

November 12, 2024

Mr. Andres Garcia  
Internal Revenue Service  
Room 6526  
1111 Constitution Avenue, NW  
Washington, D.C. 20224  
Email: [pra.comments@irs.gov](mailto:pra.comments@irs.gov)

Re: The Robert Wood Johnson Foundation comments to OMB Control  
Number 1545-0047 focusing on forms 926, 8865 and 5471

Dear Mr. Garcia:

The Robert Wood Johnson Foundation (RWJF) is writing in response to the request for comment in OMB control number 1545-0047 regarding forms and schedules used to determine that tax-exempt organizations fulfill the operating conditions within the limitations of their tax exemption. In this letter, we will focus on the tax compliance burden we experience in meeting the requirements of filing certain forms listed in Appendix A of the IRS notice; Forms 926, 8865, and 5471.

In this letter, we will provide background information on the Robert Wood Johnson Foundation mission, the types of investment activities it has to help it achieve mission that results in filing obligations listed in Appendix A, the tax burden incurred by meeting these filing obligations, the lack of practical utility of these filings, ways to enhance the quality, utility, and clarity of this information, ways to minimize the burden of collecting this information, and estimate our cost of providing this information.

### **Background and Investment Activities**

RWJF is a private foundation whose grantmaking aims to take bold leaps to transform health in our lifetime and pave the way, together, to a future where health is for everyone. On average, RWJF contributes over \$600 million annually to this purpose through grantmaking, direct charitable activities, and program related investments. You can learn more about our organization by visiting our website, [www.rwjf.org](http://www.rwjf.org). To support these programmatic efforts,

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RWJF maintains a diversified investment portfolio consisting of public equities, fixed income positions, and alternative investments in the hedge fund and private equity markets. Our alternative investments made directly and indirectly in foreign limited partnerships and foreign corporations result in tax compliance requirements to report transfers of property and other information on forms 926 Return by a Transferor of Property to a Foreign Corporation, 8865 Return of US Persons with Respect to Certain Foreign partnerships, and 5471 Information Return of US Persons with Respect to Certain Foreign Corporations. These forms are submitted as attachments to the Form 990-T, Exempt Organization Business Income Tax Return. We hope to illustrate in this letter how the redundancy of reporting information on these forms that are already reported to the US Treasury and IRS elsewhere cost unnecessary time and money.

### **Taxpayer Burden and Cost**

Preparation of the above-mentioned informational forms requires substantial investment in RWJF internal staff time, technology for tracking information, and the hiring of outside experts. RWJF staff spends more than 300 hours per year gathering and analyzing data surrounding its foreign alternative investments, use of technology to maintain the documents and track transactions, and then incurring over \$135,000 in fees for tax compliance experts to also review and prepare currently required filings resulting in an average of 300 forms yielding approximately 1,300 pages in total.

### **Lack of Practical Utility; Recommendations to Minimize Taxpayer Burden**

Next, we'd like to highlight that the information reported on forms 926, 8865, and 5471 are not used in determining either the excise tax or income tax of tax-exempt organizations because these forms do not report net investment income (NII) or unrelated business taxable income (UBTI). Further, the information reported on these forms cannot be cross referenced to ensure that taxable income is properly reported on the forms 990-PF and 990-T. To illustrate the lack of utility of filing these forms, let's look closer at what each form requires and where else the information could be ascertained by the US Treasury and the IRS.

#### **I. Forms 926, 8865, and 5471 Filing Requirements for Exempt Organizations**

##### **Overview**

Form 926, *Return by a U.S. Transferor of Property to a Foreign Corporation*, is required to be filed by U.S. persons to report certain transfers to a foreign corporation. Generally, transfers of cash exceeding \$100,000 during a 12-month period, cash transfers of any amount to a foreign corporation of which the transferor owns at least 10% (by vote or value), and noncash transfers of any amount trigger a filing requirement, whether the transfer is made directly or

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indirectly through a partnership. Though it is unclear, the transfer must also be described in section 6038B(a)(1)(A), section 367(d), or section 367(e) to be reportable. This lack of clarity causes duplicative reporting of information to the IRS since organizations conservatively file to avoid penalties, thereby providing information that is not useful to the government.

Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships, is required to be filed by U.S. persons either meeting certain ownership thresholds or who contributed cash or other property exceeding \$100,000 during a 12-month period to the partnership in exchange for a partnership interest, whether such transfer was made directly or indirectly through another partnership. An exception to filing is provided if the direct transferor was a U.S. partnership and that partnership files Form 8865 and properly reports all the required information for the contribution.

Exempt organizations of all sizes directly invest in hedge funds classified as foreign partnerships, only some of which provide Schedule K-1s or K-1 equivalents containing the information required to complete Form 8865. Additionally, certain entities legally formed as a partnership may make an election to be taxed as a corporation for U.S. tax purposes. Gathering the information and researching to determine if thresholds are met or whether elections are made are burdensome and costly. Given the extra cost and effort required to determine which form to file and then to complete these forms, we recommend that an exception to filing be provided for organizations that do not own more than 50% of such foreign partnership or otherwise control the foreign partnership.

