WRITTEN TESTIMONY OF L. MARC ZELL, ADV.

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My name is Marc Zell and I am a founder and Co-Chairman of Republicans Overseas Israel and a Vice President of Republicans Overseas, Inc. It is a great honor and privilege for me to submit the following written statement to the Subcommittee in connection with its historic hearing on the Foreign Account Tax Compliance Act ("FATCA"). I wish to express especial thanks to Chairman, Representative Mark Meadows and his staff for making this hearing possible. When I first raised the possibility of arranging this hearing in Cleveland this past summer at our meeting with Chairman Meadows and Representative Jim Jordan, both the Chairman and Congressman Jordan showed keen interest and concern about the impact of FATCA on some nine million American citizens and green-cardholders residing overseas. I also wish to thank Ranking Member, Gerry Connally, and the other members of this Subcommittee (and to *ex officio* members, Representative Jason Chafetz and Elijah Cummings) for allowing me and my colleagues to convey our *perspectives* on this very important matter. Today's hearing is a testament to your leadership and commitment to the welfare of Americans abroad and at home who are affected daily by this onerous and ill-conceived legislation. The time for repealing FATCA is long overdue.

Object of Testimony

The purpose of my written testimony is to acquaint the committee with the extraordinary efforts made by the American community in Israel under our leadership to prevent the

implementation of FATCA first vis-à-vis the Government of Israel before the US-Israel Intergovernmental Agreement ("IGA") was signed in 2014 and later when implementing legislation in the Israeli Parliament (the "Knesset") was introduced by the Israel Tax Authority ("ITA") in 2015 and 2016 to authorize statutorily the undertakings made in the IGA and then later by way of a constitutional challenge in the Israeli Supreme Court. It is also my purpose to describe for the Committee the manner in which FATCA has trampeled the sovereignty of America's sister states, in this case Israel and how FATCA has sorely affected both Foreign Financial Institutions ("FFI"'s) and their U.S. person customers on a daily basis. My written statement is accompanied by a number of relevant appendices reflecting our anti-FATCA efforts in the executive, legislative and judicial branches of the Israeli system. The Committee will note that I am also one of the original plaintiffs in the United States constitutional challenge to FATCA/FBAR now pending before the United States Court of Appeals for the Sixth Circuit. *Crawford et al. v. United States.*

Brief Biography

First a word about myself and the organization I represent. I am a United States citizen born here in Washington, D.C. some 64 years ago and raised in Montgomery County, Maryland. I am a graduate of Princeton University with a degree in Germanic Languages and Literatures/Theoretical Linguistics. I read, write or speak some nine different modern languages and a few additional ancient ones. I have a law degree from the University of Maryland with honors and served as a law clerk to the Maryland Court of Appeals before working as an associate at the Washington, D.C. office of Fried, Frank, Shriver, Harris & Jacobson. I later formed by own law firm with offices in Maryland, the District of Columbia and Virginia. I am a member of the bars of those jurisdictions, as well as the State of Israel, the Supreme Court of the

United States and several federal appellate and district courts as well as the United States Tax Court. I emigrated with wife, Robin, and children to Israel in 1986 to play a part in the incredible saga of the first Jewish commonwealth in 2,000 years. I am the father of eight children, six of whom were born in the United States and two in Israel. My wife, children and I are all proud United States citizens as well as citizens of the State of Israel. I am a principal in the law firm of Zell, Aron & Co. where I specialize in international transactions and litigation. A more comprehensive Curriculum Vitae is attached to this Statement.

The American Community in Israel

The American community in Israel numbers close to half a million souls. Of these we estimate roughly 300,000 are eligible to vote in U.S. federal elections. This past election, thanks to our efforts, some 150,000 actually did vote either by absentee ballot or by returning to the U.S. to vote. Unlike most other expatriate populations, Israel's American community reflects typical stateside demographics in terms of age, marital status, occupations and the like. This means that Americans in Israel are permanent residents, most are dual nationals, and, as a result their banking and financial needs resemble those of permanent residents in the United States. Unlike U.S. residents, however, Israeli Americans bank with FFIs. There are no U.S. banks in Israel that offer full service banking services to the consuming public. Until the FATCA issue arose in earnest in 2014, the American community in Israel was not politically active in Israeli politics as a community, in contrast to many other ethnic groups in the country (*e.g.* North Africans, Ethiopians).

