August 26, 2013

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Internal Revenue Service
Room 6129
1111 Constitution Avenue N.W.
Washington, DC 20224
U.S.A.

Re: FR Doc. 2013-15362 / Comments on Revised Form 8938

We are writing in response to the request for comments on Form 8938, *Statement of Specified Foreign Financial Assets*, under the Notice dated June 27, 2013 (FR Doc. 2013-15362). These particular comments focus on the interests of international assignees. These individuals are living and working across international borders and thus often hold assets and accounts in the location of their historical or current work and residency locations. Form 8938 currently imposes particularly burdensome requirements on individuals who may have relatively unsophisticated investments and assets but happen to work temporarily across borders. We believe modifications and clarifications can be made to alleviate these burdens and simplify reporting requirements, while continuing to allow the IRS to achieve the intended objectives and request additional detail when desired.

Our comments are relevant to the current Form 8938 as well as the draft Form 8938 as of May 23, 2013 (dated December 2013). Both versions are administratively burdensome to taxpayers, requiring all taxpayers meeting threshold requirements to gather and report significant information that we believe will ultimately be reviewed by the IRS for a limited number of taxpayers.

An important indicator of taxpayer burden is the average time estimated to complete and file the draft form – the IRS estimates 4 hours and 37 minutes per filer, a fourfold increase from the previous estimate on the 2012 form. Many of these individuals will of course be required to file Forms TD F 90.22.1 (FBARs), reporting information related to the same accounts reportable on Form 8938, for which the estimated average burden per respondent is 1 hour and 15 minutes.[1] When combined with the Form 8938, this is an estimated average burden of almost 6 hours per taxpayer required to file which we believe is understated in instances where there are multiple accounts and assets to report, even where values are relatively low. This is a significant burden that could be reduced without diminishing the core purpose.

We respectfully submit the following suggestions. Please note that references to 'FAQs' correlate to the Basic Questions and Answers on Form 8938 posted on www.irs.gov and last reviewed or updated February 26, 2013.

1. **Prevent duplicative reporting on Form 8938 and the FBAR**. A significant amount of duplicative reporting is currently required on Form 8938 and the FBAR, as highlighted in the briefing by the Government Accountability Office (GAO) to the Senate Finance Committee on February 1, 2012.[2] We understand that the IRS cannot automatically use information reported on the FBAR for analysis of federal income tax issues as it is not an IRS form. We further understand that information from the FBAR may be useful to the IRS, but believe there are manners in which the information can be used with duplicate reporting reduced or eliminated. For example, taxpayers could be permitted to attach a copy of the FBAR to Form 8938, such that it becomes a supporting submission for Form 8938. Reference to the name or number of each account reported on the FBAR could be required, but a simple checkmark to confirm that other identifying information, values, etc., matches that included on the FBAR. A simple checkmark could be required to indicate whether income related to such account was received and included on the individual's US income tax return (e.g., Form 1040). A further refinement might be for the IRS and FinCEN to agree on a common format for a continuation sheet which could be used to support entries on both forms and which might be formatted for electronic filing of both forms. These suggestions could help to reduce the burden on the taxpayer, reduce the likelihood of errors when transcribing data from one form to the other and alleviate a major area of criticism related to duplicative reporting.

[1] See FR Doc. 2013-04936
[2] GAO-12-403

2. **Limit the number of accounts or assets requiring disclosure**. Taxpayers must currently report detailed information on an unlimited number of accounts or foreign financial assets. FAQ 18 confirms that taxpayers are expected to report items that do not fit on Form 8938 by attaching and completing 'as many blank Parts I and/or II' as needed. We believe reporting responsibilities can be limited while allowing the IRS to understand the extent of a taxpayer's foreign financial accounts or assets. For FBAR purposes, filers with financial interests in 25 or more foreign financial accounts must only indicate the number of accounts. This notifies FinCen of the number of accounts the filer has such that additional details may be requested only if and as deemed necessary. A similar strategy would be welcome for Form 8938 purposes.

