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# NOT SO SAFE HAVEN: REDUCING TAX EVASION BY REGULATING CORRESPONDENT BANKS OPERATING IN THE UNITED STATES

*Michael A. Berger**

## I. INTRODUCTION

"[I]n this world nothing is certain but death and taxes."[1] However, for some only death is certain. As long as there have been taxes, wealthy individuals have sought loopholes to protect their fortunes and evade taxes.[2] Tax evasion by wealthy individuals is perhaps the greatest financial crime the United States ("U.S.") has known. For the most part the public remains in the dark to its existence, reading the occasional fictional tale in a John Grisham novel, but the truth is far more frightening. As a result of individual tax evasion the U.S. loses an estimated $100 billion in tax revenue each year.[3] Where does this money go? The answer, is numerous tax havens located around the globe. Countries all over the world lose tax revenue from wealthy patrons moving money overseas.[4] In 2005 the Tax Justice Network estimated that the total worldwide value of offshore holdings was around $11.5 trillion.[5]

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* J.D. Candidate, 2013, Maurice A. Deane School of Law at Hofstra University. I would first like to thank my family, my parents and brothers, for all of their unwavering support throughout the writing and editing process. I would also like to thank Professor Frank Gulino for helping me select this topic and providing guidance throughout the writing process. To Professor Ronald J. Colombo, for assisting in discovering a plausible solution to the problem of tax evasion. Finally, I would like to thank the staff of the *Journal of International Business & Law* for giving me this opportunity and preparing this Note for publication.

1 *Benjamin Franklin. (1706-1790)*, BARTLEBY.COM, http://www.bartleby.com/100/245.html (last visited Sept. 1, 2012).

2 Lynnley Browning, *Swiss Banking Secrecy, Under Pressure, Shifts to Singapore and Hong Kong*, N.Y. TIMES, Sept. 23, 2010, at B3 [hereinafter Browning, *Swiss Banking Secrecy*], *available at* http://www.nytimes.com/2010/09/23/business/global/23swiss.html?pagewanted=all.

3 PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, TAX HAVEN BANKS AND U.S. TAX COMPLIANCE, STAFF REPORT 1 (2008) [hereinafter TAX HAVEN BANKS], *available at* http://www.hsgac.senate.gov//imo/media/doc/071708PSIReport.pdf?attempt=2. Further reflecting the extent of this global problem, it is estimated that this $11.5 trillion held offshore leads to $255 billion in unpaid taxes. Sam Hinton-Smith, *The Offshore World*, OPEN DEMOCRACY (Mar. 21, 2006), http://www.opendemocracy.net/globalizationvision_reflections/offshore_3375.jsp. These figures solely reflect individual tax evasion. If corporations that evaded taxes were factored in the numbers would be much larger. For example, an economist at the Treasury Department estimated that Apple would have paid $2.4 billion more in federal taxes for the year ending 2011. Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES, Apr. 29, 2012, at A1, *available at* http://www.nytimes.com/2012/04/29/ business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html?pagewanted=all.

4 *See generally* Stop Tax Haven Abuse Act, H.R. 2669, 112th Cong. (2011) (proposing a solution to the problem of tax evasion by wealthy individuals).

5 NICHOLAS SHAXSON, TREASURE ISLANDS: UNCOVERING THE DAMAGE OF OFFSHORE BANKING AND TAX HAVENS 28 (2011). This value of $11.5 trillion is close to the Gross Domestic Product of the U.S. and a quarter of all global wealth. The Tax Justice Network is an independent organization that was created by the British House of Parliament to increase awareness about offshore finance and document the effects of tax evasion and tax havens. The organization is composed of academics, accountants, economists, and lawyers



 

While tax evasion is a global problem that plagues economies, not all economies get the short end of the stick. Some nations even aspire to become tax havens for the influx of capital, which fuels growth in their financial industry.[6] Alternatively, this growth has allowed these tax havens to prosper during a period of widespread economic decline.[7]

The onshore countries face reduced revenue collected by the government and a shift in the burden to the middle and lower classes to pay higher taxes.[8] In the U.S., numerous remedies have been proposed ranging from bilateral and multilateral treaties among countries, to unenacted legislation, to the formation of international organizations.[9]

Despite these efforts, the offshore financial industry has only grown.[10] In 2008, there was a breach and weakening in bank secrecy in Liechtenstein and Switzerland, two well known tax havens. However, even these breaches have failed to stem the growth of tax evasion.[11] Nevertheless, lessons can be learned from these events that can help dissuade the use of tax havens.

Part II of this Note will provide an introduction into tax havens and address the recent setbacks tax havens have had in maintaining the secrecy of their clients' identities. The analysis will focus on two of the most influential breaks in tax haven governance, the revelation of Liechtenstein Global Trust (hereinafter "LGT") client identities in Liechtenstein to German authorities and the recent disclosure of UBS clients in Switzerland to U.S. authorities.[12] These disclosures provided the impetus needed to begin prosecuting and

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among others. *About Tax Justice Network*, TAX JUSTICE NETWORK, http://www.taxjustice.net/cms/front_content.php?idcatart=103&lang=1 (last visited Sept. 1, 2012).

[6] Timothy V. Addison, *Shooting Blanks: The War on Tax Havens*, 16 IND. J. GLOBAL LEGAL STUD. 703, 711 (2009). The Island of Jersey, one such tax haven, estimates that 80% of its governmental revenue is obtained through taxing foreign corporations. Charles Recknagel, *Will G20 Crack Down on Tax Havens?*, RADIO FREE EUROPE RADIO LIBERTY (Apr. 1, 2009), http://www.rferl.org/articleprintview/1566041.html.

[7] *See* Dhammika Dharmapala & James R. Hines Jr., *Which Countries Become Tax Havens?*, NATIONAL BUREAU OF ECONOMIC RESEARCH, 1 (2006), http://www.nber.org/papers/w12802.pdf.

[8] *Levin, Coleman, Obama Introduce Stop Tax Haven Abuse Act*, LEVIN.SENATE.GOV (Feb. 17, 2007), http://levin.senate.gov/newsroom/press/release/?id=6413b85a-2bb4-41b8-8adc-d7e574f6d84a. Senator Levin has led a campaign against tax havens. Based on the estimate of $100 billion being lost yearly due to the use of tax havens, Levin stated that "[w]e cannot tolerate tax cheats offloading their unpaid taxes onto the backs of honest taxpayers." Although efforts have been made to curb this abuse the problem still exists today, almost 5 years since Levin made the statement. *Id.* Whereas "offshore" is the movement of money across borders, "onshore" is the country where the domiciled person pays taxes domestically. SHAXSON, *supra* note 5, at 12.

[9] *See* H.R. 2669 (explaining the recent measures taken by the U.S. to combat the offshore abuses of wealthy individuals). *See also Tax Information Exchange Agreements (TIEAs)*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, http://www.oecd.org/ctp/harmfultaxpractices/taxinformationexchangeagreementstieas.htm (last visited Sept. 1, 2012) (explaining some of the initiatives taken by the OECD). The obvious answer would seem to be that the developed countries which are losing all of this investment should lower their tax rates. However, lowering the tax rate would only lead tax haven nations to subsequently lower their tax rates and induce a race to the bottom. The result would be lower taxes and perhaps less offshore accounts, but would also lead to a decrease in revenue and an inability to invest in areas such as education and healthcare. Addison, *supra* note 6, at 709-10.

[10] Nicholas Shaxson defines "offshore" as "the artificial movement or use of *money* across borders, and about the jurisdictions, commonly known as tax havens, that host and facilitate this activity." SHAXSON, *supra* note 5, at 12 (emphasis in original).