FATCA in Israel: An Overview

When FATCA was first enacted in 2010, neither the Israeli government nor the Israeli public paid much attention. Israel and the United States had entered into a double tax convention in 1975 which included a provision for information exchange. A copy of the 1975 Convention is included in the Appendices. Even when the IRS began rolling out its IGA program to alleviate compliance pressures on FFIs, the Israeli Government did not rush to sign the proposed IGA. This was the case until 2014 when the Obama Administration began applying pressure on Israel to sign the IGA. As public awareness of FATCA grew, Republicans Overseas Israel (ROI) initiated contacts with Democrats Abroad in Israel and the Association of Americans and Canadians in Israel ("AACI") for the purpose of forming a united American response to IRS pressure on the Israeli Government. Citing political opposition from its parent organization, Democrats Abroad declined, but AACI did agree to join. As a consequence, ROI and AACI submitted parallel letters to Prime Minister Benjamin Netanyahu in March 2014. At first the Prime Minister's Office was open to a requested meeting, but later in apparent deference to the Obama Administration, contact was broken off. Copies of the ROI and AACI letters are provided in the Appendices. The US-Israel IGA was eventually signed on June 30, 2014. Israel adopted the Model I template without any material changes. A copy of the IGA is included in the Appendices.

It should be pointed out that even before the US-Israel IGA was signed the Israel Superintendent of Banks, a component of the Bank of Israel, had issued a directive in early 2014 requiring Israeli banks to begin FATCA compliance, notwithstanding the lack of any legal authority to do so, by directing Israeli banks to identify all their U.S.-person customers and to advise them that unless these customers complied with FATCA reporting in preparation for mass

automatic data transfer to the IRS. The Superintendent's Directive dated March __, 2014 may be found in the Appendices. ROI later challenged this Directive as illegal since at the time it was issued there was no basis in Israeli law for the enforcement of United States or any other foreign fiscal laws. Nor was the IGA, when it was eventually signed, self-executing. Superintendent's Directive caused extensive confusion for the FFIs as well as for their customers.

FATCA Implementation Legislation: A History

Although the IGA required the Israeli Government to introduce implementing legislation, no such action was taken until the Autumn of 2015, when the ITA introduced a bill to permit it to share information with foreign tax authorities within the framework of a multilateral tax information sharing regime. Proposed 2015 Law. As originally drafted, the bill contained language specifically making it applicable to FATCA. Due in large measure to the intervention of ROI which appeared for the first time to raise objections to the Bill , the Knesset Finance Committee, chaired by MK Rabbi Moshe Gafni, moved to strike all references to FATCA. The Finance Committee Chairman declared that he would not allow the ITA to sneak in the FATCA implementing language through a generic information exchange law. He insisted that FATCA implemention be addressed by specific legislation drafted for that purpose so that its data transfer provisions and other features could be examined carefully by the Finance Committee with the full participation of the American community through ROI and any other representative body. A copy of the proposed legislation appears in the Appendices in its Hebrew original.

In February 2016, the Israel Ministry of Justice together with the ITA submitted legislation aimed at implementing the FATCA and the IGA. Over the next six months, the

Finance Committee held no fewer than four separate hearings on the bill. ROI and individual members of the American community testified and otherwise participated in the hearings. ROI submitted detailed briefs raising numerous objections to the legislation and particularly to the automatic mass data transfer provisions which, ROI argued, violated Israel's privacy safeguards which have both constitutional and statutory status. A copy of ROI's brief to the Finance Committee appears in the Appendices in Hebrew.

