IMPROVE THE FILING PROCESS

Legislative Recommendation #2

Treat Electronically Submitted Tax Payments and Documents as Timely If Submitted on or Before the Applicable Deadline

SUMMARY

- *Problem:* If a taxpayer mails a payment or tax return to the IRS that is postmarked by midnight on the date due, the payment or tax return will be considered timely even if it is received a week later. If a payment or tax return is transmitted to the IRS electronically by the date due, however, it will be considered late if the IRS receives and processes it the next day. This dichotomy favors paper transmission over electronic transmission – exactly the opposite incentive that the rules should provide.
- *Solution:* Provide that a payment or document submitted by midnight on the date due will be considered timely even if the IRS does not receive and process it that day.

PRESENT LAW

IRC § 7502(a)(1) provides that if certain requirements are satisfied, a mailed document or payment is deemed filed or paid on the date of the postmark stamped on the envelope. Therefore, if the postmark shows a document or payment was mailed by the due date, it will be considered timely, even if it is received after the due date.

IRC § 7502(b) and (c) provide that this timely mailed/timely filed rule (commonly known as the "mailbox rule") applies to documents and payments sent by U.S. postal mail, designated private delivery services, and electronic filing through an electronic return transmitter. However, the statutory mailbox rule does not apply to all filings and payments. With respect to electronic filing, the Secretary is authorized to issue regulations describing the extent to which the mailbox rule shall apply.[1] To date, the only regulations the Secretary has promulgated relating to electronic filing cover documents filed through an electronic return transmitter (*i.e.*, documents that are e-filed).[2]

REASONS FOR CHANGE

The statutory mailbox rule in IRC § 7502 does not apply to the electronic transmission of payments to the IRS. In addition, the mailbox rule does not apply to the electronic filing of time-sensitive documents (except documents filed electronically through an electronic return transmitter), including those transmitted by fax, email, the digital communication portal, or upload to an online account.[3] If the IRS does not receive an electronically submitted document or payment until after the due date, the document or payment is considered late, even if the taxpayer can produce a confirmation that he or she transmitted the payment or document on or before the due date. This comparatively unfavorable treatment of electronically submitted documents and payments undermines the IRS's efforts to encourage greater use of digital services and imposes additional cost and burden on taxpayers and the IRS.

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1 IRC § 7502(c)(2). While this provision authorizes the Secretary to extend the mailbox rule for electronic filing, it does not authorize the Secretary to extend the mailbox rule for electronic payments.

2 Treas. Reg. § 301.7502-1(d).

3 *See* Treas. Reg. § 301.7502-1(d)(3)(i) (containing a definition of an electronic return transmitter). *See also* Rev. Proc. 2007-40, 2007-1 C.B. 1488 (providing a list of documents that can be filed electronically with an electronic return transmitter).

Along similar lines, the IRS encourages U.S. taxpayers to make payments electronically using the Treasury Department's Electronic Federal Tax Payment System (EFTPS). However, the EFTPS website displays the following warning: "Payments using this Web site or our voice response system must be scheduled by **8 p.m. ET the day before the due date** to be received timely by the IRS" (emphasis in original).[4] This limitation applies to all payments.

> *Example:* Based on the bolded language on the EFTPS website, if a taxpayer owes a balance due on April 15 and mails the payment to the IRS before midnight on April 15, the payment will be considered timely, even if it takes a week or longer for the IRS to receive, open, and process the check. If the same taxpayer submits the payment using EFTPS, the payment will be considered late if submitted after 8 p.m. on April 14 (28 hours earlier), even though the payment generally would be debited from the taxpayer's account on April 16 – often a week sooner than if submitted by postal mail.

This disparity in the treatment of mailed and electronically submitted payments makes little sense. As compared with a mailed check, an electronic payment is received more quickly, is cheaper to process, and eliminates the risk that a mailed check will be lost or misplaced. Yet, rather than encouraging taxpayers to use EFTPS, an earlier deadline serves as a deterrent.

