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TACKLING ESTATE TAX RETURNS AND RELATED FORMS

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Lora is a founding partner of Davis Stephenson, PLLC. She focuses her practice on providing extensive estate planning services for individuals and multi-generational families of substantial wealth. Ms. Davis assists in implementing strategies that will preserve, protect, and transfer assets consistent with each client's customized plan. While working with clients to create comprehensive legacy plans, her focus is not limited to the tax planning aspects. She addresses family dynamics and core values, charitable legacy planning, and the emotional aspects of estate planning. Her experience includes preparing a wide variety of estate planning documents, handling issues involving the Internal Revenue Service, and assisting clients with charitable planning, probate matters, fiduciary litigation, the creation and administration of business entities, transfer tax planning and marital property issues. Prior to starting the firm, Ms. Davis was with a large international law firm in Dallas, Texas, and also served as clerk to the Hon. Robert C. McGuire, Chief Judge of the U.S. Bankruptcy Court, Dallas. Before entering the practice of law, Ms. Davis served as controller for a privately-held company and was a tax consultant with Ernst & Whinney in Oklahoma City. Ms. Davis is admitted to practice in Texas, is Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization, and is a licensed CPA in Oklahoma and Texas. She is a Fellow of the American College of Trust and Estate Counsel and is active in numerous professional organizations. She is a frequent speaker on estate planning topics. She has been recognized by her peers as one of the Best Lawyers in Dallas in the area of Trusts & Estates as published by *D Magazine*, by Thomson Reuters' *Super Lawyers Magazine* as a Texas Super Lawyer, by *Texas Monthly* as a Five Star Professional Estate Planning Attorney in Dallas, and in Best Lawyers in
America, Trusts and Estates.

Education & Accreditations

- Southern Methodist University Dedman School of Law (1998), J.D., *magna cum laude*
  - Order of the Coif
  - Golden Gavel Legal Honor Society
  - Phi Delta Phi Legal Honor Fraternity
- East Central University (1987), B.S. in Accounting, with Honors
- Certified Public Accountant (Oklahoma and Texas)
- State Bar of Texas
- Board Certified in Estate Planning and Probate Law, Texas Board of Legal Specialization
- Certified as an Accredited Estate Planner® (AEP®) by the National Association of Estate Planners & Councils
- Admitted to practice before the United States District Court Northern District of Texas

Professional Memberships & Designations

- American College of Trust and Estate Counsel, Fellow
  - Business Planning Committee, Member
  - Fiduciary Income Tax Committee, Member
- State Bar of Texas Tax Section, Member
  - Council Member
  - Estate and Gift Tax Committee, Chair 2014-2015
  - Course Director, Tax Law in a Day 2014 – present
  - Outstanding Council Member Award 2015
- State Bar of Texas Real Estate, Probate and Trust Law Section, Member
  - Council Member and Chair, Powers of Attorney and Advanced Directives Committee
  - Planning Committee of the Estate Planning and Probate Drafting Course 2012, 2014, 2015
  - Planning Committee of the Advanced Estate Planning and Probate Course 2016
  - Planning Committee of the Advanced Estate Planning Strategies Course 2014, 2016
- Dallas Bar Association, Member
  - Probate, Trusts and Estates Section, Treasurer and Council Member
  - Tax Section, Member
- Dallas Estate Planning Council, Member
  - Past President and Board of Governors Member
- Estate Planning Council of North Texas, Member
- American Bar Association, Tax Section
  - Estate & Gift Taxes Committee
  - Fiduciary Income Tax Committee
- American Bar Association, Real Property, Probate and Trust Section
  - Estate and Gift Tax Committee
  - Non-Tax Estate Planning Considerations Group
- Communities Foundation of Texas Advisory Council, Member
- Estate Planning Council of Southwestern Medical Foundation/UT Southwestern Medical Center, Advisory
  - Board Member
- Southern Methodist University Planned Giving Advisory Council, Member

Select Publications & Speeches

- "May (Shall) I Take Out Your Hems? Current Trends In The Drafting And Applications Of Trust Distribution Standards," State Bar of Texas 22nd Annual Advanced Estate Planning Strategies Course, Santa Fe, New Mexico, April 28, 2016
- "PSST – Portability: Something Special to Try," Dallas Bar Association, Probate, Trusts and Estates Section, Dallas, Texas, January 26, 2016
- Comments to US Department of Treasury and IRS regarding Basis Consistency Reporting, on behalf of ACTEC, Comment Committee Member, January 2016
- "PSST – Portability: Something Special to Try," Collin County Bar Association, Estate Planning & Probate Section, Plano, Texas, December 11, 2015
- Course Faculty for ALI Estate Planning for the Family Business Owner 2015, San Francisco, California, July 9-10, 2015
- "Skipping Your Way Through GST Tax Returns," Dallas Society of CPAs Convergence 2015, Dallas, Texas, May 8, 2015
- "Friends Don't Let Friends Leave Early – Avoiding Pitfalls in Implementing the Estate Plan," State Bar of Texas 21st Annual Advanced Estate Planning Strategies Course, Santa Fe, New Mexico, April 10, 2015
- *The Durable (Yet Delicate) Power of Attorney*, Dallas Bar Association Headnotes, December 1, 2014
- "Cloudy With a Chance of Disqualification — New Rules Rain Down on Type III Non-Functionally Integrated Supporting Organizations," Texas Society of Certified Public Accountants 2014 Nonprofit Organizations Conference, Dallas, Texas, May 19, 2014
- "GRRR (Gift Return Reporting Requirements) — Taming the Wild 709 Tiger," Dallas Society of CPAs Convergence 2014, Dallas, Texas, May 8, 2014
- "Recipes for Income and Estate Tax Planning in 2014," State Bar of Texas 20th Annual Advanced Estate Planning Strategies Course, Denver, Colorado, April 24, 2014
- Comments to US Department of Treasury and IRS regarding Net Investment Income Tax Regulation, on behalf of State Bar of Texas, Section of Taxation, February 2014
- "Portability—Boom or Bust For Your Bailiwick?," Intermediate Estate Planning and Probate, Houston, Texas, June 25, 2013
- Comments to US Department of Treasury and IRS regarding Form 706-GS(D), on behalf of State Bar of Texas, Section of Taxation, May 2013
- Comments to US Department of Treasury and IRS regarding Net Investment Income Tax Regulation, on behalf of State Bar of Texas, Section of Taxation, March 2013
- "Portability – Planning and Compliance Issues," Midland Odessa Business and Estate Council, Midland, Texas, May 14, 2013
- "Portability – Planning and Compliance Issues," State Bar of Texas 23rd Annual Estate Planning & Probate Drafting Course, Dallas, Texas, October 19, 2012
- "Beneficiary Defective Trusts – Drafting the Dream Trust," State Bar of Texas 36th Annual Advanced Estate Planning & Probate Course, San Antonio, Texas, June 28, 2012
- Comments to US Department of Treasury and IRS regarding Decanting, on behalf of Section of Taxation of the State Bar of Texas, May 2012
- "Caveat Grantor: Selecting a 'Defect' to Obtain Grantor Trust Status," State Bar of Texas 35th Annual Advanced Estate Planning & Probate Course, Fort Worth, Texas, June 9, 2011
- Suspension of Federal Estate and Generation-Skipping Transfer Taxes Now in Effect (Texas), Private Clients, Trusts & Estates Alert, February 2010
- "Income Taxation of Simple and Complex Trusts," American Bar Association Section of Taxation Meeting, Washington, D.C., May 9, 2009
- "Powers of Attorney (POAs): Fiduciary and Other Issues Regarding a Financial Power of Attorney," Texas Bankers Association, Texas Graduate Trust School, Dallas, Texas, July 25, 2008
- Uniform Principal and Income Act – A Multistate Survey of Enforcement, American Bar Association Section of Taxation, May 9, 2008
- "Grantor Trusts – The Basics," State Bar of Texas, Tax Law Section Webcast, March 6, 2008
- "Basics of Grantor Trusts," American Bar Association Section of Taxation and Section of Real Property, Trust and Estate Law Joint Meeting, Vancouver, British Columbia, September 28, 2007
- "Powers of Attorney and Fiduciary Duties," Texas Bankers Association, Texas Graduate Trust School, Dallas, Texas, July 20, 2007
- "Judicial Construction and Modification of Trusts: Practical Advice for the Client," Dallas Estate Planning Council, Dallas, Texas, May 17, 2007
- Survey of State Death Taxes, American Bar Association Section of Taxation, May 9, 2003
- "Before the Will: Planning for Incapacity or Illness," Abundant Life Series, Northway Christian Church, Dallas, Texas, October 16, 2002
- Fifth Circuit Tax Update, Fifth Circuit Reporter, Quarterly – November 1999 through May 2001
- Annual Survey of Texas Law: Taxation, SMU Law Review, 2000-2001

Community Service & Personal Interests

- Dallas Voluntary Attorney Program (DVAP) volunteer and Dallas Bar Association Ementor volunteer; Chi Omega Christmas Market Volunteer
- Married with two children and two dogs; enjoys snow skiing, water sports of any kind, travel, cooking and reading

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Legal Experience

Bill Pargaman has been a partner in the Austin law firm of Saunders, Norval, Pargaman & Atkins since July of 2012. He is certified as a specialist in Estate Planning and Probate Law by the Texas Board of Legal Specialization and is a Fellow in the American College of Trust and Estate Counsel. He is very active in the Real Estate, Probate and Trust Law Section of the State Bar of Texas, having served as REPTL's Chair for the 2015-2016 bar year, as chair of its Estate and Trust Legislative Affairs Committee for the 2009, 2011, and 2013 legislative sessions, and as a Council member and chair of REPTL's Trusts Committee from 2004 to 2008.

Bill's practice involves the preparation of wills, trusts and other estate planning documents, charitable planning, and estate administration and alternatives to administration. He advises clients on the organization and maintenance of business entities such as corporations, partnerships, and limited liability entities. He represents nonprofit entities with respect to issues involving charitable trusts and endowments. Additionally, he represents clients in contested litigation involving estates, trusts and beneficiaries, and tax issues.

Education

- Doctor of Jurisprudence, *with honors,* University of Texas School of Law, 1981, Order of the Coif, Chancellors
- Bachelor of Arts, Government, *with high honors,* University of Texas at Austin, 1978, Phi Beta Kappa

Professional Licenses

- Attorney at Law, Texas, 1981

Court Admissions

- United States Tax Court

Prior Experience

- Brown McCarroll, L.L.P. (now Husch Blackwell LLP), 1981 – 2012

Speeches and Publications

Mr. Pargaman has been a speaker, author, or course director at numerous seminars, including:

- State Bar of Texas (TexasBarCLE) – Advanced Estate Planning and Probate Course, Advanced Estate Planning Strategies Course, Estate Planning and Probate Drafting Course, Advanced Guardianship Law Course, Advanced Real Estate Law Course, Advanced Real Estate Drafting Course, Advanced Tax Law Course, State Bar College Summer School, State Bar Annual Meeting, Practice Skills for New Lawyers, Essentials for the General Practitioner, Miscellaneous Webcasts, and more
- Real Estate, Probate and Trust Law Section Annual Meeting
- University of Texas Estate Planning, Guardianship, and Elder Law Conference
- South Texas College of Law Wills and Probate Institute
- Estate Planning & Community Property Law Journal Seminar
- University of Houston Law Foundation General Practice Institute, and Wills and Probate Institute

- Austin Bar Association Estate Planning and Probate Section Annual Probate and Estate Planning Seminar
- Austin Bar Association and Austin Young Lawyers Association Legal Malpractice Seminar
- Dallas Bar Association Probate, Trusts & Estate Section
- Houston Bar Association Probate, Trusts & Estate Section
- Hidalgo County Bar Association Estate Planning and Probate Section
- Bell County Bench Bar Conference
- Midland College/Midland Memorial Foundation Annual Estate Planning Seminar
- Austin Chapter, Texas Society of Certified Public Accountants, Annual Tax Update
- Texas Bankers Association Advanced Trust Forum
- Texas Credit Union League Compliance, Audit & Human Resources Conference
- Estate Planning Councils in Austin, Amarillo, Corpus Christi, Lubbock, San Antonio, and Tyler
- Austin Association of Life Underwriters

Professional Memberships and Activities

- American College of Trust and Estate Counsel, Fellow
- State Bar of Texas
    - Real Estate, Probate and Trust Law Section, Member (Chair, 2015-2016)
        - Real Estate, Probate, and Trust Law Council, Member, 2004–2008
        - Estate and Trust Legislative Affairs Committee, Member, 2000–Present (Chair, 2008–2013)
        - Public Service Committee, Chair, 2013–2014
        - Trusts Committee, Member, 2000–2010 (Chair, 2004–2008)
        - Uniform Trust Code Study Project, Articles 7–9 & UPIA, Subcommittee Member, 2000–2003
    - Texas Board of Legal Specialization (Estate Planning and Probate Law), Examiner, 1995-1997
- Estate Planning Council of Central Texas, Member (President, 1991-1992)
- Austin Bar Association, Member
    - Estate Planning and Probate Section, Member (Chair, 1992-1993, Board Member, 1997-1999)

Honors

- Recipient, TexasBarCLE STANDING OVATION award, 2014
- Listed in The Best Lawyers in America®
- Listed in *Texas Super Lawyers* (Texas Monthly)
- Listed in The Best Lawyers in Austin (Austin Monthly)

Community Involvement

- St. Stephen's Episcopal School Professional Advisory Council, Past Member
- City of Austin, XERISCAPE Advisory Board, Past Member
- Volunteer Guardianship Program of Family Eldercare, Inc. of Austin, Past Member, Advisory Board

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I. PREPARING FOR GAME DAY.

"It's not the will to win, but the will to prepare to win that makes the difference." – Bear Bryant

A. Putting Together a Team.

Before any game, you need to prepare the team, and you need to know who will be on your team. By analogy, this applies to the preparation of estate tax returns and all of those related forms that the executor may need to file with the Internal Revenue Service ("IRS"). So, let's put together your team. Gather up the executor and your associate, your paralegal, and your administrative assistant. Recruit family members and business associates of your deceased client (the "Decedent") who may have relevant information to make your job easier. Don't forget to include the Decedent's other advisors, including his or her accountant, financial advisor, insurance agent, and other specialized advisors. Those other professionals can be key players on your team. And like most great teams, each person involved in the estate should understand his or her role, duties and responsibilities to ensure that the team wins. A "win" is having your properly prepared estate tax return and each of the related forms accepted by the IRS without challenge. So, get your game face on, and let's start planning a game day strategy.

