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ARTICLE & ESSAY: THE U.S. FOREIGN ACCOUNT TAX COMPLIANCE ACT: AMERICAN LEGAL IMPERIALISM?

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TEXT:

[\*334] I. ABSTRACT

The Foreign Account Tax Compliance Act (FATCA) was enacted in 2010 and came into effect on January 1, 2013. <sup>1</sup> FATCA is by far the most extraordinary example of Congressional extraterritorial legislation in U.S. history. Eschewing the traditional practice in international law of limiting national legislation to the territory of the sovereign, the U.S. Congress explicitly crafted FATCA to impose egregious, continuing due diligence and reporting obligations on more than 100,000 financial institutions, each of which is organized and operates outside the territory of the United States. FATCA is designed to increase U.S. income tax compliance by American tax payers holding financial assets outside the United States.

This article briefly outlines the requirements of FATCA, describes the outcry by American expatriates to the unintended consequences of FATCA as well as the predicament of "accidental" and "incidental." Americans who find themselves subject to years of unpaid obligations imposed by the unique approach to taxation contained in the Internal Revenue Code. The article concludes by describing a potentially monumental unintended consequence of FATCA, the end of the centuries old practice of sovereigns refusing to enforce revenue laws of other sovereigns as the developed world joins together to arrange mutual FATCA-like reporting to enhance tax collection efforts globally.

## II. INTRODUCTION

A bank employee surreptitiously collects the names of thousands of owners' secret accounts in a Swiss bank on five CD-ROMs. Offering this data to the governments in Europe the employee seeks to become an instant millionaire. Within three months he dies of a "heart attack," at age twenty-nine. Plot line of a new thriller? Not yet. But Herve Falciani, whom the New York Times named "the Edward Snowden of banking," <sup>2</sup> does claim to have encrypted records of 130,000 such account holders. <sup>3</sup> Shortly after former French Minister of Finance, Christine Lagarde, shared a list of about 2,000 wealthy Greek tax evaders with the Greek government, two prominent Greek citizens said to have been on this "Lagarde list," died; one [\*335] "apparently hanged himself," the second "was found dead in a Jakarta hotel room" five days later. <sup>4</sup>

The existence of untaxed offshore accounts has been known for years. International criminals and larcenous national political leaders are familiar figures in novels, movies and television dramas and were the trigger for action by Congress to enact the Financial Account Tax Compliance Act, uniformly referred to as "FATCA." <sup>5</sup> Enacted in 2010, but effective only since January 2013, <sup>6</sup> FATCA has engendered a maelstrom of comment and criticism. This article

presents a basic introduction to FATCA, one of the most egregious examples of U.S. legal imperialism--the extraterritorial application of American federal legislation.

Part III provides the background to FATCA, focusing on the popularity of offshore accounts, the contribution of those accounts to the billion dollar U.S. tax gap, and what the Department of Treasury and IRS have attempted to do in order to encourage citizens with offshore accounts to comply with their obligations under the Internal Revenue Code (IRC). Part W provides an overview of the mechanics of FATCA, explaining the goal of FATCA and the penalty for noncompliance, with an emphasis on the unprecedented nature of this legislation, which imposes significant obligations on entities not subject to the jurisdiction of American lawmakers. Part V reviews a small portion of the criticism that has been generated by FATCA and how it is affecting American expatriates, financial institutions, and "accidental" or "incidental" Americans. Finally, Part VI discusses the possible reach of FATCA beyond its direct implications on foreign financial institutions and American account holders, particularly its effect on global information exchange, the erosion of bank secrecy laws, and the decline of the dollar as the de facto world currency.

### III. BACKGROUND OF THE FOREIGN ACCOUNT TAX COMPLIANCE ACT

As noted on the official Internal Revenue Service (IRS) website, Will Rogers observed, "[i]ncome tax has made more liars out of the American people than golf." <sup>n7</sup> As another anonymous pundit has said, "[w]e know [\*336] there are but two kinds of people who complain about taxes: men and women." <sup>n8</sup>

Based upon this telling commentary suggesting that Americans may not enjoy paying income taxes, one way for a few Americans to reduce income taxes paid to the IRS has apparently been to sequester funds outside the territorial limits of the United States. People associate such offshore accounts with sophisticated criminals and money laundering, spies, and corrupt third world politicians. But in the view of the IRS, many American foreign account holders who do not self-identify as spies, criminals or politicians seek to reduce their personal income taxes by stashing funds in Switzerland and elsewhere. And what about the reported 7.2 million U.S. citizens living abroad? <sup>n9</sup> Surely, most of them have one or more bank accounts. <sup>n10</sup> Profits made on funds invested from and retained in such accounts, and interest accrued thereon, have historically been outside the third party reporting systems the IRS has in place to encourage tax compliance.

#### A. How Much Are We Talking About?

Just how much might be in unreported offshore accounts? It turns out we can learn more about the sex lives of the rich and famous than we can know about such secret bank accounts. One estimate from the Tax Justice Network, however, reports that total offshore "financial wealth" may range from \$ 21 to \$ 32 trillion. <sup>n11</sup> This estimate is of all such hidden wealth, not just that sequestered away by Americans seeking to escape the IRS. Even this estimate may be conservative, because, as the Tax Justice Network notes, there are "difficulties in measuring secret practices," and other limitations on "night vision." <sup>n12</sup> The U.S. Senate Permanent Subcommittee on Investigations published a report in 2014 that included the estimate that lost tax revenues of all types range from \$ 40 to \$ 70 billion annually. <sup>n13</sup> [\*337] Confirming the inexactitude of such estimates, an earlier estimate cited by this same Subcommittee on Investigations in 2008 estimated the annual loss of \$ 100 billion. <sup>n14</sup>

The United States has an estimated annual budget deficit of over \$ 500 billion <sup>n15</sup> and one means of reducing this deficit, without raising taxes, is to collect unpaid taxes. <sup>n16</sup> FATCA focuses on taxes believed to be unpaid by individuals with assets hidden outside the United States. <sup>n17</sup> Given that there is at the moment no effective way to track such accounts, FATCA is specifically designed to deal with this information deficit by imposing extensive reporting obligations upon foreign financial institutions (FFIs). <sup>n18</sup>

#### B. Tax Havens: Where the Money Hides

Switzerland has long been a favorite tax haven for the wealthiest of the world <sup>n19</sup> and plays a vital role in the tax evasion game. <sup>n20</sup> In 2012, the Swiss Bankers Association reported that Switzerland's 300 banks held \$ 2.8 trillion in assets. <sup>n21</sup> The country's bank secrecy laws are notoriously strict <sup>n22</sup> and make it a crime for a bank to release information about clients and their [\*338] accounts, <sup>n23</sup> creating a secure and tax-evasion friendly sanctuary for those subject to U.S. and other nations' tax laws. <sup>n24</sup> But in our internet world, "offshore" no longer refers exclusively to physical locations; rather, the offshore systems of the modern world prevail wherever clients can find "secrecy, tax minimization, access, asset management, and security." <sup>n25</sup>

Before we judge too harshly (and perhaps secretly envy on some level) our tax-evading fellow Americans, let us not forget that there is nothing illegal about having funds overseas and there are multiple reasons for having assets outside the United States. <sup>n26</sup> Wherever assets are, for American taxpayers, the reality is that they are subject to the provisions of the IRC. <sup>n27</sup> FATCA is designed to identify offshore financial assets. Within the territory of the U.S., the IRS is able to encourage faithful compliance with a resident's income tax obligations by imposing third party reporting obligations directly to the IRS upon banks, employers, brokerage firms, et cetera. <sup>n28</sup> While this system is not perfect, it permits cost effective confirmation of tax returns actually filed, thus encouraging accurate filing. Such third party reporting has not been available for earnings of U.S. citizens received from outside the territory of the United States. <sup>n29</sup> FATCA addresses this reporting gap by seeking to impose such reporting obligations upon tens of thousands of institutions with no jurisdictional nexus to the United States. <sup>n30</sup>

### [\*339] C. Prior Efforts at Achieving Offshore Account Compliance

The IRS has struggled to effectively enforce the provisions of the IRC on citizens with offshore accounts. <sup>n31</sup> The Tax Division of the Department of Justice (DOJ) has made increased compliance by U.S. taxpayers with offshore accounts a top priority in recent years, as evidenced by the programs described below. <sup>n32</sup> No need to wonder if any of these attempts were fool proof--the arrival of FATCA tells us everything we need to know regarding the success of these programs. While each may have been marginally successful and their results impressive to the untrained eye, the financial world would not be weathering the FATCA storm if any of these prior compliance initiatives had been successful in its attempt to achieve full tax compliance. A primer on the history of compliance programming provides some basis to understand the intensity of FATCA.

#### 1. Foreign Bank Account Report

Early efforts to deal with offshore accounts held by Americans include the Foreign Bank Account Report (FBAR) first mandated in 1970 by the Bank Secrecy Act. <sup>n33</sup> The FBAR is not an IRS form. <sup>n34</sup> It is a form required by the Treasury Department. <sup>n35</sup> This now exclusively electronic form, FinCEN Form 114, must be filed each year separately from income tax filings with the IRS. <sup>n36</sup> The U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) receives these forms, although FBAR compliance enforcement is the responsibility of the IRS with its 90,000 plus employees. <sup>n37</sup> Penalties for failing to comply with FBAR reporting were increased in 2004, "[b]ecause of a concern about the low level of . . . compliance." <sup>n38</sup> The purpose of the FBAR mandate is to collect information [\*340] to aid in exposing money laundering and terrorist financing. <sup>n39</sup> FBAR filing continues to be required for U.S. citizens with foreign accounts, but the self-reporting system is insufficient and ineffective on its own. <sup>n40</sup>

#### 2. Qualified Intermediaries

Pursuant to Treasury Regulation 1.1441-1, <sup>n41</sup> the IRS attempted to enlist foreign banks in a reporting scheme to provide the identity of U.S. citizens having offshore bank accounts with the Qualified Intermediary Program. <sup>n42</sup> The program required foreign banks to report details of accounts registered in the names of American citizens, but excluded identities of non-U.S. clients and corporations if the FFI found that the appropriate amount of tax was being withheld on payments deemed to be paid from a "U.S. source" <sup>n43</sup> to the non-U.S. clients. <sup>n44</sup> Not surprisingly, international banks quickly found ways to defeat the program and aid their U.S. clients by suggesting and encouraging loopholes to avoid exposure. <sup>n45</sup>

[\*341] American whistleblower Bradley Birkenfeld, <sup>n46</sup> who had previously worked for the Swiss bank UBS, exposed a scheme created by UBS encouraging account holders subject to U.S. tax to create shell corporations outside of the United States and open UBS accounts in the foreign corporation's name. <sup>n47</sup> Without a U.S. person as the actual account holder, UBS determined that payments made to the shell corporations were not subject to withholdings, even though the bank was well aware that the beneficial owners were U.S. citizens subject to the IRC. <sup>n48</sup> The subsequent investigation of UBS by the Justice Department ultimately led to a deferred prosecution agreement for UBS and a \$ 780 million fine, including penalties, interest and restitution. <sup>n49</sup> The DOJ press release boasting of the successful prosecution of UBS did not acknowledge the key role of Birkenfeld. <sup>n50</sup>

#### 3. Voluntary Disclosure

Taking full advantage of the media's coverage of Birkenfeld's approach to the IRS, the unprecedented UBS deferred prosecution agreement and concerns among Americans, both domestically and those residing abroad, the IRS established the Overseas Voluntary Disclosure Program (OVDP) in 2009. <sup>n51</sup> This program was reopened with less advantageous terms in 2011 and again in 2012. <sup>n52</sup> These programs provided incentives directly to U.S. taxpayers,

including reduced civil penalties and freedom from criminal prosecution for voluntary disclosure of previously [\*342] unreported offshore accounts. <sup>n53</sup> The incentives were reduced with each successive issuance of the program, <sup>n54</sup> but the IRS has reported collecting in excess of \$ 5 billion from 33,000 participants in these OVDPs. <sup>n55</sup> The incentives that these OVDPs offered, avoiding maximum civil and all criminal penalties, were obviously effective, and a significant portion of the success of the OVDPs no doubt arose from the Birkenfeld publicity. <sup>n56</sup>

Despite the compliance generated by these programs mentioned above, it is naive to think that UBS was the sole abuser of the QI program, or that 33,000 voluntary disclosure participants make up the whole of U.S. tax evaders. <sup>n57</sup> The limited success of the QI and OVDP programs has led to the remarkably more aggressive and innovative mechanisms of FATCA. <sup>n58</sup>

#### IV. How FACTA IS SUPPOSED TO WORK

The IRS relies upon voluntary tax compliance by individual taxpayers. <sup>n59</sup> This voluntariness is bolstered by mandated confirmatory reporting directly to the IRS of taxable income by employers and financial institutions, enabling a precise, computer-based accuracy check on amounts reported by taxpayers. <sup>n60</sup> For U.S. citizens with accounts outside the United States, such confirmatory reporting has not been available. Tax treaties and Tax Information Exchange Agreements have been negotiated to deal with tangential aspects of the problem of overseas assets controlled by U.S. taxpayers, but these approaches did not deal with unreported, hidden offshore assets. <sup>n61</sup> While the problem of unreported assets offshore has been [\*343] known for decades, prior measures have not begun to solve this issue for the IRS. <sup>n62</sup> Enter FATCA.

