

FOREIGN ACCOUNTS TAX COMPLIANCE ACT (“FATCA”) F.A.Qs.

1. What is FATCA and why is it a problem for Americans abroad?

FATCA was passed by Congress and signed into law by President Obama in 2010 to discourage and apprehend tax cheats and money launderers. It requires both US citizens and their banks to report detailed information to the IRS on accounts in Foreign Financial Institutions. **The intent was to make it much more difficult for wealthy Americans *living in the US* to use offshore accounts to hide untaxed earnings from the IRS. But the bill applies to all accounts outside the US—even when they are held by Americans who live abroad.** As a result, FATCA is causing grave hardship to Americans living outside the country. Their financial accounts are being closed; for some their relationships with their non-American spouses are under strain; and some Americans are being denied positions, promotion or partnership in business. For some, the consequences of FATCA reporting¹ are so severe that they are renouncing or contemplating renouncing their US citizenship.

2. How is Democrats Abroad addressing the problems FATCA has created for Americans abroad?

Democrats Abroad formed the FBAR/FATCA Task Force² in early 2011 to examine the law, analyse its impact and advocate for reforms to ease the excessive burden FATCA places on Americans abroad. Over time we have held many productive conversations with legislators and regulators in a position to develop a solution to the suffering FATCA is causing³. We believe there is a means of resolving the problems caused by FATCA that also leaves in place its power to catch the “fat cat” tax cheats. We have generated a large amount of data on the impact of FATCA and have carefully structured arguments in support of our recommended reform. We have worked on this issue in collaboration with non-partisan organisations representing Americans living outside the US. We can see from the policy responses of the IRS⁴ that we are making progress, but there is much more work to do. Given the constraints that our volunteer status puts on our work, **we welcome all other groups interested in working to reduce the burden that FATCA places on Americans abroad.**

3. What were the key findings of the Democrats Abroad 2014 FATCA Research project?

The Democrats Abroad 2014 FATCA survey yielded 6,552 responses from Americans living across six continents and hailing from all 50 US states and the District of Columbia.

Financial account closures: One in six respondents report having had financial accounts in Foreign Financial Institutions closed due to FATCA. Two-thirds of the accounts reported closed were

¹ “FATCA reporting” means the submission by qualifying taxpayers of IRS Form 8938 – Statement of Specified Foreign Assets and the submission by Foreign Financial Institutions of reports on the accounts of US Persons.

² The Task Force is made up of volunteers with range of professional backgrounds but none of us are experts in US tax law or accounting. This year we engaged the support of an advisor based in Washington DC who worked as a tax law policy expert for both with the IRS and with Congress. He has provided strategic advice on policy, Congress and on the regulatory agencies we are working to persuade.

³ The Task Force liaises regularly with the members of Democrats Abroad about our work: documenting our discussions with lawmakers and regulators on the Democrats Abroad wiki which is accessible to members; publishing monthly reports on the Democrats Abroad website on our work and on matters related to FATCA; and messaging members when there is important information to impart.

⁴ Democrats Abroad and other groups advocating on behalf of Americans abroad point to three key IRS initiatives: 1) The [upward adjustment of FATCA reporting thresholds](#) for Americans residing abroad; 2) Vast improvements in the IRS webpage and other communications aimed at Americans abroad and 3) the [Streamlined Filing Compliance Procedures](#).

ordinary checking, savings and retirement accounts - accounts essential for managing everyday personal and household affairs. Over two-thirds (68.0%) of the checking accounts closed had a balance of less than \$10,000 when the account was closed, as did 40.4% of the savings accounts. Over half (58.9%) of the investment/brokerage accounts had a value of less than \$50,000, as did over two-thirds (69.3%) of the dedicated retirement accounts. This data demonstrates that those impacted by FATCA are overwhelmingly middle class Americans, not high-income individuals.

