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# Is the United States Becoming the “New Switzerland”? : Why the United States’ Failure to Adopt the OECD’s Common Reporting Standard is Helping it Become a Tax Haven

Rachel E. Brinson

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# IS THE UNITED STATES BECOMING THE “NEW SWITZERLAND”? WHY THE UNITED STATES’ FAILURE TO ADOPT THE OECD’S COMMON REPORTING STANDARD IS HELPING IT BECOME A TAX HAVEN

## I. INTRODUCTION

The fight against tax evasion, and subsequently tax havens, has been an ongoing battle for at least a century.<sup>1</sup> In modern times, tax evasion costs the world’s economies billions of dollars annually,<sup>2</sup> and since the 2008 financial crisis, curbing tax evasion has become a political priority.<sup>3</sup> Efforts to police offshore tax evasion include bilateral treaties<sup>4</sup> and prosecution of suspect foreign financial institutions, notably by the United States.<sup>5</sup> Furthermore, international programs sponsored by the Organisation for Economic Co-operation and Development (“OECD”) seek to promote transnational financial transparency.<sup>6</sup>

The most recent and promising development in the war on tax evasion is the participation in and implementation of the Automatic Exchange of Information (“AEOI”) program by more than 100

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1. See Sébastien Guex, *The Origins of the Swiss Banking Secrecy Law and Its Repercussions for Swiss Federal Policy*, 74 BUS. HIST. REV. 237, 240–42 (2000) (describing the French and Belgian attempts to curb the flux of capital from their countries to the haven of Switzerland during the early 1900’s).

2. Niall McCarthy, *Tax Avoidance Costs the U.S. Nearly \$200 Billion Every Year*, FORBES (Mar. 23, 2017, 9:20 AM), <https://www.forbes.com/sites/niallmccarthy/2017/03/23/tax-avoidance-costs-the-u-s-nearly-200-billion-every-year-info-graphic/#64af0b272f0d>.

3. Niels Johannesen & Gabriel Zucman, *The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown*, 6 AM. ECON. J.: ECON. POL’Y 65, 66 (2014).

4. See *id.* (discussing the use of treaties as a major policy instrument in the fight against tax evasion).

5. See Press Release, U.S. Dep’t of Just. Office of Pub. Aff., United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations (Aug. 2013) (on file with author) (describing investigations by the United States of Swiss banks believed to be assisting United States clients in committing tax evasion).

6. See generally OECD, EXCHANGE OF INFORMATION, <http://www.oecd.org/tax/exchange-of-tax-information/> (last visited Feb. 8, 2019) (“Exchange of information is about achieving global tax co-operation through the implementation of international tax standards and other instruments to put an end to bank secrecy and tackle tax evasion.”).

“jurisdictions”<sup>7</sup> around the globe.<sup>8</sup> Of the more than 100 committed countries and territories participating in the AEOI, the most notable absentee is the United States.<sup>9</sup> The refusal of the United States to participate raises questions regarding the AEOI’s potential for success.<sup>10</sup> Global implementation is essential to accomplishing AEOI’s goal of eradicating tax evasion.<sup>11</sup> Without the support of the United States, it is difficult to gauge how successful the AEOI can hope to be and furthermore how important ending tax evasion worldwide is to the United States.<sup>12</sup>

This Note proceeds in five parts. Part II provides background information on the U.S. crackdown on offshore tax evasion and the international standards relating to tax transparency.<sup>13</sup> Part III<sup>14</sup> argues that the only way for the AEOI to be successful is through global, and thus U.S.,

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7. “Jurisdictions” is the term almost always used by the OECD to describe countries, territories, and dependencies committed to participation in its international programs. Jurisdictions is not a legal term of art in this context. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES, AEOI: STATUS OF COMMITMENTS, <http://www.oecd.org/tax/transparency/AEOI-commitments.pdf> (last visited Feb. 8, 2019) (identifying countries as well as territories and non-sovereign states as jurisdictions committed to the implementation of AEOI).

8. OECD, AUTOMATIC EXCHANGE PORTAL, MAJOR ENLARGEMENT OF THE GLOBAL NETWORK FOR THE AUTOMATIC EXCHANGE OF OFFSHORE ACCOUNT INFORMATION AS OVER 100 JURISDICTIONS GET READY FOR EXCHANGES (May 7, 2018), <http://www.oecd.org/tax/automatic-exchange/news/major-enlargement-of-the-global-network-for-the-automatic-exchange-of-offshore-account-information-as-over-100-jurisdictions-get-ready-for-exchanges.htm>.

9. *See* OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS, SECOND EDITION (Mar. 27, 2018), <http://www.oecd.org/tax/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-in-tax-matters-second-edition-9789264267992-en.htm> (showing the interactive map of participating jurisdictions in the AEOI and the non-commitment of the United States).

10. *See* OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES, AUTOMATIC EXCHANGE OF INFORMATION (2018), [hereinafter GLOBAL FORUM ON TRANSPARENCY], <http://www.oecd.org/tax/transparency/automaticexchangeofinformation.htm> (explaining that global implementation is essential to effectively tackle evasion and ensure that jurisdictions are on an even footing).

11. *Id.*; *see also* Martha O’Brien, *International Developments in Exchange of Tax Information*, in *CAN BANKS STILL KEEP A SECRET? BANK SECRECY IN FINANCIAL CENTRES AROUND THE WORLD* 134, 159 (Sandra Booyesen & Dora Neo, Cambridge Univ. Press) (2017) (“To be effective, however, [AEOI] must be universal or near universal, so that the hiding places are obvious because they are so few.”).

12. GLOBAL FORUM ON TRANSPARENCY, *supra* note 10.

13. *See infra* Part II.

14. *See infra* Part III.

adoption and implementation.<sup>15</sup> Part IV<sup>16</sup> discusses the juxtaposition between the United States' official stance on tax havens and its own proclivity to become one and provides recommendations on how the United States can implement the AEOI.<sup>17</sup> Part V<sup>18</sup> concludes by recommending that the United States adopt the AEOI for the betterment of the global economy and stop the downward spiral that has already begun to make it the next big tax haven.<sup>19</sup>

## II. BACKGROUND

### A. *The U.S. Crackdown on Offshore Tax Evasion*

While U.S. taxpayers, or rather tax evaders, have been taking advantage of offshore accounts for decades, the United States Internal Revenue Service ("IRS") has historically had little success prosecuting these individuals and retrieving the lost revenue.<sup>20</sup> Then, in 2008 and 2009, the IRS and United States Department of Justice ("DOJ") pursued a series of high-profile prosecutions<sup>21</sup> that many praised as breakthroughs in the U.S. fight against tax evasion.<sup>22</sup> In particular, the United States' case against UBS AG ("UBS"), Switzerland's largest bank, made headlines as

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15. See Enzo de Vicentes, *The U.S. Hasn't Signed the AEOI Agreement: Reciprocity Demanded*, MEDIUM (Jan. 3, 2017), <https://medium.com/@icoservices/usa-aeoi-agreement-reciprocity-demanded-868ee4ae3dc6> (explaining the problem with the U.S. relying solely on FATCA because of the lack of reciprocity and U.S. accountability the act creates).

