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November 3, 2008

Internal Revenue Service
Office of the Associate Chief Counsel
(Passthroughs and Special Industries), CC:PSI
Attention: Mary Berman, Room 5300
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Comments on Notice 2008-63 (Private Trust Companies)

Dear Ladies and Gentlemen:

As invited in Notice 2008-63, 2008-31 I.R.B. 261, I write to comment on the proposed revenue ruling set forth in that Notice. This letter builds on and supplements my letter of February 27, 2006, in which I elaborated general principles and practical concerns that I thought should be reflected in any guidance regarding private trust companies.

In the main, I believe that the approach of the proposed revenue ruling is right, but that some additions to the proposed revenue ruling are needed to complete the good job it has begun.

A. Coverage and Basic Approach of the Proposed Revenue Ruling

The "Issues" section at the beginning of the proposed revenue ruling lists the correct issues. It is particularly reassuring that the revenue ruling will address the grantor-trust and beneficiary-owned-trust income tax issues under sections 671-678 (issue (5)). This will greatly improve the revenue ruling by confirming the ability of the public to rely on the holdings of the revenue ruling without fear of a surprise under tax rules that are not addressed.

Likewise, the second paragraph of the Notice states the correct basic premise for the proposed revenue ruling:

The IRS and the Treasury Department intend that the revenue ruling, once issued, will confirm certain tax consequences of the use of a private trust company that are not more restrictive than the consequences that could have been achieved by a taxpayer directly, but without permitting a taxpayer to achieve tax consequences through the use of a private trust company that could not have been achieved had the taxpayer acted directly. Comments are specifically requested as to whether or not the draft revenue ruling will achieve that intended result.

To paraphrase, the benchmark of the proposed revenue ruling is the role that an individual family member could have with respect to a trust under acknowledged existing law, and the objective of the proposed revenue ruling is to permit a private trust company to do whatever individual trustees could do directly while preventing a private trust company from being used to do indirectly what individual fiduciaries could not do directly. That is consistent with the tax policy objective described in my February 27, 2006, letter that private trust companies should be welcomed and encouraged, because they typically increase the professionalism, accountability, and independence of the trustees of private trusts. In the main, the proposed revenue ruling would serve that objective, for which I compliment the drafters. Any critique of the proposed revenue ruling, as invited in the Notice, should hold the proposed revenue ruling to that standard. The suggestions I make in this letter are made in that spirit.

B. Choice of the Revenue Ruling Format

The selection of a revenue ruling format is surprising to some estate planners and presents risks and challenges. A revenue ruling is essentially a safe harbor, which by its nature is constraining as well as reassuring for taxpayers. A revenue ruling tends to artificially force transactions into the mold of the fact pattern posed in the revenue ruling. Inevitably a revenue ruling includes factual details that leave us wondering what they are there for – the details do not seem to be material, but, without identification of the rules of general application the revenue ruling supposedly illustrates, there is no way to tell what is material and what isn't. Any taxpayer is free to challenge or push the limits of a revenue ruling, of course, but when the stakes are as high as they typically would be in a context justifying a family-owned trust company, hardly anyone would choose to incur that risk. Thus, a revenue ruling can have a chilling effect, which in this case would violate the basic premise of Notice 2008-63 that private trust companies should be treated no more harshly than individual trustees.

The proposed revenue ruling appears to recognize that dilemma. The second-last paragraph of the proposed revenue ruling gives examples of changes in circumstances in which “[t]he conclusions ... would not change,” while the last paragraph of the proposed revenue ruling gives examples of changes that could result in different tax treatment. Simply put, these two paragraphs help to distinguish between the material and immaterial factual details in the proposed revenue ruling. In the absence of rules of general application, such as we might find in a regulation, that is immensely important.

Thus, the changes I recommend to the proposed revenue ruling are of two general types:

1. Filling gaps in definitions and similar references.
2. Expanding the factual scenarios to avoid inadvertently excluding any structures that a private trust company might use without violating any apparent policy behind the proposed revenue ruling. In most cases, this could be accomplished either by expanding the factual scenarios directly or by expanding what is now the

second-last paragraph of the proposed revenue ruling to explicitly identify additional changes to facts that would not change the results.

