PREPARING ESTATE TAX RETURNS, WILLS, AND OTHER DOCUMENTS FOR PORTABILITY

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Brian Cororve brings more than 20 years of experience to counseling high-net-worth families, entrepreneurs and professionals on the most effective strategies for protecting sophisticated assets and business interests, preserving wealth through multiple generations and minimizing estate and gift taxes. His practice encompasses all aspects of complex estate planning, probate and estate administration, trust structuring and administration, asset protection planning and business succession planning. Brian is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization.

Brian has substantial experience in developing a wide variety of advanced wealth preservation strategies tailored to each client's unique family dynamics and business interests, including family limited partnerships and all types of revocable and irrevocable trusts. He has also guided individual and institutional trustees to favorable results in numerous trust modification and reformation proceedings.

In addition to planning, Brian helps executors and family members navigate every phase of complex will probates and estate administration, including asset gathering and appraisal, payment of the decedent's debts, filing estate tax returns and distributing assets to beneficiaries. Although disputes between family members are often unavoidable when significant assets and business interests are at stake, Brian always explores every option available to prevent litigation and in some cases, helps clients negotiate family settlement agreements whenever possible to avoid the cost and stress of a prolonged courtroom battle.

Brian understands that the most challenging problems can be solved by an interdisciplinary team dedicated to protecting the client's interests. When a problem involves unique issues that go beyond his practice focus and require a more holistic approach, Brian draws on the diverse skills and experience of colleagues in the firm to design the best strategy that will achieve the client's goals. He also collaborates with his clients' existing teams of family accountants, financial advisers and life insurance professionals to share ideas and maximize the effectiveness of his clients' estate planning and wealth preservation strategies.

Press Releases

- "Gray Reed Attorneys Named 2024 Best Lawyers in America," (August 17, 2023)
- "Gray Reed Recognized in the Chambers High Net Worth 2023 Legal Directory," (July 20, 2023)
- "Gray Reed Recognized in the Chambers High Net Worth 2022 Legal Directory," (July 22, 2022)
- "Gray Reed Recognized in the Chambers High Net Worth 2021 Legal Directory," (July 22, 2021)
- "Gray Reed Recognized in the Chambers High Net Worth 2020 Legal Directory," (July 9, 2020)

Speeches and Presentations

- "Things Every Texas Estate Planner Should Know About Advising New to Texas Clients, Including Transfer of Guardianship from Another State," UT 25th Annual Estate Planning, Guardianship and Elder Law Conference (August 10, 2023)
- "When Worlds Collide: Estate Planning Meets Texas Marital Property Law," State Bar of Texas Advanced Estate Planning Conference (June 8, 2023)
- "Californication: What Every Texas Estate Planner Should Know About Advising California Transplants ," State Bar of Texas 33rd Annual Estate Planning & Probate

Drafting (October 26, 2022)

- "Portability Ten(ish) Years Later: What Have We Learned?," State Bar of Texas Advanced Estate Planning & Probate Course (June 16, 2022)
- "The Importance of Planning for 2022," National Association of Insurance and Financial Advisors (January 27, 2022)
- "It Toggles the Mind: Thoughts on Grantor Trusts and How to Turn Them On and Off," 2015 State Bar of Texas 26th Annual Estate Planning m& Probate Drafting Course (October 9, 2015)
- "Portability in the New Age of Estate Planning," 2014 State Bar of Texas 38th Annual Adv. Estate Planning & Probate Course (June 11, 2014)
- "Panel Discussion: Planning with Oil and Gas Interests," 2014 Houston Business and Estate Planning Council (April 17, 2014)
- "Planning with Oil and Gas Interests: What Every Estate Planner Should Know (But may be Afraid to Ask)," 2013 Houston Bar Association Probate, Trusts & Estate Section (May 28, 2013)
- "The Estate Planning Toolbox," Houston Bar Association What the General Practitioner Needs to Know Institute Civil Day (October 28, 2011)
- "Planning for Spouses in 2011 & 2012: Opportunities and Pitfalls," 2011 Houston Bar Association Probate, Trust & Estates Section (September 27, 2011)
- "What Do We Do Now That We Have NO Estate Planning Toolbox," 2010 Texas State Bar Advanced Estate Planning Strategies Course (April 8, 2010)
- "The Estate Planning Toolbox," 2009 Houston Bar

Association Wills and Probate Institute (February 13, 2009)

- "Assisting in the Probate Process," 2008 Texas Estate Planning and Probate Practice for Paralegals Seminar (March 28, 2008)
- "The Texas Doctrine of Fraud on the Spouse," 2006 South Texas College of Law Wills and Probate Institute (September 15, 2006)
- "Pre & Post Mortem Planning for Retirement Accounts," 2002 Texas Bankers Association Estate Administration Seminar (October 9, 2002)
- "Hot Topics in Community Property Issues," 2001 Houston Bar Association CLE Seminar (March 22, 2001)

Honors

- Recognized as a leading private wealth law lawyer in Texas by *Chambers & Partners HNW* (2019 – 2023)
- Ranked as one of the leading private wealth law lawyers in Texas, *Chambers & Partners USA: America's Leading Lawyers for Business* (2020 – 2022)
- Selected by his peers for inclusion in Woodward/White, Inc.'s *The Best Lawyers in America* in the field of Trusts & Estates Law (2021 – 2024)
- Named a "Super Lawyer" by Texas Super Lawyers (a Thomson Reuters business) as published in *Texas Monthly* (2015 – 2022)
- Named a *Houstonia Magazine* Top Lawyer in Houston (2020 – 2023)

Organizational Involvement

- Houston Estate and Financial Forum
- State Bar of Texas
  - Real Estate, Probate, and Trust Law Section
- Houston Bar Association
  - Probate, Trusts and Estate Section, Chair (2023 – 2024)
- Houston Business and Estate Planning Council, Past President
- Society of Financial Service Professionals, Past President
- American Bar Association

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I. INTRODUCTION

For more than a decade, estate planners have been able to use "portability" as a means to utilize a deceased spouse's unused estate tax exemption at his or her death for the benefit of the surviving spouse. This addition to the Internal Revenue Code has been a very helpful planning tool for clients, in particular those couples with estates that are not significant enough to justify the added complexity of tax-planned trusts for the surviving spouse (although there are certainly benefits to keeping those trusts, as discussed later in this outline).

Despite the benefits that portability has provided, it has also created more work for estate planners trying to counsel their clients on estate planning options. What used to be a fairly routine discussion with clients has now become far more complicated given the myriad of options available. Further, when the first spouse passes away, the decision to make a portability election, and the steps involved with making that election, need to be considered in detail. The purpose of this paper is to provide practical advice, and examples, to help guide these discussions with clients.

II. BRIEF HISTORY OF PORTABILITY

Portability was first introduced on December 17, 2010, under the Tax Relief Unemployment Insurance Reauthorization, and Job Creation Act of 2010[1] (the "TRA 2010"), as revisions to Sections 2010 and 2505 of the Internal Revenue Code of 1986, as amended (the "Code"). Per TRA 2010, however, portability was set to expire on December 31, 2012. Fortunately, portability was made permanent under the American Taxpayer Relief Act of 2012 ("ATRA 2012"), passed on January 2, 2013, and signed into law on January 4, 2013. ATRA 2012 also made the re-unified exemption amount for estates and gifts $5 million, indexed for inflation, and raised the top gift and estate tax rate from 35% to 40%. The 2017 Tax Act doubled the exemption amount to $10 million beginning in 2018, but it will expire and revert back to $5 million on January 1, 2026.[2]

On June 15, 2012, the Treasury Department issued Temporary and Proposed Regulations to Code Sections 2010 and 2505 that provide much needed clarity and, in some cases, surprisingly taxpayer friendly interpretations of the statute. Final Regulations were issued on June 16, 2015 (referred to herein as the "Regulations") that effectively kept the same provisions as in the temporary regs.[3]

In addition to Final Regulations, the IRS has issued some helpful guidance, including Notice 2011-82, Rev. Proc. 2014-18, Notice 2017-15, Rev. Proc. 2017-34, and, most recently, Rev. Proc. 2022-32 (which will be discussed later in this paper).

III. THE RULES OF PORTABILITY AND MAKING THE ELECTION

A. How to Compute the "DSUE Amount"

Section 2010(c)(2) of the Code defines the "applicable exclusion amount" as the sum of:

(A) the basic exclusion amount, and

(B) in the case of a surviving spouse, the deceased spousal exclusion amount.

Code Section 2010(c)(2). The basic exclusion amount is defined in Code Section 2010(c)(3)(A) as $5,000,000, as adjusted by inflation each year in accordance with Code Section 2010(c)(3)(B). In 2017, Code Section 2010(c)(3)(C) was added to substitute "$10,000,000" for "$5,000,000" in subsection (A) in the case of estates of decedents dying or gifts made after December 31, 2017, and before January 1, 2026.

The deceased spousal unused exclusion amount (or DSUE Amount, for short) is found in Code Section 2010(c)(4), which states:

> For purposes of this subsection, with respect to a surviving spouse of a deceased spouse dying after December 31, 2010, the term "deceased spousal unused exclusion amount" means the <u>lesser of</u> –
>
> (A) the basic exclusion amount, or
> (B) the excess of –
>
> (i) the *applicable* exclusion amount of the last such deceased spouse of such 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.

(emphasis added).