[11] *See generally* TAX HAVEN BANKS, *supra* note 3 (describing the case histories in Liechtenstein and Switzerland).

[12] UBS AG is a company that was formed in 1998 after a merger between the Union Bank of Switzerland and the Swiss Banking Corporation. Currently UBS is not an acronym, but the official company name. *See* UBS,

investigating bankers and individuals evading taxes.[13] These two studies reveal the possibility that legislation can substantially reduce the number of wealthy Americans hiding money in offshore accounts. Part III will address the current regulations for monitoring tax evasion, both in the U.S. and abroad, analyze their ineffectiveness, and discuss why a new solution to the problem of tax evasion is required. Part IV proposes the implementation and enforcement of legislation that should regulate foreign bank subsidiaries doing business within the U.S. The tax haven system as a whole cannot be stopped. However, through penalizing onshore bank subsidiaries, the incidence of tax evasion can be shifted away from the U.S.

## II. HISTORY

Tax havens are countries that offer no or nominal tax rates to foreign investors.[14] Typically, tax havens are small countries with small populations, but a high standard of living.[15] Additionally, the countries usually have an efficient government that is both financially and politically stable.[16] Tax havens also have a lack of transparency with other countries.[17] The Organisation for Economic Co-operation and Development (hereinafter "OECD") states that transparency is needed to "ensure[] that there is an open and consistent application of tax laws among similarly situated taxpayers."[18] This is done to confirm that the correct tax liability is applied and multinational entities do not face double taxation. Another criterion of tax havens is the effective exchange of pertinent tax information between the two governments engaged in an exchange agreement.[19] This is typically reflected by the use of bilateral treaties signed between the two countries.[20] The final criterion is an absence of a requirement that the financial activity be substantial.[21]

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*Frequently Asked Questions Corporate Information*, https://www.ubs.com/global/en/about_ubs/investor_relations/faq/about.html (last updated Nov. 9, 2011, 9:11 AM).

[13] *See generally* TAX HAVEN BANKS, *supra* note 3, at 2 (discussing the investigations of certain individuals evading taxes by creating accounts in Liechtenstein and Switzerland).

[14] *Tax Haven Criteria*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, http://www.oecd.org/ctp/harmfultaxpractices/taxhavencriteria.htm (last visited Sept. 1, 2012). Another definition of a tax haven is a place "that seeks to attract money by offering politically stable facilities to help people or entities get around the rules, laws, and regulations of jurisdictions elsewhere." SHAXSON, *supra* note 5, at 11.

[15] Dharmapala & Hines Jr., *supra* note 7, at 1.

[16] *Id.* Countries that control corruption and have political stability are more attractive to investors who value secrecy and security. *See also* TAX HAVEN BANKS, *supra* note 3, at 34 (describing the characteristics that make Liechtenstein attractive to investors). Liechtenstein has touted itself as a location of "[e]conomic and political stability," with a record of success in asset management and structuring and "[s]trict laws on professional secrecy for banks and trustees." It also emphasizes protection of assets from "undesirable access" through "[d]iscretion and anonymity." All of these characteristics that it emphasizes are those of a tax haven and those that attract wealthy individuals to use this country in particular. *Id.*

[17] *Tax Haven Criteria*, *supra* note 14.

[18] *Id.* The OECD was formed in 1961 and currently has 34 member countries that strive to improve the "economic and social well-being of people around the world." *About the Organisation for Economic Co-operation and Development (OECD)*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, http://www.oecd.org/about/ (last visited Sept. 1, 2012).

[19] *Tax Haven Criteria*, *supra* note 14.

[20] *Id.* This factor coupled with the lack of transparency has been heavily analyzed by comparing countries around the world. The Tax Justice Network has created a financial secrecy index. A secrecy jurisdiction is



 

The main draw of tax havens is the absence of taxes that would otherwise be paid in a person's domiciled country.[22] The U.S. taxes domestic income of its citizens as well as income earned abroad.[23] Conversely, many countries offer more generous tax laws; the United Kingdom taxes only domestic income.[24] Tax haven countries have even more favorable tax policies, for example lower tax rates. Therefore it is not surprising that wealthy individuals will pursue avenues that preserve their fortunes and patronize banks in those countries. The resulting economic growth of these tax havens is sustainable because the lower taxes are offset by an increased tax base, hence the widespread growth of tax havens even during times of global economic instability.[25]

Liechtenstein and other tax havens offer wealthy individuals lower tax rates and, for the most part, remove the fear of prosecution.[26] This is primarily attributed to two reasons. First, in Liechtenstein tax evasion is not a criminal offense.[27] Under Liechtenstein law, it is legal for wealthy individuals from foreign countries to deposit their money in Liechtenstein's banks. Despite the obvious problems this network of tax havens creates, it is virtually impossible to shut down. Countries that operate as tax havens do not have a legal distinction between tax evasion and tax avoidance.[28] Since the laws of these countries do not consider tax evasion illegal, there is no obligation to help other countries obtain the relevant

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another term for tax havens. Financial secrecy, according to the Tax Justice Network, is when there is a refusal to share this pertinent financial information with legitimate authorities that require it to properly tax individuals. Bank employees in these secrecy jurisdictions maintain clients' secrets or face criminal penalties for revealing those secrets. *See* Tax Justice Network, *Introducing the 2011 Financial Secrecy Index*, FINANCIAL SECRECY INDEX, http://www.financialsecrecyindex.com/ (last visited Sept. 1, 2012). Switzerland is at the top of the list and avoids sharing information with other governments. *See* Giles Broom, *Switzerland Leapfrogs U.S. to Top Financial Secrecy List*, BLOOMBERG BUSINESSWEEK (Oct. 4, 2011), http://www.businessweek.com/news/2011-10-04/switzerland-leapfrogs-u-s-to-top-financial-secrecy-list.html.

[21] *Tax Haven Criteria*, *supra* note 14.

[22] Dharmapala & Hines Jr., *supra* note 7, at 4.

[23] Phil Cain, *Underworld: The Lure of a Liechtenstein Bank Account*, GLOBAL POST (Feb. 9, 2011, 7:14 AM), http://www.globalpost.com/dispatch/commerce/110208/liechtenstein-bank-secrecy-tax-havens.

[24] *Id.*

[25] Dharmapala & Hines Jr., *supra* note 7, at 4-5.

[26] *But see* David Voreacos, *Ex-UBS Banker Martin Lack Is Indicted in Tax Conspiracy Case*, BLOOMBERG (Aug. 2, 2011, 3:11 PM), http://www.bloomberg.com/news/2011-08-02/ex-ubs-banker-lack-charged-with-conspiring-to-help-americans-evade-taxes.html [hereinafter Voreacos, *Ex-UBS Banker*] (providing an example of the recent shift by U.S. authorities to prosecute private bankers); *see* TAX HAVEN BANKS, *supra* note 3, at 105 (stating that Mr. Olenicoff was being prosecuted for his role in evading U.S. taxes).

[27] Nick Mathiason, *A Journey from Haven to Hell*, THE OBSERVER, Mar. 2, 2008, at 4, *available at* http://www.guardian.co.uk/business/2008/mar/02/tax.personalfinancenews. Recently however, the U.S. has prosecuted private bankers and individuals who have unlawfully evaded taxes.

