February 14, 2022

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183

Re: Review of Bank Secrecy Act Regulations and Guidance
Docket No. FINCEN-2021-0008 / 2021-27081

ACA, Inc., a section 501(c)(4) non-profit, non-partisan advocacy organization, is pleased to submit its comments on FinCEN's review of the Bank Secrecy Act Regulations and Guidelines as these affect the community of Americans living and working overseas.

ACA, Inc. has over 40 years' experience in representing the interests of the community of 6 to 9 million Americans residing overseas. ACA is the premier non-political organization representing Americans overseas and the only organization of its kind headquartered in Washington, DC.

The increased interest combating drug dealing, money laundering and terrorist financing has caused Americans overseas, who are using financial and banking services for conducting their normal, everyday financial affairs, both foreign and domestic US, to become caught up to an indefensible degree in a myriad of reporting and regulatory issues. First and foremost are issues falling out from the Foreign Bank Account Report (FBAR) regime (FinCEN-114) and the Patriot Act Customer Identification Program (CIP) ("Know Your Client" regulations).

Foreign Bank Account Report (FBAR)

Since 1970, all Americans holding financial accounts outside of the United States are required annually to submit a Foreign Bank Account Report (FBAR) or, under amended rules, FinCEN Form 114. Although affecting all Americans, this filing has a disproportionate effect on Americans living overseas who by virtue of living outside of the United States, have a majority of their bank and other financial accounts outside the United States, that is, their accounts are considered "offshore" by the US Treasury. In reality, for Americans truly residing overseas, these are not "offshore" holdings but in-country or local accounts. Taxpayers filing FinCEN-114 without the help of a professional return preparer, often believe that the form requires the declaration of accounts, such as, checking and savings accounts. They are often not aware of the extensive breath of accounts that are intended to be declared on an FBAR, including some tax-free pension-related, investment and credit card-related accounts. Even some professional tax preparers are unaware of the extent of what needs to be reported, defaulting to

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recommending that clients "just declare everything."[1] As was demonstrated in the early compliance programs, notably the Overseas Voluntary Disclosure Programs (2014), many taxpayers became aware of the fact that they needed to report their foreign pensions on FinCEN 114 as these pensions were not considered equivalent to a US pension and, therefore, considered a reportable "bank" account. Those individuals, unwilful in their behavior and not engaging in any illicit content, entered into programs intended for individuals actively engaged in tax evasion, only to find themselves subject to severe penalties and fines for simply having mis-understood their filing requirements.

In 2010, Congress passed the Foreign Account Tax Compliance Act (FATCA) adding an additional layer of confusion to the bank reporting required annually by taxpayers. FATCA requires the reporting on IRS Form 8938 of certain financial accounts held offshore or outside of the United States, imposing higher thresholds for reporting for individuals living outside of the US ($200,000 year-end balances for individuals and $400,000 year-end balances for joint filers[2]) than FBAR, which requires the reporting of all accounts, totaling over $10,000. This duplicate reporting of financial accounts creates confusion about which accounts need to be reported on what form. It causes Americans overseas either to over report or under report, resulting in simple filing errors. The penalties, however, associated to these errors are targeted to criminal tax evasion and not simple filing errors. Many cases, it follows, lead to the imposition of penalties that are disproportionate to the errors made.

ACA advocates for the harmonization of these two reporting systems into one form. In absence of harmonization, ACA advocates for increasing the threshold for FBAR reporting, which has never been adjusted for inflation, to mirror the reporting threshold for FATCA reporting – which recognizes a higher threshold for Americans living and working overseas, given that a larger percentage of their financial holdings will be outside of the United States.

ACA also strongly – indeed begs for – some form of a "Same Country Exemption (SCE)" for FATCA reporting, which would remove from reporting the accounts Americans overseas hold in the country of their residency, recognizing that these accounts are not "offshore" for these individuals; rather they are simply their local bank and financial accounts needed for conducting their everyday live.

