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FOREIGN ACCOUNT REPORTING: Eliminate Duplicative Reporting of Certain Foreign Financial Assets and Adopt a Same-Country Exception for Reporting Financial Assets Held in the Country in Which a U.S. Taxpayer Is a *Bona Fide* Resident

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PROBLEM

As a response to IRS and congressional concerns that U.S. taxpayers were not fully disclosing the extent of financial assets held abroad, Congress passed the Foreign Account Tax Compliance Act (FATCA) in 2010.² Many U.S. taxpayers, particularly those living abroad, have incurred increased compliance burdens and costs as a result of FATCA reporting obligations on Form 8938, *Statement of Specified Foreign Financial Assets*, that significantly overlap with the Financial Crimes Enforcement Network (FinCEN) Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR), filing requirements.³ These burdens include additional tax preparation fees and the unwillingness of some foreign financial institutions (FFIs) to do business with U.S. expatriates because of significant costs and regulatory risks associated with preparing and maintaining a business for ongoing FATCA compliance.⁴

Congress has given the IRS broad authority to issue regulations and guidance for the purpose of eliminating duplicative reporting requirements.⁵ The IRS has exercised the regulatory authority to eliminate duplicative reporting of assets on the Form 8938 if the asset is reported or reflected on certain other timely-filed international information returns, and provided an exception from reporting financial accounts held in U.S. territories for *bona fide* residents of such territories.⁶ However, it repeatedly declined to adopt the National Taxpayer Advocate's recommendations⁷ to forego duplicative FATCA reporting

1 See Taxpayer Bill of Rights, available at www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

2 Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (2010) (adding Internal Revenue Code (IRC) §§ 1471-1474; 6038D). See also *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives To Restore Employment Act," Under Consideration by the Senate*, Staff of the Joint Committee on Taxation, JCX-4-10 (Feb. 23, 2010).

3 See IRS Form 8938, *Statement of Specified Foreign Financial Assets* (2015) and FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (Oct. 2013). See also IRS, *Comparison of Form 8938 and FBAR Requirements*, available at <https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>; National Taxpayer Advocate 2013 Annual Report to Congress 235.

4 See, e.g., National Taxpayer Advocate Fiscal Year 2016 Objectives Report to Congress 48-52; National Taxpayer Advocate 2013 Annual Report to Congress 238-48. Under FATCA, to avoid being withheld upon a 30 percent withholding tax on certain U.S.-source payments made to them, FFIs may register with the IRS and agree to report certain information about their U.S. accounts, including accounts of certain foreign entities with substantial U.S. owners. IRC §§ 1471-1474.

5 See, e.g., IRC §§ 6038D(h)(1); 1471(d)(1)(C)(ii).

6 See Treas. Reg. § 1.6038D-7(a) and (c). For examples of information returns, see, e.g., Forms 3520, 3520A, 5471, 8621, 8865, or 8891.

7 See National Taxpayer Advocate 2014 Annual Report to Congress 343-45; National Taxpayer Advocate 2013 Annual Report to Congress 228-37; National Taxpayer Advocate 2013 Annual Report to Congress 238-48; National Taxpayer Advocate 2012 Annual Report to Congress 134-53; TAS Recommendations for Published Guidance under IRC §§ 6038D and 1471 (Apr. 15, 2015) and (Apr. 24, 2014). See also *National Taxpayer Advocate Seeks End to Duplicative FATCA Reporting*, 2015 TNT 71-16 (Apr. 14, 2015).

where assets have already been reported on an FBAR, and to allow a same-country exception for reporting financial accounts held in the country in which a U.S. taxpayer is a *bona fide* resident despite support by other stakeholders.⁸

