ACA
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The Voice of Americans Overseas
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Association of Americans
Resident Overseas
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FAWCO
Federation of American
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Mr. Gerald Shields
Internal Revenue Service
Room 6129
1111 Constitution Avenue N.W.
Washington D.C. 20224
U.S.A.

Concerns: Comments on Draft Form 8938

December 20, 2010

Dear Mr. Shields,

American Citizens Abroad (ACA), the Association of Americans Resident Overseas (AARO) and the Federation of American Women's Clubs, Inc. (FAWCO) are non-profit, non-partisan associations representing the interests of American citizens residing and working abroad. With more than 20,000 members in over 90 countries, including an umbrella network linking over 75 independent American, international volunteer organizations in 39 countries and a vast information network reaching out to the Americans community abroad, our organizations represent a forceful voice for Americans overseas. We appreciate the opportunity to present comments to the IRS on the draft Form 8938.

The community of overseas American citizens is by far the largest group of U.S. taxpayers directly and significantly impacted by the new Form 8938. It would be difficult to reside abroad without having at least one foreign bank account in your country of residence and in its currency. The majority of Americans residing abroad are long-term overseas residents, and therefore have investments, pensions, life insurance, etc. abroad.

The instruction for completing Form 8938 has not been issued. It is imperative that the deadline for comments be extended for a reasonable period (60 days?) after the instruction has been published and disseminated to those who have requested a copy. Our comments are based on incomplete information and are filed now solely to meet the posted deadline.

The FATCA legislation, in general, and Form 8938 which is the object of the present comments, in particular, are clear examples of discrimination against one group of American citizens - those residing abroad. FATCA is intended to catch tax evaders, a goal that our associations fully support. Imposing a significant reporting burden on the five million American citizens abroad is not the answer.

Three issues have an overall bearing on our stated position:

1. The Act requires taxpayers to report the highest value of foreign assets held during the year, the so-called high water mark. The absence of an IRS instruction to the contrary makes it an obligation on the taxpayer to calculate 365 days of value and 365 exchange rates.

2. There is no consideration given for the double accounting involved if an individual transfers funds during the year from one account to another account and the high water mark of each account is applied.

3. Some foreign investments do not report annually but only at the time of sale. Some pension funds may report value only upon retirement.

   Practically, the reporting requirement under Section 6038 for foreign assets should be limited to year-end balances at the applicable year-end rates.

By the very nature of the FATCA requirement, assets are defined in foreign currencies, such as foreign bank accounts, foreign securities, etc. Consequently, it is only logical that **the reporting currency on Form 8938 should be the currency in which the assets are actually defined even if an additional column is provided for the translation into US$ at the end of the year**, with one Form for each currency held. Reporting by currency would have three significant advantages:

a. it would eliminate all of the issues linked to foreign exchange rates, as mentioned above;
b. for the taxpayer, it would reduce the significant time and risk of errors when preparing Form 8938, as mentioned in Section B below;
c. for the IRS agent, it would greatly simplify control or audit since the primary data are, by their very essence, expressed in foreign currencies.

Regarding your specific questions

A. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility

Form 8938 is the first instance, to our knowledge, whereby the IRS requires information on assets from the taxpayer. The U.S. tax code taxes on income, not assets. Therefore, the collection of information on assets held abroad is not necessary for the proper performance of the functions of the IRS. This new filing requirement is part of the

FATCA legislation, aimed to track down tax evaders; the only possible use of the information on assets is to cross check the assets declared with the revenue reported on various foreign assets. This will lead to high administrative costs for the IRS, an unfair specific reporting burden for U.S. citizens residing abroad, ineffective audits and potentially unfair penalties for overseas Americans due to misinterpretation of the data or confusion among tax filers. Regardless, one must assume that a U.S. person who decides not to report certain income will be sure not to report the related assets. Hence, since the IRS taxes on revenue and not assets, the collection of the asset information will not enhance revenue collection. **Therefore, we see no practical utility in requiring this information.**

B. The accuracy of the agency's estimate of the burden of collection of information

The IRS has defined the burden of collection of information as follows:

> *"Estimated Time per Respondent (to complete the form: 1 hour, 05 minutes*
> *Estimated Total Annual Burden Hours: 378,000"*[1]

The IRS estimate is grossly understated. First, the number of Americans residing abroad is estimated by the State Department to exceed 5 million. Based on this estimate and the IRS numbers of those filing Form 2555, Form 1116 and the FBAR, **the number of Americans affected by this new filing will probably exceed 2,000,000, more than five times the IRS estimate of 350,000.**[2]

We are not surprised by this very large discrepancy. The IRS has admitted in several instances that it does not really know the population of Americans residing abroad who should be filing reports. In fact, the Treasury Inspector General for Tax Administration report cited in Section E below states the following:

- The IRS will face the same problem with the new provision as it does with the FBAR provision as there is no easy method to determine what constitutes the potential population filing base.
- The new provision will be self-reported, similar to the FBAR. Therefore, persons trying to hide money abroad will open financial accounts in jurisdictions well known for their bank secrecy laws

[1] This translates into 348,932 tax filers, which estimate may be rounded to 350,000.

[2] In 2006, the most recent year for which data is available, the number of Americans filing Form 2555 for the foreign earned income exclusion, of which the great majority resides overseas, numbered 335,000. Another 969,000 Americans filed Form 1116 using the revenue category "General limitation income" which covers foreign social security payments, foreign pension payments received as well as earned income for those who opt to apply Form 1116 instead of Form 2555 or who have income in excess of the amount of the foreign earned income exclusion allowed under Form 2555. The IRS statistics do not report this data by residence but it is most likely that a significant percentage of this group resides overseas. In addition, close to 2,000,000 Forms 1116 are filed, mostly with passive income. Some of these filers may also be individuals who reside overseas and who have investments in foreign securities; many of those residing in the United States will have investments in foreign securities in excess of $50,000 and will have to file Form 8938. Furthermore, the Treasury Inspector General for Tax Administration report mentions that in 2009, 534,043 FBAR reports were filed, which is already in excess of the 350,000 estimated reporting for Form 8938. The great majority of those filing the FBAR will have assets exceeding the threshold of $50,000 required for Form 8938.

where they do not exchange information with the United States, making it unlikely that these accounts will ever be reported.

Based on our practical experience in reporting foreign currency revenues in US$ for the IRS form1040 and our analysis of the reporting requirements in Form 8938, the IRS estimate of the time burden of 1 hour and 5 minutes for completing Form 8938 is neither credible nor accurate. It may barely be enough to find the exchange rate(s) applicable to the reported assets on the reportable dates.

The IRS estimate grossly understates the complexities involved in reporting on all the classes of assets mentioned on Form 8938. To begin, let us mention five obvious reasons for our substantially higher estimate:

First, the confusion mentioned in Section E below will require significant time and effort just to understand what is to be reported under the four separate categories as well as the differences between Form 8938 and the FBAR (Kindly note that for the moment, in the absence of instructions, such understanding is impossible).

Second, the statutory requirement to file the highest dollar value in the year will lead the taxpayer into complex computations, as explained above. Furthermore, exchange rates vary over time. Just finding the applicable exchange rates may exceed the total time estimated by the IRS for completing Form 8938.

Third, Form 8938 requires individuals who have shares in companies not held within financial accounts to determine a value for such shares. What method is applicable – price paid, pro rata net asset value, estimated potential market value even though there is no market, etc.? Academic libraries contain entire shelves on these issues. The potential for error, litigation and penalties is enormous.

Fourth, Form 8938 requires individuals to determine the value of a life insurance policy, the value of rights under foreign social security programs, under collective savings accounts. These data may be known only annually, or perhaps only upon retirement.

Fifth, if an investor is a partner with others in a start-up venture, how does he value an investment which may be worth much less than the funds put into the venture?

