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April 16, 2020

Via U.S.Mail & Email: RJoseph.Durbala@irs.gov
Internal Revenue Service
R. Joseph Durbala
Room 6526
1111 Constitution Avenue NW
Washington DC

Re: Form 706-NA
OMB Number 1545-0531

Dear Sir/Madam:

I am writing in response to the request for comments on Form 706-NA, as published in the Federal Register on March 31, 2020. Please be advised that, although I may represent clients who may be affected by the matters addressed by this letter, neither I nor any member of my firm has been engaged by a client to make this submission or otherwise to influence the development or outcome of the subject matter of this letter.

Form 706-NA is generally required to be filed by the Executor of the estate of a nonresident non-citizen of the United States (a "non-US decedent") whose US gross estate was in excess of $60,000.

Comments to Form 706-NA

1. Part I, line 9, requests information concerning the Executor. The Executor's TIN is not requested. This should be contrasted with the Form 706, which does request the Executor's TIN. Information concerning the Executor's TIN should be equally useful for Form 706-NA as for Form 706.

2. Part I, line 10, requests information concerning the "attorney" for the "estate." This should be contrasted with the Form 706, which does not request identification of the "attorney" for the "estate" (except with respect to the authorization under Treas. Reg. § 601.504(b)(2)(i), which is separately requested in Part III). The justification for requesting this information in Part I is not evident from the Form, the Instructions, or the Treasury Regulations.

If the property reportable on Form 706-NA requires a US probate administration, there almost certainly is a US attorney involved. However, in our experience, property reported on a Form 706-NA is frequently owned jointly with the decedent's spouse, in which case there may be neither a US attorney nor a foreign attorney involved with the filing of the Form 706-NA. Although a non-US attorney may be associated with the domiciliary estate, that non-US attorney may have no information concerning the information reported on the Form 706-NA.

The Instructions to Form 706-NA imply that the term "estate" refers solely to property reportable on the Form 706-NA, which in many circumstances refers solely to US-situated assets. It is unclear whether Part I, line 10, is requesting the identification of the "attorney" solely with respect to US-situated assets, or to worldwide assets, or solely to assets subject administration in a US probate administration. And, of course, an attorney generally does not represent an "estate" but only the "Executor". Note that the term "attorney," although generally understood to refer to an individual licensed to practice before a state court in the United States, is less consistently used in foreign jurisdictions. Just as a Commonwealth jurisdiction may license both "barristers" and "solicitors" to perform "legal" services, a Latin American jurisdiction may license "abogados" and "notarios" to perform "legal" services (and may permit unlicensed "gestores" to perform limited services).

Treas. Reg. § 601.504(b)(2)(ii) states that a power of attorney is not required at a conference concerning an estate tax matter if the individual seeking to act as a recognized representative is "(ii) The attorney of record for the executor, personal representative, or administrator before the court where the will is probated or the estate is administered." If line 10 is intended to refer to the "attorney of record," then the form should use the term "attorney of record."

If the IRS has a valid need for requesting identification of every "attorney" for the "estate," then the Instructions should clarify the meaning of "attorney" and/or the meaning of "estate" for purposes of this question. Otherwise, Line 10 should be removed from Form 706-NA, as it is unnecessarily burdensome.

3. Part III requests information concerning authorization of a "representative" to receive confidential information under Treas. Reg. § 601.504(b)(2). Specifically, Part III requests the representative's name, "license state," address, CAF number, and telephone number, as well as a statement concerning the representatives licensure status.

   As indicated above, Treas. Reg. § 601.504(b)(2) encompasses both "recognized representatives" within the meaning of Treas. Reg. § 601.502 (who generally must be licensed in the United States), and the "attorney of record" before the court where the will is probated or the estate is administered (who apparently need not be licensed in the United States, if the will is probated in a non-US jurisdiction).

Neither the Form itself nor the instructions indicate whether a CAF number is required for a non-US attorney, or how a non-US attorney may obtain a CAF number. The instructions to Form 706-NA refer to the Form 2848 instructions, Circular 230 section 10.7(c)(1)(vii), and Publication 947, for information concerning practice before the IRS. While all three sources explain that "any individual" may represent an individual or entity who is outside the United States, when such representation occurs outside the United States, we believe that the IRS significantly underestimates the amount of time required for a non-US attorney (or other non-US individual) to learn about the law regarding representation by non-US individuals.

Given the likelihood that the filer of Form 706-NA will have to resolve the ambiguities of the terms "attorney", "executor," "estate," and the ability of a non-US individual to represent an "estate" or "executor", we believe the instructions should substantially expand upon the meaning of all of these terms in the context of a decedent required to file Form 706-NA.

4. The separately number lines for Part III are generally similar to the questions in Form 706, Part 4. The difference, of course, is that the preparer of Form 706 should already have reviewed the various schedules; the preparer of Form 706-NA will only review a Form 706 schedule when directed to do so by Form 706-NA or its instructions.

   The same valuation rules applicable to US decedents also apply to non-US decedents, except as specifically stated to the contrary in the Code or regulations. Treas. Reg. § 20.2103-1 specifically reference Treas. Reg. §§ 20.2031 through 20.2044-1; Treas. Reg. § 20.2104-1(b) specifically references Treas. Reg. §§ 20.2035-1 through 20.2038-1, and Chapter 14 of the Code applies to all of Subtitle B (Estate and Gift Taxes).