EXAMPLE

Madeleine and Jacque Legrand are citizens and *bona fide* residents of France. Madeleine is also an “accidental” U.S. citizen. She was born in New York City where her parents worked as foreign researchers at a U.S. university on a J-1 visa. Madeleine left the United States for France with her parents at the age of three. As an adult, she visited the United States for brief periods on several occasions prior to 2006, but has never worked in the United States. Over 20 years of employment, Madeleine and her husband have saved about 800,000 Euros for retirement that are invested in mutual funds and certificates of deposit. In 2014, when visiting the United States again, Madeleine learned of the requirement to report worldwide income and the information reporting requirements associated with certain foreign financial assets and accounts, and realized that her retirement savings met the reporting thresholds.⁹ When she returned to France, Madeleine attempted to comply but could not find free tax assistance. She became anxious about the potential FBAR and FATCA penalties that could negatively affect her retirement savings. As a result, she had to pay for tax preparation, plus an additional fee to discuss any FBAR and FATCA reporting questions with her advisor.¹⁰ In addition, upon learning that Madeleine is a dual U.S.-French citizen, the small local bank where the couple had held joint accounts for over a decade suggested that the Legrands either close the accounts or remove Madeleine from them, so that the bank can avoid costs and risks associated with reporting and withholding obligations under FATCA.

RECOMMENDATIONS

To reduce the burdens of FATCA compliance, the National Taxpayer Advocate recommends that Congress:

- Amend IRC § 6038D:
 - To eliminate duplicative reporting of assets on Form 8938, *Statement of Specified Foreign Financial Assets*, if the asset is or has been reported or reflected on an FBAR; and
 - To exclude from the specified foreign financial assets required to be reported on the Form 8938 financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident.
- Amend IRC § 1471 to specifically exclude from the definition of financial account subject to reporting by FFI financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident.

8 See, e.g., National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 93-4, 99; *Reporting of Specified Foreign Financial Assets*, Preamble to Final Regulations under IRC § 6038D, Summary of Comments and Explanation of Revisions, sec. V (G), 79 FR 73817-01 (Dec. 12, 2014); Email from the Special Counsel to the Deputy Chief Counsel (Technical) to TAS Supervisory Attorney Advisor, *Recommendations for Published Guidance under Sections 6038D and 1471* (Oct. 13, 2015). See also Government Accountability Office (GAO), GAO-12-403, *Reporting Foreign Accounts to IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified*, App. 2 (Feb. 2012); TAS meetings with representatives of the Association of Americans Resident Overseas and the Federation of American Women’s Clubs Overseas (Mar. 24, 2014 and Feb. 24, 2015); TAS meetings with Democrats Abroad Task Force on FATCA (Mar. 4, 2014 and Feb. 24, 2015).

9 For filing thresholds, see generally 31 U.S.C. § 5314(a); 31 C.F.R. § 1010.350; Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts, FinCEN Form 114 (2014) (\$10,000 threshold). See also Treas. Reg. § 1.6038D-2(a).

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

PRESENT LAW

The law requires U.S. taxpayers to file a number of information returns and imposes severe civil penalties for failing to file, many of which are not based on the amount of the underpayment of tax.¹¹ Among the most publicized are the penalties for failure to disclose foreign financial accounts (FBAR) and foreign financial assets (FATCA). The Currency and Foreign Transaction Reporting Act of 1970 (commonly known as The Bank Secrecy Act) requires U.S. citizens and residents to report foreign accounts with an aggregate value of \$10,000 or more at any time during the calendar year on the FBAR.¹² FATCA requires U.S. citizens, resident aliens, and certain non-resident aliens to file a Form 8938 with their individual returns reporting foreign assets exceeding specified thresholds.¹³

A taxpayer may be subject to a civil FBAR penalty of up to \$10,000 per violation for failing to file an FBAR even if the failure was not “willful.”¹⁴ If the government establishes the failure was willful, the maximum penalty is the greater of \$100,000 or 50 percent of the balance of the undisclosed account annually.¹⁵ The taxpayer may also face criminal penalties of up to \$500,000 and ten years in prison.¹⁶ For taxable years beginning after March 18, 2010, pursuant to FATCA, an additional penalty of \$10,000 (and of up to \$50,000 for continued failure after IRS notification) is imposed on U.S. taxpayers holding financial assets outside the United States who fail to report those assets on Form 8938.¹⁷ Underpayments of tax attributable to non-disclosed foreign financial assets are subject to an additional substantial understatement penalty of 40 percent.¹⁸ Additionally, the statute of limitations is extended to six years if there is an omission of gross income in excess of \$5,000 and the omitted gross income is attributable to a foreign financial asset.¹⁹

IRC § 1471(d)(1) defines the term “United States account” and provides for the elimination of duplicative reporting requirements.²⁰ The term “United States account” excludes financial accounts in FFIs if the holder of such account is otherwise subject to information reporting requirements