[28] *See* David Crawford, *Tax Havens Pledge to Ease Secrecy Laws*, WALL ST. J., Mar. 13, 2009, at A1, *available at* http://online.wsj.com/article/SB123685028900906181.html. In the U.S., tax avoidance is considered legal whereas tax evasion is illegal. Judge Learned Hand described tax avoidance as "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934). Tax evasion is the use of illegal measures to avoid paying taxes that one lawfully owes. It "involve[s] an individual or corporation misrepresenting their income to the Internal Revenue Service." Cornell University Law School, *Tax Evasion*, LEGAL INFORMATION INSTITUTE (Aug. 19, 2010, 5:25 PM), http://www.law.cornell.edu/wex/tax_evasion. In Switzerland, the laws refer to tax evasion as merely a misdemeanor and not a serious crime that mandates an exception to the secrecy laws. Carolyn Michelle Najera, *Combating Offshore Tax Evasion: Why the United States Should Be Able to Prevent American Tax Evaders From Using Swiss Bank Accounts to Hide Their Assets*, 17 SW. J. INT'L L. 205, 217 (2011).

information required to properly investigate and prosecute individuals evading taxes domestically.[29] Furthermore, Liechtenstein law does not require disclosure of its financial holdings to other countries.[30] The result is the ability to enter into exchange agreements with other countries where the Liechtenstein government has the discretion to reveal as much or as little information as it desires.

Second, bankers often structure transactions so deposits pass through multiple entities before reaching the desired account making it difficult for tax authorities to determine the beneficiary.[31] This problem is further exacerbated by offshore banks, such as UBS and LGT, seeking out wealthy U.S. citizens to secure more business and earn greater profits.[32] Recent studies show that employees of these offshore banks encourage wealthy individuals to open accounts and then structure the accounts so that they are not disclosed to U.S. authorities.[33]

Traditionally, tax haven bank secrecy has been airtight.[34] Attracting wealthy individuals is extremely competitive and a bank's reputation for privacy is paramount in

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[29] Crawford, *supra* note 28. Switzerland defines tax evasion as "the underpayment of taxes that results from a passive neglect to report income." Since the Swiss have an efficient financial system, a hallmark of tax havens, the ability to evade taxes is very difficult and not considered to be a criminal offense as a result. *See* Spencer Daly, *Secrecy in Limbo: What the Most Recent Settlement with the IRS Means for UBS and the Rest of the Swiss Banking Industry*, 10 J. INT'L BUS. & L. 133, 143 (2011). In fact, the Swiss Federal Constitution goes even further. It provides every person with the right to privacy in their financial affairs. As such, it states that anyone associated with a bank is restrained from divulging any information acquired while within the scope of his employment. The punishments provided, up to 3 years in prison and a steep fine, will usually convince bankers to abide by the laws even after their employment is terminated. *See Bank-Client Confidentiality*, SWISS BANKING, http://www.swissbanking.org/en/bankkundengeheimnis.htm (last visited Sept. 2, 2012).

[30] Mathiason, *supra* note 27. Similarly, Switzerland through UBS has sent a letter to clients saying in substance that the bank will not provide the Internal Revenue Service with any information about U.S. clients, provided that the account does not have any U.S. securities. This protection extends to clients even if they are U.S. taxpayers who are obligated to report the income to the Internal Revenue Service. TAX HAVEN BANKS, *supra* note 3, at 10.

[31] Jaclyn H. Schottenstein, *Is Bank Secrecy Still Bankable?: A Critical Review of Bank Secrecy Law, Tax Evasion and UBS,* 5 ENTREPRENEURIAL BUS. L. J. 351, 364 (2010).

[32] SHAXSON, *supra* note 5, at 26-27. Switzerland is known for seeking out clients from countries geographically proximate such as Germany, France, and Italy. Whereas Australians use tax havens closer to home such as Vanuatu. Americans and Latin Americans tend to use the Caribbean. India is estimated to lose close to $7 billion each year from tax evasion, most of it from Mauritius, a small island in the Indian Ocean. This loss is the result of Mauritius targeting wealthy investors by lowering tax bills and targeting wealthy clients. *See* Megha Bahree & Deborah Ball, *Island Tax Haven Roils India's Ways*, WALL ST. J., Aug. 29, 2012, at B1, *available at* http://online.wsj.com/article/SB10000872396390444327204577615924257597492.html. Information has come to light disclosing the practices of UBS in obtaining wealthy American clients. UBS bankers made regular trips to the U.S., close to 300 visits between 2001 and 2008, and organized events designed to attract wealthy individuals, sometimes meeting with 30 or 40 clients per trip. The bankers minimized the contact in the U.S. that could lead back to them such as e-mails, faxes or phone calls. *See* TAX HAVEN BANKS, *supra* note 3, at 11-14.

[33] TAX HAVEN BANKS, *supra* note 3, at 3. These employees are governed by laws that enforce banker-client privilege. Any information that is acquired in the course of business with the client is privileged and kept in strict confidence. Under Swiss law, bankers are subject to criminal action if they divulge information about the client. Schottenstein, *supra* note 31, at 355-58.

[34] In the past this included criminal activities, but since September 11, 2001, countries have been more willing to divulge information to avoid directly funding terrorist activities. *See* Mathiason, *supra* note 27.

obtaining business.[35] Recently, there was a disclosure of clients' names which opened the door to increased probing into the client lists of offshore banks. This alone will not cause a decline in the use of tax havens, however, it has contributed to relaxation of bank secrecy laws.[36] The recent break in secrecy combined with the global economic downturn has placed significant international pressure on tax havens to stop protecting the rich at the expense of the global economy.[37]

### A. LGT and Liechtenstein

Liechtenstein is a great example of a country whose characteristics are illustrative of a typical tax haven.[38] The population is well under one million and has a very high Gross Domestic Product per capita: ranking first in the world, thus fulfilling the wealth requirement.[39] It represents the typical values of a successful tax haven, "a place where trust and secrecy are perhaps more valuable than mere money."[40] Foreign countries must go through a strict process to request information about banking clients.[41] Information cannot be requested by just "throwing a dart at the wall," there must be some reasonable basis for the requested information.[42]

LGT, the primary financial institution in Liechtenstein, is owned by the Liechtenstein royal family.[43] LGT operates subsidiaries all over the world, including countries such as Austria, Germany, Ireland, and Switzerland.[44] LGT also operates a financial institution called LGT Capital Partners (USA) Inc. located in the U.S.[45]

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[35] *See* Martin A. Sullivan, *Lessons from the Last War on Tax Havens*, TAX ANALYSTS (July 30, 2007), http://www.taxanalysts.com/www/features.nsf/Articles/F3AA18739F0EFF008525744B0066459B?OpenDocument. Reputation is considered to be the biggest factor in determining whether a tax haven will be able to compete successfully against its peers. The country seen with the strongest image for security and stability will prevail. *See id.*

[36] Browning, *Swiss Banking Secrecy, supra* note 2. The settlement between the U.S. and banks in Switzerland has had a limited effect on the offshore banking industry. Wealthy Americans still keep their money in offshore banks; the location is the only thing that has changed. Instead of looking immediately to Switzerland, the rich are now moving east to Singapore and Hong Kong. This shift may signal a change from the traditional European dominance of tax havens. In Asia, the investment has been increasingly American and European, signaling a desire to leave Europe. In Singapore, the laws are similar in that they protect the privacy of investors who are legitimate and not trafficking illicit goods. It is estimated that Switzerland's offshore wealth is in the range of $2 trillion, while Singapore's is around $500 billion and Hong Kong's approximates $200 billion. All this suggests that the offshore banking industry is not declining in power but rather shifting its focus from Europe to Asia. *Id.*

[37] Crawford, *supra* note 28. The focus of this crack in bank secrecy relates to the evasion of taxes by wealthy individuals. Most tax havens have lifted secrecy regulations when offshore banks are used to hide money acquired from illegal activity. Disclosure became even greater after the September 11th terrorist attacks. *Id.*

[38] *See supra* text accompanying notes 14-21.

