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Please Address Reply to:

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April 19, 2021

Via Electronic Mail

Ms. Kinna Brewington, Kinna.Brewington@irs.gov
Ms. Sara L. Covington, Sara.L.Covington@irs.gov
Mr. Paul D. Adams, Paul.D.Adams@irs.gov
Internal Revenue Service
Room 6526
1111 Constitution Avenue NW
Washington, DC 20224

Re: Comments concerning IRS Form 8971, Information Regarding Beneficiaries Acquiring Property from a Decedent

Dear Ms. Brewington, Ms. Covington, and Mr. Adams:

The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit the attached comments on IRS Form 8971, Information Regarding Beneficiaries Acquiring Property from a Decedent. On February 17, 2021, the IRS published a notice and request for comments for Form 8971 (Treasury Notice 86 Fed. Reg. 9996 (2/17/21)), and these comments are in response to that request.

ACTEC is a professional organization of approximately 2,500 lawyers from throughout the United States. Fellows of ACTEC are elected to membership by their peers on the basis of professional reputation and ability in the fields of trusts and estates and on the basis of having made substantial contributions to those fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in providing advice to taxpayers on matters of federal taxes, with a focus on estate, gift, and GST tax planning, fiduciary income tax planning, and compliance. ACTEC offers technical comments about the law and its effective administration but does not take positions on matters of policy or political objectives.

If you would like to discuss ACTEC's recommendations, please contact Lora G. Davis, Chair of the Fiduciary Income Tax Committee, at (214) 396-8801 or lora@davisstephenson.com, or Deborah O. McKinnon, ACTEC Executive Director, at (202) 684-8460 or domckinnon@actec.org.

Respectfully submitted,

Ann B. Burns, President

Attachment: Comments of The American College of Trust and Estate Counsel (ACTEC) on Form 8971 information Regarding Beneficiaries Acquiring Property from a Decedent

cc: Ms. Catherine V. Hughes, U.S. Department of the Treasury, catherine.hughes@treasury.gov

COMMENTS OF THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL (ACTEC)
ON FORM 8971 INFORMATION REGARDING BENEFICIARIES ACQUIRING PROPERTY FROM A DECEDENT

Treasury Notice 86 Fed. Reg. 9996 (2/17/21) requested comments regarding IRS Form 8971, including ways to enhance the quality, utility, and clarity of the information to be collected; ways to minimize burden of collecting information; and whether the collection of the information is necessary for the proper performance of the functions of the agency. The American College of Trust and Estate Counsel ("ACTEC") is pleased to submit the following comments regarding IRS Form 8971 and Schedule A (current version January 2016) (herein referred to as "Form 8971" or "Schedule A," as appropriate) and the Instructions thereto (current version September 2016) (herein referred to as the "Instructions"). A portion of these comments was adapted from comments submitted by ACTEC to the initial draft Form 8971 on November 30, 2017.

Background.

Section 1014(f) of the Internal Revenue Code[1] provides rules requiring that the basis of certain property acquired from a decedent, as determined under section 1014, may not exceed the value of that property as finally determined for federal estate tax purposes, or if not finally determined, the value of that property as reported on a statement made under section 6035. Form 8971 and accompanying Schedule A are used to fulfill the section 6035 reporting obligations to the IRS and the beneficiaries of estates. On March 2, 2016, the IRS and Treasury published proposed regulations regarding sections 1014(f) and 6035. Final regulations have not been released, although the 2020-2021 Priority Guidance Plan includes the final regulations as a priority item.

Significant burdens are placed on those who are, as discussed below: (1) required to prepare and file Form 8971 and Schedule(s) A and send Schedule(s) A to beneficiaries within 30 days of filing a decedent's estate tax return (when much of the information regarding the specific assets beneficiaries are to receive is not then known), and (2) required to report successive transfers (a requirement not required by the Code but added by the proposed regulations). A further burden is placed on executors required to file Form 8971 when the existence of an estate asset is not known as of the filing date of the estate tax return. Because the executor does not include the asset on the return, a '"zero basis" for such asset is then required to be used by a beneficiary as provided in the proposed regulations (although this rule is not included in either section 1014(f) or 6035). This result can pit beneficiaries against each other and against fiduciaries and impose what amounts to a penalty on beneficiaries who had nothing to do with the filing of the estate tax return.

Finalizing the regulations is now a current "Burden Reduction" Priority Guidance Plan project. ACTEC is hopeful that and recommends that those in charge of implementing

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

any Form 8971 and Schedule A changes are coordinating with those in charge of finalizing the regulations and will recognize these burdens.

Below are general comments with respect to matters either not addressed in Form 8971, Schedule A, and the Instructions, or items that require clarification or reconsideration in order to further the continuing effort to reduce paperwork and the burden on executors with regard to Form 8971 and Schedule A, and specific comments on and suggested revisions to Form 8971, Schedule A, and the Instructions.

