THE NOT-SO-SIMPLE ESTATE PLAN OF *BREAKING BAD'S* WALTER WHITE

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I. INTRODUCTION

On September 29, 2013, over ten million people viewed the series finale of AMC's Emmy Award winning hit, *Breaking Bad*.[1] The series followed Walter White, a high school chemistry teacher in New Mexico, and his family.[2] When Walter is diagnosed with stage III lung cancer and is given less than two years to live, his desire to provide for his family after his death drives him to use his chemistry background to produce methamphetamine. By the end of the series he and his partner, Jesse Pinkman, are the largest methamphetamine producers in the southwestern United States. In the series finale, both the cancer and the police are closing in on Walter, and he is struggling to find a way to leave his methamphetamine fortune to his family without having it confiscated. Left with no other option, he forces his old college friends and former colleagues Gretchen and Elliot Schwartz, who own a very lucrative corporation known for its philanthropy, to create a fund for his family using his drug money. As the series finale comes to an end, all loose ends in the story are neatly tied up except for one. Assuming that Walter laundered the money properly, a record breaking 10.3 million viewers were left guessing whether Walter's family would receive his fortune tax free.

The answer, of course, depends on whether Walter's wife, Skyler, made a timely portability election. The transferability of a deceased spousal unused exclusion amount from the federal estate and gift tax, more frequently termed portability, was first introduced by the 2010 Tax Relief, Unemployment

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1. Eliana Dockterman, *A Record-Breaking 10.3 Million People Watched the Breaking Bad Finale*, TIME (Sept. 30, 2013), http://entertainment.time.com/2013/09/30/a-record-breaking-10-3-million-people-watched-the-breaking-bad-finale/.

2. *Breaking Bad* (AMC television program 2008–2013).

Insurance Reauthorization, and Job Creation Act ("TRA 2010").[3] Under TRA 2010, portability was set to expire on December 31, 2012.[4] However, before it expired, Congress passed the American Taxpayer Relief Act of 2012 ("ATRA 2012") making portability a permanent part of the United States Tax Code ("Code").[5] Prior to the passage of TRA 2010 and portability's permanent extension in ATRA 2012, each person had a certain amount he or she could gift or leave through inheritance or devise without incurring estate tax.[6] But, if a person failed to leave devises or inheritances in an amount equal to his or her entire exclusion amount, then any excess exclusion amount disappeared; in other words, it could not be transferred.[7] As a result, if the surviving spouse's estate exceeded his or her own exclusion amount then the balance would be subject to the estate tax.[8]

In the decade leading up to ATRA 2012, estate tax law was so complicated and so frequently changed that practitioners had difficulty preparing estate plans.[9] Congress hoped portability would make estate planning much simpler.[10] A witness before the Senate Finance Committee in 2008 even asserted that portability "will eliminate the need for many married individuals to have estate planning."[11] However, as both practitioners and taxpayers have come to realize, portability is not the simple tool it was intended to be. After years of discussion and several years of application, the Treasury Department is still working out the details involved in electing and using portability. Moreover, practitioners have not categorically recommended that married couples rely solely on portability for their estate plan; rather, practitioners have combined electing portability with a slew of other estate planning techniques to produce plans that are more beneficial to the taxpayer than just relying on portability.

This article uses the characters from *Breaking Bad* to explain the significance and application of portability, and to demonstrate that portability

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3. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303(d), 124 Stat. 3296, 3305.

4. *Id.*

5. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2315.

6. Richard S. Franklin et al., *Portability—The Regulations*, 2013 A.B.A. SEC. COMM. OF THE REAL PROP. TR. & EST. L. 1 (2013), *available at* http://meetings.abanet.org/webupload/commupload/RP512500/otherlinks_files/portability_the_regulations_2013_01_14_paper_1.authcheckdam.pdf.

7. *Id.* at 12.

8. *Id.*

9. *See* STAFF OF J. COMM. ON TAXATION, 110TH CONG., TAXATION ON WEALTH TRANSFERS WITHIN A FAMILY: A DISCUSSION OF SELECTED AREAS FOR POSSIBLE REFORM 1 (2008).

10. *Id.* at 3.

11. *Id.*

is not the easy one-size-fits-all estate-planning tool that Congress hoped for. To highlight the continuing issues with and complexity of portability, the article also discusses the most recent revenue procedure attempting to provide guidance on portability and the American Bar Association ("ABA") comments that prompted that revenue procedure. Section II of this paper briefly explains the history and concept of portability and how the portability election is made. Section III focuses on the significance of portability and its role as an estate and gift tax planning tool. Section IV discusses the recent ABA comments on the consequences of failing to elect portability, and the IRS's reaction to those comments through Revenue Procedure 2014-18. Section V concludes that portability is not the simplistic solution to complex estate planning that Congress intended.

II. UNDERSTANDING PORTABILITY

All United States citizens and residents can leave an unlimited amount of assets to their spouse or to charity without incurring estate tax.[12] Additionally, they are entitled to exclude a basic amount from their estates for purposes of determining their federal estate tax liability.[13] But, before portability became a part of the law, if one spouse did not use all of his or her basic exclusion amount during life or through testamentary dispositions, the remaining exclusion amount was wasted.[14] In other words, the decedent spouse could leave the surviving spouse all of his or her property at his or her death without incurring taxes, but when the surviving spouse died, all assets exceeding that spouse's basic exclusion amount would be subject to the estate tax unless the couple used a credit shelter trust (sometimes called a "by-pass" trust).[15] Thus, Walter could have left Skyler his entire fortune without being subjected to the estate tax. However, Skyler would only be able to give away $5.34 million in lifetime gifts or testamentary dispositions before being subjected to the estate and gift tax, unless the couple created a credit shelter trust.

A credit shelter trust works by keeping the trust property separate from the surviving spouse's estate.[16] When the first spouse dies, the trust is funded up to his or her basic exclusion amount and the remaining assets can pass to the

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12. I.R.C. §§ 2056, 2523 (2012). Transfers and gifts to spouses and charities have generally been tax free due to the unlimited marital and charitable deductions.

13. I.R.C. §§ 2001, 2010 (2012).

14. Deborah L. Jacobs, *A Married Couple's Guide to Estate Planning*, FORBES (Jan. 9, 2013, 3:14 PM), http://www.forbes.com/sites/deborahljacobs/2013/01/09/a-married-couples-guide-to-estate-planning/. Testamentary dispositions are transfers of property that take effect at the death of the person making the transfer. A will is an example of a testamentary disposition.