B. The Game Plan -- Forms to File.

You have been asked by the Decedent's designated executor to help with the estate. The designated executor is not experienced in financial matters and needs a lot of coaching to get up to speed on what his or her duties include. A good orientation program will set out the game plan for this new team member. In order to do so, you will need to determine which IRS forms are required, which ones might be helpful to file even though not required, and which ones you do not have to file (and will not want to). The IRS has provided a checklist that is included in the Form 706 instructions, which is included as Exhibit A. The AICPA also has a checklist for estate tax returns. It is 33 pages! Following is a list of forms that is a good starting point for any estate. Please note that the most current versions of all IRS forms listed below can be found at the IRS website, https://www.irs.gov/forms-pubs. Also, the IRS website has a handy new online tool to access a form, see any recent developments relating to a form, find related forms and publications, and find the link to the location to make comments on a form. The web address to locate this information is:

www.irs.gov/form__________

with the form number placed where the blank is. If there is a dash in the form, omit the dash (e.g., the link for Form SS-4 is www.irs.gov/ss4. The only forms on the list below that don't have their own handy-dandy link are Form 4422 and Form 4808.

1. Form SS-4 – Application for Employer Identification Number
2. Form 56 – Notice Concerning Fiduciary Relationship
3. Form 843 – Claim for Refund and Request for Abatement
4. Form 706 – United States Estate (and Generation-Skipping Transfer) Tax Return
5. Form 706-A – United States Additional Estate Tax Return
6. Form 706-CE – Certificate of Payment of Foreign Death Tax
7. Form 706-NA – United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of nonresident not a citizen of the United States
8. Form 2848 – Power of Attorney and Declaration of Representative
9. Form 4422 – Application for Certificate Discharging Property Subject to Estate Tax Lien
10. Form 4506 – Request for Copy of Tax Return
11. Form 4506-T – Request for Transcript of Tax Return
12. Form 4506T-EZ – Short Form Request for Individual Tax Return Transcript
13. Form 4768 – Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes
14. Form 4808 – Credit for Pre-1977 Federal Gift Taxes Paid on Property Included in the Estate (Invisible Form)
15. Form 5495 – Request for Discharge From Personal Liability Under Internal Revenue Code § 2204 or 6905
16. Form 8821 – Tax Information Authorization
17. Form 8822 – Change of Address
18. Form 8822-B – Change of Address or Responsible Party – Business
19. Form 8855 – Election To Treat a Qualified Revocable Trust as Part of an Estate
20. Form 8971 and Schedule(s) A – Information Regarding Beneficiaries Acquiring Property From a Decedent

II. FORMS TO FILE BEFORE YOU FILE THE 706.

A. Form SS-4 – Application for Employer Identification Number.

This form is used to apply for an employer identification number ("EIN") for the estate of the decedent and any trusts created under the decedent's estate plan. An EIN will also need to be obtained for any trust treated as a grantor trust of the decedent that was reporting income under his or her social security number. In addition, if there is an election under Internal Revenue Code[1] § 645 to treat a revocable trust as part of the estate for income tax purposes, any electing revocable trust will need to obtain a new EIN.

The information that you need to prepare the SS-4 for an estate includes the name (line 1) and mailing address of the estate (lines 4 and 5), the name of the executor (line 3), the county in which the estate is located (line 6), the name and social security number of responsible party (line 7), and the social security number of the decedent (line 9a). We check "other" and include "Estate Administration" on line 10. The date of death is used as the starting date (line 11) and the closing month of the accounting year can be selected (line 12). If the decedent had employees that he or she was paying personally (instead of through an entity) and those employees will be retained for some period of time, it is important that the section relating to employees is properly completed (lines 13-15). The principal activity (line 16) and the principal merchandise or services (line 17) can both be described as "Estate Administration."

If you will be preparing the application for your client, you should complete the Third Party Designee ("TPD") section of the form with all of your contact information. Although most applications are now filed using the online application, you should still complete the print form prior to applying for an EIN on behalf of your client. Additionally, you may want to consider using a separate TPD Authorization form. This is because as a TPD who is completing the online application you are required to indicate on the online application, **under penalties of perjury**, that you are authorized to apply for the EIN on behalf of the taxpayer. The IRS online instructions provide that:

If a third party designee is completing the online application on behalf of the taxpayer, the taxpayer must authorize the third party to apply for and receive the EIN on his or her behalf, according to the process below:

1. The taxpayer must sign a completed Form SS-4 (Application for Employer Identification Number), including the third party designee section, prior to the third party making the online application. A copy of the signed Form SS-4 must be retained in the third party's files.
2. The taxpayer must read and sign a statement that he/she understands that he/she is authorizing the third party to apply for and receive the EIN on his or her behalf, and to answer questions about completion of the form. A copy of the signed statement must be retained in the third party's files.
3. The assigned EIN will be disclosed to the third party upon successful completion of the online application.
4. The taxpayer will receive a computer-generated notice from the IRS stating that the EIN was assigned.

At first blush, it may appear that the TPD section of the Form SS-4 is sufficient to satisfy these requirements. That section gives the taxpayer the ability to authorize the TPD to receive the EIN and answer any questions about the form. However, the second requirement above is not satisfied by this section of the form, as it requires the taxpayer to sign a statement indicating he or she is also authorizing the TPD to **apply for** the EIN. Sample language for a separate TPD Authorization Form, which tracks the required authorization, is:

> I am hereby authorizing [Attorney] of [Law Firm Name and Address], to apply for and receive an employer identification number for [Taxpayer] and to answer questions about the completion of the Form SS-4, Application for Taxpayer Identification Number.
>
> ______________________________
>
> [Signatory]
> [Title]
> [Date]

Our practice is to ask the client to sign a statement to this effect at the same time the client signs the fully prepared paper SS-4. Having the client review the completed SS-4 helps ensure that the information you have is correct. Having both of these documents signed and in your files ensures your compliance with the IRS rules.

The EIN Assistant page is located at https://sa.www4.irs.gov/modiein/individual/index.jsp. The online process is certainly the easiest method for obtaining an EIN, unless you are lucky enough to work

[1] Unless indicated to the contrary, each reference to the "Code" herein will be a reference to the Internal Revenue Code of 1986, as amended, each reference to a "§" will be a reference to a section of the Code and each reference to a "proposed regulation §," "Prop. Reg. §," regulation §," or "Reg. §" will be a reference to the proposed regulations or regulations, as the case may be, promulgated thereunder.

for a large organization that gets blocks of EINs to assign to clients. However, there are some limitations. There is no access to the system after hours or on the weekend. The current hours of operation for the online application are Monday through Friday, 7 a.m. to 10 p.m. Eastern Time. In addition, the questions on the online application do not completely mirror the SS-4. It will ask questions that are responsive to prior answers. For example, if you are applying for an EIN for a trust, the online application has a box to check if the trustee is making a 645 election. In addition, for an estate, it will not ask for a "responsible party" per se, but will ask for the social security number ("SSN") of both the executor and the decedent.

Unfortunately, not all estates can use the online system. If you are completing Form 706-NA for a nonresident alien (which seems to now be generally referred to as a nonresident "non-citizen" rather than an "alien"), and have a need for an EIN, you will not be able to use the online application, but you can call to receive the EIN. Any taxpayer can use the paper form and submit it by facsimile (generally received within 4 days) or by mail (generally received 4 weeks after submission). No matter what method is used, only one EIN can be provided per day per "responsible party." For estates, the responsible party for this purpose is the decedent.

B. Form 56 – Notice Concerning Fiduciary Relationship.

Section 6036 requires an executor to give notice of his or her qualification to the IRS. A similar requirement for anyone acting in a fiduciary role for another is found in § 6903. The filing of the estate tax return is sufficient to give the IRS notice for purposes of § 6036 and § 6903 that the fiduciary filing the return is treated as the executor and fiduciary of the decedent's estate.[2] Although there is no requirement for a separately filed form other than the 706, the IRS has created a permissive form for this purpose, Form 56.

Form 56 allows an individual or entity to notify the IRS of a fiduciary relationship. This form may be used by any court appointed executor of the estate, as well as any trustee of a revocable trust that holds a decedent's assets at his or her death. Although not required, the use of this form will allow the fiduciary to give notice to the IRS sooner that would otherwise occur, as the estate tax return is always filed after the fiduciary role is accepted. Providing this notice earlier could, in some cases, avoid any missteps with respect to IRS communications that could be neglected following a decedent's death. In estates with complicated family dynamics, it may be a good idea to file Form 56 instead of waiting until the Form 706 is filed to ensure that the executor receives communications from the IRS about tax issues relating to the decedent and his estate.

In order to complete this form, you will need the name of the taxpayer for whom the fiduciary is acting, that taxpayer's social security number (or identifying number) and address, along with the fiduciary's name and address. You must also designate what type of taxes, which forms and which years the fiduciary is responsible for. It is important to complete this form with care, as you will want to correctly set forth the fiduciary relationship so that the fiduciary liability is clearly identified. Carefully completing the form initially will be helpful in the later termination of the relationship. This form also provides for additional notices to be sent to a fiduciary that has a CAF number, so that if a fiduciary files a corresponding Form 2848 (Power of Attorney) to request notices, these two forms will be coordinated.

If there is more than one fiduciary, they each must file their own Form 56. In addition, two separate Forms 56 will need to be filed for each executor of a decedent. One form will be for the executor acting as a fiduciary for the deceased individual in filing his or her income tax return. On that Form 56, the name of the decedent will be entered as the person for whom the fiduciary is acting. The other Form 56 will be for the executor acting as a fiduciary of the estate of the decedent in filing the estate tax return. On that second Form 56, the name of the decedent's estate will be entered as the person for whom the fiduciary is acting. The instructions provide that both the decedent's social security number and the identification number of the estate should be included on this form. Each form is filed with the IRS center where the identified tax returns are required to be filed. Currently, all estate tax returns and gift (and generation-skipping transfer) tax returns are filed in the IRS center in Cincinnati. Individual income tax returns that are not filed electronically are filed in various IRS centers based on the taxpayer's state of residence. It is unclear which IRS center will be the appropriate center for filing this form in the case of the decedent's individual return, as there are different addresses for each taxpayer depending on whether a check will be included with the return. Because the centers designated to receive funds are specifically set up for that purpose, it may be best to file the form with the IRS center designated for returns without payment. However, it seems logical that either address would be acceptable. The form should be signed by the fiduciary in his or her capacity as "trustee" or "executor."

[2] Reg. §§ 20.6036-2 and 301.6036-1(c). *See also*, Estate of Jane H. Gudie v. Commissioner, 137 T.C. No. 13 (Nov. 30, 2011).

In addition, this form provides a method for giving notice to the IRS of a revocation or termination of the original notice of fiduciary relationship. In this section of the form, you can indicate if the relationship was partially or totally revoked or terminated. You can also provide the name and address of any new fiduciaries who may be taking over the fiduciary role. Doing so will not relieve the successor fiduciary from file his or her own form, but will relieve the resigning or terminating fiduciary from further responsibility with respect to the IRS. Once the estate has distributed the assets to the beneficiaries and it does not appear that there will be any further work to do with respect to the estate, the executor may want to file this form to alert the IRS to the identity of any successor fiduciaries. In some circumstances, the executor may want to wait to file this until he or she is certain that no other issues could arise. If liability is not a concern, an executor could never file the termination notice so that in the event anything does arise out of the blue from the IRS, those notices will continue to go to the executor.

C. Form 4506 - Request for Copy of Tax Return.

This form may be needed to obtain copies of gift tax returns that have been filed during a decedent's life that cannot otherwise be located. It will be important to determine if you need to obtain copies early, as the instructions to the form indicates that it may take up to 75 **business** days (roughly 4 months) for the IRS to process your request. It has also been rumored that, sometimes, even the IRS cannot locate a return. This may be why the IRS includes a "Tip" on the first page that encourages you to try to get a copy of your return from other sources such as your CPA before requesting a copy from them!

The form itself is fairly straight forward. It will be important to include the information with respect to the taxpayer as accurately as possible. For example, the name should be listed exactly as shown on the return (e.g., James Harbert Bond and not James Bond). The IRS advises in the instructions that if the current mailing address and address shown on the return are not the same, and if a Form 8822 (or Form 8822-B in the case of a business) has not been filed, then the taxpayer should file Form 8822 (or Form 8822-B, as the case may be). If different types of forms are needed, such as prior year gift tax returns and the deceased spouse's estate tax return, you will need to file a separate Form 4506 for each type of return requested. However, you can order up to 8 different years for the same type of return on one form. Keep in mind, however, that tax returns are not kept by the IRS forever. Generally, returns are only retained for 7 years from the filing date. Fortunately, estate tax returns (and reportedly the new Form 8971 and Schedule(s) discussed below) are retained for **75 years**!

The return can be sent to the taxpayer or the any third party that is designated on the form. The copies can also be certified, if requested on line 6 of the form. A request for a copy of a previously filed tax form is not free. The cost is $50 per return, which will be refunded to the taxpayer (or to the third party, if that is elected on line 9) if the IRS is unable to provide the return.

The person signing must generally be the taxpayer or a person authorized to request returns on behalf of the taxpayer. Under § 6103(e)(3), the tax returns of a decedent can be provided to the executor of the estate. A copy of letters testamentary will need to be attached to the Form 4506 to document the executor's authority. In addition, a representative designated under Form 2848 may also request a tax return on behalf of a decedent or an executor, but only if that authority is specifically granted on the Form 2848 (Power of Attorney that is discussed in more detail below) on line 5. The executed Form 2848 showing this power must be attached to the Form 4506. There is a specific check box that the signer must check right above the signature line. The form will be rejected if this box is not checked. In addition, the form may be rejected if all of the applicable lines are not completed.

D. Form 4506-T – Request for Transcript of Tax Return.

In lieu of requesting a full copy of a tax return, you may determine that requesting a transcript may be sufficient for your needs. A transcript may be helpful if you need information from an income tax return or entity return for the decedent. Requesting a transcript is much easier than requesting a full copy of a return. You can request a transcript online and either download the transcript immediately or have the transcript mailed to you within 5-10 days. In addition, you can also call the IRS at 800-908-9946 to request a transcript by phone. Alternatively, you can complete the paper form and file it with the IRS center listed in the instructions or by fax.

The information requested can vary. You can request a return transcript, which includes most line items that are listed on the trust. Note however, that the information you receive is the information as originally filed. If there has been an audit of the return, any information that changed in the audit will not be reflected in the transcript. An account transcript contains the financial information relating to the account, such as payments made, penalties assessed and the like. If all of this information is needed, you can request a "record of account," which will include the information in both the return transcript and the account transcript. You can also request a verification of nonfiling and information on W-2 and series 1099, 1098 and 5498 returns. As with the Form 4506, you can only request one type of form per application, but you can obtain up to 4 different years for the same type of return. In addition, there is no fee associated with this form or any request made online or by phone. The other requirements to completion of the paper form are very similar to the Form 4506.

