THE IRS'S VOLUNTARY DISCLOSURE PROGRAM: NEED FOR CODIFICATION

Jay A. Soled*

ABSTRACT

For more than a century, the Internal Revenue Service (IRS) has had a voluntary disclosure program in place. Its purpose is to coax into tax compliance those wayward taxpayers who have committed criminal acts or have been remiss in fulfilling their civic tax-filing obligations. Historically, the voluntary disclosure program has had to strike a difficult balance between being attractive enough to entice tax scofflaws to participate and not being too attractive lest ordinary taxpayers feel that their compliance efforts were for naught.

A unique feature of the voluntary disclosure program is that it is entirely administrative in origin. The commissioner of the IRS formulated the program and exercises carte blanche as to its terms. The program's administrative origins have allowed it to be nimble and responsive to the evolving tax landscape, but such malleability has sometimes dissuaded qualified taxpayers from participation because they fear that the program's terms are stacked against them.

This Article advocates that Congress codify the voluntary disclosure program to bolster its appeal. By taking this legislative measure, the IRS and taxpayers would have to abide by a set of written ground rules. Doing so would curtail both real and perceived agency abuses and likely increase the number of derelict taxpayers choosing to participate.

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* Director of Master of Accountancy in Taxation Program and Professor, Rutgers Business School. L.L.M., New York University School of Law; J.D., University of Michigan Law School; B.A., Haverford College. The author thanks Richard Sapinski, Esq., and Robert Stern, Esq., for their analytical insights and assistance in refining this piece.

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INTRODUCTION

During the last century, in one form or another, the Treasury Department has overseen a voluntary disclosure program.[1] The historical focus of the program was upon taxpayers who committed criminal tax violations; they could seek absolution from the Internal Revenue Service (IRS) if, before being investigated, they approached the agency and acknowledged their guilt.[2] For noncompliant taxpayers, this forgiveness process often came at a steep financial cost in terms of additional taxes, penalties, and interest;[3] nevertheless, in many taxpayers' minds, this price tag has been well worth the cost because it negated criminal exposure and possible prison time.

During the twentieth century, the existence of the voluntary disclosure program was not well publicized, and its contours were amorphous. This was not unexpected: the genesis of the voluntary disclosure program was (and remains) entirely administrative in nature;[4] and thus, with every new IRS commissioner, there came the opportunity to curtail, expand, and tweak it.[5] Its transient features

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1. *See, e.g.*, Cono R. Namorato & Richard E. Timbie, *Voluntary Disclosure Policy: An Alternative to Legislative Amnesty*, 45 INST. ON FED. TAX'N § 38.01, § 38.02 (1986) ("The Treasury Department has followed some form of voluntary disclosure policy since 1919. The policy, which was never formalized by statute or regulation, was developed through various informal announcements by Treasury officials.").

2. *See, e.g.*, Joseph W. Burns & Murray L. Rachlin, *Should We Penalize Voluntary Disclosures?*, 28 TAXES 39, 39 (1950) ("The Bureau has stated that where a taxpayer voluntarily discloses his attempted tax evasion to proper Bureau officers before any investigation of him has commenced, it will not recommend criminal prosecution.").

3. *See* IRM 9.5.11.9(6) (Sept. 17, 2020) ("The practice also requires taxpayers to . . . [m]ake good faith arrangements with the IRS to pay in full, the tax, interest, and any penalties determined by the IRS to be applicable.").

4. *See* Charles S. Lyon, *The Crime of Income Tax Fraud: Its Present Status and Function*, 53 COLUM. L. REV. 476, 492 (1953) ("From the very beginning the whole matter of voluntary disclosure was surrounded by uncertainty; it was never explicitly provided for by statute, regulation or any of the lesser breed of public communications emanating from the Treasury and Bureau. Nor did the policy have even a statutory footing.").

5. In 1952, for example, the secretary of the Treasury Department, John W. Snyder, announced the termination of the voluntary disclosure program. I.R.S. News Release S-2930 (Jan. 10, 1952). However, in a 1962 news release, Commissioner Mortimer Caplin clarified the implications associated with policy termination: "[T]he question may arise whether a taxpayer's voluntary disclosure of his willful violations will afford immunity against criminal prosecution. I want to reaffirm our existing policy in

have been captured in various renditions of the *Internal Revenue Manual*,[6] an assortment of administrative pronouncements,[7] and numerous commissioner and Treasury Department statements.[8]

However, at the turn of the century, the salience of the voluntary disclosure program changed dramatically. Through a series of discoveries, the Treasury Department learned that thousands upon thousands of taxpayers were failing to report their offshore income, and for the first time, the agency developed viable strategies to uncover the identity of culpable taxpayers.[9] One major problem, however, was that the IRS lacked the resources to audit, let alone criminally prosecute, all of those who were guilty of tax noncompliance. The agency, therefore, commenced and broadly publicized a permutation of its voluntary disclosure program, known as the Offshore Voluntary Disclosure Program (OVDP), and its participation qualifications.[10]

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this regard. Even true voluntary disclosure of a willful violation will not of itself guarantee prosecution immunity." Harry Graham Balter, *Caplin Restates Voluntary Disclosure Policy As Rumors of IRS Change Circulate*, 16 J. TAX'N 104, 104 (1962) (quoting I.R.S. News Release IR-61-432 (Dec. 13, 1961)).

6. *See, e.g.*, IRM 9.5.11 (Sept. 17, 2020).

7. *See*, *e.g.*, Allen D. Madison, *An Analysis of the IRS's Voluntary Disclosure Policy*, 54 TAX LAW. 729, 731 n.27 (2001) ("We want to encourage people to come forward voluntarily and get right with the government." (quoting I.R.S. News Release IR-92-94 (Sept. 30, 1922))). For a set of earlier Treasury announcements, see generally Gerald L. Wallace, *Penalties and Prosecutions for Evasion of the Federal Income Tax*, 1 TAX L. REV. 329, 341–43 (1946).

8. For example, in 1945, Fred L. Vinson, the Secretary of the Treasury, stated, "The Commissioner of Internal Revenue does not recommend criminal prosecution in the case of any taxpayer who makes a voluntary disclosure of omission or other misstatement in his tax return or of failure to make a tax return." Burns & Rachlin, *supra* note 2. Later, in 1947, J.P. Wenchel, then-Chief Counsel of the Bureau of Internal Revenue (the predecessor to the IRS), stated thus:

> The Department has broad discretionary power long recognized by Congress to determine the policy and procedure for the effective enforcement of the internal revenue laws. The Department, acting under that power, does not recommend prosecution of the evader who repents in time. There is nothing new in this position. For years the position of the Department has been that where the taxpayer makes a voluntary disclosure of the intentional evasion before investigation has been initiated, criminal prosecution will not be recommended.

Id.

9. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-318, OFFSHORE TAX EVASION: IRS HAS COLLECTED BILLIONS OF DOLLARS, BUT MAY BE MISSING CONTINUED EVASION (2013) (describing the breadth of the Offshore Voluntary Disclosure Program and providing a description of those taxpayers who participated in it).

10. The first of such programs was the Offshore Credit Card Program. I.R.S. News Release

The OVDP proved to be resoundingly successful. It brought in billions of dollars in otherwise lost tax revenue and eliminated the need to audit and prosecute tens of thousands of taxpayers.[11] In addition, it caused the IRS to rethink the entirety of its voluntary disclosure program and its key attributes. Indeed, in a recent announcement, the agency released yet another iteration of its voluntary disclosure program, spelling out its salient features and the virtues associated with participation.[12]

This Article argues that the IRS—an administrative branch of government—should not have unimpeded authority to model the voluntary disclosure program's salient features and contends instead that codification is in order.[13] Notwithstanding the fact that a legislative overlay would provide less flexibility to the IRS and participating taxpayers to orchestrate their affairs, its institution would bring continuity, uniformity, and consistency to the program.

To make the case for codification, this Article is divided into several Parts. First, Part I summarizes the history of the voluntary disclosure program. Next, Part II details the present program and critiques its strengths and weaknesses. Finally, Part III contends that Congress should enact a permanent voluntary disclosure program and explains why the advantages of doing so far outweigh the disadvantages.

IR-2003-95 (July 30, 2003). During the course of the next several years, the IRS announced the details of multiple voluntary offshore disclosure programs that it instituted in 2009, 2011, 2012, and 2014. Am. Bar Ass'n Section of Tax'n, Commentary, *Comments on the 2014 Offshore Voluntary Disclosure Program and the Streamlined Procedures*, 72 TAX LAW. 65, 74–75 (2018).

11. *See* I.R.S. News Release IR-2018-52 (Mar. 13, 2018) ("Since the OVDP's initial launch in 2009, more than 56,000 taxpayers have used one of the programs to comply voluntarily. All told, those taxpayers paid a total of $11.1 billion in back taxes, interest and penalties.").

12. I.R.S. Mem. LB&I-09-1118-014 (Nov. 20, 2018) [hereinafter I.R.S. Mem.].

13. Decades ago, then-Senator Max Baucus sought to codify the voluntary disclosure program. Richard E. Harris, *Finance Bill Would Codify IRS Voluntary Disclosure Program and Stiffen Penalties for Tax Cheats*, 31 TAX NOTES 650, 650 (1986); Richard E. Harris, *Baucus Continues to Back Tax Amnesty; Skeptics Question Promises of IRS Expansion*, 30 TAX NOTES 1207, 1207 (1986); 132 CONG. REC. 2856–64 (1986) (statement of Sen. Max Baucus). Baucus's legislative efforts, however, were never realized.

I. BACKGROUND OF THE VOLUNTARY DISCLOSURE PROGRAM

In the criminal world, prosecutors know that their cases become precipitously weaker when alleged perpetrators, of their own volition, come forward, express contrition, and demonstrate a willingness to bear the consequences of their prior actions.[14] The exact same phenomenon has been true for crimes that relate to tax compliance: those taxpayers who have crossed the line but subsequently seek to make amends are difficult to prosecute.[15] The voluntary disclosure program, a deeply woven part of the nation's fabric for more than a century, tacitly recognizes this reality by allowing taxpayers who participate in it, in most instances, to avoid criminal exposure.[16]

But in the criminal world, there is another commonplace reality; namely, absent extenuating circumstances, few perpetrators are willing to come forward and throw themselves upon the mercy of prosecutors and the courts. Instead, these often-hardened risk-takers are disposed to take their chances and assume that they will not get caught. Thus, the popularity of various voluntary disclosure programs—those that are tax-related and those that are not—rise and fall, heavily dependent on external factors that often correlate with the risk of detection.[17]

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14. Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 296 (2007) ("[A]pologies and expressions of remorse influence beliefs about the general character of the wrongdoer and the entrenchment of the wrongful behavior—wrongdoers who apologize are viewed as being of better character and as being less likely to engage in similar behavior in the future."); Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 1 UTAH L. REV. 167, 190–91 tbl.7 & fig.7 (2003) (finding that offenders' apologies greatly increase the likelihood of forgiveness); Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 131 (2006) (noting that, in sentencing, "[m]any state courts have found remorse to be an appropriate mitigating factor").

15. An acknowledgment of this reality is reflected in the presence of the voluntary disclosure program. *See* Madison, *supra* note 7, at 732 ("The Voluntary Disclosure Policy may also serve as the tax enforcement entities' implicit recognition that after a taxpayer comes forward and discloses her transgressions, it might be difficult to prove the willfulness necessary to obtain a conviction for a tax crime.").

