Is FATCA 'Much Ado About Nothing'? Is FATCA's Tax Revenue Going to Offset Its IRS and Industry Costs?

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I was recently asked to analyze the often quoted figure of $150 billion lost by the U.S. Treasury to foreign non-tax compliance by U.S. taxpayers. My transcribed remarks are below. Also, see William Byrnes' Guide to FATCA & CRS Compliance (Matthew Bender 5th ed., 2017) at pp. 30, 33-34, 50, 59, 109-112, and 119-122. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926119

1. **How Much Tax Revenue Has Actually Been Collected To Date From FATCA Versus Good Old Fashioned IRS Investigatory Work**

Firstly, it is important to understand the figures that we know. Treasury reports that it has collected nearly $10 billion from its OVDP efforts. It is important to understand that this $10 billion, even if fully allocated to tax collection, is not as a result of FATCA. Instead, this $10 billion results from the UBS driven initiatives that resulted from normal investigatory techniques such as whistleblowing, prisoners dilemma, Congressional hearings, and John Doe summons enforcement. This $10 billion generated revenue over the past seven years would have been generated without FATCA.

2. **Most Of The Reported Collections Are Not Tax Revenue**

Secondly, a substantial portion of the $10 billion collected from OVDP efforts is not tax revenue at all. Thus, I am unsure why this non-tax revenue is included in the $10 billion figure? Most of the $10 billion collected over the past seven years resulted from draconian non-compliance penalties associated with the insidious 'FBAR' (Report of Foreign Bank and Financial Accounts). It would be interesting for the Census Bureau or State Department to conduct a survey of U.S. persons with foreign exposure, whether by residence or by assets, to determine how many are aware of the FBAR (FinCEN Report 114) filing requirement and secondly, how a taxpayer files it (electronically only through the FinCEN website). This form should have been known about because it is mentioned in Schedule B, right?

Actually, it was not mentioned as the 'FBAR' until 2013. The main years in question for the OVDP involve 2012 going back almost a decade. Pre-2013, Schedule B only mentions the Form TD F 90-22.1 in Part III. Arguably, Form TD F 90-22.1 should be known by tax CPAs with international clients, tax attorneys with international clients, anti money laundering experts such as the international agents of the DOJ or international compliance officers of banks. Also arguably, it is doubtful that the rest of the 10 million U.S. persons with international exposure should have a familiarity with the term Form TD F 90-22.1.

3. **How Many U.S. Persons with Foreign Exposure Are Tax Evaders?**

2013 IRS tax statistics disclose that 470,000 taxpayer returns claimed the foreign income exclusion. The foreign income exclusion is elected by a U.S. taxpayer who resides in a foreign country. Another 7.5 million U.S. taxpayer individuals claimed a foreign tax credit totaling just over $20 billion. These taxpayers have earned income from a foreign country and paid tax to the foreign country, and offset the U.S. tax liability with the foreign tax already paid. Thus, approximately eight million U.S. taxpayers with foreign exposure are filing a U.S. tax return and disclosing the foreign income. I have not studied the issue, but it is possible that of the remaining one or two million U.S. taxpayers with foreign exposure, some are

too young to be employed, and some are not employed (by example a stay at home parent married to a foreign non-resident alien).

4. **Why Is the IRS Using Its Discretion to Confiscate U.S. Taxpayer Assets Who Did Not File A Form That Almost No American Has Even Heard About, Much Less the Years in Question?**

What is clear is that these eight million compliant taxpayers are not filing FBARs. In 2002, the IRS reported to Congress that the FBAR compliance rate was less than 20 percent because it had received fewer than 200,000 FBARs when one million taxpayers may have been required to file. The 2013 Taxpayer Advocate Report, relying on State Department statistics, cited that 7.6 million U.S. citizens reside abroad and many more U.S. residents have FBAR filing requirements for foreign accounts, yet the IRS received only 807,040 FBAR submissions in 2012. The Taxpayer Advocate noted that in Mexico alone, more than one million U.S. citizens reside, and many Mexican citizens reside in the U.S.