15. *Id.*

16. *Id.*

surviving spouse tax free.[17] The trust may provide for distributions of income and principal to the surviving spouse or other beneficiaries, but it is structured to avoid inclusion in the surviving spouse's estate.[18] Generally, when the surviving spouse dies the balance of the trust passes as the decedent spouse directed in the trust document.[19] The assets in the trust are not taxed when the decedent spouse dies because they are covered by his or her basic exclusion amount, nor are they taxed when the surviving spouse dies because they are not considered part of the surviving spouse's estate.[20]

However, credit shelter trusts have several drawbacks. Generally, when one dies the value of their assets are reset to the assets' fair market value at the time of their death, which means that no income tax is owed on the assets' appreciation between time of the assets' acquisition and the date of the decedent's death.[21] If the decedent leaves his estate to his spouse then the assets become part of his surviving spouse's estate and, thus, receive a reset income tax basis when she dies as well. Trust assets, however, do not receive a reset income tax basis on the surviving spouse's death.[22] Consequently income taxes are owed on the assets' appreciation between the decedent's death and when the assets are sold after the surviving spouse's death.[23] Another disadvantage of credit shelter trusts is that couples who find themselves in a situation similar to that of the Whites may not have the time to create one or even realize the tax consequences of failing to do so. Because of portability, married couples are no longer obligated to create a credit shelter trust to take advantage of both spouses' basic exclusion amounts. Now, a surviving spouse can add his or her deceased spouse's unused exclusion amount to his or her own basic exclusion amount by making a timely portability election.[24]

A. History of Portability

Congress began considering the merits of portability in 1997, but the concept did not begin to attract attention until the mid-2000s.[25] Proponents of portability argued that it would eliminate "inefficient and costly tax planning

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. Lester B. Law & Andrew T. Huber, *Estate Planning with Portability in Mind, Part I*, 86 FLA. BAR J. 29, 30 (2012).
22. *Id.*
23. *Id.*
24. Jacobs, *supra* note 14.
25. *See* STAFF OF JOINT COMM. ON TAXATION, *supra* note 9, 9 n.14.

and result[] in similarly situated taxpayers being treated equally."[26] They also argued that without portability, "the law rewards both sophisticated planning and constant reallocation of wealth, but does not offer the same benefits to couples who do not engage in sophisticated planning or whose assets do not lend themselves to appropriate allocation."[27] To address the growing concern over the complex nature of estate tax law, Congress introduced portability in TRA 2010, but only on a temporary basis.[28] Congress authorized the Treasury Department to create new regulations to implement the portability provisions.[29] After receiving numerous public comments, the Treasury Department issued temporary regulations titled, "Portability of a Deceased Spousal Unused Exclusion Amount" ("Portability Regulations") on June 15, 2012.[30] The Portability Regulations provide the bulk of the available guidance on portability. Congress made portability a permanent feature of estate and gift tax law through ATRA 2012.[31]

B. Calculating the Deceased Spousal Unused Exemption Amount

Portability is not automatic. The proper exclusion amount must be computed and reported, and portability must be elected on the "United States Estate (and Generation-Skipping Transfer) Tax Return" ("Form 706").[32] Filing a Form 706 can be expensive and must be done according to IRS regulations.[33] But the surviving spouse cannot benefit from his or her deceased spousal unused exclusion amount ("DSUEA") unless the Personal Representative ("Executor") of the deceased spouse's estate elects portability by filing a properly completed and timely filed Form 706.[34]

Calculating the DSUEA is an integral part of making the portability election. The DSUEA is comprised of several parts. The basic exclusion amount is the amount of property that each United States citizen or resident

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26. *Id.* at 9.

27. *Id.* at 10 (quoting the American Bar Association Task Force on Wealth Transfer Taxes).

28. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303(a), 124 Stat. 3296, 3302–03.

29. *Id.*

30. Franklin et al., *supra* note 6, at 1.

31. *Id.*

32. 26 C.F.R. § 20.2010-2T(a)(7) (2013).

33. Keith Schiller, *Estate Planning at the Movies—QTIP Trusts: The New Lion King*, 38 EST., GIFTS & TR. J. 203, 204 (2013).

34. 26 C.F.R. § 20.2010-2T(a) (2012). The DSUEA election is not available to the estates of nonresident aliens. I.R.C. § 2001, 2010 (2012); Schiller, *supra* note 33, at 205. Without obtaining an extension, estates usually have nine months to file a Form 706 after the decedent's death. 26 C.F.R. § 20.2010-2T(a)(1). See Section III, *infra*, for a detailed analysis of timing issues with portability.

is allowed to transfer to someone other than his or her spouse or to charity during his or her lifetime or at death without incurring any gift or estate taxes.[35] The basic exclusion amount does not include the generation-skipping tax ("GST") exclusion amount.[36] Under TRA 2010, the basic exclusion amount is $5 million adjusted annually for inflation.[37] The inflation adjustment is computed by multiplying the basic exclusion amount ($5 million) by the cost-of-living adjustment determined under section 1(f)(3) of the Internal Revenue Code for each calendar year.[38] In 2014, the inflation adjustment increased the basic exclusion amount to $5.34 million.

The DSUEA is a married person's basic exclusion amount that remains unused at the time of his or her death after all testamentary dispositions have been made.[39] The DSUEA available to the surviving spouse is the lesser of (1) the basic exclusion amount; or (2) the unused exclusion amount of the surviving spouse's last deceased spouse over the sum of the deceased spouse's taxable estate and the total adjusted taxable gifts.[40] Unlike the basic exclusion amount, the DSUEA is not adjusted for inflation.[41] The DSUEA is computed using the basic exclusion amount from the year of the deceased spouse's death and will not increase with inflation even if it is not used for several years.[42] Thus, if Skyler, acting as Walter's executor, properly elected portability when Walter died in 2013 and she continued to live until 2025, the DSUEA from Walter will remain unchanged. In contrast, her own exclusion amount will likely be much higher.

After one elects portability, the maximum amount of property he or she can give to someone other than his or her spouse or to charity without incurring gift or estate tax is called the applicable exclusion amount.[43] The applicable exclusion amount is the sum of the basic exclusion amount (currently $5.34 million) and any DSUEA.[44] All assets exceeding one's applicable exclusion amount are subject to the estate tax and the gift tax.[45]

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35. I.R.C. § 2010 (2012); George D. Karibjanian, *Portability and Prenuptials*, 38 TAX MGM'T ESTS., GIFTS & TRS. J. 175, 176 (2013).

36. I.R.C. § 2010. In addition to one's basic exclusion amount, one also has a GST exclusion amount. Jacobs, *supra* note 14. The GST exclusion allows one to transfer a certain amount of assets to one's descendants excluding one's children. *Id.*

37. I.R.C. § 2010(c)(3).

38. *Id.*

39. I.R.C. § 2010.

40. *Id.*

41. *See id.*

42. *See id.*

43. 26 C.F.R. § 20.2010-1T(d)(2) (2012).

