2014 Annual Congress of the
European Association of Tax Law Professors
Koç University, Istanbul,Turkey

UNITED STATES NATIONAL REPORT ON EXCHANGE OF INFORMATION

Joshua D. Blank[*] and Ruth Mason[**]

I. INTRODUCTION

The United States recently has taken an aggressive stance towards non-reporting of offshore income and attendant offshore tax evasion. This National Report discusses administrative and legal mechanisms, including the Foreign Account Tax Compliance Act (FATCA), available to the United States to secure offshore tax information. It also discusses the legal regimes under which the United States shares tax information with partner jurisdictions.

II. THE RISE OF FATCA

Every year, the United States loses at least USD 100 billion in tax revenue as a result of tax evasion that occurs through the use of 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 concealed in tubes of toothpaste, which were then transported outside of the United States and into Swiss bank vaults.[3]

[*] Professor of Tax Practice and Faculty Director of the Graduate Tax Program, New York University School of Law.

[**] Hunton & Williams Professor of Law, University of Virginia School of Law.

[1] STAFF OF PERMANENT S. COMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC'Y AND GOVERNMENT AFFAIRS, 110TH CONG., STAFF REP., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 3 (2008).

[2] For discussion, *see* PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, 108TH CONG., TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS AND SECRECY 1 (2006).

[3] See Mark Hosenball & Evan Thomas, *Cracking the Vault*, NEWSWEEK, Mar. 23, 2009, at 32.

Historically, these evasion strategies have been effective because the non-U.S. jurisdictions maintained 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 the FATCA.[5]

Background. Starting in 2001, foreign financial institutions (FFIs) could enter into "Qualified Intermediary" (QI) agreements with the United States.[6] Foreign financial institutions 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 they 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 banker at UBS,[8] and the IRS's related *John Doe* summonses[9] revealed that UBS and other financial institutions openly encouraged U.S. taxpayers to form foreign shell corporations which would then open accounts with these offshore banks. Offshore banks then took the position that no withholding was required with respect to the payments to the foreign shells, even though bankers knew 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 USD 780 million, release through the Swiss government the names of 250 U.S. holders of accounts at UBS, 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. account holders. The magnitude of offshore evasion became even more

[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, Pub. L. No. 111-147, § 501, 124 Stat. 71 (2010).

[6] *See* Treas. Reg. § 1.1441-1.

[7] *Id.*

[8] *See Year in Review: The 2009 Person of the Year*, TAX NOTES TODAY, Jan. 4, 2010, at 1-3 (describing Birkenfeld's actions).

[9] STAFF OF PERMANENT S. COMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC'Y AND GOVERNMENT AFFAIRS, 110TH CONG., STAFF REP., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 3 (2008).

[10] *See. ,e.g.,* UBS Deferred prosecution Agmt p. 2, Exhibit C at 4-5.

apparent when, contemporaneously with the government's actions against UBS, it 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]

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, FFIs are subject to a 30% withholding tax on certain U.S.-source payments, including U.S.-source interest and dividends, gross proceeds from the sale of assets that generate U.S. dividends and interest, among other items.[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] Participating FFIs are required to report the name, address and other identifying information for each account holder which is a U.S. person, the account number and balance and any gross dividends, interest and other income paid to the account.[15] In addition, participating FFIs must obtain various documents from any account holders that possess indicia of U.S. status, such as a power of attorney granted to someone with a U.S. address.[16] Participating FFIs also are required to withhold 30% on certain payments to recalcitrant account holders and other financial institutions that do not comply with FATCA.[17]

Criticism. Commentators have characterized FATCA as "aggressive,"[18] "audacious,"[19] "egregious,"[20] "draconian"[21] and

[11] *See Shulman Addresses IRS's Strategic Priorities for the Future*, TAX NOTES TODAY, May 19, 2011, at 97-11.

[12] See Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 501, 124 Stat. 71 (2010).

[13] *See* I.R.C. **§§** 1471(a), 1473(1).

[14] *See* I.R.C. **§** 1471(c).

[15] *See id*.

[16] *See* Treas. Reg. § 1.1471-3.

[17] *See* I.R.C. **§** 1471(b)(1)(D).

