



AMERICAN CITIZENS ABROAD

EDUCATE, ADVOCATE AND INFORM

July 10, 2020

The Honorable Steven T. Mnuchin
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

L.G. "Chip" Harter
Deputy Assistant Secretary
(International Tax Affairs)
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Douglas W. O'Donnell
Commissioner, Large Business & International
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Sirs,

We are writing on behalf of American Citizens Abroad, Inc. (ACA) and its sister organization, American Citizens Abroad Global Foundation (ACAGF). These entities, both of which are nonpartisan and qualified exempt organizations, represent Americans abroad. The first is a qualified section 501(c)(4) organization and the second a qualified section 501(c)(3) organization.

There is an estimated 8.5 to 9 million Americans abroad. After eliminating members of the armed services and government employees and contractors and making a number of other adjustments, there are approximately 4 million US residents overseas. Based on public information, there are approximately 1.7 million overseas tax return filers. This figure reduces to approximately 1.2 million overseas tax returns, after again eliminating federal government employees. ACA, which contracts for the services of District Economics Group (DEG) of Washington, DC, since May 2017, has worked to develop [baseline information](#) on the income and investment make-up and taxation of Americans overseas. While this data gives us a great deal of insight into the subject, it obviously is not the final word. Data available to Treasury Department, the IRS and the Joint Committee on Taxation, because some of this is drawn from tax returns, is more complete.

We want to focus on the effects of passage of the Tax Cuts and Jobs Act (TCJA) Transition Tax and GILTI regimes on small to medium-size US businesses overseas. These businesses, be



they a yoga studio in Paris, a business consultancy in Buenos Aires or a coffee shop in Stockholm, if owned by Americans, are treated as a controlled foreign corporation (CFC). Once the provisions became effective and it was clear that filings needed to be made, many small businesses simply threw up their hands; the requirements to calculate and repatriate revenue from the past seven years, which had already been taxed, was a burden that many small, independent businesses could not meet because of the difficulty of assembling all the necessary information and the accounting and legal costs. In some cases reported to ACA, the cost to calculate the tax exceeded the actual tax owed.

Some relief has been provided since passage of TCJA to ease the situation for small overseas American businesses. ACA believes that Congress and the Treasury Department did not intend to target these businesses with provisions that were intended for large US multinationals engaged in offshoring profits. These small businesses in most cases, instead of accumulating profits to avoid taxation on a current basis, were saving for investing in their businesses – buying more yoga mats, hiring a secretary or buying more tables for their outdoor terrace.

With the passage of time and in light of the outcry from small businesses abroad and the lawsuits which have ensued, we think the better part of wisdom would be for Treasury Department to revisit the subject. Some simple changes in the rules would avoid a large number of problems for taxpayers and enforcement headaches for the IRS. In ACA's [testimony to the IRS](#) on the subject in October of 2018, ACA made the following recommendations which we continue to advocate.

First, TREASURY DEPARTMENT AND THE IRS SHOULD INSERT A DE MINIMIS RULE INTO THE REGULATIONS.

Many Americans abroad own and do business through what, for US tax purposes, are characterized as corporations. They are commonly organized under foreign law, which differs in many ways from, say, Delaware corporate law. The steps for organizing them are different. The people involved – often fiduciaries in civil law jurisdictions – and the documentation is different. Most importantly, the basic accounting is different. As American accountants practicing in London, Paris, Frankfurt, and elsewhere will tell you, it is not a simple trick to go from local accounting to US accounting to US tax accounting. And now with section 965 and these regulations, taxpayers will have to make additional modifications to arrive at what we will call section 965 tax accounting.

A *de minimis* rule is necessary and desirable to take small taxpayers out from under the workings of the regulations. As suggested in our comments on the regulations, the *de minimis* rule can run to citizens or residents living abroad and residency rules along the lines of those in section 911 can be utilized. The rule should apply at the level of the individual taxpayer, not the entity, so as to avoid forcing the individual to make entity-level calculations, which would defeat the purpose. Thresholds like those in the Form 8938 (Statement of Specified Foreign Financial Assets) instructions can be applied to define what is “small”.

When drafting the rule, Treasury can look at the data available to the Office of Tax Analysis to gauge how many people will be taken out of the section 965 regime and how much tax is



involved. ACA's guess –and without access to tax return data which is available to Treasury and Joint Committee on Taxation, it can only be a guess – is that all or almost all small taxpayers abroad with controlled foreign corporations (“CFCs”) can be taken out of the 965 regime and the tax cost will be little if anything. End of day, many of the small businesses in question are simply not terribly profitable.

If the Treasury Department believes it cannot write a simple, up-front *de minimis* rule because its hands are tied, then it can come at the problem from a different direction: Small taxpayers can be allowed to treat their foreign corporations as disregarded entities. There not being a corporation in place, section 965 would not apply. Affected taxpayers can be allowed to retroactively make the election.

Still another approach is set forth in the comments of the American Chamber of Commerce in Japan (ACCJ), where it is suggested that the transition tax be indefinitely postponed until the occurrence of a triggering event. This would be along the lines of the rules applicable to S corporations. ACA commends ACCJ for its thinking on this subject.