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- 11 These penalties include but are not limited to penalties under IRC §§ 6038, 6038A, 6038B, 6038C, 6039F, 6046, 6046A. See also IRC §§ 6038D, 6662(b)(7); 31 U.S.C. § 5321(a)(5).
- 12 See 31 C.F.R. § 1010.306(c); Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts, FinCEN Form 114 (2014).
- 13 Treas. Reg. § 1.6038D-2(a). An unmarried taxpayer living in the U.S. must file a Form 8938 if the total value of the taxpayer’s specified foreign financial assets is more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the tax year. This threshold is doubled in the case of specified individuals who are married filing jointly. A qualifying unmarried taxpayer living abroad must file a Form 8938 if the total value of the taxpayer’s specified foreign financial assets is more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the tax year. This threshold is doubled as well in the case of qualified individuals living abroad who are married filing jointly. *Id.*
- 14 See 31 U.S.C. § 5321(a)(5)(B). Prior to October 22, 2004, there was no penalty for a non-willful failure to file and the maximum civil penalty for willful violations was \$100,000. The American Jobs Creation Act of 2004, Pub. L. No. 108-357, Title VIII, § 821(a), 118 Stat. 1418, 1586 (Oct. 22, 2004) established a penalty for non-willful violations and increased the penalty for willful violations.
- 15 31 U.S.C. § 5321(a)(5)(C). The penalty can reach 300 percent of the account balance if the willful failures continue over a six-year period. A six-year statute of limitations applies to the civil FBAR penalty. See 31 U.S.C. § 5321(b)(1).
- 16 31 U.S.C. § 5322; 31 C.F.R. § 1010.840(b). To establish willfulness for either civil or criminal penalties, the IRS generally has to establish that the taxpayer had knowledge of the FBAR filing requirement.
- 17 IRC § 6038D.
- 18 See IRC § 6662(b)(7).
- 19 IRC § 6501(e).
- 20 IRC § 1471(d)(1)(C).

which the IRS determines would make the reporting with respect to these accounts duplicative.²¹ IRC § 1471(d)(1)(C)(ii) states:

(C) Elimination of duplicative reporting requirements.--Such term shall not include any financial account in a foreign financial institution if —

(ii) the holder of such account is *otherwise subject to information reporting* requirements which the Secretary determines would make the reporting required by this section with respect to United States accounts *duplicative* (emphasis added).

Treasury Regulation § 1.1471-5(b)(2) provides specific exceptions to the definition of financial accounts subject to reporting by FFIs. Currently, the regulation does not provide an exception for financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident.

Similarly, IRC § 6038D specifically authorizes the IRS to issue regulations or other guidance to provide appropriate exceptions from FATCA reporting when such reporting would be duplicative of other disclosures. IRC § 6038D(h)(1) provides that:

The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section, including *regulations or other guidance which provide appropriate exceptions* from the application of this section in the case of —

(1) classes of assets identified by the Secretary, including any assets with respect to which the Secretary determines that disclosure under this section would be duplicative of other disclosures... (emphasis added).

Treasury Regulations under IRC § 6038D eliminate duplicative reporting of assets on the Form 8938 if the asset is reported or reflected on certain other timely-filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891) provided the Form 8938 indicates the filing of the form on which the asset is reported.²² However, FinCEN Report 114 (FBAR) is not included on the list of those information returns.

Similarly, Treasury Regulation § 1.6038D-7(c)(1) provides that a *bona fide* resident of a U.S. possession who is required to file Form 8938 is *not required* to report financial accounts maintained by a financial institution organized under the laws of the U.S. possession of which the specified individual is a *bona fide* resident. The regulation currently does not have a similar exception for U.S. individuals who are *bona fide* residents of foreign countries.

²¹ IRC § 1471(d)(1)(C)(ii).

²² See Treas. Reg. § 1.6038D-7(a).