C. Doing More to Explicitly Accommodate a “Safe Harbor” Approach

There are three fundamental steps that the final revenue ruling should take to compensate for the limitations of the revenue ruling format and reassure the estate planning community (which, frankly, had been waiting for comprehensive regulations) that guidance in revenue ruling format can be as reliable and adaptable as regulations.

1. First, the revenue ruling should make it explicit that, in effect, it only sets forth safe harbors, and that therefore the Service will reach the same conclusions and extend the same tax treatment to private trust companies that address the fundamental objective of equivalency with the treatment of individual trustees in a different but comparable way. This might be viewed at first blush as quite bold, but it is necessary in order to vindicate the choice of the revenue ruling format. Because of the Service’s ability to scrutinize the private trust company’s equivalency to individual trustees on audit, the fact patterns in the revenue ruling would continue to be attractive choices for taxpayers, but taxpayers would have flexibility to accommodate historical or other situational limitations on their structures and relationships that a revenue ruling cannot anticipate.
2. Second, the revenue ruling should in some authoritative way carve out an exception or exceptions for private trust companies that seem to be outside the target of the revenue ruling because they are inherently accountable to the public and in that respect differ substantially from the private trust companies observed in the Service’s letter rulings.
 - a. For example, an exception should be provided for any trust company regulated by the Office of the Comptroller of the Currency, the Federal Reserve, or the Federal Deposit Insurance Corporation. Most private trust companies are not subject to regulation by any federal banking regulator, and the oversight by these federal agencies is generally regarded as significantly stricter and more uniform than the oversight exercised by state banking regulators throughout the nation.
 - b. Similarly, an exception should be provided for any trust company that serves to a substantial degree clients other than members of the family that owns it. This exemption would be comparable, for example, to the more rigorous policing of “self-dealing” by tax-exempt organizations that are “private” foundations, because it is recognized that a significant level of public support will “insure that [a public charity] is responsive to the needs of the public.” H. RPT. NO. 91-413 (PART 1), 91ST CONG., 1ST SESS. 41 (1969); *cf.* S. RPT. NO. 91-552, 91ST CONG., 1ST SESS. 57 (1969).

Although the public charity support requirement is generally one-third, a higher threshold, such as two-thirds, would be expected in the private trust company context.

- c. Exceptions based on federal regulation and exceptions based on clients drawn from the general public could be combined either disjunctively or conjunctively. Thus, a conservative exception might be described in terms of a trust company that is regulated by the OCC, Federal Reserve, or FDIC and exercises fiduciary management over total wealth no more than one-third of which is held for the benefit of members of the family or families that own the company.
3. Third, the letter ruling or some appropriate accompanying statement should describe the circumstances in which the Service expects to receive and consider requests for letter rulings involving fact patterns that do not fall squarely within the fact patterns in the revenue ruling. This would be comparable to paragraph 3.01(65) of Rev. Proc. 2008-3, 2008-1 I.R.B. 110, which includes on the list of “Areas In Which Rulings Or Determination Letters Will Not Be Issued” the issue of “[w]hether a trust exempt from generation-skipping transfer (GST) tax ... will retain its GST exempt status ... in a factual scenario that is similar to a factual scenario set forth in one or more of the examples contained in § 26.2601-1(b)(4)(i)(E)” of the regulations, thus implying that rulings will continue to be issued for factual scenarios that are not similar.

D. Definition of a Private Trust Company

The private trust company (PTC) addressed in the proposed revenue ruling is wholly owned by Family, which is described in the proposed revenue ruling. Certain members of Family are officers and directors of PTC and serve on the Discretionary Distribution Committee (DDC). Other Family members own stock, but are not officers, directors, or members of the DDC; one of them is a manager and employee of PTC. This raises the following questions:

1. Family is very precisely defined in the proposed revenue ruling with reference to a husband and wife (A and B) who are alive. What if a family that owns a private trust company includes an extended family, cousins and so forth descended from common ancestors in a higher generation, who might very well be deceased?
2. In the proposed revenue ruling, Family, outright or through trusts and other entities, owns all the stock of PTC. In Virginia, by statute, a private trust company must be owned by only one family, but that is not generally true from state to state. What if more than one family owns PTC? What if some stock is owned by non-family employees? Or by the public? What if PTC is organized as a limited liability company or other entity that does not even have “stock”?

