

# How the Ultra-Right Extremists Attack FATCA

*By Margaret Kent and Robert Feinschreiber*

Margaret Kent and Robert Feinschreiber refute arguments against FATCA put forth by representatives of the Center for Freedom and Prosperity.

The ultra-right is quite distressed about FATCA. They are “up in arms” about America’s and the OECD’s attempts on the part of individuals and businesses to limit their tax haven structuring. One such ultra-right group is the so-called “Center for Freedom and Prosperity” (CFFP). They’ve used the wrong preposition in their name—looking at their agenda, the preposition that describes that organization should be “from,” or “against,” not “for,” *i.e.*, the Center *from* Freedom and Prosperity or the Center *Against* Freedom and Prosperity.

## Quinlan and FATCA

Andrew F. Quinlan, the president of the Center for Freedom and Prosperity, presented a talk before the 36th Annual Conference on the Caribbean and Central America in New Orleans on November 29, 2012. Quinlan entitled his presentation, “Focus on Finance: Foreign Account Tax Compliance Act

**Margaret Kent** is a Senior Partner with Quantera Global in Key Biscayne, Florida ([transferpricingconsortium.com](http://transferpricingconsortium.com)).

**Robert Feinschreiber** is a Senior Partner with Quantera Global in Key Biscayne, Florida ([transferpricingconsortium.com](http://transferpricingconsortium.com)).

(FATCA)—It is Not Too Late to Stop FATCA.” He called for taxpayer resistance to FATCA. He asserts that this resistance was “part of a battle which my organization has been fighting for over a decade.” Quinlan might have a different definition of the word “decade” than do the rest of us. Congress enacted the HIRE Act<sup>1</sup> only two years before his presentation. Then again, Quinlan has been making up many of his tax concepts.

Quinlan asserts that “the United States already has one of the highest tax compliance rates in the world.” However, Quinlan fails to provide references to support his conclusion. Also, he fails to define the term, “compliance tax rates.” Quinlan takes the position that “the political class” has decided that they must “chase every last potential dollar no matter the cost.” He comments that at the time FATCA was passed, the government had estimated that it would raise \$8 billion over 10 years.

Quinlan’s view is that “FATCA is as bad for the U.S. as it is for the rest of the world.” It’s his position that larger, developed nations “went astray” when politicians began to look at private capital the way a pig looks at a trough. Quinlan appears to use the term “financial centers” as a synonym for tax havens. He describes tax evasion centers as countries that

“respected privacy rights.” In his unwieldy support for tax havens, he uses terms such as “financial privacy” and “fiscal sovereignty” as code words to reflect behavior we’d feel was appalling.

Quinlan accuses developed nations of devising ways to prevent capital from fleeing rather than adopting new policies designed to attract it. He accuses the OECD of seeking direct or indirect tax harmonization, which Quinlan describes as “the bullying of low-tax and smaller jurisdictions.”

Quinlan perceives the FATCA folks as having the United States “sticking it” to overseas banks that are hiding tax dollars from their “rightful owner”—the U.S. government. A balanced approach would dictate that the “rightful owner” is the U.S. government only to the extent of the taxpayer’s obligations to pay taxes, interest and penalties to the United States.

## The Compliance Industry

Quinlan has harsh words for accountants and lawyers. The “compliance industry,” in particular, Quinlan complains, has been repeatedly telling everyone that “FATCA is coming, there is nothing you can do about it, and oh, by the way, pay us a lot of money so that we can bring you into compliance.” One wonders as to the nature of the resistance to FATCA that Quinlan would advocate.

Quinlan is speaking to the governments of small island nations as well as to U.S. “taxpayers.” He asserts that to “coerce governments into signing agreements” with the U.S. Treasury, the Treasury was promising reciprocal information flows with the governments in the future. Quinlan asserts that the Treasury has no authority within FATCA to provide for reciprocity. He challenges the promises the U.S. Treasury is making “to seduce foreign governments into compliance agreements.”

Quinlan’s statements come close to advocating noncompliance for American “taxpayers,” stating, “Here’s my advice: You obviously have to ‘do what is necessary to prepare yourselves for compliance.’ ” When it comes to foreign governments, Quinlan takes a strong anti-FATCA stance, suggesting that “foreign governments shouldn’t surrender preemptively to

U.S. fiscal imperialism.” He encourages individual institutions not to rely on their governments to negotiate agreements with the IRS. The CFFP is seeking to become a lobbying mouthpiece for tax havens, which Quinlan describes as being “Offshore Financial Centers.”

## Quinlan Becomesirate

Quinlan became irate when the Treasury promulgated the 544-page FATCA rules. He accuses the media and the industry response to the rules as being “predictably sycophantic and short-sighted.” Quinlan criticizes the media for asserting that the United States created FATCA “to crack down on tax evasion.” He criticizes the media for “making up” the estimate that there is \$100 billion in uncollected taxes from tax evasion. Quinlan cites the obvious disconnect between that amount and the less than \$1 billion annual revenue collection.

