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The Future Of FATCA: Concerns And Issues

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by

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I. INTRODUCTION

Globalization and technological advancements have contributed to one of the more serious issues in the United States – offshore tax evasion.[1] While it is difficult to estimate the exact amount of revenue losses from offshore tax schemes, the U.S. loses approximately $100 billion per year from offshore tax evasion.[2] This problem was highlighted in 2009 when Switzerland's largest bank, UBS AG, admitted to defrauding the United States by impeding the Internal Revenue Service's (IRS) tax revenue collection from U.S. taxpayers and paid $780 million in fines, interest, penalties and restitution to the U.S.[3] As of 2016, eighty Swiss banks paid more than $1.3 billion in penalties to the U.S. in settlements involving more than 34,000 accounts that held as much as $48 billion.[4]

The U.S. responded to the global problem of offshore tax evasion by enacting the Foreign Account Tax Compliance

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Act (FATCA)[5] into law under section 501(a) of the Hiring Incentives to Restore Employments Act (HIRE), even though the U.S. had many successful attempts at reigning in the foreign banks that facilitated offshore tax evasion.[6] The general purpose of the HIRE Act was to provide tax breaks to small businesses that hire unemployed workers.[7] FATCA was designed to authorize the IRS to collect taxes on American income hidden in foreign nations.[8]

The substantial costs associated with FATCA compliance has proven to be a burden for many foreign financial institutions.[9] Instead of punishing shifty taxpayers and corporations, the IRS misguidedly has placed practically the entire burden on Americans living abroad and on the foreign financial institutions where Americans invest and keep their money. FATCA affects all U.S. citizens who own a foreign financial account, including banking and investment accounts, regardless of where they reside.[10]

This article will examine FATCA through presentations of the: (1) pertinent background that gave rise to the law; (2) essential elements of FATCA; and (3) analysis of the relevant human rights, constitutional and security arguments against FATCA.

II. BACKGROUND

Although U.S. taxpayers had been hiding income offshore for years, the IRS historically had little success finding such income[11]. The primary reason for this failure was that foreign financial institutions (FFIs) didn’t report any information to the IRS. Occasionally, the IRS became aware of an offshore account,[12] but the U.S. taxpayers were effectively on the honor system. Given what has happened since 2007[13], it would appear that many U.S. taxpayers with offshore accounts have not been very honorable.

The loss of revenue supports the argument that offshore tax evasion is a crucial issue facing the U.S. Large sums of money are squirreled away in tax haven jurisdictions such as Aruba, the Cayman Islands and Dubai, whose laws allow some U.S. citizens to evade paying U.S. income taxes.[14] Former IRS Commissioner Rossotti says the uncollected tax gap could be in the range of $250 to $300 billion per year, which is the equivalent of a 15 percent surtax on the honest taxpayer.[15]

To detect tax evasion, the IRS pursued U.S. citizens with undeclared bank accounts in foreign banks.[16] But these efforts were largely unsuccessful because FFIs did not fully report U.S. account holders' information.[17] This allowed U.S. citizens to avoid taxes on passive income, including interest, dividends and capital gains by not reporting this income to the IRS.[18]

A. Detecting Tax Evasion: OVCI and QI

During the period 1999 to 2003, two noteworthy events occurred. First, the IRS started to pursue offshore accounts when it (1) obtained credit card data from John Doe summons, [19] and (2) offered its first offshore voluntary compliance initiative (OVCI) in 2003.[20] The OVCI resulted in around 1,300 individuals identifying themselves to the IRS with approximately $75 million collected through July 2003.[21] The knowledge obtained by the IRS from pursuing various

John Doe summons and structuring the OVCI greatly aided the IRS when it pursued offshore accounts in Switzerland starting in 2008.[22]

