The ABCs of Foreign Bank Accounts

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The reporting of offshore accounts and assets has emerged as a major issue for taxpayers, practitioners, and the IRS. With the 2009 voluntary disclosure program and the 2011 initiative mostly behind us, and a third open-ended program announced, it is obvious that not all the glitches have been eliminated from the system. Much noncompliance remains, and it is not attributable to any one issue. The authors highlight the many faces that populate this diverse landscape.

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The extension to submit materials in the IRS's foreign bank account disclosure program known as the offshore voluntary disclosure initiative (OVDI) closed on December 9, 2011. Even at that time it was clear it would be months, and possibly years, before it is really over. With opting out of the program being attractive for some penalty computations, many opt-out cases will stretch well into 2012. Of course, now that a third (and evidently more permanent) voluntary disclosure program has been launched, disclosing foreign accounts and assets will stretch well into the future. Although the open-ended deadline makes sense given the vast numbers of taxpayers who still have these issues to address, like any filing deadline, time limits have a way of forcing decisions. But the more controversial part of the third program is what is perceived to be a one-size-fits-all approach.

Thus, many tax lawyers and accountants will be working on these matters for quite some time. In this light, it is appropriate to inquire into some of the factors that motivated taxpayers to disclose their foreign accounts. It is equally appropriate — and perhaps more important — to review some of the reasons that may have led to the widespread failure of taxpayers to disclose their accounts in the first place.

If You Build It, They Will Come

Some, perhaps even many, will find it tempting to simply assume (as at least some members of the press have done) that the vast bulk of noncompliant taxpayers are "tax cheats." Depending on one's definition, many may technically be that. One could even claim that *all* are.

Nevertheless, many of the taxpayers who participated in the 2009 offshore voluntary disclosure program (OVDP) and 2011 OVDI did not want to be noncompliant. Many did not even *know* they were. Those who knew they were noncompliant found a way to justify it. They justified their particular circumstances as well as the continuing effects of the tax treatment they applied.

One common thought seems to have been enabled by the once inviolate notion of bank secrecy. If no one would ever know of a Swiss (or other) account, perhaps it might never need to be disclosed or reported. Perhaps that is the tax law equivalent to the philosophical conundrum posed by the question: ''If a tree falls in a forest and no one is around to hear it, does it make a sound?''

Yet there were many less obvious questions. As one example, the ''I'm paying tax on it in [foreign country] and therefore need not report it on my U.S. return'' stance was (and perhaps remains) extremely common. There are also many practitioners, accountants, enrolled agents, and tax attorneys who were unaware of foreign bank account report filing obligations until the last few years. Every tax practitioner *today* may know what an FBAR is and when it must be filed, but just a few years ago that wasn't true.

And it is not clear that the situation has changed for many taxpayers. Even today, numerous taxpayers have never heard of FBARs or have only heard of them recently. We have met many ostensibly sophisticated people who learned of FBARs only within the past few months.

Apart from the lack of FBAR awareness and compliance, which may be easier to explain, the tax return compliance issue is much harder to fathom. One thing that makes it especially puzzling is that it seems systemic. It is surprising that many U.S. tax return preparers evidently believed it was permissible not to report income on a U.S. tax return as long as it was being taxed in another country. Perhaps some thought there was rough justice in having it taxed elsewhere.

Some of those advisers even purported to specialize in representing (or preparing returns for) U.S. persons living outside the United States. In some cases, they may have been truly unaware. In others, their advice may have been based on perceived rough justice but actually constituted willful blindness. Some advisers thought: ''If you are paying tax in [foreign country], don't worry about it on your U.S. return; it's not worth the hassle of claiming the foreign tax credit and it comes out roughly the same.''

However naive or misinformed those views may be, many practitioners and the IRS have encountered them repeatedly. But countless taxpayers and advisers who simply did not know fundamental U.S. tax rules surfaced during the 2011 program and have continued to since then.

