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#6**FOREIGN ACCOUNT REPORTING: Legislative Recommendations to Reduce the Burden of Filing a Report of Foreign Bank and Financial Accounts (FBAR) and Improve the Civil Penalty Structure****OVERVIEW**

A U.S. citizen or resident with foreign accounts exceeding \$10,000 can be subject to disproportionate civil penalties for failure to report the accounts on a *Report of Foreign Bank and Financial Accounts* (or FBAR) by June 30 of the following year.<sup>1</sup> Another penalty may apply if the accounts exceed \$50,000 and the person does not report them on Form 8938, *Statement of Specified Foreign Financial Assets*, which is part of the tax return.<sup>2</sup>

Even those who inadvertently failed to file an FBAR (*i.e.*, “benign actors”) are afraid they could be hit with the elevated penalties applicable to *willful* violations because the government may rely on circumstantial evidence of willfulness or willful blindness.<sup>3</sup> Such fears have prompted some to enter the IRS’s offshore voluntary disclosure (OVD) programs and agree to pay penalties of such severity that they appear to have been designed for bad actors.<sup>4</sup> The median penalty applied to taxpayers with the smallest accounts (*i.e.*, those in the 10th percentile with accounts of \$17,368 or less) under the 2011 OVD program, is more than eight times the unreported tax—over ten times the 75 percent penalty for civil tax fraud.<sup>5</sup>

In June 2014, the IRS reduced the amount it requires certain benign actors to pay under its settlement programs.<sup>6</sup> However, it did not allow those who have already signed closing agreements to receive the same, more reasonable program terms, in effect punishing them for addressing the problem quickly.

Unexpected and disproportionate FBAR penalties may violate a taxpayer’s *rights to be informed and to a fair and just tax system*.<sup>7</sup> Because they cause some people to agree to excessive OVD settlements, they may also erode the rights to *pay no more than the correct amount of tax, challenge the IRS’s position and be heard, and appeal an IRS decision in an independent forum*, as discussed in prior reports.<sup>8</sup> These results

- 1 See, e.g., 31 U.S.C. §§ 5314, 5321; 31 C.F.R. §§ 1010.350, 1010.306(c); FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR), [http://www.fincen.gov/forms/bsa\\_forms/](http://www.fincen.gov/forms/bsa_forms/).
- 2 The Foreign Account Tax Compliance Act (FATCA), enacted in 2010, created new IRC § 6038D and requires individuals to file Form 8938 with their income tax returns for tax years starting after March 18, 2010, which for most people is their 2011 tax returns filed during the 2012 filing season. See T.D. 9567, 76 Fed. Reg. 78,553, 2012-8 I.R.B. 395 (Dec. 19, 2011). U.S. residents who are single or married filing separately apply the \$50,000 threshold to the value of “specified foreign financial assets” at the end of the year. See, e.g., IRS, *Instructions to Form 8938* (2013). Higher thresholds generally apply in various other situations. *Id.*
- 3 See, e.g., *Williams v. Comm’r*, 489 Fed. App’x. 655, 659 (4th Cir. 2012).
- 4 See, e.g., National Taxpayer Advocate 2014 Annual Report to Congress, *supra* (Most Serious Problem: *The OVD Programs Initially Undermined the Law and Still Violate Taxpayer Rights*); National Taxpayer Advocate 2013 Annual Report to Congress 228-237; National Taxpayer Advocate 2012 Annual Report to Congress 134-153; National Taxpayer Advocate 2011 Annual Report to Congress 191-205; *Id.* at 206-72; National Taxpayer Advocate 2013 Objectives Report to Congress 7-8; *Id.* at 21-29; Taxpayer Advocate Directive 2011-1 (Aug. 16, 2011) [collectively, OVD Reports].
- 5 National Taxpayer Advocate 2014 Annual Report to Congress, *supra* (Most Serious Problem: *The OVD Programs Initially Undermined the Law and Still Violate Taxpayer Rights*); Internal Revenue Code (IRC) § 6663 (civil fraud penalty).
- 6 IRS, *Streamlined Filing Compliance Procedures* (June 18, 2014), <http://www.irs.gov/Individuals/International-Taxpayers/Streamlined-Filing-Compliance-Procedures> [hereinafter 2014 streamlined program].
- 7 See IRS Pub. 1, *Your Rights as a Taxpayer* (2014).
- 8 See *id.*; OVD Reports.

seem to be an unintended consequence of the civil FBAR penalty regime, which is designed to address criminal conduct.

## Background

### *The penalty for willful failure to file an FBAR was aimed at criminals.*

Congress enacted the FBAR filing requirement in 1970 after hearing testimony that criminals were using secret foreign bank accounts for illegal purposes (*e.g.*, tax evasion, securities manipulation, insider trading, evasion of Federal Reserve margin limitations, storing and laundering funds from illegal activities, and acquiring control of U.S. industries without detection by the Securities and Exchange Commission), and that U.S. law enforcement agencies had difficulty obtaining account information from foreign authorities.<sup>9</sup> Although a criminal penalty already applied to those who willfully failed to report the existence of a foreign account on a tax return, Treasury Department officials testified that a less-severe civil penalty would be easier to assert and less likely to violate the U.S. Constitution.<sup>10</sup> Thus, overlapping civil and criminal FBAR and tax penalties may apply to the willful failure to report a foreign account and any income it generated.<sup>11</sup>

### *FBAR reporting compliance was low, but the government imposed few FBAR penalties.*

In 2002, the IRS reported to Congress that the FBAR compliance rate was less than 20 percent because it had received fewer than 200,000 FBARs when one million taxpayers may have been required to file.<sup>12</sup> In the face of substantial noncompliance, the IRS cited the difficulty of proving willfulness as a reason for why the government had assessed only two civil FBAR penalties between 1993 and 2002.<sup>13</sup>

