REVIEWING THE UNINTENDED CONSEQUENCES OF THE FOREIGN ACCOUNT TAX COMPLIANCE ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
GOVERNMENT OPERATIONS

OF THE

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AND GOVERNMENT REFORM
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C O N T E N T S

REVIEWING THE UNINTENDED CONSEQUENCES OF THE FOREIGN ACCOUNT TAX COMPLIANCE ACT

Wednesday, April 26, 2017

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT OPERATIONS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 2:05 p.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the subcommittee] presiding.

Present: Representatives Meadows, Hice, Jordan, Ross, Blum, Connolly, Maloney, Norton, and Watson-Coleman.

Mr. MEADOWS. The Subcommittee on Government Operations will come to order, and without objection, the chair is authorized to declare a recess at any time.

Today's hearing is on the Foreign Account Tax Compliance Act, or FATCA. We will hear from our witnesses about FATCA's effect overseas and on our Treasury. However, our first witness, Senator Rand Paul, a friend, a patriot, truly someone who is willing to not only put his money where his mouth is but someone who has defended liberty and freedom each and every day, and you're certainly welcome.

He has a briefing, as I understand it, at the White House coming up, so we're happy to have you testify first, Senator, and then the Ranking Member Connolly and I will give our statement.

So in recognition of that, I'd like to recognize the Honorable Senator Rand Paul.

WITNESS STATEMENTS

STATEMENT OF THE HON. RAND PAUL

Senator PAUL. Thank you, Chairman Meadows, and thank you for inviting me to this hearing on the Unintended Consequences of the Foreign Account Tax Compliance Act. And also for allowing the American people an opportunity to hear how FATCA undermines their privacy through the bulk collection of their foreign financial records.

I oppose FATCA for two reasons. First, it violates our privacy rights, and second, I think the compliance cost actually exceed the revenue that it brings in.

Regarding privacy, the Fourth Amendment prevents the government from seizing or searching a person's house or papers, including their financial records, unless the warrant shows individualized suspicion and probable cause. This protection was included in the Bill of Rights in response to general warrants that have been issued by the British.

FATCA, I think, undermines the very heart of this privacy right. It forces foreign financial institutions to hand over U.S. citizens' personal financial records without a warrant, without a probable cause, and without naming them individually.

FATCA also violates the Fourth Amendment by demanding all data on all Americans with overseas accounts. The demand is not individualized but collected rather in bulk without specifying a specific suspicion or cause.

The government is using the heavy hand of the IRS to tell foreign financial institutions that they must hand over the records of all U.S. citizens, and if they dare to defy the government, they will be hit with a crippling tax penalty that no business could survive.

This turns the Fourth Amendment on its head. It presumes that every American with money overseas is a criminal with no proof or even suspicion of criminal activity. You are guilty until proven innocent. These are not the principles on which our country was founded, and we should not stand for it.

This is not just my concern. In January, the IRS' own taxpayer advocate raised the same concern in her annual report saying that FATCA's operative assumption appears to be that all such taxpayers should be suspected of fraudulent activity unless proven otherwise. Think about that. Guilty until proven innocent.

No one should be deceived that the data being collected by the IRS is somehow harmless or benign. In addition to having to report the name, address, taxpayer identification number of each account holder, the government requires financial firms to report the account number, the account balance, the value at the end of the reporting period, and all the inflows and outflows of the account, basically everyone for whom you have had a financial transaction or written a check to.

Comparable information is not required to be disclosed for those who have domestic accounts, so it's a double standard. You have one standard for Americans living overseas and another standard for Americans here.

The government has no business asking for or knowing this information about its citizens and certainly not without a reason to believe that the person is doing something wrong.

FATCA essentially gives the IRS all your overseas financial data without going through any court to decide if the government has a right to see your documents. FATCA seems to be also a solution in search of a problem.

The taxpayer advocate finds also that a lack of comprehensive statistical data establishing the existence of widespread noncompliance or fraud by taxpayers with foreign accounts. They don't find evidence that there is excessive problems with people not paying their taxes. It's about the same rate as people domestically, so why would we be giving the government special powers, lower standards to look at our information?

My biggest concern about FATCA is that it treats all 9 million Americans living abroad as guilty until proven innocent. FATCA acts as if the Bill of Rights does not apply to citizens dealing with their U.S. Government, depending on where they live. After FATCA was passed, some foreign banks even began to refuse to do business with Americans, even canceling their accounts to avoid the red tape and possible draconian penalties.

Individual Americans are not the only ones bearing the burden either, estimates of initial cost of compliance reach into the tens of billions of dollars globally. Ongoing compliance just for U.S. companies cost more than $160 million a year.

In addition, FATCA has led to foreign countries seeking information on citizens residing in the United States. Indeed, over 60 countries now have signed reciprocal intergovernmental agreements called IGAs. The IGAs allow bilateral exchange of financial data, meaning that the U.S. will now spy on foreigners who have accounts in our country as well, and we will aid and abet foreign countries in invading their citizens' privacy as well

Think about this. This may mean sending financial information to countries who are known as human rights abusers, such as Saudi Arabia, China, Tunisia. One can imagine the risk to a political dissident who comes to our country to escape tyranny, and then we find that we are going to be sending their information back to a tyrannical government, the tyrannical government they fled?

These bilateral agreements, these IGAs, have not received any Senate certification, no vote, no vote in the House, no congressional authority at all. They are just done by the administration with no authority. Their constitutionality is currently being challenged in court, and I think you will hear from some of those involved in that challenge.

My hope is that this hearing will shed some light on this abusive law and lead to a demand for action.

Chairman Meadows, and I have sponsored a bill to correct this injustice and repeal FATCA. Congress should pass our bill this year and put an end to this madness.

Thank you very much for letting me testify.

Mr. MEADOWS. Thank you, Senator. And you're very complimentary in terms of my involvement, but it's basically been your leadership, Senator, that not only has highlighted this, but that continues to stand as a vigilant sentinel to protect our Fourth Amendment privacy, and I just want to say thank you.

And it's an honor to have you articulate this. You brought this issue to light when no one was paying attention, and yet I found that universally you're being applauded for your protection of this constitutional right that our Founding Fathers so wisely enshrined.

Senator PAUL. This is a big, big deal to the 9 million Americans who live overseas, and you know, we are getting ready to come up on tax reform. While this may be a small issue to many other Americans, it's a big deal to them.

My hope is that the bill we have worked on, maybe we could try to get it into the tax reform package because it's an issue, I think, that should bring right and left together because, you know, sometimes the right is more concerned with financial affairs and the left more concerned with privacy and with civil liberties, but really, I think right and left can come together to say, you know what, we should protect everybody's Fourth Amendment rights.

Thank you for letting me testify.

Mr. MEADOWS. Well thank you. I know you've got to go to the White House, so you're hereby dismissed.

Thank you for your testimony. Your entire written testimony will be made part of the record. I thank the ranking member for allowing you to come in and testify early.

The chair now recognizes himself for his opening statement. We are certainly pleased to hold this hearing to examine the Foreign Account Tax Compliance Act, also known as FATCA.

FATCA requires foreign financial institutions to investigate their own accounts for suspected ties to the United States. Hear that again. Investigate their own accounts for suspected ties to the United States, and then report those accounts to the IRS for further investigation.

Now, that doesn't sound crazy in its face, but as it turns out, FATCA is a failure at a number of different levels. By its drafter's own estimate, of whom we are going to hear expert testimony today and certainly the work that has been done in some of those investigative modes, is to be applauded. I've looked at the record, and so I look forward to seeing that.

But even by those own estimates of the drafters, it was seeking to reduce tax evasion overseas and it only does that by less than 1 percent. The Senator mentioned this. You know, so less than 1 billion out of an estimated 100 billion in lost revenue overseas.

Commissioner Koskinen who has testified before this committee a number of times has given sworn testimony regarding the high rate of return on investment for spending on the IRS with normal enforcement actives. In fact, his public statements indicate a return of up to $20 for every $1 that is invested on enforcement. So a $20 return in revenue for $1 invested in enforcement.

By contrast, FATCA brings in well under, by any estimations, half of that amount on a per-dollar basis that is invested. So the IRS gets asked for about 200 million to implement FATCA in fiscal year 2017 budget. So by the commissioner's own estimates, not by mine, not by any think tank, but by the commissioner's own estimates in enforcement returns, just shifting the money from FATCA to the general enforcement areas would increase our tax revenues by over a billion dollars.

And so if we're looking at proper allocation, and this is without spending one more penny on the overall budget for the IRS, it's just shifting it, and so when we look at that, that's a significant return.

FATCA also unfairly and unilaterally burdens our biggest trading partners and strongest allies. I found out about this really by some of the people that we'll hear from today when I was in Israel and with some of the issue that they started referring to this thing called FATCA that I had no idea what it was. And so, you know, as a good politician I was saying, well, I'll get back to you on that. And so I went very quickly and googled it to figure out exactly what we were talking about, and so as I look at this, we are looking at unbelievable implications here.

When we look at the compliance cost on foreign banks and on the international economy, we are looking at up to $200 million per bank to comply and potentially hundreds of billions of dollars overall.

Other countries are understandably upset that we are hurting their economies and are doubly upset that we have not yet offered them access to our own taxpayer data. So we basically said you have to comply, and there was this reciprocal agreement, and we said: Well, you have to comply, but we're not going to comply. It was a double standard that we see, and so many of the foreign financial institutions have tried to avoid these FATCA compliance costs by refusing to take U.S. citizens.

That's what highlighted it for me, and I said: You've got to be kidding me. They're saying, well, if you're a U.S. citizen, they don't want to touch you in some of these foreign financial institutions just because of the compliance cost. So expatriates have had to make the tragic choice between keeping their citizenship and preserving their financial stability.

And to illustrate that point, I want to share a video that has been shared with the subcommittee to this committee, and so if we'd pause and maybe take a look at this video. It's approximately 3 minutes in length.

[Video shown.]

Mr. MEADOWS. Donna is not alone. FATCA has led to a number of U.S. expatriates renouncing their citizenship, and so hopefully today we'll hear from some of our witnesses on how we can address this particular issue in a meaningful way and hopefully return the accountability that we're all for to the proper balance of protecting our personal Fourth Amendment rights and yet still making sure that we hold our government accountable.

And with that, I'd like to recognize the ranking member for his opening statement.

Mr. CONNOLLY. Thank you, Mr. Chairman, and thank you for having a hearing. And maybe there's a slightly different point of view about the issue while acknowledging there are problems with the act and with its implementation.

The United States taxes the foreign income of its citizens, and we're not alone. Most countries with income taxes do the same. Citizens pay taxes on all the income they earn regardless of where they earned it.

There are benefits to this system. Americans are the most productive in the world, and this system ensures that the wealthiest among us cannot avoid paying taxes simply by moving money abroad. It's quite simple. If you receive benefits by being an American, you should pay your fair share. And I say that, but no American ought to have to foreswear his or her citizenship in trying to comply with the law.

We obviously are very sympathetic to the woman we just saw on that video. This tax system assumes everyone plays by the rules and pays their taxes according to the law. We know, unfortunately, in the past, not everyone did play the game fairly. While the law has, for decades, required us who are account holders to file reports with the Treasury Department, not everyone did.

Extremely wealthy tax cheats, not the woman we just saw on that video, hired expensive lawyers who knew how to evade the system. Whistleblower leaks changed things. Congress learned of thousands of Americans who were willfully avoiding paying their taxes and overseas income without disclosing that information to the IRS. These weren't simply inadvertent mistakes. They were willful efforts to avoid taxes.

Congress chose to take some action. That action came in the form of this act, FATCA, the Foreign Account Tax Compliance Act. Under that act, foreign financial institutions are required to disclose to the IRS the accounts of U.S. taxpayers. The Wall Street Journal reported that an IRS limited amnesty program, pursuant to this act, brought in $9.9 billion in taxes, interest, and penalties from 55,000 taxpayers who hadn't paid their taxes and income earned abroad.

FATCA is an incremental step in terms of tax collection. U.S. companies and financial institutions already provide taxpayer information to the U.S. Government through 1099 forms, and taxpayers with assets abroad file with the IRS the same information FATCA collects. Now, that information is also coming from foreign financial institutions since many taxpayers previously had not been filing.

Despite the new law, banks are still lending, and it is possible for Americans to get accounts. Citigroup, for example, operates in more than 160 countries and will give Americans abroad bank accounts and mortgages. Because of this act, international tax collection has changed. Countries around the world are adopting the Common Reporting Standard, which is based on FATCA.

Under the Common Reporting Standard, countries collect identifying information from account holders. They then share that information with a foreign account holder's country of citizenship and receive information on the accounts of their own citizens. The information collected under the Common Reporting Standard is broader than that required by FATCA. Common Reporting Standard countries collect information on all account holders, not just U.S. citizens. With 100 such nations committing to implementing the standard by 2018, efforts to evade taxes are expected to diminish.

I certainly don't mean to suggest there haven't been problems with FATCA. We just saw one. Although it's important, the law does not require anyone to give up their citizenship. The advice came, as I understand it, from a Swiss bank, but nonetheless, we have a victim here. Nobody ever should feel they have to give their U.S. citizenship.

So there are kinks, clearly, to work out, and I think that's why this hearing can be very helpful, and we want to make sure that people like Ms. Nelson and Mr. Kuettel are protected.

Repealing FATCA, however, entirely, would not restore their citizenship and could harm our government's ability to collect the taxes owed. We've had hearings in this committee about the fact that hundreds of billions of dollars, not overseas, but hundreds of billions of dollars go—are left on the table uncollected because the IRS doesn't have the staffing or resources or mechanisms, frankly, to collect taxes owed but not collected.

And so, you know, as we wrestle with the fairness of this act and its implementation problems and certainly the injustice, individuals such as the one we just saw in that video have experienced, so we want to—we certainly want to address that, but we also want to make sure that the United States Government is being fair to all of its citizens by making sure everybody pays their fair share.

So I look forward to the hearing. I look forward to hearing testimony from our witnesses, and with that, I yield back, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman for his thoughtful opening statement. We'll now go ahead and allow the witnesses, if you will make your way forward. I appreciate your flexibility with regards to allowing Senator Rand Paul to go first.

And so we would love to welcome—and we're going to keep these introductions brief. I understand we may have votes coming up here 2:45 to 2:50 range, and so we're going to try to push a little bit quicker here, but I'll hold the record open for five legislative days for any member who would like to submit a written statement.

So in recognizing our panel of witnesses, I'm pleased to welcome Mr. James Bopp, Jr., welcome; Mr. Mark Crawford, welcome; Mr. Daniel Kuettel, welcome; and Ms. Elise Bean, welcome to you all.

Pursuant to committee rules, witnesses will be sworn in before they testify, so if you will please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you're about to give will be the truth, the whole truth, and nothing but the truth?

Thank you. You may be seated.

Please let the record reflect that the witnesses all answered in the affirmative.

In order to allow time for discussion, I'd ask that you limit your oral testimony to 5 minutes, but your entire written statement will be made part of the record.

And so we'll now recognize you, Mr. Bopp, for 5 minutes. You need to hit your little button right there.

STATEMENT OF JAMES BOPP JR.

Mr. BOPP. Thank you. Thank you, Chairman Meadows, and thank you for the opportunity to testify. In my oral presentation, I will summarize the key points of my written testimony.

Republicans overseas, who which I serve as treasurer and general counsel, advocates for their rights and interests of overseas Americans. As this hearing will demonstrate, our overseas Americans are the victims of a draconian system of tax laws that disrupts their lives, deprives them of a living, and strips them of their basic Constitutional rights as U.S. citizens.

At the heart of this is the fact that the United States is only one of two countries in the entire world that tax its citizens based upon their citizenship, not their residence. So the long arm of the IRS reaches out to the 9 million U.S. citizens overseas and taxes them.

For the same reason that President Donald Trump has advocated for territorial taxation on corporations, U.S. citizens should also be taxed where they reside. The 2016 Republican national platform calls for this.

But it is worse than this. The Bank Secrecy Act resulted in the U.S. citizens being required to file a FBAR report which applies to U.S. citizens and requires them to report to the IRS for any account which they have in a foreign bank or foreign asset, and if it's—the value is greater than $10,000. Willful violation of this law results in a 50 percent penalty on the highest value of that account.

On top of this, in 2010, the Democratic Congress passed FATCA, which requires more reporting of personal and confidential financial information by individuals and by foreign financial institutions.

Individuals are required to file a FATCA report annually if they have $50,000 in foreign accounts or foreign assets, whether they are in the United States, living in the United States, or living abroad. That report includes the name, account balance, maximum value of the account, and there's a $10,000 penalty.

In addition, foreign financial institutions have one of three choices. One is to report to the IRS on every single U.S. citizen account holder the account information, the value, and then the gross receipts and gross withdrawals of that account, or two, purge themselves of all U.S. account holders and certify that to the IRS, or three, suffer a penalty of 30 percent of all transfers of all funds for all purposes from the United States to that bank.

In addition, the Obama administration has negotiated illegal intergovernmental agreements which provide, in most cases, that the banks, instead of reporting to the IRS, report to the foreign government—require the foreign banks to report to the foreign government of information about U.S. citizens which is then reported by the government to the IRS.

These agreements have not been approved and are unconstitutional. Thus, FATCA is a sweeping financial surveillance program of unprecedented scope that allows the IRS to peer into the financial affairs of any U.S. citizen with a foreign bank account.

In so doing, FATCA has imposed enormous costs on individual Americans abroad. As this hearing will demonstrate and as the Democrats abroad found out in a survey of Americans overseas, these surveys' results show the intense impact FATCA is having on overseas Americans. Their financial accounts are being closed, their relationships with nonAmerican spouses are under strain, some Americans are being denied promotion or partnership in business because of FATCA reporting, and some are planning to—contemplating renunciation of their own U.S. citizenship.

A decade ago, about 200 a year renounced. Now the number is up to 6,000 last year. These Americans are, in many ways, ordinary middle class Americans being affected in extraordinary ways.

FATCA has also imposed an enormous financial cost on foreign financial institutions, and through the IGAs has converted foreign governments and foreign banks into IRS agents who are surveilling U.S. citizens and reporting to the IRS.

FATCA has furthermore denied U.S. citizens basic constitutional rights, equal protection, due process, 14th Amendment protection against unlawful search and seizure, 8th Amendment protection against excessive fines. I am lead attorney in Crawford v. United States Department of Treasury that is making these claims.

The bottom line about all of this is that the Americans abroad are U.S. citizens who should enjoy the individual right and freedom to reside overseas, if they choose, without penalty, and America benefits when they do. They are ambassadors for America who promote this country and its values and often are directly involved in promoting American business and products overseas.

However, the U.S. Government has placed a scarlet letter on the forehead of every American, and it is stamped U.S.A., and as a result, they are treated as pariahs by foreign banks and employers. This is wrong, and it needs to stop.

[Prepared statement of Mr. Bopp follows:]

Testimony of James Bopp, Jr.[1]
Before the Subcommittee on Government Operations
of the House Committee on Ways and Means
Regarding the Foreign Account Tax Compliance Act

Thank you for the opportunity to testify regarding the Foreign Account Tax Compliance Act ("FATCA"). My testimony today will focus on FATCA, the accompanying Intergovernmental Agreements ("IGAs"), and the Report of Foreign Bank and Financial Accounts ("FBAR"). I will discuss (1) the current state of these laws, (2) their negative effects, and (3) their unconstitutionality.

I. Overview of the FATCA, the IGAs, and FBAR.

A. FATCA

FATCA was enacted on March 18, 2010 as a fiscal offset provision to the Hiring Incentives to Restore Employment Act of 2010, Pub. L. No. 111-147, 124 Stat. 71 (2010). It was enacted for the ostensible purpose of reducing tax evasion by U.S. taxpayers who fail to report foreign assets located outside of the U.S.[2] Yet in practice, FATCA has trapped innocent U.S. citizens in a shockingly draconian scheme, cutting them off from basic banking services in the country they call home and forcing them to disclose information that they would not otherwise disclose. Moreover, it forces foreign financial institutions—with the threat of a significant penalty if they do not comply—to search out and report any U.S. account holders. As discussed

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[1] Principal, The Bopp Law Firm, PC, Terre Haute, IN. *See* Summary of Resume of James Bopp, Jr. attached. The author wishes to acknowledge Courtney Turner Milbank, J.D., of The Bopp Law Firm, PC, for her research and writing assistance.

[2] *See generally* Andrew Quinlan, The Foreign Account Tax Compliance Act Will Fail to Curb Tax Evasion, Mar. 16, 2014, https://www.forbes.com/sites/realspin/2014/03/16/the-foreign-account-tax-compliance-act-will-fail-to-curb-tax-evasion/#1f8de1d768a8.

more fully below, the costs associated with such institutions becoming compliant is staggering.

FATCA is codified at 26 U.S.C. §§ 1471–74, 6038D and other scattered sections of Title 26, and has two primary components: (1) individual reporting and (2) foreign financial institution reporting.

1. Individual Reporting

The first FATCA component requires individuals to report foreign financial assets when the aggregate value of all such assets exceeds $50,000. 26 U.S.C. § 6038D(a). While the statute permits the Secretary of the Treasury to prescribe a higher threshold amount, this provision offers no additional protection to U.S. citizens. *Id.* This is because U.S. citizens are unable to rely on a threshold amount that is subjective and which the Secretary could revert at any time.

Currently, the Secretary has prescribed two separate FATCA reporting thresholds for individuals living within the U.S. and individuals living outside the U.S. For individuals living within the U.S., foreign financial assets become reportable if the aggregate value of one's assets is equal to or greater than $50,000 on the last day of the tax year or $75,000 at any time during the tax year.[3] These amounts double for married individuals filing jointly.[4] For individuals living outside of the U.S., foreign financial assets become reportable if the aggregate value of one's assets is equal to or greater than $200,000 on the last day of the tax year or $300,000 at any time

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[3] *See generally* IRS, Comparison of Form 8938 and FBAR Requirements, https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR- Requirements (last visited Apr. 19, 2017).

[4] *Id.*

during the tax year.[5] These amounts also double for married individuals filing jointly.[6]

An individual's reportable financial assets must be reported to the IRS with the individual's annual tax return using Form 8938. 26 C.F.R. § 1.6038D-4(a)(11). For each foreign account, the individual must report:

i. the name and address of the financial institution at which the account is maintained;

ii. the account number;

iii. the maximum value of the account during the taxable year;

iv. whether the account was opened or closed during the taxable year;

v. the amount of any income, gain, loss, deduction, or credit recognized for the taxable year and the schedule, form, or return filed with the IRS on which such amount is reported; and

vi. the foreign currency in which the account is maintained, the foreign currency exchange rate, and the source of the rate used to determine the asset's U.S. dollar value.

26 U.S.C. § 6038D(c); 26 C.F.R. § 1.6038D-4(a). Form 8938 additionally requires an individual to report the aggregate amount of interest, dividends, royalties, other income, gains, losses, deductions, and credits for all accounts.[7]

Individuals who fail to report such assets are subject to penalties of $10,000 for each

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[5] *Id.*

[6] *Id.*

[7] IRS, Form 8938, https://www.irs.gov/pub/irs-pdf/f8938.pdf (last visited Apr. 19, 2017).

failure to file a timely report and 40% of the amount of any underpaid tax related to the asset. *Id.* §§ 6038D(d), 6662(j)(3).

2. Foreign Financial Institution Reporting

The second FATCA component operates on all foreign financial institutions worldwide. FATCA requires such institutions to report detailed account information for any account held by a U.S. person to the U.S. government each year irrespective of whether the U.S. account-holder is suspected of tax evasion. *Id.* § 1471(b).

Foreign financial institutions must report U.S. accounts annually to the IRS on Form 8966. The report must include:

i. the name, address, and TIN of each account holder;

ii. the account number;

iii. the account balance or account value;

iv. the gross receipts and gross withdrawals or payments.

26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d)(3)(ii). Form 8966 additionally requires a foreign financial institution to report the aggregate gross amount of all income paid or credited to an account for the calendar year less any interest, dividends, and gross proceeds.[8]

Foreign financial institutions that fail to comply with FATCA's reporting scheme are subject to a substantial penalty of 30% of the amount of any payment originating from sources within the U.S. *Id.* § 1471(a).

[8] IRS, Instructions for Form 8966, 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf (last visited Apr. 19, 2017).

B. IGAs

The Treasury Department and IRS have chosen to implement FATCA by adopting regulations[9] and by entering into intergovernmental agreements ("IGAs") with foreign nations.

The Treasury Department has entered into IGAs with 113 foreign countries.[10] The IGAs were entered into force on August 31, 2015.[11] Yet, none of these IGAs have been submitted to the Senate for its advice and consent pursuant to Article II, section 2, clause 2 of the Constitution or approved by a majority vote in both houses of Congress. Nor are any of the IGAs authorized by an existing Article II treaty.

The IGAs are styled as either Model 1 or Model 2 agreements.

1. Model 1 IGAs

Under Model 1 IGAs, the foreign government ("FATCA Partner") agrees to collect the financial account information that FATCA requires a foreign financial institution to report on

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[9] FATCA regulations primarily elaborate on the requirements of the statutory provisions and clarify the statutory requirements. *See e.g.*, Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, 78 Fed. Reg. 5874 (Jan. 28, 2013); Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities, 79 Fed. Reg. 12812 (Mar. 6, 2014); Withholding of Tax on Certain U.S. Source Income Paid to Foreign Persons, Information Reporting and Backup Withholding on Payments Made to Certain U.S. Persons, and Portfolio Interest Treatment, 79 Fed. Reg. 12726 (Mar. 6, 2014); Reporting of Specified Foreign Financial Assets, 79 Fed. Reg. 73817 (Dec. 12, 2014).

[10] U.S. Dept. of the Treasury, Foreign Account Tax Compliance Act (FATCA) https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last visited Apr. 19, 2017).

[11] Tax Scan Team, *Block all Accounts that do not provide Self Certification by April 30 for FATCA: CBDT to Financial Institutions*, Apr. 11, 2017, http://www.taxscan.in/block-accounts-not-provide-self-certification-april-30-fatca-cbdt-financial-institutions/6644/.

behalf of the U.S. government and report that information to the IRS itself.[12] In effect, a foreign financial institution identifies U.S. accounts then reports specified information about the U.S. accounts to its own government.[13] That foreign government then reports such information to the IRS.[14]

In Model 1 IGAs, the foreign government has agreed to collect information similar to, but not coextensive with, the information required to be reported by a foreign financial institution to the U.S. government under FATCA.[15]

The information required to be collected regarding depository accounts includes:

i. the name, address, and U.S. TIN of each U.S. account holder;

ii. the account number of each U.S. account holder;

iii. the name and identifying number of the foreign financial institution maintaining the account;

iv. the calendar year-end balance or value of the account; and

v. the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.

In Model 1 IGAs, the foreign government has agreed to transmit the above listed

[12] *See, e.g.*, U.S. Dept. of Treasury Resource Center, Model 1A IGA Reciprocal, Preexisting TIEA or DTC, art. 2, § 1, (Nov. 30, 2014), http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf.

[13] IRS, FATCA Information for Governments, https://www.irs.gov/businesses/corporations/fatca-governments (last visited Apr. 19, 2017).

[14] *Id.*

[15] *See, e.g.*, Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, at art. 2, § 2(a).

information directly to the U.S. government.[16] In return, the U.S. government has agreed to treat each of the foreign government's reporting foreign financial institution as complying with FATCA and as not subject to the 30% withholding under § 1471(a).[17]

2. Model 2 IGAs

Under Model 2 IGAs, the foreign government has agreed (1) to direct all covered foreign financial institutions to register with the IRS and comply with all obligations under FATCA[18] and (2) to exempt such foreign financial institutions from any of the foreign government's laws that would prohibit or otherwise criminalize such conduct.[19] In return, the U.S. government has agreed to treat each of the foreign government's reporting foreign financial institutions that complies with the IGA as complying with FATCA and not subject to the 30% withholding under § 1471(a).[20]

C. FBAR

The Report of Foreign Bank and Financial Accounts ("FBAR")—while not technically part of FATCA or the IGAs—is part of the same scheme to curb tax evasion. FBAR must be filed annually with the IRS by persons who have a financial interest in, or signatory authority

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[16] Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* 12, at art. 2, § 1.

[17] *Id.* at art. 4, § 1.

[18] *See e.g.,* U.S. Dept. of Treasury FATCA Resource Center, Model 2 IGA, Preexisting TIEA or DTC, art. 2, (Nov. 30, 2014), https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-11-30-14.pdf.

[19] *See e.g.,* Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, Feb. 14, 2013, art. 4, available at http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Switzerland-2-14-2013.pdf.

[20] Model 2 IGA, Preexisting TIEA or DTC, *supra* note 18, art. 3, § 1.

over, a bank, securities, or other financial account in a foreign country with an aggregate value of more than $10,000. 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.306(c), 1010.350(a). Persons required to file include, not only citizens and residents of the U.S., but also other entities such as corporations, partnerships, trusts, etc. 31 C.F.R. § 1010.350(b). The FBAR must be filed separately from an individual's regular federal income tax return by April 15th of each year.[21]

Under FBAR, reportable bank accounts include savings accounts, depository accounts, checking accounts, securities accounts, and "other financial accounts." 31 C.F.R. § 1010.350(c). Persons can have a financial interest in a reportable account in several circumstances, including when a person owns or holds legal title to a reportable account, when they are the agent or attorney with respect to the account, or when they own more than 50% of the voting power, total value of equity, interest, or assets, or interest in profits. *Id.* § 1010.350(e). Persons have signature authority over a reportable account when they have "authority . . . (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained." *Id.* § 1010.350(f)(1).

Failure to file the FBAR can bring both civil and criminal penalties. 31 U.S.C. § 5321(d). Civil penalties vary depending on whether the failure to file was willful. *Id.* § 5321(a)(5). For non-willful violations, the maximum penalty is $10,000 for each unfiled report. *Id.* § 5321(a)(5)(B)(i). The penalty may not be imposed for non-willful violations if the violation was due to "reasonable cause" and the account balance was "properly reported." *Id.*

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[21] FinCEN, BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114) 8 (2017), https://www.fincen.gov/sites/default/files/shared/FBAR%20Line%20Item%20Filing%20Instructions.pdf

§ 5321(a)(5)(B)(ii). For willful violations, the maximum penalty is $100,000 or 50% of the balance of the account at the time of the violation. *Id.* § 5321(a)(5)(C)(i). The "reasonable cause" defense is unavailable for willful violations. *Id.* § 5321(a)(5)(C)(ii). The maximum criminal penalty for FBAR violations is a $250,000 fine and five years imprisonment. *Id.* § 5322(a).

II. These Laws Impose Unique and Discriminatory Burdens on U.S. Citizens Living and Working Abroad, and Foist Staggering Compliance Costs on Foreign Financial Institutions.

A. FATCA and the IGAs

FATCA is a sweeping financial surveillance program of unprecedented scope that allows the Internal Revenue Service ("IRS") to peer into the financial affairs of any U.S. citizen with a foreign bank account. At its core, FATCA is a bulk-data-collection program requiring foreign financial institutions to report to the IRS detailed information about the accounts of U.S. citizens living abroad, including their account balances and account transactions. 26 U.S.C. § 1471(c)(1). FATCA eschews the privacy rights enshrined in the Bill of Rights in favor of efficiency and compliance by requiring institutions to report citizens' account information to the IRS even when the IRS has no reason to suspect that a particular taxpayer is violating the tax laws.

Moreover, FATCA imposes enormous economic costs on financial institutions. An estimated 250,000 foreign financial institutions are affected by FATCA.[22] And many of those foreign financial institutions have found that it costs more to become compliant than they originally anticipated. In a 2014 survey, more than a quarter (27%) of the surveyed financial institutions estimated their annual compliance cost for 2015 to be between $100,000 and $1

[22] William Byrnes & Robert J. Munro, Background and Current Status of FATCA, LexisNexis® Guide to FATCA & CRS Compliance 1-110 (5th ed., 2017) available at https://ssrn.com/abstract=2926119Background and Current Status of FATCA.

million.[23] And 55% of financial institutions surveyed said that they expected to exceed their original budget for FATCA compliance while only 35% said they expected to remain within budget.

