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# New Proposed Regulations Will Limit Graegin Loans and Much More

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## Introduction and Overview

The 2021-2022 IRS Priority Guidance Plan includes the following item in the "Gifts and Estates and Trusts" section:

> Regulations under §2053.regarding personal guarantees and the application of present value concepts in determining the deductible amount of expenses and claims against the estate.

Proposed regulations were released on June 24, 2022, and published in the Federal Register on June 28, 2022. REG-130975-08, 87 Fed. Reg. 38331-38343. This project first appeared in the 2008-2009 Plan as an outgrowth of the project that led to the amendments of the section 2053 regulations that had been proposed in April 2007 and finalized in October 2009.

The proposed regulations address four general topics about deductions for claims and administration expenses under §2053: (1) applying present value concepts, (2) deductibility of interest, (3) deductibility of amounts paid under a decedent's personal guarantee, and (4) curing technical problems of references in existing regulations to a "qualified appraisal" for valuing claims by instead describing requirements for a "written appraisal document."

For further discussion of the proposed regulations, see Item 5.e of Aucutt, Washington Update (July 1, 2022) found **here** and available at **www.bessemertrust.com/for-professional-partners/advisor-insights**.

### 1. Applying Present Value Concepts to §2053 Deductions

The general rationale of allowing deductions for claims and expenses is that such amounts "do not pass to the decedent's legatees, beneficiaries, or heirs and, therefore, are not subject to the estate tax." Proposed Regulations Preamble [REG-130975-08] ("Preamble"). Although assets in the gross estate are valued under a "snapshot" method at the date or death (or the alternate valuation date, if applicable), the Preamble reasons that limiting the deduction under §2053 for claims and expenses

> to the discounted amount of a payment or payments made or to be made after an extended period following the decedent's death ... [is] a more accurate measure of the amounts not passing to the heirs and legatees ... [and] will more accurately reflect the economic realities of the transaction, the true economic cost of that expense or claim, and the amount not passing to the beneficiaries of the estate.

For claims and expenses paid (or to be paid) after a three-year "grace period" from the date of death, only the discounted present value of such post-grace-period payments may be deducted. The present value of each such payment made after the grace period, discounted from the date of payment to the date of death. Under Proposed Reg. §20.2053-1(d)(6)(i)(B), the discount rate to be used would be the applicable federal rate determined under section 1274(d) for the month in which the decedent died, compounded annually. Whether that is the mid-term rate (3-9 years) or long-term rate (over 9 years) would be determined by the length of time from the date of the decedent's death to the date of payment or expected date of payment. Payments made during the three-year grace period are not discounted. The formula for calculating the discounted present value is given in Prop. Reg. §20.2053-1(d)(6)(ii).

For claims or expenses that may be deducted before they are actually paid (such as amounts ascertainable with reasonable certainty, claims regarding a particular asset, or claims totaling not more than $500,000, Reg. §§20.2053-1(d)(4) & 20.2053-4(b) and (c)), the expected dates of payment (which will be used in making the present value calculations) "must be determined using all information reasonably available to the taxpayer... [and] must be identified in a written appraisal document." Prop. Reg. §20.2053-1(d)(6)(iii). The deductible present value amount will be adjusted if the actual date or dates of payment differ from the estimated payment dates. Prop. Reg. §20.2053-1(d)(6))(iii) & §20.2053-1(d)(6)(vi).

A statement must be filed with the estate tax return supporting the deduction under §2053 of any amounts paid after the three-year grace period. Prop. Reg. §20.2053-1(d)(6))(iv). The rule limiting the deduction to the discounted value of post-grace-period payment "does not apply to unpaid principal of mortgages and other indebtedness deductible under §20.2053-7." Prop. Reg. §20.2053-1(d)(6))(vii).

