

The Estate Planner

Code Sec. 1411 Material Participation by Trusts— Part 2

By Lewis J. Saret

Introduction

Generally

This column, the second of a two-part column, concludes a series of interrelated columns dealing with the Code Sec. 1411, 3.8-percent net investment income tax (NIIT). It discusses material participation of trusts and estates, concluding the discussion begun in the first part of this column (“Part 1”).¹ As noted in Part 1, to the extent that a trust or estate receives income from an activity in a trade or business in which the trust or estate materially participates, such trust or estate avoids the NIIT.

Part 1 summarized the key tax legal authorities relevant to the issue of material participation of trusts and estates, including a discussion of the following authorities:

- Legislative history of Code Sec. 469
- *M.K. Carter Trust*²
- TAM 200733023
- TAM 201029014
- TAM 201317010
- *Frank Aragona Trust*³

This, second part, will analyze several factors that may be relevant to the issue of material participation of trusts and estates.

Impact of Analysis

As the summary of tax authorities, contained in Part 1, makes obvious, the tax authorities related to material participation of trusts and estates are inconsistent.

The preamble to the final regulations under Code Sec. 1411, recognizing this fact, requested comments about this issue, stating the following:

Commentators stated that the legislative history of section 469 suggests that only a fiduciary’s participation should control in determining whether an estate or a trust materially participates in a trade or business activity. In certain situations, case law has concluded that the participation of beneficiaries and



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employees also should be considered. One commentator noted that case law and IRS guidance conflict, leaving taxpayers with uncertainty in determining the material participation of a trust.

A number of commentators requested that the Treasury Department and the IRS provide guidance on material participation of estates and trusts. However, the commentators acknowledged that guidance on material participation would apply under both sections 469 and 1411, and consequently suggested the initiation of a guidance project to propose the rules for which § 1.469-5T(g) has been reserved.

The Treasury Department and the IRS believe that the commentators have raised valid concerns. The Treasury Department and the IRS considered whether the scope of these regulations should be broadened to include guidance on material participation of estates and trusts. The Treasury Department and the IRS, however, believe that this guidance would be addressed more appropriately in the section 469 regulations.

The lack of authoritative guidance from the IRS about what constitutes material participation by a trust or estate raises several questions about whose participation counts for this analysis and what specific types of activities count.

The author understands that, in response to the IRS's request for comments, several organizations are in the process of preparing such comments, including without limitation, the American Institute of Certified Public Accountants (AICPA), the American Bar Association (ABA) Section of Taxation ("Tax Section"), the ABA Section of Real Property Trust and Estate Law (RPTE), and the American College of Trust and Estate Counsel (ACTEC).

Having said the foregoing, taxpayers and their advisors are still left with the issue of what position to take on tax returns pending further guidance from the IRS. The remainder of this column will discuss factors that various commentators have discussed as being relevant to the material participation determination ("MP Determination"). We will begin with a discussion of various factors that may be relevant to the MP Determination.

We will then continue by examining the proposed regulations that were prepared by Leo L. Schomlka, which the author understands the IRS considered adopting. These proposed regulations also do a nice job of synthesizing various factors, discussed by several commentators, about the MP Determination. This column will then conclude with recommendations for approaches that taxpayers and their advisors may want to consider with respect to the MP Determination.

Factors Relevant to MP Determination

Generally

The lack of authoritative guidance from the IRS about what constitutes material participation by a trust or estate raises several questions about whose participation counts for this analysis and what specific types of activities count. Based on issues raised by several commentators,⁴ we discuss the following issues below:

- Audit Position of the IRS
- What Types of Participation by Fiduciary Count?
- Whose Participation, Other Than Fiduciary, Counts?

Audit Position of the IRS

Before discussing various issues about the MP Determination raised by commentators, it would be prudent to look at the IRS's audit position. Fortunately, the IRS has set forth its audit position in its Passive Activity Loss Audit Technique Guide (the "Guide").⁵

The Guide was developed to provide Revenue Agents and Tax Compliance Officers with technical information and tools to examine issues relating to both income and losses from passive activities. It provides specific guidance on potential audit issues along with highlights of common errors. Having said this, the Guide is not all encompassing and does not cover every exception.