It is worth noting that the IRS online "Get Transcript" site was hacked by criminals who were able to access confidential taxpayer information of over 700,000 taxpayer accounts in 2014 and 2015. The site was suspended for a period of time, and then relaunched with additional security features.

E. Form 4506T-EZ – Short Form Request for Individual Tax Return Transcript.

This form is similar to the other in the 4506 series, however, as the name implies, it is a simplified form that is used to obtain a 1040 series return only. You can obtain up to 4 different year's returns using this form. You can also use the IRS online "Get Transcript" site or the 800 number, as described above to obtain this information more quickly.

F. Form 4768 – Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes.

Of all of the forms on the "before you file the 706" list, this is likely the most familiar to all of us. As its name implies, this form is used to file for an automatic 6-month extension of time to file a Form 706, including Forms 706-A and 706-NA. It also serves as the payment voucher for any estimated taxes that are paid with the extension request. Furthermore, it is used to request an additional extension of time to file if the executor is out of the country and to request an extension of time to pay. A separate form must be used for each return that is being extended.

The general information required for the return includes the decedent's information (i.e., name, domicile, date of death and social security number) and the executor's information (i.e., name, address and daytime phone number). An attorney, accountant, enrolled agent or any other agent designated by the executor of the estate can apply for the extension. If this occurs, the name of the person filing the application should be included in Part 1 and the relevant box should be checked in the signature section of the form.

The most common use of the form is to apply for the initial automatic extension of time to file. The due date of the extension for Forms 706 and 706-NA is 9 months following the decedent's date of death. However, if the decedent died on May 31st, the due date for the extension is February 28th (or 29th in the case of a leap year), not March 3rd (or 2nd). The due date is measured in calendar months, not days. However, if the due date falls on a weekend or a legal holiday, the due date is the next business day. The due date for Form 706-A is 6 months after the taxable disposition or cessation of qualified use. If the extension request is not filed timely, you can still file a request for an extension of up to 6 months from the original due date of the return.[3] You must show good cause in order to receive this extension. Any late filed extension request should be accompanied by a statement explaining the reason for the failure to timely-file, including the reasons why a timely extension request was not filed, the reason it is impossible or impractical to file the estate tax return by the due date and why the IRS should grant you an extension.

Because the extension is automatic, the IRS will not return a file-stamped copy of the extension to you (even if you ask them nicely and provide a copy and a self-addressed, stamped envelope). If you want to verify that the extension was delivered, you should use certified mail or one of the authorized private delivery services (DHL, Fed Ex and UPS) that will confirm delivery. If payment is being made with the extension request, having a record of the cashed check will also confirm the receipt of the extension request.

Only an executor who is out of the country can request additional time to file after the initial 6 month extension period. If an additional extension of time to file is requested, the executor must provide a statement with the form that explains in detail why it is impossible or impractical to file the estate tax return by the first extended due date of the return. The IRS cautions that the executor should file this additional extension request with sufficient time remaining so that they can consider the application prior to extended due date. The regulations indicate that filing the form too close to the due date may indicate negligence and could result in a denial of the extension.[4]

On any request for additional time, whether for a late-filed request or an out of country executor, the IRS will only contact the applicant if the request is denied. So, in this case, no news really is good news! The instructions to Form 4768 indicate that if you have filed for extension but later determine that no estate tax return needs to be filed, you should write a letter stating this that also includes a copy of the estate's probate inventory and appraisement. This letter should be sent to the service center currently designated to receive extension applications. It is unclear if the IRS has

[3] Reg. § 20.6081-1(c).
[4] *Id*.

authority to request this addition information. If a probate inventory has been prepared, it should not require any additional effort to provide this to the Service Center to forestall any undesired communication from the IRS. If no probate inventory has been prepared because no assets were held in the probate estate, I would be inclined to note that fact on the letter to the IRS.

Of course, an extension of time to file does not extend the time to pay. Unless an extension of time to pay is granted by the IRS, the estimated amount due must accompany the extension request. If the estate cannot pay the estate tax that is due, the executor can request an extension of time to pay the tax under § 6161. Form 4768 is used to request this extension. Part III is the section of the form used for this purpose. The executor must include a detailed statement as to why the estate cannot pay the tax that is due.[5] Any extension requested cannot exceed 12 months, although successive extensions can be requested and granted for a period of up to 10 years in some circumstances. In any event, an extension of time to pay the tax will not relieve the estate from payment of interest on the unpaid amounts under § 6601. Unlike the extension of time to file, the IRS specifically requests that you file Form 4768 in duplicate so that they can complete Section V to indicate if they have approved or not approved the extension of time to pay the tax and return it to the executor.

G. Form 8822 – Change of Address.

This form is used to notify the IRS that an address has changed. This form should be used any time there is a change in the address of the estate from what was initially reported on the SS-4 application. A representative of the estate, including the accountant or attorney can file this on behalf of the executor, but will need to attach a valid power of attorney (Form 2848 or otherwise) to Form 8822 in order for it to be accepted by the IRS. While you are not required to use this form, if you have filed it and the IRS still sends information such as notices of deficiency to an old address, you will not be liable for any penalties or interest relating to the deficiency if you have not received notice. However, if you fail to notify the IRS of a change of address, penalty and interest will accrue on those communications, as the burden is on the taxpayer to notify the IRS of the proper mailing address.

[5] A detailed discussion of the process for applying for an extension of time to pay the estate tax is beyond the scope of this outline. See Louis A. Mezzullo, Business Succession Planning, State Bar of Texas Estate Planning and Probate Course, June 27-29, 2012, for an excellent discussion of these rules.

H. Form 8822-B – Change of Address or Responsible Party – Business.

This form is similar, but not the same as the Form 8822. Although this form is specifically designed for use by businesses, it can apply to estates in several ways. First, if the decedent had any businesses of which he or she was the "responsible party" for income tax purposes, a separate form needs to be completed to identify the new responsible party for each of those businesses. If the decedent had any household employees, this return should be completed as well, identifying the employer (whether the decedent individually or a separate business). Additionally, if the decedent was serving as trustee of any trusts, this form should be completed with respect to each such trust.

Recent changes to regulation § 301.6109-1(d)(2)(ii) require that persons who have EINs must give updated application information as the IRS may require. By use of Form 8822-B, the IRS now requires businesses with EINs (which includes businesses of a decedent and trusts of which the decedent was serving as trustee) to update the name and SSN, EIN, taxpayer identification number ("TIN") or individual TIN (an "ITIN," which is provided to individuals who are not eligible to receive a SSN) of the responsible party. Although the use of this form for this purpose is "mandatory," there is no penalty for failing to do so. However, as the instruction point out, if there is any sort of IRS notice that is not received because it is not sent to the correct party, there will be no relief from penalties and interest that will accrue on the unheeded notices. Accordingly, you may want to consider adding this form to your estate administration checklist as a best practice.

I. Form 8855 – Election To Treat a Qualified Revocable Trust as Part of an Estate.

This form is used to make the election under § 645 to treat a revocable trust as part of an estate for income tax purposes. This election is often made to permit the estate and the revocable trust to file a joint return. It also provides an opportunity for the combined estate/trust(s) to file on a fiscal year rather than a calendar year.

The election is made by the executor of the estate using Form 8855. The executor must complete and sign the first page of the return, and each trustee of an electing trust must complete and sign page 2. Prior to completing the form, each trustee of an electing qualified revocable trust must obtain a new EIN. If no executor has been appointed, the trustee of the qualifying revocable trust can make the election. The election must be made by the due date (including extension) of the form 1041 for the first tax year of the estate (or the filing trust, of no executor is appointed). If the election is made by a trustee and an executor is later appointed, an amended election must be made within 90 days after the appointment of the executor. The amended election is made by having the newly-appointed executor file a new Form 8855 (with AMENDED ELECTION" written on the top. If the amendment is not filed timely, the election period will be deemed to have terminated the day before the executor was elected. Once an election is made, it cannot be revoked.

III. THE 706 – UNITED STATES ESTATE (AND GENERATION-SKIPPING TRANSFER) TAX RETURN AND FORM 706-NA – UNITED STATES ESTATE (AND GENERATION-SKIPPING TRANSFER) TAX RETURN, ESTATE OF NONRESIDENT NOT A CITIZEN OF THE UNITED STATES.

While preparing this outline, I came to the realization that the title should have actually been: *56-706-5495-8971-HUT! Tackling Estate Tax Return~~s~~ ~~and~~ Related Forms*. This is largely because there are so many related forms that are rarely discussed in other outlines! A complete compilation and review of those forms was always the intended focus of this presentation. And, of course, the new Form 8971 and Schedule(s) A are the MVPs of this outline, merely for the sheer "yardage" or number of pages needed to explain the new forms and the open issues relating to them. Thus, the content included in this version of the outline relating to the actual preparation of the Form 706 and Form 706-NA will be limited to a list of helpful resources for preparing those returns. The authors listed below have done a top notch job of providing the information needed to file a complete and accurate estate tax return, and more. I doubt that I could add anything to their efforts. My only tip would be to review the instruction to Form 706 every year, as changes are generally made to them on an annual basis. There is a "What's New" section on the first page that alerts you major developments and changes in the law. However, other small changes are often added along the way that are not highlighted in this section.

A. Form 706.

For a great analysis of the best practices relating to preparing returns, see Lee C. Schwemer, *The Good, the Bad and the Ugly – What to Remember When Preparing Forms 706 and 709*, presented at the State Bar of Texas Advanced Estate Planning Strategies Course, April 29, 2016. For two outstanding articles on the basics of estate tax return preparation, see Harry W. Wolff, III, *Completing the Form 706 Puzzle: An Overview of the United States Estate (and Generation-Skipping Transfer) Tax Return*, State Bar of Texas Intermediate Estate Planning & Probate Course, June 9, 2014, and Tina R. Green and Nikki L. Laing, *Gift and Estate Tax Returns: Nuts, Bolts, & Some Monkey Wrenches, Too*, State Bar of Texas Tax Law 101, August 15, 2012.

B. Form 706-NA.

All U.S. residents, regardless of citizenship, are required to file Form 706. Noncitizen, non-residents who have a gross estate located in the U.S. that exceeds $60,000 are required to file Form 706-NA. Although there may be no estate tax due because of certain death tax treaties with other countries, there will still be a reporting requirement if the gross estate exceeds the filing threshold.

IV. FORMS TO FILE WITH THE 706.

A. Form 4808 – Credit for Pre-1977 Federal Gift Taxes Paid on Property Included in the Estate (Invisible Form).

Just kidding! Although the instructions to Form 706 include a reference to Form 4808, which used to be a form used to compute the federal gift tax credit for certain pre-1977 federal gift taxes that are included in the gross estate, I have not been able to locate this form. The instructions, however, do provide the formula for calculating the credit allowed under § 2012. If any of you have a copy of this form, please let me know!

B. Form 2848 – Power of Attorney and Declaration of Representative.

This form should be prepared for every estate for which you are preparing the estate tax return. This power of attorney will allow you to speak with the IRS regarding any matters authorized in the form. Accordingly, you should complete this form in a manner that will allow you to not only discuss the estate tax return, but any previously-filed gift tax returns of the taxpayer. The form allows you to designate no more than two representatives to receive notices and communications. This limitation will apply not only to attorneys-in-fact listed on this form, but also to any appointees indicated on Form 8821, discussed below. It will be important to coordinate the filing of these forms with the CPA for the estate to ensure that the notices are going to the right advisors.

The form allows the taxpayer to authorize additional acts, such as giving authority to disclose information to third parties or to sign a return. It also allows the taxpayer to specifically limit that acts that can be performed. The execution of a subsequent power of attorney will revoke all previously filed powers of attorney on the same matters and tax years unless the old power of attorney is attached to the new form and the election to keep the old power of attorney in place is affirmatively made on the form (line 6). The taxpayer must sign and date the return. The designated attorney(s)-in-fact must also sign and date the return, providing their professional credentials and licensing jurisdiction in Part II of the form.

The instructions indicate that the taxpayer is not required to use this exact form and that a substitute form that meets the requirements of a power of attorney can be used instead. This power can be attached to a Form 2848 that is signed by the designated attorney(s)-in-fact. The taxpayer can revoke a power of attorney by either (i) preparing a new power for the same returns and years or (ii) writing "REVOKE" at the top of the first page of the form, with a signature and date below this annotation, and filing it with the IRS. A representative can withdraw from representation by writing "WITHDRAW' at the top of the first page of the form, with a signature and date below this annotation, and filing it with the IRS. If either the taxpayer or representative want to revoke or withdraw but he or she does not have the form, a letter can be prepared to send to the IRS with the relevant information to do so. Generally, this includes the relevant names, addresses, tax periods and forms.

Although the IRS will more readily rely on copies of forms, a best practice will be to get at least 2 original Form 2848s signed by the executor. One will need to be filed with the estate tax return. Having a spare original in your files could come in handy.

C. Form 5495 – Request for Discharge From Personal Liability Under Internal Revenue Code § 2204 or 6905.

This form allows the executor of an estate or a trustee of a decedent's trust to request a discharge from personal liability for certain taxes. An executor or a trustee may request a discharge from personal liability for the decedent's estate taxes under Code § 2204 or for the decedent's income and gift taxes under Code § 6905. The executor will be discharged from personal liability for any tax deficiency due 9 months or more after the request for discharge has been received by the IRS, or the earlier payment of any amount determined by the IRS to be owed. The same rules apply to a trustee, except that the time limit is reduced from 9 months to 6. The IRS may require a bond as a condition for discharge in certain instances in which the date for payment of the estate tax has been extended

Form 5495 can be filed with the estate tax return if discharge of liability if sought for the estate tax. If it is not filed with the estate tax return, then it may be filed at any time during the 3-year period following the date the estate tax return is filed. However, for any other types of taxes, the form should not be filed until after the tax returns are filed for which discharge from liability is requested. If an estate tax return is filed, all forms are filed in the same office in which the estate tax return was filed. Otherwise, the form will need to be filed in the service center in which the return was actually filed. If the form is not filed with the estate tax return, a copy of a portion of the return as filed will need to be filed with Form 5495. For other types of taxes, the returns must be attached to the request. A trustee must also attach a copy of the trust agreement and a list of the assets transferred by the decedent to the trust.

