ESTATE PLANNING AND COMPLIANCE IN THIS "TEMPORARY" ENVIRONMENT ARIZONA SOCIETY OF CPAS

OCTOBER 26, 2011

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A) TAX RELIEF ACT OF 2010

1. REPEAL AND RESTORATION OF THE ESTATE AND GST TAXES IN 2001 (EGTRRA) IN GENERAL

2. REPEAL OF THE REPEAL-2010 TAX RELIEF ACT WHAT WAS "RESTORED" EFFECTIVE 2013

3. TRANSITION BACK TO THE FUTURE-FOR 2010 DECEDENTS

    - ELECTION OUT OF THE ESTATE TAX REGIME-WHAT HAPPENS TO TAX BASIS
    - ANALYSIS NECESSARY TO DETERMINE IF THE ELECT OUT IS APPROPRIATE
    - FIDUCIARY ISSUES IN THE DECISION PROCESS
    - WHEN AND HOW TO ELECT /WHAT TO REPORT
    - 2010 FORM 706 IF NOT ELECTED OUT
    - GST TAX AND 2010 TRANSFERS

4. REUNIFICATION OF THE ESTATE AND GIFT TAX

5. PORTABILITY

B) PLANNING ISSUES FOR 2011, 2012 AND THEREAFTER

1. EFFECT OF $5M EXEMPTION AND 35%TOP RATE ON LIFETIME GIFTS IN 2011 AND 2012

2. ESTATE TAX "RECAPTURE" OF $5M GIFT TAX EXCLUSION AFTER 2010 TRA SUNSETS IN 2013

3. CURRENT REAL LIFE ISSUES

4. VALUATION DISCOUNT PLANNING IN 2011 AND 2012
   - ASSURING THE HIGHEST DISCOUNT
   - UNWINDING A DISCOUNT PLAN

5. GRANTOR RETAINED ANNUITY TRUST AND SALES TO AN INTENTIONAL DEFECTIVE GRANTOR TRUST IN 2011 AND 2012

6. LIFE INSURANCE PLANNING IN A TEMPORARY ENVIRONMENT
   - WHY OWN LIFE INSURANCE
   - EVALUATING CURRENT AND FUTURE NEED
   - EXCLUDING FROM THE ESTATE TAX (ILITs)
   -

7. CHARITABLE GIVING IN 2011 AND 2012

8. RETIREMENT PLAN DISTRIBUTION PLANNING
   - DESIGNATION OF BENEFICIARIES
   - ROLL OVERS BY SS/ESTATE/NON SPOUSE BENEFICIARY
   - ESTATE TAX MARITAL DEDUCTION

9. PREPARING THE ESTATE TAX RETURN/ASSISTING IN ADMINISTRATION OF THE ESTATE

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2011 Estate & Gift Tax Legislative Update

Internal Revenue Service

Estate & Gift Tax Program

Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act

- Signed by the President on 12/17/2010
- Legislation is a comprehensive tax and unemployment insurance package

Treasury Public Guidance

- On August 5, 2011, Treasury issued public guidance regarding the new tax law
- Notice 2011-66 provides procedural guidance, such as due dates and filing requirements
- Revenue Procedure 2011-41 provides guidance in the application of IRC §1022

Treasury Public Guidance

- On September 13, 2011, Treasury issued Notice 2011-76
- Notice 2011-76 changed the due date for the Form 8939
- Notice 2011-76 also allows an automatic 6 month extension for filing/paying certain Forms 706
  - Requested on Form 4768
  - No substantiation required

Major Provisions of 2010 Act

- Temporary extension of the provisions of EGTRRA and JGTRRA (Title I)
- Temporary AMT relief (Title II)
- Temporary estate tax relief (Title III)
- Temporary extension of investment incentives (Title IV)
- Temporary extension of unemployment (Title V)
- Temporary payroll tax cut (Title VI)
- Temporary extension of expiring provisions (Title VII)

Temporary Extension of EGTRRA and JGTRRA

- EGTRRA and JGTRRA were scheduled to expire 12/31/10
- The 2010 Tax Relief Act extends the expiration date of both acts to 12/31/12
- Estate Tax Provisions Extended:
  - Repeal of State Death Tax Credit
  - Allowance of State Death Tax Deduction
  - Repeal of the QFOBI Deduction

Temporary Estate Tax Relief (Title III)

- *Section 301* – Reinstatement of Estate Tax and Repeal of Carryover Basis
- *Section 302* – Modifications to Estate, Gift, and GST Taxes
- *Section 303* – Portability of Unused Exclusion Amount of Predeceased Spouse
- *Section 304* – Sunset Provision

Reinstatement of Estate Tax

- Section 301 amends EGTRRA to read as if the 2010 repeal of the estate tax and the 2010 carryover basis rules had never been enacted
- Section 301 is effective for deaths after 12/31/09
- The effect is to retroactively reinstate the estate tax and retroactively repeal the carryover basis rules for estates of 2010 decedents

Special Election for 2010 Decedents

- Section 301(c) provides a special election for estates of 2010 decedents
- Executor may elect to apply the estate tax repeal and carryover provisions of EGTRRA
- Once the election is made, it is irrevocable, except by consent of the Secretary of Treasury
- The election must be made on a timely filed Form 8939 (see Notice 2011-66 and 2011-76)

Extensions of Time

- Section 301(d) makes the due date for certain acts no earlier than 9 months after enactment or 9/19/11
- Applies to estates of decedents dying after 12/31/09 and before date of enactment
- Applies to generation-skipping transfers made after 12/31/09 and before date of enactment

Extensions of Time (cont.)

- Acts extended by 301(d):
  - Filing of Form 706 (and making any elections on the Form 706)
  - Payment of estate tax
  - Making any disclaimers under IRC § 2518(b)
  - Filing any return for a generation-skipping transfer under IRC §2662

Key Due Dates

- Form 8939 – Jan 17, 2012

- Form 706
  - If death is after Dec 31, 2009 and, on or before Dec 17, 2010, then Sep 19, 2011
  - Automatic extension to March 19, 2012 if F4768 filed
  - If death is after Dec 17, 2010, then nine months from date of death extension available if file F4768

Modifications to Estate Tax Section 302(a)

- $5 million applicable exclusion
- Applicable exclusion to be inflation adjusted after calendar year 2011
- 35% maximum estate tax rate

Modifications to Gift Tax Section 302(b) and (e)

- Estate and gift tax applicable exclusion and maximum rate are reunified
- $5 million applicable exclusion
- Applicable exclusion to be inflation adjusted after calendar year 2011
- 35% maximum gift tax rate
- IRC §2511(c) is repealed

Modifications to GST Tax Section 302(c)

- Applicable rate under IRC §2641(a) is zero

- Applies to generation-skipping transfers made between 12/31/09 and 1/1/11

Modifications to Estate and Gift Tax Section 302(d)

- Limits the Form 706 Gift Taxes Payable Credit (Line 7) by requiring the Credit to be computed using a 35% maximum rate on prior taxable gifts
- Increases the Form 709 Unified Credit for the current gift (Line 7) to $1,730,800
- Limits the Form 709 Unified Credit on Prior Gifts (Line 8) by requiring the Credit to be computed using a 35% maximum rate on prior taxable gifts

Portability of Unused Exclusion Section 303

- Amends definition of "applicable exclusion amount" in IRC §2010(c) to be the sum of:
  - Basic exclusion amount ($5 million), and
  - Unused exclusion amount of a deceased spouse ("DSUEA")
- The effect is to increase the applicable exclusion of a surviving spouse by any unused exclusion of a predeceased spouse

Portability of Unused Exclusion Definition of DSUEA

- Deceased spouse's unused exclusion is the lesser of:
  - Basic exclusion amount ($5 million), or
  - The excess of:
    - The basic exclusion amount of the last deceased spouse, over
    - The amount with respect to which the tentative tax is determined under IRC §2001(b)(1) on the estate of such spouse

Portability of Unused Exclusion Election Requirement

- The executor of the first spouse must elect to "port" the deceased spouse's unused exclusion to the surviving spouse
- Election must be made on a timely filed return (including extensions)
- Election is irrevocable

Portability of Unused Exclusion Limitations Period

- If the executor elects to increase the applicable exclusion amount, then the limitations period on the predeceased spouse's return will be opened

- Limitations period is opened only for purposes of making a determination of the unused exclusion amount

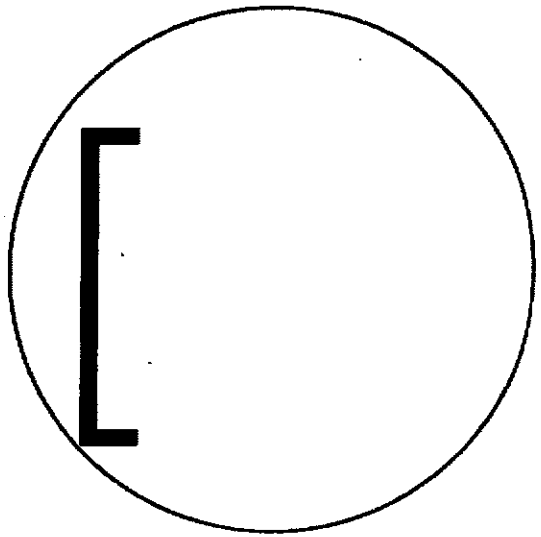
Portability of Unused Exclusion Effective Date

- Effective for estates of decedent's dying after 12/31/2010
- The first spouse must have died after 12/31/2010

Sunset
Section 304

- Section 901 of EGTRRA (the "Sunset" provision) applies to all of the amendments made by Title 3 of the 2010 Tax Relief Act.

- Transfers after December 31, 2012
  - Exemption of $1 million
  - Top Rate of 55%
  - Additional 5% surtax on certain large estates
  - State Death Tax Credit/Deduction
  - QFOBI Deduction



Questions?

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I Effect of $5m exemption and 35% top rate on lifetime gifts in 2011/12 vs. $1m and 55% in 2013.....or midway alternative

A) Assume: $10 million estate, no survivor

DOD	2011	2013	2013 ALT*
EXCLUSION	$5 M	$1 M	$3.5 M
ESTATE	10,000,000	10,000,000	10,000,000
E. TAX	3,480,800	5,140,800	3,480,800
U.C.	<1,730,800>	<345,800>	<1,205,800>
TAX DUE	1,750,000	4,795,000	2,275,000

*Assumes 3.5m exclusion and 35% max. rate

B) Assume $5 million estate, no survivor

DOD	2011	2013	2013 ALT*
EXCLUSION	$5 M	$1 M	$3.5 M
ESTATE	5,000,000	5,000,000	5,000,000
E. TAX	1,730,800	2,390,800	1,730,800
U.C.	<1,730,800>	<345,800>	<1,205,800>
TAX DUE	0	2,045,000	525,000

(B-2)

TABLE T201

2010–2012 Unified Estate and Gift Tax Rates[a, b]

If the taxable amount is: over	but not over	Tentative tax is:			of excess over
$ 0	$ 10,000	$ 0	+	18%	$ 0
10,000	20,000	1,800	+	20%	10,000
20,000	40,000	3,800	+	22%	20,000
40,000	60,000	8,200	+	24%	40,000
60,000	80,000	13,000	+	26%	60,000
80,000	100,000	18,200	+	28%	80,000
100,000	150,000	23,800	+	30%	100,000
150,000	250,000	38,800	+	32%	150,000
250,000	500,000	70,800	+	34%	250,000
500,000 1,000,000 5,000,000		155,800 * 330,800 1,130,800	+	35%	500,000 > 5M

Notes:

[a] The 2010 Tax Relief Act reinstates the estate tax rules for decedents dying after 2009, which were previously repealed for 2010 under the provisions of the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001. However, for estates of decedents who died in 2010, the executor can elect to apply pre-2010 Tax Relief Act rules (i.e., no estate tax for 2010 deaths and modified carryover basis rules for assets acquired from the decedent). (See Key Issue 2G.)

[b] Taxpayers filing under the Victims of Terrorism Tax Relief Act of 2001 should use a different tax rate schedule (from IRC Sec. 2201) (see Table T202).

* Pre 2010 tax on $1m = 345,800. due to rate bracket between $500,000 + $1m 34% to 39% in 2% increments

TABLE T202

Unified Rate Schedule for Gift Tax Returns (1998–2009)[1]

	(1) Taxable Amount Equal to or More Than—	(2) Taxable Amount Less Than—	(3) Tax on Amount in Column (1)	(4) Tax Rate on Excess over Amount in Column (1)
1998 to 2006	$ 0	$ 10,000	$ 0	18%
	10,000	20,000	1,800	20%
	20,000	40,000	3,800	22%
	40,000	60,000	8,200	24%
	60,000	80,000	13,000	26%
	80,000	100,000	18,200	28%
	100,000	150,000	23,800	30%
	150,000	250,000	38,800	32%
	250,000	500,000	70,800	34%
	500,000	750,000	155,800	37%
	750,000	1,000,000	248,300	39%
	1,000,000	1,250,000	345,800	41%
	1,250,000	1,500,000	448,300	43%
	1,500,000	2,000,000	555,800	45%
1998 to 2001	2,000,000	2,500,000	780,800	49%
	2,500,000	3,000,000	1,025,800	53%
	3,000,000	10,000,000	1,290,800	55%
	10,000,000	17,184,000	5,140,800	60%
	17,184,000	.....	.....	55%
2002	2,000,000	2,500,000	780,800	49%
	2,500,000	.....	1,025,800	50%
2003	2,000,000	.....	780,800	49%
2004	2,000,000	.....	780,800	48%
2005	2,000,000	.....	780,800	47%
2006	2,000,000	.....	780,800	46%
2007 to 2009	1,500,000	.....	555,800	45%

[1] For gift tax returns prior to 1998, use the same rates as listed in Table T201.

Worksheet Line 7 (Unified Credit Allowable for Prior Periods).

Line 7 Worksheet – Tax on Gifts Made After 1976

(a) Period	(b) Taxable Gifts for the Current Period	(c) Total Taxable Gifts for Prior Periods[1]	(d) Cumulative Taxable Gifts Including Current Period. *(Col. (b) + Col. (c))*	(e) Tax Based on 2010 Rates on Gifts from Prior Periods *(Col. (c))*[2]	(f) Tax Based on 2010 Rates on Cumulative Gifts Including Current Period *(Col. (d))*	(g) Tax on Gifts for Current Period *(Col. (f) – Col. (e))*	(h) Maximum Unified Credit Available for Current Period (based on 2010 rates)[3]	(i) Unified Credit Allowable in Prior Periods[4]	(j) Available Credit in Current Period *(Col. (h) – Col. (i))*	(k) Credit Allowable *(Lesser of Col. (g) and Col. (j))*	(l) Tax Payable for Current Period *(Col. (g) – Col. (k))*
Pre-1977											

1. Total gift taxes payable on gifts made after 1976 (add all amounts in column (l)).	1.	
2. Gift taxes paid by the decedent on gifts that qualify for "special treatment." Enter the amount from Worksheet TG, line 2, column e.	2.	
3. Subtract line 2 from 1.	3.	
4. Gift tax paid by decedent's spouse on split gift included on Schedule G. Enter amount from Worksheet TG, line 2, column (f).	4.	
5. Add lines 3 and 4. Enter here and on Part 2—Tax Computation, line 7.	5.	

[1] Column (c): Enter amount from column (d) of the ***previous*** row.
[2] Column (e): Enter amount from column (f) of the ***previous*** row.
[3] Column (h): Enter amount from the Table of Unified Credits. (For each row in column (h), subtract 20 percent of any amount allowed as a specific exemption for gifts made after September 8, 1976, and before January 1, 1977.)
[4] Column (i): Enter the sum of column (i) and column (k) from the ***previous*** row.

Column (b) Enter all taxable gifts. Enter all pre-1977 gifts on the pre-1977 row.
Column (c) Enter the amount from column (d) of the ***previous*** row.
Column (d) Enter the sum of column (b) and column (c) from the current row.
Column (e) Enter the amount from column (f) of the **previous** row.
Column (f) Enter the tax based on the amount in column (d) of the current row from *Table A — Unified Rate Schedule* above.
Column (g) Subtract the amount in column (e) from the amount in column (f) for the current row.
Column (h) Enter the amount from the *Table of Unified Credits (as recalculated using 2010 rates).*
Note. The entries in each row of column (h) must be reduced by 20 percent of the amount allowed as a specific exemption for gifts made after September 8, 1976, and before January 1, 1977 (but no more than $6,000).
Column (i) Enter the sum of column (i) and column (k) from the ***previous*** row.
Column (j) Subtract the amount in column (i) from the amount in column (h).
Column (k) Enter the lesser of column (g) and column (j) for the current row.
Column (l) Subtract the amount in column (k) from the amount in column (g) to determine any tax due. Enter result in column (l).
Repeat for each year in which taxable gifts were made.

For examples of how to use the Line 7 Worksheet, see the examples in the 2010 Instructions for Form 709, schedule B, column C (Unified Credit Allowable for Prior Periods). Add a column to the right of column (k) to determine the tax payable for the current period (column (g) minus column (k)).

Form 706 for 2010 DOD

Table of Unified Credits (as Recalculated for 2010 Rates)	
Period	Unified Credit
1977 (Quarters 1 and 2)	$6,000
1977 (Quarters 3 and 4)	$30,000
1978	$34,000
1979	$38,000
1980	$42,500
1981	$47,000
1982	$62,800
1983	$79,300
1984	$96,300
1985	$121,800
1986	$155,800
1987 through 1997	$190,800
1998	$199,550
1999	$208,300
2000 and 2001	$217,050
2002 through 2010	$330,800

192,800
202,050
211,300
220,550
345,800

Based on prior Rates

Note. In figuring the line 7 amount, do not include any tax paid or payable on gifts made before 1977. The line 7

TABLE T301

Applicable Credit and Applicable Exclusion Amounts

Estates

For Transfers Made In:	The Credit Is:	Taxable Estate Exclusion:
1987–1997	192,800	600,000
1998	202,050	625,000
1999	211,300	650,000
2000–2001	220,550	675,000
2002–2003	345,800	1,000,000
2004–2005	555,800	1,500,000
2006–2008	780,800	2,000,000
2009	1,455,800	3,500,000
2010	1,730,800 [a]	5,000,000 [a]
2011–2012[b]	1,730,800	5,000,000 [c]

Gifts

For Transfers Made In:	The Credit Is:	Taxable Gift Exclusion:
1987–1997	192,800	600,000
1998	202,050	625,000
1999	211,300	650,000
2000–2001	220,550	675,000
2002–2009	345,800	1,000,000
2010	330,800	1,000,000
2011–2012[b]	1,730,800	5,000,000[c]

Notes:

[a] The 2010 Tax Relief Act reinstates the estate tax and step-up (or step-down) in basis rules for decedents dying after 2009, which were previously repealed under the provisions of the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001]. However, for estates of decedents who died in 2010, the executor can elect to apply pre-2010 Tax Relief Act rules (i.e., no estate tax for 2010 deaths and modified carryover basis rules for assets acquired from the decedent). (See Key Issue 2G.)

[b] For gifts made in 2011 and 2012, the gift tax applicable credit is reunified with the estate tax [IRC Sec. 2631(c)].

