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Re: **Interpretive Opinion No. 03-15, Applicability of the Tennessee Insurance and Automobile Club Regulations to Driver Reimbursement Program**

Dear Mr. Broemel,

The Division of Insurance of the Tennessee Department of Commerce and Insurance ("Division") is in receipt of the request for an interpretive opinion submitted on or about April 23, 2015 to Tony Greer, Chief Counsel for Insurance. Your inquiry requested guidance regarding whether certain driver reimbursement programs are subject to regulation by the Division.

Specifically, you ask whether companies who operate programs which reimburse employees for expenses incurred due to business related use of driver-owned vehicles are subject to insurance or automobile club regulation under the Tennessee insurance laws.

As understood by the Division, a fleet leasing company plans to offer a driver reimbursement program to corporate clients. This program will: (1) provide and manage vehicle fleets; (2) provide fleet maintenance services; (3) and reimburse employees using driver-owned vehicles for business purposes. This driver reimbursement program will further provide driver communication, driver safety, repairs, including occasional non-warranty and non-collision repairs, towing through a licensed automobile club, and routine maintenance services. Any reimbursements paid by the driver reimbursement program shall be tax-qualified and thus excluded from the employee's taxable income.

In so assessing amounts for reimbursement, the company shall accumulate mileage information, draft reports and analyses, and manage the reimbursements paid to corporate employees on a cents-per-mile basis. Fees for this program are charged to the corporate client, are based on the mileage reported by the corporate employees, and are subject to monthly adjustment. Associated service fees shall not be charged to any individual employee. Furthermore, the driver reimbursement program is not designed to reimburse employees for defects covered by the

manufacturer's warranty, or repairs which would be covered under the employee's automobile insurance policy. The purported main purpose of this program is the provision of tax-qualified reimbursements to employees operating driver-owner vehicles in the course of their employment.

A contract for insurance in the State of Tennessee is "an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury, loss or damage of something in which the other party has an insurable interest[.]" Tenn. Code Ann. § 56-7-101(a) (2012). To ascertain whether a contract is insurance the service-indemnity test, a test contemplating the predominant nature of the contract, must be applied. *H&R Block E. Tax Servs. v. State*, 267 S.W. 3d 848, 863 (Tenn. Court App. 2008). In considering the contract as a whole, the service-indemnity test questions whether the contract intends to serve as a guarantee of some service, or as a promise of indemnity. *Id.* The nature of the underlying contract is also an important factor in whether a contract is one for insurance. *Id.* Lastly, for a contract to rise to the level of insurance, payment of an obligation must be contingent upon an unforeseeable act. *Id.* at 865.

Here, the construct of the driver reimbursement program is intended to be a contract which provides tax-qualified reimbursement services to employees of corporate clients, with an extraneous repair, maintenance, and towing component. The predominate nature of this contract, as described, is the provision of tax-qualified reimbursements to employees of corporate clients, a service. Additionally, the provision of this service is the purported underlying objective of this contract. Lastly, as the payment of these reimbursements is not contingent on any unforeseeable act, but rather is highly anticipated with only the amount of reimbursement remaining a contingent element, this contract fails to rise to the level of insurance. As presented, the contemplated driver reimbursement program is not insurance within the insurance laws of Tennessee.

Furthermore, automobile clubs in the State of Tennessee include "any individual or entity, who in consideration of fees, dues, periodic payments, or other specifically stated charges, promises its members to provide automobile club services." Tenn. Code Ann. § 55-18-101 (2010). An automobile club service involves "the rendering or procuring of, or reimbursement for, service that may be provided to a member related to travel and the operation, use and maintenance of a motor vehicle[.]" Tenn. Code Ann. § 55-18-102(1) (2010). Relevant services include, but are not limited to, emergency road services,[1] financial services,[2] insurance services,[3] and towing services.[4] *Id.* Essentially, automobile clubs, in consideration of an annual fee, provide repair, payment, towing, and limited insurance products to members of the automobile club. To "organize, operate, or in any way solicit members for an automobile club" is unlawful in Tennessee absent a license from the Division. Tenn. Code Ann. § 55-18-107 (2010).

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[1] Emergency road services "consist[] of the fuel delivery, extrication, lockout service, repair, replacement or other adjustment of the equipment, tires or mechanical parts of an automobile so as to permit it to be operated under its own power." § 55-18-102(6).

[2] Financial services include "loans or other financial services such as stored value cards, deposit products, or advances of money, with or without security, are made or provided to or arranged for members of any automobile club association." § 55-18-102(7).

[3] Insurance services include the sale "to a member of a policy of accident insurance covering liability or loss by a member as the result of death or personal injury or loss of or damage to the personal property of the member, or the [sale] of a hospital indemnity policy." § 55-18-102(8).

[4] Towing services "consist[] of the drafting or moving of a motor vehicle from one (1) place to another under other than its own power." § 55-18-102(15).

Furthermore, it is unlawful to "offer *any* motor club service" unless so provided with an automobile club certificate of authority. *Id.* (emphasis added).

The benefits provided under the driver reimbursement program described herein are exceedingly similar to those contemplated in automobile club statutes. Furthermore, as indicated in Tenn. Code Ann. § 55-18-107, the provision of any motor club service requires compliance with the automobile club regulations, regardless of how substantial a portion of the contract in question focuses on those services. The significant difference between an automobile club and the aforementioned program is the existence of members. The driver reimbursement program does not require the employee-drivers to pay any fees to obtain the services under the contracts, and are thus not members of the program. Rather, the contract giving rise to the motor services is with the corporate client, who pays all fees and determines which employees qualify for reimbursement under the program. As such, the driver reimbursement program, as described, is not an automobile club in the State of Tennessee. Furthermore, the contemplated program utilizes a licensed automobile club for provision of its motor club services, rendering licensure of this driver reimbursement program unnecessary and duplicative.

Please note that the Division has not made an independent investigation of the facts to determine the accuracy or completeness of the information supplied, but has instead relied solely upon the information you have provided. If such information is incorrect or changes substantially, it would be necessary for the Division to reconsider the matter and the position stated herein would be void. This letter expresses the Division's position on enforcement action only and does not purport to express legal conclusions on the issues presented. This position is furnished solely for the benefit and use of the entities described herein. Please be advised that further publication or use of this position may only be made with the Division's prior written consent.

This response by the Division is to a specific fact situation relating to the interpretation of Tenn. Code Ann. § 56-7-101(a) and should not be construed as a legal position or opinion of the Commissioner of the Tennessee Department of Commerce and Insurance or of any other official in the Department. Please note that the conclusions contained herein are based upon the representations that have been made to the Division, and any different facts or conditions might require a different response. As each inquiry is reviewed on the specific facts presented, this response is based only on such facts and may not be used as precedent by any person or entity. Any variation in the facts presented to the Division by Mr. W. Davidson Broemel could result in a different conclusion than asserted herein.

If you have further questions or concerns regarding this letter, please feel free to contact me.

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