The Guide notes that Code Sec. 469(h) requires regular, continuous and substantial participation in the operations of the business to meet material participation and for losses to be fully deductible. It also notes that there is no guidance in the regulations at this time for material participation of trusts and estates.

Therefore, the Guide states that:

As an administrative proxy, we look to the seven tests in Reg. § 1.469-5T(a) for material participation, and generally will not raise an issue if the trustee meets one of the tests. However, as a technical matter the tests apply to individuals, not to a trust or trustee. Thus,

as a legal matter, the trustee must prove he works on a regular basis in operations, on a continuous basis, and on a substantial basis in operations, i.e. rise to the requirements of IRC § 469(h).

Caution. The Guide suggests that examiners look at the following issues, which gives tax advisors an idea of when issues may arise with the IRS:

- Is the address and EIN of the entity in question a long distance from the fiduciary? Presumably, a long distance would indicate to the IRS a lack of material participation.
- Is the ownership percentage in the entity in question low or is the interest a limited partnership interest?

Note. The Guide sets out the following examination techniques and documents to request:

Examination Techniques

- Secure the trust instrument or will and read it.
- Determine who the trustee is and what his other responsibilities are. If the trustee is a busy bank officer or attorney, material participation may be questionable in businesses or entities in which the trust owns an interest.

Documents to Request

- Trust instrument or will including any amendments and codicils.
- Copies of Schedule K-1s from related entities.
- Detailed description of business activities conducted on Schedule C or F or by any partnerships, or S Corporations.
- Explanation of the duties and responsibilities of the trustee for each business, whether conducted as a Schedule C, partnership or S Corporation.
- Completion of the log at the end of Chapter 4 for any activity in which material participation is questioned.

What Types of Participation by Fiduciary Count?

Generally

The IRS's position is that the only party whose participation counts is the fiduciary. Therefore, the IRS does not consider the activities of the beneficiary or any other party for MP Determination purposes.

In addition, based on the legislative history of Code Sec. 469, the IRS treats an estate or trust as materially

participating in any activity "if an executor or fiduciary, in his capacity as such, is so participating."⁶

This raises the issue of what activities of the fiduciary are counted for purposes of the MP Determination.⁷ It also raises the issue of whether any activities by any person other than the fiduciary can be considered for MP Determination purposes.

Most commentators believe that all activity spent by fiduciaries with respect to an activity should be treated as participating in such activity.⁸ Having said this, two types of activity appear to be treated specially, namely investment activity and managerial activity, each of which are discussed below.

Work Done in Capacity of Investor

As a general matter, the regulations that apply to individuals disregards such individuals' activities that are done in the capacity of an investor unless that individual is directly involved in such activity's day to day management or operations. Specifically, Temporary Reg. §1.469-5T(f)(2)(ii) provides that work done by an individual in that individual's capacity as an investor is not treated as participation for purposes of the MP Determination unless that individual is directly involved in the activity's day to day management or operations. For this purpose, work in the capacity of an investor includes the following:

- Studying and reviewing financial statements or reports on operations of the activity
- Preparing or compiling summaries or analyses of the finances or operations of the activity for the individual's own use
- Monitoring the finances or operations of the activity in a nonmanagerial capacity⁹

Note. The work of a fiduciary inherently focuses to a greater extent on investment duties than individuals because fiduciaries have a fiduciary duty to exercise care and prudence in investment matters.

Therefore, it appears that work done in the capacity as an investor may be counted for MP Determination purposes but only if the fiduciary is already directly involved in the activity's day-to-day management or operations.

Note. The intent of this analysis appears to be to distinguish between passive investors and investors who actively participate in the activity.

