

## **Deceased Spousal Unused Exclusion Amount**

Under federal law, at death a person may transfer a certain amount of property without paying any federal estate tax. In 2019, this “applicable exclusion amount” was \$11,400,000; in 2020 it is \$11,580,000.<sup>1</sup>

Additionally, between spouses, federal law also provides for an “unlimited marital deduction,” which generally allows any amount of property to be passed to a surviving spouse without incurring federal estate tax.<sup>2</sup> However, unless the transferred property is consumed before the surviving spouse dies, the unlimited marital deduction simply defers the tax until the death of the surviving spouse, when it will be included in his or her estate.

Prior to passage of the 2010 Tax Relief Act, the applicable exclusion amount provision applied on a “per-person” basis. Thus, if an individual did not fully use his or her applicable exclusion amount (e.g., by leaving everything to a surviving spouse), the unused portion was effectively wasted. In this environment, estate planning (particularly for married couples) relied heavily on the use of trusts to ensure that each individual’s applicable exclusion amount was fully utilized.

### **A Permanent Benefit**

For married couples, this estate planning environment was significantly changed with the passage of the 2010 Tax Relief Act.<sup>3</sup> Under one provision of this legislation, any applicable exclusion amount that remains unused at the death of a spouse (termed the “deceased spousal unused exclusion amount”) is held over and made available for use by the surviving spouse in addition to the surviving spouse’s own applicable exclusion amount. Under the 2010 Tax Relief Act, this “carry-over” was temporary and effective only for 2011 and 2012.

Under the American Taxpayer Relief Act of 2012, however, the provision was made permanent.

---

<sup>1</sup> Beginning in 2011, prior federal law provided for an applicable exclusion amount of \$5,000,000. Adjusted for inflation, this amount would have been \$5,600,000 per person in 2018. For 2018-2025, the Tax Cuts and Jobs Act of 2017 increased the base exemption amount to \$10,000,000. Adjusted for inflation, this equals \$11,580,000 per person in 2020.

<sup>2</sup> The unlimited marital deduction is not allowed to a surviving spouse who is not a US citizen, unless certain requirements are met.

<sup>3</sup> This act is formally known as the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.

As with many other parts of federal tax law, a number of conditions and restrictions apply:

- **Election on a timely filed estate tax return:** The unused exclusion carryover is available only if the executor so chooses. The election is made by filing Form 706, United States Estate (and Generation-Skipping) Tax Return, within the time prescribed by law, (including extensions), even if Form 706 is not otherwise required to be filed.<sup>4</sup>
- **Use:** The deceased spousal unused exclusion amount may be used by the survivor for taxable lifetime gifts or transfers at death. The legislation does not allow a surviving spouse to utilize the unused generation skipping transfer tax exemption of a predeceased spouse.
- **Amount:** The deceased spousal unused exclusion amount is limited to the lesser of the “basic exclusion amount” or the unused applicable exclusion amount of the deceased spouse. For 2019 the basic exclusion amount was \$11,400,000; in 2020 it is \$11,580,000. If a surviving spouse remarries, the carryover is limited to the lesser of the basic exclusion amount or the unused applicable exclusion amount of the last such deceased spouse (even if it is zero).

## Examples

The following examples illustrate the application of this legislation:<sup>5</sup>

**Example #1:** George dies in 2020, having made taxable transfers of \$8,750,000 and leaving no taxable estate. An election is made on George’s estate tax return to allow his wife, Susan, to use George’s unused exclusion amount. At George’s death, Susan has made no taxable gifts. Thereafter, Susan’s applicable exclusion amount is \$14,410,000, her \$11,580,000 basic exclusion amount plus the \$2,830,000 unused exclusion amount from George.

---

<sup>4</sup> See IRS Reg. 20.2010-2 for details, including information on how to avoid making the election. See also Rev. Proc. 2017-34 for details on a simplified method for certain taxpayers to obtain an extension of time to make the portability election.

<sup>5</sup> The applicable exclusion amount is subject to adjustment for inflation. For simplicity and ease of understanding, these examples do not assume any inflation adjustment to the applicable exclusion amount.

**Example #2:** Assume the same facts as Example #1, except that Susan re-marries, this time to Bob. Bob then dies, having made \$10,000,000 in taxable transfers and leaving no taxable estate. An election is made on Bob's estate tax return to allow Susan to use Bob's unused exclusion amount. Although the combined unused exclusion amount from George (\$2,830,000) and Bob (\$1,580,000) is \$4,410,000, Susan's applicable exclusion amount is limited to \$13,160,000, the sum of her own basic applicable exclusion amount of \$11,580,000 and the \$1,580,000 unused applicable exclusion amount from Bob, her **last** deceased spouse.

**Example #3:** Assume the same basic facts as in Examples #1 and #2, except that Susan, after re-marrying, dies before Bob. After George's death, Susan's applicable exclusion amount is \$14,410,000, the sum of her own \$11,580,000 basic exclusion amount plus the \$2,830,000 unused exclusion amount from George. Susan made no taxable transfers and has a taxable estate of \$9,500,000. An election is made on Susan's estate tax return to permit Bob to use Susan's unused exclusion amount of \$4,910,000, Susan's \$14,410,000 applicable exclusion amount less her \$9,500,000 taxable estate. Bob's applicable exclusion amount is thus \$16,490,000, the sum of his own basic \$11,580,000 applicable exclusion amount and the \$4,910,000 unused exclusion amount from Susan.

*Content in this material is for general information only and not intended to provide specific advice or recommendations for any individual. It is recommended that you consult your estate attorney before making any changes to your estate plan.*

*This discussion concerns federal law; state or local law may differ.*