

## Financial Institutions

### Plaintiffs Fire Back at Justice Department in Case Over FATCA



By [Alison Bennett](#)

Aug. 26 — Battle lines have been drawn in a case seeking to get the Foreign Account Tax Compliance Act and its accompanying intergovernmental agreements declared unconstitutional ([Crawford v. Dep't of Treasury](#), S.D. Ohio, No. 3:15-cv-00250, complaint filed, 7/14/15).

As a Sept. 4 federal court hearing on injunctive relief approaches, the plaintiffs in the case fired back at the Justice Department Aug. 26 in a [response](#) attacking the DOJ's vigorous defense of the law and the IGAs in a 57-page brief filed Aug. 12.

The seven plaintiffs—including Sen. Rand Paul (R-Ky.) and six current and former U.S. citizens who assert FATCA has hurt them—argued the law is a “sledgehammer” in the government's quest to catch tax evaders when only a scalpel is needed. The law requires foreign banks to report U.S.-owned accounts to the Internal Revenue Service or face, in some cases, a 30 percent withholding tax.

#### Constitutionality Challenged

The Aug. 26 action is the latest development in the case, which began in July when the plaintiffs filed the motion for a preliminary injunction at the same time as a lawsuit challenging the constitutionality of FATCA, its agreements and other requirements to report U.S. accounts and assets in other countries ([135 DTR K-4, 7/15/15](#)).

In addition to an injunction against parts of the IGAs with Canada, Czech Republic, Israel and Switzerland, the motion seeks an injunction against requirements that aggregate gross income be reported on the Form 8966, FATCA Report, and that account balances be reported on the Report of Foreign Bank and Financial Accounts (FBAR). The court should declare that all of these violate the Constitution and the government shouldn't be allowed to enforce them, the motion said ([163 DTR K-7, 8/24/15](#)).

In their response, the plaintiffs insisted the president doesn't have the constitutional authority to negotiate IGAs without their ratification by the Senate in a manner similar to tax treaties—a point sharply rejected by the Justice Department.

#### Response: IGAs Not Authorized

They also said the penalties associated with FATCA are unconstitutional “excessive fines,” and contended that their case will succeed on the merits and the plaintiffs have suffered “irreparable harm.” Court rulings in prior cases have established these as two of the requirements that must be met in order to qualify for injunctive relief—requirements that the government contends aren't met.

The lawyer representing the plaintiffs, Jim Bopp of the Bopp Law Firm PC in Terre

Haute, Ind., said they reject the government's central argument that FATCA and other types of reporting of foreign accounts are needed to crack down on tax evasion. Rather than what he called a sledgehammer, “you really need a scalpel to separate U.S. citizens abroad from the claimed targets of the legislation,” Bopp said.

In addition, he criticized the Justice Department's contention in its Aug. 12 filing that the injuries the plaintiffs have suffered as a result of FATCA aren't enough to qualify for injunctive relief.

The law means foreign banks are faced with “draconian fines” if they don't report their U.S.-owned accounts—fines that they are avoiding by closing accounts and denying job opportunities and mortgages, Bopp said.

### Different Approaches

The case highlights the fact that while many overseas Americans agree FATCA is causing financial havoc and other problems, U.S. citizens abroad don't agree on how to fix the problems.

Some want to see FATCA overturned outright, while others support an approach known as the “same country safe harbor,” which would provide a reporting exception for those who do their banking in the foreign country where they live.

That approach is being vigorously supported by several groups, including Democrats Abroad and American Citizens Abroad, who say it is a fix that can be accomplished without legislation and can get relief to Americans overseas faster than a lawsuit that might drag on for years.

### Safe Harbor ‘Highly Achievable.’

“We think a same country safe harbor is highly achievable,” ACA spokeswoman Marylouise Serrato said Aug. 25, noting that her group was one of the first to support that approach. “It's the most doable, the most practical, we stand by that.”

Both she and Carmelan Polce, who leads the FATCA/FBAR task force for Democrats Abroad, said in separate interviews they believe that there may be support for a same-country exception both in Congress and in the Treasury Department.

Polce pointed to actions by Reps. Carolyn B. Maloney (D-N.Y.) and Mick Mulvaney (R-S.C.), who co-chair the Americans Abroad Caucus. The two wrote to Treasury Secretary Jacob J. Lew and Internal Revenue Service Commissioner John Koskinen in July urging support for the exception, as well as a letter to fellow lawmakers in June to encourage them to let the IRS and Treasury know of their support for the same-country safe harbor.

### Congressional Campaign

Polce said to date, more than 16,000 Americans overseas have sent messages to support the congressional campaign. She too told Bloomberg BNA that she believes that IRS and Treasury are aware of the difficulties faced by Americans abroad and are willing to consider solutions.

“The Treasury view is that they would like to see the law not be such a thorn for overseas Americans,” she said. At the same time, the U.S. will defend FATCA and the IGAs as constitutional “with their lives,” Polce said.

However, those involved in and supporting the lawsuit say the same-country exception isn't a permanent or adequate fix.

‘Band-Aid on a Deep Wound.’

“It's a Band-Aid on a deep wound caused by a bad law,” according to Keith Redmond, an American living in Paris who works globally with Americans overseas who are dealing with the consequences of FATCA. “It doesn't address the account closures. It will satisfy some, but it won't satisfy all of us.”

For example, he said, it doesn't provide relief to U.S. citizens who live in one foreign country but have bank accounts or other financial business in another country outside the U.S. Acknowledging that the judicial process “does take time,” Redmond said if the same-country safe harbor is viewed as more easy to achieve, “why hasn't it been done by now? It should have been done by now.”

‘Two-Tier System.’

Bopp, the attorney in the case, said a same-country safe harbor won't exempt everyone living abroad and will create a “two-tier system” of those who are protected and those who aren't.

“It does nothing to solve the problem,” Bopp said. “The safe harbor would still send some people to the back of the bus. Even if that were adopted, we would still pursue this lawsuit.”

Asked whether the plaintiffs would appeal if the court doesn't rule in their favor, Bopp said, “I'm a very aggressive litigator. I'm capable of bringing appeals.”

However, Peter Butterfield, a U.S. citizen who runs a small computer software company in Switzerland, said he feels that if the safe harbor were implemented, the foreign financial institutions affected “would realize that this solves most of their problems.”

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