An Analysis of the FBAR High-Penalty Regime

Susan C Morse

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How can the U.S. government find wealthy Americans with assets in offshore financial accounts and make sure they pay their taxes? One tool is the Report of Foreign Bank and Financial Accounts, or FBAR, rules that the U.S. government has begun to systematically enforce. The FBAR regime requires individual taxpayers to submit statements disclosing their holdings in offshore accounts or face enormous penalties based on the account asset value. Will the regime work? Maybe.

The first part of this paper describes how a high-penalty regime can successfully push taxpayers to comply and self-identify as compliers through the mechanisms of deterrence, separation, and/or signaling. These mechanisms can succeed if (1) taxpayers perceive that penalties for noncompliers and rewards offered to compliers are credible; (2) taxpayers lack close-substitute, penalty-free choices; and (3) taxpayers perceive that the government will detect noncompliers trying to masquerade as compliers. The second part contends that it is possible for the U.S. to achieve all of these elements in the FBAR case, although it would require changes to the current administration of the rules and sustained litigation and publicity.

Framework for Analyzing High-Penalty Regimes

Penalties and Rewards

High penalties can increase compliance in several ways. One mechanism is deterrence. The hypothetical fully rational taxpayer decides whether to evade tax by comparing the amount of saved tax to the penalties for cheating weighted by the chance that they will be detected. Risk aversion modifies this analysis, adding a compliance bias to the fully rational model.

Another mechanism is separation. If some taxpayers are willing to comply, they may be more inclined to self-identify as compliant if they know that failing to do so subjects them to the possibility of high penalties. Moreover, complier self-identification can permit the application of a more understanding enforcement approach for compliers and reduce the risk that compliant behavior will be crowded out by threats of severe penalties.

High penalties can also serve as signals that may change compliance norms. Compliance behavior is not only the product of inherent individual preference.
The identification of an illegal behavior by the government—including through the announcement and implementation of high penalties applicable to the behavior—can act as a norm signal that may cause some significant number of taxpayers to adopt compliance behavior. Peer-to-peer influences, in turn, may induce still others to comply. Some empirical and experimental research supports the conclusion that compliance norms can evolve over time depending on the compliance decisions of other taxpayers with whom the taxpayer identifies or communicates. And, once an individual starts to act in a more compliant fashion, the change can become an entrenched part of the way the individual views his or her personality and values.

Yet high penalties have the potential to crowd out compliant behavior as well as serving the compliance-enhancing functions of deterrence, separation, and signaling. They may commoditize and thereby undermine previous social norms of compliance. Or they may be interpreted by a compliant taxpayer as a defecting move in the previously reciprocal tit-for-tat compliance relationship the taxpayer had built with the government.

One solution to the problem of crowding out is to apply and articulate different penalties proportional to the severity of different offenses, and to also publicize rewards, such as better taxpayer service, offered to compliers. This is part of the reason why rewards for compliance are also important. Rewards may also comprise an important part of a high-penalty strategy because taxpayers who self-identify as compliers may be more likely to remain compliers if rewards engage the government with the taxpayer in a mutually reinforcing tit-for-tat reciprocity cycle.

Sometimes rewards can be specific to a certain set of rules. But it is also true that a framework that rewards compliers is already built into existing tax administration practice. The two-pronged service and enforcement mission of the Internal Revenue Service (IRS), increasingly emphasized over the last 10 years or so, reflects the government’s view that “good” and “bad” taxpayers should be treated differently. In the IRS audit and appeals processes, there is every reason to believe that taxpayers with records of compliance receive better treatment than taxpayers with records of noncompliance. In some cases, the idea of better service for more compliant taxpayers has been formalized into specific initiatives, such as the Compliance Assurance Program, or CAP, which is available to certain large corporate taxpayers.

Penalty and Reward Credibility

The ability of penalties and rewards to achieve deterrence, separation, and/or signaling goals without falling into a crowding-out trap depends on more than the penalties and rewards as stated in the statute books. A gap often exists between a de jure penalty or reward and a de facto penalty or reward policy. Several causes
can produce this gap between an on-the-books penalty or reward and its enforce-
ment in practice. These may include litigation risk management;\textsuperscript{15} internal agency
politics, such as a desire to stick to prior practice or avoid adversarial relationships
with regulatees;\textsuperscript{16} national politics, including the goal of avoiding backlash legislation
that could curtail the agency’s power or resources in response to an excessively
tough public image;\textsuperscript{17} and international politics, including a reluctance to upset
foreign governments with U.S. policies that appear harsh and unilateral.\textsuperscript{18}

A conceptually distinct—and more important\textsuperscript{19}—gap also often exists between
a de jure penalty or reward and taxpayers’ perception of a de facto penalty or re-
ward policy. Taxpayers’ internal perception of the likelihood of penalty imposition
or reward enjoyment drives their compliance decisions and hence this perception
is the real key to the success of a regulatory default strategy. Elements that influ-
ence this perception include how the agency actually imposes penalties; whether
it says it will impose penalties; and how information about penalty imposition and
rhetoric is made public and, separately, publicized.

\textbf{Close Substitutes}

Like any other kind of rule, the operation of a high-penalty regime will also be
affected by the ability of taxpayers to avoid the whole scheme by making choices
that are sufficiently close substitutes for the penalized behavior.\textsuperscript{20} David Weisbach
has conceptualized the idea of minimizing close substitutes for a taxed activity as
the goal of minimizing the “marginal efficiency cost function,” which is lower if
fewer behavioral distortions result from the imposition of a tax.\textsuperscript{21} David Schizer
has categorized the factors that may determine whether a particular “friction”
prevents taxpayers from planning around a particular rule. Schizer notes that
strong and not-malleable frictions, which may come in the form of business choice
preferences, technology limitations, and legal and accounting costs, can hinder or
prevent the development of close substitutes.\textsuperscript{22} The absence of close substitutes or,
similarly, the existence of strong and inflexible frictions, is thus key to the success
of a high penalty strategy.

The problem with close substitutes is fairly clear for the deterrence and separa-
tion goals. To the extent that taxpayers can avoid a penalty, it will neither deter
their noncompliance behavior nor incent them to self-identify as compliers. The
problem with close substitutes for a signaling goal is somewhat different.

It is possible that the simple enactment of a new rule will serve to signal the
advent of a new norm, even if the rule is not enforced. This expressive theory
suggests that the key to compliance is the persuasion of a material portion of the
population to voluntarily obey the law. Once a voluntarily obedient group reaches
a tipping point, others will follow suit. Enforcement can play a role by raising the
salience of the new law and helping to achieve a tipping-point amount of compli-
ance by persuading rational actors who are susceptible to deterrence strategies to comply, but the mere existence of the rule can also act as a signal.23

So if enforcement is not essential to the success of a signaling penalty, what is the problem with close substitutes? The problem is that a close substitute can function as a competing signal that undermines the signaling power of the enacted law, so long as the close substitute is sufficiently well known. Regulatees may gather around the workaround rather than around the law as enacted, just as motorists informally agree that driving several miles above the speed limit is close enough. The process of gathering around a close substitute is expressive and peer-enforced just as it could be for an enacted law.

**Detection and Information Strategies**

As Alex Raskolnikov has persuasively argued, a key task in tax administration is to identify noncompliers who masquerade as compliers.24 This point is highly relevant to a high-penalty regime, whether the high penalty is intended to serve only the separation purpose that Raskolnikov identified in the context of menu-based regulatory penalty default structures in tax administration or whether the high penalty also functions as a deterrent and/or signal. The deterrence function will also be frustrated if it is possible for noncompliers to hide behind the mask of compliance as compliers. Signaling will be weaker, as well, if masked noncompliance is a known workaround, for the workaround can serve as a competing signal.

In tax administration, a high-penalty regime will typically include an information filing requirement that can serve to identify the compliers as those taxpayers not subject to the high penalty. This information filing requirement presents a key opportunity to increase the government’s ability to detect noncompliers who masquerade as compliers. In the case of the FBAR rules considered here, it takes the form of a specifically crafted information return.

In focusing here in this detection and information strategies point on the identification of noncompliers masquerading as compliers, I do not mean to dismiss the importance of discovering and penalizing noncompliers. But the place for that goal within this conceptual framework is in the consideration of whether taxpayers perceive penalties and rewards as credible possibilities. Assuming that they do, and that they self-identify as compliers, the necessity of detection and information strategies to determine whether they are telling the truth is a separate and important component of an effective high-penalty strategy.

The issue of detection is also separate from the question of whether the very fact of self-identifying to the government as compliant, including through actions as simple as signing one’s name to a regulatory filing, improves the chance that a regulatee will comply. It probably does—commitment consistency is a powerful heuristic.25 However, this detection point means to leave that to the side, and fo-
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Focus on ways to improve the government's ability to detect noncompliers amid the compliance group.

One way that information filing can improve detection is through its interaction with audit strategies. In simplest form, regulatees who identify themselves as compliers may be subject to more frequent or more thorough audit. This may be a sufficient strategy for a small population of regulatees, if it is possible to craft the audit approach in a way that does not interfere with the goal of rewarding compliant taxpayers with better service.

Larger populations of regulatees require an audit selection strategy that sorts out compliance filers who are more likely to be in fact noncompliant. Part of this can be based solely on the compliance information provided by regulatees, as they can be sorted based on statistical information about the likelihood of compliance by regulatees who meet certain descriptive characteristics. This works only if those characteristics are available in information provided to the regulating agency, and it works best if they are provided in a form that allows for the performance of automatic information search functions.

A different audit-selection strategy may be available if there are alternative sources of information about regulatees. Third-party reporting is the most prevalent in tax administration, but other "non-tax documentation" sources—book-tax balance sheet differences provide one example—might also be used. Strategies here go beyond sorting based on a statistical model built from taxpayer-provided data. Instead, the regulator may analyze different sources of data to check whether they match and/or to feed a richer statistical model of the likelihood of compliance. Because of the importance of interactions between alternative sources of data and the taxpayer-provided information that signals compliance, careful design of the compliance report to maximize its usefulness in combination with other data sources will increase the chance of success for a high-penalty regime.