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- 9 See, *e.g.*, Pub. L. No. 91-507, § 241, 242 (1970); S. REP. No. 91-1139, at 2-4, 8-9 (1970); H. REP. No. 91-975, at 12 (1970). Accord H.R. REP. No. 241-3, at 27, 50 (1970) (statement of Robert M. Morgenthau, U.S. Att’y, S.D.N.Y.) (“in addition to the usual difficulties attending to the detection of criminal conduct in financial transactions, we have here the added obstacle of the use of secret foreign accounts to avoid discovery... where criminals have made such extraordinary efforts to cover their tracks, we must respond with equal vigor to uncover them.”); *Foreign Bank Secrecy: Hearings on S. 3678 and H.R. 15073 Before the S. Subcomm. on Financial Institutions, Comm. on Banking and Currency, 91st Cong. 2nd Sess. at 170 (1970)* (statement of Eugene T. Rossides, Assistant Secretary of the Treas. for Enforcement and Operations) (“Our overall aim is to build a system to combat organized crime and white collar crime and to deter and prevent the use of secret foreign bank accounts for tax fraud and their use to screen from view a wide variety of criminally related financial activities, and to conceal and cleanse criminal wealth.”).
- 10 See, *e.g.*, *Foreign Bank Secrecy: Hearings on S. 3678 and H.R. 15073 Before the S. Subcomm. on Financial Institutions, Comm. on Banking and Currency, 91st Cong. 2nd Sess. at 152 (1970)* (statement of Robert Cole, Special Assistant for Int’l Affairs, Treas. Dept.) (“Civil penalties can be imposed administratively and there are cases where it might be appropriate to impose a civil penalty where imposition of a criminal penalty [under IRC § 7203 or IRC § 7206(1)] would seem unduly harsh or could raise evidentiary or constitutional problems.”).
- 11 See 31 U.S.C. § 5321 (civil FBAR); 31 U.S.C. § 5322 (criminal FBAR); IRC § 6662 (civil tax); IRC § 7201 (criminal tax); IRC § 7203 (criminal tax); IRC § 7206 (criminal tax). See also IRC § 6038D (a relatively-new civil tax penalty, discussed below).
- 12 Department of the Treasury, *A Report to Congress in Accordance with § 361(B) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001* 6 (Apr. 26, 2002) [*hereinafter* 2002 FBAR Report]; IRS Sets New Audit Priorities, FS-2002-12 (Sept. 2002).
- 13 2002 FBAR Report at 10 (“taxpayers generally assert to the IRS that they were not aware that they were required to file an FBAR. Often, the administrative record lacks evidence to the contrary, such as an advice letter from an accountant or financial planner or any witness to testify that the taxpayer knew of the filing requirement. In such cases, the litigation risk in assessing a penalty is substantial, particularly where, after notice from the IRS or FinCEN, the person has voluntarily backfiled the missing forms. Rather than go forward with penalty assessments based on a less than substantial record, FinCEN’s limited resources have been allocated to other compliance and enforcement efforts...”).

*Following reports of people intentionally “attempting to conceal income from the IRS,” Congress enacted a non-willful FBAR penalty.*

In 2004, Congress significantly increased the maximum penalty for willful violations and imposed—for the first time—a penalty for non-willful violations.<sup>14</sup> Legislative history suggests a reason for this change was the IRS’s estimate that hundreds of thousands of taxpayers were “attempting to conceal income from the IRS.”<sup>15</sup> It did not reference a concern about taxpayers inadvertently failing to file the form. Thus, even the non-willful FBAR penalty appears to have been aimed at willful violations.

Mindful that the civil FBAR penalty appears to be aimed primarily at those engaged in criminal activity, the National Taxpayer Advocate offers legislative recommendations to reduce its burden for other taxpayers, including benign actors. Specifically, these proposals would:

- Improve the proportionality of the civil FBAR penalty;
- Require the government to prove actual willfulness before imposing the penalty for willful violations;
- Treat taxpayers who correct violations early the same as (or better than) those who correct them later; and
- Reduce the burden of foreign account reporting.

These proposals should help address concerns about the existing offshore penalty programs, and also establish principles of procedural fairness that could help the government design future penalty initiatives.

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14 The American Jobs Creation Act of 2004, Pub. L. No. 108-357, Title VIII, § 821(a), 118 Stat. 1586 (2004) (amending 31 U.S.C. § 5321(a)(5)).

15 Joint Committee on Taxation (JCT), *General Explanation of Tax Legislation Enacted in the 108th Cong.*, JCS-5-05, 377-378 (2005) (“For one scheme alone, the IRS estimates that there may be hundreds of thousands of taxpayers with offshore bank accounts attempting to conceal income from the IRS.”). See also S. REP. No. 108-11, at 101 (2003) (“attempting to conceal”); S. REP. No. 108-257, at 32 (2003) (same). Another purpose of the FBAR penalty may have been to detect criminal or terrorist financing activity. See, e.g., JCT, *General Explanation of Tax Legislation Enacted in the 108th Cong.*, JCS-5-05, 377-378 (May 2005).

## PENALTIES: Improve the Proportionality of the Civil FBAR Penalty

### PROBLEM

Civil penalties for failure to report foreign accounts on an FBAR can be disproportionate in comparison to the value of the unreported account and the amount of associated unreported income. The penalties may be severe because they are aimed at bad actors.<sup>16</sup> However, the IRS is authorized to apply them even if the taxpayer has no (or a *de minimis*) underpayment and the accounts were not used for criminal activity.<sup>17</sup> A single failure to learn about the FBAR reporting requirements can trigger multiple penalties for those who have multiple accounts or repeat the same mistake over a multi-year period.<sup>18</sup> FBAR penalties can also overlap with penalties for failure to report the same account on Form 8938, *Statement of Specified Foreign Financial Assets*, and the penalty for understatements attributable to undisclosed foreign financial assets.<sup>19</sup>

The Bank Secrecy Act (BSA) authorizes a maximum civil penalty of up to 50 percent of the maximum balance in each overseas account for each year of willful non-reporting (or, if greater, \$100,000 per violation), in addition to criminal penalties.<sup>20</sup> Even the Internal Revenue Manual (IRM) acknowledges that the maximum statutory penalty for “willful” failures to file an FBAR may “greatly exceed an amount that would be appropriate in view of the violation.”<sup>21</sup> The maximum penalty for a non-willful violation is \$10,000.<sup>22</sup> While this may seem reasonable by comparison, a taxpayer who failed to file a single FBAR form may have multiple violations each year—one for each unreported account.<sup>23</sup>

Because the statute of limitations is six years, the maximum civil FBAR penalty for large accounts is generally about three times the maximum account balance (50 percent times six, assuming a relatively constant balance).<sup>24</sup> For small accounts, the maximum penalty may be an even greater percentage. For example, someone with a total of \$10,000 in five different foreign accounts (\$2,000 in each) could be subject to a non-willful FBAR penalty of \$300,000 (six years times five accounts times \$10,000) or 30 times the account balance. If the IRS deems the violation willful, the penalty could rise to \$3 million (six years times five accounts times \$100,000) or 300 times the account balance.

