

# American Citizens Abroad

*The Voice of Americans Overseas*

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## **Why FATCA is bad for the United States and should be repealed**

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I am honored to have this opportunity to address such a distinguished group of tax, legal and financial professionals.

I am a director of American Citizens Abroad, which we call ACA. ACA is a non-profit, non-partisan association considered the Voice of Americans Overseas. We strive to educate our worldwide membership and Congress about the impact of U.S. legislation on Americans abroad and campaign to influence it. To this end, ACA has collected testimonies on various tax and banking issues and participates annually in a Washington door knock. The ACA website address is easy to remember – [www.americansabroad.org](http://www.americansabroad.org).

ACA has launched its most ambitious campaign to-date, calling for the repeal of America's onerous, overreaching and economically destructive FATCA legislation. I am not going to enter into technical details. You are certainly the experts in this area. I would like to focus on why ACA is calling for repeal. There are eight key reasons:

- First, FATCA will significantly discourage foreign investment in the United States.
- Second, FATCA will negatively impact U.S. businesses operating in global markets.
- Third, FATCA will not achieve its stated purpose - tracking down tax evaders; the law is self-defeating.
- Fourth, FATCA is not necessary; the IRS has already many other tools to go after tax evaders.
- Fifth, FATCA turns American citizens into pariahs in the international world of finance.
- Sixth, FATCA discriminates ostensibly against American citizens residing overseas.
- Seventh, FATCA creates a costly administrative nightmare for foreign financial institutions, for the IRS and for U.S. taxpayers which far exceeds any potential additional tax revenue.
- Finally, FATCA is an unacceptable manifestation of U.S. financial imperialism.

I will cover each of these points briefly.

**The first reason for opposing FACTA – and probably the most serious – is that it will discourage foreign investment in the United States**

Foreign investment in the U.S. amounts to more than \$21 trillion. The country needs to attract and retain foreign investment to finance its ever growing debt and stimulate its economy. Yet FATCA will not only restrain new investment, it will actively lead to disinvestment out of the United States, and not just by those Foreign Financial Institutions which refuse to sign up with the IRS. Private bankers are publicly advising their clients to clear their portfolios of all U.S. securities. The penalties under FATCA are so harsh that investing in U.S. securities is perceived to carry unacceptable levels of financial risk. A devastating indictment of FATCA comes from an American investment banker based in Europe whose principal activity has been to obtain private equity financing overseas for small and medium-sized U.S. companies. Because of FATCA, he reports that the market has dried up completely. Foreign investors do not want to touch the United States.

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 Banks and many others. A KPMG survey of leading fund promoters found that more than 40% of foreign funds would potentially divest out of U.S. securities.

At a time when the U.S. is hamstrung by a limping economy, by excessive federal debt, by an unsustainable foreign trade deficit, by a crashing dollar and by a dysfunctional political system, FATCA will only contribute to the woes facing the United States.

**The second reason is equally dangerous. FATCA will negatively impact U.S. businesses operating in global markets**

When U.S. companies operate overseas they must have foreign bank accounts, insurance contracts and employee pension plans to carry on day to day business. But because of FATCA, more and more FFIs are reticent to work with any American organization. This will affect in particular small and medium-sized American companies aiming to establish a foothold overseas to develop new export markets.

The situation is even worse for independent American investors or entrepreneurs aiming to work with foreigners to develop new businesses or create a joint venture overseas. FATCA requires that any foreign company not listed on a stock exchange or any foreign partnership with 10% U.S. ownership report to the IRS about the U.S. investors. This is closing doors. ACA has received reports from Americans who were instrumental in establishing a business plan for a new venture overseas, but were subsequently shut out from the final investment project by financial advisors who counseled the foreigners not to have any American partners. No foreign executive wants to be exposed to unnecessary risk with the IRS.

FATCA is creating serious, often insurmountable barriers for Americans to exercise free commerce overseas. Sadly, many leaders in Washington are both ignorant of what actually drives exports and tone deaf to the myriad warnings coming from all corners of the globe.

