NEW JERSEY STATE BAR ASSOCIATION

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VIA EMAIL AND REGULAR MAIL
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Re: Comments to Proposed New Rule N.J.A.C. 18:26

Dear Ms. Lipari:

On behalf of the New Jersey State Bar Association (NJSBA), I thank you for the opportunity to submit comments on the proposed new Transfer Inheritance Tax and Estate Tax regulations (the "Regulations") published on July 17, 2017. We have reviewed the regulations and submit the following comments for your consideration.

N.J.A.C. Title 18, Chapter 26, Subchapter 2.

The proposed title of N.J.A.C. Title 18, Chapter 26, Subchapter 2 is "SUBCHAPTER 2. IMPOSITION AND COMPUTATION OF TAX". To make it clear that this subchapter refers to inheritance tax, and not estate tax, the NJSBA recommends an amended title to read "SUBCHAPTER 2. IMPOSITION AND COMPUTATION OF TRANSFER INHERITANCE TAX".

N.J.A.C. 18:26-2.1. Nature of Tax.

The Division proposes to include 18:26-2.1, which provides as follows:

> (a) The Act imposes a tax upon transfers of the value of $500.00 or over, or of any interest thereon or income therefrom, held in trust or otherwise, to or for the use of any transferee, as set forth under N.J.S.A. 54:34-1, including, but not limited to, the following:
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> 1. In the case of a resident decedent, where such transfers consist of real or tangible personal property situated in this State or intangible personal property wherever situated, owned by such decedent; and

2. In the case of a nonresident decedent, where such transfers consist of real or tangible personal property owned by such decedent situated in this State at the time of death.

The concern is that 18:26-2.1(a)1 does not limit imposition of tax for resident decedents to transfers at death or within three years of death, as set forth in N.J.S.A. 54:34-1. Thus, the NJSBA recommends that 18:26-2.1(a)1 be revised to include the following bold language: "In the case of a resident decedent, where such transfers consist of real or tangible personal property situated in this State or intangible personal property wherever situated, owned by such decedent **at the time of death or within three years of the decedent's death**;".

N.J.A.C. 18:26-2.10. Distribution by agreement.

The division proposes to revise the wording of this section to delete the phrase "admitted to probate". The NJSBA recommends that the phrase "admitted to probate" be retained. The probate process is the legal mechanism for validating a document and proving that it is the valid will of the decedent. Removing the requirement that the will be admitted to probate circumvents the right of the Judiciary to determine whether a document is a decedent's valid will. Two or more unprobated documents may be proffered as a decedent's will. This would result in an ambiguity. Yet the division would have authority to choose between or among the documents and impose a tax based on a document that has not been proven to be a valid last will. Deleting the phrase "admitted to probate" results in lack of clarity for the administrative process and defeats the purpose of the Regulations to make the process clearer, rather than adding ambiguity.

N.J.A.C. 18:26-3A.2(b) and N.J.A.C. 18:26-3B.2(b). Amount of the tax and certain valuations, and N.J.A.C. 18:26-8.12(b). Partnerships.

The division proposes to add N.J.A.C. 18:26-3A.2(b), N.J.A.C. 18:26-3B.2(b) and N.J.A.C. 18:26-8.12(b) regarding the valuation and calculation of tax on "family limited partnerships" which seeks to define that term and to either deny any discount when valuing such interests or to generally limit any discount to 10 percent, depending on the circumstances. The statute requires that interests in all limited partnerships should be valued based on the "Clear Market Value" of such interest, just like any other assets of the estate. The NJSBA believes this attempt to deny discounts is beyond the scope of the statutory rule that seeks to tax fair value or clear market value, a factual determination made by an appraiser, and there is no authority for the disparate treatment of interests in so called "family limited partnerships" or for the limitation or denial of any valuation discounts. Further, the attempt to limit discounts to a 10 percent maximum is an entirely arbitrary percentage that is not found in the statute or law or fact. Accordingly, the NJSBA recommends these subsections be stricken.

N.J.A.C. 18:26-3A.4 and N.J.A.C. 18:26-3B.3. Reduction of tax; out-of-State property.

The division proposes to add N.J.A.C. 18:26-3A.4 and N.J.A.C. 18:26-3B.3 relating to the computation of tax as reduced by the portion of tax attributable to property located outside New Jersey and related examples. N.J.A.C. 18:26-3A.4(c)4 and N.J.A.C. 18:26-3B.3(c)4 provide the following example:

> "4. Mr. J, a nonresident, creates a trust for the benefit of his surviving spouse, Mrs. J, which includes intangible property (stocks and bonds). After Mr. J dies, Mrs. J changes domicile to New Jersey, and dies as a New Jersey resident. The trust proceeds, as intangible personal property, would be considered New Jersey property, not out-of-State property. Therefore, the out-of-State credit calculated under (a) above is not allowable in this instance for the New Jersey estate tax."

