

IRS Tax Correspondence

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Dear Mr. Novey and Ms. France:

The authors respectfully submit the attached comments regarding the need to recognize service animals for individuals with mental health disabilities as deductible expenses under Section 213. The comments describe the current regulations and pronouncements concerning service animals, and discuss regulations and pronouncements of the Departments of Justice, Transportation, and Housing and Urban Development, which have considered issues regarding service animals in considerable detail in recent years. The authors believe that the tax law should recognize advancements that have been made in the uses of service animals, particularly service dogs, and that this would be an important change best accomplished through modification of the Section 213 regulations.

The opinions expressed in these comments are those of the authors and do not represent the official opinions of any organizations with which they may be affiliated.

Sincerely,

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Service Dogs For the Mentally Handicapped Should Be Deductible Under Section 213

The only regulation dealing with the deductibility of service animals is Reg. 1.213-1, concerning the purchase of a guide dog and stating that such an expense is not to be disqualified because it is a capital expenditure.¹ This has been referred to in a number of revenue rulings that have explained that the acquisition, training, and maintenance of a guide dog purchased for a blind person, or a signal or hearing dog purchased for a deaf person, is a deductible expense. Publication 502 expands deductibility to include "a guide dog or other service animal to assist a visually-impaired or hearing-impaired person, or a person with other physical disabilities." The problem with this statement is that it does not take into account a number of functions of service dogs that have been developed in the last 20 years.

Presumably a seizure alert dog would be covered under the standard of Publication 502 because a seizure would generally be regarded as a physical disability, though episodic in nature and not often visible.² What about a dog helping an autistic child?³ Dogs have been trained to keep autistic children from engaging in self-destructive behaviors, from walking into traffic, and for other purposes that would not generally be regarded as responses to physical disabilities. The training for some of these dogs takes as long as that for guide dogs (up to two years). What about a dog that is trained to bring an Alzheimer's patient home after he gets lost? The disabled handler realizes he is lost and says "Home," and the dog takes him there, or perhaps does so when the person reaches a certain level of agitation.⁴

¹Courts have confirmed that where a taxpayer acquires a medically necessary asset, the deduction allowed is not taken over the assets' useful life but rather in full in the year of acquisition. *Riach v. Frank*, 302 F.2d 374 (9th Cir. 1962); *Oliver v. Comm'r*, 364 F.2d 575 (8th Cir. 1966); *Elwood v. Comm'r*, 72 T.C. 264 (1979).

²Ohio defines a service dog as one that assists a mobility impaired person. A "person with a seizure disorder" is included within the definition of mobility impaired person. ORC § 955.011(B)(1).

³A representative of one of the autism service dog groups noted that autistic children often have physical difficulties along with the sensory-integration and emotional regulation problems inherent to the condition.

⁴One of the authors has considered these issues from an access rules standpoint in an article that will appear in the *Journal of Animal Law* that is presently posted on the Michigan State University School of Law website (www.animallaw.info/articles/arusersminger2009.htm).

In 2006, it was estimated that there were at least 9,000 service dogs serving people that were not blind or deaf.⁵ Intake information of the Psychiatric Service Dog Society, of which one of the authors of this letter is the founder, suggests that there may now be close to 10,000 psychiatric service dogs in the United States.⁶ It may be that the deductibility of service animals is often interpreted broadly by agents in the field, but with the proliferation of service dog functions, and the increasing numbers of service dogs serving people with mental health disabilities, additional specificity is called for.

Some issues that should be considered by Treasury and the IRS include: Is training required? Some hearing dogs are formally trained but others gain alerting skills as their handlers gradually go deaf. Many seizure-alert dogs offer alerting behaviors spontaneously without having been trained as seizure-response dogs.⁷ The proliferation of service dog functions means that a simple requirement that a person be physically disabled may have the effect of both including some dogs that should probably not be deductible (because, e.g., the dog's functions are not sufficiently correlated with the disability or are more tricks than functions), and excluding some dogs that should probably be deductible (because the condition, though psychological, is quite real and might otherwise have to be treated with a complex pharmaceutical cocktail, etc.). A growing problem may arise from websites that distribute service dog credentials for a fee but without anything more than the website visitor checking a few boxes on an electronic form and giving over a credit card number to receive a service dog certification in the mail.⁸

⁵The International Association of Assistance Dog Partners estimated in 2006 that there are 9,000 service dogs in use in the U.S. by people who are neither blind nor deaf. T. Fields-Meyer and S. Mandel, "Healing Hounds: Can Dogs Help People With Mental-Health Problems Get Better?" *People Magazine* (July 17, 2006).

⁶Website of the organization at www.psychdog.org.

⁷A Hungarian research team found that a guide dog for a person who was both blind and epileptic began to become anxious before the master suffered a seizure. The dog was taught to bark and lick the owner's face and upper arm when it detected a seizure onset, which it began to do three to five minutes before a seizure began. The dog was also taught to lead its handler to a safe location if they were outside. Tamas Mezosi, Andrea Pallos, Piroshka Komondi, and Jozsef Topal, "Is It Reasonable to Forbid the Use of Dog Guides for the Blind as Predictors of Epileptic Seizures?" Hungarian Academy of Sciences, Institute for Psychology, case report (2008) (www.barathgyisegitokutya.hu).

⁸One website allows an individual to get a "personalized service dog certificate," a vest saying the dog is a service dog, and other paraphernalia, by doing no more than checking a box to indicate that the user's dog satisfies most of the items on a 10-point checklist. That is Step 1 on the website. Step 2 is to select a payment option to transfer \$249 to the organization issuing the certificates. A disclaimer on the website states that the "purchaser understands and agrees that the only involvement by www.servicedogsamerica.org is to supply the represented information and equipment." Also, "Servicedogsamerica.org is not responsible for any actions legal

(Footnote continued in next column.)

While the boundaries between what is deductible and what is not would, we think, bear some resemblance to boundaries in the access rules to be discussed next, the verification procedures that could be available to the IRS should provide considerable authority to field agents. The Departments of Justice, Transportation, and Housing and Urban Development have written rules that restaurants, hotels, transportation facilities, apartment buildings, and countless other types of business apply to verify that the individual's claim to have a service animal is legitimate. The issue must often be resolved in a very public setting, such as the entrance to a theater, and privacy issues become paramount. The IRS, on the other hand, can place the burden on the taxpayer and should, for instance, be able to expect documentation such as a letter from a psychologist or medical professional, or a Medicare card for someone under age 65, particularly where the animal is trained to provide service for a non-visible condition. Inquiry as to the nature of the condition that justifies the services of the dog is largely precluded in the rules of the other agencies, but would not need to be for the IRS.⁹

We will begin by discussing the issues raised by the Departments of Justice, Transportation, and Housing and Urban Development that are relevant for guidance that would be appropriate from Treasury and the IRS. We will then describe specific guidance from Treasury and the IRS. We will conclude with my recommendations as to the appropriate parameters of what should be deductible by taxpayers using, or whose dependents are using, service animals.