Another study estimates that the costs of some of the larger institutions may reach more than $200 million.[24] A representative for Banco Bilbao Vizcaya Argentaria, one of the largest banks in Spain, stated that "compliance costs could range from €8 million for a local entity to €800 million for a global entity."[25] And the British government estimated the aggregate initial costs to U.K. financial institutions to be £900 million to £1,600 million, with a continuing cost of £50 million to £90 million each year.[26] The total cost of implementing FATCA, has been estimated to be between $200 billion and $1 trillion.[27]

What is most striking about these costs is that they are expected to exceed the amount of additional revenue that FATCA is projected to raise. While the legislature did not perform a cost-benefit analysis before FATCA was enacted,[28] the Joint Committee on Taxation estimated

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[23] Thomson Reuters, *Thomson Reuters survey indicates FATCA compliance to cost more than anticipated*, Nov. 12, 2014, https://tax.thomsonreuters.com/press-room/press-release/thomson-reuters-survey-indicates-fatca-compliance-cost-anticipated/.

[24] Bynes and Munro, *supra* note 22, at 1-110.

[25] *Id.*

[26] *Id.*

[27] Simon Black, *Genius: FATCA Has Brought in Just $13.5 Billion in Revenue on a Cost of $1 Trillion*, Feb. 11, 2016, https://www.sovereignman.com/trends/genius-fatca-has-brought-in-just-13-5-billion-in-revenue-on-a-cost-of-1-trillion-18665/.

[28] Nigel Green, *A Corporate-Welfare Bonanza for Tax-Compliance Firms*, Apr. 2, 2017, https://www.wsj.com/articles/a-corporate-welfare-bonanza-for-tax-compliance-firms-1491163938.

that it would generate approximately $8.7 billion in additional tax revenue between 2010 and 2020.[29] The disjunction between FATCA's costs and benefits is perhaps best illustrated by the Australian experience where experts in 2014 estimated that FATCA will extract an additional $20 million in revenue for the U.S. at an estimated implementation cost of around $1 billion.[30] This marked inefficiency has led many, including the U.S. Taxpayer Advocate, to question whether FATCA's costs and difficulties are worth the marginal increase in revenues.[31]

FATCA's burdens, however, are not limited to financial institutions and fall most heavily on individual U.S. citizens. On the most fundamental level, FATCA deprives individuals of the right to the privacy of their financial affairs. FATCA authorizes the IRS to collect information on the financial assets of U.S. citizens living abroad that it cannot collect on U.S. citizens domestically. On a practical level, FATCA is severely impinging on the ability of U.S. citizens to live and work abroad. It is affecting all facets of individuals' lives from day-to-day finances and employment to family relations and citizenship.

FATCA is causing many foreign financial institutions to curtail their business dealings with U.S. citizens living abroad because the costs associated with compliance are simply not worth the trouble. According to a study conducted by the group Democrats Abroad in 2014, almost one-quarter (22.5%) of Americans living abroad who attempted to open a savings or retirement account and 10% of those who attempted to open a checking account were unable to

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[29] Joint Committee on Taxation, JCX-6-10, Estimated Revenue Effects of HIRE Act, p.1 (Mar. 4, 2010), https://www.jct.gov/publications.html?func=startdown&id=3650.

[30] Australian Banker's Association Inc., Financial System Inquiry, (Mar. 2014), 107–108, http://fsi.gov.au/files/2014/04/ABA_1.pdf.

[31] William Hoffman, *FATCA 'Tormenting' Taxpayers, Olson Says*, Tax Analysts, Oct. 8, 2014, http://www.taxanalysts.org/content/fatca-tormenting-taxpayers-olson-says.

due so.[32] The 2014 study also revealed that some Mexican financial institutions are even refusing to cash checks for Americans living in that country, many of whom are retirees.[33]

But banks are not only refusing to open new accounts or cash checks for U.S. citizens, they are also closing existing customer accounts.[34] In 2014, it was estimated that one million Americans living abroad (one-sixth of all such citizens) have had bank accounts closed because of FATCA.[35] Nearly two-thirds (60%) of those who reported having an account closed had lived abroad for twenty or more years, and most affected appear to be "overwhelmingly middle class Americans, not high income individuals."[36] More than two-thirds (68%) of checking accounts and nearly half (40.4%) of savings accounts closed had balances of less than $10,000.[37] And, over two-thirds (69.3%) of dedicated retirement accounts and more than half (58.9%) of other

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[32] Democrats Abroad, FATCA: Affecting Everyday Americans Every Day 6 (2014), https://d3n8a8pro7vhmx.cloudfront.net/democratsabroad/pages/4734/attachments/original/1449777271/Democrats_Abroad_2014_FATCA_Research_Report.pdf?1449777271 (last visited Apr. 19, 2017).

[33] Democrats Abroad, *supra* note 32, at 7.

[34] Martin Hughes, *FATCA Fall Out Closes A Million US Bank Accounts*, Money International, Oct. 7, 2014, http://www.moneyinternational.com/tax/fatca-fall-closes-million-us-bank-accounts/; Eyk Henning, *Deutsche Bank Asks U.S. Clients in Belgium to Close Accounts*, The Wall Street Journal, May 2, 2014, http://www.wsj.com/articles/SB10001424052702303678404579537610638716116; Nat Rudarakanchana, *Americans Abroad Can't Bank Smoothly As FATCA Tax Evasion Reform Comes Into Play*, International Business Times, Dec. 20, 2013, http://www.ibtimes.com/ americans-abroad-cant-bank-smoothly-fatca-tax-evasion-reform-comes-play-1517032; Jeff Berwick, *Breaking News: US Expats in Mexico Left Stranded in Latest FATCA Escalation*, The Dollar Vigilante, June 4, 2014, http://dollarvigilante.com/blog/2014/6/4/breaking-news-us-expats-in-mexico-left-stranded-in-latest-fa.html.

[35] Hughes, *supra* note 34.

[36] Democrats Abroad, *supra* note 32, at 4, 6.

[37] Democrats Abroad, *supra* note 32, at 6.

investment or brokerage accounts closed had a balance of less than $50,000.[38]

In addition to causing Americans overseas to lose access to basic financial services abroad, FATCA is also having a detrimental impact on U.S. citizens living abroad at work and at home. Many have reported that they are being denied consideration for promotions at their jobs, particularly with respect to high-level positions,[39] because of the concomitant compliance burdens foisted on employers by FATCA.[40] Indeed, in the study by Americans Abroad, 5.6% of respondents reported that they had been denied a position because of FATCA.[41] Others reported difficulty opening a business or partnering with others in joint ventures because of obstacles created by FATCA.[42] Such trends will undoubtedly affect the ability of U.S. citizens to remain economically competitive in an increasingly globalized world.

At home, FATCA is forcing Americans abroad to rearrange not only their financial affairs but also reconsider their personal relationships.[43] More than one-fifth (20.8%) of Americans abroad surveyed by Democrats Abroad have already or are considering separating

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[38] Democrats Abroad, *supra* note 32, at 6.

[39] Democrats Abroad, 2014 FATCA Research Project Datapack 21 at Table VII.3 (2014), https://d3n8a8pro7vhmx.cloudfront.net/democratsabroad/pages/4734/attachments/original/1449777269/Democrats_Abroad_2014_FATCA_Research_Datapack.pdf?1449777269 (last visited Apr. 19, 2017).

[40] Barbara Stcherbatcheff, *Why Americans Abroad Are Giving Up Their Citizenship*, June 28, 2014, http://www.newsweek.com/why-americans-abroad-are-giving-their-citizenship-256447?utm_source=taboola&utm_medium=referral

[41] Democrats Abroad, *supra* note 32 at 9.

[42] Democrats Abroad, *supra* note 32 at 10.

[43] *See generally* Democrats Abroad, *supra* note 32, at 7–9 (noting several instances where FATCA was negatively affecting familial relationships).

their accounts from their non-American spouse.[44] And 2.4% have or are considering separating or divorcing as a result of FATCA's expansive reporting requirements,[45] further destabilizing American families by adding to the already increasing divorce rate.[46] This instability is likely having the harshest impact on Americans living abroad whose spouses are the primary breadwinners and themselves not American citizens. For these individuals, such as stay-at-home mothers, FATCA is undermining their financial security and placing them in "highly vulnerable" positions because of the need to separate American spouses from a family's non-American earned financial assets.[47] It can leave them without property and without access to their families' bank accounts and credit.[48]

The issues discussed above have not only affected American expatriates, but also a group of people referred to as "accidental Americans." These accidental Americans may not have any personal or business ties to the U.S.[49] but could have been granted citizenship by being born in the U.S. or to a U.S. citizen. Yet, despite their lack of personal or business ties, they are subject to the significant burdens stemming from FATCA.

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[44] Democrats Abroad, *supra* note 32 at 7.

[45] Democrats Abroad, *supra* note 32, at 7.

[46] Christophen Ingraham, *Divorce is actually on the rise, and it's the baby boomers' fault*, The Washington Post, March 27, 2014, http://www.washingtonpost.com/blogs/wonkblog/wp/ 2014/03/27/divorce-is-actually-on-the-rise-and-its-the-baby-boomers-fault/.

[47] Democrats Abroad, *supra* note 32 at 8.

[48] Democrats Abroad, *supra* note 32, at 8 (reporting numerous situations where non-income earning spouses were removed from the families financial affairs).

[49] Bynes and Munro, *supra* note 22, at 1-107.

For some Americans living abroad, FATCA's burdens have become so heavy that they are choosing to relinquish their US citizenship just so they can avoid the crushing weight of this unprecedented law. As one author put it, FATCA "threaten[s] your bank to get your bank to threaten you. The only way to get the IRS off your back is to . . . get that expensive [Certificate of Loss of Nationality]."[50]

Indeed, record numbers of Americans have relinquished their U.S. citizenship since FATCA's passage.[51] From 2010 to 2015, a record number of citizenship renunciations occurred—totaling more than 10,000.[52] And the trend shows no signs of slowing down. In 2016, there were 5,411 renunciations, a number well above the previous record in 2015 of 4,279.[53]

In some cases, non-American spouses are pressuring their American spouses to relinquish their U.S. citizenship to avoid entangling the non-American spouses financial affairs

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[50] Daily Kos, How America holds its expats hostage on tax day, Apr. 16, 2017, http://m.dailykos.com/story/2017/4/16/1653591/-How-America-holds-its-expats-hostage-on-tax-day.

[51] Catherine Bosley and Richard Rubin, *A Record Number of Americans Are Renouncing Their Citizenship*, Bloomberg Business, Feb. 10, 2015, http://www.bloomberg.com/news/articles/2015-02-10/americans-overseas-top-annual-record-for-turning-over-passports; Ali Weinberg, *Record Number of Americans Renouncing Citizenship Because of Overseas Tax Burdens*, ABC News, Oct. 28, 2014, http://abcnews.go.com/International/record-number-americans-renouncing-citizenship-overseas-tax-burdens/story?id=26496154; Laura Saunders, *More Americans Renounce Citizenship, With 2014 on Pace for a Record*, The Wall Street Journal, Oct. 24, 2014, http://blogs.wsj.com/totalreturn/2014/10/24/more-americans-renounce-citizenship-with-2014-on-pace-for-a-record/; Robert W. Wood, *Americans Renouncing Citizenship Up 221%, All Aboard The FATCA Express*, Forbes, Feb. 6, 2014, http://www.forbes.com/sites/robertwood/2014/02/06/americans-renouncing-citizenship-up-221-all-aboard-the-fatca-express/.

[52] Bosley and Rubin, *supra* note 51.

[53] Ephraim Moss, *FATCA Causing Record Amount of Citizenship Renunciations*, Apr. 5, 2017, https://www.taxconnections.com/taxblog/fatca-causing-record-amount-of-citizenship-renunciations/#comments.

in FATCA.[54] And, at the same time, as if to add insult to injury, the U.S. government has sought to make the price of citizenship for these persons even higher. For, just as FATCA's burdens are growing steadily more burdensome as the law moves toward full implementation, the U.S. government has simultaneously increased the cost of citizenship renunciation five-fold, from $450 to $2,350.[55] The U.S. now has the highest cost of renunciation in the world.[56]

Finally, the extent of some negative effects remain to be seen. FATCA and the IGAs open the door for other countries to demand the same information from U.S. residents. The reciprocal version of the IGAs provide that the U.S. will exchange information from U.S. financial accounts held by residents of partner countries.[57] This is sure to subject U.S. financial institutions to the enormous financial burdens of implementation that foreign financial institutions are already experiencing.

B. FBAR

But FATCA is not the only attack being leveled at Americans living abroad. The Bank Secrecy Act imposes an extra requirement on overseas Americans in the form of a special reporting requirement for foreign accounts. Under the FBAR, Americans living abroad must disclose detailed information about any foreign bank accounts with a balance in excess of $10,000. In practice, it is just a trap for the unprepared and the uninformed, pinching regular

[54] Democrats Abroad, *supra* note 32, at 9.

[55] Weinberg, *supra* note 51.

[56] Robert W. Wood, U.S. Has World's Highest Fee to Renounce Citizenship, Oct. 23, 2015, https://www.forbes.com/sites/robertwood/2015/10/23/u-s-has-worlds-highest-fee-to-renounce-citizenship/#7b74c3e247de.

[57] Bynes and Munro, *supra* note 22, at 1-83.

middle-class Americans residing outside the U.S.

The penalties for failing to file the report can be financially devastating and can wipe out a person's entire savings. The maximum penalty for failing to file an FBAR is $100,000 or 50% of the value of the account, *whichever is greater* with each unfiled report begetting a separate penalty. 31 U.S.C. § 5321(a)(5)(C). As a result, a single unreported account with a static balance can be penalized multiple times for the same course of conduct continued over multiple years. Because the FBAR civil penalties are cumulative, ultimately the fine for failing to file the FBAR can far exceed the actual value of the unreported financial asset. A person who fails to report an account for only two years could be subject to a penalty *equal to the full balance of the account.* Each unfiled FBAR could subject the person to a fine of 50% of the balance of the account, resulting in an aggregate fine after two years of 100% of the value of the account. One person who failed to file the FBAR for four years was subjected to a fine of 150% of the balance of his account.[58]

III. FATCA, the IGAs and FBAR Are Unconstitutional.

On July 14, 2015, a number of Plaintiffs, including Senator Rand Paul, filed suit in the United States District Court for the Southern District of Ohio, challenging FATCA, the IGAs, and FBAR. The case is styled *Crawford v. U.S. Department of the Treasury*, Case No. 3:15-cv-00250. The merits of the case have not yet been reached and the Court has not ruled on the constitutionality of FATCA, the IGAs, and FBAR. This is because the Court dismissed the case—finding that none of the Plaintiffs had standing to challenge FATCA, the IGAs, or FBAR.

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[58] David Voreacos and Susannah Nesmith, *Florida Man Owes Record 150% IRS Penalty on Swiss Account*, Bloomberg Business, May 29, 2014, http://www.bloomberg.com/news/articles/2014-05-28/florida-man-87-owes-150-of-swiss-account-jury-says.

The Court reasoned that Plaintiff's harms were the result of third-party bank action, not the government. The Court's reasoning was flawed because it failed to take into account that banks would not have reported on U.S. accounts nor denied U.S. account holders were it not for FATCA and the IGAs. The case is now pending in the United States Court of Appeals for the Sixth Circuit. *See Crawford v. U.S. Department of the Treasury*, Case No. 16-3539.

For the reasons listed below and in *Crawford v. U.S. Department of the Treasury*, FATCA, the IGAs, and FBAR are unconstitutional.

A. The IGAs Are Unconstitutional Sole Executive Agreements.

There are four recognized sources of authority for the Executive Branch to make international agreements: (1) the Treaty Clause, (2) an act of Congress, (3) an existing treaty, and (4) the President's independent constitutional powers. Restatement (Third) of Foreign Relations Law § 303 (1987). These four sources give rise to four types of international agreements: (1) Article II treaties, (2) congressional-executive agreements, (3) treaty-based agreements, and (4) sole executive agreements. John E. Nowak & Ronald D. Rotunda, Treatise on Const. L. § 6.8(a).

Each of the first three types of agreements require action by at least one chamber of Congress. Treaties must be ratified by two-thirds of the Senators present. U.S. Const. art. II, § 2, cl. 2. Congressional-executive agreements must be authorized or approved by a majority vote in both Houses like ordinary legislation. Restatement (Third) of Foreign Relations Law § 303. Treaty-based agreements must be made pursuant to authorization contained in an existing Article II treaty. Nowak & Rotunda, *supra* § 6.8(a).

Only the fourth type of agreement—sole executive agreements—can be brought into force, if at all, without congressional action. *Id.*; 11 FAM § 723.2-2(C). They are "reserved for agreements made solely on the basis of the constitutional authority of the President." 11 FAM § 723.2-2; *accord United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 658–59 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955).

1. The IGAs Exceed the Scope of the President's Independent Constitutional Powers.

The Executive Branch has identified possible sources of the President's independent power to make international agreements as including "(1) The President's authority as Chief Executive to represent the nation in foreign affairs; (2) The President's authority to receive ambassadors and other public ministers, and to recognize foreign governments; (3) The President's authority as 'Commander-in-Chief'; and (4) The President's authority to "take care that the laws be faithfully executed." *See* 11 FAM § 723.2-2(C).

The President, however, lacks an independent power to impose taxes or specify the manner of their collection or any other power which would grant him the power to enter the IGAs unilaterally. *See generally* U.S. Const. art. II (reserving taxing power exclusively to Congress).

Yet, the IGAs are fundamentally international agreements concerning taxation and the collection of taxes. And none of them has received Senate or congressional approval or is pursuant to any authorization contained in any Article II treaty. The IGAs have not been submitted to the Senate for advice and consent.[59]

Furthermore, while FATCA authorizes the Treasury Department to adopt regulations and "other guidance," it does not authorize the making of international agreements like the IGAs. *See*

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[59] U.S. Dep't of State, Treaties Pending in the Senate (updated as of Dec. 30, 2016), http://www.state.gov/s/l/treaty/pending/index.htm (last visited Apr. 19, 2017).

26 U.S.C. § 1474(f). Finally, there is no valid treaty that otherwise authorizes the IGAs.[60]

The President, therefore, lacks the power to conclude the IGAs as sole executive agreements because their subject matter lies outside his constitutional powers.

2. The IGAs Override FATCA.

Sole executive agreements may not be "inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority." 11 FAM § 732.2-2(C); *accord Guy W. Capps*, 204 F.2d at 658–600; *Swearingen v. United States*, 565 F. Supp. 1019 (D. Colo. 1983).

Yet, the IGAs establish a different regulatory scheme than the one mandated by FATCA. The Model 1 IGAs, for example, exempt covered foreign financial institutions from the statutory requirement that they report account information directly to the Treasury Department, 26 U.S.C. § 1471(b)(1)(C), and instead allow such foreign financial institutions to report the account information to their national governments.[61]

The Model 2 IGAs, for example, exempt covered foreign financial institutions from the obligation "to obtain a valid and effective waiver" of any foreign law that would prevent the reporting of information required by FATCA, 26 U.S.C. § 1471(b)(1)(F)(i), and instead obligates the foreign government to suspend such laws with respect to FATCA reporting by covered foreign financial institutions.[62] This deprives account holders of their right under the statute to refuse a waiver.

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[60] Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why it Matters)*, 69 Tax Notes Int'l 565, 567 (2013) (The "IGAs are not treaty-based agreements.").

[61] *See e.g.*, Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, at art. 2, § 1.

[62] Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, *supra* note 19, at art. 4.

The President, therefore, lacks the power to conclude the IGAs as sole executive agreements because they override a duly enacted statute.

B. The Heightened Reporting Requirements for Foreign Financial Accounts Deny U.S. Citizens Living Abroad the Equal Protection of the Laws.

The Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. The Due Process Clause of the Fifth Amendment includes a guarantee of equal protection equivalent to that expressly provided in the Equal Protection Clause of the Fourteenth Amendment. "An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995); *United States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998). Thus, the federal government may not "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1.

The only financial information reported to the IRS about domestic accounts is the amount of interest paid to the accounts during a calendar year, 26 U.S.C. §§ 6049(a), (b); 26 C.F.R. §§ 1.6049-4(a)(1), 1.6049-4T(b)(1). For a foreign account, the information reported to the IRS includes not only the interest paid to the account,[63] but also the amount of any income, gain, loss, deduction, or credit recognized on the account,[64] whether the account was opened or closed during the year,[65] and the balance of the account.[66] Comparable information is not required to be

[63] 26 USC § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), -4(d)(4)(iv); Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, at art. 2, §2.

[64] 26 C.F.R. § 1.6038D-4(a)(8)

[65] *Id.* § 1.6038D-4(a)(6).

[66] 26 USC §§ 1471(c)(1)(C), 6038D(c)(4); 26 CFR §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, at art. 2, §2;

disclosed regarding domestic accounts of U.S. citizens. The result is that U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States.

The federal government has no legitimate interest in knowing the amount of any income, gain, loss, deduction, or credit recognized on a foreign account, whether a foreign account was opened or closed during the year, or the balance of a foreign account. The fact that the local bank accounts of citizens living abroad are not held in the U.S. bears no rational relationship to any legitimate state interest the federal government might have in prying into the private affairs of citizens living abroad.

C. The Penalties Imposed under FATCA and FBAR Are Unconstitutional Under the Excessive Fines Clause.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Excessive Fines Clause is not limited only to fines that are criminal in nature but extends to civil fines as well. *Austin v. United States*, 509 U.S. 602, 610 (1993). A fine is subject to the Excessive Fines Clause if one of the purposes of the fine is punishment. *Id.*; *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). Fines calibrated for retributive or deterrent purposes are considered to be for the purpose of punishment. *Austin*, 509 U.S. at 610.

To withstand constitutionality, fines governed by the Excessive Fines Clause must not be "excessive." U.S. Const. amend. VIII. The "touchstone" of the excessiveness analysis is "principle of proportionality," requiring a comparison of the amount of the fine and the gravity of offense. *Bajakajian*, 524 U.S. at 334. A fine violates the Eighth Amendment when the fine is

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Model 2 IGA, Preexisting TIEA or DTC, *supra* note 18, at art. 2.

grossly disproportional to the gravity of the offense. *Id.*.

The Supreme Court has identified three "general criteria" to guide the determination of whether a fine is grossly disproportionate: (1) "the degree the defendant's reprehensibility or culpability"; (2) "the relationship between the penalty and the harm to the victim caused by the defendant's actions"; and (3) "the sanctions imposed in other cases for comparable misconduct." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434–35 (2001).

1. The FATCA Foreign Financial Institution Penalty Is Unconstitutional.

Under FATCA, payments from U.S. sources to foreign financial institutions not compliant with FATCA are subject to a 30% "tax" (hereinafter the FATCA "FFI Penalty"). 26 U.S.C. § 1471(a); 26 C.F.R. § 1.1471-2T(a)(1). This penalty can be applied to any financial institution anywhere in the world if an institution fails to comply with FATCA.

Without the FFI Penalty, foreign financial institutions likely would not comply with FATCA and Plaintiffs' private financial information would not be disclosed to the U.S. government. The penalty leaves foreign financial institutions no meaningful alternative but to implement costly compliance systems and comply with FATCA. In fact, former Senator, Carl Levin, stated that "FATCA was intended to 'force foreign financial institutions to disclose their U.S. account holders or pay a steep penalty for nondisclosure.'"[67]

The FFI Penalty is intended as punishment and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610. The penalty is used as a hammer to coerce compliance by foreign financial institutions everywhere in the world, whether or not they fall within the

[67] Byrnes and Munro, *supra* note 22, at 1-4 (citing HIRE Act,156 Cong Rec § 1745, § 1745 (daily ed Mar 18, 2010) (Statement of Senator Levin)).

regulatory jurisdiction of the U.S. Furthermore, the FFI Penalty is grossly disproportional to the gravity of the offense it seeks to punish and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

2. The FATCA Passthrough Penalty Is Unconstitutional.

FATCA and the IGAs require foreign financial institutions to "deduct and withhold a tax equal to 30 percent of" any payments made to recalcitrant account holders (hereinafter the FATCA "Passthrough Penalty").[68] Recalcitrant account holders are persons who fail to provide (a) information sufficient to determine whether the account is a U.S. account to the foreign financial institution holding their account, (b) their name, address, or TIN to the foreign financial institution holding the account, or (c) who fails to provide waiver of a foreign law that would prevent the foreign financial institution from reporting the information to the IRS under FATCA. 26 U.S.C.. § 1471(d)(6).

The Passthrough Penalty is designed to punish and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610. Furthermore, the Passthrough Penalty is grossly disproportionate to the gravity of the offense and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

3. The FBAR Willfullness Penalty Is Unconstitutional.

Section 5321 of the United States Code imposes a maximum penalty of $100,000 or 50% of the balance of the account at the time of the violation, whichever is greater, for failures to file an FBAR as required by § 5314 (hereinafter the FBAR "Willfulness Penalty"). 31 U.S.C.

[68] 26 U.S.C. § 1471(b)(1)(D); 26 C.F.R. §§ 1.1471-4(a)(1), 1.1471-4T(b)(1); Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, art. 2, § 1; Model 2 IGA, Preexisting TIEA or DTC, *supra* note 18, art. 2.

§ 5321(b)(5)(C)(i).

The Willfulness Penalty is designed to punish and is therefore subject to the Excessive Fines Clause. *Austin*, 509 U.S. at 610. The Willfulness Penalty is grossly disproportionate to the gravity of the offense and is therefore unconstitutional. *Bajakajian*, 524 U.S. at 334.

D. FATCA and the IGAs Information Reporting Requirements Are Unconstitutional Under the Fourth Amendment.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment is violated in where "the Government, through 'unreviewed executive discretion,' [is permitted to make] a wide-ranging inquiry that unnecessarily 'touch(es) upon intimate areas of an individual's personal affairs.'" *U.S. v. Miller*, 425 U.S. 435, 444 n.6 (1976) (quoting *California Bankers Assn. v. Shultz*, 416 U.S. 21, at 78-79 (1974) (Powell, J., concurring)). Such indiscriminate searches may only be conducted, at a minimum, after some "invocation of the judicial process" because "the potential for abuse is particularly acute." *California Bankers Assn.*, 416 U.S. at 79 (Powell, J., concurring); *see also*, *Miller* 425 U.S. at 444 n.6 (distinguishing situations where "the Government has exercised its powers through narrowly directed subpoenas duces tecum subject to the legal restraints attendant to such process"); *Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (holding that, for administrative searches, "the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker.").

1. FATCA's Information Reporting Requirements Are Unconstitutional.

FATCA requires foreign financial institutions to report a broad range of information about the accounts of U.S. account holders to the U.S. government, including:

i. the name, address, and TIN of the account holder;

ii. the account number;

iii. the average calendar year or year-end balance or value of the account;

iv. the aggregate gross amount of interest paid or credited to the account during the year; and

v. the aggregate gross amount of all income paid or credited to an account for the calendar year less any interest, dividends, and gross proceeds.

26 U.S.C. § 1471(c)(1); 26 C.F.R. § 1.1471-4(d)(3)(ii); IRS, Instructions for Form 8966 at 10, http://www.irs.gov/pub/irs-pdf/i8966.pdf.

FATCA makes no provision for judicial oversight of the searches of the private financial records of American citizens held by foreign financial institutions in violation of the Fourth Amendment.

2. The IGAs' Information Reporting Requirements Are Unconstitutional.

The IGAs require foreign financial institutions and their governments to report a broad range of information about the accounts of U.S. account holders to the U.S. government, including:

i. the name, address, and U.S. TIN of each U.S. account holder;

ii. the account number of each U.S. account holder;

iii. the name and identifying number of the foreign financial institution maintaining the account;

iv. the calendar year-end balance of the account; and

v. the total gross amount of interest paid or credited to the account during the calendar year or other appropriate reporting period.[69]

The IGAs make no provision for judicial oversight of the searches of the private financial records of American citizens held by foreign financial institutions in violation of the Fourth Amendment.

Conclusion

As discussed above, FATCA is a sweeping financial surveillance program of unprecedented scope that allows the IRS to peer into the financial affairs of any U.S. citizen with a foreign bank account. And FBAR is a trap for the unprepared and the uninformed. The negative effects of these laws are significant and disturbing.

Innocent Americans are being denied bank accounts, having their accounts closed, being forced to separate their jointly held assets, and missing out on career and investment opportunities as a result of these laws. They are also being forced to shoulder significant penalties. Moreover, the costs associated with foreign financial institution compliance far outweighs any revenues FATCA brings in—costs U.S. banks will surely have to bear when partner jurisdictions demand reciprocal information.

Senator Rand Paul put it perfectly when he said, "FATCA is a textbook example of a bad law that doesn't achieve its stated purpose but does manage to unleash a host of unanticipated

[69] Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, art. 2, § 1; Model 2 IGA, Preexisting TIEA or DTC, *supra* note 18, art. 2.

destructive consequences . . . FATCA should be repealed and Congress should find a less onerous means of enforcing tax laws."[70] Repealing FATCA and FBAR will curb the significant harms being imposed on U.S. citizens living abroad and on foreign financial institutions. For these reasons and others discussed above, FATCA and FBAR should be repealed.

[70] Byrnes and Munro, *supra* note 22, at 1-83 (citing Sen. Paul Introduces Bill to Repeal Anti-Privacy Provisions in FATCA. May 8, 2013).

Mr. MEADOWS. Thank you, Mr. Bopp.

Mr. Crawford, you are recognized for 5 minutes.

STATEMENT OF MARK CRAWFORD

Mr. CRAWFORD. Thank you very much for allowing me to be here today to share my firsthand experience regarding the consequences of FATCA from the perspective of an international businessman.

My name is Mark Crawford. I'm an American citizen, and I do not hold any other citizenship, though at various times I've been a resident of the United Kingdom, Albania, Montenegro, and Greece. The politics that divide Americans at home don't often divide those of us broad. Most of the 9 million Americans living overseas are ordinary citizens who are living their lives, raising families, studying, and working. We're just Americans, and though we're often far from home, America is still our home, and the U.S. Constitution is still our Constitution.

In my written submission, I outline more detail about my personal background, having lived and worked across three continents over a 25-year period as a teacher in China, a missionary in Albania, a graduate student in England, a venture capitalist in the Balkans, a banker in Montenegro and Serbia, and now an entrepreneur involved in finance, natural resources, and film production.

I've employed hundreds of people and increased economic activity between the United States and its friends around the world. Throughout my work abroad, I've remained active assisting U.S. interests whenever called upon, regardless of which party controlled the Congress or the White House, including having worked for appointees of the Clinton administration, supported USAID financial inclusion projects, voluntarily chairing American Chamber of Commerce affiliates, advising leaders of several American allied governments, and more recently, volunteering to assist the Treasury Department in Kosovo.

Having worked in finance throughout the world, I returned to Albania in 2010 to pursue a business opportunity, and I ran into the consequences of FATCA. In smaller developing markets, there often isn't enough volume to support standalone financial products, so it's important for such markets to leverage off larger ones. Albania's domestic capital market is still developing, and in order to connect Albania to international capital markets, I founded an Albanian introductory brokerage firm that would work with Saxo Bank in Denmark offering basic brokerage services to Albanian residents.

When I sent the first 10 applications to Saxo Bank, they responded approving only nine. I reached out to Saxo Bank to see who was rejected, and they responded to say that I was rejected. I owned the company. I was told that though I was an Albanian resident at that time, I was rejected solely because I was an American citizen, because of fears because of the FATCA law.

I realize that due to FATCA, I could not serve U.S. persons in my Albanian brokerage firm because of the carry-on impact of the Saxo decision. The introductory brokerage vision that I had was alive, but the idea of working with Americans and American persons was dead.

I'm the pro bono chairman of the American Chamber of Commerce in Albania, and I work closely with our U.S. Embassy there in a private sector capacity trying to promote American business. A brokerage firm owned by myself that markets itself as an American led by the American Chamber chairman that does not accept American citizens is a logical anomaly to most in Albania, and understandably so.

The introductory brokerage products became sidelined, and Saxo Bank eventually grew so unhappy with me that they dropped my firm altogether. The obstacle to my brokerage business created by FATCA was a deal breaker.

Proposals to address the unintended consequences of FATCA had been considered by both parties and candidates on both sides of the aisle in the most recent presidential election. And recognizing the problems of FATCA, some have suggested implementing a safe harbor exception that would help Americans solely within the country of their residency.

Such a safe harbor exception would not have solved the negative impact that FATCA had on my situation. I have never been a resident of Denmark, thus an exception would not have alleviated Saxo Bank's relationship with me or other potential clients that I was bringing through my introductory brokerage firm from Albania.

