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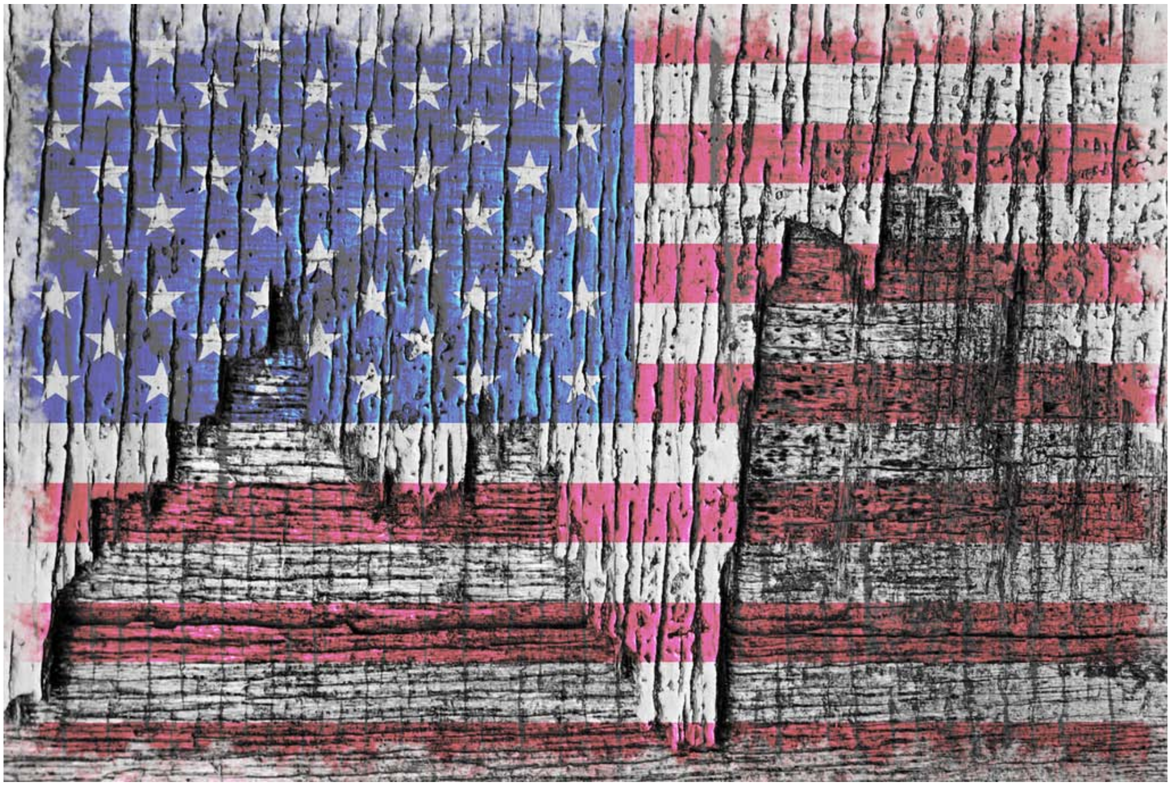
10 Facts About FATCA, America's Manifest Destiny Law Changing Banking Worldwide

Never heard of FATCA? You will. FATCA—the Foreign Account Tax Compliance Act—is America's global tax law. It was quietly enacted in 2010, and after a four-year ramp up, it's finally in effect. What is most amazing is not its impact on Americans—although that is considerable—but its impact on the world. Yes, the whole world.

Never before has an American tax law attempted such an astounding reach. And it's clear FATCA has succeeded, after shrewd diplomacy by President Obama and his Treasury Department. (There are probably some congratulatory emails somewhere!) FATCA requires foreign banks to reveal Americans with accounts over $50,000. Non-compliant institutions could be frozen out of U.S. markets, so everyone is complying.

Here are 10 facts about FATCA:

1. FATCA Blew In On a Perfect Storm. FATCA grew out of a controversial rule. America taxes its citizens—and even permanent residents—on their worldwide income regardless of where they live. In 2009, the IRS struck a groundbreaking deal with UBS for $780 million in penalties and American names. Recently, Credit Suisse took a guilty plea and paid a record $2.6 billion fine.



