DRAFT

FOR DISCUSSION ONLY

REVISION OF UNIFORM ESTATE TAX APPORTIONMENT ACT AND SECTION 3-916 OF THE UNIFORM PROBATE CODE

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

DECEMBER 2000

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With Reporter's Notes

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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UNIFORM APPORTIONMENT OF DEATH TAXES ACT

SECTION 1. SHORT TITLE. This [Act] may be cited as the "Uniform Apportionment of Death Taxes Act"

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Death taxes" means the amount due or paid as a domestic or foreign tax occasioned by or resulting from the death of an individual, including the federal estate tax, the federal generation-skipping transfer tax, State estate and inheritance taxes, State generation-skipping transfer taxes, and interest and penalties associated with those taxes.

[**COMMENT**: Currently, there is no income tax imposed at death on the amount by which a decedent's assets were appreciated at the time of his death. Except for Income in Respect of a Decedent, the basis of an asset that was included in a decedent's gross estate will become the fair market value of that asset. There currently are proposals to eliminate federal death taxes. If the federal death taxes are repealed, it is virtually certain that the repeal will be accompanied by either: (1) an income tax on capital appreciation at death, or (2) a carry-over basis under which the transferees of the decedent's properties will take the same basis in those properties that the decedent had. If an income tax on capital appreciation at death is adopted, that would be a tax "occasioned by the death of an individual" and so would be included in the definition of a "death tax" in this Section and would be apportioned among the persons interested in the decedent's gross estate. However, if a carry-over basis approach is adopted, none of the income subsequently recognized on the disposition of such property will constitute a "death tax" and will not be apportioned by this Act.

I have included a reference to interest and penalties in the definition of death taxes even though the Committee had struck that reference from the original draft. The reason is that I eliminated the reference to interest and penalties on deficiencies in Section 4(f) because I thought it fit better here. There is no need to have a special apportionment provision for penalties and interest and the deductions allowable for their payment except for the interest payable on extensions, and so I have limited the special allocation provided by Section 4(f) to interest on extensions and have left interest on deficiencies to be dealt with in the same way as death taxes generally are apportioned.]

(2) "Estate" means the fictional entity that comprises all of the decedent's assets and liabilities.

(3) "Fiduciary" means an executor, personal representative, or administrator of any description, guardian, conservator, trustee, other legal representative, or any person, acting on behalf of another, having an obligation to pay or to contribute to the payment of a death tax.

(4) "Gross estate" means all of the interests in property which are subjected to a death tax. The identity of the interests included in the gross estate depends upon the scope of the tax to be apportioned and may not be the same for different taxes.

(5) "Internal Revenue Code" means Title 26 of the United States Code as it exists on [the effective date of this [Act]] [or as subsequently amended.]

[**COMMENT**: From time to time, the lettering or numbering of subsections of a Code section may be changed or even moved to another Code section. Any references in the Act to Code sections or subsections are intended to refer to the substance of those provisions regardless of whether they are subsequently relettered or renumbered. A reference to a Code provision includes amendments that Congress subsequently makes to that provision. However, the constitution of some States prohibit a delegation of the legislative function from the State legislature to Congress, and so those States cannot incorporate subsequent changes of federal law into their apportionment acts. Instead, those States will need to make legislative adjustments to their acts from time to time in order to incorporate Congressional amendments to Internal Revenue Code provisions that are incorporated in their acts.]

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(7) "Person interested in the gross estate" means any person, including a fiduciary, entitled to receive, or who has received, whether before or after the decedent's death, property or an interest therein that is included in the decedent's gross estate, except a creditor of the decedent or the decedent's estate, or a transferee for full and adequate consideration.

(8) "Property received by a person" includes an interest in property and a right to receive any interest in property without reduction for any taxes charged to such property or paid by the recipient.

[**COMMENT**: The meaning of "property" in the Act is as broad as the definition of "gross estate" in Section 2031(a) of the Internal Revenue Code.]

(9) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

[**COMMENT**: While the definition of "State" does not include a political subdivision of a governmental entity listed in that definition, a death tax imposed by a city or other political subdivision of such a governmental entity will be included in the definition of a "death tax" in the Act and so will be apportioned by the Act.]

(10) "Value" means fair market value as finally determined for purposes of the death tax that is to be apportioned under this [Act] without reduction for the portion of the interest in property that is used, or required to be used, for the payment of death taxes, and without reduction for the payment of death taxes made or required to be made by the recipient of the interest. If an interest in property is encumbered, the value of the interest is its fair market value, as determined under this subsection, less the outstanding debt that is secured by the interest.