D. Form 8821 – Tax Information Authorization.

This form is similar to the Form 2848 power of attorney, but different. This form merely allows the designated appointee to receive information with respect to specified tax matters. As with the power of attorney, the execution of a subsequent Form 8821 will revoke all previously filed tax information authorization forms on the same matters and tax years unless the old form is attached to the new form and the election to keep the form in place is affirmatively made on the new form (line 6). The taxpayer must sign and date the return. This form may be useful for professionals who need to be advised regarding the status of various tax matters, but who do not want the responsibility for discussing matters with the IRS. For example, if the attorney is preparing the estate tax return, he or she will want to have a Form 2848 in place. However, the decedent's CPA may also want to be apprised of the status of various filings. A nice feature of Form 8821 is that you can designate not only an individual, but a corporation, firm or any other organization as your appointee. This means that the decedent's CPA firm can be designated on this form rather than just one individual. If this is not a form you are currently using, you may want to consider it as a good way to keep other client team members informed. However, keep in mind that the IRS will only send notices to 2 designees, so you will want to save one of those slots for the designated attorney-in-fact under the power of attorney.

V. FORMS TO FILE AFTER FILING THE 706.

A. Form 706-A – United States Additional Estate Tax Return.

This form is used to report any dispositions or cessations of qualified use of property that previously qualified for special use valuation. This recapture of tax savings is imposed on property that was valued at its value in actual use rather than at its higher, fair market value. This form is not filed by the executor. It is filed by the heir who originally qualified for the special use treatment. A separate form must be filed by each heir, and the tax is computed separately for each as to the portion of the property that was disposed of or is no longer in qualified use. For a recent article that discussed the complex rules surrounding special use valuation, see David J. Dietrich, *Estate Planning with Agricultural Assets: Achieving Liquidity, legacy and Flexibility*, ABA RPTE 2014, http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/step/2014/materials/step_2014_agricultural_estate_planning_for_nyc_2014.authcheckdam.pdf.

B. Form 706-CE – Certificate of Payment of Foreign Death Tax.

This form is used to claim a credit for foreign death taxes paid by a decedent. For an excellent discussion of the steps required to file for foreign death tax credits, see Brandon A.S. Ross, *Practical Pointers to Obtain the U.S. Foreign Death Tax Credit*, Probate and Property, Volume 28, Number 3 (May/June 2014).

C. Form 843 – Claim for Refund and Request for Abatement.

An executor of an estate can use this form to request a refund (but not an abatement) of estate taxes. Protective claims for a refund are sometimes filed by executors for unmatured claims and possible post-death adjustments to deductible items. In most cases, if the estate intends to file a protective claim for refund, it will do so by filing a Schedule PC with the originally filed estate tax return. However, if the Schedule PC is not filed at that time, Form 843 is used to later file a protective claim on behalf of the estate in lieu of the Schedule PC.

This form can also be used to request an abatement or refund of interest if the interest was caused by IRS error or delays. Generally, if the IRS fails to perform a managerial or ministerial act that result in a delay that causes the interest to accrue, the estate may be able to request a refund of that interest using this form.

D. Form 4422 – Application for Certificate Discharging Property Subject to Estate Tax Lien.

The IRS may apply liens to property of a decedent to secure the payment of estate taxes. If this occurs, and the taxes are later satisfied from other assets, this form is used by the executor to secure a release of the lien from the remaining assets of the estate. For more information and an interesting analysis of the issues surrounding estate tax liens, see the outstanding outline by Steven B. Gorin, *Three Recent Developments in Estate Tax Lines – How "Secret" Liens on Real Estate (and Other Assets) Must Be Considered*, at http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2013/6_december/rp_gorin.authcheckdam.pdf.

E. Form 8971 and Schedule(s) A.

When football training camps were just getting started, Congress was diligently seeking funding sources to cover the expenditures in H.R.3236, the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (P.L. 114-41) (the "Act"). Flipping through the Administration's prior year versions of their tax policy play book, also known as the "Greenbook" or the "General Explanation of the Administration's Fiscal Year Revenue Proposals," you may have noticed that a provision relating to requiring consistency in value for transfer and income tax purposes has been included ever since the fiscal year 2010 Greenbook (published May 11, 2009). This initial proposal included a basis consistency requirement not only for estate beneficiaries, but also for recipients of lifetime gifts. For the years 2010-2019, the proposed revenue from closing this loophole was projected to be $1.870 Billion. In the following years, this estimate increased to $2.103 Billion (for 2011-2020), $2.953 Billion (for 2012-2021), $2.014 Billion (for 2013-2022), $1.896 Billion (for 2014-2023), $2.501 Billion (for 2015-2024), and finally, an astounding $3.237 Billion (for 2016-2025). The 2017 Greenbook, while giving a nod to the new law, points out that there is still more money to be found and recommends broadening the scope of the basis consistency requirement so that property qualifying for the estate tax marital deduction (in estates that exceed the filing threshold, which is $5,450,000 for 2016) and property transferred by gift (if the gift is required to be reported on a federal gift tax return) would be subject to these rules. The additional revenue projected for this broadening of the scope of the new law to include marital and lifetime gifts for 2017-2026 is $1.693 Billion. Doing some simple math, and assuming that marital gifts were not excluded in the prior estimates, it looks like we could get an additional extension of the basis consistency reporting requirements if there is some upcoming legislation that needs about $1.544 Billion in revenue.

The Act was signed into law on July 31, 2015 and the basis consistency requirements are applicable "to property with respect to which an estate tax return is filed after [July 31, 2015]".[6] Two new provisions, §§ 1014(f) and 6035, were added to implement the new basis consistency rules for certain estates. Section 1014(f) provides the basis consistency rule. The general rule under this new section provides that the initial basis of property acquired from a decedent cannot exceed the value as finally determined for estate tax purposes, or if not finally determined, then the value reported to the recipient on Schedule A to Form 8971. However, this general rule only applies to assets that result in an

[6] H.R. 3236, § 2004(d).

increase in estate tax. Thus, assets that qualify for the marital and charitable deduction are not subject to the basis consistency rules of § 1014(f).[7] Section 6035 sets forth the reporting requirements that the executor of the estate must fulfill. In general, the executor of any estate that is required to file an estate tax return must prepare and file with the IRS a Form 8971 and a Schedule A for each beneficiary of the estate within 30 days following the due date (as extended) of the estate tax return.[8] A Schedule A must also be furnished to each beneficiary within this same timeframe. This section also provides for supplemental reporting in certain circumstances and penalties for failure to file. It is important to note that this section, unlike § 1014(f), does not have any exclusions that are based on the status of the recipient. This means that even though the recipient of assets that qualify for the marital or charitable deduction will not be bound to the basis consistency requirement, the executor will still need to report the estate tax value of those assets to both the IRS and the recipient. The specific requirements of Form 8971 and Schedule A are discussed in more detail below.

Also to note, and further evidence that the IRS must have some real concerns about being "whipsawed" by taxpayers on basis issues, two other changes were included in the Transportation Act relating to basis reporting issues. One change is an amendment to § 6501(e)(1)(B) to add a provision that states that an understatement of gross income due to an overstatement of basis is an omission from gross income for purposes of determining if a 6-year statute of limitations is applicable. The other addition affects the adequate disclosure rules. Section 6501(e)(1)(B)(iii) specifically provides that even if an overstated value is disclosed in a return in a manner adequate to apprise the IRS of the nature and amount of the overstatement, it will still be considered an amount omitted from gross income. This provision may give the IRS some time to go back and look at older returns that haven't made it to the six-year mark yet!

As to be expected with any completely new law, there are some glitches and hiccups in the application. We anticipate more guidance to come from the IRS after they review all of the comments they receive on the proposed regulations. The IRS has scheduled a public hearing for June 27, 2016 on the proposed regulations. Any person who submits comments by June 20, 2016 may attend the hearing and present testimony in support of his or her comments. Until more guidance is received, we will have to play by the rules that we have been given.

First, let's look at the timeline of the IRS's issued guidance on these new reporting rules. With the effective date of the new law and the new filing requirements applying to returns filed after July 31, 2015, an executor who filed an estate tax return on August 1, 2015 would have needed to file Form 8971 and Schedule(s) A with the IRS and provide Schedule(s) A to the beneficiaries of the estate by August 31, 2015. The tricky part of that deadline was that there was no existing form for reporting created at that time! Realizing the difficulty in requiring compliance by the statutorily-created deadline, the IRS issued Notice 2015-57 on August 21, 2015 extending the deadline for all reporting under the new basis consistency rules to February 29, 2016.[9] On December 18, 2015, the IRS released a draft Form 8971 and Schedule A, without including any instructions. The draft instructions were later made available on January 5, 2016. After making their way through the Office of Management and Budget for review, both were posted to the IRS draft forms website with a January 26, 2016 date and were later added with minor changes to the current forms list with a January 2016 date. On February 11, 2016, the IRS issued a further extension of time to file and to furnish the statements to beneficiaries until March 31, 2016, indicating that the delay was intended to give executors the ability to review the soon-to-be-released proposed regulations.[10] Those proposed regulations were released on March 2, 2016.[11] After being inundated with requests for a further delay to enable executors and their advisors time to review the regulations and the forms, the IRS issued Notice 2016-27[12] that provided another extension of time for filing Form 8971 and Schedule(s) A and furnishing the schedules to beneficiaries of the estate to June 30, 2016. The IRS has indicated that there will be no further extensions. Next, let's discuss the "who, what, when and where" of these new returns.

1. WHO?

This is a three part question. First, we must determine who is required to initially report to the IRS and the beneficiaries. Next, we need to determine if an initial recipient of a Schedule A is subject to further

[7] In addition, certain items of tangible personal property are not subject to the basis consistency rules of § 1014(f). This exception to the rule is discussed in more detail below under section labeled "WHAT."

[8] The proposed regulations use the term "information return" to refer to Form 8971 and Schedule(s) A that are provided to the IRS and "statement" to refer the Schedule A provided to a beneficiary of an estate. Prop. Reg. § 1.6035-1(g).

[9] Notice 2015-57, 2015-36 IRB 294 (Aug. 21, 2015).

[10] Notice 2016-19, 2016-9 IRB 362 (Feb. 11, 2016).

[11] Fed. Reg., Vol. 81, No. 43 (Mar. 4, 2016) at 11486 (Fed. Reg. Doc. 2016-04718 (Mar. 2, 2016)).

[12] Notice 2016-27, 2016-15 IRB 576 (Mar. 24, 2016).

reporting requirements in connection with a subsequent transfer of an asset reported on his or her Schedule A (which is discussed in detail below under the Subsequent Transfer Rule). Finally, we must determine which beneficiaries will receive a Schedule A.

a. Who has to initially report?

Who needs to file a Form 8971 and the initial Schedule(s) A with the IRS and initially furnish a Schedule A to each beneficiary of the estate?

(1) Short Answer:

The executor of the estate.

(2) Detailed Answer:

Section 6035(a) provides that an executor of an estate or any other person who is required to file an estate tax return under § 6018 must file the return and furnish the statements.[13] Section 6018(a) provides that executors of estates of U.S. citizens or residents that have a gross estate value that exceeds the basic exclusion amount ($5,450,000 in 2016) are required to file an estate tax return. In addition, a return will need to be filed for a nonresident non-citizen who has property located in the U.S. with a value that exceeds $60,000 (reduced by certain adjusted taxable gifts made during the decedent during life) under § 6018(a)(2) and (3). Section 6018(b) states that if an executor is not able to make a complete return for any reason, the executor must include a description of the property excluded from the return and the name of each person who holds any interest in the omitted property. Section 6018(b) goes on to provide that "[u]pon notice from the Secretary such person shall in like manner make a return as to such part of the gross estate." Further, an executor is defined to include "the executor or administrator of the decedent, or, if there is no executor or administrator appointed, qualified, and acting within the United States, then any person in actual or constructive possession of any property of the decedent."[14] Thus, in circumstances where no executor qualifies because the estate is held in a fully-funded revocable trust, the trustee of the revocable trust will be the "executor" who is required to file Form 8971 and Schedule(s) A with the IRS and furnish a Schedule A to each of the beneficiaries. Although most of the time the answer will likely be the acting executor, there may be instances where someone else entirely or in addition to the executor will be required to file and furnish these required forms. For ease of reading, the term "executor" will be used generically to refer to the person required to initially report to the IRS and the beneficiaries.

[13] See also Prop. Reg. §1.6035-1(g)(1).
[14] §2203.

Proposed regulation § 1.6035-1(a)(2) clarifies that there is no requirement to file Form 8971 and Schedule(s) A with the IRS or furnish a Schedule A to the beneficiaries of the estate if the estate tax return is not required to be filed under § 6018 but is filed in any event by the executor. Examples listed in the proposed regulations for filing a return for a nontaxable estate include to make a portability election, to make a generation-skipping transfer tax election or exemption allocation, or to file a return for a nontaxable estate to avoid a potential penalty in cases where an increase in an asset value would result in a filing requirement. These examples are not exclusive, so as long as the executor is not required to file a return under § 6018, there is no filing/furnishing requirement.

b. Who receives an initial Schedule A?

Once the person tasked with filing with the IRS and giving the beneficiaries notice is determined, that person needs to figure out who should receive an initial Schedule A.

(1) Short Answer:

Each beneficiary who receives property that is included (or required to be included) on an estate tax return that is required to be filed, subject to exceptions for certain assets.

(2) Detailed Answer:

As mentioned above, even though the basis consistency rules do not apply to surviving spouses who receive property that qualifies for the marital deduction or to charitable organizations that receive property that qualifies for the charitable deduction, those individuals and organizations are not exempt from the reporting rules under § 6035. The proposed regulations also provide some additional guidance on this subject. The executor must furnish Schedule A to each beneficiary who receives an asset that is reported on the information return.[15] If the executor is also a beneficiary of the estate, he or she is explicitly required to furnish Schedule A to himself or herself.[16] In cases of a life estate created under the estate, both the life tenant and the remainder beneficiaries must receive a Schedule A as to each of their respective interests.[17] The remainder beneficiaries are those who would take if the life tenant died immediately following the decedent.[18] If the beneficiary is a trust or an estate, the Schedule A will go to the trustee or the executor, as the case may be, and

[15] Prop. Reg. §1.6035-1(c)(1). Keep in mind that, as noted above, the term "information return" include both the Form 8971 and Schedule(s)A attached to the Form 8971.
[16] *Id*.
[17] *Id*.
[18] *Id*.

presumably not to the beneficiaries of the trust or the estate.[19] If the beneficiary is an entity, Schedule A is provided to the entity.[20]

There may be situations in which the identity of a beneficiary cannot be determined. In those cases, proposed regulation § 1.6035-1(c)(4) states that "an executor must use reasonable due diligence to identify and locate all beneficiaries." If unable to locate a beneficiary, the executor must provide all relevant details of Form 8971 and provide an explanation of the steps taken to locate the beneficiary. There is no guidance given if the executor cannot identify a beneficiary. This could occur, for example, in the case of a legal dispute over the estate that makes it unclear who the proper beneficiary is under the will or in the event that there is a class of recipients that cannot be identified by the due date of the Schedule A, such as heirs-at-law. A logical application of the proposed regulations would be to apply the rules related to beneficiaries who cannot be located to any beneficiaries who cannot be identified. Note that upon locating a beneficiary that was not initially located, the executor will have a duty to provide Schedule A to the beneficiary 30 days after locating him, her or it, as discussed in more detail in the Supplemental Reporting section below.