Teachable Moments

The Treasury Inspector General for Tax Administration released a report that provides a wealth of information about the 2009 OVDP.[1] The TIGTA report indicates that 14,922 voluntary disclosure requests were made as part of the 2009 program. Of those, approximately 9,900 were made after the extension of the program from September 23 to October 15, 2009.[2]

The IRS appears not to have anticipated the volume of disclosures. In fact, the IRS believed that the 2009 OVDP would bring in a number of taxpayers roughly equivalent to the 2003 offshore voluntary compliance initiative, which was intended to address offshore credit cards or other offshore financial arrangements[3] and yielded disclosure requests from approximately 1,500 taxpayers.[4]

The volume of taxpayers participating in the 2009 OVDP caught the IRS off guard. According to the TIGTA report, nearly 11,000 of the approximately 14,000 OVDP submissions were accepted.[5] The Service needed to verify and review more than 55,000 individual income tax returns — an increase of more than 10 percent to the national revenue agent workload.[6] In total, more than 1,350 IRS revenue agents, managers, attorneys, and other support personnel worked to process the returns and other materials submitted under the 2009 OVDP.

On average, the closed OVDP cases provided more than $200,000 in tax collections per case, which included back taxes, interest, and penalties.[7] That led to the collection of approximately $2.2 billion from taxpayers who participated in the 2009 OVDP.[8]

Not surprisingly, the IRS made an effort to mine the taxpayer data it obtained. The TIGTA report points out that the IRS established an ''E-Trak Offshore Voluntary Disclosure Program System'' to control, monitor, and evaluate the 2009 OVDP.[9] That system allowed the IRS to scour the vast quantities of data received from OVDP applicants and other sources. The IRS captured data related to banks, financial institutions, tax haven promoters, and tax professionals who assisted taxpayers during the voluntary disclosure process. That data-mining provided the IRS with the opportunity to supplement and corroborate prior leads. It also helped (and is

[1]TIGTA, ''The 2009 Offshore Voluntary Disclosure Initiative Increased Taxpayer Compliance, but Some Improvements Are Needed,'' 2011-30-118 (Sept. 21, 2011), *Doc 2011-22658*, *2011 TNT 209-19*.

[2]*Id.* at 4.

[3]IR-2003-5, *Doc 2003-1343*, *2003 TNT 10-11*.

[4]*See supra* note 1, at 4.

[5]*Id.* at 6.

[6]*Id.*

[7]*See* IRS Commissioner Douglas Shulman's statement on UBS and the voluntary disclosure program, *Doc 2010-24494*, *2010 TNT 221-25*.

[8]IR-2011-94, *Doc 2011-19648*, *2011 TNT 180-14*.

[9]*See supra* note 1, at 11.

probably still helping) the IRS develop new leads involving several banks, advisers, and promoters around the world.

In contrast, only general information is available on the statistics of the 2011 OVDI. We know that approximately 12,000 new applications were submitted by the September 9, 2011, deadline.[10] Also, approximately 3,000 applicants who came in after the 2009 OVDP deadline were allowed to participate in the 2011 OVDI, bringing the total number of voluntary disclosures in the two programs to approximately 30,000.[11] And we know that the IRS has collected roughly $500 million in taxes and interest as part of the 2011 OVDI, a figure that does not include the 25 percent miscellaneous penalty, and that doubtless will rise as more of the still extant 2011 cases are completed.[12]

Birds of a Feather

Plainly, the 2009 OVDP was a success. However, some disagree with aspects of its administration, including Taxpayer Advocate Nina Olson, who has used the pejorative "bait and switch" for the IRS's actions.[13] The IRS had no idea of the sheer number of participants the program would yield. That said, the 2011 OVDI in some respects may have been even *more* successful. The numbers between the two programs may not be that different, but the types of participants seem to be.

The 2009 OVDP appears to have attracted a significant number of sophisticated taxpayers. There was a mad rush at the end of the program for taxpayers with UBS accounts. They and others with accounts at similar European banks that had previously maintained bank secrecy may have typified the 2009 program participants.

