



Section of Taxation

10th Floor  
740 15th Street N.W.  
Washington, DC 20005-1022  
(202) 662-8670  
FAX: (202) 662-8682  
E-mail: tax@abanet.org

March 30, 2007

Hon. Mark. W. Everson  
Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Re: Comments Concerning Proposed Revisions to Form 8857 and Related Instructions

Dear Commissioner Everson:

Enclosed are comments concerning proposed revisions to Form 8857 and related instructions. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Susan P. Serota  
Chair, Section of Taxation

Enclosure

cc: Donald L. Korb, Chief Counsel, Internal Revenue Service

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**COMMENTS CONCERNING PROPOSED REVISIONS TO FORM 8857 AND  
RELATED INSTRUCTIONS**

These comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these comments was exercised by Bryan Camp of the Committee on Individual and Family Taxation. Substantive contributions were made by Dale Kensinger of the Committee on Low Income Taxpayers and Susan Morgenstern of the Committee on Pro Bono Taxpayers. The comments were reviewed by Roberta Mann, Chair of the Committee on Individual and Family Taxation, Ronald D. Aucutt of the Committee on Government Submissions and Sharon Stern Gerstman, Council Director for the Committee on Individual and Family Taxation.

Although the members of the Section of Taxation who participated in preparing these comments have clients who would be affected by the federal tax principles addressed by these comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) 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.

Contact Persons:

Bryan Camp  
Tel. 806-742-3990 x269  
Fax 806-742-0901  
Email: [bryan.camp@ttu.edu](mailto:bryan.camp@ttu.edu)

Roberta Mann  
Tel. 302-477-2159  
Fax. 320-477-2257  
Email: [rfmann@widener.edu](mailto:rfmann@widener.edu)

## EXECUTIVE SUMMARY

These comments (“Comments”) relate to the proposed revised Internal Revenue Service (“IRS”) Form 8857 and related instructions. The Form represents a good effort to reduce the statutory standards to a checklist format, but we believe some changes can be made to further strengthen this effort. We have three overall concerns with the form which are reflected in our Comments on the form and in the suggested alternatives.

First, some questions assume the requesting spouse has signed the joint return. There are occasions in which a requesting spouse has signed a return under duress from an abusive spouse. In such cases, the requesting spouse is not subject to joint and several liability because he or she did not “file” the return with free will. Signing the Form 8857 under penalty of perjury where, for example, the requesting spouse has answered “yes” to the question “Did you file a joint return?,” might impair his or her ability to later claim duress as an alternative to innocent spouse relief. *See* Section 1 of these Comments, *infra*.

The second area of concern is that with respect to many items, Form 8857 requires the requesting spouse to submit documentation along with the form. There is no doubt that the documentation is necessary and that a requesting spouse needs to furnish the IRS with evidence of any claimed spousal abuse, medical infirmities, or marital status. However, obtaining this documentation is extremely time-consuming and may delay the requesting spouse’s completion of the form. Given that requesting spouses are subject to a two-year limitations period (under section 6015<sup>1</sup>) to claim spousal relief and further subject to a two or three year look-back period under section 6511(b) to receive a refund of any overpayment, placing the burden of attaching the requisite proof with the claim may adversely effect many requesting spouses and may lead to denial of spousal relief to deserving requesting spouses. We suggest that requesting spouses be asked to identify what documentation they can obtain to support their claim, but allow them to submit that documentation at a later date. Accordingly, the second overall suggestion is to separate the “pleading” function of the Form 8857 from its “proof” function. We suggest that after receiving a properly completed Form 8857, the IRS send out an automatically-generated response acknowledging receipt, requesting the described documentation within a pre-determined time-frame (e.g., 60 days), and advising the requesting spouse of the availability of assistance from Low Income Tax Clinics or the Taxpayer Advocate Service. *See* Sections 4 and 5 of these Comments, *infra*.

The third, related concern is that many requesting spouses will be unrepresented, and less educated and/or capable than average in reading, understanding, and responding to forms. Accordingly, any simplification of the form, such as substituting many of the current checkboxes with ones labeled simply “Yes,” “No,” and “I don’t know or remember,” followed by the request to explain on a separate sheet of paper, would be welcome. Although this approach might increase processing time, the current proposed checkboxes, particularly those in Part V, may set traps for low-functioning requesting

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<sup>1</sup> All references to sections are to sections of the Internal Revenue Code of 1986, as amended (the “Code”) unless otherwise stated, and references to “Regulations” are to the Treasury regulations issued hereunder.

spouses without providing the IRS with sufficiently accurate information to make a determination about relief. *See* Section 4 of these Comments, *infra*.

