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Exporting FATCA

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Exporting FATCA

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The Foreign Account Tax Compliance Act represents a powerful response by the United States to flagrant offshore tax evasion. Although the new reporting regime has been criticized as unilateral and extraterritorial, multilateralism and cooperation so far have been the keys to implementing FATCA. In addition to spurring bilateral intergovernmental agreements to implement FATCA and copycat legislation in other jurisdictions, for many countries, the FATCA reporting requirements represent an aspirational new global standard for automatic exchange of information — one that would supplement, if not replace, information exchange on request.

This article was presented on January 17 at a symposium in Malibu, Calif., sponsored by Pepperdine University School of Law and Tax Analysts. Twenty of the nation's leading tax academics, practitioners, and journalists gathered to discuss the prospects for tax reform as it is affected by two crises facing Washington: dangerously misaligned spending and tax policies, resulting in a crippling $17.4 trillion national debt; and the IRS's alleged targeting of conservative political organizations. A video recording of the symposium is available at http://new.livestream.com/pepperdinesol/taxreform.

A. Introduction

Spurred at least in part by the revenue crunch precipitated by the financial crisis, the United States has taken an aggressive stance towards nonreporting of offshore income and attendant offshore tax evasion. Our contribution discusses administrative and legal mechanisms, especially the Foreign Account Tax Compliance Act, that the United States has deployed to obtain offshore tax information. As this article reveals, while FATCA has been widely criticized as unilateral and extraterritorial legislation, it has also bolstered the offshore tax compliance efforts of governments *other* than the United States. For many jurisdictions, FATCA thus offers an aspirational new global standard for automatic exchange of information — one that would supplement, if not replace, information exchange on request.

B. The Rise of FATCA

Every year, the United States loses at least $100 billion in tax revenue as a result of tax evasion using offshore bank accounts.[1] Offshore evasion strategies have ranged from diversion of earnings from U.S. sources into offshore trusts and other entities[2] to the conversion of cash holdings by individuals into diamonds, which were then smuggled out of the United States in a tube of toothpaste before being secreted in Swiss bank vaults.[3] Historically, these evasion strategies have been effective because of other jurisdictions' strong bank secrecy rules.[4] To overcome lack of cooperation from other jurisdictions, the United States has undertaken a series of aggressive tax enforcement approaches, culminating in the adoption of FATCA in 2010.[5]

1. Background. Starting in 2001, foreign financial institutions could enter into qualified intermediary agreements with the United States.[6] FFIs that became QIs agreed to determine the identity of their clients, but they did not have to report the identities of non-U.S. clients, including corporations, to the IRS as long as QIs concluded that the proper amount of U.S. tax was withheld on U.S.-source payments to the non-U.S. clients.[7]

The highly publicized whistleblower case of Bradley Birkenfeld, a former UBS banker,[8] and the IRS's related John Doe summonses[9] revealed that UBS encouraged U.S. taxpayers to form foreign shell corporations that would open offshore accounts at UBS. UBS then took the position that no withholding was required regarding the payments to the foreign shells, even though its bankers knew

[1]Staff of the Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, 110th Cong., ''Tax Haven Banks and U.S. Tax Compliance,'' at 3 (2008).

[2]For discussion, see Permanent Subcommittee on Investigations, 108th Cong., ''Tax Haven Abuses: The Enablers, the Tools and Secrecy,'' at 1 (2006).

[3]*See* Mark Hosenball and Evan Thomas, ''Cracking the Vault,'' *Newsweek*, Mar. 23, 2009, at 32.

[4]*See, e.g.*, Bradley J. Bondi, ''Don't Tread on Me: Has the United States Government's Quest for Customer Records From UBS Sounded the Death Knell for Swiss Bank Secrecy Laws?'' 30 *Nw. J. Int'l L. & Bus.* 1 (2010) (describing Swiss bank secrecy rules).