3. **Limit reporting requirements for accounts and assets with maximum values below a de minimis amount**. Form 8938 requires detailed reporting for accounts and assets regardless of value, provided the total value of all specified foreign financial assets exceeds the applicable reporting threshold. FAQ 15 confirms such requirement. We believe limiting reporting for assets with values below de minimis amounts could significantly reduce reporting requirements for taxpayers while allowing the IRS to gather desired information related to more valuable assets and accounts. A requirement to indicate the number of accounts and assets that fall below the de minimis amount could be required to notify the IRS of instances where taxpayers may have substantial overall account and asset values spread over a large number of accounts and assets. This could reduce both taxpayer burdens and opportunities for abuse.

4. **Clarify that compensation-related items are not reportable as not 'held for investment'**. Section 6038D(b)(2) provides that financial instruments or contracts are considered specified foreign financial assets if they are 'assets' which are 'held for investment'. In the Temporary and Proposed Regulations[3], FAQs and instructions to Form 8938 the IRS has indicated that certain compensation related items should be reported, even though they may not be 'assets' or 'held for investment'. Certain compensation-related items which will ultimately be reported on Form W-2 when they meet the necessary conditions as to the transfer of property under Section 83 principles should be clarified as not meeting either or both requirements to prevent taxpayers from unnecessary reporting. For example, items which would not generate 'net investment income, as defined in Section 1411(c), in relation to the next taxable event should reasonably not be considered as 'held for investment'. Compensation-related items which reasonably are not 'assets' and/or 'held for investment' include unexercised employee stock options (whether vested or not), unvested restricted stock, unvested or unfunded promises to pay (including restricted stock units), etc. The next taxable event for such items (e.g., exercise, vest, restriction lapse, transfer) would result in compensation, but not net investment income.

   Confusion related to stock options may be due to references to such items in both the temporary regulations under Section 6038D, the instructions to Form 8938, and published FAQs. We suggest clarification that employment related options only be considered assets held for investment to the extent they have a readily ascertainable fair market value and that other items of equity based and deferred compensation will not be reportable on Form 8938, much the same as regular cash compensation, until an 'asset' is transferred to an employee (i.e., via the exercise of employee stock option rights or the removal of restrictions related to restricted stock).

   Similarly, foreign employer and government-sponsored pension plans, which have been funded with employer and employee contributions, should be specified as not constituting assets held for investment. These plans cannot typically be funded with investment income, but instead contributions and often earnings are considered compensation for US tax purposes under Section 402(b) (though such contributions and earnings are often tax-deferred in the foreign country). Foreign pension plans of foreign employers are reasonably related to the trade or business of the employee participant and thus should not be considered as held for investment. Foreign pension plan reporting might instead be limited to plans not maintained by employers or a foreign government (e.g., those similar to IRAs and other investments the individual may independently contribute to). Additionally, a 'safe harbor' exception to reporting should be provided for foreign plans addressed in the regulations under Section 409A (at Reg. Section 1.409A-1(a)(3)) describing foreign plans which will not be considered 'nonqualified deferred compensation plans' for such purposes. These include plans where participation is addressed by treaty, broad-based foreign retirement plans, Section 457 plans, and certain welfare benefits.

   In our experience, owing to the relatively low threshold, many foreign nationals working in the US have been required to file Form 8938 merely because they may have a future interest in unvested compensation related items and/or foreign employer provided pensions. Many of these individuals have very moderate income producing assets overseas and would welcome relief from reporting which has arisen merely because of interests in employer programs over which they have no control and, in many cases, will result in future reporting on Form W-2.

[3] T.D. 9567 and REG-130302-10

5. **Require foreign currency denominated values and exchange rates only where the US Treasury Financial Management Service rates for purchasing US dollars are not used.** Form 8938 requires the taxpayer to specify the foreign currency in which accounts and assets are maintained and denominated, the exchange rate used to translate foreign denominated amounts into US dollars, and the source of the exchange rate used if not from the US Treasury Financial Management Service. Reporting burdens could be reduced by instead requiring foreign currency and exchange rate information only in instances where the US Treasury Financial Management Service rate was not used to determine the value in US dollars.

