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October 25, 2007

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Mr. Richard A. Hurst
CC:PA:LPD:PR (REG-141901-05)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

RE: REG-128224-06 (Section 67 Limitations on Estates or Trusts)

Dear Mr. Hurst:

Enclosed are the comments to the proposed regulations REG – 128224-06 (Section 67 Limitations on Estates or Trusts) submitted by the Individual and Fiduciary Income Tax Committee of the Trust and Estate Law Division of the Real Property, Trust and Estate Law Section of the American Bar Association.

The comments have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Kathleen M. Martin
Chair, Section of Real Property, Trust and Estate Law Section

cc: Donald L. Korb, Chief Counsel, Internal Revenue Service
Karen Gilbreath Sowell, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Michael J. Desmond, Tax Legislative Counsel, Department of the Treasury
Clarissa C. Potter, Deputy Chief Counsel (Technical), Internal Revenue Service

ABA SECTION OF REAL PROPERTY | TRUST & ESTATE LAW

COMMENTS OF THE
REAL PROPERTY, TRUST AND ESTATE LAW SECTION
OF THE
AMERICAN BAR ASSOCIATION

REG-128224-06 (Section 67 Limitations on Estates or Trusts)

October 25, 2007

The following comments are submitted on behalf of the American Bar Association Section of Real Property, Trust and Estate Law ("Section"). They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

The comments were prepared by members of the Individual and Fiduciary Income Tax Committee of the Trust and Estate Division of the Section. Principal responsibility was exercised by Bonnie E. Richards, chair of the Individual and Fiduciary Income Tax Committee ("Committee"), and the principal author of these comments was Jonathan G. Blattmachr. Also participating in the preparation of the comments were Robert S. Balter, Robert E. Barnhill, III, W. Birch Douglass, III, Von E. Sanborn, Martin M. Shenkman, Daniel Wintz and Diana S. C. Zeydel. These comments were reviewed by Carlyn S. McCaffrey on behalf of the Section's Committee on Governmental Submissions.

Although members of the Section who participated in preparing these comments and recommendations 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 governmental submission with respect to, or to otherwise influence the development or the outcome of, the specific subject matter of these comments.

Background

Under Section 67(a)[1], an individual taxpayer may deduct miscellaneous itemized deductions for income tax purposes only to the extent they exceed two percent of the taxpayer's adjusted gross income (the "Two Percent Floor" or "Two Percent Floor Rule"). Section 67(e) provides that the adjusted gross income of an estate or trust is to be computed in the same manner as in the case of an individual, except that "the deductions for costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate and the deductions allowable under Sections 642(b), 651, and 661 shall be treated as allowable in arriving at adjusted gross income." Expenses that are allowable as

[1] The term "Section" throughout this letter refers to a section of the Internal Revenue Code of 1986 as amended, unless otherwise indicated.

deductions in arriving at adjusted gross income are not treated as itemized deductions and, therefore, are not subject to the Two Percent Floor Rule.

On June 25, 2007, as a result of a split among the circuits in interpreting Section 67(e) as it applies to the deductibility of investment advisory fees by estates and trusts,[2] the Supreme Court granted *certiorari* in *William L. Rudkin Testamentary Trust v. Commissioner.*, 467 F.3d 149 (2nd Cir. 2006), *sub nom*., *Michael J. Knight*, *Trustee v. Commissioner*. (United States Supreme Court Docket No. 06-1286).

On July 27, 2007, the United States Treasury Department ("Treasury") published proposed regulations ("Proposed Regulations") interpreting Section 67(e). The Proposed Regulations adopt and in some ways expand the strict standard for deductibility of investment advisory fees and other miscellaneous itemized deductions by estates and trusts that was established by the United States Court of Appeals for the Second Circuit in *William L. Rudkin Testamentary Trust v. Commissioner,* 467 F.3d 149 (2nd Cir. 2006) ("*Rudkin").*

Comments and Recommendations

I. Withdraw Proposed Regulations or Extend Comment Period Until After the Supreme Court Has Ruled in *Rudkin*.

The Supreme Court has granted *certiorari* in *Rudkin,* and will examine this issue directly. Its decision in that case may address the different considerations and standards raised in decisions issued by four United States Courts of Appeals and may reconcile or eliminate the differences in opinions as to the scope of Section 67(e). *Certiorari* was granted in *Rudkin* even though the Treasury had opposed its grant. Treasury argued that the grant of *certiorari* was unnecessary because Treasury had prepared proposed regulations addressing the issue to resolve the different treatment of taxpayers in different circuits and would issue the proposed regulations shortly. Given the Court's implicit rejection of Treasury's position, it is appropriate to defer the regulatory process until the Supreme Court issues its opinion.

