COMMENT

USING A SLEDGEHAMMER TO CRACK A NUT: WHY FATCA WILL NOT STAND

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The Foreign Account Tax Compliance Act (FATCA) became law in 2010 and is an important development in combatting income tax evasion. Under FATCA, American individual and corporate taxpayers must provide comprehensive information to the Internal Revenue Service (IRS) regarding foreign bank accounts. In addition, a more controversial part of FATCA requires foreign banks to report directly to the IRS certain information about financial accounts held by American taxpayers.

These drastic changes in American tax policy are alarming to the international financial community. International banks are forced to implement expensive compliance programs to satisfy the information reporting requirements. An increasing number of foreign financial institutions will no longer want any involvement with American citizens or investments. Furthermore, Americans living abroad might be forced to denounce their American citizenship in order to gain access to insurance and basic banking options.

In response to the unilateral imposition of FATCA, foreign governments and banks may lobby for its repeal. This Comment examines factors in the global movement to repeal FATCA and suggests several workable solutions that would be agreeable to the United States and foreign nations. Specifically, this Comment suggests how investment income withholding and increased IRS enforcement actions are a better solution to prevent income tax evasion.

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INTRODUCTION: WHO GETS SCRATCHED BY FATCA

Switzerland, Aruba, the Cayman Islands, and Dubai all sound like nice places for a vacation, but this is not why the United States is concerned over their banking practices. All these countries are tax havens, and some American citizens use their laws to evade paying income taxes in the United States.[1] American citizens can evade taxes on

1. *See* OECD, TOWARDS GLOBAL TAX CO-OPERATION: REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES para. 17

passive income, such as interest, dividends, and capital gains, by not reporting income to the Internal Revenue Service (IRS).[2] The IRS estimates that between $40–70 billion in revenue is lost yearly due to offshore personal income tax evasion.[3]

In response to a tax evasion crisis and a growing budget deficit, the IRS actively searches for American taxpayers with undeclared funds in foreign banks.[4] Most recently, the United States Congress enacted the Foreign Account Tax Compliance Act (FATCA) as part of the Hiring Incentives to Restore Employment (HIRE) Act in 2010.[5] FATCA represents the latest effort by the United States to combat tax evasion by American citizens holding undeclared assets in offshore accounts. Under FATCA, American taxpayers holding financial investments abroad must now report those assets to the IRS.[6] In addition, a more controversial part of FATCA requires foreign financial institutions (FFIs) to initiate complex compliance programs that submit detailed reports to the IRS about financial accounts held by U.S. citizens.[7]

(2000), *available at* http://www.oecd.org/tax/transparency/44430257.pdf (naming thirty-five countries on a tax-haven blacklist).

2. *See* Martin A. Sullivan, *U.S. Citizens Hide Hundreds of Billions in Cayman Accounts*, 103 TAX NOTES 956, 957–59 (2004); Kim Dixon, *Nearly 15,000 Americans Admit Offshore Tax Cheating*, REUTERS, Nov. 17, 2009, *available at* http://www.reuters.com/article/2009/11/17/us-ubs-tax-amnesty-idUSTRE5AG3IU20091117.

3. *See, e.g.*, Steven A. Dean, *More Cooperation, Less Uniformity: Tax Deharmonization and the Future of the International Tax Regime*, 84 TUL. L. REV. 125, 132 (2009) (citing Joseph Guttentag & Reuven Avi-Yonah, *Closing the International Tax Gap*, in BRIDGING THE TAX GAP: ADDRESSING THE CRISIS IN FEDERAL TAX ADMINISTRATION 99, 101 (Max B. Sawicky ed., 2005)).

4. Programs such as Qualified Intermediaries and FBAR (Report of Foreign Bank and Financial Accounts) are currently being used. *See* Chad P. Ralston, Comment, *Going It Alone: A Pragmatic Approach to Combating Foreign-Effected Tax Evasion*, 24 EMORY INT'L L. REV. 873, 896–97 (2010) (describing strengths and weaknesses of the Qualified Intermediary program); *Report of Foreign Bank and Financial Accounts (FBAR)*, IRS, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Report-of-Foreign-Bank-and-Financial-Accounts-(FBAR) (last updated Feb. 27, 2013).

5. FATCA refers to sections 1471–74 of the Internal Revenue Code of 1986 as amended. I.R.C. §§ 1471-74 (2006 & Supp. V 2011). These sections were added by section 501(a) of the Hiring Incentives to Restore Employment (HIRE) Act. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 501(a), 124 Stat. 71, 97–106 (2010). Sections 501–41 of the HIRE Act are often referred to as the Foreign Account Tax Compliance Act (FATCA). *Id.* at 97.

6. I.R.C. § 1471(b)(1)(A)-(C) (2006 & Supp. V 2011).

7. § 1471(c)(1)(A)-(D).

A. FATCA Requires International Financial Institutions and American Citizens to Make Difficult Choices

Even though FATCA does not take effect until 2014,[8] it significantly affects all financial institutions and honest, taxpaying American citizens. The biggest names in banking and insurance are faced with three main options to comply with FATCA, or they will face a withholding tax[9] on all U.S.-derived revenues.[10] Additionally, Americans living abroad are faced with the tough decision of deciding to maintain or renounce their American citizenship to benefit from life insurance, participate in company pension plans, and continue using local bank accounts.[11]

To comply with FATCA, an FFI can choose between disclosing a client's personal information to the IRS, imposing a thirty percent withholding tax on all U.S. and certain non-U.S. payments, or completely avoiding U.S. investments and clients.[12] The FFIs have until January 1, 2014, to implement new account opening procedures for their client base and comply with the main FATCA provisions.[13] Extensive due diligence must be undertaken to verify identities and nationalities of all account holders. This deadline means that FFIs have a short time to initiate complicated compliance measures required by FATCA's reporting requirements or face serious hurdles related to continuing their American revenue streams.

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8. The statutory effective date is January 1, 2013, but fall 2011 regulatory guidance delayed implementation of FATCA by one year. I.R.S. Notice 2011-53, 2011-32 I.R.B. 124, 124.

9. A withholding tax in the FATCA context is a tax levied on income (interest and dividends) from securities owned by a nonresident of the tax-collecting country. *See infra* Part II.B.1.

10. *See* Shahin Shojai, *Impending and Imperative, FATCA Demands Immediate Action. Consider It an Opportunity, Not a Costly Inconvenience*, CAPCO INST. BLOG (Sept. 9, 2011), http://www.capco.com/capco-institute/capco-institute-blog/impending-and-imperative-fatca-demands-immediate-action-conside.

11. *See generally* Letter from Staffan Sevon, Chief Inv. Officer, & Ilona Karppinen, Portfolio Manager, Veritas Pension Ins. Co. Ltd., to Internal Revenue Service (Apr. 12, 2011), *available at* http://www.cticompliance.com/assets/pdf/FATCA_Veritas.pdf (describing FATCA's potential effects on certain foreign pension and retirement plans and commenting on the manner by which FATCA exemption is determined). FFIs that do not wish to comply with the FATCA requirements may simply refuse to allow U.S. citizens to hold plans or accounts. *See id.*

12. Alison Bennett, *Tax Legislation: Dozens of Stakeholders from around Globe Raise Concerns on FATCA Regime*, 29 TAX MGMT. WKLY. REP. 1535 (2010).

13. Regulations Relating to Information Reporting by FFIs and Withholding on Certain Payments to FFIs and Other Foreign Entities, Treas. Reg. § 1.1471-4(d)(7)(v)(B), 78 Fed. Reg. 5874, 5881–84 (to be codified at 26 C.F.R. pt. 1, 301); I.R.S. Announcement 2012-42, 2012-47 I.R.B. 561, 562.

Because FATCA threatens FFIs with a thirty percent withholding requirement on U.S. investments, FFIs facing heavy compliance costs might determine that it is easier to drop American clients and investments than to comply with FATCA.[14] Banking industry analysts predict that many large banks will no longer accept American clients if implementing FATCA compliance systems proves too costly.[15] Many FFIs derive significant income from American sources,[16] and the ramifications of changing their investment portfolios could drastically impact worldwide financial markets.[17]

Due to FFIs terminating business with American citizens, the six million Americans living abroad[18] will have fewer banking and investment options. FATCA legislation makes it more difficult for them to obtain bank accounts, receive insurance coverage, and participate in company-sponsored pension plans.[19] Amid mounting frustration over taxation and banking problems, a small but statistically significant number of Americans might renounce their citizenship solely to be free from American-citizen-based taxation.[20]

B. American Citizens, Foreign Countries, and International Banks Are Beginning to Resist FATCA

Resistance against FATCA is growing among American citizens, foreign governments, and multinational banks. Some of these entities have started to organize lobbying efforts to repeal or modify FATCA.[21] For example, American Citizens Abroad, a coalition of American citizens living overseas, issued a report in August 2011 calling on its

14. *See* Bennett, *supra* note 12; Letter from Andrew F. Quinlan, President, Ctr. for Freedom & Prosperity, to Timothy Geithner, Sec'y, U.S. Dep't of the Treasury (July 18, 2011) [hereinafter Letter from Quinlan], *available at* http://freedomandprosperity.org/files/fatca/FATCA-Geithner-ltr-07-18-2011.pdf.

15. *E.g.*, Letter from Quinlan, *supra* note 14.

16. *See id.*

17. *See infra* Part II.B.

18. *See 6.32 Million Americans (Excluding Military) Live in 160-Plus Countries*, ASS'N AM. RESIDENT OVERSEAS (2011), http://www.aaro.org/about-aaro/6m-americans-abroad. The Association of Americans Resident Overseas estimates 6.32 million Americans reside abroad. *Id.*

19. Brian Knowlton, *More American Expatriates Give Up Citizenship*, N.Y. TIMES (Apr. 25, 2010), http://www.nytimes.com/2010/04/26/us/26expat.html?src=me&ref=general.

20. *Id*; *see infra* Part II.C.

