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May 15, 2017

Chairman Mark Meadows
Subcommittee on Government Operations
2157 Rayburn House Office Building
Washington, DC 20515-6143

Re: Three Recommendations on How to Improve the Legal Framework Set up by the Foreign Account Tax Compliance Act

Dear Chairman Meadows,

This letter provides three recommendations on how to improve the legal framework set up by the Foreign Account Tax Compliance Act ("FATCA").[1] First, we recommend that any taxation of overseas Americans comply with established United States constitutional principles and international legal norms. Second, we recommend that the current laws be repealed in their entirety and certain proposals rejected. Third, we recommend that Congress enact a 1099 requirement on foreign banks, established by treaty, as long as this complies with established United States constitutional principles and international legal norms.

I. Taxation of Overseas Americans Must Comply with Important Established United States Constitutional Principles and International Legal Norms.

A. Overseas Americans Have a Right to Privacy.

The Fourth Amendment of the United States Constitution provides:

[1] The author wishes to acknowledge Courtney Turner Milbank, J.D., of The Bopp Law Firm, PC, for her research and writing assistance. Additionally, the author wishes to thank Anthony Parent, James Gosart, John Richardson, and Keith Redmond for their writing assistance. The author is solely responsible for these recommendations and this letter.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Constitutional protections apply to all U.S. citizens regardless of their residence,[2] and all the constitutional protections afforded U.S. citizens should be respected, whether residing abroad or in the U.S. The right of privacy, as well as other constitutional rights, are also encompassed in the IRS's Taxpayer Bill of Rights,[3] which is also applicable to all U.S. taxpayers.

Under the Fourth Amendment, financial records held by financial institutions contain personal information and must be protected. *Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015) . So such records may only be subject to search after prior judicial approval or where the targets of the search are afforded an opportunity to have the search request reviewed by a neutral

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[2] *See Reid v. Covert*, 354 U.S. 1, 5 (1955); *see also Williams v. Blount*, 314 F. Supp. 1356, 1363–1364 (D.D.C. 1970).

[3] The Right to Privacy:
"Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing."

The Right to Confidentiality:
"Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information."

INTERNAL REVENUE SERVICE, YOUR RIGHTS AS A TAXPAYER (2014), available at https://www.irs.gov/pub/irs-pdf/p1.pdf (last visited May 15, 2017).

decisionmaker before complying. *Id*. Thus, where an overseas American is suspected of criminal activity, a warrant based on probable cause is required before the IRS can look into his or her affairs.

Overseas Americans should be provided the same privacy rights afforded to Americans living in the United States.

B. Equality of Treatment Is Guaranteed by The U.S. Constitution and Established International Legal Norms for Overseas Americans and Must Be Fully Protected.

The Fifth Amendment also provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. The Due Process Clause of the Fifth Amendment includes a guarantee of equal protection equivalent to that expressly provided in the Equal Protection Clause of the Fourteenth Amendment. "An equal protection claim against the federal government is analyzed under the Due Process Clause of the Fifth Amendment." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995); *United States v. Ovalle*, 136 F.3d 1092, 1095 (6th Cir. 1998). Thus, the federal government may not "deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, § 1.

Overseas Americans must also be afforded these protections. Yet, the financial accounts of citizens living abroad are subject to more burdensome and extensive reporting, and by extension less privacy, than the local bank accounts of citizens living in the United States. Moreover, as a result, many are being denied "local" banks accounts in the country in which they reside.

This cannot be permitted and overseas Americans must be provided due process and equal protection of the laws. This entails subjecting them to the same reporting requirements as

Americans living in the United States, thus providing them the same opportunities to open "local" bank accounts in the country in which they reside.

Furthermore, established international legal norms also require equality of treatment between U.S. citizens and foreign citizens. Indeed, non-discrimination is a key concept in World Trade Organization law and policy. *See generally* General Agreement on Tarriffs and Trade 1994. These non-discrimination and equality principles are a part of international economic law and legal norms and are applied to U.S. citizens living abroad. *Id*. So, a U.S. citizen living in Switzerland must be treated the same as a Swiss citizen living there. And any banking requirements must be applied equally to all, not to a selective few U.S. citizens. Moreover, banks should not be able to discriminate based on national origin. Bank accounts should be made available and should have the same reporting requirements for all residents in a particular jurisdiction.