[c] For 2011 and 2012, the basic exclusion amount is increased by any deceased spousal unused exclusion amount. For 2012, the $5 million basic exclusion amount is indexed for inflation [IRC Sec. 2010(c)].

TABLE T301

Applicable Credit and Exclusion Amounts for Estate Tax Purposes (1977–2009)[1, 2]

For Transfers Made In:	The Credit Is:	The Exclusion Is:
1977	$ 30,000	$ 120,667
1978	34,000	134,000
1979	38,000	147,333
1980	42,500	161,563
1981	47,000	175,625
1982	62,800	225,000
1983	79,300	275,000
1984	96,300	325,000
1985	121,800	400,000
1986	155,800	500,000
1987–1997	192,800	600,000
1998	202,050	625,000
1999	211,300	650,000
2000–2001	220,550	675,000
2002–2003	345,800	1,000,000
2004–2005	555,800	1,500,000
2006–2008	780,800	2,000,000
2009	1,455,800	3,500,000
2010 — 12	~~Repealed~~ 1,730,800	~~Repealed~~ 5,000,000
2013 (and after)	345,800	1,000,000

1 The estate tax is scheduled to be repealed effective for decedents who die in 2010. However, Congress must act to permanently repeal the estate tax. Total repeal is unlikely. Practitioners should continue to monitor legislation. did this

2 These applicable credit and exclusion amounts are also correct for gift tax purposes through 2003. However, unlike the estate tax, the gift tax is not repealed. The applicable exclusion amount for gift tax purposes is $1 million for gifts made after 2001 with a related credit amount of $345,800 through 2009 and $330,800 after 2009.

TABLE T201

Unified Rate Schedule for Estate Tax Returns (1977–2009)[1]

	(1) Taxable Amount Equal to or More Than—	(2) Taxable Amount Less Than—	(3) Tax on Amount in Column (1)	(4) Tax Rate on Excess over Amount in Column (1)
1977 to 2009	0	10,000	0	18%
	10,000	20,000	1,800	20%
	20,000	40,000	3,800	22%
	40,000	60,000	8,200	24%
	60,000	80,000	13,000	26%
	80,000	100,000	18,200	28%
	100,000	150,000	23,800	30%
	150,000	250,000	38,800	32%
	250,000	500,000	70,800	34%
	500,000	750,000	155,800	37%
	750,000	1,000,000	248,300	39%
	MAY BEST 1,000,000	1,250,000	345,800	41%
	1,250,000	1,500,000	448,300	43%
1977 to 2006	1,500,000	2,000,000	555,800	45%
1977 to 2001	2,000,000	2,500,000	780,800	49%
	2,500,000	3,000,000	1,025,800	53%
1977 to 1981	3,000,000	3,500,000	1,290,800	57%
	3,500,000	4,000,000	1,575,800	61%
	4,000,000	4,500,000	1,880,800	65%
	4,500,000	5,000,000	2,205,800	69%
	5,000,000	. . . . .	2,550,800	70%
1982	3,000,000	3,500,000	1,290,800	57%
	3,500,000	4,000,000	1,575,800	61%
	4,000,000	. . . . .	1,880,800	65%
1983	3,000,000	3,500,000	1,290,800	57%
	3,500,000	. . . . .	1,575,800	60%
1984 to 1997	3,000,000	. . . . .	1,290,800	55%
1998 to 2001	3,000,000	10,000,000	1,290,800	55%
2002	2,000,000	2,500,000	780,800	49%
	2,500,000	. . . . .	1,025,800	50%
2003	2,000,000	. . . . .	780,800	49%
2004	2,000,000	. . . . .	780,800	48%
2005	2,000,000	. . . . .	780,800	47%
2006	2,000,000	. . . . .	780,800	46%
2007 to 2009	1,500,000	. . . . .	555,800	45%

[1] Taxpayers filing under the Victims of Terrorism Tax Relief Act of 2001 should use a different tax rate schedule (from IRC Sec. 2201) (see Table T203). See Table T202 for the unified rate schedule used to calculate gift taxes.

ESTATE TAX RECAPTURE OF $5 MILLION GIFT TAX EXCLUSION AFTER 2010 TAX RELIEF ACT SUNSETS

II A donor's use of the gift tax exclusion in making lifetime gifts can be **recaptured** in the form of additional estate taxes if and **to the extent that the amount of the gift tax exclusion used by the donor exceeds the donor's basic exclusion amount at the time of the donor's death**. Such a recapture is sometimes referred to as a **"clawback."** For example, if a donor were to use his or her full $5 million gift tax exclusion in 2011 and 2012, EGTRRA and the 2010 Tax Relief Act were to sunset just after midnight on December 31, 2012 and the donor were to die in 2013, the donor's estate will pay increased estate taxes, **reflecting the difference between the $5 million gift tax exclusion used and the $1 million applicable exclusion amount available at the donor's death.** This recapture potential exists because the estate tax is imposed upon the decedent's taxable estate as increased by the decedent's lifetime adjusted taxable gifts, which is **offset by the applicable exclusion amount at the donor's death.** Accordingly, to the extent that the donor's taxable gifts were sheltered from gift tax by a gift tax exclusion that is larger than the applicable exclusion amount at the time of the donor's death, such gifts will become taxable in the donor's estate.

Source: Practical estate planning in 2011 and 2012, Howard A. Zaritsky, Thomson Reuters 2011

EXAMPLE 4-2: Wilma has a $15 million estate. She makes a $5 million gift in 2011, paying no gift tax because she has her full unified credit (equivalent to a $5 million exclusion amount) available. Two years later, Wilma dies, leaving a $10 million taxable estate. The 2010 Tax Relief Act and EGTRRA sunset on December 31, 2012, leaving Wilma with a $220,550 unified credit, equivalent to a $1 million applicable exclusion amount, and a 55-percent top estate tax rate. Wilma's estate will owe $7,795,000 in estate taxes on a $10 million taxable estate, determined as follows:

Taxable estate	$ 10,000,000
Adjusted taxable gifts	$ 5,000,000
Tentative tax base	$ 15,000,000
Tentative tax	$ 8,140,800
Gift taxes payable	$ –0–
Unified credit on date of death	$ 345,800
Estate tax due	$ 7,795,000

EXAMPLE 4-3: Assume the same facts as in Example 4-2, except that Wilma made only $1 million of lifetime taxable gifts. Wilma dies in 2013, leaving a $14 million taxable estate. Wilma's estate tax liability will still be $7,795,000, determined as follows:

Taxable estate	$ 14,000,000
Adjusted taxable gifts	$ 1,000,000
Tentative tax base	$ 15,000,000
Tentative tax	$ 8,140,800
Gift taxes payable	$ –0–
Unified credit on date of death	$ 345,800
Estate tax due	$ 7,795,000

This can create a serious problem if the deceased has made lifetime taxable gifts significantly disproportionate to the decedent's remaining taxable estate. In such cases, the estate taxes due could exceed the entire taxable estate.

EXAMPLE 4-4: Wilma has a $6 million estate. Wilma lives largely on the income she receives from a trust created by her great-grandfather, and which is exempt from estate taxes because Wilma has only an income interest. The trust is also exempt from the GST tax because it was irrevocable on September 25, 1985, and no additions have been made to it after that date. Wilma makes a $5 million gift in 2011, paying no gift tax because she has her full unified credit (equivalent to a $5 million exclusion amount) available. Two years later, Wilma dies, leaving a $1 million taxable estate. The 2010 Tax Relief Act and EGTRRA sunset on December 31, 2012, leaving Wilma with a $345,800 unified credit, equivalent to a $1 million applicable exclusion amount, and a 55-percent top estate tax rate. Wilma's estate will owe $2,595,000 in estate taxes on a $1 million taxable estate, determined as follows:

Taxable estate	$ 1,000,000
Adjusted taxable gifts	$ 5,000,000
Tentative tax base	$ 6,000,000
Tentative tax	$ 2,940,800
Gift taxes payable	$ –0–
Unified credit on date of death	$ 345,800
Estate tax due	$ 2,595,000

Although a $2,595,000 tax on a $1 million taxable estate sounds unreasonable, it reflects the fact that Wilma took advantage of a $4 million gift tax exclusion that did not exist on the date of her death.

III Real Life Example (Client #: ISF 706)

Facts: Community Estate $12M split between H and W. H dies in 2010; W survives. $1.8M potential step up for H & W

Find the Best Estate Tax Alternative

Solutions possible:

A) Elect out of E.T. Return. File Form 8839 by _____ to allocate $___M step up in basis. Send $6M to Bypass Trust/ $6M to Survivor's Trust.

OR

B) File ET Return. Claim Marital Deduction of $1M. Get 900K step up each for H Estate +W. Send $5M to Bypass Trust/ $7M to Survivor's Trust

IV Facts: DOD 12-15-2010

Taxable Estate	FMV	Basis
Liquid assets	$1,750,000	$1,750,000
R. E.	$1,000,000	$250,000
FLPs & S Corp. (after 45% discount)	$2,000,000	$200,000
Debts	($550,000)	($550,000)
T.E.	$4,200,000	$1,650,000

CONSIDERATIONS:

A) File 706 ?

B) Step up election for FLP?
(NOTE—2010 Form 1065 filed on extension 10/15/2011)
How to elect now?

C) Others??

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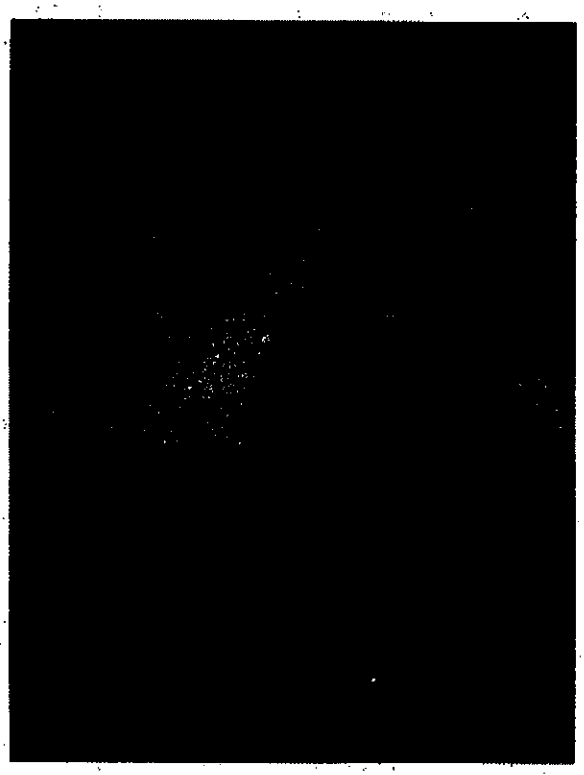

Family Limited Partnerships

FLPs Can Work For Your Client and You Can Help the Process

by Ira S. Feldman, CPA, CVA, CEP

The professional "buzz" in estate planning is currently all about Family Limited Partnerships. (In the context here, FLP refers to any form of family entity including Partnerships, LLCs, etc.). Unfortunately, this professional discourse seems to be solely focused around achieving, or in the case of the most recent tax cases on the subject, not achieving, the expected discount on value of the decedent's interest in the Family Limited Partnership for estate tax filing purposes.

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Do's and Don'ts of FLPs

1. "Minor" partners should contribute their own property to the family venture. Use proceeds of prior family gifts.
2. The managing member should NOT be the senior generation. Give them some control over governance. In some cases, use a corporate managing member not controlled by the senior members.
3. Provide for succession of management in the younger generation. The sooner, the better.
4. Do NOT transfer substantially all of the senior members' assets; and do transfer some assets requiring management. Leave the home out. The "senior" members should have a base level of support outside of the FLP.
5. Don't forget to transfer title to the assets!
6. Do get insurance on the assets - both liability and property damage.
7. Do NOT commingle personal and FLP assets.
8. Prepare a budget. Use fiscal responsibility.
9. ALL distributions must follow the operating agreement and be proportional to ownership interests.
10. Put "clothes" on the "emperor." Make the FLP look like the real entity it is.
11. If the LLC assets consist of a business interest or significant real estate, be careful to clearly define the LLC's role in the investment. Don't inadvertently change the character of the investment.
12. Prepare management reports to all members at least annually-not one prepared by the attorney.
13. Better yet, have an annual meeting of the members in a "comfortable" place where they can take time out to update all members on the family matters and renew old feuds. Take minutes of the meeting. The meeting is deductible to the LLC and they can even bring their professional advisors!!

If we carefully read the more recent and, unfortunately, mostly unfavorable tax decisions, we can develop a planning list of things that could be done right in order to meet the tax expectations. I will cite one example in this article. The Fifth Circuit Court of Appeals decision was finally issued in what is most commonly referred to as *Strangi-II*[1]. The following brief background to the case will illustrate the point "bad facts make bad law."

The Tax Court initially held for the Estate and cancelled the IRS proposed assessment of $2.5 million in additional Estate Taxes on the increased value of the $10 million in assets transferred from the decedent to the FLP. However, just prior to trial, the IRS raised a new legal theory that the Tax Court then ruled was too late to consider. The new theory involved using IRC §2036(a) to draw the assets transferred to the FLP back into the Estate at full value because nothing happened. They argued that the transfer to the FLP was merely a recycling of value. The Fifth Circuit remand back to the Tax Court considered this theory and after doing so, the bad facts produced a bad Tax Court decision *against* the Estate. On appeal to the Fifth Circuit (for the second time-*Strangi II*), the Court affirmed the IRS theory.

While professional "techies" will busy themselves with intricate technical arguments, a clear reading of the case shows the direction that most Courts are taking these days. That is, the IRS has picked the worst factual situations to challenge, and that has made easy decisions for the Courts notwithstanding the technical arguments proposed by taxpayers. In *Strangi*, the bad facts corrupted the case against the taxpayer, the least of which was the packaged Fortress Estate Plan purchased and implemented by the decedent's son-in-law lawyer, Michael Gulig (whose name the Fifth Circuit adopted for the decision). Read the case. You will see a good outline of what you can do to assist your client to establish a good fact pattern. Also see

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Estate of Schutt (TCM 2005-126) for the facts that work.

The purpose of this article is not to belabor the technical arguments. Frankly, I have seen very few cases where those technical arguments have been applied either by Courts or audits to good facts. In fact, my experience on Estate audits is just the reverse. And therein lies where we can help our client make those FLPs work.

Perhaps the reason estates are having IRS difficulties is that they have placed Estate Tax savings too high on the list of purposes for an FLP. These purposes should include the following (note where I have *intentionally* placed the tax savings):

1. Family business/investment succession
2. Management during seniors' lifetime and thereafter
3. Liability protection
4. Avoid spendthrift-preserve assets
5. Income tax "sharing" among family members
6. Achieve Estate Tax Savings (DISCOUNTS)
7. Create more work for your accountant

I threw that last one in to see if you were reading carefully. Just think, if Estate Tax is repealed, wouldn't there still be reasons for you to encourage clients to undertake FLPs?

Think about the last few FLPs you helped your clients implement. Where was the cart and where was the horse? Did your client buy a "package" program? I'm not only referring to those that are sold by purveyors of Estate Plans through commercial outlets, but also those lawyers and document preparers who focus solely on package documentation for their clients. Most of those packages have the correct wrapping, bows, and other paraphernalia, but when you open the box, the contents are rotten or non existent. That's where the accountant comes in. I am not referring to the role of undertaker; instead, let's help the client put meat on the bones. The CPA is in the best position to help his client do that task.

It's the implementation — that's where the FLP fails to achieve its Estate Tax savings. The Courts don't imply that the general principal of the discount is wrong; in fact, IRS challenges on the basis that discounts as a concept is improper have failed. The problem is that the implementation has failed or been non-existent.

You can help your client to implement a Family Limited Partnership by including the following on your implementation list:

- **Assets to be transferred** — careful selection and calculation of their value.
- **Follow the Operating Agreement to the letter** — amend it where necessary to accomplish the family goals. Canned Agreements are not as desirable as one that is more tailored to your client's family situation.
- **Obtain independent valuations** for the initial gifts, and significant future gifts.
- **File gift tax returns and check the "discount" box.** Be sure to attach a plethora of information — see the instructions for disclosures.
- **Have a "post-formation" meeting** — client and professional advisors — to double check implementation.

Do's and Don'ts for your Clients' Family Limited Partnership

You can assist your client by working with the attorney and other advisors during the implementation phase and paying careful attention to the do's and don'ts in the attached sidebar on the preceeding page. This is a valuable service you can render to your client. Most attorneys are not focused on this level of detail. The charges incurred for this service will be modest compared to the cost of defending the discount taken on the value of the FLP after you file the Estate Tax return. And, frankly, in today's atmosphere, if you don't assist your client in these matters, your client may ask (sometime through a lawsuit later on) why you didn't offer this assistance.

Clients' expectations regarding FLPs are often misplaced. They have placed too much emphasis on Estate Tax savings and not enough on the other reasons for forming this family enterprise. While the "techies" are arguing the pros and cons of tax theory, the courts clearly indicate that the problem is with implementation. Bad facts make for bad cases. You can assist your client and the other advisors in implementing and maintaining the FLP in a form that will achieve the tax result, not to mention the other advantages of such entities. See the Do's and Don'ts sidebar for specifics on what you can do. AZ CPA

Ira S. Feldman, CPA, is a Certified Valuation Analyst, Certified Estate Planner, and a tax consultant to several CPA firms. His firm, Toback CPAs, P.C., the largest locally owned CPA firm in Arizona at the time, was acquired by a national firm in 2000. Mr. Feldman is a member of the Editorial Review Board of PRACTICAL TAX STRATEGIES, published by RIA. He is a former member of the Board of Directors of the Arizona Society of CPAs, former Chairman of their Tax Committee, and currently is president of the Phoenix Tax Workshop and a Director of Small Business Council of America. He currently edits the Arizona Master Income Tax Guide™ and Arizona Master Sales & Use Tax Guide™ published by the Phoenix Tax Workshop.

Endnotes

[1] *Albert Strangi, CA5 No 03-60992, July 15, 2005 (96AFTR 2005-5048). The latest decision is reported under the name of Gulig.*

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¶ 5.02 REASONS FOR OWNING LIFE INSURANCE—APART FROM THE ESTATE AND GST TAXES

The practical estate planner must assure his or her clients understand all of the roles that life insurance plays in an estate plan. The 2010 Tax Relief Act's increased estate tax applicable exclusion amount and GST exemption reduce the need for life insurance proceeds to fund federal estate or GST tax liability. Nevertheless, liquidity will remain a concern for most significant estates.