16. *See, e.g.*, Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499, 501 (2012) ("Under a voluntary disclosure program, eligible taxpayers report their delinquent taxes in return for reduced penalties . . . . It is thus a form of 'tax amnesty.'").

17. *See, e.g.*, Daniel J. Bennett, *Killing One Bird with Two Stones: The Effect of* Empagran *and the*

Consider three phases of the income tax and how they propelled the tax-related voluntary disclosure program into existence and then shaped its ever-evolving contours: (A) the introduction of the income tax, (B) the advent of the third-party tax information return matching program, and (C) the lifting of bank secrecy laws and the advent of the international third-party tax information return matching program.

A. *Introduction of the Income Tax*

At the inception of the income tax in 1913, tax noncompliance was likely flagrant.[18] The law was new, and those who were noncompliant could always proffer the excuse that they did not know any better (i.e., they lacked the mens rea to be guilty of a crime). And for several years, the plea of ignorance under the law probably resonated with judges and juries, saving many taxpayers from incarceration for tax noncompliance.[19] In addition, though the historical record is sketchy, the Bureau of Internal Revenue (the predecessor to the IRS), at its nascent stage of existence, likely lacked sufficient labor power to conduct wide-scale and thorough

Antitrust Criminal Penalty Enhancement and Reform Act of 2004 on Detecting and Deterring International Cartels, 93 GEO. L.J. 1421, 1446–47 (2005) ("The success of the amnesty program [pertaining to antitrust actions] depends, in large part, on whether the conspirators fear detection.").

18. Revenue Act of 1913, ch. 16, 38 Stat. 114; *see also* U.S. DEP'T OF THE TREASURY, IRS HISTORICAL FACT BOOK: A CHRONOLOGY 1646–1992, at 87 (1993) [hereinafter CHRONOLOGY] ("By the end of fiscal year 1913 the administrative force in Washington D.C. numbered 277 employees . . . ."); *cf. id.* at 99 ("The personnel of the Washington office of the Bureau of Internal Revenue increased from 585 to 4,088 in this period [1917–1919].").

19. *See* Rau v. United States, 260 F. 131, 134 (2d Cir. 1919) ("If the defendant, in good faith, made the payment of the tax and penalty for the purpose of compromising the impending action, he is entitled to full protection and the benefits derived therefrom. If the money was accepted with the promise of immunity from further punishment in a criminal proceeding, it would be a complete defense to this indictment." (citing Willingham v. United States, 208 F. 137 (5th Cir. 1913))). Consider another judge's pronouncement relating to the predecessor to the modern income tax laws:

> The lax state of morals in this and other American communities, which excuses, if not encourages, persons to avoid the payment of taxes justly due the national, state and municipal governments, by the use of means which would be considered dishonest between man and man, may have had much to do with the commission of this crime by you. For these reasons, and particularly on account of the recommendation of the jury, I shall make your punishment lighter than I otherwise would.

United States v. Smith, 27 F. Cas. 1175, 1185–86 (D. Or. 1870).

audits; and as a result, those audits it did undertake were probably fairly rudimentary in nature.[20]

Nevertheless, the threat of criminal tax exposure always loomed. A spurned spouse, a fired bookkeeper, or a disgruntled employee could have incriminating information (e.g., records of stashed-away cash or a second set of books) that might make any derelict taxpayer shudder. Some of those very same taxpayers, not knowing at what point betrayal would arise, likely sought to take preemptive measures to insulate themselves from criminal exposure. Of their own volition, they, or their tax professionals, undoubtedly reached out to the IRS to demonstrate remorse before the agency contacted them, attempting to negate the grim repercussions associated with their prior criminal intent.

With World War I raging, in lieu of traditional customs, duties, and tariffs, the nation grew increasingly dependent on the income tax.[21] As this reliance became more pronounced, the IRS blossomed in size and sophistication. During the half-decade since the income tax's introduction (from 1913 to 1918), the IRS's staff undoubtedly became seasoned veterans, skilled at ferreting out those taxpayers who may have fallen far short of the mark and fraudulently failed to report income, took nonexistent deductions, or grossly exaggerated the size of their deductions.[22] As might be expected, the number of criminal tax cases grew as the year 1920 approached, compared to the number of cases when the income tax was first introduced.[23]

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20. CHRONOLOGY, *supra* note 18, at 99 ("[In 1919, the] Income Tax Unit established the Field Audit Division responsible for the field forces engaged in investigation of income and profits tax cases. Prior to this, the field forces were under the direction of the Chief of Revenue Agents, who reported directly to the Commissioner.").

21. THOMAS L. HUNGERFORD, CONG. RSCH. SERV., RL33665, U.S. FEDERAL GOVERNMENT REVENUES: 1790 TO THE PRESENT 6 (2006).

22. As reflected in *IRS Historical Fact Book: A Chronology, 1646–1992*, the Bureau of Internal Revenue quickly became increasingly large and grew in sophistication over the years following the introduction of the income tax. *See* CHRONOLOGY, *supra* note 18.

23. There are no published federal criminal tax cases in 1913, 1914, 1915, 1916, 1917, or 1918. However, beginning in 1919, the United States prosecuted several criminal income tax cases. *E.g.*, Sandberg v. United States, 257 F. 643 (9th Cir. 1919); United States v. Benowitz, 262 F. 223 (S.D.N.Y. 1919); *Rau*, 260 F. at 132.

These combined forces—anxious taxpayers coupled with an enforcement agency strengthening its compliance reach—likely silently drove the IRS to introduce its first voluntary disclosure program in 1919.[24] Derelict taxpayers, under pressure from their personal circumstances (e.g., failed marriages, troubled work relationships, or aborted business arrangements) or from the knowledge that the IRS was increasingly becoming a formidable enforcement body, recognized that a day of reckoning might soon be upon them. In addition, from a public policy perspective, the IRS likely sought to welcome back those taxpayers who expressed a willingness to return to the fold of being tax compliant.

Little is known about the specifics of the first voluntary disclosure program.[25] Nevertheless, there was a central feature of the newly instituted voluntary disclosure program that has withstood the test of time: to qualify, a participating taxpayer had to initiate a voluntary disclosure action before the IRS launched an investigation.[26] More specifically, if the IRS had already commenced an investigation and those being investigated then sought refuge in the voluntary disclosure program, their entreaties would be ignored and would potentially place the taxpayers at graver risk of criminal exposure.[27]

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24. The statutory basis for the voluntary disclosure program was Code section 3761 (1939), the predecessor of Code section 7122.

25. Bonnie G. Ross, *Federal Tax Amnesty: Reflecting on the States' Experiences*, 40 TAX LAW. 145, 146–47 (1986) ("In 1919, the Bureau of Internal Revenue adopted a policy of accepting offers in compromise of criminal liability in cases of voluntary disclosure. Approximately three weeks after its institution, however, the policy was amended to provide that offers in compromise of criminal liability would be considered, rather than automatically accepted, in voluntary disclosure cases.").

26. Bartholomew L. McLeay, Note, *Disincentives to Voluntary Disclosure:* United States v. Hebel *and* Deleet Merchandizing Corp. v. Commissioner, 3 VA. TAX REV. 401, 403 (1984) (citing INTERNAL REVENUE SERV., REPORT ON ROLE OF SANCTIONS IN TAX COMPLIANCE, HISTORY OF VOLUNTARY DISCLOSURE POLICY (1968)).

27. *See id.* at 416 n.105.

B. Advent of Third-Party Tax Information Return Matching Program

One of history's greatest tools to compel tax compliance has been the introduction of third-party tax information reporting.[28] Such reporting has yielded extraordinary outcomes: when third-party tax information reporting is available (e.g., employers report wage income via a Form W-2 (Wage and Tax Statement) and banks report interest income via a Form 1099-INT (Interest Income)), tax compliance is stellar, in the 99% range. By way of contrast, when no third-party tax information reporting is available (e.g., farm and small-business income), tax compliance is abominable, hovering around 50% and sometimes even much lower.[29]

This compliance trend, related to third-party tax information reporting, annually repeats itself and is a worldwide tax phenomenon.[30] Building upon such successes, Congress therefore constantly seeks to expand third-party tax information reporting. For example, under current law, to the extent technologically possible, financial transactions ranging from house closings to stock sales engender some form of third-party tax information reporting obligation.[31]

Notwithstanding the virtues associated with third-party tax information reporting, it has not always been part and parcel of the

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28. Jay A. Soled, *Homage to Information Returns*, 27 VA. TAX REV. 371, 371–72 (2007).

29. *See* I.R.S. News Release IR-2006-28 (Feb. 14, 2006) (finding that, for nonfarm individual proprietor income for which there is no third-party reporting, the misreporting rate was 57%, whereas for wages, salaries, and tips for which there *is* third-party reporting, the misreporting rate was 1%); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO 07-391T, TAX COMPLIANCE: MULTIPLE APPROACHES ARE NEEDED TO REDUCE THE TAX GAP: TESTIMONY BEFORE THE COMMITTEE ON THE BUDGET, U.S. SENATE (2007) (statement of Michael Brostek, Director, Tax Issues Strategic Issues Team) ("Withholding and information reporting are particularly powerful tools to reduce the tax gap."); JON BAKIJA & JOEL SLEMROD, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 256 (5th ed. 2017) (describing a study showing a 99.1% compliance rate for wages and salaries, a 43% compliance rate for nonfarm sole proprietors, and a 28% compliance rate for farm income).

30. *See, e.g.*, Deepshikha Sikarwar, *CBEC to Use Third-Party Information to Nab Tax Evaders*, THE ECON. TIMES: WEALTH, https://economictimes.indiatimes.com/wealth/personal-finance-news/cbec-to-use-third-party-information-to-nab-tax-evaders/articleshow/40383561.cms [https://perma.cc/6DBT-9WPU] (Aug. 19, 2014, 3:00 AM IST) (describing how India plans to expand its third-party tax reporting beyond the income tax to its value-added tax).

31. *See* I.R.C. § 6045 (delineating a whole series of Code sections that require third-party reporting).

Internal Revenue Code (Code). The reason for its earlier absence was logistical in nature. At the embryonic stages of the income tax, the IRS did not have the technological ability to compare what taxpayers reported on their tax returns with projections of what taxpayers should have reported on their tax returns.

But over time, the IRS grew in size and sophistication. In addition, due to the advent of World War II, tremendous financial demands arose. Accordingly, in 1943, Congress launched a novel withholding program targeting wage income.[32] With this program's introduction, for the first time, the IRS possessed a tool that used third-party employers to determine if taxpayers were being forthright in their reporting practices—at least insofar as wage income was concerned—and cast a spotlight upon all of those taxpayers who perhaps previously failed to file their income tax returns.

With the advent of third-party tax information return matching and withholding, the IRS faced the prospect that an onslaught of delinquent taxpayers would emerge from the woodwork. At the time, to audit and possibly criminally charge all of these taxpayers with failure to file and report income would have been resource-intensive. Furthermore, this risked both highlighting taxpayer truancy and undermining credibility in the system. That being the case, the agency made a series of public declarations regarding the availability of the voluntary disclosure program and strongly recommended that delinquent taxpayers avail themselves of this program or face possible dire consequences, including the imposition of steep penalties and criminal indictment.[33]

Relative to the original iteration of the voluntary disclosure program commenced in 1919, a bit more is known about the contours of the revised voluntary disclosure program. To qualify for participation, among other requirements, a participating taxpayer had

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32. Current Tax Payment Act of 1943, Pub. L. No. 78-68, § 6, 57 Stat. 126, 145–49.

