

One Small Step for Congress, an Enormous Leap for Surviving Spouses: Proposed Revisions to Increase Reliance on Portability^{1*}

I. INTRODUCTION

Betty tragically lost her husband to cancer early last year. Although his passing took its toll, she took comfort in the fact that his assets would leave her financially secure. Now, over a year later and against all odds, she has found love again and plans to remarry. Unfortunately for Betty, her newfound happiness may lead to financial woes for her successors in interest. Because the estate tax laws allow a surviving spouse to use the exclusion amount² of only the last spouse to die, Betty's ability to shield her assets from estate tax upon death could be compromised by her choice to remarry. In addition, Congress retains the right to reduce the exclusion amount that Betty saved, causing uncertainty for Betty's financial future. In a society that values and incentivizes marriage,³ this result is both inconsistent and heartbreaking; the choice between love and money is one that no one should have to make. This Paper introduces a revised estate tax provision that eliminates the unfair choice Betty faces, as well as the uncertainty regarding her saved exclusion. With the uncertainty removed, practitioners and taxpayers will have an incentive to rely on portability and the provision will achieve its goal of simplifying the estate tax.

Congress enacted portability of the estate tax exemption in 2010 to simplify estate planning and allow couples more flexibility in structuring their estate plans.⁴ Prior to 2010, the tax code (I.R.C.) incentivized complex planning by allowing couples who engaged in such planning to shield more money from estate tax, but even complex planning could not completely prevent wasted exemptions. Two distinct but related issues regarding wasted exclusions lead to the introduction of portability.⁵ Leaving assets to the surviving spouse wasted the decedent

spouse's exclusion, and increased the likelihood that the surviving spouse would owe estate tax.⁶ “[I]n order for the estate of the first spouse to die to take advantage of the [basic exclusion amount], he must have in his or her estate assets at least equal to the [basic exclusion amount].”⁷ This required constant reallocation of assets, often “from the wealthier spouse to the poorer spouse that might otherwise be unnecessary, undesirable, not practical either legally or practically, or otherwise inconsistent with the couple’s overall planning.”⁸ Bypass trust and other estate-planning techniques developed to address and mitigate the problem of wasted exemptions, but no technique could fully remedy the situation.

This problem of wasted exemptions is exactly the issue portability was designed to address. Portability resolved two concerns by allowing the decedent spouse to transfer his exemption and assets to the surviving spouse: he would not need to worry about increasing her assets to the point of exceeding the estate tax exemption, or about not having enough assets in the name of the first spouse to die to take advantage of the entire exemption amount.

To illustrate how portability works, consider Betty’s situation. Her husband left her \$3 million, which represented all of his assets, and she had \$3 million of her own at his death. Because of the unlimited marital deduction his estate owes no estate tax upon his death. Sadly, she dies before she can remarry. Before portability, she would have had her own basic exclusion amount of \$5 million, and \$6 million in assets. Her estate would have owed estate tax on the \$1 million in assets that exceeded her exclusion amount. However, portability allowed her husband to port his unused exclusion amount of \$5 million to Betty, and she can now exclude \$10 million (her own \$5 million plus her husband’s DSUEA of \$5 million). She avoids paying estate tax on the \$1 million in assets by using portability. In most situations, portability does not increase the total amount of assets shielded from tax or create any new rights for the taxpayers; it simply

allows a less complex plan to achieve the same result.⁹ This has the effect of aligning the tax code with both policy considerations and the natural inclination of spouses to protect and support each other.¹⁰

Three specific areas of uncertainty relating to portability are preventing taxpayers from relying on this provision, and the revisions address those areas of uncertainty. If taxpayers are not willing to rely on portability, the provision is not benefiting those it was designed to help.¹¹

The first area of uncertainty relates to the permanence of the provision, as well as the entire estate tax scheme. Both the current structure of the estate tax and the existence of portability are scheduled to sunset at the end of 2012.¹² Uncertainty surrounding the form of the estate tax, and especially whether portability will be continued, is preventing taxpayers from relying on portability.¹³

The second area of uncertainty involves a potential error in the code itself, and an additional problem created by the suggested governmental revision. The plain meaning of § 2010 appears to be in conflict with Congressional intent, but the proposed amendment to the code creates a new conflict with another aspect of Congress' intent. These possible interpretations of the code could have significant differences in result for taxpayers, and this uncertainty dissuades taxpayers from relying on portability.¹⁴

The third area of uncertainty involves the volatility of the basic exclusion amount ported from one spouse to another. Like the example involving Betty above, remarriage puts the ported exclusion amount at risk, and a surviving spouse could lose that entire exclusion. In addition, Congress could lower the basic exclusion amount at any time, and that reduction would effect the exclusions saved by surviving spouses. Both types of risk of exclusion reduction cause uncertainty regarding the exclusion amount, and deter taxpayers from relying on portability.

This Paper addresses and seeks to resolve all three areas of uncertainty. Part II provides a detailed explanation of why the current code provisions create uncertainty that dissuades taxpayers from relying on portability. Part III argues that in order to achieve its goals, portability must be enacted permanently. The Paper then introduces a revised version of the current code section that would resolve the technical issues with the code and provide a solution that does not conflict with Congressional intent. The revised code section also eliminates uncertainty in the amount of the ported exclusion by allowing taxpayers to use the highest exclusion available and freezing that exclusion at the death of the decedent spouse. Portability has the potential to benefit taxpayers, and with revision it can provide the certainty taxpayers need to make portability a realistic estate planning option.

II. ASPECTS OF PORTABILITY ARE UNCERTAIN, AND THAT UNCERTAINTY PREVENTS RELIANCE ON PORTABILITY

Estate planning, and specifically protecting estate tax exemptions, encourages the use of complex estate planning techniques.¹⁵ Portability was introduced to simplify this process.¹⁶ However, portability will only be used by taxpayers if they can reasonably rely on it being in effect when they need it, and providing the same planning benefits as could be achieved by using traditional planning methods. The current provision, 26 U.S.C. § 2012, has three distinct sources of uncertainty that prevent estate planning professionals from relying on portability (1) it is set to sunset at the end of 2012, (2) the proper interpretation of the code section determining the Deceased Spouse Unused Exclusion Amount (DSUEA) is unclear because it does not accurately reflect Congress' intent, and (3) the DSUEA is subject to reduction by either remarriage or Congressional action in the future. Portability will be an effective simplification tool only if practitioners and taxpayers feel that it is reliable, but practitioners and taxpayers are likely to

choose tried and true bypass trusts and other traditional methods of estate planning over the uncertain future of portability and volatile DSUEAs.

