

MSP
#23**REPORTING REQUIREMENTS: The Foreign Account Tax Compliance Act Has the Potential to be Burdensome, Overly Broad, and Detrimental to Taxpayer Rights****RESPONSIBLE OFFICIALS**

John Koskinen, Commissioner of Internal Revenue
 Heather C. Maloy, Commissioner, Large Business and International Division
 Karen Schiller, Commissioner, Small Business/Self-Employed Division
 Debra Holland, Commissioner, Wage and Investment Division
 William J. Wilkins, Chief Counsel

DEFINITION OF PROBLEM

Congress has long been concerned that U.S. taxpayers are not fully disclosing the extent of financial assets held abroad.¹ In 2010, Congress passed the Foreign Account Tax Compliance Act (FATCA) to address this issue.² FATCA imposes extensive reporting obligations on U.S. taxpayers, foreign entities, and withholding agents.³ Sanctions for FATCA noncompliance are so severe that failure to undertake the requisite reporting and disclosure can conceivably result in penalties in excess of the unreported foreign assets.⁴

The reporting obligations and potential penalties FATCA implements are, according to some expatriates and practitioners, responsible for the surge in the number of Americans renouncing their citizenship or permanent resident status.⁵ Moreover, 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's "onerous U.S. Regulations."⁶ Some stakeholders and commentators have questioned, from both a financial and tax policy perspective, whether the benefits of FATCA, including the additional tax

- 1 Some international tax policy experts believe that tax revenue losses are in the billions of dollars annually. Government Accountability Office (GAO), GAO-12-403, *Reporting Foreign Accounts to IRS: Extent of Duplication Not Currently Known, but Requirements can be Clarified*, App. 2 (Feb. 2012). A relatively recent response to this concern was passage of the Bank Secrecy Act, which requires U.S. citizens and residents to report foreign accounts on the FinCEN Report 114, *Report of Foreign Bank and Financial Accounts* ("FBAR"). See 31 U.S.C. § 5314(a).
- 2 Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat 71 (2010) (adding Internal Revenue Code (IRC) §§ 1471-1474; 6038D).
- 3 For example, U.S. citizens, resident aliens, and certain non-resident aliens must file a Form 8938, *Statement of Specified Foreign Financial Assets*, with their annual federal income tax returns, reporting foreign assets exceeding certain thresholds. IRC § 6038(D)(a); Treas. Reg. § 1.6038D-2T(a). Reporting by certain domestic entities of interests in specified foreign financial assets will be required after the IRS issues final regulations under IRC § 6038D. IRC § 6038D(f); Prop. Reg. § 1.6038D-6; Notice 2013-10, 2013-8 I.R.B. 503. An individual may also have to file the FBAR and separate penalties may apply for failure to file each form.
- 4 IRC § 6038D(d); IRC § 6662(j). Any associated FBAR penalties would be in addition to these penalties imposed by the FATCA regime.
- 5 See 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>. More renunciations have occurred in 2013 than in any other year on record. See Laura Sanders, *More U.S. Taxpayers Renounce Citizenship*, Wall St. J., Nov. 14, 2013, at C3; 78 Fed. Reg. 68151, 2013-27072.
- 6 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*, CNNMoney (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>.

revenue it is estimated to raise, are sufficient to justify the compliance burdens and economic hardships to which it subjects individuals and business entities.⁷

The ultimate undertaking of FATCA will be an international financial data regime with global information transparency.⁸ Questions remain, however, about whether such a course is advisable, whether the information being compiled is necessary and will be effectively utilized, and whether the due process rights of taxpayers will be preserved.

To date, the IRS has provided guidance on, and implemented some key components of the administratively challenging FATCA regime. The law is still in its relative infancy, however, and the IRS should proceed with great care as it moves forward with FATCA implementation. The National Taxpayer Advocate cautions the IRS to gather only the information that it will actually use, to learn from its experiences with the Offshore Voluntary Disclosure programs to more effectively preserve the due process rights of taxpayers, and to burden impacted parties as little as possible.⁹ Specifically, the National Taxpayer Advocate is concerned that:

- Reasonable cause relief or other leniency procedures for FATCA non-filers are not yet fully developed enough to favorably distinguish benign actors from bad actors, and to make penalty abatements or similar relief consistently available to good faith taxpayers.
- Absent a timely and effective mechanism for addressing inaccurate information reporting, taxpayers could face adverse consequences as a result of lax due diligence on the part of FFIs in the collection and transmission of accountholder data.
- The IRS has been slow in acting upon recommendations it has received from some well-informed stakeholders, including the Electronic Tax Administration Advisory Committee (ETAAC), the Government Accountability Office, and the National Taxpayer Advocate.