44. *Id.* § 20.2010-1T(d)(2)–(3).

45. I.R.C. § 2001 (2012).

The current maximum estate tax rate is 40% and the maximum gift tax rate is 35%.[46]

C. Electing Portability

As mentioned above, the portability election must be made on a Form 706.[47] Estates are required to file a Form 706 when the gross estate and adjusted taxable gifts exceed the decedent's basic exclusion amount.[48] Such estates must file the Form within nine months after the decedent's death unless the executor has obtained an extension.[49] Estates with values under the Form 706 filing threshold are privy to a more lenient timing rule. In the recently issued Revenue Procedure 2014-18, the IRS essentially extended the deadline to elect portability to December 31, 2014 for qualifying estates under the Form 706 filing threshold that missed the deadline to elect portability.[50]

When creating an estate plan, it is important to ensure that portability is elected or not elected according to the decedent's wishes.[51] This can be done by creating a marital or prenuptial agreement that has a provision stating who is authorized to file the Form 706 on behalf of the decedent, and whether portability should be elected.[52] A second option is to appoint an executor through the probate administration.

The Portability Regulations distinguish "appointed executors" from "non-appointed executors" and establish different filing rules for both types.[53] Appointed executors are appointed by the court through the state's probate process.[54] Non-appointed executors have actual or constructive possession of part of the decedent's property, but are not appointed by the court; despite their lack of appointment they are still considered executors under Code § 2203.[55]

An appointed executor has authority to file a Form 706 on behalf of the estate and has the option of electing portability.[56] The executor will elect or

46. *Id.*
47. 26 C.F.R. § 20.2010-2T(a).
48. I.R.C. § 2001.
49. 26 C.F.R. § 20.2010-2T(a)(1).
50. *See* Rev. Proc. 2014-18, 2014-7 I.R.B. 513; *see also* discussion *infra* Section III.
51. Franklin et al., *supra* note 6, at 7.
52. *Id.*
53. 26 C.F.R. 20.2010-2T(a)(6).
54. *Id.*
55. *Id.* § 20.6018-2.
56. *Id.* § 20.2010-2T(a)(6)(i).

not elect portability according to what the decedent expressed in his will.[57] If there is no appointed executor, non-appointed executors can file a Form 706 on behalf of the decedent and elect portability.[58] Had Walter executed a will and named an executor, only the named executor would have authority to file a Form 706 and elect portability. However, Walter did not have a will or name an executor; nonetheless, Skyler would still be able to file a Form 706 and elect portability on Walter's behalf because she was in possession of most of his property. If both an appointed executor and a non-appointed executor file a Form 706 on behalf of the decedent, the appointed executor's Form controls.[59] In the case of multiple Form 706s filed by multiple non-appointed executors, the first Form 706 filed controls.[60]

The Form 706 does not give the option of affirmatively electing portability.[61] With one exception discussed below, if a Form 706 is timely and properly filed, then portability has been elected.[62] There are two ways to not elect portability.[63] The first option is to simply not file a Form 706.[64] However, this option is only available to estates with values below the Form 706 filing threshold, currently $5.34 million.[65] The second is to affirmatively opt-out of portability.[66]

If a Form 706 must be filed because the estate's value exceeds the basic exclusion amount and the estate does not want to elect portability, the executor must affirmatively check the box on the Form indicating the desire to opt out of portability.[67] If an executor initially opts out of portability he can still make the portability election later by filing another Form 706 before the filing deadline including any extension.[68] In addition to the timely filing requirement, the Form 706 must also be "complete and properly-prepared."[69] For estates that are required to file a Form 706 regardless of the portability election, "complete and properly prepared" means that the Form must be prepared and filed according to the instructions and the relevant Treasury

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57. *Id.*

58. *Id.* § 20.6018-2. Non-appointed executors only have authority to file the Form 706 and elect portability; they cannot perform any other function regarding the estate. *Id.*

59. 26 C.F.R. § 20.2010-2T(a)(6).

60. *Id.* § 20.2010-2T(a)(6)(ii).

61. *Id.* § 20.2010-2T(a)(2).

62. *Id.*

63. *Id.* 20.2010-2T(a)(3); 71 YOSHIMI O. SMITH, NEW YORK UNIVERSITY ANNUAL INSTITUTE ON FEDERAL TAXATION § 17.04 (2013).

64. SMITH, *supra* note 63.

65. *See* I.R.C. § 2010(c)(3) (2012).

66. SMITH, *supra* note 63.

67. 26 C.F.R. § 20.2010-2T(a)(3)(i) (2012).

68. *Id.* § 20.2010-2T(a)(4).

69. *Id.* § 20.2010-2T(a)(7).

Regulation provisions.[70] There are different requirements for estates that, except for making the portability election, are not required to file a Form 706.[71]

Despite many requests to do so, the Treasury has not yet created a "Form 706 EZ" for estates filing the Form 706 solely for the purposes of electing portability.[72] However, it did lessen the burden of filing the Form for those estates by establishing a simplified value-reporting method for certain assets.[73] Under the simplified reporting method, those filing on behalf of eligible estates are not required to provide the actual value of certain assets that are eligible for marital or charitable deductions.[74] However, they still must provide an estimated value of their total estate.[75] In addition, all property that does not qualify for simplified reporting must be reported using the traditional method.[76]

D. Using Portability

Portability only pertains to married couples and only the surviving spouse can use his or her deceased spouse's unused exclusion amount.[77] The surviving spouse can use his or her DSUEA on or after the date of his or her last deceased spouse's death, so long as portability has or will be properly elected.[78] However, the surviving spouse's use of his or her DSUEA is subject to several limitations.[79] The DSUEA available is adjusted if a subsequently filed Form 706 supersedes the original portability election, or if the DSUEA is later adjusted for valuation or to correct a mistake in calculating the DSUEA.[80] Moreover, the DSUEA will be reduced totally or partially to the extent that the surviving spouse cannot validate the DSUEA claimed on the Form 706.[81]

