American Citizens Abroad
The Voice of Americans Overseas

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June 14, 2010

Re: Comments on Foreign Account Tax Compliance Act (FATCA) Provisions incorporated in the Hiring Incentives to Restore Employment Act (HIRE)

Dear Sirs,

American Citizens Abroad is pleased to have the opportunity to provide the U.S. Treasury and the Internal Revenue Service with comments on the regulations that will be put in place to administer the Foreign Account Tax Compliance Act (FATCA), provisions which are included in Section 501 of the *Hiring Incentives to Restore Employment Act* ("HIRE Act") signed into law by President Obama on March 18th 2010.

American Citizens Abroad (ACA), the voice of Americans overseas, is a non partisan, non-profit association of volunteers based in Geneva, Switzerland, with worldwide membership in over 90 countries. ACA has represented the interests of American citizens residing overseas for more than 30 years, has testified before Congress on various issues and sends a delegation every year to Washington D.C. for Overseas Americans Week in conjunction with the Association of Americans Resident Overseas (AARO) and the Federation of American Women's Clubs Overseas, Inc. (FAWCO). ACA also strives, through its website and monthly news updates, to inform the community of American citizens residing abroad of U.S. legislative changes affecting them.

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Disconnect between tax evaders and American citizens residing overseas

ACA represents U.S. citizens residing abroad. The vast majority are long-term residents overseas, whether because of marriage, working for an ONG, teaching in English speaking schools, missionary work or employment with a U.S. or foreign company. These average American citizens – 5 million in number - are not the target group that Congress is looking for with FATCA.

There is no reason to believe that there are more, or fewer, tax evaders among U.S. citizens residing abroad as in a group of similar size of citizens residing within the United States, say in Kentucky or Minnesota.

The target of FATCA is tax evaders, who are mostly resident in the United States and who tend to use a wide range of vehicles, foreign or domestic, to escape U.S. taxes, and who may also use foreign financial institutions for this purpose.

There is a significant difference between tax evaders and U.S. citizens residing abroad - the former being actively and willfully involved in tax evasion and the latter simply living and working overseas, in many cases for the benefit of the US economy and government. And yet, the latter will bear the brunt of the negative consequences of this recently enacted legislation.

FATCA as politically perceived from abroad

By unilaterally imposing its legislation on the rest of the world, the United States is bound to create serious backlash from other governments, foreign companies and foreign financial institutions. It is feared that FATCA will violate privacy and confidentiality laws of many countries; in fact, FATCA explicitly requires FFIs to obtain waivers to foreign law which are in contradiction to providing the information requested. And yet this enormous reporting requirement will probably be ineffective in finding the real culprits – the big money tax evaders residing in the United States.

Imagine the consequences for the United States if other nations decided to adopt similar policies and require U.S. banks to file, for instance, with the German or Indian government all information concerning Germany or Indian citizens residing in the United States. There would be an up-roar among U.S. banks. The number of foreigners in the United States is a large multiple of the number of U.S. citizens residing abroad. The financial drain out of the United States would be enormous and the bad-will worldwide due to overwhelming reporting requirements would be not only unproductive, but dangerous – a form of reporting war.

This unilateral extension of the U.S. laws on other nations is furthermore hypocritical. When Mexico requested the United States to furnish information on U.S. bank accounts of Mexican citizens resident in Mexico, the U.S. government refused to provide the information.[1]

Practical consequences of FATCA

1) FATCA will negatively impact the economic and financial life of the entire community of American citizens residing abroad.

Foreign nationals coming to the United States maintain bank accounts, mortgages and credit cards with U.S. financial institutions. Nobody expects an Indian engineer working in California

[1] *"Foreign Tax Cheats Find U.S. Banks a Safe Haven"* by Ken Stier, *Time Magazine*, October 29, 2009

to do his daily banking in Delhi. It would be utterly impractical. The reverse holds true - an American engineer working in Germany will do his daily banking with a German bank.

FATCA requires foreign financial institutions to report to the IRS specific data pertaining to U.S. persons, including annual debit and credit totals and any movements out of bank accounts. As a consequence, foreign institutions, as a matter of policy, are currently denying U.S. persons banking services, closing long-held accounts and refusing to open new accounts, including run-of-the-mill accounts used to receive salary, pay bills, service mortgages, write checks, service debit/credit cards, etc. Reporting is too cumbersome and expensive; legal risks are too high.