After years of talk and numerous Congressional hearings, FATCA was finally introduced in 2009 by Representatives Charles Rangel of New York and Richard E. Neal of Massachusetts. <sup>n63</sup> Additional hearings on the offshore tax problems of the IRS were held and FATCA was ultimately enacted as an addendum to the Hiring Incentives to Restore Employment Act (HIRE Act) and signed by President Obama on March 18, 2010. <sup>n64</sup> Why such an unlikely juxtaposition? Congress added FATCA to the HIRE Act to appear to "offset" the cost of the HIRE Act. <sup>n65</sup> Of course, FATCA was not fully implemented until July 1, 2014. <sup>n66</sup> In considering this offset, the Congressional Budget Office somehow determined that while FATCA would increase the U.S. deficit by \$ 11.4 billion between 2010 and 2015, it would conveniently yield a "net reduction in deficits of \$ 1.1 billion over the 2010-2020 period." <sup>n67</sup> Thus did FATCA become law.

##### A. Basic Mechanics of FATCA

The basic requirements of FATCA command foreign financial institutions and certain other non-financial foreign entities (NFFE) to disclose information directly to the IRS about financial accounts held by [\*344] U.S. taxpayers or face harsh penalties. <sup>n68</sup> The IRS has sought to make certain that no potentially qualifying institutions will slip through the cracks by including the broadest possible definition of "foreign financial institution" in FATCA. <sup>n69</sup> A "foreign financial institution" is any "financial institution which is a foreign entity." <sup>n70</sup> A "financial institution" is "any entity that accepts deposits, holds financial assets for others or is engaged primarily in the business of investing, reinvesting, or trading in securities, partnership interests, commodities or any interest in such securities." <sup>n71</sup> The mechanics of FATCA compliance are daunting all around and no attempt will be made in this article to detail them. Broadly speaking, to achieve initial compliance foreign banks must enter into an agreement with the IRS, <sup>n72</sup> determine which of their accounts are "U.S. Reportable Accounts," <sup>n73</sup> and categorize the individuals and entities having accounts with that institution according to FATCA. <sup>n74</sup>

As just one example of what FATCA requires, foreign banks must identify all "U.S. persons" who have accounts in excess of \$ 50,000. <sup>n75</sup> U.S. [\*345] persons who trigger the FFI due diligence and reporting obligations for FFIs include U.S. legal entities of every kind, plus U.S. citizens. <sup>n76</sup>

This is a continuing requirement and thus some means of continuously tracking the amounts in accounts of U.S. persons will need to be established. One additional consequence of FATCA is that FFIs will henceforth need to conduct more extensive due diligence on new customers to determine whether they are "U.S. persons." <sup>n77</sup> Current "know your customer" practices in place to deal with local Anti Money Laundering protocols will not be sufficient. <sup>n78</sup> As to existing accounts, the burdens are at least as cumbersome. Each FFI must search its existing accounts for "indicia" which might suggest that the account is associated with a U.S. person. <sup>n79</sup> Such indicia include a statement that the account holder is a U.S. citizen <sup>n80</sup> or resident, a U.S. telephone number or mailing address, and [\*346] certain other suspicious items, such as a power of attorney with a U.S. address or a mailing address which is "in care of" or to a hold mail address. <sup>n81</sup>

Well aware of the enormity of obligations it was imposing upon the rest of the world, Congress carefully crafted a draconian penalty to insure compliance.<sup>n82</sup> This enforcement mechanism has been called a "death sentence"<sup>n83</sup> and "[devastatingly] destructive . . ."<sup>n84</sup> FATCA provides in sections 1471 and 1472 of the IRC that "non-compliant" FFIs, NFFEs and individuals who have not conformed to the requirements imposed on these non-American businesses by a foreign legislature will be subject to a thirty-percent withholding penalty to be imposed on any U.S. source payments made to the institution.<sup>n85</sup>

## B. Imperial Legislation

### 1. Beyond Our Borders

FATCA is the most extraordinary extension of Congressional extraterritorial overreach ever enacted. Traditionally, acts of Congress are deemed to apply only domestically unless there is an explicit intention to have an impact beyond the territory of the United States.<sup>n86</sup>

One such law where the extraterritorial impact was clearly set forth is the Foreign Corrupt Practices Act (FCPA), which deals with acts of [\*347] Americans and certain other "U.S. persons"<sup>n87</sup> in dealings beyond the borders of the United States where bribes are paid to foreign government officials.<sup>n88</sup> The FCPA and analogous legislation in numerous other jurisdictions enacted to comply with the OECD Convention against Bribery of Foreign Government Officials in International Business Transactions<sup>n89</sup> must criminalize acts by or on behalf of persons and entities subject to such laws if they provide anything of value to a foreign government official in hopes of obtaining or retaining business or obtaining an unfair advantage.<sup>n90</sup> While the FCPA deals with conduct involving foreign government officials that is likely to occur outside the territorial limits of the United States, this law carefully and notably does not impact the foreign officials themselves, presumably because Congress has no authority to legislate for foreign officials.<sup>n91</sup> The focus of the FCPA is on acts of persons, including legal entities, over which the United States has traditional territorial jurisdiction.<sup>n92</sup> The law deals with the conduct of such persons subject to the jurisdiction of the United States even though the act of bribery giving rise to an offense may occur offshore, outside the territorial limits of the United States.<sup>n93</sup>

In stark contrast, FATCA seeks to require financial institutions with no jurisdictional nexus to the United States whatsoever, to report account activity of a broad range of persons and entities to the IRS.<sup>n94</sup> There is no doubt that in FATCA, Congress clearly and explicitly determined that the U.S. Government was going to impose its will on many tens of thousands [\*348] of private organizations, wherever located on our small planet.<sup>n95</sup> As of October 6, 2014, a total of 116,104 FFIs have completed their FATCA registration with the IRS.<sup>n96</sup>

While much of the world realizes the preeminence of the United States in many areas, why would the 28,045 FFIs in the Cayman Islands,<sup>n97</sup> or even the single registered FFI on Christmas Island,<sup>n98</sup> bother to go through the inconvenience and expense<sup>n99</sup> of registering its existence with, and agreeing to comply with, the onerous regulations issued by the IRS? One possible explanation might be that compliance with FATCA might be simple and perhaps even a positive marketing development. This however, is most definitely not the case. FATCA imposes obligations, discussed above, which are both extensive and expensive to satisfy.<sup>n100</sup> Why then have more than 100,000 foreign banks and other financial institutions succumbed to this extraordinary exercise of extraterritorial jurisdiction by a foreign government?

The wrath of FATCA leaves FFIs with little or no room to "just say no" to the IRS. While a select few small financial institutions may be able to escape FATCA, either because the American accounts of the institution do not exceed \$ 50,000 or by refusing to maintain or open accounts for U.S. persons, this is the exception.<sup>n101</sup> Larger and more prominent FFIs do not realistically have the same option, because of the thirty-percent withholding penalty and the potential to be cut out of the largest equity and bond [\*349] markets in the world.<sup>n102</sup> FFIs that resist the urge to fight back on FATCA will be "granted uninterrupted access to the world's leading global financial institutions, major currencies, and securities markets."<sup>n103</sup> The choice is simple, or rather, there is no choice at all. Avoiding and ignoring FATCA will all but shut out non-compliant FFIs from access to the U.S. dollar and many securities markets of the "FATCA compliant world."<sup>n104</sup> Thus, we will continue to see FFIs succumb to the "hegemonic" might of the United States.<sup>n105</sup>

### 2. Bank Secrecy Laws and Intergovernmental Agreements

The essence of FATCA is information reporting of account details for accounts in which the IRS has an interest.<sup>n106</sup> Reporting information includes the name of the U.S. person, the related Tax Identification Number, the account number for each such account, the highest balance in such accounts for the prior year, and the gross proceeds from such

accounts. <sup>n107</sup> In many developed nations, this information is protected as highly confidential. <sup>n108</sup> In Switzerland, as much of the movie-going public knows, releasing any portion of that information is a crime. <sup>n109</sup>

[\*350] Pressure on Switzerland to adjust its bank secrecy laws has been increasing for decades. <sup>n110</sup> Under the United Nations Convention Against Corruption (UNCAC), which entered into force in December 2005, the parties undertake to criminalize bribery and corruption, to assist in enforcing other nations' laws, and to begin to seek return of national treasure looted by corrupt politicians. <sup>n111</sup> Unlike the OECD Convention, Chapter V of the UNCAC deals explicitly with asset recovery. <sup>n112</sup> Currently, 140 nations have signed and ratified UNCAC, <sup>n113</sup> including Switzerland, which was one of the initial signatories. <sup>n114</sup> Much effort has recently been focused on funds thought to have been sequestered in Swiss banks. The United Nations Office of Drugs and Crime (UNDOC) together with the World Bank has established a Stolen Asset Recovery (StAR) initiative. <sup>n115</sup> A UNDOC publication describes efforts by the governments of Nigeria, Peru, and the Philippines to recover assets looted by former government officials in these countries and deposited in Swiss banks. <sup>n116</sup>

One clear message from recent history in Switzerland is that bank secrecy is the major impediment to asset recovery. Legal proceedings in Switzerland relating to recovery of stolen Nigerian assets required five years of litigation. <sup>n117</sup> Recovery of stolen Philippine assets commenced in early 1986 and was finally concluded in 1998, following more than twelve years of litigation. <sup>n118</sup> The Treasury Department has addressed this very real [\*351] issue of local bank secrecy and personal privacy laws. <sup>n119</sup> While FATCA seeks to have FFIs secure waivers of privacy laws from U.S. persons holding accounts in the FFI, <sup>n120</sup> the Treasury has greatly facilitated FFI compliance with local secrecy and privacy laws by negotiating Intergovernmental Agreements (IGAs). <sup>n121</sup>