33. *See* Lyon, *supra* note 4, at 495 ("[D]uring the period from about 1943 to 1947, . . . the Treasury took these two steps: (a) It put great publicity emphasis on special tax fraud drives; and (b) Various pronouncements were made to encourage taxpayers to take advantage of the voluntary disclosure policy.").

to initiate action before being investigated;[34] and starting in 1974, another requirement was added: the taxpayer's motives had to be pure.[35] Insofar as the second qualification was concerned, moral impurities driving the taxpayer's actions were to be taken into account; that is, an extenuating fact suggesting that the tax scofflaw sought to preempt the inevitable (e.g., due to a pending divorce, a spurned ex-spouse made overtures that she was determined to make a revenge disclosure) could potentially negate program qualification.[36]

From the middle to the end of the twentieth century, in an endeavor to boost taxpayer compliance, Congress added numerous third-party tax information reporting requirements.[37] As the nation's legislative branch instituted these reforms, the IRS made a series of adjustments to its voluntary disclosure program—sometimes expanding its availability and other times suspending its use.[38] It was a program with which Congress took a completely hands-off approach, granting carte blanche to the IRS as to how the agency wanted to administer it to expand tax compliance.[39]

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34. *See* United States v. Lustig, 163 F.2d 85, 88 (2d Cir. 1947) ("We think it clear from the findings and the evidence . . . that the investigation began at the latest on March 24, 1945, when the Treasury Department referred the report of the Federal Reserve Bank to the Special Agent in charge of the Treasury Intelligence Unit . . . .").

35. *See* Richard J. Trattner & Mark D. Pastor, *IRS Disclosure Policy: The Internal Revenue Service Again Abandons Voluntary Disclosure*, L.A. LAW., May 1978, at 30, 33 (citing Memorandum from the Assistant Reg'l Couns., Crim. Tax, to the Assistant Reg'l Couns., Branch Offs., W. Region (Apr. 25, 1974)).

36. *Id.* ("Where the disclosure is 'triggered' by an event which would ultimately lead to the Service's being apprised of the taxpayer's fraud by third party sources, the taxpayer's disclosure is neither truly voluntary nor motivated by altruistic desires. [The Service will henceforth recommend prosecution] . . . in those cases where an apparent voluntary disclosure has been 'triggered' by an event which 'forced' the taxpayer to disclose his tax situation to the Service. . . . As [an] example of [a] 'triggered' disclosure . . . a taxpayer's disgruntled wife announces that she is going to 'pull the plug' on him, and he beats her to it by making a disclosure to the Service. (Such a disclosure is not voluntary.)." (alternations in original)).

37. Such third-party tax information now even extends internationally. *See infra* notes 62–66.

38. *See generally* Trattner & Pastor, *supra* note 35 (describing the long and tortured history of the nation's voluntary disclosure policy).

39. *Id.* at 31.

C. Lifting of Bank Secrecy Laws and the Advent of International Third-Party Tax Information Return Matching Program

For decades, many taxpayers sought to make offshore investments. The reason was not because they thought that they could command higher profits from offshore investments than from domestic investments; instead, they believed that they could shield from taxation the income they earned related to such investments.[40]

As a practical matter, those taxpayers making these investments likely suspected that the IRS could not detect the income that they generated.[41] And for the most part, those taxpayers were right: many countries' bank secrecy laws safeguarded taxpayers' identities and investments from discovery.[42] Furthermore, the IRS lacked any meaningful mechanism to gain direct, or even indirect, access to identify those taxpayers and their shrouded accounts.[43]

When it came to overseas investments, the IRS's agenda was not focused upon tax noncompliance. Instead, the agency concentrated primarily on crimes related to money laundering and the like, and

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40. *See* STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 109TH CONG., TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS AND SECRECY 1 (Comm. Print 2006) [hereinafter TAX HAVEN ABUSES] (offering six case studies to illustrate various techniques that taxpayers use to hide assets, shift income, and utilize offshore entities in endeavors to circumvent their U.S. tax obligations).

41. *See* I.R.S. TREASURY DEP'T, TDP-2003-30-160, THE OFFSHORE CREDIT CARD PROJECT SHOWS PROMISE, BUT IMPROVEMENTS ARE NEEDED TO ENSURE THAT COMPLIANCE OBJECTIVES ARE ACHIEVED 1 (2003) ("[T]he Internal Revenue Service (IRS) Commissioner described abusive schemes using offshore bank accounts as causing the largest revenue loss to the Department of the Treasury, being the hardest to detect, and undermining the fairness of the tax system. The IRS Commissioner has said that 'diversion of income to offshore tax havens with strict bank secrecy laws represent[s] a significant area of noncompliance with tax laws.'"); *see also Crime and Secrecy: The Use of Offshore Banks and Companies: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affs.*, 98th Cong. 16 (1983) (statement of Sen. William Roth) (expressing the difficulty the IRS had in detecting offshore taxpayer noncompliance).

42. *See* TAX HAVEN ABUSES, *supra* note 40, at 9 ("Corporate and financial secrecy laws and practices in offshore tax havens make it easy to conceal and obscure the economic realities underlying a great number of financial transactions with unfair results unintended under U.S. tax and securities laws.").

43. Taxpayers were often abetted by international banks and foreign governments that competed in the global arena for U.S. investors. *See generally* Diane Ring, *Who Is Making International Tax Policy?: International Organizations As Power Players in a High Stakes World*, 33 FORDHAM INT'L L.J. 649 (2009).

even those cases were difficult to prove.[44] Yes, taxpayers who made overseas investments were supposed to file Foreign Bank Account Reports (FBARs) and declare the existence of such investments.[45] Many taxpayers nevertheless failed to do so, and their noncompliance was often met with impunity.[46]

Locked in obscurity, taxpayers flocked to making foreign investments.[47] Coaxed and coddled by overseas investment advisers and an array of others,[48] and using a variety of maneuvers,[49] U.S. taxpayers learned how to avoid even minimal chances of IRS detection. Indeed, it was protocol in the industry for overseas investment institutions not to issue monthly or annual investment statements to their U.S. investors.[50]

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44. *See* SEC'Y OF THE TREASURY, A REPORT TO CONGRESS IN ACCORDANCE WITH § 361(B) OF THE UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM ACT OF 2001 (USA PATRIOT ACT) 9 (2002) [hereinafter TREASURY REPORT] (noting that from 1993 to 2002, the U.S. government considered imposing monetary penalties in only twelve cases, resulting in only two taxpayers ultimately paying penalties; four being issued "letters of warning"; and for a variety of reasons, the remaining six not having their cases pursued).

45. This law, known at the Bank Secrecy Act, 31 U.S.C. § 5314, was enacted as part of the Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, 84 Stat. 1114 (1970).

46. *See, e.g.*, Hale E. Sheppard, *Evolution of the FBAR: Where We Were, Where We Are, and Why It Matters*, 7 HOUS. BUS. & TAX L.J. 1, 2 (2006) ("Despite these potential sanctions, FBAR compliance has remained relatively low for years."); TREASURY REPORT, *supra* note 44, at 6 ("[T]he IRS estimates that there may be as many as 1 million U.S. taxpayers who have signature authority or control over a foreign bank account and may be required to file FBARs. Thus, the approximate rate of compliance with the FBAR filing requirements based on this information could be less than 20 percent.").

47. TREASURY REPORT, *supra* note 44, at 11 ("Using IRS summonses to obtain information from these offshore jurisdictions can be prohibitively difficult and time consuming.").

48. Scott D. Michel, *Strategies for Current Filings of Noncompliant Taxpayers As FBAR Deadline Approaches*, 92 PRAC. TAX STRATEGIES 207, 209 (2014) ("Enforcement against so-called 'enablers' continues apace as well—these are the bankers, lawyers, fiduciaries, and investment advisors alleged to have assisted U.S. taxpayers in hiding money and other assets overseas. One prominent Swiss banker was arrested on holiday in Italy, and other bankers and advisors believed to have engaged in willful criminal conduct have been detained at the U.S. border. Tax practitioners in the U.S. who have assisted clients in hiding foreign accounts are also under scrutiny.").

49. *See generally* TAX HAVEN ABUSES, *supra* note 40 (illustrating various techniques that taxpayers employ to circumvent their tax obligations).

50. *See, e.g.*, David Leigh et al., *HSBC Files Show How Swiss Bank Helped Clients Dodge Taxes and Hide Millions*, THE GUARDIAN (Feb. 8, 2015, 4:00 PM), https://www.theguardian.com/business/2015/feb/08/hsbc-files-expose-swiss-bank-clients-dodge-taxes-hide-millions [https://perma.cc/5B2A-KGYP] ("HSBC's Swiss banking arm helped wealthy customers dodge taxes and conceal millions of dollars of assets, doling out bundles of untraceable cash and advising clients on how to circumvent domestic tax authorities, according to a huge cache of leaked secret bank account files."); Gary S. Wolfe, *Why Tax Evasion Is a Bad Idea: UBS and Wegelin Bank*,

But with increased technology and the globalization of the world's economy, the era of bank secrecy waned.[51] With the tap of a finger, bank personnel could gain electronic access to thousands of accounts.[52] Congress then augmented the Code's whistleblower awards, affording bank officials the means and ample financial incentives to divulge incriminating information to welcoming government officials.[53] There was little that banks and financial institutions could do to stop this from happening; as a result, information floodgates poured open.[54] For example, in 2007, Bradley Birkenfeld, a UBS employee, turned over the names of 54,000

PRAC. TAX LAW., Spring 2013, at 39, 43. According to international tax lawyer Gary Wolfe, one Swiss bank, Wegelin, took the following steps to conceal its account holders' identities:

- Opening and servicing undeclared accounts for U.S. taxpayer-clients in the names of sham corporations and foundations formed under the laws of Liechtenstein, Panama, and Hong Kong (and other jurisdictions) to conceal clients' identities from the IRS;
- [Accepting] documents falsely declaring that the sham entities were the beneficial owners of certain accounts, when in fact the accounts were beneficially owned by U.S. taxpayers;
- [Allowing U.S. taxpayers to maintain] Wegelin accounts (undeclared), using code names and numbers to minimize references to the actual names of the U.S. taxpayers on Swiss bank documents;
- [Ensuring] that account statements and other mail were not mailed to U.S. clients in the U.S.; they were instead sent to U.S. taxpayer clients' personal email accounts, to reduce risk of detection by law enforcement;
- [Issuing] checks drawn on, and executing wire transfers to, its U.S. correspondent bank accounts for the benefit of U.S. taxpayers with undeclared accounts at Wegelin (and at least two other Swiss banks);
- [Separating] the transfers into batches of checks or multiple wire transfers in amounts that were less than $10,000 to reduce the risk that the IRS would detect the undeclared accounts; [and]
- [Using] its correspondent bank accounts at UBS to help U.S. taxpayers with undeclared accounts repatriate money that they had hidden in Wegelin.

Wolfe, *supra*, at 43–44.

51. *See generally* Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532 (2018) (describing a whole series of tax-related data leaks that often resulted in criminal prosecutions and politicians seeking legislative changes to enhance tax compliance).

