
Portability – Immediate Action ItemsBy Richard S. Franklin

Portability, now permanent, is a fundamental change in estate planning. We suggest that you implement the following five action items:

- **Identify Clients with Deceased Spousal Unused Exclusion (DSUE) Amounts**
- **Use DSUE Amounts by Gift**
- **Authorize Portability Election in Will or Revocable Trust**
- **Consider Restructuring Existing Plans to Allow for Possible Use of Portability**
- **Add Mechanism to By-Pass Trusts to Attain Basis Adjustments**

Taking these steps will help to provide your clients with potential estate and income tax savings. Further details are provided below.

1. Identify Clients with DSUE. Update your client intake questionnaires to identify new clients who have any DSUE amount. To use the DSUE amount, the current gift and estate tax returns require that a copy of the deceased spouse's estate tax return be attached. If the prospective client had a spouse who died after December 31, 2010, ask for a copy of the deceased spouse's estate tax return and secure it for future use.

Identifying clients whose spouse died after December 31, 2010 will also allow you to identify situations in which the portability election was not made. Inquire why the election was not made. Often, the deceased spouse's estate would not have been required to file an estate tax return. Under the proposed portability regulations, not having filed an estate tax return means the portability election was not made. When appropriate, consider asking the IRS for an extension of time to file the portability election, which in these situations may be requested pursuant to Treas. Regs. § 301.9100-3.

2. Use DSUE Amounts by Gift. Advise surviving spouses to consider using their DSUE amounts by making gifts¹ as soon as possible for the following reasons:
 - a. *To Achieve Better Estate Tax Results.* Making gifts and using the DSUE amount as soon as possible removes all future appreciation in the assets given from the surviving spouse's estate. This saves estate taxes on the appreciation. For best tax results, make the gifts to a trust that is a "grantor trust" as to the surviving spouse.
 - b. *To Remove Concern with Remarriage.* If the surviving spouse remarries and the new spouse predeceases the surviving spouse, the new spouse's DSUE amount replaces the DSUE amount of the first deceased spouse, and the benefit is lost. Making a gift by using the DSUE amount of the first deceased spouse before the new spouse dies locks in the benefit of the first spouse's DSUE.

¹ Note that a surviving spouse making a taxable gift first uses the DSUE amount of the person who was the "last deceased spouse" at the time of the gift, before the surviving spouse is required to use his or her own basic exclusion amount. Therefore, the surviving spouse can garner the benefits of using the DSUE amount by making gifts as outlined in section 2 without necessarily using his or her own estate tax exclusion amount.

- c. *To Remove Concern over Lack of Indexing.* The DSUE amount is fixed and not indexed for inflation. Making gifts and using the DSUE amount as soon as possible is better than indexing (even if it were available) because the gifts remove all future appreciation in the assets given from the surviving spouse's estate – i.e., the value of excluding future appreciation is not limited to a cost of living adjustment.
3. Authorize the Portability Election in Wills/Revocable Trusts and Address Responsibility for Costs of Filing Return Solely for Election. Many estate planning advisors have expressed angst over the requirement of filing an estate tax return to make the portability election and with assigning responsibility for the associated costs. In most cases, however, the election should be made and paid for by the deceased spouse's estate. Below are examples of authorization language to use in wills and revocable trusts:

Sample Language for a Will

My Personal Representative shall make the portability election under section 2010(c)(5)(A) of the Code for any portion of my applicable exclusion amount that would otherwise be unused, even if it appears unclear that my spouse or my spouse's estate could benefit from such exclusion, and shall pay all expenses associated with making such election as an expense of administration. My Personal Representative shall provide to my spouse a complete copy of my estate tax return for use in tax filings in connection with my spouse's use of such ported exclusion against my spouse's inter vivos gifts or testamentary transfers. Other than providing such copy of my estate tax return, my Personal Representative shall have no obligation to my spouse, or my spouse's estate, heirs, beneficiaries, or assigns, to maintain records to substantiate the portability election or exclusion amount ported. My Personal Representative shall be held harmless with regard to the portability election, so long as my Personal Representative did not act with gross negligence or with willful neglect.

Sample Language for a Revocable Trust

My Trustee shall make the portability election under section 2010(c)(5)(A) of the Code for any portion of my applicable exclusion amount that would otherwise be unused, even if it appears unclear that my spouse or my spouse's estate could benefit from such exclusion, and shall pay all expenses associated with making such election as an expense of administration. My Trustee shall provide to my spouse a complete copy of my estate tax return for use in tax filings in connection with my spouse's use of such ported exclusion against my spouse's inter vivos gifts or testamentary transfers. Other than providing such copy of my estate tax return, my Trustee shall have no obligation to my spouse, or my spouse's estate, heirs, beneficiaries, or assigns, to maintain records to substantiate the portability election or exclusion amount ported. My Trustee shall be held harmless with regard to the portability election, so long as my Trustee did not act with gross negligence or with willful neglect.