Succinctly, IGAs are agreements negotiated by the Treasury with authorities in other nations. <sup>n122</sup> There are several variations of these agreements, the most common and the most relevant for bank secrecy and overall FATCA compliance purposes is the Model 1 IGA. <sup>n123</sup> Pursuant to the Model 1 IGA, FFIs in that jurisdiction provide information to their government, not directly to the IRS. <sup>n124</sup> This IGA provides that the foreign government discloses the required information to the IRS on an automatic basis. <sup>n125</sup> Model 1 ensures that the IRS is able to obtain "the same quality and quantity of information" as it would receive through full application of the final regulations. <sup>n126</sup> The Model 2 IGA, which is much less common, <sup>n127</sup> provides that FFIs report account information directly to the IRS. <sup>n128</sup> The Treasury emphasizes the efficiency and effectiveness of the IGAs and how the multilateral agreements will enhance "transparency and information exchange on a global basis." <sup>n129</sup>

Model IGAs were designed to avoid any inconvenience that the Treasury might face with regards to other nations' bank secrecy laws. <sup>n130</sup> [\*352] The IGAs allow the Treasury to sidestep any conflicts of law when strong-arming FFIs into releasing the requested account information. <sup>n131</sup> This "collaboration" with foreign governments allows for FATCA to ensure that the objectives of FATCA are fully met, regardless of bank secrecy laws. <sup>n132</sup> Both IGA Model 1 and Model 2 aim to have the signing jurisdiction require each financial institution within that jurisdiction collect and report the required information on U.S. accounts. <sup>n133</sup> Foreign partner jurisdictions are apparently agreeing to enter IGAs with the U.S. based on incentives such as reduced burdens in applying FATCA regulations and a promise of reciprocal information exchange by the IRS. <sup>n134</sup> It turns out the United States is not the only country plagued by tax evasion, and the thought of discovering hidden accounts of their own citizens has nations the world over bowing to FATCA. <sup>n135</sup> Even bank secrecy standard setting Switzerland has signed on with FATCA, albeit via a Model 2 rather than Model 1 IGA, requiring its financial institutions to report directly to the IRS. <sup>n136</sup> It has been reported that Switzerland will renegotiate its arrangement with the IRS and conclude a Model 1 IGA. <sup>n137</sup>

#### [\*353] V. THE PUBLIC OUTCRY

As background, it is important to note that the United States and Eritrea are the only nations currently attempting to tax their citizens on their worldwide income. <sup>n138</sup> Longstanding international practice has been to observe territorial limits on taxation, thus allowing citizens to pay taxes only in the jurisdiction in which they are residing. <sup>n139</sup>

Few would dispute the need to bring federal government revenues closer to federal expenditures. Reducing expenditures is one apparently politically inconceivable route to this end; taxing offshore corporate profits is another; a wholesale revision of the IRC is another. <sup>n140</sup> FATCA, however, takes yet another approach: that of seeking to tax offshore income of U.S. persons with offshore accounts. <sup>n141</sup> Agreeing that this is commendable, it has turned out that the details of the IRS approach have offended millions.

#### A. FATCA and the Accidental American

As noted, the United States imposes taxes based on citizenship rather than residency, meaning no matter where one lives, if one is a U.S. citizen, he or she must pay income taxes to the IRS. The United States deems all persons born in the territory of the United States to be citizens. <sup>n142</sup> Similarly, any child born outside the United States of one or more American parents is also deemed to be a citizen. <sup>n143</sup> Regardless of when they left the United States and regardless of their knowledge of our unique basis for taxing, such "accidental" or "incidental" citizens are subject to the provisions of the IRC. <sup>n144</sup> FATCA, therefore, triggers FFI reporting obligations with respect to account holders who are among the estimated 7,000,000 Americans who work and live overseas, <sup>n145</sup> persons residing in the [\*354] United States who have offshore accounts (for any reason), as well as "accidental" or "incidental" citizens.

To be perfectly clear, the IRS has always taxed citizens, as well as non-citizen residents, and FATCA does not effect any change in the tax liability of its citizens and other U.S. persons. Rather, FATCA attempts to impose significant due diligence and reporting obligations upon FFIs to determine whether they have account holders that qualify as U.S. persons. <sup>n146</sup> Therefore, FFIs not otherwise subject to FATCA, may fall under its rule simply because one or more accidental or incidental U.S. citizens--who themselves may be unaware of such status--are account holders at their institution. Fearing the penalties they may face, FFIs are limiting or terminating the services they are willing to offer to U.S. citizens. <sup>n147</sup> Some U.S. expatriates have received notice from their respective FFIs informing them that their accounts will be closed due to "regulatory issues." <sup>n148</sup> Though not the initial primary target of FATCA, the millions of Americans living abroad are now faced with the decision of whether or not to remain citizens of the United States. <sup>n149</sup>

Renunciation of U.S. citizenship is an extreme measure and "the most unequivocal way in which a person can manifest an intention to relinquish U.S. citizenship." <sup>n150</sup> Yet, in 2013, nearly 3,000 Americans made the decision to turn in their passports and leave their American citizenship behind, <sup>n151</sup> a number up 221% from the previous year. <sup>n152</sup> By the end of [\*355] 2014, 3,415 former U.S. citizens had effectively lost their citizenship,

<sup>n153</sup> and a survey conducted by the deVere Group revealed that 5.5 million expatriates are contemplating passport relinquishment. <sup>n154</sup> The cost of renunciation is high, <sup>n155</sup> but clearly some have determined that a U.S. passport is not worth the accompanying hassle.

## B. Not Just Financial Institutions and American Expatriates

### 1. The British

While we can understand why FFIs must agree to whatever the IRS demands to avoid the thirty percent withholding, customers of FFIs who have no U.S. connection whatsoever find themselves required to complete IRS Form W-8 BEN. <sup>n156</sup> Wait! "Under penalties of perjury" those without any U.S. connection must prove they are not U.S. persons? Does this take extraterritoriality to a new level? Was Congress so crazy that it not only imposed significant obligations on tens of thousands of FFIs, but it also requires perhaps hundreds of millions of their customers to prove they are not subject to U.S. tax rules?

JP Morgan Asset Management in London sent 125,000 requests for completion of the W-8BEN to its clients. <sup>n157</sup> This form, entitled "Certificate of Foreign Status of Beneficial Owner for U.S. Tax Withholding and Reporting (Individuals)," requests that clients certify that they are not a U.S. citizen or a U.S. person. <sup>n158</sup> The form begins with the following typical user-friendly instructions:

[\*356] Do NOT use this form if:  
 You are NOT an individual;  
 You are a U.S. citizen or other U.S. person, including a resident alien individual;  
 You are a beneficial owner claiming that income is effectively connected with the conduct of trade or business in the U.S.;  
 You are a beneficial owner who is receiving compensation for personal services performed in the United States;  
 A person acting as an intermediary. <sup>n159</sup>

Part I of this form seeks the name and address of the individual. Part II, however, is entitled "Claim of Tax Treaty Benefits (for Chapter 3 purposes only)." Part II begins: "I certify that the beneficial owner is a resident of within the meaning of the income tax treaty between the U.S. and that country." <sup>n160</sup>

While the IRS certainly has to be thorough and precise in implementing FATCA, was the IRS reasonable in assuming that an individual completing a W-8BEN has read Chapter 3 of the relevant tax treaty or suspecting that such person had a clue there was such a treaty that applied to them? It is easy to imagine the reaction of an American citizen receiving a similar notice from Russian, Chinese, or Zimbabwean tax authorities.

London's mayor, Boris Johnson, has strongly criticized the global tax regime of the United States, calling the practice of taxing citizens on worldwide income "outrageous."<sup>n161</sup> Born in New York, and thus a U.S. citizen, Johnson faces U.S. tax liability on the sale of his U.K. home.<sup>n162</sup> He has refused to pay the tax, joining the many expatriates and accidental Americans throughout the world who are voicing their anger at the law, calling it a "terrible doctrine of taxation."<sup>n163</sup>

#### [\*357] 2. The Canadians

There are many Americans, or "U.S. persons" for IRS purposes, living in Canada. Focusing on FATCA in Canada is useful because two Canadians have filed a claim<sup>n164</sup> against the Canadian government asserting that the IGA entered into by the United States and Canada<sup>n165</sup> to implement FATCA violates several provisions of the Constitution of Canada,<sup>n166</sup> including Canada's Charter of Rights and Freedoms,<sup>n167</sup> the Income Tax Act of Canada,<sup>n168</sup> and the Canada-U.S. Tax Treaty.<sup>n169</sup> The agreement requires Canadian FFIs to hand over information on qualifying accounts to Canadian tax authorities, who will in turn submit the information to the IRS.<sup>n170</sup>

This litigation is being crowd funded by the "Alliance for the Defence of Canadian Sovereignty."<sup>n171</sup> In a press release the group asserts that FACTA " . . . makes it mandatory for the Government of Canada to discriminate against Canadian citizens and residents, whom the U.S. deems to be 'U.S. persons,' by turning over their private bank account information to the U.S. IRS."<sup>n172</sup> The two plaintiffs were born in the United States.<sup>n173</sup> Each left the United States at the age of five and neither has returned [\*358] since.<sup>n174</sup> Neither has a U.S. passport and neither has ever filed a tax return with the IRS.<sup>n175</sup> One of the plaintiffs was born in the United States but is a Canadian resident.<sup>n176</sup> The other was married to a Canadian citizen and owned a graphic design company in Canada.<sup>n177</sup> One of the plaintiffs states she has no accounts in a Canadian financial institution in excess of \$ 50,000, ("Low Value Account" under FATCA).<sup>n178</sup> The other has at least one account that exceeds \$ 50,000 but is less than \$ 1,000,000 (a "Lower Value Account" under FATCA).<sup>n179</sup> The claim states that by agreeing with the United States in its Model 1 IGA to collect and report to the IRS personal and financial information on Canadian account holders, Canada has violated Canadian law.<sup>n180</sup>

Specifically, the claim asserts that the Model 1 IGA entered into by Canada and the United States violates the Canadian Charter of Rights and Freedoms, a document akin to the Fourth and Fifth Amendments of the U.S. Constitution, which grants the "right to life, liberty, security of person; security against unreasonable search and seizure; [and] equal protection of law without discrimination."<sup>n181</sup> Additionally, there is concern that the agreement disregards the principle of maintaining sovereignty.<sup>n182</sup> The claimants and many other Americans living in Canada feel "entrapped in U.S. citizenship" and that their rights are being violated as they are "branded" potential tax evaders.<sup>n183</sup>

While the claimants are being applauded and supported by their fellow Canadian-American FATCA haters, there may very well be a harsh reality waiting on the other side of the lawsuit. A successful lawsuit will not make FATCA go away. It will not make the fact that these Canadian-Americans have U.S. tax liability go away.<sup>n184</sup> And it will not return them to the [\*359] blissful ignorance of a "pre-FATCA world."<sup>n185</sup> The U.S.-Canadian IGA, in actuality, protects the plaintiffs and others from the full effects of FATCA.<sup>n186</sup> If found invalid under the Canadian Constitution, the IGA will disappear, but Canadian financial institutions are not about to ignore FATCA and miss out on U.S. capital markets; most will likely turn around and hand the information directly to the IRS, rather than through the Canadian Government.<sup>n187</sup> So while the plaintiffs can refuse to sign a waiver allowing release of their information, they will probably find themselves without a bank willing to work with "recalcitrant" account holders.<sup>n188</sup>

#### VI. WHAT HAPPENS Now? FATCA AND THE FUTURE OF INFORMATION EXCHANGE

FATCA has gone where no U.S. law has gone before. It has brought on a new age of international cooperation (read: coercion) in tax enforcement and information exchange, and while its objectives may be the same as prior initiatives,<sup>n189</sup> the impact of FATCA will reach well beyond the offshore accounts of U.S. persons and into the dark corners of the banking world. Initial projections that the firm hand of FATCA would push other countries to create an alternative market completely void of U.S. portfolios have fizzled out.<sup>n190</sup> The "Age of FATCA" is upon us, changing the international banking scene for good.<sup>n191</sup>