There were many other types of 2009 participants. Consider this example:

> **Alvin:** Alvin was born and raised in the United States and has run a successful computer company based in New York but with sales in various Asian countries. In the late 1990s, Alvin became concerned that he and his spouse would get divorced and that a divorce settlement might cost him more than half his net worth. He had his foreign sales people move funds from Asian computer sales to a small Luxembourg bank. Alvin deducted payments to his secret account as "consulting fees," so it was all pretax money. He never reported the income, checked the box on Schedule B, or filed FBARs reporting the account.
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> Alvin and his wife reconciled. In the summer of 2009, Alvin's Luxembourg bank informed him that it would no longer hold his funds and that his information would be disclosed to U.S. authorities. He promptly sought legal counsel and entered the 2009 OVDP, grumbling that he didn't think he should have to pay, but that a 20 percent penalty was a lot less than he would have owed had he declared the income in the first place.

Whether Alvin was similar to any 2009 participants, the 2011 OVDI seems to have been more of an "everyman's program." Many 2011 participants seemed to be people with their feet planted in more than one country. Some were unsophisticated or relatively recently arrived taxpayers, making the confusion perhaps understandable. There were many Alvins in the 2011 OVDI, but a more prototypical participant might be:

> **Zoe:** Zoe was born abroad, came to the United States for college, and later became a U.S. citizen. Like Alvin, she became successful in the computer industry. At her birth, and without her knowledge, her grandfather opened two mutual fund accounts in her country of origin that were intended to be used for Zoe's future children.
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> Zoe's grandfather died in 2007. Zoe learned of the accounts and, like her grandfather, continued to pay taxes on the earnings from funds in her home country. In the summer of 2010, one of Zoe's co-workers told her that he had entered the 2009 OVDP to disclose his foreign accounts. Zoe, who had never told her accountant about her foreign accounts (she was already paying tax on them — why would she?), called her accountant, who advised her that she should enter the program.

Alphabet Soup

From Alvin to Zoe, consider the rest of the alphabet:

> **Betty:** Betty was born in the Netherlands, immigrated to the United States, and is now a permanent resident. She has several student loans in the Netherlands and maintains accounts there to pay the student loans. Without her knowledge, Betty's mother has also listed her as a joint account holder on her own Dutch accounts, which she said is to ensure there are no transfer problems at her death. Betty files FBARs reporting only her own accounts.

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[10] *See supra* note 8.

[11] *Id.*

[12] *Id.*

[13] *See* National Taxpayer Advocate Nina Olson's 2011 Annual Report to Congress, at 201 et seq., *Doc 2012-588, 2012 TNT 8-16*.

Clyde: Clyde was born in Australia to U.S. parents. While he never lived in the United States, he retained his citizenship. All his earnings and retirements accounts are in Australia and he has never filed U.S. returns or FBARs.

David: David, an Indian citizen and U.S. permanent resident, has no foreign bank accounts but does have an extensive portfolio of Indian stocks he inherited, a few of which pay small dividends. He used to have all the paper stock certificates at his uncle's house in Mumbai. In 2006 he had all the stock certificates put in an electronic Demat account in India. He has never filed FBARs or checked the box on his tax return.

Egbert: Egbert is a U.K. citizen and a permanent U.S. resident. He manages a hedge fund and has several foreign accounts, both personally and for his business. He started filing U.S. tax returns in 2000 and learned about FBARs in 2010. He discovers that his hedge fund filed FBARs and that he even signed some, but he never disclosed or reported the interest of his personal foreign accounts.

Francesca: Francesca, a U.S. citizen in her late 60s, is a serial entrepreneur with multiple homes and businesses. She has been married three times. Her first marriage broke up in 1984 and involved a bitter custody battle and property dispute over millions in assets. At that time, she set up several accounts in Switzerland to hide assets from her spouse.

After her divorce, she never reported the accounts and let the funds accumulate. She annually filed FBARs for accounts in the United Kingdom and Japan, but never mentioned the Swiss accounts on her tax returns or FBARs. She wanted to come into compliance but knew she could hardly just start reporting interest on a Swiss account, so she hasn't done so.

George: George, a U.S. citizen, is a teacher. Since the early 1990s, he has been investing in stock and other markets and has been quite successful. Among his investments are electronic holdings of gold in the Isle of Man. George has never actually seen his gold holdings, but he understands that he has access to the gold bullion. After reading the FBAR instructions sometime between 2000 and 2004, he concluded that holdings of actual gold bullion did not need to be reported on an FBAR. He came to the same conclusion about his electronic account and has never filed an FBAR or reported the value of precious metal holdings on his income tax returns.