The IRS has never before required American citizens to file such detailed information on assets. It is a highly complex requirement, given the technical issues raised and the level of detail involved. The fact that the IRS has not yet been able to produce instructions for Form 8938 testifies to the complexity. With the threat of penalties for inaccurate filing, Americans will be forced to use specialized tax preparers for guidance and help in completing the form. This will increase their compliance costs significantly, even for the many overseas residents who owe no U.S. taxes, because of the high taxes they pay locally. **In our estimate, the effort involved, in particular in the first years, will average hours of work or payment for professional support, rather than the one hour estimated by the IRS.**

Let us assume that two million Americans file Form 8938 and spend on average 10 hours completing the form. This amounts to 20 million hours, the equivalent of 500,000 man work weeks. Assume that on average a professional tax preparer is paid $100 for one hour's work in finalizing Form 8938; this represents a cost of $200 million for tax payers. Assume that the IRS time involved to collate, analyze, audit errors, check with other IRS forms and the FBAR form averages 1 hour per form; this amounts to 2 million man hours a year. At 1200 effective hours per IRS agent per year, this corresponds to 1,666 agents fully devoted to just Form 8938. At an average cost of $100,000 per IRS agent, this amounts to $166 million of IRS expense. **Such costs far exceed any potential additional tax revenue collection due to the filing of Form 8938.**

C. Ways to enhance the quality, utility and clarity of the information collected

Under Section E and F below, specific suggestions will be made with regard to Form 8938 itself.

As stated above, two important ways to enhance the quality, utility and clarity of the information are:

- to specify that the amounts reported are year-end balances, rather than high water marks, translated into U.S. dollars at year-end exchange rates;
- to report in the currency in which the foreign assets are actually defined.

Both proposals will eliminate major sources of confusion and errors.

However, our associations are of the opinion that 99.9% of the information collected from Form 8938 will be of no use to the IRS. If reporting on assets were to improve IRS performance in collecting taxes, it would undoubtedly have been included in the tax code years ago and applied to all American tax payers. And if this is not the case, why apply it today to overseas Americans? **Our conclusion is that Form 8938 is likely to be ineffective, i.e. is unlikely to improve the performance of the IRS.**

D. Ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology

The best way to minimize the burden of the collection of information on respondents is to render inapplicable I.R.C. § 6038D and to eliminate the need for Americans to report foreign assets on Form 8938.

As for the potential in using automated collection techniques, this is an illusion since the type of information requested is not easily automated through electronic filing, particularly the information required under Parts B, C and D of Form 8938. Furthermore, the information required is defined and stored in local currencies and exchange rates are variable. According to the report of the Treasury Inspector General for Tax Administration, the IRS is still studying ways to try to computerize the FBAR report even though the FBAR has been in existence for many years, and yet the FBAR deals with a much more limited scope of assets.

Since Form 8938 will become an integral part of filing Form 1040, the inability to file electronically Form 8938 will make it impossible for all Americans residing overseas to file their Form 1040 electronically. This will lead to increased inefficiencies for the IRS.

Effective 1 January 2013, foreign banks and brokers will be required to report account values to the IRS. Since any report of value is only informational, why should both the foreign entity and the American taxpayer be required to report? The duplication is burdensome, costly and unnecessary.

E. The sources of confusion and the risks of errors

The confusion among overseas tax filers and potential errors in filing risks are very significant because Form 8938 is required in addition to TD F 90-22.1 (usually referred to as the FBAR Form), which has other criteria, a different threshold for reporting and must be filed separately to Treasury. In fact, the Treasury Inspector General for Tax Administration clearly highlighted the complexity and potential source of confusion in its report dated September 29, 2010 (Report no. 2010-30-125).