Work Done in Capacity of Manager

Work done in the capacity of a manager also receives special treatment under the passive activity loss regulations for individuals. Therefore, it can be expected that any future

regulations for trusts and estates may contain similar rules. Specifically, an individual's services performed in the management of an activity cannot be considered in the MP determination unless, for the tax year in question:

- No person (other than such individual) who performs services in connection with the activity's management receives compensation described in Code Sec. 911(d)(2)(A) in consideration for such services; and
- No individual performs services in connection with the management of the activity that exceed (by hours) the amount of such services performed by such individual.¹⁰

Note. The intent of this analysis appears to be to prevent individuals from taking a title that implies active management in the activity, such as a title of "manager," without a commensurate level of participation in the day to day operations of the activity. This appears to reflect a theme that has reappeared repeatedly of striving to look beyond titles to the underlying substance of a role by the IRS. This would seem to include the IRS rejection of a "special trustee" as not constituting a fiduciary in TAM 200733023.

Fiduciaries Acting in Multiple Capacities

One issue that frequently comes up is how to treat fiduciaries who act in multiple capacities. For example, in the *Aragona Trust* case, some of the fiduciaries were also employees of the operating company owned by the trust. The IRS, in the *Aragona Trust* case took the position that the activities of the trustees who were also employees of the operating business, in their capacity as employees should not be considered when determining whether the trust satisfied the MP Determination. Moreover, the IRS argued that because it was impossible to disaggregate the employee activities of such trustee/employees, none of their activities should be considered for purposes of the MP Determination.¹¹

The Tax Court rejected the IRS's argument in *Aragona*, reasoning that the activities of the trustees—including their activities as employees of Holiday Enterprises, LLC ("Holiday")—should be considered in determining whether the trust materially participated in its real-estate operations. The reasons the court gave for this conclusion were as follows:

- The trustees were required by Michigan law to administer the trust solely in the interests of the trust beneficiaries, because trustees have a duty to act as a prudent person would in dealing with the property of another, i.e., a beneficiary.
- The trustees were not relieved of their duties of loyalty to beneficiaries by conducting activities through

a corporation wholly owned by the trust. Therefore their activities as employees of Holiday should be considered in determining whether the trust materially participated in its real-estate operations.

In *Aragona*, the IRS also argued that because some of the trustees also had direct ownership interests in the operating business that was owned by the trust, some of their activities were attributable to their personal ownership in the business and not the trust's ownership. Therefore, according to the IRS argument, such activities should also be ignored for purposes of the MP Determination. The Tax Court also rejected this argument, reasoning:

- The owner/trustees' combined ownership in each entity was not a majority interest—for no entity did their combined ownership interest exceed 50 percent.
- The owner/trustees' combined ownership interest in each entity was never greater than the trust's ownership interest.
- The owner/trustees' interests as owners were generally compatible with the trust's goals—they and the trust wanted the jointly held enterprises to succeed.
- The owner/trustees were involved in managing the day-to-day operations of the trust's various real estate businesses.

As noted above, most commentators take the position that the fiduciary's participation in the activities in question in any capacity should count for purposes of the MP Determination.

Multiple Fiduciaries

No authority has directly addressed the impact of multiple trustees. The *Aragona Trust* case involved six trustees, three of whom were fully active in the business and three of whom were not active. Therefore, this suggests that a majority of the trustees are not required to be active in an activity in order for a trust to satisfy the MP Determination.¹²

According to Byrle Abbin, the AICPA recommended approach is that when there are multiple fiduciaries, material participation by any one fiduciary should be sufficient for purposes of the MP Determination. In other words, under this approach, "it is not necessary to take a "head count" and establish that all or a majority of trustees are material participants."¹³

Special Fiduciaries

As illustrated by TAM 200733023 and TAM 201317010, giving an individual who is active in the business the title "special trustee" or some variation thereof, is insufficient to satisfy the MP Determination, with the reason being that a title in and of itself is insufficient to make an individual

a fiduciary. Therefore, taxpayers and their advisors must look at the roles of the purported fiduciary to ensure that they really are fiduciaries.

Whose Participation, Other Than Fiduciary, Counts?

As should be obvious from the authorities discussed in Part 1, the IRS's position is that only the fiduciaries' participation counts. Therefore, activities of other parties, such as agents and employees of the fiduciary, beneficiaries, or successor fiduciaries are generally ignored for this purpose as far as the IRS is concerned.

