ACTEC®

McPherson Building
901 15th Street, NW, Suite 525
Washington, DC 20005
(202) 684-8460 Fax (202) 684-8459
www.actec.org

The American College of Trust and Estate Counsel

Please Address Reply to:

Executive Director
DEBORAH O. MCKINNON

May 27, 2016

CC:PA:LPD:PR (REG-127923-15)
Internal Revenue Service
Room 5203
PO Box 7604 Ben Franklin Station
Washington, DC 20044

Re: Comments on Proposed Regulations Under Sections 1014(f) and 6035

Dear Ladies and Gentlemen:

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit the enclosed comments on Proposed Regulations to new sections 6035 and 1014(f) of the Internal Revenue Code of 1986, as amended (the "Code"). Sections 6035 and 1014(f) were enacted as part of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (P.L. 114-41), signed into law on July 31, 2015. On March 2, 2016 the IRS released proposed regulations regarding sections 1014(f) and 6035 and requested comments to all aspects of the proposed rules.

ACTEC further requests that a public hearing be scheduled and that ACTEC have the opportunity to send representatives to that hearing to testify about these comments.

ACTEC is a professional organization of approximately 2,600 lawyers from throughout the United States. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of federal taxes, with a focus on estate, gift, and GST tax planning, fiduciary income tax planning, and compliance. ACTEC offers technical comments about the law and its effective administration, but does not take positions on matters of policy or political objectives.

If you or your staff would like to discuss ACTEC's recommendations, please contact Beth Kaufman, Chair of ACTEC's Washington Affairs Committee, at (202) 862-5062 or by email at bkaufman@capdale.com, or Leah Weatherspoon, ACTEC Communications Director, at (202) 688-0271 or by email at lweatherspoon@actec.org.

Respectfully submitted,

Cynda Ottaway

Cynda C. Ottaway, President

Enclosure: Comments on Proposed Regulations Under Sections 1014(f) and 6035

COMMENTS OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (ACTEC) ON PROPOSED REGULATIONS UNDER SECTIONS 1014(f) AND 6035 [REG-127923-15]

SUMMARY

These comments of The American College of Trust and Estate Counsel (ACTEC) address the proposed regulations under sections 1014(f) and 6035 of the Internal Revenue Code, which were enacted on July 31, 2015. Section 1014(f) requires the basis of assets received from a decedent in certain cases to be consistent with the estate tax value of those assets. Section 6035 imposes related requirements to report estate tax values to the IRS and to the recipients of assets.

A significant point of these comments (Part 9) is to discourage the wasteful reporting to a beneficiary under section 6035 of assets that have not been and may never be distributed to that beneficiary or perhaps to any beneficiary. ACTEC believes, and these comments explain, how phased reporting as distributions are made is much more workable and is entirely supported by the language, and certainly by the purpose, of the statute.

These comments also make the point (Part 2) that the treatment of property discovered after an estate tax return is filed or otherwise omitted in good faith from the return, especially the zero-basis rule for certain omitted assets, is unjustifiably harsh. Moreover, ACTEC believes, and these comments explain, that there is no authority in the statute for such a zero-basis result.

Similarly, these comments make the point (Part 12) that the requirement in the proposed regulations of subsequent reporting by recipients of assets is unclear and impractical in many cases and in any event goes beyond the authority granted by the statute, which is limited to reporting by "executors." The comments also recommend clarifications of the scope and implementation of this requirement, especially in light of confusing references in the Preamble to the proposed regulations.

ACTEC appreciates the efforts in the proposed regulations to address the treatment of various special cases, such as property subject to non-recourse indebtedness (Part 1), the existence of contingent beneficiaries (Part 7), the distribution of property to a beneficiary that is a trust or another estate (Part 8), and the inability to locate beneficiaries (Part 10). These comments identify ways in which those provisions can be clarified, expanded, improved, or in some cases corrected. For example, in the case of distributions to trusts, these comments (Part 8) explain why executors should be able to choose to report either to each trust beneficiary or only to the trustee, whichever is more efficient. In addition, these comments recommend adding a clarification of the treatment of property given to the decedent within a year before death (Part 4) and a clarification of the executor's reporting obligation when a beneficiary refuses to provide a taxpayer identification number or otherwise cooperate with the executor (Part 6).

ACTEC also appreciates the provision of common-sense exceptions from the reporting requirement under section 6035 for cash, income in respect of a decedent, tangible

personal property, and property that the executor sells. Again these comments (Part 5) identify places where those exceptions can be clarified, expanded, or otherwise improved. For example, these comments (Part 5.d) recommend clarifying that the Sale Exception applies to all dispositions in which gain or loss would be recognized, including distributions in kind to beneficiaries that are recognition dispositions because they satisfy a right to a pecuniary amount, to a specific bequest, or to income, or because the executor or trustee elects to recognize gain or loss pursuant to section 643(e)(3). Similarly, these comments recommend that the Sale Exception apply whether or not the recognized gain would be capital gain and even if the recognized gain or loss on a particular disposition happens to be zero.

Also included are comments regarding cases where an estate tax return filed on or before July 31, 2015, is supplemented after that date (Part 13) and comments on Form 8971, Schedule A, and the instructions thereto (Part 14).

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ACTEC Comments on Proposed Regulations Under Sections 1014(f) and 6035

Background. On July 31, 2015, the President of the United States signed H.R. 3236, *Surface Transportation and Veterans Health Care Choice Improvement Act of 2015* (P.L. 114-41), into law. Section 2004 of H.R. 3236 enacted new sections 1014(f) and 6035 of the Internal Revenue Code[1].

Section 1014(f) provides rules requiring that the basis of certain property acquired from a decedent, as determined under section 1014, may not exceed the value of that property as finally determined for federal estate tax purposes, or if not finally determined, the value of that property as reported on a statement made under section 6035.

Section 6035 imposes new reporting requirements with regard to property the value of which is included in a decedent's gross estate for federal estate tax purposes. Section 6035(a)(1) provides that the executor of any estate required to file a return under section 6018(a) must furnish, to both the Secretary and the person acquiring any interest in property included in the decedent's gross estate, a statement identifying the value of each interest in such property as reported on such return and such other information with respect to such interest as the Secretary may prescribe. In addition, section 6035(a)(2) provides that each person required to file a return under section 6018(b) must furnish, both to the Secretary and to each other person who holds a legal or beneficial interest in the property to which such return relates, a statement identifying the information described in section 6035(a)(1).

Section 6035(a)(3)(A) provides that each statement required to be furnished under section 6035(a)(1) or (a)(2) shall be furnished at such time as the Secretary may prescribe, but in no case at a time later than the earlier of (i) the date which is 30 days after the date on which the return under section 6018 was required to be filed (including extensions, if any) or (ii) the date which is 30 days after the date such return is filed. Failure to furnish these statements may result in penalties under sections 6721 and 6722. On December 18, 2015, the IRS released a draft Form 8971, "Information Regarding Beneficiaries Acquiring Property from a Decedent" and accompanying Schedule A (hereinafter referred to as "Form 8971" or "Schedule A", as appropriate) to fulfill the section 6035 reporting obligations to the IRS and the beneficiaries of estates. On January 6, 2016, the IRS released Instructions for Form 8971 and Schedule A (hereinafter referred to as the "Instructions"). On March 2, 2016 the IRS released proposed regulations regarding sections 1014(f) and 6035 and requested comments on all aspects of the proposed rules.

While the proposed regulations answer many questions and provide needed guidance, they also in some respects create uncertainty and raise additional questions. ACTEC believes that in order for relevant and meaningful information to be provided to the IRS and to beneficiaries for purposes of sections 1014(f) and 6035, Treasury and the IRS should adopt rules that allow fiduciaries to comply with the reporting requirements of section 6035 without being unduly burdened and without incurring unreasonable costs. In response to

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[1] Unless otherwise stated, references herein to "section(s)" or to "Code" are to the Internal Revenue Code. References herein to "§" are to relevant sections of the Treasury regulations. References herein to the "Preamble" are references to the preamble to the proposed regulations (REG-127923-15).

Treasury's and the IRS's request, ACTEC hereby submits the following comments on the proposed regulations in an effort to help clarify various areas of uncertainty and to suggest modifications to the proposed regulations. Also, ACTEC has included suggested revisions to Form 8971, Schedule A, and the Instructions that ACTEC believes would be beneficial in complying with the reporting requirements and communicating with beneficiaries.

1. Proposed §§1.1014-10(a)(2) & -10(e), *Example 1*: Property Subject to Non-Recourse Indebtedness. In *Crane v. Commissioner*, 331 U.S. 1 (1947), the Supreme Court held that when a beneficiary inherits property subject to a non-recourse mortgage "the proper basis under [the predecessor to Section 1014(b)(1)] is the value of the property, undiminished by mortgages thereon." In contrast, for purposes of reporting estate tax values, §20.2053-7 provides:

> If the decedent's estate is liable for the amount of the mortgage or indebtedness, the full value of the property subject to the mortgage or indebtedness must be included as part of the value of the gross estate; the amount of the mortgage or indebtedness being in such case allowed as a deduction. But if the decedent's estate is not so liable, *only the value of the equity of redemption* (or the value of the property, less the mortgage or indebtedness) need be returned as part of the value of the gross estate (emphasis added).

An obvious purpose of the reporting requirements of section 6035 is to provide information to beneficiaries that will be helpful to them in determining their basis in assets passing from a decedent, so that they may comply with the basis consistency rules of section 1014(f). If the decedent's estate includes property that is subject to non-recourse indebtedness, and if the executor reports the value of the property on the estate tax return as only the value of the equity of redemption as permitted by §20.2053-7, using that value for purposes of section 6035 may erroneously lead the beneficiary to believe that his or her basis in the property cannot exceed the decedent's equity of redemption in the property.

ACTEC respectfully requests that the final regulations clarify that if the decedent's estate includes property that is subject to non-recourse indebtedness, the value of the property reported on Schedule A should nevertheless be the full fair market value of the property, undiminished by any mortgages thereon, and not merely the value of the decedent's equity of redemption for the property.

Following is an example of the reporting required by the executor if the estate includes property subject to non-recourse indebtedness:

> Decedent's Estate includes an interest in an office building with an appraised fair market value of $3 million, which is subject to non-recourse indebtedness in the amount of $1.3 million. On Schedule A of Decedent's estate tax return, the executor's description of the property sets forth the foregoing amounts, and pursuant to §20.2053-7, lists the value of the office building on the return as $1.7 million. For purposes of completing Schedule A of Form 8971, the executor should list the estate tax value of the office building as $3 million.

Likewise, it would be helpful if the instructions to Schedule A provided that if the decedent's estate includes property that is subject to non-recourse indebtedness, and if the executor reports on the estate tax return only the value of the decedent's equity of redemption, the Estate Tax Value reported in Column E of Schedule A, Part 2, should be the full fair market value of the property, undiminished by any mortgages thereon, and not merely the value of the decedent's equity of redemption for the property.

