**FATCA Historical (R)evolution: The War On U.S. Criminals With Foreign Bank Accounts; A Subsidiary of Our Wars On Everything-Else (i.e., Terror, Drugs, etc.)**

*FATCA has been used primarily as a tool to increase foreign bank and financial account reporting by establishing a worldwide-financial-industry informant system. The tool of FATCA has increased reporting, but nearly all the money collected is FBAR penalty revenue, which disproportionately harms benign actors.*

[In FACTA Historical (R)evolution Part I](https://www.taxconnections.com/taxblog/legislative-history-reveals-that-fatca-had-nothing-to-do-with-collecting-tax-revenue-from-u-s-persons-with-foreign-accounts-evading-taxes), I argued that in light of JCTX-5-10,[[1]](#footnote-1) Congress failed to engage in the due-diligence necessary to reasonably relate FATCA to the collection of tax revenue lost through “tax schemes” and “tax evasion” by U.S. persons with foreign financial institution accounts. The U.S. Congress is a legislative fact-finder charged with determining whether evidence as presented negates a legislative policy-purpose. If the policy underlying a piece of legislation is negated, then the purpose of the legislation is no longer tied to the policy-purpose. In this case, JCTX-5-10 offered a direct answer to the question of how much revenue would be generated by FATCA. Therefore, Congress *knew* FATCA would collect less than one-half of one-percent of what it was supposed to collect.[[2]](#footnote-2) Congress also knew that even after ten-years, FATCA would fail to pay for HIRE. Bluntly, the stated policy-purpose for FATCA could not be achieved by FATCA. So, why *was* it enacted and why does it *remain* the law? FATCA has been used primarily as a tool to increase foreign bank and financial account reporting by establishing a worldwide-financial-industry informant system designed to curtail the use of secret foreign bank accounts for illegal purposes, including tax evasion, securities manipulation, insider trading, evasion of Federal Reserve margin limitations, storing and laundering funds from illegal activities, and acquiring control of U.S. industries without detection by the SEC.[[3]](#footnote-3)

The IRS was forced to create a foreign financial institution informant structure to force U.S. persons with foreign financial institution accounts to report what was not being reported on the FBAR.[[4]](#footnote-4) In 1970, Congress enacted the Bank Secrecy Act (BSA) requiring FBAR compliance by FinCEN. Federal law enforcement had extreme difficulties with FBAR compliance. In 2002, Treasury reported to Congress that the FBAR compliance rate was at 20% -- FinCEN and federal law enforcement could not meaningfully enforce compliance with FBAR.[[5]](#footnote-5) The 20% number was unacceptable to FinCEN, and by 2003, Treasury issued a report, revealing FBAR civil enforcement had just been delegated to the IRS. In the report, Treasury stated that “one could argue the FBAR is directed more towards tax evasion, as opposed to money laundering or other financial crimes that lie at the core mission of FinCEN”.[[6]](#footnote-6) In reality, FBAR was a FinCEN thing, but FinCEN was without the proper tools to enforce any meaningful level of compliance, causing FBAR enforcement to shift to the IRS because they were better equipped to enforce compliance – the reason behind FBAR, never changed, but the IRS still reports that FATCA collection efforts are producing tax revenue, when they’re just not.

According to the IRS, FATCA and Offshore Voluntary Disclosure Programs (OVDP) increased *individual reporting* to the IRS by 19% ($75B), resulting in an overall increase in taxes, interest and penalties of $10B.[[7]](#footnote-7). At first-glance, this looks like FATCA was an overall success, and four-years before the 2020 expected due-date! The exact language from the IRS is that the “Updated data shows 55,800 taxpayers have come into the Offshore Voluntary Disclosure Program (OVDP) to resolve their tax obligations, paying more than $9.9 billion in taxes, interest and penalties since 2009.” This is absolutely fake news. The 10-year $8.7B JCTX-5-10 FATCA estimate and the IRS reported $10B increase in taxes, interest *and* penalties does not break down how much of that $9.9B collected was from tax revenue, interest *or* penalties. It was substantially penalty revenue associated with FBAR compliance – that thing that was shifted to the IRS to manage because FinCEN was unable.

