

# G . A . T . C . A

A Practical Guide to Global  
Anti-Tax Evasion Frameworks



ROSS K. MCGILL  
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# Global Financial Markets

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Ross K. McGill · Christopher A. Haye · Stuart Lipo

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Evasion Frameworks

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# Foreword

Tax evasion in the twenty first century is a highly sophisticated and a global activity, yet its history dates back to William III in the sixteenth century and some say, gave us the term ‘daylight robbery’.

The game today is played out across international borders and, for the most part, it uses the infrastructural weaknesses in the international financial system to move and hide financial assets to minimise the degree to which those assets can be held liable for tax.

An important part is also played by the sheer complexity of regulation, domestic law and collaborative frameworks that underpin the rules by which financial institutions in over a hundred countries must conduct the due diligence and reporting necessary to support objectives of counter-evasion measures.

Because much of this body of statute, regulation and framework is written so badly, evasion is made easier by it. Indeed, in the US in 2014, Senator Levin published an article<sup>1</sup> on how to avoid the US’s own anti-evasion regulation—FATCA, which focused in the main on how investors could exploit the loopholes in the regulation.

However, the due diligence and reporting associated with FATCA creates major problems for those tasked with implementing policy and procedure in financial institutions and in corporate board rooms.

To our industry’s detriment, some parts of the financial system have been complicit to a greater or lesser extent by providing access to, or even actively promoting investment structures, vehicles and methodologies that permit or encourage such evasion activity.

Governments have not historically had the tools to be able to detect tax evasion, let alone prevent it. Tax havens of course traditionally structur-

ally encourage it and those responsible for evading tax, have leveraged their home country's inability to search for their assets offshore. What one person calls tax arbitrage, another calls tax evasion, while others blur the landscape still further with terms such as tax avoidance and aggressive tax avoidance.

In all these cases, legal structures at the international level have been very fragmented and cooperation between countries has been relatively ineffective. However, one thread connects all these issues, and that is that the assets concerned are all in the global financial system.

The difficulty has always been that a home country would need to have evidence upon which to request tax information from another country and, even if that information could be obtained from a financial institution in that country, data privacy laws would often prevent the information getting to where it could be used effectively.

Faced with both social and economic pressures, governments have more recently engaged on a major evolution of this awkward principle of exchange of [tax] information towards an automatic exchange where the burden of collecting the information to be shared between governments, falls to the financial institutions within each country.

However, not all governments have implemented these structures consistently and even where consistency is possible, the frameworks leave enough room for variations. All of this causes major problems for financial institutions trying to comply whilst reducing risk and cost through operational efficiencies.

This book is intended to try to translate the often impenetrable language of tax into a more simple explanation of the structures underlying this automatic exchange of information and the practical issues it raises for financial institutions.

The variability within these frameworks and the understandable penchant for governments to name these frameworks, laws and regulations differently, has led to one term being used as a catch-all phrase—GATCA, meaning all those structures designed to encompass Global Account Tax Compliance Activities.

The authors are recognised subject matter experts in their field and have a special and well respected ability to translate the complexities of these regulations into simpler and more practical explanations that actually help financial firms not only to cope with regulatory compliance but also control operational costs and risk.

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## Note

1. <http://blogs.angloinfo.com/us-tax/2014/03/17/how-to-avoid-fatca-tips-from-us-senate-subcommittee/>.



# Preface

This book is written for those affected by the operational and compliance impacts of regulatory frameworks whose purpose is the detection, deterrence and reporting of potential cross border tax evasion.

While most governments have been, for the most part, eager to enter into arrangements that facilitate getting their hands on information about their resident's foreign held assets, the burden of collecting all this information has fallen to the financial institutions of each jurisdiction. The existing frameworks of Know Your Customer (KYC) and Anti Money Laundering (AML) do not completely meet the requirements of GATCA frameworks. Equally, where KYC and AML can be relatively easily compartmentalised within financial institutions, GATCA frameworks create new touch points and new dependencies in and between many different functions in a typical bank, brokerage or other financial institution.

So, this book is written, not just for compliance or legal staff but, as we will amply demonstrate, it is of importance also for sales, relationship management, operations, IT, marketing, on-boarding, risk management and of course the board.

