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Message from the Chair

C. Arthur Robinson, II, Chair
Trusts and Estates Section

On behalf of the Board of Governors of the Virginia State Bar Trusts and Estates Section, I am delighted to introduce the Fall 2014 issue of our newsletter. In this issue, Stephan J. Lipskis reviews the many pitfalls and permutations of reporting foreign bank accounts and the consequences of our clients' failure to report these accounts as has been required by law for many years. The article explores the alternatives to the extremely draconian regime currently imposed on the failure to report foreign bank accounts and details the available alternatives to taxpayers who have failed to report such accounts in the past. The article provides a good picture of the Offshore Voluntary Disclosure Program as well as several alternate procedures available to assist clients in getting into compliance with the foreign bank account reporting regime and paying reduced penalties as a result.

Jennifer L. Tomac and Jerad R. Tomac address the use of alternative dispute resolution in estate planning and administration. The article points out that family members are very often driven by painful and unresolved family issues and therefore, decision-making is often emotional rather than rational, and discusses the opportunity to use alternative dispute resolution in order to come to terms with these issues. The article describes in detail the alternative dispute solution process in Virginia and gives a detailed explanation of how the process can apply, especially in the context of estates and trusts.

The article by James A. Gillis discusses the portability election, available since January 1, 2011, which allows the surviving spouse to claim the deceased spouse's unused exclusion amount under certain circumstances. The article details the potential savings to be generated by a portability election and provides guidance when making the election which involves filing Form 706 even in the case where the estate tax return would not otherwise be required to be filed. The article also details the ins and outs of the availability of the election and the parameters to be used in making decisions concerning its use.

We thank our newsletter editor, C. Daniel Vaughan, and our assistant newsletter editor, Lauren A. Jenkins, for their work in producing this Fall 2014 newsletter. Later this year, we will also be producing for all the members of our bar, a dedicated issue of the *Virginia Lawyer* which will explore Trusts and Estates topics. I commend to your attention the upcoming dedicated issue.

Please visit our website at http://www.vsb.org/site/sections/trustsandestates for additional information. Please feel free to contact me or any member of the Board of Governors with any ideas or input on the section's activities and how we may make the section of greater utility and service to our members. ⚜

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The Trusts and Estates Newsletter is published by the Virginia State Bar Section on Trusts and Estates for its members to provide information to attorneys practicing in these areas. Statements, expressions of opinion, or comments appearing herein are those of the contributors and not necessarily those of the Virginia State Bar or the Section on Trusts and Estates.

Navigating the Treacherous Task of Foreign Account Compliance

By Stephan J. Lipskis, Esq.

Alarming stories of penalty assessments[1], seizures of foreign accounts[2], and criminal prosecution[3] have drastically increased awareness of foreign account reporting requirements for U.S. taxpayers. Concerns over prosecution and punishment for tax evasion previously associated with nefarious individuals and illicit organizations now affect U.S. taxpayers holding foreign accounts for legitimate reasons. Such concerns are further heightened due to the Foreign Account Tax Compliance Act ("FATCA")[4], which became law in 2010 and became effective this year. FATCA requires foreign financial institutions to report information on U.S. account holders, thus offering the Treasury Department a previously unavailable stream of information on foreign accounts held by U.S. taxpayers. This sea change in the Treasury Department's ability to obtain information increases the need for individuals to domesticate their foreign accounts immediately.[5]

Determining the appropriate method of bringing an individual's or entity's foreign accounts into compliance requires careful analysis of a taxpayer's entire foreign account history. The initial analysis of the taxpayer's accounts determines the available means of compliance. This article addresses: (i) the required compliance for foreign accounts and several common types of non-compliance; (ii) the historical and current risk of non-compliance; (iii) the current compliance options; and (iv) the process for determining the appropriate option for bringing an unreported foreign account into compliance. Presently, account compliance may be achieved through the current iteration of the Offshore Voluntary Disclosure Program ("Current OVDP"), Streamlined Filing Compliance Procedure ("Streamlined Filing"), the Delinquent FBAR Procedure, and the Delinquent International Information Return Procedure.[6] For purposes of this article, only the Current OVDP and Streamlined Filing are addressed in detail, because the Delinquent FBAR Procedure and the Delinquent International Information Return Procedure apply in very limited circumstances.

I. Basic Compliance Requirements for Foreign Account Holders

U.S. taxpayers are not in compliance with regard to foreign accounts when they fail to properly report foreign account income on their U.S. income tax return, fail to appropriately report the existence of an account, or fail to file necessary informational disclosures. The distinction of "U.S. Taxpayer" is significant because the foreign account compliance regime applies to all individuals with U.S. tax obligations, including U.S. citizens living abroad and resident aliens. Generally, proper foreign account compliance requires a foreign account holder to: (i) disclose the existence of foreign assets on IRS Form 1040, Schedule B; (ii) file Form 8938 "Statement of Specified Foreign Financial Assets" with the foreign account holder's tax return; and (iii) file a "Report of Foreign Bank and Financial Accounts" (an "FBAR") with the Treasury Department's Financial Crimes Enforcement Network ("FinCEN") where foreign accounts aggregate to $10,000 U.S. Dollars or more.[7] Certain entities and individuals may have additional duties to file IRS Forms 3520, 8621, 8865, 5471, and 8891 with regard to gifts from foreign individuals, shareholder status in a Passive Foreign Investment Company ("PFIC"), interests in foreign partnerships, interests in any controlled foreign corporation ("CFC"), or status as a beneficiary of a Canadian Registered Retirement Plan, respectively, but a discussion of those filings is beyond the scope of this article.[8]

The FBAR filing requirement causes many foreign account non-compliance issues because of its low dollar threshold and a different filing deadline than income tax returns. Account holders and their tax professionals often miss the FBAR filing requirement due to lack of familiarity with foreign account reporting. An FBAR must be filed when a U.S. Taxpayer holds accounts with an aggregate balance of $10,000 or more at any point in a calendar year. Furthermore, the FBAR must be filed by June 30th. Unlike an individual's income

tax return, there is no opportunity for extension[9], which creates difficulties for individuals filing their income tax returns on extension in October.