Perhaps for this reason, the IRS has developed “mitigation guidelines” whereby it may impose smaller penalties—generally 5–10 percent of the account(s)—against those with accounts of \$1 million or less, provided the taxpayer meets certain threshold conditions.<sup>25</sup> Such conditions include a requirement that the taxpayer “cooperate” with the IRS during the examination (*e.g.*, the taxpayer responds to reasonable requests for documents, meetings, interviews, back-files corrected FBARs, and the IRS does not issue a

16 See, *e.g.*, JCT, *General Explanation of Tax Legislation Enacted in the 108th Cong.*, JCS-5-05, 377-378 (May 2005) (discussed above).

17 31 U.S.C. § 5321(a)(5).

18 *Id.*; 31 U.S.C. § 5321(b)(1) (six-year limitations period).

19 IRC § 6038D; IRC § 6662(j).

20 31 U.S.C. § 5321(a)(5)(C).

21 IRM 4.26.16.4(5) (July 1, 2008). This observation appears in a section of the IRM that discusses when it may be appropriate to apply a lesser penalty.

22 31 U.S.C. § 5321(a)(5)(B).

23 See, *e.g.*, IRM 4.26.16 4 (July 1, 2008).

24 A six-year statute of limitations applies to the civil FBAR penalty. See 31 U.S.C. § 5321(b)(1). Criminal penalties of up to \$500,000 and 10 years in prison may also apply. 31 U.S.C. § 5321(a)(5)(C) and 5322; 31 C.F.R. § 1010.840(b).

25 See, *e.g.*, IRM 4.26.16.4.6 (July 1, 2008); IRM Exhibit 4.26.16-2 (July 1, 2008).

summons).<sup>26</sup> Some commentators have speculated that without these guidelines, the FBAR penalty is so disproportionate it may violate the U.S. Constitution.<sup>27</sup>

### Related violations can stack penalties.

A taxpayer may also be subject to a tax penalty of \$10,000 or more per year for failing to report an account on another information return, Form 8938, *Statement of Specified Foreign Financial Assets*, which is filed with a tax return.<sup>28</sup> Although this penalty applies to the failure to file a different form, penalizing someone more than once for essentially the same mistake—failing to report a foreign account—may be considered stacking, which is generally not viewed as an effective way to promote compliance, in part because it is perceived as confusing, disproportionate, and unfair.<sup>29</sup>

Moreover, both penalties may apply even if the taxpayer has paid all U.S. taxes and the government already knows about the account. They may also apply to the failure to report accounts in the jurisdiction where the taxpayer resides. Because of the Foreign Account Tax Compliance Act (FATCA), many banks will begin reporting the foreign accounts of U.S. persons to the IRS in 2015, further reducing the usefulness of also requiring taxpayers to report the same accounts on two different forms.<sup>30</sup>

### Other information reporting penalties are proportionate.

Other information reporting penalties are more proportionate than FBAR penalties. For example, there is no penalty for failing to file a U.S. income tax return if there is no unpaid tax.<sup>31</sup> The penalty for failure to file most information returns and payee statements is generally \$100 per return, rising to 10 percent of the unreported amount for intentional violations.<sup>32</sup> By contrast, the FBAR penalty may apply even if the FBAR is one day late and even if the taxpayer has no net underreported tax (*e.g.*, because of foreign tax credits) as a result of underreporting income from the account.<sup>33</sup>

26 See, *e.g.*, IRM 4.26.16.4.6 (July 1, 2008); IRM Exhibit 4.26.16-2 (July 1, 2008).

27 See, *e.g.*, Steven Toscher and Barbara Lubin, *When Penalties Are Excessive — The Excessive Fines Clause as a Limitation on the Imposition of the Willful FBAR Penalty*, J. TAX PRAC. & PROC. 69-74 (Jan. 2010).

28 For an explanation of why the IRS believed it did not have discretion to allow consolidated reporting, see T.D. 9567, 76 Fed. Reg. 78553, 2012-8 I.R.B. 395 (Dec. 19, 2011) (preamble).

29 Accuracy-related penalties generally avoid stacking. See, *e.g.*, H.R. REP. NO. 101-386, at 662 (1989) (Conf. Rep.) (establishing “a new [accuracy-related penalty] structure that operates to eliminate any stacking.”). An IRS task force concluded that penalty stacking “seems to operate illogically and serve no important policy that could not be served in a simpler way. Stacking has a haphazard impact on proportionality unless carefully coordinated and thus should be avoided.” Executive Task Force for the Commissioner’s Penalty Study, IRS, *Report on Civil Tax Penalties*, reprinted in 89 Tax Notes Today 45-36 (Feb. 27, 1989) [*hereinafter* IRS 1989 Penalty Study]. The American Institute of Certified Public Accountants (AICPA) has observed that disproportionate penalties, unrelated to the degree of misconduct or harm, which can result from stacking, threatens to “undermine faith in the fairness of the system.” See AICPA, *Penalty Reform Task Force, Report on Civil Tax Penalties: The Need for Reform*, 7 (2009). Research suggests that faith in the fairness of the tax system promotes voluntary compliance. See, *e.g.*, National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, 1-70; National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, 34-56.

30 See, *e.g.*, T.D. 9658 (March 6, 2014) (preamble) (summarizing the reporting and withholding regime under FATCA); Notice 2013-43, 2013-2 C.B. 113 (requiring certain financial institutions to begin providing the IRS with foreign account data under FATCA by March 31, 2015).

31 IRC § 6651.

32 See, *e.g.*, IRC § 6721(a).

33 According to the IRS 1989 Penalty Study, penalties are proportionate if they vary based on the harm to the tax system and mitigation efforts, for example, by penalizing slightly-late filers owing little tax less than seriously-late filers (or nonfilers) owing more. The IRS currently allows certain people with delinquent FBARs who have no unreported income to file late without penalty. IRS, *Delinquent FBAR Submission Procedures* (Oct. 9, 2014), <http://www.irs.gov/Individuals/International-Taxpayers/Delinquent-FBAR-Submission-Procedures>. The FBAR statute also allows the IRS to waive the penalty if the taxpayer has reported all of the income from the account and establishes reasonable cause. See 31 U.S.C. § 5321(a)(5)(B).

Like the FBAR penalty, the penalties for failure to report foreign entities on information returns can be severe.<sup>34</sup> Unlike the process of creating foreign bank accounts, however, taxpayers typically create foreign entities with the assistance of advisors to avoid information reporting delinquencies.