In conclusion, my experience is that the American entrepreneurial mentality sets our culture apart. Americans do not restrict their investments based on their personal residency; rather, they pursue opportunity according to the markets. Access to international financial services is critical for all such projects, and FATCA's impact has already harmed some of my businesses, and if left unrepealed, will risk others.

It is ironic that after spending much of my career helping advance U.S. interests by expanding financial inclusion through FATCA, the United States has inadvertently restricted inclusion for its own citizens. The fact that an increasing number of banks and financial institutions reject working with United States citizens, outright harms our interests.

It is my belief that the best way to improve the current situation is not to make the situation more complex by creating carveouts or safe harbor exceptions or other partial fixes; therefore, I do support a full repeal of FATCA, and I look forward to your comments and questions in the future.

[Prepared statement of Mr. Crawford follows:]

Testimony of Mark Christopher Crawford[1]
Before the Subcommittee on Government Operations Regarding the Foreign Account Tax Compliance Act

I would like to thank you, Chairman Meadows, and members of the Government Operations Subcommittee for allowing me to be here today to share my first-hand experience as an international businessman within the context of "Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act ('FATCA')".

The politics that divide Americans at home don't often divide those abroad. Most of the 9 million overseas Americans[2] are ordinary citizens who are living their lives, raising their families, studying, and working as teachers, doctors, businessmen, or relief volunteers. We are just Americans and though we are often far from home, America is still our home and the US Constitution is still our Constitution wherever we are. I've been pleased to join a bi-partisan group to raise this issue to all three branches of Government---the White House via the Republican platform, the Judiciary via challenging FATCA in Federal Court, and today before Congress. It is my hope and desire that my testimony today prompts Congress to re-addresses the negative impact that FATCA is having on Americans around the world and to repeal this legislation.

During my testimony I will discuss (1) my own experience in international finance(always having worked in the private sector but often alongside US Government initiatives in collaboration with USAID and US Treasury), (2) the impact that FATCA has had on my entrepreneurial activity as an American living overseas, and (3) possible remedies to the unintended consequences of FATCA. I look forward to answering any questions that the Members may have as we seek to mitigate the consequences of FATCA.

I. My experience in the foreign financial sector and the importance of fostering financial inclusion.

My name is Mark Crawford. I am an American citizen and international entrepreneur, based in Dayton Ohio. I do not have any other citizenship, though at various times I have been a resident of the UK, Albania, Montenegro, Macedonia and Greece. I currently have investment activity in four

[1] Director, BlackburnSteele LLC, Dayton, Ohio; markcrawford.org ; See Resume of Mark C. Crawford attached.
[2] https://travel.state.gov/content/dam/travel/CA_By_the_Numbers.pdf

countries, including the United States. During my career, I have worked across three continents, reaching across party lines to promote American business and American values. I have started banks, micro-lending firms, NGOs, Chambers of Commerce, accounting and brokerage firms, and a film production company. I have led investments in natural resources and advised leaders of several American-allied governments regarding privatization, stabilization and economic growth. I have employed hundreds of people and increased economic activity between the United States and its friends around the world.

By way of background, my parents are Texans and my father is a Texas A&M Electrical Engineering graduate and upon graduation was commissioned into the Air Force and assigned to build unmanned spacecraft at NASA's Jet Propulsion Laboratory at Caltech. I was born in Pasadena, California in 1971.

Employment with NCR took our family to Wichita, Kansas for five years and then to Dayton, Ohio, which was NCR's headquarters at the time. I graduated from Dayton Christian High School and then attended Miami University in Ohio, studying liberal arts. I graduated from Miami in 1993, one year behind current House Speaker, Paul Ryan. Though my travels take me to a number of countries, I am still based in Dayton Ohio and one of my companies is headquartered there.

Growing up I never travelled abroad. The closest experience I had to visiting a foreign culture was visiting my Grandparents in Texas. None of my extended family had spent much time living outside of the United States since the American Revolution. That changed in 1992 during my junior year at Miami of Ohio when I was invited by English Language Institute China (ELIC), which is based in Los Angeles, to spend the summer teaching spoken English to Chinese teachers at the Hunan Educational Institute in Changsha, China. My expenses were covered by friends and family up to the point of arriving in China, at which point the University covered our costs in conjunction with ELIC.

The summer of 1992 was when the first US Olympic basketball "Dream Team" played in Barcelona, and in China I saw first-hand how closely US culture and sports are followed by many around the world. After this first-hand experience abroad I began to feel, and continue to feel today, that the more Americans are enabled to travel, study, teach, and serve abroad, there is intrinsic value not only to those that we communicate our culture, language and values with, but for ourselves as well as we experience their languages, cultures and understand their values.

While a student at Miami of Ohio, I was active with Campus Crusade for Christ. Though I did not intend to spend my career in missions and relief work, I had decided to take a gap year before applying to graduate school and was invited to spend one as a missionary in Albania working with Campus Crusade for Christ. During that year we worked with students and travelled through the villages of the country. In 1993, the banking sector in Albania at the time was hardly functional and my four hundred dollar monthly missionary stipend was flown in to Albania in cash by our regional director, who lived in Austria. I was so strapped for cash that I remember seeing a can of Coke being sold in Tirana for the first time, but I couldn't afford to buy one. Thankfully in Albania, wages have risen and many American products such as Coke, Pepsi, Microsoft, HP, Apple, Philip Morris and other American owned products are now very available in the market and affordable.

After spending a year in Albania I was accepted a Masters Program at the University of London in the UK. In the fall of 1994, I used all my savings and flew from Corfu Greece to Manchester then took the bus down to London to start my studies. I then moved to London England were I did a Masters Degree at the School of Slavonic and Eastern European Studies (currently within UCL of the University of London). I spent most of my time studying macro-economic stabilization and central bank reform under Professor Jacek Rostowski, who later became the Minister of Finance in Poland. In order to pay for the balance of my tuition, I received a Federal Stafford loan and though my account balance was always small, Barclays bank in London was kind enough to accept me as a client so that I could pay my expenses during my graduate school years. I remained fairly cash-strapped during those years and often would walk a few miles rather than take the underground. When I did buy a day pass to use the 'tube' I would often try and sell it for half price after I finished my morning classes. I stopped when someone told me that wasn't really something 'to be done' in the UK. In the end I made it through and graduated, paid for in thanks to a bit of savings, a Stafford loan, and a Barclays bank account.

I moved back to the United States at the end of 1995 and began to work for my family's financial planning firm, LifePlan Financial Group, which my father had started after his time with NCR. While working with LifePlan I earned my Series 7 securities license.

In 1996, I was recruited by appointees of President Clinton to join the Albanian-American Enterprise Fund (AAEF)[3] which was authorized by the US Congress under the Support for Eastern Europe's Democracy Act of 1989 (SEED Act).[4] I had learned functional Albanian and had experience in the country, along with a master's degree in economics and I quickly found myself moving up the corporate ladder, being assigned to the Albania office, making coffee, then answering phones, making copies, and eventually doing some basic accounting.

Albania's transition toward a pro-Western free market system has been challenging. During the 1997, there was a financial collapse because of a nationwide pyramid scheme and due to the following civil unrest all Americans were evacuated for the first time from Albania. I wound up getting myself out of the country on my own but many of my American friends were a bit slower, and had to wait for the Marines to helicopter them out of a safe zone in the American Embassy housing compound to the USS Nassau in the Mediterranean (Operation Silver Wake).[5] I do remember that those American friends of mine had to repay the US Government for the cost of their evacuation, meaning that there would be no additional cost to the taxpayer for their extraction.

One year later, Americans were evacuated a second time due to a specific threat against American interests in Albania from Egypt's Islamic Jihad, a group suspected to be related to Bin Laden and the bombings of the US Embassies in Kenya and Tanzania.[6] Again, I got myself out of the country and relocated along with many of the other Americans working in Albania to Ohrid Macedonia, where we ran each of our projects from just over the Albanian border. Even though the Americans with the AAEF had been evacuated, our work did not stop. During this evacuation the AAEF inaugurated what became its most successful investment, the American Bank of Albania, a

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[3] AAEF.com
[4] https://www.congress.gov/bill/101st-congress/house-bill/3402
[5] http://www.navy.mil/navydata/policy/vision/vis04/vpp04-appxa.pdf
[6] http://www.nytimes.com/1998/08/17/world/us-removes-its-diplomats-from-embassy-in-albania.html

Greenfield investment, 100% owned and controlled by the Fund with the purpose of introducing conservative banking practice to the country. The bank was ultimately sold to Intesa San Paolo Bank.[7] I continued to move up the corporate ladder as I lived in Macedonia, taking over an investment portfolio and running back-office operations as the deputy to the CEO of the AAEF for nine-months. Over the years several AAEF directors came and went, and by the time I was 29 years old I was running all of the Tirana based operations. In spite of its tumultuous path to capitalism, Albania has been strongly pro-American and the engagement of the Enterprise Fund fostered this relationship both while I was there and long after I left, investing in real estate, insurance, airports, shopping malls, biometric passports and trade. Though the Albanian-American Enterprise Fund was the smallest and the youngest of the Enterprise Fund's operating under the 1989 SEED ACT, our team generated the highest return on capital invested. Ultimately, at the end of the Fund's mandate, US Congress decided to return half of the original seed money to the Treasury Department and the remainder of the AAEF's capital was used to establish a US-based foundation with a mandate to use its funds to support Albanian education, entrepreneurship and infrastructure which continues to operate today.[8]

As Eastern Europe emerged from Communism during the 1990's, one of the driving objectives of US international aid assistance was the increasing financial inclusion. Concurrent to my work with the AAEF, I volunteered to found and later Chair USAID's micro-lending initiative in Albania, named the Albanian Partner for Microcredit.[9] Though this project, in collaboration with Opportunity International, based in Chicago, we were able to bring needed financing to thousands of Albanian small businesses, bringing many of our clients up to the level of being bankable by the traditional banking sector, meaning that they were able to open a bank account, receive basic transaction services and apply for traditional bank loans.

[7] http://www.intesasanpaolobank.al/web/Intesa_Sanpaolo_Signs_Participation_in_the_American_Bank_of_Albania.php

[8] https://www.usaid.gov/news-information/press-releases/albanian-american-enterprise-fund-return-15-million-american

[9] http://pdf.usaid.gov/pdf_docs/pdabu161.pdf

As a follow-up to these projects, I was recruited to move to Montenegro, then part of 'small Yugoslavia' in 2001. I become the CFO of a Greenfield investment in a private bank that had received some USAID financial support. The business strategy of the bank was to expand financial services throughout the country, with a heavy focus on supporting small businesses. It was quite challenging to start the bank in Montenegro in 2001 considering that NATO had recently bombed Montenegro along with Serbia during the Kosovo war. Nevertheless our mandate included aggressively marketing ourselves as American, with USAID assistance, and that is what we did.

At the time, Montenegro remained part of a political union with Serbia and I moved to Podgorica just following the end of the Milosevic regime. In 2001 much of the US diplomatic presence for Montenegro was still working out of Dubrovik, Croatia. We, as private businessmen, engaged in promoting American interests in advance of the establishment of the US Consulate in Podgorica, and founded a commercial bank.

Several years later I became the CEO of the bank. During my tenure as CFO and then CEO, the bank extended inclusion to over 15% of the citizens of the country, became the most profitable bank in the country and introduced MasterCard products and NCR ATMs into the country.[10] We were able to meaningfully improve US-Montenegro relations by engaging with citizens on the basic level of providing access to credit, receipt of international transfers, and savings accounts.

When Montenegro voted for independence from its union with Serbia, the United States established its Embassy in Podgorica and I was approached by Ambassador Rod Moore regarding establishing the American Chamber of Commerce in Montenegro. With the break between Montenegro and Serbia, the existing American Chamber of Commerce remained in Belgrade, Serbia and a new Chamber needed to be formed for Montenegro. Normally, the American Chamber of Commerce in a given country is an affiliate of the US Chamber of Commerce in Washington DC and, depending upon the relationship of the AmCham President of the Board and the US Embassy, the Chamber can be close collaborators representing American business interests in the country. While

[10] https://seenews.com/news/montenegros-opportunity-bank-h1-net-profit-up-four-times-to-3091-mln-euro-table-217033

we received no financial support from the US Government, I was able to successfully organize American businesses in Montenegro and formed the American Chamber of Commerce in Montenegro, serving as its Pro-Bono Chairman for two years. Upon the sale of the bank where I was the CEO in Montenegro to an Austrian banking group,[11] I moved to Greece, but continued to come back to Chair the AmCham Pro-Bono, meeting regularly with the US Ambassador and Montenegrin Prime Minister or members of his cabinet.[12]

II. The impact that FATCA has had on my entrepreneurial activity as an American living overseas

My wife, is an American citizen, but comes from the ethnic Greek minority in Albania. Most of her family only speaks Albanian and Greek, while my own ancestors haven't really spent much time outside of the United States since the American Revolution, and my family is fairly mono-lingual, speaking only English. After living in Greece for a year, we decided to move back to Albania in order for our children to learn the different languages they would need in order to communicate with my in-laws.

During my first stint in Albania the banking market had developed rapidly. Still Albania was grossly underdeveloped in terms of other traditional financial pillars. Albania had a stock market, but there had never been any listings.[13] The banks did not offer any access to international capital markets or placement options other than domestic treasury bills.

Since I had lived in Albania in the 1990's the country has progressed, coming closer to European Union candidacy and joining NATO.[14] By 2010, many of my friends had steady jobs, owned their own homes, cars and kept some savings. However, the country offered no other financial products to give them investment alternatives, therefore they were forced to either buy real estate, hold domestic treasury bills, savings account balances or cash. In smaller developing markets such as Albania, there isn't enough volume to support offering sophisticated financial products. Of the 16

[11] https://seenews.com/news/croatian-arm-of-austrias-erste-takes-over-us-micro-lenders-majority-stake-in-montenegros-opportunity-bank-237677
[12] http://photos.state.gov/galleries/montenegro/61077/2008theyearinreview/3.html
[13] http://www.tse.com.al/history/
[14] http://www.mod.gov.al/eng/index.php/security-policies/relations-with/nato/88-history-of-nato-albania-relations

banks in the market, 14 have a majority foreign shareholder and all 16 have significant foreign investors. For all of these banks, especially the 14 tied to foreign shareholders, decisions taken outside of Albania impact all of the clients of the daughter institution. Therefore, local banks piggy-back on their mother banks, insurance companies piggy-back on their group and so on in order to offer a range of products to Albanians.

While my children learned a few other languages, my vision in returning to Albania was to introduce access to international capital markets to the average Albanian citizen. Since the local stock market had no listings, I focused my efforts on developing an introductory brokerage business, where I would provide limited investment advice and know-your-customer due diligence services for a larger European investment bank that was willing to accept Albanian clients. Though my US securities license was no longer active, having earned my Series 7 years ago allowed me to qualify to apply for a brokerage license and introductory brokerage permission from the Albanian Financial Services Authority. During this process I began to hunt for an international investment firm that would work with me in Albania. Most firms viewed Albania as too small or underdeveloped to bother with, however, during my trip to Copenhagen, Saxo Bank indicated that they would be willing to work with me to develop my vision and we began to put in place the procedures and process maps in order to make that work.

After almost one year from the start of my inquiry into the application process, in the April of 2011 I was awarded Albania's first brokerage license that provided for introductory brokerage activity with a foreign investment bank.[15] A few weeks later I sent the first ten applications to Copenhagen in order to open brokerage accounts for these residents of Albania. Saxo was fairly quick to respond approving nine of the ten applicants. Naturally, I wanted to start well with my partners in Copenhagen, so I had carefully vetted all of the potential clients in order that everyone would be approved. I reached out to Saxo to see what we had missed with the client that was rejected and they simply said that the application that was rejected was my own. I, myself, was one of the ten applicants, at the time an Albanian resident. I was told that I was rejected solely because

[15] http://www.amf.gov.al/news.asp?id=506

of my American citizenship. Saxo said that due to FATCA they didn't want to work with Americans or Green Card holders. After what seemed to be a few weeks of confusion I realized that I could not serve Americans or Green Card holders in my brokerage firm in Albania because of the carry-on impact of the Saxo decision. The introductory brokerage firm vision was alive but the idea of working with Americans, Albanian-Americans, Green Card holders, etc. was dead.

My experience in banking had seen a dramatic positive effect of branding a financial institution as American owned and operated. However, a brokerage firm that marketed itself as American, yet could accept no American clients was a logical anomaly to the Albanian market, and understandably so. Our hopes to develop an introducing brokerage product lining international capital markets with Albania began to die. Volumes were not sufficient and new clients were difficult to find. The introductory brokerage product became sidelined and Saxo grew unhappy and after a couple years dropped our firm altogether. During my time in emerging markets I have become used to fluid situations and dealing with the unexpected in order to create a positive outcome. This has been the case with my brokerage firm, including the summer of 2011 when one of my student interns from the University of New York, Tirana turned out to have been a former Guantanamo Bay detainee.[16] However, the obstacle to my brokerage business created by FATCA was a deal-breaker in many ways. I was able to rework my business model, re-focusing on fee based investment advisory and bond agency work, and the business continues to develop but the financial harm was done and it was significant.

FATCA has also impacted the manner in which I operate my own personal foreign bank accounts. I am currently an independent director of an American owned bank in Albania.[17] Not every country in the world is as American friendly as Albania. By requiring US persons to provide their social security numbers to potentially foreign owned financial institutions the US Government has put its citizens at significant risk of fraud. Certainly banking secrecy and privacy is not always well guarded in emerging markets. Should a foreign financial institution, foreign government, or even

[16] https://www.ft.com/content/eba77a9c-6d71-11de-8b19-00144feabdc0
[17] https://invest-in-albania.org/the-newest-private-bank-in-albania-with-american-capital/

rouge individual working within one of the FATCA compliant institutions wish to do expat Americans harm then they would have easy access to their personal data in order to cause identity theft and harm, therefore I have restricted my banking activity as much as possible naturally causing more cost to do business bank to bank because of wire fees.

In spite of the challenges that FATCA has caused my personal business, I have remained active assisting US interests whenever called upon. In 2012, I assisted the US Treasury Department's Office of Technical Assistance (OTA) representative in Kosovo as we explored the potential for developing capital markets access in that country.[18] Additionally, I was again called upon by the US Embassy to put my name forward for Pro-Bono President of the Board of the American Chamber of Commerce, this time in Albania. I have just been unanimously elected by the members to my third two year mandate.[19]

III. Possible remedies to the unintended consequences of FATCA.

The bi-partisan group that is testifying before you today has been exploring remedies to the unintended consequences of FATCA for several years. Proposals to address the unintended consequences of FATCA have been considered by parties[20] and candidates[21] on both sides of the aisle during last year's Presidential race. In recognizing the problems of FATCA, some have suggested implementing safe harbor/same country exception that would help Americans solely within the country of residency. Such a safe harbor/same country exception would not have solved the negative impact that FACTA has had on my situation. I am not, nor have every been a resident of Denmark, thus such an exception would not alleviate Saxo Bank's relationship with me or other clients of my brokerage firm which would remain non-resident American client applicants. The best way to fully alleviate the consequences of FATCA is fully repeal this law or to mute the existence of FATCA by simplifying the tax code and moving away from citizenship based taxation (a system that

[18] http://bankassoc-kos.com/en/the-conference-on-regional-capital-markets-raising-opportunities-for-kosovo-firms
[19] http://www.amcham.com.al/general-assembly-meeting-2017/
[20] https://prod-static-ngop-pbl.s3.amazonaws.com/docs/RESOLUTION-TO-REPEAL-THE-FOREIGN-ACCOUNT-TAX-COMPLIANCE-ACT-FATCA.pdf
[21] http://www.democratsabroad.org/our_candidates

the USA shares with few outlying countries such as Eritrea and North Korea), toward a territorial or residential based system.

Today the Albanian brokerage firm is only one of several of my investments around the world, including banking, natural resources and film. Two weeks ago, I was in Albania and Bulgaria producing an action film, starring a number of American and European actors that are in the final days of filming on set right now. My experience is that the American entrepreneurial mentality sets our culture apart. American businesswomen and businessmen do not restrict their investment based on their personal residency. Their investment choices follow opportunity according the market. Access to international financial services is critical for all of such projects and FATCA's impact has already harmed some of my businesses and if left un-repealed will risk others as well.

It is ironic that after spending much of my career helping advance US interests by expanding financial inclusion, through FATCA the United States has inadvertently restricted financial inclusion for its own citizens. The fact that an increasing number of banks and financial institutions either directly (as in the case of Saxo Bank) or via a carry-on effect (as in the case of my brokerage firm in Albania) reject working with American citizens outright harms US interests. It harms Americans that are living abroad as teachers, students, missionaries, and businesses from the taking risk that is so necessary for a successful free market to work. It is my belief that the best way to improve the current situation is not to make the situation more complex by creating carve-outs and exceptions, such as safe harbor or other partial fixes. Therefore, I support a full repeal of FATCA.

Mr. MEADOWS. Thank you, Mr. Crawford.

Mr. Kuettel, you are recognized for 5 minutes.

STATEMENT OF DANIEL KUETTEL

Mr. KUETTEL. Thank you, Mr. Chairman, for allowing me to speak on the negative consequences of FATCA. I'm here— my name is Daniel Kuettel. I live in Switzerland, and I'm here to tell you why FATCA forced me to renounce U.S. citizenship.

As you see here, I brought my Army—U.S. Army jacket. I served in the Army. I served in the Army Reserves, and then I got married in the Philippines, asked my wife to come join me in America, but that was during the Dot-Com crisis. I lost my job, couldn't find work, I sent my resume around the Nation but had no luck, so I took my chances in Europe.

I did not leave the U.S. to evade taxes. I paid my taxes. I enjoyed paying taxes. I'm an economic refugee. I don't have a lot of money. I'm not wealthy. In Switzerland, we saved up to be able to finance a small condo, and then in 2012, I needed to investigate refinancing that condo. In Switzerland, every few years, you have to refinance. But when I went to a bank to ask them if they would allow me to refinance my mortgage, when they heard that I was a U.S. citizen, they denied it.

I went to another bank, I was denied again, and another. I called them. I was denied, rejected, rejected. It was horrible, terrible. I mean, if you've ever lived anything like this, this type of discrimination is unacceptable.

I was worried that I would not be able to refinance my home, and so I called HUD, I called the VA, but they told me that they only support—they only help Americans reside in America. They don't help expats.

I called the Department of Justice to inquire why this law prohibiting national origin discrimination is not being applied, and they referred me to some statute that I could never find which was supposed to state that also the law only applies to U.S. residents.

So I had to renounce, and it was a difficult decision to make. I went to a small village in Switzerland that I went to the first time that I came to Switzerland at the age of 10 where I was able to gather the strength to renounce. And afterwards, I was able to refinance my mortgage.

But today I'm here because I'm having a problem again because of FATCA and that is with my children. My daughter is still a U.S. citizen. My son, on the other hand, he's not a U.S. citizen. So my son, he can have a bank account with any bank in Switzerland. My daughter, about 310 out of 320 banks rejected her, and this is going to become a problem later on when she's 16.

In Switzerland, it's a common practice to get an apprenticeship where she would go to work, earn money, she'll need a bank account. But having a bank account means she'll have to file FBAR, she'll have to be subject to FATCA, and I mean, assuming that she even can get a bank account.

And this is just a problem which rolls over. She's going have to relive what I relived, go through what I went through. She's going have to decide if she wants to have U.S. citizenship or she wants to have a normal life in Switzerland with a normal bank account.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Kuettel follows:]

Testimony of Daniel Kuettel

U.S. House of Representatives Subcommittee on Government Operations

"Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act"

April 26, 2017, 2:00 PM

Chairmen Meadows and Members of the Subcommittee on Government Operations of the House Committee on Oversight and Government Reform

Thank you for this opportunity to discuss the unintended consequences of the Foreign Account Tax Compliance Act (FATCA). This hearing is, in my view, one of the few instances in America's 241 year history where Americans overseas are granted a glimpse of what it could possibly feel like to be politically represented. FATCA gains access to sensitive information at a heavy cost. There are plenty of tools for efficiently combatting tax evasion without harming the very people such efforts are meant to protect.

This is a story about me, an American veteran who holds on to his US Army jacket and a US passport with three holes punched into it.

Criticism of FATCA is often wrongly painted as being just a Republican thing.[1] I grew up in a liberal, Democrat-leaning environment. At times, I was a vegan or a vegetarian, a feminist, a human rights activist, or an environmentalist. I protested to save the whales and to boycott McDonalds, I advocated for urban sustainability, fought against the car culture and enjoyed alternative healthcare and preventative medicine. I am not here today for Republicans, nor for myself. I'm here today for all Americans, even those who have not yet noticed, don't want to acknowledge[2] or those who belittle the unintended consequences of FATCA.

Sadly, many US residents often tell Americans overseas to renounce their US citizenship in response to problems caused by FATCA, and many are doing so, like I did. I renounced and yet I've always been compliant and enjoy being compliant with taxation, if only filing wasn't so terribly complicated and costly! I don't have any issues with the IRS and always did what was requested of me. I'm lower middle class and have nothing to hide. I joined the Army and Army Reserves to serve my country, to earn money for college, to get out into the world, and to learn a trade. I was proud to be American. I never imagined that one day I would not be a US citizen.

After getting married in the Philippines, I applied for my wife to join me in America, but lost my job during the dot-com crisis. I sent my resume around the country, but no full-time positions were available in the gutted job market at that time. My wife could not join me to support me while I searched for work since my check to pay for her INS application bounced due to a lack of funds. With no job, student loans, credit card debt, and mortgage debt, I could not afford to pay my bills, so I took to my chances and hopped on a cheap flight to Europe. At the time, California unemployment benefits were barely enough to cover my basic housing expenses. It was only later that they were increased 3 times, after I had left. My father offered for me to stay with him, but I didn't want to be a financial burden on him. I'm an economic refugee, not a wealthy tax cheat. I did not leave America because of taxes. The IRS even owed me money when I left America. Why should I have to renounce citizenship of the country that I served due to a policy fueled with biases?

Living overseas after 9/11, I wanted to try to understand why someone would do such a terrible thing to the country that I loved and served. This led me into middle-eastern politics where, for a decade, I

[1] International Advisor. US Republicans want Fatca repeal despite $10bn tax haul. http://www.international-adviser.com/news/1032545/us-republicans-fatca-repeal-despite-usd10bn-tax-haul

[2] Robert Stack's "Myth vs. FATCA" article failed to acknowledge the discrimination caused by FATCA "https://www.treasury.gov/connect/blog/Pages/Myth-vs-FATCA.aspx

challenged bigotry against Americans. I was a free US ambassador overseas, defusing some negative consequences of US policy in ways that many US residents would never understand. Since the arrival of FATCA, I observed an increase in American hostility against Americans.[3] How can FATCA be just when it teaches Americans, or even the world, to view US citizens as being hunted tax cheats? With FATCA focusing on US indicia, why is it often coupled with the terrorism[4] card, to gather support, while Americans overseas are far more likely to become victims of terrorist attacks?

Around mid-2012, I was shocked when I inquired about refinancing my mortgage with a local bank and was told that they would not accept me as a client due to my US citizenship and FATCA.[5] I went to another bank, another, and then another, only to hear the same thing over and over again. I was being discriminated based on my American citizenship. It was unbelievable, like a nightmare. This nightmare is shared by many Americans living overseas, especially accidental Americans. My country that I had loyally served was causing me to be denied financial services.

At the time, a lot of bigotry in America was being aimed at Switzerland. Instead of being respected for serving America, I was frequently accused of being a Nazi banker who stole money from Jews, or a wealthy tax cheat hiding in a tax haven. I was supposed to be hiding billions of dollars in a secret Swiss bank account. Yet, I paid my taxes, was compliant with US filing requirements, and had no money to hide. Some Americans even argued that Switzerland would be destroyed with FATCA, and the US government was not shy in making excessive threats, like LEX USA,[6] which threatened Swiss banks[7][8] if the Swiss Parliament didn't approve a law whose details they were not allowed to know.[9] Switzerland was treated as an international whipping boy.[10] FATCA was argued as being a "Golden Opportunity"[11] to squash financial secrecy. I was originally not against FATCA and yet I didn't understand why it was having an impact upon me or why its impact was being ignored and denied. I didn't earn enough to be burdened with US double-taxation. I'm just a middle class American Veteran who is humbly happy to have food and shelter.

Being concerned that my family would not have shelter, I wanted to know what my options were for refinancing, if the local discrimination against Americans persisted. So, I filed a complaint with the Office of Fair Housing and Equal Opportunity on Housing Discrimination. They didn't respond.[12] I then tried again, and they told me that they do "not have jurisdiction to handle complaints outside of the United States."[13] Similarly, the VA responded that their mortgage assistance only applies to Veterans who reside in America.[14] I called the Department of Justice to inquire on this national origin discrimination, but they referred me to some statute, which I never found, which was supposed state that US federal laws prohibiting national origin discrimination only protected US residents. How is it possible that the US government can force FATCA upon residents of other nations by using IGA's to override local laws, without providing its Veterans with any protections?

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[3] «It is no secret that FATCA teaches Americans to be racist against Americans.». http://isaacbrocksociety.ca/2013/11/03/stated-in-honor-of-fatca-you-americans-disgust-me/

[4] «The background of this law is to detect foreign assets involving illegal savings, money laundering, combating terrorism and financing of terrorism». https://rubestax.com/en/questions/fatca/

[5] https://expatami.wordpress.com/2012/07/30/us-bank-denying-americans-services-for-being-us-persons/

[6] http://www.bilan.ch/thierry-boitelle/questions-fiscales/lex-usa-100-made-usa-cette-fois

[7] https://insideparadeplatz.ch/2013/06/17/panikmache-der-lex-usa-lobbyisten/

[8] https://www.fuw.ch/article/nationalrat-soll-nicht-auf-lex-usa-eintreten/

[9] http://www.swissinfo.ch/ger/steuerstreit_-lex-usa--nimmt-wichtige-huerde/36126994

[10] https://www.theguardian.com/business/2009/mar/01/swiss-banks-anonymity-ubs

[11] "they fail to mention the golden opportunity they have this year to make concrete progress" http://eurodad.org/1545339/

[12] https://expatami.wordpress.com/2012/07/23/filed-a-complaint-with-the-office-of-fair-housing-and-equal-opportunity-on-housing-discrimination/

[13] https://expatami.wordpress.com/2012/09/02/resubmitted-complaint-on-housing-discrimination-to-hud

[14] https://expatami.wordpress.com/2012/08/27/hud-complaint-on-housing-discrimination-vanished/

Like many Americans overseas, I wrote various US politicians, including Mitt Romney,[15] Bill Nelson,[16] and Joe Biden,[17] but they either didn't respond or sent automated boilerplate responses. I called politicians like Connie Mack and Keith Fitzgerald, but they responded that they didn't have any time for "expat issues"[18] or that their opposition would use it against them. I got the impression that many were afraid of standing up for expats in Switzerland due to the massive amount of propaganda being waged against the country.

In Switzerland, the government stated in the press that the US conflict was not going to end anytime soon. I was often told that the only way to avoid the discrimination was to renounce US citizenship. Local banks didn't publish their policy on FATCA and it was frequently changing. Some were charging US citizens outrageous fees. FATCA advocates were aware of the discrimination,[19] but claimed that they would fix FATCA after implementing it, just like they are still claiming today, many years later.[20] With US pressure growing, no support from America for its Veterans overseas and the problem lasting indefinitely, I found that it was safest to renounce my US citizenship to avoid the risk of being denied refinancing.

To find the strength to renounce the from nation that I had served to defend, I returned to the village that I had lived in when I first came to live in Switzerland at the age of 10, and asked myself if I could this time make the departure permanent. The beauty and peacefulness of the area gave me the strength that I needed to detach myself from the ability of being able to live with my family in America. Are these the types of choices we want for our Veterans to be making, to not be with their family because it is American?