[18] Scott D. Michel, *FATCA: A new era of financial transparency*, J. OF ACC., Jan. 2013.

[19] Susan C. Morse, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*, 57 VILL. L. REV. 529, 536 (2012).

"devastatingly destructive."[22] The principal criticisms have been that FATCA is not only unilateral,[23] but also extraterritorial.[24] Critics contend that FATCA requires financial institutions in jurisdictions outside the U.S. to act like "U.S. Treasury watchdogs"[25] and that it "strong arms every financial institution in the world into doing the job of the IRS."[26] 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.[27] In addition, government officials outside of the U.S. assert that despite the attempt by the U.S. enter into intergovernmental agreements (IGAs), FATCA conflicts with the local banking and privacy laws of many other jurisdictions.[28] Further, critics contend

[20] 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/.

[21] *Id*.

[22] 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/.

[23] *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* 22:449. ("How can one country impose its law on other countries without any consultations or discussions?").

[24] Canadian Finance Minister Jim Flahertty described FATCA's "far-reaching extraterritorial implications" that would "turn Canadian banks into extensions of the IRS." Letter from Finance Minister Jim 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 Provider,* 33 Va. Tax Rev. 59 (2013), at 102-3, ("the unilateral nature of FATCA arguably subverts traditional multilateral processes"). See also Allison Christians, 40 Pep.. L. Rev. 1373, 1408 ("[FATCA] proposes a turn away from multilateralism").

[25] Christopher Elias, *U.S. Foreign Account Tax Compliance Act threatens Investment in the U.S.*, Thomson Reuters, Jan. 25, 2012.

[26] Quinlan, *supra* note 22.

[27] *See* Kate Burgess, *US legislation: Industry concerned at extraterritorial tax clampdown plan*, FINANCIAL TIMES, May 8, 2012.

[28] Patricia Lee, *U.S. extra-territorial approach to regulations could have unintended consequences for Asia-Pacific region*, Thomson Reuters, Sept. 4, 2012.

that the U.S. acts like the "loan sheriff in town"[29] 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.[30]

III. FROM UNILATERLISM TO MULTILATERALISM

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

Model Intergovernmental Agreements. The largest EU countries—France, Germany, Italy, Spain, and the United Kingdom—as well as the EU's 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. Importantly, the Model 1 IGA developed with the G5 and the EU Commission contemplate reciprocal automatic exchange of information from U.S. financial institutions. FFIs located in Model 1 FATCA partner jurisdictions need not enter into separate FFI agreements with the United States in order to avoid the withholding tax. 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 FTACA.[31]

[29] Jeff N. Mukadi, *FATCA and the Shaping of a New International Tax Order*, TAX NOTES, June 25, 2012.

[30] *See e.g.*, Peter 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.

[31] Robert Stack, *Myth vs. FATCA: The Trust About Treasury's Effort to Combat Offshore Evasion* (Sept. 20, 2013) available at http://www.treasury.gov/connect/blog/Pages/Myth-vs-FATCA.aspx . See Annex for list of IGAs. Under the second IGA (Model 2), the FATCA partner country will authorize its FFIs to report FATCA-required information directly to the IRS rather than to their own governments. The U.S. has entered into Model 2 IGAs with Japan and Switzerland.

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.[32] In addition to this legislation, the United Kingdom has entered into information-sharing agreements with its crown dependencies modeled on the U.S.-U.K. bilateral IGA.[33] Notably, in order 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.[34] 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% of the corpus for failure to provide detailed information on the assets of French residents.[35]

Multilateral Information Exchange. 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 UK government stated that, "[t]he UK 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

[32] John McCann & Angela Nightingale, Tax Information Sharing, The Rise of 'FATCA-esque" Agreements. Aima, p. 2, October 24, 2013 available at www.aima.org/en/education/aimajournal/q12013/tax-information-sharing.cfm

[33] Isle of Man, Guernsey and Jersey.

[34] *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"). *See 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," and also incorporating amendments to the U.S. regulations, to the extent agreed by the parties.