In its most straightforward application, when one spouse dies survived by the other spouse, the surviving spouse's applicable exclusion amount can include the deceased spouse's DSUE Amount, assuming that the

[1] Pub. L. 111-312, 111th Cong., 2nd Sess. (Dec. 17, 2010), 124 Stat. 3296.

[2] Pub. L. No. 115-97.

[3] T.D. 9725, 80 FR 34279-34292 (June 16, 2015).

proper election is made (which is discussed in great detail below). Assuming the surviving spouse never remarries, he or she can utilize that increased applicable exclusion amount during his or her life through gifts, or to shelter assets from estate tax at death.

B. Making the Portability Election.

1. The Code

Section 2010 of the Code provides very limited guidance regarding the mechanics of the portability election. The only method by which a surviving spouse can claim a DSUE Amount is if the "executor" of the deceased spouse's estate timely files a U.S. Estate (and Generation-Skipping Transfer) Tax return (Form 706). Code Section 2010(c)(5)(A). Once the election is made, it is irrevocable. *Id*. No election can be made if the return is filed late (although for certain estates, there is some relief for late filed returns under Rev. Proc. 2022-32, discussed below). *Id*. Fortunately, the Regulations provide additional guidance on these matters.

2. Opting Out; Last Return Controls.

In addition to simply not filing a return, the executor can also "opt out" of making the election on the 706 by checking the box on "Part 6 – Portability of Deceased Spousal Unused Exclusion (DSUE)" on the Form 706. *See* Instructions for Form 706; Treas. Reg. § 20.2010-2(a)(3). Furthermore, the executor can effectively revoke a prior election by filing another 706 before the due date that changes the prior election. Treas. Reg. § 20.2010-2(a)(4). The last filed 706 before the due date will control, and whatever election is made on that return will be irrevocable. *Id*.

3. Late Filing Relief.

The Regulations make no mention of making a "protective" election (for example, in the case of a will contest) or of any relief for filing a late return under Section 9100; however, in light of numerous private letter requests for relief, the IRS promulgated Rev. Proc. 2014-18 in which they set forth a simplified method for filing a late 706 in certain cases. Rev. Proc. 2014-18, 2014-7 IRB 513. However, this relief did not apply to estates of decedents who died on or after January 1, 2014. Due to a continuing number of requests, in 2017, the IRS granted permanent relief in Rev. Proc. 2017-34 (for up to two years), which was later superseded by Rev. Proc. 2022-32 (for up to five years). In order to qualify,

(i) the deceased spouse must have died after December 31, 2010;
(ii) the deceased spouse must have been a U.S. citizen or resident on his or her date of death;
(iii) the deceased spouse's estate must not have been required to file a 706 based on the value of the gross estate plus adjusted taxable gifts and did not file a return to elect out of portability;
(iv) the late election may be made by filing a complete and properly- prepared Form 706 on or before the fifth anniversary of the decedent's date of death; and
(v) the 706 must state at the top of the Form that the return is "FILED PURSUANT TO REV. PROC. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(A). *Id*.

4. The "Executor" Makes the Election.

The Regulations provide that the "executor or administrator of a decedent (survived by a spouse) that is appointed, qualified, and acting within the United States…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." Treas. Reg. § 20.2010-2(a)(6)(i). The executor can also elect out of portability (or simply not file a return if one is not otherwise required).

5. What if there is no executor?

If no executor is appointed, the portability election can only be made by any person in "actual or constructive" possession of any property of the decedent. Treas. Reg. § 20.2010-2(a)(6)(ii). If a return is filed by a "non-appointed executor" either electing portability or opting out, then that election cannot be superseded by a contrary election made by another non-appointed executor in the same estate. *Id*.

The important thing to take away is that if there is a court-appointed executor who is not the surviving spouse, it may be difficult for the surviving spouse to make a portability election if the executor does not. This seems somewhat incongruous to the other, more liberal interpretations applied in the Regulations. In at least one case, a surviving spouse was able to force the administrator to file an estate tax return for portability purposes. *See In re Estate of Vose*, 390 P.3d 238 (Okla. 2017). Nevertheless, it becomes critically important in estate plans that involve blended families, where one spouse's children or someone other than the surviving spouse is serving as executor, that that the attorney discusses with the client whether to include some direction (or prohibition) that the executor make the portability election (even if a return is not required) for the benefit of the surviving spouse and how the related costs would be paid.

6. Requirements for Making the Election.

While Code Section 2010 made it clear that an election can only be made by filing a Form 706 for the deceased spouse's estate, it was not clear initially whether the IRS would permit returns to be filed with less stringent requirements associated with the typical estate tax return.

Fortunately, under certain circumstances, a "full and complete" return is not required. If a return is not otherwise required, and if any property included in the gross estate that qualifies for the marital deduction (under Code Section 2056 or 2056A) or the charitable deduction (under Code Section 2055), the executor does not have to report the value of the asset, only the "description, ownership, and/or beneficiary of such property…" together with information sufficient to support its qualification for the deduction. Treas. Reg. § 20.2010-2(a)(7)(ii)(A).

There are certain exceptions to this where the property values must be provided. *Id*. For example, if the value relates to amounts passing to other beneficiaries, if any a portion of the property passes to a spouse or charity, if there is a partial disclaimer or partial QTIP election, or if the value is needed to determine the estate's eligibility for alternate valuation, special use valuation or Code § 6166 estate tax deferral. However, even if the procedure applies, the executor must exercise due diligence to estimate the fair market value of the gross estate and provide a range of values within the executor's "best estimate," rounded to the nearest $250,000. Treas. Reg. § 20.2010-2(a)(7)(ii)(B).

Presumably, "best estimate" does not include full blown appraisals, but such appraisals may still be required in order to establish any step up in basis of hard-to-value assets. Still, for "simple" estates where most if not all of the assets pass to the surviving spouse outright, the relaxed requirements are a welcome addition as it makes the decision to elect portability less costly to the executor.

However, please note that for estates that include trusts (either Bypass Trusts or QTIP Trusts), a full and complete return (with values and appraisals, if needed) would still be required in order to make the portability election. A good example is a 2023 decedent with a $5 million estate that includes a bypass trust for the surviving spouse (the couple did their wills in 1998 when the exemption was $625,000). If the executor wishes to file a 706 so that the surviving spouse can claim the $7.92 million DSUE Amount, the executor would be required to file a full and complete return for the estate.

The Instructions to the Form 706 have been revised to reflect the Regulations. Furthermore, the Form itself contains a new "Part 6" on which the election can be made (or the executor can opt out). A copy of the relevant pages from the Form 706 and its instructions are attached as **Exhibit A**. Interestingly, certain concepts discussed above, such as the ability to utilize the DSUE Amounts from multiple deceased spouses through lifetime gifts, is clearly reflected in the Form and instructions.

If an estate tax return is filed in which a portability election is made, it appears that the IRS can keep the statute of limitations open on the deceased spouse's estate tax return for the sole purpose of adjusting the amount of the DSUE Amount on the surviving spouse's return. Code Section 2010(c)(5)(B). As a result, the estate tax return of a deceased spouse could be audited for the purpose of determining the correct amount of the DSUE Amount even if the surviving spouse dies decades later. Per the Regulations, the IRS may adjust or eliminate the DSUE Amount based on the examination, but it may not assess additional estate tax against a prior deceased spouse's return if the applicable period of limitations for assessment of estate taxes has expired. Treas. Reg. §§ 20.2001-2(a), 20.2010-2(d), 20.2010-3(d) and 25.2505-2(e).

IV. PLANNING WITH PORTABILITY.

With portability as a permanent part of our estate planning toolbox, we need to consider how the advice we give clients in a variety of areas should be adapted to fit this new age of estate planning.

A. Disclaimer Trusts as an Alternative.

Flexibility is more crucial than ever for estate plans. As a planning alternative, in many cases it will be a good idea to recommend using a "disclaimer" Bypass Trust that can be created at the discretion of the surviving spouse after the death of the first spouse. This way, the benefits of a Bypass Trust can still be realized depending on the exemptions in effect at that time and the desires of the surviving spouse. Of course, there are drawbacks, primarily that relying on the disclaimer rules means that the spouse must act within nine months after the first spouse's death and cannot accept the property prior to the disclaimer, and in addition, the surviving spouse cannot have a power of appointment over the Bypass Trust. Still, despite these limitations, the use of disclaimer Bypass Trusts will likely become even more popular in the face of current planning uncertainty.

B. Will Provisions to Add.

In most cases, keeping the Bypass Trust estate plan in place will continue to make sense, even with portability. For flexibility in smaller estates, many will forms include a "disclaimer" option, where the Bypass Trust is created at the option of the surviving spouse after the first spouse's death. Another, less obvious addition to a will form may be a provision regarding the executor's decision to make the portability election. Often, the will strives to deflect as much liability as reasonably possible from the executor. In that case, the will may provide that the executor be absolved from liability for making or failing to make the portability election. That election (or failure to make the election) can have ramifications on the surviving spouse and his or her family, even if they are not beneficiaries of the will. On the other hand, there may be situations in which the executor should be required to make the election. If cost is an issue, the will can provide that the executor is required to make the election so long as the surviving spouse reimburses the estate for reasonable costs associated with the preparation of the return. Of course, one risk is if the estate is audited, there may be transactions that the family does not want to come to light (think prior gifts that were not fully and adequately disclosed to get the statute of limitations running). Examples of sample Will provisions can be found in **Exhibit B**.