Especially under an assumption of limited administrative resources, efforts to improve detection of noncompliers who masquerade as compliers may appear to be at odds with the goal of increasing taxpayers' perception of the credibility of penalties and rewards. One is directed at vetting taxpayers inside the system, and the other is targeted at finding taxpayers who are outside the system. Yet it is not clear that the two enforcement efforts are diametrically opposed. In each case, the truly important metric is taxpayers' perception—in one case of the likelihood of penalty imposition for noncompliers, and in the other case of the likelihood of being found out if a noncomplier tries to masquerade as a complier. Publicity of successful government enforcement efforts could, depending on how they are absorbed by the taxpayer population, enhance both perceptions at the same time. Or they could enhance only one and be neutral as to the other, or they could enhance one at the expense of the other. A clever publicity strategy would seek the first option.
Applying the Framework to the Problem of Offshore Account Information Asymmetry

A 2002 Treasury report estimated that there were about 1 million offshore accounts held by U.S. persons and that less than 20 percent of foreign bank account reports, or FBARs, were duly filed as required annually.27 A separate recent estimate suggests that these accounts might contain in the neighborhood of $1.5 trillion. The tax collection shortfall resulting from the failure to pay tax on the income from funds placed in unreported offshore accounts might amount to as much as $50 billion annually.28

The IRS has said that account holders come from “all walks” of (relatively wealthy) life.29 One official has been reported as saying that of 50,000 accounts targeted by a subpoena discussed below—which requested all accounts with U.S. connections at a certain bank, without any filtering mechanism as to size or otherwise—a few thousand were enormous accounts of tens or hundreds of millions of dollars, and the vast majority smaller, less than ten million dollars.

Offshore account holders include heirs, immigrants, and expatriates with some personal connection to the location of their offshore account.30 Account holders who lack any non-U.S. connection may have various reasons for forming the account, including misguided acceptance of an unscrupulous planner’s advice,31 or nontax asset protection, as well as determined and conscious tax evasion. And determined tax evaders may have legal or illegal sources for their deposited funds, tax-paid or not.

Offshore account noncompliance presents a problem of information asymmetry, rather than an issue of legal uncertainty. It is perfectly clear that U.S. citizens and residents must pay U.S. tax on their worldwide income, including income that accrues to an offshore account.32 The challenge is to make offshore account holders disclose the relevant information. The FBAR rules attempt to do just that, in a framework that threatens high penalties for nondisclosure. In the second part of this paper, I apply the analytical framework developed above to evaluate whether the FBAR regime can succeed, asking whether (1) taxpayers perceive that penalties and rewards are credible, (2) close substitutes are absent, and (3) taxpayers perceive that the government can detect noncompliers masquerading as compliers.33

FBAR Reporting Could Succeed as a High Penalty Regime

The FBAR

U.S. owners of offshore accounts must annually file Reports of Foreign Banks and Financial Accounts, or FBARs, with respect to their non-U.S. holdings. This
requirement links to the individual income tax return through Line 7 of Form 1040, Schedule B, which requires a taxpayer to specify whether he or she "had an interest in or a signature or other authority over a financial account in a foreign country." The FBAR requirement is separate from recently enacted I.R.C. § 6038D—a "shadow FBAR" provision—which imposes similar self-reporting requirements.

A regulation authorized by a provision of the Bank Secrecy Act requires the filing of FBARs. A central purpose of the Bank Secrecy Act is to collect information on financial transactions in order to track down money laundering related to drug and other crimes. A neighboring statutory section requires banks to file currency transaction reports, or CTRs, with respect to nonexempt bank transactions in excess of $10,000. The statute also contains other bank reporting and self-reporting requirements.

Despite the characterization of the Bank Secrecy Act as an anti-money-laundering statute, there are at least three partially overlapping concerns with offshore accounts. First, the depositor may have illegally obtained the funds that go into an account. Second, the depositor, whether or not he or she has obtained the funds illegally, may not have properly paid taxes with respect to them. Third, the depositor may fail to pay taxes on the income from the accounts. The second and third issues are tax enforcement concerns.

The FBAR regulations are broad. They require "every person subject to the jurisdiction of the United States … having a financial interest in, or signature or other authority over, a bank, securities or other financial account" to file a report. Under a de minimis rule, a report is required if the aggregate value of the financial accounts exceeds $10,000 at any time during the calendar year. The form instructions give more specifics, but retain the broad character of the regulatory requirements, both with respect to the definition of persons required to report and with respect to the definition of accounts required to be reported. Filings are required of entities such as corporations, partnerships, and trusts and with respect to holdings in or through corporations, partnerships, trusts, or other entities. Taxpayers must report information that should be readily available to them: the existence and size of an offshore account. This paper considers the core requirement to report bank accounts financially owned by individual U.S. taxpayers directly or through a corporation or other entity over which the U.S. owner has signatory authority.

There are several civil and criminal statutory penalties specified for FBAR violations. This paper focuses on the civil willful violation penalty, which equals the greater of $100,000 or 50 percent of the balance in the account "at the time of the violation." This is a huge potential penalty, and significantly more than before the statute was amended in 2004.

The Financial Crimes Enforcement Network, or FinCEN, division of the Treasury had enforcement responsibility for FBAR compliance until 2003,
when enforcement authority was transferred to the IRS under a Memorandum of Understanding that did not explicitly anticipate the issuance of regulations.\textsuperscript{54} Perhaps in part for this reason, and certainly in part because other elements necessary for effective enforcement—such as a way to access information from foreign banks—were not in place, FBAR enforcement activity did not immediately ramp up.\textsuperscript{55} Greater attention began to be paid to the FBAR requirement, including the submission of Treasury reports on the widespread noncompliance with the requirement under a 2001 statute.\textsuperscript{56} But a voluntary disclosure offer made in 2003, which followed efforts to investigate offshore credit card issuers and encompassed FBAR filing requirements, did not result in a big enforcement success.\textsuperscript{57}

For taxable years beginning after March 18, 2010, new § 6038D of the code imposes a similar annual reporting requirement for “specified foreign assets” if the total value of such assets is in excess of $50,000.\textsuperscript{58} This requirement is in addition to the banking-law-based FBAR reporting requirement.\textsuperscript{59} This paper focuses mainly on the banking-law-based FBAR requirement rather than the § 6038D requirement, because FBAR reporting more clearly fits the high-penalty model that I am concerned with in this paper, at least as long as a willfulness-based penalty is perceived as a credible possibility.\textsuperscript{60}

\textit{Applying the High-Penalty Analytical Framework to the FBAR}

\textbf{PENALTY AND REWARD CREDIBILITY}

The first part of this paper argued that penalty and reward credibility is one factor necessary to support the success of a high-penalty regime as a deterrence, separation, and/or signaling mechanism. In the case of the FBAR, the government has done a good job so far of establishing the credibility of penalties and rewards in the minds of taxpayers. Government efforts to articulate and publicize applicable penalties crystallized in litigation relating to accounts at Swiss bank UBS and in the administration of the 2009 FBAR voluntary disclosure program.

\textit{UBS publicity leverages availability bias.} Starting in 2007, a U.S. native and UBS banker named Bradley Birkenfeld channeled evidence to the government of serious misconduct at the Swiss bank. He informed on the elaborate James-Bond-worthy secrecy practices in the cross-border private banking division at UBS, for example, “say[ing] he once transported diamonds, bought with client money abroad, into the United States in a tube of toothpaste.”\textsuperscript{61} Birkenfeld pled guilty in June 2008 to conspiring to help wealthy American Igor Olenicoff evade taxes\textsuperscript{62} and, in August 2009, received a 40-month prison sentence.\textsuperscript{63}

There ensued a criminal fraud case against UBS. The key to the case was the deliberately designed UBS process for working around the “qualified intermediary,” or QI, agreement that UBS had entered into with the U.S. government.\textsuperscript{64} The
The main thrust of the QI agreement was to permit UBS to forward non-U.S. client information to U.S. withholding agents in summary form and still obtain statutory withholding exemptions or lower treaty-based withholding rates on the payments of U.S.-source investment income to non-U.S. persons. But the QI agreement also included a less-than-airtight provision that required UBS to disclose U.S. account holders to the U.S. government, and it was this provision that UBS helped clients to deliberately plan around. The criminal case ended with a $780 million fine and a deferred prosecution agreement in February 2009.

The IRS then submitted a request for enforcement of a broad subpoena to disclose the names of more than 50,000 U.S. clients of UBS. In August 2009, after the intervention of the Swiss government as amicus in the case and top-level negotiations, the civil case settled under an agreement requiring UBS to disclose more than 4,000 names through the information exchange provisions of the U.S.-Switzerland treaty. After considerable debate, the Swiss parliament approved the agreement in the June 2010. As of August 2010, the IRS had received information about 2,000 clients.

The Justice Department used the UBS case to support the criminal prosecution of a number of offshore account holders, and it obtained a number of plea bargains, which then supported well-executed availability-bias-based publicity. The UBS case also helped the cause of the 2009 voluntary disclosure program targeted at delinquent FBAR filers. The volume of publicity of the 2009 disclosure program in contrast to the 2003 program is striking. One rough measure derives from the indispensable Tax Notes database, a touchstone for tax practitioners. Before 2008, only nine Tax Notes articles mentioned “FBARs.” Between September 2008 and October 11, 2009, 58 articles did so—partly because the earlier settlement did not focus as intensively on the FBAR as the central disclosure tool, but also because practitioners had less to say about their clients’ compliance experience in 2003. Other data is instructive as well. In a similar 2003 program targeting offshore credit and debit card accounts, a total of about 1300 applications were filed. In the 2009 program, almost 15,000 applications were received. This is far fewer than the estimated hundreds of thousands of unreported offshore accounts, and also fewer than the 50,000 or so UBS accounts initially targeted by the U.S. subpoena, but several times more than the 4,000 or so accounts expected to be disclosed in the UBS settlement.

