

February 8, 2011

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Internal Revenue Service Draft Form 8939 (December 17, 2010).

Dear Commissioner Shulman:

The American Bankers Association (ABA)¹ appreciates the opportunity to comment on Internal Revenue Service (Service) Draft Form 8939, "Allocation of Increase in Basis for Property Acquired From a Decedent." Under the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, an executor for an estate of a decedent who died in 2010 may elect either to subject the estate to the federal estate tax regime (with a \$5 million applicable exclusion amount and 35% highest marginal rate) or may opt out of the federal estate tax, with the resulting imposition of a modified carryover basis on assets in the estate. For 2010 estates in which the executor makes the election to opt out of the federal estate tax, an executor or other responsible party must file Form 8939 to allocate up to \$1.3 million increase in basis to certain property, and an additional \$3 million increase in basis to property that passes to the surviving spouse.

Many of our member institutions prepare and file tax returns in their fiduciary capacity and will file Form 8939 when finalized. However, several items in the form as proposed raise issues that, if unaddressed, may impose unnecessary burdens and confusion on the estate and the executor or trustee. To avoid this outcome, we request that the Service address the issues raised below.

Election to Opt Out of Federal Estate Tax in 2010

- We recognize that the Service did not have the opportunity to incorporate into the draft Form the recent changes to the law regarding the opt-out alternative. The final Form or instructions should state that by filing the Form, the executor has made a proper election to opt out of the federal estate tax.

Part 2 – Basis Allocation Computation

- The space provided for Item 9 should be increased since it may not be sufficient for estates with numerous beneficiaries.

¹ The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

- Item 10 refers to instructions to define “built-in losses.” The instructions should define this term to include unrealized capital losses when the market value at date of death (DOD) is less than the adjusted cost basis in the hands of the decedent or the grantor trust at DOD. The instructions should also clarify whether any suspended passive activity losses are also included in the concept of “built-in losses.”

Schedule B – Property Acquired by Person Other Than Surviving Spouse

- If a trust is a permissible recipient of estate assets, the Form or instructions should clarify which, if any, trust beneficiaries should be identified (e.g., permissible recipients of income and principal, presumptive remaindermen, or contingent remaindermen). A listing of the current permissible beneficiaries of trust income and principal should be sufficient.
- In many instances, the identity of the estate beneficiaries of particular estate assets will be unknown at the time the executor is required to file the Form because it has discretion as to how to allocate particular assets (e.g., allocation of estate assets among testamentary trusts according to formula provisions). Further complicating the situation is the fact that (1) a separate Schedule B must be filed for each recipient based on the share of estate property he or she has actually received and (2) the estate may have sold estate property prior to distribution. The Form or instructions should address how these situations are to be treated or reported. For example, it should state whether assets that are sold prior to distribution must be reported in a separate Schedule B listing the estate as the recipient.
- To address the foregoing Schedule B issues, we suggest allowing the executor to file one Form 8939 that reports all the decedent’s property subject to the modified carryover basis rules. The concept is similar to the executor filing one Form 706 for all the decedent’s property subject to estate tax. The Form should include the allocation of the decedent’s unused losses, \$1.3 million basis increase and if applicable, the \$3 million spousal basis increase. Then, at a later date, the executor would be required to file a second Form to provide the actual recipient of the property (and the Service) with the modified carryover basis applicable to the property that was actually distributed to her or him. This second Form would not have to be completed and filed until the recipient actually receives the property.
- The instructions should provide a de minimis exception or safe harbor from reporting for personal items and other miscellaneous items of insignificant value. In addition, the instructions should detail when a qualified appraisal of property is warranted, as well as what documentation is needed for basis purposes.
- The basis allocation rules apply to property “owned by a decedent” at death. Certain property included in a decedent’s gross estate for estate tax purposes is not treated as “owned by the decedent.” The Form or instructions should state what property included in a decedent’s gross estate is not modified carryover basis property.

- The instructions should clarify whether, and to what extent, it is necessary to list cash or income in respect of a decedent that is received by a beneficiary, when no basis allocation to these assets is possible.
- The instructions should state that the beneficiary who receives property with carryover basis also receives the decedent's acquisition date of the property. With both appreciated and depreciated property, the recipient's basis in the property would be determined in part by the decedent's basis. Thus, the recipient should be allowed to add on the decedent's holding period to the recipient's holding period.

Filing Issues, including Extensions and Penalties

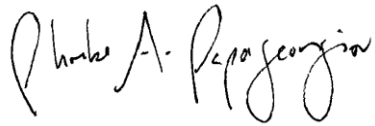
- If an extension of time has been granted to file the decedent's final 1040 Form, will that extension automatically apply to Form 8939 or must a separate extension be obtained? The instructions should address this issue.
- Will the three year statute of limitations applicable to the decedent's final 1040 Form also apply for purposes of Form 8939?
- If the decedent's gross estate is less than \$1.3 million, Form 8939 is not required to be filed. For the purpose of basis reporting, is any other action required?
- The requirement that the return be signed "under penalties of perjury" is troubling. In many instances, the basis information will either be unknown or uncertain. In other instances, the executor or trustee must rely on the information provided by others in possession of the assets. In these circumstances, the executor or trustee has no direct responsibility for such assets or for determining their income tax basis. Thus, requiring that the executor or trustee sign an "under penalties of perjury" certification as to information for which there is no firsthand knowledge will raise concerns about the possibility of criminal sanctions being imposed for simple mistakes. While we understand that the offense requires a showing of a higher level of culpability than unknowingly passing along incorrect information, the Form as proposed will create unnecessary confusion and anxiety on the part of many filers. If the Service remains of the view that a reminder of the possible sanction of perjury is necessary, we suggest that the Form state that the executor or trustee signs under penalty of perjury only for those assets about which the executor has direct knowledge. The Form could also provide a space to list the names and addresses of those individuals who provided basis information for the assets they possess.
- A trustee of a testamentary trust or a revocable living trust ("will substitute") may be the appropriate person to sign the Form. We therefore recommend that the language on the signature line include a reference to "trustee" as applicable or that the instructions explain that a trustee is included in the definition of "executor" for purposes of the Form.

Conclusion

ABA appreciates this opportunity to provide comments on draft Form 8939. We believe the clarifications suggested above will eliminate unnecessary burdens that otherwise would arise from

ambiguities in the Form. In addition, we hope that the Service will consider our suggestion to allow the executor to file one Form 8939 that reports all the decedent's property subject to the modified carryover basis rules and separate forms to the recipients when the property is actually distributed. Please feel free to write or call the undersigned if you wish to discuss these comments further.

Sincerely,

A handwritten signature in black ink that reads "Phoebe A. Papageorgiou". The signature is written in a cursive style with a large initial "P" and a distinct "A" and "G".

Phoebe A. Papageorgiou
Senior Counsel