

Simon Owen, managing director of independent Folio Insurance Managers gives the offshore view on the proposals outlined in Bill HR3301 relating to §831(b) electing captives



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INDUSTRY COMMENT

FOR A NUMBER of years now, offshore jurisdictions such as the British Virgin Islands (BVI) and Anguilla have been popular domiciles for small to medium-sized captives, including Internal Revenue Code (IRC) §831(b) captives. Generally, the primary reason for this is a combination of cost-efficient licence and management fees, together with flexible legislation that does not require local directors, locally held board meetings and local bank accounts.

For a company to be designated IRC§831(b) it must elect to be a US taxpayer by making a 953(d) election. This allows the company to maintain assets in the US rather than having to maintain bank accounts offshore and risk falling foul of the reporting requirements under the Patriot Act. Essentially, this means that the insurer operates and is regulated from offshore but control can remain within the US.

Clearly, the proposed HR3301 Bill would increase the potential benefits and the number of companies and organisations that could utilise such a structure. However, it is important that anyone considering forming an IRC§831(b) fully understands and satisfies the associated 'risk shifting', 'risk distribution' and other applicable IRS requirements. Specialist US taxation advice should always be sought in advance to ascertain that the proposed captive is eligible to qualify for IRC§831(b) status and should be reviewed thereafter at regular intervals.

It is important to remember that many businesses do not have a suitable corporate structure or spread of risk to qualify, so potential captive owners should be wary of any advisors who recommend the structure without having a full understanding of their business.

One good example of the types of

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businesses that do sometimes fit nicely into IRC§831(b) mould are the likes of managing general agents (MGAs) or managing general underwriters (MGUs) who are willing to participate in some of the risk of their generated book of insurance business. This would generally be facilitated through some form of stop loss or quota share arrangement with the carriers they represent.

Other examples of businesses that might feasibly qualify are groups of doctors pooling medical malpractice risks or property developers with a significant number of projects that are all treated as separate insureds in line with the IRS requirements.

The successful enactment of the HR3301 will certainly create additional interest in captive formations as a result of the increased premium limitations to US\$2.025m. However, buyers must ensure they are obtaining the right combination of insurance benefit and eligibility, while keeping the running costs low enough to create a viable long-term structure. With that in mind, offshore domiciles will undoubtedly continue to be some of the few suitable choices for the formation of IRC§831(b) and other lower premium captives. **CR**