Error in *Example 1* of Proposed §1.1014-10(e). Proposed §1.1014-10(e), *Example 1* provides:

> (i) At D's death, D owned 50% of Partnership P, which owned a rental building with a fair market value of $10 million subject to nonrecourse debt of $2 million. D's sole beneficiary is C, D's child. P is valued at $8 million. D's interest in P is reported on the return required by section 6018(a) at $4 million. The IRS accepts the return as filed and the time for assessing the tax under chapter 11 expires. C sells the interest for $6 million in cash shortly thereafter.
>
> (ii) Under these facts, the final value of D's interest is $4 million under paragraph (c)(1)(i) of this section. Under section 742 and §1.742-1, C's basis in the interest in P at the time of its sale is $5 million (the final value of D's interest ($4 million) plus 50% of the $2 million nonrecourse debt). Following the sale of the interest, C reports taxable gain of $1 million. C has complied with the consistency requirement of paragraph (a)(1) of this section.
>
> (iii) Assume instead that the IRS adjusts the value of the interest in P to $4.5 million, and that value is not contested before the expiration of the time for assessing the tax under chapter 11. The final value of D's interest in P is $4.5 million under paragraph (c)(1)(ii) of this section. Under section 742 and §1.742-1, C claims a basis of $5.5 million at the time of sale and reports gain on the sale of $500,000. C has complied with the consistency requirement of paragraph (a)(1) of this section.

ACTEC commends the effort to put together such a helpful example. ACTEC agrees with the basis calculations, which appear to be the main point of the example. However, in determining the sale proceeds, the example appears to have overlooked Rev. Rul. 74-40, 1974-1 C.B. 159, Situation 1, which requires any reduction in liabilities allocated to a selling partner to be added to the sale proceeds. In each of parts (ii) and (iii), $1 million (50% of $2 million) of nonrecourse debt is allocated to D, which the example recognizes by adding $1 million to the fair market value of the partnership interest in determining basis. By selling the partnership interest, C is no longer allocated that $1 million of debt. Therefore, C realizes $7 million from the sale, consisting of $6 million cash and $1 million of liability reduction. Therefore, the gain should be $2 million ($7 million minus $5 million) in part (ii) and $1.5 million ($7 million minus $5.5 million) in part (iii) of *Example 1*.

2. Proposed §1.1014-10(c)(3): After-Discovered or Omitted Property – "Zero Basis Rule". Proposed §1.1014-10(b)(1) confirms that the basis consistency rule of section 1014(f) applies only to property that is includible in the decedent's gross estate that generates an estate tax liability. Proposed §1.1014-10(c)(3) provides:

(1) If the executor reports after-discovered or omitted property on a federal estate tax return filed before the expiration of the period of limitation on assessment of estate tax, the final value of the property for estate tax purposes is determined under the usual rules of §1.1014-10(c)(1) or (c)(2).

(2) If the executor does not report after-discovered or omitted property on a federal estate tax return filed before the period of limitation on assessment expires, the final value of the after-discovered or omitted property for purposes of section 1014(f) is zero.

(3) If the executor does not file a federal estate tax return, and if after-discovered or omitted property would generate or increase the estate's tax liability, the final value (and basis) of all property includible in the gross estate that is subject to the consistent basis requirement is zero, until the final value is determined under proposed §1.1014-10(c)(1) or (2), after either the executor files a federal estate tax return that includes this after-discovered or omitted property or the IRS determines a value for the property.

This appears to mean that the beneficiaries automatically have a zero basis in property discovered after the period of assessments has run (if such property would have been includible in the decedent's gross estate and would have increased the estate's tax liability), notwithstanding the contrary rules usually applicable, both under section 1014(a) and in determining the decedent's adjusted basis in the property on the date of death.

Treasury and the IRS Lack Authority to Impose a Zero Basis Rule. This Zero Basis Rule goes beyond the section 1014(f) and 6035 requirements of basis consistency and basis reporting, and Treasury and the IRS by these provisions are proposing to legislate new law. Section 1014 provides what a beneficiary's basis in property acquired from a decedent is. This regulatory Zero Basis Rule overrules the current basis provisions of the Code and for certain assets denies a beneficiary the basis in an inherited asset that the Code currently provides for the beneficiary. Moreover, particularly in cases where the beneficiary is not the executor, this rule would cause a beneficiary to forfeit the basis in an asset the beneficiary is otherwise entitled to despite no fault of such beneficiary.

ACTEC believes that Treasury and the IRS lack authority to impose this Zero Basis Rule. Treasury and the IRS are, in essence, declaring that, because the executor did not file an estate tax return or unintentionally omitted certain assets from the return, the estate's beneficiary receives neither the decedent's adjusted basis in the property nor the basis as provided under section 1014(a). Rather, the proposed regulations appear to be an attempt, when estate tax can no longer be assessed because of the running of the assessment period, to replace the potentially lost revenue by increasing the income tax on the beneficiary when the asset is sold or exchanged, by denying the beneficiary the basis in such asset to which the beneficiary is otherwise entitled. If this is desired, ACTEC believes it is up to Congress and not Treasury and the IRS to impose such laws. This is particularly troubling when a decedent's Will apportions estate tax in a manner whereby the particular beneficiary would receive the assets and other beneficiaries would bear the burden of the estate tax (*e.g.*, the asset in question is specifically bequeathed or passes by joint tenancy with right of survivorship to the beneficiary and the decedent provided that any estate tax be paid by the residuary the estate).

This approach ignores the well-settled law that a beneficiary is estopped from adopting a value different from that used by the executor only if the beneficiary and the executor are the same person or are persons in privity, usually due to a close family relationship. *See Estate of Letts v. Commissioner*, 109 T.C. 290 (1997) (wife's estate estopped from asserting that a trust did not qualify for QTIP treatment); *LeFever v. Commissioner*, 100 F.3d 778 (10th Cir. 1996) (estoppel applied because the taxpayer was the executor of the decedent's estate); *Cluck v. Commissioner*, 105 T.C. 324 (1995) (estoppel applied because the taxpayer's spouse was the executor and the spouses had filed joint tax returns for the years at issue); *Beltzer v. United States*, 495 F.2d 211 (8th Cir. 1974) (estoppel applied because the taxpayer was a co-executor of the decedent's estate); *Hess v. United States*, 537 F.2d 457 (Ct. Cl. 1976), *cert. denied,* 430 U.S. 931 (1977) (estoppel applied to a testamentary trust whose trustees were executors of the estate). The courts have repeatedly held that a beneficiary is not estopped from asserting a different value than that reported on the estate tax return where such a close relationship did not exist. *Ford v. United States,* 270 F.2d 17 (Ct. Cl. 1960) (decedent's minor beneficiaries residing outside of the United States were not estopped from arguing a different value because they were not fiduciaries of the decedent's estate and had no knowledge of the decedent's estate tax return); *Shook v. United States,* 713 F.2d 662 (11th Cir. 1983) (estoppel not extended to an estate beneficiary for merely indicating approval of the executor's handling of the estate over which the executor had total control and the beneficiary none).

A contrary holding is superficially suggested by *Van Alen v. Commissioner*, T.C. Memo. 2013-235, but that is totally explained by the fact that the *Van Alen* opinion involved a special use valuation under section 2032A, for which section 1014(a)(3) explicitly describes the basis of property acquired from a decedent as "its value *determined* under such section" (emphasis added). On the issue of a duty of consistency apart from that explicit statutory wording the court cited only some of the same cases cited and distinguished above.

Section 1014(f) clearly adopts a new rule requiring consistent valuation of assets whose inclusion in the decedent's estate increased the liability for the tax imposed by chapter 11 (reduced by credits allowable against such tax) on such estate. It does not, however, require that a beneficiary's basis be eliminated entirely in any situation.

Section 1014(f)(4) states that "[t]he Secretary may by regulations provide exceptions to the application of this subsection." The Zero Basis Rule does not constitute an exception to the application of section 1014(f), but rather a substantial extension of that section.

Furthermore, there appears to be no legal requirement that a supplemental estate tax return be filed to report after-discovered property. In *Badaracco v. Commissioner*, 464 U.S. 386 (1984), the U.S. Supreme Court considered whether a taxpayer who filed a fraudulent return can later, by filing a nonfraudulent amended return, terminate the indefinite statute of limitations period in section 6501(c)(1) and start the general 3-year limitations period. The Court stated that "the Code does not explicitly provide for or require the filing of an amended return," which the Court then characterized as "a creature of administrative origin and grace." 464 U.S. at 393 (1984).

There is no explicit requirement in the Code, the regulations, court decisions or precedential IRS rulings that a supplemental estate tax return must be filed where the value of an estate changes or unintentionally omitted assets are thereafter discovered. Thus, Treasury and the IRS arguably are proposing to penalize executors for not filing a return that they are not otherwise required to file. See analysis in Pratt & Karibjanian, "Filing a Supplemental Estate Tax Return After Probate Litigation," 36 Est. Plan. 17 (Sept. 2009).

Section 1014(f) Does Not Apply to Assets Omitted From an Estate Tax Return. By its terms, section 1014(f) does not apply to property that is not reported on a federal estate tax return. Section 1014(f)(1), placing a limit on the beneficiary's basis, states:

> The basis of any property to which [section 1014(a)] applies shall not exceed-
>
> (A) in the case of property the final value of which has been determined for purposes of the tax imposed by chapter 11 on the estate of such decedent, such value, and
>
> (B) in the case of property not determined in subparagraph (A) and with respect to which a statement has been furnished under section 6035(a) identifying the value of such property, such value.

Section 1014(f)(3), defining when the value of property has been determined, as required by paragraph (1)(A), states:

> For purposes of paragraph (1), the basis of property has been determined for purposes of the tax imposed by chapter 11 if—
>
> (A) the value of such property is shown on a return under section 6018 and such value is not contested by the Secretary before the expiration of the time for assessing a tax under chapter 11,
>
> (B) in a case not described in subparagraph (A), the value is specified by the Secretary and such value is not timely contested by the executor of the estate, or
>
> (C) the value is determined by a court or pursuant to a settlement agreement with the Secretary.

Pursuant to section 1014(f)(3), for the value of property to be determined, subparagraph (A) applies only to property "shown on a return." Subparagraph (B) applies only if "the value is specified by the Secretary." Subparagraph (C) applies only if "the value is determined by a court or pursuant to a settlement agreement with the Secretary." None of those conditions are met in the case of an asset omitted from an estate tax return and Schedule A. Therefore, the basis consistency rule of subparagraph (A) of section 1014(f)(1) does not apply.

As to subparagraph (B) of section 1014(f)(1), it applies by its terms only when "a statement has been furnished under section 6035(a)." That condition is not met either in the case of an asset omitted from an estate tax return and Schedule A. Therefore, the basis consistency rule of subparagraph (B) of section 1014(f)(1) does not apply.

