LAW OFFICES OF
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February 9, 2023

Internal Revenue Service
Attn.: Andres Garcia
Room 6526, 1111 Constitution
Avenue NW, Washington, DC 20224

VIA EMAIL TO pra.comments@irs.gov

RE: Response to request for public comments on Forms 3520 and 3520-A
OMB Number: 1545–0159

Dear Mr. Garcia and Other IRS and Chief Counsel Personnel:

We appreciate the opportunity to provide comments pursuant to the IRS' request for comments on Forms 3520 and 3520-A published in the Federal Register on December 16, 2022.

Overview

The request for public comments concerning Forms 3520 and 3520-A invites public comments on the following:

> (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;
> (b) the accuracy of the agency's estimate of the burden of the collection of information;
> (c) ways to enhance the quality, utility, and clarity of the information to be collected;
> (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and
> (e) estimates of capital or start-up costs and costs of operation,

We provide comments on some of the categories listed above and also provide certain broader recommendations relating to Forms 3520 and 3520-A and administrative relief from reporting under Rev. Proc. 2020-17.

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Comments

We first address two categories mentioned in the request for public comment: the accuracy of the agency's burden estimate for the collection of information on these forms and ways to enhance the quality, utility, and clarity of the information to be collected.

Burden estimate is materially understated

First, concerning the agency's burden estimate, the IRS' estimate is materially understated and contradicts publicly available data. The IRS' estimate published in the Federal Register indicates only 1,820 annual responses for Forms 3520 and 3520-A. That estimate is grossly understated and appears to be a carryover from earlier burden estimates which are publicly available and accessible at www.reginfo.gov. The IRS' supporting paperwork for the last OMB review submitted December 2019 contained that figure calculated as follows:

Authority	Description	# of Respondents	# Responses per Respondent	Annual Responses	Hours per Response	Total Burden
IRC § 671-679	Form 3520	2,000	.66	1,320	54.35	71,742
IRC § 6048(b)	Form 3520-A	500	1	500	45.59	22,795
Totals		2,500		1,820		94,537

The prior December 2016 OMB recertifications submitted the exact same data separately for the two forms (a separate OMB number previously covered Form 3520-A).

Publicly available data shows 27,431 Forms 3520 were filed in 2012. See TIGTA report "A Service-Wide Strategy Is Needed to Increase Business Tax Return Electronic Filing," September 24, 2014. See also "SOI Tax Stats - Foreign Trusts" at https://www.irs.gov/statistics/soi-tax-stats-foreign-trusts (providing some historical data including that in 2014 14,100 Forms 3520-A were filed). The extremely low estimate the IRS provided in the Federal Register for the current OMB recertification appears to be a clerical holdover from the IRS' prior OMB recertification of these forms submitted in 2019 and earlier.

Over the last decade, awareness of Forms 3520 and 3520-A has grown exponentially. A decade after the 2012 statistics in the TIGTA report, we estimate that the actual number of annual filers (respondents) of Form 3520 for tax year 2022 is

probably closer to 60,000 or nearly double the 2014 statistic; we also estimate that Form 3520-A filings for tax year 2022 materially exceeds the reported 2014 data on the IRS' "SOI Tax Stats - Foreign Trusts" website.

Furthermore, the IRS' burden estimate for Form 3520 does not take into account reporting of large foreign gifts and inheritances mandated by I.R.C. § 6039F. It is clear that I.R.C. § 6039F was not included in the burden estimate because there is no mention of it in the abstract published in the Federal Register. Additionally, the burden estimates from prior submissions to OMB omit I.R.C. § 6039F. Since reporting of large foreign gifts and inheritances is much simpler than the reporting relating to foreign trusts, we recommend a separate burden estimate for the number of Forms 3520 filed solely to report large foreign gifts and inheritances. The IRS may have difficultly ascertaining the number of Forms 3520 used solely to report large foreign gifts and inheritances, and that is another reason for adopting the suggestion of creating a new, separate form to report large foreign gifts and inheritances addressed infra.

By materially understating the number of respondents, the IRS is materially understating the overall compliance burden associated with these forms. The IRS has easily accessible data in its possession and should analyze actual filing data for these forms in order to provide more accurate burden estimates to OMB. We urge the IRS to reference the most recent actual filing data in preparing burden estimates.

