

# SHOULD I STAY, OR SHOULD I GO? ANALYZING THE DILEMMA OF DUAL CITIZENS SUBJECT TO FATCA AND FBAR REPORTING IN A CITIZENSHIP BASED TAXING REGIME

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## INTRODUCTION

What do a former UK Prime Minister, an Executive of Facebook, and a person from Canada have in common?<sup>1</sup> They were all at one time citizens of the United States until they decided they no longer wanted to be.<sup>2</sup> The reason for the renounced citizenship points to a renunciation for tax reasons.<sup>3</sup> The United States stands as an outlier on the world stage by requiring income to be reported on a citizenship taxation basis; to curb tax evasion in part the Report of Foreign Bank and Financial Accounts (FBAR) and the Foreign Account Tax Compliance Act (FATCA) were created and passed to help enforce tax compliance on foreign accounts and assets.<sup>4</sup> However, both compliance tools are not without their burdens especially for dual citizens.<sup>5</sup>

Curbing tax evasion is a noble goal, but what seems to happen as a byproduct of this legislation is that there are dual citizens (often much smaller

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1. Katrin Bennhold, *Boris Johnson, British Foreign Secretary, Drops Dual U.S. Citizenship*, N.Y. TIMES (Feb. 8, 2017), <https://www.nytimes.com/2017/02/08/world/europe/britain-boris-johnson-renounces-american-citizenship.html> [<https://perma.cc/6DJY-GPJ3>]; Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 171-72 (2016); James Eastman-Timmons, *Do American-Canadian dual citizens consider their status to be an inconvenience?* 102 (2015) (M.A. thesis, Carleton University).

2. Katrin Bennhold, *supra* note 1; Ruth Mason, *supra* note 1; Eastman-Timmons, *supra* note 1, at 101-02.

3. Katrin Bennhold, *supra* note 1; Ruth Mason, *supra* note 1; Eastman-Timmons, *supra* note 1, at 101-02.

4. Allison Christians, *A Global Perspective On Citizenship-Based Taxation*, 38 MICH. J. INT'L L. 193, 205-06 (2017); *Foreign Account Tax Compliance Act (FATCA)*, INTERNAL REVENUE SERV. (Jul. 27, 2022), <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca> [<https://perma.cc/BL59-RZJ4>]; 31 U.S.C. § 5311; *History of Anti Money Laundering Laws*, FIN. CRIMES ENF'T NETWORK, <https://www.fincen.gov/history-anti-money-laundering-laws> [<https://perma.cc/8BTW-RFME>] (last visited Nov. 6, 2022); *Report of Foreign Bank and Financial Accounts (FBAR)*, INTERNAL REVENUE SERV. (Jul. 12, 2022), <https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar> [<https://perma.cc/6TWW-G73C>].

5. See generally Ruth Mason, *supra* note 1, at 169; Eastman-Timmons, *supra* note 1.

taxpayers than the intended targets of FBAR and FATCA) that are burdened by these standards as an extension of the United States citizenship based taxation tax reporting regime.<sup>6</sup> In some instances these taxpayers pay thousands of dollars in filing fees each year, or worse, are subject to steep penalties for noncompliance.<sup>7</sup> For example, the non-willful FBAR penalty is currently a \$10,000 fine for a violation (failure to file an FBAR form or failure to report one or more account(s)), but this type of fine ran the risk of increasing to \$10,000 for *each account* but for the Supreme Court's reversal of the 5th Circuit's opinion in *Bittner v. United States* (a case that involves a dual citizen).<sup>8</sup>

This has led some taxpayers to have to make the decision of whether they should renounce their citizenship, with some going as far as to liken their expatriation to being like a divorce.<sup>9</sup> Thus, either dual citizens will continue to feel compelled to renounce their U.S. citizenship, or our current way of enforcing FATCA and FBAR with minimal assistance to taxpayers will need to change. This Note seeks to find a solution that allows the United States to achieve its intended goal of achieving tax compliance through FATCA and FBAR while alleviating the burden of reporting for taxpaying U.S. citizens so that the United States does not lose its citizens along the way.

Part I of this Note will cover the history and background of FBAR (and its ambiguities, which required Supreme Court interpretation) and FATCA. Part II will cover the burden on taxpayers due to FBAR and FATCA provisions. Part III will cover the current and previous remedies and benefits provided to taxpayers to alleviate the burden of the FBAR and FATCA provisions. Part IV will analyze how Canada conducts its compliance on foreign accounts and assets compared to the United States. Part V will analyze the efficacy of government programs and provisions in the Internal Revenue Code designed to alleviate the burden created by FBAR and FATCA. Part VI will outline recommendations for the Internal Revenue Service (IRS) and Congress to consider creating reform that will not only alleviate the burden on taxpayers, but also achieve the primary goal of Congress and the IRS for implementing FBAR and FATCA: increased compliance. Part VII will conclude with a brief overview of what was discussed

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6. Kate Dore, *The Top Reason Why Americans Abroad Want To Dump Their U.S. Citizenship*, CNBC, (May 18, 2021), <https://www.cnbc.com/2021/05/18/the-top-reason-why-americans-abroad-want-to-dump-their-citizenship.html> [<https://perma.cc/H5QC-W9TW>] (note this information comes from a Greenback Expat Tax Services, a for profit company that helps US taxpayers with their tax filing obligations. So, it is important to note that information and data from this firm should not necessarily be taken as unbiased nor should it necessarily be taken as reflecting the entirety of United States citizens living abroad.); *See 2022 US Expat Trends Survey*, GREENBACK EXPAT TAX SERVS. (Jun. 15, 2022), <https://www.greenbacktaxservices.com/blog/2022-us-expat-trends-survey/> [<https://perma.cc/M7DT-DUGC>]; Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L.J. 655, 661-64 (2018); Ruth Mason, *supra* note 1, at 172-73; *see generally* Eastman-Timmons, *supra* note 1, at 108.

7. Eastman-Timmons, *supra* note 1, at 104.

8. 31 C.F.R. § 1010.821 (2022); *Bittner v. United States*, 598 U.S. 85 (2023).

9. For examples, *see* Eastman-Timmons, *supra* note 1, at 96-104; Ruth Mason, *supra* note 1, at 173.

in this Note with an emphasis on alleviating the burden on taxpayers to file FBAR and FATCA to increase compliance without taxpayers renouncing their U.S. citizenship.<sup>10</sup>

## I. HISTORY/BACKGROUND

### A. *Setting the [F]BAR: Origin of the Report of Foreign Bank and Financial Accounts (FBAR)*

FBAR began with the enactment of the Bank Secrecy Act of 1970 and is codified under C.F.R. § 1010.350.<sup>11</sup> The Bank Secrecy Act has evolved over time, but the stated purpose of the Bank Secrecy Act is to “require certain reports or records that are highly useful in criminal, tax, or regulatory investigations, risk assessments, or proceedings; or intelligence or counterintelligence activities” to curb “money laundering, terrorism finance, tax evasion, and fraud risks to financial institutions . . . .”<sup>12</sup> The Bank Secrecy Act seeks in part to accomplish this goal by having financial institutions and individuals disclose certain financial information based on the description outlined by the Secretary of the Treasury via filing the FinCen Form 114 (FBAR report).<sup>13</sup>

Specifically, for individuals

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,

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10. It is worth noting that one primary discussion point that has been debated by scholars regarding FBAR and FATCA revolves around the United States position as one of two countries (the other being Eritrea, but this system is not related to why the United States imposes a citizenship-based taxation system) with a citizenship-based taxation system and whether this system should be changed to the more globally recognized residence/citizenship-based taxation system. See Allison Christians, *supra* note 4, for context on the Eritrea matter. However, this point will not be discussed here because this would take the article into a different direction asking why we should tax citizens on abroad income and not how to help citizens that live abroad that are subject to the burdens associated with being tax compliant. Finally, the United States has been using the citizenship-based taxation system for over 100 years now so it seems unlikely that the United States would shift from this viewpoint. Montano Cabezas, *Reasons for Citizenship-Based Taxation*, 121 PA. ST. L. REV. 101, 101-03 (2016); *see also*, Richard “Dick” J. Harvey Jr., *Worldwide Taxation of United States Citizens Living Abroad – Impact of FATCA and Two Proposals*, 4 GEO. MASON J. INT’L COM. L. 319, 319-20 (2013).

11. *The Bank Secrecy Act*, FIN. CRIMES ENF’T NETWORK <https://www.fincen.gov/resources/statutes-and-regulations/bank-secrecy-act> [<https://perma.cc/L3J8-7NZA>] (last visited Nov. 20, 2022); 31 C.F.R. § 1010.350 (2022).

12. The Bank Secrecy Act has added extra levels of regulations since 1970 with one of the most notable adjustments coming post 9/11 and the most recent major adjustment coming in 2020. *BSA Timeline*, FIN. CRIMES ENF’T NETWORK <https://www.fincen.gov/resources/statutes-and-regulations/bank-secrecy-act/bsa-timeline> [<https://perma.cc/F28X-H6BL>] (last visited Nov. 20, 2022); STAFF OF JOINT COMM. OF TAX’N, 111TH CONG., TECHNICAL EXPLANATION OF “FOREIGN ACCOUNT TAX COMPLIANCE ACT OF 2009” 31, 33 (2009); 31 U.S.C. § 5311.

13. 31 U.S.C. §§ 5313-5314; 31 C.F.R. § 1010.350 (2022); *Report of Foreign Bank and Financial Accounts (FBAR)*, *supra* note 4.

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.<sup>14</sup>

The Secretary is granted several parameters for which a taxpayer is to keep and provide detail on records for transactions involving a foreign account that needs to be reported under FBAR with the primary relevant factors being: “(1) the identity and address of participants in a transaction or relationship. (2) the legal capacity in which a participant is acting. (3) the identity of real parties in interest. (4) a description of the transaction.”<sup>15</sup> Interestingly, when the taxpayer has “a financial interest in 25 or more foreign financial accounts” then they “need only provide the number of financial accounts and certain other basic information on the report.”<sup>16</sup> However, these taxpayers “will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.”<sup>17</sup>

Additionally, the FBAR report shall include:

- (1) the legal capacity in which the person filing the report is acting.
- (2) the origin, destination, and route of the monetary instruments.
- (3) when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.
- (4) the amount and kind of monetary instruments transported.<sup>18</sup>

The extensive list of accounts that should be reported mainly include financial accounts at foreign financial institutions (or even a foreign branch of a U.S. financial institution), and indirect financial interests in a foreign entity (if the taxpayer owns more than 50 percent of the entity) that in aggregate exceed \$10,000 at any point during the taxable year.<sup>19</sup> Specifically, the threshold at which the FBAR is required to be filed with FinCen is “foreign financial

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14. FBAR filings are required by entities other than just at the individual taxpayer level such as corporations and trusts, however for the purposes of this note the focus is directed towards individual taxpayers. *Comparison of Form 8938 and FBAR Requirements*, INTERNAL REVENUE SERV. (Sept. 2, 2022), <https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements> [https://perma.cc/PE45-VCQ8]; 31 U.S.C. § 5314.