16. See *infra* Part IV.

17. See Press Release, U.S. Dep't of the Treasury, *Leveling the Playing Field: Curbing Tax Havens and Removing Tax Incentives for Shifting Jobs Overseas* (May 4, 2009) (on file with author) [hereinafter *Leveling the Playing Field*]; but see Craig Rose, *The Biggest Tax Haven of Them All? The U.S., FATCA and the CRS*, BLOOMBERG LAW: INT'L TAX BLOG (Mar. 29, 2016), <https://www.bna.com/biggest-tax-haven-b57982069147/>.

18. See *infra* Part V.

19. See Rose, *supra* note 17 (arguing that FATCA does not require the U.S. to reciprocally share financial information with the countries it is receiving financial information from, thereby making the U.S. a prime market for foreigners seeking to hide assets offshore).

20. See J. Richard (Dick) Harvey, Jr., *Offshore Accounts: Insider's Summary of FATCA and its Potential Future*, 57 VILL. L. REV. 471, 473 (2012) (explaining that the IRS has historically had little success pursuing hidden income).

21. See Stephen Troiano, *The U.S. Assault on Swiss Bank Secrecy and the Impact on Tax Havens*, 17 NEW ENG. J. INT'L & COMP. L. 317, 333–346 (2011) (providing an in-depth analysis of the U.S. case against UBS and Swiss banking secrecy).

22. See Press Release, U.S. Dep't of Just. Office of Pub. Aff., *UBS Enters into Deferred Prosecution Agreement*, (Feb. 18, 2009) (on file with author) [hereinafter *UBS Deferred Prosecution Agreement*] (describing the agreement as a "milestone" in the effort to ensure fairness in tax transparency and stating that "[t]he veil of secrecy has been pulled aside").

the first time the United States pursued both civil and criminal charges against a Swiss bank for tax evasion and securities violations.<sup>23</sup>

In February 2009, UBS entered into a deferred prosecution agreement with the DOJ on charges of conspiring to defraud the United States by impeding the IRS.<sup>24</sup> The charges alleged that after agreeing to report certain information to the IRS about UBS clients from the United States, UBS evaded the reporting requirements by helping its United States clients open new accounts in the names of sham entities that would not identify the United States client as the beneficiary.<sup>25</sup> These methods allowed UBS to avoid its reporting requirements and helped its United States clients to conceal both their identities and assets from the IRS.<sup>26</sup> Additionally, the charges alleged that UBS bankers marketed their services and the benefits of Swiss banking secrecy to clients interested in evading United States taxes.<sup>27</sup>

Under the deferred prosecution agreement, UBS was required to disclose the identities and account information for certain United States customers in addition to paying \$780 million in fines, penalties, interest, and restitution.<sup>28</sup> The civil case was also settled between the United States and UBS resulting in UBS' disclosure of information on approximately 4,450 U.S. customers.<sup>29</sup> Following the settlement and deferred prosecution agreement, the DOJ pursued criminal prosecution of many of the former UBS clients identified by the bank as part of their agreements with the United States.<sup>30</sup>

Another landmark of the United States' fight against tax evasion was the 2014 Credit Suisse guilty plea agreement with the DOJ for aiding and assisting U.S. taxpayers in filing false income tax returns and other

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23. See Troiano, *supra* note 21, at 334 (“[T]he...summons on UBS was the first time the U.S. attempted to pierce Swiss bank secrecy laws to compel a Swiss bank to identify secret accounts held by a U.S. citizen.”).

24. *UBS Deferred Prosecution Agreement*, *supra* note 22.

25. *UBS Deferred Prosecution Agreement*, *supra* note 22.

26. *UBS Deferred Prosecution Agreement*, *supra* note 22.

27. *UBS Deferred Prosecution Agreement*, *supra* note 22.

28. *UBS Deferred Prosecution Agreement*, *supra* note 22.

29. Harvey, *supra* note 20, at 479.

30. See Press Release, U.S. Dep't of Just. Office of Pub. Aff., Former UBS Client Pleads Guilty to Hiding Assets in Secret Offshore Bank Accounts (Apr. 13, 2010) (on file with author) (discussing the guilty plea of the named defendant for tax felony, as well as eight other former UBS clients prosecuted as a result of the agreements with UBS).

documents with the IRS.<sup>31</sup> The plea agreement required Credit Suisse to pay a total of \$2.6 billion in fines, penalties, interest, and restitution which was the highest payment at the time in a criminal tax case in the United States.<sup>32</sup> These, as well as other prosecutions by the DOJ as part of the Offshore Compliance Initiative,<sup>33</sup> led to the classification of the United States as a leader in the effort to end tax evasion and tax havens which support the tax evaders.<sup>34</sup>

In an attempt to combat suspected tax evasion without resorting to criminal prosecution, the DOJ announced the Swiss Bank Program in August 2013.<sup>35</sup> The Swiss Bank Program encouraged Swiss banks that believed they had committed tax-related criminal offenses to cooperate in the DOJ's investigations in exchange for non-prosecution agreements.<sup>36</sup> Resolutions under the Swiss Bank Program ended in 2016<sup>37</sup> and were deemed by the DOJ to have been a "vital part" of the department's aggressive pursuit of tax evasion.<sup>38</sup>

#### B. *International Standards on Tax Transparency*

AEOI is the new global standard created by the Global Forum on Transparency and Exchange of Information for Tax Purposes ("the Global Forum").<sup>39</sup> The Global Forum is an international body, made up of 153 nations, striving towards the implementation of global standards

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31. See Press Release, U.S. Dep't of Just. Office of Pub. Aff., Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns (May 19, 2014) (on file with author) (describing the details of the Credit Suisse guilty plea with the U.S.).

32. *Id.*

33. The Offshore Compliance Initiative is the blanket term for the DOJ's tax enforcement efforts including prosecutions, the Swiss Bank Program, and other developments.

34. See Troiano, *supra* note 21, at 317 ("the European Union and the United States, have led the fight to eradicate tax havens . . .").

35. United States Dep't of Justice, Swiss Bank Program (2013), <https://www.justice.gov/tax/swiss-bank-program> (detailing the requirements of participation in the Swiss Bank Program including the payment of appropriate penalties and the ineligibility of banks already under criminal investigation and all individuals).