## COMMENTS

### 1. Comments on Part I.

**Line 2.** Line 2 asks “Did the IRS use your share of the joint refund to pay your spouse’s past-due debt, such as federal tax, child support, or student loan?” This question may be confusing, particularly to low-functioning or unrepresented persons. Instead, of including this question, the content of Line 2 could be listed in the General Instructions as one of the “Situations in Which You Should Not File Form 8857.” If the IRS determines that it should retain Line 2, we suggest rewording to the question to ask: “Did the IRS use your share of a refund from a joint return to pay any of the following separate debts of your spouse: (i) federal tax liability; (ii) child support; or (iii) student loans.”

**Line 3.** Line 3 asks the requesting spouse “Did you file a joint return?” There are times when a requesting spouse is forced to sign the return under duress from an abusive spouse. In such cases, the courts have held that the requesting spouse is not subject to joint and several liability because he or she did not actually “file” the return with free will. *See e.g. Furnish v. Comm’r*, 262 F.2d 727 (9th Cir. 1958); Reg. 1.6013-1(d). Requesting spouses in this situation may wish to preserve the duress claim as an alternative to the innocent spouse claim. Answering “yes,” under penalty of perjury, to the question “Did you file a joint return” might impair their ability to argue duress. We suggest that Line 3 be reworded to ask: “Was a joint return filed?”

### 2. Comments on Part III.

**Line 7.** Line 7 provides as follows: “UNDERPAID TAX (Equitable Relief Only) Check the box for each year your tax was underpaid if, for that year, you think it would be unfair to hold you responsible for the amount you owe. You have an underpaid tax if the tax owed on your return was not paid.” We submit that the word “owed” might cause confusion because many requesting spouses may not understand the difference between an *underpayment* and an *understatement*. The language used in the instructions, and in Line 8, which talks in terms of the tax “shown” on the return, is more helpful. Moreover, the use of different formulations for the same concept creates ambiguity and confusion. Further, the question would be more easily understood if the definition of “underpaid tax” was set out first, before the instruction to check the box. We suggest either of the following formulations of this question:

Suggestion 1: Define “Underpaid Tax” as “You have an underpaid tax if the tax shown on your return was not paid.”

Suggestion 2: Define “Underpaid Tax” by reference to the specific line in Form 1040, 1040A, or 1040EZ that sets forth the “Amount Owed.”

**Line 8.** Line 8 directs the requesting spouse to check the boxes for each type of relief that he or she is requesting for the understated tax. After this instruction, Line 8 explains that “You have an understated tax if the IRS determined that your total tax should be

more than the amount actually shown on the return.” Again, we believe that the definition of “understated tax” should be consistent throughout the form and instructions, and further suggest that the definition would be more easily understood if stated before the instruction.

**Line 9.** Line 9 directs the requesting spouse to check the box for each year he or she would like a refund if he or she qualifies for relief, and further provides that “You may be required to provide proof of payment. See instructions.” Assuming that the IRS intends to treat an affirmative response to Line 9 as a claim for refund, we believe that this is an excellent addition to Form 8857 because it will save requesting spouses from having to file duplicative Forms 1040X. If, however, the IRS intends for such requesting spouse to file a Form 1040X, we recommend that the instructions clearly state this requirement.

### **3. Comments on Part IV.**

**Line 10.** Line 10 directs the requesting spouse to identify the spouse for the tax years for which he or she is requesting relief. Requesting spouses may request relief for up to three years. Those three years need not be sequential. Indeed, requesting spouses may have been married to different spouses for different years for which they seek relief. We suggest that the phrasing of Line 10 could be improved to provide space for the requesting spouses to disclose different spouses for different years. A grid design similar to that used in lines 1-4 may be an effective method of collecting this information. Alternatively, we recommend that proposed Form 8857 be revised to cover only one tax year, or that the Instructions be revised to require requesting spouses to submit a separate Form 8857 for tax years involving different spouses or former spouses.