REASONS FOR CHANGE

Eliminate Duplicative Reporting

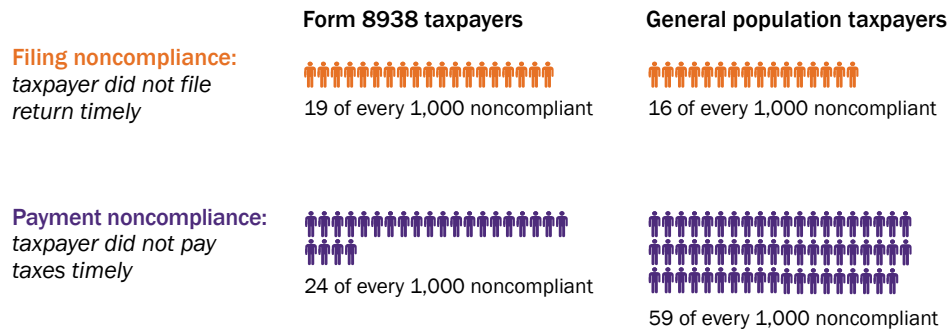
For several years, the National Taxpayer Advocate and other stakeholders have expressed concerns about the overlap of FBAR and the Form 8938, which must be filed with annual federal income tax returns.²³ The FinCEN Report 114 and the Form 8938 are significantly duplicative, increasing confusion and adding to the compliance burden for taxpayers.²⁴ Reporting and withholding obligations have resulted in additional costs and risks of substantial penalties for taxpayers and withholding agents, and might have prompted some FFIs to close accounts of U.S. taxpayers abroad.²⁵

FATCA was passed in response to IRS and congressional concerns that U.S. taxpayers were not fully disclosing the extent of financial assets held abroad.²⁶ However, the IRS's approach to FATCA apparently is based on the unsubstantiated assumption that most taxpayers are "bad actors" and that a widespread, burdensome enforcement regime is necessary. Such has been the case even though the vast majority of taxpayers have been, and likely will continue to be, fully compliant. In her 2013 report, the National Taxpayer Advocate observed that based on analysis of the data then available "... to this point, the IRS is imposing additional reporting burdens and increased potential penalties primarily on a category of taxpayers that, under principles of quality tax administration, should be encouraged, rather than penalized."²⁷ Further review of updated and expanded data from fiscal year 2010 through the present continues to demonstrate tax evaders are not feeling the weight of FATCA; instead, the burden of FATCA falls on U.S. taxpayers who likely would be compliant regardless. U.S. taxpayers under the FATCA umbrella who must file Form 8938 are generally as compliant as the overall U.S. taxpayer population as shown on Figure 2.5.1.²⁸

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- 23 National Taxpayer Advocate 2013 Annual Report to Congress 238-48; National Taxpayer Advocate Fiscal Year 2013 Objectives Report to Congress 23; National Taxpayer Advocate 2012 Annual Report to Congress 134, 141; National Taxpayer Advocate 2011 Annual Report to Congress 129-272; TAX ANALYSTS, *Texas CPAs Recommend Simplifying Foreign Financial Reporting*, 2015 TNT 167-13; GAO, GAO-12-403, *Reporting Foreign Accounts to IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified*, App. 2 (Feb. 2012).
- 24 IRS, *Comparison of Form 8938 and FBAR Requirements*, available at <http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>.
- 25 Under FATCA, to avoid being withheld upon a 30 percent withholding tax on certain U.S.-source payments made to them, FFIs should register with the IRS and agree to report certain information about their U.S. accounts, including accounts of certain foreign entities with substantial U.S. owners. IRC §§ 1471-1474.
- 26 See *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives To Restore Employment Act," Under Consideration by the Senate*, Staff of the Joint Committee on Taxation, JCX-4-10 (Feb. 23, 2010).
- 27 National Taxpayer Advocate 2013 Annual Report to Congress 241.
- 28 National Taxpayer Advocate Fiscal Year 2016 Objectives Report to Congress 48-52 (Area of Focus: *The IRS's Implementation of FATCA Has in Some Cases Imposed Unnecessary Burdens and Failed to Protect the Rights of Affected Taxpayers*).