The concern is that the example does not delineate between a nonmarital or credit shelter-type of trust for a spouse, which is not includible in the estate of the surviving spouse upon his or her death, and a marital trust for which a qualified terminable interest property (QTIP) election was made, thereby making it includible in the surviving spouse's estate upon his or her death. If not clarified, it discourages a surviving spouse for whom an out-of-state trust was created from moving back to New Jersey for fear of tax inclusion of the trust upon the spouse's death. Moreover, the attempted taxation of a nonresident trust, administered under the laws of another sovereign state, is likely an unconstitutional attempt to tax property over which the state of New Jersey does not have legal authority or control. There is no legal basis to treat a trust that is validly established outside the state of New Jersey, differently from real estate that is situated in another jurisdiction. Accordingly, the NJSBA believes the example is unclear and unnecessary, and recommends that it be stricken from the regulations.

N.J.A.C. 18:26-3A.6 and N.J.A.C. 18:26-3 B.5. Lien

N.J.A.C. 18:26-3A.6 and N.J.A.C. 18:26-3 B.5 both provide that the estate tax imposed on the estate of a resident decedent remains a lien on all property of a decedent until paid. The concern is that the tax is a lien "until paid", so the duration of the lien is unknown. By contrast, proposed N.J.A.C. 18:26-10.2 and N.J.S. 54:35-5 (as amended) provide that unpaid transfer inheritance tax is a lien for a period of 15 years from the death of the decedent.

The NJSBA has proposed a bill to amend N.J.S. 54:38-6 to provide that unpaid estate tax shall remain a lien on all property of the decedent as of the date of the decedent's death for a period of 15 years. Thus, the NJSBA suggests that N.J.A.C. 18:26-3A.6 and N.J.A.C. 18:26-3 B.5 both be revised to include language similar to N.J.A.C. 18:26-10.2, as follows:

> "(a) The New Jersey estate tax whether or not assessed or levied constitutes a lien on all the property owned by the decedent as of the date of death for the period set forth in N.J.S. 54:38-6 (as amended) unless sooner paid or secured by a bond. Except as otherwise provided in this chapter, no property owned by the decedent as of the decedent's date of death may be transferred without the written consent of the Director.
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> (b) After the period set forth in N.J.S. 54:38-6 (as amended) has expired no proceeding may be instituted to assess and collect the New Jersey estate tax or any interest or penalties due thereon. No notice or consent to transfer is required for the transfer of any real or personal property and no personal liability remains on any executor, administrator, trustee, grantee, donee, buyer, devisee, legatee, heir, next of kin, or beneficiary; however, this does not affect any right of the State under any certificate of debt, decree, or

judgment for taxes, interest, and penalties duly recorded with the clerk of the Superior Court, or with any county clerk, or to assess and enforce the collection of any tax including any interest and penalties pursuant to the terms of any bond or other agreement securing the payment of the tax, interest, and penalties."

N.J.A.C. 18:26-3A.8(d) and N.J.A.C. 18:26-3B.7(d). Filing of tax return and other information.

The division proposes changes to N.J.A.C. 18:26-3A.8 and the addition of N.J.A.C. 18:26-3B.7. However, the concern is that there are issues regarding the application of N.J.A.C. 18:26-3A.8(d) and N.J.A.C. 18:26-3B.7(d) and the requirement to file a Federal estate tax return in order to make a "Portability Election" even if a Federal estate tax return is not otherwise required to be filed. N.J.A.C. 18:26-3A.8(d) and N.J.A.C. 18:26-3B.7(d) both provide that: "In those cases where a taxpayer makes an election for Federal estate tax purposes, a like election must be made for New Jersey estate tax purposes. Assets and deductions must be treated in the same manner for both Federal and New Jersey estate tax purposes."

This is commonly known as the "Consistency Rule" and the regulations are intended to provide consistency for tax purposes for married and civil union couples for Federal tax treatment and New Jersey tax treatment, with respect to marital trusts. However, in some circumstances, a Federal estate tax return is not required to be filed, since the estate is under the Federal filing threshold (i.e., $5,490,000 in 2017), but a Federal estate tax return is filed solely to make a Federal "Portability Election" to allow the surviving spouse to utilize the deceased spouse's unused Federal estate tax exclusion amount. More importantly, the Federal laws related to making a valid QTIP election have changed. Prior to 2016, Revenue Procedure 2001-38 provided that the Internal Revenue Service (Service) would disregard and treat as a nullity for federal estate, gift, and generation-skipping transfer tax purposes any QTIP election made if the election was not necessary to reduce the Federal estate tax liability to zero. However, in 2016, Revenue Procedure 2016-49 modified and superseded Revenue Procedure 2001-38 to eliminate the automatic voiding of any such "unnecessary" QTIP election. Revenue Procedure 2001-38 confirms that a QTIP election made on a return Federal estate tax returned filed solely to make a Federal "Portability Election" will be allowed by the Service and will no longer be disregarded as void.

