Response to FinCEN Notice and Request for Comments
Docket No. FINCEN-2023-0008 / OMB Control No. 1506-0009

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

September 4, 2023

I am a citizen of the United States of America, duly registered to vote in the 3rd Congressional District of Pennsylvania. I live in Japan, where I moved in May 2001, immediately after graduating from college. While I am proud to be an American and enjoy visiting the United States once a year to see family and friends, I have made my life in Japan and this is my permanent home, where I have lived for my entire adult life.

Since my employment income is generated in Japan and denominated in Yen, as are all of my living expenses, I need to organize my financial and retirement planning in Japan. However, the extraterritorial application of U.S. laws, especially tax-related laws, presents numerous issues when saving and planning for retirement, including many examples of unnecessary reporting complexity. There are complex disclosures required for all types of non-U.S. financial products. These things aren't "foreign" to me. They are necessities to protect my family and responsibly prepare for retirement. The equivalent financial products in the U.S. are not subject to these requirements. U.S. domestic investment products are easy to report to the IRS. Those of us living abroad are punished by tax and financial reporting rules which don't fit our financial lives.

Since the passage of the Currency and Foreign Transactions Reporting Act (more commonly known as the Bank Secrecy Act) in 1970, U.S. citizens living abroad have increasingly become caught up in ongoing efforts against tax evasion and malicious actors. While battling money laundering and terrorist financing should remain critical priorities, substantial adjustments to FinCEN Form 114, the Report of Foreign Bank and Financial Accounts or "FBAR," are needed to ensure that the impact to ordinary law-abiding citizens is proportional to the financial law enforcement benefits.

I do not live "offshore." I do live in Japan, where I am responsible for paying tax on my worldwide income at rates of up to 55%. Yet, because I am a U.S. citizen, I am subject to the U.S. extraterritorial tax regime, which includes a myriad of associated information reporting requirements. This compliance burden (both on me and on the financial institutions with which I want to do business) make it burdensome for me to save, invest, protect myself with insurance, participate in pension plans and generally behave in a financially responsible way. This is because all of these essential activities are taking place in my country of residence and not in the United States. My financial accounts may be foreign to the United States, but they are local to me.

The FBAR is one example of a duplicative, burdensome and confusing information report, which no longer seems to serve a meaningful purpose given the availability to the Treasury Department of similar information from multiple other sources. **FBAR information collection from U.S. citizens who reside outside the United States is an undue burden** for the following reasons:

- Awareness of the FBAR filing requirement is low among ordinary middle-class citizens who reside outside the United States. Filing follows a multi-step online process that is completely separate from tax return preparation and filing, and many professional tax preparers do not routinely ask questions that would identify whether an individual has a filing requirement.
- The filing requirements and definitions are difficult to understand. Every year I print out the instructions and highlight the relevant passages, but it is difficult to determine whether reporting of certain account types (such as non-U.S. pensions, prepaid transit cards, or cashless payment apps) is required or not. Professional tax preparers are often hesitant to offer advice on these questions, other than to say that conservatism is prudent given the extraordinarily high penalties for compliance failures, even if non-willful.
- Filing thresholds have not been revised in over 50 years and are inordinately low. Once an individual has triggered the filing requirement as a result of having aggregate financial assets greater than $10,000, then all non-U.S. financial accounts must be declared, with no de minimis exemption. For instance, even dormant accounts with zero balances must be reported.
- FBAR filings are largely duplicative with the information collected on IRS information returns such as Form 8938 ("Statement of Foreign Financial Assets"), Form 8621 ("Information Return by a Shareholder of a Passive Foreign Investment

Company or Qualified Electing Fund"), and Form 3520A ("Annual Information Return of Foreign Trust with a U.S. Owner").

- In addition to the duplicative information reporting required of individuals, FATCA requires foreign financial institutions to file Form 8966 disclosing balances and income associated with accounts owned by U.S. citizens.
- Finally, FBAR's requirement for information on accounts for which the U.S. citizen does not have a beneficial interest but only signature authority is also a major cause of misunderstanding and unintentional compliance failures. It also leads overseas corporations to remove U.S. citizens from positions of authority over financial matters, limiting the career opportunities for those impacted.

