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State Responses to the Repeal of the State Death Tax Credit

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CHAPTER 7

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Synopsis

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¶ 700 Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (Public Law 107-16) and the State Death Tax Credit of Internal Revenue Code (IRC) § 2011

¶ 700.1 Rates and Exempt Amount

The basic provisions of EGTRRA are by now familiar: the basic structure of the estate tax component of the "unified transfer tax" is altered so that the unified credit (IRC § 2010) increases and the highest marginal rate of estate tax and generation skipping (GST) tax decreases until both taxes are repealed for 2010 but then come back to life in 2011 when the act "sunsets."

Year	Top Rate	Exempt Amount
2002	50%	$1,000,000
2003	49%	$1,000,000
2004	48%	$1,500,000
2005	47%	$1,500,000
2006	46%	$2,000,000
2007	45%	$2,000,000
2008	45%	$2,000,000
2009	45%	$3,500,000
2010	repealed	not applicable
2011	55%	$1,000,000

In addition, beginning in 2002 the 5 percent surtax on estates in excess of $10,000,000 is repealed.

¶ 700.2 Deunification

The "unified transfer tax" is "deunified" beginning in 2004 when the gift tax exempt amount will remain $1,000,000. After repeal in 2010, the gift tax will continue as a flat tax at a 35 percent rate which will apply to cumulative transfers exceeding $1,000,000.

¶ 700.3 Repeal of GST Tax

The generation skipping transfer tax is repealed along with the estate tax and the exempt amount increases with inflation until 2004 when it will be equal to the estate tax exempt amount and the tax rate will be equal to the highest estate tax rate.

¶ 700.4 State Death Tax Credit

A. EGTRRA Provisions

The state death tax credit (IRC § 2011) is gradually phased out by being reduced by 25 percent a year until it is eliminated in 2005. The highest rate of credit will be 12 percent in 2002, 8 percent in 2003, 4 percent in 2004 and 0 percent in 2005 when there will be a deduction for state death taxes paid.

B. History of IRC § 2011

The rationale for the state death tax credit is related to the structure of state taxation at the time of the creation of the modern federal estate tax in 1916. At that time, the states derived not inconsiderable revenues from state death taxes, usually inheritance, as opposed to estate, taxes. To quiet fears that the new federal tax would diminish state revenues, the state death tax credit was created in 1924 and enlarged in 1926 to give the states part of the revenue that would otherwise go to the federal government.

The credit did more than simply share the federal government's revenue with the states. Because the amount of the credit would be paid in tax no matter what, a state content with levying an estate tax equal to the credit could in effect raise revenue without adding to the burden on the taxpayer (who in this situation really is the person or persons who are the beneficiaries of the estate).

Not surprisingly, "sop" or "pick up" taxes became very popular, although several states continued to levy independent estate taxes, usually structured as inheritance taxes. In the modern world, however, these taxes seldom exceeded the state death tax credit, at least for bequests to family members. These states also have sop taxes to make sure that they receive the full benefit of the federal credit.

C. Revenue Effects of EGTRRA

The reduction in the credit, therefore, takes from the states revenues they have counted on for decades. To illustrate, before EGTRRA every incremental dollar of tax on an estate in excess of $10,100,000 (which was subject to the highest state death tax credit rate, 16 percent and subject to the maximum federal rate of 55 percent) was shared between the federal and state governments, the former receiving $0.39 and the latter $0.16.

EGTRRA is structured in such a way, however, as to use the phase out of the state death tax credit to minimize the loss of federal revenue. Taking the taxable estate in excess of $10,100,000 again, the federal top rate is 50 percent in 2002 but the top state death tax credit rate is 12 percent. Each incremental dollar of tax, therefore, is shared with $0.38 going to the federal government and $0.12 to the state. Compared to 2001, then, federal revenue has declined only $0.01, even with the reduction in the top rate, while state revenue has declined $0.04. The effect in 2003 is even more dramatic. In 2003 the top federal rate is 49 percent but the state death tax credit rate is only 8 percent. Thus $0.41 of that dollar of tax goes to the federal government and $0.08 to the state. Federal revenue has increased.

¶ 701 Factors Influencing State Reactions

¶ 701.1 Administrative and Practical Constraints

States which contented themselves with an estate tax exactly equal to the federal credit did not need an elaborate administrative structure to ensure collection of the tax. Because the state's estate tax was the same as the federal tax, a copy of the federal form 706 could suffice as the state return, and the state could rely on federal audits of returns to police the system. Not every estate underwent a federal audit, but the cost of creating a state audit system might very well be greater than the marginal additional revenue collected (and would make the state a focus of taxpayer resentment—the motto could have been, "let the feds do the dirty work"). Replacing the lost revenue with an independent estate tax would likely require the creation of a new administrative structure, an expensive undertaking which could not be completed quickly.

Addressing the problem of lost revenue by simply not conforming to the decrease in the state death tax credit and the increase in the applicable exclusion amount presents the same difficulty. Once an estate has to file a return and pay tax to the state but does not have to file a federal return, the state needs its own administrative apparatus. (It is widely believed that the decision by the New York State Department of Taxation and Finance to adopt for state purposes the immediate increase in the applicable exclusion amount to $1,000,000 was influenced, at least in part, by the dismantling of the state's administrative structure after the state adopted a sop tax in February 2000.)

An intermediate position which prevents some of the revenue loss would make the state tax equal to the pre-EGTRRA state death tax credit but conform to the increases in the applicable exclusion amount. If the state is willing to accept those increases, its tax authorities could still accept the federal 706 as its return and rely on federal audits, even after the state tax becomes a deduction in 2005.

¶ 701.2 Political Constraints

One of the advantages of the sop tax, of course, is its "invisibility." The state simply collects money that would otherwise pass to the federal government and the overall tax burden is not increased. Any action which "decouples" the state tax from the federal provisions makes it clear that the state is levying a tax that otherwise would not be paid. The effect is most obvious if the state does not go along with the increase in the applicable exclusion amount. Even though no federal tax is due, something must still be paid to the state. If the state simply clings to the pre-EGTRRA state death tax credit the state will exact a tax only when the federal government does, but estate beneficiaries will probably not be pleased to learn that the overall tax bill is higher than it would otherwise be. The second alternative might be more acceptable after the state tax becomes a deduction. Taxpayers are accustomed to deducting state taxes for federal purposes and may be slightly more accepting of a state "death tax" that is deductible.

In any event, EGTRRA is a monument to the political unpopularity of "death taxes" and that unpopularity may make it difficult for state legislatures to do anything which can be portrayed as "raising taxes."

¶ 701.3 State Constitutional and Statutory Restraints

Some state legislatures, however, may be in the perhaps fortunate position of being able to raise taxes by doing nothing because state tax law does not automatically conform to changes in federal law. Because of its wealth, size, and prominence in the trusts and estates world, New York is probably the most notorious example of a state whose estate tax law can be conformed to the federal law only by legislative action. In other states, the existing tax legislation freezes the state death tax credit at its amount as of a certain date.

The relevant Virginia statute, for example, generally conforms to changes in federal law: "Any reference in this chapter to the laws of the United States relating to federal estate and gift taxes means the provisions of the Internal Revenue Code of 1954, and amendments thereto, and other provisions of the law of the United States relating to federal estate and gift taxes, as the same may be or become effective at any time or from time to time." (Va. Code Ann. § 58.1-901) The same statute also provides, however, that the amount of the federal state death tax credit shall "in no event" be less than the amount allowable by IRC § 2011 as it existed on January 1, 1978. It would seem, then, that Virginia law will conform to all the changes contained in EGTRRA *except* the decrease in the state death tax credit.

Similarly, the relevant statute in the District of Columbia (D.C. Code § 47-3701(4)) before its recent amendment, defined the "federal credit" as the credit under IRC § 2011, but "in no event" was the amount of the credit to be less than that provided in the Internal Revenue Code as it existed on January 1, 1986. The same section of the District's Code in subdivision (6) tied all references to the Internal Revenue Code to the estate and gift tax provisions as they existed on January 1, 1986. Presumably, not only would the District not recognize EGTRRA's changes in the state death tax credit, it did not give effect to the increases in the applicable exclusion amount which began in 1998 under the provisions of the Taxpayer Relief Act of 1997 (P.L. 105-34). These provisions were amended by the "Inheritance and Estate Tax Emergency Act of 2002" approved July 23, 2002 (D.C. Laws Act 14-448). The amendment defines "federal credit" for the estates of decedents dying on or after January 1, 2002 as the "maximum amount" of the state death tax credit and provides that "[a]ny scheduled increase" in the unified credit shall not apply. The reference to the Internal Revenue Code is updated to January 1, 2001, thus freezing the state death tax credit at pre-EGTRRA levels, and freezing the unified credit at $220,500 which corresponds to an applicable exclusion amount of $675,000, assuming that the prohibition on applying scheduled increases in the unified credit applies to the post 2001 increases under TRA 1997 as well as those under EGTRRA.

The complexities of the situation in both Virginia and the District of Columbia are not unique. While it may seem simple to classify state responses to EGTRRA's repeal of the state death tax credit as either "conformity" or "decoupling," realizing that each classification must apply separately to the state death tax credit and the applicable exclusion amount, the complications come in the details. These details are explored for each state in ¶ 706, below.

In exploring those details, however, it must be kept in mind that the situation in many states is not as straightforward as it may seem. Many state statutes simply reference the Internal Revenue Code "as amended." In most cases, one can assume that such a statute will automatically track changes in the IRC and, therefore, without more, a state with such a statute will be "coupled" to federal law and will phase out its sop tax. The taxing authorities in Ohio, however, have decided that the "as amended" language cannot automatically conform state law to federal law. (*See* Marc Friedman, "The Economic Growth and Tax Relief Reconciliation Act of 2001 and the Ohio Additional Estate Tax," 13 *Probate Law Journal* 57 (Jan./Feb. 2003). Mr. Friedman is legal counsel to the Estate Tax Division of the Ohio Department of Taxation.) The argument rests on an Ohio Supreme Court case, *State v. Gill*, 63 Ohio St. 3d 53, 584 N.E.2d 1200 (1992), which held that a criminal statute which referenced federal law as amended did not contravene the Ohio Constitution's prohibition of delegation of legislative power in Article II, section 1, because "as amended" referred to the federal statute as it read on the day the state legislation was adopted. The doctrine was held to incorporation of amendments to federal law into the Ohio estate tax in *Matter of Hughes*, 1980 Ohio App. LEXIS 12207.

Such prohibitions on delegation are not uncommon. The well known New York prohibition on automatic conformity rests in part on a similar provision in Article III, section 16. As noted in ¶ 706.38, below, the Oregon Supreme Court has also held that automatic conformity contravenes a constitutional prohibition on delegation of legislative power. It is possible that other states' statutes are similarly limited.

¶ 702 Planning Under the New Regime

¶ 702.1 The Credit Shelter Disposition and the State Death Tax Credit

The state death tax credit has always played a role in planning. By using the ~~state~~ death tax credit it is possible to increase the amount passing to the credit shelter vehicle when using a marital formula clause. (A formula clause can be used to separate the property sheltered from tax by the unified credit from the rest of the estate in any context but by far the most common use is in connection with the marital deduction.) This phenomenon is caused by the way the state death tax credit is applied and is most clearly seen by examining the estate and generation skipping tax return, Internal Revenue Form 706. After the calculation of the gross estate tax (line 8) the available unified credit is subtracted (line 11) and from the remainder (line 12) is subtracted the state death tax credit (line 13). Theoretically, because the state death tax credit represents a sharing of the tax revenue with the states, the gross estate tax offset by the unified credit includes the tax that would otherwise be shared between the state and federal governments. Yet the state death tax credit which represents the state's share of the offset gross estate tax is subtracted on line 13.

