



LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL  
CENTRO DE SERVICIOS LEGALES

122 Boylston Street • Jamaica Plain, MA 02130-2246  
Telephone: 617-522-3003 • Facsimile: 617-522-0715 • TTY: 617-522-3575  
*www.legalservicescenter.org*

May 28, 2020

R. Joseph Durbala  
Internal Revenue Service  
1111 Constitution Avenue NW, Room 6526  
Washington, DC 20224

**RE: Comment Request for Forms 8857 and 8857(SP), 85 FR 17950**

Dear Mr. Durbala:

Thank you for the opportunity to submit comments on Forms 8857 and 8857(SP) to the Internal Revenue Service (“IRS”). The Federal Tax Clinic at Harvard Law School submits the following comments on behalf of our Clinic and the client communities that we serve. In its request, the IRS invited comments on five topics; this Comment in particular will focus on the third item (c): “ways to enhance the quality, utility, and clarity of the information to be collected.”<sup>1</sup>

**Clinic Background**

The Federal Tax Clinic at Harvard Law School (the “Clinic”) was founded in 2015 by Professor T. Keith Fogg, who spent over thirty years at the IRS in the Office of Chief Counsel before beginning to teach. As part of Harvard’s Legal Services Center, the Clinic works with low- and moderate-income taxpayers from the greater Boston area to provide a variety of legal services related to issues before the IRS and the Massachusetts Department of Revenue.<sup>2</sup> The Clinic receives a grant created by IRC 7526 and is a recognized Low Income Taxpayer Clinic (LITC) program, whose grant is administered by the Taxpayer Advocate Service within the IRS.<sup>3</sup>

With respect to innocent spouse cases, the Clinic regularly represents individuals seeking innocent spouse relief in the administrative process, in the United States Tax Court, and in the United States Courts of Appeal. The Clinic’s representation of clients sometimes begins with the submission of Form 8857, while at other times the Clinic enters the case during the administrative process but after the submission of Form 8857, or at the judicial level after the IRS or the Tax Court has made its decision on the basis of information previously submitted in Form 8857. These varying perspectives have given the Clinic the opportunity to see the difference that the preparation of Form 8857 can make in the outcome of requests for innocent spouse relief.

---

<sup>1</sup> 85 FR 17950.

<sup>2</sup> Federal Tax Clinic, *Legal Services Center of Harvard Law School* (last accessed May 26, 2020), <http://www.legalservicescenter.org/students-clinics/federal-tax-clinic/>.

<sup>3</sup> Taxpayer Advocate Service, *Low Income Taxpayer Clinics*, WWW.IRS.GOV (last accessed May 26, 2020), <https://taxpayeradvocate.irs.gov/about/litc>.

In addition to direct services, the Clinic also conducts research and advocacy related to important policy issues that impact our clients.<sup>4</sup> All of the clients that our Clinic serves are low- to moderate-income taxpayers. Many speak English only as a second language. In addition to the tax issues that bring them to our Clinic, our clients are often dealing with a variety of other challenges, sometimes interconnected with their tax issues, that stem from the experience of living in or near poverty. These can include everything from difficulties in navigating a state benefits system, to homelessness and food insecurity. The following Comment seeks to offer suggestions and perspectives for the IRS as it considers changes to Forms 8857 and 8857(SP) that are cognizant of the circumstances in which taxpayers like our clients will encounter these forms.

**Comment: Four Suggested Changes to IRS Forms 8857 and 8857(SP)**<sup>5</sup>

Our Clinic respectfully encourages the IRS to consider the following changes to Form 8857:

**1. Form 8857 Should Include a Voicemail Permission Checkbox in Part I.**

Line Four of Form 8857 collects the contact information of the requesting taxpayer. Line Four currently requests a phone number (the “[b]est or safest daytime phone number (between 6 a.m. and 5 p.m. Eastern Time)”) from the taxpayer.<sup>6</sup> The Clinic appreciates the IRS’s inclusion of the language “safest” out of respect for individuals in unsafe domestic living situations. Building off previous recommendations from the Taxpayer Advocate Service,<sup>7</sup> the Clinic recommends that in addition to collecting this phone number, the IRS also adds a checkbox that will allow taxpayers to indicate that IRS examiners may leave a voicemail at that same phone number should the examiner have questions about the taxpayer’s comments on Form 8857 or require additional information in order to render a decision.