ACA is astounded by the number of complaints received from U.S. citizens who have been denied banking services in their country of residence. Simultaneously, U.S. banks are routinely denying banking services to U.S. citizens residing overseas with a foreign address, hiding behind the "*Know Your Client*" rules of the Patriot Act.[2] U.S. citizens residing abroad are standing in the middle of this crossfire and they are the clear losers - unable to maintain banking relationships in the United States, unable to procure banking relationships overseas but still needing banking services to pay U.S. taxes, invest funds and simply to live in a modern economy.

Certain Qualified Foreign Financial Institutions (QFFI) may retain some, but not all U.S. clients by creating special SEC registered subsidiaries, exclusive ghettos for U.S. citizens residing abroad, but only accessible to clients with a net worth of a minimum of $1 million in investment accounts who accept to pay higher than normal banking fees to cover the additional administrative burden to comply with IRS and SEC regulations.

2) Foreign financial institutions are forced to choose between Qualified or Non-qualified

FATCA will create worldwide a two-tiers banking system, i.e. Qualified FFI (QFFI) and Non-qualified FFI (Non-QFFI). Non-QFFI will avoid any contact with the United States by not investing in U.S. securities. As they will not be subject to reporting to the IRS, they will be in a position to accept U.S. clients. Consequently many U.S. citizens residing overseas will find that their only option may be to bank with an N-QFFI. This means that U.S. citizens residing abroad as well as foreigners will be encouraged not to invest in U.S. securities. Others may be forced to deny that they are a U.S. citizen in order to prevent a QFFI bank from closing their account on short notice; the U.S. law puts U.S. citizens in jeopardy. A keen observer of financial matters has likened FATCA legislation to Prohibition - forcing U.S. citizens residing abroad to use speak-easy banks and to function illegally outside of the United States. The law has created its own loopholes; the more the IRS tries to close them, the worst it makes them.

The two-tiers process is likely to extend not only to banks, but also to insurance companies, pension funds, ETFs, etc. unless the latter are carved out of the FATCA regulations, all for the same reasons with the same undesirable consequences.

Undesirable consequences of FATCA for bona fide residents

Banking – U.S. citizens residing abroad and U.S. companies setting up commercial subsidiaries to sell U.S. products will become pariahs for foreign financial institutions. This will negatively impact the competitiveness of U.S. citizens and corporations. This works directly against President Obama's *National Export Initiative*.

[2] April 23, 2010, Representatives Carolyn Maloney and Joe Wilson, co-chairs of the Americans Abroad Caucus sent a letter to Chairman Barney Frank and Ranking Member Spencer Bachus of the Financial Services Committee, of which Representative Maloney is a senior member, requesting a hearing of the Financial Services Committee to look at current U.S. banking laws and regulations that may prevent Americans living abroad from accessing banking services in U.S. banks and in foreign banks.

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Foreign Pensions – Pension funds are, by their very nature, not suitable instruments for tax evasion and are not used for this purpose. In most countries, as in the United States, pension funds are defined by very strict laws and are tightly supervised by local governments. Consequently, pension funds should not be considered as FFI and should be explicitly carved out of the scope of the FATCA regulations. Withholding taxes on interests and dividends collected by foreign pension funds should be handled, as they currently are, by the bi-lateral tax treaties signed by the U.S.

A contrario, including foreign pension funds would have numerous undesirable consequences. It would force foreign pension funds to choose between QFFI and Non-QFFI status. Neither is desirable, from an American point-of-view:

- some pension funds may choose QFFI status and keep their portfolio of U.S. securities; but they are likely to do everything possible to avoid having U.S. citizens as employees and retirees among their members, so as to avoid the heavy reporting requirements and possible penalties provided by FATCA; this will make life difficult for American who, at the margin, may be denied employment on this ground.
- other funds may choose Non-QFFI status; they would have no reporting requirements to the U.S. and would divest from U.S. securities; the capital markets of the rest of the world are big enough to accommodate their needs. The Non-QFFI pension funds would have little objection to having U.S. citizens as employees and retirees among their members, having no reporting requirement to the IRS or other branches of the U.S. government.