#### [\*360] A. The Erosion of Bank Secrecy Laws



Tax havens are likely a thing of the past, at least for Americans. <sup>n192</sup> Bank secrecy laws are being eroded at the aggressive hand of FATCA and hidden offshore bank accounts may soon be something we read of only in history books. As discussed above, FATCA requires FFIs to release information regarding U.S. persons who hold accounts with their institutions. <sup>n193</sup> Failure to comply with FATCA by releasing the information or by entering an IGA with the Department of Treasury results in a thirty-percent penalty withholding on all U.S. source payments. <sup>n194</sup> Even if the FFI refuses to release the requested information, under the majority of IGAs the IRS can issue a "request for administrative assistance," and force compliance through the FFI's home government. <sup>n195</sup>

What is the effect of foreign bank secrecy laws? Are FFIs expected to bow down to the long arm of the IRS, a branch of a government with no jurisdictional nexus to the institution, under threat of potential criminal sanctions? As one example, Article 4 of the current IGA between the United States and Switzerland contains an enabling clause, which states that, "Swiss Financial Institutions that, pursuant to applicable U.S. Treasury Regulations, enter into an FFI Agreement with the IRS or register with the IRS as deemed-compliant FFIs, are authorized and therefore not liable to any penalty according to Article 271 of the Swiss Criminal Code." <sup>n196</sup> The Swiss Financial Market Supervisory Authority (FINMA) has even warned FFIs to comply with FATCA and "not to engage in any action to get around FATCA." <sup>n197</sup>

Switzerland recently announced its intention to negotiate a new IGA based on the Model 1 agreement to replace the current U.S.-Switzerland Model 2 IGA signed in 2013. <sup>n198</sup> It is unclear what the reason or motive is [\*361] behind negotiating a Model 1 IGA, but the switch would be consistent with the trend among other nations opting for Model 1 agreements. <sup>n199</sup> The switch poses the question of what impact such an agreement will have on Swiss criminal law, as a Model 1 IGA contemplates the automatic exchange of information between the United States and the foreign signing jurisdiction. <sup>n200</sup> Currently, the release of account holder information, without consent, by Swiss financial institutions is punishable under both civil and criminal law, but punishment may be absolved by either statutory provision or court order in specific criminal investigations. <sup>n201</sup> In effect, the Model 1 IGA will override Swiss civil and criminal law by authorizing the release of domestically protected information. The specifics of the interplay between Swiss criminal law and a Model 1 IGA are beyond the scope of this article, but the fact that a nation historically recognized for its privacy laws is willing to reform, and make major exceptions to its criminal laws speaks volumes about the extraterritorial impact of FACTA.

Lebanon, once deemed the "Switzerland of the Middle East" for its similarly protective bank secrecy laws, at first seemed to stand strong against the pressures of FATCA, the one jurisdiction to put its customers first and maintain the integrity of its bank secrecy laws. <sup>n202</sup> The governor of Lebanon's Central Bank even went as far as to recommend that banks remain non-compliant and accept the penalty for failure to release the information. <sup>n203</sup> But Lebanon's national currency is closely tied to the U.S. dollar. <sup>n204</sup> Further, Lebanon is a nation where 75% of transactions are [\*362] conducted in U.S. dollars. <sup>n205</sup> Thus, resisting FATCA is impractical. While Lebanon and the IRS have not entered into an IGA, over one hundred Lebanese FFIs have registered to comply with FATCA. <sup>n206</sup> Compliant banks will require U.S. account holders to sign a bank secrecy waiver and a withholding certificate, and are prepared to subject recalcitrant account holders to withholding or account closure. <sup>n207</sup>

Despite long histories of strong bank secrecy laws designed to protect the privacy of account holders, the traditional tax havens of the world are effectively eliminating bank secrecy when it comes to American account holders. FATCA is essentially a demand that the banks of the world throw secrecy practices out the window, <sup>n208</sup> and despite the steep cost of compliance, <sup>n209</sup> FFIs are complying. Facing the 30% withholding penalty for non-compliance, FFIs risk subjecting U.S. account holder income to a higher withholding percentage than might be imposed if the income was properly reported to the IRS by the account holder. <sup>n210</sup> At the cost of losing customers, FFIs are seemingly willing to strip U.S. persons of their privacy rights under domestic law in order to "circumvent . . . privacy laws without creating a conflict of law" and "continue to enjoy favorable tax treatment by the U.S." <sup>n211</sup>

## B. Global Information Exchange

It is difficult to imagine a situation where the United States would get away with something so internationally invasive and draconian as FATCA without the rest of the world wanting to reap the benefits as well. The United States is not the only country in the world with a tax evasion [\*363] issue. <sup>n212</sup> It is expected that other jurisdictions will follow suit. The appeal of international information exchange has had a strong pull on nations whose citizens have historically found refuge in the banking secrecy meccas of the world. As FATCA comes into effect and the benefits more fully realized, new programs and initiatives are likely to develop in other nations.

## 1. Son of FATCA

The network of IGAs that the IRS has signed with other jurisdictions has created a means for the IRS to collect information necessary to force tax compliance among offshore account holders.<sup>n213</sup> The United Kingdom became the first nation to enter an IGA with the United States in September 2012.<sup>n214</sup> Shortly after signing the agreement, the United Kingdom announced that the U.S.-U.K. FATCA agreement would serve as a model for agreements to be entered into between the United Kingdom and its Crown Dependencies and Overseas Territories.<sup>n215</sup> This FACTA-like program, colloquially referred to as the "son of FATCA," similarly requires the automatic reporting by financial institutions of U.K. resident account holder information.<sup>n216</sup> Taking a step away from the traditional residency-based [\*364] taxing regime,<sup>n217</sup> the law applies to "all funds located in U.K. IGA jurisdictions regardless of where the managers of those funds are located or whether such funds . . . receive U.K. source income."<sup>n218</sup> A distinct difference is that the U.K. FATCA agreements do not impose a withholding penalty for failure to comply, an apparently unnecessary component given the "sufficient political power" of the United Kingdom over its Crown Dependencies and Overseas Territories.<sup>n219</sup>

## 2. Global Standard for Automatic Exchange of Financial Account Information

The United Kingdom continued to be a proactive player in the development of global information sharing by heading a pilot program for automatic exchange of financial information with the "Western European G5"--United Kingdom, Italy, Germany, France, and Spain.<sup>n220</sup> Riding the tail of FATCA, the program grew rapidly and was adopted by the Organization for Economic Cooperation and Development (OECD), which has since developed a "common reporting standard" (Standard) aimed at "prevent[ing] the development of numerous competing standards for information exchange, and in doing so minimise potential costs and administrative burden for the financial sector."<sup>n221</sup> As of October 29, 2014, fifty-one jurisdictions had endorsed the standard by signing a multilateral competent authority agreement.<sup>n222</sup>

[\*365] The Standard contains two elements: (1) a common reporting standard (CRS) and (2) a model competent authority agreement (Model CAA).<sup>n223</sup> The CRS, to be implemented into domestic law by each subscribing jurisdiction, provides "due diligence and reporting procedures" for financial institutions.<sup>n224</sup> It requires financial institutions<sup>n225</sup> to report account<sup>n226</sup> information<sup>n227</sup> regarding account holders who are tax residents of a participating jurisdiction to authorities in those respective jurisdictions.<sup>n228</sup> The CRS is closely modeled after and draws from the FATCA IGA, with a particular focus on the concept of citizenship-based taxation--an approach long employed by the United States.<sup>n229</sup> The common standard is aimed at achieving the effective and efficient global exchange of information while lowering the cost of compliance.<sup>n230</sup>

The OECD provides what it believes to be factors necessary for a successful global information exchange regime:

- (1) a common standard on information reporting, due diligence and exchange of information;
- (2) a legal and operational basis for the exchange of information; and
- (3) common or compatible technical solutions.<sup>n231</sup>

Of particular interest is the legal basis for the exchange of information. The OECD suggests that the Multilateral Convention on Mutual Administrative [\*366] Assistance in Tax Matters can serve as an effective and efficient basis for the multilateral exchange of information, providing strict confidentiality and information-use rules while allowing automatic information exchange.<sup>n232</sup> The convention requires parties to enter a separate agreement, but agreements may be entered into by more than two parties, creating a single agreement with global reach.<sup>n233</sup>

With the emergence of the CRS, U.S. citizens may not be the only ones missing out on the advantage of offshore accounts. The OECD has taken FATCA and created a global standard for information exchange that is being rapidly adopted by many nations around the world.<sup>n234</sup> With this standard, the beginning of the end of tax avoidance is upon us. The days of secret financial accounts are numbered, and not just for Americans.

## C. Decline of the Dollar

FATCA reporting requirements at first appear relatively routine and hardly conjure up concerns for a "financial Armageddon."<sup>n235</sup> But it does warrant a moment of discussion when "trillions of dollars in cross-border investing" will suddenly be subject to heightened scrutiny.<sup>n236</sup> While July 1, 2014 did not bring a complete and automatic collapse of the dollar, FATCA's long-term impact on the dollar as the global standard for economic transactions looks grim by most accounts.<sup>n237</sup> Some looking to avoid the headache of FATCA will likely take their investments to other countries, while

international brokers, banks, and insurance companies will focus their efforts on less regulated markets abroad. <sup>n238</sup> There is a legitimate concern that financial institutions will "opt out of the dollar-denominated transactions or not accept U.S. accounts" as a result of FATCA and its extensive requirements. <sup>n239</sup>

[\*367] The growing trend of independence from the dollar-dominated global economy has been further bolstered by the creation of the Asian Infrastructure Investment Bank (AIIB), a \$ 100 billion bank backed by China and India. <sup>n240</sup> The AIIB is a challenge to the prominent World Bank and Asian Development Bank (ADB), and the "first serious institutional challenge to the global economic order." <sup>n241</sup> To no one's surprise, the United States has voiced concerns and opposition regarding the new bank, primarily that it is unlikely that the bank will be able to "promote good environmental, procurement and human rights standards" as compared to the World Bank and ADB. <sup>n242</sup> To hear China tell it, the United States' opposition is merely "an attempt to contain the global rise of China and its ambition to remain the dominant power of Asia." <sup>n243</sup> Regardless of the basis for concern, the reality is that as the United States continues to impose its regulations on the rest of the world as it has done with FATCA, the reaction will continue to be the development of strategies to replace the dollar as the de facto currency of the world. <sup>n244</sup>

## VII. CONCLUSION

The U.S. Government has taken a bold step with FATCA. The legislation is by far the most egregious example of extraterritorial overreach in history and has been harshly criticized by individuals and entities alike. Yet, the initial anger expressed by liable taxpayers and financial institutions throughout the world has resulted largely in submission to regulation, even  $\$ = P$  [\*368] absent jurisdictional authority. While the goal of FATCA is to increase tax compliance among American foreign account holders, its effects have been, and will continue to be, felt on a global level. As evidenced by the emergence of several copycat initiatives, FATCA's impact on global information exchange has the potential to foster international collaboration on tax matters and substantially reduce tax evasion. Offshore accounts have long been a thorn in the side for the IRS and other tax authorities that fear they are missing out on billions, and FATCA may in fact be one answer to their problems.

### Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law  
Criminal Offenses  
Money Laundering  
Communications Law  
Related Legal Issues  
Taxation  
Tax Law  
International Taxes  
General Overview

### FOOTNOTES:

n1 FATCA Frequently Asked Questions (FAQs), DELOITTE (2011), available at [http://www.deloitte.com/assets/dcom-unitedstates/local%20assets/documents/tax/us\\_tax\\_fatca\\_faqs\\_061711.pdf](http://www.deloitte.com/assets/dcom-unitedstates/local%20assets/documents/tax/us_tax_fatca_faqs_061711.pdf) (last visited Feb. 4, 2015).

n2 Doreen Carvajal & Raphael Minder, A Whistle-Blower Who Can Name Names of Swiss Bank Account Holders, N.Y. TIMES (Aug. 8, 2013), <http://www.nytimes.com/2013/08/09/business/global/a-whistle-blower-who-can-name-names-of-swiss-bank-account-holders.html?pagewanted=all&pagewanted=print> (last visited Feb. 4, 2015).

n3 Id.

n4 Tony Paterson, Mysterious death in Jakarta hotel of second man exposed on 'Lagarde list', INDEPENDENT (Oct. 10, 2012), <http://www.independent.co.uk/news/world/europe/mysterious-death-in-jakarta-hotel-of-second-man-exposed-on-lagarde-list-8204537.html> (last visited Feb. 4, 2015).

n5 Foreign Account Tax Compliance Act (FATCA), U.S. DEPT. OF TREASURY (Dec. 8, 2014) <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> (last visited Jan. 23, 2015).

n6 FATCA FAQs, *supra* note 1.

n7 Tax Quotes, IRS, <http://www.irs.gov/uac/Tax-Quotes> (last visited Feb. 4, 2015).

n8 *Id.* (Who knew the IRS had a sense of humor?).

n9 Laura Sanders, Offshore Accounts: No Place to Hide?, WALL ST. J. (Sept. 20, 2013), available at <http://online.wsj.com/articles/SB10001424127887324807704579085511331606786> (last visited Jan. 23, 2015).

n10 *Id.*

n11 The Price of Offshore, Revisited - supplementary notes June 2014, TAX JUSTICE NETWORK (June 5, 2014), available at <http://www.taxjustice.net/wp-content/uploads/2014/06/The-Price-of-Offshore-Revisited-notes-2014.pdf> (last visited Feb. 4, 2015).

n12 *Id.* at 2.

n13 U.S. Senate Permanent Subcommittee on Investigations, Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts, HOMELAND SEC. & GOVERNMENTAL AFFAIRS PERMANENT SUBCOMM. ON INVESTIGATIONS 9 (Feb. 26, 2014), available at <http://www.hsgac.senate.gov/subcommittees/investigations/hearings/offshore-tax-evasion-the-effort-to-collect-unpaid-taxes-on-billions-in-hidden-offshore-accounts> (last visited Feb. 5, 2015) [hereinafter Offshore Tax Evasion]. This estimate is for taxes avoided by individuals. It is not an estimate of offshore assets, but of lost tax revenue to the IRS.

n14 U.S. Senate Permanent Subcommittee on Investigations, Tax Haven Banks and U.S. Tax Compliance, HOMELAND SEC. & GOVERNMENTAL AFFAIRS PERMANENT SUBCOMM. ON INVESTIGATIONS 1 (2008), available at <http://www.hsgac.senate.gov/imo/media/doc/071708PSIReport.pdf> (last visited Feb. 5, 2015).

n15 Offshore Tax Evasion, *supra* note 13.

n16 It is interesting to consider why Congress determined to add perhaps \$ 500 to \$ 700 million to annual tax collections through FATCA when there are much larger sources of offshore tax which might have been addressed and which would potentially tap a much greater annual tax stream.

n17 FATCA, supra note 5.

n18 See 26 U.S.C. § 1471 (2012).

n19 Around \$ 2.1 trillion in offshore wealth sits in Swiss banks. Swiss Banking Secrecy: Don't ask, won't tell, *ECONOMIST* (Feb. 11, 2012), available at <http://www.economist.com/node/21547229> (last visited Jan. 23, 2015).

n20 Offshore Tax Evasion, supra note 13, at 30.

n21 *Id.*

n22 Financial Security Index, TAX JUSTICE NETWORK (2013), <http://www.financialsecrecyindex.com/introduction/fsi-2013-results> (last visited Feb. 7, 2013). The Tax Justice Network ranked Switzerland first out of eighty-two jurisdictions on its Financial Secrecy Index.

n23 Maurice Aubert, The Limits of Swiss Banking under Domestic and International Law, 2 *INT'L. TAX & BUS. L.* 273, 275 (1984) ("[B]anks must not disclose to third parties, whether private persons or government authorities, information subject to secrecy.").

n24 *Id.*

n25 James S. Henry, The Price of Offshore Revisited\*, TAX JUSTICE NETWORK 10 (2012), available at [http://www.taxjustice.net/cms/upload/pdf/Price\\_of\\_Offshore\\_Revisited\\_120722.pdf](http://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf) (last visited Feb. 4, 2015).

n26 See Nick Giambruno, 10 Reasons Why You Need an Offshore Bank Account, *INT'L. MAN.*, <http://www.internationalman.com/articles/10-reasons-why-you-need-an-offshore-bank-account> (last visited Jan. 23, 2015).

n27 See 26 U.S.C. § 1471; 26 I.R.C. § 61(a) (2012) ("[I]ncome from whatever source derived"); *Cook v. Tait*, 265 U.S. 47, 56 (1924) (upholding constitutionality of imposing taxes on income outside the United States).

n28 Third Party Reporting Information Center--Information Documents, IRS (Feb. 5, 2015), <http://www.irs.gov/Tax-Professionals/Third-Party-Reporting-Information-Center> (last visited Feb. 5, 2015).

n29 See generally 78 Fed. Reg. 5873, 5874 (Feb. 5, 2013).

n30 *Id.* at 5877.

n31 Offshore Compliance Initiative, U.S. DEPT. OF JUSTICE, [http://www.justice.gov/tax/offshore\\_compliance\\_initiative.htm](http://www.justice.gov/tax/offshore_compliance_initiative.htm) (last visited Feb. 5, 2015).

n32 *Id.*

n33 31 U.S.C. § 5314(a).

n34 *Id.*

n35 *Id.*

n36 See Publication, Internal Revenue Service U.S. DEPT. OF TREASURY, 4261 (REV. 2-2014), available at [www.irs.gov/pub/irs-pdf/p4261.pdf](http://www.irs.gov/pub/irs-pdf/p4261.pdf) (last visited Feb. 5, 2015).

n37 See Kenneth Thomas, A Big IRS Job and Fewer People to Do It, U.S. NEWS & WORLD REP. (May 30, 2013), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/05/30/staff-shortage-threatens-irs-performance> (last visited Feb. 5, 2015).

n38 Michael S. Kirsch, Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice, 16 FLA. TAX REV. 117, 147 (2014). Because the FBAR is to be filed each year, civil and criminal penalties for failing to file FBARS may easily exceed the amount in the account. Penalties under prior amnesty programs disproportionately hit the smaller accounts. Robert W. Wood, New IRS Offshore Amnesty Announced: Third Time's a Charm, FORBES.COM (Jan. 9, 2012), available at <http://www.forbes.com/sites/robertwood/2012/01/09/new-irs-offshore-amnesty-announced-third-times-a-charm/> (last visited Jan. 23, 2015).

n39 Tracy A. Kaye, Innovations in the War on Tax Evasion, 2014 BYU L. REV. 363, 367 (2014).

n40 Melissa A. Dizdarevic, The FATCA Provisions of the Hire Act: Boldly Going Where No Withholding Has Gone Before, 79 FORDHAM L. REV. 2967 (2011).

n41 26 C.F.R. § 1.441-1 (2003).

n42 Offshore Tax Evasion, *supra* note 13, at 10. Participation in the QI program required foreign financial institutions to enter into a standardized agreement with the IRS, agreeing to comply with withholding obligations of U.S. tax law and implement "Know-Your-Customer" policies to identify account holders with U.S. source income.

n43 *Id.* at 13.

U.S. source income refers to income that originates in the United States, such as dividends paid on U.S. stock; capital gains paid on sales of U.S. stock or real estate; royalties paid on U.S. assets; rent paid on U.S. property; interest paid on U.S. deposits; and other types of fixed, determinable, annual, or periodic income.

n44 Joshua D. Blank & Ruth Mason, U.S. Nat'l. Rep. on Exchange of Information 2 (Law & Economics Research Paper Series, Working Paper No. 14-22, 2014), available at [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2481080](http://papers.ssm.com/sol3/papers.cfm?abstract_id=2481080) (last visited Feb. 5, 2015).

n45 Offshore Tax Evasion, *supra* note 13, at 16.

[T]he banks . . . helped some U.S. clients engage in the massive sell-off of their U.S. securities; helped others establish offshore structures to assume nominal ownership of their accounts and treated them as non-U.S. accounts outside the Q.I. reporting regime; and helped many U.S. clients maintain undeclared accounts despite evidence they were hiding assets from the IRS.

n46 Blank & Mason, *supra* note 44, at 2.

n47 Id.

n48 Id.

n49 Id.

n50 Erik Larson & Carlyn Kolker, UBS Tax Fraud Case Whistleblower Gets 40-Month Prison Sentence, BLOOMBERG (Aug. 21, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid--aqRUrnD2LzH.E> (last visited Feb. 5, 2015) (For his role at UBS Birkenfeld served more than two years in prison. Birkenfeld's imprisonment has been widely criticized by the National Whistleblowers' Center. His request for leniency was supported by Senator Carl Levin, Chairman of the Senate Permanent Subcommittee on Investigations who has played a key role in seeking a solution to the failure of some to report their offshore wealth, as well representatives of the Securities and Exchange Commission and the IRS). Notwithstanding this example of bureaucratic hubris, shortly after his parole, the IRS paid Birkenfeld \$ 104 million as his (taxable) whistleblower award. Laura Saunders & Robin Sidel, Whistleblower Gets \$ 104 Million, WALL ST. J. (Sept. 11, 2012), available at <http://online.wsj.com/news/articles/SB10000872396390444017504577645412614237708> (last visited Feb. 5, 2015).

n51 Offshore Tax Evasion, *supra* note 13, at 19-21.

n52 Id.

n53 Id. at 19.

n54 Id. at 19-20 (The penalty rate rose from 20% of the highest aggregate value of the financial account in 2009 to 25% and 27.5% in 2011 and 2012, respectively).

n55 IRS Says Offshore Effort Tops \$ 5 Billion, Announces New Details on the Voluntary Disclosure Program and Closing of Offshore Loophole, IRS (June 26, 2012), <http://www.irs.gov/uac/IRS-Says-Offshore-Effort-Tops-S5-Billion,-Announces-New-Details-on-the-Voluntary-Disclosure-Program-and-Closing-of-Offshore-Loophole> (last visited Jan. 23, 2015).

n56 Offshore Tax Evasion, *supra* note 13, at 19; see also Blank & Mason, *supra* note 44 at, 2.

n57 Helen Burggraf, IRS Watchdog Says Agency's Offshore Voluntary Disclosure Schemes Too Harsh, INT'L ADVISOR (Jan. 12, 2014), <http://www.international-adviser.com/news/tax---regulation/irs-watchdog-says-its-offshore-voluntary> (last visited Jan. 29, 2015). In 2012,



the IRS received 807,040 FBAR filings, far below the reported 7.2 million U.S. citizens living abroad and other U.S. residents required to file FBARs.

n58 Blank & Mason, *supra* note 44, at 3.

n59 *Flora v. U.S.*, 362 U.S. 145, 176 (1960).

n60 Third Party Reporting Information Center, *supra* note 28.

n61 Tax Information Exchange Agreements (TIEAs), OECD.ORG, <http://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm> (last visited Jan. 29, 2015).

n62 Citizens for Tax Justice Staff, Chairman of Senate Finance and House Ways and Means Committees Introduce Watered-Down Legislation to Address Tax Havens, TAX JUSTICE BLOG (Oct. 29, 2009), [http://www.taxjusticeblog.Org/archive/2009/10/chairmen\\_of\\_senate\\_finance\\_and.php#.VI8QqVbVvBc](http://www.taxjusticeblog.Org/archive/2009/10/chairmen_of_senate_finance_and.php#.VI8QqVbVvBc) (last visited Jan. 23, 2015).

n63 *Id.* Note the irony/hypocrisy of such a bill being sponsored by Congressman Rangel, whose offshore and domestic tax problems have been clearly documented. See, e.g., James King, Charlie Rangel, Legendary Tax Cheat, Lectures Mitt Romney on Paying Taxes, VILLAGE VOICE BLOG (Sept. 18, 2012), [http://blogs.villagevoice.com/runninscared/2012/09/charlie\\_rangel\\_8.php](http://blogs.villagevoice.com/runninscared/2012/09/charlie_rangel_8.php) (last visited Jan. 23, 2015); see also Morality and Charlie Rangel's Taxes," WALL ST. J. (July 27, 2009), <http://online.wsj.com/news/articles/SB10001424052970203946904574300013592601036> (last visited Jan. 23, 2015).

n64 HIRE Act: Questions and Answers for Employers, IRS (Oct. 14, 2014), <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/HIRE-Act-Questions-and-Answers-for-Employers> (last visited Feb. 4, 2015).

n65 The economics of this is indefensible, but it is our Congress. See Letter from Douglas W. Elmendorf, Director of Congressional Budget Office, to Harry Reid, Senate Majority Leader (Feb. 18, 2010), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/112xx/doc11230/hr2847.pdf> (last visited Feb. 4, 2015). The CBO letter describing the impact of Hire Act shows this offset growing gradually from \$ 343 million to \$ 1.048 billion in 2017. Thereafter, the offset amazingly jumps by \$ 1.7 billion to \$ 2.855 billion in 2018 and by more than \$ 1.9 billion to \$ 4.812 billion in 2019.

n66 FATCA FAQs, *supra* note 1.

