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Claremont McKenna College

The Foreign Account Tax Compliance Act: The Solution or the Problem?

Submitted to
Professor James Taylor
and
Dean Peter Uvin

By
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for
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I. The Problem

“Foreign effected tax evasion” (Ralston 2010, 875), tax evasion when one’s assets are hidden in a foreign jurisdiction, is not a new obstacle for the United States (US) government in its revenue collection. Taxes are a necessity for the functioning of the US government. Taxes, the source of government revenue, come from a variety of sources that have fluctuated over the decades. The most recent federal data from 2010 indicates that the federal tax revenue is largely composed of individual income taxes and payroll taxes, making up 82% of total revenue. Federal tax revenue averaged 17.9% of Gross Domestic Product (GDP) from 1950 to 2000 and, in 2010 specifically, the government collected \$2.2 trillion (14.9% of GDP). Because of the importance of taxes, the government is invested in recapturing their annual lost tax revenue otherwise known as the tax gap. There has been a large difference between the amount of mandated taxes and the amount voluntarily and timely paid by taxpayers in a given year. The United States has attempted to solve the problem for decades since the imposition of the federal income tax with the Revenue Act of 1861 (Terrell 2012). In recent years, the United States has suffered from a significant tax gap (Heiberg 2012, 1689), totaling to an estimate of around \$100 billion annually (Ralston 2010, 875), meaning that in 2010, the US lost approximately 4.4% of its tax revenue or almost 1% of GDP due to tax evasion.

This issue is also not unique to the US. There are various estimates as to the amount of money is stashed away in tax havens around the world. One estimate by the Tax Justice Network estimates that in 2009, “\$11.5 trillion in global assets are hidden in offshore havens” (Heiberg 2012, 1686) whereas the Boston Consulting Group in a press release states, “approximately \$7.8 trillion, representing more than six percent of all

global wealth, is managed through offshore accounts where the investor has no legal residence or tax domicile” (Behrens 2013, 212). The estimates do not give the full magnitude of the issue especially for the US. The US, in particular, loses an estimated \$100 billion of tax revenue annually. The US banking system is interrupted by taxpayers taking their money out of the US and depositing in foreign accounts with no guarantee of the money’s return as an investment into the US markets. By putting money into a foreign account instead of a US bank to avoid detection by the IRS, the taxpayer or company is taking money out of the US banking system, out of the lending loop where US banks continually loan out deposits otherwise known as the money multiplier effect where, for example, \$1000 with a 10% reserve requirement can be continually loaned out to generate an addition \$8000 of wealth in the US (Ralston 2010, 883).

A renewed effort was launched after the emergence of large tax evasion scandals, UBS (a bank in Switzerland) and LGT (a private banking and asset management firm run by the Princely Family of Liechtenstein) (LGT 2015), brought widespread attention to the magnitude of institutionally assisted tax evasion, forcing Congress to react. In the past, Congress has tried to target the various loopholes in the tax law that allow for tax flight (Ralston 2010, 877), but the core of the problem is information asymmetry (Heiberg 2012, 1692). While the Internal Revenue Service (IRS) has to rely on the taxpayer providing them with their accurate information on an honor system (Harvey 2011, 472), the taxpayer heavily leans toward underreporting his or her income with the incentive of keeping more money in his or her own pocket. In fact, underreporting on timely filed tax returns makes up the bulk of the tax gap at 82.6% and of that percentage, 83% are individual tax return filers (Toder 2008). Not only does information asymmetry exist, but

identifying the taxpayers who set up foreign accounts is difficult because there is a lack of information provided by foreign financial institutions (FFIs) to the IRS. It is a two pronged problem where the probability of information provided by the taxpayer or the FFI being inaccurate is high.

The latest legislative solution to this problem enacted by Congress and signed into law by President Obama on March 18, 2010 (Harvey 2011, 472) as a part of the Hiring Incentives to Restore Employment (HIRE) act (Behrens 2013, 207) is known as the Foreign Account Tax Compliance Act (FATCA). The HIRE act itself was filled with tax breaks designed with the hope of encouraging business to hire more people and the Treasury would pay for the tax breaks by finding the tax evaders' money hiding overseas (McGurn July 16, 2012). The act increases information collection by the IRS by requiring the following:

1. Any foreign financial institution with US citizen clients must “provide annual reports to the IRS on the name and address of each US client, as well as the largest account balance in the year and total debits and credits of any account owned by a US person”
2. Any foreign company not listed on a stock exchange or any foreign partnership which has a 10% US ownership must report to the IRS the names and tax identification number (TIN) of any US owner.
3. US citizens and green card holders with foreign financial assets in excess of \$50,000, must report to the IRS all foreign financial account assets.

In particular, the last provision broadens FATCA's applicable scope of assets from not only bank accounts, but also securities accounts, annuity contracts, rental

properties, insurance contracts, pension plans, trusts and private investments in companies and partnerships now all apply and must be reported. In addition to FBAR TD F 90-22.1 filings, Section 6038D of FATCA requires U.S. taxpayers to report foreign accounts and assets with an aggregate value exceeding \$50,000 including any financial account maintained by an FFI, any stock or security issued by a non-US person, any financial interest or contract held for investment that has a non-US issuer or counterparty, and any interest in a foreign entity (Wood November 11, 2011). This requirement is in addition to the reporting of foreign financial accounts under the Qualified Intermediary (QI) System already required by the US Department of the Treasury (Brodzka 12-13).

There are various controversial aspects to the law for not only US citizens living abroad, but also any foreign financial institutions investing in US assets or employing a US citizen. It has not been long since FATCA has been in effect. Therefore, many of the consequences remain as predictions with insufficient data collected as to the effectiveness of the law in accomplishing its objectives of gathering information and deterring tax evasion. Now, at almost two years after the law's implementation, the Treasury has seen a plateau in the rate of their successes in prosecuting tax evasion (Snyder 2015, 602). This begs the question: does FATCA's actual design and implementation achieve the goal of increasing information collection and reducing tax evasion? By first looking at the cases of LGT and UBS banks that led to Congress taking action and implementing new legislation, one can then analyze past approaches by both the US and the international community. Only then will the current law, FATCA, be easier to understand. The paper will explore the unexpected consequences of FATCA, question its effectiveness, and propose an alternative solution.

II. Case Studies

Before FATCA and more generally, the Treasury's tightening of tax evasion enforcement procedures, there were billions of American tax dollars flowing out of the US. The US government implemented many pieces of legislation to curb the flow, but what led to the most recent push for the improvement of tax enforcement policies was the cases of UBS and LGT banks. These cases brought to the forefront of Congress's mind the severity of the problem and encouraged them to address the situation using tools and tactics from the LGT and the UBS cases. By opening their eyes to the possibility of collecting sufficient information from financial institutions and successfully prosecuting foreign institutions for not complying with US tax law and to find individuals or corporations evading US taxes. Due to the publicity and scale of the UBS (a large Swiss bank) & LGT Group (a private banking and asset management firm in Liechtenstein) scandals, the topic of tax evasion and the techniques that foreign financial institutions used to help American citizens hide their taxable income was in the spotlight.

A. LGT

The process of uncovering the many secrets of the Swiss banking system in the United States began in February 2008 with the less well known of the two cases, the Liechtenstein bank owned by and financially benefitting the royal family in Liechtenstein (Levin 2008, 4), the LGT Group (Harvey 2011, 476) who “maintain[ed] U.S. client accounts [...] not disclosed to U.S. tax authorities; advis[ed] U.S. clients to open accounts in the name of Liechtenstein foundations to hide their beneficial ownership of the account assets; advis[ed] clients on the use of complex offshore structures to hide ownership of assets outside of Liechtenstein; and establish[ed] ‘transfer corporations’ to

disguise asset transfers to and from LGT accounts” and also taught clients how to structure their investments to avoid Qualified Intermediary (QI) reporting rules (), necessitated by the IRS (Harvey 2011, 477) once LGT voluntarily joined the QI program in 2001 (). The tax evasion techniques were confirmed to be suggested to clients from at least 1998 to 2007 (). However, this story began a couple years earlier in 2006 when a former employee of LGT approached the German authorities, claiming that he had incriminating tax information on a stolen DVD about German citizens hiding assets. The information was verified by the German authorities, and then the authorities purchased the DVD for €4.2 million, or approximately \$6.3 million at the time (Ralston 2010, 898). On February 14, 2008, German authorities used the information of about 600 to 700 German taxpayers, executed search warrants, and arrested a prominent businessman for allegedly using Liechtenstein bank accounts to evade €1 million (then \$1.45 million) in taxes (Levin 2008, 2).

Germany’s success with extracting information from LGT with the help of whistleblowers was not only beneficial for Germany, but also for nearly a dozen countries such as the United Kingdom, Italy, France, Spain, and Australia (Levin 2008, 2). This highlights the the scope of the LGT scandal and the newfound international determination to contest tax evasion facilitated by a tax haven bank. For example, once Germany shared the information, the US was able to open more than 100 investigations (Levin 2008, 2) on suspected U.S. tax evaders (Ralston 2010, 898). One example is the Lowy account, one of the largest within LGT. It was created by Frank Lowy, the head of the Lowy family and an Australian citizen, to avoid his tax obligation and that of his three sons, David, Peter and Stephen in 1996 (Levin 2008, 6). The Lowys are in control

of the Australian-based Westfield Group (Perez and Hudson 2008). This scheme involved complex transactions with money transferred from accounts held by the Lowys into a Liechtenstein entity called the Luperla Foundation. The foundation was set up during Los Angeles and London meetings with a single LGT employee as the point person and the Israeli (Perez and Hudson 2008) Lowy family attorney, J.H. Gelbard (Levin 2008, 6), as the sole contact. This demonstrates how LGT worked with wealthy individuals to hide ownership of foundation assets. Lowy wanted to hide from Australian tax authorities, and LGT eagerly created a strategy to ensure it happened (Levin 2008, 6). In 1997, LGT acquired Sewell Services Ltd., a British Virgin Islands corporation, to serve as the intermediary as assets were transferred between Luperla and the Lowys' accounts. The Sewell LGT account had assets later passed on to Luperla (Ralston 2010, 899). There was then one more subsidiary, Beverly Park Corp., incorporated in Delaware (Levin 2008, 6) holding the stock that the Lowys set up as the link for naming beneficiaries of Luperla without revealing Luperla's asset sources (Ralston 2010, 899). Even if outwardly, the Lowys were unrelated, internal LGT documents clearly stated that the Lowys were the true beneficiaries of the foundation. Beverly Park Corp. was also ultimately owned by the Frank Lowy Family Trust. In 2001, a new entity was incorporated in the British Virgin Islands called Lonas, Inc., solely directed by Gelbard, was created to facilitate the movement of the Lowy assets to Switzerland to dissolve the foundation (Levin 2008, 6). In December of the same year, about \$68 million worth of assets was transferred to Geneva, dissolving the Liechtenstein foundation (Perez and Hudson 2008).