I believe that all of these questions should be answered by confirming that these details are immaterial to the tax treatment.

E. Discretionary Distribution Committee

In the proposed revenue ruling, PTC must have a Discretionary Distribution Committee (DDC) with exclusive authority to make all decisions regarding discretionary distributions. In what is perhaps the core feature of PTC in the proposed revenue ruling, analogous to “firewalls” and other disabling provisions historically applied to individual trustees, no member of the DDC may participate in the activities of the DDC with respect to a trust of which that DDC member or his or her spouse is a grantor or beneficiary, or of which the beneficiary is a person to whom that DDC member or his or her spouse owes an obligation of support. As a concept, that is precisely the right approach. Nevertheless, in the context of the proposed revenue ruling, questions remain:

1. Presumably the group to which these decisions are delegated need not be named “Discretionary Distribution Committee,” so long as the restrictions operate as described in the proposed revenue ruling.
2. Presumably the DDC (or the equivalent) may include members other than Family members, even though only Family members are mentioned as DDC members in the proposed revenue ruling.
3. What if PTC simply makes these decisions by action of its board of directors (or other governing body), but the governing statute or governing documents impose the same restrictions on that body as those imposed on the DDC in the proposed revenue ruling?
4. What if the governing statute or PTC’s governing documents require a DDC (or the equivalent) for each Family trust for which it serves as trustee, but the DDC does not have to be the same for every trust? (The proposed revenue ruling is not completely clear in this respect, but references to “each trust” and “all trusts” suggest a paradigm of the same DDC for all trusts served by PTC, for which there is no apparent policy reason.)
5. What if PTC serves trusts for clients other than Family members or owners? Presumably no DDC is required for those trusts.
6. While it is clear that “participation” in DDC activities includes voting on actions taken, it is not clear whether it includes advocating, presenting data, speaking of any kind, attendance when that vote is taken, attendance during that discussion, or attendance at that meeting at all.

7. Is a DDC needed in the case of discretion over distributions governed by an ascertainable standard relating to health, education, support, or maintenance?

Again it seems that these variations should be immaterial to the tax treatment. Even with respect to “participation,” while restrictions on more than voting would be understandable, they would be impractical and impossible to define and police. Such restrictions are not required or commonly used with respect to interested individual trustees.

Certainly there is no tax policy reason to discourage a private trust company from serving trusts for unrelated clients, or even actively marketing its services to unrelated clients. Such a business plan can only increase the accountability of the private trust company (and justifies the exception I recommend in part C.2 above).

In cases where the grantor is not a trustee (and not able to unilaterally become a trustee), there are generally no limitations on an individual trustee’s exercise of discretion in favor of others (if there is no obligation of support) or discretion subject to an ascertainable standard relating to health, education, support, or maintenance. Therefore, those distributions, like distributions mandated by the trust instrument or by applicable law, should be carved out of the definition of “discretionary distributions” (with an appropriate caveat for distributions to or for a beneficiary to whom a DDC member owes a legal obligation of support). The proposed revenue ruling should make it clear that even if the applicable trust terms permit distributions beyond the ascertainable standard relating to health, education, support, or maintenance, DDC decisions regarding distributions to other beneficiaries or distributions that are for health, education, support, or maintenance are not “discretionary distributions” subject to the disabling rules. Otherwise, private trust companies would be treated more harshly than individual trustees.

In this regard, distributions to the spouse of the DDC member or to a person to whom the spouse (but not the DDC member) owes a legal obligation of support should also be exempt from the disabling rules. Again, there is generally no restriction on a spouse serving as an individual trustee in such cases, and therefore private trust companies would be treated more harshly than individual trustees if this change were not made

In its analysis of Issue 1 as applied to Situation 1, the proposed revenue ruling states that “Statute prohibits any shareholder(s) of PTC from changing the governing provisions regarding the DDC.” That prohibition does not clearly appear in the statement of facts. In any event, there does not appear to be any reason for such a broad prohibition. In addition to accommodating non-Family shareholders (or other owners), it should be clarified that changes are permissible, such as changes to the size and composition of the DDC (including removing and replacing members), so long as the core principles of independence are maintained and respected. That would emulate the corresponding rules and principles that apply to individual trustees.