The Preamble explains that the rationale of requiring discounting of claims and expenses paid only after the three-year grace period is that most ordinary administration expenses are paid within three years of the date of death, three years takes into account a reasonable time for administering and closing the estate, and three years is a short enough period of time that the deduction of the full undiscounted amount of payments made within that grace period will not significantly distort the value of the net (distributable) estate. The Preamble concludes this rationale by stating that the three-year cutoff "strikes an appropriate balance between benefits and burdens."

## 2. Deductibility of Interest as an Administrative Expense

a. **Interest on Unpaid Tax and Penalties.** By statute, interest paid on estate tax deferred under §6166 is not deductible, §2053(c)(1)(D); instead a special low interest rate is applied, §6601(j)(1). For other situations, the general rule is that interest payable under §6601 on federal taxes (including income taxes, estate and gift taxes, employment taxes, and miscellaneous excise taxes), other than §6166 interest, that accrues after the date of death on any unpaid tax (including additions to tax) or penalties is deductible to the extent permitted by Reg. §20.2053-1.

(1) **Interest on Estate Tax Deferred Under §6161 or 6163.** Interest on unpaid estate tax deferred under §6161 or §6163 is "actually and necessarily incurred in the administration of the estate ... because the extension was based on a demonstrated need to defer payment."

(2) **Other Interest on Unpaid Tax or Penalties.** Other interest on unpaid tax or penalties "generally" is actually and necessarily incurred in the administration of the estate. Prop. Reg. §20.2053-1(d)(1)(ii).

If an extension is not acquired under §6161 or §6163, an important exception to the general rule (which may in many situations engulf the general rule) is that interest on unpaid tax and penalties is not actually and necessarily incurred in the administration of the estate, and therefore is not deductible, to the extent the interest expense is attributable to "an executor's negligence, disregard of appliable rules or regulations (including careless, reckless, or intentional disregard of rules or regulations) as defined in §1.6662-3(b)(2) of this chapter, or fraud with intent to evade tax." Prop. Reg. §20.2053-3(d)(1)(iii). Even if the underlying deferral, underpayment, or deficiency is not attributable to such conduct by the executor, any interest accruing after such conduct occurs by the executor will not be deductible. *Id*.

This important exception applies even if there is no negligence or fraudulent intent to evade tax if "rules or regulations" are disregarded (which arguably is what happens whenever a tax payment is not made timely or if a position on a return results in an underpayment). The reference to Reg. §1.6662-3(b)(2) provides some guidance as to what is careless (the failure to exercise reasonable diligence), reckless (making little or no effort to determine a rule or regulation requirement), or intentional disregard (disregarding a rule that the taxpayer knows). With respect to making tax payments, the "careless" standard would often be relevant (in case the executor is unaware of a payment date or of an issue that results in an underpayment), but the "intentional" standard would likely be applicable if the executor knows that a payment date exists but does not make a timely payment or knowingly takes an incorrect position that results in an underpayment. The proposed regulations do not suggest that reasons explaining why a payment was made late or why a position was taken that resulted in an underpayment are not listed as factors to overcome disregard of the rule, in contrast to the various factors described in the proposed regulations that are considered in whether interest on a loan obligation will be deductible (discussed below). The potential broad reach of the exception is suggested by Examples in the proposed regulations. In Example 2, the executor files the estate tax return and pays tax (presumably without a payment extension) a year after the due date. The executor pays the tax, assessed penalties, and interest on the tax and penalties. The Example says the failure to timely file and pay tax was "a result of [the executor's] disregard of the rules for filing the return and paying the tax and any assessed penalties" without referring to any negligence or fraudulent intent to evade tax. Such "disregard of the rules" would seem to apply in almost any situation in which taxes and penalties are not

paid timely. (In one sense, tax underpayments and penalties that are ultimately determined to apply literally result from the failure to follow correctly some tax "rule." The proposed regulations do not include any explicit kind of exception for reasonable cause or for some other reason for not correctly following some tax rule. For example, a tax underpayment may result from a subjective determination of an asset's value, the business purposes of an entity, or from good faith reliance on a tax expert, or from any number of other similar circumstances. Perhaps the word "disregard" may hint at some type of intentionality in not following a rule, but failure to timely file or pay a tax merely because the taxpayer is not aware of the time deadline is generally not a justification for avoiding a penalty. This proposed regulation literally may suggest that the estate generally would also suffer the failure to receive a deduction for interest payable on the deferred payment of the tax or penalty.)

