

November, 2014

**FATCA: An Introduction for Americans
to the “Worst Law Nobody Has Ever Heard Of”**

I am a US-born Canadian citizen who is personally impacted by the Foreign Account Tax Compliance Act (FATCA), a US law that was passed in 2010. The Canadian perspective will dominate this article but the reader should be aware that FATCA affects the entire world. The full brunt of this ill-considered addition to the US tax code falls heavily upon people who live outside the United States. For this reason I ask the reader to take a few moments to stand in the shoes of a person who is associated with the United States, in my case through citizenship conferred by birth, and whose life has taken her to live elsewhere.

Canada, like the United States, is a land of immigrants. From diverse backgrounds we have come together here in North America and made our lives, having contributed to and benefited from our wonderful countries in a myriad of ways.

Like Americans, many Canadians have maintained family ties with the lands of their heritage and many have made visits to their ancestral homelands. We have probably never questioned our right to return providing we did not immigrate from countries with despotic or totalitarian governments. Within our countries we take for granted our right and ability to move freely from one state or province to another.

Now, imagine for a moment that you were born in Pennsylvania and moved as a young child to Illinois. You grew up in Illinois, prospered there, raised a family and retired there. Then one day over the dregs of your morning coffee your eye is riveted on a small headline in the back pages of the newspaper that says “Native Pennsylvanians in Illinois Beware of Little-Known Tax Law”. To your horror you read that everyone born in Pennsylvania, even if they haven’t lived there for decades must file Pennsylvania tax returns and “out-of-state bank account reports” annually for life. The penalties for not doing so are draconian and could include jail time unless you enter a special “amnesty program” which would reduce the “failure-to-file” penalties from 50% to 27.5% *of your assets* and allow you to skip your stay as a “guest” of the state.

It sounds like a bad plot for a novel yet today this ridiculous domestic scenario is actually playing out on the international stage for people who are unfortunate enough to hail from one particular nation. Sadly, that nation is the United States of America.

The following will help to explain what is happening and why the issue so desperately needs the serious attention of everyone.

Citizenship-Based Taxation (CBT)

To understand the origins of our current situation we need to explore the concept of “citizenship-based taxation” (CBT). CBT has been on the US law books since the Civil War initially to

punish wealthy Americans who ran away to Europe in the 1860s to avoid military service. It was enshrined as law within the US tax code in 1913 and upheld by the US Supreme Court in a landmark decision of 1924 which has never been over-turned. US tax law states that all persons deemed to be American citizens shall forever be liable for income taxation by the United States wherever their money is made and wherever they live. CBT, which has (until recently) been largely un-enforced, was either completely unknown or misunderstood by many emigrants (and their advisors) to say nothing of their children who have been utterly blind-sided.

According to the 14th Amendment of the United States Constitution anyone born in the United States is a *de facto* US citizen regardless of whatever other citizenship they may hold in the course of their lifetime. Therefore, with the existence of CBT anyone with a United States birth certificate is forever taxable by the US even if they have never lived there as an adult or earned any money there. The only recourse is to officially renounce or relinquish that citizenship at a US consulate or embassy. Although renunciation is a right guaranteed in US law the process is impossibly expensive for many and could even result in financial ruin. Of the world's 193 nations only *two* practice CBT, the African dictatorship of Eritrea and the United States of America. Eritrea has been condemned for the practice by both the United Nations and the Supreme Court of Canada.

Although it began with the intent of collecting revenue from people who left their country *in order to avoid* their military responsibilities at a time of the nation's gravest need, CBT as practiced today is inherently unreasonable and entirely unjustifiable. Its continuing presence in the tax code shows that the United States has adopted the policy that anyone who leaves the United States must be doing so for some nefarious purpose. (In reality, US citizens leave the country for a variety of very ordinary reasons. My father, for example, was offered a job in Canada that was so perfectly suited to his skills and temperament that he took a cut in pay so he could take it.) CBT's punitive provisions require that people who receive *no* services from the United States and *no* payments from the US government, who have *no* property, investments or any other monetary relationship to that country, and who cost it not a dime, must file tax returns that are so complex and full of so many potentialities for making penalty-generating mistakes that there can be no thought of saving money on accounting fees by doing them oneself. "Cross-border" tax accountants are notoriously expensive and ordinary people making ordinary money are simply out of their league.