Apart from funding a prospective federal estate or GST tax liability, the most important reasons that a client should buy and maintain one or more life insurance policies, include the following:

1. The payment of administration expenses of both the insured's estate and the estate of the insured's spouse;
2. The payment of state death taxes on the insured's estate and the estate of the insured's spouse;
3. The payment of the debts of the insured and the insured's spouse;
4. The payment of income taxes owed by the insured's estate and the estate of the insured's spouse, including any tax liability attributable to items of income in respect of a decedent (IRD);
5. The payment of costs necessary to maintain the standard of living of the insured's surviving spouse, children, and other family members;
6. The provision of cash for equalizing the inheritances of beneficiaries;
7. The provision of cash needed to minimize or settle disputes between or among the deceased insured's children or between or among such children and the insured's surviving spouse;
8. The replacement of cash or assets used to fund the deceased insured's gifts to charity;
9. The provision of funds necessary to buy out the ownership interest of a person who is a partner, shareholder, or co-owner in a business that is part of the deceased insured's estate;
10. The funding of nonqualified deferred compensation obligations of the deceased or a business owned by the deceased; and
11. The funding of death-benefit-only obligations owed by the deceased or the deceased's business.[2]

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[2] On the various estate planning uses of life insurance, see Zaritsky & Leimberg, Tax Planning With Life Insurance: Analysis With Forms chs. 3, 4, 7, 8 (Thomson Reuters/WG&L, 2d ed. 1998); see also Leimberg & Gibbons, "Life (Insurance) After Estate Tax 'Repeal' or 'Reform'," 28 Est. Plan. 128 (Mar. 2001); Leimberg & Gibbons, "Dealing With EGTRRA's Impact on an Insurance Professional's Practice," 28 Est. Plan. 403, 404 (Sept. 2001); Leimberg & Gibbons, "Life Insurance: Decision-Making After September 11th and EGTRRA," 29 Est. Plan. 36 (Jan. 2002).

of the growing popularity of decanting as a means of modifying the terms of an irrevocable trust, such a ruling would be desirable. Whether it would also be welcome depends upon its contents.

[2] Allocating the GST Exemption

Life insurance trusts are often good places for GST tax planning because the grantor can allocate a relatively small amount of GST exemption to the premium payments and protect a larger sum (i.e., the death benefits) from GST tax. The 2010 Tax Relief Act made this planning easier and more secure in several ways

No Annual Exclusion For GST For Crummey W/D

1. It extends for two more years the rule permitting automatic allocation of a donor's GST exemption to lifetime transfers that are not direct skips, but that are made to generation-skipping trusts;[33]
2. It extends for two more years the rule that allows a transferor to make a retroactive allocation of GST exemption to a transfer in trust if (a) a beneficiary of the trust dies before the transfer (but after the date of enactment) and (b) the predeceasing beneficiary was both a non-skip person and a lineal descendant of the transferor's grandparent or a grandparent of the transferor's spouse, assigned to a generation younger than the generation of the transferor;[34]
3. It extends for two more years the rule allowing the severance of a single trust into multiple trusts if (a) the division is made fractionally; (b) the terms of the new trusts provide, in the aggregate, for the same succession of interests of beneficiaries as in the original trust; and (c) the undivided trust, if it has an inclusion ratio other than one (1:0) or zero (0:1), is divided into two trusts, one of which has an inclusion ratio of one and the other of which has an inclusion ratio of zero;[35]
4. It extends for two more years the rule that provides that the value of property for purposes of determining the GST inclusion ratio (and the rate of GST tax imposed on taxable events), in connection with timely and automatic allocations of GST exemption, is the value finally determined for gift or estate tax purposes;[36]
5. It extends for two more years the legislative declaration that substantial compliance with the statutory and regulatory requirements for al-

[33] IRC § 2632(c).
[34] IRC § 2632(d).
[35] IRC § 2642(a)(3).
[36] IRC § 2642(b).

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locating GST exemption establishes that the GST exemption was allocated to a particular transfer or a particular trust;[37] and

6. It substantially increases the GST exemption to $5 million for transfers and allocations in 2010, 2011, or 2012, so that insured transferors need not be as concerned that allocating GST exemption to an insurance trust will waste the allocation.

These rules make it important that the practical estate planner examine every existing irrevocable life insurance trust to determine (1) whether there is a reasonable likelihood that a GST will occur under the trust instrument; (2) whether an adequate amount of GST exemption was allocated to the trust on a timely filed gift tax return; and (3) whether additional allocations of GST exemption are appropriate.

In many cases, the practitioner will discover that GST exemption was not allocated to the trust, because all transfers to the trust qualified for the gift tax annual exclusion, and, therefore, the client (and, perhaps, the client's advisors) assumed that gift tax returns were not required. The GST exemption must be allocated to a lifetime transfer in trust on a timely filed gift tax return even if no gift tax is owed on the transfer. The IRS, however, has been very generous in permitting late allocations of GST exemption where the taxpayer relied on an accountant, attorney, or other professional to make the appropriate allocation. The IRS will, in these cases, allow a late retroactive allocation sufficient to reduce the GST tax inclusion ratio to zero.[38]

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[37] IRC § 2642(g).

[38] See, e.g., Priv. Ltr. Ruls. 200503025, 200504024, 200506003, 200509011, 200509012, 200510018, 200513008, 200519012, 200519013, 200519032, 200520008, 200532016, 200532027–200532028, 200532031, 200532037, 200535005, 200535019, 200538017, 200538018, 200538021, 200538037, 200543048, 200548003, 200549001, 200549003, 200551005, 200602027, 200603023, 200603024, 200604002, 200604024, 200608004, 200608008, 200608021, 200613021, 200616022, 200618006, 200619015, 200620003, 200625013, 200626008, 200629016, 200632009, 200636091, 200637011, 200644001, 200644007, 200652042, 200702002, 200702014, 200704003, 200710001, 200711005, 200715001, 200715008, 200715009, 200718031, 200724001, 200735006, 200735018, 200740008, 200743028, 200745005, 200746006, 200751019–200751021, 200816001, 200817011, 200825016, 200831021, 200838005, 200838021, 200838024, 200839020, 200839021, 200839022, 200839028, 200841025, 200842008, 200852012, 200905002, 200905003, 200906023, 200921007, 200925028, 200927015, 200931009, 200931010, 200934025, 200934027, 200944009, 200945003, 200947003, 200947031, 200949006, 200949021, 200953003, 200953004, 200953017, 201002010, 201010003–201010005, 201010016, 201014032, 201021012, 201022003, 201024006, 201024009–201024010, 201025036, 201026021, 201034008, 201034009, 201034013, 201035001, 201035008, 201036010, 201036011, 201039004, 201049012 (relying on accountant, CPA, or accounting firm); 200419011, 200725007 (relying on attorney and accountant; attorney relied on accountant); 200743026 (failure to allocate by accountant who relied on incorrect data from business manager); 200512006, 200550027, 200550028, 200550029, 200813021, 200946001, 200946002 (failure to allocate exemption because of errors by

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Inside This Issue

IRS Offers Filing and Penalty Relief for 2010 Estates; Basis Form Now Due Jan. 17; Extension to March Available for Estate Tax Returns

WASHINGTON — The Internal Revenue Service announced today that large estates of people who died in 2010 will have until early next year to file various required returns and pay any estate taxes due. In addition, the IRS is providing penalty relief to certain beneficiaries of these estates on their 2010 federal income tax returns.

This relief is designed to give large estates, normally those over $5 million, more time to comply with key tax law changes enacted late last year. Revised versions of the estate tax forms are now available on IRS.gov, and the carryover basis form will be released this fall.

The IRS is providing the following relief:

Large estates, opting out of the estate tax, now will have until Tuesday, Jan. 17, 2012, to file Form 8939. This special carryover basis form, required of estates making this choice, was previously due on Nov. 15, 2011. Because this is a change in the specified due date rather than an extension, no statement or form needs to be filed with the IRS to have this new due date apply.

2010 estates that request an extension on Form 4768 will have until March 2012 to file their estate tax returns and pay any estate tax due. Normally, a six-month filing extension is automatically granted to estates filing this form, but extensions of time to pay are granted only for good cause. As a result, most 2010 estates that timely file Form 4768 will have until Monday, March 19, 2012 to file Form 706 or Form 706-NA. For estates of those dying late in 2010 (after Dec. 16, 2010 and before Jan. 1, 2011), the due date is 15 months after the date of death. No late-filing or late-payment penalties will be due, though interest still will be charged on any estate tax paid after the original due date.

Special penalty relief is provided to many individuals, estates and trusts that already filed a 2010 federal income tax return, or obtained an extension and plan to file by the Oct. 17, 2011 extended due date. Late-payment and negligence penalty relief applies to persons inheriting property from a decedent dying in 2010, who then sells the property in 2010 but improperly reports gain or loss because they did not know whether the estate made the carryover basis election. Details are in Notice 2011-76, posted today on IRS.gov.

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Form **8939**

Department of the Treasury
Internal Revenue Service

Allocation of Increase in Basis for Property Acquired From a Decedent

File separately. Do NOT file with Form 1040. See below for filing address.
To be filed for decedents dying after December 31, 2009, and before January 1, 2011.

OMB No. 1545-2203

2010

If this is an amended Form 8939, check here ▶ ☐ If filing this Form 8939 revokes a timely and otherwise valid section 1022 election, check here ▶ ☐

Part 1—Decedent and Executor

1a Decedent's first (given) name and middle initial (and maiden name, if any)	1b Decedent's last (family) name	2 Decedent's Social Security No.
3 County, state, and ZIP code, or foreign country, of legal residence (domicile) at time of death	4 ☐ Check if decedent was a nonresident and was not a citizen of the U.S. See instructions. If checked, enter nationality (citizenship)	5 Date of death
6a Name of executor (see instructions)	6b Executor's address (number and street including apartment or suite number; city, town, or post office; state; and ZIP code) and phone number	
6c Executor's social security number (see instructions)		Phone no. ( )

Part 2—Basis Allocation Computation

7 Marital status of the decedent at time of death:

- ☐ Married
- ☐ Widow or widower— Name, SSN, and date of death of deceased spouse ▶ _____
- ☐ Single
- ☐ Legally separated
- ☐ Divorced— Date divorce decree became final ▶

8a Surviving spouse's name	8b Spouse's social security number

9 Individuals (other than the surviving spouse), trusts, estates, or other entities who acquired property from the estate (see instructions).

Name of individual, trust, estate, or other entity	Taxpayer identification number

10	Built-in loss (see instructions)	
11	Capital loss carryforward (see instructions)	
12	Net operating loss carryforward (see instructions)	
12a	Add lines 10, 11, and 12 (see instructions)	
12b	Enter $1,300,000 or $60,000 (see instructions)	
12c	General Basis Increase. Add the amounts on line 12a and line 12b (see instructions)	
13	Enter the total amount of General Basis Increase allocated on all Schedules A line 4B, column (e)(i) (see instructions)	
14	Enter the total amount of Spousal Property Basis Increase allocated on all Schedules A line 4B, column (e)(ii) (see instructions)	

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. I (executor) understand that if any other person files a Form 8939 or Form 706 (or Form 706-NA) with respect to this decedent or estate, that my name and address will be shared with such person, and I (executor) also hereby request the IRS share with me the name and address of any person who files a Form 8939 or Form 706 (or Form 706-NA) with respect to this decedent or estate. Declaration of preparer other than the executor is based on all information of which preparer has any knowledge.

Sign Here	▶ Signature of executor	▶ Date
	▶ Signature of executor	▶ Date

Paid Preparer Use Only				
Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
Firm's name ▶			Firm's EIN ▶	
Firm's address ▶			Phone no.	

Send Form 8939 (including accompanying schedules and statements) to: Internal Revenue Service, Estate & Gift Stop 824G, 201 W. Rivercenter Blvd., Covington, KY 41011

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SCHEDULE A (Form 8939)

Department of the Treasury
Internal Revenue Service

Disclosure of Property Acquired From the Decedent (and Recipient Statement)

Recipients of Schedule A: For more information and details on the information shown on this schedule, see the instructions for Form 8939 and *www.irs.gov/form8939*.

Estate of: | **Decedent's Social Security Number** | **Number of**

Complete a separate Schedule A for each recipient of property, including the decedent's estate. See instructions.

Part I General Information

1a Name of executor	**1b** Executor's address (number and street including apartment or suite number; city, town, or post office; state; and ZIP code) and phone number.
1c Estate's taxpayer identification number (TIN)	Phone no. ( )
2a Name and address of recipient	**2b** Recipient's taxpayer identification number (TIN)

Part II Property Information

3 For all property acquired from the decedent by the recipient named in line 2a the basis of which at the date of death is greater than or equal to its fair market value at the date of death, provide the following information. See instructions.

Item No.	(a) Description of property	(b) Date decedent acquired property	(c) Adjusted basis at death	(d) FMV at death	(e) Amount of gain that would be ordinary income
3A Totals from continuation schedules (or additional sheets) attached to this schedule					

(If more space is needed, attach the continuation schedule at the end of this Form).

4 For all property acquired from the decedent by the recipient named in line 2a the basis of which at the date of death is less than fair market value at the date of death, provide the following information. By checking the box in column (e)(ii) on line 4 for each item of property that was sold prior to distribution and to which I am allocating Spousal Property Basis Increase, I hereby certify in accordance with section 4.02(3) of Revenue Procedure 2011-41 that all of the net proceeds from the sale of such property or property interest to which Spousal Property Basis Increase has been allocated will be distributed to or for the benefit of the surviving spouse in a manner that would qualify property as qualified spousal property, as defined in section 1022(c)(3). See instructions.

Item No.	(a) Description of property	(b) Date decedent acquired property	(c) Adjusted basis at death	(d) FMV at death	(e)* Allocation of basis increase		(f) Amount of gain that would be ordinary income
					(i) General basis increase	(ii) Spousal property basis increase	
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4A Totals from continuation schedules (or additional sheets) attached to this schedule							
4B Total for columns (e)(i) and (e)(ii)							

* The sum of the amounts in columns (e)(i) and (e)(ii) on each line cannot exceed the difference between the amounts in columns (c) and (d) on that line.

(Make copies of this schedule before completing if you will need more than one schedule).

Estate of:

Decedent's Social Security Number

Number of

SCHEDULE A, LINE 3
CONTINUATION SHEET

Item No.	(a) Description of the property	(b) Date decedent acquired property	(c) Adjusted basis at death	(d) FMV at death	(e) Amount of gain that would be ordinary income
Totals for columns (c) and (d) Enter here and include on line 3A of Schedule A					

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 (Make copies of this schedule before completing if you will need more than one schedule).

Estate of:	**Decedent's Social Security Number**	**Number of**

SCHEDULE A, LINE 4
CONTINUATION SHEET

By checking the box in column (e)(ii) on line 4 for each item of property that was sold prior to distribution and to which I am allocating Spousal Property Basis Increase, I hereby certify in accordance with section 4.02(3) of Revenue Procedure 2011-41 that all of the net proceeds from the sale of such property or property interest to which Spousal Property Basis Increase has been allocated will be distributed to or for the benefit of the surviving spouse in a manner that would qualify property as qualified spousal property, as defined in section 1022(c)(3).

Item No.	(a) Description of property	(b) Date decedent acquired property	(c) Adjusted basis at death	(d) FMV at death	(e) Allocation of basis increase (i) General basis increase	(e) Allocation of basis increase (ii) Spousal property basis increase	(f) Amount of gain that would be ordinary income
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Totals for columns (e)(i) and (e)(ii) Enter here and include on line 4A of Schedule A							

Estate of:	Decedent's Social Security Number	Number of

SCHEDULE R—GENERATION-SKIPPING TAX EXEMPTION

Part 1. GST Exemption

1 Maximum allowable GST exemption	1	
2 Total GST exemption allocated by the decedent to decedent's lifetime transfers	2	
3 Total GST exemption allocated by the executor, using Form 709, to decedent's lifetime transfers	3	
4 GST exemption allocated on line 4 of Schedule R, Part 2	4	
5 Total GST exemption allocated on line 4 of Schedule(s) R-1	5	
6 Total GST exemption allocated to *inter vivos* transfers and direct skips (add lines 2–5)	6	
7 GST exemption available to allocate to trusts (subtract line 6 from line 1)	7	

8 Allocation of GST exemption to trusts (as defined for GST tax purposes):

A Name of trust	B Trust's EIN (if any)	C GST exemption allocated on lines 2–5, above (see instructions)	D Additional GST exemption allocated (see instructions)	E Trust's inclusion ratio (optional—see instructions)
8D Total. May not exceed line 7, above		8D		

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Estate of:	Decedent's Social Security Number

Part 2. Direct Skips

Name of skip person	Description of property interest transferred	Value

1 Total value of all property interests listed above	1	
2 State death taxes and other charges borne by the property interests listed above	2	
3 Total tentative maximum direct skips (subtract line 2 from line 1)	3	
4 GST exemption allocated	4	

SCHEDULE R-1 (Form 8939)

Department of the Treasury
Internal Revenue Service

Direct Skips From a Trust

Executor: File one copy with Form 8939 and send two copies to the fiduciary. Do not pay any tax. See instructions for details.
Fiduciary: See instructions for details.

Name of trust	**Trust's EIN**
Name and title of fiduciary	Name of decedent
Address of fiduciary (number and street)	Decedent's SSN
City, state, and ZIP code	Name of executor
Address of executor (number and street)	City, state, and ZIP code
Date of decedent's death	

Description of property interests subject to the direct skip	Value

1	Total value of all property interests listed above	1
2	State death taxes and other charges borne by the property interests listed above	2
3	Tentative maximum direct skip from trust (subtract line 2 from line 1)	3
4	GST exemption allocated	4
5	Subtract line 4 from line 3	5

IRS

Specific Instructions

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Checkbox for Amended Return

If this is an amended or supplemental return, check the box for an amended return. If the amended return is filed under Regulations section 301.9100-2, also write "FILED PURSUANT TO SECTION 301.9100-2" at the top of the return.

Checkbox for Revoking Section 1022 Election

If this Form 8939 revokes a previous Section 1022 Election made on an earlier Form 8939, check the box for revocation of an election.

Decedent's Name and Address

Enter the decedent's name and address.

Line 2. Decedent's Social Security Number

If the decedent was a nonresident or resident alien and did not have and was not eligible to get a social security number (SSN), the executor must apply for an individual taxpayer identification number (ITIN) on behalf of the decedent. For details on how to do so, see Form W-7 and its instructions. It takes 6 to 10 weeks to get an ITIN. If the decedent already had an ITIN, enter it wherever the decedent's SSN is requested on Form 8939.

Note.

An ITIN is for tax use only. It does not entitle the holder to social security benefits or change the holder's employment or immigration under U.S. law.

Line 6a. Executor's Name

If there is more than one executor, enter the name of the executor filing this Form 8939. List the other executors' names, addresses, and SSNs (if applicable and if known) on an attached sheet.

Line 6c. Executor's Social Security Number

Only individual executors should complete this line. If there is more than one individual executor, all should list their SSNs on an attached sheet.

Line 9. Names and Addresses of Recipients.

Enter the name and address of any recipient, other than the decedent's surviving spouse, of property acquired from the decedent.

Line 10. Built-in Loss

Enter the aggregate amount of any losses that would have been allowable under section 165 if the property acquired from the decedent had been sold at FMV immediately before the decedent's death. In the case of a decedent who was a nonresident not a citizen of the United States, enter zero. For more information, see *Unrealized Losses*, earlier.

Line 11. Capital Loss Carryforward

Enter the aggregate amount of any capital loss carryforward under section 1212(b) that would (but for the decedent's death) have been carried from the decedent's last tax year to a later tax year of the decedent. In the case of a decedent who was a nonresident not a citizen of the United States, enter zero. For more information, see *Carryforwards*, earlier.