Accordingly, in many situations, interest on tax underpayments and penalties, other than interest accruing on taxes that are extended under §6161 or §6163, will not be deductible, even though there is no negligence or fraud and even though such amounts are not received by the estate beneficiaries.

b. **Interest on Loan Obligations of the Estate.** A considerable number of cases have addressed the deductibility of interest under §2053 on funds borrowed to pay estate taxes. For descriptions of many of these cases, see section IV.D.2 of Akers, *Post-Mortem Planning—It's Not Too Late to Plan: A Review of Income, Gift and Estate Tax Planning Issues and Strategies and Disclaimer Planning Issues* (January 2022) (available from author). The Preamble observes that this issue "has been litigated often, with varying results" and that the IRS proposes to amend the regulations under §2053 "to provide guidance on the deductibility of interest accruing on a loan obligation entered into by the decedent's estate to facilitate the payment of the estate's taxes and other liabilities or the administration of the estate."

If an estate obtains a loan to facilitate payment of estate tax or other liabilities or the administration of the estate, interest on the loan may be deductible "depending on all the facts and circumstances." Prop. Reg. §20.2053-3(d)(2). Such interest will be deductible if three requirements are met: (1) the interest expense arises "from an instrument or contractual arrangement that constitutes indebtedness under the applicable income tax regulations and principles of Federal tax law"; (2) the interest expense and loan must be "bona fide in nature based on all the facts and circumstances"; and (3) the loan and loan terms "must be actually and necessarily incurred in the administration of the decedent's estate and must be essential to the proper settlement of the decedent's estate." (Note that word "essential.") The proposed regulations have a non-inclusive list of 11 "factors that collectively may support a finding" that those requirements are satisfied. Prop. Reg. §20.2053-3(d)(2). Some of those factors (none of which by themselves are presumably determinative) are:

- the interest rate and loan terms (including prepayment penalties) and whether they are reasonable and comparable to arm's-length transactions;
- if the lender includes the interest in gross income for income tax purposes, especially if the lender is a family member, related entity, or beneficiary;
- whether the payment schedule corresponds to the estate's ability to make payments and is not extended beyond what is reasonably necessary;
- the only practical alternatives to the loan are the sale of assets at significantly below-market prices, the forced liquidation of an entity that conducts an active trade or business, or "some similarly undesirable course of action";
- the estate does not have liquidity to pay estate liabilities, the estate does not have control of an entity with liquid assets to satisfy estate liabilities, the estate has no power to compel an entity to sell liquid assets and make distributions, and the estate will have sufficient cash flow to make the loan payments [an example of these factors is *Estate of Black v. Commissioner*, 133 T.C. 340 (2009) (an FLP in which the estate owned a substantial interest sold assets for

$98 million and made a $71 million loan to the estate; the court reasoned in part that the estate had no way to repay the loan other than actually receiving a distribution from or having its partnership interest redeemed by the partnership)];

- the estate's illiquidity does not occur as a result of a "testamentary estate plan to create illiquidity" or action or inaction by the executor when a reasonable alternative could have avoided or mitigated the illiquidity;
- the lender is not a beneficiary or entity in which the beneficiary has control; and
- the estate has no right recover estate tax from the person loaning the funds.

Several of those factors deserve further attention.