It must be remembered that CBT is levied in addition to the tax that the individual pays to the country she is actually living in and from which she receives her services. While it is true that a certain amount of "foreign earned income" is exempt from US tax, other forms of "foreign" income such as investments are actually taxed by *both* countries. In other cases, the US imposes tax on income that is entirely tax exempt in the country of residence *as a result* of that exemption. For example, CBT demands that a Canadian of US origin declare and pay tax on a long list of registered accounts set up by the Canadian government as tax-deferred or tax-exempt savings vehicles for special purposes. One of these is the Registered Disability Savings Plan

(RDSP). The contribution to this type of plan made by the individual is matched up to *three times* by the Canadian government. By taxing these accounts the United States receives revenue from the entire pool of Canadian taxpayers most of whom have no connection to the United States. In addition, Canadians of U.S. origin risk paying capital gains tax to the IRS on the sale of a principal residence which is fully tax-free in Canada.

It is beyond the scope of this article to provide a comprehensive listing of all the requirements that “overseas” Americans (who get nothing for their money) must meet on their tax forms because of CBT. It must suffice to say that they are far greater than the requirements for Americans living in the US who actually receive the services for which they pay.

However, I must not fail to mention the Foreign Bank Account Report (FBAR). Instituted in the early 1970s but unknown to most “overseas” Americans until very recently, this is easily the most offensive filing required of us. On the FBAR one must list *all* one’s “foreign” financial *assets to which one is signatory* if the aggregate is above \$10,000. This includes accounts held jointly with non-Americans and accounts for organizations of which one might be a signing officer. Included in the reporting requirements are account numbers and bank addresses. This exposes the accounts to an array of vulnerabilities never imagined before the age of computers. A Canadian of US birth has *all* her money, often jointly with a Canadian spouse, in a Canadian bank down the street from where she lives. This account is *not* offshore. The bank is local to her and she and her husband must have this account in order to survive in their own country. What I *earn* may be the government’s business but what I *have* is *my* business and *my* business alone.

The Crash of 2008 and the 2010 Hiring Incentives to Restore Employment (HIRE) Act

In 2008 the world endured the most disastrous economic event since the great depression. It was largely caused by foolish banking practices (subprime mortgage lending resulting in the collapse of the real estate market, etc.) in the United States. At the same time America had an influx of veterans returning from service in Iraq and Afghanistan and many were ending up unemployed and homeless. In response to this crisis, in 2010 President Obama signed into law the “Hiring Incentives to Restore Employment (HIRE) Act” which, on its surface, appeared to be a necessary and humanitarian piece of legislation. However, within its pages, and largely unnoticed, unread or ill-considered by Congress, was a section relating to the matter of how the provisions of HIRE were going to be paid for. This section was, and is, called:

The Foreign Account Tax Compliance Act (FATCA)

FATCA was inspired by the US government’s “takedown” of the Swiss bank “UBS” and was supposed to enable the US government to recoup money it was losing to overseas tax havens. However, in addition to catching big fish living in the US who have *actually* hidden money offshore, by virtue of CBT it has trawled in all “Americans” of every ilk who are just normal, middle class folk living their lives in countries outside the United States. Called “the worst law that most Americans have never heard of” by Washington, D.C. lawyer James Jatras, FATCA is,

indeed, one of the most arrogant and immoral pieces of legislation to ever emanate from the US capitol. In a nutshell (the actual regulations comprise 577 pages) FATCA requires every financial institution (FI) *on the planet*, to seek out any of its clientele who may be considered “US Persons” and to submit their names, account numbers and account balances directly to the United States Internal Revenue Service (IRS). It is not even required for these “US Persons” to be notified. But if the person *is* notified and will not give her permission for the transfer of information her account will be deemed “recalcitrant” and will be closed.

“US Persons” may be any of the following:

- US citizens, i.e. those with a US birthplace or naturalization or those with an American citizen parent who lived for at least 5 years in the United States, 2 of which were over the age of 14
- green card holders including those with an expired green card that was never formally canceled
- those with a US mailing address (Canadians who spend their winters in Arizona or Florida need to be careful here)
- those with standing instructions to have money forwarded to an account in the United States (see above)
- those with deposits from US sources

The circumstances in the above list are known as US *indicia*.