   A. We recommend that an affirmative response to Question 2.d (Other property located in the United States) or Question 4 (Access to a safe deposit box) should require the executor to complete Form 706, Schedule F, and should refer the executor to the instructions for Form 706, Schedule F. The instructions to Form 706-NA should also note the general requirements under Treas. Reg. § 20.2031-6 for valuation of household and personal effects (as occurs on Form 706, Schedule F), as it appears those requirements are generally applicable. The instructions to Form 706-NA do note the exception for works of art on loan to certain galleries or museums, as set forth in Code section 2104(b).

   B. We recommend that Question 10a specifically solicit copies of previously filed IRS Form 709 (consistent with Form 706, Part 4, Question 8a). The instructions to Form 706-NA contain this request (see page 3).

   C. We recommend that Question 11 or the instructions provide a basic explanation of the meaning of a "skip person." The term "skip person" has no common sense meaning, and the instructions to Form 706-NA provide no guidance. In effect, every filer of Form

706-NA must review the instructions to Form 706, Schedule R, in order to determine whether the form applies. A simple statement in the instructions, such as "A 'skip person' is an individual who is at least two generations younger than the decedent (e.g., a grandchild) or, for a non-relative, at least 37.5 years younger than the decedent, or a trust for the benefit of such individuals. See Regulations section 26.2663-2 and the instructions to Form 706, Schedule R" would substantially reduce the burden on most filers.

It is significant that, although the estate tax exclusion applicable to non-US decedents on Form 706-NA is only $60,000 (unless an applicable treaty provides a higher exclusion), the GST exemption applicable to non-US decedents is $11,580,000 (for 2020), and applies solely to assets that are subject to the US. Based upon the limited IRS statistics available, in 2014, the *mean* US gross estate shown on Form 706-NA was about $500,000 for all returns, and less than $1,000,000 for taxable returns. The median US gross estate would have been lower. Clearly, the automatic allocation rules would exclude the vast majority of non-US decedents. A filer of Form 706-NA might easily believe that the GST exemption for non-US decedents is only $60,000, or at most $1,000,000 (the amount set forth in Treas. Reg. § 26.2663-2). An explanation of the (limited) scope of the generation-skipping transfer tax, including the applicable GST exemption, would significantly reduce the burden of question 11.

Note also that, while Question 11 states that an affirmative response requires the executor to "attach Schedules R and/or R-1, Form 706," Schedule R itself provides inaccurate information for non-US decedents (stating that the GST tax is imposed on taxable transfers of interest in property located outside the United States).

Comments to Instructions for Form 706-NA

5. Page 1 of the instructions refer to the "consistent basis reporting requirements." In our experience, Forms 706-NA are more likely to be filed late than Forms 706. The instructions state that the due date for Form 8971 is "within 30 days of filing Form 706-NA, or earlier if the return is filed late." Given the likelihood of late filing of the Form 706, it would be helpful if the instructions said more than simply "or earlier." A clearer explanation of the consequence of late filing would be helpful.

   The instructions to Form 706-NA state, "See Form 8971 and its instructions *and the Instructions for Form 706* for more information." The reference to the Instructions for Form 706 should be deleted, as those instructions do not provide any additional information.

6. Page 2 of the instructions provide a list of Death Tax Treaties. The list is inaccurate, as the United States has not had a death tax treaty with Norway since January 1, 2015. Note that although an accurate list is available on the IRS website, see https://www.irs.gov/businesses/small-businesses-self-employed/estate-gift-tax-treaties-

international, the IRS Statistics of Income Division webpage inaccurately indicates that the United States has estate tax treaties with seventeen countries (incorrectly listing both Norway and Sweden. See https://www.irs.gov/statistics/soi-tax-stats-nonresident-alien-estate-tax-study-metadata.

General Comments on the Burden of Collection of Information

7. The Request for Comments invites comments on "the accuracy of the agency's estimate of the burden of the collection of information."

   Although the IRS states that it conducts annual studies on date included in Form 706-NA, *see* https://www.irs.gov/statistics/soi-tax-stats-estate-gift-and-trust-statistics, the IRS Statistics of Income Division has not updated its website to provide statistics on Form 706-NA for filing years after 2014. Consequently, it is impossible to evaluate the accuracy of the IRS's estimate of the number of responses. We note that the IRS estimates 800 annual responses; the number of Forms 706-NA filed was 725 in 2012, 732 in 2013, and 849 in 2014. Given the IRS's increased enforcement efforts surrounding foreign ownership of US corporations and financial accounts, it seems likely that the IRS's estimated number of responses is understated.

   In contrast to Form 706, for which the IRS estimates the burden of each separate Schedule (as set forth in the instructions to Form 706), the IRS has not provided estimates of the burden of each separate Schedule for Form 706-NA. The IRS's estimate of the burden for the "main" portion of Form 706 is near to its estimate of the burden for the entire Form 706-NA. However, many filers of Form 706-NA will need to attach one or more additional schedules from Form 706 (for example, the IRS's published statistics indicate that about one-third of Forms 706-NA include "Other Assets"), a category of assets that would appear to be reportable on Schedule G or H. In addition, IRS's published statistics indicate that almost three-fourths of Forms 706-NA include assets located outside the United States. Given that only relatively well-off non-US decedents would have US-situs estates (and it appears that such decedents had, on average, non-US assets worth more than four times the value of their US-situs assets), it seems likely that many filers will be spending significant time with respect to the reporting of those non-US assets and that the time required to do so would be similar to the time required to file a typical Form 706 (including associated schedules), even though the assets themselves may be reported directly on Schedule B of Form 706-NA. However, without current statistics, it is impossible to know for certain.

Please let me know if you have any questions concerning the foregoing.

Very truly yours,

JOSEPH BARRY SCHIMMEL