

United States

Will the FATCA Same-Country Exception Become the Rule?

With final regs under the Foreign Account Tax Compliance Act pending, advocates of the same-country exemption are anxiously waiting to see whether it will be in the guidance, but Treasury is not tipping its hand.

In an August 10 letter to Robert Stack, Treasury deputy assistant secretary (international tax affairs), American Citizens Abroad (ACA) asked that Treasury institute an exception to FATCA for the benefit of Americans living abroad whereby the reporting requirements would be waived for accounts held in the same country of residence. The exemption would help address the lockout effect that occurs when foreign banks, not willing to deal with the rigors and reporting requirements of FATCA, simply refuse to do business with U.S. customers, according to the letter. It would simultaneously increase voluntary compliance, as Americans seeking to benefit from the exemption would timely file U.S. tax returns with a same-country election attached, the ACA said.

Some practitioners have also surmised that a same-country exception might reduce the number of U.S. expatriations potentially attributable to FATCA burdens. (Prior coverage: *Tax Notes Int'l*, Sept. 14, 2015, p. 938.)

Treasury acknowledged receipt of the letter and said that it will address it as appropriate in due course.

A Chorus of Critics

The ACA is hardly alone in its call for a same-country exemption. In an August 15 letter to the IRS and Treasury, the American Institute of CPAs called for relief from existing filing requirements for foreign bank account reports and Form 8938, "Statement of Specified Foreign Financial Assets," for taxpayers with foreign financial accounts in their country of residence.

"These taxpayers have established the accounts as part of their day-to-day living, with no intent to hide assets or knowingly avoid their income tax liabilities. We believe it is unfair to subject these taxpayers to a complicated, time-consuming, and potentially expensive reporting requirement for information available to the IRS from alternative sources," the AICPA said.

Support for the exemption spans political affiliations. The Taxpayer Advocate Service recommended a regulatory change to exclude from FATCA financial accounts held in the country where a U.S. taxpayer was a bona fide resident — a move a bipartisan coalition in Congress announced its support for in a July 2015 letter to Treasury. The provision would "mitigate concerns about the collateral consequences of FATCA raised by U.S. non-residents, reduce reporting burdens

faced by [foreign financial institutions], and allow the IRS to focus enforcement efforts on identifying and addressing willful attempts at tax evasion through foreign accounts," according to the taxpayer advocate's report.

This year's official party platforms also acknowledge the need to at least revisit the reporting requirements. While Republicans want a broad repeal of FATCA, Democrats suggest "finding the right solutions" so that "law-abiding Americans living abroad are not unfairly penalized." (Prior coverage: *Tax Notes Int'l*, Aug. 8, 2016, p. 490.)

Vice presidential candidate Sen. Tim Kaine, D-Va., expressed his concern in a December 2015 letter to Treasury Secretary Jacob Lew over the "unintended consequences" of FATCA, namely the difficulty Americans abroad have had in maintaining bank accounts.

According to Marylouise Serrato, executive director of the ACA, the group has had multiple meetings and communications with Treasury addressing the possibility of a same-country exception, and Treasury seemed receptive to the idea. Serrato did not go so far as to express any certainty in its adoption, however.

"We've had extensive communications, and we are trying to keep a regular flow of dialogue going on. We really feel if it were adopted it would go a long way toward alleviating most of the lockout problems that are there," Serrato said. She added that Treasury had also been receptive to her group's suggestions, asking follow-up questions on whether the exception would solve the lockout issues and how foreign banks might work within a new rule.

What's Taking So Long?

So with seemingly little resistance from Treasury on a potential exception, it raises the question why the carveout is not yet completed. The same-country exception request is not a new one. In an October 2013 letter to Treasury asking that individuals qualify for the exemption, the ACA recommended having it pivot on other definitions already within the code. Residency would be defined under existing section 911 and financial account defined under existing section 1471(d)(2). The most recent ACA letter points to the impending finalization of the regs as "an ideal time" to implement the exception.

Inaction on the exemption thus far may be due to two factors: wariness over the potential for abuse and the sheer enormity of the FATCA regs.