Including pension funds in the scope of the FATCA regulation would have another undesirable effect, namely to artificially lower the reporting threshold. In countries, like Switzerland, which have a capitalized pension funds system for the private sector, accumulated pension rights are often the household’s largest financial asset; the $50’000.- threshold would be quickly reached, even by people of limited means.

Why create a two tier pension funds systems and why force U.S. citizens residing abroad towards the lower tier, out of the supervision of the United States?

By comparison, you can easily imagine the uproar if U.S.-based pension funds had to submit to German or Indian tax reporting requirements for the sole reason that U.S. corporations employ German or Indian staff in the United States. And this is exactly what the United States is considering imposing on the rest of the world if pension funds are not carved out of FATCA.

10% ownership in non-listed foreign companies or foreign partnerships - The direct, inevitable and very undesirable consequence of FATCA requiring foreign corporations and foreign partnerships to report to the IRS when a minimum of 10% is owned by a U.S. person will be the exclusion of U.S. persons from participating in foreign joint-ventures or partnerships in the future. Foreign partners or co-shareholders, holding up to 90% of the equity, will most certainly refuse to participate in a joint-venture if the latter is subject to IRS reporting. Why take the risks and assume the administrative burden? This will isolate the community of Americans citizens residing abroad and prevent U.S. corporations from finding valuable foreign partners to promote U.S. exports. The independent U.S. citizen entrepreneurs overseas will find it difficult to impossible to operate as foreign institutions and investors will simply not partner with them. The long-arm reach of the IRS is impeding the competitiveness of U.S. citizens and U.S. companies abroad.

Choice of investment securities – U.S. persons have traditionally been restricted in investment choice by SEC regulations, the IRS regulations and now FATCA regulations are making it worse. U.S. citizens residing abroad want to, and need to, invest some of their assets in securities in the currency where they live. The new reporting requirements are expected to be

so complicated for Passive Foreign Investment Companies (PFIC), which includes ETFs, mutual funds, hedge funds among others, that investment advisors have warned Americans in a recent seminar on FATCA that the only reasonable solution from a reporting point of view for U.S. citizens residing abroad is to divest out of PFICs and to invest only in US-registered mutual funds, ETFs and hedge funds. Yet, U.S. based funds are necessarily U.S. dollar denominated. U.S. citizens residing abroad may need to invest in the currency where they reside, and they should not be unduly penalized by complicated IRS filing if they do so. By imposing IRS reporting requirements for qualified PFICs, those structures will force Americans to leave. Alternative non-qualified PFICs will be created that will avoid all investments in U.S. securities, but will allow U.S. citizens residing abroad to invest. Once again, FATCA is pushing overseas Americans to operate on the fringe.

High cost of compliance - Every U.S. citizen residing abroad who files U.S. taxes will face significantly higher compliance costs, particularly due to the broad scope of FATCA, the uncertainly of what has to be included in the filing and how to evaluate the various assets held in foreign financial institutions. Due to these concerns and the fear of incorrect filing related to the abusively high penalties for inaccurate reporting, individuals will be forced to use professional tax preparers. The cost for such counsel from highly specialized experts is significant, at least $1,000 per filing, and very often around $2,000. For complicated filings, the cost can be way more. Large accounting firms start their fees at $3,000, and only the largest accounting firms can handle the complicated filing related to foreign corporations, foreign partnerships, foreign trusts and PFICs. Assuming an average compliance cost of $2,000, for every 1,000,000 U.S. tax filers residing overseas who have an account with a foreign financial institution, the total annual cost of compliance is $2 billion, a multiple several times over the annual additional tax revenue from FATCA projected by the Joint Committee on Taxation. The cost of FATCA compliance for FFIs and foreign companies will run in the tens of billions of dollars. These costs will be passed on to Americans citizens residing abroad in the form of higher banking fees.