**The third reason is that FATCA will not achieve its purpose to track down tax evaders as it creates a two-tier banking system worldwide.**

While the goal of preventing tax evasion is laudable, FATCA will not achieve its purpose. Due to the high cost of compliance and the perceived legal risks, many foreign financial institutions will refuse to sign an agreement with the IRS. This fact alone makes the legislation self-defeating. Through FATCA, the United States is creating a two-tier banking system worldwide – one which adheres to the U.S. legislation and one which refuses to do so. Nothing prevents those institutions that do not sign on with the IRS from accepting American clients who may or may not be tax compliant. Furthermore, observers believe that China will refuse to sign up with the IRS. China can put most transactions with the United States through its central bank, which, according to the FATCA legislation, needs not sign on with the IRS. Through FATCA, the United States provides China with an ideal opportunity to lead the second tier network of international financial institutions. With China's goal to have the Yuan become a world reserve currency, China will be the clear winner and the U.S. the loser.

**The fourth point is that FATCA is not necessary to track down tax evaders**

The IRS already has multiple tools – the QI program, the John Doe summons, Tax Information Exchange Agreements, Mutual Legal Assistance Treaties, the Swift Agreement, the whistleblower program and so on. Following its settlement with UBS, the IRS has mined the information available in the 4,450 UBS accounts turned over to the IRS. This has allowed the IRS to expand its investigations into potential international networks facilitating non-compliance. In addition, the IRS initiated the Overseas Voluntary Disclosure Program (OVDP) in 2009 which brought forth another 18,000 individuals, providing more network information to mine. A second voluntary disclosure program, OVDI, took place in 2011, closing the first week of September. Today, the IRS is bringing highly publicized cases against leading foreign financial institutions, including HSBC and Credit Suisse to name just two very prominent examples. These cases prove that the IRS can succeed in tracking down tax evaders without resorting to self-defeating measures like FATCA.

**The fifth reason for opposing FATCA is that it turns private American citizens into pariahs in the international world of finance**

The refusal of many foreign financial institutions to deal with Americans has a significant direct impact on the community of an estimated 6.3 million Americans residing and working abroad. ACA has received multiple testimonies from Americans who have had their investment accounts, mortgages or simple checking accounts in their country of residence forcibly closed as a consequence of FATCA. Institutions which do accept Americans have set up subsidiaries designed exclusively for U.S. citizens. They require high minimum account balances and carry high fees to cover the heavy compliance costs. But this does not help the average American with limited assets. Often these same Americans resident abroad are unable to maintain a banking relationship in the United States because of the Patriot Act; their foreign address makes them suspect in the eyes of U.S. banks. Americans abroad find themselves in a Catch 22 and are treated as second-class citizens.

At ACA, we seriously fear that shutting Americans out from banking access will be generalized to current accounts as the FATCA compliance date approaches. ACA has already received reports of Americans abroad being refused entry into foreign pension plans, insurance contracts or mortgages agreements based on their nationality.

**The sixth reason is that FATCA discriminates ostensibly against American citizens residing overseas.**

FATCA introduces a new Form 8938 that requires Americans to list all foreign financial assets to be filed with the U.S. tax declaration under threat of heavy penalty for inaccurate filing. Yet the United States only taxes revenue, not assets. U.S. citizens residing abroad must have foreign bank accounts and will be required to list their foreign assets with their tax declaration when Americans living in the United States have no comparable requirement to list U.S. based assets? Furthermore, foreign financial assets are already reported on the FBAR form which is sent to the Department of Treasury, so there will now be double reporting of assets, but with different criteria, to be sent to two different administrations, with cumulative penalties for non-filing – guaranteed to create mass confusion, complexity and errors. Requiring Form 8938 in addition to FBAR is more than a reporting overkill; it is harassment.

**The seventh reason for repealing FATCA is that it creates an administrative nightmare and serious financial burden for foreign financial institutions, for the IRS and for U.S. taxpayers**

This whole conference focuses precisely on those administrative complications. The multiple commentaries on FATCA draft regulations made by associations of foreign banks, insurance companies, pension funds, hedge funds from all over the world highlight the extreme complexity, difficulty and cost of compliance. Two key problems are most frequently cited - determining who is a U.S. person and the mindboggling issue of passthru payment control. The British Bankers Association clearly stated that the Treasury Notice on Passthru is simply unworkable. The BBA has also stated that FATCA creates a risk to the entire worldwide financial system, a “systemic market risk, resulting in an unpredictable cascade effect that is contrary to international efforts to establish financial stability.”