[39] Central Intelligence Agency, *Liechtenstein*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ls.html (last updated Aug. 24, 2012).

[40] Mathiason, *supra* note 27.

[41] Cain, *supra* note 23.

[42] *See* Michael J. Burns & James McConvill, *An Unstoppable Force: The Offshore World in a Modern Global Economy*, 7 HASTINGS BUS. L. J. 205, 216 (2011).

[43] TAX HAVEN BANKS, *supra* note 3, at 32.

[44] *Id.* at 33.

[45] *Id.* at 33-34.

Liechtenstein is estimated to hold close to £130 billion ($206 billion) of foreigner's money.[46] It attracts investment by touting its "'[e]conomic and political stability,' '[h]igh-quality financial services,' '[d]ecades of tradition in asset management and asset structuring,' 'a liberal legal framework,' and '[s]trict laws on professional secrecy for banks and trustees.'"[47] However, its status as a flourishing tax haven suffered a substantial setback in 2002 when data archivist, Heinrich Kieber, stole and sold a CD that contained a list of clients who were evading taxes in their home countries.[48]

Heinrich Kieber was a data archivist at the LGT subsidiary LGT Treuhand.[49] He disclosed the names of over 1,250 clients of the 77,000 account holders at LGT.[50] The information divulged was estimated to be related to financial investments of close to €3.5 billion ($4.6 billion).[51] After making copies of the disc, he offered to sell the information to the United Kingdom Inland Revenue; the offer was declined.[52] Germany, however, did not decline the offer. The German Secret Service purchased the disc for €4.2 million ($5.5 million).[53] Kieber is currently thought to be living in Australia under an assumed identity.[54] He is subject to an arrest warrant from Interpol for theft, fraud, and counterfeiting.[55] He is also subject to criminal penalties in Liechtenstein for revealing confidential information in violation of the law.[56]

This breach allowed Germany to recover some of the money it had lost over the years through evaded taxes by some of its wealthiest individuals; it also caused many wealthy patrons to seek alternatives to Liechtenstein for hiding their money.[57] Not only did Germany recover some of the money, but the authorities also made high profile arrests of prominent German businessmen.[58]

Germany was not the only country to recover assets as a result of this breach in security. The United Kingdom and Liechtenstein agreed to terms leading to the disclosure of

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[46] Mathiason, *supra* note 27.

[47] TAX HAVEN BANKS, *supra* note 3, at 34.

[48] Mathiason, *supra* note 27.

[49] Lucy S. Lee & Stafford Smiley, *Focus on Offshore Bank Accounts: The Liechtenstein and UBS Agreements*, 36 WGL-CTAX 34, 36 (2009).

[50] Mathiason, *supra* note 27.

[51] Lee & Smiley, *supra* note 49, at 36.

[52] Mathiason, *supra* note 27.

[53] *Id.*

[54] *Id.*

[55] Cain, *supra* note 23.

[56] Mr. Kieber is subject to criminal penalties for violating Article 14 of the Banking Act which states that "[t]he members of the organs of banks and their employees as well as other persons acting on behalf of such banks shall be obliged to maintain the secrecy of facts that they have been entrusted to or have been made available to them pursuant to their business relationships with clients. The obligation to maintain secrecy shall not be limited in time." As the law suggests, the scope of this banker-client privilege extends to all employees of the bank, including data archivists. As a result of breaking Liechtenstein law, a website was created that offers a reward in the sum of $7 million for any information that leads to the arrest of Mr. Kieber. TAX HAVEN BANKS, *supra* note 3, at 35, 80.

[57] *See* Mathiason, *supra* note 27. It is estimated that Germany has recovered about €1.8 billion ($2.4 billion) in unpaid taxes. Cain, *supra* note 23.

[58] Anthony D. Todero, *The Stop Tax Haven Abuse Act: A Unilateral Solution to a Multilateral Problem*, 19 MINN. J. INT'L. L. 241, 256 (2010).

British held accounts in exchange for lenient penalties.[59] Since this agreement, Great Britain has recovered close to £3 billion ($4.75 billion) in unpaid taxes.[60] In the U.S., authorities have used the disclosed information to determine that LGT has used practices that assist wealthy Americans in evading U.S. taxes.[61]

Upon the release of clients' names, the U.S. discovered that most of LGT's clients had substantial ties to the U.S.[62] It stands to reason that prior to the breach the U.S. had no idea who the potential tax evaders were and therefore, could neither prosecute nor investigate these individuals' finances. However, once the U.S. had this basic information, such as biographical data, it could ask Liechtenstein to release information on specific individuals suspected of committing a crime under U.S. law.[63] Even with this information there is no guarantee that it will fall under the Tax Information Exchange Agreement (hereinafter "TIEA") the U.S. has with Liechtenstein.[64] When probed for assistance after the breach, LGT refused to cooperate and provide information about the accounts, citing violations of Liechtenstein secrecy laws.[65] This included refusal to disclose information about the number of U.S. clients that have opened accounts with LGT, the amount of U.S. money held in LGT, or the percentage of the accounts disclosed compared to the total number of accounts.[66]

Since the dissemination of the clients' names, the U.S. has obtained information about the operations of LGT and its employees.[67] LGT employees assisted U.S. clients by advising them to open accounts with Liechtenstein foundations.[68] These foundations allowed the bank to shield the identity of the beneficiaries from U.S. authorities and therefore protect the assets within each account from taxation.[69] In addition, the employees would structure the

[59] Cain, *supra* note 23. About 12 other countries have made similar progress in investigating individuals who opened bank accounts in Liechtenstein. These countries include Italy, France, Spain, and Australia. TAX HAVEN BANKS, *supra* note 3, at 2.

[60] Cain, *supra* note 23. The Prime Minister of Liechtenstein, Klaus Tschuetscher, hopes to replicate the British agreement with other countries and thereby force banks to conform to international regulations. *See* Emma Thomasson, *Liechtenstein Now Safe Haven Not Tax Haven-PM*, THE EUROPEAN (May 23, 2012, 11:54 AM), http://www.the-european.eu/story-596/liechtenstein-now-safe-haven-not-tax-haven-pm.html.

[61] TAX HAVEN BANKS, *supra* note 3, at 32.

[62] *Id.* at 34. Client connections to the U.S. include citizenship, permanent residency, employment, real estate, and immediate relatives in the U.S. *Id.*

[63] Addison, *supra* note 6, at 722.

[64] For example, under the terms of the treaty with Liechtenstein disclosure is required for tax fraud by "means of intentional use of false, falsified, or incorrect business records, provided the tax due is substantial." *Confidentiality of Tax Havens: Information Exchange*, ISLA OFFSHORE ADVISOR, http://www.isla-offshore.com/going-offshore/tax-havens-information-exchange/ (last updated May 14, 2012).

[65] TAX HAVEN BANKS, *supra* note 3, at 34-35.

[66] *Id.* at 35. The failure to disclose this kind of statistical information prevents the Internal Revenue Service from having an idea of how many Americans are evading taxes. *See id.* at 37.

[67] *See id.* at 4-5.

[68] *Id.* at 4.

[69] *Id.* Having a bank account in the name of a Liechtenstein foundation transfers the appearance of ownership from someone who is an entity of the U.S. and subject to U.S. tax law to a foreign entity that is not responsible for filing paperwork with the Internal Revenue Service. The Marsh account is just one example of a case the subcommittee investigated of a U.S. citizen holding his money in a Liechtenstein foundation. In the Marsh case, multiple Liechtenstein foundations were opened to store over $49 million dollars. The foundations were listed as having contingent beneficiaries and therefore no taxes had to be filed with the Internal Revenue Service because there were no U.S. beneficiaries. In order to maintain secrecy, the employees of LGT took steps to conduct business in Liechtenstein and not leave a paper trail in the U.S. After being investigated, Marsh had to pay back taxes of close to $3 million. *Id.* at 37-42.

accounts to avoid the Qualified Intermediary (hereinafter "QI") requirements that mandated disclosure of certain accounts.[70] Actions by the employees of LGT show that the bank was not merely a conduit of illicit activity conducted by U.S. citizens, but rather a willing participant and possibly even an instigator.