[5]*See* Hiring Incentives to Restore Employment Act, P.L. 111-147, section 501, 124 Stat. 71 (2010).

[6]*See* reg. section 1.1441-1.

[7]*Id.*

[8]*See* ''Year in Review: The 2009 Person of the Year,'' *Tax Notes*, Jan. 4, 2010, p. 7 (describing Birkenfeld's actions).

[9]*See supra* note 1.

that the beneficial owners were U.S. residents.[10] Under a deferred prosecution agreement with the United States, UBS agreed to pay a fine of $780 million, release (through the Swiss government) the names of 250 U.S. holders of offshore UBS accounts, and cease its illegal banking and brokerage activities in the United States. Under a separate agreement, UBS ultimately agreed to disclose the names of 4,500 of an estimated 20,000 U.S. holders of offshore accounts at UBS.

There is little reason to think that abuses of the QI regime were limited to UBS. The magnitude of offshore evasion became even more apparent when, contemporaneously with its actions against UBS and other financial institutions, the government announced in 2009 an offshore voluntary compliance initiative, under which nearly 15,000 U.S. taxpayers disclosed to the IRS that they held funds in previously unreported offshore accounts.[11]

2. FATCA. In response to the weaknesses of the QI regime and the increased attention on the offshore evasion epidemic following the UBS deferred prosecution agreement, Congress enacted FATCA in 2010.[12] Under FATCA, participating FFIs are required to report the name, address, and other identifying information for each account holder that is a U.S. person, the account number and balance, and any gross dividends, interest, and other income paid to the account. Participating FFIs must also obtain various documents from any account holders that possess indicia of U.S. status. Participating FFIs are required to withhold 30 percent on some payments to recalcitrant account holders and other financial institutions that do not comply with FATCA.

FATCA's enforcement mechanism is both potent and innovative. FFIs refusing to cooperate with the regime by reporting the required information are subject to a 30 percent withholding tax on certain U.S.-source payments, including U.S.-source interest and dividends, and gross proceeds from the sale of assets that generate U.S. dividends and interest.[13] To avoid being subject to this withholding tax, FFIs must register with the IRS and commit to report information regarding their U.S. account holders and non-U.S. account holders that are entities with substantial U.S. owners.[14]

[10]*See, e.g.*, UBS Deferred Prosecution Agreement, at 2. *See also id.* at Exhibit C, at 4-5.

[11]*See* IR-2011-55, at 97-11.

[12]*See* Hiring Incentives to Restore Employment Act, P.L. 111-147, section 501, 124 Stat. 71 (2010).

[13]*See* sections 1471(a) and 1473(1).

[14]*See* section 1471(c).

3. Criticism. Commentators have characterized FATCA as ''aggressive,''[15] ''audacious,''[16] ''egregious,''[17] ''draconian,''[18] and ''devastatingly destructive.''[19] The principal criticisms have been that FATCA is not only unilateral,[20] but also extraterritorial.[21] Critics contend that FATCA requires financial institutions in jurisdictions outside the United States to act like ''U.S. Treasury watchdogs''[22] and that it ''strong arms every financial institution in the world into doing the job of the IRS.''[23] According to representatives of large financial institutions and other businesses outside the United States, the legislation will result in billions of dollars in implementation costs.[24] Some government officials outside of the United States assert that despite the attempt by the United States to enter into intergovernmental agreements, FATCA conflicts with the local banking and privacy laws of many other jurisdictions.[25] Further, critics contend that the

[15]Scott D. Michel, ''FATCA: A New Era of Financial Transparency,'' *J. of Acc.*, Jan. 2013.

[16]Susan C. Morse, ''Ask for Help, Uncle Sam: The Future of Global Tax Reporting,'' 57 *Vill. L. Rev*. 529, 536 (2012).

[17]Don Whiteley, ''IRS Wants Canada to Nab U.S. Tax Cheats: Why We Should Care,'' *The Globe and Mail*, Jan. 7, 2013, *available at* http://www.theglobeandmail.com/globe-debate/irs-wants-canada-to-nab-us-tax-cheats-why-we-should-care/article6994760/#dashboard/follows/.