Pushing individuals to a cash economy - A U.S. citizen residing overseas married to a non-U.S. person is in an especially awkward situation. Imagine a young American woman married to a foreigner, living abroad, devoting 100% of her time to raising children, not earning any income and who has no personal revenue producing assets. Foreign spouses will generally refuse to become subject to IRS reporting. The FATCA regulation is forcing the foreign spouse to cancel joint bank accounts and any access of the U.S. citizen spouse to credit card/debit card privileges. If the American spouse is able to open up a separate bank account (and that is a big if given the FATCA requirements), the income earning foreign spouse could transfer funds to the American spouse's account and would ensure that the U.S. citizen spouse's account never exceeds $9,999 so that neither FBAR nor FATCA reporting is required. More probable, the U.S. citizen spouse will be cut off from all banking relationships and will be reduced to receiving a cash allowance from the foreign spouse to carry out the purchases required for the household. This is a major issue because dual national marriages are a leading reason why U.S. citizens are long-term residents abroad. Half of those long-term residents, as surveyed by Overseas Vote Foundation, are married to non-U.S.-persons.

FATCA discriminates against U.S. persons who are bona fide overseas residents [3] compared to U.S. persons with similar economic circumstances resident within the United States, in at least five ways, namely:

- Additional reporting requirements on the citizens

[3] As defined in the U.S. tax code on Form 2555 to meet the Bona Fide Residence Test: "A U.S. citizen who is a bona fide resident of a foreign country, or countries, for an uninterrupted period that includes an entire tax year (January 1 - December 31 if you file a calendar year return) OR a U.S. resident alien who is a citizen or national of another country with which the United States has an income tax treaty in effect and who is a bona fide resident of a foreign country, or countries, for an uninterrupted period that includes an entire tax year (January 1-December 31 if you file a calendar year return)"

- Additional reporting requirements on the FFI dealing with the citizen
- Additional reporting requirements on the pension fund, insurance company, etc.
- Restriction in the choice of investments
- Higher penalties for simple reporting omissions

FATCA will work against the interests of the United States

As previously noted, FATCA will have the perverse consequence of creating a two-tier banking system worldwide – those foreign financial institutions which become QFFI and the others which do not enter into an agreement with the IRS and become Non-QFFI. Non-QFFIs will simply stop investing in all U.S. assets and will divest from any they currently hold.

Both the Swiss Bankers Association and the European Banking Federation have alluded to this in their letters [4] to both the Senate Finance Committee and the House Ways and Means Committee. The European Banking Federation and the Institute of International Bankers also alluded to this in their letter of April 23, 2010 addressed to Treasury and IRS officials commenting on the FATCA regulations. In their words, they "represent most of the non-U.S. banks and securities firms around the world that are affected by the FATCA provisions". They highlighted their concerns "that many FFIs, particularly smaller ones or those with minimal U.S. investments or U.S. customers, will opt out of U.S. securities rather than enter into a direct contractual agreement with a foreign tax authority (the IRS) that imposes substantial new obligations and the significant reputational, regulatory, and financial risks of potentially failing those obligations, or may disinvest their U.S. customers in order to reduce their compliance burdens under an FFI Agreement."

With the United States running an annual trade deficit of several hundreds of billions of dollars, the country should encourage foreign investment in the United States. FATCA will do the opposite.

Furthermore, by creating a two-tier banking system, the United States is encouraging many FFI in the rest of the world to cut off transactions with the United States and to create circuits beyond the oversight if not the control of the United States. China and Middle East countries have already indicated their desire to develop an alternative reference currency, to replace the US dollar, and FATCA will only encourage them to do so.

Doubts concerning the fiscal effectiveness of FATCA

The Joint Committee on Taxation[5] estimates a total of additional revenue of $791 million for 2010 and 2011 taken together, yet the Secretary of the Treasury stated concerning the FY 2010 Budget[6]: "We propose a total of $332 million devoted to the new Internal Revenue Service enforcement efforts, including 128 million to add nearly 800 new IRS employees to combat offshore tax evasion and improve compliance with U.S. international tax laws by business and high income individuals." And a year later in his 2010 testimony before the House Committee on Appropriations, the Secretary of the Treasury stated an additional amount for enforcement in 2011: "Our Budget request provides nearly $250 million for new enforcement initiatives aimed at reducing international tax evasion and noncompliance by businesses and high net worth filers."

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[4] Swiss Bankers Association letter of November 27, 2009 and the joint letter of the European Banking Federation and Institute of International Bankers dated November 25, 2009.