Frequently, income tax is not properly reported on assets in foreign accounts due to reasons other than the desire to evade taxes. Differences between foreign and domestic accounting, lack of current account information, and complex foreign tax regimes confuse how much income should be reported, whether foreign tax payments offset tax due to the U.S. Treasury, and what class of income the foreign account generates. Such confusion may cause a U.S. Taxpayer to significantly underreport taxable income. In failing to properly report taxable income, taxpayers may be subject to an extension of the standard three-year period of limitation on assessment of taxes and penalties to a six-year period[10] or an unlimited period.[11] The six-year period of limitations is increasingly likely because the law was modified in 2010 to extend the assessment period to six years if a taxpayer fails to report "more than $5,000 in gross income from 'specific foreign assets.'"[12] Accordingly, tax non-compliance with regard to foreign accounts may result in a problem that looms over an individual perpetually.

II. General Risk of Being Non-Compliant and Foreign Account Investigation

The Treasury Department's effort to identify non-compliant foreign account holders stems from a congressional desire to pursue criminals, terrorists, and tax cheats, that was reinforced by modification of the FBAR enforcement regime under the USA PATRIOT Act after the September 11, 2001 terrorist attacks.[13] The USA PATRIOT Act requires periodic reports to Congress on FBAR enforcement and compliance efforts.[14] The penalty regime was modified under the American Jobs Creation Act of 2004 ("Jobs Act") on October 22, 2004.[15] Prior to the USA PATRIOT Act, only willful violations were punishable and the corresponding penalties ranged between $25,000 and $100,000.[16] The current penalty regime, which is discussed in Section III, applies to both willful and non-willful violations.

Efforts to investigate violations of the FBAR reporting regime were bolstered by Congress's creation of the IRS Whistleblower Office within the IRS Criminal Investigation Division ("CID") in 2006. Pursuant to information obtained by CID regarding foreign financial institutions, many foreign financial institutions have negotiated the disclosure of accounts held by U.S. Taxpayers in return for immunity or reduced penalty assessments.[17] Throughout this process of tracking down unreported foreign accounts, the IRS has offered opportunities for those with income from a legal source to bring accounts into compliance. Initially, such efforts were informal, but the creation of the Offshore Voluntary Disclosure Program in March of 2009 ("2009 OVDP")[18] formalized the process and offered a seven-month window for bringing accounts into compliance. The success of the 2009 OVDP led to a second window for compliance in the Offshore Voluntary Disclosure Initiative in 2011 ("2011 OVDI")[19], which was succeeded by the open-ended Offshore Voluntary Disclosure Program in 2012 ("2012 OVDP")[20]. In June 2014, the 2012 OVDP became the Current OVDP[21] after receiving significant updates due to pressure from taxpayer advocacy groups for improved avenues of compliance for foreign account holders whose non-compliance is non-willful.

The structure of the Current OVDP and Streamlined Filing demonstrates a favorable approach toward non-willful cases, but offers opportunity even in the case of willful violations. Leniency toward non-willful violators of the FBAR regime should not be seen as a reason to forego compliance altogether, because FATCA reporting will certainly result in the U.S. government's obtaining information about non-willful violators. Once the Treasury Department takes action against a taxpayer or the institution where the account is held, compliance options are either limited or unavailable. Furthermore, an assertion of non-willfulness becomes more difficult to defend once an account holder is aware of a need to comply and fails to take remedial actions with regard to past non-compliance. Most important, the Current OVDP and other means for compliance are not guaranteed.

III. Penalties for Non-Compliance and Determining the Degree of Non-Compliance

In the event non-compliance is addressed outside of the Current OVDP and other compliance regimes (e.g., if the Treasury investigates a non-compliant individual

or the compliance programs are terminated), the stated penalties for non-compliance are daunting. Beyond potential tax liability and criminal penalties associated with having significant amounts of unreported taxable income, foreign financial account holders who have failed to file necessary FBARs risk a civil penalty of as much as 50% of the aggregate value of their foreign accounts, per year, if their failure to file is considered willful.[22] An assessment of a willful penalty for failure to file an FBAR in multiple years will quickly cause the account holder to be subject to a liability much greater than that of the account balance. A non-willful failure to file carries a potential penalty of up to $10,000, per year.[23]

Historically, the IRS offered some leniency to certain taxpayers due to the discretionary nature of its authority[24], but this discretion has been refined and systematically stated in the most recent guidance to provide more predictable results.[25] Importantly, the U.S. government has sought, and has been awarded, an FBAR penalty in excess of the entire account balance.[26] Accordingly, a proactive enrollment in an authorized compliance procedure is preferable to a “wait and see” approach to compliance.

IV. Current Compliance Regimes

The various compliance programs vary greatly in scope and complexity. If an account holder is involved in criminal activity or under current investigation by the IRS, the account holder will not qualify for any of the compliance regimes. Furthermore, failure to provide full information under any of the regimes risks further action by the IRS. Therefore, an account holder only exacerbates an already complex situation if all relevant facts are not revealed to the account holder’s attorney.

A. Current OVDP

Under the Current OVDP, a taxpayer must file eight years of FBARs, eight years of amended income tax returns, and pay an assessment of FBAR penalties equal to either 27.5% or 50% of the highest aggregate account balance over the eight-year disclosure period. Furthermore, account holders must provide full account statements, answer lengthy questionnaires for each account, and reconstruct historical basis data to determine tax liability. The upside of such complete disclosure is that the Current OVDP is available to individuals with accounts at institutions that are currently under investigation (at the 50% penalty rate for such accounts). Furthermore, statutory civil and criminal penalties are taken off the table once an individual is enrolled in the program. A final closing agreement is attained upon completion of the Current OVDP that states the final terms of the disclosure. Accordingly, the Current OVDP offers the most protection from future audit for individuals who qualify for enrollment compared to the other compliance regimes.

The Current OVDP is a lengthy process which is initiated when the taxpayer either files a preclearance fax or submits a Voluntary Disclosure Letter. A preclearance fax should always be submitted because it determines initial eligibility for the Current OVDP while not precluding the taxpayer from electing Streamlined Filing. Conversely, making a Streamlined Filing submission precludes entrance into the Current OVDP, and submitting a Voluntary Disclosure Letter precludes entry into the Streamlined Filing program[27] and risks non-acceptance into the Current OVDP, if done before preclearance is granted.

