

FBAR/FATCA Task Force

October/November/December 2015 Update

After an action-packed September, we found ourselves with precious little to report in the way of true movement in our FATCA reform work. Here's what's happening:

1. Generating Senate support for the "Same Country Safe Harbor"

Our best hope for persuading Treasury and the IRS to relieve the burden FATCA is placing on Americans abroad is to encourage Congress to write to Treasury and the IRS to support Same Country Safe Harbor - urgently! The House of Representatives has done that; now we are working to have the Senate do the same.

We worked steadily through July and August to generate signatures from Members of the House of Representatives on a letter to Treasury and the IRS urging them to implement the FATCA Same Country Safe Harbor for Americans Abroad. We were delighted to have the chairs of the House Americans Abroad Caucus, Rep. Carolyn Maloney (D-NY) and Rep. Mick Mulvaney (R-SC) championing the outreach and helping us to generate support from both side of the aisle. The letter went out on September 15th with 19 signatures, most of which we can claim credit for.

A Senate letter to Treasury and the IRS is proving more difficult as there isn't an Americans Abroad Caucus in the Senate (though that is another project we are working on). Democrats Abroad, fortunately, has some very good friends in the US Senate – Cory Booker (NJ), Elizabeth Warren (MA), Tim Kaine (VA), Kirsten Gillibrand (NY), Michael Bennet (CO) and Al Franken (MN) are a few of the Senators who have met with our members in person or on international teleconferences to which all of our members throughout the world were invited.

This week our international chair, Katie Solon, is in Washington DC after a meeting of the Association of State Democratic Chairs, and she will be paying a visit to the staff of these and other friends of Democrats Abroad in the US Senate. We expect more can be achieved being in the room than over email or via telephone through the dead of the night Singapore or other time. We look forward to finally making some progress on a Senate letter. Thanks to Katie for pounding the Capital Hill pavement for us.

2. FATCA Lawsuit

The last couple of months there have also been very few developments in the lawsuit, *Crawford et al v United States*, challenging the constitutionality of FATCA. As you know from one of our September updates, Judge Rose of the Ohio Southern district federal court rejected the plaintiff's request for a preliminary injunction, which would have put an immediate halt to the enforcement of FATCA. The ruling throws the prospects for the case's success into serious doubt. The US government responded to the judge's ruling by filing a motion to dismiss. The plaintiffs have sought two successive extensions of time to respond to the motion, with a response now due on December 30. The plaintiffs also sought leave to add three additional individuals to the list of plaintiffs. The US government has rejected the request; the judge can approve of the request anyway but has yet to do so. We will keep you posted on further developments.

3. Worldwide program for the exchange of financial account information starts January 1, 2016

FATCA was the model and inspiration for the Organisation for Economic Cooperation and Development (OECD) to create a worldwide program of financial account transparency and disclosure. It is known as the Common Reporting Standards (CRS) and over 90 countries have signed up to report the financial accounts of non-national account holders to the tax authority in the account holder's country of tax residence. CRS differs from FATCA in some important ways, most especially in relation to the severity of penalties for compliance failure. Foreign financial institutions which fail to meet their FATCA filing obligations face a penalty of 30 percent withholding on US source income. A penalty of this nature could jeopardize the viability of all business foreign financial institutions conduct with US-based counterparts. No financial institution that does business with US counterparts can afford to ignore the risk of getting their FATCA compliance wrong when the penalty is this high. Thus we are seeing some banks across the world refusing to handle any accounts for US citizens.

The penalties associated with CRS, on the other hand, primarily comprise fines for fraudulent reporting. From a risk management perspective FATCA compliance failures expose financial institutions to a far higher level and probability of loss.

Some have suggested that when banks start to undertake CRS compliance, reporting the financial accounts of ALL non-national account holders, they will reverse their ban on US customers. We don't believe this is the case. For foreign financial institutions, from a risk perspective, FATCA compliance is not the equivalent of CRS compliance and we do not believe it will result in banks deciding that they may as well concede to the FATCA reporting (and risk) that goes with banking US citizens.

Another factor at play that distinguishes FATCA from CRS was noted earlier: CRS reports are made to the account holder's country of tax residence. For most account holders the country they live and work in is their country of tax residence. No reporting will be made to their country of citizenship if they are a tax resident in their country of residence. This, of course, is not true for Americans abroad, who remain tax residents of the US regardless of where they live and work. The FATCA Same Country Safe Harbor for Americans abroad will have the effect of putting US citizens in the same position as all other non-national citizens with regard to financial account reporting. This is another point we are raising when CRS arises as a reason not to reform FATCA reporting requirements for bona fide US residents abroad.

Please send questions or comments to FATCA@democratsabroad.org at any time.

Thank you for supporting the work of the FBAR/FATCA Task Force.

We wish you happy holidays.

Democrats Abroad FBAR/FATCA Task Force

DeeDee Gierow (Sweden)

Carmelan Polce - Chair (Singapore)

Jennifer Powell (Switzerland)

Joe Smallhoover (France)

Katie Solon – ex officio (Germany)

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