36. *Id.*

37. See *id.* (explaining that the program was not ongoing and that "Swiss banks eligible to enter the program were required to advise the department by Dec. 31, 2013, that they had reason to believe that they had committed tax-related criminal offenses . . .").

38. Press Release, U.S. Dep't of Just. Office of Pub. Aff., Justice Department Reaches Final Resolutions Under Swiss Bank Program (Dec. 29, 2016) (on file with author).

39. See OECD, ABOUT THE GLOBAL FORUM, AUTOMATIC EXCHANGE OF INFORMATION (2018), <http://www.oecd.org/tax/transparency/about-the-global-forum/> [hereinafter ABOUT THE GLOBAL FORUM].

on tax transparency.<sup>40</sup> AEOI requires participating countries to exchange the financial account information of non-resident account holders with the tax authorities of the account holders' country of residence.<sup>41</sup> AEOI also involves the "systematic and periodic transmission of 'bulk' taxpayer information by the source country to the residence country concerning various categories of income (*e.g.* dividends, interest, royalties, salaries, pensions, etc.)."<sup>42</sup> AEOI is intended to work in conjunction with the older standard of Exchange of Information on Request ("EOIR").<sup>43</sup> EOIR allows participating countries to request taxpayer information only after demonstrating that it is foreseeably relevant for carrying out the administration or enforcement of the domestic tax laws of the requesting country.<sup>44</sup> AEOI reduces the possibilities for tax evasion by ensuring the sending and receiving of pre-agreed information to tax authorities without the need to request it.<sup>45</sup> AEOI is intended to allow governments to recover lost tax revenue from tax avoiders and to "strengthen international efforts to increase transparency, cooperation, and accountability."<sup>46</sup>

AEOI relies on the Common Reporting Standard ("CRS") to standardize the information and procedures for the automatic exchange of information.<sup>47</sup> The CRS was set out and approved by the OECD on recommendation by the Group of 20 ("G20"), "a mix of the world's largest advanced and emerging economies."<sup>48</sup> The CRS outlines "the financial account information to be exchanged, the financial institutions

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40. *See id.* ("Since its restructuring in 2009, the Global Forum has become the key international body working on the implementation of the international standards on tax transparency.")

41. GLOBAL FORUM ON TRANSPARENCY, *supra* note 10.

42. OECD, AUTOMATIC EXCHANGE OF INFORMATION, WHAT IT IS, HOW IT WORKS, BENEFITS, WHAT REMAINS TO BE DONE (2012), <http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-of-information-report.pdf>.

43. *See* GLOBAL FORUM ON TRANSPARENCY, *supra* note 41; *see also* Robert Goulder, *Should the U.S. Adopt the OECD's Common Reporting Standard?*, FORBES (June 29, 2016), <https://www.forbes.com/sites/taxanalysts/2016/06/29/should-the-u-s-adopt-the-oecd-common-reporting-standard/#594f5581744a> (explaining the limitations of EOIR because the "country making the request often must possess specific details about the taxpayer in question because tax treaties generally prohibit 'fishing expeditions'").

44. *Id.*

45. GLOBAL FORUM ON TRANSPARENCY, *supra* note 10.

46. GLOBAL FORUM ON TRANSPARENCY, *supra* note 10.

47. OECD, AUTOMATIC EXCHANGE PORTAL, WHAT IS THE CRS? (2018), <http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/>; *see also* O'Brien, *supra* note 11, at 159 ("[T]he [CRS] aims to prevent a proliferation of different due diligence and reporting requirements for financial institutions.")

48. G20 MEMBERS, 2015 TURKEY G20, <http://g20.org.tr/about-g20/g20-members/> (last visited Jan. 24, 2019).

required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.”<sup>49</sup> Additionally, the CRS calls on participating jurisdictions to gather information from their financial institutions and automatically exchange that information with other member nations annually.<sup>50</sup>

So far, over 100 jurisdictions have committed to implementing the AEOI standard, with the first exchanges beginning in 2017.<sup>51</sup> The United States is the only member of the G20 that has not committed to the AEOI.<sup>52</sup> Instead, the United States relies on the 2010 Foreign Account Tax Compliance Act (“FATCA”).<sup>53</sup>

### C. *The United States’ Tax Transparency Regulation: FATCA*

As part of the U.S.’ continuing response to the financial crisis of 2008, FATCA was introduced in Congress in October 2009.<sup>54</sup> After several modifications, it was passed as part of the Hire Act in March 2010.<sup>55</sup> FATCA “generally requires that foreign financial institutions and certain other non-financial foreign entities report on the foreign assets held by their U.S. account holders or be subject to withholding on withholdable payments.”<sup>56</sup> Originally, FATCA was a purely unilateral agreement whereby foreign financial institutions wanting to do business with the United States agreed to report certain information on U.S. account holders or otherwise suffer a 30% withholding penalty.<sup>57</sup> FATCA did not require U.S. financial institutions to exchange information on non-U.S. account holders with foreign tax authorities.<sup>58</sup>

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49. WHAT IS THE CRS?, *supra* note 47.

50. WHAT IS THE CRS?, *supra* note 47.

51. GLOBAL FORUM ON TRANSPARENCY, *supra* note 10.

52. STANDARD FOR AUTOMATIC EXCHANGE, *supra* note 9.

53. 26 U.S.C. §§ 1471–1474 (2012); *see also* Rose, *supra* note 17 (explaining the U.S. viewpoint that FATCA accomplishes the same objectives as the AEOI and CRS).

54. *See* Harvey, *supra* note 20, at 482 (describing the background of FATCA).

55. §§ 1471–1474 (2012); *see also* Harvey, *supra* note 20, at 482 (“Legislation was ultimately introduced in October 2009, modified again in December 2009, and finally adopted in March 2010 as part of the Hire Act.”).

56. U.S. INTERNAL REVENUE SERVICE, FOREIGN ACCOUNT TAX COMPLIANCE ACT, (last updated Mar. 16, 2018), <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca>.

57. § 1471(b)(1)(D) (2012).

