

## Simplified Method for Extension of Time to Elect Portability



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Section 2010(c) of the Internal Revenue Code (the “Code”) allows the estate of a person dying after December 31, 2010, and who is survived by a spouse, to make an election so that the decedent’s unused exclusion (“DSUE”) amount may be applied by the surviving spouse to his or subsequent transfers during life or at death for estate and gift tax purposes. The DSUE amount is defined under § 2010(c)(4) of the Code as the lesser of (A) the basic exclusion amount, or (B) the excess of the applicable exclusion amount of the last deceased spouse of such surviving spouse over the amount with respect to which the tentative tax is determined under § 2001(b)(1) of the Code on the estate of such deceased spouse.

Pursuant § 2010(c)(5)(A) of the Code, the DSUE may be made available to the decedent’s surviving spouse only if the executor of the deceased’s estate (i) files an estate tax return that states the computed DSUE amount and (ii) elects on the estate tax return for portability of the DSUE amount. A portability election is only effective when made on a timely filed estate tax return (including extensions), and pursuant to § 20.2010-2(a)(2) of the Regulations, if a properly completed estate tax return is prepared and filed timely, an executor will have elected portability of the decedent’s DSUE amount unless (i) the choice is made by the executor not to elect portability and (ii) the requirements of § 20.2010-2(a)(3)(i) of the Regulations for the portability election not to apply are satisfied.

Section 301.9100-3 of the Regulations sets forth the standard that the IRS applies to make a determination of whether to grant an extension of time to make a portability election because the due date for a portability election is prescribed by regulation and not by statute. In regard to a request for an extension of time to make a portability election, relief will be granted if it is satisfactorily shown that the taxpayer acted reasonably and in good faith, and that granting such relief will not prejudice the interests of the government. The IRS has issued many letter rulings granting relief under § 301.9100-3 of the Regulations for extensions of time for taxpayers to make portability elections under § 2010(c)(5)(A) of the Code in cases where decedent’s estates were not required to file estate tax returns pursuant to § 6018(a) of the Code.

In light of the number of requests by taxpayers for relief to make late portability elections in cases where no estate tax return was required to be filed pursuant to § 6018(a) of the Code, Rev. Proc. 2017-34 was issued (effective on June 9, 2017). Rev. Proc. 2017-34 provides a simplified method for such estates that have no filing requirement to obtain an extension of time under § 301.9100-3 of the Regulations to elect portability. Such simplified method for relief is allowed for qualifying estates until the later of (i) January 2, 2018, or (ii) the second anniversary of the decedent’s date of death. If the requirements of Rev. Proc. 2017-34 are not satisfied, an executor of an estate may still request relief pursuant to § 301.9100-3 of the Regulations by requesting a letter ruling. The simplified method provided in Rev. Proc. 2017-34 does not require a request for a letter ruling or payment of a user fee.