If neither subparagraph (A) nor (B) apply, then section 1014(f)(1) does not limit the basis of an asset a beneficiary receives from a decedent, and there is no authority in section 1014(f) to assign a basis of zero or any other basis to the asset, other than the basis determined under section 1014 without regard to subsection (f).

ACTEC recommends, therefore, that the final regulations eliminate the Zero Basis Rule. If the final regulations do not eliminate this rule, however, there remain several important issues that need clarification.

Zero Basis Rule and Cash. If, despite the lack of authority to legislate this Zero Basis Rule, the IRS continues to insist on including it in the final regulations, then clarification is needed as to how this Zero Basis Rule is to be applied to cash. Cash cannot have a basis below its face amount, and the final regulations should clarify that the Zero Basis Rule does not apply to cash. If the Zero Basis Rule did apply to cash, the final regulations should state whether the discovery of such cash results in currently-taxable ordinary income under the tax benefit rule. Generally, the tax benefit rule requires a taxpayer who received a tax benefit from a deduction or exclusion in an earlier year to recognize income in a later year if an event occurs that is fundamentally inconsistent with the premise on which the deduction was initially based. *Hillsboro National Bank v. Commissioner*, 460 U.S. 370 (1983); *see also Hughes & Luce L.L.P. v. Commissioner*, 70 F.3d 16 (5th Cir. 1995), *cert. denied*, 517 U.S. 1208 (1996).

The tax benefit rule allays some of the inflexibilities of the annual accounting system under specific circumstances. *Hillsboro National Bank*, 460 U.S. at 377. The general purpose of the tax benefit rule is to approximate the results produced by a tax system based on transactional rather than annual accounting. *Id*. at 381. The tax benefit rule will "cancel out" an earlier deduction when a later event is "fundamentally inconsistent" with the premise on which the deduction was initially based, even in situations where there is no actual recovery of funds. *Id.* at 381-383.

If the final regulations provide that the tax benefit rule applies because cash receives a zero basis, the final regulations should also explain when income would be recognized. Income could arguably be recognized in the year the cash is discovered, or a later year in which the period of limitations on the assessment of an estate tax deficiency expires.

3. Proposed §1.6035-1(a)(1): Section 645 Election Has No Effect. Section 645 provides that the trustee of a qualified revocable trust and an appointed executor (if any) may elect to treat the trust as part of the estate for income tax purposes. ACTEC requests clarification that a section 645 election is an election solely for income tax reporting purposes and has no effect and is irrelevant for purposes of fulfilling the reporting requirements of section 6035.

4. Proposed §1.6035-1(a)(1): Section 1014(e) Issues. ACTEC believes that it would be helpful if the final regulations address situations in which section 1014(e) applies. Section 1014(e) provides that if appreciated property is given to a decedent within one year of the decedent's death and that property passes from the decedent back to the donor (or to the spouse of the donor) as a result of the decedent's death, no section 1014(a) basis adjustment occurs. The executor may not know whether a decedent acquired an asset from a beneficiary within one year of death, but the beneficiary who transferred the asset to the decedent would know. Therefore, ACTEC requests that the final regulations provide that the application of section 1014(e) does not change the executor's reporting requirements. In other words, the executor must prepare Schedule A reporting the value of the property as reported on the federal estate tax return, without regard to the possible application of section 1014(e).

5. Proposed §1.6035-1(b)(1): Exceptions to Reporting Requirements Pursuant to the Proposed Regulations. An obvious purpose of the reporting requirements of section 6035 as to beneficiaries is to provide information to them that will be helpful in determining their basis in assets they receive as a result of the death of a decedent so that they may comply with the basis consistency rules of section 1014(f). Proposed §1.6035-1(b) defines the property to be reported on Form 8971 and Schedule(s) A as all property included in the gross estate for federal estate tax purposes with four exceptions: (1) cash (other than coins or paper bills with numismatic value) (hereinafter the "Cash Exception"); (2) income in respect of a decedent (hereinafter the "IRD Exception"); (3) those items of tangible personal property for which an appraisal is not required under §20.2031-6(b) (hereinafter the "Tangible Personal Property Exception"); and (4) property that is sold or otherwise disposed of by the estate (and therefore not distributed to a beneficiary) in a transaction in which capital gain or loss is recognized (hereinafter the "Sale Exception"). ACTEC appreciates the efforts of Treasury and the IRS in providing reasonable exceptions to the reporting requirements.

Three of these four exceptions arise because the estate tax value of the assets has no effect on a beneficiary's basis (the Cash Exception, the IRD Exception, and the Sale Exception). The Tangible Personal Property Exception also makes sense because the property excepted would rarely be sold for a gain and no deduction would be allowed for any loss on the sale of such personal property. ACTEC believes that the inclusion of these exceptions is beneficial and consistent with the presumed purpose of section 6035. However, ACTEC believes that addressing the following items in each of the exceptions would be beneficial.

a. Proposed §1.6035-1(b)(1)(i): Cash Exception. ACTEC respectfully requests the following clarifications with respect to the treatment of cash under the proposed regulations.

i. Cash in Any Financial Account. The final regulations should clarify that the Cash Exception applies not only to cash on hand that is held in physical form, but also cash held in bank accounts, money market accounts, brokerage accounts, certificates of deposit, and similar accounts.

ii. Accounts Denominated in a Foreign Currency. Presumably the term "cash" is not limited to United States currency. The final regulations should clarify that the currency of any country is considered cash.

iii. Life Insurance. Life insurance proceeds are payable in cash. The final regulations should specify that life insurance proceeds are cash for purposes of the Cash Exception, whether such proceeds are payable in a lump sum or annuitized.

iv. Promissory Notes and Accounts Receivable. For promissory notes and accounts receivable that are reported on a decedent's estate tax return with a value equal to the unpaid balance of the note or account receivable as of the date of the decedent's death, the final regulations should provide that such promissory notes and accounts receivable are cash for purposes of the Cash Exception.

v. Bonds that Mature. The final regulations should provide that if a decedent owned a bond or other financial instrument that matures and is redeemed prior to being distributed to a beneficiary, such bond or similar financial instrument falls under the Cash Exception (or under the Sale Exception, discussed below).

vi. Federal and State Tax Refunds and Other Refunds. The final regulations should provide that cash includes any federal, state and local tax refund or other refund payable in cash.

b. Proposed §1.6035-1(b)(1)(ii): IRD Exception. Proposed §1.6035-1(b)(1)(ii) provides that income in respect of a decedent (as defined in section 691) is an exception to the reporting requirements. Section 1.691(a)-1(b) defines income in respect of a decedent ("IRD") as follows:

> In general, the term "income in respect of a decedent" refers to those amounts to which a decedent was entitled as gross income but which were not properly includible in computing his taxable income for the taxable year ending with the date of death or for a previous taxable year under the method of accounting employed by the decedent.

References to IRD. Although the proposed regulations refer to "income in respect of a decedent," to avoid confusion the final regulations should refer to the "right to income in respect of a decedent," reflecting that the right to receive the IRD vests at the date of death, and although the asset is reported at its full fair market value for federal estate tax purposes, no basis adjustment to the asset occurs.

IRD Assets that have a Basis Component. Several types of assets that are traditionally considered IRD assets may have an income tax basis component (*e.g.* after-tax contributions to traditional IRAs and 401(k) accounts, Roth IRAs and Roth 401(k) accounts, nonqualified annuities, installment notes that have basis and unrecognized gain, and stock in an S corporation or an interest in a partnership that holds unrealized receivables or inventory items). Although such assets may have a basis component, the value in excess of the basis portion is typically recognized as income or gain when withdrawn or received and no basis adjustment occurs as to the IRD portion of the asset at a decedent's death. For purposes of section 6035, these types of assets should also be exempt from the reporting requirements. Alternatively, if the asset is to be reported, clarification is needed as to how to report such assets. Guidance is requested as to whether the entire asset is to be reported or only the portion of the asset for which there is a basis component.

c. Proposed §1.6035-1(b)(1)(iii): Tangible Personal Property Exception. Proposed §1.6035-1(b)(1)(iii) provides that tangible personal property for which an appraisal is not required under §20.2031-6(b) is not subject to the reporting requirements.

Section 20.2031-6(b) provides as follows:

> Notwithstanding the provisions of paragraph (a) of this section, if there are included among the household and personal effects articles having marked artistic or intrinsic value of a total value in excess of $3,000 (*e.g.*, jewelry, furs, silverware, paintings, etchings, engravings, antiques, books, statuary, vases, oriental rugs, coin or stamp collections), the appraisal of an expert or experts, under oath, shall be filed with the return. The appraisal shall be accompanied by a written statement of the executor containing a declaration that it is made under the penalties of perjury as to the completeness of the itemized list of such property and as to the disinterested character and the qualifications of the appraiser or appraisers.

ACTEC commends Treasury and the IRS for including the Tangible Personal Property Exception in the proposed regulations. Tangible personal property is not the type of property that is likely to have much, if any, appreciation in value, and therefore, if sold, does not typically result in substantial gain. Indeed, even for purposes of section 1014, proposed §1.1014-10(b)(2) deems tangible personal property for which an appraisal is not required under §20.2031-6(b) as being property that does not generate a tax liability under chapter 11 of the Code and excludes such property from the basis consistency requirements of section 1014. The Tangible Personal Property Exception helps reduce the burdens on fiduciaries in complying with the reporting requirements.

<u>De Minimis Rule</u>. As the benchmark for the Tangible Personal Property Exception, §20.2031-6(b) limits the value of the property to $3,000, a number that has been in place for more than 50 years. Because of this, ACTEC believes it would be prudent to consider an increase to this amount. Because §20.2031-6(b) provides such a low threshold for the Tangible Personal Property Exception, to further ease the burden on fiduciaries with regard to reporting this type of property, ACTEC respectfully requests that Treasury and the IRS consider a de minimis rule to exempt from the reporting requirements items of tangible personal property (excluding property individually listed on the estate tax return) that are reported on the estate tax return with a value in the aggregate of $50,000 or less (which represents less than 1% of the basic exclusion amount).