ANALYSIS OF PROBLEM

Background

Under FATCA, U.S. citizens, resident aliens, and certain non-resident aliens have expanded disclosure obligations and increased penalty exposures.

Two of FATCA's distinguishing characteristics are the vast quantity of taxpayer information it compiles and the potentially punitive measures it brings to bear in furtherance of its goal. U.S. citizens, resident aliens, and certain non-resident aliens must file a Form 8938 with their individual returns, reporting foreign assets exceeding specified thresholds.¹⁰ American Citizens Abroad, a group speaking for non-resident

⁷ Frederic Alain Behrens, *Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand*, 2013 Wis. L. Rev. 205 (2013); David Jolly & Brian Knowlton, *Law to Find Tax Evaders Denounced*, NY Times, Dec. 26, 2011, at B1. See also Joint Comm. on Taxation (JCT), JCX-5-10, *JCT Estimates Budget Effect of HIRE Act* (Feb. 23, 2010).

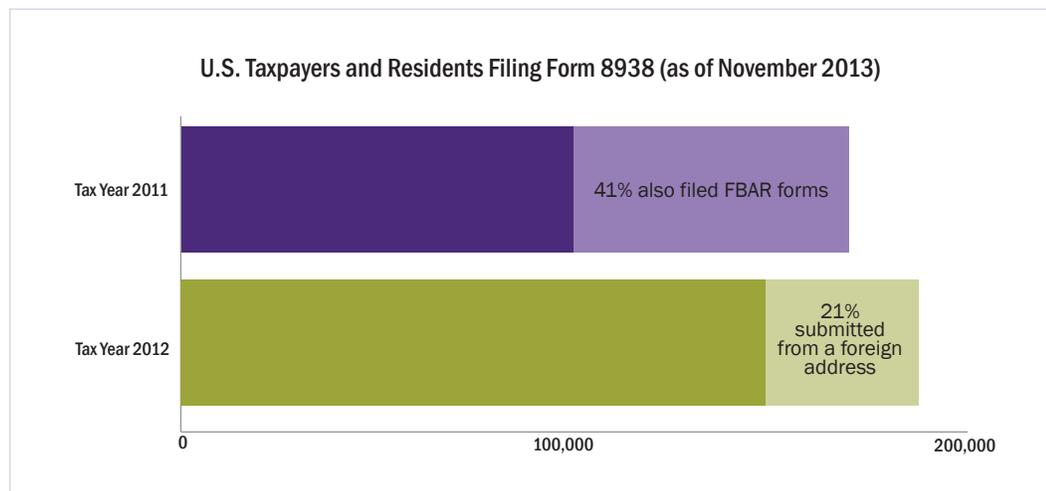
⁸ J. Richard Harvey, *Report from the Front Lines*, Tax Notes Today, 2012 TNT 151-9 (Aug. 6, 2012).

⁹ See, e.g., National Taxpayer Advocate 2012 Annual Report to Congress 134-153 (Most Serious Problem: *The IRS's Offshore Voluntary Disclosure Programs Discourage Voluntary Compliance by Those Who Inadvertently Failed to Report Foreign Accounts*).

¹⁰ Treas. Reg. § 1.6038D-2T(a). An unmarried taxpayer living in the U.S. must file a Form 8938 if the total value of the taxpayer's specified foreign financial assets is more than \$50,000 on the last day of the tax year or more than \$75,000 at any time during the tax year. This threshold is doubled in the case of specified individuals who are married filing jointly. A qualifying unmarried taxpayer living abroad must file a Form 8938 if the total value of the taxpayer's specified foreign financial assets is more than \$200,000 on the last day of the tax year or more than \$300,000 at any time during the tax year. This threshold is doubled as well in the case of qualified individuals living abroad who are married filing jointly. *Id.*

U.S. taxpayers, estimates that completing the form will add an extra three hours to the tax preparation activities of its members.¹¹ Expatriates further complain that the additional complexity of the reporting obligations often requires professional assistance, which only adds to their compliance costs, even when they ultimately owe no additional U.S. tax.¹²

U.S. taxpayers and residents meeting the specified criteria have been required to file Forms 8938 with their annual income tax returns for their 2011 and 2012 taxable years. As of November 2013, approximately 170,000 taxpayers had filed Forms 8938 for Tax Year (TY) 2011, while about 187,000 had filed for TY 2012.¹³ Roughly twenty-one percent of TY 2012 Form 8938 returns were submitted to the IRS from a foreign address.¹⁴ Of the taxpayers filing Forms 8938 in TY 2011, approximately 41 percent also filed FBAR forms.¹⁵