Ironically, the Finance Committee hearings focused more on the ultimately successful efforts by the Committee Chairman, a member of one of the coalitions's ultra-Orthodox parties, to get the ITA to carve out an exemption from FATCA's reporting requirements for so-called *gemachim*, or charitable funds run by the ultra-Orthodox communities. While the Finance Committee Chairman called the proposed bill a "terrible piece of legislation" because of its broad-sweeping and indiscriminate automatic data transfer rules and the incomprehensible compliance requirements that attempted to engraft US tax principles and procedures on an incompatible Israeli tax substrate, he felt constrained to have the Committee approve the proposed law. He argued that no politician could do otherwise in the face of the Israeli Government's warnings that failure to do so would result in the imposition of IRS sanctions against Israeli FFIs and the eventual collapse of the Israeli banking system! He expressed the hope that following the 2016 presidential election in the United States, Congress would repeal FATCA. A copy in Hebrew of the Israeli FATCA Implementation Law styled as an amendment to Israel's Income Tax Ordinance may be found in the Appendices. The complex regulations promulgated by the ITA to enforce the FATCA Implementation Law were also considered by the Finance Committee and passed without any serious discussion due to Israeli Government pressure to meet the deadlines imposed by the IRS. These Regulations are included in the

Appendices in Hebrew are virtually inscrutable from an Israeli tax perspective, inasmuch as they regurgitate *verbatim* U.S. FATCA regulations that have no counterpart in Israeli practice. In short, the Israeli Knesset capitulated to the IRS juggernaut with the result that the privacy and other fundamental rights of Americans residing in Israel under Israeli law were violated wholesale and Israeli FFIs were transformed into IRS agents even though they lacked either the knowledge or experience with US tax procedures to administer the hastily adopted FATCA regulations.

Israel Supreme Court (High Court of Justice) Proceedings

Upon approval of the FATCA Implementation statute and the regulations, the FATCA Law went into effect in Israel during the first week of September 2016. ROI promptly amended its 2015 Supreme Court Petition to challenge the Law and Regulations as adopted on various grounds, including the following: The FATCA Implementation Law, Regulations and the IGA:

1. Do not expressly authorize the infringement of the privacy rights of American citizens and Green Cardholders.
2. Violate the fundamental privacy rights of AmericVn citizens and Green Cardholders.
3. Violates customers rights under the Banking Services Law.
4. Has an improper purpose in that it is intended to enforce a foreign fiscal statute and does not grant reciprocal rights to Israeli authorities.
5. Even if the law had a proper purpose it violates the proportionality requirement because it constitutes a broad-sweeping violation of American

> citizens' and Green Cardholders basic rights beyond what is necessary to achieve the alleged purposes of the Law.

A translated copy of ROI's Amended Supreme Court Petition is included in the Appendices. In an unusual decision, the Supreme Court issued a temporary restraining order in response to ROI's motion for an injunction on the grounds that the ITA had violated the notice provisions of the FATCA Implementation Law by declaring that it was immediately transferring the personal financial information of U.S. Persons having accounts with Israeli FFIs. A copy of the TRO is included in the Appendices. A full adversary hearing was held in the Israel Supreme Court at which time the Court dissolved the TRO but imposed additional conditions on the ITA before it could release the private financial date of American citizens and Green Cardholders in Israel to the IRS. The Supreme Court panel indicated that the Court would issue a full written opinion/judgment at a later date. As of this writing, the opinion has yet to issue. Curiously, during the oral argument on the ROI's Petition, one of the justices, a former Israeli attorney-general, made a controversial statement. Although Israeli law safeguards the right of privacy as a "constitutional" right under the Basic Law: Human Dignity and Liberty and under statute, Privacy Law of 1981, Justice Manny Mazuz, stated that in the modern era individuals have no right of privacy notwithstanding the express provisions of Israeli law. The Justice's comments were widely reported in the Israeli Hebrew press. It remains to be seen how the Supreme Court will treat this sensitive issue when the formal opinion is published.

As a result of the Supreme Court's admonitions and a grass-roots campaign conducted by ROI through social media, the ITA extended the deadline for releasing Americans' private financial data through November 30, 2016. Sometime after that date the ITA transferred the data to the IRS.

