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Limit the Use of Abusive Valuation Discounts in the Transfer Tax System

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Summary

High-net-worth individuals can abuse "valuation discounts" to significantly reduce the value placed on their assets for the purposes of calculating estate, gift, and generation-skipping transfer taxes, and so decrease their transfer tax liability.

This proposal would use Treasury's regulatory authority to strengthen existing regulations to curtail the most abusive valuation discounts and create a set of valuation assumptions that would more closely align asset valuation for transfer tax purposes with economic reality.

1 Current Law

Each of the three taxes that constitute the federal transfer tax system – the gift tax, the estate tax, and the generation-skipping transfer tax – is imposed on the value of transferred property.[1] Therefore, property valuation is critical for determining the transfer tax base. Treasury regulations provide that the applicable standard for determining the value of transferred property is fair market value (FMV), or the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.[2]

In determining an asset's FMV, appraisers often adjust the value based on factors including form of ownership, restrictions on transferability, and prevailing market conditions. These adjustments can increase the value of an asset (in the form of a premium) or decrease the value of an asset (in the form of a discount).

Valuation discounts are not abusive per se and are often economically warranted. However, the application of valuation discounts in the context of valuing closely held operating businesses has motivated taxpayers to create and fund limited liability companies or partnerships not engaged in operating businesses (sometimes referred to as "family limited partnerships" or FLPs) solely to reduce the value of property for transfer tax purposes. For instance, taxpayers may capitalize a new FLP with cash or marketable securities and then make gratuitous transfers of ownership interests in the entity to their children or other family members. The value of each transfer will

[1] *See* sections 2001, 2051, and 2031 (relating to the estate tax), 2501 and 2512 (relating to the gift tax), and 2601, 2602, and 2621-2624 (relating to the generation-skipping transfer tax). Unless otherwise noted, all references to "section" are to sections of the Internal Revenue Code of 1986 (as amended) ("IRC"), and all references to "Treas. Reg. §" are to Treasury regulations issued thereunder.

[2] *See* Treas. Reg. §§ 20.2031-1(b) and 25.2512-1; *see also* Treas. Reg. § 26.2642-2(a)(1) and (b)(1) (cross-referencing the valuation rules under chapter 12 (relating to the gift tax) and chapter 11 (relating to the estate tax)).

be subject to a valuation discount for lack of control[3] (where the gifted interest is a noncontrolling interest) and a valuation discount for lack of marketability[4] (where the FLP operating agreement provides significant restrictions on the donee's ability to re-sell the gifted interest). Because of valuation discounts, transferring an interest in an entity holding cash or investment assets will generally result in a lower transfer tax than if the assets themselves were transferred outright. In the most egregious cases of transfer tax avoidance, the donor and donees dissolve the FLP shortly after the transfers and put the donees in the same position in which they would have been had the cash and investment assets been gifted to them directly.

The special valuation rules of Chapter 14 of the IRC, which includes section 2704, were enacted to curb the use of techniques designed to reduce transfer tax values without reducing the actual economic benefit to the beneficiaries.[5] Regulations, court decisions, and state laws have undercut this goal.

Section 2704(a) treats the lapse of a voting or liquidation right in a family-controlled entity as a transfer (or additional transfer) by the individual holding the right immediately before its lapse. The underlying idea is that the individual whose right lapsed has essentially transferred a benefit to the other owners of the family-controlled entity because the individual can no longer exercise the right in the company.[6] However, Treasury Regulation § 25.2704-1(c)(1) undermines section 2704(a). It includes an exception to the general rule and provides that a transfer that results in a lapse of a liquidation right for the transferor will generally *not* constitute a lapse subject to section 2704(a) if the "rights with respect to the transferred interest are not restricted or eliminated."[7] This regulatory exception means that a donor can convert their controlling interest into multiple minority interests, with a consequent decline in value, without any transfer tax consequences that would otherwise apply under the statute.

Section 2704(b) attempts to limit the availability of discounts for lack of marketability and control in closely-held entities by disregarding certain "applicable restrictions" that do not reduce actual economic value. An "applicable restriction" generally includes a restriction that limits the ability of a corporation or partnership to liquidate that (1) is more restrictive than the limitations under state law more generally and (2) potentially lapses after a transfer of an interest in the

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[3] Valuation based on "control" takes into account the value of the different rights held by an owner of an entity, such as majority voting rights, swing vote rights, or other ability to control or influence the entity. *See* David Laro and Shannon Pratt, Business Valuation and Federal Taxes, Second Edition 272 (2nd ed. 2012).

