Information Supplement

Petition 0394/2021

Who is in scope of this petition?

US Global Tax Obligations extend to:

- US Citizens residing in the EU on residence permits
- EU Citizens additionally holding US citizenship
    - By birth in US
    - By birth in EU to one US parent or grandparent
- EU Spouses of US citizens that have filed a joint tax return previously

Why can an EU Resident not invest within the US?

The MiFiD II regulations and the associated PRIIPS rules applicable to investment products broadly affect any financial institution that is providing services to a European Union resident that fails to meet the standards for a “qualified investor” (€500,000 invested assets being the primary barrier, the other being a requirement to build up a trading history that is impossible to build while blacklisted from all financial services).

Under EU regulations, no distinction is made between a US Citizen seeking to invest in the one place where they are permitted & an “ordinary” EU citizen with no substantive ties to the United States.

Because EU residents are a minority share of US customers and financial institutions find simultaneous compliance with US & EU regulations to be burdensome, it is simpler to simply deny services or to terminate accounts held by customers that they know to be EU residents.

Reference: *Thun Financial: Why US Accounts of Americans Abroad are Being Closed*

Why can a EU Resident & US Person not invest within the EU?

Foreign Investment Company (PFIC) Rules

- Designed to punish US Tax Residents with “offshore” investments
    - Does not take into account legitimate reasons for someone not residing in the US to have a non-US account
- Applicable to any non-US based investment funds (mutual funds, ETFs)
- Taxed at maximum US tax rates, with an additional interest charge levied based on fictional income, often leading to taxes that exceed any investment returns
- Annual tax filing obligation taking ~30 hours per form to complete (IRS Form 8621)

Exception: A foreign fund can become a “Qualified Electing Fund” for treatment roughly equal to a US investment fund. To date, I am aware of no EU based UCITS fund that has this status, owing to the general unwillingness to incur costs for minority populations.

Mandating that UCITS funds provide the necessary documentation for QEF Status would be a way of ensuring non-discrimination in EU financial markets, though at that point energy is best spent holding the United States accountable.

Reference: *Taxes for Expats: PFIC Guide*

The Foreign Account Tax Compliance Act

Intended to prevent offshore tax evasion by US residents & to force compliance among non-resident US Persons.

Obligates financial institutions to either:
- Identify all “US Person” customers, collect tax IDs (SSNs), and report account information to local tax authorities under the FATCA IGAs
- Certify that they have no US Person customers, achieved by terminating accounts & denying services.

Because the sanctions imposed on banks due to FATCA non-compliance are so severe, we commonly see attempts by banks at denying or closing accounts for US Persons even in rare cases where there *is no compliance obligation on the financial institutions* & where there may not even exist individual tax obligations (almost exclusively concerning retirement accounts).

The fear of having misinterpreted a foreign tax code results in overly broad discrimination with zero legal basis--no obligation exists for the financial institutions, so there is no rational basis for saying that being non-discriminatory is too burdensome.

This can be evidenced by the limited number of cases where individuals have sought legal aid to protect their rights. In [this case in the Netherlands](), the judge ruled that while *most* accounts could be closed by the bank, the bank's actions were overly broad in their attempts to close an account that had zero US compliance obligations.

How this petition proposes to remedy the situation:

Similar to the "Professional Investor" waiver for high-net-worth individuals with investment experience, this proposal seeks to permit US Tax Residents in the EU to elect to be treated as professional investors that may make use of investment services in the United States, on the basis of there being no near-term solution addressing extraterritorial US barriers to investment in the EU.

While this will not resolve FATCA related issues for Accidental Americans, nor will it address the *numerous* threats to European rule of law & sovereignty posed by the US tax regime, it will address *one* problem that affects all classes of US Tax Resident in the EU.

The Broader Picture

A Mandatory Offshoring of Money outside the EU

While it is desirable from a policy perspective for the European Union to have its residents banking within its borders, ensuring consistent regulatory and tax oversight, we must recognise that while the present US tax system remains in place, it will be impossible for anyone considered to be US Taxable to comply with this goal.

