January 31, 2025

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RE: OMB Control No. 1545-0020 – Comments on Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, and Instructions

Dear Mr. Garcia and Ms. Lesho:

On behalf of the American Institute of CPAs (AICPA), we are writing in response to OMB Control-No. 1545-0020 request for comments on Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, to provide to the Department of the Treasury ("Treasury") and the Internal Revenue Service (IRS) our suggestions for improvements to the 2024 draft Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, (dated September 12, 2024) and updated instructions (dated November 14, 2024), as well as guidance and regulations updates if Treasury and IRS find that the issues are beyond changes to the form and instructions. We note that the 2024 draft form and updated instructions are better than the prior version, but we continue to recommend the below needed clarifications and improvements. Many of our below suggestions, including items 1 through 14 and 20, were submitted to IRS in prior AICPA comments.[1]

Our suggestions for improvements to the 2024 draft Form 709 and instructions are listed below.

1. Provide clarification in the instructions to Form 709 with regard to Column C in Part 3 of Schedule A, *Computation of Taxable Gifts*, as to the elections made under section 2632(c) (electing "in and out" of a deemed generation-skipping transfer (GST) tax exemption allocation).[2] The instructions state that checking the box in Column C applies only for transfers reported on the return. Confusion can result as the instructions provide that, if a prior election has been made with respect to future transfers, the taxpayer should not check the box in Column C and should not file an explanatory statement with the applicable Form 709. There is also confusion because taxpayers currently need to check a box for both making an election in and out. One suggestion is to have two columns – one for electing in and one for electing out of the automatic allocation rules under section 2632(c).

[1] See prior AICPA comments,"Updated Suggestions for Improvements to the 2024 Draft Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, and Updated Instructions," December 18, 2024; "Suggestions for Improvements to the Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return, and Instructions," September 13, 2022; "Recommendations for the 2024-2025 Guidance Priority Plan (Notice 2024-28)," May 17, 2024; "Recommendations for the 2022-2023 Guidance Priority List (Notice 2022-21)," May 24, 2022; and "Comments on Electronic Filing (e-filing) of Forms 706, 706-NA, and 709," December 4, 2020.
[2] Unless otherwise indicated, references to a "section" are to a section of the Internal Revenue Code of 1986, as amended (the "Code"), and references to a "Treas. Reg. §" are to the Treasury regulations promulgated under the Code.

2. Provide clarification in the instructions to Form 709 with respect to gifts subject to an estate tax inclusion period (ETIP), such as a gift to a Grantor Retained Annuity Trust (GRAT). Currently, the instructions indicate such gifts should be reported in Schedule A, Part 1. As many GRATs have potential GST tax implications, consider having the instructions state that such gifts should be reported in Schedule A, Part 3. This way, a GST election can be made (either to elect in or out of the automatic allocation rules under section 2632(c)). Even though the election would not be effective until the end of the ETIP, many returns include the election on the return for the year in which the gift is made so that this election is not inadvertently overlooked when the ETIP ends. It would also be helpful for IRS to provide more detailed instruction on how to make the election, such as whether the election should apply to the GRAT, the remainder trust, or both. Clarification or direction should also be included on how, at the close of an ETIP, to report on Schedule D, Part 2, a GST allocation election for a transfer which is not a direct skip. Line 5 appears to only be for automatic allocation of exemption to transfers reported on Schedule A, Part 3, (which on page 13 of the instructions last sentence in column 1 states "if you are making election 2 or 3 on a return on which the transfer is not reported simply attach the statement as described below") and line 6 you must attach a "Notice of Allocation."

3. Remove the Form 709 reporting requirement of all outright gifts of 100% of an asset to charities. The Form 709 instructions currently provide: "If you are required to file a return to report noncharitable gifts and you made gifts to charities, you must include all of your gifts to charities on the return." Practically speaking, this reporting is often not done (except for split interests) because charitable contributions are reported on the Form 1040, U.S. Individual Income Tax Return. For outright gifts (gifts of 100% interest in an asset) that qualify for a charitable deduction, there are no gift tax implications. We suggest removing this reporting requirement. As an alternative, do not require reporting of charitable gifts that qualify for the annual exclusion that are equal to or under the annual exclusion. Split interests would still be reported. As an alternative if IRS is not able to easily remove this reporting requirement, the IRS could provide a box to check, indicating that all charitable gifts are reported on the Form 1040, similar to the checkbox for Form 8938, Statement of Specified Foreign Financial Assets, with various forms such as Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts.

4. Provide additional lines or clarification about a supporting schedule as the Deceased Spousal Unused Exclusion (DSUE) section in Form 709 Schedule C, Part 1 column F only allows for one date to be used. Gifts using the DSUE are often made on multiple dates/years.