[4] "Marketability" is defined as the ability to quickly convert property to cash at limited cost. *See id.* at 283. For example, the longer a hypothetical willing buyer must wait to liquidate their interests, the greater the discount for lack of marketability. Factors affecting marketability include the time it takes to liquidate an interest, the expense of liquidating, and other risks and obstacles facing the entity. *See* Rev. Rul. 77-287, 1977-2 CB 319.

[5] *See* 136. Cong. Rec. 30538 (October 18, 1990) ("[T]he committee sought to accomplish several goals [when designing Chapter 14]: (1) to provide a well defined and administrable set of rules; (2) to allow business owners who are not abusing the transfer tax system to freely engage in standard intrafamily transactions without being subject to severe transfer tax consequences; and (3) to deter abuse by making unfavorable assumptions regarding certain retained rights."); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§11601 and 11602 (1990).

[6] *See, e.g.,* Treas. Reg. §25.2704-1(f) Example 1.

[7] *See also* Treas. Reg. § 25.2704-1(f) Example 4 (illustrating application of the exception in a fact pattern in which a transferor eliminates the transferor's right to liquidate an entity by dividing an interest among multiple transferees).

entity to a member of the transferor's family.[8] Section 2704(b) only applies if an interest in an entity is transferred to "a member of the transferor's family" and the transferor and members of the transferor's family controlled the entity immediately before the transfer.

Since the enactment of Chapter 14, judicial decisions and new statutes in most states have undermined the applicability of section 2704(b) in many situations and rendered it inadequate at limiting valuation discounts. Most states have placed stringent liquidation limitations on partnerships and limited liability corporations.[9] As a result, many liquidation restrictions fail to qualify as "applicable restrictions" under section 2704(b) because they are no more restrictive than state law. Courts have further limited the applicability of section 2704(b) by holding that it "applies only to restrictions on the ability to liquidate an entire entity, and not to restrictions on the ability to liquidate a transferred interest in that entity."[10]

2 Reasons for Change

Section 2704 and the corresponding regulations "have been rendered substantially ineffective in implementing the purpose and intent of the statute by changes in state laws and by other subsequent development."[11] As a result, high-net-worth individuals can use abusive valuation discounts to deflate the value of their assets, eroding the US transfer tax base.

This proposal would curb the use of artificial valuation discounts by identifying additional restrictions that would be disregarded for the purposes of valuing an entity ("disregarded restrictions").

3 Proposal

Treasury should re-publish the 2016 proposed regulations under section 2704(b)(4) (the "Proposed Regulations") subject to modest clarifications.[12] The Proposed Regulations attempted to clarify the scope of section 2704 by identifying additional restrictions that would be disregarded for purposes of valuing an entity ("disregarded restrictions").[13] The Proposed

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[8] Section 2704(b)(2); Treas. Reg. § 25.2704-2(b). For example, assume a partnership agreement requires the consent of all the partners to liquidate the partnership, but state law provides that the consent of partners owning 70% of the total partnership interests would be required to liquidate the partnership. In a family-controlled partnership, the requirement that all partners must agree to liquidate the partnership would be an applicable restriction. *See* Treas. Reg. § 25.2704-2(d) Example 1.

[9] *See* Louis A. Mezzullo, Bloomberg Tax, Portfolio 809-4th: Estate Planning for Owners of Closely Held Business Interests V.B.

[10] Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, REG–163113–02, 81 Fed. Reg. 51413, 51415 (August 4, 2016) ("Restrictions on Liquidation of an Interest") (citing *Kerr v. Commissioner*, 113 T.C. 449 (1999), *aff'd*, 292 F.3d 490 (5th Cir. 2002)). *See also Estate of Harper v. Commissioner*, 79 T.C.M. (CCH) 2232 (2000); *Knight v. Commissioner*, 115 T.C. 506 (2000); *Estate of Jones v. Commissioner*, 116 T.C. 121 (2001).

[11] Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, REG–163113–02, 81 Fed. Reg. at 51415.

[12] Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, REG–163113–02, 81 Fed. Reg. 51413.

[13] *See id*.