Refused new financial services: Of those who attempted to open a savings or retirement savings account, nearly one-quarter (22.5%) were unable to do so – nearly twice as many as those who attempted to open a checking account (10%). 22.4% of attempts to open investment accounts were unsuccessful. Nearly thirteen percent (12.7%) of all attempts to open an account (of any kind) failed.

Relationships under stress: Some 2.4% of respondents with a partner reported changes in their relationship (divorce or separation), while 21% reported that they either no longer have joint accounts or are thinking of moving to separate accounts. Many more noted that the reporting requirements caused stress and conflict between them and a non-American spouse.

Jobs and Business Partnerships Denied: The survey data suggests that about one-fifth (19.6%) of overseas Americans are self-employed. Others work in business. The FATCA reporting requirements on accounts on which Americans hold signatory authority has negatively and profoundly affected their ability to own their own businesses and to advance in their profession. 5.6% state that they were denied a position because of FATCA.

In September 2014 Democrats Abroad published a report on the 2014 FATCA Research called "[FATCA: Affecting Everyday Americans Every Day](#)." We also published an [Executive Summary](#) of the report and a [FATCA survey Datapack](#).

In our discussions with lawmakers about the research findings we saw that there was strong interest in hearing the stories related by survey participants about the ways that FATCA was affecting them. Our survey instrument included a great many free-form fields for participants to elaborate on their responses to questions asked. As a result we have collected thousands of interesting stories, comments and observations. In October a selection of these stories were published in a [FATCA "storypack"](#) which will be used in our further discussions with Congress and regulators at the IRS and US Treasury Department.

4. Why are overseas banks and brokerage houses closing the accounts of Americans?

We argue that Foreign Financial Institutions are withholding financial services from American customers because of 1) the cost to Foreign Financial Institutions of implementing FATCA reporting regimes and 2) the severe penalties for FATCA compliance failures. For some Foreign Financial Institutions it is more sensible to cease doing business with American customers than to try to comply with the Act.

5. What is Democrats Abroad's recommendation for fixing FATCA?

Democrats Abroad supports the establishment of an exemption from FATCA reporting for law-abiding Americans living outside the United States.

Despite the grave injuries and inconvenience they've suffered, Americans living abroad were never the target of this law. Fortunately, Congress is accustomed to rectifying the unintended and unanticipated adverse consequences of legislation they have enacted. They subsequently establish provisions to protect the law's innocent victims, often termed "safe harbor" provisions. That is what we are seeking for Americans abroad in relation to FATCA: a same country safe harbor exemption from FATCA reporting.

When the FATCA Same Country Safe Harbor for Americans abroad is implemented -

- No American living legally abroad would have to file a FATCA report on accounts held in his or her country of residence; and
- No Foreign Financial Institutions would have to file FATCA reports on the accounts of US-tax compliant Americans residing legally in the same country.

A FATCA Same Country Safe Harbor for Americans abroad would only exempt accounts held in the country in which the account holder is *legally*⁵ resident.

6. But a great many Americans abroad have cross-border lives and so hold legitimate financial accounts in more than one country. How will this reform rescue them and their financial institutions from the burden of FATCA reporting if they can only claim the exemption for a single country in which the account holder is *legally* resident?

We are hearing this question quite a lot now that Americans abroad concerned about FATCA are learning about our advocacy work – especially from Americans living in Europe. The Democrats Abroad 2014 FATCA Survey of Americans abroad included a question about what accounts the respondent holds **in countries other than their country of residence**. 13% of respondents indicated that they also hold accounts in “in the US and elsewhere” (9.5%) or “elsewhere” (3.5%). More than one in 8 respondents, therefore, may (if they have account balances that exceed the FATCA reporting thresholds) need to file a FATCA report after the proposed Same Country Safe Harbor is implemented. We acknowledge, therefore, that this reform falls short of fully and completely resolving the problems caused by FATCA for perhaps more than 10% of overseas Americans.

Our recommended reform is predicated on the fact that it puts Americans abroad on the same footing as US-based Americans with regard to financial account disclosure. After the FATCA Same Country Safe Harbor for Americans abroad is in place, both groups of Americans will not be required to report to the IRS on financial accounts in their country of residency.