Taxpayers who filed TY 2012 Forms 8938 were compliant overall, with virtually no returns showing Tax Delinquent Investigation (TDI) or Tax Delinquent Account (TDA) activity.¹⁶ Analysis of the Form 8938 filer pool indicates Tax Delinquent Account activity on only one-half of one percent of those taxpayers' TY 2012 returns as opposed to TDA activity of approximately four percent for the overall universe of taxpayers for that tax year.¹⁷

Although a complete and reliable profile of Form 8938 filers has yet to fully emerge, this preliminary data suggests that those taxpayers who are following the FATCA filing requirements are generally compliant

11 David Jolly & Brian Knowlton, *Law to Find Tax Evaders Denounced*, NY Times, Dec. 26, 2011, at B1.

12 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>.

13 TAS Research, Compliance Data Warehouse, IRFT Entity and IRTF F1040 tables, data drawn Nov. 6, 2013. These numbers may change as more Tax Year 2012 returns filter in to the IRS.

14 Large Business & International Division (LB&I), International Business Compliance (IBC), and International Data Management (IDM) response to TAS research request (Nov. 1, 2013).

15 *Id.*

16 TAS Research, Compliance Data Warehouse, IRFT Entity table, data drawn Nov. 6, 2013. Virtually 100 percent of the population was in filing compliance according to repeater switch numbers on the CDW IRTF Entity table, and 99.5 percent were in payment compliance using the CDW IRTF Entity Open TDA Code.

17 TAS Research, Compliance Data Warehouse, IRFT Entity table, data drawn Nov. 6, 2013.

with respect to their overall tax obligations. Thus, to this point, the IRS is imposing additional reporting burdens and increased potential penalties primarily on a category of taxpayers that, under principles of quality tax administration, should be encouraged, rather than penalized.

Failure to timely file Form 8938 can result in a \$10,000 penalty for failure to disclose, plus additional penalties escalating as high as another \$50,000, if such nondisclosure continues after notification from the IRS.¹⁸ Thus, a taxpayer with a \$51,000 asset falling within the FATCA regime who does not receive or respond to an IRS notice that a Form 8938 must be filed is potentially subject to \$60,000 of non-disclosure penalties with respect to the \$51,000 asset. The severity of this regime is difficult to reconcile with the IRS principle that “Penalties should ... be objectively proportioned to the offense.”¹⁹ Moreover, a failure to file, or even an omission of information on Form 8938, could, as a preliminary matter, cause the statute of limitations to remain open with respect to the Form 8938 and any related tax liability.²⁰ Despite the severity and impact of the penalty, the IRS has no mechanism for identifying the non-filing of Forms 8938, save for when the omission is uncovered as part of a standard, non-FATCA audit.²¹

In addition to the FATCA non-disclosure penalty, a taxpayer with an “undisclosed foreign financial asset understatement” may be liable for an accuracy penalty of 40 percent of the understatement of income occurring on the tax return itself.²² Such sanctions would be in addition to any penalties arising under the FBAR regime of Title 31.²³ Given the large penalties for errors put forth by FATCA, taxpayers and their representatives have expressed concern for the “vast swath of the normally law-abiding filer community unable to afford the expensive services of a professional tax adviser.”²⁴

The FATCA reporting regime places significant burdens on FFIs and withholding agents.

Beyond the substantial risks and burdens facing taxpayers, another important aspect of FATCA is its approach to gathering information to validate and enforce the reporting of offshore income. Unless a foreign financial institution agrees to provide comprehensive information with respect to U.S. account holders, except for individuals with depository accounts having an aggregate value of \$50,000 or less, either as a participating FFI or pursuant to an intergovernmental agreement negotiated between the U.S. and the FFI's home country, a broad range of U.S.-source payments to the FFI will be subject to a 30 percent withholding tax.²⁵

18 IRC §§ 6038D(d)(1) and (d)(2). The two penalties contemplated by IRC § 6038D(d) can potentially aggregate to \$60,000. These penalties are subject to abatement under IRC § 6038D(g) if the failure to file is “shown to be due to reasonable cause and not due to willful neglect.” This determination will be made on a case-by-case basis taking into account all pertinent facts and circumstances. See Treas. Reg. § 1.6038D-8T(e).

