Excerpt from Michael S. Kirsch, Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice, 16 Fla. Tax Rev. 117 (2014)

While the report does not explicitly address the proposed gift tax treatment of overseas citizens, it implies that the gift tax will apply to them in the same manner as currently applied to nonresident aliens.[100] Accordingly, a nonresident citizen, while still living, could make unlimited gifts (including gifts to a resident citizen) of foreign situated assets free of U.S. gift taxes or income taxes.[101] In this context, as with nonresident noncitizens, gifts of stock of U.S. corporations would not be taxed.[102]

III. THE NEW ERA IN GLOBAL ENFORCEMENT AND INFORMATION SHARING

Having summarized the different proposals in the prior Part, this Part summarizes recent enforcement and compliance initiatives and their impact on global information sharing norms. It then analyzes the effect of these administrative developments on the arguments for citizenship-based and residence-based taxation regimes.

A traditional criticism of citizenship-based taxation is that the United States faces significant obstacles in enforcing citizenship-based taxation. A century ago, Professor Seligman observed that, as a practical matter, it might be "virtually impossible" to collect tax on the foreign income of a nonresident citizen.[103] As discussed above, more recent critics of citizenship-based taxation also cite administrative concerns in arguing against citizenship-based taxation. Indeed, Blum and Singer cite administrative concerns (involving both the IRS's ability to enforce the law and taxpayers' ability to comply) as the principal justification for abandoning citizenship-based taxation.[104] I have even acknowledged that "concerns about

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citizens who reside overseas"); *see also supra* notes 9–12 and accompanying text (describing the current estate tax residence test).

100. *See* AM. CITIZENS ABROAD, RESIDENCE-BASED TAXATION, *supra* note 47, at 14, 25 (suggesting that the estate and gift tax provisions of the Code should be amended to conform with the proposal). The report characterizes Code section 2801, which currently imposes a special tax on gifts made to U.S. citizens by certain former U.S. citizens, as a "punitive measure" that should be repealed. *Id*. at 30 n.35.

101. *See supra* note 11 and accompanying text (describing gift-tax provisions for nonresident aliens). As a practical matter, this would be most advantageous in the case of assets (including cash) that do not have significant built-in gain, because, unlike property passing at death, gifted property would not receive a fair-market-value basis step-up; but note that, in combination with the proposed exit tax, there might not be much untaxed appreciation after becoming a nonresident.

102. *See id*.

103. EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 517 (2nd ed. 1914).

104. *See supra* notes 40–45 and accompanying text.

enforcement might provide the strongest argument against taxing the foreign source income of citizens residing abroad."[105]

However, in the past few years, significant changes have occurred in the context of international tax enforcement that strengthen the potential for enforcing U.S. tax laws against overseas U.S. citizens. While these changes were largely instigated by U.S. enforcement initiatives and U.S. legislation, they have impacted global enforcement norms across a broad range of countries and within important multinational institutions. As a result, enforcement opportunities—such as obtaining information on accounts held by U.S. citizens in Swiss banks and other foreign financial institutions—that seemed beyond the realistic reach of U.S. tax administrators at the time that Seligman (100 years ago) and even Blum and Singer (a mere six years ago) were writing, might now be possible. Opponents of citizenship-based taxation, however, note that this enforcement expansion comes with a potential cost to overseas taxpayers, both with respect to increased complexity and cost of compliance, and through interference in their relationship with local (foreign) financial institutions.

The following paragraphs consider the relationship between this potential expansion of the IRS enforcement abilities and its potential cost to overseas taxpayers, and the resulting implications for citizenship-based taxation. The discussion also observes that, despite the administrative issues raised by the current system of citizenship-based taxation, the residence-based proposals of opponents of citizenship-based taxation raise a number of administrative problems of their own.

A. *Attack on Bank Secrecy*

During the past five years, the United States has implemented enforcement initiatives and enacted legislation that has significantly impacted overseas tax enforcement. The enforcement initiatives include leveraging the prosecution of Swiss bankers and banks to weaken bank secrecy, increased focus on taxpayers' reporting of overseas accounts, and several rounds of offshore voluntary disclosure programs ("OVDP"), while the legislative action focuses on compelling foreign financial institutions to report information on U.S. accountholders. These initiatives were not directly targeted at citizens living abroad. Rather, they were intended to increase compliance by all U.S. citizens (including, perhaps primarily, those living in the United States) who hold assets, and generate income, abroad.[106]

105. Kirsch, *Taxing Citizens in a Global Economy*, *supra* note 1, at 496.

106. *See* AM. CITIZENS ABROAD, RESIDENCE-BASED TAXATION, *supra* note 47, at 1 (complaining that the FATCA legislation and IRS enforcement efforts reflect an "unjustified bundling" of citizens abroad with rich domestically resident tax evaders who have assets hidden abroad).

Nonetheless, these efforts, both in and of themselves and through their impact on global norms, increase the potential ability of the United States to enforce U.S. tax laws against the subset of U.S. citizens living abroad who are not compliant.

Among the most significant developments are those involving Swiss banks and Switzerland's famed bank secrecy. In 2008, the United States indicted Bradley Birkenfeld, a private banker at UBS, a major Swiss bank.[107] Birkenfeld pled guilty to conspiracy to defraud the U.S. government based on his actions in helping a wealthy U.S. citizen (living in the United States) conceal millions of dollars of income in UBS accounts.[108] More importantly, Birkenfeld provided U.S. authorities with details surrounding UBS's efforts to assist American clients evade taxes, and thereby "blew a hole in the wall of secrecy surrounding the world of Swiss banking."[109] As a result of this disclosure and subsequent investigations by the Justice Department, in 2009 UBS entered a deferred prosecution agreement and admitted guilt on charges of conspiring to defraud the United States.[110] As part of that agreement, and following subsequent negotiations among the United States, UBS, and the Swiss government, the IRS received "account information about thousands of the most significant tax cheats among the U.S. taxpayers who maintain secret Swiss bank accounts."[111] Although Birkenfeld served more than two years in prison for his actions, the IRS recently agreed to pay him a $104 million whistle-blower award for revealing the information about the UBS activities,[112] which his lawyers noted will encourage other whistle-blowers around the world.[113] In a related development, the Department of Justice has begun targeting offshore financial advisors who have helped U.S. taxpayers hide money in foreign accounts. For example, Edgar Paltzer, a U.S.-trained

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107. *See* Lynnley Browning, *Ex-UBS Banker Pleads Guilty in Tax Evasion*, N.Y. TIMES, June 20, 2008, http://www.nytimes.com/2008/06/20/business/20tax.html?_r=0.

108. *See id*.

109. *Id*.

110. *See* Press Release, U.S. Dep't of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), http://www.justice.gov/tax/txdv09136.htm. UBS agreed to pay $780 million in fines, penalties, interest, and restitution, and "to expeditiously exit the business of providing banking services to United States clients with undeclared accounts." *Id*.

111. *Offshore Compliance Initiative*, U.S. DEP'T OF JUSTICE, last accessed May 10, 2014, http://www.justice.gov/tax/offshore_compliance_intiative.htm; *see also* Press Release, U.S. Dep't of Justice, U.S. Discloses Terms of Agreement with Swiss Government Regarding UBS (Aug. 19, 2009), http://www.justice.gov/tax/txdv09818.htm.