(1) **Illiquidity Issues.** Proposed Reg. §20.2053-3(d)(2)(viii) (emphasis added) cites favorably the factor that "[t]he estate's illiquidity does not occur after the decedent's death as a result of the decedent's **testamentary estate plan to create illiquidity**." The preamble (emphasis added) distinguishes the case where "illiquidity has been created **intentionally** (whether **in the estate planning**, or by the estate …") and later adds a reference to a "need for the loan … **contrived** to generate, or increase the amount of, a deduction for the interest expense." A lot of entirely legitimate "estate planning," especially in the context of family-owned and -operated businesses, includes the creation of safeguards to preserve family ownership, which necessarily prevent or seriously limit transfers outside the family. The side effect could of course be viewed as "illiquidity." Estate planners would welcome some assurance in the final regulations that such legitimate business planning is not the target of these regulations, possibly with both positive and negative examples involving family businesses.

This concern is illustrated by the court's analysis in *Estate of Murphy, Jr. v. U.S.*, 104 AFTR 2d 2009-7703 (W.D. Ark. 2009). The estate borrowed $11,040,000 from the FLP on a 9-year *Graegin* note (i.e., which had a fixed term and interest rate and which prohibited prepayment). The estate also borrowed an additional $41.8 million from a prior trust on a "regular" note (i.e., that had a floating interest rate and that permitted prepayment). The IRS argued that the interest should not be deductible for two reasons. (1) The interest was not necessarily incurred "because it was the result of an unnecessary estate-tax avoidance transfer" that drained decedent's estate of liquid assets. The court rejected this reasoning, because the FLP was created "in good faith and for legitimate and significant non-tax purposes," and because decedent retained sufficient assets ($130 million) at the time the FLP was created to pay his living expenses and anticipated estate taxes. (2) The FLP could have sold some of its assets and made a distribution of cash to the estate to pay taxes. The court also rejected this argument, reasoning that "[i]f the executor acted in the best interest of the estate, the courts will not second guess the executor's business judgment. *McKee*, 72 T.C.M. at 333."

(2) **Beneficiary or Family Entity Controlled by a Beneficiary as Lender.** Proposed Reg. §20.2053-3(d)(2)(ix) and (x) view negatively the fact that the lender is a beneficiary of the estate. Specifically, as "factors that collectively may support a finding that the interest expense also satisfies the additional requirements" of the regulations, these clauses state (emphasis added):

> (ix) The lender is **not a beneficiary** of a substantial portion of the value of the estate, and is not an entity over which such a beneficiary has control (within the meaning of section 2701(b)(2)) or the right to compel or direct the making of the loan.
>
> (x) The lender or lenders are **not beneficiaries** of the estate whose individual share of liability under the loan is substantially similar to his or her share of the estate.

It is understandable that the IRS and Treasury would be concerned about structures that might try to convert distributions to beneficiaries in their capacities as beneficiaries into interest payments that are deductible in computing the estate tax. Or concerned about borrowing from a family-owned entity that might own enough liquid assets to have accommodated the funding of the estate's tax and other obligations with a simple distribution, as analyzed in *Estate of Koons v.*

*Commissioner*, 686 Fed. Appx. 779, 119 AFTR 2d 2017-1609 (11th Cir. 2017), *aff'g* T.C. Memo. 2013-94, and cases cited therein. But it is also the experience of many estate planners that the option of borrowing from a family-owned entity, including an operating business, may be not only the most convenient but also the most protective of the viability of that entity or business whose owners are faced with tax liabilities that shareholders of public corporations, for example, could satisfy simply by sales of stock that do not affect the company. Various cases have permitted a deduction for interest paid to a beneficiary or family entity. *E.g.*, *Beat v. U.S.*, 107 AFTR 2d 2011-1804 (D. Kan. 2011); *Estate of Murphy v. U.S.*, 104 AFTR 2d 2009-7703 (W.D. Ark. 2009); *Keller v. U.S.*, 697 F.3d 238, 110 AFTR 2d 2012-6061 (5th Cir. 2012) ($114 million borrowed after death from FLP on a 9-year note; deduction allowed; "we refuse to collapse the Estate and FLP to functionally the same entity simply because they share substantial (though not complete) common control"), *aff'g* 104 AFTR 2d 2009-6015 (S.D. Tex. 2009) and 106 AFTR2d 2010-6309 S.D. Tex. (2010).