Despite the bolded warning on the main EFTPS website, the related FAQs describe circumstances in which the IRS will credit both business and individual tax payments on the date the payment is made.[5] For example, the FAQs state that business tax payments of $1 million or less made before 3 p.m. ET on the due date will be considered timely. While 3 p.m. ET on the due date is certainly better than 8 p.m. ET the day before the due date, the parameters detailed in the FAQs do not go far enough. In addition, it is unclear why the Treasury Department chose to bury the more flexible time periods in the FAQs. Given these limitations and the temporary nature of FAQs and website information, the National Taxpayer Advocate recommends that Congress amend the mailbox rule in IRC § 7502 to add permanence and common sense so that taxpayers can rely on the timeliness of electronically submitted payments.

RECOMMENDATION

- Amend IRC § 7502 to direct the Secretary to issue regulations that apply the statutory mailbox rule to all time-sensitive documents and payments electronically submitted to the IRS in a manner comparable to similar documents and payments submitted through the U.S. Postal Service or a designated delivery service.

4 *See* EFTPS, https://www.eftps.gov/eftps (last visited Oct. 27, 2022).
5 EFTPS *Frequently Asked Questions, What if I have to make a payment that is due today?*, https://www.eftps.gov/eftps/direct/FAQGeneral.page (last visited Oct. 27, 2022).

Legislative Recommendation #3

Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers

SUMMARY

- *Problem:* The majority of paid tax return preparers are non-credentialed, and some have no training or experience. Taxpayers are harmed when incompetent tax return preparers make errors that cause them to pay too much tax, deprive them of receiving certain tax benefits, or subject them to IRS tax adjustments and penalties for understating their tax.
- *Solution:* Require paid non-credentialed tax return preparers to pass a basic competency test, meet specified standards of conduct, and take annual continuing education courses about federal tax laws and procedures impacting federal tax return preparation.

PRESENT LAW

Federal law imposes no competency or licensing requirements on paid tax return preparers. Credentialed individuals who may prepare tax returns, including attorneys, certified public accountants (CPAs), and enrolled agents (EAs), are generally required to pass competency tests and take continuing education courses (including an ethics component). Volunteers who prepare tax returns as part of the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs also must pass competency tests. However, the vast majority of paid preparers are non-credentialed and are not required to pass competency tests, take any courses in tax return preparation, or follow prescribed standards of conduct.

REASONS FOR CHANGE

In recent years, the IRS has received over 160 million individual income tax returns annually, and paid tax return preparers prepare the majority of these returns. Both taxpayers and the tax system depend heavily on the ability of preparers to prepare accurate tax returns. Yet numerous studies have found that non-credentialed tax return preparers routinely prepare inaccurate returns, which harms taxpayers and the public fisc.

To protect the public, federal and state laws generally require lawyers, CPAs, doctors, securities dealers, financial planners, actuaries, appraisers, contractors, motor vehicle operators, and even barbers and beauticians to obtain licenses or certifications and, in most cases, to pass competency tests. Taxpayers and the tax system would benefit from requiring tax return preparers to pass minimum competency tests.

The following studies illustrate the extent – and adverse consequences – of inaccurate return preparation by unenrolled tax return preparers:

Government Accountability Office (GAO). In 2006, GAO auditors posing as taxpayers made 19 visits to several national tax return preparation chains in a large metropolitan area. Using two carefully designed fact patterns, they sought assistance in preparing tax returns. On 17 of 19 returns, preparers computed the wrong refund amounts with variations of several thousand dollars. In five cases, the prepared returns reflected unwarranted excess refunds of nearly $2,000. In two cases, the prepared returns would have caused the taxpayer to overpay by more than $1,500 (*e.g.*, by not claiming all deductions or other tax benefits for which the taxpayer qualified). In five out of ten cases in which the Earned Income Tax Credit (EITC) was claimed, preparers failed to ask where the auditor's child lived or ignored the auditor's answer and prepared returns claiming ineligible children. In 10 of 19 cases, business income was not reported.[1]

The GAO conducted a similar study in 2014. It again found that preparers computed the wrong tax liability on 17 of the 19 returns.[2]

Treasury Inspector General for Tax Administration (TIGTA). In 2008, TIGTA auditors posing as taxpayers visited 12 commercial chains and 16 small, independently owned tax return preparation offices in a large metropolitan area. All preparers visited by TIGTA were non-credentialed. Of 28 returns prepared, 61 percent were prepared incorrectly. The average net understatement was $755 per return. Of seven returns involving EITC claims, none of the non-credentialed preparers exercised due diligence as required under IRC § 6695(g).[3]

