

before the July 1, 2008, final compliance deadline.<sup>6</sup>

Between 2007 and 2011, the annual average value of the Consumer Price Index for all urban consumers and all items increased by 8.49 percent—from an index value of 207.342 to a value of 224.939.<sup>7</sup> Applying the percentage increase to the three monetary thresholds increases the thresholds as follows:

| Exemption  | Original threshold | Adjusted threshold |
|--|--------------------|--------------------|
| Minimum Payment Large Franchise Investment ..... | \$500              | <sup>8</sup> \$540 |
| Large franchisee ...                             | 1,000,000          | 1,084,900          |
|  | 5,000,000          | 5,424,500          |

Because the calculation of these thresholds is purely ministerial in nature and implements the Rule's mandatory adjustment mechanism, these adjustments are exempt from the rulemaking procedures specified in section 18 of the FTC Act.<sup>9</sup> In addition, the Commission has determined that notice and comment are unnecessary under the Administrative Procedure Act (APA) for the same reason. The Commission, therefore, has omitted notice and comment for good cause as provided by section 553(b)(B) of the APA.<sup>10</sup> For this reason, the requirements of the Regulatory Flexibility Act also do not apply.<sup>11</sup> Accordingly, the adjusted thresholds will take effect on July 1, 2012.

#### List of Subjects in 16 CFR Part 436

Advertising, Business and industry, Franchising, Trade practices.

#### Rule Amendments

For the reasons set out in the preamble of this document, the Federal Trade Commission amends 16 CFR Part 436 as follows:

<sup>6</sup> 72 FR 15444 (Mar. 30, 2007).

<sup>7</sup> Consumer Price Index, All Urban Consumers ("CPI-U"), available at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>.

<sup>8</sup> The Commission has rounded this figure from \$542.45 to \$540 for compliance clarity and simplicity.

<sup>9</sup> See 15 U.S.C. 57a(d)(2)(B); 16 CFR 1.15(b) (providing that non-substantive amendments to trade regulation rules are exempt from the rulemaking procedures of Section 18 of the FTC Act).

<sup>10</sup> 5 U.S.C. 553(b)(B) (providing that "good cause" exists to forego notice and comment when public comment is unnecessary).

<sup>11</sup> 5 U.S.C. 603 and 604 (no regulatory flexibility analyses required where the APA does not require public comment).

### PART 436—DISCLOSURE REQUIREMENTS AND PROHIBITIONS CONCERNING FRANCHISING

■ 1. The authority citation for part 436 continues to read as follows:

**Authority:** 15 U.S.C. 41–58.

■ 2. Amend ' 436.8 as follows:

- a. In paragraph (a)(1), remove "\$500" and, in its place, add "\$540";
- b. In paragraph (a)(5)(i), remove all references to "\$1 million" and, in their place, add "\$1,084,900"; and
- c. In paragraph (a)(5)(ii), remove "\$5 million" and, in its place, add "\$5,424,500".

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2012-14785 Filed 6-15-12; 8:45 am]

**BILLING CODE 6750-01-P**

### DEPARTMENT OF THE TREASURY

#### Internal Revenue Service

#### 26 CFR Parts 20, 25, and 602

[TD 9593]

RIN 1545-BK34

#### Portability of a Deceased Spousal Unused Exclusion Amount

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Temporary regulations.

**SUMMARY:** This document contains temporary regulations that provide guidance on the estate and gift tax applicable exclusion amount, in general, as well as on the applicable requirements for electing portability of a deceased spousal unused exclusion (DSUE) amount to the surviving spouse and on the applicable rules for the surviving spouse's use of this DSUE amount. The statutory provisions underlying the portability rules were enacted as part of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. The portability rules affect married spouses where the death of the first spouse to die occurs on or after January 1, 2011. The text of the temporary regulations also serves as the text of proposed regulations set forth in the notice of proposed rulemaking on this subject appearing elsewhere in this issue of the **Federal Register**.

**DATES:** *Effective Date.* These regulations are effective on June 15, 2012.

*Applicability Dates:* Sections of the temporary regulation relating to

portability of a deceased spousal unused exclusion amount apply to estates of decedents dying on or after January 1, 2011. For specific dates of applicability, see §§ 20.2001-2T(b), 20.2010-1T(e), 20.2010-2T(e), 20.2010-3T(f), 25.2505-1T(e), and 25.2505-2T(g).

#### FOR FURTHER INFORMATION CONTACT:

Karlene Lesho (202) 622-3090 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

#### Paperwork Reduction Act

The collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-0015. Responses to this collection of information are voluntary to obtain the benefit of being able to elect portability or to take advantage of the special reporting requirements applicable to certain assets, and, for certain estates, to opt out of a deemed portability election.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. For further information concerning this collection of information, and the address for the submission of comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble of the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the **Federal Register**.

Books and records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

#### Background

On December 17, 2010, in section 303 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111-312 (124 Stat. 3296, 3302) (TRUIRJA), Congress amended section 2010(c) of the Internal Revenue Code (Code) to allow portability of the applicable exclusion amount between spouses, and it made conforming amendments to sections 2505(a), 2631(c), and 6018(a)(1) of the Code. Section 303 of TRUIRJA directs the Secretary to issue such regulations as may be necessary or appropriate to carry out section 303(a) of TRUIRJA.

This document contains amendments to the Estate Tax Regulations (26 CFR part 20) under sections 2001 and 2010 of the Code and to the Gift Tax Regulations (26 CFR part 25) under section 2505 of the Code. The temporary regulations address not only the amendments made to section 2010(c) by TRUIRJCA and the conforming amendment to section 2505(a), but also the entirety of sections 2010 and 2505 of the Code for which there are no existing regulations. Finally, the amendment to the Estate Tax Regulations under section 2001 of the Code clarifies the application of the rule in section 2010(c)(5)(B) to section 2001 of the Code.

### Section 303(a) of TRUIRJCA

Section 303(a) of TRUIRJCA amends section 2010(c) of the Code by striking paragraph (2) of section 2010(c) and adding new paragraphs (2) through (6) of section 2010(c). Section 2010(c)(2) now defines the applicable exclusion amount, used to determine the applicable credit amount, as the sum of the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount. Section 2010(c)(3) provides that the basic exclusion amount is \$5,000,000, to be adjusted for inflation in each year after calendar year 2011. Section 2010(c)(4) defines the DSUE amount to mean the lesser of (A) the basic exclusion amount or (B) the basic exclusion amount of the last deceased spouse of the surviving spouse, less the amount with respect to which the tentative tax is determined under section 2001(b)(1) on the estate of such deceased spouse.

Section 2010(c)(5) describes special rules relating to the portability of a DSUE amount. Section 2010(c)(5)(A) provides certain requirements that must be met to allow a surviving spouse to take into account a DSUE amount of a deceased spouse. In particular, the executor of the estate of the deceased spouse must file an estate tax return, compute the DSUE amount on such return, elect portability of the DSUE amount on such return, and ensure that such return is filed within the time prescribed by law (including extensions) for filing such return. Section 2010(c)(5)(B) allows the Secretary to examine a return of the deceased spouse to determine the DSUE amount, even after the expiration of the time provided under section 6501 for assessing a tax under chapter 11 or 12.

Section 2010(c)(6) directs the Secretary to prescribe regulations as may be necessary or appropriate to carry out section 2010(c).

### Notice 2011–82

On October 17, 2011, the Department of the Treasury (Treasury) and the IRS issued Notice 2011–82 (2011–42 IRB 516) which can be found on [www.irs.gov](http://www.irs.gov). Notice 2011–82 alerts taxpayers to the requirements for the estate of a deceased spouse to elect portability of a DSUE amount. In addition, Notice 2011–82 announces that the estate of a deceased spouse will be deemed to elect portability of the DSUE amount by timely filing a complete and properly-prepared estate tax return, and that such return will be deemed to include a computation of the DSUE amount until such time as the IRS revises the estate tax return to expressly contain the DSUE amount computation. Notice 2011–82 also provides guidance to the estates of deceased spouses who choose not to make the portability election. Notice 2011–82 announces that Treasury and the IRS intend to issue regulations to implement section 303 of TRUIRJCA. Accordingly, Treasury and the IRS invited comments on a number of specific issues. Treasury and the IRS received comments on these issues, as well as additional issues identified by commenters. The comments are discussed in more detail in the “Explanation of Provisions” section of this preamble.

### Notice 2012–21

On March 3, 2012, Treasury and the IRS issued Notice 2012–21 (2012–10 IRB 450) (which can be found on [www.irs.gov](http://www.irs.gov)). Notice 2012–21 grants to qualifying estates a six-month extension of time for filing an estate tax return to elect portability of an unused exclusion amount provided that the qualifying estate files Form 4768, “Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes,” within 15 months of the decedent’s death. A qualifying estate is the estate of a person who died, survived by a spouse, during the first half of calendar year 2011, and whose gross estate has a fair market value that does not exceed \$5 million. With the extension granted by this notice, the estate tax return must be filed within 15 months of the decedent’s death.

### Explanation of Provisions

#### 1. Rules in Section 2010(a), (b), and (d) of the Code

The temporary regulations in § 20.2010–1T(a) state the general rule of section 2010(a) that an applicable credit amount will be allowed to the estate of every decedent against the estate tax imposed by section 2001. The

temporary regulations in § 20.2010–1T(b) incorporate the rule in section 2010(b) relating to an adjustment to the applicable credit amount for certain gifts made before 1977. Finally, as provided in section 2010(d), the temporary regulations in § 20.2010–1T(c) limit the amount of the allowable credit so that it does not exceed the amount of the estate tax imposed by section 2001.

#### 2. Explanation of Applicable Terms

The temporary regulations in § 20.2010–1T(d) define terms relevant to computing the credit amount allowable under section 2010. The relevant terms include *applicable credit amount*, *applicable exclusion amount*, *basic exclusion amount*, *DSUE amount*, and *last deceased spouse*.

#### 3. Making the Portability Election

##### a. Election Required on Estate Tax Return

The temporary regulations in § 20.2010–2T(a) require an executor electing portability to make that election on a timely-filed estate tax return. The last return filed by the due date of the return, including extensions actually granted, will supersede any previously-filed return. Thus, an executor may supersede a previously-filed portability election on a subsequent timely-filed estate tax return if the executor satisfies the requirement in § 20.2010–2T(a)(3)(i). But see § 20.2010–2T(a)(6) when contrary elections are made by more than one person permitted to make the election. The temporary regulations in § 20.2010–2T(a)(4) provide that a portability election is irrevocable once the due date (as extended) of the return has passed.