The Lowy company had a web of an organization structure with complex transactions to ensure that assets are difficult to track to their final destination. The Lowy family is an example that highlights the great lengths individuals go to to avoid taxes. In conjunction with banks, individuals and corporations are willing to go above and beyond to create complex mechanisms that could shield their assets from tax costs. The German authorities used the LGT case's informant-driven approach. Due to the informant-driven approach's success, Germany utilized it in other cases. They have continued to enter into negotiations with possible whistleblowers. One in particular is from the Geneva branch of the global bank, HSBC, who negotiated a €2.5 million asking price for information on about 1,500 tax evaders' information with the possibility of increasing Germany's treasury with €100 million - 40 times greater than the price the authorities paid (Ralston 2010, 898). With the Germans changing their approach successfully, the US followed Germany's lead and dug further into the CD of information from the former LGT employee to find possible US tax evaders. This reflects a shift in the US approach to an informant-driven approach.

The US investigation into the Lowy family account (\$68 million), in particular, was accompanied by the data collection on six other large suspected accounts. The six others included James Albright Marsh (\$49 million), William S. Wu (\$4.6 million), Henry and Steven Greenfield (\$2.2 million), Jorge and Conchita Gonzalez (\$4.4 million), Richard M. Chong (\$9.4 million), and Michael Miskin (\$6 million). All the values listed are the values of their accounts at the end of 2001 (Levin 2008, 5).

Jack Marsh was from Florida operating in the construction business and decided to form four foundations Liechtenstein from 1985-2004. LGT helped in the establishment

of two of them. In 2007, the value of the assets in the foundations was an aggregate of more than \$49 million. LGT did not report the accounts even with the QI reporting requirements and instead, advised Marsh to divest his LGT foundations of U.S. securities, and treated the accounts as owned by the Liechtenstein foundations. The IRS discovered the Liechtenstein foundations through the information released by the Germans and the Marsh family is now being penalized for tax evasion on the \$49 million (Levin 2008, 5).

William S. Wu is a Chinese- born US citizen living in New York. along with his sister, a US citizen living in Hong Kong establishing three separate foundation in Liechtenstein with the help of LGT. These foundations were intended to conceal ownership interests. For example, in 1997, Wu sold his New York to a supposed unrelated party. In reality, the buyer, Tai Lung Worldwide Ltd., a British Virgin Islands company owned by a Bahamian corporation called Sandalwood International Ltd., wholly owned by Wu's foundation, was the purchaser. His sister utilized the foundations in a similar fashion. Unfortunately for LGT, their own documentation indicates that, "the bank was fully aware of these arrangements and expressed no concerns" (Levin 2009, 5).

Harvey Greenfield, a New York businessman in the toy industry established a Liechtenstein foundation in 1992 with him as the sole primary beneficiary and Steven Greenfield, his son, with the power of attorney. The foundation had two British Virgin Islands corporations serving as transfer conduits. By the end of 2001, the foundations had an asset value of about \$2.2 million. In March 2001, LGT wanted the Greenfields to transfer funds to LGT out of its current location in a Hong Kong branch of the Bank of Bermuda foundation assets valued at "around U.S. \$30 million" An LGT meeting memorandum states, "The Bank of Bermuda has indicated to the client that it would like

to end the business relationship with him as a U.S. citizen. Due to these circumstances, the client is now on the search for a safe haven for his offshore assets [...] The clients are very careful and eager to dissolve the Trust with the Bank of Bermuda leaving behind as few traces as possible” (Levin 2008, 6). The memorandum is, in fact, proof that LGT uses its privacy laws as a selling point and is more than willing to help US clients move substantial funds to tax havens (Levin 2008, 6).

Jorge and Conchita Gonzalez operated a Puerto Rican car dealership selling Volvos with LGT forming two Liechtenstein foundations and two Liechtenstein corporations to assist them. Two entities provided financing. Another was the guarantor of the dealership’s debts, without revealing ownership, taking Volvo invoices and sending additional invoices to the dealership for selected cars, charging more than Volvo charged. The court applied damages of \$130 million to the dealership and the Gonzalezes. LGT documents show that the bank was aware of the litigation and helped them transfer assets to a newly established foundation (Levin 2008, 7).

Richard M. Chong, a US citizen living in California, utilized four funds holding a combined value of about \$9.4 million in 2002 that were reorganized by LGT after his father’s death. In 2004, LGT set up for the foundation to be used as a transfer corporation to disguise the flow of assets in and out of the foundation’s accounts. The direct link is broken from the foundation to the final destination of the funds, making it harder to track (Levin 2008, 7).

Michael Miskin had a more complicated case due to his residency. Although he was a citizen of the United Kingdom, he claimed to live in Bermuda, but actually lived in California for a decade from 1991 to 2002. After his wife filed for divorce, he

disappeared, ignoring orders to transfer real estate and £3 million in alimony to his now ex-wife by hiding his assets all around the world. LGT connection to the specific case is undetermined, but internal LGT documents do show that LGT helped Miskin open an account in Liechtenstein and deposit millions of Swiss francs. In 1998, LGT helped him form a Liechtenstein foundation and transfer into its account his existing LGT funds, then valued at nearly 10 million Swiss francs or \$6.6 million even after they discovered that he was hiding assets from the court and his ex- wife. The Liechtenstein foundation and funds were never disclosed. Most interestingly, even while Miskin lived in California in the condominium building he purchased in 1998, he denied his US residency and was encouraged by LGT. An internal LGT memorandum noted, “The financial beneficiary has his PLACE OF RESIDENCE IN BERMUDA and not in the U.S. Hence, he pays no taxes in the U.S.!!!!!!” (Levin 2008, 8).

Once the seven LGT accounts listed in the Staff Report are taken as one sum, there was a total of at least \$126 million that went undisclosed. Now the IRS can assess back taxes and penalties. Even if the IRS only takes a 10 percent retroactive tax as the penalty percentage, the US Treasury would increase by \$12.6 million (Ralston 2010, 900). Moreover, the IRS announced on February 26, 2008 that it was initiating enforcement action against over 100 U.S. taxpayers with offshore accounts at LGT (Levin 2008, 2). The IRS was reminded of the value of information that could be obtained from foreign entities and this was reinforced with the case that followed.

B. UBS

In May of 2008, the US arrested Bradley Birkenfeld, a former UBS private banker on charges that he helped U.S. taxpayers evade U.S. tax through the use of offshore

accounts (Harvey 2011, 476) and conspired with Mario Staggli, an executive and part owner (Levin 2008, 2) at a trust company in Liechtenstein (Browning May 14, 2008). Specifically, he was charged for working with Staggli to aid Igor Olenicoff to defraud the US of \$7.2 million in taxes on \$200 million in offshore accounts (Levin 2008, 9). It was Birkenfeld's testimony in a sworn deposition before the permanent Subcommittee of Investigations within the Committee on Homeland Security and Governmental Affairs (Levin 2008, 9) that was the foundation of the investigation into UBS and their wealthy American clients and it was the first time the US pierced a hole in the curtain of secrecy surrounding Swiss banking (Browning June 20, 2008). It was the result of the US actively pursuing foreign nationals for their actions in aiding US citizens evade their tax burden.

Reportedly, Birkenfeld came forward under the IRS's whistleblower program which allows for informants to earn monetary awards for willingly providing new information to the IRS after a trip to the US in 2007 and had been disclosing information to the IRS for many months (Harvey 2011, 476), but was unable to escape prosecution himself. Even though he also operated under the whistleblower program, Birkenfeld still subsequently plead guilty in June 2008, a month after his arrest. Interestingly, in September 2012, after serving two and a half years in prison, Birkenfeld was awarded \$104 million under the IRS whistleblower program. The whistleblower program refers to the IRS proceeding in taking action against a taxpayer for tax underpayment or fraud when the amount in dispute exceeds \$2 million for a corporate entity. based on information from an individual. The whistleblower may receive between 15% and 30% of the collected proceeds. The amount may be reduced if the individual was involved in

any of the actions in relation to the underpayment of tax (26 U.S.C. § 7623(b)) (Lunder March 27, 2014).

The Department of Justice (DOJ) revealed that UBS helped over, “52,000 Americans hide billions of dollars of untaxed assets in secret Swiss accounts between 2000 and 2007”. According to settlement documents, they would often use shell financial entities to hide the money (Jucca 2010) by creating fictitious trusts and bogus corporations to conceal the ownership and control of offshore assets (Browning May 14, 2008). Throughout the DOJ’s investigation, they discovered that UBS would structure their foreign accounts to avoid Qualified Intermediary (QI) reporting under the then-enacted foreign tax rules (Harvey 2011, 477). Under the QI requirements, an institution like LGT or UBS that agreed to report and withhold U.S. taxes in aggregate in return for being freed of the legal obligation to disclose the names of their non-U.S. clients (Levin 2008, 4). However, none of the required 1099 forms for these 19,000 plus accounts were ever filed since UBS took to recognizing them as outside their QI reporting obligations or structured the accounts so they would be outside the requirements (Levin 2008, 9).