112. The award was authorized under Code section 7623(b).

113. David Kocieniewski, *Whistle-Blower Awarded $104 Million by I.R.S.*, N.Y. TIMES, Sept. 11, 2012, http://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html.

lawyer working for a Swiss law firm, recently pled guilty to conspiring with U.S. taxpayers to evade income taxes on assets held in foreign accounts.[114] According to a former government prosecutor, "Now it's clear that the U.S. will make deals with advisers who come clean, not just with individual taxpayers and banks."[115] As a result, U.S. taxpayers holding secret foreign accounts are under additional pressure, given the possibility that their advisers might choose to protect themselves by giving client names to prosecutors.[116]

The actions against UBS had a cascading effect on U.S. enforcement efforts against other Swiss banks. For example, following news reports that UBS was being investigated by U.S. authorities, Wegelin & Co., Switzerland's oldest bank, "opened and serviced dozens of new undeclared accounts for U.S. taxpayers in an effort to capture clients lost by UBS."[117] As a result of these and other actions, Wegelin eventually pled guilty to facilitating tax evasion by U.S. taxpayers and agreed to pay $74 million in restitution, fines, and forfeitures.[118] Shortly thereafter, Wegelin shut down operations after more than 270 years in business.[119] As a *Wall Street Journal* article observed, "In the span of just one year, Wegelin & Co. went from being one of the most prestigious banks in Switzerland to . . . becoming essentially defunct. . . . That rapid demise is a lesson in how quickly the rules

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114. *See* Press Release, U.S. Attorney's Office, S. Dist. N.Y., Swiss Lawyer Pleads Guilty in Manhattan Federal Court to Conspiring with U.S. Taxpayers to Evade Federal Income Taxes and File False Tax Returns (Aug. 16, 2013), http://www.justice.gov/usao/nys/pressreleases/August13/EdgarPaltzerPleaPR.php.

115. Laura Saunders, *Offshore-Adviser Plea Marks Shift in Tax Crackdown*, WALL ST. J., Aug. 23, 2013, http://online.wsj.com/news/articles/SB10001424127887323980604579029124124818620 (quoting Jeffrey Neiman).

116. *See id*. (quoting a criminal tax lawyer's observation that "[i]f I were one of [Mr. Paltzer's] clients, I'd be having a heart attack").

117. Press Release, U.S. Attorney's Office, S. Dist. N.Y., Swiss Bank Pleads Guilty in Manhattan Federal Court to Conspiracy to Evade Taxes (Jan. 3, 2013), http://www.justice.gov/usao/nys/pressreleases/January13/WegelinPleaPR.php [hereinafter Press Release, Jan. 3, 2013]. Although Wegelin had no branches outside of Switzerland, "it directly accessed the U.S. banking system through a correspondent bank account that it held at UBS AG ("UBS") in Stamford, Connecticut." *Id*. For additional details regarding the actions of Wegelin bankers to capture business from U.S. citizens fleeing UBS, see Indictment, U.S. v. Wegelin & Co., No. S1-12-Cr.02, http://www.justice.gov/tax/2012/Wegelin%20S1%20indictment.PDF.

118. *See* Press Release, Jan. 3, 2013, *supra* note 117.

119. *See* John Tagliabue, *Swiss City Fears for Cultural Legacy in Wake of Bank's Fall*, N.Y. TIMES, Jan. 24, 2013, http://www.nytimes.com/2013/01/25/world/europe/swiss-city-fears-for-cultural-legacy-in-wake-of-a-banks-fall.html. The bank's valuable assets were placed with another Swiss bank, while its bad assets remained with Wegelin under another name. *See id*.

have changed in global banking, and an illustration of the U.S. Justice Department's increasing reach."[120]

Enforcement actions have not been limited to UBS and Wegelin. According to the Department of Justice:

> Since 2009, the department has charged more than 30 banking professionals and 68 U.S. accountholders with violations arising from their offshore banking activities. Fifty-four U.S. taxpayers and four bankers and financial advisors have pled guilty, and five taxpayers have been convicted at trial. One Swiss bank [UBS] entered into a deferred prosecution agreement, and a second Swiss bank [Wegelin] was indicted and pleaded guilty.[121]

In addition, the department currently is actively investigating fourteen other financial institutions regarding their Swiss-based activities.[122] More importantly, the Department of Justice and the Swiss Federal Department of Finance recently released a joint statement stating that Switzerland will encourage its banks to participate in a new Department of Justice program. That program, aimed at incentivizing Swiss banks to cooperate in the investigation of U.S. persons using foreign bank accounts to commit tax evasion, promises nonprosecution agreements and penalty caps for those Swiss banks that satisfy detailed information cooperation requirements regarding accounts in which U.S. taxpayers have a direct or indirect interest.[123]

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120. Reed Albergotti, *Wegelin's Fall to Tax-Haven Poster Child*, WALL ST. J., Mar. 3, 2013, http://online.wsj.com/article/SB10001424127887323293704578334310421785672.html.

121. Press Release, U.S. Dep't of Justice, United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations (Aug. 29, 2013), http://www.justice.gov/opa/pr/2013/August/13-tax-975.html.

122. *See id*.

123. *See id*. Participating banks seeking nonprosecution agreements must agree to pay a 20 percent penalty (based on the maximum aggregate dollar value of all nondisclosed U.S. accounts held on August 1, 2008). *See id*. Because of concerns that accounts opened after the UBS affair reflect a greater degree of bank culpability (as reflected in the prosecution of Wegelin), accounts opened between August 2008 and February 2009 are subject to a 30 percent penalty, and accounts opened after February 2009 are subject to a 50 percent penalty. *See id*. According to the Department of Justice:

> The program is intended to enable every Swiss bank that is not already under criminal investigation to find a path to resolution. It also creates significant risks for individuals and banks that continue to fail to cooperate, including for those Swiss banks that facilitated U.S. tax evasion but fail to cooperate now, for all U.S.

Commentators have noted that the Department of Justice's success in obtaining information and cooperation from Swiss banks, with the involvement of the Swiss government, impacts not only tax-motivated Swiss bank secrecy, but also tax-motivated bank secrecy in other countries where U.S. taxpayers may try to hide income. For example, a prominent tax attorney and contributor to *Forbes* observed:

> Some said it would never happen. They were wrong. The U.S. and Swiss reached a deal that punishes Swiss banks and paves the way for even more transparency. . . . And it takes little imagination to know this will impact even obscure and far-flung countries too. After all, just remember the past and Switzerland's long tradition of bank confidentiality.
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> . . . The watershed deal to punish Swiss banks truly closes the door on bank secrecy and a bygone era of tax evasion.
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> . . . [F]or Americans holding undisclosed funds in Switzerland or anywhere else, with FATCA and now the capitulation of what amounts to all of Switzerland, it seems clear that disclosure—everywhere and of everything—is inevitable.[124]

Another international tax attorney, writing in a tax practice journal, similarly concluded:

> Anyone familiar with the recent U.S. activity surrounding foreign accounts knows that the [handwriting] on the wall is very clear: Swiss bank secrecy, indeed bank secrecy worldwide, is a thing of the past . . . . These developments [including the globalization of the economy, technological developments regarding information sharing, and concerns over financial secrecy associated with international terrorist financing] signal the beginning of the

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> taxpayers who think that they can continue to hide income and assets in offshore banks, and for those advisors and others who facilitated these crimes.

