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THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

Please Address Reply to:

November 30, 2017

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Desk Officer for Treasury
New Executive Office Building
Room 10235
Washington, DC 20503
Via email at OIRA_Submission@OMB.EOP.gov

Treasury PRA Clearance Officer
1750 Pennsylvania Ave NW, Suite 8142
Washington, DC 20220
Via email at PRA@treasury.gov

Re: Form 8971

Dear Ladies and Gentlemen:

Treasury Notice 82 Fed. Reg. 50733 (11/1/17), requested comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden regarding IRS Form 8971. The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit the attached comments regarding IRS Form 8971 which the Treasury released on December 18, 2015 and the instructions thereto which the Treasury released on January 6, 2016. ACTEC previously submitted comments regarding sections 6035 and 1014(f) of the Internal Revenue Code of 1986, as amended (the "Code"). The following comments are limited to matters that affect the Form 8971 and Schedule A thereto, and do not repeat the comments previously submitted by ACTEC regarding the proposed regulations to sections 6035 and 1014(f) except as they directly relate to the Form 8971 and Schedule A thereto.

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 Shapiro Kaufman, Chair of the Washington Affairs Committee at (202) 862-5062 or by email at bkaufman@capdale.com, or Deborah McKinnon, ACTEC Executive Director, at (202) 684-8455, or by email at domckinnon@actec.org.

Respectfully submitted,

Susan T. House, President

COMMENTS OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (ACTEC)

Regarding From 8971 and Instructions Thereto

Treasury Notice 82 Fed. Reg. 50733 (11/1/17), requested comments regarding the burden estimate, or any other aspect of the information collection, including suggestions for reducing the burden regarding IRS Form 8971. The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit the following comments regarding IRS Form 8971 and Schedule A thereto that the Treasury released on December 18, 2015 and revised in January 2016 (hereinafter referred to as "Form 8971" and "Schedule A", respectively), and the instructions thereto that the Treasury released on January 6, 2016 and revised in September 2016 (hereinafter referred to as "Instructions"). ACTEC previously submitted comments regarding sections 6035 and 1014(f) of the Internal Revenue Code.[1] The following comments are limited to matters that affect Form 8971 and Schedule A thereto, and do not repeat the comments previously submitted by ACTEC regarding the proposed regulations to sections 6035 and 1014(f) except as they directly relate to Form 8971 and Schedule A thereto.

1. 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.

[1] Unless otherwise stated, references herein to "section(s)" or to "Code" are to the Internal Revenue Code of 1986, as amended. 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).

However, ACTEC believes that it would be appropriate to expand these exceptions, and that such expansion would significantly reduce the reporting burden.

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 IRS 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 IRS should clarify that the currency of any country is considered cash.

iii. Life Insurance. Life insurance proceeds are payable in cash. The IRS 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 IRS should provide that such promissory notes and accounts receivable are cash for purposes of the Cash Exception.

v. Bonds that Mature. The IRS 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 IRS 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 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.

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.

De Minimis Rule. 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).

d. <u>Proposed §1.6035-1(b)(1)(iv): Sale Exception</u>. 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 to reduce the burden.

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. Requiring reporting in these situations is an unnecessary collection of information.

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 the IRS 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 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 to reduce the burden.

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

a. 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 to reduce the reporting burden.

> 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.

Example 2. 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.

Example 3. 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.

b. Situations Involving a Revocable Trust. 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 IRS 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 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 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).

c. <u>Situations Involving an Irrevocable Trust</u>. 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 IRS 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 to provide the flexibility needed to reduce the reporting burden.

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 IRS 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 to provide the flexibility needed to reduce the reporting burden.

3. <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 burdensome, 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 to 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 to reduce the reporting burden 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).

4. <u>Proposed §1.6035-1(f): Subsequent Transfers Reporting Rule</u>. 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. This rule creates an undue and excessive burden on taxpayers.

a. <u>No Statutory Authority for Subsequent Transfers Reporting Rule</u>. 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.

b. <u>Rule Applies in Perpetuity</u>. 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."

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 and unreasonably burdensome.

c. <u>Other Issues Related to the Subsequent Transfers Reporting Rule</u>. ACTEC believes that the IRS should clarify the following areas to ensure accurate information collection and to reduce the reporting burden.

<u>Powers of Substitution</u>. 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.

<u>Powers of Appointment</u>. 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?

<u>Decanting</u>. If a trustee decants a trust, the 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 by the IRS to ensure accurate information collection.

5. Comments on and Suggested Revisions to Form 8971, Schedule A, and Instructions. In addition to the comments about the due date of Form 8971 and Schedule(s) A in Part 3, 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 the IRS, reduce the reporting burden, and allow executors to have better confidence in complying with the reporting requirements.

a. Date of Furnishing Schedule A. Form 8971 provides that the executor must indicate the date a Schedule A was provided to each beneficiary. In addition, the Instructions provide that "[t]he executor of the estate . . . must certify on Form 8971 . . . the date on which Schedule A was provided to each beneficiary and should keep proof of mailing, proof of delivery, acknowledgment of receipt, or other information relevant for the estate's records." 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 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.

b. "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.[2] 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)."

[2] See the discussion in Part 3 above.

c. <u>Identification of Number of Beneficiaries</u>. 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.

d. <u>Requirement of Form 8971 if No Schedule A is Required</u>. 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 needed as to whether a Form 8971 is required if there are no beneficiaries to whom a Schedule A is required to be provided.

e. <u>New Notice on Schedule A to Inform a Beneficiary of Transferee Reporting Requirements</u>. 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 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.

f. <u>Instruction Regarding Tangible Personal Property</u>. In the previous comments submitted by ACTEC regarding the proposed regulations to sections 6035 and 1014(f), clarification was requested as to how to identify and allocate the value of tangible personal property items among the persons acquiring an interest in those items for which an appraisal is required under §20.2031-6(b) when those items are reported on the estate tax return as a group rather than as individual items, and the grouped items pass to more than one person (and not necessarily equally). As beneficiaries may disagree as to the value of their share of tangible personal property, it would be less burdensome for the executor to inform each beneficiary of that beneficiary's aggregate share of any "group value" with 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. If these requests regarding reporting the value of a group of tangible personal property are adopted, ACTEC recommends that Schedule A 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.