A member of the Section made an inquiry to Mr. Eric Solomon, Assistant Secretary for Tax Policy, as to whether Treasury would withdraw the Proposed Regulations or extend the comment period until at least 90 days after the Supreme Court issues its decision. Mr. Solomon would not give any assurance that Treasury would do either. Because we do not know whether the Proposed Regulations will be withdrawn, we address them in these comments. If the Proposed Regulations are not withdrawn, we respectfully request that the period to comment on the Proposed Regulations be extended until 90 days after the Supreme Court renders its decision in *Rudkin* to permit all interested parties to have the benefit of the reasoning in the Supreme Court's decision in

[2] Compare William A. Rudkin Testamentary Trust v. Commissioner, 467 F.3d 149, 154 (2d Circuit 2006)., *Scott v. United States*., 328 F.3d 132, 140 (4th Circuit 2003)., *Mellon Bank, N.A. v. United States.*, 265 F.3d 1275, 1279 (Fed. Cir. 2001) *O'Neill v. Commissioner*, 994 F.2d 302, 304 (6th Cir. 1993).

formulating their comments. In conjunction with extending the comment period, we also respectfully request that the public hearing scheduled for November 14, 2007, be delayed until 30 days after the close of the extended comment period to avoid the possible need for a second hearing.

II. **Issue Final Regulations Consistent with the Taxpayer's Position in *Rudkin*.**

The taxpayer in the *Rudkin* case took the position that administration costs, incurred in an estate or trust as a result of the fiduciary's special duties and responsibilities are fully deductible without regard to the Two Percent Floor Rule because those costs would not have been incurred if the property were not held in such trust or estate. We believe the taxpayer's position is correct and respectfully urge that the final regulations adopt that position.

In the absence of a ruling from the Supreme Court that the construction of the statute urged by the taxpayer in *Rudkin* is the correct one, we are doubtful that Treasury will adopt it. Accordingly, we offer comments on the Proposed Regulations on the assumption that the final regulations will not adopt the taxpayer's construction of Section 67(e) in *Rudkin*. We emphasize, however, that we believe the taxpayer's position is correct and that the final regulations should be consistent with that approach.

III. **Change "Could" to "Would" to Be Consistent with the Statute.**

Proposed Regulation § 1.67-4(b) provides that an expense must be "unique" to an estate or trust in order to avoid the Two Percent Floor Rule and that, ". . . a cost is unique to an estate or a non-grantor trust only if an individual *could* not have incurred that cost in connection with property not held in an estate or trust." (Emphasis added.)

We believe that this proposed rule is inconsistent with the Internal Revenue Code ("Code"). Section 67(e) does not require that a type of cost be unique to estates or trusts or that it could not have been incurred by an individual in order to avoid application of the Two Percent Floor. Instead, it requires only that a particular cost be "incurred in connection with the administration of the estate or trust and . . . *would* not have been incurred if the property were not held in *such* trust or estate."[3] (Emphasis added.) We believe that the Code's phrase "would not have been incurred" creates a standard that must be applied to the specific circumstances of each particular estate or trust. The possibility that an individual could have incurred such a cost is not relevant to the application of the Code's standard.

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[3] Although we appreciate that some might debate the point and that it may become a focus in the Supreme Court's decision in *Rudkin,* we think it difficult to contend that the word "such" does not require that the determination of deductibility requires that the specific circumstances of the specific estate or trust be considered.

The use of the word "could" instead of the word "would," in the Proposed Regulations impermissibly narrows the scope of the Section 67(e). The terms "could not" and "would not" have different meanings and are not interchangeable. We recognize that if the word "could" is changed to "would" further modifications to the Proposed Regulations will be required.

The applicability of the word "unique" in the context of the deductibility of investment advisory fees under Section 67(e) was originally used in *O'Neill v. Commissioner.*, 994 F2d 302, (6^{th} Cir. 1993), where it was said that fiduciaries "uniquely occupy a position of trust for others and have an obligation to the beneficiaries to exercise proper skill and care with the assets of the trust." The word was not used to describe the nature of the cost incurred, but rather the quality of the relationship of the fiduciary to the beneficiaries and the trust assets. We believe the use of the word in the context of the Proposed Regulations to describe and limit the "type of product or service rendered to the estate or trust, rather than the characterization of the cost of that product or service," is in error.