52. *Id.* at 542 ("In the age of centralized and computerized data storage, it has become easier for disgruntled employees, hackers, and other data thieves to obtain tax-related data from banks, law firms, and other sources and to leak it.").

53. I.R.C. § 7623.

54. *See* Lynnley Browning, *Swiss Banker Blows Whistle on Tax Evasion*, N.Y. TIMES (Jan. 18, 2010), http://www.nytimes.com/2010/01/19/business/19whistle.html [https://perma.cc/2YUS-WVZM] (detailing the case of a former Swiss banker who delivered tax-related information regarding "more than 100 trusts, dozens of companies and hedge funds and more than 1,300 individuals, from 1997 through 2002" to the IRS, a Senate subcommittee conducting tax investigations, and the Manhattan District Attorney's Office).

overseas investors, earning a whopping $104 million whistleblower award for his efforts.[55]

Technology also caused other avenues of tax circumvention to come to a brisk end. For example, in the Information Age, taxpayers quickly learned that their erstwhile means of using credit cards funded with offshore funds were problematic.[56] With electronic tracing and the IRS's power to subpoena credit card company records, the fate of this noncompliance route came to a complete and sudden conclusion.[57]

The avalanche of information that the IRS was receiving and processing painted an ugly picture of rampant tax noncompliance. Thousands upon thousands of taxpayers were engaging in overseas investing and failing to report their earned income, costing the nation billions of dollars in lost tax revenue.[58] Previously, academics, politicians, and others pontificated that the tax-reporting situation was bad, but even they underestimated just how bleak the situation truly was.[59]

The gravity of the problem stirred rare bipartisan congressional responses. Congress's members took up arms and decided to launch a two-pronged attack. First, they sought to lift the veil of secrecy that cloaked many offshore accounts; therefore, along with the rest of the world leaders, they pressured foreign governments to repeal their

55. *See generally* BRADLEY C. BIRKENFELD, LUCIFER'S BANKER UNCENSORED (2016) (detailing Birkenfeld's personal account of the UBS scandal and how he secured the whistleblower award).

56. *See* I.R.S. TREASURY DEP'T, *supra* note 41, at 2 ("The IRS approach is multifaceted and includes coordinating Compliance activities with media coverage and the Criminal Investigation function to heighten taxpayer awareness. In summary, the IRS obtains cardholder and merchant credit card records to identify the taxpayer, builds cases for assignment to the Compliance field function, generates media coverage, and refers promoters for criminal investigation.").

57. *See generally* Paul Jensen & Pam Spikes, *Offshore Credit Card Records: Invasion by the IRS*, 29 INT'L TAX J. 59, 59 (2003) (describing how the IRS curtailed illicit offshore credit card use).

58. *See* STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 110TH CONG., TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 1 (Comm. Print 2008) ("Each year, the United States loses an estimated $100 billion in tax revenues due to offshore tax abuses.").

59. *See* Joseph Guttentag & Reuven S. Avi-Yonah, *Closing the International Tax Gap*, *in* BRIDGING THE TAX GAP: ADDRESSING THE CRISIS IN FEDERAL TAX ADMINISTRATION 99, 101 (Max B. Sawicky ed., 2005) (estimating that individuals' offshore tax evasion resulted in $40–$70 billion in annual lost U.S. tax revenues).

bank secrecy laws or risk economic reprisals.[60] With much reluctance, these governments (in particular, the legislature in Switzerland) agreed to pull back the veil of their bank secrecy laws, opening these accounts and their owners to scrutiny.[61] Second, Congress instituted the Foreign Account Tax Compliance Act (FATCA).[62] Under the Act, foreign financial institutions must either (i) disclose the identities of U.S. investors to the IRS, or (ii) endure a punishing withholding tax on their U.S. investments.[63] Given these choices, the vast majority of foreign financial institutions chose what they perceived to be the lesser evil, fulfilling the disclosure-reporting requirements rather than enduring the harsh withholding tax.[64] As

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60. *See* Kevin McCoy, *U.S. Wants Names of 52,000 Customers of Swiss Bank UBS*, USA TODAY (Feb. 18, 2009), http://www.usatoday.com/money/industries/brokerage/2009-02-18-ubs-settles-sec-charges_N.htm [https://perma.cc/KM7V-28PA] (noting that the U.S. Department of Justice demanded that the UBS bank give up the names of 52,000 of its customers).

61. *See* Michael Shields, *Era of Bank Secrecy Ends As Swiss Start Sharing Account Data*, REUTERS, (Oct. 5, 2018), https://www.reuters.com/article/us-swiss-secrecy-idUSKCN1MF13O [https://perma.cc/U5H3-KB6C] ("The era of mystery-cloaked numbered Swiss bank accounts has officially come to a close as Switzerland, the world's biggest center for managing offshore wealth, began automatically sharing client data with tax authorities in dozens of other countries."); *see also* Itai Grinberg, *The Battle over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 313 (2012) ("Most governments of major developed countries agree that access to information from other countries is vital to the full and fair enforcement of their tax laws."); G20, DECLARATION ON STRENGTHENING THE FINANCIAL SYSTEM—LONDON SUMMIT, 2 APRIL 2009, at 5 (Apr. 2, 2009), http://www.g20.utoronto.ca/2009/2009ifi.pdf [https://perma.cc/6GXH-XZU8] (noting that leaders of the G20 countries set a goal to end the era of banking secrecy and emphasized "a new cooperative tax environment").

62. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, § 501(a), 124 Stat. 71, 97–106 (2010).

63. *See* Melissa A. Dizdarevic, Comment, *The FATCA Provisions of the Hire Act: Boldly Going Where No Withholding Has Gone Before*, 79 FORDHAM L. REV. 2967, 2967 (2011) ("In an effort to crack down on offshore tax evasion, the United States is implementing a new set of information reporting and withholding requirements on foreign banks and other foreign entities. These provisions, known as the Foreign Account Tax Compliance Act (FATCA) . . . require thirty percent withholding of the entity's U.S.-source income, unless they disclose specific information regarding their customers' identities and account balances.").

64. *See* Robert W. Wood, *10 Facts About FATCA, America's Manifest Destiny Law Changing Banking Worldwide*, FORBES (Aug. 19. 2014, 2:27 AM), https://www.forbes.com/sites/robertwood/2014/08/19/ten-facts-about-fatca-americas-manifest-destiny-law-changing-banking-worldwide/#55d9a9951305 [https://perma.cc/7SQS-TECD] ("More than 80 nations—including virtually every one that matters—have agreed to the law. So far, over 77,000 financial institutions have signed on too. Countries must throw their agreement behind the law or face dire repercussions."). *See generally* Reuters Staff, *U.S. Says 77,000 Banks, Firms Sign Up to Fight Tax Evasion*, REUTERS, https://www.reuters.com/article/us-usa-tax-fatca/u-s-says-77000-banks-firms-sign-up-to-fight-tax-evasion-idUSKBN0ED1U620140602 [https://perma.cc/Y4Q9-LMLX] (June 2, 2014,

part of FATCA, Congress also expanded tax information reporting requirements beyond bank accounts; by mandating the use of a Form 8938 (Statement of Specified Foreign Financial Assets), Congress requires taxpayers to disclose their foreign income-generating financial assets (e.g., foreign rental property held in an entity).[65] The failure to make such disclosures triggers the application of stiff penalties, and violations can be deemed to be criminal in nature.[66]

As was previously the case when Congress introduced third-party tax information returns,[67] noncompliant taxpayers recognized that they had placed themselves in a precarious situation. If they did nothing, they risked almost certain discovery and possibly time spent locked up in a penitentiary; yet if they turned themselves in, they risked the same criminal exposure and consequences. However, in recognition of the fact that the IRS could not possibly audit and prosecute all of the delinquent taxpayers and in an endeavor to make the latter option (turning themselves in) more attractive, the Treasury Department commenced the OVDP, a subset of the voluntary disclosure program.[68]

Although the OVDP's premise was simple—if taxpayers came forward before being investigated, they could quash potential criminal tax exposure—details regarding program participation underwent several permutations.[69] First introduced by the IRS in 2003,[70] the OVDP pertained specifically to taxpayers who used credit cards linked to unreported offshore bank accounts.[71] Forthcoming taxpayers had reduced penalty exposure and, furthermore, safeguarded themselves from criminal exposure.[72] During the next

1:47 PM).

65. I.R.C. § 6038D.

66. § 6038D(d).

67. *See* discussion *supra* Section I.B.

68. *See* Mary Lou Gervie, *Offshore Voluntary Disclosure Initiative*, TAX ADVISOR (Apr. 1, 2011), https://www.thetaxadviser.com/issues/2011/apr/april-tpp-2011-02.html [https://perma.cc/UM4M-UTZG] ("The IRS initiated the first offshore voluntary compliance program in 2003.").

69. *Id.*

70. *Id.* For an excellent overview of the voluntary disclosure program, see Lederman, *supra* note 16.

71. Lederman, *supra* note 16, at 504–08.

72. *Id.* at 506.

several years, beyond the 2003 initiative, the IRS commenced four new OVDPs, launched in 2009, 2011, 2012, and 2014. Details of each of these program participation requirements are enumerated below, and their salient features are encapsulated in the Appendix.[73]

2009 Program:[74]

- Payment of all back taxes, interest, and an accuracy-related penalty;
- Accurate filing of the prior six years of income tax returns and FBARs (2003–2008);
- Standard offshore penalty rate: in lieu of the FBAR and other penalties, payment of a 20% penalty on the taxpayer's highest offshore account balance.

2011 Program:[75]

- Payment of all back taxes, interest, and an accuracy-related penalty;
- Accurate filing of the prior eight years of income tax returns and FBARs (2003–2010);
- Standard offshore penalty rate: in lieu of the FBAR and other penalties, payment of a 25% penalty on the taxpayer's highest offshore account balance.

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73. *See infra* Appendix.

74. *See* Memorandum from Linda E. Stiff, Deputy IRS Comm'r for Servs. & Enf't, to Comm'r, Large & Mid-Size Bus. Div., and Comm'r, Small Bus./Self-Employed Div. (Mar. 23, 2009), https://www.irs.gov/pub/newsroom/memorandum_authorizing_penalty_framework.pdf [https://perma.cc/2PTE-69MF]; INTERNAL REVENUE SERV., FREQUENTLY ASKED QUESTIONS 9 (May 6, 2009), https://www.irs.gov/pub/irs-news/faqs.pdf [https://perma.cc/H8K3-F3ZA] ("The twenty percent penalty applies to entities. The twenty percent penalty applies to all assets (or at least the taxpayer's share) held by foreign entities (e.g., trusts and corporations) for which the taxpayer was required to file information returns, as well as all foreign assets (e.g., financial accounts, tangible assets such as real estate or art, and intangible assets such as patents or stock or other interests in a U.S. business) held or controlled by the taxpayer.").

75. I.R.S. News Release IR-2011-14 (Feb. 8, 2011). *See generally* Kevin E. Packman, *IRS Renews Its Focus on Unreported Foreign Accounts and Assets: The 2011 Disclosure Program*, 114 J. TAX'N 197 (2011).

2012 Program:[76]

- Payment of all back taxes, interest, and an accuracy-related penalty;
- Accurate filing of the prior eight years of income tax returns and FBARs (2004–2011);
- The introduction of a separate streamlined program (which was not part of the OVDP) that allowed qualifying taxpayers (i.e., U.S. taxpayers living abroad who owed $1,500 or less in tax for any of the covered years) to resolve their tax issues with no penalties;[77]
- Standard offshore penalty rate: in lieu of the FBAR and other penalties, payment of a 27.5% penalty on the taxpayer's highest offshore account balance.