**Line 11.** Line 11 asks for information regarding the current marital status between the requesting spouse and the person identified on Line 10. Where the requesting spouse has been widowed, the form requires that the requesting spouse attach a photocopy of the death certificate and will, and where the requesting spouse has been separated or divorced, the form requires that the requesting spouse attach a photocopy of the “entire separation agreement” and the “entire divorce decree.” Line 11 also includes a “Note” advising the requesting spouse that “[a] divorce decree stating that your former spouse must pay all taxes does not necessarily mean you qualify for relief.”

First, we do not believe that requiring a requesting surviving spouse to submit a photocopy of the will would assist the IRS in determining the date of death or any other relevant fact. Second, the terms “entire separation agreement” and “entire divorce decree” may cause confusion and add to the processing burden. The word “entire” suggests that the requesting spouse must submit additional documents, such as attachments to the decree, incorporated separation, property settlement, child support or child custody agreements or arrangements, subsequent modifications to the decree or agreement, or annual reports required by the decree. We recommend that the IRS reword this request to make clear that nothing is required beyond the separation agreement or divorce decree itself. Finally, with respect to the “Note” regarding legal effect of divorce decree, some reviewers thought that the Note was not necessary because the same

information is contained in the Instructions, but others thought it was useful to highlight this issue because many requesting spouses are confused by the relationship between a divorce decree absolving them of responsibility for taxes and their qualification for spousal relief.

**Line 12.** Line 12 asks the requesting spouse to state “the highest level of education you had completed when you filed the return(s).” First, as noted in connection with Line 10, requesting spouses may claim relief for up to three separate, potentially non-sequential, tax years, and the requesting spouse’s educational level may have been different for different years. Line 12 does not differentiate between multiple years. We suggest that Line 12 be revised to allow requesting spouses to check a box for their education level for each of the three years for which they seek relief. Again, the grid design used in Line 1-4 may be effective here.

Second, there may be a significant difference in level of functioning between requesting spouses who have completed high school and requesting spouses who have completed only up to 6th or 7th grade. Additionally, the passage of time since formal education might affect a requesting spouse’s capacity. According to statistics compiled by the Center for Financial Services Innovation, in approximately 27% of households, no one has completed high school or obtained a GED (July 2005 Fact Sheet on file by Bryan Camp). When considering the impact of education on eligibility for disability, the Social Security Administration (“SSA”) regulations recognize that both level of education and time since education has ended influences the level of knowledge a claimant may reasonably be presumed to possess. 20 C.F.R. § 404.1564. Accordingly, Form SSA-3368-BK (“Disability Report Adult”) asks claimants whether they are literate and asks them to identify the last grade of education they completed and when. The SSA regulation explains that:

The importance of your educational background may depend upon how much time has passed between the completion of your formal education and the beginning of your physical or mental impairment(s) and by what you have done with your education in a work or other setting. Formal education that you completed many years before your impairment began, or unused skills and knowledge that were a part of your formal education, may no longer be useful or meaningful in terms of your ability to work. Therefore, the numerical grade level that you completed in school may not represent your actual educational abilities. These may be higher or lower. However, if there is no other evidence to contradict it, we will use your numerical grade level to determine your educational abilities. The term education also includes how well you are able to communicate in English since this ability is often acquired or improved by education. In evaluating your educational level, we use the following categories:

(1) Illiteracy. Illiteracy means the inability to read or write. We consider someone illiterate if the person cannot read or write a simple message such

as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.

(2) Marginal education. Marginal education means ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs. We generally consider that formal schooling at a 6th grade level or less is a marginal education.

(3) Limited education. Limited education means ability in reasoning, arithmetic, and language skills, but not enough to allow a person with these educational qualifications to do most of the more complex job duties needed in semi-skilled or skilled jobs. We generally consider that a 7th grade through the 11th grade level of formal education is a limited education.

(4) High school education and above. High school education and above means abilities in reasoning, arithmetic, and language skills acquired through formal schooling at a 12th grade level or above. We generally consider that someone with these educational abilities can do semi-skilled through skilled work.

(5) Inability to communicate in English. Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn't speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, we consider a person's ability to communicate in English when we evaluate what work, if any, he or she can do. It generally doesn't matter what other language a person may be fluent in.

