Campaign to Repeal FATCA

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The Honorable Steven Terner Mnuchin
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Secretary Mnuchin:

The Campaign to Repeal FATCA (www.RepealFATCAcom) was launched earlier this year with one purpose: to get rid of the Foreign Account Tax Compliance Act. FATCA is a textbook example of a badly conceived, badly written, and badly enforced law that doesn't achieve its stated purpose but does inflict an excess of harmful consequences on citizens, American taxpayers around the world, the global financial and investment sectors, and the principle of national sovereignty.

As Co-Leaders of the Campaign, we are writing to you on the supposition that in a democratic country elections should have consequences. When a political party stands before the electorate on declared principles and makes specific promises, those principles and promises should be reflected in how that party governs under its mandate from the voters.

The 2016 Republican Platform reads in part:

> "The Foreign Account Tax Compliance Act (FATCA) and the Foreign Bank and Asset Reporting Requirements result in government's warrantless seizure of personal financial information without reasonable suspicion or probable cause. Americans overseas should enjoy the same rights as Americans residing in the United States, whose private financial information is not subject to disclosure to the government except as to interest earned. The requirement for all banks around the world to provide detailed information to the IRS about American account holders outside the United States has resulted in banks refusing service to them. Thus, FATCA not only allows 'unreasonable search and seizures' but also threatens the ability of overseas Americans to lead normal lives. We call for its repeal and for a change to residency-based taxation for U.S. citizens overseas."

This Republican pledge to repeal FATCA rests on the deepest and most cherished American principles, not least a decent respect for the privacy of citizens who are not engaged in lawbreaking and are not even suspected of doing so. Even the IRS's own Taxpayer Advocate Service has criticized FATCA's "enforcement-oriented regime with

respect to international taxpayers" with its "operative assumption [that] appears to be that all such taxpayers should be suspected of fraudulent activity, unless proven otherwise."

FATCA's privacy violations and compliance burdens fall disproportionately upon people of moderate means, few of whom are engaged in evasion or owe any tax at all. As examined at a hearing on April 26 of this year by the House Subcommittee on Government Oversight presided over by House Freedom Caucus Chairman Mark Meadows, FATCA has led to financial institutions around the world denying or withdrawing financial services from Americans, in turn leading to growing numbers of U.S citizenship renunciations. (Meanwhile the genuine "fat cats" supposedly targeted by FATCA can easily avoid it by hiding assets in real estate, bullion, fine art, gems, and other ruses.)

FATCA's indiscriminate invasion of privacy would be unjustifiable even if it were an effective mechanism for detecting offshore tax evasion and recovering revenues due. But FATCA is a failure from that standpoint as well, as irrefutably demonstrated by Professor William Byrnes of Texas A&M University School of Law, who calculates that the actual net recovery attributable to FATCA is a mere $100-200 million per year – far less than the approximately $800 million it was scored upon enactment in 2010. Worse, projects Byrnes, the recovery trend is downward, and FATCA (excepting penalties for filing deficiencies, even where there is no tax liability) could soon cost more money than it brings in. This contrasts to the IRS's standard of approximately seven dollars in tax recovery for every enforcement dollar spent. As a weapon to combat tax evasion, FATCA is a waste of money that could be more effectively spent on other programs.

In addition, FATCA imposes massive compliance costs on the entire global financial system – money that comes out of the pockets of customers, depositors, and shareholders. Even a small non-U.S. bank can expect to spend millions of dollars looking for American "indicia" among thousands of accounts. According to available data, bigger institutions spend much more. For example, according to the *Wall Street Journal*, Canada's "Big Five" banks collectively had paid out $693.5 million in primary compliance by 2014. Bank of Nova Scotia alone had spent $100 million as of 2013. As cited by Professor Byrnes, BBVA (Banco Bilbao Vizcaya Argentaria, S.A.), Spain's second-largest bank, estimates FATCA compliance costs to be at least €8 million for a local entity up to €800 million for a global one; similarly a cost estimate from the U.K. Revenue for British financial institutions is a one-off cost of approximately £900 million to £1,600 million, with an ongoing cost of £50 million to £90 million a year. Estimates of total global compliance spending rely on aggregating what is known about per-institution costs. One such projection assesses FATCA's cumulative cost at between $58 billion and $170 billion. This is an order of magnitude greater than any recoveries from FATCA.