15. 31 U.S.C. § 5314(a). It is also worth noting that 31 U.S.C. § 5314(b) outlines further parameters for which the Secretary can require further clarification for each transaction.

16. 31 C.F.R. § 1010.350(g)(1).

17. *Id.*

18. 31 U.S.C. § 5316(b). Note that a fifth requirement leaves the door open for the Secretary to prescribe “additional information” to be provided at the Secretary’s discretion.

19. Internal Revenue Serv., *supra* note 14.

accounts exceeding \$10,000 maintained during the previous calendar year.”<sup>20</sup> Despite this straightforward description, the targeted accounts for dual citizens can be broadly defined to include several accounts from mutual funds and Canadian disability funds.<sup>21</sup>

There are both willful and non-willful penalties for violating the filing requirements of the FBAR report, with the willful violation leading to a maximum of the greater of \$100,000 or 50 percent of the amount of the transaction or balance in the account that was omitted.<sup>22</sup> The non-willful penalty specifically states “[t]he Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314 . . . shall not exceed \$10,000” in addition to the previously mentioned willful violation penalty provisions.<sup>23</sup> It is also worth noting that non-willful violation penalties can be avoided if the taxpayer shows reasonable cause and that “the amount of the transaction or the balance in the account at the time of the transaction was properly reported.”<sup>24</sup>

The Bank Secrecy Act and, by association, FBAR, are codified under Title 31 of the United States Code rather than Title 26 since the goal of the Bank Secrecy Act is not just tax related but is focused on curbing financial crimes and related various other crimes such as the financing of terrorism and prevention of fraud against financial institutions.<sup>25</sup> This means that the FBAR is primarily under the regulatory body of the Financial Crimes Enforcement Network (FinCen), whereas the IRS oversees the tax side of compliance.<sup>26</sup> Overlap can occur if FinCen detects a violation on the FBAR form which it then may transfer to the IRS to assess the penalty on the taxpayer’s return.<sup>27</sup> This dual jurisdiction

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20. 31 C.F.R. § 1010.306(c) (2023).

21. See Christians, *supra* note 4, at 193, 215, 225, n. 83, 127; Eastman-Timmons, *supra* note 1, at 67, 97-98, 112.

22. 31 U.S.C. § 5321(a)(5)(C)(i)(I)-(II).

23. 31 U.S.C. § 5321(a)(5)(A)-(B).

24. 31 U.S.C. § 5321(a)(5)(B).

25. *FinCen’s Commitment to Open Government*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/fincens-commitment-open-government> [<https://perma.cc/HJ6V-R4W2>] (last visited Nov. 20, 2022); Pub. L. No. 107-56, 107th Cong., § 357, 115 Stat. 272 (2001) (notes the difference the with which the IRS uses the information reported to FinCen via the FBAR).

26. *ITG FAQ #1 Answer What is the Intent of Title 31?*, INTERNAL REVENUE SERV. (Dec. 21, 2021), <https://www.irs.gov/government-entities/indian-tribal-governments/itg-faq-1-answer-what-is-the-intent-of-title-31> [<https://perma.cc/2Y2R-AF8D>]; *ITG FAQ #2 Answer-What role does the IRS have in the enforcement of Title 31?*, INTERNAL REVENUE SERV. (Dec. 27, 2021), <https://www.irs.gov/government-entities/indian-tribal-governments/itg-faq-2-answer-what-role-does-the-irs-have-in-the-enforcement-of-title-31> [<https://perma.cc/T5YL-8NUD>].

27. The reason FinCen can transfer this tax related information over to the IRS is because the Bank Secrecy Act is promulgated under Title 31 of the U.S.C. and is thus not subject to the same confidentiality rules that the IRS is subject to under Title 26 (specifically, I.R.C. § 6103); 31 U.S.C. § 5324; *FinCen’s Commitment to Open Government*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/fincens-commitment-open-government> [<https://perma.cc/HJ6V-R4W2>] (last visited Nov. 20, 2022); Pub. L. No. 107-56, 107th Cong., §§ 357, 5319, 115 Stat. 272 (2001).

could be confusing to taxpayers and practitioners alike.<sup>28</sup> A circuit split between the 9th and the 5th Circuit Courts of Appeals on whether a non-willful penalty should be imposed per taxpayer or per account adds to the confusion.<sup>29</sup>

### *B. Judgment Call: Circuit Split Over FBAR Non-Willful Penalty*

#### *1. Briefing Boyd*

The first of the two circuit split cases involves Defendant (Jane Boyd), who owned fourteen foreign financial accounts within the United Kingdom that had balances exceeding \$10,000.<sup>30</sup> The account balances skyrocketed in the years 2009-2011 because of an inheritance she received from her deceased father.<sup>31</sup> The accounts accrued interest and dividends which the Defendant did not report for 2010 until the defendant opted to join the Offshore Voluntary Disclosure Program (OVDP) in 2012.<sup>32</sup> The defendant filed amended returns with the appropriate FBAR filings for 2010, but then decided to withdraw from the OVDP in 2014.<sup>33</sup> The IRS reviewed the amended return for penalties, and although the FBAR was filled out accurately for 2010, the IRS determined that she had committed thirteen FBAR violations, one for each account she failed to timely report for 2010.<sup>34</sup> The IRS imposed a non-willful penalty of \$47,279, which the defendant rejected arguing that the penalty is supposed to be \$10,000 total per taxpayer, not per account.<sup>35</sup> This is because the non-willful violation under 31 U.S.C. § 5321, was for one violation of the FBAR report and not by account (which would be thirteen violations in this case).<sup>36</sup>

The majority held in favor of the defendant Boyd, focusing on the specific issue of the case (whether an untimely filing of the FBAR form is subject to one or multiple non-willful violations) and by applying the circuit's precedent for interpreting tax penalty cases.<sup>37</sup> The majority began by looking at 31 U.S.C. § 5321(a)(5)(A) and applied a plain meaning approach to the word "provision" in

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28. See generally Thomas Greenaway, *Worldwide Taxation, Worldwide Enforcement*, 54 TAX NOTES INT'L, 759, 763-64 (2009); See also the point made by the Court in *Bittner v. United States*, 598 U.S. 85, 102-04 (2023).

29. *United States v. Boyd*, 991 F.3d 1077 (9th Cir. 2021); *United States v. Bittner*, 19 F.4th 734 (5th Cir. 2021); See generally Nicholas R. Peterson, *Does the \$10,000 Non-Willful FBAR Penalty Apply Per Account or Per Report? An Analysis of Boyd*, J. INT'L TAX'N 49 (2020); See generally Timothy M. Todd, *The FBAR's Muddy Morass: Shining A Light With Interpretative Tools*, TAX NOTES (Oct. 10, 2022), <https://www.taxnotes.com/featured-analysis/fbars-muddy-morass-shining-light-interpretative-tools/2022/10/07/7f65p> [<https://perma.cc/4FD4-AKYM>]. Both articles outline the confusion an ambiguity that was created in interpreting the statute.

30. *Boyd*, 991 F.3d at 1079.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; 31 U.S.C. § 5321.

37. *Boyd*, 991 F.3d at 1086.

the phrase “a civil money penalty on any person who violates, or causes any violation of, any provision of Title 31 Section 5314.”<sup>38</sup> In noting that 5314(a) contains two provisions, the majority held that since the FBAR was filed correctly, but just not on time that Boyd only violated C.F.R 1010.306 (the regulation enforcing the timeliness provision of 5314) and thus, violated the FBAR provisions only once.<sup>39</sup> The majority then dissected the government’s argument that the word “any” in 5314(a) suggested that more than one violation *per report* could occur; the court disagreed, finding that “any” does not mean more than one violation can occur under 5314, but that the word “simply refers to the relevant regulations that prescribe how the provisions in 5314 may be violated.”<sup>40</sup> Importantly, in a similar line of textual analysis the court also reviewed the regulation and noted that unlike the willful violation regulation and the reasonable cause provision under the non-willful regulation, there is no language indicating that violations should be assessed by account.<sup>41</sup> Lastly, the court notes that this omission seems to indicate Congress intended to leave off the “by account” portion for non-willful penalties, but even if the regulation were ambiguous the court would apply precedent from the 9th Circuit to strictly construe the provision against the Government if it is ambiguous.<sup>42</sup>

The dissenting opinion by Judge Ikuta provides one of the foundational pieces supporting the government’s interpretation of the non-willful penalty in both the Supreme Court dissenting opinion and the 5th Circuit Court of Appeals’ majority opinion of *Bittner*.<sup>43</sup> This argument analyzes the statutory construction of the non-willful penalty provision, asserting that the majority takes an overly procedural analysis of the language when the majority should focus on the substantive point of the penalty.<sup>44</sup>

Judge Ikuta notes that the first clause of 31 C.F.R. § 1010.350(a) that United States taxpayers that have “a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country” are obligated to report their financial interest in these financial accounts to the IRS (substantive) on the specified form (procedural).<sup>45</sup> Judge Ikuta further notes that 31 C.F.R. § 1010.306(d) outlines that § 1010.350(a) has two separate elements

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38. The majority further concluded provision to mean “an article or clause (as in a contract) that introduces a condition” or “a condition, requirement, or item specified in a legal instrument.” *Id.* at 1081.

39. *Id.* at 1078-79.

40. *Id.*

41. *Id.*

42. The court also discussed the rule of lenity and why it would not be applied in this case because the *Bradley* case that the court relied upon for its strict construction was not a penal case which would likely match the proper application to *Boyd* because the non-willful penalty imposed on *Boyd* was a civil and not criminal penalty. *Id.* Additionally, the *Bittner* court also discussed the rule of lenity and came to the same conclusion that the case at hand and the non-willful penalty by itself are not criminal proceedings. *United States v. Bittner*, 19 F.4th 734 (5th Cir. 2021).

43. *Boyd*, 991 F.3d at 1087.

