

THE RISELING REPORT

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TO PORT OR NOT TO PORT: PORTABILITY OF FEDERAL ESTATE TAX EXEMPTION

In December 2010, Congress passed and President Obama signed the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (H.R. 4853) (the “**Act**”), which made a significant change to Federal estate tax law, a new feature: portability of a spouse’s Federal estate tax exemption. Section 302 of the Act increases a person’s Federal estate tax exemption to \$5,000,000 (the “**Basic Amount**”). However, Section 303 of the Act changes the exemption amount for married individuals. Section 303 provides that, in the case of a surviving spouse, the surviving spouse’s exemption amount is the Basic Amount plus the deceased spouse’s unused exemption amount. Section 303 also adjusts the Basic Amount for inflation in multiples of \$10,000 for each year after 2011.

The Act provides that a deceased spouse’s “unused exemption amount” is the **lesser** of: (1) the Basic Amount or (2) the Basic Amount less the tentative estate tax on the estate of the deceased spouse. In order for the surviving spouse to claim the deceased spouse’s unused exemption amount, the executor of the deceased spouse’s estate **must** file an estate tax return that computes the unused exemption amount and makes an irrevocable election that the unused exemption amount will be “taken into account” by the surviving spouse. **Such an election cannot be made after the time prescribed by law (including extensions) for the filing of an estate tax return.**

The new portability feature means that a surviving spouse possibly could have a Federal estate tax exemption of \$10,000,000. For example, if the deceased spouse left a taxable estate of \$3,000,000, the deceased spouse would leave \$2,000,000 of his or her exemption amount unused. If a proper election is made on the deceased spouse’s estate tax return, then the surviving spouse will be able to add the deceased spouse’s unused exemption amount to his or her exemption, leaving the surviving spouse with an exemption amount of \$7,000,000. However, it should be noted that portability applies only to the estate tax exemption. **There is no portability of the GST tax exemption.** Clearly, portability is a unique feature that offers new estate planning techniques to reduce the estate tax burden.

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