



DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

Small Business/Self-Employed Division

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MEMORANDUM FOR TAX FORMS & PUBLICATIONS

FROM: Lisa M. Piehl
Program Manager , Estate & Gift Tax Policy

SUBJECT: Response to Comments Received from the State Bar of Texas, Tax Section

On May 18, 2016, comments received by IRS Tax Forms & Publications from the State Bar of Texas, Tax Section ("State Bar") were forwarded to Estate & Gift Tax Policy (E&G Policy) for review and response. The comments have been reviewed and the response to each is below.

Item 1 – Timing of Filing Form 706-GS(D-1)

The State Bar suggests moving the filing date for Form 706-GS(D-1) forward 30 days to March 15 of the year following the distribution subject to the generation-skipping rules for ease of notice, filing Form 706-GS(D), and payment of any tax due. The current April 15 filing rule is established by the Internal Revenue Code (section 2662) and its related regulations. The change suggested would require a legislative adjustment to the rule, which is unlikely. Footnote 1 to the letter from the State Bar acknowledges that the amendment required may be beyond the scope of the relief being sought. E&G Policy agrees that this would require legislative action.

Also, Form 706-GS(D-1) is an information return. There is no prohibition on filing early nor is there a restriction on providing the recipient (distributee) with an early draft/copy in order to be mindful of the Form 706-GS(D) tax filing and payment obligation. The fiduciary, presumably, has known about the distribution and can assess the potential filing and tax implications as early as January. The fiduciary duty to give notice to the skip person is not limited to notice via the filing of the information return on April 15. The options to file early, give the beneficiary an early draft/copy of the information return, or provide another form of notice all adequately address the concerns raised. Amending the current filing rules, which will require legislative action, is not a likely or viable option.

Item 2 – Addition of a Cautionary Note to the Instructions for Form 706-GS(D-1)

The State Bar also suggests that the IRS consider adding a cautionary note to the Instructions for Form 706-GS(D-1) regarding the timing of filing Form 706-GS(D-1) and providing the distributee with information necessary to timely file Form 706-GS(D). This is not needed because Form 706-GS(D-1) clearly indicates on its face that Copy B is intended for the distributee and the instructions at the bottom of Copy B specifically notify the distributee of the

obligation to file Form 706-GS(D). Adding additional information to the Instructions for Form 706-GS(D-1) would be unnecessarily repetitive.

In item 2, the State Bar also suggests that the IRS consider including a cautionary note in the Instructions for Form 706-GS(D-1) which would inform or remind the trustee to file Form 706-GS(D-1) and provide a copy of the form to the distributee in a timeframe sufficient to allow the taxpayer to challenge the valuation of any distributed asset and/or timely file Form 706-GS(D) and pay any generation-skipping transfer tax. This is also unnecessary because Form 706-GS(D-1) has this specific notice on the attached "Instruction for Skip Person Distributee" found on page 3. Once again, the concerns raised by the State Bar can be addressed by filing Form 706-GS(D-1) early, providing an early draft/copy to the distributee, or notification by other means.

In its final suggestion in item 2, the State Bar recommends that the cautionary note inform or remind the trustee that failure to provide the Form 706-GS(D-1) to the distributee within a sufficient timeframe may be considered a breach of fiduciary duty. E&G Policy disagrees with this suggestion because the IRS is not responsible for advising fiduciaries of their duties or for defining acts or omissions that might result in a breach of those duties.

Item 3 – Eliminating the Filing Requirement for Trusts with an Inclusion Ratio of Zero

The State Bar suggests that the IRS consider eliminating the Form 706-GS(D-1) filing requirement for trusts with an inclusion ratio of zero. E&G Policy disagrees with this suggestion because there is always the possibility that the inclusion ratio is reported incorrectly. Both the IRS and the distributee should be given the required notice via the information return and an opportunity to cure the error.

Also, one of the State Bar's stated objectives is to reduce the likelihood of breach of fiduciary duty claims. Rather than eliminate the filing requirement, a more prudent position would be to continue to file Forms 706-GS(D-1) with an inclusion ratio of zero because doing so protects the distributee. The information provided on Form 706-GS(D-1) puts both the distributee and the IRS on notice that a transfer was made but that Form 706-GS(D) is not required to be filed. Also, in light of the new consistency of basis rules, Form 706-GS(D-1) could serve as a record of the reported transfer if the transfer gives rise to basis implications.

Another argument raised by the State Bar in support of this suggestion is reducing the burden related to preparing Form 706-GS(D-1). Many returns are required to be filed where no tax is due. The majority of those being filed (that have been reviewed) do not reflect an overwhelming preparation burden.

The State Bar provides an alternate suggestion if the trustee of a trust with an inclusion ratio of zero must file Form 706-GS(D-1). The suggestion is that the trustee only be required to file in the first year in which a distribution is made, with no filing requirement if the inclusion ratio remains zero at the time of any subsequent distributions. Again, this suggestion presumes that all Forms 706-GS(D-1) are filed accurately. The hazard lies in the fact that the IRS does not have the resources to verify the accuracy of every Form 706-GS(D-1); if subsequent transfers with a zero inclusion ratio were not reported, potential opportunities to cure any errors would

be lost.

Also, Form 706-GS(D-1) serves certain non-tax purposes as an information return. It confirms that a transfer has been made and, in some instances, that there is no requirement to file Form 706-GS(D) or pay tax. That kind of information is not only critical for meeting fiduciary duties, it serves an important role in tax administration as well.

For the foregoing reasons, Estate & Gift Tax Policy is not in support of the suggested changes raised by the State Bar of Texas, Tax Section.