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September 29, 2017

The Honorable Steven Mnuchin
Secretary of the U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Mnuchin,

I am writing to you regarding the Foreign Account Tax Compliance Act (FATCA) [26 U.S.C. § 1471-1474; 26 U.S.C. § 6038D]. As discussed below, FATCA is an invasive, costly failure that I strongly suggest must be repealed at the soonest possible opportunity, hopefully in the context of tax reform enacted this year. In addition, the means adopted during the tenures of your predecessors Jack Lew and Timothy Geithner to implement FATCA via a series of legally dubious and constitutionally infirm non-treaty agreements with other countries must not be allowed to stand. I ask your assistance in assuring that FATCA repeal is part of any relevant legislation, and that the Treasury Department takes prompt action to cease the implementation of FATCA via Intergovernmental Agreements (IGAs).

FATCA's proponents claim that it is simply a "transparency" measure – similar to a domestic 1099 – to ensure greater tax compliance for assets held offshore. This characterization is misplaced. Domestic tax law requires reporting of taxable events, such as income (a W-2 Wage and Tax Statement) or bank interest (a 1099-INT). U.S. law, based on a presumption of innocence, does not generally require inquiry into asset principle unless there is reason to suspect wrong-doing. By contrast, FATCA requires wholesale reporting of Americans' assets and transaction history absent any such suspicion, solely because the asset is held outside the United States. This is despite the fact that the IRS's own Taxpayer Advocate Service reports that "the vast majority" of Americans residing abroad "actually appear to be substantially more compliant than a comparable portion of the overall U.S. taxpayer population."¹

¹ Taxpayer Advocate Service, 2016 Annual Report to Congress, Vol. 1; "FOREIGN ACCOUNT TAX COMPLIANCE ACT (FATCA): The IRS's Approach to International Tax Administration Unnecessarily Burdens Impacted Parties, Wastes

Despite such an invasion of privacy, FATCA has failed in its stated purpose of recovering revenue lost to offshore tax evasion. Last year the Internal Revenue Service (IRS) credited FATCA for “collecting” \$10 billion from “taxpayers coming back into compliance,”² but that figure conflates genuine tax revenues with penalties for filing deficiencies and recoveries from all offshore enforcement programs, not just FATCA. In the estimate of Professor William H. Byrnes of Texas A&M University School of Law, the real net tax recovery of FATCA alone is about \$200 million annually and may be only half of that. Professor Byrnes projects that FATCA may “soon cost more money than it brings in.”³ Indeed, his view may actually be overly optimistic in light of the IRS’s commendable enforcement standard of recovering seven dollars for every dollar spent.⁴

By contrast, because of the IRS’s need to try to discern indicators of evasion within a sea of indiscriminate personal information belonging to non-evaders, W. Gavin Ekins of the nonpartisan Tax Foundation suggests that, under FATCA, finding “a dollar of tax evasion may cost us \$5 of actually sifting through the data and compliance costs.”⁵ FATCA’s unsatisfactory ratio of return must also be weighed against the impact on taxpayers saddled with burdensome reporting paperwork. The Tax Foundation estimated in 2016 that these requirements cost individuals nearly four and half million hours and more than \$165 million,⁶ an amount comparable to FATCA’s likely proceeds. This does not even take into count the massive compliance costs imposed on financial institutions.

The above summarizes the good and sufficient reasons why FATCA must be repealed and enforcement dollars spent on more effective programs to detect and punish actual tax evasion. While your support for that effort will be appreciated, it is a task primarily of Congress. But I now turn to a matter almost entirely within your purview, on which I ask your prompt and decisive action. This relates to IGAs invented by the Department in consultation with five European governments for the purpose of enforcing FATCA.