A. Portability's Impermanence is Inhibiting its Effectiveness

Without being a permanent provision in the I.R.C., portability will not be utilized by professionals or taxpayers.¹⁷ Without action by Congress, portability will sunset at the end of 2012.¹⁸ If portability is allowed to sunset, the exemptions that have been ported to surviving spouses will be lost to the extent that they have not been used to make lifetime gifts.¹⁹ This clearly provides a significant incentive for taxpayers to use bypass trusts to protect their exemptions instead of relying on portability. To ensure the use of a ported DSUEA, the surviving spouse would have to die by the end of 2012. Few, if any, professional estate planners or taxpayers will be willing to rely on portability in its current state of uncertainty.²⁰

B. Uncertainty in the Interpretation of The DSUEA Amount is Reducing Reliance on Portability

The proper interpretation of § 2010 (c)(4) is unclear because the plain meaning of the code does not match Congress's intent. This lack of clarity provides uncertainty in portability's function and the resulting tax implications. In some situations, the plain meaning of the code does not allow for a surviving spouse to take full advantage of the DSUEA received from a deceased spouse. The Joint Committee on Taxation (JCT) issued a possible amendment to the code,²¹ but while that change would clarify the code, it would frustrate Congress' intent regarding privity of portability. This uncertainty further adds to taxpayers' inability to rely on portability and undermines its effectiveness as an alternative to complex planning.

1. *In Some Situations §2010(C)(4) Prevents Surviving Spouses from Taking Full Advantage of Portability*

The plain meaning of § 2010(c)(4)²² limits a surviving spouse from taking full advantage of portability when the decedent spouse had a DSUEA from a prior spouse. For example,²³ Husband 1 (H1) dies in 2011 leaving \$3 million to his brother and \$2 million in cash to Wife (W). Because H1 used \$3 million of his basic exclusion amount to exclude the \$3 million he left to his brother, he has a \$2 million exclusion to leave to W as her DSUEA. W dies in 2011 with a \$7 million applicable exclusion amount²⁴ (her \$5 million basic exclusion amount plus her \$2 million DSUEA from H1). W has a taxable estate of \$3 million. The question is, when W dies what is Husband 2's (H2) DSUEA from W? Based on the plain meaning of the statute, the DSUEA is the lesser of the current basic exclusion amount, or the deceased spouse's basic exclusion amount less any tax as determined under § 2001. So H2's DSUEA would be the lesser of the amount of the basic exclusion amount when he dies (we will assume this will remain \$5 million) or \$5 million (W's basic exclusion amount) - \$3 million (W's tentative taxable estate), leaving H2 with a \$2 million DSUEA. In this result, W's DSUEA from H1 is wasted, a result that could be avoided by using traditional estate planning techniques.

If H1 had used the rest of his basic exclusion amount (\$2 million) to put the \$2 million in trust instead of transferring it to W, he would have protected that money from the estate tax. W would have had no DSUEA, but she would have only used \$1 million of her own basic exclusion amount to shelter her taxable estate, leaving a \$4 million DSUEA to H2. Although W would not have had access to the additional \$2 million that was put in trust instead of being transferred to her, she would have been able to pass on more of her own basic exclusion amount to H2, potentially sheltering an additional \$2 million from the estate tax. This inability to utilize W's

DSUEA further reduces portability's effectiveness by incentivizing taxpayers to continue using traditional estate planning techniques instead of relying on portability,

2. *The Joint Committee on Taxation's Example Conflicts with the Plain Meaning of the Code*

The result reached in JCT Example 3 is in conflict with the plain meaning of §2010(c)(4)(B)(i) as discussed in Part IIB1. The JCT example interprets the term "basic exclusion amount" in §2010(c)(4)(B)(i) as "applicable exclusion amount," thereby taking advantage of the DSUEA W received from H1 and reaching the same result as could be achieved by H1's use of a bypass trust:

Following Husband 1's death, Wife's applicable exclusion amount is \$7 million (her \$5 million basic exclusion amount plus \$2 million deceased spousal unused exclusion amount from Husband 1). Wife made no taxable transfers and has a taxable estate of \$3 million. An election is made on Wife's estate tax return to permit Husband 2 to use Wife's deceased spousal unused exclusion amount, which is \$4 million (Wife's \$7 million applicable exclusion amount less her \$3 million taxable estate). Under the provision, Husband 2's applicable exclusion amount is increased by \$4 million, i.e., the amount of deceased spousal unused exclusion amount of Wife.²⁵

The JCT recognized this conflict with a possible amendment of the code itself:

The provision adds new section 2010(c)(4) A technical correction may be necessary to replace the reference to the *basic* exclusion amount of the last deceased spouse of the surviving spouse with a reference to the *applicable* exclusion amount of such last deceased spouse, so that the statute reflects intent.²⁶

This proposed amendment would allow W to utilize the DSUEA she received from H1 and pass on the maximum amount of her own basic exclusion amount to H2. This result more accurately reflects Congress' intent regarding the functionality of portability,²⁷ and if enacted would prevent the negative result created by the plain meaning of the statute. However, the JCT revision may create a conflict with Congressional intent regarding privity.

3. The Joint Committee on Taxation's Potential Amendment Creates a Problem with Privity of Portability

While the JCT proposed amendment more accurately reflects Congress' intent regarding the functionality of portability and resolves one issue with § 2010(c)(4)(B)(i), adoption of the amendment would destroy the privity requirement built into the current provision. Privity of portability refers to the idea that a DSUEA should only be able to be ported from one spouse to that individual's spouse; H1's basic exclusion amount should not be able to be ported through W to H2. This idea is a critical limitation to prevent the abuse of portability, and was an important factor when Congress was considering enacting portability.

In her testimony before the Senate, Ms. Kovar explained that “[p]ortability legislation should make clear that husband #2 cannot use the exemption of husband #1.” If that were not made clear, “the unused exemption of husband #1, then husband #2 could float indefinitely as each succeeding surviving spouse passed the exemption to the next spouse. . . . This potential for infinite portability . . . would not be within the reasonable expectations of a married couple.”²⁸ Although Congress did not follow her advice and spell out the privity requirement in so many words, it is implicit in the current portability provision and that implicit privity would be eliminated if the JCT amendment were enacted.