It remains to be seen whether there will be an enormous difference in the resulting number of criminal prosecutions. Contemporaneous with the 2003 program, reportedly a total of 10 individuals were prosecuted. As of April 2010, about 15 taxpayers had been charged and most of those had pled guilty; the IRS had reported several months earlier that it was investigating “dozens” of taxpayers in the aftermath of the voluntary disclosure program.

A large wave of prosecutions would increase the persuasiveness of the FBAR high-penalty regime, but the fact of a large number of cases is not dispositive, in
part because taxpayers’ estimation of the likelihood of being caught is a perception. A central purpose of audit and compliance publicity is to increase taxpayers’ or tax preparers’ perception of the risk of detection.78 These efforts should leverage the well-established cognitive availability bias, which prompts us to estimate the “likelihood of an event on the basis of how quickly instances or other associations come to mind.”79 Studies support the existence of an “indirect” audit effect related to taxpayers’ decisions to comply because they hear news of others getting caught.80 Estimates of the ratio between the dollars brought in because of other taxpayers’ compliance compared to the additional collections resulting from the audit itself are in the range of 11 or 15:1.81

Associations come more quickly to mind if the stories are familiar.82 Publicizing famous and/or egregious taxpayers may produce some indirect audit effect, but it should not be expected to maximize the possible effect, because many taxpayers whom the government seeks to influence are neither famous nor egregious. To take advantage of the powerful tool of availability bias, a publicity strategy should effectively communicate to taxpayers that people like them get caught by the IRS or settle with the IRS because of a fear of being caught.83

The 2008–2010 plea bargain publicity does a nice job of leveraging availability bias. Historically, the IRS has managed to attract publicity mainly for the most famous or egregious offenders (such as Leona Helmsley or tax protestors like Ed Brown, who barricaded himself in his New Hampshire home against a Federal agent siege). But in the UBS case, the media has run stories on plea bargains entered into by offshore account holders whose stories are somewhat egregious, but not the worst or largest stories out there. This average-rich-person storyline maximizes the availability bias power of the plea bargain publicity.

Some of the taxpayers in the news for tax evasion through offshore accounts are Forbes-400 rich.84 But featured taxpayers also include Steven Michael Rubinstein, a Florida accountant with a UBS account allegedly worth “at least $6 million;”85 and Robert Moran, Florida resident whose company builds and rents yachts and the alleged owner of an account containing “at least $3.7 million;”86 and Jeffrey Chernick, a New York resident who runs a toy company and concealed “more than $8 million.”87 They include Juergen Homann of Saddle River, New Jersey, who runs a chemical company and allegedly concealed “about $6.1 million in assets;”88 John McCarthy, a Malibu businessman whose account allegedly held “more than $1 million;”89 and Roberto Cittadini, a retired Boeing sales manager who pled guilty to “hiding nearly $2 million.”90

These are not small numbers, but they are also not among the largest accounts out there. Of the 52,000 UBS clients on the original summons list, one description put the number of “ultrawealthy” taxpayers with accounts worth “tens to hundreds of millions of dollars” at several thousand and suggested that the government would focus its attention there.91 Yet that is not where all the action has been. Smaller UBS clients were reportedly included on the list selected for
disclosure. For a typical offshore account holder, the news about indictments and plea bargains of the merely very wealthy, rather than the Forbes 400, has more salience and taps more effectively into availability bias. The IRS should publicize different kinds of taxpayers that have gotten caught to the extent it legally can. The government’s apparent focus on marshaling simple and easily decided (or plea bargained) charges makes sense, as does its emphasis on continuing its prosecution, plea bargain and publicity program and in covering banks other than UBS, particularly in light of reports that Swiss bank clients may be moving their accounts to other banks, for example in Singapore and Hong Kong. The government appears aware of the need to broaden the net beyond UBS and has instituted criminal proceedings against another large bank, HSBC, and at least two of its clients.

The IRS is fortunate in this case that various media outlets are following this story closely, because Section 6103 of the Code, which prohibits the IRS from disclosing confidential taxpayer “return information,” limits the government’s direct publicity efforts. The enumerated exceptions in the statute do not even include explicit permission for the IRS to publicize return information that has already been disclosed publicly, whether through a posted lien, civil or criminal litigation, taxpayer discussion of the case in a public forum, or otherwise, although in light of the case law the IRS has gotten comfortable with the strategy of posting basic press releases, or links to such releases, on its website.

Voluntary disclosure penalty transcends legal uncertainty. The IRS approach to its FBAR voluntary disclosure program also supported taxpayer perception of credible penalties—subject to the close substitutes issue discussed below. In general, a valid voluntary disclosure is a full disclosure of unpaid tax, made before the IRS has begun an investigation of the taxpayer and including a good faith undertaking by the taxpayer to pay all tax, interest and penalties determined by the IRS to be due. The IRS will take such a disclosure into account in determining whether to recommend criminal prosecution to the Justice Department.

The government chose a high monetary penalty benchmark for this program. In particular, it took the civil willfulness penalty equal to 50 percent of the account balance for each annual failure to file, as its starting point. In addition to requiring taxpayers to file returns going back 6 years and pay all back taxes, interest, and either accuracy or delinquency penalties, participants in the FBAR voluntary disclosure program faced a maximum penalty of 20 percent of the account balance for the year (of the six years covered) with the highest balance.

The IRS stated unequivocally, and repeatedly, that in its view all taxpayers who have failed to pay tax on income related to the offshore accounts—no matter whether they are among the super-rich—are intentionally concealing income and assets from the government rather than negligently remaining unaware of filing and taxpaying obligations. The government declined to recognize a distinction between business accounts and savings and investment accounts for purposes of
applying the 20-percent penalty in the voluntary disclosure program. Some reports suggest that an anticipated reduction to a 5-percent penalty apparently meant to apply to inherited accounts would be rarely, if ever, granted.

The IRS wanted to “draw a clear line between those individual taxpayers with offshore accounts who voluntarily come forward to get right with the government and those who continue to fail to meet their tax obligations.” But it certainly did not suggest that those who came forward would be let off scot-free. The government indicated that taxpayers who voluntarily disclosed would not be recommended for criminal prosecution, but the 20-percent-of-account-value monetary fine, derived from the benchmark of the statutory willfulness penalty, is a substantial amount.

Remarkably, the government managed to establish 20 percent of the account value as a credible penalty—in other words, it successfully publicized that penalty level in its program, and voluntarily disclosing taxpayers appear to have accepted it as a benchmark—despite legal uncertainty about how a court would apply the willfulness standard in the offshore account situation. Under the Supreme Court’s Cheek case, “willful” violation of a legal duty to file a tax form generally requires that the defendant know of the legal duty. It is conceivable, given the historic lack of publicity and enforcement about the FBAR filing requirements, that a defendant might be able to show a lack of willfulness. There is one circuit case decided under the Cheek standard that rejected an “ostrich” defense theory in an FBAR filing case, but it involved egregious facts.

FBAR compliance rewards. As argued above in the description of the analytic framework, perceived rewards for compliant taxpayers reduce the risks of crowding out compliant behavior and complement perceived penalties for noncompliant taxpayers, thus supporting the deterrence, separation and signaling goals of a high-penalty regime. Existing features of U.S. tax administration, such as its articulated service/enforcement goal and the tendency to treat historically compliant taxpayers more gently in the audit and Appeals process, serve as rewards for all compliant taxpayers. Specific elements of the FBAR regime aimed at shaping or explaining the compliance option could do an even better job in this specific case. In particular, the government should keep FBARs confidential from third parties and publicize more effectively the benefits of the compliance option.

The FBAR does not receive the confidentiality protection extended to most tax filings. This is because it is not denominated a tax return for purposes of Section 6103, as it is not required by Title 26 of the U.S. Code, but rather by Title 31. It is not clear whether an FBAR attached to a tax return would count as return information. The FBAR instructions direct that taxpayers not file FBARs with their tax returns, but the voluntary disclosure guidance is less clear.

In any case, carving FBARs out of Section 6103 is apparently intentional. Although the taxpayer confidentiality provisions include some exceptions for sharing information with other Federal agencies, the concept of the FBAR was
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to provide a more generally available database. A banking statute requires the Secretary of the Treasury to develop “standards and guidelines” relating to who has access to information administered by the FinCEN division of Treasury. In 2009, Senator Max Baucus considered proposing the classification of FBAR filings as confidential tax return information.

But even though increased FBAR confidentiality might conceivably act as a compliance-inducing reward, it is not clear how the government could go about ensuring this for taxpayers. Making FBARs tax return information by statute has the disadvantage of undermining the access of other agencies to FBAR information, in contravention of the original law’s intention. But without a statutory amendment, the government presumably cannot promise that it will keep FBARs secret against, say, Freedom of Information Act requests or court orders emerging from civil litigation to the same extent tax return information is kept secret under I.R.C. § 6103. The FBAR form warns of possible information sharing with other “state, local and foreign” government entities but is silent on the question of sharing with other third parties. The advantage of extending rewards to compliant taxpayers suggests that Treasury should strongly resist any non-government third party information requests, and, of course, publicize any wins.

A better-publicized explanation of what happens to taxpayers who choose the compliance option would also increase the power of compliance rewards to shape compliance behavior. The main available pieces of information are the penalty limit of 20 percent of account value indicated in the 2009 voluntary disclosure program and the 25 percent penalty benchmark put forth in the follow-on 2011 program. Compliant taxpayers presumably enjoy other benefits, such as the peace of mind that comes from getting right with the government and (hopefully) cordial and competent handling of the FBAR filings and related matters. However, clarifications of the rewards for compliance face two central challenges: taxpayer confidentiality and menu complexity.