C. Overseas Americans Must Be Afforded Transparency in Statistical Data Collection and Freedom of Information.

There have been many claims regarding the purpose and necessity of FATCA, how much it has raised, and why it is still needed. However, reliable statistics about tax evasion by overseas Americans and stateside residents through the use of foreign accounts has not been provided to the public.

On the other hand, there is a plethora of data showing the negative effects of FATCA, FBAR, and the IGAs on overseas Americans.[4] This includes data about overseas Americans

[4] Democrats Abroad, FATCA: Affecting Everyday Americans Every Day 6 (2014), https://d3n8a8pro7vhmx.cloudfront.net/democratsabroad/pages/4734/attachments/original/1449777271/Democrats_Abroad_2014_FATCA_Research_Report.pdf?1449777271 (last visited Apr.

being denied bank accounts and promotions, having their existing customer accounts closed, and/or being forced to separate their assets from a spouse, to divorce, or to renounce their citizenship.[5]

So any proposed legislation should include a requirement that the IRS collect reliable data and statistics regarding tax evasion by overseas Americans and stateside residents through the use of foreign accounts. Moreover, that data should be made available to Congress and the public, subject to any constitutional and privacy concerns.

This data will allow Congress and the public to do a cost-benefit analysis on any proposed legislation—ensuring that requirements are in place to curb tax evasion while not unnecessarily burdening overseas Americans.

II. The Current Laws and Proposals Do Not Comply with the Aforementioned Principles and Norms and Are Unconstitutional.

A. FATCA, FBAR and the IGAs Should Be Repealed in Their Entirety.

The heightened reporting requirements on individuals and foreign banks for foreign bank accounts under FATCA, FBAR, and/or the IGAs violate U.S. constitutional protections to the extent that they require U.S. citizens living abroad and/or foreign banks to report more detailed information about their foreign bank accounts than required of U.S. citizens with U.S. bank accounts and that they require confidential financial information without a warrant. Further, such laws violate international legal norms by imposing reporting requirements of US citizens in a foreign country that are not imposed on the citizens of that country.

19, 2017).

[5] *Id*.

While the local bank accounts of citizens in the United States are only subject to reporting of the amount of interest paid to the accounts via the 1099-INT,[6] the local bank accounts of citizens living abroad are subject to reporting of a much broader and more intrusive set of information. US citizens holding local bank accounts in foreign countries must report, and their foreign bank may also report, not only the interest paid to the account,[7] but also the amount of any income, gain, loss, deduction, or credit recognized on the account,[8] whether the account was opened or closed during the year,[9] the balance of the account,[10] the maximum value of the account,[11] and the information on any joint owners.[12] Comparable information is not required to be disclosed regarding domestic accounts of U.S. citizens. The result is that U.S. citizens living in a foreign country are treated differently than U.S. citizens living in the United States.

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[6] While there are a series of other 1099 documents, including the 1099-MISC for independent contractor earnings, the 1099-DIV for dividends and other distributions, the 1099-G for state income tax refunds and unemployment compensation, the 1099-R for withdraws from traditional IRAs, and the 1099-C for debt cancellations; the relevant 1099 here is the 1099-INT. This 1099-INT reports interest income from banks where an individual has an account.

[7] 26 USC § 1471(c)(1)(C); 26 C.F.R. §§ 1.1471-4(d)(3)(ii), -4(d)(4)(iv); Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, at art. 2, §2.

[8] 26 C.F.R. § 1.6038D-4(a)(8)

[9] *Id.* § 1.6038D-4(a)(6).

[10] 26 USC §§ 1471(c)(1)(C), 6038D(c)(4); 26 CFR §§ 1.1471-4(d)(3)(ii), 1.6038D-4(a)(5); Model 1A IGA Reciprocal, Preexisting TIEA or DTC, *supra* note 12, at art. 2, §2; Model 2 IGA, Preexisting TIEA or DTC, *supra* note 18, at art. 2.