Service Animals and Related Categories as Defined by the Departments of Justice, Transportation, and Housing and Urban Development

The Department of Justice recently proposed substantial revisions to its general access rules, and the Departments of Transportation and Housing and Urban Development have issued final regulations in the last two years, all of which raise issues that should be considered by the IRS. We will discuss those aspects of these rules that could provide analogs for the tax law.

or otherwise caused by the use of the equipment or printed material supplied." The website states that "You can train your Service Dog to meet the specific needs of your disability."

⁹For instance, Department of Transportation Guidance counsels airline personnel concerning inquiring into a service animal's function as follows:

Ask the passenger about his or her disability as it relates to the need for a service animal. Once the passenger identifies the animal as a service animal, you may ask, "How does your animal assist you with your disability?" Avoid the question "What is your disability?" as this implies you are asking for a medical label or the cause of the disability, which is intrusive and inconsistent with the intent of the [Air Carrier Access Act]. Remember, [14 CFR] Part 382 is intended to facilitate travel by people with disabilities by requiring airlines to accommodate them on an individual basis.

73 Fed. Reg. 27660 (emphasis added).

Current Department of Justice access definition. The current Department of Justice rules define a service animal as a —

guide dog, signal dog, or other animal¹⁰ individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.¹¹

The DOJ rules go on to state that a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.¹² A disability is “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.” Each of these phrases is separately defined. A disability does not include:

- (i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (ii) Compulsive gambling, kleptomania, or pyromania; or
- (iii) Psychoactive substance use disorders resulting from current illegal use of drugs.¹³

Proposed Department of Justice definition. In June 2008,¹⁴ the Department of Justice proposed to amend its access rules because it “continues to receive a large number of complaints from individuals with service animals.”

At the same time, some individuals with impairments — who would not be covered as individuals with disabilities — are claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access to hotels, restaurants, and other places of public accommodation. Another trend is the use of wild, exotic, or unusual species, many of which are untrained, as service animals. The Department is

proposing amendments to its regulation on service animals in the hope of mitigating the apparent confusion.¹⁵

The June 2008 proposal would substantially narrow the types of animals that could be service animals, but is more expansive on the types of psychological conditions that a service animal could be used for:

Service animal means any dog or other common domestic animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing minimal protection¹⁶ or rescue work, pulling a wheelchair, fetching items, assisting an individual during a seizure,¹⁷ retrieving medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and assisting individuals, including those with cognitive disabilities, with navigation. The term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities. The term service animal does not include wild animals (including nonhuman primates born in captivity), reptiles, rabbits, farm animals (including any breed of horse, miniature horse, pony, pig, or goat), ferrets, amphibians, and rodents. Animals whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being are not service animals.

This proposal has been criticized by, among others, the guide horse industry, which trains miniature horses to work in the same manner as guide dogs. DOJ’s argument is apparently not based on a belief that animals other than dogs and cats cannot provide services, but on public reaction to some animals.

The Department is compelled to take into account practical considerations of certain animals and contemplate their suitability in a variety of public

¹⁰ See *Janush v. Charities Housing Development Corp.*, 169 F. Supp.2d 1133 (ND CA 2000) (denying defendant’s motion to dismiss on grounds plaintiff’s two birds and two cats could not be service dogs, noting that 28 CFR 36.104 defines a service animal as a guide dog, signal dog, “or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability . . .”).

¹¹28 CFR 36.104.

¹²28 CFR 36.302(c)(1).

¹³28 CFR 36.104.

¹⁴Department of Justice, “Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities,” 73 Fed. Reg. 34508 (June 17, 2008) (proposed amendments to 28 CFR Part 36, concerning nondiscrimination in public accommodations and in commercial facilities). See also 73 Fed. Reg. 34465 (June 17, 2008) (proposed amendments particularly to 28 CFR Part 35, concerning nondiscrimination in provision of state and local governmental services).

¹⁵73 Fed. Reg. 34515-6.

¹⁶The preamble indicates that commenters urged elimination of this phrase, but the Department of Justice believes it should be retained but understood to exclude attack dogs that pose a threat to others. 73 Fed. Reg. 34516. Some commenters had noted that the mere presence of a dog may act as a crime deterrent and thus provide minimal protection, but the Department argues that this interpretation was not contemplated. 73 Fed. Reg. 34521. The Department cites dogs that alert individuals of an oncoming seizure, or responding to the seizure, as the sort of situation contemplated.

¹⁷The wording does not seem to cover seizure-alert dogs, but the items specified are said not to be all inclusive.

contexts, such as restaurants, grocery stores, and performing arts venues.¹⁸

Training requirement. The current DOJ rules, as quoted above, require that a service animal be “individually trained to do work or perform tasks for the benefit of an individual with a disability.” Although commenters to the DOJ had suggested that “without training standards the public has no way to differentiate between untrained pets and service animals,”¹⁹ the DOJ proposals do not impose a formal training standard. The DOJ noted that some functions of service animals, such as alerting to seizures, often arise spontaneously in the behavior of the animal.²⁰

Post-May 13, 2009 air carrier access definition. In 1996, the Department of Transportation defined a service animal as “any guide dog, signal dog, or other animal individually trained to provide assistance to an individual a disability.”²¹ In May 2008, the Department of Transportation revised air travel regulations under the Air Carrier Access Act, including applying the rules to foreign carriers.²² Significant changes were made to the provisions regarding access for individuals traveling with service animals.

DOT now defines a service animal as —

Any animal that is individually trained *or able* to provide assistance to a qualified person with a disability; or any animal shown by documentation to be necessary for the emotional well-being of a passenger.²³

¹⁸Id. Full-sized horses would obviously be a problem in many environments but miniature horses can be as small as many of the breeds used as guide dogs.

¹⁹Id.

²⁰A. Kirton, A. Winter, E. Wirrell, and O.C. Snead, *Seizure Response Dogs: Evaluation of a Formal Training Program*, 13(3) *Epilepsy Behavior* 499-504 (October 2008) (59% of dogs trained to respond to seizures developed the skill to recognize seizures in advance once they began working with epileptics).