As Birkenfeld’s testimony revealed, the bankers would even use all sorts of spy-like techniques to avoid U.S. detection (Harvey 2011, 476) With LGT, the bankers and the clients would use code words to confirm their identities in their communications (Levin 2008, 4). With UBS, it went beyond that to the extent of stashing watches, jewelry and artwork that they had bought with money hidden offshore in safe deposit boxes in Switzerland (Browning June 20, 2008). Birkenfeld testified to he and his colleagues taking trips “to pitch tax plans that were intended to conceal American bank clients’ ownership of accounts in a Swiss bank” (Browning May 14, 2008). UBS would advised

their bankers traveling to the United States to tell the customs officials that the visit purpose was for pleasure, not business. Moreover, the bank urged clients to destroy banking records to conceal their offshore accounts and to use Swiss credit cards so the Internal Revenue Service could not track their purchases (Browning June 20, 2008). UBS maintained an estimated 20,000 accounts worth an estimated 18.2 billion francs or \$17.9 billion, only 1,000 of which are declared (Levin 2008, 9). It was a lucrative business for them since based on their October 2005 data, 180 billion francs out of about 202.1 billion francs, about 90 percent of their year-to-date revenues, were from undeclared accounts. From Birkenfeld's signed statement, he affirmed in 2008, the undeclared business earned UBS approximately \$200 million per year (Levin 2008, 10).

For their tax evasion infractions, the DOJ pursued UBS on two fronts (Harvey 2011, 478): 1) civil John Doe summons and 2) tax evasion and securities violations. On June 30, 2008 when the IRS filed a John Doe summons with the U.S. District Court for the Southern District of Florida. This summon specifically requested for the bank to disclose all its U.S. customers potentially avoiding US taxes to the IRS (Harvey 2011, 477). One day later, the court approved the serving of the summons, but UBS refused to comply. Their argument was that under the Swiss bank secrecy laws, the bank was not allowed to disclose customer information (Harvey 2011, 477). More specifically, under Article 47 of the Swiss Federal Act on Banks and Savings Banks and Article 43 of the Federal Act on Stock Exchanges and Securities Trading, "Swiss financial entities generally may not divulge client information to third parties with any violations of the [secrecy] law carrying strict criminal penalties and significant fines. The only exception is if bank account information is needed in connection with a criminal proceeding"

(Nelson 2012, 401). Even then, since tax evasion is not regarded as a crime under Swiss law. Switzerland only recognizes tax fraud and releases information to authorities "when documents are forged or falsified, or when there is a scheme of lies to deceive tax authorities" (Nelson 2012, 401). It must get to the point where the client engages in "fraudulent activities such as setting up accounts with shell companies that lack any real business substance" (Mollenkamp 2009). Switzerland's laws fostered the necessary characteristics for a tax haven and the US wanted to use UBS as a model case deterring tax evasion.

Therefore, a few months later, on Oct 17, 2008, top executives from UBS and Swiss regulators went to New York for a closed door meeting with U.S. officials with a simple action plan: admit guilt, settle the case and move on. However, the executives were wrong to think that they would be able to easily avoid civil or criminal repercussions for their actions this time around. The team of officials was already conducting a wide ranging tax fraud investigation that centered on the bank. This team included Kevin Downing, the U.S. Department of Justice Tax Division Attorney who dropped an unexpected condition on UBS. He wanted the bank to disclose names of U.S. tax evaders as a part of the settlement (Jucca 2010) and requested for 52,000 client names. 7,000 out of the 52,000 accounts were tied to offshore companies and trusts, and therefore, more susceptible to fraud while at least another 17,000 accounts are owned by individuals and are less risky (Mollenkamp 2009). Chief Executive Oswald Gruebel, who took over in February of 2009, said the IRS's demand for information "puts UBS in an untenable position, caught between the laws of two sovereign nations" (Mollenkamp 2009). Finally, through months of negotiations, UBS finally agreed to pay a \$780 million

fine in 2009 (Jucca 2010) and did disclose approximately 4,450 US customers (Harvey 2011, 479) out of the 52,000 requested (Harvey 2011, 478). UBS was able to defer prosecution with a deferred prosecution agreement (DPA) on its criminal charges.

The success of the UBS case was tainted by the willingness of the Justice Department and IRS to consider a settlement. Some banks and other FFIs see it as “a retreat from the tough stance the two agencies have taken toward offshore tax evasion. It is as if they have taken a step back from the aggressive stance they took in October [2008]” (Mollenkamp 2009). When the purpose of their pursuit of the UBS case is 1) deterrence and 2) information gathering to hold the bank accountable, the agencies must be counted on to follow through. If a FFI believes that their lack of reporting or continuation in the solicitation of US citizens seeking a tax haven is worth the monetary penalties, they will continue to aid their clients for the sake of their profit margin. On the other hand, William M. Sharp Sr., an international tax lawyer in Tampa, Florida., a representative for UBS clients, said, “the IRS to a certain extent already had won the fight with Swiss banks, because they're now cutting back on the business they do with U.S. clients” (Mollenkamp 2009). Over 43,000 clients (McKenzie 2014) have been taking advantage of the Offshore Voluntary Compliance Initiative that began in March of 2009 (Harvey 2011, 479) to reach voluntary disclosure settlements with the IRS (Mollenkamp 2009).

Overall, the US government and the IRS gained some of the knowledge they were fishing for when UBS turned over 4700 names of its American depositors (McKenzie 2014). They gained leverage over the Swiss banks, ripping a hole in the curtain of secrecy. More than 300 Swiss banks were given the option by the US government to seek

non-prosecution agreements before December 31, 2013 if they had any reason to believe they violated tax laws. The initiative requires participants to 1) disclose how they helped Americans hide assets, 2) hand over data on undeclared accounts, and 3) pay penalties. Since 106 of the banks sought to join the initiative, thousands of Americans with undisclosed foreign accounts may face inquiries by IRS agents (McKenzie 2014). To not be prosecuted, the banks do not have a free pass. They must also pay 20 percent of the value of the accounts that were not disclosed to the IRS on August 2008 and 30 percent for any accounts opened between then and February 2009 and then 50 percent for accounts opened since then (McKenzie 2014). The banks were to be penalized for pursuing more clients even as they were aware of the prosecution with UBS. There was some relief granted to the bank in the form of a reduction to penalties for each American who applies to the Offshore Voluntary Disclosure Initiative before his or her name is disclosed to the IRS (McKenzie 2014).

The US did not leave the Swiss banks alone after the UBS case and in fact, the US government's success with UBS has left Swiss banking law "as a shadow of its former self" (Wood February 4, 2012). UBS was just the tip of the iceberg for next, the government targeted Credit Suisse then Wegelin & Co.. Specifically, Wegelin was a 270 year old bank that was put out of business in 2013 when the bank admitted to helping American tax cheats hide \$1.2 billion. Amazingly, the bank only had branches in Switzerland and stood by its claim that it was bound *only* by Swiss banking laws. In the end, those characteristics were not enough and the bank became the first foreign bank to plead guilty and pay fines that totaled about \$74 million (\$20 million of restitution to the

IRS, \$22 million fine, \$15.8 million for fees earned, and other fees) (Wood January 3, 2013).

The UBS and LGT cases set a precedent for the US government's future prosecution of other FFIs and set the tone for the DOJ as well as the IRS in their pursuit of tax evaders. Their desire to hold individual tax evaders accountable manifested itself in a variety of tools that the departments utilize and in the newly developed information collection strategy: FATCA.

III. Tax Evasion Prevention Approaches: Past and Present

In order to understand the current tax law used to monitor foreign accounts held by US citizens, one must acknowledge past solutions and other countries' laws addressing the same issue of tax evasion. Therefore, an important question to ask is what has worked in the past and what the US government can continue to implement. There are many methods the US government is currently using to bring tax evaders in. FATCA was to close the loopholes in the other tools, improving upon the old tactics. First, let's look at multinational approaches and then analyze the tools the US uses to see how those tools were not enough.

A. Multilateral Approaches

Various organizations at the multinational level have taken on the challenge to combat tax evasion. One example is the the Organization for Economic Cooperation and Development's (OECD) attempt at a multilateral initiative (Ralston 2010, 874). Unfortunately, it only resulted in developing a definition for tax havens that resulted in a list that fit the criteria and met the standards. This initiative gave more structure to the issue of countries supporting citizens evading their taxes, but lacked an enforcement mechanism that would encourage those countries to discard their tax haven status.

Another multilateral initiative is the European Union (EU) Savings Directive which, in fact, has the same aim as FATCA, collecting information on foreign accounts held by their country's citizens. The difference lies in how and what information is collected. Personal identifying information is not passed between the EU countries. It is a simpler regime where account holders can choose to disclose to their home financial institutions, and if they do not, the financial institution withholds income tax at the

applicable treaty rate and then pays the tax to the home country (Michel 2011, 712). Paying agents in each country levy “a withholding tax on cross-border payments and remit a portion of it to the appropriate country based on the beneficial owner's citizenship without revealing any information about the owner's identity” (Nelson 2014, 421). More simply, countries put aside taxes for another country in the EU with the help of financial institutions without revealing the identity of the specific taxpayer. Governments can make the modifications to their domestic laws that are necessary for compliance (Nelson 2014, 421) without implementing a pass-thru provision (Nelson 2014, 422) like FATCA. The EU has created a system that attempts to resolve the problems of having either only a full information reporting model or an anonymous withholding model for tax administration (Nelson 2014, 421).

B. Unilateral Approaches by the US

For the US specifically, there are tools in the government’s toolbox created to exchange financial information with other countries with the ultimate goal of limiting or even stopping tax evasion and tracking down tax evaders. The tools are meant to foster communication amongst countries in their tax investigations. Nevertheless, the tools are not enough and in more recent years, with the problem unresolved, in combination with the LGT and UBS scandals, contributed to the creation of FATCA.

1. TIEA (Tax Information Exchange Agreements)

Tax information exchange agreements (TIEAs) were developed by the OECD Global Forum Working Group on Effective Exchange of Information made up of representatives from OECD Member countries and delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus, Isle of Man, Malta, Mauritius, the Netherlands

Antilles, the Seychelles and San Marino (OECD April 2002). The agreements were created to exchange information and thereby promote international cooperation in tax matters. The predecessor to TIEAs was undertaken by the OECD in its 1998 OECD Report titled, “Harmful Tax Competition: An Emerging Global Issue” (OECD April 2002). The lack of efficiency in information exchange leads to loopholes for harmful tax practices to take place. The model agreement first released in April 2002 is not meant to serve as a binding instrument but instead contains two models. Agreements are then modelled off of the base agreement which includes both a multilateral instrument and a model for bilateral treaties or agreements. The multilateral instrument component is not the tradition multilateral agreement. Instead, it provides the basis for an integrated bundle of bilateral treaties with countries being able to choose which countries and on what terms they will be bound to (OECD April 2002). The bilateral version is a model for bilateral information exchange agreements. The agreements do not require a country to go against its laws by providing any information not generally available under its laws or that would violate trade secrets or public policy (Lunder March 27, 2014).