Enhancements to quality, utility, and clarity are possible

Second, we recommend that the IRS enhance the quality, utility, and clarity of the information to be collected on these forms. Form 3520 has a split personality, and we propose developing a separate form for reporting large foreign gifts and inheritances. Further, the IRS has not done enough to educate the general public and tax professionals about the requirements to report large foreign gifts and inheritances on Form 3520. Buried on page 87 of the 2022 Form 1040 instructions is a small mention of foreign gift and inheritance reporting. The 2022 Form 1040 instructions state:

> However, if you received a gift or bequest from a foreign person (including amounts from foreign corporations and foreign partnerships that you treated as gifts) totaling more than $17,339, you may have to report information about it on Form 3520, Part IV.

We recommend that the IRS create a separate form for reporting large foreign gifts and inheritances along with instructions that clearly educate the public. The IRS should include in Form 1040 instructions the actual current reporting thresholds for foreign gifts and inheritances from a nonresident alien individual or a foreign estate ($100,000) and do more to educate the public and tax professionals about the reporting requirements and penalties associated with large foreign gifts and inheritances. Additionally, we strongly

recommend that the $100,000 threshold be increased to take into account inflation over the last two decades. Such an increase does not require statutory amendment. Notice 97-34 increased reporting large foreign gifts and inheritances from $10,000 to $100,000, and we recommend an increase in reporting to $500,000 through a similar notice or other agency guidance.

Most importantly, the IRS should add a checkbox to Form 1040 asking taxpayers whether they received any gifts and inheritances from sources outside of the United States. If the answer is "yes" then, the Form 1040 should direct taxpayers to the appropriate form and instructions. This suggestion naturally flows with the current Form 1040, Schedule B questions concerning foreign bank accounts and foreign trusts.

Further, we recommend that the IRS make clear to the public and tax professionals that the IRS systemically assesses maximum penalties for late and amended Forms 3520 and 3520-A. We request more transparency from the IRS about its penalty procedures and campus practices including the practice of assessing systemic penalties at maximum rates; we also urge more transparency on how IRS personnel at the Ogden Campus handle penalty assessments and requests for abatement. We also posit that systemic penalty assessments without considering reasonable cause runs contrary to the IRS' penalty policy by forcing taxpayers to engage professionals and take their penalty disputes to the Independent Office of Appeals. The IRS' Policy Statement P-20-1 addresses macro-level penalty policy and notes:

> The Service will demonstrate the fairness of the tax system to all taxpayers by:
>
> > A. Providing every taxpayer against whom the Service proposes to assess penalties with a reasonable opportunity to provide evidence that the penalty should not apply;
> > B. Giving full and fair consideration to evidence in favor of not imposing the penalty, even after the Service's initial consideration supports imposition of a penalty; and
> > C. Determining penalties when a full and fair consideration of the facts and the law support doing so.

IRM 1.2.1.12.1(9).

Because Ogden Campus personnel are making penalty assessments, that IRS unit needs the capability of correcting errors and considering reasonable cause in order to comply with Policy Statement P-20-1. Otherwise, the IRS is not "giving full and fair consideration to evidence in favor of not imposing the penalty." Further, when the Ogden Campus assesses systemic penalties at maximum rates and ignores reasonable cause statements submitted with late submissions, it fails to fully and fairly consider the facts

and law. For example, many practitioners have submitted detailed reasonable cause statements attached to late Forms 3520 and 3520-A. In general, Ogden Campus personnel do not consider reasonable cause statements, even in cases where the facts present "textbook" reasonable cause cases where the failure to timely submit Forms 3520 and 3520-A arise from reasonable reliance on professionals.

