



Subject: Comments - Financial Services Tax Reform Working Group, Ways and Means Committee
Attention: Representative Adrian Smith and Representative John Larson
Concerns: Recommendation to repeal FATCA (Foreign Account Tax Compliance Act)

April 4, 2013

American Citizens Abroad (ACA) was one of the first organizations to call for the repeal of FATCA soon after passage of the law in 2010 and maintains its recommendation that Congress should repeal FATCA within the framework of tax reform seeking an efficient, fair tax system. It is evident from the perspective overseas that:

- **FATCA will not achieve its purpose of tracking down tax evaders;**
- **FATCA is destroying the community of seven million Americans abroad;**
- **FATCA creates serious damage to the United States and its economy.**

FATCA will not achieve its purpose

FATCA is 1984 in the world of George Orwell. Big brother will have access to all personal information, disregarding personal privacy and risk of identity theft. But big loopholes are already apparent. **FATCA will lead to a two-tier banking system worldwide** - those countries which adhere to FATCA and those which refuse. Russia has already refused and rumour is that the Chinese will also either refuse outright or find an indirect path to circumvent FATCA reporting requirements. The position of other Asian countries, Middle East countries and Latin American countries is not yet known.

The costs of implementing FATCA are absolutely disproportionate to the expected additional tax revenue. The Joint Committee on Taxation estimates additional tax revenue of only about \$750 million a year for ten years. Compliance, however, of foreign financial institutions (FFI) will cost tens of billions of dollars and U.S. financial institutions face similar costs due to administrative requirements on payments and the reciprocity measures introduced in the Intergovernmental Agreements (IGA). FATCA has already engendered enormous cost for the IRS and Treasury Department through the hundreds of thousands of hours spent by top tax specialists devoted to drafting regulations and negotiating with foreign governments. How many more millions will be required for the IRS to administer and analyze the mass of information flows scheduled to begin in 2014? Congress has never subjected FATCA to a cost/benefit analysis.

The IRS does not need FATCA to pursue tax evaders. Even prior to the passage of FATCA, the IRS had a whole basket of tools, including the QI program, the John Doe summons, Tax Information Exchange Agreements, Mutual Legal Assistance Treaties, the Swift Agreement and the whistleblower program. Furthermore, the IRS Overseas Voluntary Disclosure Program (OVDP) has already brought in over \$5 billion in just four years. The OVDP requires participating taxpayers to provide all information on international networks facilitating tax evasion. Consequently, the IRS now has a vast data base to mine

for efficient law enforcement, whereas FATCA requires the IRS to look for a needle in a haystack of a massive amount of irrelevant, disparate data, costly to administer and inappropriate for effective law enforcement.

FATCA is destroying the community of seven million Americans abroad

American citizens have become pariahs in the international financial community because of FATCA.

The cost of administering FATCA and the perceived legal threats are so high that FFIs prefer not to retain or take on American clients, who represent only a tiny fraction of their total clientele. ACA has received multiple testimonies of Americans residing overseas who have had bank accounts in their country of residence closed, who have been denied entry into foreign pension plans and insurance contracts, who have had mortgages cancelled, who have been pushed off of joint-bank accounts held with foreign spouses, who have lost access to credit cards and who have been forced into a cash economy.

A few major financial institutions may still allow cash accounts, but certainly no investment accounts. PFIC reporting rules exclude investment in foreign mutual funds. Only the few wealthy with financial assets in excess of \$1 million have access to SEC registered subsidiaries of foreign banks for investment purposes. In addition, U.S. financial institutions refuse to take on American clients with a foreign address because of the Patriot Act. The average American abroad is shut off from all avenues for personal investment.

In this environment, it is difficult and complicated for Americans to move overseas, establish normal banking relationships required for modern life and gain international experience.

Business opportunities for Americans overseas are blocked. Foreign partners no longer accept Americans in new ventures because FATCA requires reporting to the IRS of any U.S. person owning 10% or more of an unlisted foreign corporation or partnership. Some American-owned businesses overseas have closed down because of lack of access to banking facilities.

FATCA automatically categorizes any American abroad as suspect and ostensibly discriminates against Americans abroad. Americans overseas must report their foreign financial assets on Form 8938 with their 1040 under threat of heavy penalty for non-reporting, but in the eyes of Americans abroad, these assets are local, not foreign. Americans residing in the United States have no such comparable reporting on their U.S.-based assets.

FATCA is contrary to the Universal Declaration on Human Rights, to which the United States is a signatory, as it forces FFIs to discriminate against Americans on the basis of their citizenship.ⁱ

The rapid rise in renunciations of U.S. citizenship over the last four years is directly linked to FATCA.

U.S. policy has indeed gone astray when it forces its own citizens to renounce their U.S. nationality, particularly at a time when the U.S. needs to reinforce its competitive position in the global economy.