2014 Program:[78]

- Payment of all back taxes, interest, and an accuracy-related penalty;
- Accurate filing of the prior eight years of income tax returns and FBARs (2006–2013);
- Expansion of the streamlined program by including non-willful taxpayers residing in the United States and removing other eligibility requirements;[79]

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76. *See* I.R.S. News Release IR-2012-5 (Jan. 9, 2012).

77. *See* I.R.S. News Release IR-2012-65 (June 26, 2012); *Streamlined Filing Compliance Procedures*, IRS, https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures [https://perma.cc/3ZFH-A2VT] (Feb. 17, 2021) (noting an effective date of September 1, 2012).

78. I.R.S. News Release IR-2014-73 (June 18, 2014).

79. *Id.* Under the revisions, taxpayers who were inadvertent in their noncompliance (e.g., their reporting failures were accidental or negligent rather than willful) were obligated to either (i) pay a minimal 5% penalty plus amend three years of prior income tax returns and submit six years of FBARs, or (ii) submit six years of FBARs in those instances when no tax was due. *Id.*

- Standard offshore penalty rate: in lieu of the FBAR and other penalties, payment of a 27.5% penalty on the taxpayer's highest offshore account balance.

For many years, the IRS reaped the benefits of the OVDP. As thousands of taxpayers became participants, the program yielded billions of tax dollars and brought many otherwise delinquent taxpayers back into the compliance fold.[80] But over time, the number of willing participants dwindled, and thus the IRS decided in 2018 to terminate the OVDP.[81] At the same time, the IRS decided to restructure the voluntary disclosure program.

II. ANALYSIS OF THE VOLUNTARY DISCLOSURE PROGRAM

During the century that the voluntary disclosure program has been extant, it has never gained much national prominence. Although there may be many reasons for its low profile, one stands out: the voluntary disclosure program has an aura of amnesty surrounding it; as a result, many Treasury Department staff members, politicians, academics, and commentators harbor misgivings about instituting it.[82]

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80. *See* I.R.S. News Release, IR-2018-52 (Mar. 13, 2018) ("Since the OVDP's initial launch in 2009, more than 56,000 taxpayers have used one of the programs to comply voluntarily. All told, those taxpayers paid a total of $11.1 billion in back taxes, interest and penalties. The planned end of the current OVDP also reflects advances in third-party reporting and increased awareness of U.S. taxpayers of their offshore tax and reporting obligations.").

81. *Closing the 2014 Offshore Voluntary Disclosure Program: Frequently Asked Questions and Answers*, IRS, https://www.irs.gov/individuals/international-taxpayers/closing-the-2014-offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers [https://perma.cc/W6GY-MXQY] (Sept. 26, 2018) ("While the program has been successful in the past, there has been a significant decline in the number of taxpayers participating as well as an increase in awareness of offshore tax and reporting obligations."); I.R.S. News Release IR-2018-52 (Mar. 13, 2018) (noting that while 18,000 disclosures were made in 2011, only 600 were made in 2017).

82. *See, e.g.*, *Efforts to Reduce Taxpayer Burdens: Hearing Before the Subcomm. on Oversight of the Internal Revenue Serv. of the Comm. on Fin.*, 98th Cong. 31 (1983) [hereinafter *Efforts to Reduce Taxpayer Burdens*] (statement of Roscoe L. Egger Jr., Comm'r, IRS) ("[H]onest taxpayers may perceive an amnesty as 'special treatment' for dishonest taxpayers, and therefore unfair, inequitable, and contrary to IRS policy of administering the tax laws uniformly."). However, during the 1980s, there were heated debates about whether the federal government should introduce a tax amnesty program. *See generally* Richard E. Harris, *Revenue Sans Taxes: Congress Shifts Attention to Federal Tax Amnesty*, 30 TAX

By way of background, consider the nature of tax amnesty programs and their central features. Many such programs declare that delinquent taxpayers should come forward of their own accord and pay the tax they owe; as a quid pro quo for being compliant, participating taxpayers can, depending upon the program, pay a reduced interest charge, endure a smaller penalty or none at all, and avoid criminal prosecution.[83] Other commonplace program features are that once the amnesty period lapses, exoneration will not be offered again, more burdensome penalties will be imposed, and added enforcement efforts will be undertaken.[84]

State legislatures that have instituted tax amnesty programs have experienced mixed results.[85] On the one hand, some have collected sizable amounts of tax revenue and have been able to add many new taxpayers to the compliance fold.[86] On the other hand, the revenue collections have been lackluster in some instances, and it remains unclear whether participating states could have achieved the same objectives (namely, greater revenue flow and increased tax compliance) if they had simply instituted more rigorous enforcement mechanisms.[87] Furthermore, the mere institution of tax amnesty

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NOTES 916 (1986); Carol Douglas, *Is a Federal Amnesty the Answer to Our Deficit Problems?*, 30 TAX NOTES 711 (1986).

83. *See* Elliott Uchitelle, *The Effectiveness of Tax Amnesty Programs in Selected Countries*, FED. RES. BANK N.Y. Q. REV., Autumn 1989, at 48, 48 ("[M]ost amnesty programs share a common feature—a grace period during which delinquent taxpayers can correct prior infractions of the tax law without incurring penalties normally associated with tax delinquency.").

84. *See* Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 GEO. MASON L. REV. 667, 706 (2007) ("A tax amnesty also should signal, and be combined with, significantly heightened government efforts to enforce compliance with existing (or newly reformed) tax rules. In fact, to the extent that tax amnesties are successful it generally is difficult to determine whether that success is attributable to the amnesty, to the threat of enhanced enforcement efforts, or to the enhanced enforcement efforts themselves.").

85. Gary Klott, *State Amnesties: Results Mixed*, N.Y. TIMES, Mar. 15, 1988 (§ D), at 2.

86. *See, e.g.*, Boise, *supra* note 84, at 696–97 ("States collecting the largest amounts to date include New York with over $1.23 billion; New Jersey with $822 million, Illinois with $692 million, California with $197 million, and Massachusetts with $182 million.").

87. *Id.* at 704–05 ("In the United States, Connecticut's first tax amnesty, in 1990, generated $54 million. A second amnesty five years later generated only $40.9 million. Of particular interest, however, was the fact that 219 participants in the second amnesty had also participated in the first amnesty. Together, the 219 participants accounted for 4.5% of the revenues collected in the 1990 amnesty and 10.3% of the revenue collected in the subsequent amnesty. The inference is that having participated in one amnesty, taxpayers began to engage in strategic behavior in anticipation of the second amnesty.").

programs sends an implicit message to noncompliant taxpayers that if they wait long enough, every few years they can be absolved of their sins.[88] Both tax amnesty proponents and opponents point to conflicting data that support their differing positions.[89]

Even if state tax amnesty programs are deemed successful, few believe that this "success" can be replicated at the federal level.[90] The fear is that once an administration institutes an amnesty program to generate revenue, this practice will become reoccurring, ultimately undermining the system's integrity as honest taxpayers think twice about being chumps and paying tax when actually due.[91] In addition, it is unclear whether Congress would have the political stomach to institute heftier penalties upon those who remained noncompliant or to grant the IRS additional resources to conduct broader and more rigorous audits that the public would likely consider overly intrusive.

Given the misgivings that surround federal tax amnesty programs, it is no surprise that the voluntary disclosure program has not gained much public recognition; after all, it shares some of the central characteristics of an amnesty program.[92] Said in the vernacular of taxpayers, the voluntary disclosure program essentially declares that if one comes forward before being on the IRS's radar screen, the agency will wipe the taxpayer's slate clean—yes, one will have to pay back taxes, interest, and possible penalties, but these burdens pale in comparison to spending time locked away behind bars.

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88. *See* STAFF OF J. COMM. ON TAX'N, 105TH CONG., TAX AMNESTY 11 (Comm. Print 1998) (explaining that once a government institutes a tax amnesty, taxpayers may harbor the expectation that future amnesties will be forthcoming).

89. *See generally* William M. Parle & Mike W. Hirlinger, *Evaluating the Use of Tax Amnesty by State Governments*, 46 PUB. ADMIN. REV. 246 (1986).

90. *See, e.g.*, Leo P. Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 VA. TAX REV. 535, 556 (1991) ("[R]ecent amnesty programs have been designed to achieve several objectives, including: (1) reaping a one-time revenue windfall; (2) increasing future revenues by adding new names to the tax rolls; and (3) improving the voluntary tax compliance rate. However, close scrutiny reveals that amnesty does not significantly advance these popular objectives.").

91. *See Efforts to Reduce Taxpayer Burdens*, *supra* note 82, at 9 ("[I]nstituting one amnesty might encourage the belief that the offer would be repeated in the future, leading to noncompliance in the interim.").

92. *See, e.g.*, Martinez, *supra* note 90, at 562–63 ("Voluntary disclosure can be viewed as merely a kind of permanent amnesty policy.").

Furthermore, the application of the voluntary disclosure program at one time was narrowly limited to negating criminal exposure; but now, with the introduction of the streamlined voluntary disclosure program,[93] it extends to mitigating civil penalties as well.

Due to the similarities between tax amnesty programs and the voluntary disclosure program, some commentators have labeled the latter "pseudo-amnesty" in nature.[94] The major distinctions between a true amnesty program and the voluntary disclosure program are as follows: an amnesty program is generally offered for a short period of time and then it lapses, whereas the voluntary disclosure program has been in existence in one form or another for more than 100 years; amnesty programs generally grant relief related to both civil and criminal tax derelictions, whereas the voluntary disclosure program has traditionally applied strictly to criminal defalcations; and finally, a hallmark of many amnesty programs has been their waiver or reduction of interest charges and penalties, but the voluntary disclosure program has, until recently, never offered any interest or penalty relief.[95]

In 2018, the IRS decided once again to overhaul the nation's voluntary disclosure program.[96] Section II.A describes the salient features of this revised program. Next, Section II.B critiques its central features.

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93. Robert S. Steinberg, *Features That Distinguish the OVDP and the Streamlined Filing Compliance Procedure*, 97 PRAC. TAX STRATEGIES 72, 72 (2016).

94. Stephan Michael Brown, *One-Size-Fits-Small: A Look at the History of the FBAR Requirement, the Offshore Voluntary Disclosure Programs, and Suggestions for Increased Participation and Future Compliance*, 18 CHAP. L. REV. 243, 243 (2014) (referring to the OVDP, stating that the IRS "has introduced a series of pseudo-amnesty programs"); Hale E. Sheppard, *Third Time's the Charm: Government Finally Collects "Willful" FBAR Penalty in* Williams, 117 J. TAX'N 319, 330 (2012) ("The taxpayer's success in *Williams II*, followed by the taxpayer's defeat in *Williams III*, will trigger additional uncertainty for taxpayers who are currently participating in one of the Service's pseudo-amnesty programs, such as the offshore voluntary disclosure program (OVDP).").

95. *See generally Sales and Use Tax Amnesty Program v. Voluntary Disclosure Program*, DUFF & PHELPS (May 3, 2018), https://www.duffandphelps.com/insights/publications/state-and-local-tax/sales-and-use-tax-amnesty-program-v-voluntary-disclosure-program [https://perma.cc/Z3QY-UVFP].