##### b. Timely Filing Required

For a valid portability election, section 2010(c)(5) requires the executor to make the election on an estate tax return filed within the “time prescribed by law” (including extensions) for filing that return. Section 6075(a) requires the filing of an estate tax return made under section 6018(a) within 9 months of the date of the decedent’s death. Section 6018(a) requires an estate tax return to be filed when the gross estate of a citizen or resident exceeds the excess (if any) of the basic exclusion amount in effect under section 2010(c) in the calendar year of the decedent’s death over the sum of the decedent’s adjusted taxable gifts as defined in section 2001(b) and the amount allowed to the decedent as a specific exemption under section 2521 as in effect prior to its repeal by the Tax Reform Act of 1976.

A commenter on Notice 2011-82 noted that neither section 2010(c)(5)(A) nor any other section of the Code provides a “time prescribed by law” for filing an estate tax return on behalf of a decedent’s estate when the basic exclusion amount exceeds the value of the decedent’s gross estate. Accordingly, the commenter requested that the regulations clarify the meaning of “time prescribed by law” as it applies in section 2010(c)(5)(A).

For executors who are required to file an estate tax return under section 6018(a), section 6075(a) requires the executor to file the estate tax return within nine months after the decedent’s date of death. When an executor is not required to file an estate tax return under section 6018(a), the Code does not specify a due date for a return filed for the purpose of making the portability election. The temporary regulations in § 20.2010-2T(a)(1) require every estate electing portability of a decedent’s DSUE amount to file an estate tax return within 9 months of the decedent’s date of death, unless an extension of time for filing has been granted. (See Notice 2012-21 providing for an extension of time to file an estate tax return for the estates of certain decedents who died in the first half of calendar year 2011.) This timing requirement for filing a return applies to all estates electing portability regardless of the size of the gross estate. The temporary regulations provide in § 20.2010-2T(a)(1) that an estate choosing to elect portability will be considered for purposes of Subtitle B and Subtitle F of the Code to be required to file a return under section 6018(a).

This rule will benefit the IRS as well as taxpayers choosing the benefit of portability because the records required to compute and verify the DSUE amount are more likely to be available at the time of the death of the first deceased spouse than at the time of a subsequent transfer by the surviving spouse by gift or at death, which could occur many years later. This rule also is consistent with the “Technical Explanation of the Revenue Provisions Contained in the ‘Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010’ Scheduled for Consideration by the United States Senate,” J. Comm. On Taxation, 111th Cong., JCX-55-10 (Dec. 10, 2010) (Technical Explanation), which suggests that estates deciding to elect portability that are not otherwise required to file an estate tax return under section 6018(a) are intended to be subject to the same timely-filing requirements applicable to estates required to file an estate tax return under section 6018(a). The Technical Explanation states that the DSUE

amount is available to a surviving spouse “only if an election is made on a timely filed estate tax return (including extensions) of the predeceased spouse \* \* \* regardless of whether the predeceased spouse otherwise is required to file an estate tax return.” JCX-55-10, page 52; see also “General Explanation of Tax Legislation Enacted in the 111th Congress,” J. Comm. On Taxation, 111th Cong., JCS-2-11, pages 554-555 (March 2011) (General Explanation) (incorporating the same language from the Technical Explanation).

#### c. Portability Election Upon Filing of “Complete and Properly-Prepared” Estate Tax Return

Notice 2011-82 provides that the estate of a decedent dying after December 31, 2010, will be deemed to make the portability election upon the timely filing of a “complete and properly-prepared” estate tax return. The temporary regulations in § 20.2010-2T(a)(2) provide that the estate of a decedent (survived by a spouse) makes the portability election by timely filing a complete and properly-prepared estate tax return for the decedent’s estate.

Several commenters responding to Notice 2011-82 requested that Treasury and the IRS define what is meant by a “complete and properly-prepared” estate tax return. Commenters further requested that Treasury and the IRS consider the cost and burden associated with filing an estate tax return and establishing and substantiating the values reported on such return for those estates that are not required to file a return under section 6018(a) but are filing such a return solely to elect portability of the decedent’s DSUE amount.

The temporary regulations in § 20.2010-2T(a)(7)(i) provide that an estate tax return prepared in accordance with all applicable requirements is considered a “complete and properly-prepared” estate tax return. The temporary regulations in § 20.2010-2T(a)(7)(ii), however, provide that executors of estates that are not otherwise required to file an estate tax return under section 6018(a) do not have to report the value of certain property that qualifies for the marital or charitable deduction. If an executor chooses to make use of this special rule in filing an estate tax return, the executor must estimate the total value of the gross estate (including the values of the property that do not have to be reported on the estate tax return under this provision), based on a determination made in good faith and with due diligence regarding the value

of all of the assets includible in the gross estate. The instructions issued with respect to the estate tax return (“Instructions for Form 706”) will provide ranges of dollar values, and the executor must identify on the estate tax return the particular range within which falls the executor’s best estimate of the total gross estate. An amount corresponding to this range will be included on line 1, part 2, of the estate tax return, along with an indication of whether the line 1 total includes an estimate under this special rule. By signing the return, the executor is certifying, under penalties of perjury, that the estimate falls within the identified range of values to the best of the executor’s knowledge and belief. The inquiry required to determine the executor’s best estimate is the same an executor of any estate must make under current law to determine whether the estate has a filing obligation pursuant to section 6018(a); that is, to determine whether the fair market value of the gross estate exceeds the excess of the basic exclusion amount over the sum of the decedent’s adjusted taxable gifts and the amount allowed to the decedent as a specific exemption under section 2521.

#### d. Opting Out of Portability Election

If the executor of the estate of a decedent with a surviving spouse does not wish to make the portability election, the temporary regulations in § 20.2010-2T(a)(3) require the executor to make an affirmative statement on the estate tax return signifying the decision to have the portability election not apply. If no estate tax return is required for that decedent’s estate under section 6018(a), not filing a timely return will be considered to be an affirmative statement signifying the decision not to make a portability election.

#### e. Executor Responsible for Making Portability Election

A commenter responding to Notice 2011-82 suggested that the temporary regulations allow a surviving spouse to file an estate tax return on behalf of a decedent independently of a duly-appointed executor if the surviving spouse notifies the executor of the intention to file and the executor does not, in fact, file a return. Section 2010(c)(5), however, permits only the executor of the decedent’s estate to file the estate tax return and make the portability election. Section 2203 defines the term “executor” for purposes of the estate tax to mean “the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and

acting within the United States, then any person in actual or constructive possession of any property of the decedent.”

The temporary regulations in § 20.2010–2T(a)(6)(i) provide that an executor or administrator that is appointed, qualified, and acting within the United States for the decedent’s estate (an appointed executor), may file an estate tax return to elect portability or to opt to have the portability election not apply. The temporary regulations in § 20.2010–2T(a)(6)(ii) provide that, if there is no appointed executor, any person in actual or constructive possession of any property of the decedent may file the estate tax return to elect portability or to opt to have the portability election not apply. The temporary regulations in § 20.2010–2T(a)(6)(ii) refer to such a person as a “non-appointed executor” and provide that a portability election made by a non-appointed executor cannot be superseded by a contrary election made by another non-appointed executor of that same decedent’s estate.

#### 4. Computing the DSUE Amount

##### a. Computation Required on Estate Tax Return To Elect Portability

The temporary regulations in § 20.2010–2T(b)(1) require that an executor include a computation of the DSUE amount on the estate tax return of the decedent to allow portability of that decedent’s DSUE amount. A complete and properly-prepared return contains the information required to compute a decedent’s DSUE amount. Accordingly, in a transitional rule consistent with Notice 2011–82, the temporary regulations in § 20.2010–2T(b)(2) provide that the IRS will deem the required computation of the decedent’s DSUE amount to have been made on an estate tax return that is considered complete and properly-prepared. The temporary regulations further clarify that, once the IRS revises the prescribed form for the estate tax return expressly to include the computation of the DSUE amount, executors that previously filed an estate tax return pursuant to the transitional rule will not be required to file a supplemental estate tax return using the revised form.

##### b. Method of Computing the DSUE Amount

Section 2010(c)(4) defines the DSUE amount as the lesser of (A) the basic exclusion amount, or (B) the excess of (i) the basic exclusion amount of the last deceased spouse of the surviving spouse, over (ii) the amount with respect to which the tentative tax is

determined under section 2001(b)(1) on the estate of such deceased spouse.

The temporary regulations in § 20.2010–2T(c)(1)(i) confirm that the term “basic exclusion amount” referred to in section 2010(c)(4)(A) means the basic exclusion amount in effect in the year of the death of the decedent whose DSUE amount is being computed. Generally, only the basic exclusion amount of the decedent, as in effect in the year of the decedent’s death, will be known at the time the DSUE amount must be computed and reported on the decedent’s estate tax return. Because section 2010(c)(5)(A) requires the executor of an estate electing portability to compute and report the DSUE amount on a timely-filed estate tax return, and because the basic exclusion amount is integral to this computation, the term “basic exclusion amount” in section 2010(c)(4)(A) necessarily refers to such decedent’s basic exclusion amount.

In responding to Notice 2011–82, several commenters also argued that the reference to “basic exclusion amount” in section 2010(c)(4)(B)(i) should be interpreted to mean “applicable exclusion amount,” citing to the computation of the DSUE amount in *Example 3* on page 53 of the Technical Explanation and to footnote 1582A that was added to the General Explanation by the “ERRATA—General Explanation of Tax Legislation Enacted in the 111th Congress” (ERRATA). JCX–20–11, at page 1. *Example 3* computes the DSUE amount of a deceased spouse who was preceded in death by one spouse and was survived by another spouse. The deceased spouse’s DSUE amount is computed using the applicable exclusion amount rather than the basic exclusion amount of the deceased spouse (as reduced by the amount of the deceased spouse’s taxable estate). *Example 3* is reproduced verbatim in the General Explanation. See JCS–2–11 at page 555. The ERRATA acknowledges that section 2010(c)(4)(B)(i) uses the term basic exclusion amount, but notes that “[a] technical correction may be necessary to replace the reference to the basic exclusion amount of the last deceased spouse of the surviving spouse with a reference to the applicable exclusion amount of such last deceased spouse, so that the statute reflects intent.” JCX–20–11, at page 1, n. 1582A.

Treasury and the IRS have carefully considered this issue. Construing the language of section 2010(c)(4)(B)(i) as referring to the same number described in section 2010(c)(4)(A) would lead to an illogical result because it would effectively render the use of “basic exclusion amount” in section

2010(c)(4)(A) meaningless. Specifically, the basic exclusion amount (the amount referenced in section 2010(c)(4)(A)) cannot be less than that same number reduced by another number (the amount referenced in section 2010(c)(4)(B)). Under such an interpretation, the basic exclusion amount referenced in section 2010(c)(4)(A) could not limit or impact the DSUE amount, and thus it would serve no purpose as written. Based on the principle that a statute should not be construed in a manner that renders a provision of that statute superfluous and consistent with the indicia of legislative intent reflected in the Technical Explanation and the General Explanation, and in the exercise of the express authority granted by Congress in sections 2010(c)(6) and 7805, Treasury and the IRS have determined that the reference in section 2010(c)(4)(B)(i) to the basic exclusion amount is properly interpreted to mean the applicable exclusion amount. Thus, the temporary regulations adopt this interpretation.