### **FBAR penalties are even more disproportionate when they apply to reasonable or minor mistakes.**

If the tax avoided by the failure to report an offshore account and the income from the account is too minor to trigger an accuracy-related penalty under IRC § 6662, the failure is likely to have been unintentional or due to reasonable cause, particularly if there is no indication that the account was used in connection with a crime. Similarly, the failure to report accounts that have already been reported to the IRS by third parties is likely to be inadvertent,<sup>35</sup> as is the failure to report accounts in the jurisdiction where the taxpayer lives.<sup>36</sup> Taxpayers residing offshore have legitimate non-tax reasons for opening accounts where they reside.

The reasonable cause exception does not automatically cover these situations. Moreover, taxpayers have to provide evidence of reasonable cause, but it is difficult for them to prove a negative. For example, even if the IRS does not pursue willful penalties, it is difficult for taxpayers to show reasonable cause for failure to file a tax return based on ignorance of the law or reliance, as relevant authorities suggests they are essentially presumed to know about return filing requirements.<sup>37</sup> The IRS relies on these same authorities in determining reasonable cause for failure to file an FBAR.<sup>38</sup>

### **EXAMPLE 1<sup>39</sup>**

When an engineer immigrated to the United States and became a resident, he retained a joint account with his family overseas containing proceeds from the sale of the family residence. He asked the bank not to send him statements because he treated the funds as belonging to his overseas relatives. He did not disclose the account when filling out a questionnaire for his U.S. tax return preparer because it did not occur to him that the small amount of earnings it generated might be taxable to him in the U.S. As a result, his preparer did not check the box on Schedule B to indicate he had a foreign account. He repeated this error

34 See, e.g., Form 5471, *Information Return of U.S. Persons With Respect to Certain Foreign Corporations*, Form 5472, *Information Return of a Foreign Owned Corporation*, Form 926, *Return by a U.S. Transferor of Property to a Foreign Corporation*, Form 8865, *Return of U.S. Persons With Respect to Certain Foreign Partnerships*, Form 3520, *Annual Return to Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, Form 3520-A, *Annual Return of Foreign Trust With a U.S. Owner*. The penalty for failure to file these information returns is generally \$10,000 per violation or a percentage of the funds transferred. See generally IRC §§ 6038, 6038B, 6038D, 6039F, 6048. Accord 2012 OVD FAQ #5. Another consequence of the failure to file these information returns (or Form 8938) is that the statute of limitations period for the related income tax return generally does not begin to run. See IRC § 6501(c)(8). Moreover, a 40 percent penalty may apply to the portion of any understatement attributable to a transaction involving an undisclosed foreign financial asset. IRC § 6662(j).

35 *But see United States v. Williams*, 489 Fed. Appx. 655 (4th Cir. 2012) (unpublished) (concluding an FBAR violation was willful notwithstanding evidence the government was already aware of the unreported account).

36 *C.f.*, IRC § 6038D(h); Treas. Reg. § 1.6038D-7T (providing that Form 8938 does not need to include accounts the taxpayer reported on certain other tax forms or that are held in the U.S. possession where the taxpayer resides).

37 See, e.g., *United States v. Boyle*, 469 U.S. 241, 251-252 (1985); IRM 20.1.1.3.2.2.6(3) (Nov. 25, 2011) (ignorance of the law); IRM 20.1.9.1.1(4) (Mar. 21, 2013) (reliance on preparer). The requirement to file an FBAR is not as widely known as the requirement to file a tax return. This should make it easier to show reasonable cause for failure to file an FBAR than for failure to file a tax return. See Treas. Reg. 1.6664-4(b)(1) (“Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer.”). But, the IRM seems to suggest the opposite. See e.g., IRM 20.1.9.1.1(4) (Mar. 21, 2013).

38 See IRM 4.26.16.4.3.1 (July 1, 2008).

39 All of the examples in this discussion are hypothetical.

on all subsequent returns. The taxpayer has never filed an FBAR because he was not aware of the filing requirement. The offshore account had a relatively constant balance of about \$100,000. The taxpayer underreported a very small amount of earnings from the account—not enough to trigger the substantial understatement penalty under IRC § 6662.<sup>40</sup>

Because the statute of limitations for FBAR violations is six years, the FBAR penalty could be as high as \$600,000 (the greater of \$100,000 or 50 percent per year)—six times the balance—if the IRS deems the violation to be “willful” (and it might, as discussed below).<sup>41</sup> By contrast, the maximum non-willful FBAR penalty could be \$60,000 (\$10,000 per year).<sup>42</sup> The IRS would waive the penalty if it determined the taxpayer had reasonable cause and ultimately reported all of the income from the account.<sup>43</sup> In this case, however, the IRS does not agree that the violation was due to reasonable cause. It believes a reasonable person exercising ordinary business care and prudence would have either disclosed the account to the preparer or reviewed Schedule B, either of which would have alerted him or her to the FBAR filing requirement in the absence of any other impediment (*e.g.*, a mental impairment or malpractice by the preparer).<sup>44</sup>

FBAR penalties may apply even if the IRS was already aware of the account (*e.g.*, because of third party filings from the foreign bank). Had violations occurred after the 2011 tax year, the taxpayer could also be subject to a penalty of \$10,000 per year for failing to report the same account on Form 8938 *Statement of Specified Foreign Financial Assets*.<sup>45</sup>

40 An understatement is substantial, triggering an accuracy-related penalty, if it exceeds the greater of (i) 10 percent of the tax required to be shown on the return, or (ii) \$ 5,000. IRC § 6662(d).

41 The FBAR penalty could be an even greater percentage of the balance if the account value had fallen since the end of the sixth year (or if the account were less than \$200,000, as the maximum penalty is never less than \$100,000). See 31 U.S.C. § 5321(a)(5). As this example illustrates, the FBAR penalty can be much greater than the mere forfeiture of the unreported funds. Yet, the IRS has ceased using civil forfeiture provisions that would otherwise apply when people structure cash transactions to avoid BSA reporting, presumably because they were viewed as overly harsh. See Tax Analysts, *IRS Backs off Some Civil Forfeitures After Media Inquiries*, 2014 TNT 208-1 (Oct. 27, 2014).

42 *Id.*

43 *Id.* Assume the IRS's mitigation guidelines do not apply because the taxpayer did not timely respond to the examiner's request to provide voluminous historic account statements from a foreign bank translated into English, the IRS issued a summons, and as a result, the taxpayer was not deemed to have cooperated. See IRM Exhibit 4.26.16-2 (July 1, 2008).

