

## **IRS and Treasury Department wave white flag in battle over the Administrative Procedure Act notice and comment requirements: Submit comments on the proposed regulations regarding micro-captive insurance by June 12, 2023**

Dentons Federal Tax Controversy Insights

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### **KEY CONTACTS**

Gregory Rhodes

Ronald Levitt

Kristin Martin

For those paying attention, taxpayers have been using the Administrative Procedure Act (“APA”) as a sword to cut through attacks by the Internal Revenue Service (“IRS”), particularly in relation to conservation easement transactions and micro-captive insurance arrangements. Essentially, taxpayers have successfully fended off a myriad of substantive attacks by wielding the IRS’s seemingly routine failure to comply with notice and comment procedures as required by the APA against it.

The IRS and Treasury Department took notice. In response the agencies seem to be abandoning the once-held stance that compliance with the notice and comment procedures under the APA was not required for certain notices and regulations, in favor of issuing proposed regulations and soliciting public comments. One such notice being Notice 2016-66, identifying so-called micro-captive insurance transactions, and other substantially similar transactions, as transactions of interest. Notice 2016-66 created certain responsibilities for taxpayers involved in the identified transactions.

The IRS and Treasury Department issued Notice 2016-66 in violation of the APA’s procedural notice and comment requirements. See *CIC Services, LLC v. IRS*, No. 3:17-cv-110, slip op. at 4 (E.D. Tenn. June 2, 2022). In response, the IRS and Treasury Department issues proposed regulations on April 11, 2023. These regulations may be accessed online from the Federal Register’s official webpage at:

<https://www.federalregister.gov/documents/2023/04/11/2023-07315/micro-captive-listed-transactions-and-micro-captive-transactions-of-interest>. Important dates and information, including public comments

already received, may be accessed through this webpage. All interested parties should submit comments by June 12, 2023 (either written or electronic) via the Federal eRulemaking Portal here: <https://www.regulations.gov>.

The IRS and Treasury Department plan to hold a public hearing, but interested parties must take action to speak or attend. To speak, a request and outline of topics to be discussed must be submitted by June 12, 2023. This may be done by accessing the Federal eRulemaking Portal here: <https://www.regulations.gov/>. If an individual wishes to testify by telephone, email [publichearings@irs.gov](mailto:publichearings@irs.gov) and use subject line "Request to TESTIFY at Hearing for REG-109309-22." Include a copy of the individual's public comments and outline of discussion topics. If by June 12, 2023, no outlines have been received, the public hearing will be cancelled. The public hearing is currently scheduled to take place as a teleconference on July 19, 2023, at 10AM EST.

Importantly, you must also request to attend the public hearing by 5PM EST on July 17, 2023. If an individual wishes to attend by telephone, email [publichearings@irs.gov](mailto:publichearings@irs.gov) and use subject line "Request to ATTEND hearing for REG-109309-22." If you need accessibility accommodations, make sure to submit that request by July 14, 2023. These portals, emails, and telephone numbers may be found on the Federal Register's webpage listed above which.

## FEDERAL TAX CONTROVERSY TEAM

### Alabama



**Michelle Abrams Levin**  
Shareholder  
Huntsville  
michelle.levin@dentons.com



**Ronald Levitt**  
Shareholder  
Birmingham  
ronald.levitt@dentons.com



**Gregory Rhodes**  
Shareholder  
Birmingham  
gregory.rhodes@dentons.com



**David Wooldridge**  
Shareholder  
Birmingham  
david.wooldridge@dentons.com



**Logan Chaney Abernathy**  
Senior Managing Associate  
Huntsville  
logan.abernathy@dentons.com



**Sidney W. Jackson, IV**  
Senior Managing Associate  
Birmingham  
sidney.jackson@dentons.com



**J.R. Davidson**  
Managing Associate  
Birmingham  
john.davidson@dentons.com



**Sarah Green**  
Managing Associate  
Huntsville  
sarah.green@dentons.com



**Kristin Martin**  
Managing Associate  
Birmingham  
kristin.martin@dentons.com



**Emily C. Ellis**  
Associate  
Birmingham  
emily.ellis@dentons.com



**Sarah Ray**  
Of Counsel  
Huntsville  
sarah.ray@dentons.com

### Indiana



**Stephanie Bruns**  
Senior Managing Associate  
Indianapolis  
stephanie.bruns@dentons.com



**Brett Miller**  
Counsel  
Indianapolis  
brett.miller@dentons.com

## Iowa



**Michael Gilmer**  
Special Counsel  
Des Moines  
[michael.gilmer@dentons.com](mailto:michael.gilmer@dentons.com)

## Kentucky



**Chaz Lavelle**  
Partner  
Louisville  
[charles.lavelle@dentons.com](mailto:charles.lavelle@dentons.com)



**Mark Loyd**  
Partner & Co-Leader,  
Tax National Practice Group  
Louisville  
[mark.loyd@dentons.com](mailto:mark.loyd@dentons.com)



**Bailey Roese**  
Partner  
Louisville  
[bailey.roese@dentons.com](mailto:bailey.roese@dentons.com)

## Pennsylvania



**Frank Marano**  
Shareholder  
Pittsburgh  
[frank.marano@dentons.com](mailto:frank.marano@dentons.com)



**Michael Silverman**  
Shareholder  
Pittsburgh  
[michael.silverman@dentons.com](mailto:michael.silverman@dentons.com)

## Utah



**Gary Thorup**  
Shareholder  
Salt Lake City  
[gary.thorup@dentons.com](mailto:gary.thorup@dentons.com)