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**REPORT OF THE ESTATE AND GIFT TAXATION COMMITTEE  
ON PROPOSED REGULATIONS UNDER  
IRC SECTIONS 1014(F) AND 6035 CONCERNING CONSISTENT BASIS REPORTING  
BETWEEN DECEDENTS' ESTATES AND PERSONS ACQUIRING PROPERTY  
FROM A DECEDENT**

The New York City Bar Association, through its Committee on Estate and Gift Taxation (the “City Bar”), respectfully submits this memorandum setting forth its comments to REG-127923-15, which contains proposed regulations under IRC<sup>1</sup> §§ 1014(f) and 6035 concerning consistent basis reporting for property acquired from a decedent (the “Proposed Regulations”).<sup>2</sup> As further discussed in this report, we wish to highlight two aspects of the Proposed Regulations that we believe warrant revision.

**BACKGROUND**

On July 31, 2015, President Obama signed into law the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, sometimes referred to as the “Highway Act.” The Highway Act, among other things, added new provisions to IRC §§ 1014(f) and 6035 concerning basis consistency and reporting for property acquired from a decedent. These new statutory provisions apply to Federal estate tax returns filed after July 31, 2015, and have two primary components: (1) a substantive rule requiring basis consistency that is set forth in IRC § 1014(f); and (2) reporting requirements imposed upon executors and certain other persons under

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<sup>1</sup> All references to “IRC” are to the Internal Revenue Code of 1986, as amended.

<sup>2</sup> Available at [https://www.irs.gov/irb/2016-12\\_IRB/ar10.html](https://www.irs.gov/irb/2016-12_IRB/ar10.html).

IRC § 6035. The Highway Act also enacted related penalty provisions under IRC §§ 6662, 6721 and 6722. Congress left it to the U.S. Department of Treasury and the Internal Revenue Service (IRS) to determine how to implement these rules, and originally gave the IRS 30 days to do so – until August 31, 2015. The IRS has now on three separate occasions issued notices postponing the filing deadlines. The most recent such notice, Notice 2016-27, 2016-15 IRB 1, pushed back the filing deadline for the reporting form and accompanying statement that are applicable here – IRS Form 8971 and the Schedule A thereto – to June 30, 2016.

On March 4, 2016, the IRS published Proposed Regulations under IRC §§ 1014(f) and 6035 that are the subject of this report. The Proposed Regulations request comments by June 2, 2016.

## **OUR RECOMMENDATIONS**

### **I. The Exclusion from Reporting of the Information Return and the Statement Should Be Extended to Where No Capital Gain or Loss Results from the Sale or Other Disposition of Property Because the Sales Price Equals the Basis**

Proposed § 1.6035-1(b) defines the property to be reported on the information return (“Form 8971”) and the accompanying statement to be furnished to the recipients of property acquired from a decedent (“Schedule A”) as all property included in the gross estate for Federal estate tax purposes, with four exceptions:

1. Cash (other than coins or paper bills with numismatic value);
2. Income in respect of a decedent (*e.g.*, qualified retirement plans and individual retirement accounts);
3. Those items of tangible personal property for which an appraisal is not required under Treas. Reg. § 20.2031-6(b); and

4. Property that is sold or otherwise disposed of by the estate (and therefore not distributed to a beneficiary) in a transaction in which capital gain or loss is recognized.

With respect to the fourth prong set forth above, a question arises as to what happens if property is sold or otherwise disposed of at a price that is precisely equal to the property's basis so that no capital gain or loss results in what would otherwise be a fully taxable transaction. This could very easily occur if property is sold soon after the decedent's death as a result of the step-up in basis to fair market value upon death that will generally apply under IRC § 1014(a)(1). The purpose of this fourth prong, however, appears to be to exclude transactions that are fully taxable, and therefore it should encompass such a sale notwithstanding that such a sale does not produce a capital gain or loss. Accordingly, we recommend that the Proposed Regulations be modified to extend the fourth exception to cover this situation as well.

**II. The Transferor's Exclusion from Reporting on the Information Return and Statement Should Be Extended to Subsequent Transfers to a Trust of which the Transferor is a Deemed Owner for Income Tax Purposes where Such Transfer is an Incomplete Gift for Gift Tax Purposes**

IRC § 6035(a)(2) imposes a reporting requirement on the executor of the decedent's estate and on any other person required to file an estate tax return under IRC § 6018. According to the preamble to the Proposed Regulations, the Treasury Department and the IRS are concerned that opportunities may exist in some circumstances for the recipient of such reporting to circumvent the purpose of the statute. The preamble cites as an example the gifting of property to a complex trust for the benefit of the transferor's family.

Relying upon the regulatory authority granted to Treasury by IRC § 6035(b)(2), the Proposed Regulations require additional information reporting by certain subsequent transferors in limited circumstances. Specifically, Proposed § 1.6035-1(f) provides that, with regard to

property that previously was reported or is required to be reported on a Schedule A furnished to a recipient, when the recipient distributes or transfers (by gift or otherwise) all or any portion of that property to a *related transferee*, whether directly or indirectly, in a transaction in which the transferee's basis for Federal income tax purposes is determined in whole or in part with reference to the transferor's basis, the *transferor* is required to file and furnish with the IRS and the transferee, respectively, a supplemental Schedule A documenting the new ownership of this property. This proposed reporting requirement is imposed on each such recipient of the property.<sup>3</sup> For purposes of this provision, a related transferee means any member of the transferor's family as defined in IRC § 2704(c)(2), any controlled entity (meaning here a corporation or any other entity in which the transferor and members of the transferor's family, whether directly or indirectly, have control within the meaning of IRC § 2701(b)(2)(A) or (B)), and any trust of which the transferor is a deemed owner for income tax purposes.<sup>4</sup>

This last prong would appear to apply to a transfer by a transferor to his or her revocable living trust that is an incomplete gift for gift tax purposes under Treas. Reg. § 25.2511-2. There does not appear to be any benefit to be gained by the Service from requiring such reporting because the fact that such gift is incomplete for gift tax purposes will cause the transferred property to be includable in the transferor's gross estate upon his or her death under IRC §§ 2036 and 2038 – which generally will produce a subsequent step-up in basis to fair market value as of

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<sup>3</sup> A separate *transferor's* supplemental Schedule A to the Form 8971 should be issued by the IRS to accommodate these circumstances.

<sup>4</sup> In the event such transfer occurs before a final value is determined within the meaning of Proposed § 1.1014-10(c), the transferor must provide the executor with a copy of the supplemental Schedule A filed with the IRS and furnished to the transferee reporting the new ownership of the property. When a final value is determined, the executor will then provide a supplemental Schedule A to the new transferee instead of to the transferor. The supplemental Schedule A is due no later than 30 days after the transferor distributes or transfers all or a portion of the property to the transferee. See Proposed § 1.6035-1(f). Consideration should be given to deferring the due date of the transferor's supplemental Schedule A to the extended due date for the estate tax return, or the actual filing date of the estate tax return, whichever is earlier, provided that such date is not less than 30 days after the transfer.

the transferor's death under IRC § 1014(a)(1). Accordingly, we recommend that the Proposed Regulations be modified to exclude from reporting a transfer to a trust of which the transferor is a deemed owner for income tax purposes where such transfer is an incomplete gift for gift tax purposes under Treas. Reg. § 25.2511-2.

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