Of course, the state death tax credit cannot exceed the estate tax remaining after subtraction of the unified credit (line 12). Therefore, if the formula has worked to create a taxable estate exactly equal to the applicable exclusion amount, there will be no state death tax credit. However, once the taxable estate exceeds the applicable exclusion amount, the entire state death tax credit is available to offset the resulting tax. The taxable estate can be increased, therefore, by an amount that will generate a tax equal to the available state death tax credit.

Example: Year of death, 2003, applicable exclusion amount $1,000,000, state death tax credit 50 percent of the pre-EGTRRA amount. The maximum shelter amount is $1,043,456. (The IRC § 2001 tax on that amount is $363,617. The IRC § 2010 unified credit is $345,800 reducing the tax to $17,817 which is exactly the state death tax credit under IRC § 2011, as reduced by EGTRRA.)

¶ 702.2 States Fully Conforming to EGTRRA

The lawyer and the client must decide whether the increase in the sheltered amount is worth paying a tax to the state that otherwise would not be paid (remember, if the shelter amount is limited to the amount the tax on which is exactly offset by the IRC § 2010 unified credit, there will be no federal estate tax and no state death tax credit). In states conforming to EGTRRA, the answer is usually "no." Many clients may simply refuse to pay an unnecessary tax. Others will be adamant that the couple's capital must not be diminished by taxes at the first death if the survivor is to be able to maintain his or her lifestyle.

The advantage of increasing the sheltered amount, of course, is the reduction of the marital deduction gift which will be taxed when the surviving spouse dies. Even before the enactment of EGTRRA trying to determine the desirability of obtaining that advantage involved several factors difficult to determine precisely: how long the surviving spouse will live, how fast the increase in the shelter amount will grow to offset the loss of the state tax paid, how much of the principal of the marital gift will the survivor consume or give to family members. After EGTRRA the factors include the increasing applicable exemption amount and the possibility of repeal of the estate tax. The difficulty in most situations of evaluating these factors will probably lead most to forgo increasing the credit shelter through use of the state death tax credit.

This was the usual conclusion before EGTRRA complicated matters. Perhaps the best illustration of the prevalent attitude toward the question of taking advantage of the shelter increase in true sop tax situations is what happened in New York when the state adopted a sop tax. For decades New York levied an independent estate tax which exceeded the amount of the § 2011 credit and had an applicable exemption amount much smaller than the federal equivalent. In such a situation, increasing the shelter amount by taking advantage of the § 2011 credit produces a very small increase in tax due the state (see ¶ 702.4 below) and most New York wills which included formula bequests referred to the amount which can pass tax free taking into account the unified credit and the state death tax credit (and in some situations, other credits as well). When the sop tax became effective many foresaw numerous construction proceedings to eliminate the reference to the state death tax credit so that "unnecessary" tax would not be paid to the state. In order to forestall the resulting delay and expense, the New York State Bar Association sponsored and the Legislature and Governor enacted into law a new section 2-1.12 of the EPTL. The statute provides that a formula contained in a will or trust created prior to February 1, 2000 which "in sum or substance [provides] for a bequest of the maximum amount of property that can be sheltered from federal estate tax by reason of available credits against such tax" and the formula was not amended at any time after January 31, 2000 then, "unless the instrument containing such formula specifically provides that there are non-tax reasons for taking the federal credit for state death taxes into account, such formula shall be deemed not to include a reference to the federal credit for state death taxes."

¶ 702.3 States with a Decoupled State Death Tax Credit

In states which conform to the increase in the applicable exclusion amount (which includes states adopting the increases under EGTRRA and in those which have conformed to some of the increases, usually to $1,000,000 which equals conformity through 2003) but continue to measure their state tax by the old state death tax credit, use of the state death tax credit to increase the credit shelter amount is even more unappealing than it is in a true sop tax situation.

Example: Year of death, 2003, applicable exclusion amount $1,000,000, state death tax credit 50 percent of the pre-EGTRRA amount, but state continues to levy a tax equal to the pre-EGTRRA state death tax credit. The maximum shelter amount is still $1,043,456 (see **Example** in ¶ 702.2). The state tax, however, is $35,633, twice the state death tax credit allowable under EGTRRA. The price of the $43,456 increase in the sheltered amount is a tax equal to 82 percent of the increase.

One can assume that very few clients would view the use of the state death tax credit in this situation favorably and will be content to limit the credit shelter to the applicable exclusion amount.

¶ 702.4 States with Decoupled Applicable Exclusion Amount and § 2011 Credit

The situation is different in states which have an applicable exclusion amount less than the federal amount. In these states, tax will be due the state even if there is no federal estate tax due. Usually, using the state death tax credit to increase the sheltered amount will produce relatively little increase in state tax.

> **Example:** Year of death, 2004, federal applicable exclusion amount \$1,500,000, state applicable exclusion amount \$1,000,000, state continues to levy tax equal to the pre-EGTRRA state death tax credit. A credit shelter disposition of \$1,500,000 will generate no federal estate tax but will generate a state tax of \$64,400. Adding \$37,097 to the credit shelter will generate a federal tax of \$16,694 (45 percent of the amount over the applicable exclusion amount, which is the start of the 45 percent bracket) offset by a § 2011 credit of \$16,694. Under pre-EGTRRA law, the state death tax credit on a taxable estate of \$1,537,097 is \$66,776 (4 times the § 2011 credit because EGTRRA makes the state death tax credit allowable in 2004 equal to one-fourth of the pre-EGTRRA credit) which means that the state estate tax increases from \$64,400 to \$66,776. The price of increasing the credit shelter by \$37,097, therefore, is only \$2,376 additional state tax.

Many clients might view the addition to the credit shelter worth an additional \$2,376 in tax paid to the state. Of course, the question becomes moot after 2004 when the state death tax credit is repealed and replaced by a deduction (IRC § 1058).

There is another complication that can arise in states which have decoupled from the increase in the applicable exclusion amount and the decrease in the § 2011 credit if state law freezes all the estate tax provisions as they were before the enactment of EGTRRA. The 2001 act repeals the deduction for qualified family owned business interests (QFOBIs) (IRC § 2047) for estates of decedents dying after December 31, 2003. In combination with the unified credit, the QFOBI deduction shelters from tax a maximum of \$1,300,000. With the increase in the applicable exclusion amount to \$1,500,000 in 2004, the QFOBI deduction does not give any additional benefit to the estates of family business owners. After 2003, however, in a state like New York where the estate tax law is federal law without any provisions that are part of EGTRRA (a "true" pre-EGTRRA freeze) calculating the state tax will require using the § 2047 deduction for QFOBIs where it is available. In such a jurisdiction, calculating the state tax will not always involve simply modifying the numbers on the federal estate tax form to reflect a smaller applicable exclusion amount and a larger state death tax credit. In appropriate situations the QFOBI deduction not only may but must be used in the state calculation if its use will reduce the state tax.

¶ 702.5 Avoiding State Tax in States with Decoupled Applicable Exemption Amount

As shown in the **Example** in ¶ 702.4, the state death tax in a state which has decoupled from the increase in the applicable exclusion amount and the reduction in the state death tax credit can be substantial. The state death tax under pre-EGTRRA IRC § 2011 on a $2,000,000 taxable estate (the federal applicable exclusion amount in 2006, 2007, and 2008) is $99,600 and the tax on a $3,5000,000 taxable estate (the federal applicable exclusion amount in 2009) is $229,200. These are not insignificant amounts, and for some clients paying tax to the state in these amounts will be unacceptable. At the very least, a surviving spouse may be loathe to lose that much capital to taxes. The only solution is to limit the taxable estate to the applicable exclusion amount recognized by the state.

The state death tax credit is calculated on the taxable estate without taking into account adjusted taxable gifts. This opens the possibility of a near death gift designed to reduce the taxable estate to the state's applicable exclusion amount. If the client is unwilling to forgo the basis step-up for the assets what would be the subject of the gift, the gift could be made with borrowed funds and the loan repaid with the proceeds of the post-death sale of the assets. Such gifts are likely, however, to be true deathbed gifts and might have to be made by an attorney-in-fact. The power of attorney will have to reviewed and a determination made as to the ability of the attorney-in-fact to make gifts. If there is time to plan to use this technique, it might be worthwhile to place the client's assets in a revocable trust with a trustee who is specifically authorized to make the gifts.

The other alternative is to use a marital formula gift which limits the sheltered amount to the state's applicable exclusion amount. This approach assumes, of course, that the best course is to base the formula on the state applicable exclusion amount. The result is an "overfunded" marital deduction which can lead to an otherwise avoidable tax at the death of the surviving spouse. Whether or not that tax will ever be paid, however, is not any easy question to answer. Will the spouse consume enough of the marital gift to reduce his or her estate to the applicable exclusion amount? Given the provisions of EGTRRA what will be the applicable exclusion amount at the surviving spouse's death? Will there even be an estate tax at that time? In the face of such uncertainty, the best approach in drafting documents is probably to provide maximum flexibility to determine the credit shelter gift at the death of the first spouse.

¶ 702.6 Maintaining Flexibility at the Death of the First Spouse

There are basically three routes to flexibility:

(1) disclaimer (IRC § 2518)

(2) a partial QTIP election (Treas. Reg. § 20.2056(b)-7(b)(2)).

(3) a contingent QTIP election (Treas. Reg. § 20.2056(b)-7(d)(3)(i))

A. Disclaimer

While there are several variations, the basic idea of using a disclaimer is to allow the surviving spouse to decide the size of the taxable estate by disclaiming property that would otherwise pass to the surviving spouse. In its simplest form, the residuary clause of the will leaves all property to the surviving spouse and provides that any property disclaimed will pass into the credit shelter trust. The problems with such a plan are well known. The rules for a tax qualified disclaimer require that the disclaimant not have any discretionary powers as trustee nor any power of appointment over the disclaimed property, except those limited by an ascertainable standard. (IRC § 2518(b)(4) and Treas. Reg. § 25.2518-2(e)(2))

Even if the requirements of a tax qualified disclaimer can be met, the question remains, will the surviving spouse actually disclaim. It may be very difficult to give up control over the disclaimed property. Even if the spouse were willing, will he or she be competent to disclaim? Disclaimers by incompetents are difficult matters to arrange and state laws differ on possibilities and procedures. For example, if local law requires judicial approval of a disclaimer by an incompetent, that approval may be linked to the "best interests" of the protected person. A court could easily find that giving up capital is not in the surviving spouse's best interest.

B. Partial QTIP Election

A partial QTIP election requires a trust in which the spouse has the sole income interest for life which means that even after a partial election only the spouse can benefit from the trust, which may not fit the testator's plan. A more palatable alternative may be to create a credit shelter vehicle for the state applicable exclusion amount, guaranteeing at least that much property for the credit shelter beneficiaries.

C. Contingent QTIP Election

A contingent QTIP election creates give the surviving spouse a qualified income interest for life only in the portion of the trust for which the election is made. This allows others to benefit from the non-QTIP portion of the trust and may serve to allay concerns not well addressed by a partial QTIP election.

¶ 703 Non-residents

Non-residents are usually subject to estate taxes on property located in the state. Most states which measure their tax by the state death tax credit (decoupled or not) take as their tax that portion of the credit which bears the same proportion to the total available credit as the taxable estate subject to tax by the state bears to the total taxable estate. Conversely, most states credit against their tax the proportionate part of the credit claimed by the non-resident state. There are some exceptions. New York's sop tax, for example, is the total credit minus the lesser of the pro rata share paid to other states or the amount actually paid. Since New York has frozen the § 2011 credit at pre-EGTRRA levels, there will always be a little more for New York to take. Florida, for instance, gives credit for the amount paid by the estate of a resident to another state which means that the overall tax may probably not increase. If the state of residence only gives credit for the other state's pro rata share of the credit, however, there is a real problem. The practitioner must pay close attention to the possibility that the client's estate may be taxable in more than one state.