F. Personnel Decisions

Under the proposed revenue ruling, Statute (in Situation 1) and PTC's governing documents (in Situation 2) provide that only officers and managers of PTC may participate in decisions regarding personnel of PTC, including the hiring, discharge, promotion and compensation of employees. It is understandable that interference by shareholders (or other owners) would be discouraged where they are Family members (although, as stated above, ownership of a private trust company need not be limited to Family members). But companies often have "compensation committees" (or the equivalent) of outside directors (including non-employee owners) to review the performance and recommend the compensation of the CEO and sometimes other top executives. The proposed revenue ruling should explicitly permit such best practices, even where the non-employee owners on such committees are Family members, so long as those Family members have no operational role in the company.

G. States Without an Adequate Private Trust Company Statute

It is commendable that the proposed revenue ruling eschews a requirement that a private trust company be organized in a state with any particular kind of statute. This avoids local distinctions and permits evenhanded federal tax treatment of private trust companies throughout the country. But the following questions are raised:

1. What if a state statute provides for private trust companies, but does not provide all the safeguards set forth in Situation 1 in the proposed revenue ruling?
2. Is it realistic, in Situation 2, to depend on provisions in a private trust company's governing documents limiting the persons who may amend those governing documents?

There is no apparent policy reason to deny a private trust company or the family or families it serves the ability to rely on the proposed revenue ruling simply because the state's statutory effort falls short of the standards in the proposed revenue ruling. There is no apparent policy reason why a private trust company should have more assurance of its tax treatment in a state that doesn't even try to provide statutory authority. Many private trust companies could simply shop for a favorable state law anyway. The proposed revenue ruling should explicitly permit a private trust company's governing documents to fill in the safeguards not provided by a state statute. If it is acceptable to provide for such a result when there is no statute at all, there is no reason not to allow that result with respect to any areas a statute leaves unaddressed or addresses inadequately.

With respect to standards that are provided by the private trust company's governing documents rather than a state statute, in Situation 2 (as set forth in Notice 2008-63 or expanded as I recommend in the preceding paragraph), the proposed revenue ruling depends on the irrevocable delegation of certain shareholder's rights of amendment to a committee dominated by non-shareholders. I predicted in my letter of February 27, 2006, that such an effort to emulate

trust-like “irrevocability” would be tempting, but mistaken, because the notion of a “company” entails voluntary association. Of course the owners of a company can change their contract and change the company’s charter.

Nevertheless, in pursuit of its commendable objective of providing uniform treatment among the states, the proposed revenue ruling is on the right track. Whether in a state with no statute as in Situation 2 or to fill in gaps in a state statute in the expansion of Situation 2 that I recommend, it is appropriate to require extraordinary efforts to amend a necessary safeguard in the governing documents. To avoid ambiguity, however, the proposed revenue ruling should acknowledge the following:

1. For new trusts created with the private trust company as trustee (the 2008 trusts in the proposed revenue ruling), the desired level of the equivalent of irrevocability can be provided in the trust instrument itself. The trust instrument might provide that if a private trust company that is the trustee materially amends its governing documents, it will cease to be a trustee.
2. Alternatively (and it is important that this be an alternative, because this may be the only way to deal with existing trusts as the proposed revenue ruling clearly seeks to do), the “break the glass” prohibition or limitation on amendment will be respected regardless of its enforceability under state law, but if that prohibition itself is amended or ignored and then PTC materially amends its governing documents, it will lose the protection of the proposed revenue ruling just the same as if Statute itself in Situation 1 were materially amended.
3. In any event, the proposed revenue ruling should acknowledge the relevance of the degree of regulatory oversight to which the private trust company might be subjected, particularly in the case of private trust companies subject to federal regulation, elaborated in part C.2 above (related to Safe Harbors).