[**COMMENT**: If a debt is secured by more than one interest in property, the value of each such interest is the fair market value of that interest less a portion of the debt that it secures. The portion of a debt to be so allocated to an interest to determine the interest's value is a fraction of the debt equal to the fraction in which the numerator is the value of the interest (determined without reduction for any debts secured by that interest other than debts senior to the debt to be allocated) and the denominator is the value of all interests in property that secure the debt (reduced only by debts senior to the debt to be so allocated).

If a decedent's will or other dispositive instrument directs that property controlled by that instrument is to be used to pay a debt that is secured by an interest or interests in property, that provision will constitute an additional bequest to the person or persons who are to receive the interests securing the debt.]

SECTION 3. APPORTIONMENT BY WILL OR OTHER DISPOSITIVE INSTRUMENT.

(a) If the decedent's will has a clear and unambiguous direction as to the apportionment of any or all death taxes, those death taxes shall be apportioned according to that direction.

(b) To the extent that any death taxes are not apportioned by decedent's will, the otherwise unapportioned taxes shall be apportioned in accordance with a clear and

unambiguous direction in the trust instrument for a revocable trust for which the decedent was the grantor. If conflicting directions are given in more than one revocable trust instrument, the directions in the most recently dated trust instrument, taking into account the date of an amendment that altered a dispositive provision of the trust, will control.

(c) To the extent that any death taxes are not apportioned by decedent's will or a revocable trust of which decedent was the grantor, a clear and unambiguous provision in an inter vivos or testamentary instrument disposing of property subject to the instrument that the property be applied to the payment of an otherwise unapportioned death tax or that an otherwise unapportioned death tax shall or shall not be apportioned to the property, shall control the extent of the application of the property to the satisfaction of the death tax or the insulation of the property from the payment of the death tax.

[**COMMENT**: The statutory allocation rules of the Act essentially are default rules in the event that the decedent does not make a valid provision as to how death taxes are to be allocated. The decedent has the power to determine which recipients of decedent's property will bear the death taxes and in what proportion. It is necessary to determine in which of the instrument or instruments that the decedent executed must the decedent's direction be included to be valid. One possible choice was to permit the directions in each instrument that the decedent executed to determine the extent to which property controlled by that instrument will bear a share of death taxes, but it was deemed undesirable to have the provisions for an allocation scheme scattered among a number of documents. It was determined that it would be preferable to have the decedent's directions set forth in one instrument so that the decedent's personal representative would not have to search multiple instruments to ascertain the decedent's directions. Accordingly, the Act provides an order of priority for a decedent's directions of death tax allocations. To the extent that a decedent makes a valid direction in the decedent's will, that direction will trump any competing direction in another instrument. To the extent that the will does not provide for the allocation of death taxes, a direction in an instrument that the decedent executed to create a Revocable Trust will control the allocation of death taxes. If the decedent executed more than one Revocable Trust instrument, the directions in the instrument that was executed most recently will control. In determining which Revocable Trust instrument was executed most recently, the date of any amendment that altered a dispositive provision of the Trust will be taken into account. In the event that the allocation of death taxes is not fully provided for by the decedent's will or Revocable Trust instrument, then directions contained in other instruments executed by the decedent that disposes of property will control to the extent that the direction applies to the property disposed of in that instrument. An example of a direction in an instrument disposing of property, other than a will or Revocable Trust instrument, is a direction in a designation of a beneficiary of life insurance proceeds either that the proceeds will be used to pay a portion of death taxes or that the proceeds are not to be used to pay death taxes. A designation of that form will be honored if there is no conflicting designation in a will or a Revocable Trust instrument.

The federal estate tax laws provide a right of the decedent's personal representative to collect a portion of the decedent's federal estate tax from the recipients of certain property that is included in the decedent's gross estate. See e.g., Sections 2206 to 2207B of the Internal Revenue Code. These provisions are not apportionment statutes; rather, they empower the personal representative to collect a portion of the estate tax that is attributable to the property that was included in the decedent's gross estate. These provisions can be overriden by the decedent's directions either in a will, or in the case of several of the provisions, in a Revocable Trust instrument. The Act does not track those provisions in that the Act allows the Revocable Trust instrument to control only if the will does not make a conflicting direction, and the Act permits other instruments to control in limited circumstances. These provisions in the Act do not conflict with federal law since the federal law only empowers the personal representative to collect the mandated amounts; it does not direct how the collected amounts are to be used by the personal representative.