(6) Information about your education. We will ask you how long you attended school and whether you are able to speak, understand, read and write in English and do at least simple calculations in arithmetic. We will also consider other information about how much formal or informal education you may have had through your previous work, community projects, hobbies, and any other activities which might help you to work.

20 C.F.R. § 404.1564. With the SSA regulations in mind, we suggest that Line 12 be reformulated to ask which grade a requesting spouse had completed at the time the joint return was filed and whether the claimant could, at that time, read or write in a language supported by IRS forms and instructions.

**Line 13.** Line 13 asks “Were you a victim of spousal abuse for any of the tax years you want relief?” In addition, Line 13 directs the requesting spouse to attach a statement explaining the abuse and when it started, along with photocopies of any identification,

such as police reports, restraining order, doctor's report or letter, or a notarized statement from someone who was aware of the situation.

First, some requesting spouses may not respond to "spousal abuse," but may respond if asked about "domestic violence." Indeed, most emergency shelters for abused spouses are called "Domestic Violence" shelters or "Battered Women" shelters and are not called "Spousal Abuse" shelters. In addition, Line 13 is grammatically incorrect as written. Accordingly, we suggest that Line 13 be reworded to ask "Were you a victim of spousal abuse or domestic violence during any of the years listed in Line 6." Finally, this question might be better placed under Part II "About Yourself" so that the IRS will know from the first page that the case involves a claim of spouse abuse.

#### **4. Comments on Part V.**

**Overall Comment.** Part V seeks information concerning the requesting spouse's involvement with finances and return preparation during the tax years at issue. There is no doubt that the information sought in Part V is necessary for the proper determination of spousal relief. However, the strong theme of the comments we received was that using a form to collect this information creates two significant problems. First, the information sought by Part V — particularly information that goes to the "knew or should have known" requirement — may be too complex to be accurately captured by a form. As a consequence, the IRS will be more likely to make inaccurate classifications. Second, the use of a form to collect this information creates unnecessary traps for low-functioning requesting spouses, causing low-functioning requesting spouses to submit unintentionally inaccurate information under penalty of perjury, which may be difficult to later correct.

We suggest that Part V either be eliminated altogether, or eliminate questions 16, 17 and 21. Alternatively, we suggest that the questions in Part V be made open-ended by structuring the questions with checkboxes for "Yes," "No," and "I don't know or remember," followed by a line asking for an explanation and a description of the documentation or other proof that may support their claim, rather than requiring them to submit such documentation along with the form. In addition, an explanation of the "know or had reason to know" standard may be helpful.

**Line 15.** Line 15 asks the requesting spouse "How were you involved with preparing the returns?" The requesting spouse is then directed to check all of the boxes that apply, including, for example "You prepared or helped prepare the returns," "you gathered receipts and cancelled checks," "you reviewed the returns before you signed them," etc.

As noted previously, requesting spouses may claim relief for up to three potentially non-sequential years. Line 15 recognizes this by directing the requesting spouses to organize their information on a separate sheet of paper. However, in order to simplify the form, we suggest that Line 15 be revised to allow requesting spouses to check a box for their preparation level for each of the years for which they seek relief in a grid design similar to that employed in Lines 1-4. Line 15 could still instruct requesting spouses to provide further explanation on a separate page, but the suggested change

would provide the IRS with an immediate understanding of the requesting spouse's level of preparation for each year.

Second, as currently worded, the checkboxes might lead requesting spouses to provide inaccurate information to the IRS. For example, a requesting spouse who checks that she "prepared or helped prepare the return" might mean only that she gathered the information about a deduction item or filled in one schedule, neither of which had anything to do with omitted income items. That checkbox, without explanation, does not provide sufficient information to determine the level of knowledge attributable to the requesting spouse. A similar comment can be made for any of the checkboxes. We suggest that Line 15 be revised to ask "Were you involved with preparing the return?", with signature boxes for "Yes," "No," or "I don't know or remember," along with a request for the requesting spouse to explain his or her answer. It would also be helpful if, either the request for explanation or the Instructions include examples of the type of information that the IRS is interested in, e.g., whether the requesting taxpayer gathered receipts and cancelled checks, or reviewed the returns before signing, etc.