Given only 807,040 FBARs from a potential class of eight to ten million FBAR filers that have breached the non-inflation adjusted $10,000 FBAR filing threshold, compliance with FBAR filing appears to be declining. *The IRS War on the FBAR is simply not working.*

Did the U.S. Treasury have middle class non-technical friendly, publicity campaigns to inform these U.S. persons about the FBAR and its disjointed filing date and procedure (filed in June, not April, not with the Form 1040 and to a different address than required by the Form 1040)? Think back to 2004 and the availability of research on the WWW. Not the robust treasure trove that we are familiar with today. I lived overseas as a student and lawyer until 1998. I was not exposed to any Treasury educational campaigns regarding the FBAR, much less the Form 1040 for U.S. persons living abroad. Such informational campaigns may have been ongoing and my experience anecdotal but I suspect that I was representative of the general U.S. population residing in foreign countries. The FinCEN website has this past year been repositioned slightly more user-friendly with the downloadable individual filer PDF, albeit still not built around a core non-technical audience of individual U.S. filers. The new 22-page FBAR instruction booklet is a bit daunting, and YouTube videos made for non-technical persons may help reinforce the information contained therein (the IRS videos in recent years are a strong step in this direction, but need better media production).

5. **What Is the IRS Actually Collecting From Taxpayers If Not Tax Revenue?**

To the point of portioning the $10 billion collected between tax revenue (U.S. Code Title 26) and proceeds of crime (U.S. Code Title 31) is to discover that the FBAR obligation is a Title 31 reporting requirement of the Bank Secrecy Act ("BSA") for anti-money laundering. The 1970 Congressional report accompanying the enactment of the BSA states that the BSA was meant as an investigatory tool to assist in the detection and prosecution of "petty criminals, members of the underworld, those engaging in "white collar" crime and income tax evaders." The FBAR is not a legislative reporting requirement of the Title 26 income tax system. The FBAR is a Financial Crimes Enforcement Network ("FinCEN") requirement though FinCEN has contracted the IRS to enforce FBAR compliance on behalf of FinCEN. The annual inflation-adjusted maximum penalty for negligently not filing a FBAR is $1,078 and the maximum penalty for non-willful noncompliance is $12,459. Willful non-compliance, on the other hand, carries a maximum penalty of $124,588 or if greater, the 50 percent confiscation of the underlying assets at issue of the non-filing. The IRS' has discretion whether to apply the negligent, non-willful or criminal "willful" standard and range of penalty within a standard.

6. **How Has The IRS Used Its Discretion to Encourage Voluntary Compliance?**

Congress probably meant for the BSA's FBAR penalties, or certainly, the confiscatory implementation of FBAR's penalty regime, to only be applied to the most heinous, criminal tax evaders that fall into the descriptive class of petty criminals, the underworld, and "white collar" criminals mentioned in the 1970 legislative history. Yet, according to the Government Accountability Office Report of 2013, 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). Calculate that penalty as a percentage of the non-reported income.

Moreover, in its reporting of tax revenue collected from the OVDP, which should only be revenue generated pursuant to Title 26, the IRS has included the amounts generated from Title 31. Title 26 tax revenues are based upon income and its penalties as a percentage of underreported tax liability. Title 31 penalties are

based upon assets and do not correspond to income and tax liability. Title 26 has its own income and asset reporting forms distinctive from the FBAR, including 3520 (foreign trusts), 5471 (CFCs), 8621 (PFICs), 8655 (foreign partnerships) and the recent addition of the FATCA Form 8938 to report foreign assets. The Taxpayer Advocate Service (TAS) has at length covered the duplicative and confusingly inconsistent reporting required by the FBAR and Form 8938.

Does a $2,220 IRS imposed FinCEN Form 114 penalty for a $17 tax understatement encourage future voluntary compliance? Probably not. ***It may encourage the opposite.*** Have disproportionate FBAR fines at least produced a corresponding higher rate of FBAR compliance? The IRS does not know the answer to this question, and cannot know with its current allocation of internal resources for its Office of Service-wide Penalties (OSP). The Taxpayer Advocate noted in its 2014 Report to Congress that two decades prior Congress recommended that the IRS "develop better information concerning the administration and effects of penalties" to ensure they promote voluntary compliance. Yet, the IRS Office of Service-wide Penalties (OSP) is "an office of six analysts buried three levels below the Small Business/Self-Employed Division Commissioner [that] cites insufficient resources, insufficient staffing, employees with the wrong skill sets, and a lack of access to penalty-related data as barriers to conducting penalty research."