21. Joanne Ellul, *Cutting Claws of the Fatca*, MONEYMARKETING (Nov. 17, 2011, 12:00 PM), http://www.moneymarketing.co.uk/investments/cutting-claws-of-the-fatca/1041628.article.

membership base to lobby Congress to repeal the law.[22] In addition, Washington lobbyist James Jatras, a former United States diplomat and current principal of Squire Sanders Public Advocacy, recently launched an extensive worldwide campaign to repeal FATCA.[23] These repeal movements aim to inform the public about FATCA and educate elected representatives about FATCA's harm.[24]

Foreign governments feel threatened by the IRS unilaterally imposing its reach beyond the territorial boundaries of the United States and imposing tax laws on their citizens.[25] Russia is strongly opposed to implementation of FATCA within its borders.[26] Canada considers FATCA an inefficient use of capital and hopes to be granted an exemption.[27] Taiwan will not permit its banks to forward information to the United States.[28] In light of these responses, the IRS still dreams of implementing FATCA in a cooperative way and will not consider exempting specific countries.[29]

The financial industry's reaction to the reporting requirements is also equally fierce.[30] Bank managers are struggling to comply with the

22. Steven Sloan, *IRS Delays Overseas Bank Reporting Rule Criticized by Aegon*, BLOOMBERG (July 14, 2011, 3:50 PM), http://www.bloomberg.com/news/2011-07-14/irs-delays-overseas-bank-reporting-rule-criticized-by-aegon-1-.html ("The way this new law is structured is totally disproportionate and unworkable, the equivalent of using a bulldozer to destroy an ant hill." (quoting Jackie Bugnion, Director, Am. Citizens Abroad)).

23. George Prior, *Interview: James Jatras, Lawyer and Anti-FATCA Lobbyist*, IEXPATS.COM (Dec. 28, 2012), http://www.iexpats.com/2012/12/interview-james-jatras-lawyer-and-anti-fatca-lobbyist/.

24. See *infra* Part II.C.

25. *E.g.*, Rejane Reibaud & Thibault Madelin, *Banque: Les Etats-Unis Imposent Leur Loi à l'Europe*, LES ECHOS (Jan. 10, 2013, 7:00 AM), http://www.lesechos.fr/entreprises-secteurs/finance-marches/actu/0202488374141-banque-les-etats-unis-imposent-leur-loi-a-l-europe-527131.php.

26. On April 24, 2012, the Russian Finance Ministry stated that FATCA "breaches the principle of sovereign equality of states" and complying with FATCA "would lead to the breach by Russian financial institutions of banking secrecy laws with corresponding liability for any damage caused." Irina Bykhovskaya & Maria Frolova, *Russia Seeks Intergovernmental Approach toward Agreement on U.S. FATCA Implementation*, 2012 WORLDWIDE TAX DAILY 102-4, LEXIS 2012 WTD 102-4.

27. John McCrank, *UPDATE 1-Canada Hopes for Exemption on US FATCA Rules*, REUTERS, Oct. 5, 2011, *available at* http://www.reuters.com/article/2011/10/05/canada-usa-taxes-idUSN1E7941R120111005.

28. *Treaty Needed before FATCA Will Be Honored: KMT Lawmaker*, CHINA POST, Dec. 28, 2012, *available at* http://www.chinapost.com.tw/taiwan/foreign-affairs/2012/12/28/365496/Treaty-needed.htm.

29. *See* McCrank, *supra* note 27.

30. The head of Europe, Middle East, and Africa for JP Morgan Asset Management said: "[w]ith FATCA there is a cost on us in Europe but benefits in the U.S.[] The benefit is $8.5 bln over 10 years . . . for multinational banks I have seen estimates of $100 million (each, in one-off costs)." Nigel Tutt, *Tax Evasion Law "Could*

law and, as the initial compliance deadlines approach, many banks are still in the dark.[31] A backlash from bank managers could have major repercussions for the United States and must be seriously evaluated against initial policy goals of FATCA. The fragile world economy has enough problems as it is without having substantial tax reporting requirements imposed upon it by the United States.[32]

Due to this widespread opposition and numerous practical problems, Congress must consider alternatives to the continued implementation of FATCA. This Comment examines FATCA's stifling economic effects and explores alternatives that would accomplish similar policy goals. Part I provides a brief history of the United States' efforts to combat international tax evasion and a detailed overview of FATCA. Part II examines FATCA's weaknesses and proposes solutions that better solve the international income tax evasion problem. This Comment concludes that FATCA should be repealed or less restrictive measures implemented immediately.

I. THE PROBLEM OF INTERNATIONAL INCOME TAX EVASION AND FATCA

Tax evasion is a concern of any government that imposes an income tax on its citizens.[33] Because the United States' federal income tax is based on a system of "voluntary compliance," it is essential that taxpayers are given an incentive to comply with tax laws.[34] The IRS primarily uses monetary penalties and criminal sanctions to ensure that taxes are rightfully collected.[35] Although most Americans decide to

Cost Big Banks $100 Million," REUTERS, Nov. 18, 2011, *available at* http://www.reuters.com/article/2011/11/18/us-usa-tax-idUSTRE7AH19120111118.

31. A bank manager remarked, "[i]t would be easier to just write a cheque to the IRS . . . ." *Id.*

32. Herman B. Bouma, *11 Reasons Why FATCA Must Be Repealed*, 41 TAX MGMT. INT'L J. 651 (2012).

33. Marla Carew & Eric Nemeth, *The Trouble with Foreign Financial Accounts: Your Client Tells You about an Offshore Account, but the IRS Voluntary Disclosure Window Has Closed*, MICH. B.J., Dec. 2009, at 34 ("Some United States taxpayers are evading billions of dollars per year in United States taxes through the use of offshore accounts." (quoting Press Release, U.S. Dep't of Justice Tax Div., Dep't of Justice Asks Court to Serve Summons for Offshore Records (Apr. 15, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-tax-349.html)).

34. *Flora v. United States*, 362 U.S. 145, 176 (1960) (holding that "[o]ur system of taxation is based upon voluntary assessment and payment, not upon distraint").

35. *See generally* I.R.C. §§ 6651–6751 (2006 & Supp. V 2011) (listing penalties for failure to comply with provisions of the Internal Revenue Code).

comply voluntarily with tax laws, there remain citizens who decide to hide income and assets from the IRS to avoid paying taxes.[36]

Noncompliance with tax obligations can occur in three ways: nonfiling, underpayment, and underreporting of taxes due.[37] These problems are particularly profound in the area of international taxation because many tax friendly havens exist,[38] and, therefore, many prevention efforts target this area.[39] 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.[40] The exact amount of revenue losses from tax avoidance and evasion are difficult to estimate, but some have calculated that the annual cost of offshore tax abuses by American citizens may be around $100 billion per year.[41]

Uniquely, the United States is the only developed country that taxes citizens living abroad.[42] It addresses the problem of international tax evasion in several different ways.[43] Most importantly, Americans must

36. *See* Edward J. McCaffery & Joel Slemrod, *Toward an Agenda for Behavioral Public Finance*, *in* BEHAVIORAL PUBLIC FINANCE 3, 15–17 (Edward J. McCaffery & Joel Slemrod eds., 2006) (arguing that enforcement provides taxpayers with an extrinsic motivation to comply with tax laws).

37. *Tax Gap Facts and Figures*, IRS, 1, www.irs.gov/pub/irs-utl/tax_gap_facts-figures.pdf (last visited Feb. 16, 2013).

38. CAROLINE DOGGART, TAX HAVENS AND THEIR USES 1–2 (new ed. 1975); Joann M. Weiner & Hugh J. Ault, *The OECD's Report on Harmful Tax Competition*, 51 NAT'L TAX J. 601, 601–08 (1998); RICHARD A. GORDON, INTERNAL REVENUE SERV., IRS PUB. 1150 (4-81), TAX HAVENS AND THEIR USE BY UNITED STATES TAXPAYERS—AN OVERVIEW 3–5 (1981).

39. JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 1–2 (2010).

40. Press Release, The Boston Consulting Group, Global Wealth Continues Its Strong Recovery with $9 Trillion Gain, but Pressures on Wealth Managers Persist, Says Study by the Boston Consulting Group (May 31, 2011), *available at* http://www.bcg.com/media/PressReleaseDetails.aspx?id=tcm:12-77753.

41. *E.g.*, *Tax Haven Banks and U.S. Tax Compliance: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 1 (2008) (statement of Sen. Carl Levin, Chairman, Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Governmental Affairs).

42. *See* INTERNAL REVENUE SERV., IRS PUB. 54, TAX GUIDE FOR U.S. CITIZENS AND RESIDENT ALIENS ABROAD (2012).

43. Melissa A. Dizdarevic, Comment, *The FATCA Provisions of the HIRE Act: Boldly Going Where No Withholding Has Gone before*, 79 FORDHAM L. REV. 2967, 2969 (2011) (describing how the IRS depends on voluntary information reporting and the use of withholding taxes to ensure that income is collected); Martin A. Sullivan, *Proposals to Fight Offshore Tax Evasion*, 123 TAX NOTES 264, 264–68 (2009) (explaining how the IRS uses a Qualified Intermediary program under which foreign banks that receive payments certify the nationality of their depositors and reveal the identity of any American citizens using their banking services).

voluntarily report foreign bank accounts to the IRS.[44] These efforts have been largely successful; however, the Obama administration continues to seek new ways to combat income tax evasion and build the national income tax base to fight a growing budget deficit.[45] FATCA represents the United States' latest effort to solve this problem and is one of the largest pieces of tax legislation enacted in the past thirty years.

A. Overview of FATCA and Its Key Provisions

In response to a heightened problem of international tax evasion and several high-profile court cases,[46] Congress enacted FATCA in March 2010.[47] FATCA aims to promote tax compliance by American citizens and residents by encouraging FFIs to report to the IRS information regarding their American customers.[48] To accomplish this goal, the main compliance provisions of FATCA require FFIs to report information on their U.S. account holders to the IRS, and other foreign entities to provide information regarding their beneficial owners to U.S. withholding agents.[49] FFIs that do not sign an IRS agreement will face withholding on U.S.-source interest and dividends, gross proceeds from the disposition of U.S. securities, and pass-thru payments.[50] Beyond FFIs, many American companies based in the United States are also affected because FATCA's broad drafting also captures payments to nonfinancial foreign entities (NFFEs).[51] Under certain situations, an American company may have to withhold on payments to its own subsidiaries, which could be considered NFFEs.[52]

FFIs and NFFEs must comply with FATCA by entering into an agreement with the IRS to provide information about their accounts in the United States or substantial American owners.[53] By taking the compliance route, the entity can avoid the thirty percent withholding

44. I.R.S. Form 1040, sched. B, l. 7a, OMB No. 1545-0074 (2012); *see also* 31 U.S.C. § 5314 (2006); 31 C.F.R. § 103.24 (2010).