New York State Department of Taxation and Finance. During 2008 and 2009, agents conducted nearly 200 targeted covert visits in which they posed as taxpayers and sought assistance in preparing income or sales tax returns. In remarks made at an IRS Public Forum, the Acting Commissioner of the New York Department of Taxation and Finance stated that investigators found "an epidemic of unethical and criminal behavior."[4] At one point, the Department reported that it had found fraud on about 40 percent of its visits, and it had made over 20 arrests and secured 13 convictions.[5]

IRS Study on EITC Noncompliance. The IRS conducted a study to estimate compliance with EITC requirements during the 2006-2008 period. Among the findings of the study, unaffiliated unenrolled preparers (*i.e.*, non-credentialed preparers who are not affiliated with a national tax return preparation firm) were responsible for "the highest frequency and percentage of EITC overclaims." The study found that half of the EITC returns prepared by unaffiliated unenrolled preparers contained overclaims, and the overclaims averaged between 33 percent and 40 percent.[6]

In 2002, before these studies were published, the National Taxpayer Advocate recommended that Congress authorize the IRS to conduct preparer oversight. Her proposal received widespread support from stakeholders and members of Congress. The Senate Committee on Finance twice approved legislation authorizing preparer oversight on a bipartisan basis under the leadership of Chairman Grassley and Ranking Member Baucus.[7]

1 GAO, GAO-06-563T, *Paid Tax Return Preparers: In a Limited Study, Chain Preparers Made Serious Errors* (2006).
2 GAO, GAO-14-467T, *Paid Tax Return Preparers: In a Limited Study, Preparers Made Significant Errors* (2014).
3 TIGTA, Ref. No. 2008-40-171, *Most Tax Returns Prepared by a Limited Sample of Unenrolled Preparers Contained Significant Errors* (2008).
4 Jamie Woodward, Acting Commissioner, New York Dept. of Taxation and Finance, Remarks at the IRS Tax Return Preparer Review Public Forum (Sept. 2, 2009).
5 *Id. See also* Tom Herman, *New York Sting Nabs Tax Preparers*, Wall St. J. (Nov. 26, 2008).
6 IRS Pub. 5162, Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns 24–26 (Aug. 2014).
7 Tax Administration Good Government Act, H.R. 1528, 108th Cong. § 141 (2004) (incorporating Tax Administration Good Government Act, S. 882); Telephone Excise Tax Repeal and Taxpayer Protection and Assistance Act of 2006, S. 1321, 109th Cong. § 203 (2006) (incorporating Taxpayer Protection and Assistance Act of 2005, S. 832).

On one occasion, the full Senate approved the legislation by unanimous consent.[8] In 2005, the House Ways and Means Subcommittee on Oversight held a hearing at which representatives of five outside organizations expressed general support for preparer oversight.[9] Several of the same organizations reiterated that support as recently as last year.[10]

In 2009, the Commissioner of Internal Revenue concluded that the IRS had the authority under § 330 of Title 31 of the U.S. Code to regulate tax return preparation as "practice" before the IRS. The IRS initiated extensive hearings and discussions with stakeholder groups to receive comments and develop a system within which all parties believed they could operate.[11] The IRS, together with the Treasury Department, implemented the program in 2011. However, it was terminated two years later after a U.S. district court upheld a challenge to the IRS's authority under 31 U.S.C. § 330 to regulate tax return preparation. The court concluded that "mere" tax return preparation did not constitute "practice" before the IRS.[12]

The IRS subsequently created a voluntary "Annual Filing Season Program." Non-credentialed preparers who participate must meet specific requirements, including taking 18 hours of continuing education each year, which includes an examined tax refresher course. If they meet the requirements, the IRS provides them with a "Record of Completion" that they presumably can use in their marketing to attract potential clients.[13] The D.C. Circuit has upheld the IRS's authority to implement this program.[14] However, the program is less rigorous than the one the IRS implemented in 2011, and most non-credentialed preparers do not participate. This voluntary program does not satisfy the objectives of a comprehensive regime.

