

# PUBLICATION

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## Extension of Portability Election Announced

February 28, 2012

Notice 2012-21, issued by the Internal Revenue Service on February 17, 2012, allows certain estates an extension of time to make the portability election.

### Background

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 amended the Internal Revenue Code to provide that an estate of a person dying after December 31, 2010 who was married at the time of death may elect to permit the surviving spouse to use the decedent's unused applicable exclusion amount for lifetime or testamentary transfers. The decedent's unused applicable exclusion amount is known as the "deceased spousal unused exclusion amount," and the election is commonly known as the "portability election." The portability election is made on a timely filed Form 706, including extensions. The IRS Regulations grant taxpayers an automatic six-month extension to file Form 706, provided Form 4768 (Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes) is filed within nine months of death.

### Notice 2012-21

The IRS issued Notice 2012-21 in response to comments made to the Service about guidance on the portability election issued on October 17, 2011 in Notice 2011-82, which grants "qualifying estates" an extension of six months to file Form 4768. Thus, the extension request itself may be made up to fifteen months from the decedent's death. The intent is to provide relief to executors who did not have proper or timely guidance regarding the portability election.

Therefore, executors of qualifying estates now have an additional six months to file Form 4768. A qualifying estate is one in which (i) the decedent is survived by a spouse, (ii) the decedent's date of death was after December 31, 2010 and before July 1, 2011, and (iii) the fair market value of the decedent's gross estate does not exceed \$5,000,000.

A qualifying estate wishing to take advantage of the extended deadline must file Form 4768 within fifteen months of death with the notation "Notice 2012-21, Extension for Good Cause Shown" or otherwise sufficiently notifying the Service on or with Form 4768 that the extension is being filed pursuant to Notice 2012-21. Note that Form 706, as so extended, must be filed within fifteen months of death. The Notice extends only the time for filing Form 4768.

### Conclusion

The extension allowed by Notice 2012-21 is not automatic -- the Form 4768 must be filed within fifteen months of death as referenced above. Failure to make a timely portability election may cause additional federal estate tax to be due by the heirs of the surviving spouse, even though the estate of the first spouse to die is well under the current exclusion amount by design or otherwise.

If you have any questions regarding Notice 2012-21, please contact any attorney in the Firm's Tax Department.