Impact of FATCA in Israel: Some Examples

The enactment of the FATCA Law and implementing regulations has caused enormous problems for American citizens, including thousands of young Americans who have lived all their lives in Israel. Consider the case of Leah, a 30-year U.S. citizen, who emigrated to Israel at the age of six weeks and is the mother of three. Leah never had a Social Security Number, although she carries a U.S. passport and voted in the 2016 Election. She is employed as a social worker, earning about $2,000 per month. Her salary is deposited directly into her Israeli bank account. She has no bank accounts in the United States or any other assets. She and her husband rent a trailer home. Shortly after FATCA became fully operative in Israel in late 2016, her bank notified her that she had been identified as a U.S. person and that she had to report to the bank to fill out IRS forms. She did so, but was told that she could not fill out the forms unless she gave the bank her U.S. social security number, which as noted she never had. The bank immediately froze her account held jointly with her non-American spouse. For months now she has been unable to access her bank account and make use of her salary. The family is suffering every day and has been forced to borrow money from parents and friends. Leah has applied for a Social Security Number through the U.S. Embassy but has been told she cannot obtain the SSN without her birth certificate which she cannot find and therefore must first obtain a certified copy from the U.S. state where she was born.

Another example: Judah is a Holocaust survivor who came to Israel from Europe and later emigrated to the United States where he was employed as a scientist. During the time he was living in the United States he became a U.S. citizen and retained his Israeli nationality. He established an retirement account over the years which accumulated a substantial sum. While in the U.S., Judah inherited an apartment in Israel in which he owned a partial interest along with

his children. This apartment generated rental income over the years which was retained in Israel and managed by one of Judah's siblings. Judah filed regular income tax returns with the IRS and reported the income he received from the Israeli apartment. Sometime after 2012 Judah read about FATCA and consulted a tax attorney. The latter had actually been involved in drafting FATCA in 2009/2010. The tax attorney recommended that Judah make voluntary disclosure of his innocent and unwitting failure to make FATCA declarations when he filed his U.S. tax returns. Judah did so, but soon learned that the IRS was not willing to waive the draconian FATCA penalties for non-compliance. Judah learned to his chagrin that the bulk of his retirement savings were going to be exhausted in order to pay the IRS penalties. This is coming as Judah is about to go into retirement with only a fraction of the funds he had saved for this purpose over the years.

Yet another example: Michael was born in India and emigrated to Israel at a young age with his family. After completing his military service in the Israel Defense Forces, where he was wounded in battle, he emigrated to the United States where he obtained a Green Card and married a natural born U.S. citizen and had three U.S.-citizen children. Michael never became a U.S. citizen. He regularly files his U.S. tax returns together with his wife. Over the years Michael took some of the money he earned in the United States as a airplane mechanic and opened a bank account in Israel for the purpose of purchasing one day a retirement home for him and his wife. He never learned about FATCA from his U.S. tax advisor and accountant; nor did he have independent knowledge of FATCA. As a result, Michael never filed FATCA declarations with his U.S. tax returns. On a recent trip to Israel when Michael was intending to purchase the retirement home, his Israeli bank told him that they had frozen his account for failure to file what the bank stated was the required IRS FATCA forms. He filled out the forms

as requested but was then told that the account would remain blocked until he could prove to the bank that he had complied with the FATCA disclosure requirements on his U.S. tax returns. Michael asked the bank why it was imposing such a requirement, inasmuch as he understood that was not required under the FATCA Implementation Law and Regulations. He was told by the bank branch manager that the bank's legal department had sent around a circular requiring U.S. citizens and Green Cardholders to prove that they had complied with FATCA disclosure requirements in filing their U.S. tax returns as a condition to being able to use their Israeli bank accounts. Michael explained that this was not the bank's business. However, the bank erroneously believed that it was required to comply not only with the Israeli implementing rules but also with the U.S. FATCA law, since this was what it had been required to do under the Bank Superintendent's Directive issued prior to the IGA and the FATCA Implementation Law. With his funds frozen Michael was unable to complete the purchase of the retirement home; had to forfeit his earnest money deposit and is now trying to find a way to unblock his account. He is devastated.