[35] McCann & Nightingale, *supra*, p 2

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 US FATCA legislation and the subsequent intergovernmental agreements to implement it)."[36]

The United Kingdom also 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."[37] The European G5 have already taken steps in this direction, announcing that they will exchange information multilaterally based on the U.S. IGA Model Agreement.[38] In May, 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."[39]

Likewise, official statements from the EU cast FATCA as providing an "a unique opportunity to move from a series of bilateral agreements to a multilateral system."[40] Unilateral FATCA ultimately may help improve the leaky EU Savings Directive.[41] Strengthening the Directive has been impeded by veto-holding EU Member States attempting to preserve what was left of banking secrecy in their

[36] HM Revenue & Customs, Implementing the United Kingdom's Agreements with the Crown Dependencies to Improve International Tax Compliance, Discussion document, 4 (26 June 2013).

[37] HM Revenue & Customs, Implementing the United Kingdom's Agreements with the Crown Dependencies to Improve International Tax Compliance, Discussion document, 4 (26 June 2013).

[38] G5 press release.

[39] EU Members States Join Chancellor's Calls for Global Action on Tax Evasion (May 14, 2013), available at www.gov.uk.

[40] Statement by Belgium, the Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, the Netherlands, Poland, Portugal, Romania, Slovakie, Slovenia, Space, Sweden, and the United Kingdom on the Pilot Multilateral Automatic information Exchange Facility, ECOFIN 14 May 2013. *See also* Council of the EU, Press Release, 3238th Council Meeting, Economic and Financial Affairs, 14 May 2013 at 12, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/137122.pdf.

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

jurisdictions.[42] 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 MEP 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."[43]

If FATCA becomes 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 only with respect to Americans. If every country adopted a FATCA-like regime, FFIs would no longer be looking for a needle in a haystack. Standardization according to the FATCA model would also limit mitigate FFIs' concerns that they may be subject to a variety of conflicting reporting requirements from different states. Likewise, IGAs and attendant legislative changes in FATCA partner countries work out 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 unilateral and extraterritorial U.S. legislation.

IV. UNANSWERED QUESTIONS

At the same time that IGAs solve conflicts between FATCA and foreign bank regulations and other laws, however, IGAs raise legal questions of their own. Congressman Bill Posey (R.-Fla) recently sent a letter to U.S. Treasury Secretary Jack Lew questioning the legal authority under which the IGAs are negotiated and asking whether Treasury expects IGAs to be self-executing.[44]

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

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

[44] Posey letter *available at* http://www.repealfatca.com/downloads/Posey_letter_to_Sec._Lew_July_1,_2013.pdf.

IGAs also raise political questions. For example, to the extent that the United States negotiates reciprocal Model 1 IGAs,[45] implementing legislation presumably would be required to impose new reporting requirements on U.S. financial institutions,[46] and such 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). To take just one example, if domestic financial institutions will be obliged to apply FATCA's pass-through rules for payments to entitles, domestic financial institutions will face the problem of accounts held by Delaware LLCs for which they lack beneficial ownership information.[47]

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 pre-existing automatic information exchange obligations, such as the EU Savings Directive?[48] Are the protections afforded to account holders' private information 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?[49]

[45] Cite IGA model 1 (or cite IGA with UK) (contemplating "equivalent levels of reciprocal automatic exchange.")

[46] See US Budget Fiscal Year 2014, Analytical Perspectives, at 202 (proposing to request such legislation)

[47] 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 information exchange partner states that beneficial ownership information is not available for LLCs in several states, including Delaware).

[48] *See, e.g.*, EU Commission, An Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion, COM(2012) 772 final (Dec. 6, 2012) at 9 (urging OECD to adopt EUSD reporting forms and software to avoid proliferation of diverse requirements).

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

FATCA already represents a substantial commitment of government resources, both by the United States, which has developed and negotiated IGAs and written 500 pages of regulations, and FATCA partner jurisdictions. Affected financial institutions are also shouldering heavy burdens to implement a reporting regime that is estimated to raise only USD 8.7 billion over ten years.[50] But the complexity and novel legal questions raised by FATCA, which have necessitated repeated extension of its effective date 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?

V. 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 our trading partners to rally behind a new standard of automatic information exchange.[51] Thus, the initial outraged reactions to FATCA among private parties and some government officials, seems to be shifting to acquiescence by the FFIs, and, in at least some countries, welcome acceptance.