Id.

124. Robert W. Wood, *Every American with Money Abroad—Anywhere Abroad—Is Impacted by Massive Bank Deal*, FORBES, Aug. 31, 2013, http://www.forbes.com/sites/robertwood/2013/08/31/every-american-with-money-abroad-anywhere-abroad-is-impacted-by-massive-bank-deal/.

end of bank secrecy around the world. Of course, bank secrecy laws will still exist, and depositors will still be able to hide financial information from other individuals, such as business partners, spouses and litigation adversaries. However, the day has come when individuals can no longer hide certain financial details from governments.[125]

B. *Heightened Focus on Reporting Requirements*

Concurrently with the Department of Justice's efforts against Swiss banks, the IRS increased its enforcement efforts against U.S. citizens in the international context. As with the Swiss bank situation, these efforts did not focus exclusively (or even primarily) on overseas citizens. Rather, they focused on overseas financial accounts held by U.S. persons, including U.S. citizens (regardless of whether the citizen lived in the United States or abroad). A principal focus of these efforts has been the FBAR.

The FBAR arose in 1970 under the Bank Secrecy Act.[126] This legislation requires certain U.S. persons to report their foreign bank and financial accounts each year.[127] The reporting is made on Treasury Form TD F 90-22.1,[128] and is required only if the aggregate balance in the foreign accounts exceeds $10,000 at any time during the calendar year.[129] The FBAR is not an IRS form, and perhaps more importantly, it is not filed with a person's income tax return and does not have the same due date as a tax return.[130] However, Schedule B of IRS Form 1040 asks the taxpayer whether

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125. Bryan C. Skarlatos, *The IRS Continues to Attack Unreported Foreign Bank Accounts by Criminally Indicting Three Swiss Bankers*, 13 J. TAX PRAC. & PROC. 17, 57 (Dec. 2011/Jan. 2012).

126. *See* 31 U.S.C. § 5314(a).

127. For an overview of the historic evolution of the FBAR, see Hale E. Sheppard, *Evolution of the FBAR: Where We Were, Where We Are, and Why it Matters*, 7 HOUS. BUS. & TAX L.J. 1 (2006) [hereinafter Sheppard, *Evolution of the FBAR*].

128. Effective July 1, 2013, FBARs must now be filed electronically. *See* IRS, *Report of Foreign Bank and Financial Accounts (FBAR)*, IRS, last accessed Feb. 3, 2014, http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Report-of-Foreign-Bank-and-Financial-Accounts-%28FBAR%29.

129. *See* General Instructions, Dep't of Treas. Form TD F 90-22.1 (Rev. 1-2012) [hereinafter FBAR Instructions].

130. An individual's income tax return generally is due by April 15 following the close of the calendar tax year. *See* I.R.C. § 6072(a). However, the tax return of a U.S. citizen whose tax home and abode is outside the United States is not due until June 15. *See* Reg. § 1.6081-5(a)(5). In contrast, the FBAR is due by June 30 immediately following the calendar year being reported. *See* FBAR Instructions, *supra* note 129. Whereas a taxpayer generally can receive an automatic six-month

she had a financial interest in, or signatory authority over, a foreign financial account and, if so, instructs the taxpayer to file the FBAR form in accordance with the FBAR instructions.[131]

Attention to the FBAR has increased significantly in recent years. Shortly after the September 11, 2001, terrorist attacks, Congress enacted the USA Patriot Act.[132] In an effort to prevent, detect, and prosecute those involved in money laundering and terrorist financing, the USA Patriot Act instructed the Treasury department to "study methods for improving compliance with the [FBAR] reporting requirements."[133] In order to allow better enforcement of the FBAR requirement, in 2003 the Treasury Department's Financial Crimes Enforcement Network ("FinCEN"), which previously had been responsible for FBAR examination and penalty assessment, delegated these responsibilities to the IRS, with its more extensive resources.[134]

Because of concern about the low level of FBAR compliance, in 2004 Congress increased the penalties for willful failure to file, added a new penalty for nonwillful failures, and shifted the burden of proof onto the individual in certain situations.[135] The maximum civil penalty for a willful violation of FBAR reporting is the greater of $100,000 or 50 percent of the balance of the account at the time of the violation.[136] Because the penalty might apply for each year that the form is not filed, the total penalties could exceed the balance in the foreign account.[137] Even if the failure to file was

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extension for filing an income tax return, no extension of time is allowed for filing the FBAR. *See* Reg. § 1.6081-4(a); *see also* FBAR Instructions, *supra* note 129.

131. *See* I.R.S. Form 1040, Sched. B (Interest and Ordinary Dividends), line 7a (2012).

132. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

133. USA Patriot Act of 2001, Pub. L. No. 107-56, § 361(b), 115 Stat. 272, 332.

134. *See* 31 C.F.R. § 103.56(g).

135. *See generally* Sheppard, *Evolution of the FBAR*, *supra* note 127, at 17–19 (describing changes made by the 2004 legislation).

136. 31 U.S.C. § 5321(a)(5). In addition, criminal penalties of up to $500,000 and ten years in prison may apply. 31 U.S.C. § 5322; 31 C.F.R. § 1010.840.

137. *See, e.g*., Complaint, United States v. Carl R. Zwerner, Case No. 1:13-cv-22082-CMA (So. Dist. Fla., Miami Div. June 11, 2013), http://online.wsj.com/public/resources/documents/CivilFBARLawsuit07122013.pdf (Treasury Department assessed cumulative penalties of more than $3 million for four annual FBAR reporting failures, although the highest balance in the account during the four-year period was less than $1.7 million). This assessment of cumulative penalties appears to be an exception to the more-typical IRS practice of seeking only a single 50 percent penalty. *See* I.R.M. 4.26.16.4.7(4) ("Given the magnitude of the maximum penalties permitted for each violation, the assertion of multiple penalties and the assertion of separate penalties for multiple violations with respect to a single FBAR

not willful, the account holder may be subject to a $10,000 penalty per violation.[138] Because each account that is not reported is viewed as a separate violation, more than $10,000 of penalties might accrue each year.[139]

C. *FATCA and Intergovernmental Agreements*

FATCA,[140] enacted as part of the Hiring Incentives to Restore Employment Act of 2010,[141] established another significant mechanism for

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form, should be considered only in the most egregious cases."); *see also* Laura Saunders, *When Are Tax Penalties Excessive*, WALL ST. J., July 12, 2013, http://online.wsj.com/article/SB10001424127887324694904578598230978458720.html [hereinafter Saunders, *Penalties Excessive*] (citing tax attorneys who have handled numerous FBAR cases). The IRS National Taxpayer Advocate and others have argued that these cumulative penalties may violate the "excessive fines" prohibition in the Eighth Amendment to the U.S. Constitution. *See* NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS, *supra* note 51, at 147 ("The National Taxpayer Advocate is concerned that such a disproportionate civil penalty amount, particularly in the absence of clear limits on the situations in which it can be applied, is excessive to the point of possibly violating the U.S. Constitution. . . . In any event, it is certainly a scary prospect for taxpayers."); *see also* Marie Sapirie, *Do FBAR Fines Violate the Eighth Amendment?*, 71 TAX NOTES INT'L 499 (Aug. 5, 2013) (citing United States v. Bajakajian, 524 U.S. 321 (1988), which held that a punitive forfeiture of 100 percent for failing to file a Customs currency report was grossly disproportional to the gravity of the offense); Saunders, *Penalties Excessive*, *supra* (same).