IV. Adopt a Rule that Administrative Costs Incurred to Fulfill Fiduciary Duties Are Deductible Without Regard to the Two Percent Floor.

In our view, the administrative costs of non-grantor trusts and estates that "would not have been incurred if the property were not held in such trust or estate," include those incurred in order to fulfill the trustee's fiduciary duties with respect to the administration of trust assets. These fiduciary duties are directly related to the specific circumstances of "*such* trust or estate" and the costs associated with them should not be subject to the Two Percent Floor Rule. Those administrative costs include fees for investment management, investment advice and legal that, under applicable state law, are incurred in order for the trust assets to be invested as required by state law (such as, in many states, a "prudent investor" would invest) taking into account factors including investment risk, investment return, the purposes of the trust, the specific provisions of the governing instrument, and the specific circumstances of the trust beneficiaries.

Trustees have fiduciary obligations not only to enhance the investment performance of the trust assets in general, but also to produce a return for current beneficiaries and protect and foster growth for future beneficiaries, including remainder beneficiaries, in accordance with the trust terms and state law. Individuals who are not subject to state law requirements with respect to prudent investment of their own assets and are not required to invest in such a manner. Protecting expenses incurred to enable the trustees to fulfill this fiduciary obligation from the Two Percent Floor Rule serves the purposes intended by Congress.

Other tax law provisions specifically provide that fiduciaries, as opposed to individuals, must seek out and rely on the advice of investment counsel in recognition of the special responsibility that fiduciaries assume when they agree to hold and manage assets for the benefit of persons other than themselves. For example, Section 4944 imposes an excise tax on a private foundation (and through the application of Section 4947(a) on certain other entities) for the making of a "jeopardy investment" and on a foundation manager who willfully makes such an investment. Treas. Reg. § 53.4944-1(a)(2) indicates that whether an investment jeopardizes the carrying out of the exempt purposes of the organization (and, therefore, constitutes a jeopardy investment) turns on whether the "foundation managers, in making such investment, have failed to exercise ordinary business care and prudence, under the facts and circumstances prevailing at the time of making the investment, in providing for the long- and short-term financial needs of the foundation to carry out its exempt purposes." Although the regulation was issued prior to the general adoption of the prudent investor standard, the regulation identifies a number of factors that a foundation manager may take into account in exercising the requisite standard of care and prudence, similar in nature to the kinds of factors that a trustee must consider under the prudent investor standard. The regulation also provides that, "the determination whether the investment of a particular amount jeopardizes the carrying out of the exempt purposes of the foundation shall be made on an investment by investment basis, in each case taking into account the foundation's portfolio as a whole." It is not difficult to draw the parallel that trustees of private trusts face similar obligations to preserve the purposes of the trusts in making investments and in administering the trust assets for the benefit of third parties, such a beneficiaries. The regulation suggests that this special duty (and liability) is not one that individuals face in making their own investments. Treas. Reg. § 53.4944-1(b)(2)(i)(v)(second sentence) provides that, in general, a foundation manager will not be treated as having "knowingly" made a "jeopardy investment" if the manager, after full disclosure of the factual situation to qualified *investment counsel*, relies on that counsel's advice. In effect, the regulations under Section 4944 compel a foundation manager to seek investment advice.

Similarly, an executor or trustee may seek the advice of an investment counselor to help the fiduciary determine if the fiduciary is acting prudently when required to invest under a state law standard. Presumably that advice, if obtained by a foundation, is a proper expense of the foundation pursuant to Treas. Reg. § 53.4944-1(b)(2)(i)(v). It follows that it also should be allowed as a proper expense of the estate or trust without application of the Two Percent Floor Rule because it is incurred to ensure that an investment meets a legally imposed duty of prudence. For example, when a fiduciary must or may distribute fiduciary accounting income, the fiduciary may seek legal and/or investment advice to ensure that the level of income generated is reasonable and consistent with the prudent investor duties.

In order for most trusts to qualify for the gift or estate tax marital deduction, the trustee must invest to produce a reasonable level of income for the spouse who is the trust beneficiary. See, e.g., Treas. Reg. § 20.2056(b)-5(f). Moreover, the trustee, under state law, may also be required to consider the effect of inflation and deflation in making investment decisions. See, e.g., New York Estates, Powers and Trusts Law 11-2.3. Just as the potential liability for making a jeopardy investment does not apply to an individual in making his or her own investments, so too the prudent investor obligations of an executor and trustee in seeking to fulfill the specific fiduciary duties arising in such capacities cannot apply to an individual. Just as a foundation manager may face penalties under Section 4944(b) for willfully making a jeopardy investment, an executor or trustee may face the equivalent of penalties under state civil law for not prudently investing the trust or estate assets consistently with his or her fiduciary duties.

