

Legislative Recommendation #7

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 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 abroad, face increased compliance burdens and costs because the FATCA reporting obligations significantly overlap with the FBAR filing requirements.³ According to a 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 IRS Form 8938 if the assets are reported or reflected on certain other timely filed international information returns (*e.g.*, IRS 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, § 511(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 Oct. 11, 2023).

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), <https://www.gao.gov/products/gao-19-180>.

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

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.⁸ For example, foreign hedge funds and foreign private equity funds are specified foreign financial assets reported on IRS 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 IRS 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. In fact, 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.⁹

We also recognize the administrative challenges the IRS faces 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 Title 26 (*i.e.*, the tax code). However, we believe the reduction in taxpayer burden associated with substantially eliminating duplicative reporting requirements 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 a 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 could 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 IRS 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.

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.), <https://www.gao.gov/products/gao-12-403>.

8 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 counter-terrorism issues.

9 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).

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), <https://www.gao.gov/products/gao-19-180>.

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 a U.S. person is a *bona fide* resident from the specified foreign financial assets required to be reported on IRS 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).