---

<sup>4</sup> See Federal Tax Clinic, *supra* note 2; see also TAXPAYER ADVOCATE SERVICE, LOW INCOME TAXPAYER CLINICS PROGRAM REPORT 2019, at 9 (2019), *available at* <https://www.irs.gov/pub/irs-pdf/p5066.pdf> (“Clinics providing representation and education to low-income and ESL taxpayers are well-situated to identify and evaluate instances where the IRS’s interpretation and implementation of the tax laws harms taxpayers or hinders them from exercising their taxpayer rights. Encouraging clinics to identify problems and propose solutions benefits both the taxpayers and the IRS by helping the IRS to shape policies to better serve and thus better administer tax policy.”).

<sup>5</sup> While this Comment’s language focuses on Form 8857, its proposals extend (with appropriate translations) to Form 8857(SP) as well.

<sup>6</sup> IRS, FORM 8857, REQUEST FOR INNOCENT SPOUSE RELIEF 1 (Jan. 2014), *available at* <https://www.irs.gov/pub/irs-pdf/f8857.pdf> [hereinafter *Form 8857*].

<sup>7</sup> See 1 TAXPAYER ADVOCATE SERVICE, FISCAL YEAR 2017 OBJECTIVES REPORT TO CONGRESS 180 (2017), *available at* [https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-JRC/Area\\_of\\_Focus\\_13.pdf](https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-JRC/Area_of_Focus_13.pdf).

It is common knowledge that taxpayers, especially those proceeding *pro se*, struggle to understand complex tax forms and guidance, including guidance found on the IRS website.<sup>8</sup> This is likely particularly true when taxpayers encounter new forms, such as Form 8857, as opposed to materials like Form 1040 that most taxpayers encounter on a more regular basis. Thus, individuals completing Form 8857 may misunderstand its requirements, or include relevant information but in a manner that could appear unclear to an IRS examiner. While IRS examiners are not required to, they have the ability to contact taxpayers in situations like this in order to obtain clarification.<sup>9</sup> Importantly, many taxpayers may not be available during the 6am to 5pm EST call hours, so a voicemail option would increase the likelihood that the inquiring examiner can contact a taxpayer and resolve any questions about their comments on Form 8857. In particular, many low- and moderate-income taxpayers may have jobs with shifts or irregular schedules and would benefit from a voicemail option.

This change should be adopted because it presents little burden to the IRS or taxpayers while offering benefits to both. First, with a slight reconfiguring of the address box sizes, the IRS should be able to accommodate a short line and checkbox for this voicemail option without increasing the length of Form 8857. Second, IRS examiners would not be obligated to call taxpayers with the inclusion of this option, but for those who choose to do so, the voicemail option increases the likelihood that the reason behind their call will be addressed and their examination of a particular case improved. Third, taxpayers who prefer not to receive voicemails from the IRS may simply leave the box unchecked to indicated their preference.

*a. Sample Language for Recommendation 1: To be Added to Part II, Line 4*

[Under or following “Best or safest daytime phone number (between 6 a.m. and 5 p.m. Eastern Time)”, and followed by a checkbox] “Check here if you consent to the IRS leaving a voicemail message at this number ☐ .”

