The federal estate tax laws changed significantly in the early 2010s. The first such change occurred on June 9, 2010, when the Internal Revenue Service (IRS) issued Revenue Procedure 2010-24 to provide guidance. The federal estate and gift tax exemption was scheduled to increase from $5,000,000 to $10,000,000, indexed annually for inflation. The TCJA, which was signed into law in December 2017, doubled the exemption amount to $11,200,000. The increased exemption amount, or DSUE (deceased spousal unused exclusion) to the surviving spouse by portability, resulting in the loss of increased federal gift and estate tax. The IRS received numerous private letter ruling requests for an extension of time to elect portability. In other requests, the executor was unaware of the need to make a portability election. Relief is available if the executor of the surviving spouse's estate discovered that a portability election was never made. The IRS recognized a need for continued relief and issued Revenue Procedure 2017-34 to provide guidance.

**Extensions**

Revenue Procedure 2017-34 provides a simplified method to obtain an extension of time to file Form 706 and elect portability. Relief is available for estates of decedents who died after December 31, 2010. The increased $10,000,000 federal estate tax exemption, plus adjusted taxable value of the gross estate, plus adjusted taxable gifts, did not exceed the federal estate tax exemption. Revenue Procedure 2017-34 should be available to many estates to take advantage of the maximum federal estate tax exemption. If a portability election was made, the statute of limitations remains open on the first spouse's estate. However, this tolling is limited, as the first deceased spouse's Form 706 may be re-examined solely to review the calculation of DSUE.

**New York State Estate Tax**

In addition to the federal estate tax, there is a New York State estate tax applicable to New York resident decedents and non-residents who have property located in New York State. The current New York estate tax exemption is $5,250,000. New York does not follow the federal rules, and does not allow portability of any New York estate tax exemption.

On January 1, 2019, the New York estate tax exemption is scheduled to match the federal amount. It is unclear at this time whether New York will amend its estate tax law to the new increased $10,000,000 federal estate tax exemption, as amended by the TCJA. The estate tax portion of the New York Tax Law refers to the IRC with all amendments enacted on or before January 1, 2014. As such, beginning January 1, 2019, the New York estate tax exemption will likely track the prior federal exemption at $5,000,000, adjusted for inflation.

Portability is a valuable tool for married couples to take advantage of the maximum federal estate and gift tax exemption. It is important to consider the estate tax implications of marriage and death. Executors of smaller estates must also carefully consider the benefits of making a timely portability election. Similarly, attorneys representing executors must fully communicate the benefits of portability to their clients. Attorneys should also review estate plans and trusts in light of the new estate tax changes.

**Election of Portability**

In some cases, a court-appointed executor or administrator may be necessary to administer a deceased estate. If a surviving spouse or other individual receives property from the deceased spouse's estate, the executor must file a complete and properly prepared Form 706 on or within the two-year anniversary of the decedent's death. The executor may file a complete and properly prepared Form 706 on or before the later of January 1, 2018 or the second anniversary of the decedent's death.

Additional Form 706 and portability requirements are specified in Revenue Procedure 2017-34. If the executor files a complete and properly prepared Form 706 on or before the later of January 1, 2018 or the second anniversary of the decedent's death, the Revenue Procedure must be used. If filing will occur after such two-year anniversary, the executor must request a private letter ruling. Again, relief is only available if Form 706 was not required to be filed based upon the size of the gross estate.

**Filing Form 706**

If an estate is eligible for relief, the executor must file a complete and properly prepared Form 706 on or before the later of January 1, 2018 or the second anniversary of the decedent’s death. Additionally, the executor must file a statement on the following on the top of page one of Form 706: "FILING PURSUANT TO REV. PROC. 2017-34 TO ELECT PORTABILITY UNDER § 20106(e)(5)(A)."

Now that January 2, 2018 has passed, there are only two ways for an executor to take advantage of Revenue Procedure 2017-34. If filing will occur on or within the two-year anniversary of the decedent’s death, the Revenue Procedure must be used. If filing will occur after such two-year anniversary, the executor must request a private letter ruling. Again, relief is only available if Form 706 was not required to be filed based upon the size of the gross estate.