

**September 2012**

**TO: CLIENTS AND THEIR ADVISORS**

**RE: FEDERAL ESTATE TAX “PORTABILITY” ELECTION AND BENEFITS:  
A VALUABLE ESTATE PLANNING TECHNIQUE**

Effective January 1, 2011, there was a restructuring of the federal estate tax exclusion amount and tax rates. A noteworthy feature of the restructuring is that for married couples, the unused exemption of the first spouse to die is now “portable” to the estate of the surviving spouse. This eliminates, at least for the time being on the federal (but not necessarily on the state) level, some of the reasons why the traditional “credit shelter” and “by-pass” trust arrangements have been a longtime hallmark of estate planning. Surviving spouses can now rely upon post mortem planning and instead incorporate “renunciation” trusts in their Wills. This provision is scheduled to expire on December 31, 2012. It is unknown whether Congress will renew or extend this provision.

Congress enacted the portability provisions in 2010 for decedents dying in 2011 or 2012. Technically, they provide that the exclusion amount of a surviving spouse is increased by the amount, if any, by which the taxable estate of the pre-deceased spouse was less than the applicable exclusion amount in effect for the year in which the pre-deceased spouse died. This is referred to as the “deceased spousal unused exclusion” or DSUE. For example, if one spouse died in 2011 leaving a taxable estate of \$1 million, and the surviving spouse dies in 2012, the exclusion of the surviving spouse equals the 2012 exclusion amount for him or her (\$5,120,000) plus the DSUE (the 2011 exclusion amount of \$5,000,000 less the taxable estate of \$1,000,000, which equals \$4,000,000), for a total of \$9,120,000.

Recently enacted temporary Treasury Regulations clarify a few issues. The estate of the pre-deceased spouse must file a Form 706, US Estate Tax Return, even if not otherwise subject to estate tax, and elect on that return to allow the surviving spouse to use the DSUE amount. If the surviving spouse is pre-deceased by more than one spouse (i.e. widowed more than once), only the DSUE, if any, relating to the most recent pre-deceased spouse may be used. Another important rule is that portability is only prospective—it cannot be used to carry forward any unused exclusion from the estate of a pre-deceased spouse who died before 2011.

Our office is available to assist you or your clients in exploring these and other sophisticated gift and estate tax planning opportunities including family limited partnerships, qualified personal residence trusts and charitable scenarios which will assist in the preservation of wealth for future generations. Our other areas of specialization include tax dispute resolution, tax planning, business law representation and retirement planning issues.