The current version of § 2010(c)(4)(B)(i) limits the DSUEA to the lesser of the current exclusion amount or “the basic exclusion amount of the last such deceased spouse of such surviving spouse” – the taxable estate. Because the DSUEA can never be more than the decedent spouse's basic exclusion amount, a previous spouse's exclusion can never be ported to a subsequent spouse. For example, assume H1 died in 2011 leaving his entire \$5 million exclusion to W as a DSUEA. W dies in 2011 with a basic exclusion amount of \$5 million and no taxable

estate. H2 dies in 2012 when the basic exclusion amount has been indexed for inflation and is \$5.12 million.

Under the current code, the DSUEA that W can leave to H2 is the lesser of the current basic exclusion amount (\$5.12 million in 2012) or W's basic exclusion amount (\$5 million from 2011) – W's taxable estate (\$0). The DSUEA that W can leave to H2 is \$5 million because it is less than \$5.12 million. W can never leave more than her basic exclusion amount to H2 as a DSUEA because her basic exclusion amount – her taxable estate will always be less than or equal to her basic exclusion amount. Because she can only leave up to her basic exclusion amount to her surviving spouse, privity will always exist for the purposes of portability.

When the proposed JCT amendment is applied to the same fact pattern the result will be different. H2 dies in 2012 and we want to know the amount of the DSUEA he received from W. It will be the lesser of the current basic exclusion amount (\$5.12 million) or W's *applicable* exclusion amount (W's basic exclusion amount of \$5 million + \$5 million DSUEA that W received from H1) – W's taxable estate (\$0). In this case, H2 will receive a DSUEA from W of \$5.12 million, the lesser of \$5.12 million or \$10 million. W's basic exclusion amount was only \$5 million, so the \$.12 million that ported to H2 originally belonged to H1.

In the example above the basic exclusion amount's index for inflation created the \$.12 million discrepancy between W's basic exclusion amount and H2's basic exclusion amount. However, the basic exclusion amount is always subject to change by Congress. Privity issues could also be implicated if Congress were to raise the basic exclusion amount in the future. Continuing the same example, assume that instead of dying in 2012, H2 died in 2013. Assume as well that Congress permanently enacted portability and raised the basic exclusion amount to \$6 million. If no additional privity requirements were enacted, there would be an issue similar to

that in the above example. W would have a \$10 million applicable exclusion amount, of which only \$5 million was her basic exclusion amount. H2's basic exclusion amount is \$6 million. The DSUEA that H2 will receive from W is the lesser of H2's basic exclusion amount (\$6 million) or W's applicable exclusion amount (\$10 million). Of the \$6 million that H2 will have as a DSUEA from W, \$1 million originally belonged to H1 and was ported through W. This porting of exclusions from H1 to H2 is exactly the danger of not maintaining privity.

The JCT amendment may provide a solution to the conflict between Congress's intent and the plain meaning of the statute, but it creates a similar conflict in another area. Without additional amendments, the JCT proposal is not an effective way of correcting conflicts between Congress' intent and the language of the code.

C. The Volatility of the DSUEA Prevents Reliance on Portability by Taxpayers

The fear of a reduction in DSUEA caused by either remarriage or changes in legislation will prevent taxpayers from relying on portability. While basic exclusion amounts can be utilized and thus protected using traditional estate planning techniques, taxpayers who rely on portability risk losing some or all of their DSUEA. This volatility in the DSUEA will prevent taxpayers from relying on portability, thus reducing its use and benefit.

1. Remarriage Creates an Uncertainty in DSUEA that will Prevent Reliance on Portability

Because the code restricts the DSUEA that individuals can use to that of the last deceased spouse, remarriage can put a DSUEA from a prior spouse in jeopardy. Whenever a surviving spouse in possession of any DSUEA considers remarriage, she will have to consider whether she is willing to risk losing some or all of her DSUEA. Not only does this provision put restrictions on remarriage,²⁹ it also provides a disincentive to use portability.

Any remarriage will put an existing DSUEA at risk. To revisit our example, H1 leaves a

DSUEA of \$3 million and \$3 million in cash to W. W marries H2. If H2 survives W, the issue with the current code section discussed in Part IIB applies. But assume W survives H2. Assume as well that H2 has children and grandchildren from a prior marriage. If H2 leaves \$4 million to his three children, he will be left with a \$1 million DSUEA to leave to W. Because H2 is her last surviving spouse, that \$1 million will replace H1's \$3 million DSUEA and W will be left with only a \$1 million DSUEA. Short of not remarrying, currently there is no way to prevent this result. If H2's executor does not file an estate tax return or does not elect portability W will receive no DSUEA but will still lose the DSUEA from H1.³⁰

However, traditional planning techniques offer a better option. If H1 had put that \$3 million into a bypass trust instead of passing his exclusion and the money to W, that \$3 million would have been shielded from estate tax; because he relied on portability, W has lost the ability to shield that money and could owe estate tax that she would have been able to avoid otherwise. This result could dissuade taxpayers from relying on portability and encourage reliance on traditional estate planning techniques.

2. Congress's Ability to Reduce Existing DSUEA's Prevents Reliance on Portability

The possibility that a reduction in the basic exclusion amount would reduce existing DSUEAs creates an uncertainty that will reduce reliance on portability. Section 2010(c)(4)(A) limits the amount of an individual's DSUEA to the current basic exclusion amount, regardless of the amount of basic exemption left unused by the deceased spouse;³¹ this creates an opportunity for Congress to reduce the amounts of DSUEA being saved by surviving spouses. For example, assume H1 died in 2011 and left a \$5 million DSUEA to W. Then, in 2012, Congress reduced the basic exclusion amount for 2012 to \$3.5 million. If W died in 2012, the DSUEA available to her would be limited to the current basic exclusion amount: \$3.5 million. However, if H1 had

put the \$5 million into a bypass trust, he would have been able to use his entire \$5 million exclusion and shield all \$5 million from the estate tax. This ability to reduce the DSEAU creates a discrepancy between what can be achieved using traditional planning methods and the result under portability.

Congress enacted portability to encourage the simplification of estate planning and align the incentives in the I.R.C. with the natural inclinations of taxpayers. Portability has the ability to achieve those goals, but will only be effective if taxpayers feel they can rely on portability as a planning tool. The three types of uncertainty described above—impermanence, uncertainty of interpretation of § 2010(c)(4)(B)(i), and the volatility of the DSUEA based on remarriage or legislation—may cause taxpayers to shy away from portability and turn instead to traditional estate planning tools. Increasing the certainty and reliability of the portability provision will improve taxpayer reliance and the effectiveness of portability as a simplification measure.

