



AMERICAN CITIZENS ABROAD

EDUCATE, ADVOCATE AND INFORM

April 29, 2016

The Honorable Robert B. Stack
Deputy Assistant Secretary for International Tax Affairs
United States Department of the Treasury
Main Treasury
Washington, DC 20220

Dear Secretary Stack:

FATCA / “Lockout” of Americans Abroad by FFIs / Will “Same Country” Exemption Help?

This letter is written on behalf of American Citizens Abroad, Inc. (“ACA”). ACA is an exempt, non-profit, nonpartisan, volunteer organization representing and advocating on behalf of an estimated 6 to 8 million Americans residing overseas.

Background

In October 2013, ACA proposed in a letter to Treasury Department and the Internal Revenue Service that a “Same Country” exemption be added to the FATCA regulations and future IGAs. The letter described in general what might be the workings of such an exception.¹ In February 2015, ACA, together with several other groups, met with you to discuss this subject. Our discussion was wide-ranging and very constructive. At that meeting, you were presented with a written description of the “Same Country” exemption developed for ACA.² You noted that putting in place a “Same Country” exemption would not require legislation but could be done as an amendment to the FATCA regulations. One question you asked was: If a “Same Country” exemption was added to the regulations and the network of IGAs, would this likely make a difference? In other words, would FFIs, which are excluding Americans as customers for their banking services, change their behavior?

No doubt “lockout” exists

Before turning to that particular question, we want to emphasize that, for sure, Americans are being turned away by foreign banks and other foreign financial institutions. ACA and a number of other groups have documented this fact. It is further supported by many articles in newspapers and journals, by letters to Members of Congress and otherwise. ACA has received hundreds of emails, letters and tweets complaining about this problem.³ ACA also has conducted, alone and in conjunction with others, surveys that include this subject. No one disputes that the problem exists.⁴

¹ Letter from ACA to Rolfes, Musher and others, regarding “Same-Country” Exception for Accounts of US Taxpayers Residing Abroad, 28 October 2013, published at <https://www.americansabroad.org/media/files/files/5d6f2a3a/same-country-exception-letter.pdf>. Others have also written about the possibility of such an exemption or exception. Christians, “Could a Same-Country Exception Help Focus FATCA and FBAR?”, Tax Notes International, July 9, 2012, p. 157.

² A copy of this document, Bruce, “Same Country” Exemption for Accounts of US Taxpayers Residing Abroad: Relaxation of FATCA Rules to Mitigate ‘Lock-Out’ and Unnecessarily Burdensome Reporting Problems”, February 2015, is attached.

³ Searches using keywords “Americans abroad” and “banking lockout” produce thousands of results describing the situation, individuals’ dilemma, and banks said to be guilty of the behavior.

⁴ In a survey conducted by University of Nevada, Reno, and American Citizens Abroad Global Foundation, between June 16 and August 15, 2015, a key finding was 86% of respondents said that FATCA needs to be reworked to allow Americans overseas access to banking services and include a “Same Country exemption” provision (i.e., no reporting requirement for accounts held in the same country of residence). The survey elicited 684 usable responses. It was



Will a “Same Country” exemption make a difference?

Yes, in all likelihood, as discussed below.

Some of the difficulties encountered. To begin with, however, it should be noted that an answer to this question is hard to come by. The answer must come from FFIs. The individuals at an FFI who can provide an answer or at least insight into the situation at the bank or other FFI and how the institution might react are located in different places in the organization. The question whether to service Americans is typically a Board level decision. But the crucial inputs are spread over legal, compliance and general operational units. A reaction to the question requires conversance with FATCA and the existing set of US and other, for example European, securities and other regulatory rules.⁵

Some initial decisions. At the outset, we decided to focus on retail banking services because the provision of investment services to Americans resident in a foreign country traipses through both the foreign country’s non-tax, non-FATCA securities laws and similar US rules. We also decided it was necessary to picture in some detail what a “Same Country” exemption might look like. How would it work? How easily might it be implemented by the bank? In dealing with the subject, we worked off, and ordinarily provided a copy of, the attached written description developed for ACA.⁶

What we did. In order to try to get an answer, we did several things. We went to banks thought to be turning away new American customers or closing the accounts of existing American customers. We obtained names of banks from communications coming to ACA or because they appeared in news reports. On some occasions we simply contacted a bank and asked them if they accepted Americans’ business. A few banks we simply knew through some member of ACA’s leadership.