The second event occurred on January 1, 2001, which was the date the U.S. implemented the Qualified Intermediary (QI) system.[23] Prior to 2001, FFIs did not: (1) collect U.S. tax documentation with respect to any taxpayers; (2) withhold U.S. tax, (3) file information returns with the IRS; or (4) submit to IRS examinations. As a result: (1) a U.S. taxpayer could invest in U.S. source assets with an FFI but the FFI was not required to report anything to the IRS;[24] and (2) U.S. banks were not obtaining adequate documentation from FFIs to document a reduced U.S. withholding tax rate on payments to foreign customers of such FFIs.[25]

By implementing the QI system, the IRS was attempting to address these two problems. As a result, the QI system required QIs to identify their customers. If they were foreign customers, the QI could keep the identity of the customer secret as long as the correct amount of U.S. withholding tax was collected. For U.S. customers, the QI was required to report to the IRS any U.S. source income. To keep the QIs honest, the QI system required an audit by either the IRS or an independent auditor.[26]

While the QI system was a major advancement when compared to the pre-2001 tax evasion environment, it became apparent that it wasn't working well at preventing U.S. taxpayers from using offshore accounts to avoid U.S. taxes. There were several major loopholes that U.S. taxpayers exploited in order to avoid reporting income to the IRS.[27]

The loopholes of the QI system were: (1) that foreign source income was not required to be reported; (2) there was no requirement to determine the beneficial owner; (3) that FFIs were allowed to exclude certain customers from the QI system; and (4) the QI audit was not really an audit but rather a list of procedures that needed to be performed.[28] These loopholes were on the minds of the IRS, the U.S. Treasury and the U.S. Congressional staff when they proposed and drafted FATCA in 2009 and 2010 in light of the LGT and UBS scandals.[29]

B. The Liechtenstein Global Trust and Union Bank of Switzerland Tax Evasion Scandals

In February 2008, it was publicly disclosed that German tax authorities had purchased customer account information from an employee at the Liechtenstein bank of LGT. This bank had close ties to the Liechtenstein royal family. Apparently, the German tax authorities had shared the information with nations around the world and the IRS initiated an enforcement action against over 100 U.S. taxpayers with offshore accounts at LGT.[30]

In May 2008, an even bigger scandal erupted when the U.S. arrested Bradley Birkenfeld, a former UBS banker who pleaded guilty one month later to assisting U.S. taxpayers evade U.S. tax by using offshore accounts. Birkenfeld's guilty plea included all types of spy-like techniques used by Birkenfeld and his colleagues to avoid U.S. detection. These spy-like techniques included encrypted computers, code words, smuggling diamonds in toothpaste tubes and more.[31]

Reports indicate that Bradley Birkenfeld came forward under the IRS's whistleblower program in 2007 and had been disclosing information to the IRS for several months. However, he failed to disclose to the IRS and the Justice Department information concerning his largest account, Igor Olenicoff. As a result, despite blowing the whistle on UBS, Birkenfeld was prosecuted and received a sentence of forty months.[32]

On June 30, 2008, the IRS filed a John Doe summons with the U.S. District Court for the Southern District of Florida, requesting that UBS disclose to the IRS all of its U.S. customers that may have been avoiding the payment of U.S. tax. One day later, UBS refused to comply with the summons arguing that under Swiss bank secrecy law, they were not permitted to disclose customer information.[33]

In July 2008, the U.S. Senate Permanent Subcommittee on Investigations (PSI) held publicized hearings on offshore accounts. At these hearings, IRS Commissioner Shulman gave testimony surrounding offshore accounts and the QI system: "Specifically, we are considering changes to the regulations to require QIs to look through certain foreign entities – such as trusts – to determine whether any U.S. taxpayers are beneficial owners. We are also considering a regulation to have QIs report U.S. taxpayers' worldwide income to the IRS in certain cases – not just U.S. source income."[34]

The PSI report found that LGT and UBS assisted U.S. clients in structuring their foreign accounts to avoid QI reporting to the IRS. The report also found that the IRS should broaden QI audits to require bank auditors to report evidence of fraud or illegality.[35] Since the QI system was created through Treasury regulations and FFI contracts, the IRS and the Treasury could have changed the QI rules without legislation. However, since there was a strong desire to impose withholding taxes on financial institutions that were not part of the QI, legislation was needed.[36] This is how FATCA would be conceived.