FIGURE 2.5.1²⁹

Noncompliance Rates for Form 8938 Filers vs. General Population Taxpayers



The National Taxpayer Advocate previously has observed taxpayers' willingness to meet their reporting and filing obligations is driven more by considerations of personal integrity and perceptions of systemic fairness than by economic deterrence and enforcement measures.³⁰

As of December 2015, approximately 300,000 taxpayers had filed Forms 8938 for tax year (TY) 2013, while about 283,000 had filed for TY 2014.³¹ Of the taxpayers filing Forms 8938 in TY 2013, approximately 38 percent also filed FBAR forms.³² Roughly 24 percent of Form 8938 returns were submitted to the IRS from a foreign address based on TY 2013 data.³³

29 Data drawn from IRS Compliance Data Warehouse (CDW), IRTF Entity and IMF Status History tables (Mar. 26, 2015). This table uses status code 03 data (Tax Delinquency Investigation) to measure filing compliance and status code 22, 24, and 26 data (Tax Delinquent Account) to measure payment compliance. The analysis covers five tax years from 2009 forward. In addition, FATCA filers appear to have a lower level of reporting noncompliance than the general population because FATCA filers have a lower percentage of high-scoring DIF returns in comparison to filers overall. Data drawn April 13, 2015 from CDW, IRTF Entity table, Processing Year 2013. High-scoring DIF returns were defined as those with a DIF value that exceeded 80 percent of DIF scores in the general population for a particular TPI class. We calculated a cutoff point for DIF scores at the 80th percentile for each TPI class for Processing Year 2013 and calculated the percentage of FATCA filers in each TPI class that exceeded the DIF cutoff point. Only 16.5 percent of FATCA filers exceeded their respective DIF cutoff points, compared to, of course, 20 percent for individual filers in the general population. Thus, FATCA filers showed a lower percentage of "high-scoring" DIF returns than the overall population.

30 National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, 134.

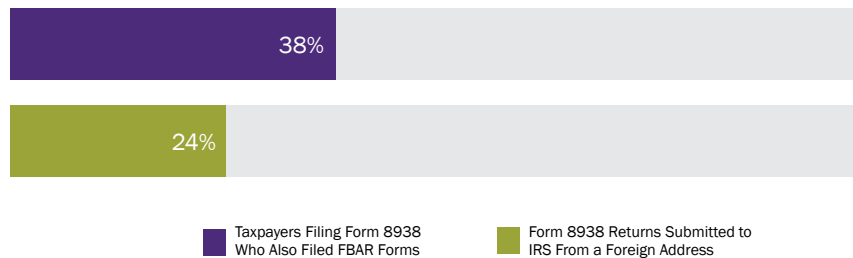
31 TAS Research, CDW, IRTF Entity and IRTF F1040 tables, data drawn Nov. 16, 2015. These numbers may change as more TY 2013 and 2014 returns are filed with the IRS.

32 TAS Research, CDW, IRTF Entity and IRMF_F90_22 tables, data drawn Nov. 16, 2015.

33 IRS LB&I Division, Planning, Analysis, Inventory, and Research (PAIR) analysis, CDW, IMF_Entity table, data drawn Dec. 18, 2015.

FIGURE 2.5.2³⁴

Taxpayers Filing Forms 8938 in Tax Year 2013



As noted above, the IRS has regulatory authority under FATCA to eliminate duplicative reporting on FATCA Form 8938 and FBAR. However, it repeatedly has declined to do so, citing the Joint Committee on Taxation (JCT) Technical Explanation accompanying the HIRE Act.³⁵ The Technical Explanation states that “[n]othing in this provision [section 511 of the HIRE Act enacting new section 6038D] is intended as a substitute for compliance with the FBAR reporting requirements, which are unchanged by this provision.”³⁶ At the same time, as described above, the *statutory* language (as opposed to a JCT explanation) specifically authorizes elimination of duplicative reporting requirements.³⁷

While the IRS may feel constrained in its regulatory authority to change the FBAR filing requirements, it is specifically granted the freedom to adjust FATCA filing requirements. The National Taxpayer Advocate is therefore baffled by the IRS’s inexplicable unwillingness to address this unnecessary duplication of reporting requirements. It appears that congressional action specifically *requiring* the IRS to eliminate duplicative reporting under FATCA and FBAR is necessary to alleviate significant burdens being experienced by affected taxpayers and to protect the taxpayers’ rights to *privacy* and to a *fair and just tax system*.

Same-Country Exception

As stated above, U.S. taxpayers residing abroad are subject to overlapping reporting requirements under FBAR and FATCA, which increase preparation expenses and the chance of error.