Many countries have established TIEAs. For example, the United States has such agreements with Antigua and Barbuda (2000), the Cayman Islands (2001), the Bahamas (2002), the British Virgin Islands (2002), the Netherlands Antilles (2002), Guernsey (2002), the Isle of Man (2002), Jersey (2002), Aruba (2003), Liechtenstein (2008), Monaco (2009), and Panama (2010) (OECD 2015). Generally, they are used when the countries involved in the exchange of taxpayer information do not already have a comprehensive bilateral income tax treaty containing an information exchange provision. Having these agreements allows for countries to cooperate and to elicit information and

other assistance from one another to aid in the enforcement of the specific country's tax laws (Heiberg 2012, 1693). Nevertheless, TIEAs are limited when domestic laws restrict information exchange or the other country is unable to obtain the information sought (Lunder March 27, 2014). They are often useless in the face of secrecy and privacy laws. Therefore, the US had to create other tools to gather information.

2. Bilateral Tax Treaties

The next level of agreement between countries in regards to tax collection is bilateral tax treaties, which are "limited to information that is legally obtainable in the normal course of administration of the requested country and does not include trade secrets" (Heiberg 2012, 1693). Like TIEAs, the limitation prevents the country requesting information from accessing information protected by banking secrecy rules, like those in Switzerland, thereby excusing the country from releasing pertinent information to the country seeking to track down their tax evaders. In October of 2008, the UBS executives walked into the meeting in New York with the US DOJ Tax Division and assumed that they could use these provisions to their advantage. Little did they know, the testimony of a UBS banker under the whistleblower clauses and the evidence collected since were enough for the US government to target the Swiss bank more specifically.

3. John Doe Summons

One of the tools that the US DOJ used was John Doe summons. They are unilateral mandates which request the release of information on an unidentified taxpayer or a group of taxpayers. The summons can only be served after approval by a Federal court and then issued by a high ranking executive specially authorized to do so (IRS November 22, 2011). The IRS can only summon information when it can establish that (1)

the summons relates to a particular person or ascertainable class; (2) a reasonable basis exists for issuing the summons (Heiberg 2012, 1696); and (3) the information is not readily available or accessible (IRS November 22, 2011). The IRS must have sufficiently developed their research on the project of identifying the specific tax compliance problem in order to seek court authorization. This is because John Doe summons cannot be used to conduct a “fishing expedition” (IRS November 22, 2011). Enforcement issues can arise when a foreign entity holds the information (Heiberg 2012, 1697) like they did in the UBS case, but recent cases have expanded the power of the summons. Intermediaries can now be compelled to release record identifying US taxpayers who has used the intermediaries to aid in their alleged tax evasion activities. That places a lot of power in the hands of the IRS that the IRS must be aware of whenever it serves any John Doe summons (Bonano, Casas, and Kinser April 29, 2015).

4. Title 31 Subpoenas

Under a Title 31 Summons, FinCEN Form 113, of the Bank Secrecy Act enacted to safeguard against crimes such as terrorist financing, money laundering and other illicit activities, a financial institution, an officer or employee of a financial institution (including former employees), and any custodian of records or reports are required under the Bank Secrecy Act or Title 31 CFR Chapter X. This means a taxpayer can be compelled to turn over bank account details and to produce records and documents for the purposes of an investigation. It may be issued for opening books and records or subpoenaing witnesses (IRS June 11, 2015). When subpoenaed, the taxpayer is given a choice: disclose potentially self-incriminating evidence or be found in contempt of the court and subject to civil or criminal penalties which could include jail time (Heiberg

2012, 1697). Again, like John Doe Summons, the subpoenas can only be used under particular circumstances and must be granted by a judge. The particular circumstances are due to the limitations where a Title 31 summons cannot be used as a tool in a criminal investigation. However, if there is evidence of a crime discovered during the Title 31 summons, then those pieces of evidence can be used for criminal prosecution and litigation purposes. Moreover, the books are not opened without notice. The customer must be given the opportunity for filing of a motion to challenge the summons of his or her financial records because the information is protected under the the Right to Financial Privacy Act (Title 12 USC §§ 3401–3422) (IRS June 11, 2015).

5. Offshore Voluntary Disclosure Program/Compliance Initiative

The Offshore Voluntary Disclosure Program was first introduced in 2003, offering taxpayers with undisclosed income from offshore accounts an opportunity to come clean with their most up-to-date tax returns (IRS December 22, 2014). A voluntary disclosure specifically occurs when the communication is truthful, timely, complete, and the taxpayer shows a genuine willingness to cooperate and make good on his or her tax liability, interest, and any other penalties applicable (IRS August 18, 2012). A taxpayer can disclose through a letter from an attorney which includes the complete and accurate amended returns, offering to pay the tax, interest, and any penalties determined by the IRS to be applicable in full and is received timely. It is timely when the IRS has yet to commence an examination or investigation of the taxpayer or notified the taxpayer of its intention to do so (IRS August 18, 2012).

Taxpayers must provide the documents required by FAQ 25; be cooperative throughout the process; pay a 20 percent accuracy-related penalties under IRC § 6662(a)

on the full amount of your offshore-related underpayments of tax for all years; pay failure-to-file penalties under IRC § 6651(a)(1) and § 6651(a)(2), if applicable; pay a miscellaneous Title 26 offshore penalty equal to 27.5 percent (or 50 percent if related to circumstances described in FAQ 7.2) of the highest aggregate value of OVDP assets (see FAQ 35) during the voluntary disclosure period; submit payment of any Title 26 tax liabilities for years included in the offshore disclosure period, applicable interest, an offshore penalty, accuracy-related penalties for offshore-related underpayments, and the failure-to-file and failure-to-pay penalties; execute a Closing Agreement on Final Determination Covering Specific Matters, Form 906; and cooperate with IRS and DOJ by providing information on FFIs who helped them through the process of establishing and/or maintaining an offshore arrangement. If the taxpayer is unable to make the payment, the taxpayer must make good faith arrangements with the IRS to pay the money back in full (see FAQ 20) (IRS July 15, 2015).

One may wonder why a taxpayer would choose to voluntarily disclose their yet-to-be-discovered foreign accounts, but after the UBS and LGT scandals, the IRS has become extra vigilant along with an extra tool at their disposal, FATCA. The likelihood of discovery could be weighed into their decision to disclose. A voluntary disclosure is considered along with many other factors in an investigation in deciding if criminal prosecution is the proper course of action and does not automatically guarantee immunity from prosecution. It could result in prosecution not being recommended (IRS August 18, 2012) for any issue relating to tax noncompliance or the failure to file Report of Foreign Bank and Financial Accounts (FBAR reported on FinCEN Form 114). Voluntary

disclosures enable noncompliant taxpayers to pay their tax liabilities and minimize chances of criminal prosecution (IRS December 22, 2014).

In 2003, the results were reassuring as it resulted in approximately 1,300 individuals identifying themselves to the IRS with approximately \$75 million collected through July 2003 (Harvey 2011, 473). It was successful enough that the IRS decided to utilize the program again (Harvey 2011, 479) starting in March 23, 2009 and ending in October 15, 2009 (IRS December 22, 2014). In this instance, the success of the program was apparent when more than 14,700 U.S. taxpayers admitted to previously unreported offshore accounts. One reason for the program's success could be due to fear that the information would be released anyway at the price of more civil penalties and possible criminal prosecution after UBS's agreement to disclose 4,450 of their US taxpayer accounts (Harvey 2011, 479). UBS's US clients were eager to avoid any criminal charges after their account information was revealed and chose to take advantage of the limited amnesty period to come forward and acknowledge their tax evasion (Mollenkamp 2009). Then there was the 2011 Offshore Voluntary Disclosure Initiative (OVDI), which ran from February 8, 2011 through September 9, 2011 (IRS December 22, 2014). The program in 2009 and the initiative in 2011 addressed the civil ramifications of a taxpayer's voluntary disclosure. It defined the number of tax years covered and setting the civil penalties that will apply (IRS December 22, 2014). The OVDPs have uniform penalty structures and have enabled the IRS to resolve a very large number of cases without examination (IRS July 15, 2015)

The current Offshore Shore Disclosure Program (OVDP) which began in January 2012 was terminated (McKenzie 2014), but it was decided to be continued with modified

terms and later to be discontinued at the IRS's discretion (IRS July 15, 2015). The terms for what will be now known as the 2014 OVDP serve as a counterpart to Criminal Investigation's Voluntary Disclosure Practice (IRS December 22, 2014) and contain the same objectives as 2009 and 2011 OVDPs (IRS July 15, 2015), but with slight modifications effective on July 1, 2014. There is a higher penalty rate than the previous programs (IRS December 22, 2014) at a 50% offshore penalty if "either a foreign financial institution at which the taxpayer has or had an account or a facilitator who helped the taxpayer establish or maintain an offshore arrangement has been publicly identified as being under investigation or as cooperating with a government investigation" (IRS July 15, 2015). This is in response to the increasing number of banks either being investigated or cooperating with the IRS and the DOJ. Because more than 30,000 U.S. taxpayers' foreign accounts have been disclosed to the IRS over the last few years (Wood January 3, 2013), taxpayers are more inclined to disclose. For those whose names have yet to be disclosed to the IRS, they apply to the program and those accepted to OVDP must amend their last eight years of income tax returns, pay any additional taxes, interest and penalties, and file eight years of special reports for foreign accounts (FBARs). The taxpayer can file for a softer penalty, but if the appeal is not persuasive, the IRS reserves the right to assert even higher penalties (McKenzie 2014). The fear of penalties has encouraged people to disclose, but it is yet to be determined whether or not the punishments serve as a deterrent to tax evasion in the first place.