In August 2009, the IRS and UBS ultimately settled the John Doe summons instead of allowing the Court to decide the conflicts of law issue between U.S. and Swiss law. UBS agreed to disclose information on approximately 4,450 U.S. customers.[37] But given the loopholes and issues surrounding the QI system, there was general agreement among senior IRS officials that something had to be done. This is where FATCA came in.[38]

III. FATCA EPITOMIZED

In 2010, FATCA amended the Internal Revenue Code of 1986 by adding a new Chapter 4.[39] In order to enforce FACTA more easily, the U.S. entered into several intergovernmental agreements (IGA), whereby foreign governments agreed to collect the required information from financial institutions located in their nations and disclose that information to the IRS on an annual basis.[40] While FATCA has several focuses, the most pertinent facet of the law concern FFIs and IGAs.[41]

A. The FATCA Regulation of FFIs

An alarming aspect of FATCA for FFIs is the severe penalty associated with a violation. Any FFI that fails to meet the FATCA reporting requirements will be subject to a stringent 30% withholding tax on all payments of U.S. source income.[42] To avoid this penalty, an FFI must fall into one of two categories: (1) it has an agreement with the U.S. Treasury

Secretary; or (2) it meets certain criteria ensuring that it does not maintain financial accounts owned by one or more U.S. persons or U.S.-owned foreign entities.[43]

As discussed earlier, one of the major problems with the QI system was the ability of the QI to ignore customer accounts. One of the major FATCA design features was to require that a QI have procedures to identify all U.S. customers within the QI and potentially identify all U.S. customers in affiliated FFIs.[44]

For example, assume that a hypothetical foreign bank has 2 million customers throughout the world, but only 1% of such customers are U.S. persons and 2% of the foreign bank's customers have investments in the U.S. In this hypothetical example, FATCA requires the foreign bank to perform detailed customer due diligence procedures on its entire 2 million customer base in order to properly identify the 3% that could be directly impacted by FATCA. If the foreign bank did not perform this customer due diligence effectively, it could be subject to the penalty of 30% withholding tax on all payments of U.S. source income.

This leads to the next problem regarding the payment of the penalty. How would one determine whether a payment to an FFI is attributable to a withholdable payment? The IRS/Treasury has tentatively decided to apply a pro-rata approach.[45] So, if 20% of a FFI's worldwide assets are U.S. assets, then 20% of the non-U.S. source payments to an FFI or a recalcitrant account holder would be subject to the 30% withholding tax penalty. Needless to say, this would lead to a lot of administrative complexity, especially in cases where local laws may restrict the collection of withholding tax on payments that appear to be unrelated to the U.S.

As an alternative, the FFI may elect "to be withheld upon rather than withhold on payments to recalcitrant account holders and nonparticipating FFIs" If an FFI elects this alternative, the IRS will only withhold 30% of all withholdable payments to the FFI that are directly attributable to the recalcitrant account holder and nonparticipating FFI. [46] However, an FFI that elects this option will forfeit any rights it may have under any treaty with the U.S. with respect to any amount withheld as a result of such election – leading to a loss of significant earnings for the FFI even after the FFI has provided all of the lengthy, required information about the account holder.

FATCA also has some loopholes. A FFI does not have to report any depository accounts it maintains belonging to U.S. beneficiaries when the aggregate value of all accounts the FFI maintains is less than $50,000.[47] Nor does a FFI have to report any account held by another FFI that is in compliance with the FATCA reporting requirements. [48] Furthermore, the U.S. Treasury has chosen not to withhold the 30% penalty from FFIs if the beneficial owner is: (1) part of a foreign government; (2) part of an international agency; (3) a foreign central bank; or (4) anyone else whom the U.S. Treasury believes poses a low risk of tax evasion.[49] It is possible that some FFIs may use these loopholes to circumvent FATCA based on their connections and bargaining power.

