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## 11 Reasons Why FATCA Must Be Repealed

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With all due respect, FATCA<sup>1</sup> is sheer idiocy and must be repealed as soon as possible. There are 11 reasons why.

1. The Height of Arrogance. Under FATCA, the United States unilaterally requires every foreign bank in the world (including, e.g., a bank in Uzbekistan) to report directly to the U.S. Internal Revenue Service (IRS) about the bank's U.S. account holders. This is the height of arrogance on the part of the United States. The situation is actually even worse than this because the requirement applies to all foreign financial institutions (FIs), a term that is defined very broadly to include not only foreign banks but also foreign brokerage houses, mutual funds, private equity funds, pension funds, and insurance companies (to name a few). Thus, for purposes of FATCA, the term "account" includes a traditional bank account (ondemand payable), a brokerage account, and an owner-

ship interest in a mutual fund.<sup>3</sup> It has been estimated that there are at least 600,000 foreign FIs in the world.<sup>4</sup>

**2. Blatant Violation of the Golden Rule.** The Golden Rule states (as hopefully the reader knows), "Do unto others as you would have others do unto you." President Obama has indicated that this is a guiding principle in his personal life and also for his Administration.<sup>5</sup> It is clear, however, that the United States would not be happy if, e.g., France required ev-

<sup>&</sup>lt;sup>1</sup> The term "FATCA" is being used here to refer to \$\$1471–1474 of the Internal Revenue Code of 1986 (the "Code"). These sections were added by \$501(a) of the Hiring Incentives to Restore Employment (HIRE) Act, P.L. 111-147 (Mar. 18, 2010). Sections 501–541 of the HIRE Act are often referred to as The Foreign Account Tax Compliance Act.

<sup>&</sup>lt;sup>2</sup> §1471(d)(5); Prop. Regs. §1.1471-5(e).

<sup>&</sup>lt;sup>3</sup> §1471(d)(2); Prop. Regs. §1.1471-5(b).

<sup>&</sup>lt;sup>4</sup> Elliot, "IRS Officials Offer Preliminary Details of FATCA Registration Process," 2012 *TNT* 194-1 (10/5/12). *See* statement therein by William Holmes, Director (International Data Management), Large Business & International Division, IRS, estimating that 600,000 foreign FIs would be registering with the IRS by June 30, 2013.

<sup>&</sup>lt;sup>5</sup> Tenety, "Obama: Christ and the Golden Rule Informed Support of Same-Sex Marriage," May 10, 2012, http://www.washingtonpost.com/blogs/under-god/post/obama-christ-and-the-golden-rule-informed-support-of-same-sex-marriage/2012/05/09/gIQAeJshDU\_blog.html. It is reported therein that, in an interview with ABC's Robin Roberts, "the president painted his endorsement of same-sex marriage as an outgrowth of his Christian beliefs:

<sup>... [</sup>Michelle and I] are both practicing Christians and obviously this position may be considered to put us at odds with the views of others but, you know, when we think about our faith, the thing at root that we think about is not only Christ sacrificing himself on our behalf, but it's also the Golden Rule, you know, treat others the way you would want to be treated. And I think that's what we try to impart to our kids and that's what motivates me as president and I figure the most consistent I can be in being true to those precepts, the better I'll be as a dad and a husband and hopefully the better I'll be as president."

ery bank in the United States to report directly to the French "IRS" about the bank's French account holders. How can the United States impose requirements on foreign FIs that it would not want foreign countries to impose on U.S. FIs?

- **3. Bullying at the Nation-State Level.** FATCA is a gross example of bullying at the nation-state level. The United States realizes it has the world's largest economy and thus can exert enormous pressure on foreign FIs to comply with FATCA by threatening to impose a 30% withholding tax on payments they receive related to U.S. investments. On August 6–7, 2012, the White House, along with Lady Gaga, came out against bullying at a summit hosted by the U.S. Department of Education. "So many people observe bullying and they just look the other way," said White House advisor Valerie Jarrett. "You don't have to look the other way, you could actually do something." Hopefully, the White House will see FATCA for what it is bullying and "actually do something."
- **4. Disruption of International Relations.** Normally, a State exercises jurisdiction over its own FIs and information is shared among States through appropriate governmental channels. In the case of FATCA, the United States is telling a country's FIs to report directly to the IRS, showing complete disregard for the country's primary jurisdiction over its own FIs. Whatever happened to comity among nations?
- **5. Direct Conflict with Many Foreign Laws.** FATCA is directly contrary to the laws of many countries, which prohibit local FIs from turning informa-

tion over to foreign governments.9 Thus, FIs in such countries are definitely between "a rock and a hard place." Because of this fundamental problem with FATCA (which, for some reason, the drafters of the legislation seemed to have been oblivious to), 10 the U.S. Treasury decided to enter into special intergovernmental agreements (FATCA IGAs) with countries whose laws prohibit their FIs from reporting information directly to the IRS. On Feb. 8, 2012, Treasury issued the "Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom Regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA," announcing the intent of the named countries to enter into FATCA IGAs.<sup>11</sup> The approach described therein later became known as Model I. On July 26, 2012, Treasury issued a prototype of such a FATCA IGA, with both reciprocal and non-reciprocal versions, depending on whether the United States would obligate itself to provide equivalent information to the partner country. <sup>12</sup> On Sept. 14, 2012, Treasury announced that the United States and the United Kingdom had signed the first Model I FATCA IGA (a reciprocal version).<sup>13</sup>

<sup>&</sup>lt;sup>6</sup> For an indication of how the U.S. Congress might respond to such legislation, see the European Union Emissions Trading Scheme Prohibition Act of 2011, passed by the U.S. Senate on Sept. 22, 2012. Upset about the European Union's attempt to subject U.S. airlines (and other foreign airlines) to the European Union Emissions Trading Scheme, the U.S. Senate passed the legislation, which permits the Secretary of Transportation (DOT) to prohibit an operator of a U.S. civil aircraft from participating in any emissions trading scheme unilaterally established by the European Union. On Nov. 13, 2012, the U.S. House of Representatives passed the legislation by a voice vote. Stewart, "EU Delays Airline Participation in Emissions Trading," 2012 WTD 220-1 (11/14/12). President Obama signed the legislation on Nov. 27, 2012. Stewart, "Obama Signs Bill to Bar Airline Participation in EU Emissions Trading Scheme," 2012 TNT 229-7 (11/28/12). On Nov. 12, 2012, the European Commission had announced that the European Union Emissions Trading Scheme was being suspended for one year to give an opportunity for a global approach to be developed. WTD Doc. 2012-23353 (11/14/12). At a minimum, FATCA should be suspended for the same reason.

