Statement of Ronald D. Aucutt
On Behalf of The American College of Trust and Estate Counsel
At the Public Hearing on June 27, 2016
Consistent Basis Reporting Between Estate and Person Acquiring Property From Decedent
(REG-127923-15)

Good morning. I am Ronald Aucutt. I am a partner in the Tysons Corner office of the law firm of McGuireWoods. I am also a member of the Washington Affairs Committee of The American College of Trust and Estate Counsel (ACTEC) and was the representative of the Washington Affairs Committee primarily involved in finalizing ACTEC's comments on these proposed regulations and in recommending approval of those comments to ACTEC's president, Cynda Ottaway. President Ottaway has asked me to represent ACTEC at this hearing, as well as my colleague Gregg Simon, who chaired the ACTEC task force that drafted the comments. Lora Davis, who is here today on behalf of the Tax Section of the State Bar of Texas, was also an active participant on that task force.

I am going to focus on the reporting requirement under section 6035, particularly the requirement in the proposed regulations that property not yet distributed be reported within 30 days after the estate tax return is filed.

The reporting requirements seem elaborate and burdensome well out of proportion to any apparent value in enforcing section 1014(f). The estate planning community's acceptance will be crucial to making those rules work. And ACTEC believes that the biggest element of the proposed regulations that currently denies them that acceptance is the wasteful reporting of the estate tax value of assets long before those assets are in the hands of the beneficiaries who have any need or reason to care about basis. In an estate large enough and complex enough to require the filing of a federal estate tax return, there will almost certainly be few if any distributions within 30 days after that estate tax return is filed, other than certain assets like jointly held assets that pass by operation of law or contract at the time of death.

The futility of reporting information about the basis (in other words, value) of an asset to a beneficiary who has not received the asset and who may never receive it goes without saying. Moreover, providing beneficiaries with tedious lists of assets they never received, lists that here and there have a value that is relevant, will never encourage compliance with section 1014(f); it will frustrate compliance. I won't labor these points any further, but will assume there's simply no question about the desirability of tying reporting to distributions.

The problem then has to be a concern about Treasury's authority to reach a sensible result <u>under the statute</u>. And it's easy to see the problem. Section 6035(a)(3) says that "[e]ach statement required to be furnished under paragraph (1) or (2) shall be furnished at such time as the Secretary may prescribe, but **<u>in no case</u>** at a time later than the earlier of" – basically 30 days after the estate tax return is filed. I get it that the words "in no case" might seem to be restrictive. But in context what these words apply to – looking now at paragraphs (1) and (2) just as the statute does – is the requirement that "[t]he executor of any estate required to file a return under section 6018(a) shall furnish to the Secretary and to each person **<u>acquiring</u>** any interest in property included in the decedent's gross estate … a statement identifying the value <u>of each</u>

interest in such property." Now it probably shouldn't say "property included in the decedent's gross estate"; it should say "property **the value of which is** included in the decedent's gross estate." Since it doesn't say that, I suppose the proposed regulations could have taken the position that because there really is no such thing as a "gross estate" that includes "property," the statute doesn't apply to anything, and there is no reporting requirement at all. That would have been silly; everyone knows what Congress meant, or would have meant if it had focused on the difference. So we all interpret the statute to say something that makes sense in addressing what Congress must have had in mind, or would have if it had focused.

But it is also silly to go to the other extreme and require reporting about property that has not been distributed when what the statute requires to be identified is each interest in property **acquired** by a person. In this case what Congress apparently had in mind was that the acquisition of property from a decedent happens at death *when the decedent happens*. So the statute likewise should be construed with reference to that as the paradigm. So construed, the seemingly rigid deadline of 30 days after filing the estate tax return makes sense, but it would apply only to assets received at death, or before the estate tax return is filed. Assets distributed after that would have to be reported on supplemental statements – perhaps within 30 days after the distribution, which would respect the idea of 30 days contained in the statute and treat the identification of the recipient in effect as an "adjustment" for purposes of section 6035(a)(3)(B). In fact, distribution is already treated as an "adjustment" in the proposed regulations,[1] although supplemental reporting is only optional. But recognizing that the statutory period from the decedent's death is really 10 months, or 16 months if there is an extension (as there often is), then the idea the AICPA has suggested of requiring just one filing each calendar year – say, January 31 – would make a lot of sense too, especially if early filing was permitted when the executor wanted to close the estate. Either rule would certainly serve the obvious purpose of the statute by giving beneficiaries information they need as and when they need it. Just as the statute ties the time of reporting to the filing of the estate tax return when values are known, on the apparent assumption that distribution has already occurred, the approach ACTEC proposes will also tie the time of reporting to the actual distribution when the recipient acquiring the asset is known, information that obviously is equally important to the Service.

In fact, simply letting "acquiring" mean "acquiring" is less of a textual stretch than supplying the words "the value of which" that Congress didn't use, in order to make sense of the statute at all. But no one would fault either interpretation.

