



# ESTATE PLANNING & TAXATION

By **Sharon L. Klein**

## IRS Issues Long-awaited Portability Guidance

Here's a summary of the temporary regulations and proposed rules on the deceased spousal unused exclusion

**O**n June 15, 2012 the Internal Revenue Service released temporary regulations and proposed rules regarding the portability of the deceased spousal unused exclusion (DSUE) amount. Here are the highlights.

### Election Required

Portability must be elected on a “timely filed” Form 706, which, regardless of the size of the estate, is a return filed within nine months of death or, if an extension has been granted, the last day of the extension period. The IRS has required that the portability election be made on a “complete and properly-prepared” estate tax return. This is an estate tax return prepared in accordance with all applicable requirements.

However, the temporary regulations contain a special rule for estates that don't otherwise have a filing requirement, but are filing Form 706 solely to make the portability election. These estates don't have to report the value of certain property that qualifies for the marital or charitable deduction. The estate need only report the description, ownership and/or beneficiary and other information necessary to establish the right to the deduction. To take advantage of this special rule, the executor must estimate the total value of the gross estate, using ranges of dollar values that will be provided in Form 706 instructions. The executor must identify on Form 706 an amount corresponding to the range that's within the executor's best estimate of the total gross estate. Until the prescribed form of estate tax return includes this estimate, the executor is to use his best

judgment (under penalties of perjury), rounded to the nearest \$250,000.

An executor can't use the special rule under certain circumstances, including if a partial qualified terminable interest property election is made.

### Deemed Election

Upon the timely filing of a complete and properly-prepared estate tax return, an executor will have elected portability, unless the executor specifically chooses not to do so. Until the IRS revises the estate tax return to expressly contain the DSUE amount computation, the return will be deemed to include that computation. It won't be necessary to file a supplemental return using the revised form once it's released if a return has been previously filed.

### Opting Out?

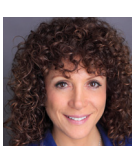
The executor must make an affirmative statement on the estate tax return signifying the decision not to have portability apply. Not filing a timely return will be considered an affirmative statement signifying the decision not to make the portability election.

### Who Makes Election?

If an executor is appointed, only the executor, not a surviving spouse, can file the return and make the portability election. If there's no appointed executor, any person in actual or constructive possession of any of the decedent's property can file the return to elect portability.

### Computing DSUE Amount

In computing the DSUE amount, the reference to the basic exclusion amount of the last deceased spouse of the surviving spouse is interpreted as the applicable exclusion amount of the last deceased spouse, so that the statute would reflect the calculation of the DSUE amount as



**Sharon L. Klein** is a managing director and head of wealth advisory at Lazard Wealth Management LLC in New York City



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described by the Joint Committee on Taxation.

Amounts on which gift taxes were paid by a decedent are excluded from adjusted taxable gifts for DSUE computation purposes.

## Effective Date

If a portability election is made, a decedent's DSUE can be used in determining the applicable exclusion amount of the surviving spouse for all transfers after the decedent's date of death.

## Effect of Remarriage

The surviving spouse can include in her applicable exclusion amount the DSUE amount of her most recently deceased spouse, even if she's then married to another individual. If the second marriage ends in divorce and the divorced spouse dies, the first predeceased spouse remains the last predeceased spouse for DSUE purposes. The divorced spouse isn't considered the last predeceased spouse because he wasn't married to the surviving spouse at death.

The last deceased spouse is identified as of the date of a taxable gift by the surviving spouse.

The DSUE from a prior deceased spouse can't be used, even if the last deceased spouse has no or a smaller amount of DSUE than a prior spouse.

An individual who's survived multiple spouses may use each last deceased spouse's DSUE for gifting before the death of the next spouse and can, therefore, use the DSUE amount of multiple deceased spouses in succession. In other words, there's no recapture of previously gifted amounts made by using the DSUE of a prior last deceased spouse.

When the surviving spouse makes a gift, the DSUE of the last deceased spouse is applied before the surviving spouse's own exclusion amount.

## Returns of Predeceased Spouses

The IRS can examine returns of deceased spouses whose DSUE is included in a surviving spouse's applicable exclusion amount, regardless of whether the limitations period has expired for the earlier return. The DSUE amount reported on the earlier return can be adjusted, but additional tax on the earlier return can be assessed only within the applicable limitations period for that return.

## What About Non-Citizens?

An executor of a nonresident decedent who wasn't a citizen can't make a portability election. There are special rules with respect to the application of portability to qualified domestic trusts, pursuant to which the decedent's DSUE is finally redetermined upon occurrence of final distribution or other final event (usually death of the surviving spouse) that triggers estate tax liability under Internal Revenue Code Section 2056A. If the termination event is death, this generally means that the DSUE will not be available to the surviving spouse during life (except for gifts in the year of death).

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