Any European anti-offshoring measures will naturally conflict with the US's extraterritorial definition of people banking in the countries they live in as being "offshore", placing them at risk of excessive compliance costs and severe penalties.

Predatory "Penalty Based" Taxation

The Treasury routinely pursues substantial $10,000 fines for non-substantive errors, ranging from the failure to report a bank account containing €0.01, to failing to report a retirement account that the US considers to not qualify for benefits under the treaty, or simply following the incorrect instructions provided by the US Internal Revenue Service.

Troublingly, individuals have limited legal recourse, being obligated to pay the fines *prior* to submitting any appeals. The Treasury routinely argues that the penalties are not subject to legal protections against *excessive fines or punishment*.

The US also takes the view that children under the age of 18 are responsible for their tax compliance, despite the likelihood that they are unaware of any tax obligations they have, are unable to complete the complicated forms that may not be in their first language, and are expensive for a tax preparer to complete. (See FBAR Filing Instructions, Page 6)

Destructive legislation like FATCA, promoted within the United States as improving tax compliance, has failed to substantially improve the collection of taxes, with the bulk of its revenue increase coming from excessively large penalties.

References:
American Expat Financial News Journal: How a routine Form 3520 filing can easily go (eye wateringly expensively) wrong
American Expat Financial News Journal: Victims of IRS Forms 3520 & 3520A coming forward to protest large and unfair penalties
Texas A&M School of Law: Background & Current Status of FATCA

An Limiting of the European Tax Base

The premise of an EU population being forced to keep its assets in a foreign country that subjects them to harsher taxation & punitive compliance measures should be concerning.

European tax bases are harmed in the following ways:

- Lost Revenue: barriers to investing, business ownership, and self-employment result in wealth accrual & income not occurring, resulting in European taxes not being collected. In the long run, lack of savings & investment vehicles is financially devastating.
- Compliance costs: The average net income in a relatively wealthy country like the Netherlands is ~€29,000 per year, of which an American can reasonably expect to pay between €650 to €1800 in tax preparation costs. The premise of a European spending 2.5 to 6% of net income on a foreign tax preparer instead of in their local economy should trouble this body.
- Excessive Fines: Should the US engage in confiscatory taxation via fines or the 877A repatriation tax, this substantially reduces income and assets that European countries may tax.

We also cannot discount the possibility of tax evasion facilitated by the United States. While European countries have eagerly fulfilled their obligations under the FATCA IGAs, not understanding the perverseness of US extraterritorial taxation, the United States has not provided any reciprocal information to European tax authorities.

While we cannot assume that every account owner went delinquent following their offshoring to the United States, the statistics on German account values reported under the FATCA IGA show *massive* capital flight between 2014 & 2015, on the order of some €68 billion. At a minimum, this is a loss of asset management fees for German institutions. At worst, this corresponds with tax non-compliance by German residents.

The United States cannot be assumed to negotiate in good faith

Despite assurances from various European Union offices & member state governments that the United States is “better informed of the problems”, the reality is that no meaningful progress has been made to date and that the situation for US Citizens continues to deteriorate.

As we discuss the harms of legislation enacted by the United States in the 1800s, the 1980s, and 2010, I feel obliged to inform the Parliament of serious policy proposals that would further worsen the situation of all Americans present in Europe--Accidentals, recognized Dual Citizens, and Residents alike.

In the immediate near-term future, we can expect two major pieces of legislation that will need to collectively raise $4 trillion in revenue, the “Infrastructure Bill” and the “Reconciliation Bill”. As evidenced by the following policy documents coming from the US Treasury and Senate Finance Committees, there is a strong potential for these bills to include provisions harmful to any non-resident citizen *or even their non-citizen spouse*.

The American Families Plan Tax Compliance Agenda: The Biden Administration has proposed a substantive increase in financial account reporting requirements (“1099 Reporting”) that would extend to Foreign Financial Institutions, expanding on the already problematic FATCA reporting regime.