The Act does not permit a direction for allocation of death taxes, or for the insulation from an allocation, that is made by anyone other than the decedent to override the allocation provisions of the Act. For example, if X created a QTIP trust for Y, the value of the trust assets will be included in Y's gross estate for estate tax purposes on Y's death. The instrument that X executed to create the QTIP trust might provide that the trust is not to bear any of the death taxes imposed at Y's death. The Act does not honor that direction, and provides that only Y can direct that the QTIP trust will not bear any portion of Y's death taxes. In this regard, it is noteworthy that the right granted to a decedent's estate by Section 2207A of the Internal Revenue Code to collect a share of the federal estate tax from a QTIP that is included in the decedent's gross estate can be waived only by direction of the decedent in a will or revocable trust instrument. The view of the Committee is that Y is in the best position to determine the optimum allocation of Y's death taxes among the various assets that comprise Y's gross estate. If Y fails to make an allocation, the default provisions of the Act are more likely to reflect Y's intentions than would a direction of a third person. There is a stronger case for allowing the donee of a power of attorney from the decedent to make a valid direction as to the application of the property subject to that power to the payment of death taxes; but, even there, the view was taken that the default provisions of the statute were more likely to represent the decedent's wishes than would a third person's direction.]

(d) If a decedent directs in the decedent's will, revocable trust instrument, or other instrument, that death taxes are to be paid from a fund or trust, unless expressly stated otherwise, the direction is to be interpreted as meaning that, to the extent feasible, the payment is to be made from property that otherwise would have been added to the fund or trust but is not a part of the fund or trust at the time of contribution to the payment of the death tax.

[**COMMENT**: If taxes are to be paid from a fund or trust for which a charity has a remainder interest or an annuity interest, that could cause a loss of the entire charitable deduction. The Service has been reluctant to treat a payment from such a trust or fund as merely reducing the size of the charitable deduction, and has disallowed the charitable deduction entirely. The Service has indicated informally in at least one case that if the

payment of the tax is made before that cash is made a part of the fund or trust, then the payment will not disqualify the charitable deduction. There are numerous instances in which instruments have been drafted requiring a portion of death taxes to be paid from a charitable remainder trust or a charitable lead trust. Subparagraph (d) is an attempt to protect the deduction in such cases.]

SECTION 4. STATUTORY APPORTIONMENT OF DEATH TAXES.

(a) Except as otherwise provided in this [Act,] any death tax is apportioned among the persons interested in the gross estate in the proportion that the value of the interest in property received by each person interested in the gross estate bears to the total value of the gross estate.

[(b) Unless other assets of the gross estate are insufficient to satisfy the decedent's federal estate tax liability, none of that tax is apportioned to specific or pecuniary bequests. If the other assets of the gross estate are insufficient, the shortfall is apportioned to the beneficiaries of the specific and pecuniary bequests in proportion to the respective values of those bequests. This subsection does not apply to a pecuniary bequest of an amount that exceeds Ten Thousand ($10,000) dollars.]

[**COMMENT**: The Committee was divided as to whether this provision should be included in the Act. Some members maintain that all interests in property that is included in a decedent's gross estate should bear its proportionate share of the death tax. A majority of the Committee maintains that there is cause to exclude specific bequests and relatively small pecuniary bequests partly because of the nuisance aspect of including small amounts and partly because of the belief that most decedents would not intend that a specific bequest or a small pecuniary bequest be reduced by charging it with a share of the death taxes.]

(c) A State inheritance tax that is imposed on the receipt of an interest in property is charged to the person receiving that interest in property.

[**COMMENT**: While it appears that currently only one state has an inheritance tax, as contrasted to an estate tax), this provision has been included in the Act to deal with the possibility that a number of states may reintroduce an inheritance tax if the federal estate tax is eliminated or substantially reduced. State estate taxes typically are based on the federal estate tax, and so the elimination or reduction of the latter would have a significant effect on the revenue collections of the State.]

(d) A federal or State generation-skipping transfer tax is charged to the transfer to which that tax is applied. If there is more than one transferee, the tax is apportioned among them in proportion to the values of their respective interests.

