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THE TAX LAWYER

TAXES 3/30/2015

FATCA Repeal Efforts Just Failed, But Is It A Good Law?

Budget amendment SA 621, to repeal [FATCA](#), the Foreign Account Tax Compliance Act, failed to reach the Senate floor. Efforts to repeal America's massive global disclosure law may not be dead, but they are comatose. Besides, repeal efforts make unsavory soundbites. One line descriptions of large and complex tax laws may be inherently deceptive. In the case of FATCA, that seems especially so.

The one line description? FATCA combats U.S. tax evasion by requiring disclosure of non-U.S. bank accounts. Yet it does vastly more than this. Passed in 2010, it took four years of preparation for it to apply, and even now, it is not fully in operation. The repeal FATCA movement just went down to defeat, and anyone opposing FATCA has a thankless job. [The Hill](#) said opposing FATCA is [endorsing tax evasion](#):

“To oppose FATCA is to oppose transparency and cooperation and take the United States out of its leadership role in combating tax evasion. The United States Congress is faced with a choice. It can stand for openness, transparency, and honesty – or for tax evasion, secret bank accounts, and subterfuge.”



FATCA requires foreign banks to reveal Americans with accounts over \$50,000. Non-compliant institutions are frozen out of U.S. markets, so everyone is complying. FATCA grew out of a controversial rule. America taxes its citizens and 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. Later, 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.

The world has agreed, even tax havens, Russia and China. Financial institutions everywhere have signed on to avoid the dire repercussions. Institutions are on the [FII List Search and Download Tool](#) and nations are on the [FATCA Archive](#). FATCA's 30% tax and exclusion from U.S. markets would be so catastrophic that everyone complied. And in what is a kind of global witch hunt, American indicia means reporting.

There is no question that FATCA has done some good, as have the other unimaginable successes the U.S. has had at global transparency. But at what cost? FATCA's massive and systemic overkill is great and vastly expensive. It is an elephant gun aimed at mosquitoes. And it has damaged the lives of over 7 million Americans abroad. Many can no longer open or maintain bank accounts where

they live, get mortgages, or run their local businesses or households without difficulty. Many institutions around the world simple will not—perhaps cannot—open and maintain accounts for Americans, financial pariahs.

And the dollar cost of FATCA is astounding. Americans lose money by FATCA. The revenue it generates is small and its costs are large. Many of those costs are borne by foreign financial institutions, but even there, it is questionable whether America has hurt itself with the law. Global transparency is admirable, but in many cases America is perceived as a bully, one treading on the sovereignty of other nations. Canadians recently [filed suit to block FATCA and prohibit handover of U.S. names to IRS](#). The legal [claim](#) challenges the Inter-Governmental Agreement under which Canada can turn over private bank account information.

From an institutional and individual perspective. U.S. reporting is difficult and the burdens are high. Of course, FATCA just *adds* to the burden, including Form 8938, but it doesn't replace FBARs. U.S. persons with foreign bank accounts exceeding \$10,000 must file an FBAR by each June 30. 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 penalties can [exceed the offshore account balance](#).

U.S. account holders who aren't compliant can enter the [Offshore Voluntary Disclosure Program](#) and pay a 27.5% or 50% penalty. Alternatively, the less expensive [Streamlined Program](#) may be a good option for those who qualify. A [quiet disclosure](#) could bring civil FBAR penalties or even prosecution.

Some say FATCA will be like prohibition, lasting for a time but doomed. It certainly doesn't look that way. There may well be a middle ground in which portions of FATCA can be retained but softened so vast numbers of expats are not hurt and so the compliance costs of this astonishing law are made somewhat more modest. But someone who is opposed to FATCA is not in favor of tax evasion. It is not that simple.

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