2. Musculoskeletal System (1.00 and 101.00): February 4, 2022.

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5. Cardiovascular System (4.00 and 104.00): February 4, 2022.

6. Digestive System (5.00 and 105.00): February 4, 2022.

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9. Skin Disorders (8.00 and 108.00): February 4, 2022.

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15. Immune System Disorders (14.00 and 114.00): February 4, 2022.

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[FR Doc. 2019–25635 Filed 11–25–19; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 20

[TD 9884]

RIN 1545–B072

Estate and Gift Taxes; Difference in the Basic Exclusion Amount

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations addressing the effect of recent legislative changes to the basic exclusion amount allowable in computing Federal gift and estate taxes. The final regulations will affect donors of gifts made after 2017 and the estates of decedents dying after 2025.

DATES:

Effective Date: These final regulations are effective on and after November 26, 2019.

Applicability Date: For date of applicability, see § 20.2010–1(f)(2).

FOR FURTHER INFORMATION CONTACT: Deborah S. Ryan, (202) 317–6859 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Section 11061 of the Tax Cuts and Jobs Act, Public Law 115–97, 131 Stat. 2504 (2017) (TCJA) amended section 2010(c)(3) of the Internal Revenue Code (Code) to provide that, for decedents dying and gifts made after December 31, 2017, and before January 1, 2026, the basic exclusion amount (BEA) is increased by $5 million to $10 million as adjusted for inflation (increased BEA). On January 1, 2026, the BEA will revert to $5 million as adjusted for inflation.

This document contains amendments to the Estate Tax Regulations (26 CFR part 20) relating to the BEA described in section 2010(c)(3) of the Code. On November 23, 2018, a notice of proposed rulemaking (proposed regulations) under section 2010 (REG–106706–18) was published in the **Federal Register** (83 FR 59343). No public hearing was requested or held. Written or electronic comments responding to the proposed regulations were received. After consideration of all the comments, this Treasury decision adopts the proposed regulations with certain revisions. Comments and revisions to the proposed regulations are discussed in the Summary of Comments and Explanation of Revisions.

The final regulations adopt the special rule provided in the proposed regulations in cases where the portion of the credit against the estate tax that is based on the BEA is less than the sum of the credit amounts attributable to the BEA allowable in computing gift tax payable within the meaning of section 2001(b)(2). In that case, the rule provides that the portion of the credit against the net tentative estate tax that is attributable to the BEA is based upon the greater of those two credit amounts. The rule thus would ensure that the estate of a decedent is not inappropriately taxed with respect to gifts that were sheltered from gift tax by the increased BEA when made.

Summary of Comments and Explanation of Revisions

1. Overview

Most commenters agreed that the special rule would avoid an unfair situation that otherwise could effectively vitiate the statutory increase in the BEA during the period January 1, 2018, through December 31, 2025 (increased BEA period). These commenters also acknowledged that the special rule would provide important clarification for taxpayers. However, one commenter suggested an alternate approach and two others disputed the regulatory authority to adopt the special rule. Some commenters suggested technical changes. All of the other comments were requests for clarification of the interaction of the special rule with the inflation adjustments to the BEA, the deceased spousal unused exclusion (DSUE) amount, and the generation-skipping transfer (GST) tax, and requests for additional examples. These comments are discussed in this preamble.

2. Inflation Adjustments

Several commenters noted that the example in the proposed regulations does not reflect the annual inflation adjustments to the BEA, and requested clarification of the effect of those adjustments on the application of the special rule. The inflation adjustments were not included in that example for purposes of more simply illustrating the special rule. However, by definition, the term BEA refers to the amount of that exclusion as adjusted for inflation, so the Department of the Treasury (Treasury Department) and the IRS agree that examples including inflation adjustments would be appropriate. Accordingly, the examples in the final regulations reflect hypothetical inflation-adjusted BEA amounts.

One commenter requested confirmation that under the special rule a decedent does not benefit from the increased BEA, including inflation adjustments, to the extent it is in excess of the amount of gifts the decedent actually made, and agreed that this is the appropriate interpretation of the statute. Specifically, the increased BEA as adjusted for inflation is a ‘‘use or lose’’ benefit and is available to a decedent who survives the increased BEA period only to the extent the decedent ‘‘used’’ it by making gifts during the increased BEA period. The final regulations include *Example 2* in § 20.2010–1(c)(2)(ii) to demonstrate that the application of the special rule is based on gifts actually made, and thus is inapplicable to a decedent who did not make gifts in excess of the date of death BEA as adjusted for inflation.