## 21 ILSA J Int'l &amp; Comp L 334, \*

n67 No calls for Congressional accuracy or honesty so this so called "offset" merits no further analysis. Letter from Douglas W. Elmendorf, *supra* note 65.

n68 78 Fed. Reg. at 5873.

n69 See *id.*

n70 26 U.S.C. § 1471(d)(4) ("Foreign financial institution: The term "foreign financial institution" means any financial institution which is a foreign entity. Except as otherwise provided by the Secretary, such term shall not include a financial institution which is organized under the laws of any possession of the U.S.") (emphasis added).

n71 *Id.* at § 1471 (d)(5). Except as otherwise provided by the Secretary, the term "financial institution" means any entity that:

- (A) accepts deposits in the ordinary course of a banking or similar business;
- (B) as a substantial portion of its business, holds financial assets for the account of others; or
- (C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interests, commodities (as defined in section 475(e)(2)), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.

n72 78 Fed. Reg. at 5874.

n73 Agreement between the Government of the United States of America and the Government of [FATCA Partner] to Improve International Tax Compliance and to Implement FATCA, U.S. DEPT. OF TREASURY (June 6, 2014), available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-6-6-14.pdf> (last visited Feb. 5, 2015) ("U.S. Reportable Accounts" is defined as "a Financial Account maintained by a Reporting [FATCA Partner] Financial Institution and held by one or more Specified U.S. Persons or by a Non-U.S. Entity with one or more Controlling Persons that is a Specified U.S. Person.").

n74 78 Fed. Reg. at 5875.

n75 *Id.* at 5876 ("The final regulations exempt from review entirely any preexisting accounts held by individuals with a balance or value of \$ 50,000 or less.").

n76 *Id.* at 5875 (see Part III.A).

n77 26 U.S.C. § 1471(b)(1)(A)-(B); see also Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, IRS § III (Apr. 8, 2013), available at [http://www.irs.gov/irb/2013-15\\_IRB/ar16.html](http://www.irs.gov/irb/2013-15_IRB/ar16.html) (last visited Feb. 6, 2015). "Section 1471(b)(1)(A) and (B) requires an FFI that enters into an FFI agreement (a participating FFI) to identify its U.S. accounts and comply with verification and due diligence procedures prescribed by the Secretary."

n78 Annex I: Due Diligence Obligations for Identifying and Reporting on U.S. Reportable Accounts and on Payments to Certain Nonparticipating Financial Institutions, U.S. DEPT. OF TREASURY (Nov. 4, 2013), available at <http://www.D.gov/resource-center/tax-policy/treaties/Documents/FATCA-Annex-I-to-Model-1-Agreement-11-4-13.pdf> (last visited Feb. 5, 2015) [hereinafter Annex I], Under Model 1 IGA, a reporting FFI must conduct an electronic records search of "lower value accounts" (accounts with a balance or value greater than \$ 50,000 but less than \$ 1,000,000) for any U.S. indicia including U.S. citizenship or residency; unambiguous indication of U.S. birth place; current U.S. mailing or residence address; current U.S. telephone number; instructions to transfer funds to an account maintained in the U.S.; power of attorney or signatory authority granted to person with a U.S. address; or "in-care-of" or "hold mail" address that is the sole address on file for the account holder. In addition to the electronic records search, a paper record search must also be conducted on "higher value accounts" (accounts with a balance or value greater than \$ 1,000,000) if the electronic records search does not capture the account holder's nationality or residence status; the account holder's residence address and mailing address currently on file; the account holder's current telephone number on file; whether there are standing instructions to transfer funds in the account to another account; whether there is a current "in-care-of" or "hold mail" address; and whether there is any power of attorney or signatory power for the account.

n79 *Id.* at 1.

n80 US CONST. amend. XIV, § 1 (Each person born in the United States is by default a U.S. citizen pursuant to Section 1 of the 14th Amendment to the U.S. Constitution); 8 U.S.C. § 1401(c) (2012) (A person born outside of the United States who has two parents who are U.S. citizens, one of whom is a resident of the United States, is a citizen of the United States); see also 8 U.S.C. § 1401(d)

[A] person born outside of the U.S. and its outlying possessions of parents one of whom is a citizen of the U.S. who has been physically present in the U.S. or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the U.S.;

8 U.S.C. § 1401(e)

[A] person born in an outlying possession of the U.S. of parents one of whom is a citizen of the U.S. who has been physically present in the U.S. or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person.

n81 Supplemental Notice to Notice 2010-60 Providing Further Guidance and Requesting Comments on Certain Priority Issues Under Chapter 4 of Subtitle A of the Code, IRS 10 (May 9, 2011), available at <http://www.irs.gov/pub/irs-drop/n-11-34.pdf> (last visited Feb. 4, 2015).

n82 Robert W. Wood, FATCA Registration Goes Online, FORBES.COM (Aug. 23, 2013), available at <http://www.forbes.com/sites/robertwood/2013/08/23/fatca-registration-goes-online/> (last visited Jan. 23, 2015).

n83 *Id.*

n84 Andrew F. Quinlan, FATCA and US Fiscal Imperialism Threaten To Sink Global Economy, THE DAILY CALLER (Mar. 19, 2013), available at <http://dailycaller.com/2013/03/19/fatca-and-us-fiscal-imperialism-threaten-to-sink-global-economy/2/> (last visited Feb. 4, 2015).

n85 26 U.S.C. §§ 1471-72 (2012).

n86 See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

n87 15 U.S.C. § 78dd-1(g)(2) (2012) ("[T]he term 'U.S. person' means a national of the U.S. . . . or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the U.S. or any State, territory, possession, or commonwealth of the U.S., or any political subdivision thereof.").

n88 Foreign Corrupt Practices Act: An Overview, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/criminal/ffaud/fcpa/> (last visited Jan. 23, 2015).

n89 Mark Pieth & Huguette Labelle, Viewpoint: Making Sure that Bribes Don't Pay, THOMSON REUTERS FOUNDATION (Dec. 17, 2012), <http://www.trust.org/item/?map=viewpoint-making-sure-that-bribes-dont-pay> (last visited Jan. 23, 2015) ("All 40 parties have passed laws making foreign bribery a crime.").

n90 See, e.g., Matthew W. Muma, Toward Greater Guidance: Reforming the Definitions Of the Foreign Corrupt Practices Act, 112 MICH. L. REV. 1337, 1338 (2014).

n91 *U.S. v. Castle*, 925 F.2d 831, 836 (5th Cir. 1991) (confirming that the FCPA does not permit prosecution of foreign officials, even for conspiracy to violate the FCPA).

n92 15 U.S.C. § 78m(h)(1) (2012); 15 U.S.C. § 78dd-1(g)(2) (2012); 15 U.S.C. § 78dd-3 (f)(1).

n93 15 U.S.C. § 78dd-1(g)(2).

n94 26 U.S.C. § 1471(d).

n95 The Supreme Court has repeatedly proclaimed that Congress legislates solely for the territories of the United States, unless there is an express determination to the contrary. "[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the U.S." *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949). This canon of construction has been applied through much of our history. See, e.g., *The Apollon*, 22 U.S. 362, 370 (1824). The doctrine set out in *The Apollon* has evolved a great deal since 1824, however, since Justice Story wrote: "The laws of no nation can justly extend beyond its own territories except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction." *Id.*

n96 FATCA Foreign Financial Institution (FFI) List Search and Download Tool, IRS (Dec. 23, 2014), <http://apps.irs.gov/app/fatcaFfiList/flu.jsf> (last visited Jan. 23, 2015) (The names and jurisdictions of organization are updated each month by the IRS).

n97 *Id.*

n98 *Id.*

n99 See Richard Dyson, *British Public is Footing a £ 1bn Bill - to Aid the US Taxman*, TELEGRAPH.CO.UK (July 4, 2014), <http://www.telegraph.co.uk/finance/personalfinance/investing/10944585/British-public-footing-a-1bn-bill-to-aid-the-US-taxman.html> (last visited Jan. 23, 2015).

n100 See *id.*

n101 See Annex I, 2(A)(4), *supra* note 78, at 2(A)(4).

n102 Scratched by the FATCA, *ECONOMIST* (Nov. 24, 2011), available at <http://www.economist.com/node/21540270?fsrc=scn/tw/te/ar/scratchedbyfatca> (last visited Jan. 23, 2015).

n103 Don Seymour, *FATCA's Good, Bad, Ugly Choices*, PENSIONS & INVESTMENTS (Apr. 14, 2014), <http://www.pionline.com/article/20140414/PRINT/304149990/fatcas-good-bad-ugly-choices-foreign-institutional-investors-face-new-extraterritorial-oversight?template=print> (last visited, Jan. 25, 2015).

n104 *Id.*

n105 Id.

n106 See 26 U.S.C. § 1471.

n107 Id.

n108 Aubert, *supra* note 23, at 273-76

The civil obligation of Swiss banks to respect confidentiality of a client's account arises from three legal principles: the civil right to personal privacy, the contractual relationship between the customer and the bank, and specific statutory provisions governing bank secrecy. Penal and administrative sanctions apply to breaches of banking secrecy. [A]rticle 273 of the Penal Code prohibits acts of economic espionage by anyone, and this may be applied to bankers. The Banking Commission of Switzerland . . . can prevent any bank . . . from continuing operations if the bank fails to maintain confidentiality regarding clients' affairs.