96. I.R.S. Mem., *supra* note 12, at 1.

A. *Current Features*

To qualify for program participation, as with the prior OVDPs and voluntary disclosure programs, interested taxpayers must follow four steps. These are enumerated below.

1. *Preclearance*

Step 1 requires the taxpayer to submit a preclearance request.[97] The likely reason that the IRS is adamant that taxpayers make this request before a voluntary disclosure submission is that the agency wants to ensure that (i) the income in question is from legal sources (e.g., not a kickback or drug-related), (ii) the taxpayer is not under current criminal investigation, and (iii) the IRS is not already auditing the taxpayer or a related party. If a taxpayer's responses are not in order, the taxpayer will not qualify for program participation; however, if the taxpayer clears this hurdle (i.e., the IRS Criminal Division officially accepts the taxpayer's application), the taxpayer can proceed to the next step.[98]

2. *Preliminary Acceptance*

Predicated upon having secured preclearance from the IRS Criminal Division, Step 2 requires that taxpayers timely supply information related to their noncompliance, including a narrative providing the facts and circumstances, assets, entities, related parties, and any professional advisers involved in the noncompliance.[99] The IRS apparently uses this information to evaluate the tax returns submitted as part of Step 3 in the process.

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97. *Id.* at 2 (declaring that taxpayer candidates must use a Form 14457 (Voluntary Disclosure Practice Preclearance Request and Application)).
98. *Id.* at 3.
99. *Id.*

3. Submission of the Corrected or Delinquent Filings

Step 3 involves an assigned agent requesting corrected or delinquent tax returns and the taxpayer responding to and fulfilling this request.[100] What is uncertain is exactly when participating taxpayers must submit amended or delinquent returns and other filings; what is clear, however, is that the examiner is supposed to conduct a comprehensive audit of all of the taxpayer's filings. Those taxpayers who are not cooperative during their civil examination risk the examiner revoking their acceptance into the program.

4. Look-Back Period and Penalty Computation

The final step involves an examination of the look-back period and penalty computations. Under the revised voluntary disclosure program, the IRS's position is that the look-back period is the shorter of (a) the most recent six years, or (b) the period of taxpayer noncompliance.[101] However, the IRS left itself an enforcement hammer: if the taxpayer and auditor are not able to resolve their audit adjustment differences, the examiner is granted discretion "to expand the scope to include the full duration of noncompliance and may assert maximum penalties under the law with the approval of management."[102]

Regarding penalty application, the revised voluntary disclosure program provides a bifurcated penalty structure.

i. Tax Deficiency Penalties

The examiner is supposed to apply the civil fraud penalty (i.e., 75% of the tax due) to the year with the largest tax liability. Furthermore, albeit not stated, it is likely that an accuracy-related penalty (currently 20%) will apply to all other years. In the case of non-filing, failure to file (currently 5% per month for each month not

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100. *Id.*
101. *Id.* at 4.
102. I.R.S. Mem., *supra* note 12, at 4.

submitted up to a 25% maximum) and failure to pay (currently 0.5% per month for each month not paid up to a 25% maximum) penalties will apply.[103]

ii. Offshore Tax-Filing Penalties

In the case of voluntary disclosures involving offshore accounts, a "willful" FBAR 50% penalty will apply to the highest aggregate balance in all offshore accounts during the six-year look-back period.[104] In addition, there is a plethora of other penalty provisions that may apply to a taxpayer's circumstances, such as a failure to file a Form 5471 (Information Return of U.S. Persons with Respect to Certain Foreign Corporations), and the application of these provisions are left up to "examiner discretion."[105]

B. Critique

1. Advantages

There are numerous advantages associated with the current voluntary disclosure program. Among them are its nimbleness, balance, and equity. Consider each of these virtues.

Historically, the voluntary disclosure program has been responsive to the evolving tax landscape. Congress has essentially granted the Treasury Department unrestrained authority to settle tax controversies as it pleases, and the voluntary disclosure program is emblematic of this deference.[106] The IRS is at liberty to shape and mold the program as the agency sees fit. Thus, if one particular facet of the program is not working well (e.g., the time limitations associated with form submissions prove too generous or too onerous

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103. *Id.*
104. *Id.* at 5.
105. *Id.*
106. *See* I.R.C. § 7122(a) ("The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense . . . .").

to the IRS or participating taxpayers), the agency does not have to petition Congress to make a legislative adjustment. Instead, it can simply issue a new pronouncement, and, voilà, the change is done.[107] Of course, if a facet of the program is working particularly well (e.g., offering a streamlined alternative for non-willful Code violations),[108] such a measure can readily be expanded—again, without seeking Congress's imprimatur or enduring the lengthy vetting process commonly associated with the promulgation of Treasury regulations.[109]

Another positive attribute of the voluntary disclosure program is the delicate balance it attempts to strike between competing goals. On the one hand, if its participation terms are too lenient (e.g., applicable penalties are waived), it might result in otherwise compliant taxpayers becoming unmoored from the tethering supplied by the Code; on the other hand, if its participation terms are too harsh (e.g., applicable penalties eradicate a taxpayer's entire net worth), the program may lose its allure. In light of these opposing concerns, by waiving any criminal liability but still imposing stiff (yet not draconian) monetary penalties, the current voluntary disclosure program seeks to achieve an appealing middle ground.

In addition to nimbleness and balance, in its present embodiment, the current voluntary disclosure program strives to be equitable. For those taxpayers who willfully violated their civic tax obligations, the penalties are rather severe, albeit participation greatly mitigates the possibility that the taxpayer will have to endure the mental anguish

107. *See, e.g.*, Naftali Z. Dembitzer, *Beyond the IRS Restructuring and Reform Act of 1998: Perceived Abuses of the Treasury Department's Rulemaking Authority*, 52 TAX LAW. 501, 501 (1999) ("The authority of the Treasury Department . . . to promulgate regulations is circumscribed by nontax legislation. When issuing tax regulations, the Treasury and, by delegation, the Internal Revenue Service . . . must comply with the requirements of the Administrative Procedure Act of 1946, providing taxpayers with appropriate advance notice and considering comments from the public before issuing final regulations, except in limited circumstances.").

108. *See* IRM 9.5.11.9 (Sept. 17, 2020).

109. *See* Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1157 (2008) ("Provisions of the APA that impose procedural requirements for agency rulemaking activity apply generally to Treasury's efforts to promulgate rules and regulations interpreting the I.R.C.").

and shame of a possible prison sentence.[110] However, in those instances in which taxpayers were non-willful in their noncompliance (e.g., failing to understand the nature and scope of their filing responsibilities), this factor is prioritized and rather modest penalties apply as part of the streamlined program (which functions in unison with the voluntary disclosure program).[111]

2. *Disadvantages*

Despite the foregoing advantages associated with the current voluntary disclosure program, there are a myriad of disadvantages associated with it as well. These disadvantages include admittance ambiguity, broad IRS discretionary powers, and a failure to account for the prospect of recidivism. Consider each of these weaknesses.

During its century-old history, one critical issue that has plagued the voluntary disclosure program is setting the ground rules for taxpayer participation. More specifically, it is unclear when an investigation has commenced and program participation is thus precluded;[112] indeed, even the current rendition of the voluntary disclosure program fails to establish clear demarcation lines that explicitly spell out exactly when the IRS has begun an investigation.[113] Due to the ambiguity surrounding program

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110. *See* IRM 9.5.11.9(3) (Sept. 17, 2020) ("A voluntary disclosure will be considered along with all other factors in determining whether criminal prosecution will be recommended. A voluntary disclosure does not guarantee immunity from prosecution.").

111. *See* Steinberg, *supra* note 93.

112. Trattner & Pastor, *supra* note 35, at 31–32 (listing numerous ambiguities in the IRS standards that courts have been tasked to investigate).

113. The *Internal Revenue Service Manual* makes the following declaration:

> A disclosure is timely if it is received before:
>
> (a) The IRS has initiated a civil examination or criminal investigation of the taxpayer, or has notified the taxpayer that it intends to commence such an examination or investigation.
>
> (b) The IRS has received information from a third party (e.g., informant, other governmental agency, or the media) alerting the IRS to the specific taxpayer's noncompliance.
>
> (c) The IRS has acquired information directly related to the specific liability of the taxpayer from a criminal enforcement action (e.g., search warrant, grand jury subpoena).

IRM 9.5.11.9(7) (Sept. 17, 2020).

participation, many tax scofflaws are wary and, accordingly, would rather take their chances of going undetected than seek program refuge. In particular, they fear that if the IRS rejects their application as being late (i.e., the IRS has already initiated an investigation), their compliance efforts might result in making them an audit target when their tax shenanigans might otherwise have been overlooked.

Another problematic aspect of the current voluntary disclosure program is that it vests the IRS with a lot of discretion in how the agency metes out justice. As evidence of this, consider each of the four steps of the current voluntary disclosure program delineated *supra* in Section II.A. As part of Step 1, namely, the preclearance process, the IRS screens taxpayer applications and, after a thorough vetting, decides whether a particular taxpayer does or does not qualify for program participation; unfortunately, there are no opportunities to challenge this determination by turning to a third-party neutral arbitrator (however, once chosen for program participation, a taxpayer can opt out but bears the concomitant risk of potential criminal exposure). Step 2 requires that the taxpayer timely submit certain information or risk being jettisoned from program participation. Step 3 involves the submission of the corrected or delinquent filings. During this phase, taxpayers are supposed to "promptly and fully cooperate during civil examinations," or the examiner may request that the IRS Criminal Division "revoke preliminary acceptance."[114] Step 4 centers on issues pertaining to the look-back period and penalty computation. Embedded in the current policy is the following statement: where the taxpayer and examiner do not reach agreement on the audit adjustments, "the examiner [is given] discretion to expand the scope to include the full duration of non-compliance and may assert maximum penalties under the law with the approval of management."[115] Clearly, when it comes to the voluntary disclosure program, the IRS truly enjoys the upper hand.

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114. I.R.S. Mem., *supra* note 12, at 4.
115. *Id.*

A final problem besetting the current voluntary disclosure program is the issue of recidivism, which is commonplace in the criminal realm. Study after study indicates that, in comparison to the general public, people who perpetrate crimes are far more apt to commit them in the future.[116] The current voluntary disclosure program ignores this fact and implicitly assumes that, going forward, participating taxpayers will be forthright in their reporting practices. This salutary message imparts the following signal to program participants: if and when another avenue of tax avoidance becomes available (even if it is illegitimate), it might be financially worthwhile to undertake it because the voluntary disclosure program will always offer possible refuge.

III. PROPOSED LEGISLATIVE REFORM

Although the current voluntary disclosure program is not broken, it could be improved. One of the primary reasons that some taxpayers hesitate to participate in the program is that when they learn that it is entirely a creation of IRS formulation, they balk, fearing that the agency can make up its own rules as a star chamber.[117] As such, taxpayers legitimately regret that they lack any meaningful recourse to challenge outcomes, particularly if they are assigned a rogue IRS agent. Furthermore, many taxpayers believe that if their application is denied when they seek preclearance approval, they are at great risk of being targeted and enduring criminal prosecution.[118]

Congress should not take these taxpayer concerns lightly. Given the IRS's limited resources, those taxpayers who recoil at program

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116. *See* U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS 3 (2019) (finding that nearly 64% of federal offenders who had been convicted of violent offenses and were released in 2005 were rearrested for a new crime or for a violation of their supervision conditions within the next eight years, compared to 39.8% of nonviolent offenders who were rearrested).