The majority the banks contacted did not want to discuss the issue. Sometimes no reason was given. Sometimes it was said that the bank did not want to publicize its policies and how these were arrived at. Sometimes it was indicated that the bank was operating without a clear understanding of how the FATCA rules, as a practical matter, would be applied. Other banks said that because the rules and procedures were new, it would take a “wait-and-see” approach.

What we found – in general. A few banks weighed into the subject. The reactions varied. The following are the main points causing banks to steer away from American customers.

Banks wanted to be politic. They avoided saying that they hated the entire FATCA exercise and wished it would simply go away.

They understood that they were foreign financial institutions under the law and needed to register. All of them had registered. All of them had expended a great deal of time and, to them, a huge amount of money learning about FATCA and equipping themselves to make threshold decisions.

deployed using a web-based approach among a cross-section of adults ages 18 and older, living in more than 60 countries.

⁵ In most cases, within a bank that does not take American customers, there was almost always not a unanimity of opinion. Interestingly, more technical staff, including operations and legal, typically thought that problems could be identified and overcome. Managers in compliance, not unsurprisingly, saw challenges. The strongest resistance resided with board members.

⁶ In discussing with FFIs how a same country exemption might work, we fielded a number of interesting thoughts as to how it might best be designed. These can be summarized with the cliché “Keep it simple stupid”. An FFI would need only to be able to identify the individual as an American covered by the exemption. It should be able to rely upon a customer’s representation that he or she is covered, supported by an American passport and an IRS form electing to be covered. The bank then would be permitted to treat this customer as a non-American for purposes of FATCA, however it would not be compelled to do so. If for whatever reason the bank wished to treat the individual as an American and his or her account as a US account, and thus subject to the FATCA regime, the bank could do so. Or the bank could simply turn away this customer.



They were mindful of the large and costly effort necessary to create compliance systems and train personnel. Significant parts of the compliance systems were novel.

The decision whether to have American customers in almost all cases was driven by economics. Mainly, did the bank at present have a significant number of Americans with sizable accounts? Were these geographically concentrated? Were there links with important corporate customers of the bank, such as, large corporations that banked with, including borrowed from, the bank? Might any of these have an American corporate parent? Might the high-level management be American? Would the failure to provide banking services to American managers and employees risk driving the corporate customer to a different bank?⁷

What we found having to do with FATCA. Several FATCA-related reasons for turning away American customers cropped up with all of the banks willing to discuss the subject in detail.

First, FATCA and the IGAs lay down new, extremely detailed due diligence rules for identifying US accounts. These rules sit on top of local jurisdiction anti-money laundering and similar in-house due diligence rules. Banks believe it helps to cut a wide swath around the FATCA due diligence rules by announcing that they do not accept American customers. This reduces the population of people that have to be vetted carefully for indicia of “Americanness”. All customers have to be vetted, but it is felt that Americans will “self-select” out of the population. The remaining population will be easier to deal with, as demonstrably local to the foreign jurisdiction.

Secondly, the banks strongly want to avoid having to deal with the intricacies of reporting on US accounts. They are not at all familiar with the US procedures and paperwork that this involves. The responsibilities placed on a Responsible Officer are especially worrisome. The intricacies of withholding and paying over amounts are different from things experienced by the banks. The possibility of the bank being responsible for taxes not withheld is a form of risk that the bank finds difficult to quantify.

Thirdly, the general lack of familiarity with the entire subject is a reason to avoid as many parts of it as possible and to go slowly. FATCA is an outgrowth of general US tax rules and, in particular, Chapter 3 withholding tax rules. Foreign banks are generally not familiar with these.⁸ Conservative bankers, especially those that in recent years have been burnt by brushing up against highly engineered financial instruments, are fundamentally wary of things that they do not understand.

Fourth, US Department of Justice and IRS enforcement activities against banks, such as the enforcement program directed at Swiss banks, instituted in August 2013, frightened people. The safe decision, it seemed, was to steer clear of the area by steering clear of US customers.

