Texas Society of
Certified Public Accountants

Sent via email
Notice.comments@irscounsel.treas.gov

January 6, 2012

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Jeffrey Van Hove
Legislative Counsel
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. Curtis G. Wilson
Associate Chief Counsel for Passthroughs
and Special Industries
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on REG-128224-06 regarding IRC § 67(e), Exception to the 2-Percent Floor for Estates and Trusts, Prop. Reg. § 1.67-4

Dear Messrs. Shulman, Wilkins, Van Hove, and Wilson:

The Texas Society of Certified Public Accountants (TSCPA) is a nonprofit, voluntary professional organization representing more than 29,000 CPAs. One of the expressed goals of TSCPA is to speak on behalf of its members when such action is in the best interest of its constituency and serves the cause of CPAs in Texas, as well as the public interest. TSCPA has established a Federal Tax Policy Committee (FTP) to represent those interests on related tax matters. The FTP has been authorized by TSCPA's Board of Directors to submit comments on such matters of interest to committee membership. The views expressed herein have not been approved by the Board of Directors or Executive Board and, therefore, should not be construed as representing the views or policies of TSCPA. We appreciate the opportunity to provide comments to the Internal Revenue Service (IRS) on its proposed regulations regarding § 67(e).

We recommend that the final § 67(e) regulations adopt a *Hubert* approach and a percentage safe-harbor for bundled fees.

A Hubert Approach

We support the American Bar Association's suggestion that the final § 67(e) regulations adopt an approach similar to that used by the *Hubert* regulations (i.e., regulation § 20.2056(b)-4). Such an

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approach would add clarity to the regulations and provide the government and taxpayers with a familiar framework to work within.

The use of a *Hubert* approach could be implemented in the final § 67(e) regulations by establishing and defining two separate classes of costs, "entity-related costs" and "asset-related costs."

- Entity-related costs would be those costs that are incurred as a result of the entity. Examples of entity-related costs would be tax return preparation, fiduciary accountings, fiduciary bonds and insurance, court filing fees, legal and accounting fees, executor fees, trustee fees, appraisal fees of a unitrust, and other costs that would not have been incurred absent the separate legal entity of the estate or trust.

- Asset-related costs would be those costs incurred by an owner of property simply by reason of being the owner of the property. Examples of asset-related costs would be investment advisory fees, custodian fees, bank charges, and other nonbusiness expenses incurred for the production of income or the maintenance of income producing property that do not depend on the identity of the owner.

Entity-related costs would be exempt from the two-percent floor while asset-related costs would be subject to the 2-percent floor unless the fiduciary demonstrates that a hypothetical individual would not commonly or customarily incur the asset-related cost.

Bundled Fees

The proposed regulations provide that the portion of a bundled fee attributable to investment advice will be subject to the 2-percent floor. The proposed regulations further allow the fiduciary and/or return preparer to use any reasonable method to determine the portion of a bundled fee attributable to investment advice. We agree with the American Institute of CPAs and the American Bar Association that the IRS should abandon its unbundling requirement for investment fees. Such a requirement (unbundling) has no basis in case law. Moreover, it is impossible to assign a realistic value to each part that adds up to the whole because the sum of the parts exceeds the total fee charged. Thus, competing providers are likely to allocate the excess in arbitrary and inconsistent ways. Nonetheless, if the IRS retains this requirement in the final regulations we urge the retention of any reasonable method to unbundle such fees.

In addition, if the IRS retains the unbundling requirement for investment fees, we urge the IRS to adopt a safe-harbor *alternative* whereby 20 percent of a bundled trustee fee would be deemed attributable to investment advice (and, thus, subject to the 2-percent floor) and 80 percent would be attributable to other fiduciary services (and, thus, not subject to the 2-percent floor). We believe an 80/20 ratio is appropriate because a fiduciary typically provides, as part of a bundled fee, numerous services that have nothing to do with investment advice, such as the following:

- Review of the governing instrument to determine governing law, investment restrictions or authorizations, trustee provisions, distribution standards, duration of trust, tax attributes, etc.

- Summarize the important provisions of the governing instrument and any relevant court determinations affecting the trust.

- Consider the proper situs in which to administer the trust.

- Collect and retain beneficiary information.

- Collect the information necessary for the preparation of federal and state tax returns, prepare or arrange for the preparation of such tax returns, and review such tax returns before they are filed.

- Determine and prepare (or have prepared) quarterly federal and state estimated tax payments.

- Consider requests by beneficiaries for discretionary distributions and/or loans from the trust, including reviewing the trust instrument for appropriate authorization, submission of the request to the relevant committee of the trust company, and communications to and from the beneficiary relating to the exercise of discretion.

- Manage beneficiary disputes.

- Analyze the income, gift, and generation-skipping transfer (GST) tax consequences of distributions from the trust, including use of the 65-day election to distribute income from a complex trust following the close of a calendar year.

- Determine application of the separate share rule.

- Analyze the estate, gift, and GST tax consequences of the termination of the trust, including the potential liability of the trustee for the payment of such tax, and coordination with the executor of the deceased beneficiary's estate in calculation of any such tax payable by reason of the inclusion of the trust in the deceased's estate.

- Calculate the accrued income as of the termination date and distribute the accrued and undistributed income to the appropriate beneficiaries.

- Determine whether a judicial or non-judicial accounting is appropriate to settle the trustee's account, prepare or manage the preparation of the accounting, and file appropriate court papers (if necessary).

- Compute the § 691(c) deduction for estate tax imposed on items of income in respect of a decedent, if applicable.

The preamble to the proposed regulations ("The Preamble") indicates that the IRS and Treasury Department have previously received comments about the use of numerical or percentage safe harbors. The Preamble states that commentators were concerned that fiduciaries could not rely on safe harbors because of their fiduciary duties and that safe harbors could increase complexity by requiring complicated anti-abuse rules. We suspect, however, that many fiduciaries would feel comfortable using a percentage safe harbor. Further, if use of the safe harbor is optional, then a fiduciary that does not feel comfortable using the safe harbor can instead use another reasonable method to determine the portion of that fiduciary's bundled fee that is attributable to investment advice.

We do not believe that the *option* to use a percentage safe harbor would be detrimental to a fiduciary or require complex anti-abuse rules. To the contrary, we believe that a percentage safe harbor would promote significant efficiency by eliminating the need to use a costly and/or complicated allocation method. Finally, we believe that the final regulations should contain the examples we provided as practical guidance on how to apply these regulations.

Thank you for the opportunity to submit these comments. We would be pleased to discuss them if you believe that would be helpful. You may contact me at 713.333.0555 or TSCPA staff liaison Patty Wyatt at 817.656.5100.

Sincerely,

Carol A. Cantrell, CPA, JD
Chair, Federal Tax Policy Committee
Texas Society of Certified Public Accountants

Principal responsibility for drafting these comments was exercised by Carol A. Cantrell, CPA, JD; Kenneth M. Horwitz, CPA, JD ; Carol G. Warley, CPA, PFS ; and Mark T. Watson, CPA, CFP.