45. For example, President Obama's 2009 national budget suggested funding for an additional 800 IRS agents that would be located permanently overseas to combat tax evasion. Laura Saunders, *IRS Touts Its Amnesty, Trains Sights on Evaders*, WALL ST. J., Oct. 15, 2009, at C7.

46. *See generally, e.g.*, UBS Case, FED. DEP'T JUST. & POLICE (July 15, 2010), http://www.ejpd.admin.ch/ejpd/en/home/themen/wirtschaft/ref_fallubs.html.

47. *See generally* I.R.C. §§ 1471–74 (2006 & Supp. V 2011).

48. *Id.*

49. *See generally* Reporting and Withholding by FFIs, Prop. Treas. Reg. § 1.1471-1, 77 Fed. Reg. 9022 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 1, 301).

50. *Id.*

51. *See* I.R.C. § 1472(c)–(d).

52. *Id.*

53. § 1471(b)(1).

consequence so long as they continue to comply with FATCA and updated treasury regulations.[54] The primary factor encouraging foreign entities to comply is the avoidance of withholding. Many of FATCA's main provisions will start being phased in during early 2013 to 2017.[55]

These new rules are a dramatic shift in American tax policy and require significant compliance measures by FFIs. Under FATCA, unlike other withholding regimes, the tax withheld is not for the purpose of securing payment of the taxpayer's liability, but as a penalty for failure to report tax obligations.[56] This type of tax withholding will not only affect the American clients of FFIs, but it will also spread compliance costs to other business groups of these institutions.[57] According to the new treasury regulations, existing client relationships must all be identified, documented, and classified.[58] Banks will have to conduct large surveys to identify their client bases and consider how to examine all existing relationships at once and, where necessary, to manually supplement the documentation.[59] One of the main reasons that banks will not comply with FATCA is that it requires an extensive reevaluation of computer and regulatory systems to ensure that customer accounts are properly reported to the IRS.[60]

B. Intergovernmental Agreements Concerning FATCA Compliance

In addition to publishing the FATCA regulations, the Treasury Department is busy negotiating treaties and agreements with foreign governments to ensure local laws are not violated by FATCA's reporting

54. When reporting to the IRS on American citizen accounts, the FFIs will be required to provide names, addresses, account numbers, balances of each applicable account, and details on the gross receipts and gross payments or withdrawals. *See* § 1471(a)–(c).

55. *FATCA: Postponed Deadlines*, SULLIVAN & CROMWELL LLP, 4–6 (July 15, 2011), http://www.sullcrom.com/publications/ (enter date of article; select the matching publication; follow "download full PDF" hyperlink); *see infra* Part I.C.

56. *FATCA: Postponed Deadlines*, *supra* note 55, at 1–2.

57. *See, e.g.*, *FATCA and the Funds Industry: Defining the Path*, KPMG (June 2011), http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/Documents/fatca-and-the-funds-industry-defining-the-path.pdf (suggesting that mutual fund managers view divestment of U.S. assets as a suitable solution to FATCA compliance).

58. Reporting and Withholding by FFIs, Prop. Treas. Reg. § 1.1471-3, 77 Fed. Reg. 9022, 9022, 9054–72 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 1, 301). The proposed Treasury Regulations take up almost one hundred pages of the Federal Register. 77 Fed. Reg. 9022–109.

59. Peter R. Altenburger, *FATCA: US Legislation with Broad Consequences for Many*, SWISS-AM. CHAMBER COM. (Sept. 11, 2010), http://www.amcham.ch/members_interests/p_business_ch.asp?s=7&c=1.

60. *Id.*

requirements. This began with the Treasury Department issuing a joint statement with France, Germany, Italy, Spain, and the United Kingdom announcing a plan to pursue government-to-government agreements as an alternative to regular FATCA compliance.[61] The intergovernmental approach intends to remove legal impediments to FATCA compliance and reduces the anticipated financial burdens of compliance for foreign banks in the countries that make agreements.[62]

Rather than forcing all foreign banks to submit information directly to the IRS, certain agreements allow banks to report information about American account holders through their home governments.[63] This compliance method, in contrast to FATCA's original direct reporting requirement, would prevent violation of local laws.[64] Further, under the reciprocal form Model 1 Intergovernmental Agreement (IGA), the IRS would send information on bank accounts held in the United States by residents of a signatory country to that country's revenue service.[65] The United Kingdom entered into the first FATCA intergovernmental agreement of this type on September 12, 2012, and many other countries soon followed.[66] This could force American banks to submit client information to potentially hundreds of foreign government agencies.[67]

In addition to Model 1 IGAs, the IRS released a different Model 2 IGA on November 14, 2012.[68] Previously agreed to in principle by Switzerland and Japan, the new Model 2 IGA requires direct reporting by FFIs to the IRS (unlike the Model 1 IGA).[69] "The benefits of the Model 2

61. U.S. TREASURY DEP'T, JOINT STATEMENT FROM THE UNITED STATES, FRANCE, GERMANY, ITALY, SPAIN AND THE UNITED KINGDOM REGARDING AN INTERGOVERNMENTAL APPROACH TO IMPROVING INTERNATIONAL TAX COMPLIANCE AND IMPLEMENTING FATCA (2012), *available at* http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Fr-Ger-It-Sp-UK-02-07-2012.pdf.

62. *Id.*

63. *Id.*

64. Itai Grinberg, *The Battle over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 336–37 (2012).

65. U.S. TREASURY DEP'T, MODEL INTERGOVERNMENTAL AGREEMENT TO IMPROVE TAX COMPLIANCE AND TO IMPLEMENT FATCA 13 (2012), *available at* http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf.

66. U.S. TREASURY DEP'T, AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO IMPROVE INTERNATIONAL TAX COMPLIANCE AND TO IMPLEMENT FATCA (2012), *available at* http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-UK-9-12-2012.pdf.

67. *See infra* Part II.A.2.

68. *US Treasury Department Releases "Model 2" FATCA Intergovernmental Agreement*, SULLIVAN & CROMWELL LLP (Nov. 28, 2012), http://www.sullcrom.com/FATCA_International_Agreements/ (follow "download full PDF" hyperlink).

69. *Id.*

IGA are similar to those conferred by the [Model 1] approach"; however, the Model 2 IGA does not provide reciprocity and a general exchange of information between nations.[70] The Model 2 IGA could prevent identity theft and other types of information misuse by countries that are signatories.

These multilateral treaties negotiated directly between governments represent a shift in FATCA implementation. While not envisioned as part of the 2010 law, the agreements are now seen as a more practical way to implement FATCA. However, there is still no way to avoid the fact that potentially 190 different intergovernmental agreements would need to be negotiated between the United States and foreign governments to ensure global FATCA compliance.

C. Timeline for Compliance and Missed FATCA Deadlines

The release of FATCA regulations is nothing like the punctuality of the Swiss banks[71] the IRS is targeting. Initially, the main deadline for FATCA compliance was January 1, 2013.[72] However, the Treasury Department was unable to meet this deadline and many other important dates on the original FATCA compliance timeline.[73] The new deadline for implementing due diligence procedures to identify and document accounts is now January 1, 2014.[74] Further, FFIs will now have until January 1, 2017, to begin withholding U.S. tax from noncompliant clients' investment gains, which is an additional two years from the original deadline.[75]

Delays in issuing final regulations "mean businesses will have less time to prepare for compliance."[76] Multinational firms state they need at least twelve months to prepare for FATCA's 2014 start date and it is

70. *Id.*; U.S. TREASURY DEP'T, MODEL INTERGOVERNMENTAL AGREEMENT TO IMPROVE TAX COMPLIANCE AND TO IMPLEMENT FATCA [NON-RECIPROCAL VERSION] (2012), *available at* http://www.treasury.gov/press-center/press-releases/Documents/reciprocal.pdf.

71. *See generally Switzerland's Obsession with Time* (BBC radio broadcast May 25, 2008), *available at* http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/7415455.stm.

72. I.R.S. Announcement 2012-42, 2012-47 I.R.B. 561, 561.

73. Patrick Temple-West, *IRS Delays Key Start Dates for Global Tax Evasion Law*, REUTERS, Oct. 24, 2012, *available at* http://www.reuters.com/article/2012/10/24/us-usa-tax-fatca-idUSBRE89N1PS20121024.

74. I.R.S. Announcement 2012-42, 2012-47 I.R.B. 561, 562.

75. *Id.* at 563; *IRS Announcement 2012-42: Foreign Account Tax Compliance Act (FATCA)*, DELOITTE (Oct. 24, 2012), http://www.deloitte.com/view/en_US/us/Services/tax/03b2a4fb3499a310VgnVCM2000003356f70aRCRD.htm.

76. Patrick Temple-West, *U.S. Treasury to Miss Deadline on Tax Crackdown—Sources*, REUTERS, Dec. 20, 2012, *available at* http://www.reuters.com/article/2012/12/20/us-usa-taxes-fatca-idUSBRE8BJ0T320121220.

critically important that final regulations interpreting FATCA are released soon.[77] Considering how delays have been prevalent in the past and more are expected in the future, FFIs might gain more time to institute compliance measures. However, this uncertainty in the compliance timeline is generally troublesome for those in the financial industry.[78]

II. FATCA IS AN EVIL GENIUS: THE HIGH COST OF FATCA WILL LEAD TO ITS REPEAL OR SIGNIFICANT CHANGES TO ITS CURRENT FORM

FATCA's withholding system is primarily being used not to increase tax revenue (which is normally the main tax policy goal), but rather "as a means to coerce an information-sharing agreement" with foreign banks.[79] The IRS devised a way to get information they need about American taxpayers through private, third-party sources. FATCA seeks taxpayer compliance and payment "by creating a disincentive for noncompliance where efficient information systems typically take an incentive-based approach."[80]

The new law represents a complete departure from the traditional way withholding tax regimes are used to increase the tax base. Existing withholding tax systems are designed to ensure the collection of taxes before the money can be spent for any other purpose.[81] FATCA is designed to secure information about taxpayers. In short, the IRS requires foreign banks to voluntarily agree to something that provides the IRS with information it needs at a relatively low cost and low effort to the U.S. government.[82]

The high cost of compliance imposed on private parties simply outweighs the benefits of FATCA. This type of analysis will be a driving force behind movements to repeal the law. In evaluating the effectiveness of FATCA, it is important to compare its laudable policy goal of preventing income tax evasion to its substantial downsides. The downsides include effects on investment in the United States, the heavy compliance costs that FFIs must face, the violation of foreign laws, and limited financial options for Americans living abroad. After examining

77. *Id.*

78. *See infra* Part II.A.2.