The reason this book has been written is very simple. The regulatory frameworks that comprise GATCA are extremely complex. Most firms do not have sufficient resources to understand those complexities, let alone operationalise any of them in an intelligent way. The object of the book is not to provide a detailed analysis of these regulations. There are others who can do a better job and who focus on the principles and tax theory. While we will give the reader enough background and context to understand each framework, we choose to focus more keenly on the practical implications.

In other words, our job is to understand the theory and complexities and translate them into something that the reader might find useful in their day to day work.

Typically this means that we will be describing the kinds of challenges that we see every day in the international financial services markets. We see what happens when complex regulations hit small or medium sized financial institutions with little or no knowledge, low levels of exposure to the given markets and cultural or linguistic differences - they make compliance problematic at best and totally lacking at worst.

We have said on a number of occasions—regulators don't write regulations based on the size of the firms they regulate, their capacity or their exposure. They are usually written as one size fits all with little or no recognition given to medium and small financial firms. So, the problem really is that one size just does not fit all.

Yateley, UK

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# Contents

## **Part I Background and Principles**

<b>1</b>	<b>Introduction</b>	<b>3</b>
<b>2</b>	<b>Moral Outrage and Righteous Indignation</b>	<b>7</b>
<b>3</b>	<b>Background and Principles</b>	<b>15</b>

## **Part II US Foreign Account Tax Compliance Act (FATCA)**

<b>4</b>	<b>Introduction to FATCA</b>	<b>29</b>
<b>5</b>	<b>Principles of FATCA</b>	<b>37</b>
<b>6</b>	<b>Identification and Documentation</b>	<b>53</b>
<b>7</b>	<b>Simplifying FATCA</b>	<b>65</b>
<b>8</b>	<b>FATCA Withholding</b>	<b>83</b>
<b>9</b>	<b>Reporting</b>	<b>95</b>

## **Part III OECD Automatic Exchange of Information (AEOI)**

<b>xiv</b>	<b>Contents</b>	
<b>10</b>	<b>Introduction to AEOI &amp; CRS</b>	<b>103</b>
<b>11</b>	<b>Principles of AEOI-CRS</b>	<b>107</b>
<b>12</b>	<b>The Common Reporting Standard</b>	<b>127</b>
<b>13</b>	<b>Automatic Exchange of Information</b>	<b>141</b>
<b>14</b>	<b>Operational Issues of AEOI</b>	<b>149</b>
	<b>Part IV OECD Base Erosion and Profit Shifting</b>	
<b>15</b>	<b>Introduction to BEPS</b>	<b>159</b>
<b>16</b>	<b>BEPS Actions Part I</b>	<b>171</b>
<b>17</b>	<b>BEPS Actions Part II</b>	<b>189</b>
<b>18</b>	<b>Impacts of BEPS</b>	<b>209</b>
	<b>Part V The Global Overview</b>	
<b>19</b>	<b>Introduction</b>	<b>223</b>
<b>20</b>	<b>Cyber Risk</b>	<b>225</b>
<b>21</b>	<b>Challenges of GATCA</b>	<b>235</b>
<b>22</b>	<b>Conclusions</b>	<b>251</b>
	<b>Appendix A: List of Abbreviations and Acronyms</b>	<b>259</b>
	<b>Appendix B: US Model 1 Reciprocal IGA Template</b>	<b>263</b>
	<b>Index</b>	<b>287</b>

# Abbreviations and Acronyms

A-NFFE	Active NFFE
AEoI	Automatic Exchange of Information
AML	Anti Money Laundering
APA	Advanced Pricing Arrangements
AUP	Agreed Upon Procedure
BEPS	Base Erosion and Profit Shifting
BIAC	Business Industry Advisory Committee
BO	Beneficial Owner
C-DCFFI	Certified Deemed Compliant FFI
CbCR	Country by Country Reporting
CFA	Committee on Fiscal Affairs
CFC	Controlled Foreign Company
CIV	Collective Investment Vehicle
CRS	Common Reporting Standard
CSD	Central Securities Depository
DC-FFI	Deemed Compliant FFI
EAG	Expanded Affiliate Group
EEA	European Economic Area
EFTPS	US Electronic Federal Tax Payment System
EIN	Employer Identification Number
EoI	Exchange of Information
EU	European Union
FATCA	Foreign Account Tax Compliance Act ( <i>misnomer</i> )
FATF	Financial Action Task Force
FDAP	Fixed, Determinable, Annual or Periodic income
FFI	Foreign Financial Institution
FHTP	Forum on Harmful Tax Practices