B. Intergovernmental Agreements (IGAs)

FATCA requires that FFIs enter into agreements with the IRS that require the "participating" FFI to perform identification and due diligence procedures concerning account holders. [50] A different level of diligence is expected with respect to individual accounts and entity accounts as well as between new and preexisting accounts.[51] FFIs that comply with the due diligence guidelines will be deemed to be compliant with the identifying requirement and not held to the strict liability standard.[52]

When the proposed regulations were released, the U.S. Treasury also released a joint statement with the British, French, German, Italian and Spanish governments regarding an intergovernmental approach that would allow the financial institutions of these nations to report the required FATCA information to their own governments. These respective governments would then report the data to the IRS.[53] The intergovernmental approach framework would include the elimination of the requirement of the FFI to negotiate a separate agreement with the IRS. The U.S. Treasury stressed that these IGAs are an alternative approach to obtaining the information required by FATCA, not an exception.[54] The European Commissioner of Taxation stated that the goal is to develop a Model Agreement that could be used by all of the Member Nations and ultimately lead to automatic information exchange between countries.[55]

The U.S. Treasury is engaged in active negotiations with a number of nations and jurisdictions so it is conceivable that FATCA will become the global standard.[56] More than 80 nations have signed on to the U.S. law.[57] One ramification of these IGAs is that in order for them to be productive, the U.S. will must also provide these nations with information on accounts held in U.S. financial institutions by the residents of these nations. On behalf of the U.S. Treasury, Assistant Secretary McMahon stated that "……bilateral solutions require reciprocity."[58] It is natural to speculate that such an undertaking may lead to information leaks.

The exchange process under FATCA is constantly changing and many are worried about the implications of this everchanging process.[59] There are many increased risks and costs associated with FATCA.

IV. FATCA ISSUES

The FATCA withholding tactics will only bring an estimated $1 billion of lost taxes back to the U.S.[60] While $1 billion may sound like a substantial amount, it pales in comparison to the estimated $99 billion of American taxes that will remain lost every year as well as the extremely high cost of FATCA compliance to FFIs.[61] The estimated cost of FATCA implementation is $100 million per financial institution.[62]

Industry experts estimate that about 900,000 FFIs are subject to FATCA, which means that the total cost of FATCA implementation of $90 billion will dramatically overcome its potential tax savings of $1 billion.[63] With an estimated success rate of 1% and the hefty costs placed on FFIs, many Americans may have their foreign bank accounts closed as a result of FATCA.[64]

FATCA has been met with accusations ranging from claims of unfair treatment, to human rights abuse, to constitutional issues to privacy and security leaks, from within the U.S. and abroad.[65]

A. Unfair Treatment

The nonprofit, nonpartisan, volunteer association with a caucus in Congress, American Citizens Abroad, stated in a letter to the Congressional Ways and Means Committee that it 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 joint-bank accounts held with foreign spouses."[66]

Furthermore, American Citizens Abroad claims that Americans living abroad cannot easily withdraw their money from the closed foreign account and redeposit it with U.S. financial institutions because the Patriot Act discourages U.S. financial institutions from taking on clients living overseas.[67] So "the average American living abroad is shut off from all avenues for personal investment."[68]

In addition to being closed out from financial institutions, Americans living abroad may find it more difficult to become owners in new overseas business ventures due to FATCA's requirement that such ventures be reported to the IRS if at least 10% of the venture is owned by one or more Americans.[69]

B. Human Rights Abuse

In order to implement FATCA, Americans living abroad must be singled out on the basis of their national origin.[70] American Citizens Abroad believes FATCA forces FFIs and foreign governments to discriminate against Americans.[71]