Form 5471, *Information Return of U.S. Persons With Respect to Certain Foreign Corporations*, is required to be filed by U.S. persons meeting certain ownership thresholds. The form is very complex and seeks to calculate the amount of income that must be recognized currently by the shareholder, as either Subpart F income, or Global Intangible Low-Taxed income (GILTI). For most exempt organizations there is no tax impact from these investments. For private foundations, subpart F income is subject to the net investment income tax at the rate of 1.39%. Only for those organizations that have a tax impact (private foundations and those using debt to purchase the investment causing unrelated business income) should a filing be necessary if ownership exceeds 50%.

Gathering the information to file each of these forms is difficult. While some investment managers proactively provide the information required to complete each of these forms, many do not. In addition, many organizations also have investments in domestic partnerships that make transfers to both foreign corporations and foreign partnerships, causing indirect ownership of these

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foreign entities. While gathering the information for indirect ownership is easier since it is required to be included in the Schedule K-1 issued to the partner, there is inconsistency in how each partnership handles reporting the information. Due to these difficulties, there is confusion and additional work needed to interpret whatever information is provided and obtained. Additionally, an EO may be invested in multiple partnerships that may each potentially invest in the same foreign entities, which would require a tracking system to aggregate transfers across all the partnerships and within a 12-month period.

## **II. Analysis**

### **Form 926**

As mentioned above, many organizations take a conservative approach when filing Form 926. However, guidance clarifying whether and under what circumstances organizations are required to file Form 926 could provide significant time and cost savings if they are not required to file Forms 926 in certain circumstances, regardless of whether such clarity is provided in updated Instructions for Form 926 or other guidance. Ultimately, this could reduce the burden on Treasury, the IRS, tax practitioners, and exempt organizations by preventing duplicative and unnecessary filings. The cost savings realized will benefit the public at large by being expended, instead, on their charitable missions.

Section 6038B(a)(1)(A) provides that “each United States person who transfers property to a foreign corporation in an exchange described in section 332, 351, 354, 355, 356, or 361...shall furnish to the Secretary, at such time and in such a manner as the Secretary shall by regulations prescribe, such information with respect to such exchange or distribution as the Secretary may require in such regulations.” The Secretary has provided exceptions to the reporting requirement via Treas. Reg. §1.6038B-1(b)(2) for transfers of stock or securities under section 367(a), including an exception for exempt organizations where there is no unrelated business income. Based on this, exempt organizations should not be required to file Form 926 since there is low risk of unreported income or unrecognized gain that has any tax impact, and the Secretary has the authority to provide a broader filing exception for tax-exempt organizations in Treas. Reg. §1.6038B-1.

Given the significant administrative burden on exempt organizations filing Forms 926, Treasury and the IRS should consider excepting from such filing requirement exempt organizations that do not own more than 50% of a foreign corporation or otherwise control the foreign corporation. The IRS could also consider making an exception to the filing requirement for indirect transfers to foreign corporations made through a U.S. partnership that files Form 926 and

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properly reports all the required information, similar to the exception provided for filing Form 8865 with respect to similar transfers to a foreign partnership. This would help alleviate the duplicative reporting where a Form 926 is being filed at all tiers of ownership related to same underlying transfers.

Public charities who file Form 990 are required to report information about their foreign investments in Schedule F when they exceed \$100,000. If there is information that the IRS needs from EOs with respect to an investment in a foreign corporation, such information could be provided more efficiently through Schedule F rather than Form 926. For private foundations, perhaps a similar schedule could be created to report such information. Section 6038 grants the Secretary authority to determine the manner in which taxpayers should furnish the information otherwise required to be reported on Form 926. Thus, the Secretary has the authority to modify Form 990-PF such that any essential information from Form 926 could be reportable.

#### Form 8865

Section 6038(a)(5) provides that “[i]n the case of a foreign partnership which is controlled by United States persons holding at least 10-percent interests..., the Secretary may require each United States person who holds a 10-percent interest in such partnership to furnish information relating to such partnership.” Treas. Reg. §1.6038-3(a)(2) is the regulation prescribing the requirement to file Form 8865 and provides that “[e]xcept as provided in paragraph (c), (d), or (e) of this section, for each year of a partnership during which the partnership has controlling ten-percent partners, each controlling ten-percent partner must complete and file Form 8865.” Treas. Reg. §1.6038-3(d) then provides an exception to this filing requirement for “trusts relating to state and local government employee retirement plans.” The Secretary, therefore, has the discretion to determine whether to grant filing exceptions for Form 8865, especially considering that section 6038 does not discuss an exception for state and local government employee retirement plans. Much of the analysis mentioned above regarding Form 926 applies to Form 8865 regarding the reason that EOs should be afforded filing relief.