It is thus no mystery why big accounting, law, and software firms are thrilled with FATCA and are keen to insist that "FATCA is here to stay!" But corporate welfare for compliance vendors who are the real fat cats in this saga is no reason to keep a bad law.

Thus, there is overwhelming reason for the Republican Party – which is in unified control of the Executive Branch and of both houses of Congress – to keep its promise to the American people. To that end, our Campaign is working with the Congressional sponsors of FATCA repeal legislation in both chambers: Senator Rand Paul (S.869) and Representative Mark Meadows (H.R. 2054). The repeal movement has also gained the support of numerous taxpayer groups, including Americans for Tax Reform, the National Taxpayers Union, the Center for Freedom and Prosperity, American Commitment, the Taxpayers Protection Alliance, the Competitive Enterprise Institute, R Street Institute, The Market Institute, the Center for Individual Freedom, Frontiers of Freedom, 60

Plus Association, FreedomWorks, the Sovereign Society Freedom Alliance, the Institute for Liberty, The National Tax Limitation Committee, Citizen Outreach, Campaign for Liberty, Jeffersonian Project, The Institute for Policy Innovation, Americans for Limited Government, the National Center for Policy Analysis, the Small Business and Entrepreneurship Council, and others. In addition, the Credit Unions of North America and the World Council of Credit Unions have also called for repealing FATCA.

We are confident that legislative progress is being made and that FATCA will be repealed in the near future. We are writing to you now because of our disappointment that no positive action has yet been taken by the other part of the apparatus of government, in the Executive Branch. This includes the Department of the Treasury.

Our concerns in this area relate mainly to the so-called "intergovernmental agreements" (IGAs). The IGAs are a product of the Treasury Department's realization soon after FATCA's enactment that it was unenforceable in light of other countries' privacy laws and that the only way to implement this ill-advised and badly crafted mandate on hundreds of thousands of non-U.S. firms – over which American law has no jurisdiction – would be to induce foreign governments to enforce FATCA against their own citizens and institutions. Worse, as an incentive for foreign governments to sign the IGAs, the Geithner and Lew Treasury Department promised, in the name of the United States, to provide "reciprocal" information from U.S. institutions – a promise which, if kept, would impose immense FATCA-like compliance costs on American domestic financial firms.

Neither such reporting nor the IGAs themselves are authorized by FATCA or any other statute. The IGAs are not submitted as treaties to the U.S. Senate for that body's advice and consent, though the non-U.S. party is required to ratify the IGA under "its necessary internal procedures for entry into force." Imposing such one-sided agreements on America's trading partners under threat of sanctions amounts to a gross violation of international comity and the very concept of national sovereignty. No wonder the Organisation for Economic Co-operation and Development, which for years has sought to extinguish personal financial privacy and create a worldwide financial data fishbowl, has praised the IGAs as a "catalyst" to that end.

It should be clear from the foregoing that the IGAs are a textbook example of the prior administration's disdain for the rule of law in favor of Executive overreach. As former House Speaker John Boehner put it in another context, President Barack Obama demonstrated an unprecedented circumvention of Congressional authority "through executive action, changing and creating his own laws, and excusing himself from enforcing statutes he is sworn to uphold – at times even boasting about his willingness to do it, as if daring the American people to stop him." This characterization fits the IGAs to a T.

Secretary Mnuchin, the IGAs are purely inventions of the Treasury Department under your two immediate predecessors and can be revoked by you under the same authority. We are aware of at least two Congressional letters sent to you taking issue with the IGAs and urging specific steps by your Department to nullify the IGAs and alleviate their harmful impact. One letter, from Senator Paul and Congressman Meadows, was sent on April 3, 2017, and was also addressed to OMB Director Mick Mulvaney. The other, from Congressman Bill Posey, a member of the Financial Services Committee, was sent on September 29.

Despite these urgings, nothing has been done to reverse your predecessors' highhanded and legally dubious actions related to FATCA. Quite to the contrary, under the Trump Administration the Department has pressed ahead with signing additional IGAs. For example, an IGA was signed with Ukraine in February of this year – after President Trump took office – and with Kazakhstan in September. Making "progress" towards a FATCA

agreement with Singapore (a euphemism for pressuring that country) was part of President Trump's briefing points for Prime Minister Lee Hsien Loong's White House visit in October.