It is our view that the better way to address this disparity between the uncollected taxes and annual tax collection is to recognize that FATCA is far too weak to achieve its initial objectives. Our objective should be for Congress to strengthen FATCA. In the words of The Carpenters, as to the U.S. Treasury Department, let’s acknowledge that “we’ve only just begun.” Quinlan retreats to suggesting the standard paranoia that the purpose of FATCA is to expand the power and scope of government.

We believe that Congress should strengthen FATCA by including a penalty regime, tax clawbacks such as through Subpart F and jail sentences. Then, the United States and the OECD need to address noncompliant countries. Travel bans, export bans, import bans and other commercial bans might lie ahead for these countries. Could we be talking about a blockade?

Isn’t it about time that the OECD takes a “kiss my ring” approach to these tax havens?

Having previously attacked “the compliance industry,” Quinlan now hones his attack on tax lawyers for offering “bad, self-serving advice.” Into his attack mode, Quinlan charges that “tax lawyers have

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must respond to 15 sustainability questions, concerning energy and climate, materials efficiency, nature and resources and people and community. Target, another large chicken purchaser, also has its own sustainability program.<sup>8</sup> These first-tier suppliers are encouraging similar sustainability for lower-tier suppliers, which also must be ready to implement energy costs. Energy-efficiency measures, such as lighting and HVAC upgrades, represent major steps toward a better environmental performance. EAct tax deductions are available to assist companies in this endeavor.

## Conclusion

To both decrease operating costs and increase their supplier positions under consumer sustainability programs, both growers and chicken processors can benefit from LED lighting upgrades. Growers can increase profits by lowering energy costs, and processors can boost their supplier status with Walmart, Target and other major chicken purchasers. Chicken farmers who are able to change to more efficient LED technology will enjoy energy savings and a high likelihood of receiving a \$1.80 per square foot tax deduction.<sup>9</sup>

### ENDNOTES

- <sup>1</sup> Damona Doye, Brian Freking, Shannon Ferrell and Josh Payne, *Broiler Production Considerations for Potential Growers*, OKLAHOMA COOPERATIVE EXTENSION SERVICE, 2008.
- <sup>2</sup> Energy Policy Act of 2005 (P.L. 109-58) ("EAct").
- <sup>3</sup> Charles Goulding, Jacob Goldman and Christopher Winslow, *The EAct and Alternative Energy Tax Aspects of Walmart's Supplier Sustainability Program*, CORP. BUS. TAX'N MONTHLY, Jun. 2011, at 13.
- <sup>4</sup> James M. MacDonald, *The Economic*

*Organization of U.S. Broiler Production*, Economic Research Service, USDA, 2008; and Nation Chicken Council, [www.nationalchickencouncil.org/](http://www.nationalchickencouncil.org/).

<sup>5</sup> *Supra* note 1.

<sup>6</sup> Charles Goulding, Kenneth Wood and Raymond Kumar, *Optimizing the 3, 2, 1 LED Lighting Tax Deduction Countdown*, CORP. BUS. TAX'N MONTHLY, Jul. 2010, at 13.

<sup>7</sup> *Supra* note 3.

<sup>8</sup> Charles R. Goulding, Andressa Bonafe and Raymond Kumar, *Tax Aspects of Target's Corporate Responsibility Program*, CORP. BUS. TAX'N MONTHLY, Aug. 2013, at 11.

<sup>9</sup> See also, Dr. H. L. Goodwin, Susan Sullivan and Susan Watkins, *Field Demonstration of Advanced Lighting Technologies for Poultry Houses*, University of Arkansas System's Division of Agriculture, 2011.

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completely sold-out their clients, soliciting untold sums with an unjustifiable and unconscionable law." Quinlan challenges the "extensive costs associated with bringing institutions into compliance," which he asserts will be "estimated at upwards of \$100 million for larger organizations." Quinlan gives his pitch supporting his ultra-right group: "[I]nvesting even a tiny sum in comparison in the hopes of developing more sane tax policies and undoing FATCA ought to be a no-brainer."

## "Don't Trust Economists"

We have strong experience in working with economists, both inside and outside the transfer pricing arena. Nevertheless, we were intrigued when we saw a piece entitled, "Don't Trust Economists." Most certainly, there are occasional economists we view with disdain, chief among them being Daniel J. Mitchell. What Mitchell recommends deviates

sharply from standard Keynesian economic theory, or any other logical theory, for that matter. He is part of the flat-tax crowd, and he eschews any semblance of competition that America faces in the world stage. Mitchell wrote "Don't Trust Economists" when he is exactly the person we should not be trusting.

Not to be undone, Daniel J. Mitchell enters the fray on behalf of the so-called Center for Freedom and Prosperity. In the interests of fair disclosure, we think that Mitchell should have described his "center" as the Center for Tax Freedom and Prosperity for Tax-Evaders.

## What the CFFP Wants

Mitchell and his cabal at the Center for Freedom and Prosperity seem to want to dismantle the U.S. government! He describes his chopping block as "a target-rich environment." Mitchell would abolish first Department of Housing and Development, then the Department of Education, the Department of Agriculture, the Department of Energy, the Department of Commerce, the Department of Transportation and more. CFFP calls Head Start "another costly government failure."