Although the IRS position is that the activities of a fiduciaries agents and employees are not considered at all for purposes of the MP Determination, the sole case to address this issue, *M.K. Carter Trust (Mattie Carter Trust case)*¹⁴ held that the Mattie Carter Trust's material participation should be determined by reference to the persons who conducted the business of the activity (*i.e.*, the ranch in the case of the Mattie Carter Trust) on the trust's behalf, including activities of the trust's agents and employees. Applying this standard, the *Mattie Carter Trust* court concluded that the collective activities of such persons with relation to the ranch operations during relevant times were regular, continuous and substantial so as to constitute material participation.

Caution. Although there is legal authority for taking the position that a trust's agents and employees' activities count for purposes of the MP Determination, taxpayers and their advisors should anticipate that the IRS would disagree with any such position taken.

Note. The IRS position of excluding the activities of all agents and employees of the fiduciary raises the issue of whether a trust whose sole trustee is a corporate trustee can ever materially participate in an activity.

Trust and Estate MP Determination Approach Proposed by Leo L. Schmolka ("Schmolka Approach")

Generally

The author understands the IRS considered adopting certain ideas that Leo L. Schmolka had regarding the intersection of the passive activity loss rules, embodied in Code Sec. 469, and subchapter J.¹⁵ Mr. Schmolka discussed his ideas in depth in a NYU School Tax Law Review article (the

"Schmolka Article"), which contains a complete set of Mr. Schmolka's dream set of regulations ("Schmolka Regs").¹⁶

The Schmolka article first summarized key components of subchapter J, then described the concepts that formed the basis of the Schmolka Regs, and then set out the Schmolka Regs themselves.

Comment. The Schmolka Regs are prescriptive. That is, they are designed to show what the law should be, not what the law currently is. As a result, taxpayers and their advisors cannot rely on the Schmolka Regs. However, because they do a very good job of analyzing how the existing treasury regulations might apply to trusts and estates, they are instructive when analyzing a trust or estate to make a MP Determination. Also note that the Schmolka Regs predate the *Frank Aragona Trust* case. Therefore, they do not incorporate that case.

Schmolka Regs

General Approach

Schmolka Reg. §1.469-5(g) provides that trusts and estates materially participate in an activity if, and only if, the trust or estate satisfies one of three "Rules" that the Schmolka Regs set out.¹⁷

Rule (1). A trust or estate satisfies Rule (1) if the fiduciary materially participates under the standards of Temporary Reg. §1.469-5T(a)(1),(2), (3), (4), or (5). Therefore, a trust or estate would satisfy Rule (1) if the fiduciary satisfies one or more of the following standards:

- The fiduciary participates in the activity for more than 500 hours during such year.¹⁸
- The fiduciary's participation in the activity for the tax year constitutes substantially all of the participation in such activity of all individuals (including individuals who are not owners of interests in the activity) for such year.¹⁹
- The fiduciary participates in the activity for more than 100 hours during the tax year, and such fiduciary's participation in the activity for the tax year is not less than the participation in the activity of any other individual (including individuals who are not owners of interests in the activity) for such year.²⁰
- The activity is a significant participation activity (within the meaning of Temporary Reg. §1-469-5T(c)) for the tax year, and the fiduciary's aggregate participation in all significant participation activities during such year exceeds 500 hours.²¹
- The fiduciary materially participated in the activity (determined without regard to this particular test)

for any five tax years (whether or not consecutive) during the 10 tax years that immediately precede the tax year.²²

Rule (2). A trust or estate satisfies Rule (2) if the fiduciary materially participates under the standards of Temporary Reg. §1.469-5T(a)(7). Therefore, a trust or estate would satisfy Rule (2) if the fiduciary, based on all of the facts and circumstances, the fiduciary participates in the activity on a regular, continuous, and substantial basis during such year.²³

Rule (2) requires the fiduciary to also satisfy the rules contained in Temporary Reg. §1.469-5T(b), which provides that certain types of participation is insufficient to satisfy the MP Determination.