Regulations were withdrawn pursuant to the Treasury's recommendation in response to Executive Order 13789, which was purportedly aimed at reducing tax regulatory burden.[14]

Generally, the Proposed Regulations provided that a restriction on the ability to redeem or liquidate an interest in an entity that either lapses after the transfer or can be removed by the transferor or the transferor's family is a "disregarded restriction."[15] Disregarded restrictions do not include restrictions imposed by or required to be imposed by federal or state law.[16] A restriction that can be overridden by governing documents or other agreement is not considered imposed by or required to be imposed by federal or state law.[17]

Once a restriction is determined to be disregarded, the Proposed Regulations state that valuing the transferred interest subject to a disregarded restriction occurs "under generally accepted valuation principles as if the disregarded restriction does not exist in the governing documents, local law, or otherwise."[18]

If Treasury decides to re-publish the Proposed Regulations, it should consider the following clarifications and revisions to promote sound principles of tax administration and preempt concerns that may be raised by stakeholders in the rulemaking process:

3.1 Clarify the valuation method for entities subject to section 2704(b)

Treasury should clarify how to value interests in family-controlled entities that have a "disregarded restriction." Some commentators argued that the Proposed Regulations exceeded Treasury's regulatory authority by virtually eliminating all valuation discounts for intra-family transfers. Specifically, the commentators argued that the Proposed Regulations required that transfers of interests in family-controlled entities be valued as if the holder of the interest has a put right to sell the interest to the entity within six months for a value at least equal to a pro rata share of the net value of the entity in return for cash or property (a "deemed put right").[19] Indeed, if an appraiser were required to assume that liquidation or redemption could always occur within

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[14] *See* Executive Order 13789—Second Report to the President on Identifying and Reducing Tax Regulatory Burdens, 82 Fed. Reg. 48013 (October 16, 2017), and Estate, Gift, and Generation-Skipping Transfer Taxes; Restrictions on Liquidation of an Interest, REG–163113–02, 82 Fed. Reg. 48779 (October 20, 2017). Despite withdrawal, the Proposed Regulations remain substantially sound, administrable, and worth reproposing with modest clarifications.

[15] *See* Prop. Treas. Reg. § 25.2704-3(b)(1).

[16] *See* Prop. Treas. Reg. § 25.2704-3(b)(5)(iii).

[17] *See id.*

[18] Prop. Treas. Reg. § 25.2704-3(f).

[19] *See, e.g.*, Howard M. Zaritsky, Jonathan G. Blattmachr & Mitchell Gans, *Treasury Proposes New Regulations to Restrict Valuation Discount Planning*, 155 Trusts & Estates 15, 21 (2016); *see also* Kevin Matz, *Proposed Regulation Under Section 2704*, NYS Society of CPAs (2016) (noting, "[s]ome commentators have speculated that the implication of the Proposed Regulations is to actually read 'deemed put rights' into the governing documents and local law for valuation purposes, as if the interest holder were granted the affirmative right to withdraw its interest in exchange for a pro rata share of the entity's 'minimum value' upon six months' notice. It does not appear, however, that the Proposed Regulations indicate such an interpretation . . . .").

six months, no matter how impractical, the result would be the virtual elimination of discounts for lack of marketability and even lack of control.

However, in our view this concern is based on inappropriate inferences from the Proposed Regulations. The Proposed Regulations do not assume the holder of an interest actually holds a deemed put right for purposes of valuing that interest. Rather, as noted above, for purposes of valuing an interest in an entity, the Proposed Regulations simply ignore any restriction on the interest holder's ability to liquidate or redeem their interest if that restriction is a "disregarded restriction." The commentators' misapprehension may be based on the fact that the Proposed Regulations do provide that a restriction is not a "disregarded restriction" if the interest holder has a right to sell the interest to the entity for cash or certain property within six months for a value at least equal to a pro rata share of the net value of the entity.[20]

To address the misapprehension about deemed put rights, if the Proposed Regulations are re-published, Treasury should clarify the effect of a "disregarded restriction" on entity valuation. For example, Treasury could note in the preamble that nothing in the Proposed Regulations is intended to imply particular substantive rights with regard to an entity or an interest in an entity. Appraisers are not required to assume that a right to redeem or liquidate an interest is affirmatively granted to an owner simply because the appraiser must otherwise disregard certain restrictions on that owner's ability to liquidate or redeem their interest. Accordingly, in the preamble or by expanding on the existing illustrative examples, Treasury could address the applicability of default state laws that do not directly restrict a particular owner's ability to redeem or liquidate their interest, but that otherwise restrict the termination or liquidation of the entity itself.

