

**Recommendations for Published Guidance under IRC §§ 6038D
and 1471: Eliminate Duplicative Reporting of Assets on the FATCA
Form 8938 if the Asset is Reported or Reflected on the FBAR (FinCEN
Report 114) and Exclude Financial Accounts Maintained by a Financial
Institution in the Country of Which the U.S. Person is a Bona Fide
Resident from FATCA Reporting**

Recommendations

Amend Temporary Regulation § 1.6038D-7T(a) to eliminate duplicative reporting of assets on Form 8938 if the asset is reported or reflected on a timely-filed FinCEN Report 114;

Amend Treasury Regulation § 1.1471-5(b)(2) to specifically exclude from the definition of financial account subject to reporting by foreign financial institutions 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; and

Amend Temporary Regulation § 1.6038D-7T to exclude from the specified foreign financial assets required to be reported on the Form 8938 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.

Reasons for Change

For several years, the National Taxpayer Advocate and other stakeholders have expressed concerns about the overlap and duplicative disclosure requirements of the FinCEN Report 114, Report of Foreign Bank and Financial Accounts (FBAR), and the Form 8938, Statement of Specified Foreign Financial Assets, which must be filed with annual federal income tax returns.¹ The FinCEN Report 114 and the Form 8938 are significantly duplicative, which, increases confusion and adds to the compliance burden for taxpayers.²

Organizations representing U.S. taxpayers abroad and the press have voiced concerns about unintended consequences of new FATCA rules for foreign financial institutions, which make it harder for U.S. taxpayers living abroad to open and maintain legitimate bank accounts overseas.³ Some foreign financial institutions (FFIs), such as DeutscheBank, HSBC, and ING have reportedly been closing out foreign accounts of U.S. citizens in response to FATCA.⁴ During recent meetings with TAS, organizations of U.S. citizens abroad reiterated their concerns and proposed several changes to IRS regulations.⁵

IRC § 1471(1) defines the term "United States account" and provides for the elimination of duplicative reporting requirements.⁶ More specifically, the term "United States account" excludes financial accounts in foreign financial institutions if the holder of such account is otherwise subject to information reporting requirements which the IRS determines would make the reporting with respect to these accounts duplicative.⁷ Treasury Regulation § 1.1471-5(b)(2) provides specific exceptions to the definition of financial account subject to reporting by foreign financial institutions. Currently, the regulation does not provide an exception for 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.

Temporary Regulation under IRC § 6038D eliminates duplicative reporting of assets on the Form 8938 if the asset is reported or reflected on certain other timely-filed international information returns (e.g., Forms 3520, 3520A, 5471, 8621, 8865, or 8891), provided the Form 8938 indicates the filing of the form on which the asset is reported.⁸ However, FinCEN Report 114 (FBAR) is not included on the list of those information returns.

Temporary Regulation § 1.6038D-7T(c) provides that a bona fide resident of a U.S. possession who is required to file Form 8938 is not required to report financial accounts maintained by a financial institution organized under the laws of the U.S. possession of which the specified individual is a bona fide resident.⁹ The temporary regulation currently does not have a similar exception for U.S. persons who are bona fide residents of foreign countries.

The IRS can significantly alleviate reporting burden for U.S. persons who are bona fide residents in foreign countries and facilitate their legitimate need for local banking services in their countries of residence by revising regulations under IRC §§ 6038D and 1471 to eliminate the requirement to report specified foreign financial assets on the Form 8938 if such persons timely report the assets on the FinCEN Report 114 (FBAR), and to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. persons are bona fide residents from FATCA reporting.¹⁰ Proposed regulatory changes will not inhibit the IRS's ability to obtain information about financial accounts maintained by foreign financial institutions outside of the U.S. person's country of bona fide residency.