We believe that complicating our recommendation with provisions that make accommodation for taxpayers with accounts outside their country of residency will disrupt this fundamental argument in support of this reform. Our reform WILL remove the FATCA reporting requirement for Americans in their country of residence and so resolve the critical problem of country-of-residency account closures for all Americans living abroad. We believe we cannot solve the country-of-residency problem for 100 percent of Americans abroad if we overreach and try to solve a further FATCA problem burdening some 10%-15% of Americans abroad.

In summary, at this point we will not be tinkering with our reform in order to solve the problem of FATCA reporting for accounts in Foreign Financial Institutions outside one’s country of residence because we believe it would jeopardise our efforts to solve the problem of FATCA reporting for accounts in Foreign Financial Institutions within one’s country of residence.

7. How will the FATCA Same Country Safe Harbor for Americans abroad work?

The mechanism for claiming the Safe Harbor would certainly need to be established by the IRS, but we had a very simple thought about how it could work. Americans abroad would claim the Same Country Safe Harbor provision in their tax returns and would provide a copy of that form to all the

⁵ A mechanism to determine 'legal residency' is already provided for in the US tax code (Section 911) and is used routinely by Americans abroad when claiming the Foreign Earned Income Exclusion.

Foreign Financial Institutions where they hold accounts. Those institutions would keep these forms on file and would then be able to exclude the taxpayer from their FATCA filings.

8. Why will US lawmakers and regulators support the FATCA Same Country Safe Harbor for Americans abroad?

We believe that the FATCA Same Country Safe Harbor for Americans abroad will greatly reduce FATCA-related financial account closures, expand tax compliance (important for getting the IRS on board) and improve FATCA's effectiveness.

Account Closures: The FATCA Same Country Safe Harbor for Americans abroad would simplify FATCA compliance for Foreign Financial Institutions, thereby lowering costs and risks. If the FATCA Same Country Safe Harbor for Americans abroad is adopted, we expect financial institutions will stop turning away Americans residing in their country and resume servicing them as they have for decades.

Tax Compliance: For reasons abundantly clear to us - confusion, ignorance, misinformation - compliance with tax filing amongst Americans abroad has historically been very low. In order for Americans abroad to take advantage of the FATCA Same Country Safe Harbor provision and protect their access to financial products from local banks and other financial institutions they will need to file tax returns.⁶ We believe the enhanced levels of tax compliance, which would be a direct benefit of the FATCA Same Country Safe Harbor will help us gain the support of regulators at the IRS and Treasury.

FATCA's Effectiveness: Exempting the legitimate accounts of ordinary, law-abiding Americans abroad from FATCA reporting will cleanse the FATCA data pool of financial accounts that are of little use to the IRS's efforts to catch tax cheats. IRS Commissioner John Koskinen has acknowledged that one of the IRS's "biggest challenges lies in having the resources to build and maintain systems that can effectively use all of the (FATCA) data." We believe that removing these data would greatly assist the IRS in identifying and focusing on genuine tax cheats hiding assets offshore.

We believe the FATCA Same Country Safe Harbor for Americans abroad will preserve the original intent of FATCA to fight illegal tax avoidance by Americans using overseas accounts to hide assessable earnings from the IRS, but alleviate the useless reporting, by Americans and by their banks, of ordinary accounts used by law-abiding citizens living abroad to pay their bills and save for the future. [We believe momentum is growing in support of the rules change](#). Treasury is expected to release new FATCA rules in the last quarter of 2016 and we continue to push for the Safe Harbor to be amongst them.