**Line 16.** Line 16 asks "When you signed the returns, were you concerned that any of the returns were incorrect or missing information?" This query is followed by three checkboxes, and directs the requesting spouse to include an explanation if his or her answers are not the same for each tax year at issue. The three checkboxes are "You knew something was incorrect or missing, but you said nothing," "You knew something was incorrect or missing and asked about it," and "You did not know anything was incorrect or missing." Line 16 also contains a space for explanation of the above.

The first comment is the same comment that made with respect to Line 15. We recommend that Line 16 be revised to allow requesting spouses to check a different box for each of the three years they seek relief in a grid design similar to that employed in Lines 1-4.

Second, as explained in connection with Line 3, the requesting spouse may have signed the return under duress. Line 16 does not provide for this possibility. Accordingly, we suggest that the IRS add an additional checkbox or line for duress, and omit the introductory clause of Line 16, which reads: "For what years were you concerned that any of the returns were incorrect or missing information?"

Third, Line 16 appears to be directed solely to understatement situations, as each checkbox assumes that some information on the return was incorrect or missing. Requesting spouses seeking only section 6015(f) relief, however, will have filed returns where there is no incorrect or missing data, yet may feel compelled to check off the third checkbox "You did not know anything was incorrect or missing" out of a belief that they must answer every line. Thus, for years in which the requesting spouse seeks only equitable spousal relief from underpayments, Line 16 may collect potentially irrelevant and inaccurate information. To correct this problem, we suggest adding a checkbox stating "Not Applicable" because you have request relief only for Underpaid Tax on Line 7." If this suggestion is adopted, the "Not Applicable" checkbox, should be the first

checkbox so requesting spouses do not erroneously fill in unneeded information. Alternatively, the IRS could add an instruction advising requesting spouses that they need not fill in Line 16 for tax years listed on Line 7.

Fourth, the current construction of this line creates two problems. First, the information sought here is too limited to make accurate determinations. Under section 6015(b), a requesting spouse must demonstrate that he or she did not know and had no reason to know of the inaccurate deduction item or missing item of income. Likewise, requesting spouses may be denied relief under section 6015(c) (separation of liabilities) if the IRS establishes that the requested spouse had actual knowledge of the impropriety of the deduction or omission of income. The information captured by the Form does not materially aid in either determination. Further information is necessary regardless of which box the requesting spouse checks. For example, if the requesting spouse checks “You did not know anything was incorrect or missing,” this does not mean that the requesting spouse *should not have* known, and further inquiry is required to determine what that “something” was. As noted above, if the requesting spouse is seeking relief under section 6015(c), the “something” may either lead to denial of relief or may affect the scope of relief granted.

Next, we have concern that requesting spouses simply will not understand how to answer Line 16, and that this will generate false positives and negatives. For example, it is not clear what difference there is between the checkbox “You knew something . . . and asked about it” and “You knew something . . . but you said nothing.” What if the requesting spouse knew something and made a comment but did not ask? What if the requesting spouse suspected (but did not know) something was incorrect and asked about it? What if the requesting spouse suspected (but did not know) something was incorrect but “saw-no-evil”? What if the requesting spouse was “concerned” but did not “know”? What if the requesting spouse was concerned *in general* about his or her spouse but was not concerned (and had no reason to be concerned) about any particular item on the return. Requesting spouses responding in good faith—especially low-functioning and unrepresented requesting spouses—may not understand which checkbox to check or what to explain. This confusion may result in false positives (granting relief to ineligible requesting spouses) or false negatives (denying relief to eligible requesting spouses). For example, a false positive might occur if a requesting spouse who was suspicious to the extent that a reasonable person would have made an inquiry (but can in good faith claim he or she did not “know”) about an omission of income checks (in good faith) the box indicating “You did not *know* anything was incorrect or missing.” Likewise, a false negative might occur if a requesting spouse who did not know or have any reason to know of the item of omitted income giving rise to the deficiency nevertheless accurately checks the “You knew something was incorrect or missing, but you said nothing,” because the requesting spouse knew that another item of information was incorrect—either an item unrelated to the calculation of tax, such as the address used on the return, or an item that arguably did not affect the calculation of tax, such as a disagreement between the spouses about the proper valuation of property donated to a charity, or an item that only marginally affected the calculation of tax, such as an exaggerated claim for a single deduction item.