[18]*Id*.

[19]Andrew F. Quinlan, ''FATCA and US Fiscal Imperialism Threaten to Sink Global Economy,'' *The Daily Caller*, Mar. 19, 2013, *available at* http://dailycaller.com/2013/03/19/fatca-and-us-fiscal-imperialism-threaten-to-sink-global-economy/.

[20]*See, e.g.*, EU Parliament FATCA Hearing, May 28, 2013 (statement of Marie Rosvall, president of the Fiscal Committee, European Banking Federation), *available at* http://www.youtube.com/watch?v=zRoU-JNFhr0, at 22:44 (''How can one country impose its law on other countries without any consultations or discussions?'').

[21]Canadian Finance Minister James M. Flaherty described FATCA's ''far-reaching extraterritorial implications'' that would ''turn Canadian banks into extensions of the IRS.'' Letter from Flaherty to *The Washington Post*, *The New York Times*, and *The Wall Street Journal* (Sept. 16, 2011), *available at* http://business.financialpost.com/2011/09/16/read-jim-flahertys-letter-on-americans-in-canada. *See also* Arthur J. Cockfield, ''The Limits of the International Tax Regime as a Commitment Projector,'' 33 *Va. Tax Rev*. 59 (2013), at 102-103 (''the unilateral nature of FATCA arguably subverts traditional multilateral processes''). *See also* Allison Christians, ''Putting the Reign Back in Sovereign,'' 40 *Pepp. L. Rev*. 1373, 1408 (FATCA ''proposes a turn away from multilateralism'').

[22]Christopher Elias, ''U.S. Foreign Account Tax Compliance Act Threatens Investment in the U.S.,'' Reuters, Jan. 25, 2012.

[23]Quinlan, *supra* note 19.

[24]*See* Kate Burgess, ''U.S. Legislation: Industry Concerned at Extraterritorial Tax Clampdown Plan,'' *Financial Times*, May 8, 2012.

[25]Patricia Lee, ''U.S. Extra-Territorial Approach to Regulations Could Have Unintended Consequences for Asia-Pacific Region,'' Reuters, Sept. 4, 2012.

United States acts like the "loan sheriff in town"[26] by demanding information from other jurisdictions without offering any information in exchange. In light of this criticism and the legal obstacles of local bank secrecy rules, several commentators have even predicted that the FATCA regime will not survive.[27]

C. From Unilateralism to Multilateralism

While complaints about the unilateralism and extraterritoriality of FATCA are not without merit, FATCA has enhanced *multilateral* cooperation in combating tax evasion, and it has spawned similar legislation and treaties in other jurisdictions.

1. Model IGAs. The largest EU countries — France, Germany, Italy, Spain, and the United Kingdom — as well as the European Commission worked with the United States to develop the text of the Model 1 IGA. Along with the Model 2 agreement, these IGAs seek to both reduce compliance burdens for FFIs and avoid conflicts between FFIs' obligations under FATCA and their client-confidentiality obligations under foreign law. For example, FFIs located in Model 1 partner jurisdictions need not enter into separate FFI agreements with the United States in order to avoid the withholding tax.[28]

Importantly, the Model 1 IGA developed with the G-5 and the commission contemplates reciprocal automatic exchange of information from U.S. financial institutions. The United States entered into the first Model 1 IGA with the United Kingdom, and several more have followed. The United States is actively engaged in talks with 70 jurisdictions regarding FATCA.[29]

2. Son of FATCA. Perhaps more remarkable has been the adoption of FATCA-like legislation or treaties by other jurisdictions. For example, the United Kingdom has drafted "son of FATCA" legislation aimed at securing information from its crown dependencies and overseas territories.[30] The United Kingdom has entered into information sharing agreements with its crown dependencies modeled on the U.K.-U.S. bilateral IGA.[31] Notably, to minimize additional compliance burdens for financial institutions, the United Kingdom has incorporated nearly identical reporting requirements as those required under the U.S. model IGAs, even going so far as to denominate threshold account values in U.S. dollars and incorporating by reference U.S. Treasury regulations.[32] An important difference is that the United Kingdom's agreements with its crown dependencies lack the withholding tax enforcement mechanism of FATCA.