79. *See* Dizdarevic, *supra* note 43, at 2989.

80. *Id.*

81. *Id.* at 2975.

82. Clayton Norman, *U.S. Tax Officials Eye Offshore Accounts*, TICO TIMES, Oct. 21, 2011 ("Denise Hintzke, director of financial services at Deloitte, [states] . . . 'I've heard people call [FATCA] "evil genius" [because] the IRS is getting these financial institutions to voluntarily agree to do something that provides them with what they need at a relatively low cost to our government.'").

why FATCA is an overweight piece of legislation, this Comment proposes more reasonable solutions to income tax evasion that will achieve many of FATCA's goals while addressing global criticism and concerns. Lastly, this Comment examines the possible success of the repeal movement in light of recent actions by lobbying groups and foreign governments.

A. The Downsides Outweigh the Benefits of FATCA

The driving force behind the repeal of FATCA will be a close analysis of the policy problems associated with its enactment and enforcement. Some view FATCA's expansive requirements as American imperialism upon global affairs.[83] The United States is telling foreign banks to directly report to the IRS, showing complete disregard for a country's primary jurisdiction over its own banking regulation and revenue collections.[84] Lawmakers must carefully reconsider FATCA with these considerations front and center.

1. FATCA DISCOURAGES FOREIGN DIRECT INVESTMENT IN THE UNITED STATES

FATCA discourages foreign direct investment in the United States because of the withholding requirement on American securities.[85] The United States is currently one of the largest recipients of foreign direct investment in the world.[86] The American economy is dependent on continuous foreign direct investment.[87] Due to the large size and importance of American equity and bond markets, "the vast majority of foreign fund managers will feel obliged to register" with the IRS.[88] If

83. *See* Daniel Mitchell & Brian Garst, *Die Zwei Gesichter Amerikanischer Steuerpolitik*, SCHWEIZER MONAT, http://www.schweizermonat.ch/artikel/die-zwei-gesichter-amerikanischer-steuerpolitik (last visited Feb. 25, 2013).

84. *See* Bouma, *supra* note 32, at 652.

85. *See* Barbara Novick et al., *Foreign Account Tax Compliance Act Challenges for Investors*, BLACKROCK (May 2011), https://www2.blackrock.com/webcore/litService/search/getDocument.seam?contentId=1111137960&Source; Conrad de Aenlle, *A Long-Distance Relationship with the I.R.S.*, N.Y. TIMES (Dec. 2, 2012), http://www.nytimes.com/2012/12/03/business/global/03iht-srtaxfatca03.html?pagewanted=all&_r=0.

86. *Foreign Direct Investment*, ECONOMIST, Oct. 27–Nov. 2, 2012, at 45.

87. The U.S. economy holds over $2 trillion of foreign assets. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at 779 tbl.1255 (129th ed. 2009), *available at* http://www.census.gov/compendia/statab/2010/tables/10s1255.pdf.

88. *Scratched by the FATCA*, ECONOMIST, Nov. 26th-Dec. 2nd, 2011, at 86 ("Managers will then have to tell the IRS whether their clients are American citizens. [In order to satisfy this requirement], they will have to find out a lot more than whether the

there is no registration, withholding is imposed if the investment fund holds U.S. securities.[89]

In response, some FFIs might view withdrawal from U.S. fixed income and equity markets as the easiest solution to FATCA compliance.[90] For these FFIs, it would be cheaper to purchase other securities than to install computer systems required to identify all their customers.[91] A KPMG survey of leading fund promoters found that more than forty percent of foreign funds would potentially divest from U.S. securities.[92] Because FATCA puts the United States at a competitive disadvantage in the global market of foreign direct investment, other countries with more favorable laws such as China and India will benefit.[93]

Important players in international finance might exit the American markets if their operating costs become too high or worldwide risk cannot be reasonably mitigated.[94] Nevertheless, large-scale disinvestment

client has an American address. They will need to check, for example, whether the client was born in the United States or whether interest or dividends are transferred to a bank account there.").

89. *See* I.R.C. § 1474 (2006 & Supp. V 2011); Christian M. McBurney, *FATCA as Applied to Investment Funds: Suggested Fund Agreement Provisions*, PRIVATE EQUITY ALERT (Nixon Peabody LLP), June 10, 2011, http://www.nixonpeabody.com/118725.

90. Warnings of disinvestment out of U.S. securities come from far and wide: the Japanese Bankers Association, the European Banking Federation, the Institute of International Bankers, and many other banking organizations. *See, e.g.*, Letter from Japanese Bankers Ass'n to Manal Corwin, Deputy Assistant Sec'y (Int'l Tax Affairs), U.S. Dep't of the Treasury, et al., (Oct. 28, 2011), *available at* http://bsmlegal.com/PDFs/FATCA_JapaneseBankers.pdf; Letter from Guido Ravoet, Sec'y Gen., European Banking Fed'n, & Sarah A. Miller, Inst. of Int'l Bankers, to Manal Corwin, Deputy Assistant Sec'y Tax Pol'y (Int'l), U.S. Dep't of Treasury, et al. (Apr. 30, 2012), *available at* http://www.cticompliance.com/assets/pdf/EBF-IIB%20submission%20on%20FATCA%20proposed%20regulations%204-30-12.pdf; Letter from Mary Richardson, Alt. Inv. Mgmt. Ass'n Ltd., to Internal Revenue Serv. (Nov. 1, 2010), *available at* http://bsmlegal.com/PDFs/FATCA_AIMA.pdf; *FATCA and the Funds Industry: Defining the Path*, *supra* note 57.

91. *FATCA and the Funds Industry: Defining the Path*, *supra* note 57, at 12.

92. *Id.* at 6.

93. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–08–320, FOREIGN INVESTMENT: LAWS AND POLICIES REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES (2008), *available at* http://www.gao.gov/new.items/d08320.pdf; Andrew Quinlan, *Coerced Foreign Tax Compliance Is Killing American Jobs*, FORBES (Nov. 20, 2012), http://www.forbes.com/sites/realspin/2012/11/20/coerced-foreign-tax-compliance-is-killing-american-jobs/.

94. Niels Jensen, *How to Kill the Scapegoat: Addressing Offshore Tax Evasion with a Special View to Switzerland*, 63 VAND. L. REV. 1823, 1851 (2010) ("Exposing [investor] income from invested foreign capital to the looming threat of a thirty percent withholding tax may deter investors and lead to significant capital flight [out of the United States]."); *FATCA and the Funds Industry: Defining the Path*, *supra* note 57, at 5, 6.

appears unlikely given the importance of the United States and its financial markets.[95] However, this disinvestment fear is especially profound with FATCA because the Treasury Secretary, at his or her discretion, can terminate a disclosure agreement with an FFI and reinstate the withholding tax through provisions granted in FATCA.[96]

Possible capital withdraws will affect financial markets far beyond the United States. The British Bankers' Association stated that FATCA creates a "systemic market risk, resulting in an unpredictable cascade effect that is contrary to international efforts to establish financial stability."[97] This instability stems from the fact that there will be large movements of capital in and out of banks.[98] Portfolio managers will have to confront a multitiered banking system with certain banks complying with FATCA and others not.[99] In a similar statement, the Brazilian Federation of Banks also expressed fears that FATCA's implementation will violate Brazilian laws and create banking instability throughout South America.[100]

95. *See FATCA and the Funds Industry: Defining the Path*, *supra* note 57, at 5.

96. I.R.C. § 1471(b)(1) (2006 & Supp. V 2011) ("Any agreement entered into under this subsection may be terminated by the Secretary upon a determination by the Secretary that the foreign financial institution is out of compliance with such agreement.").

97. Letter from Sarah Wulff-Cochrane, British Bankers' Ass'n, to Office of the Int'l Tax Counsel, U.S. Dep't of the Treasury, et al. 17 (Aug. 15, 2011), *available at* http://www.bba.org.uk/policy/article/bba-submission-to-the-us-treasury-and-irs-on-the-us-foreign-account-tax-com/tax/ (follow "Download" hyperlink); *see also Notice 2012-60, Notice and Request for Comments Regarding Implementation of Information Reporting and Withholding under Chapter 4 of the Code*, BRITISH BANKERS' ASS'N, app. 12 (Oct. 29, 2010), www.bba.org.uk/download/6819; *Notice 2011-34, Supplemental Notice to Notice 2010-60 Providing Further Guidance and Requesting Comments on Certain Priority Issues*, BRITISH BANKERS' ASS'N, 8 (June 7, 2011), http://www.bba.org.uk/policy/article/submission-of-the-british-bankers-association-on-notice-2011-34/tax/ (follow "Download" hyperlink) [hereinafter *Notice 2011-34*].

98. *See Notice 2011-34*, *supra* note 97, at 8.

99. *See* Letter from Sarah Wulff-Cochrane, British Bankers' Ass'n, to Office of the Int'l Tax Counsel, U.S. Dep't of the Treasury, et al., *supra* note 97, at 11–12.

100. Letter from Murilo Portugal, Chairman, Federação Brasileira de Bancos, to Manal Corwin, Deputy Assistant Sec'y Tax Pol'y (Int'l), U.S. Dep't of Treasury, et al. (Dec. 22, 20122), *available at* http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/Tax/us_tax_c%C3%B3pia_da_carta_original_enviada_ao_IRS_010112.pdf.

2. FATCA CREATES A SERIOUS FINANCIAL BURDEN FOR FINANCIAL INSTITUTIONS

The amount of information that FATCA requires banks to submit to the IRS is immense,[101] and disengaging from capital markets located in the United States is not an option for most FFIs.[102] Thus, it will be necessary to work with the IRS to comply with FATCA. Recent agreements between foreign governments and the United States started making this process easier.[103] However, the information currently provided by the IRS in the form of proposed treasury regulations gives little guidance to banks.[104] The British Bankers' Association clearly stated that the treasury notice on pass-thru payments is simply unworkable.[105]

Furthermore, the approach of avoiding U.S. assets may do the trick, but this is not true in all cases due to the pass-thru reporting requirements of FATCA.[106] Certain non-American assets will also be affected by FATCA because the banks that hold them do business with Americans in different capacities. In reality, every non-American fund may need to become FATCA compliant in order to continue their current line of business.[107] Thus, global investors will end up carrying the cost of FATCA compliance unwillingly in their portfolios even though they purposefully avoid financial investments connected to the United States.