While New Zealand is known for upholding human rights, its government officials have acknowledged their intention to displace human rights in order to comply with FATCA.[72] In a letter published by New Zealand's tax authority, Internal Revenue, the New Zealand government determined that violating the rights of U.S. persons was necessary, given the risk under FATCA of either being shut out of the U.S. investment market or facing the 30% withholding penalty associated with noncompliance.[73]

If FATCA does discriminate against Americans, it would be a violation of the Universal Declaration of Human Rights (UDHR),[74] which as adopted by the United Nations General Assembly in 1948.[75] The UDHR clearly states that no person shall be discriminated against on the basis of national origin and no distinction is made because of the nation a person comes from.[76]

A number of legal cases involving FATCA have already surfaced. In 2014, the Dutch Board for the Protection of Human Rights ruled against FATCA on the basis of nationality discrimination.[77] Also in 2014, several Canadian citizens filed a lawsuit against the Canadian Attorney General in Federal Court in Canada.[78] The Canadian plaintiffs hope to prevent the Canadian government from turning over private bank account information under FATCA from more than one million United States persons and their families who live in Canada.[79] In 2016, Rand Paul and several other plaintiffs filed a suit against the U.S. Treasury and other government agencies over foreign bank account reporting requirements under the Foreign Account Tax Compliance Act; however, an Ohio District Court judge dismissed this suit for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1), without prejudice.[80]

C. Constitutionality of IGAs

The U.S. Treasury began implementing IGAs with foreign nations when dealing with the difficulty of implementing FATCA overseas.[81] Since the U.S. Treasury is an administrative agency under the Executive branch, these IGAs are considered executive agreements. [82] Executive agreements are limited in scope; "according to the Restatement of Foreign Relations Law of the U.S., the President may validly conclude executive agreements that (1) cover matters that are solely within his executive power, or (2) are made pursuant to a treaty, or (3) are made pursuant to a legitimate act of Congress."[83]

IGAs were never mentioned as a proviso of the HIRE Act, so technically, the President has no power to form IGAs through the use of executive agreements; this means that the IGAs must go through the Senate treaty making process to legitimately bind the U.S.[84] But since the FACTA IGAs were never brought to the Senate, there is no statutory authorization under which the IRS may enter into them and they are not treaty-based amendments.[85] This indicates that the IGAs have no congressional authorization, which in turn means that they must be sole executive agreements. [86] If the IGAs are sole executive agreements, then they are not binding because the Executive branch does not have the power to enter into such agreements if they are to bind the U.S. globally.[87]

D. Privacy and Security Leaks

FATCA has caused Americans living abroad to be even more afraid of security risks when their personal financial information is reported by non-U.S. financial institutions or foreign government agencies to the IRS.[88] FATCA reporting will include: (1) the name, address and taxpayer identification number of each US account holder at the financial institution; (2) the account number; (3) account balance and value; (4) the account's gross receipts and gross withdrawals or payments; and (5) other account related information requested by the Internal Revenue Service (IRS).[89] The Treasury Inspector General for Tax Administration has voiced concerns with the security of data transmission as required by FATCA.[90]

In September 2014, the IRS issued a fraud alert to all international financial institutions that are complying with FATCA. Scam artists posing as the IRS have fraudulently solicited financial institutions seeking the identities of account holders as well as their financial account information.[91] Financial institutions registered to comply with FATCA, and those in jurisdictions that have an IGA in effect to implement the FATCA provisions through their local governments, have already been approached by parties impersonating themselves as the IRS. The IRS now has reports of incidents from various countries and continents.[92]

The issues of unfair treatment, human rights abuse, unconstitutionality and security are all reasons supporting the repeal of FATCA, especially since the costs of implementing FATCA far outweigh the benefits it may derive.

V. CONCLUSION

While tax evasion is an enormous problem, FATCA is not a solution to the problem. FATCA was primarily created to deal with the weaknesses of the QI system but it has turned out to be a case of overregulation that infringes upon the rights of Americans who live abroad. A strengthening of the QI system may have been enough to adequately address the issue of global tax evasion without the need to create a costly, massive piece of legislation that infringes on the rights of so many and may prove to be a threat to security.