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70. *Id.*; 26 C.F.R. §§ 20.6018-2 to -4 (2012).
71. 26 C.F.R. § 20.2010-2T(a)(7)(ii).
72. Franklin et al., *supra* note 6, at 9.
73. *Id.*
74. 26 C.F.R. § 20.2010-2T(a)(7)(ii)(A).
75. *Id.* § 20.2010-2T(a)(7)(ii)(B).
76. *Id.* § 20.2010-2T(a)(7)(i). Traditionally, filing a Form 706 is a complicated process requiring a list of all assets, their values rounded to the nearest dollar, and proof of ownership. *See* 26 C.F.R. § 20.2010-2T(a)(7). The specific requirements and process of filing a Form 706 are beyond the scope of this paper.
77. *See* 26 C.F.R. § 20.2010-2T (2012).
78. 26 C.F.R. § 20.2010-3T(c) (2012).
79. *Id.*
80. *Id.*
81. *Id.*

The Treasury Department has provided regulations to aid taxpayers in determining who qualifies as a "last deceased spouse."[82] Under the regulations, the last deceased spouse is the person who was married to the surviving spouse and is the last spouse to predecease the surviving spouse.[83] Prior to the Supreme Court's decision in *United States v. Windsor*, a surviving spouse in a same-sex marriage was not considered a surviving spouse for purposes of electing and using portability.[84] However, shortly after the *Windsor* decision, the IRS issued Revenue Ruling 2013-17, stating that the Agency recognizes "a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage . . . even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages."[85] To clarify who qualifies as a surviving spouse, assume that Hank and Marie are married, and Hank is killed in a violent drug-related shootout in the desert outside of Albuquerque. Eventually, Marie remarries Gus and predeceases him. In this situation, Hank is Marie's last deceased spouse. Even though Marie and Gus were married when Marie died, the last deceased spouse must predecease the current decedent, which, in this example, is Marie.

For estate tax purposes, when the surviving spouse dies, the DSUEA is only available to the extent left by the surviving spouse's last deceased spouse.[86] Therefore, in a variation of the previous example, if Marie is predeceased by Gus, then Marie will only have access to Gus's unused exemption amount; Hank's unused exclusion amount will be lost. However, Marie could use both Hank's and Gus's exclusion amount by making lifetime gifts during her marriage to Gus.[87] Any such gifts Marie makes are first covered by Hank's exclusion amount; her own basic exclusion amount is left to cover later transfers.[88] Continuing with the example, assume Hank's entire basic exclusion amount of $5.34 million was ported to Marie. So, during her marriage to Gus, she has an applicable exclusion amount of $10.68 million (Hank's $5.34 million DSUEA + Marie's $5.34 million basic exclusion amount). During her marriage, Marie gives $10.68 million in lifetime gifts.

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82. 26 C.F.R. § 20.2010-1T (2012).

83. *Id.* § 20.2010-1T(d)(5).

84. Rev. Proc. 2014-18, 2014-7 I.R.B. 513.

85. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. The Revenue Ruling distinguishes same-sex marriages from civil unions and domestic partnerships: "the terms 'spouse,' 'husband and wife,' 'husband,' and 'wife' do not include individuals . . . who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage . . . and the term 'marriage' does not include such relationships." *Id.*

86. 26 C.F.R. § 20.2010-3T(b) (2012).

87. *Id.*

88. *Id.*

If Gus predeceases Marie without using any of his basic exclusion amount and his executor elects portability, then Marie will have access to Gus's entire basic exclusion amount as well; thus enabling her to dispose of $16.02 million during her lifetime with no estate or gift tax consequences.

III. PLANNING WITH PORTABILITY

As previously mentioned, Congress introduced portability into the law in an attempt to simplify estate tax planning.[89] And, for a few couples, it is likely that Congress succeeded in providing an easy and successful planning tool. However, in practice, credit shelter trusts and other complex estate planning tools still offer significant advantages over portability. Additionally, practitioners have begun to develop complex estate plans combining portability and other estate planning techniques.[90] Moreover, because of portability, an individual's basic exclusion amount has become a valuable asset and is even being used as a bargaining chip in marital agreement negotiations.[91] Before portability, a DSUEA was not transferable, so it had no value to anyone but the decedent. Thus, portability may not be the simplistic tool it was intended to be, but rather an additional complication in estate planning. This section discusses the advantages and disadvantages of portability by comparing it to traditional credit shelter trust planning, as well as various drafting considerations to keep in mind while contemplating a portability-driven estate plan.

A. Advantages of Portability

The most obvious advantage to planning with portability is that it allows couples to keep and use both spouses' basic exclusion amounts without having to make lifetime gifts or set up trusts. The advantageous characteristic of portability that enthralled Congress is its simplicity.[92] Though portability has not introduced simplicity to estate planning in the majority of situations,

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89. *See supra* text accompanying notes 7–10, 25–28.

90. *See* Richard S. Franklin et al., *Portability—The Game Changer*, 2013 A.B.A. SEC. COMM. OF THE REAL PROP. TR. & EST. L. 1 (2013), *available at* http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/heckerling/2013/portability_the_game_changer_2013_01_15_paper_2.authcheckdam.pdf.

91. Karibjanian, *supra* note 35.

92. Many commentators have associated portability with simplistic estate planning and based on that view have not seen it as a useful primary planning technique. *See*. Franklin et al., *supra* note 90. However, portability-driven plans need not be so simplistic and when used in accordance with grantor trusts and QTIP elections, can offer benefits that traditional estate planning techniques cannot. *Id.*

for some couples, relying solely on electing portability will be simpler and less expensive than setting up various trusts to take advantage of both spouses' unused exclusion amounts.[93] As previously mentioned, portability can also be used as a very effective fallback plan if the decedent does not have an adequate estate plan in place at the time of his or her death.[94] However, if couples have time to plan, then using portability rarely produces the best result.

In addition, there are several less obvious advantages to electing portability. Remember that under the traditional credit shelter trust estate plan, any appreciation in value on the trust property accrued after the decedent's death and before the surviving spouse's death does not receive a reset income tax basis when the surviving spouse dies.[95] In contrast, when portability is properly elected, the assets receive a reset income tax basis both at the decedent's death *and* at the surviving spouse's death.[96] Also, portability can be useful in providing inexpensive estate tax insurance. To be sure, filing a Form 706 solely for the purpose of electing portability can be a significant expense.[97] However, if there is any possibility that the surviving spouse's estate could exceed her basic exclusion amount by the time she dies, then electing portability can ensure exclusion from the estate tax at her death.[98] Assume for example that Walter and Skyler are married. Walter dies in 2014 with a $4 million estate. He leaves his entire estate outright to Skyler who also has a $4 million estate. Walter's executor files a Form 706 and elects portability. Assume that by the time Skyler dies the basic exclusion amount has increased to $7 million and the combined estate's value has increased to $9 million. Skyler's applicable exclusion amount is $12.34 million (Walter's $5.34 million DSUEA + Skyler's $7 million basic exclusion amount). Therefore, Skyler's estate will not owe any estate tax. If, however, Walter's executor did not elect portability, $2 million of Skyler's estate would be subject to the estate tax, because only Skyler's basic exclusion amount would

93. Dan Holbrook, *Federal Estate Tax Portability: Making Sense of Changes in Estate Tax Law*, 47 TENN. B.J. 16, 16 (2011). Of course, some complex estate plans use portability along with QTIP and grantor trusts to take advantage of the benefits of both portability and traditional estate planning. But, these estate plans are beyond the scope of this article.

