

Basis Consistency Final Regulations **(published in Federal Register September 17, 2024)**

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Long Awaited Final Regulations; IRS Reverses Course Regarding Three Very Controversial Provisions in Proposed Regulations

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1. Brief Synopsis

Final basis consistency regulations were published in the Federal Register on Sept. 17, 2024. Planners have anxiously been anticipating these final regulations (now issued 8 years after the proposed regulations were published in March, 2016). In particular, three issues in the proposed regulations were highly criticized by planners, and the IRS has reversed course as to all three of those issues.

- (1) **Reporting of Undistributed Property.** The Form 8971 and beneficiary “Statements” (attached as Schedules A to the Form 8971) generally must be filed within 30 days after the estate tax return is due (or is filed before the due date). The proposed regulations required that for undistributed property at the end of that 30-day period the beneficiary’s Statement must include *all* estate assets that might be distributed to the beneficiary (which might include most of the estate assets). The final regulations adjust the due date for Statements for property that beneficiaries have not received by 30 days after the estate tax return is due or is filed before the due date; such Statements are due by January 31 of the calendar year following the year of acquisition. Coordinating changes are made to the information that must be included in the initial and supplemental Information Returns (Form 8971).
- (2) **Removal of Zero Basis Rule for Unreported Property.** The proposed regulations surprisingly took the position that after-discovered or omitted property gets a basis of zero if the property is not reported on an estate tax return before the period of limitations on assessments has expired. The final regulations delete the zero basis provisions.
- (3) **Eliminating the Subsequent Transfer Reporting Requirement for All Beneficiaries Other Than Trustees.** The proposed regulations also surprisingly included a subsequent transfer reporting requirement. If a recipient of an asset in the gross estate makes a subsequent gift or distribution to a “related transferee” the proposed regulations required that the recipient must file a beneficiary Statement with the IRS and the transferee. The IRS and Treasury concluded that the burden of the requirement, including penalties for noncompliance, is too heavy to impose on individual beneficiaries, and the final regulations omit the subsequent transfer reporting requirement for individual recipients. However, the requirement continues to apply to trustees of beneficiary trusts when they make distributions, including direct distributions to trust beneficiaries and distributions pursuant to the exercise or lapse of a person’s power of appointment (whether general or limited). The subsequent transfer report by trustees is due by January 31 of the calendar year following the year of distribution.

The final regulations make various other changes from the proposed regulations, including clarifying and adding additional exceptions from the consistent basis and reporting requirements and clarifying information to be reported on initial and supplemental Information Returns (Form 8971), including the situations for which supplemental Information Returns must be filed.

The final regulations generally are effective for estates for which estate tax returns are filed after Sept. 17, 2024. However, the consistent basis and reporting requirements continue to apply to estates for which estate tax returns are filed after July 31, 2015.

2. Overview of Major Changes in Final Regulations

- a. **Overview.** The basis consistency provisions of §1014(f) and §6035 were enacted as part of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015, enacted July 31, 2015. Section 1014(f) provides that for federal income tax purposes the basis of property to which §1014(a) applies (i.e., property acquired from a decedent but with various exceptions) shall not exceed the final value determined for estate tax purposes, or if the final value has not been determined, the value provided in a statement to the decedent’s recipients. Section 6035 provides that if the estate is required to file an estate tax return under §6018(a), the executor is required to submit valuation information reports to recipients and to the IRS. Penalties apply (potentially very substantial penalties) if the required reports are not given. These statutory provisions apply to estates for which estate tax returns are filed after the date of enactment (i.e., after July 31, 2015).

Form 8971 and its Instructions were released on January 29, 2016, and revised draft instructions were released in June and October 2016, with a September 2016 date. No later versions of the Form or Instructions have been issued. Updated information about Form 8971 is posted at <https://www.irs.gov/forms-pubs/about-form-8971>. (It was last updated August 4, 2024 to update where to file Form 8971—at Internal Revenue Service, Stop 824G, 7940 Kentucky Drive, Florence, KY 41042.)

Temporary and proposed regulations regarding §1014(f) and §6035 were published in the Federal Register on March 4, 2016. Various provisions in the proposed regulations were very controversial. The IRS received over thirty written comments about the proposed regulations. ACTEC filed very detailed comments on May 27, 2016, and ACTEC representatives testified at the hearing with the IRS about the proposed regulations.