[50] *See* JCT, *JCT Estimates Budget Effect of HIRE Act*, JCX-5-10 (Feb. 23, 2010).

[51] The OECD has judged countries' tax transparency according to the standard of information-exchange on request, but it also has long advocated for automatic information exchange. Cites.

APPENDIX: ADDITIONAL QUESTIONNAIRE RESPONSES

Sources of the exchange of information system in United States

1. *Which tax treaties between the United States and other countries, if any, contain the following?:*
    a. *Art. 26 of the OECD MTC*
    b. *Art. 26, paragraph 5, of the OECD MTC*
    c. *Art. 27 of the OECD MTC*

Country	**Article 26**	**Article, 26 Para. 5**[52]	**Article 27**
Armenia (USSR treaty 1973)	No	No	No
Australia (treaty 1982, protocol 2001)	Yes, not exact language	No	No
Austria (treaty 1996)	Yes, not exact language	No	Yes, not exact language
Azerbaijan (USSR treaty 1973)	No	No	No
Bangladesh (treaty 2006)	Yes, not exact language	Yes, not exact language	No
Barbados (treaty 1984, protocol 2004)	Yes, not exact language	Yes, not exact language	No
Belarus (USSR treaty 1973)	No	No	No
Belgium (treaty 2006, protocol 2006, memorandum 2009)	Yes, not exact language	Yes, not exact language	Yes, not exact language
Bulgaria (treaty 2007, protocols	Yes, not exact	Yes	No

[52] Current (2006) U.S. Model Tax Treaty contains equivalent language in Article 26(5). This chart indicates whether such language is included in the relevant treaties in force.

2007, 2008)	language		
Canada (treaty 1980, protocols 1980, 2007)	Yes, not exact language	Yes	Yes, not exact language
China (treaty 1984)	Yes, not exact language	No	No
Cyprus (treaty 1984)	Yes, not exact language	No (but see notes of exchange)	Yes, not exact language
Czech Republic (treaty 1993)	Yes, not exact language	No	No
Denmark (treaty 2000, protocol 2006)	Yes, not exact language	Yes, not exact language	Yes, not exact language
Egypt (treaty 1980)	Yes, not exact language	No	Yes, not exact language
Estonia (treaty 1998)	Yes, not exact language	Yes, not exact language	Yes, not exact language
Finland (treaty 1989, protocol 2006)	Yes, not exact language	Yes, not exact language	Yes, not exact language
France (treaty 1994, protocols 2004, 2009, memorandum 2009)	Yes, not exact language	Yes	Yes, not exact language
Georgia (USSR treaty 1973)	No	No	No
Germany (treaty 1989, protocol 2006)	Yes, not exact language	Yes, not exact language	Yes, not exact language
Greece (treaty 1950)	Yes, not exact language	No	Yes, not exact language
Hungary (treaty 1979)	Yes, not exact	no	Yes, not exact language

	language		
Iceland (treaty 2007, protocol 2007)	Yes, not exact language	Yes, not exact language	Yes, not exact language
India (treaty 1989)	Yes, not exact language	No	No
Indonesia (treaty 1988)	Yes, not exact language	No	Yes, not exact language
Ireland (treaty 1997, amendment 1999)	Yes, not exact language	No	No
Israel (treaty 1975)	Yes, not exact language	No	No
Italy (treaty 1999)	Yes, not exact language	No	Yes, not exact language
Jamaica (treaty 1980)	Yes, not exact language	No	Yes, not exact language
Japan (treaty 2003, protocol 2003)	Yes, not exact language	No	Yes, not exact language
Kazakhstan (treaty 1993)	Yes, not exact language	Yes, not exact language	No
Korea, South (treaty 1976)	Yes, not exact language	No	Yes, not exact language
Kyrgyzstan (USSR treaty 1973)	No	No	No
Latvia (treaty 1998)	Yes, not exact language	Yes, not exact language	Yes, not exact language
Lithuania (treaty 1998)	Yes, not exact language	Yes, not exact language	Yes, not exact language

