RPPTL Section *Chair* *George J. Meyer*	 The Florida Bar 651 E. Jefferson Street Tallahassee, FL 32399-2300	**Tax Section** *Chair* *Domenick R. Lioce*

November 7, 2011

CC:PA:LPD:PR (Notice 2011-82)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

By email to: Notice.Comments@irscounsel.treas.gov

Re: IRS Notice 2011-82, Guidance on Electing Portability of Deceased Spousal Unused Exclusion Amount

To Whom It May Concern:

The Treasury Department recently issued IRS Notice 2011-82, requesting comments on certain specific issues for consideration in proposed regulations to be issued under Section 2010(c) of the Internal Revenue Code of 1986, as amended ("IRC"). We are pleased to submit these comments on behalf of the Tax Section and the Real Property Probate and Trust Law Section of The Florida Bar.

Although the members of The Florida Bar Tax Section and Real Property Probate and Trust Law Section who participated in preparing these comments may have clients who would be affected by the Proposed Regulations, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of the specific subject matter of these comments.

Principal responsibility for these comments was exercised by David M. Silberstein, Esq., and Taso M. Milonas, Esq. These comments were reviewed by James Barrett, Esq., Lester Law, Esq., and Elaine Bucher, Esq. Contact information is as follows:

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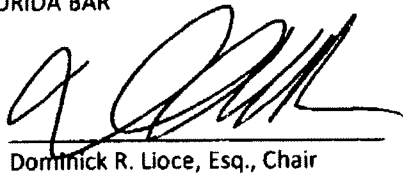
If you have questions regarding these comments, please contact Mr. Silberstein or Mr. Milonas.

The Florida Bar is the third largest organized state bar association in the United States. The Tax Section is comprised of more than 2,000 members and the Real Property Probate and Trust Law Section is comprised of more than 9,300 members. These materials were prepared by the Comment Projects Subcommittees of both the Tax Section and the Real Property, Probate and Trust Law Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions, please do not hesitate to contact us.

THE TAX SECTION OF
THE FLORIDA BAR

By: 
Dominick R. Lioce, Esq., Chair

THE REAL PROPERTY, PROBATE
AND TRUST LAW SECTION OF THE
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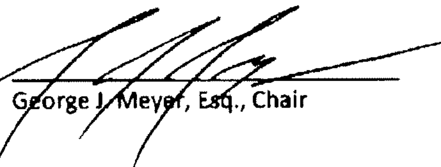
By: 
George J. Meyer, Esq., Chair

Enclosure

THE FLORIDA BAR

TAX SECTION
AND
REAL PROPERTY, PROBATE, AND TRUST LAW SECTION

COMMENTS TO IRS NOTICE 2011-82, GUIDANCE ON ELECTING PORTABILITY OF DECEASED SPOUSAL UNUSED EXCLUSION AMOUNT

To Whom It May Concern:

These comments are written on behalf of the Tax Section ("Tax Section") and the Real Property Probate and Trust Law Section ("RPPTL Section") of The Florida Bar, and are being submitted in response to the request of the Internal Revenue Service and Treasury Department (collectively referred to herein as "Treasury") in IRS Notice 2011-82 (the "Notice") for comments for consideration in issuing proposed regulations under Section 2010(c) of the Internal Revenue Code of 1986, as amended ("IRC"). IRC Section 2010(c) was amended by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "TRUICA").

We would like to acknowledge and thank the ABA Section of Real Property, Trust and Estate Law for its generosity in sharing a draft of its comments with us. We do not intend to repeat the ABA's positions and comments, but would like to acknowledge its thoroughness and request that the Treasury give thoughtful consideration to its positions and comments.

The Notice requested comments on the following five specific issues:

1. The determination in various circumstances of the deceased spousal unused exclusion amount (the "DSUEA") and the applicable exclusion amount;
2. The order in which exclusions are deemed to be used;
3. The effect of the last predeceasing spouse limitation described in IRC Section 2010(c)(4)(B)(i);
4. The scope of Treasury's right to examine a return of the first spouse to die without regard to any period of limitation in IRC Section 6501; and
5. Any additional issues that should be considered for inclusion in the proposed regulations.

We do not intend to address each of the foregoing issues, which we believe the ABA addressed thoroughly and at length in its comments. We would like to address the following issues: (i) the scope of Treasury's right to examine returns; (ii) the determination of "clawbacks"; (iii) what constitutes a timely filed return in certain circumstances; and (iv) the asymmetrical application of the portability election under current tax law.

1. Proposed Regulations should clarify the scope of the Treasury's right to examine a return of the first spouse to die without regard to any period of limitation in IRC Section 6501.

Under TRUICA, Treasury is authorized "to examine a return of the deceased spouse to make determinations with respect to such amount [the DSEUA] for purposes of carrying out this subsection." The Proposed Regulations should specifically limit such review to estate and gift taxes, and state that such review does not apply to income taxes or generation skipping transfer taxes.

A second issue involves the difference in scope of such review under TRUICA and under other Gift and Estate Tax Returns. For example reviews of Gift Tax returns that have adequately disclosed items are limited to three (3) years, but use of a DSEUA by a surviving spouse could extend that period indefinitely. This can create record keeping issues for the surviving spouse and his or her professional advisors.