<u>Group Value of Tangible Personal Property and Multiple Beneficiaries</u>. Although ACTEC appreciates the efforts of Treasury and the IRS in creating the exception from the reporting requirements for certain tangible personal property, concern remains for the reporting requirements for those estates in which tangible personal property is not covered by the exception and for which an appraisal under §20.2031-6(b) is required. Proposed §1.6035-1(c)(3) provides that if the executor has not determined the property that will be used to satisfy a beneficiary's interest by the due date of the Form 8971 and Schedule(s) A, the executor must report to each beneficiary all property that could be used to satisfy the beneficiary's interest. As an example of this reporting, section 10 of the Preamble's Summary of Comments on Notice 2015-57 and Explanation of Provisions describes "tangible personal property defined in §20.2031-6 to be distributed among a group of beneficiaries as that group determines" as an example of this type of reporting. In *Janis v.*

Commissioner, T.C. Memo. 2004-117, *aff'd*, 461 F.3d 1080 (9th Cir. 2006), the Court held that the discounted estate tax value of an art gallery (group) set the aggregate basis of the artwork, which aggregate basis was then to be spread among the individual items. If tangible personal property items for which an appraisal is required under §20.2031-6(b) are reported on the estate tax return as a group rather than as individual items, and if the grouped items pass to more than one person (and not necessarily equally), clarification is requested as to how to identify and allocate the value of the property among the persons acquiring an interest in the property. As beneficiaries may disagree as to the value of their share of tangible personal property, ACTEC requests that the executor have the obligation to inform each beneficiary of that beneficiary's aggregate share of any "group value." Furthermore, ACTEC respectfully requests that the executor be given the authority to allocate the value reported on the estate tax return among the group of items on any reasonable basis, and if a beneficiary receives items valued as a group by the executor, that the beneficiary be given the authority to further allocate the value to such items on any reasonable basis.

d. Proposed §1.6035-1(b)(1)(iv): Sale Exception. The fourth exception, found in proposed §1.6035-1(b)(1)(iv), provides that "[p]roperty sold, exchanged, or otherwise disposed of (and therefore not distributed to a beneficiary) by the estate in a transaction in which capital gain or loss is recognized" is excluded from the reporting requirements of section 6035. ACTEC believes that this exception is more restrictive than intended in its description of the types of transactions to which the exception applies and that any asset subject to any type of recognition event should be exempt from the reporting requirements.

Under section 643(e)(1), the basis of any property received by a beneficiary in a distribution from an estate or trust is equal to the adjusted basis of such property in the hands of the estate or trust immediately before the distribution, adjusted for any gain or loss recognized to the estate or trust on the distribution. As a result, in those settings where the estate of the decedent recognizes gain or loss prior to or as a result of a distribution, the estate tax value of the distributed property does not determine or have bearing on the basis of the distributed property in the hands of the recipient, and the reporting requirements of section 6035 should not apply.

As proposed §1.6035-1(b)(1)(iv) is currently drafted, in order for the exception to apply, the property must be disposed of by an estate, but it seems clear that the language intends to include any disposition of property, regardless of by whom it is made, if such disposition would be reportable by the decedent's estate for income tax purposes (including, for example, by the trustee of a qualified revocable trust treated as part of the estate of a decedent as a result of having filed an election under section 645 or by the executor for a loss recognized under section 267(b)(13)). In addition, a disposition should be excluded even if the gain or loss recognized is zero (*i.e.*, where the amount realized is equal to the cost basis of the asset). Therefore, ACTEC believes it would be helpful if the language were revised to clarify that if a disposition of property is made in a transaction that would be reportable by the estate, the exception applies.

Likewise, the language in the parenthetical clause of the proposed regulation, *i.e.* "(and therefore not distributed to a beneficiary)" suggests that for purposes of the Sale Exception a disposition of property in which gain or loss would be recognized does not include a distribution of that property to a beneficiary. As noted below, however, there are circumstances in which a distribution to a beneficiary may itself cause gain or loss to be recognized. In other words, the parenthetical appears to be attempting to clarify that a distribution of the property to a beneficiary that is not a recognition event is not a disposition of the property for purposes of the exception. In order to better describe the application of this exception, ACTEC believes that distributions to beneficiaries for which gain or loss may be realized should also be exempt from the reporting requirements of section 6035, as discussed below. The current language found in proposed §1.6035-1(b)(1)(iv) should be made clear regarding who is making the distribution and to whom the distribution is being made. In other words, the language should be revised to make it clearer that a distribution, not in a context in which gain or loss would be recognized, made by an executor, an administrator, or a trustee to an heir, legatee, devisee or beneficiary is not part of this exception.

In addition, as currently drafted, the exception applies only if the property is disposed of in a transaction in which capital gain or loss is recognized. It is unclear why the requirement of recognition of a capital gain or loss is necessary, and instead, ACTEC believes that any type of sale, exchange, or other disposition of the property (other than a distribution to a beneficiary that is not itself a recognition event) should trigger the exception. The language that limits its application to capital transactions does not account for other dispositions the effect of which is to make the date-of-death value of the property irrelevant in determining a beneficiary's basis in that property. For example, gain or loss on dispositions of property used in a trade or business by an estate may result in ordinary (not capital) income or loss pursuant to section 1231. Similarly, if an estate disposes of depreciable property described in section 1245 or 1250, any gain on the disposition may be characterized as ordinary income due to recapture. Other provisions of the Code, including sections 1014, 2032, and 6166, illustrate that what is important is not the type of income, but the fact that the original asset is no longer part of the estate or trust. In addition, as currently drafted, by providing that a capital gain or loss must be recognized, confusion exists if the transaction produces no gain or loss. In other words, if the asset is sold, exchanged, or otherwise disposed of for an amount equal to its basis, the gain or loss would be zero. Accordingly, ACTEC respectfully requests that the language be revised to reflect that any recognition event causes the exception to apply.

In order to address the foregoing issues, ACTEC respectfully requests that §1.6035-1(b)(1)(iv) be revised to except from the reporting requirements any property that is sold, exchanged, or otherwise disposed of (and not distributed by an executor, administrator or trustee to an heir, legatee, devisee or beneficiary in a manner that does not cause gain recognition) in a transaction that constitutes a sale or exchange that is reportable for income tax purposes (or that would be reportable if the gain or loss were not zero).

In addition to the foregoing, there are other areas where gain or loss may occur during the administration of an estate that may be appropriate for the Sale Exception. Section 1.661(a)-2(f) addresses two situations that cause gain or loss to be realized during an administration of a decedent's estate and therefore make the estate tax value meaningless to the distributee of the asset. The first situation is when an in kind distribution of property is used to satisfy certain bequests, and this situation is broken down into three types of distributions.

The first type of distribution is when an asset is distributed to a beneficiary in order to satisfy a bequest of a specific dollar amount to the beneficiary. This type of distribution is exemplified in *Kenan v. Commissioner,* 114 F.2d 217 (2d Cir. 1940). The second type of distribution is when a bequest is made of specific property but other property is distributed to the beneficiary in satisfaction of the bequest. The third type of distribution is when a distribution of current income is required to be made to a beneficiary and property other than cash is used to satisfy the distribution.

In each of these types of distributions, assets are being distributed that may have either appreciated or depreciated in value but are being distributed in order to satisfy a bequest of a specific dollar amount or of specific property, and in each situation gain or loss will be realized by the estate. Because the estate may realize gain or loss, the value of the asset as determined for federal estate tax purposes is irrelevant to the beneficiary. *See* §1.1014-4(a)(3). As a result, such assets should be treated as disposed of by the estate of the decedent, and therefore not subject to the reporting requirements of section 6035.

The second situation addressed in §1.661(a)-2(f) is when an executor or trustee makes an election to recognize gain or loss pursuant to section 643(e)(3). When such an election is made by an executor or a trustee, gain or loss is realized by the estate or trust in the same manner as if such property had been sold to the distributee at its fair market value. Because such an election results in gain or loss being realized by the estate of the decedent, the estate tax value of the distributed property does not determine the basis of the distributed property in the hands of the recipient, and the reporting requirements of section 6035 should not apply.

In each of these two situations, the estate tax value of the distributed property does not determine the basis of the distributed property in the hands of the recipient. Therefore, ACTEC suggests that the Sale Exception in the final regulations be clarified by providing that property for which gain or loss is realized pursuant to §1.661(a)-2(f) and recognized (even if the recognized gain or loss is zero) by the estate of the decedent is also exempt from the reporting requirements of section 6035.

6. Proposed §1.6035-1(c)(1): Uncooperative Beneficiaries. Sometimes the executor may not be able to obtain information from a beneficiary. For example, a beneficiary may be uncooperative and refuse to provide his, her, or its taxpayer identification number ("TIN") prior to the due date of Form 8971 and Schedule A, and the executor has no authority to compel the disclosure. In addition, if the beneficiary is a trust and the trustee of such trust has not yet obtained a TIN (as when a trust has not been funded and has no income or deductions to report for federal income tax purposes), or if the beneficiary does not have a TIN (as when he or she is not a U.S. citizen), there may not be a TIN at the due date of Form 8971 and Schedule A. The Instructions state that a form with an answer of "unknown" or similar language will not be a complete return. In the case of a TIN, the Instructions provide that errors or omissions related to a TIN are never inconsequential.

ACTEC believes that the Instructions impose an impossible and unreasonable burden, which the regulations should relieve. ACTEC believes that if an executor, after reasonable due diligence, cannot obtain the address or TIN for a beneficiary the executor should be allowed to answer "unknown", similarly to how the estate tax return instructions for Part 4, Line 5 allow the executor to "[e]nter the SSN of each individual beneficiary listed. If the number is unknown, or the individual has no number, please indicate 'unknown' or 'none.'"

Guidance is needed to determine how Form 8971 and Schedule A can be completed in these circumstances. Form 8971 and Schedule A could include a section for the executor to indicate that some or all of the information is unavailable, and to provide all of the information then available to the executor that may be helpful to identify the beneficiary for whom such information is unavailable or nonexistent. ACTEC respectfully requests that guidance be given that confirms that providing information in this manner will satisfy the reporting requirements applicable to the executor under section 6035 and will fall under the reasonable cause exception to the penalties imposed for failure to file Form 8971 and Schedule(s) A and for failing to provide Schedules A to beneficiaries.

7. <u>Proposed §1.6035-1(c)(1): Contingent Beneficiaries (Life Estates and Remainder Interests)</u>. Proposed §1.6035-1(c)(1) states that for purposes of identifying the beneficiary to whom notice is given,

> the beneficiary of a life estate is the life tenant, the beneficiary of a remainder interest is the remainderman(men) identified as if the life tenant were to die immediately after the decedent, and the beneficiary of a contingent interest is a beneficiary, unless the contingency has occurred prior to the filing of the Form 8971. If the contingency subsequently negates the inheritance of the beneficiary, the executor must do supplemental reporting in accordance with paragraph (e) of this section to report the change of beneficiary.

ACTEC believes that this statement is unclear because it appears to treat a contingent beneficiary as entitled to notice only while their interest is contingent, and not to entitle them to notice once their interest is certain. For example, consider the situation in which the contingency is the requirement that the primary remainderman not survive the life tenant. If the primary remainderman predeceases the life tenant and the contingent beneficiary survives the life tenant, the contingent beneficiary takes at the life tenant's death. The proposed regulations state that both the primary remainderman and the contingent beneficiary are beneficiaries entitled to notice, unless the life tenant dies before the Form 8971 is filed. This seems contrary to the general operation of this paragraph because it requires notice to a beneficiary who may never receive an interest, but it does not require notice to a beneficiary whose right to the interest has been clarified before the Form 8971 is filed.