The proposed regulations would not prohibit the deduction of interest where the lender is a beneficiary or entity controlled by a beneficiary; they simply offer "factors" to be weighed. Again, estate planners would welcome some assurance in the final regulations that such weighing would be appropriately balanced.

(3) ***Graegin* Loans.** *Graegin* loans (see *Estate of Graegin v. Commissioner*, T.C. Memo. 1988-477), have a set interest rate for a set number of years and prohibit prepayment of either principal or interest; because the amount of interest is fixed and determinable, *Graegin* (and many subsequent cases) have allowed a full upfront undiscounted estate tax deduction for the payment of interest that might be deferred for, say, 15 years.

The effect of the present value and interest limitations under the proposed regulations is that the expense deduction for interest paid on *Graegin* loans will be significantly restricted under the proposed regulations. Even if a deduction is allowed for post-death interest accruing on the loan, the deduction for interest paid after three years will be discounted as discussed above. Proposed Reg. §20.2053-1(d)(6). Furthermore, an interest deduction may be denied totally for some loans after applying the eleven factors listed in the proposed regulations. Those factors generally reflect issues that have been addressed in various cases involving loans obtained to pay estate taxes, but some cases have not been as restrictive as is suggested by the listed factors. For example, as mentioned above, one of the negative factors listed in the proposed regulations is whether the lender is a beneficiary or entity in which the beneficiary has control, but various cases have permitted a deduction for interest paid to a beneficiary or family entity. Also, some courts have refused to second guess the business judgments of executors by not requiring "that an estate totally deplete its liquid assets before an interest expense can be considered necessary," *Estate of Thompson v. Commissioner*, T.C. Memo 1998-325, or requiring an estate to qualify to defer estate taxes under §6166 rather than borrowing funds to pay the estate taxes, *McKee v. Commissioner*, T.C. Memo. 1996-362.

(4) **Illustrative Cases.** The Preamble cited only two cases – one that allowed the deduction (*Graegin*, discussed above) and another that didn't (*Black*).

In *Estate of Black v. Commissioner*, 133 T.C. 340 (2009), an FLP sold about one-third of its very large block of stock in a public company in a secondary offering, generating about $98 million to the FLP, and the FLP loaned $71 million to the estate to pay various taxes, expenses, and a charitable bequest. The estate argued four reasons for allowing an interest deduction. (1) The executor exercised reasonable business judgment when he borrowed funds, (2) the FLP was not required to make a distribution or redeem a partnership interest from the estate, (3) the son was the managing partner and executor and owed fiduciary duties to both the estate and the partnership, and (4) the loan itself was a bona fide loan. The IRS argued that the loan was (1) unnecessary and (2) not bona fide (because the transaction had no economic effect other than to generate an estate tax deduction). The court found that the loan was not necessary, basing its analysis primarily on the "no economic effect" rationale that the IRS gave in its "no bona fide

loan" argument. The court noted that the partnership agreement allowed modifications, and a modification permitting a distribution of stock to the partners or a partial redemption of the estate's interest would not have violated the son's fiduciary duties, as managing partner, to any of the partners. The court reasoned further that the estate had no way to repay the loan other than actually receiving a distribution from or having its partnership interest redeemed by the partnership in return for the stock, which it would then use to discharge the debt. Instead, the partnerships sold the stock and loaned the sale proceeds to the estate. Under the court's analysis, the key factor in denying any deduction for loans obtained to pay debts and expenses seems to be that the loan was not necessary to avoid selling assets. The other cases cited by the taxpayer in which an interest deduction was allowed involved situations where the estate avoided a forced sale of illiquid assets or company stock. In this case, the company stock that was owned by the FLP was in fact sold by the FLP. *See generally* Liss, Estate of Black*: When Is It 'Necessary' to Pay Estate Taxes With Borrowed Funds?,* 112 J. TAX'N (June 2010).