Accounts of under \$50,000 are supposed to be safe from scrutiny but this is by no means guaranteed. According to the FAQ page on the website of auditing firm Deloitte, “We understand that a number of FFIs are *not* going to use the \$50,000 *de minimis* exception due to difficulties in changing multiple systems to calculate the value of its depository accounts.”

The financial industry feels it has no choice but to comply because the US is wielding a threatening stick in the form of 30% withholding of all US source payments to non-compliant FIs.

The hunt for US Persons began on July 1, 2014.

Intergovernmental Agreements (IGAs)

The intrusive measures necessary for FIs to comply with this legislation would make it necessary to break the privacy laws of the countries in which the FIs are located. The US Treasury Department recognized the difficult position that the FIs were in so it came up with a plan which would allow banks to submit the necessary information to the governments of their respective countries which would, in turn, submit the information to the IRS themselves. The banks would still have to collect the information but at least they would not be breaking the law by doing so.

Governments who signed on to this Treasury Department offer, called an Intergovernmental Agreement (IGA), would need to be willing to adjust their countries' laws accordingly.

In the IGAs the US Treasury assures signatory nations that the United States understands the importance of providing them with reciprocal data on their own taxpayers and that it will do its best to do that. However, such reciprocal data-sharing has not been authorized by Congress and is never likely to be. In fact, as I write, a lawsuit over the issue filed against the Treasury Department by the bankers' associations of the states of Texas and Florida is before the courts.

As it stands at present, FATCA is a one way street with information flowing *to* the US *from* all other nations and nothing whatsoever flowing back the other way. Moreover, even if at some point in the future full reciprocity *is* instituted it will not be a fair exchange because, except for Eritrea, all other nations on earth practice residence-based taxation (RBT). They have no need for information about the finances of their citizens who no longer live within their borders.

In addition, it has been suggested that the IGA approach instituted by the US Treasury Department is not even legal. IGAs were not mentioned in the FATCA legislation that passed through Congress. They were instituted, after the fact, by the Treasury Department when it realized that FATCA wasn't going to fly without them. As it stands, the agreement process has not been given the green light by Congress. Indeed, as types of tax treaties or amendments to tax treaties the agreements require ratification by the US Senate. None have so far been subjected to scrutiny by that body.

Regardless, many governments have signed FATCA IGAs, agreeing to alter their own privacy and banking laws to accommodate the United States. They have signed out of fear of the institution of the 30% FATCA sanctions against their banks. The Canadian government did so on February 5, 2014 and now finds itself the defendant in a lawsuit being brought against it by two Canadian women of US birth. They represent the estimated one million Canadians and their families who now stand completely unprotected by their own government whose moral integrity and courage have collapsed in the face of the sheer might of US economic power.

Who Does FATCA Affect?

The short answer is: just about everybody. At the top of the list are **those who carry U.S. indicia and who live outside of the United States**. In Canada these are estimated to represent approximately 3% of the Canadian population. Add to that their spouses and family members with whom they share accounts and a much larger figure is indicated (perhaps, as has been suggested by some, as great as 12%.) Publicity about FATCA has served to educate not only "overseas US Persons" about CBT and FBAR but also those who employ them or otherwise associate with them. US Persons are being asked to vacate positions with signing authority. Some couples are reconsidering marriage plans and getting divorced due to the understandable unwillingness of non-US spouses to have their personal and financial information shared with the government of a foreign country. Banks, particularly in Europe, are refusing services, including

such basics as mortgage renewals, to “US Person” customers. The list of abuses is lengthy and I refer you to the reference links that I provide in Part IV: Conclusion.

In addition, there will be FATCA fallout on **all bank customers outside the United States**. FATCA, and the response to it by the world’s FIs, puts everyone with a bank account at risk of scrutiny for evidence of US *indicia*. This is a violation of everyone’s financial privacy particularly if a 3rd party is hired by the FI to perform this work as is, apparently, a possibility in the United Kingdom. In addition, it is estimated that implementing the systems necessary to comply with FATCA is costing every single FI in the world somewhere in the neighbourhood of 100 *million* dollars. This cost will undoubtedly be passed on to *all* their customers in the form of higher bank fees. And **taxpayers of IGA signatory nations** will be on the hook for implementation costs to comply with the terms of a FATCA IGA.