## **xvi**      **Abbreviations and Acronyms**

FI	Financial Institution
FIRE	Filing Information Returns Electronically
FISCO	Fiscal Compliance Experts Group
FWS	Full Withholding Statement
G20	Group of governments and central banks from 20 major economies
GATCA	Global Account Tax Compliance Activities
GDPR	General Data Protection Regulation
GIIN	Global Intermediary Identification Number
HCTA	Host Country Tax Authority
HIRE	Hiring Incentives to Restore Employment Act (2010)
HMA	Hybrid Mismatch Arrangement
ICG	Informal Consultative Group
IDES	International Data Exchange System
IGA	Inter Government Agreement
IP	Implementation Protocol
IPR	Interim Periodic Review
IRC	US Internal Revenue Code
IRS	US Internal Revenue Service
ISD	Investor Self Declaration
ITIN	Individual Taxpayer Identification Number
KYC	Know Your Customer
LOB	Limitation of Benefits
MAP	Mutual Agreement Procedure
MCAA	Model Competent Authority Agreement
MLI	Multilateral Instrument
MTC	Model Tax Convention
NP-FFI	Non-Participating FFI
NFE	Non Financial Entity
NFFE	Non Financial Foreign Entity
NGO	Non Governmental Organisation
NQI	Non Qualified Intermediary
NRA	Non-Resident Alien
NWFP	Non Withholding Foreign Partnership
NWQI	Non Withholding Qualified Intermediary
OECD	Organisation for Economic Cooperation and Development
OTC	Over the Counter
P-NFFE	Passive NFFE
PAI	Private Arrangement Intermediary
PE	Permanent Establishment
PFFI	Participating FFI
POA	Power of Attorney
PPT	Principal Purpose Test

PR	Periodic Review
QI-EIN	Qualified Intermediary EIN
QDD	Qualified Derivatives Dealer
QI	Qualified Intermediary
QSL	Qualified Securities Lender
R-DCFFI	Registered Deemed Compliant FFI
RA	Repurchase Agreement
REIT	Real Estate Investment Trust
RO	Responsible Officer
SaaS	Software as a Service
SSN	Social Security Number
SSNA	Social Security Numbering Agency
SWIFT	Society for Worldwide Interbank Financial Telecommunications
T-BAG	Tax Barriers Business Advisory Group
TCC	Transmitter Control Code
TIEA	Tax Information Exchange Agreement
TIN	Tax Identification Number
TP	Transfer Pricing
TRACE	Tax Relief and Compliance Enhancement
USWA	United States Withholding Agent
WFP	Withholding Foreign Partnership
WFT	Withholding Foreign Trust
WQI	Withholding Qualified Intermediary
WRPS	Withholding Rate Pool Statement
1042	US Tax Return for non-US Financial Institutions
1042-S	US Information Reports for non-US Recipients



# List of Figures

Fig. 3.1	Legal and operational basis of FATCA	20
Fig. 3.2	Legal and operational basis of AEOI	22
Fig. 5.1	Legal structure and basis of FATCA	38
Fig. 5.2	Account structure holder under FATCA	45
Fig. 6.1	Account structure holder under FATCA	54
Fig. 6.2	Data extraction methodology for FATCA reporting	57
Fig. 8.1	Pass-Thru payments withholding methodology	90
Fig. 11.1	Legal and operational basis of AEOI	108
Fig. 11.2	Information flow in CRS/AEOI	114
Fig. 15.1	List of BEPS associates	169
Fig. 17.1	Simple Transfer Pricing in BEPS	190
Fig. 20.1	Cyber risk profile of AEOI	226

# Part I

## Background and Principles

# 1

## Introduction

Tax evasion has been with us as long as taxes themselves. Idiomatically, death and taxes are renowned for being the only things that are certain in our lives.<sup>1</sup> It's hardly surprising, therefore, that we seem singularly engaged in efforts to evade both.