6. Qualified Intermediaries (QI) System

The predecessor of FATCA, the Qualified Intermediary (QI) system, was introduced in 2001 in order to incentivize foreign entities to cooperate with the US

(Harvey 2011, 475) and “to simplify withholding and reporting obligations for payments of income ... made to an account holder through one or more foreign intermediaries” (Lunder March 26, 2014). A “Qualified Intermediary” (QI) enters into a QI Agreement with the IRS (Rev. Proc. 2000-12, 2000-4 I.R.B. 387) and is governed by the Agreement (IRS January 27, 2015). Possible QIs include FFIs or foreign clearing organization, a foreign corporation on paper to claim treaty benefits for shareholders, or other entities accepted by the IRS on a case-by-case basis (IRS January 27, 2015). It requires QIs to report US source income of US customers (Harvey 2011, 475) and provide information about US customers, including “non-customer-specific reporting and the ability to claim more easily applicable exemptions or lower withholding taxes” (Heiberg 2012, 1694), and submit to audits (Lunder March 27. 2014). The system was meant to solve two problems: (1) give the US the ability to collect information on taxpayers investing in US source assets in a foreign financial institution (FFI) and (2) obtain the adequate documentation from FFIs for US financial institutions, generally banks, to properly document a reduction of customers’ US withholding tax rate on payments to foreign customers of such FFIs. Payments include all those that are received by the QI in a QI designated account and are reportable amounts or reportable payments. Reportable amounts included US source dividends, interest, rents, royalties and other fixed or determinable income (IRS January 27, 2015). The QI agrees to assume some documentation and withholding responsibilities to gain simplified reporting requirement for foreign account holders and the power to choose whether or not to disclose account holder information to a possible competing withholding agent (IRS January 27, 2015).

Overall, the QI system was meant to solve the lack of information provided and to close the loopholes. It required QI participants to file 1099 Forms for all U.S. persons who are clients and for accounts beneficially owned by U.S. persons. This was regardless of whether or not the client has U.S. securities or receives U.S. source income and who holds the account. It could have been in the name of a foreign corporation, trust, foundation, or other types of entities and it would still have to file. Beneficial owners would have to be identified by applying QI reporting obligations with their Know-Your-Customer (KYC) procedures to close the QI-KYC Gap (Harvey 2011, 478) with the QI obtaining documentary evidence in the form of a W-9. KYC procedures in a particular country and company must be approved by the IRS before an institution may be designated as a QI (IRS January 27, 2015).

The QI system was based upon the hope that FFIs would provide their information and that customers would provide adequate documentation. Many loopholes existed because before 2001, the FFIs were not required to report to the IRS (Harvey 2011, 474). Many U.S. taxpayers that had previously invested in U.S. source assets through a FFI just converted those assets to foreign source assets by contributing their U.S. source assets to a foreign shell entity (or entities) and were then able to continue to avoid reporting to the IRS. Moreover, it was on an honor system which allowed FFIs to designate which accounts were included in the QI system (Harvey 2011, 475). Many tax evaders avoid investing in a foreign mutual fund or a private equity fund that was treated as a corporation for US tax purposes and only invest in those that did not self identify themselves as a QI (Harvey 2011, 476). This created a disincentive for FFIs to categorize themselves as QIs since it would limit the range of assets they could diversify their

portfolio and in a way, prevented them from investing in one of the most stable and profitable markets: the US. Although, ideally, legislators hoped that a substantial number of all reputable FFIs would substantially become QIs (Harvey 2011, 482), this did not happen due to the cumbersome requirements for companies to comply.

C. Present Solution: FATCA- Foreign Account Tax Compliance Act

The most recent tax evasion prevention law is the Foreign Account Tax Compliance Act. At the front and center of the discussions during the drafting of FATCA in 2009 and 2010 before FATCA was signed into law was a plan to close all the loopholes discovered in the implementation of the 2001 QI system (Harvey 2011, 476) and for those who evade U.S. taxation to be “identified, brought to justice, and prevented from repeating such evasion in the future” (Nelson 2012, 412). Before, citizens could either provide to the US government their account information voluntarily under the Offshore Voluntary Compliance Initiative or Congress would be provided with the same information with the FFIs acting as intermediaries.

The legislators wanted to ensure that there would be no loopholes to exploit as with the QI system. QIs would now be required to report both U.S. and foreign source income for U.S. taxpayers, determine if U.S. taxpayers are the beneficial owners of foreign shell entities, and review all customer accounts within the affiliated group to identify any U.S. taxpayers. Goals also include increasing the protection on the US tax base, fighting tax evasion, strengthening the transparency of international financial flows (Brodzka 14), tracking down tax evaders (Heiberg 2012, 1688), and preventing money laundering which finances terrorism (Graffy 2015). The spirit of the FATCA’s text as affirmed by the Congressional Committee on Taxation’s Joint Statement is "to achieve

reporting, not to collect withholding tax" (Nelson 2012, 416). The overall design of FATCA was meant to close the loopholes and to increase the government's access to information by opening up channels for reporting for U.S. citizens and residents with foreign assets.

FATCA applies to what are known as specified individuals (SIs) which includes US . citizens and resident aliens, nonresident aliens who elect for resident alien treatment on a joint tax return, and nonresident aliens who are residents of Puerto Rico, Guam, American Samoa, the Northern Mariana Islands, or the U.S. Virgin Islands (Lunder March 27, 2014). Under FATCA, foreign accounts must be reported under Title 31 on the FinCen Form 114 (Report of Foreign Bank and Financial Accounts or FBAR) if the cumulative value of the accounts is over \$10,000 at any point during the year. The form must be filed electronically and received by June 30 with no possible deadline extension (Lunder March 27, 2014).

With more information, the IRS has higher hopes of detecting and deterring offshore tax evasion and of solving the second prong of the problem: the difficulty in identifying individual tax evasion perpetrators. The IRS could increase its rate of successful prosecutions, putting more money back into the US Treasury. In order for tax evasion to be reduced, the government must target the core of the problem: information asymmetry (Heiberg 2012, 1692). This asymmetry exists because the government must rely on taxpayer- provided information, but with the most expansive withholding scheme that has ever existed (Heiberg 2012, 1701), the US government hoped to incentivize foreign governments and FFIs into compliance by covering US owned foreign entities (any foreign entity with at least one substantial US owner) and specified US persons, not

including corporations whose stocks trade regularly on an established securities market, individual retirement plans, and certain investment vehicles and trusts, etc. (Lunder March 27, 2014).

By adding more reporting requirements and incentives, the law gives the Treasury access to more information from the FFIs than ever before. The incentive to encourage reporting in FATCA is a fine, the imposition of “a thirty percent withholding tax on the gross amount of certain U.S.-source payments made to nonparticipating FFIs, noncompliant nonfinancial foreign entities (NFFE), and recalcitrant account holders.” In fact, FATCA's authors, Representative Charlie Rangel and Senator Max Baucus described the bill as offering foreign banks an ultimatum, “If you wish to access our capital markets, you have to report on U.S. account holders” (Nelson 2012, 395). The withholding tax was created with the intent to cut companies off from access to critical U.S. financial markets if they didn’t pass along American data (Wood 2014). A withholdable payment includes “interest [sic], dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, and other fixed or determinable annual or periodical gains, profits, and income, if such payment is from U.S. sources; and the gross proceeds from the sale or other disposition of any property of a type that can produce interest or dividends from U.S. sources; but does not include income effectively connected with a U.S. trade or business” (Lunder March 27, 2014). Like the American Bar Association said, FATCA's withholding provisions is "a club to force FFIs and others to disclose the identities of American taxpayers who bank and conduct other business overseas" (Nelson 2012, 395).

FATCA also has a passthrough provision where a P-FFI must withhold on other payments the extent attributable to a withholdable payment (Harvey 2011, 484). The provision effectively re-characterizes a portion of the foreign source payment as a US source payment instead. Some find that it goes beyond the US's prerogative where the institution would now be re-sourcing foreign source income to the US when there may be no tax abuse at all (Harvey 2011, 485).

Moreover, FATCA also adds more penalties. Civil penalties go up to \$60,000, while criminal penalties are from \$250,000 to the maximum of five years in jail for individuals. A convicted tax evader must also pay a 40 percent understatement penalty with respect to undisclosed foreign financial assets (or 75 percent in cases of fraud) (Snyder 2015, 597). Even the FFI's employees are not safe for they are held responsible for the portion of the FFI's FATCA compliance they were assigned and can also be held criminally responsible if he or she intentionally makes false compliance certifications (Snyder 2015, 597). FATCA is trying to encompass every possibility that a tax evader could use to hide their assets and hopes to encourage taxpayer compliance and payment with a "disincentive for noncompliance" (Behrens 2013, 217) and attempts to hold individual tax evaders and the bankers who establish and maintain their accounts accountable.

IV. The Controversy: Is FATCA Working?

FATCA was for the purpose of tax information collection that would lead to increased prosecution of tax evaders and hopefully, a deterrent effect. Included with the HIRE act that included tax breaks to encourage businesses to hire more, FATCA was the addition to the act that was to pay for the tax breaks by, “making fat cats hiding money in their overseas accounts pay their ‘fair share’” (McGurn July 16, 2012).

Like with many other tax laws, FATCA was created with good intentions, but unfortunately, since FATCA has been in effect on July 1, 2014. it has created more problems than it has solved. Since the 2008 global financial crisis, the fragile world economy has plenty of financial and economic related problems to resolve as is without adding the imposition of substantial tax reporting requirements by the US on the global economy (Behrens 2013, 211). Moreover, the HIRE Act’s tax breaks had done little to reduce unemployment. Unfortunately, the overall legislation's penalties including FATCA compliance costs and etc. may cause the loss of more US jobs than all the call centers in India combined (McGurn July 16, 2012).

FATCA’s hope was to increase communication and exchange of foreign tax account data that would lead to the accomplishment of the government’s secondary goals: increasing accountability by opening up for investigations that lead to the prosecution of tax evaders and increasing tax revenue to bolster the US Treasury. The 30 percent withholding tax on revenues generated in the US is a crushing penalty for today’s global financial markets (Haugen May 13, 2015) and the failure to properly report information could result in penalties in excess of the unreported foreign assets (Koskinen et al. 2013, 238). FATCA brings with it an increase in the burden on US citizens living abroad, an

increase in compliance costs for companies abroad, an increase in IRS costs, and a perception of the US imposing its undue influence on other countries. It really has been a, “bipartisan lesson in the law of unintended consequences” (Haugen May 13, 2015).