²¹61 Fed. Reg. 56420 (November 1, 1996) (wording of now superseded 14 CFR 382.37(c)).

²²Department of Transportation (DOT), “Nondiscrimination on the Basis of Disability in Air Travel; Final Rule,” RINs 2105-AC97, 2105-AC29, 2105-AD41, 73 Fed. Reg. 27613 (May 13, 2008). The Department had issued a notice of proposed rule-making (NPRM) in November 2004 to apply the Air Carrier Access Act to foreign carriers. DOT, RIN 2105-AC97, 69 Fed. Reg. 64363 (November 4, 2004), among other things proposing to move the provisions of 14 CFR 382.55, regarding access with service animals, to 382.117. Another NPRM, which included proposals included in the final rules of 2008, concerned medical oxygen and portable respiration assistive devices, but did not mention service animals. DOT, RIN 2105-AC29, 70 Fed. Reg. 53108 (September 7, 2005). A third NPRM, issued in 2006, concerned accommodations for individuals who are deaf, hard of hearing, or deaf-blind, but also did not mention service animals. DOT, RIN 2105-AD41, 71 Fed. Reg. 9285 (February 23, 2006). Additional detail on access rules can be found in a guide issued by DOT: *A Guide to the Air Carrier Access Act and Its Implementing Regulations*, 70 Fed. Reg. 41481 (July 19, 2005).

²³73 Fed. Reg. 27614, 27663 (May 13, 2008) (“Glossary”) (emphasis added).

As to why training is no longer a *sine qua non*, DOT elaborates:

Generally, a service animal is individually trained to perform functions to assist the passenger who is a qualified individual with a disability. In a few extremely limited situations, an animal such as a seizure alert animal may be capable of performing functions to assist a qualified person with a disability without individualized training. Also, an animal used for emotional support need not have specific training for that function. Similar to an animal that has been individually trained, the definition of a service animal includes: An animal that has been shown to have the innate ability to assist a person with a disability; or an emotional support animal.²⁴

It is the opinion of the authors that emotional support animals should be distinguished from psychiatric service animals and should not be considered a category of service animal. Emotional support animals are pets, even if they are pets for persons with disabilities. Agencies other than the Department of Transportation do not define “service animal” to include emotional support animals.

Department of Housing and Urban Development definitions. The Department of Housing and Urban Development has issued three regulatory regimes regarding animals that should be excepted from no-pets policies. The regimes concern (1) a handicapped person in almost any dwelling unit, (2) persons in projects for the elderly or persons with disabilities under federally administered and subsidized housing programs, and (3) persons with disabilities in public housing. The second and third sets of regulations implement legislation designed to recognize the importance of animals in the lives of the elderly, disabled, and individuals living in subsidized housing.

HUD’s general reasonable accommodation requirement. The first of the three HUD regulations implements the Fair Housing Amendments Act of 1988, 42 U.S.C. 3601 et seq. Under the Act, discrimination in the sale or rental of a dwelling to almost any buyer or renter because of a handicap is unlawful. Discrimination includes, under 42 U.S.C. 3604(f)(3)(B), “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” An example in 24 CFR 100.204(b)(1) concerns a guide dog:

A blind applicant for rental housing wants live in a dwelling unit with a seeing eye dog. The building has a *no pets* policy. It is a violation of § 100.204 for the owner or manager of the apartment complex to refuse to permit the applicant to live in the apartment with a seeing eye dog because, without the seeing eye dog, the blind person will not have an equal opportunity to use and enjoy a dwelling.

The term “service dog” or “service animal” is not used in this regulation but the principle is broader than just guide dogs, as indicated by the *Joint Statement of the*

²⁴73 Fed. Reg. 27658.

Department of Housing and Urban Development and the Department of Justice (May 17, 2004), providing that a signal dog would also be a necessary accommodation to a deaf tenant.

A housing provider has a “no pets” policy. A tenant who is deaf requests that the provider allow him to keep a dog in his unit as a reasonable accommodation. The tenant explains that the dog is an assistance animal that will alert him to several sounds, including knocks at the door, sounding of the smoke detector, the telephone ringing, and cars coming into the driveway. The housing provider must make an exception to its “no pets” policy to accommodate this tenant.

The formal coverage of just guide and signal dogs is similar to the pronouncements of the IRS in regulations and revenue rulings. In more recent rulings, however, HUD has considered emotional support and psychiatric services of animals, as discussed next.

HUD rules regarding projects for the elderly and persons with disabilities. In October 2008, HUD amended regulations governing requirements for pet ownership in HUD-assisted public housing and multifamily housing projects for the elderly and persons with disabilities (72 Fed. Reg. 58448, October 27, 2008). Under 24 CFR 5.303, as amended, project owners and public housing agencies may not apply or enforce policies (such as no-pet policies) against animals “that are necessary as a reasonable accommodation to assist, support, or provide service to persons with disabilities.”²⁵ The new rule applies to animals that reside in projects for the elderly or persons with disabilities, as well as to animals that visit the projects. Animals that visit the projects to provide support could include therapy dogs and their handlers involved in visitation programs.

How should Treasury describe animals deductible as medical expenses? The Departments of Transportation and Housing and Urban Development, in their own recently issued access rules, have not joined Justice in restricting the types of animals that can be service animals. There would seem to be no reason why Treasury should limit the deductibility of a service animal when the services an animal provides properly relate to and alleviate a physical or psychological condition.

Psychiatric service animals and emotional support animals. As used in this discussion, and generally by federal agencies, a psychiatric service animal is trained to do work or perform tasks that assist a person with a mental health disability, whereas an emotional support animal is not trained and merely provides non-specific comfort to its owner.

Department of Justice treatment. In its June 2008 proposal, DOJ noted that psychological services are recognized in the current rules, but in the preamble the agency expands on services that animals can perform for individuals who are mentally handicapped.

Psychiatric service animals can be trained to perform a variety of tasks that assist individuals with

disabilities to detect the onset of psychiatric episodes and ameliorate their effects. Tasks performed by psychiatric service animals may include reminding the handler to take medicine; providing safety checks, or room searches, or turning on lights for persons with Post Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; and keeping disoriented individuals from danger.²⁶

The preamble also notes that “a psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place.”²⁷

To be a service animal, the animal must do more, according to the Department of Justice proposed rules, than provide emotional comfort. Animals “whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or promote emotional well-being are not service animals.”²⁸ Such animals are to be distinguished from animals that assist persons with mental health disabilities by virtue of their training.

