

# ISSUES OF CONCERN FOR U.S. CITIZENS WORKING ABROAD

## Findings and Recommendations of the Americans Resident Abroad Working Group (ARAWG) March 2013

### Introduction

The U.S. Department of State estimates that some seven million U.S. citizens live outside the country, for periods varying from some months to some decades. Several organizations now exist to enable them to pursue common goals, including the identification and clarification of the ways that U.S. Government policies and legislation affect them. Over the years issues mainly related to citizenship law, voting, social security, taxation and representation have been salient. The overseas citizens' organizations have communicated the views of their members to relevant authorities in Washington using the limited channels available to them, primarily the annual Overseas Americans Week (OAW) in Washington, and the Americans Abroad Caucus, chaired by Congresswoman Carolyn Maloney and consisting of twenty-five members of Congress.

Since 2010 concerns about tax issues specifically related to overseas residence have reached a new level of intensity. Overseas citizens' concerns stem mainly from the passage and implementation of the 2010 Foreign Account Tax Compliance Act (FATCA) with its 500+ pages of regulations, the strengthening of the Report of Foreign Bank and Financial Accounts (FBAR) reporting requirements and penalties, and programs of "voluntary disclosure" (limited amnesty) for overseas citizens to bring themselves into compliance with their U.S. filing obligations.

Many specific problems have arisen in this regard, but the underlying factor in all cases is the fact that the U.S.—uniquely among the world's major countries—taxes personal income on the basis of citizenship, irrespective of where it is earned, whereas other countries tax on the basis of residence.

While the recent legislation has had the laudable aim of making it more difficult for U.S. residents to evade taxes by the use of foreign bank accounts, it has produced considerable "collateral damage" for ordinary, law-abiding Americans and their enterprises based overseas. Apart from the specific problems enumerated below FATCA and FBAR have created such uncertainty that Americans living abroad can have no peace of mind in any aspect of their business and financial life; practically all decisions would or may be thought to have tax implications.

This report is an attempt by a group of private individuals, along with representatives of organizations representing overseas Americans, to summarize the upwelling of reactions to these measures by American citizens residing in various countries in all parts of the world. The information available to the working group has come from a variety of sources beginning with a series of important Town Hall Meetings held throughout Switzerland. These were conducted in Lugano, Bern, Basel, Geneva,

Lausanne and Zurich with the participation of the U.S. State Department. Additional information on these issues came from American Citizens Abroad (ACA) and from Democrats Abroad and Republicans Abroad. Town Hall Meetings have also been held in other countries, such as Panama, Burundi and Madagascar.

In Canada, where the number of U.S. citizens in residence (including dual nationals) is counted in the hundreds of thousands, issues related to FATCA and FBAR were prominent political issues in 2011-12. A member of the Canadian Parliament, who was Deputy Speaker of the House of Commons, expressed her concern about the effect of the U.S. measures in a series of open letters to her constituents in British Columbia. This prompted the country's minister of finance to make various public statements criticizing the unfair effects of FATCA and FBAR on dual Canadian-American citizens. Considerable press coverage and public discussion ensued.

Articles on these issues have also appeared in the Wall Street Journal, Time, the New York Times, the Atlantic, UPI, Bloomberg and Forbes. English-language publications in other countries, such as the Economist, Daily Telegraph, Financial Times, the Japan Times and the Toronto Globe and Mail, have covered the subject. Finally, individual reports and testimonials have been communicated to the members of the Working Group directly or through their organizations from respondents in various countries including, but not limited to, Germany, France, Japan, Sweden, the Bahamas, Dubai, Chile, and New Zealand.

Material from all of these sources has been used to augment the findings from the Town Hall Meetings held in Switzerland and has been utilized in this report.