III. CHANGES TO THE EXISTING CODE WILL REDUCE UNCERTAINTY AND INCREASE RELIANCE ON PORTABILITY

Part II discussed the various ways in which the current portability provision creates uncertainty and prevents reliance. The uncertainty caused by a lack of permanence is perhaps the most serious issue, and also the easiest to solve by enacting portability without a scheduled sunset. The types of uncertainty discussed in Parts IIB and IIC are more complex and require changes to the I.R.C. itself. This Part introduces a suggested revision to the current provision and discusses how the proposed provision resolves the uncertainty laid out in Parts IIB and IIC.

A. Taxpayers Will Not Rely on Portability Unless it is a Permanent Provision

Although provisions of the I.R.C. are always subject to amendment and repeal by Congress, those amendments and repeals take both a coordinated effort by members of Congress

and an affirmative action by a majority of Congress. As a relatively uncontroversial provision,³² if portability were made permanent it would be unlikely to garner enough notice to be repealed or even amended and should be relatively reliable. In contrast, portability is currently set to sunset at the end of 2012,³³ and will require a coordinated effort and affirmative vote in Congress to become permanent or even be extended. That level of uncertainty does not encourage reliance on portability as a planning option, especially when more secure planning alternatives exist. Congress should permanently add portability to the I.R.C. to improve the utility of portability and encourage reliance.³⁴

B. Proposed Revisions to 26 U.S.C. § 2010(c)

This section proposes a revised § 2010(c) that addresses both the uncertainty of interpretation and the volatility of the DSUEA laid out in Parts IIB and IIC. The revisions are underlined for clarity.

(c) Applicable credit amount

...

(2) Applicable exclusion amount

For purposes of this subsection, the applicable exclusion amount is the sum of—

(A) the basic exclusion amount, and

(B) in the case of a surviving spouse, the greatest available³⁵ deceased spousal unused exclusion amount.

...

(4) Deceased spousal unused exclusion amount

For purposes of this subsection, with respect to a surviving spouse of a deceased spouse dying after December 31, 2012, the term “deceased spousal unused exclusion amount” means the lesser of—

(A) the basic exclusion amount of the deceased spouse,³⁶ or

(B) the excess of—

(i) the applicable³⁷ exclusion amount of such deceased spouse of such surviving spouse, over

(ii) the amount with respect to which the tentative tax is determined under section 2001 (b)(1) on the estate of such deceased spouse.³⁸

The following subsections apply the revised statute to the fact-patterns from Part II to

demonstrate how the revisions resolve those problems with the current §2010.

1. *The Revised Provision Allows Spouses to Take Full Advantage of Portability by Resolving the Uncertainty in the Interpretation of the DSUEA*

Unlike the current portability provision, the revised version will allow spouses to take full advantage of their DSUEA because §2010(c)(4)(B)(i) uses *applicable* amount as suggested by the JCT.³⁹ If we revisit our example but apply the revised statute, the result will more closely mirror the result achievable using bypass trusts. H1 dies in 2011 leaving a \$2 million exclusion amount and \$2 million in cash to W. W dies in 2011 with a \$7 million applicable exclusion amount (her \$5 million basic exclusion amount plus her \$2 million DSUEA from H1). W has a taxable estate of \$3 million. The question is, when W dies what is H2's DSUEA from W? H2's DSUEA will be the lesser of W's basic exclusion amount (\$5 million) or W's applicable exclusion amount (\$7 million) less her taxable estate (\$3 million). Thus, H2 will receive a \$4 million DSUEA from W, matching the result under the JCT suggested amendment. The revised statute resolves the issue of wasting H1's DSUEA when W predeceased H2.

However, while the JCT suggested amendment does not retain the privity requirement that Congress intended, the revised statute does require privity. The revised provision uses the basic exclusion of the *deceased* spouse to limit the DSUEA amount in § 2010(c)(4)(A) instead of using the basic exclusion amount of the *surviving* spouse; this prevents the increases in § 2010(c)(4)(A) over the amount in § 2010(c)(4)(B)(i) that allowed H1's exclusion to be ported to H2 in the example. The revised statute resolves the potential waste of H1's DSUEA and the lack of privity in the JCT amendment.

2. *Reducing the Volatility of the DSUEA Amount Will Increase Taxpayer Reliance on Portability*

The volatility of the DSUEA discourages taxpayers from choosing portability over

traditional estate planning tools. By using a bypass trust at death, taxpayers can shield assets equal to the basic exclusion amount at the taxpayer's death. In contrast, if a taxpayer relies on portability as a planning tool, she risks the reduction in asset shielding through either remarriage or congressional reduction of the basic exclusion amount. The revised statute eliminates the risk of reduction of the DSUEA through either remarriage or Congressional action. Through this reduction of uncertainty regarding the DSUEA, the revised provision increases the reliability of portability.

a. Allowing Surviving Spouses to Use the Greatest DSUEA Available Will Increase Reliance on Portability

In the case of an individual with multiple deceased spouses, allowing taxpayers to use their greatest DSUEA instead of requiring use of the DSUEA of the last spouse to die will increase the attractiveness of portability. Currently remarriage puts a DSUEA in jeopardy, but allowing a surviving spouse to use her highest available DSUEA would remove this remarriage disincentive.⁴⁰ Prior bills introducing portability allowed a surviving spouse to aggregate DSUEAs up to the basic exclusion amount of the surviving spouse.⁴¹ This position is also supported by The American College of Trust and Estate Counsel, which “recommends that . . . the Code be amended to . . . permit[] aggregation of the deceased spousal unused exclusion amount subject to the cap of the basic exclusion amount at the deceased spouse's death.”⁴² However, ACTEC recognizes that allowing a surviving spouse to aggregate DSUEAs may provide an administrative burden and frustrate Congress' intent to simplify portability; if that is the case, “ACTEC recommends that consideration be given to permitting the estate of the surviving spouse to use the unused exclusion amount of *any* predeceased spouse, not just the *last* deceased spouse, subject to the cap.”⁴³

Allowing a surviving spouse to use the highest DSUEA available simplifies this option even further. Surviving spouses do not need a choice, because they would never chose to use a lower DSUEA over a higher one. Adding a choice would unnecessarily add complexity and the opportunity for error. Allocating the highest available DSUEA to each surviving spouse will reduce the administrative burden on the I.R.S. without compromising the rights of the taxpayers.