In FATCA's current form, any bank or company in the world that might receive payment from outside its country will need to register with the IRS to get an identity number which other entities will use to

101. *See* Reporting and Withholding by FFIs, Prop. Treas. Reg. § 1.1471-3, 77 Fed. Reg. 9022, 9022, 9054–72 (Feb. 15, 2012) (to be codified at 26 C.F.R. pt. 1, 301).

102. *The Foreign Account Tax Compliance Act (FATCA)*, DLA PIPER LLP, 3, http://www.dlapiper.com/files/Uploads/Documents/FATCA-Alert.pdf (last visited Feb. 1, 2013).

103. *See supra* Part I.B.

104. *See generally* I.R.S. Notice 2011-53, 2011-32 I.R.B. 124; I.R.S. Notice 2011-34, 2011-19 I.R.B. 765; I.R.S. Notice 2010-60, 2010-37 I.R.B. 329.

105. The British Bankers' Association notes that "[c]ustomer service and operations could be overwhelmed by customers querying payments . . . . [T]he implications of disruption could be profound." Jessica Meek, *Banks Fear FATCA Raises Operational and Systemic Risks*, RISK.NET (Sept. 26, 2011), http://www.risk.net/operational-risk-and-regulation/feature/2109648/banks-fear-fatca-raises-operational-systemic-risks (quoting Letter from Sarah Wulff-Cochrane, British Bankers' Ass'n, to Office of the Int'l Tax Counsel, U.S. Dep't of the Treasury, et al., *supra* note 97, at 16).

106. I.R.C. § 1471(d)(7) (2006 & Supp. V 2011) ("The term 'passthru payment' means any withholdable payment or other payment to the extent attributable to a withholdable payment.").

107. *See* Grinberg, *supra* note 64, at 335.

determine their FATCA compliance status.[108] Foreign banks will either have to prevent non-nationals from having bank accounts in order to be treated by the IRS as "local banks," or identify foreign customers under FATCA.[109] This puts local banks in the position of having to possibly deny bank accounts to residents of their geographical neighbors or comply with reporting obligations that have no direct effect on their domestic banking customers.

Further, with reciprocal IGAs, U.S. banks need to send information to countless foreign governments under the Article 2 reporting requirements.[110] U.S. banks will need to install information reporting systems that link each customer's nationality to his or her accounts. Currently, this is nearly impossible because no regulations exist informing U.S. banks how to comply.[111] Although banks are in a better position to implement these compliance measures due to antiterrorism and money laundering laws, insurance companies are completely in the dark about implementing the obligations that Model 1 IGAs require.[112] In the end, this will raise the cost of domestic banking services by passing increased compliance costs to retail customers.

An IRS Information Reporting Program Advisory Committee (IRPAC) report said that recent notices and proposed regulations still leave too little time for banks to build required systems and provide little guidance on performing required account due diligence.[113] The IRPAC report strongly recommends that the IRS "issue further guidance that [provides] additional time [and instructions] to develop the required [information] systems."[114] Another suggestion advanced by the IRPAC

108. *See* § 1471(b)(1)(B).

109. Reporting and Withholding by FFIs, Prop. Treas. Reg. § 1.1471-5(f)(2)(i), 77 Fed. Reg. 9022, 9091 (Feb. 15, 2012); I.R.S. Notice 2011-34, 2011-19 I.R.B. 765.

110. *See supra* Part I.B.

111. Interview with James George Jatras, Principal, Squires Sanders Pub. Advocacy, in Wash., D.C. (Jan. 8, 2013).

112. *Id.*; *see also* 31 U.S.C. § 5318A (2006).

113. ELIZABETH DOLD ET AL., INFORMATION REPORTING PROGRAM ADVISORY COMMITTEE: GENERAL REPORT 75–77 (2011) [hereinafter IRPAC REPORT], *available at* http://www.irs.gov/pub/irs-utl/2011_information_reporting_program_advisory_committee_public_report.pdf (detailing recent assessment of IRS on the FATCA implementation around the world and explaining the response that the IRS is getting concerning FATCA).

114. *Id.* The IRPAC report noted that the IRS's phased implementation of FATCA provides temporary relief, but that there may not be enough time for financial institutions to build required systems and perform required due diligence to satisfy compliance requirements. *Id.* IRPAC is an advisory committee "composed of individuals who represent various segments of the tax professional community." Carol Grant, IRS Office of Nat'l Pub. Liaison, *Information Reporting Program Advisory Committee (IRPAC) Facts*, IRS, http://www.irs.gov/Tax-Professionals/Information-Reporting-Program-Advisory-Committee-(IRPAC)-Facts (last updated Jan. 18, 2013).

report is to provide clearer procedures that withholding agents can implement to "verify[] an account holder is an FFI and its status as a participating FFI."[115] Thus, there is an implicit acknowledgement from an advisory committee to the IRS that developing FATCA-compliant information systems is more difficult for FFIs than the IRS originally anticipated.[116]

Lastly, it is not clear whether the benefits of increased revenue outweigh the heavy cost of compliance associated with FATCA. The predicted tax revenues of FATCA amount to approximately $800 million annually.[117] This revenue is countered by the enormous implementation costs and future operating costs for which institutions must anticipate and plan for.[118] In addition, compliance costs are also deductible against a firm's current revenues, which would further reduce the amount of overall revenue brought in by FATCA.[119] The United States already has one of the highest corporate tax rates in the world.[120] Members of Congress should not support a tax law with questionable revenue gains that may even be offset entirely by reduced economic activity.

115. IRPAC REPORT, *supra* note 113.

116. The IRPAC report also shows that even the IRS admits that the heavy compliance costs are being shifted onto unwilling third parties who may have no connection to the United States. *See generally id.*; Reporting and Withholding by FFIs, 77 Fed. Reg. 9022, 9023 (proposed Feb. 15, 2012) (noting, for example, that the IRS "[r]ecogniz[es] that there are costs associated with the implementation of any new reporting regime").

117. STAFF OF JOINT COMM. ON TAXATION, 111TH CONG., ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT TO THE SENATE AMENDMENT TO THE HOUSE AMENDMENT TO THE SENATE AMENDMENT TO H.R. 2847, THE "HIRING INCENTIVES TO RESTORE EMPLOYMENT ACT," JCX-6-10 (2010), *available at* https://www.jct.gov/publications.html?func=startdown&id=3650 (taking the average of annual estimated revenue effects for the years 2010–20 results in an estimated annual revenue of $792 million).

118. A rough estimate shows that average compliance cost is approximately $5–10 million per FFI, which if introduced by all FFIs might result in global cost of compliance near $1–2 trillion. *See* Altenburger, *supra* note 59. "Companies affected by the new rules, including BlackRock, Western Union and Prudential, may spend more than $100 million each to comply with the law." Patrick Temple-West, *U.S. Issues Final Tax Anti-evasion Rules, Enforcement Ahead*, REUTERS, Jan. 17, 2013, *available at* http://www.reuters.com/article/2013/01/17/us-usa-tax-fatca-idUSBRE90G1AU20130117.

119. *See* I.R.C. § 162(a) (2006).

120. Duanjie Chen & Jack Mintz, *Corporate Tax Competitiveness Rankings for 2012*, TAX & BUDGET BULL. (Cato Inst., Wash., D.C.), Sept. 2012.

3. FATCA FAILS TO CONSIDER THE IMPACT OF EXISTING TAX TREATIES AND FOREIGN LAWS

Another downfall of FATCA is that the overly U.S.-focused approach to offshore tax evasion fails to consider the impact of existing tax treaties and foreign laws.[121] Foreign banks are already subject to regulatory oversight and laws in their home countries.[122] At one extreme, the FATCA reporting requirements might be considered illegal in countries where a foreign bank is headquartered.[123] The IRPAC report warned of serious global repercussions from the new requirements because "[t]he obligations that FATCA imposes on FFIs . . . potentially conflict with legal constraints imposed on such FFIs under foreign law in a number of respects."[124] Intergovernmental agreements between the United States and foreign nations have recently been used to avoid banks breaking local laws while complying with FATCA reporting requirements.[125] Even with these agreements, the burdens created on the entire banking world are a highly inefficient way to deal with American offshore tax evasion.

Some of the bank accounts affected by FATCA might not even be held by Americans. This could happen where a foreign spouse in a foreign country earns the money that goes into the account and supports a stay-at-home American spouse.[126] In that case, the IRS would require banking details on a non-American citizen. Banks should be concerned about providing this sensitive information about a customer who has no contact with the United States and could be exposed to regulatory sanctions and lawsuits from account holders.[127]

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121. The IRPAC report also gave the examples of potential violations of privacy or data-protection laws that implementation of FATCA would violate. Foreign banks may also be prohibited by national laws from collecting withholding tax, particularly on pass-through payments. IRPAC REPORT, *supra* note 113, at 75.

122. *Id.* at 74–75.

123. *See* Cynthia Blum, *Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, 6 FLA. TAX REV. 579, 634 (2004) (stating that countries "seek[ing] to force a tax haven to give up bank secrecy is a violation of the tax haven's sovereignty").

124. IRPAC REPORT, *supra* note 113, at 75. For example, FATCA's reporting requirements could potentially violate nonwaivable privacy or data protection laws in foreign countries. *See id.*; I.R.C. § 1472 (2006 & Supp. V 2011) (obligating all nonfinancial foreign entities to disclose information about their ten-percent U.S. account owners or to certify that they have no such account owners).

125. *See supra* Part I.B.

126. Cafree, Comment to *IRS Advisory Committee Warns of FATCA Conflicts*, ACCT. TODAY (Oct. 27, 2011), http://www.accountingtoday.com/news/IRS-Advisory-Committee-Warns-FATCA-Conflicts-60614-1.html.

127. *Id.*; *The Foreign Account Tax Compliance Act (FATCA)*, *supra* note 102.

Banking privacy laws are important to many jurisdictions and these local law constraints may conflict with the implementation of FATCA unless approved by local government action.[128] Intergovernmental agreements have been used to allow FATCA compliance while adhering to local laws. For example, Switzerland grants an exception to Article 271 of the Swiss Criminal Code[129] through an intergovernmental agreement that enables Swiss financial institutions to comply with FATCA rules, in particular regarding the reporting of information to the IRS.[130] It will be highly burdensome on the IRS to negotiate similar exceptions in many other countries that have strict banking privacy laws.