Despite the public blow to Liechtenstein's reputation for secrecy, it remains a profitable tax haven. After the scandal broke, the Liechtenstein government issued a statement that reaffirmed its position on bank secrecy and publicly expressed outrage that another sovereign nation would purchase stolen private financial information and disclose it to the public.[71]

The response by the Liechtenstein government reveals an insight into the future of bank secrecy. First, the government has every intention of retaining its secrecy laws and will look to strengthen its resolve to avoid such disclosures in the future. Second, any solution to reduce individual tax evasion by U.S. citizens in foreign countries must be established through a route that avoids Liechtenstein authorities. Finally, in order to avoid a standstill in investigating specific clients, information must come from within Liechtenstein. The Internal Revenue Service (hereinafter "IRS") cannot investigate clients based on the information it currently possesses. For Liechtenstein to adhere to the TIEAs, the IRS must show that it has some basis for the requested disclosure.[72]

### B. UBS and Switzerland

Switzerland has been the primary focus of bank secrecy and tax havens for decades.[73] For this reason, it serves as a perfect case study on bank secrecy. Emphasizing bank secrecy and having a reputation as a country that protects its clients' identities has allowed Switzerland to become "the world's biggest offshore banking center."[74] As a result of this reputation, UBS has attracted large numbers of wealthy Americans to open accounts in Switzerland.[75] UBS estimated that as of 2008 it had approximately 20,000 accounts from

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[70] *Id.* at 32. The Marsh account also provides an opportunity to understand how LGT was able to avoid the Qualified Intermediary reporting requirements. After Liechtenstein had signed the Qualified Intermediary agreement with the U.S. pledging to disclose the relevant tax information, LGT employees met with Mr. Marsh and explained the options he had to avoid these reporting requirements. Subsequently, Mr. Marsh consented to removing his investments in U.S. securities and transferring them to investments in Europe. This transfer allowed LGT to report the Marsh account as falling outside the Qualified Intermediary reporting requirements and not disclosing the accounts to the Internal Revenue Service. *Id.* at 41-42. A Qualified Intermediary serves as a way to disclose information about foreign accounts to the pertinent authorities in an information exchange. *See infra* Part III.A.

[71] TAX HAVEN BANKS, *supra* note 3, at 80.

[72] TIEAs are bilateral agreements reached between the governments of two countries, for example Liechtenstein and the U.S., to exchange information regarding bank's client information. *See infra* Part III.B.

[73] Emma Thomasson, *Swiss Banks Tout Stability and Secrecy to Lure Rich,* REUTERS (Oct. 5, 2011, 10:58 AM), http://www.reuters.com/article/2011/10/05/us-banks-switzerland-idUSTRE7943FW20111005.

[74] *Id.*

[75] TAX HAVEN BANKS, *supra* note 3, at 8.

Americans, almost 19,000 of which remained undeclared to U.S. authorities.[76] The estimated worth of these accounts was slightly less than $18 billion.[77]

UBS is one of the largest banks in Switzerland.[78] Another is Credit Suisse, which has also been under investigation for assisting U.S. clients evade taxes.[79] As part of its operations, UBS serves private and corporate clients by offering wealth management, investment banking, and asset management services.[80] UBS operates in over fifty countries including the U.S., where 37% of its employees work.[81] However, as a result of recent legal troubles, Switzerland's position at the top of the offshore banking world has become a bit more precarious.[82]

In 2007 Bradley Birkenfeld, a UBS private banker turned whistleblower, voluntarily provided documentation to the U.S. concerning tax evasion by wealthy U.S. clients.[83] Among the information provided were the identities of some American citizens who maintained private accounts with the bank.[84] These American citizens owned close to 19,000 undeclared accounts with an estimated value of $18 billion.[85] Instead of the U.S. collecting taxes on that $18 billion, it generates UBS close to $200 million per year.[86]

Similar to LGT, UBS instructed its employees in methods that allowed the bank to hide private clients' accounts from the IRS.[87] U.S. clients were told that if they did not invest in U.S. securities then the accounts would avoid the QI requirements and avoid disclosure.[88]

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[76] *Id.* at 9. The data received from UBS suggests that the undeclared accounts contain more money and were more profitable for the bank than those that were declared. *Id.* at 85.

[77] *Id.* at 9-10. Birkenfeld signed a Statement of Facts for the U.S. government that claimed UBS had "$20 billion of assets under management in the United States undeclared business, which earned the bank approximately $200 million per year in revenues." *Id.* at 10.

[78] *Banking*, SWISSWORLD.ORG, http://www.swissworld.org/en/economy/key_sectors/banking/ (last visited Sept. 2, 2012).

[79] Lynnley Browning & Jonathan Stempel, *U.S. Probes 8 Offshore Banks for Aiding Tax Evasion*, REUTERS (Sept. 20, 2011, 7:05 PM), http://www.reuters.com/article/2011/09/20/us-offshorebanksidUSTRE78J30E20110920. Markus Walder, the former chief of North American offshore banking for Credit Suisse was brought up on charges of conspiring to defraud the government by helping Americans evade taxes. Credit Suisse reached an agreement with German authorities to pay $200 million as part of a settlement for assisting German citizens in evading taxes. *See also* Trefis Team, *Credit Suisse Settles with German Authorities to Clear Overhang*, TREFIS (Sept. 26, 2011), http://www.trefis.com/stock/cs/articles/75232/credit-suisse-settles-with-german-authorities-to-clear-overhang/2011-09-26.

[80] *UBS in a Few Words*, UBS, https://www.ubs.com/global/en/about_ubs/about_us/ourprofile.html (last modified Aug. 29, 2012, 11:58 AM).

[81] *Id.* UBS is traded on the New York Stock Exchange. *See* Schottenstein, *supra* note 31, at 379.

[82] Browning, *Swiss Banking Secrecy*, *supra* note 2.

[83] TAX HAVEN BANKS, *supra* note 3, at 9.

[84] *Id.*

[85] David Spencer, *Cross-Border Tax Evasion and Bretton Woods II (Part 2)*, 20 J. INT'L TAX 45, 48 (2009).

[86] TAX HAVEN BANKS, *supra* note 3, at 10.

[87] In a letter to U.S. clients, the bank bragged about its secrecy by explaining that the bank faced the possibility of sanctions by a Swiss regulator should privacy laws be violated. UBS also stated that it has operated offices in the U.S. since 1939 and has been subject to the risk of U.S. authorities claiming jurisdiction over assets booked abroad, but has successfully navigated these risks. *See id.* at 87. Other methods of hiding the client's accounts include holding client mail in Switzerland and shredding all documentation after the client views the information. UBS even claims to have laptops that are programmed to receive encrypted messages that allegedly could not be accessed by U.S. customs. *Id.* at 98-101.

[88] *Id.* at 10-11. As a benchmark to explore the full effect of UBS's operations, the subcommittee investigating UBS determined that U.S. clients sold over $2 billion worth of U.S. securities in 2001 alone. This was done

Birkenfeld testified that when meeting with U.S. clients it was not necessary to explain the relationship between the Swiss bank accounts and paying taxes. He stated that not having to pay taxes was "[c]learly understood" by the U.S. clients.[89] UBS actively targeted U.S. clients by setting up events in the U.S. that were designed to attract wealthy Americans.[90] The reason for focusing on wealthy Americans was because, as one UBS document so eloquently put it, "31% of World's UHNWIs [Ultra High Net Worth Individuals] are in North America (USA + Canada)."[91] The U.S. has 222 billionaires that contribute to a worth of over $700 billion.[92] As a business operating to make a profit, it is understandable that UBS would focus on acquiring American business.

