

## Client Alert



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## IRS Issues Proposed Regulations Regarding the "Consistent Basis Reporting Rules" for Property Acquired by the Decedent

On March 3, 2016, the Internal Revenue Service ("IRS") issued anxiously awaited proposed regulations addressing what are sometimes referred to as the "consistent basis reporting rules" for those who receive property from a decedent and their basis is determined under Code Section 1014(a). This alert provides an overview of the proposed regulations and highlights some of the notable issues. The alert follows the outline of the proposed regulations.

### Overview

On July 31, 2015, the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (the "Act") enacted new provisions requiring consistency between the basis of certain inherited property and the value of that property for US federal estate tax purposes. The purpose of the consistent basis reporting rules is to deal with the perceived abuse when a decedent's estate reports the value of property included in the gross estate as being discounted to generate a lower US federal estate tax, and the recipient of the property reports their basis in the same property as being higher pursuant to Code Section 1014(a) in an effort to reduce any US federal income tax on a later disposition of the property.

In general, a recipient of property from a decedent takes a basis equal to the fair market value of the property at the time of the decedent's death (i.e., stepped-up basis/stepped-down basis). Code Section 1014(f) now requires that a recipient's basis in certain property acquired from a decedent shall not exceed the value of the property as finally determined for US federal estate tax purposes, or if the final value has not been determined, then the value reported on the furnished statement required under Code Section 6035.

To implement the consistent basis requirement, a new reporting regime was created under Code Section 6035. The executor (as discussed further below) if required to file a US federal estate tax return (IRS Form 706 or 706-NA) is now further required to furnish to the IRS and to the person acquiring the property a statement identifying the value of the property received and other information as the Secretary may prescribe. US federal estate tax returns are required to be filed by: (1) the estates of US citizens and those domiciled in the US with gross estates exceeding the \$5.45 million (for 2016) US federal estate tax exemption, and (2) the estates of noncitizen nonresidents with US situs property exceeding the \$60,000 US federal estate tax exemption. On January 29, 2016, the IRS released the final version of IRS Form 8971 (*Information Regarding Beneficiaries Acquiring Property From a Decedent*) to serve as the required form to comply with the new consistent basis reporting rules under Code Section 6035.

The Act further instituted new accuracy-related penalty provisions under Code Section 6662(b)(8) for recipients who reported basis on a tax return that exceeds the basis determined under Code Section 1014(f) and such underpayment of tax is attributable to the reporting of an inconsistent estate basis. In addition, the failure to file IRS Form 8971 and furnish the required statement to the beneficiary will be subject to the penalties under Code Sections 6721 and 6722, respectively, which is generally \$250 per form or statement (but can accrue up to a maximum of \$3 million for an executor's intentional disregard of the reporting rules).

The consistent basis reporting rules were effective as of the date of the enactment of the Act applying to property with respect to which a US federal estate tax return is filed after July 31, 2015 resulting in the basis reporting statement to apply even if the decedent died before July 31, 2015. Just days before the first round of required statements were about to become due, the IRS issued Notice 2015-57 delaying the due date of the statements until February 29, 2016. This allowed the IRS time to develop the necessary IRS Form 8971 and to entertain comments from the public. Given the number of comments received by the public the IRS again delayed the reporting requirements until **March 31, 2016**. It is anticipated that the IRS will soon inform the public whether they will again postpone the first due date to file IRS Form 8971 for those US federal estate tax returns filed after July 31, 2015.

## Consistency of Basis with US Federal Estate Tax Return

The proposed regulations state that a recipient's *initial* basis under Code Section 1014(f) shall not exceed the final value as determined under #5 below. The recipient's initial basis will then be used when the recipient:

- reports a future taxable event to the IRS with respect to the property (e.g., depreciation);
- sells or exchanges the property in a transaction that results in the recognition of gain or loss for US federal income tax purposes; and
- enters into a transaction for which the basis of property received is determined in whole or in part by reference to the basis of the property acquired from the estate (e.g., like-kind exchange or involuntary conversion).

## Effect of Other Provisions of the Code that Govern Basis

### Subsequent basis adjustments

Under newly enacted Code Section 6662(k), an *inconsistent basis* arises if the basis of property claimed on a recipient's tax return exceeds its final value as determined under Code Section 1014(f). The proposed regulations acknowledge that a recipient's *initial basis* can be adjusted as a result of post-death events as permitted under other parts of the Code. Examples include:

- (i) gain recognized for US federal income tax purposes upon an in-kind distribution of the property from the decedent's estate or trust;
- (ii) post-death capital improvements to the property;
- (iii) depreciation or amortization; and

- (iv) post-death adjustments to the basis of an interest in a partnership or S corporation.