<sup>&</sup>lt;sup>7</sup> "Bullying Prevention Summit Backed by White House, Lady Gaga," NBC News Channel & NBC4, Aug. 13, 2012, http://www2.nbc4i.com/news/2012/aug/13/bullying-prevention-summit-backed-white-house-lady-ar-1135719/.

<sup>&</sup>lt;sup>8</sup> *Id*.

<sup>&</sup>lt;sup>9</sup> For example, on Apr. 24, 2012, the Russian Finance Ministry issued a statement that FATCA "breaches the principle of sovereign equality of states" and complying with FATCA "would lead to the breach by Russian financial institutions of banking secrecy laws with corresponding liability for any damage caused." Bykhovskaya and Frolova, "Russia Seeks Intergovernmental Approach Toward Agreement on U.S. FATCA Implementation," 2012 WTD 102-4 (5/25/12). On Oct. 25, 2012, the Minister of Revenue of New Zealand stated that, under FATCA, New Zealand "financial institutions would have to enter into separate agreements with the IRS, withhold tax on certain accounts, and risk being in conflict with New Zealand's privacy and human rights laws." WTD Doc. 2012-22091 (10/26/12).

<sup>&</sup>lt;sup>10</sup> The drafters assumed a foreign privacy law could be waived by an account holder (*see* §1471(b)(1)(F)), but apparently did not contemplate that a foreign law might prohibit all disclosure by a foreign FI to the IRS.

<sup>&</sup>lt;sup>11</sup> See Bennett, "United States, Five Other Countries Reveal Approach to FATCA Information Sharing," 26 Daily Tax Rpt. GG-3 (2/9/12).

<sup>&</sup>lt;sup>12</sup> See Bennett, "Treasury Unveils New Model Agreement for FATCA Intergovernmental Data Sharing," 144 Daily Tax Rpt. GG-1 (7/27/12).

<sup>&</sup>lt;sup>13</sup> See Bennett, "U.S., U.K. Sign First Intergovernmental Information Sharing Accord Under FATCA," 179 Daily Tax Rpt. G-4 (9/17/12). On Oct. 9, 2012, the governments of Guernsey, Jersey, and the Isle of Man simultaneously announced their intention to negotiate FATCA IGAs similar to the one entered into by the United Kingdom. WTD Doc. 2012-20969 (10/10/12). On Oct. 12, 2012, the Dutch Finance Ministry announced that the Netherlands intended to sign a Model I FATCA IGA with the United States. Miller, "Netherlands to Sign FATCA Agreement with U.S.," 2012 TNT 204-8 (10/22/12). On Oct. 25, 2012, New Zealand announced it intended to negotiate a Model I FATCA IGA with the United States. WTD Doc. 2012-22091 (10/26/12). On Nov. 7,

Because Model I not only allows a foreign FI to provide information to its own "IRS" but also eases certain other burdens under FATCA, some countries were also interested in entering into FATCA IGAs even though they wanted their FIs to still report directly to the IRS. On June 21, 2012, Treasury issued the "Joint Statement from the United States and Japan Regarding a Framework for Intergovernmental Cooperation to Facilitate the Implementation of FATCA and Improve International Tax Compliance" and the "Joint Statement from the United States and Switzerland Regarding a Framework for Cooperation to Facilitate the Implementation of FATCA." The approach reflected in these announcements became known as Model II, and on Nov. 14, 2012, Treasury issued a prototype of such a FATCA IGA. 15 Thus. Treasury is willing to enter into a FATCA IGA with a country even if the country is willing for its FIs to share tax information directly with the IRS. On Nov. 8, 2012, Treasury announced that it is "engaged with more than 50 countries and jurisdictions around the world to improve international tax compliance and implement the information reporting and withholding tax provisions commonly known as the Foreign Account Tax Compliance Act (FATCA)."16

It might be argued that to repeal FATCA now would be inopportune because FATCA is causing so many countries to enter into FATCA IGAs with the United States. However, is it fair to negotiate with someone when you have a gun pointed at their head? Does that accord with the American sense of fairness?

2012, Australia announced it had commenced formal discussions with the United States on a reciprocal Model I FATCA IGA. *WTD* Doc. 2012-23034 (11/9/12). On Nov. 8, 2012, Canada announced that negotiations were being held with the United States on a Model I FATCA IGA. *WTD* Doc. 2012-23119 (11/9/12). On Nov. 15, 2012, Denmark and the United States signed a Model I FATCA IGA (a reciprocal version). *WTD* Doc. 2012-23835 (11/20/12). On Nov. 19, 2012, Mexico and the United States signed a Model I FATCA IGA (a reciprocal version). *WTD* Doc. 2012-24304 (11/28/12).

