January 31, 2011

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments on Draft Form 8939, Allocation of Increases in Basis for Property Acquired From a Decedent

Dear Commissioner Shulman:

This letter is submitted on behalf of the Individual and Fiduciary Income Tax Committee, the Estate and Gift Tax Committee and the International Tax Planning Committee of the Real Property, Trust and Estate Law Section (the “RPTE Section”) of the American Bar Association (the “ABA”) and the Fiduciary Income Tax Committee (“FIT Committee”) of the Section of Taxation (the “Tax Section”) of the ABA in response to the request for comments by the Internal Revenue Service (the “Service”) in its release of the Draft Form 8939. The comments expressed in this letter represent the views of the RPTE Section and the Tax Section only and have not been approved by the ABA’s House of Delegates or Board of Governors and therefore should not be construed as representing the position of the ABA.

Carol A. Cantrell, Chair of the Individual and Fiduciary Income Tax Committee, supervised the preparation of these comments and participated in their preparation. The principal drafting responsibility was exercised by Lenny W. Thebarge, Jr., who also made substantive contributions along with Robert S. Balter, Robert E. Barnhill, III, Scott A. Bowman, Jenny M. Hill, Randy M. Karsh, Michael B. Nelson, Jeanne L. Newlon, Joseph B. Schimmel, and Thomas M. Sheehan. These comments were reviewed by Edward F. Koren on behalf of the RPTE Section’s Committee on Governmental Submissions (“COGS”), Mary Ann Mancini, Council Director for the FIT Committee, and John P. Barrie on behalf of the Tax Section’s COGS.

Although the attorneys who participated in preparing these comments on behalf of the RPTE Section and the Tax Section have clients who might be affected by the legal issues addressed herein, no such member (or firm or organization to which any such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these comments.
Once again, we appreciate the opportunity to submit these comments and we respectfully request that the Service consider our recommendations. Members of the RPTE Section and the Tax Section are available to meet and discuss these matters with the Service and its Staff and to respond to any questions.

Sincerely,

Charles H. Egerton  
Chair, Section of Taxation

Alan F. Rothchild, Jr.  
Chair, Section of Real Property, Trust and Estate Law

Enclosure

cc: Michael F. Mundaca, Assistant Secretary (Tax Policy), Department of the Treasury  
William J. Wilkins, Chief Counsel, Internal Revenue Service  
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AMERICAN BAR ASSOCIATION

SECTION OF REAL PROPERTY, TRUST AND ESTATE LAW
SECTION OF TAXATION

COMMENTS CONCERNING IRS FORM 8939

EXECUTIVE SUMMARY

On December 17, 2010, President Obama signed into law the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 ("TRA 2010"). TRA 2010 permits executors acting on behalf of estates of decedents dying after December 31, 2009, and before January 1, 2011, to make an election regarding the basis framework applied to the property of the estate. If the election is made, the eligible estate property is subject to carry-over basis. During the administration of such an estate, there must be an allocation of an increase in basis. In order to effect such allocations, the Internal Revenue Service (the “Service”) has proposed Form 8939, Allocation of Increase in Basis for Property Acquired From a Decedent (the “Form”).

On December 16, 2010, the Service issued a draft of the Form and requested comments on the Form. These Comments set out our recommendations for suggested revisions to the Form and the need for Instructions regarding the same.

COMMENTS

I. Introduction

We recognize that the regulations regarding the election procedures under TRA 2010 and the substantive content to be included on the Form are not settled. However, because the election, once made, is irrevocable without obtaining “consent of the Secretary of the Treasury or the Secretary’s delegate,” we believe it is important that a draft of Instructions be made available. We also believe that a draft of proposed comprehensive Instructions should be circulated for comment prior to finalizing the Form.

2 TRA 2010 § 301(c).
Clarification of the purpose of the Form and of the Service’s expectation for its contents are necessary for tax practitioners and taxpayers to comply with the Service’s reporting requirements regarding the allocation of basis and for practitioners to provide their clients with cogent counsel regarding the election decision. We recognize the Service’s interest in attempting to achieve administrative simplification by promulgation of an allocation form that may serve several purposes. We believe, however, that identification of the Service’s purpose or purposes for the Form is necessary to enable tax practitioners and taxpayers to comment on the Form. If the purpose of the Form is simply to allocate basis by the due date, as its title suggests, then we recommend a simpler Form. If the purpose of the Form is to obtain detailed information about all distributions to beneficiaries who received eligible estate property, we believe a more complex Form is needed and more analysis is warranted. Because an executor/trix making such an election is required to report the allocation of basis to beneficiaries of eligible estate property acquired from the decedent, it appears the Service must use this Form for that purpose or promulgate another form for such a notification to beneficiaries.