## **TAX AND BANKING RELATED ISSUES**

Strong emotions have characterized most of the Town Hall Meetings and communications. Fear, anger, panic, anguish, uncertainty, outrage, betrayal are some of the words that have been used to describe individuals' feelings in the face of the U.S. Government actions discussed in this report. Some individuals are afraid to travel back to the U.S. The number of Americans considering or carrying out citizenship renunciations has been increasing rapidly. While the absolute numbers are small compared to the number of foreigners seeking U.S. green cards, it is troubling that those renouncing or considering it seem to be concentrated in significant countries (e.g. U.K., France, Germany, Sweden, Switzerland) in Western Europe and Canada, with which the U.S. has close political, economic and human/cultural links. They include many veterans and ex-Peace Corps staff. Many if not most have the experience, skills and contacts which the U.S. badly needs to compete in international markets. The feeling that "I didn't think my government was capable of treating its citizens in such a way" is widespread. As one respondent wrote, "It takes time for a typical American to understand the harshness of these initiatives (FATCA, OVDP). Most, who grew up thinking the U.S. Government is fair and decent, are at first in denial. Once they are convinced that the harshness is true, they evaluate the risk-reward of coming forward. Some are still in denial." Also widespread is the perception that the U.S. Government and the general public see the overseas American community mainly as a problem rather than an asset, which serves to advance American economic and cultural interests in an increasingly globalized world.

Here are some of the specific ways the problem has been manifest:

**Double Taxation of Income:** Although in theory the foreign earned income exclusion (FEIE) and the network of bilateral tax treaties eliminate this problem by giving credit against U.S. taxes for tax paid to the country of residence, in practice double taxation remains a problem. Not all types of foreign tax are

offset; capitals gains are handled differently; there is ambiguity about pension contributions of foreign employers; and the FEIE is limited in amount and does not cover all types of income (for instance pension income). Moreover there are repeated Congressional initiatives to repeal the FEIE outright.

**Taxation of Capital Losses as Capital Gains:** In strong-currency countries, changing exchange rates can result in an apparent capital “gain” on the sale of a foreign asset such as a house that was purchased during an earlier year when the dollar was stronger, even though in terms of the currency of the country of residence the asset may have been sold at a loss.

**Abusive Behavior of the IRS in the Offshore Voluntary Disclosure Program (OVDP):** The IRS program designed to motivate delinquent taxpayers or foreign account holders to regularize their situation appears to have been implemented in a deceptive and unfair way. Some individuals who actually owed no to minimal tax and had made filing oversights and errors received fines (for non-disclosure) that represented a substantial part of their life savings. The program designed for criminals was applied equally to those who made errors of omission and oversight. Strong comments about this aberrant behavior were made in the report of the IRS Taxpayer Advocate issued in December 2011. See link here to this report: [http://www.irs.gov/pub/irs-utl/irs\\_tas\\_arc2011\\_exec\\_summary.pdf](http://www.irs.gov/pub/irs-utl/irs_tas_arc2011_exec_summary.pdf)

**Links between Passport Authorities and the IRS:** There is a widespread perception and some anecdotal evidence among overseas Americans that, contrary to law and declared policy, passport renewals may be made contingent on the production of documents to demonstrate that the applicant is tax-compliant. Whatever the truth of the matter, the passport renewal form now mandates that the applicant supply his Social Security Number if he has one. If this perception is well founded, given the complexity of overseas tax law and compliance, even simple errors in filing could lead an overseas American to lose her/his passport. This fear was reinforced by a bill before the Congress in 2012 that would have made such a link explicit. Some citizens are apprehensive and anxious about returning to the U.S. because of this perception.

**Use of Informants:** Questions have been repeatedly raised about the morality of the IRS offering rewards to informants to denounce their fellow citizens suspected of U.S. tax non-compliance. They asked how such a practice could be reconciled with American values of solidarity, friendship and mutual trust.

**Closing Bank Accounts and Restricting Investment Opportunities for U.S. Citizens:** Over half of participants in some of the Town Hall Meetings indicated that they were having problems with opening or keeping local bank accounts, because FATCA was making it administratively cumbersome and perhaps risky for foreign banks to have U.S. citizens as clients. Employees of some of the banks confirmed that this was their policy. In some cases the timing was such that positions had to be closed out at a considerable loss. A respondent in Germany is unable to have a brokerage account as Fidelity Germany closed his account in 2011 and “no German companies will touch me as a US citizen.” Another respondent from Germany adds that Deutsche Bank AG, HSBC Holdings Ltd, Bank of Singapore Ltd and DBS Group Holdings Ltd were among the wealth management firms rejecting US citizens as clients. Similar experience from a respondent in Sweden. A Certified Financial Planner from Dubai reports that Fidelity, Ameritrade and Etrade are among the firms that will no longer open accounts for Americans overseas. Another respondent reports that Via Mat International, a major storage firm for precious metals and other valuables, has decided that it will no longer provide the service of storing bullion (in the words of its management) “at its vaults outside of the U.S. to private customers with potential U.S. tax liability.” Those banks, which did accept American clients, were imposing restrictions on the kinds of investments that they could make.