Additionally, organizations representing U.S. taxpayers abroad have voiced concerns about unintended consequences of new FATCA rules for FFIs that make it harder for U.S. taxpayers living abroad to open

34 TAS Research, CDW, IRFT Entity and IRMF_F90_22 tables, data drawn Nov. 16, 2015. IRS LB&I Division, PAIR analysis, CDW, IMF_Entity table, data drawn Dec. 18, 2015. These numbers will change as more TY 2013 returns are filed with the IRS.

35 *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the “Hiring Incentives To Restore Employment Act,” Under Consideration by the Senate*, Staff of the Joint Committee on Taxation, JCX-4-10 (Feb. 23, 2010). See also *Reporting of Specified Foreign Financial Assets*, Preamble to Final Regulations under IRC § 6038D, Summary of Comments and Explanation of Revisions, sec. V (G), 79 FR 73817-01 (Dec. 12, 2014); Email from the Special Counsel to the Deputy Chief Counsel (Technical) to TAS Supervisory Attorney Advisor, *Recommendations for Published Guidance under Sections 6038D and 1471* (Oct. 13, 2015); National Taxpayer Advocate 2015 Objectives Report to Congress 93-94, 99.

36 *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the “Hiring Incentives To Restore Employment Act,” Under Consideration by the Senate*, Staff of the Joint Committee on Taxation, JCX-4-10 (Feb. 23, 2010) at 60.

37 IRC §§ 1471(d)(1)(C)(ii) and 6038D(h)(1).

and maintain legitimate bank accounts overseas.³⁸ Some FFIs, such as DeutscheBank, HSBC, and ING, have reportedly closed out foreign accounts of U.S. citizens in response to FATCA to avoid significant costs and regulatory risks associated with preparing for and maintaining an ongoing FATCA compliance.³⁹ Other FFIs have severely restricted the services they offer to these customers.⁴⁰

During recent meetings with TAS, organizations of U.S. citizens abroad reiterated their concerns about the difficulty of opening bank accounts in their countries of residency.⁴¹ The National Taxpayer Advocate has personally received multiple reports from taxpayers, taxpayer representatives, and tax professionals residing in a range of countries including Austria, Hungary, and Sweden and from some foreign tax officials themselves.⁴² Because FATCA creates burdens for FFIs, some foreign banks are unwilling to open accounts for U.S. citizens abroad, especially for those individuals residing in small communities where the global banks do not have branches.

Similarly, substantial day-to-day compliance burdens and costs of implementing FATCA are placed on financial institutions.⁴³ For example, unless an FFI agrees to provide comprehensive information regarding accounts of U.S. taxpayers, a broad range of U.S.-source payments to that FFI are subject to a 30 percent withholding tax.⁴⁴ FATCA further charges withholding agents with the responsibility of determining whether they are obliged to undertake FATCA withholding and implementing that withholding when it is required.⁴⁵

As a recommendation to help minimize the burden of FATCA compliance for both individual U.S. taxpayers residing abroad and FFIs, the National Taxpayer Advocate proposed that the IRS and Treasury adopt a “same-country exception.”⁴⁶ Accounts opened by U.S. citizens in a foreign country of *bona fide* residence are not “offshore” accounts designed for tax avoidance. These *bona fide* residents have a legitimate need for local banking services in their countries of residence. Thus, it is more logical and in keep-

38 IRC §§ 1471-1474. See, e.g., ACA Comments on the Proposed Treasury Regulations Concerning FATCA Dated February 8, 2012 (Apr. 4, 2012), available at <https://www.americansabroad.org/files/6813/4192/6083/acastatementapril2012s.pdf> (last visited Nov. 23, 2015); April Carvelli, *Taxes Pushing U.S. Citizens to Renounce*, Imperfect Parent (Apr. 17, 2012) (quoting Francisca N. Mordi, Vice President and Senior Tax Counsel at the American Bankers Association, who stated she received a number of calls from Americans in Europe complaining about banks closing their accounts. “They’re going to drop Americans like hot potatoes,” Mordi says. “The foreign banks are upset enough about the regulations that they’re saying they just won’t keep American customers, and it’s giving (Americans living abroad) a lot of sleepless nights.”), available at <http://www.imperfectparent.com/topics/2012/04/17/taxes-pushing-u-s-citizens-to-renounce/>; James Fellows, *The FATCA Chronicles: Tales From China, Canada, and Estonia*, THE ATLANTIC (Jan. 3, 2012), available at <http://www.theatlantic.com/international/archive/2012/01/the-fatca-chronicles-ales-from-china-canada-and-estonia/250771/>; Judi Lembke, *Americans in Sweden Suffer U.S. Tax Crackdown*, THE LOCAL (Sweden’s News in English) (Mar. 6, 2012), available at <http://www.thelocal.se/39522/20120306/>.