9. The Republicans say they want to repeal FATCA. Why won't Democrats Abroad join their campaign to repeal FATCA?

Democrats Abroad supports policy that cracks down on illegal tax avoidance. When some tax payers break the law by hiding assessable earnings from the IRS in offshore accounts it increases the burden for the rest of us. For many decades those with access to elite financial structures and schemes have been using offshore accounts in bank/tax secrecy jurisdictions to become even richer. Nations

⁶ Fortunately, in 2014 the IRS enacted important changes to compliance regulations that make it much easier for Americans abroad who do not file tax returns to become tax compliant. There are now no criminal charges nor penalties imposed on non-wilful non-filers. See Question 11 for further discussion.

throughout the world have determined to bring this practice to an end and Democrats Abroad believes that is a good thing. Democrats Abroad supports the policy initiative behind FATCA. We also think FATCA can be fixed to remove the unintended adverse impacts it has on law-abiding Americans abroad.

In January 2014 the Republican National Committee (RNC) passed a resolution calling for the repeal of FATCA. While the resolution made it look like repealing FATCA would be Republican Party policy, the Republican-controlled House of Representatives did not introduce a bill calling for FATCA to be repealed in all of 2014. A bill calling for the repeal of parts of FATCA was re-introduced in the Senate by Senator Rand Paul in March 2015. It has one co-sponsor and [a 1% chance of being enacted](#).

The RNC and Republicans Overseas, the organization formed in 2013 by members of the RNC to cultivate the overseas vote for Republicans, has been very open about their strategy of exploiting the anger and upset around FATCA to raise money and build support for Republican candidates amongst Americans living abroad.

Republicans Overseas has admitted that it sees FATCA as a political tactic for activating a ground game to attract overseas voter. If FATCA had been repealed by Congress before 2016, the Republicans would lose this wedge issue in the 2016 campaign. Republicans ran in the 2014 midterm elections on a pledge to repeal FATCA as soon as they won control of the Senate. They have had control of both houses for two years but a repeal bill to mirror Sen Paul's bill has not as yet been introduced in the House. And why would it. The GOP [can use the promise of a FATCA repeal](#) to take into its campaigns for Congress and the White House. We understand that FATCA hearings may be planned for the months leading up to election day – an opportunity to make the case for repeal. We are putting ourselves forward for inclusion on the witness list for a House hearing on FATCA should one be scheduled for this year.

There is a global context for this question as well. By 2017 FATCA will have been in place for more than three years and be well entrenched in the compliance practices of international banks and brokerage houses. In addition, in 2017 [the "global FATCA"](#) will start to come on-line with the commencement of financial account reporting by at least 80 countries under the OECD Common Reporting Standards. By that time international financial account transparency and disclosure will be a given and the global crackdown on illegal tax avoidance will be very difficult for Republicans to arrest.

10. What about the FATCA lawsuit filed by Senator Paul and backed by Republicans Overseas posing a challenge to the constitutionality of the law? Why is Democrats Abroad not supporting this legal action as a means of affecting relief from the FATCA burden for Americans abroad?

In June 2015 Republican constitutional lawyer, Jim Bopp, filed a lawsuit in Ohio challenging FATCA on constitutional grounds. The plaintiffs are Americans overseas who contend that FATCA violates their rights under the 4th Amendment (unreasonable searches and seizures), 5th Amendment (equal protection) and 8th Amendment (excessive fines clause). Republican senator Rand Paul joined as an additional plaintiff in his capacity as a US senator. His claim was that as a senator, he was not given the right to provide advice and consent to the FATCA Intergovernmental Agreements, which he views as treaties. The government believes they are not treaties, rather administrative level agreements to which the Senate's advise-and-consent rights do not apply.

In April 2016 the case was dismissed (for lack of standing) but an appeal was filed shortly thereafter. Democrats Abroad continues to follow the case.

Democrats Abroad has no objection to the law being tested in the courts but we do not support the ambition of destroying the legislation entirely. We support good faith policy created to stop tax evasion that is well thought out and designed to catch tax cheats, not innocent people. We fundamentally support FATCA's policy goal of discouraging and apprehending wealthy tax cheats and making sure that everyone pays their fair share. Taken in the context of the broader debate about rapidly increasing wealth inequality in the United States, supporting the destruction of FATCA would go against our core values, particularly given we believe it can be fixed.