These recommendations are supported by the National Taxpayer Advocate.

[1] ACA is highly familiar with the population of return preparers specializing in work for Americans abroad. ACA for many years has published an online Expat Tax Service Providers. https://acareturnpreparerdirectory.com/. We have noted that a significant number of tax return preparers only prepare the tax returns and shy away from preparing FBARS. These can entail a great deal of detail and require a disproportionate amount of work which is difficult to charge for.

[2] Single or filing separately from spouse: If you have more than $200,000 at the end of the year or $300,000 at any one time in the year in foreign financial assets, you'll need to submit Form 8938 Married filing jointly: If you are filing jointly with your spouse and have more than $400,000 by the last day of the year or more than $600,000 at any one time during the year, you'll need to submit Form 8938. This applies even if only one of the spouses lives abroad.

ACA also supports the National Taxpayer Advocate's recommendation for modifying the definition of willful for purposes of determining FBAR violations and reduced maximum penalty amounts. Criteria used to determine "willful" behavior in determining those taxpayers eligible to enter into the Streamlined Filing Compliance Procedures should be transparent. This procedure, developed in response to the lack of a compliance program for individuals who were not willful in their failure to report FBARs or to include all accounts on an FBAR, gives the IRS wide discretion in determining an individual's behavior as willful or non-willful. This policy does more to turn individuals away from entering into compliance than actually encouraging them to come forward and "catch up".

The National Taxpayer Advocate and others have cited that in many cases the harshness of the maximum penalty for willful is disproportionate to the actual reporting failure. With such discretion between determining willful and non-willful behavior, it can be difficult for taxpayers to establish that a violation was not willful. If the goal of the Streamlined Filing Compliance Procedure is to encourage taxpayers to "get right with the system" and ensure continued tax compliance, taxpayers need the assurance their actions will be fairly judged. ARC20_PurpleBook_04_ReformPenInts_35.pdf (irs.gov)

Lastly, ACA recommends that FinCEN conduct a special training for return preparers and others servicing Americans abroad. They should be given the opportunity to educate themselves as to all the detailed rules. And they might also be required to state, as to each client, whether they have advised the client on FBAR reporting requirements. If they have not, this might be treated as a failure to meet their obligations.

Patriot Act Customer Identification Program (CIP)

In 2001, Congress passed the Patriot Act mandating that banks and financial institutions implement a Customer Identification Program (CIP) to insure against terrorist financing, money laundering and drug dealing. The Patriot Act puts forth recommendations for financial institutions to consider when evaluating clients through CIP with their "Know Your Client" guidelines. These guidelines have often been used by US-based banks and financial institutions (brokage houses,investment companies) to deny services to Americans living and working overseas because of their lack of US residential address. Although each private institution is free to determine their own regulations for assessing clients, the guidelines give banks and financial institutions recommendations as to what they should consider when developing their criteria and making their client determinations.

ACA advocates for FinCEN to take into consideration the need for Americans living overseas to maintain US-based financial accounts and adapt its CIP "Know Your Client" guidelines to

reflect this. Many Americans living overseas still maintain brokage accounts, private pensions, IRAs, 401s in the United States even though they live and work overseas. All Americans paying taxes and receiving tax refunds need a US-based bank account to make and receive tax payments and refunds. Many retired Americans living overseas want their Social Security benefits paid to them in a US-based bank. Some Americans still have family or business needs that require them to manage and pay bills in the United States. For these reasons and others, Americans overseas should not be locked out of US banking needs and FinCEN should provide financial institutions with recommendation on how they can screen American overseas clients to ensure that they can maintain US-based financial accounts.

While we recognize that tax legislation is not within the jurisdiction of FinCEN, ACA supports the adoption of Residence-Based Taxation (RBT) which would alleviate many of these issues. [Current ACA Advocacy for Tax Reform and How You Can Help | Washington, DC | (americansabroad.org)]

Thank you for your attention to this important subject.

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