**2. Form 8857 Should Include Collect Data on ESL Status in Part II.**

Part II of Form 8857 currently collects important biographical information from taxpayers requesting innocent spouse relief, such as marital/living status and educational background.<sup>10</sup> These indicators, as well as other indicators such as the gender of requesting spouses, figure heavily into case outcomes as well as the broader work of the IRS and tax professional community.<sup>11</sup> Building on these indicators, the Clinic recommends that the IRS start collecting

---

<sup>8</sup> See 1 TAXPAYER ADVOCATE SERVICE, 2018 ANNUAL REPORT TO CONGRESS 60 (2018), available at [https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18\\_Volume1\\_MSP\\_03\\_NAVIGATINGIRS.pdf](https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume1_MSP_03_NAVIGATINGIRS.pdf) [hereinafter *TAS 2018 Annual Report*] (citing research in which, across generations of taxpayers including millennials, Gen Xers, and Baby Boomers, 17% or fewer of respondents found the IRS website to be “[e]asily searchable,” “[w]ell organized,” or “[u]ser-friendly”).

<sup>9</sup> See *id.*

<sup>10</sup> See Form 8857, *supra* note 6, at 2.

<sup>11</sup> See, e.g., Stephanie H. McMahon, *An Empirical Study of Innocent Spouse Relief: Do Courts Implement Congress's Legislative Intent?*, 12 FLA. TAX REV. 629, 666 (2012) (citing the impact

information about whether taxpayers filing Form 8857 identify as ESL, and if so, what their first or preferred language is.

The Clinic appreciates the many steps that the IRS has taken to increase language access for American taxpayers, both generally<sup>12</sup> and within the context of innocent spouse claims.<sup>13</sup> Gathering more information about the language needs of innocent spouses will help the IRS continue affirming its commitment to serving all taxpayers, while providing data that can help the IRS make informed decisions about where to deploy existing language access resources.

For example, Form 8857 has been translated to Spanish<sup>14</sup> because the IRS has designated Spanish a “frequently encountered”<sup>15</sup> language. Nevertheless, many of the 25.1 million ESL taxpayers in the United States<sup>16</sup> speak non-English languages other than Spanish, which the IRS has recognized in other contexts.<sup>17</sup> The Clinic thus submits this recommendation as an efficient method to identify whether, and if so which, additional ESL communities beyond Spanish-speakers may be routinely using Form 8857 and could benefit from resources such as IRS-provided translation services<sup>18</sup> or LITC Clinics that have the ability to represent ESL clients. Notably, this question will be relevant even for individuals completing Form 8857(SP): for instance, some individuals whose native language is Portuguese or Italian may know more Spanish than English, and thus prefer to complete Form 8857(SP) even though their primary or preferred language is not actually Spanish.

This change should be adopted because it presents little burden to the IRS or taxpayers while offering benefits to both. First, with the addition of just one to two lines to Form 8857, the IRS could implement a broad data collection effort that has the potential to improve its processing of Form 8857 as well its language access service. Second, IRS examiners would not be obligated to take any additional action to provide language access beyond the actions already required by federal law and existing IRS procedure; rather, in addition to the systemic data collection

---

of education level, which is collected in Part II of Form 8857, on innocent spouse cases: “The amount of education and the perception of education also matter, with those having lesser education generally doing better [in their claims for innocent spouse relief].”).

<sup>12</sup> See, e.g., IRS OFFICE OF EQUITY, DIVERSITY & INCLUSION, LANGUAGE ACCESS FOR TAXPAYERS WITH LIMITED ENGLISH PROFICIENCY FREQUENTLY ASKED QUESTIONS (Jan. 2016), available at <https://www.irs.gov/pub/irs-utl/language-access-taxpayers-limited-english-proficiency-faqs.pdf>.

<sup>13</sup> IRS, FORM 8857(SP), SOLICITUD PARA ALIVIO DEL CÓNYUGE INOCENTE (Jan. 2014), available at [https://www.irs.gov/pub/irs-access/f8857sp\\_accessible.pdf](https://www.irs.gov/pub/irs-access/f8857sp_accessible.pdf) [hereinafter *Form 8857(SP)*].