Fifth, when the banks learn that customers can shift from being US to being non-US and shift back again because, for example, they become a resident alien under substantial presence rules, the dangers of having “American” customers become magnified.⁹

⁷ In only one instance did we come across a bank that appeared to be prejudiced against American customers. Culturally, the bank never pitched its services to Americans. The then new FATCA rules, we discerned, rightly or wrongly, provided a rationale for this choice.

⁸ Just the FATCA regulations themselves are vast and somewhat frightening. The reader who is not familiar with the US Internal Revenue Code quickly realizes that the meaning of the rules unfolds by cross-reference on top of cross-reference on top of cross-reference. Frequently one ends up with Code provisions, regulations and case law attached to quite different parts of the Code, and the impression is that of a morass.

⁹ Points tending to support a business model including American customers were: (a) Americans might be an important segment of a bank’s base of perspective customers. For example, reportedly there are approximately 200,000 US-born immigrants in the UK. This figure understates the number of Americans because individuals can be American citizens without having been born in the US and individuals might be living in the UK without having “immigrated”. (b) In some locales, such as London, Americans control a good deal of wealth. It is common for them to congregate in professional groups, social groups, churches, and the like. Generally speaking, they do not take kindly to having a door closed in their face. They frequently serve as corporate officers and directors and entrepreneurs. It’s not uncommon for them to share professional advisors, such as, investment advisors, attorneys, accountants, and



What can reasonably be discerned from all of this?

A same country exemption would address the key concerns that relate to FATCA.

First, the bank would be inoculated from problems of mis-identifying Americans. If an American identified herself as an American, presenting her American passport, and provided the bank with an IRS “Same Country” election, that is, electing to have her account treated as a non-US account, FATCA would not apply. There would be no additional due diligence hoops to be jumped through; there would be no reporting to the Model 1 jurisdiction tax authority or to the IRS. The bank would not be required to look behind the face of the account holder’s election. The account holder would give one copy of the election to the bank, a second copy to the IRS (as an attachment to her Form 1040), and would retain one copy. (For further details, see the attached explanation).

Secondly, the bank, it follows, would not have to concern itself with FATCA reporting, the mechanics of Chapter 4 withholding, exposure to risks of being liable for tax, etc. With respect to these accounts, a Responsible Officer would not worry about not fulfilling obligations.

Thirdly, individuals at the bank, at least as to Americans owning these exempted accounts, would not have to worry about what strikes them as unfathomable provisions buried in the matrix of FATCA. If their only customers were non-US persons – Brits, Germans, French, Dutch, Danes – and Americans who have provided proper “Same Country” elections, the bank would be outside the worst, in their view, of FATCA. For a Danish bank with overwhelmingly Danish customers, the American could be treated the same as one of its Danish customers. The bank would register as an FFI, but that would be it.

Fourth, the bank would no longer have to “steer clear” of FATCA. The FATCA “problem” would be solved. Also, the bank could optimistically look for similar solutions with respect to other forms of automatic exchange of information.

Fifth, the problem of individuals shifting in and out of the “American” category would be solved so far as FATCA is concerned. If an individual becomes US by virtue of flunking the substantial presence test, as before, he is obligated under existing rules to disclose this fact to the bank and file US tax returns and other forms. If he wants to remove himself from the purview of FATCA (in order, for example, to avoid having to file Form 8938) and remain a customer the bank (if the bank does not accept American customers other than those that elect to be treated as non-Americans under the same country exemption), he will need to make the election and file it with the IRS and the bank. Of course, the obligation still rests on the US taxpayer to report and pay US taxes to the US and to file Foreign Bank Account Reports.