44 See, *e.g.*, *United States v. Boyle*, 469 U.S. 241 (1985); IRM 20.1.9.1.1(4) (Mar. 21, 2013).

45 See IRC § 6038D; T.D. 9567, 76 Fed. Reg. 78,553, 2012-8 I.R.B. 395 (Dec. 19, 2011).

## RECOMMENDATIONS

To address the disproportionality of the civil FBAR penalty, the National Taxpayer Advocate recommends legislation to:

1. Cap the civil FBAR penalty at the lesser of
  - (a) Ten percent of the unreported account balance or five percent for non-willful violations (similar to the IRS's mitigation guidelines), and
  - (b) Forty percent of the portion of any underpayment attributable to the improperly undisclosed accounts (similar to the penalty for undisclosed foreign financial assets (*e.g.*, assets not reported on Form 8938) under IRC § 6662(j)).<sup>46</sup>
2. Eliminate or waive the civil penalty for failure to report an account on an FBAR if there is no evidence the account was used in connection with a crime and:<sup>47</sup>
  - a. The account information was already provided to the IRS, for example, on a Form 8938, *Statement of Specified Foreign Financial Assets*, or by a third party (*e.g.*, a financial institution or government);<sup>48</sup>
  - b. The amount of unreported income from the account does not create a substantial understatement under IRC § 6662(d);<sup>49</sup> or
  - c. The taxpayer resides in the same jurisdiction as the account.<sup>50</sup>

<sup>46</sup> To avoid stacking, only one penalty should apply to understatements of income from foreign financial assets not disclosed on either a Form 8938 or an FBAR.

<sup>47</sup> Under this recommendation, the civil FBAR penalty could still be waived on the basis of reasonable cause as is the case under current law.

<sup>48</sup> Because the Financial Crimes Enforcement Network (FinCEN) may not be authorized to receive all of the account information provided to the IRS by third parties, it may be advisable for legislation to distinguish between information available to the IRS and information available to FinCEN. An alternative would be to have the disclosure of account information to the IRS by third parties create a presumption that, in the absence of evidence to the contrary, a taxpayer's failure to provide the same information was due to reasonable cause and was not willful.

<sup>49</sup> Even if the understatement is substantial, legislation could require the government to consider whether it was reasonable for the taxpayer to believe that any unreported income would be offset by foreign tax credits in connection with its reasonable cause determination.

<sup>50</sup> For similar proposals, see, *e.g.*, Christians, Allison, *Paperwork and Punishment: It's Time to Fix FBAR*, 73 TAX NOTES INT'L 147 (Oct.13, 2014).



## PENALTIES: Require the Government to Prove Actual Willfulness Before Imposing the Penalty for Willful FBAR Violations

### PROBLEM

Benign actors cannot be sure the IRS will not view their FBAR violations as “willful,” and attempt to impose severe penalties. This is because the government has eroded the distinction between willful and non-willful violations.

The IRS may meet its burden of proving willfulness if it establishes a “voluntary, intentional violation of a known legal duty.”<sup>51</sup> Because Schedule B of Form 1040 (*U.S. Individual Income Tax Return*) asks if the taxpayer has a foreign account and references the FBAR filing requirement, however, the government has been successful in arguing—in cases involving bad actors—that the filing of a Schedule B can turn a subsequent failure to file an FBAR into a willful violation (called “willful blindness”), at least if combined with other circumstantial evidence such as efforts to conceal the account.<sup>52</sup> It is unclear what other circumstantial evidence or factors the IRS will consider or if it will distinguish between efforts to conceal the account with the intent to evade U.S. taxes or conceal crimes,<sup>53</sup> as opposed to inadvertent concealment, or concealment based on reasonable concerns about financial privacy or fears of unwarranted persecution, seizure, or extortion by a government or others (*e.g.*, terrorists or organized criminals).<sup>54</sup> The IRS has

- 51 *Ratzlaf v. U.S.*, 510 U.S. 135, 142 (1994) (citing *Cheek v. U.S.*, 498 U.S. 192, 201 (1991)); IRM 4.26.16.4.5.3 (July 1, 2008). The government has the burden to prove the violation was willful by a preponderance of the evidence. See, *e.g.*, *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012). In connection with its streamlined program, however, the IRS stated on its website: “Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.” IRS, *Streamlined Domestic Offshore Procedures* (Oct. 9, 2014), <http://www.irs.gov/Individuals/International-Taxpayers/U-S-Taxpayers-Residing-in-the-United-States>.
- 52 See, *e.g.*, *Williams v. Comm’r*, 489 Fed. App’x. 655, 659 (4th Cir. 2012) (unpublished) (“Evidence of acts to conceal income and financial information, combined with the defendant’s failure to pursue knowledge of further reporting requirements as suggested on Schedule B, provide a sufficient basis to establish willfulness on the part of the defendant,” quoting *U.S. v. Sturman*, 951 F.2d 1466, 1476 (6th Cir. 1992)); *U.S. v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012); IRM 4.26.16.4.5.3(6) (July 1, 2008) ([after filing a Schedule B,] “the failure to learn of the filing requirements coupled with other factors, such as the efforts taken to conceal the existence of the accounts and the amounts involved may lead to a conclusion that the violation was due to willful blindness.”). Under these authorities, a person might conclude that a reckless failure to read the instructions on Schedule B is akin to willfulness. In a criminal context, a person generally may be charged with knowledge of a violation by reason of willful blindness if he or she is aware of a “high probability” of its existence, unless he actually believes that it does not exist. See, *e.g.*, Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 YALE L.J. 2231 (1993) (discussing various interpretations of the willful blindness standard).
- 53 At an American Bar Association (ABA) conference one IRS employee reportedly provided his personal view, that a person would not be deemed willful if he was concealing the account to evade foreign taxes. See Kristen A. Parillo, *ABA Meeting: More Guidance Coming on Modified OVDP and Streamlined Filing*, 2014 TNT 184-7 (Sept. 23, 2014) (quoting John McDougal as saying “the willfulness we’re trying to determine is with respect to U.S. obligations, not foreign obligations...[I]f ... I’m convinced he had no clue he had to file in the United States, then that seems to me to be the answer to the question”).
- 54 See *e.g.*, Patrick J. Smith, *District Court Misapplies APA in Florida Bankers Association*, 142 TAX NOTES 745 (2014) (suggesting residents of some U.S. treaty partners such as China, Egypt, Indonesia, Mexico, Pakistan, Panama, the Russian Federation, and Venezuela, might reasonably fear that information provided by the U.S. government to their governments under a treaty would not remain confidential, notwithstanding the confidentiality provisions of the treaty).

declined to provide guidance to the public that would clarify its interpretation of willfulness and potentially assuage these concerns.<sup>55</sup>

For this reason, even a benign actor who inadvertently overlooked the requirement(s) cannot be sure the violation will be treated as non-willful or due to reasonable cause.<sup>56</sup> Because of this uncertainty, the OVD programs have pressured some benign actors into paying more than they would in an examination.<sup>57</sup>