In England in 1696, King William III, short of cash, introduced the Window Tax<sup>2,3</sup> that led to many home owners bricking up as many windows as they could, in order not to have to pay it. In many cases, the social context to tax evasion has been very different from that which we see today. Tax evasion was often seen as the only way for people to protect themselves from the unfair treatment of their governments or, more commonly, their monarchs. In fact, the genesis of the phrase 'daylight robbery' to represent society being unfairly punished through the tax system, is often ascribed to the Window Tax of 1696.<sup>4</sup>

Today, the meaning of tax evasion has changed and is now more commonly associated with rich or super rich individuals hiding assets offshore, and corporations deliberately manipulating their affairs to reduce their liability to tax.

The line between evasion and avoidance has also been blurred in society's consciousness. In simplified terms, tax evasion<sup>5</sup> means knowing a rule or law that would lead to a tax liability and intentionally breaking it with malice of forethought. This would typically involve other illegal acts such as fraud and would be subject to criminal prosecution and penalties. Tax avoidance<sup>6</sup> on the other hand means finding a loophole or way around the rule so that the rule does not apply in the first place, or the effect is modified to reduce

or eliminate the applicability of the tax. This latter implies that there is no illegal act being committed.

The existence of loopholes in tax laws through omission or, more commonly, ineffective drafting, grows in proportion to their complexity. The result of complex tax laws, is complex regulation of tax laws, to the extent that even regulations designed to combat evasion are, of necessity, also very complex—ergo, they also have loopholes. As Chief Engineer Scott says in *Star Trek III, The Search for Spock* ‘the more they overthink the plumbing, the easier it is to stop up the drain’.<sup>7</sup>

Governments of all persuasions have, in more recent times, also been very adept on a social level at shifting the negative image that affected William III and the Parliament of the day, away from themselves as the ‘greedy bad guys’ and onto the very rich. In simpler times this would be seen as rather Robin Hood-esque, although it could be argued that it actually appears to be closer to ‘take from the rich and...keep it to offset trade deficits and budget overspends’.

The increasing gulf between rich and poor in all parts of the world has only served to exacerbate this and make it easier to sustain, despite the fact that most of the ‘poor’ pay no tax at all and ‘the rich’ shoulder most of the burden in absolute cash terms.<sup>8</sup> In this way, governments are keen to present themselves as independent intermediaries or the stewards of our money, rather than collectors and spenders.

Whatever the history, or whether you believe that the principles or focus of regulations are well applied or not, the scale of tax evasion is agreed, by all, to be significant. The Tax Justice Network, in its 2012 report, indicated that the value of hidden assets globally, as at 2010, was between \$21–\$32 trillion.<sup>9</sup> That would, even on the most conservative calculations, mean a significant loss in tax revenues.

However, in the period 2008 to date, we have never seen such a concerted effort in and between governments to create a globalised framework to detect, prevent and deter such behaviour.

Traditionally, governments have very limited opportunities to detect evasion. After all, the simplest way to evade a country’s taxation regime for investors is of course to ensure the assets on which tax can be assessed, are not held domestically. Equally, for corporations, the imperative is usually to optimise profits and returns for shareholders that naturally drives attention to all levels of the P&L, including that of taxation.

For corporations, tax evasion can take many forms, but given the legal issues surrounding this, they have historically been more apt to engage in tax avoidance in this community. Corporations can of course be investors them-

selves, particularly if they maintain large treasury balances. However, their greater concern is with the base taxation applicable to their primary trading activities. This has led to some very notable cases in which corporations have manipulated their tax base, perfectly legally, to a different jurisdiction in order to benefit from a lower tax rate on the principal.

The effect of this relocation, usually also associated with some changes to ownership and trading structures, is to reduce or *erode* the base level of profit on which tax is calculated in the home country (or where most of the substantial economic activity takes place). We should remember that for such companies there are several areas of the tax base that remain unaffected. These companies are still paying VAT, still employing people and still paying employers national insurance and such. So, sweeping generalisations based on changes to the tax on profits should be avoided.

This ‘[tax] base erosion’ through ‘profit shifting [by relocation]’ has led to the OECD’s BEPS framework that is one of the subjects of this book.

Investing offshore to hide assets and manipulating the tax base are the most basic tactics that have led governments to rest their attention on the single common denominator—the international financial services community.