44. *Id.*

45. *Id.*

in requiring that the United States taxpayer must disclose their financial interest by reporting this interest on the forms outlined by the Secretary.<sup>46</sup> Finally, Judge Ikuta outlines that the non-willful violation provision (while not having the words “by account” in its provision) includes under subparagraph (B)(ii) a reasonable cause exception for “any violation” which Judge Ikuta infers that “[t]his language indicates that the failure to report a single transaction, or the balance in a single account, constitutes a violation.”<sup>47</sup> Judge Ikuta then notes prior precedent in stating “[t]he ‘normal rule of statutory construction’ is that ‘identical words used in different parts of the same act are intended to have the same meaning’” and as such it is unlikely that “Congress wanted the word “violation” to have a different meaning in different subparagraphs.”<sup>48</sup>

## 2. Briefing Bittner

On the other side of the split, the 5th Circuit Court of Appeals held that the non-willful violation penalty should be applied to each inaccuracy (in this case, by account).<sup>49</sup> In *Bittner* it is noted that the taxpayer, Alexandru Bittner (Bittner), was a successful businessman and dual citizen of Romania and the United States.<sup>50</sup> Bittner had been naturalized in 1987, but did not file an FBAR until 2012, when he learned of his filing requirements upon returning to the United States from Romania.<sup>51</sup> Upon filing his FBAR forms for the years 2007-2011 Bittner was assessed a penalty of \$2.72 million for failing to timely file each account for the years 2007-2011. The district court reduced the amount to \$50,000 holding the violation was on a per form basis.<sup>52</sup>

The Court of Appeals began its analysis by first reviewing Bittner’s reasonable cause argument, holding first that Bittner lacked reasonable cause to avoid the non-willful penalty.<sup>53</sup> The Court noted that “reasonable cause” is a term of art used in both the BSA and Internal Revenue Code (IRC), with both being used for the same reason - to avoid “penalties for admitted violations of federal tax law.”<sup>54</sup> To prove reasonable cause the taxpayer needs to show “that the individual exercised ordinary business care and prudence, considering all pertinent facts and circumstances on a case-by-case basis.”<sup>55</sup> The court

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46. *Id.*

47. *Id.* at 1089.

48. *Id.* at 1090.

49. *United States v. Bittner*, 19 F.4th 734, 749 (5th Cir. 2021).

50. *Id.* at 739.

51. *Id.*

52. The court noted that the penalties for the remaining years prior to 2007 were time-barred, which is why those penalties were not reviewed in this case. *Id.*; 31 U.S.C. § 5321(b)(1).

53. *United States v. Bittner*, 19 F.4th 734, 739-40 (5th Cir. 2021).

54. *Id.* at 741.

55. The court notes that reasonable cause is reviewed by the objective standard and has a heavy burden for the taxpayer to show reasonable cause. *Id.* at 741-42. This is important later because if one of the burden relievers available to dual citizens is reasonable cause, but such



ultimately reasoned that Bittner failed to exercise ordinary care by failing to learn about his potential tax liability for the United States.<sup>56</sup> The court also dismissed arguments that Bittner (1) spoke very little English, (2) barely lived in the United States, and (3) sought tax compliance by filing FBARs upon learning of this obligation as evidence for reasonable cause.<sup>57</sup> Furthermore, the court rationalized that while an IRS factsheet that states “[r]easonable cause may be established if you show that you were not aware of specific obligations to file returns or pay taxes, depending on the facts and circumstances,” the factsheet is also not persuasive enough evidence to establish reasonable cause, noting that the guidance is not law and should not be treated as such.<sup>58</sup>

From here the court proceeded to concur with most of the reasoning of the government for why the non-willful violation should be by account and not by taxpayer.<sup>59</sup> The primary points that the court found persuasive included the textual arguments that the “by account” language was inserted in the willful violation and reasonable cause provisions in the statutes and structurally this should apply to the non-willful penalty.<sup>60</sup> This reasoning is pushed further by the court in noting that one possible reason Congress did not add the “by account” language is because, unlike the willful penalty which has either \$100,000 penalty or 50% of the account, the non-willful penalty imposes a maximum of \$10,000 eliminating the need to have a percentage by account.<sup>61</sup> The court further reasoned that a structural argument exists, as noted by Judge Ikuta in *Boyd*, that there is a procedural element to file the FBAR, but a substantive element to report the accounts to accomplish the goal of the BSA.<sup>62</sup> The court ultimately held that the penalty assessed to Bittner for failing to file the FBAR on time with the correct accounts should be penalized by account and not by taxpayer.<sup>63</sup>

### 3. *Getting a Second Opinion on Bittner*

The Supreme Court granted certiorari to Bittner’s case and by a 5-4 decision, the Court held that the 5<sup>th</sup> Circuit erred in its holding that the non-willful penalty should be assessed by account.<sup>64</sup> The Court first noted that the obligation to file a report in the way the Secretary prescribes under 31 U.S.C. §

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reasonable cause is not provable by lack of knowledge, then this solution likely would not be helpful in resolving the compliance burden to have more dual citizens voluntarily report their applicable foreign accounts or assets in the case of FATCA.

56. *Id.* at 742.

57. *United States v. Bittner*, 19 F.4th 734 (5th Cir. 2021).

58. *Id.* at 743.

59. *Id.* at 743-49.

60. *Id.* at 744.

61. *Id.* at 746-47.

62. *Id.* at 745.

63. *Id.* at 749.

64. *Bittner v. United States*, 598 U.S. 85, 102-04 (2023).

5314 is binary in that an applicable person either complies with the section by fulfilling every requirement under that section, or they do not.<sup>65</sup> The Court also notes that if someone is required to file and fails to do so then that person will be subject to a penalty either for willfully, or in this case, non-willfully failing to file.<sup>66</sup> Relevant to this case, the issue boiled down to the penalty assessed for such violations. The Court looked at the statutory language for the non-willful penalty and noted that the word “account” does not appear in the language for the non-willful penalty provision, whereas “account” does appear in the willful violation provision of 31 U.S.C. § 5321(a)(5)(C) and (D).<sup>67</sup> The government argued that because the per-account language is included in the willful penalty that it should be inferred for the non-willful penalty.<sup>68</sup> However, the Court noted that the fact that there is this distinction in the willful and non-willful provisions hurts the government’s argument, stating “[w]hen Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning.”<sup>69</sup>

The Court also looked at contextual evidence beyond the text of the statutes at issue. A Department of Treasury notice of proposed rulemaking, a relevant IRS form, and IRS “fact sheet,” and letters sent from the government to FBAR filers all provide language stating that the non-willful penalty would not exceed \$10,000.<sup>70</sup> While the Court notes this evidence alone is not controlling on this issue, the Court does state that it “may consider the consistency of an agency’s views when we weigh the persuasiveness of any interpretation it proffers in court.”<sup>71</sup> The Court also pointed to the reasonable cause provision under § 5321(a)(5)(B)(ii) as another provision in which Congress specifically required a per-account calculation, indicating that when Congress wanted something to be done “per account,” they knew how to do it, and the fact that they did *not* include “per account” in the non-willful violation section is evidence that the penalty should be per filing, and not per account.<sup>72</sup>

From here, the majority opinion by the Court addresses the dissenting opinion’s argument that the pattern of per account language in both the willful and reasonable cause provision should suggest that the same per account rule shall then apply to the non-willful violation.<sup>73</sup> The majority opinion by the Court outlines that the dissent’s argument that a compliant report must provide a complete list of information on the accounts does not point to whether the penalty itself shall accrue per report or per account.<sup>74</sup>

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65. *Id.* at 93.

66. *Id.*

67. *Id.* at 93.

68. *Id.* at 92, 94.

69. *Id.* at 94.

70. *Id.* at 96-97.

71. *Id.* at 97.

72. *Id.* at 95.

73. *Id.* at 95-96.

74. *Id.*

The Court then examines the legislative history of the Bank Secrecy Act and the Act's statement of purpose found at § 8311 to conclude that the Government's position in *Bittner* is not consistent with the way the non-willful violations section of the Act developed, nor is it required or implied given the purpose of the Act is to file reports and records -not evidence of Congress' intent to maximize penalties for each non-willful mistake.<sup>75</sup> The Court then points to another example of Congress' intent to have the non-willful violation be on a report basis by citing to the statute which states that for persons with twenty-five or more applicable accounts, the person does not need to provide every specific detail for each account at the time of filing (although they would need to provide more detailed information at the request of the Secretary); rather they "need only provide the number of financial accounts and certain other basic information."<sup>76</sup>

The Court further reasons that taking the government's interpretation would create a in which willful violators may end up owing less in penalties than non-willful violators; if a taxpayer for example had one account with a value of \$1 million and then withdrew this amount before the filing deadline, he would owe \$100,000 in penalties.<sup>77</sup> However, if someone had twenty foreign financial accounts with a total of \$50,000 across those accounts and failed to file the FBAR then that taxpayer would be assessed a \$200,000 penalty.<sup>78</sup> The government counters that an anomaly would exist if the penalties were assessed per report because the Secretary has broad discretion to make the filing requirements, and could require a separate report for each account be on a separate form.<sup>79</sup> The government concludes that this would then effectively establish a non-willful violation by account.<sup>80</sup> The majority responds that the Secretary's ability to do this is not a question before them, that this discretion could result in less reporting obligations too, and either way, but the Secretary's discretion does not answer the question of whether the Secretary may impose penalties on a per report or a per account basis.<sup>81</sup>

Citing *Commissioner v. Acker*, the Court deviated from *Boyd* and the 5<sup>th</sup> Circuit in holding that applying the rule of lenity, a principle that requires courts to strictly construe statutes that impose penalties against the government and in favor of the individuals, would result in favor of a per report over a per account approach.<sup>82</sup> The government argued that *Acker* should be distinguished because that case involved the Internal Revenue Code, not the BSA.<sup>83</sup> The majority responded, stating the "rule of lenity is not shackled to the Internal Revenue

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75. *Id.* at 97-100.