138. 31 U.S.C. § 5321(a)(5).

139. According to the IRS, taxpayers who reported and paid all tax on their income for prior years, but did not file FBARs, should go ahead and file delinquent FBARs and the IRS will not impose the failure-to-file penalty, provided the taxpayer has not yet been contacted regarding an income tax examination or request for delinquent returns. *See Options Available to Help Taxpayers with Offshore Interests*, IRS, last accessed Jan. 2, 2014, http://www.irs.gov/uac/Instructions-for-New-Streamlined-Filing-Compliance-Procedures-for-Non-Resident-Non-Filer-US-Taxpayers; Q&A 17, *2011 Offshore Voluntary Disclosure Initiative Frequently Asked Questions and Answers*, IRS, last accessed Mar. 19, 2014, http://irs.gov/Businesses/International-Businesses/2011-Offshore-Voluntary-Disclosure-Initiative-Frequently-Asked-Questions-and-Answers. *But see, e.g.*, Amy Feldman, *The Perils of Overseas Tax Disclosure: An Immigrant's Story*, REUTERS, Jan. 28, 2013, http://www.reuters.com/article/2013/01/28/us-column-feldman-immigrants-idUSBRE90R10Q20130128 (describing penalty concerns of a resident alien who failed to report income or file FBAR forms on foreign accounts inherited from his sister, even though the foreign tax credit allegedly would have eliminated any U.S. residual tax had the account income been reported).

140. FATCA is codified in Code sections 1471–74.

141. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, 124 Stat. 71 (2010).

overseas enforcement. As a general matter, the United States does not have direct enforcement authority over foreign financial institutions. However, the enforcement efforts against Swiss banks, discussed above, demonstrate that the United States can exercise some indirect enforcement influence over foreign banks that have connections to the U.S. financial system.[142] The FATCA legislation goes a step further, leveraging the fact that many foreign financial institutions ("FFIs") hold at least some U.S. investments. As summarized in the Treasury Decision publishing the final FATCA regulations:

> U.S. taxpayers' investments have become increasingly global in scope. FFIs now provide a significant proportion of the investment opportunities for, and act as intermediaries with respect to the investments of, U.S. taxpayers. Like U.S. financial institutions, FFIs are generally in the best position to identify and report with respect to their U.S. customers. Absent such reporting by FFIs, some U.S. taxpayers may attempt to evade U.S. tax by hiding money in offshore accounts. To prevent this abuse of the U.S. voluntary tax compliance system and address the use of offshore accounts to facilitate tax evasion, it is essential in today's global investment climate that reporting be available with respect to both the onshore and offshore accounts of U.S. taxpayers. This information reporting strengthens the integrity of the U.S. voluntary tax compliance system by placing U.S. taxpayers that have access to international investment opportunities on an equal footing with U.S. taxpayers that do not have such access or otherwise choose to invest within the United States.
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> To this end, [FATCA] extends the scope of the U.S. information reporting regime to include FFIs that maintain U.S. accounts. [FATCA] also imposes increased disclosure obligations on certain [nonfinancial foreign entities ("NFFEs")] that present a high risk of U.S. tax avoidance.[143]

Under FATCA, if an FFI fails to report certain information to the IRS on accounts held by U.S. persons, or if certain NFFEs do not provide information on their substantial U.S. owners to withholding agents, a 30

142. *See, e.g.*, *supra* note 117 (noting that Wegelin had no branches outside of Switzerland, but "it directly accessed the U.S. banking system through a correspondent bank account that it held at UBS AG ("UBS") in Stamford, Connecticut").

143. T.D. 9610, 78 Fed. Reg. 5874 (Jan. 28, 2013).

percent withholding tax is imposed on U.S.-source payments made to that FFI or NFFE, regardless of who is the ultimate beneficial owner of the payments.[144] The foreign entities are required to exercise due diligence in determining which accounts are held by U.S. persons, including an inquiry into whether an individual account holder was born in the United States or otherwise has indicia of U.S. status.[145] The final FATCA regulations provide a phased-in implementation, beginning on January 1, 2014, and continuing through 2017,[146] although the IRS subsequently delayed the implementation of FATCA withholding until July 1, 2014.[147]

In order to overcome concerns that some FFIs are prevented by their countries' laws from reporting FATCA information directly to the IRS (thereby exposing the FFIs to withholding on U.S. investment income), the Treasury Department has signed intergovernmental agreements ("IGAs") with a number of foreign countries, and is negotiating IGAs with a significant number of additional countries.[148] These IGAs are based on two different models. Under Model 1 IGAs, the FFIs in the partner jurisdiction report specified information about U.S. accounts to the partner jurisdiction's tax authorities, which then exchange this information with the IRS on an automatic basis.[149] Thus, the partner jurisdiction acts as the intermediary

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144. *See id*.

145. For example, an FFI generally must review its existing individual accounts for U.S. indicia, including designation of the account holder as a U.S. citizen or resident, a U.S. place of birth, a current U.S. residence or mailing address, a current U.S. telephone number, standing instructions to make payments to an account maintained in the United States, or a current power of attorney or signatory authority granted to a person with a U.S. address. *See* Reg. § 1.1471-4(c)(5)(iv)(B). This suggests that, once FATCA is implemented, the IRS may be in a stronger position to identify citizens living overseas. If so, this would address one of the administrative criticisms raised by Schneider regarding citizenship-based taxation—the inability of the foreign countries to identify U.S. citizens and provide information on them to the IRS under existing exchange-of-information provisions of treaties. *See* Schneider, *The End of Taxation without End*, *supra* note 39, at 56.

146. *See* Notice 2013-43, 2013-31 I.R.B. 113, at 2.

147. *See id*. at 6.

148. For a general discussion of the issues arising in the implementation of FATCA, see Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 334–39 (2012) [hereinafter Grinberg, *Battle Over Taxing Offshore Accounts*]. *See also infra* note 244 (discussing legal and practical issues that might arise from the implementation of FATCA).

149. *See* T.D. 9610, 78 Fed. Reg. 5874 (Jan. 28, 2013). The Model 1 IGA is drafted in both a reciprocal form (in which the United States also promises to gather and transmit FATCA-compliant information to the partner country) and a nonreciprocal form (in which the United States does not make this reciprocal promise). However, "[i]t is hard to imagine any country signing [the nonreciprocal version]"). Lee A. Sheppard, *Will U.S. Hypocrisy on Information Sharing*

between its FFIs and the IRS. Under Model 2 IGAs, the partner jurisdiction agrees to direct and enable all nonexempt FFIs in its jurisdiction to register with the IRS and report specified information about U.S. accounts directly to the IRS.[150] Government-to-government exchange of information can be used under a Model 2 IGA to provide supplemental information in the case of recalcitrant account holders.[151]

Given the broad extent to which FFIs hold at least some U.S.-source investments, the FATCA regime holds the potential to significantly widen the scope of the IRS's ability to collect information on foreign accounts, whether held by U.S. citizens residing in the United States or those residing abroad. Both versions of the Model IGA contemplate that financial institutions, as part of their due diligence, will look for indicia of U.S. citizenship in their account records.[152] The potential real-life impact of FATCA is evidenced by the significant number of foreign jurisdictions that have either agreed to, or are negotiating, IGAs, rather than have their FFIs exposed to the withholding tax.