Henrietta: Henrietta, a U.S. citizen, is involved in online gaming activities and is keenly aware of the liability risks of operating in the United States. She has more than 25 non-U.S. entities, and her businesses process credit cards and do other banking activities overseas. Because of the extent of her companies' bank activities, Henrietta assumes that only her companies need to report the accounts. Therefore, she has not filed FBARs.

Igor: Igor grew up in the Ukraine and came to the United States in his early 20s. He began the process but never obtained a green card. He did, however, file federal income tax returns while working in Silicon Valley. He invested in Silicon Valley startups before returning to his home country. Income from those investments flows to his European bank accounts. Igor reports the income on a Form 1040-NR, but does not file FBARs and doesn't believe he needs to.

Janet: Janet was born and raised in the United States but immigrated to France in the late 1970s. She married a wealthy Frenchman who promptly died, leaving her a large inheritance chiefly of Impressionist paintings. Since the 1970s, the paintings have appreciated dramatically and Janet has sold off one or two every few years as her chief source of income. Janet spoke to her U.S. accountant, who assured her that her pieces of art and other collectibles do not need to be reported on an FBAR. She relied on that guidance and has never filed an FBAR.

Khloe: Khloe is a U.S. citizen who recently inherited substantial accounts from her grandfather, a Greek shipping magnate. She has not accessed those funds. She recently learned that her grandfather also was engaged in the sale of illegal narcotics, the proceeds of which are in her inherited accounts. She is considering the new disclosure program and is worried about the provenance of the foreign funds.

Larry: Larry was born and raised in Korea and moved to the United States to go to college. He returned to Korea, where he joined a national company and received stock options and other equity compensation. He later returned to the United States, married a U.S. citizen, and became a U.S. taxpayer. The options (granted before he was a U.S. citizen) have now begun to vest and he is exercising them. Larry never made a section 83(b) election for the options and does not know if the option exercise will give rise to a U.S. tax liability. Larry has never filed FBARs.

Martha: Martha was born in California and moved to Canada in the late 1970s. She began working and paid money into a Canadian registered retirement savings plan. Since moving to Canada, she has never filed U.S. federal income tax returns (including Forms 8891) or FBARs.

Naomi: Naomi was born in the United States to Israeli parents who were students in the United States. She grew up in Israel and learned only recently that she was born in the United States and is a U.S. citizen. She has small Israeli accounts and foreign income.

Oscar: Oscar was born in the Dominican Republic but moved to the United States for work and ultimately became a citizen. He established a bank account in his home country to help his aged mother. He and his mother are both named on and signatories to the account, but he regards it as his mother's money. Oscar sends money to the account each month, but has never withdrawn any. Oscar's mother reports the interest income from the account on her own foreign return.

Patrick: Patrick, a U.S. citizen, moved to Saudi Arabia to work in oil exploration for BP. He has not returned to the United States in more than 10 years and has no intention of returning. He is paid by BP in Saudi Arabia and pays local taxes on his income. He has not filed a U.S. return or FBAR since he moved to the Middle East.

Quan Yin: Quan Yin was born in China and is now a U.S. permanent resident. She and her three siblings (who do not live in the United States) own a condominium in Beijing. Quan Yin and her siblings recently started renting the condo to a relative. Quan Yin figures that she does not need to report the condo on her FBAR (which reports her other foreign accounts). Because the condo is rented to a family member, she figures the income is not reportable on her Form 1040, either.

Raquel: Raquel and her boyfriend are U.S. citizens who often travel to Italy. Last year they decided to start importing Tuscan pottery for sale in the United States. They each opened accounts with Banca d'Italia with less than $10,000 earned in the United States. They are now planning to marry and file joint returns.

Stanley: Stanley was born in Argentina to Argentinean parents. He moved to the United States, married a U.S. citizen, and had children. His parents set up Argentinean accounts for his children's education. Stanley is listed as a joint account holder on the Argentinean accounts, but all parties understand the purpose of the accounts. Stanley is considering filing delinquent FBARs going back to 2003 and listing the account only in Part IV, "Information on Financial Account(s) Where Filer has Signature Authority But No Financial Interest in the Account(s)."