Immigrants to the United States who still have bank accounts in the countries from which they came are also in serious positions with regard to FATCA. Immigrants are welcomed to the United States every day but immigration officials don’t tell them about the requirement to file FBARs. With FATCA, these people who may hold accounts in their homelands for no worse a purpose than to help support elderly parents are now in danger of being penalized several times the value of each account that they have neglected to report.

Finally, **America itself** will feel the unintended backlash of FATCA and the CBT tax policy it has exposed and is now enforcing. The effects may take a great deal longer to be felt in America but already, around the world, people and institutions are divesting themselves of US content in their portfolios. They are seeking alternative markets and investigating alternative reserve currencies. The world may have agreed, in large part, to FATCA but it has done so grudgingly and at financial gunpoint. On a personal level, many people like myself are now frightened of traveling to the United States. In the past, cross-border shopping, winter vacations in the southern States and just visiting relatives were a way of life. Now we spend our money elsewhere and are estranged from our families. The list goes on (see references in Part IV) and none of it bodes well for the future prosperity of the United States and her people.

The Negative Consequences of FATCA

All told, FATCA is a ‘lose-lose’ situation on a massive scale. The many costs of FATCA are felt at the national, the corporate and the personal level. The costs are legal, financial, emotional and integral. First and foremost, FATCA uses the language of threat and intimidation to coerce submission from the rest of the world. Canada for example, the closest and most stalwart friend of America, has been coerced into destroying the carefully knit fabric of its inclusive society. Thanks to FATCA, Canada now has a law that allows Canadians of a certain national origin to be treated as foreigners by their banks.

Canada stands to lose a significant percentage of its tax base to FATCA as penalty money, back taxes, fines and fees (as well as \$2,350.00 for every dual citizen who wishes to renounce her US

citizenship) are levied against Canadian citizens who have unwittingly run afoul of a US tax law they didn't know existed. A large number of affected citizens are retired people who came to Canada as babies or young children and have lived their entire lives here having organized their financial affairs like any other Canadian. Now, in their "golden years" they are discovering that as "US Persons" they are invested in all the wrong vehicles and stand to lose much of their hard-earned and hard-saved "nest-eggs" in order to pay a government to which they had no idea they had any financial "responsibility".

One of the things that make a nation "sovereign" is its right to determine its own laws within its own borders. FATCA rides roughshod over Canada's *Charter of Rights and Freedoms* as it transforms a significant number of Canadians into 2nd class citizens, citizens who have now lost their financial privacy, their right to a full range of investment options and even their right to have a bank account. FATCA has resulted in the institution into Canadian law of discrimination based on national origin which is strictly forbidden by our *Charter*. Meanwhile, our compatriots "down under" will have to contend with these words penned on p. 6 of the FATCA Regulatory Impact Statement issued by the government of New Zealand: "U.S. persons: Any avenues they may have to take action against financial institutions for breaches of the Privacy Act or Bill of Rights Act may be extinguished."

With the signing of its FATCA IGA Canada is forcing me, and hundreds of thousands like me, to impale myself upon one of three prongs of a "Morton's Fork": #1) apply for a Social Security Number and start filing US tax returns at enormous annual cost of time and money; #2) be literally *forced* to officially renounce or relinquish my relationship with the land of my birth, at enormous cost both financial and emotional. (This is a huge issue, adequate discussion of which is beyond the scope of this article.); and #3) become a financial non-person with less than \$10,000 in my own name, take my name off the title to my house, etc.

For the "free world", FATCA, as the handmaiden of CBT, ushers in George Orwell's *Nineteen Eighty-Four* just a few decades late. Sadly, the list of the world's "Big Brothers" now includes the name of Uncle Sam.

Solution

This article was written in response to a request for a step-by-step explanation of FATCA that would help Americans understand what it is all about. I would like to conclude with an illustration similar to the one with which I began. If you were born in California but moved to Massachusetts in your 20s and lived there the rest of your life should you have to pay state taxes to California until the day you die? If you lived in Denver at one time and then moved to Atlanta should you have to keep paying municipal taxes to Denver for the rest of your life? Your answer to both questions, I'm sure, would be a resounding, "No! That's ridiculous!" Of course it's ridiculous and so is having to pay taxes to a *country* in which you no longer live.