After renouncing, the US government forced the US program on Switzerland, which was its method of violating the double-taxation treaty to do group fishing needed to enforce FATCA. The US program fined Swiss banks for having US clients. It didn't matter if the US clients were innocent or guilty or where they resided. With its non-prosecution agreements, the US Department of Justice approved national origin discrimination against Americans. The impact was that, by the time that I needed to refinance, no bank in Switzerland was willing to have US clients as customers. US citizens had become a risk and a threat. If I had not renounced, then I would have lost my home.[21]

Because of the US Program, I had to prove my innocence, even though I was tax-compliant, simply because I used to be a US citizen. Under threat of being denied financial services, I was forced to hand over to my local bank many years of my US tax returns. After having proven my innocence, the bank then demanded, due to FATCA, for me to waive my right to privacy where I live in Switzerland for the rest of my life and beyond. I replied that I was willing to waive my right to privacy for those years that I was a US citizen, but not afterwards, since such violated local privacy protection laws. The Joint Statement on FATCA states that the US government respects Swiss law.[22]

After renouncing, my son, the son of a US Veteran and a descendant of the Mayflower, was born without US citizenship. This means that he can take his savings to any local bank and they will accept him as new client, treating him as a respected local. Yet, my daughter was rejected by approximately 310 out of 330 banks, simply because she is a tax-compliant US citizen,[23] due to US policy. If she

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[15] https://expatami.wordpress.com/category/representative/mitt-romney/

[16] https://expatami.wordpress.com/2012/08/03/letter-to-senator-bill-nelson-on-h-r-6263/

[17] https://expatami.wordpress.com/category/representative/joe-biden/

[18] https://expatami.wordpress.com/category/representative/connie-mack/

[19] https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg63014/pdf/CHRG-111hhrg63014.pdf

[20] https://www.facebook.com/DemsAbroad/posts/10158421674145005

[21] http://isaacbrocksociety.ca/2013/06/07/its-official-renouncing-us-citizenship-saved-our-home/

[22] https://www.sif.admin.ch/sif/de/home/dokumentation/medienmitteilungen/medienmitteilungen.msg-id-50049.html

[23] «19 Banken nehmen wieder US-Bürger als Kunden auf» http://www.tagesanzeiger.ch/wirtschaft/standard/19-Banken-nehmen-wieder-USBuerger-als-Kunden-auf/story/26115487

could renounce US citizenship, then she would be treated the same as my son. Both of my children were born to the same parents in the same country, the same city, and the same hospital and have the right to be treated equally. US Federal Law prohibit national origin discrimination.[24] The US government could enable innocent children to not be discriminated against, if it allowed them to be able to choose to become US citizens at the age of 18. Yet, instead, the US Department of State is charging children an outrageous fee of $2,350[25] to avoid discrimination, assuming they are permitted to renounce. US citizens with disabilities are denied the right to renounce. They have no refuge from discrimination.

I hope that this helps you to gain a better visualization of the world of FATCA beyond US borders. The bridge connecting America to its overseas population is crumbling under its weight, and I hope that this bridge can be renovated before it collapses.

[24] «Federal laws prohibit discrimination based on a person's national origin, race, color, religion, disability, sex, and familial status.». https://www.justice.gov/crt/federal-protections-against-national-origin-discrimination-1

[25] https://www.forbes.com/sites/robertwood/2016/02/20/422-fee-increase-to-renounce-citizenship-yields-millions-with-exits-up-560/#7c0c3c2c2219

Mr. MEADOWS. Thank you for your testimony.

Thank you for your service to our country.

And you are in a minority. You're the only witness, I think, that I've ever heard who says they enjoy paying taxes.

So—but Ms. Bean, you're recognized.

And before I recognize you, I want to just say that this hearing, where it's highlighting some of the difficulties with FATCA, I want to recognize, as I did in my opening statement, the great work that you did with UBS in the investigation, and so nothing in this is meant to be disparaging of the consequences of what I believe are unintended consequences of really your fine work, and so I recognize you for 5 minutes.

Mr. CONNOLLY. Mr. Chairman.

Mr. MEADOWS. Yes.

Mr. CONNOLLY. Could I just ask a unanimous consent request before we hear from Ms. Bean. I meant to do this in my opening statement. I have a statement from the FACT Coalition opposing H.R. 2054, I'd ask be entered in the record.

Mr. MEADOWS. Without objection.

Mr. CONNOLLY. And I would also comment on the Chairman's comment to Mr. Kuettel. Actually there are only two kinds of people who oppose taxes, men and women.

Mr. MEADOWS. We'll now recognize Ms. Bean for 5 minutes.

STATEMENT OF ELISE BEAN

Ms. BEAN. Well, thank you, Chairman Meadows, Ranking Member Connolly, and the members of the subcommittee for inviting me here today to present another view of FATCA.

I was asked to testify because for many years I worked for Senator Carl Levin on the Senate Permanent Subcommittee on Investigations, and we held a number of hearings looking at how foreign banks were helping U.S. clients hide assets and evade U.S. taxes.

To give you a couple of examples. We had a gentleman named John Mathewson who testified in front of us. He set up a bank in the Cayman Islands called, "Guardian Bank & Trust," had about 2,000 clients, $150 million in assets, and he said, in his opinion, virtually all of his clients were engaged in tax evasion. He said a standard practice to handle them was he would set up a shell company in the Cayman Islands, open up an account in the name of the shell company, the client would supply the money, and then he would give the client a credit card in the name of the shell company, and he would advise him to sign it illegibly on the back. That way they could use the credit card in the United States to withdraw funds from their Cayman account without anybody linking their name to their shell company.

We looked at two banks in Switzerland, UBS, the largest bank in Switzerland and the second largest, Credit Suisse. UBS was shown that they had 52,000 undeclared accounts, meaning accounts opened by U.S. clients that had never been disclosed to the IRS with about $18 billion in assets.

They were sending Swiss bankers to U.S. soil. It wasn't a case of us going there, but sending their Swiss bankers here to yachting races, art shows, tennis tournaments, quietly handing around their business card and trying to convince people to put their money abroad. They were very successful. They had tens of thousands of clients through those methods. They eventually pleaded guilty. They paid a fine of $780 million, and they eventually disclosed about 4,500 names to the U.S. but 4,500 is nowhere close to the 52,000 undeclared clients.

Credit Suisse had, at their peak, about 22,000 undeclared accounts with about $10 billion in assets. They too pleaded guilty. They paid a fine of about $2.6 billion. But guess what, they never disclosed any of those 22,000 accounts to the U.S. The U.S. had to find those people on their own, and they haven't found very many of them.

We did identify two clients. One told us about an occasion where his Credit Suisse banker met him at a luxury hotel here in the U.S. over breakfast, slipped him a Sports Illustrated magazine, and in between the pages was his bank statement so he could know what was going on in his Swiss account. That's how they did business.

Another gentleman told us about how he went to the bank's headquarters in Zurich. He was ushered into an elevator with no buttons. It was remotely controlled. He was taken up to a floor and shown to a room with all white walls. The whole point being how the bank was so secret, and they actually told him they did not file the forms that required disclosure of his account to the IRS.

In short, our investigations—and by the way, we also looked at a bank in Liechtenstein, and there we were able to get very detailed records on about 150 U.S. clients who had accounts there, and we gave examples at our hearing just to give you one, a Florida contractor in a construction business set up four Liechtenstein foundations, opened up accounts in the name of those foundations, and stashed about $49 million in those accounts that had not been disclosed to the U.S. until a whistleblower turned over the documents to the agency.

In short, our investigation showed that opening up offshore bank accounts for U.S. clients was big business, billions of dollars, tens of thousands of clients. Additional evidence of the scope of the problem is the IRS Offshore Voluntary Disclosure Program. The latest statement from the IRS says that they have now had word from 100,000 Americans, 100,000 Americans who admitted to having an undeclared offshore account. In order to get right with the government, they have now, as Mr. Connolly said earlier, paid a total of about $9.9 billion to satisfy the back taxes that they owed.

That's the backdrop for FATCA. That's why FATCA was enacted on a bipartisan basis. The first thing to understand about FATCA is it does not impose a tax on anyone here or abroad. It does not impose a tax. It is simply a transparency measure, and it matches what every American citizen has been doing for decades. All of us get 1099s that are turned into the IRS about all domestic bank accounts. All of us do. It simply institutes the same program so that an American living here who opens up a U.S. bank account is treated the same way as an American living here or abroad opens up a foreign bank account.

Recent research has shown that FATCA and other offshore account disclosure programs are working. Preliminary results from the 2017 study says that since 2009, the number of individuals reporting offshore accounts to the IRS has increased by 19 percent, and they have disclosed additional account assets of over $75 billion. It's starting to work. We are starting to change and end these offshore abuses.

Now, how has FATCA helped? Well, first of all, it leveled the playing field between Americans who open accounts here and Americans who open accounts abroad. It treats them the same way. It also leveled the playing field between U.S. banks and foreign banks. U.S. banks no longer see their wealthiest best clients leaving the U.S. bank and going to a foreign bank because they can open up a secret account. U.S. banks first. This restored a level playing field between U.S. banks and foreign banks.

At the same time, everybody is correct that FATCA did not have a smooth implementation. It had a very rough beginning. There were a lot of banks that were furious at this U.S. attack on your secrecy and on their business model to open up these accounts, particularly in Switzerland.

We went after UBS, Credit Suisse. We had a program to go after another 100 banks. Switzerland is very unhappy with the U.S., but you know what, those banks have adapted. Those banks have said that they will comply with FATCA. And in fact, today, 7 years later, there are over 274,000 foreign financial institutions have signed up to FATCA and agreed to comply with it.

In addition, 100 countries have adopted a similar FATCA program under the leadership of the OECD to do the exact same thing that we're doing. So disclosing foreign account information is becoming the global norm. So while it was a very rough beginning, people were very angry, particularly in Switzerland, that's not the case 7 years later today. Now many banks are agreed to comply with FATCA.

Now, we've heard today about how some American citizens are saying that FATCA is forcing them or leading them to give up their citizenship, but I have to also point out that that's affecting a very small number of people.

In 2015, about 4,300 people gave up their citizenship. That same year, we got new citizens of 730,000, people willing to pay U.S. taxes. And when you compare that 4,300 figure to the 9 million Americans living abroad, you're talking about a rate of less than one-tenth of 1 percent.

To conclude, I wanted to say that repealing FATCA today would be a mistake. It would hurt honest taxpayers who have to disclose their account information on a bulk basis every year to the IRS. That's what honest taxpayers do. Whether you're honest or not, that's how banks treat your bank accounts here in the U.S. But it would hurt honest taxpayers here living in the United States to allow people who have the wherewithal to go abroad to not play by the same rules.

It would encourage Americans to move more of their money offshore to get some of that secrecy. It would disadvantage U.S. banks who would again have to compete against foreign bank secrecy. It would also waste all of the investments made by those foreign banks to comply with FATCA. They have all done it. They are complying.

We began disclosures in 2015. All of that money would be wasted. And finally, it would return us to an era where it was much easier to have an offshore account hide your assets and evade your taxes. So that's why I think repealing FATCA would be a tragic mistake.

Thank you.

[Prepared statement of Ms. Bean follows:]

STATEMENT OF ELISE J. BEAN
FORMER STAFF DIRECTOR & CHIEF COUNSEL OF THE U.S. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS

BEFORE

U.S. HOUSE SUBCOMMITTEE ON GOVERNMENT OPERATIONS

ON

REVIEWING THE UNINTENDED CONSEQUENCES OF THE FOREIGN ACCOUNT TAX COMPLIANCE ACT

April 26, 2017

Thank you, Chairman Meadows, Ranking Member Connolly, and Members of the House Subcommittee on Government Operations for this invitation to testify about the Foreign Account Tax Compliance Act, also known as FATCA.

I was asked to testify today because, for more than a decade, I served as staff director and chief counsel for Senator Carl Levin on the U.S. Senate Permanent Subcommittee on Investigations. During that time, Senator Levin and his Republican partners conducted a number of bipartisan investigations that exposed how U.S. taxpayers were using offshore bank accounts to hide assets and evade U.S. taxes.

Using offshore bank accounts to evade taxes is a longstanding problem. In a 2001 hearing, a U.S. citizen named John Mathewson testified before our Subcommittee about a bank he ran in the Cayman Islands called Guardian Bank & Trust.[1] According to Mr. Mathewson, Guardian Bank held offshore bank accounts with about $150 million in assets for about 2,000 clients, 95% of whom were U.S. clients.

Mr. Mathewson testified at the hearing that, in his opinion, virtually all of the bank's U.S. clients were engaged in tax evasion, which was why they had opened offshore accounts. He also told us that, after opening the bank, he'd returned to the United States for a vacation and was arrested for cheating on his own taxes. To avoid imprisonment, he turned over his entire client list and their bank records to the U.S. government. He then spent several years testifying against his former clients in various court proceedings seeking their payment of back taxes.

At our hearing, he explained how Guardian Bank typically handled its U.S. clients. He said that, in most cases, the bank established a Cayman shell company for the client, opened an account in the name of that shell company, and then took care never to link the company's name

[1] "Role of U.S. Correspondent Banking in International Money Laundering," U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 107-84 (3/1/2001).

to the client's name outside the walls of the bank. Mr. Mathewson said that his U.S. clients also typically paid him to issue a credit card in the name of their shell company, so they could use that credit card in the United States to withdraw funds from their Cayman accounts. He said he instructed them to sign their names illegibly on the back of credit card and on any charge slips, again to avoid linking their names directly to their shell companies. He said the credit cards made it easy for his clients to access their offshore funds. He noted that he had not dreamed up the credit card system, but had simply copied common practice among Cayman banks with offshore clients. He testified that his bank was just one of many Cayman banks providing similar services.

A second example involves a whistleblower named Heinrich Kieber who, in 2007, walked into our Subcommittee offices and handed us records for about 150 U.S. clients with secret accounts at a financial institution in Liechtenstein called LGT Bank. He'd been hired by the bank to convert it into a paperless office and, as a result, had been given full access to its records. He told us that, when reviewing them, he'd been appalled at how the bank was helping wealthy and corrupt individuals hide assets and evade taxes. He made a copy of the bank records and took them to various tax authorities around the world, some of which paid him millions of dollars to gain access to the information. Mr. Kieber told us he'd given one set of the records to the IRS in hopes of earning a whistleblower reward; he gave us a second set free of charge with no strings attached.

When we examined the records, we identified U.S. taxpayers who'd opened LGT accounts without disclosing them to the IRS and failed to pay taxes on the resulting income. One was a Florida construction contractor who, over a period of twenty years, formed four Liechtenstein foundations, opened accounts in their names at Liechtenstein banks, and compiled undeclared assets exceeding $49 million.

Another was a New Yorker who opened LGT accounts in the name of two Liechtenstein foundations and stashed at least $4.5 million in the accounts. He even pretended to sell his New York home to one of the foundations, after which he paid "rent" to that foundation as a way to move still more of his money offshore.

Still another LGT account held $68 million in the name of a Liechtenstein foundation controlled by a wealthy family from Australia. That account caught our eye, because one of the family members was a California resident who had agreed to use a U.S. shell company to trigger transfer of the foundation funds to new accounts in Switzerland.

A third tax haven bank offering U.S. clients secret offshore accounts was disclosed by a whistleblower named Bradley Birkenfeld who also walked through the Subcommittee doors in 2007. Mr. Birkenfeld was a U.S. citizen, born and raised in Boston, who became a private banker in the wealth management field and worked at several non-U.S. banks, including UBS, the largest bank in Switzerland. After he lost his job at UBS, Mr. Birkenfeld decided to inform U.S. authorities about some of the bank's troubling practices, reaching out to the Department of Justice, the IRS, and our Subcommittee.

His story was explosive. He told us that UBS regularly sent dozens of Swiss private bankers to the United States each year to recruit new clients and service existing ones with Swiss accounts never declared to the IRS. In other words, he wasn't describing a case of U.S. taxpayers traveling to Switzerland to open accounts; it was a case of UBS sending Swiss bankers onto U.S. soil to convince U.S. clients to hide their money abroad.

According to Mr. Birkenfeld, UBS paid all the necessary travel and event costs to enable its Swiss bankers to mingle with affluent U.S. guests at events like art shows, yachting races, and tennis tournaments, so that they could quietly hand out their business cards. A UBS document stated that, in 2004, the bank maintained 52,000 undeclared Swiss accounts for U.S. clients with an estimated $18 billion in assets.

In 2008, Senator Levin and Senator Norm Coleman held a hearing and issued a bipartisan report exposing how LGT and UBS had been helping U.S. clients cheat on their taxes.[2] During the hearing, a UBS representative surprised everyone present by openly admitting to the wrongdoing, apologizing for it, and announcing that UBS would no longer open accounts for U.S. clients without reporting them to the IRS. UBS later pled guilty to participating in a criminal conspiracy to help its U.S. clients evade U.S. taxes and paid a $780 million fine.

One last example involves the second largest bank in Switzerland, Credit Suisse. In 2014, Senator Levin and Senator John McCain held a hearing and issued a joint report showing that, just like UBS, Credit Suisse had sent private bankers onto U.S. soil to recruit and service wealthy U.S. clients.[3] The evidence indicated that, at its peak, Credit Suisse had over 22,000 U.S. clients with undeclared Swiss accounts containing more than $10 billion.

One Credit Suisse client interviewed by the Subcommittee told us about how, when he met his Swiss banker at a luxury U.S. hotel for breakfast, the banker gave him a Sports Illustrated magazine with his Swiss bank statement slipped in between the pages. Another client described how, when he visited the bank's main offices in Zurich, he was ushered into a remotely controlled elevator with no floor buttons, and escorted into a bare room with white walls, all dramatizing the bank's focus on secrecy. The client said he'd opened his account after being told that the bank did not require completion of the form used to report accounts to the IRS. He was also offered a credit card to draw money from his Swiss account while in the United States.

Credit Suisse later pled guilty to helping U.S. clients cheat on their taxes and paid a criminal fine totaling $2.6 billion. At the same time, the Swiss government would not permit the bank to disclose to the United States the full list of 22,000 Americans with undeclared accounts.

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[2] "Tax Haven Banks and U.S. Tax Compliance," U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 110-614 (7/17/2008). See also "Tax Haven Banks and U.S. Tax Compliance: Obtaining the Names of U.S. Clients with Swiss Accounts," U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 111-30 (3/4/2009).

[3] "Offshore Tax Evasion: The Effort to Collect Unpaid Taxes on Billions in Hidden Offshore Accounts," U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 113-397 (2/29/2014).

The hearings held by the Permanent Subcommittee on Investigations provided detailed evidence of a foreign banking industry that was ready, willing, and adept at facilitating U.S. tax evasion. Additional evidence of the size of the offshore problem is the IRS' Offshore Voluntary Disclosure Program. Begun in 2009, the program offers reduced penalties to taxpayers who admit to the existence of an undeclared foreign account and agree to pay back taxes and interest owed on their undeclared assets. As of 2016, the program had been used by more than 100,000 Americans to come into compliance with the law and pay back taxes exceeding $10 billion. That's 100,000 Americans and $10 billion – huge figures, but ones that likely reflect only a small percentage of the tax cheating going on. It is against that backdrop that FATCA was enacted into law and should be evaluated today.

FATCA Today

FATCA was authored and championed by Congressman Charlie Rangel and Senator Max Baucus. It became law as part of a broader bill known as the HIRE Act. A bipartisan majority of 68 Senators voted to enact the HIRE Act into law.

That was in March 2010, seven years ago. Since then, Treasury has issued implementing regulations, and banks around the world have invested in the infrastructure needed to comply with the law. Exchanges of account information under FATCA began in earnest in 2015.

It is important to note that FATCA does not impose a tax on anyone, here or abroad. If FATCA were repealed, no one anywhere in the world would get a tax break. Americans living abroad would owe the same amount of tax then as they do now. If some Americans living abroad think they shouldn't pay U.S. taxes, should pay less, or shouldn't have to pay an exit tax to give up their citizenship, their beef is with the tax code, not FATCA.

FATCA's sole aim is to increase the transparency of foreign accounts of U.S. taxpayers, so they can't be used for tax evasion. New research suggests FATCA is working. According to the preliminary results of a 2017 study by four university professors and an IRS research analyst, FATCA and earlier IRS offshore account initiatives have already "increased the number of individuals reporting foreign accounts to the IRS by at least 19 percent, and they increased total wealth disclosed by at least $75 billion."[4]

How has FATCA helped? Essentially, FATCA leveled the playing field between U.S. taxpayers who open accounts here at home and those who open accounts abroad – subjecting both sets of accounts to equivalent disclosure obligations.

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[4] See "Taxing Hidden Wealth: The Consequences of U.S. Enforcement Initiatives on Evasive Foreign Accounts," Niels Johannesen, University of Copenhagen, Patrick Langetieg, Internal Revenue Service, Daniel Reck, University of California at Berkeley, Max Risch, University of Michigan, and Joel Slemrod, University of Michigan (Working Draft as of 4/24/2017), at 1, http://www.law.nyu.edu/sites/default/files/upload_documents/Slemrod%20Week%2013.pdf.

FATCA has also leveled the playing field between U.S. banks and foreign banks. For decades, U.S. banks have been required to disclose information about accounts opened by U.S. clients, sending 1099 forms to the IRS and their accountholders. Until FATCA, many foreign banks did not have the same disclosure obligation. Even foreign banks that signed agreements promising to disclose their U.S. client accounts often didn't follow through, because there was no meaningful penalty if they didn't.

The result was that U.S. banks watched some of their best clients move funds offshore to foreign banks that didn't disclose accounts to the IRS. U.S. banks lost out to foreign banks selling secrecy. It was as simple as that.

Then FATCA changed the rules. It clamped down on the foreign bank secrecy that put U.S. banks at a competitive disadvantage. It did so by creating a meaningful penalty to ensure that foreign banks disclose their U.S. client accounts to U.S. authorities, just like U.S. banks do. The key provision states that any foreign bank that fails to disclose their U.S. client accounts to the IRS is subject to a 30% tax on any income earned by that bank in the United States. That 30% tax, which is collected before the foreign bank's U.S. income leaves our borders, is a powerful enforcement mechanism.

Because of it, many foreign banks, like U.S. banks, have now agreed to disclose their U.S. client accounts to the IRS by filing a form once per year. Over 274,000 financial institutions of all types, including tens of thousands of foreign banks, have now registered under FATCA.

Not only that, but countries around the world followed the U.S. lead. Under the leadership of the OECD, more than 100 countries have signed international agreements enabling them to exchange information about foreign accounts. The first disclosures under the OECD system will take place this year, affecting financial accounts around the world.

Nevertheless, some foreign banks are still angry about FATCA's compliance costs, and support eliminating the law. Repealing FATCA would, in fact, lower their costs, but it would also give those foreign banks a permanent cost advantage over U.S. banks whose disclosure obligations will continue. It is unclear, by the way, just how much of a cost savings foreign banks would actually enjoy since, even without FATCA, they would still have disclosure obligations under the OECD system. It is also unclear whether saving foreign banks money is a compelling reason to support repealing a transparency law like FATCA that makes it harder for foreign banks to facilitate U.S. tax evasion.

Some Americans living abroad also dislike FATCA. They complain that FATCA caused some foreign banks to refuse to provide banking services to Americans. It is true that, early on, some foreign banks did close accounts held by U.S. clients or refused to open new ones, because they didn't want to have to comply with FATCA. But today, tens of thousands of foreign banks have crossed that bridge, are complying with FATCA, and can open accounts for U.S. clients. Banks like UBS and Credit Suisse have made commitments to transparency, are already disclosing U.S. client accounts to the IRS, and don't plan on going back. And don't forget U.S. banks that welcome U.S. clients, like Citibank which operates in 160 countries. Online banking offers still another option. The reality today is that Americans living abroad can get banking services in virtually any country.

Another claim by some Americans living abroad is that FATCA is causing U.S. citizens to give up their U.S. citizenship, rather than report their financial accounts to the IRS, even though their fellow U.S. residents have operated under the same disclosure requirements for years. The data shows, however, that only a relatively tiny number of U.S. citizens give up their citizenship. In 2015, for example, about 4,300 people gave up their U.S. citizenship, while that same year, we welcomed nearly 730,000 new citizens ready and willing to pay U.S. tax.[5] And when compared to the 9 million Americans living abroad,[6] even if we made the outlandish assumption that, in 2015, every single person gave up their citizenship because of FATCA, FATCA would still be responsible for only 0.05% of Americans living abroad who gave up their citizenship. That is not even one tenth of one percent.

The bottom line is that, while FATCA did cause some initial disruptions, it has since become widely accepted and even imitated around the world. Tens of thousands of banks have made the investments needed to comply with it. A lawsuit seeking to invalidate the law was dismissed in court, because its plaintiffs were unable to establish that FATCA had caused any one of them a specific rather than theoretical injury.[7]

FATCA's rough beginning is behind us. Instead, FATCA has already begun discouraging offshore tax evasion, causing more U.S. taxpayers to disclose their offshore accounts, report their offshore income, and pay the taxes they owe.

With U.S. tax reform at the top of the Congressional agenda, a multitude of policy options are clamoring for attention. Of all those policy options, repealing a law that stops dishonest taxpayers from hiding money abroad shouldn't make the list. Especially since every dollar lost to tax evasion is another dollar that must be made up for by honest taxpayers or by cuts to critical public programs. Repealing FATCA would hurt honest taxpayers, incentivize wealthy Americans to move funds offshore, disadvantage U.S. banks, and help foreign banks aid and abet U.S. tax evasion.

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[5] IRS Quarterly Publication of Individuals, Who Have Chosen To Expatriate, as Required by Section 6039G (2/9/2017), https://www.federalregister.gov/documents/2017/02/09/2017-02699/quarterly-publication-of-individuals-who-have-chosen-to-expatriate-as-required-by-section-6039g; Naturalization Fact Sheet, U.S. Citizenship and Immigration Services, https://www.uscis.gov/news/fact-sheets/naturalization-fact-sheet.

[6] U.S. Department of State, https://travel.state.gov/content/dam/travel/CA_By_the_Numbers.pdf.

[7] See *Crawford v. United States Department of the Treasury*, Case No. 3:15-CV-00250 (USDC S.D. Ohio), Entry and Order Denying Plaintiffs' Motion for Leave to File an Amended Verified Complain (DOC. 32); Granting Defendants' Motion to Dismiss (DOC. 26) Plaintiffs' Complaint (DOC. 1); and Terminating Case (4/25/2016), http://www.taxcontroversy360.com/files/2016/04/Case.pdf.

Mr. MEADOWS. Thank you, Ms. Bean.

The chair recognizes himself for a series of questions.

So Ms. Bean, let me go—because you made some very profound statements there that I'm not sure you want to carry them out. Are you suggesting that the whole reason to do this is that U.S. banks want us to do it?

Ms. BEAN. Well, it's my understanding that when FATCA passed the first time around, the point——

Mr. MEADOWS. I'm just asking for your sworn testimony. Are you suggesting that U.S. banks are really supportive of this law?

Ms. BEAN. Yes, I think banks do not want to compete against foreign banks that——

Mr. MEADOWS. So if I get the banking institutions to say that they don't have a problem with us repealing that, you would change your opinion?

Ms. BEAN. Well, many of those banking institutions have foreign banks as members.

Mr. MEADOWS. No, I know that.

Ms. BEAN. So that's the opinion——

Mr. MEADOWS. That's what I'm saying. So at this point, if they changed their position, would you change yours?

Ms. BEAN. I think U.S. banks do not want to compete against foreign banks that can take their wealthiest clients——

Mr. MEADOWS. That's not the question I asked.

Ms. BEAN. —and separate accounts.

Mr. MEADOWS. That not what I—I said if they changed it, would you change your opinion?

Ms. BEAN. If they, you mean if U.S. banks?

Mr. MEADOWS. Yes.

Ms. BEAN. Not their trade associations, which have foreign banks in them. But if you could get U.S. banks alone to say we don't want FATCA anymore, they'd still have to comply, by the way, with all of the other——

Mr. MEADOWS. Well, they're about to have to comply. You see, we haven't forced them to comply on this side, you know, and——

Ms. BEAN. They do comply——

Mr. MEADOWS. In a different way. We do not require them to comply with foreign entities at this particular point. So if France——

Ms. BEAN. Yes, we do.

Mr. MEADOWS. We're not forcing them to do that unless there's a reciprocal agreement. I've looked at it, Ms. Bean, and so we can argue the point, so let me go to one other side of this.

So you're saying it's the investment that we made, even if it's bad policy, we shouldn't go the other direction because we made a substantial investment and everybody is getting used to it. Is that your testimony?

Ms. BEAN. It is. Foreign banks——

Mr. MEADOWS. All right.

Ms. BEAN. By the way, these aren't U.S. banks, but these are foreign banks——

Mr. MEADOWS. Okay. I've got 5 minutes, so yes or no answers are the best for me, but you can explain. That's fine.

So GAO did a study in 2013, and they suggested that really it's the voluntary disclosure that has most of this. It's not the IRS coming in. It's the voluntary disclosure that comes up with this.

In fact, they said, in that study, 80 percent—now these are of the high income people. So the lower income people like Mr. Kuettel would not be actually in this study, but they said 80 percent of the high income individuals, the income that we recovered actually came from fees and—penalties and fees, not actually income tax. Does that strike you as surprising?

So of the 800 million that we actually got last year, 80 percent of that were fees and penalties. It wasn't really taxes.

Ms. BEAN. When people don't pay their taxes and they're caught by the IRS, they do impose penalties.

Mr. MEADOWS. Listen, this isn't my first rodeo. I get that. What I'm saying is does that surprise you that 80 percent of the money we have coming in is actually fees and penalties? It's not tax avoidance. It's a penalty or a fee that goes with that. So the number we're collecting, the vast majority of it is just a fee and a penalty for voluntary disclosure. Does that surprise you?

Ms. BEAN. It did not surprise me, but it also includes interest, I believe, not just penalties but also interest.

Mr. MEADOWS. Well, when we look at this, when we look at——

Ms. BEAN. I think it's the biggest part of it.

Mr. MEADOWS. It was 80 percent. I mean, I've got the study right here. I'll be glad to share it with you. It's 80 percent would basically come from penalties and fees, quote.

And so when we look at that, you know, then what you're doing is you're taking this number down, and so we're investing 200 million to try to go over, and we're assuming that they're not doing legal activity. I think most people actually agree with Mr. Kuettel. They may not be happy about their paying taxes, but they agree that it is their civic duty to do so.

Ms. BEAN. I would agree with that.

Mr. MEADOWS. And so when we see that, we're making an assumption that activity is illegal, just like Senator Rand Paul was taking about. So what you're saying is that it's okay for us to go in and get details on their private accounts and making sure that we understand that in case there is illegal activity. Is that your premise today?

Ms. BEAN. I don't like getting a 1099 on my bank account. I'm an honest customer.

Mr. MEADOWS. That's not what I asked. Is it your sworn testimony——

Ms. BEAN. Like I would here with a 1099——

Mr. MEADOWS. —that it's okay for us to go look at the private individual account with the suspicion that there may be illegal activity, and that's okay?

Ms. BEAN. I treat all Americans the same. 1099s or 1042s, I treat them all the same.

Mr. MEADOWS. Ms. Bean, you're—this isn't your first rodeo either. You're not answering my question.

Is it your sworn testimony that it's okay to go into the private individual accounts under the suspicion that there may be illegal activity and look at that as FATCA does?

Ms. BEAN. As FATCA and American law does, yes, I think that is appropriate.

Mr. MEADOWS. All right. So let's look at it a little bit differently. So I am assuming you are a law abiding citizen. Would it be okay, under that same premise then, for me to go look at all your emails and all your private correspondence which some would argue is not as intimate as your financial details, would it be okay for me to go in there looking for suspicious activity? Would you think that that would be appropriate?

Ms. BEAN. No.

Mr. MEADOWS. Okay. I agree with you, and so what we've done——

Ms. BEAN. And the difference is that one is about paying taxes——

Mr. MEADOWS. What we've done——

Ms. BEAN. The other one is about private communications. There's a difference there. All of us——

Mr. MEADOWS. Listen, my son is graduating from law school. His specialty is Fourth Amendment. So I mean, we've had these arguments at the dinner table, and so when we look at that, I understand the difference. But as we start to see this, Ms. Bean, here's what I'm saying.

We're investing money, which forces a compliance nature that is making people where they can't bank or where actually being a U.S. citizen is a detriment internationally for any financial, whether you're in a single household or whether you're a financial corporation. Do you think that that was the intended purpose of this bill?

Ms. BEAN. The Supreme Court.

Mr. MEADOWS. Was that the intended purpose of the bill, yes or no?

Ms. BEAN. Was the intended purpose to denigrate Americans? Absolutely not.

Mr. MEADOWS. All right. Thank you.

I'll recognize the ranking member.

Mr. CONNOLLY. Thank you. I do want to, you know, want to caution about only looking at extremes. So we can ask about intrusion into Americans' financial information as if all of it is extreme.