Clarification of these two issues would provide administrative simplification, mitigating the burden placed upon the Service by numerous amended filings and processing numerous denials of Form 8939 filings. We strongly support the Service’s efforts to provide clarity both to the purpose of the Form and to the substantive content to be included in the Form. Although we agree with many of the fields and content within the Form, we respectfully recommend the purpose of the Form and its substantive content be more clearly defined and modified as discussed more fully below.

II. Modification of Instructions for the Form

A. Clarification of due date

The Form does not give an explicit due date. TRA 2010 contains formulae for establishing due dates for filings with the Service. These formulae indicate the new filing due date for Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, is no earlier than nine (9) months after the date of enactment of TRA 2010 or nine (9) months after the decedent’s death. However, it appears that this nine-month extension period does not apply to Form 8939. Given the $10,000 penalty for late filing of the Form under I.R.C. § 6716(a), we believe that providing an explicit due date on the Form or within its Instructions would reduce
any potential confusion over its due date and make it easier for estates making such an election to comply with the deadline established by the Service.

If the Service is not inclined to include the due date on the Form or in its Instructions, we suggest promulgation of Regulations addressing the date by which the filing of the Form must occur subject to any extension granted by the Service or provided for in subsequent Regulations.

B. Reduction of the volume of disclosures required and establishment of a *de minimis* threshold amount for reporting of assets

In compiling these comments it became evident that preparation of the Form and the attached schedules could prove to be an onerous task if all the decedent’s assets are to be reported on a property-by-property basis (including those to which no basis increase is allocated). This process might require the preparation and submission of multiple schedules or supplements to be attached to the Form. Moreover, it might be impossible to determine the basis for many of the decedent’s personal items such as trophies, collections, awards, and memorabilia that have been acquired over the decedent’s lifetime. Guidance would be needed on how to report and determine the basis of such items.

Therefore, we recommend that the Service reduce the volume of disclosures that would be required by the Form. We recommended that the Service require disclosure only of those assets whose fair market value (“FMV”) as of date of death exceeds a threshold amount, perhaps as little as $10,000. Alternatively, a threshold could be established based upon the amount of basis step-up allocated to a specific asset (*i.e.*, whenever the basis step-up allocation to a particular asset exceeds $10,000). We believe the likely reduction from myriad documents the Service would receive (as appear to be required by the draft Form and its schedules) would foster administrative efficiency and provide clearer guidance for compliance with the Form’s filing requirements.

C. Inclusion of “community property” on Schedules A and B

A situation may exist in which an executor opts for zero percent (0%) estate tax and allocates some of the spousal basis increase to the spouse’s one-half of the “community” property. However, it is not clear how and if the spouse’s one-half community property should be reported on Schedule A. There is no place on the Form to indicate the surviving spouse’s
one-half community property interest to which a basis increase is being allocated. Under I.R.C. §§ 6018 and 6716, the decedent’s $3 million spousal basis allocation can apply to either the decedent’s property or the surviving spouse’s one-half community property interest (i.e., all community property is deemed owned 100 percent (100%) by the decedent if the one-half transferred by the decedent to decedent’s spouse is treated as owned by the decedent). For this reason, we suggest that the Form permit an executor or trustee to identify the surviving spouse’s “community” one-half to which a basis increase is being allocated.

In addition, some community property jurisdictions allow spouses to divide their community property on an equal but non-pro rata basis during lifetime or after death. Such divisions are often referred to as “aggregate agreements.” Section 1022 is not clear whether a spouse’s one-half community property interest will be determined on a property-by-property basis or in the aggregate. If the one-half interest is determined on a property-by-property basis, then no basis increase will be available for property that has been divided under an equal but non-pro rata basis under an aggregate agreement.

Therefore, we recommend that the Form’s Instructions clearly articulate the manner in which community property is to be reported on the Form. We suggest that the Form include a way to indicate which property is community property. We also recommend that the Instructions clarify whether the spouse’s one-half community property interest will include community property that has been divided in an equal but non-pro rata (aggregate) fashion, or whether it includes only property that is owned one-half by each spouse on a property-by-property basis.