GENERAL COMMENTS

Non-Recourse Indebtedness. ACTEC respectfully requests that if a decedent's estate includes property that is subject to non-recourse indebtedness, the value of the property reported on Schedule A should be the full fair market value of the property. In furtherance of this suggestion, it would be helpful if the Instructions provide that if a decedent's estate includes property that is subject to non-recourse indebtedness and the executor reports on the estate tax return only the value of the decedent's equity in the property, the Estate Tax Value reported in Column E of Schedule A, Part 2, should be the full fair market value of the property, undiminished by any indebtedness thereon, and not merely the value of the decedent's equity in the property.

If the foregoing suggestion is adopted, following is an example of the reporting required by the executor if an estate includes property subject to non-recourse indebtedness:

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

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

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

ACTEC believes that Schedule A should be provided only to the life tenant and the presumptive remainder beneficiaries as of the due date of the filing of the Form 8971.

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

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

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

ACTEC recommends that for the executor to fulfill the reporting requirements of section 6035, the executor should be permitted to file Form 8971 and Schedule(s) A, reporting as transfers to the trustee, all assets that are held by either the decedent or the trustee on the date of death, to the extent includible in the decedent's gross estate for federal estate tax purposes. This same treatment should also be extended to assets held by the decedent under a "pay on death" or "transfer on death" designation in favor of a trustee. If, however, the trust is one that terminates on the decedent's death, ACTEC recommends that the executor be permitted to either provide Schedule A to the trustee or provide Schedule(s) A directly to the beneficiary(ies) of the terminating trust (with notice to the trustee of the direct reporting to the beneficiary(ies)). By providing an option in this latter situation, it may be more economical and efficient for the executor to furnish the required Schedule A directly to each beneficiary rather than furnishing it to the trustee, who in turn will be required to furnish an additional Schedule A to each beneficiary and to the IRS. By furnishing the Schedule A directly to each beneficiary, the required paperwork is reduced, perhaps substantially, which benefits the executor, the trustee and the IRS. In addition, the beneficiary who needs the information will have it more promptly.

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

Proposed Limits on Scope of Form 8971 and Schedule(s) A if the Beneficiary Is Not Determined. The Instructions provide that if an executor has not determined which beneficiary is to receive an item of property as of what would otherwise be the due date of the Form 8971 and Schedule(s) A, the executor must list on that beneficiary's Schedule A all items of property that could be used, in whole or in part, to fund that

beneficiary's interest. This requirement results in duplicative reporting and thus increases paperwork and burden on executors. Although some executors may be able to easily comply with this rule, it is more likely that executors of the larger estates to which this reporting requirement applies will have difficulty complying with this provision.

ACTEC believes that the current approach to reporting may cause confusion for beneficiaries. Furnishing Schedule A to a beneficiary listing all items of property that could be used to fund the beneficiary's distribution, when the beneficiary will not, in fact, receive all of such assets (even when the listing states that the beneficiary's distribution will be funded in whole or in part with the listed assets), can result in a beneficiary believing that he or she may be entitled to all of such assets. In fact, in an extended administration, many of the assets of an estate may be sold, so that the beneficiary will not receive any of the assets reported on the estate tax return. Schedule A does not provide a place for the executor to notify a beneficiary that the assets reported on the Schedule as property in which the beneficiary has acquired an interest includes assets (and potentially a significant number of assets) that the beneficiary will not receive. Moreover, it is likely that confusion will be increased by the portion of Schedule A titled "Notice to Beneficiaries" that states "[y]ou have received this schedule to inform you of the value of property *you received* from the estate of the decedent named above" (emphasis added).

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

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

Section 6035(a) requires the executor to furnish "to each person *acquiring* any interest in property included in the decedent's gross estate for Federal estate tax purposes a statement identifying the value of each interest in such property" (emphasis added). If only a portion or none of the assets are distributed in satisfaction of a beneficiary's interest in the decedent's estate prior to furnishing Form 8971 and Schedule A, then the specific interest in the property of the decedent's estate with respect to the undistributed assets *acquired* at that point in time is a general claim equal to the value of the assets allocable to the beneficiary. It may be many months or years before the executor determines with certainty the specific assets that will be distributed to specific beneficiaries, or before there

is an actual distribution of assets to a beneficiary in satisfaction of his, her or its interest in the estate. ACTEC believes that, to be in compliance with the provisions of section 6035, in these situations, the executor should be required to identify on the Schedule A furnished to a beneficiary only the "value" as reported on the estate tax return with respect to the undistributed assets in the aggregate (or that beneficiary's share), without providing asset information at the time Schedule A is furnished. In other words, the executor should be required to furnish to each beneficiary only a Schedule A showing the dollar amount of that beneficiary's interest in the undistributed property of the estate as one item, rather than an asset-by-asset listing of the property of the estate that may or may not be received by that beneficiary. In these reporting situations, ACTEC respectfully requests that Schedule A include a section for the executor to indicate that some or all of the specific items of property in which the beneficiary will *acquire* an interest have not been determined as of the due date of Form 8971 and Schedule A. Further, ACTEC recommends that when the executor later distributes assets to the beneficiary, the executor would be required to file a supplemental Form 8971 and furnish Schedule A to the beneficiary providing the asset information and value of the property as shown on the return for any assets actually distributed to a beneficiary that were listed on the estate tax return. ACTEC further recommends that the due date for filing the supplemental Form 8971 and providing Schedule(s) A to these beneficiaries could be either within 30 days of making the distribution or on an annual basis, such as January 31 of the year following a year when distributions are made. This subsequent reporting requirement would allow a beneficiary to be able to comply with the basis consistency reporting requirement, as applicable, and would provide information of practical utility to the IRS.