First, Temporary Reg. §1.469-5T(b) provides that the fact that an individual (fiduciary in case of trust or estate) satisfies the requirements of any participation standard under any provision other than Code Sec. 469 and the regulations thereunder (*e.g.*, standards under Code Secs. 1402 and 2032A) must be ignored for purposes of determining whether such person materially participates in any activity for Code Sec. 469 purposes.²⁴

Second, Temporary Reg. §1.469-5T(b) provides that an individual's services (*i.e.*, a fiduciary's services in context of Rule (2)) performed in the management of an activity must be ignored when determining whether that person materially participates unless, for the year in question:

- No person (other than such person) who performs services in connection with the management of the activity receives compensation described in Code Sec. 911(d)(2)(A) in consideration for such services; and
- No individual performs services in connection with the management of the activity that exceed (by hours) the amount of such services performed by such individual.²⁵

Third, the fiduciary must participate no less than 100 hours during the tax year in question.²⁶

Rule (3). A trust or estate satisfies Rule (3) if, during the entire 12-month period ending on the last day of the tax year:

- The activity has at least one full-time employee (who may be a fiduciary or a beneficiary), substantially all of whose services are in the active management of the activity;
- The activity has at least three full-time employees (none of whom is a beneficiary or a fiduciary), substantially all of whose services are services directly related to the conduct of the activity;
- The activity pays or incurs amounts allowable of the activity's gross income for such period; and as deductions solely by reason of Code Sec. 162 or 404 that exceed 15 percent;

- A fiduciary materially participates under the standard of Temporary Reg. §1.469-5T(a)(7) (*i.e.*, the same rule as contained in Rule (2)),²⁷ with the following modifications. First, for purposes of applying Temporary Reg. §1.469-5T(b)(2)(iii), which is incorporated via Temporary Reg. §1.469-5T(a)(7), the 100-hour rule shall be applied by substituting 50 hours for 100 hours. Second, compensation paid to a fiduciary or to a beneficiary having more than a remote contingent interest (within the meaning of Code Sec. 318(a)(3)(B)) shall be ignored.

Special Rules and Definitions

Generally. As noted above, there are several unresolved issues under existing law regarding the MP Determination. These include the following:

- What type of participation counts?
- Whose participation counts?
- How does the MP Determination Analysis apply to fiduciaries acting in multiple capacities or where there are multiple fiduciaries?
- How does the MP Determination analysis apply to non-individual trustees?
- How does the MP Determination analysis apply to activities conducted through closely held corporations or partnerships?

What Types of Participation Counts in the MP Determination—General

Rule

The Schmolka Regs provide that, as a general rule, any work done by a fiduciary in connection with an activity in which the trust or estate owns an interest at the time of such work is treated as participating.²⁸

Work Done in Capacity of Investor

For purposes of Rules (1) and (2), work done in the capacity of an investor does not count as participation unless the fiduciary is directly involved in the activity's day to day management or operations.²⁹

For this purpose, work done by a fiduciary in its capacity as an investor in an activity includes the following:

- Studying and reviewing financial statements or reports on operations of the activity;
- Preparing and compiling summaries or analyses of the finances or operations of the activities for the individual's own use; and
- Monitoring the finances or operations of the activity in a non-managerial capacity.³⁰

Note. The Schmolka Regs do count work done in the capacity as an investor as participation for purposes of Rule (3). For this purpose, such activities are given greater weight to the extent that the fiduciary has authority to effectuate changes based on that work.³¹

Work Done in Capacity of Manager

Regarding managerial work, the Schmolka Regs count all managerial activities for purposes of Rules (2) and (3). This differs slightly from Temporary Reg. §1.469-5T(f)(2)(ii)(C), which imposes preconditions to the recognition of management work.³²

Successor Fiduciaries

Most trust instruments and wills include provisions for successor fiduciaries. The Schmolka Regs provide that only work done by the currently serving fiduciary counts for purposes of the MP Determination. Therefore, activities of named successor fiduciaries, which are not currently serving as such, do not count for purposes of the MP Determination.³³

Fiduciaries Acting in Multiple Capacities; Multiple Fiduciaries

The Schmolka Regs take the position that the fiduciary's total participation counts towards the MP Determination regarding of whether the fiduciary acts in multiple capacities.³⁴ The Schmolka Regs also address the issue of how to treat multiple fiduciaries by aggregating the participation of all of the fiduciaries of the trust or estate in question.³⁵