Commenters also sought confirmation that under the special rule a decedent dying after 2025 will not benefit from post-2025 inflation adjustments to the BEA to the extent the decedent made gifts in an amount sufficient to cause the total BEA allowable in the computation of gift tax payable to exceed the date of death BEA as adjusted for inflation. This is confirmed in *Example 1* of § 20.2010–1(c)(2)(i) of these final regulations. In computing the estate tax, the BEA, in effect, is applied first against the decedent's gifts as taxable gifts were made. To the extent any BEA remains at death, it is applied against the decedent's estate. Therefore, in the case of a decedent who had made gifts in an amount sufficient to cause the total BEA allowable in the computation of gift tax payable to equal or exceed the date of death BEA as adjusted for inflation, there is no remaining BEA available to be applied to reduce the estate tax. The special rule does not change the five-step estate tax computation required under sections 2001 and 2010 of the Code or the fact that, under that computation, only the credit that remains after computing gift tax payable may be applied against the estate tax.

One commenter recommended that, where the BEA allowable in computing gift tax payable exceeds the date of death BEA including inflation adjustments, the special rule should permit the use of a BEA equal to the sum of the BEA allowable in computing gift tax payable and the post-2025 inflation adjustments. For the reasons discussed in the preceding paragraphs, this recommendation is inconsistent with the unified gift and estate tax statutes. If the BEA allowable in computing gift tax payable exceeds the date of death BEA as adjusted for inflation, under the special rule, the inflation adjustments already have been allowable against taxable gifts and it would be inconsistent with the estate tax statute to allow them again against the estate tax.

3. DSUE

Several commenters asked for confirmation that, even if the amount of BEA that is allowable under section 2010(c)(3) of the Code decreases after 2025, a DSUE amount elected during the increased BEA period will not be reduced as a result of the sunset of the increased BEA. Section 2010(c)(4) defines the DSUE amount as the lesser of the BEA or the unused portion of the deceased spouse's applicable exclusion amount (AEA) at death. The regulations in §§ 20.2010–1(d)(4) and 20.2010–2(c)(1) confirm that the reference to BEA is to the BEA in effect at the time of the deceased spouse's death, rather than the BEA in effect at the death of the surviving spouse. A DSUE election made on the deceased spouse's estate tax return allows the surviving spouse to take into account the deceased spouse's DSUE amount as part of the surviving spouse's AEA. Section 2010(c)(5); § 20.2010–2(a). AEA is the sum of the DSUE amount and the BEA. Section 2010(c)(2). A decrease in the BEA after 2025 will reduce the surviving spouse's AEA only to the extent that it is based upon the BEA, but not to the extent that it is based on the DSUE amount. Therefore, the sunset of (or any other decrease in) the increased BEA has no impact on the existing DSUE rules and the existing regulations governing DSUE continue to apply. *Examples 3* and *4* of § 20.2010–1(c)(2)(iii) and (iv), respectively, of these final regulations address this situation. The examples demonstrate that, if a spouse dies during the increased BEA period, and the deceased spouse's executor makes the portability election, the surviving spouse's AEA includes the full amount of the DSUE that is based on the deceased spouse's increased BEA. This DSUE amount is available to offset the surviving spouse's transfer tax liability regardless of when the transfers are made, whether during or after the increased BEA period.

4. BEA Computations

Several commenters raised questions concerning the calculation of the credit amount solely attributable to the BEA in computing gift tax payable where the AEA upon which the credits are based consists of amounts other than the BEA. In response to these comments, the final regulations clarify how to determine the extent to which a credit allowable in computing gift tax payable is based solely on the BEA. First, the credit may not exceed that amount necessary to reduce the gift tax for that calendar period to zero. Second, any DSUE amount available to the decedent for that calendar period is deemed to be applied to the decedent's gifts before any of the decedent's BEA is applied to those gifts. This is consistent with the existing ordering rule concerning the application of DSUE to a given transfer. See §§ 20.2010–3(b) and 25.2505–2(b). Third, in a calendar period in which the AEA allowable with regard to gifts made during that period includes both DSUE and BEA, the allowable BEA may not exceed that necessary to reduce the tentative gift tax to zero after the application of the DSUE amount. Fourth, in a calendar period in which the AEA allowable with regard to gifts made during that period includes both DSUE and BEA, the portion of the credit based solely on the BEA for that period is that which corresponds to the result of dividing the BEA allocable to those gifts by the AEA allocable to those gifts. *Example 4* of § 20.2010–1(c)(2)(iv) of these final regulations addresses the application of the DSUE ordering rule as well as the computation of the credit based solely on the BEA in a calendar period in which the transfer exhausts the remaining DSUE amount with the result that the BEA is also allowable.