We urge the IRS to add Forms 3520 and 3520-A to the list of forms eligible for First Time Abatement (FTA) relief. John Hinding, Director, Specialized Examination Programs & Referrals, wrote a memo dated December 7, 2022 to employees of the Independent Office of Appeals extending FTA to systemic Form 5471 and Form 5472 penalties; at this time, it appears that only business return filers are subject to systemic penalties relating to Forms 5471 and 5472. Mr. Hinding's memo is welcome news to the tax community and business filers that may be contesting systemic penalties relating to Forms 5471 and 5472. But many practitioners have expressed dismay over not including Forms 3520 and 3520 in that memo. The lack of inclusion of Forms 3520 and 3520-A ignores the many individual taxpayers contesting penalties relating to those forms, all the while business taxpayers are afforded FTA for other international information returns. It seems unfair to offer FTA to more sophisticated business taxpayers while not providing FTA to individual taxpayers. We urge an expansion of FTA to the systemic penalties imposed on Forms 3520 and 3520-A.

We strongly recommend that the IRS create a safe harbor for late filing of Forms 3520 and 3520-A where taxpayers are not under civil examination or criminal investigation and where the IRS has not already received specific information concerning the non-filing of an international information return. Conceptually, this safe harbor proposal for late filings of Forms 3520 and 3520-A could be likened to the penalty protections afforded qualified amended returns. See Treas. Reg. § 1.6664-2(c)(3). Such a safe harbor is needed because the Ogden Campus assesses maximum penalties for late and amended Forms 3520 and 3520-A without regard to the underlying facts, including reasonable cause. The Ogden Campus' procedures not only run contrary to the IRS' macro-level penalty policy but the procedures create a strong disincentive for voluntary compliance.

The strong disincentive for voluntary compliance is obvious; simply assessing maximum penalties without regard to the facts is prompting many taxpayers to elect prospective compliance rather than self-correcting past mistakes. The IRS' penalty policy begins with: "Penalties are used to enhance voluntary compliance." IRM 1.2.1.12.1(1). In the context of Form 3520 and Form 3520-A reporting, systemic penalties are actually working against voluntary compliance by creating a disincentive to self-correct past reporting mistakes. The IRS's policy of systemic penalty assessment also creates ethical issues for practitioners who counsel taxpayers on compliance matters. See Megan Brackney, The IRS's Aggressive Enforcement of Foreign Information Return Penalties Has Created Ethical Dilemmas For Practitioners (Part 2), PROCEDURALLY TAXING

(December 8, 2022) https://proceduralltaxing.com/the-irss-aggressive-enforcement-of-foreign-information-return-penalties-has-created-ethical-dilemmas-for-practitioners-part-2/.

Furthermore, the IRS may not be aware of the strong disincentive for tax professionals, specifically smaller CPA firms, to handle compliance matters relating to Forms 3520 and 3520-A because of the Ogden Campus' practice of systemic penalty assessment. Some tax professionals are no longer preparing Forms 3520 and 3520-A because of the IRS' strict liability for any and all perceived mistakes, foot faults, errors, and tardiness. The IRS' current practice of systemically assessing maximum penalties regardless of underlying facts is creating too much risk for some tax professionals especially smaller CPA firms. In many cases involving penalties assessed by the Ogden Campus, penalties far exceed malpractice insurance coverage. This is driving some CPA firms to eliminate handling Forms 3520 and 3520-A as part of their tax practices.

Broader Recommendations

Our broader recommendations focus on two main points: (1) issuing regulations or under I.R.C. § 6039F other administrative guidance to exempt certain spousal transfers from reporting and (2) providing greater administrative relief from Form 3520 and 3520-A reporting and more guidance on reporting.

Spousal Transfers

Many U.S. persons are married to non-resident aliens (NRAs). In such marriages between U.S. persons and NRAs, routine property transfers and gifts from the NRA spouse to the U.S. person spouse trigger reporting under § 6039F. It is our understanding that the IRS has generally taken the position that even transfers between spouses that under local law may be characterized as spousal support are subject to Form 3520 part IV reporting as gifts. We recommend excluding transfers from an NRA spouse to a U.S. person spouse from reporting.