Non-Individual Fiduciaries

For non-individual fiduciaries, such as corporate trustees, the Schmolka Regs take the position that the total activities of such fiduciary's employees are treated as that fiduciary's participation for purposes of the MP Determination.³⁶

Activities Conducted Through Closely Held Corporations or Partnerships

For closely held corporations, the Schmolka Regs apply Temporary Reg. §1.469-1T(g)(3)(I) and (iii), which addresses how to apply the material participation analysis to closely held businesses, to the MP Determination for

trusts and estates.³⁷ Therefore, a closely held corporation (*i.e.*, not the trust or estate, but the closely held corporation in which the trust or estate owns an interest) will be treated as satisfying the MP Determination if:

- One or more fiduciaries, each of who is treated as materially participating in such activity, owns (directly or indirectly) more than 50 percent of the value of such corporation's outstanding stock, or the requirements of Code Sec. 465(c)(7)(C) are satisfied (taking into account Code Sec. 465(c)(7)(D) but not Code Sec. 465(c)(7)(C)(iv)); and
- The determination of whether the fiduciary materially participates in the activity in question must be determined by applying Temporary Reg. §1.469-5T except that in applying such rules:
 - All activities of the corporation must be treated as activities in which the fiduciary holds an interest in determining whether the fiduciary participates in an activity of the corporation; and
 - The fiduciary's participation in all activities other than activities of the corporation shall be disregarded in determining whether its participation in an activity of the corporation is treated as material participation under Temporary Reg. §1.469-5T(a)(4) (relating to material participation in significant participation activities).

Conclusion

Part 1 of this column summarized key legal authorities relevant to the issue of material participation of trusts and estates, including a discussion of the following authorities. This part 2 discussed several factors that may be relevant to the issue of whether a trust or estate materially participates in a business activity. It then summarized a set of proposed regulations that were prepared by Leo Schmolka, which were published in the New York University School of Law's Tax Law Review, but which are commentary since they are not promulgated by the Service. The Schmolka Regs constitute the most thorough analysis of the issue of material participation available and are useful when examining trusts and estates to determine whether such trusts or estates material participate in a trade or business activity.

ENDNOTES

¹ Lewis J. Saret, *The Estate Planner: Code Sec. 1411 Material Participation of Trusts & Estates (Part 1) – Current Status and Planning*, TAXES (July 2014).

² *M.K. Carter Trust*, ND-TX, 2003-1 ustc ¶150,418, 46 FSupp2d 536.

³ *Frank Aragona Trust*, 142 TC 9, Dec. 59,859 (2014).

⁴ See *e.g.*, Michael J. Grace & John M. Nuckolls, *Material Participation Under Passive Activity Limitations and NIIT*, ABA Tax Section Meeting Materials (Sept. 21, 2013); Steve R. Akers, *Mat-*

erial Participation by Trusts, *Frank Aragona Trust*, 142 TC No. 9 (Mar. 27, 2014); Michael J. Grace & David H. Kirk, *Planning Under the Section 1411 NIIT*, ABA Tax Section Meeting Materials (May 2013); Richard L. Dees, *20 Questions and Answers on the New 3.8 NIIT*, TAX NOTES (Aug.