Republicans pay lip service to supporting ending illegal tax avoidance, but this is a bit hard to take at face value given the GOP's general opposition to reasonable levels of federal taxation and to virtually any enforcement efforts by the IRS. Undermining FATCA appears to be part of the broader Republican strategy to weaken the IRS and protect the interests of the GOP's wealthy backers, many of whom may have been using offshore tax shelters for decades.

And the lawsuit also is by no means a vehicle for affecting urgent and enduring FATCA relief. Given the typical pace of US litigation and the inevitable appeals, the final outcome probably won't be clear for years. While the Republicans are making a big show of trying to get rid of FATCA altogether, Democrats Abroad, in collaboration with the non-partisan organisations of Americans abroad, is working extremely hard and with great urgency, to find a pragmatic solution to address the very serious concerns of Americans abroad – of any political persuasion – who are harmed by the way FATCA is being implemented.

We don't believe the constitutional challenge presents any realistic prospect of giving relief to Americans overseas for years to come and it may be more of a PR ploy and political wedge than a genuine attempt to respond to the concerns of overseas Americans.

11. Wouldn't FATCA disappear altogether as a concern for Americans abroad if there were Residence-Based Taxation instead of Citizenship-Based Taxation? The Republicans support Residence-Based Taxation; why don't Democrats support it?

Democrats Abroad supports residence-based taxation (RBT). It has been in our platform since 1992. Given Democrats Abroad's limited volunteer resources, and our view that **there is no political support in Congress – by representatives from either political party - for this change in tax policy,**⁷ we have, to this point, elected not to advocate actively in support of RBT. We have given full-throated support to other organisations of overseas Americans who have made RBT a focus of their advocacy. We have also included an accounting of the problems caused for Americans abroad by Citizenship-Based Taxation in our Congressional door-knocks.

A change of position was announced earlier this year. In May the global leaders of Democrats Abroad endorsed the establishment of a Task Force with a mandate to actively advocate in support of RBT. A Terms of Reference has been drafted. Task Force team members have been recruited. A page on the DA website will be set up for the Task Force to provide updates on its advocacy activities and initiatives. We will work in cooperation with the other organisations representing Americans abroad to maximise our advocacy efforts. Please stay posted for further developments.

12. What about the large cohort of Americans abroad who are not filing tax returns? What is Democrats Abroad's advice for them?

⁷ We note comments in [this position paper published on 11 December 2014 by Republican members of the Senate Finance Committee about how RBT might be implemented](#). The paper falls short of endorsing RBT. It also envisions a complex non-residency test, proposes the imposition of a punitive "exit tax" for those declaring the non-residency and remains silent on how the policy would accommodate those who are already non-resident.

In June 2014, the IRS announced changes to the **Streamlined Filing Compliance Procedures** – the procedures for non-tax filers to use in becoming compliant with their US tax filing and reporting obligations. It comes as close to anything we are ever likely to see to being a genuine “amnesty” program for those Americans abroad (and not abroad) who, due to ignorance, misinformation or confusion, have not filed tax returns. Democrats Abroad recommends that Americans who do not currently file tax returns become compliant with their US tax filing and reporting obligations, consulting, if applicable, with a tax advisor⁸ about the Streamlined Filing Compliance Procedures.

Information about the [Streamlined Filing Compliance Procedures is available on the IRS website](#). Basically, the procedure involves filing tax returns for the last three years and Foreign Bank Account Reports (FBARs) for the last six years. Participants would be required to pay any taxes due plus interest, but no penalties. Because of the Foreign Earned Income Exclusion most Americans living outside the US will owe no taxes.

13. The Foreign Bank Account Report (FBAR), with its far lower reporting threshold, impacts many more Americans abroad than FATCA. What are you doing to fix FBAR?

The Foreign Bank Account Report (FBAR) has been discussed with lawmakers in our Congressional Door Knocks, especially the fact that the reporting threshold has not been upwardly adjusted since the reporting requirement was initiated in the early 1970s.