Line 12. Net Operating Loss Carryforward

Enter the aggregate amount of any NOL carryover under section 172 that would (but for the decedent's death) have been carried from the decedent's last tax year to a later tax year of the decedent. In the case of a decedent who was a nonresident not a citizen of the United States, enter zero. For more information, see *Carryforwards*, earlier.

You can use Schedule A of Form 1045, Application for Tentative Refund to figure the amount, if any, of the decedent's NOL

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Line 12a.

Add lines 10, 11, and 12. This line 12a is the amount of the Carryovers/Unrealized Losses Increase.

Line 12b.

For nonresident decedents who were not United States citizens, enter $60,000. For all others, enter $1,300,000.

Line 12c. General Basis Increase

Add lines 12a and 12b. This line 12c is the total General Basis Increase that is available to allocate to property acquired from and owned by the decedent.

Line 13.

Enter the sum of the totals from all Schedules A, line 4B, column (e)(i) on this line. This total may not exceed the amount listed on line 12a.

Line 14.

Enter the total from each Schedule A, line 4B, column (e)(ii) on this line. This total may not exceed $3,000,000.

Schedule A

Complete a separate Schedule A—Disclosure of Property Acquired From the Decedent (and Recipient Statement) for each recipient of property acquired from the decedent, including each of the following.

- The decedent's estate.
- The decedent's surviving spouse, if any.
- Any QTIP or other trust.
- Each other person who acquires property from the decedent by bequest, devise, inheritance, or otherwise by reason of the death of the decedent to the extent that such property passed without consideration.

Each property or interest in property required to be disclosed on Form 8939 must be reported on a Schedule A.

Multiple and partial interests in property.

For an undivided or fractional interest in property held by and received from the decedent by the recipient listed on line 2a, describe only the undivided or fractional interest. For a life estate or remainder interest in property, where the partial interest received by the recipient listed on line 2a was created by the bequest or devise made by the decedent, however, Basis increase may be allocated only to the entire property owned by the decedent. Therefore, assuming the decedent's adjusted basis in the entire property is less than the FMV of the property at the date of death, describe the undivided interest in property (including the decedent's adjusted basis, the property's FMV at the date of death, and the amount of Basis increase allocated by the executor) on an attachment to Line 4 or in column (a) of Line 4. Also include in this description the applicable section 7520 rate, the life tenant's age, and the recipient's actuarial factor at the decedent's date of death. Compute the recipient's portion of adjusted basis, FMV, and basis increase allocation (allocated on an actuarial basis between the income and the remainder interests), and list the recipient's share of each in columns (b) through (f) on line 4.

Note.

For property transferred in trust with an income and remainder interest, the trust is considered the sole recipient of the property.

Example.

Donald died on October 10, 2010, owning real property. Donald originally acquired the property on December 10, 2007. As of Donald's date of death, the property has an FMV of $967,000 and an adjusted basis of $425,000. Donald devised the property to Larry for life, with remainder to Rachel. At the time of Donald's death, Larry is 48 years old. The section 7520 rate for October 2010 is 2.0 percent. Donald's executor, Edward, makes the Section 1022 Election by timely filing Form 8939. Edward allocates $542,000 of General Basis Increase to the property. See *Attachment to Larry's Schedule A*, on the next page and *Attachment to Rachel's Schedule A*, later.

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Line 1a—Executor's Name

Enter the name of the executor shown on line 6a of Form 8939.

Line 2a—Name and Address of Recipient

Enter the name and address of the recipient of the property acquired from the decedent reported on this Schedule A.

Line 2b—Recipient's Taxpayer Identification Number

If the person named in line 2a is an individual, enter the SSN or ITIN, as applicable, of that individual. If the person named in line 2a is a corporation, partnership, trust, estate, or other entity, enter the entity's employer identification number (EIN).

Line 3—Property Acquired from the Decedent with Adjusted Basis Greater Than or Equal to FMV

List each item of property (other than cash) acquired from the decedent by the person listed on line 2a the basis of which at the time of death is greater than or equal to its FMV at the date of death. Number each item of property in the left-hand column.

Column (a). Description of the Property. For each item of property acquired from the decedent, accurately describe the property received by the person named on line 2a. The following guidelines can be used in describing the property.

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- *Real property.* Describe the real estate in enough detail so that the property could be easily located.
    1. For each parcel of real estate, report the area.
    2. For city or town property, report the street and number, ward, subdivision, block and lot, etc.
    3. For rural property, report the township, range, landmarks, etc.
- *Stocks.* For stocks, list:
    1. The number of shares;
    2. The exact name of corporation; and
    3. The principal exchange upon which sold, if listed on an exchange.
- *Bonds.* For bonds, list:
    1. The quantity and denomination;
    2. The name of obligor;
    3. Date of maturity;
    4. Interest rate;
    5. Interest due date; and
    6. The principal exchange, if listed on an exchange.
- *Tangible personal property.* Accurately describe any tangible personal property (for example, works of art, jewelry, furs, silverware, books, statuary, vases, oriental rugs, coin or stamp collections) received by the person listed on line 2a in enough detail so that such property could be easily identified by its description.

Column (b). Date Decedent Acquired the Property. For each item of property, enter the date the decedent acquired the property. If the actual date of acquisition is not known, and cannot be determined after reasonable inquiry, enter the approximate date of acquisition and write "approximate" after the date.

Column (c). Adjusted Basis at Death. For each item of property, enter the adjusted basis of the property as of the date of the decedent's death. See *Decedent's Adjusted Basis*, earlier, for more details.

Column (d). FMV at Death. For each item of property, enter the FMV of the property as of the date of the decedent's death. See *Fair Market Value (FMV)*, earlier, for more information.

Column (e). Ordinary Gain. For each item of property, enter the maximum amount of gain, if any, that would be ordinary. Attach a statement detailing how you figured the amount of gain that would be ordinary.

Line 4—Property Acquired From the Decedent With Adjusted Basis Less Than FMV

List each item of property (other than cash) acquired from the decedent by the person listed on line 2a the basis of which at the time of death is less than its FMV at the date of death.

Number each item of property in the left-hand column. Four categories of property can be reported here.

1. Property that receives an allocation of both General Basis Increase in column (e)(i) and also Spousal Property Basis Increase in column (e)(ii).
2. Property that receives only an allocation of Spousal Property Basis Increase in column (e)(ii).
3. Property that receives only an allocation of General Basis Increase in column (e)(i).
4. Property that receives no allocation of increase to basis.

Do not include in column (e)(i) or (e)(ii) of line 4 any adjustments to basis other than adjustments to basis under section 1022(b) or (c). For example, do not include in column (e)(i) or (e)(ii) any adjustments to basis required or permitted under sections 469, 1016, or 2654.

Column (a). Description of the property. For each item of property acquired from the decedent, accurately describe the property received by the person listed on line 2a. Use the guidelines discussed under the instructions to line 3, column (a), earlier.

If the property is property in which the surviving spouse acquires a qualified terminable interest, include a description of the spouse's interest in the property and include the designation "QTIP" in the description of the property.

If the property is any of the kinds of property listed under *Property Not Eligible for Increase to Basis* earlier, include sufficient information to identify the kind of ineligible property and the designation "Ineligible Property" in the description of the property. Attach a statement that lists the item number from Schedule A, Line 4 and an explanation as to why the property is ineligible for a basis increase.

If the item of property acquired from the decedent is treated as not having been owned by the decedent at the time of death, so state. If the item of property acquired from the decedent is treated as having been owned by the decedent at the time of death to the extent provided in rule 2 or rule 3 under *Jointly held property*, earlier, attach a statement and show how the extent of the decedent's ownership is figured.

Column (b). Date decedent acquired the property. For each item of property, enter the date the decedent acquired the property. If the actual date of acquisition is not known, and cannot be determined after reasonable inquiry, enter the approximate date of acquisition and write "approximate" after the date.

Column (c). Adjusted basis at death. For each item of property, enter the adjusted basis of the property as of the date of the decedent's death. See *Decedent's Adjusted Basis*, earlier, for more details.

Column (d). FMV at death. For each item of property, enter the FMV of the property as of the date of the decedent's death. See *Fair Market Value (FMV)*, earlier, for more information.

Column (e)(i). Basis increase allocated to property. List the amount of General Basis Increase (as defined in Rev. Proc. 2011-41, section 4.02

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(2)) allocated to the property described in column (a).

Do not include in column (e)(i) any adjustments to basis other than those provided for in section 1022(b).

Column (e)(ii). Spousal Property Basis increase allocated to property. List the amount of Spousal Property Basis Increase (as defined in Rev. Proc. 2011-41, section 4.02(2)) allocated to the property described in column (a).

Do not include any adjustments to basis other than those provided for in section 1022(c) or in Rev. Proc. 2011-41, section 4.02(3).

Spousal Property Basis Increase may be allocated only to qualified spousal property, except as otherwise provided in Rev. Proc. 2011-41, section 4.02(3).

If column (e)(ii) includes an allocation of Spousal Property Basis Increase to property that is sold (regardless of whether the allocation of Spousal Property Basis Increase is made before or after such sale) instead of being distributed to or for the surviving spouse, check the box in column (e)(ii). Attach a statement identifying the property by item number and showing how the allocation of Spousal Property Basis Increase complies with the rules of Rev. Proc. 2011-41, section 4.02(3).

Attach this statement to the Schedule(s) A that show the property to which Spousal Property Basis Increase is allocated. Also, attach to such schedules each document providing a bequest or devise to the surviving spouse.

Column (f). Ordinary gain. Enter in column (f) the maximum amount of gain, if any, that would be treated as ordinary income. Attach a statement including the item number from line 4, showing how you figured the amount of gain that would be ordinary and providing sufficient information to figure this amount on any subsequent sale, exchange, or other disposition.

Line 4B—Total Allocation of Basis Increase

Add column (e)(i) and (e)(ii) and place the sum on line 4B. The sum of line 4B, column (e)(i) of all Schedules A may not exceed the amount on line 12c, General Basis Increase, on page 1. Enter the sum of line 4B, column (e)(i) from all Schedules A on line 13 of page 1. Enter the sum of line 4B, column (e)(ii), from all Schedules A on line 14, of page 1.

Schedules R and R-1—GST Exemption

Introduction and Overview

Schedule R is used to allocate the generation-skipping (GST) exemption. Schedule R-1 is used to inform the trustee of certain trusts of the amount of GST exemption allocated to such trusts. Because the GST tax rate for 2010 is zero, these schedules are not used to compute the GST tax. For certain definitions and general rules that may be applicable, see the instructions to Schedule R in the instructions to Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

How To Complete Schedules R and R-1

Valuation. Enter on Schedules R and R-1 the FMV of the property interests subject to the GST tax.

How To Complete Schedule R

Part 1. GST Exemption Reconciliation

Part 1, line 8, Part 2, line 4, and line 4 of Schedule R-1 are used to allocate the decedent's GST exemption. This allocation is made by filing Form 8939 and attaching a completed Schedule R and/or R-1. Once made, the allocation is irrevocable. You are not required to allocate all of the decedent's GST exemption. However, the portion of the exemption that you do not allocate will be allocated by the IRS under the deemed allocation at death rules of section 2632(e).

For transfers made through 1998, the GST exemption was $1,000,000. Beginning in 2010, the GST exemption is $5,000,000; however, the tax rate on generation-skipping transfers made in 2010 is 0%. The exemption amounts for 1999 through 2009 are as follows:

Year of transfer	GST exemption
1999	1,010,000
2000	1,030,000
2001	1,060,000
2002	1,100,000
2003	1,120,000
2004 and 2005	1,500,000
2006, 2007, and 2008	2,000,000
2009	3,500,000

The amount of each increase can only be allocated to transfers made (or appreciation that occurred) during or after the year of the increase. The following example shows the application of this rule:

Example.

In 2003, G made a direct skip of $1,120,000 and applied her full $1,120,000 of GST exemption to the transfer. G made a $450,000 taxable direct skip in 2004 and another of $90,000 in 2006. For 2004, G can only apply $380,000 of exemption ($380,000 inflation adjustment from 2004) to the $450,000 transfer in 2004. For 2006, G can apply $90,000 of exemption to the 2006 transfer, but nothing to the transfer made in 2004. At the end of 2006, G would have $410,000 of unused exemption that she can apply to future transfers (or appreciation) starting in 2007.

Line 2. These allocations will have been made either on Forms 709 filed by the decedent or on Notices of Allocation made by the decedent for *inter vivos* transfers that were not direct skips but to which the decedent allocated the GST exemption. These allocations by the decedent are irrevocable.

Also include on this line allocations deemed to have been made by the decedent under the rules of section 2632. Unless the decedent elected out of the deemed allocation rules, allocations are deemed to have been made in the following order:

1. To *inter vivos* direct skips and
2. Beginning with transfers made after December 31, 2000, to lifetime transfers to certain trusts, by the decedent, that constituted indirect skips that were subject to the gift tax.

For more information, see section 2632.

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Line 3. Make an entry on this line if you are filing Form(s) 709 for the decedent and wish to allocate any exemption. See Notice 2011-66, section II.B. for special rules regarding *inter vivos* direct skips occurring during 2010.

Lines 4 and 5. These lines represent your allocation of the GST exemption to direct skips made by reason of the decedent's death. Complete Part 2 and Schedule R-1 before completing these lines.

Line 6. Line 6 is used to allocate the remaining unused GST exemption (from line 7) and to help you compute the trust's inclusion ratio. Line 6 is a Notice of Allocation for allocating the GST exemption to trusts as to which the decedent is the transferor and from which a generation-skipping transfer could occur after the decedent's death.

If line 6 is not completed, the deemed allocation at death rules will apply to allocate the decedent's remaining unused GST exemption, first to property that is the subject of a direct skip occurring at the decedent's death, and then to trusts as to which the decedent is the transferor. If you wish to avoid the application of the deemed allocation rules, you should enter on line 6 every trust (except certain trusts entered on Schedule R-1, as described below) to which you wish to allocate any part of the decedent's GST exemption. Unless you enter a trust on line 6, the unused GST exemption will be allocated to it under the deemed allocation rules.

If a trust is entered on Schedule R-1, the amount you entered on line 4 of Schedule R-1 serves as a Notice of Allocation and you need not enter the trust on line 6 unless you wish to allocate more than the Schedule R-1, line 4 amount to the trust. However, you must enter the trust on line 6 if you wish to allocate any of the unused GST exemption amount to it. Such an additional allocation would not ordinarily be appropriate in the case of a trust entered on Schedule R-1 when the trust property passes outright (rather than to another trust) at the decedent's death.

To avoid application of the deemed allocation rules, Schedule R should be filed to allocate the exemption to trusts that may later have taxable terminations or distributions under section 2612 even if the form is not required to be filed to report GST tax.

Line 6, column C.

Enter the GST exemption included on lines 2 through 5 of Part 1 of Schedule R, and discussed above, that was allocated to the trust.

Line 6, column D.

Allocate the amount on line 7 of Part 1 of Schedule R in line 6, column D. Value the trust as of the date of death. You should inform the trustee of each trust listed on line 6 of the total GST exemption you allocated to the trust. The trustee will need this information to compute the GST tax on future distributions and terminations.

Line 6, column E. Trust's inclusion ratio.

The trustee must know the trust's inclusion ratio to figure the trust's GST tax for future distributions and terminations. You are not required to inform the trustee of the inclusion ratio and may not have enough information to compute it. Therefore, you are not required to make an entry in column E. However, column E and the worksheet below are provided to assist you in computing the inclusion ratio for the trustee if you wish to do so.

You should inform the trustee of the amount of the GST exemption you allocated to the trust. Line 6, columns C and D may be used to compute this amount for each trust.

Note.

This worksheet will compute an accurate inclusion ratio only if the decedent was the only settlor of the trust. You should use a separate worksheet for each trust (or separate share of a trust that is treated as a separate trust).

WORKSHEET (inclusion ratio):

1	Total FMV of all of the property interests that passed to the trust
2	State death taxes and other charges actually recovered from the trust
3	Subtract line 2 from line 1
4	Add columns C and D of line 6
5	Divide line 4 by line 3
6	Trust's inclusion ratio. Subtract line 5 from 1.000

How To Complete Schedule R-1

Line 4. Do not enter more than the amount on line 3. If you wish to allocate an additional GST exemption, you must use Schedule R, Part 1. Making an entry on line 4 constitutes a Notice of Allocation of the decedent's GST exemption to the trust.

Filing Schedule R-1. Attach to Form 8939 one copy of each Schedule R-1 that you prepare. Send two copies of each Schedule R-1 to the fiduciary.

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More Online Instructions

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Part III. Administrative, Procedural, and Miscellaneous

Method for Making Election to Apply Carryover Basis Treatment under Section 1022 to the Estates of Decedents who Died in 2010 and Rules Applicable to Inter Vivos and Testamentary Generation-Skipping Transfers in 2010

Notice 2011–66

PURPOSE

This notice provides guidance with regard to the time and manner in which the executor of the estate of a decedent who died in 2010 elects, pursuant to section 301(c) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111–312 (124 Stat. 3296) (TRUIRJCA), to have the estate tax not apply and to have the carryover basis rules in section 1022 apply to property transferred as a result of the decedent's death. This notice also addresses how a donor may elect out of the automatic allocation of generation-skipping transfer (GST) tax exemption to direct skips occurring during 2010. It also clarifies the due dates for returns for the taxable year ending December 31, 2010, that report a generation-skipping transfer, that allocate GST exemption, or that opt out of the automatic allocation of GST exemption. In addition, the notice discusses the application of chapter 13 (the GST tax) to testamentary transfers during 2010. Finally, this notice addresses certain other collateral issues arising from the determination of basis under section 1022.

This notice applies to executors of the estates of decedents who died in 2010 and to recipients of property acquired from such decedents (within the meaning of section 1022(e)) (hereinafter, *acquired from the decedent*), if the executors make the election under section 301(c) of TRUIRJCA. This notice also applies to donors who made a gift during 2010 that is a generation-skipping transfer or an indirect gift for purposes of the GST tax. See Revenue Procedure 2011–41 for a safe harbor with regard to the interpretation and application of section 1022.

BACKGROUND

Subtitle A of title V of the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107–16 (EGTRRA) enacted section 2210, which made chapter 11 (the estate tax) inapplicable to the estate of any decedent who died in 2010 and chapter 13 (the GST tax) inapplicable to generation-skipping transfers made in 2010. On December 17, 2010, TRUIRJCA became law, and section 301(a) of TRUIRJCA retroactively reinstated the estate and GST taxes. However, section 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect to apply the Internal Revenue Code (IRC) as though section 301(a) of TRUIRJCA did not apply with respect to chapter 11 and with respect to property acquired or passing from the decedent (within the meaning of section 1014(b)). Thus, section 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect not to have the provisions of chapter 11 apply to the decedent's estate, but rather, to have the provisions of section 1022 apply (Section 1022 Election).

Even though an executor may elect out of the estate tax under TRUIRJCA, the provisions of chapter 13 (GST tax) nonetheless continue to apply. Section 302(c) of TRUIRJCA, however, provides that the applicable tax rate for each GST occurring during 2010 is zero. Section 301(d)(2) provides that, in the case of any generation-skipping transfer made after December 31, 2009, and before December 17, 2010, the due date for filing a return required under section 2662 of the IRC (including any election required to be made on such return) shall not be earlier than September 17, 2011.