[11] FinCEN, BSA E-Filing System, File the Report of Foreign Bank and Financial Accounts (FinCEN Form 114), http://bsaefiling.fincen.treas.gov/NoRegFilePDFIndividual FBAR.html.

[12] *Id*.

But broader and more intrusive reporting is not the only issue associated with FATCA, FBAR, and the IGAs. Instead, these onerous requirements are leading many banks to reject American citizens in their entirety. This leaves overseas Americans without "local" checking and savings accounts used for everyday, routine financial activity such as the payment of daily personal expenses (e.g., food, clothing, housing, fuel, utilities, etc.) and other recurring expenses necessary to support daily life in modern society.

Thus, with respect to overseas Americans holding local bank accounts, the heightened reporting requirements imposed by FATCA, FBAR, and the IGAs violate the basic rights to privacy and to equal protection of the laws guaranteed by the Fifth Amendment. Therefore, they should be repealed.

Furthermore, while we have not made a study of this issue, it is apparent that most foreign countries do not impose a similar regime of reporting by their own citizens to their government as is imposed by FATCA, FBAR and applicable IGAs on US citizens living there. As a result, these laws violate established international legal norms.

1. FATCA

In addition to the heightened reporting requirements, the penalties imposed by FATCA are also unconstitutional and should be repealed.

Fines are subject to the Excessive Fines Clause when they are intended to punish, as opposed to remediate, the offender. *Austin v. United States*, 509 U.S. 602, 609–10 (1993). And, when such fines are grossly disproportional to the gravity of the offense, they are unconstitutional. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

FATCA imposes a 30% "tax" on payments to foreign financial institutions from U.S. sources when these foreign institutions choose not to help the IRS pry into the bank accounts of their U.S. customers (the "FFI Penalty"). The 30% "tax" is not a tax at all but rather a penalty designed to accomplish indirectly through financial coercion what the U.S. government cannot mandate directly through regulation. It is imposed on noncompliant foreign financial institutions without regard to whether the institution even has American account holders suspected of tax evasion. As a penalty, the 30% "tax" lacks all proportion to the harm posed by an institution's noncompliance. The FATCA FFI Penalty is therefore unconstitutional under the Excessive Fines Clause.

Similarly, FATCA also imposes a 30% "tax" on account holders who exercise their rights under the statute not to identify themselves as American citizens to their banks and to refuse to waive privacy protections afforded their accounts by foreign law (the "Passthrough Penalty"). Like the "tax" on noncompliant foreign financial institutions, the "tax" on individual account holders is not a "tax" but a mechanism for deterring individuals from maintaining their privacy. The Passthrough Penalty ignores a citizen's actual tax liability altogether. It is imposed regardless of whether the American account holder owes any taxes or has otherwise evaded any U.S. tax obligations. An account holder can dutifully and truthfully file their taxes, identify their foreign accounts to the IRS, and file their FATCA and FBAR reports each year and yet still be subjected to a 30% fine on all payments from their bank to their accounts.[13]

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[13] This is because the Passthrough Penalty is imposed on recalcitrant account holders, regardless of tax liability. A person becomes a recalcitrant account holder if they fail to provide (a) information sufficient to determine whether the account is a United States account to the foreign financial institution holding their account, (b) their name, address, or TIN to the foreign

The FFI Penalty and the Passthrough Penalty are unconstitutional under the Eighth Amendment and should be repealed.

2. FBAR

Not only does FBAR subject overseas Americans to additional reporting requirements beyond those of Americans living stateside—denying overseas Americans the rights to privacy and equal protection of the laws—it also imposes a large penalty for willful violations.

The original purpose behind the criminal and civil FBAR penalties of the Bank Secrecy Act of 1970 was to provide law enforcement with a tool to fight violent, international crimes (i.e. drug trafficking, human trafficking, and terrorism). Yet, we have not been able to find one instance of an FBAR penalty being imposed upon any one person accused of committing the underlying crimes. Rather, the FBAR's mission has creeped into something it was not intended to combat: tax compliance. It adds a parallel Title 31 reporting penalty scheme to the already existing penalty scheme in place by Title 26.