5. Remove the requirement in the Form 709 and instructions requiring reporting the number of donees. If that is not possible, clarify in the Form 709 instructions how the number of donees is calculated on the Form 709, page 1, line 10, which requests that the taxpayer list the total number of donees. For example, does the taxpayer look through a gift to a trust to the number of beneficiaries with withdrawal rights? And if the gift to a trust exceeds the annual exclusions, would the taxpayer separately count the trust? Also, what about a gift to a trust with no withdrawal rights? Also confirm treatment of charitable gifts if such reporting is not removed as suggested in item 3 above.

6. Revise the Form 709 Schedule A for taxpayers to indicate on Form 709 Schedule A that the gift is to the trust but indicate in the description the individuals that have a withdrawal right

allowing for the annual exclusion. The Form 709 instructions currently provide that "for a gift in trust, each beneficiary of the trust is treated as a separate donee for purposes of the annual exclusion." Making the suggested revision would more accurately show the trust as the donee (with the withdrawal rights described) rather than show each beneficiary as a donee.

7. The Form 709 instructions should be clarified to allow, as provided in the adequate disclosure regulations, either providing a trust summary or attaching the trust document, and the IRS should provide a description of what is needed in a trust summary to satisfy the adequate disclosure regulations. Consider developing a form on which specific information could be entered, rather than free-form descriptions.

8. Remove from the Form 709 instructions the requirement to provide a trust summary or attach the trust agreement to the Form 709, if the trust summary or trust agreement was previously included or attached, in order to start the running of the statute of limitations for adequate disclosure. Consider a repository of trust electronic documents instead of paper attaching it every year. We suggest mirroring the Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, and Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner, where the taxpayer checks a box that says "attached previously," and then provides the year the documents were attached.

9. Request for a specific form or at least sample allocation/election statements to include with Form 709 filings for GST allocations/elections under section 2632(c). A standardized/developed form or sample statements for GST allocations/elections would help standardize the information being provided to the IRS, instead of practitioners developing their own GST allocation/election statements. We realize there are many variables to consider when making a standardized form or sample statements for both electing in or out of GST allocations/election, with even more variables when late allocations and ETIPs are considered. Therefore, consider providing sample allocation/election statements for practitioners to follow if not possible to develop additional forms. Also, as we suggested previously, provide a procedure for taxpayers to retroactively revoke inadvertent section 2632(c) elections and provide a similar revenue procedure to Rev. Proc. 2004-46 for situations in which the donor's GST exemption is automatically allocated to a transfer, but the donor did not want GST exemption to be allocated.[3]

10. In the Form 709 instructions, clarify for split-gifts, as provided in the adequate disclosure regulations (Treas. Reg. § 301.6501(c)-1(f)(6)), the trust summary of terms (or trust agreement) and all the documents required for adequate disclosure, (i.e., valuation, agreements, entity documents) is required to be attached to only the actual donor's return, and not to both the return filed by the donor and the return filed by the spouse.

11. Delete from the Form 709 instructions discussion that for a gift to be adequately disclosed, it requires a "full and complete Form 709." In the current Form 709 instructions under the discussion of the Adequate Disclosure rules, the discussion mentions that "a gift will be considered adequately disclosed if the return or statement includes the following" and then

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[3] See prior AICPA comments, "Comment Request for Election Out of Generation-Skipping Tax (GST) Exemption Deemed Allocations (OMB Control Number 1545 -1892 and Regulation Project Number TD 9208)," April 2, 2024.

lists a number of bullet points. Among the points listed is “A full and complete Form 709” and also “Either a qualified appraisal or a detailed description of the method used to determine the fair market value of the gift.” The discussion then goes on to reference the applicable regulation under Treas. Reg. § 301.6501(c)-(1) and (f) for details. The regulations cited provide a general rule for adequate disclosure that the gift tax return should provide a description in a manner adequate to apprise the IRS of the nature of the gift and the basis for the value reported. It then goes on to provide that a detailed description of the method used to determine that value should include any financial data that were utilized, etc. The adequate disclosure regulations do not address what a “full and complete Form 709” entails. Since the regulations do not provide this “full and complete Form 709” requirement for adequate disclosure, the current Form 709 instructions requiring that a “full and complete Form 709” in order for a gift to be adequately disclosed should be deleted.