A commenter requested an example involving a taxable estate that exceeds the available exclusion amount. Each of *Examples 2, 3,* and *4* of § 20.2010–1(c)(2)(ii), (iii) and (iv), respectively, of these final regulations contemplates that the decedent's estate potentially is taxable, and identifies the exclusion amounts upon which the credit against the tentative estate tax is based.

A commenter suggested that examples be provided regarding the computation of the gift tax on gifts made during the increased BEA period and after the sunset of that period. The computation of the gift tax in both situations was discussed in detail in the preamble to the proposed regulations. See part V.2., *Effect of Increase in BEA on the Gift Tax,* and part V.4., *Effect of Decrease in BEA on the Gift Tax,* in the Background section of the proposed regulations. That discussion concludes that the existing seven-step gift tax computation required under sections 2502 and 2505 of the Code appropriately applies in the case of both increases and decreases in the BEA. Accordingly, there is nothing that needs to be changed in the gift tax computation and thus, no need for gift tax examples.

Some commenters suggested a BEA ordering rule, similar to that for DSUE, under which the increase in the BEA during the increased BEA period over the BEA in effect in 2017 (base BEA) is deemed to be allowable against gifts before the base BEA. They posited that this would allow donors to utilize the increase in the BEA without being deemed to have utilized the base BEA, so that the base BEA would remain available for transfers made after 2025. Specifically, a $5 million gift made during the increased BEA period would use the temporary increase in the BEA and preserve or ''bank'' the base BEA of $5 million so as to be available after 2025 for either gift or estate tax purposes. This suggestion was not adopted for several reasons. First, it is inconsistent with the sunset of the increased BEA in that it, in effect, would extend the availability of the increased BEA beyond 2025. As discussed in section 2 of this Summary of Comments and Explanation of Revisions, *Inflation Adjustments,* the increased BEA is a ''use or lose'' benefit that is available only during the increased BEA period. Second, it is inconsistent with the cumulative structure of the unified transfer tax regime. Under that regime, the BEA in effect for a particular year is the exclusion allowable for cumulative purposes—that is, for all prior taxable gifts and the current gift or taxable estate. In the case of a donor or decedent who made prior gifts in an amount at least equal to the post-2025 exclusion amount in effect in the year of the current gift or death, there is no remaining BEA available to be applied. Finally, as is explained in the preamble to the proposed regulations, the existing seven-step gift tax computation required under sections 2502 and 2505 of the Code appropriately adjusts for gifts made in an earlier period during which the BEA differed from the BEA in effect for a current gift. The suggested BEA ordering rule would create the same sort of problem these final regulations are designed to correct.

5. GST Tax

Several commenters asked for confirmation that, during the increased BEA period, donors may make late allocations of the increase in GST exemption to inter vivos trusts created prior to 2018.[1] An increase in the BEA correspondingly increases the GST tax exemption, which is defined by reference to the BEA. Section 2631(c). The effect of the increased BEA on the GST tax is beyond the scope of this rulemaking.

A commenter requested confirmation and examples showing that allocations of the increased GST exemption made during the increased BEA period (whether to transfers made before or during that period) will not be reduced as a result of the sunset of the increased BEA. There is nothing in the statute that would indicate that the sunset of the increased BEA would have any impact on allocations of the GST exemption available during the increased BEA period. However, this request is beyond the scope of this project.

6. Anti-Abuse Rule

A commenter recommended consideration of an anti-abuse provision to prevent the application of the special rule to transfers made during the increased BEA period that are not true inter vivos transfers, but rather are treated as testamentary transfers for transfer tax purposes. Examples include transfers subject to a retained life estate or other retained powers or interests, and certain transfers within the purview of chapter 14 of subtitle B of the Code. The purpose of the special rule is to ensure that bona fide inter vivos transfers are not subject to inconsistent treatment for estate tax purposes. Arguably, the possibility of inconsistent treatment does not arise with regard to transfers that are treated as part of the gross estate for estate tax purposes, rather than as adjusted taxable gifts. An anti-abuse provision could except from the application of the special rule transfers where value is included in the donor's gross estate at death. Although the Treasury Department and the IRS agree that such a provision is within the scope of the regulatory authority granted in section 2001(g)(2), such an anti-abuse provision would benefit from prior notice and comment. Accordingly, this issue will be reserved to allow further consideration of this comment.