Resources, and Fails to Protect Taxpayer Rights,” page 221; See:

https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1_MSP_16_FATCA.pdf

² IRS press release, “Offshore Voluntary Compliance Efforts Top \$10 Billion; More Than 100,000 Taxpayers Come Back into Compliance,” Oct. 21, 2016; See: <https://www.irs.gov/newsroom/offshore-voluntary-compliance-efforts-top-10-billion-more-than-100000-taxpayers-come-back-into-compliance>

³ “Background and Current Status of FATCA” Texas A&M University School of Law Legal Studies Research Paper No. 17-31, pages 1-34, 35; See: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926119

⁴ IRS press release, “National Taxpayer Advocate Delivers Annual Report to Congress; Focuses on Tax Reform, IRS Funding and Identity Theft,” Jan. 9, 2013; See: <https://www.irs.gov/newsroom/national-taxpayer-advocate-delivers-2012-annual-report-to-congress>

⁵ “Why Americans are giving up citizenship in record numbers,” *Washington Post*, June 1, 2016; See:

⁶ Tax Foundation, “The Compliance Costs of IRS Regulations,” June 15, 2016; See: <https://taxfoundation.org/compliance-costs-irs-regulations/>

While the IGAs read like treaties and have the effect of treaties in purporting to create mutual obligations between sovereign states they are not submitted to the United States Senate for that body's advice and consent to their ratification, though the non-U.S. "partner" country is required to do so under its necessary internal procedures for entry into force. In July 2013, I wrote⁷ to Secretary Lew with a specific request for the statutory authority for the IGAs. The Department responded, after a delay of nearly a year, with the following statutory justification:⁸

"The United States relies, among other things, on the following authorities to enter into and implement the IGAs: 22 USC Section 2656; Internal Revenue Code Sections 1471, 1474(f), 6011, and 6103(k)(4) and Subtitle F, Chapter 61, Subchapter A, Part III, Subpart B (Information Concerning Transactions with Other Persons)."

None of the sections⁹ cited above confers on the Treasury Department any authority for making agreements with foreign governments for the furnishing of private financial information. In particular, there is nothing in the cited sections that allows the Department to promise (under the so-called "Model 1" IGA) on behalf of the United States FATCA-"equivalent" reporting to foreign tax services of private information obtained from domestic American financial institutions. Following through with this unauthorized promise would impose on American banks, credit unions, insurance companies, and other institutions crushing compliance costs of the magnitude already suffered by foreign institutions – costs that would inevitably be passed on to American consumers.

The IGAs represent a prime example of the kind of executive overreach that unfortunately typified the previous administration. I ask you to rein in this abuse by ceasing the negotiation of new IGAs and freezing the implementation of existing ones. This action should include a freeze on enforcement of FATCA regulations on taxpayers and financial institutions. Further, I ask that you notify IGA jurisdictions that these dubious pseudo-treaties are under legal review and that their nullification or abrogation from the U.S. side can be expected pending FATCA's anticipated repeal.

Nothing in the foregoing should be construed in any way as being "soft" on tax evasion. Quite to the contrary, in addition to its other flaws FATCA is a distraction and a diversion of resources from effective tax enforcement based on standard investigatory techniques. As a member of the Financial Services Committee I look forward to working with the Department on measures to ensure effective tax enforcement that targets the guilty, without penalizing the innocent or

⁷ See: http://www.repealfatca.com/downloads/Posey_letter_to_Sec._Lew_July_1,_2013.pdf

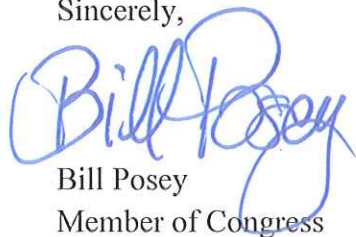
⁸ See: <http://federaltaxcrimes.blogspot.com/2014/07/irs-letter-to-congressman-defending-its.html>

⁹ For a definitive section-by-section demolition of the Department's response, see Professor Allison Christians, McGill University Faculty of Law, "IRS claims statutory authority for FATCA agreements where no such authority exists," <http://taxpol.blogspot.com.au/2014/07/irs-claims-statutory-authority-for.html>

compromising our cherished American constitutional and legal norms. In the meantime, FATCA and the IGAs must go.

Thank you for your assistance on this critical matter.

Sincerely,

A handwritten signature in blue ink that reads "Bill Posey". The signature is stylized and written in a cursive-like font.

Bill Posey
Member of Congress