C. Addressing the Portability Election in Marital Agreements.

Spouses who have significant assets may wish to use the other spouse's DSUE Amount if it means they will save significant estate taxes. This has become a negotiating point in Marital Agreements, where the spouse without assets has something valuable to trade in exchange for other rights from the monied spouse. Family law attorneys are likely going to be less aware of these issues, so even if an estate planner doesn't draft marital agreements, he or she may want to have some language handy in case they are asked to review an agreement on behalf of their client. Examples of sample Marital Agreement provisions can be found in **Exhibit C**.

D. Using the Increased Gift Tax Exemption.

It goes without saying that one of the best opportunities offered by portability is the ability for a surviving spouse to use the DSUE Amount to shelter significant lifetime gifts from gift tax. There are two factors that strongly support this position: one, the fact that the surviving spouse will potentially lose the DSUE Amount upon remarriage and the death of the subsequent spouse, and two, the fact that the DSUE Amount will be utilized first before the surviving spouse's basic exclusion amount when making any gifts. Of course, the surviving spouse would need to have the assets available to make the gifts (and not miss having the use of those assets), but assuming that is the case, it can be a powerful estate planning tool.

E. Advising the Executor.

The executor of an estate in which the decedent died after December 31, 2010, and is survived by a spouse, regardless of the size of that estate and whether the spouse uses a Bypass Trust in his or her testamentary plan, may be eligible to make the portability election on that decedent's estate tax return. Failure to file a return, or failure to make the election, means that the DSUE Amount is not available to the surviving spouse.

Everyone likes to believe they are going to win the lottery one day; failure to make the portability election could, however unlikely, result in more estate tax being owed when the surviving spouse dies. (Of course, the surviving spouse could always find a poor spouse to remarry in order to take advantage of his or her DSUE Amount, but that's another topic).

The question then is when does it make sense to file an estate tax return in order to preserve the first spouse's DSUE Amount, even if the combined estate is well under the exemption amounts?

Please note that the threshold for filing an estate tax return will still be based on the original basic estate tax exclusion amount ($10 million, adjusted for inflation), and is not adjusted based on the addition of a DSUE Amount. Code Section 6018(a)(1). Assuming that the deceased spouse's estate is under the basic exclusion amount, how should an estate planning practitioner advise his or her client about the election?

The downside is primarily the cost of preparing the estate tax return. Given that fewer returns are filed each year, attorneys very often prepare the returns for clients, at an hourly rate. For smaller estates, CPAs may offer a lower cost alternative for preparation, and in many cases, the preparation of a "portability" return will be much easier if all assets are passing outright to the surviving spouse. Another downside is having to disclose assets on a return that may otherwise escape scrutiny. In this case, the client will need to weigh the pros and the cons of filing vs. not filing. At a minimum, the surviving spouse (and the executor, if it is someone else) should be told about the portability and the preparation of an estate tax return should be discussed and documented. Practitioners should consider adding a general discussion in the form letter they send to the executor. An example of a form letter to a surviving spouse who is serving as executor of the deceased spouse's estate can be found in **Exhibit D**.

F. Planning for Non-resident Spouses.

1. <u>Nonresidents/Noncitizens.</u>

It should be noted that under the Regulations, if a decedent is a nonresident, noncitizen of the U.S., no portability election can be made and no DSUE Amount is available to the surviving spouse (even if the surviving spouse is a U.S. citizen and/or resident). Treas. Reg. § 20.2010-2(a)(5). If the decedent is a resident and/or citizen but the surviving spouse is not, then the surviving spouse cannot utilize the DSUE Amount; however, if the surviving spouse subsequently becomes a resident and/or citizen, then they can utilize the DSUE Amount on gifts or at death when that surviving spouse is a resident/citizen. Treas.

Reg. §§ 20.2010-3(e), 25.2505-2(f). In other words, there may be some benefit to making the portability election when the decedent is a resident/citizen and the surviving spouse is not, just in case.

2. Qualified Domestic Trusts.

If the resident/citizen deceased spouse creates a Qualified Domestic Trust (QDOT) under his or her will for the benefit of the non-citizen/non-resident surviving spouse, then the decedent's estate is allowed a marital deduction. Distributions from the QDOT (during the surviving spouse's lifetime or at his or her death) are subject to estate taxes attributable to the deceased spouse's estate. Therefore, when a portability election is made, the DSUE Amount will need to be decreased based on subsequent distributions from the QDOT, and the surviving spouse will not be able to make use of the DSUE Amount until the date of the event that triggers the final estate tax liability of the decedent under Section 2056A, which would either be at the surviving spouse's death or when there is a terminating distribution from the QDOT. Treas. Reg. §§ 20.2010-3(c)(2), 25.2505-2(d)(2). If the surviving spouse is not a U.S. citizen on the date of the deceased spouse's death, but later becomes a citizen, the DSUE Amount is considered "final" and is available to the surviving spouse. *See* Treas. Regs. 20.2010-2(c)(4), 20.2010-3(c)(3) and 25.2505-2(d)(3).

V. GIFTING STRATEGIES WITH DSUE.

In addition to advising clients regarding options and mechanics of making a portability election, once the election has been made and the surviving spouse has added the DSUE Amount to his or her basic exclusion amount, there are a number of opportunities (and pitfalls) for making use of that DSUE Amount during the surviving spouse's lifetime (and at death). Some of these issues are discussed below.

1. DSUE Amount Cannot Be More than Basic Exclusion Amount in Year of Deceased Spouses Death.

While the surviving spouse's basic exclusion amount will continue to increase with inflation, the DSUE Amount is a fixed amount and won't change (although it can be lost, see below). Further, the DSUE Amount can never be *more* than the deceased spouse's basic exclusion amount *at the time of his or her death*. Treas. Reg. § 20.2010-2(c)(1)(i). What this means essentially is that there is a ceiling to how much DSUE a surviving spouse can claim, but it does not mean that, once claimed, it will go down if the basic exclusion amount goes down in the future. It will stay fixed at the amount at the time of the deceased spouse's death.

This is particularly important in light of the potential reduction of the gift and estate tax exemptions in 2026. If a spouse dies in 2023 and the surviving spouse claims the full DSUE amount of $12.92 million, and then the surviving spouse later passes away after 2026, that $12.92 million DSUE Amount should still be available (unless the surviving spouse has used it or there is a subsequent deceased spouse).

> *Example.* Henry and Casey are a married couple. Henry dies in 2020, leaving his entire estate outright to Casey. Casey's potential DSUE Amount from Henry is $10.58 million ($11.58 million basic exclusion, less $1 million in adjusted taxable gifts). Assuming Casey does not make any taxable gifts during her life and dies in 2023, her applicable exclusion amount would be $23.5 million ($12.92 million, which is Casey's basic exclusion amount in 2023, plus Henry's $10.58 million DSUE Amount). If Casey dies in 2026 and the basic exclusion amount is now $8 million, he applicable exclusion amount would be $18.58 million in this example.

2. "Use it or Lose it."

A surviving spouse can only use the DSUE Amount from his or her last deceased spouse. If a surviving spouse remarries and the new spouse predeceases the surviving spouse, the surviving spouse can only use that most recent (deceased) spouse's DSUE Amount. Treas. Reg. § 20.2010-3(a)(1). In fact, if the second deceased spouse has no DSUE Amount, or if the executor of the second deceased spouse's estate fails to make a timely portability election (or opts out), then the surviving spouse can see their prior DSUE Amount reduced to $0. Treas. Reg. § 20.2010-3(a)(2).

> *Example*. If Scott predeceases Ramona in 2021 and leaves his $4 million estate to his children, then Ramona's DSUE Amount from Scott would be $7.7 million, when added to her $12.92 million, equaling a $20.62 million estate tax applicable exclusion amount. Ramona then remarries Gideon, who dies and leaves his entire $15 million estate to his children, leaving Ramona with a $0 DSUE Amount. As a result, Ramona's applicable exclusion went from $20.62 million (her basic exclusion amount plus Scott's DSUE Amount) to $12.92 million (her basic exclusion amount in 2023).

However, since the DSUE Amount is based on the last deceased spouse, even if a surviving spouse remarries, he or she should keep the DSUE Amount from the last surviving spouse as long as they die before the new spouse. Treas. Reg. § 20.2010-3(a)(3). Furthermore, divorce does not have any effect on the DSUE Amount, because the ex-spouse's death will not be considered a "last deceased spouse" because they were no longer married. *Id*.

3. Computing DSUE Amount when there are multiple deceased spouses.

The computation of the DSUE Amount, while seemingly simple in concept, becomes much more complicated if the surviving spouse remarries. If our newly married surviving spouse (we'll call her SS1) now passes away, survived by her own surviving spouse (we will call him SS2), what amount of DSUE would SS2 be able to claim from SS1's estate? This question was the cause of some concern based on the original language of TRA 2010, which seemed to limit the DSUE Amount that could be claimed by SS2 to an amount not greater than the basic exclusion amount of SS1, less the taxable estate of SS1 or any lifetime gifts made by SS1. In effect, any DSUE that SS1 might have received from her deceased spouse (DS1) would not count when computing SS1's DSUE Amount. While this may seem confusing (and it is), it is no longer an issue, as the statute was modified by ATRA 2012 and has been interpreted by the Regulations. As a result, SS1 is now deemed to have used her DSUE from her deceased spouse first *before* her basic exclusion amount is reduced. Some examples might be helpful.