Moreover, as discussed below, there are far more efficient ways to clamp down on offshore tax evasion than imposing a massive reporting burden on the entire world. The U.S.-U.K. FATCA IGA is 40 pages, single-spaced, with very detailed rules in the main document and the two Annexes. There will no doubt be many variations among FATCA IGAs (despite Treasury's best efforts to limit them), and variations from what the final FATCA regulations will provide. These are variations that the IRS will need to keep on top of, and any foreign FI that has operations in more than one foreign country will need to master the nuances of the relevant FATCA IGAs and the regulations.<sup>17</sup> As stated by Robert Foley of State Street Bank and Trust Co. on Nov. 8, FIs "will be forced into a local model of tax compliance not contemplated by the regulations, because rather than a single mechanism for reporting to the IRS they will face multiple systems for reporting to local taxing authorities." <sup>18</sup> Moreover, it will also be necessary to have Competent Authority agreements in place between the United States and each signatory to a FATCA IGA. According to William Holmes, Director (International Data Management), Large Business & International Division, IRS, because FATCA IGAs are "'virtually silent on implementation-type issues,' competent authority agreements between the U.S. and other foreign tax authorities will have to be the 'flesh on the bones' that makes the daily operations of the system work.", 19

<sup>&</sup>lt;sup>14</sup> Rothman, "IRS Debuts Alternative FATCA Approach in Compliance Pacts with Switzerland, Japan," 120 *Daily Tax Rpt.* G-3 (6/22/12).

<sup>&</sup>lt;sup>15</sup> WTD Doc. 2012-23541 (11/16/12).

<sup>&</sup>lt;sup>16</sup> "U.S. Engaging with More Than 50 Jurisdictions to Curtail Offshore Tax Evasion," *WTD* Doc. 2012-23092 (11/9/12). Treasury initially implied that it would enter into a FATCA IGA with a country only if it had an income tax treaty or a tax information exchange agreement (TIEA) with the United States or was a signatory to the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters. However, Treasury has now indicated that a FATCA IGA itself can form the legal basis for the exchange of information (on a non-reciprocal basis) and thus it is willing to enter into a FATCA IGA with any country. *See* Parillo and Arora, "Corwin Explains FATCA Agreement Options for Countries Without U.S. Treaty or TIEA," 2012 *TNT* 162-1 (8/21/12).

<sup>&</sup>lt;sup>17</sup> Candace Ewell, a Director with PricewaterhouseCoopers LLP, stated that "difficulties could arise for banks that conduct business in jurisdictions with IGAs and without IGAs, as well as jurisdictions with local laws that do not permit compliance with FATCA." Bennett, "Concern Building on FATCA Reporting in U.S. Financial Community, Practitioners Say," 166 Daily Tax Rpt. G-1 (8/28/12). With respect to timeframes for compliance, on Sept. 20, 2012, Manal Corwin, Deputy Assistant Secretary for International Tax Affairs, U.S. Department of the Treasury, stated that "U.S. officials are aware that institutions, as they prepare to comply, are worried that they might be compelled to prepare for 'multiple' time frames for the FATCA regulations on one hand, and, on the other, jurisdictions' varying plans to sign and ratify intergovernmental FATCA implementation agreements and these jurisdictions' differing legislative procedures." Mitchell, "Treasury Official: Institutions Can Rely on Signed IGAs to Plan for FATCA Reporting," 185 Daily Tax Rpt. I-5 (9/25/12). In an attempt to bring a bit more conformity to the area, on Oct. 24, 2012, the IRS issued Announcement 2012-42, 2012-47 I.R.B. 561, which "set new, later implementation dates for due diligence procedures to identify and document accounts under [FATCA], increasing conformity between proposed regulations and [FATCA IGAs] and giving banks more time to implement system changes." Arora, "New FATCA Timelines Increase Conformity Between Regs, Intergovernmental Agreements," 2012 TNT 207-1.

<sup>&</sup>lt;sup>18</sup> Coder, "Extensive FATCA Negotiations Underway, Treasury Announces," 2012 *TNT* 218-1 (11/9/12).

<sup>&</sup>lt;sup>19</sup> Id

Given the length of time needed for the negotiation of a FATCA IGA, for the ratification process, for the enactment of necessary legislation or the promulgation of necessary regulations, and for the negotiation of an implementing Competent Authority agreement, it is going to be many, many years before a significant number of FATCA IGAs are actually in full effect. To deal with this problem (at least partially), Manal Corwin, Deputy Assistant Secretary for International Tax Affairs, U.S. Department of the Treasury, announced that once a FATCA IGA has been signed, foreign FIs in that partner country may rely on that FATCA IGA even though it has not yet been ratified by the partner country and thus the FATCA IGA is not yet legally in effect.<sup>20</sup> What this means when necessary legislation has not vet been enacted or necessary regulations have not yet been promulgated or an implementing Competent Authority agreement has not yet been negotiated is far from clear.<sup>21</sup> Moreover, even with this accommodation, there likely will be many countries for which negotiations on FATCA IGAs have not been completed prior to the effective date of FATCA, i.e., January 1, 2014, and there will no doubt be mass confusion between that date and the time when a relevant FATCA IGA is actually signed. Has the whole world gone insane?

In negotiating a system of FATCA IGAs with potentially 190 or more countries, the Treasury is in the process of building a Rube Goldberg monstrosity that will be very cumbersome for foreign FIs to comply with and very difficult for the IRS to administer. As will be discussed later, there are already effective and efficient enforcement tools to deal with offshore tax evasion and there is no need to ramp up the complexity to such an extreme degree.