If all of the 9 million U.S. citizens who reside outside the United States actually complied fully with the FBAR filing requirements, FinCEN would be inundated with an overload of useless information about the everyday financial activities of ordinary people. This would not support FinCEN's mission of combatting money laundering, but rather drown out the indicia of risk in a tidal wave of unnecessary information.

The Government Accountability Office ("GAO") has called attention to the overlap and redundancy of information being fed to Treasury, and called for consolidation and simplification to relieve the burden on Americans abroad.[1] In addition, the "challenges" identified by the GAO in 2018 with "...complying with US tax reporting requirements on their foreign retirement savings"[2] can be very onerous, often requiring expensive professional assistance, which further induces fear of punitive sanctions and stresses caused by forcing unwilling non-US spouses and business associates into US reporting further discourage compliance.

In conformity with Paperwork Reduction Act requirements, FinCEN has invited comments on whether the FBAR form is fit for purpose. According to 44 USC 3508, "before approving a proposed collection of information, the Director shall determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility…. To the extent, if

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[1] Foreign Asset Reporting, Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on U.S. Persona Abroad, [GAO-19-180], April 2019

[2] Workplace Retirement Accounts: Better Guidance and Information Could help Plan Participants at Home and Abroad Manage Their Retirement Savings, [GAO-18-19], January 2018, "Highlights"

any, that the Director determines that the collection of information by an agency is unnecessary for any reason, the agency may not engage in the collection of information."

"Practical utility" can be measured by reviewing FinCEN's data reporting, consultation of those reports, investigations launched and successful resolutions or prosecutions of anti-money laundering/counter-terrorist financing (AML/CTF). Research conducted by the Association of Americans Resident Overseas found no data to demonstrate that data from FBAR filings is actually being leveraged in a meaningful way.

- The 266 pages of the 2016 FATF report, "Anti-money laundering and counter-terrorist financing measures United States," showcase the methods and results of AML and CTF activities. FBAR is mentioned just 8 times, but only as a part of lists, except for giving the average number of filings in 2012-2014.
- Of the average 18.4 million reports FINCEN received annually (2012-2014), 95% were about active movement of money, such as SARs and CTRs. The remaining 5% were passive "reports": FBARs which simply state that accounts exist. No enforcement actions have been reported as having resulted from FBAR filings.
- FinCEN's fiscal year 2020 Congressional Budget Justification and Annual Performance Report and Plan does not even mention FBAR. It states there were about 12,000 BSA database users (of 20.4 million reports) in FY 2019 and that they were satisfied with their use for detecting illicit activity, but no statistics show the number or percentage of FBAR filings consulted or instances in which an FBAR was the source motivating an investigation, let alone the discovery and prosecution of AML or CTF activities.

Without evidence of serving any purpose for combatting money laundering and terrorist financing activities, administering the FBAR regime is consuming resources which could be deployed to other activities, and has not shown the practical utility that is required to justify its continuation.

Even absent the legal requirements of 44 USC 3508 to cease information collection, under 31 USC 5314(b), the Secretary can prescribe:

- to which countries FBAR should apply
- a "reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section"
- "the magnitude of transactions subject to a requirement or a regulation"
- "the kind of transaction subject to or exempt from a requirement or a regulation"

- "other matters the Secretary considers necessary"

These available authorities should be used to relieve this redundant burden on both Americans abroad and on FinCEN itself. **The Treasury Department should modify the regulations in 31 CFR § 1010.350** to help FinCEN achieve proportionality while simultaneously providing relief for non-resident citizens and improving FBAR's effectiveness as a law enforcement tool.

Currently, FBAR reporting is **redundant, disproportionate to risk, and fails to take into account the necessity for non-resident citizens to hold foreign bank accounts** in order to responsibly manage their financial affairs. At the same time, enforcement efforts are generally disproportionate, with FinCEN and the IRS exercising little discretion and often pursuing statutory-maximum penalties even for infractions deemed non-willful. This results in highly regressive penalties that disproportionately harm the middle and working class.

Thank you for this opportunity to provide commentary and recommendations. In addition to these general comments, the annex below addresses the specific questions posed in FinCEN's notice and request for comments on the proposed renewal, without change, of FinCEN Form 114. The reform proposals outlined herein are intended to reduce paperwork burdens for both the public and FinCEN, align reporting to accounts that are large enough to pose a substantial risk relating to financial crimes, and to ensure that enforcement serves a public benefit.