The term service animal includes individually trained animals that do work or perform tasks for the benefit of individuals with disabilities, including psychiatric, cognitive, and mental disabilities.²⁹

Doing work or performing a task would include, besides keeping an individual with dissociative identity disorder grounded in time and place, reminding the owner to take medicine, providing safety checks or room searches, turning on lights for persons with post-traumatic stress disorder, interrupting self-mutilation by persons with dissociative identity disorders, and keeping disoriented individuals from danger. The “do work or perform tasks” language does not require that there be an overt physical task in order for a service animal to be considered legitimate under the law. Many psychiatric service dogs ‘do work’ for their disabled handlers and this includes serving in a passive capacity as the handler incorporates the dog into a cognitive intervention that serves to mitigate the handler’s disability. For example, persons who experience hallucinations often leverage their dog’s natural response to its immediate environment in order to ascertain whether what she or he is hearing or seeing is really there, or not. The service animal, in this example, is assisting the individual in a passive, albeit legitimate, role.

A psychiatric service dog can help some individuals with dissociative identity disorder to remain grounded in time or place. As one service dog user stated, in some cases “critical forms of assistance can’t be construed as physical tasks,” noting that the manifestations of “brain-based disabilities,” such as psychiatric disorders and autism, are as varied as their physical counterparts.³⁰

²⁵24 CFR 5.303 (emphasis added).

²⁶73 Fed. Reg. 34516.

²⁷73 Fed. Reg. 34521.

²⁸Proposed 28 CFR 36.104

²⁹Id. See also discussion at 73 Fed. Reg. 34516.

³⁰73 Fed. Reg. 34521.

Although DOJ distinguishes psychiatric service animals from emotional support animals, it acknowledges that there are situations in which an animal providing emotional comfort and support should be covered by access provisions:

[T]here are situations . . . , particularly in the context of *residential settings and employment*,³¹ where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may appropriately provide for increased access for animals other than service animals.³²

Department of Transportation treatment. The Department of Transportation distinguishes between psychiatric service animals and emotional support animals, but allows carriers to apply the same policies to each.³³ Psychiatric service animals —

may be trained by their owners, sometimes with the assistance of a professional trainer, to perform tasks such as fetching medications, reminding the user to take medications, helping people with balance problems caused by medications or an underlying condition, bringing a phone to the user in an emergency or activating a specially equipped emergency phone, or acting as a buffer against other people crowding too close.³⁴

As did the Department of Justice in its proposals, the Department of Transportation considered the coverage of emotional support animals. DOT received comments from service animal groups regarding this issue:

Unlike *other* service animals, emotional support animals are often not trained to perform a specific active function, such as pathfinding, picking up objects, carrying things, providing additional stability, responding to sounds, etc. This has led some service animal advocacy groups to question their status as service animals and has led to concerns by carriers that permitting emotional support animals to travel in the cabin would open the door to abuse by passengers wanting to travel with their pets.³⁵

The new rules limit access of psychiatric service animals and emotional support animals to individuals with a diagnosed mental or emotional disorder, and carriers may insist on “recent documentation from a licensed mental health professional to support the passenger’s desire to travel with such an animal.” The passenger must have a mental or emotional disability recognized in the DSM-IV.³⁶ The passenger must need the

emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger’s destination.³⁷

It is the opinion of the authors that a psychiatric service animal, should always be provided access to an airplane’s cabin with its human handler, but an emotional support animal should be regarded as a pet (as it is under HUD regulations), even though the animal provides non-specific comfort to a person with a disability. Thus, if other rules limit access to the cabin to a specific number of pets, an emotional support animal should not be admitted if that number has been filled. A psychiatric service animal should be admitted in any case. This is the opinion of the authors and obviously does not reflect the position of DOT.

Department of Housing and Urban Development treatment. The term “psychiatric service animal” is not used in the HUD regulations, though emotional support animals are discussed.

[E]motional support animals do not need training to ameliorate the effects of a person’s mental and emotional disabilities. Emotional support animals by their very nature, and without training, may relieve depression and anxiety, and/or help reduce stress-induced pain in persons with certain medical conditions affected by stress.³⁸

The second sentence indicates that some animals that would be psychiatric service animals under the Department of Justice rules are lumped with emotional support animals by HUD. The agency, however, does not mean to require that any animal providing some benefit to a tenant must always be accepted. A mental health professional must connect the tenant’s possession of the animal with an alleviation of at least one symptom of the disability. This requires more than a mere statement that a dog or cat makes a tenant feel good.³⁹

Deductibility of psychiatric service animals and emotional support animals. This is an issue that would have to be carefully considered in expanding the deductibility of service animals to include services to persons with mental health disabilities. The authors feel that since psychiatric service animals are trained to do work or perform tasks for a mentally disabled individual, expenses related to them should be deductible. Untrained emotional support animals (i.e., pets) should not be. All service dogs are trained in three areas: basic obedience, public access skills, and disability-related assistance. A simple inquiry as to the training of the dog should reveal

³¹The preamble notes that the Department of Housing and Urban Development uses the term “assistance animal,” and that this usage denotes “a broader category of animals than is covered by the ADA.” 73 Fed. Reg. 34521.

³²73 Fed. Reg. 34516 (emphasis added).

³³73 Fed. Reg. 27655.

³⁴73 Fed. Reg. 27659.

³⁵73 Fed. Reg. 27636 (emphasis added).

³⁶*The Diagnostic and Statistical Manual for Mental Disorders*, now in its fourth edition (generally referred to as “DSM IV”), is (Footnote continued in next column.)

the standard classification of mental disorders used by mental health professionals in the United States and is published by the American Psychiatric Association (www.psych.org/MainMenu/Research/DSMIV.aspx).

³⁷14 CFR 382.117(e).

³⁸73 Fed. Reg. 63836.

³⁹As noted above, a separate rule covers animals that assist, support, or provide service to persons with disabilities who live in public housing, other than housing developments for the elderly or persons with disabilities. This rule, in 24 CFR 960.705 reads in all substantive respects the same as that of 24 CFR 5.303, just discussed, and will not be discussed further here.

whether or not the dog in question is trained to assist the individual. Handlers of service animals are used to and comfortable with this line of questioning. Pet owners are not because they are usually unfamiliar with how service animals are trained.

Animal's function must relate to the individual's disability. The Departments of Justice and Transportation provide non-exclusive examples of the tasks and work provided by service animals for their human handlers. The Department of Housing and Urban Development has elaborated on a nexus requirement. Because of the authority of the IRS to obtain more information about the disability involved than the other federal agencies, such a nexus requirement would be appropriate for the IRS.