In the same vein, the French "mini-FATCA" aims at overseas trusts and carries a penalty of the larger of €10,000 or 5 percent of the corpus for failure to provide detailed information on the assets of French residents.[33]

3. FATCA as new global standard. In addition to the jurisdictions emulating FATCA, many jurisdictions view FATCA as an opportunity to establish a global standard for automatic information exchange. For example, in discussing its new information sharing agreements with its crown dependencies, the U.K. government stated that:

> the U.K. was quick to see the potential . . . to embed a new international standard in the exchange of information based around the FATCA model. This would provide a step change in the ability of the international community to tackle tax evasion, while minimizing costs for governments and business (who are already investing in the systems and processes necessary to comply with the U.S.

[26]Jeff N. Mukadi, "FATCA and the Shaping of a New International Tax Order," *Tax Notes Int'l*, June 25, 2012, p. 1227.

[27]*See, e.g.*, Peter J. Spiro, "The (Dwindling) Rights and Obligations of Citizenship," 21 *Wm. & Mary Bill Rts. J.* 899 (2013) ("It is not clear that the FATCA regime is sustainable"); Frederic Behrens, "Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand," 2013 *Wis. L. Rev*. 205.

[28]Other benefits of the Model 1 IGA for FFIs include reduced due diligence requirements and exemptions from FATCA reporting requirements for more kinds of institutions and products.

[29]Robert Stack, "Myth vs. FATCA: The Truth About Treasury's Effort to Combat Offshore Evasion" (Sept. 20, 2013), *available at* http://www.treasury.gov/connect/blog/Pages/Myth-vs-FATCA.aspx. Under the Model 2 IGA, the FATCA partner country will authorize its FFIs to report FATCA-required information directly to the IRS. The United States has entered into Model 2 IGAs with Bermuda, Japan, and Switzerland.

[30]John McCann and Angela Nightingale, "Tax Information Sharing, the Rise of 'FATCA-esque' Agreements," Aima, at 2 (Oct. 24, 2013), *available at* www.aima.org/en/education/aimajournal/q12013/tax-information-sharing.cfm.

[31]Isle of Man, Guernsey, and Jersey. *See, e.g.*, statement of Guernsey's chief minister describing the Guernsey-U.K. agreement as providing for "enhanced reporting of tax information along FATCA principles." States of Guernsey, release (May 14, 2013), *available at* http://www.gov.gg/article/107574/Chief-Minister-emphasises-Guernseys-support-for-greater-global-tax-transparency.

[32]*See, e.g.*, Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Jersey to Improve International Tax Compliance, Annex I, Art. II (reporting financial institutions may, as an alternative to the reporting procedures provided in the agreement, apply the reporting procedures described in the "U.S. Treasury Regulations"). *Id.*, at art. 1.1(f), defining U.S. regulations as those "Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions and Other Foreign Entities." *See also id*. (incorporating amendments to the U.S. regulations, to the extent agreed by the parties).

[33]McCann and Nightingale, *supra* note 30, at 2.

FATCA legislation and the subsequent intergovernmental agreements to implement it).