[1] See Joint Comm. on Taxation, JCS–1–18, ''General Explanation of Public Law 115–97,'' 89 (2018), indicating that a late allocation of GST exemption (increased by the increase in the BEA) may be made during the increased BEA period.

7. Regulatory Authority

Two commenters suggested that the special rule would exceed the scope of the authority granted by Congress. They stated that the impact of the rule is on the estates of decedents dying after the sunset of the increased BEA period. They suggested that the rule would violate the reconciliation rules under which the TCJA was passed because it would increase the impact on the deficit beyond 2025, and therefore could not have been what Congress intended in the grant of regulatory authority. They also suggested that the avoidance of an estate tax that recaptures gift tax on sheltered gifts could not have been what Congress intended because they interpret the TCJA revenue estimates as showing that the recapture of that gift tax was contemplated. In short, these commenters suggested that Congress was concerned with the treatment of transfers made before January 1, 2026, but not with those made after December 31, 2025.

As explained in the following paragraphs, these suggestions are inconsistent with section 2001(g), which addresses the effect of changes in tax rates and exclusion amounts on the computation of the estate tax. Moreover, they are also inconsistent with the plain language of section 2001(g)(2), which addresses circumstances that can occur only after December 31, 2025.

What is now section 2001(g)(1) of the Code was added by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public Law 111–312, 124 Stat. 3296 (2010) (TRUIRJCA). Section 302(a) of TRUIRJCA raised the exclusion amount to $5 million, as adjusted for inflation, and reduced the maximum tax rate from 45 to 35 percent. Section 302(d)(1)(B) of TRUIRJCA, ''Modifications of Estate and Gift Taxes to Reflect Differences in Credit Resulting From Different Tax Rates,'' added section 2001(g) to the Code. The effect of section 2001(g) is to treat the post-1976 taxable gifts and the taxable estate consistently by applying the same tax rate, regardless of whether the transfer occurred during life or at death. This consistency is achieved by using one tax rate to determine not only the gift and estate tax liabilities, but also the credit against the estate tax and against all prior gift taxes. This is the case regardless of whether rates have increased or decreased.

Section 2001(g)(2) of the Code was added by the TCJA. Section 11061 of the TCJA raised the BEA to $10 million, as adjusted for inflation, for transfers after December 31, 2017, and before January 1, 2026. The TCJA then provided that the BEA reverts to $5 million, as adjusted for inflation, for transfers after December 31, 2025. The addition of section 2001(g)(2) was a conforming amendment to the estate tax. H. Conf. Rept. 115–466, 115th Cong., 1st sess. 316 (Dec. 15, 2017). Under current law, the first change in the BEA to which section 2001(g)(2) could be applicable is the decrease to $5 million, as adjusted for inflation, on January 1, 2026.

As explained in the preamble to the proposed regulations, a decrease in the BEA has the potential to cause the imposition of estate tax on gifts that were sheltered from gift tax by the higher BEA in effect when the gifts were made. Again, under current law, this can occur only after December 31, 2025, when the BEA reverts to $5 million, as adjusted for inflation, as a result of the sunset of the increased BEA.

The impact of the sunset of the increased BEA as of January 1, 2026, was precisely the situation Congress wished to have addressed when it made the explicit grant of regulatory authority under section 2001(g)(2) and, further, the purpose of that grant was to authorize a regulatory rule to ensure that there will be no imposition of estate tax on inter vivos gifts that were sheltered from gift tax by the increased BEA in effect when the gifts were made. Indeed, prior legislative efforts to address the effect of anticipated reductions in the exclusion amount have proposed various approaches to produce the same result. See the Sensible Estate Tax Act of 2011, H.R. 3467, 112th Cong., 1st sess. section 2(c) (2011) (amending section 2001(g) to address a proposed reduction in the exclusion amount from $5 million to $1 million); and the Middle Class Tax Cut Act, S. 3393, 112th Cong., 2nd sess. section 201(b) (2012) (adding section 2001(h) to address a proposed reduction in the exclusion amount from $5 million to $3.5 million). As explained in ''General Explanation of Public Law 115–97'' (TCJA Bluebook),

> Because the increase in the basic exclusion amount does not apply for estates of decedents dying after December 31, 2025, it is expected that this guidance will prevent the estate tax computation under section 2001(g) from recapturing, or ''clawing back,'' all or a portion of the benefit of the increased basic exclusion amount used to offset gift tax for certain decedents who make taxable gifts between January 1, 2018, and December 31, 2025, and die after December 31, 2025.

