



February 7, 2023

Mr. Andres Garcia  
Internal Revenue Service  
Room 6526  
1111 Constitution Ave, NW  
Washington, DC 20224

Dear Mr. Garcia:

**RE: OMB Number 1545–1910—Information Return of U.S. Person With Respect to Foreign Disregarded Entities; and Transactions Between Foreign Disregarded Entity of a Foreign Tax Owner and the Filer**

The American Institute of CPAs (“AICPA”) appreciates the opportunity to provide comments on information collections, as required by the Paperwork Reduction Act of 1995, for Form 8858, *Information Return of U.S. Persons With Respect to Foreign Disregarded Entities (FDEs) and Foreign Branches (FBs)* and Schedule M (Form 8858), *Transactions Between Foreign Disregarded Entity (FDE) or Foreign Branch and the Filer or Other Related Entities*. We are writing in response to comments requested by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) on Proposed Collection; Comment Request for Form 8858.<sup>1</sup>

Specifically, the AICPA is providing comments on whether the collection of information is necessary for the proper performance of the functions of the agency and recommends providing an exemption from filing Form 8858 for certain dual resident taxpayers.

Background

Regulation § 301.7701(b)-7(a)(1)<sup>2</sup> provides that a dual resident taxpayer “is an individual who is considered a resident of the United States pursuant to the internal laws of the United States and also a resident of a treaty country pursuant to the treaty partner's internal laws.” Certain dual resident taxpayers that claim a treaty benefit calculate their United States (U.S.) income tax liability as a nonresident alien under the Internal Revenue Code (IRC) and regulations.<sup>3</sup> Individual taxpayers making such an election file Form 1040-NR, *U.S. Nonresident Alien Income Tax Return*, even if they may be considered U.S. persons for certain purposes and Schedule M of Form 8858.

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<sup>1</sup> <https://www.federalregister.gov/documents/2022/12/09/2022-26820/proposed-collection-comment-request-for-form-8858> 87 FR 75700.

<sup>2</sup> All references to “section” are to the Internal Revenue Code of 1986 (IRC), as amended, and all references to “Reg. §”, “Prop. Reg. §”, and “regulations” are to U.S. Treasury regulations promulgated thereunder, unless otherwise specified.

<sup>3</sup> IRC §6114 and Treas. Reg §301.7701(b)-7, disclosed on Form 8833 *Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)* attached to a timely filed Form 1040NR.

## Recommendation

The AICPA recommends that Treasury and the IRS provide an exemption from filing Form 8858 for dual resident individual taxpayers who elect to calculate their U.S. income tax liability as a nonresident alien under the IRC and regulations and file Form 1040-NR.

## Analysis

Treasury and the IRS have provided a similar exemption from the section 6038D reporting requirements of Form 8938, *Statement of Specified Foreign Financial Assets*, and section 1298(f) reporting requirements of Form 8621, *Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund*. The reporting requirements for both Form 8938 and Form 8621 are applicable to dual resident taxpayers who elect to be treated as a resident of the treaty partner and thus file Form 1040-NR. The same rationale should apply for Form 8858 reporting purposes.

The following language in the Preamble to the final regulations under 6038D,<sup>4</sup> contains an exception from reporting for dual resident taxpayers:

A comment recommended an exemption from the section 6038D reporting requirements be included for an individual who is a dual resident taxpayer and who, pursuant to a provision of a treaty that provides for resolution of conflicting claims of residence by the United States and the treaty partner, claims to be treated as a resident of the treaty partner. In such a case, a dual resident taxpayer may claim a treaty benefit as a resident of the treaty partner and will be taxed as a nonresident for U.S. tax purposes for the taxable year (or portion of the taxable year) that the individual is treated as a nonresident.

The final rule adopts this recommendation for a dual resident taxpayer who determines his or her U.S. tax liability as if he or she were a nonresident alien and claims a treaty benefit as a nonresident of the United States as provided in Treas. §301.7701(b)-7 by timely filing a Form 1040NR, "*Nonresident Alien Income Tax Return*," (or such other appropriate form under that section) and attaching a Form 8833, *Treaty Based Return Position Disclosure Under Section 6114 or 7701(b)*. The Treasury and the IRS have concluded that reporting under section 6038D is closely associated with the determination of an individual's income tax liability. Because the taxpayer's filing of a Form 8833 with his or her Form 1040NR (or other appropriate form) will permit the IRS to identify individuals in this category and take follow-up tax enforcement actions when considered appropriate, reporting on Form 8938, *Statement of Specified Foreign Financial Assets*, is not essential to effective IRS tax enforcement efforts relating to this category of U.S. residents.

The recommendation to provide an exemption from filing Form 8858 for certain dual residents would harmonize the reporting requirements for dual resident taxpayers electing to calculate U.S. federal income tax as nonresident aliens who file Forms 1040-NR. Pursuant to Reg. §301.6114-1(b)(8) and Reg. §301.6114-1(d)(1), such individuals must furnish Forms 8833, *Treaty-Based*

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<sup>4</sup> Preamble to Treas. Reg. § 1.6038D-2, T.D. 9706 79 FR 73817.

*Return Position Disclosure Under § 6114 or 7701(b)* as attachment to Forms 1040-NR. Since the IRS will be able to identify such taxpayers and take follow-up actions, it is not essential for such taxpayers to also be required to file Form 8858.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact Robert Russell, Chair, AICPA International Taxation Technical Resource Panel, at (714) 641-3493 or [rrussell@rutan.com](mailto:rrussell@rutan.com), Arlene Schwartz, AICPA Senior Manager – Tax Policy & Advocacy, at (202) 434-9208 or [Arlene.Schwartz@aicpa-cima.com](mailto:Arlene.Schwartz@aicpa-cima.com); or me at (601) 326-7119 or [JanLewis@HaddoxReid.com](mailto:JanLewis@HaddoxReid.com).

Sincerely,

A handwritten signature in cursive script, appearing to read "Jan Lewis".

Jan Lewis, CPA  
Chair, AICPA Tax Executive Committee

cc: Mr. Peter Blessing, Associate Chief Counsel (International), Internal Revenue Service  
Mr. Daniel McCall, Deputy Associate Chief Counsel (International), Internal Revenue Service  
Ms. Lindsay Kitinger, Deputy International Tax Counsel, Department of the Treasury