Taxpayer confidentiality concerns limit the government’s ability to tell salient stories about taxpayers who choose to comply. Even the broadest view regarding the ability of the IRS to disclose information also available in public records would not permit the IRS to publicize taxpayers whose cases are not litigated or otherwise publicized, such as through liens. Public discussion by the taxpayer, for example, does not waive the confidentiality protection. The statute does permit disclosure to persons designated in writing by the taxpayer. Accordingly, an explicit waiver of taxpayer confidentiality and permission to publicize might work to permit the IRS to disclose specific taxpayer information. But getting the waiver and connecting it to a publicity strategy would be a time-consuming and often futile case-by-case exercise.

Publicity of different categories of taxpayers who, for example, settled with the IRS would likely be permitted under the flush language of Section 6103 (b) (2), which excludes from the definition of protected return information “data in a form
which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Typically this rule—the Haskell amendment—is used to permit "statistical studies or other compilations of data," as Senator Haskell explained when proposing it on the floor. The Supreme Court has held that it cannot support the disclosure of return information from which identifying details have merely been redacted.

However, several courts have concluded that information assembled in a more granular way than the macro-level IRS statistics on income tables might fit within the Haskell amendment's description of data that falls outside the return information definition. For example, the Ninth Circuit held that Section 6103 did not block a FOIA request from logging companies for a report the IRS had prepared on tax preparation in their business. In another case, the Court of Federal Claims, in response to a discovery request from an oil company seeking information about production methods of other companies claiming a Section 43 credit, concluded that “[a] list of the various production methods could be compiled. If only this list, and no other information, were delivered to plaintiff, then Section 6103 would not be violated.”

The IRS can describe compiled data in a more engaging way than in tabular statistical form without violating Section 6103. In particular, it should be able to describe general types of offshore account taxpayers with the goal of more effectively communicating the possibility of audit and prosecution and the benefits of disclosure and settlement. It need not stick to dry categorical descriptions. More creative and salient tactics are needed. The government should consider fictional portrayals, taxpayer testimonials, or more abstract, but salient, messages about the different results produced by the compliance and penalty regimes.

THE CLOSE SUBSTITUTE OF QUIET DISCLOSURE

As the first part of this paper discussed, the problem of close substitutes can also bar a high-penalty regime from achieving its deterrence, separation, and/or signaling goals. This is an issue for the FBAR filing requirement. The possibility of a "quiet disclosure" option may exist as a close substitute alternative to voluntary disclosure.

"Quiet disclosure" is the practice of simply filing amended tax returns for the years in question. It is not endorsed by any government guidance, in contrast to official "voluntary disclosure," which is described in the Internal Revenue Manual. Voluntary disclosure includes a list of conditions—and features an undertaking by the IRS to consider the fact of disclosure when deciding whether to forward a case to the Justice Department for criminal prosecution, such as for tax evasion. In practice, it is generally thought that voluntary disclosure bars criminal prosecution.

Even though quiet disclosure is not officially endorsed, it is a fairly well-established practice, and taxpayers’ expectation that quiet disclosure offers at least
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some protection against criminal prosecution is also well entrenched.\textsuperscript{139} This presents a problem for the integrity of the high-penalty FBAR rules, because the quiet disclosure option probably will not subject the taxpayer to the significant willful-failure-to-file-derived penalties that the IRS has applied to voluntarily disclosing taxpayers. The quiet disclosure option weakens the ability of the high-penalty FBAR regime to serve its deterrence, separation and signaling functions.

The deterrence power of the FBAR, grounded in taxpayers' comparison of the risks and rewards of filing and not filing, depends on taxpayers' belief that failure to file the FBAR will lead to the government imposing penalties and withholding rewards. A no-penalty quiet disclosure option would suggest that there is little cost to failing to file the form initially, and that the taxpayer may wait to see whether the government seems to have the ability to discover his or her offshore accounts by other means. If the government does, then quiet disclosure is an easy solution.\textsuperscript{140}

The separation goal of a high-penalty system is similarly undermined by the quiet disclosure option. Compliant taxpayers might choose up-front compliance, by filing the FBAR, or delayed compliance, through quiet disclosure. The quiet disclosure option does not clearly identify compliant taxpayers in the way that filing an FBAR does, and therefore makes it more difficult for the government to target taxpayer service or tailored detection strategies to the compliance group. The signaling potential of the high-penalty FBAR system is also muffled by the availability of quiet disclosure, because quiet disclosure constitutes a competing signal around which taxpayers may gather instead.

To permit FBAR reporting to function as a high-penalty regime that promotes deterrence, separation and signaling, this quiet disclosure close substitute should be removed. The government has taken the first step toward doing so, by providing that it will not respect quiet disclosure—in contrast to voluntary disclosure—as a reason to refrain from criminal prosecution in the offshore account context.\textsuperscript{141} But taxpayers' perception is what counts. So the plan for eliminating a quiet disclosure option should include appropriate, availability-bias-motivated publicity, such as publicity of taxpayers subject to civil and/or criminal penalties despite efforts at quiet disclosure.

DETECTION AND INFORMATION STRATEGIES

A key possible weakness in a high-penalty regime is the possibility that taxpayers who wish to game the system may pretend to be compliers.\textsuperscript{142} Excellent audit of FBAR filers is therefore essential, as is publicity of successful audit. The availability of data and the nature of the FBAR filing group as a small population with established publicity avenues can shape the audit strategy in the case of the FBAR.

In the short term, until third-party data can be used to cross-check the accuracy of FBAR filing, audit filters must derive from statistical models containing the
information on FBAR filings themselves, together with other predictive variables such as reported Form 1040 income level and demographic characteristics. The shadow FBAR tax return filing mandated for taxable years starting after March 18, 2010 by § 6038D is therefore important to the audit project. This is because taxpayer confidentiality limitations restrict the IRS’s ability to use tax return information to enforce FBAR requirements. The shadow FBAR filing required under § 6038D is intended to solve this problem and permit the IRS to develop a program to automatically match § 6038D data with other tax return information.143

Fortunately, the taxpayers targeted by the FBAR filing requirement are not an enormous group—perhaps one million or so. The actual audit rate for wealthier taxpayers—6.42 percent for Fiscal Year 2009 for taxpayers with income in excess of $1 million—exceeds substantially the 1.03 percent rate for individual taxpayers on average.144 And the IRS has formed a special group to coordinate offshore account examinations for high-net-worth individuals.145 The small size and high net worth characteristics of the target population also facilitate effective publicity. In fact, the government has a proven publicity strategy: the distribution of press releases that national and international newspapers then report on. It is likely that this publicity and newspaper coverage reaches some significant portion of the taxpayers required to file FBARs.

The possible future availability of third-party data, perhaps from non-U.S. banks or governments, should shape the way in which the government collects FBAR and shadow FBAR data now. In particular, data fields should be simplified in anticipation of establishing a standardized global format for third-party reports in the future. The essential contents of an FBAR or shadow FBAR form filed on behalf of an individual usually can be reduced to four information fields: taxpayer identity, which should often reduce to a TIN; the identity of the financial institution at which the account is held; the maximum value of the account for the year; and the account number.146 Even if electronic filing—which would require statutory authorization147—is not yet feasible, assigning numeric codes for these fields would facilitate data entry and sorting based on paper source documents. For example, foreign financial institutions should have identification numbers to be used on FBAR and other filings.148 Without these simplification and automation measures, the government may face a situation where it has gobs of paper FBAR information about taxpayers and does not know what to do with it.149 And it may also find it more difficult than necessary to crosscheck FBAR filings against information provided through a global reporting system, if and when such a system ultimately develops.

Conclusion

The FBAR rules have the necessary ingredients to support the high-penalty compliance mechanisms of deterrence, separation, and signaling. But to maximize
their effectiveness, the government should adjust several aspects of its administration of the rules. Tax administrators should continue to work to increase taxpayers’ perception of the credibility of the penalties and rewards specified under the FBAR system, by expanding the reach of their criminal and civil investigations to other banks and by publicizing both cases where taxpayers failed to file FBARS and got caught and also the advantages of compliance. They should defend third-party confidentiality to FBAR filers. They should also eliminate the close substitute option of quiet disclosure as a remedy for the failure to file an FBAR.

Finally, the government should pursue the goal of increasing taxpayers’ perception of the likelihood that noncompliers who masquerade as compliers will be detected. This last goal should involve good audit coverage of FBAR and shadow FBAR filers, publicity of successful audits to the extent consistent with taxpayer confidentiality limitations, and the development of a limited number of standardized, numerically coded data fields for FBAR and shadow FBAR reports which may ultimately be cross-checked against global information reports about U.S. account holders.

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Endnotes

2 See id.
3 See Alex Raskolnikov, Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement, 109 COLUM. L. REV. 689, 704–05 (2009) (describing the separation function of penalties and noting the targeting benefit of avoiding crowding out); see also Dan M. Kahan, The Logic of Reciprocity: Trust, Collective Action, and Law, 102 Mich. L. Rev. 71, 83–84 (2003) (suggesting that emphasizing the possibility of audit will not encourage reciprocal compliance behavior); Marjorie Kornhauser, Normative and Cognitive Aspects of Tax Compliance: Literature Review and Recommendations for the IRS Regarding Individual Taxpayers, in 2 NAT’L TAXPAYER ADVOCATE,


5 See Dan M. Kahan, Social Influence, Social Meaning and Deterrence, 83 VA. L. REV. 349, 365 (1997) (arguing that individuals decide whether or not to commit crimes in large part based on their perception of others’ criminal behavior).

6 See James Alm, Gary H. McClelland and William D. Schulze, Changing the Social Norm of Tax Compliance by Voting, 52 KYKLOS 141, 153, 161 (reporting increased compliance if experimental subjects were permitted to communicate about their compliance decisions); Michael Wenzel, Motivation or Rationalisation? Causal Relations Between Ethics, Norms and Tax Compliance, 46 J. Econ. Psychol. 491, 504–05 (2005) (reporting longitudinal study results showing that group norms affect personal ethics when a taxpayer identifies with the group).