A. The Burden on U.S. Citizens

If one looks at the number of US citizens that live abroad and must report their worldwide income, there is a surprisingly large constituency of US citizens living abroad. If aggregated together as one state, the group would rank as the 12th largest state based on population size after New Jersey with 8.7 million U.S. citizens. They are a powerful group. In fact, the overseas vote has swung elections in the past (Graffy October 10, 2015). However, US citizens are now considered a liability by many institutions who no longer find their American clients to be worth the burden and potential legal penalties. FFIs such as Deutsche Bank, HSBC, and ING have reportedly been closing US citizens’ foreign accounts in response to FATCA’s “onerous U.S. Regulations” (Koskinen et al. 2013, 238). One could even say that FFIs are, “abandoning [US citizens] in droves (Graffy 2015) since they do not want to work with US citizens' investments anymore (Democrats Abroad 2014). On the other hand, US banks also do not want to deal with US citizens abroad. According to a Democrat abroad’s testimonial, he is, “blocked on both sides -- from the US institutions for being abroad and from the local institutions for being an American. [He is] still young but feel unable to plan for [his] retirement without fear of getting caught on one side or the other and therefore penalized” (Democrats Abroad 2014, 6). Another person describes a similar situation where they can neither invest in their country of residence nor the US even though he or she faithfully meets his or her tax obligations each and every year (Democrats Abroad 2014, 11).

There are many examples of the sacrifices made to accomplish a greater goal of catching the higher valued taxpayers. In a globalized economy, limiting access to financial accounts of any American citizens overseas puts US individuals and businesses at a distinct disadvantage competitively (Nelson 2012, 413). It hurts the US's international presence (Haugen May 13, 2015) as people decide to renounce their US citizenship or permanent residence rather than comply with the new tax laws (Koskinen et al. 2013, 238). Innocent honest citizens, Americans who are middle class, married, and moved overseas to be with a partner, for a job, or to retire have been the largest population to suffer from the negative impacts. The impacts of FATCA have been quantified in a study conducted by Democrats Abroad from June 18 to July 15, 2014 with 6,552 responses from US citizens from all 50 states and the District of Columbia (DC). Distribution of the survey was through the Democrats Abroad, the main arm of the Democratic party for American overseas, including promotion on the main site sites of other organizations catering to the same constituency and social networks (Democrats Abroad 2014, 3). Results were overwhelmingly negative since many feel that FATCA should really be targeting the citizens living in the US and storing their money in tax havens. Instead, the law has overreached and could be wasting their time and resources on pursuing individuals who are not the real culprits while those who are responsible live comfortably in the US (Democrats Abroad 2014, 13).

A couple had been living in Australia for many years when they received notice that their retail store chain's merchant banking account was canceled because, "FATCA reporting demands overwhelmed their bank's capabilities". Their business could not operate without banking and credit card capabilities (Haugen May 13, 2015). Another

testimonial described how someone's account was blocked and restored within two weeks. However, the weeks caused the person to miss monthly payments, resulting in a dock to his local credit (Democrats Abroad 2014, 5). These are specific examples of how middle class Americans abroad lose their bank accounts, home mortgages and even, their retirement savings due to exposure to debilitating taxes and penalties (Haugen May 13, 2015). One in six American have lost an account in a foreign bank or a brokerage house due to FATCA (Democrats Abroad 2014, 4) and two- thirds of the known closed accounts have been the essential accounts including ordinary checking, savings, and retirement accounts (Democrats Abroad 2014, 5). 68% of checking accounts had a closing balance less than \$10,000 and 58.9% of investment or brokerage, and 69.3% of retirement accounts had a value of less than \$50,000. Even opening accounts is a problem with 22.5% turned away for trying to open a savings or retirement account and 10% for attempting to open a checking account (Democrats Abroad 2014, 6). The data supports that the majority of those impacted are not the high income individuals who are often the tax evaders, but instead the middle class American living overseas who has been reporting their taxes faithfully to the IRS.

For any foreigner interacting with an American, they must now reflect on their financial future since homeownership, pensions, insurance, privacy and investments could be negatively affected by FATCA (Graffy 2015). An American and Swiss couple found out the hard way the impact the law could have after they discovered they would lose the morgage on their family's home after a more than 20 year marriage because of FATCA's reporting requirements (Haugen May 13, 2015).

No business will want to involve an American when his or her citizenship comes with a maze of rules, regulations, potential fines and criminal penalties. It has come down to some companies giving employees an ultimatum: give up your job or give up your citizenship (Graffy 2015). No person should be put into such a position due to a law that is meant to improve tax information exchange and reduce tax evasion. An American woman living in Sweden was restricted from entering a promising information technology partnership after the chief investor learned that an American on board would require opening the partnership's books to the IRS (McGurn July 16, 2012). An American man had a promising career in management with a French multinational corporation working specifically in Brazil, but instead was told that he would be passed over for promotion, effectively ending his career with the company. The position he would be promoted to, Country Manager, would give him signatory authority over the French company's local bank accounts, necessitating the opening of those accounts' books to the IRS. These are just two specific examples of American executives with foreign companies being refused a promotion because. "it puts the company in a vulnerable position" (McGurn July 16, 2012) since the law would require that all transactions on the company accounts, despite not being taxable in the US, be reported to the IRS (Haugen May 13, 2015). As long as FATCA continues to be in effect, middle class taxpayers will continue to lose financial accounts that are essential for daily life at possibly an accelerating rate.

Another impact on US citizens is the cost of both money and time to comply with the new regulations. The American Citizens Abroad group advocating for American citizens living overseas states that completing Form 8938 will add an extra three hours to

tax preparation .The added complexity of the reporting obligations necessitates professional help, adding to compliance costs. There is concern over the large population of tax filers who cannot afford the expense of a professional tax adviser. Moreover, the added costs are even if the taxpayer does not owe any additional US tax (Koskinen et al. 2013, 240). In actuality, a taxpayer can accumulate tens of thousands of dollars in fines even if he or she doesn't owe the IRS a dime in actual taxes (McGurn July 16, 2012).The tax filers who are law abiding citizens should not be punished for not being able to afford the help they need in order to comply (Koskinen et al. 2013, 240) , but in reality, are, “disproportionately likely to be subject to burdensome compliance initiatives and unnecessarily high penalties” (Koskinen et al. 2013, 241). This is because, “there is no differentiation in the penalty based on willfulness of the failure to file” (Lunder March 27, 2014). It creates a situation where the taxpayers who are filing are almost being penalized for being law-abiding citizens even though under the reporting regime before FATCA, the taxpayers who filed Form 8938 in 2012 were shown to be generally compliant with almost no returns showing any Tax Delinquent Investigation (TDI) or Tax Delinquent Account (TDA) activity (Koskinen et al. 2013, 240).

With citizens feeling the burden of the costs as well as the loss of their essential financial accounts, they have begun to renounce their US citizenship in desperation (Haugen May 13, 2015) in order to continue to, “benefit from life insurance, participate in company pension plans, and continue using local bank accounts” in their country of residence (Behrens 2013, 208). Renunciation of citizenship does come at a price. Individuals are still responsible for their current tax year tax liabilities and are still required to file back taxes and pay off any penalties owed. There is also an exit tax on

individuals with an annual income of about \$150,000 or more or a net worth of at least \$2 million (Heiberg 2012, 1703). Since FATCA came into effect fully in 2014, 3,417 renounced their citizenship, a 266% increase over 2012, before FATCA came fully into effect (Graffy 2015). Moreover, perhaps in anticipation of FATCA's onerous compliance requirements, 2,999 people renounced their citizenship (Democrats Abroad 2014, 13). There could be other factors that contribute to the increase, but there are a conceivably large number of people who decide to prioritize their livelihoods in their country of residence as opposed to maintaining their allegiance with the country they are currently citizens of.

US citizens living abroad essentially have been declared guilty of financial crimes unless they can prove otherwise (Graffy 2015). It is the opposite of what the US legal system should operate as. It cannot be an assumption of guilty presumed innocent. The operating assumption with Fatca is, "If you are working abroad, you must be a tax cheat" (McGurn July 16, 2012).

This is inaccurate and disruptive to the livelihoods of US citizens living overseas. Most of those who end up deciding to renounce their citizenship are faithful US citizens. Most are not wealthy tax evaders who would rather trade their passport to reduce their income tax liability. They are generally middle class Americans living abroad who fully comply with their US tax reporting responsibilities (Haugen May 13, 2015). Unfortunately, with FATCA, the innocent are being penalized under this system for the undiscovered culprits of tax evasion. FATCA has led to the increase in divestment from US citizens as assets.

B. The Burden on FFIs

When looking at the other half of financial transactions, companies have also taken on a large burden as well as to compliance because they are subject to FATCA if they have either US clients or hold US assets in any form. The law adds an additional layer of complexity to an already highly complex system of international taxation (Heiberg 2012, 1706) because of the requirement of FFIs to report US account holders to the IRS. After identification, FFIs withhold a 30% tax on payments or transfers to account holders who do not provide the necessary information including their name, address, and US taxpayer identification number (TIN). For any US-owned foreign entity, the name, address, and U.S. TIN of each substantial U.S. owner are required along with their account balance as of December 31, 2013 and account number. The same reporting requirements also apply to any private foreign corporation, business, or partnership in which a U.S. citizen is a ten percent or greater shareholder. Foreign business deals may be closed off to Americans since their involvement, all partnership and/or investment activities must be reported to the IRS (Behrens 2013, 226). This means exposing the underlying value and cash flows attributable to all the investors, whether they are U.S. citizens or not (Behrens 2013, 226) like what would have happened to the information technology partnership in one of the stories above.

To ensure due diligence and the avoidance of fines and/or legal penalties, FATCA requires every company with US citizens or assets involved to update and improve their information and reporting system (Brodzka 12). There are high compliance costs associated with buying new technology and hiring new employees to be responsible for the new workload (Heiberg 2012, 1704). Time spent to create a new information flow

system or update the current system is also a compliance cost. Anti-money laundering and know your customer (KYC) procedures must be clarified in conjunction with FATCA to ensure new customers are properly approved and documented with the necessary information to discern if they are American taxpayers (Brodzka 15). A FFI has responsibilities as well since if it fails to withhold the proper amount, the agent is personally liable for the uncollected funds if the funds are not collected or if the funds are over the appropriate amount, the FFI is subject to claims from their clients of the excess amount (Koskinen et al. 2013, 242). The FFIs, however, are poorly informed and there are few experts who are aware of the full extent and reach of FATCA (Democrats Abroad 2014, 5).