4. A WILD WILD LIFE: FATCA IS A NIGHTMARE FOR AMERICAN EXPATRIATES

Due to the high cost of compliance and the perceived legal risks, many FFIs will refuse to sign an agreement with the IRS.[131] This will lead foreign banks, insurance providers, and pension plans to stop accepting American clients. In extreme cases, Americans have been unable to participate in company pension funds or conclude insurance contracts and, as a result, are rendered unemployable by FATCA's main provisions.[132] European banks such as Deutsche Bank, Commerzbank, HSBC, ING Group, and Credit Suisse began terminating accounts of some American customers in early 2011.[133]

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128. *See* Scott D. Michel & David H. Rosenbloom, *FATCA and Foreign Bank Accounts: Has the U.S. Overreached?*, 62 TAX NOTES INT'L 709, 711 (2011).

129. *See* Schweizerisches Strafgesetzbuch [StGB], Code pénal suisse [CP], Codice pénal svizzero [CP] [Criminal Code] Decl. 21, 1937, SR 311.0, art. 271 (Switz.) (setting forth the criminal statute used to enforce Switzerland's stringent banking privacy laws).

130. U.S. TREASURY DEP'T, JOINT STATEMENT FROM THE UNITED STATES AND SWITZERLAND REGARDING A FRAMEWORK FOR COOPERATION TO FACILITATE THE IMPLEMENTATION OF FATCA (2012), *available at* http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Statement-US-Switzerland-06-21-2012.pdf.

131. *Why FATCA Is Bad for America and Why It Should Be Repealed*, AM. CITIZENS ABROAD (July 2012), http://www.americansabroad.org/issues/fatca/fatca-is-bad-for-america-why-it-should-be-repealed/ (describing how FATCA creates a two-tiered banking system worldwide—one which adheres to the U.S. legislation and one which refuses to do so).

132. *Id.*

133. Bill Hinchberger, *European Banks Shut Americans out over U.S. Tax Rules*, USA TODAY (Sept. 27, 2012, 10:14 PM), http://www.usatoday.com/story/money/business/2012/09/27/american-expats/1594695/; *Reaction to US Tax Law: European Banks Stop Serving American Customers*, SPIEGEL ONLINE (Dec. 14, 2011, 4:10 PM), http://www.spiegel.de/international/business/reaction-to-us-tax-law-european-banks-stop-serving-american-customers-a-803742.html.

Beyond eliminating basic banking options, FATCA makes doing business harder for Americans abroad. This could be one of the possible reasons Facebook cofounder Eduardo Saverin renounced his American citizenship.[134] FATCA requires that the same reporting required by FFIs be used by any private foreign corporation, business, or partnership in which a U.S. citizen is a ten percent or greater shareholder.[135] The implication for a wealthy investor, like Saverin, is that FATCA's reporting regime would be imposed on all of his non-U.S. co-investors in future business deals.[136] This requirement would expose the underlying value and cash flows attributable to all the investors, whether they are U.S. citizens or not.[137] For this reason, American investors might be excluded from foreign business deals because their involvement would require some activity of all partners to be reported to the IRS.

The FATCA legislation also increases the penalties and likelihood of detection for failing to file a return for a passive foreign investment company (PFIC).[138] In addition to filing the new "FATCA Form,"[139] many Americans living abroad may unknowingly hold investments in foreign mutual funds that are classified as PFICs[140] and have never filed the appropriate tax return. Under IRC § 1298, a U.S. person who is a PFIC shareholder must file an annual report containing information required by the IRS.[141] FATCA allows the IRS to see these PFIC holdings and many Americans abroad may now be penalized for participating in a foreign pension plan. Clearly, Congress intends one of the effects of FATCA to be enforcement of the PFIC rules.

134. David Kuenzi, *Eduardo Saverin's Citizenship Renunciation Is Not about Taxes, It's about American Imperial Overreach*, EMERGING MONEY (May 18, 2012, 10:00 AM), http://emergingmoney.com/politics-markets/facebook-cofounder-eduardo-saverin-citizenship-renunciation-not-about-taxes/.

135. *Id.*

136. *Id.*

137. *See* I.R.S. Form 5471, OMB No. 1545-0704 (Dec. 2012); I.R.S. Form 8858, OMB No. 1545-1910 (Dec. 2012); I.R.S. Form 8865, OMB No. 1545-1668 (2012).

138. David Kuenzi, *Why Americans Should Never, Ever Own Shares in a Non-US Incorporated Mutual Fund*, THUN FIN. ADVISORS, 2 (Apr. 2012), http://www.thunfinancial.com/Why-Americans-Should-Never-Own-Foreign-Mutual-Funds.php.

139. Specified individuals must report their ownership of certain foreign financial accounts and securities, including certain interests in trusts and estates, on Form 8938 for the 2011 tax year. *See* I.R.S. Form 8938, OMB No. 1545-2195 (Nov. 2012).

140. I.R.C. § 1298 (2006 & Supp. V 2011).

141. § 1298(f).

B. Trimming the Excess Fat: Skinnier Solutions That Solve the Tax Evasion Problem

The IRS does not need to strong-arm banks into FATCA compliance. There are alternatives to FATCA, which would avoid the excess administrative weight, expensive bank compliance costs, and perceived risks as seen from overseas. First, Congress could repeal FATCA and eventually introduce a replacement law that imposes a withholding tax across the board on all U.S. source interest, dividends, royalties, and social security payments. Second, the IRS could increase enforcement actions and whistleblower programs. Alternatively, minor tweaks to FATCA such as lowering reporting thresholds, more specific exemptions, and extended compliance deadlines could help struggling banks and desperate American expatriates.

1. WITHHOLDING REQUIREMENTS ON DIVIDEND, INTEREST, AND OTHER INVESTMENT INCOME

Withholding is a simple concept that effectively addresses the problem of income tax evasion.[142] "The payor holds back a portion of the payment and remits it to the proper tax authorities, to be applied against the payee's tax liability. . . . Withholding could easily be adopted for dividends, interest and other investment income, which are currently subject to [only] information reporting."[143] In support of this idea, many other industrialized countries impose withholding on investment income of their citizens globally.[144]

The United States has not availed itself of this powerful enforcement tool to collect taxes on investment income by Americans.[145] Withholding rates could vary for different types of taxpayers. For example, lower rates on social security payments would avoid punitive financial conditions for modest retirees living overseas and higher rates could be imposed on taxpayers with higher adjusted gross incomes. Today, the withholding tax applies only to dividend, rents, and royalty payments made to foreigners overseas.[146] The standard rate is thirty

142. Lily Kahng, *Investment Income Withholding in the United States and Germany*, 10 FLA. TAX REV. 315, 322–23 (2010) (describing how wage withholding is very effective).

143. *Id*.

144. *Id*. at 340–41.

145. *See generally* Richard L. Doernberg, *The Case against Withholding*, 61 TEX. L. REV. 595, 599–603 (1982); Charlotte Twight, *Evolution of Federal Income Tax Withholding: The Machinery of Institutional Change*, 14 CATO J. 359, 367–90 (1995).

146. INTERNAL REVENUE SERV., INSTRUCTIONS FOR FORM 1042-S: FOREIGN PERSON'S U.S. SOURCE INCOME SUBJECT TO WITHHOLDING (2013); INTERNAL REVENUE

percent withholding, often reduced to fifteen percent through bilateral tax treaties with other countries.[147]

If a withholding tax were in place, any person or entity receiving U.S.-based income overseas would be subject immediately to the withholding tax. Americans who are honest and declare their income correctly to the IRS would be able to recuperate any excess withholding in their tax returns. If these taxpayers did not properly report their income, the government would have already collected revenue and no tax would be avoided. The tax base is sufficiently preserved and minimum burdens are placed on third parties. Other countries have a similar system in place, and it has solved many tax gap problems associated with foreign income tax evasion by their citizens.[148]

Additionally, this withholding system would bring in a new pool of contributors to the tax base of the United States. This new tax base would consist of foreigners who have bank accounts in the United States and might pay no tax on gains attributable these holdings. In addition, these taxpayers likely do not declare the revenue gained to their principal country of residence as well. Thus, the United States would help other countries combat the international problem of income tax evasion instead of imposing unilateral tax laws.[149]

Any new withholding tax should not apply to capital movements,[150] which are targeted by the FATCA penalties.[151] Applying withholding to capital movements would drive foreign capital out of U.S. markets because it is confiscatory and investors would allocate their funds elsewhere. As mentioned above, this would hurt the U.S. economy by putting it at a cost disadvantage in global money markets because investors would find countries with more favorable laws.[152] By adopting withholding on only investment income, the United States could properly collect tax revenue and maintain capital investment within the country.

SERV., IRS PUB. 515, WITHHOLDING OF TAX ON NONRESIDENT ALIENS AND FOREIGN ENTITIES (2012).

147. *Id.*

148. *See* Kahng, *supra* note 142, at 340–41.

149. Piroska Soos, *Self-Employed Evasion and Tax Withholding: A Comparative Study and Analysis of the Issues*, 24 U.C. DAVIS L. REV. 107, 126–30 (1990) (withholding is an efficient, reliable way to collect tax because it improves compliance in payment and reporting).

150. "Capital movement" is the transfer of capital between two foreign countries either by the import or export of securities, dividend payments, or interest payments. *See* Chander Kant, *What Is Capital Flight?*, 25 WORLD ECON. 341, 341–58 (2002).

151. I.R.C. § 1471(c)(1)(A)-(D) (2006 & Supp. V 2011).

152. *See supra* Part II.A.

2. INCREASED ENFORCEMENT ACTIONS, WHISTLEBLOWER REWARDS, AND STIFF PENALTIES PREVENT INCOME TAX EVASION

In addition to withholding, existing tools such as increased tax enforcement actions, compensating whistleblowers, and expensive penalties prevent income tax evasion. The IRS should focus on identifying Americans using foreign banks to hide income.[153] Through the voluntary disclosure program[154] and settlement agreements with banks,[155] the United States now has a wealth of powerful tools to locate networks helping tax evasion.[156] These enforcement efforts strategically identify areas where Americans are evading taxes rather than casting a worldwide whale net to catch tax evaders as FATCA legislation aims to do.