[**COMMENT**: This Act does not provide for the apportionment of the income tax payable on the receipt of Income in Respect of a Decedent (IRD). The current tax treatment of IRD causes serious problems and inequities, but these can only be cured by federal legislation. IRD is subjected to both federal estate taxes and income taxes. If no relief were provided, that would be unfair in that the IRD would have been reduced by the income tax payable thereon if it had been collected before the decedent's death, and only the net amount remaining would have been subjected to estate taxation on the decedent's death. The federal tax law seeks to prevent an inequity from taking place by providing a deduction for income tax purposes for the amount of estate tax that is attributable to the IRD. The deduction is allowed against the income recognized when the IRD is collected. However, the deduction for the estate tax on IRD is an itemized deduction, and is subject to the overall limitation on itemized deductions imposed by Section 68 of the Internal Revenue Code. Under Section 68, when an individual's adjusted gross income exceeds a threshold amount, the individual's itemized deductions are reduced by an amount equal to 3% of the difference between the individual's adjusted gross income and the threshold amount. The maximum amount of reduction cannot exceed 80% of the total amount of the individual's itemized deductions. On the death of an individual who had a large amount of IRD that constituted a major portion of the decedent's estate, (for example, if the decedent had a large amount accumulated in a qualified deferred compensation plan), the personal representative would need to draw upon the IRD to pay the death taxes. If the beneficiary of the IRD collects enough of it to pay the estate tax and turns that amount over to the personal representative, the beneficiary will incur a large amount of taxable income and thus a large amount of adjusted gross income. As much as 80% of the deduction for the IRD's share of the decedent's estate tax could be lost as a deduction because of the Section 68 overall limitation. It is not feasible to solve this problem through the Act, but efforts should be made to encourage Congress to address this problem.]

SECTION 5. ALLOWANCE FOR EXEMPTIONS, DEDUCTIONS, SPECIAL VALUATIONS, CREDITS, AND DEFERRALS.

(a) In making an apportionment, allowances must be made, as provided in subsections (b) through (f), and Sections 6 through 9.

(b) A deduction or exemption allowed by reason of a person's relationship to the decedent or by reason of the purposes of the transfer inures to the benefit of the person bearing that relationship or receiving that transfer. If an interest that qualifies for deduction or exemption is subject to prior interests (whether present or future interests) for which no deduction or exemption is allowable, the tax apportionable against those prior interests will not be collected from principal but will be collected from the persons holding the

nondeductible prior interests. If an annuity or fixed percentage interest in a fund qualifies for a charitable deduction under Section 2055(e)(2)(B, and if any subsequent interests in that fund are nondeductible, the tax apportionable to the subsequent nondeductible interests will not be collected from principal but will be collected from the persons holding those subsequent nondeductible interests.

[**Comment**: This provision is aimed primarily at transfers that qualify for a marital or charitable deduction. Since the property transferred to the surviving spouse or charity effectively causes no federal estate tax to the extent that it is deductible, no part of the surviving spouse's or charity's interest that so qualifies should bear any of the estate tax burden; and, to that end, the provision insulates the property and the recipient from bearing any part of the payment of the tax. Similarly, if a deduction or exemption is allowed for the transferred interest under any other death tax, the transferred property will not bear any part of that tax burden. In addition to the equity of this provision, the insulation of the spouse's and the charity's interest from bearing any part of the tax will prevent a reduction of the marital or charitable deduction that otherwise would occur.

If a charitable bequest is made in the form of a charitable remainder annuity trust, a charitable remainder unitrust, or a pooled income fund, an interest that precedes the charitable remainder will not qualify for a deduction unless it is a QTIP interest or another charitable interest. The tax apportioned to a nondeductible preceding interest should not be paid from principal of the trust because that would endanger the qualification of the trust for the charitable deduction. See Rev. Procs. 90-30, 90-31, and 90-32. Moreover, even if the apportioned amount of tax could be collected from the principal of the trust, that would reduce the amount of charitable deduction that is allowable. Similarly, the bequest of a remainder interest to a surviving spouse will qualify for a marital deduction. If the tax apportioned to the interests preceding the marital bequest can be paid from principal, it will reduce the amount of the marital deduction. The likely intent of the decedent would be to maximize the marital and charitable deductions available for the bequests. The provision conforms to that likely intent unless the decedent expressly provides otherwise.

A remainder interest in a personal residence or a farm and a qualified conservation contribution also can qualify for a charitable deduction. In such cases, the tax apportionable to the nondeductible preceding interests will be treated the same as are taxes apportioned to preceding nondeductible interests in a charitable remainder trust or unitrust.

A charitable lead trust can qualify for a charitable deduction under Section 2055(e(2)(B) of the Internal Revenue Code. A succeeding interest in such a trust may not qualify for a deduction and frequently will not. If the tax apportioned to a nondeductible succeeding interest were to be paid from the principal of the trust, that might endanger the qualification of the charity's interest for a deduction. See Treas. Reg. § 20.2055-2(e)(2)(vi)(f). To avoid that risk, the Act provides that the tax will not be collected from the principal of the trust, and, instead, will be collected from the persons holding the nondeductible interests.]