Since the 2011 program was invalidated, House and Senate members have introduced legislation to provide the IRS with the statutory authority to establish and enforce minimum standards. In the Senate, Senators Portman and Cardin sponsored bipartisan authorizing legislation in 2018,[15] and Senators Wyden and Cardin sponsored similar legislation in 2019.[16] In the House, Congressman Panetta and Congressman Rice sponsored bipartisan authorizing legislation in 2021.[17] In 2015, former Congresswoman Black and former Congressman Becerra, both members of the Ways and Means Committee, sponsored similar legislation.[18] Consistent with the position of both the Obama and Trump Administrations, the Department of the Treasury included a legislative proposal in its fiscal year 2023 revenue proposals to provide the Secretary with explicit authority to regulate all paid preparers of federal tax returns by establishing mandatory minimum competency standards.[19]

8 Tax Administration Good Government Act, H.R. 1528, 108th Cong. § 141 (2004) (incorporating Tax Administration Good Government Act, S. 882).

9 The organizations were the American Bar Association, the American Institute of Certified Public Accountants, the National Association of Enrolled Agents, the National Society of Accountants, and the National Association of Tax Professionals. *See Fraud in Income Tax Return Preparation: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 109th Cong. (2005).

10 William Hoffman, *Tax Groups and Conservatives Gird for Battle Over Preparer Regs*, Tax Notes Today, (Aug. 2, 2021) (discussion of organizations supporting Taxpayer Protection and Proficiency Act).

11 *See* IRS Pub. 4832, Return Preparer Review (Dec. 2009).

12 *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

13 Rev. Proc. 2014-42, 2014-29 I.R.B. 192.

14 *AICPA v. IRS*, 746 Fed. App'x 1 (D.C. Cir. 2018).

15 Protecting Taxpayers Act, S. 3278, 115th Cong. § 202 (2018).

16 Taxpayer Protection and Preparer Proficiency Act of 2019, S. 1192, 116th Cong. (2019).

17 Taxpayer Protection and Preparer Proficiency Act of 2021, H.R. 4184, 117th Cong. (2021).

18 *See* Tax Return Preparer Competency Act of 2015, H.R. 4141, 114th Cong. § 2 (2015) (Cong. Black) and Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 202 (2015) (Cong. Becerra).

19 Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2023 Revenue Proposals* 83-86 (Mar. 2022), https://home.treasury.gov/system/files/131/General-Explanations-FY2023.pdf.

The IRS's Taxpayer Experience Strategy provides an additional reason for establishing preparer standards.[20] The IRS envisions giving preparers access to taxpayer information through online accounts. While there are considerable benefits to this plan, there are also significant security risks, including identity theft and other fraud. As the examples above demonstrate, the absence of standards for tax return preparers exacerbates unethical behavior, including fraud. These risks would be mitigated by the adoption of minimum standards for tax return preparers.

Some have argued that requiring preparers to pass a competency test and take annual continuing education courses would address competence but would not ensure preparers conduct themselves ethically. The National Taxpayer Advocate agrees that tax law competency and ethical conduct are distinct issues. However, we believe preparer standards would raise both competency and ethical conduct levels. A preparer who invests in learning enough about tax return preparation to pass a competency test and takes annual continuing education courses would demonstrate a commitment to return preparation as a profession. The preparer would be a vested partner in the tax system and would have more to lose if he or she is found to have engaged in misconduct, just like attorneys, CPAs, EAs, and other credentialed preparers. If tax return preparation is characterized as "practice" before the IRS – as the 2011 plan did – the Office of Professional Responsibility would have oversight authority over preparers and could impose sanctions in cases of unethical conduct.

In sum, the GAO, TIGTA, and other compliance studies described above have consistently found that tax returns prepared by non-credentialed preparers are often inaccurate. Minimum standards would directly improve preparer competency levels and are likely to raise ethical norms.

RECOMMENDATION

- Amend Title 31, § 330 of the U.S. Code to authorize the Secretary to establish minimum standards for paid federal tax return preparers.[21]

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20 IRS Pub. 5426, Taxpayer First Act Report to Congress 42-45 (Jan. 2021).

21 For legislative language generally consistent with this recommendation, *see* Taxpayer Protection and Preparer Proficiency Act of 2019, S. 1192 & H.R. 3330, 116th Cong. (2019) and other bills cited herein.

Legislative Recommendation #4

Extend the Time for Small Businesses to Make Subchapter S Elections

SUMMARY

- *Problem:* Individuals who incorporate their sole proprietorships or small businesses often miss the deadline for electing to be treated as an "S" corporation because the election deadline generally precedes the filing deadline for the corporation's first income tax return. Taxpayers routinely obtain permission to make late elections but at considerable cost and hassle for the business and the IRS alike.
- *Solution:* Allow taxpayers to elect "S" status on their first timely filed corporation income tax return.