D. Clarification of the Form and its Instructions addressing where to enter undistributed eligible estate property

In many instances, an executor would be required to satisfy the Service’s filing requirement for the Form prior to the distribution of all of the eligible property of the estate. Upon the filing of the Form, the executor has made his or her decision regarding basis allocation, despite the fact the executor may not know the identity of the beneficiary for each property to which basis is allocated. We recommend the Service clarify the manner in which such future distributions of property are to be reported on the Form. We believe it would be helpful for the
E. Clarification of the Instructions regarding treatment of the $3 million spousal increase in basis

We ask the Service to consider the inclusion of more detailed Instructions relating to the preferred reporting method for the $3 million spousal increase in basis. We recommend that the Service clarify whether the $3 million spousal property basis increase may be allocated to property that is sold by the estate if the proceeds from such sale are distributed to the surviving spouse.

F. Clarification of Instructions regarding the process for amending Form 8939 submissions

With respect to amendment of the Form, we recommend that the Service allow the Form to be amended and, in so doing, adopt a liberal amendment process. If, however, the Service is promulgating the Form primarily to obtain information regarding the allocation of basis (and not as a report of the final determination of the distribution of all eligible estate property), the Service could limit the instances in which the Form may be amended.

Neither the Code nor the Regulations require a taxpayer to file an amended tax return. However, there could be instances in which a taxpayer wishes to amend the Form. We recommend that the Service provide guidelines with respect to such amendment. For example, Treas. Reg. §20.6081-1 provides that an estate tax return “cannot be amended after the expiration of the extension period although supplemental information may subsequently be filed.” Thus, it would be helpful to know if there is a period after which the Form may not be amended and whether any supplemental information may be provided after such date.

We also request that the Service address distributions from administrative trusts. For example, if all of the estate’s assets are held in an administrative trust, would the executor or the trustee be the proper person to amend the Form once ultimate distributions are made (i.e., when subtrusts are funded, outright transfers made, or both)? If the executor and the trustee are not the same person, they may have duties to different sets of beneficiaries that conflict with each other. Moreover, in some cases the administrative and distribution responsibilities are borne by
different fiduciaries. Thus, the Service’s amendment process would dictate the person who would amend the return.

We recognize that the Service may be concerned about articulating a detailed set of instances in which the Form may be amended. However, we request that the Service provide a general set of circumstances that would permit amendment and the manner by which such amendment may be made.

G. Request for extensions of time for filing Form 8939

We recommend the Service permit an extension of time for filing of the Form that extends beyond the due date for filing the decedent’s Form 1040, U.S. Individual Income Tax Return. Although the executor of an estate making an election under TRA 2010 may be able to comply with the Service’s filing requirements for the decedent’s Form 1040 and Form 8939, it is foreseeable many executors will not have such ability. We believe permitting a Form 8939 to be filed within a pre-determined period of time after the filing of a decedent’s Form 1040 would foster administrative efficiency and enable filing parties to report more accurate information on the Form 8939.

Moreover, if the purpose of the Form is to report which beneficiary acquired which asset, this information will often not be known by the original filing due date. It may take as long as two (2) or more years to know who will receive the assets, especially in complex administrations. Because assets are constantly being bought and sold, the assets ultimately distributed may not be the same as those on hand at the date of death. It would be helpful if the Service limits the required disclosures only to those assets to which a basis increase is allocated. Other assets to which a basis increase is not allocated could be reported in summary or group fashion, such as Form 706 allows on page 2, Part 4 – General Information.

As a matter of convenience, we think it would be reasonable for such an extension to be no shorter than six (6) months past the due date for the decedent’s Form 1040. We believe such an exercise of discretion is within the authority of the Service. The Service is permitted to grant extensions and six-month (6) automatic extensions exist from the due date of a return to permit the filing party “[t]o make regulatory or statutory elections whose due dates are the due date of the return . . . .” Treas. Reg. § 301.9100-2(b) (1997).
H. Clarification of Instructions regarding allocations made by estates with no executor or with both executor and trustee

We recommend that the Service include Instructions addressing instances in which no executor exists and in which an estate has both an executor and a trustee. We suggest such Instructions identify the party who may make the election and describe the manner in which such election may be made.

I. Clarification of basis step-up for partnership entities.

We recommend the Service address allocating basis increases to partnership and other pass-through entities. Numerous decedents’ estates will have to address basis allocations to a decedent’s interest in a pass-through entity, such as a limited liability company (“LLC”). On its face, I.R.C. § 1022 clearly treats the LLC interest as property and a basis step-up is available for the interest. However, we seek clarification from the Service regarding any special manner in which the basis increase for pass-through entities is to be treated and the method by which it is to be reflected on the Form and its Schedules.