8 See, e.g., Eric Fleisig-Greene, Law’s War With Conscience: The Psychological Limits of Enforcement, 2007 B.Y.U. L. REV. 1203, 1222, 1233-1235 (2007) (arguing that law can have an adverse impact on previously existing positive norms and citing one empirical study suggesting that taxpayers who received letters notifying them of a likely audit reported less income than other taxpayers).

9 See, e.g., Marjorie Kornhauser, supra note 3, at 164 (arguing that a commodified exchange view of taxation can undermine voluntary compliance and prompt taxpayers to believe that the government is not fair); Marjorie Kornhauser, Tax Compliance and the Education of John (and) Jane Q. Taxpayer, Tax NOTES 737, 739 & n.21 (Nov. 10, 2008) (noting the importance of procedural fairness and reciprocal trust for compliant taxpayers).

10 See Kahan, supra note 3, at 83–84 (noting the inconsistency of audit threats with a tit-for-tat relationship).

This idea of government-taxpayer reciprocity is distinguishable from the idea of taxpayer-taxpayer reciprocity connected to the common provision of public goods. See Sagit Leviner, An Overview: A New Era of Tax Enforcement—From “Big Stick” to Responsive Regulation, 2 REG. & GOVERNANCE 360, 365 (2008); Dennis J. Ventry, Jr., Cooperative Tax Regulation, 41 Conn. L. Rev. 431, 436 (2009).


See, e.g., Ian Ayres & John Braithwaite, Responsive Regulation 44-47 (1992) (arguing that an agency that threatens serious punishments may be “vulnerable to a litigious firm determined to shatter its myth of invincibility”).

For example, although the IRS has broad statutory powers to summon documents, see I.R.C. § 7602; and the Supreme Court has vindicated its authority to use these powers to summon tax accrual workpapers prepared by accountants, see United States v. Arthur Young, 465 U.S. 805, 816 (1984), the IRS has historically followed a “policy of restraint” under which it will only seek workpapers “to obtain collateral sources of data, not to fish for new issues.” Thomas J. Monks, Your Papers, Please: Requests for FIN 48 Workpapers, 125 Tax Notes 901, at nn. 72–75 (Oct. 28, 2009). This restraint may stem from habit as well as from a desire to dodge litigation risks, limit exposure to restrictive statutory changes, and/or avoid souring relationships with taxpayers. For a summary of recent developments in the area of tax accrual workpapers and a view that they can never constitute protected work product, see Dennis J. Ventry Jr., A Primer on Tax Work Product for Federal Courts, 123 Tax Notes 875 (May 18, 2009).


See, e.g., Ayres & Braithwaite, supra note 15, at 44–47 (identifying that regulatees' perception of an agency's "invincibility" as a key factor).


See David Weisbach, Line Drawing, Doctrine and Efficiency in the Tax Law, 84 Corn. L. Rev. 1627, 1665–66 (1999) (defining marginal efficiency cost of funds as the ratio between the revenue from a tax change with no behavioral distortion and the actual (presumably lower but still positive) revenue including the impact of behavioral effects).


See Cooter, supra note 4, at 595 (explaining an expressive theory of enactment and enforcement of law).

See Raskolnikov, supra note 3, at 724–28 (exploring several ways to increase the likelihood of detection in the compliance group).

See, e.g., Kahan, supra note 5, at 358–59 (noting that the desire to avoid cognitive dissonance motivates individuals to conform their behavior).


See Sec'y of Treas., 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 6 (noting that the IRS estimated the number of foreign bank accounts at 1 million and the number of annual FBAR filings at about 180,000). The IRS reported that 322,414 FBARs were filed in 2007. See IR 2008–79. Without more information about the number of offshore accounts, which may have increased, the frequency with which one FBAR filer listed more than one account or more than one FBAR filer reported one account and so forth, better estimates are difficult to produce.

See Martin Sullivan, U.S. Citizens Hide Hundreds of Billions in Cayman Accounts, 103 Tax Notes 956 (May 24, 2004) (citing $70 billion estimate); Hearing on Issues Involving Banking Secrecy Practices and Wealthy American
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The overall 2001 tax gap estimates were based on National Research Program (NRP) audit studies. See Eric Toder, What is the Tax Gap?, 117 Tax Notes 367, 370–74 (Oct. 22, 2007) (describing NRP estimation methodology). The cited estimates of offshore account noncompliance derive from independent estimates of the size of offshore accounts held by U.S. individual taxpayers, and according to one report “it is doubtful that the $345 billion estimate includes the entire international tax gap.” Treas. Inspector Gen’l for Tax Admin., A Combination of Legislative Actions and Increased IRS Capability and Capacity Are Required to Reduce the Multi-Billion Dollar U.S. International Tax Gap (Jan. 27, 2009), available at http://www.treas.gov/tigta/iereports/2009reports/2009IER001fr.html. Despite the different methodology and incomplete overlap, comparing the $350 billion measure of overall noncompliance to the $50 billion estimate of offshore account noncompliance should give an idea of the general size of the tax gap problem and relative importance of its components, as intended.

See IR 2003-95 (July 30, 2003) (“People from all walks of life applied for the [2003 voluntary disclosure] program, including lawyers, dentists, business executives, estate heirs, and numerous other occupations.”).


At a Senate committee hearing in 2002, for example, lawmakers heard testimony from an orthopedic surgeon and Federal inmate. He had gotten into financial trouble, refused the offers of several tax protestor promoters, and then entered into a offshore “business trust” arrangement supported by “legal opinions and letters from several attorneys.” He thought things were legal, he claimed, until he discovered that the trust routed funds from Utah to the Isle of Man and then to Austria and provided false receipts for the funds. He stated that he was attempting to extricate himself from the situation when he was found out. Transcript of Hearing on Schemes, Scams and Cons, Part II: The IRS Strikes Back, 107th Cong., 2d Sess. (Apr. 11, 2002) 16–22 (statement of Dr. Daniel Bullock).
A U.S. citizen or resident alien may exclude certain income earned abroad from the performance of services, but this foreign earned income exclusion does not exempt investment income from U.S. tax. See I.R.C. § 911. One of the requirements for the foreign earned income exclusion is that the individual demonstrate his or her substantial foreign presence abroad by meeting either the bona fide residence test or the 330-day test. See I.R.C. § 911(d). Such a taxpayer may also be able to reduce his or her U.S. tax by the amount of foreign taxes paid, but must record the foreign tax credit claim on the tax forms submitted to the U.S. government. See I.R.C. § 901 (providing for foreign tax credit election); IRS, Form 1116 (enabling foreign tax credit election); IRS, Form 1116 INSTRUCTIONS at 1 (explaining that in certain circumstances a taxpayer with “passive category income” only may claim a foreign tax credit on line 47 of Form 1040 without filing Form 1116). In most offshore account situations, in any case, there is no foreign tax to credit.

Another law, the Foreign Account Tax Compliance Act, or FATCA, also attempts to solve the problem of offshore account information asymmetry. FATCA was enacted as part of a larger jobs-oriented tax package in March 2010. See P.L. 111–147 § 501 (codified at I.R.C. §§ 1471–1474). It requires non-U.S. financial institutions to tell the U.S. government about their U.S. account holders and includes very high penalties for noncompliance. In future work, I hope to analyze FATCA using the framework developed here.

IRS Form 1040, Schedule B, Line 7.

See I.R.C. § 6038D. The provision is effective for tax years beginning after the date of enactment, March 18, 2010. See P.L. 111–147 § 511(c). See also infra text accompanying notes 58–60 (contrasting § 6038D and FBAR requirements).

See 31 C.F.R. § 103.24.


See Levy, supra note 37, at § 3.02 (“The grande dame of money laundering regulation is the statute commonly known as the Bank Secrecy Act of 1970.”).

See 31 U.S.C. § 5313(a); 31 C.F.R. § 103.22.
40 See, e.g., 31 U.S.C. § 5318(g) (regarding “Suspicious Activity Reports,” or SARs).

41 See 31 U.S.C. § 5316(a) (requiring persons who physically transport more than $10,000 cross border to make a “Currency and Monetary Instrument Report”, or CMIR).

42 See generally Levy, supra note 37, at § 6.02 (providing an overview of reporting requirements).

43 The legislative history of the 1970 enactment of the Bank Secrecy Act includes a concern for these tax evasion issues. Swiss bank accounts are not a recent phenomenon. “One of the most damaging effects of an American’s use of secret foreign financial facilities is its undermining of the fairness of our tax laws. Secret foreign financial facilities, particularly in Switzerland, are available only to the wealthy. To open a secret Swiss account normally requires a substantial deposit, but such an account offers a convenient means of evading U.S. taxes. . . . [I]t is grossly unfair to leave the secret foreign bank account open as a convenient avenue of tax evasion.” H.R. Rep. No. 91–975, reprinted in 1970 U.S.C.C.A.N. 4394, 4397–98 (1970).

44 31 C.F.R. § 103.24.

45 The definition of a person subject to the jurisdiction of the United States is narrowed in the form instructions to “a citizen or resident of the United States, or a person in or doing business in the United States.” Instructions to TD F 90-22.1 [hereinafter FBAR Instructions] at 6. See Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estate & Gifts ¶ 65.5.8, available at Lawrence Lokken, The Big, Bad FBAR: Reporting Foreign Bank Accounts to the U.S. IRS 2-4 (2009), available at http://ssrn.com/abstract=1429744 (describing persons required to report and interpretation of “doing business” language). Proposed regulations and other guidance also narrow FBAR filing requirements somewhat. See infra notes 48 and 50.

46 See FBAR Instructions, at 6 (defining financial account).

47 An entity account may be required to be reported because of a U.S. person’s financial interest in or signatory authority over such account. See FBAR Instructions at 6–7 (describing financial interest and signatory authority rules); Bittker & Lokken, supra note 45, at ¶¶ 65.5.8.4 and 65.5.8.5 (same). Various other requirements to report ownership in and transactions with foreign entities also exist. See IRS Forms 5471, 5472, 3520-A, 8865.