76. *Id.* at 100.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

Code” or any other code; as *Acker* notes “[t]he law is settled that *penal statutes* are to be construed strictly,’ and an individual ‘is not to be subjected to a penalty unless the words of the statute plainly impose it.’”<sup>84</sup> The majority also notes that the cases cited in *Acker* involved a wide range of statutes from the Communications Act of 1934 to bankruptcy law.<sup>85</sup> The Court also noted that the rule of lenity helps protect the promise under the Due Process Clause that “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”<sup>86</sup> The majority states, “the government’s current theory poses a serious fair-notice problem” because “[t]he relevant provisions of the BSA nowhere discuss per-account penalties for non-willful violations” and “[a] number of the government’s own public guidance documents have seemingly warned of per-report” and notably the Court was “even told that, until 2008 and 2009, when the government began aggressively enforcing FBAR penalties, ‘many experienced tax professionals and return preparers were not aware of the FBAR reporting obligations . . . .’”<sup>87</sup> They concluded, “[i]f many experienced accountants were unable to anticipate the government’s current theory, we do not see how ‘the common world’ had fair notice of it.”<sup>88</sup>

Additionally, the Court notes that the question before them has both criminal and civil ramifications, in which the government’s interpretation of per account violation would impact the criminal penalties for willful violations.<sup>89</sup> This would mean in cases similar to Mr. Bittner’s, under the criminal penalties for a willful violation that person could face a \$68 million fine and a prison sentence of 1,360 years (based on a per account calculation) compared to a \$1.25 million fine and a prison sentence of 25 years (based on a per report calculation).<sup>90</sup> The Court held that non-willful penalties shall be assessed by report rather than by account.<sup>91</sup>

### C. Foreign Account Tax Compliance Act (FATCA)

The Foreign Account Tax Compliance Act (FATCA) came into effect in 2010 as a part of the Hiring Incentives to Restore Employment (HIRE) Act to further curb tax evasion.<sup>92</sup> FATCA was passed in part as a result of the continuing tax evasion scandals that had occurred abroad with the most notable

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84. *Id.*

85. *Id.* at 102.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Summary of Key FATCA Provisions*, INTERNAL REVENUE SERV. (Nov. 9, 2022), <https://www.irs.gov/businesses/corporations/summary-of-key-fatca-provisions> [<https://perma.cc/Z3WG-QW4N>].

instance being the scandal involving UBS AG Bank.<sup>93</sup> A whistleblower alleged that UBS AG Bank assisted United States taxpayers in evading taxes through foreign accounts held by the bank; in exchange for deferred prosecution, the bank agreed to cooperate with the U.S. investigation and settle the claim for \$780 million.<sup>94</sup>

FATCA requires compliance from both foreign financial institutions and qualified individuals that are citizens, green card holders, and a certain group of individuals that reside within the United States for a certain period of time.<sup>95</sup> These specified individuals are required to file a form 8938 to disclose assets related to foreign financial institutions and certain investment assets.<sup>96</sup> According to the IRS, the type of foreign assets that are reportable include (1) foreign financial accounts, (2) a foreign financial account that holds foreign stock or securities (just the account, not the actual securities), (3) foreign stock or securities not held inside a financial account, (4) foreign partnership interests and mutual funds and foreign hedge and private equity funds (5) “foreign accounts and foreign non-account investment assets held by foreign or domestic grantor trust for which you are the grantor”, and lastly (6) foreign life insurance policies or annuity contracts that have cash value.<sup>97</sup>

The threshold for reporting assets ranges depending on whether the filer is filing jointly or individually, whether the individual lives within the United States or abroad when these assets exceed \$50,000 (\$100,000 for joint filers) on the last day of the tax year, or if the account exceeds \$75,000 (\$150,000 for joint filers) at any point during the year for single filers living in the United States.<sup>98</sup> However, this amount is expanded for specified individuals that live outside of the United States, with an increase from \$50,000 and \$75,000 to \$200,000 and \$300,000 respectively for single filers and from \$100,000 and \$150,000 for joint filers to \$400,000 and \$600,000.<sup>99</sup> According to the I.R.S. the penalty for failing to file FATCA form 8938 is “[u]p to \$10,000 for failure to disclose and an additional \$10,000 for each 30 days of non-filing after IRS notice of a failure to disclose, for a potential maximum penalty of \$60,000; criminal penalties may also apply” for failure to file.<sup>100</sup>

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93. *UBS Enters Into Deferred Prosecution Agreement*, THE U.S. DEP’T OF JUST. (Feb. 18, 2009), <https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement> [<https://perma.cc/8SF9-9ML6>].

94. *Id.*

The government alleged that “UBS executives helped United States taxpayers open new UBS accounts in the names of nominees and/or sham entities . . . and helped United States taxpayers to continue to conceal their identities and assets from the IRS” and the government further alleged “that Swiss bankers routinely traveled to the United States to market Swiss bank secrecy to United States clients interested in attempting to evade United States income taxes.”

95. I.R.C. § 6038D; Internal Revenue Serv., *supra* note 14.

96. I.R.C. § 6038D; Internal Revenue Serv., *supra* note 14.

97. I.R.C. § 6038D; Internal Revenue Serv., *supra* note 14.

98. Internal Revenue Serv., *supra* note 14.

99. *Id.*

100. *Id.*

Additionally FATCA acts as a voluntary disclosure form which means that the program works by relying on the taxpayer and third party (typically a foreign financial institute (FFI) such as the taxpayer's bank) to disclose the information for relevant accounts to comply with FATCA.<sup>101</sup> The benefit the United States gets from the FATCA and FBAR is information about U.S. finances held in foreign accounts, which can be used for purposes of tax collection, combatting the financing of terrorism, and anti-money laundering initiatives; however, compliance with FBAR and FATCA reporting puts a significant burden on dual citizen taxpayers that live abroad.<sup>102</sup>

## II. BURDEN ON TAXPAYERS

### A. *The Burden Weighing on Taxpayers*

Upon reviewing FBAR and FATCA through the lens of their purpose and application, it is important to consider the burden imposed on qualified individuals, namely dual citizens and resident aliens that live abroad.<sup>103</sup> The first clear burden is the penalty imposed by both FBAR and FATCA on citizens who did not know of this filing requirement. Some dual citizens, in certain circumstances, may not have even known of their United States citizenship.<sup>104</sup> As previously seen through *Bittner* a dual citizen unaware of their filing obligations generally is not absolved of the penalties imposed by FBAR and FATCA.<sup>105</sup>

If the dual citizen did not know of their filing obligations yet knew they were a dual citizen there is an indication that the United States citizen should have looked into their tax filing status.<sup>106</sup> However, it should also be taken into consideration that the United States has the only citizenship-based taxation regime and every other country reports on a residence-based taxation system.<sup>107</sup> Because the United States is the only citizen-based taxing regime, it is

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101. I.R.C. § 6038D; Internal Revenue Serv., *supra* note 14.

102. Dore, *supra* note 6; Sebastian Beer, Maria Delgado Coelho & Sebastien Leduc, *Hidden Treasures: The Impact of Automatic Exchange of Information on Cross-Border Tax Evasion* (Int'l Monetary Fund, Working Paper No. 2019/286); Shu-Yi Oei & Diane M. Ring, *When Data Comes Home: Next Steps in International Taxation's Information Revolution*, 64 MCGILL L.J. 707, 750 (2019) (noting the risk of having exchange data harm taxpayers that may unintentionally make mistakes).

103. See Greenback Expat Tax Servs., *supra* note 6.

104. Christians, *supra* note 4, at 194-95; Eastman-Timmons, *supra* note 1, at 51.

105. See generally *United States v. Bittner*, 19 F.4th 734 (5th Cir. 2021); *Penalty Relief for Reasonable Cause*, INTERNAL REVENUE SERV. (Sept. 21, 2022), <https://www.irs.gov/payments/penalty-relief-for-reasonable-cause> [<https://perma.cc/SN7R-KWCV>].

106. Internal Revenue Serv., *supra* note 105.

107. As Christians notes, the other country Eritrea technically has a citizenship taxation of 2%, but this taxation has been denounced by several countries including the United States because the tax has been alleged to have been connected to funding war within Eritrea. Allison Christians, *A Global Perspective On Citizenship-Based Taxation*, 38 Mich. J. Int'l L. 193, 206 (2017).

reasonable for certain dual citizens to be unaware of their tax filing obligations to the United States if they have not entered or have been removed from the United States for a long period of time, or who had previously thought they had rescinded their United States citizenship only to learn later on that they had improperly done so.<sup>108</sup>

Another group of U.S. citizens, dubbed the “Accidental American” by scholars such as Allison Christians, also run into filing problems.<sup>109</sup> Accidental Americans are dual citizens that live outside the United States and did not know of their United States citizen status.<sup>110</sup> Examples of Accidental Americans include citizens being born in the United States or to a parent that is a citizen of the United States, but are never informed of their dual citizenship status and generally remain outside of the United States.<sup>111</sup>

A lack of notice of the requirement to file still plagues some foreign United States citizens and green card holders; 6% and 20% of United States dual citizens are unaware of their FBAR and FATCA filing requirements respectively even though these filing requirements have been in place for decades.<sup>112</sup> According to a survey conducted by Greenback Expat Tax Services, a for profit tax services business for United States expatriates, from a sample size of 3,200 Americans living abroad in over 121 countries, the primary recourse to have non-willful violators come into compliance for foreign United States citizens and green card holders is the IRS Streamlined Filing Compliance Procedure.<sup>113</sup> Note, however, that 40% of the surveyed United States citizens and green card holders do not know about the IRS Streamlined Filing Compliance Procedure and some filers who did know about the system, but failed to file in previous years, may be deterred by the possibility that they will be subjected to steep penalties when their return is amended.<sup>114</sup> The IRS guidance on individuals who may be concerned that they had willfully not filed returns is grim; “[t]axpayers who are concerned that their failure to report income, pay tax, and submit required information returns was due to willful conduct . . . should consider participating in the IRS Criminal Investigation Voluntary Disclosure Practice and should consult with their professional or

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108. Eastman-Timmons, *supra* note 1, at 98-99.

109. Christians, *supra* note 4.

110. *Id.*

111. Eastman-Timmons, *supra* note 1, at 96-104.

112. Greenback Expat Tax Servs., *supra* note 6.

113. As previously stated, this information comes from a Greenback Expat Tax Services, a for profit company that helps US taxpayers with their tax filing obligations. Thus, it is important to note that information and data from this firm should not necessarily be taken as unbiased, nor should it necessarily be taken as reflecting the entirety of United States citizens living abroad.). *See Living Abroad Is Complex Enough. We'll simplify the US expat tax part*, GREENBACK EXPAT TAX SERVs., <https://www.greenbacktaxservices.com/about-us/> [<https://perma.cc/GCK4-UUFP>] (last visited Mar. 3, 2023); Greenback Expat Tax Servs., *supra* note 6.