PRESENT LAW

IRC § 1362(b)(1) provides that a small business corporation (S corporation) may elect to be treated as a passthrough entity by making an election at any time during the preceding taxable year or at any time on or before the 15th day of the third month of the current taxable year. The prescribed form for making this election is Form 2553, Election by a Small Business Corporation.

IRC § 6072(b) provides that income tax returns of S corporations made on a calendar-year basis must be filed on or before March 15 following the close of the calendar year, and income tax returns of S corporations made on a fiscal year basis must be filed on or before the 15th day of the third month following the close of the taxable year.

REASONS FOR CHANGE

Many small business owners are not familiar with the rules governing S corporations, and they learn about the ramifications of S corporation status for the first time when they hire a tax professional to prepare their corporation's income tax return for its first year of operation. By that time, the deadline for electing S corporation status has passed. Failure to make a timely S corporation election can cause significant adverse tax consequences for businesses, such as incurring taxation at the corporate level and rendering shareholders ineligible to deduct operating losses on their individual income tax returns.[1] For context, over five million S corporation returns were filed in fiscal year 2021, which accounted for 71 percent of all corporate returns.

Taxpayers may seek permission from the IRS to make a late S corporation election under Revenue Procedure 2013-30 or through a private letter ruling (PLR) request. Under the revenue procedure, a corporation that failed to timely file Form 2553 may request relief by filing Form 2553 within three years and 75 days of the date the election is intended to be effective. In addition, the corporation must attach a statement explaining its reasonable cause for failing to timely file the election and its diligent actions to correct the mistake upon its discovery.

Finally, all shareholders must sign a statement affirming they have reported their income on all affected returns as if the S corporation election had been timely filed (*i.e.*, during the period between the date the S corporation election would have become effective if timely filed and the date the completed election form is

1 The value of an S corporation election increased for many taxpayers with the passage of the Tax Cuts and Jobs Act, which generally allows individual taxpayers to deduct 20 percent of domestic "qualified business income" (QBI) from a passthrough business, including an S corporation, effectively reducing the individual income tax rate on such income by 20 percent. The deduction is subject to certain income thresholds (first $315,000 of QBI for joint filers and $157,500 for single returns), phase-outs for professional services, and limitations based on W-2 wages paid or capital invested by a business owner for larger pass-through entities. *See* IRC § 199A; Pub. L. No. 115-97, § 11011 (2017); H.R. Rep. No. 115-466, at 205-224 (2017) (Conf. Rep.).

filed). If an entity cannot comply with the revenue procedure, it may request relief through a PLR, for which the IRS charges a user fee ranging from $6,200 to $30,000 per request.[2]

The S corporation election deadline burdens small businesses by requiring them to pay tax professionals and often IRS user fees to request permission to make a late election. It also burdens shareholders because when the IRS rejects an S corporation return due to the absence of a timely election, the status of the corporation is affected, and that may cause changes on the shareholders' personal income tax returns. In addition, the deadline and relief procedures require a commitment of significant resources by the IRS to process late-election requests.

Because small business owners often consider the S corporation election for the first time when they prepare their company's first income tax return, the burdens described above would be substantially eliminated if corporations could make an S corporation election on their first timely filed income tax return.

RECOMMENDATION

- Amend IRC § 1362(b)(1) to allow a small business corporation to elect to be treated as an S corporation by checking a box on its first timely filed Form 1120S, U.S. Income Tax Return for an S Corporation, (including extensions).[3]

2 *See* Rev. Proc. 2020-1, 2020-1 I.R.B. 1. User fees for PLRs are set forth in the first revenue procedure of each year.

3 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 304 (2018).

Legislative Recommendation #5

Adjust Individual Estimated Tax Payment Deadlines to Occur Quarterly

SUMMARY

- *Problem:* Estimated tax installment payments for individual taxpayers are sometimes referred to as "quarterly payments," but they are not due at even three-month intervals. Rather, they are spaced at three-month, two-month, three-month, and four-month intervals (April 15, June 15, September 15, and January 15, respectively). This is confusing to taxpayers and can make it difficult for them to calculate their net income; few businesses keep their books and records based on these uneven cutoff dates.
- *Solution:* Revise the estimated tax payment deadlines so they fall at even quarterly intervals.