Legislation to clarify that only violations that the IRS proves are actually willful (without relying solely on circumstantial evidence) are subject to a willful FBAR penalty would reduce the excessive discretion afforded the IRS in determining what penalty to assert. It would also support the taxpayer's *right to be informed*, which includes the right to a clear explanation of the law.<sup>58</sup>

## EXAMPLE 2

Assume the same facts as Example 1 (in the Legislative Recommendation: *Improve the Proportionality of the Civil FBAR Penalty*, above). The IRS asserts the willful FBAR penalty because, although it cannot prove the taxpayer intentionally violated a known legal duty (*i.e.*, was willful), it may be able to establish willful blindness (by a preponderance of the evidence) based on circumstantial evidence, including the fact that the taxpayer asked the bank to hold his account statements, did not inform his preparer of the account, and did not check the box on Schedule B of his return to indicate he had foreign account(s).<sup>59</sup> Even though his violation was inadvertent, the taxpayer may not be able to avoid the willful FBAR penalty because he cannot prove he was unaware of the FBAR filing requirement (*e.g.*, has no documentation to establish a mental impairment or that he did not read Schedule B) or reasonably relied on inaccurate advice from his tax advisor.

## RECOMMENDATION

To protect benign actors from having to prove their FBAR violations were nonwillful and to give everyone a better understanding about when a willful or nonwillful FBAR penalty applies, the National Taxpayer Advocate recommends legislation to clarify that the government has the burden to establish actual willfulness (*i.e.*, specific intent to violate a known legal duty, rather than mere negligence or recklessness) before asserting a willful FBAR penalty, and cannot meet this burden by relying solely on circumstantial evidence.<sup>60</sup>

55 See, e.g., Amanda Athanasiou, *IRS Addresses Questions About OVDP and Streamlined Filing*, 2014 TNT 212-7 (Oct. 31, 2014); Amy S. Elliott, *IRS Working with SSA on Offshore Streamlined Filing Requirement*, 2014 TNT 216-3 (Nov. 6, 2014) (“[W]e made a deliberate decision not to define what constitutes non-willfulness, Best [Senior Advisor to the Deputy Commissioner (International), IRS Large Business and International Division], said. She added that while the IRS has ...provided training to agents, the training didn’t include specific guidance on non-willfulness.”). However, the IRS may be forced to disclose some of this material, at least to those willing to litigate. See, e.g., Marie Sapirie, *What the OVDP Training Materials Tell Us*, 2014 TNT 230-2 (Dec. 1, 2014) (discussing redacted training materials provided to one taxpayer who had to pursue litigation to obtain them).

56 See, e.g., Caroline Ciralo, *The FBAR Penalty: What Constitutes Willfulness?*, MD J. TAX’N (May 2013).

57 See, e.g., National Taxpayer Advocate 2014 Annual Report to Congress, *supra* (Most Serious Problem: *The OVD Programs Initially Undermined the Law and Still Violate Taxpayer Rights*); National Taxpayer Advocate 2013 Annual Report to Congress 228-237.

58 See IRS Pub. 1, *Your Rights as a Taxpayer* (2014).

59 IRM 4.26.16.4.5.3(6) (July 1, 2008).

60 Under current law, the government is only required to establish willfulness by a preponderance of the evidence. See, e.g., *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012) (applying the “preponderance” standard, rather than “clear and convincing,” or “beyond a reasonable doubt”).

## CLOSING AGREEMENTS: Authorize the IRS to Modify Closing Agreements to Treat Taxpayers Who Correct Violations Early the Same as (or Better Than) Those Who Correct Them Later

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### PROBLEM

The IRS announced in June 2014, that it would accept more favorable settlement terms from those willing to certify their FBAR violations were not willful.<sup>61</sup> When it had previously made taxpayer-favorable revisions to its OVD programs, the IRS allowed otherwise-qualifying taxpayers who had signed closing agreements to modify their agreements to benefit from the more lenient program terms.<sup>62</sup> However, the IRS did not allow otherwise-qualifying taxpayers to modify their agreements to take advantage of the more lenient terms announced in 2014. It is not clear that the IRS is legally authorized to do so.

Before the IRS changed the OVD program in 2014, it encouraged benign actors who inadvertently failed to report foreign accounts to enter various OVD settlement programs, then “opt out” and be examined.<sup>63</sup> Instead of risking an examination, many agreed to pay a significant percentage of their offshore assets (typically 20 to 27.5 percent)—sometimes more than they would have been asked to pay had they been subject to examination.<sup>64</sup>

Under OVD program changes announced in 2014, benign actors (*i.e.*, those who certify their violations were not willful) who are nonresidents may correct FBAR violations without penalty.<sup>65</sup> U.S. residents pay only five percent of the unreported account balance.<sup>66</sup>

Taxpayers who agreed to pay more under a prior OVD program than they would pay under the current program(s) felt penalized for coming forward early.<sup>67</sup> It is difficult to see how such an approach will encourage future compliance by them or anyone else. Instead, it creates an incentive for anyone facing potentially severe penalties to wait for the government to become more reasonable, which is inconsistent with the objective of promoting voluntary compliance.

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61 See 2014 streamlined program (explaining that the IRS may “incorporate the streamlined penalty terms in the OVD closing agreement,” but only for a taxpayer who applied to an OVD program before July 1, 2014 and “does not yet have a fully executed OVD closing agreement.”).

62 The IRS previously offered to amend 2009 OVD agreements for taxpayers who would qualify for the reduced 5 percent or 12.5 percent offshore penalty rates under the 2011 OVD. See 2011 OVD FAQ #52; 2011 OVD FAQ #53. Similarly, it allowed taxpayers to modify closing agreements in a manner consistent with the earlier (2012) streamlined program. See IRS, *Frequently Asked Questions Regarding the Streamlined Filing Compliance Procedures for Non-Resident, Non-Filer Taxpayers*, FAQ #5 (Dec. 2013), <http://www.irs.gov/Individuals/International-Taxpayers/FAQReStreamlinedFilingComplianceProceduresNRNFTPs>.

63 See, e.g., 2011 OVD FAQ #51.

64 For a more detailed discussion of this problem, see, e.g., OVD Reports.

65 See 2014 streamlined program.

66 *Id.*

67 See Andrew Velarde, *Practitioners Disagree on Fairness of Lack of OVD Retroactivity*, 2014 TNT 152-2 (Aug. 7, 2014) (quoting one practitioner as saying, “[T]he OVD has many taxpayers with closing agreements who were non-willful but who were scared to opt out...If those same taxpayers had the choice to participate in the streamlined program as it is today back then, they would have never gone into OVD,” but offering a different view from another).