We suggest eliminating Line 16 and instead covering this information in an interview with the requesting spouse in which the IRS employee would use a decision-tree script to obtain the necessary information more accurately and efficiently. Alternatively, the IRS could create a separate schedule containing the decision-tree script, or reword Line 16 to ask “Were you concerned that any of the returns were incorrect or missing information,” with checkboxes for “Yes,” “No,” and “I don’t know or remember,” and a request for explanation.

In sum, we believe that Line 16 is a poor substitute for a conversation between the IRS and the requesting spouse, and reducing the level of knowledge determination to a series of three checkboxes is unlikely to aid the IRS in making the “knew or should have known” determination necessary for granting relief under sections 6015(b) or (c).

**Line 17.** Line 17 asks “When you signed any of the returns, what did you know about the income of the person on line 10?” This question is followed by five checkboxes indicating the level of knowledge about the spouse’s income.

First, as stated in reference to many of the lines on Form 8857, we suggest revising Line 17 to allow requesting spouses to check a different box for each of the years for which they seek relief in a grid design. Indeed, for the first checkbox, “You knew the person had income,” the explanatory response is set forth in a grid with a different box for each tax year. A similar design could be employed for the other four checkboxes. In addition, we recommend that the introductory line to Line 17 be reworded to ask “What did you know about the income of your spouse for each of the years listed in Line 6?”

Second, Line 17 does not provide for the possibility that the requesting spouse may have signed the return under duress. Again, we suggest that the IRS add an additional checkbox or line for duress, and reword the introductory clause to omit “When you signed the return,” and instead to ask “What did you know about the income of the person on line 10 for any of the tax years listed in line 6?”

Third, Line 17 is directed to understatement situations. Again, we suggest adding a checkbox stating “Not Applicable” because you have request relief only for Underpaid Tax on Line 7.” Again, if this suggestion is adopted, the “Not Applicable” checkbox, should be the first checkbox so requesting spouses do not erroneously fill in unneeded information. Alternatively, the IRS could add an instruction advising requesting spouses that they need not fill in Line 17 for tax years listed on Line 7.

Fourth, Line 17 is likely to add little value to the determination of spousal relief and may illicit inaccurate or incomplete information and confusing responses. Of particular concern are the checkboxes “You knew that person had no income” and “You did not know if that person had income.” Many requesting spouses who seek section 6015(b) relief because their spouses concealed income which the IRS later discovered will not be able to check the “You knew that person had no income” box, because it is impossible to say they “knew” their spouse did not have income since one cannot “know”

something that is not true. Such requesting spouses will most likely check “You did not know if that person had income.” As can be seen by this example, the information captured by Line 17 is insufficient to determine eligibility for relief. We suggest that the IRS eliminate Line 17 altogether, or greatly simplify it to ask the requesting spouse for an open-ended narrative response in the same vein as suggested for Lines 15 and 16.

**Line 18.** Line 18 asks “When you signed the returns, did you know any amounts were owed to the IRS for those tax years?” If the answer is “Yes,” the form asks the requesting spouse to explain when and how he or she thought the amounts owed would be paid.

First, Line 18 does not provide a format for response for requesting spouses who are seeking relief for multiple years. We suggest that Line 18 be revised to allow requesting spouses to check a different box for each of the up to three years for which they seek relief in a grid design similar to Lines 1-4.

Second, the requesting spouse may have signed the return under duress, and Line 18 does not provide for this possibility. Accordingly, we suggest that the IRS add an additional checkbox or line for duress, and reword the introductory clause to omit “When you signed the return,” and instead ask “For what years did you know any amounts were owed to the IRS?”

Third, Line 18 contains ambiguities similar to those of Lines 16 and 17. The requesting spouse may reasonably think that Line 18 asks about either the tax shown on the return or the balance due shown on the return. For example, if the amount of tax shown on the return was \$8,000 and the return showed an amount due of \$100, the requesting spouse may reasonably think that Line 18 applies either to \$100 or the \$8,000. Moreover, Line 18 cannot capture accurate information where the underpayment of tax resulted from false claims about payments (either false claims about withholding or estimated tax payments), which may result in an incorrect determination. We suggest eliminated Line 18 altogether, or, alternatively, creating an open-ended questions, such as “For each tax year, please explain why you thought the amount of tax reported on the return was paid or how you expected it was going to be paid.”