6. **Provide reporting exception for accounts and assets whereby Forms 1099 have been issued for related income items**. Form 8938 reporting was designed in part to ensure that income of foreign accounts and assets, which is taxable for US income tax purposes, is appropriately captured and reported as such on individual income tax returns. Only foreign-related accounts and assets require reporting, with certain exceptions where the IRS can be reasonably assured that related income will be reported to the IRS. For example, assets held in financial accounts maintained by US payers are not subject to reporting. We suggest that reporting also not be required for foreign financial accounts and assets held in such accounts if the foreign payer issued Forms 1099, on the basis that the IRS can be reasonably assured that relevant income will be reported to the IRS. For these purposes, Form 1042-S reporting should also constitute an exception if Form 8938 is required for those filing Forms 1040NR (e.g., those considered nonresident aliens under income tax treaty).

7. **Confirm that contracts related to the rental of foreign real estate are not specified foreign financial assets.** FAQ 3 confirms that foreign real estate, including a rental property, does not need to be reported on Form 8938. We request confirmation that contracts related to such rentals (e.g., leases) are also not reportable on Form 8938.

8. **Provide further details of classification as foreign social security**. FAQ 14 addresses the exception for foreign social security, specifying that such category includes 'payments or the rights to receive the foreign equivalent of social security, social insurance benefits or another similar program of a foreign government'. We suggest clarification that foreign systems included in agreements entered into under Section 233 of the Social Security Act (commonly known as totalization agreements) will be accepted as foreign social security, as will systems that are mandatory under the laws of the relevant foreign country (regardless of whether such country has a totalization agreement with the US) as not voluntary 'investments'. A specific safe harbor may reasonably include plans described in Reg. Section 1.409A-1(a)(3)(iv).

9. **Clarify what is meant by 'counterparty'.** The term 'counterparty' is referenced regularly in the form, instructions, and FAQs, with reporting requirements related to counterparties, but the term is not defined. We suggest that the term be clearly defined and that examples be provided for clarity.

10. **Limit information required for each account and asset**. Form 8938 requires taxpayers to gather and report information they may not have readily available and that can be difficult to obtain. We believe that reporting requirements can be greatly simplified, allowing the IRS to review primary information and request additional detail when desired. Examples of information that should be removed from Form 8938 and requested only on an as-needed basis include mailing address of financial institutions and other entities, the type of foreign entity (partnership, corporation, trust, or estate), and similar information related to issuers and counterparties. Particularly where taxpayers continue to invest via the internet vs. visiting physical locations they may have accounts or invest through, such information may not be readily available or ordinarily relevant for the taxpayer. Identifying and reporting such information can be administratively burdensome to taxpayers, though the information will presumably be reviewed by the IRS for only a limited number of filers. Again, if ultimately desired, we expect that the IRS could request the information from this limited number of filers to simplify reporting for others.

11. **Include specification for a taxpayer with joint accounts or assets with a nonresident alien spouse.** Form 8938 requires taxpayers to indicate whether reportable accounts and assets are jointly owned, presumably allowing the IRS to expect similar reporting by the spouse where the couple do not file a joint return. Where the spouse is a nonresident alien, Form 8938 is of course not required. To manage IRS expectations and review, we suggest an entry on the form specifying the nonresident alien spouse.

12. **Confirm application of increased thresholds to taxpayers living abroad for only part of the year.** Form instructions provide increased reporting thresholds for taxpayers living abroad. These increases

recognize that individuals living abroad will generally have foreign assets and accounts due to living abroad and that applying the threshold amounts applicable to those living in the US would result in excessive reporting for taxpayers who are not part of the intended demographic (i.e., US citizens and residents attempting to evade US tax by holding investments in offshore accounts).