Continue?, 69 TAX NOTES INT'L 320, 323 (Jan. 28, 2013) [hereinafter Sheppard, *Hypocrisy on Information Sharing*].

150. *See* T.D. 9610, 78 Fed. Reg. 5874 (Jan. 28, 2013).

151. *Id*.

152. Under the Model 1 IGA, for preexisting "lower value accounts" (typically those greater than $50,000, but less than $1 million) the reporting FFI must search its electronic records for identification of the account holder as a U.S. citizen or for an unambiguous indication of the holder's U.S. place of birth. *See* U.S. DEP'T OF TREASURY, MODEL 1 IGA ANNEX I, DUE DILIGENCE OBLIGATIONS FOR IDENTIFYING AND REPORTING ON U.S. REPORTABLE ACCOUNTS AND ON PAYMENTS TO CERTAIN NONPARTICIPATING FINANCIAL INSTITUTIONS § II.B.1 (rev. Jul. 12, 2013) [hereinafter MODEL 1 ANNEX]. However, an account is not reportable based on the U.S. place of birth if the FFI obtains a self-certification from the account holder that she is not a U.S. citizen or tax resident, the account holder's non-U.S. passport showing citizenship or nationality in a country other than the United States, and a copy of the account holder's Certificate of Loss of Nationality (or a reasonable explanation of why she does not have such a certificate). *See id*. § II.B.4. For preexisting "high-value accounts," the FFI may need to perform not only an electronic search for this information, but also a manual search of paper records. *See id*. § II.D. For new accounts, the reporting FFI must obtain a self-certification from the account holder that allows the FFI to determine whether the account holder is a "resident in the United States for tax purposes," which is defined to include a U.S. citizen even if she is also a tax resident of another jurisdiction. *See id*. § III.B. The FFI must confirm the reasonableness of the self-certification under standards set forth in the Model 1 Annex. *See id*. The Model 2 IGA contains similar due diligence requirements regarding the identification of U.S.-citizen account holders. *See* U.S. DEP'T OF TREASURY, MODEL 2 IGA ANNEX I, DUE DILIGENCE OBLIGATIONS FOR IDENTIFYING AND REPORTING ON U.S. REPORTABLE ACCOUNTS AND ON PAYMENTS TO CERTAIN NONPARTICIPATING FINANCIAL INSTITUTIONS (rev. Jul. 12, 2013) [hereinafter MODEL 2 ANNEX].

In addition to the reporting requirements imposed on FFIs, FATCA imposes additional reporting requirements on U.S. residents and citizens, including citizens residing abroad, who hold specified foreign financial accounts.[153] This reporting is done on IRS Form 8938.[154] In general, a U.S. resident or citizen must file Form 8938 if the total value of her foreign bank and investment accounts is $50,000 on the last day of the tax year or more than $75,000 at any time during the tax year.[155] However, if the individual resides outside the United States, the filing thresholds are significantly higher—a U.S. individual residing abroad needs to file the form only if her foreign accounts exceed $200,000 on the last day of the tax year or more than $300,000 at any time during the tax year (these thresholds are $400,000 and $600,000, respectively, for qualified married couples residing abroad and filing a joint return).[156]

Although there may be significant overlap between the accounts reported on Form 8938 and the FBAR report, individuals must file both forms if applicable.[157] Unlike the FBAR report, which is filed with FinCEN no later than June 30, the Form 8938 is filed with the IRS at the time the individual's income tax return is filed.[158] A taxpayer who fails to file the Form 8938 may be subject to a $10,000 penalty.[159] In addition, she may be subject to an additional $10,000 penalty if she does not file a correct and complete form within 90 days after being notified by the IRS of her failure to file (and an additional $10,000 for each 30-day period, or part of a period,

153. *See* I.R.C. § 6038D.

154. *See* I.R.S. Form 8938, *Statement of Specified Foreign Financial Assets* (rev. Nov. 2012).

155. *See* I.R.S., *Instructions for Form 8938*, at 2 (rev. Nov. 2012) [hereinafter I.R.S., Form 8938 Instructions]. The thresholds for married taxpayers filing jointly are double these amounts (*i.e.*, $100,000 on the last day, or $150,000 at any time during the year). *See id*. In contrast, the FBAR form's $10,000 threshold applies regardless of whether the U.S. citizen resides in the United States or abroad.

156. *See* Reg. § 1.6038D-2T(a)(3), (4).

157. The IRS website warns taxpayers that "[t]he new Form 8938 filing requirement does not replace or otherwise affect a taxpayer's obligation to file [the FBAR form]. Individuals must file each form for which they meet the relevant reporting threshold." *Comparison of Form 8938 and FBAR Requirements*, IRS, last accessed Feb. 10, 2014, http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements. The website contains a detailed comparison chart explaining the differences and similarities between the two forms' filing requirements. *See id*.

158. *See* I.R.S., Form 8938 Instructions, *supra* note 155, at 1.

159. *See* I.R.C. § 6038D(d)(1).

during which the failure to file continues after the initial 90-day period.[160] The maximum penalty for continuing failure to file is $50,000.[161]

D. Overseas Voluntary Disclosure Program

These enforcement developments generated significant attention not only among tax practitioners, but also in the mass media. The combination of significant penalties for failure to properly report, and the heightened possibility of detection as a result of the new enforcement developments, generated significant concern among noncompliant taxpayers. Even those U.S. citizens whose interest in a foreign bank account was benign had reason for concern. For example, a U.S. citizen might have inherited the account from a foreign relative or established the account as a routine banking matter while living overseas. Although she did not report the account's income on her U.S. tax return, that income might not have been subject to U.S. tax even if reported, to the extent the income was taxed in the foreign country and was eligible for a foreign tax credit. Nonetheless, by failing to disclose the account on an FBAR form, the taxpayer could be subject to significant penalties.

Given the heightened interest among taxpayers and their advisors to "come clean" in anticipation of the IRS's enhanced enforcement tools, and the IRS's incentives to encourage previously noncompliant taxpayers to enter the system,[162] the IRS has implemented several iterations of an Overseas Voluntary Disclosure Program ("OVDP"): in 2009, 2011, and in 2012 (which is still ongoing).[163] Perhaps not surprisingly, given the publicity

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160. *See* I.R.C. § 6038D(d)(2).

161. *See id*. This $50,000 penalty for continuing failure to file is in addition to the initial $10,000 penalty for failure to file. *See id*. (noting that the $50,000 cap applies to "this paragraph" (*i.e*., the "continuing failure to file" paragraph)).

162. A voluntary disclosure program helps the IRS, given that the IRS "doesn't have the resources, the time, or the ability to locate all noncompliant U.S. taxpayers. Thus, a voluntary disclosure policy that encourages those persons to confess—and that fairly addresses individual circumstances—is absolutely essential if the Service is to meet its mission . . . ." Thomas Zehnle, *Rethinking the Approach to Voluntary Disclosures*, 134 TAX NOTES 575 (Jan. 30, 2012).