**Line 19.** Line 19 asks “when you signed any of the returns, were you having serious financial problems? (for example, bankruptcy or bills you could not pay?).”

First, like many other lines in the proposed Form 8857, Line 19 does not provide a format for response for requesting spouses who are seeking relief for multiple years. We suggest that Line 19 be revised to allow requesting spouses to check a different box for each of the up to three years for which they seek relief in a grid design similar to Lines 1-4.

Second, as discussed previously, the requesting spouse may have signed the return under duress. Line 19 does not provide for this possibility. Accordingly, we suggest that the IRS add an additional checkbox or line for duress, and reword the

introductory clause to omit “When you signed the return,” and instead to ask “Were you having serious financial problems (for example, bankruptcy or bills you could not pay) during any of the tax years on line 6?”

Third, like Lines 16, 17 and 18, this line asks for relevant information (to determine whether a requesting spouse had a reasonable expectation that a tax would be paid). We submit that the type information sought by Line 19 is not suitable for a bulk-processing determination and would be better sought by an IRS employee through an interview using a script and decision-tree.

**Line 20.** Line 20 asks the requesting spouse, “For the years you want relief, tell us how you were involved in the household finances.” The requesting spouse is directed to check any of the six checkboxes that apply, which include, for example, “You knew the person on line 10 had separate accounts,” “You had joint accounts but you had limited use of them or did not use them,” “You were not involved in handling money for the household,” etc. Line 20 also directs the taxpayer to explain if the answers are not the same for all of the tax years.

Although Line 20 accounts for the fact that the requesting spouse may be seeking relief for multiple years by asking for an explanation if the answers are not the same for each year, we suggest simplifying the form by allowing requesting spouses to check a different box for each of the up to three years for which they seek relief in a grid design similar to Lines 1-4.

Second, the information sought by Line 20 may lead to inaccurate determinations. For example, the existence of -- or the taxpayer’s knowledge of -- separate checking accounts does not aid the IRS in determining who had control over decisions about finances. We suggest that Line 18 be revised to focus more on control. For example, checkbox 4 could be reworded as follows: “You made decisions about how money was spent. For example, you decided whether and when to pay bills or buy significant household items.”

**Line 21.** Line 21 asks “Has the person on line 10 ever transferred assets (money or property) to you? (For example, was something of value, such as real estate or stocks, put in your name rather than in that individual’s name)?” Line 21 may be too broadly-worded and that the information sought (evasive transfers) could be better captured by a more specifically worded question. We suggest revising Line 21 to ask two “Yes” or “No” questions: (i) “During your marriage to the person in line 10, did you and your spouse transfer ownership of any jointly owned property (like bank accounts, stock account, or real estate) to you alone without payment?” and (ii) “During your marriage to the person in line 10, did you buy anything in your name only using your spouse’s money?”

## 5. Comments on Part VI.

**Overall comment.** Part VI gathers information about the requesting spouse's current financial situation. However, current financial hardship is not a requirement for relief under sections 6015(b) or (c). Accordingly, we suggest requesting spouses should be instructed, either on Form 8858 or in the instructions, that they do not need to fill out Part VI if they are not requesting equitable relief under section 6015(f).

**Line 23.** Line 23 directs the requesting spouse to provide the IRS with current average monthly income and expenses for the entire household. Line 23 further directs the requesting spouse to include income from everyone who lives with the requesting spouse. As noted above, information about the requesting spouse's finances is relevant to an equitable relief determination. However, information about the income and expenses of a non-liable friend or relative of the requesting spouse, with whom the requesting spouse might be living or from whom the requesting spouse is receiving support, is not relevant to the determination of the *requesting spouse's* financial hardship. Many requesting spouses in financial hardship live off of the kindness of friends or relations. Such "gift" income is highly contingent, and such living conditions are often highly unstable. As a result, the fact that such requesting spouses may temporarily have such housing, for example, does not mean that circumstances cannot change abruptly and that they will necessarily have a home in the following month. We submit that the relevant information is whether the requesting spouses have sufficient resources of their own on which to live. Accordingly, we recommend that Line 23 be used to capture information about how much income a requesting spouse receives in the form of gifts, and should discount that income in determining the degree of financial hardship.