As more fully discussed below in the "What" section, generally only the assets that (i) are reported on the estate tax return or are assets with a basis that is determined by reference to an asset reported on the estate tax return in whole or in part, and (ii) are distributed (or will be distributed) to a beneficiary are reported on Schedule A. So, whether or not a beneficiary of an estate actually will receive a Schedule A will depend on the administration of each estate. For example, if all of the assets of the estate are liquidated during the administration of the estate prior to the filing deadline for the estate tax return and the beneficiary does not receive any assets that were held in the estate on the date of death, no Schedule A will be required. Proposed regulation § 1.6035-1(b) provides for additional exceptions from the reporting requirements, which include cash, income in respect of a decedent, tangible personal property for which an appraisal is not required and certain property sold by the estate. These exceptions are discussed below in more detail. Thus, even though a beneficiary may be the proper recipient of a Schedule A, there may be no assets to report on the Schedule A after all is said and done.

[19] Prop. Reg. §1.6035-1(c)(2).

[20] *Id*.

(3) Questions:

Following are a few questions that have arisen in working through the statute, the proposed regulations and the forms.

Who is included as a remainder beneficiary for reporting purposes? There appears to be a typo in the proposed regulations relating to the determination of remainder beneficiaries. It seems fairly clear that the Treasury and IRS left out the word "not" in this section. Below is the logical correction to proposed regulation § 1.6035-1(c)(1):

> For purposes of this provision, 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 [**not]** a beneficiary, unless the contingency has occurred prior to the filing of the Form 8971.

Representatives from Treasury and the IRS have informally acknowledged this error, which they indicated will be corrected in the final regulations.[21] Although this acknowledgment does not bind the IRS and there is no certainty that inserting the word "not" will be the final correction, it is the most logical reading of the sentence in its entirety. For those who are facing the task of determining whether or not to provide a Schedule A to all potential remaindermen by including remote contingent beneficiaries, it will most likely be a matter of comparing the risks of under reporting (see the section on Penalties below) and over reporting (i.e., giving too much information to beneficiaries that creates confusion and possible agitation of beneficiaries) against the practical difficulty of identifying and providing notice to all potential beneficiaries.

Who gets Schedule A, the fiduciary or the beneficiary? The proposed regulations are fairly clear that notice should go to a fiduciary of a trust or estate instead of to the beneficiaries. However, professionals have queried whether this is the appropriate rule in all cases. For example, if a decedent had a will that left everything outright to her only child, the child would be the proper recipient of the Schedule A. However, if the same decedent had a will that left all of her property to a revocable trust, of which Trust Company A was the trustee, and the trust provided that on her death all assets

[21] Acknowledged by Cathy Hughes on May 7, 2016 at the ABA Tax Section Meeting during a presentation by Cathy Hughes (with Office of Tax Policy, Department of Treasury) and Theresa Melchiorre (Attorney with the Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS).

would pass outright to her only child as the sole beneficiary, the trustee of the (terminating) revocable trust would be the proper recipient of the Schedule A. This outcome seems a bit nonsensical. In addition, there may be circumstances in which there is no current fiduciary serving at a time when notice is required to be given (e.g., due to the death or resignation of the trustee or executor). In these situations, it may make sense to give the executor the option to choose who the notice should be given to, the fiduciary or the actual beneficiaries. Until further guidance is provided, as long as there is a trustee who is able to accept the Schedule A, giving the notice to the trustee appears to be the prudent action to take. In cases where there is no trustee serving at the time that the Schedule A is due, a logical approach would be to use the method provided for unlocated beneficiaries by notifying the IRS of the situation on the timely-filed Form 8971 and later filing the Schedule A when a new trustee is appointed.

What if the executor cannot identify or locate a beneficiary timely? The guidance provided on how to meet the requirements of § 6035 in the case of missing or unidentified beneficiaries needs to be expanded to cover circumstances under which the executor, despite reasonable due diligence, is unable to obtain sufficient information to file a complete Schedule A for other reasons. For example, sometimes the executor is unable to obtain an SSN or TIN from the beneficiary. While the executor may be able to withhold a distribution of the asset until the SSN or TIN is finally received, that date may be well after the due date of the Schedule A for that uncooperative beneficiary. There may be instances where the beneficiary does not have an SSN, TIN or an ITIN (which is provided to individuals who are not eligible to receive a SSN). This could occur with foreign beneficiaries. There will be many circumstances under which the executor will not have the ability to direct the foreign beneficiary to obtain an ITIN or the trustee of the trust to obtain a TIN. This issue also fairly often occurs when a trust is created under the will as a beneficiary, but because of the administration, the newly-created trust has not yet been funded and no TIN has been obtained.

If any of these circumstances arise with respect to a client that you are advising, it would be wise to exert all possible efforts to comply with the reporting requirements. Advance planning for these issues will be critical, so that you can document that the executor exercised due diligence in attempting to gather the information needed for the Schedule A. For example, if the executor is also the trustee of the trusts created under the will, it will likely make sense to distribute at least a minimal amount to the trusts in order to establish them for state law purposes so that the executor/trustee can get a TIN for the new trust. If the issue relates to uncooperative beneficiaries, the executor should start early and attempt often to get this information from the beneficiaries. All of these efforts should be documented, explicitly providing the number of times and the methods by which the executor attempted to obtain the needed information. If it is possible to withhold any distribution to the beneficiary pending the receipt of this information, that would be a prudent course to take as well. It would seem logical that as long as assets have not been distributed to a beneficiary, the failure to timely report the basis of those undistributed assets will not put the IRS at a disadvantage or thwart Congress's goal of basis consistency. Thus, a failure to timely report in a situation like this should not result in harsh penalties on the estate for being unable to comply with a provision that requires the cooperation of individuals over which the executor has no control. Admittedly, issues relating to a foreign beneficiary are a stickier wicket. If the situation is one in which the ITIN can be obtained by the beneficiary, the executor should request that the beneficiary take those steps. The IRS website indicates that it takes a minimum of 7 weeks for them to process a completed application for an ITIN, so this process should be started early.[22] If the foreign beneficiary fails to qualify or refuses to apply for an ITIN, the executor is again put in a nearly impossible situation. In those circumstances, resorting to the judicial system may be a possible resolution that would protect the executor. In the meantime, other than passing along other suggestions to the IRS,[23] executors and their advisors will be tasked with finding their own way in these difficult situations.

2. WHAT?

Now that we have determined who gives and gets the information, we need to determine what exactly needs to be reported on Schedule A. This is where things start to get a little murky. We will start with an overview of the general reporting rules for all estates subject to § 6035. After addressing the general rules, we will review the requirements for a supplemental reporting under § 6035(a)(3)(B) and proposed regulation § 1.6035-1(e) ("Supplemental Reporting"). Finally, we will analyze when the new rule under proposed regulation § 1.6035-1(f) will require a recipient of an asset from an estate to report a subsequent transfer of

[22] A detailed review of the requirements for obtaining an ITIN are beyond the scope of this paper. See https://www.irs.gov/individuals/general-itin-information for information from the IRS.

[23] Comments on the proposed regulations can be submitted to the IRS electronically via the Federal eRulemaking Portal at http://www.regulations.gov.

that asset (the "Subsequent Transfer Rule"). Only Schedule A reporting requirements will be described in this section. The details relating to what information is reported on Form 8971 is discussed below in the section for "Completing the Forms."

a. General Reporting Rules for Schedule A.

Schedule A is provided to both the IRS and each beneficiary receiving property from the estate that is reportable under the new rules. This schedule is intended to give the beneficiary notice of his or her initial basis in an asset, while giving the IRS a method for tracking that value in relation to each specific beneficiary. As discussed in more detail below, this reporting is generally due 30 days after the estate tax return is filed. Does every asset of the estate need to be reported on a schedule?

(1) Short Answer:

For Schedule(s) A, generally only the value of assets that (i) are reported on an estate tax return or are assets with a basis that is determined by reference to an asset reported on the estate tax return in whole or in part, **and** (ii) are distributed (or are anticipated to be distributed) to a beneficiary are reported. There are some exceptions to reporting, such as cash, items of income in respect of a decedent ("IRD"), tangible personal property items for which an appraisal is not required and property disposed of by the estate if capital gain or loss is recognized.

(2) Detailed Answer:

The requirement that the executor file a report with the IRS within 30 days following the estate tax return due date (or actual filing date, whichever is earlier) that lists all of the assets that the beneficiaries of the estate have received or will receive clearly does not take into account the fact that, in most estates, very few assets have been distributed by that time and decisions have not been made as to which specific assets the beneficiaries will receive. Indeed, most assets of an estate are typically retained by the executor of the estate until at least the closing of the estate for federal estate tax purposes, whether by audit or a closing letter. A prudent executor will want to avoid the risk of distributing the estate before taxes are finally determined, in the event that those assets will be needed to pay any additional tax. In some cases, distributing those assets before a final tax determination could result in personal liability to the executor. It is apparent that the Treasury and IRS tried to make do with a law that was passed hurriedly by a legislature that is oblivious to these practical realities. However, the proposed solution to report anything the executor believes "could" be distributed to a beneficiary on Schedule A seems to be an ineffective approach to attaining the goal of getting "basis" information in the hands of the person who will need it for his or her own tax reporting purposes. Moreover, this requirement could result in a situation that is fraught with peril for an executor of an estate with beneficiaries who are at odds with each other. It is not unusual for there to be personal issues among related beneficiaries that require careful attention from the executor. That delicate balance could easily be disturbed by this reporting burden that is placed on the executor. Executors who find themselves in this type of situation may want to take steps to ameliorate a potentially disastrous result.

Of course, the simplest approach will be to actually distribute assets prior to filing Schedule A. In some situations, that may be possible, such as when the surviving spouse is the sole beneficiary and the executor of the estate. Alternatively, reporting all of the assets as potential distributions to every beneficiary may not be as awkward in estates with a small number of assets or beneficiaries who all get along so that there will be no angst over any differences between the potential allocations reported and the actual distributions made. Some have suggested that, to the extent practical, a fiduciary should liquidate assets of the decedent following death to eliminate the reporting requirement all together. Alternatively, changing the form of the assets during estate administration has been proposed as a way to eliminate the reporting requirement. For example, the executor could sell a decedent's property to a new entity established by the beneficiaries and then make distributions of the entity interests to the beneficiaries. If the sale occurs very quickly following the death of the decedent, the potential for a gain or loss on the sale would be minimal. There are too many different possible scenarios to discuss in detail here, but it seems highly likely that there will be many cleverly designed techniques that will be implemented to reduce or even completely eliminate the reporting requirement under § 6035.

Proposed regulation § 1.6035-1(b) clarifies that the value of assets reported on an estate tax return, as well as any asset with a basis that is determined by reference to an asset reported on the estate tax return whether in whole or in part, must be reported on a Schedule A. It also clarifies that for a nonresident non-citizen decedent, only property that is subject to U. S. estate tax, and for community, only the decedent's one-half interest must be reported on the Schedule. In addition, it provides for some exceptions from reporting that are not found in the statute. Those exceptions include cash (but not coin collections or other currency with numismatic value), IRD, tangible personal property for which no appraisal is required under regulation § 20.2031-6(b) (i.e., assets without a value in excess of $3,000, which are also exempt from the basis consistency rules of § 1014), and property sold, exchanged or disposed of by the estate in a transaction in which "capital gain or loss" is recognized and that is not distributed to a beneficiary.[24] It is important to keep in mind that what is being reported is the **value** of the asset as reported on the estate tax return and not what might actually be the recipient's **basis** in the asset.

(3) Questions:

Following are a few questions that have arisen relating to the general reporting rules.

What counts as cash? Clearly the exception for cash applies to the cold, hard cash that the decedent has stashed in his wallet, under his mattress, in the cookie jar, and any other location. It also seems likely that this exception applies to cash held in all bank and brokerage accounts, certificates of deposit and other similar accounts. Equally likely, those types of accounts and actual cash that are held in a foreign currency should also be treated as cash. To the extent that life insurance proceeds are payable solely in cash, those proceeds should logically be treated as cash for Schedule A reporting purposes. Less clear examples of assets that are arguably equivalent to cash include notes receivable, accounts receivable and tax or other refunds that are valued on the estate tax return at their face amount. Until clarification is received on these issues, it may be prudent to err on the side of over reporting on Schedule A for some of these assets, such as insurance and receivables. Depending on the risk tolerance of the executor (which may correlate directly with the potential exposure to penalties), you may end up reporting everything but that cookie jar cash.

Questions about IRD. The term IRD generally means amounts that would be treated as gross income of the decedent if he or she had received them during life. Common examples include IRAs and 401(k) accounts. However, there are several types of assets that may include IRD that will also have a basis component. Examples include IRAs and 401(k) accounts established with after-tax contributions, certain Roth IRAs and Roth 401(k) accounts, nonqualified annuities, installment notes with basis and unrecognized gain, and an interest in pass-through entity that holds inventory or unrealized receivables. It is not clear if these "hybrid" IRD assets fall under the exception for IRD. From a pure compliance perspective, it would seem that assets that have a basis component that are received from the decedent should not qualify for the exception. With that in mind, a conservative approach would be to report any hybrid assets on a Schedule A. Indeed, there is no IRS penalty for over reporting.