For a detailed discussion about the legislative history behind the basis consistency provisions, the Form 8971, and the proposed regulations, see Item 5.b of Aucutt, *Washington Update: Pending and Potential Administrative and Legislative Changes* (February 2024) found [here](#) and Akers, *Basis Consistency Temporary and Proposed Regulations* (March 25, 2016) found [here](#), both available at www.bessemertrust.com/for-professional-partners/advisor-insights and Akers, *The Executor's Job Gets Tougher: Basis Consistency and Selected Other Income Tax Issues Facing Executors*, 51ST ANN. HECKERLING INST. ON EST. PL. ¶1803.1 (2017).

Treasury officials reported in May 2022 that they were hoping “to get [final regulations] out soon,,” but the publication of the final regulations obviously has been delayed. Officials reported in the Spring of 2024 that the final regulations may be coming by the end of the summer of 2024; indeed, the final regulations were issued on September 16, 2024, to be published in the Federal Register on September 17, 2024. (T.D. 9991, 89 FED. REG. 76356, Sept. 17, 2024).

Some highlights from the final regulations are briefly summarized.

- b. **Due Date for Statements to Beneficiaries Reporting Property the Beneficiaries Have Not Yet Acquired.** One of the most controversial provisions of the proposed regulations (that would have been problematic for many if not most estates required to file basis consistency reports) was that “Statements” (Schedules A to Form 8971) had to be provided to all beneficiaries by the earlier of 30 days after the due date of the estate tax return or the date that is 30 days after the date the estate tax return is filed with the IRS. If the executor had not determined what property would be distributed to each beneficiary by that time, the executor had to report on the Statement for each beneficiary *all* the property that the executor could use to satisfy the beneficiary’s interest. Commenters complained that would cause duplicate reporting, may confuse beneficiaries by leading them to expect to receive all the property reported to them, and would require disclosure of private information about many if not most estate assets to all potential beneficiaries (which might result in conflicts and litigation among beneficiaries with competing interests).

Commenters noted that §6035(a)(1) requires the executor to furnish Statements “to each person *acquiring* any interest in property included in the decedent’s gross estate,” and the common meaning of “acquiring” and the way it is used in other Code sections refers to something already received.

The IRS adopted that interpretation of the term “acquiring,” and adjusted the due date of Statements for property that beneficiaries have not received by 30 days after the estate tax return is due or is filed before the due date. The final regulations continue to require that for each beneficiary who acquired property on or before the due date or earlier filing of the estate tax return, the due date of Statements is 30 days after the due date or earlier filing of the return. But the due date for furnishing a Statement to a beneficiary who acquires property at a later date is January 31 of the calendar year following the year of acquisition. (That will give the beneficiary plenty of time to properly report tax information after the beneficiary received the property, for example, reporting income from the

beneficiary's sale of the property.) A beneficiary is treated as "acquiring" property when title vests in the beneficiary or the beneficiary has sufficient control or connection with the property that the beneficiary can take action related to the property for which basis of the property is important (such as selling or depreciating the property). That usually occurs when the property is distributed but may occur upon the death of the decedent for property passing by contract or operation of law. Reg. §1.6035-1(c)(4).

If the executor anticipates that a beneficiary will receive certain property, the executor has the option to furnish Statement(s) to any such beneficiaries within 30 days of filing the estate tax return. That could reduce the burden associated with these filing requirements if the executor believes certain beneficiaries will receive particular property. If a different beneficiary ends up receiving that property, the executor must file a supplemental Information Return with the IRS and a revised Statement to the beneficiary. Reg. §1.6035-1(c)(5), §1.6035-(d)(2)(iv). (Such supplemental returns are required within 30 days after information becomes available to conclude that supplemental reporting is required. Reg. §1.6035-1(d)(4).)

Coordinating changes are made to the information that must be included in the initial and supplemental Information Returns (Form 8971). Statements are attached (as Schedules A) for property distributed before the due date or earlier filing date of the estate tax return and Statements that the executor elects to furnish by that date as to property the executor anticipates distributing to particular beneficiaries. Reg. §1.6035-1(c)(1). The Information Return must be filed by the due date even if no Statements are attached. Preamble to Final Regulation, T.D. 9991, 89 FED. REG. 76356, at 76365 (Sept. 17, 2024).