H. Amendment Committee

In Situation 2 (not governed by a state private trust company statute), an Amendment Committee is created, with exclusive authority to change the tax-sensitive provisions of PTC’s governing documents. A majority of the members of the Amendment Committee must be individuals who are neither Family members nor related or subordinate to any shareholder of PTC.

In addition to the efficacy of an Amendment Committee approach at all (which I discuss in part G), there are questions about the Amendment Committee itself, as in the case of the DDC:

1. As with the DDC, presumably the group with this exclusive authority need not be named the “Amendment Committee.”

2. What if PTC has shareholders (or other owners) who are not Family members (which, as discussed above, the proposed revenue ruling does not seem to contemplate)? May persons related or subordinate to those owners, or even those owners themselves, be counted as non-Family members of the DDC?
3. What if PTC's governing documents, including the tax-sensitive provisions, may be amended by action of its board of directors (or other governing body), but the governing documents require that a majority of the members of that governing body must be individuals who are neither Family members nor persons related or subordinate to any Family member?
4. What if PTC's governing documents may be amended in the usual way, regardless of the composition of the group with the authority to do so, but an individual or individuals who are neither Family members nor related or subordinate to any Family member simply have a veto over such amendments of any tax-sensitive safeguards.

Again it seems that these variations should be immaterial to the tax treatment.

On the other hand, while the proposed revenue ruling requires the Amendment Committee to act by "no less than majority vote," which could be construed as requiring only a majority vote of a quorum, it would be appropriate to expand this to "a vote of no less than a majority of its members," thus ensuring that a majority of members who vote for any amendment are independent members. (The suggested veto approach would make such a change unnecessary.)

I. Subordinate Employees of Executives

As I stated in my letter of February 27, 2006, grantor trust issues (in contrast to transfer tax issues) are particularly vexing in the context of a private trust company, because section 672(c) specifically includes "a subordinate employee of a corporation in which the grantor is an executive" in the definition of a "related or subordinate party," which, if the employee is "subservient," is significant in determining the independence of a trustee for purposes of affecting the allocation or timing of distributions under section 674(c) and approving loans under section 675(3). Nevertheless, the whole idea of a private trust company is that it is formed and operated to serve the financial and personal objectives of a family or group of families whose members have created or are likely to create trusts. That some of those family members will be both executives of the company and grantors of trusts administered by the company is entirely foreseeable and natural.

As I said on the first page of this letter, the extension of the proposed revenue ruling to grantor trust issues is particularly reassuring, because without that the revenue ruling could lure taxpayers with workable transfer tax rules into arrangements laden with income tax traps. Accordingly, while respecting the clear meaning of sections 674(c) and 675(3) in light of section

672(c), the proposed revenue ruling simply must find a way to accommodate private trust companies to the statutory construct Congress created in 1954 without any indication that it had private trust companies in mind. To repeat the plea in my February 27, 2006, letter, “finding a way to do that is crucial to the public acceptance, usefulness, and stability of the guidance.”

Notice 2008-63 apparently agrees. The conclusion in the proposed revenue ruling that “voting control,” even 100% voting control, of PTC is irrelevant in the context of the DDC structure and related firewalls is statesmanlike, but not aggressive; it is realistic and it is right, for the reasons the proposed revenue ruling cites. This represents a good start at the attempt to reconcile the over-50-year-old language of section 672(c) to the realities of private trust companies. But like my letter of February 27, 2006, the proposed revenue ruling finds the issue of “a subordinate employee of a corporation in which the grantor is an executive” to be even more challenging. Unfortunately, the proposed revenue ruling only notes that fact and provides no creative solution. Working with their stakeholders in the estate planning, tax, and fiduciary communities, the IRS and the Treasury Department simply must try harder. If no solution is found in the context of this revenue ruling, then many private trust companies will still be obliged to request their own letter rulings.

In referring to “executives” and “subordinate employees,” Congress indicated that its target was the person “whose relationship to the grantor is such that a power held by such person may be tantamount to a power in the grantor.” H. RPT. NO. 1337, 83D CONG., 2D SESS. A212 (1954); S. RPT. NO. 1622, 83D CONG., 2D SESS. 365 (1954). But the statute does not define “executive” or “subordinate” – or “subservient.” As in the case of “voting control,” it is important to find an approach that serves the congressional purpose, realistically reflects the nature of private trust companies, provides objective standards, and works.