[5] Joint Committee on Taxation, JCS-6-10, "*Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment to the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 2847, the "Hiring Incentives to Restore Employment Act*""

[6] Testimony of the Secretary of the Treasury of May 21, 2009 in the Financial Services Subcommittee Hearing on the Treasury FY 2010 Budget

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The budgeted amounts in Treasury for 2010 and 2011 total $582 million. Yet the JCT total projected increase in tax revenue from FATCA for 2010 and 2011 combined is only $791 million. The budgeted costs announced by the Secretary of the Treasury amount to 74% of the additional revenue expected by the JCT. In addition to these costs will be the higher expenses related to the administrative burden on the IRS and Treasury to put in place the agreements with the foreign financial institutions that participate in the new U.S. reporting program, to administer the filings and to carry out audits and reviews prescribed by the law. It is bad tax policy if the direct expenses linked to collecting additional taxes represent such a high proportion of the taxes collected.

Raising significant new taxes out of the U.S. citizens residing overseas is most likely unfounded hope, with or without FATCA, since a significant part of this community resides in countries with personal income taxes higher than in the United States, essentially, Western Europe, Canada and Japan. Even if the number of filings were to increase because of FATCA, the amount collected would not increase because of additional tax credits for taxes paid to the country of residence.

The excessive penalties levied on "errors' in FATCA reporting will, however, become a source of tax revenue. Given the significant lack of clarity in the filing requirements, the potential for simple errors of omission or confusion due to the differences in foreign bank reporting documentation, U.S. citizens residing abroad are at risk of facing important losses. This is not tax collection but abusive confiscation levied on a community that has limited access to recourse.

ACA requests an objective cost effectiveness study of the IRS costs related to 1040 filings of bona fide U.S. citizens compared to the tax revenue collected from U.S. citizens residing abroad - a GAO study, a Treasury/IRS study or an independent audit by a recognized U.S. audit firm. It should take into consideration the cost of preparing specific 1040, 2555 and 1116 instructions and updates, the cost of maintaining the special Texas office for 1040 overseas filings, the cost of training IRS personnel, tax inspectors and auditors specifically for filers residing overseas, the cost for Treasury to determine housing exclusion limits by city every year, the cost of negotiating foreign tax treaties with the "savings clause", the cost of the Michigan office for FBAR filings and now the additional costs of FATCA, including preparing reporting instructions, establishing agreements with hundreds of thousands of FFI, foreign corporations and partnerships, developing the software programs to receive the future reporting and finally administering FATCA which will involve millions of reports, mountains of data and additional IRS personnel. This study should be made public. All U.S. citizens have a right to know if IRS funding is used efficiently.

FATCA is one of the undesirable consequences of citizenship-based taxation

Professor Avi-Yonah, the Irwin I. Cohn Professor of Law and Director, International Tax LLM Program, University of Michigan,[7] challenges citizenship-based taxation by demonstrating its weak legal foundations as well as the unworkable nature of its implementation. He bases his conclusions on the benefits argument, the ability to pay argument and the administrability argument.

American Citizens Abroad can testify to and confirm a multitude of instances whereby citizenship-based taxation specifically discriminates against U.S. citizens and their families

[7] Professor Reuven S. Avi-Yonah, the Irwin I. Cohn Professor of Law and Director, International Tax LLM Program, the University of Michigan authored "*The Case Against Taxing Citizens*" in a working paper dated March 22, 2010 published by the University of Michigan. It is available at HTTP://WWW.LAW.UMICH.EDU/CENTERSANDPROGRAMS/ELSC/ABSTRACTS/PAGES/PAPERS.ASPX

residing abroad. ACA participated actively in researching and drafting the Overseas Americans Week position paper of April 2010 devoted to this tax issue.[8]

Many U.S. citizens who are long-term overseas residents and who have dual-nationalities will find FATCA reporting requirements the straw that breaks the camel's back. Restrictions on normal banking activities and harassment by the IRS coupled with the high cost of compliance will lead more Americans abroad to decide that the U.S. passport is not worth the bother, the costs and the risks. This is not a desirable outcome! Americans with dual-citizenship represent close to half the American community in some foreign countries.

FATCA regulations must be made clear and significantly defined concerning individual taxpayers' responsibilities.

