

**AMERICAN BAR ASSOCIATION**

**Section of Real Property,  
Trust & Estate Law**

321 North Clark Street  
Chicago, Illinois 60654-7598  
FAX: (312) 988-5262  
<http://www.abanet.org/rpte>  
E-mail: [rpte@abanet.org](mailto:rpte@abanet.org)

May 6, 2009

The Office of the Assistant Secretary for Tax Policy  
Elizabeth Garrett, Nominee  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

Re: IRS Proposed Regulation 26 CFR 1.67-4, REG-128224-06 Regarding Fees of Trusts and Estates

Dear Ms. Secretary:

The following comments are submitted by the American Bar Association (“ABA”) Section of Real Property, Trust and Estate Law. The comments have not been approved by the House of Delegates or the Board of Governors of the ABA and should not be construed as representing the position of the ABA. The comments were prepared by the Individual and Fiduciary Income Tax Committee of the ABA Section of Real Property, Trust and Estate Law (“Committee”). The Committee wishes to express certain of its concerns over a proposed Treasury Department regulation § 1.67-4(c), which would require trustees and executors to “unbundle” their single commission fees and, if made a final regulation, would have a significant adverse impact on fiduciary administration.

Under the proposed regulation, fiduciaries would be required to unbundle or break down their fees to determine the nature of the services rendered and to what extent, if any, the component parts, otherwise deductible under section 212 of the Internal Revenue Code of 1986 as amended (“IRC”), may be subject to reduction by the “2-percent floor” pursuant to IRC Sections 67(a) and 67(e). The ABA Section of Real Property, Trust and Estate Law previously expressed concerns about unbundling to the Internal Revenue Service (“IRS”) and the Treasury Department in May 2008 (“2008 Report”).<sup>1</sup> It pointed out that unbundling is required neither by the statute nor by the Supreme Court’s decision in *Knight v. Commisone*<sup>2</sup> and that it would be extremely burdensome and impractical, if possible at all, for trustees and executors to implement and the IRS to enforce.

Recently, new concerns have arisen that we ask the Treasury Department to consider when drafting any final regulations. The requirement to unbundle trustee fees for income tax purposes may have the unintended effect of causing beneficiaries to assert that costs should be consistently allocated under state law. Under the Uniform Principal and Income Act of nearly all states and many trust agreements, trustee fees, custodial fees, and investment management fees are paid equally from the trust’s income and principal. But most other administrative costs are often paid entirely from fiduciary accounting income. These costs may include property management, tax preparation, fiduciary bond

<sup>1</sup> ABA Section of Real Property, Trust, and Estate Law comments to IRS and Treasury on REG- 128224-06 dated May 21, 2008, available at [www.regulations.gov](http://www.regulations.gov). Similar concerns were also expressed in the November 14, 2007 Treasury Department hearing by many witnesses.

<sup>2</sup> *Knight v. Comm’r*, 128 S. Ct. 782 (2008).

**CHAIR**  
Steve R. Akers  
Ste. 800  
300 Crescent Court  
Dallas, TX 75201-1800  
**CHAIR-ELECT**  
Roger D. Winston  
7th FL 4800 Montgomery Lane  
Bethesda, MD 20814-3462  
**REAL PROPERTY DIVISION**  
**VICE-CHAIR**  
Andrew F. Palmieri  
Ste. 310, 277 S. Washington St.  
Alexandria, VA 22314-3674  
**TRUST & ESTATE DIVISION**  
**VICE-CHAIR**  
Alan F. Rothschild, Jr.  
P.O. Box 2707  
Columbus, GA 31902-2707  
**FINANCE AND CORPORATE SPONSORSHIP OFFICER**  
Gideon Rothschild  
The Chrysler Building  
405 Lexington Avenue, 12th Floor  
New York, NY 10174-2299  
**SECRETARY**  
Susan G. Talley  
546 Carondelet St.  
New Orleans, LA 70130-3588  
**LAST RETIRING CHAIR**  
Kathleen M. Martin  
Ste. 1900  
220 South 6th Street  
Minneapolis, MN 55402-4522  
**SECTION DELEGATES TO HOUSE OF DELEGATES**  
David M. English  
203 Hulston Hall  
Columbia, MO 65211-4300  
Leopold Z. Sher  
Ste 2800, 909 Poydras Street  
New Orleans, LA 70112-4046  
David K. Tang  
Ste 2900, 925 4th Avenue  
Seattle, WA 98104-1158  
**ABA BOARD OF GOVERNORS LIAISON**  
Howard H. Vogel  
PO Box 217  
Knoxville, TN 37901-0217  
**COUNCIL**  
Nancy Appleby  
Washington, DC  
Edward T. Brading  
Johnson City, TN  
Katherine N. Barr  
Birmingham, AL  
Marc S. Bekerman  
New York, NY  
Dominic J. Campisi  
San Francisco, CA  
David J. Dietrich  
Billings, MT  
Jo Ann Engelhardt  
Palm Beach, FL  
Jeramie J. Fortenberry\*  
Gulfport, MS  
Christopher H. Gadsden  
Radnor, PA  
Michael Glazerman  
Boston, MA  
Steven B. Gorin  
St. Louis, MO  
Bernard V. Kearse III  
Sandy Springs, GA  
William P. La Piana  
New York, NY  
Elizabeth C. Lee  
Washington, DC  
Orlando Lucero  
Albuquerque, NM  
Jo-Ann Marzullo  
Boston, MA  
Martin P. Miner  
New York, NY  
Robert C. Paul  
New York, NY  
John W. Porter  
Houston, TX  
Sandra G. Porter  
Tampa, FL  
Susan Porter  
New York, NY  
Stephen R. Romine  
Norfolk, VA  
Barbara Ann Sloan  
New York, NY  
Robert A. Stout, Jr.\*  
Westfield, NJ  
David A. Thomas  
Provo, UT  
Ira J. Waldman  
Los Angeles, CA  
**Young Lawyers Division Liaison\***  
**SECTION DIRECTOR**  
Robin K. Roy  
(312) 988-5670  
**ASSOCIATE DIRECTOR**  
Mary Ann Peter  
(312) 988-6155  
**MARKETING, COMMUNICATIONS AND MEMBERSHIP DIRECTOR**  
Cynthia Dickmann  
(312) 988-5540  
**MARKETING AND COMMUNICATIONS MANAGER**  
Amanda S. Paull  
(312) 988-5260  
**MEETINGS AND CLE MANAGER**  
Nikia Robinson  
(312) 988-5263  
**MEETINGS REGISTRAR**  
Hillary Clark  
(312) 988-5683  
**COMMITTEE COORDINATOR**  
Bunny R. Lee  
(312) 988-5651