PRESENT LAW

Under IRC § 6654(c), individual taxpayers generally are required to make estimated tax payments in four installments due on or before April 15, June 15, September 15, and January 15. Under IRC § 6654(l), the same deadlines generally apply for estates and trusts.[1]

REASONS FOR CHANGE

Although estimated tax installment payments are sometimes referred to as "quarterly payments," they do not align with calendar year quarters, and the payment dates are not evenly spaced. The April 15 and June 15 installments are due two months apart; the June 15 and September 15 installments are due three months apart; the September 15 and January 15 installments are due four months apart; and the January 15 and April 15 installments are due three months apart.

These dates are not intuitive and create compliance burdens. Small business owners and self-employed individuals are particularly affected by the estimated tax rules because their incomes generally are not subject to wage withholding. Yet small businesses are far more likely to keep their books based on regular three-month quarters than based on the seemingly random intervals prescribed by IRC § 6654.

These uneven intervals make it more difficult for many taxpayers to calculate net income and save appropriately to make estimated tax payments and thus may reduce compliance.[2] They also cause confusion, as taxpayers struggle to remember the due dates. This confusion affects both traditionally self-employed workers and workers in the gig economy. Setting due dates to fall 15 days after the end of each calendar quarter would make it substantially easier for taxpayers to remember and comply with the due dates.

1 IRC § 6654(j) requires certain non-resident aliens to make three estimated tax payments, which are due on June 15, September 15, and January 15. The June 15 date coincides with the due date for Form 1040-NR, U.S. Nonresident Alien Income Tax Return, as provided in IRC § 6072(c). If this proposal is adopted, we recommend the second payment deadline be changed from September 15 to October 15 for consistency. IRC § 6655(c) generally requires corporate taxpayers to make estimated tax payments in four installments due on April 15, June 15, September 15, and December 15. Some of the benefits of establishing uniform quarterly estimated payment deadlines apply to corporate taxpayers to the same extent as individuals. However, we have not analyzed the implications of changing the corporate estimated payment deadlines, so this recommendation is limited to the deadline applicable to individual taxpayers.

2 Treasury Inspector General for Tax Administration, Ref. No. 2004-30-040, *While Progress Toward Earlier Intervention With Delinquent Taxpayers Has Been Made, Action Is Needed to Prevent Noncompliance With Estimated Tax Payment Requirements* 12 (2004).

RECOMMENDATION

- Amend IRC § 6654(c)(2) to set the estimated tax installment deadlines 15 days after the end of each calendar quarter (*i.e.*, April 15, July 15, October 15, and January 15).[3]

3 For legislative language generally consistent with this recommendation, see Tax Deadline Uniformity Act of 2020, H.R. 5979, 116th Cong. § 2 (2020). *See also* Tax Deadline Simplification Act, H.R. 4214, 117th Cong. § 2 (2021); Protecting Taxpayers Act, S. 3278, 115th Cong. § 305 (2018); Small Business Owners' Tax Simplification Act of 2017, H.R. 3717, 115th Cong. § 2 (2017).

Legislative Recommendation #6

Eliminate Duplicative Reporting Requirements Imposed by the Bank Secrecy Act and the Foreign Account Tax Compliance Act

SUMMARY

- *Problem:* U.S. taxpayers with foreign accounts and assets currently are subject to two sets of foreign financial asset information reporting requirements – one for the IRS and one for the Financial Crimes Enforcement Network (FinCEN). Much of the information requested by these two Treasury Department bureaus is duplicative, yet affected individuals must complete separate forms for each, and they are subject to significant penalties for failure to report certain accounts or assets on one or both forms, even when little or no tax is owed.
- *Solution:* Reduce taxpayer reporting burden and government costs to process and store the same or similar information twice by eliminating duplicative filing requirements for taxpayers with foreign accounts and assets.