##### c. Effect of Gift Taxes Paid and Payable on Computing the DSUE Amount

Several commenters on Notice 2011–82 suggested that, for purposes of computing the DSUE amount under section 2010(c)(4), the amount referred to in section 2010(c)(4)(B)(ii), which is the amount on which the decedent’s tentative tax is determined under section 2001(b)(1), be construed to take into account gift tax paid by such decedent. The commenters noted that, to avoid using exclusion for amounts on which gift tax was paid, this construction should apply in computing the DSUE amount of such a decedent if (1) gift tax was paid by a decedent on transfers that caused the total of his or her taxable transfers to exceed the applicable exclusion amount at the time of the transfer, and (2) the total adjusted taxable gifts of the decedent is less than the applicable exclusion amount on the date of his or her death. The temporary regulations in § 20.2010–2T(c)(2) provide that amounts on which gift taxes were paid by a decedent are excluded from adjusted taxable gifts for the purpose of computing that decedent’s DSUE amount.

##### d. Potential Impact of Credits in Sections 2013–2015 on the DSUE Amount

Commenters on Notice 2011–82 asked for clarification as to whether the DSUE amount is determined before or after the application of other available credits, such as the credit for tax on prior transfers (section 2013), the credit for foreign death taxes (section 2014), and the credit for death taxes on remainders

(section 2015). The issue of the impact of the credits in sections 2013 to 2015 on computing the DSUE amount merits further consideration. The temporary regulations reserve § 20.2010-2T(c)(3) to provide future guidance on this issue. Treasury and the IRS request comments regarding appropriate rules to coordinate these credits with portability of the exclusion. For the manner of submitting these comments, see the notice of proposed rulemaking on this subject appearing elsewhere in this issue of the **Federal Register**.

#### 5. Use of the DSUE Amount by the Surviving Spouse

##### a. Date DSUE Amount May Be Taken Into Consideration by Surviving Spouse

Commenters on Notice 2011-82 asked for clarification on when the DSUE amount of a decedent is available to the surviving spouse or to the surviving spouse's estate for use in determining the surviving spouse's applicable exclusion amount. The temporary regulations in §§ 20.2010-3T(a) and 25.2505-2T(a) provide that, if the decedent is the last deceased spouse of the surviving spouse on the date of a transfer by the surviving spouse that is subject to gift or estate tax, the surviving spouse, or the estate of the surviving spouse, of that decedent may take into account that decedent's DSUE amount in determining the applicable exclusion amount of the surviving spouse when computing the surviving spouse's gift or estate tax liability on that transfer. This rule applies only if the decedent's executor elected portability. In addition, the temporary regulations in §§ 20.2010-3T(c)(1) and 25.2505-2T(d)(1) provide that a portability election made by the executor of a decedent's estate is effective as of the date of the decedent's death. Thus, the DSUE amount of a decedent survived by a spouse may be included in determining the applicable exclusion amount of the surviving spouse under section 2010(c)(2), subject to any applicable limitations, with respect to all transfers occurring after the death of the decedent, if the executor of the decedent's estate makes a portability election and the election is not superseded by the executor of the decedent's estate before the due date of the return, including extensions.

##### b. Last Deceased Spouse Limitation on DSUE Amount Available to Surviving Spouse

Some commenters responding to Notice 2011-82 suggested that the regulations clarify the scope of the last deceased spouse limitation in section

2010(c)(4)(B)(i). The temporary regulations in § 20.2010-1T(d)(5) explain that the term "last deceased spouse" referred to in section 2010(c)(4)(B)(i) means the most recently deceased individual who was married to the surviving spouse at that individual's death, except that an individual dying before calendar year 2011 cannot be considered the last deceased spouse of such surviving spouse. The temporary regulations in §§ 20.2010-3T(a)(3) and 25.2505-2T(a)(3) clarify that remarriage alone does not affect who will be considered the last deceased spouse and does not prevent the surviving spouse from including in the surviving spouse's applicable exclusion amount the DSUE amount of the deceased spouse who most recently preceded the surviving spouse in death. The temporary regulations further clarify that the identity of the last deceased spouse of the surviving spouse for purposes of portability is not affected by whether the estate of the last deceased spouse elects portability of the deceased spouse's DSUE amount or whether the last deceased spouse has any DSUE amount available. This is consistent with the statutory language, which refers to the "last deceased spouse of such surviving spouse" without further qualification, as well as with the Technical Explanation, which states that "[t]he last deceased spouse limitation applies whether or not the last deceased spouse has any unused exclusion or the last deceased spouse's estate makes a timely election." JCX-55-10, at page 52, n. 57; see also General Explanation, JCS-2-11, at page 554, n. 1582.

For purposes of determining the applicable credit amount under section 2505(a)(1), a commenter asked Treasury and the IRS to clarify when one determines the identity of the last deceased spouse. Although section 2505(a)(1) refers to the applicable credit amount in effect under section 2010(c) as would apply if the donor died as of the end of the calendar year, this does not mean that the identity of the last deceased spouse is subject to change for purposes of computing the surviving spouse's applicable exclusion amount if the surviving spouse is preceded in death by a subsequent spouse after the gift transfer but before the end of the calendar year. Therefore, the temporary regulations provide in § 25.2505-2T(a) that for purposes of determining a surviving spouse's applicable exclusion amount when the surviving spouse makes a taxable gift, the surviving spouse's last deceased spouse is identified as of the date of the taxable

gift. See § 20.2010-3T(a) for a comparable rule for estate tax purposes.

##### c. DSUE Amount Available in Case of Multiple Spouses and Previously-Applied DSUE Amount

Some commenters responding to Notice 2011-82 requested that the regulations clarify the outcome when a surviving spouse is preceded in death by more than one spouse. In particular, commenters asked how the DSUE amount to be included in the applicable exclusion amount of a surviving spouse is affected when a decedent who is currently considered the last deceased spouse of such surviving spouse either has no DSUE amount or has a smaller amount of DSUE in comparison to a decedent who previously was considered the last deceased spouse of such surviving spouse. The temporary regulations clarify that, in either situation, the surviving spouse may not apply any remaining DSUE amount from a prior deceased spouse.

In addition, the temporary regulations address how to compute the DSUE amount included in the applicable exclusion amount of a surviving spouse who made gifts between the deaths of two decedents, each of whom were at separate times the last deceased spouse of such surviving spouse. First, the temporary regulations in § 25.2505-2T(b) create an ordering rule by providing that, when a surviving spouse makes a taxable gift, the DSUE amount of the decedent who is the last deceased spouse of such surviving spouse will be considered to apply against the amount of the surviving spouse's taxable gifts for that calendar year before the surviving spouse's own basic exclusion amount will apply.

Second, the temporary regulations, in §§ 25.2505-2T(c) and 20.2010-3T(b), compute the DSUE amount available to such a surviving spouse or to his or her estate, respectively, as including both: (i) The DSUE amount of the surviving spouse's last deceased spouse, and (ii) any DSUE amount actually applied to taxable gifts pursuant to the rule in § 25.2505-2T(b) to the extent the DSUE amount so applied was from a decedent who no longer is the last deceased spouse for purposes of section 2010(c)(4)(B)(i). Under the rules in § 25.2505-2T, a surviving spouse may use the DSUE amount of a predeceased spouse as long as, for each transfer, such DSUE amount is from the surviving spouse's last deceased spouse at the time of that transfer. Thus, a spouse who has survived multiple spouses may use each last deceased spouse's DSUE amount before the death of that spouse's next spouse, and thereby may apply the

DSUE amount of multiple deceased spouses in succession. However, this does not permit the surviving spouse to use the sum of the DSUE amounts of those deceased spouses at one time, and a surviving spouse may not use the remaining DSUE amount of a prior deceased spouse following the death of a subsequent spouse.

#### *6. Authority To Examine Returns of Deceased Spouses*

Section 2010(c)(5)(B) confirms the IRS's authority to examine returns of each deceased spouse of the surviving spouse to determine the allowable DSUE amount even if the period of limitations on assessment under section 6501 has expired for the tax under chapters 11 or 12 with respect to such returns.

Section 7602(a) provides that the IRS may examine any books, papers, records, or other data which may be relevant or material to an inquiry for the purpose of ascertaining the accuracy of any return or determining the liability of any person for any internal revenue tax or liability. The returns of each deceased spouse whose executor elected portability are relevant or material to the determination of the allowable DSUE amount to be applied by the surviving spouse to a taxable transfer.

Accordingly, the temporary regulations confirm in §§ 20.2001-2T(a), 20.2010-2T(d), 20.2010-3T(d), and 25.2505-2T(e) that, in determining the allowable DSUE amount, the IRS may examine any one or more returns of each deceased spouse of the surviving spouse whose executor elected portability. Upon examination, the IRS may adjust or eliminate the DSUE amount reported on a return; however, the IRS may make an assessment of additional tax with respect to the deceased spouse's return only within the period of limitations under section 6501. The ability of the IRS to examine returns of a deceased spouse applies to each transfer by the surviving spouse to which a DSUE amount is or has been applied. The returns and return information of a deceased spouse may be disclosed to the surviving spouse or the surviving spouse's estate as appropriate under section 6103.

A commenter to Notice 2011-82 suggested that the regulations clarify whether the IRS's authority to examine returns even after the period of limitations on assessment has expired, as confirmed in section 2010(c)(5)(B), would suspend the substantive review and examination of the estate tax return of a decedent with a surviving spouse. Except to the extent provided in section 2010(c)(5)(B) with regard to the

computation of the DSUE amount, the limitation in section 6501 continues to apply to the estate tax return so examination of the estate tax return will not be suspended solely because of the possibility of future reviews to determine the decedent's DSUE amount.

#### *7. Applicability of Portability Rules to Nonresidents Who Are Not Citizens*

Several commenters requested that the regulations clarify the applicability of the rules in section 2010(c) to estates of nonresidents who are not citizens. In response to these comments, the temporary regulations provide in § 20.2010-2T(a)(5) that an executor of the estate of a nonresident decedent who was not a citizen of the United States at the time of death may not make a portability election on behalf of that decedent. The temporary regulations in §§ 20.2010-3T(e) and 25.2505-2T(f) provide that a nonresident surviving spouse who was not a citizen of the United States at the time of such surviving spouse's death may not take into account the DSUE amount of any deceased spouse of such surviving spouse, except to the extent allowed under a treaty obligation of the United States.