Prior to completing distribution of the surviving spouse's estate, all tax matters will need to be resolved. The Proposed Regulations should provide that the applicable periods of limitations will cease coincidently with the termination of those periods of limitation applicable to the surviving spouse.

2. Proposed Regulations should clarify that no clawback of the DSEUA will result in the imposition of Estate or Gift Tax.

It is recognized and should be noted that the issue of clawback or recapture is not unique to the portability analysis and could exist even where no portability issue is present. For example, the issue can arise anytime the applicable exclusion amount at the decedent's death is less than the amount the decedent previously allocated to a lifetime transfer. Portability does, however, have the potential to magnify or exacerbate the problem.

It is possible that the clawback or recapture of a DSEAU could occur in the event of a remarriage by and subsequent death of the surviving spouse or a future reduction in the basic exclusion amount that would apply to the surviving spouse. There are a number of other instances where a clawback or recapture could create an unintended result. The Proposed Regulations should provide that no such clawback of the DSEAU would result in the imposition of either gift or estate tax.

3. A Filing Trap for the Unwary.

A theme inherent in IRS Notice 2011-82 and the legislative history of TRUICA as it relates to IRC Section 2010(c)(5)(A) is simplification in planning for taxpayers and their advisors. The Notice states that the procedure for making the portability election should be "as straightforward and uncomplicated as possible." The reality is that application as described will likely create far more complexity, uncertainty and costs to taxpayers, their advisors and the Service. Currently, the great majority of decedent's estates do not require the preparation and filing of a federal estate tax return. The new rules would impose a *de facto* filing requirement on

each and every decedent's estate or risk losing the portability benefit upon the death of the survivor. For example, assume A has a modest estate and dies in 2011 without filing an estate tax return. Years later, A's spouse B dies after winning $20 million in the lottery. Under this scenario, B's estate would be denied the benefits of portability. We believe the added cost and complexity to A's estate in the preparation and filing of a return when none was otherwise due, the cost and administrative burden put upon the Service to review each such return, and the potential claim for malpractice that now might lie against every practitioner dealing with an otherwise simple, non-taxable estate situation militates against such a draconian application and instead suggests the need for a simpler and more practical approach.

This could include an optional "look-back" approach. Under this approach, a schedule could be attached to and made part of the surviving spouse's estate tax return verifying that the exclusion was unused at the death of the first spouse and is being allocated at the second death. This approach recognizes the reality that it is only upon the death of the survivor that all relevant facts (e.g., value of survivor's estate, current available exclusion) will be known. There is precedent in the estate and gift tax law for this type of approach in the common use of disclaimers and we believe such an approach would go a long way toward achieving the Service's stated goal of making the election as "straightforward and uncomplicated" as possible. It would relieve the vast majority of taxpayers of the undue cost and expense of filing of an estate tax return when one is otherwise not necessary, lessen the administrative burden on the Service in reviewing such returns, and eliminate the potential malpractice claim against an otherwise competent advisor not routinely advising taxable estate situations.

Another issue the Proposed Regulations should address is the determination of what constitutes a "timely" filed return (including extensions). Under current law, the time for filing begins if and only if the value of the gross estate plus taxable gifts of the first spouse's estate is at or above the minimum filing requirement. Conversely, for estates below the minimum, the clock never begins to run. The look-back approach suggested above would obviate this issue altogether. Another alternative would be to include a definition along the following lines: "In determining whether a decedent has timely filed a return (including extensions) for portability election purposes, the return must be filed if at all within nine months of the decedent's death, excluding extensions, *regardless* of the value of the decedent's gross estate." We believe this alternative is inferior to the look-back approach, but superior to the current proposal.

Finally, the Proposed Regulations should also permit extension of the filing requirements to permit late filings and reformation of improperly calculated DSEAU's. Treasury should revise the Forms 706 and 709 to include calculations of DSEAU.

4. Asymmetrical Application.

Symmetry is a characteristic or theme pervasive throughout current tax law. For example, where one party has income another typically has a corresponding and equal deduction. Symmetry is evident in estate and generation-skipping transfer ("GST") tax law in that the current GST amount equals the amount of the taxpayer's applicable exclusion amount for estate tax purposes. The portability election as enacted is asymmetrical in application and contradicts the long-standing notion of tax symmetry because it focuses only on the unused applicable

exclusion remaining for estate but not GST tax purposes. While technically beyond the scope of the requested comments, this disconnect should be noted and addressed in account in future revisions of the law.

5. Summary Comments.

In summary, we believe that portability is beneficial to taxpayers, but it should not become a trap for the unwary. Taxpayers and their professional representatives should be able to rely on rules that are clear as to filing and election requirements. The Proposed Regulations should strive to create more certainty in the application of these rules without imposing an undue administrative burden on the Service.

Taxpayers will be relying on the use of a DSEUA in executing pre- and post- nuptial agreements, making gifts, and planning their estates. They will need as much certainty as possible to make appropriate decisions and be able in accordance with applicable law. Taxpayers will rely on these rules in structuring their lives, and taxpayers need a system on which they can rely.

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