Although there is no 2015 legislative history as such, section 6035 was drawn *verbatim* from section 1422 of the "Discussion Draft" introduced by Ways and Means Committee Chair Dave Camp on February 21, 2014. The accompanying summary stated that "[t]he estate would be required to report the value of the property to the IRS and to the beneficiary **receiving** the property."[2] The corresponding Joint Committee Staff explanation stated that the executor "is

[1] Proposed Reg. §1.6035-1(e)(3)(i)(B).

[2] Ways and Means Committee Majority Tax Staff, Tax Reform Act of 2014 Discussion Draft Section-by-Section Summary 31 (2014).

required to report to **both** **the** recipient and the IRS"[3] – not, for example, "all the possible recipients and the IRS."

The statutory language is traceable to the identical language in the "Sensible Estate Tax Act of 2011," introduced by Congressman McDermott in November 2011, described in the accompanying CRS summary as requiring disclosure "to **recipients** of any interest in an estate or a gift, information identifying the value of each interest **received**."[4] That in turn derives from similar language in the "Responsible Estate Tax Act" introduced by Senator Sanders in June 2010.[5] The next two sections of Senator Sanders' bill provided legislative language regarding valuation rules for certain transfers of nonbusiness assets[6] and requiring a minimum 10-year term for GRATs,[7] which along with consistent basis happen to be the same three estate and gift tax proposals that were included in the 2009 and the then current 2010 Treasury Greenbooks (except that the statutory language on valuation drew from proposals from the Clinton Administration).[8] Now that's not a coincidence, and the clear origin of these proposals not in original congressional ideas after all, but in efforts by some in Congress to implement the Greenbook proposals (albeit with some odd variations) ought to reassure the Treasury Department all the more that it's in a good position to interpret what had to have been contemplated and to tie the reporting requirement to the receipt of the property.

It is true that the statute refers not just to acquiring property, but to acquiring "any interest in property." Except for assets that do pass at death or are specifically bequeathed – not the assets ACTEC is concerned about – the question whether a beneficiary has an interest in undistributed property itself has been debated for centuries, especially in the context of a trust, usually in the form of a highly theoretical debate over whether a beneficial interest is "*in rem*" or "*in personam*." Suffice it to say that the **practical** result under modern estate administration rules and procedures is there is no such interest in undistributed property unless perhaps it is specifically bequeathed and the estate is solvent.

Finally, ACTEC believes, as its written comments elaborate, that two significant positions taken in the proposed regulations clearly exceed the regulatory authority granted by the statute. These are the so-called "zero basis rule" for certain property after-discovered or otherwise inadvertently omitted from an estate tax return (because section 1014(f) by its terms

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[3] Staff of the Joint Committee on Taxation, Technical Explanation of the Tax Reform Act of 2014, A Discussion Draft of the Chairman of the House Committee on Ways and Means To Reform the Internal Revenue Code: Title I – Tax Reform for Individuals (JCX-12-14) 75 (Feb. 26, 2014).

[4] "Sensible Estate Tax Act of 2011," H.R. 3467, 112th Cong., 1st Sess., sec. 5 (Rep. McDermott, D-WA) (Nov. 17, 2011) and the accompanying CRS summary ("to recipients of any interest in an estate or a gift, information identifying the value of each interest received").

[5] "Responsible Estate Tax Act," S. 3533, 111th Cong., 2nd Sess., sec. 6 (Sen. Sanders, I-VT) (June 24, 2010) and the accompanying CRS summary ("require executors of estates to file information returns and provide valuations and consistent basis information to persons acquiring property from decedents or by gift"). The "Responsible Estate Tax Act," H.R. 5764, 111th Cong., 2nd Sess. (July 15, 2010) and the accompanying CRS summary are identical.

[6] Sec. 7.

[7] Sec. 8.

[8] Department of the Treasury, "General Explanations of the Administration's Fiscal Year 2010 Revenue Proposals" 119-23 (May 11, 2009) (see http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2010.pdf); Department of the Treasury, "General Explanations of the Administration's Fiscal Year 2011 Revenue Proposals" 122-26 (Feb. 1, 2010) (see http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2011.pdf).

applies only to a final determination that begins with a return[9] or a Schedule A furnished under section 6035[10]) and the requirement to report so-called "subsequent transfers" (because section 6035 by its terms applies only to "executors"). ACTEC's comments also make more technical suggestions in case you disagree. I'll conclude by saying again that ACTEC's suggestion that the final regulations construe the statutory word "acquiring" to mean "acquiring," for the convenience of both taxpayers and the Service, would be much less of a textual stretch than the zero-basis and subsequent-transfer rules that will only frustrate taxpayers and their advisers. Thus I return to the point I started with that ACTEC's proposal is crucial to the public acceptance of these rules.

[9] Section 1014(f)(1)(A).
[10] Section 1014(f)(1)(B).