**6. Negative Impact on the U.S. Economy.** As mentioned earlier, the penalty for not complying with

FATCA is a 30% tax on certain payments related to U.S. investments. This, of course, might lead a number of foreign FIs to simply stop investing in the U.S. economy (either for themselves or on behalf of others). Is this what we want, especially when we're only now slowly recovering from the Great Recession? In an Oct. 10 letter to Douglas H. Shulman, Commissioner of Internal Revenue, Congressman David G. Reichert (R-Wash.), a member of the Ways and Means Committee, expressed his concern that FATCA was going to affect investment in the United States. He cited the "potential negative impact on the ability of the US Government to sell Treasury bonds and other US Debt instruments, with foreign persons less likely to purchase US Debt instruments for fear of inappropriate (but difficult and expensive to challenge) with-holding being imposed."<sup>22</sup> He also was concerned that "foreign investors may choose simply to avoid US investment products constructed and sold by US firms . . . [and] US-traded instruments, contracts or securities for fear of a potential tax withholding event caused by someone in the investment chain failing to comply with FATCA terms, or simply by disclosure requirements that occur in [the] absence of any US tax liability."23

7. Immense Burden on Foreign FIs to Comply. Reference has already been made to the burden foreign FIs will have in dealing with multiple FATCA IGAs. Moreover, even if they only need to focus on the FATCA regulations, that will be complexity enough. The proposed FATCA regulations issued on Feb. 8, 2012,<sup>24</sup> are almost 400 pages in length and it is unlikely the final regulations will be any shorter. I am reminded of a conversation I had with several employees of a small bank in Sweden, who were only recently "waking up" to FATCA. I must say I felt some pity on them when I pictured them trying to pore through and digest 400 pages of Treasury regulations, which I am sure even American tax practitioners will have difficulty making sense of.

In addition to just trying to understand the regulations, foreign FIs will have a very heavy burden in complying with them. Speaking at a Boston Bar Association panel on FATCA, Barend Salemink of Rabobank Nederland said the biggest challenge under FATCA will be "managing relationships as institutions seek more information from their clients." He said that there are approximately 25,000 employees at his bank who interact with clients and all employees "who have extensive interaction with account holders

<sup>&</sup>lt;sup>20</sup> Mitchell, "Treasury Official: Institutions Can Rely on Signed IGAs to Plan for FATCA Reporting," 185 *Daily Tax Rpt.* I-5 (9/25/12).

<sup>&</sup>lt;sup>21</sup> In many cases a FATCA IGA is being negotiated with a partner country because the country's privacy laws do not permit its FIs to provide the information required by FATCA to the IRS. Under a Model I FATCA IGA, a country's FIs will instead provide the information to that country's tax authorities. However, that might itself require a change in the privacy laws, either separately or as part of the FATCA IGA. If that change in the law has not yet gone into effect, then the FIs in that country will not be able to turn the information over to the country's tax authorities. Thus, even though the FIs may be able to "rely" on the signed FATCA IGA, they will not be able to comply with it. Query whether Treasury has the authority through a FATCA IGA to waive statutory FATCA reporting requirements when FIs cannot yet comply with the FATCA IGA. The same issue arises with respect to a Model II FATCA IGA (permitting direct reporting to the IRS) when a FATCA IGA has not yet gone into effect and FIs are not yet legally permitted to turn information over to the IRS.

<sup>&</sup>lt;sup>22</sup> WTD Doc. 2012-21511 (10/18/12).

 $<sup>^{23}</sup>$  Id.

<sup>&</sup>lt;sup>24</sup> REG-121647-10. TNT Doc. 2012-2485 (2/9/12).

<sup>&</sup>lt;sup>25</sup> Arora and Trivedi, "FATCA Reporting Said to Require Compliance Expertise," 2012 *TNT* 203-2 (10/19/12).

will have to be trained in implementing FATCA requirements,"<sup>26</sup> including due diligence requirements pertaining to the identification of U.S. accounts. At the same meeting, Robert Foley of State Street Bank and Trust Co. stated that an investment fund will be spending significant time and money, regardless of whether it is subject to FATCA or a FATCA IGA.<sup>27</sup> Is it fair to make the innocent suffer for the sins of a few?

8. Burden on U.S. Individuals Residing Abroad. FATCA is already proving to be a substantial burden on U.S. individuals residing abroad, even though it has not yet gone into effect. According to American Citizens Abroad (ACA), a non-profit, non-partisan, volunteer advocacy association with members in more than 90 countries, many Americans working abroad are already experiencing difficulty in opening and maintaining bank accounts, pension plans, and life insurance contracts with foreign FIs because the FIs are aiming "to reduce the administrative burden and perceived legal risk associated with U.S. person clientele under FATCA legislation."28 According to ACA, "FATCA is the straw that has broken the back of Americans and green card holders residing overseas .... FATCA has turned Americans abroad into pariahs in the international financial world."29 As stated by Charles P. Rettig of Hochman, Salkin, Rettig, Toscher & Perez PC, "A lot of banks do not want to deal with U.S. account holders anymore."30

**9.** Waste of Treasury and IRS Resources. Treasury and the IRS are now pouring immense resources into the implementation of FATCA. Not only are they pouring immense resources into the development of the FATCA regulations (the proposed version of which was almost 400 pages long) and into the IRS's administration of FATCA, but Treasury and IRS officials are now traipsing around the world to negotiate potentially 190 (or more) FATCA IGAs. Tonsidering that FATCA is only projected to raise \$9 billion

over 10 years,<sup>32</sup> while the tax gap is estimated to be around \$450 billion a year,<sup>33</sup> one has to seriously question whether Treasury and the IRS are putting their resources to good use. A much better use of those resources would be on the audit frontlines assisting IRS revenue agents who are trying to reduce the massive tax gap from the underground economy here in the United States.

10. Efficient and Effective Enforcement Tools Already Exist. Efficient and effective enforcement tools already exist to crack down on offshore tax evasion by U.S. individuals. At the IRS/George Washington University 24th Annual Institute on Current Issues in International Taxation on Dec. 15, 2011, Douglas H. Shulman, Commissioner of Internal Revenue, stated the following about the IRS's existing "multi-pronged and integrated approach to combating individual offshore non-compliance":

[W]e have been scouring the vast quantity of data we received from all of our different offshore programs and other sources. This data mining has already proved invaluable in supplementing and corroborating prior leads, as well as developing new leads, involving numerous banks, advisors and promoters from around the world. I can tell you that we now have additional cases and banks in our sights. . . .

