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October 10, 2023

Policy Division
Financial Crimes Enforcement Network
P.O. Box 39
Vienna, VA 22183
Attn: Docket No. FINCEN–2023–0008; OMB Control No.1506–0009.

Re: Comments on Notice of Renewal Without Change of Reports of Foreign Financial Accounts Regulations and FinCEN Form 114

To Whom it May Concern:

Enclosed please find a letter in response to the request for comments with respect to a renewal, without change, of existing information collection requirements concerning reports of foreign financial accounts and FinCEN Form 114. These comments are submitted on behalf of the Section of Taxation and have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Scott D. Michel

Scott D. Michel
Chair, Section of Taxation

Enclosure

cc: Hon. Lily Batchelder, Assistant Secretary (Tax Policy), Department of the Treasury
Thomas West, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Jarrett Jacinto, Attorney-Advisor, Department of the Treasury
Hon. Daniel I. Werfel, Commissioner, Internal Revenue Service
William M. Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service
Drita Tonuzi, Deputy Chief Counsel (Operations), Internal Revenue Service
Kathryn Zuba, Associate Chief Counsel (Procedure & Administration), Internal Revenue Service

**AMERICAN BAR ASSOCIATION**
**SECTION OF TAXATION**

# Comments on Notice of Renewal Without Change of Reports of Foreign Financial Accounts Regulations and FinCEN Form 114, Report of Foreign Bank and Financial Accounts

These comments ("**Comments**") are submitted on behalf of the American Bar Association Section of Taxation (the "**Section**") and have not been reviewed or approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Siana Danch. Substantial contributions were made by Peter Hardy. These Comments have been reviewed by John M. Colvin, Member of the Committee on Government Submissions, Michael J. Desmond, Chair of the Committee on Government Submissions, and Lisa M. Zarlenga, Vice-Chair for Government Relations for the Tax Section.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section's diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: October 10, 2023

## BACKGROUND

On August 10, 2023, the U.S. Financial Crimes Enforcement Network ("**FinCEN**") published a Notice and Request for Comment ("**Notice**")[1] seeking comments with regard to 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**"). FinCEN issued the Notice as part of its continuing effort to reduce paperwork and burdens on filers.

In the Notice, FinCEN seeks comment on various specific questions, including the following:[2]

1. 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;
2. The accuracy of the agency's estimate of the burden of the collection of information; and
3. Ways to enhance the quality, utility, and clarity of the information to be collected.

## DISCUSSION

As noted above, FinCEN is not proposing to make changes to the FBAR form. The last two times FinCEN renewed the form, the agency also did not propose changes.[3] FinCEN may have found little reason to change the Form or in general revise the FBAR regime over the last few years but in the experience of practitioners who represent clients in FBAR-related matters, where enforcement and litigation activity have been substantial in the past fifteen years, certain changes to the filing regime would be timely and appropriate.

First, FinCEN should consider adjusting the filing threshold upward from the current aggregate account balance of $10,000. That filing threshold has been in place for three decades. FinCEN has the authority to change it. The Bank Secrecy Act ("**BSA**") places with the Secretary of the Treasury the duty to determine "the magnitude of transactions subject to a requirement or a regulation" but has left it up to the agency to determine the appropriate method of implementing the statute.[4] Because there is no *statutory* threshold, adjustments to the $10,000 aggregate account balance under the regulations are within the purview of FinCEN.[5] Given changes in global financial conditions and, obviously, changes in the value of a U.S. dollar over the past 30 years, the $10,000 threshold – which, as an aggregate measure, can include multiple accounts –

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[1] 88 Fed. Reg. 54,397 (Aug. 10, 2023).

[2] *See* Notice, Section II, Request for Comment, 88 Fed. Reg. at 54,399.

[3] *See* 83 Fed. Reg. 65,394 (Feb. 19, 2019); 85 Fed. Reg. 73,129 (Nov. 16, 2020).

[4] 31 U.S.C. § 5314.

[5] *See* 31 C.F.R. § 1010.306(c).

is plainly too low and results in significant overreporting and overfiling, resulting in unnecessary burdens and compliance costs for taxpayers, and substantial amounts of irrelevant information for FinCEN. For comparison, in connection with Form 8938, *Statement of Specified Foreign Financial Assets*, the Internal Revenue Service (the "**Service**") only requires disclosures of foreign assets held by the taxpayer that exceed defined thresholds that are substantially higher than the $10,000 level applied to FBARs.[6] To balance the burdens and obligations on U.S. persons holding foreign financial accounts with the benefits obtained by the government, FinCEN should review the filing threshold and consider increasing it.

Second, FinCEN should collect and provide the public with reports on the usefulness of FBARs. Although FinCEN routinely publishes the total number of FBARs filed each year (and how many were filed by individuals and entities), it does not, and to our knowledge, has never provided public information on the utility of FBAR filings. FBAR penalties have been heavily litigated over the last few years, but those cases involve non-compliant taxpayers where, presumably, FinCEN has *not* collected the required information. The vast majority of people who file FBARs are complying with the law, but FinCEN does not disclose publicly, for example, how many thousands of fully-compliant FBARs are useful to law enforcement and tax administration. To be sure, the FBAR requirement, by promoting transparency as to foreign accounts, aims to deter money laundering and other financial crimes. Collecting and educating the public on the usefulness of the data obtained by FinCEN, however, could further assist with voluntary compliance: when people know *why* they have to file an information form they may be more motivated to do so. All the public has seen so far is that the government penalizes people who do not comply. The public does not know what, if anything, FinCEN does with the "average" FBAR filer's information and how it justifies the sometimes large cost of compliance.