Luxembourg (treaty 1996)	Yes, not exact language	Yes, not exact language	Yes, not exact language
Malta (treaty 2008)	Yes, not exact language	Yes	No
Mexico (treaty 1992, protocol 2003)	Yes, not exact language	No	No
Moldova (USSR Treaty 1973)	No	No	No
Morocco (treaty 1977)	Yes, not exact language	No	No
Netherlands (treaty 1992, protocol 2004)	Yes, not exact language	Yes, not exact language	Yes, not exact language
New Zealand (treaty 1982, protocol 2008)	Yes, not exact language	Yes	Yes, not exact language
Norway (treaty 1971)	Yes, not exact language	No	Yes, not exact language
Pakistan (treaty 1957)	Yes, not exact language	No	No
Philippines (treaty 1976)	Yes, not exact language	No	Yes, not exact language
Poland (treaty 1974)	Yes, not exact language	No	No
Portugal (treaty 1994)	Yes, not exact language	Yes, not exact language	No
Romania (treaty 1973)	Yes, not exact language	No	Yes, not exact language
Russia (treaty 1992)	Yes, not	No	No

	exact language		
Slovak Republic (treaty 1993)	Yes, not exact language	No	No
Slovenia (treaty 1999)	Yes, not exact language	No	No
South Africa (treaty 1997)	Yes, not exact language	No	Yes, not exact language
Spain (treaty 1990)	Yes, not exact language	No	No
Sri Lanka (treaty 1993, protocol 2002?)	Yes, not exact language	No	No
Sweden (treaty 1994, protocol 2005)	Yes, not exact language	No	Yes, not exact language
Switzerland (treaty 1996)	Yes, not exact language	Yes? (see Memorandum)	Yes, not exact language
Tajikistan (USSR treaty 1973)	No	No	No
Thailand (treaty 1996)	Yes, not exact language	No	No
Trinidad (treaty 1970)	Yes, not exact language	No	No
Tunisia (treaty 1985)	Yes, not exact language	No	No
Turkey (treaty 1996)	Yes, not exact language	No	No
Turkmenistan (USSR treaty 1973)	No	No	No

Ukraine (treaty 1994)	Yes, not exact language	No	No
United Kingdom (treaty 2001, protocol 2001)	Yes, not exact language	Yes (see exchange notes)	Yes, not exact language
Uzbekistan (USSR treaty 1973)	No	No	No
Venezuela (treaty 1999)	Yes, not exact language	Yes, not exact language	No

2. *Is the United States a party to the OECD Mutual Assistance Convention of 1988 and the 2010 Protocol?*

The United States is party to the OECD Mutual Assistance Convention of 1988, which has been in force since April 1, 1995.[53] While the United States signed the 2010 Protocol (May 27, 2010), it has not been ratified nor entered into force. The United States entered reservations with respect to Articles 2, 3, 4, 17, 29 and 30.[54]

3. *Describe the Tax Information Exchange Agreements (TIEAs) signed by United States with black or grey list countries.*

United States Tax Information Agreements		
Country	***Date***	***In Force?***
American Samoa	1987	1988
Antigua and Barbuda	2001	2003
Aruba	2003	2004
Bahamas	2002	2004/2006
Barbados	1984	1984
Bermuda	1988	1988

[53] *See* OECD, STATUS OF THE CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS AND AMENDING PROTOCOL, November 12, 2013, *available at* http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf

[54] *See id.*

Brazil	2007	2013
British Virgin Islands	2002	No
Cayman Islands	2001	2004/2006
Colombia	2001	No
Costa Rica	1989	1991
Dominica	1987	1988
Dominica Republic	1989	1989
Gibraltar	2009	2009/2010
Grenada	1986	1987
Guam	1989	No
Guernsey	2002	2006
Guyana	1992	1992
Honduras	1990	1991
Isle of Man	2002	2004/2006
Jamaica	1986	1986
Jersey	2002	No
Liechtenstein	2008	2010
Marshall Islands	1991	1991
Mexico	1989	1990
Netherlands Antilles	2002	2007
Peru	1990	1991
Puerto Rico	1989	1989
St. Lucia	1987	1991
Trinidad and Tobago	1989	1990

The collection and exchange of information under anti-money-laundering legislation

The United States has implemented several different measures to prevent tax evasion and money laundering. These are described briefly below.