Not only are we bringing people back into the U.S. tax system, we are bringing revenue into the U.S. Treasury while at the same time turning the tide against offshore tax evasion. . . .

Europe, Asia September 17-28, 2012 to Discuss FATCA Implementation," News Release of U.S. Treasury Department Office of Public Affairs, Sept. 17, 2012. WTD Doc. 2012-3577 (9/19/12). On Nov. 6, 2012, Brenda Zent, a taxation specialist in Treasury's Office of International Tax Counsel, stated that "a team of government officials continues to travel around the world to discuss the implementation of FATCA." Bennett, "Final Rules on FATCA Likely Issued by Year's End, Treasury Official Tells AICPA," 215 Daily Tax Rpt. G-1 (11/7/12). As noted earlier, on Nov. 8, 2012, Treasury announced that it is "engaged with more than 50 countries and jurisdictions around the world to improve international tax compliance and implement the information reporting and withholding tax provisions commonly known as the Foreign Account Tax Compliance Act (FATCA)." "U.S. Engaging with More Than 50 Jurisdictions to Curtail Offshore Tax Evasion," WTD Doc. 2012-23092 (11/9/12).

<sup>&</sup>lt;sup>26</sup> *Id*.

<sup>&</sup>lt;sup>27</sup> Id

<sup>&</sup>lt;sup>28</sup> Comments Submitted Apr. 4, 2012, by ACA on the Proposed FATCA Regulations, http://americansabroad.org/files/6813/4192/6083/acastatementapril2012s.pdf.

<sup>&</sup>lt;sup>29</sup> *Id. See also* letter of Feb. 9, 2012, from Congresswoman Carolyn B. Maloney (R-N.Y.), Chair of the Congressional Americans Abroad Caucus, to Secretary of the Treasury Timothy Geithner, expressing her concern that Americans living abroad are being denied personal banking services or are having their existing accounts closed because of the impending implementation of FATCA, *WTD* Doc. 2012-3577 (2/23/12); "Banking Services Denied to U.S. Citizens Abroad," AARO, http://www.aaro.org/banking-services-denied-2010.

<sup>&</sup>lt;sup>30</sup> Trivedi, "Whistleblower Referrals Leading to CI, DOJ Investigations," 2012 *TNT* 219-4 (11/13/12).

<sup>&</sup>lt;sup>31</sup> See, e.g., "Deputy Assistant Secretary Corwin to Travel to

<sup>&</sup>lt;sup>32</sup> Joint Committee on Taxation, Estimated Revenue Effects of the Revenue Provisions Contained in an Amendment to the Senate Amendment to the House Amendment to the Senate Amendment to H.R. 2847, The "Hiring Incentives to Restore Employment Act" Scheduled for Consideration by the House of Representatives on March 4, 2010, JCX-6-10 (3/4/10).

<sup>&</sup>lt;sup>33</sup> Internal Revenue Service, *Tax Gap for Tax Year 2006*, Jan. 6, 2012. *TNT* Doc. 2012-357 (1/9/12).

People who may consider hiding money offshore should also take note of ours and the Department of Justice's success record when it comes to criminal prosecutions. People hiding assets offshore have received jail sentences running from months to years, and they have been ordered to pay hundreds of thousands and even millions of dollars.

I think it's fair to say that we are well on our way to deterring the next generation of tax-payers from using hidden bank accounts to cheat on their taxes. Through our ongoing efforts, we are demonstrating that the world has become a smaller place. . . that we will eventually find you if you are hiding assets overseas.<sup>34</sup>

It was only after making these comments that Commissioner Shulman spoke about FATCA and he did so only briefly. Interestingly, he expressed no praise of, nor appreciation for, FATCA; he only stated that Treasury and the IRS were trying to implement it in a practical way.<sup>35</sup> One might infer from the Commissioner's remarks that he believes the IRS and the Department of Justice are doing just fine with their existing tools and there is no need for FATCA.<sup>36</sup>

In his final speech as Commissioner, given to the Fall Tax Division Meeting of the AICPA on Nov. 8, 2012, Commissioner Shulman again stated that the IRS is making strong progress in attacking offshore tax evasion *and this time he made no mention whatsoever of FATCA*. The Commissioner had the following remarks about the IRS's successes using existing enforcement tools:

Over the past five years, we have significantly increased our resources and focus on offshore tax evasion, and the results have been substantial. We upped the ante in a meaningful way with our work on Swiss financial institutions — where for the first time in history, a bank secrecy jurisdiction turned over thousands of names and account numbers.

As we increased our enforcement efforts and gained significant momentum, we gave tax-payers a chance to come in voluntarily and avoid going to jail. . . .

[W]e are very pleased that we've had approximately 38,000 voluntary disclosures from individuals who came in under the special programs.

To date, these individuals have paid back taxes and stiff penalties amounting to more than \$5.5 billion, and the number continues to grow. We are mining the information we have received and have launched our next wave of investigations on banks, bankers, intermediaries and taxpayers.

Collecting additional revenue for past misdeeds — as important as that may be — is not the only, or even primary, consideration here. It's perhaps more important that we're bringing U.S. taxpayers back into the system ... back into compliance ... so they properly report and pay their taxes for years to come. We have fundamentally changed the risk calculus of taxpayers who are thinking about hiding their money overseas, and we are well on our way to deterring the next generation of taxpayers from using hidden bank accounts to cheat on their taxes.<sup>37</sup>

If one puts on the Commissioner's hat, it should be clear why the Commissioner appeared less than thrilled with FATCA. He no doubt was concerned about the burden FATCA would place on the IRS by requiring it to deal with 600,000 foreign FIs and with mountains of information that would be coming in every year from potentially 190 or more countries. As Commissioner Shulman had emphasized time and again, the IRS is making major strides in cracking down on offshore tax evasion using existing enforcement tools. The subtext in the Commissioner's speeches appears to be that the IRS is doing just fine and there is no need for the onerous reporting system imposed by FATCA. Interestingly, at the end of his speech, he implored Congress to "keep a keen eye on tax legislation that adds to complexity and is difficult for taxpayers to comprehend and for us to administer."38

Officials from the IRS's Criminal Investigation Division (CID) and the Tax Division of the U.S. Depart-

<sup>&</sup>lt;sup>34</sup> WTD Doc. 2011-26413 (12/16/11).