Various other cases have allowed interest deductions for loans from family entities with interesting discussions of some of the 11 factors mentioned in the proposed regulations. One of these is *Estate of Duncan v. Commissioner*, T.C. Memo. 2011-255. In that case, the decedent had transferred a substantial part of his estate, including oil and gas businesses to a revocable trust. The decedent at his death exercised a power of appointment over an irrevocable trust that had been created by decedent's father to appoint the assets into trusts almost identical to trusts created under the revocable trust. The irrevocable trust and the revocable trust had the same trustees and beneficiaries. Following decedent's death in January 2006, the revocable trust borrowed about $6.5 million from the irrevocable trust to cover the estate's shortfall in being able to pay federal and state estate taxes and various administration expenses and debts. The loan was evidenced by a 6.7% 15-year balloon note that prohibited prepayment. A 15-year term was used because the volatility of oil and gas prices made income from the oil and gas businesses difficult to predict. The 6.7% interest rate was the rate quoted by the banking department of the corporate co-trustee for a 15-year bullet loan. (At the time of the loan, the long term AFR was 5.02% and the prime rate was 8.25%.) In fact, the revocable trust ended up being able to generate over $16 million in cash within the first three years, but the note prohibited prepayment. The revocable trust did not expect to generate sufficient cash to repay the loan within three years.

In *Estate of Duncan*, the estate claimed a deduction under § 2053 of about $10.7 million for interest that would be payable at the end of the 15-year term of the loan. The IRS denied any deduction for the interest (although at trial it was willing to allow a deduction for three years of interest). The court determined that the interest was fully deductible. (1) The loan was bona fide debt. Even though the lender and borrower trusts had the same trustees and beneficiaries, the loan still had economic substance because the parties were separate entities that had to be respected under state law. (2) The loan was actually and reasonably necessary. The revocable trust could not meet its obligations without selling its illiquid assets at reduced prices. Because of the trustee's fiduciary duty, the irrevocable trust could not merely purchase assets from the revocable trust without requiring a discount that third parties would apply. The terms of the loan were reasonable and the court refused to second guess the business judgments of the fiduciary acting in the best interests of the trust. The 15-year term was reasonable because of the volatile nature of the anticipated income. The interest rate was reasonable; using the AFR as the interest rate would have been unfair to the irrevocable trust because the AFR represents the appropriate interest rate for extremely low risk U.S. government obligations. The IRS complained that there were no negotiations over the rate, but the court said that the trustees had made a good-faith effort to select a reasonable interest rate and that "formal negotiations would have amounted to nothing more than playacting." (3) The amount of the interest was ascertainable with reasonable certainty. The IRS argued that the loan might be prepaid and that there is no economic interest to enforce the clause prohibiting prepayment. The court found that prepayment would not occur because the two trusts had to look out for their own respective economic interests. If a

prepayment benefited one trust it would be a financial detriment to the other. *See generally* Stephen Liss, *In* Estate of Duncan*, the Tax Court Returns to Traditional* Graegin *Loan Principles*, 116 J. TAX'N 193 (April 2012).

In the future, a case with facts similar to *Estate of Duncan* would be impacted significantly by the positions taken in the proposed regulation (after it is finalized). The interest payments after three years from the date of death would be discounted to the date of death present value using the mid-term AFR (at the date of death) for interest payments in years 4-9 and the long-term AFR for interest payments in years 10-15 as the discount rates. Whether a deduction for the interest payments would be disallowed entirely as a result of applying the 11 factors in Prop. Reg. §20.2053-3(d)(2 is not clear, but the IRS likely anticipates that the explicit reference to those factors in the regulation would bolster its argument that a deduction for the interest payments should be disallowed.