¶ 704 Generation Skipping Transfer Tax

Many states have legislation taking advantage of the credit for state generation skipping transfer tax in IRC § 2604 which is equal to 5 percent of the federal tax imposed. Most of these states have enacted their own GST tax equal to the federal credit. States which have frozen their sop tax at pre-EGTRRA levels may or may not still levy their GST tax at pre-EGTRRA rates. In states like New York where automatic conformity is impossible, the "old" GST will remain. In states which have specifically "decoupled" their IRC § 2011 rates (and perhaps the applicable exemption amount as well) the language of the relevant statute may or may not also decouple the state's GST tax.

If the GST tax is decoupled, that is, the tax is to be levied as if EGTRRA were never enacted, the mechanics of calculating the tax will be complicated. If the exemption applied to the generation skipping transfer was larger than that allowed under pre-EGTRRA law the state inclusion ratio will be different from the federal ratio. In addition, the tax rate used for the state calculation will differ from the federal rate. Finally, if allocation of the exemption to the transfer was made by using one of the provisions added by EGTRRA—§ 2632(c) (automatic allocation), § 2632(d) (retroactive application), § 2642(a)(3) (qualified severance), § 2642(g)(1) (late elections to allocate), § 2642(g)(2) (substantial compliance)—the allocation may not be recognized by the state. The possibilities for confusion and for mistakes are great, and the challenge faced by the state authorities in verifying the accuracy of returns probably will be greater still. It does not take great prescience to predict that a decoupled generation skipping transfer tax will prove to be all but unworkable.

¶ 705 Independent Estate Taxes

Although overshadowed by the sop tax, many states with sop taxes also have independent taxes, usually inheritance taxes. In addition, some states have created, and more may create, new independent taxes which may or may not refer to the pre-EGTRRA state death tax credit.

¶ 705.1 Inheritance Taxes

States with inheritance taxes also had sop taxes, and because the rate of inheritance tax on family members was usually lower than the state death tax credit rate, the sop tax yielded greater revenue and was the tax applied to the estate. Several states were in the process of phasing out their inheritances taxes, at least for transfers to family members, when EGTRRA came along. As the state death tax credit decreases in states conforming to the phase out these inheritance taxes may become relevant once again. They have their own quirks and oddities, usually dealing with the valuation of future interests. Most of them, however, now exempt spousal transfers and levy only low rates on other intrafamily transfers. The rate levied on strangers, however, can be steep—in Nebraska the rate is 18 percent on ~~such~~ transfers in excess of $50,000. Of course, starting in 2005 these taxes will be deductible.

¶ 705.2 New Taxes

Any state that decouples from the provisions of EGTRRA will eventually face ~~the~~ necessity of creating an estate tax system, even if the estate tax is definitively repealed. New Jersey is among the first to tackle the problem. New Jersey has frozen the state death tax credit at pre-EGTRRA levels but has made provision for the creation of a "simplified tax system" to be prescribed by the Director of Taxation and designed to produce a tax liability "similar" to that under the Code as it existed on December 31, 2001. Thus an applicable exemption amount of $675,000 will be used but the tax must be able to be calculated "not withstanding the lack or paucity of information" and other information compliance problems resulting from the repeal of the federal tax. One can only hope that the New Jersey authorities are able to create a workable system which could be of use to other states in facing the same problem.

¶ 706 State by State Survey

¶ 706.1 Alabama

A. Statutory Framework

Alabama Code § 40-15-2 levies a tax "equal to the full amount of state tax permissible when levied by and paid to the State of Alabama as a credit or deduction" in computing "any federal estate tax payable by such estate according to the act of Congress in effect, on the date of the death of the decedent."

The same section also provides that the tax shall be levied "only so long as and during the time an inheritance or estate tax is enforced by the United States against Alabama inheritances or estates and shall only be exercised or enforced to the extent of absorbing the amount of any deduction or credit which may be permitted by the law of the United States now existing or hereinafter enacted . . . ."

These statutory provisions reproduce the provisions of Alabama Constitution Art. XXI which limits the state to levying a tax not to exceed amounts which can be credited or deducted under federal law.

B. Analysis

By conforming Alabama's tax to federal law in effect on the date of the decedent's death, Ala. Code § 40-15-2 insures first that the state will conform to the changes enacted by EGTRRA.

The section also insures that the Alabama tax will end with the repeal of the estate tax in 2010; whether or not the state tax will be reborn with the sunset of EGTRRA is an open question.

The reference in Ala. Code § 40-15-2 to a "deduction" literally means that the unlimited deduction created by EGTRRA for the years 2005-2009 creates a confiscatory state estate tax. The constitutional provision seems to forbid such a reading, but clarification would be useful.

¶ 706.2 Alaska

A. Statutory Framework

Alaska Statutes Annotated § 43.31.011 levies a tax equal to "the credit allowable under the applicable federal revenue Act for estate, inheritance, legacy and succession taxes actually paid to the several states" with adjustments for property located in and taxed by other jurisdictions.

A.S.A. § 43.31.420 defines "gross estate" and "net estate" as having the meanings given "under the provisions of the applicable federal revenue Act."

B. Analysis

The statutes do not define "applicable federal revenue Act" but the plain meaning should be the relevant federal law in effect at the date of death of the decedent. Thus Alaska's tax will decrease in conformity to EGTRRA.

The reference to the credit "allowable" should incorporate changes in the applicable exemption amount under EGTRRA.

¶ 706.3 Arizona

A. Statutory Framework

Arizona Revised Statutes Annotated § 42-4051 levies a tax "in the amount of the federal credit" on the transfer of the estates of residents with adjustments for taxes levied by other states.

A.R.S.A. § 42-4001 defines "federal credit" to mean "the maximum amount of the federal credit for state death taxes allowable" by § 2011 "of the internal revenue code."

A.R.S.A. § 42-1001 defines "internal revenue code" to mean IRC 1986 "as amended and in effect as of March 9, 2002 . . . ."

B. Analysis

The definition of "internal revenue code" insures that the amount of Arizona's tax will conform to the changes made by EGTRRA in the state death tax credit.

The reference to the credit "allowable" should incorporate changes in the applicable exemption amount under EGTRRA.

¶ 706.4 Arkansas

A. Statutory Framework

Arkansas Code Annotated § 26-59-103 states that chapter 59, which imposes the estate tax, "shall remain in force and effect so long as the United States Government retains in full force and effect . . . the present federal estate tax" and that the chapter shall cease to be operative "when the United States Government ceases to impose any estate tax of the United States."

A.C.A. § 26-59-106(a) imposes a tax "the amount of which shall be a sum equal to the federal credit allowable under the federal estate tax law, 26

U.S.C. § 2001 et seq., as in effect on January 1, 2002." The tax is repealed for estates of decedents dying after January 1, 2005. (*See* Act 645 (S.B. 60) Laws 2003.)

Subsection (c)(2) states that "if no federal estate tax is imposed upon the transfer of property, no Arkansas tax shall be imposed on such transfer."

B. Analysis

The state death tax credit is frozen at pre-EGTRRA levels.

The increase in the filing requirement amount strengthens the conclusion that the applicable exemption amount will increase according to pre-EGTRRA law.

A.C.A. § 26-59-106(c)(2), however, can be interpreted to mean that a taxable estate equal to the applicable exemption amount as increased by EGTRRA will not pay Arkansas estate tax. Thus in 2002 a taxable estate of $1,000,000 will pay neither federal nor Arkansas tax, but a taxable estate of $1,100,000 will pay federal tax and Arkansas tax calculated under pre-EGTRRA law giving an applicable exemption amount for state purposes of $700,000.

The nullification provision insures that the Arkansas tax will cease when federal appeal becomes effective. The reference to "the present federal estate tax" seems to make it more certain that the tax will not revive if EGTRRA sunsets

¶ 706.5 California

A. Statutory Framework

California Revenue and Taxation Code § 13301 prohibits the state from imposing "any gift, inheritance, succession, legacy, income, or estate tax, or any other tax, on gifts or on the estate or inheritance of any person or on or by reason of any transfer occurring by reason of a death."

Cal. R & T. Code § 13302, notwithstanding the provisions of § 13301, levies a California estate tax equal to the portion "of the maximum allowable amount of the credit for state death taxes, allowable under the applicable federal estate tax law" whenever "a federal estate tax is payable to the United States."

The same section also provides that the section "in no event" shall increase the "total death tax" due California and the United States beyond that "which would result if this section were not in effect."

Cal. R & T. Code § 16710 levies a generation skipping transfer tax in the amount of the credit "allowable" under IRC § 2604.

B. Analysis

The prohibition of a state transfer tax and the exception for a "sop" tax were enacted by initiative and referendum in 1982 and cannot be repealed without a popular vote. (Cal. Const., Art. II, § 1014)

The reference in Cal. R & T Code § 13302 to the "allowable" credit under the applicable federal law, assuming that the applicable law is the law in effect on the date of the decedent's death, conforms California law to EGTRRA, reducing the state death tax credit and increasing the applicable exemption amount. The similar reference to the GST tax credit should have the same result.

¶ 706.6 Colorado

A. Statutory Framework

Colorado Revised Statutes Annotated § 39-23.5-103 levies a tax "in the amount of the federal credit" on the transfer of the estate of every domiciliary with adjustments for property taxed by other states.

C.R.S.A. § 39-23.5-102 defines "federal credit" to be the maximum amount of the credit "for state death taxes allowable under section 2011 of the internal revenue code."

The same section defines "internal revenue code" as IRC 1986 "as amended."

C.R.S.A. § 39-23.5-106 levies a generation skipping transfer tax in the amount of the credit "allowable" under IRC § 2604.

B. Analysis

The definition of internal revenue code to include amendments should conform Colorado law to EGTRRA with regard to both the estate and GST taxes.

The definition of the amount of tax as the amount of the credit "allowable" confirms that the applicable exemption amount will increase as provided in EGTRRA.

¶ 706.7 Connecticut

A. Statutory Framework

Connecticut General Statutes Annotated § 12-391(a) imposes a tax on the transfer of the estates of residents in an amount equal to "the amount of the federal credit allowable for estate, inheritance, legacy and succession taxes paid to any state or the District of Columbia under the provisions of the federal internal revenue code in force at the date of such decedent's death . . ." with adjustments for property taxed by other states.

C.G.S.A. § 12-390b levies a generation skipping transfer tax in the amount of the "allowable" credit under IRC § 2604 at the date of the taxable transfer.

C.G.S.A. § 12-340 imposes an inheritance tax on transfers by residents and on transfers of property within the state by nonresidents.

C.G.S.A. § 12-344 sets forth the rates of inheritance tax which range up to 14 percent on transfers to non-relatives. There is no tax on transfers to a surviving spouse or to descendants (and in 2004 there will be no tax on transfers to surviving spouses of descendants). The tax will be phased out entirely for deaths on or after January 1, 2006. (Legislation passed in November, 2001 extended by period of phase out by one year to 2006, P.A. 01-1, § 1 eff. Nov. 20, 2001.)

B. Analysis

The reference in C.G.S.A. § 12-391(a) to the amount of the credit under the provisions of the IRC in effect at the decedent's death conforms Connecticut law to EGTRRA's reduction of the credit and the reference to the amount "allowable" confirms that the applicable exemption amount will increase as provided in EGTRRA.

The reference in C.G.S.A. § 12-390b to the date of transfer should also phase out the GST tax in accord with EGTRRA.

The last year of the inheritance tax, 2005, is the first year of the deduction for state taxes. After the expiration of the inheritance tax, Connecticut will be without a transfer tax.

¶ 706.8 Delaware

A. Statutory Framework

Delaware Code Annotated § 1502 imposes a tax on transfers by resident decedents equal to "the amount of credit allowable under the provisions of the federal estate tax laws for estate, inheritance, legacy and succession taxes paid to any state."

D.C.A. § 1501 defines "federal estate tax" to mean "the tax imposed under the United States Internal Revenue Code (26 U.S.C. § 2001 et seq.), as amended."