A preclearance fax requires more information under the Current OVDP than it did under the 2012 OVDP. Specifically, the Current OVDP requires telephone numbers, names, and addresses of applicable foreign financial institutions, along with identifying information of all foreign and domestic entities through which the undisclosed assets were held by the taxpayer.[28] The IRS attempts to answer all preclearance faxes within thirty days of submission. In the author’s experience, the timeline for their response is usually closer to two weeks, but requests made since the Current OVDP was instated have been delayed due to a high volume of submissions. Upon receipt of preclearance, a Voluntary Disclosure Letter must be submitted within 45 days.

The Voluntary Disclosure Letter is a questionnaire created by the IRS which requires the account holder to give detailed information on the foreign assets, associated individuals, and entities. The Voluntary Disclosure Letter is used to determine whether the individual is accepted into the Current OVDP. The individual will be notified of preliminary acceptance or denial to the Current OVDP after the Voluntary

Disclosure Letter has been reviewed. If preliminarily accepted, a full voluntary disclosure package must be submitted within 90 days.

The voluntary disclosure submission requires: (i) amended income tax returns for the eight year period; (ii) appropriate consents to extend the statute of limitations on tax liability within the disclosure period; (iii) a penalty worksheet that states the account balances for each year of the disclosure and determines to which year the 27.5% or 50% penalty is applied; and (iv) other related documents such as corresponding powers of attorney and checks for tax liability and penalty amounts.

The extensiveness of the full submission creates urgency in the information gathering process. Extensions are available upon request, but filing a full and complete submission with the IRS within the 90-day period demonstrates that the individual is committed to the program and may maintain goodwill with the agent assigned to the case. Depending on the circumstances, compiling data for eight years on foreign financial accounts and taxes may be difficult or impossible. Accordingly, time should be budgeted carefully to ensure a full submission will be ready for the 90-day deadline. While full payment of taxes, interest, and penalties with the full submission is preferred, there is an opportunity to agree to a payment plan.

Upon receipt of the full submission, the IRS assigns the matter to an agent who will correspond with the taxpayer regarding any need for supplementary information. Once the review of the submission has been completed and the submission accepted in full, a closing agreement will be presented to the taxpayer. The taxpayer may opt-out of the Current OVDP at any time prior to signing the closing letter. Opting-out subjects the taxpayer to potential investigation by the IRS, and should be considered carefully to assess the risk associated with an investigation.

B. Streamlined Filing

The U.S. Treasury created Streamlined Filing this year to expand what were previously the 5% penalty regime[29] and Non-Resident, Non-Filer regime under OVDP 2012.[30] The former 5% penalty regime applied only to individuals who had minimal interaction with their account and required the same amount of documentation as the rest of the OVDP 2012 program. In fact, demonstrating the 5% penalty under the OVDP 2012 required significantly more detail to prove that an account holder's minimal activity met the test. The former Non-Resident, Non-Filer regime required similar information and was likewise unduly burdensome. The Streamlined Filing reduces the documentation requirements under the predecessor subprograms of the 2012 OVDP, and creates a much simpler avenue for compliance than the full-fledged enrollment into the Current OVDP. Streamlined Filing is bifurcated into the categories of U.S. Taxpayers residing in the United States ("Resident Streamlined Filers") and those residing outside of the United States ("Non-Resident Streamlined Filers").[31]

Non-Resident Streamlined Filers are afforded an excellent avenue for compliance. An individual is considered a non-resident if, in any of the three most recent tax years: (i) the individual did not have a U.S. abode; and (ii) the individual was physically outside of the United States for 330 full days. By filing delinquent or amended income tax returns for three years, FBARs for six years, and a statement certifying foreign status and non-willfulness, the taxpayer will only be required to pay back taxes and related penalties and interest.[32] Unlike the other programs discussed, the taxpayer does not have to pay an FBAR penalty.

Resident Streamlined Filers must file the same information as Non-Resident Streamlined Filers except the certification of non-willfulness omits the proof of foreign residence.[33] In addition, the taxpayer is subject to a 5% FBAR penalty for the highest aggregate account balance over the six applicable years.[34] In the event an FBAR was properly filed for any of the six years, such year is removed from the penalty calculation.

Under both of the Streamlined Filing procedures, the risk of audit is the same as any amended or delinquent income tax return.[35] It is important to note that the taxpayer is providing information for unreported assets on FBARs for six years, but only filing amended returns for three years. Accordingly, the potential for pursuing an audit of income tax returns dating between four and six years prior to the submission should be carefully considered with regard to the amount of income that is unreported, if any, on such returns. In the event the taxpayer has significant unreported for-

eign source income in the four to six years prior to the submission, the Current OVDP process may offer a more comfortable compliance regime, despite the severe increase in associated penalties and tax.

V. Determining the Proper Means of Compliance

Once a noncompliant foreign account has been identified, several steps must be followed in assessing the account holder's foreign account compliance options to determine the proper method. The basic categories of this information gathering are: Initial Eligibility; Factual Determinations; and Tax Exposure.

A. Initial Eligibility

In order to properly assess the compliance options, an advisor must determine whether any active investigations are underway and the extent of the individual's foreign financial interests. First, the advisor should identify all foreign financial accounts owned by or under the control of the individual which should have been reported in the previous eight FBARs. Generally, a client comes to an advisor with one foreign account the client knows is non-compliant; however, the advisor must be clear that all foreign accounts are required to be brought into compliance.

Next, it must be determined if the account holder is under investigation by the IRS or a foreign tax authority, or if any accounts are held at a foreign financial institution currently under investigation by the IRS. A list of institutions under investigation is available at the IRS website.[36]

None of the compliance methods will be available if the account holder is currently under investigation. The account holder's only option is to contest the highest aggregate account balance used to assess the FBAR penalties. If any of the institutions holding accounts are under investigation by the IRS, then the Current OVDP is the best option available for compliance and a 50% penalty will be applied (assuming the taxpayer is accepted into the Current OVDP). If neither the institutions nor the individual is subject to investigation, then many more compliance options potentially become available.