Acknowledging the significance of the fiduciary obligations of trustees and executors as unique and different from any obligations that individuals may have will not result in all administrative expenses being deductible. A fiduciary may incur a variety of costs that are incidental to the maintenance of the assets being held by the fiduciary that are not related to fiduciary's duties to the beneficiaries under state law. For example, maintenance fees for rental real estate, bank fees, and cooperative apartment fees are not incurred as a direct result of the property being held in a trust or estate and should be subject to the Two Percent Floor. We believe that only those costs incurred that are directly related to a fiduciary's duties and responsibilities should be deductible without regard to the Two Percent Floor.

For these reasons, the final or new Proposed Regulations should provide that investment advisory fees incurred to carry out the specific duties of the executor or trustee, consistent with the duty of care imposed by the instrument or applicable local law in making investments, are deductible without regard to the Two Percent Floor. Failure to treat these costs as costs which "would not have been incurred if the property were not held in such trust or estate" ignores the specific responsibilities imposed upon fiduciaries.

We agree with the position taken in the Proposed Regulation that certain expenses (including those listed in Proposed Regulation § 1.67(e)-4(b) such as those rendered in connection with fiduciary accountings) in all cases should be allowed to an estate or non-grantor trust without regard to the Two Percent Floor.

V. **Clarify That Expenses From a Pass-Through Entity Are Subject to the Two Percent Floor.**

The potential abuse of using pass-through entities to avoid the application of the Two Percent Floor is recognized in Section 67(c). We think that all expenses attributed to an estate or trust from a pass-through entity, such as a partnership, should be subject in their entirety to the Two Percent Floor to the same extent as they would be if attributed to an individual partner. We do not view these expenses, even though incurred during the administration of an estate of trust, as directly related to the fiduciary duties of the executor or trustee.

VI. **If the Recommendations Described Above are not Adopted, Consider Creating Safe Harbors.**

The Preamble to the Proposed Regulations invites comments on whether safe harbors or other guidance concerning allocation methods would be helpful. We believe that safe harbors and further guidance are critical to the efficient administration of the rules contained in the Proposed Regulations.

The Proposed Regulations contemplate that a single fee may be composed of expenses which would be in part subject to the Two Percent Floor and in part fully deductible without regard to the Two Percent Floor Rule. Proposed Regulation § 1.67-4(c) provides that, when there is a single fee, a "bundled fee," "the estate or nongrantor trust must identify the portion (if any) of the legal, accounting, investment advisory, appraisal or other fee, commission, or expense that is unique to estates and trusts and is thus not subject to the 2-percent floor."

Under the Proposed Regulations, each fee incurred by a non-grantor trust would need to be analyzed to determine what portion of it is subject to the Two Percent Floor. This task will be unmanageable because of the extraordinary difficulty – indeed, perhaps the impossibility – of accurately characterizing portions of a single expense.

In the case of investment advisory fees, each fee would have to be analyzed to determine which portion of it was allocable to the kind of investment advise needed because the investments were being made by a fiduciary. Similar problems will exist with respect to other types of fees, such as, legal fees, incurred by trusts and estates. A case-by-case approach will likely result in frequent disputes between taxpayers and the IRS. Avoiding such disputes with respect to miscellaneous itemized deductions was one of the purposes of adopting Section 67.[4]

We believe the adoption of safe harbors with respect to particular types of expenses will reduce the risk of frequent disputes between the IRS and fiduciaries as to what part of investment advisory and other fees is deductible without regard to the Two Percent Floor and what part is not. Unless the taxpayer elects to make a specific allocation, safe harbor percentages should be available for certain types of expenses Although these safe harbors would not effectuate a principled application of the line the Proposed Regulations have drawn, the safe harbors would make the Two Percent Floor Rule more practical to administer.

The safe harbor percentages should be rooted in a fact-based analysis of the typical facts and circumstances applicable to estates and trusts. We propose below safe harbor percentages based on our collective experience. They divide the expenses following the lines drawn in the Proposed Regulations, taking into account the public policy favoring a fair and efficient administration of the tax laws. We also describe certain kinds of services generally obtained by fiduciaries from investment advisors and attorneys and certain kinds of services performed by fiduciaries the cost of which should not be subject to the Two Percent Floor Rule.

