

American Citizens Abroad (ACA)

The Voice of Americans Overseas

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The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington D.C., 20224

November 1, 2011

Dear Mr. Shulman,

Statements on the United States tax policy made by U.S. Ambassador David Jacobson's to the Canadian Club of Ottawa have been reproduced in the press and brought to our attention.¹

Referring to the uproar in the Canadian press about the abusive FBAR penalties imposed on dual-national American-Canadians who wanted to enter the U.S. reporting system and owed no U.S. taxes, Ambassador Jacobson stated: *"The United States isn't out to get honest "grandmas" who don't owe anything to the Internal Revenue Service... My message is to sit tight. We are not unreasonable. We are not unsympathetic. We are not irresponsible. The IRS is exploring ways to accommodate the roughly one million dual Canadian-American citizens living here."*

American Citizens Abroad wishes to bring to your attention the fact that the IRS rigid application of heavy FBAR penalties is a worldwide problem for Americans residing overseas, not limited to Canada. American Citizens Abroad has received multiple testimonies from individuals all around the globe who owed no or minimal U.S. taxes and who entered the voluntary disclosure programs in good faith to correct their prior non-filing of the 1040 and the FBAR.² The stories we have received are heartbreaking, individuals being penalized largely on the non-filing of the FBAR, losing an important part of their life's savings, suffering serious emotional stress from IRS harassment and rigidity. These individuals have lived most if not all of their lives overseas, have earned their income and saved overseas.

The IRS did not apply discretion to adapt penalties to the individual circumstances as it is authorized to do. Worst yet, the IRS changed the guidance rules under the first voluntary disclosure program retroactively, thereby automatically imposing a 20% penalty on the highest balance on overseas financial assets over the prior 6 years. These aggressive tactics follow a period of more than 30 years when FBAR reporting was not enforced by the Department of the Treasury to the point that even professional tax preparers were not aware of the need to report.

The estimated six million Americans living and working abroad are, on the whole, honest, hard-working average citizens, fulfilling their tax obligations in the country where they reside and for the most part owing little or no tax to the United States due to the application of foreign tax credits and the foreign earned income exclusion. Overseas Americans by necessity must have bank accounts and financial instruments in their country of residence; hence the FBAR filing requirement makes them particularly vulnerable and subject to discrimination as they most likely have the vast majority of assets in their country of residence.

The perceived abuse by the IRS under the voluntary disclosure programs has instilled fear and has criminalized honest Americans living and working overseas. IRS actions have put a flood light on the fundamental overreach of the United States in taxing on a citizenship-basis rather than a residency-basis. The United States is the only country in the world³ to have such a policy. Now with FATCA reporting coming on top of FBAR reporting, the overseas community feels not only harassed but strangled. This is all the more difficult to accept in that Americans overseas, the majority of whom are long-term residents abroad, feel that citizenship-based taxation is unjust as it subjects them to burdensome filing in two countries and double taxation, and yet they do not receive the services provided to U.S. residents.

With the harsh FBAR penalties promulgated and the public threats that the IRS has made with regard to even heavier penalties if individuals try to enter the system quietly, the IRS has created an impossible situation for honest Americans residing abroad who have not yet initiated filing. Either they enter with a noisy disclosure and fear losing a good part of their life savings, or they take a chance with a quiet disclosure and risk even heavier penalties, or they try to disappear into the woodwork and never return to the United States. This is no way to treat honest citizens who want to comply with the law. By treating Americans abroad as criminals, the IRS is pushing Americans abroad away from the United States. U.S. policy contrasts totally with that of other countries which view their overseas communities as valuable representatives of the country's economic and cultural interests and do not tax them but encourage mutually beneficial dialogue.

ACA is fully aware that only Congress can change the law regulating taxation. But we urge you to modify IRS policy and to apply leniency not just with Canadian-Americans, but worldwide

with regard to Americans overseas who have not been reporting in the past and want to enter the U.S. tax system in order to comply with United States law. Prior to the voluntary disclosure programs of 2009 and 2011, when someone initiated reporting, they did so simply by filing the current year and the prior five years with a letter of explanation. Back taxes and penalties related to those back taxes were paid, but there were no penalties related to past non-filing of the FBAR.

In this respect, we would like to highlight the recent recommendation to the IRS made by Scott D. Michel, President of Caplin and Drysdale, Washington D.C., and M E. Matthews, partner in the Washington office of Morgan, Lewis and Bockius LLP: *“We suggest returning to the rough-justice concept that minimizes IRS resources applied to this class of tax noncompliance by offering the following.... 8) A separate path for Americans living abroad whereby they can reenter the system without the imposition of penalties except when there is evidence of fraud or willfulness. Surely a ‘check the box,’ Q & A-type system can be designed for those cases, with enough spot-checking to deter cheating.”*⁴

We thank you for your attention and consideration.

Sincerely yours,

Marylouise Serrato Jackie Bugnion
Executive Director Director

CC: The Honorable Nina Olson, National Taxpayer Advocate
 The Honorable Timothy F. Geithner, Secretary of the Treasury

¹ “Ottawa Seeks Leniency for Canadians in U.S. Tax” by Barrie McKenna, which appeared in *The Globe and Mail* on October 19, 2011. <http://www.theglobeandmail.com/globe-investor/personal-finance/ottawa-seeks-leniency-for-canadians-in-us-tax-hunt/article2205001/>

² The ACA position paper, « The FBAR Scam » can be found at <http://www.aca.ch/fbarscam.pdf>

³ The only other country practicing citizenship-based taxation is Eritrea.

⁴ Scott D. Michel and Mark E. Matthews, “OVDI is Over – What’s Next For Voluntary Disclosures?”, Tax Notes, Tax Analysts, pp. 377-378, October 17, 2011. http://www.morganlewis.com/pubs/TaxNotes_OVDI-is-Over_18oct11.pdf