



## AMERICAN CITIZENS ABROAD

THE VOICE OF AMERICANS OVERSEAS

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

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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 of 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 regulations<sup>1</sup> and the various Intergovernmental Agreements<sup>2</sup> and the reporting thresholds for Form 8938<sup>3</sup> 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.

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\* American Citizens Abroad is a tax-exempt, non-partisan organization promoting the interests of Americans residing outside the US. <https://www.americansabroad.org/>. The principal author of this paper is Charles M. Bruce. A number of individuals, including individuals associated with other organizations representing Americans abroad, contributed, and their contributions are gratefully acknowledged. Questions and comments are invited. These can be sent to [cmb@ilf.ch](mailto:cmb@ilf.ch). The term “Safe Harbor” is used by some other groups in lieu of “Same Country”.

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

<sup>2</sup> 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).

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

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.<sup>4</sup> The individual would have 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).<sup>5</sup>

"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"<sup>6</sup> (e.g., a commercial, checking, savings, time, or thrift account), a "custodial account"<sup>7</sup> (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).<sup>8</sup>

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.<sup>9</sup>

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

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

<sup>5</sup> 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.

<sup>6</sup> "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).

<sup>7</sup> "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).

<sup>8</sup> §1.1471-5(b)(3)(iii).

<sup>9</sup> 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.

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.<sup>10</sup>

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 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.<sup>11</sup>

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).

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

<sup>11</sup> Section 911.