19 Internal Revenue Manual (IRM) 20.1.1.2.1 (Nov. 25, 2011).

20 IRC § 6501(c)(8)(A).

21 LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013).

22 IRC § 6662(j) defines an “undisclosed foreign financial asset understatement” as “the portion of the understatement for such taxable year which is attributable to any transaction involving an undisclosed foreign financial asset.” The generation of taxable income from a foreign account to which IRC § 6038D would apply is considered to represent a “transaction” for purposes of the 40 percent understatement penalty. See JCT, JCX-4-10, *JCT Estimates Budget Effect of HIRE Act* 63, 64 (Feb. 23, 2010). Thus, the IRC § 6662(j) penalty is triggered by an understatement of income on the return associated with the non-reporting of a foreign asset, whereas the IRC § 6038D penalty arises solely on account of non-disclosure of the foreign asset, regardless of whether or not the asset generates taxable income during the year.

23 GAO, GAO-12-403, *Reporting Foreign Accounts to IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified*, App. 2 (Feb. 2012). See also National Taxpayer Advocate 2012 Annual Report to Congress 134, 141 (Most Serious Problem: *The IRS's Offshore Voluntary Disclosure Programs Discourage Voluntary Compliance by Those Who Inadvertently Failed to Report Foreign Accounts*).

24 David Jolly & Brian Knowlton, *Law to Find Tax Evaders Denounced*, NY Times, Dec. 26, 2011, at B1. See also 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>.

25 IRC § 1471(a); IRC § 1473(1).

FATCA imposes extensive reporting obligations on U.S. taxpayers, foreign entities, and withholding agents.

Beginning after June 30, 2014, FATCA will charge withholding agents with the responsibility of determining whether they are obliged to undertake FATCA withholding, and of implementing that withholding whenever it is required.²⁶ This endeavor represents a large undertaking, both in terms of time and resources, the difficulty of which has been compounded by IRS delays in issuing regulations and finalizing forms.²⁷ FATCA compliance requires the development of substantial new systems and processes on the part of most withholding agents.²⁸ If a withholding agent fails to undertake the required withholding, the agent is personally liable for the uncollected funds.²⁹ On the other hand, if withholding agents unreasonably over-withhold, they are subject to claims from their counterparties.³⁰

Starting in January 2014, FFIs will be expected to finalize their registration information with the IRS through a dedicated online IRS portal.³¹ As the IRS finalizes and approves registrations, it will issue FFIs a global intermediary identification number (GIIN).³² The IRS will electronically post the first FFI list in June 2014, and update it monthly. Review of this list will allow withholding agents to determine whether or not to withhold on payments made to FFIs.

Registered FFIs will be required to file information reports on their U.S. account holders beginning with respect to accounts held during the 2014 calendar year.³³ This reporting will be due no later than March 31 of the following year, and will typically occur through an electronic Form 8966, *FATCA Report*.³⁴ The primary identification mechanism of U.S. account holders on the Form 8966 will be taxpayers' Social Security numbers or tax identification numbers.³⁵ Taxpayers without such identifying numbers will generally be treated as recalcitrant account holders and will be subject to withholding undertaken by the FFI.³⁶

26 Notice 2013-43, 2013-31 I.R.B. 113.

27 Payson Peabody, *SIFMA, Comments on the Final FATCA Regulations* (June 21, 2013), at p. 2, available at <http://www.sifma.org/comment-letters/2013/sifma-submits-comments-to-the-us-department-of-treasury-and-the-irs-on-final-fatca-regulations/>.

28 Payson Peabody, *SIFMA, Comments on the Proposed FATCA Regulations* (Apr. 30, 2012), available at <http://www.sifma.org/issues/item.aspx?id=8589938585>.

29 IRC § 1474(a).

30 Payson Peabody, *SIFMA, Comments on the Final FATCA Regulations* (June 21, 2013), at p. 2, available at <http://www.sifma.org/comment-letters/2013/sifma-submits-comments-to-the-us-department-of-treasury-and-the-irs-on-final-fatca-regulations/>; Treas. Reg. § 1.1474-1(f).

31 Notice 2013-43, 2013-31 I.R.B. 113.

32 *Id.* The GIIN will be used by the IRS in the application of FATCA as a global identifier of registered FFIs, and will also be used by withholding agents to validate the FATCA compliance of FFIs.

33 Notice 2013-43, 2013-31 I.R.B. 113. Given current uncertainties created by IRS delays in the issuance of guidance and final forms, however, a number of banking and financial industry associations have requested an extension in the milestone dates for implementing FATCA. See Payson Peabody, *SIFMA et al., Letter to Treasury and IRS, Request for Additional Extension of the FATCA, Phased Timeline* (Nov. 18, 2013), available at <http://www.sifma.org/issues/item.aspx?id=8589946219>.

