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.

[T.D. 9593, 77 FR 36157, June 18, 2012]

§ 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)(5)(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 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.

(i) 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 §20.2056(a)–1(b) (except with regard to establishing the value of the property) and the instructions for the estate tax return with regard to the date of death value of these assets in accordance with paragraph (a)(7)(ii)(A) 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 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 (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.
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) 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 and makes the QDOT election for the property passing to the surviving spouse. 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.

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 a 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 re-determined 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 decedent'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.

[T.D. 9593, 77 FR 36157, June 18, 2012]