HUD nexus requirement. Prior to the amendments to 24 CFR Part 5, a project owner could require resident animals to qualify as assistive animals, which meant that three requirements had to be satisfied:

- (i) The tenant or prospective tenant certifies in writing that the tenant or a member of his or her family is a person with a disability;
- (ii) The animal has been trained to assist persons with that specific disability; and
- (iii) The animal actually assists the person with a disability.⁴⁰

HUD has eliminated the training requirement and now says, according to the preamble, that housing agencies are authorized to verify that the animal qualifies as a reasonable accommodation under the Rehabilitation Act of 1973 (29 U.S.C. 794) and the Fair Housing Act, as amended by the Fair Housing Amendments Act of 1988 (42 U.S.C. 3601 et seq.)

An animal qualifies as a reasonable accommodation if: (1) An individual has a disability, as defined in the Fair Housing Act or Section 504, (2) the animal is needed to assist with the disability, and (3) the individual who requests the reasonable accommodation demonstrates that there is a relationship between the disability and the assistance that the animal provides.

There must, therefore, be "an identifiable relationship, or nexus, between the requested accommodation and the person's disability." Further:

The Department's position has been that animals necessary as a reasonable accommodation do not necessarily need to have specialized training. Some animals perform tasks that require training, and others provide assistance that does not require training.

Analogs for the IRS. The assistance provided by a service animal should relate directly to the served individual's disability. Disruptive behavior of a service animal is a good reason for excluding it from many environments, but this factor should not enter into consideration of whether an animal should be deductible except to the extent that, if such behavior is observed by an agent, it may raise questions as to whether the

taxpayer actually has a legitimate service animal. As noted previously, there are ways to obtain bogus certifications of service animal status. This question can be considered in the verification process, discussed next.

Verification procedures of the departments of Justice, Transportation, and Housing and Urban Development. Verification under Department of Justice and Department of Transportation rules must often occur in public settings where other customers or passengers are watching the interaction between business or airline personnel and the person with the service animal. More privacy may be available in HUD-regulated situations where an individual is applying for an apartment.

Department of Justice. The general rules of the Department of Justice, as noted above, define a service animal as "individually trained to do work or perform tasks for the benefit of an individual with a disability." DOJ has taken this as meaning that public accommodations may inquire as to the training the animal has received and the tasks it performs, but inquiry is not to concern the disability.

A public accommodation shall not ask about the nature or extent of a person's disability, but can determine whether an animal qualifies as a service animal. For example, a public accommodation may ask if the animal is required because of a disability; and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified or licensed as a service animal.⁴¹

Department of Transportation. The Department of Transportation directs air carriers as follows in verifying service animal status:

As evidence that an animal is a service animal, you must accept identification cards, other written documentation, presence of harnesses, tags, or the credible verbal assurances of a qualified individual with a disability using the animal.⁴²

It is, however, "generally not permissible to insist on written credentials for an animal as a condition for treating it as a service animal."⁴³ If the animal is a psychiatric service animal or an emotional support animal, the airline can insist on documentation regarding the individual's condition:

If a passenger seeks to travel with an animal that is used as an emotional support or psychiatric service animal, you are not required to accept the animal for transportation in the cabin unless the passenger provides you current documentation (i.e., no older than one year from the date of the passenger's scheduled initial flight) on the letterhead of a licensed mental health professional (e.g., psychiatrist, psychologist, licensed clinical social worker) stating the following:

⁴¹Proposed 28 CFR 36.302(c)(6).

⁴²14 CFR 382.117(d).

⁴³73 Fed. Reg. 27635.

⁴⁰24 CFR 5.303, prior to the 2008 amendment.

(1) The passenger has a mental or emotional disability recognized in the Diagnostic and Statistical Manual of Mental Disorders — Fourth Edition (DSM IV);

(2) The passenger needs the emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger's destination;

(3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and

(4) The date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.⁴⁴

Some mental health advocacy groups are challenging these requirements. They assert that requiring a letter from a mental health professional in order to fly discriminates against and stigmatizes handlers of Psychiatric Service Dogs who merely wish to be treated the same as all other disabled persons. The letter requirement is also viewed as erecting a barrier to access. Many low-income persons with mental health disabilities are unable to provide such a letter because they have no health insurance and therefore no mental healthcare provider. Should these persons be precluded from flying?

The DOT procedures receive some elaboration in the preamble to the final rules:

1. *Obtain credible verbal assurances:* Ask the passenger: "Is this your pet?" If the passenger responds that the animal is a service animal and not a pet, but uncertainty remains about the animal, appropriate follow-up questions would include:

"What tasks or functions does your animal perform for you?" or

"What has it been trained to do for you?" or

"Would you describe how the animal performs this task (or function) for you?"

• As noted earlier, functions include, but are not limited to:

A. Helping blind or visually impaired people to safely negotiate their surroundings;

B. Alerting deaf and hard-of-hearing persons to sounds;

C. Helping people with mobility impairments to open and close doors, retrieve objects, transfer from one seat to another, maintain balance; or

D. Alert or respond to a disability-related need or emergency (e.g., seizure, extreme social anxiety or panic attack).

* * *

• If a passenger cannot provide credible assurances that an animal has been individually trained or is able to perform some task or function to assist the passenger with his or her disability, the animal

might not be a service animal. In this case, the airline personnel may require documentation (see Documentation below).

• There may be cases in which a passenger with a disability has personally trained an animal to perform a specific function (e.g., seizure alert). Such an animal may not have been trained through a formal training program (e.g., a "school" for service animals). If the passenger can provide a reasonable explanation of how the animal was trained or how it performs the function for which it is being used, this can constitute a "credible verbal assurance" that the animal has been trained to perform a function for the passenger.

2. *Look for physical indicators on the animal:* Some service animals wear harnesses, vests, capes or backpacks. Markings on these items or on the animal's tags may identify it as a service animal. It should be noted, however, that the absence of such equipment does not necessarily mean the animal is not a service animal. Similarly, the presence of a harness or vest on a pet for which the passenger cannot provide such credible verbal assurance may not be sufficient evidence that the animal is, in fact, a legitimate service animal.

