

Legislative Recommendation #8

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 Maintained by U.S. Persons in the Countries Where They Are *Bona Fide* Residents

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 to the Financial Crimes Enforcement Network (FinCEN).¹ FinCEN Report 114, Report of Foreign Bank and Financial Accounts (FBAR), has been prescribed for complying with this requirement.

The Foreign Account Tax Compliance Act (FATCA)² added 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. IRS Form 8938, Statement of Specified Foreign Financial Assets, has been prescribed for complying with this requirement. 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,”³ 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 exceptions from FATCA reporting when such reporting would duplicate other disclosures.

REASONS FOR CHANGE

Many U.S. taxpayers, particularly those living abroad, face increased compliance burdens and costs because the FATCA reporting obligations significantly overlap with the FBAR filing requirements.⁴ The IRS has exercised its regulatory authority to eliminate duplicative reporting of assets on Form 8938 if the assets are reported or reflected on certain other timely filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891).⁵ The IRS has also provided an exception from the reporting rules for *bona fide* residents of U.S. territories for financial accounts held in such territories.⁶

However, the IRS has not adopted 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 been reported on an FBAR.⁷ Although FBARs are filed with FinCEN,

¹ See 31 U.S.C. § 5314(b)(3) and 31 C.F.R. § 1010.306(c).

² Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010).

³ See IRC § 1471(d)(1) for a definition of “United States account.”

⁴ IRS, Comparison of Form 8938 and FBAR Requirements, <https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements> (last visited Nov. 6, 2020).

⁵ Treas. Reg. § 1.6038D-7(a)(1).

⁶ Treas. Reg. § 1.6038D-7(c).

⁷ 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).

the IRS has access to the information on those forms. We understand the IRS is concerned that FinCEN could change the FBAR, leaving the IRS without access to information about foreign accounts that are not required to be reported on a Form 8938. However, this should not be a concern if only accounts actually reported on an FBAR may be omitted from a Form 8938 on which they would otherwise have to be reported.

In addition, the IRS has not adopted the National Taxpayer Advocate's recommendation to provide an exception from FATCA reporting for financial accounts held in the country in which the U.S. taxpayer is a *bona fide* resident. If adopted, these recommendations would reduce compliance burdens for U.S. taxpayers, who currently must file additional complex forms themselves or pay higher tax return preparation fees. If adopted, these recommendations could also reduce the compliance burdens for FFIs, some of which are reluctant to do business with U.S. expatriates because of the significant costs and regulatory risks associated with ongoing FATCA compliance. This reluctance makes it difficult for U.S. citizens to open bank accounts in certain countries.

RECOMMENDATIONS

- Amend IRC § 6038D to (i) eliminate duplicative reporting of assets on Form 8938 where an asset is reported or reflected on an FBAR, and (ii) exclude 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 from the specified foreign financial assets required to be reported on Form 8938.⁸
- Amend IRC § 1471 to exclude 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 from the definition of “financial account” subject to reporting by FFIs.⁹

⁸ For legislative language similar to this recommendation, see The Overseas Americans Financial Access Act, H.R. 4362, 116th Cong. §§ 2 & 3 (2019) (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); H.R. 2136, 115th Cong. §§ 1 & 2 (2017) (same).

⁹ 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*).