ACTEC believes that the final regulations should add the word "not" to the quoted material, so as to state that "the beneficiary of a contingent interest is *not* a beneficiary, unless the contingency has occurred prior to the filing of the Form 8971." This change will also ensure that the executor is not required to maintain oversight of the life estate for the life tenant's entire lifetime.

If contingent beneficiaries are not so excluded, do contingent beneficiaries beyond the presumptive remainder beneficiaries need to be considered? Section 1.6035-1(c) discusses three types of beneficiaries: (i) life tenants, (ii) remaindermen, and (iii) beneficiaries of contingent interests. Because §1.6035-1(c) references both remaindermen and beneficiaries of contingent interests, it appears that it requires the executor to provide Schedules A not only to the initial presumptive contingent beneficiary(ies), but also to the further contingent beneficiaries, that is, those who would receive the property if the initial contingent beneficiary(ies) should die or their beneficial interests otherwise fail. For example, in the case of a life estate created for X with the remainder beneficiaries being X's heirs, if at the time of creation of the life estate, X was married with two children, the presumptive remainder beneficiaries might be X's spouse and children, to whom Schedules A would need to be provided. However, as X's spouse and children (and their descendants) may die before the termination of the life estate (X's death), do Schedule(s) A also need to be provided to X's parents, siblings and their descendants (who would be X's heirs if at the time of the termination of the life estate X's spouse and descendants were all deceased)? And because X's spouse, descendants, parents and their descendants may all predecease X, then do Schedule(s) A also need to be given to X's grandparents and their descendants (who would then be X's heirs)? Theoretically, there would be no end to the further contingent beneficiaries. This would be a significant burden on executors not only in trying to identify remote further contingent beneficiaries, but also in sending numerous Schedules A to remote beneficiaries who likely will never receive the remainder interest. ACTEC believes that Schedules A should need to be provided only to the life tenant and the presumptive remainder beneficiaries as of the due date of the filing of the Form 8971.

The proposed regulations also do not define the term "contingent interest." The final regulations should define a "contingent interest" as the beneficiary who would take if the presumptive remainderman died before the life tenant.

8. Proposed §1.6035-1(c)(2): Beneficiary Not an Individual – Treatment of Certain Trusts.

In General. Proposed §1.6035-1(c)(2) states that "[i]f the beneficiary is a trust or another estate, the executor must furnish the beneficiary's Statement to the trustee or executor of the trust or estate, rather than to the beneficiaries of that trust or estate." The proposed regulations do not distinguish between trusts that terminate on the date of the decedent's death and those that continue in existence, nor do they clearly address whether different notice is required where the trustee already has title to some or all of the assets included in the decedent's gross estate on the date of death. Keeping with the statutory goal of providing the information to the person who will need the valuation information to meet his or her own reporting obligations, it appears that the best solution will be to allow the executor to determine the proper party to receive the information in view of the facts and circumstances of each particular case. Below are examples that demonstrate how the facts and circumstances can affect how this reporting can best be made.

> Example 1. Assets that are includible in an estate pass to a trust that terminates on the decedent's death and the trustee of that trust will have a subsequent reporting obligation under proposed §1.6035-1(f). The executor has sufficient information to prepare a Form 8971 and a Schedule A for each of the beneficiaries who will be receiving the assets of the terminating trust. It will likely be more economical and efficient for the executor to furnish the required Schedule A directly to each beneficiary rather than furnishing it to the trustee, who in turn will be required to

furnish an additional Schedule A to each beneficiary and to the IRS. By furnishing the Schedule A directly to each beneficiary, the required paperwork is reduced, perhaps substantially, which benefits the executor, the trustee and the IRS. In addition, the beneficiary who needs the information will have it more promptly.

<u>Example 2</u>. Assume the same facts as in Example 1, except that the executor does not have sufficient information to prepare a Form 8971 and a Schedule A for each of the beneficiaries who will be receiving the assets of the terminating trust. In this situation, the executor will have no choice other to furnish the Schedule A to the trustee of the trust. The trustee will be in a better position to obtain the requisite information directly from the beneficiaries to enable the trustee to properly furnish the Schedule A to each beneficiary of the trust.

<u>Example 3</u>. Assets that are includible in an estate pass to a trust that is created upon the decedent's death or that is already in existence and will not terminate upon the decedent's death. In most cases, the executor should furnish the Schedule A to the trustee of such trust, as the trustee is the person in possession of the assets and will be the person who needs the information provided by Schedule A. However, in some circumstances, such as the case of a trust without a trustee at the date on which Schedule A is due (because of the death of the designated trustee, or otherwise), it may be appropriate for the executor to furnish a Schedule A to each beneficiary of such trust in lieu of furnishing it to the trustee of the trust.

ACTEC believes that permitting the executor to report to either the trustee or the beneficiaries of a trust directly will accomplish the intended goals of the proposed regulations in an efficient and effective manner. Conserving the financial resources and time of both the taxpayer and the IRS are important goals to consider in determining the best methods to provide the reporting required under section 6035.

<u>Situations Involving a Revocable Trust</u>. It is very common in estate planning for the trustee of a revocable trust to hold some, but not all, of what would be the decedent's assets on the date of death were they not held in such a trust. ACTEC believes it is unclear under the proposed regulations how the assets of a revocable trust that are held by the trustee on the date of death should be reported on a Schedule A and to whom the Schedule A should be provided. ACTEC believes the proposed regulations could be read as requiring that either:

(1) the executor file Form 8971 and Schedule(s) A reporting as transfers to the trustee all assets that were held by either the decedent or the trustee on the date of death, to the extent that those assets are includible in the decedent's gross estate for federal estate tax purposes; or

(2) the executor file Form 8971 and Schedule(s) A reporting as transfers to the trustee all assets held by the decedent on the date of death, and the executor report as distributions to the beneficiaries of the trust any assets held by the trustee on the date of death.

ACTEC believes that the final regulations should permit the executor to file Form 8971 and Schedule(s) A, reporting as transfers to the trustee, all assets that are held by either the decedent or the trustee on the date of death, to the extent includible in the decedent's gross estate for federal estate tax purposes. This approach is consistent with Revenue Ruling 85-13, 1985-1 C.B. 184, which treats the assets held by the trustee of a grantor trust as actually being held by the grantor, for all income tax purposes. A revocable trust is a grantor trust under section 676(a) and becomes a separate taxpayer only upon the grantor's death. Therefore, the trustee of the revocable trust after the grantor's death is deemed to have received the trust assets from the deceased grantor; it should be irrelevant whether or not those assets were previously titled in the name of the trustee or the deceased grantor. This same treatment should also be extended to assets held by the decedent under a "pay on death" or "transfer on death" designation in favor of a trustee. As in Example 1 above, ACTEC also recommends that the final regulations provide that the executor may instead give Schedule(s) A directly to the beneficiary(ies).

In the case of a "fully funded" revocable trust where there is no probate estate and no executor is appointed by a court, the trustee of such trust is considered the statutory executor pursuant to section 2203 and is required to file the estate tax return. Again, ACTEC believes that the final regulations should provide that the same options for reporting described above apply so that the trustee of such revocable trust may furnish any required Schedule A either to himself/herself/itself as trustee or may furnish Schedule(s) A directly to the beneficiary(ies).

If the IRS does not adopt the position that the executor may satisfy the reporting requirements by reporting to either the trustee or the trust beneficiaries as described above in the case of a pour-over will and revocable trust, then ACTEC requests that the final regulations clarify whether the assets pouring into the revocable trust should be reported by the executor as passing to the trust, or should instead be reported as passing to the beneficiaries of the trust. If the assets pouring into the revocable trust are required to be reported by the executor as passing to the trust, ACTEC believes that the final regulations should clarify that a beneficiary of the previously revocable trust is determined to be a "related transferee," without regard to the individual trustee's family or business relationship to the beneficiary. In these situations, ACTEC believes that the trustee should be deemed to have made any later distribution solely in a fiduciary capacity regardless of whether the recipient is related to the trustee. A contrary rule would create dramatically different filing requirements for trustees who are family members of the deceased and trustees who are independent trustees. ACTEC believes that such a distinction has no basis in the statute or legislative history and would significantly complicate the already difficult task of selecting a proper fiduciary.

Situations Involving an Irrevocable Trust. This same issue regarding to whom reporting is required arises in the context of an irrevocable trust the assets of which are includible in a decedent's gross estate (*e.g.*, under section 2036, 2037, 2038 or 2044). This would occur, for example, with an *inter vivos* QTIP trust at the death of the donee-spouse. It may be difficult for the executor to obtain the information about the beneficiaries and assets of an *inter vivos* QTIP trust with which to file a timely and complete Form 8971 and Schedule(s) A. ACTEC recommends that the final regulations permit the executor or trustee to report the trust assets includible in the deceased donee-spouse's gross estate as having been distributed from the estate to either the trustee or the beneficiaries of the *inter vivos* QTIP trust.

A similar analysis would apply with respect to other irrevocable trusts to the extent that they are includible in a decedent's gross estate under section 2036, such as grantor retained annuity trusts (GRATs) or qualified personal residence trusts (QPRTs) where the grantor dies during the reserved annuity or reserved use period of the trust. In addition, a similar issue arises in the case of an irrevocable trust the assets of which are includible in a decedent/powerholder's gross estate under section 2041. In such situations, ACTEC believes that the final regulations should state that the assets already held by the trustee are deemed to have been transferred by the executor to the extent such assets are includible in the decedent's gross estate, and that the executor may report those assets as distributions to either the trustee or the beneficiaries of the trust, as provided above.

9. <u>Proposed §1.6035-1(c)(3): Proposed Limits on Scope of Form 8971 and Schedule(s) A if the Beneficiary Is Not Determined</u>. Section 6035 requires that certain basis information be submitted to the IRS as required by regulation but in no event later than 30 days after the due date for filing or the actual filing date of the federal estate tax return. However, section 6035(b) expressly authorizes Treasury to prescribe such regulations as necessary to carry out the section. Proposed §1.6035-1(c)(3) and the Instructions provide that if an executor has not determined which beneficiary is to receive an item of property as of what would otherwise be the due date of the Form 8971 and Schedule(s) A, the executor must list on that beneficiary's Schedule A all items of property that could be used, in whole or in part, to fund that beneficiary's interest. The Preamble acknowledges that this requirement will result in duplicative reporting, but states that it will also allow a beneficiary to be able to comply with the basis consistency reporting requirement, if applicable. However, a beneficiary cannot have a basis consistency reporting requirement until assets are actually distributed from an estate to that beneficiary. Although some executors may be able to easily comply with this rule, it is more likely that executors of the larger estates to which this new reporting requirement applies will have difficulty complying with this provision.