To keep this piece below 5,000 words, I will not go into the breadth of criminology and compliance studies about levels versus frequency of punishment, punishment versus rehabilitation, nor do I pretend to be an expert in such area. However, note that "voluntary" compliance is not compliance driven by fear of prosecution and punishment ("P&P"). Compliance may be driven by P&P, but not "voluntary" compliance. My colleague and former Treasury senior officer Dr. Jack Manhire has written extensively on this issue (see his articles on SSRN).

7. **Questionable IRS FBAR Prosecutions That Do Not Lead to Voluntary Compliance**

Mary Estelle Curran, uneducated beyond high school, was 79 at the time of her tax evasion and FBAR non-compliance plea, and owed $667,716 in taxes plus interest and penalties over the seven years, thus on average $95,388 lost tax revenue per year including the 40 percent understatement penalty and interest on the understatement. But her imposed penalty for failure to report the foreign bank accounts on her FBAR form, which is a Bank Secrecy Act/FinCEN violation

constituting an anti-money laundering penalty instead of a tax penalty, was $21,666,929, comprised of 50 percent of the high balance of the accounts, thus on average $3,095,275 per year FBAR penalty. In conclusion, Mary Curran paid a tax liability, interest and penalties and then the IRS charged her more than 32 times the tax and the tax penalty.

Criminal tax attorney, Charles Rettig, reported in the June/July 2014 Journal of Tax Practice & Procedure that various taxpayers who have opted out of the IRS' offshore voluntary disclosure program (OVDP) have already received notices asserting multiple, cumulative, FBAR penalties of 50 percent for each year under audit. Rettig also described the finding of a trial jury against Carl Zwerner. Zwerner, at 87 more elderly than Mrs. Curran, through his tax attorney, made voluntary disclosures to the IRS Criminal Investigation in 2009 before the OVDP was established, for 2004 through 2006, 2007 having been timely filed. Although the Tax Court and IRS appeals abated a 75 percent civil income tax fraud penalty imposed by the IRS, a jury upheld a 150 percent cumulative FBAR penalty, equaling $3,488,609.33 for an account with a high balance of $1,691,054 during the relevant time period. In conclusion, the IRS confiscated all of Carl Zwerner's foreign account although non-compliant did voluntarily disclose before an audit was undertaken.

These are just two examples of a pattern. Is this the discretion for punishment that Congress meant to give the IRS? Is this the level of punishment that Congress intended to be doled out?

8. **False Positives Lead to Unnecessary Audits That Lead To Loss of Confidence In The IRS**

Whatever the amount of 'hidden' non-tax compliant dollars remains overseas, normal investigatory techniques will continue to collect it, not FATCA. On the other hand, FATCA will probably lead to a substantial number of false positives from mismatching the submitted taxpayer information via Forms 8938 (FATCA), 3520 (foreign trusts), 5471 (CFCs), 8621 (PFICs) and 8655 (foreign partnerships) with the information received from foreign institutions via Forms 8966. Treasury probably should have stuck with the 'known', that being the 1099 series, instead of creating new form 8966. Taxpayers subject to audit because of false positives may lose confidence in the IRS ability to administer the tax system. That would, in turn, lead to less compliance.

9. **FATCA In the Context of the Tax System**

Thirdly, turn to the issue of revenue raised from income tax. Based on 2015 IRS data, individuals paid $1.5 trillion income tax (this amount does not include social security tax, medical tax, corporation tax, excise tax, and customs tax). Social security tax collection is another one trillion dollars. And our final figure to consider is all tax receipts in 2015: $3.2 trillion. Now create pie chart. In the annual FATCA portion of the chart, include the generous annual amount of $300 million. Is that sliver which represents 0.0094 of a percent noticeable? If one only considers income tax and social security tax, the result is still too small to actually observe at 0.012 of a percent (one-hundredth of one percent).

10. **Where Is The Regulatory Impact Analysis And Cost-Benefit Study?**

We have not even discussed a regulatory impact cost-benefit analysis yet. How much does it cost the IRS to collect this amount? Has the IRS capital expenditure been taken into account in its cost analysis? Is the IRS ahead or at a loss after expenditure? How should the industry compliance costs be figured into the cost-benefit analysis? Has the U.S. suffered growth drag as a result of this legislation, and if so, by how much? Has the U.S. suffered any loss of foreign direct investment, and if so how much? Unfortunately, a cost-benefit analysis was not run for the imposition of FATCA and its regulations.