To revisit our example, H1 leaves a DSUEA of \$3 million and \$3 million in cash to W. W marries and then outlives H2. Assume H2 has children and grandchildren from a prior marriage. If H2 leaves \$4 million to his three children, his \$1 million DSUEA will replace H1's \$3 million DSUEA and W will be left with only a \$1 million DSUEA instead of the \$3 million she would have kept but for her remarriage. If H1 had put his \$3 million into a bypass trust instead of passing it along to W, that money would have been shielded from the estate tax. Now, W may have to pay estate tax on \$2 million more than she would have if H1 had relied on traditional planning rather than portability, or if she had not remarried. The current portability provision either incentivizes traditional planning or disincentivizes marriage, neither of which are policies society generally wishes to promote.⁴⁴

In contrast, the revised statute will resolve these misguided incentives. Under the revised statute, W will use the greatest DSUEA available to her. In this case, she would have a \$3 million DSUEA from H1 and a \$1 million DSUEA from H2; the IRS will have records of both DSUEAs and will automatically apply the greater DSUEA to her estate when she dies. This result matches the result achievable by either using traditional planning or refraining from remarriage, but is much simpler and has far less impact on personal choices.

Limiting surviving spouses to using only one DSUEA will provide the same preventative check on portability abuse that the current provision serves. Although the possibility of

marrying for the sole purpose of gaining a DSUEA⁴⁵ is still present under the revised statute, this “approach would provide no more incentive to enter into a sham marriage than exists under the current statute but would eliminate an undesirable marriage penalty.”⁴⁶ Under the current statute, individuals attempting to take advantage of portability could easily marry an individual close to death to gain a full DSUEA and then refrain from remarriage, while under the revised statute they could marry a terminally ill person with an available exemption and then remarry with impunity. The flexibility of using the highest DSUEA regardless of when it was received could make taking advantage of portability slightly easier, but abuses of portability will be available regardless of the way surviving spouses access their DSUEAs. The flexibility and benefit gained by allowing use of the greatest DSUEA will far outweigh the possibility that portability abusers will gain a slight edge in their fraudulent behavior.

Allowing taxpayers to use the greatest DSUEA they have available will eliminate remarriage disincentives and promote reliance on portability. The revised statute does not create any new rights for taxpayers—they can achieve a similar result under the current statute by using traditional planning tools or refraining from marriage. It will simplify estate planning and eliminate the risk of DSUEA forfeiture that exists under the current statute. Allowing taxpayers to use their greatest DSUEA is an important change to this provision and will increase taxpayers’ reliance on portability.

b. Freezing the DSUEA at the Death of the Deceased Spouse Would Eliminate Uncertainty and Increase Reliance on Portability

Freezing the amount of a DSUEA at the death of the deceased spouse will reduce the volatility of the DSUEA amount and encourage reliance on portability over traditional planning. Unlike the other proposed revisions to the code, in some circumstances this recommendation will

create benefits not available through traditional planning or use of the current portability provision; this new benefit is explained in situation (c) below. However, this new benefit is small in comparison to the benefit created by the enactment of portability itself, and its use to create advantages not achievable by traditional planning is likely to be limited. The benefits of freezing DSUEA amounts outweigh the possible detriments created by this change.

The current portability provision limits the DSUEA amount to the current basic exclusion amount in effect when the surviving spouse dies.⁴⁷ This provision allows Congress to reduce the DSUEA amount available to all surviving spouses who have not yet taken advantage of their DSUEAs. It is likely that the reduction in the basic exclusion amount would not be targeted at reducing the DSUEA, but every surviving spouse with a DSUEA would be collateral damage to such a change in the tax code. Taxpayers expect changes in the tax code and can adapt their plans to address those changes. But when Congress changes the rules effecting taxpayers in a retroactive way, such as reducing the DSUEA amount, taxpayers no longer have the chance to change planning techniques to address these changes. This lack of ability to plan effectively will reduce taxpayers' willingness to rely on portability and will incentivize the traditional planning techniques that portability sought to replace.

There are three possible situations taxpayers might be in that create different results and different concerns under this revised provision: (a) H(a) dies with \$5 million and uses that money to create a bypass trust to shield the money from estate tax, (b) H(b) dies with \$5 million, but leaves all \$5 million and his \$5 million basic exclusion to W(b) using portability, and (c) H(c) dies with no money, leaving only his \$5 million exclusion to W(c). We are now in 2013, Congress has made portability permanent and has reduced the basic exclusion amount to \$3.5 million.⁴⁸

Because H(a) used a bypass trust to protect his \$5 million and did not rely on portability, he is unaffected by the change in basic exclusion amount under either the current or revised provision. His \$5 million will remain in trust, likely with the income to W(a) for life, and then to their children upon her death. The bypass trust has the advantage of protecting assets up to his basic exclusion amount, and under the current provision is the only way to ensure use of the entire basic exclusion amount while providing for W(a). If a taxpayer has assets equal to his basic exclusion amount, and for support purposes can afford to put them in trust, the current provision encourages use of a bypass trust in lieu of reliance on portability.

H(b) could have created a bypass trust but instead chose to rely on portability and leave all assets and exclusion to W(b). While this reflects the desire of most individuals to leave all assets to the surviving spouse,⁴⁹ it is not the most effective method of shielding assets from the estate tax. Under the current provision, when Congress lowered the basic exclusion amount W(b)'s DSUEA dropped from \$5 million to \$3.5 million. If W(b) had her own assets of \$3.5 million already, this reduction in her DSUEA will result in an increase in estate tax liability on \$1.5 million, or roughly \$525,000 (35% of \$1.5 million) in estate tax liability that could have been avoided by using a bypass trust.

In contrast, under the revised provision W(b)'s own basic exclusion amount would be reduced to \$3.5 million, but her DSUEA would have remained frozen at \$5 million, allowing her to shield all of her assets from estate tax. This is the same result that H(b) would have achieved by using a bypass trust like H(a), but without the need for complex planning. This equal treatment of similarly situated taxpayers regardless of complex planning is more consistent with portability's purpose of simplifying estate planning than the result under the current provision.

While allowing H(b) to freeze his basic exclusion amount achieves the same result as if

he has used a bypass trust, allowing H(c) to freeze his exclusion creates a new right that does not exist under the current provision. While H(b) had the ability to shield his basic exclusion amount and chose not to, H(c) cannot use his exclusion because he does not have any assets to create a trust. Without portability, H(c)'s entire exclusion amount would have been wasted, but portability allows him to preserve his exclusion amount by porting it to W(c). This saving of the exclusion already creates a new right that did not exist before portability, although Congress apparently did not object to its creation.⁵⁰ Allowing the surviving spouse to freeze the DSUEA at the death of the decedent spouse creates another small right in addition to that created by portability.