So I'll pose the opposite question to you, Ms. Bean, would it be okay if we completely repealed FATCA, and while we're at it, say that anybody is free, as an American citizen, to have a secret bank account in Switzerland and should never have to report on it and should never have to pay taxes on it unless they feel like it? What's wrong with that?

Ms. BEAN. Well, what's wrong with that is we have tens of thousands of people who are cheating on their taxes and——

Mr. CONNOLLY. Correct. Right.

FATCA didn't just come out of, you know, busybodies who love putting their nose in people's private business and there was no problem to solve and it was just another perverse liberal thing to do in Congress, right?

Ms. BEAN. Correct.

Mr. CONNOLLY. I mean, there was actually a problem identified, which was rather substantial tax evasion in the billions of dollars.

Hard-working Americans pay their fair taxes, and none of us like to see anyone cheating, right?

Ms. BEAN. Correct.

Mr. CONNOLLY. Okay. Now, here's my question. Having said all of that, the testimony we've heard from your three colleagues at the table would suggest that sometimes, though, we've gone too far, that maybe the intention was good, but it's disrupting people's lives. We've had testimony from two Americans that they had to renounce their citizenship because a bank in Switzerland told them they had to, if I got the testimony right. And surely you would agree that's not an intended consequence of FATCA?

Ms. BEAN. No, it's not.

Mr. CONNOLLY. You said something about the rollout, you admitted, was rocky. So is the implementation still rocky? Are there still unintended consequences that maybe Congress needs to address or someone implementing needs to address?

Ms. BEAN. FATCA still is not—it's far from a perfect law. There are things that could be improved.

Mr. CONNOLLY. Nothing is a perfect law. I hate that expression. I mean, that implies something could be perfect. Nothing is perfect. I wish there were, but there is not. So we will put that aside.

So it has problems in its implementation still?

Ms. BEAN. Yes.

Mr. CONNOLLY. Okay.

And listening to the testimony of the three gentlemen to your left—left? Right?

Ms. BEAN. My right.

Mr. CONNOLLY. Right. Sorry.

Do they have a point? I mean, do you recognize what you're hearing here as a fair critique, maybe not a comprehensive critique? You and I would stipulate that the purpose of FATCA is a good one, and it has done some good, clearly, in promoting an international standard and in collecting taxes that otherwise would have been foregone. But, in doing that, either in the zeal or in the reach, it's hurt people unintentionally. That's really what we're hearing here. And I'm concerned about that as a Member of Congress.

I don't want to see fellow citizens hurt. I want to see tax cheats brought in. I want to see everyone pay their fair taxes. And maybe not everybody up here shares that philosophy. I do. But I don't want to be hurting people in the process who are innocent victims of a well-intentioned piece of legislation that's overly broad or is badly implemented. And that's what I'm asking you to comment on.

Ms. BEAN. I really think their concern is misplaced.

Mr. CONNOLLY. Whose?

Ms. BEAN. The people to my right.

Mr. CONNOLLY. Okay.

Ms. BEAN. I think what they're concerned about is, in some cases, it's unfair to tax them because they don't live in the United States.

Mr. CONNOLLY. Can I just say—I've seen this—Mr. Chairman, if I can interrupt one second?

I would ask everybody to forbear civility and acceptance. This is not a hearing where you're shaking your head because you don't like what somebody says. We're going to hear everybody, and we're going to try to be fair. But you're not free to be commenting through body language on whether you approve or disprove of somebody's right to express themselves. You know, if you're at the table, you get to express yourself. If you're not, please be forbearing and polite.

Ms. Bean?

Ms. BEAN. I was just going to point out that, even if FATCA were completely repealed, you'd still have all of the same problems about people saying "we're getting taxed when we shouldn't be" or "getting taxed too much" or "the process for renouncing citizenship is too complicated or too expensive." All of those things would still be true because FATCA itself does not impose any tax, and it does not, of course, require anybody to renounce their citizenship.

I think Switzerland was a particularly tough place to be, that the banks there were particularly upset because FATCA was aimed, in part, at Swiss bank secrecy. I think that a lot of those Swiss banks now have changed their practice. UBS and Credit Suisse now agree to open up accounts for American citizens and report them to the IRS, and a lot of other Swiss banks——

Mr. CONNOLLY. Thank you. Unfortunately, votes have been called.

Mr. Chairman, I would like, if it's all right, to have Mr. Bopp just comment on that, if he would like to. I'd like to hear the other point of view.

Mr. MEADOWS. Yeah. Very quickly.

Mr. CONNOLLY. Very quickly.

Mr. MEADOWS. We've got a couple minutes left, and we're going to need to recess and reconvene. So very quickly.

Mr. BOPP. Thank you. I would just make a couple of points. First, this is not an unusual or rare problem that is affecting Americans overseas. The Democrats Abroad survey of Americans overseas found that 65 percent of married Americans overseas have lost bank accounts because of FATCA.

Secondly, this does not level the playing field. U.S. banks have to file, you know, 1099s regarding interest income. Under FATCA, foreign banks have to not only identify income but also gains and losses, et cetera, also gross receipts, gross withdrawals, account information, value—no taxpayer in the United States reports that information to the IRS.

And, finally, regarding the penalty point that you made, the $9.7 billion that she's talking about of taxes, interest, and penalties, most of those penalties we know anecdotally were not because these people needed to pay any taxes and failed to do it, but because they failed to file this form, this one lousy form that generates a 50-percent penalty of the highest value in the account. If you do it in the second year, fail to file your form, you're now at a hundred percent. That's the penalty. And, you know, that is something this committee should force the IRS to explain to the American people about how FATCA is working.

Mr. MEADOWS. All right. We're going to reconvene probably, for planning purposes, no sooner than 3:35. So you can go get coffee, do whatever you want. And so this committee stands in recess.

[Recess.]

Mr. MEADOWS. The chair recognizes the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

Ms. Bean, I want to pick up with you, if we can continue here.

Any idea how much revenue is lost to offshore tax evasion each year?

Ms. BEAN. Estimates have been between $100- and $150 billion per year is lost to offshore tax evasion.

Mr. HICE. All right. Between $100- and $150 billion. And you're satisfied with that estimate?

Ms. BEAN. Yes.

Mr. HICE. Okay.

And how much revenue is brought in because of FATCA?

Ms. BEAN. I don't know. It's such a new law. They just started the reporting in 2015. I don't know if they have any statistics yet.

Mr. HICE. Okay. The Joint Committee on Taxation estimated $870 million. Are you familiar with that estimate?

Ms. BEAN. That is being brought in per year?

Mr. HICE. [Nonverbal response.]

Ms. BEAN. I wasn't familiar, but okay.

Mr. HICE. Okay. Based on that, assuming that the Joint Committee on Taxation is accurate, at least in the ballpark, it is very poor math. We've got a loss of $100- to $150 billion. We're only bringing in 870 million. And that's just part of the problem. I mean, we're spending—figures have been going out today—$200 billion spent on this. The estimates on that range from a little less than that. The $200 billion is kind of a middle-of-the-road estimate. I've seen as high as a trillion, as low as $8 billion. But the middle-of-the-road guess, $200 billion. And besides all that—I mean, I listen to these witnesses and read their testimonies and the harm that has been caused individuals around the world and the harm that has come about to some of our allies. You even mentioned yourself how—you know, you said that, in your opinion, things are changing. But many of our allies have been hurt because of this. Obviously, it's not a very efficient use of IRS resources.

And, quite frankly, I have questions as to just whether or not this thing is even constitutional or not. There are tremendous constitutional questions that come up with this. The fact that Americans living overseas are forced to provide financial information that would normally require a warrant is just amazing to me. There's obviously an issue at least with the Fourth Amendment there.

We have heightened reporting requirements to treat Americans living overseas more harshly than those living here. And that, obviously, is a Fifth Amendment concern. You just wonder even how constitutional this thing is at its very foundation. And then the fact that this was instituted without congressional authority—President Obama—the agreements were made. I mean, you've got a separation-of-powers issue.

I guess my point is, over and over and over, there's just questions on this thing as to even how effectively it's working. If we're bringing in $870 million but the cost is some $200 billion, it doesn't take a whole lot of math to figure out this is not a very efficient thing. And you add to it the harm that's being caused and the constitutional issues that are being raised, it appears to me that, although this may have been implemented with good intentions, as has been mentioned here today, there's enough information that's come forth here about FATCA that, frankly, I find this thing not only to be disastrous as a law but dangerous, potentially, constitutionally. And it just seems to me in every way this ought to be repealed; if not, majorly modified. Just a quick yes/no, would y'all agree or disagree that this needs to be either repealed or modified?

Mr. Bopp?

Mr. BOPP. I definitely agree it needs to be repealed. We have thought about fixes, alleged fixes, being proposed by various people. The problem is it leaves all the essential elements of the FATCA regime in place. The burdens on most individuals, the burdens on financial institutions, don't change in any of the proposals that we are aware of. And the constitutional issues remain.

And we just should not be treating people that are U.S. citizens, because they're residing abroad, stripping them of their rights as if they are second class citizens.

Mr. HICE. Okay.

My time has expired.

Mr. Crawford, Mr. Kuettel, yes or no, repeal or modify?

Mr. CRAWFORD. Yes. I support a repeal.

Mr. KUETTEL. Yes. I support repeal.

Ms. BEAN. No, I don't. And just so you know, the courts that have looked at these types of issues have upheld——

Mr. HICE. Nor do you believe it should be modified? You like it just as it is?

Ms. BEAN. I think there's some modifications that would be appropriate.

Mr. HICE. Okay.

Thank you, Mr. Chairman.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the gentlewoman from New York, Mrs. Maloney, for 5 minutes.

Mrs. MALONEY. Thank you, Mr. Chairman.

I want to thank you very, very much for your focus on this issue. It's an extremely important one as we move into more of a global world with many Americans living abroad.

And, of course, I thank Ranking Member Connolly.

And thank you to all of the witnesses who have come from all of the corners of the globe to testify about the future of this important law.

I represent a district that has many Americans that live abroad that have expressed the concerns of Mrs. Nelson, although I have never had a first family who came over on the first ships testify to me. But many people have told me the excruciating experience of renouncing their American citizenship and their inability to open up bank accounts or being forced off the bank account of their spouse.

But, likewise, I'm very sympathetic to the points that Ms. Bean has raised about the need to crack down on terrorism financing, drug financing, human trafficking financing, and just plain crooks. But I do think that we could reach some type of agreement in going forward.

I personally do not think FATCA should be abolished. But certainly the reporting procedures should not subject ordinary Americans, in my opinion, to the same scrutiny as criminal tax evaders, money launderers. And coming from New York, which is constantly a terrorist target, the extreme concern that law enforcement has in New York, and I'd say around the country, of terrorism financing.

I've been particularly interested in this issue for some time now as co-chair and founder of the Americans Abroad Caucus. I have heard reports from constituents overseas detailing how FATCA's expensive and risky reporting requirements have had a negative impact on access to banking services for Americans living abroad.

FATCA was passed to fight overseas tax havens and make sure that American money could not be hidden from tax obligations, which is something I strongly support, and I'm sure most Members do as well. It does this by requiring foreign financial institutions to disclose certain information to IRS about American-held accounts or the institution will be subject to a 30-percent withholding tax on all of its income from U.S. sources.

Unfortunately, in order to minimize their exposure to FATCA reporting requirements and avoid any withholding fees and potential penalties, some foreign financial institutions have decided to simply close accounts for U.S. citizens or refuse to open new ones for them or have asked them to get off the account of their spouse. As a result, many law-abiding American citizens living overseas have lost access to everyday financial tools, such as mortgages, bank accounts, insurance policies, and pension funds, all of which are critical services in a modern economy, regardless of your place of residence.

Now, I believe it is essential that the Treasury Department has the tools it needs to fight overseas tax havens and make sure that any American money around the world remains compliant with the U.S. Tax Code, but the current FATCA reporting procedures subject ordinary Americans to the same scrutiny as criminal tax evaders. It's gotten so bad that some Americans have resorted to renouncing their American citizenship in response, and that's unacceptable. Whether it's 1 or 2 or 2,000, we should not live in a world where people feel they have to renounce their citizenship in order to comply with, basically, transparency laws.

Recognizing the consequences that the reporting requirements have had on Americans living abroad, the IRS Taxpayer Advocate Service 2015 annual midyear report to Congress recommended that the IRS exclude from FATCA reporting financial accounts maintained by a financial institution in the country in which the U.S. citizen is a bona fide resident.

And I have here a letter that about 20 Members of Congress joined me in signing and sent to Treasury and IRS supporting this idea, this narrow, narrow exemption for American taxpayers.

The report details how this proposal would mitigate concerns about unintended consequences raised by overseas Americans, reduce the reporting burden on FFIs, and allow the IRS to focus its enforcement efforts on identifying and addressing willful attempts at tax evasion or money laundering or money hiding through foreign accounts. The IRS would retain access to foreign financial account information as citizens would still be required to submit the report of foreign bank and financial accounts. Additionally, the Financial Crimes Enforcement Network, or FinCEN, the query system ensures IRS employees direct access to FBAR data.

The Treasury Department has not yet implemented this recommendation, and I wrote this letter on September 15th of 2015, which I'd like to submit to the record.

Mr. Chairman?

Mr. MEADOWS. Without objection.

Mrs. MALONEY. —to the IRS and Treasury Departments, urging adoption of this reform, but still nothing has happened.

So today I—as we hold this hearing, they haven't taken any—been taken to institute a policy to alleviate the burden on overseas Americans as a result of FATCA. That is why, last night, I introduced the Overseas Americans Financial Access Act, which would implement the recommendation and exempt Americans from FATCA reporting if their accounts are held in the same country where they are bona fide residents. It is a narrowly tailored change that could drastically improve the financial conditions for Americans living abroad.

I hope my colleagues will join me in this good-faith effort to make FATCA more effective in its intention and yet less burdensome on law-abiding Americans living and working abroad.

And I request permission to place in this record, I think, an excellent document that was prepared by the Foreign Account Reporting on the issue and ways it could be improved, which included the recommendation that I legislated last night. And I have the bill here. And I'd also like to put that in the record.

I feel that this narrowly tailored approach would relieve the burden on American residents, members of—Americans, yet keep the benefit of cracking down on terrorism financing, drug financing, human trafficking financing and just plain criminal behavior.

My time is long over—expired. I thank the gracious chairman for allowing me this time to speak, and I look forward to a second round where I can participate in asking questions.

Thank you.

Mr. MEADOWS. I thank the gentlewoman.

Her two unanimous consents, without objection, so ordered.

Mr. MEADOWS. And the chair recognizes the gentlewoman from the District of Columbia, my good friend Eleanor Holmes Norton.

Ms. NORTON. Let me thank you, Mr. Chairman, for this really interesting and important and revealing hearing.

I was pleased to hear my good friend Mrs. Maloney take a stab at how we could, in fact, go at the probable unintended consequences of going after bad guys and getting good guys while at the same time not opening the gates altogether to the bad guy.

Indeed, I was a little surprised to hear some of your responses to the question that was asked by my colleague on the other side whether repeal or modification was appropriate. Let me remind you what it takes in this Congress and what it took in the Congress that passed this to get legislation through to recoup taxes or to tax anyone.

The evidence was overwhelming of human trafficking, of drug smuggling, of tax cheats, so overwhelming, that, in a Congress which is not known as passing a lot of bills and in a Congress which has cut the IRS more than it has cut any other part of the government, this legislation, FATCA, was passed. So I have to ask you, when you say you would like repeal, do you really mean you want no law on the books that went after the bad guys so that we could make sure that the good guys weren't, in fact, caught? I'm going to ask you to think about that, because this is the kind of modification that is going to take bipartisan support. And you just heard a Member offer at least one version of modification.

But if you come to the Congress of the United States, who passed a law like this after being overwhelmed by evidence, and say, "The only thing we want is a wide open gate and ask you to throw all of that away," then you're not really helping us. So I'm asking you whether you would consider the notion of modifications that would in fact help us deal with what moved all of us during your testimony.

Mr. Bopp? Let me hear all down the line on that.

Mr. BOPP. Thank you.

And, of course, we have considered the possibility of changes such as proposed and other proposals. And the problem is, is we do not find that they will be effective in relieving the burdens——

Ms. NORTON. All right. Mr. Bopp, my time is——

Mr. BOPP. And I can tell you why.

Ms. NORTON. You know, you may not have seen any yet, but you see what you give us, an all-or-nothing kind of resolution. And that, of course, it tells us, who don't do much in the first place, nothing.

I just want to ask in the—I would—maybe the chairman would grant me some time as well, because I want to see whether any of you would be open to modification going back to where we were. The fact that you haven't seen one——

Mr. MEADOWS. The chair will give——

Ms. NORTON. —doesn't mean that there isn't one in existence. And there haven't been hearings like this; doesn't mean that working with people couldn't help us.

But I do have to ask Ms. Bean about this—what looks like the rest of the country moving toward us with this common reporting standard. Does that, in fact, share much of what we've been talking about in FATCA, Ms. Bean, this common reporting standard, this OECD effort to collect and share information about foreign-held accounts?

Ms. BEAN. It's modeled on FATCA. It's very similar to it. It's not identical. But, yes, and over a hundred countries have now signed up to that system.

Ms. NORTON. So, if anything, it looks like the rest of the world is moving toward FATCA because of hearings which opened this matter up, in fact, found. So could they work together to stop the kind of tax evasion we've been talking about, the common reporting standard and FATCA, Ms. Bean?

Ms. BEAN. That's the hope, that with most banks around the world starting to report account information to governments, that this whole problem of secret bank accounts that, as you said, are used not only by tax evaders but terrorists, criminals, sex traffickers, drug lords, that whole problem would be much more manageable because of the transparency.

Ms. NORTON. Would the information of U.S. account holders still be collected if Congress repeals FATCA but the common reporting standard continued in existence?

Ms. BEAN. I don't know the answer to that. I believe it would be. But I'd have to look at it in more detail.

Ms. NORTON. I wish you would get that answer back to our chairman.

I have to tell all of you sitting at the table: I was a tenured professor of law before I came to Congress. And, essentially, I taught one of the—in addition to the hard level of court courses I taught, one was negotiations. So I came kind of with the frame of mind is every—lawyers can be most helpful if they understand that we live in a world where each side can't get what he wants but can, in fact, be satisfied. And it's that kind of problem-solving approach I've tried to bring to the Congress as well. So I must tell you: When somebody tells me to take back a piece of legislation that could have passed only if we were deluged with information that made it irresistible, if you tell me that that is the only answer, I have to tell my friends at the table that you're asking for the status quo. And I would ask you to work with Mrs. Maloney, with me, with the chairman, to find a way out of this dilemma so that, in trying to help the good guys—and you represent them—we do not go back to opening the gate to all the bad guys we were after in the first place.

I thank the chairman for his indulgence.

Mr. MEADOWS. I thank the gentlewoman.

I would like to make note that the chair did give the additional 2 minutes to the gentlewoman from D.C.

Ms. NORTON. That's why I love him so much.

Mr. MEADOWS. We're going to go ahead—since the gentlewoman from New York wanted a second round, we're going to go ahead and do a brief second round. So I'm going to recognize myself for a series of questions.

But let me clear up, I guess, some testimony. I've got sworn testimony that Ms. Bean says that we're not asking financial institutions abroad to do anything that the United States banks do.

And, Mr. Bopp, your sworn testimony seemed to be at odds with Ms. Bean.

So help me clear up—Mr. Bopp, I think you said that more than just a 1099, they are required to have all kinds of other information.

I want to give you a chance to correct the record if you're not correct in your sworn testimony.

Mr. BOPP. The 1099 that American banks are required to send in to the IRS and to the taxpayer, of course, reports the interest income on the account. It does not report gross receipts. It does not record gross withdrawals. It does not report the value of the account. These are things that FATCA requires foreign banks to provide to the IRS. So——

Mr. MEADOWS. All right. So you're saying that foreign banks have to do that and U.S. banks don't?

Mr. BOPP. [Nonverbal response.]

Mr. MEADOWS. Okay. I think we'll get a different opinion here, but, Ms. Bean, go ahead. Are you saying that his testimony is not correct?

Ms. BEAN. Mr. Bopp is correct. There's additional information under FATCA from foreign banks than there is in the U.S. banks.

Mr. MEADOWS. Why is that?

Ms. BEAN. I think that's just the way the law was written.

Mr. MEADOWS. Do you not see that as problematic?

Ms. BEAN. Well, I think one reason is that U.S. banks are subject to subpoena from U.S. law enforcement in a way that foreign banks aren't. So U.S. law enforcement, if they wanted to, could get the information——

Mr. MEADOWS. Oh. Whoa. Whoa. Whoa. So you're saying FATCA—FATCA's intent, from someone who should know—FATCA's intent was to allow a way to access information without a subpoena? Is that what you just said?

Ms. BEAN. Yes. Just like 1099s. There's no subpoena for a 1099.

Mr. MEADOWS. Right. But you're saying that, because we did FATCA, we're going to have our constitutional protections violated because of a law? Is that your sworn testimony here today?

Ms. BEAN. The courts have said it is not unconstitutional. The Supreme Court——

Mr. MEADOWS. But you're saying they're getting around a subpoena, is you're saying they're subject to a subpoena, and somebody else is not subject to a subpoena.

Ms. BEAN. I think you were asking me, why would FATCA require more information——

Mr. MEADOWS. No. I was asking you if it was different. Because your sworn testimony from my first round of questions is you said that we weren't asking them to do anything that a U.S. bank was asked to do. That was your sworn testimony. And I can get them to read back the transcript. But I assume that you're saying now you want to change that to say that, yes, we are asking foreign banks to do something that a U.S. bank doesn't have to do. Is that correct?

Ms. BEAN. What I meant in my testimony is that we're requiring foreign banks to file a form on all accounts opened by U.S. clients. And we have U.S. banks that have to file a form on all accounts opened at U.S. banks.

But Mr. Bopp is correct. There are a couple additional items of information primarily——

Mr. MEADOWS. So you would be okay with waiving those couple additional items and amending the law, because obviously that's—we're not treating people the same in the United States as we do abroad?

Ms. BEAN. I would not because from a foreign bank, U.S. law enforcement cannot——

Mr. MEADOWS. Well, I'm going to go back to what the gentlewoman from the District of Columbia says. You can't have it the other way either. I mean, they may not be able to get full repeal, but you can't keep the full law and sit here and negotiate in good faith and assume that everything with FATCA is correct.

Ms. BEAN. In fact, the rest of the world has noticed the same difference——

Mr. MEADOWS. They're being forced to notice the world because of what we're doing——

Ms. BEAN. —press the U.S. to provide that additional information——

Mr. MEADOWS. Would you not agree with that? They're being forced to do it because of what we're doing from our law and forcing them to do it?

Ms. BEAN. We are forcing them through the 30 percent——

Mr. MEADOWS. And do you not see that some of these sides effects that we've had expert testimony from Mr. Kuettel and Mr. Crawford, that those side effects of our forcing financial institutions to do it are having repercussions that were not intended in the original law?

Ms. BEAN. My entire adult life I've had to file a 1099 on every bank account I've ever opened.

Mr. MEADOWS. So you would be okay——

Ms. BEAN. I'm okay with that.

Mr. MEADOWS. All right. So let's go there. And maybe that's a reasonable compromise. We repeal FATCA and that we require foreign institutions to have to file a 1099 to the IRS on interest income. Would you be okay with that?

Ms. BEAN. I'd prefer the 1099 to be expanded to what FATCA requires.

Mr. MEADOWS. Therein is a deeper problem. But we won't go there.

Ms. Bean, we're not going to ever agree on that.

Ms. BEAN. Okay.

Mr. MEADOWS. So let's go ahead with this.

Are you okay, yes or no, with us just repealing back and saying that a foreign account has to do a 1099 on interest income as a U.S. Bank would do, as Mr. Bopp, and that's all they have to do? Are you okay with that?

Ms. BEAN. No. No, I'm not.

Mr. MEADOWS. You know, I find it challenging that—because apparently—so what are the problems that you see with FATCA, Ms. Bean?

Ms. BEAN. Well, one of the—there are a number of problems. One of the problems is——

Mr. MEADOWS. How many problems would you say there are with FATCA?

Ms. BEAN. Well, I haven't counted them up. But let me give you two of them.

Mr. MEADOWS. Okay.

Ms. BEAN. One is that, when the IRS started to penalize people for violating the law, their penalties—they had a range of penalties they could do—they were very unreasonable in the penalties they applied.

Mr. MEADOWS. So what would a reasonable penalty be?

Ms. BEAN. Well, one of the things that the IRS did at the insistence of the Taxpayer Advocate is they came up with a system that, if you had an inadvertent violation of the law——

Mr. MEADOWS. Inadvertent by who? Now, I will sometimes tell my wife that I forgot to take the trash out inadvertently. Is that—I mean, inadvertent by whose standard?

Ms. BEAN. I think they require a certificate from the taxpayer. And if the taxpayer will certify that they—it was inadvertent; they didn't realize that they were violating the law——

Mr. MEADOWS. I would think that that would happen 100 percent of the time, wouldn't you?

Ms. BEAN. How about that. And then they're qualified for much lower penalties. So that's the system that's been set up.

Mr. MEADOWS. So what should the penalty be, Ms. Bean?

Ms. BEAN. That's a very complicated question.

Mr. MEADOWS. But you're an expert witness. You are here at the request of the minority as an expert witness. I would assume you have an opinion on that since you were involved in part of this. What would be an appropriate penalty?

Ms. BEAN. Well, I'll give you an example. There was a gentleman that they found a bank in Israel. He had hidden $21 million in those accounts, never been reported to the IRS. The IRS then ended up hitting him with a fine of $8.3 million for the many years that he hid those accounts, and he went through a lot of machinations to hide them from IRS agents.

Mr. MEADOWS. But that's criminal. That's criminal.

I mean—so here's what we're talking about, is when we are looking at that, if, indeed, he went through all kinds of issues—I mean, we've got laws that say we have to disclose those accounts. I know, every year, my accountant would ask that. But what you're saying is, is that—so a big penalty, if he's got a lot of money, is okay; but a big penalty, if they don't have a lot of money, is not okay? Is that what you're saying? I'm trying to figure out what—I'm trying to answer the question for you since you don't seem like you want to answer the question. What's an appropriate penalty?

Ms. BEAN. Well, the penalties currently are gauged to how much money is in the account. So that's one thing they do take into account. And another thing they take into account is whether it was inadvertent or not.

Mr. MEADOWS. So are you going to answer the question or not? What's the appropriate penalty?

Ms. BEAN. Sometimes the appropriate penalty is zero.

Mr. MEADOWS. All right.

Ms. BEAN. If you didn't know you were violating the law, the penalty could be zero.

Mr. MEADOWS. All right. So you're okay if we say you didn't know that you were violating the law, that the penalty would be zero?

Ms. BEAN. In some cases, yes.

Mr. MEADOWS. Okay. We're not getting much of anywhere.

What would be the other example? So penalties being outrageous is one. What's the other problem? You said there was two.

Ms. BEAN. The other one I would mention is that we've had the FBAR for many years where people have to identify their foreign accounts.

Mr. MEADOWS. Right.

Ms. BEAN. But now, under FATCA, we created another form that seems to be very duplicative of the first form.

Mr. MEADOWS. Right.

Ms. BEAN. And I'm not sure that we need that second form. And as people have said, there are a lot of trips and traps to complying with FATCA, and that seems to me to be one of them, to have that extra form.

Mr. MEADOWS. All right. So let me understand. Your best recommendation on improving FATCA is we get rid of one form, and we may adjust the penalty. Those are your two best attempts at trying to fix FATCA?

Ms. BEAN. Yes. Because, as I say, I've lived my life under that regime.

Mr. MEADOWS. All right. So, if you've lived your life under that regime, knowing that there is a return, knowing that the IRS, that the gentlewoman from the District of Columbia talked about, knowing that there are financial resources, knowing that Commissioner Koskinen says that he can get a 20-percent return sometimes—or even let's take conservative, under sworn testimony, he said an 8-to-1 return, wouldn't we be better off taking the $71 million that we spent last year and using it for some other type of enforcement that provided a better return? Because aren't we only getting 1 percent of what—your sworn testimony said there's $100 billion out there. We're only collecting 1 percent of those taxes. And, actually, it's not even that. It's taxes and fees and penalties and interest. So we're spending all this money to address 1 percent of the problem.

Ms. BEAN. Well, $150 billion includes all of the corporate tax avoidance. So that's a whole different issue. But when you're looking at individuals, the numbers that are usually used are $35- to $70 billion a year just for individuals. I'd been asked earlier about offshore tax avoidance and evasion altogether. But for individuals, it's $35- to $70 billion.

Mr. MEADOWS. All right. I'm way beyond my time. So here's what I would ask you to do, each one of you to do, is come up with three recommendations. Your two that you gave me under sworn testimony don't count. I need three recommendations on what you would do with FATCA.

I need you to look at—in the spirit of trying to find—if we do not fully repeal, what are the three most onerous situations that affect gentlemen like Mr. Crawford and gentlemen like Mr. Kuettel? What are those areas? Are all of you willing to either give me your recommendations back to the committee to do that?

Okay. Thank you.

I recognize the gentlewoman from New York, Mrs. Maloney.

Mrs. MALONEY. I thank the gentleman for his concern and trying to get an answer. But, to me, it's not a monetary thing. It really is human life because terrorism financing has become a way of life in this world.

Mr. MEADOWS. Well, will the gentlewoman yield for one point of——

Mrs. MALONEY. No. I have a phone call with Justice Ginsburg in about 5 minutes. So I can't yield right now. Excuse me, Mr.—I just have to ask one question, and that's it.

Listen, so—I disrupted my train of thought.

So, just recently, this month, Chairman Hensarling of the Financial Services Committee created a whole new committee on terrorism financing because it's such a huge issue.

Bombs went off in my district several months ago. The police caught the guy. But the question is, where did he get his money from? So cracking down on terrorism financing is a real concern.

And I would say, why are people hiding money? A lot of times it's not just to save on taxes. It's because they're selling guns. They're selling human bodies, or they're involved in drugs or all kinds of things that basically hurt people.

So I'm trying to—and I join you with your question—find a solution—and I look forward to working with you on it—that allows us in law enforcement to go after the bad guys but protects people like Mr. Kuettel. So my question is to Mr. Kuettel, would the exemption that was really put forward by the Taxpayer Advocate Service that basically recommended that the IRS exclude from FATCA reporting financial accounts maintained by a financial institution in the country in which the U.S. Citizen is a bona fide resident—that would have taken care of Mrs. Nelson's situation, which she explained so clearly. But as a bona fide citizen of Switzerland, this particular change would have excluded you from this burden. Is that correct? Pardon me?

Mr. KUETTEL. I fear not.

Mrs. MALONEY. Why not? Because you're a bona fide citizen in a country, you would no longer have to do the FATCA. That's what this recommendation says.

Mr. KUETTEL. From my experience, the damage of FATCA has already been done. The banks are already terrified of America. If you just exclude local residents from FATCA, they still have the reporting requirements for the taxation. When I take my daughter here to a bank, practically any bank, the first question is, "Are you taxed by America?" They don't ask, "Are you reportable by America?" They ask, "Are you taxed," meaning she's a tax threat.

Mrs. MALONEY. That's the current law now. But if the law changed so that, if you're a bona fide citizen, you could just say back to them, "I am a bona fide resident of this country, therefore"—or you could get a form from our government that says, therefore, if you're going to a financial institution in your country—I would like to get legal counsel to look at it, because I believe you would be exempt under these types of recommendations.

In any event, something needs to be done on it. And I thank the chairman for his attention to it and his personal involvement in it and absolutely all of the panelists.

But I do believe cracking down on terrorism financing, which is one of the major reasons of this, is a critically important concern, unfortunately, in the world now.

So thank you, and I yield back. And I thank you. And I'm sorry I couldn't yield, but—I'm in trouble right now.

Mr. MEADOWS. That's all right. I've got a very long memory. So that's—we'll go from there. I thank the gentlewoman for—I understand. A Supreme Court Justice or a Member of Congress from North Carolina: I would have made the same choice you did.

So it's—I thank the gentlewoman for her interest.