* * * * *

We believe that most banks that are currently turning away Americans’ business in fact would like to have that business if they could be removed from the workings of FATCA. The banks, with rare exceptions, do not have a bad attitude towards Americans. In fact, it is just the opposite. Individual Americans are generally liked, and their business is appreciated. If for purposes of FATCA, the American could be converted into a Brit, or German, or Frenchman, or Dutchman, or Dane, that would be most welcome. Accepting as a customer an individual who identifies himself as an American, with an American passport

return preparers. Americans can also influence the preferences of other individuals; if they feel unfairly treated, they are likely to “bad-mouth” a bank to high heaven. (c) Families frequently – quite frequently – have an American someplace in the woodwork. For example, what might appear at first glance to be an Arab family spending part of the year in London, in fact will have young-adult children (millennials) and grandchildren who are American because they were born in the US or they were born to a US parent or they evolved into resident aliens or they married a US individual in the family. (d) As customers go, Americans can be relatively easy to work with. (e) The realization that sooner or later, with FATCA, or some metastasized version of FATCA, or Common Reporting Standards, the bank is going to have to come to grips with the trials and tribulations of dealing with American customers.



(no need to dance around this fact and no need to perform a complicated analysis applying tax, nationality and immigration rules), and provides a "Same Country" election, would become a risk-free step, and this would be a great relief.

The In light of the above, ACA sincerely hopes that Treasury Department will immediately amend the FATCA regulations to insert a "Same Country" exemption. The workings of the exemption, as can be seen, are simple. The form IRS election can be put on one page. Banks can embrace this approach or, if they choose, for whatever reason, continue to refuse US customers. Also, Americans residing in a foreign country, if they like, can decide not to avail themselves of the exemption and, therefore, not file the election. This can be their choice.


In addition to benefiting American citizens abroad and foreign banks, the "Same Country" exemption will benefit the IRS. Americans abroad, in order to get the benefit of greater access to banking services, will need to come forward and file their US tax return, with the "Same Country" election attached. This will help address the nagging problem of noncompliance.

Together with other groups, ACA has promoted this proposal by, among other things, bringing it to the attention of the Congressional Americans Abroad Caucus, which has written to Treasury Department supporting the proposal, and candidates from both political parties.¹⁰ The National Taxpayer Advocate has specifically recommended exclusion from FATCA reporting of financial accounts maintained by an FFI in the country of which the US person is a bona fide resident. To our knowledge, every group representing Americans overseas, which has considered the subject, has urged promulgation of such an exemption. Significantly, in a survey conducted recently "[e]ighty-six percent (86%) of respondents said that FATCA needs to be reworked to allow Americans overseas access to banking services and include a 'Same Country exemption' provision (i.e., no reporting requirement for accounts held in the same country of residence)."¹¹

Given the reasonably-anticipated benefits, the ease with which this provision could be put into effect, and the "across-the-board" support, adoption of this proposal, we submit, should be acted upon as soon as possible.

Thank you for your consideration.

Kind regards.


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American Citizens Abroad, Inc.

CC: Danielle Rolfes

¹⁰ Letter from 19 Members of the Congressional Americans Abroad Caucus to Secretary of the Treasury Lew and Commissioner of the Internal Revenue Service Koskinen (September 15, 2015). Both Secretary Clinton and Senator Sanders, Democratic candidates for President, have expressed their support of an effective same country safe harbor proposal. http://www.democratsabroad.org/our_candidates; Email from Hillary Clinton, About FATCA, dated February 29, 2016.

¹¹ "Survey results on consequences of FATCA for Americans living overseas", University of Nevada, Reno, and American Citizens Abroad Global Foundation, Tax Analysts Document 2016-489.

“Same Country” Exemption for Accounts of US Taxpayers Residing Abroad: Relaxation of FATCA Rules to Mitigate “Lock-Out” and Unnecessarily Burdensome Reporting Problems

Charles M. Bruce[†]

Under sections 1471-1474 of the Internal Revenue Code (commonly known as the Foreign Account Tax Compliance Act or FATCA), foreign financial institutions, such as foreign banks, are required to comply with relatively new withholding and reporting rules. Also, individual taxpayers, including American taxpayers living abroad, are required to report information about foreign financial assets, including foreign bank accounts and similar financial accounts; Form 8938 results from these rules.

Problems with “Lock-Out” and Burdensome Reporting Requirements Applied to “Garden Variety” Individual Accounts

American taxpayers living abroad are experiencing problems with “lock-out” from some foreign financial institutions. Banks are turning away American customers or asking existing American customers to find another bank. This development is attributable, at least in part, to the relatively new FATCA rules. These institutions (primarily banks) say they cannot afford the costs of complying with the FATCA rules, including the costs of conducting FATCA-mandated payee identification procedures and reporting to the IRS on US accountholders.