94. *Id.*

95. Law & Huber, *supra* note 21, at 29.

96. *Id.*

97. Schiller, *supra* note 33, at 208. In 2010, the National Society of Accountants surveyed over one thousand accountants nationwide to find the average cost of preparing various tax forms. *Tax Return Preparation Fees Vary by Type of Return, Geographic Region*, ACCOUNTINGWEB (Feb. 24, 2010), http://www.accountingweb.com/topic/firm-news/tax-return-preparation-fees-vary-type-return-geographic-region. They estimated the average cost of preparing a Form 706 to be slightly over $2,000. *Id.*

98. Schiller, *supra* note 33, at 208.

apply. At the current estate tax rate of 40%, this means Skyler's estate would owe $800,000 in estate tax. Therefore, even though the Whites had to pay for preparing and filing a Form 706 at Walter's death, their investment in the Form was likely well under $800,000.

B. Disadvantages of Portability

Though planning with portability offers several benefits, it also has some major drawbacks. Often, relying solely on portability is not the most favorable estate planning technique when dealing with clients who have previously been married. Remember that the surviving spouse can only take advantage of his or her most recently deceased spouse's unused exclusion amount,[99] and if the surviving spouse remarries he or she can lose his or her previous spouse's unused exemption amount.[100] This '"now you see it, now you don't characteristic of portability" creates planning difficulties when the husband, wife, or both have been married previously.[101]

Additionally, nineteen states and the District of Columbia impose some form of state estate or inheritance tax in addition to federal estate taxes, and none of them permit a portability election.[102] Couples in those states cannot rely on the federal portability election to minimize their exposure to state estate taxes.[103] Instead, they will need to consider other estate planning strategies such as the credit shelter trust.[104] Also, the GST exclusion is not portable.[105] Therefore, couples wishing to maximize their GST exemptions cannot rely solely on portability and will need to use other estate planning techniques as well.[106]

Aside from these general disadvantages of portability, there are several standard benefits of using trusts that portability, when used alone, cannot

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99. *Id.* at 207.

100. *Id.*

101. Elaine Hightower Gagliardi, *Elaine Hightower Gagliardi on Planning with Portability*, 2012 EMERGING ISSUES 6622 (2012). An example of how the DSUEA can be lost in this situation can be found in Section I.D: "Using Portability."

102. Jacobs, *supra* note 14. The states that have some form of separate estate tax are: Connecticut, Delaware, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska (at the county level), New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, and Washington. Ashlea Ebeling, *Where Not to Die in 2014: The Changing Wealth Tax Landscape*, FORBES (Nov. 1, 2013, 11:00 AM) http://www.forbes.com/sites/ashleaebeling/2013/11/01/where-not-to-die-in-2014-the-changing-wealth-tax-landscape/.

103. Jacobs, *supra* note 14.

104. *Id.*

105. *Id.*

106. *Id.*

provide. First, trusts offer the decedent assurance that his or her assets will ultimately pass as he or she desires.[107] If couples rely solely on portability, then the decedent runs a risk that the surviving spouse will not distribute her assets as she intended.[108] Additionally, trusts can be used to benefit descendants or other beneficiaries during the surviving spouse's lifetime.[109] In contrast, if portability and the marital deduction are the only estate-planning techniques used, no such benefit is guaranteed because the surviving spouse has complete control over the assets and no obligation to provide for any other beneficiary.[110] Moreover, assets in a credit shelter trust cannot be reached by the surviving spouse's creditors,[111] whereas with portability, the surviving spouse's creditors are able to reach all property that the decedent spouse passed directly to the surviving spouse.[112] Finally, the surviving spouse is not able to waste or make poor decisions regarding the assets in a credit shelter trust.[113] However, if the couple relies solely on portability, the surviving spouse will be able to use or spend all assets that pass directly to him however he likes.[114] Controlling the distribution of the estate as well as protecting its assets from poor management are an important aspect of an estate plan for many decedents. Consequently, merely relying on portability for an estate plan will not be an option for decedents with those concerns. Instead, despite Congress's intention, they will still have to rely on more complicated estate planning techniques.

C. Drafting Considerations

Although portability, when used alone, may not be the optimal planning tool in every situation, its relative advantages make it a worthwhile tool to consider in every situation.[115] In deciding whether electing portability is a good choice for a particular estate there are numerous factors to consider, the most important of which, income tax exposure, is discussed below.[116]

Income tax consequences are an important factor to consider in deciding whether to rely on the portability election or to use a more traditional estate

107. Holbrook, *supra* note 91, at 17.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 18.
112. *Id.*
113. *Id.*
114. *See id.*
115. Law & Huber, *supra* note 21, at 29.
116. *Id.*

plan.[117] Estate taxes are not much of a concern, and minimizing income tax liability becomes a higher priority, when a couple's estate is worth significantly less than their joint exclusion amount of $10.68 million.[118] However, the trade-off between minimizing estate taxes and income taxes becomes more of an issue for couples who have a taxable estate (one that exceeds their applicable exclusion amount) or who have an estate that is near their applicable exclusion amount.[119] For example, assume that Walter and Skyler are married and each owns a car wash, both of which are valued at $5.34 million. Walter dies in 2014 and his car wash is transferred to a credit shelter trust. Under this plan, the car wash will receive a reset income tax basis on Walter's death to $5.34 million. Assuming the car wash is his only asset, no estate taxes are owed on the car wash's appreciation at Skyler's later death because it is not considered part of her estate. The trade-off, however, is that the car wash will not receive a reset income tax basis when Skyler dies. This means that Walter's estate will owe income tax on the asset's appreciation that accrued between Walter's death and when it is sold after Skyler's death.