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

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

ACTEC believes that a more efficient way to administer section 6035 is to permit Form 8971 and Schedule A to be filed with the IRS, and Schedule A to be furnished to the beneficiary, within 30 days of the distribution of the property to the beneficiary or on an annual basis. Whether the executor elects to report all assets that may be distributed

to the beneficiary in the future or to delay reporting until an actual distribution occurs should not have any effect on the asset value information that the IRS ultimately receives. ACTEC acknowledges and appreciates that this could potentially be years after the estate tax return has been filed. However, the duty to file a supplemental Form 8971 and furnish supplemental Schedule(s) A under the method proposed by ACTEC is similar to the duty already contemplated in proposed §1.6035-1(e) and should create no higher risk of noncompliance. Form 8971 and Schedule A can provide a box to be checked to notify the IRS that subsequent reporting will be made after actual distribution of assets. This will provide notice to the IRS that a supplemental Form 8971 and Schedule A will later be provided, ensuring that any required reporting can be tracked.

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

Accordingly, ACTEC believes that the mandatory 30-day statutory timeframe should be limited to assets that are distributed before the filing date (or due date for filing) of the estate tax return, including assets that pass by reason of the decedent's death without action by the executor. In addition, ACTEC believes that with respect to assets that have not yet been distributed to a beneficiary, the executor should have the choice of either (1) furnishing a Schedule A with a list of assets that may be distributed to such beneficiary or (2) furnishing a Schedule A with an initial valuation of the beneficiary's interest in the estate, with the requirement in that case that a supplemental Schedule A be furnished once assets of the estate that were initially included on the estate tax return are actually distributed to the beneficiary.

Form 8971 and Schedule(s) A (if Supplemental Information to the Estate Tax Return is filed). Clarification is respectfully requested regarding whether a Form 8971 is required to be filed when an executor files an estate tax return and later files supplemental information to the estate tax return ("Supplemental 706 Information"). If a supplemental Form 8971 and Schedule(s) A are required in this situation, guidance is respectfully requested regarding (1) the information that must be included on the supplemental Form 8971, (2) to which beneficiaries a Schedule A must be furnished, and (3) the assets that must be included on Schedule(s) A.

ACTEC believes the most logical outcome is for any supplemental Schedule A to include only those assets with respect to which the Supplemental 706 Information reflects a change, such as after-discovered assets or assets with changed values. In a situation in which Supplemental 706 Information is filed to disclose one after-discovered asset, it would seem inequitable and burdensome to subject every asset in the estate to the Form 8971 reporting requirements, even though the other assets were correctly reported on an estate tax return timely filed on a date when no Form 8971 requirements were in effect (i.e., a return filed on or before July 15, 2015).

ACTEC believes that if the Form 8971 is filed as a consequence of the filing of Supplemental 706 Information, then only those beneficiaries who have or may have an interest in those particular assets should receive Schedule(s) A. Furnishing a Schedule A to any other beneficiaries would, in ACTEC's view, create confusion for those beneficiaries and burden the estate with additional expense.

SPECIFIC COMMENTS

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

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

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

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

who will receive assets from an estate or the number of beneficiaries who are to receive a Schedule A.

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

New Notice on Schedule A to Inform a Beneficiary of Transferee Reporting Requirements. The executor will often not owe fiduciary duties to beneficiaries to whom Schedule A needs to be provided. For example, executors typically do not owe fiduciary duties to beneficiaries whose only interest in a decedent's estate arises from their interests in assets held with the decedent as joint tenants with right of survivorship or in trusts includible in a decedent's gross estate pursuant to sections 2036, 2037 and 2038. However, proposed §1.6035-1(f) imposes a reporting requirement on recipients, i.e., the beneficiaries who initially receive a Schedule A from the executor. If a recipient transfers to a related transferee property that previously was reported or is required to be reported on a Schedule A furnished to the recipient, then the recipient/transferor is required to file with the IRS, and furnish to the transferee, a supplemental Schedule A documenting the new ownership of this property (the "Subsequent Transfers Reporting Rule"). The executor has no duty to inform these beneficiaries of their obligation for any future reporting that might arise because of the subsequent transfer of one of these assets pursuant to proposed §1.6035-1(f). If the Subsequent Transfers Reporting Rule is adopted in the final regulations, ACTEC recommends that Schedule A be modified to inform recipients of Schedule A of their obligations under the Subsequent Transfers Reporting Rule.

Digital Signatures. The IRS recently announced that it would allow taxpayers and representatives to use digital signatures when signing Form 706. The same rules should apply to Form 8971 and Schedule(s) A.