

# PUBLICATION

---

## IRS Issues Proposed And Temporary Regulations On Portability

August 22, 2012

Portability was introduced into the estate planning wheelhouse by the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010. Since that introduction practitioners have been clamoring for additional guidance on a number of aspects of electing portability for estates on the U.S. Estate (and Generation Skipping Transfer) Tax Return, Form 706 (the Estate Tax Return), and how and when the deceased spouse's unused exclusion (DSUE) amount can be used. In Temporary Regulations, T.D. 9593, and Proposed Rules, REG-141832, both of which appeared in the *Federal Register* on June 18, 2012, the IRS provided some guidance regarding portability.

Electing Portability. The Temporary Regulations give practitioners and executors guidance on electing portability. Executors of estates electing portability must timely file a "complete and properly-prepared" Estate Tax Return, even if no return would otherwise be due. Timely filing is within nine months of the date of death, unless an extension is granted. A "complete and properly-prepared" Estate Tax Return is somewhat redundantly defined as a return prepared in accordance with all applicable requirements. Additionally, the new rules confirm that estates electing portability on an Estate Tax Return do not get the benefit of the statute of limitations under Section 6501 of the Internal Revenue Code, leaving timely filed Estate Tax Returns electing portability open to audit for an indeterminate amount of time.

Guidance on Utilizing the DSUE. Prior to the issuance of the new rules, practitioners faced uncertainty as to how a surviving spouse might use the DSUE. The Temporary Regulations provide that, if the decedent is the last deceased spouse of the surviving spouse on the date of a transfer by the surviving spouse that is subject to gift or estate tax, then the surviving spouse, or the surviving spouse's estate, can use that DSUE amount in determining the applicable exclusion amount of the surviving spouse when computing that spouse's gift or estate tax liability on the transfer. In other words, the surviving spouse can use the DSUE when making lifetime gifts.

The Temporary Regulations provide that while lifetime gifts made by the most recently deceased spouse who used the gift tax exclusion reduces the DSUE available to the surviving spouse, the DSUE is not reduced by taxable gifts made by the most recently deceased spouse so long as gift tax was paid. However, in order to take advantage of the DSUE, portability must have been elected by the executor of the relevant estate.

The Temporary Regulations also clarify that in the case of multiple deceased spouses, the surviving spouse may only use the DSUE of the last (or most recently) deceased spouse. However, remarriage alone does not affect who will be considered the last deceased spouse.

Relaxation of Estate Valuation. Executors and practitioners may be somewhat relieved to know that the Temporary Regulations allow executors to estimate, based on a determination made in good faith and with due diligence, the value of all of the assets includible in the gross estate. The Temporary Regulations also do not require the specific calculation of the marital deduction or charitable deduction.

Opting out. The Temporary Regulations state that if the executor of the estate of a decedent with a surviving spouse that is required to file an Estate Tax Return does not wish to make the portability election, the executor

must make an affirmative statement on the Estate Tax Return stating the decision that the portability election does not apply.

Portability Not a Planning Mechanism. Despite the additional guidance on portability provided by the new rules, portability is not an estate planning mechanism, and taxpayers should not rely on portability. While portability has very narrow applications and is scheduled to sunset on January 1, 2013, an estate plan that utilizes generation-skipping trusts provides significant benefits that portability simply does not offer. For example, such trusts provide creditor protection and generally can prevent property from being taxed not only in you and your spouse's estate but also in the estates of your beneficiaries.

If you have questions regarding these federal portability issues, or wish to discuss any estate planning matters, please contact any attorney in the Firm's Tax Department.