I do not criticize the IRS for FATCA (FBAR enforcement – the IRS should be held accountable, but FATCA is on Congress). The IRS did not create FATCA – that is the responsibility of the U.S. voting public. We voted in a Congress that voted the HIRE act that ordered Treasury (and thus the IRS) to enforce a new Chapter 4 (FATCA) of the IRC. The FATCA regs are highly complex but the complexity comes from the IRS responding to industry. The tax code could be much simpler. The complexity results from numerous incentives and carve-outs, lobbying, economic direction of activity and investment through tax policy etc. The FATCA regs are like the Code in that respect. I am sure many who are impacted by FATCA will respond that they did not vote for a particular Congressperson that voted for the HIRE Act and its FATCA, or for the president who signed the bill into law. But that is an argument in the realm of Constitutional democracy, not tax law. And while the HIRE act was primarily a Democratic bill, it only passed because 13 Republicans voted for it in the Senate.

11. **Is There Really $150 Billion Of Annual Lost Tax Revenue That U.S. Taxpayers Are Hiding From The IRS?**

Finally, examine the often quoted figures of $100 billion to $150 billion of lost tax revenue due to foreign tax evasion. In July 2008, the U.S. Senate Permanent Subcommittee on Investigations held a hearing and issued a report entitled "Tax Haven Banks and U.S. Tax Compliance." The critical underlying justification for FATCA as a substantial revenue raiser ultimately rested on a single statement and its footnote in that 2008 Report: Each year, the United States loses an estimated $100 billion in tax revenues due to offshore tax abuses. In a follow-up report four years later, the Subcommittee jumped the U.S. tax revenue loss by 50%, stating: "Contributing to that annual tax gap are offshore tax schemes responsible for lost tax revenues totaling an estimated $150 billion each year."

However, upon review of the estimated revenue for the offset, the Congressional Joint Committee on Tax (JCT) in 2010 substantially reduced the Subcommittee estimate to only $8.7 billion of tax revenue over the ten years of 2010 to 2020, an average revenue of $870 million per year. That's a stark difference of more than $99 billion to $149 billion annually.

What was the statistical methodology used by the Subcommittee to estimate the figures of $100 billion and $150 billion lost U.S. tax revenue each year from 'offshore tax abuses' and 'schemes'?

12. **What Did the IRS Testify to Congress About Lost Tax Revenue from Foreign Tax Evasion? Has Congress Enacted Legislation Based on Bad Information?**

The answer is to be found in a Congressional Research Service (CRS) Memorandum of July 23, 2001 referencing an inquiry made by the House Majority Leader as to the method used by attorney Jack Blum, an IRS contract consultant, to construct the then estimate of $70 billion of illegal tax evasion losses due to tax havens. This figure was contained in his affidavit submitted in support of the government's request from the federal court for a John Doe summons for records from MasterCard and American Express. According to the CRS: "Mr. Blum's estimate was contained in a declaration filed in connection with a petition the Internal Revenue Service filed with the U.S. District Court for the Southern District. In response to your request, we contacted Mr. Blum and discussed his estimate; he

was not able to send us a written discussion of his estimating procedure … We did not discuss these particular aspects of the estimating process in our initial conversation with Mr. Blum and our attempts to contact Mr. Blum on a follow-up basis have not been successful." On March 4, 2009 the IRS Commissioner Charles Shulman testified before the Subcommittee that there is no credible estimate of lost tax revenue from offshore tax abuse.

Treasury Departments have often stated large figures of unreported annual taxable income in foreign jurisdictions, and a huge asset base from which that income percolates. By example, the IRS has stated that underreporting and underpayment of tax liabilities account for more than 90 percent of the $450 billion tax gap dollars. While the IRS has not estimated the size of the international tax gap, the Treasury Inspector General for Tax Administration reported in 2012 that estimates range from $40 billion to $123 billion annually. In 2000, the U.S. State Department estimated that assets secreted in offshore jurisdictions totaled $4.8 trillion. In 2007, the OECD estimated the total at $5 trillion to $7 trillion. The statements of the lost annual income tax because of U.S. taxpayers evasion and the amount of unreported assets can only be congruent if every dollar held by "offshore" financial institutions is held by a U.S. taxpayer. However, the U.S. is not the only generator of wealth and not the only country with "evading" taxpayers who do not report foreign assets.