FATCA is actually only the “*second* worst law nobody has ever heard of”. It is but a symptom of the real disease. CBT is the issue that needs to be addressed by the American people, their Congress and their President. CBT is un-American at its profoundest root. The Revolution that created the United States of America was, to use modern terminology, an anti-CBT revolt that threw off the yoke of taxation by the mother country. Not long after she lost her colonies, Great Britain (and, later, most of the rest of the world) adopted the principle that *residence* in a country is the *only* criterion upon which an income tax can be fairly imposed. Only residents receive the benefits of the tax dollars they pay. Differently put, this is why you pay taxes:

- to pay your fair share of the cost of services that the government provides to *you* and your community. My services are provided to me by the government of Canada. I have chosen to live in Canada and to become a full-fledged member of Canadian society. As such, my community with whom I share my tax dollars is Canadian. Although I am considered by virtue of the 14th Amendment to be an American citizen and am happy to be associated with the United States as the land of my birth and heritage I am *not* a member of American society. Since the age of 10 I have not spent more than 30 consecutive days in that country at any one time.

Conversely, this is *not* why we pay taxes:

- for some possible *potential* use of services that one is highly unlikely to ever require.
- to qualify to exercise one’s rights. Rights are free and available to all at no cost. They are not privileges afforded only to the few who can pay for them.

In short, FATCA without CBT could actually work. If foreign financial institutions were asked to report only on accounts held by customers with US addresses the IRS might catch the real tax evaders at far less cost to all involved. As it is, FATCA has already managed to waste billions of dollars worldwide as well as an incalculable measure of human energy that would have been put to far better use some other way in this sorry world. The upheaval of innocent lives through financial loss, marital discord, emotional stress and loss of health is FATCA’s legacy to the community of “Americans overseas” and those they love.

In the 1960s I was taught that prevention from leaving one’s country was one of the most infamous hallmarks of everything that was wrong with Communism. Yet America has effectively adopted a very similar and practical application of the same principle. CBT is an invisible ball and chain around the ankles of every American. FATCA is its enforcer. The solution is simple. The United States needs to abandon CBT and adopt RBT as its principle of income taxation like the rest of the world. This, and only this, will allow Americans to have real freedom in the 21st century mobile world.

[This article was written by a 60-year-old retired woman who has lived in Canada since the age of 5. She has been a Canadian citizen for 41 years and is a dual citizen with the United States by virtue of her birth there. She has been married to a native-born Canadian for 33 years.]

Resources for Further Details, Links and Commentary

<https://www.democratsabroad.org/sites/default/files/2014%20FATCA%20Research%20%20Stories%20of%20FATCA%20-%20Affecting%20Everyday%20Americans%20Every%20Day.pdf>

(Read these testimonials from ordinary Americans who live outside the United States.)

<http://www.repealfatca.com/>

(This resource contains much information about why FATCA is bad for the United States itself.)

<http://waysandmeans.house.gov/taxreform/workinggroups.htm>

(The submission by Jacqueline Bugnion is a “must read” for anyone new to this issue)

<http://americansabroad.org/files/5513/3589/8020/taxnotes.pdf>

<http://americansabroad.org/files/9013/3589/7793/fatcapp.pdf>

http://americansabroad.org/files/2813/6456/7161/final_arawg2.pdf

<http://americansabroad.org/files/6513/6370/3681/finalsubrbtmarch2013.pdf>

<http://www.theglobeandmail.com/globe-investor/personal-finance/irs-bearing-down-on-americans-in-canada/article586970/>

<http://isaacbrocksociety.ca/wp-content/uploads/2013/11/FATCA-Fact-Sheet-2013.11.21.pdf>

<http://taxprof.typepad.com/files/76ti0147.pdf>

(Click on this link for background and clearly explained information about FBAR.)

<http://thefranco-americanflopouse.blogspot.ca/2014/10/lee-and-bopp-chance-to-turn-tide.html>

(Click on this link to read about legal actions against FATCA being taken in the United States.)

<http://www.adcs-adsc.ca/>

(Click on this link if you would like more information about the lawsuit being launched against the Canadian government for acquiescing to the demands of FATCA.)