Investment Income Reporting. Banks must report to the IRS information regarding the income that their customers earn in their individual banking and checking accounts. Each January, banks provide to the IRS a report, IRS Form 1099-INT, which summarizes the interest income paid to their account holders. The interest that

must be reported includes interest paid by the bank on savings accounts, interest-bearing checking accounts and bonds.

Money Laundering. When individuals deposit or withdraw more than USD 10,000 in a U.S. bank, the bank is required to file a "Currency Transaction Report" with the IRS. Several exemptions prevent this reporting requirement from applying to certain retail and other customers. This reporting requirement is designed to enable the IRS to detect money laundering and financial crimes.

Tax Evasion Reporting. A U.S. person who holds a financial interest in a non-U.S. bank account must file a Report of Foreign Bank and Financial Accounts (FBAR) if the aggregate value of the foreign financial accounts exceeds USD 10,000 at any time during the calendar year. Penalties of up to USD 10,000 may apply for non-wilfully failure to file an FBAR. Wilful non-filing, can result in penalties as high as 50% of the value of the non-US account, and additional criminal penalties. There is no cap on the amount of this penalty.

Exchange of Information System in Practice: The Numbers

The Internal Revenue Service has released the number of incoming exchange requests for the years 2006 to 2010. The table below presents the number of incoming requests (*i.e.*, from other countries to the United States) and outgoing requests (*i.e.*, from the United States to other countries):

INCOMING AND OUTGOING SPECIFIC INFORMATION EXCHANGE REQUESTS 2006-2010[55]						
	2006	2007	2008	2009	2010	All
Incoming (to US)	1,173	1,088	797	914	843	4,815
Outgoing (to other countries)	221	197	236	203	165	1,022
TOTAL	**1,394**	**1,285**	**1,033**	**1,117**	**1,008**	**5,837**

[55] Gen. Acc't. Office, *IRS's Information Exchanges with Other Countries Could Be Improved through Better Performance Information*, 21, Sept. 2011.

Taxing authorities, whether the IRS or a non-U.S. agency, respond to information requests with varying processing speeds, depending on the type of information requested. The table below describes the processing time for different categories of information requests during the years 2006 to 2009.

PROCESSING TIME FOR INFORMATION REQUESTS, BY INFORMATION CATEGORY, 2006-2009 [56]				
	Incoming Requests (to U.S.)		Outgoing Requests (from U.S.)	
Type of Information Request	% of Cases	Median time in days	% of Cases	Median time in days
Bank records	6	142	21	191
Corporate records	31	142	24	156
Public records	9	24	6	158
Real estate records	1	104	2	207
Records from security brokers	1	128	0	103
Tax return data	27	46	32	100
Third-party interviews	20	141	6	147
Other	5	34	9	129
All cases where information type is known	**100**	**110**	**100**	**139**

Joint Audits and Multinational Audits

1. *Does the United States use joint audits?*

The United States engages in an audit cooperation program, the "Simultaneous Examination Program" and the "Criminal Investigation Program" (SCIP). These programs are authorized by the exchange of information provisions of U.S. tax treaties and the

[56] *Id.*

tax information exchange agreements with other countries. The United States uses these programs to investigate tax issues related to specific taxpayers in cases where a treaty party country has a common interest. Under these programs taxing authority officials coordinate audit plans and information requests.

2. *How many agreements for joint audits have been concluded by the United States? How many joint audits have been conducted until now?*

The Internal Revenue Service, currently, the United States has working arrangements under its Simultaneous Examination Program (SEP) with Australia, Canada, France, Germany, Italy, Japan, Korea, Mexico, Norway, Philippines, Sweden and the United Kingdom.[57] According to the Internal Revenue Manual, the absence of a working agreement with a particular country does not prevent an examiner from recommending simultaneous examination because the legal basis for such examinations is the exchange of information article of tax treaties and TIEAs.

