



American Institute of CPAs
1455 Pennsylvania Avenue, NW
Washington, DC 20004-1081

September 14, 2012

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Mr. Jeffrey Van Hove
Tax Legislative Counsel
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. Curtis G. Wilson
Associate Chief Counsel for
Passthroughs and Special Industries
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on [REG-141832-11](#) and [TD 9593](#) regarding Guidance on Portability,
Notice of Proposed Rulemaking (6/18/2012)

Dear Messrs. Shulman, Wilkins, Van Hove, and Wilson:

The American Institute of Certified Public Accountants (AICPA) submits the below comments in response to the above mentioned proposed and temporary regulations published on June 18, 2012, regarding guidance on the portability of the deceased spousal unused exclusion (DSUE) amount. The regulations provide guidance on the estate and gift tax applicable exclusion amount, in general, as well as on the applicable requirements for electing portability of the DSUE amount to the surviving spouse and on the applicable rules for the surviving spouse's use of this DSUE amount.

The AICPA is the world's largest member association representing the accounting profession, with nearly 386,000 members in 128 countries and a 125-year heritage of serving the public interest. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

Background

In December of 2010, as part of the [Tax Relief, Unemployment, Reauthorization, and Job Creation Act of 2010](#), Congress amended Internal Revenue Code (IRC) section 2010(c) to allow the surviving spouse of a decedent who dies after December 31, 2010 (and before January 1, 2013) to utilize any unused estate tax exclusion of the decedent. This right is commonly referred to as "portability." Portability will sunset on December 31, 2012 unless extended or made permanent by future legislation.

The Honorable Douglas H. Shulman
The Honorable William J. Wilkins
Mr. Jeffrey Van Hove
Mr. Curtis G. Wilson
September 14, 2012
Page 2 of 4

General Comments

The AICPA recognizes the effort that was devoted by Internal Revenue Service (IRS) and Treasury officials to provide greater clarity for taxpayers and practitioners. The guidance is appreciated as it generally provides a reasonable approach to interpreting, implementing, and complying with the portability rules.

We are hopeful that Congress will permanently extend the portability rules to allow taxpayers and practitioners to rely on the rules in spousal estate planning. In addition, we are hopeful that Congress will allow the generation-skipping transfer (GST) tax exemption to be portable between spouses as suggested in our [AICPA written statement](#) to the May 31, 2012, House Small Business Committee Economic Growth, Tax and Capital Access Subcommittee [hearing](#) on estate tax reform “Planning for the Death Tax: Can Small Businesses Survive.”

Specific Comments

IRS should Extend Permanently the Temporary Relief Provided in Notice 2012-21

The AICPA has been very concerned about estates not being able to take advantage of portability of the DSUE amount because the executors and practitioners are unaware of its provisions or the requirement to file a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, in order to make the portability election. The Treasury Department and the IRS recognized that executors of estates that are not otherwise required to file a Form 706 may have inadvertently missed the opportunity to take advantage of portability. Notice 2012-21 (2012-10 I.R.B. 450) provided relief for estates of individuals who passed away between January 1, 2011, and June 30, 2011, that were not required to file a Form 706 because the gross estate did not exceed \$5 million. Those estates could make the portability election by filing Form 4768 (the application for extension of time to file the estate tax return) and Form 706 within fifteen months of the individual’s death.

The AICPA welcomes the relief provided by Notice 2012-21 for estates of decedents who died in the first six months of 2011. We believe, however, that the concerns prompting the issuance of Notice 2012-21 are ongoing. Families of decedents with gross estates under the basic exclusion amount will not in all cases be familiar with the deadline for making the portability election. Many families have not begun addressing the administration of the estates of decedents who died toward the end of 2011 and would not have considered whether to file an estate tax return or extension.

We recommend that the extension method provided in Notice 2012-21 to file Form 4768, Application of Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes, and Form 706 within 15 months after the decedent’s death be

The Honorable Douglas H. Shulman
The Honorable William J. Wilkins
Mr. Jeffrey Van Hove
Mr. Curtis G. Wilson
September 14, 2012
Page 3 of 4

afforded permanently to any estate that is not otherwise required to file a Form 706, not just the estates of decedents who passed away during the first six months of 2011.