In general, the FBAR has not been as concerning for Americans abroad as FATCA has been - because there is no parallel FBAR account reporting by financial institutions. Taxpayers submit FBAR reports but the institutions where they hold their accounts do not. Unlike FATCA, therefore, FBARs 1) have not been the cause of account closures by foreign financial institutions, and 2) have not exposed non-tax return filing Americans abroad to the risk of being “outed” to the IRS by their overseas banks and brokerage houses. Nevertheless, there are grave concerns amongst Americans abroad about the FBAR.

Our 2014 survey yielded many comments about the FBAR. Older Americans abroad were especially concerned about the shift to mandatory online FBAR filing. The automation of the report is probably meant to make it easier for Americans abroad to file – but for many it has made the task harder and more stressful. Also, the automation of the data reporting reminds Americans of NSA data gathering and so also raises anxiety about privacy and the appropriateness and necessity of the reporting.

Our discussions with lawmakers and regulators in 2015 will include reporting on these matters and further requests that the reporting threshold be raised.

14. Why do I have to submit an FBAR⁹ as well as a FATCA report when so much of the information reported is the same?

⁸ See Question 14 regarding tax advisors.

⁹ Americans with more than \$10,000 in accounts in Foreign Financial Institutions are required to file the FBAR. This requirement has been in place since 1972 but has only been enforced by Treasury since 2004. For the 2013 filing Treasury mandated that the FBAR must be submitted electronically. This has created some challenges for those less accustomed to electronic document transfers, which we will raise in our next submission to the regulators. Treasury and IRS maintain that the FATCA was created for the purpose of tax administration and FBAR was created for the purpose of law enforcement.

In early 2012, the Government Accountability Office (GAO) published a report (GAO-12-403) noting that the FBAR and FATCA report are duplicative and recommending revisions to both forms and further examination of how to reduce duplication. The FATCA Same Country Safe Harbor for Americans abroad would remove the FATCA reporting requirement for the vast majority of filers who live outside the US. Removing the FBAR reporting requirement - which burdens only the taxpayer but not their bank - might be considered next. We are liaising with the GAO which is planning further study of this issue.

In April 2015 [the National Taxpayer Advocate published her views](#) on the matter of duplicative FBAR and FATCA reporting and recommended that the FBAR rules and the FATCA rules for reporting bank accounts on Form 8938, should be merged. We hope support for this notion will grow.

15. What about the cost of filing? Haven't there been reports in the media suggesting that the cost of hiring a tax accountant or adviser can run into the tens of thousands of dollars?

Democrats Abroad is aware of media reports that published what we believe are highly misleading estimates about the cost of tax advice. The "big brand" global tax advisers that cater to high net worth individuals probably charge out at a level in the tens of thousands of dollars, but their fees reflect the level of work required to prepare the accounts of taxpayers who have complex investment portfolios.

There are services available to Americans abroad that are far more reasonably priced. We recommend that you:

- visit the American Citizen Services section of the website of your local US embassy or consulate to see if they post a listing of local US expat tax service providers.
- consult the [tax return preparer directory published by American Citizens Abroad](#).

Be warned. There are likely to be consultants cruising around the market seeking to exploit the need for US expat tax services. They may have a very good understanding of local tax laws but insufficient knowledge of US tax law. Even worse, they may have questionable ethics with regard to customer service or billing. Use your common sense and gut instinct in considering their services. Employing tax accountants who come well recommended may help you avoid doubtful or dubious consultants.

16. How can I stay up to date with what Democrats Abroad is doing to address the unintended adverse consequences of FATCA?

The Task Force posts monthly updates to the FATCA page of the Democrats Abroad website. Click on the red "DA FATCA Position and Reports" button on the homepage of www.democratsabroad.org and scroll down the page to review our reports and postings. We also post reports and materials to the Democrats Abroad wiki: wiki.democratsabroad.org. If you click on "Issues and Constituencies" and then click on "Reform FATCA" you will see DA's FATCA reports and materials and also be able to sign up for updates on our work. We will only send messages to this list when there are new developments to report.

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