

WRITTEN TESTIMONY OF AMERICAN CITIZENS ABROAD, INC.
SUBCOMMITTEE ON GOVERNMENT OPERATIONS

HEARING ON REVIEWING THE UNINTENDED CONSEQUENCES OF
THE FOREIGN ACCOUNT TAX COMPLIANCE ACT

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This testimony is submitted on behalf of American Citizens Abroad, Inc.

ACA is grateful to the SUBCOMMITTEE ON GOVERNMENT OPERATIONS for holding this hearing on some of the unintended consequences of FATCA.

“LOCKOUT” OF AMERICANS ABROAD FROM BANKING SERVICES BY FOREIGN BANKS

ACA wishes to focus on the most important unintended consequence affecting our members, who are individuals residing overseas. It is the problem of “lockout” of Americans abroad from banking services by foreign banks. In the wake of enactment of FATCA, there arose the problem of Americans abroad being denied financial services – including retail banking services – by foreign banks. To some difficult-to-quantify degree, this was found to be due to the imposition of FATCA rules. For over two years, groups representing Americans abroad, Members of Congress and others worked to have a “Same Country Exemption” adopted. The “Same Country Exemption”, for purposes of FATCA, would exclude from the definition of a “U.S. account” accounts held by U.S. individuals resident in the same jurisdiction as the Foreign Financial Institution (FFI) with which the account is held. Simply put, it removes from the force of FATCA accounts at neighborhood banks used in the day-to-day conduct of an individual’s life.¹

Treasury Department, last December, when it issued a comprehensive set of amended FATCA tax regulations, had the opportunity to fix this problem by inserting a Same Country Exemption in the regulations, but it didn’t; more on this below. **ACA IS REQUESTING THIS COMMITTEE OR INDIVIDUAL MEMBERS TO URGE THE TREASURY DEPARTMENT TO MAKE THIS AMENDMENT TO THE REGULATIONS. ALTERNATIVELY, CONGRESS SHOULD AMEND THE FATCA LEGISLATION TO INSERT THE EXEMPTION.**

There is little doubt that the “lockout” problem exists. There are hundreds if not thousands of testimonials by Americans abroad to this effect. These have been assembled and presented by groups, such as, American Citizens Abroad. Moreover, Treasury Department has never said that it believes otherwise.

The prior Administration’s Treasury Department, at one point, wondered whether FFIs would react to a Same Country Exemption by “loosening up”, that is, acting to provide financial services for American taxpayers living in their locale abroad. An investigation was conducted. It was shown that the effect would be positive.²

¹ For a more detailed description, see <https://www.americansabroad.org/media/files/files/feffd7bf/same-country-exemption-2015-04-06.pdf>.

² Letter from American Citizens Abroad to Robert B. Stack, then-Treasury Deputy Assistant Secretary (International Tax Affairs), dated Aug. 10, 2016.

Do individuals residing abroad really want a Same Country Exemption? The answer is yes. This was a subject of a survey conducted in 2015. "Eighty-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)."³

Beyond individual Americans living overseas and affected by the lockout problem, was the Same Country Exemption broadly supported? Yes. Not only was it supported by the individuals themselves, but also groups, such as, American Citizens Abroad, FAWCO (a global women's NGO comprised of an international network of independent volunteer clubs and associations with 64 member clubs in 34 countries worldwide), AARO (Association of Americans Resident Overseas), and others, Members of Congress (including the bipartisan Congressional Americans Abroad Caucus), and the National Taxpayer Advocate. In fact, no one has spoken against the proposal.

IS INSERTION OF A SAME COUNTRY EXEMPTION IN THE REGULATIONS DIFFICULT?

No. In fact, it is remarkably easy to achieve. The "tissue" for inserting it in the regulations exists. It is similar to language currently residing in the regulations and Intergovernmental Agreements. There would need to be an election filed by the individual wishing to bring him or herself within the provisions, but this could be a one-page form.