Mitchell seeks to restrain government in America and around the world. He advocates the promulgation of the flat tax. He would get rid of all "deductions, exemptions, shelters, preferences, and credits." Of course, we know better than that. No nation could survive for long with such a scheme. He describes his plan as a "neutral tax system." His scheme might make sense if, in fact, we were all "created

equal.” In fact, there are differences among us, and as human beings, we do respond to incentives and disincentives.

## ENDNOTES

<sup>1</sup> FATCA was enacted by the HIRE Act (P.L. 111-147).

## China

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- loopholes and having effective disclosure requirements.
2. The service pillar includes the process of reducing the effort and resources that businesses would have to employ to demonstrate their tax compliance. The Chinese officials view the advance pricing arrangement program as exemplifying this services pillar.
  3. The Chinese officials assert that China does not always have the same technical expertise and resources that developed countries possess, but argue that transfer pricing work in China is developing quickly. According to these Chinese officials, the real objective in conducting audits is to raise awareness of Chinese tax administration to enforce tax compliance. The Chinese tax administration uses this third pillar under an industry-based approach to accomplish this third objective.

The Chinese officials glow with pride as a testament to the Chinese tax administration’s audit success. The tax administration focused on one particular industry—the Chinese officials fail to provide the industry. The tax authorities increased the average profit margin from one percent to 5.6 percent between 2004 and 2008.

## Conclusion

The Chinese officials recognize that the application of the arm’s-length principal to multinational enterprises in developing countries poses a practical challenge.<sup>47</sup> Specifically, the developing country needs to establish a sound legal framework for transfer pricing and needs to overcome these legal issues. These developing countries often encounter their lack of transfer pricing specialists, *i.e.*, the lack of sufficient transfer pricing specialists to conduct the transfer pricing analysis, coupled with a lack of reliable comparables for the analysis itself.

The Chinese officials “toot their own horn” about China. China, as a developing country, has unique economic and geographical factors, and these factors contribute to the profitability of Chinese taxpayers and their foreign parent companies.<sup>48</sup> These factors include, but are not limited to the following:

- readily available migrant labor;
- low labor costs;
- low infrastructure costs;
- first-mover advantages in certain industries;
- foreign exchange controls;
- growing population; and
- consumer demand for foreign products and luxury products.

The Chinese officials then comment that other developing countries have their own unique features. These unique features similarly require special attention from a transfer pricing perspective.

The Chinese officials comment that multinational enterprises have often implemented group transfer pricing policies that are sensitive to developed countries’ transfer pricing regulations and nuances. Despite this sensitivity the mul-

tinational enterprises neglect to consider whether the developing countries have applied the arm’s-length principle.<sup>49</sup>

The Chinese officials comment that China has overcome this challenge or dichotomy by using practical solutions.<sup>50</sup> These solutions are sensitive to unique economic and geographic factors for operations in China. These solutions include the following:

- location savings;
- market premium; and
- alternative methods of analysis besides the traditional transactional methods and the profit-split methods.

The Chinese officials are courting the developing countries. These officials state that the Chinese tax administration has shared its insights on applying the arm’s-length principle for developing countries and welcomes other perspectives on these issues.<sup>51</sup>

## ENDNOTES

<sup>1</sup> United Nations, Economic and Social Council, PRACTICAL MANUAL ON TRANSFER PRICING (ECOSOC/6583, May 29, 2013).

<sup>2</sup> Robert Feinschreiber and Margaret Kent, ASIA-PACIFIC TRANSFER PRICING HANDBOOK, at Ch. 10, 185-204 (John Wiley & Sons, Inc., 2012).

<sup>3</sup> *Id.*, at Ch. 9, 175-184.

<sup>4</sup> *Id.*, at Ch. 24, 345-356.

<sup>5</sup> Robert Feinschreiber and Margaret Kent, TRANSFER PRICING HANDBOOK, GUIDANCE FOR THE OECD REGULATIONS, at Ch. 10.3.1.1 (John Wiley & Sons, Inc., 2012).

<sup>6</sup> *Id.*, at Ch. 10.3.1.2.

<sup>7</sup> *Id.*, at Ch. 10.3.1.3.

<sup>8</sup> *Id.*, at Ch. 10.3.2.1.

<sup>9</sup> *Id.*, at Ch. 10.3.2.2.

<sup>10</sup> *Id.*, at Ch. 10.3.2.3.

<sup>11</sup> *Id.*, at Ch. 10.3.2.4.

<sup>12</sup> *Id.*, at Ch. 10.3.2.5.

<sup>13</sup> *Id.*, at Ch. 10.3.3.1.

<sup>14</sup> *Id.*, at Ch. 10.3.3.2.

<sup>15</sup> *Id.*, at Ch. 10.3.3.3.

<sup>16</sup> *Id.*, at Ch. 10.3.3.4.

<sup>17</sup> *Id.*, at Ch. 10.3.3.5.

<sup>18</sup> *Id.*, at Ch. 10.3.3.6.

<sup>19</sup> *Id.*, at Ch. 10.3.3.7.

<sup>20</sup> *Id.*, at Ch. 10.3.3.8.