> "Another problem is that many taxpayers will find that their filing requirements will not only have increased, but also become considerably more complicated as a result of the addition of I.R.C. § 6038D. For example:
>
> - Taxpayers not only will be required to file the new information for I.R.C. § 6038D, but they may also be required to file an FBAR.
> - Taxpayers may also find that certain terms are defined differently in the BSA regulations and the Internal Revenue Code. For example, the term United States is defined in the BSA regulations as *...the States of the United States, the District of Columbia, the Indian lands, and the Territories and Insular Possessions of the United States.*[20] While in the I.R.C. it is defined as *"United States" when used in a geographical sense includes only the States and the District of Columbia.*[21]
> - Complexity will also be encountered because of the differences between the FBAR requirements and I.R.C. § 6038D; individual taxpayers in similar circumstances could have different reporting outcomes...
>
> The following example demonstrates the potential differences in these two provisions:
> Two individual taxpayers owning foreign stocks worth $55,000 can end up with entirely different reporting outcomes. One taxpayer that owns $55,000 in foreign stocks through a foreign stock brokerage account would be required to file both an FBAR and the I.R.C. § 6038D disclosure on his or her tax return, while the other taxpayer that held $55,000 worth of foreign stocks issued by a person other than a U.S. person outside of a foreign financial account would only be required to complete the I.R.C. § 6038D disclosure on his or her tax return. In this example, if the amount the stock is worth is reduced from $55,000 to $45,000, the first taxpayer is only required to file an FBAR and the second taxpayer is not required to file a disclosure of any type."

Our organizations would like to highlight other situations which will be a source of confusion for Americans residing abroad. For example:

- A stay-at-home mother who is an American married to a foreigner has just interest income of $1,000 on her personal savings account which amounts to $55,000, the amount saved when she worked prior to having a family. She also has signatory authority on her foreign husband's current account as well as a credit card linked to that account. For the FBAR, she must file both accounts, as she has signatory authority over her husband's account. For the I.R.C. § 6038D (Form 8938), does she have to file a 1040 even though her personal revenue is

below the income threshold for required filing, just to file for her one personal account of $55,000? This example is not an exceptional case as half of the Americans residing overseas on a long-term basis cite marriage as the reason.

- An individual who has $9,000 in a banking account abroad and a foreign life insurance policy worth $45,000 will have to file Form 8938, since total foreign assets exceed $50,000, but not the FBAR as the bank account is below $10,000.
- An individual who has signatory authority as treasurer, but no financial interest in bank accounts of several charitable organizations abroad will have to report these on the FBAR, but not on Form 8938.

There will remain much overlap between the two reports, which means that American citizens residing abroad will have to file two separate reports, which are different, but which contain largely the same information. This creates a double administrative burden for the individual citizen as well as a double burden for the IRS, since it is the IRS which is administering the FBAR for the Treasury. There is also an increased likelihood that human error will lead to discrepancy in the forms, presenting an additional administrative burden to the taxpayer and to the IRS.

Confusion related to filing two reports can be highly penalizing as the IRS has stated: "*The IRS will use the information to determine whether to audit this taxpayer or transaction, including whether to impose penalties.*" The penalties allowed under I.R.C. § 6038D are severe and would probably be cumulative with penalties for inaccurate filing of FBAR. Overseas Americans who make errors with no intention of defrauding the IRS risk losing a good part of their savings through penalties and/or lawyers fees for defense. This need to report assets under threat of confiscation of those assets specifically discriminates against U.S. citizens residing abroad.

F. Specific comments on details of Form 8938

1. Title at top of the form: The comment "Attach to your tax return....." should begin on the line below the title, not on the same line. Similarly, why is there the gap before "See separate instructions"?

2. Presumably the OMB and the Sequence numbers will be numbers in the final version.

3. Why do you have the text "Identifying number" instead of "Your social security number", as is found on other forms for the 1040, including form 2555? Form 1116 uses the term "Identifying number as shown on page 1 of your tax form". Even the TD F 90-22.1 (FBAR) uses the term "U.S. Taxpayer Identification number". Just "Identifying number" will raise confusion in the minds of tax filers.

4. The tax filer is systematically referred to instructions with regard to Part A, B, C, D. The instructions should make very clear at the beginning the difference between the categories because a tax payer will wonder if he/she must list under Part B all stocks held in a financial account, which are already included in the totals of the statement of the financial institution listed under Part A. For Part C, instructions must list those contracts

which must be reported and those which do not need to be reported. For Part D, what is meant by a foreign entity? What makes it different from any "stock or security issued" as defined under Part B? What is the distinction between Part C and Part D, particularly since both apply the term "interest"?