34 Notice 2013-43, 2013-31 I.R.B. 113

35 Both the paper and the electronic versions of the Form 8966 will specify applicable conventions for providing the name of the account holder. As in the case of Chapter 3 reporting, however, the name field will be subordinate to the SSN/TIN field for purposes of data collection and manipulation under FATCA. LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013).

36 LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013); see also Treas. Reg. § 1.1471-4.

Given the delays and other shortcomings associated with the IRS Individual Taxpayer Identification Number (ITIN) application procedures, some account holders, despite their best efforts, could find themselves subject to withholding as they experience the long wait for ITINs to be issued.³⁷

The approach adopted by FATCA could be a highly effective means of obtaining the desired information, but, in addition to objections based on resource burdens, it has given rise to discussions of sovereignty issues, as well as concerns regarding economic repercussions. For example, Murray Rankin, the Canadian equivalent of a “Shadow Minister” for National Revenue, recently reiterated his party’s concerns regarding FATCA:

New Democrats are concerned with the prospect of a foreign nation unilaterally imposing obligations on Canadian banks to disclose personal information. The Canadian Government has a responsibility to protect Canada’s tax base, and while we understand the United States’ desire to protect their own tax base, this should not come at the cost of the rights of individuals residing in our own country. Cracking down on tax cheats should occur through international cooperation rather than unilateral action.³⁸

By most measures, FATCA-related costs equal or exceed projected FATCA revenue.

The Congressional Joint Committee on Taxation estimates FATCA will generate additional tax revenue of approximately \$8.7 billion over the next ten years.³⁹ By way of comparison, industry sources believe that overall private sector implementation costs could equal or exceed the amount that FATCA is projected to raise.⁴⁰ The IRS costs associated with long-term development and implementation of the FATCA regime have not been systematically quantified.⁴¹ Similarly, the compliance costs and penalty exposure burdens on individual taxpayers are difficult to estimate, while, in addition to the compliance costs, business entities face possible application of the 30 percent withholding tax against non-compliant FFIs and potential liability against agents who do not undertake proper withholding.⁴²

37 For more detailed information, see Most Serious Problem: *ITINs: ITIN Application Procedures Burden Taxpayers and Create a Barrier to Return Filing*, *supra*.

38 Letter from Murray Rankin, Member of Parliament for Victoria, Official Opposition Critic for National Revenue, to Canadian Minister of Finance James M. Flaherty (Sept. 25, 2013), available at <http://maplesandbox.ca/wp-content/uploads/2013/09/Rankin-Letter-to-Flaherty.pdf>; see also James Jatras, *Canada’s Shadow Revenue Minister Warns Government against Sellout on FATCA!*, OpEdNews (Oct. 5, 2013), available at <http://www.opednews.com/articles/Canada-s-Shadow-Revenue-Mi-by-James-Jatras-Canada-us-Integration-131005-282.html>. For the IRS’s response to allegations such as those raised by Mr. Rankin, see Robert Stack, *Myth vs. FATCA: The Truth about Treasury’s Effort to Combat Offshore Tax Evasion*, Myth No. 7, Lexis Nexis (Sept. 20, 2013).

39 See JCT, JCX-5-10, *JCT Estimates Budget Effect of HIRE Act* (Feb. 23, 2010).

40 Deloitte Regulatory Review, *FATCA: Determined to Pierce the Corporate Veil* (Apr. 2011), p. 3, available at http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Financial%20services/Regulatory%20Review%20April%202011/Deloitte_Regulatory_Review_April_2011_FATCA.pdf. Brian Kindle, *FATCA May Identify Tax Cheats, but Its Dragnet for Financial Criminals May Produce an Even Bigger Yield*, Association of Certified Financial Crime Specialists (Mar. 1, 2012), available at <http://www.acfcs.org/fatca-may-identify-tax-cheats-but-its-dragnet-for-financial-criminals-may-produce-an-even-bigger-yield/>.

41 GAO, GAO-12-484, *Foreign Account Reporting Requirements: IRS Needs to Further Develop Risk, Compliance, and Cost Plans* (Apr. 2012). In response to this GAO report, the IRS did quantify its 2011 and 2012 costs, and likewise projected costs through the end of FY 2013. LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013). Nevertheless, this analysis provides an incomplete picture of the required economic resources, as FATCA development and implementation will continue at least until 2017.