4. Consider Restructuring Existing Plans to Allow for Possible Use of Portability. For many married couples, the large Federal estate tax exclusion amount of \$10.5 million (\$5.25 million per spouse) eliminates the possibility of paying Federal estate taxes, assuming the portability election is made. The chart on the last page of this Alert projects the aggregate Federal

estate tax exclusion amount for a married couple, considering inflation adjustments. An estate plan using portability allows for a basis adjustment upon the surviving spouse's death for the aggregate estate. This may produce a better income tax result than relying upon a traditional by-pass trust. In a recent article, [Portability – The Game Changer](#), Lester B. Law, George D. Karibjanian, and I explain how a portability plan may attain better income and estate tax results, while at the same time providing the other benefits associated with a by-pass trust. These include asset management, spendthrift trust protection, disposition control upon the surviving spouse's death and GST exemption planning. We also explain that portability planning may provide better estate and income tax results for a married couple whose estate will exceed the aggregate Federal estate tax exclusion amount.

5. Add Mechanism to By-Pass Trusts to Attain Basis Adjustments. A client may wish to use a traditional by-pass trust for many reasons, including specific family circumstances. When the by-pass trust is used, consider adding a mechanism to achieve an income tax basis adjustment for appreciated trust assets without increasing Federal estate taxes. Such a provision will be useful if the surviving spouse will have any unused applicable exclusion amount.² This would mitigate the income tax detriment of the by-pass trust as compared to portability planning. Mechanisms to accomplish this result include (1) writing a provision in the by-pass trust that authorizes an Independent Trustee to make unlimited distributions to the surviving spouse, (2) authorizing an Independent Trustee to grant the surviving spouse a general power of appointment over the by-pass trust, or (3) providing the surviving spouse with a special power of appointment that could be exercised in a way that triggers the so-called Delaware tax trap.

If you have any questions about portability, please contact one of our lawyers.

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² For example, suppose that upon the surviving spouse's death, the by-pass trust has \$4 million of assets, and that the surviving spouse has assets of \$3 million and remaining applicable exclusion of \$6.5 million. The surviving spouse will have \$3.5 million of excess applicable exclusion amount. If the by-pass trust has any appreciated property in it, the idea is to subject all or a portion of such appreciated assets to estate taxation in the surviving spouse's estate. If the amount subjected to estate taxation is not more than the excess exclusion of \$3.5 million there is no estate tax liability, but there would be an income tax basis adjustment on the applicable appreciated assets.

Applicable Exclusion Amounts in the Future

This chart projects the aggregate applicable exclusion amounts (AEA) that will be available to a married couple, considering annual inflation adjustments to the basic exclusion amount (BEA). The axis across the table is the year of the first spouse's death – to that point in time the BEA component of both spouses' AEAs are being indexed, and thereafter going down the axis on the left side of the table to the year of the surviving spouse's death, on the BEA of the surviving spouse's AEA is being indexed. This may assist in determining whether it is reasonable to assume the couple will have an estate tax liability.

Projected Aggregate Applicable Exclusion Amount based on the Year of the Deceased Spouse's Death and Surviving Spouse's Death

