

Submitted Via Regulations.gov

June 1, 2016

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 20024

Re: IRS Notice of Proposed Rulemaking, Consistent Basis Reporting Between Estate and Person Acquiring Property From Decedent, 81 Federal Register 11486 (Mar. 4, 2016).

Dear Commissioner Koskinen:

The American Bankers Association¹ (ABA) appreciates the opportunity to comment on the Internal Revenue Service's (IRS) proposed regulations requiring executors to report to the IRS and beneficiaries the basis of assets acquired from certain estates. Many of our member banks, savings associations, and trust companies act as executor on decedents' estates and thus will be subject to the new reporting requirements. We appreciate that the IRS again extended the deadline for reporting of affected estates, this time from March 31 until June 30, 2016, but still believe that the public should have access to the final regulations *before* reporting is required.²

Background on Proposal

Pursuant to the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (Act),³ executors of estates required, under 26 USC 6018(a), to file a federal estate tax return, Form 706, must report to the IRS and estate beneficiaries the value of each beneficiary's interest in the estate property.⁴ The reporting is done on Form 8971 and related Schedule A,

¹ The American Bankers Association is the voice of the nation's \$16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$12 trillion in deposits and extend more than \$8 trillion in loans.

² See previous ABA letter dated March 11, 2016, urging that the compliance date be extended until the end of August 2016.

³ P.L. 114-41.

⁴ Generally, the value is the fair market value of the bequeathed property on the date of death.

which the executor must file within thirty days of filing the Form 706. In late 2015 and early 2016, the IRS issued Form 8971 and the related instructions. On March 4, 2016, the IRS issued proposed regulations that, along with the instructions to the Form 8971, govern the reporting of basis to the IRS and beneficiaries.

Eliminate Unnecessary Filings of Form 8971

For a variety of reasons, often executors will liquidate an estate before distributing the assets in the form of cash to beneficiaries. Under proposed § 1.6035-1(b)(1)(i), an executor is not required to report cash distributions to beneficiaries, yet, it is unclear whether an executor that has liquidated the estate still has a basis reporting obligation to the IRS. In the interest of conserving the resources of both the IRS and the executor, we ask that the final rules clarify that no Form 8971 reporting is due to any party if there are no reportable assets. To that end, we recommend that the IRS amend § 1.6035-1(a)(2) to add the following sentence at the end: “An executor shall have no obligation to file an Information Return if all property acquired from an estate (before, on, or after the due date of such return) is excepted under paragraph (b)(1) of this section.”

Property Excepted from Reporting Requirements in § 1.6035-1(b)(1)

We appreciate that the IRS has attempted to make compliance less onerous by providing exceptions for certain property from the reporting requirements. We ask that these exceptions be clarified and broadened to further minimize unnecessary reporting. First, the definition of cash should include cash in any financial account, cash in foreign currencies, life insurance proceeds, bond proceeds, and other interests that are payable in cash. Second, the exception for property sold, exchanged, or otherwise disposed of should not be limited to situations in which there is a capital gain or loss. Instead, this exception should include all dispositions of property for which a transaction is recognized for income tax purposes, regardless of whether it produces capital gain or loss.

Proposed Rules Addressing Beneficiaries

The proposed rules contain a number of provisions addressing issues that arise with beneficiaries of estates. However, because the rules must be read in conjunction with the instructions to Form 8971, additional guidance is needed to prevent inadvertent penalties on estates. Most

significantly, the instructions to Form 8971 state that if a taxpayer identification number (TIN) is not listed for each reported beneficiary, the IRS will consider it “incomplete and may subject the estate to penalties.”⁵ Situations may arise in which an estate makes a distribution to a beneficiary that has no TIN, such as individuals who are nonresident aliens, small religious groups, and even governmental agencies, such as the National Park Service. In addition, certain beneficiaries may be unreachable or unresponsive to requests for this information – especially those who acquire property from the estate without any involvement or interaction with the executor. Examples of these beneficiaries include surviving joint tenants and beneficiaries of land trusts, as well as recipients of payable-on-death (POD) and transfer-on-death (TOD) accounts, retirement accounts and other contractual arrangements. The regulations should clarify that a Form 8971 is not considered incomplete and that the estate will not be subject to penalties in situations where the beneficiary has no TIN or where the beneficiary is unreachable or uncooperative.

Treatment of After-Discovered or Omitted Property

The proposed regulations provide that if the executor does not report after-discovered or omitted property on a federal estate tax return filed before the period of limitation on assessment expires, the final basis value of that property for purposes of section 1014(f) is zero. This onerous rule goes well beyond the statutory requirements and authority given under the Act’s basis consistency and basis reporting provisions, and would unfairly deny an estate beneficiary the basis in an inherited asset that the beneficiary is otherwise entitled to under section 1014. We, therefore, urge the IRS to withdraw this requirement from the proposed rules.

Reporting of Subsequent Transfers

In an effort to prevent beneficiaries from “circumvent[ing] the purpose of the statute,” the IRS has proposed that beneficiaries receiving reported property *also* have a reporting obligation under certain circumstances, including subsequent gratuitous transfers to family members or family controlled entities. In essence, this provision creates a chain of subsequent filings whereby whenever a beneficiary (including a trust as beneficiary) disposes of an asset other than by sale, the beneficiary would need to file Form 8971 and issue Schedule(s) A to subsequent recipients. The IRS states that its authority to promulgate this provision, which could impose

⁵ Instructions to Form 8971, page 3.

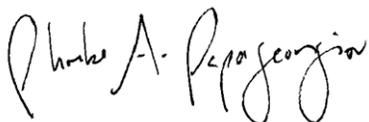
reporting obligations decades after the initial transfer from the decedent's estate, may be found in 26 USC 6035(b)(2), even though that statutory provision only addresses "property acquired from decedents" and not from living donors. Because of the uncertainty over the statutory authority for such provision, it will very likely be challenged by subsequent transferors, resulting in costly litigation, delays in uniform compliance, and uncertainty among taxpayers.

While executors are fiduciaries to the estate, they are often not fiduciaries to the beneficiaries and therefore have no obligation to advise them on their potential reporting obligations. Moreover, prudent fiduciaries would likely avoid advising beneficiaries on their reporting obligations, because doing so may expose them to liability for providing improper advice. Lastly, neither the regulations nor the instructions provide any guidance on how beneficiaries of estate property are to know of their potential subsequent filing obligations. Thus, this new requirement is ripe for inadvertent violations and would undermine efforts at voluntary compliance if most property recipients and subsequent transferors are not sophisticated enough to understand the rules or simply are unaware of them. In the end, because we do not see a statutory basis for this obligation and believe it generally impracticable, we urge the IRS to withdraw this requirement from the proposed rules.

Conclusion

ABA appreciates the opportunity to provide comments on the proposed rules governing the reporting of basis to the IRS and estate beneficiaries. We urge the IRS to amend the proposal to make the reporting less onerous, while still providing helpful information to the IRS and beneficiaries.

Sincerely,

A handwritten signature in black ink that reads "Phoebe A. Papageorgiou". The signature is written in a cursive, flowing style.

Phoebe A. Papageorgiou
Vice President, Trust Policy