

#11 HARMONIZE REPORTING REQUIREMENTS FOR TAXPAYERS SUBJECT TO BOTH THE REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS AND THE FOREIGN ACCOUNT TAX COMPLIANCE ACT BY ELIMINATING DUPLICATION AND EXCLUDING ACCOUNTS A U.S. PERSON MAINTAINS IN THE COUNTRY WHERE HE OR SHE IS A *BONA FIDE* RESIDENT

Present Law

The Currency and Foreign Transaction Reporting Act of 1970 (commonly known as the Bank Secrecy Act) requires U.S. citizens and residents to report any foreign account with an aggregate value exceeding \$10,000 at any time during the calendar year.⁶⁷ FinCEN Report 114, Report of Foreign Bank and Financial Accounts (FBAR), has been prescribed for filing this report.

The Foreign Account Tax Compliance Act (FATCA)⁶⁸ added Internal Revenue Code (IRC) § 6038D, which requires U.S. citizens, resident aliens, and certain non-resident aliens to file a statement with their federal income tax returns to report foreign assets exceeding specified thresholds. Form 8938, Statement of Specified Foreign Financial Assets, has been prescribed for filing this statement. As codified by FATCA, IRC §§ 1471-1474 provide that foreign financial institutions (FFIs) that do not register with the IRS and agree to report certain information about their “United States accounts,”⁶⁹ including accounts held by U.S. persons and accounts of certain foreign entities with substantial U.S. owners, are subject to a 30 percent withholding tax on certain U.S. source payments they receive.

IRC § 1471(d)(1) authorizes the IRS to issue regulations to eliminate duplicative reporting requirements. IRC § 6038D similarly 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.

Reasons for Change

Many U.S. taxpayers, particularly those living abroad, face increased compliance burdens and costs as a result of FATCA reporting obligations that significantly overlap with the FBAR filing requirements.⁷⁰ The IRS has exercised its regulatory authority to eliminate duplicative reporting of assets on Form 8938 if an asset is reported or reflected on certain other timely filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891).⁷¹ It has also provided an exception from the reporting rules for financial accounts held in U.S. territories for *bona fide* residents of such territories.⁷²

However, the IRS has repeatedly declined to adopt the recommendations of the National Taxpayer Advocate that are also supported by other stakeholders, including the Government Accountability Office, to eliminate duplicative FATCA reporting where assets have already been reported on an FBAR⁷³ and to provide a same-country exception for reporting financial accounts held in the country in which a U.S. taxpayer is a *bona fide* resident. These recommendations, if adopted, would reduce the compliance burdens on U.S. taxpayers, who

67 See 31 U.S.C. § 5314(b)(3) and 31 C.F.R. § 1010.306(c).

68 Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010).

69 See IRC § 1471(d)(1) for a definition of “United States account.”

70 IRS, Comparison of Form 8938 and FBAR Requirements, <http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements>.

71 Treas. Reg. § 1.6038D-7(a)(1).

72 Treas. Reg. § 1.6038D-7(c).

73 See, *e.g.*, Government Accountability Office, GAO-12-403, *Reporting Foreign Accounts to the IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified* (Feb. 2012).

now must file additional complex forms themselves or pay higher tax return preparation fees. They would also reduce the compliance burdens on FFIs, some of which are declining to do business with U.S. expatriates because of the significant costs and regulatory risks associated with ongoing FATCA compliance. In addition, the unwillingness of certain FFIs to do business with U.S. expatriates makes it difficult for U.S. citizens to open bank accounts in certain countries.

Recommendations

- Amend IRC § 6038D (i) to eliminate duplicative reporting of assets on Form 8938, Statement of Specified Foreign Financial Assets, where an asset is or has been reported or reflected on an FBAR and (ii) to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the subject U.S. person is a *bona fide* resident from the specified foreign financial assets required to be reported on Form 8938.⁷⁴
- Amend IRC § 1471 to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the subject U.S. person is a *bona fide* resident from the definition of “financial account” subject to reporting by FFIs.⁷⁵

⁷⁴ For legislative language similar to this recommendation, see H.R. 2136, 115th Cong. §§ 1 & 2 (2017) (providing an exception from certain reporting requirements with respect to the foreign accounts of individuals who are *bona fide* residents of the countries in which their accounts are maintained).

⁷⁵ For additional information on the National Taxpayer Advocate’s recommendations, see National Taxpayer Advocate 2015 Annual Report to Congress 353-363 (Legislative Recommendation: *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*).