Given the facts that (1) many Americans living abroad have been denied access into their foreign pensions, insurance contracts and bank accounts as a result of FATCA; (2) many Americans may be singled out on the basis of their national origin because of FACTA; (3) the constitutionality of FACTA may be questionable; and (4) scam artists have already obtained personal information about people as a result of the FACTA data transmission, it is clear that FACTA should be repealed.

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[1] *See* OFFSHORE COMPLIANCE INITIATIVE, U.S. DEP'T JUST., http://www.justice.gov.ez-pkw[http://perma.cc/U56J-R58J] (Combatting the serious problem of non-compliance with our tax laws by U.S taxpayers using secret offshore bank accounts is one of the Tax Division's top litigation priorities); *see also* Tracy A. Kaye, *Innovations in the War on Tax Evasion,* 2014 BYU L. REV. 363, 364-65 (2014).

[2] JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 1 (2015); Frederic

Behrens, *Using a Sledgehammer to Crack a Nut; Why FATCA Will Not Stand,* 2013 WIS. L. REV. 205, 211 (2013).

[3] Supra note 1.

[4] Kevin McCoy, *U.S. Slaps $1.3B in Penalties on Swiss Banks,* USA TODAY, January 27, 2016 (http://usat.ly/1ROpKw3).

[5] *See* MARNIN J. MICHAELS, INTERNATIONAL TAXATION P6.01[1] (2014) (FATCA is veiled as the funding mechanism for the Hiring Incentives to Restore Employment Act (HIRE Act)).

[6] *See* Kaye, *supra* note 1, at 364 (explaining that the U.S. behaved unilaterally by enacting FATCA in 2010).

[7] 156 Cong. Rec. S1745 (daily ed. Mar. 18, 2010) (statement of Sen. Levin).

[8] Background and Current Status on FATCA, LexisNexis.com (2014), Available at http://www-lexisnexis-com.ez-proxy.brooklyn.cuny.edu:2048/store/images/samples/9780769853734.pdf

[9] Marylouise Serrato, Comments – Financial Services Tax Reform Working Group, Ways & Means Committee (Apr. 4, 2013), available at http://waysandmeans.house.gov//uploadedfiles/american_citizens_abroad_wg_comments_3.pdf.

[10] 26 U.S.C. §§1471-1474 (2012).

[11] *See,* e.g., Letter from Henry Morgenthau, Jr., U.S. Sec'y of Treasury, to Franklin D. Roosevelt, President of U.S. (May 29, 1937), available at http://www.presidency.ucsb.edu/ws/index.php?pid=15413#axzzlqRIOpHZ8 (explaining why tax collections are less than expected). In this letter, Secretary Morgenthau explains that offshore accounts held by U.S. taxpayers are part of the problem.

[12] For example, the IRS occasionally became aware of an offshore account by a whistleblower such as a former spouse or business partner.

[13] *See*, e.g., Staff of S. Permanent Subcommittee on Investigations, Rep. on Tax Haven Banks & U.S. Tax Compliance 9 (July 17, 2008), available at http://www.hsgac.senate.gov/download/report-psi-staff-report-tax-haven-banks-and-us-tax-compliance-july-17-2008. Per the report, UBS had approximately 20,000 (aggregate value of approximately $18 billion) U.S. customers of which only 1,000 (5%) were declared accounts implying that 95% of UBS's accounts may have been evading U.S. tax laws.

[14] Frederic Behrens, Comment, Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand, 2013 Wis. L. Rev. 205, 207 (2013).

[15] Shah, Anup. 2013. *Tax Avoidance and Tax Havens; Undermining Democracy.* GLOBAL ISSUES, Article 54.