Further, in illustrative examples, Treasury may consider clarifying that if an appraiser is being asked to assume disregarded restrictions do not "exist in the governing documents, local law, or otherwise,"[21] such an appraiser must still consider all other relevant factors in determining the marketability of an interest in the entity and the level of control afforded to the interest holder. These factors will still include: (1) the risk that a hypothetical willing buyer would incur in dealing with existing owners, (2) an interest holder's ability or inability to control the entity or influence the entity's investment strategy (as a result of, e.g., a minority interest, a swing vote etc.), (3) the liquidity of the entity, the expense to the business of a partial liquidation, or other obstacles to the entity's ability to redeem an ownership interest or liquidate, and (4) the stability of the entity's earnings and patterns of distributions

In making these clarifications, Treasury would confirm that the re-published Proposed Regulations would not eliminate all discounts; rather, they would simply oblige an appraiser to ignore provisions in governing documents intended to artificially enhance discounts. In practice, most discounts on interests in operating businesses would continue to be appropriate and only the most abusive attempts to artificially generate discounts would be affected.

This revision to the Proposed Regulations is not technically challenging and likely would not require extensive work to implement.

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[20] *See* Proposed Regulation § 25.2704-3(b)(5)(v) and (b)(6).

[21] Prop. Treas. Reg. § 25.2704-3(f).

3.2 Clarify Meaning of "Member of the Family" and Scope of Impacted Entities for Purposes of Section 2704(b)

Treasury should clarify in the Proposed Regulations the meaning of "member of the family" and the scope of impacted entities for the purposes of section 2704(b). Section 2704(c)(2) provides that, for purposes of section 2704, the term "member of the family" means an individual's spouse, any ancestor or lineal descendant of the individual or their spouse, the individual's siblings, and the spouses of the foregoing individuals. However, instead of setting forth such definition, the Proposed Regulations cross-reference a definition in Treas. Reg. § 25.2702-2(a)(1).[22] Similarly, in lieu of describing what it means for "members of the family" to "control" an entity, Prop. Treas. Reg. §§ 25.2704-2(c) and 25.2704-3(c) cross-reference the definition of "controlled entity" in Treas. Reg. § 25.2701-2(b)(5).[23] Consistent with section 2701(b), in Treas. Reg. § 25.2701-2(b)(5), "controlled entity" is defined by reference to "applicable family members" rather than "member of the family." "Applicable family members," as defined in section 2701(b)(2)(C) and Treas. Reg. § 25.2701-1(d)(2), would include a transferor's nieces and nephews, even though the definition of "member of the family" for determining transfers subject to applicable restrictions would not.

The Proposed Regulations, if re-issued, should make clear that Treas. Reg. § 25.2701-2(b)(5) is being referenced for the definition of "control" rather than for the definition of the term "controlled entity," which is not used in the Proposed Regulations. More importantly, however, the reference to Treas. Reg. § 25.2701-2(b)(5) in both the Proposed Regulations and final Treas. Reg. § 25.2704-1(a)(2)(i) should be changed to refer specifically to clauses (ii), (iii), and (iv) of Treas. Reg. § 25.2701-2(b)(5) (as modified by the Proposed Regulations), the three provisions that address the meaning of "control," without reference to "applicable family members," which are addressed in Treas. Reg. § 25.2701-2(b)(5)(i).

Separately, it appears that either definition of "family" makes it less likely that an entity will be a controlled entity if passed down to members of the third or fourth generation of a family.[24] Although this is a result of the definitions in the statute, explicitly noting this operation of the

[22] *See* Prop. Treas. Reg. §§ 25.2704-2(c) and 25.2704-3(c).

[23] That definition is also cross-referenced in Treas. Reg. § 25.2704-1(a)(2)(i) for the definition of "control."

[24] Assume Grandparent (GI) founded a company and left it equally to three children A, B, and C (GII), who have died and left their interests equally to each of their children (GIII). Also assume Transferor is a child of A and a grandchild of Grandparent. The definition of "member of the family" in section 2704(c) includes brothers or sisters, but not descendants of brothers or sisters, so nieces and nephews are not included under that definition. Therefore, for purposes of determining whether Transferor and members of Transferor's family control the company, the interests held by Transferor and Transferor's siblings may be considered but nothing beyond that; thus, any interest held by a descendant of Child B or Child C will not be relevant. (Even the broader definition of family as seemingly incorporated by the Proposed Regulations' cross-reference to Treas. Reg. § 25.2701-2(b)(5) does not include aunts or uncles or their descendants; it refers to descendants of the transferor's parent, but not of the transferor's grandparent. *See also* section 2701(e)(1) and (2).) Therefore, GIII owners will need to take into account only stock held by their siblings, which would aggregate to only 1/3 ownership of the entity. This is less than 50% ownership of the entity, so the GIII owners would not be considered to control the entity for purposes of section 2704.

provisions in the Proposed Regulations could preempt concerns voiced against the effects of the Proposed Regulations on long-held family businesses.[25]

These modifications would likely not be difficult for Treasury to implement.