First, in defining or describing “executives” for this purpose, the proposed revenue ruling might borrow from its own language and limit its reach to officers and managers of PTC who may participate in personnel decisions regarding members of the DDC, including the hiring, discharge, promotion, and compensation of DDC members.

Second, in defining or describing “subordinate employees” who are “subservient,” the proposed revenue ruling might consider limiting its reach to “direct reports” – persons over whom the grantor as executive exercises personal, direct, and immediate supervision. Employees further down the line in the company’s organizational chart can appropriately be assumed for this purpose not to have a “relationship to the grantor ... such that a power held by such person may be tantamount to a power in the grantor.” Even if that assumption seems aggressive and controversial in the abstract, it would be appropriate in a private trust company context, where, as I explained in my February 27, 2006, letter, professionals (presumably including the professionals between the grantor and the employees in question in the company’s organizational chart) are hired for their expertise, experience, or special training in trust administration, beneficiary relations, or investment management, and the assembly of such professionals in the private trust company often fosters increased professionalism and accountability in the administration of family trusts. In any event, such an assumption might be

necessary to avoid publication of a revenue ruling with the fundamental flaw of incomplete and unworkable treatment of the grantor trust issue.

Third, the proposed revenue ruling might consider expansion of its factual scenarios to provide that Statute (in Situation 1) and PTC's governing documents (in Situation 2) (subject to the comments I made above about the "irrevocability" of those governing documents) prohibit an executive (as defined above) from taking DDC decisions (with respect to any trust of which that executive is a grantor) into account in making personnel decisions with respect to DDC members. While not a perfect test, it is no more subjective or onerous than many standards of employment law, and a company may avoid it completely by walling off the grantor from any personnel decisions involving DDC members (which the proposed revenue ruling should explicitly endorse).

Fourth, for reasons stated in part F above (related to Personnel Decisions), it is essential to explicitly exclude from the meaning of "executives" any board members who have no operational role.

Fifth, as I stated in footnote 26 in my letter of February 27, 2006, it would be appropriate for the proposed revenue ruling to invoke a "facts and circumstances" test to limit the protection of the proposed revenue ruling on audit if an actual understanding of "subservience" to any grantor or beneficiary is proved.

J. Terms of the Trusts

In the proposed revenue ruling, the instrument governing each trust gives the trustee discretionary authority to distribute income and/or principal during the primary beneficiary's life to the primary beneficiary and, in the case of new trusts, to other beneficiaries. Each trust instrument also gives the primary beneficiary a testamentary power to appoint the trust principal among members of Family (other than himself or herself) and charity. Each trust instrument provides that the grantor, or the primary beneficiary if the grantor is not living, may appoint a successor trustee (other than himself or herself) if the current trustee either resigns or is no longer able to fulfill the duties of trustee. Finally, each trust will terminate no later than 21 years after the death of the last to die of certain designated individuals living at the time of the creation of the trust. These questions are presented:

1. In the case of a preexisting trust, what if the trustee is also authorized to distribute income or principal to others, such as descendants of the primary beneficiary, or spouses, in-laws, or stepchildren of such descendants, or charity, or any other group of beneficiaries?
2. What if the primary beneficiary's testamentary power of appointment may be exercised in favor of persons other than Family members and charity, such as in-laws or stepchildren of Family members, or, for that matter, anyone in the world

other than the primary beneficiary's creditors, estate, or creditors of his or her estate (a common formulation inspired by section 2041(b)(1))?

3. What if there is no primary beneficiary of a trust, but the trust is a "pot" or "spray" or "sprinkle" trust?
4. What if a beneficiary or beneficiaries have the right to appoint successor trustees even while the grantor is still alive?
5. What if the grantor and/or beneficiaries have the right to remove, as well as replace, a trustee?
6. What if a trust complies with the law of the applicable jurisdiction, but does not terminate with reference to a classical "perpetuities" period of designated lives-in-being plus 21 years, because the applicable law provides or allows a different approach?