58. §§ 1471–1474 (2012); *see also* Peter A. Cotorceanu, *Hiding in Plain Sight: How Non-US Persons Can Legally Avoid Reporting Under Both FATCA and GATCA*, TRUSTS & TRUSTEES 1, 2 (Oct. 21, 2015) (“Under the FATCA statute... non-US financial institutions are

In response to FATCA, foreign countries saw an opportunity to crackdown on tax evasion in their own jurisdictions with the help of the United States.<sup>59</sup> In exchange for “reciprocal”<sup>60</sup> exchanges of information with the United States, other governments agreed to allow FATCA reporting in their jurisdictions.<sup>61</sup> The passing of FATCA in the United States and the implementation of local legislation in foreign countries allowing for FATCA reporting “acted as a catalyst for the move towards automatic exchange of information in a multilateral context.”<sup>62</sup> The international standard of AEOI, several years after the passing of FATCA, is the result of the move towards multilateral exchange of information.<sup>63</sup>

### III. PARTICIPATION OF THE UNITED STATES IS ESSENTIAL TO ESTABLISHING AEOI AS THE GLOBAL STANDARD FOR TAX TRANSPARENCY

The purpose of having a global standard for tax transparency and the exchange of information is to ensure that all jurisdictions are on an even footing with respect to their taxpayers complying with resident tax laws.<sup>64</sup> Any deviation from this standard, particularly a deviation from a major financial market like the United States,<sup>65</sup> causes a significant problem for not only tax enforcement, but also in the ability of the OECD and Global Forum to gather commitments from other non-participating nations. This section discusses (1) the reasons why AEOI is more

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required to give the US data about US persons. The USA is not required to give anything in return.”).

59. See Cotorceanu, *supra* note 58, at 3 (explaining that governments of other countries saw an opportunity for a “win-win” if they could convince the U.S. to reciprocate information about their taxpayers).

60. As will further be explained, “reciprocal” exchanges of information by the U.S. under FATCA are not entirely reciprocal. Countries that have reciprocal IGAs with the U.S. do not receive the same information on non-U.S. persons as the U.S. does from foreign financial institutions about U.S. account holders.

61. See Cotorceanu, *supra* note 58.

62. STANDARD FOR AUTOMATIC EXCHANGE, *supra* note 9.

63. STANDARD FOR AUTOMATIC EXCHANGE, *supra* note 9; O’Brien, *supra* note 11, at 159 (“The CRS...is obviously and admittedly inspired by, and modelled on the FATCA Model 1 IGAs, but it is reciprocal.”).

64. See GLOBAL FORUM ON TRANSPARENCY, *supra* note 10 (“The global implementation of AEOI is an essential step for stimulating the development of a global level playing field.”).

65. See Rose, *supra* note 17 (describing the United States as “the world’s biggest financial centre”).

comprehensive as a multilateral exchange of information than FATCA,<sup>66</sup> (2) the reasons the United States is unwilling to adopt AEOI,<sup>67</sup> and (3) how the failure of the United States to participate will ultimately harm the global economy.<sup>68</sup>

A. *FATCA Does Not Accomplish the Same Objectives as the AEOI*

Although the OECD conditionally accepts the United States' non-commitment to AEOI,<sup>69</sup> the United States maintains that it does not need to engage in AEOI because FATCA achieves the same results.<sup>70</sup> The reality is the United States receives information about their tax evaders but does not report similar information to foreign tax authorities.<sup>71</sup> Under AEOI, the United States would be required to report that kind of information to committed AEOI jurisdictions.<sup>72</sup>

FATCA provides that complying foreign financial institutions shall “report on an annual basis the information described in subsection (c) ... in the case of any United States account maintained by such [a foreign financial] institution.”<sup>73</sup> The information the foreign financial

66. See Cotorceanu, *supra* note 58, at 5 (explaining that “until US law is changed to mandate [F]ATCA-style reporting, the USA simply can’t agree to the sort of comprehensive information exchange [F]ATCA requires.”).

67. Cotorceanu, *supra* note 58, at 5; Rose, *supra* note 17 (“the U.S. ... seems to be taking the view that it doesn’t need to engage with the CRS because FATCA does the same job.”).

68. Johannesen & Zucman, *supra* note 3, at 66; GLOBAL FORUM ON TRANSPARENCY, *supra* note 10.

69. See AEOI: STATUS OF COMMITMENTS, *supra* note 7, at n.1. In a footnote to its list of committed jurisdictions, the OECD noted that:

The United States has undertaken automatic information exchanges pursuant to FATCA from 2015 and entered into intergovernmental agreements (IGAs) with other jurisdictions to do so. The Model 1A IGAs entered into by the United States acknowledge the need for the United States to achieve equivalent levels of reciprocal automatic information exchange with partner jurisdictions. They also include a political commitment to pursue the adoption of regulations and to advocate and support relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.

*Id.*; see also Rose, *supra* note 17 (commenting on the OECD footnote regarding the U.S. and opining that the U.S.’s commitment to advocating for legislative change has “[f]or the time being...satisfied the OECD.”).

70. Rose, *supra* note 17.

71. Cotorceanu, *supra* note 58, at 2.

72. See Cotorceanu, *supra* note 58, at 5 (explaining that the United States would have to change its reporting requirements in order to comply with AEOI standards).

73. 26 U.S.C. § 1471(b)(1)(C) (2012).

institutions agree to report to the United States includes the name, address, Taxpayer Identification Number, and the account number and balance of each account holder “which is a specified United States person.”<sup>74</sup> However, FATCA does not include provisions requiring the United States to share the same information about non-U.S. persons with U.S. accounts to foreign tax authorities.<sup>75</sup>

As a partial solution to the problem of reciprocity, the United States entered FATCA intergovernmental agreements (“IGAs”) with certain countries<sup>76</sup> detailing what information the United States would give those countries in return for their cooperation with FATCA.<sup>77</sup> However, the reciprocal IGAs are still severely limited in what information the United States will share with its partner countries.<sup>78</sup> Generally, the IRS does not give its reciprocal FATCA partners information about depository accounts held by entities, non-cash accounts unless the account earns U.S. source income, or information about the controlling person of any entity even if the entity is controlled by a resident of a reciprocal country.<sup>79</sup>

The United States cannot give its reciprocal partners certain information because that information is not currently reported to the IRS by U.S. financial institutions.<sup>80</sup> Additionally, the United States does not have a law mandating the collection of information that it would be required to report if it joined AEOI.<sup>81</sup> The OECD has cited the reluctance of the United States to change the law regarding the collection of information from financial institutions as one of the reasons for its failure to commit to the AEOI.<sup>82</sup> However, the countries committed to AEOI were

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74. See 26 U.S.C. § 1471(c)(1) (2012) (providing that foreign financial institutions will also report “the name, address, and TIN of each substantial United States owner” of an account holder that is a United States owned foreign entity).

75. See Cotorceanu, *supra* note 58, at 3 (listing the information that the U.S. is *not* required to give its FATCA partners).

76. Not all countries with FATCA IGAs are classified as “reciprocal” IGAs. See Cotorceanu, *supra* note 58, at n.7 (explaining that “[s]ome countries do not care to receive information from the USA about their residents.”).

77. Cotorceanu, *supra* note 58, at 3.

78. Cotorceanu, *supra* note 58, at 3.

79. See Cotorceanu, *supra* note 58, at 3 (explaining the kind of information the IRS does not exchange with FATCA partners because U.S. financial institutions do not currently report that information to the IRS).