Assume alternatively that Walter leaves his entire estate to Skyler and his executor elects portability. The car wash receives a reset income tax basis at Walter's death and at Skyler's death, and the DSUEA election shields Walter's $5.34 million car wash from estate taxes when Skyler dies. But, if Skyler uses her entire basic exclusion amount to cover her separate estate and Walter's car wash has increased in value, then that increase will be subject to the estate tax. Based on the previous two examples, which is the better estate plan? The answer depends on whether the income tax due on the appreciation of the car wash in the credit shelter trust plan is greater than the estate tax due on the appreciation in value in the portability plan.[120] But, in most circumstances, the estate tax savings in the credit shelter plan will be more substantial than the income tax savings in the portability plan.[121]

In both of the previous examples, Walter's and Skyler's estates were taxable. When a couple's estate is well under the Form 706 filing threshold, an estate plan with a QTIP trust[122] where the QTIP election and portability election is made often produces a more favorable result than a credit shelter

117. Gagliardi, *supra* note 99.

118. *Id.*

119. *Id.*

120. *Id.*

121. Franklin et al., *supra* note 90, at 6.

122. QTIP trusts provide income to the surviving spouse during the surviving spouse's life then the remaining amount passes to other beneficiaries when the surviving spouse dies. It allows the decedent to take advantage of the marital deduction and provide for the surviving spouse while still maintaining control over the trust assets.

trust.[123] This is because the assets in a QTIP trust receive a reset income tax basis at the surviving spouse's death while assets in a credit shelter trust do not.[124] Couples with smaller estates (well under the basic exclusion amount) should not be too concerned with the estate tax because their estates can pass without being subjected to the estate tax.[125] Therefore, in these instances the reset income tax basis often makes a portability-driven plan more appealing than a credit shelter plan.[126]

As practitioners become more familiar with portability, estate plans are increasingly encompassing both portability and other techniques to obtain the advantages of both types of plans. One such plan combines portability with grantor trusts. With a traditional estate plan, the credit shelter trusts that are created after the death of the deceased spouse are considered "non-grantor" trusts for income tax purposes.[127] This means that either the trust or the beneficiary is responsible for paying income tax on the income generated by the trust.[128] Therefore, either the trust assets grow at a slower rate because taxes are paid using principal or the beneficiary, who is supposed to benefit from the trust, will owe tax on the trust income.[129] However, if portability is elected, the estate plan can be structured so that the surviving spouse can take advantage of his or her DSUEA as soon as the decedent dies by using a portion of or all the DSUEA to create a grantor trust for the benefit of their descendants or other beneficiaries.[130] This can be achieved by adding a provision to or creating a marital agreement. Grantor trusts are beneficial because the grantor (surviving spouse) is responsible for the income tax on the income generated by the trust.[131] As a result, the assets in the trust grow tax-free to the beneficiaries during the grantor's lifetime.[132] Also, the income tax payments made by the grantor are not considered gifts to the beneficiaries for purposes of the gift tax.[133]

Another key benefit of using grantor trusts in combination with electing portability is that the grantor uses "pre-estate tax" dollars to pay the income tax owed on trust income.[134] This means that the money spent on the income

123. Franklin et al., *supra* note 90, at 6.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 12.
128. *Id.* at 13.
129. *Id.*
130. *Id.* at 14.
131. *Id.* at 13.
132. *Id.*
133. Rev. Rul. 2004-64, 2004-27 I.R.B. 1.
134. Franklin et al., *supra* note 90, at 8.

tax is no longer part of the grantor's estate and therefore, is not subject to any future estate tax.[135] Essentially, all income tax payments made with pre-estate tax dollars are deducted against future estate taxes.[136] On the other hand, income taxes paid from a credit shelter trust's principal during the surviving spouse's lifetime are paid with "post-estate tax" dollars.[137] This means that the dollars have already been excluded from the surviving spouse's estate and from estate tax.[138] Thus, unlike spending pre-estate tax dollars, spending post-estate tax dollars does not reduce the amount of assets in the estate that will be exposed to the estate tax when the surviving spouse dies.[139]

D. Portability Planning in Marital Agreements

Even if a couple chooses to rely only on portability, using it in its simplest form as Congress intended, there are still numerous considerations and planning involved in ensuring that the estate plan is as effective as possible. By allowing people to transfer their basic exclusion amount, portability has created a valuable asset and negotiation tool where before it only had value to the individual to whom it was attached.[140] Consider the following example: Jesse and Jane are negotiating a premarital agreement to prepare for their upcoming marriage, which is the first marriage for both of them. Jesse has had much success in the methamphetamine business and has a large estate worth $15 million. Jane's estate is worth $1 million. It is 2014, so the basic exclusion amount is $5.34 million. Assume the estate tax rate is 40%. Typically, someone in Jesse's position would not ask for financial consideration from Jane in a premarital agreement because his estate is worth much more than his fiancé's. But, if Jane dies before Jesse, Jane's executor could elect portability, thereby increasing Jesse's applicable exclusion amount to $9.68 million (Jane's $4.34 million DSUEA (assuming she does not leave her estate to Jesse) + Jesse's $5.34 million basic exclusion amount). Thus, when Jesse dies his estate will save $1.736 million in estate taxes ($4.34 multiplied by the 40% tax rate). Therefore, Jane's DSUEA is a valuable asset to Jesse, but only if Jane's executor elects portability at her death. Based on this additional asset, Jane may be able to negotiate extra financial considerations from Jesse in exchange for a guarantee regarding the DSUEA election.

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135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. Karibjanian, *supra* note 35, at 177.

As the example above demonstrates, when a husband and wife have significantly uneven assets, electing portability favors the wealthier spouse when the poorer spouse dies first.[141] However, preparing and filing a Form 706 is expensive and is usually paid by the decedent's estate.[142] If the poorer spouse's estate is not otherwise required to file a Form 706, the decedent's beneficiaries—who would not derive any benefit from electing portability—have little incentive to file the Form to make the election[143] The surviving spouse, on the other hand, receives all of the benefits from the portability election at no cost to himself.[144] Therefore, as a matter of fairness, the surviving spouse should be responsible for preparing and filing the Form 706.[145] To address this issue, the couple could negotiate an agreement that would guarantee the portability election so long as the surviving spouse pays for the cost of preparing and filing the Form 706.[146]

Additionally, if portability is elected, the decedent's Form 706 remains open for "limited audit" for three years after the surviving spouse's Form 706 is filed.[147] While the Form 706 is open, the decedent's executor must keep records that support the calculation of the DSUEA.[148] Therefore, a provision that the records be transferred to the surviving spouse after the Form 706 is filed and that the surviving spouse be responsible for maintaining those documents should also be included.[149] Such a provision would ensure that the surviving spouse is responsible for the costs associated with maintaining the documents, not the surviving spouse's beneficiaries.[150]

In theory, portability can be elected and used as soon as the decedent dies.[151] In practice, however, if the decedent's executor did not have a good relationship with the surviving spouse he or she could intentionally prolong the election process, delaying the surviving spouse's use of the DSUEA.[152] Therefore, a couple may also want to consider a provision requiring the decedent's executor to give the surviving spouse an estimated DSEUA as soon as possible after the decedent's death.[153] Both spouses could ensure

141. *Id.* at 179.
142. *Id.*
143. *Id.*
144. *Id.* at 180.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 182.
152. *Id.*
153. *Id.*

cooperation by putting such a provision in each of their respective wills.[154] Thus, as this section indicates, even couples who plan to rely on portability in its simplest form should do some additional planning to make sure they achieve optimal results from making the election.