<sup>14</sup> *Id.*

<sup>15</sup> Jennifer J. Lee, *Operationalizing Language Access Rights for Limited English Proficient Taxpayers*, 91 TEMP. L. REV. 791, 799 (2019).

<sup>16</sup> *Id.* at 791.

<sup>17</sup> See, e.g., IRS, *Help Available at IRS.gov in Different Languages and Formats*, WWW.IRS.GOV (May 21, 2018), <https://www.irs.gov/newsroom/help-available-at-irsgov-in-different-languages-and-formats> (identifying IRS provision of language resources in at least five non-English languages).

<sup>18</sup> See, e.g., *id.* (advertising IRS oral interpretation services for over 300 languages).

benefits offered by this change, examiners would be equipped with additional information that will help them provide more efficient and targeted answers to taxpayers who request services such as interpreters. Third, taxpayers who prefer not to provide information about their language ability or preferences may simply leave the box unchecked.

*a. Sample Language for Recommendation 2: To be Added to Part II*

“Is your primary or preferred language one other than English?” ☐ Yes ☐ No. If YES, what is your primary or preferred language? \_\_\_\_\_”

**3. Form 8857 Should Cite to Directly to Sources Outlining the Relevant Legal Factors for Innocent Spouse Relief on Page 1.**

The IRS begins Form 8857 with an informational box highlighting “Important Things to Know” about Form 8857. The Clinic appreciates that the IRS has used this space to direct taxpayers to its instructional publication for Form 8857, “Instructions for Form 8857.”<sup>19</sup> However, both the “Important Things to Know” box and the Instructions for Form 8857<sup>20</sup> fail to identify the relevant factors that IRS examiners use in evaluating Innocent Spouse Claims, despite the fact that the IRS publishes this information in other public-facing guidance about Innocent Spouse Relief.<sup>21</sup> The Clinic recommends that the IRS add a citation to IRS Publication 971 in the second bullet point of the “Important Things to Know” box.

Central to a fair and just tax system is the principle that taxpayers “have the right to know what they need to do to comply with tax laws.”<sup>22</sup> This includes “clear explanations of the law and IRS procedures in all tax forms, instructions, publications, notices, and correspondence.”<sup>23</sup>

Because neither Form 8857 nor its current instructions provide the relevant legal factors that the IRS uses in its determination of innocent spouse cases, taxpayers filling out Form 8857 lack a “clear explanation of the law.” While individuals familiar with the law may understand that Form 8857 seeks to guide taxpayers through a series of questions designed to elicit answers that will map on to the controlling legal factors for these cases, the IRS should not assume that taxpayers or even tax professionals unfamiliar with this particular legal standard will interpret

---

<sup>19</sup> See *Form 8857*, *supra* note 6, at 1 (citing IRS, INSTRUCTIONS FOR FORM 8857 (Jan. 2014), available at <https://www.irs.gov/pub/irs-pdf/i8857.pdf>).

<sup>20</sup> See IRS, INSTRUCTIONS FOR FORM 8857 2–3 (Jan. 2014), available at <https://www.irs.gov/pub/irs-pdf/i8857.pdf> [hereinafter *8857 Instructions*] (stating at most that “[t] into account all the facts and circumstances, the IRS determines it would be unfair to hold you liable for the understated or unpaid tax”).

<sup>21</sup> See, e.g., IRS, “FACTORS FOR DETERMINING WHETHER TO GRANT EQUITABLE RELIEF,” PUBLICATION 971 INNOCENT SPOUSE RELIEF 9–12 (Oct. 2014), available at <https://www.irs.gov/pub/irs-pdf/p971.pdf> [hereinafter *Pub. 971*] (listing factors that “the IRS will consider” in innocent spouse cases).

<sup>22</sup> *Taxpayer Bill of Rights*, TAXPAYER ADVOCATE SERVICE (last accessed May 26, 2020), <https://taxpayeradvocate.irs.gov/taxpayer-rights>.