80. See Cotorceanu, *supra* note 58, at 5 (“[M]ost of the data that [F]ATCA requires to be exchanged is not currently reported to the IRS by US financial institutions.”).

81. Cotorceanu, *supra* note 58, at 5.

82. AEOI: STATUS OF COMMITMENTS, *supra* note 7, at n.1.

required to change or pass new laws that allowed them to collect the necessary data to be reported if they did not already do so.<sup>83</sup>

Therefore, FATCA does not accomplish the same goals as AEOI because of the limited reciprocity the act allows, and the United States is unable to commit to AEOI based on its current legal and financial reporting structure.<sup>84</sup>

*B. Countries that Are Participating in the AEOI Seek the United States' Commitment, but Meet Pushback*

Since 2009, the DOJ has led the world in the crackdown on offshore tax evasion.<sup>85</sup> Therefore, the United States' refusal to join the OECD-led initiative for transnational tax transparency through implementation of the AEOI and CRS is viewed by some as hypocritical.<sup>86</sup>

The European Union,<sup>87</sup> Switzerland,<sup>88</sup> and Panama<sup>89</sup> voiced outcry over the failure of the United States to commit and demanded that the U.S. play by the same rules as the rest of the world. One Swiss critic in particular stated, “[h]ow ironic—no, how *perverse*—that the USA, which has been so sanctimonious in its condemnation of Swiss banks, has become the banking secrecy jurisdiction *du jour*.”<sup>90</sup> Even tax experts in the

83. See Cotorceanu, *supra* note 58, at 6, n.14 (explaining that the U.S. is given a pass where other countries committed to the AEOI are not).

84. Cotorceanu, *supra* note 58, at 5.

85. See Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L. J. 655, 660 (2018) (describing the U.S. attack on tax evasion as “a family of legislative, regulatory, and prosecutorial measures to combat offshore tax evasion.”); see also STANDARD FOR AUTOMATIC EXCHANGE, *supra* note 9 (describing FATCA as “a catalyst for the move towards automatic exchange of information in a multilateral context.”); see also *The Biggest Loophole of All*, THE ECONOMIST (Feb. 20, 2016), <https://www.economist.com/international/2016/02/20/the-biggest-loophole-of-all> (explaining that the U.S. crackdown on tax evasion “sparked a global revolution in financial transparency”).

86. See *The Biggest Loophole of All*, *supra* note 85 (discussing the controversy and noting that some countries have “brand[ed] America a hypocrite”).

87. See *The Biggest Loophole of All*, *supra* note 85 (“A group in the European Parliament argues that, if America refuses to reciprocate fully, it should be hit with a reverse FATCA... ‘We don’t want a tax war, but nor can the US have it all its own way.’”).

88. See Enzo de Vicentes, *The U.S. Hasn’t Signed the AEOI Agreement: Reciprocity Demanded*, MEDIUM (Jan. 3, 2017), <https://medium.com/@icoservices/usa-aeoi-agreement-reciprocity-demanded-868ee4ae3dc6> (“Switzerland . . . demand[s] the U.S. to walk the talk”).

89. See *The Problem Child: A Tax Haven Professes to Stand on Principle, Risking Pariah Status*, THE ECONOMIST (Feb. 18, 2016), <https://www.economist.com/international/2016/02/18/the-problem-child> (explaining Panama’s view that “[s]mall financial centers . . . are being bullied into accepting competitiveness-sapping rules shunned by... America.”).

90. Cotorceanu, *supra* note 58, at 5 (emphasis in original).

United States have admitted that it is “a little awkward” for the United States to have a standard for other countries to comply with that it does not adhere to itself.<sup>91</sup> There has been little criticism or pressure on the United States for its failure to adopt the AEOI from the OECD.<sup>92</sup> Some analysts suggest that the OECD does not want to antagonize the United States because of its power as the leading financial authority and influencer in the world.<sup>93</sup>

Many suggest that the United States has no need or desire to participate in the AEOI.<sup>94</sup> One explanation for the United States’ disinterest is that it already receives all the information it wants about U.S. tax evaders from FATCA.<sup>95</sup> Another, and arguably more significant explanation, is the belief that participation in the AEOI could potentially harm the U.S. financial industry, one of the largest sectors of the American economy.<sup>96</sup> Efforts to prevent the United States from participating in more aggressive reforms of offshore financing are led by hugely influential lobbying groups, which are backed in turn by some of the world’s biggest corporations.<sup>97</sup> Lobbying groups argue that tax evasion reforms invade privacy, hurt tax competition between countries, and result in expensive compliance costs for financial institutions.<sup>98</sup> The combination of these factors, in addition to the need to change the data collection laws if the United States did commit to AEOI, make it unlikely that the United States will adopt AEOI.<sup>99</sup>

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91. See Rose, *supra* note 17 (quoting U.S. Treasury Deputy Assistant Secretary for International Tax Affairs Bob Stack).

92. See Rose, *supra* note 17 (“Rather than placing the U.S. on the naughty-boy list of jurisdictions that haven’t committed to the CRS, the OECD has instead added [a] footnote” that explains the U.S.’s commitment to attempting to further legislation that will eventually allow it to participate in AEOI).

93. See Craig Rose, *The EU’s Tax Haven Blacklist – Will the U.S. Eventually be Added?*, BLOOMBERG LAW: INT’L TAX BLOG (Dec. 6, 2017), <https://www.bna.com/eus-tax-haven-b73014472806/> (“the OECD . . . is unlikely to pick a fight with its most important member, the U.S.”).

94. Cotorceanu, *supra* note 58, at 5; see also Rose, *supra* note 17.

95. Cotorceanu, *supra* note 58, at 5.

96. Cotorceanu, *supra* note 58, at 5.

97. See Sasha Chavkin, *Lobbyists for the Havens: ICIJ’s Guide to the Offshore System’s Defenders*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 21, 2013), <https://www.icij.org/blog/2013/11/lobbyists-havens-icijs-guide-offshore-systems-defenders/> (identifying the major lobbyist groups pushing back against efforts to crackdown on offshore tax evasion and naming corporations such as Google, Toyota, and Coca-Cola as members of these lobbyist groups).