13. **What Do We Definitively Know From Swiss Non-Prosecution Agreements?**

The UBS scandal was 'the straw that broke the camel's back' and became the key driver for FATCA's enactment. The Subcommittee noted over 52,000 U.S. persons with suspicious Swiss UBS bank accounts, with an estimated $20 billion under assets. "John Doe" summons were issued by the Justice Department against the UBS bank, requiring information on the U.S. accountholders. UBS settled with Justice for a $780 million fine and the details of 4,500 U.S. account holders of the group of 52,000. The origin of the funds and lost tax revenue held by the 52,000 accounts originally requested in the UBS case remains unknown.

On February 26, 2014 Credit Suisse appeared before the Subcommittee and testified that it had a maximum 22,000 potentially suspicious accounts with U.S. beneficiaries, totaling roughly $10 billion and $12 billion in assets under management. The total fines derived from the ten Swiss-based non-prosecution

agreements announced by the Justice from UBS in 2009 to the most recent four on May 28, 2015 thus far approximate $4.8 billion, including: MediBank ($826,000), LBBW ($34,000), Scobag ($1,090), Finter (approximately $5.4 million), Vadian ($4,250,000), BSI ($211 million), Bank Leumi ($400 million), Credit Suisse ($2.6 billion), Wegelin ($57.8 million) and UBS ($780 million).

Based on the statistics from Treasury reports and the OVDP, not every UBS and Credit Suisse account was noncompliant. No portion of UBS' and Credit Suisse's behavior encouraging tax evasion is excusable whether it be 50 or 50,000 non-compliant taxpayers. But the information gleaned from the UBS' and Credit Suisse results do not support any of the current Treasury estimates of $80 billion to $100 billion of lost annual tax income earned from assets hidden in foreign accounts.

14. **What Do We Know About U.S. Taxpayer Income from 2007, 2008, and 2009? My Back Of A Napkin Thoughts.**

Most taxpayers over the period of 2007, 2008 and 2009 lost asset value and money – even half. Everyone with a U.S. retirement account will relate to the retirement assets value falling significantly during this period. In 2010 it started to recover. Then in 2011 markets started to grow again but it took most U.S. taxpayers until 2012 to be back to where they were in the beginning of 2007.

For sake of this napkin exercise, do not consider earned wages such as the $100,000 earned by the offshore worker on a rig in the North Sea. After the foreign exemption for income, for foreign housing, and the foreign tax credit, more likely than not a *de minimis* U.S. income tax liability remains if any at all.

Thus, for this exercise, the offshore "non-reported" money is taxable savings for portfolio investment. Generally speaking, the effective tax rate on passive assets is preferential in the U.S., that is instead of the ordinary income tax rates, it is about half those. Thus, for most upper middle class and high net wealth persons, the passive income will attract either a 15 percent or the maximum rate of 20 percent because generally speaking a portfolio manager will set up exposure for non-taxable income like certain types of government notes, some preferentially taxed capital gains, some preferentially taxed dividends, and a very small portion of ordinary taxed income like corporate bond interest. Wealthy sophisticated investors would have elected portfolios that minimized taxation in relation to the appetite for return and risk. For sake of argument, use an average 15 percent tax

rate on foreign passive income, albeit it is likely to be lower.

Note that if a U.S. taxpayer with “hidden assets” that attract a greater effective tax rate upon the income generated from the foreign assets than the applicable U.S. tax rate, then common sense dictates that the U.S. taxpayer will simply report the income for which the foreign tax credit will meet the U.S. tax liability. By example, if the effective U.S. rate would be 10 percent on a portfolio, and the investor is attracting 10 percent tax on the portfolio’s income, then the foreign tax credit would normally wash out the U.S. tax. In fact, the investor would be worse off with “hidden” assets because of the additional administration and risk incurred.

Also note that in years of no income or of losses, a U.S. taxpayer has either no tax liability or a loss to carry back two years or to carry forward. By example, the tremendous losses of 2007 and 2008 may carry back to the income tax liability generated in 2005 and 2006, perhaps eliminating income tax liability for those years.

