September 27, 2013

Room 5205
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Portability Election Relief under Treasury Regulation Sections 301.9100-2 and -3

Ladies and Gentlemen:

Enclosed is a submission by the American Bar Association (“ABA”) Section of Real Property, Trust and Estate Law (“RPTE”) concerning extensions of the time under Treasury Regulation Sections 301.9100-2 and -3 to make the so-called portability election provided in section 2010(c)(2)(5)(A) of the Internal Revenue Code (the “portability election”). The submission (the “Submission”) was prepared by the RPTE Estate and Gift Tax Committee of the Income and Transfer Tax Planning Group; it has not been approved by the Board of Governors or the House of Delegates of the ABA, and should not be construed as representing the policy of the ABA.

Although the attorneys who participated in preparing the Submission have clients who may be affected by the legal issues addressed by the comments, no such member (or firm or organization to which any such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these comments.

Thank you in advance for considering the Submission. The members of the Committee who had principle responsibility for this Submission are available to meet and discuss
matters with the Service and its staff and to respond to any questions. Their contacts for discussion are:

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<tr>
<td>Richard S. Franklin</td>
<td>Lester B. Law</td>
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<td>(202) 857-3434</td>
<td>(239) 263-4662</td>
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Very truly yours,

Susan G. Talley  
Chair, Section of Real Property, Trust and Estate Law

cc: Hon. Daniel I. Werfel  
Acting Commissioner, Internal Revenue Service

Hon. William J. Wilkins  
Chief Counsel, Internal Revenue Service

Hon. Mark J. Mazur  
Assistant Secretary (Tax Policy), Department of the Treasury

Catherine V. Hughes  
Attorney-Advisor, Office of Tax Policy, Department of the Treasury

James F. Hogan  
Chief, Branch 4 (Pass-throughs & Special Industries), Internal Revenue Service

Cara Lee T. Neville, Secretary, American Bar Association

Thomas M. Susman, Governmental Affairs, American Bar Association
COMMENTS OF SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW
AMERICAN BAR ASSOCIATION
CONCERNING TREASURY REGULATIONS SECTION 301.9100-2 AND -3
IN CONTEXT OF THE PORTABILITY ELECTION UNDER
INTERNAL REVENUE CODE SECTION 2010

The following comments and recommendations pertaining to Treas. Reg. § 301.9100-2 (the “9100-2 Regulations”), and Treas. Reg. § 301.9100-3 (the “9100-3 Regulations”) (together “9100 Regulations”) are submitted on behalf of the American Bar Association Section of Real Property, Trust and Estate Law (“RPTE”). This submission (the “Submission”) has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

Comments were prepared by members of the Estate and Gift Tax Committee (the “Committee”) of the Income and Transfer Tax Planning Group of RPTE and were reviewed by Pam H. Schneider on behalf of the RPTE Committee on Government Submissions. If you have any questions, please feel free to contact either of the persons listed below:

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Although the members of the Section who prepared these comments have clients who would be affected by the Federal tax principles addressed, or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a submission with respect to, or otherwise influence the development or the outcome of, the specific subject matter of these comments. Section members, including the authors, are interested in the way that these rules affect the way they manage their practices and business units.

1. Executive Summary

For the reasons detailed below, we are requesting the availability of relief under the 9100-2 Regulations (“9100-2 Relief”) be expanded and the procedure for seeking relief under the 9100-3 regulations (“9100-3 Relief”) be simplified in two very specific situations, both of which involve extending the time to make the so-called portability1 election with respect to estates under the threshold in § 6018(a)2 for being required to file a Form 706 (i.e., nothing is being requested relating to estates over such threshold).3 We refer to those estates under the filing threshold as “smaller estates”.

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1 Portability refers to a married person’s ability to transfer his or her unused applicable exclusion amount (at the time of death) to his or her surviving spouse. Portability applies to estates of decedents dying after December 31, 2010 by reason of two amendments to Internal Revenue Code § 2010. First, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the “2010 Tax Act”) amended §2010 to make portability available to estates of decedents dying after December 31, 2010 and before January 1, 2013. Second, the American Taxpayer Relief Act of 2012 (“ATRA 2012”) deleted the sunset date of December 31, 2012, making portability a mainstay in the Federal estate and gift tax regime.

2 Unless otherwise noted, all section references are to the Internal Revenue Code of 1986 as amended.

3 The term “Form 706” refers to the United States Estate (and Generation-Skipping Transfer) Tax Return. An estate of a decedent dying after December 31, 2010 is under the threshold for filing a Form 706 if the value of the
First, we request that an extension of time to make the portability election be available under the 9100-2 Regulations during the six month extension period (the “extended 6-month period”) applicable to a Form 706 in situations in which neither an original Form 706 nor an extension request was filed by the un-extended due date (i.e., within nine months after the decedent’s death (the “original 9-month period”)).