3.3 Reconsider Treatment of Lapse of Voting or Liquidation Rights

Treasury should remove the regulatory exception to section 2704(a). Treas. Reg. § 25.2704-1(c)(1) allows donors to convert their controlling interest into minority interests, with a consequent decline in value, without transfer tax consequences. The Proposed Regulations would have denied the exception for transfers occurring within three years of the transferor's death and treated a lapse of a liquidation right under section 2704(a) as "occurring" on the date of death.[26] This change would have applied to lapses of certain rights occurring on or after publication of the final regulations.[27]

Removing this regulatory exception altogether would simplify the application of section 2704(a) and eliminate the ability of donors to convert their controlling interest in an entity to a minority interest without triggering a gift. Eliminating this exception would generally strengthen the application of section 2704(a) and capture value transferred to a donor's family members when that donor voluntarily decides to convert their controlling interest into a noncontrolling minority interest.

If Treasury decides to keep the exception and limit its application to transfers more than three years before the transferor's death as the Proposed Regulations suggested, it should make three clarifications. First, it should clarify whether the value of the resulting gift is determined as of the date of death, given the deemed timing of the lapse, or as of the date of transfer, given the timing of the actual lapse.

Second, Treasury should clarify how double taxation is to be avoided if the new valuation rules also applied to the lifetime transfer and reduced a valuation discount. For example, if a transferor gifts interests in an entity, and those interests are not eligible for a valuation discount under the Proposed Regulations, there is a chance that the value subject to gift tax (for lack of a discount) will also be included in the transferor's taxable estate as a lapse if the transferor dies within three years of the gift. A rule addressing this potential for double taxation could be modeled off Treas. Reg. § 25.2704-1(c)(2)(ii).

Finally, Treasury should also clarify the applicability of the limitation on the exception to taxpayers that relied on the current regulations under section 2704(a) but pass away within the three-year window after the reproposed regulations would be finalized. Because Prop. Treas. Reg. § 25.2704-1(c)(1) could deem a lapse to occur on the transferor's date of death after the reproposed regulations are finalized, even if the actual lapse occurs before, it may be helpful to clarify through the preamble or in an explanatory illustration that the actual lapse must have occurred both after the reproposed regulations are finalized and within three years of the

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[25] *See* American College of Trust and Estate Counsel 27 (October 27, 2016), Comments on Proposed Regulations Under Section 2704 (arguing that where a disregarded restriction has endured multiple generations, that restriction should not be ignored for valuation purposes).

[26] *See* Prop. Treas. Reg. § 25.2704-1(c)(1).

[27] *See* Prop. Treas. Reg. § 25.2704-4(b)(1).

transferor's death. This would address a potential reading that the rule would apply to a lapse that occurred before the reproposed regulations are finalized if the rule would treat a lapse as occurring after the reproposed regulations are finalized.[28]

Removing the regulatory exception would require limited work from Treasury. Keeping the exception and making the suggested clarifications would involve more work and require addressing some technical questions.

3.4 Revise Language Describing the Role of Default State Law Restrictions

Treasury should revise the language in the Proposed Regulations that describes the role of default state law restrictions. Section 2704(b)(3)(B) provides that an applicable restriction will not include a restriction imposed or required to be imposed by federal or state law. Prop. Treas. Reg. § 25.2704-2(b)(4)(ii) further provides that "[a] law that is limited in its application to certain narrow classes of entities, particularly those types of entities (such as family-controlled entities) most likely to be subject to transfers described in section 2704 is not a restriction that is imposed or required to be imposed by federal or state law." The Proposed Regulations continue, "[i]n addition, a restriction is not imposed or required to be imposed by federal or state law if that law also provides . . . a different statute for the creation and governance of that same type of entity that does not mandate the restriction."