163. The 2009 program allowed disclosures between March 23 and October 15, 2009. *See* U.S. DEP'T OF TREASURY, INSPECTOR GEN. FOR TAX ADMIN., THE 2009 OFFSHORE VOLUNTARY DISCLOSURE INITIATIVE INCREASED TAXPAYER COMPLIANCE, BUT SOME IMPROVEMENTS ARE NEEDED 2 (REF. NO. 2011-30-118) (2011) [hereinafter TIGTA 2009 REPORT]. The 2011 program allowed disclosures between February 8 and September 9, 2011. *See 2011 Offshore Voluntary Disclosure Initiative*, IRS, last accessed Nov. 4, 2013, http://www.irs.gov/uac/2011-Offshore-Voluntary-Disclosure-Initiative. The 2012 program, which began on January 9, 2012, is still in effect as of September 2013. *See 2012 Offshore Voluntary Disclosure Program*, IRS, last accessed Jan. 24, 2014, http://www.irs.gov/uac/2012-

surrounding the UBS enforcement action, almost half of the disclosures in the 2009 OVDP involved accounts in Switzerland.[164] The IRS has publicized the success of these programs, noting that between 2009 and 2012:

> [The OVDPs] resulted in the collection of more than $5.5 billion in back taxes, interest, and penalties from approximately 38,000 applicants. In addition, the programs provided the IRS with a wealth of information on various banks and advisors assisting people with offshore tax evasion, which the IRS is using to continue its international enforcement efforts.[165]

Each of the OVDPs has utilized a stick-and-carrot approach to encourage taxpayers to come forward before the government discovers their wrongdoing.[166] The "stick" involves the threat of criminal prosecution and maximum statutory penalties, including fraud penalties and the information return-related penalties described above, in the context of weakening foreign bank secrecy regimes and increased IRS access to foreign account

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Offshore-Voluntary-Disclosure-Program (noting that the IRS may end this open-ended disclosure program at any time). The IRS had tried an earlier offshore voluntary disclosure initiative in 2003, related to an offshore credit card enforcement project, but the initiative had only limited impact. *See* Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499, 504–08 (2012) [hereinafter Lederman, *Voluntary Disclosures*].

164. *See* GOV'T ACCOUNTABILITY OFFICE, OFFSHORE TAX EVASION[:] IRS HAS COLLECTED BILLIONS OF DOLLARS, BUT MAY BE MISSING CONTINUED EVASION 14 (GAO-13-318, 2013) [hereinafter GOV'T ACCOUNTABILITY OFFICE, OFFSHORE TAX EVASION].

165. NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS, *supra* note 51, at 144; *see also* Press Release, IRS, IRS Says Offshore Effort Tops $5 Billion, Announces New Details on the Voluntary Disclosure Program and Closing of Offshore Loophole, IR-2012-64 (June 26, 2012), http://www.irs.gov/uac/IRS-Says-Offshore-Effort-Tops-$5-Billion,-Announces-New-Details-on-the-Voluntary-Disclosure-Program-and-Closing-of-Offshore-Loophole. For the first 10,000 cases closed under the 2009 OVDP, the median foreign account balance was approximately $570,000, with a median FBAR-related penalty of $108,000. GOV'T ACCOUNTABILITY OFFICE, OFFSHORE TAX EVASION, *supra* note 164, at 13 tbl. 2. The 90th-percentile account balance was $4 million, while the 90th-percentile FBAR-related penalty was $793,000. *Id*.

166. A disclosure is not considered "voluntary," and thus not eligible for the OVDP, if the IRS has already initiated a civil examination of the taxpayer, regardless of whether or not the examination relates to undisclosed foreign accounts. *See Voluntary Disclosure: Questions and Answers*, IRS, last accessed Mar. 19, 2014, http://www.irs.gov/uac/Voluntary-Disclosure:-Questions-and-Answers.

information.[167] The "carrot" involves the elimination of criminal exposure[168] and caps on civil penalties, although this latter aspect of the carrot has become less tasty with each OVDP iteration. The 2009 program contained the most taxpayer-favorable terms: in general, a taxpayer who voluntarily disclosed offshore accounts and fully cooperated was (i) assessed all taxes and interest going back six years, (ii) assessed either an accuracy or delinquency penalty on underpaid tax for all those years, and (iii) in lieu of FBAR and other penalties, assessed a penalty equal to 20 percent of the highest aggregate amount in the foreign accounts.[169]

Following the success of the 2009 program, the IRS implemented the 2011 OVDP. However, its terms were not as taxpayer-favorable. Rather than a six-year lookback, taxpayers disclosing under the 2011 program were required to pay back taxes, interest, and an accuracy or delinquency penalty for the past eight years.[170] Moreover, the penalty in lieu of FBAR and related penalties was raised to 25 percent (rather than 20 percent) of the highest aggregate amount in the accounts during the eight-year period (this penalty was capped at 12.5 percent if the offshore accounts did not exceed $75,000 in any relevant year).[171]

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167. *See* TIGTA 2009 REPORT, *supra* note 163, at 2; *see also* Q&A 5–6, *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers*, IRS, last accessed Aug. 26, 2013, http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers [hereinafter IRS, *OVDP Q&A*] (containing an extensive list of potential criminal and civil penalties that might apply if a taxpayer does not disclose foreign accounts); Lederman, *Voluntary Disclosures*, *supra* note 163, at 502 (concluding that the offshore voluntary disclosure programs have "encouraged quite a number of taxpayers to make voluntary disclosures, but . . . the IRS's repeated use of offshore voluntary disclosure initiatives may have diminishing returns unless the government continues to engage in well-publicized criminal prosecutions of tax evaders").

168. *See* TIGTA 2009 REPORT, *supra* note 163, at 1 & n.1 (noting that the OVDP is an extension of the IRS's longstanding Voluntary Disclosure Practice, which generally allows taxpayers to eliminate the risk of criminal prosecution by voluntarily disclosing in a truthful and complete manner before certain events occur that might otherwise allow the IRS to discover the potential wrongdoing); *see also 2011 Offshore Voluntary Disclosure Initiative Frequently Asked Questions and Answers*, IRS, last accessed Mar. 19, 2014, http://www.irs.gov/Businesses/International-Businesses/2011-Offshore-Voluntary-Disclosure-Initiative-Frequently-Asked-Questions-and-Answers (stating that the Department of Justice takes voluntary disclosure into account in deciding whether to criminally prosecute a taxpayer, and that the IRS will not recommend criminal prosecution to the Department of Justice when a taxpayer truthfully, timely, and completely complies with the voluntary disclosure practice).

169. *See* TIGTA 2009 REPORT, *supra* note 163, at 2.

170. *See id*. at 3.

171. *See id*.