Senate Bill 510 - The Ultra-Millionaire Wealth Tax: This sets a clear picture for what United States legislators consider to be rightfully theirs. The most harmful provisions are:

- A 40% flat tax on assets *in addition to* the “877A Expatriation Tax” for individuals renouncing citizenship, levied on anyone (such as Accidentals) who is not fully tax compliant on the day of renunciation or whose total assets (including their place of residence and projected pension value) exceed ~€1,700,000.
- An annual wealth tax levied on *married couples*, including non-resident citizens and their non-resident, non-US citizen spouses.
- A mandate for the Treasury to increase its enforcement of FATCA & collection of penalties.

Senate Hearing: Closing the Tax Gap: Lost Revenue from Noncompliance and the Role of Offshore Tax Evasion - Of note, the hearing contained calls for automated and more aggressive FATCA enforcement, which would most certainly run afoul of GDPR and the European concepts of due process. The existence of non-resident citizens was not discussed in substance, but the former IRS National Taxpayer Advocate issued a stark warning of the potential for injustices similar to the Dutch *Toeslagenaffaire,* which resulted in the resignation of our cabinet.

Senate Report: Overhauling International Taxation: The chair of the US Senate Finance Committee proposes to substantially increase the "GILTI" Tax on foreign businesses controlled by US citizens, including small businesses located in the European Union. One public comment submitted by advocates of tax reform correctly noted that the United States does not distinguish between yoga studios & Amazon. Indeed, the complexity and harshness of US extraterritorial taxation poses problems for EU businesses. The current draft of proposed international corporate tax changes makes zero mention of small businesses held by *US Citizens* not residing in the US.

We must all consider ourselves lucky that in the divided political climate of the United States, the most heinous proposals see little chance of adoption before 2023. Nonetheless, we must be aware that the US discussion is not focused on *resolving issues faced by non-resident US citizens*, but on *expanding* the scope of extraterritorial taxation, even to those whose only nexus to the US is marriage to a US citizen.

Why the EU must take *any* unilateral action

In order for substantial changes in the situation to occur, it will be necessary for changes in the United States tax code to be made and for there to be either unilateral or mutual reinterpretations of the tax treaties made between the United States and Member States.

The barriers to implementing this can be summarised as:

- Non-resident citizens lack adequate political representation & are frequently mischaracterized by both Congresspeople and the media as wealthy tax cheats whose sole reason for living in a place like Europe is to seek lower taxes.
- United States legislation presently requires a concept known as "revenue neutrality". This creates a zero-sum game in which even the most miniscule cost of implementing reforms is perceived to be at the cost of US residents, a higher legislative priority.
- A lack of meaningful resistance by any foreign government. While Eritrea's extraterritorial taxes are regarded as a human rights violation, the United States has the clout for it to be regarded as an "internal policy matter".

It is worth noting that while the Internal Revenue Service regularly advises Congress on improvements related to easing paperwork burdens, reducing excessive fines, and providing adequate tax filing support, Congress has not been receptive to recommendations regarding international filers in the past decade. The IRS does not believe that it has the authority to implement any improvements as simple as improving tax forms on its own.

The European Union has a number of means to unilaterally challenge US extraterritorial taxation of EU residents and/or to force the United States to the negotiating table. As shown by the previous section, until the European Union firmly says *no*, the United States will continue to expand its extraterritorial tax regime, interpreting meek responses as continued consent.

I would encourage the European Union to use its collective economic and political strength to the benefit of its residents, rather than allowing the United States to pick off member states one by one by deferring the issue to individual member states.

At a minimum, this body must examine the ways of mitigating the harms caused by the Commission and Council's acceptance of US taxation of EU residents--in the short term through adjustment of EU law, and in the long run through making this a *real* diplomatic priority.

References:
Should Overseas Americans Be Required to Buy their Freedom?