Joint Comm. on Taxation, JCS–1–18, ''General Explanation of Public Law 115–97,'' 89 (2018). One commenter disputes the TCJA Bluebook explanation as an indication that the grant of regulatory authority was to prevent this ''clawback'' on the basis of the fact that the Bluebook was not published until almost one year after the enactment of the TCJA. The Treasury Department and the IRS consider the TCJA Bluebook's explanation of the grant of regulatory authority to be an accurate reflection of Congressional intent.

Finally, one commenter said that the special rule is based on the ''flawed assumption'' that such ''clawback'' would constitute double taxation. The commenter said that the gift and estate taxes are two different taxes, even though cumulative, and thus subjecting the same inter vivos transfer to both taxes would not be double taxation. The Treasury Department and the IRS disagree with this proposition. The gift and estate taxes are subject to a unified structure that ensures that a transfer is taxed only once, regardless of whether that transfer ultimately is treated as an inter vivos transfer or as a testamentary transfer. Indeed, the way in which the estate tax statute addresses prior gifts included in the gross estate makes it clear that a single transfer is to be taxed only once.

In sum, section 2001(g) is directed to the consequences of changing tax rates and decreasing exclusion amounts on the computation of the estate tax. In the absence of section 2001(g)(1), a change in tax rates could subject post-1976 taxable gifts and the taxable estate to different rates, which could adversely impact the amount of credit available against the estate tax. In the absence of the special rule implementing the directions in section 2001(g)(2), a decrease in the exclusion amount could have the effect of understating the gift tax payable on post-1976 gifts, with the result that estate tax would be imposed on gifts that were sheltered from tax when made by the increased BEA. Under current law, a decrease in the exclusion amount cannot occur until after December 31, 2025. This is the period to which section 2001(g)(2) is directed. Accordingly, the special rule is well within the scope of the regulatory authority and accurately reflects the purpose of that authority.

8. Alternate Approach

Another commenter, although supportive of the goal of the special rule, objected to the special rule, saying that the rule would eliminate the benefit of some post-2025 inflation adjustments. The commenter proposed an alternative rule designed to preserve the availability of those inflation adjustments. Each point will be addressed in turn.

As previously discussed, under the special rule, the post-2025 inflation adjustments provide no additional benefits to the decedent until the post-2025 BEA, as adjusted for inflation, exceeds the amount of the BEA previously allowable to shelter gifts from gift tax. The commenter pointed out that, under current law, inflation adjustments to the BEA that become effective after a gift was made are available against the tax on subsequent gifts or the taxable estate, even if the full amount of the BEA at the time of the prior gift was allowable against the gift tax on that gift. The commenter questioned why this should not continue to be the case after 2025. Although it is true that subsequent inflation adjustments are available to the taxpayer in later years, a reduction in the BEA creates a very different situation that justifies a different result. In that case, which is the focus of the special rule, the statute provides that, on January 1, 2026, the BEA is reset at a reduced amount. While that amount will be subject to annual inflation adjustments, the usual rules will continue to apply. Specifically, exemption that shelters gifts during life is not available on death. Thus, if the amount of BEA allowable during life exceeds the date of death BEA, there is no remaining BEA available to the decedent's estate, even though the BEA at death includes post-2025 inflation adjustments. Thus, the special rule does not eliminate the benefit of the post-2025 inflation adjustments; however, neither does it change the fact that the credit based on the BEA may be applied only once.

The commenter suggested an alternative rule under which the computation of gift tax payable to be applied after 2025 instead would be based on the BEA as if the BEA's temporary increase to $10 million had never been enacted. By treating a portion of the increased BEA period gifts as taxable, the commenter's proposal increases gift tax payable to free up a credit based on the post-2025 inflation adjustments for use against the estate tax. In support of this approach, the commenter cites the language of the sunset provision of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Public Law 107–16, 115 Stat. 38, 150 (2001). Section 901(b) of EGGTRA provides, in part, that the Code shall be applied after the expiration of the increased exclusion amount as if the increased exclusion amount ''had never been enacted.''

Finally, the commenter questioned the choice of the special rule as being administrable, but acknowledged that the commenter's alternative rule would require changes to the computation of the gift tax as well as the estate tax.