The 2012 program, which is still in effect,[172] ratchets the potential penalties higher than the earlier programs. In particular, the FBAR-related penalty is raised to 27.5 percent (rather than 25 percent) of the highest aggregate amount in the accounts during the eight-year period.[173] As with the 2011 program, the penalty is capped at 12.5 percent if the offshore accounts did not exceed $75,000 in any relevant year.[174] Taxpayers can opt out of the OVDP and have their cases handled under normal examination procedures, but the IRS Taxpayer Advocate has warned taxpayers about the potential risks of this approach.[175]

Three categories of taxpayers are eligible for a five percent (rather than 27.5 percent) offshore reporting penalty under the OVDP. The first category includes taxpayers who inherited or otherwise acquired the foreign account from another person and who had only specified limited contact with the account.[176] The second category includes foreign-resident citizens who were "unaware" citizens (*e.g*., those who were born in the U.S. to foreign-citizen parents but who were raised in a foreign country and had been unaware of their U.S. citizenship status).[177] The third category includes foreign-resident citizens who timely complied with the tax requirements in their country of residence and who had no more than $10,000 of U.S.-source income in each year.[178]

The increased enforcement environment may have also encouraged significant numbers of U.S. citizens with foreign accounts to reenter the tax

172. *See supra* note 163.

173. *See* IRS, *OVDP Q&A*, *supra* note 167, Q&A 8.

174. *See id*. Q&A 53.

175. *See* Kristen A. Parillo, *Taxpayer Advocate Urges U.S. Taxpayers to Use Caution on Offshore Voluntary Disclosure*, 2013 TAX NOTES TODAY 186-1 (Sept. 25, 2013). Taxpayers might consider opting out if they had minimal underpayment of tax and believe their failure to file the FBARs was not "willful." *See, e.g*., Jeremiah Coder, *Taxpayers Face Hurdles and Risks When Opting Out of OVDP*, 2013 TAX NOTES TODAY 12-4 (Jan. 17, 2013) (discussing potential benefits and risks of opting out). A recent unpublished Fourth Circuit opinion may give taxpayers pause regarding the "willfulness" standard. *See* United States v. Williams, 489 F. App'x 655 (4th Cir. 2012) (holding that the district court clearly erred in finding that a taxpayer did not willfully fail to file the FBAR form, given that the taxpayer had checked "no" on the Schedule B, Form 1040, question asking whether he had any interest in a foreign financial account).

176. *See* IRS, *OVDP Q&A*, *supra* note 167, Q&A 52.

177. *See id*. Schneider refers to this category of citizens as "accidental" citizens. *See supra* note 63 and accompanying text. The IRS site does not explicitly address those "unknowing" or "unaware" citizens who were born and raised abroad and obtained citizenship through descent from a citizen-parent. However, the site makes clear that a person who knew she was a citizen but did not inquire as to U.S. tax obligations is not eligible for this lower penalty rate.

178. *See* IRS, *OVDP Q&A*, *supra* note 167, Q&A 52.

system through another route—a "quiet disclosure."[179] Under this approach, the taxpayer merely files late FBARs and an amended tax return reporting offshore income from prior years, and generally pays the tax deficiency along with interest and either an accuracy-related or delinquency penalty, but this approach attempts to avoid FBAR-related penalties that would have been owed in the OVDP.[180] A more extreme approach would be to ignore prior years and merely begin filing FBARs and reporting income in the current year from foreign accounts that had been in existence for many years, in the hope that the prior years' omissions would not be detected by the IRS.[181] Taxpayers attempting either of these approaches, rather than the OVDP, take the risk of maximum FBAR penalties and, depending on the circumstances, criminal prosecution.[182]

The Government Accountability Office ("GAO"), in a recent report on the general success of the OVDPs, noted that there may have been a very significant number of quiet disclosures during the years of the OVDPs and that such disclosures undermine the incentive to participate in the OVDPs.[183] The GAO report recommended that the IRS increase its efforts to detect quiet disclosures and suggested new methodologies that the IRS might use to do so.[184] The IRS announced that it is taking steps to implement the GAO's recommendations.[185]

E. Impact on Global Information Sharing and Cooperation Norms

The foregoing summary indicates the significant changes that have taken place—and continue to take place—in U.S. overseas tax enforcement during the past five years. As important as these developments may be from the perspective of U.S. tax administrators, they are just as important in the impact they have had on global information sharing and tax enforcement norms. Perhaps in combination with the global economic downturn and the resulting efforts of national governments to find additional sources of revenue, the softening of Swiss bank secrecy, upcoming implementation of FATCA IGAs, and other aspects, the U.S. enforcement efforts have

179. *See* GOV'T ACCOUNTABILITY OFFICE, OFFSHORE TAX EVASION, *supra* note 164, at 11.

180. *Id*.

181. *See id*.

182. *See id*.; *see also* IRS, *OVDP Q&A*, *supra* note 167, Q&A 15.

183. *See* GOV'T ACCOUNTABILITY OFFICE, OFFSHORE TAX EVASION, *supra* note 164, at 23. The GAO, using a more comprehensive methodology than the IRS had been using, identified more than 10,000 potential quiet disclosures for the period examined. *See id*. at 24–26.

184. *See id*. at 30.

185. *See id*.

significantly strengthened the willingness of other countries to expand information sharing to combat cross-border tax evasion.[186]

For example, Angel Gurria, the Secretary-General of the Organization for Economic Cooperation and Development ("OECD"), recently observed that "[t]he political support for automatic exchange of information on investment income has never been greater,"[187] attributing this in part to the U.S. efforts to cooperate with other countries in implementing FATCA. In 2013, the OECD released a report describing its efforts to improve information exchange, highlighting its efforts to establish a global standard on automatic information exchange,[188] and in early 2014 it published new standards for automatic information exchange.[189] In addition, the leaders of the Group of Twenty ("G20") recently issued a declaration strongly supporting increased information sharing, concluding that "[w]e look forward to the practical and full implementation of the new standard on a global scale."[190]

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186. *See generally* Grinberg, *Battle Over Taxing Offshore Accounts*, *supra* note 148 (describing how recent developments in the United States and elsewhere reflect an emerging international consensus to have financial institutions act as cross-border tax intermediaries using an automatic information reporting model, rather than an anonymous withholding model).

187. Kristen A. Parillo & Stephanie Soong Johnston, *G-20 Seeks Global Action on Automatic Information Exchange*, 70 TAX NOTES INT'L 386, 386 (Apr. 29, 2013).

188. *See* OECD, OECD SECRETARY-GENERAL REPORT TO THE G20 FINANCE MINISTERS, 2013 TAX NOTES TODAY 77-33 (Apr. 19, 2013).

189. *See* OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION[:] COMMON REPORTING STANDARD (2014), http://www.oecd.org/ctp/exchange-of-tax-information/Automatic-Exchange-Financial-Account-Information-Common-Reporting-Standard.pdf. The introduction of this document highlights the role that FATCA and the IGAs played in spurring OECD countries to support these new standards. *See id*. at 5.

