Reg. Section 20.2010-2

Portability provisions applicable to estate of a decedent survived by a spouse

(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 § 20.2010-3 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 nine 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. An extension of time to elect portability under this paragraph (a) will not be granted under §301.9100-3 of this chapter to an estate that is required to file an estate tax return under section 6018(a), as determined without regard to this paragraph (a). Such an extension, however, may be available under the procedures applicable under §§301.9100-1 and 301.9100-3 of this chapter to an estate that is not required to file a return under section 6018(a), as determined without regard to this paragraph (a).

(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 is 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 or may supersede a portability election

previously made, provided that the estate tax return reporting the election or the superseding 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 on or after January 1, 2011. 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 timely 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 timely 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 when there is no appointed executor for that decedent's estate can be superseded by a subsequent contrary election made by an appointed executor of that same decedent's estate on an estate tax return filed on or before the due date of the return, including extensions actually granted. An election to allow portability made by a non-appointed executor cannot be superseded by a contrary election to have portability not apply 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 in certain circumstances as provided in this paragraph (a) and as may be further described in guidance issued from time to time by publication in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter). In particular, 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 a recipient other than the recipient of the marital or charitable deduction property;

(2) The value of such property is needed to determine the estate's eligibility for the provisions of sections 2032, 2032A, or another estate or generation-skipping transfer tax provision of the Code for which the value of such property or the value of the gross estate or adjusted gross estate must be known (not including section 1014 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) Return requirements when reporting of value not required for certain property. 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. Using the executor's best estimate of the value of properties to which paragraph (a)(7)(ii)(A) of this section applies, the executor must report on the estate tax return, under penalties of perjury, the amount corresponding to the particular range within which falls the executor's best estimate of the total gross estate, in accordance with the Instructions for Form 706.

(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 2015, survived by his wife (W), that both H and W are U.S. 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 reports 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 outright to 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 attaches a copy of H's will 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 reports 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 (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)Requirement for DSUE computation on estate tax return. Section 2010(c)(5)(A) requires an executor of a decedent's estate to 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. This requirement is satisfied by the timely filing of a complete and properly prepared estate tax return, as long as the executor has not elected out of portability as described in paragraph (a)(3)(i) of this section. See paragraph (a)(7) of this section for the requirements for a return to be considered complete and properly prepared.

(c)Computation of the DSUE amount.

(1)General rule. Subject to paragraphs (c)(2) through (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)Impact of applicable credits. An estate's eligibility under sections 2012 through 2015 for credits against the tax imposed by section 2001 does not impact the computation of the DSUE amount.

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

(i) In general. 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 termination of all QDOTs created by or funded with assets passing from the decedent or the death of the surviving spouse) on which estate tax is imposed under section 2056A. See §20.2056A-6 for the rules on determining the estate tax under section 2056A. See §20.2010-3(c)(3) regarding the timing of the availability of the decedent's DSUE amount to the surviving spouse.

(ii) Surviving spouse becomes a U.S. citizen. If the surviving spouse becomes a U.S. citizen and if the requirements of section 2056A(b)(12) and the corresponding regulations are satisfied, the estate tax imposed under section 2056A(b)(1) ceases to apply. Accordingly, no estate tax will be imposed under section 2056A either on subsequent QDOT distributions or on the property remaining in the QDOT on the surviving spouse's death and the decedent's DSUE amount is no longer subject to adjustment.

(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 in 2015, survived by Wife (W). H and W are U.S. 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 $3,430,000 (the lesser of the $5,430,000 basic exclusion amount in 2015, or the excess of H's $5,430,000 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 of this paragraph (c)(5) 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 2002 transfer.
(ii) Application. On H's death, the executor of H's estate computes the DSUE amount to be $3,430,000 (the lesser of the $5,430,000 basic exclusion amount in 2015, or the excess of H's $5,430,000 applicable exclusion amount over the sum of the $1,000,000 taxable estate and $1,000,000 of adjusted taxable gifts sheltered from tax by H's applicable credit amount). 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 U.S. 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 2015 with a gross estate of $2,000,000. H's surviving spouse (W) is a 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 $3,930,000 (the lesser of the $5,430,000 basic exclusion amount in 2015, or the excess of H's $5,430,000 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. At all times since H's death, W has been a U.S. resident. In 2017, 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 $2,130,000 (the lesser of the $5,430,000 basic exclusion amount in 2015, or the excess of H's $5,430,000 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)).

Example (4). Computation of DSUE amount when surviving spouse with QDOT becomes a U.S. citizen.

(i) Facts. The facts are the same as in Example 3 of this paragraph (c)(5) except that W becomes a U.S. citizen in 2016 and dies in 2018. The U.S. Trustee of the QDOT notifies the IRS that W has become a U.S. citizen by timely filing a final estate tax return (Form 706-QDT). Pursuant to section 2056A(b)(12), the estate tax under section 2056A no longer applies to the QDOT property.

(ii) Application. Because H's DSUE amount no longer is subject to adjustment once W becomes a citizen of the United States, H's DSUE amount is $3,930,000, as it was preliminarily determined as of H's death. Upon W's death in 2018, the value of the QDOT property is includible in W's gross estate.

(d)Authority to examine returns of decedent. The IRS may examine returns of a decedent in determining the decedent's DSUE amount, regardless of whether the period of limitations on assessment has expired for that return. See §20.2010-3(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 on or after June 12, 2015. See 26 CFR 20.2010-2T, as contained in 26 CFR part 20, revised as of April 1, 2015, for the rule applicable to estates of decedents dying on or after January 1, 2011, and before June 12, 2015.