The commenter's alternative rule was not adopted for several reasons. First, the plain language that Congress used in section 2001(g)(2)(B) directs that the BEA to be used in computing gift tax payable is the historical one, the one ''applicable with respect to any gifts made by the decedent.'' Congress did not use the ''had never been enacted'' language in section 2001(g)(2). Second, the suggestion is inconsistent with the treatment of the credit in the unified gift and estate tax regime. The credit is applied first against the gift tax as gifts are made, and then, to the extent any credit remains at death, against the estate tax. To the extent that the credit that sheltered the decedent's gifts from gift tax exceeds the credit available at death, including any post-2025 inflation adjustments, the decedent already has had the benefit of the credit available at death—specifically, an amount equal to the post-2025 inflation adjustments already has been allowed in computing the gift tax. The pre-2026 BEA based credit and the post-2025 BEA based credit are not two separate credits; rather, they are the same credit, whose maximum amount is reduced after 2025. Once the cumulative value of taxable gifts has exceeded a particular amount of credit, that amount of credit has been used and is no longer available. Finally, as a policy matter and in general terms, the statutory estate tax computation is designed to impose a 40 percent tax on the taxable estate of a decedent who has fully exhausted the available credit by gifts made during life. This is true regardless of whether the gifts were sheltered from gift tax by the increased BEA. That result is achieved by the approach of the special rule in these final regulations, but would not be achieved by the approach recommended by the commenter. By treating a portion of the increased BEA period gifts as taxable despite the fact that they were not subjected to tax, the commenter's proposal would overstate gift tax payable. The result would be an understatement of the estate tax.

9. Applicability Date

Sections 7805(b)(1)(A) and (B) of the Code generally provide that no temporary, proposed, or final regulation relating to the internal revenue laws may apply to any taxable period ending before the earliest of (A) the date on which such regulation is filed with the **Federal Register**; or (B) in the case of a final regulation, the date on which a proposed or temporary regulation to which the final regulation relates was filed with the **Federal Register**. Section 7805(b)(7) provides that the Secretary may provide for any taxpayer to elect to apply any regulation before the dates specified in section 7805(b)(1).

Consistent with section 7805(b)(1)(A), these final regulations apply to estates of decedents dying on and after November 26, 2019. Consistent with section 7805(b)(7), paragraph (e)(3) of these final regulations may be applied by estates of decedents dying after December 31, 2017, and before November 26, 2019. In the interest of clarity, a cross-reference has been added addressing the basic exclusion amount applicable to estates of decedents dying after June 11, 2015, and before January 1, 2018.

Special Analyses

These final regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities. These final regulations will affect donors of gifts made after 2017 and the estates of decedents dying after 2017, and implement an increase in the amount that is excluded from gift and estate tax. Neither an individual nor the estate of a deceased individual is a small entity within the meaning of 5 U.S.C. 601(6). Accordingly, a regulatory flexibility analysis is not required.

Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

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

Statement of Availability of IRS Documents

Notice 2017–15 is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *http://www.irs.gov*.

List of Subjects in 26 CFR Part 20

Estate taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR part 20 is amended as follows:

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

■ **Par. 1.** The authority citation for part 20 is amended by revising the entry for § 20.2010–1 to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 20.2010–1 also issued under 26 U.S.C. 2001(g)(2) and 26 U.S.C. 2010(c)(6).

* * * * *

■ **Par. 2.** Section 20.2010–0 is amended by redesignating the entries for § 20.2010–1(c) through (e) as entries (d) through (f), respectively, and adding a new entry for § 20.2010–1(c) to read as follows:

§ 20.2010–0 Table of contents.

* * * * *

§ 20.2010–1 Unified credit against estate tax; in general.

* * * * *

(c) Special rule in the case of a difference between the basic exclusion amount applicable to gifts and that applicable at the donor's date of death.

* * * * *

■ **Par. 3.** Section 20.2010–1 is amended by:

■ 1. In the final sentence of paragraph (a), removing ''paragraph (d)(1)'' and adding ''paragraph (e)(1)'' in its place;

■ 2. Redesignating paragraphs (c) through (e) as paragraphs (d) through (f), respectively;

■ 3. Adding a new paragraph (c); and

■ 4. Revising newly redesignated paragraphs (e)(3) and (f).

The addition and revisions read as follows:

§ 20.2010–1 Unified credit against estate tax; in general.