However, the IRS may not have the legal authority to modify OVD agreements. Closing agreements are generally governed by contract law principles,<sup>68</sup> under which an agreement can be modified with the consent of both parties.<sup>69</sup> However, section 7121(b) provides that closing agreements

shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—(1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States...

Accordingly, the IRM states that the parties to a closing agreement cannot rescind or modify it by consent.<sup>70</sup> Thus, legislation to clarify that the parties can modify closing agreements by consent would empower the IRS to treat those who corrected violations early the same as those who corrected them later. It would also be consistent with a taxpayer's *right to a fair and just tax system*.<sup>71</sup>

### EXAMPLE 3

Assume the taxpayer described in Example 1 (in the Legislative Recommendation: *Improve the Proportionality of the Civil FBAR Penalty*, above) entered the IRS's 2011 OVD program, which required him to amend eight returns, file six FBARs, and pay any unpaid tax, accuracy-related penalties, failure to pay penalties, and a 25 percent "offshore penalty" of \$25,000.<sup>72</sup> Although he would owe much less—perhaps nothing—outside of the OVD program, he did not opt out (*i.e.*, he accepted these terms) because he was concerned that opting out could affect his immigration status, unsure about whether the IRS would deem his violations to be willful, and concerned about the cost, burden, and stress of an IRS examination and the potential for having to appeal and litigate the examination determination(s).

The taxpayer now wishes he had not come forward to correct the problem so quickly. Under the 2014 OVD program changes, he would have qualified for the terms of the streamlined program. Had his case still been open on July 1, 2014, the IRS would have accepted a closing agreement requiring him to pay only his unreported tax plus an offshore penalty of five percent or \$500. However, the IRS will not agree to amend his closing agreement to provide him with similar terms.

### RECOMMENDATION

To empower the IRS to treat taxpayers consistently and fairly, the National Taxpayer Advocate recommends legislation to authorize the IRS to modify closing agreements with the taxpayer's consent, particularly when necessary to promote equity or public policy (including consistency). She also recommends directing the IRS to use this authority to amend OVD closing agreements to make them consistent with the terms of agreements publicly offered to similarly-situated taxpayers in subsequent IRS programs.

68 See, e.g., *U.S. v. National Steel Corp.*, 75 F3d 1146, 1150 (7th Cir. 1996); *Rink v. Comm.*, 47 F3d 168, 171 (6th Cir. 1995).

69 See, e.g., *Large v. Mobile Tool Int'l*, 724 F.3d 766, 772 (7th Cir. 2013) ("Parties are free to abrogate, change, modify, or substitute a primary contract with their mutual assent."). Treasury Regulation section 301.7121-1(b)(1) also contemplates "a series of closing agreements relating to the tax liability for a single period," but Rev. Proc. 68-16 § 3.02, 1968-1 C.B. 770 clarifies that "no such [subsequent closing] agreement may modify any matter previously determined by closing agreement except as provided by statute." See also IRM 8.13.1.1.1 (Nov. 9, 2007).

70 IRM 8.13.1.6.1 (Nov. 9, 2007).

71 See IRS Pub. 1, *Your Rights as a Taxpayer* (2014).

72 2011 OVD FAQ #7.

## FBAR FORMS: Reduce the Burden of Foreign Account Reporting

### PROBLEM

Foreign account reporting is unnecessarily burdensome and duplicative.<sup>73</sup> U.S. citizens and residents may be required to report foreign accounts on different forms (FBAR vs. Form 8938), at different times of the year (June 30th for FBAR vs. April 15th or September 15th for Form 8938), when they reach different thresholds (\$10,000 for FBAR vs. \$50,000 or more for Form 8938), using different definitions, and even though the government may already know about the accounts.<sup>74</sup> Requiring taxpayers to file forms on two different dates may increase preparation expenses and the chances of error, because taxpayers must remember two filing deadlines and potentially consult advisors twice.

#### The FBAR reporting threshold has declined in real terms.

Stakeholders have also argued that the FBAR reporting threshold is too low.<sup>75</sup> Although it has fluctuated over the years, today's \$10,000 threshold is the same as it was in 1970.<sup>76</sup> If indexed for inflation from 1970, \$10,000 would be more than \$61,000 in today's dollars—significantly more than the \$50,000 threshold for reporting on Form 8938.<sup>77</sup>

#### Raising the FBAR threshold to \$50,000 could eliminate nearly one third of the forms.

Because there are fewer wealthy taxpayers with large accounts than middle-class taxpayers with smaller accounts, increasing the reporting threshold could significantly reduce the number of people who have to file FBARs. Over 30 percent of the FBARs the IRS received in calendar year 2012—nearly 250,000

73 TAS has repeatedly recommended that the IRS to address this unnecessary and duplicative burden. See National Taxpayer Advocate 2013 Annual Report to Congress 228-237; National Taxpayer Advocate 2013 Annual Report to Congress 238-248; National Taxpayer Advocate 2012 Annual Report to Congress 134-153; TAS Recommendations for Published Guidance under IRC §§ 6038D and 1471 (Apr. 24, 2014). The IRS has consistently declined. See, e.g., National Taxpayer Advocate 2015 Objectives Report to Congress 93-94, 99 (June 2014) (citing, in part, FinCEN's authority over the FBAR filing requirements).

74 For further discussion of these overlapping reporting requirements, see Treasury Inspector General for Tax Administration (TIGTA), *New Legislation Could Affect Filers of the Report of Foreign Bank and Financial Accounts, but Potential Issues are Being Addressed*, Ref. Num. 2010-30-125 (Sept. 2010); Government Accountability Office, GAO-12-403, *Reporting Foreign Accounts to IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified*, App. 2 (Feb. 2012); IRS, *Comparison of Form 8938 and FBAR Requirements*, at <http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>. The IRS could reduce, but not eliminate, duplicative reporting by adding items reported on an FBAR to the existing list of items that taxpayers do not have to report on Form 8938. See Treas. Reg. § 1.6038D-7T. The IRS has access to the FinCEN Query System, which allows IRS employees direct electronic access to FBAR data.

75 See Recommendation by the Federation of American Women's Clubs Overseas, Inc. (FAWCO), Association of Americans Resident Overseas (AARO), and American Citizens Abroad (ACA) (Feb. 2012).