The penalty for "willful" failure to file an FBAR for foreign accounts is the *greater* of $100,000 or 50% of the value of the unreported account. This penalty was intended to punish the worst criminal offenders but has been applied to average taxpayers. In fact, there are numerous instances of the IRS imposing or threatening to impose FBAR penalties when there was no tax due. That is, in cases of no tax compliance issue, the IRS still impose penalties of up to 50% of account value, because the Bank Secrecy Act authorizes this. This penalty is designed to punish

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financial institution holding the account, or (c) a waiver of a foreign law that would prevent the foreign financial institution from reporting the information to the IRS under FATCA. *Id.* § 1471(d)(6).

and is grossly disproportionate to the conduct leading to the penalty, failure to file a form. Accordingly, the Willfulness Penalty is unconstitutional under the Excessive Fines Clause.

FBAR should be repealed in its entirety—thus eliminating the extra reporting requirements and excessive penalties.

3. IGAs

The IGAs lack any constitutional basis. They have not been submitted to the Senate for its advice and consent under Article II, they have not been submitted to the Senate and the House for approval as congressional-executive agreements, and they have not been authorized by any treaty. They can stand, then, only as sole executive agreements and then only if they fall within the President's independent constitutional authority to make international agreements. But the power "To lay and collect Taxes" is expressly and exclusively reserved to Congress under Article I of the Constitution. The President lacks any independent authority over such matters. For this reason alone, the IGAs are unconstitutional.

But they are also unconstitutional for another related reason. Sole executive agreements cannot contravene legislative enactments. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953), *aff'd*, 348 U.S. 296, 75 S. Ct. 326, 99 L. Ed. 329 (1955). Yet, the IGAs do just that. They override FATCA by eliminating the requirement that foreign financial institutions register with the IRS directly under FATCA and by nullifying the right of individuals to refuse to waive foreign privacy laws that would otherwise prohibit their banks from disclosing their account information to the IRS. This second ground thus provides another independent reason that the IGAs are unconstitutional.

For these reasons, the IGAs should be eliminated.

B. Citizenship Based Taxation Should be Eliminated.

The United States imposes taxation based on the "world income" on its residents and citizens—regardless of where they live. This is referred to as citizenship-based taxation. Under citizenship-based taxation, a "resident" or U.S. citizen is required to include as U.S. taxable income all forms of income, from any geographical sources.

A "resident" is an individual who has a physical presence in the United States sufficient to trigger tax jurisdiction over the person. The rules for determining what constitutes "residence" for U.S. tax purposes are found in Internal Revenue Code 7701(b).

A U.S. "citizen" includes "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." U.S. CONST. amend. XIV.[14] Due to the fact that being born in the U.S. is the most common way to acquire U.S. citizenship, there are millions of citizens who do not have an actual residence in the United States or any connection to the United States, nor do they meet the requirements of Internal Revenue Code 7701(b). A "citizen" can cease to be a citizen by relinquishing U.S. citizenship—with an associated cost of $2,350.

One of the biggest issues with citizenship based taxation is that it subjects overseas Americans to double taxation—once in their country of residence and once in the country of their citizenship. In addition, overseas Americans have the added difficulty of being subject to two tax systems at the same time.

FATCA, FBAR, and the IGAs are the enforcement mechanism for U.S. citizenship-based taxation. Americans abroad cannot sustain the immense pressures and requirements of both the

[14] The definition of who is a "citizen" is not found in the Internal Revenue Code but is found in the Immigration and Nationality Act and the 14th Amendment of the Constitution.

tax systems—the one where they reside and the U.S. tax system. Thus, FATCA is forcing Americans abroad into a set of circumstances where they must renounce their U.S. citizenship to survive.