In 2012, KPMG, a multinational accounting firm, conducted a global survey of global and regional banks, insurance companies and various other financial institutions including global investment banks and broker/dealers, securities companies and transfer agents. The survey's purpose was to assess participants' (FFIs) awareness, attitudes and actions regarding FATCA. The data as of 2012 showed that the majority (57%) have completed or are undertaking an impact assessment. Most FFIs (68%) believed that FATCA would take between 6 and 18 months to implement. The next largest group at 23% predicted that it would require 18 months or more and not surprisingly, only 9% of FFIs think implementation could happen in less than six months. (Brodzka 16). Companies also prepared themselves for the compliance costs that FATCA would bring by allocating a certain amount for it. Based upon the same survey by KPMG, the median budget was approximately \$250,000 after taking into consideration the large disparities between budgets due to company size and client base. 53% of the survey participants allocated

less than \$250,000 to FATCA while the next largest group at 21% budgeted for \$1 to \$10 million. Some companies (4%) put aside up to \$100 million or more (Brodzka 17).

If one takes a look at the benefits and costs generated by FATCA, it becomes clear that FATCA generates about the same amount of revenues and expenses over the next ten years, if not less revenue. In 2014, implementation costs were estimated to be around \$500 to 1000 billion worldwide, while running costs were calculated to be about \$10-30 billion worldwide. The running costs will help to cover the IRS's hiring of nearly 800 new employees devoted to international enforcement. The world sees the changes and influence a globally empowered IRS can exert with FATCA (McGurn July 16, 2012). As more and more FFIs choose to comply and disclose, the US government obtains more information to use to pursue new targets (Snyder 2015, 597). The FFIs no longer have the comfort of the US government's finite resources protecting tax evaders and their bankers from prosecution (Snyder 2015, 597). FATCA could generate additional tax revenues of \$8.5 billion over the course of ten years with a global rate of return of FATCA of 1% (Brodzka 14). Another source, the Joint Committee on Taxation, has given an even lower estimate of \$8.714 billion over the same ten years. (Nelson 2012, 398). Even earlier in 2011, it was found that FATCA could cost financial institutions \$100 million even when one is only considering compliance costs according to James Broderick, the head of JP Morgan's European, Middle Eastern and African asset management business. Moreover, the Joint Committee on Taxation estimates that FATCA will bring in less than a billion dollars annually over the next decade (McGurn July 16, 2012). Ultimately, FATCA forces foreign institutions to bear the cost of tracking down US tax evaders (Heiberg 2012, 1705) because at the very core of the legislation is the assumption that other

countries, non-Americans, will spend, “time and substantial sums to help the United States enforce its own domestic law” (Nelson 2012, 399). Regardless of the well-intentioned purpose of the Act, FATCA has asked the global financial system to, “pay 100 USD for the US to get less than 1 USD” (Brodzka 14).

Because the act only drains revenues with the increase in costs, FFIs who comply may choose to shift compliance costs instead to U.S. investors. (Heiberg 2012, 1705). As a penalty rather than an assurance of payment of the taxpayer's liability, FATCA’s withholding rules will affect the American clients of FFIs and increase compliance costs for other business groups of the impacted FFIs” (Behrens 2013, 214). P-FFIs also must take into account the possibility of having transactions with non-compliant FFIs and guard against the potential liability of improper withholding. (Koskinen et al. 2013, 243). However, for businesses, the FFIs’ compliance costs will be deductible for US tax purposes and offset any increase in collections attributable to increased reporting of overseas financial assets as opposed to that for the individual taxpayer (Nelson 2012, 398). The actual aggregate amounts both companies and individual taxpayers will pay for compliance costs and penalty exposure burdens is difficult to estimate, but individual taxpayers more so (Koskinen et al. 2013, 243).

The costs of compliance are great for both individuals and businesses, but FFIs, in particular, are compelled to comply if they, “do not wish to find themselves on the margins of the global financial market” (Brodzka 20). Nevertheless, the US cannot operate under the assumption that the US investment market is so large and desirable that FFIs and investors cannot find another source of investment. Asian countries such as China and India are perfect examples of opportunities that will be exploited, leading to

the possibility of over forty percent of foreign funds being divested from the US” (Behrens 2013, 219). Because of FATCA, the US is left in a disadvantageous position. A thirty percent withholding tax on US source investments is a strong incentive for FFIs to direct their capital elsewhere. The legislators also came up with a passthrough provision which means that, “[t]o avoid the reach of FATCA, a nonparticipating FF1 must avoid holding not only U.S. assets but also financial interests in participating FFIs that hold U.S. financial assets or interests in other participating FFIs” (Nelson 2012, 397). As stated by Orrin G. Hatch, the chairman of the United States Senate Committee of Finance, “many companies have already decided that our current regime of worldwide taxation with absurdly high tax rates is simply too onerous and have opted to locate their tax domiciles in countries with lower rates and territorial tax systems” (Hatch 2015). To Ron Wyden, the ranking member of the same committee, the US tax system is, “an anti- competitive mess” (Wyden 2014) that is driving billions of investment dollars overseas. Tax evaders have found a big loophole in FATCA since FFIs can then choose to shift all investments away from the US, Even FATCA which was meant to close the loopholes is still plagued with the chronic disease of loopholes and inefficiency of the overall US tax code (Wyden 2014). Those FFIs would attract US citizens as hiding places for their undeclared income. FATCA cannot hold onto the FFIs without American investments and as a result, cannot capture the Americans who choose to hide their assets in those institutions. Thus, it is the start of a vicious cycle of divestment while tax evaders have another avenue, almost impossible to track method to avoid U.S. taxation (Nelson 2012, 414).

C. Legislative Overreach

Overall, one can describe FATCA as an US legislative overreach and imposition on the national sovereignty of other countries (Heiberg 2012, 1704). It is the epitome of a non-cooperative approach where FFIs are punished for not following US law. Some even say that the Treasury Department exceeded its authority by making intergovernmental agreements (IGAs), which require U.S. banks to divulge their clients' citizenship to foreign governments. FATCA is overpowering in many circumstances since any provision in a current tax treaty conflicting with FATCA is overridden with FATCA because "the law is superior if it is implemented after the treaty" (Heiberg 2012, 1703). FATCA currently can undermine policy decisions about other countries' domestic banking, data privacy, and tax administration regimes (Nelson 2012, 414). The IGAs are necessary bilateral or multilateral agreements in order for US law to bypass conflict-of-laws problems (Nelson 2012, 415). Realistically, there are potentially 190 different intergovernmental agreements that would need to be negotiated between the US and other governments to ensure global FATCA compliance (Behrens 2013, 216). The agreements are just an alternative for the implementation of FATCA. Under the IGA Model, FFIs in a FATCA partner country wouldn't be required to enter into a direct agreement with IRS even though they still are subject to the IRS registration requirement. As long as the FFI follows the agreement that the IRS has arranged with the FFI's country, it will be deemed to have complied with the FATCA requirements, meaning they are not be subject to withholding on payments received or the requirements related to recalcitrant account holders (Lunder March 27, 2014). Model 1 IGA is based on the joint statement from Germany, the United Kingdom, Spain, France and Italy otherwise known as the G5

where US account holders are to be reported by FFIs to local tax authorities, who then pass the information onto the US IRS under the existing information sharing arrangements. For Model 1 IGA specifically, FFIs are required to identify and report US accounts, otherwise known as US Reportable Accounts, annually, required that passive Non-Financial Foreign Entities (NFFEs) to also report substantial US owners or controlling persons or certify that there is no US owner involved. There is the same requirement of the withholding agent to withhold 30% of payments made to non-PFFIs and recalcitrant accounts and no withholding the 30% tax in respect of PFFIs (Karundia 2015, 162). The Model 2 IGA is different in that it is based on the joint statement with Japan and Switzerland where FFIs would report to IRS directly, and IRS can request authorities to provide information on accounts that refuse to provide their appropriate information to the FFI and the IRS. Similar agreements hold true in that the US now had the obligation to exchange information on accounts held in its financial institutions by the residents of FATCA partner countries (Karundia 2015, 163).

FATCA has put more than 100,000 (Snyder 2015, 597) FFIs in a position where they don't win. They have a choice of either facing financial sanctions in the US for violating their FATCA FFI agreement for complying with local laws, or legal sanctions in the local jurisdiction for complying with their FATCA FFI agreement (Nelson 2012, 400). For example, banks in the EU are bound by the EU Data Protection Directive which includes a ban on transmitting of sensitive personal information to the US (Brodzka 12). It is a battle between the countries who value and demand total disclosure like the US because they value transparency in financial relationships and those countries who, favor privacy and discretion such as Switzerland. FATCA, along with the policymakers who

drafted and signed it into law, does not take into account that there may be other justifications for other countries' banking practices beyond what the US sees at the facilitation of tax evasion by US citizens (Nelson 2012, 412).

Overall, FATCA has not lived up to its expectations and when unveiled, has shown that the IRS, FFIs, and individual taxpayers are not prepared to cope with the new procedural requirements from filling out the forms to sorting out the relevant, significant information. FATCA's revenues will barely outweigh its costs and the compliance issues for taxpayers and FFIs extend beyond money. It is often time and effort used up in unproductive data compilation as well as taxpayers' livelihoods damaged by the FATCA-promoted decisions made by financial institutions. The benefit is data collection, but the costs include the loss of American citizens that are among America's assets and the ruining of some people's lives. Is it worth it?

