Foreign FATCA Criticism Unlikely To Spur Changes

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European opposition to the U.S. Foreign Account Tax Compliance Act isn't likely to gain much traction in America, where revenue authorities lack the incentive — and legal backing — to exempt certain citizens living abroad from reporting their financial information.

Tax specialists say the U.S. Treasury Department is unlikely to change reporting requirements of the U.S. Foreign Account Tax Compliance Act in response to European complaints that the law is unfair to foreigners with little connection to the United States. (AP)

Two members of the French Parliament said in May that France should consider withdrawing (2019 Law360 137-152) from its treaty with the U.S. on FATCA if more isn't done to relieve the compliance burden for "accidental Americans," or those born in the U.S. but with little connection to the country otherwise. However, despite recent criticism from French politicians and other European officials, the U.S. Treasury Department is unlikely to take a seat at the negotiation table any time soon, specialists say.

Treasury isn't expected to change FATCA reporting requirements because of the measure's enforcement element and because Congress would first need to exempt U.S. citizens living abroad from paying taxes to the Internal Revenue Service. If Treasury renegotiated agreements without this legislative change, it would be choosing not to bother with people who have legal tax obligations, according to Kat Saunders Gregor, a tax partner at Ropes & Gray LLP and co-founder of the firm's tax controversy group.

"Very few instances in history have I ever seen the Treasury Department decide as a policy matter that they're just not going to collect tax," she said.

Under FATCA, which Congress passed in 2010 and which went into full effect in 2014, Americans must report the holding of more than $50,000 in foreign assets. In addition, foreign financial institutions must disclose information on U.S. taxpayer accounts to the IRS through intergovernmental agreements, or IGAs.

The measure has been the target of recent criticism from overseas in part because of its impact on accidental Americans. A report released May 15 by the two French Parliament members — Laurent Saint-Martin of President Emmanuel Macron's Republique en Marche party and Marc Le Fur of the center-right Republican party — said this group suffers "banking injustice."

FATCA allows U.S. authorities to impose sanctions on foreign banks that refuse to transmit data on U.S. citizens living abroad, and as a result French banks are unwilling to accept customers with links to the U.S., the report said.

A day after the French lawmakers released their report, the Netherlands' state secretary for finance, Menno Snel, said that because of FATCA, Dutch people “face high costs and hassle, even though they didn't even know they were taxable in the United States.”

Éric Woerth, president of the finance committee of the National Assembly in France, followed up on Monday with a letter to Macron that said the May 15 report made it possible to question national sovereignty under the country's FATCA agreement with the U.S.

The messages from the Dutch and French officials echoed concerns European lawmakers expressed last summer. In July, the European Parliament voted 470-43 (2018 Law360 186-38) to approve a nonbinding report that called for “extraterritorial” U.S. laws on foreign bank accounts to be renegotiated because they limit privacy and banking access for over 100,000 European Union citizens.

European officials are pushing back against FATCA because it's now becoming clear that the U.S. is imposing tax obligations on citizens and residents of other countries, according to John Richardson, a Canada-based attorney who helps dual U.S. citizens with FATCA compliance.

Foreign authorities are now saying that “you may call these people U.S. citizens, but we're not willing to accept them as U.S. citizens for the purposes of FATCA and IGAs anymore,” he said.

The French report also took issue with one-way flow of tax data, saying that while French banks are giving U.S. authorities information about U.S. citizens, American banks aren't reciprocating with information on French citizens. The authors urged the French state to take a number of measures — and to consider exiting the FATCA treaty if they fail.

Saint-Martin, one of the authors, told Law360 that “now that the report is out, we wish to capitalize on the momentum it created in order to provide a basis for discussion at a national and international level.”

On the national level, the report has strong proposals and has been shared by all French Parliament members, according to Fabien Lehagre, president of the France-based Association of Accidental Americans.

The U.S. Treasury “is aware that there is a problem,” and members of Congress now need to push for legislative changes, he said.