WOULD FFIs RESIST BECAUSE THIS MIGHT CREATE ADDITIONAL WORK?

No. A Foreign Financial Institution's participation would be voluntary. If it did not want to treat individuals qualifying for the exemption as "outside" FATCA, that would be its prerogative. If it wanted to remain ornery, it could do so. But if it wanted to have American customers and not have to wrestle with FATCA, it could do this. Most FFIs have said that they would be delighted to have American customers if they could be "inoculated" from FATCA. (The individual taxpayer's participation would also be voluntary. If the individual did not want to make the election, he or she could skip it. The account in question would remain subject to the FATCA rules.)

IF A SAME COUNTRY EXEMPTION WERE IMPLEMENTED, WOULD THIS INCREASE THE RISK OF CHEATING BY AMERICANS ABROAD?

No. The provision of the exemption would reduce cheating. In order to take advantage of the exemption, individuals would have to file a tax return and attach a SCE election. The "lockout" problem is tempting people to cheat by avoiding FFIs, or giving their FFI wrong or incomplete KYC documentation, or otherwise. Same Country Exemption encourages compliance.

WHERE ARE WE NOW?

The problem of "lockout" still exists. The reasonable desire to have it solved remains.

What can be done? Here's what can be done:

³ University of Nevada, Reno, and American Citizens Abroad Global Foundation, "A Study of the Consequences of the Foreign Account Tax Compliance Act on Americans Living Overseas: Survey Results and Interpretations" (Jan. 2016).

1. The new Deputy Assistant Secretary for International Tax Affairs, soon to be named, and his or her team can simply insert into the FATCA regulations a Same Country Exemption. As everyone has acknowledged and as the handling of the recently finalized FATCA regulations prove, there is no need for legislation. A form election to be filed by the affected American abroad can be published. All of this can be explained in a notice to Foreign Financial Institutions. No doubt, groups representing Americans abroad will gladly assist in disseminating the news to individual taxpayers abroad and FFIs.
2. Congress can enact a Same Country Exemption. True, this can be done. In fact, it is no big secret that Members, even prior to the late-stage work on the finalized FATCA regulations, have taken steps to do this. But what a shame that everyone should be put to this trouble.
3. Congress can repeal FATCA. That would solve the problem of the absence of a Same Country Exemption. There are several other problems with FATCA, and this would solve those as well. There are some, however, who for various reasons would like not to go this far.
4. CONGRESS CAN ENACT RESIDENCY-BASED TAXATION IN LIEU OF THE EXISTING CITIZENSHIP-BASED TAXATION. THIS IS PROBABLY THE BEST SOLUTION OF ALL. In saying “no” to SCE, the Treasury Department put its finger on the problem: It is residency-based taxation. “[S]ince U.S. citizens and U.S. resident aliens are subject to U.S. income tax on their worldwide income regardless of where they reside and regardless of whether their accounts are maintained by U.S. financial institutions or FFIs” [we need to be worried about them cheating].⁴

It’s unfortunate that the prior Administration’s Treasury Department did not act to solve this “lockout” problem. The problem of “lockout” for Americans abroad could have easily been solved by inserting a Same Country Exemption in the FATCA regulations, saving everyone a lot of angst. Why didn’t it? It’s hard to say. We think that when weighing the *benefit* of making it possible for Americans abroad to utilize run-of-the-mill accounts at what amount to neighborhood banks against the *risk* that some US taxpayers holding such an account might cheat on their taxes, Treasury Department, last December, balked. ACA URGES THIS SUBCOMMITTEE, CONGRESS AND THE CURRENT TREASURY DEPARTMENT TO WEIGH AGAIN THE CHOICES AND COME TO THE OPPOSITE CONCLUSION.