E. Protecting the DSUEA

Even after portability is properly elected, more planning is required to make sure the DSUEA is protected.[155] The DSEUA can be lost in two ways: (1) by a change in the law; or (2) by the surviving spouse's subsequent marriage.[156] If the surviving spouse remarries, the DSUEA becomes more at risk each day after the wedding because the DSUEA is lost when either the second spouse or the surviving spouse dies.[157] The best way to protect the DSEUA is for the surviving spouse to not remarry; but, for obvious reasons, that may not always be a viable means of protection.[158] Fortunately, there are several other options available to ensure that the DSUEA is not lost.[159]

One option is for the surviving spouse to make considerable taxable gifts to his or her beneficiaries before his or her second spouse dies.[160] However, this option may not always be practicable either. Such large gifts during life could interfere with the surviving spouse's lifestyle. Therefore, to use the DSUEA by making lifetime gifts, the surviving spouse needs to have enough assets left, after making the gifts, to maintain his or her desired lifestyle.

A second option to preserve the DSUEA after the surviving spouse remarries is for the surviving spouse and his or her second spouse to draft an agreement on the matter or add a provision to their premarital agreement.[161] If it is likely that the second spouse's unused exemption amount will be less than the deceased spouse's unused exemption amount, then the provision could address whether the second spouse's estate would reimburse, either in full or in part, the surviving spouse for the loss of the larger DSUEA.[162]

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154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*

IV. FAILURE TO MAKE A TIMELY PORTABILITY ELECTION

As viewers of *Breaking Bad* know, prior to Walter's death, the White family lawyer, Saul Goodman, changed his identity and relocated to an unknown location to avoid prosecution for his involvement in laundering Walter's money and aiding Walter in covering up his methamphetamine production, murder, and other various crimes. Without legal advice, it is reasonable to assume that Walter's wife, Skyler, will not know that she needs to make a timely portability election. Until recently, it was unclear what the consequences would be if Skyler failed to make the election. However, on February 10, 2014, the IRS published Revenue Procedure 2014-18 which offers guidance to those who missed the deadline to elect portability.[163] The Revenue Procedure was issued in large part to address the comments made by the ABA urging the IRS to grant an extension of time to elect portability for estates under the Form 706 filing threshold.

Prior to the Revenue Procedure 2014-18, and likely after it expires, taxpayers had two options for relief: obtain an extension under the 9100-2 Regulations or request an extension under the 9100-3 Regulations. The 9100-2 Regulations give an automatic extension to elect portability when the taxpayer meets certain requirements.[164] To qualify for the automatic extension, the taxpayer: must file a timely Form 706 without requesting an extension of time to file the Form; fail to elect portability on the Form; miss the original nine-month due date for filing the return; and file an amended Form 706 that makes the portability election within the six-month extension period, after the original nine-month period, which would have been available had the taxpayer filed a timely extension request.[165] In order to obtain the 9100-2 extension, the taxpayer must have filed the Form 706 during the original nine-month period, corrected the mistake within the six-month extension period, and correctly filed the original or amended return according to the 9100-2 Regulations.[166]

Taxpayers who failed to file a corrected Form 706 within the six-month extension must attempt to obtain relief under 9100-3.[167] However, it is generally more time-consuming and expensive to obtain relief under 9100-3 than it is under 9100-2.[168] Under the 9100-3 Regulations the IRS can grant discretionary relief by extending the time to make a tax election if 9100-2 relief is not available and the time for filing the return is not governed by

163. Rev. Proc. 2014-18, 2014-7 I.R.B. 513.
164. *See* 26 C.F.R. § 301.9100-2 (2012).
165. *Id.*
166. *Id.*
167. 26 C.F.R. § 301.9100-3(a) (2012).
168. *Compare* 26 C.F.R. § 301.9100-2, *with* 26 C.F.R. § 301.9100-3(a).

statute.[169] To obtain relief, the taxpayer must be acting in good faith and the government cannot be prejudiced by the prospective relief.[170] The taxpayer must follow the procedure for requesting a private letter ruling and pay the applicable $10,000 fee.[171] At the time the American Bar Association submitted its comments, the IRS was only granting 9100-3 relief to estates below the Form 706 filing threshold.[172]

A. The American Bar Association's Comments

In an effort to bypass the costly and time-consuming 9100 process used to obtain an extension of the deadline to elect portability, on September 27, 2013, the American Bar Association Section of Real Property, Trust and Estate Law requested the IRS to expand 9100 relief in specific situations.[173] The ABA's comments requested that the IRS make a narrow exception to the 9100-2 requirement that the original Form 706 be filed during the original nine-month period only for estates under the estate tax threshold.[174] The ABA requested this exception because it believes many smaller estates that, except for making the portability election, have no reason to file a Form 706, may mistakenly miss the deadline to file a timely Form 706 or request an extension.[175] The ABA also asserted that such mistakes may often be caused by "inadequate or nonexistent professional advice as to the new portability system."[176] The ABA asserted that an exception should be made only when

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169. *See* 26 C.F.R. § 301.9100-3.

170. *Id.*

171. *Id.* In addition to the $10,000 fee, obtaining a private letter ruling requires one to provide a statement of facts containing all relevant information and copies of all relevant documents, a statement identifying pending legislation that may affect the proposed ruling, a statement on whether the taxpayer has previously requested a private letter ruling on the particular or similar issue, and a statement of supporting and contrary authorities. Rev. Proc. 2012-4 § 9, 2012-1 C.B. 125. Also, the taxpayer or his agent must produce a detailed affidavit outlining the circumstances leading up to the failure to make the election, when the taxpayer relied on professional advice, and to what extent the taxpayer relied on such professional advice. *Id.* Finally, the taxpayer must provide detailed affidavits from his or her tax return preparer, any individual who substantially contributed to the return, and all attorneys and tax professionals that advised the taxpayer on the election. *Id.*

172. This is because the IRS cannot grant 9100-3 relief when the timing for filing the return is controlled by statute. The Form 706 timing is controlled by statute, but for estates below the filing threshold filing the Form is optional and thus, regulations and not statutes control the timing for filing.