While disparate efforts have been common, it is only really since 2010 that major inertia has built up in the international community, driven to a large extent by the G20 to forge strong detection frameworks. It is these frameworks that we seek to discuss in this book. They are:

- The US FATCA regulations
- The OECD Automatic Exchange of Information framework and
- The OECD Base Erosion and Profit Shifting framework

Together these frameworks, commonly referred to under the acronym ‘GATCA’ (Global Account Tax Compliance Activities), represent a step change, not only in the level of detail and technological focus associated with detection and reporting, but also a substantive step by the global community to act in concert.

Prior regulatory efforts had floundered on general principles of data protection and a manual methodology for exchange. In other words, tax information could be exchanged between governments but only on specific request and only where the requesting government could demonstrate cause i.e. no fishing trips as the Americans would say. The changes we are seeing have substance over this older model because they engage in ‘*automatic* exchange’ and because the financial services industry is the ubiquitous source for the data and has the technology budget<sup>10</sup> to deliver it.

This book however, is not about history, it's about the present and the future.

We will not be dwelling, in this book, on the reasons, nor the ethics involved in tax evasion. This book will be focusing instead on the challenges, practical issues that are raised by these frameworks for the corporations and financial firms that are generally seen as the information gathering layer in these frameworks.

## Notes

1. [https://en.wikipedia.org/wiki/Death\\_and\\_taxes\\_\(idiom\)](https://en.wikipedia.org/wiki/Death_and_taxes_(idiom)).
2. [https://en.wikipedia.org/wiki/Window\\_tax](https://en.wikipedia.org/wiki/Window_tax).
3. <http://www.lincolnst.edu/publications/articles/window-tax>.
4. <http://www.phrases.org.uk/meanings/daylight-robbery.html>.
5. <http://www.investopedia.com/terms/t/taxevasion.asp>.
6. [http://www.investopedia.com/terms/t/tax\\_asp](http://www.investopedia.com/terms/t/tax_asp).
7. <http://quotegeek.com/quotes-from-movies/star-trek-iii-the-search-for/6800/>.
8. <http://www.telegraph.co.uk/news/2016/04/26/nearly-half-of-britons-pay-no-income-tax-as-burden-on-rich-incre/>.
9. [https://www.taxjustice.net/cms/upload/pdf/Price\\_of\\_Offshore\\_Revisited\\_120722.pdf](https://www.taxjustice.net/cms/upload/pdf/Price_of_Offshore_Revisited_120722.pdf).
10. <http://www.idc.com/getdoc.jsp?containerId=prUS41216616>.

# 2

## Moral Outrage and Righteous Indignation

### Context

From 2012 onwards we have started to see a strange phenomenon. A case of moral outrage and righteous indignation focused on the banking industry. Unfortunately, there was some fire where the smoke was. The case of Barclays Bank, and others, ‘fixing’ LIBOR, JPMorgan, HSBC and others, were mired at one point or another in similar cases where the ‘public’ were presented with all the bad bits about the banking industry at the same time. Banker’s bonuses were also an easy target and the calls for more regulation of the banking industry were rife, as well as calls to split the larger banks into retail (low risk) and investment (high risk).

This focus on banking was only the latest in a series of high profile cases where the inner workings of an industry were opened up to scrutiny. We had previously seen the UK Parliament engulfed in an expenses scandal that saw the same reaction. In that case, members of parliament had (and have) a system of expenses since they need to be able to service the needs of their constituents locally, as well as be present in Parliament in London from time to time. How those expenses are claimed and what can be claimed were laid out in a set of rules. When it became clear that some members of parliament were ‘abusing’ the system, the resulting furore was aimed at them, even though, in many cases, a close scrutiny revealed that they were within the rules. It is interesting that no-one criticised those who made the rules for failing to devise a better system. It was the moral outrage that people could be ‘self-centred’ that drove Parliament to change the rules (relatively quietly) while pillorying those who had transgressed.

In more recent times we have continued to see similar transgressions that would seem to indicate that it almost doesn't matter what regulation you put in place, someone will find a way around it. The Panama Papers leaks associated with Mossack Fonseca again highlighted that, despite years of previous outrage, those shouting the loudest were, at the same time, often breaking the very rules they were criticising.

