February 21, 2019

CC:PA:LPD:PR
(REG-106706-18), Room 5203
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Attn: Deborah S. Ryan

Re: REG-106706-18

Ms. Ryan,

These comments are submitted on behalf of The Greystocke Project, a 501(c)(4) organization whose purpose is to advocate for state and federal tax and nontax legislative and regulatory measures to limit the intergenerational transferability of accumulated wealth.

It is not at all clear the Treasury has authority to forgo the "clawback" after 2025 of exclusion amounts applied to taxable gifts made during the temporary increase under section 2010(c)(3).

The preamble to the notice of proposed rulemaking openly acknowledges that this reading is directly contrary to what it calls a "literal" reading of existing subsection (b) of section 2001. Section 11061 of the 2017 tax bill **did not amend that subsection.** But the notice asserts that the Treasury somehow has authority under section 2001(g)(2), also enacted as part of section 11061, to effect a rewrite of subsection (b).

What paragraph (2) of subsection (g) actually says is that the Treasury "shall prescribe such regulations as may be necessary or appropriate **to carry out this section** with respect to any difference between" the exclusion amount applicable at the date of a decedent's death and the amount applicable at the time of any lifetime transfers (emphasis supplied). The conference committee explanation mistakenly paraphrases this as requiring regulations necessary or appropriate **to carry out "the purposes of"** the section. The "blue book" -- which was issued twelve months after the fact -- takes this a step further by asserting that "it is expected" that these regulations would prevent "clawback," but given the lapse of time, this "explanation" cannot reasonably be said to reflect legislative intent.

Of course, "the purposes of" section 11061 are not made explicit in the legislative text. While the present regulatory project illustrates the difficulty of articulating the details, and one might argue that the task could not readily be accomplished in the eleventh hour, it should not have been difficult for the drafters to specify at least in broad strokes what they intended. One might note that the substantive rule is expressed in the proposed regulation in fewer than 250 words.

Existing section 2001(g), in text now renumbered as subparagraph (1), states the general rule that in adding back adjusted taxable gifts to calculate the estate tax subsection (b), the rates of tax and amounts of

available exclusion to be used are those in effect **at the date of the transferor's death.** The preamble to the proposed regs acknowledges in two examples that a "literal" application of this existing text, which section 11061 of the 2017 tax bill **did not amend**, would require "clawback."

Subsection (a) of section 11061 itself says only that the exclusion amount is doubled through 2025. One might equally suppose that the "purpose" was to protect the estates of decedents who might happen to die during the interval, leaving the problem of possible relief from "clawback" to another Congress. And the revenue estimates provided by the Joint Committee on Taxation would appear to substantiate this latter view.

JCX 67-17 on the 2017 tax bill shows revenue losses climbing to about ten billion a year through the sunset, and then dropping sharply to about three billion in fiscal 2027, when returns for decedents who died after the sunset would start coming due. JCX 71-18 on HR 6760, which would have made the doubled exclusion amount permanent, shows some additional revenue loss starting in 2024, and then climbing quickly to twelve and fourteen billion in 2027 and 2028 -- strongly suggesting that staff understood there might be "clawback" absent further legislation. That bill passed the House in 2018 but died in the Senate Finance Committee.

If the 2017 estimate did assume there would be a "clawback," then the present regulation project amounts to an end run around the Byrd Rule. After all, it was a Senate amendment that imposed the sunset. The proposed regulation would negate what may have been a key component of the sunset, causing **revenue losses outside the budget window** that were not accounted for in the JCT estimate. On the other hand, if the estimate assumed there would not be a "clawback," this should have been made clear to legislators who were not "in the room" as this compromise was being hammered out.

Sincerely,

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