98. *Id.*

99. See Cotorceanu, *supra* note 58, at 5 (“The USA isn’t likely to enter into [AEOI] any time soon”).

C. *While Becoming a Tax Haven May Benefit the United States Individually, Overall It Will Cause Harm to the Global Economy and Economic Relationships*

A significant consequence of the United States relying on FATCA and refusing to implement the OECD's AEOI program is the reality that, by doing so, the United States is becoming one of the biggest tax havens in the world.<sup>100</sup> Although there is no universally accepted definition of a tax haven,<sup>101</sup> the OECD definition relies on four factors: (1) no or low tax on relevant income, (2) reluctance to exchange information, (3) a lack of transparency or inadequate financial disclosures, and (4) foreign entities receive preferential tax treatment without the need to establish a "substantial" presence or impact on the local economy.<sup>102</sup> As the law currently stands, the United States does not collect the requisite information for financial institutions that it would need to adequately report tax evaders to their resident countries.<sup>103</sup> Opponents of changing the U.S. reporting requirements consistently point to the costs of compliance with more stringent reporting requirements.<sup>104</sup> Due in large part to the United States' unilateral exchanges and limited reciprocal exchanges, non-U.S. taxpayers seeking to avoid tax enforcement in their resident countries are rapidly moving their assets to the United States.<sup>105</sup> Other definitions of tax havens include the necessity of stable economic and political systems, both of which the United States arguably satisfies.<sup>106</sup> The 2018 Financial Secrecy Index, which ranks jurisdictions according

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100. See Rose, *supra* note 17 (suggesting that the "U.S. is emerging as a leading tax and secrecy haven"); Cotorceanu, *supra* note 58, at 5, 13 (calling the United States the "new Switzerland" and stating "[t]hat 'giant sucking sound' you hear? It is the sound of money rushing to the USA to avoid [AEOI] reporting.").

101. See Conor Clarke, *What Are Tax Havens and Why Are They Bad? The Hidden Wealth of Nations: The Scourge of Tax Havens*. By Gabriel Zucman, 95 TEX. L. REV. 59, 67 (2016) (explaining that there is no universally accepted definition of tax haven).

102. See OECD, TOWARDS GLOBAL TAX CO-OPERATION, 1, 10 n.4 (2000) (defining the OECD's tax haven criteria); *but see* Clarke, *supra* note 101, at 67 (discussing the various definitions of tax haven).

103. Cotorceanu, *supra* note 58, at 5.

104. See Chavkin, *supra* note 97 (expressing the fear of the U.S. Council for International Business that "compliance [with OECD reporting standards] would be costly and burdensome.").

105. See Cotorceanu, *supra* note 58, at 5 ("[A]ll one has to do to avoid reporting under [F]ATCA is move one's assets to a financial institution resident in the USA for [F]ATCA purposes.").

106. TOWARDS GLOBAL TAX CO-OPERATION, *supra* note 102.

to their secrecy laws and the scale of their offshore financial activities, ranks the United States as second, behind only Switzerland.<sup>107</sup>

Despite the duplicitous impression it leaves on the rest of the world that the United States is closing its own tax gap through enforcement of FATCA while abstaining from helping other countries achieve the same objective, there are many proponents in the United States pushing to keep it out of AEOI and also strengthening the country's secrecy standards.<sup>108</sup> One analyst draws vague attention to the "chilling effect CRS might have on domestic capital formation" and the "incentive for foreign capital to flock to U.S. banks" if the United States does not participate in AEOI.<sup>109</sup>

In contrast, advocates for tax transparency point to the devastating effects tax havens and offshore financial activity can have on the citizens of both rich and poor countries around the world.<sup>110</sup> The Tax Justice Network, an international advocacy and research group, estimates that "\$21 to \$32 trillion of private financial wealth is located, untaxed or lightly taxed, in secrecy jurisdictions around the world."<sup>111</sup> The problems created by tax evasion and offshore secrecy include the distortion of financial markets and investments, the opportunity to participate in other criminal activities such as fraud and money laundering, and the further degeneration of poorer countries due to the loss of tax revenue from the wealthy elite.<sup>112</sup> Additionally, tax havens and evasion contributed to the global financial crisis of 2008, from which many countries are still recovering.<sup>113</sup> The creation of a global system targeting offshore tax havens remains part of the action plan taken by world leaders following the financial crisis to help increase international cooperation in the event of a similar financial meltdown.<sup>114</sup> For these reasons, the fight against

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107. *The Financial Secrecy Index*, TAX JUSTICE NETWORK (2018), <https://www.financialsecrecyindex.com/>.

108. See Cotorceanu, *supra* note 58, at 5 (explaining that both people in Congress and banking lobbyists have an interest in keeping the U.S. from participating in AEOI for fear of destroying the U.S.'s competitive advantage).

109. Goulder, *supra* note 43.

110. See *The Financial Secrecy Index*, *supra* note 107 (describing the ways that offshore secrecy harms people in wealthy and poor countries around the world).

111. *The Financial Secrecy Index*, *supra* note 107.

112. *The Financial Secrecy Index*, *supra* note 107.

113. See Sol Picciotto, *How Tax Havens Helped to Create a Crisis*, FIN. TIMES (May 5, 2009), <https://www.ft.com/content/96ec9414-39a6-11de-b82d-00144feabdc0> (naming faults in the international tax system as a contributing factor to the financial crisis).

114. See Gracielle R. Cabungcal, *Paradise Lost? Searching for New (Off) Shores: The State of Bank Secrecy, Fiduciary Mistrust, and International Estate Planning After the*

offshore tax evasion continues to be a key policy issue for countries around the world.<sup>115</sup>

Accordingly, the United States then faces the debacle between sacrificing its competitive advantage and leading by example and promoting worldwide fiscal transparency.<sup>116</sup> Studies show that tax evaders shift their assets from tax haven to tax haven in response to treaties, thereby further supporting the proposition that in order for the AEOI and its goal of stopping tax evasion to be successful, there must be global implementation.<sup>117</sup> If the United States values tax transparency for all countries over personal economic gain, then it must adopt the global framework for automatic exchange.<sup>118</sup>

#### IV. THE UNITED STATES SHOULD MAKE EVERY EFFORT TO AVOID BECOMING A TAX HAVEN

Many regard the United States as one of the leaders in the fight against tax evasion.<sup>119</sup> In particular, the U.S. assaults on Swiss banking secrecy in the UBS and Credit Suisse cases were seen as major victories for tax transparency.<sup>120</sup> In those cases the DOJ came down hard on major Swiss banks that helped U.S. taxpayers evade taxes by hiding assets in offshore accounts and forced the banks to pay billions to the IRS in fines and retribution.<sup>121</sup> As the first cases of the kind, the United States was praised for its ability to pierce the centuries-long fortress that was Swiss banking secrecy laws.<sup>122</sup> Additionally, the Obama administration pushed

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*Financial Crisis*, 25 QUINNIPIAC PROB. L.J. 67, 69 (2011) (explaining the coordinated efforts of the G20 following the financial crisis to combat offshore tax evasion).

115. Niels Johannesen & Gabriel Zucman, *The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown*, 6 AM. ECON. J.: ECON. POL'Y 65, 66 (2014).