Based on the change in the law, the NJSBA recommends that N.J.A.C. 18:26-3A.8 and N.J.A.C. 18:26-3B.7 be revised to allow a "New Jersey only QTIP Election" in cases where a Federal estate tax return is not required to be filed, whether or not a Federal estate tax return is actually filed. The NJSBA recommends that N.J.A.C. 18:26-3A.8(d) and N.J.A.C. 18:26-3B.7(d) be revised to add the following sentence at the end: "Provided, however, that if a Federal estate tax return is not required to be filed, a qualified terminable interest property ("QTIP") Election is permitted for New Jersey estate tax purposes, whether or not a Federal estate tax return is filed."

N.J.A.C. 18:26-3C.2. Transfer of property requires waiver.

The division proposes to add N.J.A.C. 18:26-3C.2, which provides that even though no estate tax will be imposed on the estate of any resident decedent dying after Dec. 31, 2017, N.J.S.A. 54:38-6 requires that property owned by the decedent as of the date of the decedent's death may be transferred only with the

written consent of the director in compliance with the waiver requirements of N.J.A.C. 18:26-11. N.J.A.C. 18:26-11.15 generally requires a waiver (written consent of the Director) for the transfer of property unless the gross estate of a resident decedent does not exceed $200. N.J.S.A. 54:38-6 relates to assessment and collection of taxes and the liability of administrators, executors, trustees, grantees, donees and vendees, for any and all such taxes until paid. Requiring written consent of the director to transfer property is a mechanism to ensure collection of such taxes. However, if no such estate taxes will be assessed and collected, then it no longer makes sense to require written consent of the director for such transfers. Further, this proposed rule is more onerous than current law and will make administration of small estates (the threshold for which was $675,000 and is now $2,000,000 for 2017 decedents) much more difficult. Moreover, there is no benefit to the state for imposing the requirement since there will be no estate tax imposed. Thus, the NJSBA believes that there is no longer a need for such a waiver requirement if there is no estate tax due for the estate of any resident decedent dying after Dec. 31, 2017.

N.J.A.C. 18:26-7.9. Administration expenses.

The division proposes rewording this section, but makes no substantive changes. The NJSBA again recommends that this section should clarify that if an estate includes a business previously operated by the decedent as a sole proprietorship is to be liquidated, insofar as the value of the estate includes the "Clear Market Value" of that business, there should be allowed as an administrative expense deduction, the reasonable costs of goods sold and selling expenses. Thus, the NJSBA recommends that this section should be revised as follows: "A deduction is allowed for all the reasonable and ordinary expenses of administering a decedent's estate including reasonable and ordinary fees for executors, administrators and attorneys, reasonable costs of goods sold and selling expenses of liquidating a decedent's business previously operated as a sole proprietorship, and, in addition, the reasonable cost incurred on an appeal from a determination of the Inheritance Tax Bureau.

N.J.A.C. 18:26-7.10(a). Executor's and administrator's expenses

The current and proposed regulations state that the deduction for executor's or administrator's commissions is determined in accordance with the applicable statute, N.J.S. 3B:18-14. It then restates those percentages. The NJSBA recommends not to include the statutory percentage rates in the regulations because including them has the potential to cause confusion or other problems if the statutory rates are amended in the future. Thus, the NJSBA recommends the recitation of the statutory commission percentage rates be stricken from the regulations and that N.J.A.C. 18:26-7.10(a) be revised to read as follows:

> "In the absence of a judgment of the court exercising jurisdiction over the probate of an estate, the deduction for executor's or administrator's commissions is determined in accordance with N.J.S.A. 3B:18-14. Where the amount claimed by the executor or administrator or allowed by the court is less than that determined by the application of the rates set forth in N.J.S.A. 3B:18-14, only such amount as claimed or allowed shall be permitted as a deduction."

N.J.A.C. 18:26-7.10(d). Executor's and administrator's expenses.

The division proposes to make no substantive revisions to this subsection. This subsection states that, for inheritance tax purposes, a deduction will be allowed for executor's or administrator's commissions on real estate only if the property is actually sold by the executor, or administrator, or if the property is "expressly directed to be sold by the terms of the decedent's will." The NJSBA believes there is no statutory authority for the requirement that the property must be sold as outlined in the regulations and recommends striking this subsection from the regulations.

N.J.A.C. 18:26-8.9. Fractional interest in real property.

The division proposes to make no substantive changes to this section regarding the valuation of fractional interests in real property. The statute requires that fractional interests in real property be valued based on the "Clear Market Value" of such property, just like any other assets of the estate. The attempt to change the law through regulation rather than providing clarification is unacceptable. There is no authority for the disparate treatment of fractional interests in real property. Therefore, the NJSBA recommends striking this section from the regulations.