> *Example*. Casey remarries Ron, then Casey dies in 2023. Casey's applicable exclusion amount is $23.5 million. Ron wants to claim Casey's DSUE Amount and add it to his basic exclusion amount. The largest amount Ron can claim is $12.06 million, which is the basic exclusion amount in the year of Casey's death. But what if Casey leaves her $10 million estate to her children? Under TRA 2010, Ron's DSUE Amount would have been $2.92 million, but under the modified language of TRA 2012, Ron can still claim a $12.92 million DSUE from Casey (her $10 million taxable estate is absorbed first by the DSUE Amount Casey received from Henry).

Likewise, if Casey made taxable gifts during her life of $10 million, the same result would apply, meaning the taxable gifts use up Henry's DSUE Amount first before using Casey's basic exclusion amount. The ability to use the DSUE Amount has important planning implications that will be discussed below.

4. Adjustment for Gift Taxes Paid.

There is one other adjustment to DSUE Amount that is worth mentioning. If the deceased spouse made taxable gifts that required the payment of gift taxes, the amount of the adjusted taxable gifts of the decedent is reduced by the amount of taxable gifts, if any, on which gift taxes were paid for the calendar year of the gift(s). Treas. Reg. § 20.2010-2(c)(2). This achieves an equitable result where otherwise the DSUE Amount would be reduced by amounts that were taxable and did not actually utilize the deceased spouse's exemption in the year of the gift.

B. Gifting Strategies – the ability to use DSUE Amounts from multiple deceased spouses.

The Regulations make it clear that applicable exclusion amount will include the DSUE Amount from the last deceased spouse, which may be applied at the surviving spouse's death as well as against taxable gifts made during the surviving spouse's life. Treas. Reg. §§ 20.2010-3(a)(1), 25.2505-2(a)(1). While this seems straightforward at the surviving spouse's death, it creates some interesting questions on how this rule is applied to lifetime gifts.

One thing is made explicit, which is that when the surviving spouse who has added a DSUE Amount to her applicable exclusion amount makes a gift, that the DSUE Amount is applied to the taxable gift before the surviving spouse's basic exclusion amount. Treas. Reg. §25.2505-2(b). This is an incredibly helpful and taxpayer friendly position that, until the Temporary (and ultimately Final) Regulations were issued, was not at all clear from the statute.

1. Effect of Subsequent Remarriage DSUE Amount Gifts.

But what if the surviving spouse made gifts during life that used the DSUE Amount, then later remarries, and the new spouse predeceases her, becoming the "new" last deceased spouse?

> *Example*. Let's refer to this as the "*Private Benjamin Example*." Judy marries Yale, who dies on their wedding day. Judy claims Yale's DSUE Amount and adds it to her basic exclusion amount. Later, Judy makes a taxable gift to Captain Lewis, which is equal to the DSUE Amount. Judy later marries Henri, who also dies shortly thereafter, leaving his estate to his family and no DSUE Amount is available to Judy. At Judy's death, what happens?

The first deceased spouse's DSUE Amount is replaced by the second deceased spouse's DSUE Amount, but what about the prior gifts that used the first deceased spouse's DSUE? Do those no longer count? Until the Regulations were issued, no one could be sure of the answer. But the good news is, in yet another taxpayer-friendly position, the Regulations give us (mostly) helpful guidance on these complicated questions.

2. The "Last Deceased Spouse."

For gift purposes, the "last deceased spouse" is determined at the time the gift is made. Treas. Reg. §25.2505-2(a)(1)(i). This special rule can be helpful, because if the surviving spouse remarries in the same year that the first deceased spouse died and makes gifts before the second spouse dies that same year, those gifts still utilize the first deceased spouse's DSUE Amount. Without the rule, the surviving spouse would not be able to make gifts without some risk of them becoming taxable (although she could also not get remarried). In the absence of this special rule, only the DSUE Amount of the second deceased spouse would apply since the gift tax unified credit is based on the applicable exclusion amount "if the donor died as of the end of the calendar year." Code Section 2505(a)(1). Of course, the special rule can work to the detriment of the donor spouse as well. Since a DSUE Amount can't be used until a spouse dies, a donor with a terminally ill spouse would not be able to make gifts utilizing the potential DSUE Amount until an actual death occurs.

3. Making DSUE Amount Gifts from multiple deceased spouses.

In addition to the foregoing, the Regulations provide yet another (surprisingly) friendly position for taxpayers: it is possible to make gifts utilizing the DSUE Amounts from multiple deceased spouses. The Regulations state that if a surviving spouse has made lifetime gifts that utilized the DSUE Amounts from prior deceased spouses who are different from the last deceased spouse, the then 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 (or at the surviving spouse's death) is the sum of:

(i) The DSUE Amount of the surviving spouse's last deceased spouse…; 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. Treas. Reg. §§ 20.2010-3(b), 25.2505-2(c).

In other words, while it is not possible for a surviving spouse to accumulate DSUE Amounts from multiple deceased spouses at her death (due to the "last deceased spouse" rule), it is possible for the surviving spouse to utilize multiple DSUE Amounts so long as she is making taxable gifts prior to the death of any subsequent spouses. While this seems like a morbid planning opportunity (the thought of "black widows" collecting DSUE Amounts comes to mind), it is, nevertheless, a very helpful rule that every estate planner needs to understand.

> *Example*. Assuming Yale dies in 2021 and Judy receives a \$11.7 million DSUE Amount from Yale, she adds that to her basic exclusion amount of \$12.92 million for a total applicable exclusion amount of \$24.62 million. Judy then makes gifts of \$20 million to Captain Lewis. Later, Judy marries Henri, and on his death in 2023, he has a DSUE Amount of \$12.92 million. Due to the rules, Judy can utilize Henri's DSUE, which she can apply during her life against taxable gifts or at her death. Judy's applicable exclusion amount would be \$17.54 million (her remaining basic exclusion amount of \$4.62 million after the \$20 million gift, plus Henri's \$12.92 million DSUE Amount).

To underline the application of this rule, the schedules in which the applicable exclusion amount is calculated for gift and estate tax purposes both contain sections dealing with DSUE Amounts from prior deceased spouses used on gifts by the donor/decedent. *See* **Exhibit A**.

4. Timing of Gifts.

One word of caution. From a timing standpoint, the surviving spouse is able to utilize the last deceased spouse's DSUE Amount beginning on the date of the deceased spouse's death. However, the election can only be made on the deceased spouse's estate tax return (as discussed below), which is not due until nine months after the date of death (and can be extended an additional six months). Accordingly, it is possible that a surviving spouse will make gifts relying on the portability election being made, but if the executor does not file a return (and the surviving spouse in this situation has no right to file a return because there is an executor), then the gifts could be taxable. Treas. Reg. § 25.2505-2(d)(1). Furthermore, it is possible for the executor to file a return making the election before the due date, and then file a subsequent return opting out of portability. *Id*.

It is also possible for the DSUE Amount to be reduced by valuation adjustment upon audit. Since the last return filed before the deadline will apply, the surviving spouse would be out of luck. Obviously, this is a non-issue when the surviving spouse is also the executor, but in estates where this is not the case (e.g., second marriage situations), the surviving spouse must be careful to rely on the portability election before it has been made.

VI. PORTABILITY VS. BYPASS TRUSTS.

The introduction of portability, along with significantly higher (and re-unified) estate and gift tax exemptions truly are "game changers" in the approach estate planners will need to take going forward. Using a testamentary trust to preserve the estate tax exemption of the first spouse to die (referred to herein as a "Bypass Trust") has long been a staple of estate planners. Understandably, a significant number of clients for whom Bypass Trusts would have been an easy decision must now carefully consider an increasing number of factors that in many cases are impossible to predict. Estate planners must learn how to guide their clients through this complex array of choices and provide them with sufficient (but comprehensible) information to make informed decisions. As an added challenge, now with portability, many potential clients may no longer feel it is even necessary to deal with testamentary planning at all, not knowing all of the potential landmines that await the unsuspecting. Welcome to the new age of estate planning.

A. Benefits of Portability.

Portability offers some clear and unmistakable benefits. Ultimately, whether these are enough to outweigh the benefits of a Bypass Trust will certainly depend on the particular facts at hand. However, from a general standpoint, here are a few noteworthy benefits:

1. <u>Back stop to lack of estate planning.</u>

Just like the GST automatic allocation rules, portability offers a respite (both to estate planners and the IRS who has to review private letter ruling requests) from a lack of planning. For spouses who did not choose to add tax-planned trusts to their wills (or if they have no will at all), a lack of a Bypass Trust at the first spouse's death surely meant that the first deceased spouse's exemption would be partially or completely wasted, unless the surviving spouse was willing to disclaim and let assets pass to the next beneficiaries in line. Now that is no longer an issue, so long as the portability election is made in a timely fashion.

2. <u>Simplicity.</u>

A Bypass Trust, despite its numerous benefits (as described below), will always be more complicated than no trust. Estate plans can now be incredibly simple (and flexible) without wasting the first spouse's exemption.