Greater Administrative Relief and Guidance

We praise the IRS for the administrative relief from reporting under Rev. Proc. 2020-17. Nonetheless, we request more guidance and explicit exceptions to I.R.C. § 6048 reporting for foreign pensions and pension-type arrangements in Treasury Regulations. See, e.g., Roy A. Berg and Marsha-Laine Dungog, U.S. Income Tax Treatment of Australian Superannuation Funds, TAX NOTES INT'L, October 10, 2016 (among other things requesting that the regulations under § 6048 be amended to clarify that Australian superannuation arrangements be excluded from reporting on Forms 3520 and 3520-A). There are many gray areas relating to when foreign pensions and pension-type arrangements may or may not be reportable as foreign trusts. We recommend more

guidance from the IRS on those issues, and we recommend broader administrative relief from reporting beyond Rev. Proc. 2020-17. Specifically, we recommend raising the thresholds in Rev. Proc. 2020-17 § 5.03(4) to an annual limit of $200,000 or less and a lifetime limit of $3,000,000 or less. The current limits in Rev. Proc. 2020-17 exclude too many taxpayers from the relief provided thereby creating expensive compliance burdens and traps for the unwary. Also, higher limits would also take into account potential future currency fluctuations in the event the U.S. dollar materially weakens.

The following facts are based on real life examples illustrating the need for increasing the limits provided in Rev. Proc. 2020-17:

> Mr. Smith, a UK citizen, retired a few years ago. During his working years, he had a modest pension with his employer and later moved the employer-managed pension into a self-invested personal pension (SIPP) in the UK. The balance in his SIPP is about $750,000 US, and Mr. Smith fits squarely within the definition of "middle class." Mr. Smith manages the investments in his SIPP. The U.K. SIPP just barely exceeds the limits provided for in IRS Rev. Proc. 2020-17 to avoid reporting the SIPP as a foreign trust under IRC sec. 6048. The UK sets lifetime limits for contributing to SIPPs at £1,073,100.
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> Upon retiring, Mr. Smith began volunteering his time with a U.S. non-profit. The non-profit asked him to temporarily move to the U.S. to assist with projects. Mr. Smith arrived in the U.S. and the temporary move lasted longer than he anticipated. Mr. Smith became a U.S. person in 2018 as a result of the substantial presence test. Mr. Smith is eligible to take distributions from his SIPP based on his age, and he has taken some distributions in each year while in the U.S. for living expenses while volunteering with the non-profit.
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> In 2018, 2019, and 2020, Mr. Smith used what he thought was a qualified and competent tax return preparer to file his Forms 1040. Mr. Smith's return preparer reported the SIPP on Forms 8938 and on FBARs but failed to identify the SIPP as a foreign grantor trust and failed to file Forms 3520 and 3520-A for Mr. Smith. Mr. Smith has not been contacted by the IRS about his filings.
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> Mr. Smith engaged new tax professionals for in 2022 for the preparation of his 2021 income tax return, and his new professionals identified the foreign trust reporting issue relating to his U.K. SIPP.

In the vignette above, the taxpayer Mr. Smith made honest efforts to report his SIPP to the IRS and FinCEN by reporting it on Forms 8938 and on FBARs, and he relied on his tax professional to advise him of required reporting. Although of modest means,

Mr. Smith does not qualify for relief under Rev. Proc. 2020-17. Since UK pension plans are covered under the U.S.-U.K. income tax treaty exempting the earnings from current U.S. taxation, Mr. Smith had no tax noncompliance.

Mr. Smith's prior reporting predicament requires choosing between two main options: (i) filing delinquent Forms 3520 and 3520-A and facing substantial systemic penalties or (ii) prospective compliance. If Mr. Smith were to file delinquent Forms 3520 and 3520-A he would face a nightmare of IRS administrative action involving penalty assessments, likely collection action leading to Collection Due Process proceedings, and a very lengthy process of requesting abatement of the penalties. Allowing Mr. Smith to file past due Forms 3520 and 3520-A without systemic penalties would demonstrate "the fairness of the tax system to compliant taxpayers." Penalty Policy 20-1 at IRM 1.2.1.12.1(3). Alternately, administrative relief by increasing the thresholds provided in Rev. Proc. 2020-17 would benefit taxpayers like Mr. Smith. We urge the IRS to consider the real world effects of its current policies and its penalty procedures at the Ogden Campus.

In conclusion, in relation to Forms 3520 and 3520-A we urge the IRS to revise the burden estimates for these forms, we urge the IRS to enhance the collection of information on these forms by creating a new form for reporting large foreign gifts and inheritances, and we urge the IRS to consider real life examples in providing broader relief to taxpayers.

Sincerely,

Daniel N. Price
Managing Member
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cc (via email):
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