5. In the four boxes, you have "Maximum value .....during taxable year." As we have already commented above, it is practically impossible for the tax filer to know how to reply. The tax payer does not have a daily value of investment positions and the US$ changes in value every day. The instructions should make the filing requirements very clear and there should be a footnote reference on the form itself that the definition of maximum value is defined in the instructions. As we have stated above, applying the year end foreign currency values translated into dollars at the year end U.S. dollar rate is the only practical possibility.

The term "taxable year" also raises more questions. Is the term "taxable year" defined in the instructions? Does this correspond to the calendar year? This question is raised because Form TD F 90-22.1 uses the term "Maximum value of account during calendar year reported". Since those who file Form1040 jointly with this new form will also have to file TD F 90-22.1, consistency in terms would be most helpful. Additionally, our organizations have asked several professional tax filers if the first "taxable year" is 2010 (due to be reported April 15, 2011) or the following year, and we have received varying opinions - even the professionals are not clear as to when the reporting requirement commences. And the IRS office in Paris has refused to take a stand on this simple issue.

6. Very little space is provided for the Name of financial institution, Name of the issuer, Name of counterparty of instrument, contract or interest. On the TD F 90-22.1, a whole line is allowed for the name. Similarly the space allotted for the address is very restrained; in contrast, the TD F 90-22.1 has five separate boxes devoted to the address – Mailing address; City; State, if known; Zip/postal code, if known; country. Under Part B, the "Description of stock or security by class, issue or type" also has insufficient space; imagine, for instance, trying to fit in "6 5/8 % convertible subordinated bond, series B, due Oct. 17, 2019" in the box. The form as currently presented does not lend itself in any way whatsoever to electronic filing. In fact, the only way that the current format will allow individuals to complete the form in a readable fashion would be if the form would allow wrap around text in each box – which is most unlikely as such forms are always PDF. Under Part C, the box "Description of other instrument, contract or interest" allows a little more space, but is still most likely inadequate. Under Part D, "Description of interest held in foreign entity" the space allotted is totally inadequate.

7. In Part D, "foreign" is misspelled as "foreing" in the box concerning Maximum value.

8. The average taxpayer residing overseas will have no idea why all of a sudden Form 8939 must be filed. It would be helpful for the taxpayer if Form 8938 mentioned that I.R.C. § 6038D in the tax code since March 2010 requires filing Form 8938 starting the fiscal year 2010 or 2011, whichever is applicable.

Conclusion

We thank you for this opportunity to express our comments on the proposed Form 8938.

While we have attempted to provide constructive comments at all levels, we would like to conclude by stating that Americans residing abroad represented by our organizations are convinced that the entire FATCA legislation, including the additional reporting requirements for U.S. persons to file Form 8938 with the 1040, will have serious negative repercussions for the United States economy in general and for American citizens residing abroad in particular.

- Requiring Form 8938 in addition to the FBAR is a total overkill on the part of Congress. This will lead to significant inefficiencies within the IRS and high compliance costs for American citizens. Regrettably, it will almost certainly lead to non-compliance on the part of many and the resulting loss of available information about them at all.
- The penalties outlined under I.R.C. § 6038D (d) for not reporting on time are confiscatory with the systematic increase in penalty beyond a 90-day delay up to $50,000. Many individuals overseas who currently do not file the 1040 because their income is below the filing requirement threshold will ignore the new asset reporting requirement and will be vulnerable to unjustifiable and unfair penalties. Is the purpose of the IRS to collect penalties or to collect taxes?

- I.R.C. § 6038D (g) then states: "*No penalty shall be imposed by this section on any failure which is shown to be due to reasonable cause and not due to willful neglect. The fact that a foreign jurisdiction would impose a civil or criminal penalty on the taxpayer (or any other person) for disclosing the required information is not reasonable cause.*" Such a statement not only reflects total disdain for the rest of the international community, but also places American citizens residing overseas in an untenable position, particularly in those countries where privacy laws preclude requiring this type of information.