N.J.A.C. 18:26-8.13 "Close" or "family" corporation

The division proposes to add this section, which provides that if the stock of a closely held corporation or family corporation is "incapable of being valued on the basis of bona fide sales" then, in addition to any appraisal of such stock, numerous other detailed data for up to five years before the decedent's date of death must be supplied with the filing of the return. The meaning of "incapable of being valued on the basis of bona fide sales" is unclear, but it seems to require the additional data outlined in proposed N.J.A.C. 18:26-8.13 in almost all cases.

The NJSBA believes it is overly burdensome to require this information in addition to an appraisal The director may request additional information upon review of the filed return and appraisal, if the director believes it is necessary and appropriate in order to value the stock. Further, the statute requires that the value of the stock of any closely held corporation be based on the "Clear Market Value" of such stock, just like any other assets of the estate. Respectfully, the NJSBA believes there is no authority for the disparate treatment of the stock of a closely held corporation and recommends striking this section of from the regulations.

N.J.A.C. 18:26-8.14. Assets of close corporation or partnership of known market value.

The division proposes to revise subsection (a) of this section to provide as follows: "When determining book value of the stock of a closely held corporation or interest in a partnership, no discount will be allowed on assets that have a definite, established, and known daily market value and are readily reducible to cash at that value (that is, stocks and bonds)."

First, it is unclear whether a discount will be disallowed for the value of the entire entity, or just the underlying assets. Further, the value of the stock of a closely held corporation or interest in a partnership is based on the value of the entity, not its separate underlying assets. If this subsection seeks to deny any discount in valuing any closely held corporation or interest in a partnership that owns marketable securities, there is no authority for such a blanket denial of any valuation discounts for a closely held

corporation or partnership, even if it includes marketable securities. Thus, the NJSBA recommends striking this section from the regulations.

N.J.A.C. 18:26-11.1(c)5(v). Consent to transfer; generally.

The division proposes to revise subsection (c)5(v) of this section to provide that an affidavit of waiver by a Class "A" transferee cannot be used for "Other circumstances determined by the Director or not specifically allowed in N.J.A.C. 18:26-11 or by statute.". The NJSBA suggests that this statement is ambiguous and overly broad. As such, it recommends that N.J.A.C. 18:26-11.1(c)5(v) be revised as follows: "Other circumstances not specifically allowed in N.J.A.C. 18:26-11 or by statute."

N.J.A.C. 18:26-11.21(a)1. Specific Waiver Situations.

The division proposes to add N.J.A.C. 18:26-11.21(a)1, which requires a waiver for the transfer of any Individual Retirement Account (IRA) in which the funds are held in an institution which would otherwise require a waiver, as specified in N.J.A.C. 18:26-11.1(a). The NJSBA believes there is no authority to treat an IRA any differently from any other qualified retirement asset, such as a pension, which is exempt from the waiver requirement. In addition, an IRA is similar to a trust in that it passes non-probate property to a named beneficiary and thus, should be exempt under N.J.A.C. 18:26-11.13(c). Imposing a waiver requirement on retirement accounts creates a significant administrative burden on taxpayers. Further, the time required to obtain a waiver might cause negative income tax ramifications. For example, an IRA might need to be segregated into separate non-spousal inherited IRA accounts by Oct. 31 of the year following the year of the account owner's death, and might be prevented from meeting this important tax deadline if a waiver is required and not yet obtained. Also, the beneficiary of an IRA might be prevented from timely taking a required minimum distribution if a waiver is required and not yet obtained at the time the distribution must be made in order to avoid penalties. As the NJSBA believes there is no authority to add this requirement and that it may cause negative income tax ramifications, it recommends that N.J.A.C. 18:26-11.21(a)(1) be stricken from the regulations.

N.J.A.C. 18:26-11.22. Transfer of stock of a New Jersey corporation.

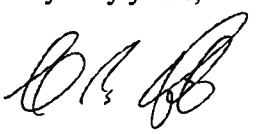
The division proposes to add N.J.A.C. 18:26-11.22, which provides that no New Jersey corporation may transfer any of its stock of a resident decedent, even if held in trust for a resident decedent, without the written consent of the director. The NJSBA believes this statement is overly restrictive and could cause negative tax and legal consequences. As such, the NJSBA recommends N.J.A.C. 18:26-11.22 be stricken from the regulations.

N.J.A.C. 18:26-12.2. Administration of Transfer Inheritance Tax and New Jersey Estate Tax.

There is a typographical error in N.J.A.C. 18:26-12.2(a)1iii, and the NJSBA recommends that "devise" be revised to read "devisee."

Thank you for the opportunity to submit these comments and for your consideration of same.

Very truly yours,



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