Freezing the exclusion amount would be a small and relatively inconsequential step down the road of benefit creation. Congress already created a new benefit by enacting portability, and protecting that benefit from reduction is a small expansion of that benefit. Portability allows H(c) to save his \$5 million exclusion and pass it on to his wife, something he could not do without portability. Allowing him to freeze that benefit at \$5 million instead of reducing it to \$3.5 million does create a benefit, but only a small one. For this benefit to actually be available to W(c), Congress would have to reduce the basic exclusion amount, and she would have to have assets exceeding double her basic exclusion amount.⁵¹ In this case, where H(c) left no assets to W(c) it is likely that they, like the vast majority of Americans, did not have the assets available to create a \$5 million bypass trust to preserve his exclusion. And like the vast majority of Americans, W(c) is not likely to have more than \$7 million in assets at her death.⁵² It is possible that she will inherit money, start a successful business, or win the lottery after becoming widowed and would have a use for the \$1.5 million in exclusion that would be preserved if her DSUEA had been frozen. But it is much more likely that she will die with assets less than her

own exclusion amount, not to mention the reduced DSUEA. Although freezing the DSUEA amount would create a new benefit for taxpayers, for the most part that benefit will only be used by taxpayers who could have achieved the same result through complex planning.

Freezing the DSUEA would enable portability to implement the intent of Congress to simplify estate planning. Although it would create a small new benefit for taxpayers in the same position as couple(c), its largest effect would be in protecting taxpayers like couple(b) and helping to convince taxpayers like couple(a) to rely on portability. The benefits created by incentivizing reliance on portability and the simplification of estate planning outweigh the small new benefit that will be provided to a limited number of taxpayers like couple(c). Without a provision freezing the DSUEA, the uncertainty surrounding portability will continue incentivizing traditional planning and preventing reliance on portability.

V. CONCLUSION

Portability is important because it simplifies estate planning and aligns the tax code with the natural inclination of taxpayers. However, the uncertainty created by the current provision is deterring taxpayers from relying on portability, undermining its purpose and reducing its effectiveness. A few simple changes in the code itself will resolve the uncertainty and increase taxpayers' willingness to rely.

Portability must be enacted permanently to have any chance of effectiveness. With the sunset only months away and no permanence in sight, no taxpayer would risk losing an exemption that could be saved using traditional planning methods. Permanence is the first step in increasing reliance on portability.

Uncertainty surrounding the conflict between the plain meaning of the code and Congress' intent must also be resolved. Taxpayers will not rely on portability when the

interpretation of the statute is unclear. The revised statute would implement Congress' intent without creating the issues of privity implicit in the JCT proposed amendment. Resolving this uncertainty will allay taxpayer fears and increase reliance on portability.

The volatility of the DSUEA is another barrier preventing taxpayers from relying on portability. Remarriage should not mean taking a risk of losing your DSUEA; many tax provisions incentivize marriage, and this one should not act against public policy by disincentivizing it. Allowing surviving spouses to use the greatest DSUEA at their disposal is an equitable solution that would increase reliance on portability.

The volatility of the DSUEA based on congressional action is another factor reducing reliance on portability. Taxpayers can preserve their basic exclusion amounts through traditional estate planning techniques. The current portability provision comes with an ongoing threat of reduction of the DSUEA and that threat is undermining the effectiveness of portability. Although in some cases freezing the DSUEA at death will protect assets in a way that taxpayers would not have been able to achieve without this provision, that is a more equitable result than retroactively reducing their ability to shield assets from the estate tax. The revised provision will allow taxpayers to be secure in their choice to rely on portability, and that will increase the effectiveness of the provision.

Portability is a potentially useful provision, but the uncertainty regarding its future coupled with the volatility of the protection it provides are undermining its effectiveness. Implementing the provision was a necessary step toward simplifying estate planning and allowing taxpayers to plan in ways that reflect their natural inclinations. The revised provision will take the final step toward providing the certainty taxpayers need to make portability a realistic estate planning option.

¹ Based on Shirley Kovar’s testimony before the Senate. *Outside the Box on Estate Tax Reform: Reviewing Ideas to Simplify Planning*, Hearing Before the S. Comm. on Finance, 110th Cong. 12 (2008) [hereinafter *Outside the Box*] (“[Portability] may be a small step for Congress, but it is going to be an enormous leap for surviving spouses.”).

² See note 29, *supra* and accompanying text for discussion of the last decedent spouse.

³ See note 44, *infra* for a discussion of the marriage incentives provided by the tax code and other benefits.

⁴ *Outside the Box*, *supra* note 1, at 121 (“The most obvious feature of portability is that it vastly simplifies estate planning and after-death administration for a married couple.”).

⁵ Portability is a statutory transfer of the decedent spouse’s unused exclusion amount (DSUEA) to the surviving spouse upon the death of the decedent spouse. *Id.* at 10.

⁶ See the example involving Betty on page 2.

⁷ *Outside the Box*, *supra* note 1, at 129.

⁸ *Id.*

⁹ *Id.* at 124 (“[P]ortability does not open a new door. Under current law, a married couple can achieve the same goal of use of the deceased spouse’s exemption as portability does. The difference is that current law . . . requires a married couple to engage in complicated planning and put up with complex administration . . .”). *But see* J. COMM. ON TAXATION, JCX-23-08, TAXATION OF WEALTH TRANSFERS WITHIN A FAMILY: A DISCUSSION OF SELECTED AREAS FOR POSSIBLE REFORM 10 (2008). (“Although proponents of portability generally assert that portability simply allows spouses to achieve the same result that otherwise would have been achieved through costly tax planning and re-titling of assets, a portability provision . . . may allow couples to achieve better results that they could have achieved through the best estate planning.” For a complete explanations of the “better results” taxpayers may achieve see *infra* notes 50 & 51 and accompanying text.

¹⁰ If negative tax consequences were disregarded, most spouses would choose to leave all assets to the surviving spouse. *Outside the Box*, *supra* note 1, at 123 (A[n] . . . important reason we support portability is that clients typically prefer that the spouse be the full owner of the couples’ combined estate upon the death of the surviving spouse.”).