### 3. Deductibility of Amounts Paid Pursuant to Decedent's Personal Guarantee

The proposed regulations treat a claim against the estate based on the decedent's personal guaranty as a "claim founded upon a promise" that is governed by Reg. §20.2053-4(d)(5), which requires

> that the promise or agreement was **bona fide** and **in exchange for adequate and full consideration** in money or money's worth; that is, the promise or agreement must have been bargained for at arm's length and the price must have been an adequate and full equivalent reducible to a money value. (Emphasis added).

The proposed regulations revise Reg. §20.2053-4(d)(5) by restating the existing provision as a new subparagraph (i) titled "In general," and adding a new subparagraph (ii) titled "Decedent's promise to guarantee a debt." Prop. Reg. §20.2053-4(d)(ii).

a. **Bona Fide Requirement**. The bona fide requirement is that the agreement must have been bargained at arm's length and, in the case of a claim involving a family member, the decedent's agreement to guarantee the debt of a family member, a related entity, or a beneficiary must meet the requirements of Reg. §20.2053-1(b)(2)(ii). (This simply reiterates the "bona fide" requirement that applies all deductions for claims under §2053.)

b. **In Exchange for Full Consideration**. A safe harbor is provided for a decedent's guarantee of a debt of an entity in which the decedent had an interest when the guarantee was given. The guarantee will be treated as satisfying the requirement that the agreement be in exchange for adequate and full consideration if **either** of two tests are met:

   (1) At the time the guarantee was given, the decedent had control (within the meaning of §2701(b)(2)) of the entity; or

   (2) To the extent the maximum liability of the decedent under the guarantee did not exceed, at the time the guarantee was given, the fair market value of the decedent's interest in the entity.

c. **Right of Reimbursement.** The amount of the deduction of payment of a guarantee is reduced to the extent of the estate's right of contribution or reimbursement.

d. **Avoiding Double Counting.** Payments made pursuant to a decedent's guarantee of a debt are deductible as a claim only to the extent the guarantee has not been taken into account in valuing an asset of the gross estate under Reg. §20.2053-7 (by reducing the value of the asset by all or some of the amount of an unpaid mortgage or debt against the property) or otherwise.

### 4. Substantiation Requirements for Valuations of Certain Administration Expense Deductions

The regulations permit a deduction for claims against the estate under §2053 before the claim is actually paid in three circumstances: (1) claims for certain ascertainable amounts (Reg. §20.2053-1(d)(4)); (2) claims and counterclaims in a related matter (Reg. §20.2053-4(b); and (3) claims totaling not more than $500,000 (Reg. §20.2053-4(c). The new substantiation rules in the proposed regulations apply to situations (2) and (3). The existing regulations require a "qualified appraisal"(within the meaning of §170) to value such

claims. The IRS has determined that certain elements of a qualified appraisal under §170 do not apply in the context of valuing a claim against the estate. The proposed regulations provide revised rules for a "written appraisal document" that must support the value of claims for purposes of Reg. §20.2053-4(b) and (c). Prop. Reg. §20.2053-4(b)(1)(iv) & Prop. Reg. §20.2053-4(c)(1)(iv). The appraisal requirements are more focused for the §2053 context.

The proposed regulations specify detailed information that must be included in the report. There are limitations on who can give the report; the person must be qualified to appraise the claim and cannot be a member of the decedent's family, a related entity, a beneficiary, a family member of a beneficiary or a related entity as to a beneficiary, or an employee or owner of any of the above. One of the requirements, in Proposed Reg. §20.2053-4(b)(1)(iv)(F) and (c)(i)(iv)(F), is that the appraisal be signed by the appraiser "under penalties of perjury." That is apparently an unprecedented requirement, and it is especially surprising in a context that requires the appraiser to be unrelated and therefore less likely to have first-hand knowledge of the underlying facts.

### 5. Effective Date

As proposed, the changes would apply to the estates of decedents dying on or after the date the final regulations are published in the Federal Register.