IRC Section 6038B(a)(1)(B) provides that “each United States person who transfers property to a foreign partnership in a contribution described in section 721 or any other contribution ...shall furnish to the Secretary, at such time and in such a manner as the Secretary shall by regulations prescribe, such information with respect to such exchange or distribution as the Secretary may require in such regulations.” Therefore, we believe that the recommended exception to filing could be provided for in Treasury Regulations Section 1.6038B-1.

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As mentioned above, public charities who file Form 990 are required to report information about their foreign investments in Schedule F when they exceed \$100,000. If there is information that the IRS needs from EOs with respect to an investment in a foreign partnership, such information could be provided more efficiently through Schedule F rather than Form 8865. For private foundations, perhaps a similar schedule could be created to report such information. Section 6038 and section 6046A grant the Secretary authority to determine the manner in which taxpayers should furnish the information otherwise required to be reported on Form 8865. Thus, the Secretary has the authority to modify Form 990-PF such that any essential information from Form 8865 could be reportable.

### Form 5471

Pursuant to section 6038(a)(4), “the Secretary may require any United States person treated as a United States shareholder” of any foreign corporation treated as a controlled foreign corporation for any purpose under subpart F to furnish information under section 6038(a)(1).<sup>1</sup> Additionally, section 6046 requires certain U.S. persons (e.g., U.S. citizens or residents who are officers or directors of a foreign corporation and meet certain stock ownership requirements) to file a return that “shall be in such form and shall set forth, in respect of the foreign corporation, such information as the Secretary prescribed by forms or regulations as necessary for carrying out the provisions of the income tax laws.” The Secretary, therefore, has the authority to more narrowly tailor the types of exempt organizations that are required to file Form 5471, such that certain organizations posing little or no risk of noncompliance with United States tax laws could be excepted from the Form 5471 filing requirement.

The Treasury has already provided a similar exception to filing Form 8621, *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*, for tax-exempt shareholders that would not receive taxable income from such investment.<sup>2</sup> Therefore, it would be reasonable to extend an exception to filing Form 5471 when the exempt organization would not receive taxable income from such investment in a foreign corporation.

Requiring exempt organizations to file Form 5471 when they will not recognize taxable income as a result of the investment adds complexity and cost to their

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<sup>1</sup> See also Treas. Reg. §1.6038-3(l), under which the Secretary granted an exception for persons that do not own direct or indirect interests in a foreign corporation or are required to furnish information solely by reason of attribution of stock ownership from a nonresident alien.

<sup>2</sup> Treas. Reg. §1.1298-1(c)(1).



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annual tax reporting that does not appear to provide much benefit to the IRS in terms of providing information that the IRS uses to help enforce the tax laws.

As mentioned already, public charities who file Form 990 are required to report information about their foreign investments in Schedule F when they exceed \$100,000. If there is information that the IRS needs from EOs with respect to an investment in a foreign corporation, such information could be provided more efficiently through Schedule F rather than Form 5471. For private foundations, perhaps a similar schedule could be created to report such information and Part I, Line 11 (other income) could be used to identify any subpart F income that is taxable. Section 6038 and section 6046 grant the Secretary authority to determine the manner in which taxpayers should furnish the information otherwise required to be reported on Form 5471. Thus, the Secretary has the authority to modify Form 990-PF such that any essential information from Form 5471 could be reportable.

### III. Recommendations

RWJF recommends that Treasury and the IRS:

- Clarify reporting requirements for all taxpayers.
- Eliminate the filing requirement of all three of these forms, 926, 8865, and 5471, for exempt organizations. Alternatively, change the filing threshold –
  - for 926 to be both 10% or greater ownership by vote/value AND transfers over an amount much larger than the current \$100,000 such as \$10,000,000;
  - for 8865 to have more than 50% ownership of a foreign partnership or otherwise control of the foreign partnership;
  - for 5471 to have more than 50% ownership of a foreign corporation and subpart F income from that foreign corporation which would be subject to section 4940 tax on net investment income or for which debt was used to purchase the investment.
- Eliminate the Form 926 filing requirement for exempt organizations that are invested in a partnership which is the direct owner and transferor to a foreign corporation if such partnership already files Form 926 at the partnership level.
- Change the reporting period for transfers from a 12-month rolling period to a fixed 12-month period based on the foreign corporation's reporting period.
- Leverage information already filed with the Treasury International Capital System on Form SLT which is a monthly market value reporting of foreign investments in securities by country.
- As an alternative to filing Forms 926, 8865, and 5471, create a schedule for Form 990-PF for minimized disclosures of ownership.

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In summary, we believe there is precedence to excuse tax-exempt organizations from having to file forms 926, 8865, and 5471. By allowing exceptions from filing these forms for tax-exempt organizations, you will help alleviate the burden incurred to satisfy the current compliance filing requirements; and as a result, these exempt organizations can use the savings to further direct their resources to their missions.

Thank you for your consideration of these comments as you ascertain the taxpayer burden of meeting certain filing requirements. We welcome the opportunity to discuss these further, so if you have any questions, please contact us.

Sincerely,



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