Post-death payments on recourse or non-recourse debt secured by the property, however, *do not* result in an adjustment to the property's basis.

### Permissible basis adjustments

The effect of such permitted adjustments will not result in any violation of:

- the property exceeding the final value as determined under #5 below for purposes of Code Section 1014(f); and
- the accuracy-related penalty under Code Section 6662(b)(8) as it relates solely to such permitted adjustments.

## Property That Increases US Federal Estate Liability

### General rule and application

Code Section 1014(f)(2) provides that the consistent basis rule only applies to property whose inclusion in the decedent's gross estate increased the US federal estate tax liability (reduced by credits allowable against the tax other than the credit for prepayment of tax). The proposed regulations generally provide that if *any* US federal estate tax liability is incurred, *all* of the property in the gross estate is deemed to increase the US federal estate tax liability and is subject to the consistent basis rule.

### Exclusions

However, the proposed regulations do provide circumstances where certain property will be excluded from the consistent basis rule because it does not increase the US federal estate tax liability:

- (i) all property reported on a US federal estate tax return if no US federal estate tax would actually be imposed due to allowable credits (e.g., the decedent's remaining unified credit);
- (ii) all property that qualifies for a charitable deduction or marital deduction;
- (iii) any tangible personal property with a total value of \$3,000 or less (for which an appraisal is *not* required for purposes of a US federal estate tax return).

## Final Value of Property Acquired From a Decedent

### Finality of US federal estate tax value

The proposed regulations reconfirm what will be considered the final value for purposes of Code Section 1014(f)(3) when a required US federal estate tax return is filed with the IRS:

- (i) the value reported on a US federal estate tax return and the period of limitations for assessment has expired without any adjustment or contesting by the IRS;
- (ii) the value determined or specified by the IRS once the periods of limitation for assessment and a claim for refund or credit of the tax have expired without any timely contest;

- (iii) the value determined by a settlement agreement that is final and binding on all parties; or
- (iv) the value determined by a court, once the court's determination is final.

### **No finality of US federal estate tax value**

In the case when no US federal estate tax return is filed but a statement is required to be furnished to the beneficiary under Code Section 6035, the final value will be the value reported on the statement. However, the proposed regulations do provide that if the value reported on the statement is subsequently re-determined under the above rules, then the recipient may no longer rely upon the value initially provided by the executor on such statement for the basis of the property. If the recipient uses such basis for any future taxable event and results in the reporting of an inconsistent basis as defined under Code Section 6662(k), then the recipient could be subject to the accuracy-related penalties under Code Section 6662(b)(8).

### **After-Discovered or Omitted Property**

For purposes of Code Section 1014(f), the proposed regulations address the basis of property that was discovered after the US federal estate tax return was prepared ("after-discovered property") or property that was not originally included on the US federal estate tax return ("omitted property"). The proposed regulations discuss three different scenarios: (i) reporting of the property prior to the expiration of the period of limitation on assessment; (ii) not reporting of the property prior to the expiration of the period of limitation on assessment; and (iii) when no US federal estate tax return was filed.

### **Amended US federal estate tax return**

In the first scenario, if the after-discovered or omitted property would have generated or increased the US federal estate tax liability if it had been reported on a US federal estate tax return, and the executor files or amends the previously filed US federal estate tax return, then the final value is determined as discussed above.

### **No amended US federal estate tax return or no US federal estate tax return ever filed**

If the period of limitation on assessment has passed and the executor is unable to file or amend the US federal estate tax return to include the after-discovered or omitted property, then the proposed regulations state that the basis or final value of *only* the after-discovered or omitted property is *zero*.

If no US federal estate tax return is filed, then the proposed regulations state that the final value of *all* property included in the decedent's gross estate is *zero* until the final value is determined as discussed earlier.

### **Definition of Executor**

It was unclear under the Act who would qualify as the "executor" for purposes of Code Sections 1014(f) and 6035. The proposed regulations have generally adopted the definition of executor as applicable for US federal estate tax purposes, which generally means the person appointed under US local law, or if no person is acting in such capacity, then such persons in actual or constructive possession of the decedent's property at the time of death. The proposed regulations expand on this to also include any beneficiaries who are required to file a US federal estate tax return under Code Section 6018(b).