Also, Americans abroad believe that their normal, local checking and savings accounts in their country of residence should not be subjected to the special foreign assets reporting requirements in Form 8938.

A “SAME COUNTRY” EXEMPTION FOR ACCOUNTS OF US TAXPAYERS RESIDING IN A FOREIGN COUNTRY WOULD HELP RELIEVE THE “LOCK-OUT” PROBLEM AND THE PROBLEM OF UNNECESSARILY BURDENSOME REPORTING. IT IS ALSO, AS CAN BE SEEN, REMARKABLY QUICK AND EASY TO PUT IN PLACE.

The FATCA regulations and the regulations under section 6038D, which mandates Form 8938, should be amended by Treasury Department to provide a simple “Same Country” exemption. Just as the rules for local banks in the FATCA regulations¹ and the various Intergovernmental Agreements² and the reporting thresholds for Form 8938³ were instituted administratively, the Treasury Department should promulgate rules permitting individuals to elect, if they wish, to have their local financial accounts, in effect, exempted from FATCA.

SINCE TAXPAYERS WOULD HAVE TO FILE THE REGULAR FORM 1040 OR FORM 1040NR TO AVAIL THEMSELVES OF THE EXEMPTION, COMPLIANCE AMONG AMERICANS OVERSEAS WOULD BE SIGNIFICANTLY INCREASED.

Allow Foreign Financial Institutions to exclude Same Country Accounts from definition of US account for all FATCA purposes

A qualifying “Same Country” financial account maintained at a foreign financial institution (FFI) and held solely by one or more qualifying individuals would be treated the same as a small – \$50,000 or less – account under existing FATCA regulation §1.1471-5(a)(4). Under regulation §1.1471-5(a)(4), if the aggregate balance does not exceed \$50,000, the account is excluded from the definition of US account and, therefore, in general, removed from the workings of the FATCA withholding tax and reporting regimes.

In order to qualify under the “Same Country” rule, the account would have to be in an FFI licensed and regulated under the laws of the country of residence of the individual.⁴ The individual would have

[†] This writing represents the views of the author alone and not necessarily those of any other person or group. Any errors are attributable only to him.

¹ Reg. §1.1471-5(f)(1)(i)(A), Income Tax Regulations.

² Agreement Between Switzerland and the United States for Cooperation to Facilitate the Implementation of FATCA, Annex II, Para. II, A, 1 (Financial Institutions with Local Client Base).

³ See Instructions for Form 8938 (Rev. Dec. 2014), p. 2/12 (Reporting Thresholds Applying to Specified Individuals).

⁴ The same type of requirement exists under the Local FFI (local bank) rules in various Intergovernmental Agreements.

to be a resident of the same country. An individual's residency would be defined as it is under existing section 911 (Citizens or residents of the United States living abroad). See §§911(d)(1)(a) & (B).⁵

"Financial account" would be defined as it is under existing section 1471(d)(2) and the FATCA regulations thereunder, that is, as a "depository account"⁶ (e.g., a commercial, checking, savings, time, or thrift account), a "custodial account"⁷ (e.g., an arrangement for holding a financial instrument, contract, or investment, including a share of corporate stock, a note, a bond, but debenture, or some other evidence of indebtedness), and an equity or debt interest in the subject financial institution (other than an interest which is readily traded on established securities market).⁸

An individual residing in a foreign country could elect, but would not have to elect, to have an account treated as a "Same Country" Account by providing an election to the relevant FFI (such as, the individual's bank) and attaching a copy to his or her regular Form 1040 or Form 1040NR. The FFI would then be relieved from the requirement to treat the account in question as a US account and to process and report information with respect to it.⁹

The same country exemption would be for individuals only.

With respect to accounts as to which an American account holder had made a "Same Country" election, the bank could ignore the fact that the individual was an American and treat the account as if it were owned by a non-American. AS A RESULT, THERE WOULD BE NO REASON FOR THE BANK TO TURN AWAY THIS CUSTOMER.