3. *Request documentation for service animals other than emotional support or psychiatric service animals:* The law allows airline personnel to ask for documentation as a means of verifying that the animal is a service animal, but DOT's rules tell carriers not to require documentation as a condition for permitting an individual to travel with his or her service animal in the cabin unless a passenger's verbal assurance is not credible. In that case, the airline may require documentation as a condition for allowing the animal to travel in the cabin. This should be an infrequent situation. The purpose of documentation is to substantiate the passenger's disability-related need for the animal's accompaniment, which the airline may require as a condition to permit the animal to travel in the cabin. Examples of documentation include a letter from a licensed professional treating the passenger's condition (e.g., physician, mental health professional, vocational case manager, etc.)

4. *Require documentation for emotional support and psychiatric service animals:* With respect to an animal used for emotional support (which need not have specific training for that function but must be trained to behave appropriately in a public setting), airline personnel may require current documentation (i.e., not more than one year old) on letterhead from a licensed mental health professional stating (1) that the passenger has a mental health-related disability listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM IV); (2) that having the animal accompany the passenger is necessary to the passenger's mental health or treatment; (3) that the individual providing the assessment of the passenger is a licensed mental health professional and the passenger is under his or her professional care; and (4) the date and type of the

⁴⁴14 CFR 382.117(e).

mental health professional's license and the state or other jurisdiction in which it was issued. Airline personnel may require this documentation as a condition of permitting the animal to accompany the passenger in the cabin. The purpose of this provision is to prevent abuse by passengers that do not have a medical need for an emotional support animal and to ensure that passengers who have a legitimate need for emotional support animals are permitted to travel with their service animals on the aircraft. Airlines are not permitted to require the documentation to specify the type of mental health disability, *e.g.*, panic attacks. There is a separate category of service animals generally known as "psychiatric service animals." . . . As with emotional support animals, it is possible for this category of animals to be a source of abuse by persons attempting to circumvent carrier rules concerning transportation of pets. Consequently, it is appropriate for airlines to apply the same advance notice and documentation requirements to psychiatric service animals as they do to emotional support animals.

5. *Observe behavior of animals:* Service animals are trained to behave properly in public settings. For example, a properly trained guide dog will remain at its owner's feet. It does not run freely around an aircraft or an airport gate area, bark or growl repeatedly at other persons on the aircraft, bite or jump on people, or urinate or defecate in the cabin or gate area. An animal that engages in such disruptive behavior shows that it has not been successfully trained to function as a service animal in public settings. Therefore, airlines are not required to treat it as a service animal, even if the animal performs an assistive function for a passenger with a disability or is necessary for a passenger's emotional well-being.⁴⁵

Verification of unusual service animals. The Department of Transportation advises that passengers "with unusual service animals also may want to carry documentation confirming that their animal has been trained to perform a function or task for them."

Department of Housing and Urban Development. After recent amendments, public housing agencies —

are authorized to verify that the animal qualifies as a reasonable accommodation under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794⁴⁶) (Section 504) and the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3601-3631)). An animal qualifies as a reasonable accommodation if: (1) An individual has a disability, as

defined in the Fair Housing Act or Section 504, (2) the animal is needed to assist with the disability, and (3) the individual who requests the reasonable accommodation demonstrates that there is a relationship between the disability and the assistance that the animal provides.⁴⁷

Somewhat more specifically:

[P]ersons who are seeking a reasonable accommodation for an emotional support animal may be required to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides support that alleviates at least one of the identified symptoms or effects of the existing disability.

Verification procedures appropriate for IRS. The IRS, in correspondence with a taxpayer who has claimed a service animal deduction, could request written materials evidencing the taxpayer's disability and the animal's training as a service animal. Disability verification documents may include letters from doctors, a Medicare card for persons under the age of 62 years, Social Security Disability Income paperwork, private disability insurance paperwork, a military disability rating document, a forbearance on a bank loan based upon disability, a DMV disability placard, etc. In person-to-person interviews, agents could ask the taxpayer about the condition for which the service animal is used, how the service animal was trained, and what it does to assist the handler's condition. At a minimum, a service animal handler should be able to speak to the animal's training with relative ease. Some will have accumulated documentation of their dog's training, though, not everyone will have done so especially if the dog is owner-trained.

Medical deductions under section 213. Under Section 213(d), medical care includes amounts paid for the mitigation, treatment, or prevention of disease, as well as for qualified long-term care services, as defined in Section 7708B(c)(1), which also includes "preventive, therapeutic, curing, treating, mitigating, and rehabilitative services, and maintenance or personal care services which," are required by a chronically ill individual," and "are provided pursuant to a plan of care prescribed by a licensed health care practitioner." To be deductible as a medical expense, there must be a direct or proximate relationship between the expense and the diagnosis.⁴⁸ The Service determined in Rev. Rul. 58-533⁴⁹ that expenses for psychiatric therapy for the taxpayer's mentally ill daughter at a specially equipped center were deductible under Section 213.

Under Reg. 1.213-1(e)(1)(v)(a), "the cost of medical care includes the cost of attending a special school for a mentally or physically handicapped individual, if his condition is such that the resources of the institution for

⁴⁵73 Fed. Reg. 27659.

⁴⁶Under 29 U.S.C. 794(a):

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

⁴⁷73 Fed. Reg. 63834 (emphasis added).

⁴⁸*Havey v. Commissioner*, 12 TC 412 (1949), cited in PLR 200140017 (June 25, 2001) (collection of DNA deductible if to be used for medical diagnosis, but where collection is to store DNA until genetic tests are developed, IRS cannot declare the procedure deductible).

⁴⁹1958-2 CB 108. See also Rev. Rul. 55-261, 1955-1 CB 307.

alleviating such mental or physical handicap are a principal reason for his presence there.”⁵⁰ Autism Service Dogs of America (ASDA), a nonprofit organization that provides trained dogs to children with autism, argues that such dogs should accompany autistic children to school and that the presence of a dog calms a child and reduces outbursts. It would appear that facilitating the child’s ability to remain in a school, or a special school, should be deductible.⁵¹

In Rev. Rul. 55-261,⁵² the IRS said that allowable medical expenses include the cost of a guide dog and its maintenance, as were eyeglasses, hearing aids, and artificial teeth and limbs.⁵³ These three items could be said to be analogous to the more traditional functions of service dogs — guiding the blind or visually impaired, alerting the deaf or hearing impaired, and providing balance support to the mobility impaired.⁵⁴

In Rev. Rul. 57-461,⁵⁵ the IRS considered whether “amounts paid by a blind individual for food, inoculations, and other expenses connected with the maintenance of a guide-dog, which the individual uses daily in the conduct of his business, may be deducted as business expenses rather than medical expenses.” The IRS said the expenses were deductible, but as medical expenses, not business expenses, analogizing the situation to that described in *Bakewell v. Commissioner*,⁵⁶ where a deaf lawyer attempted to deduct his hearing aid as a business expense. There, the Tax Court allowed a medical expense for the hearing aid.⁵⁷

In Rev. Rul. 64-173,⁵⁸ expenses of paying a person to accompany a blind child throughout the school day were considered medical under Section 213. The IRS analogized this to the use of a guide dog under Rev. Ruls. 55-261 and 57-461. In Rev. Rul. 68-295,⁵⁹ the taxpayer purchased a dog and paid to have it trained to alert his daughter, who had a congenital hearing defect, of dan-

gerous conditions. Analogizing this to the expense of a guide dog under Rev. Rul. 55-261, the IRS said that the hearing dog was a medical deduction.

