DEMOCRATS ABROAD

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

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Submitted online

Democrats Abroad is pleased to respond to FinCEN's request for comments on the proposed renewal, without change, of FinCEN Form 114, the Report of Foreign Bank and Financial Accounts ("FBAR"). Our general comments as well as responses to your specific questions are based on the experiences of our 200,000 members.

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

The FBAR is duplicative, burdensome, and confusing. Given the availability to the Treasury Department of similar information from multiple other sources, it no longer serves a meaningful purpose. **FBAR information collection from U.S. citizens who reside outside the United States is an undue burden** because:

- Among ordinary middle-class citizens who reside outside the United States, awareness of the FBAR filing requirement is low. While some information about tax obligations and FATCA is available on Embassy or Consulate websites, there is nothing to raise awareness about FBAR. 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. 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 – given the extraordinarily high penalties for compliance failures, even if non-willful – conservatism is prudent.
- 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 largely duplicate 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 duplicate information 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 a major cause of misunderstanding and unintentional compliance failures. It also leads non-U.S. corporations to remove U.S. citizens from positions of authority over financial matters, limiting their career opportunities.

The Government Accountability Office (GAO) has 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.[1] Our proposals for reform are intended to help FinCEN achieve proportionality, 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 improve FBAR's effectiveness as a law enforcement tool.

We advocate:

1. **Eliminating the FBAR filing requirement for non-resident U.S. citizens altogether, or excluding 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.
    - At a minimum, the two individual bank-account filing requirements (FBAR and Form 8938) should be consolidated and data shared between IRS and FinCEN as necessary. This has been a recurring point of feedback from the IRS National Taxpayer Advocate for many years.[2] [3] [4] [5]
2. **Adjusting FBAR reporting thresholds** to $80,000 – which accounts for inflation in the 50 years since FBAR's introduction-- to be followed thereafter by annual inflation adjustments.
3. **Customizing thresholds to take into account "geographic risk."** The motivations and justifications for holding non-U.S. accounts differ greatly between U.S. citizens residing in the country and those living abroad. Americans abroad need a local bank account in order to receive salary and make payments for local bills, rent, mortgage payments, etc. If the reporting requirement for non-resident citizens continues, then the reporting threshold for non-residents should be raised to $400,000 (consistent with IRS Form 8938) and adjusted for inflation going forward.
4. **Improving the proportionality of enforcement/penalties for FBAR violations and clearly defining willful vs. non-willful recommendations**. Again this has long been a point of feedback from the IRS National Taxpayer Advocate.[6]
5. **Restoring paper FBAR filings and improving e-filing options to allow popular tax-filing software to include FBAR e-filing.** We have received reports from seniors living abroad who struggle to file

[1] https://www.gao.gov/products/gao-19-180
[2] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2022/01/ARC21_PurpleBook_02_ImproveFiling_8.pdf
[3] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook_02_ImproveFiling_9.pdf
[4] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_PurpleBook_02_ImproveFiling_8.pdf
[5] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_PurpleBook.pdf, Recommendation #12
[6] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook_04_ReformPenInts_35.pdf

the FBAR, given there is no paper-file option and it has to be e-filed. Many are forced to pay an accountant to file the FBAR for them, and in some cases we've heard of accountants charging $100 per account, imposing an enormous burden on our most vulnerable citizens.[7]

6. **Excluding accounts under a de minimis threshold**, even when the reporting obligations are triggered based on aggregate foreign bank account balances.
7. **For non-resident U.S. citizens, excluding accounts where they only have signatory authority on the account but no beneficial interest**. This will ensure that Americans abroad are not excluded from work or community opportunities that may require being added as a signatory.

To summarize, FBAR reporting is currently **redundant, disproportionate to risk, and fails to take into account the necessity of holding foreign bank accounts when residing outside of the United States.** At the same time, enforcement efforts are generally disproportionate, with FinCEN exercising little discretion and often pursuing statutory-maximum penalties even for infractions deemed non-willful. This results in highly regressive penalties that disproportionately impact middle- and working-class Americans living abroad.

Thank you for the opportunity to comment and provide recommendations. We encourage you to read our responses to specific questions in the annex included with our letter.

Sincerely,

Martha McDevitt-Pugh
International Chair
Democrats Abroad
chair@democratsabroad.org

Rebecca Lammers
Chair, Taxation Task Force
Democrats Abroad
rebecca_lammers@democratsabroad.org

[7] https://assets.nationbuilder.com/democratsabroad/pages/31033/attachments/original/1669430637/Democrats_Abroad_2022_Update_on_Tax_and_Financial_Access_Issues_of_Americans_Abroad.pdf?1669430637 Pg. 13-14

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:

In 2023, the FBAR has become obsolete. 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, there was limited international tax cooperation, and automated reporting was not yet under consideration. Due to the introduction of overlapping data-reporting mechanisms, similar information is now available to the Treasury Department from 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. Further, current regulations fail to distinguish between accounts *substantially contributing to the reporting threshold* and accounts that are *de-minimis*.
2. FBAR reports largely duplicate 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 (“FATCA IGA Reporting”) disclosing balances and income associated with accounts owned by U.S. citizens.
4. FBAR regulations and guidance as a whole do not promote risk-based safeguards, and do not fulfill their original purpose because they fail to distinguish between non-resident U.S. Citizens, whose non-U.S. banking is normal due to living abroad, and resident U.S. Citizens, whose non-U.S. banking should be subject to additional scrutiny.

FBAR reporting is thus redundant, disproportionate to risk, and fails to take into account the necessity of holding foreign bank accounts when residing outside the United States. Without evidence of serving any purpose for combatting money laundering or financing terrorist activities, **administering FBAR consumes time and resources that could be deployed to other activities, and has not shown the practical utility 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 U.S. Code § 5314(b), the Secretary can however 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;" and
- "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.