TRUIRJCA also retroactively repealed section 2511(c), which treated each transfer in trust during 2010 as a gift unless the trust was treated as wholly owned by the donor or the donor's spouse. Because of this retroactive repeal, this section does not apply even if a Section 1022 Election is made.

GUIDANCE

I Section 1022 Election and Filing Requirements.

A. Section 1022 Election.

The executor of the estate of a decedent who died in 2010 may make the Section 1022 Election by filing a Form 8939, *Allocation of Increase in Basis for Property Acquired From a Decedent*, on or before November 15, 2011. Once made, the election is irrevocable except as provided in section I.D.1 or D.2 of this notice. Prior filings purporting to make the Section 1022 Election must be replaced with a timely filed Form 8939.

If, for the same decedent, the Internal Revenue Service (IRS) receives a Form 8939 and either a Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, or a Form 706–NA, *United States Estate (and Generation-Skipping Transfer) Tax Return Estate of Nonresident not a Citizen of the United States*, the IRS will issue a letter to each person who filed such a form. The letter will include the name and address of each person who filed a Form 706 (or Form 706–NA) or a Form 8939 with respect to the decedent, and will explain that each of those persons must collectively sign and file either a restated Form 706 (or Form 706–NA) or Form 8939 on or before 90 days from the date the IRS mails such letters. If no restated Form 706 (or Form 706–NA) or Form 8939, signed by each person who previously filed any such form, is filed within that 90-day period, the IRS will determine whether the executor has made a Section 1022 Election for the decedent's estate or whether the decedent's estate is subject to chapter 11. In making this determination, the IRS will consider all relevant facts and circumstances disclosed to the IRS, including without limitation the relative total fair market values of the decedent's property in the possession of the executors and the nature and significance of the economic impact of the Section 1022 Election (or its loss) on the beneficial owners of the property held by each executor. Some factors may be more relevant, and may be accorded more weight, than others for any particular estate.

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B. Method to Allocate Basis.

The executor must allocate Basis Increase, as defined in section 4.02 of Revenue Procedure 2011–41, on a timely filed Form 8939. For purposes of this section, references to the term "executor" shall be construed in accordance with section 2203 as if that section was applicable. Accordingly, if an executor has been appointed, has qualified, and is acting for a decedent's estate within the United States, the IRS generally will only accept Forms 8939 filed by such executor.

If an executor has not been appointed, any person in actual or constructive possession of property acquired from the decedent may file a Form 8939 for the property he or she actually or constructively possesses. If the IRS receives multiple Forms 8939 that collectively purport to allocate Basis Increase in an amount greater than the amount of Basis Increase available to the estate, the IRS will issue a letter to each person who filed such a form. The letter will include the name and address of each other person who filed a Form 8939 with respect to the decedent, and will explain that each of those persons must collectively sign and file a single, restated Form 8939 allocating available Basis Increase in order to make the Section 1022 Election. The restated Form 8939 must be filed on or before 90 days from the date the IRS mails such letters. If no restated Form 8939, signed by each such person who previously submitted a Form 8939, is filed within that 90-day period, the IRS will allocate the available Basis Increase as the IRS, in its discretion, may determine. In making this determination and exercising its discretion, the IRS will consider all relevant facts and circumstances disclosed to the IRS. That allocation might be made on a *pro-rata* basis, based on the amount of unrecognized appreciation in the property owned by the decedent (within the meaning of section 1022(d)) (hereinafter, *owned by the decedent*) at death and acquired from the decedent that was reported on the timely filed Forms 8939, or in any other manner deemed appropriate for the particular decedent's estate by the IRS in the exercise of its discretion.

The recipient's basis in a particular property (including the amount of Basis Increase allocated to that property) is subject to adjustment upon the examination by the IRS of any tax return reporting a value dependent upon the property's basis (for example, the property's depreciation, sale, or other disposition that triggers gain or loss on the property, or otherwise).

C. Reporting Requirements.

If the executor makes the Section 1022 Election, the executor must report and value on Form 8939 all property (excluding cash and property that constitutes the right to receive an item of income in respect of a decedent under section 691 (IRD)) acquired from the decedent. Section 6018(b)(1). In addition, the executor also must report all appreciated property acquired from the decedent, valued as of the decedent's date of death, that was required to be included on the donor's Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return*, if such property was acquired by the decedent by gift or by *inter vivos* transfer for less than adequate and full consideration in money or money's worth during the 3-year period ending on the date of the decedent's death. Section 6018(b)(2). This does not include property transferred to the decedent by the decedent's spouse, who had not acquired the property in whole or in part by gift or by *inter vivos* transfer for less than adequate and full consideration in money or money's worth during that same 3-year period.

In the case of a deceased nonresident who is not a citizen of the United States, the property to be reported is limited to tangible property situated in the United States that is acquired from the decedent and any other property acquired from the decedent by a United States person. Section 6018 describes the information that must be provided on Form 8939.

In addition to the information as provided in this paragraph C, the executor must include with the Form 8939 any other information and supporting documentation as identified in the instructions to the Form 8939 or in any Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*)).

Within 30 days after the executor files a timely filed Form 8939, the executor (or each executor filing such a form) must provide a statement to each recipient acquiring property reported on that form, setting forth the information required under section 6018(c), regardless of whether the executor allocates Basis Increase to such property on the form. Section 6018(e). If an adjustment is made to the basis of property reported on a Form 8939, the executor must provide updated statements to each recipient of property affected by that adjustment within 30 days after making the adjustment or receiving notice of the adjustment from the IRS, whichever is applicable.

D. Time for Filing Return.

1. In General.

Form 8939 is due November 15, 2011. A Form 8939 filed prior to that date may be amended or revoked, but only on a subsequent Form 8939 filed on or before November 15, 2011. The Form 8939 that is timely filed by an executor is the last Form 8939 filed by that executor on or before November 15, 2011. No executor's Form 8939 will have any effect on any Form 8939 filed by a different executor. The IRS will not grant extensions of time to file a Form 8939 and will not accept a Form 8939 or an amended Form 8939 filed after the due date, except as provided in section I.A or B (in the event of conflicting filings) or in section I.D.2 (regarding relief provisions) of this notice. Thus, a taxpayer may not file an estate tax return as well as a conditional Form 8939 that would take effect only if an estate tax audit results in an increase in the gross estate above the applicable exclusion amount. Notwithstanding the previous sentences, however, for persons qualifying under section 7508 or 7508A, the due date for filing a Form 8939 is postponed as provided in those sections. Any executor filing a Form 8939 after November 15, 2011, pursuant to section 7508 or 7508A should write "Filed Pursuant to Section 7508" or "Filed Pursuant to Section 7508A", as applicable, on the top of the form. The failure to write these notations at the top of the Form 8939, however, does not adversely impact the extension granted under section 7508 or 7508A. Furthermore, for decedents qualifying for relief under section 692, an executor must file a Form 8939 to make the Section 1022 Election.

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2. Relief Provisions.

Four types of relief from the requirements of section I.D.1 of this notice are available. First, an amended Form 8939 may be filed after the due date of that form for the sole purpose of allocating Spousal Property Basis Increase, as that term is defined in section 1022(c)(2) and section 4.02(3) of Revenue Procedure 2011–41, among the property eligible to receive an allocation of that basis, provided that each of the two following requirements is satisfied. The first requirement is that the Form 8939 must have been timely filed and was complete when filed except for the allocation of the full amount of the Spousal Property Basis Increase to the eligible property reported on that Form 8939. The second requirement is that each amended Form 8939 must be filed no more than 90 days after the date of the distribution of the qualified spousal property to which Spousal Property Basis Increase is allocated on that amended Form 8939.

Second, provided an executor timely filed a Form 8939, the executor may file an amended Form 8939 under the provisions of § 301.9100–2(b) on or before May 15, 2012, for any purpose except to make or revoke a Section 1022 Election. The executor must write "Filed Pursuant to Section 301.9100–2" on the top of the amended Form 8939.

Third, an executor may apply for relief to supplement a timely filed Form 8939 under § 301.9100–3. A request for relief to supplement a timely filed Form 8939 is limited to an extension of time to allocate any Basis Increase that has not previously been validly allocated, and such relief, if appropriate, will be granted only if: (1) after filing the Form 8939, the executor discovers additional property to which remaining Basis Increase could be allocated; and/or (2) the fair market value of property reported on the Form 8939 is adjusted as the result of an IRS examination or inquiry. Relief will not be granted to reduce an allocation of Basis Increase made on a timely filed Form 8939.

Fourth, an executor may apply for relief under § 301.9100–3 in the form of an extension of the time in which to file the Form 8939 (thus, making the Section 1022 Election and the allocation of Basis Increase), which relief may be granted if the requirements of § 301.9100–3 are satisfied. Taxpayers should be aware, however, that, in this context, the amount of time that has elapsed since the decedent's death may constitute a lack of reasonableness and good faith and/or prejudice to the interests of the government (for example, the use of hindsight to achieve a more favorable tax result and/or the lack of records available to establish what property was or was not owned by the decedent at death), which would prevent the grant of the requested relief.

II GST Tax in 2010.

A. With Respect to Decedents Who Died in 2010

The GST tax was retroactively reinstated by TRUIRJCA and applies to the estates of all decedents who died after December 31, 2009, regardless of whether a Section 1022 Election is made. The GST tax is computed by multiplying the taxable amount by the applicable rate. Section 2602. Section 2641(a) defines the applicable rate for this purpose as the maximum federal estate tax rate applicable to the estate of a decedent dying at the time of the transfer, multiplied by the inclusion ratio with respect to that transfer. Section 302(c) of TRUIRJCA provides that, for each GST occurring during 2010, the applicable rate under section 2641(a) is zero. This provision is interpreted to mean that the maximum federal estate tax rate for purposes of computing the GST tax on such a transfer is deemed to be zero which, when multiplied by any inclusion ratio, will result in an applicable rate of zero. As under the law applicable to GSTs occurring prior to 2010, the only way to achieve a zero inclusion ratio for the transfer is to make a timely allocation of GST exemption to the transfer.

If the executor of a decedent who died in 2010 makes the Section 1022 Election, the executor allocates that decedent's available GST exemption by attaching the Schedule R of Form 8939 to the Form 8939 for that decedent's estate. If the Form 8939 is timely filed, this allocation will be considered a timely allocation of the decedent's GST exemption under section 2632.

B. *Inter Vivos* Direct Skips

In the case of *inter vivos* direct skips that occurred in 2010, if the donor wishes to pay GST tax at the rate of zero percent and therefore does not wish to have any GST exemption allocated to that transfer, the donor may elect out of the automatic allocation of GST exemption to that direct skip in either of two ways. First, the donor affirmatively may elect out of the automatic allocation by describing, on a timely filed Form 709, both the transfer and the extent to which the automatic allocation is not to apply. See section 26.2632–1(b)(1)(i). Alternatively, that same regulation also provides that, ". . . a timely-filed Form 709 accompanied by payment of the GST tax (as shown on the return with respect to the direct skip) is sufficient to prevent an automatic allocation of GST exemption with respect to the transferred property." Because it is clear that a 2010 transfer not in trust to a skip person is a direct skip to which the donor would never want to allocate GST exemption, the IRS will interpret the reporting of an *inter vivos* direct skip not in trust occurring in 2010 on a timely filed Form 709 as constituting the payment of tax (at the rate of zero percent) and therefore as an election out of the automatic allocation of GST exemption to that direct skip. This interpretation also applies to a direct skip not in trust occurring at the close of an estate tax inclusion period (ETIP) in 2010 other than by reason of the donor's death. However, a donor may or may not want to allocate GST exemption to a 2010 direct skip made to a trust. Therefore, this interpretation will not apply to any transfer in trust that is a direct skip or that occurs at the end of an ETIP. In addition, because this interpretation only applies to *inter vivos* direct skips, it will also not apply to any direct skip, or to the close of an ETIP, by reason of the donor's death. Section 26.2632–1(c)(4). The rules regarding the automatic allocation of GST exemption will apply to transfers described in the preceding sentence unless the transferor affirmatively elects to have those rules not apply.

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C. Filing Deadlines

Section 2611(a) defines a GST transfer as a direct skip, a taxable distribution, or a taxable termination. An indirect skip, as defined in section 2632(c)(3), is not a GST transfer. Section 2631 provides that each individual is allowed a GST exemption amount which may be allocated to any property with respect to which such individual is the transferor. Under § 26.2632–1(b)(3) and (4), an election to treat a trust as a GST trust or to allocate GST exemption to any *inter vivos* transfer other than a direct skip, is made on a timely filed Form 709. Section 2632(b)(1) and (c)(1) provide that, if any individual makes a direct or indirect skip during life, any unused portion of such individual's GST exemption shall be allocated to the property transferred to the extent necessary to make the inclusion ratio for such property zero. Sections 2632(b)(3) and (c)(5) and § 26.2632–1(b)(1)(i) and (b)(2)(ii) provide that an individual may prevent the automatic allocation of GST exemption by so providing on a timely filed Form 709.

Section 301(d)(2) of TRUIRJCA extends the time for filing any return required under section 2662 (including any election required to be made on such return) to report a GST transfer made after December 31, 2009, and before December 17, 2010, to September 17, 2011. Accordingly, the due date for filing a return reporting a direct skip, a taxable distribution, or a taxable termination (including any election required to be made on such return) that occurred on or after January 1, 2010, through December 16, 2010, is September 19, 2011, including extensions (because September 17, 2011, falls on a Saturday), except in the case of a Schedule R attached to Form 8939, which is due on or before November 15, 2011.

However, the language of Section 301(d)(2) of TRUIRJCA does not extend the due date of all gift and GST returns for 2010. Specifically, to the extent a return relates to an indirect skip, or to a post-December 16, 2010, direct skip, the due date of the return is not extended. Thus, the due date for filing a Form 709 that does not report a GST transfer or that reports a GST transfer (or any election pertaining to such transfer) that occurs on or after December 17, 2010, through December 31, 2010, was April 18, 2011, including extensions. In addition, the due date for filing a Form 709 to elect to treat a trust as a GST trust or to allocate GST exemption to a transfer occurring during 2010 under § 26.2632–1(b)(3) or (4) was April 18, 2011, including extensions. However, if a donor timely filed Form 709 for the taxable year ending December 31, 2010, but failed to allocate GST exemption to a transfer occurring during such year, see § 301.9100–2 for possible relief.

D. Application of Chapter 13 to Testamentary Transfers During 2010

For purposes of chapter 13, the Treasury Department and IRS will construe and apply any reference to chapter 11 without regard to whether the executor of a decedent who died in 2010 made a Section 1022 Election. For example, references to chapter 11 in §§ 2612(c)(1), 2642(b)(2)(A), 2642(f), 2651(e)(1)(B), and 2661(2) will be construed as if the decedent was subject to chapter 11 even if the decedent's executor made the Section 1022 Election.

III Transfer Certificates Under § 20.6325–1

Section 6324(a)(1) generally provides that, unless the estate tax is paid in full, a lien is imposed upon the gross estate of a decedent for 10 years from the date of death for any unpaid estate tax liability. Section 6324(a)(2) generally provides that, if the estate tax is not paid when due, then (1) any transferee, trustee, person in possession of property, or person who receives property from the gross estate as described in sections 2034 to 2042 shall be personally liable for the estate tax to the extent of the value of that property on the decedent's date of death and (2) any part of any property included in the gross estate that is transferred by such person shall be divested of the lien and a like lien shall attach to all of the property of such person. Section 6325(c) and the regulations thereunder provide procedures for issuing a certificate of discharge of lien for any property subject to any lien imposed by section 6324.

In the case of a transfer agent holding property registered in the name of a nonresident decedent who is not a citizen of the United States, § 20.6325–1(a) provides that the IRS may issue a transfer certificate to permit the transfer of property without liability for such decedent's estate tax. Specifically—

> [a] transfer certificate is a certificate permitting the transfer of property of a nonresident decedent without liability. . . . Corporations, transfer agents of domestic corporations, transfer agents of foreign corporations (except as to shares held in the name of a nonresident decedent not a citizen of the United States), banks, trust companies, or other custodians in actual or constructive possession of property, of such a decedent can insure avoidance of liability for taxes and penalties only by demanding and receiving transfer certificates before transfer of property of nonresident decedents.

Thus, transfer certificates requested with respect to property of a nonresident decedent who is not a citizen of the United States have been issued by the IRS when the Commissioner has been satisfied that the "tax imposed upon the estate, if any, has been fully discharged or provided for." Section 20.6325–1(c).

Concerns have been raised as to whether it is still necessary to obtain such transfer certificates prior to transferring property owned by nonresident decedents who are not citizens of the United States, who died in 2010, and whose executors make the Section 1022 Election. This notice clarifies that a transfer certificate is not required, and the IRS will not issue transfer certificates, with respect to the property of a nonresident decedent who is not a citizen of the United States, who died in 2010, and whose executor makes the Section 1022 Election.

IV Election to Treat a Trust as Part of an Estate Under Section 645

Under section 645, if the executor (if any) of an estate and the trustee of a qualified revocable trust so elect, the trust will be treated as part of the estate (and not as a separate trust) for income tax purposes for all taxable years of the estate ending after the date of the decedent's death and before the applicable date. Section 645(b)(2) defines "applicable date" as, "(A) if no return of tax imposed by chapter 11 is required to be filed, the date which is 2 years after

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the date of the decedent's death, and (B) if such a return is required to be filed, the date which is 6 months after the date of the final determination of the liability for tax imposed by chapter 11." If an executor makes the Section 1022 Election, no return of tax imposed by chapter 11 is required to be filed. Accordingly, if an executor makes the Section 1022 Election, section 645(b)(2)(A) applies and the applicable date is the date that is 2 years after the date of the decedent's death.

REQUEST FOR COMMENTS

The Treasury Department and the IRS invite public comments on the guidance provided in this notice. All materials submitted will be available for public inspection and copying.

Comments may be submitted to Internal Revenue Service, CC:PA:LPD:PR (Notice 2011–66), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Couriers Desk at 1111 Constitution Avenue, NW, Washington, DC 20224, Attn:CC:PA:LPD:PR (Notice 2011–66), Room 5203. Submissions may also be sent electronically via the internet to the following email address: *Notice.comments@irscounsel.treas.gov*. Include the notice number (Notice 2011–66) in the subject line.

EFFECTIVE DATE

This notice is applicable to executors of the estates of decedents who died in 2010, and to persons acquiring property from such a decedent whose executor makes the Section 1022 Election. This notice is also applicable to donors who made a GST transfer or an indirect gift for purposes of the GST tax during 2010. The Treasury Department and the IRS intend to issue regulations to confirm the guidance set forth in this notice.

DRAFTING INFORMATION

The principal authors of this notice are Laura Urich Daly, Theresa Melchiorre, and Mayer Samuels of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Laura Urich Daly, Theresa Melchiorre, or Mayer Samuels at (202) 622–3090 (not a toll-free call).

PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been submitted to the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and OMB approval is pending. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The first, second, and third collection of information requirements, as required by section 6018(c) and (e), are in section I.C. of this notice. The collection of information relates to the requirement that the executor provide a statement to each recipient acquiring property reported on Form 8939. Section I.C of this notice also requires the executor to provide updated statements to each recipient of property affected by any adjustment made to Form 8939. Finally, section I.C of this notice requires the executor to provide any other information and supporting documentation as identified in the instructions to the Form 8939 or in any Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(*b*)). This collection of information is necessary for the proper performance of the function of the IRS in the collection of income tax when the property is later disposed of by the recipient or other holder of the property.

It is anticipated that the decedent's executor will complete and attach to Form 8939 schedules showing property received by each recipient acquiring property from a decedent. To meet this collection of information requirement, the executor is required to send a copy of the schedule relating to property received by that particular recipient to such recipient and to send an updated schedule to each recipient in the event the information on the schedule changes. The decedent's executor will also have to provide any other information and supporting documentation as identified in the instructions to the Form 8939 or in any Internal Revenue Bulletin. We estimate that approximately 7,000 estates of decedents who died in 2010 will file Form 8939 and that it will take an executor approximately 10 hours to comply with these requirements. The total reporting burden is estimated to be 70,000 hours.

The fourth collection of information requirement in this notice is in section II.A. as provided in Treasury Regulation § 26.2632–1(d)(1), and relates to allocating the decedent's unused GST exemption. This information collection is necessary for the proper performance of the function of the IRS in the collection of GST tax when there is a taxable termination or taxable distribution. We estimate that 6,000 executors of estates of decedents who died in 2010 will allocate the decedent's unused GST exemption on a Schedule R for Form 8939 attached to Form 8939 and that it will take each executor approximately 3 hours to prepare the documentation. The total reporting burden is estimated to be 18,000 hours.

Books or records relating to collections of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

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26 CFR 601.105: Examination of returns and claims for refund, credit or abatement; determination of correct liability

(Also Part I §§1022, 172, 165, 469, 1212, 1040, 684, 6018, 20.6325–1)

Rev. Proc. 2011–41

SECTION 1. PURPOSE

This revenue procedure provides optional safe harbor guidance under section 1022 of the Internal Revenue Code (Code), enacted by section 542 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), P.L. 107–16 (115 Stat. 76–81). Section 1022 determines a recipient's basis in property acquired from the decedent (within the meaning of section 1022(e)) who died in 2010 if the decedent's executor elects to have section 1022 apply. Section 301(c) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111–312 (124 Stat. 3296) (TRUIRJCA), allows such an executor to elect to have the estate tax not apply and to have the carryover basis rules in section 1022 apply to

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property transferred as a result of the decedent's death (Section 1022 Election). This revenue procedure does not address the time or manner in which such an executor makes the Section 1022 Election or allocates generation-skipping transfer (GST) exemption to transfers occurring as a result of such decedent's death. Instead, taxpayers must see Notice 2011–66 for such guidance.

SECTION 2. BACKGROUND

Subtitle A of title V of EGTRRA enacted section 2210, which made chapter 11 (the estate tax) inapplicable to the estate of any decedent who died in 2010 and chapter 13 (the GST tax) inapplicable to generation-skipping transfers made in 2010. On December 17, 2010, TRUIRJCA became law, and section 301(a) of TRUIRJCA retroactively reinstated the estate and GST taxes. However, section 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect to apply the Code as though section 301(a) of TRUIRJCA did not apply with respect to chapter 11 and with respect to property acquired or passing from a decedent (within the meaning of section 1014(b)). Thus, section 301(c) of TRUIRJCA allows the executor of the estate of a decedent who died in 2010 to elect not to have the provisions of chapter 11 apply to the decedent's estate, but rather, to have the provisions of section 1022 apply.

SECTION 3. SCOPE

The safe harbor procedures of this revenue procedure apply to executors of the estates of decedents who died in 2010 and to recipients of property acquired from such decedents, if the executors make the Section 1022 Election. If the executor of the estate of the decedent who died in 2010 makes the Section 1022 Election and follows the applicable provisions of section 4 of this revenue procedure and takes no return position contrary to any provisions of section 4, the Internal Revenue Service (IRS) will not challenge the taxpayer's ability to rely on the provisions of section 4 either on the Form 8939, *Allocation of Increase in Basis for Property Acquired From a Decedent*, or any other return of tax.

SECTION 4. APPLICATION

.01 *Application of Section 1022.*

(1) *In General.* Section 1022 applies to the estate of a decedent who died in 2010 only if the executor, as defined in section 2203, makes the Section 1022 Election as described in Notice 2011–66. Section 1022(a)(1) generally provides that property acquired from the decedent (within the meaning of section 1022(e)) (hereinafter, *acquired from the decedent*) is treated as having been transferred by gift. If the decedent's adjusted basis is less than or equal to the property's fair market value (FMV) determined as of the decedent's date of death, the recipient's basis is the adjusted basis of the decedent. Section 1022(a)(2)(A). If the decedent's adjusted basis is greater than that FMV, the recipient's basis is limited to that FMV. Section 1022(a)(2)(B).

If the executor of the estate of a decedent who died in 2010 makes the Section 1022 Election, section 1022 applies to determine a recipient's basis in all property acquired from that decedent, regardless of the year in which the property is sold or distributed. Accordingly, if property is acquired from the decedent who died in 2010 and the executor makes the Section 1022 Election, then when the property is sold during 2010, 2011 or any subsequent year, the recipient's (seller's) basis in the property is determined under section 1022 rather than under section 1014.

Furthermore, sections 1022(b) and (c) allow the executor of such a decedent's estate to allocate additional basis (Basis Increase) to increase the basis of certain assets that both are acquired from the decedent and are owned by the decedent (within the meaning of section 1022(d)) (hereinafter, *owned by the decedent*) at death. If the property is acquired from and owned by the decedent, and if the decedent's adjusted basis in the property is less than the property's FMV on the decedent's date of death, then the executor generally may allocate Basis Increase to the property, provided that the property's total basis may not exceed the property's FMV on the date of death.

(2) *Property Not Subject to Section 1022.* If the decedent's executor makes the Section 1022 Election, section 1022 will apply to determine a recipient's basis only in property acquired from the decedent as further described in section 4.01(3) of this revenue procedure. Thus, section 1022 does not determine the recipient's basis in every type of property transferred from a decedent who died in 2010. An example of property that is not property acquired from the decedent is property that constitutes a right to receive an item of income in respect of a decedent under section 691 (IRD). Section 1022(f). For purposes of section 1022, annuities subject to income tax under section 72 are considered property that constitutes the right to receive an item of IRD. Rev. Rul. 2005–30, 2005–1 C.B. 1015. The recipient's basis in property that is not subject to section 1022 is determined under other applicable sections of the Code.

(3) *Property Acquired From the Decedent — Section 1022(e).* Property acquired from the decedent (within the meaning of section 1022(e)) is property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent. The term also includes property transferred by the decedent during the decedent's lifetime: (i) to a qualified revocable trust as defined in section 645(b)(1), regardless of whether the election under section 645 is made for that trust; or (ii) to any other trust with respect to which the decedent reserved the right to make any change in the enjoyment thereof through the exercise of a power to alter, amend, or terminate the trust (which, for this purpose, is deemed to include a retained reversionary interest in the trust on death and trust property subject to any retained power of appointment). Finally, the term includes any other property that passes from the decedent by reason of death to the extent that such property passes without consideration, such as: (i) any property transferred at the decedent's death by reason of the decedent's holding and/or exercising a general power of appointment (as defined in section 2041) with respect to such property if that power was not created by the decedent, (ii) property held by the decedent and another person as joint tenants with right of survivorship or as tenants by the entirety; and (iii) the surviving spouse's one-half interest in community property (as discussed in section 4.05 of this revenue procedure).

The term does not include, however, a decedent's interest in a qualified terminable interest property (QTIP) trust or similar arrangement described in section

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1022(c)(5) funded for the benefit of the decedent by the decedent's predeceased spouse. As a result, this property is not subject to section 1022 and a recipient's basis in this property will not be determined under section 1022. See section 4.01(2) of this revenue procedure.

(4) *Property Owned by the Decedent — Section 1022(d).* Property acquired from the decedent must also be owned by the decedent at death (within the meaning of section 1022(d)) to be eligible for the allocation of Basis Increase under sections 1022(b) and/or (c). Section 1022(d)(1)(A). Thus, property may be acquired from the decedent, and its basis will be determined under section 1022(a), but will not be eligible to receive an allocation of Basis Increase unless that property is also owned by the decedent at death. Property owned by the decedent at death includes, but is not limited to: (i) any property legally titled in the name of the decedent at death (and not held by the decedent solely in a legal or representative capacity); (ii) certain jointly owned property, whether owned as tenants in common or with rights of survivorship (see section 1022(d)(1)(B)(i)); (iii) property transferred by the decedent during life to a qualified revocable trust as defined in section 645(b)(1), regardless of whether the election under section 645 is made for that trust; and (iv) certain community property (see section 1022(d)(1)(B)(iv)).

Section 1022(d)(1)(B) provides additional rules defining ownership for this purpose and specifically states that, for purposes of determining whether Basis Increase may be allocated to property, certain property is not owned by the decedent at death. For example, property over which the decedent holds any power of appointment is not considered owned by the decedent at death. In addition, although considered to have been acquired from the decedent, property transferred to a trust by the decedent during life in which the decedent retained a power to alter, amend, or terminate the trust is not considered owned by the decedent at death for this purpose. Property transferred to a trust by the decedent during life in which the decedent retained an income interest is not considered owned by the decedent at death solely by reason of that retained income interest. In addition, because of the different definitions of ownership in sections 679 and 1022, although a transfer of property to a foreign trust by a United States grantor, for example, may be sufficient to cause that grantor to be treated as the owner of at least a portion of that trust for income tax purposes under section 679, such a transfer is not sufficient to result in the trust's being considered to be owned by the United States grantor at that grantor's death for purposes of section 1022(d).

Notwithstanding these examples, however, even though the property in these types of trusts would not be deemed to be owned by the decedent, if the terms of the trust require the trust property to revert back to the decedent upon death, then such property is deemed to be owned by the decedent. Finally, an interest in a QTIP trust or similar arrangement described in section 1022(c)(5) funded for the benefit of the decedent by a predeceased spouse of the decedent is not owned by the decedent for this purpose.

The provisions of sections 4.01(2), (3), and (4) are illustrated by the following examples:

Example 1. On August 1, 2006, decedent (D) created a qualified personal residence trust (QPRT) pursuant to § 25.2702–5(c). The term of the QPRT expires on July 31, 2011. The QPRT instrument provided that, if D dies prior to July 31, 2011, the property in the QPRT is to be distributed to D's child (C). D died in 2010, and D's executor made the Section 1022 Election. In this case, the property in the trust had been transferred to the trust by D during D's lifetime. The QPRT is not a qualified revocable trust as defined in section 645(b)(1) nor is it a trust over which the decedent reserved the right to make any change in the enjoyment thereof through the exercise of a power to alter, amend, or terminate the trust. The property that passes to C under the QPRT instrument by reason of D's death is not considered to have been acquired from D and thus, section 1022 is not applicable to determine C's basis in the property held in the QPRT. Instead, C's basis in this property is determined under other applicable sections of the Code.

Example 2. Assume the same facts as in *Example 1*, except that the QPRT instrument provided that, if D dies prior to July 31, 2011, the QPRT terminates and the property in the QPRT is to be distributed to D's estate. Because the trust property becomes the property of D's estate at D's death, the trust property is considered to have been acquired from D. Section 1022(e)(1). For the same reason, the property is also considered owned by D and, therefore, Basis Increase may be allocated to this trust property.

(5) *Property Owned By and Acquired From the Decedent But Not Eligible for the Allocation of Basis Increase.* Notwithstanding the rules regarding the definition of property owned by and acquired from the decedent, section 1022 provides that Basis Increase may not be allocated to two types of property. First, pursuant to section 1022(d)(1)(C), the executor may not allocate Basis Increase to property that is acquired by the decedent by gift or by *inter vivos* transfer for less than adequate and full consideration in money or money's worth during the three-year period ending on the date of the decedent's death. This prohibition does not apply, however, to property acquired by the decedent from the decedent's spouse, provided the property had not been transferred to the spouse during such three-year period in whole or in part by gift or by *inter vivos* transfer for less than adequate and full consideration in money or money's worth.

Second, pursuant to section 1022(d)(1)(D), the executor may not allocate Basis Increase to the stock or securities of a foreign personal holding company, a DISC or former DISC, a foreign investment company, or a passive foreign investment company, unless such company is a qualified electing fund as defined in section 1295 with respect to the decedent.

.02 *Amount of Basis Increase.*

(1) *Basis Increase.* Basis Increase consists of the sum of the General Basis Increase (Aggregate Basis Increase and Carryovers/Unrealized Losses Increase) under section 1022(b) and the Spousal Property Basis Increase under section 1022(c).

(2) *General Basis Increase.* The General Basis Increase is the sum of the Aggregate Basis Increase and the Carryovers/Unrealized Losses Increase under section 1022(b).

(a) *Aggregate Basis Increase.* The Aggregate Basis Increase is $1,300,000 under section 1022(b)(2)(B).

(b) *Carryovers/Unrealized Losses Increase.* The Carryovers/Unrealized Losses Increase consists of the sum of: (i) the amount of any capital loss carryovers under section 1212(b) that would (but for the decedent's death) have been carried from the decedent's last taxable year to a later taxable year; (ii) the amount of any net operating loss carryovers under section 172 that would (but for the decedent's death) have been carried from the decedent's last taxable year to a later taxable year; and (iii) the amount of unrealized losses that would have been allowable under section 165 if the property acquired from the decedent had been sold at FMV immediately before the decedent's death. Section 1022(b)(2)(C).

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The capital loss carryovers under section 1212(b) and the net operating loss carryovers under section 172 available to be included in General Basis Increase are the losses that would carry forward to years after the year of the decedent's death.

The amount of unrealized losses consists solely of the losses described in section 165(c)(1) and (2) from all property acquired from the decedent that would have been allowable as a deduction, if the property had been sold at FMV immediately before the decedent's death. However, losses described in section 165(c)(3) are sustained prior to the decedent's death and would not arise on a hypothetical sale of the property. These losses therefore must be claimed instead on the decedent's final Form 1040, and may not be included in the Carryovers/Unrealized Losses Increase. For the purpose of computing unrealized losses, the capital loss limitations referred to in section 165(f) are ignored. Thus, for example, the amount of any loss that would have been allowable under section 165 if the property acquired from the decedent had been sold at FMV immediately before the decedent's death is determined without the dollar limitations on capital losses under section 1211. Section 1022(b)(2)(C)(ii).

Existing income tax rules will apply to determine the decedent's share of these loss carryovers and unrealized losses under section 172 and section 1212(b) if the decedent's final Form 1040 is filed jointly with the decedent's surviving spouse. Thus for example, if a calendar year decedent and the surviving spouse file a joint Form 1040 for 2010, these amounts will be determined based on their tax liability with respect to the decedent's final taxable year ending on the date of the decedent's death and the surviving spouse's taxable year ending on December 31, 2010. With regard to such loss carryovers and unrealized losses arising from community property, see sections 4.05 and 4.06(4) of this revenue procedure.

The provisions of this section 4.02(2)(b) are illustrated by the following example:

Example 3. D owned 100 shares of stock that D held for profit within the meaning of section 165(c)(2). The stock is a capital asset, and any gain or loss from the sale of the stock would be long-term capital gain or loss under sections 1221 and 1222(3). D died in 2010, still owning the stock. As of D's date of death, D's adjusted basis in the stock pursuant to section 1011 was $5,000, and the stock's FMV on D's date of death was $1,000. D did not sell the stock during life, and thus did not incur a loss under section 165(c)(2) reportable on D's final Form 1040. The stock is considered to be property owned by and acquired from D. D's executor made the Section 1022 Election. If D had sold the stock immediately prior to D's death, D would have had a net long-term capital loss of $4,000. Based on D's 2010 taxable income, D would have been able to deduct $3,000 of the loss and $1,000 would have been carried over to future years. Section 1211(b). For purposes of section 1022, however, the full unrealized net long-term capital loss of $4,000, that would have been available to D if D had sold the stock before death, is available as a Carryovers/Unrealized Losses Basis Increase.

(3) *Spousal Property Basis Increase.* The Spousal Property Basis Increase is $3,000,000 under section 1022(c)(2) and may be allocated to any or all property owned by and acquired from the decedent that also satisfies the definition of qualified spousal property in section 1022(c)(3). Qualified spousal property is property that either is transferred outright to the decedent's surviving spouse (within the meaning of section 1022(c)(4)) or is QTIP (within the meaning of section 1022(c)(5)), whether or not held in trust. The definition of QTIP under this provision does not require that a QTIP election under section 2056(b)(7) be made.

The executor may allocate Spousal Property Basis Increase to qualified spousal property that has already been distributed. See paragraph I.D.2 of Notice 2011–66 regarding relief for allocating Spousal Property Basis Increase to such property distributed after the due date of the Form 8939.

In addition, Spousal Property Basis Increase also may be allocated to property that is sold (regardless of whether the allocation of Spousal Property Basis Increase is made before or after such sale) prior to its distribution. However, this allocation may be made only to the extent that the executor (1) certifies on the Form 8939 that the net proceeds from the sale of that property will be distributed to or for the benefit of the decedent's surviving spouse in a manner that would qualify property as qualified spousal property, and (2) attaches to Form 8939 each document providing a bequest or devise to the surviving spouse.

The allocation of Spousal Property Basis Increase to property not distributed in kind is illustrated by the following examples. In each example, assume that the decedent's Aggregate Basis Increase and Carryovers/Unrealized Losses Increase have been fully allocated to other assets.

Example 4. D died in 2010 owning 20,000 shares of Corporation X stock. D's executor made the Section 1022 Election. D's adjusted basis in the stock is $600,000 ($30 per share), and the FMV on D's date of death is $2,000,000 ($100 per share). Under the terms of D's will, D's Spouse (S) is to receive 50 percent of D's estate, outright. Four months after D's death, the FMV of the stock declines to $1,800,000 ($90 per share). D's executor sells all 20,000 shares of the stock and receives $1,770,000 in proceeds net of sales commissions (thus, $88.50 per share). D's executor intends to distribute all of the proceeds from the sale of the stock to S, in partial satisfaction of S's residuary bequest; there are no known outstanding liabilities that would reduce this distribution. D's executor may allocate up to $1,400,000 of Spousal Property Basis Increase ($70 to each of the 20,000 shares of stock) if the required certification and supporting documentation is included on a timely filed Form 8939. (Note that, to the extent that more than $58.50 per share is allocated to the stock, the sale will generate a loss.)

Example 5. The facts are the same as in *Example 4* except that D's executor applies $165,000 of the net proceeds from the sale of the stock to pay administrative expenses of D's estate. D's executor intends to distribute the remaining $1,605,000 of net proceeds from the sale of the stock to S. Spousal Property Basis Increase may be allocated to no more than 18,135 shares. This number of shares is determined either by dividing the net proceeds to be distributed to S by the net per-share proceeds ($1,605,000 / $88.50 = 18,135.6 shares, limited for this purpose to 18,135 whole shares), or by calculating the ratio of the net proceeds payable to S to the total net proceeds (20,000 shares x $1,605,000 / $1,770,000 = 18,135.6 shares, thus limited to 18,135 whole shares). As in *Example 4*, D's executor may allocate up to $70 of Spousal Property Basis Increase to each of these 18,135 shares of the stock (for a total of $1,269,450), all of the net proceeds of which will be distributed to S, provided a certification and supporting documentation are included on a timely filed Form 8939.

