

October 9, 2023

**Comment to FinCEN on a renewal, without change, of existing information collection requirements concerning reports of foreign financial accounts and FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).**

**Docket No. FinCEN-2023-0008**  
**OMB control number 1506–0009**

In conformity with Paperwork Reduction Act requirements, FinCEN has invited comment on a renewal, without change, of existing information collection requirements concerning reports of foreign financial accounts and FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).

This comment is by the Association of Americans Resident Overseas (AARO), founded in 1973 to assist American citizens abroad with their rights and obligations vis-a-vis the United States. AARO is a registered non-profit association under French law with members in over 36 countries.

AARO will respond in this letter to the first item for which comment is invited, namely “*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.*”

AARO responds in the negative. The collection of FBARs is not necessary for the proper performance of the functions of the agency. Nor does it have “practical utility” as neither reports that form the database and analysis nor consultation of those reports make any material contribution to FinCEN’s performance.

AARO submits the following reasons why FBAR information collection is unnecessary:

1. As a GAO Report published in 2019<sup>1</sup> (GAO Report) has pointed out, the FBAR is redundant given the passage and implementation of the Foreign Account Tax Compliance Act (FATCA). Foreign financial accounts held by U.S. persons are now subject to three separate, but overlapping, reporting requirements: Form 8938, filed by taxpayers; Form

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<sup>1</sup> Foreign Asset Reporting: Actions Needed to Enhance Compliance Efforts, Eliminate Overlapping Requirements, and Mitigate Burdens on U.S. Persons Abroad, [GAO-19-180].

Dear OMB Staff,

The filing is wrong when it states “The information required to be reported on the FBAR is basic information U.S. persons will have received on account statements from the foreign financial institutions where the accounts are opened and maintained. Those statements will provide a U.S. person with the information needed to complete and file the FBAR.” No foreign or domestic financial institution provides the highest value account balance over the course of a year as a matter of practice. The result is the need to calculate this independently by keeping constant track of the fluctuating value of an account in question which is massively time intensive given the likelihood that money is frequently coming into and exiting the same account on a fairly regularly basis I.e. as a pay check is received, rent paid, etc. This time burden may only be 5 minutes a day, but assuming records must be kept once a week, 5 minutes \* 52 weeks immediately raises the reporting burden to 260 minutes.

This is just one example of the insufficient evidence which supports the FinCEN estimated average reporting burden per FBAR filer of 55 minutes. It is interesting to note that IRS Form 8938 which ostensibly collects the same information, has an estimate average reporting burden of 4 hours and 43 minutes (Figure taken from 86 FR 47741, *Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Form 8938, Statement of Specified Foreign Financial Assets.*). Additionally, the same Federal Register Notice has and estimated 350,000 responses.

Additionally, the FINCEN estimated number of respondents is cited as the total number of FBARs filed in the previous year (1,503,807). There is no documentation supporting that this is a realistic number for the number of expected FBAR filings.

A more reasonable number of the expected filers can be calculated as follows: In 2018 the US government Accountability Office report "Workplace Retirement Accounts" included estimates of U.S. citizens abroad by geographic region, as of April 21, 2015, arriving at an estimated total of 8,739,688 Americans residing abroad. Furthermore, the Federal Voting Assistance Program in 2018 estimates 60% of those living abroad are over age 18 (<https://www.fvap.gov/info/interactive-data-center/overseas>). Assuming that those under age 18 do not have over \$10,000 USD in assets and are thus not required to file an FBAR and using the figure from the Government Accountability Office report, it is possible to estimate that there are 5,243,813 Americans over the age of 18 living abroad. This is significantly more than the FinCEN proposed figure and while it is fair to assume that not all individuals have an account which exceeds \$10,000 USD, even assuming that half of them do means that there is significant underreporting. This is likely due to 30% of Americans living abroad unaware of their FBAR reporting requirement (<https://www.aaro.org/issues/2020-advocacy-survey>, note, the 30% figure is likely an overestimate as it comes from an organization which is made up of individuals who are involved in the issues of Americans living abroad). Alternatively, it could be due to willful non reporting out of fear of penalties which the IRS National Taxpayer Advocate has emphasized are extreme and applied harshly and without recourse to their willful or non-willful nature.

These discrepancies raise questions about the nature of FINCEN's figures, their accuracy, sourcing, and ultimately result in the overall effectiveness of the department to properly do its job if it cannot accurately estimate and deliver on the tasks it is attempting to complete. This is consistent with the need for OMB to disapprove FINCEN's application for a “Renewal Without Change of Reports of Foreign Financial Accounts Regulations and FinCEN Form 114, Report of Foreign Bank and Financial Accounts.”

Instead, I echo others in the below points and call for the FBAR system to be adjusted as the following recommendations make clear. Doing so will deliver a more modern system, one which is better positioned to accomplish FINCEN's stated mission to “safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.” and allow limited staff time and resources to be

devoted to the actual illicit use, instead of sweeping up every day Americans who are long term resident abroad and rely on their “foreign” bank accounts to pay rent, receive a paycheck, and pay for groceries.

8966, filed by foreign financial institutions who host the accounts; and FBARs. FBARs add little to the others.