Now consider the overall summed taxable income and tax payable because of the foreign assets held by U.S. taxpayers for 2006 through 2012. In 2006, a year of strong market growth and capital appreciation, probably substantial tax liability accrues from the foreign assets. But in 2007, probably a loss for most taxpayers, that carried back to 2006 and probably wiped out the 2006 gain. Now consider 2008? It’s another horrible loss year. Generally speaking – the markets lost and U.S. taxpayers suffered substantial asset value and passive income losses. A taxpayer that simply sat on cash did not earn taxable income to underreport. The remainder of 2007’s loss and the 2008 loss are now available to take against any small gain earned in 2009.

For most taxpayers, it was not until 2010 that portfolios and investment income began a healthy recovery. 2008’s loss may have been enough to reduce 2010’s gain to de minimis. In 2011 and 2012 the U.S. taxpayers were steaming along on the current bull market, finally gaining back lost ground and generating taxable income. Point being, over these six year years of income, after losses are taken into account from amending returns to reflect actual income, probably the actual tax due is relatively small. FBAR may be very large as explained above, but not the underlying tax liability. A resilient actual estimate can be provided from gleaning IRS data that is now available for these years (I will entertain that estimate this summer with a research assistant to complete a currently submitted

law review article).

15. **What Is the Value of Assets U.S. Taxpayers "Hide" Overseas?**

I have authored various posts and research reports estimating the amount of assets held overseas by U.S. taxpayers, and it's nothing close to what would be necessary to generate $150 billion tax. Using the liberal 15 percent average tax rate above, these "hidden" assets would need to generate one trillion dollars of annual income. Using a nearly impossible average annual return of 10 percent, it would require $10 trillion of hidden assets of U.S. taxpayers on top of the amount of compliant assets. More likely the average return is closer to seven percent and the necessary hidden foreign assets more than $15 trillion. To provide context, it is reasonably estimated that globally, including every investment fund, every retirement account, every country and every taxpayer, assets under management are approximate $75 trillion. Thus, to generate this illusionary $150 billion lost tax dollars, U.S. tax evaders would need to have hidden 20 percent of all global wealth. While it is already shown unlikely that most U.S. taxpayers with foreign assets are tax evaders based on the 2013 IRS tax statistics that 470,000 taxpayer returns claimed the foreign-income exclusion and another 7.5 million claimed a foreign tax credit totaling just over $20 billion, it is even more unlikely that 20 percent of global wealth belongs to U.S. tax evaders.

16. **FATCA Changing Behavior That Changes Potential Foreign Income To Tax?**

From a big picture view, FATCA, anecdotally, seems to change the behavior of U.S. persons regarding exposure to overseas assets and investments as well as driving up foreign institutional costs. I have not undertaken this research yet. I have noticed via U.S. statistics, BIS and other sources, that the U.S. has attracted investment capital. But I do not know the portion, if any, is from U.S. persons repatriating or from foreign investors. By example, for sake of a back-of-napkin explanation, X was held overseas by U.S. investors in 2012. Then say that because of a combination of the fear of FATCA compliance by foreign institutions and U.S. taxpayers and the increased foreign institutional costs, the 2016 foreign investment number is 10 percent less than X. Then in 2016, my U.S. taxpayer will probably earn 10 percent less foreign income on annual average. Consequently, the IRS potential claim of future revenues from FATCA must be reduced. Maybe FATCA was actually meant to act as a form of exchange control and cause the

repatriation of foreign assets by U.S. individuals? The U.S. has arguably leveraged tax policy before to shore up its trade and investment deficits before.

The U.S. has arguably leveraged tax policy before to shore up its trade and investment deficits before. In 1984 the U.S. enacted an exemption for portfolio interest from withholding tax. The IMF has raised the point, and several other pundits, that such action may have been targeted at Latin America that experienced a capital flight of $300 billion to the U.S. A substantial portion of these funds were derived from Brazil. In fact, some pundits have suggested that Miami as a financial center resulted not from the billions generated from the laundering of drug proceeds which had a tendency to flow outward, but from the hundreds of billions generated from Latin inward capital, nearly all unreported to the governments of origination. Others have suggested that this mechanism was used by the Reagan administration to minimize the trade deficit.

17. **IRS Compliance Costs?**

The above back-of-napkin rough estimates may explain why FATCA has generated relatively little tax revenue. Recall that the streamlined procedures are only producing a revenue from three years of tax filings, interest and penalties of $9,375 per taxpayer. As far as tax revenues go, offshore enforcement has not lived up to its hype. Hard to justify to Congress the substantial amount of additional resources that the IRS is requesting for more enforcement based on the small potential for future tax revenue based on the current tax revenue.