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[4] See, e.g., General Explanation of the Tax Reform Act of 1986, prepared by the Professional Staff of the Joint Committee on Taxation, p. 78.

A. ***Safe Harbor for Investment Advisory Fees***

Assuming that the final regulations provide that the Two Percent Floor applies to the deduction of investment advisory fees relating to investing for total return, but also assuming, that the cost of investment advisory services incurred to allow the fiduciary to invest in accordance with the prudent investor rules of applicable state law to produce a reasonable amount of income and preserve the spending power of corpus will be deductible without regard to the Two Percent Floor, we think a safe harbor of 75% is appropriate in the case of trusts. In other words, unless the trustee chooses to demonstrate otherwise, 75% of investment advisory fees would be deductible by a trust without regard to the Two Percent Floor as related to the trustee's obligations to the beneficiaries to invest consistently with a prudent investor standard under the terms of the governing instrument or local law and to otherwise meet specific terms of the trust and 25% would be deductible only with respect to the Two Percent Floor. However, if the final regulations provide, as the Proposed Regulations do, that custody fees are subject to the Two Percent Floor, and if the investment advisory services include custody services which are not identified as a separate line item, we recommend that the safe harbor for investment advisory fees be reduced to 70%. (We are advised that many investment advisory firms make no additional charge for custody services but we understand that some do.)

In our experience, the purposes and scope of investment advisory services (and other services, such as legal and appraisal services) incurred during the administration of an estate are often different than the purposes and scope of such services during the administration of a trust. For example, on account of the obligation to pay the decedent's debts and to pay estate taxes soon after the decedent's death, investment advice often involves hedging investments or obtaining short-term fixed income obligation for short-term liquidity needs of an estate that do not typically arise with respect to a trust. Although we believe, therefore, that different safe harbors could be developed for estates as opposed to trusts, we think the added complications of doing so (e.g., for how long will the estate be treated as one for purposes of the estate safe harbors, when will a revocable trust that acts as a Will substitute be treated as a decedent's estate) is not worth the effort.

B. ***Safe Harbor for Legal Fees***

The Proposed Regulations list legal fees as a type of expense that may or may not be deductible without regard to the Two Percent Floor. We believe that legal fees should be deductible without regard to the Two Percent Floor Rule unless they would have been incurred regardless of who owned the trust or estate property, that is, unless they are incidental to the maintenance of the assets being held by the fiduciary that are not related to the fiduciary's duties to the beneficiaries under state law. We recommend that any legal fees rendered that relate to the construction of the governing instrument, the enforceability of a provision in a governing instrument, the unique income tax treatment of estates and trusts (such as the determination of distributable net income within the meaning of Section 643(a) of the trust or estate), the determination of whether an expense is a proper charge to the trust or estate, whether a receipt or expense is allocable to income or corpus of the trust or estate, whether a trust or estate is subject to state or local income tax (as the rules governing the income taxation of estates and trusts generally are unique and different from the determination of whether an individual is subject to such state or local income tax)[5], accounting by the fiduciary, communications with the beneficiaries and their counsel and the scope or carrying out of fiduciary duties (such as the duty to account, to inform beneficiaries about certain matters and so on) should be listed as the type of legal fees that are deductible without regard to the Two Percent Floor.

Our list is not intended to be exhaustive but merely illustrative. In making our recommendation of a safe harbor for legal fees, we assume that that the final regulations will continue to provide, as the Proposed Regulations do, that legal services in defending a claim that arose during the decedent's lifetime and the preparation of a gift tax return, will continue to be listed as the type of legal expense that is subject to the Two Percent Floor. In our experience, the costs for legal fees related to the defense of a lifetime claim and the preparation of a gift tax return usually are *de minimis* compared to the universe of estate or trust legal fees, if they are incurred at all, and are typically dealt with differently on a post-death basis than they would have been during life when the taxpayer could have actively participated in the preparation of the such defense or gift tax return. For this reason, we believe that legal fees should not be subject to the Two Percent Floor, with the explicit exception that legal fees related to defending a claim that arose during the decedent's lifetime and preparation of gift tax returns are subject to the Two Percent Floor. If, however, the final regulations do not adopt this approach, we suggest a safe harbor for legal fees of 90%. Unless the fiduciary chooses to demonstrate otherwise, 90% of legal fees would be deductible by an estate or trust without regard to the Two Percent Floor and 10% would be deductible only with respect to that floor.

