new york state society of
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certified public accountants

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September 4, 2012

CC:PA:LPD:PR (REG-141832-11)
Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

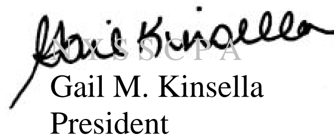
Filed electronically: http://www.regulations.gov (IRS-REG-141832-11)

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

The New York State Society of Certified Public Accountants, representing more than 28,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding the above captioned notice. The NYSSCPA thanks the Internal Revenue Service for the opportunity to comment.

The NYSSCPA's Estate Planning Committee deliberated the provisions and drafted the attached comments. If you would like additional discussion with us, please contact Lawrence Lipoff, Chair of the Estate Planning Committee, at (914) 262-6812, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,



Gail M. Kinsella
President

Attachment

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NEW YORK STATE SOCIETY OF

CERTIFIED PUBLIC ACCOUNTANTS

COMMENTS ON
THE PROPOSED AND TEMPORARY REGULATIONS ON THE PORTABILITY OF A DECEASED SPOUSAL UNUSED EXCLUSION AMOUNT (IRS-REG-141832-11)

September 4, 2012

<u>Principal Drafter</u>

Kevin Matz

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New York State Society of Certified Public Accountants

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

The New York State Society of Certified Public Accountants 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"). Specifically, we write to suggest a modification to the Proposed Regulations to prevent a surviving spouse from sustaining an unfair hardship in circumstances in which an executor who has been appointed for the deceased spouse's estate has not filed an estate tax return to make (or to opt out of affirmatively) 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 him or her to file an estate tax return for the decedent's estate in order to make the portability election.

The Proposed Regulations in § 20.2010-2T(a)(6) provide that if an executor or administrator is acting within the U.S. (an "appointed executor"), 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 permit an appointed executor to act pursuant to a grant of general or limited authority by a U.S. probate court of competent jurisdiction ("general letters" and "limited letters," respectively). If there is not an appointed executor, 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.

We believe that the Proposed Regulations do not go far enough to protect the interests of the surviving spouse in many circumstances that are reasonably foreseeable. For example, the surviving spouse may find himself or 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 in situations in which 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 when the appointed executor is a child of the deceased spouse's prior marriage.

To help rectify this, the Proposed Regulations should be clarified to provide that if the surviving spouse receives limited letters of appointment from a U.S. court of competent jurisdiction authorizing him or her to file the estate tax return on behalf of the deceased spouse's estate in order to make the portability election, such grant of limited letters will confer upon the

surviving spouse status as an "appointed executor" for purposes of filing an estate tax return with the Internal Revenue Service (the "Service") to make a portability election.

There is a further timing issue that must be considered in this context because 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 might not have ruled upon the surviving spouse's petition for limited letters by the estate tax return's due date. Accordingly, we suggest that the Proposed Regulations take into account this potential timing problem and allow the estate tax return (including any extension thereof) to be filed by the surviving spouse provided that confirmation of the court's grant of such limited letters to the surviving spouse be filed with the Service within one year after the timely filing of the estate tax return (including any extensions thereof). If such confirmation is not provided within this one-year time period, the estate tax return will be deemed not to have been filed validly by the surviving spouse, and the portability election shall be disregarded.