Annex: Responses to Specific Requests for Comments

(i) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility:

The FBAR has become obsolete, and substantial adjustments are needed to ensure that the impact on ordinary law-abiding citizens is proportional to the law enforcement benefits.

At the time of its introduction in the 1970s, automatic reporting was not yet a concept, nor was international tax cooperation in the advanced state that exists today. Due to the introduction of other overlapping data reporting mechanisms, similar information is now available to the Treasury Department from multiple other sources.

The practical utility of FBAR reporting is limited for four key reasons:

1. It is disproportionately filled with information concerning low-value accounts because reporting thresholds have not been indexed to inflation – what was once a sum of money that was atypical to have in bank accounts is now reasonably commonplace, and current regulations fail to distinguish between accounts *substantially contributing to the reporting threshold* and accounts that are *de-minimis*.
2. FBAR filings are largely duplicative with the information collected on IRS information returns such as Form 8938 ("Statement of Foreign Financial Assets"), Form 8621 ("Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund"), and Form 3520A ("Annual Information Return of Foreign Trust with a U.S. Owner").
3. In addition to the duplicative information reporting required of individuals, FATCA requires foreign financial institutions to file Form 8966 disclosing balances and income associated with accounts owned by U.S. citizens.
4. The FBAR regulations and guidance as a whole do not promote risk-based safeguards, and arguably do not fulfill their original purpose. The root of the problem is the failure to distinguish between <u>non-resident</u> U.S. Citizens whose non-U.S. banking activity is normal due to living overseas, and <u>resident</u> U.S. Citizens whose non-U.S. banking may be cause for additional scrutiny.

FBAR reporting is redundant, disproportionate to risk, and fails to take into account the necessity of holding foreign bank accounts when residing outside of the United States. Without evidence of serving any purpose for combatting money laundering and terrorist financing activities, **administering the FBAR regime is consuming resources that could be deployed to other activities and has not shown the practical utility that is required to justify its continuation**.

The statutory authority for the FBAR filing requirement is found in 31 U.S. Code § 5314(a) and begins with the statement: "**Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency**, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency."

Under 31 US Code § 5314(b), the Secretary can prescribe:

- to which countries FBAR should apply
- a "reasonable classification of persons subject to or exempt from a requirement under this section or a regulation under this section"
- "the magnitude of transactions subject to a requirement or a regulation"
- "the kind of transaction subject to or exempt from a requirement or a regulation"
- "other matters the Secretary considers necessary"

These available authorities should be used to relieve this redundant burden on both Americans abroad and on FinCEN itself. **The Treasury Department should modify the regulations in 31 CFR § 1010.350** to help FinCEN achieve proportionality while simultaneously providing relief for non-resident citizens and improving FBAR's effectiveness as a law enforcement tool.

Recommendation #1: Eliminate the FBAR filing requirement for non-resident U.S. citizens altogether, or exclude reporting requirements for accounts held by individuals in their country of residence.

Given Form 8966 reporting by foreign financial institutions, it is not clear why individual filings are required at all. The Government Accountability Office (GOA) has also called

attention to the overlap and redundancy of information being fed to the Treasury and called for consolidation and simplification to relieve the burden on Americans abroad.[3] Similarly, the IRS National Taxpayer Advocate has called for the consolidation of FBAR and IRS Form 8938 (with data sharing between IRS and FinCEN as necessary) for multiple years.[4][5][6][7]

Recommendation #2: Adjust FBAR reporting thresholds to $70,000, which accounts for inflation in the 50 years since FBAR's introduction, followed by annual inflation adjustments thereafter.

Recommendation #3: Customize thresholds to take into account "geographic risk." The motivations and justifications for holding non-U.S. accounts differ greatly between resident and non-resident U.S. citizens. If the reporting requirement for non-resident citizens is continued, then the reporting threshold for non-residents should be raised to $400,000 (consistent with IRS Form 8938).

Recommendation #4: Exclude accounts under a de minimis threshold, even when the reporting obligations are triggered based on aggregate foreign bank account balances.