#### *8. Applicability of Portability in Case of Qualified Domestic Trusts*

A commenter suggested that the regulations clarify how the portability rules apply when a qualified domestic trust (QDOT) (defined in section 2056A(a)) is created for the benefit of a surviving spouse who is a not a citizen of the United States. When property of a decedent passes to a QDOT, the decedent's estate is allowed a marital deduction under section 2056(d)(2) for the value of such property. Ultimately, however, estate tax is imposed on such property under section 2056A as distributions constituting taxable events are made from the QDOT. The estate tax imposed by section 2056A is the decedent's estate tax liability, and that tax generally equals the amount of additional estate tax that would have been imposed under section 2001 if the amount involved in the taxable event had been included in the decedent's taxable estate and had not been deductible under section 2056. See § 20.2056A-5(a). The estate tax that would have been imposed under section 2001 is computed by determining the net tax under section 2001 after the allowance of any credits, including the applicable credit amount determined under section 2010(c). Consequently, when a QDOT has been created for the benefit of a decedent's surviving spouse, the executor of the decedent's estate

will compute a DSUE amount, on a preliminary basis, that may decrease as distributions constituting taxable events under section 2056A are made.

Commenters made several suggestions for applying portability to this situation. One proposal is to allow a decedent's DSUE amount to be computed and available to the surviving spouse as of the date of death of the decedent, without regard to the estate tax to be imposed by section 2056A. A second suggestion is to allow an executor of such an estate to elect portability with respect to only a portion of the DSUE amount so that an executor could reserve a portion of the decedent's DSUE amount for the estate tax to be imposed by section 2056A. A third proposal is to allow the decedent's applicable exclusion amount and the initially-determined DSUE amount to be applied on a chronological, or first come, first served, basis; that is, by applying the decedent's applicable exclusion amount on the occurrence of a taxable event subject to the estate tax imposed by section 2056A and at the time of a transfer by the surviving spouse subject to the gift tax imposed by section 2501, in each case, to the extent applicable exclusion amount or DSUE amount, respectively, is available at such times.

Each of the proposals raises issues of fairness, complexity, and administrability. The applicable exclusion amount first and foremost belongs to the decedent. Portability of a DSUE amount allows a surviving spouse to use a decedent's exclusion amount only to the extent it is not used by that decedent. Accordingly, the temporary regulations allow the decedent's estate full availability of the decedent's applicable exclusion amount until such time as the final estate tax liability of the decedent is computed. The temporary regulations in § 20.2010-2T(c)(4) provide that the executor of a decedent's estate claiming a marital deduction for property passing to a QDOT shall compute the decedent's DSUE amount on a preliminary basis on the decedent's estate tax return for the purpose of electing portability, although such amount subsequently will be reduced by the estate tax imposed by section 2056A. The temporary regulations further provide that the DSUE amount of such a decedent shall be redetermined upon the final distribution or other taxable event on which estate tax under section 2056A is imposed, which is generally upon the death of the surviving spouse or the earlier termination of all QDOTs created for that surviving spouse. The temporary regulations provide in

§ 20.2010–3T(c)(2) that the earliest date such a decedent's DSUE amount may be included in determining the applicable exclusion amount available to the surviving spouse or the surviving spouse's estate is the date of the event that triggers the final estate tax liability of the decedent under section 2056A. Generally, this means that such a decedent's DSUE amount will be available for transfers occurring by reason of the surviving spouse's death, but generally will not be available to the surviving spouse during life. However, the decedent's DSUE amount will be available to apply to the surviving spouse's taxable gifts made in the year of the surviving spouse's death, or, if the event terminating the QDOT occurs prior to the surviving spouse's death, then in the year of that terminating event and/or any subsequent year during the surviving spouse's life. Treasury and the IRS request further comments on this issue. For the manner of submitting these comments, see the notice of proposed rulemaking on this subject appearing elsewhere in this issue of the **Federal Register**.

### Special Analyses

It has been determined that this Treasury decision is not considered a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. In addition, section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations because they are excepted from the notice and comment requirements of section 553(b) and (c) of the Administrative Procedure Act under the interpretive rule and good cause exceptions provided by section 553(b)(3)(A) and (B) of that Act. These regulations are necessary to provide immediate guidance to estates of a decedent with a surviving spouse and to spouses surviving such a decedent on the application of the portability rules of section 2010(c), which applies to estates of decedents dying and gifts made after December 31, 2010. These regulations provide necessary guidance to address fundamental issues concerning the portability election, the computation of the DSUE amount, the identity of the last deceased spouse, and the application of the DSUE amount by the surviving spouse. In addition, the issues addressed by the regulations have been publicly noticed and subject to comment through the publication of Notice 2011–82. For these reasons, good cause exists for dispensing with notice and public comment pursuant to section 553(b) and (c) of the Administrative

Procedure Act. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), please refer to the Special Analyses section of the preamble to the cross-referenced notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

### Drafting Information

The principal author of these temporary regulations is Karlene Lesho, Office of the Associate Chief Counsel (Passthroughs and Special Industries). Other personnel from the IRS and the Treasury Department participated in their development.

### List of Subjects

#### 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

#### 26 CFR Part 25

Gift taxes, Reporting and recordkeeping requirements.

#### 26 CFR Part 602

Reporting and recordkeeping requirements.

### Amendments to the Regulations

Accordingly, 26 CFR parts 20, 25, and 602 are amended as follows:

## PART 20—ESTATE TAX; ESTATE OF DECEDENTS DYING AFTER AUGUST 16, 1954

■ **Paragraph 1.** The authority citation for part 20 is amended by adding entries in numerical order to read as follows:

**Authority:** 26 U.S.C. 7805. \* \* \*  
Section 20.2010–0T also issued under 26 U.S.C. 2010(c)(6).  
Section 20.2010–1T also issued under 26 U.S.C. 2010(c)(6).  
Section 20.2010–2T also issued under 26 U.S.C. 2010(c)(6).  
Section 20.2010–3T also issued under 26 U.S.C. 2010(c)(6). \* \* \*

■ **Par. 2.** Section 20.2001–2T is added to read as follows:

### § 20.2001–2T Valuation of adjusted taxable gifts for purposes of determining the deceased spousal unused exclusion amount of last deceased spouse (temporary).

(a) *General rule.* Notwithstanding § 20.2001–1(b), see §§ 20.2010–2T(d) and 20.2010–3T(d) for additional rules regarding the authority of the Internal Revenue Service to examine any gift or other tax return(s), even if the time

within which a tax may be assessed under section 6501 has expired, for the purpose of determining the deceased spousal unused exclusion (DSUE) amount available under section 2010(c) of the Internal Revenue Code (Code).

(b) *Effective/applicability date.* Paragraph (a) of this section applies to the estates of decedents dying in calendar year 2011 or a subsequent year in which the applicable exclusion amount is determined under section 2010(c) of the Code by adding the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount.

(c) *Expiration date.* The applicability of this section expires on or before June 15, 2015.

■ **Par. 3.** Section 20.2010–0T is added to read as follows:

### § 20.2010–0T Table of contents (temporary).

This section lists the table of contents for §§ 20.2010–1T through 20.2010–3T.

#### § 20.2010–1T Unified credit against estate tax; in general (temporary).

- (a) General rule.
- (b) Special rule in case of certain gifts made before 1977.
- (c) Credit limitation.
- (d) Explanation of terms.
  - (1) Applicable credit amount.
  - (2) Applicable exclusion amount.
  - (3) Basic exclusion amount.
  - (4) Deceased spousal unused exclusion (DSUE) amount.
  - (5) Last deceased spouse.
  - (e) Effective/applicability date.
  - (f) Expiration date.

#### § 20.2010–2T Portability provisions applicable to estate of a decedent survived by a spouse (temporary).

- (a) Election required for portability.
  - (1) Timely filing required.
  - (2) Portability election upon filing of estate tax return.
  - (3) Portability election not made; requirements for election not to apply.
  - (4) Election irrevocable.
  - (5) Estates eligible to make the election.
  - (6) Persons permitted to make the election.
  - (7) Requirements of return.
    - (b) Computation required for portability election.
      - (1) General rule.
      - (2) Transitional rule.
      - (c) Computation of the DSUE amount.
        - (1) General rule.
        - (2) Special rule to consider gift taxes paid by decedent.
          - (3) [Reserved]
          - (4) Special rule in case of property passing to qualified domestic trust.
          - (5) Examples.
          - (d) Examination to examine returns of decedent.
            - (e) Effective/applicability date.
            - (f) Expiration date.

#### § 20.2010–3T Portability provisions applicable to the surviving spouse's estate (temporary).

(a) Surviving spouse's estate limited to DSUE amount of last deceased spouse.

(1) In general.

(2) No DSUE amount available from last deceased spouse.

(3) Identity of last deceased spouse unchanged by subsequent marriage or divorce.

(b) Special rule in case of multiple deceased spouses and a previously-applied DSUE amount.

(1) In general.

(2) Example.

(c) Date DSUE amount taken into consideration by surviving spouse's estate.

(1) General rule.

(2) Special rule when property passes to surviving spouse in a qualified domestic trust.

(d) Authority to examine returns of deceased spouses.

(e) Availability of DSUE amount for estates of nonresidents who are not citizens.

(f) Effective/applicability date.

(g) Expiration date.

■ **Par. 4.** Section 20.2010-1T is added to read as follows:

**§ 20.2010-1T Unified credit against estate tax; in general (temporary).**

(a) *General rule.* Section 2010(a) allows the estate of every decedent a credit against the estate tax imposed by section 2001. The allowable credit is the applicable credit amount. See paragraph (d)(1) of this section for an explanation of the term *applicable credit amount*.

(b) *Special rule in case of certain gifts made before 1977.* The applicable credit amount allowable under paragraph (a) of this section must be reduced by an amount equal to 20 percent of the aggregate amount allowed as a specific exemption under section 2521 (as in effect before its repeal by the Tax Reform Act of 1976) for gifts made by the decedent after September 8, 1976, and before January 1, 1977.

(c) *Credit limitation.* The applicable credit amount allowed under paragraph (a) of this section cannot exceed the amount of the estate tax imposed by section 2001.

(d) *Explanation of terms.* The explanation of terms in this section applies to this section and to §§ 20.2010-2T and 20.2010-3T.

(1) *Applicable credit amount.* The term *applicable credit amount* refers to the allowable credit against estate tax imposed by section 2001 and gift tax imposed by section 2501. The applicable credit amount equals the amount of the tentative tax that would be determined under section 2001(c) if the amount on which such tentative tax is to be computed were equal to the applicable exclusion amount. The applicable credit amount is determined by applying the unified rate schedule in

section 2001(c) to the applicable exclusion amount.

(2) *Applicable exclusion amount.* The *applicable exclusion amount* equals the sum of the basic exclusion amount and, in the case of a surviving spouse, the deceased spousal unused exclusion (DSUE) amount.

