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New York City Bar Association
Joint Subcommittee of the Trusts, Estates and Surrogate's Courts Committee and the Estate and Gift Taxation Committee

Via E-Mail at http://www.regulations.gov (IRS-REG-141832-11)
CC:PA:LPD:PR (REG-141832-11)
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments to the Proposed and Temporary Regulations on the Portability of the Deceased Spousal Unused Exclusion Amount (IRS-REG-141832-11)

Dear Sir or Madam:

The New York City Bar Association, through a Joint Subcommittee of the Trusts, Estates and Surrogate's Courts Committee and the Estate and Gift Taxation Committee, respectfully submits its comments to Proposed and Temporary Regulations 141832-11 concerning the portability of the deceased spousal unused exclusion amount (the "DSUEA") (the "Proposed Regulations"). We write specifically to suggest a modification to the Proposed Regulations to prevent a surviving spouse[1] from sustaining an unfair hardship where an executor who has been appointed for the deceased spouse's estate has not filed an estate tax return to make (or to affirmatively opt out of) a portability election under IRC § 2010(c)(5)(A) (a "portability election") as of the due date for filing the decedent's estate tax return, and the surviving spouse has an application pending as of such filing deadline with a U.S. probate court of competent jurisdiction to obtain limited letters to authorize her to file an estate tax return for the decedent's estate in order to make the portability election.

[1] For purposes of illustration, our examples assume that the wife will survive the first husband.

Our primary objective is to ensure fairness and the availability of the benefits of portability to a surviving spouse in situations where the decedent has not fully utilized his or her exclusion amount as an option to more complicated estate planning techniques, such as those that involve the creation of trusts upon the death of the first spouse to die. We are grateful to the Internal Revenue Service (the "Service") for its comprehensive response to the majority of the concerns that we raised in our comments to Notice 2011-82.

The Proposed Regulations in § 20.2010-2T(a)(6) provide that if an executor or administrator is acting within the United States (an "appointed executor"), then only such appointed executor – and not the surviving spouse (unless the surviving spouse is the appointed executor) – can file the estate tax return and make the portability election. It appears that the Proposed Regulations would therefore permit an appointed executor to act pursuant to a grant of either general or limited authority by a U.S. probate court of competent jurisdiction ("general letters" and "limited letters" respectively). If there is no appointed executor, then any person in actual or constructive possession of any of the decedent's property can file the estate tax return to make the portability election as a statutory executor under IRC § 2203. The Proposed Regulations refer to such person as a "non-appointed executor" and provide that a portability election made by a non-appointed executor cannot be superseded by a contrary election made by another non-appointed executor of that same decedent's estate unless such other non-appointed executor is the successor of the non-appointed executor who made the election.

Unfortunately, the Proposed Regulations do not go far enough to protect the interests of the surviving spouse in many circumstances that are reasonably foreseeable. Indeed, the surviving spouse may find herself at the mercy of a conflicted appointed executor who may not owe any fiduciary duties to the surviving spouse under applicable state law to file an estate tax return to make a portability election where the total value of the decedent's estate is less than the estate tax exemption amount and therefore no estate tax return is required to be filed. This may be particularly likely to occur in a second marriage situation where the appointed executor is a child of the deceased spouse's prior marriage.

For example, suppose Wife marries Husband 1, and after his death marries Husband 2. Suppose further that Husband 2's estate is smaller than the basic exclusion amount so that no Federal estate tax return is required to be filed, and his estate passes under his estate planning documents solely to the children of Husband 2's first marriage. Such an estate plan will often be enacted pursuant to a prenuptial agreement. Suppose further that Husband 2's appointed executor is a child of Husband 2 who does not want to incur the time and expense of preparing and filing a Federal estate tax return that would not otherwise be required solely to benefit the surviving spouse by making a portability election. Moreover, under state fiduciary law principles, a strong argument could be made that, under these circumstances, the appointed executor of Husband 2's estate should not be incurring professional fees to prepare and file a Federal estate tax return for the sole purpose of benefiting the surviving spouse who is not a beneficiary of Husband 2's estate.

While the Wife in the above example might be able to protect herself by negotiating a provision in a prenuptial agreement that requires Husband 2's appointed executor to file the required estate tax return and make the necessary election, we believe that the correct policy result should be to encourage the use of the portability election to ensure fairness and the

availability of the benefits of portability as an option to more complicated estate planning alternatives.

Under the Proposed Regulations, if the Wife receives limited letters of appointment from a U.S. court of competent jurisdiction authorizing her to file the estate tax return on behalf of Husband 2's estate in order to make the portability election, such grant of limited letters would confer upon the Wife status as an appointed executor for purposes of filing an estate tax return with the Service to make a portability election. While this apparently provides a solution to the dilemma of the surviving spouse confronted with an executor who will not file an estate tax return to make a portability election where no estate tax return is otherwise required to be filed, there is a timing issue that must be considered in this context. The estate tax return is due nine (9) months after the decedent's death. As a practical matter, this poses a significant risk that a U.S. court of competent jurisdiction may not have ruled upon the Wife's petition for limited letters by the estate tax return's due date. Accordingly, we suggest that the Proposed Regulations take account of this potential timing problem and allow the estate tax return to be filed by the Wife provided that confirmation of the court's grant of such limited letters to the Wife is filed within one year after the due date of the estate tax return (including any extensions thereof). If such confirmation is not provided within this one-year time period, then the estate tax return will be deemed to have not been validly filed by the Wife, and therefore the portability election shall be disregarded.

Sincerely yours,

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