2. On the basis of the GAO Report (see Table 8), the FBAR overlap with Form 8938 requirements for U.S. residents is around 62%. The only additional information that the remaining 38% of FBARs generate relates to accounts that have been deemed to be too small to merit reporting under FATCA. FinCEN can perform its functions without these.
3. For Americans resident overseas the FBAR regime is especially poorly targeted. The failure to index the \$10,000 FBAR threshold for almost 50 years has reduced that threshold to a minor portion of most families' assets. As a result, reporting appears to be dominated by everyday checking accounts, retail savings accounts and middle-class savings vehicles (such as life insurance). These have little to do with FinCEN's performance of its mandated duties. Duplication with (FATCA) Form 8938 reporting may be less than for U.S. residents since higher Form 8938 thresholds (\$200,000 for a single taxpayer) reflect the reality that local financial accounts where people live are the necessary norm. But significant additional duplication with (FATCA) Form 8966 reporting (by foreign banks) is likely to remain since the higher Form 8938 thresholds for non-residents do not apply to Form 8966.

AARO submits the following reasons why FBAR information collection, especially from Americans resident abroad, has no practical utility.

1. We are not aware of any contribution FBARs make either to countering financial crime or to supporting FinCEN's alignment of its activities with the Treasury's new objectives in its Strategic Plan for FY 2022-2026.
2. The main evidence that FBARs make no contribution to FinCEN's work is that FinCEN itself seems to attach little or no importance to them. Arguably, the two most important vehicles for FinCEN to set out its priorities, objectives, methods and achievements are (1) the major (266 page) *Mutual Evaluation Review* undertaken in 2016, with FinCEN's active participation, by the Financial Action Task Force (FATF Review)<sup>2</sup>; and (2) its annual *Congressional Budget Justification and Annual Performance Plan and Report* (Budget Justification). Anything important will receive high-profile attention in both of these documents. FBARs are notable for the minimal attention they receive in these documents.

(a) The FATF Review, carried out by specialists from other Task Force member governments and reviewed by the Task Force, showcases the methods and evaluates the policies and performance of U.S. AML/CFT activities. It also calls attention to weaknesses. FBARs did not merit any mention in discussion of

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<sup>2</sup> Financial Action Task Force, "Anti-money laundering and counter-terrorist financing measures – United States", *Fourth Round Mutual Evaluation Report*, 2016, FATF, Paris.

substance, appearing only occasionally as part of lists and in a table reporting the full list of Bank Secrecy Act (BSA) reports received by FinCEN during 2012-14.

- (b) The great bulk of BSA reports, nearly 95% of the 26.9 million received in 2022, relate to actions involving financial movements, mainly currency transaction reports (CTRs) and suspicious activity reports (SARs). The FATF Review's discussion of important intelligence sources focuses heavily on these, especially SARs. Of all the BSA reports that FinCEN collects, only FBARs are passive ones that do not relate to actions but simply state that accounts existed at some unknown date. The FATF Review cites no reported FinCEN actions, such as investigation launches or prosecutions, that were motivated or assisted by FBAR filings.
- (c) The recent (2020) 3<sup>rd</sup> Enhanced Follow-up Report<sup>3</sup> (Follow-up Report) focused on whether progress had been made with addressing some technical compliance deficiencies identified in the FATF Review (without addressing any issues of effectiveness). It also reviewed U.S. implementation of new FATF recommendations. Issues relating to scope for sharing information contained in BSA reports warranted some discussion in the Follow-up Report,<sup>4</sup> but only SARs received any explicit attention. FBARs were not mentioned.
- (d) The FATF's Budget Justification is FinCEN's own exposition of its priorities and methods. We can find no mention of FBARs in the Budget Justification for the past three years. It is clear that CTRs, which constitute the great bulk of BSA filings, are important. And the Budget Justification regularly highlights SAR filings (nearly triple the number of FBARs in 2022) as well as annual surveys of 13,000+ BSA database users that report high levels of satisfaction with their use for detecting illicit activity. But no information is provided about frequency or usefulness of FBAR consultations, instances when FBAR filings motivated further investigation or contributions to discovery or prosecution of money laundering or financing of terrorism.

In summary, following the implementation of FATCA, FBARs have outlived any usefulness they might have had. Awareness of the FBAR and the obligation to file is low, leading to poor compliance<sup>5</sup>. Given the overlap and duplication of reporting requirements, FBARs add little to what FATCA reporting (Forms 8938 and 8966) provides beyond some everyday checking and

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<sup>3</sup> Financial Action Task Force, "Anti-money laundering and counter-terrorist financing measures – United States", *3<sup>rd</sup> Enhanced Follow-up Report and Technical Compliance Re-Rating*, 2020 FATF, Paris.

<sup>4</sup> Follow-up Report, page 7.

<sup>5</sup> Although FBARs do not derive from the tax code and are not part of returns, courts have ruled that a tick-the-box question at the end of Schedule B, which a small number of filers (13.2% of the total in 2020) attach to their tax returns, constitutes sufficient warning of FBAR requirements.

savings accounts too small to reach FATCA reporting thresholds. This is particularly the case for Americans resident abroad.

In addition, penalties levied for reporting failures or oversights have too often been grossly disproportionate.

All of this calls for simplification and consolidation of reporting requirements.<sup>6</sup> Given increased demands on FinCEN resources, notably associated with the Corporate Transparency Act, collecting and managing a data base of FBARs are distractions. Without evidence of serving its AML and CTF purposes, FBARs have not shown the required practical utility that would justify its continuation. They should be eliminated.

Thank you for offering us this opportunity to make our views known. We remain at your disposal.

The Association of Americans Resident Overseas

Doris L. Speer  
President

Paul Atkinson  
Chairman, Banking Committee

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<sup>6</sup> See, for example, the GAO Report, *supra*, and the National Taxpayer Advocate's "2022 Purple Book," Legislative Recommendation #8.