114. *Streamlined Filing Compliance Procedures*, INTERNAL REVENUE SERV. (Oct. 12, 2022), <https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures> [<https://perma.cc/FV5T-44HL>]; Greenback Expat Tax Servs., *supra* note 6.

legal advisers.”<sup>115</sup>

Additionally, even if the United States dual citizen or green card holder does know of their filing obligations and has not run afoul of the FBAR and FATCA provisions there is still the burden of filing the United States tax return and FBAR forms because of the items that trigger the filing requirements for the FBAR or United States tax return.<sup>116</sup> According to David McKeegan, the co-founder of Greenback Expat Tax Services, “[y]ou have people doing what seems to them like very normal things, like saving for retirement, or buying a home. . . [b]ut when you do it overseas, sometimes you can get yourself into a whole lot of trouble.”<sup>117</sup> It is important to note that Greenback Expat Tax Services is a business that focuses on assisting American expats with their tax burdens, so the following survey results should be taken with some scrutiny in applying to the entirety of US citizens living abroad.<sup>118</sup> This burden of reporting which even connects to the previously mentioned standard activities such as potentially buying a home or having a retirement account are one reason why several Americans have considered expatriation or have expatriated from the United States, especially with 86% of the dual citizens surveyed felt excluded with little likelihood that these burdens would be addressed.<sup>119</sup>

Moreover, not every expatriate is indifferent about their United States citizenship.<sup>120</sup> In fact, one former American explained their expatriation experience by stating “I renounced my U.S. citizenship . . . I was so emotional that I threw up outside the embassy. During my renunciation, I broke down. It was like getting a divorce.”<sup>121</sup> The Greenback survey further notes that 40% of dual citizens surveyed sought to renounce their citizenship because of the burdensome filing requirements.<sup>122</sup> Additionally, 6% of the surveyed dual citizens had trouble receiving banking services because of the filing requirements.<sup>123</sup> These burdens have played a role in why “[r]oughly 1 in 4 American expatriates is ‘seriously considering’ or ‘planning’ to renounce their U.S. citizenship” with that figure ballooning to almost two-thirds of the surveyed group who are considering on some level renouncing their United States citizenship.<sup>124</sup> This large figure may come off as even more troublesome when realizing that there are an estimated 9 million United States citizens living abroad.<sup>125</sup>

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115. Internal Revenue Serv., *supra* note 114.

116. Greenback Expat Tax Servs., *supra* note 6.

117. Kate Dore, *One Key Problem Has 1 in 4 Expats ‘Seriously Considering’ or ‘Planning’ to Renounce U.S. Citizenship*, CNBC, (Jun. 17, 2022), <https://www.cnbc.com/2022/06/17/1-in-4-expats-seriously-considering-renouncing-us-citizenship.html> [<https://perma.cc/4GC3-B3N8>].

118. Greenback Expat Tax Servs., *supra* note 113.

119. Greenback Expat Tax Services, *supra* note 6; Kate Dore, *supra* note 117.

120. Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 227 (2016).

121. *Id.*

122. Greenback Expat Tax Servs., *supra* note 6.

123. *Id.*

124. Kate Dore, *supra* note 117; *id.*

125. Kate Dore, *supra* note 117.



Additionally, the burden on United States dual citizens does not necessarily stop when they renounce their United States citizenship.<sup>126</sup> Rather, dual citizens that decide to renounce their United States citizenship must also pay a \$2,350 renunciation fee in addition to potentially being subject to an exit tax.<sup>127</sup> This exit tax is codified under I.R.C. § 877A by having “[a]ll property of a covered expatriate shall be treated as sold on the day before the expatriation date for its fair market value.”<sup>128</sup> The gain and loss on the mark-to-market sale are taken into account for the taxable year the citizenship was renounced, with an inflation adjusted exclusion of \$744,000 for covered expatriates.<sup>129</sup> A person is considered a covered expatriate when the taxpayer has an “average annual net income tax for the 5 years ending before the date of expatriation or termination of . . . \$172,000 for 2021;” when the taxpayer’s “net worth is \$2 million or more on the date of [the taxpayer’s] expatriation or termination of residency;” or when the taxpayer “fail[s] to certify on Form 8854 that [they] have complied with all U.S. federal tax obligations for the 5 years preceding the date of [their] expatriation or termination of residency.”<sup>130</sup>

### III. CURRENT AND PREVIOUS ALLEVIATIONS FOR TAXPAYERS

#### *A. The Potential Alleviations Available or Previously Available to Taxpayers*

Considering the previously mentioned burdens, it is important to recognize the avenues that the United States provides to help alleviate the reporting burdens for United States citizens and residents.

One available procedural outlet for the taxpayer to be relieved of some or all civil penalties is for the taxpayer to display that they acted in good faith and showed reasonable cause.<sup>131</sup> Reasonable cause is both codified under the

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126. The following article lends an interesting view that shows how reporting requirements even for royalty as Megan Markle for instance is a citizen of the United States and thus by extension her child, Archie, may have to report income if he receives income from the royal family. The article further discusses that Megan’s only recourse would be to renounce her United States citizenship and Archie would need to make the same renunciation when he turns 18. Darla Mercado, *Megan and Harry Can Flee to Canada but They Will Still Owe Taxes in the United States*, CNBC (Jan. 22, 2020), <https://www.cnbc.com/2020/01/22/meghan-and-harry-will-still-owe-taxes-to-the-irs-whenever-they-go.html> [<https://perma.cc/X7JP-777Y>].

127. *If I renounce my US Citizenship, am I Free from US Taxes?*, GREENBACK EXPAT TAX SERVS. (last visited Nov. 20, 2022), <https://www.greenbacktaxservices.com/faq/renounce-citizenship-free-us-taxes/> [<https://perma.cc/8N4B-3GAH>]; *Expatriation Tax*, INTERNAL REVENUE SERV. (Jul. 26, 2022), <https://www.irs.gov/individuals/international-taxpayers/expatriation-tax> [<https://perma.cc/GQ8P-63UQ>].

128. I.R.C. § 877A(a)(1).

129. *2021 Instructions for Form 8854*, INTERNAL REVENUE SERV. (Dec. 9, 2022); I.R.C. § 877A(a)(2), (3).

130. *2021 Instructions for Form 8854*, INTERNAL REVENUE SERV. (Dec. 6, 2022); *see also* Internal Revenue Serv., *supra* note 127.

131. Internal Revenue Serv., *supra* note 105; *see also* 31 U.S.C. § 5321.

provision of FBAR and is also available in a similar capacity for accuracy related penalties or a failure to file a return or associated form.<sup>132</sup> However, it is important to note that certain excuses have explicitly been deemed to not constitute reasonable cause, including “lack of knowledge.”<sup>133</sup> Specifically, the IRS states that a taxpayer is “responsible for knowing or getting advice on how to file returns and pay or deposit taxes on time. This includes filing requirements, deadlines, and amounts” the taxpayer owes.<sup>134</sup>

One resource that is available in assisting taxpayers to figure out their tax obligations is the Taxpayer Advocacy Service (TAS).<sup>135</sup> Founded in 1996, the TAS is an independent organization within the IRS that Congress formed “to help individual and business taxpayers resolve problems that haven’t been resolved through normal IRS channels,” and to “address large-scale, systemic issues that affect groups of taxpayers.”<sup>136</sup> Specifically, according to the IRS, TAS was developed as an outlet for assistance when the taxpayer cannot resolve their problem with the IRS and the taxpayer’s “problem is causing financial difficulties for [the taxpayer], [the taxpayer’s] family, or [the taxpayer’s] business,” the taxpayer or their business is facing “an immediate threat of adverse action,” the taxpayer has “tried repeatedly to contact the IRS but no one has responded [to the taxpayer], or the IRS hasn’t responded by the date promised.”<sup>137</sup>

TAS provides online resources and guides for several tax matters, including FATCA and FBAR filings.<sup>138</sup> TAS also provides a toll free phone line to contact a representative.<sup>139</sup> For contacting a local taxpayer advocate, the IRS provides a search webpage to find a taxpayer advocate by state (contactable by phone or by fax).<sup>140</sup> Lastly, international taxpayers can contact the general taxpayer advocate phone number or the Hawaii or Puerto Rico office depending on the taxpayer’s time zone.<sup>141</sup>

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132. 31 U.S.C. § 5321(a)(5)(B); Internal Revenue Service, *supra* note 105.

133. Internal Revenue Serv., *supra* note 105.

134. *Id.*

135. *Taxpayer Advocate Service*, INTERNAL REVENUE SERV. (last visited Nov. 2, 2022), <https://www.irs.gov/taxpayer-advocate> [<https://perma.cc/3XUD-7P35>]; see also *We’re Your Voice At the IRS*, TAXPAYER ADVOC. SERV., <https://www.taxpayeradvocate.irs.gov/> [<https://perma.cc/9ZX7-JM7L>] (last visited Nov. 19, 2022).

136. *Our History*, TAXPAYER ADVOC. SERV., <https://www.taxpayeradvocate.irs.gov/about-us/our-history/> [<https://perma.cc/KDH5-USFA>] (last visited Nov. 19, 2022).

137. *Local Taxpayer Advocate*, INTERNAL REVENUE SERV., <https://www.irs.gov/advocate/local-taxpayer-advocate> [<https://perma.cc/548V-K2AU>] (last visited Oct. 27, 2022).

138. *Foreign Account Tax Compliance Act*, TAXPAYER ADVOC. SERV. (last visited Nov. 19, 2022), <https://www.taxpayeradvocate.irs.gov/get-help/international/foreign-account-tax-compliance-act/> [<https://perma.cc/67FB-863X>]; see also *Foreign Bank and Financial Accounts*, TAXPAYER ADVOC. SERV., <https://www.taxpayeradvocate.irs.gov/get-help/international/foreign-bank-financial-accounts/> [<https://perma.cc/H8R6-FRJD>] (last visited Nov. 19, 2022).

139. *Contact Us*, TAXPAYER ADVOC. SERV. (last visited Nov. 19, 2022), <https://www.taxpayeradvocate.irs.gov/contact-us/> [<https://perma.cc/BCX8-AFYX>].

140. Taxpayer Advoc. Serv., *supra* note 137.

141. *Id.*

Another service available for dual citizen taxpayers is the Competent Authority Program.<sup>142</sup> The assistance of a competent authority is only available when the United States has a tax treaty with the country where the dual citizen resides.<sup>143</sup> Additionally, the competent authority is available when the taxpayer has “been denied treaty benefits or it is likely that the actions of the United States or the foreign country have resulted (or will result) in double taxation or taxation otherwise inconsistent with the treaty.”<sup>144</sup> The taxpayer has “discretion over the time for filing a request; however, delays in filing may preclude effective relief.”<sup>145</sup> To ensure the effectiveness of using the competent authority service, the taxpayer is recommended to file a “protective claim for credit or refund of U.S. taxes in accordance with Section 11 of Revenue Procedure 2015-40” and to review the OECD MAP procedures for competent authority review.<sup>146</sup> Competent authority programs are one route for resolving disputes when the dispute lies in a treaty, but FBAR and FATCA dispute resolution is limited in this regard, as treaties circulate around information exchanges generally for financial information reporting, but not for resolving FBAR or FATCA reporting disputes.<sup>147</sup>

An opportunity for taxpayers to become compliant and reduce their penalties in relation to FBAR and FATCA filings came through the various offshore voluntary disclosure programs (OVDP) issued in 2009, 2012, and 2014.<sup>148</sup> The 2009 OVDP was the first of the programs to incentivize taxpayers to disclose their foreign accounts and assets in exchange for a penalty generally assessed at 20% (but the IRS later had limited discretion to further reduce this penalty).<sup>149</sup> After the 2009 OVDP closed, the 2011 offshore voluntary disclosure initiative (OVDI) opened.<sup>150</sup> The 2011 OVDI offered taxpayers an opportunity to avoid criminal prosecution for previous failure to disclose applicable foreign assets or accounts while also paying a maximum 25% penalty (and back taxes

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142. *Competent Authority Assistance*, INTERNAL REVENUE SERV. (last visited Oct. 12, 2022), <https://www.irs.gov/individuals/international-taxpayers/competent-authority-assistance> [<https://perma.cc/J69R-QCKB>].