<sup>&</sup>lt;sup>35</sup> *Id. See also* Jackson, "U.S. Offers 11 Swiss Banks Deal to End Tax Evasion Investigation," 2011 *TNT* 245-2 (12/21/11).

<sup>&</sup>lt;sup>36</sup> In a news release issued on June 26, 2012, the Commissioner stated, "We continue to make strong progress in our international compliance efforts that help ensure honest taxpayers are not footing the bill for those hiding assets offshore. People are finding it tougher and tougher to keep their assets hidden in offshore accounts." "IRS Says Offshore Effort Tops \$5 Billion, Announces New Details on the Voluntary Disclosure Program and Closing of Offshore Loophole," IR-2012-64, June 26, 2012, *WTD* Doc. 2012-13611 (6/27/12).

<sup>&</sup>lt;sup>37</sup> "Prepared Remarks of IRS Commissioner Doug Shulman before the AICPA, Washington, DC," IR-2012-89, Nov. 7, 2012, *TNT* Doc. 2012-22997 (11/8/12).

<sup>&</sup>lt;sup>38</sup> *Id*.

ment of Justice have backed up the Commissioner's statements that existing enforcement tools are proving very successful. On Sept. 14, 2012, Rebecca Sparkman, Director (Operations Policy and Support), CID, said the IRS's offshore voluntary disclosure initiative (OVDI) is growing by "leaps and bounds" and is a huge success. "What we're finding is that when people are coming in, they're telling us about their banker, they're telling us about their bank, they're telling us about the place they had their money that we might not know about," she said, "[a]nd that leads us to the next bank, it leads us to the next promoter, it leads us, obviously, to the next client."<sup>39</sup> On Oct. 18, discussing the "great success" the IRS has had in uncovering criminal conduct involving Swiss bank accounts, Richard Weber, Chief of the CID, stated, "We've made it a significant priority to expand to other countries, and we have agents doing that now," pointing out that the work involves partnerships with foreign governments and law enforcement agencies and that the IRS now has 17 attaches at key embassies and consulates in 10 countries, with plans to expand the international presence.<sup>40</sup>

On Oct. 21, Kathryn Keneally, Assistant Attorney General (Tax Division) in the U.S. Department of Justice, stated that the government "is collecting significant information about offshore account holders that has not been made public, making discovery of the accounts more likely even without the added pressure to come forward that has been created by the Foreign Account Tax Compliance Act." She went on to state:

Our investigations are continuing, they are expanding — it is a big world, but we are looking throughout the world and are investigating beyond where you have seen us.

... We have sources of information that are diverse; we are getting account holder information in ways that are not public.

There will be cases brought where there was no indication in the press that our investigations were going that way prior to when you see prosecutions. We have a number of interesting initiatives that I cannot discuss, but we are every day developing information and getting account holder information. Fail-

ure to come into the offshore disclosure initiative is getting increasingly dangerous. 42

After the enactment by Congress in 2006 of the "IRS Whistleblower Law," 43 whistleblowers are also proving to be an important source of information for the CID and the Department of Justice. Thomas E. Bishop, CID Assistant Special Agent in Charge in New York, stated that the 2006 whistleblower law is "a 'game changer' for the IRS's efforts to combat off-shore evasion." For example, according to Stephen M. Kohn, Executive Director of the National Whistleblowers Center, Bradley Birkenfeld, the whistleblower who exposed UBS's \$20 billion illegal tax fraud scheme, "saved the taxpayers countless billions of dollars. To date, the information he provided the U.S. government directly resulted in more than \$5 billion in recoveries for American taxpayers and are at the foundation of other investigations and indictments of Swiss financial institutions and their clients." <sup>45</sup> On Sept. 11, 2012, the IRS paid Mr. Birkenfeld \$104 million for exposing UBS's tax evasion scheme. In a joint statement, Mr. Birkenfeld's attorneys stated, "The IRS today sent 104 million messages to whistleblowers around the world — that there is now a safe and secure way to report tax fraud and that the IRS is now paying awards. The IRS also sent 104 million messages to banks around the world — stop enabling tax cheats or you will get caught."46 The National Whistleblowers Center stated that it was "initiating an international campaign to educate employees regarding their rights under new whistleblower reward laws" and that, "[a]s demonstrated by the IRS' decision in the Birkenfeld case, these laws can be effectively used to combat corruption, illegal offshore tax evasion and money laundering."47

Since efficient and effective enforcement tools already exist, we should not impose a massive and very costly reporting burden on the whole world. Instead, the United States should continue its existing approach of requesting information when there are specific suspicions of non-compliance, e.g., as a result of information obtained from whistleblowers, from vol-

<sup>&</sup>lt;sup>39</sup> Bennett, "Taxpayers Required to Talk to IRS Even After Voluntary Disclosure Cases Closed," 180 *Daily Tax Rpt.* G-4 (9/18/12).

<sup>&</sup>lt;sup>40</sup> Herzfeld, "Charges Expected from Offshore Probes Outside of Switzerland, IRS Official Says," 202 *Daily Tax Rpt.* G-7 (10/19/12).

<sup>&</sup>lt;sup>41</sup> Coder, "Some Offshore Account Information Uncovered by DOJ Not Yet Made Public," 2012 *TNT* 205-1 (10/23/12).

<sup>&</sup>lt;sup>42</sup> *Id*.