39 See National Taxpayer Advocate 2013 Annual Report to Congress 238.

40 *Id.*

41 TAS meetings with representatives of the Association of Americans Resident Overseas and the Federation of American Women’s Clubs Overseas (Mar. 24, 2014 and Feb. 24, 2015); TAS meeting with Democrats Abroad Task Force on FATCA (Mar. 4, 2014 and Mar. 4, 2015).

42 National Taxpayer Advocate’s meetings at the University of Vienna, Austria, Harvard Club of Hungary, Budapest, Hungary, and Swedish Tax Agency, Stockholm, Sweden.

43 Presentation of the National Taxpayer Advocate to the Securities Industry and Financial Markets Association (Oct. 7, 2014). See also Lee Sheppard, *News Analysis: The Reformation of FATCA*, 2015 TNT 92-1 (May 13, 2015).

44 IRC §§ 1471(a) and 1473(1). IRC § 1471(d)(1)(B) excepts from the reporting and withholding requirements those accounts that are held by individuals at the same FFI and have an aggregate value of \$50,000 or less. Note that an FFI can provide information either as a participating FFI or pursuant to an intergovernmental agreement negotiated between the U.S. and the FFI’s home country.

45 IRC §§ 1471-1474; Notice 2013-43, 2013-31 I.R.B. 113.

46 TAS Recommendations for Published Guidance under IRC §§ 6038D and 1471 (Apr. 15, 2015) and (Apr. 24, 2014). See also *National Taxpayer Advocate Seeks End to Duplicative FATCA Reporting*, 2015 TNT 71-16 (Apr. 14, 2015).

ing with the spirit of FATCA to require information reporting on financial assets and accounts opened in a country other than one's country of residence.

The IRS could have significantly alleviated reporting burdens for U.S. persons who are *bona fide* residents in foreign countries by revising regulations under IRC §§ 6038D and 1471 to eliminate the requirement to report specified foreign financial assets on the Form 8938 if such persons have reported the assets on the FBAR. The IRS could also facilitate these taxpayers' legitimate need for local banking services in their countries of residence by excluding financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. persons are *bona fide* residents from FATCA reporting.⁴⁷ To this point, the IRS has not been willing to pursue these recommendations proposed by the National Taxpayer Advocate and supported by other stakeholders.⁴⁸ In response to the National Taxpayer Advocate's request that this proposal be included in the U.S. Department of the Treasury Office of Tax Policy and the IRS Priority Guidance Plan, the IRS Office of Chief Counsel maintained:

Under longstanding U.S. tax policy, U.S. citizens are taxed on their worldwide income irrespective of where they reside. Section 6038D was enacted to provide the IRS with an effective means to ensure compliance by all U.S. taxpayers owning foreign financial assets, including those residing outside of the United States. Thus, it was decided that the regulations under section 1471 and 6038D should not provide a broad carve out (from either the FFI reporting rules or the taxpayer self-reporting requirements, respectively) for U.S. citizens residing abroad as proposed in [TAS Recommendations for Published Guidance under Sections 6038D and 1471]. However, please note that the section 6038D regulations provide very substantial reporting relief for most U.S. citizens who are *bona fide* residents of another country. The regulations do so by providing aggregate foreign financial asset reporting thresholds for U.S. citizens residing abroad that are very generous and substantially higher than those applicable to other U.S. taxpayers. As a result, only those U.S. taxpayers residing abroad who have very substantial foreign financial asset holdings are required to file a Form 8938.⁴⁹

For "accidental" Americans who have lived abroad for most of their lives, as described in the example above, the increased thresholds may not achieve the intended result as their savings may exceed even the higher thresholds.⁵⁰ This is particularly true where the accounts subject to reporting contain retirement savings. As a result, these taxpayers will bear the cost of tax preparation expenses for duplicate reporting under FBAR and FATCA. Others excepted from FATCA reporting under the higher thresholds will bear

47 To qualify for foreign earned income exclusion and foreign housing exclusion or deduction, a U.S. citizen or resident alien (for tax purposes) must have a tax home in a foreign country, and either be a *bona fide* resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year (*bona fide* residence test), or be present in a foreign country or countries during at least 330 full days in any period of 12 consecutive months (physical presence test). IRC § 911(d)(2).