<sup>23</sup> *Id.*

those questions correctly. Because the IRS has already found it acceptable to describe this standard in public-facing documents such as Publication 971, it should cite directly to that guidance in Form 8857, rather than referring taxpayers first to a separate set of instructions. A direct citation will be particularly useful given the fact that taxpayers already report difficulties in navigating the IRS website and its forms.<sup>24</sup> By connecting Form 8857 to its controlling law through a direct citation, the IRS will better meet taxpayers' Right to Be Informed by reducing the possibility that taxpayers searching for this information will get lost in the current gap between Form 8857 and Publication 971.

This change should be adopted because it presents little burden to the IRS or taxpayers while offering benefits to both. First, the language required to implement this change should require no more than one or two lines in the "Important Things to Know" box. With modest reconfiguration, it is likely that this addition can be made without increasing the number of pages contained in Form 8857. Second, adding this language will go a long way toward increasing taxpayer comprehension of Form 8857, its questions, and their requirements. This increased comprehension will benefit taxpayers by meeting their Right to Be Informed. Third, increased taxpayer comprehension of Form 8857 increases the likelihood that taxpayers will provide relevant information for the IRS examiners who will be reviewing these forms, thereby creating fuller and more clear records which will facilitate easier decisions both initially and upon appeal.

*a. Sample Language for Recommendation 3: To be Added to "Important Things to Know" Box on Page 1 of Form 8857.*

"The factors that the IRS will use when considering your request are explained in IRS Publication 971 "Innocent Spouse Relief," which can be found at <https://www.irs.gov/pub/irs-pdf/p971.pdf>."

#### **4. Form 8857 Should Request Information On Past Financial Practices in Part III.**

Among other information requested in Part III of Form 8857, the IRS collects information about family financial practice *during the years for which relief is requested*. The Clinic appreciates that the IRS needs to focus its information collection on the years at issue. However, information about past family financial practices may illuminate issues such as constructive knowledge that are pertinent to the controlling legal tests for 26 I.R.C. § 6015(f) relief.<sup>25</sup> Accordingly, the Clinic recommends that the IRS provide taxpayers with an opportunity to include information about past household financial practices in Part III; one possible location with Part III could be in Line 18, as described below in subsection 4(a) of this recommendation.

When the IRS evaluates innocent spouse claims controlled by § 6015(f) of the Internal Revenue Code, it typically does so by employing a balancing test of several factors outlined in Rev. Proc.

---

<sup>24</sup> See *TAS 2018 Annual Report*, *supra* note 8, at 60 (citing cross-generational difficulties in navigating IRS website).

<sup>25</sup> See 26 C.F.R. 601.105 § 4.03(2)(c) (2013) (setting forth details of knowledge as one of the factors for determining innocent spouse relief requests that fall under 26 I.R.C. § 6015(f)).

2013-34.<sup>26</sup> One important factor that applies to several types of relief available under § 6015 is the Knowledge factor. In some cases, taxpayers report actual knowledge of certain facts, such as an understatement on a tax return.<sup>27</sup> In other cases, however, taxpayers do not report actual knowledge of relevant facts but the IRS or U.S. Tax Court may determine that this taxpayer nonetheless had constructive knowledge of those facts.<sup>28</sup>

Importantly, various Tax Court decisions show that past household financial practice may influence a finding of constructive knowledge.<sup>29</sup> These types of practices could include anything from spending habits to household arrangements for the management of family financial affairs, and the relevance of these facts to the knowledge inquiry makes sense when one imagines the types of situations that could lead a taxpayer to request innocent spouse relief, particularly if the request comes after a significant change in household financial practice. For instance, it may be the case that a requesting spouse in a long-standing marriage never previously participated in household finances, yet began to do so shortly before or during the year in which the liability at issue arose—perhaps due to a new household circumstance, such as a change in jobs. That spouse’s financial involvement during the year at issue would likely strengthen a presumption of knowledge under the Rev. Proc. 2013-34 factors and weigh against relief. However, when considered against a fuller backdrop of that family’s financial history, that spouse would actually appear to have a sparse level of familiarity with the family’s finances, and likely with the overall process of filing joint taxes. This perspective counsels more strongly *against* a finding of knowledge under the Rev. Proc. 2013-34 factors and *favours* relief. Notably, Rev. Proc. 2013-34 does not impose any requirement that the “facts and circumstances” considered in an analysis of its factors pertain only to the years at issue.