V. Conclusion: Implementation Issues and Suggestions for Improvement

Following the fall of the Swiss curtain of bank secrecy with UBS and LGT, the US expanded its power to allow it to penalize FFIs for not complying with US law. FATCA has come into full force after much delay. Even before FATCA was in effect, many tax and legal scholars were anticipating a variety of issues with the law. Unfortunately, the negative impacts have been significant on US citizens living abroad and the FFIs complying with the law while it is still unknown as to the contributory impact of FATCA on the IRS's tax information gathering and on the US Treasury. With the law still in its infancy, one has to acknowledge it as a work in progress. FATCA should have been implemented more carefully, but there are some changes that still can be made now. Moreover, FATCA cannot be a US unilateral action. It must be a global effort to be successful.

From a positive outlook, FATCA has encouraged more taxpayers to participate in the OCVD and as the IRS collects more information, they are able to untangle the web of tax evaders and tax evasion opportunities. Companies can approach FATCA compliance as an opportunity to streamline their organizational structure, to enhance processing efficiencies or realign the business model (Brodzka 21), the FFIs can turn a compliance nightmare into an efficient strategy. FATCA is also making banking transparent worldwide (Wood 2014) which carries even greater importance after the 2008 financial crisis.

There are current problems the IRS is facing with FATCA that could have been easily fixed. For example, the data platform, the International Compliance Management Model (ICMM), created by the IRS to compile the information from Form 8966,

surprisingly, is also in its infancy. The system, “ingests, validates, stores, and manages FATCA information, including FATCA reports received both electronically in the FATCA XML (via IDES) and on paper 8966 forms” (IRS June 22, 2015). It is the technological aid used to match information collected on Forms 8938 against the information on Forms 8966, 1042, and 1042S to identify and pursue non-filers (Koskinen et al. 2013, 244). While FATCA was passed with the HIRE Act in 2010 and first planned for implementation on January 1, 2013, the ICMM is not fully developed. To compensate for this, the IRS has amicably granted taxpayers for only the 2014 tax year an automatic 90 extension to file for eligible taxpayers who file a request in a timely manner (IRS June 22, 2015). The system is a new one for them as well even though in reality, they should have prepped it and tested it at least three years ago.

Another easy fix would be clarity as to what the information the IRS wishes to gather that is useful. The Offshore Voluntary Disclosure Programs are great examples for the IRS to follow to ensure taxpayers only spend extra time preparing what is necessary and burden the impacted parties as little as possible (Koskinen et al. 2013, 239). Something that must be done immediately is for the IRS must take proactive steps to preserve the due process rights of taxpayers with leniency procedures such as reasonable cause relief for FATCA non-filers. No such mechanisms have been developed to distinguish the tax evaders from the honest taxpayer who made a mistake on their forms (Koskinen et al. 2013, 239). Law-abiding taxpayers should not be punished for actions not intending to deceive. With FATCA, the IRS does not seem to have dedicated much energy to ensuring that account holder information provided to the IRS by the FFIs is accurate. It is understandable that the IRS is restricted by their budget, limited resources,

and other obligations, but even the Office of Audit of the Treasury Inspector General for Tax Administration labelled the accuracy of Form 8938 as a priority and a, “critical component for the success of the IRS’s compliance activities with implement the FATCA” (Treasury September 23, 2015). In the instance that they are incorrectly reported by the FFI, they also have failed to establish channels for US citizens to challenge the information reported (Koskinen et al. 2013, 245). FFIs have compliance challenges of their own which include a variety of common challenges such as, “data quality errors caused by inaccurate translation, invalid addresses and aliases and data corruption caused by combining similar information across multiple systems.” Unfortunately, inaccurate reporting triggers substantial penalties for both parties.(Koskinen et al. 2013, 245) even if they did not intentionally misreport their income. Overall, due to the IRS being unprepared for the implementation of FATCA, the taxpayers and the FFIs are the ones to suffer as they iron out all the kinks in the system. The IRS must be reasonable and implementing procedures and technology that will simplify the FATCA reporting process is crucial.

In the future with the creation of undoubtedly a new foreign tax regime, the IRS must be prepared when the law comes into effect. Solution that could help taxpayers and even the IRS now is the reduction of the data duplication on Form 8938 and the FBAR form. This can be easily solved by combining or substantially revise the forms. Once that happens, then taxpayers can be free of the unreasonable double penalty (the FBAR penalty under Title 31 and the non-disclosure penalty under Title 26) for failing to report a single account on both forms (Koskinen et al. 2013, 247). Simplification will protect the due process rights of what can be considered the US’s most valuable global asset, its

people (Graffy 2015). FATCA cannot be discouraging US citizens overseas, America's international sales force (McGurn July 16, 2012), to leave the country or to continue to be American citizens when it is crucial for American companies and US citizens to stay engaged with the world (Michel 2011, 712).

If the IRS is better prepared then people can be better informed earlier on in the process. Before the implementation of any complex taxation structure especially one as complicated as FATCA, the IRS should better educate the impacted institutions and individuals. Interestingly, Gary Clyde Hufbauer, the Reginald Jones Senior Fellow at the Peterson Institute for International Economics wrote five years ago in 2011 that, "Congress should first pass a simple statute to delay the implementation of FATCA for five years"(Hufbauer July 22, 2011). Congress did delay the enactment of FATCA, but with multiple delays instead of a full five year postponement. The five year postponement would have given the Treasury department more time to arrange agreements with foreign governments that were more of a bilateral action mutually decided by the two parties rather than the current FATCA, a unilateral action by the US. Reporting should be done by both countries. He suggested a completely different implementation system where the first target of the requirements would only be high net worth households. Only after the IRS has tried out the system on what is most likely the most well informed group of people about new tax procedure, they can begin to target households with fewer holdings at random (Hufbauer July 22, 2011). A test trial of the law would have been helpful and should be considered in the future for any new tax regime in the works.

There have been a variety of laws proposed since FATCA went into effect such as repealing FATCA or a same country exception which would exclude accounts held by

Americans in the foreign country where they reside (Graffy 2015) from FATCA reporting requirements. One piece of legislation that calls for the repeal of many of FATCA's provisions in order to, "repeal the violation of sovereign nations' laws and privacy matters." The provisions include, "the reporting and withholding requirements on FFIs and NFFEs (IRC Sections 1471-1474); the reporting requirement for foreign financial assets (IRC Section 6038D); the extension of the statute of limitations for significant omissions of income in connection with foreign assets (IRC Section 6501(e)); the penalties for underpayments attributable to undisclosed foreign financial assets (IRC Section 6662(b)(7),(j)); the reporting requirements for activities with respect to passive foreign investment companies (IRC Section 1298(f)); the reporting requirement for U.S. owners of foreign trusts (IRC Section 6048(b); and the minimum penalty with respect to failure to report on certain foreign trusts (IRC Section 6677(a))" (Lunder March 27, 2014). Other bills include a provision to strengthen FATCA such as the Stop Tax Haven Abuse Act (H.R. 1554, Section 102); Sequester Delay and Stop Tax Haven Abuse Act (H.R. 3666, Section 202); Stop Tax Haven Abuse Act (S. 1533, Section 102); and the CUT Loopholes Act (S. 268, Section 102) (Lunder March 27, 2014).

Specifically for FATCA, some definitions should be updated to expand the reach of FATCA to cover all the possible loopholes. The first would be to expand the reporting requirement to include any US person, "who directly or indirectly forms, transfers assets to, is a beneficiary of, has a beneficial interest in, or receives money or property or the use thereof from"; include transaction accounts as financial accounts; and include entities engaged in investing in derivatives and swaps as financial institution. A substantial US owner for corporations and partnerships should include any person

owning, directly or indirectly or as a beneficial owner, the threshold amount of the entity is any person who owns (Lunder March 27, 2014). The clarification on the definitions can be easily corrected and tightens the coverage of FATCA.

A new act that will benefit the IRS and the legislators is the H.R. 597, Commission on Americans Living Abroad Act. which requires the establishment of a such commission to study how federal laws and policies affect U.S. citizens living in foreign countries. The first report is to be within one year of the act's enactment with its findings and recommendations (Lunder March 27, 2014). Moreover, with the FATCA regime changes being so comprehensive. There should be a similar act researching FATCA's impact after five years to evaluate reporting burdens on both foreign and US firms and the costs and benefits (Hufbauer July 22, 2011).

The world is already seeing the US at a turning point in its tax evasion crackdown. The deterrent for tax evaders is that the information collected by FATCA and other IRS and DOJ tools will lead to harsh civil and criminal penalties. However, there have been setbacks at trial in one of the US government's flagship bank cooperation programs, creating uncertainty (Snyder 2015, 596). Numerous banks have pulled back after past cooperation, and the US DOJ even lost a high-profile trial against a senior Swiss banker which could be an early indication of more problems to come (Snyder 2015, 596). Without the deterrent power of prosecution, tax evaders may not fear misreporting or not disclosing their information.

FATCA must be a global solution since. "the ultimate undertaking of FATCA will be an international financial data regime with global information transparency" (Koskinen et al. 2013, 239) Murray Rankin, the Canadian equivalent of a "Shadow

Minister” for National Revenue stated , “Cracking down on tax cheats should occur through international cooperation rather than unilateral action” (Koskinen et al. 2013, 243). Collaboration will be key to close the gaps and to reverse the disincentives to invest in the US (Nelson 2012, 415) and legislators were aware that they may ultimately need to convince other countries to adopt FATCA-like systems, or create a multilateral P-PFI system (Harvey 2011, 484). When more countries also implement the same regime, the tax evader has less investment options and less places to hide their money from their tax authority since the number and the quality of financial institutions tax cheats can use will be reduced (Harvey 2011, 494). As of May 1, 2015, the list of approved PFFI has grown to 162,610 entities (IRS September 23, 2015). A few major countries such as China, India, Russia, and the EU would need to agree to the system in order for it to have the leverage to implement such a radical system (Harvey 2011, 494). As history has shown, “in economic matters the United States often accomplishes more working in cooperation with other nations and their institutions rather than seeking to impose its own law and its will” (Michel 2011, 712). As of 2014, more than 80 nations and over 77,000 financial institutions have signed on (Wood 2014) and the IGAs creates the means to collect the information from FFIs and to send the data to the IRS without separate IRS data disclosure agreements (Browning 2012).

Ideally, FATCA should have been implemented with more preparation, information disbursement, a complete information collection system, and agreements that limit the scope of assets and tax havens that tax evaders can invest in. Hopefully, the next foreign tax law will also ensure that there are not unintended consequences undermining the law’s effectiveness.

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