- Looking beyond the specific requirements of Form 8938, our organizations are particularly concerned by the numerous and insidious forms of discrimination, all linked to the FATCA requirements, that have recently appeared against Americans; for instance:
    - Foreign insurance companies are already beginning to refuse to issue life insurance policies for American citizens.
    - Foreign banks are refusing to have American clients with investment portfolios; some even refuse to open current accounts for Americans.
    - The reporting requirements under FATCA with regard to partnerships and shares held in companies owned outside of financial institutions will seriously engender prejudice for the United States as well as for its citizens residing abroad. Americans will no longer be invited to join

foreigners in start-up companies overseas, as just 10% American ownership requires IRS reporting on the partners and the company.

- American citizens and hence American businesses are becoming pariahs in the international banking world, at a time when the U.S. aims to double its exports. FATCA reduces the competitiveness of U.S. companies in the global market place.

- Many foreign financial institutions will refuse to enter into agreements with the IRS for the filing requirements of those institutions. They will consequently disinvest their U.S. securities and will encourage their foreign clients to do the same. This is already occurring in Switzerland and Japan, for example, and banks located in the European Union have signaled that FATCA legislation is contrary to European legislation and have placed reserves on their participation in the program.
- Foreign financial institutions which do not enter into an agreement with the IRS to be a registered FFI will create a second tier of foreign financial institutions that will work outside of the framework of the U.S. dollar. U.S. persons who want to evade U.S. taxes will be welcome in such institutions. The Chinese will be delighted to have this encouragement to create a non-U.S. dollar trading zone.
- FATCA engenders one of the most self-destructive programs for the economic welfare and future of the United States ever devised by Congress.

ACA, AARO and FAWCO strongly recommend not only seriously revising Form 8938, but also question its usefulness in terms of information collected, IRS efficiencies and tax filer compliance. The IRS should encourage Congress to repeal FATCA legislation and the related filing requirement for Form 8938.

Sincerely yours,

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Marylouise Serrato Executive Director	John Flint President	Lucy Stensland Laederich U.S. Liaison

DRAFT FORM xxxxx -STATEMENT OF FOREIGN FINANCIAL ASSETS

Form 8938 (Rev. July 2010) Dept.of the Treasury Internal Revenue Service	**Statement of Foreign Financial Assets** >Attach to your tax return if you owned specified foreign financial assets having an aggregate value of more than $50,000. >See separate instructions.	OMB No. 1545-xxxx Attachment Sequence No. **XXX**
Name(s) shown on your income tax return		**Identifying number**

Important: Fill in all applicable lines and schedules. All information **must** be in English. All amounts **must** be stated in U.S. dollars unless otherwise indicated.

Complete Part A if you held any interest in any financial account maintained by a foreign financial institution during the taxable year (see instructions), **and**

Complete Part B if you held any interest in any stock or security issued by a person other than a United States person (see instructions), **and**

Complete Part C if you held any interest in any financial instrument or contract held for investment that has an issuer or counterparty which is other than a United States person (see instructions), **and**

Complete Part D if you held any interest in a foreign entity (see instructions).

Part A. Schedule of any financial asset maintained by a foreign financial institution (see instructions).

Name of financial institution	Address of financial institution	Financial account number	Maximum value of account during taxable year

Part B. Schedule of any stock or security issued by a person other than a U.S. person (see instructions).

Name of issuer	Address of issuer	Description of stock or security by class, issue and type	Maximum value of stock or security during taxable year

Part C. Complete blocks (a) through (f) with schedule of any other instrument, contract or interest (see instructions).

(a) Name of issuer	(b) Address of issuer	(c) Description of other instrument, contract or interest
(d) Name of counterparty of instrument, contract or interest	**(e) Address of counterparty**	**(f) Maximum value of other instrument, contract or interest during taxable year**

Part D. Schedule of any interest in a foreign entity (see instructions).

Name of foreign entity	Address of foreign entity	Description of interest held in foreign entity	Maximum value of interest in foreing entity during taxable year