## FATCA

The object of FATCA is to prevent, deter, detect and correct tax evasion by Americans.

America has a voluntary tax system in which tax payers are expected to disclose their income both from domestic and foreign sources. At the same time, the US government claims the right to tax the global income of its citizens.

The US has some of the highest taxes on the wealthy in the western world. A wealthy American can expect to pay a marginal tax rate of around 40–50%. It is therefore natural to expect that some will find ways to hide their income and the cash reserves that generate that income.

## Avoidance or Evasion?

Tax evasion is different from tax avoidance. Tax avoidance is the use of legal means to mitigate the amount of tax to be paid. This is often achieved by the use of specialist advisers who know and understand the loopholes and strategies which exist in any complex tax system (and all tax systems are complex). Tax evasion on the other hand is the deliberate breaking of the law to achieve the same objective.

No system is, of course, static. What, today, is tax avoidance, tomorrow may be deemed tax evasion, and so the tax system is in a state of constant flux with regulators trying to catch up with those in the markets trying to find innovative ways to avoid paying tax, or worse, evade tax.

In 2012 we also saw a moral dimension enter this space. The sub-prime crisis and financial crash of 2008, the following global credit crunch and subsequent double dip recession, the results of which are still with us today, were caused by two activities. First, financial institutions, led from the US, lending without adequate controls or oversight of whether those being lent to were capable of re-paying their debt. Second, the public, again led from



the US, accepted this 'easy money' in the knowledge that even small changes in the market would make it difficult or impossible to repay the debt that they had incurred. In other words, 'it takes two to tango'. There is usually an uneasy truce between the financial firms on the one side, who maintain strong lobbying presence in Washington, DC to argue for rules that allow them optimal freedom to pursue their business and profit led interests, and 'the public'. The public have their views too, but in many cases that view is seen through the lens of the media.

In 2012, we saw the triumvirate of public, media and financial services explode, when some of the activities of some of the banks and brokerage houses were found to be 'risky' if not illegal. No-one complains when someone takes a risk and the result is a win. But, equally, no-one seems to feel any sense of culpability in the current financial state of the world, quite the opposite. It was *all*, the fault of the financial services industry. The media certainly fed this monster and the politicians reacted as one might have predicted. Moral outrage. The outrage had to be 'moral' because otherwise, they would have had to recognise that (i) there were always two halves to the culpability and (ii) they were the ones who were (and are) responsible for the legal and regulatory framework that should act as the guardian.

Let me put it another way. If you borrow money and your lender does not do sufficient due diligence, then clearly they are culpable. But equally, and this is the part that people conveniently over-look, if you agree to borrow the money, there is both a legal and moral obligation on you to make sure that you understand the terms of the arrangement (you're the one signing the contract) and that you can repay the debt. If the debt goes toxic—there were two sides that agreed the terms. Let's not forget that we're not really dealing with complex financial instruments here, as some have led the market to believe. The sub-prime crisis that triggered all this, was about normal Americans signing up to mortgage deals that were too good to be true, and which they had good reason to know that they may have problems repaying. Yes, the financial firms were also culpable. The reason the products were too good to be true, was a lack of due diligence on the borrower's ability to service the debt, and the underlying principle that they were packaging this debt and risk up and laying it off in complex ways around the world, in order to be able to offer the easy money in the first place.

So, a most dangerous situation began to arise in 2010 and 2011. Even though there was culpability on both sides to create the global financial crash and continuing recession, the public, fuelled by the media, found the blame game way too easy, targeting the banks and brokers. Since the regulatory and legal frameworks could not be changed overnight by normal

means, capitalism had a new enemy—moral outrage. There are two problems with moral outrage. First, in our modern society, we use laws (and our appointed agents the politicians) to translate the ‘majority’ view of morality into a set of laws. The trick is to minimise the set of laws in order to maximise the degree of freedom that people have within their society whilst keeping them safe, well fed and able to help the society prosper. The question is how well ‘people’ determine what’s ‘moral’. When you’re facing a mountain of debt (that you helped create), your job is in jeopardy and the world seems to be falling apart around you—is probably not the right time to be judging what’s moral. Secondly, outrage. Well the problem here is simply that fire feeds fire. The media have played an important role in fuelling the ‘outrage’ part of this equation and the public have played into this at every step. It’s usually politicians who are blamed for diverting attention from one thing in order to hide something going on elsewhere. In this case, the public had its attention expertly diverted by the media, who pointed the finger of blame at the financial services industry as the sole wrong-doer. The politicians, unable to use the framework of law and regulation to show how well they had it ‘in hand’ raised the hand of righteous indignation in order to be clearly seen on the same side as their electorate. Judgements about morality as the foundation for changes in law or regulation, are hardly best made when your emotional state is ‘outrage’.