1. Make clear the distinction between FATCA and FBAR reporting

There will be mass confusion among U.S. tax filers with the new requirements for both FATCA and FBAR reporting. They won't understand why there are two filings and they will be confused because the reporting requirements are very different. The threshold for FBAR is $10,000 and requires reporting not only on financial bank accounts in which one has a financial interest, but also those over which one has just signature authority but no financial interest. FATCA, on the other hand, has a threshold of $50,000, concerns ONLY foreign financial assets in which the U.S. person has a financial interest, but the range of financial assets to be reported is much broader than just the bank accounts reported under FBAR.

2. Defining the threshold

A serious question arises as to what determines the threshold – gross assets or net assets, i.e. assets minus liabilities. Mortgages are a contract although they are a liability. The definition of what is included to reach the threshold is crucial.

ACA understands that Treasury has flexibility in adjusting the threshold for FATCA reporting by citizens filing their 1040. If such is the case, **ACA strongly suggests that the threshold for reporting be $250,000 and not $50,000.** This would prevent a lot of frustration and useless paperwork for many tax filers and for the IRS. It would allow the IRS to concentrate on taxpayers with higher net worth.

3. Who is required to file?

The reporting requirement under FATCA includes all U.S. persons who have a financial interest in a foreign financial institution and total assets in excess of $50,000. Will individuals have to file a 1040 just because of the FATCA reporting requirements, even though they do not have income at the minimum level that normally triggers the 1040 reporting requirement? Those individuals should not be required to file a 1040 because of FATCA. If Treasury and IRS decide they should file, many Americans overseas with little or no income will be unaware of the filing requirement.

Another question arises with regard to reporting foreign trusts for **minor children who are beneficiaries of a foreign trust.** What is the filing requirement for minor children who are beneficiaries of a Trust, but who have no authority in the trust or its assets? Imagine that the Trust is set up by foreign parents but their child was born in the United States and therefore is American. Does the minor have to file a separate 1040 to report the trust contract? Who is responsible for filing for the American child – parents, trustee? Or is the child exempt from the reporting requirement as long as he/she has no access to the assets in the trust?

4. Questions concerning Passive Foreign Investment Companies (PFIC)

[8] "*US Taxes, US Exports and the Competitiveness of Overseas Americans in the World Economy*" This paper is available at http://www.overseasamericansweek.com

The law appears to require specific reporting forms for PFICs which includes foreign mutual funds, foreign ETFs, and foreign hedge funds. If these investments are held by a QFFI and the U.S. taxpayer files the total value of the assets in the QFFI portfolio, is there still a need for a separate reporting on different forms PFICs? If separate forms are required, the references of those forms must be clearly stated in Treasury/IRS regulations.

A clear description of the investments included in PFICs is imperative because the small investor may be unaware that a foreign mutual fund, foreign ETF or foreign hedge fund requires specific reporting as PFICs. Some Americans overseas may unknowingly purchase an ETF based on the Standard and Poors' Index, but which is not an SEC-registered security. Hence, the Treasury instructions should carry serious warnings about possible confusion between SEC registered and non-SEC registered securities as well as the extra reporting burden of owning PFICs.

5. Questions concerning "any financial instrument or contract"

One particular phrase in the law appears to be all encompassing - "(B) *any financial instrument or contract held for investment that has an issuer or counterparty which is other than a United States person.*" What does this definition include?

Foreign Social Security programs must not be considered "a financial instrument or contract" as they are a legal requirement, not a contract. The individual has neither control nor access to these funds; they are converted into a pension upon retirement.

Private pension funds should not included among the contracts required to be reported under FATCA on the 1040. Pension funds are often determined and required by the laws of the country where one resides, or by the policy of the employing company. This is not a form of private financial asset which is under the direct control of the individual, and it certainly is not an instrument designed to escape taxes. As pension plans are the principal savings mechanism for many individuals, the inclusion of pension plans in the new reporting of foreign financial assets on the 1040 would push many people over the $50,000 threshold, creating an unnecessary additional administrative burden on the IRS and on Americans overseas.

PricewaterhouseCoopers has recognized the particular sensitivity of the issue of pension funds. "We anticipate strong industry support for a regulatory expansion of the exceptions list to include, at a minimum, non-U.S. pension funds."[9]

If foreign pension funds are required to be reported, the United States would be doubly penalizing Americans simply because they live abroad. Already, the United States does not recognize foreign pension funds as qualified under U.S. law with the possible exception of Canada through a bi-lateral treaty. Hence, U.S. law already deprives overseas Americans of the fiscal encouragement for savings for retirement enjoyed by residents of the United States. It does not allow citizens overseas to deduct contributions to foreign private pension funds and requires that employers' contributions to foreign pension funds be added to the gross salary for U.S. tax purposes.