* * * * *

(c) *Special rule in the case of a difference between the basic exclusion amount applicable to gifts and that applicable at the donor's date of death.* Changes in the basic exclusion amount that occur between the date of a donor's gift and the date of the donor's death may cause the basic exclusion amount allowable on the date of a gift to exceed that allowable on the date of death. If the total of the amounts allowable as a credit in computing the gift tax payable on the decedent's post-1976 gifts, within the meaning of section 2001(b)(2), to the extent such credits are based solely on the basic exclusion amount as defined and adjusted in section 2010(c)(3), exceeds the credit allowable within the meaning of section 2010(a) in computing the estate tax, again only to the extent such credit is based solely on such basic exclusion amount, in each case by applying the tax rates in effect at the decedent's death, then the portion of the credit allowable in computing the estate tax on the decedent's taxable estate that is attributable to the basic exclusion amount is the sum of the amounts attributable to the basic exclusion amount allowable as a credit in computing the gift tax payable on the decedent's post-1976 gifts.

(1) *Computational rules.* For purposes of this paragraph (c):

(i) In determining the amounts allowable as a credit:

(A) The amount allowable as a credit in computing gift tax payable for any calendar period may not exceed the tentative tax on the gifts made during that period (section 2505(c)); and

(B) The amount allowable as a credit in computing the estate tax may not exceed the net tentative tax on the taxable estate (section 2010(d)).

(ii) In determining the extent to which an amount allowable as a credit in computing gift tax payable is based solely on the basic exclusion amount:

(A) Any deceased spousal unused exclusion (DSUE) amount available to the decedent is deemed to be applied to gifts made by the decedent before the decedent's basic exclusion amount is applied to those gifts (see §§ 20.2010–3(b) and 25.2505–2(b));

(B) In a calendar period in which the applicable exclusion amount allowable with regard to gifts made during that period includes amounts other than the basic exclusion amount, the allowable basic exclusion amount may not exceed that necessary to reduce the tentative gift tax to zero; and

(C) In a calendar period in which the applicable exclusion amount allowable with regard to gifts made during that period includes amounts other than the basic exclusion amount, the portion of the credit based solely on the basic exclusion amount is that which corresponds to the result of dividing the basic exclusion amount allocable to those gifts by the applicable exclusion amount allocable to those gifts.

(iii) In determining the extent to which an amount allowable as a credit in computing the estate tax is based solely on the basic exclusion amount, the credit is computed as if the applicable exclusion amount were limited to the basic exclusion amount.

(2) *Examples.* All basic exclusion amounts include hypothetical inflation adjustments. Unless otherwise stated, in each example the decedent's date of death is after 2025.

(i) *Example 1.* Individual A (never married) made cumulative post-1976 taxable gifts of $9 million, all of which were sheltered from gift tax by the cumulative total of $11.4 million in basic exclusion amount allowable on the dates of the gifts. The basic exclusion amount on A's date of death is $6.8 million. A was not eligible for any restored exclusion amount pursuant to Notice 2017–15. Because the total of the amounts allowable as a credit in computing the gift tax payable on A's post-1976 gifts (based on the $9 million of basic exclusion amount used to determine those credits) exceeds the credit based on the $6.8 million basic exclusion amount allowable on A's date of death, this paragraph (c) applies, and the credit for purposes of computing A's estate tax is based on a basic exclusion amount of $9 million, the amount used to determine the credits allowable in computing the gift tax payable on A's post-1976 gifts.

(ii) *Example 2.* Assume that the facts are the same as in *Example 1* of paragraph (c)(2)(i) of this section except that A made cumulative post-1976 taxable gifts of $4 million. Because the total of the amounts allowable as a credit in computing the gift tax payable on A's post-1976 gifts is less than the credit based on the $6.8 million basic exclusion amount allowable on A's date of death, this paragraph (c) does not apply. The credit to be applied for purposes of computing A's estate tax is based on the $6.8 million basic exclusion amount as of A's date of death, subject to the limitation of section 2010(d).

(iii) *Example 3.* Individual B's predeceased spouse, C, died before 2026, at a time when the basic exclusion amount was $11.4 million. C had made no taxable gifts and had no taxable estate. C's executor elected, pursuant to § 20.2010–2, to allow B to take into account C's $11.4 million DSUE amount. B made no taxable gifts and did not remarry. The basic exclusion amount on B's date of death is $6.8 million. Because the total of the amounts allowable as a credit in computing the gift tax payable on B's post-1976 gifts attributable to the basic exclusion amount (zero) is less than the credit based on the basic exclusion amount allowable on B's date of death, this paragraph (c) does not apply. The credit to be applied for purposes of computing B's estate tax is based on B's $18.2 million applicable exclusion amount, consisting of the $6.8 million basic exclusion amount on B's date of death plus the $11.4 million DSUE amount, subject to the limitation of section 2010(d).