Birkenfeld provided a look behind the veil of Swiss bank secrecy into how UBS did business with U.S. clients. Igor Olenicoff, a UBS client with whom Birkenfeld worked closely, provides a good example of the relationship between a UBS banker and an American client. Mr. Olenicoff, a U.S. citizen, made billions of dollars in the real estate market.[93] When his relationship with Birkenfeld began, Olenicoff created accounts in numerous tax havens under the names of offshore corporations.[94] Despite knowing that the beneficiary of the accounts was a U.S. citizen, the accounts were not disclosed to the IRS as was required under U.S. law.[95] Over time, Olenicoff used Birkenfeld's advice to adjust his accounts in order to evade taxes and maintain anonymity.[96] As a result of providing this information and assisting the IRS, Birkenfeld was arrested while in the U.S. for his involvement in tax evasion.[97] He pled guilty to conspiracy to evade taxes with Olenicoff.[98] Throughout his

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just to avoid the QI reporting requirements. The money was then reinvested in assets that did not mandate disclosure to U.S. authorities. In a letter to clients, UBS states that even if it knows that the client is an American taxpayer, the bank will not reveal the information despite being obligated to do so under U.S. law. *See id.* at 87.

89 *Id.* at 97.

90 *Id.* at 11-12. These events included art fairs, performances by the UBS Vervier Orchestra and yachting events. During the UBS bankers' trips to the U.S., every precaution was taken to avoid a paper trail that could lead back to the client or the bank. For example, bankers were not to use any U.S. emails or make any phone calls in the U.S. to discuss a client's accounts. *Id.* at 12.

91 *Id.* at 97.

92 *Id.*

93 *Id.* at 104.

94 Mr. Olenicoff subsequently brought suit against UBS AG stating that defendants "'carefully crafted investment scheme' to defraud Plaintiffs, thousands of other investors, and the United States Treasury Department out of hundreds of millions of dollars in fees, costs, and taxes." Olenicoff v. UBS AG, No. SACV 08-1029 AG (RNBx), 2009 WL 481281, at *1 (C.D. Cal. Feb. 24, 2009); *see also* David Voreacos, *UBS Sued by Billionaire Who Pleaded Guilty in Offshore Tax Scam*, BLOOMBERG (Sept. 17, 2008, 5:23 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=arpCAztL_LmU (stating that Olenicoff, who pled guilty to tax violations, was lured into using an offshore account under the guise that his actions complied with U.S. law). As a result of the U.S. investigating him, Olenicoff paid $52 million to the U.S. for the taxes he evaded as well as penalties imposed for breaking the law. *Id.*

95 *See* TAX HAVEN BANKS, *supra* note 3, at 106; *see also Report of Foreign Bank and Financial Accounts (FBAR)*, INTERNAL REVENUE SERV., http://www.irs.gov/businesses/small/article/0,,id=148849,00.html (last updated Aug. 14, 2012) (explaining when accounts located in a foreign country should be disclosed to U.S. authorities).

96 TAX HAVEN BANKS, *supra* note 3, at 106.

97 *Id.* at 9; *see also* Indictment, United States v. Birkenfeld, No. 08-60099, 2008 WL 2113269 (S.D. Fla. Apr. 10, 2008) [hereinafter *Birkenfeld* Indictment] (stating that Birkenfeld is a U.S. citizen and therefore subject to jurisdiction of U.S. courts).

business dealings with Olenicoff, Birkenfeld hid $200 million worth of assets in Switzerland and helped Olenicoff evade $7.2 million in taxes.[99]

Birkenfeld's disclosure of clients' names has led the U.S. government to clamp down on offshore tax evasion.[100] Eight banks are under criminal investigation for their roles in assisting U.S. citizens evade taxes by moving money overseas.[101] This comes after UBS paid $780 million in penalties for assisting wealthy Americans in evading taxes and released the names of 4,450 American clients who had been patronizing UBS.[102] The original agreement also required the Swiss Justice Department to reveal the names of American clients who were suspected of tax fraud and had over 1 million Swiss francs in their accounts.[103] Despite UBS's willingness to cooperate, Switzerland has taken measures to prevent UBS from disclosing the pertinent information; it would be in violation of Swiss law.[104]

After UBS agreed to the disclosure, some 30,000 clients voluntarily declared the presence of offshore accounts to gain amnesty from prosecution.[105] The Voluntary Disclosure Program provided the incentive of reduced penalties and a lower likelihood of criminal prosecution.[106] The IRS estimates that this led to a collection of almost $2.7 billion in back taxes.[107]

### C. Effect on Bank Secrecy

Although bank secrecy has not ended as a result of these two breaches, there have been far reaching ramifications.

#### i. *Indicting Bank Employees*

After Birkenfeld was indicted, Raoul Weil, head of UBS's Wealth Management business and CEO of the U.S. cross-border business and worldwide private banking division,

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[98] *See generally Birkenfeld* Indictment, *supra* note 97 (listing the charges that Birkenfeld faced). The indictment alleges that Birkenfeld "unlawfully, willfully and knowingly, did combine, conspire, confederate and agree . . . to defraud the United States and an agency thereof, to wit, the Internal Revenue Service of the United States Department of Treasury, in violation of Title 18, United States Code, Section 371." The methods taken by Birkenfeld, such as creating shell companies and advising clients to destroy offshore banking records, explain how he was able to avoid disclosure to U.S. authorities. *Id.*

[99] TAX HAVEN BANKS, *supra* note 3, at 83.

[100] *See* Browning & Stempel, *supra* note 79.

[101] *Id.*

[102] *Id.* The $780 million fine resolves the civil and criminal allegations. The fine is made up of $380 million of profits from illegal acts and the remaining $400 million represents the lost tax revenues faced by the U.S. *See* Daly, *supra* note 29, at 147. The revelation of the 4,450 American client names may seem like a win for the U.S., but the original lawsuit demanded the names of 52,000 Americans holding offshore accounts. Najera, *supra* note 28, at 209.

[103] Najera, *supra* note 28, at 208-09.

[104] *Id.* at 209.

[105] Browning & Stempel, *supra* note 79. Voluntary disclosure has been defined as "willful correction of past mistakes to the IRS before being caught." U.S. citizens that have flocked to voluntarily disclose their offshore accounts will not be subject to criminal charges for tax evasion. *See* Daly, *supra* note 29, at 149.

[106] Najera, *supra* note 28, at 210.

[107] Browning & Stempel, *supra* note 79.

was charged with conspiracy to defraud the U.S. of income taxes.[108] The indictment alleges that Weil was involved in increasing the profits of UBS at the expense of the U.S. government by assisting wealthy American clients evade taxes.[109] It also alleges that the UBS bankers who targeted wealthy American clients reported to Weil.[110] Weil allegedly provided incentives for the bankers to obtain more business, knowing that it was in violation of the reporting requirements under U.S. law.[111] If convicted, Weil faces a maximum of five years in prison and fines of $250,000.[112] After the indictment was alleged, UBS released a statement that "UBS entities based outside the U.S. will discontinue offering cross-border private banking services to U.S. clients."[113]

In furtherance of the U.S. approach to reducing bank secrecy, Martin Lack, a former banker and head of UBS's North American business, was charged with conspiracy to defraud the U.S.[114] The IRS has developed a trend of charging private bankers with conspiracy to defraud the U.S. in hopes that each banker will reveal more information about U.S. clients and slowly open the vault of Swiss bank secrecy.[115] Lack marks the second Swiss national in a top position to be indicted by U.S. authorities.[116] The indictment alleges that Lack not only used UBS to hide assets, but also patronized Swiss cantonal banks.[117] Additionally, he allegedly encouraged his clients not to take advantage of the voluntary disclosure program which would have limited the penalties faced for tax evasion.[118]

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[108] Spencer, *supra* note 85, at 51.