Private life insurance contracts – If private insurance contracts are included in the 1040 reporting by individuals, clear instructions must be made to determine the asset value to take into consideration – the present value of the policy or the value of the policy upon death.

Mortgages – Since mortgages are a contract, even though they represent a liability, are they to be reported? Are they taken into determination in calculating the threshold for reporting?

[9] PricewaterhouseCoopers (2010): Understanding FATCA: What you need to know now about this sweeping legislation, Global IRW Newsbriefs, page 6.
https://emarketing.pwc.com/reaction/images/FSMarketing/understandingFATCA.pdf

Futures, Options and Derivatives – If these contracts are to be included, how should they valued?

Other contracts - Since there are very serious penalties for under-reporting of foreign assets, the IRS must be extremely specific as to what is to be included in "other contracts" so as not create information traps whereby an individual unintentionally under-reports because the instructions on the scope of investments were not clear.

6. When does the new reporting of foreign financial investments on the 1040 begin?
The year when the various reporting requirements come into effect varies in the law. It appears that the principal reporting of bank accounts with FFIs and the new reporting for trusts will begin for the tax year 2011, which must be reported by April 15, 2012. Reporting of passive foreign investment companies, however, appears to begin in 2010. Particular confusion will result with regard to the new reporting regulations for PFICs, starting with the difference in method of reporting before and after March 18th and doubts as to whether both the new reporting and reporting of Form 8621 must continue for reporting in 2011. The same timing question arises concerning 10% ownership in foreign companies and 10% interests in partnerships.

7. How does one determine the highest value in the year of a bank account in USD?
It is not possible to know the highest balance in the year as many investments are in foreign securities and the dollar fluctuates; this would require a daily translation of the portfolio value at the exchange rate(s) applicable on that date; foreign banks don't provide this information, but only quarterly or monthly bank statements. It is totally unreasonable to expect taxpayers to make such calculations manually. Instructions related to the application of FATCA must specify a practical calculation method; it should accept, for example, the year end balance translated into US dollars at the year end exchange rate. This is the base for the calculation generally accepted for FBAR filing, even though the new FBAR rules also refer to "highest value" during the year. Allowing the same calculation method as for FBAR would avoid confusion and facilitate compliance.

8. Arbitrary decision-making of the IRS leading to unjustified penalties
The method of determining the total value of foreign financial assets must be very clear as FATCA imposes a 40% penalty on the revenue attributed to under-statement of assets, as determined by the IRS. The law gives the IRS great latitude in determining if reporting is incomplete and imposes unduly heavy penalties on Americans residing abroad for simple human errors.

9. Concern about scaling penalties with unjustifiably short notice delays
The Joint Committee on Taxation report *on FATCA* of February 23, 2010[10] stated the following: "Individuals who fail to make the required disclosures are subject to a penalty of $10,000 for the taxable year. An additional penalty may apply if the Secretary notifies an individual by mail of the failure to disclose and the failure to disclose continues. If the failure continues beyond 90 days following the mailing, the penalty increases by $10,000 for each 30 day period (or a fraction thereof), up to a maximum penalty of $50,000 for one taxable period."

This 90 day period and subsequent 30 day periods are too short. Americans who reside abroad and have received individual communications from the IRS have complained that they receive IRS mailings months after the date on the communication report and often after the deadline indicated for compliance. An automatic increase in the penalty can lead to totally unjustified penalties if the individual residing overseas does not receive the document within a time frame

[10] The Joint Committee on Taxation report, *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives to Restore Employment Act," under Consideration by the Senate (Ref: x-4-10)* of February 23, 2010

to allow him/her to study the issue, and if necessary, correct the reporting and pay the initial penalty.

What is the definition of "mailing" by the IRS – the date on the IRS document or the actual time that the document is put into U.S. postal system for mailing? Or does the IRS assemble mail and hold it for some time before actually initiating the mailing to a foreign location for further mail distribution? In some places in Africa, Latin America and Asia, it may take two months or more for a mailing from the United States to arrive. The law presumes that all mail sent to a foreign address will arrive within the same delays as those for U.S. addresses; this simply is not the case.