So, yes, the world was in a deep and continuing financial crisis. Yes, the financial services industry has a level of culpability. But the public share part of that blame. They put the politicians where they are. They accepted the easy money when it was there—they created the conditions in which the financial services industry acted. And the public believed the media when they created the fire of moral outrage.

This point is nicely made by the problem that UK comedian Jimmy Carr had in 2012. Mr Carr had used a special scheme, provided by an adviser, through which he ended up paying very little tax. This is tax avoidance. When this scheme came to light, it was with stunning speed that the then prime minister, David Cameron, announced to the nation that Mr Carr’s activity, while technically legal, was morally reprehensible. This caused Mr Carr to apologise publicly and change his financial affairs—even though he had done nothing wrong. This highlights the dangers inherent in a moral attitude to tax. Mr Carr’s only actual tripwire was that he had been specifically making a point of humorous outrage in his comedy sketches about how banks could get away with paying very little tax, by using, as it happens, the same sort of approach that he himself had already taken. True, that’s an embarrassing situation, but neither the bank nor Mr Carr were

doing anything illegal. If anyone was to blame, it should be the regulator. They made the rules, and they didn't write them clearly enough to preclude what someone, at some future point, would view as wrong. Equally, Mr Cameron is not in charge of the morals of British society and had no right, in my view, to abuse his position as Prime Minister, in order to make a moral comment about an entirely legal activity. The reason is that, while accepting that the activity was legal, he created a reputational issue for Mr Carr because no-one, conveniently, drew the line between tax avoidance and tax evasion. The public, again fed by media oversimplification, essentially thought Mr Carr was evading tax, when he was actually just doing what he had every right to do under the rules of the time.

The people who usually 'bash' the wealthy are often those, who, were they put into the same position, would almost certainly do exactly the same thing. Morality is like Einstein's theory of relativity—it depends on the viewpoint of the observer.

I also want to take this opportunity, since it is relevant to the argument over FATCA, to make three more points.

My first is that whatever gets said in moral outrage about the wealthy not paying their fair share, all western governments know that most of the cash that pays for their country to work—comes disproportionately from the wealthy. Behind closed doors, the biggest angst in the tax system is trying to figure out where the tax line is, above which, the wealthy will start to move all their money elsewhere. It's a balancing act and sometimes governments get it wrong, but they do spend a lot of time trying to get it right. Overall, for example, both in the UK and the US, over 70% of the cash that government spends, outside of gilts, comes from taxes on the wealthy. Time spent by government fiddling with marginal tax rates for those at the bottom of the wealth pyramid is diversionary behaviour and makes very little real difference. There is also always a missing factor in this 'fair share' concept. It's the rich who create many of the jobs that those throwing the rocks have. The other major employer of course is government itself, via the public sector, and most of their money comes from...the rich.

In this climate, it's probably not surprising that wealthy Americans, in fact wealthy people everywhere, end up in some balance of tax avoidance. But that fire is not fuelled by the media in the first instance. That fire is fuelled by the accounting firms who analyse the rules for loopholes and create the avoidance plans. I choose not to call them 'schemes' as that's too close to 'scams'.

The irony is that those in relevant positions can hardly say that they don't know what's going on, nor that they could not stop it much more simply

and effectively than with FATCA. The biggest ‘circuit’ in the industry is the one where the people in the regulatory sphere, leave that public service for a while and usually end up in highly paid jobs at the accounting firms. Those same people, usually after a few years, end up cycling back into government service. The knowledge of what’s going on has always been there.