3. <u>Qualified Retirement Plans.</u>

For many clients, their traditional IRA or 401(k) is their biggest asset. Unfortunately, these make poor assets for estate planning because of the income tax liability built into the account. Because traditional IRA distributions are subject to ordinary income taxes, the goal is to defer, defer, defer. Typically, the best option from an income tax standpoint is to name the surviving spouse as the primary beneficiary, so he or she can then roll it into their own IRA and defer distributions until he or she is 72. Because this asset is passing outright to the surviving spouse, it is not available to fund the Bypass Trust under the will. If the tax benefits of using the Bypass Trust are more desired, then it can be named as the beneficiary of the IRA, but at the beginning of 2020, the IRA rules regarding permissible beneficiaries changed and in most cases, a trust that is named as beneficiary of an IRA will need to withdraw all of the IRA proceeds within ten years of the participant's death (all subject to ordinary income taxes). Code Section 401(a)(9)(H)(i). The best case scenario now for a trust for the benefit of the surviving spouse to qualify would require the trustee to immediately begin distributing the minimum required distribution to the surviving spouse based on the surviving spouse's life expectancy.

Now, with portability, the decision is easier if the surviving spouse is named as the outright beneficiary, as opposed to the trustee of the Bypass Trust. If the deceased spouse's executor makes a portability election on a timely filed estate tax return, the added exemption may fully shelter the IRA upon the surviving spouse's death, without the need for having it pass to a Bypass Trust.

B. Drawbacks of Portability.

1. <u>No GST equivalent.</u>

The DSUE Amount does not apply to the generation-skipping transfer (GST) tax. Unfortunately, a deceased spouse's unused GST exemption cannot be used by a surviving spouse. This means that if the first spouse to die wants to fully utilize his or her GST exemption, the spouse should create a non-marital trust or a reverse QTIP trust for the benefit of the surviving spouse.

2. <u>No Indexing.</u>

One of the features of the TRA 2010 is that the basic estate tax exclusion amount is indexed for inflation starting in 2012. At the first spouse's death, his or her basic exclusion amount may have been indexed for inflation, but once it becomes a DSUE Amount, it will not be subject to future adjustments for inflation after his or her death. However, the surviving spouse's basic estate tax exclusion amount will still be adjusted for inflation at his or her subsequent death. Code Section 2010(c)(3)(B).

3. Election Required.

Of course, a DSUE Amount is only available to the surviving spouse if the executor makes the appropriate election by filing an estate tax return for the deceased spouse. There are a number of potential roadblocks: the cost of preparing the return, filing a return on time, blended family situations, etc., that can make this anything but a straightforward proposition.

C. Benefits of a Bypass Trust Over Portability.

Despite the clear benefits of portability for a lot of estate plans, it is likely that Bypass Trusts will continue to be recommended by estate planners as a fundamental tool in their toolbox. This is because there are numerous tax and non-tax benefits of Bypass Trusts, as well as the incredible amount of flexibility a trust can provide.

1. Creditor/Divorce Protection.

One of the primary advantages of a trust, regardless of any estate tax benefits, is the fact that a trust's assets will be exempt from most creditors under state law. In fact, this is often a bigger factor in persuading a client to use a trust than not. For example, a properly drafted spendthrift trust should protect the surviving spouse from liability for a tort committed by the surviving spouse, contractual claims against the surviving spouse, or claims of a new spouse against the surviving spouse's assets. Furthermore, the assets of the trust should be protected from future spouses of the surviving spouse. Even if the surviving spouse is the trustee, the spouse's interest in the Bypass Trust can be protected from divorce if the trust is properly drafted and will keep separate property interests from being comingled with community property.

2. Allocation of GST Exemption.

As mentioned earlier, one of the features not included in the 2010 Tax Act is the portability of a spouse's unused GST exemption. Allocation of a deceased spouse's GST exemption to a Bypass Trust can be an extremely powerful means of avoiding estate and GST taxes for several generations. Using a Bypass Trust at the first death effectively doubles the amount of GST exemption that can be allocated by a married couple to trusts for their children. If a Bypass Trust is not used, the first deceased spouse's GST exemption will be wasted.

3. Protects Appreciation of Assets.

The use of a Bypass Trust will protect the enhanced value of the deceased spouse's assets. The income and appreciation generated by the assets in the deceased spouse's estate that pass into a Bypass Trust will escape future estate tax upon the death of the surviving spouse. The DSUE Amount does not change, and in fact, is not even indexed for inflation (unlike the estate tax basic exclusion amount). Finally, by using a Bypass Trust, the surviving spouse will be able to "spend down" his or her assets first (which will be included in his or her taxable estate at death) while preserving the assets in the Bypass Trust for the remainder beneficiaries.

4. Loss of DSUE Amount upon Remarriage.

One of the biggest risks to a surviving spouse who relies on portability instead of a Bypass Trust is the potential loss of the DSUE Amount upon remarriage. If the surviving spouse remarries and he or she outlives the second spouse, the surviving spouse will lose the first deceased spouse's DSUE Amount in favor of the second spouse's DSUE Amount. If the executor of the second deceased spouse's estate refuses to file an estate tax return, the surviving spouse will not only lose the first deceased spouse's DSUE Amount but have nothing to replace it with. On the other hand, use of a Bypass Trust will preserve the first deceased spouse's exemption, regardless of whether the surviving spouse remarries (and, the trust may protect the trust assets from any claims made by the second spouse).

In fact, by utilizing a Bypass Trust, the surviving spouse can acquire multiple DSUE Amounts without having to make any lifetime gifts. If the first deceased spouse's exemption is allocated to the assets of a Bypass Trust, upon the death of the second deceased spouse, the surviving spouse can elect portability and use his DSUE Amount without losing the benefit of the first deceased spouse's exemption (which is still in the Bypass Trust).

5. Avoid Audit of Assets in Bypass Trust upon Second Death.

While it is not unheard of for the estate of the first spouse to die to be audited, it is less likely if no estate tax is due on the first spouse's death. By using a Bypass Trust, the assets in the trust will not need to be disclosed a second time if the surviving spouse dies and files an estate tax return. In fact, since the Bypass Trust assets are not included in the surviving spouse's estate, if the surviving spouse's assets outside the trust (including prior taxable gifts) are less than the exemption amount, the surviving spouse should not be required to file an estate tax return at all. Please note that the threshold for filing a return is based on the surviving spouse's basic exemption amount, without regard to any DSUE Amount.

6. "Locks in" the Estate Plan.

If the first deceased spouse is concerned that the surviving spouse will squander his/her assets on the new spouse to the detriment of the children, the Bypass Trust can provide for an independent trustee, strict distribution provisions, and no power of appointment (so that the assets have to pass to the children at the death of the surviving spouse).

D. Drawbacks of Credit Shelter Trust vs. Portability.

Of course, despite the myriad benefits of a Bypass Trust, there are still some important drawbacks that are worth noting. In the past, a Bypass Trust would often be an automatic part of any estate plan over a certain amount, whereas today, it is going to take a lot more discussion to arrive at the best solution for the client.

1. No Stepped-Up Basis.

The most compelling tax reason to avoid using a Bypass Trust in favor of portability is the fact that the Bypass Trust assets will not receive a step up in basis when the surviving spouse dies. In the past, the tradeoff of the loss of a stepped-up basis was easily outweighed by the fact that the estate tax rate (55%, not so long ago) was much greater than the capital gains rate (currently 15% on long term gain). However, two important things have changed. One, the estate tax exemption amount is much higher than it ever was in the past, meaning a lot fewer estates are subject to the tax, and two, the difference between the estate tax rate (40%) and the capital gains rate (23.8%) is not as great as it used to be. If the surviving spouse's estate would not be subject to any estate tax at her death because it is under the exemption (with or without portability), in many cases the spouse's heirs would be better off from a tax standpoint if all of the surviving spouse's assets received a stepped-up basis. Of course, it is impossible to predict what rates will be in the future, and the non-tax benefits of Bypass Trusts are still very compelling, but estate planners can no longer overlook the income tax ramifications of these decisions. Someone said recently that we are all income tax lawyers now, and that is not an incorrect statement.

2. Trusts Are Complicated.

While the concept of a Bypass Trust should be pretty straightforward to practicing estate planners, it is a foreign concept to many clients. And for some clients, the hassle of administering the Bypass Trust, including segregating and transferring assets to the trust, keeping track of multiple tax returns, and respecting the distribution provisions of the trust can be intimidating. Although estate planners can offer a lot of help in this area, there are going to be clients who are just not great candidates for Bypass Trusts and would be better served by relying on portability.

E. Not an "either/or" choice.

It is important to note that the portability election is still available even if a Bypass Trust is used in the will of the deceased spouse. Assuming the deceased spouse's estate is less than the estate tax exemption (including adjusted taxable gifts), then a DSUE Amount would still be available over and above what passes to the Bypass Trust. This DSUE Amount could be used by the surviving spouse during his or her lifetime, preserving that spouse's basic exclusion amount. Of course, an estate tax return would need to be filed for the deceased spouse, and any assets passing to the Bypass Trust would likely need to be disclosed in full, as opposed to the more streamlined option for assets qualifying for the marital deduction. Regardless, it is likely that the number of estate tax returns will rise for this reason, even though the number of estates subject to the estate tax has decreased significantly in the last few years.