12. Clarify the Form 709 instructions under the Supplemental Documents discussion the language that says that “to support the value of your gifts, you must provide information showing how it was determined” and the requirement for stock in a closely held corporation (with no reference to partnerships or limited liability companies (LLCs)), that balance sheets, income statements, and dividends paid for each of the five (5) preceding years must be attached. This requirement in the Form 709 instructions is confusing and not consistent with the adequate disclosure regulations. This requirement appears to only apply to property valued under the rules of Chapter 14 of the Internal Revenue Code and states “a detailed description (including all actuarial factors and discount rates used) of the method used to determine the amount of the gift arising from the transfer (or taxable event), including, in the case of an equity interest that is not actively traded, the financial and other data used in determining value. Financial data should generally include balance sheets and statements of net earnings, operating results, and dividends paid for each of the 5 years immediately before the valuation date.” This section in the Form 709 instructions should be updated and clarified to be in line with Treas. Reg. § 301.6501(c)-1(e)(2)(iii)

13. Regarding basis, remove the requirement for reporting basis for the remainder interest or allow taxpayers to write “unknown” or leave it blank for GRATs, sales, etc. as the remainder interest is unknown at the time of the filing of the return. Alternatively, if that is not possible, provide clarification on how to calculate basis for GRATs, sales, etc. and clarify if the basis is the gift amount or the amount transferred to trust?

14. Allow e-filing of the Form 709 (as previously requested in our December 4, 2020 letter).

15. Move the language on Page 9 of the updated 2024 Form 709 instructions regarding gift splitting not elected (“If the total is $18,000 or less, you need not enter on Schedule A any gifts (except gifts of future interests) that you made to that donee.”) to instead replace the current language on Page 4 regarding the annual exclusion (“All of the gifts made during the calendar year to a donee are fully excluded under the annual exclusion if they are all gifts of present interest and they total $18,000 or less.”) to clarify that it applies to the annual exclusion whether or not gift splitting is elected. It makes more sense to relocate this language and not have it under the gift splitting area.

16. Clarify that the only language for the notice of spousal consent that should be included is: “a statement that the consenting spouse is electing to treat all gifts made to third parties as

having been made one-half by each spouse," as stated on Page 8 of the updated instructions (dated October 16, 2024).

17. Change Part I, line 19 language from ("Did you **and** your spouse make gifts to third parties?) to instead say ("Did you **or** your spouse make gifts to third parties?") because if either or both made gifts, need to check yes.

18. Provide more space on Schedule A or a continuation page for columns (b) and (d) to avoid needing to attach additional statements that may face e-filing limitations.

19. Clarify the instructions for Schedule A, Line B, regarding gifts to section 529 plans to indicate that gifts made to section 529 plans would be reportable in Part 1 **or Part 2** (determined by the skip status of the donee) rather than only Part 1 as is currently indicated. It currently says, "For each of the 5 years, you report in **Part 1** of Schedule A one-fifth (20%) of the amount for which you made the election. In column (e) of **Part 1** (Schedule A), list the date of the gift as the calendar year for which you are deemed to have made the gift (that is, the year of the current Form 709 you are filing)." We think it should instead say, "For each of the 5 years, you report as appropriate in Part 1 **or Part 2** of Schedule A one-fifth (20%) of the amount for which you made the election. In column (e), list the date of the gift as the calendar year for which you are deemed to have made the gift (that is, the year of the current Form 709 you are filing)."

20. Clarify that ratable portions of section 529 plans pursuant to the section 529 election should be reported as of January 1 of the tax year filing. The date would be helpful for counting annual exclusions, and since the ratable portions appear to be counted before any other gift, we suggest the date of January 1 (as we previously requested in our May 17, 2024 comments).

21. On Page 3, under the Qualified Disclaimers section, the instructions mention "decedent" in 4.a. This is only applicable if it is property passing by reason of death, not during life (see Treas. Reg. § 25.2518-2(e)), since there would not be a decedent in this context and can lead to confusion, so this "decedent" language should be removed. It also would be beneficial to direct taxpayers to section 2518, related Treas. Regs. and local law.

22. On Page 4 of the instructions under the Annual Exclusion section, the first paragraph is a bit misleading. We suggest updating the last sentence to "For a gift in trust, each beneficiary having a present interest in such gift is treated as a separate donee…."

23. On Page 4 under the Transfers Subject to the GST Tax section, it is misleading as a gift to a direct skip trust that is eligible for the gift tax annual exclusion may not be eligible for the GST tax annual exclusion (unless section 2642(c) or section 2503(c) apply). This is clarified later on Page 9. A possible suggestion would be to reference Gift Subject to Both GST Taxes starting on Page 9 or include similar language as provided on the bottom of Page 9 and top of Page 10.

24. On Page 8 of the instructions Line 7, Consent of Spouse Item 1, we suggest updating and clarifying to say, "The consent may not be obtained after April 15 (or the extended due date) following the end of the year…."

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If you have any questions, please contact Carol Warley, Chair, AICPA Trust, Estate, and Gift Tax Technical Resource Panel, at (713) 625-3583 or carol.warley@rsmus.com; Eileen Sherr, AICPA Senior Manager – Tax Policy & Advocacy, at (202) 434-9256 or Eileen.Sherr@aicpa-cima.com; or me at (830) 372-9692 or bvickers@alamo-group.com.

Sincerely,

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