The Government Accountability Office (GOA) has also called attention to the overlap and redundancy of data transfer to Treasury and called for consolidation and simplification to relieve the burden on Americans abroad.[8] Similarly, the IRS National Taxpayer Advocate has long called for consolidation of FBAR and IRS Form 8938, with data sharing between IRS and FinCEN as necessary.[9] [10] [11] [12]

If the Treasury were to eliminate either FBAR or Form 8938 reporting, it should eliminate FBAR, as it cannot be e-Filed like IRS forms can. Furthermore, public awareness of FBAR is generally lower than awareness of annual tax-filing obligations. Where possible, FATCA IGA Reporting should be leveraged to avoid unnecessary self-reporting.

Recommendation #2: Adjust FBAR reporting thresholds to $80,000, 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. Americans abroad need a local bank account in order to receive salary and make payments for local bills, rent, mortgage payments, etc. whereas Americans resident inside the U.S. do not have this need. If the reporting requirement for non-resident citizens continues, then the reporting threshold for non-residents should be raised to $400,000 (consistent with IRS Form 8938) and adjusted for inflation going forward.

Recommendation #6: Exclude accounts under a de minimis threshold, even when the reporting obligations are triggered based on aggregate foreign-bank-account balances.

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[8] https://www.gao.gov/products/gao-19-180

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

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

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

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

Recommendation #7: 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 another major cause of misunderstanding and unintentional compliance failures. This requirement also leads overseas corporations to remove U.S. citizens from positions of authority over financial matters, limiting their career opportunities.

(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.

- 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, FinCEN should consider adding more flexibility about which balance may be reported.

- Finally, elimination of the paper-filing option for FBAR has increased the burden on some taxpayers, such as the elderly or those without stable Internet connections. FBAR filing follows a multi-step online process that is completely separate from tax-return preparation and filing, adding to the time burden.

Recommendation #5: Restore paper FBAR filings and improve e-filing options to allow popular tax-filing software to include FBAR e-filing.

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

As explained in our response to item (i) above, Treasury should modify FBAR-reporting criteria and thresholds to take a more risk-based approach and to 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 U.S.-resident U.S. taxpayers with respect to accounts held within the U.S.

Recommendation #2: Adjust FBAR reporting thresholds to $80,000, which accounts for inflation in the 50 years since FBAR's introduction, followed by annual inflation adjustments. $10,000 in a bank account is not what it was in the 1970s, nor will our suggested $80,000 reporting threshold remain relevant without continuing inflation adjustments. 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) and adjusted for inflation going forward. 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 #6: 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 our general feedback and in our responses to other questions, 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.

Recommendation #5: Restore paper FBAR filings, and improve e-filing options to allow popular tax-filing software to include FBAR.
Lack of clarity around reporting obligations, and severe penalties, result in this being a form commonly outsourced to professional tax preparers. This is, in many ways, a $150 "tax" on working- and middle-class Americans who are uncomfortable preparing and submitting a simple form because it is backed by draconian penalties.

Recommendation #4: Improve the proportionality of enforcement/penalties for FBAR violations and clearly define willful vs. non-willful violations. This has also been a point of feedback from the IRS National Taxpayer Advocate.[13]

We advise FinCEN to exercise extreme caution with its use of technology to improve efficiency in processing reports. Use of such systems may be appropriate in highlighting reports to audit, but we advocate for humans to make the ultimate decision to assess penalties. Technology provides a means to assess information, but such assessments are fallible and should not be regarded as evidence on their own.

[13] https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook_04_ReformPenInts_35.pdf

Many of our members have witnessed a growing number of international scandals centered around the use of software intended to improve enforcement efficiency, but with unacceptably high false-positive rates and inadequate opportunities for manual review or redress. Some of these scandals have been included in U.S. Congressional testimony as examples of what *not* to do.

Two of the most prominent examples are the Dutch *Toeslagenaffaire* ("Child Benefits Affair") and the United Kingdom's "Horizon" Post-Office Scandal. The fallout of the Child Benefits Affair resulted in the resignation of the entire Dutch government cabinet,[14] and the U.K. Horizon Scandal is publicly documented to have resulted in suicides by the unjustly accused[15] as well as jail sentences for the innocent.[16]

United States tax and financial regulations are *highly* extraterritorial in nature, and possibly conflict with foreign laws and due process protections. Given that the European Union's General Data Protection Regulation (GDPR) has specific and additional safeguards that apply in any sort of automated decision making, we urge extreme caution.

Automated enforcement efforts may introduce valid appeals to legal compatibility, rights, and due process with regards to countries that assist the U.S. Due to recent missteps, many E.U. courts have taken dim views towards algorithmic tax/law enforcement.

We urge FinCEN to be mindful of E.U. court rulings (*Schrems, Schrems II)* that conclude that the United States has inadequate due process protections and oversight. It is reasonable to question whether "algorithmically assessed FBAR penalties" would be specifically excluded from mutual collection assistance.

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

The present FBAR filing system is a barrier to technological compliance approaches, requiring specific proprietary software (Adobe Acrobat) and offering zero possibility to integrate into existing e-filing workflows common in the tax preparation space. Modern e-filing should permit common tax-preparation software suites to prepare and file FBAR reports, ideally via APIs that avoid the need for human reading or transcription.

[14] https://www.theguardian.com/world/2021/jan/15/dutch-government-resigns-over-child-benefits-scandal
[15] https://www.independent.co.uk/voices/post-office-scandal-high-court-ruling-subpostmaster-a9253236.html
[16] https://www.theverge.com/2021/4/23/22399721/uk-post-office-software-bug-criminal-convictions-overturned