

ALERT

November 2022

IRS Grants Major Extension To Make “Portability” Election For Estates Not Required To File Estate Tax Returns From 2017 To Present

By: Louis P. Karol, Esq., LLM, CPA
Michael J. Borger, Esq., LLM

IRS Alert:

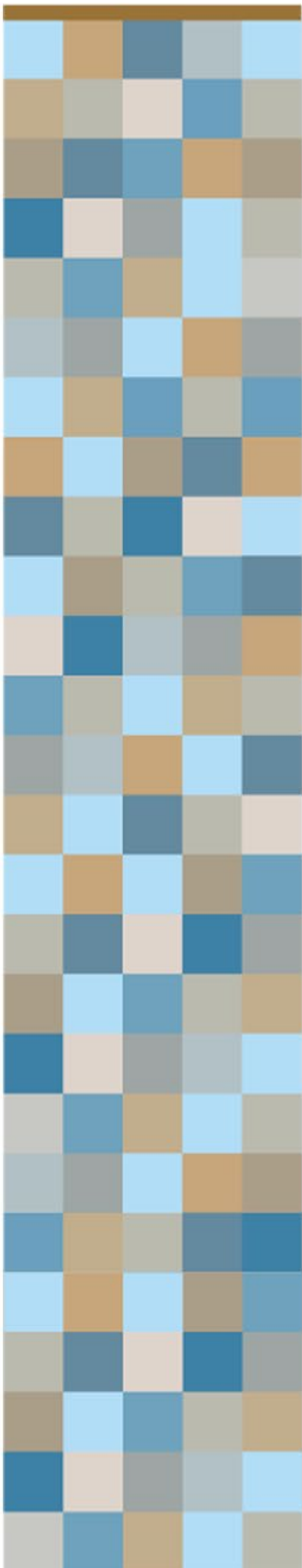
The Internal Revenue Service (“IRS”) recently issued Revenue Procedure 2022-32 which provided surviving spouses extended relief to make “portability” elections without the need for the issuance of a private letter ruling from the IRS. Estates now have until the fifth annual anniversary of the decedent’s date of death to make the election, even if they were not previously required to file an estate tax return.

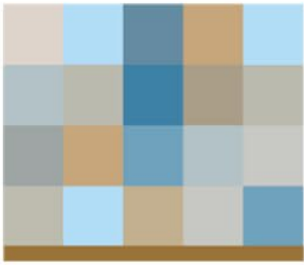
Background:

The Tax Cuts and Jobs Act of 2017 (“TCJA”) increased the unified gift and estate tax exclusion amount to **\$10,000,000** per person (adjusted annually for inflation). Under current federal tax law, an executor, personal representative, or surviving spouse of the estate of a decedent may elect to carryover the deceased spouse’s unused unified estate and gift tax credit for the benefit of the surviving spouse (i.e., use “portability”) on a timely filed estate tax return, which is due nine months from the date of death of the decedent (plus an automatic six-month extension by simply filing Form 4768). Prior to Revenue Procedure 2022-32, to get a further extension of time to make a portability election, the IRS would need to issue a private letter ruling.

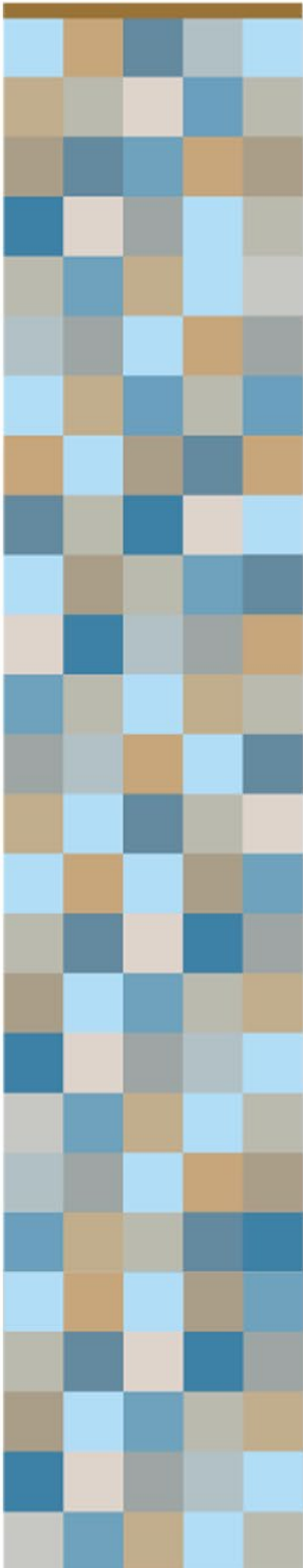
In calendar year 2022, the lifetime credit is at an historic high of **\$12,060,000** per person, so a surviving spouse may be able to utilize his or her lifetime credit plus the deceased spouse’s remaining credit to attain a total of **\$24,120,000** in estate and gift tax credits that can be utilized for tax-free transfers of wealth during the lifetime of the surviving spouse. In 2023, the credit increases to **\$12,920,000** per person (**\$25,840,000** per married couple).

With such a large lifetime credit, however, many estates in 2017 or later were not required to file federal estate tax returns under IRC Section 6018(a) because the





ALERT



gross value of these estates did not exceed the basic exclusion amount in effect following the passing of the TCJA.

