

Client Alert: 2010 Tax Act Provides Portability to Reduce the Estate Taxes Paid by Couples

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As a part of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, P.L. 111-312 (124 Stat. 3302) (the "2010 Tax Act") and the corresponding changes to the Internal Revenue Code (the "Code"), the IRS is offering a new way for surviving spouses to reduce their estate tax bill if their spouse passed away after December 31, 2010.

In accordance with the 2010 Tax Act, the estate tax basic exclusion amount was increased from \$1,000,000 to \$5,000,000 for the 2011 and 2012 tax years. Under that same legislation, spouses now have a new "portability election" that makes the unused estate tax exclusion amount at the death of the first spouse "portable."

Pursuant to section 303(a) of the 2010 Tax Act and section 2010(c) of the Code, a surviving spouse is able to make an election whereby she may take her spouse's unused estate tax basic exclusion amount and add it to her own estate tax basic exclusion amount to be used upon her death. An example of the election's benefit is as follows:

If a husband were to die in 2011 with an estate tax basic exclusion amount of \$5,000,000 and an estate worth \$3,000,000, his estate would have \$2,000,000 of unused estate tax basic exclusion amount. Under the 2010 Tax Act's portability election, the surviving spouse can elect to have this \$2,000,000 of unused exclusion added to her own estate tax basic exclusion amount at the time of her death. Therefore, if the wife dies in 2012 after taking advantage of the portability election, her estate will have not only her \$5,000,000 of basic exclusion, but also an additional \$2,000,000 of exclusion, giving her estate a total estate tax exclusion amount of \$7,000,000. Under the right circumstances, the portability election can generate substantial estate tax savings.

In fact, the IRS has now made it easier to make the portability election. According to IRS Notice 2011-82, all an estate's executor or personal representative has to do to make the portability election is to file a federal estate tax return (Form 706). No affirmative statement has to be made by the estate indicating that it wants to take the election.

For more information concerning the portability election or other changes to the federal estate tax under the 2010 Tax Act, [click here](#) or contact a member of Nexsen Pruet's Estate Planning and Wealth Transfer Planning team.