Efficient enforcement actions carried out by the Department of Justice Tax Division[157] have an "outsized deterrent effect," which motivates Americans to pay their taxes.[158] Further, officials from the IRS's Criminal Investigation Division (CID) and the Department of Justice Tax Division have stated that existing enforcement tools are proving very successful.[159] Congress needs to increase the funding for IRS and Justice Department enforcement efforts to track down tax cheats and bring their money back into the American tax base.[160] "The [United States] should welcome, and treat with appropriate leniency, those who

153. Michel & Rosenbloom, *supra* note 128, at 712.

154. I.R.S. News Release IR-2012-64 (June 26, 2012); I.R.S. News Release IR-2012-5 (Jan. 9, 2012).

155. *See, e.g.*, *Swiss Bank Wegelin to Close after US Tax Evasion Fine*, BBC NEWS (Jan. 4, 2013), http://www.bbc.co.uk/news/business-20907359.

156. Michel & Rosenbloom, *supra* note 128.

157. *Offshore Compliance Initiative*, U.S. DEPARTMENT JUST., http://www.justice.gov/tax/offshore_compliance_intiative.htm (last visited Feb. 18, 2013).

158. Michel & Rosenbloom, *supra* note 128; *see, e.g.*, Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance*, *in* WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 193, 212–13 (Joel Slemrod ed., 1992).

159. "On Sept. 14, 2012, Rebecca Sparkman, Director (Operations Policy and Support), CID, said the IRS's offshore voluntary disclosure initiative (OVDI) is growing by 'leaps and bounds' and is a huge success." Bouma, *supra* note 32, at 656 (quoting Alison Bennett, *Taxpayers Required to Talk to IRS Even after Voluntary Disclosure Cases Closed*, DAILY TAX RPT., Sept. 18, 2012, at G-4).

> "What we're finding is that when people are coming in, they're telling us about their banker, they're telling us about their bank, they're telling us about the place they had their money that we might not know about," she said, "[a]nd that leads us to the next bank, it leads us to the next promoter, it leads us, obviously, to the next client."

Bennett, *supra* (quoting Rebecca Sparkman, Dir. of Operations Policy and Support, IRS Criminal Investigation Div.); *see* Bouma, *supra* note 32.

160. Michel & Rosenbloom, *supra* note 128, at 709, 712–13.

come forward to make voluntary disclosures of their undeclared [offshore banking accounts]."[161]

In addition, the IRS has an expansive whistleblower law that encourages tax compliance.[162] Whistleblowers who come forward with information about tax evasion are graciously compensated. In a recent example, Bradley Birkenfield received $104 million in compensation ($4600 for every hour he spent in prison) for exposing a $20 billion illegal tax fraud scheme which implicated the Swiss bank UBS.[163] "[T]hese laws can be effectively used to combat corruption, illegal offshore tax evasion and money laundering" in a more efficient manner than widespread FATCA implementation.[164]

3. EVEN IF FATCA IS NOT REPEALED, CHANGES ARE REQUIRED

Changes in FATCA could address several of the law's main flaws. With minor tweaks, compliance will be easier and more understandable for FFIs and Americans living abroad. Further, more time to implement FATCA compliance will be greatly appreciated. The arbitrary and complex provisions of FATCA could be replaced with a much more clear-cut, logical approach.

a. Increase the threshold amount for FATCA reporting and exempt certain types of financial instruments

A possible solution that does not involve repealing FATCA is to increase the threshold for individual reporting requirements.[165] "FATCA reporting includes life insurance contracts and pension funds as well as

161. *Id.* at 712; Press Release, Dep't of Justice, UBS Client Pleads Guilty to Failing to Report $6.1 Million in Swiss Bank Accounts (Sept. 25, 2009), *available at* http://www.justice.gov/tax/txdv091027.htm. *Cf.* Carolyn B. Lovejoy, Note, *UBS Strikes a Deal: The Recent Impact of Weakened Bank Secrecy on Swiss Banking*, 14 N.C. BANKING INST. 435, 442–43 (2010) (describing Switzerland's long tradition and history of banking secrecy).

162. *See* I.R.C. § 7623 (2006).

163. David Kocieniewski, *Get Out of Jail Free? No, It's Better*, N.Y. TIMES, Sept. 11, 2012, at A1.

164. Press Release, Nat'l Whistleblowers Ctr., UBS Bank Insider Celebrated for Exposing $20 Billion Tax Evasion Scheme: $104 Million Paid to the Whistleblower (Sept. 11, 2012) (quoting Stephen Kohn, Exec. Dir., Nat'l Whistleblowers Ctr.), *available at U.S. Group Announces $104 Million IRS Award*, 2012 WORLDWIDE TAX DAILY 177-28, LEXIS 2012 WTD 177-28; Michel & Rosenbloom, *supra* note 128, at 712–13.

165. *Unintended Consequences: The REAL Impact of the Foreign Account Tax Compliance Act*, ASS'N AM. RESIDENT OVERSEAS, www.aaro.org/fatca (last visited Feb. 27, 2013).

bank accounts."[166] Raising the required reporting limit will lower the burden on Americans of modest incomes who generally pay their taxes.[167] Raising the reporting requirement from $50,000 to $500,000 is a very workable solution.[168] Congress should also increase the granting of exemptions to banks with smaller accounts, which are less likely to be hiding client assets.

Additionally, it might be possible to maintain the $50,000 threshold but exclude the reporting requirement on certain life insurance policies and pension funds. Again, this would mainly benefit individual taxpayers, but it could also ease the burden on FFIs because they can organize their clients' accounts by types of balances and only install reporting systems to deal with large accounts. These changes are not radical and could be easily implemented before the 2014 FATCA compliance deadline.

Additionally, the reporting requirement threshold for U.S. ownership in foreign corporations and partnerships could be changed from 10% to 50%. Currently, smaller investor groups might exclude American citizens from their business ventures because the legal and technical burden of complying with the FATCA reporting demands would be overwhelming. Changing to a 50% ownership requirement would penalize fewer Americans in small business ventures abroad and ensure that only significant ventures are targeted.

b. Extend the deadline for FATCA compliance and provide more detailed procedures for foreign financial institutions

Since many organizations are struggling to be ready by 2014,[169] extending compliance deadlines and providing more detailed instructions for complying with the information-reporting requirement would be practical. The IRS has already extended the time for compliance,[170] but that is not enough. On July 14, 2011, the IRS announced a phase-in schedule, which effectively delays implementation of FATCA for one year and, in some cases, until 2015 for banks that meet certain initial

166. *Id.*

167. *Id.*

168. The IRS has also hinted at the fact that $500,000 is a cutoff point for extending the deadline for FFIs to comply with regulations. *See* I.R.S. Notice 2011-53, 2011-32 I.R.B. 124.

169. *Ready for FATCA? One in Four Financial Institutions Not Even Aware of Impending US Tax Legislation*, CANADA NEWSWIRE, Sept. 26, 2011, *available at* http://www.newswire.ca/en/story/846971/ready-for-fatca-one-in-four-financial-institutions-not-even-aware-of-impending-us-tax-legislation.

170. I.R.S. Notice 2011-53, 2011-32 I.R.B. 124.

reporting requirements.[171] This schedule was again changed in 2012, pushing back the deadlines slightly more, but not enough.[172]

"[D]ue to a lack of standards around the interpretation of regulations, they are often interpreted differently from firm to firm."[173] FATCA's reporting requirements also "present serious difficulties around client onboarding for firms that do not have automated systems."[174] Additionally, these financial institutions know their information systems better than the IRS and should be given leeway to devise alternative reporting and disclosure structures in line with enforcement expectations. Specific guidelines showing how the IRS will enforce FATCA and an acknowledgement from the IRS indicating lenient initial enforcement could help FFIs implement procedures at lower costs and higher value to banking customers.

C. This "FATCA(T)" Does Not Have Nine Lives: The Movement to Repeal FATCA

Because FATCA likely will not achieve its stated purpose and will hamper the United States as it competes in a fragile global economy, it should be repealed. There are better options that combat tax evasion without requiring third parties to bear the heavy burden of supplying the IRS with information.[175] The American public and most lawmakers do not understand the law's broad-reaching effects and that needs to change.[176]

Several methods, used along with lobbying Congress, can achieve the repeal of FATCA.[177] "These include hearings, ordering [a] cost/benefit stud[y] (which never was done for FATCA), withholding [IRS] enforcement funding, freezing Executive Branch nominations, and . . . most importantly, blocking implementation of [more Model 1 and 2] IGAs as the 'weak link' in the FATCA enforcement plan . . . ."[178] A

171. *Id.*

172. *See supra* Part I.C.

173. Nicholas Hamilton, *Deutsche's Sutton: Industry Must Collaborate on FATCA Front*, RISK.NET (Nov. 25, 2011), http://www.risk.net/operational-risk-and-regulation/news/2127827/deutsches-sutton-industry-collaborate-fatca. The head of customer data at Deutsche Bank states, "[t]here are so many myths and legends built up around how to interpret rules because, for the most part, regulators don't give us rules—they give us guidelines and we interpret them differently within our firms." *Id.*

174. *Id.*

175. *See supra* Part II.B.

176. *See* Jim Jatras, *Jim Jatras Responds to Isaac Brock Society on FATCA*, ISAAC BROCK SOC'Y (Oct. 24, 2012), http://isaacbrocksociety.ca/2012/10/24/jim-jatras-responds-to-isaac-brock-society-on-fatca/.

177. *Id.*

178. *Id.*

significant public relations campaign is also needed to educate the public about FATCA.[179] The financial industry should consider funding a substantial Congressional lobbying and media campaign to avoid the substantial compliance costs it will face once FATCA goes into full effect.[180]

1. MAJOR FACTORS TO BE CONSIDERED IN A REPEAL OF FATCA

Recent messages to the IRS from foreign governments signal worldwide discontent with the FATCA requirements.[181] As the 2014 compliance deadline quickly approaches, more pressure directed towards the IRS to ease the regulations or for Congress to repeal FATCA will occur.[182] FFIs are scrambling to implement FATCA's reporting requirements and are genuinely scared of facing noncompliance.[183] This noncompliance would result in disastrous thirty percent withholding on investment income.[184]

In considering whether the movement to repeal FATCA will be successful, it is important to consider some roadblocks that groups lobbying for its repeal must face. First, FATCA was voted into law under the HIRE Act, which had broad bipartisan support.[185] The main purpose of this Act was to get Americans back into jobs and bolster the American economy through a significant stimulus package.[186] Besides the FATCA

179. *Id*.