(iv) *Example 4.* Assume the facts are the same as in *Example 3* of paragraph (c)(2)(iii) of this section except that, after C's death and before 2026, B makes taxable gifts of $14 million in a year when the basic exclusion amount is $12 million. B is considered to apply the DSUE amount to the gifts before applying B's basic exclusion amount. The amount allowable as a credit in computing the gift tax payable on B's post-1976 gifts for that year ($5,545,800) is the tax on $14 million, consisting of $11.4 million in DSUE amount and $2.6 million in basic exclusion amount. This basic exclusion amount is 18.6 percent of the $14 million exclusion amount allocable to those gifts, with the result that $1,031,519 ($0.186 \times \$5,545,800$) of the amount allowable as a credit for that year in computing gift tax payable is based solely on the basic exclusion amount. The amount allowable as a credit based solely on the basic exclusion amount for purposes of computing B's estate tax ($2,665,800) is the tax on the $6.8 million basic exclusion amount on B's date of death. Because the portion of the credit allowable in computing the gift tax payable on B's post-1976 gifts based solely on the basic exclusion amount ($1,031,519) is less than the credit based solely on the basic exclusion amount ($2,665,800) allowable on B's date of death, this paragraph (c) does not apply. The credit to be applied for purposes of computing B's estate tax is based on B's $18.2 million applicable exclusion amount, consisting of the $6.8 million basic exclusion amount on B's date of death plus the $11.4 million DSUE amount, subject to the limitation of section 2010(d).

(3) [Reserved]

* * * * *

(e) * * *

(3) *Basic exclusion amount.* Except to the extent provided in paragraph (e)(3)(iii) of this section, the *basic exclusion amount* is the sum of the amounts described in paragraphs (e)(3)(i) and (ii) of this section.

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

(ii) For any decedent dying after calendar year 2011 and before calendar year 2018, $5,000,000 multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year of the decedent's death by substituting ''calendar year 2010'' for ''calendar year 1992'' in section 1(f)(3)(B) and by rounding to the nearest multiple of $10,000. For any decedent dying after calendar year 2017, $5,000,000 multiplied by the cost-of-living adjustment determined under section 1(f)(3) for the calendar year of the decedent's death by substituting ''calendar year 2010'' for ''calendar year 2016'' in section 1(f)(3)(A)(ii) and rounded to the nearest multiple of $10,000.

(iii) For any decedent dying after calendar year 2017, and before calendar year 2026, paragraphs (e)(3)(i) and (ii) of this section will be applied by substituting ''$10,000,000'' for ''$5,000,000.''

* * * * *

(f) *Applicability dates*—(1) *In general.* Except as provided in paragraph (f)(2) of this section, this section applies to the estates of decedents dying after June 11, 2015. For the rules applicable to estates of decedents dying after December 31, 2010, and before June 12, 2015, see § 20.2010–1T, as contained in 26 CFR part 20, revised as of April 1, 2015.

(2) *Exceptions.* Paragraphs (c) and (e)(3) of this section apply to estates of decedents dying on and after November 26, 2019. However, paragraph (e)(3) of this section may be applied by estates of decedents dying after December 31, 2017, and before November 26, 2019. For the explanation of the basic exclusion amount applicable to estates of decedents dying after June 11, 2015, and before January 1, 2018, see § 20.2010–1(d)(3), as contained in 26 CFR part 20, revised as of April 1, 2019.

§ 20.2010–3 [Amended]

■ **Par. 4.** Section 20.2010–3 is amended by removing ''§ 20.2010–1(d)(5)'' wherever it appears and adding in its place ''§ 20.2010–1(e)(5)''.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: November 12, 2019.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF EDUCATION

34 CFR Parts 674, 682, and 685

RIN 1840–AD48

[Docket ID ED–2019–FSA–0115]

Total and Permanent Disability Discharge of Loans Under Title IV of the Higher Education Act

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Interim final regulations.

SUMMARY: The Department of Education (Department) issues these interim final regulations to amend and update the regulations for total and permanent disability student loan discharge for veterans by removing administrative burdens that may have prevented at least 20,000 totally and permanently disabled veterans from obtaining discharges of their student loans, as the law provides. These barriers create significant and unnecessary hardship for these veterans. Removing these barriers is a matter of pressing national concern. Although the Department construes its interim final rulemaking power narrowly, under these circumstances the Department finds