[109] *Id.*; *see also* Indictment, United States v. Weil, No. 08-60322, 2008 WL 4898212 (S.D. Fla. Nov. 12, 2008) [hereinafter *Weil* Indictment] (alleging that Weil "unlawfully, willfully and knowingly, did combine, conspire, confederate and agree . . . to defraud the United States . . . in the ascertainment, computation, assessment and collection of federal income taxes").

[110] Brian Baxter, *DOJ Charges UBS Wealth Management Head with Aiding Tax Fraud*, THE AM LAW DAILY (Nov. 12, 2008, 2:01 PM), http://amlawdaily.typepad.com/amlawdaily/2008/11/breaking-doj-ch.html; *see also Weil* Indictment, *supra* note 109 (stating that Weil was involved in creating incentives to reward those employees who increased cross-border business with the U.S.).

[111] Carlyn Kolker, *Ex-UBS Executive Raoul Weil Declared a Fugitive by U.S. Judge*, BLOOMBERG (Jan. 14, 2009, 00:01 AM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aSEvhPR7Ok6A. In addition to providing incentives to bankers, Weil was also involved in training the bankers to avoid being detected by U.S. authorities during the business trips to the U.S. *See Weil* Indictment, *supra* note 109.

[112] Kolker, *supra* note 111.

[113] Baxter, *supra* note 110.

[114] Lynnley Browning, *Ex-UBS Banker Indicted On Charges of Providing Tax Evasion Services to Wealthy Americans*, HUFFINGTON POST (Oct. 2, 2011, 6:12 AM), http://www.huffingtonpost.com/2011/08/02/us-indicts-ex-ubs-banker-tax-evasion_n_916341.html [hereinafter Browning, *Ex-UBS Banker Indicted*].

[115] *See id.* Credit Suisse has reported that it was notified by U.S. officials that many of its bankers were indicted after the bank came under scrutiny for allegations of criminal conduct.

[116] *Id.*; *see also* Kevin Gray, *Ex-UBS Banker Sentenced for Aiding U.S. Tax Evasion*, REUTERS (Nov. 18, 2011, 5:11 PM), http://www.reuters.com/article/2011/11/18/us-usa-tax-ubs-idUSTRE7AH1J920111118 (discussing the charges that Lack faces). After his indictment was filed, the U.S. deemed Lack a fugitive. The U.S. can only exercise jurisdiction in limited circumstances. All U.S. citizens hiding money offshore are subject to jurisdiction of the U.S., as well as bankers who are U.S. citizens. However, the issue is a bit more obscure when the bankers are Swiss nationals. *See* Browning, *Ex-UBS Banker Indicted*, *supra* note 114.

[117] Browning, *Ex-UBS Banker Indicted*, *supra* note 114. Swiss cantonal banks are financial institutions whose major stakeholder is the canton in which the bank is located. *Banking*, *supra* note 78. As a result of their relationship with each canton, the banks are protected by the Swiss government and considered to be some of the safest banks in Switzerland. Browning, *Ex-UBS Banker Indicted, supra* note 114.

[118] *See* Browning, *Ex-UBS Banker Indicted, supra* note 114; *see also* Voreacos, *Ex-UBS Banker, supra* note 26 (explaining that Lack discouraged his clients from patronizing the amnesty program).

### ii. *Efforts to Increase Transparency*

During the recent global economic recession, the pressure on tax havens and their wealthy clients has intensified.[119] As tax haven activity becomes a more mainstream issue, tax havens are responding by slowly opening up to the public.[120] Despite pledging to increase cooperation with foreign governments, tax havens have been slow to change their ways.[121]

Switzerland recently reached an agreement with Great Britain to tax the money held in its banks by British citizens.[122] This comes after a similar deal was reached with Germany.[123] The effect of this deal is expected to net the British government close to £5 billion ($7.9 billion).[124] Although the clients' names will still remain protected under the agreement, this effort reflects a change in the bank secrecy environment from the past.[125]

The German agreement with the Swiss banks, UBS and Credit Suisse, required the banks to pay $2.6 billion as part of a settlement offer.[126] This settlement was the result of wealthy German citizens holding 200 billion Swiss francs in Swiss bank accounts that remained free from German taxation.[127] A major benefit of the deal for Swiss banks is that private client information does not have to be released.[128] In fact, a recent court decision all but guarantees the protection of client information.[129] A Swiss court decided on April 5, 2012 that Credit Suisse would not be permitted to release account data of American clients because it is protected under a tax treaty.[130]

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119 *See* Crawford, *supra* note 28.

120 *Id.*

121 *See generally id.* (discussing the promises made by tax havens to ease secrecy laws).

122 *Trouble Island: Public Anger and Shareholder Unease Threaten Tax Havens' Tranquility*, THE ECONOMIST (Oct. 15, 2011), http://www.economist.com/node/21532264.

123 *Id.*

124 *Id.*

125 *Id.*

126 *Swiss to Pay 2 bln Sfr for German Tax Deal-Paper*, REUTERS (Aug. 7, 2011, 5:28 AM), http://www.reuters.com/article/2011/08/07/swiss-tax-idUSL6E7J704B20110807. The original figure sought by Germany was closer to 10 billion francs. *Id.*

127 *Id.*

128 *Id.*

129 David Jolly, *Swiss Court Ruling Hampers a Tax Deal*, N.Y. TIMES, Apr. 12, 2012, at B5, *available at* http://www.nytimes.com/2012/04/12/business/global/swiss-court-decision-snarls-effort-to-reach-us-tax-deal.html?_r=1. The decision is based on the regulations of the TIEA. *See infra* Part III.B. The Swiss court determined that the Internal Revenue Service requested information that was overly broad and the bank could not properly identify the individuals in question. This adheres to the international norm that a treaty country may "decline the request to exchange information" when it would violate that country's domestic law. JOINT COMM. ON TAXATION, JCX-31-11, EXPLANATION OF PROPOSED PROTOCOL TO THE INCOME TAX TREATY BETWEEN THE UNITED STATES AND SWITZERLAND 43 (2011) [hereinafter PROTOCOL TO THE INCOME TAX TREATY], *available at* http://www.jct.gov. Despite this court ruling, Swiss banks have disclosed the names of some of their employees to U.S. authorities. This disclosure violates Swiss law and is of little value since many of the employees are not suspected of being linked to tax evasion. *See* Anita Greil & Marta Falconi, *Swiss Banks Share Names With U.S.*, WALL ST. J., Aug. 21, 2012, at C3, *available at* http://online.wsj.com/article/SB10000872396390443713704577601473375807822.html.