Example 6. D died in 2010 owning personal property with an adjusted basis of $200,000 and a FMV on D's date of death of $500,000. D's executor made the Section 1022 Election. Under the terms of D's will, D's spouse (S) is to receive 50 percent of D's estate, outright. Four months after D's death, D's executor sells the personal property for $600,000. D's executor applies $150,000 of the net proceeds from the sale of the personal property to pay administrative expenses of D's estate and intends to distribute the remaining $450,000 of net proceeds from the sale of the personal property to S. D's executor may allocate no more than $225,000 of Spousal Property Basis Increase to the personal property. This maximum allocation is determined by multiplying the unrealized appreciation at death ($300,000) by the ratio of net proceeds to be distributed to S over the total net proceeds of the sale. Thus, D's executor may allocate up to $225,000 ($300,000 X ($450,000 / $600,000)) of Spousal Property Basis Increase to the personal property, provided a certification and supporting documentation are included on a timely filed Form 8939.

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Spousal Property Basis Increase also may be allocated to property held by a testamentary charitable remainder trust (CRT) as defined in section 664 (subject to the limit of section 1022(d)(2)), if the surviving spouse is the sole non-charitable beneficiary of the CRT and the CRT would have qualified for the marital deduction under section 2056(b)(8) if the executor of the decedent's estate had not made the Section 1022 Election.

(4) *Nonresident Decedents who are not citizens of the United States.* In the case of a nonresident decedent who was not a citizen of the United States at death, the amount of the Aggregate Basis Increase is limited to $60,000 and is not increased by any Carryovers/Unrealized Losses Increase. This limitation in section 1022(b)(3), however, only applies to limit the available General Basis Increase to $60,000. Accordingly, an executor of the estate of a nonresident decedent who was not a citizen of the United States at death may allocate Spousal Property Basis Increase to qualified spousal property (within the meaning of section 1022(c)(3)) owned by and acquired from the decedent.

.03 *General Rules for Allocating Basis Increase.* The executor may allocate Basis Increase to property owned by and acquired from the decedent on a property-by-property basis, provided that the decedent's adjusted basis in each such property (after the allocation, if any) does not exceed the FMV of that property at the decedent's death. For example, Basis Increase may be allocated to one or more shares of stock or to a particular block of stock rather than to the decedent's entire holding of that stock. Generally, Basis Increase may be allocated to property owned by and acquired from the decedent even after the executor has disposed of or distributed the property. For a special rule regarding Spousal Property Basis Increase, see section 4.02(3) of this revenue procedure.

For each property, the sum of the decedent's adjusted basis in that property and the Basis Increase allocated to that property may not exceed the FMV of that property on the decedent's date of death. Section 1022(d)(2). Under this rule, the executor may not allocate any Basis Increase to increases in value occurring after the decedent's death.

For purposes of section 1022(a), references to the term "property" include interests in that property. Thus, Basis Increase may be allocated to some or all of the decedent's shares of stock in a particular company, or to a life or remainder interest owned by the decedent at death. However, if, by reason of the decedent's death, the decedent's property is divided into different interests that are not undivided portions or fractional interests of each and every interest or right in the property that was owned by the decedent, Basis Increase may not be allocated separately to the various interests in that property created by reason of the decedent's death. An example of such a division of property is the division of property owned outright by the decedent at death into a life interest and a remainder interest in that property. Basis Increase may be allocated to the property owned by the decedent at death, but may not be allocated separately to the life estate and/or remainder interest.

.04 *Determination of Fair Market Value.*

(1) *In General.* The FMV of property acquired from the decedent who died in 2010 is determined in the same manner for purposes of section 1022 as for purposes of the estate tax. Thus, the provisions contained in the regulations under section 2031 that require appraisals to determine the FMV of certain property included in the gross estate for federal estate tax purposes also apply for purposes of determining the FMV of property acquired from the decedent under section 1022. The executor must attach any appraisals required under section 2031 to the Form 8939.

(2) *Aggregation Rule.* The Basis Increase allocated to property acquired from the decedent by a recipient cannot increase the recipient's basis in that property or property interest above the FMV of that property or interest in the hands of the decedent at death. See section 1022(d)(2). Therefore, for purposes of section 1022, the FMV of an undivided portion of the decedent's property that is acquired from the decedent at death is a fractional share of the FMV of the decedent's property at death. Thus, if each of two or more recipients acquires an undivided portion of a property from the decedent, then the FMV of each recipient's portion of that property for purposes of section 1022 is the FMV of the decedent's entire interest in the property at death multiplied by a fraction. The numerator of that fraction is the undivided portion of the decedent's property acquired by that recipient, and the denominator is the decedent's entire interest in that property at death. An undivided portion of the decedent's property refers to a fraction or percentage of each and every interest or right the decedent held in the property at death.

.05 *Special Rules for Community Property.* The decedent's interest in community property held by the decedent and the surviving spouse under the community property laws of any state or possession of the United States or any foreign jurisdiction is treated as owned by and acquired from the decedent if the decedent's interest satisfies the requirements of sections 1022(d) and (e). If at least one-half of the whole of the community interest is treated as owned by and acquired from the decedent under these provisions (without regard to the special rule for community property in section 1022(d)(1)(B)(iv)), the surviving spouse's one-half interest in that community property also is treated as owned by and acquired from the decedent for purposes of section 1022. Section 1022(d)(1)(B)(iv). Accordingly, the surviving spouse's basis in his or her one-half interest in community property, as determined under section 1022(a), will be the lesser of the surviving spouse's adjusted basis of that interest in such community property or the FMV of that interest on the decedent's date of death. In addition, Basis Increase may be allocated to the surviving spouse's one-half interest in such community property.

If both spouses' interests in such community property are treated as owned by and acquired from the decedent as described in the preceding paragraph, all of the unrealized losses described in section 4.02(2)(b) of this revenue procedure that would have been allowable to both the decedent and the surviving spouse if the property had been sold at FMV immediately before the decedent's death are included in the General Basis Increase. In contrast, only the decedent's net operating loss carryovers and capital loss carryovers are eligible to be included in the General Basis Increase. Further, to the extent the decedent's net operating loss carryovers and capital loss carryovers are deductible on the final jointly filed Form 1040, they are not available to be added to the General Basis Increase.

The provisions of this section 4.05 are illustrated by the following examples:

Example 7. (i) D and D's spouse (S) live in a community property state (State). D died in 2010, and D's executor made the Section 1022 Election. At D's death, Property X, community property of D and S under the laws of State, had an adjusted basis of $1,000,000 and a FMV of $8,000,000. D and S used Property X in a trade or business within the meaning of section 165(c)(1). Under the community property laws of State, each spouse is entitled to an undivided equal share of community property. D and S have filed joint Forms 1040 for all taxable years in which they have owned Property X, including 2010, the year of D's death. D and S have a total of $100,000 of net operating losses under section 172, after the deductions taken on D's and S's final joint Form 1040. $50,000 of the $100,000 of net operating losses would (but for D's death) be carried from D's last taxable year to a later taxable year of D. Under the community property laws of State, upon the death of a married person, one-half of the community property belongs to the decedent and the other one-half belongs to the surviving spouse. Therefore, one-half of Property X belongs to D and the other one-half belongs to S. In D's will, D bequeathed D's one-half interest in Property X to D's child (C). In this case, C acquired Property X by bequest, and therefore, Property X is acquired from D and is subject to the provisions of section 1022. As a result, C's basis in Property X under section 1022(a)(2) is $500,000, the lesser of D's adjusted basis in D's one-half interest in Property X or the FMV of that interest at D's death. In addition, because Property X is considered as owned by D at the time of death, General Basis Increase may be allocated to D's interest in Property X. The executor of D's estate has $1,300,000 in Aggregate Basis Increase and $50,000 (D's share of the $100,000 of the unused net operating losses) in Carryovers/Unrealized Losses Increase available to allocate to the interest acquired by C in Property X.

(ii) On the date of D's death, the other one-half interest in Property X belongs to S under the laws of State. As a result, for purposes of section 1022, S's one-half interest in Property X is deemed to have been owned by and acquired from D. Under section 1022(a)(2), S's basis in S's one-half interest in Property X is $500,000, the lesser of S's adjusted basis in S's one-half interest or the FMV of that interest as of D's death. That interest has a FMV on D's death of $4,000,000.

(iii) The executor may allocate Basis Increase to S's one-half interest in Property X. In this case, the executor decides to allocate $450,000 of Aggregate Basis Increase, $50,000 of Carryovers/Unrealized Losses Increase, and $3,000,000 in Spousal Property Basis Increase to S's one-half interest in Property X. As a result, S's basis in S's one-half interest in Property X is $4,000,000 (the sum of S's own adjusted basis of $500,000 and S's allocated Basis Increase of the sum of $450,000, $50,000, and $3,000,000), equal to its FMV as of D's date of death. D's $50,000 in unused net operating losses is included in Basis Increase that is allocated by D's executor to S's interest in Property X; the other $50,000 of the unused net operating losses is available to S on S's subsequent income tax returns.

(iv) With respect to the one-half interest in Property X passing from D to C, the executor may allocate any or all of the remaining General Basis Increase of $850,000 to this property. In this case, the executor allocates the entire remaining $850,000 of General Basis Increase to C's one-half interest in Property X. C's basis in the one-half interest in Property X is $1,350,000 ($500,000 plus $850,000).

Example 8. (i) The facts are the same as in *Example 7*, except that the FMV of Property X on D's date of death was $800,000. Under section 1022(a)(2), S's basis in S's one-half interest in Property X is $400,000, the lesser of S's $500,000 in adjusted basis and the FMV of that interest in Property X as of D's date of death. D's executor may not allocate any Aggregate Basis Increase, Carryovers/Unrealized Losses Increase, or Spousal Property Basis Increase to spouse's one-half interest in the community property because the property's basis, as augmented under section 1022, may not exceed its FMV on D's date of death. For the same reason, D's executor may not allocate any General Basis Increase to the one-half interest in Property X passing to C.

(ii) A loss of $200,000 would have been incurred if Property X had been sold at FMV immediately before D's death. All of this $200,000 is available as Carryovers/Unrealized Losses Increase that may be allocated to property owned by and acquired from D with a basis pursuant to section 1022(a)(2) that is less than the FMV as of D's date of death.

.06 *Interaction of Section 1022 with Certain Other Income Tax Provisions.*

(1) *Holding Period of Inherited Property.* To the extent the recipient's basis in property acquired from the decedent is determined under section 1022, the recipient's holding period of that property shall include the period during which the decedent held the property, whether or not the executor allocates any Basis Increase to that property.

In computing the applicable percentage under section 1250 for purposes of determining the amount of ordinary gain on the sale of section 1250 property, section 1250(e) applies to determine the period of time the recipient is deemed to have held section 1250 property acquired by gift or on the death of a decedent. Therefore, to the extent a recipient's basis in property is determined under section 1022, the recipient's holding period of such property under section 1250(e)(2) includes the period during which the property was held by the decedent, regardless of whether the executor allocates any Basis Increase to that property.

(2) *Tax Character of Inherited Property.* The tax character of property acquired from the decedent by a recipient is determined in the same way as the holding period. Thus, to the extent a recipient's basis in property is determined under section 1022, the tax character of the property is the same as it would have been in the hands of the decedent. Consequently, for property described in section 1221 (capital assets) or section 1231 (property used in a trade or business and involuntary conversions), and for property subject to section 1245 (depreciation recapture upon disposition of certain depreciable property) or section 1250 (depreciation recapture upon disposition of certain depreciable real property), the tax character of the property described in these sections (the basis of which is determined under section 1022) in the hands of the recipient is the same as it would have been in the hands of the decedent. However, the tax character of the property may be affected by a subsequent change in the recipient's use of the property.

The provisions of this section 4.06(2) are illustrated by the following example:

Example 9. D owned tangible personal property (section 1245 property) and claimed on D's income tax return a depreciation deduction under section 168 that would have been subject to recapture under section 1245 if D had sold the property prior to D's death. D died in 2010 and D's executor made the Section 1022 Election. D bequeathed all of D's tangible personal property to D's child (C). Because C's basis is determined under section 1022, the property is section 1245 property in the hands of C and therefore will be subject to recapture under section 1245 when sold by C, regardless of whether the property is depreciable property in the hands of C or whether the executor allocates any Basis Increase to that property. *See* § 1.1245-3(a)(3).

(3) *Depreciation of Property Acquired from the Decedent.* If section 1022 applies to property acquired from the decedent that is depreciable property in the hands of the recipient, regardless of whether the executor allocates any Basis Increase to the property, the recipient is treated for depreciation purposes as the decedent for the portion of the recipient's basis in the property that equals the decedent's adjusted basis in that property. Consequently, the recipient determines any allowable depreciation deductions for this carryover basis by using the decedent's depreciation method, recovery period, and convention applicable to the property. If the property is depreciable property in the hands of both the decedent and the recipient during 2010, the allowable depreciation deduction for 2010 for the decedent's adjusted basis in the property is computed by using the decedent's depreciation method, recovery period, and convention applicable to the property, and is allocated

between the decedent and the recipient on a monthly basis. This allocation is made in accordance with the rules in § 1.168(d)–1(b)(7)(ii) of the Income Tax Regulations for allocating the depreciation deduction between the transferor and the transferee.

The portion of the recipient's basis in the property that exceeds the decedent's adjusted basis in the property as of the decedent's date of death (for example, the Basis Increase allocated to the property by the executor) is treated for depreciation purposes as applying to a separate asset that the recipient placed in service on the day after the date of the decedent's death. Accordingly, the recipient determines any allowable depreciation deductions for this excess basis by using the depreciation method, recovery period, and convention applicable to the property on its placed-in-service date or, if not held on that date as depreciable property by the recipient, on the date of the property's conversion to depreciable property.

(4) *Passive Activity Loss Provisions.* Section 469(a) disallows certain losses from passive activities. However, pursuant to section 469(b), losses disallowed under section 469(a) may be suspended and carried forward. Section 469(g)(2) provides that, if an interest in a passive activity is transferred by reason of the taxpayer's death, the taxpayer may treat suspended passive losses as losses that are not from a passive activity (and therefore may deduct the losses) to the extent such losses are greater than the excess (if any) of the basis of such property in the hands of the transferee, over the adjusted basis of such property immediately before the death of the taxpayer. Section 469(j)(6) provides that, when an interest in a passive activity is transferred by gift, the basis of such interest immediately before the transfer is increased by the amount of any passive activity losses allocable to such interest that have not been allowed as deductions as a result of section 469(a). Once used to increase the donor's basis, these losses may not be deducted for any taxable year.

Because property owned by the decedent at death will be treated under section 1022 as having been transferred by gift, section 469(j)(6), rather than section 469(g)(2), applies to determine the decedent's adjusted basis in such property. The basis adjustment under section 469(j)(6) is deemed to occur immediately prior to the decedent's death, and thus is applied to determine the decedent's adjusted basis in the property at death as described in section 1022(a)(2)(A). In addition, any loss that would have been sustained under sections 165(c)(1) or (c)(2) on a hypothetical sale of the property immediately prior to the decedent's death (equal to the excess of the decedent's adjusted basis (determined as described under section 469(j)(6)) over the FMV at death) may be included in the section 165 losses in the General Basis Increase. Because the reduction in the hypothetical loss under section 165 by reason of the section 469 basis adjustment equals the amount of section 469 loss added to the decedent's basis, there is no duplication of a benefit under these two sections.

Section 1022(d)(1)(B)(iv) provides that the surviving spouse's interest (as well as the decedent's interest) in certain community property is deemed to have been owned by and acquired from the decedent, and thus 100 percent of that community property is deemed to have been transferred by gift for purposes of section 1022. Because section 469(j)(6) increases basis by the amount of suspended passive activity losses allocable to the interest that is transferred by gift, 100 percent of those losses, rather than only the decedent's one-half of such losses, are to be added to determine the decedent's and the spouse's adjusted basis in that community property for purposes of section 1022(a) and to determine the amount of unrealized section 165 losses to be included in the General Basis Increase. To the extent that losses attributable to the spouse's interest in the community property are used to increase basis and/or were included in Carryovers/Unrealized Losses Increase allocated by the decedent's executor, such losses may not thereafter be deducted by the spouse. However, to the extent that losses attributable to the spouse's interest in community property are not so used by the decedent's executor, they remain the spouse's suspended passive activity losses. For purposes of this computation, these losses will be deemed to be the last part of Basis Increase allocated, and the decedent's share of these losses will be deemed to be allocated before the surviving spouse's share of these losses.

The provisions of this section 4.06(4) are illustrated by the following examples:

Example 10. D owned an apartment building that generated losses that have been disallowed under section 469. D died in 2010 and D's executor made the Section 1022 Election. The building is property owned by and acquired from D. Pursuant to D's will, D's child (C) is to acquire the building. On D's date of death, the FMV of the building was $100,000, the basis of the building was $10,000, and the suspended passive activity losses allocable to the building were $50,000. Pursuant to section 469(j)(6), the $50,000 in suspended passive activity losses are added to D's basis of $10,000, resulting in an adjusted basis of $60,000. For purposes of section 1022(b)(2)(C)(ii), a hypothetical sale of the property just before D's death would have produced a gain of $40,000 ($100,000 FMV less D's adjusted basis of $60,000), so there is no loss under section 165 from this property. C's basis in the building as of D's date of death is $60,000, plus any amount of the General Basis Increase allocated to this property.

Example 11. Assume the same facts as in *Example 10*, except that the suspended passive activity losses allocable to the building are $200,000 instead of $50,000. Pursuant to section 469(j)(6), the $200,000 in suspended passive activity losses are added to D's basis of $10,000 resulting in an adjusted basis of $210,000. Under section 1022(a)(2), C's basis in the building is $100,000 (the lesser of D's adjusted basis in the building ($210,000) and the building's FMV on the date of death ($100,000)). Thus, C's basis in the building reflects $90,000 of the section 469 suspended losses. If the property had been sold at FMV immediately before D's death, a section 165 loss of $110,000 would have been allowable (FMV of $100,000 minus $210,000 of D's adjusted basis). This $110,000 constitutes the section 165 loss that may be included in the General Basis Increase.

(5) *Recognition of Gain on Satisfaction of Pecuniary Bequest with Appreciated Property.* Section 1040, as applicable to the estates of decedents who died in 2010 and whose executors make the Section 1022 Election, provides that, if an executor distributes appreciated property to satisfy a pecuniary bequest, the estate must recognize gain to the extent the FMV of the distributed property on the date of distribution exceeds its FMV on the date of the decedent's death. The basis of that property in the hands of the recipient then equals the sum of the basis of that property immediately before the distribution and the amount of gain recognized by the estate.