B. Factual Determinations

After determining initial eligibility for the compliance regimes by uncovering the location of an account and whether an investigation of an account is underway, an advisor should carefully question the individual about the circumstances surrounding the account. The IRS compliance efforts are largely geared towards catching individuals who are actively evading taxes and those individuals who assist such efforts. Accordingly, normal banking activity and individuals acting on their own volition to open and maintain accounts justifiably bear less scrutiny than those individuals who actively sought counsel in attempting to evade U.S. taxes via offshore accounts. As a result, details on how the account was set up, account management, and receipt of communications regarding the account are crucial. The facts gathered in this phase generally determine whether the Current OVDP's liability mitigation makes it a preferable option despite the higher associated penalty. This process collects the information required for the Voluntary Disclosure Letter and Current OVDP submission, as well as the Certification Statement, if Streamlined Filing is an option. Furthermore, this step allows for a determination of whether an assertion of "non-willfulness" is viable.

If Initial Eligibility determines that the individual is ineligible for any compliance program, the Factual Investigation initiates the fact gathering necessary to challenge the IRS's investigation into the individual as a "willful" violator of the FBAR reporting requirement. Relatively little case law addresses the willfulness of an individual's conduct in failing to report financial assets and, unfortunately, that which does exist does not bode well for account holders. Accordingly, a practitioner should always educate a client on what conduct has been considered "willful" in previous decisions and what conduct is considered "willful" under the Current OVDP guidance, because many clients will cling steadfastly to their personal definition of willfulness. In *United States v. Williams*, the IRS won on appeal a finding of willfulness where a taxpayer failed to file an FBAR after having reached an agreement with the IRS regarding previous violations of foreign income reporting requirements.[37] In *Williams*, the Fourth Circuit provided two inferential means of determining willfulness: a "willful blindness" standard and a "conscious effort to avoid learning about reporting requirements" standard.[38] While each of those standards is helpful when discussing the account history with a client, the specific guidance provided in the compliance programs

offers a clearer picture of the intended scope of the term "willfulness."

C. Tax Exposure

In assessing which compliance method to use, the "tax tail" should not wag the dog. In fact, the penalty regime should likewise not be the primary consideration. The foremost concern in determining the proper compliance method is the individual's comfort with potential liability. The Current OVDP offers the security of a written agreement with the IRS upon completion, but none of the other compliance methods offer similar solace. Accordingly, the information gathered in the Factual Determination step must be used to assess potential risks of future audit and investigation instead of limiting the assessment to simply compliance options. Often many avenues will be available, but risk assessment is the best determinant of the proper route. The penalty and tax implications of a choice between the Current OVDP and Streamlined Filing are significant. The former's eight-year look back causes a potential for a significant increase in tax, interest, and penalties compared to the three-year look back under Streamlined Filing. Furthermore, the 22.5% difference in the respective penalty amounts creates additional incentive to choose Streamlined Filing, if it is an option. Accordingly, an assessment of the differences between the tax, interest, and penalties due under each of the programs may be instructive in cases where the Factual Determinations make that decision a close call. The individual's comfort level with the individual's choice is paramount because the Current OVDP is a long process and Streamlined Filing risks an audit of the submitted income tax returns.

VI. Conclusion

Unfortunately, many individuals who have been trapped in non-compliance are simply caught up in the United States' overly complicated foreign tax and account reporting requirements. The potential for being reported under FATCA means those who have unreported accounts can no longer afford to ignore the problem. Fortunately, the available compliance programs offer a potential solution for taxpayers who are willing to confront the problem. ⚜

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(Endnotes)

1. *See, e.g.*, Charles Rettig, *Zwerner: Jury Determines 150% FBAR Penalty Applies - What Next?*, FORBES, May 29, 2014, http://www.forbes.com/sites/irswatch/2014/05/29/zwerner-jury-determines-150-fbar-penalty-applies-what-next/.

2. *See, e.g*., Robert W. Wood, *Credit Suisse Account Holders Face Search and Seizure*, FORBES, July 14, 2012, http://www.forbes.com/sites/robertwood/2012/07/14/credit-suisse-account-holders-face-search-and-seizure/.

3. *See, e.g*., Associated Press, *Beanie Babies Creator H. Ty Warner Sentenced for Tax Evasion*, ABC NEWS, Jan. 14, 2014, http://www.wjla.com/articles/2014/01/beanie-babies-creator-h-ty-warner-sentenced-for-tax-evasion-99245.html.

4. I.R.C. §§ 1471–74.

5. *See* I.R.S., IRS Offshore Voluntary Disclosure Efforts Produce $6.5 Billion; 45,000 Taxpayers Participate, FS-2014-6, June 2014, http://www.irs.gov/uac/Newsroom/IRS-Offshore-Voluntary-Disclosure-Efforts-Produce-$6.5-Billion;-45,000-Taxpayers-Participate (reporting over 45,000 voluntary disclosures between 2009 OVDI, 2011 OVDI, and 2012 OVDP) (last visited Nov. 20, 2014).

6. *See* I.R.S., Options Available For U.S. Taxpayers with Undisclosed Foreign Financial Assets, June, 2014, http://www.irs.gov/Individuals/International-Taxpayers/Options-Available-For-U-S--Taxpayers-with-Undisclosed-Foreign-Financial-Assets (last visited Nov. 20, 2014).

7. FinCEN *Report 114, Report of Foreign Bank and Financial Accounts* [hereinafter *FBAR*], http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Report-of-Foreign-Bank-and-Financial-Accounts-FBAR (last visited Nov. 20, 2014).

8. For specific guidance on these forms, visit www.IRS.gov.

9. *FBAR, supra* note 7.

10. I.R.C. § 6501.

11. IRM 25.6.1.9.5.2.

12. Robert W. Wood, *Beware Longer IRS Statute of Limitations on Foreign Accounts*, FORBES, May 14, 2012, http://www.forbes.com/sites/robertwood/2012/05/14/beware-longer-irs-statute-of-limitations-on-foreign-accounts/.

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PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

14. *See* Hale E. Sheppard, *Evolution of the FBAR: Where We are, and Why it Matters*, 7 HOUSTON BUS. L. & TAX J. 1, 12 (2006).

15. Pub. L. No. 108-357, § 821, 118 Stat. 1418, 1586 (2004).

16. *See* Sheppard, *supra* note 14, at 12.

17. *See* John Letzing, et al., *Credit Suisse Settlement with U.S. Could Top $800 Million*, WALL ST. J., Jan. 22, 2014, http://online.wsj.com/news/articles/SB10001424052702304632204579336671237500260.