48 Recent government comments and guidance have expanded practitioners’ previous understanding of the breadth of the financial account definition. See FBAR Instructions at 6 (providing that financial accounts “generally also encompass any accounts in which the assets are held in commingled funds”); see also Letter from New York State Bar Association to Neal S.
Wolin, Deputy Secretary, Department of the Treasury, et al. (July 17, 2009), *available at* LEXIS, TNT library, 2009 TNT 137–13, [hereinafter NYSBA July 17, 2009 Letter] at text accompanying notes 13–22 (charging that a “flurry” of informal guidance and media comments indicating that holders of accounts in commingled funds such as non-U.S. hedge funds or private equity funds presented a “tension” with earlier guidance and took practitioners by surprise). Proposed regulations, however, “reserve the treatment of investment companies other than mutual funds or similar pooled funds” despite some concerns about the possible use of entities such as hedge funds for tax evasion. See Financial Crimes Enforcement Network: Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 75 Fed. Reg. 8844, 8846 (proposed Feb. 26, 2010) (to be codified at 31 C.F.R. Part 103). See also Notice 2009–62, 2009–35 I.R.B. 260 (requesting comments on various FBAR filing requirements).

49 The FBAR form requires the reporting of the maximum amount in the account during the year reported. See Treasury Department Form TD F 90.22–1.

50 Proposed regulations and other guidance would not disturb the FBAR filing requirement in this paradigm case. See Financial Crimes Enforcement Network: Amendment to the Bank Secrecy Act Regulations—Reports of Foreign Financial Accounts, 75 Fed. Reg. 8844 (proposed Feb. 26, 2010) (to be codified at 31 C.F.R. Part 103); Notice 2010–23 (providing administrative relief for FBAR filing requirements such as for certain signatories without financial interest in the account); Announcement 2010–16 (suspending FBAR filing requirement for certain non-U.S. persons).

51 There is also a voluminous list of possible penalties for tax evasion and other offenses that may be linked to failure to file an FBAR. See IRS, Voluntary Disclosure Questions and Answers, available at www.irs.gov/newsroom/article/0,,id=210027,00.html, Q&A 14 and 15 (listing possible civil and criminal penalties).

52 See 31 U.S.C. § 5321(a)(5) (specifying willful civil penalty). See also 31 U.S.C. § 5321(a)(5)(B) (specifying $10,000 civil penalty with reasonable cause exception); 31 U.S.C. § 5322(a) and (b) (specifying criminal penalties including imprisonment). See generally Bittker & Lokken, *supra* note 45, at ¶ 65.5.8.7 (summarizing penalties).

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54 See IRS News Release 2003–48; 31 C.F.R. § 103.56(g). See also NYSBA July 17, 2009 Letter, supra note 48, at text accompanying notes 6–7 (describing delegation of authority).

55 One 2008 Tax Court case, based on tax years 1993–2000, is notable for the imposition of FBAR penalties in the presence of particularly egregious facts and for the Tax Court's lack of jurisdiction to review the propriety of the imposition of FBAR penalties by the IRS. See Williams v. Comm'r, 131 T.C. 54, 58–59 (2008) (finding no jurisdiction in the absence of a notice of deficiency, lien or levy); T.C. Memo 2009–81 (concluding on summary judgment that Williams' criminal tax fraud guilty plea collateral estopped him from contesting civil fraud charges).

56 The reports were filed under section 361(b) of the USA Patriot Act of 2001, which “requires the Secretary of the Treasury to (1) study ways to improve compliance with the reporting requirements set forth in Section 5314, and (2) submit an annual report on the study to Congress.” Levy, supra note 37, at § 10.02.

57 The offshore credit card initiative of 2000–2003 sought information about credit card holders from MasterCard, Visa and other payment processors. See, e.g., John Hembera, IRS Targets AmEX, MasterCard in Offshore Fishing Expedition, Tax Notes (Oct. 26, 2000). In general that initiative did not face a bank secrecy obstacle, since it targeted U.S. payment processors. See, e.g., Dorsey v. United States, 2004–1 U.S.T.C. ¶ 50,164 (D. Md. 2004) (refusing to quash summons under § 7602; bank secrecy issue not raised). However, it culminated in only 10 or so prosecuted cases, plus settled cases that did not get publicized; it is reportedly considered not a great success. See Rev. Proc. 2003–11, 2003–1 C.B. 311 (announcing offshore initiative directed in part at credit cards); Lee Sheppard, Now What? Dealing With UBS Account Disclosures, 124 Tax Notes 847, 851–52 (Aug. 31, 2009) (recalling results of credit card initiative); Heather Bennett, IRS Offshore Compliance Initiative Collects $170M, 102 Tax Notes 713 (Feb. 9, 2004) (reporting that the initiative collected 1300 applications and $170 million).

58 I.R.C. § 6038D(a).

59 See Joint Committee on Tax’n, Technical Explanation of the Revenue Provisions Contained in Senate Amendment 3310, the “Hiring Incentives to Restore Employment Act,” Under Consideration by the Senate 60 (Feb. 23, 2010) (noting that § 6038D does not modify or replace the FBAR requirements).

60 The basic § 6038D penalty is $10,000, increasing to a maximum of $50,000 after notification by the Secretary. See I.R.C. § 6038D(d) (providing $50,000 maximum for “any failure,” presumably meaning a limit for each annual
failure to file). Another provision increases substantial underpayment penalty for "any transaction involving a foreign financial asset" from 20 percent to 40 percent. See I.R.C. § 6662(b)(6). But these penalties do not approach the size of FBAR penalties such as the 50 percent of account value willful civil penalty and the possibility of imprisonment.

61 Evan Thomas & Mark Hosenball, Cracking the Vault, Newsweek (Mar. 23, 2009).


64 Over 5000 foreign banks, such as UBS, Credit Suisse and Deutsche Bank, have signed qualified intermediary agreements with the U.S. See Letter from New York State Bar Association to Sen. Max Baucus et al. (Sept. 10, 2009) available at LEXIS, TNT library, 2009 TNT 175–67, [hereinafter NYSBA Sept. 10, 2009 Letter]. The alternative is nonqualified intermediary, or NQI treatment, which requires the submission of beneficial owner information for each specific account to avoid U.S. withholding on U.S. source payments of investment income such as interest and dividends. See generally Treas. Regs. §§1.1441–1 et. seq. (containing QI and NQI documentation and withholding rules). Importantly, there is no presumption of U.S. status for purposes of backup withholding with respect to gross security sale proceeds. See Treas. Regs. 1.6049–5(d)(3)(ii) (providing that withholding on gross proceeds is not required for payment to a non-U.S. intermediary unless the payer has actual knowledge that a nonexempt U.S. person is the beneficial owner of the payment).

65 See Rev. Proc. 2000–12, 2000–1 C.B. 387 (outlining model QI agreement). Prior to the adoption of these nonresident withholding rules, the U.S. had little assurance that the rules for reducing rates on U.S.-source investment income payments to non-U.S. investors were properly enforced. See Susan C. Morse & Stephen E. Shay, Qualified Intermediary Status: A New U.S. Withholding Role for Foreign Financial Institutions Under Final U.S. Withholding Regulations, 27 Tax Mgm’t Int’l J. 331, 332–33 (1998) (noting that the regulations require foreign financial institutions to provide information about “foreign status, eligibility for treaty benefits, and qualification for other statutory withholding tax exemptions such as those applicable to effectively connected income and foreign government or international organization status” and “plac[e] the burden of investigating beneficial ownership on QIs rather than on U.S. custodians”). See also Reuven S. Avi-Yonah, International Tax as International Law 27, 28,
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A compromise struck in the model QI agreement, in deference to bank secrecy rules, does not flatly require QIs to disclose the identity of their U.S. clients. Instead, it describes the option of reconciling the existence of a U.S. account holder with bank secrecy laws by excluding U.S. securities or other assets that generate U.S.-source reportable payments from the U.S. client’s account. See Rev. Proc. 2000–12, 2000 C.B. 387 § 6.02 (“If QI is prohibited by law, including by contract, from disclosing to a withholding agent … the account holder’s name … then QI must (i) request … the authority to make such a disclosure; (ii) request … the authority to sell any assets that generate … reportable payments or (iii) request that the account holder disclose himself.”).

UBS apparently recommended to U.S. clients that they hold accounts through a nominee blocker corporation in a tax haven or that they take advantage of the fact that the qualified intermediary reporting rules only applied to assets that generated U.S. source income by moving U.S. account holders out of assets that produced U.S. source income, perhaps trading in U.S. treasuries for British gilts. See, e.g., UBS, Qualified Intermediary System: U.S. Withholding Tax on Dividends and Interest Income From U.S. Securities 1 (Oct. 2004) (“A QI has to ensure that US Persons … either declare themselves to the US tax authorities … or are no longer permitted to invest in US securities.”).


See id. (reporting civil case settlement).

See Lynnley Browning, Swiss Approve Deal for UBS to Reveal U.S. Clients Suspected of Tax Evasion, N.Y. TIMES (June 17, 2010). This followed a decision by the Swiss Federal Administrative Court that the failure to file a W-9 with UBS for transmission to the U.S. tax authorities did not constitute “tax fraud and the like” and therefore did not meet a requirement under a 1996 treaty for an exception to bank secrecy protection. See Daniel Pruzin, Switzerland for Now to Hand Over Data on Only 250 Secret Accounts with UBS, BNA Tax Management Weekly Report 144–45 (Feb. 1, 2010).

See Lynnley Browning, IRS to Drop Suit Against UBS Over Tax Havens, N.Y. Times (Aug. 26, 2010).