Perhaps the only positive outcome from FATCA is that it surely creates a lot of good paying work for CPAs, tax lawyers, software technicians, and investment counselors. But this generates huge expenses for foreign financial institutions. Cost of compliance for large banks is estimated to be \$250 million or more for each institution. Compliance for all foreign financial institutions worldwide runs into the tens of billions of dollars. And that is not counting the cost for the IRS administration or for the American tax payer. In contrast, the U.S Joint Committee on Taxation estimated that FATCA would bring in additional revenue of only \$750 million on average per year over the next eleven years. The cost of FATCA administration is grossly out of proportion with potential revenue for the IRS. At a time when Washington needs to scale down its heavy bureaucracy, FATCA will only increase it.

**Now I come to last reason – perhaps this should in fact be the first. FATCA is an inexcusable and unacceptable manifestation of U.S. financial imperialism.**

As an American citizen, I am personally horrified to see the United States unilaterally impose its law on foreign institutions in this manner. It is unacceptable that Congress has passed legislation to turn

foreign financial institutions into fiscal policemen for the IRS and that Congress dares supersede foreign law and require foreign financial institutions to break their local laws to abide by the IRS. Gary Hufbauer of the Peterson Institute of International Finance describes FATCA legislation as “imperial overreach” and states: “Not only does the FATCA legislation brush past tax treaties and foreign privacy statutes; it also imposes significant accounting costs on perhaps 100,000 foreign financial institutions.”

To clearly understand the word “imperialism”, just imagine for an instant that Germany introduces a FATCA-type legislation. Then you will start to fully appreciate the uproar when American businessmen realize that they have to report to the Bundessteuer Amt – that’s the German IRS – in German, on their forms, in Euros, using German accounting standards, under threat of major penalties, because one of their business partners is a German citizen holding as little as a 10% stake in an American business. Now multiply this example by every country that has citizens resident in the cultural melting pot of the United States, and one can easily see how our entire banking system would collapse under the weight of such heavy bureaucracy should foreign governments choose to retaliate by adopting U.S.-type legislation.

Scott Michel and David Rosenbloom, leading tax lawyers at Caplin & Drysdale in Washington wrote an article in May 2011 in *Tax Analysis* entitled “FATCA and Foreign Bank Accounts: Has the U.S. Overreached?” They concluded, and I quote: “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. We urge Congress, working with Treasury and the IRS, to consider the repeal of FATCA’s core provisions and the consideration of alternative approaches aimed at solving a perennial tax enforcement problem without engendering a profound anti-American reaction overseas.”

With FATCA, Congress has combined ignorance with arrogance. FATCA legislation was slipped into the HIRE bill intended to stimulate job growth in the United States. Many who voted for the HIRE legislation were not even aware of the content of the FATCA legislation, let alone aware of its implications. It was simply sold as another way to combat tax evasion; those who may have opposed it were labeled soft on tax-cheats. The arrogance behind this legislation is the presumption that the U.S. economy is so important in the world that all foreign financial institutions will have to bend unilaterally to its will. And for many American lawmakers, the fact that in today’s global economy this presumption is far from true is a heavy realization they have not yet come to terms with.

### **Conclusion and appeal**

For all of these reasons, ACA has launched a global campaign to repeal FATCA. We encourage American citizens to write to their Congressmen, and we are organizing an ever-expanding coalition of associations to lend their voice and support our position to pressure Congress and the Obama Administration to repeal FATCA. In just a few short months, our coalition has already grown to include other associations of Americans abroad, several American Chambers of Commerce overseas, the National Taxpayer Union, the Center for Freedom and Prosperity and others. We are actively seeking a champion in Congress to lead the movement to repeal FATCA and are engaging a professional lobbyist in

Washington specifically for this purpose. But we cannot do it alone. I sincerely hope that the European Commission and nations throughout the world join forces to politically oppose this unilateral extension of U.S. law worldwide.

We need your support to lend your voice and your resources to back our lobbying campaign. I ask that you all encourage your institutions and their related associations to come on board and help stop this madness. We need your moral support and your financial support to be successful in this endeavor. Cards with our Stop FATCA logo and the coordinates of American Citizens Abroad are available at the conference. Do not hesitate to contact us, and we hope that many of you will sign onto our campaign - Repeal FATCA Now!

Thank you very much for your attention.