 $<sup>^{43}</sup>$  §7623 of the Code, enacted by \$406(a)(1) of the Tax Relief and Health Care Act of 2006, P.L. 109-432 (12/20/06).

 $<sup>^{44}</sup>$  Trivedi, "Whistleblower Referrals Leading to CI, DOJ Investigations," 2012 TNT 219-4 (11/13/12).

<sup>&</sup>lt;sup>45</sup> "Biggest Tax Whistleblower in History Released from Prison," National Whistleblowers Center, Aug. 1, 2012, *WTD* Doc. 2012-16401 (8/3/12).

<sup>&</sup>lt;sup>46</sup> "Justice for Birkenfeld: UBS Bank Insider Celebrated for Exposing \$20 Billion Tax Evasion Scheme, \$104 Million Paid to the Whistleblower," National Whistleblowers Center, Sept. 11, 2012, WTD Doc. 2012-18938 (9/12/12).

<sup>&</sup>lt;sup>47</sup> Id

untary disclosures, or as a result of specific investigations by tax authorities, either by the IRS or by foreign tax authorities. This is a much more realistic and practical approach that avoids imposing a heavy burden on the financial industry. One must keep in mind a cost-benefit analysis and not get so carried away with information reporting that one fails to consider whether the benefits justify the costs imposed on others. When one factors in the additional tax deductions foreign FIs will have for foreign tax purposes as a result of the massive FATCA compliance burden, it might very well be true that, on a worldwide basis, FATCA is a significant revenue loser. Indeed, FATCA might very well be a revenue loser for the United States, given additional tax deductions U.S. persons will have for their expenses in complying with withholding requirements under FATCA. 48 Thus, a costbenefit analysis should not only take into account the costs to the financial industry but to governments as well — "for what shall it profit a global tax system, if it shall gain all the information in the world, and lose revenue as a result?" As stated by John Harrington, former International Tax Counsel, U.S. Department of the Treasury, and now with SNR Denton LLP, "There's a point at which chasing noncompliance isn't worth the cost."50

11. The United States Is Not Willing to Provide the Same Information on a Reciprocal Basis. Perhaps the strongest reason why FATCA is sheer idiocy is because the United States is not willing to subject U.S. FIs to the same types of reporting burdens that it is imposing on *foreign* FIs. This is simply outrageous. In Article 6(1) of the reciprocal Model I FATCA IGA, the United States said it "acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange" with its FATCA partners and "is committed to further improve transparency and enhance the exchange relationship ... by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic exchange."51 (Emphasis supplied.) It is clear, however, that the U.S. Treasury

Department has now backed off from this commitment.

This was made abundantly clear in a letter of Oct. 10, 2012, from Mark Mazur, Assistant Secretary of the Treasury for Tax Policy, to Sen. Rand Paul (R-Ky.),<sup>52</sup> in response to the Senator's concerns about reporting that might be required of U.S. FIs as a result of the Joint Statement of Feb. 8, 2012 (which indicated the United States planned to enter into FATCA IGAs with France, Germany, Italy, Spain, and the United Kingdom). In his letter, Assistant Secretary Mazur states, "The United States cannot expect foreign governments with shared policy goals and practices regarding transparency and fairness to facilitate the reporting of the information required under FATCA by their financial institutions if we are unwilling to help address tax evasion under their tax systems. We think the most straightforward approach would be to share information, in appropriate circumstances, that pursuant to existing law already must be reported to the IRS about accounts held by their residents in the United States." (Emphasis supplied.) He then goes on to state the following:

The information that the United States would agree to exchange under the reciprocal version of the Model Agreement differs in scope from the information that foreign governments would agree to provide to the IRS. In fact, the information specified to be exchanged by the IRS under the reciprocal version of the Model Agreement is limited to the information that U.S. financial institutions will be required under existing regulations to report to the IRS about nonresident accounts for 2013. While the reciprocal version of the Model Agreement includes a policy commitment to pursue equivalent levels of reciprocal automatic exchange in the future, no additional obligations will be imposed on U.S. financial institutions unless and until additional laws or regulations are adopted in the United States.<sup>53</sup> [Emphasis supplied.]

It is very clear, therefore, that Treasury officials have little interest in imposing FATCA-type reporting burdens on U.S. FIs.

<sup>&</sup>lt;sup>48</sup> In his Oct. 10, 2012 letter to Commissioner Shulman, Congressman Reichert expressed concern that FATCA "might provide little or no additional net revenue for the US Government while both imposing potentially massive compliance costs and providing significant disincentives for foreign persons and institutions to do business with US persons and the US Government." *WTD* Doc. 2012-21511 (10/18/12).

<sup>&</sup>lt;sup>49</sup> Paralleling the words of Christ, "For what shall it profit a man, if he shall gain the whole world, and lose his own soul?" Mark 8:36 (King James Version).

<sup>&</sup>lt;sup>50</sup> Bennett, "Concern Building on FATCA Reporting in U.S. Financial Community, Practitioners Say," 166 *Daily Tax Rpt.* G-1 (8/28/12).

<sup>&</sup>lt;sup>51</sup> Reciprocal Model I FATCA IGA, WTD Doc. 2012-15912

<sup>(7/27/12).</sup> Emphasizing the importance of reciprocity, Dieter Eimermann, Deputy Head of the International Division, Tax Department, German Federal Ministry of Finance, stated, "It was also important for the United States to acknowledge the importance that equivalence and reciprocity should be achieved, which is partly there right now." Mitchell, "Treasury Official: Institutions Can Rely on Signed IGAs to Plan for FATCA Reporting," 185 *Daily Tax Rpt.* I-5 (9/25/12).

<sup>&</sup>lt;sup>52</sup> WTD Doc. 2012-21331 (10/17/12).