¹¹ Because portability is not useful to taxpayers until the second spouse dies, the earlier portability is enacted the more useful it will be. In 2008 the JCT estimated that based on the then-current estate tax laws (exclusion amount of \$3.5 million), enactment of portability would benefit only 730 estates in 2009 (both spouses would have to die in 2009 to take advantage of portability in the year it was enacted). J. COMM. ON TAXATION, *supra* note 9, at 12–13. However, if portability had been enacted in 1999, 10,000 estates would have benefited in 2009. *Id.* This huge increase in beneficiaries demonstrates not only that portability will benefit a substantial number of estates, but that its benefits will continue to improve over time.

¹² J. COMM. ON TAXATION, JCX-55-10, TECHNICAL EXPLANATION OF THE REVENUE PROVISIONS CONTAINED IN THE “TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010” SCHEDULED FOR CONSIDERATION BY THE UNITED STATES SENATE 55 (Dec. 10, 2010).

¹³ In making recommendations for changes in the portability provisions, the ABA suggested making portability permanent because “[t]he impermanence of Portability require[s] taxpayers to engage in estate planning had not been enacted.” *Exhibit A on Comments For Reform And*

Simplification of The Federal Transfer Tax Laws, ABA TAX SECTION ESTATE AND GIFT TAXES COMM. REAL PROP. AND TRUST LAW SECTION 13 (2011) available at <http://meetings.abanet.org/webupload/commupload/RP509000/newsletterpubs/ExhibitAComments.pdf>.

¹⁴Comments to Congress recommending changes to the portability provision noted that the conflict between the plain meaning of the code and the suggested change to comply with Congressional intent

leave[s] taxpayers in a quandary; How do taxpayers and their advisors deal with an example purporting to explain existing law, which instead explains that the example highlights a technical correction which may be reflected in future legislation? We believe that the Service should provide that no taxpayer will be penalized by reason of following . . . the result that we think Congress intended In any case, we respectfully request regulatory clarification to resolve this issue.

Formal Questions And Comments Concerning Internal Revenue Code Section 2010(C)(2) – (6), AM. BAR ASS'N SECTION OF REAL PROP., TRUST AND ESTATE LAW INCOME AND TRANSFER TAX GRP., ESTATE AND GIFT TAX COMM. 6 (2011) available at <http://meetings.abanet.org/webupload/commupload/RP509000/newsletterpubs/PortabilityABARPTTEEGCommittee.pdf>.

¹⁵ See *supra* Part IIB.

¹⁶ *Outside the Box*, *supra* note 1, at 122 (“The most obvious feature of portability is that it vastly simplifies estate planning . . . for a married couple”).

¹⁷ Under present law, “Portability is scheduled to sunset as of January 1, 2013. . . . The impermanence of Portability require[s] taxpayers to engage in estate planning as if Portability had not been enacted. . . . We suggest that regardless of the potential sunset of other changes in the federal estate, gift and GST tax laws under [the current law], Portability should be made permanent.” ABA TAX SECTION ESTATE AND GIFT TAXES COMM. REAL PROP. AND TRUST LAW SECTION, *supra* note 15, at 13.

¹⁸ J. COMM. ON TAXATION, *supra* note 12, at 55.

¹⁹ *Portability- Part One*, THE ESTATE AND GIFT TAX COMMITTEE OF THE REAL PROPERTY TRUST & ESTATE LAW SECTION OF THE ABA 10 (2012) [hereinafter *Portability- Part One*] available at http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/heckerling/2012/heckerling_report_2012_portability_part_one.authcheckdam.pdf.

²⁰ See note 17.

²¹ J. COMM. ON TAXATION, JCX-20-11, ERRATA “GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 111TH CONGRESS” (Mar. 23, 2011).

²² (4) Deceased spousal unused exclusion amount

For purposes of this subsection, with respect to a surviving spouse of a deceased spouse dying after December 31, 2010, the term “deceased spousal unused exclusion amount” means the lesser of—

(A) the basic exclusion amount, or

(B) the excess of—

(i) the basic exclusion amount of the last such deceased spouse of such surviving spouse, over

(ii) the amount with respect to which the tentative tax is determined under

section 2001 (b)(1) on the estate of such deceased spouse.

²³ The Joint Committee on Taxation (JCT) released three examples to explain the portability provisions in December 2010. This example, as well as the other examples in this paper, is based on the fact-pattern in JCT Example 3. Because the JCT examples cast the husband as the first to die spouse, for the most part the examples in this Paper will also have the wife as a surviving spouse. J. COMM. ON TAXATION, *supra* note 12, at 55.

²⁴ The applicable exclusion amount is the sum of the basic exclusion amount and the DSUEA. § 2010(c)(2).

²⁵ J. COMM. ON TAXATION, *supra* note 12, at 53.

²⁶ J. COMM. ON TAXATION, *supra* note 21 at 1(emphasis added).

²⁷ *Id.*

²⁸ *Outside the Box*, *supra* note 1, at 138.

²⁹ ABA TAX SECTION ESTATE AND GIFT TAXES COMM. REAL PROP. AND TRUST LAW SECTION, *supra* note 13, at 2 (“It may be argued that the Last Deceased Spouse Approach effectively penalizes the surviving spouse . . . as a result of remarriage and the early death of the new spouse Taken to extreme, this aspect of the current law could arguably discourage marriage in certain circumstances.”). See note 44 and accompanying text for policy discussion of restraints and incentives for marriage.

³⁰ J. COMM. ON TAXATION, *supra* note 12, at 52 n.57 (“The last deceased spouse limitation applies whether or not the last deceased spouse has any unused exclusion or the last deceased spouse’s estate makes a timely election.”).

³¹ (4) Deceased spousal unused exclusion amount

For purposes of this subsection, with respect to a surviving spouse of a deceased spouse dying after December 31, 2010, the term “deceased spousal unused exclusion amount” means the lesser of—

(A) *the basic exclusion amount*, or

(B) the excess of—

(i) the basic exclusion amount of the last such deceased spouse of such surviving spouse, over

(ii) the amount with respect to which the tentative tax is determined under section 2001 (b)(1) on the estate of such deceased spouse.

§ 2010(c) (emphasis added).

³² *Portability- Part One*, *supra* note 19, at 6(“[T]here is a good chance that portability will become a permanent fixture of the federal estate and gift tax system. Portability is commonly thought of as a popular and noncontroversial middle-class-taxpayer-friendly provision, which appears to have support from both sides of the Congressional aisle.”)

³³ J. COMM. ON TAXATION, *supra* note 12, at 55.