B. Analysis

The reference in D.C.A. § 1501 to the IRC "as amended" conforms Delaware law to EGTRRA's reduction of the state death tax credit.

The reference in D.C.A. § 1502 to the amount "allowable" confirms that the applicable exemption amount will increase as provided in EGTRRA.

¶ 706.9 District of Columbia

A. Statutory Framework

DC Code § 47-3701 was amended by the "Inheritance and Estate Tax Emergency Act of 2002," approved July 23, 2002 and then again effective October 21, 2002 and yet again effective December 4, 2002. These multiple enactments were required to deal with the need for Congressional review of District laws. In all its incarnations, the Act is designed "to ensure the continued collection of the taxes at a level comparable to the tax collected prior to the enactment of recent amendments to the Internal Revenue Code of 1986."

The amended statute provides that for decedents dying after April 1, 1987 and before January 1, 2002 "federal credit" (which is the amount of the DC tax) means the "maximum amount of credit" under IRC § 2011 "as it existed on January 1, 1986."

For decedents dying after December 31, 2001, "federal credit" is defined as the maximum credit under IRC § 2011 and "any scheduled increase in the unified credit provided in section 2010 of the Internal Revenue Code or any successive provision shall not apply."

Also for decedents dying after December 31, 2001, "Internal Revenue Code" is defined as IRC 1986 "in effect for federal estate tax purposes on January 1, 2001."

The December 4, 2002 enactment is subject to a 60-day period for Congressional review.

B. Analysis

The amended statute clearly freezes the state death tax credit at pre-EGTRRA levels.

The reference to increases in the unified credit could be read as freezing the applicable exclusion amount at $675,000, the amount corresponding to a unified credit of $220,550, the § 2010 credit in effect on January 1, 2001, thus ignoring the increases in the credit enacted in TRA 1997.

¶ 706.10 Florida

A. Statutory Framework

Florida Statutes Annotated § 198.02 imposes a tax on transfers by resident decedents "the amount of which shall be a sum equal to the amount by which the credit allowable under the applicable federal revenue act for estate, inheritance, legacy, and succession taxes" exceeds the taxes paid to other states in respect of the decedent's property.

F.S.A. § 198.01 defines gross estate and net estate in terms of "the applicable federal revenue act."

F.S.A. § 198.021 imposes a generation skipping transfer tax in the amount of the IRC § 2604 credit "as amended."

Florida's Constitution, Art. VII § 5 prohibits the levying of a tax upon the estates or inheritances of natural persons who are citizens of the state, "in excess of the aggregate of amounts which may be allowed to be credited upon or deducted from any similar tax levied by the United States or any state."

B. Analysis

The reference in F.S.A. § 198.02 to the amount of the credit allowable under the "applicable federal revenue act" will coordinate Florida law with EGTRRA.

The reference to the GST tax credit provision "as amended" should continue the state's GST tax until the tax itself is repealed after 2009.

In addition, the constitutional provision will end the estate tax when the credit ends after 2004, although the provision would seem to authorize an unlimited estate tax beginning in 2005 when the deduction against the federal tax comes into existence. Such an interpretation, of course, is unlikely.

¶ 706.11 Georgia

A. Statutory Framework

Georgia Code § 48-12-2(b) levies a tax "in an amount equal to the amount allowable as a credit for state death taxes under Section 2011 of the Internal Revenue Code of 1986."

Under G.C. § 48-1-2(14), "Internal Revenue Code" means the code "provided for in federal law enacted on or before January 1, 2002."

Georgia updates this statutory reference to the IRC every year and Ga. L. 2002, p. 439, § 2 states, as did all the predecessor acts, that provisions of the IRC "which were as of January 1, 2002, enacted into law but not yet effective shall become effective for purposes of Georgia taxation on the same dates upon which they become effective for federal tax purposes."

B. Analysis

Georgia completely conforms to federal law, and so long as the annual conformity statutes are passed, will continue to track all future changes.

¶ 706.12 Hawai'i

A. Statutory Framework

Hawai'i Revised Statutes Annotated § 236D-3 imposes a tax "in an amount equal to the federal credit" on the transfer of the estate of every resident with adjustments for property taxed by other states.

H.R.S.A. § 236D-2 defines "federal credit" to mean "the maximum amount of the credit for state death taxes allowed by section 2011 for the decedent's adjusted taxable estate" and defines "section 2011" as "section 2011 of the Internal Revenue Code of 1986, as amended or renumbered."

H.R.S.A. § 236D-3.5 imposes a generation skipping transfer tax in the amount of the IRC § 2604 credit as that section may be amended.

B. Analysis

The reference in H.R.S.A. § 236D-2 to IRC § 2011 "as amended or renumbered" conforms Hawai'i law to the changes in the state death tax credit made by EGTRRA. The similar provision regarding the IRC § 2604 credit will also end the GST tax with repeal in 2010.

The reference in § 236D-2 to the amount of the credit "allowed" confirms that the applicable exemption amount will increase as provided in EGTRRA.

¶ 706.13 Idaho

A. Statutory Framework

Idaho Code Annotated § 14-403 imposes a tax "in an amount equal to the federal credit" on the transfer of the estates of residents with adjustments for property taxed by other states.

I.C.A. § 14-402 defines "federal credit" as the "maximum amount of the credit for state death taxes allowed by section 2011 of the United States Internal Revenue Code of 1986, and the maximum amount of the credit for the generation skipping tax allowed by section 2604 of the United States Internal Revenue Code of 1986." Idaho therefore imposes both an estate tax and a generation skipping transfer tax measured by the respective federal credits. The GST tax presumably does not apply to lifetime direct skips.

I.C.A. § 63-3004 defines "Internal Revenue Code" to mean IRC 1986 "as amended, and in effect on the first day of January, 2002."

B. Analysis

The conformity date in I.C.A. § 63-3004 insures that Idaho will conform to EGTRRA completely. The estate tax will end with the abolition of the credit in 2005 and the GST tax will end with the repeal of the tax in 2010.

Once again, even though the Idaho statute does not refer to the applicable exclusion amount, the reference in the same section to the credit "allowed" confirms that the applicable exemption amount will increase as provided in EGTRRA,

¶ 706.14 Illinois

A. Statutory Framework

35 Illinois Compiled Statutes Annotated § 405/3 levies an Illinois estate tax on every taxable transfer of property having a tax situs in Illinois in the amount of "the maximum state tax credit allowed with respect to the taxable transfer" with adjustments for taxes paid to other states.

35 Il.C.S.A. § 405/4 imposes "[a]n Illinois generation-skipping transfer tax" on "every taxable transfer resulting in federal generation-skipping transfer tax . . ." involving transferred property with a situs in Illinois in the amount of the maximum "state tax credit" with adjustments for payments of tax to other states.

35 Il.C.S.A. § 405/21 defines "state tax credit" to mean the credit for state tax "allowable under Section 2011 or section 2604 of the Internal Revenue Code." The same section defines "Internal Revenue Code" to mean IRC 1986 "as amended from time to time."

B. Analysis

The statutory reference to IRC 1986 "as amended" insures that Illinois law incorporates all the changes made by EGTRRA in the IRC § 2011 and § 2604 credits.

Even though the Illinois statute does not refer to the applicable exclusion amount, the reference in the same section to the credit "allowable" confirms that the applicable exemption amount will increase as provided in EGTRRA

¶ 706.15 Indiana

A. Statutory Framework

Indiana Code Annotated § 6-4.1-11-2 makes the Indiana estate tax that portion of the "federal state death tax credit" attributable to property in Indiana included in the gross taxable estate.

I.C.A. § 6-4.1-11.5-8 makes the Indiana generation skipping tax equal to that portion of the federal state GST tax credit attributable to property in Indiana included in the taxable transfer.

I.C.A. § 6-4.1-1-4 defines the "federal death tax credit" as the maximum credit provided under § 2011 "of the Internal Revenue Code."

I.C.A. § 6-4.1-11.5-2 defines the state GST tax credit as the credit under § 2604 "of the Internal Revenue Code."

I.C.A. § 6-3-1-11(a), defines "Internal Revenue Code" to mean IRC 1986 "as amended and in effect on January 1, 2002."

I.C.A. § 6-3-1-11(b), however, states that "whenever the Internal Revenue Code is mentioned in this article" the particular provisions referred to and all other provisions of IRC 1986 "shall be regarded as incorporated in this article by reference . . . ."

"This article" is Article 3 "Other State Income Taxes;" the definitions of "federal state death tax credit" and the GST credit appear in Article 4.1, "Death Taxes." Whether I.C.A. § 6-3-11(a) applies to the meaning of "Internal Revenue Code" in Article 4.1 is unclear.

Indiana also levies an inheritance tax.

I.C.A. § 6-4.1-1-3 defines Class A transferees as lineal descendants or ancestors of the decedent and I.C.A. § 6-4.1-5-1(b) sets the highest rate of tax on transfers to them at 10 percent.

I.C.A. § 6-4.1-1-3 defines Class B transferees as siblings of the transferor, descendants of those siblings, or the spouse or surviving spouse of the transferor's child and I.C.A. § 6-4.1-5-1(b) sets the highest rate of tax on transfers to Class B transferees at 15 percent.

I.C.A. § 6-4.1-1-3 defines Class C transferees as any transferee, other than a surviving spouse, not included in Classes A or B and I.C.A. § 6-4.1-5-1(b) sets the highest rate of tax on transfers to them at 20 percent.

I.C.A. § 6-4.1-3-7 exempts from inheritance tax property interests transferred to the decedent's surviving spouse.

B. Analysis

If Indiana law does define for estate tax purposes "Internal Revenue Code" to mean the Code as it read on January 1, 2002 then Indiana conforms to EGTRRA both with respect to the phase out of the state death tax credit and its replacement with a deduction and to the increase in the applicable exclusion amount.

If I.C.A. § 6-3-1-11 does not apply to the estate tax, the situation is unclear. There seems to be no other provision tying references to the IRC to the Code as it read on any particular date.

In any event, Indiana will still have its inheritance tax which in some circumstances could exceed the state death tax credit but will be deductible beginning in 2005.

¶ 706.16 Iowa

A. Statutory Framework

Iowa Code § 451.2 levies a tax in an amount equal to the "federal estate tax credit for state death taxes as allowed in the Internal Revenue Code."

Iowa Code § 450A.2 levies a generation skipping tax equal to the federal credit under IRC § 2604.

Iowa Code § 422.3(5) defines "Internal Revenue Code" as the IRC 1986 "as amended to and including January 31, 2002." The date has been updated every year, and the current updating (§ 3 of Ch. 1069 of the laws of 2002) applies retroactively to January 1, 2001. Presumably this means EGTRRA was incorporated into Iowa law as soon as it became effective.

Iowa levies an inheritance tax which is credited against the tax equal to the state death tax credit. I.C. § 451.2(2).

Property passing to the surviving spouse, parents, grandparents, great-grandparents, lineal descendants, children including legally adopted children and "biological children" entitled to inherit is exempt from tax. (I.C. § 450.9)

Under I.C. § 450.10 property passing to siblings and children-in-law is taxed at a maximum rate of 10 percent and the maximum rate on transfers to others is 15 percent.

B. Analysis

As far as the sop tax based on the federal credit is concerned, Iowa conforms completely to federal law and the tax will end with the repeal of the credit in 2005. The GST tax will continue until the federal tax is repealed in 2010.

After the federal credit is eliminated, the inheritance tax will remain and be deductible against the federal estate tax beginning in 2005.

¶ 706.17 Kansas

A. Statutory Framework

Kansas Statutes Annotated § 79-15,101(a) states "Any term used in this act shall have the same meaning as when used in a comparable context in the internal revenue code. Any reference in this act to the 'internal revenue code' shall mean the provisions of the United States internal revenue code of 1986, as such code exists on December 31, 1997. Any reference in this act to a specific provision of the internal revenue code shall be to such provision as it exists on December 31, 1997."