Courts have noted that in determining whether expenses are appropriately deductible as medical, due regard has to be given to the increase in the value of the property affected.⁶⁰ As stated by one court:

[I]t does seem clear that even capital expenditures, to the extent they are uncompensated by increases in property value, may be considered medical expenses to the degree they are incurred “for medical care” within the meaning of section 213.⁶¹

Thus, adding power steering to a car was not deductible though the change was made at the direction of a physician.⁶² Adding special ramps to a house are deductible to the extent they do not improve the value of a house.⁶³ These situations might find an analogy in the deductibility of a service dog that also happened to be valuable for reasons besides its service functions, such as being a breeding dog for prize show dogs. The value of the dog might depend more on its show dog value than its service dog skills, in which case the acquisition cost, and some of the maintenance costs, might not be properly deductible. The burden would be on the taxpayer to establish that portion of the expenses related to the dog that would be deductible under Section 213. This would be an extremely uncommon situation because prize show dogs are usually showed by professional show dog handlers who remove the dog from the home for months at a time while cruising the show circuit nationally with the dog. A disabled person who relies upon a service dog on a daily basis probably would not allow a service dog to be on the road with someone else for months at a time.

In sum, the current guidance of the Service clearly recognizes only two categories of service dogs — guide and hearing dogs — and Publication 502, without any specificity, refers to other service dogs for the physically handicapped. This reflects an era in the development of service dogs that is, by modern standards, rather primitive. Service dogs are not adequately defined, and the current guidance does not take into account those dogs that are assisting persons with mental health disabilities. This leaves in a gray area those dogs that serve persons whose handicaps are not easily classified as physical.

Increasing medical and social roles of dogs make more precise definition of what makes a service animal under the tax law appropriate. Medical uses of dogs continue to be discovered. Certain cancers can be detected by dogs. Twenty years ago this was anecdotal.

⁵⁰See *Greisdorf v. Commissioner*, 54 TC 1684 (1970), acq. 1970-2 CB XIX (tuition was expended for medical care within the meaning of Section 213(3)(1)). See PLR 200729019 (April 10, 2007). See also PLR 200704001 (September 29, 2006).

⁵¹Amounts paid by a taxpayer to maintain his mentally retarded son in a half-way house, as recommended by a psychiatrist, in order to facilitate the son’s ability to get out of a hospital and live in the community were deductible medical care expenses in Rev. Rul. 69-499, 1969-2 CB 39.

⁵²1955-1 CB 307.

⁵³Some state tax codes provide that expenses for a guide dog and upkeep of a guide dog are deductible under Pennsylvania tax law. 55 P.S. § 181.132(5)(i); see 55 P.S. § 451.4(a)(1)(i)(III).

⁵⁴Support for the mobility impaired is similar to one aspect of the training of guide dogs, which in addition to guiding their handlers are also chosen from breeds large enough to provide physical support should the master lose his/her balance.

⁵⁵1957-2 CB 116.

⁵⁶23 TC 803 (1955).

⁵⁷Payments made by blind employees for readers for services performed in connection in the conduct of the blind employee’s work were deductible business expenses. Here, the employee did not use the services outside of the work situation. Rev. Rul. 73-316, 1973-2 CB 318.

⁵⁸1964-1 CB 121.

⁵⁹1968-2 CB 92.

⁶⁰*Riach v. Frank*, 302 F.2d 374 (9th Cir. 1962).

⁶¹*Ferris v. Comm’r*, 582 F.2d 1112 (7th Cir. 1978) (increase in property value from enclosing swimming pool had to be considered in determining if deduction was available). See also *Goldaper v. Comm’r*, TCM 198-73-343 (cost of professional driver to take taxpayer to work not deductible as he would have had to commute in any case and could have used taxis).

⁶²*Earle v. Comm’r*, TCM 1962-273.

⁶³*Oliver v. Comm’r*, 364 F.2d 575 (8th Cir. 1966).

Some who did not know they had melanoma,⁶⁴ or breast cancer,⁶⁵ found their dog constantly licking or nudging a place on the owner's body. Subsequent tests found the diseases and sometimes saved lives. Through a complex training regimen, dogs have been taught to detect lung, breast, and bladder cancers in experimental settings,⁶⁶ and there may come a time when doctors visiting remote communities will be able to perform some initial screening with a cancer-sniffing dog. Seizure alerting was discovered in a similar manner. Hypoglycemia alerting is only beginning to be studied.⁶⁷ Dogs that predict migraines have been reported.⁶⁸ A two-leash system for autistic children (with the second leash held by a parent) has shown considerable promise in Canadian research.⁶⁹

Dogs that live with autistic children have been taught to perform a number of service functions: barking when the child wakes up during the night or if the child starts to engage in some dangerous or unhealthy behavior, such as eating feces. Not all dogs that live with autistic children perform any functions for the children, however. Some are merely pets. The best evidence will often be a combination of the training the dog has received and the opinion of an expert on autism.⁷⁰

A particularly common situation involves the growing use of animal assisted therapy, where a psychiatrist or other mental health professional uses a therapy dog (or

sometimes another species) as part of the therapeutic intervention. These types of treatments are undoubtedly deducted as payments to the mental health professional. Some health care facilities have "professional therapy dogs" living on the sites and visiting an entire patient population.⁷¹ Many of these facilities are tax-exempt, but presumably a for-profit entity might argue that providing this kind of therapeutic intervention is a business expense for the facility.