116. Goulder, *supra* note 43.

117. See Johannesen & Zucman, *supra* note 3, at 67 (“[F]inding that tax evaders shift deposits in response to treaties.”); GLOBAL FORUM ON TRANSPARENCY, *supra* note 10.

118. Goulder, *supra* note 43.

119. See Troiano, *supra* note 21, at 317 (“[T]he United States [has] led the fight to eradicate tax havens....”).

120. See Patrick Winters, *A Top Swiss Bank Settles a Decade After Secrecy Began to Crumble*, BLOOMBERG (Aug. 14, 2018), <https://www.bloomberg.com/news/articles/2018-08-14/a-top-swiss-bank-settles-a-decade-after-secrecy-began-to-crumble> (citing the investigations and pressure from the U.S. as the reason for the “end of Switzerland’s famous secrecy laws”).

121. Press Release, Office of Pub. Aff., U.S. Dep’t of Justice, Credit Suisse Sentenced for Conspiracy to Help U.S. Taxpayers Hide Offshore Accounts from Internal Revenue Service (Nov. 21, 2014) (on file with author).

122. Troiano, *supra* note 21.

for international tax law reform that would help “reduce the amount of taxes lost to tax havens.”<sup>123</sup> Therefore, the United States’ newfound listing at the top of the secrecy jurisdiction leaderboard coupled with its “wishy-washy ‘commitment’ . . . to advocate and support the enactment of legislation” that would allow it to participate in the global framework of mutual exchange of information should give proponents of tax transparency cause for concern.<sup>124</sup>

A. *How the United States Can Implement AEOI, But Why it is Unlikely to Do So*

In order for the United States to adopt and implement the AEOI, it would be required to amend its current tax law to change U.S. financial institutions’ information gathering and reporting requirements to the IRS.<sup>125</sup> For those legal changes to occur and for the United States to demonstrate its willingness to embrace OECD policies, support will need to be garnered from the legislative branch, the executive branch, and more importantly from the banking industry and lobbyist groups.<sup>126</sup> Currently, gathering such support will prove to be very difficult.<sup>127</sup>

The U.S. legislature faced resistance in 2010 when it approved FATCA and when FATCA went into effect at the start of 2014.<sup>128</sup> Therefore, an attempt by Congress to approve even more burdensome disclosure requirements by U.S. financial institutions in order to comply with AEOI reporting standards could be expected to meet even stronger pushback.<sup>129</sup> Additionally, FATCA and other rules to prevent tax evasion

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123. *Leveling the Playing Field*, *supra* note 17.

124. Rose, *supra* note 17.

125. See Cotorceanu, *supra* note 58, at 5 (explaining that U.S. law would need to be amended in order for the information required by AEOI to be gathered by U.S. financial institutions and reported to the IRS).

126. OECD, THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (2018), <http://www.oecd.org/about/>.

127. See Chavkin, *supra* note 97 (highlighting the pushback against OECD reporting standards by the banking industry and lobbyist groups).

128. See Patrick Temple-West, *Exclusive: Foreigner’s Accounts in U.S. Banks Eyed in Tax Crackdown*, REUTERS (Feb. 4, 2013), <https://www.reuters.com/article/us-usa-tax-fatca/exclusive-foreigners-accounts-in-u-s-banks-eyed-in-tax-crackdown-idUSBRE91312W20130204> (explaining that the Obama administration was “facing resistance from some in the U.S. banking industry” over the proposal to require more disclosure from U.S. banks).

129. See O’Brien, *supra* note 11, at 158 (explaining that even “U.S. legislators[] expressed reluctance to reciprocate [reporting to other jurisdictions], and their support for making the United States a haven for capital from other countries”).

were urged for and supported by the Obama administration.<sup>130</sup> The Trump administration has not yet released an official stance on the problem of tax evasion, however the President's personal use of aggressive tax planning strategies suggests that his administration might not be inclined to support regulations that would require more reporting to the IRS from financial institutions.<sup>131</sup>

Additionally, advocates for the United States adopting the AEOI system of tax reporting face the might of the United States banking lobby.<sup>132</sup> As previously discussed in this note,<sup>133</sup> major lobbyist groups believe that the AEOI requirements would harm U.S. financial interests.<sup>134</sup> One group specifically lists the "adoption of tax policies that will significantly strengthen our global competitiveness" among its tax priorities for the year.<sup>135</sup> The argument that more invasive reporting procedures by U.S. financial institutions will harm our tax competitiveness is one that is echoed throughout the banking industry.<sup>136</sup> U.S. financial institutions are also extremely concerned with the additional cost of compliance that accompanies more detailed reporting requirements.<sup>137</sup> Many also argue that the disclosure of financial information to foreign agencies and authorities threatens consumer privacy.<sup>138</sup>

*B. Why it is in the United States' Best Interest to Implement AEOI*

It would be in the United States' best interest to implement AEOI for two main reasons. First, IRS results since the implementation of

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130. See Aruna Viswanatha, *Obama Administration Adopts Rule to Fight Money Laundering, Tax Evasion*, THE WALL ST. J. (May 5, 2017 at 9:00 PM), <https://www.wsj.com/articles/obama-administration-adopts-rule-to-fight-money-laundering-tax-evasion-1462496401> (discussing the administration's response to the Panama Papers and the resurgence of determination to fight tax evasion and crimes associated with it).

131. See Daniella Diaz, *Trump: "I'm Smart" for not Paying Taxes*, CNN (Sept. 27, 2016, 12:39 PM), <https://www.cnn.com/2016/09/26/politics/donald-trump-federal-income-taxes-smart-debate/index.html> (relaying the then Presidential nominee's comments in a recent debate that not paying federal taxes makes him smart).

132. Chavkin, *supra* note 97.

133. Chavkin, *supra* note 97.

134. Chavkin, *supra* note 97.

135. NATIONAL FOREIGN TRADE COUNCIL, *2017 GOALS AND PRIORITIES*, 1, 3 (Mar. 7, 2017), <http://www.nftc.org/default/general%20information/2017goalsandpriorities.pdf>.

136. See Chavkin, *supra* note 97 (explaining some of the major arguments put forth by lobbyist groups opposed to tax evasion reform).

137. Chavkin, *supra* note 97.

138. See Lissa Broome, *The United States of America*, in CAN BANKS STILL KEEP A SECRET? BANK SECRECY IN FINANCIAL CENTRES AROUND THE WORLD 368, 368 (2017) (explaining that anti-tax evasion legislation weakens financial privacy).