III. Modification of the Form

We recommend that the Service reconsider the draft Form and consider substantive modifications or clarifications to the following portions of the draft Form:

A. The Form should have a location in which to allocate the decedent’s $5 million GST exemption.

The Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”)\(^3\) repealed the application of the generation-skipping transfer tax (“GST tax”) for certain transfers made in 2010. TRA 2010 reinstated the GST tax effective January 1, 2010, and provided a GST tax exemption of $5 million. While I.R.C. § 2664 has been repealed and is not affected by the election or non-election of carry-over basis, we recommend the Service insert a place in the Form to provide allocation of a decedent’s GST tax exemption in addition to allocation of basis.

B. The Form should contain an explicit, affirmative statement indicating the executor’s intention to elect the zero estate tax/carryover basis.

We support the Service’s use of a form to make the election provided for in TRA 2010. For the reasons discussed below, we believe the Form should be modified. We believe modifying the Form to include an explicit affirmative statement indicating the intent to elect would provide significant administrative efficiency. We are aware that the Service previously promulgated forms containing explicit, affirmative selection options. For example, the 1977 version of Form 5970 had such an explicit affirmative election option.

We suggest that, because such an election by an executor may be revoked under TRA 2010 only by “consent of the Secretary of the Treasury or the Secretary’s delegate,” such an election indication should be made by way of an explicit selection on the Form. We are not suggesting that the Form contain any statement addressing the manner or likelihood of revocation of the election, but we suggest that the Form provide an explicit, affirmative selection option. We do not believe it would place undue administrative burden on the Service to include such a section making use of a check-box, circle selection or other similar textual device on the Form to aid in the saliency of the explicit, affirmative selection.

C. The Form should not contain a large number of spaces to fully describe the eligible property and should permit use of an approximate date of acquisition by the decedent.

We believe the space provided for description of property on the Schedules is insufficient. We suggest limiting the number of property description fields on the Form as estates reporting with the Form will most likely be forced to attach additional support schedules to fully satisfy the Service’s reporting requirements. However, while we suggest limiting the number of property description fields on the Form, we suggest expanding the space provided for the property descriptions fields on the Form because it would be difficult to establish the meaning of words written or typed into such a small space. Although it is difficult to establish a bright-line number of entries that would be useful, we recommend each Schedule be modified to reflect no more than five (5) property description fields. In addition, it will be difficult or impossible to determine the exact date each property was acquired by the decedent. We therefore suggest changing the field for “Date the decedent acquired the property” to
“Approximate date the decedent acquired the property” or providing Instructions that allow the use of approximate dates.

D. **Schedule A of the Form should provide a field in which to indicate the name and address of the trustee of a Qualified Terminable Interest Property (‘QTIP’) trust.**

Schedule A seems to contemplate that all qualified spousal property will be distributed as outright transfers. However, property transferred to the trustee of a QTIP Trust will also qualify as qualified spousal property. Therefore, we suggest that the Service modify Schedule A to include information related to QTIP trusts. Because the surviving spouse typically has no access to the corpus of the QTIP trust and simply receives income from the assets in the QTIP trust, we believe it is important to include the identity and address of such a QTIP trust’s trustee in an additional, designated field in Part 1 of Schedule A.

E. **Columns (b) and (e) of Part II, Line 3, in Schedules A and B may be omitted.**

Part II, Line 3, of Schedules A and B references eligible property received from the decedent in which the basis at the time of the decedent’s death exceeds FMV at the date of death. Column (b) of Part II, Line 3, asks for the decedent’s acquisition date and Column (e) allows an executor to indicate whether any gain would be ordinary. We suggest that Columns (b) and (e) are unnecessary and may be omitted. Neither the holding period nor the character of property received from the decedent that is “stepped down” to FMV are determinable by reference to the decedent. We believe that eliminating these fields on the Form would aid in administrative simplification by reducing unnecessary fields to be reviewed by Service employees and reducing errors.

F. **Part 2, Line 10, should be modified to provide a clearer definition of total built-in loss to be recorded.**

Part 2, Line 10, references the decedent’s total built-in loss, which may be a very significant number in many cases. Because the decedent’s total built-in loss can be derived from information requested elsewhere on this Form, we suggest that Part 2, Line 10, be expanded to bring forward entries from Schedules A and B, Part II, and calculate the total built-in loss on page 1 of the Form. Alternatively the Instructions could provide a Worksheet to accomplish the
same objective. We believe these modifications to the Form or the Instructions would increase the accuracy of the total built-in loss amount entered in Part 2, Line 10.