American Bankers Association

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May 30, 2014

The Honorable John A. Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Final Rule – Section 67 Limitations on Estates and Trusts

Dear Commissioner Koskinen:

The American Bankers Association (ABA)[1] writes seeking relief and clarification regarding the Internal Revenue Service's (IRS) recent final regulations promulgated under Code section 67(e) (Rule).[2] The Rule provides guidance on the costs incurred by estates or non-grantor trusts that are subject to the 2-percent floor for miscellaneous itemized deductions under section 67(a) of the Internal Revenue Code.

In their fiduciary capacity, our member banks and trust companies (collectively referred to as banks) act as trustee or executor. In exchange for accepting this responsibility, banks charge trustee and executor fees that are now subject to the tax allocation requirements of the Rule. Of particular consequence to our member banks is the Rule's requirement to "unbundle" trustee and executor fees to allocate the portion of the fee charged for services subject to the 2-percent floor.

As we have noted in previous letters, our member banks have charged their fiduciary fees, in accordance with applicable state law, in exchange for fulfilling the singular and unique duties that the fiduciary relationship requires. In other words, these fees are not the sum of separately imposed fees for distinct services that can be readily, and with any degree of certainty, "unbundled." Because of the inherent difficulties in

[1] The American Bankers Association is the voice of the nation's $14 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits and extend nearly $8 trillion in loans.

[2] 79 Federal Register 26616, *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-05-09/pdf/2014-10661.pdf.

applying the Rule's artificial construct to these fees, we seek guidance and relief for our members to comply with IRS requirements.

Effective Date

Most importantly, we seek relief from the immediate effective date of the Rule. Under the Rule, the "unbundling" requirements apply to taxable years beginning on or after May 9, 2014. We appreciate that the IRS may have intended to give the industry time to make necessary changes to trust department operations and administration, by assuming that the Rule would only apply to trusts and estates beginning on January 1, 2015 (the start of the first tax year after May 8, 2014, for existing trusts and calendar year estates). However, the Rule, as written, would appear to apply immediately to any non-grantor trust *created* after May 8, as well as to an estate of a decedent who dies after May 8. For those trusts and estates on a fiscal year, the Rule would also appear to apply immediately to the new fiscal year starting after May 8.

Banks are in the process of attempting to determine how to allocate their fees in compliance with the Rule and design and implement the necessary program changes. Although the Rule does allow for any reasonable method of allocation, fiduciaries still must devote considerable thought and analysis to determine how this allocation can be done fairly, consistently, accurately and in keeping with the fiduciary duties owed as a trustee or executor. We therefore urge the IRS to extend the effective date to taxable years beginning on or after January 1, 2015, regardless of when the trust was created or when a decedent died. Such an effective date will give banks and trust companies the crucial time needed to prepare more fully to comply with the Rule. So too would this extension give the IRS time it will presumably need to implement any necessary changes to Form 1041 and its instructions to allow for "unbundling" of fiduciary fees.

Tax Preparation Fees

The Rule contains a list of tax preparation fees that would not be subject to the 2-percent floor because individuals would not commonly or customarily incur them. Those fees relate exclusively to all estate and generation-skipping transfer tax returns, fiduciary income tax returns, and the decedent's final individual income tax returns ("exclusive list"). The Rule then states that, "The costs of preparing *all* other tax returns (for example, gift tax returns) are costs commonly and customarily incurred by individuals and thus are subject to the 2-percent floor." [Emphasis added].

We are concerned that the IRS's presumption that fees associated with all other tax return preparation are subject to the 2-percent floor is overly broad. We further believe that the exception for tax preparation fees should be sufficiently flexible to allow for the full deduction of tax preparation fees that are not commonly or

customarily incurred by individuals, as allowed under the statute, yet not on the Rule's "exclusive list."

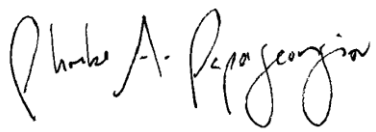
For example, executors often discover that decedents have not been filing gift tax returns over the years and now must, post-death, prepare and file these returns as part of their executorial duties. Accordingly, if a gift tax return is done in conjunction with a decedent's estate, the return expenses should be fully deductible, because they are an extension of the necessary preparation of the decedent's federal estate tax return or, if none is required, as a part of the executor's duties to have the decedent's prior gifts properly reported.

In addition, many foreign countries are imposing wealth and income taxes on foreign tax-resident beneficiaries of domestic trusts, making the trustee jointly responsible for that tax payment or information reporting to the foreign government. This type of tax return is expensive to complete and should not be subject to the 2-percent floor, because an individual would not commonly or customarily incur such an expense. However, because this type of tax return is not included on the Rule's "exclusive list," it is presumed to be subject to the 2-percent floor and not fully deductible from the income of the trust.

Conclusion

In closing, ABA urges the IRS to delay the effective date of the Rule until tax years starting on or after January 1, 2015, in particular for the "unbundling" requirements. A fiduciary's overarching responsibility – and corresponding liability – makes such unbundling a difficult analysis indeed, and requires time to implement. In addition, we believe that the exception for tax preparation fees should be sufficiently flexible to allow for the full deduction of tax preparation fees that are not commonly or customarily incurred by individuals yet not on the Rule's "exclusive list."

Sincerely,



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