Conclusions and Recommendations

ACA strongly believes that there are two fundamental methods for addressing the problems that FATCA will create for U.S. citizens who are for bona fide overseas residents.

First, find a more efficient way to track tax evaders - The United States has every right to go after genuine tax evaders and those who are cheating the tax system – United States citizens who are not fully reporting their worldwide income; the United States already has multiple tools to do this – the QI program, the John Doe summons, the "Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters", Tax Information Exchange (TIE) Agreements, Mutual Legal Assistance Treaties (MLAT) and the "Swift Agreement".[11] With all of these tools in hand, the broad sweep of FATCA, which has such undesirable impacts on American citizens residing abroad, as well as on the nation, is the wrong approach.

Second, eliminate citizenship-based taxation - ACA strongly urges Treasury and the IRS to weigh the real damages and costs inflicted on the United States and on American citizens residing abroad due to the nation's citizenship-based taxation against the meager tax revenue collected from American citizens overseas, since the United States must recognize, and has recognized, that other nations have the first right of taxation.

This is an essential demand of the community of U.S. citizens residing abroad, as argued above, in summary form, and in the *Overseas Americans Week* research paper referenced in footnote 8, in a more detailed format.

Barring changes in the legislation, ACA strongly urges Treasury and the IRS to design FATCA regulations so as to ensure that American citizens residing overseas are not subject to unfair, discriminatory burdens and to keep the reporting to a minimum.

1. ACA urges Treasury to exclude U.S. citizens who are bona fide residents overseas[12] from FATCA reporting by FFI and by the individual taxpayer. Bona fide US citizens residing overseas would still have to be identified by the FFI, but the annual reporting on those accounts to the IRS would be excluded from FATCA reporting. This would reduce the administrative burden and perceived legal risks of FFI for adequate compliance and would encourage them to maintain normal banking relationships with U.S. citizens residing in their country. Foreign financial institutions and the IRS would be able to focus their attention on

[11] Tools available to the IRS as enumerated by Asher Rubinstein, Esq. in his article "*Expat Americans living and working abroad: On the IRS Radar*" of May 2010. Rubinstein & Rubinstein LLP, 18 East 48th Street, New York, N.Y.10017, http://www.assetlawyer.com

[12] As defined in the U.S. Tax Code. See footnote 3.

accounts owned by U.S. residents. Excluding bona fide American citizens residing overseas from FATCA reporting on their 1040 would eliminate the discrimination imposed by FATCA on Americans citizens residing abroad compared to filing requirements of U.S. residents.

If Treasury insists that bona fide U.S. citizens residing overseas remain subject to FATCA reporting, then ACA recommends the following:

2. Treasury should define the threshold for FATCA as *net reportable foreign assets* (assets less liabilities with foreign pension funds being excluded from reporting requirements) and should set the threshold to at least $250,000. This would greatly reduce the cost of compliance for the average American citizen overseas and for the IRS. It would allow Treasury and the IRS to focus on wealthy tax evaders.

3. Treasury should not require foreign pension funds to report on American citizens who participate in their pension plans. This reporting requirement will impede access of American citizens to the employment market outside the United States.

4. Treasury should set the threshold of FATCA requirements for foreign corporations and partnerships at 50% ownership by U.S. persons, not 10%. The low 10% threshold will stifle competitiveness of U.S. citizens abroad.

5. ACA formally requests an objective cost effectiveness study of the IRS on the real costs of IRS administration for 1040 filings of bona fide U.S. citizens residing overseas compared to the tax revenue collected from U.S. citizens residing abroad.

We thank you for your consideration and remain entirely available for any questions or comments.

Sincerely yours,

Marylouise Serrato	Jacqueline Bugnion
ACA Executive Director	**ACA** Director

CC: President Barack Obama
Senator Max Baucus, Chair, Senate Finance Committee
Senator Chuck Grassley, Ranking Member, Senate Finance Committee
Representative Sandy M. Levin, Chair, Ways and Means Committee
Senator Carl Levin, Chairman Permanent Subcommittee on Investigations
Mr. Timothy F. Geithner, Secretary of the Treasury
Representative Dave Camp, Ranking Member, Ways and Means Committee
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