DEMOCRATS ABROAD

Chairman Mark Meadows
Ranking Member Gerry Connolly
Subcommittee on Government Operations
Committee on Oversight and Government Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

Democrats Abroad
PO Box 15130
Washington, DC 20003
USA

DemocratsAbroad.org
VoteFromAbroad.org

Problems with voting overseas?
help@VoteFromAbroad.org

DA Executive Committee:

Chair, Katie Solon
Chair@DemocratsAbroad.org

Vice Chair, Art Schankler
Vice-Chair@DemocratsAbroad.org

Treasurer, Tom Schmid
Treasurer@DemocratsAbroad.org

Secretary, Julia Bryan
Secretary@DemocratsAbroad.org

Legal Counsel, Orlando Vidal
Counsel@DemocratsAbroad.org

RVC Asia-Pacific, Alex Montgomery
RVC-AP@DemocratsAbroad.org

RVC Americas, Jody Quinnell
RVC-Americas@DemocratsAbroad.org

RVC EMEA, Merrill Oates
RVC-EMEA@DemocratsAbroad.org

Re: Modifications for the Foreign Accounts Tax Compliance Act

May 3, 2017

Dear Chairman Meadows and Ranking Member Connolly,

On behalf of Democrats Abroad I would like to express my appreciation to the Subcommittee on Government Operations for holding the April 26th hearing exploring the unintended consequences of the Foreign Account Tax Compliance Act (FATCA). Democrats Abroad has been involved in discussions about FATCA's impact on Americans living abroad with lawmakers and administration officials at the Treasury and IRS for more than five years. Although we have supported taxation on the basis of residency rather than citizenship since our inception, absent a switch to residency based taxation, we strongly believe that FATCA reform is a desirable and achievable goal.

We remain hopeful that there is a bipartisan FATCA remedy that both addresses the problems the law inadvertently causes for non-resident Americans and also reinforces the law's ability to fight tax evasion and the financial crimes that underwrite terrorist financing, sustain corruption and facilitate trafficking in drugs, arms and humans.

Democrats Abroad strongly recommends the following FATCA modifications:

1. **Implement the Same Country Safe Harbor Exemption from FATCA reporting for Americans Abroadresiding outside of the U.S.**

If a same country safe harbor exemption is applied to FATCA, the law would treat the financial accounts of Americans abroad in their bona fide country of residence the same way as it treats U.S. accounts of Americans residing in the U.S. In brief, foreign financial institutions would be exempt from filing FATCA reports on the accounts of U.S. tax-compliant Americans residing legally in the same country. The FATCA same country safe harbor exemption would only exempt accounts held in the country in which the account holder legally resides.

This reform would preserve the original Congressional intent of FATCA to fight illegal tax avoidance by Americans using overseas accounts to hide assessable earnings from the IRS. Furthermore, it would alleviate the valueless reporting of ordinary accounts used by law-abiding citizens living abroad to pay their bills and save for the future.

This FATCA reform would resolve key concerns of Americans living overseas, especially the concern that they are losing access to a diversified supply of banking and brokerage products when foreign financial institutions elect not to do business with American customers because of compliance requirements and unreasonable penalties for non-compliance. It would provide a solution for Americans residing abroad who feel their last viable option to avoid financial discrimation is to renounce their U.S. citizenship.

2. Moderate the unreasonably high penalties for FATCA compliance failures

Foreign Financial institutions (FFIs)

- FFIs that fail to satisfy their FATCA compliance obligations are subject to 30% withholding of U.S.-sourced payments
- Counterparties who fail to deduct the 30% withholding from a FATCA non-compliant FFI are liable for 100% of the withholding. FATCA regulations, therefore, also impose compliance costs and serious non-compliance penalties on the payers of U.S.-sourced income to FFIs.

These penalties are confiscatory, unfair and unreasonable. Democrats Abroad favors clear reductions of the penalties and rules that permit mitigation.