The 2009 program followed another initiative, in 2003, which was generally characterized as having produced “limited success” in large part due to a lack of enforcement action and publicity. See supra note 57 (describing results of
2003 voluntary disclosure program launched in part as a response to offshore credit card initiative); Joint Committee on Taxation, Tax Compliance and Enforcement Issues With Respect to Offshore Accounts and Entities 48–49 (Mar. 30, 2009) (hereinafter JCT 2009 Offshore Account Report) (reporting the view that the lack of parallel enforcement actions and publicity limited the success of the 2003 program). In 2003 at least one onerous penalty provision, the 50 percent provision for willful failure to file an FBAR, was not yet law.


75 See Sheppard, supra note 57, at 851.


78 See, e.g., James Andreoni et al., Tax Compliance, 36 J. Econ. Lit. 818, 846 (1998) (summarizing tax compliance studies associating a high subjective probability of detection with significantly higher compliance rates).


80 See, e.g., James Alm, Betty R. Jackson & Michael McKee, Getting the Word Out: Enforcement Information Dissemination and Compliance Behavior 93 J. Pub. Econ. 392, 401 (2009) (reporting results of laboratory study showing that subject-to-subject messaging about audit outcomes significantly affects

See Alan H. Plumley, I.R. Publication 1916: The Determinants of Individual Income Tax Compliance: Estimating the Impacts of Tax Policy, Enforcement, and IRS Responsiveness 35 (1996) (estimating the indirect audit effect at 11.6 times the direct audit effect); Dubin, supra note 86, at 519 (reporting result of 15.1:1 under simulation doubling audit rates). See Susan T. Fiske & Shelley E. Taylor, Social Cognition 270–71 (1984) (noting “retrieval biases,” “strength of association biases” and ease of imagining events); Amos Tversky & Daniel Kahneman, Availability: A Heuristic for Judging Frequency and Probability, 163, 163 in Judgment Under Uncertainty: Heuristics and Biases (Daniel Kahneman, Paul Slovic & Amos Tversky, eds., 1982). (“Life-long experience has taught us that instances of large classes are recalled better and faster than instances of less frequent classes, that likely occurrences are easier to imagine than unlikely ones, and that associative connections are strengthened when two events frequently co-occur.”) See also Ronald Chen & Jon Hanson, Categorically Based: The Influence of Knowledge Structures on Law and Legal Theory, 77 S. Cal. L. Rev. 1106, 1179 (2004) (“[C]ues that are prominent or catch our attention are more likely to activate associated categories and schemas.”).

See Morse, supra note 11, at 510 (“[An audit] publicity campaign featuring more typical taxpayers would have more salience.”).

See Joanna Chung & Haig Simoniam, Former UBS Employee Charged With Helping Billionaire Evade Tax, Fin. Times, May 14, 2008 (noting the December 2008 guilty plea of real estate magnate Igor Olenicoff, who agreed to pay $52 million in back taxes related to “income earned on about $200 million of assets kept offshore”); see also Lynnley Browning, Suicide Victim May Have Hidden Millions Abroad, N.Y. Times, Sept. 15, 2009, at B1 (reporting that the government had begun to build a criminal tax evasion case involving as much as $100 million in back taxes against Finn Caspersen before his death).

See, e.g., Lynnley Browning, Florida Man, a UBS Client, Pleads Guilty to Tax Fraud, N.Y. Times, June 26, 2009 (reporting Rubinstein guilty plea); Lynnley


87 See Lynneley Browning, Inquiry Widens as UBS Client Pleads Guilty, N.Y. Times, July 29, 2009 (reporting Chernick guilty plea).


89 See David Voreacos & Carlyn Kolker, UBS Client to Admit Failure to Report Swiss Account to IRS, Bloomberg, Aug. 15, 2009 (reporting anticipated McCarthy guilty plea).


91 Lynnley Browning, Settlement Anticipated in UBS Case, N.Y. Times, June 22, 2009 (reporting the description of a government official).

92 See Laura Saunders, IRS Extends Deadline to Declare Foreign Accounts, Wall St. J., Sept. 22, 2009, (reporting “no discernible pattern as to which customers were selected” for required disclosure under UBS settlement and repeating on practitioner’s comment that “‘[s]everal of our clients with ‘plain vanilla’ accounts well under $1 million have gotten these letters.’”). The U.S. John Doe summons request did not discriminate based on the size of the account. See Memorandum in Support of Ex Parte Petition for Leave to Serve John Doe Summons at 5, In re Tax Liabilities of John Does (S.D. Fla. No. 08–21864) (June 30, 2008) (describing John Doe class as any U.S. taxpayer with “signature or other authority … with respect to any financial accounts,” except for taxpayers who had supplied UBS with Forms W-9 and been subject to Form 1099 reporting). However, since the description of account selection criteria under the summons settlement is not yet available, it is difficult to tell whether targeting a range of accounts was an intentional strategy. See Sheppard, supra note 57, at 850 (speculating that the U.S. targeted large accounts and accounts with particularly creative planning).

93 Publicizing taxpayers who have been caught is likely more important that publicizing the audit rate or the compliance rate, both of which draw mixed results in terms of their ability to promote additional compliance. Taxpayers may interpret the audit rate as communicating that audit activity exists or communicating that an audit is too unlikely to worry about. Cf. Alm, Jackson & McKee, supra note 80, at 401 (noting conflicting results for “official” publication of audit information in laboratory study). The IRS does publish audit rates, though it keeps the factors that affect its audit selection mechanism secret.
The typically cited problem with publicizing the compliance rate, as opposed to quietly disclosing it, is that taxpayers can interpret the figure as meaning “a clever minority cheats” instead of “most people pay their taxes.” In one real-life experiment, Minnesota taxpayers received a letter from the Minnesota Department of Revenue stating that nearly all taxpayers—93 percent—were compliant. Increased compliance, measured by reference to actual tax returns filed, was not statistically significant for those who received the letter. The possibility that the audience will self-identify with or aspire to be part of the “clever minority” makes this a risky strategy. See Marsha Blumenthal et al., Do Normative Appeals Affect Tax Compliance? Evidence from a Controlled Experiment in Minnesota, 54 Nat’l Tax J. 125, 135 (2001) (stating that a statement of high compliance “may be interpreted to mean that the revenue department is unable to detect cheating”).

See BNA, Tax Mgt’l Weekly Report at 100 (Jan. 25, 2010) (noting 150 ongoing offshore account criminal investigations and that “hundreds of taxpayers are still coming in under IRS’s basic procedures for voluntary disclosure”). Plea bargain publicity has continued to emerge, and continues to feature the average wealthy. See, e.g., Lynnley Browning, UBS Client Pleads Guilty to Tax Fraud, N.Y. Times (Apr. 12, 2010) (reporting guilty plea of Harry Abrahamsen of Oradell, New Jersey, whose UBS account was allegedly financed by claiming $1.3 million in inflated expenses—which would have produced a tax benefit of perhaps approximately $500,000).

See Sheppard, supra note 57, at 850 (suggesting that the IRS should pursue and publicize 50 UBS cases and 20 from other banks).

See Lynnley Browning, Seeking Bank Secrecy in Asia, N.Y. Times (Sept. 22, 2010) (reporting hundreds of billions of dollars in account value reductions in Europe and gains in Hong Kong and Singapore).


I.R.C. § 6103. The statute defines “return information” very broadly and it includes “any information developed or obtained by the IRS during the course of an audit or investigation of the taxpayer, as well as the mere fact that the taxpayer’s return has been or is being audited or investigated.” Stephen W. Mazza, Taxpayer Privacy and Tax Compliance, 51 Kan. L. Rev. 1065, 1091 (2003). A series of exceptions permits disclosure of return information in certain specific circumstances, which include several third-party disclosure permissions necessary to effective administration. For example, the IRS may disclose information in connection with judicial proceedings, see, e.g., I.R.C. § 6103(h)(4), and under certain circumstances to
obtain relevant information, see I.R.C. § 6103(k)(6), or put an interested party on notice, see, e.g., 6103(e).

99 See, e.g., I.R.C. § 6103(b)(1) (permitting disclosures to the general public when it publicizes “data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer”).

100 See, e.g., Mazza, supra note 98, at 1121 (“The IRS’s current efforts to communicate strong and meaningful deterrence messages are hampered by the lack of an exception in section 6103 permitting disclosure of return information to criminal tax proceedings.”).

The circuit courts have divided into three camps. The Ninth and Sixth Circuits have adopted a “public records” exception that permits the IRS to publicize taxpayer information that has been disclosed in litigation, including in an indictment or other filing that precedes a final determination. See Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996) (holding valid IRS disclosure of taxpayers’ names and tax deficiency in an advertisement for the sale of property under tax lien despite the later release of the lien due to improper notice); Schrambling v. United States, 937 F.2d 1485, 1488–89 (9th Cir. 1991) (concluding that the filing of a tax lien destroyed confidentiality); Lampert v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (focusing on press releases relating to charges and final resolutions and declining to use a “strict, technical reading of the statute” because such a reading would “defeat the purposes of the statute”), cert. denied, 490 U.S. 1034 (1989). The Fourth Circuit adopts the technical statutory reading rejected by the Ninth Circuit and holds that no disclosure of return information is permitted regardless of the public disclosure of such information elsewhere. See Mallas v. United States, 993 F.2d 1111, 1120–21 (4th Cir. 1993) (finding a violation of Section 6103 under a strict statutory reading and on facts including the disclosure of more facts than appeared in the court opinion, which was subsequently unanimously reversed by an en banc Fourth Circuit decision). The Fifth, Seventh and Tenth Circuits have adopted forms of an “immediate source” exception, which permits disclosure if the IRS in fact drew the relevant information from court or other public proceedings and not from inside agency information. See Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989) (noting that Section 6103 “is not a prohibition of any kind against the disclosure of opinions of the Tax Court”); see also Rice v. United States, 166 F.3d 1088 (10th Cir. 1999) (finding no Section 6103 violation where IRS press official had obtained press release information from public findings and trial and sentencing proceedings); Johnson v. Sawyer, 120 F.3d 1307, 1325–26 (5th Cir. 1997) (finding a violation of Section 6103 where information disclosed by IRS employee “came either from Johnson’s return file or from information ‘in [the IRS employee’s] head’”). See generally Mazza, supra note 98, at...
1105–14, 1121–22 (analyzing case law and related cases in other contexts considering when public disclosure diminishes privacy rights and describing and evaluating Joint Committee and Treasury recommendations “which essentially adopt the Ninth Circuit’s public records exception”).


