Response to Belgium suspending its FATCA Agreement with the U.S.

On May 24, 2023 the Belgian Data Protection Authority (DPA) released a comprehensive 77-page ruling that suspends the transfer of financial data on U.S. citizens resident in Belgium to the United States within the framework of its FATCA (Foreign Account Tax Compliance Act) Inter-Governmental Agreement (IGA) due to General Data Protection Regulation (GDPR) violations. The ruling:

- described the FATCA IGA as excessive, serving only a vague purpose, and subjecting innocent individuals to a generalized presumption of guilt, such that its implementation was seen as running counter to rulings from the EU’s Court of Justice (CJEU);
- noted that prevailing jurisprudence considers the U.S. government to have inadequate data protection practices, and that the FATCA IGA insufficiently guarantees people’s rights;
- reminded that Article 96 (regarding international agreements predating GDPR) does not provide an indefinite exemption from data protection obligations for the U.S.;
- describes the power imbalance between ordinary U.S. citizens abroad and the Internal Revenue Service as significant enough to warrant classification of U.S. citizens as “vulnerable persons” under the GDPR—a status generally applied to children, asylum seekers, and those with intellectual disabilities—due to the complexity, limited means of appeal, and punitive nature of U.S. “offshore” tax provisions that apply to Belgian residents.

Americans abroad have long complained of FATCA’s data privacy overreach, which the Belgian ruling confirms. Congress has not acted on those complaints in over a decade, forcing the Belgian government to intervene to protect American citizens from a uniquely American problem.

The European Union has previously made clear that Americans resident in the EU struggle to meet U.S. taxation and reporting obligations and face extensive discrimination from Foreign Financial Institutions (FFIs). Although the resulting Treasury Notice 2023-11 asked foreign governments to “encourage” FFIs to stop discriminating against U.S. citizens, and for their U.S. citizen-residents to comply with obligations, EU FFIs continue to deny essential services to U.S. citizens.

Democrats Abroad joins other advocates in pointing out that the extraterritorial imposition of tax obligations disproportionately harms the working and middle class, fails to hold the wealthy accountable, and is impossible for the IRS to fairly administer. The inability of Americans abroad to save and invest for retirement because of U.S. tax policy—combined with excessively burdensome tax reporting—explains in part the high numbers of renunciations.

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3 Machine translation of ruling in English link: https://archive.is/b7pY4
4 Pages 42 through 47
5 Pages 48 through 55
6 Pages 34 through 41
7 Page 67
8 In countries where discrimination based on [additional] nationality is illegal, it is common to instead deny services to “U.S. tax residents”
Attempts to prevent tax abuses by high-net-worth individuals residing in the U.S. disproportionately impact non-resident citizens, who are subject to disparate treatment based on where they live. Among “anti-offshoring” provisions—aimed at U.S. residents—with the most draconian penalties in the tax code, FATCA follows a revenue model based on penalties rather than actual taxes owed. It was expected to generate $8.7 billion in revenue from penalties when it was passed, but has instead resulted in a $560 million loss for the U.S.\(^{10}\)

More generally, the Internal Revenue Service is poorly equipped to administer a reporting and tax system for individuals living in jurisdictions external to the U.S. The IRS itself acknowledged that the cost of resolving critical filing issues for this demographic is disproportionate,\(^{11}\) especially in light of the modest tax liability of most Americans residing abroad. The cost of correctly filing a U.S. tax return typically far exceeds the actual liability. Reporting obligations—often vague—are seemingly designed for maximum complexity\(^ {12}\) and create opportunities for error.\(^ {13\,14}\) Contrary to the Taxpayer Bill of Rights,\(^ {15}\) U.S. tax policy concerning Americans abroad appears to be driven more by dogma and political prejudice than by data and sound policy, resulting in massively unequal treatment depending on where a citizen lives.

It is the rich who survive with, or even benefit from a broken tax code: They are able to afford defense lawyers,\(^ {16}\) accountants, and financial planners for compliance and investment. They are sent “education letters” inviting them to amend filings without the penalties imposed on ordinary taxpayers,\(^ {17}\) and benefit from favorable taxation on US-sourced income.

Transitioning to a modern system of taxation and reporting based on physical place of residence—rather than the outdated model of citizenship—would increase tax revenues while addressing these problems and resolving the fundamental issues that led to the invalidation of the Belgian IGA. As further legal challenges question the legality and underlying premises of FATCA throughout Europe, Democrats Abroad calls upon Congress and the Treasury to provide immediate and comprehensive solutions to the problems caused by citizenship-based taxation and FATCA for Americans abroad.

Democrats Abroad has developed targeted policy proposals to address these issues. We invite constructive dialogue with Congress and Treasury on reforms that would be effective, progressive, and broadly appealing to both Americans abroad and the IRS.

\(^{10}\) https://www.tigta.gov/sites/default/files/reports/2022-06/20230019fr.pdf


\(^{12}\) Form 8621, commonly needed for Americans abroad retirement accounts, is estimated by the IRS to take 49 hours to complete https://www.irs.gov/instructions/i8621

\(^{13}\) An incorrectly completed form has no statute of limitations and a $10,000 penalty.

\(^ {14}\) The IRS does not provide guidance on what retirement accounts qualify for tax treaty benefits. Different CPAs commonly give conflicting advice, and it may be impossible to know if the IRS disagrees with a treaty position until substantial penalties have been incurred.


\(^ {16}\) See Bittner v. United States for a description of the plaintiff’s finances

\(^ {17}\) https://www.tigta.gov/sites/default/files/reports/2022-06/20230019fr.pdf