[16] Id. at 207.
[17] Id. at 206.
[18] Behrens, supra note 16, at 206-07.
[19] *See* Offshore Credit Card Program (OCCP), Internal Revenue Service, http://www.irs.gov/newsroom/article/0,,id=105698.html (providing brief summary of IRS efforts in issuing John Doe summons surrounding credit cards); A John Doe summons is defined as "any summons where the name of the taxpayer under investigation is unknown and therefore not specifically identified." Internal Revenue Service, Internal Revenue Manual § 25.5.7.2 (2011), available at http://www.irs.gov/irm/part25/irm25-005-007.html.
[20] *See* IRS Unveils Offshore Voluntary Compliance Initiative; Chance for "Credit-Card Abusers" to Clear Up Their Tax Liabilities, Internal Revenue Service (Jan. 14, 2003), http://www.irs.gov/newsroom/article/0,,id=105689,00.html.
[21] *See* Offshore Compliance Program Shows Strong Results, Internal Revenue Service (July 30, 2003), http://www.irs.gov/newsroom/article/0,,id=111987,00.html (describing results of 2003 OVCI).
[22] *See* Foreign Account Tax Compliance Act (FATCA), U.S. Dep't of the Treas., http:///www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx (last updated June 9, 2014).
[23] Treas. Reg. § 1.1441-1(5) (2001).
[24] A U.S. taxpayer could also invest in non-U.S. source assets and avoid reporting, but failing to report income form U.S. source assets was significantly more troubling.
[25] Treas. Reg. § 1.1441-1(5) (2001).
[26] Treas. Reg. § 1.1441-1(5) (2001).
[27] J. Richard Harvey, Jr., *Taxation of Offshore Accounts: Insider's Summary of FATCA and Its Potential Future,* 57 Vill. L. Rev. 471, 475 (2012).
[28] Id. at 475.
[29] Id. at 476.
[30] *See* IRS and Tax Treaty Partners Target Liechtenstein Accounts, Internal Revenue Service (Feb. 26, 2008), http://www.irs.gov/newroom/article/0,,id=179387,00.html.
[31] *See* Bradley Birkenfeld: UBS Informant to Begin Prison Sentence Friday, Huffington Post (Mar. 28, 2010), http://www.huffingpost.com/2010/01/04/bradley-ubs-inn410753.html;

Former UBS Banker Sentenced to 40 Months for Aiding Billionaire American Evade Taxes, U.S. Department of Just. (Aug. 21, 2009), http://www.justice.gov.ez-proxy.brooklyn.cuny.edu:2048/opa/pr/2009/August/09-tax-831.html. Some argued that the Department of Justice was too tough on Birkenfeld but the message to future whistleblowers is clear: disclose everything you know, especially if your own hands aren't 100% clean.

[32] Id.

[33] *See* PSI Staff Report, Justice Department Asks Court to Serve IRS Summons for UBS Swiss Bank Account Records, U.S. Department of Justice (June 30, 2008), http://www.justice.gov.ez-proxy.brooklyn.cuny.edu:2048/tax/txdv08579.htm.

[34] Tax Haven Banks and U.S. Tax Compliance: Hearing before the Permanent Subcommittee on Investigations on Homeland Sec. and Governmental Affairs, 110th Cong. 61 (2008) (statement of IRS Comm'r Doug Schulman).

[35] Supra note 33.

[36] Supra note 33.

[37] J. Richard Harvey, Jr., *Taxation of Offshore Accounts: Insider's Summary of FATCA and Its Potential Future,* 57 Vill. L. Rev. 471, 475 (2012).

[38] Id.

[39] 26 U.S.C. §§1471-1474.

[40]FATCA – Archive, U.S. Dep't of the Treasury, http://www.treasury.gov/resource-center/tax-olicy/treaties/Pages/FATCA-Archive.aspx.

[41] 26 U.S.C. §§1471(a).

[42] 26 U.S.C. §§1471(a).

[43] 26 U.S.C. §§1471(a).

[44] I.R.C. § 1471(b)(1)(A).

[45] *See* I.R.S. Notice 2010-34, 2010-17 I.R.B. 612, at § II.

[46] 26 U.S.C. §§1471(b)(3)(C)(ii).

