Sent by electronic mail to notice.comments@irscounsel.treas.gov

Re: Comments concerning Notice 2008-63 (Private Trust Companies)

November 3, 2008

Internal Revenue Service
Office of the Associate Chief Counsel
(Passthroughs and Special Industries), CC:PSI
Attn: Mary Berman, Room 5300
1111 Constitution Avenue, NW
Washington, DC 20224.

Dear Ladies and Gentlemen:

Enclosed are my personal comments on Notice 2008-63, concerning private trust companies ("PTCs") and various income, estate, and gift tax sections of the Internal Revenue Code. These comments were recently published online at www.wealthstrategiesjournal.com for my column on "Choices" under the title "Recent Tax Guidance on Private Trust Companies, Family Co-Trustees and Distribution Committees: Notice 2008-63."

These comments cover many aspects of the Notice, but in particular express the view that tax guidance on PTCs should consider whether the process of succession for fiduciary decision-makers in the private trust company is tax-sensitive, especially because corporate custom and practice provides a hierarchy of inherent powers that can be used to remove and replace executives, employees, and directors. These comments take the position that the concerns addressed by Rev. Rul. 95-58 do not apply to PTCs except in the rare case in which the PTC structure in question offers a unilateral power to remove and replace a fiduciary. Such a rare case would be comparable to that arising outside of the PTC context. In the more common case involving a PTC, the ability of any grantor or beneficiary to make changes is diluted by the collective and stratified nature of authority within a company. The enclosed comments take the view that it is inappropriate and unnecessary -- and in any event extraordinarily difficult -- to try to construct a safe harbor for PTCs by using the concepts employed in Rev. Rul. 95-58. Shared powers to change fiduciaries should not be treated as grounds for attributing the tax-sensitive powers of those fiduciaries to a grantor or beneficiary.

If, to the contrary, shared replacement powers as well as unilateral powers are considered to be a basis for attribution at least in some cases, the enclosed comments do not offer a

proposed safe harbor for PTCs. The comments forthcoming from the American College of Trust and Estate Counsel consider the question in detail and provide a very promising suggestion for a safe harbor that deserves serious consideration. As illustrated in Example 3 in the ACTEC comments, grantors and beneficiaries cannot dominate PTCs if the board of directors and the DDC members serve for staggered terms longer than one year and the votes of grantors and beneficiaries cannot be counted if the removals and replacements would cause a change of control within a three-year span. In this way, self-interested shareholders who can remove and replace directors, and directors who can change DDC members, cannot use an actual or threatened change of control to influence fiduciary decision-makers, because the process is too cumbersome and drawn out. Even if one change of control could be effective after three years, there is not serious threat that the process could be repeated in any meaningful way that would influence the conduct of the new appointees.

This suggestion provides a practical and simple safe harbor solution, especially when compared to the alternative of trying to apply the "related or subordinate" limitations of Rev. Rul. 95-58 to a company structure, which leads to extraordinary complexity and raises more questions than it answers, as explained in the ACTEC comments. The suggestion is not an untested idea. Longer, staggered terms for directors have been used for some time in the corporate business world; such "classified boards" are permitted under the corporate laws of every jurisdiction in the United States. In that context, it is used for anti-takeover purposes to reduce the power of new "hostile" shareholders, and also to create a safer haven for the work of independent directors when considering the relationships between inside and outside directors. The use of these techniques for publicly held business corporations is widely discussed in the literature, including in the Stanford Law Review article at 54 Stan. L. Rev. 887 (May 2002) entitled "The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy," by L. A. Bebchuk, J. C. Coates IV, and G. Subramanian, and in The Business Lawyer article at 54 Bus. Law. 102 (May 1999) entitled "Corporate Governance Out of Focus: The Debate over Classified Boards," by R. H. Koppes, L.G. Ganske, and C.T. Haag.

Thank you for your consideration.

Don Kozusko

Donald Kozusko
Kozusko Harris Vetter Wareh LLP
1666 K Street, N.W. - Suite 400
Washington, D.C. 20006
Tel. 202.457.7211
Fax 202.318.4444, 202.457.7201
www.kozlaw.com