Exhibit A

Form 706 (Rev. 8-2019)

Estate of:	Decedent's social security number

Part 4—General Information *(continued)*

If you answer "Yes" to any of the following questions, you must attach additional information as described.		Yes	No
10	Did the decedent at the time of death own any property as a joint tenant with right of survivorship in which **(a)** one or more of the other joint tenants was someone other than the decedent's spouse, and **(b)** less than the full value of the property is included on the return as part of the gross estate? If "Yes," you must complete and attach Schedule E		
11a	Did the decedent, at the time of death, own any interest in a partnership (for example, a family limited partnership), an unincorporated business, or a limited liability company; or own any stock in an inactive or closely held corporation?		
b	If "Yes," was the value of **any** interest owned (from above) discounted on this estate tax return? If "Yes," see the instructions on reporting the total accumulated or effective discounts taken on Schedule F or G		
12	Did the decedent make any transfer described in sections 2035, 2036, 2037, or 2038? See instructions. If "Yes," you must complete and attach Schedule G		
13a	Were there in existence at the time of the decedent's death any trusts created by the decedent during his or her lifetime?		
b	Were there in existence at the time of the decedent's death any trusts not created by the decedent under which the decedent possessed any power, beneficial interest, or trusteeship?		
c	Was the decedent receiving income from a trust created after October 22, 1986, by a parent or grandparent?		
	If "Yes," was there a GST taxable termination (under section 2612) on the death of the decedent?		
d	If there was a GST taxable termination (under section 2612), attach a statement to explain. Provide a copy of the trust or will creating the trust, and give the name, address, and phone number of the current trustee(s).		
e	Did the decedent at any time during his or her lifetime transfer or sell an interest in a partnership, limited liability company, or closely held corporation to a trust described in line 13a or 13b?		
	If "Yes," provide the EIN for this transferred/sold item. ▶		
14	Did the decedent ever possess, exercise, or release any general power of appointment? If "Yes," you must complete and attach Schedule H		
15	Did the decedent have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?		
16	Was the decedent, immediately before death, receiving an annuity described in the "General" paragraph of the instructions for Schedule I or a private annuity? If "Yes," you must complete and attach Schedule I		
17	Was the decedent ever the beneficiary of a trust for which a deduction was claimed by the estate of a predeceased spouse under section 2056(b)(7) and which is not reported on this return? If "Yes," attach an explanation		

Part 5—Recapitulation.

Note: If estimating the value of one or more assets pursuant to the special rule of Reg. section 20.2010-2(a)(7)(ii), enter on both lines 10 and 23 the amount noted in the instructions for the corresponding range of values. See instructions for details.

Item no.	Gross estate		Alternate value	Value at date of death
1	Schedule A—Real Estate	1		
2	Schedule B—Stocks and Bonds	2		
3	Schedule C—Mortgages, Notes, and Cash	3		
4	Schedule D—Insurance on the Decedent's Life (attach Form(s) 712)	4		
5	Schedule E—Jointly Owned Property (attach Form(s) 712 for life insurance)	5		
6	Schedule F—Other Miscellaneous Property (attach Form(s) 712 for life insurance)	6		
7	Schedule G—Transfers During Decedent's Life (att. Form(s) 712 for life insurance)	7		
8	Schedule H—Powers of Appointment	8		
9	Schedule I—Annuities	9		
10	Estimated value of assets subject to the special rule of Reg. section 20.2010-2(a)(7)(ii)	10		
11	Total gross estate (add items 1 through 10)	11		
12	Schedule U—Qualified Conservation Easement Exclusion	12		
13	Total gross estate less exclusion (subtract item 12 from item 11). Enter here and on line 1 of Part 2—Tax Computation	13		

Item no.	Deductions		Amount
14	Schedule J—Funeral Expenses and Expenses Incurred in Administering Property Subject to Claims	14	
15	Schedule K—Debts of the Decedent	15	
16	Schedule K—Mortgages and Liens	16	
17	Total of items 14 through 16	17	
18	Allowable amount of deductions from item 17 (see the instructions for item 18 of the Recapitulation)	18	
19	Schedule L—Net Losses During Administration	19	
20	Schedule L—Expenses Incurred in Administering Property Not Subject to Claims	20	
21	Schedule M—Bequests, etc., to Surviving Spouse	21	
22	Schedule O—Charitable, Public, and Similar Gifts and Bequests	22	
23	Estimated value of deductible assets subject to the special rule of Reg. section 20.2010-2(a)(7)(ii)	23	
24	Tentative total allowable deductions (add items 18 through 23). Enter here and on line 2 of the Tax Computation	24	

Page 3

Form 706 (Rev. 8-2019)

Estate of: | **Decedent's social security number**

Part 6—Portability of Deceased Spousal Unused Exclusion (DSUE)

Portability Election

A decedent with a surviving spouse elects portability of the DSUE amount, if any, by completing and timely filing this return. No further action is required to elect portability of the DSUE amount to allow the surviving spouse to use the decedent's DSUE amount.

Section A. Opting Out of Portability

The estate of a decedent with a surviving spouse may opt out of electing portability of the DSUE amount. Check here and do not complete Sections B and C of Part 6 only if the estate opts **NOT** to elect portability of the DSUE amount. ☐

Section B. Qualified Domestic Trust (QDOT)

	Yes	No
Are any assets of the estate being transferred to a QDOT?	☐	☐

If "Yes," the DSUE amount portable to a surviving spouse (calculated in Section C, below) is preliminary and shall be redetermined at the time of the final distribution or other taxable event imposing estate tax under section 2056A. See instructions for more details.

Section C. DSUE Amount Portable to the Surviving Spouse (To be completed by the estate of a decedent making a portability election.)

Complete the following calculation to determine the DSUE amount that can be transferred to the surviving spouse.

1	Enter the amount from line 9d, Part 2—Tax Computation . . .	1	
2	Reserved . . .	2	
3	Enter the value of the cumulative lifetime gifts on which tax was paid or payable. See instructions . . .	3	
4	Add lines 1 and 3 . . .	4	
5	Enter amount from line 10, Part 2—Tax Computation . . .	5	
6	Divide amount on line 5 by 40% (0.40) (do not enter less than zero) . . .	6	
7	Subtract line 6 from line 4 . . .	7	
8	Enter the amount from line 5, Part 2—Tax Computation . . .	8	
9	Subtract line 8 from line 7 (do not enter less than zero) . . .	9	
10	DSUE amount portable to surviving spouse (Enter lesser of line 9 or line 9a, Part 2—Tax Computation) . .	10	

Section D. DSUE Amount Received From Predeceased Spouse(s) (To be completed by the estate of a deceased surviving spouse with DSUE amount from predeceased spouse(s))

Provide the following information to determine the DSUE amount received from deceased spouses.

A Name of Deceased Spouse (dates of death after December 31, 2010, only)	B Date of Death (enter as mm/dd/yy)	C Portability Election Made? Yes	C No	D If "Yes," DSUE Amount Received From Spouse	E DSUE Amount Applied by Decedent to Lifetime Gifts	F Year of Form 709 Reporting Use of DSUE Amount Listed in col. E	G Remaining DSUE Amount, if any (subtract col. E from col. D)
Part 1 — DSUE RECEIVED FROM LAST DECEASED SPOUSE							
		☐	☐				
Part 2 — DSUE RECEIVED FROM OTHER PREDECEASED SPOUSE(S) AND USED BY DECEDENT							
		☐	☐				
		☐	☐				
		☐	☐				
		☐	☐				
		☐	☐				
		☐	☐				
		☐	☐				
		☐	☐				
		☐	☐				
		☐	☐				
Total (for all DSUE amounts from predeceased spouse(s) applied) . .							

Add the amount from Part 1, column D, and the total from Part 2, column E. Enter the result on line 9b, Part 2—Tax Computation . . . ▶

established market for the stock, and those sales that do occur are at irregular intervals and seldom reflect all the elements of a representative transaction as defined by FMV.

Line 13. Trusts

If you answered “Yes” on either line 13a or line 13b, attach a copy of the trust instrument for each trust.

Complete Schedule G if you answered “Yes” on line 13a and Schedule F if you answered “Yes” on line 13b.

Line 15. Foreign Accounts

Check “Yes” on line 15 if the decedent at the time of death had an interest in or signature or other authority over a financial account in a foreign country, such as a bank account, securities account, an offshore trust, or other financial account.

Part 5—Recapitulation

Gross Estate—Items 1 Through 11

Items 1 through 9. You must make an entry in each of items 1 through 9.

If the gross estate does not contain any assets of the type specified by a given item, enter zero for that item. Entering zero for any of items 1 through 9 is a statement by the executor, made under penalties of perjury, that the gross estate does not contain any includible assets covered by that item.

Do not enter any amounts in the “Alternate value” column unless you elected alternate valuation on *Part 3—Elections by the Executor*, line 1.

Note. If estimating the value of one or more assets pursuant to the special rule of Regulations section 20.2010-2(a)(7)(ii), do not enter values for those assets in items 1 through 9. Total the estimated values for those assets and follow the instructions for item 10.

Which schedules to attach for items 1 through 9. You must attach the following.

- Schedule F. Answer its questions even if you report no assets on it.
- Schedules A, B, and C, if the gross estate includes any (1) Real Estate, (2) Stocks and Bonds, or (3) Mortgages, Notes, and Cash, respectively.
- Schedule D, if the gross estate includes any life insurance or if you answered “Yes” to question 9a of *Part 4—General Information*.
- Schedule E, if the gross estate contains any jointly owned property or if you answered “Yes” to question 10 of *Part 4—General Information*.
- Schedule G, if the decedent made any of the lifetime transfers to be listed on that schedule or if you answered “Yes” to question 12 or 13a of *Part 4—General Information*.
- Schedule H, if you answered “Yes” to question 14 of *Part 4—General Information*.
- Schedule I, if you answered “Yes” to question 16 of *Part 4—General information*.