48 Email from the Special Counsel to the Deputy Chief Counsel (Technical) to TAS Supervisory Attorney Advisor, *Recommendations for Published Guidance under Sections 6038D and 1471* (Oct. 13, 2015); TAS meetings with the Special Counsel to the Deputy Chief Counsel (Technical) (May 23, 2014 and June 17, 2015).

49 Email from the Special Counsel to the Deputy Chief Counsel (Technical) to TAS Supervisory Attorney Advisor, *Recommendations for Published Guidance under IRC Sections 6038D and 1471* (Oct. 13, 2015).

50 A qualifying unmarried taxpayer living abroad must file a Form 8938 if the total value of the taxpayer's specified foreign financial assets is more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the tax year. This threshold is doubled as well in the case of qualified individuals living abroad who are married filing jointly. Treas. Reg. § 1.6038D-2(a).

the risk of IRS audits due to potential FFI errors because FFIs are still required to report their accounts to the IRS on Forms 8966, *FATCA Report*.⁵¹

Both groups will face the increased risk of errors as the IRS has shut itself off from a two-way dialogue with taxpayers abroad by closing all IRS tax attaché posts and eliminating the Electronic Tax Law Assistance Program, which was the only free method for taxpayers abroad to ask and receive answers to their specific tax law questions without paying toll phone or fax charges.⁵² Similarly, both groups will continue experiencing difficulties with opening or maintaining bank accounts unless the definition of financial accounts subject to reporting by FFIs under IRC § 1471(d) excludes accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident.

EXPLANATION OF RECOMMENDATIONS

Treasury Regulations under IRC § 6038D eliminate duplicative reporting of assets on the Form 8938 if the asset is reported or reflected on certain other timely-filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891) provided the Form 8938 indicates the filing of the form on which the asset is reported.⁵³ The proposed legislation will achieve similar results by eliminating duplicative information reporting under FBAR. The proposed legislative change will not jeopardize the IRS's access to foreign financial account information reported on FBARs. The IRS has access to the FinCEN Query System, which allows IRS employees direct electronic access to FBAR data.

This legislative proposal would also exclude from FATCA coverage foreign financial assets held in the country in which a U.S. taxpayer is a *bona fide* resident. It would mitigate concerns about the collateral consequences of FATCA raised by U.S. non-residents, reduce reporting burdens faced by FFIs, and allow the IRS to focus its enforcement efforts on identifying and addressing willful attempts at tax evasion through foreign accounts.⁵⁴ From a technical perspective this exception is substantially similar to the regulatory exception provided to *bona fide* residents of U.S. territories.⁵⁵

Information reporting can be very useful and can influence taxpayer behavior and future compliance, provided it is narrowly tailored to accomplish a reasonable result. The proposed legislative recommendations enhance taxpayer *rights to privacy* and *to a fair and just tax system* without inhibiting the IRS's ability to obtain information about financial accounts maintained by FFIs outside the U.S. person's country of *bona fide* residency.

51 Reaching the IRS to address inadvertent errors would be especially problematic given the decline in phone service over the recent year. In FY 2013, the average wait time on the international phone line was 10.5 minutes, compared to 19.9 minutes in FY 2015, a 90 percent increase. Furthermore, the average level of service on the international phone line in FY 2015 was only 55 percent. See Most Serious Problem: *International Taxpayer Service: The IRS's Service on Demand Strategy Fails to Compensate for the Closure of International Tax Attaché Offices and Does Not Sufficiently Address the Unique Needs of International Taxpayers, supra*.

52 *Id.*

53 See Treas. Reg. § 1.6038D-7(a).

54 A workable same-country exception would require the development of detailed guidance from the IRS, ideally arrived in consultation with FFIs and other stakeholders. One potential starting point would be to allow an FFI to accept the self-reporting of its accountholders to the extent that this reliance is reasonable under the facts and circumstances known to the FFI.

55 See Treas. Reg. § 1.6038D-7(c).