(3) *Basic exclusion amount.* The *basic exclusion amount* is the sum of—

(i) For any decedent dying in calendar year 2011, \$5,000,000; and

(ii) For any decedent dying after calendar year 2011, \$5,000,000 multiplied by the cost-of-living adjustment determined under section 1(f)(3) for that calendar year by substituting “calendar year 2010” for “calendar year 1992” in section 1(f)(3)(B) and by rounding to the nearest multiple of \$10,000.

(4) *Deceased spousal unused exclusion (DSUE) amount.* The term *DSUE amount* refers, generally, to the unused portion of a decedent's applicable exclusion amount to the extent this amount does not exceed the basic exclusion amount in effect in the year of the decedent's death. For rules on computing the DSUE amount, see §§ 20.2010-2T(c) and 20.2010-3T(b).

(5) *Last deceased spouse.* The term *last deceased spouse* means the most recently deceased individual who, at that individual's death after December 31, 2010, was married to the surviving spouse. See §§ 20.2010-3T(a) and 25.2505-2T(a) of this chapter for additional rules pertaining to the identity of the last deceased spouse for purposes of determining the applicable exclusion amount of the surviving spouse.

(e) *Effective/applicability date.* Paragraphs (d)(2), (d)(3), (d)(4), and (d)(5) of this section apply to the estates of decedents dying in calendar year 2011 or a subsequent year in which the applicable exclusion amount is determined under section 2010(c) of the Internal Revenue Code by adding the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount. Paragraphs (a), (b), (c), and (d)(1) of this section apply to the estates of decedents dying on or after June 15, 2012.

(f) *Expiration date.* The applicability of this section expires on or before June 15, 2015.

■ **Par. 5.** Section 20.2010-2T is added to read as follows:

**§ 20.2010-2T Portability provisions applicable to estate of a decedent survived by a spouse (temporary).**

(a) *Election required for portability.* To allow a decedent's surviving spouse to take into account that decedent's

deceased spousal unused exclusion (DSUE) amount, the executor of the decedent's estate must elect portability of the DSUE amount on a timely-filed Form 706, “United States Estate (and Generation-Skipping Transfer) Tax Return” (estate tax return). This election is referred to in this section and in § 20.2010-3T as the portability election.

(1) *Timely filing required.* An estate that elects portability will be considered, for purposes of Subtitle B and Subtitle F of the Internal Revenue Code (Code), to be required to file a return under section 6018(a). Accordingly, the due date of an estate tax return required to elect portability is 9 months after the decedent's date of death or the last day of the period covered by an extension (if an extension of time for filing has been obtained). See §§ 20.6075-1 and 20.6081-1 for additional rules relating to the time for filing estate tax returns.

(2) *Portability election upon filing of estate tax return.* Upon the timely filing of a complete and properly-prepared estate tax return, an executor of an estate of a decedent (survived by a spouse) will have elected portability of the decedent's DSUE amount unless the executor chooses not to elect portability and satisfies the requirement in paragraph (a)(3)(i) of this section. See paragraph (a)(7) of this section for the return requirements related to the portability election.

(3) *Portability election not made; requirements for election not to apply.* The executor of the estate of a decedent (survived by a spouse) will not make or be considered to make the portability election if either of the following applies:

(i) The executor states affirmatively on a timely-filed estate tax return, or in an attachment to that estate tax return, that the estate is not electing portability under section 2010(c)(5). The manner in which the executor may make this affirmative statement on the estate tax return will be as set forth in the instructions issued with respect to such form (“Instructions for Form 706”).

(ii) The executor does not timely file an estate tax return in accordance with paragraph (a)(1) of this section.

(4) *Election irrevocable.* An executor of the estate of a decedent (survived by a spouse) who timely files an estate tax return may make and may supersede a portability election previously made, provided that the estate tax return reporting the decision not to make a portability election is filed on or before the due date of the return, including extensions actually granted. However, see paragraph (a)(6) of this section when contrary elections are made by more

than one person permitted to make the election. The portability election, once made, becomes irrevocable once the due date of the estate tax return, including extensions actually granted, has passed.

(5) *Estates eligible to make the election.* An executor may elect portability on behalf of the estate of a decedent (survived by a spouse) if the decedent dies in calendar year 2011 or during a subsequent period in which portability of a DSUE amount is in effect. However, an executor of the estate of a nonresident decedent who was not a citizen of the United States at the time of death may not elect portability on behalf of that decedent, and the timely filing of such a decedent's estate tax return will not constitute the making of a portability election.

(6) *Persons permitted to make the election*—(i) *Appointed executor.* An executor or administrator of the estate of a decedent (survived by a spouse) that is appointed, qualified, and acting within the United States, within the meaning of section 2203 (an appointed executor), may file the estate tax return on behalf of the estate of the decedent and, in so doing, elect portability of the decedent's DSUE amount. An appointed executor also may elect not to have portability apply pursuant to paragraph (a)(3) of this section.

(ii) *Non-appointed executor.* If there is no appointed executor, any person in actual or constructive possession of any property of the decedent (a non-appointed executor) may file the estate tax return on behalf of the estate of the decedent and, in so doing, elect portability of the decedent's DSUE amount, or, by complying with paragraph (a)(3) of this section, may elect not to have portability apply. A portability election made by a non-appointed executor cannot be superseded by a contrary election made by another non-appointed executor of that same decedent's estate (unless such other non-appointed executor is the successor of the non-appointed executor who made the election). See § 20.6018-2 for additional rules relating to persons permitted to file the estate tax return.

(7) *Requirements of return*—(i) *General rule.* An estate tax return will be considered complete and properly-prepared for purposes of this section if it is prepared in accordance with the instructions issued for the estate tax return (Instructions for Form 706) and if the requirements of §§ 20.6018-2, 20.6018-3, and 20.6018-4 are satisfied. However, see paragraph (a)(7)(ii) of this section for reduced requirements applicable to certain property of certain estates.

(ii) *Reporting of value not required for certain property*—(A) *In general.* A special rule applies with respect to certain property of estates in which the executor is not required to file an estate tax return under section 6018(a), as determined without regard to paragraph (a)(1) of this section. With respect to such an estate, for bequests, devises, or transfers of property included in the gross estate, the value of which is deductible under section 2056 or 2056A (marital deduction property) or under section 2055(a) (charitable deduction property), an executor is not required to report a value for such property on the estate tax return (except to the extent provided in this paragraph (a)(7)(ii)(A)) and will be required to report only the description, ownership, and/or beneficiary of such property, along with all other information necessary to establish the right of the estate to the deduction in accordance with §§ 20.2056(a)-1(b)(i) through (iii) and 20.2055-1(c), as applicable. However, this rule does not apply to marital deduction property or charitable deduction property if—

(1) The value of such property relates to, affects, or is needed to determine, the value passing from the decedent to another recipient;

(2) The value of such property is needed to determine the estate's eligibility for the provisions of sections 2032, 2032A, 6166, or another provision of the Code;

(3) Less than the entire value of an interest in property includible in the decedent's gross estate is marital deduction property or charitable deduction property; or

(4) A partial disclaimer or partial qualified terminable interest property (QTIP) election is made with respect to a bequest, devise, or transfer of property includible in the gross estate, part of which is marital deduction property or charitable deduction property.

(B) *Statement required on the return.* Paragraph (a)(7)(ii)(A) of this section applies only if the executor exercises due diligence to estimate the fair market value of the gross estate, including the property described in paragraph (a)(7)(ii)(A) of this section. The Instructions for Form 706 will provide ranges of dollar values, and the executor must identify on the estate tax return an amount corresponding to the particular range within which falls the executor's best estimate of the total gross estate. Until such time as the prescribed form for the estate tax return expressly includes this estimate in the manner described in the preceding sentence, the executor must include the executor's best estimate, rounded to the nearest

\$250,000, on or attached to the estate tax return, signed under penalties of perjury.

(C) *Examples.* The following examples illustrate the application of paragraph (a)(7)(ii) of this section. In each example, assume that Husband (H) dies in 2011, survived by his wife (W), that both H and W are US citizens, that H's gross estate does not exceed the excess of the applicable exclusion amount for the year of his death over the total amount of H's adjusted taxable gifts and any specific exemption under section 2521, and that H's executor (E) timely files Form 706 solely to make the portability election.

*Example 1.* (i) *Facts.* The assets includible in H's gross estate consist of a parcel of real property and bank accounts held jointly with W with rights of survivorship, a life insurance policy payable to W, and a survivor annuity payable to W for her life. H made no taxable gifts during his lifetime.

(ii) *Application.* E files an estate tax return on which these assets are identified on the proper schedule, but E provides no information on the return with regard to the date of death value of these assets in accordance with paragraph (a)(7)(ii)(A) of this section. To establish the estate's entitlement to the marital deduction in accordance with § 20.2056(a)-1(b) (except with regard to establishing the value of the property) and the instructions for the estate tax return, E includes with the estate tax return evidence to verify the title of each jointly held asset, to confirm that W is the sole beneficiary of both the life insurance policy and the survivor annuity, and to verify that the annuity is exclusively for W's life. Finally, E certifies on the estate return E's best estimate, determined by exercising due diligence, of the fair market value of the gross estate in accordance with paragraph (a)(7)(ii)(B) of this section. The estate tax return is considered complete and properly prepared and E has elected portability.

*Example 2.* (i) *Facts.* H's will, duly admitted to probate and not subject to any proceeding to challenge its validity, provides that H's entire estate is to be distributed to a QTIP trust for W. The non-probate assets includible in H's gross estate consist of a life insurance policy payable to H's children from a prior marriage, and H's individual retirement account (IRA) payable to W. H made no taxable gifts during his lifetime.

(ii) *Application.* E files an estate tax return on which all of the assets includible in the gross estate are identified on the proper schedule. In the case of the probate assets and the IRA, no information is provided with regard to date of death value in accordance with paragraph (a)(7)(ii)(A) of this section. However, E makes a QTIP election and attaches a copy of H's will creating the QTIP, and describes each such asset and its ownership to establish the estate's entitlement to the marital deduction in accordance with the instructions for the estate tax return and § 20.2056(a)-1(b) (except with regard to establishing the value of the property). In the case of the life

insurance policy payable to H's children, all of the regular return requirements, including reporting and establishing the fair market value of such asset, apply. Finally, E certifies on the estate return E's best estimate, determined by exercising due diligence, of the fair market value of the gross estate in accordance with paragraph (a)(7)(ii)(B) of this section. The estate tax return is considered complete and properly prepared and E has elected portability.

(iii) *Variation.* The facts are the same except that there are no non-probate assets, and E elects to make only a partial QTIP election. In this case, the regular return requirements apply to all of the property includible in the gross estate and the provisions of paragraph (a)(7)(ii) of this section do not apply.

