

If you had a loved one or friend pass way after 12/31/10, there is a potential opportunity to minimize paying estate taxes. To take advantage, consideration should be given to filing an estate tax return (Form 706) before the deadline of 1/2/2018.

The 2010 Tax Act introduced a new estate planning concept – exclusion portability. In short, the estate of a deceased spouse can transfer to the surviving spouse any portion of the federal estate tax exclusion that he/she does not use. The surviving spouse can then add that amount to the exclusion he or she is otherwise entitled to, increasing the total amount that can be passed on tax free. This new feature makes it easier for married couples to minimize the potential impact of gift and estate tax.

Prior to the 2010 Tax Act, if a spouse passed away without having planned for his or her exclusion, the deceased spouse's estate would have passed tax free to the surviving spouse under the unlimited marital deduction (assuming all assets passed to the surviving spouse), and the deceased spouse's exclusion would be lost or "wasted." The surviving spouse's estate could then only transfer an amount equal to his or her own exclusion free from federal estate tax. To solve this dilemma, married couples typically set up what is commonly referred to as a credit shelter trust (or bypass trust) that sheltered or preserved the exclusion of the first spouse to pass away. Portability can achieve a similar result without the use of a credit shelter trust.

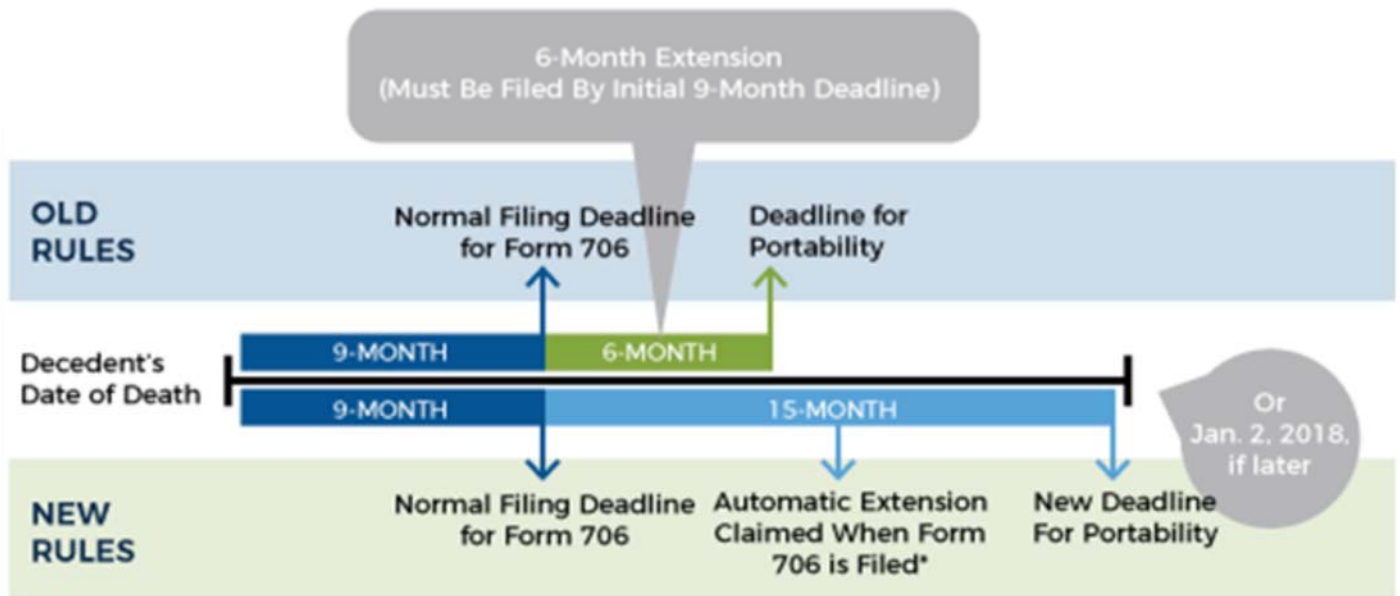
To use the exclusion portability, the estate of the first spouse to pass away must elect to use portability on the estate tax return. An estate tax return must be filed by the estate of the first spouse to pass away to use portability even if the return is not otherwise required to be filed.

The IRS issued a ruling stating any estate of a decedent who passed away after 12/31/2010 is automatically granted an extension until 1/2/2018 to file Form 706 (estate tax return) to claim portability. Also, the executor will automatically have until the second anniversary of the decedent's date of death to file an estate tax return. In other words, for someone who passed away after 12/31/2010, the executor has until the later of 1/2/2018 or two years after the decedent's death. See following page for graphical representation of filing deadlines.

### **Example**

Robert passed away on September 4, 2011, leaving \$1,000,000 to his wife Rachel. No estate tax return was filed when Robert passed and therefore Rachel did not inherit his unused estate tax exemption. Rachel then passes away on June 1<sup>st</sup>, 2016, with combined assets (including Robert's \$1M) of \$7,000,000, which she left to her children. Rachel's estate tax exemption is \$5,450,000 because they never filed a return of portability when Robert passed. Rachel will owe 40% estate taxes on the amount above her exemption ( $\$1,550,000 \times 40\% = \$620,000$  tax owed). However, if they retroactively file an estate tax return for his unused exemption (\$5,000,000 in 2011), then Rachel would have a total exemption amount of \$10,450,000. Therefore, no tax would be due.

**DEADLINE TO FILE FORM 706 TO CLAIM PORTABILITY:  
ORIGINAL VS NEW RULES UNDER REV. PROC. 2017-34**



\*If gross estate otherwise below Form 706 required filing threshold

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