104 See 31 U.S.C. § 5321(a)(5) (providing for a penalty of the greater of $100,000 or 50 percent of the balance in the account at the time of the violation). Prior to 2004, the maximum penalty for a willful violation was the lesser of $100,000 or the account balance at the time of violation. See Bittker & Lokken, supra note 45.

105 See id.; IRS, Voluntary Disclosures: Questions and Answers, supra note 51, at Q&A 22 (giving penalty example). Delinquency penalties for failure to file and failure to pay are typically calculated as a percentage of the tax due per month of failure to file or pay, up to a maximum of 25 percent each. See I.R.C. § 6651. The accuracy penalty equals 20 percent of certain underpayments including an underpayment attributable to negligence, disregard of rules or regulations, a substantial underpayment or other misconduct. See I.R.C. § 6662. See generally Leandra Lederman & Stephen W. Mazza, Tax Controversies: Practice and Procedure § 10.02 (2d ed. 2002).

106 Cf. Fred Feingold, Further Guidance Needed on Who Must Report Foreign Accounts, 123 Tax Notes 1023, May 25, 2009 (arguing that the FBAR proposal goes too far, as ignorance of reporting requirements, not willful intent to evade tax, may cause failure to comply with FBAR filing).

107 See IRS, Voluntary Disclosure: Questions and Answers, supra note 51, at Q&A 32.

108 In guidance, the IRS stated that a 5 percent penalty might apply to accounts that the taxpayer "did not open or cause … to be opened, [where] there has been no activity … during the period the account … was controlled by the taxpayer, and … all applicable U.S. taxes have been paid on the funds [deposited] in the accounts.” Memorandum from Linda E. Stiff, Deputy IRS Commissioner for Services and Enforcement, to Commissioner, Large and Mid-Size Business Division and Commissioner, Small Business/ Self-Employed Division (March 23, 2009), at 2. An inherited account, for
example, might fit these criteria. However, practitioners report that as a practical matter taxpayers cannot persuade the government to apply only a 5 percent penalty. See, e.g., Remarks of Frank Agostino, Kathryn Keneally & Bryan Skarlatos, The Prosecution and Defense of Offshore Bank Accounts, ABA Tax Section Teleconference and Live Audio Webcast (Mar. 3, 2010).


110 See id.; see also IRS Extends Deadline for Disclosing Hidden Offshore Accounts, IR 2009–84, Sept. 21, 2009.

111 As this article went to press, the government announced a second FBAR-targeted voluntary disclosure program that used a 25-percent-of-account-value fine for most accounts and added a 12.5 percent penalty for smaller accounts whose value did not exceed $75,000 in any covered year. See Second Special Voluntary Disclosure Initiative Opens; Those Hiding Assets Offshore Face Aug. 31 Deadline, IR 2001-14 (Feb. 8, 2011).


114 See United States v. Sturman, 951 F.2d 1466, 1476–77 (6th Cir. 1991) (holding that actions taken to conceal assets from the government, including the use of different corporations to transfer funds, together with admitted “knowledge of and failure to answer a question concerning signature authority at foreign banks on Schedule B of his income tax return” “provided a sufficient basis to establish willfulness on the part of the defendant”).

115 See supra text accompanying notes 13–14 (outlining reward elements built into tax administration).


117 See I.R.C. § 6103(b)(1) (defining “return” as “including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed”).

118 See IRS, Voluntary Disclosure: Questions and Answers, supra note 51, Q & A 6, 26 (indicating that all missing “returns” may be filed with the voluntary disclosure letter and not specifying that FBARs should be sent separately).

119 See Bittker & Lokken, supra note 45 (“[A]lthough this reporting regime is administered by the IRS, it is not the only Federal agency having access
to the reported information, and government use of the information is not restricted to tax enforcement.”); LEVI, supra note 37.

120 See 31 U.S.C. § 310(c)(2); see also Lee Sheppard, FBAR Filing for Hedge Funds, 125 Tax Notes 496, 500 (Aug. 17, 2009) (calling practitioner’s § 6103 concerns a “red herring”).

121 Cf. Baucus Seeks to Deter, Detect, Discourage Offshore Tax Evasion, Tax Notes (Mar. 12, 2009), available at 2009 TNT 46-19 (reporting on legislation discussion draft that would have required FBARs to be filed along with tax returns and to require tax preparers to ask due diligence questions specifically relating to FBAR compliance).

122 The banking law, at 31 U.S.C. § 310(c), references the Privacy Act, 5 U.S.C. § 552a, which includes an exception for any court order, see 5 U.S.C. § 552a(b)(2) and has been classified by Congress as a statute that does not provide general protection against FOIA disclosure for the information that it covers, see 5 U.S.C. § 552a(b)(2). The law relating to the disclosure of tax return information, for example to third parties under FOIA and in civil litigation, has developed differently. See, e.g., LEDERMAN & MAZZA, supra note 105, at § 3.04 (noting issues related to the “tension between FOIA and Section 6103”).

123 See Department of the Treasury, Form TD F 90-22.1.

124 In one case, a district court awarded a taxpayer $75,000 in compensatory damages and $250,000 in punitive damages plus costs as a result of IRS employees’ discussion of a taxpayer’s case on a radio show with the taxpayer and submission of a letter to the editor concerning the case in response to the taxpayer’s prior letter to the editor. See Ward v. United States, 973 F. Supp. 996, 1000–02 (D. Colo. 1997) (imposing damages pursuant to I.R.C. § 7431(c)).

125 See I.R.C. § 6103(c).


127 I.R.C. § 6103(b)(2).


129 Church of Scientology of California v. IRS, 484 U.S. 9 (1987). See also Long v. IRS, 891 F.2d 222, 223–24 (9th Cir. 1989) (holding on remand that audit “check sheets” were not in a form that constitutes a reformulated data base of the sort that is eligible for disclosure under the Haskell amendment).
See Willamette Industries, Inc. v. United States, 689 F.2d 865 (9th Cir. 1982); see also Gary, Plant, Mooty, Mooty & Bennett, P.A. v IRS, 1990 U.S. Dist. LEXIS 18799 (following Willamette and holding that Section 6103 did not block a FOIA claim for the IRS to produce the “Brown Report,” relating to industry-level data about computer company audits).


Listing types of taxpayers in a press release was apparently not effective when used in connection with the 2003 voluntary disclosure program. See IR 2003–95 (July 30, 2003) (“People from all walks of life applied for the [2003 voluntary disclosure] program, including lawyers, dentists, business executives, estate heirs and numerous other occupations.”).

Pennsylvania has recently adopted an interesting, salient, Orwellian approach to publicizing a tax amnesty program. See Pennsylvania Dep’t of Revenue, http://www.pataxpayup.com/portal/server.pt/community/resources_advertising/18999 (last visited May 21, 2010) (including links to communications including TV commercial titled “We Know Who You Are.”).

See Treas. Regs. § 1.451–1(a) (“If a taxpayer ascertains that an item should have been included in gross income in a prior taxable year, he should, if within the period of limitation, file an amended return and pay any additional tax due.”); Lederman & Mazza, supra note 105, at § 2.02 [D] (describing generally amended return practice).

See supra note 103 and accompanying text (describing voluntary disclosure guidance).

See, e.g., Letter from Stuart E. Abrams et al. to The Honorable Douglas H. Shulman, Commissioner of Internal Revenue & John DiCicco, Esq., Acting Assistant Attorney General, Department of Justice, Tax Division 2 (Mar. 30, 2010) (asserting that to maintain consistency with taxpayer and practitioner expectations, the government should ensure that taxpayers who attempt voluntary disclosure in “good faith” are not prosecuted, even if their disclosures are technically late).

See Saltzman & Book, supra note 103, at ¶¶ 12.07[3][d] & [e] (distinguishing quiet disclosure from voluntary disclosure and noting disadvantages such as the waiver of Fifth Amendment protection and the possibility of an additional violation if the amended returns are incorrect).

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139 Cf. Lawrence R. Jones, Jr., Dealing With the IRS Collection Division § 1412, at 235–26 (1995) (stating that a taxpayer has a very limited chance of criminal prosecution if failure to file is corrected by filing tax returns and recommending the resolution of “all questionable items on the delinquent tax return … in favor of the IRS” to minimize the risk of fraud charges).

140 Of course, the taxpayer’s willingness to choose the quiet disclosure option instead of the voluntary disclosure option with its more explicit commitment to avoid a criminal prosecution recommendation depends in part on the taxpayer’s risk aversion.

141 See IRS, Voluntary Disclosure Questions and Answers, supra note 51, at Q & A 10 (“Those taxpayers making ‘quiet’ disclosures should be aware of the risk of being examined and potentially criminally prosecuted for all applicable years.”).

142 See Raskolnikov, supra note 3, at 724 (noting that very high compliance regime penalties will induce gamers, particularly aggressive gamers, to try to hide behind the compliance regime).


146 See, e.g., I.R.C. § 6038D(c).

147 I.R.C. § 6011(e) generally specifies the Secretary’s ability to require electronic filing. Robert Foley of State Street Bank has suggested that taxpayers at least be able to elect electronic FBAR filing, citing in part the ability of the IRS to more effectively use electronically submitted data. See email from Robert J. Foley to Notice Comments (Aug. 27, 2009), available at LEXIS: TNT library, 2009 TNT 173–19 or Doc. 2009–20081).

148 The applicable FBAR regulation delegates to the Secretary of the Treasury the authority to prescribe the information that must be listed on the form. 31 C.F.R. § 103.24(a).

149 Cf. Blank, supra note 26, at 1632 (describing the problem of overdisclosure under tax shelter disclosure rules).