190. *G20 Leaders' Declaration*, 2013 TAX NOTES TODAY 174-39 (Sept. 6, 2013). Shortly before the G20 meeting, the United States and five other countries issued a joint statement expressing support for the OECD's efforts on automatic information exchange and encouraging the G20's engagement in this issue. *See* Press Release, U.S. White House, Office of the Press Secretary, *Joint Statement by Kingdom of Denmark, Republic of Finland, Republic of Iceland, Kingdom of Norway, Kingdom of Sweden, and the United States of America* (Sept. 4, 2013), http://www.whitehouse.gov/the-press-office/2013/09/04/joint-statement-kingdom-denmark-republic-finland-republic-iceland-kingdo; *see also* Press Release, U.S. Dep't of Treasury, *Joint Communique by France, Germany, Italy, Spain, the United Kingdom and the United States on the Occasion of the Publication of the "Model Intergovernmental Agreement to Improve Tax Compliance and Implement FATCA*,*"* http://www.treasury.gov/press-center/press-releases/Documents/joint%20communique.pdf (describing the new IGA model as "an important step forward in establishing

Similarly, leaders of the G-8 nations recently expressed their support for the OECD information exchange efforts, stating, "We commit to establish the automatic exchange of information between tax authorities as the new global standard, and will work with the [OECD] to develop rapidly a multilateral model which will make it easier for governments to find and punish tax evaders."[191] An OECD report prepared for the recent G-8 summit notes that the U.S. Department of Treasury's Model 1 IGA is "a logical basis on which to build" a global standard of automatic information exchange.[192] Furthermore, a proposal was recently introduced for an EU Council Directive to implement a FATCA-like initiative among the EU Member States.[193]

Perhaps even more important than the buy-in by the larger global economies, recent U.S.-led developments have affected traditional tax havens and secrecy jurisdictions beyond Switzerland. A number of other traditional offshore financial centers have signed, or are currently negotiating, IGAs with the United States to implement FATCA. For example, the Cayman Islands, recently ranked as the second-most-secretive jurisdiction in the world (behind Switzerland), announced that it has concluded negotiations and will sign a Model 1-based IGA with the United States.[194] Commenters suggested that the Model 1 IGA, which centralizes financial institutions' reporting through their government, was chosen by the Cayman Islands in anticipation that other countries might have some version of FATCA in the future, which would make future compliance easier.[195] Among other offshore financial centers, the United States has initialed an agreement with Bermuda,[196] is in final negotiations with Guernsey, the Isle

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a common approach to combat tax evasion based on automatic exchange of information").

191. G-8, *2013 Lough Erne Communiqué*, 2013 TAX NOTES TODAY 118–21 (June 18, 2013).

192. *See* OECD, A STEP CHANGE IN TAX TRANSPARENCY[:] OECD REPORT FOR THE G8 SUMMIT, LOUGH ERNE, ENNISKILLEN, JUNE 2013, at 10, http://www.oecd.org/ctp/exchange-of-tax-information/taxtransparency_G8report.pdf.

193. *See* European Commission, *Proposal for a Council Directive Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation*, 2013/0188 (CNS), http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_cooperation/mutual_assistance/direct_tax_directive/com_2013_348_en.pdf.

194. *See* Andrew Velarde, *U.S., Caymans to Sign Milestone FATCA Agreement*, 71 TAX NOTES INT'L 679 (Aug. 19, 2013).

195. *See id*. (quoting tax attorney Jonathan Jackel).

196. *See* Laura Saunders, *Offshore Accounts: No Place to Hide?*, WALL ST. J., Sept. 20, 2013, http://online.wsj.com/news/artivles/SB100014241278877324807704579085511331606786 [hereinafter Saunders, *No Place to Hide*].

of Man, and Jersey,[197] and has begun negotiations with the British Virgin Islands.[198]

A number of prominent tax attorneys, including former government officials, have observed that this response by traditional secrecy jurisdictions reflects an awareness that global norms have changed. For example, one attorney concluded that

> 2013 may very well be the watershed year resulting in the final pathway to global tax compliance and the elimination of offshore tax abuse facilitated by bank secrecy. At the bilateral and multinational levels and the statutory, legislative, and administrative levels, the many global tax initiatives are seemingly converging on the same landscape.[199]

Similarly, another practitioner observed that "[t]he Caymans have traditionally been thought of as a secrecy jurisdiction, as was Switzerland, [but now] [t]hey're falling like dominoes."[200] Another noted that he advises

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197. *See id*.

198. *See* Kristen A. Parillo, *B.V.I. Premier "Sets Record Straight" on FATCA*, 71 TAX NOTES INT'L 962 (Sept. 9, 2013) [hereinafter Parillo, *B.V.I. Premier*]. The BVI negotiations, like the Cayman Islands agreement, centers on the Model 1 IGA. *See id*.

199. William M. Sharp Sr., *Navigating Offshore Tax Hazards: An Update*, 70 TAX NOTES INT'L 695, 706 (May 13, 2013) [hereinafter Sharp, *Navigating Offshore Tax Hazards*].

200. *See* Alison Bennett, *U.S.-Caymans FATCA Agreement Signals Growing Tax Transparency, Practitioners Say*, BNA DAILY TAX REPORT (Aug. 19, 2013); *see also id*. (quoting numerous other practitioners and former government officials regarding the global shift toward transparency). One attorney explained the participation of Caribbean and other financial centers in the FATCA process by noting,

> In today's world, counterparties don't want to deal with noncompliant entities, regardless of whether they're deriving U.S.-source income. . . . With the trend toward eliminating bank secrecy and enhancing transparency, you either join in or become an outlier. Jurisdictions that depend on the attractiveness of their business environment need to be very sensitive to what the trends are.

Parillo, *B.V.I. Premier*, *supra* note 198, at 962 (quoting Alan Granwell of DLA Piper). Similarly, another attorney observed that China's signing of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, and the recent agreement between the United States and Switzerland, "show that even large and politically powerful jurisdictions have to find the proper balance between

clients with offshore accounts that "tax havens where people can hide money are a thing of the past. . . . Forget about confidentiality. Transparency is here to stay."[201] Even the Premier of the British Virgin Islands, D. Orlando Smith, observed that because automatic information exchange is becoming the new global standard, it is "incumbent on any responsible person to be straight with our people and offer solutions, not create confusion by misleading them [about the need to cooperate with the United States]."[202]

IV. IMPLICATIONS OF ADMINISTRATIVE DEVELOPMENTS

A. *Disproportionate Impact on Overseas Citizens*

1. *Impact of Enforcement Initiatives*

The recent expansion in overseas enforcement was not driven by concerns over citizens residing abroad. Rather, its focus is principally individuals living in the United States who are hiding income in foreign accounts.[203] Nonetheless, in a citizenship-based taxing system, enforcement actions targeting foreign accounts will, by their very nature, disproportionately impact citizens living abroad. Whereas it might be relatively unusual for a citizen living in the United States to have signatory authority over a foreign bank account, such authority is relatively routine for a citizen residing abroad. Just as a person living in New York for an extended period of time might be expected to open a local bank account in New York for her routine financial transactions, a U.S. citizen living in London or Paris might be expected to open a local bank account in that city.[204] A citizen abroad might also be more likely to open investment accounts abroad and, to the extent she has family ties in the foreign country, inherit or otherwise acquire a foreign account from a family member.

In addition, although foreign-resident citizens generally are subject to U.S. taxation, it is possible that a foreign-resident citizen might not owe U.S. income tax on investment income earned from the foreign account.[205] In particular, if the individual lives in a foreign country that taxes the income,

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cooperation and financial confidentiality to remain viable in today's world." *Id*. (paraphrasing Bruce Zagaris).

201. Saunders, *No Place to Hide*, *supra* note 196 (quoting Henry Christensen of McDermott, Will & Emery in New York).

202. Parillo, *B.V.I. Premier*, *supra* note 198.

203. *See supra* notes 107–121 and accompanying text.

204. Of course, the citizen abroad might also open a foreign bank account in a foreign city or country in which she does not reside, which may or may not be used for routine banking activities.

205. The foreign earned income exclusion, discussed *supra* notes 6–7 and accompanying text.