To qualify as living abroad, the taxpayer must have a tax home in a foreign country and meet one of two 'presence abroad' tests. These tests mirror those for qualification for the foreign earned income and housing exclusions under Section 911 of the Code. The tests require the taxpayer to have been a bona fide resident of a foreign country or countries for an entire tax year, or to be present in a foreign country or countries for at least 330 days during a period of 12 consecutive months. Where taxpayers meet these tests but move to or from the US during the tax year, a partial exclusion is permitted under Section 911 for the portion of the year prior to moving to the US or after departure (even if consideration of presence or residence in the following year must be considered in determining whether the applicable test is met). We expect that the increased thresholds for Form 8938 reporting apply provided the taxpayer meets the relevant tests (e.g., qualifies to claim the Section 911 exclusion) for only a portion of the year, but would welcome confirmation in this regard.

13. **Provide exception, or increased thresholds for, foreign nationals temporarily resident in the US.** Foreign nationals who have historically lived abroad but move to the US will typically continue to have accounts and investment assets in their home countries for at least some period of time after their move. This is particularly true in the case of those living in the US for temporary periods due to international work assignments, as such individuals expect to return to their home countries. Similar to US citizens living abroad, we do not believe that foreign nationals living temporarily in the US are part of the intended demographic for which the burdens of Form 8938 responsibilities are justified. These individuals instead simply held accounts and assets in their home countries while considered US nonresident aliens, and often before having any intent to move to the US. We suggest an exception to reporting be provided for foreign nationals newly resident in the US (e.g., less than 3 years of US residence). We also suggest providing increased thresholds for foreign nationals who historically resided outside the US but moved to the US and did not dispose of all accounts and assets in their home countries, perhaps with an exception for accounts and assets acquired after the establishment of US residence. Such individuals may be subject to penalties or other negative investment consequences if they were to dispose of such accounts and assets earlier than if they had continued to reside in their home countries.

14. **Simplify or remove Part III, *Summary of Tax Items Attributable to Specified Foreign Financial Assets*.** The reporting required in Part III of Form 8938 is arguably the most time-consuming portion of the form and thus contributes significantly to burdens currently placed on those required to file the form. Though we understand the reporting is intended to simplify IRS review of taxpayer returns for confirmation that income from foreign accounts and assets is appropriately captured, we question whether the additional 'map' of information obtained justifies the burden on taxpayers since Part III can be particularly complex.

    Consider a taxpayer with a foreign account and a foreign asset, both of which earn interest income, have deductible fees, and for which foreign tax is paid. The taxpayer also has interest income and fees from US accounts and assets and files Schedules A and B with Form 1040, but no dividends, royalties, gains/losses, or other income related to foreign assets or accounts. A relatively common and simple scenario. The current and draft Forms 8938 require this taxpayer to take the following steps to complete Part III (line references are to tax year 2012 forms and schedules):

    a. From Schedule B, determine which portion of interest income reported relates to foreign accounts and assets (interest related to US accounts and assets will not be relevant, such that the total determined will not match total interest income reported on Form 1040 or Schedule B).

    b. From the portion determined, further separate to determine the interest allocable to each category (foreign accounts and foreign assets).

    c. Report each such amount on column (c) of lines 1a and 2a.

    d. Report the form and line (e.g., Form 1040, line 8a) and/or Schedule and line (e.g., Schedule B, line 1) on columns (d) and (e) of lines 1a and 2a.

e. Determine which deductions are related to foreign accounts and assets (deductions related to US accounts and assets will not be relevant, such that the total determined will not match total deductions reported on Schedule A).

f. In doing so, make a guess as to how the limitation on investment interest expense deductions (under Section 163(d)) and the 2% floor on miscellaneous itemized deductions (under Section 67) should be considered and allocated, as no guidance is provided currently.

g. From the portion determined (after a guess as to whether gross or net, and if net, how to allocate limitations on the deductible portion), allocate the investment interest expense and investment expense allocable foreign accounts and assets. Also guess as to how and whether carryforwards of investment interest expense from previous years should be allocated.

h. Add the investment interest expense and investment expense deductions determined to be allocable to foreign accounts together, and report the total on column (c) of line 1f and 2f, respectively.