Hannah is a Canadian-Israeli dual national. She was born in the United States and carried a U.S. passport until the age of 12 when she moved with her widowed mother to Canada when her mother remarried, this time to a Canadian citizen. Hannah remained in Canada past her emancipation until she married in her early 20's. Her husband was a Canadian national. At the time of her marriage, Canadian law required that if she were to become a Canadian citizen she would have to renounce her American citizenship as a matter of course. This she did. Later on she and her husband and their children emigrated to Israel where Hannah opened a bank account in her individual name. After the issuance of the Superintendent of Bank's 2014 FATCA Directive, her Israel bank (an FFI) summoned her to the branch office and demanded that she

sign the required IRS forms, including giving her American Social Security Number. Hannah explained to the bank officials that she was not a U.S. person, having earlier relinquished her U.S. citizenship before coming to Israel. The bank clerk and the branch manager refused to accept her explanation and insisted that she was a U.S. person because she had been born in the United States. Hannah engaged legal counsel who explained these facts to the bank to no avail. Contrary to U.S. and Canadian law, the Israeli bank decided that under FATCA and the FATCA Implementing Law and regulations, it was authorized to determine the U.S.-person status of its customers. The bank officials cavalierly stated that if Hannah had a problem she could sue the bank and seek a declaratory judgment. Lacking the funds to engage Hannah counsel and lacking a Social Security Number, Hannah was helpless in the face of the bank's erroneous interpretation of law. Her bank account was frozen and she had no recourse but to enlist the assistance of U.S. consular officials who were reluctant to intervene.

The last example is my own. As mentioned I am a practicing international business attorney with small boutique offices in Jerusalem, the U.S. and in other locations. In the course of my work I am frequently asked to hold funds in trust for my corporate and individual clients. Since I am a U.S. and Israeli dual national I qualify as a U.S. person for purposes of FATCA. Since the Israeli Superintendent of Banks issued its FATCA Directive in 2014 my Israeli banks (FFIs) have insisted that I submit IRS W-9 and W-8BEN forms for each trust account I open even when the beneficiaries of these accounts are not U.S. persons. No manner of explanation has served to dissuade the banks from this practice. My status as a U.S. person is sufficient to trigger the demand. In accordance with my ethical and fiduciary obligations I notified the beneficiaries of these accounts of the banks' requirements. Several of my non-U.S. person clients thereafter notified me that they had decided to discharge me as counsel out of concern

that my U.S.-person status would jeopardize the confidentiality of their financial information and create a risk that this information could be transferred automatically to the IRS, even though these clients had no tax liability or any obligation to report to the IRS under American law. The FATCA reporting requirements continue to cause potential clients to look for alternative counsel rather than engage me where the representation would involve escrow and trusts funds. This has materially affected my professional practice in a negative fashion. Other American attorneys I know have had similar experiences.

Conclusion

These few examples are repeated thousands upon thousands of times each month for Americans (and non-Americans) residing in Israel (and the United States) of all ages, economic categories and occupations. Many have responded by engaging accountants and attorneys at considerable expense to explain and assist them in filing the required FATCA documentation, which to many inexperienced bank customers are utterly incomprehensible. Bank officials are often themselves perplexed by the U.S. tax forms which have no counterpart in Israeli tax practice and daily life. The forms are in English and are not translated into Hebrew, because the banks believe that to comply with FATCA they must have their customers fill out the English-language forms published by the IRS. Bank clerks and branch managers often have little knowledge of the IRS forms and lengthy FATCA requirements. Many Americans and non-Americans have been caught up in the FATCA red tape administered by the local FFIs even though their accounts have little or no funds or are even overdrawn! These customers are sent threatening form letters and even possible litigation by the bank for failure to comply with the banks' interpretation of FATCA's arcane requirements.