Possibilities of Abuse Will Continue to Exist

Greater specificity of what is appropriately deductible would help deter abuse. One website, mentioned previously, allows an individual to get a "personalized service dog certificate," a vest saying the dog is a service dog, and other paraphernalia, by doing no more than checking a box to indicate that the user's dog satisfies most of the items on a 10-point checklist. That is Step 1 on the website, which has the heading, "Public Access Test for Qualification." Step 2 is to select a payment option to transfer \$249 to the organization issuing the certificates.⁷² This is a bargain given the expenses involved in training dogs with standards set by legitimate certifying and registration organizations. While people may be obtaining such online certifications to provide support for arguments about getting their dogs into restaurants, there may be others who will see the tax potential. The site does not require that the buyer specify what services the dog performs (either physical or psychological). The benefits of deducting the expenses of maintaining a dog could easily be greater than a dependent deduction. While an audit might determine that a dog whose certification was obtained this way was not legitimate, with the lack of current guidance in the tax law, it is not clear what resources a field agent would be able to look to in analyzing the issue.

Suggested Parameters for New Tax Rules

We suggest that the following specificity and changes should be made clear in formal pronouncements from Treasury and/or the IRS:

1. Service animals for persons with mental health disabilities (i.e., psychiatric service animals) should be deductible. Service animals should be defined as animals that are individually trained to do work or perform tasks that assist a person with a disability.
2. Formal training should not be required in defining what is a deductible service animal, but it is appropriate that training be taken into consideration in verifying that an animal qualifies as a deductible medical expense. Service animals

⁶⁴H. Williams and Pembroke, Sniffer Dogs in the Melanoma Clinic? *Lancet* 1:734 (1989). A dog tested by researchers in 2004 was proven to be highly accurate at detecting melanomas. D.P. Pickel, G.P. Manucy, D.B. Walker, S.B. Hall SB, and J.C. Walker, Evidence for Canine Olfactory Detection of Melanoma, 89 *Applied Animal Behaviour Science* 107-116 (2004).

⁶⁵James S. Welsh, Darryl Barton, and Harish Ahuja, A Case of Breast Cancer Detected by a Pet Dog, *Community Oncology* 326 (July/August 2005).

⁶⁶M. McCulloch, T. Jezierski, M. Broffman, A. Hubbard, K. Turner, and T. Janecki, "Diagnostic Accuracy of Canine Scent Detection in Early- and Late-Stage Lung and Breast Cancers," 5(1) *Integrative Cancer Therapies* 30-9 (March 2006).

⁶⁷See Susan L. Duncan, "APIC State-of-the-Art Report: The Implications of Service Animals in Health Care Settings" (2000) ([www.ajicjournal.org/article/S0196-6553\(00\)90024-5/pdf](http://www.ajicjournal.org/article/S0196-6553(00)90024-5/pdf)) (listing hypoglycemia alerting as a new function of service dogs). See also K. Lim, A. Wilcox, M. Fisher, and C.I. Burns-Cox, Type 1 Diabetes and Their Pets, 9 (suppl. 2) *Diabetic Medicine* S3-S4 (1992).

⁶⁸Curiously, one case is found in a judicial decision. See *Timberlane Mobile Home Park v. The Human Rights Comm'n*, 122 Wash. App. 896, 95 P.3d 1288 (2004).

⁶⁹Kristen E. Burrows, Cindy L. Adams, and Suzanne T. Millman, Factors Affecting Behavior and Welfare of Service Dogs for Children with Autism Spectrum Disorder, 11(1) *Journal of Applied Animal Welfare Science* 42-62 (2008)

⁷⁰As a practical matter, service dogs that are program-trained are expensive to produce. This is an expense that would, even if deductible, not often be entertained by someone who did not expect to benefit from the services the dog will provide. These expenses, which can run \$30,000 or more, may sometimes be paid in significant part by charitable organizations, but the organizations will not wish to subsidize people who do not need the animals. In fact, most programs require proof of disability before they will place a service dog with a disabled client.

⁷¹Kansas recognizes such dogs as qualifying for access in much the same way as service dogs. KRS § 39-1113(d).

⁷²A disclaimer on the website states that the "purchaser understands and agrees that the only involvement by service-dogsamerica.org is to supply the represented information and equipment. Also, "Service-dogsamerica.org is not responsible for any actions legal or otherwise caused by the use of the equipment or printed material supplied." The website does note that "You can train your Service Dog to meet the specific needs of your disability."

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should be individually trained to the extent necessary to perform their work or tasks appropriately. If an animal is not originally purchased as a service animal but later becomes one, the cost of the dog in a given tax year and training expenses for this purpose should be deductible.

3. Animals that function as service animals should not be restricted as to species, but it is appropriate to recognize that animals that cannot be trained easily are less likely to be able to do work or perform tasks that should be recognized as qualifying the animal as a deductible service animal.

4. There should be a direct correlation between the assistance provided by the service animal and the disability of the individual served. A dog that can retrieve a dropped pencil may be useful to an individual whose mobility impairment makes it difficult to move or bend over, but to an individual suffering from post-traumatic stress disorder (PTSD) who is otherwise ambulatory, picking up pencils may be no more than a parlor trick. That said, side effects of medications used to treat PTSD may cause vertigo in which case retrieval behaviors and balance support on the part of the dog would be disability mitigating and therefore legitimate.

5. Verification of deductible service animal status on audit should be able to include inquiry into the nature of the service(s) the animal provides, how the animal was trained, and the individual's disabling condition. Since the burden lies with the taxpayer, the IRS can reasonably request evidence of the service animal's qualifications. This is similar to the burden that courts have placed on tenants to establish their need to keep service dogs.⁷³ If the burden is not met, the animal should not be deductible.

⁷³In re Kenna Homes Cooperative Corporation, West Virginia Court of Appeals, Civil Action 99-C-2745, No. 29644 (October 23, 2001) (physician of tenants did not correlate any

If it would be helpful, the authors would be happy to propose a draft regulation.

Conclusion

The increase in the number of service animals and the breadth of assistance they provide to persons with physical and/or mental health disabilities means that disputes as to which animals are appropriately deductible are inevitable. The current guidance from Treasury and the IRS dates from a time when service animals were limited to guide dogs and hearing dogs. Three other federal agencies have been struggling to issue access rules appropriate for the increasingly diverse services that disabled persons are receiving from animals. It is appropriate that the IRS issue guidance that would set boundaries for what services are deductible.

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activities of dogs with disabilities of married tenants; "In order to show that the disabled person needs the assistance of a service animal to ameliorate the effects of his or her specific disability, it is reasonable to require the opinion of a physician who is knowledgeable about the subject disability and the manner in which a service dog can ameliorate the effects of the disability"; housing project could require tenants to get additional verification of the skills of their dogs and the need to have them).

(Footnote continued in next column.)