American Bankers Association
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Karlene M. Lesho
Attorney
Office of Associate Chief Counsel (Passthroughs and Special Industries)
Internal Revenue Service
U.S. Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Internal Revenue Service Notice 2011-82, Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount.

Dear Ms. Lesho:

The American Bankers Association (ABA)[1] appreciates the opportunity to comment on Internal Revenue Service (Service) Notice 2011-82, "Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount." Pursuant to Section 303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the Act), executors of decedents dying after December 31, 2010, must file Form 706 for the decedent's surviving spouse to take advantage of the decedent's unused applicable exclusion amount. Notice 2011-82 explains how this election can be made.

Many of our member institutions prepare and file Form 706 in their fiduciary capacity as executor or trustee. Over the years, ABA has supported the policy of allowing surviving spouses to add their deceased spouses' unused exclusion amount to their own exclusion amount. Our members would like to take advantage of this opportunity for their fiduciary accounts and clients. However, in order to do so, we recommend that the Service address a number of concerns in forthcoming regulations and future Form 706s.

Need for Simplified Form 706 to Make the Election

We appreciate that the Service wishes to make "the portability election on the Form 706 … as straightforward and uncomplicated as possible to reduce the risk of inadvertently missed elections."[2] Under the guidance, an executor would have to file a Form 706 for the deceased spouse in order to elect to pass the unused exclusion amount to the surviving spouse. However, smaller estates that would not normally file a Form 706 may have difficulty filing a "properly-prepared and complete" form if they had to complete the entire form. We therefore recommend that the Service create a shortened version of Form 706, which only requires executors to complete the first page for those estates with less than the applicable exclusion amount ($5 million in 2011 and $5.12 million in 2012),

[1] The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

[2] Notice 2011-82, 5.

as such estates would not be required to file a federal estate tax return were not for the portability election. The other sections of Form 706 could be elective Schedules for those estates that are more complicated – likely the estates that are already receiving expert assistance from law firms, accountants, and financial institutions.

Order of Exclusions

In the guidance, the Service requests comments on the order in which a surviving spouse's estate may use the exclusion amounts that are available to the surviving spouse. We believe that in the interest of simplicity and ensuring that a deceased spouse's unused exclusion amount is not wasted, a surviving spouse should be allowed to use the deceased spouse's unused exclusion amount first before having to use his or her own exclusion amount.

The following example explains our recommendation on the proper order of exclusions. At Husband 1's death, his estate uses $2 million of his allowable $5 million exclusion amount and elects to transfer the remaining $3 million exclusion amount to his Wife. Wife makes a gift of $3 million to her children. Wife remarries, and Husband 2 predeceases her. Husband 2's estate also elects to transfer his unused exclusion amount to Wife. If Wife's prior $3 million gift is effectively treated as a "split gift," coming half from Husband 1's unused exclusion amount and half from Wife ($1.5 million each), then the balance of Husband 1's unused exclusion amount presumably disappears and is therefore wasted at Husband 2's death. If, instead, the $3 million gift is treated as coming first from Husband 1, then all of Husband 1's remaining exclusion amount is fully used. This latter result appears to be consistent with the Congressional intent to simplify spousal planning and ensure that exclusion amounts are not wasted. For the reasons stated above, we recommend that the Service allow a surviving spouse to use the unused exclusion amount from his or her deceased spouse before using his or her own.

Examination of Prior Returns

Under Internal Revenue Code Section 2010(c)(5)(B), even though the statute of limitations may have expired for purposes of assessing gift or estate tax with respect to a deceased spousal unused exclusion amount, the Service nevertheless may examine the deceased spouse's return "to make determinations with respect to such amount for purposes of carrying out this subsection." Given that this authority is discretionary and not mandatory, we believe that the Service should announce a policy of restraint on examining returns after the executor receives the estate closing letter. ABA believes it is important to articulate this limit on examination authority to give executors, surviving spouses, other family members, beneficiaries, and trustees closure on their estate planning and filings. Leaving these returns open to prolonged examination would interfere with the smooth and timely distribution of estate assets to the next generation, particularly with respect to family businesses and farms.

Sunset in 2013

Our members are concerned about the temporary nature of the election and would appreciate some clarification on how the Service will react to particular situations if Section 303 of the Act sunsets on January 1, 2013. For example, suppose a surviving spouse takes advantage of the portability election to make a $6 million lifetime gift using the exclusion amounts of both the surviving spouse and the deceased spouse, but then dies when the portability provision no longer exists: will the Service

presume that the gift is now subject to federal gift or estate tax? It would be helpful for gift givers and advisers alike to know the answer to this question.

Multiple Trustees

In some situations, a decedent's estate may have no executor but instead several separate trustees of revocable trusts. If these trustees do not share information with each other, or perhaps do not know of each other's existence, they may file separate Form 706s to elect portability for the surviving spouse. It would be helpful if the Service could announce how these situations may be avoided, perhaps employing some sort of determination through the closing letter process.

Conclusion

ABA appreciates this opportunity to provide comments on Notice 2011-82. We believe the clarifications suggested above will eliminate some of the confusion that may arise from this new ability to transfer unused exclusion amounts to surviving spouses. In addition, we hope that the Service will consider our suggestion to allow the executor to file a shortened Form 706 for those estates that are only filing the Form to take the election. Please feel free to write or call the undersigned if you wish to discuss these comments further.

Sincerely,

/s/ Phoebe A. Papageorgiou

Phoebe A. Papageorgiou
Senior Counsel