How does the tangible personal property exception work? This exception appears to be aimed at reducing the burden of reporting the value of the sheets and towels to the IRS and the beneficiaries of the estate. Unfortunately, the dollar amount of the exception is tied to a regulation that was written in 1958. Applying the U.S. Bureau of Labor Statistics CPI(U) Index, $3,000 in 1958 would be worth nearly $25,000 now. Regulation § 20.2031-6(a) provides the general rule for reporting household and personal items that don't individually exceed $3,000. It requires an itemized list, although items valued at $100 or less that are contained in the same room may be grouped together. The regulation indicates that a "room by room" itemized list is desirable. Based on informal surveys of colleagues, this room by room list is rarely (if ever) used, and most executors report this as one lump sum item for the whole house (taking care to get any one item valued at over $3,000 separately appraised, of course).[25] With the spotlight on this regulation, basis consistency, and initial basis reporting requirements, it is unclear whether our old ways of reporting will continue to be acceptable. I suspect that many practitioners, after reviewing this provision, will ask their executors to either obtain full appraisals that include room by room estimates of the items that are not individually appraised, or will ask the executor to separate out the estimated values of those sheets, towels and picture frames on a room by room basis. After all, with fewer returns being filed overall, you don't want to leave low-hanging fruit for the IRS to pick. This is an easy item to report in a manner that most closely reflects the desired reporting method. Unfortunately, the cost burden-benefit ratio often does not work to the executor's favor for this type of reporting.

Assuming that the executor does get an appraisal, you are not home free yet. Often, an appraiser will lump together like items in a group for valuation purposes. However, those items may ultimately be divided among beneficiaries of the estate based on their allocations or selections in satisfaction of their share of the tangible personal property of the decedent. It seems unlikely that the IRS expects the executor to specifically allocate value among the beneficiaries for these types of items. However, there is no direction currently under the regulations. A practical approach would be to provide the beneficiaries who receive a share of the tangible personal property with the value information on all of

[24] Prop. Reg. §1.6035-1(b)(1).

[25] Note that although the regulations seem to require that only single items valued at over $3,000 require further documentation, some collections, namely coin and stamp collections, are listed as well. See Treas. Reg. §20.2031-6(b).

the appraised property so that each of them can allocate the value to the items he or she ultimately receives. However, if those assets are distributed prior to the filing of the Schedule A, the executor is technically obligated to only report to the beneficiary the assets that he or she actually received (and not those that others have received). Arguably, even if the assets have been distributed, there may be some reallocation among the beneficiaries. In larger estates, the listing of these types of assets seems to be disproportionally long. It would seem that any method used by the executor that gives the beneficiary and the IRS sufficient information to determine the basis of assets that were or may be distributed to a beneficiary would be acceptable. Items of this nature are less likely to be sold for a gain or a deductible loss and pose little risk of creating a whipsaw situation for the IRS. However, until further guidance is issued, it may be prudent to report these assets down to the last sofa (and the sock stuck in it) to the greatest extent possible.

Is the sale exception really only applicable if capital gain or loss is recognized by the estate? This helpful exception likely was intended to encompass any asset that is sold by the estate that does not result in a carryover basis in the property received in return (e.g., a like-kind exchange). Certainly there are other types of gains (e.g., § 1231 gains) and sometimes no gain or loss at all even if a disposition has occurred. There are also situations in which assets that are distributed to a beneficiary can trigger gain or loss to the estate, and in those circumstances, it seems like those assets should qualify for the sale exception as well. Unfortunately, the proposed regulations are relatively clear on this point and limit the exception to the sale of assets that result in capital gain or loss. So, for now, the prudent approach would be to report all assets at the value reported on the estate tax return even if that value may not accurately reflect the Schedule A recipient's basis in the asset due to a deemed recognition event or a sale in which capital gain or loss is not recognized.

Further, is the sale exception really only applicable if the property is not distributed to a beneficiary? In addition to the capital gain requirement, the proposed regulation excepting property disposed of by the executor from the reporting requirement also (parenthetically) explains that the exception only applies when property is "… therefore not distributed to a beneficiary…."[26] However, in some cases when property is distributed to a beneficiary from an estate gain or loss could be recognized by the estate. In those cases, under § 643(e) the beneficiary would take the estate's basis, adjusted for any gain or loss recognized. Consequently, giving the beneficiary a Schedule A with the estate tax value of the asset would make no sense at all and is likely to cause confusion. It appears that the parenthetic language was added for clarification purposes. Unfortunately, it creates more confusion instead. Hopefully this will be corrected in the final regulations so that the sale exception applies to any disposition of property that is reportable by the estate in which the recipient is not using the estate's basis, in whole or in part, to determine his or her own basis. Until there is clarification, it appears that the safest course for the executor to take is to report any assets distributed to the beneficiary from the estate that don't neatly fit into the capital gain or loss sale exception described above.

b. Supplemental Reporting.

To ensure that the IRS (and each beneficiary) is apprised of any changes in reported values, there is a general duty imposed on the executor to supplement any prior reporting if changes occur after the initial Form 8971 and Schedule(s) A are filed. Does every change need to be reported?

(1) Short Answer:

In general, the executor will be required to file a supplemental Form 8971 and Schedule(s) A with the IRS and provide the supplemental Schedule A to each affected beneficiary if there is a change in **any** of the information that was previously reported.[27] However, there is no requirement to supplement to correct "inconsequential" errors. In addition, there is no duty to supplement if the original Schedule A included assets that were not actually distributed to a beneficiary, as long as the assets that were distributed were included on the original Schedule A furnished to the beneficiary.

(2) Detailed Answer:

The IRS wants to know about any changes to the information that you provide on either Form 8971 or Schedule A that will affect their ability to implement their new basis consistency processing system. Any change or correction relating to the identity of the recipient or the reported value must be given to the IRS by filing a supplemental Form 8971 and Schedule(s) A. This includes any change that makes the originally reported information incorrect or incomplete. Examples provided in the proposed regulations include (i) discovery of assets that were not included on the estate tax return, (ii) changes in the value of assets reported pursuant to an IRS audit, litigation, or otherwise, (iii) a change in the identity of the recipient, and (iv) a disposition of an asset of the decedent by the executor that results in the basis of the new asset being determined with reference to the disposed asset (in

[26] Prop. Reg. §1.6035-1(b)(1)(iv).

[27] Prop. Reg. §1.6035-1(e)(1).

whole or in part, such as a like-kind exchange or an involuntary conversion). For example, if values are changed on audit, the values as adjusted must be included on a supplemental Schedule A that is given to each affected beneficiary and filed with the IRS with a supplemental Form 8971.

There are only two exceptions to this general rule. One is the exception for any subsequent clarification of "who got what" once distributions have actually been made. As long as the asset that a beneficiary actually receives is properly reported on his or her Schedule A, there is no duty to supplement to specifically identify what he or she received. For example, if there are two beneficiaries of an estate and all assets of the estate were reported on each beneficiary's Schedule A, then no supplemental filing is required to report the specific items they each actually received on distribution. There is no prohibition on filing a supplemental return to do so, but it is not required. Presumably, because the IRS will have information on each asset on the Schedule A connected with the beneficiary, their system will work in cases with over reporting, even though they may likely have a lot of extra information that they will never need with respect to each beneficiary.

The other exception is for "inconsequential errors and omissions." These are defined in regulation § 301.6722-1(b) as "…any failure that cannot reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting it on his or her return or from otherwise putting the statement to its intended use." The regulations go on to give examples of errors and omissions that are never inconsequential, including a wrong dollar amount, use of the wrong form (i.e., one not acceptable to the IRS) or an improper method for delivery of the statement. In addition, any item in the recipient's address that is incorrect that could prevent or delay the recipient from being able to receive and use the information on the statement is not inconsequential. An example in the regulations indicates that the misspelling of "Boulevard" would be inconsequential, but that a transposition of numbers in an address would not be inconsequential. The instructions to Form 8971 and Schedule A have a similar definition of inconsequential errors and omissions, but go on to provide additional information in this regard. With respect to the Form 8971 and the Schedule(s) A provided to the IRS, an error or omission related to a TIN, a beneficiary's surname, or the value of an asset the beneficiary is receiving from an estate is **never** inconsequential. With respect to the Schedule A provided to a beneficiary, an error or omission related to a significant item in a beneficiary's address or the value of an asset the beneficiary is receiving from an estate is **never** inconsequential.

As a practical matter, the Form 8971 and Schedule(s) A should be treated with the same care given to Form 1099 and other similar informational returns. Most estate planning attorneys are not used to preparing these types of filings, so special attention will need to be given to each form to ensure that all of the information is properly reported to avoid harsh penalties, as discussed below. In addition, it would be wise for an executor to report **any** change in a supplemental filing other than the most minor typographical errors. Clearly an error in amount, a TIN, or a misspelled surname requires correction, as stated in the instructions. But, what if there is a misspelled first name, e.g., "Laura" or "Lori" or "Lara" instead of "Lora?" A cautious executor would file a supplemental Form 8971 and Schedule A for any change to a beneficiary's name or address.

c. Subsequent Transfer Rule.

This rule, which is solely a creation under the proposed regulations, requires that a beneficiary report any later transfer of an asset received from an estate that was originally required to be reported on a Schedule A if the transfer is to a related transferee and that transferee determines its basis, in whole or in part, with reference to the transferor-beneficiary's basis. What transfers are included under this new rule and how are they reported?

(1) Short Answer:

Any beneficiary of an estate who receives assets that are reportable on Schedule A will need to report a subsequent transfer of any such asset if (i) the transferee is a related transferee and (ii) the transferee's basis is determined in whole or in part by reference to the initial beneficiary's basis. This report will be made on a Schedule A that is filed with the IRS and provided to the transferee within 30 days after the transfer. If the transfer occurs before the receipt of a Schedule A by the originally designated beneficiary, he or she must provide a Schedule A to the IRS, the transferee **and** the executor. This report will identify the asset but will not include a value (as presumably, none has yet to be given to the beneficiary) and is also due within 30 days after the transfer. The duty to file the Schedule A with the initial estate tax value to the subsequent transferee will then shift to the executor.

(2) Detailed Answer:

This rule attaches to nearly every asset received from an estate with a reporting requirement and appears to apply in perpetuity to the extent any portion of the asset is subsequently transferred to a related party. Let's parse out what assets and which recipients this rule affects.

There are three steps to determine if an asset is subject to this rule. First, the transferor of the property must determine if the asset should have been reported on a Schedule A, whether or not it was actually reported. If the answer to this question is yes, then the asset is potentially subject to this rule. Thus, assets that pass to a surviving spouse that are reported on a Schedule A, although not subject to the basis consistency rule under § 1014(f), may be subject to the Subsequent Transfer Rule. However, property that qualifies for an exception from reporting (e.g., tangible personal property excluded under proposed regulation § 1.6035-1(b)(1)(iii)) would not need to be reported under this rule, even if all of the other requirements of the rule are met.

Second, the transferor of the property must determine if the transferee is a related transferee. For these purposes, the proposed regulations define a related transferee as (i) any member of the transferor's family as determined under § 2704(c)(2), (ii) any controlled entity (any entity in which the transferor and his or her family as defined above have control, whether direct or indirect, as defined in § 2701(b)(2)(A) or (B), and (iii) any trust of which the transferor is treated as owner for income tax purposes (i.e., a grantor trust).[28] Section 2704(c)(2) defines family to include the transferor's spouse, any ancestor or lineal descendant of the transferor or the transferor's spouse, and any sibling or spouse of a sibling of the transferor. Section 2701(b)(2)(A) defines a controlled corporation as a corporation in which at least 50% (by vote or value) of the stock of the corporation is held by the transferor and his or her family. Section 2701(b)(2)(B) defines a controlled partnership as a partnership in which at least 50% of the capital or profits interests or any interest as a general partner in a limited partnership is held by the transferor and his or her family.

Third, the transferor of the property must conclude that the transferee will determine his or her basis, in whole or in part, by reference to the transferor's basis. This will occur in any transaction in which carryover basis applies, such as a gift to the transferee or a like-kind exchange. If the answer to all three of the above questions is "yes," then the asset will be subject to the Subsequent Transfer Rule.

If the Subsequent Transfer Rule applies, it will be important to determine who must give and who will receive the required subsequent report. If the asset has already been reported on a Schedule A by the executor of the estate, then the transferor-beneficiary will report the subsequent transfer on a Schedule A that is furnished to both the transferee and the IRS. This Schedule A will be completed in its entirety, including the value that was initially reported to the transferor-beneficiary (even though this may no longer be the basis in the hands of the transferor-beneficiary). If the transferor-beneficiary wants to supplement the statement with information regarding changes to the basis while held by him or her, the transferor-beneficiary may do so on the Schedule A. However, that information must be on a separate line or schedule so that the value reported on the initial Schedule A is identical to the value reported on the subsequently-filed Schedule A. Presumably this will allow the IRS to link the assets from the estate to each subsequent related-party owner of the asset. In the case of a transfer that occurs before the transferor-beneficiary of an estate receives the initial Schedule A, the transferor will also need to give a Schedule A to the executor of the estate. This additional requirement allows the executor to receive necessary information about the transferee, so that when the executor later prepares its required Schedule A, the executor will know who to give it to (i.e., the subsequent transferee rather than the initial transferor-beneficiary).

For example, suppose Beneficiary owns Blackacre as joint tenants with right of survivorship with Husband. At Husband's death, the interest in Blackacre vests in Beneficiary at date of death and is not subject to administration in Husband's estate. After Husband's death, Beneficiary makes improvements to Blackacre that increase her basis in the property. Shortly thereafter, Beneficiary makes a gift of Blackacre to Daughter. The estate tax return for Husband has not been filed, nor has the Form 8791 and Schedule(s) A. However, within 30 days after the gift, Beneficiary will be required to prepare a Schedule A to report the transfer of Blackacre to Daughter. This report will need to be given to Daughter, the IRS and the executor of Husband's estate. Because Beneficiary has not yet received a Schedule A, she does not need to include a value of Blackacre on the Schedule A that she prepares. However, she may separately report the value of the improvements to Blackacre, so that Daughter will have that information, which will be needed to determine her own basis in the property. When the executor later files Form 8971 and Schedule(s) A, the Schedule A that shows the value of Blackacre as reported on the estate tax return will be furnished to Daughter instead of to her mother, the Beneficiary. In addition, it appears that if Daughter 50 years later swaps her interest in Blackacre with her sister in exchange for her sister's interest in Whiteacre in a like-kind exchange, Daughter will need to furnish a Schedule A to her sister and to the IRS that provides the value of Blackacre as initially reported on Husband's estate tax return that was filed 50 years before.

(3) Questions:

[28] Prop. Reg. § 1.6035-1(f).