180. *Id*.

181. Scott D. Michel and H. David Rosenbloom of Caplin & Drysdale state in their call for the repeal of FATCA, "it is becoming increasingly apparent that the backlash from FATCA, the burden on IRS regulation writers, and the enormous cost of compliance are not worth the tax revenue that FATCA is likely to produce or to justify the other benefits of enhanced compliance." Michel & Rosenbloom, *supra* note 128, at 713; *see also Foreign Account Tax Compliance Act (FATCA) Comment Letter to IRS and Responses*, DELOITTE, http://www.deloitte.com/view/en_US/us/Services/tax/by-issue/fatca-resource-library/e7d4e74a9f948310VgnVCM3000001c56f00aRCRD.htm (last updated Nov. 15, 2012) (listing letters submitted to the IRS against FATCA).

182. *See* Michel & Rosenbloom, *supra* note 128, at 711–13; Jatras, *supra* note 176.

183. Hamilton, *supra* note 173; Michel & Rosenbloom, *supra* note 128, at 711–12.

184. *See supra* Part I.A.

185. Ajay Shamdasani, *FATCA Legislation Unlikely to Be Repealed, Conference Hears*, THOMSON REUTERS, Mar. 14, 2012, *available at* http://fatca.thomsonreuters.com/wp-content/uploads/2012/09/APAC-FATCA-legislation-unlikely-to-be-repealed-conference-hears.pdf; *Amendment to H.R. 2847*, DEMOCRATIC POL'Y & COMM. CTR., http://dpc.senate.gov/docs/lb-111-2-21.html (last visited Feb. 18, 2013).

186. *See* Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, §§ 1–301, 124 Stat. 71, 71–78 (2010); Remarks on Signing the Hiring Incentives to Restore Employment Act, 2010 DAILY COMP. PRES. DOC. 185 (Mar. 18, 2010).

provisions, other parts of the bill create new tax credits that encourages businesses to hire new employees.[187]

In the current environment, with voters not interested in raising taxes, a repeal of FATCA, which is aimed at increasing tax revenue, will not be looked upon favorably. Even the most vociferous proponents of repeal concede that FATCA will be a tough nut to crack, but claim that "if and when FATCA receives the kind of scrutiny in the United States it should have received before enactment, it is unlikely to survive." [188] Further, tax evasion is a contentious political issue. Voters will not like seeing a bill repealed that is aimed to target tax evasion by wealthy Americans taking advantage of loopholes in the current system.[189] As long as getting Americans back to work remains a top priority for Congress, the bipartisan support that enacted FATCA will struggle to repeal it.

In addition, Americans living outside the United States do not have a big footprint in American politics and have no concentrated voting strength in any particular state or district. Although groups such as American Citizens Abroad and Republicans Abroad have organized movements to repeal FATCA, American expatriates have trouble speaking with a unified voice on the issue.[190] A strong unified message is needed to ensure the success of the repeal movement.

Lastly, FATCA is not mainly about revenue and is more about information on foreign bank accounts held in foreign countries.[191] This may also be part of the reason why a proposed withholding regime would not be implemented because it is not in line with Congress's policy purpose behind the bill when it was enacted. There could be other ways to get information from banks, but in general there will be a similar sentiment against this. However, efforts to repeal tax legislation enacted by President Barack Obama have succeeded before.[192]

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187. §§ 101–201, 124 Stat. at 72–77.

188. *FATCA Ends 2012 with a Whimper, Stumbles into 2013*, REPEAL FATCA (Jan. 4, 2013), http://www.repealfatca.com/index.asp?idmenu=4&title=News&idsubmenu=107 ("Proponents of the 'Foreign Account Tax Compliance Act' (FATCA)—a/k/a 'the worst law most Americans have never heard of'—fell short at the end of 2012 on two key indices, further puncturing its air of presumptive inevitability.").

189. Bryan S. Arce, Note, *Taken to the Cleaners: Panama's Financial Secrecy Laws Facilitate the Laundering of Evaded U.S. Taxes*, 34 BROOK J. INT'L L. 465, 467 (2009) (citing Mike Godfrey, *Senate 'Offshore' Hearing Called 'One-Sided,'* TAX NEWS (Aug. 3, 2006), http://www.tax-news.com/archive/story/Senate_Offshore_Hearing_Called_OneSided_xxxx24430.html).

190. *See FATCA—Sign the Petition to Repeal below*, REPUBLICANS ABROAD EUROPE, http://www.republicansabroadeurope.org/fatca_petition (last visited Feb. 22, 2013); *Why FATCA Is Bad for America and Why It Should Be Repealed*, *supra* note 131.

191. *See* Dizdarevic, *supra* note 43, at 2994.

192. *See infra* Part II.C.2.

2. BURDENSOME LAWS HAVE BEEN SUCCESSFULLY REPEALED

There are significant examples of the sudden collapse of important government initiatives, once targeted campaigns against them were launched.[193] For example, the Medicare Catastrophic Coverage Act of 1988–89 was repealed seventeen months after it was enacted.[194] "Unlike FATCA, the Catastrophic Coverage Act . . . had a clear and identifiable set of beneficiaries" and provided services directly to Americans.[195] Extensive lobbying also played a significant factor reversing broad presidential and congressional support in the Dubai Ports World controversy.[196]

More directly related to federal tax policy, lobbyists successfully repealed certain expanded information reporting requirements that were passed as part of the 2010 healthcare reform legislation.[197] The repeal, passed as the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011, eliminated the onerous requirement that businesses file a 1099 form to report purchases of goods or services of more than $600 per year.[198] In response to the repeal, President Obama said that he looked "forward to continuing to work with Congress to improve the tax credit policy in this legislation."[199]

Judging from the recent repeal of burdensome 1099 reporting requirements for small businesses, there might be similar hope for a FATCA repeal.[200] Some have described FATCA as an international

193. *See* Jatras, *supra* note 176; Interview with James George Jatras, *supra* note 111.

194. Jatras, *supra* note 176. "Rarely has a Government program that promised so much to so many fallen apart so fast." Martin Tolchin, *Retreat in Congress: The Catastrophic-Care Debacle: A Special Report: How the New Medicare Law Fell on Hard Times in a Hurry*, N.Y. TIMES, Oct. 9, 1989, at A1.

195. Jatras, *supra* note 176 (citing Tolchin, *supra* note 194).

196. *See id.*; *Lobbyist's Last-Minute Bid Set Off Ports Controversy* (NPR radio broadcast Mar. 8, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5252263 (explaining how the 2005 Dubai Ports World deal was blocked by private lobbying efforts despite having broad support from Democrats and Republicans in Congress); Interview with James George Jatras, *supra* note 111.

197. *Repeal of Expanded Information Reporting Requirements*, IRS, http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Repeal-of-Expanded-Information-Reporting-Requirements (last updated Aug. 4, 2012).

198. Pub. L. No. 112-9, 125 Stat. 36; *Repeal of Expanded Information Reporting Requirements*, *supra* note 197.

199. *The U.S. Congress Votes Database: H.R. 4*, WASH. POST (Mar. 3, 2011), http://projects.washingtonpost.com/congress/112/house/1/votes/162/; Statement by President Obama on H.R. 4 (Apr. 14, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/04/14/statement-president-obama-hr-4.

200. *See* Daniel Mitchell, *FATCA Law Is a Nightmare for Cross-Border Economic Activity*, CATO INST., June 20, 2011, *available at* http://www.cato-at-liberty.org/fatca-law-is-a-nightmare-for-cross-border-economic-activity/. Mitchell

version of the onerous 1099 reporting requirements that were repealed by President Obama in 2011.[201] Additionally, the repeal was largely based on a compromise between Democrats and Republicans over the larger Health Care Spending Bill.[202] The recent repeal of legislation indicates that Congress is willing to address the concerns of citizens and the banking industry by repealing legislation that is not practical.

CONCLUSION: FATCA, THE ROAD TO NOWHERE

It is critical for all participants, including government organizations and the general public of consumers, to strike an acceptable balance of burdens on each side, so that all participants can achieve their goals. FATCA is not the way for the U.S. government to prevent income tax evasion. Moreover, the current state of the U.S. economy is already problematic, and legislation increasing the reluctance of foreigners to invest in the United States is worrisome.[203] The IRS should not force taxpayers and banking consumers of foreign nations to pay the costs of compliance with American tax laws from which these people derive no benefit.

It is becoming increasingly apparent that the protests against the implementation of FATCA, the burden on IRS regulation writers, and the enormous cost of compliance for FFIs are not worth the tax revenue and information that FATCA is projected to produce.[204] The growing opposition movement will continue to attract the opposition of foreign banks, international governments, and American citizens abroad likely culminating in the repeal of FATCA. In the end, if someone wants to hide their assets abroad, they will figure out a way to do it. The goal of FATCA is laudable, but using it as a means of achieving a reduction in offshore tax evasion is destined to fail.

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describes the recent repeal of the burdensome reporting requirements, but he expresses less optimism for a FATCA repeal, "since the burden is largely falling on foreigners, there's no groundswell among voters to repeal [FATCA]—even though it will impose far more damage on the American economy." *Id.*

201. *E.g.*, Dan Mitchell, *FATCA Law Is an International Version of Obamacare's 1099 Provision, a Nightmare for Cross-Border Economic Activity That Is Undermining Investment in America*, CENTER FOR FREEDOM & PROSPERITY (June 20, 2011), http://danieljmitchell.wordpress.com/2011/06/20/fatca-law-is-an-international-version-of-obamacares-1099-provision-a-nightmare-for-cross-border-economic-activity-that-is-undermining-investment-in-america/.

202. Robb Mandelbaum, *1099 Repeal Passes Senate, Heads to White House*, N.Y. TIMES YOU'RE THE BOSS (Apr. 5, 2011, 4:22 PM) http://boss.blogs.nytimes.com/2011/04/05/1099-repeal-passes-senate-heads-to-white-house/.

203. *See* Bouma, *supra* note 32, at 654.

204. *See, e.g.*, *Foreign Account Tax Compliance Act (FATCA) Comment Letter to IRS and Responses*, *supra* note 181 (listing letters sent to the IRS urging a repeal of FATCA by concerned foreign banks, governments, and international tax organizations).