Accordingly, we suggest that the IRS reword Line 23 as follows: "Tell us your current average monthly income and expenses for your entire household. If family or friends are supporting you, include the amount of their support as "gifts." Under "Monthly Expenses" put down all expenses, whether paid for with income from gifts or other types of income."

## INSTRUCTIONS TO PROPOSED FORM 8857

**1. Comments on "General Instructions."** Under the heading "Purpose of Form," the first paragraph provides: "When you file a joint income tax return, both you and your spouse are jointly and individually responsible for the tax. This is called joint and several liability. You are jointly and severally liable even if you later divorce and the divorce decree states that your former spouse will be solely responsible for the tax." We suggest revising this paragraph to instead read: "When you file a joint income tax return, the law makes both you and your spouse responsible for the entire tax liability. This is called joint and several liability. Joint and several liability applies not only to the tax liability you show on the return but also to any additional tax liability the IRS determines to be due, even if the additional tax is all because of your spouse or former spouse. Under federal law, you remain jointly and severally liable for taxes, and the IRS can still collect

from you, even if you later divorce and the divorce decree states that your former spouse will be solely responsible for the tax.”

Second, the second paragraph under the heading “Purpose of Form,” provides: “If you believe that only your spouse or former spouse should be held responsible for the tax, you can request relief from the tax liability, plus related penalties and interest. To request relief, you must file Form 8857. The IRS will use the information you provide on the form and any attachments to determine if you are eligible for relief. If the IRS needs additional information, you will be contacted. We recommend revising the beginning of this paragraph to read: “If you believe that only your spouse or former spouse should be responsible for any part of the tax, you can request relief from all or part of the tax liability. . . .”

**“Situations in Which You Should Not File Form 8857.”** First, the first bullet point, which discusses whether the tax liability has been adjudicated in a prior proceeding, might be more understandable if broken into two bullet points, as follows:

- In a final decision dated after July 22, 1998, a court considered whether to grant you relief from joint liability and decided not to do so;
- In a final decision dated after July 22, 1998, a court did not consider whether to grant you relief from joint liability, but you participated in the proceeding and did not ask for that relief.

Second, the instructions explain that the IRS will not “provide your personal information.” We suggest an alternative phrasing, such as “the IRS will not disclose your personal information.” In addition, we recommend that the instructions also advise that “the IRS will not provide your spouse or former spouse a copy of your Form 8857.”

**“When to File.”** The instructions regarding “When To File” could be clearer on when the requesting spouse will know when to file. For example, instead of stating “the IRS sends you a notice,” we suggest that the instructions state: “The IRS is examining your return, is proposing to increase your tax liability or is demanding that you pay a tax liability.” In addition, the instructions reference the “issuance of a section 6330 notice...” Instead, we suggest that the instructions refer to the Form numbers of typical Collection Due Process notices, as the average requesting spouse is unlikely to know what a “section 6330 notice” is.

**“Where to File.”** The instructions direct a taxpayer who is “meeting with” an IRS employee for an examination, examination appeal, or collection to file the Form 8857 with that employee. We recommended replacing “meeting with” to “communicating with” since many times a requesting spouse will only communicate with the IRS through correspondence, or, at best, by telephone.

## 2. **Comments on Part III.**

**“Collection Statute of Limitations.”** The instructions refer to the Collection Statute of Limitations (“CSED”), and advise the requesting spouse that the IRS has 10 years to collect an amount owed, and that the IRS is not allowed to collect after that 10-

year period ends. The instructions further advise the requesting spouse that if he or she requests innocent spouse relief or separation of liability relief for any tax year, the IRS cannot collect from the requesting spouse for that year while the request is pending. In *Billings v. Comm’r*, 127 T.C. 7 (2006), the Tax Court held that requesting spouses seeking only section 6015(f) relief cannot petition the Tax Court under section 6015(e). Since it is section 6015(e) that triggers both the prohibition on collection and the corresponding tolling of the CSED, the result of the *Billings* decision is that the IRS is no longer prohibited from collection action (and the CSED is no longer tolled) while the IRS considers stand-alone section 6015(f) petitions. Accordingly, we recommend that the instructions advise the requesting spouse that the CSED is no longer tolled pending section 6015(f) requests.