C. *Safe Harbor for Trustee's and Executor's Fees*

Executor's and trustee's commissions are not incurred unless property is held in a trust or estate. They should be deductible in full without regard to the Two Percent Floor. The Proposed Regulations, provide that if an estate or trust pays a single fee or commission for costs that are subject to the Two Percent Floor and those that are not, the fiduciary must identify the portion of the fee or commission that is subject to the floor and the portion that is not.

We respectfully suggest that fiduciary commissions should not be subject to such unbundling under the reasoning of the Proposed Regulations because no individual could incur an executor's or trustee's commission with respect his or her property. An executor's or trustee's commission is unique to an estate or trust as that term is used in the Proposed Regulations. We note, for example, that state laws providing for a percent commission for an executor or trustee do not vary the fee depending on the type of

[5] See, e.g., New York Tax Law § 605.

service the fiduciary renders. For example, under New York Surrogate's Court Procedure Act Section 2307, an executor's commission applies whether the fiduciary makes investment decisions with or without the advice of an outside investment counselor. We believe that statutory fees should not be required to be unbundled merely because the person serving as trustee has not paid for separate investment advice.

Section 67(e) requires a determination of whether costs incurred in connection with the administration of a trust or estate "would not have been incurred if the property were not held in such trust or estate." Giving the statutory language its plain meaning, the clearest case for applying it would be to trustee's and executor's commissions. These commissions should be fully deductible because they would not have been incurred if the property were not held in a trust or estate. Although none of the four court of appeals cases (*O'Neill, Mellon, Scott* and *Rudkin*) involved trustee or executor services, the opinions assume full deductibility of commission expenses. In *Rudkin*, the opinion, picking up on language used in the Scott opinion, stated that "fees paid to trustees...are fully deductible" *William A. Rudkin Testamentary Trust v. Commissioner*, 467 F.3d 149, 154 (2d Circuit 2006). *See also, Scott v. U.S.*, 328 F.3d 132, 140 (4th Circuit 2003). A similar statement appears in *Mellon* ("It is undisputed that trustee fees are fully deductible," *Mellon Bank, N.A. v. United States.*, 265 F.3d 1275, 1279 (Fed. Cir. 2001)) and *O'Neill* ("Expenses such as trustee fees...are examples of expenses peculiar to a trust and, therefore, are subject to the § 67(e) exception," *O'Neill v. Commissioner*, 994 F.2d 302, 304 (6th Cir. 1993)) opinions. Obviously these commissions are not payable if the trust or estate has not been created. Therefore, we believe that they should be deductible without regard to the Two Percent Floor.

If the final regulations will provide that an executor's or trustee's commission must be "unbundled," we believe, based upon our experience, that the safe harbor for such fees should be at least 85%. We arrive at this percentage based on our experience that commercial trustees often reduce their trustee commission to 40% of their normal charges when asked what they would charge for pure trusteeship with delegated investment management. The remaining 60% that may appear to be related to investment advice, should be subject to the safe harbor of 75% suggested above, yielding a combined rate for this safe harbor of 85%. Unless the fiduciary chooses to demonstrate otherwise, at least 85% of commissions would be deductible by an estate or trust without regard to the Two Percent Floor and no more than 15% would be deductible only with respect to that floor.

D. *Safe Harbor for Other Expenses*

The Proposed Regulations, in dealing with the unbundling of fees, suggest that certain other expenses, such as appraiser and accounting fees, may be subject in part to the Two Percent Floor and in part not subject to it. We think that accounting and appraisal fees for the preparation of fiduciary income tax returns and accounting by the fiduciary (including periodic reports given to beneficiaries) should be expressly listed as not subject to the Two Percent Floor. We have difficulty envisioning circumstances where accounting fees would be incurred other than with respect to the duties of an executor or trustee to account for the actions the fiduciary has taken. Similarly, we have not experienced circumstances where a fiduciary would incur appraisal fees that do not relate to the duties of the fiduciary to account or to prepare tax returns required to be filed by the estate or trust. It would be helpful for the final regulations to specify what types of accounting or appraisal services would not relate to the fiduciary's duty to account or the preparation of the fiduciary income tax returns. If the final regulations do provide such a list of such services, we suggest that a safe harbor be developed for them.

We appreciate the opportunity to submit these written comments and would welcome the opportunity to offer any additional assistance that might be desired.