This is a very important estate planning opportunity because if the federal transfer tax laws change, the non-portability credit (i.e., the surviving spouse's unified credit) may be subject to a major reduction. In fact, under current law, the current **\$12,060,000** per person credit is set to “sunset” on January 1, 2026 and be reduced to **\$5,000,000** per person (as adjusted for inflation). Thus, for example, if in 2026 the lifetime estate and gift tax credit is reduced to **\$5,000,000** per person, then the surviving spouse of a decedent who died prior to January 1, 2026 will have a maximum available credit of **\$17,060,000** (i.e., the carryover amount of \$12,060,000 (as adjusted for inflation) plus his or her \$5,000,000 credit).

Notably, the IRS has indicated that Individuals taking advantage of the increased gift tax exclusion amount in effect from 2018 to 2025 will not be adversely impacted after 2025 when the exclusion amount is scheduled to drop to pre-2018 levels. Accordingly, gifts and other transfers of wealth made during this time period will not be “clawed back” into the decedent's estate or subject to additional transfer tax liability.

Conclusion:

Electing portability now, even if the deceased spouse's estate was not required by IRC Section 6018(a) to file an estate tax return, is critical. Revenue Procedure 2022-32 allows estates only filing for portability purposes to make the portability election by the fifth annual anniversary of the decedent's date of death.

If a spouse passed away in 2017 or later and you believe this new rule may benefit you or the decedent's surviving spouse, please contact a member of our Trusts and Estates department below to discuss your unique situation in more depth, or have your accountant or financial advisor reach out to them directly.

Brian Adelman – badelman@moritthock.com

Sheryl Bergstein – sbergstein@moritthock.com

Michael Borger – mborger@moritthock.com

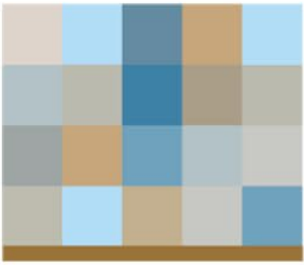
Michael Calcagni – mcalcagni@moritthock.com

Jennifer Cunningham – jcunningham@moritthock.com

Karen C. Davakis – kdavakis@moritthock.com

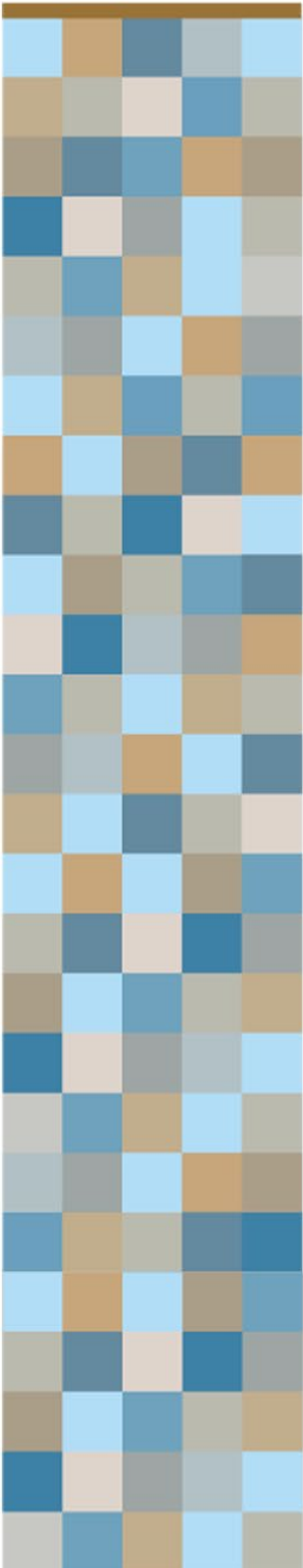
Johanna C. David – jdavid@moritthock.com

Louis Karol – lkarol@moritthock.com



STRENGTH IN PARTNERSHIP®

ALERT



Steven Kay – skay@moritthock.com

Henry E. Klosowski – hklosowski@moritthock.com

Dennis Kucica – dkucica@moritthock.com

Ronald P. Perry – rperry@moritthock.com

Howard Sosnik – hsosnik@moritthock.com

Adina Sposta – asposta@moritthock.com

David N. Wechsler – dwechsler@moritthock.com

Moritt Hock & Hamroff LLP is a broad-based commercial law firm with more than 80 lawyers and a staff of paralegals. The firm's practice areas include: closely-held/family business practice; commercial foreclosure; commercial lending & finance; construction; copyrights, trademarks & licensing; corporate, mergers and acquisitions, & securities; covid litigation; creditors' rights, restructuring & bankruptcy; privacy, cybersecurity & technology; dispute resolution; employment; healthcare; landlord & tenant; litigation; marketing, advertising & promotions; not-for-profit; real estate; secured lending, equipment & transportation finance; sports law; tax; and [trusts & estates](#).



This Alert is published solely for the interests of friends and clients of Moritt Hock & Hamroff LLP for informational purposes only and should in no way be relied upon or construed as legal advice.

©2022 Moritt Hock & Hamroff LLP

Attorney Advertising

400 Garden City Plaza, Garden City, NY 11530 | Tel (516) 873-2000 | Fax (516) 873-2010
1407 Broadway, 39th Floor, New York, NY 10018 | Tel (212) 239-2000 | Fax (212) 239-7277

www.moritthock.com