Allow individuals to ignore same country accounts for purposes of reporting financial assets on Form 8938 (Statement of Specified Foreign Financial Assets)

As a consequence of the exclusion of "Same Country" accounts from the definition of US account for FATCA withholding and reporting purposes, these accounts would be treated as an exception to the reporting requirements set forth in Form 8938. In this regard, they would be similar to the accounts of a bona fide resident of a US possession, such as, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the US Virgin Islands.¹⁰

An American taxpayer subject to the Form 8938 filing requirements, who had elected to have one or more accounts treated as a same country account by filing the above-mentioned election, could omit the account(s) from his or her Form 8938. The account would not count for purposes of determining whether or not one of the reporting thresholds, set forth in the Instructions to the Form, are met. IF

⁵ The section 911 definition of "resident" would apply by cross-reference, but the individual, in fact, would not have to claim the Section 911 benefits. Therefore, for example, retired individuals, who have no earned income, could be covered by the "Same Country" exemption rules.

⁶ "Depository account" means any account that is –

(1) A commercial, checking, savings, time, or thrift account, or an account that is evidenced by a certificate of deposit, thrift certificate, investment certificate, passbook, certificate of indebtedness, or any other instrument for placing money in the custody of an entity engaged in a banking or similar business for which such institution is obligated to give credit (regardless of whether such instrument is interest bearing or non-interest bearing), including, for example, a credit balance with respect to a credit card account issued by a credit card company that is engaged in a banking or similar business;

§1.1471-5(b)(3)(i)(A)(1).

⁷ "Custodial account" means –

an arrangement for holding a financial instrument, contract, or investment (including, but not limited to, a share of stock in a corporation, a note, bond, debenture, or other evidence of indebtedness, a currency or commodity transaction, a credit default swap, a swap based upon a nonfinancial index, a notional principal contract as defined in §1.446-3(c), an insurance or annuity contract, and any option or other derivative instrument) for the benefit of another person.

§1.1471-5(b)(3)(ii).

⁸ §1.1471-5(b)(3)(iii).

⁹ As in the case of the small account exception, the bank could decide to report if for whatever reason this was less burdensome or is was already geared up to do so. Treas. Reg. §1.1471-5(a)(4)(ii), Income Tax Regulations. The election would be in a form created by the IRS. The information provided thereon, such as, Taxpayer Identification Number, account information, status as resident of a foreign country, and name of foreign country, would be certified as correct. The taxpayer would be instructed to attach a copy to his or her tax return.

¹⁰ Instructions for Form 8938 (Statement of Specified Foreign Financial Assets) (Rev. Dec. 2014), p. 7/12.

AN INDIVIDUAL ONLY OWNED ACCOUNTS AS TO WHICH HE OR SHE HAD MADE A "SAME COUNTRY" ELECTION, THERE WOULD BE NO REQUIREMENT TO FILE THE FORM 8938.

Additional Points

In order to claim the "Same Country" exemption, the individual taxpayer would be required to attach a copy of the election to his or her timely-filed Form 1040 or 1040NR. In this respect, the requirement is similar to that which applies to a taxpayer wishing to claim the foreign earned income or foreign housing exclusion.¹¹

An individual would complete the election on a 1-page, front and back, IRS form providing the individual's name, address, Taxpayer Identification Number, and country of residence, and listing the "Same Country" accounts (name and address of bank and name, number and type of account, *i.e.*, depository, custodian, etc.). The individual would certify that this information is correct. Also, the individual would state that he or she is a resident of X foreign country and the bank(s) are licensed and regulated under the laws of X country of residence (the same country where the individual is a resident). One copy of the election would be given to the bank; a second would be attached to the individual's federal income tax return; a third would be retained by the taxpayer. Instructions would be included on the form. Taxpayers would be warned that filing the election does not excuse them from having to report any income on the account on their tax return or from having to file an FBAR, provided in both instances they meet the applicable thresholds.

The "Same Country" exemption would not affect in any way the requirement to file a Form 1040 or 1040NR.

Nor would the "Same Country" exemption affect in any way the requirement to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).

Charles M Bruce
Washington, DC
February 2015

¹¹ Section 911.