## Requirement to Provide IRS Form 8971 and Schedule A Statement under Code Section 6035

### Information Return

As mentioned, IRS Form 8971, including its Schedule A, was released by the IRS in late January this year. The proposed regulations confirm that Form 8971 is the required *Information Return* to be filed by the executor to comply with Code Section 6035 if the executor is otherwise required to file a US federal estate tax return. Form 8971 will report the final value of property included in the decedent's gross estate, the recipient of that property, and other items required in the instructions to the Form.

### Statement(s)

The Schedule A to Form 8971 will serve as the *Statement* that the executor must also complete and provide a copy to each beneficiary who has (or will) acquire property from the decedent or by reason of the decedent's death. Schedule A will include the final value of the property received by that beneficiary.

## Circumstances Under Which No IRS Form 8971 is Required Under Code Section 6035

The proposed regulations clarify that IRS Form 8971 is only required to be completed for purposes of Code Section 6035 if the decedent's estate is required to file a US federal estate tax return. In other words, no reporting is required under Code Section 6035 if, for example, a US estate tax return is only filed to make a US federal generation-skipping transfer tax exemption allocation, a portability election or a protective US federal estate tax return filing. This is a welcome relief for taxpayers.

## Property to be Reported on IRS Form 8971 and Schedule A Statement

### General Rule

For purposes of Code Section 6035, the property required to be reported on IRS Form 8971 is all property included in the gross estate for US federal estate tax purposes (even if such property was excluded under the provisions of Code Section 1014(f) because it does not increase the US federal estate tax liability). For example, this includes:

- (i) any property whose basis is determined in whole or in part by reference to that property, such as resulting from a *like-kind exchange* or *involuntary conversion*;
- (ii) property—for a *deceased nonresident non-citizen*—that is subject to US federal estate tax; and
- (iii) the decedent's one-half of *community property*.

### Exceptions

The IRS clarified, most likely for practical reasons, that reporting is not required for:

- (i) cash (other than coins or paper bills with numismatic value);
- (ii) income in respect of a decedent;

- (iii) those items of tangible personal property with a total value of \$3,000 or less (for which an appraisal is *not* required for purposes of a US federal estate tax return); and
- (iv) 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 for US federal income tax purposes.

## Identification of Beneficiaries

### General rules

Code Section 6035(a) requires a statement to be furnished “to each person acquiring any interest in property included in the decedent’s gross estate.” The proposed regulations clarify that this requirement applies to any beneficiary (including one that is also an executor) who receives property that must be reported on IRS Form 8971 filed with the IRS.

*Examples* of beneficiaries include:

- (i) *Life tenant* (beneficiary of a life estate),
- (ii) *Remainderman* (beneficiary of a remainder interest) identified as if the life tenant were to die immediately after the decedent, and
- (iii) Beneficiary of a *contingent interest*, unless the contingency has occurred prior to the filing of the IRS Form 8971.
  - In case of a contingent beneficiary, if the contingency subsequently negates the inheritance of the beneficiary, the executor must file supplemental reporting to report the change of beneficiary at that time.
  - It appears that this contingent requirement would cause the executor to have continuing duties until the contingency occurs allowing determination of whether supplemental return and statements are needed. This can be the case even if the estate has closed under local law and the executor has been released of its obligations.

### If the estate beneficiary is not an individual

If the beneficiary of the estate is a business entity, trust, or another estate, the executor must furnish the statement to the business entity, the trustee, or the executor. The statement should *not* be provided to the beneficiaries of the trust or the other (recipient) estate or to the owners of the business entity.

### Duplicate reporting when estate beneficiary not determined

It is possible that by the due date of the US federal estate tax return the executor has not yet determined what property will be used to satisfy the interest of each beneficiary. The proposed regulations clarify that the executor must report on each beneficiary’s statement *all property* that the executor *could* use to satisfy the interest of that beneficiary. This approach results in the duplicate reporting of those assets on multiple statements, but each beneficiary will have been advised of the final value of each property that may be received by that beneficiary and, therefore, will be able to comply with the Code Section 6035 reporting requirements.

*Examples* when such multiple reporting would be required include when:

- tangible personal property is to be distributed among a group of beneficiaries as that group determines,
- the residuary estate is distributable to multiple beneficiaries, or
- multiple residuary trusts are to be funded.