The legitimacy of tax solutions other than exchange of information

3. *As far as the use of illegally obtained data (i.e. the LGT Bank case, the HSBC case and the UBS case) is concerned, it is not clear and homogeneous whether a public authority could profit of information acquired and/or received to support both an administrative and criminal tax assessment: what is the position of your country?*

The Fourth Amendment of the U.S. Constitution provides protection from "unreasonable searches and seizures" By the government. A person's constitutional privacy rights can only be invaded where she has a "legitimate expectation of privacy." The consequence of violating the privacy right is exclusion of evidence obtained as "fruit of a poisonous tree." Some precedent unfavorable to the taxpayer exists on the question of whether a taxpayer has a legitimate expectation of privacy with respect to bank records.[58]

[57] IRS, Int. Rev. Man. 4.60.1.3, *available at* http://www.irs.gov/irm/part4/irm_04-060-001.html#d0e440.

[58] *See, e.g.*, United States v. Payner, 447 U.S. 727 (1980) (holding that a U.S. taxpayer has no such legitimate expectation of privacy for Bahamian bank records

Even if such a reasonable expectation could be established, however, this right only offers protection from *government* action. It therefore does not apply when non-governmental actors, including informants and whistleblowers, obtain the information. As a result, provided the informant was not a government actor and was not acting at the behest of a government actor in gathering the information, the government would be able to use an informant's information, even if the informant broke the law to obtain or convey the information.

1. *In case illegally obtained data are used to support an administrative and/or criminal tax assessment, is the taxpayer informed and/or allowed to be involved in the due course of procedure? Does the taxpayer have the possibility to reject the request and/or the use of data? Can the taxpayer refuse to collaborate with the Tax Administration without jeopardizing his position?*

The U.S. Constitution offers several protections for criminal defendants, including the right to confront witnesses and the right against self-incrimination. Thus, a taxpayer would, in a criminal case, have the opportunity to challenge evidence obtained from a whistleblower (or any other evidence in the government's case).

With a court order, the United States can compel taxpayers to consent to foreign financial institutions' disclosure of account information, including in cases where the government otherwise would be unable to obtain the records. Compelled consent to disclosure pursuant to a court order has been held not to violate the constitutional right against self-incrimination because such consent is non-testimonial.[59] Perhaps more importantly, compelled production of financial account records (e.g., through a subpoena), *even where*

stolen by U.S. law enforcement from the briefcase of a Bahamian bank official in the United States, at least in the case where Bahamian law provided little privacy protection for those records). *See also* Timothy P. O'Toole, et al, Can a Prosecuter Make Your Cough Up Your Offshore Account? TAX NOTES p. 1313, 1314 (Mar. 14, 2011) (expressing doubt whether the taxpayer-unfavorable expectation-of-privacy analysis in Payner would apply in a case involving a foreign jurisdiction with strong bank-secrecy law).

[59] *See* Doe v. United States, 487 U.S. 201 (1988). See O'Toole, et al, supra note __, at 1315 (questioning the continued appliciability of *Doe* in light of subsequent precedent more favorable to criminal defendants)

the records themselves or the act of producing them are self-incriminating, has been held to fall under the "required records" exception to the privilege against self-incrimination. This exception applies in cases where the government seeks to compel production of documents kept pursuant to a valid regulatory regime.[60]

2. *In case your country has ever implemented a whistleblower program in order to collect tax information and to conduct tax assessments, is the reward to whistleblowers taxable?*

The Internal Revenue Service is authorized to pay whistleblower awards to individuals who report acts of tax noncompliance. If the IRS uses the information provided to detect underpayment of taxes, it may pay the whistleblower up to 30% of the additional tax, penalty, and other amounts it collects.[61] Whistleblower awards are fully taxable as gross income, and are subject to withholding.[62] In 2012, the IRS Whistleblower Office issued administrative guidance describing a process by which award recipients may apply for a reduced withholding rate.[63] Whistleblower Bradley Birkenfeld was awarded USD 104 million for his assistance in building the case against UBS.