The United Kingdom announced that, in addition to its crown dependencies, it would seek to negotiate similar automatic information exchange agreements with other jurisdictions, and that these contemplated agreements, along with its own IGA with the United States, ''all form part of a drive to embed a new single international standard in the automatic exchange of tax information.'' Likewise, in May 2013, 16 EU member states called for a ''new global standard for automatic exchange of information to tackle tax evasion, based on the U.S. FATCA legislation.'' Most importantly, in early 2014, the OECD announced,[34] and the G20 approved,[35] a new Common Reporting and Due Diligence Standard for use by countries wishing to exchange information automatically. The OECD describes this standard as drawing ''extensively on the intergovernmental approach to implementing FATCA . . . with a view maximizing efficiency and reducing cost for financial institutions.''[36]

4. Multilateral information exchange. FATCA also seems to have precipitated or accelerated efforts at multilateral information exchange. For example, the G-5 announced that they will exchange information multilaterally based on the U.S. model IGA.[37] Likewise, official statements from the EU cast FATCA as providing ''a unique opportunity to move from a series of bilateral agreements to a multilateral system.''[38] Indeed, unilateral FATCA ultimately may help improve the leaky EU savings directive.[39] Veto-holding EU member states attempting to preserve what was left of banking secrecy in their jurisdictions have blocked amendments to the directive.[40] Members of the EU Parliament, even when they vehemently oppose FATCA, seem to agree that FATCA has galvanized the EU into action. For example, at a public parliamentary hearing on FATCA, European Parliament member Sophia in 't Veld (Netherlands) stated, ''The fact that we're welcoming the application of third country law on our territory is only a reflection of the weakness of the European Union. We only have ourselves to blame because we were unable to adopt our own policies.''[41]

If FATCA represents a new global standard for information exchange, that standardization would mitigate the concern by banking associations that they are being asked to shoulder an extraordinary administrative burden concerning only Americans. If every country adopted a FATCA-like regime, FFIs would no longer be looking for American needles in a global haystack. Standardization according to the FATCA model would mitigate FFIs' concerns that they could be subject to a variety of conflicting reporting requirements imposed by different states. Likewise, IGAs and attendant legislative changes in FATCA partner countries resolve conflicts between FFIs' obligations under FATCA and their obligations under local law. In short, multilateralism and cooperation may be the key to successful implementation of what has been criticized as unilateral and extraterritorial U.S. legislation.

D. Unanswered Questions

Even as IGAs solve conflicts between FATCA and foreign law, IGAs themselves raise domestic legal questions. For example, Rep. Bill Posey, R.-Fla., sent a letter last July to Treasury Secretary Jacob Lew questioning the legal authority under which the IGAs are negotiated and asking whether Treasury expects IGAs to be self-executing.[42]

In addition to legal questions, IGAs raise political questions. For example, to the extent that the

[34]OECD, Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard (undated document declassified Jan. 17, 2014) at 6, *available at* http://www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Common-Reporting-Standard.pdf.

[35]*See* ''EU Tax Commissioner Welcomes Global Tax Transparency Standard,'' Tax Analysts *Worldwide Tax Daily* (Feb. 23, 2014).

[36]OECD, Standard for Automatic Exchange, *supra* note 34, at 3 (describing the aim of the standard as ''to avoid a proliferation of different standards which would increase costs for both governments and financial institutions'').

[37]HM Treasury, ''Joint Communique on the 'Model Intergovernmental Agreement to Improve Tax Compliance and Implement FATCA''' (July 26, 2012), *available at* https://www.gov.uk/government/news/joint-communique-on-the-model-intergovernmental-agreement-to-improve-tax-compliance-and-implement-fatca.

[38]Statement by Belgium, the Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom on the Pilot Multilateral Automatic Information Exchange Facility, ECOFIN (May 14, 2013), *available at* https://www.gov.uk/government/publications/statement-on-the-pilot-multilateral-automatic-information-exchange-facility. *See also* Council of the EU, release, 3238th Council Meeting, Economic and Financial Affairs, at 12 (May 14, 2013), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/137122.pdf.

[39]Council Directive 2003/48, 2003 O.J. (L 157) 38 on taxation of savings.

[40]For the requirement of member state unanimity in tax matters, see Treaty on the Functioning of the European Union, art. 115.