117. *See* Trattner & Pastor, *supra* note 35, at 31 ("In fact, the birth of the Policy came to light in what appears to be a haphazard series of off-the-cuff [IRS] announcements.").

118. *See, e.g.*, David S. Grossman & Robert M. McCallum, *Steps to Reduce Tax and Penalties on Nonfilers*, 49 TAX'N FOR ACCTS. 337, 338 (1992) ("Practitioners should be aware that the Government may attempt to obtain statements or admissions made by the client for use in a criminal prosecution.").

participation may remain undetected; furthermore, even derelict taxpayers whose defalcations are discovered may prove difficult to prosecute. Though it is not easy to pinpoint exactly how many noncompliant taxpayers at any one time are reluctant about or aghast at playing strictly by the IRS's rules, the number is undoubtedly large.

Metaphorically, the voluntary disclosure program should be the equivalent of a lighthouse, beckoning wayward taxpayers to find their way home. This Part advocates that Congress make the lighthouse beam even brighter by codifying the program. Codification would weave the program into the Code's fabric, enhancing its visibility, luring additional taxpayers to participate, and generating much-needed tax revenue, which would bode well for the nation's financial health.

A. Codification of the Voluntary Disclosure Program

As Congress contemplates codifying the voluntary disclosure program, it should not attempt to micromanage all of its details. Instead, in broad brushstroke, it should set forth certain parameters and leave it to the Treasury Department to handle specific details. The first part of this legislative exercise would be to institute procedural mechanisms that the IRS and taxpayers should follow; the second part would be to delineate an appropriate penalty structure.

1. Procedural Rules

Congress should institute a set of procedural rules that the IRS and taxpayers would have to adhere to, akin to those already in place with respect to Tax Court filings.[119] Rigid procedural mechanisms work; their binary feature ("yes, you met the requirements" or "no, you did

119. Note that under Code section 7453, Congress permits the U.S. Tax Court to have its own set of procedural rules, a right that the court has exercised. Leandra Lederman, *Tax Appeal: A Proposal to Make the United States Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1233 (2008) ("Thus, the Tax Court has the statutory authority to prescribe its own procedural rules for both regular and small tax cases.").

not meet the requirements") voids any room for conjecture. Three important procedural rules that come to mind are as follows: (a) defining when an IRS investigation has commenced, (b) instituting a reasonable timetable for when the IRS must respond to a taxpayer's initial entry submission, and (c) establishing a reasonable timetable for when qualified taxpayers must submit corrected or delinquent returns.

i. Investigation Commencement Designation

One of the items that gnaws at taxpayers is the uncertainty of knowing whether they qualify for program participation.[120] On the one hand, taxpayers often recognize the fact that they have committed a crime (e.g., hid income in offshore accounts) or mistakenly failed to be tax compliant (e.g., forgot to submit certain tax information returns such as a Form 5471, which carries steep financial penalties);[121] on the other hand, they ordinarily have no idea whether the IRS has learned of their malfeasance or nonfeasance. For many taxpayers, this uncertainty casts a dark shadow: although they would like to participate in the voluntary disclosure program, they fear that if they make a submission and it is rejected because an investigation has already begun, the IRS will have added ammunition to target them.[122]

To assuage taxpayer concerns, Congress should establish clear guidelines of what constitutes an investigation. Although there is no one approach, the proposed legislation could read as follows:

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120. *See, e.g.*, *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2012*, IRS [hereinafter *2012 Offshore Voluntary Disclosure FAQs*], https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program-frequently-asked-questions-and-answers-2012#:~:text=Who%20is%20eligible%20to%20make,and%20the%20OVDP%20penalty%20regime [https://perma.cc/ZT6X-DGB7] (Mar. 4, 2020).

121. I.R.C. § 6679(a)(1) (imposing a $10,000 penalty for a filing failure).

122. *See* IRM 9.5.11.9(6) (Sept. 17, 2020).

> Taxpayers are deemed on actual or constructive notice that an investigation has commenced when an audit has begun of (a) the taxpayer, (b) a member of the taxpayer's family (defined to include the taxpayer's spouse, parents, children, grandchildren, or siblings), (c) an active business enterprise in which the taxpayer owns a ten percent or greater ownership stake (after applying the ownership attribution rules of Code section 267), or (d) an enterprise or financial institution in which the taxpayer passively holds investments.

In the case of (d), an added element could be a declaratory letter issued by the IRS instructing the enterprise or financial institution to inform investors that the IRS has commenced a formal audit. In situations (a)–(d), an audit would be deemed commenced when the IRS reaches out to the parties in question using correspondence or engaging in a physical inquiry.

ii. IRS Timetable to Respond

One of the most anguishing time periods for taxpayers is waiting to hear how the IRS will respond to their preclearance submission (i.e., whether they qualify for program participation). Not to be overly dramatic, but some taxpayers have anecdotally equated this waiting period to learning whether the guillotiner will beckon them from their cell for execution. Although the IRS needs time to process taxpayers' applications, this procedure should not be elongated.[123] Accordingly, a forty-five-day window seems appropriate; the taxpayer in question need not anguish too long, but this window would allow enough time for the IRS to scrutinize the taxpayer's submission. The IRS's failure to respond within this allotted period

123. I.R.S. TREASURY DEP'T, TDP-2016-30-030, IMPROVEMENTS ARE NEEDED IN OFFSHORE VOLUNTARY DISCLOSURE COMPLIANCE AND PROCESSING EFFORTS 12 (2016) ("[T]he IRS has taken nearly two years to complete 20,587 [OVDP] case certifications, with 241 cases taking at least four years to complete.").

would result in the agency automatically accepting the candidate into the program.

iii. Timetable to Submit Paperwork

Once a taxpayer has been accepted, the onus is on the taxpayer to present a case establishing why leniency is in order. The time to make this presentation should not be open-ended. Instead, Congress should provide a three-month window, with permission to extend the window a maximum of two more months. Using this time allotment, taxpayers can prepare amended or delinquent tax returns and can secure the necessary financing to pay taxes, interest, and applicable penalties. Taxpayers who fail to make a timely submission would risk, at the discretion of the IRS, being ejected from the program.

2. Penalty Structure

Once again, Congress should set forth some basic ground rules for the appropriate penalty structure and let the Treasury Department fill in the particulars. These ground rules should account for the fact that willful taxpayers need to be taught a lesson: civil society teeters when taxpayers purposefully and strategically do not fulfill their tax-filing obligations, putting critical public institutions (e.g., the military and the judicial system) at risk of financial collapse.[124] Furthermore, even when taxpayers' actions are non-willful, civil society is jeopardized if taxpayers do not learn and adhere to tax compliance rules.[125] Finally, taxpayers who participate in the voluntary disclosure program should know that they must learn from their mistakes; accordingly, those taxpayers who participate should be precluded from doing so again in another voluntary disclosure program. Thus, the ground rules for setting forth a penalty structure

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124. *See* Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting) ("Taxes are what we pay for civilized society . . . .").

125. *See generally* Alice G. Abreu, *Taxes, Power, and Personal Autonomy*, 33 SAN DIEGO L. REV. 1 (1996).

should take into account these three factors: (a) willfulness, (b) non-willfulness, and (c) potential for recidivism.

i. Willfulness

Because Congress does not know nor can it anticipate the future tax shenanigans that taxpayers might undertake, it cannot set a concrete penalty structure in place for program participants. Instead, it should declare that program participants have an option: once they enter the program and negate potential criminal liability, they can opt out of the program and be penalized under existing penalty provisions; alternatively, they can accept whatever penalty structure the IRS has put in place to attract program participants.[126]

Congress should add a provision that willful taxpayers who seek to circumvent program participation by making so-called quiet disclosures—whereby taxpayers submit one or more tax returns to the IRS through normal submission channels without acknowledging any guilt for their defalcations—are precluded from program participation.[127] Furthermore, the fact that they chose this route to hide their derelictions may constitute additional evidence of their efforts to cover up their crimes.[128]

ii. Non-Willfulness

Taxpayers who mistakenly fail to fulfill their civic obligations are not without culpability.[129] Often, they are remiss, negligent, or

126. *See 2012 Offshore Voluntary Disclosure FAQs*, *supra* note 120.

127. *See, e.g.*, Remy Farag, *HSBC Client Prosecuted After Quiet Disclosure*, 22 J. INT'L TAX'N 8, 8–9 (2011) (noting that quiet disclosures may constitute evidence that taxpayers are seeking to hide their prior actions).

128. *Frequently Asked Questions*, *supra* note 74, at 3–4 ("Those taxpayers making 'quiet' disclosures should be aware of the risk of being examined and potentially criminally prosecuted for all applicable years.").

129. *See, e.g.*, Dale A. Oesterle, *Viewing CERCLA As Creating an Option on the Marginal Firm: Does It Encourage Irresponsible Environmental Behavior?*, 26 WAKE FOREST L. REV. 39, 48 (1991) ("[C]ourts have moved from a standard requiring direct personal participation to a standard that includes broadly defined forms of culpable nonfeasance. Thus, a corporation that does not have established corporate policies against illegal releases, backed by proper lines of authority, communication, and monitoring, may find that its chief officers, managers, and even controlling shareholders are personally

unwilling to invest the time and resources necessary to fulfill their civic obligations. Yet, by societal standards, nonfeasance is deemed less heinous than malfeasance.[130] Thus, as part of the codification process, Congress should require that the IRS institute a second tier to the penalty structure that is less onerous than the penalty structure in place for willful taxpayers.[131]

iii. Potential for Recidivism

When it comes to the commission of crimes, those who perpetrate them are apt to do so again.[132] In recognition of this, Congress should add a provision that taxpayers can only participate in the voluntary disclosure program on a one-time basis, regardless of whether their actions are willful or non-willful. By engrafting such a provision to the voluntary disclosure program, taxpayers would be on notice not to be enticed by the siren calls of future shady tax arrangements or not to give only secondary attention to their tax-filing obligations. The voluntary disclosure program should reflect magnanimity on the part of Congress. However, it should be a one-time source of refuge for taxpayers who, during life's journey, lose their way; it should not be a comfort blanket for those who periodically get cold feet when their felonious tax dealings go south or for those who routinely take their tax-filing obligations for granted.

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liable for all CERCLA violations.").

130. *See, e.g.*, Singleton v. City of Hamilton, 515 N.E.2d 8, 12 (Ohio Ct. App. 1986) ("[A] municipal corporation is not generally liable for nonfeasance."); Dalehite v. United States, 346 U.S. 15, 44 (1953) ("To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.").

131. *See* NAT'L TAXPAYER ADVOC., 2012 ANNUAL REPORT TO CONGRESS 143 (2012) ("[The IRS should expand] and clarify the Streamlined Nonresident Filing Initiative to encourage all benign actors (including U.S. residents and those owing more than $1,500) to correct past noncompliance using less burdensome procedures that do not unnecessarily drain IRS enforcement resources (e.g., expand and clarify who qualifies for it and further explain who will be deemed to have reasonable cause for failure to file an FBAR).").

132. *See* U.S. SENT'G COMM'N, *supra* note 116.