K.S.A. § 79-15,102 imposes a tax on the estate of a decedent "whose estate is required by federal law to file a return for federal estate taxes." The amount of the tax "shall be equal to the amount of the maximum credit allowable by section 2011 of the internal revenue code . . . ."

K.S.A. § 79-15,114 imposes a tax equal to the maximum credit under IRC § 2604 "[w]henever the amount of the tax imposed upon a generation-skipping transfer by section 2601 of the internal revenue code is determined . . . ."

The estates of decedents dying after June 5, 2002 will also be subject to a succession tax which is structured like an inheritance tax. A surviving spouse is exempt from tax and there is provision for a QTIP trust. Lineal ancestors and descendants, including step-children and adopted children, their descendants and spouses and surviving spouses are Class A distributees subject to tax at rates which reach 5 percent on amounts over $500,000. Brothers and sisters are Class B distributees subject to tax at rates which reach 10 percent on amounts over $500,000. All others, including other relatives and strangers to the blood of the decedent are Class C distributees subject to tax at rates which reach 15 percent on amounts over $200,000.

B. Analysis

The reference date of December 31, 1997 and the specific reference to IRC § 2011 freezes the state death tax credit at the pre-EGTRRA level.

However, the levying of tax only on an estate required to file a federal estate tax return refers to "federal law" and not to the Internal Revenue Code. This provision could be read to in effect incorporate the increase in the applicable exclusion amount into Kansas law, levying tax only on taxable estates in excess of that amount but at rates set by the pre-EGTRRA state death tax credit. The state tax authority, however, interprets the statute as freezing the Kansas law as of December 31, 1997 and states that the applicable exclusion amount will increase in accord with TRA 1997. Notice 02-81, June 26, 2002.

The conformity date seems to freeze the top transfer tax rate at 55 percent which effects the amount of IRC § 2604 credit.

The succession tax will become deductible in 2005.

¶ 706.18 Kentucky

A. Statutory Framework

Kentucky Revised Statutes § 140.130 levies an estate tax equal to the amount "by which the credits for state death taxes allowable under the federal tax law" exceeds the state's inheritance tax.

K.R.A. § 140.010 levies an inheritance tax which does not exceed 10 percent on interests received by lineal descendants and 16 percent on interests received by others and completely exempts interests received by the surviving spouse (K.R.A. §§ 140.070, 140.080)

B. Analysis

There is nothing in the statutes which ties the reference to "federal tax law" to any specific date. Without more, then, Kentucky law should conform to EGTRRA and the estate tax will end with the repeal of the IRC § 2011 credit in 2005. The inheritance tax will be deductible.

¶ 706.19 Louisiana

A. Statutory Framework

Louisiana Statutes Annotated-Revised Statutes § 47:2431 levies "an estate transfer tax upon all estates which are subject to federal estate taxation under the Federal Internal Revenue Code."

L.S.A.-R.S. § 47:2432(A) provides that "[w]henever there is a credit allowable under the United States Internal Revenue Code as to the amount of the federal estate tax for amount of state death taxes, the maximum amount of the credit for the state death taxes shall be paid to the state of Louisiana."

L.S.A.-R.S. § 47:2434 declares that the intent of the statute is to obtain for the state "the benefit of the estate tax credit allowable under the provisions" of the IRC.

L.S.A.-R.S. § 47:2401 levies an inheritance tax, however, the same section repeals the tax for deaths occurring after June 30, 2004. In the meantime, the rates, which were a maximum of 10 percent on transfer to strangers, are being phased out (L.S.A.-R.S. § 47:2403); there is a complete exemption for transfers to a surviving spouse (L.S.A.-R.S. § 47:2402(1)(e)).

B. Analysis

In the absence of any language freezing the provisions of the IRC as of a certain date, Louisiana law will conform to EGTRRA.

The inheritance tax will be phased out before the elimination of the state death tax credit.

¶ 706.20 Maine

A. Statutory Framework

Maine Revised Statutes Annotated, Title 36 § 111 defines references to the Internal Revenue Code as references to the Code and its amendments as of March 15, 2002.

M.R.S.A. 36 § 4062 defines "federal credit" as the maximum credit under IRC § 2011.

M.R.S.A. 36 § 4063 levies a tax on decedents dying prior to January 1, 2002 or after December 31, 2002 (i.e. other than during 2002) to be equal to the § 2011 credit.

M.R.S.A. 36 § 4063-A levies a tax on decedents dying during 2002 equal to the amount of the federal credit divided by .75.

B. Analysis

Other than for decedents dying in 2002, Maine conforms to federal law.

For decedents dying in 2002, Maine will recognize the increase in the applicable exclusion amount to $1,000,000 but the state tax will be equal to the pre-EGTRRA credit (dividing the 2002 credit by .75 will restore the amount to the pre-EGTRRA level).

¶ 706.21 Maryland

A. Statutory Framework

Maryland Code Annotated § 7-302 levies an estate tax on the transfer of the estates of residents and of non-residents with real or tangible personal property in the state.

M.C.A. § 7-304(b) makes the tax equal to the federal credit (with adjustments for property outside of Maryland) and subsection (a) defines "federal credit" as the maximum credit under IRC § 2011 allowed against the federal tax.

M.C.A. § 7-309 freezes the IRC § 2011 credit at pre-EGTRRA levels but conforms Maryland law to all other provisions "of federal estate tax law, including the applicable unified credit allowed against the federal estate tax" to the law in effect at the decedent's death. Once the estate tax is repealed, the state death tax credit will remain at pre-EGTRRA levels and Maryland law will conform to all other provisions of the federal estate tax law as they were in effect "on the date immediately preceding the effective date of the repeal of the federal estate tax."

M.C.A. § 7-402 levies a generation skipping transfer tax in the amount of the "federal credit" on generation skipping transfers occurring at the same time as a death, and specifically excludes direct skips.

M.C.A. § 7-401(b) defines the federal credit as the IRC § 2604 credit.

Maryland levies an inheritance tax which exempts a surviving spouse, grandparents, parents, all lineal descendants and their spouses and siblings. (M.C.A. § 7-203(b)). The maximum rate of tax is 10 percent (M.C.A. § 7-204)

B. Analysis

M.C.A. § 7-309 freezes the IRC § 2011 credit at pre-EGTRRA levels but adopts all the other changes made by EGTRRA.

Therefore, the applicable exclusion amount will increase.

The state tax, though levied according to the pre-EGTRRA version of IRC § 2011, will be deductible against the federal tax beginning in 2005.

In 2010 the Maryland tax will continue using the pre-EGTRRA § 2011 credit and all other provisions as of December 31, 2009. This provision may lead to a problem. The law as of December 31, 2009 makes state death tax deductible from the gross estate. The taxable estate, therefore, is net of the state tax. If the state tax is to be calculated by using the IRC § 2011 credit as it existed pre-EGTRRA and the taxable estate is defined as of December 31, 2009, the result is a circular computation—one cannot calculate the state tax without knowing the size of the taxable estate, but the size of the taxable estate depends on the amount of the state tax.

The December 31, 2009 conformity date will conform Maryland's GST tax to the federal tax on that date if the reference to the "federal estate tax law" includes the GST tax statute. If not, of course, the tax will be repealed as of 2010.

The inheritance tax will continue and be deductible starting in 2005.

¶ 706.22 Massachusetts

A. Statutory Framework

Massachusetts General Laws Annotated Ch. 65C § 2A provides that for estates of decedents dying before January 1, 2003, a tax is imposed equal to the state death tax credit "under Code section 2011, as amended and in effect as of the date of the death of the decedent."

M.G.L.A. 65C § 2A provides for estates of decedents dying on or after January 1, 2003 a tax is imposed equal to the amount of the state death tax credit "that would have been allowable to a decedent's estate as computed under Code section 2011, as in effect on December 31, 2000 . . . ."

M.G.L.A. 65C § 4A imposes a generation skipping transfer tax equal to the IRC § 2604 credit as contained in the Internal Revenue Code on December 31, 1981.

M.G.L.A. 65C § 1 defines "Code" to be the Internal Revenue Code on January 1, 1975.

B. Analysis

Massachusetts will conform to federal law with regard to the state death tax credit through 2002. The credit will revert to pre-EGTRRA levels for 2003 and forward.

The meaning of these provisions for the applicable exemption amount is unclear. Presumably the amount was not frozen as of 1975. On November 6, 2002 the commonwealth tax authorities issued Technical Information Release 02-18 which states that the applicable exclusion amount will increase in accord with the provisions of TRA 1997.

On February 19, 2003 the tax authorities further clarified the law, and made planning a little easier, by ruling that a separate Massachusetts QTIP election may be made for in an estate whether or not a federal QTIP election is made or is made in a different amount. This ruling allows an estate of a decedent who has a surviving spouse to eliminate both federal and Massachusetts taxes without "overqualifying" the federal marital deduction. Department of Revenue Directive 03-2.

¶ 706.23 Michigan

A. Statutory Framework

Michigan Compiled Laws Annotated § 205.232 imposes a tax equal to the "maximum allowable federal credit under the internal revenue code" for death taxes paid to the states.

M.C.L.A. § 205.233 imposes a generation skipping transfer tax equal to the credit in IRC § 2604.

M.C.L.A. § 205.256(g) defines "Internal Revenue Code" to mean the IRC in effect on January 1, 1998 "or, at the option of the personal representative, in effect on the date of the decedent's death."

B. Analysis

The statute's incorporation date would freeze the § 2011 credit at pre-EGTRRA levels and the applicable exemption amount at TRA 1997 levels.

The provision allowing the personal representative to use the provisions of the IRC in effect at the date of death allows the estate to use the law as enacted by EGTRRA, so in essence, Michigan conforms to federal law and will phase out the credit, the estate tax, and the GST tax.

A divided Michigan Court of Appeals has held that the Michigan statute does not levy a state tax if an estate's federal tax is eliminated by the operation of the unified credit and tax on prior transfers credit (IRC § 2013) even though the Internal Revenue Code limits the amount of the TPT credit by the estate tax due *after* application of the unified credit and the state death tax credit (IRC § 2013(c)(1)(A)). *In re Estate of Lacks*, __ N.W.2d __, 2003 Mich. App. LEXIS 560.

¶ 706.24 Minnesota

A. Statutory Framework

Minnesota Statutes § 291.005(8) defines "Internal Revenue Code" to mean the Code as amended through December 31, 2000. This date was last changed by legislation passed in May 2002.

M.S. § 291.03 imposes a tax equal to the maximum § 2011 credit "computed" under the Internal Revenue Code. "Computed" was substituted for "allowable" by legislation passed in May 2002.

M.S. § 289A.10 ties the Minnesota filing requirement to the applicable exemption amount as it was to increase under the provisions of TRA 1997. This section was amended by legislation passed in May 2002.

B. Analysis

The "maximum" state death tax credit is frozen at pre-EGTRRA levels. This conclusion is reinforced by the 2002 amendment which changed the reference to the credit "allowed" to the credit "computed."

While there is no direct legislation on the applicable exemption amount, the coupling of the return requirement to the applicable exemption amount as set by TRA 1997 would indicate that the amount for tax purposes of the Minnesota tax is set by pre-EGTRRA law.

Revenue Notice 02-16 confirms this view. The notice sets forth procedures to be followed by estates which must file a Minnesota return but need not file a federal return. In such a situation, the alternate valuation date and special use valuation are not available, and deductions subject to the IRC § 642(g) election and taken on the federal form 1041 may be deducted for both Minnesota estate and fiduciary income tax purposes.

¶ 706.25 Mississippi

A. Statutory Framework

Mississippi Code Annotated § 27-9-5 imposes a tax on the estates of decedents dying on or after January 1, 2000 "in an amount equal to the maximum amount of state death tax credit permissible as a credit or deduction in computing any federal estate tax payable by the estate according to the act of Congress in effect" on the date of the decedent's death.

In addition, "[t]he tax imposed by this section shall not exceed the aggregate amounts which may by any law of the United States be allowed to be credited against or deducted for federal estate tax."