- c. **Removal of Zero Basis Rule for Unreported Property.** The proposed regulations surprisingly took the position that after-discovered or omitted property gets a basis of zero if the property is not reported on an estate tax return before the period of limitations on assessments has expired. Prop. Reg. §1.1014-10(c)(3)(i)(B).

Comments to the IRS argued that the zero basis rule was not authorized by the statute (§1014(f), which applies only to property reported on an estate tax return, the IRS's regulatory authority was to provide exceptions to the basis consistency requirement not to expand basis consistency, and the Code does not support denying at least allowing a carryover basis for an inherited asset). The IRS rejected those arguments.

Comments also urged that the practical effects of the zero basis rule are onerous, unduly harsh, and unfair (beneficiaries do not control reporting on estate tax returns by executors and unreported property is more likely to arise by an inadvertent omission or as a result of being undiscovered, rather than willful omission). The preamble to the final regulations recognizes those practical effects and also observes that existing Federal tax enforcement mechanisms (including criminal liability) serve to deter willful nonreporting on the estate tax return.

The final regulations delete the zero basis provisions in proposed regulation §1.1014-10(c)(3)(i)(B). The final regulations do not specifically address after-discovered or omitted property, but the preamble to the final regulations addresses the comments about the zero basis rule and concludes with this summary.

The rule identifying property subject to the consistent basis requirement in §1.1014-10(c)(1)(i) of the final regulations, together with the definition of the term *included property* in §1.1014-10(d)(4) of the final regulations, is sufficient to clarify the scope of the consistent basis requirement, and therefore these final regulations do not include a specific rule on the basis of unreported property.

Preamble to Final Regulations, T.D. 9991, 89 FED. REG. 76356 at 76361 (Sept. 17, 2024) (emphasis included in original).

- d. **Eliminating the Subsequent Transfer Reporting Requirement for All Beneficiaries Other Than Trustees.** The proposed regulations also surprisingly included a subsequent transfer reporting requirement. If a recipient of an asset in the gross estate makes a subsequent gift or distribution to a "related transferee" (which, for some strange reason, included a grantor trust but not a non-grantor

trust for a related party) the recipient must file a Schedule A (beneficiary Statements are Schedules A attached to the Form 8971) with the IRS and transferee reporting the change in ownership and final estate tax value of the property. Prop. Reg. §1.6035-1(f).

Comments to the IRS about this requirement included that the IRS lacks authority to require reporting of subsequent transfers, the reporting requirement could continue for generations, the requirement would be impossible for the IRS to monitor and enforce, and the requirement would be particularly unfair to unsophisticated individual recipients who would likely be unaware of the reporting requirement and would be more likely to become subject to noncompliance penalties. The IRS and Treasury reconsidered the benefits and burdens of the proposed subsequent transfer reporting requirement and concluded that the burden of the requirement, including penalties for noncompliance, is too heavy to impose on individual beneficiaries. However, the IRS and Treasury concluded that for trustees of trusts the subsequent transfer reporting requirement would not be sufficiently burdensome to outweigh the needs of and benefits to the IRS and trust beneficiaries. Preamble to Final Regulations, T.D. 9991, 89 FED. REG. 76356, at 76372 (Sept. 17, 2024).

The final regulations omit the subsequent transfer reporting requirement for individual recipients of property that was in Prop. Reg. §1.6035-1(f), but the requirement continues to apply to trustees of beneficiary trusts when they make distributions, including direct distributions to trust beneficiaries and distributions pursuant to the exercise or lapse of a power of appointment (whether general or limited). The subsequent transfer reporting requirement would apply to trustees of trusts that receive property from beneficiary trusts (so the reporting obligation continues until property is distributed to an individual not in trust). But the reporting requirement does not apply to a sale or other transaction that is a recognition event for income tax purposes (whether or not resulting in a gain or loss) if the property's basis is no longer determined by reference to the estate tax value of the property. Reg. §1.6035-1(h)(1), (3).

The subsequent transfer report by trustees is due by January 31 of the calendar year following the year of distribution. Reg. §1.6035-1(h)(2).