So, my biggest challenge in looking at the context of FATCA is that the world which created FATCA, and in which it operates, is founded on moral outrage, a failure by the public to recognise or take their share of responsibility. The knowledge that the wealthy, the jobs they create and the taxes they do pay are a critical part of the equation and finally that, apart from the public, everyone else knows what is actually going on and diverts the public attention at relevant and opportune times. The question of today’s society is not what’s fair, nor what’s moral. These are things, the perception of which can be manipulated. It’s who decides what’s relevant and when is opportune.

The framework in which this all operates, as we know, is law and regulation. The law in this case is the HIRE Act and the regulation, what we’ve come to know as FATCA. Over the last twenty years, the world has undoubtedly changed. From a regulatory perspective, what the UK called ‘light touch’ regulation is actually what is more commonly known as ‘principles based’ regulation, as opposed to rules based regulation.

Both have their good and bad points and, with FATCA, we are headed firmly down the route of rules based regulation.

We all strive for certainty in an uncertain world. That imperative leads to the false proposition that with rules, you can contain, define and completely control a system. That, by having rules, you somehow create certainty out of chaos. Of course, any physics undergraduate will tell you that this is a frivolous position. You cannot measure or control a system without affecting the system in some way. Equally, the more complex the system, the more unlikely it is that your rules will be sufficient to encompass all possible permutations of how those rules might be interpreted, applied or avoided.

The converse in human society is to have principles e.g. do no wrong; do what’s fair; do what’s right. That’s an equally frivolous position because, as I pointed out, who defines fair, wrong and right? Those value principles can and do change over time.

So, to regulate financial services, with a view to addressing tax evasion, a rules based system would have to be enormously complex—much more complex, by orders of magnitude, than the current tax system. Equally, a principles based system would need to have everyone outside and inside the system agreeing on what is right and fair etc. Neither system will ever

work without the other. Yet the public yearn, and the politicians and media hold out the view that it can somehow be achieved.

What does this have to do with FATCA? Well, FATCA is a reaction to my foregoing points and to the world in which we currently live. There are many outside the US that believe that FATCA is both disproportionate to its intent and politically the worst example of extra-territoriality seen in recent times.

Will FATCA achieve what it set out to achieve? Probably not; at least not in the way originally intended.

One of the biggest myths about FATCA is that it's a withholding tax system. It's not, it's a reporting system with penalties that just happen to be applied via a tax system. However, its convergence to IRC Chapter 3, the QI rules—which is a tax system, has some interesting consequences. It starts to create a system which has dual objectives—tax income and evasion deterrence. These have heretofore been separate issues. Moral outrage is bringing them together and I'm not sure that's a good thing.

The foregoing has addressed mainly the evasion pursued by individuals via the financial services system and the extension of FATCA into the OECD's AEOI and CRS is a matter of further discussion later in this book, as it triggers more of an operational and cost effect than one of moral outrage. However, tax evasion also takes the form of corporate misbehaviour and interestingly there is much more considered outrage in this area. Companies such as Amazon, Starbucks and Apple have all come in for criticism and, in some cases, investigation, for their tax strategies. Again, for anyone placed into a similar position and with a remit to serve shareholders, some of these strategies are understandable and, for the most part are defined as avoidance and not evasion. In this context again we see the effect of concepts of fairness and ethics that, while they have no legal force, can create seismic shifts in corporate behaviour on the basis that brand values, reputation and thus revenues, can be damaged by what, in any other business would be deemed a back office administrative activity. Many of these cases are raised in the public awareness by the increasing impact of social media, and of larger numbers of people expressing their views immediately and on-line. Earlier in 2017 United Airlines became very painfully aware of the speed with which brand reputation can be damaged. Many of those mentioned already have seen similar campaigns to boycott companies because of their perceived bad tax practices. This is what has also led to the OECD Base Erosion and Profit Shifting framework (BEPS).

It is difficult not to have some sympathy with a company that employs many thousands of people (who all pay taxes from their wages and indirect

taxes such as VAT on purchases they make with them) at hundreds of retail outlets (that generate business rate taxes) and that in turn support a myriad of secondary support industries. The fact that legislatures write inadequate laws, and regulators write overly complex and porous regulation, brings no outrage. In such cases, the argument from governments, on behalf of the people, that corporation tax from these firms is the sole (or even major) contribution to tax revenues is simplistic at best and disingenuous at worst.