Back in April of 2017, Associate Dean and Professor William Byrnes at Texas A&M School of Law wrote a piece for Wolters-Kluwer entitled: *Is FATCA ‘Much Ado About Nothing’? Is FATCA’s Tax Revenue Going to Offset its IRS and Industry Costs*? In this piece, Professor Byrnes noted that “according to the Government Accountability Office Report of 2013[[8]](#footnote-8), for small accounts of less than $100,000 that over a six-year period had only an average of $103 tax owing (that equals $17 a year additional tax revenue), the IRS imposed a FBAR penalty of $13,320 (i.e., $2,220 a year FBAR penalty on average for $17 dollar tax understatement, in additional to the tax penalty and interest).” Calculating that penalty as a percentage of the non-reported income reveals that just a little over one-half-of-one-percent of the total revenue collected was in-fact tax revenue (0.0076), for the smaller accounts. As you will see below, the larger accounts pay half or less the penalty percentage on average of the smaller account holders. That means, on average, their tax revenue was about 1.5% -2.0% of the total revenue paid.

The penalty for FBAR was aimed at criminals and bad actors, but now non-criminal benign actors have been impacted the greatest. People who are unrepresented by counsel or have small accounts are more likely to make inadvertent reporting violations than those who are represented or have large accounts.[[9]](#footnote-9) Under the 2009 OVDP, the median offshore penalty paid by those with the smallest accounts was nearly six-times the median unreported tax, as compared to about three-times the unreported tax for those with the largest accounts (penalty to tax ratio 6:1).[[10]](#footnote-10) Under the 2011 OVDP, the median offshore penalty for those with the smallest accounts increased to eight-times the unreported tax (penalty to tax ratio 8:1).[[11]](#footnote-11) FATCA is mostly FBAR penalty revenue and benign actors with the smallest accounts, proportionally, suffer the most. It looks and smells like everything the U.S. does, with regard to its various wars on things. The people most vulnerable get hurt the most, and it doesn’t achieve the ends it was supposed to to begin with. FATCA wasn’t designed to collect tax revenue, but instead as a tool to force foreign financial institutions to report on U.S. persons with accounts abroad.

1. Technical Explanation & Estimated Revenue Effects of the Revenue Provisions Contained in Senate Amendment 3310, The Hiring Incentives to Restore Employment Act (HIRE), JCTX-4-10 and JCTX-5-10. [↑](#footnote-ref-1)
2. Evidence revealed an estimated $150B was lost annually through offshore tax evasion in 2009, but by February, 2010 the JCT clarified that all FATCA should be expected to collect over ten-years, was $8.7B *Banking Secrecy Practices and Wealthy Americans*, House Ways and Means Subcommittee. on Select Revenue Measures, 111th Cong. (2009). [↑](#footnote-ref-2)
3. Taxpayer Advocate Annual Report to Congress (2014). Citing to 31 U.S.C. §§ 5314, 5321; 31 C.F.R. §§ 1010.350, 1010.306(c); FinCEN-Form 114, Report of Foreign Bank and Financial Accounts (FBAR), http://www.fincen.gov/forms/bsa\_forms/. [↑](#footnote-ref-3)
4. Dennis Kleinfeld, a prominent tax attorney in southern Florida, wrote an article for NewsMax (a well-respected conservative media outlet) which came to a closely-related conclusion. The article is available at <https://www.newsmax.com/finance/deniskleinfeld/republicans-fatca-gop-trump/2017/06/04/id/794044/>. Dennis states that the greatest concern is the complete loss of financial privacy, by treating everyone holding a financial account anywhere in the world as a U.S. tax evader , requiring all U.S. persons to report to the U.S. government even the smallest financial details, or be subject to civil and criminal penalties. [↑](#footnote-ref-4)
5. U.S. Department of the Treasury, A Report to Congress in Accordance with §361(B) of the Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 6 (Apr. 26th, 2002). The estimate of required FBAR filings was based in part on the number of credit and debit cards held by U.S. citizens and residents to access funds in offshore accounts. *See* Taxpayer Advocate Annual Report to Congress (2014). [↑](#footnote-ref-5)
6. Cite to 2003 Treasury Report – sending FBAR to IRS. [↑](#footnote-ref-6)
7. Internal Revenue Service, “Offshore Voluntary Compliance Efforts Top $10 Billion; More Than 100,000 Taxpayers Come Back into Compliance,” October 21st,2016 available at https://www.irs.gov/uac/newsroom/offshore-voluntary-compliance-efforts-top-10-billion-more-than-100000-taxpayers-come-back-into-complianceIn fact, the 10BB likely results from the UBS-driven initiatives that resulted from normal investigatory techniques such as whistleblowing, prisoners’ dilemma, Congressional hearings, and John Doe summons enforcement. [↑](#footnote-ref-7)
8. GAO-13-318, *Offshore Tax Evasion: IRS Has Collected Billions of Dollars, but May be Missing Continued Evasion.* [↑](#footnote-ref-8)
9. Id at 3, P. 85. [↑](#footnote-ref-9)
10. Id at 3, P. 86. [↑](#footnote-ref-10)
11. Id. [↑](#footnote-ref-11)