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. See Beer, Coelho & Leduc, *supra* note 102.

148. *IRS Criminal Investigation Voluntary Disclosure Practice*, INTERNAL REVENUE SERV., <https://www.irs.gov/compliance/criminal-investigation/irs-criminal-investigation-voluntary-disclosure-practice> [<https://perma.cc/LJU6-LBGS>] (last visited May 6, 2022).

149. Memorandum from Monica L. Baker & Rosemary Sereti, Internal Revenue Serv., on Use of Discretion on 2009 OVDP Cases (Mar. 1, 2011), [https://www.irs.gov/pub/irs-drop/ovdi\\_memo\\_use\\_of\\_discretion\\_3-1-11.pdf](https://www.irs.gov/pub/irs-drop/ovdi_memo_use_of_discretion_3-1-11.pdf) [<https://perma.cc/8GSF-54D8>]; *IRS Offshore Voluntary Disclosure Efforts Produce \$6.5 Billion*;

*45,000 Taxpayers Participate*, INTERNAL REVENUE SERV., (Jun. 2011). <https://www.irs.gov/pub/irs-news/FS-14-06.pdf> [<https://perma.cc/8P8B-ZH87>].

150. *2011 Offshore Voluntary Disclosure Initiative*, INTERNAL REVENUE SERV. (Mar. 4, 2020), <https://www.irs.gov/businesses/international-businesses/2011-offshore-voluntary-disclosure-initiative-2> [<https://perma.cc/BHN3-VQ4D>].

and interest).<sup>151</sup>

The 2012 OVDI did not deviate much from its 2011 counterpart (increased the maximum penalty from 25% to 27.5%), but the 2014 OVDP deviated substantially from its predecessors.<sup>152</sup> The 2014 OVDP implemented an increased penalty limit to 50% on certain offshore accounts in addition to the payment of back taxes and interest on unfiled or incorrectly filed returns.<sup>153</sup> However, the OVDP is no longer available to taxpayers, having closed in September of 2018.<sup>154</sup>

#### IV. COMPARING CANADA AND UNITED STATES REPORTING REGIME

##### A. Comparative Law: Two Sides of the Compliance Coin

While FBAR and FATCA are utilized by the United States to aim for compliance for reporting on foreign financial assets, the United States is not alone, with several jurisdictions adopting reporting standards to maintain compliance.<sup>155</sup> Since there is an overlap between the goals of different reporting regimes, it would be beneficial to see how the United States attempts to maintain reporting compliance with one of its allies: Canada. Canada not only uses two types of reporting structures that have goals similar to FBAR and FATCA, but also because Canada is one of the countries that has established a heightened level of information exchange with the United States via Intergovernmental Agreements (IGAs).<sup>156</sup>

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151. *IRS Offshore Programs Produce \$4.4 Billion to Date for Nation's Taxpayers; Offshore Voluntary Disclosure Program Reopens*, INTERNAL REVENUE SERV. (Jan. 9, 2012), <https://www.irs.gov/pub/irs-news/ir-12-005.pdf> [<https://perma.cc/T9NJ-MP5W>]; see also *Second Special Voluntary Disclosure Initiative Opens; Those Hiding Assets Offshore Face Aug. 31 Deadline*, INTERNAL REVENUE SERV. (Feb. 8, 2011), <https://www.irs.gov/pub/irs-news/ir-11-014.pdf> [<https://perma.cc/D32G-4FMY>].

152. *IRS Offshore Programs Produce \$4.4 Billion to Date for Nation's Taxpayers; Offshore Voluntary Disclosure Program Reopens*, *supra* note 151; see also Stephen Drake, *Last Chance to Become Compliant for US Taxpayers as Offshore Voluntary Disclosure Program Deadline Approaches*, PRICEWATERHOUSE COOPERS (last visited Nov. 20, 2022), <https://www.pwc.com/m1/en/tax/people-and-organisation/last-chance-to-become-compliant-for-us-taxpayers.pdf> [<https://perma.cc/JM7Q-EPB2>]; see also *IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come into Compliance*, INTERNAL REVENUE SERV. (Jun. 18, 2014), <https://www.irs.gov/pub/irs-news/IR-14-073.pdf> [<https://perma.cc/3YHZ-D59S>].

153. Drake, *supra* note 152; *IRS Makes Changes to Offshore Programs; Revisions Ease Burden and Help More Taxpayers Come into Compliance*, *supra* note 152.

154. *Closing the 2014 Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/international-taxpayers/closing-the-2014-offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers> [<https://perma.cc/P5PW-9488>] (last visited May 25, 2022).

155. See Beer, Coelho & Leduc, *supra* note 102.

156. Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, U.S.-Can., Feb. 5, 2014.

This Note will focus on requirements for individuals and not financial institutions, since the goal of this paper is to provide recommendations on helping relieve the reporting burden for individuals subject to FATCA and FBAR.<sup>157</sup> One issue that will not be fully analyzed is the issue that United States citizens have with acquiring bank accounts from foreign institutions.<sup>158</sup> The root of this issue stems from foreign financial institutions' (FFIs) inability to maintain compliance with FATCA and FBAR, not with individual compliance.<sup>159</sup> Thus, the issue is beyond the scope of this Note.

### B. FBAR of the North

While discussing FBAR's penalties, it is important to remember that one of the goals is tax compliance, a goal which the Canadian Revenue Agency (CRA) and the IRS have in common.<sup>160</sup> The IRS uses FBAR to ensure compliance when it comes to foreign accounts, and the CRA utilizes the Foreign Income Verification Statement (T1135).<sup>161</sup> One difference is that the FBAR reports foreign accounts that exceed \$10,000 at any time, whereas the T1135 only requires those with property valuing more than \$100,000 to file.<sup>162</sup> Both the FBAR and the T1135 also provide a simplified filing method in that the FBAR allows for a "check the box" report when there are over twenty-five foreign accounts that exceed \$10,000 in the tax year, and Part A of the T1135 allows a "check the box" report for taxpayers with foreign property in excess of \$100,000 but under \$250,000 during the tax year.<sup>163</sup> The contrasting point, interestingly, is that the FBAR requires taxpayers to fill out the account information for each account when there are less than twenty-five accounts that exceed \$10,000, whereas the CRA requires filers with property exceeding \$250,000 in value to

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157. See Stephen Garden, *EU to Push US to Help Accidental Americans at Meeting Next Month*, BLOOMBERG TAX (Jan. 25, 2023), <https://news.bloombergtax.com/daily-tax-report-international/eu-to-push-us-to-help-accidental-americans-at-meeting-next-month> [https://perma.cc/W4LA-4MRV]; see also Michael Rapoport, *Treasury Issues FATCA Guidance for Foreign Banks, Residents (2)*, BLOOMBERG TAX (Dec. 30, 2022), <https://news.bloombergtax.com/daily-tax-report/treasury-issues-guidance-on-fatca-for-foreign-banks-residents> [https://perma.cc/RVS2-R7HG]. This is a solid step in the right direction, however this change between the United States and EU is temporary and a more permanent solution would need to be made. But again, this is more for FFIs. For an academic article that discusses this impact especially tailoring it to Canada, see Yvonne Woldeab, *Americans We Love You But Can't Afford You*, 30 AM. U. INT'L L. REV. 611 (2015).

158. See Garden, *supra* note 157; Rapoport, *supra* note 157; Woldeab, *supra* note 157.

159. See Garden, *supra* note 157; Rapoport, *supra* note 157; Woldeab, *supra* note 157.

160. *Foreign Income Verification*, GOV'T OF CAN. (May 24, 2022), <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/information-been-moved/foreign-reporting/foreign-income-verification-statement.html> [https://perma.cc/C5NC-HPPV]; cf. Internal Revenue Serv., *supra* note 14.

161. See Gov't of Can., *supra* note 160; Internal Revenue Serv., *supra* note 14.

162. 31 C.F.R. § 1010.306(c) (2023); see also Gov't of Can., *supra* note 160.

163. 31 C.F.R. § 1010.350(g) (2023); see also Gov't of Can., *supra* note 160.

write out the details for assets using the more detailed Part B of the T1135.<sup>164</sup>

### C. FATCA the Outlier

At first blush, it may seem that the United States is a global outlier in its use of FATCA as part of its asset reporting regime. However, when taking a look at Canada and the roughly other 100 jurisdictions that use the Common Reporting Standard (CRS), it is apparent that there are some similarities between the two regimes.<sup>165</sup> After all, the CRS was inspired by what FATCA aimed to achieve by creating an exchange network to curb tax evasion.<sup>166</sup>

CRS jurisdictions generally coordinate to report information on residents of that jurisdiction for tax compliance, but Canada has also adopted the CRS “wider approach,” meaning that Canadian financial institutions have a duty to report on account holders living in any jurisdiction, not just the United States and Canada.<sup>167</sup> The United States, on the other hand, negotiates information exchanges that help satisfy FATCA reporting obligations by negotiating intergovernmental agreements (IGAs) on different model standards.<sup>168</sup> These models generally allow for different levels of reporting and privileges to the other jurisdiction, with Model 1A IGAs allowing for reciprocity of information to the jurisdiction’s competent authority, while Model 1B IGAs generally do not.<sup>169</sup> This degree of reciprocity is also a key difference between the CRS and FATCA; the CRS was designed with the idea of full reciprocity to curb the threat of tax evasion, but FATCA’s difference in Models creates selective barriers for similar reciprocity from jurisdiction to jurisdiction.<sup>170</sup> Relevantly, the Model 1 FATCA IGA agreements and the CRS apply identical definitions for United States citizens, which require United States citizens and residents to still be reported.<sup>171</sup> One distinct difference is that while both CRS and FATCA have some variant of an automatic exchange of information system (AEOI), the two differ in the level of reciprocity of information.<sup>172</sup>

Additionally, a contrasting point between FATCA and the CRS is that there

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164. 31 C.F.R. § 1010.306(c) (2023); *see also* Gov’t of Can., *supra* note 160.