FOOTNOTES

1 National Taxpayer Advocate 2013 Annual Report to Congress 238-248; National Taxpayer Advocate Fiscal Year 2013 Objectives Report to Congress 23; National Taxpayer Advocate 2012 Annual Report to Congress 134, 141; National Taxpayer Advocate 2011 Annual Report to Congress 129-272; Government Accountability Office, GAO-12-403; Reporting Foreign Accounts to IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified, App. 2 (Feb. 2012)

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

3 IRC §§ 1471-1474. See, e.g., American Citizens Abroad (ACA) Comments on the Proposed Treasury Regulations Concerning FATCA Dated February 8, 2012 (Apr. 4, 2012), at <http://www.aca.ch/acastatementapril2012s.pdf> (last visited Apr. 19, 2012); April Carvelli, Taxes Pushing U.S. Citizens to Renounce, Imperfect Parent (Apr. 17, 2012) (quoting Francisca N. Mordi, Vice President and Senior Tax Counsel at the American Bankers Association, who stated she received a number of calls from Americans in Europe complaining about banks closing their accounts. "They're going to drop Americans like hot potatoes," Mordi says. "The foreign banks are upset enough about the regulations that they're saying they just won't keep American customers, and it's giving (Americans living abroad) a lot of sleepless nights."), at http://www.imperfectparent.com/topics/2012/04/17/taxes_pushing-u-s-citizens-to-renounce/ (last visited Apr. 19, 2012); James Fellows, The FATCA Chronicles: Tales From China, Canada, and Estonia, The Atlantic (Jan 3, 2012), at <http://www.theatlantic.com/international/archive/2012/01/the-fatca-chronicles-tales-from-china-canada-and-estonia/250771/> (last visited Apr. 19, 2012); Judi Lembke, Americans in Sweden Suffer U.S. Tax Crackdown, The Local (Sweden's News in English) (Mar. 6, 2012), at <http://www.thelocal.se/39522/20120306/> (last visited Apr. 18, 2012).

4 Rowan Morrison, When Banks Pay the Price, Editions Financial (Aug. 30, 2012), available at <http://www.editionsfinancial.co.uk/2012/08/30/when-banks-pay-the-price/>. See also Sofia Yan, Banks Lock out Americans Over New Tax Law, CNN Money (Sept. 15, 2013), available at <http://money.cnn.com/2013/09/15/news/banks-americans-lockout/>; Simon Bradley, U.S. Expats Feel the Burden of FATCA (May 28, 2013), available at http://www.swissinfo.ch/eng/politics/US_expats_feel_the_burden_of_FATCA.html?cid=35932576; Tom Geoghegan, Why Are Americans Giving up Their Citizenship?, BBC News Mag. (Sept. 26, 2013), available at <http://www.bbc.co.uk/news/magazine-24135021>; Katie Holliday, HSBC Cuts Ties with US Clients Ahead of FATCA, Investment Week (July 21, 2011), available at <http://www.investmentweek.co.uk/investment-week/news/2095508/hsbc-cuts-ties-clients-ahead-fatca>.

5 As stated by representatives of organizations of U.S. citizens abroad, accounts opened by U.S. citizens in a foreign country of bona fide residence are not "offshore" accounts designed for tax avoidance. These bona fide residents have a legitimate need for local banking services in their countries of residence. Only accounts in a country other than one's country of residence should be subject to information reporting. TAS meeting with representatives of the Association of Americans Resident Overseas and the Federation of American Women's Clubs Overseas (Mar. 24, 2014), TAS meeting with Democrats Abroad Task Force on FATCA (Mar. 4, 2014)

7 IRC § 1471(1)(C)(ii).

8 See Temp Reg. § 1.6038D-7T(a)

9 Id.

10 To qualify for foreign earned income exclusion and foreign housing exclusion or deduction, a US citizen or resident alien (for tax purposes) must have a tax home in a foreign country, and either be a bona fide resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year (bona fide residence test), or be present in a foreign country or countries during at least 330 full days in any period of 12 consecutive months (physical presence test) IRC § 911(d)(2)