<sup>53</sup> LA

Treasury officials have stated publicly that foreign countries that have signed FATCA IGAs will need to ensure that the information required under FATCA (as modified by the IGA) can be provided to the United States and such countries are required to amend their laws and/or regulations if necessary to do so.<sup>54</sup> It is highly peculiar that Treasury is requiring foreign countries to change their laws and/or regulations so that they can provide the information required under FATCA but the United States is making no commitment to change its laws and/or regulations so that it can provide FATCA-type information to its partners under "reciprocal" FATCA IGAs. At a meeting of the ABA Tax Section on Sept. 14, 2012, Danielle Rolfes, International Tax Counsel, U.S. Department of the Treasury, was asked what steps the U.S. government is taking, by way of legislation or regulations, to ensure that U.S. FIs can reciprocate the type of information that is required from foreign FIs under FATCA. Rolfes said "the only information that is implicated is that which is already being collected, or will be collected once rules requiring banks to report interest paid to nonresident aliens fully take effect."55 Rolfes and Steven A. Musher, IRS Associate Chief Counsel (International), stated that the reporting the United States can offer under existing law and regulations (including the 2013 changes requiring banks to report interest paid to nonresident aliens) is "close enough" to equivalent reporting.<sup>56</sup>

There are, however, major differences between the type of information that foreign FIs are required to report under FATCA and the type of information that U.S. FIs are currently required to report about foreign account holders. For example, U.S. banks do not need to report account balances and current reporting requirements for U.S. mutual funds, private equity funds, and insurance companies do not come anywhere close to the requirements under FATCA imposed on foreign mutual funds, private equity funds, and insurance companies. For Treasury to take the position that existing reporting requirements for U.S. FIs are close enough to what is required under FATCA is absurd and is belied by the fact that U.S. FIs are very concerned that they might be subject to FATCA-type reporting with respect to their foreign account holders. As stated by Michael Silva with DLA Piper LLP, there is a real concern among U.S. banks that the rules

for reporting deposit interest to nonresident aliens are "only the first in a more stringent series of requirements to glean information that can be shared with other jurisdictions that have signed" FATCA IGAs.<sup>57</sup>

Treasury is correct in being reluctant to impose FATCA-type reporting on U.S. FIs, perhaps because it realizes that the U.S. Congress would not stand for having massive new information reporting requirements imposed on U.S. FIs, especially when the information pertains to foreign account holders. Treasury might also realize that such massive new information reporting requirements would probably end up costing the fisc revenue due to increased tax deductions resulting from increased compliance expenses. Whatever the reason, given that Treasury has decided not to impose FATCA-type reporting on U.S. FIs, how can it in good conscience impose FATCA reporting on foreign FIs? The audacity of the Treasury Department to enter into "reciprocal" FATCA IGAs that are such one-way streets is unbelievable. It is time for Treasury to throw in the towel and push for FATCA's repeal.

## CONCLUSION

The bottom line is that FATCA is sheer idiocy and must be repealed as soon as possible. The world economy has enough problems as it is without having inane reporting requirements imposed upon it. Moreover, the U.S. economy has enough problems as it is without having legislation that causes foreigners to think twice about investing in the United States. FATCA has resulted in an extremely inefficient deployment of Treasury and IRS resources, which would be much better employed going after noncompliance involving \$450 billion a year, rather than \$9 billion over 10 years. Existing enforcement tools, including the encouragement of whistleblowers, have proved themselves more than adequate to deal with the so-called "scourge" of offshore tax evasion. Finally, it is outrageous for the United States to impose the burden of FATCA on the rest of the world when it is not willing to impose the same reporting burden (truly equivalent reporting) on U.S. FIs.

FATCA was clearly written and enacted without being thought through carefully; it shows what can happen when tax legislation is considered by Congress without ever having been subject to any hearings by the House Ways and Means Committee or the Senate Finance Committee. Hopefully, there will be some "profile in courage" in Treasury who will stand up and declare that FATCA is madness and urge Treasury and the White House to push for repeal.

<sup>&</sup>lt;sup>54</sup> Bennett, "FATCA Final Rules, FFI Agreement Expected to Be Unveiled in Fall, Treasury Official Says," 179 *Daily Tax Rpt.* G-8 (9/17/12).

<sup>&</sup>lt;sup>55</sup> *Id*.

<sup>&</sup>lt;sup>56</sup> At the ABA Tax Section meeting, Rolfes said, "Reciprocity doesn't mean identical information must be exchanged," and Musher stated, "I don't think the balance is at all unequal; . . . the concept of tit-for-tat doesn't apply." *Id.* 

<sup>&</sup>lt;sup>57</sup> Bennett, "Concern Building on FATCA Reporting in U.S. Financial Community, Practitioners Say," 166 *Daily Tax Rpt.* G-1 (8/28/12).

If, after repeal, Treasury still wishes to pursue some type of worldwide automatic information reporting system, it should do so within the context of the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters (which, despite its title, is open to all nations)<sup>58</sup> and should seek changes to that convention that are ac-

ceptable not only to the other signatory countries but also to U.S. FIs and the U.S. Congress.<sup>59</sup>

signed letters of intent to sign it. The Convention "was opened to all countries in 2011 in an effort to make it a more effective tool for battling tax avoidance and evasion." Mitchell, "OECD Tax Transparency Forum Plans Rating System; Critics Express Skepticism," 216 *Daily Tax Rpt.* I-1 (11/08/12).

<sup>59</sup> At a minimum, FATCA should be suspended in order to give an opportunity for a global approach to be developed. See fn. 6, above, and what the European Commission did with respect to the European Union Emissions Trading Scheme. Obviously, suspension, rather than repeal, would allow the United States to "save face" if such is important to certain persons in the government.

<sup>&</sup>lt;sup>58</sup> The Global Forum on Transparency and Exchange of Information for Tax Purposes, which includes 116 advanced, emerging, and developing countries, announced at its meeting in Cape Town, South Africa, on Oct. 25–27, 2012, that 50 of its members either have signed the OECD/Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters or have