Some commenters have noted that the subsequent transfer reporting requirement for trustees will be a burden for individual trustees, many of whom will be unaware of the requirement. See Wallace, *Estate Tax Basis Consistency Regs to Reduce Compliance Burden*, TAX NOTES (Sept. 17, 2024).

- e. **Ability of Beneficiaries to Challenge Value.** Several commenters requested that a procedure be added under which a beneficiary could challenge the determination of final value since the beneficiary has no control over the executor's reporting on the estate tax return or involvement in any redetermination of value in an examination or court proceeding. The IRS rejected that request because of "[a]dministrability and other concerns," including that it would leave the IRS in the same position of litigating valuation issues with a beneficiary, the same as before the enactment of §1014(f). However, the IRS and Treasury are considering future guidance that may allow a beneficiary to produce "certain credible evidence of value" during some limited period of time "if the credible evidence of value indicates the reported value represents a substantial understatement of value." Preamble to Final Regulations, T.D. 9991, 89 FED. REG. 76356, at 76362 (Sept. 17, 2024).
- f. **Excepting Certain Types of Property From Consistent Basis and/or Reporting Requirements.**
 - (1) **Estate Tax Returns Filed On or Before July 31, 2015.** The consistent basis provisions of §1014(f) and the reporting requirements under §6035 apply to estates for which estate tax returns are filed after July 31, 2015. The final regulations clarify that the basis consistency and reporting requirements do not apply to estates for which the estate tax return was filed on or before July 31, 2015, even if the due date of the return is after July 31, 2015 or if one or more supplements to the return are filed after July 31, 2015. Reg. §1.1014-10(c)(1)(ii); §1.6035-1(b)(1).
 - (2) **Overview of Types of Excepted Property.** The proposed regulations provide as exceptions to the consistent basis requirement only property that qualifies for the marital or charitable deduction and tangible personal property for which an appraisal is not required under §20.2031-

6(b). Prop. Reg. §1.1014-10(b)(2). The proposed regulations provided four exceptions of types of property that do not have to be reported under §6035: (i) cash (other than a coin collection or other coins or bills with numismatic value); (ii) income in respect of a decedent; (iii) tangible personal property for which an appraisal is not required; and (iv) property sold or disposed of in a transaction in which capital gain or loss is recognized. Prop. Reg. §1.6035-1(b)(1). The final regulations add clarifications and add some types of excepted property.

- (3) **Property Wholly Deductible Under Marital or Charitable Deductions.** Property qualifying for the estate tax marital or charitable deduction is not subject to the consistent basis provisions of §1014(f) (but generally is subject to the reporting requirements under §6035). The final regulations clarify that property qualifying for only a *partial* marital or charitable deduction is not excepted from the consistent basis requirement. The preamble to the final regulations lists several examples:

(1) a charitable remainder trust, a charitable lead trust, or a pooled income fund; (2) a trust subject only to a partial QTIP election under section 2056(b)(7); and (3) property divided between the decedent's surviving spouse and a charity if the sum of the deductions for the two interests given to those recipients is less than the value of the property included in the value of the gross estate.

Preamble to Final Regulation, T.D. 9991, 89 FED. REG. 76356, at 76358-59 (Sept. 17, 2024). As to that third example, the actual language of the final regulation is broad enough to include property divided between two charities if the sum of the deductions is less than the gross estate value, as occurred in *Estate of Warne v. Commissioner*, T.C. Memo. 2021-17. Reg. §1.1014-10(c)(2)(xi).

- (4) **Taxable Termination Property Subject to GST Tax and Surviving Spouse's One-Half Community Property Interest.** The consistent basis and reporting requirements apply only to property included in the decedent's gross estate. The proposed regulations provided a long list of items not included in the gross estate and therefore not subject to the requirements. The final regulations add several additional exceptions.

(a) **Taxable Termination Property Not Subject to Consistent Basis.** The final regulations add that property subject to a taxable termination for GST tax purposes is not in the gross estate and therefore is not subject to the consistent basis requirement. Reg. §1014-10(c)(2)(xiii).