Teena: Teena was born in India and married a U.S. citizen in the 1970s. She received her U.S. citizenship, but she and her husband returned to India in 1980. Her husband took care of all tax matters, including filing their tax returns. He died in 2003. Teena has not filed a U.S. tax return since then, but now wishes to move to the United States to be close to her children.

Ulrich: Ulrich is a U.S. citizen who has lived in Germany since 1994. In 2006 he sold his personal residence in Berlin for approximately $1.6 million. His basis was $400,000. He invested the proceeds in the German stock market. Ulrich has reported the investment earnings (but not the sale of the residence) on his U.S. federal income tax return, and checked the box at the bottom of Schedule B. However, only in 2010 did Ulrich start filing FBARs.

Vera: Vera, a U.S. citizen, owns more than 10 percent, but less than 50 percent, of a foreign corporation located in Europe. The company invests in commercial real estate in the EU. Vera does not report her direct ownership of the company on her FBARs, and has never filed Forms 5471. She does report the investment income she receives from the company on her tax returns.

Walter: Walter and his two brothers are U.S. citizens and joint owners of a Swiss account. They inherited the Swiss account from their parents, who were Holocaust survivors. Because the money was an inheritance, and Walter and his brothers thought that inheritances are tax free, they did not report the account or its earnings on their respective income tax returns. They also did not file FBARs.

Walter and his brothers use the money from the account when they travel to Europe. Walter is much wealthier than his siblings and wants to pay any penalties associated with delinquent tax filings on behalf of the other siblings despite their joint ownership and responsibility for the account.

Xerxes: Xerxes was born in Iraq, but moved to the United States as a child and became a citizen. He still has close ties to Iraq. To help one of his U.S. friends buy property in Bagdad, Xerxes had his friend transfer funds to his Iraqi account, more than doubling its value for only a few days. He then used the funds to purchase the property on his friend's behalf. His FBAR for the year of the transaction does not reflect the increase in value from the receipt of his friend's funds.

Yvonne: Yvonne, a U.S. citizen, was an accountant who worked throughout Europe and the Southeast Asia for several large accounting firms. She lived in various foreign locales and had many foreign accounts. She filed FBARs starting in the mid-1990s and reported her accounts. However, she had Australian retirement accounts that she never declared on her FBARs and, given her knowledge of tax law, did not believe were reportable.

Goose and Gander

As those hypotheticals suggest, there was a wide spectrum of fact patterns between Alvin and Zoe in both the 2009 OVDP and the 2011 OVDI. There were many taxpayers who appeared to be more willful than Alvin in their failure to report and file returns related to their accounts. There were also many taxpayers whose facts are even more sympathetic than Zoe's and whose failure to report and file returns related to their foreign accounts appears to be anything but willful.

One of the greatest criticisms of the 2011 program (and its 2009 counterpart) was its one-size-fits-all character. Some degree of uniformity is sensible; in a program in which certainty is arguably what people want most, the idea of looking at individual circumstances seems impracticable.

Moreover, the idea of amnesty is to open doors. Some who enter will be guiltier than others. It may be unrealistic to think that the IRS could formulate a program that would ask why accounts were opened or whether funds had previously been subject to U.S. tax. Recently, the IRS appears to be willing to look more closely at what it could see as more sympathetic sectors of noncompliance. For example, it has offered special dispensation for some U.S. citizens or dual citizens residing outside the United States.[14] Yet the number of taxpayers who lost 20 or 25 percent of their retirement savings generated in a foreign country before U.S. residency and on which all foreign taxes had been paid is hard to ignore.

As we consider Alvin and the rest of the alphabet, let's consider whether he and Zoe should be treated the same. Alvin paid 20 percent of the account values and possibly avoided the tax on the initial consulting fee earnings. Zoe paid 25 percent of foreign accounts intended for her children. In Zoe's case, only minimal earnings escaped U.S. income tax. In Alvin's case, the entire account value did.

Even given all the limitations the IRS has and the nature of amnesty, one can argue that Alvin and Zoe are too different to be treated the same. It is probably not possible to resolve that debate. One answer is that those cases are the very reason for opting out.