(c) Any deduction or credit for property previously taxed, and any credit for gift taxes or for death taxes of a foreign country paid by the decedent or the decedent's estate, inures to the proportionate benefit of all persons interested in the gross estate. Any credit for death taxes imposed by a State, other than the tax paid from the interests in property the transfer of which caused the imposition of the tax or paid by the recipients of those interests in property, inures to the proportionate benefit of all persons interested in the gross estate. Any credit for gift taxes that were paid by a person interested in the gross estate shall inure to the benefit of that person, and any credit for a State inheritance tax that is paid from an interest in property the transfer of which generated that tax or is paid by the recipients of that interest shall inure to the benefit of the recipients of that interest.

[**COMMENT**: The only State death tax that is payable out of the interest in property the transfer of which caused the imposition of that tax is an inheritance tax. An inheritance tax will reduce the amount that the recipient of that property will receive, but it will not reduce the value of the recipient's interest in the gross estate according to the definition of "value" in the Act. The payment of the State death tax is essentially a payment of a portion of the federal estate tax to the extent that a federal estate tax credit is allowed for the payment. My original draft gave the recipient of the property the benefit of the federal estate tax credit for the inheritance tax. My notes state that the Committee decided to delete that provision, but I cannot recall why that decision was made. It seems to me that the recipient should get the benefit of a credit allowed for the inheritance tax that the recipient effectively paid. I do not see how the inheritance tax situation differs from that of the donee of a gift who pays the gift tax, and the Committee has agreed to give the benefit of the gift tax credit to the donee in that case.]

(d) If the payment of any part of a death tax is deferred because of the inclusion of certain interests in property in the gross estate, the advantage of that deferral inures to those persons who have the right to receive the interests that are the reason for the deferral in proportion to the values of their interests.

(e) To the extent that an interest in property passing to or for the benefit of a surviving spouse, or any charitable, religious, public, or similar purpose will not be an allowable federal estate tax deduction solely because the value passing to the recipient is reduced by the imposition of a State or foreign death tax upon the interest, none of the federal estate tax shall be apportioned to the recipient of that interest. [This subsection does not apply if

the result would be to deprive the estate of a deduction otherwise allowable under Section 2053(d) of the Internal Revenue Code, relating to a deduction for State and foreign death taxes on transfers for charitable, religious, or public uses. The decrease in federal estate tax resulting from a deduction of State or foreign death taxes on an interest passing for a charitable, religious, or public purpose will inure solely to the benefit of the recipient of that interest.]

[**COMMENT**: If a State or foreign death tax is imposed on a charitable bequest, Section 2053(d) of the Internal Revenue Code grants the personal representative an election to deduct the amount of that death tax from the gross estate for federal estate tax purposes. A condition of qualifying for this deduction is that the deduction must inure solely for the benefit of the public, charitable or religious transferee. Consequently, a requisite to obtaining that deduction is that a portion of the federal estate tax be allocated to the charity so that the deduction can reduce the charity's federal estate tax liability and thereby inure to the benefit of the charity. The last two sentences of the provision are designed to protect the estate's right to that deduction. The benefit derived from obtaining a death tax deduction under Section 2053(d) is reduced by the detriment of losing part of the charitable deduction. I have placed the last two sentences in brackets so that the Committee can decide if they should be included in the Act.]

(f) Any interest payable on an extension or deferral of taxes and any tax deduction associated with the interest payments are equitably apportioned to reflect the benefit of the extension or deferral and the burden of the interest payments.

[**COMMENT**: I eliminated the reference in this subparagraph to interest on deficiencies and the deduction for such interest. I thought that that matter does not require any special allocation and is better treated as part of the general allocation of death taxes. Therefore, I altered the definition of death taxes to expressly refer to interest and penalties. The Committee may wish to reinstate the original draft as revised by the Committee at our first meeting.

SECTION 6. NO APPORTIONMENT BETWEEN LIMITED AND REMAINDER INTERESTS. Except as otherwise provided in Subsections 5(b), 7(c), 8(c) and 9(c), no interest in income and no estate for years or for life or other limited interest in any property or fund, other than an annuity, is subject to apportionment as between the limited interest and the remainder. The tax allocated to the limited interest and the remainder is chargeable against the principal of the property or fund subject to the limited interest and remainder. The tax allocated to an annuity is charged to the annuitants.

[**COMMENT**: I am uncertain how to deal with an annuity. The problem is (as was pointed out by the Committee) the difficulty with collecting the tax from the annuitant or the annuitant's interest. Moreover, if the annuity was purchased from an insurance company or other professional provider, there is no fund or principal from which to collect the tax if it were to be charged against the fund or principal. In Subsection 5(b), the Act requires the annuitant of a charitable or marital remainder interest fund to pay the tax, and that was done to protect the estate's qualification for the charitable deduction and the maximization of the marital deduction. Nevertheless, the Act gives the same treatment to all other nondeductible annuities. If the tax cannot be collected from the annuitant when the tax is due, the shortfall will have to be made up from other persons interested in the estate, and they will have a claim against the annuitant. Note that if an annuity is payable from a fund, and if the tax were to be collected from the principal of the fund, and if no adjustment were made to the amount of annuity that is payable, the tax would be borne exclusively by the remainder interest. That would not be fair unless the decedent expressly provided for that treatment.]