Although the first exception seems appropriately tailored toward ensuring that state legislatures cannot undermine the Proposed Regulations, the second exception should be further clarified. As drafted, this language poses significant administrability and enforcement concerns. This exception could be made more administrable for practitioners and the IRS by adding illustrative examples and disaggregating the concepts contained in the long sentence from which the preceding passage is extracted. More specifically, it is not clear from the language of the Proposed Regulations how an entity for which restrictions on liquidations are mandated can be the "same type of entity" as one for which they are not. If a state jurisdiction creates a new form of entity, this guidance does not help practitioners or the IRS determine whether that new form of entity, with all of its mandated restrictions, can be considered the "same type of entity" as one without those mandated restrictions. Consider, for example, the differences between a general partnership and a limited partnership or limited liability company, or the differences between an S corporation (with its limited type of shareholders and stock classes) and a C corporation. It is unclear whether and how to determine if those entities should be considered of the "same type." Treasury could, at a minimum, clarify that determining the "type of entity" entails consideration of the nomenclature used for the entity, as well as similarity of mandatory governing law provisions, particularly those that do not relate to restrictions on liquidations and redemptions.

Clarifying the role of default state law restrictions would require some technical drafting that would likely consume more resources than the other suggested modifications to the Proposed Regulations.

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[28] *See* The American College of Trust and Estate Counsel Comments on Proposed Regulations Under Section 2704 12 (October 27, 2016) (reading the Proposed Regulations to apply to lapses occurring before the Proposed Regulations are finalized where the transferor dies within three years of the transfer but after the Proposed Regulations are finalized).

4 Scope of Impact

This proposal would not eradicate valuation discounts, but it would limit the most abusive valuation discounts.

A revenue estimate for this precise set of proposals is not available. However, a legislative proposal included in the 2013 Greenbook that would create certain disregarded restrictions and substitute for the disregarded restrictions specified assumptions for the purposes of valuing an interest in a family-controlled entity was estimated to raise $18 billion over 10 years.[29]

The distribution of revenue raised by this proposal would be highly progressive, as the proposal would only affect high-net-worth individuals who are subject to the transfer tax regime.

5 Additional Discussion

Authority: Treasury has the authority to re-publish the Proposed Regulations with the specified clarifications and revisions. Section 2704(b)(4) gives the Secretary broad authority to "provide that other restrictions shall be disregarded in determining the value of the transfer of any interest in a corporation or partnership to a member of the transferor's family if such restriction has the effect of reducing the value of the transferred interest . . . but does not ultimately reduce the value of such interest to the transferee." The exception to section 2704(a) contained in Treas. Reg. § 25.2704-1(c)(1) is a regulatory exception and does not have a statutory basis. Treasury thus has the authority to remove the exception.

Legislative alternative: Congress could pass legislation similar to section 138210 of H.R. 5376 as introduced on September 27, 2021. That proposal would statutorily limit valuation discounts on non-business assets in entities (defined to include certain passive assets, including those that are beyond the reasonable needs of working capital for the business).[30] The Joint Committee on Taxation estimated this proposal would raise $19.9 billion over 2022-2031.[31] This legislative proposal would eliminate artificial valuation discounts in a more comprehensive way than this regulatory proposal would. In the absence of legislative change, however, Treasury should exercise its existing regulatory authority to limit the most abusive valuation discounts.

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[29] Dep't of the Treas., *General Explanations of the Administration's Fiscal Year 2013 Revenue Proposals* 79, 203 (2012). It is difficult to compare the expected revenue effect of our proposal with that of this legislative proposal, as the legislative proposal left many of the key details to be determined in regulations and was scored relative to a different baseline for transfer tax rates. Under the legislative proposal, a "disregarded restriction" includes limitations on a holder's right to liquidate their interest that are "more restrictive than a standard to be identified in regulations." The proposal similarly stated that the regulations would specify what the valuation assumptions would be. Further, the revenue estimate for the legislative proposal was evaluated relative to a baseline in which the basic exemption amount was $3.5 million per individual for estate and generation-skipping taxes, and $1 million for gift taxes. *Id.* at 76. By contrast, this regulatory proposal would apply against the backdrop of the current transfer tax regime, unless the parameters were changed by legislation. In 2022, the exemption level is $12.06 million per individual for each transfer tax. The narrower transfer tax base under current law may mean that the regulatory proposal would raise less revenue than the legislative proposal was estimated to raise.

[30] Build Back Better Act, H.R. 5376, 116th Cong. § 138210 (as introduced by House, September 27, 2021).

[31] *See* Joint Comm. on Tax'n, JCX-42-21, Estimated Budgetary Effects Of An Amendment In The Nature Of A Substitute To The Revenue Provisions Of Subtitles F, G, H, I, And J Of The Budget Reconciliation Legislative Recommendations, (Sept. 13, 2021). In 2031, the last year of the budget window and after the 2025 expiration of the 2017 tax law's exemption level increase, the proposal would raise about $2.7 billion annually.