Comparing FATCA to a "huge freight ship," Charles Bruce of Bonnard Lawson-Lausanne — who is also legal counsel for the ACA and an author of both letters to Treasury — said that to make any course adjustments in the regs takes time. That said, he thought that implementing the same-country exception would be relatively simple. He suspected that Treasury wanted to draft an exception and that it would likely come before Election Day.

“[It’s] an unusually easy . . . provision. I’ve worked on a lot of provisions and most of them are 20 times more difficult than this. First of all, there is no doubt there is a problem,” Bruce said, citing a greater lockout problem among less sophisticated, medium-sized and smaller banks in continental Europe and South America. Weighing the requirements of FATCA-style know-your-customer procedures against business from U.S. customers, many banks decided that the former was too high a cost, Bruce said. The requirement that FFIs send reportable information to the IRS by magnetic media also was apparently unpalatable to some banks, he added. Bruce also said that while the exception would not eliminate the problem, it would help substantially.

Bruce said the circumstances surrounding the exemption were “lucky” given how easy it would be to carve out of the rules.

“I used to work on Capitol Hill and worked on things where legislative counsel would be the ones with the pencil,” said Bruce, who was once legislative counsel for the Senate Finance Committee. “We’d look at some things and think, ‘Oh, geez, this is going to take 50 new definitions. There is no way it could be less than 20 pages. It’s going to be turgid and it’s going to be weird.’ Same-country [exception] is easy,” he said, referencing how it would piggyback off other rules and might resemble the *de minimis* rule.

Serrato speculated that initially Treasury and the banks may have needed time to evaluate the pervasiveness of the lockout problem. According to survey results released in January from the University of Nevada, Reno, and the ACA Global Foundation, 86 percent of Americans overseas thought FATCA needed to provide the exemption to allow better access to banking services. (Prior coverage: *Tax Notes Int’l*, May 9, 2016, p. 560.)

“With our initial conversations with Treasury that predate the October 2013 [letter], they were saying, ‘It looks like banks are locking people out of mortgages. Mortgages are not required for FATCA reporting, so it must not be FATCA,’” Serrato said, as an example of the learning curve involved in implementing the rule. “They are turning down people for financial tools that are not reportable, but if you roll that back a little bit, you see that it is all in relation to the overall FATCA reporting requirements,” and the risk to the bank’s bottom line of having noncompliant Americans.

Serrato said that based on the ACA’s communications with Treasury, the biggest concern from the department may be the potential for any exemption to open the door for abuse, which might also slow down rule-writing to ensure a more careful carveout. But Serrato was quick to point out that the FATCA regs (T.D. 9610) “tipped [Treasury’s] hat” at a same-country exemption for individuals, given their inclusion of an exemption for banks that don’t have business outside their country of incorporation. Bruce also dismissed the

the likelihood that a targeted same-country exception might present a “terrorist loophole” problem.

“Most of the legislative offices that we’ve spoken to, they understand the problem, they get it. They understand that there is a legitimate reason for Americans overseas to have these accounts,” Serrato said, adding that FATCA reporting exacerbates an already complicated filing system for Americans overseas. But “everybody seems to say [the same-country exemption] seems fairly reasonable,” she said.

Serrato argued that banks were becoming more familiar with the FATCA regime and that while there might be slightly less lockout than earlier, it remains a problem. Further, overseas Americans still had concerns about documentation requirements as they receive Form W-9 requests from their banks and as exposure to how the regs work in practice grows, she said.

“A lot of times [that] people are talking to the lowest level in the bank hierarchy . . . there’s a lot of confusion,” Serrato added.

Another benefit to the same-country exception is that it could be made completely voluntary — the banks could choose whether they wished to participate and therefore be “inoculated” from many of the problems of FATCA, Bruce said.

And although visibility regarding the reach of FATCA has increased among the overseas taxpayer community, there were still individuals who remained noncompliant, Bruce argued. The fact that any election would presumably be filed on a one-page form given to the bank, with a duplicate going to the IRS, could increase compliance. And that would represent “a big damn benefit” to Treasury, Bruce said.

◆ *Andrew Velarde, Tax Analysts.*
Email: andrew.velarde@taxanalysts.org