42 See, e.g., Deloitte Regulatory Review, *FATCA: Determined to Pierce the Corporate Veil* (Apr. 2011), p. 3, available at http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Financial%20services/Regulatory%20Review%20April%202011/Deloitte_Regulatory_Review_April_2011_FATCA.pdf.

The technology necessary for the IRS to utilize the information being gathered under FATCA is still in the early stages of development.

The IRS has started developing a data platform, referred to as the International Compliance Management Model (ICMM), to compile the information drawn from the Form 8966 that will employ recent and newly-designed technology and will adopt common international protocols.⁴³ These protocols will be

used to facilitate bilateral information exchanges, which some governments require as a precondition for their cooperation in the FATCA regime. Such exchanges, which will occur under negotiated intergovernmental agreements, have given rise to substantial privacy concerns because they often will involve providing foreign governments with information regarding accounts held in the U.S.⁴⁴

The reporting obligations and potential penalties FATCA implements are, according to some expatriates and practitioners, responsible for the surge in the number of Americans renouncing their citizenship or permanent resident status.

Eventually, the IRS plans to use the ICMM data platform to match information collected on Forms 8938 against the information gleaned from Forms 8966, 1042, and 1042S to identify and pursue non-filers.⁴⁵ The ICMM data platform, however, has not yet been built.⁴⁶ The technology project, which is a core feature of FATCA implementation, is in the early stages of developing business requirements, and funding for the project has only recently been approved.⁴⁷ The compliance application, which would match and compare the information reported by the various parties, is not scheduled for release until 2016 at the earliest.⁴⁸ Successful development of a functional, cutting-edge, data platform to compare and analyze the range of information gathered will be crucial to the long-term effectiveness of FATCA.

The IRS Should Preserve the Due Process Rights of Taxpayers by Issuing FATCA-specific Relief Procedures with Respect to Benign Non-filers.

FATCA sets forth substantial penalties to enforce compliance on the part of U.S. taxpayers, FFIs, and withholding agents. Given their relative lack of resources, however, individual taxpayers, particularly those residing abroad, are disproportionately likely to be subject to burdensome compliance initiatives and unnecessarily high penalties. As a result, the IRS should learn from its history with its OVD programs and proactively take steps to protect due process rights of taxpayers falling within the FATCA regime.⁴⁹

Reasonable cause relief is contemplated for both the failure to file Form 8938 and for the related “undisclosed foreign financial asset understatement” penalties related to FATCA. The language of the associated regulations and IRM Part 20, however, is quite broad, and provides IRS personnel with little guidance

43 LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013).

44 Letter from Congressman Bill Posey to Jack Lew, Secretary of the Treasury (July 1, 2013).

45 Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Person*; Form 1042S, *Foreign Person's U.S. Source Income Subject to Withholding*.

46 LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013).

47 LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013).

48 *Id.*

49 FATCA non-filers are subject to the OVD program and related guidance. See *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers*, <http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers>. This program, however, has substantial deficiencies. See Most Serious Problem: *Offshore Voluntary Disclosure: The IRS Offshore Voluntary Disclosure Program Disproportionately Burdens Those Who Made Honest Mistakes*, *infra/supra*.

specific to FATCA regarding circumstances under which relief would be appropriate and should be granted.⁵⁰

For example, IRM Part 20 explains that in considering a request for a reasonable cause abatement based on ignorance of the law, IRS personnel should weigh factors such as recent changes to the tax forms or law and the level of complexity of a tax or compliance issue. However, it also says ignorance of the law will constitute a valid excuse for non-compliance only if the taxpayer could not reasonably have been expected to know of the law.⁵¹ Thus, a likelihood exists that IRS employees could take the position that, in all but extraordinary circumstances, even non-resident filers should be aware of FATCA, and therefore would have no basis for seeking relief from applicable penalties. Accordingly, without FACTA-specific guidance, the approach adopted by the IRS could be, at best, anecdotal, inconsistent, and unpredictable, and at worst, could systematically fail to properly address the circumstances of benign non-filers.

The IRS should quickly establish reasonable cause or similar relief procedures for FATCA non-filers that favorably distinguish benign actors from bad actors. Without such guidance, a real danger exists that reasonable cause relief under the FATCA regime may be available in theory but not be applied in practice. As a result, the National Taxpayer Advocate recommends that the IRS issue guidance indicating lenient treatment of benign non-filers with respect to the non-application or abatement of IRC §§ 6038D and 6662(j) penalties. Specifically, such leniency is particularly appropriate in the early years of the FATCA regime, where there is no indication of bad faith on the part of the taxpayer, and where penalties are, or would be, disproportionate as compared with the size of the foreign accounts in question and the related taxable income to be reported. The IRS should collaborate and consult with the National Taxpayer Advocate in the development of standards for reasonable cause or similar relief in this context.