Some participants in the Town Hall Meetings also reported that they had problems with their accounts in the U.S. also, as banks there were uncertain about the legal and administrative implications under the new legislation of having overseas Americans as clients. Individuals and small entrepreneurs were therefore finding it very difficult to maintain a normal economic life while living abroad. One respondent wrote: “For the last 25 years I have been busting open niche markets for American products, contributing to lowering the trade deficit, developing new markets for US producers, creating employment for my brethren back home, increasing the tax base where they live. Two months ago my bank informed me that I could no longer make wire transfers to the States. That being the case, how will I pay my suppliers? This is forcing me to shut down my 100% legal and tax compliant operation abroad, building new long term niche markets for US products, and to relocate back to the U.S.”

**Disinvesting in U.S. Securities:** Various aspects of FATCA—the administrative burden of compliance, legal uncertainties and tax implications—are leading some foreign financial institutions to cease investing in U.S. securities for their own account, and to advise or even require their clients to do the same. An impassioned statement on this was made by a senior American financial executive with long experience in the sector.

**U.S. Citizens Shunned in International Business:** The FBAR process requires that information must be provided to the IRS on any foreign bank account for which a U.S. citizen has signature authority, even if s/he has no beneficial interest in the account. This problem is not limited to the for-profit sector. A respondent from Israel reports that FATCA and FBAR have “caused fear, anxiety and anger for a number of Expats in Israel. It has especially upset the volunteers at not-for-profit organizations who because they have signing authority over accounts at the not-for-profit now find themselves with hefty accounting bills in order to be in compliance. It is not unusual for officers of not-for-profits here to have upwards of a dozen accounts that require FBAR reporting.”

Evidence was presented that some foreign firms are excluding U.S. citizens from consideration for senior executive posts for which they need to have signature authority. More generally, Americans are disadvantaged in competing for jobs in multinational companies if they are covered by expatriate packages because their double exposure to income tax makes them more expensive. A respondent who works for Caterpillar points out that the number of U.S. expatriates at his firm “have been significantly reduced in recent years due to increasing cost and administrative burden.” He adds that “At Caterpillar, you cannot be considered a high potential employee if you are not willing to move abroad.” Americans may be shunned not only in established enterprises but also in overseas joint ventures, since if their stake is higher than 10% the venture itself must be reported to the IRS under FATCA.

**Career Uncertainty:** Many Americans engaged in or contemplating international careers are presently uncertain and fearful about the implications of the recent laws, regulations and proposals on the viability of their career paths. These include but are not limited to FATCA, FBAR, and recurrent initiatives to tighten or even eliminate the FEIE. While such measures may not always be aimed specifically at overseas Americans, those who promulgate them seem indifferent at best, hostile at worst, to their impact on this group of citizens.

**Destructive Impact on Families:** A surprising and disturbing issue repeatedly raised is the impact on international couples, especially those in which the wife is American, of FBAR and FATCA, which require disclosure to the IRS of information on joint financial accounts even if only one spouse or business partner is a U.S. citizen. Several distraught American wives described the anguished dilemmas they faced in such cases. For those who were not aware of, and had not previously filed, the

necessary FBARs, they will have to declare these joint accounts with their non-American spouses and be subjected to heavy penalties, possibly on their joint life savings, something their non-U.S. husbands may be reluctant to accept. The tragic choices facing the women can boil down to divorce, renunciation of U.S. citizenship, the sale of businesses and investments they helped build, or living “on a cash basis”—which would put them and their children at risk under local law.

**“Accidental” Americans:** This term refers to those who acquired U.S. nationality by being born in the U.S. or whose parent(s) is American but who have seldom or perhaps never lived in the U.S. as adults and may not intend to do so. In view of the publicity surrounding FATCA a number of them now realize perhaps for the first time that they are legally obligated not only to file a U.S. income tax declaration, despite having effectively no ties to the U.S., but also to regularize their tax status for past years. Many mature, U.S.-born-and-bred Americans whose careers have led them to live much of their lives overseas are now in a quandary about what advice to give their “accidental American” children: renounce their citizenship, pay up, or ignore their U.S. tax obligations? Young overseas American parents are also asking whether they should exercise their option to get a U.S. passport for their minor children.