To eliminate FATCA's serious collateral damage on Americans abroad, the United States must adopt residence-based taxation, which would *de facto* eliminate applicability of FATCA to Americans residing overseas. American Citizens Abroad has submitted to the International Tax Reform Working Group of

the Ways and Means Committee a detailed proposal for transition to residence-based-taxation for individuals.

FATCA creates serious damage to the United States and its economy

Foreign governments worldwide are furious that the U.S. Congress has the arrogance to exercise financial imperialism, to unilaterally impose its laws on the rest of the world, to require foreign financial institutions to spend tens of billions of dollars to comply with U.S. law and to require FFIs to break privacy laws in their own country in order to comply with FATCA, exclusively for the benefit of the United States, with no reciprocity, let alone any prior negotiation. Since FATCA has proved unworkable as legislated, the Department of the Treasury has been obliged to negotiate IGAs with foreign governments to circumvent the privacy issue and to introduce a limited form of reciprocity, but resentment abroad remains great. There will be a backlash and immediate consequences. The reciprocity agreements in the IGAs create a major burden for U.S. financial institutions now required to filter out by nationality all accounts owned by foreign residents and to report on those accounts to the respective governments.

An immediate impact of FATCA is a serious reconsideration by foreigners of the risks and dangers of investing in the United States. Foreign insurance companies have already pulled back. Private bankers are advising their foreign clients to reduce U.S. investments, if not totally divest. Foreign investment groups that had been providing fresh capital to small and medium-sized U.S. corporations have stopped this activity. Latin American money is retreating from U.S. banks. The threat of FATCA confiscatory 30% withholding tax not only on all U.S. source fixed or determinable annual or periodical gains, profits, and income (FDAP income) but also on the sale value of U.S. assets creates great uncertainty and reserve among foreign investors.

FATCA creates a new barrier to U.S. exports. The President's Export Commission has recognized that the major export potential of the country comes from small and medium-sized U.S. companies. How will they be able to initiate export activities overseas if they cannot even open a bank account abroad?

Finally, FATCA creates systemic risks for the entire international financial community, through potential processing errors, chain effect, misinformation, etc. One measure of the law – the passthru deemed essential by Congress for an air-tight system – has been defined as unworkable by the British Bankers' Association and even by one of the authors of FATCA legislation, J. Richard Harvey, of Villanova University.ⁱⁱ FATCA is bad law on all fronts and should be repealed.

Thank you for your consideration.

Sincerely yours,

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Executive Director

American Citizens Abroad

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Notes:

ⁱ Article 7 of the Universal Declaration of Human Rights, to which the United States is signatory, reads: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms states under Article 1:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Under FATCA rules, FFIs are obliged to discriminate against U.S. citizens on the basis of their “national origin”. U.S. persons and/or those considered as having “U.S. status” are being forced by their bank—under penalty of account closure—to sign, in addition to the W-9 form, W-8BEN form or document establishing “non-U.S. status”, a separate document expressly releasing the bank from complying with the country's banking secrecy laws and/or the legal or contractual arrangements in effect upon establishing the client's bank account. One such document from a reputable foreign financial institution attempting to comply with FATCA guidelines, states: “By signing this declaration, the client formally agrees to the Bank's communicating the client's personal information to the American tax authority (IRS) as well as information on assets held at the Bank and income generated by those assets. Consequently, the client hereby explicitly frees the Bank from the obligation to maintain banking secrecy.”ⁱ

The client is put into a position of no choice. Account closure of “recalcitrant” persons with U.S. citizenship would not only mean that they would be placed in a category of “closer scrutiny” by the IRS but would, in effect, result in their not being able to live a normal life outside the territory of the United States—this in clear violation of Article 13, paragraph 2 of the Universal Declaration of Human Rights, ensuring that: “Everyone has the right to leave any country, including his own, and to return to his country.”

Peter W. Hogg, CC., W.C., Professor Emeritus and Former Dean of the Hosgoode Hall Law School and author of Canada's only comprehensive treatise on constitutional law has warned the Canadian government about the unconstitutionality of discriminating against individuals on the basis of citizenship in his letter dated December 12, 2012 addressed to the Finance Minister Canada concerning FATCA and Canadian Charter of Rights and Freedoms. “Section 15 (1) of the *Canadian Charter of Rights and Freedoms* provides: ‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.’” Professor Hogg continues: “Note that the prohibited grounds of discrimination include ‘national or ethnic origin’, and the Supreme Court has held that citizenship is an ‘analogous ground’ also prohibited by s. 15(1).” (*Andrews v. Law Society of BC* (1989) 1 S.C.R. 143)... “The point of this letter is to urge the Government not to agree to an IGA which would call for foreign legislation which would offend s. 15 of the Charter.”

ⁱⁱ J. Richard Harvey, « Offshore Accounts : Insider's Summary of FATCA and its Potential Future », December 1, 2011. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969123