The IRS Should Develop a Timely and Effective Mechanism for Addressing Information Reporting Errors of FFIs.

FFIs reporting account holder information either directly or indirectly to the IRS under the FATCA regime are subjected to a variety of due diligence requirements. Most of these rules focus on ensuring that the FFI is scrutinizing potential U.S. account holders with sufficient vigor, that adequate procedures and systems are in place for this process and that, indeed, the FFI is not in any way assisting account holders in escaping detection from the IRS.⁵² Moreover, the IRS is developing technology to verify that the desired data fields on the electronic forms 8966 are complete.⁵³ Nevertheless, the IRS seems to have dedicated less energy to ensuring that the account holder information provided to the IRS is accurate or to establishing relief mechanisms for circumstances in which FFIs transmit erroneous information.

Given the vast swath of information being transferred by FFIs and compiled by the IRS as part of the FATCA regime, the information reported with respect to some U.S. taxpayers and residents will inevitably be wrong. Some will certainly be reported to have assets beyond what they actually possess, while others

50 Treas. Reg. § 1.6038D-8T; IRC § 6664(c); IRM Part 20, *Penalty and Interest*, which provides internal IRS guidance implementing the applicable reasonable cause regulations. In particular, see IRM 20.1.9.22 (Mar. 21, 2013), relating to IRC § 6038D penalties, and IRM 20.1.5.13 (Jan. 24, 2012) relating to IRC § 6662(b)(7) and (j) penalties. These sections incorporate the FATCA penalties into the IRM, but provide no FATCA-specific guidance with respect to reasonable cause or similar procedures.

51 IRM 20.1.1.3.2.2.6 (Nov. 25, 2011).

52 Treas. Reg. §§ 1.1471-4(c)(7) and 1.1471-4(f)(3).

53 LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013).

will undoubtedly be listed as having accounts or assets they never owned. Common challenges banks face include “data quality errors caused by inaccurate translation, invalid addresses and aliases and data corruption caused by combining similar information across multiple systems.”⁵⁴ Individuals and entities impacted by such inaccuracies run the risk of substantial penalties.

Intergovernmental agreements do address this issue in passing, but in a non-systematic and unsatisfactory fashion. They typically allude to the matter and then make provision for the U.S. Competent Authority (Competent Authority) to contact an FFI that is providing inaccurate information.⁵⁵ The IRS does furnish guidance to taxpayers for bringing issues before the Competent Authority, but the extent of the related time delays and administrative burdens on taxpayers is unknown.⁵⁶

While Competent Authority intervention would certainly be beneficial in the most complex cases, the IRS should develop a more streamlined approach for resolving routine reporting errors by FFIs that is both timely and readily accessible to average taxpayers. Such a mechanism should certainly be in place by the time FFIs begin reporting account holder information in March 2015. Otherwise, the only practical recourse for affected taxpayers would appear to involve either prevailing on audit or petitioning the U.S. Tax Court for review of a notice of deficiency. In addition to the taxpayer’s burden, the amount of IRS resources dedicated to this review would be staggering and also completely avoidable.

The IRS Should Act Responsively and Expeditiously to Implement Stakeholder Suggestions.

The IRS has sought and received significant comments and recommendations from stakeholders with respect to the ongoing development and implementation of FATCA. To its credit, the IRS has been responsive to many of these comments and suggestions. Nevertheless, the IRS has yet to act on important responses from some well-informed stakeholders.

For example, ETAAC has recommended that, to facilitate efficient compliance with the FATCA regime, the IRS should create mechanisms enabling withholding agents to undertake the real-time electronic matching and identification of GIINs assigned by the IRS to registered FFIs.⁵⁷ Such compliance technology would replace the current plan of requiring withholding agents to download GIIN numbers monthly and develop their own mechanisms for the review and validation of FATCA compliance by FFIs. ETAAC similarly recommended that the IRS further ease compliance burdens on FFIs by allowing direct uploads of registration information with, and related updates to the IRS.⁵⁸

In response to an information request from the National Taxpayer Advocate, however, the IRS indicated that it would not implement ETAAC’s recommendation regarding the real-time matching of

54 Informatica, *Ensure Accurate Account Holder Identification, Matching, and Quality Data for FATCA Compliance* (2013), available at <http://www.informatica.com/us/solutions/industry-solutions/banking-and-capital-markets/fatca-compliance/>.