Item 10. Under Regulations section 20.2010-2(a)(7)(ii), if the total value of the gross estate and adjusted taxable gifts is less than the basic exclusion amount (see section 6018(a)) and Form 706 is being filed only to elect portability of the DSUE amount, the estate is not required to report the value of certain property eligible for the marital or charitable deduction. For this property being reported on Schedules A, B, C, D, E, F, G, H, and I, the executor must figure the best estimate of the value. Do not include the estimated value on the line corresponding to the schedule on which the property was reported. Instead, total the estimated value of the assets subject to the special rule and enter on line 10 the amount from the Table of Estimated Values, later, that corresponds to that total.

Note. The special rule does not apply if the valuation of the asset is needed to determine the estate's eligibility for the provisions of section 2032, 2032A, 2652(a)(3), or 6166, or any other provision of the Code or regulations.

Note. As applies to all other values reported on Form 706, estimates of the value of property subject to the special rule of Regulations section 20.2010-2(a)(7)(ii) must result from the executor’s exercise of due diligence and are subject to penalties of perjury.

Exclusion—Item 12

Item 12. Conservation easement exclusion. Complete and attach Schedule U (along with any required attachments) to claim the exclusion on this line.

Deductions—Items 14 Through 23

Items 14 through 22. Attach the appropriate schedules for the deductions claimed.

Item 18. If item 17 is less than or equal to the value (at the time of the decedent's death) of the property subject to claims, enter the amount from item 17 on item 18.

If the amount on item 17 is more than the value of the property subject to claims, enter the greater of:

- The value of the property subject to claims, or
- The amount actually paid at the time the return is filed.

In no event should you enter more on item 18 than the amount on item 17. See section 2053 and the related regulations for more information.

Item 23. Under Regulations section 20.2010-2(a)(7)(ii), if the total value of the gross estate and adjusted taxable gifts is less than the basic exclusion amount (see section 6018(a)) and Form 706 is being filed only to elect portability of the DSUE amount, the estate is not required to report the value of certain property eligible for the marital or charitable deduction. For this property being reported on Schedule M or O, enter on line 23 the amount from line 10.

Part 6—Portability of Deceased Spousal Unused Exclusion (DSUE)

Section 2010(c)(4) authorizes estates of decedents dying after December 31, 2010, to elect to transfer any unused exclusion to the surviving spouse. The amount received by the surviving spouse is called the *deceased spousal unused exclusion* (DSUE) amount. If the executor of the decedent’s estate elects transfer, or portability, of the DSUE amount, the surviving spouse can apply the DSUE amount received from the estate of the surviving spouse’s last deceased spouse (defined later) against any tax liability arising from subsequent lifetime gifts and transfers at death.

Note. A nonresident surviving spouse who is not a citizen of the United States may not take into account the DSUE amount of a deceased spouse, except to the extent allowed by treaty with the nonresident surviving spouse's country of citizenship.

Last Deceased Spouse Limitation

The *last deceased spouse* is the most recently deceased person who was married to the surviving spouse at the time of that person's death. The identity of the last deceased spouse is determined as of the day a taxable gift is made, or in the case of a transfer at death, the date of the surviving spouse's death. The identity of the last deceased spouse is not impacted by whether the decedent's estate elected portability or whether the last deceased spouse had any DSUE amount available. Remarriage also does not affect the designation of the last deceased spouse and does not prevent the surviving spouse from applying the DSUE amount to taxable transfers.

When a taxable gift is made, the DSUE amount received from the last deceased spouse is applied before the surviving spouse's basic exclusion amount. A surviving spouse may use the DSUE amount of the last deceased spouse to offset the tax on any taxable transfer made after the deceased spouse's death. A surviving spouse who has more than one predeceased spouse is not precluded from using the DSUE amount of each spouse in succession. A surviving spouse may not use the sum of DSUE amounts from multiple predeceased spouses at one time nor may the DSUE amount of a predeceased spouse be applied after the death of a subsequent spouse.

Making the Election

A timely filed and complete Form 706 is required to elect portability of the DSUE amount to a surviving spouse. The filing requirement applies to all estates of decedents choosing to elect portability of the DSUE amount, regardless of the size of the estate. A timely filed return is one that is filed on or before the due date of the return, including extensions. See Rev. Proc. 2022-32 (superseding Rev. Proc. 2017-34) for the simplified procedures for late elections.

The timely filing of a complete Form 706 with DSUE will be deemed a portability election if there is a surviving spouse. The election is effective as of the decedent's date of death, so the DSUE amount received by a surviving spouse may be applied to any transfer occurring after the decedent's death. A portability election is irrevocable, unless an adjustment or amendment to the election is made on a subsequent return filed on or before the due date.

Note. Under Regulations section 20.2010-2(a)(5), the executor of an estate of a nonresident decedent who was not a citizen of the United States at the time of death cannot make a portability election.

If an executor is appointed, qualified, and acting with the United States on behalf of the decedent's estate, only that executor may make or opt out of a portability election. If there is no executor, see Regulations section 20.2010-2(a)(6)(ii).

Opting Out

If an estate files a Form 706 but does not wish to make the portability election, the executor can opt out of the portability election by checking the box indicated in Section A of this Part. If no return is required under section 6018(a), not filing Form 706 will avoid making the election.

Figuring the DSUE Amount

Regulations section 20.2010-2(b)(1) requires that a decedent's DSUE be figured on the estate tax return. The DSUE amount is the lesser of (a) the basic exclusion amount in effect on the date of death of the decedent whose DSUE is being figured, or (b) the decedent's applicable exclusion amount less the amount on line 5 of *Part 2—Tax Computation* on the Form 706 for the estate of the decedent. Amounts on which gift taxes were paid are excluded from adjusted taxable gifts for the purpose of this computation.

When a surviving spouse applies the DSUE amount to a lifetime gift or bequest at death, the IRS may examine any return of a predeceased spouse whose executor elected portability to verify the allowable DSUE amount. The DSUE amount may be adjusted or eliminated as a result of the examination; however, the IRS may only make an assessment of additional tax on the return of the predeceased spouse within the applicable limitations period under section 6501.

Special Rule Where Value of Certain Property Not Required To Be Reported on Form 706

The regulations provide that executors of estates who are not otherwise required to file Form 706 under section 6018(a) do not have to report the value of certain property qualifying for the marital or charitable deduction. For such property, the executor may estimate the value in good faith and with the due diligence to be afforded all assets includible in the gross estate. The amount reported on Form 706 will correspond to a range of dollar values and will be included in the value of the gross estate shown on *Part 2—Tax Computation*, line 1. See the instructions for *Part 5—Recapitulation*, lines 10 and 23, earlier, for more details.

Specific Instructions

Portability Election. If you intend to elect portability of the DSUE amount, timely filing a complete Form 706 is all that is required. Complete Section B if any assets of the estate are being transferred to a qualified domestic trust and complete Section C of this Part to figure the DSUE amount that will be transferred to the surviving spouse.

Section A. Opting Out of Portability. If you are filing Form 706 and do not wish to elect portability, then check the box indicated. Do not complete Section B or C.

Section B. Portability and Qualified Domestic Trusts (QDOTs). A QDOT allows the estate of a decedent to bequeath property to a surviving spouse who is not a citizen of the United States and still receive a marital deduction. When property passes to a QDOT, estate tax is imposed under section 2056A as distributions are made from the trust. When a QDOT is established and there is a DSUE amount, the executor of the decedent's estate will determine a preliminary DSUE amount for the purpose of electing portability. This amount will decrease as section 2056A distributions are made. In estates with a QDOT, the DSUE amount generally may not be applied against tax arising from lifetime gifts because it will not be available to the surviving spouse until it is finally determined, usually upon the death of the surviving spouse or when the QDOT is terminated.

Note. If a surviving spouse who is not a citizen of the United States becomes a citizen and the section 2056A tax no longer applies to the assets of the QDOT, as of the date the surviving spouse becomes a U.S. citizen, the DSUE amount

Schedule A—Example 1

In this example, alternate valuation is not adopted; the date of death is January 1, 2022.

Item number	Description	Alternate valuation date	Alternate value	Value at date of death
1	House and lot, 1921 William Street NW, Washington, DC (lot 6, square 481). Rent of $8,100 due at the end of each quarter, February 1, May 1, August 1, and November 1. Value based on appraisal, copy of which is attached			$550,000
	Rent due on item 1 for quarter ending November 1, 2021, but not collected at date of death			8,100
	Rent accrued on item 1 for November and December 2021			5,400
2	House and lot, 304 Jefferson Street, Alexandria, VA (lot 18, square 40). Rent of $1,800 payable monthly. Value based on appraisal, copy of which is attached			375,000
	Rent due on item 2 for December 2021, but not collected at death			1,800

Schedule A—Example 2

In this example, alternate valuation is adopted; the date of death is January 1, 2022.

Item number	Description	Alternate valuation date	Alternate value	Value at date of death
1	House and lot, 1921 William Street NW, Washington, DC (lot 6, square 481). Rent of $8,100 due at the end of each quarter, February 1, May 1, August 1, and November 1. Value based on appraisal, copy of which is attached. Not disposed of within 6 months of date of death	7/1/22	$535,000	$550,000
	Rent due on item 1 for quarter ending November 1, 2021, but not collected until February 1, 2022	2/1/22	8,100	8,100
	Rent accrued on item 1 for November and December 2021, collected on February 1, 2022	2/1/22	5,400	5,400
2	House and lot, 304 Jefferson Street, Alexandria, VA (lot 18, square 40). Rent of $1,800 payable monthly. Value based on appraisal, copy of which is attached. Property exchanged for farm on May 1, 2022	5/1/22	369,000	375,000
	Rent due on item 2 for December 2021, but not collected until February 1, 2022	2/1/22	1,800	1,800

is considered final and is available for application by the surviving spouse. See Regulations sections 20.2010-2(c)(4), 20.2010-3(c)(3), and 25.2505-2(d)(3).