Once the *exact* distribution has been determined, the executor *may*, but is not required to, file a supplemental IRS Form 8971 with the IRS and furnish supplemental Schedule As to the beneficiaries.

### Reporting when estate beneficiary not located

The executor must use reasonable due diligence to identify and locate all beneficiaries. If the executor is unable to locate a beneficiary by the due date, the executor must so report this on the IRS Form 8971 and explain the efforts the executor has taken to locate the beneficiary and to satisfy the obligation of reasonable due diligence.

If the executor subsequently locates the beneficiary, within *30 days* of locating the beneficiary the executor must furnish the beneficiary with that beneficiary's Schedule A statement and file a supplemental Form 8971 with the IRS attaching a copy of the beneficiary's Schedule A statement attached.

If the executor is unable to locate a beneficiary and distributes the property to a different beneficiary who was not originally identified on the IRS Form 8971 as the recipient of that property, within *30 days* after the property is distributed the executor must furnish the substitute beneficiary with that beneficiary's Schedule A statement and file a supplemental Form 8971 with the IRS attaching a copy of the substitute beneficiary's Schedule A statement.

## Due Date for IRS Form 8971 and Schedule A Statement

### General Due Dates

The executor is required to file IRS Form 8971 with the IRS, and is required to furnish each beneficiary with the Schedule A statement, on or before the earlier of the date that is 30 days after the due date of the US federal estate tax return (including extensions actually granted, if any), or the date that is 30 days after the date on which that return is filed with the IRS.

### Transitional relief

The proposed regulations provide a transition rule for any US federal estate tax return that was due on or before July 31, 2015, but is filed after that date. In this case, the due date for IRS Form 8971 and all Schedule A statements is 30 days after the date on which the US federal estate tax return is actually filed.

## Supplemental IRS Form 8971 and Schedule A Statements

### Requirement to supplement

As required under Code Section 6035(a)(3)(B), if an adjustment (change) is needed to the information required to be reported on IRS Form 8971 or Schedule A statement, the executor is required to file a supplemental IRS Form 8971 with the IRS including all supplemental Schedule A statements

and furnish a corresponding supplemental Schedule A statement to each affected beneficiary.

### Adjustments requiring to supplement

The duty to supplement applies to any change that causes the information—as reported on the IRS Form 8971 or any Schedule A statement—to be incorrect or incomplete. *Examples* include the following:

- discovery of property that should have been reported but was not reported on the US federal estate tax return;
- change in the property value pursuant to an examination or litigation;
- change in the identity of the beneficiary to whom the property is to be distributed (pursuant to a death, disclaimer, bankruptcy, or otherwise);  
or
- executor's disposition of property acquired from the decedent or as a result of the death of the decedent in a transaction, such as a like-kind exchange or involuntary conversion, in which the basis of new property is determined in whole or in part by reference to the disposed property.

### Adjustments not requiring supplement

In contrast, a supplemental IRS Form 8971 and Schedule A statements *may* be filed, but are not required to be filed:

- to correct an inconsequential error or omission; or
- to specify the actual distribution of assets previously reported as being available to satisfy the interests of multiple beneficiaries when previously not determined.

### Due date of supplemental reporting

The supplemental IRS Form 8971 must be filed and each supplemental Schedule A statement must be furnished on or before *30 days* after:

- (i) the final value of property is determined;
- (ii) the executor discovers that the information reported on the Form 8971 or Schedule A statement is incorrect or incomplete; or
- (iii) a supplemental US federal estate tax return is filed to report property not reported on a return filed previously; in this case, a copy of the supplemental Schedule A statement provided to each beneficiary of an interest in this property must be attached to the supplemental IRS Form 8971.

It is possible that one of the above three events occurs before or on the date property is distributed to a beneficiary from a *probate estate* or a *decedent's revocable trust*. In such a case, in respect of the supplemental IRS Form 8971 and supplemental Schedule A statement, the due date is *30 days* after the date the property is distributed to the beneficiary.

On the Schedule A statement, the executor may choose to furnish information to the beneficiary regarding changes to the basis of the reported property that occurred after the date of death but before or on the date of distribution. In



such a case, the information on the basis adjustment, which is not required by the regulations, must be shown separately from the final value required to be reported on the Schedule A statement.