i. Report the form and line (e.g., Form 4952, lines 1, 2, or 3 and Form 1040, line 40) and and/or schedule and line (Schedule A, lines 14 and 23), on columns (d) and (e), respectively of lines 1f and 2f, respectively.

j. Separately report each portion allocated on column (c) of lines 1f and 2f.

k. A similar exercise in relation to the foreign tax credits determined related to foreign accounts and assets, separately. Taxpayers must currently make guesses as to whether the applicable amounts reported on Form 1116, Part II (foreign taxes paid or accrued) are reportable on column (c) of lines 1(g) and 2(g), or instead whether amounts reported on line 14 of Form 1116 (foreign taxes available for credit, after taking into account carrybacks, carryovers, and reductions) or line 22 of Form 1116 (foreign tax credit for the applicable category, after limitations are considered) are expected. Further, taxpayers may need to consider more than one Form 1116 and add relevant amounts from each together to determine the relevant portion ultimately reported on Form 1040, line 47. This may be true, for example, if the taxpayer has foreign tax credits related to more than one category of income (for example, passive, general, and treaty re-sourced categories).

l. The taxpayer must also make an uneducated guess as to whether and how alternative minimum tax (AMT) comes into play (we strongly suggest clarification that AMT is not relevant for Form 8938 completion).

We expect that the main concern of the IRS in designing Form 8938, Part III, is to confirm that income related to foreign accounts and assets is properly reported on the taxpayer's Form 1040 (or 1040NR in the case of a resident for Section 6038D purposes but filing Form 1040NR). We would expect that the IRS could make a determination of such income by review of information already reported on forms and schedules. Further, we question whether confirmation of deductions and credits related to foreign accounts and assets is of particular importance to the IRS. As evidenced by the above steps and uncertainties applicable to a rather common and simple taxpayer scenario, Part III is a substantial burden (complexity and time-wise) on the taxpayer for which the IRS's need for the requested details seems to be limited.

15. **If Part III of Form 8938 continues in revised versions of the form, provide guidance as to whether and how tax items exempt under treaty should be reported**. Some tax items, as they are described, do not result in gross income due to domestic law or tax treaty provisions. We suggest that 'tax items' be defined as including only those impacting gross income or ultimate tax, and only to the extent of such impact.

16. **Remove Part VI, item 2 entry for 'Identifying Number or Other Designation' related to each 'Other Foreign Asset'.** While we expect that the account number for each foreign account will typically be readily available and obvious, the same cannot be said to be true for other foreign assets. While the instructions indicate that if there is no account number, 'other information identifying the asset' should be entered, no guidance or examples are included as to what other identifying information might be expected or relevant. We suggest that this information not be required on Form 8938 as the description is reasonably

sufficient (in addition to other entries that continue to be required), or, at a minimum, that sufficient guidance and examples be provided to assist taxpayers in completing the entry.

17. **Remove entries for dates assets were acquired or disposed of during the year.** Currently, taxpayers are required to complete entries indicating the date(s) foreign assets were acquired or disposed of during the taxable year, if applicable. This information appears to be another taxpayer-prepared 'map' for the IRS to consider whether applicable income and gains were properly reported on the taxpayer's federal income tax return. We question the additional relevant information obtained by requesting the acquisition date of reportable assets, and expect that the IRS can confirm the dates acquired and disposed of for any taxable asset disposals by reference to information already reportable on Form 8949, *Sales and Other Dispositions of Capital Assets* (which of course feeds into Schedule D). Therefore, the duplicate entry on Form 8938 is an unnecessary, additional burden on the taxpayer and should be removed.

Thank you for considering our comments on Form 8938 and applicable instructions, which we believe can reduce burdens to taxpayers while retaining the interests of the IRS. Should you have any questions or wish to discuss these comments, please do not hesitate to contact Clarissa Cole at (213) 217-3164 or clarissa.cole@us.pwc.com, or Derek Nash at (202) 414-1702 or derek.m.nash@us.pwc.com.

Very Truly Yours,

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