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21. FS-2014-6, *supra* note 5.

22. 31 U.S.C. §5321(a)(5)(A); IRM 4.26.16.4.5.1.

23. 31 U.S.C. §5321(a)(5)(A); IRM 4.26.16.4.4

24. *See* Sheppard, *supra* note 14, at 23.

25. IR-2014-73 (June 18, 2014)

26. *See United States v. Zwerner*, No. 1:13-cv-22082-CMA (Fla. Dist. Ct., April 29, 2014).

27. *See* Current OVDP Frequently Asked Questions and Answers, # 12, http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised [hereinafter OVDP FAQs] (last visited Nov. 16, 2014); see also Streamlined Filing Compliance Procedures, http://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures (last visited Nov. 20, 2014).

28. OVDP FAQs, *supra* note 27, #23.

29. *See* I.R.S., IRS Says Offshore Effort Tops $5 Billion, Announces New Details on the Voluntary Disclosure Program and Closing of Offshore Loophole, IR-2012-64, June 26, 2012, http://www.irs.gov/uac/IRS-Says-Offshore-Effort-Tops-$5-Billion,-Announces-New-Details-on-the-Voluntary-Disclosure-Program-and-Closing-of-Offshore-Loophole (last visited Nov. 20, 2014).

30. 2012 OVDP Frequently Asked Questions and Answers, # 17, http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers (last visited Nov. 20, 2014).

31. Streamlined Filing Compliance Procedures, *supra* note 27.

32. U.S. Taxpayers Residing Outside of the United States, http://www.irs.gov/Individuals/International-Taxpayers/U-S-Taxpayers-Residing-Outside-the-United-States (last visited Nov. 16, 2014).

33. *See U.S. Taxpayers Residing in the United States*, http://www.irs.gov/Individuals/International-Taxpayers/U-S-Taxpayers-Residing-in-the-United-States (last visited Nov. 20, 2014).

34. *Id*.

35. *See id*.; U.S. Taxpayers Residing Outside of the United States, *supra* note 32.

36. www.irs.gov.

37. *United States v. Williams*, No. 10-2230, unpublished (4th Cir. July 20, 2012).

38. *Id*. ⚜

The Use of Alternative Dispute Resolution in Estate Planning and Administration

By Jennifer & Jerad Tomac

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."[1]

Abraham Lincoln – 1850

As trusts and estates attorneys, we often find ourselves at the crossroads of salient legal issues and our client's emotions. Dealing with death and incapacity has a tendency to bring painful, unresolved family issues to the forefront. In two of my client meetings today, the clients spent 75% of the time talking to me about topics and facts that are, legally, completely irrelevant. They delved into their childhood, their spats with family members, their goals for the future and, in one case, the diverse wildlife they frequently encounter outside their new home. These meetings are not unusual. These cases present a unique opportunity to help clients solve their legal disputes while also assisting them in resolving (or at least not exacerbating) the underlying emotional and family issues. As Abraham Lincoln pointed out, as attorneys and counselors at law, we have "a superior opportunity" to be peacemakers. One of the primary ways we can do this is by helping our clients choose the means of dispute resolution that will be most advantageous for their particular situation.

This article takes a brief look at the historical and current uses of Alternative Dispute Resolution ("ADR") in the United States at large, as well as locally, in Virginia. Building on these ideas, this article suggests reasons why judges and attorneys should offer ADR options to parties dealing with trust and estate issues.

The History of Alternative Dispute Resolution

Throughout much of history, the modes of dispute resolution that we today refer to as "alternative" were the primary means of problem solving. Prior to the establishment of formal judicial systems, the ancient Egyptians, Phoenicians, and Greeks, to name a few, utilized various forms of arbitration and negotiation to resolve disputes.[2] Much like the more formal aspects of our judicial system, the use of ADR in America can be traced to the English common law practice whereby, as early as the 11th century, parties would agree to have an upper-class male within their village hear their grievances and issue a decision. In lieu of a formal hearing, the king would then ratify the decision of the local decision-maker.[3]

This more private, localized system of dispute resolution was continued by the Pilgrim colonists during the early days of the settlement of the American colonies. Having just crossed an ocean to escape the control of what they believed was a corrupt and oppressive government, the colonists utilized local informal arbitration to resolve the majority of their disputes.[4] Unsurprisingly, this preference for party driven dispute resolution quickly found its way into the framework of America's new government. As early as 1790, Congress established arbitration as the primary means of dispute resolution within the federal government by including arbitration provisions in legislation such as the Patent Act.[5] Although the federal government and many state governments used ADR to resolve the majority of governmentally related issues, it was not until the 1920s, with the passing of the Federal Arbitration Act, that U.S. Courts were expressly authorized to recognize and enforce private parties' agreements to arbitrate and arbitration awards.[6] The Federal Arbitration Act spurred the use of ADR in the private sector by ensuring that courts would enforce arbitration clauses and ratify arbitrated remedies.

Alternative Dispute Resolution in Virginia

In 1987, Chief Justice Harry L. Carrico created the Commission on the Future of Virginia's Judicial System and charged the Commission's thirty-four members with developing a vision and a plan for the future of the Commonwealth's judicial system.[7] The Commission's report, issued in 1989, included ten recommendations, or "visions," that Virginia's judicial system needed to focus on in order to meet its core mission of justly resolving disputes.[8] One of these visions, "Vision Three," centers on the idea that, in order to best serve its citizens, the judicial system needs to offer mechanisms that instead of simply deciding the case, seek to resolve the parties' dispute.[9] Acknowledging that the court process is not always the most efficient or appropriate method to resolve parties' disputes, the report states that the judicial system must offer alternative dispute resolution programs.[10] In 1991, in an effort to combat the presumption that litigation is always the preferred means of dispute resolution and to provide ongoing support to local courts seeking to implement alternative dispute resolution systems, the Supreme Court of Virginia created the Department of Dispute Resolution Services (the Department) within the arm of the Office of the Executive Secretary.[11] The goals of the Department include:

- to develop within the judicial system a range of options that provides the capability of resolving disputes in a manner most effective for the dispute involved;
- to encourage and promote the use of alternative dispute resolution in all judicial circuits and to investigate funding sources for such programs;
- to develop, where appropriate, and evaluate experimental or pilot alternative dispute resolution programs;
- to provide training and education programs to alternative dispute resolution practitioners, court personnel, law enforcement personnel, businesses, students, members of the bar, judges, and the general public; and
- to determine to what extent the use of alternative dispute resolution programs may reduce the civil workload of Virginia courts.[12]

With these goals in mind, the Department identified seven dispute resolution options that it encouraged local courts to explore and develop in order to best serve their citizens. The options range from very informal to very formal, and involve varying degrees of party control. Generally, the more informal the process, the more the parties control the outcome. In order of formality, from least to most formal, the Department identified the following dispute resolution options:

(i) conciliation;
(ii) mediation;
(iii) early neutral evaluation;
(iv) summary jury trial;
(v) arbitration;
(vi) settlement conference; and
(vii) adjudication.[13]

Over the past twenty years several jurisdictions have implemented successful ADR programs in courts throughout the Commonwealth.

1. Conciliation. In Fairfax County Circuit Court, as a part of the Conciliation Program, experienced litigators volunteer their time to help parties resolve preliminary motions and petitions. The conciliator does not decide the matter for the parties, but makes reasoned recommendations to aid the parties in resolving the issue. The program has been very successful, with approximately 85% of matters reaching some degree of resolution without further court intervention.[14]
2. Mediation. Courts in Prince William County, the City of Richmond, and Henrico County have Dispute Resolution Coordinators in the courthouse who screen cases to determine whether a case is appropriate for mediation and conduct orientation sessions to educate prospective parties about the mediation process. Over the past ten years, an out of court agreement has been reached in more than half of the cases where mediation was attempted.[15]
3. Neutral Case Evaluation. The Fairfax and Fauquier County Circuit Courts have established Neutral Case Evaluation Programs where judges or experienced attorneys act as neutral facilitators, meet with parties

> and their respective counsel in a settlement conference setting, and provide an honest evaluation of the case. The programs have been very successful, with less than 20% of cases proceeding to trial.[16]

In addition to the options above, Section 8.01-576.5 of the Virginia Code permits judges, on their own motion, to refer any contested civil matter to an ADR orientation session. Upon receiving the referral from the judge, the parties must attend an orientation session to learn about the ADR options available to them. Every year Virginia judges refer approximately 12,000 cases to ADR, the vast majority of which are family law cases dealing with divorce and child custody.[17] There is no reason that this propensity for ADR could not be extended to trust and estate cases, which bear so many similarities to those which are traditionally thought of as "family law" cases.

The ever-growing awareness of the potential advantages of ADR is evident in the Virginia State Bar's Professional Guidelines. The comments to Rules 1.2 and 1.4 provide that attorneys have an ongoing duty to communicate to the client the "advantages, disadvantages, and availability of dispute resolution processes" that would aid the client in achieving his/her goals.[18]

ADR Use within the World of Wills, Trusts, and Estates

Estate and Trust Administration

Virginia's Uniform Trust Code specifically authorizes a trustee to "[r]esolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution."[19] In addition to determining the substantive law applicable to the matter, attorneys should always consider the dispute resolution process that is best suited for the case, and present the clients with information regarding the dispute resolution options available to them. Choosing the correct process for resolving the dispute substantially affects the likelihood that the client will be pleased with the outcome of the case. As mentioned above, over the past twenty years, judges and attorneys have increasingly recognized that the intensely personal nature of family law cases, paired with the fact that most of the time it is necessary for the parties to maintain some type of personal relationship, makes family law cases uniquely well -suited for the less formal, more party-driven dispute resolution options, such as mediation. The same can be said of the majority of trust and estate cases.

ADR experts have found that the following factors increase the likelihood that a case is well suited for mediation:

(i) the emotions of the parties are intense and are preventing a settlement;
(ii) there is a need or desire for the parties to maintain an ongoing relationship;
(iii) communication between the parties is poor;
(iv) misperceptions or stereotypes are hindering productive exchanges; and
(v) the parties perceive their interests as incompatible.[20]

Like traditional family law cases, the intensely personal nature of the issues involved in administering a will and/or trust, make these cases well-suited for ADR. Much of the time, estate and trust administration cases revolve around emotions as much as facts, and the time and money required to litigate the matter often leaves both parties tired, frustrated, and unsatisfied. Additionally, litigation's intensely adversarial nature often guarantees that parties who started out disliking each other will loathe each other by the time the case is over. Meditation, on the other hand, can be tailored to meet the parties' needs; it can be scheduled anytime, is a much shorter process, and costs significantly less. Perhaps even more important, it is collaborative in nature, as opposed to being adversarial; the parties are encouraged to design their own solution. The self-determinative nature of mediation can significantly reduce the winner/loser dichotomy that parties feel when they receive a litigation verdict and therefore assist the parties in maintaining a working relationship.

Another significant benefit of ADR is that the parties are able to choose the person(s) who oversee(s) the decision-making process. Most Circuit Court judges will readily admit that they are not experts in trust and estate matters. Indeed, Virginia has long acknowledged the benefit of having an available decision-maker with extensive knowledge of estate administration laws and procedures; that is the essence of Virginia's Commissioner of Accounts system. Appointed by the judges of the Circuit Court, the Commissioner of Accounts for each

judicial circuit is a seasoned attorney with years of experience in the area of trusts and estates. Section 64.2-1209 of the Virginia Code gives all parties interested in the administration of an estate the option of presenting their grievances in a hearing before the Commissioner instead of filing suit in the Circuit Court. Generally more informal in nature and utilizing relaxed evidentiary standards, the hearings often resemble a mediation/arbitration hybrid. If, at the close of the hearing, the parties are unable to reach a mutually agreeable settlement, the Commissioner will issue the Commissioner's findings in a report that, once confirmed by the Circuit Court, is binding on the parties.[21]

While Virginia's unique Commissioner of Accounts system provides many families with the opportunity to resolve estate administration issues in a less formal, less adversarial, less expensive fashion, this option is only available in matters that are before the Commissioner for review.[22] Therefore, a Commissioner cannot hear matters relating to: (i) estates under $50,000, where accounts have been waived; (ii) testamentary trusts, where accounts have been waived; and (iii) revocable trusts. That being said, disputes that arise in connection with these matters are extremely similar in nature to matters resolved every day in the mediation/arbitration hybrid format of a Commissioner's hearing and, as such, provide attorneys and judges with an excellent opportunity to encourage parties to explore the use of ADR options to resolve their disputes.