## REPRESENTATION, CITIENSHIP AND OTHER ISSUES

**Representation in Washington:** In contrast to many other advanced countries, the U.S. has effectively no formal channel through which its overseas citizens have a voice in the national government, neither in the Executive Branch nor in Congress. In meeting after meeting of Americans overseas many pointed out that, “We have taxation without representation.” As a respondent from Japan put it, “We have no say in Congress making these laws that impact us.” Many respondents point out that if proper channels of representation had existed, many of the problems that put them at a competitive and moral disadvantage might have been avoided.

Overseas Americans do have the right to vote in national elections in the district of their last U.S. residence; thus they are “represented” by the Congressperson for that constituency. However, since they form only a minute portion of the electorate for any one district (even though in total they outnumber the population of about two-thirds of the individual states), issues related to their overseas residence tend to get little attention from most Congresspersons. The technical systems for communicating with Congressional (and Executive Branch) offices—email and telephone templates, etc.—tend to be set up in such a way that overseas constituents effectively have no access, unless they can use the coordinates of their former residence. Embassies around the world do not have it in their remit to give support to U.S. citizens in “their” countries, except for consular services.

**Citizenship for Children Born Abroad to, or Adopted by, a U.S. Citizen Parent:** Some respondents mentioned the difficulties they faced because current U.S. laws on the transmission of U.S. citizenship at birth to a child born abroad are different depending on marital status, the nationality of the other parent, and the amount of time that a parent has previously lived in the U.S. prior to the birth of the child abroad. The requirements also differ depending on whether one is married or not, and if unmarried they are different depending on whether the U.S. parent is male or female. The core question was why such discrimination continues today? Why cannot all children born to or adopted by a U.S. citizen parent enjoy the same automatic opportunity to acquire U.S. citizenship at birth or adoption as a “natural born” child, no matter where the birth takes place?

**Medicare for Overseas Retirees:** Today overseas Americans who want to have Medicare Part B coverage when they return to the U.S., either on a visit or permanently, have to start paying for this extra coverage **before** returning, even though it is not available for use abroad. If they delay enrolling

(which can only be done during the first three months of each year) there is a penalty that depends on the number of years of delay before the payment begins. Many respondents wondered why a system such as the US Military “Tri-Care” for medical delivery could not be extended for those retirees who relocate overseas giving them access to their Medicare benefits without having to travel or visit the United States for these services.

**Reduced Social Security Benefits for some Overseas American Retirees:** Overseas Americans who have worked in a foreign country and contributed to a foreign social security program can lose some of their American social security benefits when they retire, even if they have made all of the requisite contributions to the U.S. social security program. This reduction takes place under the “Windfall Elimination Provision” (WEP). Respondents commenting on this issue felt strongly that the name was inappropriate and the effect was unfair.

### OUR RECOMMENDATIONS

The following recommendations of our Working Group, based upon the testimonials and creative ideas submitted to us by the various types of respondent from all parts of the world, are animated by three main principles: (1) overseas Americans are very positive assets of the United States and should be recognized and treated as such; (2) they should not face discrimination relative to other Americans; and (3) they and their employers should not be put at a competitive disadvantage in international markets.

**Establish Direct Representation for Overseas Americans in the U.S. Congress:** There are currently nonvoting members of Congress from the sparsely populated territories Puerto Rico, the District of Columbia, Guam, American Samoa, and the Virgin Islands. The seven million overseas Americans should have at least one voting member. Institutional arrangements used by other countries to provide their overseas citizens with a voice in government should be studied and emulated as appropriate. Pending such action Congressional offices should adapt their email and telephone systems so as to enable qualified overseas constituents to communicate with them without difficulty. The method used by Congresswoman Carolyn Maloney may serve as a model.

**Create the Post of Ombudsman for Overseas Americans:** Established as an independent and adequately staffed agency, the Ombudsman should be charged with investigating and addressing issues, complaints and recommendations made by U.S. citizens living abroad, and transmitting reports on these activities to the Congress and Executive Branch.