Does the IRS have the authority to impose this reporting requirement? This rule clearly demonstrates that the IRS is serious about keeping track of the basis (or at least the initially reported value) of inherited assets. The preamble to the proposed regulations indicates that § 6035(b) gives the IRS authority to establish this rule, as it is necessary to carry out § 6035. Many professionals have opined that this reading goes too far. Section 6035 specifically tasks the executor (or other person required to file an estate tax return pursuant to § 6018) with the responsibility of reporting initial basis. Grafting this requirement onto any type of subsequent transferee, whether related or not, appears to go beyond the authority given to Treasury and the IRS. As mentioned above, the basis consistency rules were contemplated to apply not only to transfers at death, but also to gifts during life. Congress specifically declined to apply the new rules that broadly when passing § 6035. Accordingly, it would seem that the IRS does not have the authority to extend the reach of § 6035 this far under current law. What should a beneficiary do if faced with a Subsequent Transfer reporting requirement? Without further guidance, it would appear prudent to advise any client faced with this issue to file a Schedule A with the IRS and furnish it to the transferee.

What should a beneficiary do if he or she does not receive a Schedule A from the executor but believes he or she should have? It is obvious that there are many uncertainties and questions surrounding the reporting requirements under § 6035. It is fairly likely that the reporting requirements will be interpreted differently among executors, beneficiaries and their advisors. What if the executor of an estate takes the position that she does not need to provide a Schedule A to a beneficiary who receives property from the estate because the property distributed was in satisfaction of a pecuniary bequest to the beneficiary and the estate recognized capital gain on the distribution? In this scenario, the executor interpreted the exception in proposed regulation § 1.6035-1(b)(1)(iv) to exclude this asset from the required reporting even though it was distributed to a beneficiary. However, what if the beneficiary who received the asset is more conservative, and interprets that regulation in way that she believes requires the asset to be reported to her on a Schedule A, so that when the beneficiary subsequently transfers the asset to her child, she believes that she is subject to the Subsequent Transfer Rule? The regulations would seem to require the beneficiary to furnish a Schedule A to the executor, the child and the IRS. What should the executor do with this information? What if there is no executor to give the Schedule A to because the administration of the estate is closed or the executor is deceased and no successor is appointed because there is no longer a need for administration of the estate? It is unclear how the IRS will respond in these situations. Hopefully there will be guidance forthcoming that will clarify enough of the uncertainties to eliminate these types of conundrums. In the meantime, the facts and circumstances of each case will likely steer executors and beneficiaries towards the result that makes the most sense. Clearly, the safest approach with respect to the IRS would be to always report.

How do the related party rules work in the context of trusts? Pulling in the related party definitions from §§ 2701 and 2704 were helpful to a certain degree, as most tax practitioners are familiar with the application of these definitions. However, these definitions do not take into account every possible scenario with respect to the Subsequent Transfer Rule. One big question is how these rules apply in the context of trusts. Grantor trusts with respect to the transferor are specifically included as a related party for purposes of this rule. However, it is unclear why this would be necessary with respect to a revocable trust that is treated as a grantor trust. For all tax purposes, the transferor-grantor of the trust will still be considered the owner of the trust. The need for subsequent reporting in this situation is mysterious. Possibly there will be clarification by the IRS that grantor trusts that are includable in the estate of the transferor-grantor will not be subject to this rule.

Application of the rule to individual trustees of a trust that is not a grantor trust is also unclear. For example, assume that Family Trust received assets from decedent's estate. Family Trust later distributes those assets in kind to a beneficiary of the trust. If Independent Bank is the trustee of Family Trust, there should be no subsequent reporting requirement, because beneficiary is not related to Independent Bank. However, what is the result if Mom is the trustee and Son is the beneficiary who receives the distribution? Is there a subsequent reporting requirement because Mom is related to Son? Or is there no requirement, because Mom, as trustee is making the distribution and a trustee in that capacity alone is not related to any other individual? It seems incongruous that the rules would be different based on the identity of the trustee. However, logic does not always apply when interpreting tax laws. Some thoughtful consideration will need to be given to this issue if it arises. There could be planning opportunities to avoid the issues altogether, depending on the flexibility given in the trust instrument relating to designation of successor trustees and delegation of powers among multiple trustees.

Alternatively, what if the trustee does not distribute the assets, but a beneficiary of the trust exercises a limited or special power of appointment over trust assets that results in a distribution of an asset to an individual who is related to the beneficiary? The transfer is directed by the related-party beneficiary, but implemented by the trustee of the trust. It is unclear if and how the Subsequent Transfer Rule would apply in this context. If reporting is required, should the trustee report the transfer or should the appointing beneficiary? It seems most logical that if reporting is required, that the trustee provide the Schedule A to the recipient. Although there is no certainty that any reporting is required, it does appear that there would be no complaints by the IRS for over reporting.

How will a beneficiary know about the Subsequent Transfer Rule? Executors are clearly on notice of these new reporting rules and advisors are geared up to provide advice on how to comply with their obligations. However, once they provide the required Schedule A to a beneficiary, they owe no further duties to advise beneficiaries on their potential subsequent reporting requirements. What about the beneficiaries who receive assets from an estate? How will they know that they may be subject to the Subsequent Transfer Rule? It's not unusual for individuals to make gifts of property without telling an advisor (really!). If a beneficiary of an estate receives a Schedule A, there is nothing on that schedule to indicate any subsequent reporting requirement. Although § 1014 is referenced at the bottom of the schedule, § 6035 is not. Even for a curious beneficiary who looks up the instruction for Schedule A, there is no information to be found with respect to the Subsequent Transfer Rule. As advisors, this will be one more question to ask of our clients: Did you inherit any property that was reported (or required to be reported) on an estate tax return after July 31, 2015? Hopefully these concerns will be addressed by the IRS when they revise the forms and clarify the scope of the Subsequent Transfer Rule. Until then, it might be a best practice to be extra nosey by asking your clients to let you know if they inherit property and decide to transfer or otherwise dispose of that property in any way.

3. WHEN?

Not only is it important to know when the executor is required to file the initial Form 8971 and Schedule(s) A with the IRS and furnish an initial Schedule A to each beneficiary who is required to receive one, but it is also important to know the deadlines for a Supplemental Reporting and a transfer that falls under the Subsequent Transfer Rule. Each of these three time frames are addressed separately below. Finally, we'll review when penalties may apply for failing to timely file a complete and accurate Form 8971 or failing to timely furnish a Schedule A, including the ultimate penalty, the "Zero Basis Rule" of proposed regulation § 1.1014-10(c)(3).

a. Initial Form 8971 and Schedule(s) A.

What is the general rule for reporting under § 6035?

(1) Short Answer:

The initial Form 8971 and Schedule(s) A are due on the date that is the **earlier** of (i) 30 days after the due date (with extensions) of the estate tax return, or (ii) 30 days after the return is actually filed.[29] However, due to the extension granted by the IRS, the due date for Form 8971 and Schedule(s) A for estate tax returns filed after July 31, 2015 and before June 1, 2016, is June 30, 2016.[30]

(2) Detailed Answer:

The Act provides that § 6035 applies to property with respect to which an estate tax return is actually filed after July 31, 2015. This means that the rules will also apply to returns that were due prior to July 31, 2015, but were filed after that date, no matter what the reason.[31] However, the regulations provide for a transition rule that makes the Form 8971 and Schedule(s) A deadline 30 days after the date an estate tax return is actually filed if the returns should have been filed on or before July 31, 2015 but it is not filed until after that date.[32] This extension of time is also set forth in the instructions to Form 8971, although the instructions are imprecisely worded and appear to give the extension of time for any late-filed return. Based on some taxpayer's prior experiences relating to reliance on IRS guidance, it would be wise for executors not to count on the broadly-worded instructions when advising about filing deadlines.[33] A literal reading of the proposed regulatory provision seems to indicate that if you are late in filing an estate tax return that had a filing deadline of July 31, 2015, the first day of the 30-day timeframe for the filing of Form 8971 and Schedule(s) A will not start to run until you actually file the return. However, if you have an estate tax return with deadline that is one day later, August 1, 2015, that Form 8971 and Schedule(s) A will be due on June 30, 2016 and penalties will begin to accrue if they are not filed by that date. It may be that any other rule would have been considered a retroactive application of the law, which resulted in this interesting transitional rule. In any case, it will normally be prudent to advise an executor who is

[29] § 6035(a)(3)(A).
[30] Notice 2016-27 (see discussion above).
[31] Prop. Reg. § 1.6035-1(d)(1).
[32] Prop. Reg. § 1.6035-1(d)(2).
[33] *See* Bobrow v. Commissioner, TC Memo 2014-21 (Jan. 28, 2014) (taxpayer who relied on guidance in an IRS publication and proposed regulations relating to IRA rollovers found liable for penalties for exceeding allowable rollovers in one year).

delinquent in filing a required return to file both the tax return and the Form 8971 and Schedule(s) A as soon as possible to avoid potential penalties.

b. Supplemental Reporting.

If a supplemental report is required to be filed, when is it due?

(1) Short Answer:

A supplemental report is generally due 30 days after the date on which the reason for the supplemental return is identified. However, if a supplemental report is required with respect to an asset that has not yet been distributed to a beneficiary from the probate estate or a revocable trust, that supplemental Form 8971 and Schedule A will not be due until 30 days after the asset is distributed to the beneficiary.[34]

(2) Detailed Answer:

The date on which the 30-day deadline begins to tick will depend on what triggers the supplemental filing. If the reason for the supplemental report is a redetermination of the value of an asset on the return, the clock will start ticking on the date the final value of the asset is determined. The proposed regulations provide that the final value is (i) the value on the return as reported if it is not timely adjusted or contested by the IRS prior to the expiration of the statute of limitations, (ii) the value determined by the IRS if the taxpayer does not timely claim a refund or credit prior to the expiration of the statute of limitations, (iii) the value determined by a final and binding agreement, or (iv) the value determined by a court once that determination is final.[35]

If the reason for the supplemental report is to report an error or omission that requires a supplemental report, the clock will start ticking on the date the error or omission is discovered.[36] If the reason for the supplemental report is because the executor is filing a supplemental estate tax return to report property omitted from the prior return(s), the clock will start ticking on the date the supplemental return is filed.[37] Interestingly, the IRS has provided an overall exception for assets that have not been distributed to a beneficiary from the probate estate or a revocable trust at the time the supplemental reporting requirement arises. That exception provides that the supplemental Form 8971 and Schedule A is not due until 30 days after the asset is in fact distributed to the beneficiary. This exception to the general rule is very practical. Hopefully the IRS will be willing to carry over this position in other situations where the information will not be needed by a beneficiary before he or she actually receives the asset.

(3) Questions:

How do you know when the final value is actually final? Particularly with respect to valuations that are the subject of judicial determination, it is unclear when a court's determination is final. Once a court has ruled, that court's ruling is generally final. However, either of the parties typically is able to appeal the ruling to a higher court. Presumably the reference in proposed regulation § 1.1014(c)(1)(iv) to a "final" ruling means either when the time to appeal has expired with no such appeal filed or when an appeal to the U.S. Supreme Court has not been selected to be heard by the Court.

Is there a requirement to file a Form 8971 and Schedule(s) A in connection with a supplemental return filed after July 31, 2015 for a return with an initial due date on or before that date? At first blush, the proposed regulations appear to broadly apply to any supplemental return filed after July 31, 2015. However, on closer inspection, it seems that the rules may not apply to a supplemental return filed in connection with an estate tax return initially filed on or before July 31, 2015. Under proposed regulation § 1.6035-1(i), the reporting rules will apply to a "return required by § 6018" that is filed after July 31, 2015. The only return required under § 6018 is the timely-filed estate tax return, which may later be supplemented but which cannot be amended.[38] Because any supplemental return that is filed does not actually amend the return, the supplemental return is not a return required by § 6018. Thus, it does not appear that a supplemental return filed in connection with an estate tax return that was originally filed on or before July 31, 2015 is a return that is subject to § 6035 and no Form 8971 or Schedule(s) A should be required to be filed. As discussed above, the analysis on how to best comply under these circumstances will involve weighing the risks and rewards of the two options (to report or not to report).

If a decision is made to report the supplemental information on a Schedule A, then the executor will need to decide exactly what needs to be reported and to whom. It seems logical that a supplemental filing of this type will only require the executor to report the assets included on the supplemental return and not assets that were previously reported on the originally filed return that remain unaffected by the supplemental filing. Consistent with this approach, only the beneficiaries of the estate whose interests are affected by the supplemental return should receive a Schedule A. Under the currently drafted rules, these would appear to

[34] Prop. Reg. § 1.6035-1(e)(4)(ii).
[35] Prop. Reg. § 1.1014-10(c)(1).
[36] Prop. Reg. § 1.6035-1(e)(4)(i)(B).
[37] Prop. Reg. § 1.6035-1(e)(4)(i)(C).
[38] Prop. Reg. § 20.6081-1(d).

be safe assumptions to make. However, clarification by the IRS will be much appreciated.

c. Subsequent Transfer Rule.

If the Subsequent Transfer Rule applies, when must the Schedule A reporting the transfer be filed with the IRS, furnished to the transferee, and, if required, provided to the executor?

(1) Short Answer:

The new Schedule A is generally due 30 days after the date on which the gift, sale or transfer occurs.

(2) Detailed Answer:

Under the Subsequent Transfer Rule, a beneficiary who transfers an asset subject to the rule is required to report that transfer on a Schedule A that is filed with the IRS and furnished to the transferee no later than 30 days after the transfer. If the transfer occurs prior to the receipt of the initial Schedule A from the executor of the estate, then the transferor-beneficiary must also provide a copy of the Schedule A to the executor of the estate within that same 30-day period. In that case, the executor will then be required to furnish the Schedule A from the estate to the subsequent transferee instead of to the initially intended beneficiary no later than 30 days after the original due date of the Form 8971 and Schedule(s) A, or any supplemental return, as discussed above.[39]

d. Penalties.

For penalty purposes, the Form 8971 is considered an information return and the Schedule A is considered a payee statement. The IRS has simply slotted these new returns into longstanding statutory provisions. This means that the rules and procedures that apply are well-established and will be fairly simple for the IRS to implement even with this confusing new law. What penalties will apply for late filing, failure to file, or other mistakes made while we (including the IRS) are all trying to work through the uncertainties of the new rules? In addition, what penalties apply when a beneficiary who is subject to the consistent basis reporting requirement under § 1014(f) reports an inconsistent basis?

(1) Short Answer:

Any failure to timely file or to file a correct and complete Form 8971 and Schedule(s) A with the IRS will be subject to penalties under § 6721. Penalties for those same failures with respect to the Schedule A provided to a beneficiary will be imposed under § 6722. Waiver of any penalties for reasonable cause are provided under § 6724. The penalties for reporting a basis that exceeds the amount reported on Schedule A are determined under § 6662, which provides for penalties imposed on underpayments.