Since then, with over a hundred Swiss banks taking a DOJ deal and many other developments, banking is now more transparent than could ever have been imagined. FATCA was enacted in 2010, when only some of those developments were unfolding. The idea was to cut off companies from access to critical U.S. financial markets if they didn't pass along American data. And boy did that idea work.

2. Everyone Around the World is Complying. More than 80 nations—including virtually every one that matters—have agreed to the law. So far, over 77,000 financial institutions have signed on too. Countries must throw their agreement behind the law or face dire repercussions. Even tax havens have joined up. The IRS has a searchable list of financial institutions. See FFI List Search and Download Tool and a User Guide. Countries on board are at FATCA – Archive.

3. Even Russia and China Agreed to FATCA. If you think money anywhere can escape the IRS, think again. Even notoriously difficult China and Russia are on board. Which is more amazing? Probably Russia. The U.S. and Russia were negotiating a FATCA deal until March, 2014, but Russia's annexation of Crimea caused the U.S. to suspend talks. That meant Russian financial institutions faced being frozen out of U.S. markets. Russia took last minute action to allow Russian banks to send American taxpayer data to the U.S. when President Vladimir Putin Signed a Law in the 11th Hour to Satisfy U.S. Treasury.

4. FATCA is America's Big Stick. Cleverly, FATCA's 30% tax and exclusion from U.S. markets would be so catastrophic that everyone has opted to comply. Foreign financial institutions must withhold a 30% tax if the recipient isn't providing information about U.S. account holders. The choice is simple, and that's why everyone is complying.

5. Everyone is on the Lookout for American Indicia. Foreign Financial Institutions (FFIs) must report account numbers, balances, names, addresses, and U.S. identification numbers. For U.S.-owned foreign entities, they must report the name, address, and U.S. TIN of each substantial U.S. owner. And in what is a kind of global witch hunt, American indicia will likely mean a letter. Don't ignore it.

6. FBARs Are Still Required. FBARs predate FATCA, but get ready for duplicate reporting. FATCA just *adds* to the burden, including Form 8938, but it doesn't replace FBARs. The latter have been in the law since 1970 but have taken on huge importance since 2009. U.S. persons with foreign bank accounts exceeding $10,000 must file an FBAR by each June 30.

These forms are serious, and so are the criminal and civil penalties. FBAR failures can mean fines up to $500,000 and prison up to ten years. Even a non-willful civil FBAR penalty can mean a $10,000 fine. Willful FBAR violations can draw the greater of $100,000 or 50% of the account for each violation–and each year is separate. The numbers add up fast. Court Upholds Record FBAR Penalties, Exceeding Offshore Account Balance.

7. FATCA is Compelling Compliance. U.S. account holders who aren't compliant have limited time to get to the IRS. The IRS recently changed its programs, making its Offshore Voluntary Disclosure Program a little harsher. Yet for those not willing to pay the 27.5% penalty—which rose to 50% August 4, 2014 for some banks—the new IRS's Streamlined Program may be a good option for those who qualify.

The latter applies now to both foreign and U.S.-based Americans. Some still want to amend their taxes and file FBARs in a "quiet disclosure" which could bring civil FBAR penalties or even prosecution. Thus, caution is clearly in order.

8. Banking Will Never Be the Same. FATCA is making banking transparent worldwide. With Swiss bank deals, prosecutions, summonses, and FATCA, the IRS has quicker, better and more complete information than ever.

9. Forget Repeal or Dismantling FATCA. Republicans have mounted a lackluster repeal effort, but there's no serious push to repeal FATCA. At least not one that's getting traction. (No hate mail please, but honest, repeal now isn't likely.) Some say FATCA will be like prohibition, lasting for a time but doomed. We'll see, but it sure doesn't look that way now.

Still, Canadians recently Filed Suit To Block FATCA And Prohibit Handover Of U.S. Names To IRS. The suit claims the Inter-Governmental Agreement under which Canada can turn over private bank account information is illegal. The legal claim challenges the constitutionality of the agreement the Canadian government struck with the United States.

10. Don't Count on Other Passports. Some dual nationals or U.S. Green Card holders think they can bypass FATCA—and other U.S. tax rules—by using a non-U.S. passport and non-U.S. address with their foreign bank. Don't. You may just make it worse, handing the IRS another badge of willfulness. Your bank and the IRS will likely find out eventually, even if not right away.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.

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