Again it seems to me that these variations should be immaterial to the tax treatment. None of these variations would be thought to present an issue in the case of individual trustees. Indeed, there is no reason to view any terms of any trust as relevant, unless they effectively override the firewall safeguards applicable to the private trust company. Presumably, the revenue ruling would recite that any power to remove and replace trustees would be subject to the limitations of Rev. Rul 95-58, 1995-2 C.B. 191 (although, as I stated in my February 27, 2006, letter, the estate planning community generally does not understand the need to import section 672(c) into transfer tax law).

K. Reciprocal Agreements

Under the proposed revenue ruling, Statute (in Situation 1) and PTC's governing documents (in Situation 2) provide that no Family member may enter into any reciprocal agreement, express or implied, regarding discretionary distributions from any trust for which PTC serves as trustee.

It would be a breach of fiduciary duty, if not a violation of law, for a person to use a fiduciary position to bargain for personal benefit. Any specific prohibition would be unnecessary and redundant at best and would risk weakening or qualifying general legal duties at worst. Therefore, I recommend deleting it from the proposed revenue ruling. Nevertheless, as in the case of "subservience," it would be appropriate for the proposed revenue ruling to invoke a "facts and circumstances" test to limit the protection of the proposed revenue ruling on audit if an actual "reciprocal agreement" is proved.

L. The Significance of the Word “Alone”

The five “holdings” in the proposed revenue ruling state that neither the appointment nor the service of PTC in Situation 1 or Situation 2 will “alone” cause unwelcome tax consequences. This is understandable, because obviously there are other factors that could cause adverse tax consequences in certain cases and the proposed revenue ruling does not purport to address those factors. Even so, the use of the word “alone” is ominous and can be frustrating.

The word “alone” implies that the use of a private trust company together with other features might cause adverse tax consequences. But that might be just another way of saying that those other features might “alone” create those adverse tax consequences, and the presence of the private trust company is irrelevant. It is hard to imagine a scenario in which other features would not have tax consequences “alone” but would in the context of a private trust company, except for features that themselves undermine the safeguards built into the private trust company structure, in which case the proposed revenue ruling would not provide any protection anyway.

If, however, it is thought that a family’s use of a private trust company might make it more vulnerable to other tax problems, then this proposed revenue ruling would be a good occasion for explicitly sounding that warning.

The word “alone” is accurate and should be unobjectionable. But because of the potential of the word to alarm, the public acceptance of the proposed revenue ruling and the stability of law and practice in this area would be reinforced if the proposed revenue ruling explained what “alone” means and provided an example or two.

M. Stock in Controlled Corporations and Life Insurance

Notice 2008-63 asks for comments on whether additional guidance is necessary where trust assets include stock in a controlled corporation or life insurance. The estate planning community has experience with techniques to isolate grantors for purposes of sections 675(4)(A) & (B) and 2036(b) and insureds for purposes of section 2042(2). It should not be a serious problem to adapt these techniques to private trust companies if, as I recommend, the proposed revenue ruling acknowledges that operating rules similar to those applied to the DDC (and similar to those used for individual trustees) will also be effective for these purposes.

With respect to controlled corporations, it is a fact of life that shares of stock or other ownership interests in a private trust company are often owned by trusts (which the proposed revenue ruling acknowledges in its fact patterns) and that often those are trusts of which the private trust company itself is the trustee (as to which the proposed revenue ruling is silent). As I noted on the last page of my letter of February 27, 2006, the circular appearance presents some interesting issues about fiduciary duty and enforceability, but these issues are not fundamentally different from those presented when individual family members are trustees. The proposed revenue ruling should specifically acknowledge that approach to ownership and acknowledge

that it presents no tax issues as long as operating rules similar to those applied to the DDC are observed.

N. Conclusion

Again I commend the IRS and the Treasury Department for tackling these issues and for making such a reassuring start. The proposed revenue ruling is built on the correct basic premise of comparability to individual trustees and is generally well-conceived. It still leaves questions, as identified in this letter. I encourage the IRS and Treasury to address those questions consistently with that basic premise and with regard for the need for the broadest possible fact patterns in the otherwise confining context of a revenue ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald D. Aucutt". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

Ronald D. Aucutt