B. Critique

There is a reason that the IRS has never been a proponent of codifying the voluntary disclosure program. The agency fears that codification might send a loud and potentially dangerous message to tax scofflaws that there is always an opportunity to make amends, thereby undermining the serious nature of tax transgressions.[133] More specifically, unabashed risk-takers could consider this absolution opportunity as a signal that they can go about their merry way and likely find salvation in the voluntary disclosure program if they ever learn that the IRS is clamping down in general or scrutinizing particular industries. Also, with institutionalization, the IRS could potentially abuse the process as well.[134]

But the proposed codification proposal is not intended to constitute a bright red neon sign declaring to program participants that "all is forgiven." Instead, although the proposed program embodies the principle of clemency and recognizes the human propensity to make mistakes, it attaches serious financial consequences and other repercussions to program participation.

As discussed *infra*, aside from the potential revenue that the program is apt to generate, codification provides a host of other benefits, including the following: a formal recognition that taxpayer redemption is possible, a working procedure for the IRS and taxpayers alike to follow, and a penalty structure that is sensitive to culpability and factors in the opportunity to diminish recidivism.

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133. *See* Gerald P. Moran, *Tax Amnesty: An Old Debate As Viewed from Current Public Choices*, 1 FLA. TAX REV. 307, 325 (1993) ("A policy of tax amnesty, despite the recent changes in the agency discussed above, remains antithetical to the purpose for which the Service was created and the interests of its careerist members who have a vital stake in the continuation of past practices."); SEC'Y OF THE TREASURY, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH: THE TREASURY DEPARTMENT REPORT TO THE PRESIDENT 91 (1984) (stating the Treasury Department's opposition to a federal amnesty program); Douglas, *supra* note 82 (suggesting that federal tax amnesty will not resolve the country's fiscal problems).

134. Ross, *supra* note 25, at 151 ("Critics argued that an official voluntary disclosure provision, by its nature, encourages corrupt administration by Service agents who can 'tip off' a tax evader that an investigation is about to begin."); David R. Burton, *The Tax Amnesty Issue Dictates Patience*, 22 TAX NOTES 1369, 1370 (1984) (reporting instances of IRS agents who falsified written documentation of voluntary disclosure on behalf of taxpayers who actually had not disclosed until after an investigation had commenced).

No one should underestimate the importance of Congress giving its imprimatur to the voluntary disclosure program. This overture would comfort taxpayers who sought to reform their ways (including those who, in the past, were malevolent, negligent, or remiss in the handling of their federal tax obligations). No longer would the voluntary disclosure program remain an obscure part of pseudo law, buried deep within the *Internal Revenue Service Manual*,[135] inaccessible to most taxpayers and even the vast majority of tax professionals. Instead, a simple Google query would reveal that Congress had endorsed the voluntary disclosure program and its use by taxpayers.

Another important feature of codification is that it would provide a step-by-step procedural framework and a penalty structure sensitive to culpability. Procedural institutionalization would have a twofold effect: first, it would possibly reduce the number of litigated cases surrounding the issue of when an IRS investigation had been deemed to have commenced;[136] second, it would provide both the IRS and taxpayers with clear timetables detailing when various paperwork submissions had to be made.[137] Having a multitier penalty structure versus a one-size-fits-all approach would demonstrate that not all tax transgressions are of the same ilk—to the contrary, some are far more heinous than others, and "justice" should be meted out accordingly.[138]

A final attribute of codification would be the premium it places on an appropriate and effective penalty structure. As a general axiom, all humans make mistakes; some learn from these experiences, and others do not. In the case of the former, the voluntary disclosure program offers salvation; in the case of the latter, the incorrigibles will confront the consequences. Consider those criminals who, as part of a plea bargain, secure significantly reduced prison sentences or, alternatively, are entirely absolved of their crimes. If they

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135. *See* IRM 9.5.11.9.1 (Sept. 17, 2020).
136. *See id.* at 9.5.11.9.7.
137. *See supra* Section III.A.1.
138. *See supra* Section III.A.2.

subsequently commit another crime, prosecutors, per tradition, will go after them with a vengeance.[139] Incorporating the one-time opportunity feature into the voluntary disclosure program appropriately addresses the redemption/recidivism issue: on the one hand, anchored in the Judeo–Christian–Islamic spirit, Congress can demonstrate forgiveness by enabling taxpayers to avail themselves of the voluntary disclosure program; on the other hand, its magnanimity should not be taken for granted.

The virtues associated with the codification of the voluntary disclosure program are clear. With respect to those taxpayers who seek to cleanse their souls, the Treasury Department will capture more tax revenue, the need for the IRS to pursue criminal prosecutions will be obviated, and the agency will be at liberty to dedicate its limited resources to those recalcitrant taxpayers who obstinately and irredeemably fail to pay their taxes or fulfill their other tax-filing obligations. Were all these outcomes to come to fruition, the voluntary disclosure program would be a model for state revenue agencies,[140] and other industrialized countries,[141] to emulate.

CONCLUSION

The voluntary disclosure program has a long and successful history of augmenting tax compliance in the United States. There are several metrics that evidence this point: during the past century, thousands of participants have shed their noncompliance status, the

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139. *See, e.g.*, Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 447 (2011) ("Finally, repeat offenders do worse at sentencing than first-time offenders as well and not only because of recidivist sentencing schemes, mandatory minimums, and career criminal statutes. Even absent any statutory or guideline mandate, judges are far more likely to impose harsher sentences on repeat criminals than on first-timers.").

140. For example, New York already has a comprehensive voluntary disclosure program in place. *See Voluntary Disclosure and Compliance Program*, N.Y. STATE DEP'T OF TAX'N & FIN., https://www.tax.ny.gov/enforcement/vold/ [https://perma.cc/PK4S-PUS7] (May 17, 2019).

141. For example, Canada already has a voluntary disclosure program in place. *See Disclosures Program—Introduction*, GOV'T OF CAN., https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/voluntary-disclosures-program-overview.html [https://perma.cc/C33N-Q3UR] (May 29, 2020).

program has raised billions of dollars in additional revenue, and program participation not only has enabled erstwhile derelict taxpayers to sleep at night knowing that their sins have been absolved but also has permitted them to become productive members of the taxpaying community.[142] Few other federal programs boast such accolades.

Despite these successes, the voluntary disclosure program requires greater transparency. Codification would achieve this objective and, by doing so, increase program participation, raise additional revenue, and help prevent the IRS from having to undertake labor-intensive tax criminal cases.

Like any legislation, the codification of the voluntary disclosure program would not be without its issues. In particular, the IRS could no longer respond as rapidly as it did in the past to the ever-changing economic and technological landscape; instead, going forward, it would potentially have to petition Congress to institute necessary reform measures. However, on the whole, the advantages associated with codification far outweigh the disadvantages.

That being the case, Congress should act expeditiously and make codification of the voluntary disclosure program a top priority. The message associated with codification would be simple: shouldering one's appropriate tax burden is a civic duty; if you have failed to do so, the nation's legislative branch offers a remedial means for you to be a productive and compliant member of society again. Said somewhat differently, formally incorporating the voluntary disclosure program into the Code would function as an inviting doormat of sorts, welcoming wayward taxpayers back home again.

142. *See supra* Section II.B.

APPENDIX[143]

	2003 Offshore Voluntary Compliance Initiative	2009 Offshore Voluntary Disclosure Program	2011 Offshore Voluntary Disclosure Initiative	2012 Offshore Voluntary Disclosure Program	2014 Offshore Voluntary Disclosure Program
Factors that influenced participation	Promoters identified and John Doe summons for information on taxpayers who used bank cards to access hidden offshore income	John Doe summons for UBS accounts in Switzerland	IRS actions against many foreign banks, including HSBC, which provided IRS information on accounts in India	FATCA and increased actions against a number of foreign financial institutions	FATCA fully effective and bank secrecy laws nullified
Application period	January 14, 2003, to April 15, 2003	March 23, 2009, to October 15, 2009[144]	February 8, 2011, to September 9, 2011	January 9, 2012, to present [the IRS has since terminated the program][145]	July 1, 2014, to September 28, 2018
Tax years for which delinquent taxes were collected	4 years (1999 to 2002)	6 years (2003 to 2008)	8 years (2003 to 2010)	8 years[146]	8 years[147]
Standard offshore penalty rate[148]	No offshore penalty	20%	25%	27.5%	27.5%[149]

143. This table is from a GAO report but modified by the author to include the 2014 column information. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 9.

144. The IRS granted a one-time extension of the original September 23, 2009 deadline for certain voluntary disclosures. *Id.* Those taxpayers had until October 15, 2009. *Id.*

145. The 2012 OVDP had no set deadline for taxpayers to apply. *Id.* Additionally, the IRS stated that the terms of the program could change at any time. *Id.* For example, the IRS could increase penalties associated with the program for all or some taxpayers or a defined class of taxpayers, or it could decide to end the program at any point. *Id.*

146. Tax years covered are determined by the last closed tax year when the taxpayers apply to the program, plus the seven previous tax years. *Id.*

147. Tax years covered are determined by the last closed tax year when the taxpayers apply to the program, plus the seven previous tax years. *Id.*

148. The offshore penalty rate is applied to the highest aggregate account balance during the calendar years that correspond to the tax years covered by the program. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 9.

149. The IRS increased this penalty to 50% in instances when the taxpayer had invested in certain "bad banks" known as foreign facilitators. *Id.* A list of such institutions is available on the IRS website.

	2003 Offshore Voluntary Compliance Initiative	**2009 Offshore Voluntary Disclosure Program**	**2011 Offshore Voluntary Disclosure Initiative**	**2012 Offshore Voluntary Disclosure Program**	**2014 Offshore Voluntary Disclosure Program**
Mitigated offshore penalty rate	No offshore penalty	5% for passive account holders;[150] beginning in February 2011, option for 2009 OVDP participants to receive 2011 OVDI mitigated penalties, which they were allowed to apply for retroactively	12.5% for accounts valued less than $75,000; 5% for passive account holders	12.5% for accounts valued less than $75,000; 5% for passive account holders	A separate, streamlined process (not part of OVDP) made universally available to all non-willful taxpayers, with a significantly reduced penalty of 5% of Dec. 31 highest account value for prior six years when taxes were owed and no penalty if only information returns were delinquent
Other penalties	Accuracy-related penalty (up to 20% of unpaid taxes) and/or Delinquency penalty (up to 25% of unpaid taxes)				
IRS reported number of disclosures	1,321	15,000	18,000	Approx. 5,000 to date	Unknown/not reported
Total collected (unpaid taxes, penalties and/or fees) as reported by IRS	$200 million	$4.1 billion (as of December 31, 2012)	$1.4 billion (as of December 31, 2012)	Not available	Not available

Foreign Financial Institutions or Facilitators, IRS, https://www.irs.gov/businesses/international-businesses/foreign-financial-institutions-or-facilitators [https://perma.cc/VDQ2-RKG5] (June 11, 2020).

150. A 5% penalty rate was generally allowed if taxpayers did not open or cause the account to be opened, had no account use, and had paid all applicable U.S. taxes on funds deposited to the accounts, with only account earnings having escaped U.S. taxation. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 9. In later program years, minimal account activity was allowed, for example, to update address information or to withdraw a minimal amount of funds, defined as less than $1,000 in any program year for which the taxpayer was noncompliant. *Id.* This limit did not include transfers back to the United States upon closing an offshore account. *Id.*