Estate Planning

> "But having endeavoured to be plain, and explicit in all Devises–even at the expence of prolixity, perhaps of tautology, I hope, and trust, that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises to be consonant with law, My Will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants–each having the choice of one–and the third by those two. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their sense of the Testators intention; and such decision is, to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."[23]
>
> Last Will and Testament of
> George Washington - 1799

This early example of an estate planning arbitration clause was written by President George Washington, and can be found in his Will, which is on display in the Fairfax County Circuit Court archives.

As President Washington's Will makes evident, the use of arbitration clauses in wills is not a new practice; however, despite its historical use, it is not a widely used practice. This is due in large part to the unresolved question of whether mandatory mediation/arbitration clauses in wills and trusts are binding on the beneficiaries. Although most U.S. courts favor arbitration, the enforcement of the clauses has historically been limited to contract cases where all parties involved in the dispute consented to arbitrate disputes arising under the contract. Because beneficiaries are not typically signatories to wills and trusts, courts have been reluctant to enforce arbitration clauses against beneficiaries who wished to litigate their dispute.[24] A few states, including Arizona and Florida, have recently enacted legislation authorizing mandatory arbitration clauses in wills and trust.[25] In addition, a few state courts, including those in Texas and California, have recently issued decisions enforcing arbitration clauses in trust documents.[26]

In Virginia, while it is clear that fiduciaries may elect to settle disagreements via ADR,[27] it is not clear whether courts will enforce a mandatory mediation/arbitration clause within a will or trust. Nonetheless, including such a clause in a will or trust could be sufficient to encourage squabbling beneficiaries to attempt to resolve their dispute in the manner prescribed by the testator/grantor. Attorneys interested in discussing this option with clients are encouraged to look at the American Arbitration Association's

sample clauses and suggested wills and trusts arbitration rules.[28]

By encouraging potential litigants to attempt to resolve estate and trust administration disputes through ADR, judges and practitioners can assist families in moving forward in a more amicable fashion, while simultaneously reducing the strain on Virginia's overworked and understaffed judiciary. Similarly, a well-drafted mediation or arbitration clause in a will or trust can make the difference between a two-year, $200,000 litigation battle where family members never speak to each other again, and a two-month, $2,000 mediation where the family members scream and cry and pout and then, eventually, work out an agreement that everyone can accept. Not every case is appropriate for ADR, but every case presents attorneys with the "superior opportunity" to help their clients understand all of the options available for resolving the dispute in the most peaceable way possible. ⚜

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Making the Portability Election

By James A. Gillis

Estate planning attorneys have been working with portability for almost four years now. Since January 1, 2011, the executor of an estate with a surviving spouse has had the ability to make a portability election to claim the deceased spousal unused exclusion (DSUE) amount.[1] Once ported to the surviving spouse, the surviving spouse can use the DSUE amount to shield future asset transfers from estate and gift taxes. In order to make the portability election, a full and timely estate tax return which calculates the DSUE amount must be filed.[2] Depending on the circumstance, the DSUE amount can be very valuable. A portability election made in 2014 can save up to $2,136,000 in gift and estate taxes.

Although perhaps in theory designed to simplify the estate planning process and bring an element of fairness to decedents who failed to employ traditional tax planning, portability in practice adds another layer to the estate administration process. Whenever there is a surviving spouse, the estate attorney needs to consider and advise the executor about the portability election to some degree. This article discusses the mechanics of making the portability election, the content of the attorney's advice pertaining to portability, and using the ported DSUE amount.

Portability should always be considered when available because it can be so valuable. For example, if a married couple owned all of their assets jointly and one spouse died in 2014, a DSUE amount of $5,340,000 could be ported to the surviving spouse. If the surviving spouse died later that year with $10,680,000 of assets, no tax would be due. If no portability election had been made, the estate tax bill would be $2,136,000.

That said, the burden of making the portability election is significant. If an executor would like to make the election, the executor needs to be prepared for the diligence and legal fees required to prepare a full-blown estate tax return. An effective portability election requires that a "complete and properly-prepared estate tax return" be filed which calculates the DSUE amount.[23] The return must be filed on time – within nine months of the date of death, or within fifteen months if the executor requests an automatic extension.[4]

When an estate tax return is being filed solely to elect portability, a limited shortcut is available. The executor can estimate the date of death value of property that is completely shielded by the marital and charitable deductions.[5] The return still must report a description of the property and all other information necessary to establish the estate's right to the marital and charitable deductions, along with an estimate of the total value of the estate.[6] This method could save money if, for example, the decedent owned a closely-held business that passes to the surviving spouse, and the surviving spouse is not planning to sell the interest. In that case, the cost of a business valuation could be avoided; however, this shortcut could turn out to be a landmine later if the surviving spouse decides to sell or gift the interest because the basis for income tax purposes would not be readily available. The attorney should carefully consider whether the potential savings are worth the risk before giving advice in this area.

A portability election can only be made on a timely filed estate tax return, but all is not lost if the filing deadline has passed. The executor could still make a portability election as long as there was no statutory requirement that an estate tax return be filed. A return is not required by statute if the value of the gross estate plus adjusted taxable gifts is less than the applicable exclusion amount in the year of death ($5,340,000 in 2014, indexed for inflation). Because the deadline for making a portability election is set by regulation, a private letter ruling (PLR) request can be made asking for an extension of time under Section 301.9100-3 of the Procedure and Administration Regulations to make the election. The PLR request must establish that the executor

acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the government.[7]

An additional automatic extension of time is available for estates with decedents who died in 2011, 2012, and 2013. In 2013, *United States v. Windsor* struck down Section 3 of the Defense of Marriage Act.[8] As a result, the IRS was required to recognize same-sex couples for all tax purposes. The IRS issued several revenue procedures in the wake of the *Windsor* decision that automatically allowed surviving spouses of same-sex couples to file late estate tax returns for the sole purpose of electing portability. Because the law was new and changing (prior to *Windsor*, there were disagreements as to the requirements for making a valid portability election), the IRS extended late filing for the purpose of electing portability to all estates.[9] If the decedent died in 2011, 2012, or 2013 with a surviving spouse, but without an estate tax return filing requirement, the executor can file an estate tax return electing portability by December 31, 2014. In order to do so, the return must state that it is "FILED PURSUANT TO REV. PROC. 2014-18 TO ELECT PORTABILITY UNDER §2010(c)(5)(A)."[10]

Before portability was law, determining whether there was an estate tax return filing requirement was an objective exercise. The total value of the estate was either above or below the filing threshold. Some of the valuations may have been subjective, but the conclusion of whether or not to file was based on an objective measure. Not so with portability. If no return is required by statute, a subjective determination of whether the return should be filed must be made by the client.