SECTION 7. APPORTIONMENT OF BENEFITS FROM AND ADDITIONAL TAX ON QUALIFIED REAL PROPERTY.

(a) For purposes of this section, "qualified real property" means qualified real property as defined in Section 2032A of the Internal Revenue Code and as to which a valid election for special valuation has been made pursuant to Section 2032A.

[**COMMENT**: Section 2031© of the Internal Revenue Code provides an election whereby a portion of the value of land that is subject to a qualified conservation easement, as defined in Section 2031(c)(8), is excluded from the gross estate. The Act makes no special provision for the allocation of the benefits of that election since the reduction in value of the land will reduce the portion of federal estate tax that is allocated to the persons owning interests in that land. A reduction of the portion of the estate tax that is allocated to those persons is not equivalent to giving them the benefit of the reduction in estate tax that the exclusion creates, but the added complexity of providing a remedy similar to the one employed in Section 7 militates against adopting that approach. However, in Section 8, special treatment is provided for the allocation of the benefits and additional tax arising under Section 2031(c)(5) when an agreement is made to terminate development rights that the donor had retained in the conveyance of a qualified conservation easement.]

(b) If an election is made pursuant to Section 2032A of the Internal Revenue Code, the apportionment of the federal estate tax is based upon the amount of federal estate tax that would have been payable but for the election. The amount of reduction in federal estate tax resulting from an election pursuant to Section 2032A of the Internal Revenue Code reduces the federal estate tax that otherwise would have been apportioned to the owners of interests in the qualified real property that is the subject of the election. The reduction is

apportioned among those owners according to the proportionate values of their interests in the qualified real property. If the federal estate tax that otherwise would have been apportioned to the owner of an interest in qualified real property is reduced to zero, any excess amount of reduction reduces the federal estate tax that otherwise would be apportioned to the other persons interested in the gross estate. This amount of reduction is apportioned among the other persons interested in the gross estate in proportion to the values of their interests in the gross estate for federal estate tax purposes.

(c) If an additional federal estate tax is imposed under Section 2032A© of the Internal Revenue Code, by reason of an early disposition of qualified real property or a cessation of qualified use, the additional federal estate tax is a charge against the portion of the qualified real property to which the additional tax is attributable. The additional federal estate tax is apportioned among the persons interested in that portion of the qualified real property in proportion to their interests as valued at the time that the additional federal estate tax is incurred. If ownership of the portion of the qualified real property to which the additional federal estate tax is attributable is split between one or more limited interests and remainder interests, the apportionment of the additional tax is made on the basis of the actuarial values of those interests, as determined under the federal estate and gift tax regulations.

[**COMMENT**: The apportionment of the additional federal estate tax between limited and remainder interests is contrary to the general rule in Section 6 that charges taxes to the principal of the property in which the limited interest exists. The reason for treating the additional federal estate tax differently is similar to the reason for apportioning the tax to annuity interests. Since the limited interest in qualified real property will be a term interest, there will be no principal from which to pay the tax unless the property is sold. If the tax is paid from other funds, it would not reduce the value of the limited interest if no part of the tax is apportioned to that interest. If the additional tax was imposed because of a cessation of qualified use of the property, there is no reason to require the owners to sell unless they need to do so to obtain the required funds to pay the tax. So, the provision leaves the owners with a choice of paying the tax from other funds or selling the property to pay the tax. In either event, the owners of the limited interest will bear their share of the tax.

The allocation between the limited and remainder interests is made according to the actuarial values determined under the federal estate and gift tax regulations. Those

actuarial values are set according to standards established in Section 7520 of the Internal Revenue Code, which mandates the utilization of current market conditions to establish actuarial values. See e.g., Treas. Reg. § 20.2031-7(d).

The Act allocates the additional federal estate tax among the owners according to the values of their interests as determined at the time that the additional tax is incurred rather than as of the date of the decedent's death. Persons who had an interest in the qualified real property at the time of the decedent's death may not have an interest when the additional tax is imposed and therefore will not share in the payment of the additional tax.]

(d) If [a State] estate or succession tax has a provision for a special valuation of certain real property, the apportionment of the reduction of the State tax that is obtained thereby, and the apportionment of any additional tax incurred by reason of an early disposition of the property or cessation of qualified use, is made in the same manner as is provided in this [Act] for the federal estate tax.

