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BY APPOINTMENT ONLY

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TO: CLIENTS AND THEIR ADVISORS

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

Effective January 1, 2011, the federal estate tax exclusion amount and tax rates were restructured. A noteworthy feature of the restructuring is that for married couples, the unused exemption of the first spouse to die is now “portable” to the estate of the surviving spouse. This eliminates, at least for the time being on the federal (but not necessarily on the state) level, some of the reasons why the traditional “credit shelter” and “by-pass” trust agreements have been a longtime hallmark of estate planning. Surviving spouses can now rely upon post mortem planning and instead incorporate “renunciation” trusts in their Wills.

The portability provisions provide that the exclusion amount of a surviving spouse is increased by the amount, if any, by which the taxable estate of the pre-deceased spouse was less than the applicable exclusion amount in effect for the year in which the pre-deceased spouse died. This is referred to as the “deceased spousal unused exclusion” or DSUE. For example, if one spouse died in 2014 leaving a taxable estate of \$1 million, and the surviving spouse dies in 2015, the exclusion of the surviving spouse equals the 2015 exclusion amount for him or her (\$5,430,000) plus the DSUE (the 2014 exclusion amount of \$5,340,000 less the taxable estate of \$1,000,000 which equals \$4,340,000), for a total of \$9,770,000.

Recently enacted final Treasury Regulations (TD 9725) clarified a few issues. The estate of the predeceased spouse must file a timely (including extensions) Form 706, US Estate Tax Return, even if not otherwise subject to estate tax, and elect on that return to allow the surviving spouse to use the DSUE amount. If the surviving spouse is pre-deceased by more than one spouse (i.e. widowed more than once), only the DSUE, if any, relating to the most recent pre-deceased spouse maybe used. Another important rule is that portability is only prospective—it cannot be used to carry forward any unused exclusion from the estate of a pre-deceased spouse who died before 2011.

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