Whatever the inequity of the programs, the huge number of those situations cannot easily be explained. Why was there such genuine confusion over points that seem so fundamental? The FBAR requirement only recently became a fundamental precept among tax practitioners, let alone the public. But that's not the case for reporting worldwide income. And that is the most puzzling.

Given what seems to have been rampant noncompliance, it is doubtful that all the problems have gone away. While the third IRS program is an extremely positive development, it is not clear that even its open-endedness will bring to an end what seems in many ways to be more confusion than intentional noncompliance. The range of stories suggests that the circumstances giving rise to those issues will continue.

Rubik's Cube

There are many questions raised by the success of the two programs; a fundamental one is why the failure to report was so rampant. Why did the roughly 30,000 taxpayers who came forward fail to report their foreign accounts and worldwide income?

Some were tax cheats who understood their reporting and filing obligations and willfully elected to ignore them. However, for many in the 2009 OVDP and perhaps even more in the 2011 OVDI, the tax cheat moniker does not seem entirely appropriate. Many taxpayers like Zoe simply did not know about their obligations to file FBARs, check the box on Schedule B, and report their worldwide income.

That the United States is atypical in assessing tax on worldwide income doesn't help the situation. Suppose you queried the average American and described a taxpayer paying tax in county X on income made in country X. If you ask about his U.S. tax return, how many taxpayers (even sophisticated ones) would recognize that the foreign income *already* subject to tax in a foreign country must *also* appear on the return? In many ways, that system is counterintuitive.

So who is to blame for the failures of taxpayers from A to Z with foreign accounts and income who

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[14] *See* FS-2011-13, *Doc 2011-25752*, *2011 TNT 237-12*.

failed to report them? It appears that there are at least five culprits: the IRS, tax practitioners, taxpayers, Congress, and most amorphous of all, our tax system itself.

Blame Game

It is easy to blame the IRS. Arguably, it is the IRS's responsibility (at least in part) to educate taxpayers about their filing obligations. The IRS certainly cannot persuade the average citizen, or even most tax practitioners, to study the FBAR regulations.

However, a general knowledge of how the tax system functions should transcend code and filing subtleties. In part, the onus is on the Service to educate the Alvins and Zoes of the world about their obligations. This is especially true as ever more complicated reporting requirements (such as Form 8938 to report foreign assets) are implemented.

Of course, the IRS can hardly do it all. Tax professionals may be equally (or more) at fault for the systemic failure that has led to programs like the 2009 OVDP and 2011 OVDI. Like the IRS, our task is not only to prepare protests or file returns, but also to ask clients the appropriate questions to elicit and determine the extent of their filing and reporting obligations.

Many accountants, enrolled agents, and tax attorneys simply did not know about FBAR filing obligations before the 2009 OVDP. We suspect that a smaller number did not know of or failed to inform their clients about our worldwide tax regime. If tax advisers do not know or cannot impart the rudimentary requirements of the tax code, we fail to perform our primary responsibilities to clients and to the system.

Yet tax advisers — and return preparers — can only do so much. Taxpayers themselves are certainly not without blame. Despite the complexity of the code, taxpayers must bear a degree of responsibility to educate themselves about their reporting and filing obligations. Some taxpayers knew about their responsibility to file FBARs and report their foreign income and consciously chose not to do so. Many more taxpayers, whether through apathy or resignation, failed to make the effort to understand what they must produce and file.

And then there is Congress. The tax code has long been used for social policy, but in recent decades, Congress has tinkered with it with increasing hyperactivity to an extent that most tax practitioners could never have imagined. Since 1986 alone, there have been 15,000 changes to the tax code.[15]

Our tax system has long been complex and nuanced, but it has moved into the realm of the ridiculous. Today, no one can fathom it. Specialization has reached its zenith and is never enough. As recently reported, few lawmakers — the very individuals who enacted and constantly tinker with the tax code — actually complete their own returns.[16] The code's complexity inevitably makes it nearly impossible for most laypersons to prepare their tax returns without a professional preparer.[17] Even IRS Commissioner Douglas Shulman uses a hired preparer.[18]

The code alone holds approximately 3.8 million words, nearly five times as many as appear in the King James Bible.[19] But the tax code is only the feet of the giant. Much of the law is contained not in the code but in the regulations, which are even more voluminous. Then there are court opinions and all manner of other releases, memoranda, notices, private letter rulings, published rulings, information releases, general counsel memoranda, and more.