**Enact House Resolution 597, introduced into the current session of Congress, the Commission on Americans Living Abroad Act:** This would require that the Congress systematically study the impact of government policies on the nearly seven million American citizens living abroad. See more here: <http://www.govtrack.us/congress/bills/113/hr597/text>

**Give Overseas Americans a Role in U.S. Public Diplomacy:** At least one overseas American should be added to the membership of the U.S. Advisory Commission on Public Diplomacy, which works for the Department of State. The Commission should also assist in the study called for by House Resolution 597, or conduct the study itself if that resolution is not enacted.

**Encourage Regular Contacts with Overseas Americans:** Members of the Executive Branch, Members of Congress, and relevant U.S. Government staff members should systematically endeavor to include discussions with overseas Americans in their agendas while traveling abroad, whenever possible.

**Move from a Citizenship-Based to a Residence-Based Income Tax System (RBT):** This change would bring the U.S. federal income tax system into conformity with the practice of all other major countries. It would be the key initial contribution to leveling the playing field for American individuals and firms trying to compete internationally for jobs and markets. Overseas Americans could then conduct their business and banking activities in a normal way. The efforts to try to catch tax evaders need not be affected. A proposal to this effect was made to the relevant committees of the Congress in February 2013. The text (*RBT: Residence-based Taxation: A Necessary and Urgent Tax Reform*) can be found at: <http://americansabroad.org/files/6513/6370/3681/finalsubrbtmarch2013.pdf> The proposal estimates that tax receipts would increase by \$30 billion over ten years if RBT were adopted. It should be looked at favorably and be scored by the Joint Committee on Taxation.

**Make FATCA less Toxic and Create an Advisory Council comprised of the representatives of overseas organizations and IRA/Treasury:** If residence-based taxation were to be applied there would be no need for FATCA, which could be repealed. Most of our respondents felt that that would be the best solution. If, however, it remains in force it should be adapted in such a way as to reduce the negative effects. The creation of Advisory Council where overseas organizations and the IRS and Treasury could meet to review and discuss issues would help mitigate problems. Many of these proposals were voiced to IRS/Treasury in meetings recently held in November, 2012, with emphasis on the creation of an Advisory Council where overseas organizations along with representatives of IRS and Treasury could work on issues and concerns with regard to regulations. See letter: <http://americansabroad.org/files/7613/5584/7772/IRS-Treasury-follow-up.pdf>

**Supervision of future “Voluntary Disclosure” Programs:** Repetitions of the Voluntary Disclosure program should be scrutinized by the Treasury Department and relevant Congressional bodies to ensure that the gross inequities that characterized previous rounds, and that were examined in 2011 by the IRS Taxpayer Advocate Office, are not repeated. An appeals process should be used to provide recourse to those who feel they have been victimized.

**Eliminate the Windfall Elimination Provision (WEP) of the Social Security Act.** WEP unfairly penalizes those who are recipients of legitimate foreign pensions by reducing their Social Security benefits. Americans who have paid into both a foreign and Americans Social Security system should have full access to their contributions. For more on this subject please see: <http://americansabroad.org/issues/social-security/social-security-and-the-overseas-american/>

**Guarantee Automatic Citizenship at Birth or Adoption for all Children Born or Adopted Abroad by a U.S. Parent:** Legislation to this effect has been introduced in earlier sessions of Congress. All Americans should enjoy the same right to transmit U.S. citizenship to all of their children at birth, including all children born to or adopted by a U.S. citizen abroad.

**Change the Payment Provisions for Medicare Part B for Overseas Retirees and consider extension of Tri-Care:** This could be done in line with a proposal already introduced in the Congress that would allow overseas Americans to register and start paying these premiums upon their permanent return to the U.S. without being penalized for late registration. Consider the extension of Tri-Care model for medical services for Americans retiring overseas. See: <http://americansabroad.org/files/6713/3589/8138/medicare.pdf>

## A FINAL WORD

In all the communications we have had with respondents it has been striking how they see themselves as loyal and proud Americans and how troubled they are about the dilemmas posed for them by some

of the situations we have described. It is our hope and theirs that the issues raised and the suggestions offered here will therefore be given due attention by the Executive Branch and the Congress and soon lead to appropriate redress.

Many of these issues are not just simple details of our daily individual lives but profoundly affect the perception of our country and its future as seen from abroad. We hope that someday soon overseas Americans will come to be seen as the assets of our country that they really are, that due consideration be given to our experiences and suggestions, and that these will henceforth be actively solicited on an ongoing basis.

#### **MEMBERS OF THE WORKING GROUP**

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