³⁴ Portability is likely to become a permanent part of the I.R.C; President Obama supports the permanent enactment of portability after 2012. *General Explanations of the Administration’s Fiscal Year 2013 Revenue Proposals*, DEPT. OF THE TREASURY (2012) 76 (“the portability of unused estate and gift tax exclusion between spouses would be made permanent.”) *available at* <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf>.

³⁵ Changing this wording to the “greatest available” clarifies which DSUEA a taxpayer will use.

³⁶ Changing this wording establishes privity and freezes the DSUEA at the death of the deceased

spouse.

³⁷ Adopting the JCT suggested amendment allows taxpayers to utilize the entire DSUEA and leave the maximum amount to a surviving spouse. Because § 2010 (c)(4)(A) was changed to the *decedent* spouse's basic exclusion amount, the issues with privity that were present in the JCT amendment are not present here.

³⁸ The original § 2010 for comparison:

(c) Applicable credit amount

...

(2) Applicable exclusion amount

For purposes of this subsection, the applicable exclusion amount is the sum of—

(A) the basic exclusion amount, and

(B) in the case of a surviving spouse, the deceased spousal unused exclusion amount.

...

(4) Deceased spousal unused exclusion amount

For purposes of this subsection, with respect to a surviving spouse of a deceased spouse dying after December 31, 2010, the term “deceased spousal unused exclusion amount” means the lesser of—

(A) the basic exclusion amount, or

(B) the excess of—

(i) the basic exclusion amount of the last such deceased spouse of such surviving spouse, over

(ii) the amount with respect to which the tentative tax is determined under section 2001 (b)(1) on the estate of such deceased spouse.

³⁹ See *supra* Part IIB3.

⁴⁰ *Eight Recommendations to Improve Implementation of Existing Tax Laws*, THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL 10 (2011) *available at* http://www.actec.org/Documents/misc/Radford_Comments_11_02_11.pdf (“As written, [the last decedent spouse limitation] could discourage legitimate marriages of individuals with smaller unused exclusion amounts and therefore defeats the purpose of other legislation that encourages marriages by granting married individuals tax advantages not available to single individuals.”)

⁴¹ S. 722 111th Cong. § 302(a)(4) (2009); H.R. 5970 109th Cong. § 102(a)(4) (2006).

⁴² THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, *supra* note 40 at 11

⁴³ *Id.*

⁴⁴ Many laws incentivize marriage by offering benefits to married couples that are not available to non-married couples. The unlimited marital deduction allows for transfer of assets freely between spouses with no tax consequences. 26 U.S.C.A. § 2056. The cost of employer provided health insurance coverage for spouses is not subject to federal tax, while domestic partners are taxed on these benefits. Tara Siegel Bernard, *Google to Add Pay to Cover a Tax for Same-Sex Benefits*, NYTimes.com June 30, 2010, *available at* <http://www.nytimes.com/2010/07/01/your-money/01benefits.html>. Spouses who were married for at least ten years have the option to elect 50% of their spouse's social security benefits or 100% of their own. 42 U.S.C. § 402(b)(1) (2006).

⁴⁵ “When the concept of portability was first presented a few years ago, the question came up about whether a serial spouse could accumulate unused applicable exclusion amounts from

multiple deceased husbands, and then run advertisements in the local newspaper to the effect: ‘SF, looking for wealthy SM. I can still drive at night and have \$22 million of estate tax exclusion available.’” Marvin D. Hills, *Subsequent Remarriage Complicates Exclusion Amount Portability*, 38 ESTPLN 3, 3 (2011). Another practitioner suggests an alternate ad: “‘Old, Poor, Unhealthy Widower: Full Exemption Available At a reasonable cost, my exemption is available to you. Here’s my contact info. . . .’” Warren S. Hersch, *FSP Speaker Sees Worms in Estate Tax Portability Feature*, NATIONAL UNDERWRITER (Aug. 19, 2011) <http://edit.lifeandhealthinsurancenews.com/News/2011/8/Pages/FSP-Speaker-Sees-Worms-in-Estate-Tax-Portability-Feature.aspx>. Even law professors are getting into the game. Steven R. Akers, *Heckerling Musings* ABA Real Property, Trust & Estate Law eReport 89 (February 2011) (“If there are any rich ladies out in the room, I’m happy to parlay my unused exemption amount. I’m even happy to arrange for my death for the right price.”) (Attributed to Sam Donaldson in his remarks at the Heckerling Institute 2011) available at www.americanbar.org/content/dam/aba/publications/rpte_ereport/2011_aba_rpte_ereport_01_complete.authcheckdam.pdf.

⁴⁶ THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, *supra* note 40 at 11.

Although this quote is recommending that individual taxpayers can choose any one of their DSUEAs as opposed to simply using the greatest available DSUEA, the two approaches are so similar that this reasoning applies to both.

⁴⁷ § 2010(c)(4)(A).

⁴⁸ President Obama’s proposed budget for 2013 recommends returning to the estate tax structure and values present in 2009; that includes deunifying the gift and estate tax, and returning the estate tax exclusion to \$3.5 million. *General Explanations of the Administration’s Fiscal Year 2013 Revenue Proposals*, DEPT. OF THE TREASURY (2012) 76 available at <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2013.pdf>. Because portability currently applies to both gift and estate tax, this deunifying of the estate and gift tax could have implications for the future of portability. However, discussion of those implications are beyond the scope of this Paper.

⁴⁹ See *supra* note 10.

⁵⁰ The JCT noted the creation of this benefit, and that Congress could consider it to be problematic. J. COMM. ON TAXATION, *supra* note 9, at 10. It suggested the option of limiting the DSEAU to the lesser of the total assets of the couple or the unused exclusion amount of the decedent spouse. *Id.* Although this would limit the benefit created by portability, the JCT conceded that this option would add complexity and the administrative burden of assessing the value of the surviving spouse’s assets in addition to those of the decedent spouse. *Id.* As Congress enacted portability without the proposed restriction or any other means of preventing this new benefit, the creation of the new benefit must have been preferable to creating a further administrative burden.

⁵¹ To make use of the benefit of freezing the DSUEA, W(c) would need over \$7 million in assets at her death (assuming she made no lifetime gifts). The \$1.5 million of the DSUEA that W(c) lost could only be used if W(c) already used her \$3.5 million basic exclusion amount and the \$3.5 million DSUEA.

⁵² In 2011 only 3,270 estates, or .13% of estates, were estimated to be subject to estate tax. *Historical Returns as Percentage of Deaths*, TAX POLICY CENTER (last updated Nov. 2011), available at <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=52>.