The burdens of FATCA compliance have caused a not insignificant number of American citizens in Israel to consider renouncing their American citizenship. This has lead many to despair. Others have elected to circumvent FATCA through artifice and even fraud as they seek to manage their daily financial affairs, becoming outlaws in the process. We are speaking of ordinary Americans and Green Cardholders who otherwise are obedient, law-biding members of society. These folks earn modest incomes, pay their Israeli taxes, and file and pay U.S. taxes. They are not the scofflaws, tax cheats and tax evaders the drafters of FATCA sought to catch and punish.

FATCA has also created a gross infringement on the privacy rights of Americans residing abroad. They are subject to ad hoc, automatic seizure of their data by FFIs, acting as *de facto* IRS agents, and transmission of this data to IRS under circumstances where a U.S. citizen or Green Cardholder residing in the United States would not be subject to such disclosures. In Israel for many taxpayers the situation is aggravated by the fact that Israeli tax law, unlike its American counterpart, requires periodic filing of asset and liability reports. This information is required to be reported to the ITA and would not be available to the IRS or the U.S. Government except in cases of suspected criminal activity or tax evasion. Yet this information now fully digitized can be transferred automatically to the IRS at the push of a button. The situation is made even worse by the fact that these wholesale data transfers are being made to an agency that (a) has been shown to have inadequate systems for protecting personal data from foreign and domestic cyber-invaders [*see* the Decision by the European Court of Justice decrying the inadequacy of U.S. government data protection policies and systems in *Schrems v. Data Protection Commissioner* (Oct. 6, 2015); and (b) has itself improperly targeted taxpayers and organizations for political purposes. The risks to Americans residing in Israel are heightened by

the fact that the hacking of IRS servers by foreign governments that are hostile to Israelis and terrorist organizations determined to target Israelis and Americans abroad. FATCA's data transfer rules are at odds with American values protecting the sanctity of individual privacy. Justice Mazuz's cynical abolition of the right of privacy in the cross-border context is fundamentally at odds with the principles of both American and Israeli constitutional law and democracy.

Beyond the impact of FATCA on ordinary people, the law, the IGA and the entire FATCA administrative regime is repugnant to the sovereignty of the foreign countries who, like Israel, have been strong-armed by the IRS and the U.S. Administration into FATCA compliance. The attempt by the U.S. Government to force foreign banks located outside the United States to become effectively IRS agents is offensive to traditional concepts of sovereignty and independence. It is completely at odds with the current U.S. Administration's emphasis on the importance of national borders, the limits of globalism and the respect for the sovereignty of foreign governments. Not a few members of the Israeli Knesset expressed frustration at the fact that they were being coerced by the IRS through the ITA into adopting U.S. tax policies and procedures many of which were at odds with longstanding Israeli practice.

The Israeli experience with FATCA has not been a favorable one. American citizens and Green Cardholders are incensed. They gave mass support to ROI efforts to prevent or mitigate the effects of the FATCA implementation legislation and to the litigation, which is still pending, aimed at remedying the illegal effects of this highly problematic reporting regime. FATCA has disrupted and continues to disrupt peoples' lives by interfering with their ability to manage their financial affairs through conventional banking systems. FATCA has forced law-biding citizens to consider or actually become scofflaws and offenders where the restrictions have left them no

real alternatives. FATCA has compelled FFIs to perform administrative functions for the IRS that they are ill-equipped and often totally incompetent to perform. FATCA represents the worst in U.S. governmental overreach by using IGAs and the threat of retribution against FFIs doing business in the United States to coerce foreign sovereigns into adopting and enforcing U.S. fiscal law and policies. Were the shoe on the other foot and foreign governments would attempt to pressure the U.S. domestic banks to enforce foreign tax laws, there would be an uproar in Congress and throughout the American Republic – and rightfully so.

The time has come to put an end to the monstrosity that FATCA has become for the sake of millions of Americans living abroad, for the sake of millions more Americans living here at home with bank accounts, insurance and other financial assets abroad and for the sake of America's friends and allies, like the State of Israel.