- 2013); Steve Akers, ACTEC Commentary on TAM 201317010, *Aragona* (then pending) and material participation, dated June 7, 2013; Leo L. Schmolka, *Passive Activity Losses, Trusts, and Estates: The Regulations*, 58 TAX L. REV. 191 (Spring 2005); Byrle M. Abbin, *INCOME TAXATION OF FIDUCIARIES AND BENEFICIARIES CH. 8* (2014); Jeremiah W. Doyle, IV, *Trusts & The New Medicare Tax*, Vermont Bar Association, May 1, 2014.
- ⁵ Internal Revenue Service, *Passive Activity Loss: Audit Technique Guide*, Training 3149-115 (Feb. 2005).
- ⁶ S. Rep. No. 313, 99th Cong., 2d Sess. 735.
- ⁷ For individuals, any work done by that individual in connection with the activity in question, without regard to the capacity in which the individual does that work, is treated as participation by such individual.
- ⁸ See, e.g., Douglas W. Schwartz, LA County Bar Association Taxation Section, Determining "Material Participation" by a Trust Under the New Medicare Contribution Tax, 2012 TNT 166-58 (Aug. 27, 2012); Leo L. Schmolka, *Passive Activity Loss, Trusts and Estates: The Regulations (If I Were King)*, 58 TAX L. REV. 191 (Spring 2005), Schmolka Reg. §1.469-5(g)(2)(ii)(A).
- ⁹ Temporary Reg. §1.469-5T(f)(2)(ii)(B).
- ¹⁰ Temporary Reg. §1.469-5T(b)(2)(ii).
- ¹¹ See also TAM 201317010.
- ¹² Steve R. Akers, *Material Participation by Trusts*, Frank Aragona Trust. v. Commissioner, 142 TC No. 9 (March 27, 2014) (Apr. 2014).

¹³ Byrle M. Abbin, *Income Taxation of Fiduciaries and Beneficiaries Sec. 808.4* (2014).

¹⁴ *Supra* note 2.

¹⁵ *Supra* note 8.

¹⁶ Another approach, which is similar to the approach embodied in the Schmolka Regs, is the approach recommended by the ABA Section of Taxation, which is as follows:

In this regard, we recommend that the new proposed regulation package would provide that material participation by a trust or estate can be accomplished through meeting at least one of three tests:

- (a) The fiduciary materially participates under the standards that apply to individuals under previously promulgated Regulations.
- (b) The fiduciary, based on all facts and circumstances, participates in the activity on a regular, continuous and substantial basis during the year.
- (c) The fiduciary participates in the activity on a regular, continuous and substantial basis, either directly or through employees or contractors whose services are directly related to the conduct of the activity.

ABA Section of Taxation, "Comments Concerning Proposed Treasury Regulations Under Section 1411 (Apr. 5, 2013).

¹⁷ Schmolka Reg. §1.469-5(g)(2).

¹⁸ Temporary Reg. §1.469-5T(a)(1).

¹⁹ Temporary Reg. §1.469-5T(a)(2).

²⁰ Temporary Reg. §1.469-5T(a)(3).

²¹ Temporary Reg. §1.469-5T(a)(4).

²² Temporary Reg. §1.469-5T(a)(5).

²³ Temporary Reg. §1.469-5T(a)(7).

²⁴ Temporary Reg. §1.469-5T(b)(2). Certain retired individuals and surviving spouses in the farming context are exempted from these rules.

²⁵ Temporary Reg. §1.469-5T(b)(2)(ii).

²⁶ Temporary Reg. §1.469-5T(b)(2)(iii).

²⁷ Temporary Reg. §1.469-5T(a)(7) states "(b)ased on all of the facts and circumstances (taking into account the rules in paragraph (b) of this section), the individual participates in the activity on a regular, continuous, and substantial basis during such year."

²⁸ Schmolka Reg. §1.469-5(g)(2)(ii)(A).

²⁹ Schmolka Reg. §1.469-5(g)(2)(ii)(B)(1); Temporary Reg. §1.469-5T(f)(2)(ii)(A).

³⁰ Temporary Reg. §1.469-5T(f)(2)(ii)(B).

³¹ Temporary Reg. §1.469-5T(f)(2)(ii)(B).

³² Schmolka Reg. §1.469-5(g)(2)(ii)(C); Leo L. Schmolka, *Passive Activity Loss, Trusts and Estates: The Regulations (If I Were King)*, 58 TAX L. REV. 191, n. 168 (Spring 2005).

³³ Schmolka Reg. §1.469-5(g)(2)(ii)(D).

³⁴ Schmolka Reg. §1.469-5(g)(2)(ii)(E).

³⁵ Schmolka Reg. §1.469-5(g)(2)(ii)(E).

³⁶ Schmolka Reg. §1.469-5(g)(2)(ii)(F).

³⁷ Schmolka Reg. §1.469-5(g)(2)(ii)(G).

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