[41]*See* EU parliamentary hearing on FATCA, at 38:57, *available at* http://www.youtube.com/watch?v=zRoU-JNFhr0.

[42]Letter from Posey to Lew, ''Rep. Posey Calls for FATCA Enforcement Moratorium'' (July 1, 2013).

United States negotiates reciprocal Model 1 IGAs,[43] implementing legislation presumably would be required to impose new reporting requirements on U.S. financial institutions,[44] and those new reporting requirements likely would face political resistance from affected parties. If domestic financial institutions do not already possess account ownership information sufficient to determine their reporting obligations under reciprocal IGAs, their compliance burdens will increase (and, presumably, so will their political resistance to reciprocity).[45] To take just one example, if domestic financial institutions ultimately will be obliged to apply FATCA's passthrough rules for payments to entities, domestic financial institutions will face the problem of accounts held by Delaware limited liability companies for which they lack beneficial ownership information.[46]

These are really just the tip of the iceberg; FATCA raises many additional questions. For example, can the U.S. standard become a worldwide standard, in light of competing preexisting automatic information exchange obligations, such as the EU savings directive?[47] Are the privacy protections afforded to account holders adequate under FATCA? To what extent will developing countries benefit from a new standard of automatic information exchange, particularly when those countries lack the administrative apparatus to reciprocate information?[48]

FATCA already represents a substantial commitment of government resources, both by FATCA partner jurisdictions and by the United States, which so far has developed and negotiated 19 IGAs and written hundreds of pages of guidance.[49] Affected financial institutions have shouldered heavy burdens to implement a reporting regime that is estimated to raise only $8.7 billion over 10 years.[50] Moreover, the complexity and novel legal questions raised by FATCA, which have necessitated extended effective dates and the phasing-in of its provisions over a period of six years, raise questions about the ultimate fate of the legislation. If political will for FATCA was founded principally on fiscal stress, will the United States abandon the regime as the economy improves?

E. Conclusion

Fiscal crisis emboldened the United States to use access to its capital markets as an enforcement mechanism for securing information about domestic taxpayers from foreign institutions. And, in turn, the U.S. passage of FATCA emboldened some of our trading partners to rally behind a new standard of automatic information exchange.[51] Thus, the initial

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[43]Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA, art. 6, at 13-14 (describing U.S. commitments to exchange information on a reciprocal basis with the FATCA partner).

[44]*See* Office of Management and Budget, ''Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2014,'' at 202 (proposing to request that legislation).

[45]Under current IGAs, the reciprocal reporting obligations of the United States are limited to information that U.S. financial institutions already are required to collect concerning non-U.S. account holders. *See* ''Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA,'' art. 2(2)(b), at 9. But the Model 1 IGA also includes a statement that the United States will pursue ''equivalent levels of information exchange.'' *Id.* at 1.

Under the heading ''Reduce the Tax Gap and Make Reforms,'' the analytical perspectives for the 2014 budget briefly describes a budget proposal that would provide the secretary of the Treasury authority to ''prescribe regulations that would require reporting of information with respect to nonresident alien individuals, entities that are not U.S. persons, and certain U.S. entities held in substantial part by non-U.S. owners, including information regarding account balances and payments made with respect to accounts held by such persons and entities.'' OMB, *supra* note 41, at 202. The proposal notes that reciprocal exchange of information ''similar'' to that required from FFIs under FATCA would improve intergovernmental cooperation on FATCA enforcement. *Id*.

[46]*See* ''OECD Peer Review of the United States,'' at 38, 87, *available at* http://www.oecd-ilibrary.org/docserver/download/2313691e.pdf?expires=1386362385&id=id&accname=ocid194310&checksum=2AC3F7FC32AA87A46CAFF95E538C05AD (citing complaints by U.S. information exchange partner states that beneficial ownership information is not available for LLCs in several states, including Delaware).