*Example 3.* (i) *Facts.* H's will, duly admitted to probate and not subject to any proceeding to challenge its validity, provides that 50 percent of the property passing under the terms of H's will is to be paid to a marital trust for W and 50 percent is to be paid to a trust for W and their descendants.

(ii) *Application.* The amount passing to the non-marital trust cannot be verified without knowledge of the full value of the property passing under the will. Therefore, the value of the property of the marital trust relates to or affects the value passing to the trust for W and the descendants of H and W. Accordingly, the general return requirements apply to all of the property includible in the gross estate and the provisions of paragraph (a)(7)(ii) of this section do not apply.

(b) *Computation required for portability election—(1) General rule.* In addition to the requirements described in paragraph (a) of this section, an executor of a decedent's estate must include a computation of the DSUE amount on the estate tax return to elect portability and thereby allow the decedent's surviving spouse to take into account that decedent's DSUE amount. See paragraph (b)(2) of this section for a transitional rule when the estate tax return form prescribed by the Internal Revenue Service (IRS) does not show expressly the computation of the DSUE amount. See paragraph (c) of this section for rules on computing the DSUE amount.

(2) *Transitional rule.* Until such time as the prescribed form for the estate tax return expressly includes a computation of the DSUE amount, a complete and properly-prepared estate tax return will be deemed to include the computation of the DSUE amount. See paragraph (a)(7) of this section for the requirements for a return to be considered complete and properly-prepared. Once the IRS revises the prescribed form for the estate tax return to include expressly the computation of the DSUE amount, executors that previously filed an estate tax return pursuant to this transitional rule will

not be required to file a supplemental estate tax return using the revised form.

(c) *Computation of the DSUE amount—(1) General rule.* Subject to paragraphs (c)(2) through (c)(4) of this section, the DSUE amount of a decedent with a surviving spouse is the lesser of the following amounts—

(i) The basic exclusion amount in effect in the year of the death of the decedent; or

(ii) The excess of—

(A) The decedent's applicable exclusion amount; over

(B) The sum of the amount of the taxable estate and the amount of the adjusted taxable gifts of the decedent, which together is the amount on which the tentative tax on the decedent's estate is determined under section 2001(b)(1).

(2) *Special rule to consider gift taxes paid by decedent.* Solely for purposes of computing the decedent's DSUE amount, the amount of the adjusted taxable gifts of the decedent referred to in paragraph (c)(1)(ii)(B) of this section is reduced by the amount, if any, on which gift taxes were paid for the calendar year of the gift(s).

(3) [Reserved]

(4) *Special rule in case of property passing to qualified domestic trust.*

When property passes for the benefit of a surviving spouse in a qualified domestic trust (QDOT) as defined in section 2056A(a), the DSUE amount of the decedent is computed on the decedent's estate tax return for the purpose of electing portability in the same manner as this amount is computed under paragraph (c)(1) of this section, but this DSUE amount is subject to subsequent adjustments. The DSUE amount of the decedent must be redetermined upon the occurrence of the final distribution or other event (generally the death of the surviving spouse or the earlier termination of all QDOTs for that surviving spouse) on which estate tax is imposed under section 2056A. See § 20.2056A-6 for rules on determining the estate tax under section 2056A. See § 20.2010-3T(c)(2) regarding the timing of the availability of the decedent's DSUE amount to the surviving spouse.

(5) *Examples.* The following examples illustrate the application of this paragraph (c):

*Example 1. Computation of DSUE amount.*

(i) *Facts.* In 2002, having made no prior taxable gift, Husband (H) makes a taxable gift valued at \$1,000,000 and reports the gift on a timely-filed gift tax return. Because the amount of the gift is equal to the applicable exclusion amount for that year (\$1,000,000), \$345,800 is allowed as a credit against the tax, reducing the gift tax liability to zero. H dies on September 29, 2011, survived by

Wife (W). H and W are US citizens and neither has any prior marriage. H's taxable estate is \$1,000,000. The executor of H's estate timely files H's estate tax return and elects portability, thereby allowing W to benefit from H's DSUE amount.

(ii) *Application.* The executor of H's estate computes H's DSUE amount to be \$3,000,000 (the lesser of the \$5,000,000 basic exclusion amount in 2011, or the excess of H's \$5,000,000 applicable exclusion amount over the sum of the \$1,000,000 taxable estate and the \$1,000,000 amount of adjusted taxable gifts).

*Example 2. Computation of DSUE amount when gift tax paid.* (i) *Facts.* The facts are the same as in *Example 1* except that the value of H's taxable gift in 2002 is \$2,000,000. After application of the applicable credit amount, H owes gift tax on \$1,000,000, the amount of the gift in excess of the applicable exclusion amount for that year. H pays the gift tax owed on the transfer in 2002.

(ii) *Application.* On H's death, the executor of H's estate computes the DSUE amount to be \$3,000,000 (the lesser of the \$5,000,000 basic exclusion amount in 2011, or the excess of H's \$5,000,000 applicable exclusion amount over the sum of the \$1,000,000 taxable estate and \$1,000,000 adjusted taxable gifts). H's adjusted taxable gifts of \$2,000,000 were reduced for purposes of this computation by \$1,000,000, the amount of taxable gifts on which gift taxes were paid.

*Example 3. Computation of DSUE amount when QDOT created.* (i) *Facts.* Husband (H), a US citizen, makes his first taxable gift in 2002, valued at \$1,000,000, and reports the gift on a timely-filed gift tax return. No gift tax is due because the applicable exclusion amount for that year (\$1,000,000) equals the fair market value of the gift. H dies in 2011 with a gross estate of \$2,000,000. H's wife (W) is a US resident but not a citizen of the United States and, under H's will, a pecuniary bequest of \$1,500,000 passes to a QDOT for the benefit of W. H's executor timely files an estate tax return and makes the QDOT election for the property passing to the QDOT, and H's estate is allowed a marital deduction of \$1,500,000 under section 2056(d) for the value of that property. H's taxable estate is \$500,000. On H's estate tax return, H's executor computes H's preliminary DSUE amount to be \$3,500,000 (the lesser of the \$5,000,000 basic exclusion amount in 2011, or the excess of H's \$5,000,000 applicable exclusion amount over the sum of the \$500,000 taxable estate and the \$1,000,000 adjusted taxable gifts). No taxable events within the meaning of section 2056A occur during W's lifetime with respect to the QDOT, and W makes no taxable gifts. In 2012, W dies and the value of the assets of the QDOT is \$1,800,000.

(ii) *Application.* H's DSUE amount is redetermined to be \$1,700,000 (the lesser of the \$5,000,000 basic exclusion amount in 2011, or the excess of H's \$5,000,000 applicable exclusion amount over \$3,300,000 (the sum of the \$500,000 taxable estate augmented by the \$1,800,000 of QDOT assets and the \$1,000,000 adjusted taxable gifts)).

(d) *Authority to examine returns of decedent.* The IRS may examine returns of a decedent in determining the

decendent's DSUE amount, regardless of whether the period of limitations on assessment has expired for that return. See § 20.2010-3T(d) for additional rules relating to the IRS's authority to examine returns. See also section 7602 for the IRS's authority, when ascertaining the correctness of any return, to examine any returns that may be relevant or material to such inquiry.

(e) *Effective/applicability date.* This section applies to the estates of decedents dying in calendar year 2011 or a subsequent year in which the applicable exclusion amount is determined under section 2010(c) of the Code by adding the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount.

(f) *Expiration date.* The applicability of this section expires on or before June 15, 2015.

■ **Par. 6.** Section 20.2010-3T is added to read as follows:

**§ 20.2010-3T Portability provisions applicable to the surviving spouse's estate (temporary).**

(a) *Surviving spouse's estate limited to DSUE amount of last deceased spouse—*

(1) *In general.* A deceased spousal unused exclusion (DSUE) amount of a decedent, computed under § 20.2010-2T(c), is included in determining a surviving spouse's applicable exclusion amount under section 2010(c)(2), provided—

(i) Such decedent is the last deceased spouse of such surviving spouse within the meaning of § 20.2010-1T(d)(5) on the date of the death of the surviving spouse; and

(ii) The executor of the decedent's estate elected portability (see § 20.2010-2T(a) and (b) for applicable requirements).

(2) *No DSUE amount available from last deceased spouse.* If the last deceased spouse of such surviving spouse had no DSUE amount, or if the executor of such a decedent's estate did not make a portability election, the surviving spouse's estate has no DSUE amount (except as provided in paragraph (b)(1)(ii) of this section) to be included in determining the applicable exclusion amount, even if the surviving spouse previously had a DSUE amount available from another decedent who, prior to the death of the last deceased spouse, was the last deceased spouse of such surviving spouse. See paragraph (b) of this section for a special rule in the case of multiple deceased spouses and a previously-applied DSUE amount.

(3) *Identity of last deceased spouse unchanged by subsequent marriage or divorce.* A decedent is the last deceased spouse (as defined in § 20.2010-

1T(d)(5)) of a surviving spouse even if, on the date of the death of the surviving spouse, the surviving spouse is married to another (then-living) individual. If a surviving spouse marries again and that marriage ends in divorce or an annulment, the subsequent death of the divorced spouse does not end the status of the prior deceased spouse as the last deceased spouse of the surviving spouse. The divorced spouse, not being married to the surviving spouse at death, is not the last deceased spouse as that term is defined in § 20.2010-1T(d)(5).

(b) *Special rule in case of multiple deceased spouses and previously-applied DSUE amount—*(1) *In general.* A special rule applies to compute the DSUE amount included in the applicable exclusion amount of a surviving spouse who previously has applied the DSUE amount of one or more deceased spouses to taxable gifts in accordance with § 25.2505-2T(b) and (c) of this chapter. If a surviving spouse has applied the DSUE amount of one or more last deceased spouses to the surviving spouse's transfers during life, and if any of those last deceased spouses is different from the surviving spouse's last deceased spouse as defined in § 20.2010-1T(d)(5) at the time of the surviving spouse's death, then the DSUE amount to be included in determining the applicable exclusion amount of the surviving spouse at the time of the surviving spouse's death is the sum of—

(i) The DSUE amount of the surviving spouse's last deceased spouse as described in paragraph (a)(1) of this section; and

(ii) The DSUE amount of each other deceased spouse of the surviving spouse, to the extent that such amount was applied to one or more taxable gifts of the surviving spouse.