Second, we request that a simplified alternative method of obtaining an extension of the time to make a portability election be made available to smaller estates for a specified period ending no earlier than the later to occur of (a) June 30, 2014, or (b) six months from the date of publication of guidance setting forth the simplified alternative method.

2. 9100 Relief for smaller estates making the Portability Election under the 9100-2 Regulations

a. Background. The 9100-2 Regulations currently provide an automatic extension of the time to make a portability election when the taxpayer:4 (a) timely files a Form 706 without requesting an extension of time to file such return; (b) fails to make a portability election on such return; (c) has allowed the original 9-month due date for filing the return to pass (the “original 9-month period”); and (d) files an amended Form 706 and makes the election on within the six month period that follows the original 9-month period (the “extended 6-month period”) that would have been afforded the taxpayer had the taxpayer timely filed an extension request. Currently, to obtain 9100-2 Relief, a taxpayer must have (i) filed the original Form 706 during the original 9-month period,5 (ii) taken corrective action within the extended 6-month period",6 and (3) filed the original or amended return in the manner provided for in the 9100-2 Regulations.7

b. Requested Expansion. The Committee believes there should be an exception to the requirements that an original Form 706 be filed during the original 9-month period for estates under the filing threshold (“smaller estates”). In the Committee’s view, it would be commonplace that executors of many smaller estates, which have no filing obligation apart from making the portability election, inadvertently fail (or have failed) to file a timely Form 706 or an extension request within original 9-month period. Moreover, the Committee believes that in many cases this failure will be caused by inadequate or nonexistent professional advice as to the new portability system. In some of these cases, however, during the extended 6-month period, the taxpayers may realize their mistakes and desire to take corrective action. In this limited circumstance, the Committee believes it is in the government and taxpayers’ best interests to allow corrective action to be taken under the 9100-2 Regulations, particularly as it is completely understandable that smaller estates may not seek the kind of professional advice necessary to understand, in a timely fashion, the need to file in order to take advantage of the portability

decedent’s gross estate plus adjusted taxable gifts (and specific exemption with respect to gifts made after September 8, 1976 and before January 1, 1977) does not exceed the basic exclusion amount (currently that amount is $5.25 million in 2013).

4 For purposes of this paper, the “taxpayer” will refer to estates that are eligible to make the election and eligible persons who can make the return for eligible estates. Temp. Reg. § 20.2010-2T(a)(5) and (6).

5 Treas. Reg. § 301.9100-2(b).

6 Treas. Reg. § 301.9100-2(c).

7 Treas. Reg. § 301.9100-2(d).
election. Moreover, if blanket relief of this nature is not considered appropriate we ask that such relief be granted for a limited period, such as five years from the enactment of ATRA 2012.

The alternative for smaller estates in this situation is to pursue 9100-3 Relief (discussed below). If a taxpayer filed a request for such relief before the end of the extended 6-month period, it is unlikely that the Service would consider the request as being remote in time. After all, the request would be made during the same time period had an extension request been made. It seems likely that most such requests under the 9100-3 Regulations made before the expiration of the extended 6-month period (i.e., within 15 months of death) would be viewed as being timely. Therefore, in this limited circumstance, it seems administratively most expedient and efficient to allow relief under Treas. Reg. § 301.9100-2(b) (instead of relying on 9100-3 Relief). Obtaining 9100-2 Relief is generally considerably less time consuming and costly than obtaining relief under the 9100-3 Regulations; accordingly, it is generally less burdensome on the taxpayers and on the Service.

3. 9100-3 Relief

a. Background. Discretionary relief extending the time to make a tax election may be granted under the 9100-3 Regulations if: (1) 9100-2 Relief is not available, and (2) the time for filing the return is not statutory. In the context of the portability election, this provision applies only in cases where: (1) but for making the portability election, the estate would not have been required to file a Form 706 (i.e., in smaller estates); and (2) the time for filing the Form 706 (which may include the extended 6-month period) has expired. If the taxpayer has acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the Government, the Service may grant relief. In order to obtain an extension of time under the 9100-3 Regulations, the taxpayer must file a private letter ruling request and pay the applicable fees. Pursuant to Rev. Proc. 2013-1, such fees would be $10,000 (or a lesser fee if the gross income is below a certain threshold).