IRS should Provide a Short Form 706-EZ to Make Portability Election

For many estates of decedents who passed away in 2011 and who have or will pass away in 2012, the sole reason for filing Form 706 is to take advantage of portability of the DSUE amount. In order to facilitate these filings in a cost-efficient manner, we recommend that the IRS provide a Form 706-EZ. The sole purpose of this form would be for taxpayers to fulfill their responsibility of filing an estate tax return to elect portability and to detail the calculation of the DSUE amount. The AICPA would be pleased to assist the IRS in developing such a form.

Surviving Spouse should be able to File for Portability if the Executor does Not

Under IRC section 2010(c)(5), only the executor of a decedent's estate is eligible to make a portability election. Many estates are not required to file a Form 706 because the gross estate is less than the exclusion amount. For small estates, the sole purpose for filing a Form 706 is to elect portability. In such cases, the only individual with a vested interest in filing an estate tax return may be the surviving spouse, who frequently is not the executor.

In such circumstances, we recommend that if the executor chooses not to file an estate tax return, the surviving spouse should have the option of filing the return in order to take advantage of portability. The personal representative may not want to incur the cost of filing a tax return on behalf of the estate. However, the surviving spouse may be willing to coordinate and finance the preparation of the estate tax return and should have this option.

Decedent's DSUE Amount

The preamble to the temporary regulations requests comments regarding appropriate rules to coordinate the various estate tax credits with portability of the exclusion. It seems necessary to use examples to determine how the DSUE amount should interrelate with the estate tax credits. We use the state death tax credit for purposes of illustrating the points while using one of the easiest credits to compute. We realize that the state death tax credit is currently not available, but it may be reinstated in future legislation along with making portability permanent. We believe that similar results would apply with the other credits.

Assume that the decedent died in 2011 with a taxable estate of \$2 million and no prior taxable gifts and that the state death tax credit is available. If the estate is required to pay a state estate tax equal to the amount of the credit, the tentative tax would be \$680,800 and the state death tax credit would be \$99,600. As a result, the net tax before the application of the applicable credit amount is \$581,200 (\$680,800 - \$99,600). If the taxable estate had been

The Honorable Douglas H. Shulman
The Honorable William J. Wilkins
Mr. Jeffrey Van Hove
Mr. Curtis G. Wilson
September 14, 2012
Page 4 of 4

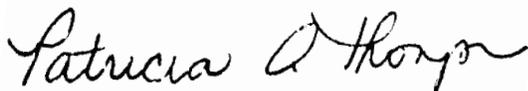
\$1,715,429, the tentative estate tax would have been \$581,200. This means the estate used an applicable exclusion amount of only \$1,715,429, rather than \$2 million. The DSUE amount should be \$3,284,571, rather than \$3 million. If the decedent lived in a state with no state estate tax, the tentative tax would be \$680,800, the estate would have utilized \$2 million of its applicable exclusion amount, and the DSUE amount would be \$3 million.

The estate's applicable exclusion amount used for purposes of the DSUE amount should be the amount of taxable estate if the tentative tax is equal to the net estate tax after the application of all credits. This result is similar to the position taken in the temporary regulations with respect to gift tax paid on taxable gifts. If the decedent paid gift tax on taxable gifts because the taxable gifts exceeded the applicable exclusion amount at the time of the gift, these gifts are excluded from adjusted taxable gifts for purposes of computing the decedent's DSUE amount. This adjustment is necessary to avoid using the decedent's exclusion amount for amounts on which gift tax was paid. Similarly the decedent's exclusion amount should not be used for amounts covered by one of the estate tax credits, and this extra exclusion amount should be included in the decedent's DSUE amount.

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We welcome the opportunity to discuss these comments or to answer any questions that you may have. I can be reached at (401) 699-0206, or patt@pgco.com; or you may contact Frances Schafer, Chair, AICPA Trust, Estate, and Gift Tax Technical Resource Panel, at fswcs3@comcast.net; Ita Rahilly, Chair, AICPA Portability Task Force, at (845) 567-9000 or irahilly@vddw.com; or Eileen Sherr, AICPA Senior Technical Manager, at 202-434-9256, or esherr@aicpa.org.

Sincerely,



Patricia A. Thompson, CPA
Chair, Tax Executive Committee

cc: Ms. Catherine Veihmeyer Hughes, Estate and Gift Tax Attorney Advisor, Office of Tax Policy, Treasury Department
Mr. James Hogan, Chief, Branch 4, Office of the Associate Chief Counsel for Passthroughs and Special Industries, Internal Revenue Service
Ms. Karlene Lesho, Attorney, Office of Associate Chief Counsel for Passthroughs and Special Industries, Internal Revenue Service