M.C.A. § 27-9-11 adopts the applicable exclusion amount as modified by EGTRRA for decedents dying on or after January 1, 2002.

B. Analysis

To the extent the tax is linked to the § 2011 credit, it will diminish and then vanish in accord with the provisions of EGTRRA.

To the extent the tax is linked to what may be "deducted" the provision is unclear. If the language which refers to the credit "permissible as a credit or deduction" refers only to the IRC § 2011 credit, the tax will disappear with the disappearance of the credit in 2004.

The requirement that the tax not exceed amounts which may be "credited against or deducted for federal estate tax" further clouds the picture. Beginning in 2005 the deduction is unlimited. Theoretically, the provision could be read to create a confiscatory estate tax. Presumably that is not what the legislature intended, a conclusion reinforced by the addition of the language by amendment in April 2000, before the passage of EGTRRA. Clarification would be welcome.

¶ 706.26 Missouri

A. Statutory Framework

Vernon's Annotated Missouri Statutes § 145.011 levies a tax on estates equal to the "maximum credit for state death taxes allowed by" the IRC.

V.A.M.S. § 145.995 levies a generation skipping transfer tax equal to the credit allowed under IRC § 2604.

V.A.M.S. § 145.091 states that any reference to the Internal Revenue Code is a reference to IRC 1954 "and amendments thereto, . . . as they may be or become effective, at any time or from time to time."

V.A.M.S. § 145.1000 (added July 6, 2001) provides that "if the federal estate tax imposed pursuant to Section 2011 of the Internal Revenue Code, as amended is repealed, then no tax shall be imposed on the transfer of a decedent's estate in Missouri." The provision is made effective "on the same date as the effective date of the repeal of the federal estate tax."

B. Analysis

The conformity provision (V.A.M.S. § 145.091) clearly phases out the state death tax credit according to the provisions of EGTRRA.

Presumably, though it is not explicit, the provision will also increase the applicable exemption amount in accord with EGTRRA.

The repeal provision in V.A.M.S. § 145.1000 seems to be intended to end the Missouri estate tax when the federal state death tax credit ends, but the reference to the federal estate tax "imposed" by IRC § 2011 is inaccurate. In addition, the provision becomes effective when the federal estate tax is repealed, but under EGTRRA that will occur on December 31, 2009; the § 2011 credit ends on December 31, 2004. The legislation makes no mention of the GST tax, but presumably the legislature intended to end Missouri's tax with the repeal of the federal tax in 2010.

¶ 706.27 Montana

A. Statutory Framework

Montana Code Annotated § 72-16-904 imposes an estate tax on the transfer of every estate of a decedent "leaving an estate that is subject to the federal estate tax imposed by the United States of America under the applicable provisions of the Internal Revenue Code . . . ."

M.C.A. § 72-16-905 makes the tax equal to the "maximum tax credit allowable for state death taxes against the federal estate tax . . ." and declares that the purpose of the statute is "to impose only those additional taxes that may be necessary to give this state the full benefit of the maximum tax credit allowable against the federal estate tax . . . ."

M.C.A. § 72-26-906 requires the personal representative of the estate of any decedent "whose estate is subject to the payment of a United States Estate tax" to file a duplicate of the federal estate tax return with the state department of revenue.

M.C.A. § 72-16-1002 imposes a generation skipping transfer tax equal to the IRC § 2604 credit and M.C.A. § 72-16-1001 defines "Internal

Revenue Code" as used in the portion of the statute dealing with the GST tax as IRC 1986 "as amended."

B. Analysis

While the estate tax provisions do not contain a definition of "Internal Revenue Code" the intent to levy only those "additional taxes" necessary to take advantage of the credit would indicate that the Montana estate tax will disappear with the repeal of the IRC § 2011 credit.

The conclusion is further strengthened by the filing requirement which extends only to the estates of decedents required to pay a United States estate tax. This provision also indicates that the increase in the applicable exclusion amount is also part of Montana law. This provision does create a loophole of a sort. Read literally, an estate which has taken advantage of the § 2011 credit to increase the amount of property passing to the credit shelter disposition is not required to file a return—it will not pay federal tax but will owe tax to the state by reason of taking advantage of the § 2011 credit.

The reference in the GST tax statute to the IRC "as amended" conforms Montana's GST tax to the EGTRRA provisions and will repeal the state tax with the repeal of the federal tax.

¶ 706.28 Nebraska

A. Statutory Framework

Through 2002, Nebraska Revised Statutes Annotated § 77-2101 levied an estate tax equal to the IRC § 2011 credit.

Beginning January 1, 2003, N.R.S.A. § 77-2101 defines the Nebraska estate tax, levied under N.R.S.A. § 77-2101.01, on the Nebraska taxable estate, which is defined as "the federal taxable estate, as determined under Chapter 11 of the Internal Revenue Code, minus one million dollars."

The same section defines the Nebraska "taxable transfer" for purposes of the Nebraska generation skipping transfer tax, levied under N.R.S.A. § 77-2101.02, as the federal taxable transfer under IRC Chapter 13 minus $1,000,000.

N.R.S.A. § 77-2101.03 sets forth a tax table for the Nebraska estate tax which is identical to the pre-EGTRRA version of the state death tax credit in IRC § 2011.

The same section sets the rate of the Nebraska generation skipping transfer tax at a flat 16 percent of the Nebraska taxable transfer.

N.R.S.A. § 77-2103 states in full: "If the amount of the transfer tax imposed by Chapters 11 and 13 of the Internal Revenue Code is increased or deceased as affecting a transfer taxable under sections 77-2101 to 77-2116, the tax imposed upon such transfer under such sections shall be changed accordingly."

Nebraska also levies an inheritance tax, N.R.S.A. § 77-2001. The tax rate on transfers to parents and all lineal descendants of the decedent (including adopteds) and to certain persons to whom the decedent stood in "the acknowledged relation of a parent" is 1 percent. There is no tax on transfers to a surviving spouse. N.R.S.A. § 77-2004. Under N.R.S.A. § 77-2005.01 the same 1 percent tax rate extends to transfers to the relatives of the decedent's former spouse to whom the decedent was married at the time of the former spouse's death and to relatives of the decedent's surviving spouse. N.R.S.A. § 77-2206 sets forth the tax rates for all other taxable transfers which reach 18 percent on transfers in excess of $50,000.

B. Analysis

The new Nebraska regime, taking effect on January 1, 2003, is not without its peculiarities.

First, the tax table in N.R.S.A. § 77-2102.03 is identical to the IRC § 2011 table but does not have the same effect.

Under pre-2002 IRC 1986 § 2001, the state death tax credit on a federal taxable estate of $1,100,000 was $ 38,800 (the "adjusted taxable estate" for § 2011 purposes is the taxable estate minus $60,000). The allowable state death tax credit, that is, the money the state would actually collect in 2001 was the full $38,000 (the federal tax due on the taxable estate, after application of the 2001 § 2010 unified credit was $166,250, which exceeds the § 2011 credit thus allowing the full credit and reducing the federal tax payable to $126,250).

In 2002, the state would collect $28,500 (the federal tax payable after subtracting the 2002 § 2010 unified credit is $41,000 and the 2002 § 2011 credit is $28,500 (.75 × $38,000)).

Beginning in 2003, the Nebraska estate tax on a federal taxable estate of $1,100,000 is $560. Because the "Nebraska taxable estate" is the federal taxable estate minus $1,000,000 Nebraska will levy tax on $100,000, and under pre-EGTRRA § 2011 the credit on a taxable estate of that amount is $560.

Part of the problem is the difference between a deduction and a credit. By deducting $1,000,000 from the taxable estate rather than crediting the tax on the taxable estate with an amount equal to the tax on the first

$1,000,000 of the taxable estate, the state allows the taxpayer the benefit of the lower brackets. If the state used a credit approach and the same tax table, the state tax on a taxable estate of $1,100,000 would be $6,000 (the tax on $1,100,000 which is $42,640 minus the tax on $1,000,000 which is $36,640).

But the principal cause of the steep decrease in tax is disappearance of the federal estate tax from the calculation. The tax collected by a state with a sponge tax is limited by two things, the amount of the state death tax credit and the amount of the tentative federal estate tax remaining after subtraction of the unified credit. The applicable exemption amount is created by a credit against the federal tax; it is given effect for state death tax credit purposes only through the effect of the unified credit.

In addition, the Nebraska generation skipping transfer tax presents difficulties.

IRC § 2604 allows a credit for state generation skipping transfer taxes not to exceed 5 percent of the federal tax imposed.

The Nebraska statue imposes a flat 16 percent tax on the "taxable transfer" which is the federal transfer minus $1,000,000.

Under pre-EGTRRA law, then, assuming a $1,100,000 taxable transfer to which $1,000,000 of exemption applies, the federal tax is $55,000 and the state credit $2,750.

Starting in 2003, the Nebraska tax is $16,000.

In addition, there is a significant problem in the definition of "taxable transfer." Consider a taxable transfer which occurs because of a taxable termination of a trust to which sufficient exemption had been allocated to reduce the inclusion ratio to zero. Assume the taxable transfer is $2,000,000. The federal tax is zero, but is the Nebraska tax $160,000 (($2,000,000 − $1,000,000) × .16)? Taken literally, the Nebraska taxable transfer is indeed $1,000,000.

Clearly, there are aspects of the new Nebraska regime which require clarification, especially the meaning of N.R.S.A. § 77-2103.

¶ 706.29 Nevada

A. Statutory Framework

Nevada Revised Statutes § 375A.100 levies a tax on the transfer of the taxable estate of a decedent "in the amount of the maximum credit allowable against the federal estate tax for the payment of state death taxes."

N.R.S. § 375A.025 perhaps redundantly defines "federal credit" as "the maximum amount of the credit against the federal estate tax for state death taxes allowed by 26 U.S.C. § 2011 . . . ."

N.R.S. § 375B.100 levies a tax on generation skipping transfers other than direct skips in the amount of the federal credit.

N.R.S. § 375.030 defines federal credit as the IRC § 2604 credit "allowed."

The Nevada Constitution, Art. X, § 4, was amended in 1986 to provide that the legislature may tax estates "only to the extent of any credit allowed by federal law for the payment of the state tax." In addition, "[t]he combined amount of these federal and state taxes may not exceed the estate tax which would be imposed by federal law alone."

B. Analysis

The statutory language certainly could be interpreted as tying Nevada law to federal law.

The constitutional provision, however, clearly requires that Nevada law conform to the changes made by EGTRRA. Limiting the tax to the amount of the § 2011 credit will end Nevada's tax when the credit ends.

Nevada's GST tax will end when the federal tax is repealed.

¶ 706.30 New Hampshire

A. Statutory Framework

New Hampshire Revised Statutes § 87:1(I) imposes an estate tax on the estate of every decedent whose estate "is subject to an estate tax under the provisions of the United States Internal Revenue Code of 1986, as amended . . . ."

N.H.R.S. § 87:1(II) makes the tax equal to the "maximum federal estate tax credit allowable for state death taxes . . . ."

N.H.R.S. § 87:1(IV) requires that the tax be levied "in every case" in which the state death tax credit is "available as a credit on the decedent's federal estate tax return."

Note that New Hampshire does impose an inheritance tax, N.H.R.S. § 86:6. The tax is levied at a rate of 18 percent, but property passing to the decedent's spouse; lineal ascendants and descendants and those persons' spouses; adopted children and their spouses and lineal descendants; "a person who for 10 consecutive years prior to the person's fifteenth birthday was a member of the household of the decedent;" and stepchildren and their spouses and lineal descendants is exempt from tax. The tax is repealed effective January 1, 2003 which will leave the sop tax as the only tax.

B. Analysis

The statutory reference to the IRC "as amended" and the requirement that the tax be levied in every case where the credit is available should conform New Hampshire law to the changes made by EGTRRA.