One lawmaker has already floated legislation (2018 Law360 354-156) that would amend the U.S. tax code's obligations on nonresident citizens. Rep. George Holding, R-N.C., introduced a bill in December that would exempt from taxation foreign income earned by “qualified nonresident” citizens living overseas.

The bill, the Tax Fairness for Americans Abroad Act, wouldn't have a direct impact on intergovernmental agreements or the FATCA statute itself. But it could pressure the U.S. to change reporting requirements, Richardson said.

For example, he said, if the U.S. were no longer imposing tax on the French income of a French resident, “then why should those accounts be reported to U.S. Treasury?”

Currently, U.S. citizens living abroad are generally required to file income tax returns even if they qualify for benefits such as the foreign earned income exclusion or foreign tax credits. These benefits “substantially reduce or eliminate” U.S. tax liability, according to the IRS.

Matt Stross, tax counsel to Holding, told Law360 the FATCA statute itself would likely have to change before certain accounts could be exempt from reporting requirements. But the North Carolina lawmaker's bill “makes that mountain a little easier to climb,” he said.

“FATCA's a thorny issue, so any changes to that are met with roadblocks by both sides of the aisle,” Stross said. “The hope was that if you take away the underlying need for some of FATCA, it could lead to some of those changes.”

There are plans to reintroduce the bill once it has bipartisan support, Stross said.

Meanwhile, others believe the bill goes too far. The legislation would allow American citizens to receive unlimited income abroad without paying tax to either the U.S. or the countries where they live, noted Edward Zelinsky, a tax law professor at the Yeshiva University Benjamin N. Cardozo School of Law.

“This is fundamentally a rejection of the notion that U.S. citizens should pay tax if they're not paying tax to a foreign country,” he said.

Stross said that the possibility that income could go untaxed in both the U.S. and another country was not a goal of Holding's bill, and that Holding's office and the Joint Committee on Taxation were considering the issue.

He added that under the bill, any investments that U.S. citizens living abroad have within American borders — such as shares in a company or a property — would still be taxed by the U.S. when the assets are sold.

“The hope is that income that could otherwise be highly mobile will still remain subject to U.S. tax,” Stross said. “But we're certainly still looking for any other potential avenues for abuse with JCT and definitely want to lock those down.”

In the meantime, an absence of legislation is not the only factor holding Treasury back from renegotiating intergovernmental agreements under FATCA.

Peter Cotorceanu, who is of counsel in the Zurich office of Anaford AG, said he didn't think “there's a snowball's chance in hell” that the U.S. will renegotiate the agreements under the current administration, which “is not particularly outward-looking.

The U.S. will likely continue to use FATCA as an enforcement mechanism. Under the statute, foreign banks that have failed to meet reporting and registration requirements regarding their American account holders must pay a 30 percent withholding tax on payments from the U.S.

Foreign banks can invest in the U.S. and receive related payments without paying any tax, but the assumption is that they're using non-American citizens' assets, Gregor at Ropes & Gray said.

“If you want to be able to invest in U.S. Treasury securities without any withholding on the way back out, you have to come to the table and you have to prove that you're not hiding American money behind that,” she said.

Even if the U.S. switched to a territorial system for individuals, there would still need to be an enforcement mechanism to ensure that American citizens aren't hiding assets in other countries to avoid U.S. tax, she said.

Gregor noted if that system isn't FATCA, it could be the common reporting standard, which the Organization for Economic Cooperation and Development designed as the global framework for tax administrations to share individuals' bank account information.

As for how France might approach renegotiations, Saint-Martin said withdrawing unilaterally from a FATCA agreement should be a last resort. Doing so wouldn't solve the problems accidental Americans face and would present risks for French financial institutions, he said.

“However, it is a legal option, and one we will consider if the USA is unwilling to have a real dialogue on the subject,” Saint-Martin said. “Accidental Americans are French citizens, and we should not leave them on their own because of diplomatic considerations.”

--Additional reporting by Todd Buell and Joshua Rosenberg. Editing by Robert Rudinger and John Oudens.