(2) *Example.* The following example, in which all described individuals are US citizens, illustrates the application of this paragraph (b):

*Example. (i) Facts.* Husband 1 (H1) dies on January 15, 2011, survived by Wife (W). Neither has made any taxable gifts during H1's lifetime. H1's executor elects portability of H1's DSUE amount. The DSUE amount of H1 as computed on the estate tax return filed on behalf of H1's estate is \$5,000,000. On December 31, 2011, W makes taxable gifts to her children valued at \$2,000,000. W reports the gifts on a timely-filed gift tax return. W is considered to have applied \$2,000,000 of H1's DSUE amount to the amount of taxable gifts, in accordance with § 25.2505-2T(c), and, therefore, W owes no gift tax. W has an applicable exclusion amount remaining in the amount of \$8,000,000 (\$3,000,000 of H1's remaining DSUE amount plus W's own \$5,000,000 basic exclusion amount). After

the death of H1, W marries Husband 2 (H2). H2 dies in June 2012. H2's executor elects portability of H2's DSUE amount, which is properly computed on H2's estate tax return to be \$2,000,000. W dies in October 2012.

(ii) *Application.* The DSUE amount to be included in determining the applicable exclusion amount available to W's estate is \$4,000,000, determined by adding the \$2,000,000 DSUE amount of H2 and the \$2,000,000 DSUE amount of H1 that was applied by W to W's 2011 taxable gifts. Thus, W's applicable exclusion amount is \$9,000,000.

(c) *Date DSUE amount taken into consideration by surviving spouse's estate—*(1) *General rule.* A portability election made by an executor of a decedent's estate (see § 20.2010-2T(a) and (b) for applicable requirements) applies as of the date of the decedent's death. Thus, the decedent's DSUE amount is included in the applicable exclusion amount of the decedent's surviving spouse under section 2010(c)(2) and will be applicable to transfers made by the surviving spouse after the decedent's death. However, such decedent's DSUE amount will not be included in the applicable exclusion amount of the surviving spouse, even if the surviving spouse had made a transfer in reliance on the availability or computation of the decedent's DSUE amount:

(i) If the executor of the decedent's estate supersedes the portability election by filing a subsequent estate tax return in accordance with § 20.2010-2T(a)(4);

(ii) To the extent that the DSUE amount subsequently is reduced by a valuation adjustment or the correction of an error in calculation; or

(iii) To the extent that the surviving spouse cannot substantiate the DSUE amount claimed on the surviving spouse's return.

(2) *Special rule when property passes to surviving spouse in a qualified domestic trust.* When property passes from a decedent for the benefit of a surviving spouse in one or more qualified domestic trusts (QDOT) as defined in section 2056A(a) and the decedent's executor elects portability, the DSUE amount available to be included in the applicable exclusion amount of the surviving spouse under section 2010(c)(2) is the DSUE amount of the decedent as redetermined in accordance with § 20.2010-2T(c)(4). The earliest date on which the decedent's DSUE amount may be included in the applicable exclusion amount of the surviving spouse under section 2010(c)(2) is the date of the occurrence of the final QDOT distribution or final other event (generally, the death of the surviving spouse or the earlier

termination of all QDOTs for that surviving spouse) on which tax under section 2056A is imposed. However, the decedent's DSUE amount as redetermined in accordance with § 20.2010-2T(c)(4) may be applied to certain taxable gifts of the surviving spouse. See § 25.2505-2T(d)(2)(i) of this chapter.

(d) *Authority to examine returns of deceased spouses.* For the purpose of determining the DSUE amount to be included in the applicable exclusion amount of the surviving spouse, the Internal Revenue Service (IRS) may examine returns of each of the surviving spouse's deceased spouses whose DSUE amount is claimed to be included in the surviving spouse's applicable exclusion amount, regardless of whether the period of limitations on assessment has expired for any such return. The IRS's authority to examine returns of a deceased spouse applies with respect to each transfer by the surviving spouse to which a DSUE amount is or has been applied. Upon examination, the IRS may adjust or eliminate the DSUE amount reported on such a return; however, the IRS may assess additional tax on that return only if that tax is assessed within the period of limitations on assessment under section 6501 applicable to the tax shown on that return. See also section 7602 for the IRS's authority, when ascertaining the correctness of any return, to examine any returns that may be relevant or material to such inquiry. For purposes of these examinations to determine the DSUE amount, the surviving spouse is considered to have a material interest that is affected by the return information of the deceased spouse within the meaning of section 6103(e)(3).

(e) *Availability of DSUE amount for estates of nonresidents who are not citizens.* The estate of a nonresident surviving spouse who is not a citizen of the United States at the time of such surviving spouse's death shall not take into account the DSUE amount of any deceased spouse of such surviving spouse within the meaning of § 20.2010-1T(d)(5) except to the extent allowed under any applicable treaty obligation of the United States. See section 2102(b)(3).

(f) *Effective/applicability date.* This section applies to the estates of decedents dying in calendar year 2011 or a subsequent year in which the applicable exclusion amount is determined under section 2010(c) of the Code by adding the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount.

(g) *Expiration date.* The applicability of this section expires on or before June 15, 2015.

#### **PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954**

■ **Par. 7.** The authority citation for part 25 is amended by adding an entry in numerical order to read as follows:

**Authority:** 26 U.S.C. 7805. \* \* \*  
Section 25.2505-2T also issued under 26 U.S.C. 2010(c)(6). \* \* \*

■ **Par. 8.** Section 25.2505-0T is added to read as follows:

#### **§ 25.2505-0T Table of contents (temporary).**

This section lists the table of contents for §§ 25.2505-1T and 25.2505-2T.

*§ 25.2505-1T Unified credit against gift tax; in general (temporary).*

- (a) General rule.
- (b) Applicable rate of tax.
- (c) Special rule in case of certain gifts made before 1977.
- (d) Credit limitation.
- (e) Effective/applicability date.
- (f) Expiration date.

*§ 25.2505-2T Gifts made by a surviving spouse having a DSUE amount available (temporary).*

(a) Donor who is surviving spouse is limited to DSUE amount of last deceased spouse.

- (1) In general.
- (2) No DSUE amount available from last deceased spouse.

(3) Identity of last deceased spouse unchanged by subsequent marriage or divorce.

(b) Manner in which DSUE amount is applied.

(c) Special rule in case of multiple deceased spouses and previously-applied DSUE amount.

- (1) In general.
- (2) Example.

(d) Date DSUE amount taken into consideration by donor who is a surviving spouse.

- (1) General rule.
- (2) Special rule when property passes to surviving spouse in a qualified domestic trust.

(e) Authority to examine returns of deceased spouses.

(f) Availability of DSUE amount for nonresidents who are not citizens.

- (g) Effective/applicability date.
- (h) Expiration date.

■ **Par. 9.** Section 25.2505-1T is added to read as follows:

#### **§ 25.2505-1T Unified credit against gift tax; in general (temporary).**

(a) *General rule.* Section 2505(a) allows a citizen or resident of the United States a credit against the tax imposed by section 2501 for each calendar year. The allowable credit is

the applicable credit amount in effect under section 2010(c) that would apply if the donor died as of the end of the calendar year, reduced by the sum of the amounts allowable as a credit against the gift tax due for all preceding calendar periods. See §§ 25.2505-2T, 20.2010-1T, and 20.2010-2T of this chapter for additional rules and definitions related to determining the applicable credit amount in effect under section 2010(c).

(b) *Applicable rate of tax.* In determining the amounts allowable as a credit against the gift tax due for all preceding calendar periods, the unified rate schedule under section 2001(c) in effect for such calendar year applies instead of the rates of tax actually in effect for preceding calendar periods. See sections 2505(a) and 2502(a)(2).

(c) *Special rule in case of certain gifts made before 1977.* The applicable credit amount allowable under paragraph (a) of this section must be reduced by an amount equal to 20 percent of the aggregate amount allowed as a specific exemption under section 2521 (as in effect before its repeal by the Tax Reform Act of 1976) for gifts made by the decedent after September 8, 1976, and before January 1, 1977.

(d) *Credit limitation.* The applicable credit amount allowed under paragraph (a) of this section for any calendar year shall not exceed the amount of the tax imposed by section 2501 for such calendar year.

(e) *Effective/applicability date.*

Paragraph (a) of this section applies to gifts made on or after January 1, 2011. Paragraphs (b), (c), and (d) of this section apply to gifts made on or after June 15, 2012.

(f) *Expiration date.* The applicability of this section expires on or before June 15, 2015.

■ **Par. 10.** Section 25.2505-2T is added to read as follows:

#### **§ 25.2505-2T Gifts made by a surviving spouse having a DSUE amount available (temporary).**

(a) *Donor who is surviving spouse is limited to DSUE amount of last deceased spouse—(1) In general.* In computing a surviving spouse's gift tax liability with regard to a transfer subject to the tax imposed by section 2501 (taxable gift), a deceased spousal unused exclusion (DSUE) amount of a decedent, computed under § 20.2010-2T(c) of this chapter, is included in determining the surviving spouse's applicable exclusion amount under section 2010(c)(2), provided:

(i) Such decedent is the last deceased spouse of such surviving spouse within the meaning of § 20.2010-1T(d)(5) of

this chapter at the time of the surviving spouse's taxable gift; and

(ii) The executor of the decedent's estate elected portability (see § 20.2010-2T(a) and (b) of this chapter for applicable requirements).

(2) *No DSUE amount available from last deceased spouse.* If on the date of the surviving spouse's taxable gift the last deceased spouse of such surviving spouse had no DSUE amount or if the executor of the estate of such last deceased spouse did not elect portability, the surviving spouse has no DSUE amount (except as and to the extent provided in paragraph (c)(1)(ii) of this section) to be included in determining his or her applicable exclusion amount, even if the surviving spouse previously had a DSUE amount available from another decedent who, prior to the death of the last deceased spouse, was the last deceased spouse of such surviving spouse. See paragraph (c) of this section for a special rule in the case of multiple deceased spouses.

(3) *Identity of last deceased spouse unchanged by subsequent marriage or divorce.* A decedent is the last deceased spouse (as defined in § 20.2010-1T(d)(5) of this chapter) of a surviving spouse even if, on the date of the surviving spouse's taxable gift, the surviving spouse is married to another (then-living) individual. If a surviving spouse marries again and that marriage ends in divorce or an annulment, the subsequent death of the divorced spouse does not end the status of the prior deceased spouse as the last deceased spouse of the surviving spouse. The divorced spouse, not being married to the surviving spouse at death, is not the last deceased spouse as that term is defined in § 20.2010-1T(d)(5) of this chapter.

(b) *Manner in which DSUE amount is applied.* If a donor who is a surviving spouse makes a taxable gift and a DSUE amount is included in determining the surviving spouse's applicable exclusion amount under section 2010(c)(2), such surviving spouse will be considered to apply such DSUE amount to the taxable gift before the surviving spouse's own basic exclusion amount.