ACTEC believes that the statutory timeframe, if applied as the proposed regulations would apply it, is essentially unworkable, requiring the executor to do what may be impracticable and without any corresponding tax policy enforcement benefit. In many situations, the identity of the beneficiary who will actually receive an asset will not be determined or even determinable within the statutory timeframe. ACTEC believes that the currently proposed approach to reporting may cause confusion for beneficiaries. Furnishing Schedule A to a beneficiary listing all items of property that could be used to fund the beneficiary's distribution, when the beneficiary will not, in fact, receive all of such assets (even when the listing states that the beneficiary's distribution will be funded in whole or in part with the listed assets), can result in a beneficiary's believing that he or she may be entitled to all of such assets. In fact, in an extended administration, many of the assets of an estate may be sold, so that the beneficiary will not receive any of the assets reported on the estate tax return. Schedule A does not provide a place for the executor to notify such a beneficiary that the assets reported on the Schedule as property in which the beneficiary has acquired an interest includes assets (and potentially a significant number of assets) that the beneficiary will not receive. Moreover, it is likely that the confusion will be increased by the portion of Schedule A titled "Notice to Beneficiaries" that states "[y]ou have received this schedule to inform you of the value of property *you received* from the estate of the decedent named above" (emphasis added).

In addition, requiring an executor to report in this manner may result in significant additional administrative time and expense being incurred on behalf of the estate. Requiring an executor to "guess" which assets could fund a beneficiary's interest could also increase the potential fiduciary liability of the executor. This concern will result in the executor spending a significant amount of time and resources to determine how to best report unfunded beneficiary interests. This provision may also have an effect on the actual administration of the estate, as the executor may determine that he or she has a fiduciary duty to reduce this administrative burden by liquidating or restructuring the assets of the estate to reduce or eliminate the burden of this onerous reporting requirement.

ACTEC acknowledges that creating a practical and workable solution to satisfy both the statutory requirements and the policy objectives of section 6035 is challenging. ACTEC applauds the IRS for identifying a method that will, in many cases, allow the executor to meet its reporting requirements on a timely basis. However, ACTEC believes that there is an additional, more practical solution to this reporting predicament.

Section 6035(a) requires the executor to furnish "to each person *acquiring* any interest in property included in the decedent's gross estate for Federal estate tax purposes a statement identifying the value of each interest in such property" (emphasis added). If only a portion or none of the assets are distributed in satisfaction of a beneficiary's interest in the decedent's estate prior to furnishing Form 8971 and Schedule A, then the specific interest in the property of the decedent's estate with respect to the undistributed assets *acquired* at that point in time is a general claim equal to the value of the assets allocable to the beneficiary. It may be many months or years before the executor determines with certainty the specific assets that will be distributed to specific beneficiaries, or before there is an actual distribution of assets to a beneficiary in satisfaction of his, her or its interest in the estate. ACTEC believes that, to be in compliance with the provisions of section 6035, in these situations, the executor should be required to identify on the Schedule A furnished to a beneficiary only the "value" as reported on the estate tax return with respect to the undistributed assets in the aggregate (or that beneficiary's share), without providing asset information at the time Schedule A is furnished. The executor should be required to furnish to each beneficiary only a Schedule A showing the dollar amount of that beneficiary's interest in the undistributed property of the estate as one item, rather than an asset-by-asset listing of the property of the estate that may or may not be received by that beneficiary. In these reporting situations, ACTEC respectfully requests that Schedule A include a section for the executor to indicate that some or all of the specific items of property in which the beneficiary will *acquire* an interest have not been determined as of the due date of Form 8971 and Schedule A. Furthermore, ACTEC recommends that when the executor later distributes assets to the beneficiary, the executor would be required, within 30 days of making the distribution, to file a supplemental Form 8971 and furnish Schedule A to the beneficiary providing the asset information and value of the property as shown on the return for any assets actually distributed to a beneficiary that were listed on the estate tax return. This subsequent reporting requirement would allow a beneficiary to be able to comply with the basis consistency reporting requirement, if applicable.

Following is an example of the application of the initial reporting by the executor as described in ACTEC's proposal:

> Decedent's Estate with a value of $10 million is allocated under her will as follows: an outright devise of House (reported with a value of $2 million on the estate tax return) to Beneficiary H, a formula bequest of $5 million to Trust A, and a residuary bequest of $3 million to Trust B. As of the date of the filing of the estate tax return, House has been distributed to Beneficiary H, but no other distributions have been made. Schedule A to Beneficiary H would include the $2 million value of House as reported on the estate tax return. Schedule A to Trustee of Trust A would include a description of the property of the estate in which it has acquired or will acquire an interest as "$5 million in cash or property (unfunded)." Schedule A to Trustee of Trust B would include a description of the property of the estate in which it has acquired an interest as "$3 million in cash or property (unfunded)." Within 30 days after assets are distributed to Trust A and Trust B, the executor would be required to file a supplemental Form 8971 and Schedule(s) A with the IRS and provide supplemental Schedule(s) A to the trustees of Trust A and Trust B for any assets distributed that were listed on the estate tax return.

ACTEC believes that the better and easier way to administer section 6035 is to permit Form 8971 and Schedule A be filed with the IRS, and Schedule A to be furnished to the beneficiary, within 30 days of the distribution of the property to the beneficiary. Whether the executor elects to report all assets that may be distributed to the beneficiary in the future or to delay reporting until an actual distribution occurs should not have any effect on the asset value information that the IRS ultimately receives. ACTEC acknowledges and appreciates that this could potentially be years after the estate tax return has been filed. However, the duty to file a supplemental Form 8971 and furnish supplemental Schedule(s) A under the method proposed by ACTEC is similar to the duty already contemplated in proposed §1.6035-1(e) and should create no higher risk of noncompliance. Form 8971 and Schedule A can provide for a box to be checked to notify the IRS that subsequent reporting will be made after actual distribution of assets. This will provide notice to the IRS that a supplemental Form 8971 and Schedule A will later be provided, ensuring that any required reporting can be tracked. Although the exact time of the filing of the supplemental Form 8971 and Schedule(s) A cannot be known, by either the executor or the IRS, there are existing laws that address the acceptable duration of an estate administration. One certain indicator of the closing of an estate that would alert the IRS that a supplemental Form 8971 and Schedule(s) A should be provided is an executor's filing of a final income tax return for an estate. The executor will be obligated as a fiduciary to comply with these subsequent reporting requirements. Within 30 days following the distribution to a beneficiary of assets that were reported on the estate tax return, the executor will be required to file a supplemental Form 8971 and Schedule A.

It is anticipated that in many situations allowing executors to delay reporting until actual distribution will reduce the administrative burden and conserve resources of both the estate and the IRS. However, in some instances, it may be more efficient for the executor to report the assets that are intended to be distributed to a beneficiary within the initial 30-day filing deadline and before the distribution is actually made.

Accordingly, ACTEC believes that the mandatory 30-day statutory timeframe should be limited to assets that are distributed before the filing date (or due date for filing) of the estate tax return, including assets that pass by reason of the decedent's death without action by the executor. In addition, ACTEC believes that with respect to assets that have not yet been distributed to a beneficiary the executor should have the choice of either (1) furnishing a Schedule A with a list of assets that may be distributed to such beneficiary or (2) furnishing a Schedule A with an initial valuation of the beneficiary's interest in the estate, with the requirement in that case that a supplemental Schedule A be furnished once assets of the estate that were initially included on the estate tax return are actually distributed to the beneficiary. In a challenging statute that cries out for interpretation, this approach would give the word "acquiring" as used in section 6035(a)(1) its customary meaning and would preserve the mandatory 30-day rule of section 6035(a)(3)(A)(i) and (ii) for such property and interests in property so acquired before the estate tax return is due or filed, thus "carry[ing] out" section 6035 within the meaning of section 6035(b).

10. Proposed §1.6035-1(c)(4): Beneficiaries That Cannot Be Located. Section 1.6035-1(c)(4) provides that an executor must use reasonable due diligence to identify and locate all beneficiaries and, if the executor is unable to identify and locate a beneficiary by the due date of the Form 8971, then the executor is required to report that on the Form 8971 and explain the efforts taken to locate the beneficiary. The proposed regulation further provides that, if the executor subsequently locates the beneficiary, the executor is required to furnish the beneficiary with a Schedule A and file a supplemental Form 8971 with the IRS within 30 days of locating the beneficiary. It also states that, if the executor is unable to locate a beneficiary and distributes the property to a different beneficiary who was not identified in the Form 8971 as the recipient of that property, the executor is required to file a supplemental Form 8971 with the IRS and furnish the successor beneficiary (and the IRS) with a Schedule A within 30 days after distributing the property.

The inability to find someone who is an "inheritor" is a relatively common occurrence, especially when the decedent dies intestate and "heirs at law" succeed to the property through the applicable intestate statute. A search for an inheritor also may arise when a "class" bequest is made, such as "to the descendants *per stirpes* of my late sister Joyce living at my death" and there is uncertainty as to which of the descendants of Joyce take. The executor (or other fiduciary) almost certainly will be under a duty under applicable state law to make a reasonable attempt to establish who these "takers" are and to locate them. *See generally* Beyer, "How to locate heirs and beneficiaries," (Aug. 29, 2008), available at http://lawprofessors.typepad.com/trusts_estates_prof/2008/08/how-to-locate-h.html.

ACTEC recommends that the final regulations provide that an executor will be treated as having exercised due diligence in identifying and locating beneficiaries if the executor follows a local custom, rule, or protocol to search for unknown and unlocated heirs. ACTEC believes that the specific steps an executor must take to be treated as exercising due diligence will be different for each estate (*e.g.*, using a genealogist or heir finder, DNA testing, litigation, or other methods), and thus it would not be appropriate to prescribe specific steps that every estate must take to locate an unknown or unlocated heir. ACTEC believes that an executor's duties under local law are sufficient for compliance with the regulatory direction that the executor must use reasonable due diligence to identify and locate all beneficiaries.

11. Proposed §1.6035-1(e): 30-Day Rule for Supplemental Filing. Proposed §1.6035-1(e) addresses the duty to file a supplemental Form 8971. Subsection (e)(4)(i)(A) provides that the due date shall be on or before 30 days after "[t]he final value within the meaning of §1.1014-10(c)(1) is determined." Proposed §1.1014-10(c)(1) provides that the *final value* of property reported on a return filed pursuant to section 6018 is its value as finally determined for purposes of the tax imposed by chapter 11. ACTEC commends Treasury and the IRS for acknowledging the varied circumstances under which a value may be finally determined. In order to more clearly identify the exact date on which that final value is determined, ACTEC respectfully requests two clarifications. In circumstances in which the value of an asset is determined by an agreement (as described in proposed §1.1014-10(c)(1)(iii)), ACTEC recommends that the date such valuation is considered final be defined as the date on which the taxpayer and the IRS have agreed upon and executed a Form 890 or similar binding agreement.