For example, suppose you have a married couple living in Washington DC. One works as a lobbyist for an NGO and has a defined benefits pensions. The other is self employed in a lobby firm, working under an LLC. According to the IRS filing requirements, it would take about 15 hours and $280 to complete their yearly filings. Should they under report income, any penalties would be a percentage of their unreported tax burden. The worst case is a 20% civil fraud penalty.

Compare the same couple with one different fact. They moved to Australia because the NGO reassigned the wife to Sydney. The husband, likewise, moves his business overseas. They open a bank account, contribute to the mandatory Australian retirement fund, purchase a house with a mortgage and get a life insurance policy on both of them.

These are now their new filing requirements:

- Form 8938
- Form 3520-A
- Form 3520
- Form 5471 (to be filed by the husbands new Australian corporation where he is self employed)
- Form 720 Excise Tax.
- FinCEN Form 114

The burden that was 15 hours now goes up to

- 4.37 hours for Form 8938,
- 57.2 hours for Form 720,
- 54.20 hours for Form 3520,
- 61.22 Hours for Form 3520-A.
- 50 hours estimate for Form 5471

For a total of 226.99 hours (according to the IRS's own time estimates) not including time to file the FBAR.

The penalties for innocent misfiling or non filings for the above foreign reporting forms for the couple are up to $50,000, per year. It is likely that the foreign income exclusion and foreign tax credit will negate any actual tax due to the IRS. So each year, there is a lurking $50,000 penalty for getting something technically wrong on a form, yet there would be no additional tax due to the US treasury.

Eliminating these onerous reporting requirements or switching to a residence based taxation system would cure this disparate treatment of taxpayers. Furthermore, without citizenship based taxation, there would be no justification for FATCA, FBAR or the IGAs.

C. The Same Country Exemption Is Not Sufficient to Protect Americans Abroad.

A commonly cited "fix" to FATCA, known as Same Country Exemption ("SCE"), would exempt Americans abroad from FATCA-related reporting and penalties for banking activity in their country of residence. SCE is the basis for legislation introduced by Rep. Carolyn Maloney on April 25. There are multiple reasons why SCE would not be successful as a remedy to the multiple failings of FATCA.

SCE would not remove from foreign financial institutions ("FFI") the potentially catastrophic 30% penalty for failure to comply with FATCA. Such penalties could potentially threaten the very solvency of the financial institution and is a risk that most financial institutions would seek to eliminate or minimize by continuing to limit or eliminate overseas Americans as account holders. Thus a main root cause for the record number of citizenship renunciations and discrimination against overseas Americans due to FATCA would remain in place.

Compliance costs for FFI's would not change and could possibly increase. Under FATCA, banks need to clearly identify who among their account holders is and is not a U.S. citizen and are required to implement costly compliance processes to report extensive and intrusive details about the account activities of U.S. citizens. These costs have been estimated to be in the tens of billions of US dollars globally, vastly outstripping any estimate of potential recoveries by the IRS. Under SCE, these costly systems would remain and would become one step more complex in that FFI's would be required to identify who, among their U.S. citizen account holders, also has a valid exemption under SCE.

In addition, there are incongruencies between the IRS and foreign countries' tax authorities regarding the criteria for bona-fide resident and fiscal resident. Foreign countries' laws do not necessarily match U.S. laws. This adds an exceptional burden on the FFIs to ascertain who is and who is not a bona-fide and/or fiscal resident of the country. Additionally, there will need to be a "control" done every year to ensure that the US citizens in question have not changed their status lest the 30% withholding penalty is applied. This adds an additional burden on the FFIs which they will not be willing to undertake.

SCE will also not help the circumstances for overseas Americans who must have banking facilities in more than one country, such as smaller countries like Liechtenstein, San Marino, Andorra, Vatican or Monaco. Even with SCE in place, a resident of Vatican would not be able to have an account located across the street in Rome.

Additionally, SCE would not protect individuals who live in one country but work in another. For example, an individual may live in Germany, but work in Switzerland. By spending most of their life in Switzerland, they should be able to have a bank account there. Indeed, each of our witnesses in the hearings, Ms. Nelson, Mr. Kuettel and Mr. Crawford have found it necessary to have accounts in more than one European country. Yet, SCE would not help them.