premiums, “tax lot” accounting, legal research, review of the governing instrument, verification of situs, review of life and other insurance policies, review of distribution requirements, review of investment policies and portfolio allocation in light of the governing instrument and the Prudent Investor Act, appraisal fees, supplies, salaries, consultants’ fees, rent, consideration of tax elections, analysis of generation-skipping tax implications, communicating with the beneficiaries, lawyers, accountants, and others, and a host of other products and services too numerous to mention.

We are concerned that if, for example, the trustee's fee is allocated half each to income and principal, the principal beneficiaries may claim that the separate components identified for tax purposes should be allocated entirely to income, if those separate components would be so allocated under applicable state law. On the other hand, if the trustee allocates the separate components to income based on state law or the terms of the governing instrument, the income beneficiaries will bear a greater share of the administrative costs. Thus, they will likely claim that the allocation to income is not proper because the components are really part of the overall trustee fee, which is generally allocated one-half to principal. To avoid such disputes, it may be incumbent on trustees in the 27 states that authorize conversion to a unitrust, for those trustees to consider converting, because after such a conversion, the allocation of an expense to income or to corpus does not affect the amount that must be paid to the income beneficiaries. We do not believe that Congress intended such a far reaching effect under IRC § 67(e).

We also believe that unbundling will cause other administrative problems for trustees – and the government. Under the laws of most states, the amount of a fiduciary's fee is required to constitute “reasonable compensation.” Fiduciaries’ fees, therefore, generally reflect the unique aspects of the specific trust or estate in question. They also vary widely from trust to trust, year to year, and from state to state. As a consequence, an unbundling requirement would require trustees to unbundle on a case by case basis each trust and estate, at an enormous cost to trustees, executors, and their beneficiaries as well as to the IRS. Unbundling also increases the overall uncertainty of fiduciary administration. Therefore, it seems that unbundling is an impractical and unworkable requirement aimed at nonexistent abuses, and which has consequences far beyond what Congress intended under Section 67(e).

Nonetheless, if the final regulations maintain the unbundling requirement, we request that they advise fiduciaries in detail how unbundling should be accomplished in a manner that is both fair and workable. The regulations could, for example, require a breakdown by each person of a trust company that worked on any matter for the trust or estate and what that person’s responsibility is, and so forth. And given that the Supreme Court in *Knight* acknowledged that some investment advisory fees might not be subject to the 2-percent floor, fiduciaries need guidance on how to determine which of their investment fees are fully deductible and which are subject to the 2-percent floor under IRC § 67. We also recommend that the final regulations clearly articulate any standard of proof that must be met.

For those reasons and for the reasons expressed in the 2008 Report and at the November 14, 2007 hearing, we hope that the Treasury Department will reconsider its proposal to require unbundling of fiduciary fees. If not, we respectfully suggest that another hearing on any unbundling proposal would be helpful.

We thank you for your consideration of our concerns about the proposed regulation. Carol A. Cantrell, Chair of the Individual and Fiduciary Income Tax Committee, supervised the preparation of these comments and participated in their presentation along with Martin M. Shenkman, Robert E. Barnhill, and Robert S. Balter. These comments were reviewed by Jonathan G. Blattmachr on behalf of the Section’s Committee on Government Submissions.

Although the Committee members who prepared these comments have clients who would be affected by the Federal tax principles addressed, or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or the outcome of, the specific subject matter of these comments.

If you have any questions or if we can be of further assistance, please write or call Carol A. Cantrell at 713-667-9147, or [ccantrell@bvccpa.com](mailto:ccantrell@bvccpa.com).

Respectfully submitted,

A handwritten signature in black ink that reads "Steve R. Akers". The signature is written in a cursive, flowing style.

Steve R. Akers  
Section Chair

cc: Mr. Eric San Juan, Acting Tax Legislative Counsel, Treasury  
Ms. Catherine V. Hughes, Attorney-Advisor, Office of Tax Policy, Treasury  
Ms. Clarissa C. Potter, Acting Chief Counsel, IRS  
Mr. Curtis G. Wilson, Associate Chief Counsel (Passthroughs and Special Industries), IRS  
Ms. Jennifer N. Keeney, Attorney-Advisor, Office of Associate Chief Counsel (Passthroughs and Special Industries), Branch 2, IRS  
Bernice B. Donald, Secretary, American Bar Association  
Thomas M. Susman, Director, Governmental Affairs, American Bar Association