U.S. Taxpayers

- Taxpayers whose accounts exceed the FATCA reporting thresholds who fail to file IRS Form 8938 currently could suffer a penalty of $10,000. From 90 days past the date of the notice of a delinquent form, penalties of $10,000 per month could be assessed up to a total of $50,000.
- Underpayments of tax due from earnings on unreported accounts are currently assessed a 40% penalty.
- There is currently no statute of limitations on compliance failures.

These penalties are confiscatory, unfair and unreasonable. For taxpayer violations investigators should be permitted to show leniencey in cases of non-wilful acts or where there are other mitigating factors. The statute of limitations should be brought into alignment with other tax infractions.

3. For U.S. taxpayers who file FATCA reports, eliminate the requirement that they also file the Report of Foreign Bank and Financial Accounts (also known as Foreign Bank Accounts Report or FBAR)

Holders of accounts in FFIs whose balances exceed the FATCA reporting threshold report their FFI accounts on BOTH the FATCA report (Form 8938) and the FinCEN FBAR report (Form 114). The FBAR reporting threshold is significantly lower.

- The reports are highly duplicative and only create extra work and expense for the tax return preparer. Filing both is deemed unnecessary and wasteful by American taxpayers of every political persuasion.

- Both reports are collected by the IRS, with the FBAR collected on behalf of FinCEN. As both FinCEN and the IRS are embodied within the Treasury, the IRS could easily send all FATCA to FinCen on the taxpayer's behalf instead of sending the FBAR. FinCen therefore would collect the same data than it would otherwise.

Thank you for considering our views and including our FATCA modification recommendations in the Subcommittee's hearing record. We look forward to working with the Chair and Ranking Member in to resolve this important issue for the estimated 9 million Americans abroad, especially those who view FATCA as costly and stressful.

We believe FATCA reform can be achieved with a bipartisan effort. If you or your staff have any questions regarding our work on or recommendations for reforming FATCA, please feel free to contact me or Democrats Abroad's Carmelan Polce at +65 9380 1084 or cpolce@tpg.com.au.

Sincerely,

Kathryn Solon
International Chair
Democrats Abroad
chair@democratsabroad.org
202-660-8904

Attachments:
I Democrats Abroad FATCA Position Paper
II Same Country Safe Harbor Exemption from FATCA Reporting
III Democrats Abroad 2014 FATCA Research (Attached as separate files)
Report "FATCA: Affecting Everyday Americans Every Day"
Executive Summary "FATCA: Affecting Everyday Americans Every Day"
Research Datapack
"Stories of FATCA – Affecting Everyday Americans Every Day"

ATTACHMENT I

DEMOCRATS ABROAD
POSITION PAPER ON FATCA AND HOW TO FIX IT

What is FATCA?

The Foreign Accounts Tax Compliance Act (FATCA) was passed in 2010 in response to a growing concern that Americans, mostly living in the US, were using offshore accounts for tax dodging and money laundering. The legislation mandates two things:

- Every American with signatory power over accounts in Foreign Financial Institutions (banks, brokerage houses, etc) that, in aggregate, exceeded certain thresholds ($50,000 in the US and $200,000 abroad) report all such accounts on Form 8938 with their federal tax return. Note that this applies not only to personal accounts but accounts over which the individual controls - but may not own - the funds. (A corporate treasurer or CFO, for example).

- Every Foreign Financial Institution (FFI) must report to the IRS the details of every account held by a US Person. Any FFI that fails to do so faces a withholding of 30% of all funds coming into that bank from US sources.

The Unintended Consequences of FATCA

FATCA imposes crippling fines on FFIs who do not demonstrate compliance. This places both a burden and a risk on the bank and the result is inevitable. Banks all over the world are electing to deny financial services to Americans. It is increasingly difficult for an American to open or maintain a bank or brokerage account abroad solely because of their citizenship. More and more banks are asking all customers to certify whether or not they are a US citizen. If the answer is yes, service is often denied and accounts closed.