(2) Somewhat) Detailed Answer:

Penalties for failure to file on time or failure to file a complete and correct information return with the IRS such as the Form 8971 and Schedule(s) A can draw a steep penalty. That penalty is $260 for each return to which a failure occurs, not to exceed a total penalty of $3,193,000. If a failure is corrected within 30 days after the required filing date, the $260 penalty is reduced to $50 and the total maximum for corrected returns is reduced to $532,000 (with all of the above penalty limits adjusted for inflation). The penalties can be much higher in cases of intentional disregard and lower if receipts are less than $5,000,000. It is not clear if the receipts of the estate or those of the decedent prior to death will be used for this calculation. Presumably the receipts of the estate will be the relevant number. There are also certain exceptions for de minimis errors and certain errors corrected by August 1 of a calendar year under §§ 6721 and 6722. It is unclear how these will apply to estates, which do not have a filing deadline that is tied to the calendar year in any way. The instructions to Form 8971 make it clear that for purposes of applying the penalties, each Form 8971 and all of the Schedule(s) A filed with a Form 8971 count as only one return and will be subject to one penalty. However, the penalties for failing to provide Schedule A to a beneficiary will apply to each Schedule A that is not so provided. In addition, as the instructions further warn, using the terms "none," "unknown," or similar language when reporting a beneficiary's TIN on Form 8971 will cause the form to be considered incomplete and may cause the estate to incur penalties.

The penalty for reporting a basis that exceeds what is reported on Schedule A is 20% of the underpayment of tax that is due to the understatement of income. In general, the penalties increase if there is a substantial understatement.

A more detailed discussion of the imposition of penalties under these sections of the Code is beyond the scope of this article due to the variety of taxpayers, dollar amounts and circumstances that can affect the amount of the penalty in a particular situation. Suffice it to say that mistakes will inevitably occur. Identifying them early and filing a supplemental report as quickly as possible will go a long way towards showing the IRS that the executor tried in good faith to comply. If the executor can demonstrate that the failure to file a correct Form 8971 and Schedule(s) A with the IRS or to furnish a correct Schedule A to a beneficiary was due to an

[39] Prop. Reg. § 1.6035-1(f).

event beyond the executor's control or due to significant mitigating factors, the penalties may not be imposed.[40]

e. Zero Basis Rule.

Last but not least, what appears to be the ultimate penalty is the provision in § 1.1014-10(c)(3) that provides for a "zero" basis in any assets that are not reported on a return prior to the termination of the statute of limitations. How can this be?

(1) Short Answer:

The IRS has taken a hard stance in situations where after-discovered or overlooked assets are omitted from the estate tax return, and likewise omitted from the Schedule A reporting system. If no supplemental return is filed to report an asset (whether because the statute of limitations has expired or otherwise), the basis in the unreported asset will be zero in the hands of the recipient-beneficiary. However, as long as the asset is reported to the IRS and to the beneficiary-recipient before the period of limitations expires with respect to the estate tax return this draconian rule will not apply.

(2) Detailed Answer:

Proposed regulation § 1.1014-10(c)(3) provides the rules for after-discovered or omitted property. The rule fairly directly states that if this type of property is reported on an estate tax return before the expiration of the period of limitation on assessment of estate tax, then the final value of the property for estate tax and basis purposes will be the value as finally determined under the usual rules. However, if such the after-discovered or omitted property is not reported on an estate tax return filed before the period of limitation on assessment expires, the final value of that property in the hands of the recipient-beneficiary is zero, zilch, nada. In addition, if no return has been filed for an estate, and if inclusion of the after-discovered or omitted property would generate or increase the estate's tax liability, the final value (and the associated basis in the hands of the recipient-beneficiary) of **all** property includible in the gross estate that is subject to the consistent basis requirement is zero, until a return is filed and the final value is determined under the usual rules.[41] Although there is uncertainty about the IRS's authority to implement this rule and its application to certain types of assets, as discussed below, the rule itself is fairly clear. It will be important to advise executors that, unless the rules are changed, they need to promptly report any assets that may be later discovered on a supplemental estate tax return after the initial return has been filed.

(3) Questions:

Can the IRS and Treasury do that? It is unclear how the IRS and Treasury are able to implement this rule in the regulations when there is no parallel or delegating language to do so in the statute. While § 1014(f)(4) states that "[t]he Secretary may by regulations provide exceptions to the application of this subsection," creating a whole new rule that completely eliminates basis in assets does not constitute an "exception" to the application of § 1014(f), but rather a significant expansion of existing law. Indeed, it is generally acknowledged that there has not been a requirement to supplement an estate tax return for after-discovered or unintentionally omitted property from an estate tax return. Imposing a penalty on a beneficiary for an executor's failure to file a return he or she has no legal obligation to file is inappropriate and overreaching.

In addition, it is not clear if § 1014 will apply to these types of assets in any event. Section 1014(f)(3) requires that the value of property is determined for purposes of the application of § 1014 if the value is shown on a return and not contested, specified by the Secretary, or determined by a court or by a settlement agreement with the Secretary. If property is not reported on an estate tax return, none of those conditions are met. Thus, it would appear that the basis consistency rule of § 1014(f)(1)(A) does not apply. Additionally, § 1014(f)(1)(B) will not apply, because an unreported asset will not be reported on a Schedule A. If § 1014(f)(1) does not apply at all, then there can be no limitation on the basis of an asset that a beneficiary receives from a decedent.

While it is reasonable for the IRS and Treasury to want to take the position that there would be no basis in property that is not included on an estate tax return, there does not appear to be any basis in the law to do so. However, unless the executor you are advising wants to be the test case for this controversy, it makes sense to advise executors of this risk at the outset so that they can consider the consequences when determining how diligent they may want to be in searching for assets of the estate.

Can cash have a zero basis? If the zero basis rule does apply, how will that affect the later discovery of cash? Presumably gain will need to be recognized at some point if the initial basis is zero. Will the recognition date be the date of discovery, or the date on which the limitation period expires to report the asset on an estate tax return if after the discovery?

4. WHERE?

All Forms 8971 and Schedules A must be filed with the Cincinnati service center:

[40] Reg. § 301.6724-1.

[41] Prop. Reg. § 1.1014-10(c)(3)(ii).

Department of the Treasury
Internal Revenue Service Center
Mail Stop #824G
Cincinnati, OH 45999

It is important to note that although a Form 8971 and the Schedule(s) A must be filed together, they must **not** be attached to or filed with the estate tax return. Estate tax returns are filed at the general address, while these special reporting forms have their very own mail stop. VIP treatment for the new stars on the tax compliance team – they get their very own locker room!

5. Completing the Forms.

Now that you have all of the answers as to who, when, what and where, completing the forms will be a snap! It is my understanding that some of the 706 software has been retooled to complete Form 8971 for you based on your initial input (e.g., GEMS software), while other programs maintain fillable forms that do not automatically populate (e.g., UltraTax).

a. Completing Form 8971.

The important thing to note about this form is that no values are reported on this return. The Form 8971 is basically a transmittal cover sheet for the Schedule(s) A that are included in the filing with the IRS. Accordingly, aside from circumstances that may prevent the executor from getting the information needed to complete this form, it is fairly easy to complete.

The top of the form provides a check box to indicate if this is a supplemental filing required under the Supplemental Reporting rules. Part I of Form 8971 contains information that can be pulled directly from part 1 of the 706, with the alternate valuation election coming from Part 3. Any beneficiary who will receive a Schedule A (as discussed above) must be listed on Form 8971, along with his, her or its SSN, ITIN or TIN, and full address. The executor will also need to include the date on which the Schedule A was provided to each beneficiary listed on the form. It is not entirely clear, but a reasonable interpretation would be that this should be the date the notice was mailed (by email, U.S. mail or private mail service) or personally delivered to the beneficiary and not the date it was actually received by the beneficiary. Part II of the form also requires the executor to list how many beneficiaries have received or are expected to receive property from the estate. It is not entirely clear if the IRS wants to know all beneficiaries who will receive property from the estate or if they want to know the number of beneficiaries who will be receiving a Schedule A from the executor. It seems likely that the latter is the information that the IRS needs. Similarly, it is unclear what this number should be if a supplemental filing is being submitted. Should this number only reflect the Schedule(s) A that will be provided in connection with the supplemental return or all? To be on the safe side, you may want to choose one method or the other, and notate in an attachment how you arrived at the number included on the return.

In addition, because of the exceptions to reporting under proposed regulation § 1.6035-1(b), there could be situations in which no Schedule A must be provided. Although it seems unnecessary to file a Form 8971 in these circumstances, there does not appear to be an exception to the general rule for this. Thus, it would be prudent to file the Form 8971 without any accompanying Schedule A. Because all of this reporting is so new to both advisors and the IRS, it may be advisable to note the reason no Schedule A was attached to forestall unnecessary communications from the IRS.

b. Completing Schedule A.

The top of this form also provides a check box to indicate if this is a supplemental filing required under the Supplemental Reporting rules. The general information requested in Part 1 includes the names and SSN/TIN of the decedent and the beneficiary, along with the executor's name, address and phone number. Part 2 of the form requests very detailed information about the property passing to a beneficiary. Column B requires a description of the property and the Schedule and Item number from the decedent's estate tax return. The instructions provide that the description included here must be the same that is used on the estate tax return. If the beneficiary will acquire a partial interest in an asset that information also needs to be noted in this column. Column C requires a Y (yes) or N (no) answer to whether the assets increased the estate tax liability. If any estate tax is due, then the answer to this will always be Y, except in the case of assets passing to or for the benefit of a spouse that qualifies for the marital deduction or assets passing to charity that qualify for the charitable deduction. If no estate tax is due, then the answer to this will always be N. Column D requests the valuation date, which will be either the date of death or the alternate valuation date. Column E requires the estate tax value to be reported, which may change on a supplemental filing.

c. Transmitting the Forms.

A paper copy of Form 8971 and the related Schedule(s) A must be mailed to the IRS by the same methods that an estate tax return can be mailed. There are a few more options for delivery of a Schedule A to a beneficiary. In addition to U.S. Mail and private mail services, the Schedule A can also be emailed or delivered in person to the beneficiary. The instructions require the executor to retain proof of mailing, proof of delivery, an acknowledgement of receipt or other evidence of delivery. This type of evidence is fairly easy to obtain with mail, and a signed receipt for personal delivery will be an effective way to acknowledge receipt. However, the use of email to furnish the Schedule A to a beneficiary would only seem appropriate in circumstances in which you are certain the beneficiary will acknowledge receipt by return email or otherwise acknowledge receipt in a sufficient fashion to protect the executor. The instructions also note that in the case of an estate or trust beneficiary with multiple fiduciaries, delivery of the Schedule A to one trustee or executor is sufficient to meet the delivery requirement to that beneficiary.

6. Advising the Beneficiaries.

Although it might be tempting for the attorney who is assisting the executor to provide advice and information to the beneficiaries of the estate with respect to the information provided to each of them on Schedule A, this should be done with great caution. The executor and the beneficiaries of an estate often have potentially conflicting interests. Indeed, most of us have engagement letters that explicitly state that we are only representing the executor of the estate and do not represent the beneficiaries. It will make sense to ensure that any additional information provided to the beneficiaries of an estate is carefully worded so that there can be no implication that you are advising them as their counsel. Undoubtedly there will be confusion created with this reporting, as the value that is reported on the estate tax return and the Schedule A that is the "initial basis" of a beneficiary of the estate (and his or her subsequent transferees) will often not be the actual basis in the hands of that person. A sample letter that you may want to consider using when transmitting Schedule A to a beneficiary is attached as Exhibit B.

VI. CONCLUSION.

Preparing estate tax returns, and the related forms, has never been easy. With the addition of the new basis consistency rules, we have been challenged to learn how to apply this new law and to adjust our practice and procedures in a way that will allow us to be the most responsive to our clients.

> "If you are prepared, you will be confident, and will do the job." – Tom Landry

EXHIBIT A

Copy of IRS Checklist from Form 706 Instructions

Checklists for Completing Form 706

To ensure a complete return, review the following checklists before filing Form 706.

Attachments …

- Death Certificate
- Certified copy of the will—if decedent died testate, you must attach a certified copy of the will. If not certified, explain why.
- Appraisals—attach any appraisals used to value property included on the return.
- Copies of all trust documents where the decedent was a grantor or a beneficiary.
- Form 2848 or 8821, if applicable.
- Copy of any Form(s) 709 filed by the decedent.
- Copy of Line 7 worksheet, if applicable.
- Form 712, if any policies of life insurance are included on the return.
- Form 706-CE, if claiming a foreign death tax credit

Have you …

- Signed the return at the bottom of page 1?
- Had the preparer sign, if applicable?
- Obtained the signature of your authorized representative on Part 4, page 2?
- Entered a Total on all schedules filed?
- Made an entry on every line of the Recapitulation, even if it is a zero?
- Included the CUSIP number for all stocks and bonds?
- Included the EIN of trusts, partnerships, and closely held entities?
- Included the first 4 pages of the return and all required schedules?
- Completed Schedule F? It must be filed with all returns.
- Completed Part 4, line 4, on page 2, if there is a surviving spouse?
- Completed and attached Schedule D to report insurance on the life of the decedent, even if its value is not included in the estate?
- Included any QTIP property received from a predeceased spouse?
- Entered the decedent's name, SSN, and “Form 706” on your check or money order?
- Completed Part 6, section A if the estate elects not to transfer any deceased spousal unused exclusion (DSUE) amount to the surviving spouse?
- Completed Part 6, section C if the estate elects portability of any DSUE amount?
- Completed Part 6, section D and included a copy of the Form 706 of any predeceased spouse(s) from whom a deceased spousal unused exclusion (DSUE) amount was received and applied?

EXHIBIT B

Sample Cover Letter to Accompany Schedule A to Form 8971 Sent to Beneficiary by Executor

Dear [Beneficiary]:

As you know, I am serving as Independent Executor of the Estate of [Decedent]. Pursuant to federal law, I am required to provide certain information to you as a beneficiary of the Estate. Please find [enclosed/attached] a completed Schedule A to Form 8971 that contains this required information, a copy of which is also being provided to the Internal Revenue Service as required by law.

The Schedule A provides you with information about the value of property as reported on the estate tax return of the Estate that you have already received or may receive from the Estate. This information may be important to you if you later sell, give, or otherwise transfer all or any portion of the ownership of the property that you receive from the Estate. Please consult your own tax advisor regarding your federal income tax obligations with respect to this information and possible tax penalties for failure to comply with federal law in connection with this information.

Sincerely yours,

[Executor],
Independent Executor,
Estate of [Decedent], Deceased