[**COMMENT**: The reference to "a State" was placed in brackets at the suggestion of the Committee. The purpose is to permit the name of the State adopting the Act to be inserted. It appears to the Reporter that it should read instead as a general reference, without brackets, to any State since the tax might be imposed by a State other than the one that is adopting the Act.]

SECTION 8. APPORTIONMENT OF BENEFITS FROM AND ADDITIONAL TAX ON LAND FOR WHICH A RETAINED DEVELOPMENT RIGHT WAS TERMINATED.

(a) For purposes of this section,"land for which a retained development right was terminated" means land that is subject to a qualified conservation easement, as defined in Section 2031(c)(8) of the Internal Revenue Code, for which every person having an interest in the land executed a timely agreement that complied with Section 2031(c)(5)(B) of the Internal Revenue Code to extinguish permanently some or all of the development rights that the donor of a conveyance of the qualified conservation easement had retained.

(b) If all of the persons having an interest in land subject to a qualified conservation easement that was included in the decedent's gross estate make a timely agreement to terminate permanently some or all of any retained development rights, the resulting reduction of federal estate tax provided by Section 2031(c)(5)((B) of the Internal Revenue

Code inures to the benefit of the persons owning interests in the land in proportion to the values of their interests. If the federal estate tax that otherwise would have been apportioned to the owner of an interest in the land is reduced to zero, any excess amount of reduction reduces the federal estate tax that otherwise would be apportioned to the other persons interested in the gross estate. This amount of reduction is apportioned among the other persons interested in the gross estate in proportion to the values of their interests in the gross estate for federal estate tax purposes.

(c) If an additional federal estate tax is imposed under Section 2031(c)(5)(C) of the Internal Revenue Code, by reason of any failure to implement an agreement to terminate development rights, the additional federal estate tax is a charge against the land to which the additional tax is attributable. The additional federal estate tax is apportioned among the persons owning interests in the land in proportion to their interests as valued at the time that the additional federal estate tax is incurred. If ownership of an interest in the land to which the additional federal estate tax is attributable is split between one or more limited interests and remainder interests, the apportionment of the additional tax is made on the basis of the actuarial values of those interests, as determined under the federal estate and gift tax regulations.

[**COMMENT**: See the Comment to Subsection 7(c).]

(d) If [a State] estate or succession tax provides a reduction of the tax by reason of an agreement to terminate development rights to land that is subject to a qualified conservation easement, the apportionment of the reduction of the State tax that is obtained thereby, and the apportionment of any additional tax incurred by reason of any failure to implement the agreement, is made in the same manner as is provided in this [Act] for the federal estate tax.

[**COMMENT**: See the Comment To Subsection 7(d).]

SECTION 9. APPORTIONMENT OF BENEFITS FROM AND ADDITIONAL TAX ON QUALIFIED FAMILY-OWNED BUSINESS INTERESTS

(a) For purposes of this section, "qualified family-owned business interests" means interests defined in Section 2057(e) of the Internal Revenue Code as to which a valid election has been made pursuant to Section 2057(b)(1)(B) of the Internal Revenue Code to deduct from the decedent's gross estate the adjusted value of those interests. For purposes of this section, a "Section 2057 deduction" means the federal estate tax deduction allowed by Section 2057(a)(1) and (2).

(b) The tax benefit of a Section 2057 deduction is the difference between the amount of federal estate tax that would be payable if no election were made to take the deduction and the amount that is payable when the deduction is validly elected. The tax benefit of the Section 2057 deduction inures to the benefit of the persons owning an interest in the qualified family-owned business interests in proportion to the values of their interests. If the federal estate tax that would otherwise be allocated to a person owning an interest in the qualified family-owned business interests is reduced to zero, any excess amount of the tax benefit of the section 2057 deduction will be apportioned to the other persons interested in the gross estate in accordance with the values of their interests.

[**COMMENT**: If an estate elects to take a deduction under Section 2057 of the Internal Revenue Code, that election can cause a reduction of the amount of Unified Credit that is allowable to the estate under Section 2010 of the Internal Revenue Code. Section 2057(a)(3) requires that the "applicable exclusion amount" of Section 2010 be reduced if the election under Section 2057 is made and if certain conditions exist. There is no need to include a special provision in the Act to deal with the possible reduction of the Unified Credit. Since the tax benefit that is allocated under the Act is the difference between the tax payable when the deduction is not elected and the tax payable when the deduction is elected, that calculation takes into account the effect of the reduction of the Unified Credit.