ACA ALSO STRONGLY URGES CONGRESS TO VOTE TO ADOPT RESIDENCY-BASED TAXATION CITIZENSHIP-BASED TAXATION. RBT is simply a form of territorial taxation for individuals. At present, we have partial territoriality for individuals in the form of the foreign earned income exclusion (section 911), which was enacted together with Subpart F, providing partial territorial tax treatment for corporations, in the early 1960s. The US, as many of you know, is the only country, apart from the small African country of Eritrea, that follows this approach. This change, ACA believes, can be made without the loss of any revenue to the Treasury and without creating opportunities for abuse. ACA will be communicating more on this subject very soon. It is working now to develop best-quality revenue estimates.

⁴ T. D. 9809, Final and Temporary Regulations (Summary of Comments and Explanation of Revisions at Provisions, Comments and Changes to §1.1471-1 ((Scope of Chapter 4 and definitions)), pp. 47-48).

Thank you for your consideration of these remarks.

AMERICAN CITIZENS ABROAD, INC.

For additional information, go to <https://www.americansabroad.org/> or contact Marylouise Serrato at info@americansabroad.org.

ACA is a nonprofit, nonpartisan, volunteer, membership organization. It is qualified as a tax-exempt social welfare organization (section 501(c)(4) of the Internal Revenue Code. Alongside it is American Citizens Abroad Global Foundation, organized as a publicly-supported charity under section 501(c)(3). ACA is the successor of American Citizens Abroad, which was organized as a voluntary association by American expatriates mainly in and around Geneva in 1978.

- Early on, ACA was instrumental in getting citizenship legislation rewritten in order that children of US citizens, who had not met certain then-existing US residency requirements, were eventually able to do so.
- ACA was instrumental in increasing the FATCA (Foreign Account Tax Compliance Act) Form 8938 filing thresholds for US citizens living and working overseas, from \$50,000 to \$200,000.
- ACA was instrumental in getting the IRS to introduce its Streamlined Foreign Offshore Program.
- ACA was instrumental in showcasing the importance of the Foreign Earned Income Exclusion (FEIE) resulting in the introduction of legislation in 2011 by Congresswoman Maloney and Congressman Garrett calling for the removal of the cap on the Foreign Earned Income Exclusion.
- ACA has developed approaches to enactment of residency-based taxation in lieu of citizenship-based taxation, beginning with a forum/debate on “Taxation of Americans Abroad in the 21st Century: Citizenship-Based Taxation vs. Residency-Based Taxation”, held at the University of Toronto in May 2014.
- ACA developed and launched in June 2014 the ACA Tax Return Preparers Directory, which provides an online comprehensive listing of specialist return preparers able to service Americans abroad. The Directory is free of charge for ACA members and the public alike. <http://www.acareturnpreparerdirectory.com/>
- At the time of enactment in December 2015 of section 32101 of the Fixing America’s Surface Transportation Act, empowering the State Department to revoke or deny passports in specific cases when taxes are unpaid, ACA succeeded in having inserted in the Joint Explanatory Statement of the Committee of the Conference, as part of the Conference Agreement, important ameliorative provisions.
- In March 2016, ACA, in cooperation with the State Department Federal Credit Union, ACA launched the ACA-introduced the SDFCU account for its members, extending banking services to Americans living overseas who previously were unable to open US bank accounts. The account can be opened and operated entirely online. It is available regardless of the fact that the account holder does not have a residence or even a mailing address US. The account is essentially the same as that enjoyed by consular officers and other Americans working at US embassies around the world. <https://www.americansabroad.org/sdfcu-account/>
- ACA was pleased to testify at the National Taxpayer Advocate Public Forum in May 2016, which placed on record the tax and compliance problems facing Americans living and working overseas.
- ACA has supported the repeal of the 3.8% surtax on net investment income, which results in double taxation for Americans overseas since foreign tax credits are not permitted to offset the tax.

This testimony was prepared by Marylouise Serrato, Executive Director, Charles M. Bruce, Legal Counsel, and Glen Frost, Assistant Legal Counsel, on behalf of ACA. Thanks go to all members of ACA’s Executive Committee and retired Director Jackie Bugnion.