We note that the Secretary of the Treasury is required, under section 6216 of the Anti-Money Laundering Act of 2020 ("**AMLA**"),[7] to solicit public comment, consult with other government stakeholders, and broadly "undertake a formal review of the regulations implementing the BSA and related guidance" in order to, in part, ensure that BSA regulations continue to require reports or records that are "highly useful" in countering financial crime. We also note that in order to better inform the regulated community of how BSA reporting is actually used by law enforcement, as the AMLA requires, FinCEN has increased its publications regarding the utility of BSA reporting as

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[6] For the 2022 year, unmarried or married filing separate individuals living in the United States must file Form 8938 if they hold $50,000 or more in foreign assets on the last day or $75,000 at any time during the year. Individuals who are unmarried or married filing separate returns and living outside the United States must file Form 8938 if they hold $200,000 or more in foreign assets on the last day of the tax year, or more than $300,000 at any time during the year. The thresholds are higher for filers who elect married filing joint status. *See* Form 8938 Instructions (Rev. Nov. 2021).

[7] Pub. L. No. 116-283, § 6216, 134 Stat. 3388, 4582-83.

to, for example, Suspicious Activity Reports regarding export violations,[8] and business email compromises.[9] FinCEN has never issued such analysis with respect to FBAR filings.[10]

Third, FinCEN may consider revising its estimate that "the annual reporting and recordkeeping burden per FBAR filer will be one hour (55 minutes for FBAR reporting, and five minutes for FBAR recordkeeping, *i.e.*, keeping a copy of the FBAR form)." The five-minute estimate to comply with the recordkeeping requirement presumes great familiarity with electronic filing process and system. Someone filing their first FBAR may not immediately understand how to prepare and save an electronic copy. Therefore, FinCEN should consider increasing the estimate for compliance with the recordkeeping requirement.

More important perhaps, FinCEN should reconsider its estimate of an average of 55 minutes for the reporting requirement. FinCEN appropriately considers that there is a range of time involved in completing an FBAR – but the range (20 to 90 minutes) is not realistic. To be able to report an account in 20 minutes, the lowest point on the estimated range, would involve only the most straight-forward scenario: one foreign checking or savings account, with at least one's month's balance in excess of $10,000 and with readily available statements from the financial institution. This scenario is unrealistic for a U.S. person holding a foreign financial account that, for example, may not have statements that are easily translated into the FBAR form, or whose balances are in foreign currency. For filers with multiple accounts (even just a checking and a savings account), the time involved is compounded. In the experience of tax practitioners, the 90-minute high end of the range also does not reflect the complexity of the form and instructions. A U.S. person even of modest means living abroad will likely have more than one foreign financial account, denominated in a non-U.S. currency. Further, if an individual cannot afford to engage a tax professional or accountant to assist in the preparation, then the individual must personally make the determination as to the appropriate valuation of the account, or whether an account located abroad qualifies as a foreign financial account (*e.g.*, financial accounts maintained with financial institutions located on U.S. military institutions do not have to be reported). This could consume significantly more time than 90 minutes.

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[8] *See* FinCEN, Trends in Bank Secrecy Act Data (Sept. 8, 2023), available at https://www.fincen.gov/sites/default/files/shared/FTA_Russian_Export_Controls_FINAL_508.pdf.

[9] *See* FinCEN, Business Email Compromise in the Real Estate Sector (Mar. 30, 2023), available at https://www.fincen.gov/sites/default/files/shared/Financial_Trend_Analysis_BEC_FINAL.pdf.

[10] The tax professional community would also benefit from any effort by FinCEN to disclose publicly the importance of FBAR filings. Tax professionals and their clients face requirements to provide roughly the same information (albeit, as noted, with higher financial thresholds) that goes on an FBAR on the Form 8938, a partly duplicative tax form that is filed with the Service – an agency jointly tasked with enforcing the FBAR obligations. We urge FinCEN to explain why it needs essentially the same information on a separate form and how such information helps it perform its legally required regulatory and enforcement functions.

Finally, FinCEN should revise the FBAR filing instructions to reflect the Supreme Court's decision in *Bittner v. United States,*[11] where the Court held that the non-willful penalty for a FBAR violation of $10,000 is to be assessed on a "per form" basis, rejecting the government's position that it should be assessed on a "per account" basis. The FBAR instructions currently provide that for a non-willful penalty: "A person who is required to file an FBAR and fails to properly file may be subject to a civil penalty not to exceed $10,000 per violation." FinCEN should clarify, in line with *Bittner*, that "a violation" means an FBAR form for a tax year. Furthermore, FinCEN should consider clarifying that the $100,000 lower limit for a willful penalty is subject to inflation adjustments, is higher than $100,000, and only increases (and decreases). Given the significant changes in the FBAR penalty regime, FinCEN should provide FBAR filers with a clearer understanding of the consequences of non-compliance.

For all these reasons, the Section urges FinCEN to consider the foregoing comments and recommendations to ensure that the burdens of compliance with the FBAR to U.S. persons do not outweigh the usefulness to the U.S. government in administering tax and money laundering laws, to provide the public with important information about the usefulness of FBAR filings, to reflect the amount of time it takes to properly complete the form, and to correct the instructions as regards potential penalties.

[11] 142 S. Ct. 2833 (2022).