76 See, e.g., Form 4683, *U.S. Information Return on Foreign Bank, Securities & Other Financial Accounts* (1970) (\$10,000 threshold); Form 90.22-1, *Report of Foreign Bank and Financial Accounts* (1978) (\$1,000 threshold); Form 90.22-1, *Report of Foreign Bank and Financial Accounts* (1983) (\$5,000 threshold); 50 Fed. Reg. 42,691 (Oct. 22, 1985) (\$10,000 threshold); Bank Secrecy Act (BSA), *Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts*, FinCEN Form 114 (2014) (\$10,000 threshold).

77 Dep't of Labor, Bureau of Labor Statistics, *CPI Inflation Calculator*, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm). We understand that FinCEN has opposed the suggestion to increase the FBAR filing threshold, in part, because \$10,000 may be more significant when denominated in certain foreign currencies. However, this was true in 1970 when the threshold was more than \$61,000 in today's dollars. *Id.*

forms—reported accounts of less than \$49,999.<sup>78</sup> Thus, assuming most taxpayers file only one form, coordinating the FBAR filing threshold with the Form 8938 threshold could reduce taxpayer burden by nearly one third.

In addition, if information about large offshore accounts is more useful to the government than information about those with small ones, then raising the threshold could ease taxpayer burden without significantly reducing the value of the FBAR to the government. Further, curtailing low-dollar FBAR filings would reduce the resources required to process them and help the government focus its limited resources on the higher-dollar filings—and higher-dollar non-filers.

### One form would be better than two, if confidentiality concerns are addressed.

If it aligns the FBAR and Form 8938 thresholds and deadlines, Congress should also consider consolidating the reporting requirements. Indeed, between 1970 and 1977, the Treasury Department only required taxpayers to report foreign accounts under the BSA on tax returns using Form 4683, *U.S. Information Return on Foreign Bank, Securities & Other Financial Accounts*.

In 1977, after taxpayer privacy laws were expanded under IRC § 6103, the IRS required people to report these accounts on a different form—not part of the return—so it could share the information with other federal agencies such as FinCEN.<sup>79</sup> Therefore, if Congress requires the Treasury Department to combine these forms, it may also want to clarify that certain information on the combined form is not deemed part of the tax return and is not subject to IRC § 6103.

In connection with any such change, however, Congress should require the IRS to limit and prominently identify on the form, any information that may be disclosed to FinCEN.<sup>80</sup> Without transparency and specificity, some taxpayers might withhold other information from the IRS based on a concern that it could be disclosed to other agencies. Foreign account information may be distinguished from other tax-related information because it is already required to be reported to FinCEN.

78 IRS response to TAS information request (Nov. 20, 2014) (indicating the IRS received 807,040 FBARs in CY 2012 – 248,128 (31 percent) reporting accounts less than \$49,999, 521,244 (65 percent) reporting accounts of more than \$50,000, and 37,668 (5 percent) reporting no account values). Because this data reflects the number of FBARs and not the number of taxpayers, if one taxpayer filed two FBARs, each reporting accounts of \$30,000, this would be reflected as two FBARs with account values less than \$49,999. *Id.*

79 See, e.g., Treasury Inspector General for Tax Administration (TIGTA), *New Legislation Could Affect Filers of the Report of Foreign Bank and Financial Accounts, but Potential Issues are Being Addressed*, Ref. Num. 2010-30-125 (Sept. 2010); General Accounting Office (GAO), *Better Use of Currency and Foreign Account Reports by Treasury and IRS Needed for Law Enforcement Purposes*, GGD-79-224 3 (April 6, 1979), <http://archive.gao.gov/f0302/109024.pdf>. Because the IRS considers itself FinCEN's agent in administering the BSA, it segregates information obtained under Title 31 (e.g., the FBAR) and Title 26 (tax), and requires a "related statute" determination before allowing IRS employees to use Title 26 information in a BSA investigation under Title 31. IRM 4.26.14.2 (July 24, 2012). However, in one recent case where a taxpayer complained that the IRS opened an FBAR investigation without first making a "related statute" determination pursuant to IRS procedures, the court granted the government's motion to dismiss, concluding that the FBAR statute (31 USC § 5314) was a "related statute" for purpose of IRC § 6103. See *Hom v. United States*, 112 A.F.T.R.2d (RIA) 6271 (N.D. Cal. 2014). The court's reasoning may suggest that because the FBAR statute is a "related statute," the IRS may use tax information covered by IRC § 6103 in an FBAR investigation without first making a case-specific determination, but we are not aware of any current plans by the IRS to change its procedures.

80 This would be in accordance with the taxpayer *right to be informed*. IRS Pub. 1, *Your Rights as a Taxpayer* (2014). Retaining the confidentiality restrictions on the remainder of the return would also further the taxpayer *right to confidentiality*. *Id.*

#### EXAMPLE 4

Assume the taxpayer described in Example 1 (in the Legislative Recommendation: *Improve the Proportionality of the Civil FBAR Penalty*, above) retains the foreign account. In 2015, the foreign bank reports the account to the IRS. The taxpayer is nonetheless required to report the account on Form 8938, which he files with his tax return by April 15, though an extension may be available. He must also report the account on an FBAR by June 30. No FBAR filing extension is available. Even if he has already paid for tax preparation, he may have to pay another fee to discuss any FBAR questions with his advisor.<sup>81</sup> Moreover, he may need to hire another advisor if his return preparer is not familiar with the FBAR rules.

#### RECOMMENDATION

To reduce taxpayer burden, the National Taxpayer Advocate recommends aligning the FBAR filing deadline and threshold(s) with the Form 8938 filing deadline and threshold(s). Specifically, she recommends increasing the \$10,000 FBAR filing threshold to match the threshold applicable to Form 8938 (*i.e.*, at least \$50,000), adjust it for inflation, and change the FBAR filing due date to coincide with the due date applicable to a taxpayer's federal income tax return and Form 8938 (including extensions).

If Congress aligns these due dates and thresholds, it should also consider requiring the Treasury Department to consolidate the reporting of foreign accounts (*i.e.*, the FBAR and Form 8938) so that taxpayers only have to report them on one form. To facilitate this change, legislation should clarify that the IRS may disclose certain account information to FinCEN without violating IRC § 6103. The legislation should require the IRS to highlight (on the new form) any information not subject to the normal confidentiality rules (*e.g.*, because it is not part of the tax return).<sup>82</sup>

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81 TAS has been informed that this fee could be substantial, particularly for persons overseas. TAS meeting with representatives of the American Citizens Abroad (Sept. 4, 2014).

82 Congress might also clarify that taxpayers not otherwise required to file a tax return could, nonetheless, use the same form to satisfy their reporting obligations under the BSA.