See also Swiss Banking Secrecy: Don't ask, won't tell, *supra* note 19 ("Swiss law entrenched bank secrecy in 1934, making it a criminal offense to reveal a client's identity.").

n109 Aubert, *supra* note, 23 at 273-76.

n110 Id. at 282.

n111 See United Nations Convention Against Corruption, U.N. OFF. ON DRUGS & CRIME 5 (2004), available at [https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf) (last visited Feb. 5, 2015).

n112 Id. at 42.

n113 United Nations Convention against Corruption Signature and Ratification Status as of 12 November 2014, U.N. OFF. ON DRUGS & CRIME (2014), available at <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Jan. 23, 2015).

n114 Id.

n115 Stolen Asset Recovery Initiative (StAR), WORLDBANK.ORG (2014), <http://star.worldbank.org/star/> (last visited Jan. 23, 2015).

n116 Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan, U.N. OFF. ON DRUGS & CRIME & WORLD BANK, 20-25(2007), available at <http://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf> (last visited Feb. 9, 2015).

n117 *Id.* at 18.

n118 *Id.* at 21; LARISSA GRAY ET AL., FEW AND FAR: THE HARD FACTS ON STOLEN ASSET RECOVERY 2 (2014), available at <http://star.worldbank.org/star/publication/few-and-far-hard-facts-stolen-asset-recovery> (Further illustrating the difficulty of overcoming bank secrecy laws, UNODC reported in 2014 that in connection with anti-corruption efforts (rather than tax evasion), of the \$ 20 to \$ 40 billion estimated to have been looted and sequestered offshore each year; a total of just \$ 423.5 million was recovered between 2006 and mid-2012. Of this only \$ 166.5 million was recovered from Swiss banks.).

n119 78 Fed. Reg. at 5960.

n120 *Id.*

If a participating FFI . . . is prohibited by law from reporting the information required . . . with respect to a U.S. account that it maintains unless a valid and effective waiver of such law is obtained, the participating FFI must request a valid and effective waiver. For accounts other than preexisting accounts, the participating FFI must obtain a valid and effective waiver upon opening the account or, if prohibitions on disclosures cannot by law be waived, the participating FFI must refrain from opening accounts that are U.S. accounts.

n121 *Id.* at 5877.

n122 *Id.*

n123 *Id.*

n124 78 Fed. Reg. at 5877.

n125 *Id.*

n126 Id.

n127 Thirteen countries have signed or have agreed to sign Model 2 IGAs. FATCA Archive, U.S. DEPT. OF TREASURY (Jan. 8, 2015), <http://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca-archive.aspx> (last visited Jan. 23, 2015).

n128 78 Fed. Reg. at 5877.

n129 Id.

n130 Id.

n131 Id.

n132 Id.

n133 78 Fed. Reg. at 5877.

n134 Id. (When a partner jurisdiction enters a Model 1 FATCA IGA with the United States, FFIs in that jurisdiction will not be required to apply the final FATCA regulations and will be treated as having met all due diligence requirements if in complete compliance with domestic laws enacted pursuant to the terms of the IGA. In jurisdictions where a Model 2 IGA is in place, FFIs are required to comply with FATCA regulations unless modified by the agreement.)

n135 Nathan Newman, Explaining The Wormy Morass Of Obama's FATCA Tax Evasion Law, FORBES.COM (May 30, 2014), <http://www.forbes.com/sites/realspin/2014/05/30/explaining-the-wormy-morass-of-obamas-fatca-tax-evasion-law/> (last visited Jan. 23, 2015) (Several Model 1 IGAs contemplate a degree of reciprocity in the information exchange regime. But this seemingly generous offer quickly fizzles out as anything remotely beneficial for partner jurisdictions when you realize that the United States is not required to look beyond what are clearly shell corporations to extract beneficial account holder information, as is required by FFIs under FATCA.).



n136 Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, U.S. DEPT. OF TREASURY (Feb. 14, 2014), available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf> (last visited Feb. 5, 2015).

n137 See Jay R. Nanavati, Switzerland Announces Intention to Change from Model 2 IGA to Model 1, GLOBAL TAX ENFORCEMENT (Oct. 9, 2014), available at <http://www.globaltaxenforcement.com/fatca/switzerland-announces-intention-to-change-from-model-2-iga-to-model-1/> (last visited Jan. 22, 2015).

n138 Phil Hodgen, Does the U.S. Stand Alone?, HODGENLAW PC (May 15, 2012), <http://hodgen.com/does-the-united-states-stand-alone/> (last visited Feb. 4, 2015). The Philippines taxes citizens living abroad only on income sourced from the Philippines.

n139 Id.

n140 See generally Chris Edwards, A Plan to Cut Federal Spending, CATO INSTITUTE (May 2014), available at <http://www.downsizinggovernment.org/sites/downsizinggovernment.org/files/pdf/plan-to-cut-federal-spending.pdf> (last visited Jan. 22, 2015).

n141 See generally FATCA FAQs, *supra* note 1.

n142 U.S. CONST. amend. XIV; see also *Rogers v. Bellei*, 401 U.S. 815, 829-30 (1971).

n143 8 U.S.C. §§ 1401(c)-(d) (2012).

n144 See generally 8 U.S.C. § 1401.

n145 Issues of Concern for U.S. Citizens Working Abroad, AMERICAN RESIDENTS WORKING ABROAD GROUP (ARWAG) (Mar. 2014), available at [https://americansabroad.org/files/2813/6456/7161/final\\_arawg2.pdf](https://americansabroad.org/files/2813/6456/7161/final_arawg2.pdf) (last visited Jan. 22, 2015).

n146 See generally FATCA FAQs, *supra* note 1.

n147 See, e.g., Sin Srinivas, 'I was terrified we'd lose all our money': banks tell US customers they won't work with Americans, *GUARDIAN* (Sept. 24, 2014), available at <http://www.theguardian.com/money/2014/sep/24/americans-chased-by-irs-give-up-citizenship-after-being-forced-out-of-bankaccounts> (last visited Jan. 22, 2015).

n148 *Id.*

n149 *Id.*

n150 Renunciation of U.S. Nationality, U.S. DEPT. OF STATE, <http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/renunciation-of-citizenship.html> (last visited Feb. 1, 2015).

n151 Srinivas, *supra* note 147.

n152 Robert W. Wood, Americans Renouncing Citizenship Up 221%, All Aboard The FATCA Express, *FORBES.COM* (Feb. 6, 2014), available at <http://www.forbes.com/sites/robertwood/2014/02/06/americans-renouncing-citizenship-up-221-all-aboard-the-fatca-express/> (last visited Jan. 22, 2015); see also Laura Saunders, Record Number Gave Up U.S. Citizenship or Long-Term Residency in 2014, *WALL ST. J.* (Feb. 10, 2015), available at <http://www.wsj.com/articles/record-number-gave-up-u-s-citizenship-or-long-term-residency-1423582726> (last visited Feb. 18, 2015); see generally Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by Section 6039G, Nat'l Archives and Rec's Admin. (Feb. 11, 2015), <https://www.federalregister.gov/articles/2015/02/11/2015-02850/quarterly-publication-of-individuals-who-have-chosen-to-expatriate-as-required-by-section-6039g#page-7700> (last visited Feb. 18, 2015).

n153 Robert W. Wood, Americans Renounce Citizenship In New Record Numbers, *FORBES.COM* (Oct. 30, 2014), available at <http://www.forbes.com/sites/robertwood/2014/10/30/americans-renounce-citizenship-in-record-numbers-why-you-should-care/> (last visited Jan. 22, 2015) [hereinafter *Americans Renounce Citizenship*].

n154 Robert W. Wood, 5.5 Million Americans Eye Giving Up U.S. Citizenship, Survey Reveals, *FORBES.COM* (Oct. 27, 2014), available at <http://www.forbes.com/sites/robertwood/2014/10/27/5-5-million-americans-eye-giving-up-u-s-citizenship-survey-reveals/> (last visited Jan. 22, 2015).

n155 Renunciation requires proof of U.S. tax compliance for the five years preceding renunciation, payment of an exit tax, payment of a steep renunciation fee, and other possible penalties. Expatriation Tax, IRS, <http://www.irs.gov/individuals/International-Taxpayers/Expatriation-Tax> (last visited Feb. 7, 2015).

n156 IRS Form W-8BEN, IRS, available at <http://www.irs.gov/pub/irs-pdf/fw8ben.pdf> (last visited Feb. 4, 2015).

n157 Richard Dyson, Why are British investors being forced to fill in US tax forms, TELEGRAPH.CO.UK (May 30, 2014), available at <http://www.telegraph.co.uk/finance/personalfinance/investing/funds/10864539/Why-are-British-investors-being-forced-to-fill-in-US-tax-forms.html> (last visited Jan 22, 2015).

n158 IRS Form W-8BEN, *supra* note 156.

n159 See Dyson, *supra* note 157 (The author of a column in the London Telegraph compared the W-8BEN to forms required of those subject to HM Revenue & Customs and noted that the IRS' form "makes HMRC's jargon-strewn documents look by comparison intelligible and human.").

n160 See IRS Form W-8BEN, *supra* note 156.

n161 Robert W. Wood, Mayor Boris Johnson's Terrible, Horrible, No Good, Very Bad Day...As An American, FORBES.COM (Nov. 18, 2014), available at <http://www.forbes.com/sites/robertwood/2014/11/18/mayor-boris-johnsons-terrible-horrible-no-good-very-bad-day-as-an-american/> (last visited Jan. 22, 2015).

n162 *Id.*

n163 Nigel Green, In Support of Boris Johnson: The US's Imperialistic Foreign Tax Law Helps No One, CITY A.M. (Dec. 10, 2014), available at <http://www.cityam.com/1418246339/support-borisjohnson-us-s-imperialistic-foreign-tax-law-helps-no-one> (last visited Jan. 22, 2015).

n164 *Hillis v. AGC*, T-1736-14 (C.T.C.) (Can.).

n165 Agreement Between the Government of Canada and the Government of the U.S. of America to Improve International Tax Compliance through Enhanced Exchange of Information under the Convention Between the U.S. of America and Canada with Respect to Taxes on Income and on Capital, CAN. DEP'T. OF FIN. (Feb. 5, 2014), available at <http://www.fin.gc.ca/treatiesconventions/pdf/FATCA-eng.pdf> (last visited Jan. 22, 2015).

n166 See generally *Hillis*, T-1736-14 (Can.).

n167 See *id.* at 15-17.

n168 See id. at 7.

n169 See id.

n170 See Robert W. Wood, Canada Signs U.S. FATCA Deal, IRS To Get Data, FORBES.COM (Feb. 7, 2014), available at <http://www.forbes.com/sites/robertwood/2014/02/07/canada-hungary-signu-s-fatca-deals-irs-to-get-data/> (last visited Jan. 22, 2015).

n171 Robert W. Wood, Canadians File Suit To Block FATCA And Prohibit Handover Of U.S. Names To IRS, FORBES.COM (Aug. 12, 2014), available at <http://www.forbes.com/sites/robertwood/2014/08/12/canadians-file-suit-to-block-fatca-and-prohibit-handover-of-u-s-names/> (last visited Jan. 22, 2015).

n172 Press Release, Alliance for Defense of Canadian Sovereignty, Minister of National Revenue added as defendant in Canadian FATCA lawsuit (Oct. 9, 2019) available at [https://adcsovereignty.files.wordpress.com/2014/10/adcs\\_prr\\_oct9\\_20141.pdf](https://adcsovereignty.files.wordpress.com/2014/10/adcs_prr_oct9_20141.pdf). (last visited Jan. 22, 2015).

n173 See Ama Sarfo, U.S. Expats Sue Canadian Gov't Over FATCA Cooperation, LAW 360 (2014), available at <http://www.law360.com/articles/566464/us-expats-sue-canadian-gov-t-over-fatcacooperation> (last visited Feb. 5, 2015).

n174 Id.

n175 Id.

n176 Id.

n177 Id.

n178 Annex I, *supra* note 78, at 2.

n179 Id.

n180 See generally id.

n181 Canadians File Suit To Block FATCA And Prohibit Handover Of U.S. Names To IRS, supra note 171.

n182 See generally id.

n183 Id.

n184 Julius Melnitzer, Canadian-U.S. Dual Citizens Could Be Worse Off If FATCA Lawsuit Succeeds, FIN. POST (Aug. 18, 2014), available at <http://business.financialpost.com/2014/08/18/canada-u-s-dual-citizens-could-be-worse-off-if-fatca-lawsuit-succeeds/# federated-1> (last visited Jan. 22, 2015).

n185 Id

n186 Id.