So let me—in the interest of clarity, let's talk about what this is and what it is not. This is really not about the terrorist organizations that go and deal with that. I have a little bit of expertise there. The Hezbollah sanctioning bill was a bill that I actually started in the first Congress. I understand the aspects. It is now law. It is affecting behavior because we're going after money for terrorists. But we use totally different vehicles than this particular vehicle. And so to suggest that they're one and the same would not be accurate.

I mean, and when you look at central bank activity and the moving of funds and all of that, it is a very different issue. It's very complex, but it's very different. I have real problems with us treating citizens of the United States who happen to live abroad differently than citizens of the United States that happen to live in the contiguous 48 or whether it's Puerto Rico or anywhere else. When we start to look at this, it is critically important that we understand the constitutional foundations of who we are as a Nation. And in the interest of everything that we know, we can go after all kinds of things where we start violating the civil liberties of individuals in the interest of compliance.

And that's why we have—our Founding Fathers set it up. That's why we have a Fourth Amendment. And we've got other areas where the Fourth Amendment is being challenged.

And so, Ms. Bean, I would ask you to have an open mind and try to figure out those areas where the side effects and the testimonies that we've heard from these individuals and others, thousands of others, are being affected. So I'd ask you to keep an open mind and look at that.

Mr. Bopp, I'd ask you to look at it from a different perspective. Assuming that we can't get enough bipartisan support—which I believe we can—but if we can't get enough bipartisan support to repeal this and actually replace it with something else—and I hate to use the words "repeal and replace" in the context of anything these days—but as I look at this, if we can look at repealing and replacing it with something, I would ask you to take the thoughtful suggestions here.

Here is my closing remark. Senator Rand Paul recognized an issue that was brought to him not only from his concern for freedom-loving individuals and the Constitution, but it was something that was highlighted over and over again. And if you travel abroad, we have U.S. citizens who love the United States, who truly—some of them are more patriotic than some who live in my State of North Carolina. And yet they're being forced with a decision of, do they renounce the country they love so that they can continue to transact even a normal bank account? And that's a choice that we shouldn't be forcing people to make.

I think there are ways that we can figure this out and tailor this so that we truly go after those who have a problem with tax not only avoidance but criminal activity. We know that, indeed, it is our obligation to pay taxes, and to avoid that in an improper manner is certainly not anything that a Republican or a Democrat would condone.

And so it is in that spirit that I would ask you to report back your three recommendations. Get as many—we won't limit it to three, but if you don't give me three, you'll hear from us. How about that? Is that a deal?

Mr. MEADOWS. I want to thank all of you for the discussion and, truly, for your testimony. It's been very illuminating.

If there's no further business before the committee, the committee stands adjourned.

[Whereupon, at 4:27 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

FACTCOALITION
Financial Accountability & Corporate Transparency

April 25, 2017

Member of Congress
U.S. House of Representatives
Washington, DC 20515

RE: Oppose H.R. 2054/S. 869; Protect the Foreign Account Tax Compliance Act (FATCA)

Dear Member of Congress,

We write on behalf of the Financial Accountability and Corporate Transparency Coalition (FACT Coalition) to urge you to oppose H.R. 2054/S. 869. The purpose of this bill is to repeal the Foreign Account Tax Compliance Act (FATCA), an important tool to combat tax evasion by wealthy individuals who fail to report to the Internal Revenue Service (IRS) income related to foreign accounts, as has long been required by U.S. law.

The FACT Coalition is a non-partisan alliance of more than 100 state, national, and international organizations working toward a fair tax system that addresses the challenges of a global economy and promoting policies to combat the harmful impacts of corrupt financial practices.[1]

The 2010 law requires foreign banks and other foreign financial institutions holding U.S. client accounts to report certain information about those accounts to the IRS. This is information that those accountholders should already have been reporting but often were not, as shown by a series of offshore tax evasion cases over the years. For example, prior to passage, Switzerland's largest bank, UBS, paid a $780 million penalty and pled guilty to helping tens of thousands of U.S. clients (who did not disclose their accounts as required by U.S. law) evade U.S. taxes. UBS opened Swiss accounts for these clients without disclosing the accounts to the IRS, as was required under UBS's Qualified Intermediary agreement with the U.S.[2] To combat that type of misuse of foreign accounts, FATCA created transparency measures that parallel the transparency measures that have long applied to U.S. taxpayers with domestic accounts.

Every year, your employer, your bank, the Social Security Administration, and anyone holding or investing your savings sends you and the IRS information about your accounts. This long-standing U.S. enforcement process combines patriotism and accountability to create a culture of tax compliance. This sensible approach has allowed us to pay for national priorities such as defense, education, and infrastructure. It is a necessary practice that ensures everyone is playing by the rules.

[1] For a full list of FACT members, see: https://thefactcoalition.org/about/coalition-members-and-supporters/
[2] "UBS Enters into Deferred Prosecution Agreement". *U.S. Department of Justice*. February 18, 2009 (accessible at https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement).

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According to the IRS, tax compliance in the U.S. is upwards of 80%.[3] Many experts attribute that high rate, in part, to third party reporting requirements that ensure information is shared about taxpayer assets and income.[4] In contrast, the lack of tax compliance is often cited as one of the leading causes of financial woes in economically struggling nations. We are, as a country, engaged in a robust debate around tax rates, exemptions and structures, but few would argue that a goal of tax reform should be to make it easier to illegally evade taxes. And yet, repealing FATCA would do just that.

FATCA does not impose any new tax on any individual, here or abroad. Put simply, with or without FATCA, U.S. taxpayers with money in foreign banks would still owe taxes — and many were required to disclose their accounts long before FATCA was adopted.[5] The only difference would be that, if FATCA were repealed, foreign accountholders would be at far less risk of being caught.

FATCA disclosures apply only to wealthier individuals. Additional individual reporting requirements apply only to foreign accounts holding more than $50,000 for individuals and $100,000 for joint-filing U.S. residents holding offshore accounts. For those living abroad, the thresholds are more than $200,000 for individuals and $400,000 for couples.[6] For the foreign banks, the reporting requirements are for accounts with more than $50,000.

FATCA also levels the playing field between U.S. and foreign financial institutions. For years, U.S. financial institutions complied with legal requirements to report account information for U.S. taxpayers to the IRS, while foreign financial institutions did not. Law-abiding U.S. banks were forced to compete against foreign banks that allowed wealthy U.S. clients to open foreign accounts without disclosing them to the IRS. FATCA ended that unfair competition by imposing a meaningful penalty on foreign financial institutions that failed to disclose their U.S. client accounts. Repealing FATCA would reinstate not only the foreign bank secrecy that disadvantaged U.S. banks, but also the secrecy incentives that encouraged wealthy U.S. individuals to move their money and assets offshore.

Opponents of FATCA have sometimes raised concerns regarding the costs of FATCA compliance. In fact, those costs are borne by foreign banks and put them on par with U.S. banks that already bear the same reporting responsibilities and costs. In a letter to Congressional leadership, groups opposed to FATCA wrote that "the global economy would come to a grinding halt" if FATCA-style reporting were adopted more widely.[7] However, FATCA-style standards are already being put in place by 100 other countries

[3] "The Tax Gap: Tax Gap Estimates for Tax Years 2008-2010". *Internal Revenue Service*. April 4, 2017 (accessible at https://www.irs.gov/uac/the-tax-gap).
[4] Slemrod, Joel. "Tax Compliance and Enforcement: New Research and Its Policy Implications (Working Draft)". *University of Michigan*. January 16, 2016 (accessible at http://webuser.bus.umich.edu/jslemrod/Tax_Compliance_New_Research_012016.pdf).
[5] "Report of Foreign Bank and Financial Accounts (FBAR)". *Internal Revenue Service*. February 27, 2017 (accessible at https://www.irs.gov/businesses/small-businesses-self-employed/report-of-foreign-bank-and-financial-accounts-fbar).
[6] "Summary of FATCA Reporting for U.S. Taxpayers". *Internal Revenue Service*. November 7, 2016 (accessible at https://www.irs.gov/businesses/corporations/summary-of-fatca-reporting-for-u-s-taxpayers).
[7] "Coalition of 23 Groups to Congress: Include FATCA Repeal in Tax Reform". *Center for Freedom and Prosperity*. March 21, 2017 (accessible at http://freedomandprosperity.org/files/2017-FATCA_repeal_coalition_ltr.pdf).

that, just like the United States, seek to crack down on tax evasion through foreign bank accounts.[8] The new laws are kicking in this year with those countries unconcerned about any ill effect on the global economy. FATCA-style information exchange is quickly becoming the global norm.

The initial costs to establish new systems to automate FATCA reporting requirements have already been spent and cannot be avoided since, even if FATCA were repealed, foreign banks would still have to comply with the information exchange laws in other countries. The cost savings argument was never about U.S. banks and, now, is less relevant for foreign banks.

Tax evasion is a serious crime, and the victims are honest taxpayers. Economists estimate that offshore tax evasion by wealthy U.S. individuals robs the U.S. Treasury of between $35 billion[9] and $70 billion[10] each year. As we engage in a broader tax reform debate, we should be focused on closing loopholes and tightening anti-evasion measures, not loosening them.

H.R. 2054/S. 869 takes us in the wrong direction, and we strongly urge you to oppose the bill. We appreciate your consideration of our views. For additional information, please feel free to contact Clark Gascoigne at cgascoigne@thefactcoalition.org.

Sincerely,

Gary Kalman
Executive Director
The FACT Coalition

Clark Gascoigne
Deputy Director
The FACT Coalition

[8] "AEOI: STATUS OF COMMITMENTS (100 jurisdictions have committed)". *Organisation for Economic Co-operation and Development.* April 10, 2017 (accessible at https://www.oecd.org/tax/transparency/AEOI-commitments.pdf).
[9] Zucman, Gabriel. "The Hidden Wealth of Nations: The Scourge of Tax Havens". Chicago, IL: *University of Chicago Press*, September 22, 2015 (accessible at http://www.press.uchicago.edu/ucp/books/book/chicago/H/bo20159822.html).
[10] Guttentag, Joseph, and Reuven Avi-Yonah. "Closing the International Tax Gap." In *Bridging the Tax Gap: Addressing the Crisis in Federal Tax Administration*, edited by M. B. Sawicky, 99-110. Washington, D.C.: Economic Policy Institute, 2006.

FACTCOALITION
Financial Accountability & Corporate Transparency

Coalition Members and Supporters

Organizational Members

National/International

ActionAid USA
Americans for Democratic Action
American Federation of Labor – Congress of Industrial Organizations (AFL-CIO)
American Federation of State, County and Municipal Employees (AFSCME)
American Sustainable Business Council
Campaign for America's Future
Center for Economic and Social Rights (CESR)
Citizens for Responsibility and Ethics in Washington (CREW)
Citizens for Tax Justice
EarthRights International
EG Justice
Enough Project
Fair Share
Fair Share Education Fund
Financial Transparency Coalition
Friends of the Earth U.S.
Global Financial Integrity
Global Witness
Government Accountability Project
Institute for Policy Studies – Program on Inequality and the Common Good
Institute on Taxation and Economic Policy
JPIC Ministry – Missionary Oblates
Jubilee USA Network
Leadership Conference of Women Religious
The Main Street Alliance
National Priorities Project
New Rules for Global Finance
OpenTheGovernment.org
Oxfam America
Pacific Environment
Polaris
Project On Government Oversight (POGO)
Public Citizen
Sargent Shriver National Center on Poverty Law
Service Employees International Union (SEIU)
Small Business Majority
Tax Justice Network USA
U.S. Public Interest Research Group (PIRG)
U.S. Public Interest Research Group (PIRG) Education Fund
U.S. UNCUT

State/Local

Arizona
Arizona Fair Share
Arizona Public Interest Research Group

California
California Fair Share
California/Venezuela Region – Religious Sisters of Charity
California Public Interest Research Group
Jubilee Bay Area
Main Street Alliance of California

Colorado
Colorado Fair Share
Colorado Main Street Alliance
Colorado Public Interest Research Group

Connecticut
Connecticut Fair Share
Connecticut Public Interest Research Group

Delaware
Delaware Americans for Democratic Action (Delaware ADA)

Florida
Florida Fair Share
Florida Public Interest Research Group
Main Street Alliance of Florida

Georgia
Georgia Fair Share
Georgia Public Interest Research Group

Idaho
Idaho Main Street Alliance

Illinois
Citizen Action / Illinois Illinois Fair Share
Illinois Public Interest Research Group

Iowa
Iowa Citizen Action Network
Iowa Citizens for Community Improvement

Iowa Fair Share
Iowa Farmers Union
Iowa Main Street Alliance
Move to Amend – Iowa Chapter

Kentucky
Kentucky Fair Share

Minnesota
Main Street Alliance of Minnesota
Minnesota Fair Share

Maine
Maine Small Business Coalition

Maryland
Maryland Fair Share
Maryland Public Interest Research Group

Massachusetts
Massachusetts Fair Share
Massachusetts Public Interest Research Group

Michigan
Michigan Fair Share
Michigan Public Interest Research Group

Missouri
Missouri Public Interest Research Group

Montana
Montana Fair Share
Montana Small Business Alliance

Nevada
Nevada Fair Share

New Hampshire
New Hampshire Fair Share
New Hampshire Public Interest Research Group

New Jersey
New Jersey Main Street Alliance
New Jersey Public Interest Research Group

New Mexico
New Mexico Public Interest Research Group

North Carolina
Fair Share in North Carolina
North Carolina Public Interest Research Group

North Dakota
North Dakota Fair Share

Ohio
Ohio Fair Share
Ohio Public Interest Research Group
Main Street Alliance of Ohio

Oregon
Jubilee Oregon
Main Street Alliance of Oregon
Oregon Fair Share
Oregon State Public Interest Research Group

Pennsylvania
Pennsylvania Fair Share
Pennsylvania Public Interest Research Group
SEIU Local 668, Pittsburgh, PA
UFCW Local 23, Western PA

South Carolina
South Carolina Small Business Chamber of Commerce

Texas
Texas Fair Share
Texas Public Interest Research Group

Vermont
Main Street Alliance of Vermont

Virginia
Virginia Fair Share
Main Street Alliance of Virginia

Washington (State)
Main Street Alliance of Washington
Washington Public Interest Research Group

Wisconsin
Wisconsin Fair Share
Wisconsin Public Interest Research Group

Individual Supporters

Eileen Appelbaum, Senior Economist, Center for Economic and Policy Research
Dean Baker, Co-Director, Center for Economic and Policy Research
Elise J. Bean, former Staff Director and Chief Counsel of the U.S. Senate Permanent Subcommittee on Investigations
William K. Black, Assoc. Professor, Economics & Law, University of Missouri – Kansas City
Charles Davidson, Executive Director, Kleptocracy Initiative, Hudson Institute
John Schmitt, Senior Economist, Center for Economic and Policy Research

Congress of the United States
Washington, DC 20515

September 15, 2015

The Honorable Jacob Lew
Secretary of the Treasury
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Secretary Lew and Commissioner Koskinen,

On behalf of the roughly eight million American citizens who live abroad, we write to express our concerns regarding several tax reporting requirements imposed on U.S. citizens living abroad that have created the unintended consequence of limiting overseas Americans' access to legitimate banking services. We respectfully request that the Treasury Department adopt a recent Taxpayer Advocate Service recommendation that Foreign Account Tax Compliance Act (FATCA) reporting exclude financial accounts maintained by a financial institution in the country of which the U.S. person is a bona fide resident.

When FATCA was passed in 2010, the intent was to combat and prevent overseas tax havens. Unfortunately, in its implementation, FATCA has had detrimental consequences on law-abiding Americans living outside the U.S.

As you know, FATCA requires Foreign Financial Institutions (FFIs) to report accounts of U.S. citizens directly to the United States or to the government of the country where the bank is located for further transmission to the U.S. through Intergovernmental Agreements (IGAs), or be subject to a 30% withholding on their U.S. investments. In many cases, these accounts are no different than savings or checking accounts in local bank branches across the U.S. People rely on their convenience and depend on these accounting services to simplify basic financial responsibilities such as paying living expenses, saving for higher education or planning for retirement.

Some Foreign Financial Institutions have simply closed accounts or refused to open new ones for U.S. citizens in order to minimize their exposure to FATCA reporting requirements, withholding fees and potential penalties. This practice leaves law-abiding American citizens without access to everyday financial tools such as mortgages, bank accounts, insurance policies and pension funds -- all of which are critical services regardless of place of residence.

The IRS Taxpayer Advocate Service (TAS) has recognized this issue and has expressed concerns about the redundancy of FATCA reporting requirements. In order to address this, the TAS issued a recommendation on April 13, 2015 that FATCA reporting exclude financial accounts maintained by a financial institution in the country in which the U.S. citizen is a bona fide resident. We support this recommendation and urge its implementation.

While we recognize that Treasury is tasked with the difficult job of making sure American money around the world remains compliant with the U.S. tax code, the current FATCA reporting procedures subject ordinary Americans to the same scrutiny as criminal tax evaders and money launderers. Revision of these reporting policies is necessary to ensure that Americans remain competitive in international business and continue to contribute to economies here in the U.S. and around the world. Adopting the TAS's recommendation is an efficient way to avert a banking lockout while maintaining the integrity and intention of FATCA.

Thank you again for your attention to this request.

Sincerely,

Carolyn B. Maloney
Member of Congress

Mick Mulvaney
Member of Congress

Don Beyer
Member of Congress

Robert Pittenger
Member of Congress

Walter B. Jones
Member of Congress

Michael M. Honda
Member of Congress

Sam Farr
Member of Congress

Blaine Luetkemeyer
Member of Congress

Loretta Sanchez
Member of Congress

Jared Polis
Member of Congress

David Price
Member of Congress

Ruben Gallego
Member of Congress

Karen Bass
Member of Congress

Ted Lieu
Member of Congress

Dina Titus
Member of Congress

Bill Pascrell, Jr.
Member of Congress

Grace Meng
Member of Congress

Zoe Lofgren
Member of Congress

Eleanor Holmes Norton
Member of Congress

CC: Nina E. Olson, National Taxpayer Advocate

LR #5 FOREIGN ACCOUNT REPORTING: Eliminate Duplicative Reporting of Certain Foreign Financial Assets and Adopt a Same-Country Exception for Reporting Financial Assets Held in the Country in Which a U.S. Taxpayer Is a *Bona Fide* Resident

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PROBLEM

As a response to IRS and congressional concerns that U.S. taxpayers were not fully disclosing the extent of financial assets held abroad, Congress passed the Foreign Account Tax Compliance Act (FATCA) in 2010.[2] Many U.S taxpayers, particularly those living abroad, have incurred increased compliance burdens and costs as a result of FATCA reporting obligations on Form 8938, *Statement of Specified Foreign Financial Assets*, that significantly overlap with the Financial Crimes Enforcement Network (FinCEN) Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR), filing requirements.[3] These burdens include additional tax preparation fees and the unwillingness of some foreign financial institutions (FFIs) to do business with U.S. expatriates because of significant costs and regulatory risks associated with preparing and maintaining a business for ongoing FATCA compliance.[4]

Congress has given the IRS broad authority to issue regulations and guidance for the purpose of eliminating duplicative reporting requirements.[5] The IRS has exercised the regulatory authority to eliminate duplicative reporting of assets on the Form 8938 if the asset is reported or reflected on certain other timely-filed international information returns, and provided an exception from reporting financial accounts held in U.S. territories for *bona fide* residents of such territories.[6] However, it repeatedly declined to adopt the National Taxpayer Advocate's recommendations[7] to forego duplicative FATCA reporting

1 See Taxpayer Bill of Rights, *available at* www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

2 Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (2010) (adding Internal Revenue Code (IRC) §§ 1471-1474; 6038D). *See also Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives To Restore Employment Act," Under Consideration by the Senate*, Staff of the Joint Committee on Taxation, JCX-4-10 (Feb. 23, 2010).

3 *See* IRS Form 8938, *Statement of Specified Foreign Financial Assets* (2015) and FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (Oct. 2013). *See also* IRS, Comparison of Form 8938 and FBAR Requirements, *available at* https://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements; National Taxpayer Advocate 2013 Annual Report to Congress 235.

4 *See, e.g.*, National Taxpayer Advocate Fiscal Year 2016 Objectives Report to Congress 48-52; National Taxpayer Advocate 2013 Annual Report to Congress 238-48. Under FATCA, to avoid being withheld upon a 30 percent withholding tax on certain U.S.-source payments made to them, FFIs may register with the IRS and agree to report certain information about their U.S. accounts, including accounts of certain foreign entities with substantial U.S. owners. IRC §§ 1471-1474.

5 *See, e.g.*, IRC §§ 6038D(h)(1); 1471(d)(1)(C)(ii).

6 *See* Treas. Reg. § 1.6038D-7(a) and (c). For examples of information returns, see, *e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891.

7 *See* National Taxpayer Advocate 2014 Annual Report to Congress 343-45; National Taxpayer Advocate 2013 Annual Report to Congress 228-37; National Taxpayer Advocate 2013 Annual Report to Congress 238-48; National Taxpayer Advocate 2012 Annual Report to Congress 134-53; TAS Recommendations for Published Guidance under IRC §§ 6038D and 1471 (Apr. 15, 2015) and (Apr. 24, 2014). *See also National Taxpayer Advocate Seeks End to Duplicative FATCA Reporting*, 2015 TNT 71-16 (Apr. 14, 2015).

where assets have already been reported on an FBAR, and to allow a same-country exception for reporting financial accounts held in the country in which a U.S. taxpayer is a *bona fide* resident despite support by other stakeholders.[8]

EXAMPLE

Madeleine and Jacque Legrand are citizens and *bona fide* residents of France. Madeleine is also an "accidental" U.S. citizen. She was born in New York City where her parents worked as foreign researchers at a U.S. university on a J-1 visa. Madeleine left the United States for France with her parents at the age of three. As an adult, she visited the United States for brief periods on several occasions prior to 2006, but has never worked in the United States. Over 20 years of employment, Madeleine and her husband have saved about 800,000 Euros for retirement that are invested in mutual funds and certificates of deposit. In 2014, when visiting the United States again, Madeleine learned of the requirement to report worldwide income and the information reporting requirements associated with certain foreign financial assets and accounts, and realized that her retirement savings met the reporting thresholds.[9] When she returned to France, Madeleine attempted to comply but could not find free tax assistance. She became anxious about the potential FBAR and FATCA penalties that could negatively affect her retirement savings. As a result, she had to pay for tax preparation, plus an additional fee to discuss any FBAR and FATCA reporting questions with her advisor.[10] In addition, upon learning that Madeleine is a dual U.S.-French citizen, the small local bank where the couple had held joint accounts for over a decade suggested that the Legrands either close the accounts or remove Madeleine from them, so that the bank can avoid costs and risks associated with reporting and withholding obligations under FATCA.

RECOMMENDATIONS

To reduce the burdens of FATCA compliance, the National Taxpayer Advocate recommends that Congress:

- Amend IRC § 6038D:
  - To eliminate duplicative reporting of assets on Form 8938, *Statement of Specified Foreign Financial Assets*, if the asset is or has been reported or reflected on an FBAR; and
  - To exclude from the specified foreign financial assets required to be reported on the Form 8938 financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident.
- Amend IRC § 1471 to specifically exclude from the definition of financial account subject to reporting by FFIs financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident.

8 *See, e.g.*, National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 93-4, 99; *Reporting of Specified Foreign Financial Assets*, Preamble to Final Regulations under IRC § 6038D, Summary of Comments and Explanation of Revisions, sec. V (G), 79 FR 73817-01 (Dec. 12, 2014); Email from the Special Counsel to the Deputy Chief Counsel (Technical) to TAS Supervisory Attorney Advisor, *Recommendations for Published Guidance under Sections 6038D and 1471* (Oct. 13, 2015). *See also* Government Accountability Office (GAO), GAO-12-403, *Reporting Foreign Accounts to IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified*, App. 2 (Feb. 2012); TAS meetings with representatives of the Association of Americans Resident Overseas and the Federation of American Women's Clubs Overseas (Mar. 24, 2014 and Feb. 24, 2015); TAS meetings with Democrats Abroad Task Force on FATCA (Mar. 4, 2014 and Feb. 24, 2015).

9 For filing thresholds, see generally 31 U.S.C. § 5314(a); 31 C.F.R. § 1010.350; Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts, FinCEN Form 114 (2014) ($10,000 threshold). *See also* Treas. Reg. § 1.6038D-2(a).

10 TAS has been informed that this fee could be substantial, particularly for persons overseas. TAS meeting with representatives of the American Citizens Abroad (ACA) (Sept. 4, 2014).

PRESENT LAW

The law requires U.S. taxpayers to file a number of information returns and imposes severe civil penalties for failing to file, many of which are not based on the amount of the underpayment of tax.[11] Among the most publicized are the penalties for failure to disclose foreign financial accounts (FBAR) and foreign financial assets (FATCA). The Currency and Foreign Transaction Reporting Act of 1970 (commonly known as The Bank Secrecy Act) requires U.S. citizens and residents to report foreign accounts with an aggregate value of $10,000 or more at any time during the calendar year on the FBAR.[12] FATCA requires U.S. citizens, resident aliens, and certain non-resident aliens to file a Form 8938 with their individual returns reporting foreign assets exceeding specified thresholds.[13]

A taxpayer may be subject to a civil FBAR penalty of up to $10,000 per violation for failing to file an FBAR even if the failure was not "willful."[14] If the government establishes the failure was willful, the maximum penalty is the greater of $100,000 or 50 percent of the balance of the undisclosed account annually.[15] The taxpayer may also face criminal penalties of up to $500,000 and ten years in prison.[16] For taxable years beginning after March 18, 2010, pursuant to FATCA, an additional penalty of $10,000 (and of up to $50,000 for continued failure after IRS notification) is imposed on U.S. taxpayers holding financial assets outside the United States who fail to report those assets on Form 8938.[17] Underpayments of tax attributable to non-disclosed foreign financial assets are subject to an additional substantial understatement penalty of 40 percent.[18] Additionally, the statute of limitations is extended to six years if there is an omission of gross income in excess of $5,000 and the omitted gross income is attributable to a foreign financial asset.[19]

IRC § 1471(d)(1) defines the term "United States account" and provides for the elimination of duplicative reporting requirements.[20] The term "United States account" excludes financial accounts in FFIs if the holder of such account is otherwise subject to information reporting requirements

11 These penalties include but are not limited to penalties under IRC §§ 6038, 6038A, 6038B, 6038C, 6039F, 6046, 6046A. *See also* IRC §§ 6038D, 6662(b)(7); 31 U.S.C. § 5321(a)(5).

12 *See* 31 C.F.R. § 1010.306(c); Electronic Filing Requirements for Report of Foreign Bank and Financial Accounts, FinCEN Form 114 (2014).

13 Treas. Reg. § 1.6038D-2(a). An unmarried taxpayer living in the U.S. must file a Form 8938 if the total value of the taxpayer's specified foreign financial assets is more than $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year. This threshold is doubled in the case of specified individuals who are married filing jointly. A qualifying unmarried taxpayer living abroad must file a Form 8938 if the total value of the taxpayer's specified foreign financial assets is more than $200,000 on the last day of the tax year or more than $300,000 at any time during the tax year. This threshold is doubled as well in the case of qualified individuals living abroad who are married filing jointly. *Id.*

14 *See* 31 U.S.C. § 5321(a)(5)(B). Prior to October 22, 2004, there was no penalty for a non-willful failure to file and the maximum civil penalty for willful violations was $100,000. The American Jobs Creation Act of 2004, Pub. L. No. 108-357, Title VIII, § 821(a), 118 Stat. 1418, 1586 (Oct. 22, 2004) established a penalty for non-willful violations and increased the penalty for willful violations.

15 31 U.S.C. § 5321(a)(5)(C). The penalty can reach 300 percent of the account balance if the willful failures continue over a six-year period. A six-year statute of limitations applies to the civil FBAR penalty. *See* 31 U.S.C. § 5321(b)(1).

16 31 U.S.C. § 5322; 31 C.F.R. § 1010.840(b). To establish willfulness for either civil or criminal penalties, the IRS generally has to establish that the taxpayer had knowledge of the FBAR filing requirement.

17 IRC § 6038D.

18 *See* IRC § 6662(b)(7).

19 IRC § 6501(e).

20 IRC § 1471(d)(1)(C).

which the IRS determines would make the reporting with respect to these accounts duplicative.[21] IRC § 1471(d)(1)(C)(ii) states:

> (C) Elimination of duplicative reporting requirements.--Such term shall not include any financial account in a foreign financial institution if—
>
> > (ii) the holder of such account is *otherwise subject to information reporting* requirements which the Secretary determines would make the reporting required by this section with respect to United States accounts *duplicative* (emphasis added).

Treasury Regulation § 1.1471–5(b)(2) provides specific exceptions to the definition of financial accounts subject to reporting by FFIs. Currently, the regulation does not provide an exception for financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident.

Similarly, IRC § 6038D specifically authorizes the IRS to issue regulations or other guidance to provide appropriate exceptions from FATCA reporting when such reporting would be duplicative of other disclosures. IRC § 6038D(h)(1) provides that:

> The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section, including *regulations or other guidance which provide appropriate exceptions* from the application of this section in the case of—
>
> > (1) classes of assets identified by the Secretary, including any assets with respect to which the Secretary determines that disclosure under this section would be duplicative of other disclosures… (emphasis added).

Treasury Regulations under IRC § 6038D eliminate duplicative reporting of assets on the Form 8938 if the asset is reported or reflected on certain other timely-filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891) provided the Form 8938 indicates the filing of the form on which the asset is reported.[22] However, FinCEN Report 114 (FBAR) is not included on the list of those information returns.

Similarly, Treasury Regulation § 1.6038D-7(c)(1) provides that a *bona fide* resident of a U.S. possession who is required to file Form 8938 is *not required* to report financial accounts maintained by a financial institution organized under the laws of the U.S. possession of which the specified individual is a *bona fide* resident. The regulation currently does not have a similar exception for U.S. individuals who are *bona fide* residents of foreign countries.

21 IRC § 1471(d)(1)(C)(ii).

22 See Treas. Reg. § 1.6038D-7(a).

REASONS FOR CHANGE

Eliminate Duplicative Reporting

For several years, the National Taxpayer Advocate and other stakeholders have expressed concerns about the overlap of FBAR and the Form 8938, which must be filed with annual federal income tax returns.[23] The FinCEN Report 114 and the Form 8938 are significantly duplicative, increasing confusion and adding to the compliance burden for taxpayers.[24] Reporting and withholding obligations have resulted in additional costs and risks of substantial penalties for taxpayers and withholding agents, and might have prompted some FFIs to close accounts of U.S. taxpayers abroad.[25]

FATCA was passed in response to IRS and congressional concerns that U.S. taxpayers were not fully disclosing the extent of financial assets held abroad.[26] However, the IRS's approach to FATCA apparently is based on the unsubstantiated assumption that most taxpayers are "bad actors" and that a widespread, burdensome enforcement regime is necessary. Such has been the case even though the vast majority of taxpayers have been, and likely will continue to be, fully compliant. In her 2013 report, the National Taxpayer Advocate observed that based on analysis of the data then available " … to this point, the IRS is imposing additional reporting burdens and increased potential penalties primarily on a category of taxpayers that, under principles of quality tax administration, should be encouraged, rather than penalized."[27] Further review of updated and expanded data from fiscal year 2010 through the present continues to demonstrate tax evaders are not feeling the weight of FATCA; instead, the burden of FATCA falls on U.S. taxpayers who likely would be compliant regardless. U.S. taxpayers under the FATCA umbrella who must file Form 8938 are generally as compliant as the overall U.S. taxpayer population as shown on Figure 2.5.1.[28]

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23 National Taxpayer Advocate 2013 Annual Report to Congress 238-48; National Taxpayer Advocate Fiscal Year 2013 Objectives Report to Congress 23; National Taxpayer Advocate 2012 Annual Report to Congress 134, 141; National Taxpayer Advocate 2011 Annual Report to Congress 129-272; Tax Analysts, *Texas CPAs Recommend Simplifying Foreign Financial Reporting*, 2015 TNT 167-13; GAO, GAO-12-403, *Reporting Foreign Accounts to IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified*, App. 2 (Feb. 2012).

24 IRS, *Comparison of Form 8938 and FBAR Requirements*, *available* at http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements.

25 Under FATCA, to avoid being withheld upon a 30 percent withholding tax on certain U.S.-source payments made to them, FFIs should register with the IRS and agree to report certain information about their U.S. accounts, including accounts of certain foreign entities with substantial U.S. owners. IRC §§ 1471-1474.