Starting Basic Exclusion Amount		\$ 5,250,000		Inflation Adjustment		2.45%		Year of Deceased Spouse's Death																
		2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030					
Year of Surviving Spouse's Death	2013	10,500,000																						
	2014	10,630,000	10,760,000																					
	2015	10,760,000	10,890,000	11,020,000																				
	2016	10,890,000	11,020,000	11,150,000	11,280,000																			
	2017	11,030,000	11,160,000	11,290,000	11,420,000	11,560,000																		
	2018	11,170,000	11,300,000	11,430,000	11,560,000	11,700,000	11,840,000																	
	2019	11,320,000	11,450,000	11,580,000	11,710,000	11,850,000	11,990,000	12,140,000																
	2020	11,470,000	11,600,000	11,730,000	11,860,000	12,000,000	12,140,000	12,290,000	12,440,000															
	2021	11,620,000	11,750,000	11,880,000	12,010,000	12,150,000	12,290,000	12,440,000	12,590,000	12,740,000														
	2022	11,780,000	11,910,000	12,040,000	12,170,000	12,310,000	12,450,000	12,600,000	12,750,000	12,900,000	13,060,000													
	2023	11,940,000	12,070,000	12,200,000	12,330,000	12,470,000	12,610,000	12,760,000	12,910,000	13,060,000	13,220,000	13,380,000												
	2024	12,100,000	12,230,000	12,360,000	12,490,000	12,630,000	12,770,000	12,920,000	13,070,000	13,220,000	13,380,000	13,540,000	13,700,000											
	2025	12,270,000	12,400,000	12,530,000	12,660,000	12,800,000	12,940,000	13,090,000	13,240,000	13,390,000	13,550,000	13,710,000	13,870,000	14,040,000										
	2026	12,440,000	12,570,000	12,700,000	12,830,000	12,970,000	13,110,000	13,260,000	13,410,000	13,560,000	13,720,000	13,880,000	14,040,000	14,210,000	14,380,000									
	2027	12,610,000	12,740,000	12,870,000	13,000,000	13,140,000	13,280,000	13,430,000	13,580,000	13,730,000	13,890,000	14,050,000	14,210,000	14,380,000	14,550,000	14,720,000								
	2028	12,800,000	12,930,000	13,060,000	13,190,000	13,330,000	13,470,000	13,620,000	13,770,000	13,920,000	14,080,000	14,240,000	14,400,000	14,570,000	14,740,000	14,910,000	15,100,000							
	2029	12,980,000	13,110,000	13,240,000	13,370,000	13,510,000	13,650,000	13,800,000	13,950,000	14,100,000	14,260,000	14,420,000	14,580,000	14,750,000	14,920,000	15,090,000	15,280,000	15,460,000						
	2030	13,170,000	13,300,000	13,430,000	13,560,000	13,700,000	13,840,000	13,990,000	14,140,000	14,290,000	14,450,000	14,610,000	14,770,000	14,940,000	15,110,000	15,280,000	15,470,000	15,650,000	15,840,000	16,030,000				
	2031	13,360,000	13,490,000	13,620,000	13,750,000	13,890,000	14,030,000	14,180,000	14,330,000	14,480,000	14,640,000	14,800,000	14,960,000	15,130,000	15,300,000	15,470,000	15,660,000	15,840,000	16,040,000	16,230,000				
	2032	13,560,000	13,690,000	13,820,000	13,950,000	14,090,000	14,230,000	14,380,000	14,530,000	14,680,000	14,840,000	15,000,000	15,160,000	15,330,000	15,500,000	15,670,000	15,860,000	16,040,000	16,230,000					
2033	13,770,000	13,900,000	14,030,000	14,160,000	14,300,000	14,440,000	14,590,000	14,740,000	14,890,000	15,050,000	15,210,000	15,370,000	15,540,000	15,710,000	15,880,000	16,070,000	16,250,000	16,440,000						
2034	13,970,000	14,100,000	14,230,000	14,360,000	14,500,000	14,640,000	14,790,000	14,940,000	15,090,000	15,250,000	15,410,000	15,570,000	15,740,000	15,910,000	16,080,000	16,270,000	16,450,000	16,640,000						
2035	14,190,000	14,320,000	14,450,000	14,580,000	14,720,000	14,860,000	15,010,000	15,160,000	15,310,000	15,470,000	15,630,000	15,790,000	15,960,000	16,130,000	16,300,000	16,490,000	16,670,000	16,860,000						
2036	14,410,000	14,540,000	14,670,000	14,800,000	14,940,000	15,080,000	15,230,000	15,380,000	15,530,000	15,690,000	15,850,000	16,010,000	16,180,000	16,350,000	16,520,000	16,710,000	16,890,000	17,080,000						
2037	14,630,000	14,760,000	14,890,000	15,020,000	15,160,000	15,300,000	15,450,000	15,600,000	15,750,000	15,910,000	16,070,000	16,230,000	16,400,000	16,570,000	16,740,000	16,930,000	17,110,000	17,300,000						
2038	14,860,000	14,990,000	15,120,000	15,250,000	15,390,000	15,530,000	15,680,000	15,830,000	15,980,000	16,140,000	16,300,000	16,460,000	16,630,000	16,800,000	16,970,000	17,160,000	17,340,000	17,530,000						
2039	15,100,000	15,230,000	15,360,000	15,490,000	15,630,000	15,770,000	15,920,000	16,070,000	16,220,000	16,380,000	16,540,000	16,700,000	16,870,000	17,040,000	17,210,000	17,400,000	17,580,000	17,770,000						
2040	15,340,000	15,470,000	15,600,000	15,730,000	15,870,000	16,010,000	16,160,000	16,310,000	16,460,000	16,620,000	16,780,000	16,940,000	17,110,000	17,280,000	17,450,000	17,640,000	17,820,000	18,010,000						