No one can read it all. Even if we could, it would be obsolete by the time we finished. There have been more than 4,400 changes to the tax code over the past decade alone — more than one a day. Plainly, the manifold requirements of the still-new Foreign Account Tax Compliance Act (FATCA) add more complexity to a system that is arguably already groaning and bloated. Adding more and

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[15]Statement of Sen. Max Baucus, D-Mont., on changes in the code since the Tax Reform Act of 1986, *Doc 2011-4310*, *2011 TNT 41-27*.

[16]*See* Walter Alarkon and Jay Heflin, "Few Lawmakers File Their Own Tax Returns, Citing Code's Complexity," *The Hill*, Apr. 14, 2010:

> Several senior lawmakers, including Senate Majority Leader Harry Reid (D-Nev.), Senate Finance Committee Chairman Max Baucus (D-Mont.), Senate Minority Whip Jon Kyl (R-Ariz.), ranking Finance member Sen. Orrin Hatch (R-Utah) and Ways and Means member Rep. Jim McDermott (D-Wash.), said they turn to accountants. Many of the lawmakers said they've used the same accounting firm for years. Of the 28 members of Congress who responded to survey questions from The Hill, Sen. Mike Enzi (R-Wyo.) was the only one who does his returns all by himself.

[17]*See* Shulman's prepared remarks before Harvard Kennedy School, Nov. 14, 2011: "Perhaps the most telling indicator of taxpayer confusion over the code's complexity is that today, 90 percent of individual taxpayers pay for professional tax preparation or tax software to prepare their tax returns."

[18]*See* Shulman's comments during C-SPAN's *Newsmakers* program, Jan. 9, 2011: "I've used one for years. I find it convenient. I find the tax code complex so I use a preparer."

[19]*See* Jack Hough, "Tax System: Too Complex to Be Constitutional?" *SmartMoney*, Jan. 18, 2011.

more complexity has even led to the (probably tongue-in-cheek) question whether our tax system has become too complicated to be constitutional![20]

Yet all that does not explain what led to the 2009 and 2011 programs. Even if one could seriously contend that our system is so complex as to be unconstitutional, and no matter how much we may decry the Byzantine complexity and constant change that defines our tax law, reporting worldwide income is — and has long been — a central part of our system.

And that brings us to the system itself. In this season of political campaigns, some say that we need to move to a territorial system of taxation that no longer taxes worldwide income.[21] That may be, but that would be a seismic shift. It may be time for a simpler system: Even keeping worldwide reporting, perhaps a system with significantly less complexity would make its central features more prominent. Perhaps seemingly central features could then be discerned by average people.

One could argue that such fundamental precepts as reporting worldwide income are obscured by the gargantuan bloat of a system that has made even its basic features featureless. Perhaps even central features like the nose and eyes can be ignored when seeing an obese and misshapen giant. Of course, it is *our* obese and misshapen giant, and we have all played a part in feeding it.

Conclusion

The government and many taxpayers and practitioners see the 2009 OVDP and 2011 OVDI as successes. Many formerly noncompliant taxpayers have been brought back into the system. Henceforth, they presumably will continue to fulfill their reporting and filing obligations. On many levels, that is a good thing.

However, peel back the layers, and one could reasonably conclude that the 2009 and 2011 programs are indications of a more systemic problem. The failure of education and tax professionals, and the system overload for so many, create a perfect storm. The aggregate unreasonable complexity of some tax filing and reporting obligations shows that the system needs fixing. It's everyone's responsibility to contribute to the overhaul, perhaps from A to Z.

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[20] *Id.*

[21] *See, e.g.*, a draft plan by House Ways and Means Committee Chair Dave Camp, R-Mich., to move the United States from a worldwide system of taxation to a territorial system, *Doc 2011-22576*, *2011 TNT 208-27*.