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July 20, 2011

Internal Revenue Service
CC:PA:LPD:PR (NOT-121556-10)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044
notice.comments@irsconsult.treas.gov

RE: Comments Regarding Draft Form 8938

Dear Sir or Madam:

I am pleased to submit The Florida Bar Tax Section's comments on draft Form 8938.

Principal responsibility for these comments was exercised by Abraham W. Smith, Alfredo R. Tamayo and Margarita Muina. The comments were reviewed by James Barrett.

Although the members of The Florida Bar Tax Section who participated in preparing these comments may have clients who would be affected by draft Form 8938, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

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The Florida Bar Tax Section is comprised of approximately 2,000 members. These materials were prepared by the Comment Projects Subcommittee of the Tax Section.

As always, we will be pleased to provide additional commentary as requested. If you have any questions regarding our comments, please do not hesitate to contact us.

Sincerely,


Domenick R. Lioce, Chair

The Tax Section has the following comments and recommendations regarding draft Form 8938:

1. Citizens or Residents of the United States

As currently drafted, the new reporting requirement applies to any individual, including nonresident aliens. We recommend limiting the applicability of the new reporting requirement to individuals who are citizens or residents of the United States.

2. Automatically Extended

Form 8938 will be attached to an individual's tax return. As such, we recommend Form 8938 be due on the date that an individual's income tax return is due, including extensions. If a individual files a Form 4868 to extend the time to file their tax return, the due date of the Form 8938 should automatically be extended.

3. Definition of "Interest"

The reporting requirements apply to any individual who holds any "interest" in a specified foreign financial account. We recommend that the IRS model its definition of "interest" following as closely as possible the definition of "financial interest" contained in the instructions to Form TD F 90-22.1 ("FBAR").

4. Definition of "Value"

The reporting requirements require an individual to report the maximum value of the asset during the taxable year. Determining the value of bank accounts and publicly traded securities is relatively easily. Determining the value, however, of non-publicly traded securities is difficult and generally requires an individual to acquire an appraisal. To ease the compliance burden on individuals, we welcome the "check the box" method of valuation provided on draft Form 8938 for assets with values less than \$200,000. This method of valuation should reduce the need for individuals to obtain appraisals for exact valuations. We recommend that the IRS expand this "check the box" method and include the following additional options:

- \$200,001 - \$500,000
- \$500,001 - \$1,000,000
- \$1,000,001 - \$10,000,000
- over \$10,000,001

5. Beyond Scope of Statute

Parts I(3), II(3) and III of draft Form 8938 are beyond the scope of the statute. The statute does not require individuals to report items including (i) when the account was opened or closed, (ii) when the asset was acquired or disposed, or (iii) the tax items attributable to the specified foreign financial assets. As such, these parts of the draft Form 8938 should be removed. Not only are these provisions beyond the scope of the statute, but these provisions will significantly increase the cost and burden of preparing Form 8938.

6. FBAR Duplication

Part I of draft Form 8938 is similar to information reported on the FBAR. Thus, we recommend a note be added to Part I as follows (which is similar to the note under Part II):

Note. If you reported specified foreign financial assets on Form TD F 90-22.1, you do not have to include the assets on Form 8938. You must complete Part IV. See instructions.

The FBAR should be included in the list of forms set forth in Part IV.

7. 25 or More Foreign Financial Assets

For individuals with a financial interest in 25 or more foreign financial accounts, the FBAR provides a simplified reporting system. We recommend Form 8938 adopt a similar approach for individuals with an interest in 25 or more specified foreign financial assets.

8. Form 8858 Duplication

Part IV of draft Form 8938 does not require specified foreign financial assets reported on IRS Forms 3520, 3520-A, 5471, 8621 or 8865 to also be included on Form 8938. Not included in this list of IRS forms is IRS Form 8858. We recommend the list of IRS forms contained in Part IV of draft Form 8938 be expanded to include IRS Form 8858.

9. Exchange Rates

Draft Form 8938 requires all amounts to be reported in US dollars. When finalized, we recommend the instructions to Form 8938 follow as closely as possible the guidance contained in the instructions to the FBAR which address the foreign currency exchange rates to use and how they should be applied to convert foreign currency to US dollars.

10. Disregarded Entities holding FFA's

A domestic single member LLC without an election in place to be treated as an association taxable as a corporation is treated as a "US person" for FATCA disclosure purposes. IRC Sec. 6038D and IRS Form 8938 on their face apply solely to individuals. IRS Form 8938 should explicitly require disclosure of foreign financial assets by individual single members of LLC's.

11. US individual partners of domestic partnerships holding FFA's

The Treasury should indicate if US individuals who are partners of a domestic partnership holding FFA's as all or a portion of the underlying assets of the domestic partnership must file IRS Form 8938 to disclose their pro rata share of the FFA's. Arguably, the individual is limited to the terms of the partnership agreement and has no direct access to the FFA's under most versions of relevant partnership law. A literal reading of IRC Sec. 6038D applies solely to US individuals and not to US entities. Yet, as in the case of single member entities, full disclosure would seem to require that US individuals disclose their share of FFA's especially in the case of investment partnerships. It should be noted that the foregoing disclosure would enlarge the statute beyond its terms and may well be outside the scope of the statute.

12. FAQ # 52

Examples 1 – 3 www.irs.gov/businesses/international/article/0,,id=235699,pp.html/ 2011 Offshore Voluntary Disclosure Initiative; FAQ No. 52 limit the OVDI penalty in cases where the US person resides abroad; has timely complied with all tax reporting and payment required in the country of residency and has less than \$10,000 of US source income. In other cases, FATCA disclosures do not apply for transactions or taxpayers who are perceived as “low risk” of tax evasion.

The Joint Committee Summary of the HIRE Act makes clear that IRS Form 8938 is not identical to the FBAR form and in fact is required even if the US person is not required to file the FBAR. For example, the US individual beneficiary of less than 50% of the foreign trust must disclose his interest by filing IRS Form 8938 but need not file the FBAR. Also, the FBAR is not required of US persons or transactions viewed as having a “low risk” of tax evasion either as not disclosing foreign source income or foreign bank accounts. For purposes of filing the Form 8938, the Treasury should articulate any taxpayer or transaction exempt from filing due to the “low risk” of tax evasion, such as US citizens who have lived overseas for all or most of their lives and often are not aware of the US income tax worldwide reach.