¶ 706.31 New Jersey

A. Statutory Framework

New Jersey Statutes Annotated § 54:38-1(a) was amended effective July 1, 2002 and now provides that for decedents dying after December 31, 2001 tax is levied on the estate either in the amount of the maximum credit that would have been allowable under the IRC in effect on December 31 2001 or in the amount determined under "the simplified tax system" as may be prescribed by the Director of the Division of Taxation to produce a liability "similar" to that under the IRC as of December 31, 2001.

N.J.S.A. § 54:38-1(c) directs that the "simplified system" be based upon an applicable exclusion amount of $675,000 and result in a similar amount of tax as that under the IRC as of December 31, 2001 but also make it possible to calculate the tax "notwithstanding the lack or paucity of information" resulting from such factors as the absence of a valuation made for federal tax purposes and "any other information compliance problems [resulting from] the phased repeal of the federal estate tax."

N.J.S.A. § 54:34-2 levies an inheritance tax at rates of up to 16 percent, but exempts transfers to a surviving spouse, parent or grandparent, child or children and issue of any child of the decedent.

B. Analysis

Clearly the New Jersey tax has been "decoupled" and will remain at pre-EGTRRA levels.

It seems unlikely that the inheritance tax will result in a higher tax except in exceptional circumstances.

The "simplified system" provision recognizes at least the practical problems that arise from decoupling.

¶ 706.32 New Mexico

A. Statutory Framework

New Mexico Statutes Annotated § 7-7-3(A) levies an estate tax in an amount equal to the "federal credit."

N.M.S.A. § 7-7-2(D) defines "federal credit" to mean the maximum amount of the credit allowed by § 2011 and (L) defines "Section 2011" to mean IRC 1986 § 2011 "as amended or renumbered."

B. Analysis

The reference to the IRC "as amended" ensures that New Mexico's estate tax will be phased out in accord with the provisions of EGTRRA.

¶ 706.33 New York

A. Statutory Framework

Tax Law § 951(a) defines "Internal Revenue Code" for purposes of New York's estate tax to mean IRC 1986 as it existed with all amendments enacted on or before July 22, 1998. New York is constitutionally forbidden from "automatically" conforming its tax law to changes in federal law (except for certain income tax provisions).

Tax Law § 952 imposes an estate tax in an amount equal to the maximum amount allowable as a credit against the federal estate tax under IRC § 2011.

Tax Law § 1002 imposes a generation skipping transfer tax equal to the IRC § 2604 credit.

B. Analysis

New York's fixed conformity date has not been changed to reflect EGTRRA (although the state has conformed to the special relief provisions enacted by Congress applying to the estates of victims of the terrorist attacks of September 11, 2001, Laws 2002, Ch. 85, § 5 (Part Q)).

New York will therefore continue to levy its estate and GST taxes under pre-EGTRRA law except that the applicable exemption amount is $1,000,000 for 2002 and subsequent years (TSB-M-02(2)M (March 21, 2002)).

¶ 706.34 North Carolina

A. Statutory Framework

North Carolina General Statutes Annotated § 105-32.2(a) levies an estate tax and subsection (b) makes the amount of the tax "the maximum credit for state death taxes allowed under section 2011 of the Code without regard to the phase-out of the credit under subdivision (b)(2) of that section." There are adjustments for property taxed which is located outside the state.

This section (as amended in 2002, effective January 1, 2002, to freeze the § 2011 credit at pre-EGTRRA levels) is repealed for estates of decedents dying on or after January 1, 2004.

N.C.G.S.A. § 105-32.7 levies a generation skipping transfer tax in the amount of the IRC § 2604 credit.

N.C.G.S.A. § 105-228.90(1b) defines "Code" to mean the Revenue Code as enacted as of May 1, 2002.

B. Analysis

The state death tax credit is frozen at pre-EGTRRA levels for 2002 and 2003. Beginning in 2004 it appears that the North Carolina estate tax is repealed, one year before the credit itself is abolished.

Otherwise, North Carolina law conforms to federal changes.

Therefore, the generation skipping transfer tax credit will reflect the reduction of the top rate transfer tax rate under EGTRRA and the applicable exclusion amount will increase.

¶ 706.35 North Dakota

A. Statutory Framework

North Dakota Century Code Annotated § 57-37.1-02 levies an estate tax.

N.D.C.C.A. § 57-37.1-04 makes the amount of tax equal to "the maximum credit allowable for state death taxes against the federal estate tax imposed with respect to a decedent's estate . . . ." For purposes of the section, "federal estate tax" means "the tax imposed on transfers of estates of decedents pursuant to the United States Internal Revenue Code of 1954, as amended . . . ."

N.D.C.C.A. § 57-37.1-01 defines both "federal gross estate" and "federal taxable estate" as meaning the gross estate and the taxable estate of a decedent "as determined for federal estate tax purposes pursuant to the provisions of the United States Internal Revenue Code of 1986, as amended through December 11, 1990."

B. Analysis

The reference to IRC 1986 "as amended through December 11, 1990" would seem to freeze North Dakota into pre-TRA 1997 law, but only with regard to the definitions of "federal gross estate" and "federal taxable estate." Neither definition appears to be relevant to the calculation of the tax imposed.

The reference to IRC 1954 "as amended" in N.D.C.C.A. § 57-37-1.04 for the definition of "federal estate tax" certainly increases the applicable exemption amount and, assuming that the state death tax credit is part of the "tax imposed on transfers of estates by decedents" (which it should be if the unified credit is part of the tax) North Dakota conforms to EGTRRA and its estate tax will be phased out.

¶ 706.36 Ohio

A. Statutory Framework

Ohio Revised Code Annotated § 5731.18 levies an "additional estate tax" "in an amount equal to the maximum credit allowable by subtitle B, chapter 11 of the Internal Revenue Code of 1954, 26 U.S.C. 2011, as amended . . . ."

The "additional tax" is to be credited with amounts paid under O.R.C.A. § 5731.02 which levies an estate tax at rates that reach 7 percent on taxable estates of more than $500,000. There is an unlimited marital deduction under O.R.C.A. § 5731.15.

O.R.C.A. § 5731.181 levies a generation skipping transfer tax in the amount of the credit under IRC 1986 §§ 2601-2624 "as amended."

B. Analysis

The references to the IRC "as amended" will conform Ohio to the EGTRRA changes.

The separate Ohio estate tax will become a deduction from the federal taxable estate in 2005 and will survive the repeal of the federal estate tax under EGTRRA.

¶ 706.37 Oklahoma

A. Statutory Framework

Oklahoma Statutes Annotated § 68-802 levies an estate tax at rates set forth in O.S.A. § 68-803, which for the net estate and transfers to father, mother, child, child of husband or wife, adopted child, or any lineal descendant of the decedent or of such adopted child at rates that range from 0.5 percent to 10 percent on net estates in excess of $10,000,000. For transfers to all others the rates range from 1 percent to 15 percent on net estates in excess of $1,000,000.

O.S.A. § 68-804 levies an additional tax to the extent that the independent state tax is less than "the credit allowed by the federal government on estate tax . . . pursuant to U.S.C. Section 2011 . . . ."

B. Analysis

The Oklahoma additional estate tax will be phased out in accord with the provisions of EGTRRA—there is no provision freezing IRC provisions as of any date.

However, the independent estate tax will continue and will be deductible against the federal tax beginning in 2005.

¶ 706.38 Oregon

A. Statutory Framework

Oregon Revised Statutes § 118.010(1) imposes a tax on the transfer of property at death and (2) makes that tax equal to "the maximum amount of the state death tax credit allowable" under IRC § 2011.

O.R.S. § 118.010(5) provides that if credits under than the § 2011 credit result "in no federal estate tax" no tax shall be imposed under the section.

B. Analysis

There is no statutory provision freezing the Oregon reference to the code at any particular date.

In *Seale v. McKennon*, 215 Or. 562, 336 P.2d 340 the Supreme Court of Oregon held that a statutory provision purporting to allow a state agency to promulgate as the law of Oregon future law of the United States is an unconstitutional delegation of legislative powers contravening Art. 1, § 21 of the state constitution.

Under the *Seale* case, therefore, the IRC provisions applicable in Oregon are those that existed when O.R.S. § 118.010 was last amended in 1997.

On October 25, 2002 the Governor vetoed House Bill 4077 which would have abolished the Oregon estate tax beginning in 2005; prior to 2005 the tax would have been frozen at pre-EGTRRA levels.

¶ 706.39 Pennsylvania

A. Statutory Framework

72 Pennsylvania Statutes Annotated § 9117 imposes a tax equal to the difference between the Pennsylvania inheritance tax and the "maximum credit for State death taxes allowable under section 2011 of the Internal Revenue Code of 1986 . . . ." This tax is levied only "[i]n the event that a Federal estate tax would be payable to the Federal Government on the transfer of the taxable estate of a decedent . . . ." This provision was amended effective July 1, 2002 by substituting "in the event that a Federal

estate tax would be payable" for "in the event a Federal estate tax is payable."

72 P.S.A. § 9106 imposes an inheritance tax on Pennsylvania estates and 72 P.S.A. § 9116 imposes the tax at rates that range from 0 percent on transfers to a spouse, through 4.5 percent on transfers to grandparents, parents, and lineal descendants, 12 percent on transfers to siblings, to 15 percent on transfers to all others.

72 P.S.A. § 9102 defines "federal estate tax" as the tax imposed under Chapter 11 "of the Internal Revenue Code of 1986" and states than any reference to IRC 1986 "shall mean the Internal Revenue Code of 1986 . . . as amended to June 1, 2001," which is prior to the enactment of EGTRRA on June 7, 2001.

B. Analysis

The Pennsylvania statutes clearly freeze the Commonwealth's tax at pre-EGTRRA levels, with regard to both the state death tax credit and the applicable exclusion amount. Presumably, the applicable exclusion amount will increase according to the provisions of TRA 1997.

¶ 706.40 Rhode Island

A. Statutory Framework

General Laws of Rhode Island Annotated, 1956 § 44-22-1.1(a)(2) imposes a tax on the estates of decedents dying after January 1, 2002 "equal to the maximum credit for state death taxes allowed by 26 U.S.C. § 2011 as it was in effect as of January 1, 2001, provided, however, any scheduled increase in the unified credit provided in 26 U.S.C. § 2010 in effect on January 1, 2001, or thereafter, shall not apply."

Gen. Laws 1956, § 44-40-3 imposes a generation skipping transfer tax in the amount allowable as a credit under IRC § 2604.

Subsection (c)(2) provides that the terms "gross estate" and "federal gross estate" have the same meaning as when used "in a comparable context in the laws of the United States" and reiterates that any reference to the Internal Revenue Code "or other laws of the United States" means as those laws were in effect on January 1, 2001.

B. Analysis

Clearly, Rhode Island will continue to levy a sponge tax as if EGTRRA had never been enacted.

In addition, the last phrase in Gen. Laws Ann. 1956 § 44-22-1.1 which makes increases in the unified credit inapplicable seems to apply to the increases scheduled to occur under the provisions of TRA 1997. Presumably the applicable exclusion amount is therefore frozen at $675,000.

The decoupling provision does not refer to the GST tax and the reference to the credit "allowable" certainly can be read to mean that the tax will end with the repeal of the federal tax.

¶ 706.41 South Carolina

A. Statutory Framework

Code of Laws of South Carolina 1976 Annotated § 12-16-510 imposes "[a] tax in the amount of the federal credit" on the estates of residents, with adjustments for property outside of the state.

Code 1976 Ann. § 12-16-20(2) defines "federal credit" as the "maximum amount of the credit for state death taxes allowable by" IRC § 2011, but only after taking into account other credits permitted by the IRC and not in excess of the amount necessary to reduce the federal estate tax to zero.

Code 1976 Ann. § 12-6-40(A)(1) defines "Internal Revenue Code" to mean IRC 1986 "as amended through December 31, 2001 and includes the effective date provisions contained in it."