(b) **Spouse's One-Half Interest Community Property Interest Not Subject to Consistent Basis and Reporting Requirements.** The surviving spouse's one-half of community property is not in the decedent's gross estate for estate tax purposes and therefore is not subject to the consistent basis and reporting requirements. Reg. §1014-10(c)(2)(xii); §1.6035-1(e)(1). If the executor makes a non pro rata division and distribution of community property under applicable state law, property included in the decedent's gross estate that is distributed to the surviving spouse in lieu of the spouse's interest in community property pursuant to state law must be reported on the Information Return and on a Statement to the spouse. Reg. §1.6035-1(e)(1).

- (5) **Cash.** The proposed regulations did not include cash as property not subject to the consistent basis requirement and described cash that is not subject to the reporting requirement fairly generically. Prop. Reg. §1.6035-1(b)(1). The final regulations add more guidance for cash-type assets that are not subject to the consistent basis or reporting requirements. The following are not subject to either the consistent basis or reporting requirements: U.S. dollars (defined to include physical bills and coins with values equal to their face values, Reg. §1.1014-10(d)(6)), U.S. dollar-denominated demand deposits, certificates of deposit denominated in U.S. dollars, cash collateral denominated in U.S. dollars held by a third party to secure a liability, money market funds, life insurance proceeds payable in a lump sum in U.S. dollars, and tax refunds (Federal, state, or local) payable in U.S. dollars. Reg. §1014-10(c)(2); §1.6035-1(f)(2).

The preamble to the final regulations lists as examples the following items that do not fall within the list of excepted property in § 1.6035-1(f)(2) of the final regulations:

(1) currency other than in United States dollars; (2) any payments not made in United States dollars; (3) life insurance policies not paid in United States dollars, and life insurance policies payable to a beneficiary in United States dollars annually or at some other interval for a period of time after the decedent's death; (4) notes (other than an installment obligation subject to section 453) that the decedent did not forgive in full upon the decedent's death, whether or not expressed in United States dollars; (5) U.S. Savings bonds; and (6) accounts receivable (unless such property consists entirely of the right to receive an item of income in respect of a decedent as defined in section 691 (IRD)). This property generally has basis, its value generally may not equal its face value and, accordingly, this property is not excepted from the reporting requirements in the final regulations. For the same reasons, digital assets as defined in section 6045(g)(3)(D), including virtual currency or cryptocurrency, do not fall within the list of excepted property set forth in § 1.6035-1(f)(2) of the final regulations.

Preamble to Final Regulations, T.D. 9991, 89 FED. REG. 76356, at 76368 (Sept. 17, 2024).

(6) **Household and Personal Effects.** In the exception for "tangible personal property for which an appraisal is not required under §20.2031-6(b)," the final regulations changes "tangible personal property" to "household and personal effects" to conform more closely to §20.2031-6(b). This refers to household and personal effects that do not have a marked artistic or intrinsic value over \$3,000.

(7) **Notes Forgiven by Decedent.** The final regulations add as an exception to the consistent basis and reporting requirements notes that are forgiven in full by the decedent, whether or not denominated in U.S. dollars. Reg. §1014-10(c)(2)(viii); §1.6035-1(f)(2)(viii).

(8) **Property Whose Basis is Unrelated to the Federal Estate Tax Value of the Property.** The proposed regulations except income in respect of decedent property from the consistent basis and reporting requirements. The final regulations add to the consistent basis and reporting exceptions several other types of assets whose basis is unrelated to the estate tax value of the property:

- Annuity contracts subject to §72 and amounts received as an annuity under §72;
- Income in respect of a decedent property described in §691;
- Amounts received under installment obligations subject to the §453 installment method;
- Stock of a passive foreign investment company (§1296(i)) if the basis is the decedent's basis immediately before death;
- Retirement plans, deferred compensation plans and IRAs expressed entirely in U.S. dollars;
- Bonds to the extent redeemed by the issuer for U.S. dollars prior to being distributed to a beneficiary;
- Property included in the gross estate of a beneficiary who died before the due date of the Information Report (the Form 8971); and
- Any other property that may subsequently be identified by the IRS as excepted property.

Reg. §1.1014-10(c)(2)(x); §§1.6035-1(f)(2)(xi).

(9) **Property Sold or Disposed of in Recognition Events.** Assets sold or disposed of in recognition events (whether or not resulting in gain or loss and whether any gain is capital or ordinary) are not subject to the reporting requirements under §6035. The final regulations add examples of such property.