(c) If an additional federal estate tax is imposed under Section 2057(f) of the Internal Revenue Code, by reason of any of the provisions in Section 2057(f)(1), the additional federal estate tax is a charge against the portion of the qualified family-owned business interests to which the additional tax is attributable. The additional federal estate tax is

apportioned among the persons owning an interest in that portion of the qualified family-business interests in proportion to their interests as valued at the time that the additional federal estate tax is incurred. If ownership of an interest in the portion of the qualified real property to which the additional federal estate tax is attributable is split between one or more limited interests and remainder interests, the apportionment of the additional tax is made on the basis of the actuarial values of those interests, as determined under the federal estate and gift tax regulations.

[**COMMENT**: See the comment to Subsection 7(c).]

(d) If [a State] estate or succession tax has a provision for a special valuation of family-owned business interests, the apportionment of the reduction of the State tax that is obtained thereby, and the apportionment of any additional tax incurred by reason of an early disposition of the property or cessation of qualified use, is made in the same manner as is provided in this [Act] for the federal estate tax.

[**COMMENT**: See the comment to Subsection 7(d).]

SECTION 10. RECOVERY FROM PROPERTY IN THE POSSESSION OF THE FIDUCIARY.

(a) The fiduciary may withhold the death tax apportioned to the interest of any person interested in the gross estate from any property that is under the control of the fiduciary and is distributable to that person. If that property is insufficient to satisfy the tax apportioned to that person, the fiduciary may recover the deficiency from that person.

(b) If property held by the fiduciary is to be distributed before final apportionment of the death tax, the fiduciary may require the distributee to provide a bond or other security for that person's share of the tax in the form and amount prescribed by the fiduciary.

SECTION 11. RIGHT OF FIDUCIARY TO RECOVER TAX.

(a) If all property subject to apportionment does not come into the control of the fiduciary who has the duty to pay the death tax, the fiduciary is entitled, and has the duty

(unless excused by the affected persons or unless in the reasonable judgment of the fiduciary it is not cost effective to proceed), to recover from the persons interested in the gross estate the tax apportioned to those persons under this [Act] or the fiduciary may proportionately assign to the affected persons the fiduciary's entitlement to recover.

(b) If the fiduciary or assignee cannot recover under subsection (a) the amount of a tax apportioned to any person, the amount not recovered is equitably apportioned among the other persons interested in the gross estate who are subject to apportionment, provided that the total tax apportioned to a person may not exceed the value of that person's interest.

(c) If an ancillary personal representative controls property that is subject to contribution to the payment of a death tax, the domiciliary fiduciary is entitled to recover from the ancillary personal representative the proportional amount of tax apportioned to that property.

SECTION 12. RIGHT OF REIMBURSEMENT.

(a) If a person is charged with or required to pay a tax greater than the amount apportioned to that person because another person does not pay the tax apportioned to that other person, the person charged with or required to pay the greater amount has a right of reimbursement against the other person.

(b) In the discretion of the fiduciary, the right of reimbursement granted by subsection (a) may be enforced through the fiduciary or by the person entitled to reimbursement.

SECTION 13. JUDICIAL ACTION TO DETERMINE APPORTIONMENT.

(a) The fiduciary, transferee, or any person interested in the gross estate may commence an action to have a court determine and enforce the apportionment pursuant to this [Act].

(b) An action under this [Act] must be commenced in the court in which the estate of the decedent was administered or, if no administration has been commenced, in the court of any county in which the estate of the decedent may be administered.

(c) If proceedings for the administration of the decedent's estate are pending, an action under this Act shall be combined with the administration.

SECTION 14. COMMENCEMENT OF ACTION BY NONRESIDENT.

(a) A fiduciary or other person who is resident in another State may commence an action in this State to recover from a person interested in the gross estate, who either is resident in this State or owns property in this State, the amount of death tax apportioned to the defendant and recoverable by the plaintiff.

(b) The action must be commenced in a court of competent jurisdiction of a county in which administration of the decedent's estate would be proper or, if none, in which any defendant resides or owns property.

(c) For purposes of the action, the apportionment by the court having jurisdiction to make that apportionment is prima facie correct.

SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 16. SEVERABILITY CLAUSE. If any provision of this [Act] or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 17. EFFECTIVE DATE. This [Act] takes effect [on the date on which it is enacted].

SECTION 18. REPEALS. The following acts and parts of acts are repealed as of the effective date of this [Act]:

(1) .....

(2) .....

(3) .....

SECTION 19. SURVIVAL OF FORMER LAW. Notwithstanding the repeal of former law by the enactment of this [Act], former law remains applicable if the decedent died before the effective date of this [Act].