The attorney has a key role in helping the client through the decision-making process. Because the DSUE amount can be so valuable, it is critical that certain pieces of information be conveyed to the client in a meaningful and useful format. Inputs are needed, so whenever there is a surviving spouse, the attorney needs to gather information about all of the assets and taxable gifts of the decedent and of the surviving spouse. Requests for that information should be added to the standard checklist that is given to the client at the start of the representation. The client's failure to act (i.e., not filing the return) constitutes electing out of portability and that election becomes irrevocable when the filing due date passes. With limited exceptions, the election cannot be revoked, so if the executor is not going to file the return, an affirmative informed decision should be made either way.

The client's options with respect to the portability election, as well as his or her decision regarding the election, should be confirmed in writing. Creating a written record signals to the client that the decision should be taken seriously and also protects the attorney from potential malpractice claims. It is not enough to inform the client in a conclusory manner that the client can file an estate tax return to claim the DSUE amount; technical details are by and large not helpful to the client's decision-making process in this context. The attorney has an ethical duty to present the options in clear economic terms to help the client make an informed decision.[11]

If the attorney is representing the surviving spouse, a full picture of the assets should be obtained and presented. There are two calculations that should be emphasized to the client. First is the estimated estate tax (if the surviving spouse has over $5,340,000 of assets) or the remaining exemption (if the surviving spouse has less than $5,340,000 of assets) if nothing is done, based on the current asset values and the current state of the law. Second is that same calculation (tax or remaining exemption) if a portability election is made. The presentation style should be tailored to the client's level of sophistication, but at least showing the basic arithmetic can act as a check that helps ferret out errors. One strategy is to present the two key calculations in the body of a simple one page letter, and to enclose one or more spreadsheets detailing the estate's assets, the surviving spouse's assets, and the tax calculations.

The letter should make it clear that the estimated tax or remaining exemption is calculated as of the present time and that the client should take this information to the client's financial advisor for projections regarding future values. This is especially true if the surviving spouse is younger with significant earning potential. Even if no tax would be due now, there could be significant growth of the assets over time

such that the survivor's estate could reasonably be expected to owe tax.

The final piece of information is the estimated cost to the client of making the portability election. Preparing an estate tax return is neither easy nor inexpensive. The client needs to be able to weigh the costs to be able to make an informed decision. If the situation is borderline, it is appropriate to emphasize the potential tax savings because of its potential significance. Most wealthy clients will agree that it is worth spending a few thousand dollars now to potentially save hundreds of thousands or millions of dollars of tax later. Some will not. That is why there should be a space for the client to sign the letter indicating whether or not the client wants to proceed with making the election. Of course there should be a warning near to where the client is signing confirming that a decision not to proceed will become irrevocable once the filing deadline has passed. It may be tempting to advise the hesitant client to file an automatic extension request; however, delaying decision-making when all of the information is available is rarely a good idea.

The only person with the power to make the portability election is the executor, which for estate tax purposes and for purposes of making the portability election is the court-appointed personal representative.[12] If one has not been appointed, any person in actual or constructive possession of the decedent's property is considered the executor.[13] In many cases, the surviving spouse is the executor. If not, the attorney should be thinking about the potential conflicts between the executor's fiduciary duties and the executor's interest in the estate as a beneficiary, and address any conflicts from the start of the representation.

For example, the surviving spouse could have signed a marital agreement waiving all inheritance rights, there could be two sets of children and different estate plans, or a child of the decedent but not of the surviving spouse could be serving as executor. If the surviving spouse would like the executor to make the portability election, there is a conflict of interest between the executor's fiduciary duties and the executor's interest in the estate as a beneficiary because preparing the estate tax return is an administrative expense paid from the residue. The contours of the fiduciary duties under these circumstances may be fuzzy. A Virginia executor is charged by statute "with the responsibility of filing any income, inheritance or estate tax returns required by state or federal law …."[14] Whether an estate tax return is required under the statute if the surviving spouse requests that one be filed may be a stretch, but there may be a common law fiduciary duty that makes filing a requirement under certain circumstances. It may seem fair but unadvisable to have the surviving spouse pay for the return. When portability is available, but the surviving spouse is not serving as executor, sifting through the facts of the situation, evaluating how the law applies to that situation and establishing a plan regarding the portability election so that there is a predetermined course of action is time well spent.

The surviving spouse can use the ported DSUE amount to shield future gifts and transfers at death from tax. In the gift tax context, the DSUE amount is used before the surviving spouse's own applicable exclusion amount.[15] A surviving spouse can only have one DSUE amount at a time. Remarriage does not destroy the DSUE amount of a surviving spouse, but if the remarriage ends in death, the surviving spouse loses the DSUE amount ported from the first deceased spouse to the extent it is not applied to taxable gifts. For example, if a remarried surviving spouse makes $2 million of taxable gifts, the DSUE amount is used first. If the surviving spouse's new spouse dies, the surviving spouse keeps the $2 million prior DSUE amount because it was already applied to lifetime taxable gifts, but loses the rest of the DSUE amount.[16] Of course, a new portability election can be made to claim the second deceased spouse's DSUE amount.

At death, the DSUE amount can be used by a U.S. citizen or a resident alien. It can only be used by a non-resident alien if there is a tax treaty in place.[17] One thing to keep in mind is that the IRS has the authority to examine the estate tax return whenever the DSUE amount is used.[18] For that reason it is a good idea to keep a complete copy of the return and all of the supporting documents in a safe and accessible place. ⚜

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