Ordinary, middle class, law-abiding Americans are suffering solely because they happen to live outside the US. An American living in Toulouse, France, for example, has the same need for financial services as an American living in Pittsburgh. But the denial of basic financial services to Americans living abroad is a serious unintended consequence of FATCA.

Democrats Abroad conducted a survey in June/July 2014 which garnered about 6,500 responses in a matter of weeks. About 16% of respondents reported having an account closed and that percentage is certainly higher now. A one-page summary of the horrifying results of the survey can be found in the appendix.

A Same Country Safe Harbor for Americans Abroad from FATCA Reporting

Democrats Abroad, American Citizens Abroad, Association of Americans Residing Abroad and Federation of American Women's Clubs Overseas propose the establishment of **a Same Country Safe Harbor for Americans Abroad from FATCA Reporting.** The Same Country Safe Harbor would require the Treasury to treat the financial accounts in the country in which an American is legally resident the same as an account in the US held by an American resident in the US. For example,

- An American living in, for example, Toulouse, France would not have to file a FATCA report with the details of any accounts he had in France; and
- Any FFI in France that held the account of an American legally resident in France would not be required to report on that account to the IRS (and would not face any penalties for failing to do so).

The US National Taxpayer Advocate has also endorsed the FATCA Same Country Safe Harbor for Americans abroad, as have both Democratic Party candidates for president of the United States.

The FATCA Safe Harbor is a Win-Win for Americans living abroad, the IRS and Treasury

The unintended consequences of FATCA on banking abroad would be eliminated for all overseas resident Americans with financial accounts in the country where they legally reside. Our 2014 survey data suggests this might include 85-90% of such Americans abroad.

Congress has made serious cuts to the budget of the IRS over the past few years. IRS Commissioner John Koskinen has publicly expressed his concern that about whether IRS has adequate enforcement resources. Implementation of the Same Country Safe Harbor would cut FATCA data inputs by 85% or more, and leave behind the FATCA filings of those of true interest to the IRS and Treasury.

If the Same Country Safe Harbor were implemented, it would be far easier to find the real targets of FATCA - the tax dodgers, money launderers and other financial crimes perpetrators – who, it stands to reason, do not use financial accounts in their countries of residence to carry out their criminal acts.

Urgency is key

There has rarely been an issue that so unites the community of Americans who live and/or work overseas. Everyone would benefit from the adoption of the Same Country Safe Harbor except those for whom the original legislation was intended.

Ideally, like the other organisations representing Americans abroad, Democrats Abroad favors a switch from Citizenship Based Taxation to Residency Based Taxation, which would largely eliminate the problems that FATCA causes overseas Americans. With Congressional and White House attention now focussed on comprehensive tax reform there may be a real opportunity to see this important policy shift enacted. We support our colleague organisations who are working steadily towards the preparation of a Residency Based Taxation model that would make the policy revenue neutral to the federal budget. We expect revenue neutrality would make it possible to insert the legislation into any personal tax reform package that makes its way to a vote in Congress.

Circumstances being what they are, Congress may not succeed in progressing comprehensive tax reform. In the interim, therefore, we will continue to encourage the IRS and Treasury to *urgently* adopt the Same Country Safe Harbor for Americans abroad.

April 2017

Appendix: 2014 FATCA Survey Findings

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 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 their 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.

ATTACHMENT II

DEMOCRATS ABROAD
REFORMING FATCA - A SAME COUNTRY SAFE HARBOR FROM FATCA REPORTING FOR AMERICANS LIVING ABROAD

Democrats Abroad has been working for more than five years to demonstrate to Congress, the IRS and the US Treasury that the financial accounts of law-abiding, tax compliant overseas resident Americans in their countries of bona fide legal residence should be exempted from FATCA reporting because they present none of the dangers the legislation was intended to proscribe. Despite the grave injuries and inconvenience they've suffered[1], Americans living abroad were never the target of the law.

