

## IRS Further Extends the Deadline for Portability Returns to 5 Years

On July 8, 2022, the IRS issued Revenue Procedure 2022-32, which provided a simplified method for certain taxpayers to obtain an extension of time up to five years to make a portability election under section 2010(c)(5)(A).

### The Power of Portability

Portability is a valuable tool for married couples that enables spouses to combine their federal estate and gift tax exemption. At the death of the first spouse, the amount of any remaining estate or gift tax exemption that was not used by the decedent or their estate can be transferred or “ported” to the surviving spouse. Following the transfer, the surviving spouse can benefit from an increased exemption amount as they create or revise their wealth transfer strategies to reduce the tax bill left to their loved ones upon their own death.

It’s important to note that the decedent’s exemption, if elected, remains static, meaning it is currently not indexed with inflation and not subject to statutory increases or decreases in the exemption afforded living taxpayers. For example, a taxpayer dying in 2022, absent further legislative changes, can leave their \$12,060,000 exemption to their surviving spouse, and though it will not increase further with inflation, it will stay intact at \$12,060,000 beyond the 2026 “sunset” discussed further below. However, if the surviving spouse remarries at any point, the unused balance of the “ported” exemption from that deceased spouse is no longer available.

Portability is not automatic, meaning a surviving spouse will not inherit their deceased spouse’s unused exemption amount (DSUE) without action. For the surviving spouse to receive their spouse’s unused exemption, the estate of the deceased spouse must file IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return.

For estates that are required to file an estate tax return, portability must be elected on a timely filed return that is due nine months after death, unless an extension (up to six months) is obtained. For estates that are not required to file an estate tax return, such as those estates that do not owe a tax, Form 706 must still be timely filed to elect portability. When portability first became available, estates that were not required to file an estate tax return were subject to the same deadline as those required to file an estate tax return if they wished to elect portability.

### Extending the Filing Deadline

First introduced in 2010 as part of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act, the concept of portability has existed for less 15 years. As such, it’s easy to understand how many estates not required to file an estate tax return may have missed the window to elect portability for the surviving spouse. For these estates who did miss the window, up until 2017, their only option was to request a letter ruling for an extension of time from the IRS, which is a costly and time-consuming process.

In response to a large number of ruling requests, the IRS first issued Rev. Proc. 2017-34. Published in 2017, Rev. Proc. 2017-34 served to provide an extension of two years from the date of death for estates not required to file an estate tax return to use a simplified method to file a portability return. However, even with this extension, the IRS still continued to receive a significant number of ruling requests applying for

an extension of time to file a portability return where more than two years had passed since death of the decedent. These ruling requests were a burden on IRS resources, requiring further action from the agency.

To provide relief for both the IRS and taxpayers, Rev. Proc. 2022-32 now further extends the time to file portability returns from two to five years from death for estates not required to file returns. The five-year extension was determined based on the IRS having observed that a notable percentage of the ruling requests they received for extensions were from estates of decedents who had died within the last five years. Estates can now use the simplified method provided in Rev. Proc. 2022-32 to obtain an extension of time to file a portability return.

***Special note:*** Rev. Proc. 2022-32 does not provide a “do-over” for estates that timely filed Form 706 and failed to elect portability. The extension only applies to those estates not required to file Form 706 and that did not in fact file.

### **Looking Ahead to 2026: The Increased Value of Portability**

Given today’s high federal estate and gift tax exemption, it’s likely many clients will not use their full exemption amount, let alone the unused exemption from their spouse if he or she passes first. It’s critical to remember that these high exemption amounts are scheduled to sunset in 2026, at which point the estate and gift tax exemption will revert to \$5 million, adjusted for inflation, which basically cuts it in half of what it is today. As a result, many clients who may not have an estate tax issue today are likely to have an estate tax issue in less than four years from now, which will make the benefits and flexibility of portability more valuable to these clients. Now is the time to meet with clients to review their estate plans to ensure they are prepared for both today’s environment and what looms ahead in the not-so-distant future.

Prudential’s Advanced Planning team is available to support you as you work with clients to review clients’ estate plans and consider different strategies to implement to meet their unique needs. We look forward to being of assistance, and can be reached at 800-800-2738, Option 4.

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