Most importantly, a FATCA modified by SCE will still leave in place multiple unconstitutional features, described elsewhere in this document, which can never be acceptable. For example, SCE would still require overseas Americans to report a level of personal banking information that would require probable cause and a search warrant in order to obtain domestically.

The SCE proposal does not include all financial accounts in the resident country but only deposit accounts. Therefore, it does not change being shut out of all the financial products available in the resident country.

In sum, SCE would not improve the circumstances of the millions of overseas Americans being harmed by FATCA and other laws. It is woefully inadequate and should be rejected.

D. OECD Common Reporting Standard

Proponents of FATCA often say that the OECD Common Reporting Standard ("CRS") is an attempt to create a sort of Global FATCA. Although the CRS may have been inspired by FATCA there are some differences between the two.

The Common Reporting Standard is an agreement among reportable jurisdictions to exchange information about reportable persons who are tax residents of a country. CRS is based on the principle of "Exchange Of Information". With CRS, countries may be required to change their domestic laws in order to allow for information exchange with a foreign government.

A "reportable jurisdiction" is a country that has agreed to implement the OECD Common Reporting Standard. A "reportable person" is a tax resident of a reportable jurisdiction.
The rules for determining who is a tax resident are determined by the reportable jurisdiction. In cases where a person is a tax resident of more than one reportable jurisdiction, treaty tie-breaker rules can be used to determine tax residence.

The United States is not a CRS reportable jurisdiction. As a result the United States is not entitled to receive information under the CRS. Furthermore, residents of the U.S. are NOT reportable persons under the CRS.

The same issues that exist with FATCA exist with CRS, as to harms of Americans abroad, but are then replicated in the U.S. If the United States agreed to the CRS, the U.S. would have to impose on its own banking system reporting requirements similar to FATCA, where U.S. banks would have to report of foreign citizens in the U.S. to at least 100 foreign countries. And the result is the imposition of enormous FATCA-like compliance costs on all U.S. banking facilities. This "alternative" should be rejected..

III. Congress Should Enact a 1099 Requirement on Foreign Banks, Established by Treaty, as Long as this Complies with Established United States Constitutional Principles and International Legal Norms.

As discussed above, any new requirements must conform with established principles and international legal norms. In accordance with those principles of privacy, due process, equality, and transparency, we suggest that Congress require foreign banks to report Form 1099 information on U.S. citizens to their government and for the foreign government to issue a 1099 to U.S. citizens and to report that information to the IRS.

A. 1099 Requirement.

In the United States, the IRS uses the 1099 series of forms to track income that is outside the normal wages, salaries, and tips received from employment. Interest income is one such source of income and is reported on Form 1099-INT.

Form 1099-INT summarizes the interest income, for the tax year, paid on savings accounts, interest-bearing checking accounts, and US Savings bonds. It is also used to report other tax items related to interest income, including early withdrawal penalties, foreign tax on interest, and federal tax withheld.

A bank, financial institution or other entity that pays an individual at least $10.00 in interest during a year must prepare a 1099-INT, send a copy by January 31 to the individual, and file it with the IRS. The IRS then uses that information to ensure an individual's income tax return reflects the correct amount of interest income.

B. Implementation of 1099-INT.

Like banks in the United States, foreign banks should be required to collect this information and provide it to their government to provide to the IRS. In addition, the foreign government would provide a Form 1099-INT to any U.S. citizens paid at least $10.00 in interest.

In order to accomplish this, treaties should be negotiated with foreign governments. These treaties should integrate the 1099-INT requirements within the foreign jurisdiction's existing system of banking regulations and local tax authority—rather than making it a requirement from the IRS. Furthermore, this requirement would be enforced by current penalties already used by foreign governments to enforce existing bank reporting. Finally, the authorizing legislation should provide that such treaties can only be negotiated with countries which collect such information regarding their own citizens, because of the need to adhere to the established international legal norm of equality of treatment.