Check the appropriate box in this section and see the instructions for Schedule M if more information is needed about QDOT.

Section C. DSUE Amount Portable to Decedent's Surviving Spouse. Complete Section C only if electing portability of the DSUE amount to the surviving spouse.

On line 1, enter the decedent’s applicable exclusion amount from *Part 2—Tax Computation,* line 9d. The *applicable exclusion amount* is the sum of the basic exclusion amount for the year of death, any DSUE amount received from a predeceased spouse, if applicable, and any Restored Exclusion Amount.

Line 2 is reserved.

On line 3, enter the value of the cumulative lifetime gifts on which gift tax was paid or payable. This amount is figured on line 6 of the Line 7 Worksheet, Part B, as the total of Row (r) from the Line 7 Worksheet, Part A. Enter the amount as it appears on line 6 of the Line 7 Worksheet, Part B.

Figure the unused exclusion amount on line 9. The DSUE amount available to the surviving spouse will be the lesser of this amount or the basic exclusion amount shown on *Part 2—Tax Computation*, line 9a. Enter the DSUE amount as determined on line 10.

Section D. DSUE Amount Received From Predeceased Spouse(s). Complete Section D if the decedent was a surviving spouse who received a DSUE amount from one or more predeceased spouses.

Section D requests information on all DSUE amounts received from the decedent’s last deceased spouse and any previously deceased spouses. Each line in the chart should reflect a different predeceased spouse; enter the calendar year(s) in column F. In Part 1, provide information on the decedent’s last deceased spouse. In Part 2, provide information as requested if the decedent had any other predeceased spouse whose executor made the portability election. Any remaining DSUE amount which was not used prior to the death of a subsequent spouse is not considered in this calculation and cannot be applied against any taxable transfer. In column E, total only the amounts of DSUE received and used from spouses who died before the decedent’s last deceased spouse. Add this amount to the amount from Part 1, column D, if any, to determine the decedent’s total DSUE amount.

Schedule A—Real Estate

CAUTION *If any assets to which the special rule of Regulations section 20.2010-2(a)(7)(ii) applies are reported on this schedule, do not enter any value in the last three columns. See the instructions for* Part 5—Recapitulation*, line 10, for information on how to estimate and report the value of these assets.*

If the total gross estate contains any real estate, complete Schedule A and file it with the return. On Schedule A, list real estate the decedent owned or had contracted to purchase. Number each parcel in the left-hand column.

EXHIBIT B

Portability. If my spouse survives me, my expectation is that my Executor will participate in the filing of a United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706), even if no such Form 706 were otherwise required to be filed for my estate, for the purposes of preserving for my spouse any "deceased spousal unused exclusion amount" as such term is defined in section 2010(c)(4) of the Internal Revenue Code. However, upon the written request of my spouse (or if my spouse is incapacitated, my spouse's duly appointed agent), my Executor shall file or cause to be filed a United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706), even if no such Form 706 were otherwise required to be filed for my estate, for the purposes of preserving for my spouse any "deceased spousal unused exclusion amount" as such term is defined in section 2010(c)(4) of the Internal Revenue Code; provided, that if a Form 706 is not otherwise required to be filed for my estate and my spouse (or if my spouse is incapacitated, my spouse's duly appointed agent) makes such a written request, the cost of preparing and filing the Form 706 shall be borne and paid for by my spouse, including, without limitation, professional fees and appraisal fees incurred in connection with the preparation of such Form 706. In the event that no such request is made by my spouse (or if my spouse is incapacitated, my spouse's duly appointed agent), I recognize that circumstances could arise in which it might be advisable not to file such Form 706 and the decision of whether to file such Form 706 by my Executor shall be in my Executor's sole discretion, whose decision shall be conclusive on all concerned.

EXHIBIT C

Deceased Spousal Unused Exclusion Amount

Each Party agrees to provide in his or her last will that the personal representative of his or her estate will, to the extent requested by the other Party as surviving spouse, participate in the filing of a United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706), even if no such Form 706 were otherwise required to be filed for his or her estate, for the purposes of preserving for the other Party any "deceased spousal unused exclusion amount" as such term is defined in section 2010(c)(4) of the Code if the following conditions are satisfied: (i) based on information available to the personal representatives of the estate of the first Party to die it reasonably appears that there will be "deceased spousal unused exclusion amount" as such term is defined in section 2010(c)(4) of the Code; and (ii) the surviving Party has agreed in writing to indemnify the personal representatives of the estate of the first Party to die for all costs and expenses, including without limitation, professional fees and appraisal fees incurred in connection with the preparation of the Form 706. Each Party agrees to direct in his or her last will that the personal representatives of his or her estate shall (x) take all steps necessary to ensure that a Form 706 is timely prepared and filed for his or her estate; and (y) provide a draft Form 706 for the estate of the first Party to die to the surviving Party for review and comment prior to its filing. Further, each Party agrees to comply with section 254.004 of the Texas Estates Code and to include in his or her last will or codicil an acknowledgment of the existence of this Agreement and a summary of its material provisions as they concern the provisions of this Section, substantially in the following form:

> "Contractual Nature of This Will. In accordance with Texas Estates Code Section 254.004, I declare that I make certain provision in this will as a contract between my spouse and myself. The contractual provisions of this will is set forth in Paragraph _____. All other provisions of my will are not contractual and may be revoked or modified by me at any time for any reason."

Each Party agrees to provide the other Party with a photocopy of his or her executed last will or codicil and valid beneficiary designations made in compliance with this Section.

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EXHIBIT D

[Date]

Personal & Confidential

____
____
____

Re: Estate of ________________, Deceased (the "Estate")

Dear ___________:

In our letter to you dated ______________ addressing your duties as [executor/administrator], we discussed that one of your duties includes the preparation and filing of a federal estate (and generation-skipping transfer) tax return, also known as a "Form 706," for your [husband's/wife's] Estate. You are not required to file a Form 706 unless the value of your [husband's/wife's] gross estate is greater than $12,920,000 (the federal estate tax exemption for 2023). Based upon the information that we have at this point, it does not appear that the gross estate exceeded $12,920,000 (this includes any prior taxable gifts made by your [husband/wife]); therefore, no Form 706 is required. **If this is not the case, please notify us immediately.** Please note that only half of the value of any community property assets are counted in your [husband's/wife's] gross estate; the other half belongs to you.

Although a Form 706 may not be required, you may still consider filing a Form 706 in order to make a "portability" election. Portability is designed to allow your [husband's/wife's] unused federal estate tax exemption to be added to your exemption for federal gift and estate tax purposes. If you file a Form 706 in a timely manner, you will be able to add your [husband's/wife's] $12,920,000 exemption to your exemption (less any lifetime taxable gifts) to your exemption, which can be applied at your death or to taxable gifts made during your lifetime.

While making the portability election can be beneficial, there are some limits of which you should be aware. A taxpayer is only allowed to utilize the exemption of the "last deceased spouse." If you were to remarry, and if your new spouse predeceases you, you will lose your [husband's/wife's] excess exemption (although you may use it for gifts during your lifetime).

If a Form 706 is required for a taxable estate, the executor must file the Form 706 within nine months after the decedent's death (________________), which may be extended an additional six months. However, if a Form 706 is filed to elect portability only, the Internal Revenue Service has allowed portability returns to be filed within five years after the decedent's date of death.

<u>Notwithstanding the extended filing period, if you choose to file a Form 706 for portability, we strongly advise that you file the Form 706 in the near future, preferably around the same time as the Inventory, so it is not overlooked.</u>

In many cases, a complete Form 706 is required (although you are allowed to estimate values of assets passing directly to the surviving spouse). Because of the complexity and time required, the cost of preparing a Form 706 can be difficult to estimate, and will depend upon the nature and extent of the Estate's particular assets and complexity of the return. Please consult with the Estate's accountant to determine whether they are able to assist you with the preparation of the

____
[Date]
Page 2

Form 706 (we are happy to review). If you prefer, we have a lot of experience with these types of returns and would be able to prepare the Form 706 on your behalf.

Once you have made your decision, we ask that you acknowledge your choice by initialing the option below on this letter and sending it back to us by email or U.S. regular mail.

We realize this is a complex matter and we would be happy to answer any questions you may have. Please contact me at your earliest convenience.

Very truly yours,

____

AFTER READING THIS LETTER, PLEASE INITIAL ONE OF THE FOLLOWING AND RETURN A COPY TO US:

_____ Yes, I intend to prepare and file a Federal Estate (and Generation-Skipping Transfer) Tax Return (Form 706) for the purpose of making the portability election and I wish for my accountant to prepare the Return.

_____ Yes, I intend to prepare and file a Federal Estate (and Generation-Skipping Transfer) Tax Return (Form 706) for the purpose of making the portability election and I wish for [you][your firm] to prepare the Return.

_____ No, I do not intend to prepare or file a Federal Estate (and Generation-Skipping Transfer) Tax Return (Form 706) for the purpose of making the portability election.