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RE: AICPA Request for Guidance on the Ability to Split Gifts under Section 2513 when the Donee Spouse has an Interest in the Trust but All the Transfers made to the Trust during the Year may be Withdrawn by Trust Beneficiaries

Dear Mr. Korb and Mr. O'Shea:

The American Institute of Certified Public Accountants (AICPA) is submitting this letter to suggest that guidance be issued by the Internal Revenue Service (IRS) on the ability of a husband and wife to split gifts under section 2513 when the donor spouse makes gifts to a trust, the donee spouse has an interest in the trust, and all the transfers made to the trust during the year may be withdrawn by trust beneficiaries. It is also suggested that this issue be considered for acceptance in the pilot program announced in Notice 2007-17, 2007-12 I.R.B. 748, to obtain input from the public on the initial development of the project.

The AICPA is the national professional organization of certified public accountants comprised of approximately 330,000 members. Our members advise clients on federal, state and international tax matters, and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized business, as well as America's largest businesses.

Specifically, guidance is needed on the ability of a donor and his or her spouse to split gifts under section 2513 on gifts that the donor makes to a trust in which the spouse has an ascertainable interest when the children and perhaps the spouse have Crummey withdrawal powers over the property transferred.

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The issues presented here are best illustrated by considering the following fact pattern:

> The trust instrument provides that, after the death of the taxpayer, the trustee is to pay the spouse all the trust income and has the discretion to distribute principal to the spouse if needed for the spouse's maintenance and support and upon the spouse's death the assets will be divided among the couple's three children. The taxpayer contributes $66,000 to the trust, and each child has the right to withdraw $22,000 from the trust following the contribution.

May the taxpayer and his or her spouse split all the gifts so that each is considered to have transferred $33,000 or are they permitted to split only the portion of the transfer after carving out the present value of the spouse's interest in the income and the principal? If the spouse also has a withdrawal right, how does that affect the couple's ability to split the gift? What happens if in the previous example the taxpayer transferred $71,000 to the trust, the spouse had the right to withdraw $5,000, and each child had the right to withdraw $22,000? May the donor and his or her spouse split all the gifts, split all the gifts except for $5,000, or split all the gifts after carving out the present value of the spouse's interest in the income and principal?

Reg. sect. 25.2513-1(b)(4) provides that if one spouse transfers property in part to his or her spouse and in part to third parties, the consent to split gifts is effective with respect to the interest transferred to third parties only insofar as that interest is ascertainable at the time of the gift and hence severable from the interest transferred to the spouse. It is unclear how the gift-splitting rules are to apply when the donee spouse has an ascertainable interest in the trust but other trust beneficiaries have the right to withdraw the contributions made to the trust during the year.

Private letter rulings appear to approach this issue in different ways. One appears to ignore the Crummey powers and looks to the spouse's interest in the trust so that only the portion of the transfer after carving out the spouse's interest may be the subject of gift splitting. The other states that the Crummey withdrawal rights override the spouse's interest in the trust so that the entire transfer to the trust is available for gift splitting (the wife did not have a Crummey withdrawal right).

In PLR 200422051, the trust agreement provided that following the death of the donor, all the income was to be paid to the donor's wife for life and so much principal as the trustee determined was needed for her reasonable support and medical care. The wife and the children each had Crummey withdrawal rights over the contributions. The PLR ignored the Crummey withdrawal rights held by the children in determining whether the wife's interest would be severable and therefore the rest of the transfer would be subject to gift splitting. In that situation, the wife's interests in the trust were ascertainable, and the PLR permitted gift splitting for the amount of the transfer that exceeded the value of the wife's interests. It is unclear whether the property subject to the wife's withdrawal right was taken into consideration when valuing her interests or just the value of the wife's interests in the income and the principal. A similar result was reached in PLR 200616022 in which the withdrawal rights of the children were ignored (the

spouse had no withdrawal right) in determining what portion of the gift was subject to gift splitting.

PLR 200130030 involved transfers to a trust not in excess of double the annual exclusion for the number of children who had the right to withdraw all the contributions made to the trust during the year. Under the terms of the trust, the trustee had the discretion to distribute to the donor's husband income and principal for his health and maintenance in reasonable comfort. The trustee also had the discretion to distribute income and principal to the donor's descendants based on an ascertainable standard. The trustee is prohibited from making any distribution that would have the effect of discharging a legal obligation of the donor or her husband. The ruling concludes that because the children had the right to withdraw all the contributions made to the trust, the right of the trustee to make discretionary distributions to either the husband or the wife's descendants is subordinate to the right of the descendants to exercise their withdrawal rights, and accordingly, if the gift-splitting election is properly made, the transfer to the trust will be treated as made one-half by the wife and one-half by the husband.

We respectfully submit that PLR 200130030 reaches the correct result by looking at who has the right to withdraw the contributions made to the trust. As long as all the contributions to the trust during a year may be withdrawn by beneficiaries other than the donor's spouse, the entire transfer to the trust should be eligible for gift splitting.

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We thank you for the opportunity to present our suggestion and welcome the opportunity to discuss our comments further with you or others at the IRS. Please feel free to contact me at (212) 773-2858 or jeffrey.hoops@ey.com; or Steven A. Thorne, Chair of the AICPA Trust, Estate, and Gift Tax Technical Resource Panel, at (312) 486-9847 or stethorne@deloitte.com; or Eileen R. Sherr, AICPA Technical Manager, at (202) 434-9256 or esherr@aicpa.org; to discuss the above suggestion or if you require any additional information.

Sincerely,

Jeffrey R. Hoops
Chair, AICPA Tax Executive Committee

cc: Mr. Eric Solomon, Assistant Secretary for Tax Policy, Treasury Department (Fax: (202) 622-0605)
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