(c) *Special rule in case of multiple deceased spouses and previously-applied DSUE amount—(1) In general.* A special rule applies to compute the DSUE amount included in the applicable exclusion amount of a surviving spouse who previously has applied the DSUE amount of one or more deceased spouses. If a surviving spouse applied the DSUE amount of one or more last deceased spouses to the surviving spouse's previous lifetime transfers, and if any of those last

deceased spouses is different from the surviving spouse's last deceased spouse as defined in § 20.2010-1T(d)(5) of this chapter at the time of the current taxable gift by the surviving spouse, then the DSUE amount to be included in determining the applicable exclusion amount of the surviving spouse that will be applicable at the time of the current taxable gift is the sum of—

(i) The DSUE amount of the surviving spouse's last deceased spouse as described in paragraph (a)(1) of this section; and

(ii) The DSUE amount of each other deceased spouse of the surviving spouse to the extent that such amount was applied to one or more previous taxable gifts of the surviving spouse.

(2) *Example.* The following example, in which all described individuals are US citizens, illustrates the application of this paragraph (c):

*Example. (i) Facts.*

Husband 1 (H1) dies on January 15, 2011, survived by Wife (W). Neither has made any taxable gifts during H1's lifetime. H1's executor elects portability of H1's deceased spousal unused exclusion (DSUE) amount. The DSUE amount of H1 as computed on the estate tax return filed on behalf of H1's estate is \$5,000,000. On December 31, 2011, W makes taxable gifts to her children valued at \$2,000,000. W reports the gifts on a timely-filed gift tax return. W is considered to have applied \$2,000,000 of H1's DSUE amount to the 2011 taxable gifts, in accordance with paragraph (b) of this section, and, therefore, W owes no gift tax. W is considered to have an applicable exclusion amount remaining in the amount of \$8,000,000 (\$3,000,000 of H1's remaining DSUE amount plus W's own \$5,000,000 basic exclusion amount). After the death of H1, W marries Husband 2 (H2). H2 dies on June 30, 2012. H2's executor elects portability of H2's DSUE amount, which is properly computed on H2's estate tax return to be \$2,000,000.

(ii) *Application.* The DSUE amount to be included in determining the applicable exclusion amount available to W for gifts during the second half of 2012 is \$4,000,000, determined by adding the \$2,000,000 DSUE amount of H2 and the \$2,000,000 DSUE amount of H1 that was applied by W to W's 2011 taxable gifts. Thus, W's applicable exclusion amount during the balance of 2012 is \$9,000,000.

(d) *Date DSUE amount taken into consideration by donor who is a surviving spouse—(1) General rule.* A portability election made by an executor of a decedent's estate (see § 20.2010-2T(a) and (b) of this chapter for applicable requirements) applies as of the date of the decedent's death. Thus, the decedent's DSUE amount is included in the applicable exclusion amount of the decedent's surviving spouse under section 2010(c)(2) and will be applicable to transfers made by

the surviving spouse after the decedent's death. However, such decedent's DSUE amount will not be included in the applicable exclusion amount of the surviving spouse, even if the surviving spouse had made a taxable gift in reliance on the availability or computation of the decedent's DSUE amount:

(i) If the executor of the decedent's estate supersedes the portability election by filing a subsequent estate tax return in accordance with § 20.2010-2T(a)(4) of this chapter;

(ii) To the extent that the DSUE amount subsequently is reduced by a valuation adjustment or the correction of an error in calculation; or

(iii) To the extent that the DSUE amount claimed on the decedent's return cannot be determined.

(2) *Special rule when property passes to surviving spouse in a qualified domestic trust—(i) In general.* When property passes from a decedent for the benefit of a surviving spouse in one or more qualified domestic trusts (QDOT) as defined in section 2056A(a) and the decedent's executor elects portability, the DSUE amount available to be included in the applicable exclusion amount of the surviving spouse under section 2010(c)(2) is the DSUE amount of the decedent as redetermined in accordance with § 20.2010-2T(c)(4) of this chapter. The earliest date on which the decedent's DSUE amount may be included in the applicable exclusion amount of the surviving spouse under section 2010(c)(2) is the date of the occurrence of the final QDOT distribution or final other event (generally, the death of the surviving spouse or the earlier termination of all QDOTs for that surviving spouse) on which tax under section 2056A is imposed. However, the decedent's DSUE amount as redetermined in accordance with § 20.2010-2T(c)(4) of this chapter may be applied to the surviving spouse's taxable gifts made in the year of the surviving spouse's death, or if the terminating event occurs prior to the surviving spouse's death, then in the year of that terminating event and/or any subsequent year during the surviving spouse's life.

(ii) *Example.* The following example illustrates the application of this paragraph (d)(2):

*Example. (i) Facts.* Husband (H), a US citizen, dies in January 2011 having made no taxable gifts during his lifetime. H's gross estate is \$3,000,000. H's wife (W) is a US resident but not a citizen of the United States and, under H's will, a pecuniary bequest of \$2,000,000 passes to a QDOT for the benefit of W. H's executor timely files an estate tax return and makes the QDOT election for the

property passing to the QDOT, and H's estate is allowed a marital deduction of \$2,000,000 under section 2056(d) for the value of that property. H's taxable estate is \$1,000,000. On H's estate tax return, H's executor computes H's preliminary DSUE amount to be \$4,000,000. No taxable events within the meaning of section 2056A occur during W's lifetime with respect to the QDOT. W makes a taxable gift of \$1,000,000 to X in December 2011 and a taxable gift of \$1,000,000 to Y in January 2012. W dies in September 2012, not having married again, when the value of the assets of the QDOT is \$2,200,000.

(i) *Application.* H's DSUE amount is redetermined to be \$1,800,000 (the lesser of the \$5,000,000 basic exclusion amount in 2011, or the excess of H's \$5,000,000 applicable exclusion amount over \$3,200,000 (the sum of the \$1,000,000 taxable estate augmented by the \$2,200,000 of QDOT assets)). On W's gift tax return filed for 2011, W cannot apply any DSUE amount to the gift made to X. However, because W's gift to Y was made in the year that W died, W's executor will apply \$1,000,000 of H's redetermined DSUE amount to the gift on W's gift tax return filed for 2012. The remaining \$800,000 of H's redetermined DSUE amount is included in W's applicable exclusion amount to be used in computing W's estate tax liability.

(e) *Authority to examine returns of deceased spouses.* For the purpose of determining the DSUE amount to be included in the applicable exclusion amount of the surviving spouse, the Internal Revenue Service (IRS) may examine returns of each of the surviving spouse's deceased spouses whose DSUE amount is claimed to be included in the surviving spouse's applicable exclusion amount, regardless of whether the period of limitations on assessment has expired for any such return. The IRS's authority to examine returns of a deceased spouse applies with respect to each transfer by the surviving spouse to which a DSUE amount is or has been applied. Upon examination, the IRS may adjust or eliminate the DSUE amount reported on such a return; however, the IRS may assess additional tax on that return only if that tax is assessed within the period of limitations on assessment under section 6501 applicable to the tax shown on that return. See also section 7602 for the IRS's authority, when ascertaining the correctness of any return, to examine any returns that may be relevant or material to such inquiry.

(f) *Availability of DSUE amount for nonresidents who are not citizens.* A nonresident surviving spouse who was not a citizen of the United States at the time of making a transfer subject to tax under chapter 12 of the Internal Revenue Code shall not take into account the DSUE amount of any deceased spouse except to the extent

allowed under any applicable treaty obligation of the United States. See section 2102(b)(3).

(g) *Effective/applicability date.* This section applies to gifts made in calendar year 2011 or in a subsequent year in which the applicable exclusion amount is determined under section 2010(c) of the Code by adding the basic exclusion amount and, in the case of a surviving spouse, the DSUE amount.

(h) *Expiration date.* The applicability of this section expires on or before June 15, 2015.

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

■ **Par. 11.** The authority citation for part 602 continues to read as follows:

**Authority:** 26 U.S.C. 7805.

■ **Par. 12.** In § 602.101, paragraph (b) is amended by adding the following entry in numerical order to the table to read as follows:

**§ 602.101 OMB Control numbers.**

| CFR Part or section where identified and described | Current OMB Control No. |
|--|-------------------------|
| * * * * *  | * * * * *               |
| (b) * * *  |                         |
| * * * * *  | * * * * *               |
| 20.2010-2T .....                                   | 1545-0015               |
| * * * * *  | * * * * *               |

**Steven T. Miller,**  
*Deputy Commissioner for Services and Enforcement.*

Approved: June 12, 2012.

**Emily S. McMahon,**  
*Acting Assistant Secretary of Treasury (Tax Policy).*

[FR Doc. 2012-14781 Filed 6-15-12; 8:45 am]

**BILLING CODE 4830-01-P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA-R02-OAR-2011-0956; FRL-9682-7]

**Determinations of Failure To Attain the One-Hour Ozone Standard by 2007, Current Attainment of the One-Hour Ozone Standard, and Attainment of the 1997 Eight-Hour Ozone Standards for the New York-Northern New Jersey-Long Island Nonattainment Area in Connecticut, New Jersey and New York**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is finalizing four separate and independent determinations related to the New York-Northern New Jersey-Long Island (NY-NJ-CT) one-hour and 1997 eight-hour ozone nonattainment areas. The boundaries of the one-hour and eight-hour ozone nonattainment areas differ slightly. With respect to the NY-NJ-CT one-hour nonattainment area, EPA is determining that the area previously failed to attain the one-hour ozone National Ambient Air Quality Standard (NAAQS) by its applicable attainment deadline of November 15, 2007 (based on complete, quality-assured and certified ozone monitoring data for 2005-2007), and EPA is also determining that the area is currently attaining the now revoked one-hour ozone standard based on complete, quality-assured and certified ozone monitoring data for 2008-2010.

Quality-assured ozone monitoring data in the Air Quality System for 2011 indicate the area continues to attain the revoked one-hour ozone standard. With respect to the NY-NJ-CT 1997 eight-hour ozone nonattainment area, EPA is determining that the area attained the 1997 eight-hour ozone standard by the applicable deadline, June 15, 2010, based on complete, quality-assured and certified ozone monitoring data for 2007-2009. EPA is also determining that the area is currently attaining the 1997 eight-hour ozone standard based on complete, quality-assured and certified ozone monitoring data for 2008-2010. Quality-assured ozone monitoring data for 2011 indicate that the area continues to attain the 1997 eight-hour ozone standard.

EPA's ozone implementation regulation for the 1997 eight-hour ozone standard provides that the requirements for the States to submit certain reasonable further progress plans, attainment demonstrations, contingency measures and any other planning requirements of the Clean Air Act related to attainment of that ozone standard shall be suspended for as long as the area continues to attain the standard. A determination of attainment does not constitute a redesignation to attainment. Redesignation requires the states to meet a number of additional criteria, including EPA approval of a state plan to maintain the air quality standard for ten years after redesignation.

**DATES: Effective Date:** This rule is effective on July 18, 2012.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R02-OAR-2011-0956. All