As it happens, Congress is accustomed to rectifying the unintended and unanticipated adverse consequences of legislation they have enacted. To fix errant aspects of ratified legislation Congress subsequently enacts further 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 safe harbor exemption from FATCA reporting.

When a safe harbor exemption is applied to FATCA, the law would treat the financial accounts of Americans abroad in their country of residence the same way as it treats the US accounts of Americans residing in the US. In brief, foreign financial institutions would be exempt from filing FATCA reports on the accounts of US-tax compliant Americans residing legally in the same country. A FATCA safe harbor exemption would only exempt accounts held in the country in which the account holder is *legally* resident[2].

It 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.

- No American would have to file a FATCA report on accounts held in his or her country of residence; and
- No foreign financial institution would be required to file reports on exempt accounts to the IRS.

This FATCA reform resolves the key concerns of Americans living overseas, especially the concern that they will lose access to a diversified supply of banking and brokerage products when financial institutions elect not to do business with American customers because of the FATCA compliance requirements.
Democrats Abroad supports the establishment of a Same Country Safe Harbor Exemption from FATCA reporting for law-abiding Americans living legally abroad and is working to generate support from Congress, the IRS and the US Treasury for making this change to the FATCA implementation rules.

---

[1] See Democrats Abroad published research on the unintended adverse consequences of FATCA, "FATCA: Affecting Everyday Americans Every Day."

[2] 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.

Making the case

A FATCA Same Country Safe Harbor Exemption for Americans living legally abroad will not affect the battle against tax evasion and money laundering.

- Firstly, the IRS is highly unlikely to miss out on the capture of lost tax revenue by putting a Same Country Safe Harbor Exemption into the FATCA implementation rules. Tax evaders, after all, do not hide assessable earnings in accounts in the countries where they are resident taxpayers. The same is true of terrorism financiers, money-launderers, gun-runners or drug lords. They funnel their untaxed or illicit earnings into accounts in other jurisdictions. The FATCA Same Country Safe Harbor Exemption is, therefore, of no use to them as a loophole to avoid detection.

- Secondly, the cost to the financial sector of complying with FATCA, put in the range of $US7-10b, will be materially mitigated by the FATCA Same Country Safe Harbor Exemption, depending upon what mechanism is established for claiming the exemption. Because of 1) the cost of implementing reporting regimes and 2) the penalties for compliance failures, the compliance frameworks being created by some foreign financial institutions includes the exclusion of some American customers for certain products. The FATCA Same Country Safe Harbor Exemption will simplify the compliance exercise, lowering costs and lowering risks. Banks and brokerage houses currently refusing service to Americans will be very pleased to stop turning these customers away and Americans seeking financial products in their country of residency will be very pleased to see the supply of financial products and service providers restored.

- Lastly, honest, law-abiding Americans holding normal savings and investment accounts in countries where they pay local taxes are not FATCA's target. The data collected through FATCA reporting will be far more useful to Treasury's efforts to identify and apprehend tax cheats when it is scrubbed of data that is useless and distracting to their efforts. The FATCA Same Country Safe Harbor Exemption will do that by eliminating reporting on everyday financial accounts that are highly likely to be of no use to tax and law enforcement efforts.

The FATCA Same Country Safe Harbor Exemption, also known as the FATCA "Same Country Exception", has the support of American Citizens Abroad, the Association of Americans Resident Overseas and the Federation of American Women's Clubs Overseas. It is endorsed by the IRS National Taxpayer Advocate and has the support of the House Americans Abroad Caucus.

For more information please contact the Democrats Abroad FBAR/FATCA Task Force on fatca@democratsabroad.org.

April, 2017

ATTACHMENT III

Attached as separate files

Democrats Abroad 2014 FATCA Research:

1. Report "FATCA: Affecting Everyday Americans Every Day"
2. Executive Summary "FATCA: Affecting Everyday Americans Every Day"
3. Research Datapack
4. "Stories of FATCA – Affecting Everyday Americans Every Day"