165. *Guidance on Common Reporting Standard*, GOV’T OF CAN. (Mar. 10, 2022), <https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/enhanced-financial-account-information-reporting/reporting-sharing-financial-account-information-other-jurisdictions/guidance-on-common-reporting-standard-part-income-tax-act.html> [https://perma.cc/R76K-HEFE].

166. Beer, Coelho & Leduc, *supra* note 102.

167. Gov’t of Can., *supra* note 165 at ¶ 1.5.

168. *Standard For Automatic Exchange of Financial Account Information in Tax Matters*, OECD (Jul. 21, 2014), <https://www.oecd-ilibrary.org/docserver/9789264216525-en.pdf?expires=1697854927&id=id&accname=guest&checksum=6E920D32C94A2B71737BFDF3156C746> [https://perma.cc/H4MK-PFPM]; Beer, Coelho & Leduc, *supra* note 102.

169. Beer, Coelho & Leduc, *supra* note 102.

170. *Id.*; OECD, *supra* note 168.

171. *Id.*

172. Beer, Coelho & Leduc, *supra* note 102.

are certain accounts that are excludable from reporting under CRS, but United States residents or citizens would still have to report income, like that from Registered Disability Savings Plans, under the Model 1 FATCA IGA to the IRS.<sup>173</sup> James Eastman noted this potential issue for dual citizens; an interviewed Canadian dual citizen stated “I am in my mid-forties. I should be contributing to those . . . I’m too afraid that if I started an RRSP the filing paperwork, I think would be a little too difficult for me, and if I make a mistake the penalties are usurious.”<sup>174</sup> This is an example of how U.S. citizens with dual citizenship are burdened by FATCA’s reporting requirements, where a Canadian resident without U.S. citizenship is free of that burden through the relevant CRS exclusions.

Because there is a link between expatriation and FATCA reporting requirements, in addition to the continued outcry by foreign United States citizens and expatriates regarding tax reporting requirements, it is important to analyze the issues and proposals to resolve the compliance issue for individuals subject to FBAR and FATCA.<sup>175</sup>

## V. ANALYSIS

### *A. Analysis: Why Do Dual Citizens Claim to be “Accidental Americans”?*

When looking forward to solutions for Congress and the IRS to consider, it is reasonable to reiterate that the scope of this Note is for dual citizens, particularly those that fall into the “Accidental Americans” camp. Furthermore, it is important to note that Accidental Americans are plagued with issues related to reporting requirements that led some to go as far as to renounce their citizenship.<sup>176</sup>

### *B. Why Do Dual Citizens Consider Renouncing Their Citizenship?*

When reviewing the potential burdens addressed in this Note it is best to hear from the individuals that directly suffer from the imposition of FATCA and

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173. Eastman-Timmons, *supra* note 1, at 65; Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on

Income and on Capital, *supra* note 156.

174. Eastman-Timmons, *supra* note 1, at 66; Agreement Between the Government of the United States of America and the Government of Canada to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, *supra* note 156.

175. Beer, Coelho & Leduc, *supra* note 102; Dore, *supra* note 6.

176. *See* Dore, *supra* note 6.

FBAR.<sup>177</sup> According to a survey conducted by Greenback Expat Tax Services (Greenback), 40% of expatriates state that the reason they renounced their citizenship was because of the tax filing requirements imposed on them.<sup>178</sup> “It can get very complicated very quickly,” stated David McKeegan, co-founder of Greenback, a point that gets directly at the issue of FBAR and FATCA having some overlapping functions for reporting accounts, which may confuse taxpayers, with 19% of those surveyed noting that the top tax change they would make would be to call for a more streamlined process (with the fifth most popular calling for the FBAR and FATCA statement to be merged).<sup>179</sup> For example, in 2009, Sandra, a United States/Canadian taxpayer, had heard about the requirements of filing an FBAR from a newspaper article, and in addition to paying a \$78,000 penalty, Sandra had at one point filed a sixty-four-page tax return with a zero owing balance due to the compliance burden.<sup>180</sup> Sandra pondered “[h]ow am I going to be able to do this? How will I do this? I will have to give up citizenship somehow, because it’s just so complicated.”<sup>181</sup> The study and analysis conducted by James Eastman further noted that “[s]ome participants were aware of their U.S. citizenship but for a period of time were unaware of their U.S. tax filing obligations.”<sup>182</sup> These attestations strike three key issues: (1) lack of sufficient notice on whether the taxpayer needs to file and (2) how to file in addition to (3) the financial burdens that filing requirements impose on these dual citizens. This begs the question of whether these dual citizens are receiving sufficient help.

### *C. Are the Resources Available Sufficient Help?*

Competent authority agreements could help filers with dual citizenship to create a more streamlined process for international tax disputes, but this again is generally limited to countries with an agreement in place.<sup>183</sup> However, a more comprehensive answer must be instituted to ensure global compliance.

Lastly, while now revoked, the voluntary disclosure programs did provide

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177. *Id.*; see generally Tina’s story in Christians, *supra* note 4; Eastman-Timmons, *supra* note 1 at 96-104.

178. Also note that this survey was conducted by 3100 American expatriates over 125 countries. Dore, *supra* note 6.

179. *Id.*; see also J. Richard “Dick” Harvey, *supra* note 10, at 339-40. Dick Harvey is one of the academics to bring up the potential of merging the FBAR and FATCA form, which will be discussed more in depth later in this note, plus the merge would likely expand the scope of the FBAR because this serves as the FinCen to combat crime so might serve as a stronger combined tool.

180. Eastman-Timmons, *supra* note 1, at 103-04.

181. *Id.* at 104.

182. *Id.* at 108.

183. INTERNAL REVENUE SERV., MEMORANDUM OF UNDERSTANDING BETWEEN THE COMPETENT AUTHORITIES OF CANADA AND THE UNITED STATES OF AMERICA (Sept. 7, 2007), [https://www.irs.gov/pub/irs-utl/2010\\_arbitration\\_mou\\_nov\\_8-10\\_-\\_final.pdf](https://www.irs.gov/pub/irs-utl/2010_arbitration_mou_nov_8-10_-_final.pdf) [<https://perma.cc/N287-Z2TQ>].



aid to taxpayers at the outset of FATCA and the increased enforcement of FBAR with the IRS reportedly pulling in revenue of \$4.4 billion from the programs.<sup>184</sup> It makes relative sense why the IRS would decide to close the offshore voluntary disclosure programs with 18,000 taxpayers coming forward in 2011 to just 600 in 2017.<sup>185</sup> According to the IMF, the voluntary disclosure program works as a benefit when considered as a “last chance” and loses this strength and chance for compliance because evaders will feel like there is always a lifeline of sorts available when there are repeated or frequent disclosure programs in place.<sup>186</sup> That being said, while there may be a concern of a loss in strength of the disclosure program, it may be beneficial to Accidental Americans and dual citizens to have a revised and limited disclosure program that is tailored to an average income threshold and a description to provide the reasonable cause for not filing in the past with an inclusion of lack of sufficient notice.<sup>187</sup>

*D. Does the Current Form of Notice Actually Put Taxpayers  
on Sufficient Notice?*

One key issue that seemed to be implied by frustrated dual citizens is that there was no knowledge of a filing requirement, or in some cases, knowledge of being a United States citizen (especially at the outset of FATCA).<sup>188</sup> This leads to the question of whether there is sufficient notice to United States taxpayers of their filing requirements.<sup>189</sup> While there are webpages by the IRS that outline FBAR (even with a hotline that runs from 8am-4pm), and a webpage for FATCA, there is an issue of having these webpages being the only form of notice for taxpayers.<sup>190</sup> That is, the taxpayer has to know they are a United States citizen and then actively seek out potential filing requirements. Additionally, the FBAR hotline is useful but may be problematic given the different time zones around the world making availability more restricted.<sup>191</sup> Allison Christian notes in her article that perhaps reasonable notice could be when United States

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184. Kelly Phillips Erb, *IRS Announces End To Offshore Voluntary Disclosure Program*, FORBES (Mar. 13, 2018), <https://www.forbes.com/sites/kellyphillipserb/2018/03/13/irs-announces-end-to-offshore-voluntary-disclosure-program/?sh=49792a9577b3> [<https://perma.cc/P7GJ-HN3M>].

185. *Id.*

186. Dora Benedek, Martin Grote, Grace Jackson, Maksym Markevych, Christophe J. Waerzeggers & Lydia E. Sofrona, *Voluntary Disclosure Programs – Design, Principles, and Implementation Considerations*, INT’L MONETARY FUND T/N/M/2022/002 (Apr. 6, 2022).

187. *Id.* Citing because of the lack of strength of the repeated filing requirement generally.

188. *See generally* Kate Dore, *supra* note 6; Christians, *supra* note 4; *see also* James Eastman-Timmons, *supra* note 1, at 102-04.

189. This note was briefly spoken about by Christians and implied by the display of testimony by Eastman. Christians, *supra* note 4; Eastman-Timmons, *supra* note 1, at 96-104.

190. *Report of Foreign Bank and Financial Accounts (FBAR)*, *supra* note 4; *Foreign Asset Tax Compliance Act*, Internal Revenue Serv., <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca> [<https://perma.cc/TMF3-UJME>].

191. *Report of Foreign Bank and Financial Accounts (FBAR)*, *supra* note 4.

citizens that live abroad visit the embassy to obtain benefits from the United States such as a passport, but if one of the key goals of FBAR and FATCA is compliance with reporting, then this would only cast a net on the United States citizens that know of their status or plan to utilize those citizenship benefits by visiting the embassy.<sup>192</sup> This coupled with the fact that the IRS had reduced its foreign assistance budget by shuttering its foreign attaché offices abroad and email line of contact in 2015 leaves little help for dual citizens.<sup>193</sup>

One shining beacon of assistance is TAS; however, this group acts more as a team that assists taxpayers when they cannot resolve their issues with the IRS, which makes it a more restricted access group apart from the online resources made available and the increased phone lines including international phone services located in Hawaii and Puerto Rico.<sup>194</sup> However, it is questionable as to whether a full solution should rest on the shoulders of a team that generally seems to act as a mediating team when called to action between the IRS and the taxpayer when a dispute is not resolved.<sup>195</sup> Upon analyzing the remedies available for taxpayers and the lack of a strong notice system, there are cracks within the compliance and assistance services provided within the Internal Revenue Code and by the IRS and TAS. With these vulnerabilities it is important to bring back into the scope the effectiveness of FBAR and FATCA in comparison to the burdens that can arise.