The only difference between these treaties and the current legal requirement of the issuance of a 1009 is that domestic banks are required to issue a 1099 directly to the account holder and foreign governments would be required to issue a 1099 to a U.S. citizen. One of the principal harms of the FATCA requirement of foreign banks is that they are obligated to ferret out U.S. citizens from among their account holders. Many foreign banks have been unwilling to assume the liability for doing this. This proposal would shift that responsibility to foreign governments, under agreed procedures with the U.S. government under a treaty, thereby relieving foreign banks of that responsibilities and liability.

C. Foreign Banking Institutions Should Participate in the Treaty Negotiations.

In order to ensure that overseas Americans will be permitted to open and maintain bank accounts in the foreign jurisdiction, foreign banks should be active participants in these treaty negotiations. This will further ensure that all persons are treated equally regardless of residency or citizenship.

If, however, Congress determines that this 1099-INT requirement would not provide sufficient benefit verses any harm created, it should not be pursued.

Conclusion

In conclusion, we recommend that any taxation of overseas Americans comply with the rights to privacy, due process, and equal protection of the laws, as well as other rights, guaranteed by the Constitution and by established international legal norms. We recommend that the U.S. establish residency based taxation, eliminating the current citizenship based taxation. We further recommend that FATCA, FBAR, and the IGAs be eliminated in their entirety and that the Same County Exemption and Common Reporting Standards be rejected. Finally, we recommend Congress enact a modified 1099 requirement on foreign banks, established by treaty, as long as this complies with U.S. constitutional principles and international legal norms.

Sincerely,
The Bopp Law Firm, PC

/s/ James Bopp, Jr.

James Bopp, Jr.
Courtney Turner Milbank

May 15 2017 RECOMMENDATIONS of Stephen John Kish to Subcommittee on Government Operations on how to improve the legal framework set up by FATCA[15]

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee on Government Operations, I appreciate having this opportunity to submit a second written statement regarding your April 26, 2017 hearing on harm caused by the Foreign Account Tax Compliance Act (FATCA), which is here appended to the statement of Mr. James Bopp.

I am responding to your request seeking recommendations on possible modifications to FATCA that might decrease the harm caused by this law.

My name is Stephen John Kish. I was born in Seattle Washington on July 11, 1948 and renounced my U.S. citizenship in 2016. As I mentioned in my written April 19 2017 submission to your subcommittee, I am a Plaintiff in Crawford v. U.S. Department of the Treasury, a lawsuit currently pending in United States Court of Appeals for the Sixth Circuit.

My thoughts below on how to decrease the harm of FATCA are based on the principle that U.S. laws must not cause unreasonable harm to people impacted by the law or violate the U.S. Constitution:

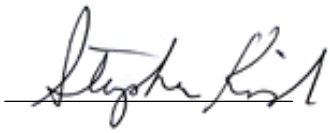
1) Repeal FATCA, FBAR, IGAs, and the FATCA/FBAR-enforced Citizenship-based taxation. Here I support enthusiastically James Bopp's recommendation that FATCA, FBAR, and the IGAs, should be repealed in their entirety and citizenship-based taxation be eliminated (with the latter replaced with territorial/residence based taxation as is the worldwide standard). Because I personally fear that any even a "watered-down" FATCA-like replacement law will negatively,

[15] Mr. Kish asked that he be permitted to file a written response to the committee, as a follow-up to his original submission. As such, his personal written response is appended here.

significantly, and specifically impact on Americans overseas and/or contradict our Constitution, I cannot recommend or support any FATCA replacement legislation; and

2) Modify citizenship laws to decrease FATCA harm. Should the FATCA law be repealed and not replaced, I recommend that former U.S. citizens who affirm to the Department of State that they renounced their citizenship because of FATCA, will have their citizenship re-instated without cost or difficulty should they so wish. Conversely, should FATCA not be repealed --- and consequently the harm continues --- I suggest that those persons who need to renounce their citizenship because of FATCA, be allowed a swift path to renunciation of their citizenship without any cost, administrative impediments, or penalties whatsoever.

I hope that you will find these thoughts useful.



Stephen John Kish

May 15, 2017

Toronto, Ontario

Canada