In addition, in response to requests for additional clarification, §1.6035-1(f)(2)(x)(A) through (E) of the final regulations include examples of excepted property pursuant to this rule as follows: (1) property distributed in satisfaction of a pecuniary bequest on which the estate recognizes any gain or loss pursuant to §1.661(a)-2(f); (2) property for which an election under section 643(e)(3) has been made for the estate to recognize any gain or loss; (3) interests in business entities that are redeemed for United States dollars prior to distribution to a

beneficiary; (4) property disposed of in a transaction described in section 267(a) and (b)(13), which disallows a loss from the sale or exchange of property, directly or indirectly, between the executor and the beneficiary of the estate, except in a sale or exchange in satisfaction of a pecuniary bequest; and (5) property subject to the mark to market accounting method at the time of distribution from the estate or from the decedent's revocable trust.

Preamble to Final Regulations, T.D. 9991, 89 FED. REG. 76356, at 76369-70 (Sept. 17, 2024).

- g. **Information Returns and Supplemental Information Returns.** The final regulations add various clarifications regarding information to be reported on initial and supplemental Information Returns (Form 8971), including the situations for which supplemental Information Returns must be filed.

One of the clarifications is that an Information Return must be filed even if all distributions from the estate are of property excepted from the reporting requirements. If excepted property exists, the executor must disclose on the Information Return that some or all of the property included in the gross estate is excepted from the full reporting requirements, but the executor is not required to identify the excepted property or provide a Statement to a beneficiary with regard to excepted property. Reg. §1.6035-1(f)(1).

Several clarifications are made regarding reporting to beneficiary trusts. The beneficiary Statement is generally given to the trustee of the trust, but the final regulations allow the executor to furnish the Statement directly to trust beneficiaries, with a copy to the trustee, "if the executor reasonably believes that it is unlikely that the beneficiary trust will depreciate, sell, or otherwise dispose of the property subject to reporting in a recognition event for income tax purposes but instead will distribute the property in kind to the trust beneficiaries." Reg. §1.6035-1(g)(2)(i). If a beneficiary trust does not have at least one trustee and a tax ID number by the due date for filing the Information Return, the executor "must report on the Information Return that the beneficiary trust has not yet been established." Once the beneficiary trust has been established and the trust information becomes available to the executor, a supplemental Information Return and Statement must be filed within 30 days. Reg. §1.6035-1(g)(2)(ii).

- h. **Penalties.** The regulations to §6721 (failure to file correct information returns) and §6722 (failure to furnish correct payee statements) are modified in the final regulations to clarify that those sections apply to Information Returns and Statements, respectively, under §6035 as to Information Returns and Statements required to be filed on or after January 1, 2024. The preamble further clarifies the penalty provisions.

A penalty applies separately to each initial or supplemental Information Return that the executor is required to file with the IRS, and to each initial or supplemental Statement that the executor is required to furnish to a beneficiary. Accordingly, only one penalty under section 6721 may be imposed for filing an incorrect Information Return, even if copies of multiple required Statements are not attached to the Information Return, but multiple penalties under section 6722 may be imposed for furnishing multiple incorrect Statements, even if the Statements were filed with the IRS as attachments to a single Information Return.

Preamble to Final Regulations, T.D. 9991, 89 FED. REG. 76356, at 76372 (Sept. 17, 2024). The final regulations also refer to §6724 and applicable regulations relating to waivers of the penalties if it is shown that the failure was due to reasonable cause and not to willful neglect. Reg. §1.6035-1(i).

- i. **Property Subject to Debt.** The final regulations keep the helpful provision that the value of property for basis purposes is the gross value undiminished by recourse or non-recourse debt, regardless of whether the estate tax return reports the net value or separately reports the gross value and the outstanding debt. Reg. §1.1014-10(b)(3)(i).

- j. **Effective Date of Regulations.** Consistent with §7805(b)(1), the §1.1014-10 consistent basis final regulations apply to estates of decedents if the estate tax return is filed after the date of publication in the Federal Register, and the §1.6035-1 reporting final regulations apply to estates required to file an estate tax return if the return is filed after the date of publication in the Federal Register (i.e., after September 17, 2024). Reg. §1.1014-10(f); §1.6035-1(j). However, the consistent basis and reporting requirements in general continue to apply to estates for which estate tax returns are filed after July 31, 2015.