Section 1040 further provides that the same rule will apply to distributions of appreciated trust property made in satisfaction of trust provisions that are the equivalent of a pecuniary bequest, but only to the extent so provided in regulations. This safe harbor will apply this rule to quali-

fied revocable trusts as defined in section 645(b)(1), as well as to trusts that would have been included in the decedent's gross estate for federal estate tax purposes under section 2036, 2037, or 2038 had the decedent's executor not made the Section 1022 Election.

The provisions of section 1040, however, do not apply to the distribution of property that constitutes the right to receive an item of IRD in satisfaction of a pecuniary bequest.

(6) *Sale or Exchange Treatment of Transfers to Nonresident Aliens.* Section 684, enacted in 1997, generally provides that any transfer of property by a United States person to a foreign estate or trust (except to the extent that a person is treated as the owner of the trust under section 671) is treated as a sale or exchange of such property, and requires the transferor to recognize gain in the amount of any excess of the FMV of the property at the time of the transfer over the transferor's adjusted basis in the property. For transfers of property occurring on the death of a decedent whose executor makes the Section 1022 Election, this provision also applies to transfers of property by United States persons to nonresident aliens.

The existing regulations provide an exception to the general rule of taxation under section 684 in the case of a transfer of property by reason of the death of a United States transferor, but only if the basis of such property in the hands of the recipient is determined under section 1014(a). Section 1.684–3(c). If the recipient's basis in such property is not determined under section 1014(a), section 684 continues to apply, and the United States transferor is treated as having transferred the property immediately before death and is required to recognize the built in gain in the property transferred at that time. Section 1.684–3(g), *Example 3*.

For purposes of applying section 684 to transfers of property by reason of the death of a United States person in 2010 whose executor makes the Section 1022 Election, the question has arisen as to whether (1) section 684 applies prior to section 1022, with the effect of treating the transfer as a sale for FMV before any Basis Increase may be allocated to the property, or (2) whether the executor's allocation of Basis Increase is deemed to increase the recipient's basis in the property before the amount of any unrecognized gain taxable under section 684 is determined.

If the property is owned by and acquired from the decedent, the executor's allocation of Basis Increase will be deemed to occur prior to the application of section 684. Specifically, in determining the adjusted basis of the property in the hands of the decedent under section 684(a)(2), any allocation of Basis Increase shall be deemed to occur prior to the computation of gain under section 684. Thus, the amount of gain recognized under section 684 on the transfer may be reduced or even eliminated if sufficient Basis Increase is allocated to such property.

However, if the property transferred is not owned by the decedent at death, then no Basis Increase may be allocated to the property, and the decedent will be required to recognize all of the unrealized gain in the property transferred to the foreign estate or trust or to the nonresident alien as provided in section 684.

The provisions of this section 4.06(6) are illustrated by the following examples:

Example 12. D, a United States citizen, acquired stock in 1984 for $1,000 that had a FMV of $30,000 on D's date of death in 2010. D bequeathed the stock to D's brother (N), a nonresident alien. The executor of D's estate made the Section 1022 Election, and, therefore, may allocate General Basis Increase of up to $29,000 to this stock. Such an allocation of basis will be deemed to have occurred prior to the deemed sale under section 684. Accordingly, if the executor allocates $29,000 of General Basis Increase to the stock, then D will recognize zero gain on D's final Form 1040 under section 684 on the bequest of the stock to N.

Example 13. D, a United States citizen, acquired real property located in the United States in 1984 for $1,000,000 that had a FMV of $10,000,000 on D's date of death in 2010. D's executor made the Section 1022 Election. D's will devised the real property to D's brother (N), a nonresident alien. Assuming that the General Basis Increase available to the executor of D's estate for allocation is $1,300,000, the executor may allocate up to the entire amount of General Basis Increase to this property. Such an allocation will be deemed to have occurred prior to the deemed sale under section 684. Accordingly, if the executor allocates $1,300,000 of General Basis Increase to this property, D will recognize gain on D's final Form 1040 under section 684 in the amount of $7,700,000 ($10,000,000 of FMV less $2,300,000 of basis) on the devise of the property to N.

Example 14. In 2005, D, a United States citizen, transferred securities with a FMV of $5,000 and an adjusted basis of $1,000 to a foreign trust (FT). The income from FT was payable to D during D's life, but D retained no other right to and no power over FT. At all times after the 2005 transfer through D's death, FT has a United States beneficiary, D (within the meaning of section 679(c)), and D was treated as the owner of FT under section 679(a). D died in 2010 and D's executor made the Section 1022 Election. The FMV of the assets of FT at D's death was $30,000. Notwithstanding that D was the owner of FT under section 679 on the date of death, because the securities were transferred by D in an *inter vivos* transfer to FT over which D retained no other right or power, the securities were not acquired from the decedent and section 1022 does not apply to the securities in FT. Under §1.684–2(e)(1), D is treated as having transferred the securities to FT immediately before D's death, and D must recognize $29,000 of gain on D's final Form 1040 under section 684(a).

.07 *Testamentary Charitable Remainder Trusts.* Section 1.664–1(a)(1)(iii) provides, among other things, that a trust is a CRT if a deduction is allowable under section 170, 2055, 2106, or 2522 and the trust meets the description of a charitable remainder annuity trust or a charitable remainder unitrust, as such terms are described in §§ 1.664–2 and 1.664–3, respectively. A testamentary CRT that otherwise qualifies as a CRT under section 664 and the regulations thereunder, but fails to meet the requirement that a deduction is allowable under section 2055 solely because the decedent's executor makes a Section 1022 Election thus making section 2055 inapplicable to the decedent's estate, will qualify as a CRT under section 664.

SECTION 5. AREAS NOT COVERED BY THIS REVENUE PROCEDURE

This Revenue Procedure does not address the manner in which the executor of the estate of a decedent who died in 2010 makes the Section 1022 Election. For information on making that election, the deadline for making that election and related procedures, and on allocating the decedent's GST exemption to transfers occurring at a death occurring in 2010, see Notice 2011–66.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective August 29, 2011, the date this revenue procedure was published in the Internal Revenue Bulletin. However, taxpayers may apply the safe harbor in this revenue procedure for prior periods.

SECTION 7. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been submitted to the Office of Management and Bud-

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get (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and OMB approval is pending. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collection of information requirement in this revenue procedure is in section 4.02(3) and section 4.04(1) of this revenue procedure. The collection of information in section 4.02(3) relates to certain documents the executor is required to attach to the Form 8939 if the executor allocates Spousal Property Basis Increase to property that is sold prior to its distribution to the surviving spouse.

The collection of information in section 4.04(1) relates to the requirement that the executor obtain and attach to the Form 8939 the FMV appraisal of certain property acquired from the decedent. This collection of information is necessary for the proper performance of the function of the IRS in the collection of the income tax when the property is later sold by the recipient or other holder of the property. In addition, this collection is necessary to comply with the requirements of section 6018.

We estimate that 7,000 executors of estates of decedents who died in 2010 will make the Section 1022 Election and thus will be required to file Form 8939, and that it will take approximately 8 hours to prepare the documentation. The total reporting burden is estimated to be 56,000 hours.

Books or records relating to collections of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

SECTION 8. DRAFTING INFORMATION

The principal authors of this revenue procedure are Laura Urich Daly, Theresa Melchiorre, and Mayer Samuels of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this revenue procedure, contact Laura Urich Daly, Theresa Melchiorre, or Mayer Samuels at (202) 622–3090 (not a toll-free call).

Due Dates for Filing Form 706, Form 706-NA, or Form 8939, Extension of Time to Pay Estate Tax, and Penalty Relief for Recipients of Property Acquired from Decedents who Died in 2010

Notice 2011–76

PURPOSE

This notice provides the executor of an estate of a decedent who died in 2010 (Executor of a 2010 Estate) who timely files a Form 4768, *Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes*, an automatic extension of time to file an estate tax return and to pay the estate tax due. Furthermore, this notice revises the due date of Form 8939, *Allocation of Increase in Basis for Property Acquired From a Decedent*. It also provides penalty relief to certain persons who acquired property, the basis of which is determined under section 1022, and disposed of such property during 2010. This notice applies to each Executor of a 2010 Estate and to recipients of property acquired from decedents who died in 2010.

BACKGROUND

In General

Section 501 of the Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107–16 (115 Stat. 69) (EGTRRA), repealed the estate tax for the estates of decedents who died in 2010 (2010 Decedents). EGTRRA also repealed section 1014 and replaced it with section 1022. Section 1014 generally provides that the recipient's basis in property passing from a decedent is the fair market value (FMV) of the property on the decedent's date of death. Section 1022 generally provides that the recipient's basis in property acquired from a decedent is the lesser of the decedent's adjusted basis in the property and the FMV of the property on the decedent's date of death.

Section 301(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111–312 (124 Stat. 3296) (TRUIRJCA), repealed section 501 of EGTRRA and section 1022. The repeal of EGTRRA retroactively reinstated the estate tax for 2010 Decedents and also reinstated section 1014. TRUIRJCA also increased the applicable exclusion amount to $5,000,000 for 2010 Decedents. Section 301(c) of TRUIRJCA, however, allows the Executor of a 2010 Estate to elect not to have the estate tax provisions and section 1014 apply, but rather, to have the provisions of section 1022 apply (Section 1022 Election). With the election, the estate will pay no estate tax and in most cases the basis of the property acquired from the decedent will be determined under section 1022. In addition, the executor may allocate additional basis to certain property. *See* Rev. Proc. 2011–41, 2011–35 I.R.B. 188.

Filing and Payment Dates

Under section 301(d) of TRUIRJCA, the due date for filing an estate tax return and for paying the estate tax for an estate of a decedent who died after December 31, 2009, and before December 17, 2010, is no earlier than September 17, 2011. The due date, therefore, for estates of decedents who died on or after January 1, 2010, and on or before December 16, 2010, is September 19, 2011, because September 17, 2011, falls on a Saturday. Under section 6075(a), the due date for filing an estate tax return for a decedent who died after December 16, 2010, is nine months after the date of the decedent's death. Section 6151 provides that, when a tax return is required, the person required to make such return shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

Section 542 of EGTRRA provides that the return required under former section 6018 (Form 8939, which is filed to make a Section 1022 Election, to report the information required under section 6018, and to allocate additional basis under section 1022) shall be filed with the decedent's final income tax return (for example: Form 1040, *United States Individual Income Tax Return*, or Form 1040-NR, *United States Nonresident Alien Income Tax Return)* or by such later date specified in regulations prescribed by the Secretary. Notice 2011–66, 2011–35 I.R.B. 184, which the Treasury Department and IRS intend to confirm in regulations, provides that Form 8939 is due on or before November 15, 2011.

Section 6081 provides that the Secretary may grant a reasonable extension of time for filing any return and that, except in the case of taxpayers who are abroad, no such extension may be for more than six months. In addition, section 6161(a) provides that the Secretary may extend the time for payment of the amount of the tax shown, or required to be shown, on any return for a reasonable period from the date fixed for payment thereof.

GUIDANCE

Forms 706 and 706-NA

Because of the date Congress enacted TRUIRJCA and the length of time required to implement the legislative changes and to issue the Form 8939 with related instructions, the Executor of a 2010 Estate may not have sufficient time to make an informed decision as to whether or not to make a Section 1022 Election and to complete the required filings. Therefore, the Treasury Department and IRS believe it is reasonable to grant the estates of 2010 Decedents an automatic extension of time to file the estate tax return and an extension of time to pay the estate tax. Accordingly, the Treasury Department and IRS grant the Executor of a 2010 Estate who files a Form 4768 by the due date for filing Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*, or Form 706-NA, *United States Estate (and Generation-Skipping Transfer) Tax Return Estate of Nonresident not a Citizen of the United States*, both an automatic six-month extension of time to file Form 706 or Form 706-NA pursuant to section 6081, and a six-month extension of time to pay the estate tax. The Executor of a 2010 Estate is not required to substantiate on the Form 4768 the reason for requesting an extension of time for payment of the estate tax to receive the six-month extension of time to pay the estate tax due. However, interest will accrue on the estate tax liability from the due date of the return, excluding extensions. *See* I.R.C. § 6601.

Except in the case of an executor abroad, under section 6081, the Treasury

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Department and IRS cannot grant additional extensions of time to file Form 706 or Form 706-NA to such estates, regardless of whether an executor files a Form 4768 requesting an additional extension of time to file. An executor, however, may apply for an additional extension of time to pay the estate tax under section 6161 if the executor files a Form 4768 on or before the extended due date of the payment of tax and provides the documentation required with such form. *See* I.R.C. § 6161.

The IRS will not impose late filing and late payment penalties under section 6651(a)(1) or (2) on estates of decedents who died after December 31, 2009, and before December 17, 2010, if the estate timely files Form 4768 and then files Form 706 or Form 706-NA and pays the estate tax by March 19, 2012. The IRS also will not impose late filing or late payment penalties under section 6651(a)(1) or (2) on estates of decedents who died after December 16, 2010, and before January 1, 2011, if the estate timely files Form 4768 and then files Form 706 or Form 706-NA and pays the estate tax within 15 months after the decedent's date of death.

Form 8939

The due date for filing Form 8939 is changed from November 15, 2011, to January 17, 2012. Thus, a Section 1022 Election is timely if made on a Form 8939 filed by (and may be amended or revoked on or before) January 17, 2012. The Treasury Department and IRS will not grant any further extension of time to file Form 8939, to make the Section 1022 Election, or to amend or revoke the Section 1022 Election, except as provided in sections I.A, B, or D.1 or 2 of Notice 2011–66. Accordingly, as contemplated in section I.D.2 of Notice 2011–66, an executor may file an amended Form 8939 if the provisions of § 301.9100–2(b) are satisfied, by July 17, 2012.

Moreover, the penalty under section 6716 does not apply to the Executor of a 2010 Estate solely because the Form 8939 is filed after November 15, 2011, but on or before January 17, 2012. Similarly, a penalty under section 6716 does not apply to the Executor of a 2010 Estate solely because a statement required to be furnished to beneficiaries is provided after December 15, 2011, but on or before February 17, 2012.

Generation-Skipping Transfer (GST) Tax

If an executor makes a Section 1022 Election on a Form 8939 filed on or before January 17, 2012, and allocates the decedent's available GST exemption (or makes an election under the GST tax) on an attached Schedule R or R–1, the allocation or election will be considered timely and effective as of the decedent's date of death pursuant to section 2632. Alternatively, the automatic allocation rules under section 2632 will apply if the executor timely files the Form 8939 without attaching a Schedule R or R–1. If the executor does not make the Section 1022 Election or if the executor timely revokes a Section 1022 Election, then the automatic allocation rules under section 2632 will apply unless the executor timely files Form 706 or Form 706-NA with the Schedule R or R–1 attached.

Federal Income Tax Return for any Individual, Estate, or Trust, Form 709, and State Estate or Inheritance Tax

This notice does not extend the due date for paying any income tax or for filing any income tax return for any individual, estate, or trust (for example, Form 1040, Form 1040-NR, or Form 1041, *United States Income Tax Return for Estates & Trusts).* In addition, this notice does not extend the due date for paying any gift tax or for filing any Form 709, *United States Gift (and Generation-Skipping Transfer) Tax Return.* Finally, this notice does not extend the time to file an estate or inheritance tax return required by any state of the United States or to pay any estate or inheritance tax due to such state.

Penalty Relief

Section 6651(a)(2) generally provides that, in the case of any failure to pay the tax shown on any return required to be filed under subchapter A of chapter 61 on its due date, unless it is shown that the failure is due to reasonable cause and not willful neglect, an addition to tax shall apply. In addition, section 6662(a) imposes a 20 percent penalty on any portion of an underpayment of tax due to negligence, disregard of rules or regulations, or a substantial understatement of income tax. Section 6664(c) provides that no penalty under section 6662(a) shall be imposed on any portion of an underpayment if it is shown that there is a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

Revenue Procedure 2011–41 provides a safe harbor for determining a recipient's basis and other pertinent information such as the tax character and holding period of property acquired from a 2010 Decedent and whose executor makes a Section 1022 Election. However, when the recipient of property acquired from a decedent who disposed of such property during 2010 files the recipient's income tax return, the recipient may not know whether the decedent's executor will make the Section 1022 Election and, if so, the amount (if any) of Basis Increase (as defined in Rev. Proc. 2011–41) the executor will allocate to that property. Therefore, the recipient may not know the property's basis or other pertinent information such as tax character and holding period. When filing the recipient's income tax return and computing the income tax liability, the recipient will have to make a good faith estimate, based on the facts and circumstances, regarding such information with respect to the property acquired from the 2010 Decedent. Accordingly, to the extent that the recipient's tax liability is increased, as shown on an amended return or otherwise, by reason of the application of section 1022 to the estate of a 2010 Decedent, the recipient's reasonable cause and good faith will be presumed and the Treasury Department and IRS will not impose either the section 6651(a)(2) addition to tax for failure to pay, or the section 6662(a) penalty. The recipient should write across the top of the amended return "IR Notice 2011–76" to alert the IRS that the recipient meets these requirements for reasonable cause.

EFFECTIVE DATE

This notice is effective on September 13, 2011. This notice applies to each Executor of a 2010 Estate and to persons acquiring property from a 2010 Decedent.

DRAFTING INFORMATION

The principal authors of this notice are Laura Daly, Theresa Melchiorre, and

Mayer Samuels of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Laura Daly, Theresa Melchiorre, or Mayer Samuels at (202) 622–3090 (not a toll-free call).

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Part IV. Items of General Interest

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations

Branded Prescription Drug Fee

REG–112805–10

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9544) relating to the branded prescription drug fee imposed by the Affordable Care Act (ACA). The regulations affect persons engaged in the business of manufacturing or importing certain branded prescription drugs. The text of the temporary regulations also serves as the text of the proposed regulations.

DATES: Written and electronic comments and requests for a public hearing must be received by November 16, 2011.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–112805–10), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered to: CC:PA:LPD:PR Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–112805–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *http:www.regulations.gov* (IRS REG–112805–10).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Celia Gabrysh at (202) 622–3130; concerning submissions of comments and request for a hearing *Richard.A.Hurst@irscounsel.treas.gov*, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking has been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d) and assigned control number 1545–2209.

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by October 17, 2011. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs of operation, maintenance, and purchase of service to provide information.

The collection of information in this proposed regulation is in §51.7. This information is necessary to evaluate whether an error report regarding a preliminary fee calculation is valid and justifies an adjustment to the preliminary fee calculation. The likely respondents are manufacturers and importers of branded prescription drugs.

Estimated total annual reporting and/or recordkeeping burden: 1800 hours.

Estimated annual burden per respondent/recordkeeper: 40 hours.

Estimated number of respondents and/or record keepers: 45

Estimated frequency of responses: Annually.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Temporary regulations in this issue of the Bulletin add a new part, Part 51, to subchapter D, Miscellaneous Excise Taxes. Part 51 provides guidance on the annual fee imposed on covered entities engaged in the business of manufacturing or importing branded prescription drugs by section 9008 of the ACA. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the new part.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory flexibility assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations primarily affect large corporations. Thus, Treasury Department and the IRS do not expect a substantial number of small entities to be effected. Therefore, a Regulatory Flexibility Analysis under the Regulatory

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