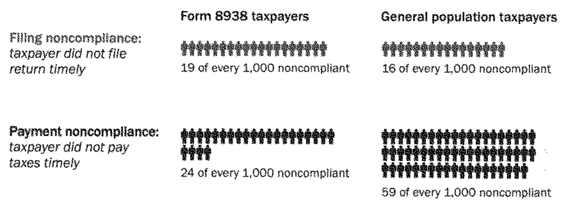
26 *See Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives To Restore Employment Act," Under Consideration by the Senate*, Staff of the Joint Committee on Taxation, JCX-4-10 (Feb. 23, 2010).

27 National Taxpayer Advocate 2013 Annual Report to Congress 241.

28 National Taxpayer Advocate Fiscal Year 2016 Objectives Report to Congress 48-52 (Area of Focus: *The IRS's Implementation of FATCA Has in Some Cases Imposed Unnecessary Burdens and Failed to Protect the Rights of Affected Taxpayers*).

FIGURE 2.5.1[29]

Noncompliance Rates for Form 8938 Filers vs. General Population Taxpayers



The National Taxpayer Advocate previously has observed taxpayers' willingness to meet their reporting and filing obligations is driven more by considerations of personal integrity and perceptions of systemic fairness than by economic deterrence and enforcement measures.[30]

As of December 2015, approximately 300,000 taxpayers had filed Forms 8938 for tax year (TY) 2013, while about 283,000 had filed for TY 2014.[31] Of the taxpayers filing Forms 8938 in TY 2013, approximately 38 percent also filed FBAR forms.[32] Roughly 24 percent of Form 8938 returns were submitted to the IRS from a foreign address based on TY 2013 data.[33]

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29 Data drawn from IRS Compliance Data Warehouse (CDW), IRTF Entity and IMF Status History tables (Mar. 26, 2015). This table uses status code 03 data (Tax Delinquency Investigation) to measure filing compliance and status code 22, 24, and 26 data (Tax Delinquent Account) to measure payment compliance. The analysis covers five tax years from 2009 forward. In addition, FATCA filers appear to have a lower level of reporting noncompliance than the general population because FATCA filers have a lower percentage of high-scoring DIF returns in comparison to filers overall. Data drawn April 13, 2015 from CDW, IRTF Entity table, Processing Year 2013. High-scoring DIF returns were defined as those with a DIF value that exceeded 80 percent of DIF scores in the general population for a particular TPI class. We calculated a cutoff point for DIF scores at the 80th percentile for each TPI class for Processing Year 2013 and calculated the percentage of FATCA filers in each TPI class that exceeded the DIF cutoff point. Only 16.5 percent of FATCA filers exceeded their respective DIF cutoff points, compared to, of course, 20 percent for individual filers in the general population. Thus, FATCA filers showed a lower percentage of "high-scoring" DIF returns than the overall population.

30 National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, 134.

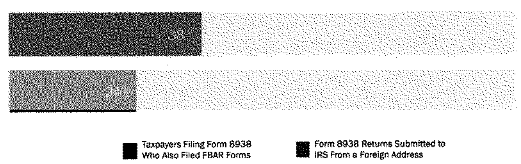
31 TAS Research, CDW, IRFT Entity and IRTF F1040 tables, data drawn Nov. 16, 2015. These numbers may change as more TY 2013 and 2014 returns are filed with the IRS.

32 TAS Research, CDW, IRFT Entity and IRMF_F90_22 tables, data drawn Nov. 16, 2015.

33 IRS LB&I Division, Planning, Analysis, Inventory, and Research (PAIR) analysis, CDW, IMF_Entity table, data drawn Dec. 18, 2015.

FIGURE 2.5.2[34]

Taxpayers Filing Forms 8938 in Tax Year 2013



As noted above, the IRS has regulatory authority under FATCA to eliminate duplicative reporting on FATCA Form 8938 and FBAR. However, it repeatedly has declined to do so, citing the Joint Committee on Taxation (JCT) Technical Explanation accompanying the HIRE Act.[35] The Technical Explanation states that "[n]othing in this provision [section 511 of the HIRE Act enacting new section 6038D] is intended as a substitute for compliance with the FBAR reporting requirements, which are unchanged by this provision."[36] At the same time, as described above, the *statutory* language (as opposed to a JCT explanation) specifically authorizes elimination of duplicative reporting requirements.[37]

While the IRS may feel constrained in its regulatory authority to change the FBAR filing requirements, it is specifically granted the freedom to adjust FATCA filing requirements. The National Taxpayer Advocate is therefore baffled by the IRS's inexplicable unwillingness to address this unnecessary duplication of reporting requirements. It appears that congressional action specifically *requiring* the IRS to eliminate duplicative reporting under FATCA and FBAR is necessary to alleviate significant burdens being experienced by affected taxpayers and to protect the taxpayers' rights *to privacy* and *to a fair and just tax system.*

Same-Country Exception

As stated above, U.S. taxpayers residing abroad are subject to overlapping reporting requirements under FBAR and FATCA, which increase preparation expenses and the chance of error.

Additionally, organizations representing U.S. taxpayers abroad have voiced concerns about unintended consequences of new FATCA rules for FFIs that make it harder for U.S. taxpayers living abroad to open

34 TAS Research, CDW, IRFT Entity and IRMF_F90_22 tables, data drawn Nov. 16, 2015. IRS LB&I Division, PAIR analysis, CDW, IMF_Entity table, data drawn Dec. 18, 2015. These numbers will change as more TY 2013 returns are filed with the IRS.

35 *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives To Restore Employment Act," Under Consideration by the Senate*, Staff of the Joint Committee on Taxation, JCX-4-10 (Feb. 23, 2010). *See also Reporting of Specified Foreign Financial Assets*, Preamble to Final Regulations under IRC § 6038D, Summary of Comments and Explanation of Revisions, sec. V (G), 79 FR 73817-01 (Dec. 12, 2014); Email from the Special Counsel to the Deputy Chief Counsel (Technical) to TAS Supervisory Attorney Advisor, *Recommendations for Published Guidance under Sections 6038D and 1471* (Oct. 13, 2015); National Taxpayer Advocate 2015 Objectives Report to Congress 93-94, 99.

36 *Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the "Hiring Incentives To Restore Employment Act," Under Consideration by the Senate*, Staff of the Joint Committee on Taxation, JCX-4-10 (Feb. 23, 2010) at 60.

37 IRC §§ 1471(d)(1)(C)(ii) and 6038D(h)(1).

and maintain legitimate bank accounts overseas.[38] Some FFIs, such as DeutcsheBank, HSBC, and ING, have reportedly closed out foreign accounts of U.S. citizens in response to FATCA to avoid significant costs and regulatory risks associated with preparing for and maintaining an ongoing FATCA compliance.[39] Other FFIs have severely restricted the services they offer to these customers.[40]

During recent meetings with TAS, organizations of U.S. citizens abroad reiterated their concerns about the difficulty of opening bank accounts in their countries of residency.[41] The National Taxpayer Advocate has personally received multiple reports from taxpayers, taxpayer representatives, and tax professionals residing in a range of countries including Austria, Hungary, and Sweden and from some foreign tax officials themselves.[42] Because FATCA creates burdens for FFIs, some foreign banks are unwilling to open accounts for U.S. citizens abroad, especially for those individuals residing in small communities where the global banks do not have branches.

Similarly, substantial day-to-day compliance burdens and costs of implementing FATCA are placed on financial institutions.[43] For example, unless an FFI agrees to provide comprehensive information regarding accounts of U.S. taxpayers, a broad range of U.S.-source payments to that FFI are subject to a 30 percent withholding tax.[44] FATCA further charges withholding agents with the responsibility of determining whether they are obliged to undertake FATCA withholding and implementing that withholding when it is required.[45]

As a recommendation to help minimize the burden of FATCA compliance for both individual U.S. taxpayers residing abroad and FFIs, the National Taxpayer Advocate proposed that the IRS and Treasury adopt a "same-country exception."[46] Accounts opened by U.S. citizens in a foreign country of *bona fide* residence are not "offshore" accounts designed for tax avoidance. These *bona fide* residents have a legitimate need for local banking services in their countries of residence. Thus, it is more logical and in keep-

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38 IRC §§ 1471-1474. See, *e.g.*, ACA Comments on the Proposed Treasury Regulations Concerning FATCA Dated February 8, 2012 (Apr. 4, 2012), *available at* https://www.americansabroad.org/files/6813/4192/6083/acastatementapril2012s.pdf (last visited Nov. 23, 2015); April Carvelli, *Taxes Pushing U.S. Citizens to Renounce*, Imperfect Parent (Apr. 17, 2012) (quoting Francisca N. Mordi, Vice President and Senior Tax Counsel at the American Bankers Association, who stated she received a number of calls from Americans in Europe complaining about banks closing their accounts. "They're going to drop Americans like hot potatoes," Mordi says. "The foreign banks are upset enough about the regulations that they're saying they just won't keep American customers, and it's giving (Americans living abroad) a lot of sleepless nights."), *available at* http://www.imperfectparent.com/topics/2012/04/17/taxes-pushing-u-s-citizens-to-renounce/; James Fellows, *The FATCA Chronicles: Tales From China, Canada, and Estonia*, The Atlantic (Jan. 3, 2012), *available at* http://www.theatlantic.com/international/archive/2012/01/the-fatca-chronicles-tales-from-china-canada-and-estonia/250771/; Judi Lembke, *Americans in Sweden Suffer U.S. Tax Crackdown*, The Local (Sweden's News in English) (Mar. 6, 2012), *available at* http://www.thelocal.se/39522/20120306/.

39 *See* National Taxpayer Advocate 2013 Annual Report to Congress 238.

40 *Id.*

41 TAS meetings with representatives of the Association of Americans Resident Overseas and the Federation of American Women's Clubs Overseas (Mar. 24, 2014 and Feb. 24, 2015); TAS meeting with Democrats Abroad Task Force on FATCA (Mar. 4, 2014 and Mar. 4, 2015).

42 National Taxpayer Advocate's meetings at the University of Vienna, Austria, Harvard Club of Hungary, Budapest, Hungary, and Swedish Tax Agency, Stockholm, Sweden.

43 Presentation of the National Taxpayer Advocate to the Securities Industry and Financial Markets Association (Oct. 7, 2014). *See also* Lee Sheppard, *News Analysis: The Reformation of FATCA*, 2015 TNT 92-1 (May 13, 2015).

44 IRC §§ 1471(a) and 1473(1). IRC § 1471(d)(1)(B) excepts from the reporting and withholding requirements those accounts that are held by individuals at the same FFI and have an aggregate value of $50,000 or less. Note that an FFI can provide information either as a participating FFI or pursuant to an intergovernmental agreement negotiated between the U.S. and the FFI's home country.

45 IRC §§ 1471-1474; Notice 2013-43, 2013-31 I.R.B. 113.

46 TAS Recommendations for Published Guidance under IRC §§ 6038D and 1471 (Apr. 15, 2015) and (Apr. 24, 2014). *See also National Taxpayer Advocate Seeks End to Duplicative FATCA Reporting*, 2015 TNT 71-16 (Apr. 14, 2015).

ing with the spirit of FATCA to require information reporting on financial assets and accounts opened in a country other than one's country of residence.

The IRS could have significantly alleviated reporting burdens for U.S. persons who are *bona fide* residents in foreign countries by revising regulations under IRC §§ 6038D and 1471 to eliminate the requirement to report specified foreign financial assets on the Form 8938 if such persons have reported the assets on the FBAR. The IRS could also facilitate these taxpayers' legitimate need for local banking services in their countries of residence by excluding financial accounts maintained by a financial institution organized under the laws of the country of which the U.S. persons are *bona fide* residents from FATCA reporting.[47] To this point, the IRS has not been willing to pursue these recommendations proposed by the National Taxpayer Advocate and supported by other stakeholders.[48] In response to the National Taxpayer Advocate's request that this proposal be included in the U.S. Department of the Treasury Office of Tax Policy and the IRS Priority Guidance Plan, the IRS Office of Chief Counsel maintained:

> Under longstanding U.S. tax policy, U.S. citizens are taxed on their worldwide income irrespective of where they reside. Section 6038D was enacted to provide the IRS with an effective means to ensure compliance by all U.S. taxpayers owning foreign financial assets, including those residing outside of the United States. Thus, it was decided that the regulations under section 1471 and 6038D should not provide a broad carve out (from either the FFI reporting rules or the taxpayer self-reporting requirements, respectively) for U.S. citizens residing abroad as proposed in [TAS Recommendations for Published Guidance under Sections 6038D and 1471]. However, please note that the section 6038D regulations provide very substantial reporting relief for most U.S. citizens who are *bona fide* residents of another country. The regulations do so by providing aggregate foreign financial asset reporting thresholds for U.S. citizens residing abroad that are very generous and substantially higher than those applicable to other U.S. taxpayers. As a result, only those U.S. taxpayers residing abroad who have very substantial foreign financial asset holdings are required to file a Form 8938.[49]

For "accidental" Americans who have lived abroad for most of their lives, as described in the example above, the increased thresholds may not achieve the intended result as their savings may exceed even the higher thresholds.[50] This is particularly true where the accounts subject to reporting contain retirement savings. As a result, these taxpayers will bear the cost of tax preparation expenses for duplicate reporting under FBAR and FATCA. Others excepted from FATCA reporting under the higher thresholds will bear

47 To qualify for foreign earned income exclusion and foreign housing exclusion or deduction, a U.S. citizen or resident alien (for tax purposes) must have a tax home in a foreign country, and either be a *bona fide* resident of a foreign country or countries for an uninterrupted period which includes an entire taxable year (*bona fide* residence test), or be present in a foreign country or countries during at least 330 full days in any period of 12 consecutive months (physical presence test). IRC § 911(d)(2).

48 Email from the Special Counsel to the Deputy Chief Counsel (Technical) to TAS Supervisory Attorney Advisor, *Recommendations for Published Guidance under Sections 6038D and 1471* (Oct. 13, 2015); TAS meetings with the Special Counsel to the Deputy Chief Counsel (Technical) (May 23, 2014 and June 17, 2015).

49 Email from the Special Counsel to the Deputy Chief Counsel (Technical) to TAS Supervisory Attorney Advisor, *Recommendations for Published Guidance under IRC Sections 6038D and 1471* (Oct. 13, 2015).

50 A qualifying unmarried taxpayer living abroad must file a Form 8938 if the total value of the taxpayer's specified foreign financial assets is more than $200,000 on the last day of the tax year or more than $300,000 at any time during the tax year. This threshold is doubled as well in the case of qualified individuals living abroad who are married filing jointly. Treas. Reg. § 1.6038D-2(a).

the risk of IRS audits due to potential FFI errors because FFIs are still required to report their accounts to the IRS on Forms 8966, *FATCA Report*.[51]

Both groups will face the increased risk of errors as the IRS has shut itself off from a two-way dialogue with taxpayers abroad by closing all IRS tax attaché posts and eliminating the Electronic Tax Law Assistance Program, which was the only free method for taxpayers abroad to ask and receive answers to their specific tax law questions without paying toll phone or fax charges.[52] Similarly, both groups will continue experiencing difficulties with opening or maintaining bank accounts unless the definition of financial accounts subject to reporting by FFIs under IRC § 1471(d) excludes accounts maintained by a financial institution organized under the laws of the country of which the U.S. person is a *bona fide* resident.

EXPLANATION OF RECOMMENDATIONS

Treasury Regulations under IRC § 6038D eliminate duplicative reporting of assets on the Form 8938 if the asset is reported or reflected on certain other timely-filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891) provided the Form 8938 indicates the filing of the form on which the asset is reported.[53] The proposed legislation will achieve similar results by eliminating duplicative information reporting under FBAR. The proposed legislative change will not jeopardize the IRS's access to foreign financial account information reported on FBARs. The IRS has access to the FinCEN Query System, which allows IRS employees direct electronic access to FBAR data.

This legislative proposal would also exclude from FATCA coverage foreign financial assets held in the country in which a U.S. taxpayer is a *bona fide* resident. It would mitigate concerns about the collateral consequences of FATCA raised by U.S. non-residents, reduce reporting burdens faced by FFIs, and allow the IRS to focus its enforcement efforts on identifying and addressing willful attempts at tax evasion through foreign accounts.[54] From a technical perspective this exception is substantially similar to the regulatory exception provided to *bona fide* residents of U.S. territories.[55]

Information reporting can be very useful and can influence taxpayer behavior and future compliance, provided it is narrowly tailored to accomplish a reasonable result. The proposed legislative recommendations enhance taxpayer *rights to privacy* and *to a fair and just tax system* without inhibiting the IRS's ability to obtain information about financial accounts maintained by FFIs outside the U.S. person's country of *bona fide* residency.

51 Reaching the IRS to address inadvertent errors would be especially problematic given the decline in phone service over the recent year. In FY 2013, the average wait time on the international phone line was 10.5 minutes, compared to 19.9 minutes in FY 2015, a 90 percent increase. Furthermore, the average level of service on the international phone line in FY 2015 was only 55 percent. *See* Most Serious Problem: *International Taxpayer Service: The IRS's Service on Demand Strategy Fails to Compensate for the Closure of International Tax Attaché Offices and Does Not Sufficiently Address the Unique Needs of International Taxpayers, supra.*

52 *Id.*

53 See Treas. Reg. § 1.6038D-7(a).

54 A workable same-country exception would require the development of detailed guidance from the IRS, ideally arrived in consultation with FFIs and other stakeholders. One potential starting point would be to allow an FFI to accept the self-reporting of its accountholders to the extent that this reliance is reasonable under the facts and circumstances known to the FFI.

55 See Treas. Reg. § 1.6038D-7(c).

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May 15, 2017

Chairman Mark Meadows
Subcommittee on Government Operations
2157 Rayburn House Office Building
Washington, DC 20515-6143

Re: Three Recommendations on How to Improve the Legal Framework Set up by the Foreign Account Tax Compliance Act

Dear Chairman Meadows,

This letter provides three recommendations on how to improve the legal framework set up by the Foreign Account Tax Compliance Act ("FATCA").[1] First, we recommend that any taxation of overseas Americans comply with established United States constitutional principles and international legal norms. Second, we recommend that the current laws be repealed in their entirety and certain proposals rejected. Third, we recommend that Congress enact a 1099 requirement on foreign banks, established by treaty, as long as this complies with established United States constitutional principles and international legal norms.

I. Taxation of Overseas Americans Must Comply with Important Established United States Constitutional Principles and International Legal Norms.

A. Overseas Americans Have a Right to Privacy.

The Fourth Amendment of the United States Constitution provides:

[1] The author wishes to acknowledge Courtney Turner Milbank, J.D., of The Bopp Law Firm, PC, for her research and writing assistance. Additionally, the author wishes to thank Anthony Parent, James Gosart, John Richardson, and Keith Redmond for their writing assistance. The author is solely responsible for these recommendations and this letter.

Chairman Meadows
May 10, 2017
Page 2

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Constitutional protections apply to all U.S. citizens regardless of their residence,[2] and all the constitutional protections afforded U.S. citizens should be respected, whether residing abroad or in the U.S. The right of privacy, as well as other constitutional rights, are also encompassed in the IRS's Taxpayer Bill of Rights,[3] which is also applicable to all U.S. taxpayers.

Under the Fourth Amendment, financial records held by financial institutions contain personal information and must be protected. *Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015) . So such records may only be subject to search after prior judicial approval or where the targets of the search are afforded an opportunity to have the search request reviewed by a neutral

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[2] *See Reid v. Covert*, 354 U.S. 1, 5 (1955); *see also Williams v. Blount*, 314 F. Supp. 1356, 1363–1364 (D.D.C. 1970).

[3] The Right to Privacy:
"Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing."

The Right to Confidentiality:
"Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information."

INTERNAL REVENUE SERVICE, YOUR RIGHTS AS A TAXPAYER (2014), available at https://www.irs.gov/pub/irs-pdf/p1.pdf (last visited May 15, 2017).

decisionmaker before complying. *Id*. Thus, where an overseas American is suspected of criminal activity, a warrant based on probable cause is required before the IRS can look into his or her affairs.

Overseas Americans should be provided the same privacy rights afforded to Americans living in the United States.

B. Equality of Treatment Is Guaranteed by The U.S. Constitution and Established International Legal Norms for Overseas Americans and Must Be Fully Protected.

The Fifth Amendment also provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. The Due Process Clause of the Fifth Amendment includes a guarantee of equal protection equivalent to that expressly provided in the Equal Protection Clause of the Fourteenth Amendment. "An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995); *United States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998). Thus, the federal government may not "deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1.

Overseas Americans must also be afforded these protections. Yet, the financial accounts of citizens living abroad are subject to more burdensome and extensive reporting, and by extension less privacy, than the local bank accounts of citizens living in the United States. Moreover, as a result, many are being denied "local" banks accounts in the country in which they reside.

This cannot be permitted and overseas Americans must be provided due process and equal protection of the laws. This entails subjecting them to the same reporting requirements as

Americans living in the United States, thus providing them the same opportunities to open "local" bank accounts in the country in which they reside.

Furthermore, established international legal norms also require equality of treatment between U.S. citizens and foreign citizens. Indeed, non-discrimination is a key concept in World Trade Organization law and policy. *See generally* General Agreement on Tarriffs and Trade 1994. These non-discrimination and equality principles are a part of international economic law and legal norms and are applied to U.S. citizens living abroad. *Id.* So, a U.S. citizen living in Switzerland must be treated the same as a Swiss citizen living there. And any banking requirements must be applied equally to all, not to a selective few U.S. citizens. Moreover, banks should not be able to discriminate based on national origin. Bank accounts should be made available and should have the same reporting requirements for all residents in a particular jurisdiction.

C. Overseas Americans Must Be Afforded Transparency in Statistical Data Collection and Freedom of Information.

There have been many claims regarding the purpose and necessity of FATCA, how much it has raised, and why it is still needed. However, reliable statistics about tax evasion by overseas Americans and stateside residents through the use of foreign accounts has not been provided to the public.

On the other hand, there is a plethora of data showing the negative effects of FATCA, FBAR, and the IGAs on overseas Americans.[4] This includes data about overseas Americans

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[4] Democrats Abroad, FATCA: Affecting Everyday Americans Every Day 6 (2014), https://d3n8a8pro7vhmx.cloudfront.net/democratsabroad/pages/4734/attachments/original/1449777271/Democrats_Abroad_2014_FATCA_Research_Report.pdf?1449777271 (last visited Apr.

being denied bank accounts and promotions, having their existing customer accounts closed, and/or being forced to separate their assets from a spouse, to divorce, or to renounce their citizenship.[5]

So any proposed legislation should include a requirement that the IRS collect reliable data and statistics regarding tax evasion by overseas Americans and stateside residents through the use of foreign accounts. Moreover, that data should be made available to Congress and the public, subject to any constitutional and privacy concerns.

This data will allow Congress and the public to do a cost-benefit analysis on any proposed legislation—ensuring that requirements are in place to curb tax evasion while not unnecessarily burdening overseas Americans.

II. The Current Laws and Proposals Do Not Comply with the Aforementioned Principles and Norms and Are Unconstitutional.

A. FATCA, FBAR and the IGAs Should Be Repealed in Their Entirety.

The heightened reporting requirements on individuals and foreign banks for foreign bank accounts under FATCA, FBAR, and/or the IGAs violate U.S. constitutional protections to the extent that they require U.S. citizens living abroad and/or foreign banks to report more detailed information about their foreign bank accounts than required of U.S. citizens with U.S. bank accounts and that they require confidential financial information without a warrant. Further, such laws violate international legal norms by imposing reporting requirements of US citizens in a foreign country that are not imposed on the citizens of that country.

19, 2017).

[5] *Id.*

While the local bank accounts of citizens in the United States are only subject to reporting of the amount of interest paid to the accounts via the 1099-INT,[6] the local bank accounts of citizens living abroad are subject to reporting of a much broader and more intrusive set of information. US citizens holding local bank accounts in foreign countries must report, and their foreign bank may also report, not only the interest paid to the account,[7] but also the amount of any income, gain, loss, deduction, or credit recognized on the account,[8] whether the account was opened or closed during the year,[9] the balance of the account,[10] the maximum value of the account,[11] and the information on any joint owners.[12] Comparable information is not required to be disclosed regarding domestic accounts of U.S. citizens. The result is that U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States.

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[6] While there are a series of other 1099 documents, including the 1099-MISC for independent contractor earnings, the 1099-DIV for dividends and other distributions, the 1099-G for state income tax refunds and unemployment compensation, the 1099-R for withdraws from traditional IRAs, and the 1099-C for debt cancellations; the relevant 1099 here is the 1099-INT. This 1099-INT reports interest income from banks where an individual has an account.

[7] 26 USC § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), -4(d)(4)(iv); Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, at art. 2, §2.

[8] 26 C.F.R. § 1.6038D-4(a)(8)

[9] *Id.* § 1.6038D-4(a)(6).

[10] 26 USC §§ 1471(c)(1)(C), 6038D(c)(4); 26 CFR §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, at art. 2, §2; Model 2 IGA, Preexisting TIEA or DTC, *supra* note 18, at art. 2.

[11] FinCEN, BSA E-Filing System, File the Report of Foreign Bank and Financial Accounts (FinCEN Form 114), http://bsaefiling.fincen.treas.gov/NoRegFilePDFIndividualFBAR.html.

[12] *Id.*

But broader and more intrusive reporting is not the only issue associated with FATCA, FBAR, and the IGAs. Instead, these onerous requirements are leading many banks to reject American citizens in their entirety. This leaves overseas Americans without "local" checking and savings accounts used for everyday, routine financial activity such as the payment of daily personal expenses (e.g., food, clothing, housing, fuel, utilities, etc.) and other recurring expenses necessary to support daily life in modern society.

Thus, with respect to overseas Americans holding local bank accounts, the heightened reporting requirements imposed by FATCA, FBAR, and the IGAs violate the basic rights to privacy and to equal protection of the laws guaranteed by the Fifth Amendment. Therefore, they should be repealed.

Furthermore, while we have not made a study of this issue, it is apparent that most foreign countries do not impose a similar regime of reporting by their own citizens to their government as is imposed by FATCA, FBAR and applicable IGAs on US citizens living there. As a result, these laws violate established international legal norms.

1. FATCA

In addition to the heightened reporting requirements, the penalties imposed by FATCA are also unconstitutional and should be repealed.

Fines are subject to the Excessive Fines Clause when they are intended to punish, as opposed to remediate, the offender. *Austin v. United States*, 509 U.S. 602, 609–10 (1993). And, when such fines are grossly disproportional to the gravity of the offense, they are unconstitutional. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

FATCA imposes a 30% "tax" on payments to foreign financial institutions from U.S. sources when these foreign institutions choose not to help the IRS pry into the bank accounts of their U.S. customers (the "FFI Penalty"). The 30% "tax" is not a tax at all but rather a penalty designed to accomplish indirectly through financial coercion what the U.S. government cannot mandate directly through regulation. It is imposed on noncompliant foreign financial institutions without regard to whether the institution even has American account holders suspected of tax evasion. As a penalty, the 30% "tax" lacks all proportion to the harm posed by an institution's noncompliance. The FATCA FFI Penalty is therefore unconstitutional under the Excessive Fines Clause.

Similarly, FATCA also imposes a 30% "tax" on account holders who exercise their rights under the statute not to identify themselves as American citizens to their banks and to refuse to waive privacy protections afforded their accounts by foreign law (the "Passthrough Penalty"). Like the "tax" on noncompliant foreign financial institutions, the "tax" on individual account holders is not a "tax" but a mechanism for deterring individuals from maintaining their privacy. The Passthrough Penalty ignores a citizen's actual tax liability altogether. It is imposed regardless of whether the American account holder owes any taxes or has otherwise evaded any U.S. tax obligations. An account holder can dutifully and truthfully file their taxes, identify their foreign accounts to the IRS, and file their FATCA and FBAR reports each year and yet still be subjected to a 30% fine on all payments from their bank to their accounts.[13]

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[13] This is because the Passthrough Penalty is imposed on recalcitrant account holders, regardless of tax liability. A person becomes a recalcitrant account holder if they fail to provide (a) information sufficient to determine whether the account is a United States account to the foreign financial institution holding their account, (b) their name, address, or TIN to the foreign

The FFI Penalty and the Passthrough Penalty are unconstitutional under the Eighth Amendment and should be repealed.

2. FBAR

Not only does FBAR subject overseas Americans to additional reporting requirements beyond those of Americans living stateside—denying overseas Americans the rights to privacy and equal protection of the laws—it also imposes a large penalty for willful violations.

The original purpose behind the criminal and civil FBAR penalties of the Bank Secrecy Act of 1970 was to provide law enforcement with a tool to fight violent, international crimes (i.e. drug trafficking, human trafficking, and terrorism). Yet, we have not been able to find one instance of an FBAR penalty being imposed upon any one person accused of committing the underlying crimes. Rather, the FBAR's mission has creeped into something it was not intended to combat: tax compliance. It adds a parallel Title 31 reporting penalty scheme to the already existing penalty scheme in place by Title 26.

The penalty for "willful" failure to file an FBAR for foreign accounts is the *greater* of $100,000 or 50% of the value of the unreported account. This penalty was intended to punish the worst criminal offenders but has been applied to average taxpayers. In fact, there are numerous instances of the IRS imposing or threatening to impose FBAR penalties when there was no tax due. That is, in cases of no tax compliance issue, the IRS still impose penalties of up to 50% of account value, because the Bank Secrecy Act authorizes this. This penalty is designed to punish

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financial institution holding the account, or (c) a waiver of a foreign law that would prevent the foreign financial institution from reporting the information to the IRS under FATCA. *Id.* § 1471(d)(6).

and is grossly disproportionate to the conduct leading to the penalty, failure to file a form. Accordingly, the Willfulness Penalty is unconstitutional under the Excessive Fines Clause.

FBAR should be repealed in its entirety—thus eliminating the extra reporting requirements and excessive penalties.

3. IGAs

The IGAs lack any constitutional basis. They have not been submitted to the Senate for its advice and consent under Article II, they have not been submitted to the Senate and the House for approval as congressional-executive agreements, and they have not been authorized by any treaty. They can stand, then, only as sole executive agreements and then only if they fall within the President's independent constitutional authority to make international agreements. But the power "To lay and collect Taxes" is expressly and exclusively reserved to Congress under Article I of the Constitution. The President lacks any independent authority over such matters. For this reason alone, the IGAs are unconstitutional.

But they are also unconstitutional for another related reason. Sole executive agreements cannot contravene legislative enactments. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953), *aff'd*, 348 U.S. 296, 75 S. Ct. 326, 99 L. Ed. 329 (1955). Yet, the IGAs do just that. They override FATCA by eliminating the requirement that foreign financial institutions register with the IRS directly under FATCA and by nullifying the right of individuals to refuse to waive foreign privacy laws that would otherwise prohibit their banks from disclosing their account information to the IRS. This second ground thus provides another independent reason that the IGAs are unconstitutional.

For these reasons, the IGAs should be eliminated.

B. Citizenship Based Taxation Should be Eliminated.

The United States imposes taxation based on the "world income" on its residents and citizens—regardless of where they live. This is referred to as citizenship-based taxation. Under citizenship-based taxation, a "resident" or U.S. citizen is required to include as U.S. taxable income all forms of income, from any geographical sources.

A "resident" is an individual who has a physical presence in the United States sufficient to trigger tax jurisdiction over the person. The rules for determining what constitutes "residence" for U.S. tax purposes are found in Internal Revenue Code 7701(b).

A U.S. "citizen" includes "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." U.S. CONST. amend. XIV.[14] Due to the fact that being born in the U.S. is the most common way to acquire U.S. citizenship, there are millions of citizens who do not have an actual residence in the United States or any connection to the United States, nor do they meet the requirements of Internal Revenue Code 7701(b). A "citizen" can cease to be a citizen by relinquishing U.S. citizenship—with an associated cost of $2,350.

One of the biggest issues with citizenship based taxation is that it subjects overseas Americans to double taxation—once in their country of residence and once in the country of their citizenship. In addition, overseas Americans have the added difficulty of being subject to two tax systems at the same time.

FATCA, FBAR, and the IGAs are the enforcement mechanism for U.S. citizenship-based taxation. Americans abroad cannot sustain the immense pressures and requirements of both the

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[14] The definition of who is a "citizen" is not found in the Internal Revenue Code but is found in the Immigration and Nationality Act and the 14th Amendment of the Constitution.

tax systems—the one where they reside and the U.S. tax system. Thus, FATCA is forcing Americans abroad into a set of circumstances where they must renounce their U.S. citizenship to survive.