55 Model Intergovernmental Agreement (Model 1), Article 5, No. 1, available at <http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf>; Model Intergovernmental Agreement (Model 2 Template), Article 4, No.1, available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-to-Implement-11-14-2012.pdf>. As per Rev. Proc. 2006-54, the Deputy Commissioner (International), Large and Mid-Size Business Division, acts as the U.S. competent authority in administering the operating provisions of tax treaties, including reaching mutual agreements in specific cases, and in interpreting and applying tax treaties. See Delegation Order 4-12 (Rev. 2), IRM 1.2.43 (July 1, 2010).

56 See IRS, Competent Authority Assistance, available at <http://www.irs.gov/Individuals/International-Taxpayers/Competent-Authority-Assistance>.

57 The Electronic Tax Administration Advisory Committee Annual Report to Congress (June 2013).

58 *Id.* at 30.

GIIN numbers because the recommendation involved significant technical and data protection issues.⁵⁹ According to the IRS, ETAAC's second suggestion regarding direct uploads of registration information is on the list for a system upgrade at some point in the future. As of the date of the National Taxpayer Advocate's inquiry, the IRS had yet to provide ETAAC with a reply to its recommendations.⁶⁰ Improved responsiveness to the suggestions and comments of well-informed stakeholders such as ETAAC is indispensable for FATCA implementation to move forward in a most efficient and least burdensome manner.

On a separate front, the National Taxpayer Advocate and the GAO have recommended that the IRS combine, or at least substantially revise, the Form 8938 and the FBAR form because the forms are significantly duplicative, which increases confusion and adds to the compliance burden for taxpayers.⁶¹ In addition, a taxpayer who fails to report a single account on both forms could face two sets of penalties — the FBAR penalty under Title 31 and the non-disclosure penalty under Title 26.⁶² To address this point, the IRS has published a FATCA/FBAR comparison chart on IRS.gov. While this chart is a helpful tool, it is not a comprehensive solution to this serious problem. Accordingly, the National Taxpayer Advocate reiterates her recommendation that the two forms be combined or at least substantially revised to eliminate or reduce duplication.

Another group whose input should be considered is the estimated seven million American citizens living abroad. The reporting obligations, the penalties for even inadvertent non-compliance, and the unintended economic consequences of FATCA, including the reported refusal by some FFIs to transact business with would-be U.S. account holders, fall with disproportionate force on this segment of taxpayers. As a result, their ideas for mitigating the negative impact of FATCA should be solicited and carefully examined. The National Taxpayer Advocate suggests the IRS work to obtain the recommendations of American citizens living abroad by holding roundtables or similar mechanisms.

CONCLUSION

The National Taxpayer Advocate recognizes that the implementation of FATCA is still a work in progress. Nevertheless, the IRS has not developed FATCA-specific guidelines under which benign non-filers can seek and obtain reasonable cause or similar relief with respect to related non-disclosure and underreporting penalties, and has yet to provide an adequate mechanism for addressing reporting errors of FFIs regarding U.S. account holders. Moreover, although the IRS has been responsive to some comments and suggestions throughout the development of the FATCA regime, the IRS has not acted upon advice it has received from some well-informed stakeholders. FATCA carries with it the potential for substantial resource burdens and significant due process concerns that will arise to the extent that the regime is not correctly and effectively implemented in practice as well as properly conceived in theory.

59 LB&I, IBC, and IDM response to TAS research request (Nov. 1, 2013).

60 Email correspondence from ETAAC Chair to TAS (Nov. 7, 2013).

61 National Taxpayer Advocate 2012 Annual Report to Congress 134, 141 (Most Serious Problem: *The IRS's Offshore Voluntary Disclosure Programs Discourage Voluntary Compliance by Those Who Inadvertently Failed to Report Foreign Accounts*).

62 *Id.*

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Undertake proactive steps to preserve the due process rights of taxpayers, by issuing FATCA-specific guidance for reasonable cause or similar relief, which adopts a measured approach to the imposition of penalties with respect to benign non-filers.
2. Ensure that U.S. taxpayers and non-residents have at their disposal a timely and effective mechanism for addressing information reporting errors of FFIs.
3. Act responsively and expeditiously to implement recommendations of stakeholders that have particular expertise on the effective implementation of FATCA.
4. Take immediate steps to eliminate or reduce duplication between the Form 8938 and the FBAR form.