n187 See id. Canadian financial institutions will face violating Canadian law in doing so, but the Canadian Government is not likely to sit quietly as the IGA is torn to pieces. In all likelihood, the Canadian Government will amend legislation to allow for this or find another way around.

n188 Id. A "recalcitrant account holder" refers to "any holder of an account maintained by an FFI if such account holder is not an FFI . . . and (i) the account holder fails to comply with requests by the FFI for the documentation or information required . . . for determining the status of such account as a U.S. account." 26 C.F.R. § 1.1471-5(g).

n189 Annex I, supra note 78, at 1.

n190 G. Warren Whitaker, FATCA and the future, FINANCIER WORLDWIDE (June 2013), available at <http://www.financierworldwide.com/fatca-and-the-futureAVHDgHibVvBd> (last visited Jan. 22, 2015).

n191 Id.

n192 See John Letzing, *Swiss Banks Say Goodbye to a Big Chunk of Bank Secrecy*, WALL ST. J. (July 1, 2014), available at <http://blogs.wsj.com/moneybeat/2014/07/01/swiss-banks-say-goodbye-to-abig-chunk-of-bank-secrecy/> (last visited Jan. 22, 2015).

n193 Annex I, *supra* note 78, at 1.

n194 Id.

n195 Armando Mombelli, *Swiss banks to tell all under FATCA*, SWISSINFO.CH (June 30, 2014), <http://www.swissinfo.ch/eng/multimedia/swiss-banks-to-tell-all-under-fatca/40473870> (last visited Jan. 22, 2015).

n196 Agreement between the United States of America and Switzerland for Cooperation to Facilitate Implementation of FATCA, *supra* note 136, at art. 4 (emphasis added).

n197 Mombelli, *supra* note 195.

n198 The announcement was made on Oct. 8, 2014. At the time this article was written, the original Model 2 agreement between the United States and Switzerland was in effect. Nanavati, *supra* note 137.

n199 As of November 22, 2014, Switzerland is one of only seven countries to have a Model 2 IGA in effect. The other countries include Austria, Bermuda, Chile, Hong Kong, Japan, and Moldova. Gregory C. Walsh, et al., *The Latest Model*, STEP J. (May 2013), <http://www.step.org/latest-model> (last visited Jan. 22, 2015).

n200 Id. The original Model 2 IGA requires FFIs to obtain consent for release of information from account holders. Consequences for refusing consent include "aggregate reporting, an IRS group request to the FTA as the Swiss competent authority, transmission by the FI of account information to the FTA, and exchange of such information by the FTA with the IRS."

n201 Some facts about Swiss banking secrecy, ASSET PROTECTION CORPORATION, <http://www.assetprotectioncorp.com/swissbanking.html> (last visited Jan. 22, 2015).

n202 Reem Ramzi Hachache, Lebanon -- "The Switzerland of the Middle East" YOUR MIDDLE EAST (Apr. 29, 2013), [http://www.younmiddleeast.com/features/lebanon-the-switzerland-of-the-middleeast\\_12495](http://www.younmiddleeast.com/features/lebanon-the-switzerland-of-the-middleeast_12495) (last visited Jan. 22, 2015).

n203 Aidan J. Delgado & Vincent J. Guglielmotti, FATCA Compliance Challenges Lebanese Bank Secrecy Laws, BROWNRUDNICK (May 22, 2013), <http://www.brownrudnick.com/news-resources/detail/2013-05-fatca-compliance-challenges-lebanese-bank-secrecy-laws> (last visited Jan. 22, 2015).

n204 The Lebanese Pound is pegged to the U.S. Dollar at 1 USD -- 1,507.5 LBP. Lebanese Pound, OANDA, available at <http://www.oanda.com/currency/iso-currency-codes/LBP> (last visited Jan. 22, 2015). A "currency peg" is defined as a "country or government's exchange rate policy of pegging the central bank's rate of exchange to another country's currency." See Currency Peg, INVESTOPEDIA, <http://www.investopedia.com/terms/c/currency-peg.asp> (last visited Jan. 22, 2015); see also Elias Sakr, Lebanese Banks Help U.S. in Fight Against Tax Evasion, DAILY STAR LEB. (June 10, 2014), available at <http://www.dailystar.com.lb/Business/Lebanon/2014/Jtm-10/259470-lebanese-banks-help-us-in-fightagainst-tax-evasion.ashx#axzz31m8iz2IE> (last visited Jan. 22, 2015).

n205 Sakr, *supra* note 204.

n206 *Id.*

n207 *Id.*

n208 See Valentin Katasonov, What 's Behind the Campaign to Combat Bank Secrecy, STRATEGIC CULTURE FOUNDATION (May 15, 2014), <http://m.strategic-culture.org/news/2014/05/15/what-behind-the-campaign-to-combat-banking-secrecy.html> (last visited Jan. 22, 2015).

n209 The cost of compliance is estimated to be between \$ 30 and \$ 80 million per firm. Mark R. Van Heukelom, The Foreign Account Tax Compliance Act and Foreign Insurance Companies: Better to Comply than To Opt Out, 39 J. OF CORP. L. 1 (Fall 2013).

n210 Neils Jenson, How to Kill the Scapegoat, 63 VAND. L. REV. 1849-51 (Nov. 2010).

n211 *Id.*

n212 See Vanessa Houlder, UK Tax Gap Climbs to £ 34bn, FIN. TIMES (Oct. 16, 2014), available at <http://www.ft.com/cms/s/0/48d5a518-552a-11e4-b616-00144feab7de.html#axzz3ImmOqYvc> (last visited Feb. 4, 2015) ("Business and individuals paid £ 34bn less tax than they should have done in 2012-2013.").

n213 Charles York & David Stainer, UK 'Son of FATCA' and Recent Information Exchange Proposals, BLOOMBERG (Jan. 31, 2014), [http://clientlink.allenoverly.com/lncreative\\_preview/UK\\_son\\_of\\_FATCA\\_and\\_recent\\_information\\_%20exchange\\_proposals.pdf](http://clientlink.allenoverly.com/lncreative_preview/UK_son_of_FATCA_and_recent_information_%20exchange_proposals.pdf) (last visited Feb. 4, 2015).

n214 Id.; Agreement Between the Government of the U.S. of America and the Government of the United Kingdom of Great Britain and Northern Ireland to Improve International Tax Compliance and to Implement FATCA, U.S. DEPT. OF TREASURY (Sept. 12, 2012), available at <http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-UK-9-12-2012.pdf> (last visited Feb. 4, 2015).

n215 York & Stainer, supra note 213. The Crown Dependencies include the Isle of Man, Guernsey and Jersey. Id. The Overseas Territories include the Cayman Islands, the British Virgin Islands, Bermuda, Anguilla, Turks and Caicos Islands, Montserrat, and Gibraltar. Id.

n216 Salman Shaheen, EXCLUSIVE: UK To Impose Son of FATCA on Crown Dependencies, Despite Government's Denials, INT'L TAX REV. (Nov. 23, 2012), <http://www.internationaltaxreview.com/Article/3121964/EXCLUSIVE-UK-to-impose-son-of-FATCA-on-Crown-Dependencies-despite-governments-denials.html>. The aim of the program was to collect information regarding U.K. residents with accounts in the Crown Dependencies and the Overseas Territories. York & Stainer, supra note 213.

n217 Meaning of 'residence' and how it affects your tax, Tax on Foreign Income, Gov.UK (Jan. 16, 2015), <http://www.hmrc.gov.uk/international/residence.htm> (last visited Feb. 4, 2015). The United Kingdom typically taxes based on residency and domicile, rather than citizenship.

n218 UK FATCA Compliance for Investment Funds, SCHULTE ROTH & ZABEL LLP (Nov. 7, 2014), [http://www.srz.com/UK\\_FATCA\\_Compliance\\_for\\_Investment\\_Funds/](http://www.srz.com/UK_FATCA_Compliance_for_Investment_Funds/) (last visited Feb. 4, 2015).

n219 York and Stainer, supra note 213. This difference is significant, as FATCA as enforced the United States has been highly criticized as drastic overreach without jurisdictional nexus to affected FFIs.

n220 Id.

n221 Id.



n222 Tax Flash: Standard for Automatic Exchange of Financial Information in Tax Matters, LOYENS & LOEFF (Oct. 30, 2014), <http://www.loyensloeff.com/nl-NL/News/Publications/Flashes/Pages/TaxFlash30October.aspx> (last visited Feb. 6, 2015). The signing nations include Albania, Anguilla, Argentina, Aruba, Austria, Belgium, Bermuda, British Virgin Islands, Cayman Islands, Colombia, Croatia, Curacao, Cyprus, Czech Republic, Denmark, Estonia, Faroe Islands, Finland, France, Germany, Gibraltar, Greece, Guernsey, Hungary, Iceland, Ireland, Isle of Man, Italy, Jersey, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Montserrat, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Turks and Caicos Islands, and the United Kingdom. In total, over eighty jurisdictions, including Switzerland, have expressed their commitment to implementing the Global Standard to specific timetables and other countries are invited to join as well. Id.

n223 Id.

n224 Id.

n225 Standard for Automatic Exchange of Financial Account Information, ORG. FOR ECON. COOPERATION AND DEV. 3 (2014), available at <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf> (last visited Feb. 5, 2015) ("The financial institutions that are required to report under the CRS do not only include banks and custodians but also other financial institutions such as brokers, certain collective investment vehicles and certain insurance companies.").

n226 Id. ("Reportable accounts include accounts held by individuals and entities (which includes trusts and foundations), and the standard includes a requirement to look through passive entities to report on the individuals that ultimately control these entities.").

n227 Id. ("The financial information to be reported with respect to reportable accounts includes all types of investment income (including interest, dividends, income from certain insurance contracts and other similar types of income) but also account balances and sale proceeds from financial assets.").

n228 Id.

n229 Id. at 6.

n230 Standard for Automatic Exchange of Financial Account Information, *supra* note 225.

n231 Id.

n232 Id. at 8.

n233 Id.

n234 See generally id.

n235 Kevin D. Freeman, Is FATCA Implementation on July 1st Doomsday for the Dollar?, GLOBAL ECON. WARFARE (June 26, 2014), available at <http://globaleconomicwarfare.com/2014/06/is-fatca-implementation-on-july-1st-doomsday-for-the-dollar/> (last visited Feb. 5, 2015).

n236 Id.

n237 Id.; Sean Hyman, What Happens When FATCA Kicks In?, MONEY NEWS (May 25, 2014), <http://www.moneynews.com/SeanHyman/Foreign-Account-Tax-Compliance-Act-FATCA/2014/05/24/id/573219/> (last visited February 5, 2015).

n238 Id.

n239 Rudy Martin, Not Just Another Anti-Dollar Alliance--The BRICS Bank, INVESTING INSIGHTS (July 9, 2014), <http://www.acamarglobal.com/not-just-another-anti-dollar-alliance-brics-bank> (last visited Feb. 5, 2015). Martin describes FATCA as an example of "overdollaring." He describes overdollaring as:

[T]he process of making a currency or other component operate in international trade other than that for which the source currency is denoted for (hence the name "overdollaring"). Prime examples of this are oil and other commodities. Net exchange rates and transactions costs and conditions may also be changed (lowered in favor of the buyer), which can increase the pace at which trades flow. Most overdollaring techniques increase commodity consumption, generating more inflation, which effects must be dispersed if the source economy is to remain operational. Id.

n240 China Launches New World Bank Rival, RT.COM (Oct. 25, 2014), <http://rt.com/business/198928-china-world-bank-rival/> (last visited Feb. 5, 2015). A total of twenty-one Asian countries have signed the memorandum of understanding concerning the AIIB. Notably, Australia, South Korea, and Indonesia are not among the signing nations, likely following pressure from the United States to abstain. Id.

n241 Id.

n242 Id.

n243 Id.

n244 Martin, supra note 239.