Code 1976 Ann. § 12-16-720 imposes a generation skipping transfer tax where the transferor was a resident of the state on the date of the original transfer in the amount of the credit under IRC § 2604.

B. Analysis

The statutory definition of "Internal Revenue Code" as including amendments only through December 31, 2001 conforms the South Carolina estate and generation skipping transfer tax provisions to EGTRRA.

¶ 706.42 South Dakota

A. Statutory Framework

South Dakota Codified Laws Annotated § 10-40A-2 imposes an estate tax on all estates subject to "the federal tax" and § 10-40A-3 makes the tax equal to "the death tax credit."

S.D.C.L. Ann. § 10-40A-1 defines "death tax credit" as the maximum allowable credit "against the federal tax for state death taxes;" defines "federal tax" as the tax "imposed on the transfer of the taxable estate of decedents by the Internal Revenue Code;" and defines "Internal Revenue Code" as the federal IRC "as amended and in effect on January 1, 2002."

South Dakota Constitution Art. 11, § 15 prohibits the levying of a tax "on any inheritance." The section was added by initiative and became effective on July 1, 2001. (The vote was 251,316 for and 62,334 against.)

B. Analysis

The statutory definition of "Internal Revenue Code" as including amendments through January 1, 2002 conforms state law to EGTRRA.

The constitutional provision prohibits the state from enacting its own tax.

¶ 706.43 Tennessee

A. Statutory Framework

Tennessee Code Annotated § 67-8-303 levies an inheritance tax on a broad array of transfers set forth in T.C.A. § 67-8-304.

Under T.C.A. § 67-8-302 beneficiaries are divided into two classes, Class A consisting of spouse, children, lineal ancestors and descendants, siblings, sons- and daughters-in-law, and step-children. All other relatives, persons, associations or corporations are in Class B.

T.C.A. § 67-8-314 taxes Class A beneficiaries at rates that reach 9.5 percent on a net taxable estate of $440,000 and taxes Class B beneficiaries at rates identical to those applying to Class A.

T.C.A. § 67-8-204 imposes a sop tax to the extent the federal credit exceeds the Tennessee inheritance tax.

T.C.A. § 67-8-203(a) provides that "the provisions of chapter 11 of the Internal Revenue Code of 1954, or of any amendment thereto, or of any substituted act . . . shall be applied to the same extent as if the provisions were set forth in this part."

T.C.A. § 67-8-203(b) provides that the tax levied by § 67-8-204 shall not apply to the estates of decedents dying subsequent to the date of the repeal of Chapter 11 "or of the provisions thereof allowing the credit."

T.C.A. § 67-8-603(a) levies a generation skipping transfer tax equal to the amount allowable as a credit under IRC § 2604.

B. Analysis

Tennessee law will automatically conform to the provisions of EGTRRA and the sop tax will end with the end of the credit. The GST tax will end with the end of the federal tax.

The independent Tennessee tax will continue and will be deductible against the federal tax beginning 2005. Note that under the Tennessee tax there is no marital deduction.

¶ 706.44 Texas

A. Statutory Framework

Vernon's Texas Statutes and Codes Annotated § 211.051 levies an estate tax equal "to the amount of the federal credit."

V.T.C.A. § 211.054 levies a generation skipping transfer tax equal to the IRC § 2604 credit.

V.T.C.A. § 211.003 provides that citations of or references to the Internal Revenue Code are to the IRC as it existed on September 1, 1981 "or as amended after that date."

B. Analysis

Because the conformity provision includes all amendments to the IRC, the estate tax and the GST tax will phase out in accord with the provisions of EGTRRA.

¶ 706.45 Utah

A. Statutory Framework

Utah Code Annotated § 59-11-103(1) imposes a tax "in the amount of the federal credit."

U.C.A. § 59-11-102(2) defines "federal credit" as the maximum amount of the IRC § 2011 credit and (9) defines "Section 2011" to mean IRC § 2011 "as amended or renumbered."

B. Analysis

The statutory reference to IRC § 2011 as amended will cause the Utah tax to phase out in accord with the provisions of EGTRRA.

¶ 706.46 Vermont

A. Statutory Framework

32 Vermont Statutes Annotated § 7442a(a) imposes a tax on the estate of every decedent dying on or after January 1, 2002 in an amount equal to the amount of the IRC § 2011 credit "as in effect on January 1, 2001."

The statute was amended after the passage of EGTRRA by deleting language that referred to the credit under IRC § 2011 "as amended" and inserted the language referring to the credit under the law in effect on January 1, 2001.

32 V.S.A. § 7460 imposes a generation skipping transfer tax equal to the IRC § 2604 credit "as in effect on January 1, 2001."

32 V.S.A. § 7475 provides: "The laws of the United States, relating to the federal estate and gift taxes as in effect on January 1, 2002, are hereby adopted for the purpose of computing the tax liability under this chapter, except with the credit for state death tax under Sections 2011 and 2604 as in effect on January 1, 2001, of the Internal Revenue Code, and without any deduction for state death taxes under Section 2058 of the Internal Revenue Code."

B. Analysis

For purposes of the Vermont tax, the IRC § 2011 credit will remain at pre-EGTRRA levels so long as the federal estate tax exists. The state will recognize the increase in the applicable exclusion amount under EGTRRA and a circular computation is avoided by the express exclusion of any deduction for state death taxes. Section 7475 may or may not be intended to end the state tax when the federal tax ends.

Section 7475 does not refer to the GST tax and it is uncertain whether the state's tax will end with the repeal of the federal tax.

¶ 706.47 Virginia

A. Statutory Framework

Virginia Code Annotated § 58.1-902(A) levies a tax "in the amount of the federal credit" on the taxable estate of every resident. Subsection (B) provides an adjustment for state death tax imposed by a state other than Virginia on property of a Virginia resident located in that other state based on credit allowed for that tax "under § 2011 of the Internal Revenue Code of 1954, as amended or renumbered. . . ."

V.C.A. § 58.1-901 defines "federal credit" to mean the maximum amount of the credit allowable under IRC § 2011 and "in no event . . . shall such amount be less than the federal credit allowable by § 2011 of the Internal Revenue Code as it existed on January 1, 1978."

V.C.A. § 58.1-901 defines "taxable estate" to mean taxable estate "as defined in § 2051 of the United States Internal Revenue Code of 1954 as amended or renumbered, or the successor provisions of the law of the United States" and defines gross estate by using the meaning of the term "as defined in § 2031 of the United States Internal Revenue Code of 1954 as amended or renumbered, or the successor provisions of the law of the United States."

V.C.A. § 58.1-936 imposes a generation skipping transfer tax in the amount of the IRC § 2604 credit.

Finally, V.C.A. § 58.1-901 states: "Any reference in this chapter to the laws of the United States relating to federal estate and gift taxes means the provisions of the Internal Revenue Code of 1954, and amendments thereto, and other provisions of the law of the United States relating to federal estate and gift taxes, as the same may be or become effective at any time or from time to time."

The filing requirement in V.C.A. § 58.1-905(A) requires "[t]he personal representative of every estate subject to the tax imposed by this chapter who is required by the laws of the United States to file a federal estate tax return" to file with the Virginia authorities a return for the tax due under the state law and a copy of the federal return.

A bill to conform Virginia's estate tax to federal law, thus phasing out the tax with the phase out of the state death tax credit passed the legislature but was vetoed by the Governor, whose veto was upheld by the state Senate on April 2, 2003.

B. Analysis

Absent an amendment like that contained in House Bill 694 the § 2011 credit is frozen at pre-EGTRRA levels.

All other references to the IRC are to the federal law as amended. That provision combined with the filing requirement leads to the conclusion that the increase in the applicable exemption amount under EGTRRA will be applicable to Virginia decedents. The provision also means that the state GST tax will end with the repeal of the federal tax.

This conclusion is strengthened by the reference in V.C.A. § 58.1-901 to the maximum credit "allowable" under IRC § 2011. Had the reference omitted the section number, one could argue that the applicable exemption amount (i.e., unified credit) was frozen at the 1978 level.

¶ 706.48 Washington

A. Statutory Framework

Revised Code of Washington Annotated § 83.100.030 imposes "[a] tax in an amount equal to the federal credit . . . on every transfer of property of a resident" with adjustments for property taxed by other states.

R.C.W.A. § 83.100.045 levies a generation skipping transfer tax in the amount of the "federal credit."

R.C.W.A. § 83.100.020 defines federal credit to mean the IRC 1986 § 2011 credit or the IRC 1986 § 2604 credit depending on the context and defines "Internal Revenue Code" to mean IRC 1986 "as amended or renumbered as of January 1, 2001."

Senate Bill 6785 would change the IRC conformity date to January 1, 2002 but retain the definition of "federal credit" as of January 1, 2001. Thus the state death tax credit would be frozen but the applicable exemption amount and the tax rates would change in accord with EGTRRA. The bill apparently went no further than passage in the state senate.

B. Analysis

Given the conformity date of January 1, 2001, Washington law will not recognize the changes made by EGTRRA.

¶ 706.49 West Virginia

A. Statutory Framework

West Virginia Code Annotated § 11-11-3 imposes an estate tax in the amount, if any, of the "maximum allowable federal credit for state death taxes" and the unified credit "established in" IRC § 2010 "as amended, shall be applied before calculating the West Virginia estate tax."

W. Va. Code Ann. § 11-11-2(b)(5) defines "federal credit" as including the IRC § 2011 credit and the IRC § 2604 credit as they existed on January 1, 1985 but for decedents dying after December 31, 2001 the "maximum amount" of the credits shall not be less than the credit under IRC § 2011 as amended by EGTRRA.

W. Va. Code Ann. § 11-11-4 imposes a tax "in the amount of the federal credit on the transfer of the taxable estate of every resident decedent. . . ." Presumably this section, unlike § 11-11-3, includes a tax on generation skipping transfers.

B. Analysis

The definition of federal credit means that West Virginia will recognize the reduction of the credit by EGTRRA and the state's estate tax will end in 2005. The state's GST tax will end when the federal tax is repealed.

Because the unified credit must be applied before the West Virginia tax is calculated, the increases in the applicable exemption amount will be recognized.

¶ 706.50 Wisconsin

A. Statutory Framework

Wisconsin Statutes Annotated § 72.02 imposes an estate tax on the transfer of all property subject to a federal estate tax and that has a taxable situs in Wisconsin. There are adjustments for property outside of the state. The tax is equal to "the federal credit against the federal estate tax."

W.S.A. § 72.01(11m) defines "federal credit" for deaths after September 30, 2002 and before January 1, 2008 as the IRC § 2011 credit "as computed under the federal estate tax law in effect on December 31, 2000" and for deaths after December 31, 2007 as computed under the federal estate tax law in effect on the date of the decedent's death.

Subsection (11n) defines "federal estate tax" for deaths in the same time frame as that used in (11m) to mean the federal estate tax computed under the law in effect on December 31, 2000. After 2007 the tax is computed under the law in effect on the date of death.

B. Analysis

Wisconsin has frozen its estate tax at pre-EGTRRA levels for deaths before 2008.

After 2007, however, the tax will disappear and EGTRRA will be in force in the state.

¶ 706.51 Wyoming

A. Statutory Framework

Wyoming Statutes Annotated § 39-19-103(a) levies a tax on the transfer of property constituting the "Wyoming gross estate."

Subsection (b) makes the tax equal to the "maximum state death tax credit allowed to a Wyoming estate as a credit against federal estate taxes under the law of the United States . . . ."

Subsection (b) also states that the purpose of the provisions enacting the state tax is to take advantage for Wyoming of the state death tax credit "without increasing the aggregate of federal and state death, transfer or succession taxes on any estate."

B. Analysis

Wyoming is unusual in that the statutory references are to the "law of the United States" rather than to the IRC.

This general reference, coupled with the stated intention not to increase the taxes on any estate should be taken as meaning that Wyoming conforms to EGTRRA.