

The Death of FATCA?

Ways Forward After Belgium Nixes US law in favor of the
privacy protections of GDPR

Anthony E. Parent, Esq.

John Richardson, Esq.

Keith Redmond, Advocate for the American Overseas

Regulatory Crisis!

- ◆ The European Commission has already put the subject on the agenda for its next regulatory dialogue with the current administration in the US which will take place in July. It's likely (not yet confirmed) that the Presidency of the EU Council does the same.
- ◆ Member States know very well that the GDPR applies to everyone as soon as data flows leave the United States, so beyond FATCA, the real challenge for them will be to save the CRS.
- ◆ Belgium has every interest in not being the only one concerned; a finding that the US can't comply with GDPR is huge.
- ◆ In the short term, there will be negotiation with the US.
- ◆ BRICS rising - between Russia and China, the United States needs Europe to maintain hegemony.
- ◆ Add to this that the United States has never reciprocated with FATCA and has never joined the CRS.

Regulatory Crisis!

1st scenario

The Belgian government will appeal so that the subject can be tried by the European Court of Justice (EUCJ).

2nd scenario

Other authorities are responding to the complaint and outlawing exchanges made under FATCA.

3rd scenario

A court decision is rendered in the context of the appeals in Belgium, France or Luxembourg and it goes to the EUCJ.

Regulatory Crisis!



John Richardson - lawyer for "U.S. person..." @Expatriati... · May 31 ...

A country that (1) signs tax treaty with US that includes [#savingclause](#) (giving US right to always tax [@USCitizenAbroad](#) living in treaty country) + (2) signs [#FATCA](#) IGA (giving US sole right to define who is US citizen) has ceded total sovereignty to US. home.treasury.gov/system/files/1...

- ee) The term “**U.S. Person**” means a U.S. citizen or resident individual, a partnership or corporation organized in the United States or under the laws of the United States or any State thereof, a trust if (i) a court within the United States would have authority under applicable law to render orders or judgments concerning substantially all issues regarding administration of the trust, and (ii) one or more U.S. persons have the authority to control all substantial decisions of the trust, or an estate of a decedent that is a citizen or resident of the United States. This subparagraph 1(ee) shall be interpreted in accordance with the U.S. Internal Revenue Code.

The Law

26 U.S. Code § 1471 - Withholdable payments to foreign financial institutions

(C) Elimination of duplicative reporting requirements

Such term shall not include any financial account in a foreign financial institution if—

(i)

such account is held by another financial institution which meets the requirements of subsection (b), or

(ii)

the holder of such account is otherwise subject to information reporting requirements which the Secretary determines would make the reporting required by this section with respect to United States accounts duplicative.

What Belgium Can Do

What Belgium Can Do - Three Solutions

Solution 1 - Ensure that there are no "U.S. accounts"

- close ALL accounts of U.S. citizens

Solution 2 - Ensure No "U.S. Accounts" - Restrict U.S. citizens to depository accounts with balances below \$50,000 USD

- have an automatic account closing mechanism if the balance gets close to \$50,000 USD

Solution 3 - Ensure No Foreign Financial Institutions In Belgium - Belgium Can Become A U.S. Territory

What US Can Do

Solution 1 - Change The Definition of U.S. Person In 7701 to exclude U.S. citizens (Note that this would solve the problem from a legislative perspective. But the words "U.S. citizen" are baked into the FATCA IGA, so this would not solve the problem from the perspective fo the IGA

Solution 2 - Change The Definition of U.S. Account to exclude accounts held by residents of foreign countries

Solution 3. - Change the treaty saving clause to provide an exception to allow U.S. citizens to become "treaty nonresidents" in the same way that Green Card Holders can (preserves citizenship taxation)

Solution 4 - Refrain from giving "notice of noncompliance" under the FATCA IGA. This would (generally) create a "same country exemption" without officially creating one.

Solution 5 - Prohibit ALL U.S. citizens from maintaining any kind of financial account with a foreign bank. Establish the "FATCA Bank And Trust" all over the world with a direct link to the IRS. This also end the need for FBAR and (possibly) Form 8938

The US can fix this by following US Law

26 U.S. Code § 1471 - Withholdable payments to foreign financial institutions

(C) Elimination of duplicative reporting requirements

Such term shall not include any financial account in a foreign financial institution if—

- (i) such account is held by another financial institution which meets the requirements of subsection (b), or
- (ii) the holder of such account is otherwise subject to information reporting requirements which the Secretary determines would make the reporting required by this section with respect to United States accounts duplicative.