For 2017 the IRS requested an additional half-billion dollar budget increase of which *more than 20 percent ($126,739,000) is for additional FATCA enforcement* on top of its current spending on FATCA. The IRS request for the additional FATCA funding for an extra 273 FATCA FTEs and $127 million works out to the equivalent of $460,000 per FTE requested. Aggressive compliance enforcement of the FBAR has produced far greater income. More FBAR asset forfeitures from the likes Mary Estelle Curran are likely if the IRS is required to justify an additional $127 million for offshore enforcement.

Perhaps this extra $127 million is necessary to sort out the number of false positives that are likely to be generated from the mismatch of data from the Form 8966 submitted by foreign financial institutions and U.S. taxpayers Form 8938 and corresponding 1040 schedules like Schedule B (interest and dividends). Are

mismatches likely? I'll draft another article based on research contained in my treatise about how many W-9s and W-8s have errors and thus, technically, not valid. The answer is that at least 20 percent are contain errors.

I discuss foreign government and foreign industry compliance costs in my treatise. But as mentioned above, the U.S. Treasury did not undertake a FATCA cost-benefit analysis. However, it can be estimated that the U.S. financial institution costs, if it implements full FATCA reciprocity, may exceed $200 million additional dollars beyond current compliance expenditure if loss of fees and income are taken into account. This may be roughly estimated based upon FinCEN's cost analysis for U.S. financial institutions to collect ultimate beneficial ownership information of corporations unto the new FinCEN form. This new FinCEN requirement that begins from March 2018 may be called a FATCA-light requirement. FinCEN calculated in 2014 that it would cost U.S. institutions slightly more than $54 million each year for new accounts, not including advisory services. I suspect it to be much more. The U.S. Treasury calculated that a W-8BEN-E requires 20 hours of compliance time to complete (validation may require more time). The W-8BEN-E cost of compliance has not been factored into the FinCEN FATCA-light cost analysis. Using FinCEN's $20/hour cost, without advice, one may use a figure of $400 labor time for the W-8BEN-E FATCA forms. FinCEN estimated that eight million accounts are opened each year covered by its FATCA light. Thus, multiply the number of accounts by the additional FinCEN and W-8BEN-E FATCA compliance and the costs escalate above $3 billion. But one should offset the gains earned to GDP from the additional income for the compliance industry, such as the income generated to publishers and authors from FATCA and CRS treatise and offset the gains by the activities that banks should be undertaking anyway to validate the 1042-S (this is the withholding form submitted with U.S. source payments to non-U.S. taxpayers) and to comply with the normal anti money laundering legislation. Anyway – the figure is more than will be collected. Likely U.S. financial institution industry costs will greatly exceed tax revenue generated.

18. **Do Another Estimate of Tax Revenues to Be Generated Based on What We Know Know**

I contend that the government needs to re-estimate the future FATCA generated revenue from income tax, and not include anti money laundering generated asset forfeitures from FBAR, after which it must take into consideration the potential reduction of U.S. taxpayers holding of asset through foreign accounts.

19. **Footnotes and Sources, Other FATCA Research**

For extensive footnotes, source references, links to documents and my other FATCA research, please see Byrnes, William, Guide to FATCA & CRS Compliance (Matthew Bender 5th ed., 2017) at pp. 30, 33-34, 50, 59, 109-112, and 119-122. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926119

Byrnes, William, *How May the United States Leverage its FATCA IGA Bilateral Process to Incentivize Good Tax Administrations among the World of Black Hat and Grey Hat Governments? A Carrot & Stick Policy Proposal*. Emory International Law Review, Vol. 31, No. 1, 2017; Texas A&M University School of Law Legal Studies Research Paper No. 17-16. Available at SSRN: https://ssrn.com/abstract=2916444 or http://dx.doi.org/10.2139/ssrn.2916444

Prof. William Byrnes (Texas A&M University School of Law) is a prolific author of tax law treatises, global tax and money laundering prevention compendia, and annual Tax Facts books that have sold more than 150,000 and have many thousand online subscriptions. In 2016 he was the 9th most downloaded tax professor on SSRN. Before full-time academia, William Byrnes served in a senior international tax position focused on transfer pricing with a Big 6 firm.