[47]*See, e.g*., EU Commission, ''An Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion,'' COM (2012) 772 final, at 9 (Dec. 6, 2012) (in an effort to avoid proliferation of diverse reporting requirements, this document urges the OECD to adopt reporting forms and software developed for implementing the EU savings directive).

(Footnote continued in next column.)

[48]For further discussion, see Itai Grinberg, ''Taxing Capital Income in Emerging Countries: Will FATCA Open the Door?'' 5 *World Tax J*. 325-367 (2013).

[49]As of January 22, 2014. For a current list of IGAs, see http://www.treasury.gov/resource-center/tax-policy/treaties/pages/fatca-archive.aspx.

[50]*See* JCT, ''Estimated Revenue Effects of the Revenue Provisions Contained in Senate Amendment 3310, The 'Hiring Incentives to Restore Employment Act,' Under Consideration by the Senate,'' JCX-5-10 (Feb. 23, 2010).

[51]The OECD Global Forum peer review process continues to judge countries' tax transparency according to the standard of information exchange on request, but the OECD strongly supports automatic information exchange. For the OECD's recent work on automatic information exchange, see OECD Report for the G-8 Summit by Lough Erne, ''A Step Change in Tax Transparency'' (2013), at 4 (describing a ''step change in international tax transparency driven by developments around the globe, including in the United States and Europe, with unprecedented political support for automatic exchange of information''). Likewise, the EU Commission, referring to the savings directive, described the EU as ''the long-time pioneer of automatic exchange of information internationally.'' EU Commission, ''Automatic Exchange of Information: Frequently Asked Questions'' (June 12, 2013), *available at* http://europa.eu/rapid/press-release_MEMO-13-533_en.htm.

outraged reactions to FATCA among private parties and government officials seem to be shifting to acquiescence by the FFIs, and at least some government officials view FATCA as an opportunity to strengthen their own offshore enforcement.

Carried Interest for The Common Man

By Richard Winchester

Richard Winchester is an associate professor at Thomas Jefferson School of Law.

In this article, Winchester explains how the tax rules permit a self-employed individual to limit the tax on his earnings. He also assesses the merits of a proposal to address the situation.

This article was presented on January 17 at a symposium in Malibu, Calif., sponsored by Pepperdine University School of Law and Tax Analysts. Twenty of the nation's leading tax academics, practitioners, and journalists gathered to discuss the prospects for tax reform as it is affected by two crises facing Washington: dangerously misaligned spending and tax policies, resulting in a crippling $17.4 trillion national debt; and the IRS's alleged targeting of conservative political organizations. A video recording of the symposium is available at http://new.livestream.com/pepperdinesol/taxreform.

In recent years, the public has become increasingly aware of the compensation arrangement known as carried interest, which permits private equity fund managers to pay tax at obscenely low rates on obscenely high earnings for their work.[1] The publicity has led Congress to consider no fewer than eight separate pieces of legislation since 2007 to increase the tax on carried interest.[2] Much of the energy behind this movement seems to be grounded in a concern that the current tax system allows the superrich to gain an advantage that is unavailable to anyone else. However, that is not entirely accurate. For years, huge numbers of ordinary self-employed people have been able to limit the tax on their earnings when they conduct their business through a formal business entity instead of

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[1] *E.g.*, Jenny Anderson and Andrew Ross Sorkin, "Congress Weighs End to Private Equity Tax Break," *The New York Times*, June 21, 2007.

[2] For a concise summary of these legislative measures, see James B. Sowell, "Carried Interest: Line Drawing and Fairness (or Lack Thereof)," *Tax Notes*, Nov. 11, 2013, p. 617; Sowell, "Carried Interest: Line Drawing and Fairness (or Lack Thereof), Part 2," *Tax Notes*, Nov. 18, 2013, p. 721; and Sowell, "Carried Interest: Line Drawing and Fairness (or Lack Thereof), Part 3," *Tax Notes*, Nov. 25, 2013, p. 857.