In addition, in situations in which the value of an asset is determined by a court (as described in proposed §1.1014-10(c)(1)(iv)), ACTEC recommends that additional guidance be provided with respect to determining when a court's determination is "final." ACTEC suggests clarifying "final" to mean the date when the time for appealing a court ruling, whether an order, judgment or decision, has expired. For cases decided by the U.S. Tax Court, the determination will be final on the day the time for appealing the decision (not necessarily the opinion) expires without an appeal having been taken. For cases decided by a federal district court, the determination will be final on the day the time for appealing the judgment expires without an appeal having been taken. Finally, if a case is appealed, the determination will be final on the day the appellate judgment has been entered and the time for appealing the judgment to the U.S. Supreme Court has expired without a petition for writ of certiorari having been filed.

12. Proposed §1.6035-1(f): Subsequent Transfers Reporting Rule. Proposed §1.6035-1(f) would impose new reporting requirements on recipients, *i.e.,* the beneficiaries who initially receive a Schedule A from the executor. If a recipient transfers to a related transferee property that previously was reported or is required to be reported on a Schedule A furnished to the recipient, then the recipient/transferor is required to file with the IRS, and furnish to the transferee, a supplemental Schedule A documenting the new ownership of this property (the "Subsequent Transfers Reporting Rule"). The Subsequent Transfers Reporting Rule applies only to a transaction in which the transferee's basis for federal income tax purposes is determined in whole or in part with reference to the transferor's basis.

If the subsequent transfer (such as an in-kind distribution to a trust beneficiary) occurs before federal estate tax values have been finally determined, the transferor must also provide the executor with a copy of the supplemental Schedule A filed with the IRS and furnished to the transferee reporting the new ownership of the property.

In essence, the Subsequent Transfers Reporting Rule creates a chain whereby whenever a beneficiary disposes of an asset in a lifetime transfer other than by sale to a related transferee the transferor/beneficiary is required to file supplemental Schedule(s) A with the IRS and provide the Schedule(s) A to the transferee beneficiary(ies).

The proposed regulation raises a number of issues and concerns discussed below. First, there is no statutory authority for the Subsequent Transfers Reporting Rule. Second, the rule has no termination date and thus applies to all subsequent transfers in perpetuity. Third, the application of the rule to irrevocable trusts is confusing because the Preamble and provisions of §1.6035-1(f) are inconsistent. Fourth, it is unclear how the Subsequent Transfers Reporting Rule applies in the case of a distribution from an interim administrative trust to the trust beneficiaries. Finally, it is unclear how the rule applies in a number of settings described below.

No Statutory Authority for Subsequent Transfers Reporting Rule. The Preamble makes clear that the "purpose of this reporting [Subsequent Transfers Reporting Rule] is to enable the IRS to monitor whether the basis claimed by an owner of the property is properly based on the final value of that property for estate tax purposes. Treasury and the IRS are concerned, however, that opportunities may exist in some circumstances for the recipient of such reporting to circumvent the purpose of the statute (for example, by making a gift of the property to a complex trust for the benefit of the transferor's family)."

Section 6035(a)(1) provides that the "[t]he *executor* of any estate required to file a return under section 6018(a) shall furnish to the Secretary and to each person acquiring any interest in property included in the decedent's gross estate for Federal estate tax purposes a statement…" (emphasis added). The proposed regulations attempt to impose a reporting obligation on the beneficiary of an estate following the reporting by the executor. There is no statutory authority for the Subsequent Transfers Reporting Rule. Whether or not the creation of a perpetual chain of title to aid the IRS in enforcement of section 1014(f) may be desirable as a matter of policy, it is not the policy Congress reflected in section 6035 when it limited the reporting requirement to an "executor," and, indeed, explicitly eliminated from the Administration's legislative proposal the statutory imposition of a similar reporting requirement on donors of gifts.

The Preamble states that the authority for the Subsequent Transfers Reporting Rule is section 6035(b)(2). The reference to (b)(2) is puzzling. Section 6035(b) provides "[t]he Secretary shall prescribe such regulations as necessary to carry out this section, including regulations relating to … (2) situations in which the surviving joint tenant or other recipient may have better information than the executor regarding the basis or fair market value of the property." Subsection (b)(2) addresses situations in which the executor does not have sufficient information to provide the information required by Form 8971 and Schedule(s) A. Such a situation is also described in section 6018(b) in which property passes directly to a beneficiary and the executor does not have sufficient information regarding the property or beneficiary to include such information on the federal estate tax return. Nothing in subsection (b)(2) grants the IRS the authority to require a beneficiary identified on the federal estate tax return filed by the executor to file a supplemental Schedule A when the beneficiary transfers property.

Rule Applies in Perpetuity. The Preamble states that the "Treasury Department and the IRS are concerned, however, that opportunities may exist in some circumstances for the recipient of such reporting to circumvent the purpose of the statute (for example, by making a gift of the property to a complex trust for the benefit of the transferor's family)." This concern is a legitimate concern, but the proposed regulations affect not only the original transferee/recipient but all future transferees unless the transferee receives the interest in a transfer subject to estate tax or income tax (where the basis is not determined in whole or in part by reference to that property). Proposed §1.6035-1(f) states that the Subsequent Transfers Reporting Rule "applies to the distribution or transfer of any other property the basis of which is determined in whole or in part by reference to that property." ACTEC believes that an example illustrating the scope of the rule is appropriate.

The rule is ambiguous as to whether it is intended to apply to all subsequent transfers in perpetuity or is intended to prevent an initial recipient from making lifetime transfers to related transferees solely for the purpose of avoiding the basis consistency rule. The Preamble implies that the purpose of the Subsequent Transfers Reporting Rule is the latter. Having the Subsequent Transfers Reporting Rule extend into perpetuity is unnecessary.

Definition of Related Transferee – Trusts. The Subsequent Transfers Reporting Rule applies to transfers to "related transferees," which is defined as (i) any member of the transferor's family as defined in section 2704(c)(2), (ii) any controlled entity (a corporation or any other entity in which the transferor and members of the transferor's family (as defined in section 2704(c)(2)), whether directly or indirectly, have control within the meaning of section 2701(b)(2)(A) or (B)), and (iii) any trust of which the transferor is a deemed owner for income tax purposes. The treatment of trusts in the proposed regulations is confusing, and ACTEC respectfully requests that it be clarified. Much of the confusion arises from the treatment of "any trust of which the transferor is a *deemed owner* for income tax purposes" (emphasis added) as a related transferee. The definition is inconsistent with the statement in the Preamble that notes that the rule is intended to preclude taxpayers from circumventing the purpose of section 6035 "…for example, by making a gift of the property to a *complex trust* for the benefit of the transferor's family..." (emphasis added).

Complex trusts and grantor trusts are income tax concepts that have completely different income tax treatment under Subchapter J of the Code. The final regulations should at least clarify whether the rule is limited in its application to grantor type trusts or is intended to apply to complex trusts, or to both. Further, it is possible for a trust to begin as a complex trust (or simple trust) and then become a grantor trust, or begin as a complex trust (or simple trust) and then become a grantor trust, and this can happen each year, or multiple times within one tax year. In addition, a grantor trust will automatically become a complex trust (or simple trust) upon the grantor's death. The IRS should clarify whether and how the rule is triggered if a trust converts from a complex trust (or simple trust) to a grantor trust, and whether and how the rule is triggered once a trust has converted from a complex trust (or simple trust) to a grantor trust.

In addition, a grantor trust may be revocable or irrevocable. The rule should not apply to transfers to revocable trusts, which are grantor trusts under section 676. For example, if a recipient transfers property to his or her revocable trust, the rule should not apply because the revocable trust is not a separate taxpayer for income tax purposes. However, the subsequent transfer of the same property to a related transferee of the original recipient should be covered by the rule as a transfer to a related transferee.

ACTEC believes that the proposed regulation does not accomplish the stated purpose of the Subsequent Transfers Reporting Rule of preventing taxpayers from circumventing section 6035 by "making a gift of the property to a *complex trust* for the benefit of the transferor's family" (emphasis added). In this regard the rule is not limited to trusts that have as their beneficiaries persons who are members of the transferor's family as defined in section 2704(c)(2). Also, as previously noted, the application of the rule to irrevocable trusts is confusing because the Preamble and provisions of §1.6035-1(f) are inconsistent. In particular the Preamble references complex trusts and the proposed regulation refers to grantor trusts. ACTEC also believes that the proposed regulations inadvertently omitted the word "not." The rule should logically apply to "any trust of which the transferor is *not* a deemed owner for income tax purposes" (emphasis added).

As stated above, ACTEC believes that the Subsequent Transfers Reporting Rule should not apply to grantor trusts. A grantor is required to report all items of income and deductions of a grantor trust on his or her individual income tax return. If the trust files a federal income tax return, it will typically include a statement that all items of income and deductions are being reported on the grantor's individual income tax return. Thus, in the case of a grantor trust that is the recipient/transferor, the grantor of the recipient/transferor would already have the needed basis information to report the gain on a subsequent sale by the trust on his or her individual income tax return making the application of the Subsequent Transfers Reporting Rule to grantor trusts redundant.

Other Issues Related to the Subsequent Transfers Reporting Rule. ACTEC believes that the final regulations should clarify the following areas.

Powers of Substitution. Whether the Subsequent Transfers Reporting Rule is applicable if a grantor exercises a "swap power" over a grantor trust (perhaps, although not necessarily, a power described in section 675(4)(C)), as to any assets transferred back to the grantor.

Powers of Appointment. Whether the Subsequent Transfers Reporting Rule is applicable to the assets held in a complex trust (or simple trust) and transferred by a beneficiary using a non-general power of appointment. Specifically, if the beneficiary of an irrevocable trust exercises a non-general power of appointment directing that assets that were previously subject to section 1014(f) and section 6035 be distributed in-kind to a named individual or trust (a carryover basis transaction), will the Subsequent Transfers Reporting Rule apply? If the rule is applicable, is the person responsible for the reporting the trustee of the underlying trust or the beneficiary who exercised the power of appointment?

The same problem arises with respect to in-kind distributions from a complex trust (or simple trust) by a Trustee in cases where a section 643(e) election is not made by the Trustee. In such cases will the Trustee have to comply with the Subsequent Transfers Reporting Rule?

Decanting. If a Trustee decants a trust, the final regulations (or separate decanting guidance that might be issued by the IRS) should address whether, or under what circumstances, the Subsequent Transfers Reporting Rule continues to apply to the decanted trust.

Clarification Requiring Reporting of Subsequent Transfers and Non-Reporting for Eventual Funding of Unfunded Bequests. There is ambiguity in the proposed regulations between the Subsequent Transfers Reporting Rule and the rule for unfunded bequests. The rule for unfunded bequests provides that once a beneficiary receives a Schedule A with all possible funding assets, a supplemental Schedule A is not required to be filed specifying the actual distribution of assets previously reported as being available. If the asset passes to a "related transferee," although no subsequent reporting may be needed under the unfunded bequests provisions, subsequent reporting may be needed under the Subsequent Transfers Reporting Rule. The interplay of the two rules should be clarified in the final regulations.