3. *In case your country has ever implemented an offshore tax*

[60] *See, e.g.*, In re Grand Jury Proceedings, No. 4-10, (No. 12-13131, D.C. Docket No. GJ 4-10) (D.C.Cir. 2013) available at http://www.ca11.uscourts.gov/opinions/ops/201213131.pdf at 4-5 (upholding district court's ruling that the required records exception applied because "(1) federal law required [the taxpayers] to maintain and make available for inspection records regarding their foreign financial accounts; (2) that recordkeeping requirement… was 'essentially regulatory' and not criminal in nature; (3) the records were of the sort that 'bank customers would customarily keep'; and (4) the records had 'public aspects' because they contained information that federal law [the taxpayers] to maintain and make available for inspection by the IRS [and]. . . report to the Treasury Department".) Op. at 4-5. The last requirements, (3) and (4) above, refer to (a) the requirement under the Bank Secrecy Act that U.S. persons keep certain records regarding foreign accounts, including the name and value of the account, and (b) the requirement to file an FBAR) See also id. at 14 (citing other circuit courts reaching the same conclusions, including the Fifth, Seventh, and Ninth Circuits).

[61] I.R.C. § 7623(b).

[62] I.R.C. § 61.

[63] *See* IRSIG WO -25-0612-03.

> *amnesty and/or an offshore voluntary disclosure program, what is the ground of legitimacy for such initiatives? Do the programs cover administrative as well as criminal tax exposures?*

The IRS currently allows taxpayers to participate in an Offshore Voluntary Disclosure Program. Under the current program, which has no deadline, individuals who disclose their offshore bank accounts are subject to a civil tax penalty of 27.5 percent of the highest aggregate balance in foreign bank accounts or value of foreign assets during the eight full tax years prior to the disclosure.[64] Individuals who participate in this program are not subject to criminal tax evasion charges, which could result in prison.[65] The IRS offered similar voluntary disclosure initiatives in 2009[66] and 2011, albeit with disclosure deadlines and lower civil tax penalties.[67] According to the IRS, these two initiatives resulted in 33,000 disclosures and more than USD 3.4 billion in collected taxes.[68] A requirement common to all three programs was that, to be eligible to participate, the taxpayer had to disclose *before* the IRS received the taxpayer's name from any other source (including John Doe summonses, UBS disclosures, etc).

[64] *See* IRS, *IRS Offshore Programs Produce $4.4 Billion To Date for Nation's Taxpayers; Offshore Voluntary Disclosure Program Reopens*, Jan. 9, 2012.

[65] *See id*.

[66] *See* IRS, Voluntary Disclosure: Questions and Answers, http://www.irs.gov/uac/Voluntary-Disclosure:-Questions-and-Answers (first posted May 6, 2009).

[67] *See* IRS, 2011 Offshore Voluntary Disclosure Initiative Frequently Asked Questions and Answers, http://www.irs.gov/Businesses/

International-Businesses/2011-Offshore-Voluntary-Disclosure-Initiative-Frequently-Asked-Questions-and-Answers (first posted Feb. 8, 2011).

[68] *See id*.

Some U.S. states offer similar voluntary disclosure programs, which is important because the federal and state governments share information, so any offshore information obtained by the United States can be made available to the U.S. person's residence state.[69]

4. *Is your country discussing the implementation of a so called Rubik standard agreement with Switzerland or any other country? What would the ground of legitimacy be for such initiative?*

No, the Rubik agreements are not part of the U.S. strategy for combating tax evasion, as the United States prefers automatic exchange of information to anonymous withholding. In February 2013, the United States signed a Model 2 IGA with Switzerland under which covered Swiss financial institutions will automatically report U.S. persons' account information directly to the IRS. Furthermore, the United States has developed a program under which Swiss banks that helped U.S. taxpayers evade their U.S. tax obligations can come forward, make aggregate disclosures (e.g., about where U.S. taxpayers leaving the participating bank transferred their funds), and thereby avoid prosecution. The program does not apply to the 14 Swiss banks already subject to investigation by U.S. prosecutors.

[69] *See, e.g.*, New Jersey Dept. of Treasury Press Release (Jun. 13, 2013) available at http://www.state.nj.us/treasury/taxation/offshore.shtml (describing state program that complements the federal OVDI under which participants "avoid all civil penalties, including the 50% civil fraud penalty. However, the 5% late payment penalty and the 5% amnesty penalty will not be waived"). Similar programs are available in many states, including California, Connecticut, Florida, and New York.