Without alerting taxpayers that the IRS and U.S. Tax Court may consider information about household financial practice extending beyond the specific years at issue, the current Form 8857 risks undermining taxpayers’ ability to present a full request for relief. This risk is heightened given Form 8857’s emphasis on the specific tax years for which relief is requested.<sup>30</sup> Thus, the IRS should consider revising Form 8857 to include language that invites taxpayers to include relevant information even if it stems from years prior to those at issue in their request for relief.

---

<sup>26</sup> See, e.g., *id.* at § 4.03(2) (listing factors for § 6015(f) relief).

<sup>27</sup> See, e.g., *Form 8857*, *supra* note 6, at 3 (providing options where taxpayers can indicate they knew various facts at the timing of filing, i.e., that they had “actual” knowledge of those facts).

<sup>28</sup> See, e.g., *Reilly-Casey v. Comm’r*, 106 T.C.M. (CCH) 707, at \*4 (2014) (applying Rev. Proc. 2013-34 to find that petitioner had *reason to know*, not actual knowledge); *Jacobsen v. Comm’r*, 116 T.C.M. (CCH) 95, at \*6 (2018), *aff’d*, 950 F.3d 414 (7th Cir. 2020) (applying Rev. Proc. 2013-34, explicitly splitting discussion of knowledge factor into “Actual Knowledge” and “Reason to Know,” and stating that the “Reason to Know” analysis “encompass[es] two separate types of constructive knowledge”).

<sup>29</sup> See, e.g., *Jacobsen*, 116 T.C.M. (CCH) at \*6 (stating that one example of a fact or circumstance relevant to the analysis of the knowledge factor is “the presence of expenditures that appear lavish or unusual *when compared to the family’s past levels of income, standard of living, and spending patterns*”) (emphasis added).

<sup>30</sup> See, e.g., *Form 8857*, *supra* note 6, at 4 (“Tell us if and how you were involved with finances and preparing returns *for those tax years.*”) (emphasis added).

This change should be adopted because it presents little burden to the IRS or taxpayers while offering benefits to both. First, the language required to implement this change should require no more than one additional clause in Line 18, which currently includes 3.5 blank comment lines. Even if this recommended language is added, the comment lines could be reduced by one so that the number of pages contained in Form 8857 do not increase. Second, adding this language will help ensure that taxpayers have an opportunity to provide all information relevant to their request. Third, increasing the comprehensiveness of taxpayer comments on Form 8857 will assist the IRS examiners who review these forms by reducing the need for additional or clarifying information, and by creating fuller and more clear records for initial examinations and appeals.

*a. Sample Language for Recommendation 4: To be added to Part III, Line 18*

The final sentence of Line 18 currently reads: “Explain anything else you want to tell us about your household finances” and is followed by 3.5 blank lines. This could be amended to read, “Explain anything else you want to tell us about your household finances, *from the years that this form is about or any earlier years during which you filed a joint return with the non-requesting spouse (the person you listed in Line 5).*”

**Conclusion**

Thank you for the opportunity to submit comments on Forms 8857 and 8857(SP). Please feel free to contact the Harvard Federal Tax Clinic with any further questions.

Sincerely,

T. Keith Fogg  
Director, Federal Tax Clinic  
Legal Services Center of Harvard Law School  
122 Boylston Street  
Jamaica Plain, MA 02130  
Email: [kfogg@law.harvard.edu](mailto:kfogg@law.harvard.edu)  
Phone: 617-390-2532