For example, suppose you have a married couple living in Washington DC. One works as a lobbyist for an NGO and has a defined benefits pensions. The other is self employed in a lobby firm, working under an LLC. According to the IRS filing requirements, it would take about 15 hours and $280 to complete their yearly filings. Should they under report income, any penalties would be a percentage of their unreported tax burden. The worst case is a 20% civil fraud penalty.

Compare the same couple with one different fact. They moved to Australia because the NGO reassigned the wife to Sydney. The husband, likewise, moves his business overseas. They open a bank account, contribute to the mandatory Australian retirement fund, purchase a house with a mortgage and get a life insurance policy on both of them.

These are now their new filing requirements:

- Form 8938
- Form 3520-A
- Form 3520
- Form 5471 (to be filed by the husbands new Australian corporation where he is self employed)
- Form 720 Excise Tax.
- FinCEN Form 114

The burden that was 15 hours now goes up to

- 4.37 hours for Form 8938,
- 57.2 hours for Form 720,
- 54.20 hours for Form 3520,
- 61.22 Hours for Form 3520-A.
- 50 hours estimate for Form 5471

For a total of 226.99 hours (according to the IRS's own time estimates) not including time to file the FBAR.

The penalties for innocent misfiling or non filings for the above foreign reporting forms for the couple are up to $50,000, per year. It is likely that the foreign income exclusion and foreign tax credit will negate any actual tax due to the IRS. So each year, there is a lurking $50,000 penalty for getting something technically wrong on a form, yet there would be no additional tax due to the US treasury.

Eliminating these onerous reporting requirements or switching to a residence based taxation system would cure this disparate treatment of taxpayers. Furthermore, without citizenship based taxation, there would be no justification for FATCA, FBAR or the IGAs.

C. The Same Country Exemption Is Not Sufficient to Protect Americans Abroad.

A commonly cited "fix" to FATCA, known as Same Country Exemption ("SCE"), would exempt Americans abroad from FATCA-related reporting and penalties for banking activity in their country of residence. SCE is the basis for legislation introduced by Rep. Carolyn Maloney on April 25. There are multiple reasons why SCE would not be successful as a remedy to the multiple failings of FATCA.

SCE would not remove from foreign financial institutions ("FFI") the potentially catastrophic 30% penalty for failure to comply with FATCA. Such penalties could potentially threaten the very solvency of the financial institution and is a risk that most financial institutions would seek to eliminate or minimize by continuing to limit or eliminate overseas Americans as account holders. Thus a main root cause for the record number of citizenship renunciations and discrimination against overseas Americans due to FATCA would remain in place.

Compliance costs for FFI's would not change and could possibly increase. Under FATCA, banks need to clearly identify who among their account holders is and is not a U.S. citizen and are required to implement costly compliance processes to report extensive and intrusive details about the account activities of U.S. citizens. These costs have been estimated to be in the tens of billions of US dollars globally, vastly outstripping any estimate of potential recoveries by the IRS. Under SCE, these costly systems would remain and would become one step more complex in that FFI's would be required to identify who, among their U.S. citizen account holders, also has a valid exemption under SCE.

In addition, there are incongruencies between the IRS and foreign countries' tax authorities regarding the criteria for bona-fide resident and fiscal resident. Foreign countries' laws do not necessarily match U.S. laws. This adds an exceptional burden on the FFIs to ascertain who is and who is not a bona-fide and/or fiscal resident of the country. Additionally, there will need to be a "control" done every year to ensure that the US citizens in question have not changed their status lest the 30% withholding penalty is applied. This adds an additional burden on the FFIs which they will not be willing to undertake.

SCE will also not help the circumstances for overseas Americans who must have banking facilities in more than one country, such as smaller countries like Liechtenstein, San Marino, Andorra, Vatican or Monaco. Even with SCE in place, a resident of Vatican would not be able to have an account located across the street in Rome.

Additionally, SCE would not protect individuals who live in one country but work in another. For example, an individual may live in Germany, but work in Switzerland. By spending most of their life in Switzerland, they should be able to have a bank account there. Indeed, each of our witnesses in the hearings, Ms. Nelson, Mr. Kuettel and Mr. Crawford have found it necessary to have accounts in more than one European country. Yet, SCE would not help them.

Most importantly, a FATCA modified by SCE will still leave in place multiple unconstitutional features, described elsewhere in this document, which can never be acceptable. For example, SCE would still require overseas Americans to report a level of personal banking information that would require probable cause and a search warrant in order to obtain domestically.

The SCE proposal does not include all financial accounts in the resident country but only deposit accounts. Therefore, it does not change being shut out of all the financial products available in the resident country.

In sum, SCE would not improve the circumstances of the millions of overseas Americans being harmed by FATCA and other laws. It is woefully inadequate and should be rejected.

D. OECD Common Reporting Standard

Proponents of FATCA often say that the OECD Common Reporting Standard ("CRS") is an attempt to create a sort of Global FATCA. Although the CRS may have been inspired by FATCA there are some differences between the two.

The Common Reporting Standard is an agreement among reportable jurisdictions to exchange information about reportable persons who are tax residents of a country. CRS is based on the principle of "Exchange Of Information". With CRS, countries may be required to change their domestic laws in order to allow for information exchange with a foreign government.

A "reportable jurisdiction" is a country that has agreed to implement the OECD Common Reporting Standard. A "reportable person" is a tax resident of a reportable jurisdiction.
The rules for determining who is a tax resident are determined by the reportable jurisdiction. In cases where a person is a tax resident of more than one reportable jurisdiction, treaty tie-breaker rules can be used to determine tax residence.

The United States is not a CRS reportable jurisdiction. As a result the United States is not entitled to receive information under the CRS. Furthermore, residents of the U.S. are NOT reportable persons under the CRS.

The same issues that exist with FATCA exist with CRS, as to harms of Americans abroad, but are then replicated in the U.S. If the United States agreed to the CRS, the U.S. would have to impose on its own banking system reporting requirements similar to FATCA, where U.S. banks would have to report of foreign citizens in the U.S. to at least 100 foreign countries. And the result is the imposition of enormous FATCA-like compliance costs on all U.S. banking facilities. This "alternative" should be rejected..

III. Congress Should Enact a 1099 Requirement on Foreign Banks, Established by Treaty, as Long as this Complies with Established United States Constitutional Principles and International Legal Norms.

As discussed above, any new requirements must conform with established principles and international legal norms. In accordance with those principles of privacy, due process, equality, and transparency, we suggest that Congress require foreign banks to report Form 1099 information on U.S. citizens to their government and for the foreign government to issue a 1099 to U.S. citizens and to report that information to the IRS.

A. 1099 Requirement.

In the United States, the IRS uses the 1099 series of forms to track income that is outside the normal wages, salaries, and tips received from employment. Interest income is one such source of income and is reported on Form 1099-INT.

Form 1099-INT summarizes the interest income, for the tax year, paid on savings accounts, interest-bearing checking accounts, and US Savings bonds. It is also used to report other tax items related to interest income, including early withdrawal penalties, foreign tax on interest, and federal tax withheld.

A bank, financial institution or other entity that pays an individual at least $10.00 in interest during a year must prepare a 1099-INT, send a copy by January 31 to the individual, and file it with the IRS. The IRS then uses that information to ensure an individual's income tax return reflects the correct amount of interest income.

B. Implementation of 1099-INT.

Like banks in the United States, foreign banks should be required to collect this information and provide it to their government to provide to the IRS. In addition, the foreign government would provide a Form 1099-INT to any U.S. citizens paid at least $10.00 in interest.

In order to accomplish this, treaties should be negotiated with foreign governments. These treaties should integrate the 1099-INT requirements within the foreign jurisdiction's existing system of banking regulations and local tax authority—rather than making it a requirement from the IRS. Furthermore, this requirement would be enforced by current penalties already used by foreign governments to enforce existing bank reporting. Finally, the authorizing legislation should provide that such treaties can only be negotiated with countries which collect such information regarding their own citizens, because of the need to adhere to the established international legal norm of equality of treatment.

The only difference between these treaties and the current legal requirement of the issuance of a 1009 is that domestic banks are required to issue a 1099 directly to the account holder and foreign governments would be required to issue a 1099 to a U.S. citizen. One of the principal harms of the FATCA requirement of foreign banks is that they are obligated to ferret out U.S. citizens from among their account holders. Many foreign banks have been unwilling to assume the liability for doing this. This proposal would shift that responsibility to foreign governments, under agreed procedures with the U.S. government under a treaty, thereby relieving foreign banks of that responsibilities and liability.

C. Foreign Banking Institutions Should Participate in the Treaty Negotiations.

In order to ensure that overseas Americans will be permitted to open and maintain bank accounts in the foreign jurisdiction, foreign banks should be active participants in these treaty negotiations. This will further ensure that all persons are treated equally regardless of residency or citizenship.

If, however, Congress determines that this 1099-INT requirement would not provide sufficient benefit verses any harm created, it should not be pursued.

Conclusion

In conclusion, we recommend that any taxation of overseas Americans comply with the rights to privacy, due process, and equal protection of the laws, as well as other rights, guaranteed by the Constitution and by established international legal norms. We recommend that the U.S. establish residency based taxation, eliminating the current citizenship based taxation. We further recommend that FATCA, FBAR, and the IGAs be eliminated in their entirety and that the Same County Exemption and Common Reporting Standards be rejected. Finally, we recommend Congress enact a modified 1099 requirement on foreign banks, established by treaty, as long as this complies with U.S. constitutional principles and international legal norms.

Sincerely,
The Bopp Law Firm, PC

/s/ James Bopp, Jr.

James Bopp, Jr.
Courtney Turner Milbank

May 15 2017 RECOMMENDATIONS of Stephen John Kish to Subcommittee on Government Operations on how to improve the legal framework set up by FATCA[15]

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee on Government Operations, I appreciate having this opportunity to submit a second written statement regarding your April 26, 2017 hearing on harm caused by the Foreign Account Tax Compliance Act (FATCA), which is here appended to the statement of Mr. James Bopp.

I am responding to your request seeking recommendations on possible modifications to FATCA that might decrease the harm caused by this law.

My name is Stephen John Kish. I was born in Seattle Washington on July 11, 1948 and renounced my U.S. citizenship in 2016. As I mentioned in my written April 19 2017 submission to your subcommittee, I am a Plaintiff in Crawford v. U.S. Department of the Treasury, a lawsuit currently pending in United States Court of Appeals for the Sixth Circuit.

My thoughts below on how to decrease the harm of FATCA are based on the principle that U.S. laws must not cause unreasonable harm to people impacted by the law or violate the U.S. Constitution:

1) Repeal FATCA, FBAR, IGAs, and the FATCA/FBAR-enforced Citizenship-based taxation. Here I support enthusiastically James Bopp's recommendation that FATCA, FBAR, and the IGAs, should be repealed in their entirety and citizenship-based taxation be eliminated (with the latter replaced with territorial/residence based taxation as is the worldwide standard). Because I personally fear that any even a "watered-down" FATCA-like replacement law will negatively,

[15] Mr. Kish asked that he be permitted to file a written response to the committee, as a follow-up to his original submission. As such, his personal written response is appended here.

significantly, and specifically impact on Americans overseas and/or contradict our Constitution, I cannot recommend or support any FATCA replacement legislation; and

2) Modify citizenship laws to decrease FATCA harm. Should the FATCA law be repealed and not replaced, I recommend that former U.S. citizens who affirm to the Department of State that they renounced their citizenship because of FATCA, will have their citizenship re-instated without cost or difficulty should they so wish. Conversely, should FATCA not be repealed --- and consequently the harm continues --- I suggest that those persons who need to renounce their citizenship because of FATCA, be allowed a swift path to renunciation of their citizenship without any cost, administrative impediments, or penalties whatsoever.

I hope that you will find these thoughts useful.

Stephen John Kish

May 15, 2017

Toronto, Ontario

Canada

Mark Christopher Crawford
400 Southbrook Drive
Dayton, Ohio 45459

May 12, 2017

Chairman Mark Meadows
Subcommittee on Government Operations
2157 Rayburn House Office Building
Washington, DC 20515-6143

Re: Response from Mark Christopher Crawford, How to Improve the Legal Framework Set up by the Foreign Account Tax Compliance Act

Dear Chairman Meadows,

I would like to thank you for allowing me to respond to the following question: "Please provide three recommendations on how to improve the legal framework set up by the Foreign Account Tax Compliance Act (FATCA)". My three responses will focus on (1) Addressing the current negative incentives that financial institutions face under FATCA which prompt them to purge themselves of American clients (2) Improving the Revenue offset framework that FATCA was intended to address within the HIRE Act of 2010 (3) Addressing any anti-money laundering aspect associated with the repeal of FATCA.

I. Addressing the Current Negative Incentives that Global Financial Institutions Face under FATCA which Prompt Them to Purge Themselves of American Clients

The cost of compliance with FATCA[1] and the threat of a 30-percent withholding tax[2] in the case of non-compliance are prompting Foreign Financial Institutions (FFI) to comply with FATCA by purging US persons from their clientele. In some cases, in order to retain financial services abroad, Americans

[1] http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/REPORTING-REQUIREMENTS-The-Foreign-Account-Tax-Compliance-Act-Has-the.pdf
[2] https://www.irs.gov/businesses/corporations/information-for-foreign-financial-institutions

have had to give up their US citizenship in order to avoid being purged from the international financial sector.

One solution to addressing this issue is the complete repeal of FATCA thus removing the incentive for banks to treat US persons differently than other clients that they may have, removing the additional compliance cost and the threat of penalty for non-compliance. I support full repeal of FATCA.

An alternate proposal is to create a Same Country Exception (SCE)[3]. I appreciate that alternative solutions are being put forward insofar as their existence clearly recognizes that that the status quo of the FATCA legislation and its impact on Americans abroad is unacceptable. The weakness of the SCE proposal is that it assumes that Americans will move to a single country of residency and stay there for the rest of their lives. It assumes that financial institutions are willing to not only go through the compliance cost of determining whether their clients are US persons, but also increase their compliance procedures to determine year on year whether existing US person clients that might qualify under a SCE continue to do so. Should an SCE eligible US person in one country move away from that country, returning to the USA or moving elsewhere, then those persons' financial accounts may become non-complaint. Foreign financial institutions would still be liable for the withholding penalty on previously SCE eligible accounts and the incentive to remove this contingent liability by purging US persons from their clientele would be unaltered.

Americans living abroad are neither monolithic nor static. Many Americans move abroad for a brief period of time and establish residency in one country for their studies, short-term teaching assignments, temporary duty assignments, etc then move to another country and establish a new residency and so on, or even return to the United States. In my career I have held residency in the United Kingdom during my graduate student year, in Albania at various times for business, in Montenegro for several years while running a bank and in Greece for a year. Additionally, I have lived

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[3] https://www.congress.gov/bill/115th-congress/house-bill/2136

abroad for significant periods in Macedonia and China. I often returned to the United States in between residency in foreign countries, thereby re-establishing residency in America. I have done significant business in countries where I have not been a resident and have held ownership in companies based in countries where I have not been a resident. Based on my personal experience, I do not believe that a Same Country Exception would solve the unintended consequences of FATCA on American citizens or be helpful in reducing bank compliance costs and removing contingent liability from foreign financial institutions when accepting American clients. More specifically, a SCE would not help my own brokerage firm (mentioned in my verbal testimony on April 26th) in removing contingent liability under FATCA, thus I do not believe that SCE will have a meaningful impact on solving the unintended consequences of FATCA on my clientele. I continue to support full repeal as the best method of removing the potential penalties that foreign financial institutions face, currently prompting them to purge themselves of US clients.

II. Improving the Revenue Offset Framework that FATCA was Intended to address within the HIRE Act of 2010

The Foreign Account Tax Compliance Act (FATCA) was not passed as a stand-alone initiative. Rather it was included in the Hiring Incentives to Restore Employment (HIRE) Act of 2010 ostensibly a revenue offset to the payroll tax credit, etc as provided by the Act[4]. The cost-benefit ratio of implementing FATCA has been consistently challenged[5]. IRS supporters complain that its mandate has been expanded to include FATCA, while its budget has been reduced[6]. As we discussed in the hearing,

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[4] https://www.irs.gov/uac/two-new-tax-benefits-aid-employers-who-hire-and-retain-unemployed-workers
[5] http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/REPORTING-REQUIREMENTS-The-Foreign-Account-Tax-Compliance-Act-Has-the.pdf
[6] http://www.cbpp.org/research/federal-tax/irs-funding-cuts-compromise-taxpayer-service-and-weaken-enforcement

FATCA is currently having dramatic unintended consequences on Americans living abroad[7]. A solution that helps provide a better revenue offset is to reduce the IRS mandate by repealing FATCA, move away from a citizenship-based taxation (CBT) system entirely (the USA is the only industrialized nation in the world that implements CBT[8]), and focus available IRS funding on a simplified more efficient IRS mandate that generates a better "ROI" or cost-benefit ratio as outlined by the Taxpayer Advocate[9].

III. Addressing any Anti-Money Laundering (AML) Aspect Associated with the Repeal of FATCA

During the verbal testimony on April 26, Committee members stressed the importance of Anti-Money Laundering (AML) efforts, including the prevention of drug trafficking, human trafficking and other illicit activity. The panel of witnesses was asked to reflect on the impact that a full repeal of FATCA would have on these issues. It is important to note that the creation of FATCA was revenue driven, rather than as an Anti-Money Laundering tool. Entities around the world are engaged in AML activity independent of FATCA.[10] The United States has a long history of activity in preventing money laundering independent of FATCA.[11] In my previous written testimony I referred to the multiple banks where I have had first-hand experience in the ownership, board or management in Albania, Montenegro and Serbia. All of these banks where I was affiliated had majority US shareholders and some had support from USAID. Each of these banks had rigorous anti-money laundering procedures and policy, independent of FATCA. In my personal experience, a continuation of efficient Anti-Money Laundering efforts will be uninhibited by the repeal of FATCA.

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[7] https://oversight.house.gov/hearing/reviewing-unintended-consequences-foreign-account-tax-compliance-act/
[8] http://www.bbc.com/news/35383435
[9] https://www.irs.gov/uac/newsroom/national-taxpayer-advocate-delivers-2012-annual-report-to-congress
[10] https://www.imf.org/external/np/leg/amlcft/eng/aml4.htm
[11] https://www.fincen.gov/history-anti-money-laundering-laws

Response by Elise J. Bean to Question from Chairman Mark Meadows

Subcommittee on Government Operations

April 26, 2017 Hearing: "Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act"

1. Please provide three recommendations on how to improve the legal framework set up by the Foreign Account Tax Compliance Act (FATCA).

During the hearing, I mentioned the following two recommendations to improve FATCA's legal framework.

(1) **FATCA Penalties.** One key concern related to FATCA involves the sometimes large penalties imposed on those who violate FATCA disclosure obligations or fail to pay taxes owed on income earned abroad. The IRS has partially addressed this problem by establishing a program that eliminates penalties for persons who inadvertently violate the law. See IRS Streamlined Filing Compliance Procedures, https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures. Consideration could also be given to eliminating penalties on Americans living abroad who, when they file an overdue or incorrect tax return, are found to owe no federal tax.

(2) **Duplicative Forms.** In implementing FATCA, the IRS chose to create a new tax return, Form 8938, for individuals to report foreign accounts and assets. The new form duplicates requests for information contained in the pre-existing Foreign Bank Account Report or FBAR. The two forms should be reviewed to minimize duplication, and if possible, the new IRS form should be eliminated in favor of retaining the FBAR. To facilitate this process, the FBAR form may need to be expanded and statutory language may be needed to remove any legal impediment to the IRS' making full use of the FBAR, which is not an IRS form, but a Treasury FinCEN Form 114 sponsored by the Financial Crimes Enforcement Network.

Chairman Meadows asked that I identify three additional recommendations in addition to the two discussed during the hearing.

(3) **Foreign Financial Institution Discrimination Against U.S. Citizens.** When FATCA was first promulgated in 2010, some foreign financial institutions reacted by closing or refusing to open accounts for U.S. citizens, in an effort to avoid complying with FATCA's disclosure requirements. Today, seven years later, over 274,000 foreign financial institutions have agreed to comply with FATCA, including over 6,000 in Switzerland, and this problem has eased. Nevertheless, some Americans living abroad cite continuing problems with opening accounts at foreign financial institutions. To curb

any ongoing discrimination against U.S. citizens, legislation could be enacted barring the sale of U.S. Treasury bonds to any foreign financial institution that, because of FATCA, has a policy or practice of refusing to open accounts for U.S. persons. Because U.S. Treasury bonds are an attractive investment for most foreign financial institutions, this prohibition might provide a useful tool to combat any ongoing foreign discrimination against U.S. citizens.

(4) **Accidental Americans.** Some of the opposition to FATCA appears to be misplaced anger at U.S. tax and citizenship laws applicable to so-called "accidental Americans," meaning individuals with no ties to the United States, no intention of claiming U.S. citizenship, and a history of living as a national of another country, yet treated by the U.S. government, over their protests, as U.S. citizens. Some claim that they have been unfairly forced by the State Department or IRS to acknowledge U.S. citizenship and accept significant tax liability, because they happened to have been born in the United States to foreign parents or born to a U.S. citizen who emigrated with them to another country. Consideration could be given to enacting legislation creating a special system to enable these individuals to establish, with documentary evidence, that they have been citizens of another country for a minimum period of years with no U.S. ties, are not U.S. citizens, and therefore have no tax liability. At a minimum, the legislation could set up a system allowing foreign parents to file a simple form electing to terminate the U.S. citizenship of their minor children and thereby free them from future U.S. tax liability. Filing the form with U.S. authorities could be deemed to eliminate any future FATCA, FBAR, or U.S. tax liability for the affected minor.

(5) **Expatriation Fee.** In 2014, the United States increased the fee to renounce U.S. citizenship from $450 to $2,350, reportedly the highest expatriation fee in the world. The State Department justified the fee increase, in part, by citing the need to counsel persons about the consequences of renunciation and verify their citizenship status. Some of those costs may be related to determining whether an applicant is free of any U.S. tax liability and has paid any tax exit fee. Americans living abroad have described the current fee as prohibitively expensive. Consideration could be given to enacting legislation that would lower the current expatriation fee. Additionally, the legislation could require a substantially lower fee for minors who have never worked and do not require the same level of investigation as adults to evaluate their tax status.

I hope these recommendations are useful.

Response by Elise J. Bean to
Questions from Ranking Member Gerald E. Connolly

Subcommittee on Government Operations

April 26, 2017 Hearing: "Reviewing the Unintended Consequences of the Foreign Account Tax Compliance Act"

1. During your testimony, you referred to court decisions which have upheld federal laws requiring information about bank accounts. Please provide citations to key court decisions.

California Bankers Assn. v. Shultz, 416 U.S. 21 (1974)(holding that Bank Secrecy Act recordkeeping and reporting regulations, including requiring information on foreign bank accounts, to be reasonable, are analogous to IRS third party income and wage reporting requirements, and do not violate the Fourth Amendment prohibition against unreasonable searches and seizures), https://supreme.justia.com/cases/federal/us/416/21/case.html.

United States v. Miller, 425 U.S. 435 (1976)(holding that accountholders have no privacy rights in bank records held by financial institutions, and a government subpoena to a bank to obtain those records does not violate the Fourth Amendment prohibition against unreasonable searches and seizures), https://www.oyez.org/cases/1975/74-1179.

In re Grand Jury Proceedings (Bank of Nova Scotia), 740 F.2d 817 (11th Cir. 1984), cert. denied, 469 U.S. 1106 (1985)(holding that the United States may compel a foreign bank to produce offshore account records without having to show that the requested records are relevant or necessary to a grand jury proceeding), http://law.justia.com/cases/federal/appellate-courts/F2/740/817/233788/. See also *In Re Grand Jury Proceedings (United States v. Bank of Nova Scotia)*, 691 F.2d 1384, (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983), http://openjurist.org/691/f2d/1384/grand-jury-proceedings-united-states-v-bank-of-nova-scotia.

In re Grand Jury Subpoena, 696 F.3d 428 (5th Cir. 2012)(holding that accountholders of offshore bank accounts may be compelled to produce offshore account records to the U.S. government, and a government subpoena to an accountholder to obtain those records does not violate the Fifth Amendment privilege against self-incrimination), http://www.ca5.uscourts.gov/ opinions%5Cpub%5C11/11-20750-CV0.wpd.pdf. See also *In re Grand Jury Subpoena dated February 2, 2012*, 741 F.3d 339 (2d Cir. 2013), http://caselaw.findlaw.com/us-2nd-circuit/1652860.html.

Linde v. Arab Bank, 706 F.3d 92 (2nd Cir. 2013)(holding that a district court may impose sanctions on a foreign bank for failure to produce offshore account records in response to a government subpoena, even if the bank's failure is due to foreign bank secrecy laws and foreign government orders not to produce), http://www.leagle.com/decision/In%20FCO%2020130118068/LINDE%20v.%20ARAB%20BANK,%20PLC.

Florida Bankers Ass'n v. U.S. Dept. of Treasury, 799 F. 3d 1065 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 2429 (2016)(dismissing as premature a lawsuit challenging U.S. regulations requiring U.S. banks to collect and report account information to the IRS for accounts opened by non-U.S. accountholders), https://www.cadc.uscourts.gov/internet/opinions.nsf/D721EA0BE95BBED585257EA10052EDE5/$file/14-5036-1567856.pdf.

Crawford v. U.S. Dept. of Treasury, Case No. 3:15-CV-00250 (USDC S.D. Ohio), Entry and Order Denying Plaintiffs' Motion for Leave to File an Amended Verified Complain (DOC. 32); Granting Defendants' Motion to Dismiss (DOC. 26) Plaintiffs' Complaint (DOC. 1); and Terminating Case (4/25/2016)(dismissing lawsuit challenging FATCA due to a lack of standing and a failure to state an injury; on appeal before the Sixth Circuit), http://www.taxcontroversy360.com/files/2016/04/Case.pdf.

2. During the hearing, you testified that more than 274,000 foreign financial institutions have now agreed to comply with FATCA. Please provide the source for that number.

The IRS FATCA website includes a publicly available list of all foreign financial institutions that have signed agreements with the IRS and agreed to comply with FATCA. It is updated monthly. Before the hearing, I downloaded the list and observed that it included over 274,000 foreign financial institutions. See FATCA Foreign Financial Institution List Search and Download Tool, https://apps.irs.gov/app/fatcaFfiList/flu.jsf.

3. During the hearing, you indicated that the United States now provides account information from U.S. banks to foreign countries. Please identify those countries and the supporting regulations.

In 2012, the United States finalized regulations requiring financial institutions with U.S. offices to disclose to the IRS account information on accounts opened for nonresident aliens. See Sections 1.6049-4(b)(5) and 1.6049-8 of the Income Tax Regulations; "Guidance on Reporting Interest Paid to Nonresident Aliens," 77 Fed.Reg. 76, at 23391 (4/19/2012). When finalizing the 2012 guidance implementing the new regulations, Treasury stated in part: "These regulations will facilitate intergovernmental cooperation on FATCA implementation by better enabling the IRS, in appropriate circumstances, to reciprocate by exchanging information with foreign governments for tax administration purposes."

Since 2012, Treasury has issued several updated lists of the countries approved for account information exchange, with each new list longer than its predecessor. The latest, Rev. Proc. 2017-31, "Implementation of Nonresident Alien Deposit Interest Regulations," was issued in March 2017. It identifies 43 countries "with which the automatic exchange of the information collected under §§ 1.6049-4(b)(5) and 1.6049-8 has been determined by the Treasury Department and the IRS to be appropriate." The 43 countries are:

Australia	Iceland	Mexico
Azerbaijan	India	Netherlands
Belgium	Ireland	New Zealand
Brazil	Isle of Man	Norway
Canada	Israel	Poland
Colombia	Italy	Portugal
Czech Republic	Jamaica	Saint Lucia
Denmark	Jersey	Slovak Republic
Estonia	Korea, Republic of	Slovenia
Finland	Latvia	South Africa
France	Liechtenstein	Spain
Germany	Lithuania	Sweden
Gibraltar	Luxembourg	United Kingdom
Guernsey	Malta	
Hungary	Mauritius	

4. During the hearing, there was a discussion of the differences between the information required by 1099 forms for U.S. banks and FATCA-related forms for foreign banks.

a. What information do the FATCA-related forms require that does not appear on 1099 forms?

Both the FACTA-related form 8966 and the U.S. 1099 forms, collectively, require affected financial institutions to disclose, for each covered account, the account number, the accountholder's name and tax identification number, and the interest, dividends, sale proceeds, and other miscellaneous income paid into the account. Additionally, the FATCA-related form requires foreign financial institutions to disclose the account balance and whether the account was closed during the year. For certain accounts, such as those in which a recalcitrant accountholder refuses to provide any identifying information, the FACTA-related form also requires disclosure of the number of such accounts, the gross amount of payments into those accounts, and the accounts' aggregate balance. It is important to note that, in some cases, U.S. regulations permit foreign financial institutions to elect to file 1099 forms instead of filing the FACTA-related form 8966. See Section 1.1471-4(d)(5)(i)(A) and (B).

b. Why is this information necessary for tax enforcement?

The added account information on the FATCA-related form 8966 – the account balance and any account closure – is needed to help the IRS gauge whether it should invest resources to inquire into a U.S. taxpayer's foreign holdings. It also helps determine whether a foreign account exceeds certain threshold levels and, so, must be reported, for example, on the Foreign Bank Account Report (FBAR), which applies only to accounts exceeding $10,000.

c. If this information is not provided on 1099 forms, how does the IRS obtain it from domestic financial institutions?

U.S. law enforcement can subpoena account balance and other account information from domestic financial institutions, if needed. In contrast, U.S. subpoenas cannot easily compel information from a foreign financial institution located outside of U.S. borders, which is one key reason why the FATCA-related form requires additional information.

d. Other than from the FATCA-related forms, are there other methods the IRS may use to obtain this information from foreign financial institutions?

U.S. law enforcement may use tax treaties, tax information exchange agreements, mutual legal assistance agreements, Qualified Intermediary Agreements, and, in some cases, subpoenas to request information from foreign financial institutions or their foreign governments about accounts opened or controlled by U.S. persons, but all of those methods are difficult, costly, and time-consuming to use, and none can be enforced using the 30% excise tax available to enforce compliance with FATCA disclosure obligations.

e. Does collecting this information imply that U.S. citizens with foreign accounts are violating the law?

No. Opening a foreign account does not, per se, violate any U.S. law, and collecting account information – which is done for domestic as well as foreign accounts – does not imply any legal violation. The United States has one of the highest tax compliance rates in the world, estimated by the IRS to exceed 80%, which means U.S. tax authorities view the vast majority of U.S. taxpayers as law-abiding, including those with foreign accounts. See, e.g., https://www.irs.gov/uac/the-tax-gap. One reason for the high U.S. tax compliance rate is the IRS' use of a wide range of third party reporting requirements to gather information about the income and assets of U.S. taxpayers. Research has long shown that third party reporting discourages tax cheating, encourages greater tax compliance, and improves tax collection. See, e.g., http://www.budgetmodel.wharton.upenn.edu/issues/ 2016/7/29/tax-compliance-and-enforcement-an-overview-of-new-research-and-its-policy-implications. It also helps ensure tax fairness and protects honest taxpayers from being taken advantage of by dishonest taxpayers.

5. During the hearing, there was a discussion of the differences between citizenship- and residency-based tax systems.

a. Please explain the difference between the two systems.

Citizenship-based taxation assesses taxes on the worldwide income of a country's citizens no matter where they live in the world. Residency-based taxation assesses taxes on "residents," a category defined differently by different countries, but generally revolving around the concept of a person physically living for a minimum period of time in the country assessing the tax.

b. If the U.S. transitioned to a residency-based tax system, do you believe FATCA would still be necessary to prevent tax evasion?

Yes. Residents may open accounts in other countries and use them to hide assets and evade U.S. tax. That is why FATCA applies to Americans living within the United States as well as to Americans living abroad.

6. If the United States were to repeal FATCA, would the information of U.S. citizens be collected by foreign financial institutions in countries subscribing to the Common Reporting Standard?

I apologize, but I don't know enough about the Common Reporting Standards to respond.