
  - e. The premiums are based on knowledge of loss history and/or actuarial analysis.
  - f. The program has defined claims administration procedures, and claims

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<sup>1</sup>As noted in TAM 200453012, page 17: “In reaching this conclusion, we have considered the argument that the arrangement at issue involves only one insured (Taxpayer 1), and that the arrangement therefore cannot constitute insurance for federal income tax purposes because there is insufficient risk distribution. **The risks in the present case, however, originated not with Taxpayer 1 but with the large number of unrelated customers of Taxpayer 1.** The amounts paid by those customers to purchase Program E Vehicle Service Agreements were pooled, and those customers were indemnified for the repair of specified components of identified vehicles, either in cash or in kind.” See also Rev. Rul. 2009-26, situation 1 (ninety percent quota share arrangement between IC Y, with 10,000 policyholders and Z, which conducted no other business; Z qualified as an insurance company because Z was reinsuring risks underwritten by an insurance company); PLR 201428006 (service contracts shifted customers’ risk of mechanical failure to Obligor, and Obligor transferred to taxpayer; found to be insurance).

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- are filed and paid in accordance with insurance industry standards.
3. The PORCs utilized by the clients represented by this writer do not accept any of the "enterprise risk" as described in Section 1 of Notice 2016-66.
  4. The PORCs are providing recognized coverages, set by arms' length market negotiations with consumers and under requirements set by unrelated insurers.
  5. The PORCs have already been examined, and deemed not to justify listed transaction treatment.
  6. **Requiring reporting from PORCs will lead to thousands of submissions to the IRS that have little, if any, resemblance to the situations described in Section 1 of the Notice.** This will cause an unnecessary burden on taxpayers, and will divert IRS resources and enforcement efforts. Effectively, PORC reporting will create a greater haystack and thereby diminish the IRS's capability to find the needle.

The undersigned is available to conference or meet with Service personnel as may be deemed appropriate for discussion of this matter. **In view of the impending January 31, 2017 deadline for compliance, and the amount of labor anticipated should compliance prove necessary, it is urged that the Service give this comment letter immediate attention.**

This comment letter is **not** intended to seek any relief from the reporting requirements for any companies that engage in the activities set forth in Section 1 of the Notice.<sup>2</sup> It seeks the very limited clarification that the Notice is not intended to apply to companies engaged in the "PORC" type of arrangements involving unrelated third party risk set forth in New Motor Vehicle Dealership ATG chapter 8, Notice 2002-70, Notice 2004-65, or TAMs 2004-53012 and 53013.

Very truly yours,

WEILL & MAZER,  
A Professional Corporation

By: 

ANDREW J. WEILL

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<sup>2</sup> It is of course possible that some PORCs may have engaged in transactions that use products that are not derived from unrelated third party risk. In those situations, this writer and others involved in compliance have advised taxpayers of their obligation to make the requisite disclosures under the Notice.