13. Proposed §1.6035-1(i): Supplemental Information to an Estate Tax Return Filed on or Before July 31, 2015. Clarification is respectfully requested regarding whether a Form 8971 is required to be filed when an executor filed an estate tax return before July 31, 2015, and files supplemental information to the estate tax return ("Supplemental 706 Information") subsequent to July 31, 2015. ACTEC believes the proposed regulations do not require the executor to file a Form 8971 in this situation. However, if a Form 8971 is required, ACTEC believes guidance is needed regarding (i) the assets that must be reported on the Form 8971, and (ii) the beneficiaries to whom the executor is required to furnish a Schedule A.

Filing Requirement for Form 8971. The proposed regulations appear, to ACTEC, to indicate that a Form 8971 is not required to be filed in this situation. Proposed §1.6035-1(i) states that the regulation "…will apply to property acquired from a decedent or by reason of the death of a decedent whose return required by section 6018 is filed after July 31, 2015." Regulation §20.6081-1(d) provides that a return as complete as possible must be filed by the extended due date. The return "…cannot be amended after the expiration of the extension period although supplemental information may subsequently be filed that may result in a finally determined tax different from the amount shown as the tax on the return." Under proposed §1.6035-1(i), the test for whether a Form 8971 is required is the filing date of the "return required by section 6018." The return required by section 6018 can only be the timely filed estate tax return, as set forth in §20.6081-1(d). In addition, because any Supplemental 706 Information subsequently provided cannot amend the return pursuant to §20.6081-1(d), the Supplemental 706 Information is not a return required by section 6018. If Supplemental 706 Information is filed in connection with an estate tax return that is first filed on or before July 31, 2015, then ACTEC believes that such a return is not described in proposed §1.6035-1(i) and no Form 8971 is required.

Contents of Form 8971 and Schedule(s) A (if required). If a Form 8971 and Schedule(s) A are required in this situation, guidance is respectfully requested regarding the information that must be included on the Form 8971, to which beneficiaries a Schedule A must be furnished, and the assets that must be include on Schedule(s) A.

ACTEC believes the most logical outcome is for any Schedule A in this situation to include only those assets with respect to which the Supplemental 706 Information reflects a change, such as after-discovered assets or assets with changed values. In a situation in which Supplemental 706 Information is filed to disclose one after-discovered asset, it would seem inequitable to subject every asset in the estate to the Form 8971 reporting requirements, even though the other assets were correctly reported on an estate tax return timely filed on a date when no Form 8971 requirements were in effect.

If the Schedule(s) A need only include the assets affected by the Supplemental 706 Information, ACTEC believes that additional guidance is necessary regarding which beneficiaries must receive a Schedule A. On this question, the proposed regulations may provide some guidance by analogy. When a supplemental Form 8971 is filed pursuant to the duty to supplement under proposed §1.6035-1(e), paragraph (e)(1) provides that "…the executor must file a supplemental Information Return with the IRS including all supplemental Statements and furnish a corresponding supplemental Statement to each affected beneficiary by the due date described in paragraph (e)(4) of this section." In other words, the proposed regulations require that only the particular beneficiaries "affected" by the supplemental Form 8971 must be provided with supplemental Schedule(s) A, not all beneficiaries. ACTEC believes the result should be the same if the Form 8971 is filed as a consequence of the filing of Supplemental 706 Information or a supplemental Form 8971 pursuant to proposed §1.6035-1(e). In both cases, it seems logical for only those beneficiaries who have or may have an interest in those particular assets to receive Schedule(s) A. Furnishing a Schedule A to any other beneficiaries would, in ACTEC's view, create confusion for those beneficiaries and burden the estate with additional expense.

14. Comments on and Suggested Revisions to Form 8971, Schedule A, and Instructions. ACTEC offers the following comments on Form 8971, Schedule A, and Instructions as recommendations of possible revisions that would aid executors in providing meaningful information to beneficiaries and allow executors to have better confidence in complying with the reporting requirements.

Due Date for Form 8971 and Schedule A. Section 6035(a)(3)(A) provides that each statement required to be furnished under section 6035(a)(1) or (a)(2) shall be furnished at such time as the Secretary may prescribe, but in no case at a time later than the earlier of (i) the date which is 30 days after the date on which the return under section 6018 was required to be filed (including extensions, if any) or (ii) the date which is 30 days after the date such return is filed. The Instructions further provide that if the first estate tax return is filed after its due date (including any extensions) and after July 2015, Form 8971 and Schedule(s) A are due 30 days after the date of the filing of the estate tax return. ACTEC requests clarification in the final regulations to confirm the Instructions by providing that if the first estate tax return is not timely filed, Form 8971 and Schedule(s) A are due 30 days after the first estate tax return is filed.

Date of Furnishing Schedule A. Form 8971 provides that the executor must indicate the date of service of Schedule A. In addition, the Instructions provide that "[t]he executor of the estate . . . must certify on Form 8971 the date on which the Schedule A was provided to each [of the][2] beneficiaries." ACTEC believes that the terminology used in Form 8971 and the Instructions is unclear. Accordingly, ACTEC requests that the Instructions be revised to clarify that date of mailing (or the date of sending by one of the other listed means), rather than the date of receipt, is the date to be used in determining if the executor timely provided

[2] Bracketed language is missing in Schedule A.

Schedule A to the beneficiary. If the date of receipt were required, it would become much more difficult for an executor to ever file Form 8971 on time. Likewise, ACTEC requests that Part II, Column D of Form 8971 be revised to read "Date Provided to Beneficiary" rather than "Date of Service."

"Notice to Beneficiaries" on Schedule A. The "Notice to Beneficiaries" at the bottom of Schedule A provides that Schedule A is being provided to inform the beneficiary of "the value of property you received from the estate. . . ." This statement will not be accurate in many cases and thus may be misleading to the beneficiary. Pursuant to section 6035, Schedule A is to be provided to each person acquiring an interest in property of the estate to identify the value of that interest as reported on the estate tax return. At the time of furnishing Schedule A to a beneficiary, no property may have been distributed to that beneficiary, and when property is distributed to a beneficiary, it may not be the property listed on Schedule A. ACTEC respectfully requests that any notice to beneficiaries included on Schedule A be revised to reflect the nature of the information to be reported pursuant to section 6035 and that the word "received" be dropped unless the regulations are changed to make "received" accurate.[3] Accordingly, ACTEC requests that the first sentence of the Notice to Beneficiaries on Schedule A be revised to read: "You have received this schedule to inform you of the value of the property described above, as reported on the estate tax return (or in the case of a supplemental schedule, as adjusted)."

Purpose of Form Statement. The Instructions provide that "[s]ome property received by a beneficiary may have a consistency requirement, meaning that the beneficiary must use the value reported on Schedule A as the beneficiary's initial basis [of][4] the property." This statement is not consistent with section 1014 or section 6035. Section 1014(f)(1)(B) provides that the basis of property shall not exceed the value of any property reported to a beneficiary on Schedule A. Section 6035 is a value-reporting requirement, not a basis-reporting requirement. ACTEC respectfully requests clarification in the final instructions for Form 8971 to accurately describe the scope of sections 1014 and 6035.

Identification of Number of Beneficiaries. Part II of Form 8971 asks "How many beneficiaries received (or are expected to receive) property from the estate?" Because of the exceptions to the reporting requirements set forth in proposed §1.6035-1(b), it is possible that there may be beneficiaries who receive property of the estate but to whom no reporting is required. ACTEC believes that this may cause confusion in the reporting to the IRS because the number of beneficiaries receiving assets from an estate may be different from the number of beneficiaries who are to receive Schedule(s) A. Clarification is needed if the answer to this question is to be based upon the number of beneficiaries who will receive assets from an estate or the number of beneficiaries who are to receive a Schedule A.

Requirement of Form 8971 if No Schedule A is Required. Because of the exceptions to the reporting requirements set forth in proposed §1.6035-1(b), it is possible that there may be no beneficiaries to whom a Schedule A is required to be provided. Clarification is

[3] See the discussion in Part 9 above.

[4] Bracketed language is missing in Instructions.

needed as to whether a Form 8971 is required if there are no beneficiaries to whom a Schedule A is required to be provided.

New Notice on Schedule A to Inform a Beneficiary of Transferee Reporting Requirements. Many times the executor will not owe fiduciary duties to beneficiaries to whom Schedule A needs to be provided. For example, executors typically do not owe fiduciary duties to beneficiaries whose only interest in a decedent's estate arises from their interests in assets held with the decedent as joint tenants with right of survivorship, and trusts includible in a decedent's gross estate pursuant to sections 2036, 2037 and 2038. The executor has no duty to inform these beneficiaries of their obligation for any future reporting that might arise because of the subsequent transfer of one of these assets pursuant to proposed §1.6035-1(f). If the Subsequent Transfers Reporting Rule remains in the final regulations, ACTEC recommends that the Schedule A and/or the instructions to Schedule A be modified to inform recipients of Schedule A of their obligations under the Subsequent Transfers Reporting Rule.

Reporting Partial Interests on Schedule A. A single asset may pass to more than one beneficiary so that each owns a partial or fractional interest in the asset. In other words, a single asset may be divided among two or more beneficiaries. Schedule A, Part 2, Column E is labeled "Estate Tax Value" and the instructions require the column to be completed with the value reported on the estate tax return. If a single asset passes to more than one beneficiary, it will lead to confusion if the entire value as reported on the estate tax return is reported in Part 2, Column E of each Schedule A. Clarification is needed that in this case a proportionate share of the estate tax value is to be reported to each beneficiary.

Following is an example of the reporting that would be made on Schedules A if more than one beneficiary will receive a portion of an asset:

> Decedent owned 100% of a closely held business, ABC Company, and his Will bequeaths the stock to X (60%), Y (25%), and Z (15%). The value of ABC Company reported on the Decedent's estate tax return is $15,000,000. X's Schedule A would describe the property as "60% of ABC Company" and report a value of $9,000,000, Y's Schedule A would describe the property as "25% of ABC Company" and report a value of $3,750,000", and Z's Schedule A would describe the property as "15% of ABC Company" and report a value of $2,250,000."

Instruction Regarding Tangible Personal Property. If the requests regarding reporting the value of a group of tangible personal property are adopted as described in the discussion of "Group Value of Tangible Personal Property and Multiple Beneficiaries" in Part 5.c above, ACTEC recommends that Schedule A, entitled "Notice to Beneficiaries," include an instruction that the beneficiary may allocate the group value among the assets included in the group reported on Schedule A on any reasonable basis. Any items of tangible personal property individually listed and valued on the estate tax return should also be individually listed on Schedule A.