173. A.B.A. SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW, RE: PORTABILITY ELECTION RELIEF UNDER TREASURY REGULATION SECTIONS 301.9100-2 AND -3 (2013) [hereinafter A.B.A. LETTER].

174. *Id.*

175. *Id.*

176. *Id.*

the taxpayers realize their mistake and wish to correct it within the extended six-month period.[177]

The ABA also requested that the IRS provide a procedure for obtaining an extension to make the portability election under 9100-3 without requiring the private letter ruling process or a user fee, at least for estates of decedents who died before January 1, 2015 (two years after the portability rules were made permanent, and less than thirty months after it was established that estates under the estate tax filing threshold had to make the portability election on a timely Form 706).[178] The ABA offered several arguments to support their request. Portability has only been available to taxpayers for a short period of time and typically it takes both taxpayers and advisors a significant period of time to understand the requirements and consequences of new tax provisions.[179] Relatedly, when new tax provisions are added to the Code, large numbers of good faith mistakes are common, especially when the new provision is as complicated and dramatic as portability.[180] Additionally, there has been a lack of clarity as to the timing requirement for smaller estates.[181] Prior to the issuance of the Portability Regulations in June 2012, it was unclear whether estates under the estate tax filing threshold were required to make an election on a Form 706 within a specific time frame.[182] Moreover, the relief most often available to taxpayers is found under the 9100-3 Regulations and, as previously mentioned, such relief is expensive and time consuming for smaller estates.[183]

B. Revenue Procedure 2014-18

Revenue Procedure 2014-18 addresses the problems identified by the ABA, albeit not in the manner they specifically requested. The Procedure provides a simplified method of obtaining an extension to elect portability.[184] Under the simplified method, a qualified taxpayer need only file a complete and properly prepared Form 706 on or before December 31, 2014 and indicate on the top of the Form that it is "Filed Pursuant to Rev. Proc. 2014-18 To Elect Portability Under § 2010(c)(5)(A)."[185] If the taxpayer meets all of the eligibility requirements and files the Form correctly, then the IRS will,

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177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. Rev. Proc. 2014-18, 2014-7 I.R.B. 513.
185. *Id.*

for portability purposes, treat the Form 706 as though it was timely filed in accordance with § 20.2010-27(a)(1).[186] To qualify for the simplified method, the taxpayer must be the executor of "the estate of a decedent who has a surviving spouse; died after December 31, 2010, and on or before December 31, 2013;" and the decedent was a United States citizen or resident on the date of his death.[187] Also, the taxpayer's estate must be under the Form 706 filing threshold and must have missed the deadline for filing one.[188]

Essentially, the IRS granted the ABA's request by providing a way to obtain an extension to elect portability without having to go through the private letter ruling process. However, the relief requested by the ABA pertained to all decedents dying before December 31, 2015, while the relief granted only pertains to decedents dying after December 31, 2010 and before or on December 31, 2013.[189] Thus, the IRS only provides relief to those who have already missed the filing deadline or will miss it this year; it does not provide relief to decedents who have died this year or will die any time during or after this year.[190] Luckily for Skyler White, Walter died in 2013 so she will be able to take advantage of Revenue Procedure 2014-18.

The ABA argued that a simplified method was needed because portability was a new concept and taxpayers generally need some time to become familiar with a new tax provision.[191] One explanation for why the IRS only provided relief to estates of decedents that have already died is that portability's newness is beginning to wear off. In some form or another, portability has been available for over three years now. And, while it is likely that the average American is no closer to understanding or even recognizing the existence of portability than they were when it was first introduced in 2010, the average American has no reason to elect portability or fret over their failure to do so. In 2012, only 9,400[192] people were required to file a Form 706. The number of estates below the filing threshold but for which portability may still be relevant is also very low—in 2007 only 1.8 million out of 301 million Americans (.5%)[193] had an estate over two million.[194]

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186. *Id.*

187. *Id.*

188. *Id.*

189. A.B.A LETTER, *supra* note 171; Rev. Proc. 2014-18, 2014-7 I.R.B. 513.

190. *See* Rev. Proc. 2014-18, 2014-7 I.R.B. 513.

191. A.B.A LETTER, *supra* note 171.

192. *Statistics of Income: Estate Tax Returns Filed for Wealthy Decedents 2003–2012*, IRS (Aug. 2013), http://www.irs.gov/pub/irs-soi/12estateonesheet.pdf.

193. *Population Estimates, Vintage 2007: National Tables*, U.S. CENSUS BUREAU, http://www.census.gov/popest/data/historical/2000s/vintage_2007/index.html (last visited Aug. 26, 2014).

194. Jeanne Sahadi, *Wealth of 1.8 Million Americans Tops $2M*, CNN MONEY (Mar. 2, 2012, 5:42PM), http://money.cnn.com/2012/03/02/news/economy/wealth_in_America.

Furthermore, most people with estates that size will undoubtedly not attempt to file their own taxes or develop their estate plan on their own. The IRS notes on its website that, "most estates [filing a Form 706] engage the services of both attorneys and CPAs."[195] Therefore, it is not up to the average American to familiarize themselves with portability and filing a Form 706; rather, it is up to estate planning professionals. And, because the cut-off date for qualifying for the simplified method to obtain an extension to elect portability is quickly approaching at the end of 2014, it seems as though the IRS believes estate tax professionals have had long enough to familiarize themselves with portability.

V. CONCLUSION

In 2008, long before portability was a part of the law, Senator Max Baucus, chairman of the Senate Finance Committee, in referring to estate tax planning said, "[p]lanning lies with men, success lies with heaven."[196]

Now that portability has been available for several years, it would be interesting to know whether Senator Baucus's belief has changed. It probably has not. Though portability may be beneficial as a back-up plan where the only other option is no estate planning at all (the White family must surely think so), portability, when used alone, rarely produces the best outcome when compared with other estate planning techniques. Instead, portability is most beneficial when used in coordination with other estate planning tools that allow practitioners to meet their clients' unique needs and preserve their GST exclusion amount. Thus, rather than providing a simple do-it-yourself estate planning tool, Congress has merely added to the complexity of estate planning.

195. *See Frequently Asked Questions on Estate Tax: Who should I hire to represent me and prepare and file the return?*, IRS (last updated Jul. 3, 2014), http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Frequently-Asked-Questions-on-Estate-Taxes.

196. Sen. Max Baucus, *Hearing Statement of Senator Max Baucus (D-Mont.) Regarding Estate Tax Reform: Reviewing Ideas to Simplify Planning*, COMM. ON FIN. (Apr. 3, 2008), http://www.finance.senate.gov/imo/media/doc/040308mb1.pdf.