Applying the transition tax to small CFCs owned by Americans abroad is unwise. It is a misstep. Treasury Department should “walk back” these regulations.

Second, THE OFFICIAL ESTIMATED AVERAGE ANNUAL BURDEN PER TAXPAYER, WHICH IS SAID TO BE 5 HOURS, IN OUR VIEW IS SIMPLY INCORRECT. It grossly underestimates the burden. It is unclear how the Treasury Department itself arrived at this figure. ACA operates an online Expat Tax Services Directory, which is very popular with persons looking for return preparers and similar service providers. An informal search for information from return preparers listed in the Directory tells us that time required to comply with the new rules is much higher than that suggested in the Regulations.

There may be several reasons for this. Reading and understanding the new rules is time-consuming. Applying them to an entity, may or may not be properly characterized as a US corporation for US tax purposes, often requires special analysis. It may be necessary to translate documents. The conversion of information presented as local accounting in the foreign jurisdiction, to US-style accounting, to US tax accounting, and then making the adjustments to arrive at the calculations needed to comply with the new tax provisions, are extremely difficult and novel steps. A survey of taxpayers and return preparers, we submit, would never result in an estimate of five hours.¹

We turn next to Treasury's determination that the Regulatory Flexibility Act (“RFA”) does not apply essentially because shareholders of foreign corporations are not small entities.

The conclusion stated in the Regulations that the collection of information requirements will not have significant economic impact on a substantial number of small entities we believe is wrong. It ignores the reality that Americans abroad frequently own and operate businesses, often small businesses.

¹ Should you wish to pursue some type of survey of preparers familiar with the preparation of returns for Americans abroad, we would be pleased to help with this.



As for the point that collections of information apply only to owners of specified foreign corporations, and “[b]ecause it takes significant resources and investment for foreign business to be operated in corporate form by United States persons, specified foreign corporations will infrequently be small entities”, this demonstrates the fundamental problem. Treasury Department, unfortunately, is not sufficiently in touch with the reality of Americans abroad and the many businesses owned and operated by them. Foreign corporations owned by Americans abroad exist in abundance. They are an everyday fact of life.

Similarly, as to the point “the collection of information requirements in this regulation apply primarily to persons that are United States shareholders of specified foreign corporations. The ownership of sufficient stock in specified foreign corporations in order to constitute a United States shareholder generally entails significant resources and investment such that businesses that are United States shareholders are generally not small corporations.” This again misses the point that in the Americans abroad community many individuals own small businesses directly or sometimes through entities.

Stepping back, Treasury Department, in our view, regrettably is not well informed about the situation of Americans abroad. These regulations, in the eyes of tens of thousands of individuals living overseas, simply miss the mark.

Treasury Department should come at the subject again. It should assess, under the Regulatory Flexibility Act, the impact of these proposed regulations on “small entities,” as defined in the Act, including small entities abroad.

To do so, it will need to identify the population of these entities. Among other things, Treasury should determine how many Americans abroad own CFCs, what are the size of the assets inside these CFCs, what is the inventory of relevant accumulated earnings and profits. Treasury Department should not promulgate regulations without knowing who is affected and to what extent. This goes against the fundamental requirements of the RFA, including the requirement for analysis of the small entities to which the rules will apply and an estimate of their number. Treasury Department cannot conclude that the regulations will not have a significant economic impact on a substantial number of small entities without a good idea about who is being affected.

* * * *

In addition to pleading for a *de minimis* rule in the transition tax and GILTI regulations, ACA continues to urge the Treasury to amend the FATCA regulations to insert therein a similar *de minimis* rule. Everyone would be helped. There would not be any great loss of revenue to the Treasury. The IRS would save resources.

The true corrective measure however is a switch from citizenship-based taxation (CBT) to residency-based taxation (RBT). Many of the aforementioned problems and others related to citizenship-based taxation would be alleviated by the adoption of residency-based taxation. The IRS and Treasury’s experience, as well as that of the community of overseas Americans, during the current pandemic has further highlighted serious problems in administration of CBT under the provisions of the CARES Act. ACA recently highlighted these in our letter to the [National Taxpayer Advocate](#); inability of the Get My Payment tool to work with foreign addresses, delay



July 10, 2020
Page 5

times for delivery of checks due to international mail shutdowns and delays, inability of individuals to deposit US checks into foreign bank accounts, to name a few.

Thank you for your consideration of these points.

Kind regards.

Marylouise Serrato
Executive Director
American Citizens Abroad

Charles Bruce
Legal Counsel
American Citizens Abroad

Jonathan Lachowitz
Chairman
American Citizens Abroad

CC: Erin M. Collins
National Taxpayer Advocate

Representative George Holding
Member, House Committee on Ways and Means

Representative Donald S. Beyer, Jr.
Member, Americans Abroad Caucus

Representative Dina Titus
Member, Americans Abroad Caucus

Representative Carolyn Maloney
Co-Chair of the Americans Abroad Caucus