## Subsequent Transfers

As part of its regulatory authority under Code Section 6035, the IRS has surprisingly provided in the proposed regulations that when a recipient of property who receives a Schedule A statement subsequently transfers property in certain transactions, such transferors will also have similar reporting requirements. Specifically, if the property is subsequently transferred to a “related transferee” in a transaction in which the related transferee's basis will be determined in whole or part with reference to the transferor's basis (e.g., gift transactions and like-kind exchanges), then the transferor will be required to provide the IRS and the related transferee a supplemental Statement documenting the new ownership of this property within 30 days after the date of transfer. This reporting requirement is imposed on each transferee in the chain of property ownership who makes a transfer of the property to a related transferee until the property has been sold or exchanged in a transaction resulting in gain or loss for US federal income tax purposes.

For purpose of this rule, a “related transferee” includes the individual's spouse, ancestor or descendant of such individual or of their spouse, siblings of the individual, and spouses of the siblings, spouses of the ancestors of the individual or of the ancestors of their spouse, spouses of the descendants of the individual or of the descendants of their spouse, controlled entities, and any trust which is deemed owned by the transferor.

Where a subsequent transfer is made before a final value of the asset is determined, the subsequent transferor must provide the executor with a copy of the supplemental Schedule A statement reporting the new ownership of the property. Upon the final value being determined, the executor will provide a supplemental Schedule A statement to the new transferee instead of to the subsequent transferor.

The subsequent transferor must provide the supplemental Schedule A statements to the IRS and the related transferee no later than 30 days after the subsequent transfer to the related transferee.

## Surviving Joint Tenants or other Recipients Under Code Section 6035(b)(2)

The IRS concluded that regulations were not necessary under Code Section 6035(b)(2) relating to situations where a surviving joint tenant or other recipient may have better information as to the basis or fair market value of the property received as a result of the decedent's death, as Code Section 6018(b) addresses these situations. Where the executor does not have the complete information as to any property that is part of the gross estate, pursuant to Code Section 6018(b) the executor must include the name of every person holding a legal or beneficial interest in such property. Any such person named in the US federal estate tax return, upon notice from the Secretary, is required to file a IRS Form 8971 as to this part of the property.

## Removal of Regulations Under former Code Section 6035

It is proposed to withdraw the foreign personal holding company regulations under repealed former Code Section 6035 with the exception of the

regulations that were revised April 1, 2015 which continue to apply to taxable years of a foreign corporation that begin on or before December 31, 2004.

## Request for new process

No regulations have been proposed to create a process to allow a beneficiary to challenge the value reported by the executor on the IRS Form 8971. These rights are governed by applicable state law.

## Conclusion

The proposed regulations did provide much needed guidance for how to operate under the consistent basis rules. However, the proposed regulations have included certain controversial provisions, especially those related to the “zero basis” rules and the rules requiring recipients of property to be subject to the same reporting rules if the property is subsequently transferred in certain “carry over” basis transactions. It is anticipated that these specific rules will attract several comments and possible changes before becoming final.

The “zero basis” could result in a recipient, who is not an executor, being penalized for an omission or failure by the executor which is out of their control, especially since the proposed regulations do not provide the recipient any means of challenging the basis reported on the Schedule A statement. Effectively this puts beneficiaries of estates on the hook for making sure the executor is following through with its obligations to the estate. Estate closing agreements may need to be modified to limit an executor's release and indemnification provisions to preserve any claims resulting in zero basis treatment as a result of the executor's inaction.

The proposed regulations do not address the situation if the recipient disposes of the property prior to the due date required for the executor to furnish a supplemental statement to the recipient for such re-determination of value. Presumably a recipient could argue reasonable cause in this instance, but clarity would be helpful.

The proposed regulations also bring into question the IRS's authority to impose the Schedule A statement reporting requirements on subsequent transferors who are neither executors or other persons required to file a US federal estate tax return.

Once officially published as final, the proposed regulations will apply to property acquired from, or by reason of the death of, a decedent whose US federal estate tax return is filed **after July 31, 2015**. Taxpayers may rely upon these proposed rules before the date of official publication adopting the rules as final.

Meanwhile, as of the date of this alert the first consistent reporting due date is still March 31, 2016. The failure to file a correct and complete IRS Form 8971 could result in penalty exposures. The instructions to IRS Form 8971 note that the failure to provide a beneficiary's tax identification number is *never* an inconsequential error or omission. In some cases it may be difficult to obtain such information, especially in relation to non-U.S. beneficiaries. The proposed regulations do not clarify these practical concerns.

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