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 each foreign account in which they have a financial interest or over which they have signature or other authority to FinCEN when the combined value of those accounts exceeds $10,000 at any time during the calendar year.[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) 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 certain foreign financial assets exceeding specified thresholds.[2] IRS Form 8938, Statement of Specified Foreign Financial Assets, has been prescribed for complying with this requirement. IRC § 6038D 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.[3] According to a recent Government Accountability Office (GAO) report, "the duplicative reporting of foreign financial asset data on two different forms also creates additional costs to the government to process and store the same or similar information twice, and enforce reporting compliance with both 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, or 8865).[5] The IRS has also provided an exception from the reporting rules for *bona fide* residents of U.S. possessions for certain financial assets held in such possessions.[6]

1 *See* 31 U.S.C. § 5314 and 31 C.F.R. § 1010.306(c).
2 Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97-117 (2010); IRC § 6038D(a) & (b).
3 IRS, Comparison of Form 8938 and FBAR Requirements, https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements (last visited May 18, 2022).
4 GAO, GAO-19-180, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on U.S. Persons Abroad* (2019).
5 Treas. Reg. § 1.6038D-7(a)(1).
6 Treas. Reg. § 1.6038D-7(c).

However, the IRS has not adopted the recommendations of the National Taxpayer Advocate that are also supported by other stakeholders, including the GAO, to substantially reduce duplicative FATCA reporting where assets have been reported on an FBAR.[7] Although FBARs are filed with FinCEN, the IRS has been delegated responsibility from FinCEN to enforce compliance with the FBAR reporting requirements and thus has access to the information on those forms.[8]

We recognize that the FATCA and FBAR statutes serve different purposes and that information collected on foreign financial assets under the two statutes therefore may be inconsistent.[9] For example, foreign hedge funds and foreign private equity funds are specified foreign financial assets reported on Form 8938 but are not reported on an FBAR. Conversely, indirect interests in foreign financial assets through an entity are reported on an FBAR but are not required to be reported on Form 8938. However, we believe two different bureaus within the same cabinet department (Treasury) can and should coordinate the information collected and harmonize the information collection procedures to reduce the compliance burden for taxpayers.

We are also aware of administrative implications for the IRS when working with Title 31 requirements and FinCEN guidance related to the disclosure of FBARs, statutes of limitation, investigations, penalties, collections, and the like that differ from the rules contained in the IRC. However, we believe the reduction of taxpayer burden associated with largely duplicative reporting outweighs the administrative inconvenience for the IRS. We concur with the GAO's assessment that a legislative change to the FBAR and FATCA reporting requirements is necessary to eliminate overlapping reporting requirements and collection of duplicative information while still retaining access to the information both for tax compliance and criminal law enforcement purposes.[10]

Finally, the IRS has not adopted the National Taxpayer Advocate's recommendation to provide a limited exception from FATCA reporting for financial accounts held in the country in which the U.S. taxpayer is a *bona fide* resident.[11] If adopted, these recommendations would reduce compliance burdens for U.S. taxpayers who currently must file additional complex forms themselves or pay higher fees to tax professionals to do it for them, and potentially would reduce the government resources required to process and store the same or similar information twice.

RECOMMENDATIONS

- Amend IRC § 6038D and 31 U.S.C. § 5314 to eliminate duplicative reporting of assets on Form 8938 where a foreign financial account is correctly reported or reflected on an FBAR while ensuring continued IRS access to foreign financial asset data for both tax compliance and financial crime enforcement purposes.

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7 *See, e.g.*, GAO, GAO-12-403, *Reporting Foreign Accounts to the IRS: Extent of Duplication Not Currently Known, But Requirements Can Be Clarified* (2012) (The GAO recommended that Treasury direct the Office of Tax Policy, the IRS, and FinCEN to determine whether the benefits of implementing a less duplicative reporting process exceed the costs and, if so, to implement that process.).

8 The authority to enforce the FBAR reporting requirements has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and the IRS. *See* 31 C.F.R. § 1010.810(g).

9 While FATCA allows the IRS to identify taxable income from foreign sources and is designed to improve the IRS's ability to curb taxpayer noncompliance, the information reported on the FBAR is collected to identify money laundering, financial crimes, and certain tax, regulatory, and counterterrorism issues.

10 GAO, GAO-19-180, *Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on U.S. Persons Abroad* 26 (2019).

11 *See generally* IRC § 911(d)(1)(A); Treas. Reg. § 1.911-2(c).

- Amend IRC § 6038D 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 specified foreign financial assets required to be reported on Form 8938.[12]
- Authorize the Secretary of the Treasury to issue regulations under Titles 26 and 31 to harmonize FBAR and FATCA reporting requirements to eliminate duplication and direct the Secretary to issue such regulations within one calendar year from the effective date of the legislation.

12 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).