

## January 2012— Estate Tax Portability for Deaths in 2012 and Beyond

On September 29, 2011, the Internal Revenue Service provided notice (Notice 2011-82) reminding the estates of married individuals who died during or after 2011 that they must file an estate tax return in order to elect to use estate tax portability. Estate tax portability allows the surviving spouse to use his or her deceased spouse's unused estate tax exclusion amount. The estate tax portability was not available prior to 2011.



For deaths in 2011 and 2012, an estate is generally excluded from estate taxes if the taxable estate, including taxable gifts made during life, is under \$5,000,000. For estates under this amount, estate tax portability allows the unused portion of the exclusion amount to be passed onto the surviving spouse, but only if the surviving spouse files an estate tax return. The estate tax return is due nine months after the date of death.

In the past an estate tax return was only required should an estate exceed the exclusion amount. Because estate tax portability is only available when an estate tax return is filed, the IRS expects that most estates of people who are married will want to make the portability election by filing an estate tax return. Many tax practitioners were hoping that the IRS would create a simple form to elect to have the portability apply, but the IRS did not want to require the executor to affirmatively make the election. Instead, the IRS is requiring all surviving spouses who want to make the

election to file an estate tax return, despite the fact that most of the estates would not have been required to file an estate tax return in the first place.

As a result, all surviving spouses whose spouse died in or after 2011 should consider making the portability election by filing the estate tax return. Even those with a small estate should consider making the election to maximize the estate tax exemption that is available at the surviving spouse's death.

Gresham|Savage can assist a surviving spouse with evaluating whether or not an estate tax return should be filed. Please contact Philip M. Savage, IV or David L. Tarbet in our Trust & Estate Department if you have question about this Client Alert or Estate Tax Portability.

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