#### *E. What Works with FBAR and FATCA?*

The compliance goal has in some respects been partially achieved by FBAR and FATCA in that the voluntary disclosure periods have brought in around \$4.4 billion to make certain taxpayers compliant. In addition the programs have helped catch large scale tax evasion with two individuals, Robert Smith and Robert Brockman, who were evading taxes on \$200 million dollars offshore and in Brockman's case around \$2 billion dollars in capital gains.<sup>196</sup> This focal point of catching "whales" has been prominent, and was even referenced in the dissent in *Boyd*, seeing as Smith had agreed to pay \$139 million in taxes and penalties as part of his agreement.<sup>197</sup> However, due to the low thresholds of FATCA and FBAR for filing requirements, the tractor beam of compliance has pulled in several everyday dual citizens who are burdened by the filing costs of FBAR and FATCA, with some filers going so far as to consider their citizenship "a

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192. It should be noted that Allison makes this point because then it would create a taxation system for citizens that want to be affiliated with the United States and receive benefits while protecting dual citizens that do not utilize their benefits. Christians, *supra* note 4.

193. Mason, *supra* note 1, 215-16.

194. Internal Revenue Serv., *supra* note 137.

195. *Id.*

196. Laura Saunders, *The IRS Reels in a Whale of an Offshore Tax Cheat—and Goes for Another*, WALL ST. J. (Oct. 23, 2020), <https://www.wsj.com/articles/the-irs-reels-in-a-whale-of-an-offshore-tax-cheatand-goes-for-another-11603445399> [<https://perma.cc/P9C4-7X79>].

197. *Id.*; Phillips Erb, *supra* note 184.

curse” and others even feeling pain in renouncing their citizenship.<sup>198</sup> Additionally, if compliance is the end goal it seems odd that the United States has such a lopsided agreement between it and most of the countries that it enters agreements with because of the lack of reciprocity of information.<sup>199</sup> With these issues looming, the question is what can be done to help dual citizens while maintaining the compliance goals of Congress and the IRS.

## VI. RECOMMENDATIONS TO REDUCE BURDEN FOR TAXPAYERS

### *A. Recommendation*

The impact of FBAR and FATCAs compliance burdens have sweeping effects on dual citizens, but the burden does not have to be so cumbersome. Congress should implement statutory remedies, but also administratively there need to be outlets for notification and assistance for taxpayers to adequately receive assistance for FBAR and FATCA. Given the theme for dual citizens’ issues with FBAR and FATCA is the lack of notice and cost of compliance, the following recommendations will aim to cumulatively reduce these burdens, starting with statutory remedies.<sup>200</sup>

### *B. Raising the (F)BAR*

This recommendation seeks to curb the issue of filing the FBAR for smaller taxpayers and dual citizens altogether by suggesting that the FBAR raise the filing threshold to at least \$100,000 to match with FATCA. From a policy perspective, the United States already exempts over \$100,000 when adjusted for inflation.<sup>201</sup> Thus, if the United States does not mind losing the roughly \$100,000 of exempted income, then why is there a concern of about \$10,000 being available in a foreign account?<sup>202</sup> Furthermore, the increase to \$100,000 would allow for a simple transition to a previous recommendation from Richard “Dick” Harvey to merge the FBAR and FATCA forms.<sup>203</sup> This would help alleviate the burden of filing by not requiring two separate forms. However, the fact that FBAR is used by both FinCen and the IRS for two separate purposes whereas FATCA is only for the IRS would still need to be dealt with.<sup>204</sup> So, even if there is not a compromise to expand the list of reported items to include both foreign accounts and foreign assets on one form, then the next best alternative

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198. Ruth Mason, *supra* note 1, at 227; *see also* Eastman-Timmons, *supra* note 1, at 111.

199. Beer, Coelho & Leduc, *supra* note 102.

200. Dore, *supra* note 6; Christians, *supra* note 4, at 223-24; *see generally* Eastman-Timmons, *supra* note 96-104.

201. I.R.C. § 911; 31 U.S.C. § 5321(a)(5)(A)-(B), Internal Revenue Serv., *supra* note 14.

202. I.R.C. § 911; 31 U.S.C. § 5321(a)(5)(A)-(B), Internal Revenue Serv., *supra* note 14.

203. Harvey, *supra* note 10, at 339-40.

204. Internal Revenue Serv., *supra* note 14. Shown in where to file the returns with FBAR being reported to FinCen and FATCA to the IRS with the tax return.

should be to have reporting threshold amount be the same amount for both the FBAR and FATCA to help taxpayers remember the threshold for both reporting regimes.

### *C. Provide Notice of Information and Obligation*

One key recommendation involves creating a notice system to help dual citizens learn of their filing requirements from the IRS ahead of their filing of the FBAR or FATCA to allow taxpayers that are unaware of their filing obligations to learn directly that, since they are citizens of the United States, they may have to file the FBAR or FATCA when they reach the account threshold for FBAR or the asset level for FATCA (ideally it would be the same if the \$100,000 amount recommendation is adopted). This notice would be sent out using the information obtained by the IRS from the countries that have signed the dual tax agreements that allow for an exchange of information.<sup>205</sup>

From there, notices will be sent out to the taxpayer via mail to the taxpayer's residence address to inform them of their status. Additionally, Allison Christian's idea for notices to be provided at the United States embassies makes sense. A general notice should be provided there and perhaps expanded to include a statement on flights outside the United States with an inflight IRS informational pamphlet provided upon boarding the plane. At the very least, notices should be attempted to be delivered via mail list to the prospective taxpayers' addresses.<sup>206</sup> The notice letter shall include copies of the FBAR and/or FATCA forms with instructions on how to file the forms and resources (including the recommended OVDP) to help taxpayers with questions. Additionally, the notice shall include the list of accounts under FBAR and assets under FATCA that should be reported and on what form (unless the IRS and FinCen adopt a merged form as previously mentioned). The next phase of providing notice is to ensure that there is adequate support assistance to ensure taxpayers receive adequate help in filing the FBAR and FATCA.

### *D. Comply and Demand*

The next recommendation would be to utilize part of the recently proposed \$80 billion to the IRS budget to be allocated to bring more available phone lines for taxpayers to communicate outside of the FBAR hotline, which runs on United States time zones, and the TAS phone lines.<sup>207</sup> Furthermore, money from

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205. Beer, Coelho & Leduc, *supra* note 102.

206. Christians, *supra* note 4, at 240-41.

207. Kate Dore, *Reconciliation Bill Includes Nearly \$80 Billion For IRS Including Enforcement, Audits: What That Means For Taxpayers*, CNBC (Aug. 8, 2021), <https://www.cnbc.com/2022/08/08/reconciliation-bill-includes-nearly-80-billion-for-irs-funding.html> [<https://perma.cc/LSF3-K22K>]; Taxpayer Advoc. Serv., *supra* note 139; Internal Revenue Serv., *supra*

the proposed IRS budget should be allocated to expanding the resources under TAS to have TAS market its assistive guidance and contact networks to international taxpayers to better accomplish their duty to advocate for taxpayers.<sup>208</sup>

### *E. A Compliance Lifeline*

To help nudge most taxpayers in the right direction, this Note recommends a new OVDP to be set in place with the same parameters of the 2011 OVDP; penalty maximum of 25% and no criminal prosecution.<sup>209</sup> This is done to help incentivize the Accidental Americans and dual citizens who were not on notice of their tax reporting compliance status or perhaps the obligation to file the FBAR in addition to the rest of their tax forms an opportunity to do so at a lower rate.

The penalty of 25% is suggested in this Note because it seems reasonable to have some penalty to both make a statement that filing the FBAR and FATCA is important for tax compliance, but especially in the sense of FinCen's goal of ensuring national security.<sup>210</sup> The IMF notes however, that having frequent and similar disclosure programs would reduce the programs ineffectiveness.<sup>211</sup>

Thus, the twist with this new disclosure program would be that it is only available for smaller taxpayers to ensure this OVDP helps protect those who reasonably may not have the ability to pay to find out their international filing obligations. The ceiling amount for taxpayers to be eligible for the program is that the taxpayer's gross income may not exceed \$400,000 to help set a guide point of what the ceiling should be for the OVDP with regard to middle class taxpayers.<sup>212</sup>

## VII: CONCLUSION

It is important to ensure tax compliance domestically and abroad, and the IRS is trying its best to achieve this with the resources it has. But to have an

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note 4. It should also be noted that as of August 4, 2023, the IRS budget is at risk of being dramatically adjusted down from \$80 billion to \$59 billion dollars. However, this reduction should not impede an effort to allocate a portion of this funding to assisting taxpayers to know of and how to report their FBAR and FATCA reporting obligations. Fatima Hussein & Kevin Freking, *Debt limit bill gives Republicans IRS cuts, but Democrats say they expect little near-term impact*, AP NEWS (June 1, 2023), <https://apnews.com/article/irs-debt-ceiling-budget-x-date-yellen-fe538fd8371cdf647400a27e6d56a9fb> [<https://perma.cc/A8YW-FD6U>].

208. Dore, *supra* note 207.

209. Internal Revenue Serv., *supra* note 150.

210. 31 U.S.C. § 5311, 5313-14; C.F.R. § 1010.350 (2022); Internal Revenue Serv., *supra* note 4.

211. Benedek, Grote, Jackson, Markevych, Waerzeggers & Sofrona, *supra* note 186.

212. Greg Iacurci, *Biden Reiterates \$400,000 Tax Pledge To Fund Agenda*, CNBC (Mar. 2, 2022), <https://www.cnbc.com/2022/03/02/biden-reiterates-400000-tax-pledge-to-fund-agenda.html> [<https://perma.cc/9Q3Q-DJLH>].

optimal tax compliance system under the United States citizenship reporting regime, there must be adjustments made both statutorily and administratively to help dual citizens and United States citizens/green card holders that are living abroad. As previously mentioned in this article, there are several burdens for taxpayers to file and remain compliant with the standards of FBAR and FATCA, and with a general lack of proactive outreach, it may be difficult to have taxpayers receive notice of their obligations before it is too late.

Thus, to ensure a stronger and more uniform tax compliance network, the United States must adopt a stronger notice system with sufficient informational resources to help inform and put taxpayers on notice by using proper resource allocation to branches of the IRS. Second, there should be an offshore voluntary disclosure program to provide amnesty for the Accidental Americans that were put on notice to file their FBARs at a lower penalty rate in order to achieve the long-term gain of continual compliance abroad. Third, if the IRS does not want to adopt the new disclosure program, then it is up to Congress to amend the statutes to increase the FBAR threshold to a minimum of \$100,000 in line with FATCA.<sup>213</sup>

Tax compliance is a noble goal, but renouncing one's citizenship should not be the go to option for burdened dual citizens and taxpayers living abroad. Rather, we must collectively work to make a more uniform and effective approach to help notify taxpayers and assist them in maintaining compliance rather than watch those citizens go.

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213. 31 C.F.R. § 1010.821 (2022); 31 U.S.C. 5321(a)(C)(i)-(D).