Recommendation #5: For non-residents, exclude accounts where a U.S. Person only has signatory authority on the account but no beneficial interest. The current requirement for information on accounts for which the U.S. citizen does not have a beneficial interest but only signature authority is also a major cause of misunderstanding and unintentional compliance failures. It also leads overseas corporations to remove U.S. citizens from positions of authority over financial matters, limiting the career opportunities for those impacted.

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[3] Foreign Asset Reporting, Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on U.S. Persona Abroad, [GAO-19-180], April 2019

[4] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_PurpleBook_02_ImproveFiling_8.pdf

[5] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook_02_ImproveFiling_9.pdf

[6] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_PurpleBook_02_ImproveFiling_8.pdf

[7] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_PurpleBook.pdf, Recommendation #12

(ii) the accuracy of the agency's estimate of the burden of the collection of information:

The agency's estimation of the information collection burden fails to consider the broad range of account types which may be covered by the FBAR reporting requirement.

- The filing requirements and definitions are difficult to understand. For an ordinary individual reading the instructions provided with the form, it is difficult to determine whether reporting of certain account types (such as non-U.S. pensions, prepaid transit cards, or cashless payment apps) is required or not. Professional tax preparers are often hesitant to offer advice on these questions, other than to say that conservatism is prudent given the extraordinarily high penalties for compliance failures, even if non-willful.
- Gathering information on the cash value of insurance policies, the highest annual balance of a pension plan, or the estimated balance of a pre-paid transit card is often time-consuming if even possible.
- Determining the maximum account balance during the year may in some cases be substantially more burdensome than simply reporting the balance shown on the most recent statement. For individual taxpayers, the agency should consider adding more flexibility about which balance may be reported.

In my personal experience, gathering the information required to be reported on the FBAR form requires a higher level of attention than a typical consumer pays to his financial accounts. I have to diligently download and file statements related to accounts that I would otherwise infrequently refer to such as pension or retirement accounts. Finding the maximum balance then requires opening each file and checking the balance reported for each statement period. I have to physically travel to the branches of two of my banks to update passbooks for savings accounts that are largely dormant. One of these bank accounts is located 500 miles away from my primary residence because it is used to make utility payments for a rural cottage. I have to call my life insurance provider and ask for a quote on the cash value of my life policy, because documentation is not otherwise available. Finally, it takes time to carefully type in the foreign address and account number related to each financial account. All of this consumes well more than the 55 minutes you have estimated as the time burden for completing FBAR reporting.

(iii) ways to enhance the quality, utility, and clarity of the information to be collected:

As explained in the response to question (i) above, Treasury should modify FBAR reporting criteria and thresholds to take a more risk-based approach and reduce "noise" in the reported data.

Recommendation #1: Eliminate the FBAR filing requirement for non-resident U.S. citizens altogether, or exclude reporting requirements for accounts held by individuals in their country of residence. Take into account, inter alia, that no similar reporting obligation is currently imposed on US-resident US taxpayers with respect to accounts held within the US).

Recommendation #2: Adjust FBAR reporting thresholds to $70,000, which accounts for inflation in the 50 years since FBAR's introduction, followed by annual inflation adjustments thereafter. $10,000 in a bank account is not what it was in the 1970s, nor will our suggested $70,000 reporting threshold remain relevant without an annual inflation adjustment on a forward-looking basis. Also note that currency exchange rate fluctuations can also have a substantial impact on reportable balances, which should be taken into account.

Recommendation #3: Customize thresholds to take into account "geographic risk." The motivations and justifications for holding non-U.S. accounts differ greatly between resident and non-resident U.S. citizens. If the reporting requirement for non-resident citizens is continued, then the reporting threshold for non-residents should be raised to $400,000 (consistent with IRS Form 8938). Furthermore, customized thresholds should be applied to certain types of highly regulated accounts such as retirement accounts. These accounts are almost always non-portable and cannot be "onshored" to the United States, even if someone returns to the United States and is physically resident there.

Recommendation #4: Exclude accounts under a de minimis threshold, even when the reporting obligations are triggered based on aggregate foreign bank account balances.

(iv) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology:

As stated in the general feedback and responses to other questions above, the present reporting rules for FBAR result in inefficient resource allocation and are generally not risk-aware. Automatic exchange of information under FATCA renders self-reporting redundant and obsolete. Where possible, FATCA IGA reporting should be leveraged to avoid unnecessary self-reporting.

(v) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information:

No comment.