To put it bluntly, after the passage of a full year since Election Day 2016, by all indications the Obama Administration remains firmly in power as far as FATCA and the IGAs are concerned. While from outside the Treasury Department we are not in a position to tell which individuals are responsible for this state of affairs, we suggest with all due respect that it is your responsibility to inform the career officials who work for you than an election took place last year and to direct them to cease their efforts to carry out your predecessors' legally deficient directives with respect to FATCA. At a minimum this should include (from the April 3 letter to you from Senator Paul and Representative Meadows) your taking action to –

> "Instruct the Treasury Department's Office of International Affairs and other elements of the Department that may be involved to cease all efforts to negotiate, sign, and implement IGAs. Continued signings of new IGAs – most recently with Ukraine in February 2017 – send a false signal that the new administration is committed to this destructive law as matter of policy.
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> "Announce that the IGAs are under legal review of their authority and that if they are found to be legally infirm – as I [sic] believe they will be – they may be declared invalid *ab initio* with immediate effect or terminated upon expiry of the one-year's notice specified.
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> "Under the broad authority FATCA grants the Treasury Secretary, deem all impacted foreign institutions compliant on a temporary basis pending outcome of the legal review of the IGAs. The IRS should also be instructed to suspend enforcement of provisions impacting individual taxpayers; and, on an urgent basis to help decrease the spiking increasing [sic] in U.S. citizenship renunciations, suspend imposition of penalties for FATCA filing errors by individuals."

We thank you for your prompt attention to this matter and your anticipated implementation of the measures above.

We now turn our attention to a distinct but related topic. The same passage in the Republican Platform pertaining to FATCA also calls for "a change to residency-based taxation for U.S. citizens overseas." As is not necessary to detail here, the United States is the only major country that taxes its citizens worldwide on the basis of citizenship, not residence. This creates a host of problems and inequities for the up to ten million Americans resident abroad. While adoption of a residency-based taxation (RBT) system is not a specific task of our Campaign, we strongly endorse the concept and hope it will be enacted as part of tax reform legislation pending on Capitol Hill.

As far as we are aware, RBT is not yet included in either the House or Senate tax bill. We also note that there are several approaches as to how RBT could be adopted. However, we draw your attention to the fact that suggestions have been made that adoption of RBT – were it to occur – would eliminate the need for repealing FATCA.

In our opinion, nothing could be further from the truth. While adoption of RBT could in some minor way assuage the administrative pain inflicted on Americans abroad, the fundamental flaws of FATCA would remain. As far as FATCA goes, RBT's positive impact would be comparable to an aspirin's on cancer. (This is *not* meant to minimize RBT's benefits on matters unrelated to FATCA.)

Even under an RBT system, the larger toxic features of FATCA would remain. Keep in mind that FATCA is purely a financial reporting mandate that has no direct relationship to taxes or to what assets get taxed. FATCA

demands data on assets *whether they are subject to taxation or not.* In principle, FATCA and the IGAs could stay in place just as they are even if RBT is adopted. At best, the entire structure of FATCA's indiscriminate violation of personal privacy would remain unaffected except, in principle, applied only to U.S. residents as opposed to all citizens. The IGAs would presumably stay in place as well, with their ongoing damage to the principle of state sovereignty. The massive compliance costs imposed on financial institutions globally would remain, as would the gravy train for the relevant vendors.

Perhaps worst of all, by enacting RBT but leaving FATCA on the books, the Trump Administration would be wrongly declaring the FATCA problem solved. This would allow the dead hand of the past administration to reach into the future without limit: more IGAs, perhaps in due course the imposition of reciprocity on domestic American financial firms, and in the foreseeable future a global FATCA – or "GATCA." This is the antithesis of what the GOP Platform promised.

The media carry numerous accounts of how the Trump Administration's policies are being undermined by career bureaucrats and, in some cases, even holdovers from the Obama era. To the extent that that is the case at the Treasury Department and the root of the concerns we have expressed in this letter, we ask that you take prompt and firm action to rectify matters. We are already almost a year into what was supposed to be a sharp break from the failed policies of the past with as yet no Executive progress on FATCA. It's well past time that the choice American voters made last year became a reality with respect to this critical issue.

Thanking you in advance for your attention and consideration, we remain –

Sincerely yours,

Nigel J. Green Jim Jatras

CC:

The Honorable Rand Paul
The Honorable Mark Meadows
The Honorable Bill Posey
The Honorable Mick Mulvaney
Mr. Grover Norquist, Americans for Tax Reform
Mr. Pete Sepp, National Taxpayers Union
Mr. Brian Garst, Center for Freedom and Prosperity

Plus BCCs