[47] Id. § 1471(d)(1)(B)(ii).

[48] Id. § 1471(d)(1)(C)(i)-(ii).

[49] Id. §1471(f)(3)(1)-(4).

[50] Id. §1471(b)(1)(A), (B).

[51] Treas. Reg. § 1.1471-4(c).

[52] *See* I.R.C. § 1471(a); *see* also I.R.C. § 1471(b)(1)(D)(i); I.R.C. § 1471(d)(7).

[53] Press Release, U.S. Dep't of Treasury, Joint Statement from the U.S., Fr., Ger., It., Spain and the U.K. Regarding an Intergovernmental Approach to Improving Int'l. Tax Compliance and Implementing FATCA (Feb. 8, 2012), available at http://www.treasury.gov/press-center/press-releases/documents/02071%20Treasury%20IRS%FATCA%20Statement.pdf

[54] Id.

[55] Alison Bennett, Semeta Says EU Member States Working Toward Uniform Model Pacts Under FATCA, BNA Daily Tax Rep., May 8, 2012, No. 88, at J-1.

[56] Press Release, U.S. Dep't of Treasury, U.S. Engaging with More than 50 Jurisdictions to Curtail Offshore Tax Evasion (Nov. 8, 2012), http://www.treasury.gov/press-center/press-releases/Pages/tg1759.aspx; *see* also Jeremiah Coder, Extensive FATCA Negotiations Underway, Treasury Announces, 137 Tax Notes 722 (2012).

[57] Robert W. Wood, Canadians File Suit to Block FATCA And Prohibit Handover of U.S. Names To IRS, Forbes (Aug. 12, 2014) https://www.forbes.com/sites/robertwood/2014/08/12/canadians-file-suit-to-block-fatca-and-prohibit-handover-of-u-s-names/#4b6cee3e1ed0.

[58] Press Release, U.S. Dep't of Treasury, Remarks by Acting Assistant Secretary Emily McMahon at the NY State Bar Association Annual Meeting (Jan. 25, 2012), available at http://www.treasury.gov/press-center/press-releases/Pages/tg1399.aspx.

[59] James O'Toole, JP Morgan: 76 Million Customers Hacked, CNN Money (Oct. 3, 2014), money.cnn.com/2014/10/02/technology/security/jpmorgan-hack/?iid=EL.

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[68] Id.

[69] 26 U.S.C. § 1473(2)(A)(i)-(iii) (2012).

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[71] Peter Frawley, Legislation to Enable Compliance with an Intergovernmental Agreement Between the United States and New Zealand, Internal Revenue (Sept. 23, 2013), http://taxpolicy.ird.govt.nz/sites/default/files/2013-ris-arearm-bill-04.pdf.

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[74] JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, University of Pennsylvania Press (1999); "More than fifty years after its adoption it now is the moral backbone and the source of inspiration of a whole new branch of international law. From a time when there were virtually no international instruments concerned with the realization of human rights, the post-World War II era has seen the evolution of around two hundred assorted declarations, conventions, protocols, treaties, charters, and agreements, all dealing with the realization of human rights in the world. Of these postwar instruments no fewer of sixty-five mention in their prefaces or preambles the Universal Declaration of Human Rights as a source of authority and inspiration." (Morsink, 19-20); Henry J Steiner and Philip Alston, International Human Rights in Context: Law, Politics, Morals, (2nd Ed.), Oxford University Press, Oxford, 2000. Many international lawyers and legal scholars believe that the Universal Declaration of Human Rights forms part of customary international law.

[75] Universal Declaration of Human Rights Home Page, Office of the High Comm'r for Human Rights (Dec. 8, 1948), http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx.

[76] Article 2 of the Universal Declaration of Human Rights, United Nations (1948), available at http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx, states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs…."; Article 7 of the UDHR states, "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."

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[86] Id.
[87] Id.
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[89] Id.
[90] Id.
[91] Id.
[92] Id.