We believe that on the face of the 9100-3 Regulations, smaller estates are eligible to seek an extension of time to make a portability election because the temporary regulations (not the statute) impose the Form 706 filing requirement for smaller estates if an executor wishes to make a portability election. At the same time smaller estates are the most likely to need relief and the least likely to be able to absorb the costs of obtaining 9100-3 Relief.

b. Requested Expansion. For this reason and others, which are discussed in more detail below, we respectfully request that the Service provide a simplified alternative procedure for smaller estates to obtain an extension of time to make the portability election under the 9100-3 Regulations, similar to the procedures set forth in Revenue Procedures 2004-46 and 2004-47. More specifically, we urge the adoption of a simplified alternative procedure without the private letter ruling process or a user fee to obtain relief at least with respect to smaller

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8 IRB 2012-28, July 9, 2012. For purposes of these comments, we generally will refer to the proposed and temporary regulations as the “temporary regulations” or “Temp. Reg.”
10 Rev. Proc. 2004-46, 2004-2 C.B. 142, provides a simplified alternate method for certain taxpayers to obtain an extension of time under the 9100-3 Regulations to make a timely allocation of the GST exemption. Similarly, Rev. Proc. 2004-47, 2004-2 C.B. 169, provides a simplified alternative method for certain taxpayers to obtain an extension of time to make a late reverse QTIP election under § 2652 (a)(3). Both alternate methods may be used in lieu of the letter ruling process and no user fee is charged for requests filed under the cited revenue procedures.
estates of decedents who died or die before January 1, 2015 (i.e., two years after the portability rules were made permanent and less than 30 months after it was made clear that smaller estates need to make the portability election on a timely filed return). After this temporary relief window, the normal rules set forth in the 9100-3 Regulations would remain applicable.

We believe such relief is desirable and appropriate for several compelling reasons, including:

- **Newness of portability and the attendant election.** Because portability is a new and in many ways a transformative part of the federal transfer tax system, there has been a time lag between its enactment and the ability of advisors to understand the provision, its significance and requirements and to convey to the client the benefits and burdens of portability. Moreover, as history has demonstrated, the need to make an election with respect to a new transfer tax provision often confounds taxpayers and their advisors such that a surprisingly large number of good faith mistakes are made. This is often the case when the new legislation does not represent as dramatic a change as portability. In fact, portability is in many ways an extreme example of this phenomenon.\(^\text{11}\)

- **Lack of clarity concerning the need to file a “timely” return to make the election.** When portability was originally enacted, it was unclear whether smaller estates had to make an election on a Form 706 filed within a specific time period. It was only when the temporary portability regulations were issued, that in June 2012, it became clear that smaller estates were required to file a Form 706 within the original 9-month period (unless an extension was requested, and in that case before the expiration of the extended 6-month period) in order to make a portability election.

- **Cost to smaller estates of making the election.** Some of the failures to make the election are attributable to the cost of making the election (i.e., hiring of a tax preparer, and/or lawyer to do the analysis and determine if the election was viable), the time and energy necessary to prepare and file the return, and the uncertainty of the tax laws at the time that the election was due.

- **Cost to smaller estates of 9100-3 Relief under the usual procedures.** Unfortunately, 9100-3 Relief is not a complete solution for smaller estates in this situation. As discussed above, it is costly to the taxpayer. Such relief requires the preparation and filing of a private letter ruling, paying the legal and/or accounting fees and cost to prepare and file the same, and paying the private letter ruling filing fee to the Service. Yet even for those smaller estates of those individuals who died after 2010 but before the temporary regulations were issued, and whose executors failed to file the Form 706 and make the election, or who filed the return but failed to make the election, the only available relief is under the 9100-3 Regulations.

- **Cost to Government of ultimately successful requests for relief.** For many of the reasons set forth above, it seems reasonable that most (if not all) requests by smaller estates of decedents who died or die before January 1, 2015 (i.e., two years after the portability rules were made permanent and less than 30 months after it was made clear that smaller estates need to make the portability election on a timely filed return). After this temporary relief window, the normal rules set forth in the 9100-3 Regulations would remain applicable.

\(^{11}\) Although portability was originally enacted as part of the 2010 Tax Act it was originally effective only during 2011 and 2012 and therefore only relevant if both spouses died during that two year period. It was only after ATRA 2012 made portability a permanent part of the estate and gift tax system that practitioners had to consider its implications for all estates of decedents survived by a spouse. Moreover, its enactment in 2010 was relatively quick, and there was little time to study the provision.
estates for 9100-3 Relief made during the suggested time period will be granted. Therefore, the Government would be well-served by creating a specific window of time during which all such requests could be filed and these portability elections cleaned up, using a procedure similar to those set forth in Revenue Procedures 2004-46 and 2004-47 or to that applicable Treas. Reg. § 301.9100-2(c) and (d) with no need for a private letter ruling or fees. This would be administratively efficient and consistent with the Congressional policy that led to the enactment of portability.

Thank you in advance for your consideration of these recommendations. We hope you will not hesitate to contact the individuals named above to discuss these recommendations further or provide additional assistance.