FATCA suggest that it is not working as it was intended.<sup>139</sup> One scholar suggests that in order for FATCA to be successful, other countries need to participate in a “multilateral FATCA regime.”<sup>140</sup> Ironically, the AEOI satisfies that requirement as it is a mutual exchange of tax information between more than 100 countries.<sup>141</sup> Additionally, apart from the high-profile prosecutions and settlements of major banks and tax evaders by the DOJ, since FATCA, the IRS has taken little action against taxpayers with undeclared offshore accounts and assets.<sup>142</sup> A federal report suggests that despite FATCA’s requirement that foreign financial institutions identify United States clients and report information on those clients to the IRS, the reports from the foreign financial institutions that the IRS has received have been disorganized and inaccurate.<sup>143</sup> The vast amount of paperwork coupled with incorrect identifying information has created more work for an agency already plagued by limited resources.<sup>144</sup> The result is limited recovery of lost revenue.<sup>145</sup>

Second, the United States should be mindful of its current reputation as a leader in the fight against tax evasion and the negative consequences that could result from the loss of that reputation.<sup>146</sup> In the late 1990s Switzerland was at the center of a worldwide controversy related to accusations that its Swiss bank secrecy laws had been codified to protect stolen Nazi treasures.<sup>147</sup> While perhaps not an entirely accurate representation of the motives behind its bank secrecy laws,<sup>148</sup> Switzerland continues to face criticism for protecting the accounts of clients whose money may fund illegal activities and even terrorism.<sup>149</sup> If the United

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139. See Spencer Woodman, *IRS Spent \$380m but Took “Limited or No Action” on Offshore Tax Dodges*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (July 16, 2018), <https://www.icij.org/blog/2018/07/irs-spent-380m-but-took-limited-or-no-action-on-offshore-tax-dodges/> (describing IRS shortcomings and why FATCA has not actually worked as it was intended to).

140. See Harvey, *supra* note 20, at 494–498 (offering suggestions for the long-term success of FATCA).

141. GLOBAL FORUM ON TRANSPARENCY, *supra* note 10.

142. Woodman, *supra* note 139.

143. Woodman, *supra* note 139.

144. Woodman, *supra* note 139.

145. Woodman, *supra* note 139.

146. See Troiano, *supra* note 21, at 317 (“[T]he European Union and the United States, have led the fight to eradicate tax havens . . .”).

147. See Guex, *supra* note 1 (explaining the misconception that surrounded the controversy and arguing that Swiss banking secrecy laws were in place long before World War II).

148. Guex, *supra* note 1.

149. See Guex, *supra* note 1, at 265 (naming dictators from Zaire and Nigeria who deposited stolen funds into Swiss bank accounts).

States becomes a tax haven with exacting secrecy protections, as it is predicted to become, then similar accusations and repercussions will likely be leveled against the United States like they have been done to Switzerland.<sup>150</sup>

## V. CONCLUSION

Tax evasion is not a problem that can be tackled by one country alone.<sup>151</sup> Nor is it a problem whose consequences are felt only by some.<sup>152</sup> Tax evasion affects the whole world and is harmful to both rich and poor countries alike.<sup>153</sup> Therefore, a coordinated global solution is the only viable option for truly curbing the crippling problem of lost revenue to offshore tax evasion.<sup>154</sup>

The United States has long maintained a reputation for being a leader in the global fight against tax evasion.<sup>155</sup> Its groundbreaking prosecution of the Swiss bank UBS and others led to claims around the world that banking secrecy was finally being brought to an end.<sup>156</sup> Additionally, with the adoption of FATCA, the United States was again at the forefront of initiatives aiming to bring tax evaders to justice.<sup>157</sup>

However, after the adoption of FATCA, the United States' efforts to help other countries in their fights against tax evaders began to wane.<sup>158</sup> Its reciprocal IGAs with FATCA partners are halfhearted and lack substantive information that will help partner countries identify entities and individuals using U.S. financial institutions to hide assets.<sup>159</sup> Then, when the call for a global standard backed by the international OECD was made, the United States considered itself exempt.<sup>160</sup> Some viewed the

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150. Cotorceanu, *supra* note 58, at 2 (calling the United States the “new Switzerland”).

151. See *The Financial Secrecy Index*, *supra* note 107 (describing the ways that offshore secrecy harms people in wealthy and poor countries around the world).

152. See *The Financial Secrecy Index*, *supra* note 107.

153. See *The Financial Secrecy Index*, *supra* note 107.

154. GLOBAL FORUM ON TRANSPARENCY, *supra* note 10; O'Brien, *supra* note 11.

155. See O'Brien, *supra* note 11, at 159 (describing the United States as “the original driver of change”).

156. See *UBS Deferred Prosecution Agreement*, *supra* note 22 (stating that “[t]he veil of secrecy has been pulled aside”).

157. O'Brien, *supra* note 11, at 159.

158. See O'Brien, *supra* note 11, at 158 (noting that “the United States may in fact be playing the role of tax haven to the rest of the world”).

159. Cotorceanu, *supra* note 58.

160. See *The Biggest Loophole of All*, *supra* note 85 (discussing frustration with the U.S. and its failure to reciprocate); Rose, *supra* note 17 ([T]he U.S. is standing aloof from this OECD initiative to which 96 other jurisdictions have committed.”).

United States' non-commitment as a temporary circumstance that would be remedied over time.<sup>161</sup> While still others viewed it as another example of American exceptionalism.<sup>162</sup>

In order for the United States to maintain its reputation as a leader in the global fight against tax evasion, it must walk the walk and accept the OECD's Automatic Exchange of Information standard.<sup>163</sup> Although the United States was ahead of the game with the implementation of FATCA in 2010, well before the G20 call to action in 2014, it is now

behind the rest of the major world powers in securing a more transparent and less tax competitive future.<sup>164</sup> The most critical thing for the success of the OECD and its member nations is ensuring the commitment of the United States to implementation of the AEOL.<sup>165</sup>

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161. See Rose, *supra* note 17 (discussing the OECD's footnote that gives the U.S. the benefit of the doubt in exchange for its future "commitment" to enact legislation that would allow it to comply with AEOL).

162. Cotorceanu, *supra* note 58, at 6.

163. See O'Brien, *supra* note 11, at 159 ("It is to be hoped that before long the United States will sign on to [AEOL] and remove any possibility that the original driver of change will become the newest and safest tax haven for evaders from the rest of the world.").

164. O'Brien, *supra* note 11, at 159.

165. See ABOUT THE GLOBAL FORUM, *supra* note 39 ("[I]mplementation of these international standards significantly contributes to the fight against tax evasion.") (emphasis added); O'Brien, *supra* note 11, at 159 ("To be effective, however, [AEOL] must be universal or near universal, so that the hiding places are obvious because they are so few"); see also Harvey, *supra* note 20, at 498 ("It would be substantially cheaper for financial institutions if there is one global standard."); Rose, *supra* note 17 ("[T]he lack of reciprocity in FATCA leave a massive US-shaped hole in the emerging global framework for automatic exchange.").

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