130 Jolly, *supra* note 129.

Liechtenstein has also faced mounting pressure and has pledged to ease bank secrecy laws in response.[131] By promising to ease secrecy laws, the tax havens hope to be removed from the OECD "blacklist."[132] Although these exchange agreements suggest that the countries are cooperating, in practice the results are not as clear. Jeanette Schwamberger, spokesperson for the German government, said it best when she announced, "[w]e don't care what Liechtenstein or Andorra say; it is action that counts."[133]

Although these actions appear on the surface to represent change, banking secrecy is still a growing industry. Louay Al-Doory, the head of global business development at Reyl & Cie, a Swiss wealth management firm, stated that he is "not worried at all about Swiss banking, about its long term viability, growth and ability to ride through this storm."[134] This statement has been confirmed by Pierre de Weck, head of wealth management at Deutsche Bank, by noting that Switzerland has more than made up for lost market share in Europe by tapping the expanding economies of Asia and the Middle East.[135] This rejuvenation of sorts comes after UBS experienced a large scale abandonment of wealthy private banking clients following the recent tax evasion scandal.[136]

It appears clear from the recent indictments and promises to become more transparent that the revelation of client information from whistleblowers has slowed the offshore industry.[137] However, the current measures will not be sufficient to ensure that the industry does not weather this storm.

## III. CURRENT INITIATIVES TO DETER TAX EVASION

The U.S. taxes its citizens on their worldwide income.[138] The IRS mandates that as a U.S. citizen "you must report income from all sources within and outside of the U.S."[139] Failure to report income that is earned abroad or maintained in accounts abroad is a crime.[140] Currently, the U.S. has many different laws and treaties that are designed to regulate the taxation of foreign income and investigate individuals who evade paying these taxes. To date they have proven largely unsuccessful in reducing offshore tax evasion.

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[131] Crawford, *supra* note 28. Andorra, a tax haven on the OECD "blacklist," also pledged to lower its secrecy laws. Belgium, another country with strict bank secrecy laws, claimed to be moving to automate tax information exchange. *Id.*

[132] *Id.*

[133] *Id.*

[134] Thomasson, *supra* note 73.

[135] *Id.*

[136] Deborah Ball & Goran Mijuk, *UBS Foresees Slender Profit*, WALL ST. J., Oct. 5, 2011, at C3, *available at* http://online.wsj.com/article/SB10001424052970204612504576610010757886624.html.

[137] *See generally* UBS, ANNUAL REPORT 28 (2010) [hereinafter UBS, ANNUAL REPORT], *available at* http://www.ubs.com/global/en/about_ubs/investor_relations/annualreporting/2010.html (follow "Annual report 2010" hyperlink) (stating that UBS experienced outflows from its Wealth Management business during the years of Birkenfeld's indictment). The losses were attributed to the damage to UBS's reputation and decline of the cross-border private banking business. *Id.*

[138] *Income from Abroad is Taxable*, INTERNAL REVENUE SERV., http://www.irs.gov/Businesses/Income-from-Abroad-is-Taxable (last updated Aug. 3, 2012).

[139] *Id.*

[140] *See id.*

### A. Qualified Intermediary Program

The Qualified Intermediary Program (hereinafter "QI Program") was designed to facilitate the transfer of information between countries and banks.[141] A QI is defined as "an eligible person that enters into a QI Agreement with the IRS."[142] Under this program, "[a] QI generally assumes certain documentation and withholding responsibilities in exchange for simplified information reporting for its foreign account holders."[143] The intended result of this program was to identify and disclose the accounts of American clients that derive wealth from the U.S. and attempt to hide it overseas.[144] Transparency among banks would theoretically increase by requiring the reporting of income that consists of source dividends and interest along with other fixed income.[145] The disclosing party can be either a foreign financial institution, a foreign branch of a U.S. financial institution, or a foreign corporation, among others.[146]

However, foreign banks are not going to just disclose this information, there must be an incentive. This incentive is the ability to determine the level of withholding taxes, thereby making it easier to comply with the QI requirements.[147] The intended benefit of this policy is a reduction in the prior requirements placed on banks engaging in business with customers holding U.S. securities.[148] As of 2001, both UBS and LGT took steps to enter into a QI Program with the IRS.[149]

Still, private bankers can easily avoid the QI Program's disclosure requirements. Employees of UBS and LGT, as well as any other bank operating under a QI Program, could structure the assets in an account to avoid the reporting obligations.[150] For example, one of the terms of the QI Program is that "the IRS authorizes the QI to act as a QI but does *not* obligate it to do so."[151] As such, private bankers may adopt the QI qualifications to remove the stigma and negative effect on a bank or country's reputation and then simply avoid the reporting requirements; effectively maintaining the status quo.[152] The IRS would have no cause of action as no violation occurs. Yet Swiss bankers undermine the QI Program and

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141 Schottenstein, *supra* note 31, at 372.

142 *Qualified Intermediary Frequently Asked Questions*, INTERNAL REVENUE SERV., http://www.irs.gov/Businesses/International-Businesses/Qualified-Intermediary-Frequently-Asked-Questions (last updated Aug. 2, 2012).

143 Lee & Smiley, *supra* note 49, at 36.

144 *See* Schottenstein, *supra* note 31, at 372.

145 *See Qualified Intermediary Frequently Asked Questions*, *supra* note 142. The income that is not included in the reporting requirements includes interest on deposits made with other banks if the money remains on deposit for two weeks or less, original discount from a sales transaction that was completed within two weeks, among some others listed in Treas. Reg. Section 1.6049-5(b)(7), (10), (11). Source dividends and interest are a form of determinable income. *Id.*

146 *Id.*

147 Schottenstein, *supra* note 31, at 373.

148 *Id.*

149 Spencer, *supra* note 85, at 49.

150 *Id.* In the UBS case, private bankers informed their U.S. clients that by selling U.S. securities, the QI obligations could be avoided and the accounts could remain undisclosed. *See* TAX HAVEN BANKS, *supra* note 3, at 88.

151 *Qualified Intermediary Frequently Asked Questions*, *supra* note 142 (emphasis added).

152 *See generally* Crawford, *supra* note 28 (discussing the promises made by tax havens to ease secrecy laws).

continue to aid the evasion of taxes.[153] As a result, the QI Program is ineffective in reducing tax evasion by wealthy U.S. citizens.

### B. Tax Information Exchange Agreements

The TIEAs are bilateral agreements signed by countries to exchange information in an effort to curb tax evasion.[154] The benefit of a TIEA is that the exchange of information covers both criminal and civil tax issues.[155] This is significant as tax evasion is not considered a criminal act in many tax havens.[156] An exchange agreement limited to criminal matters would focus on money laundering and not reach wealthy clients moving money offshore. In a TIEA, an authority representing each nation will make a formal request for the disclosure of pertinent information regarding a specific case that is being investigated.[157] Typically, the information being requested is held by a bank or financial institution.[158]

As a bilateral instrument, each nation has the ability to structure each TIEA to meet its desired needs. For example, Liechtenstein has a TIEA with numerous countries and discloses information relating to criminal tax matters.[159] It places such restrictions in the agreements as no direct access to bank information and requiring a court order for disclosure.[160] Switzerland, on the other hand, provides no access for civil issues, allowing bank secrecy rules to be broken only in the event of tax fraud but not tax evasion.[161] Exchanging information through bilateral agreements has the drawback of giving tax havens more power in negotiating each particular agreement, which leads to minimal disclosure.[162]

Numerous conditions, as provided for within the contractual language of the TIEAs, must be met before any disclosure. First, the requesting country must have exhausted all possible avenues in seeking this information.[163] This obstacle can pose a significant barrier because often the information required is located with the foreign bank.[164] Without the assistance of other countries, the U.S. would not have enough information to effectively investigate citizens suspected of tax evasion.[165] Second, certain privileged information is

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[153] TAX HAVEN BANKS, *supra* note 3, at 88.

[154] Lee & Smiley, *supra* note 49, at 34. To be deemed in compliance with the OECD requirements and remove the stigma of being uncooperative, a country must sign 12 TIEA agreements. JAMES K. JACKSON, CONG. RESEARCH SERV., 2009 WL 5529581, THE OECD INITIATIVE ON TAX HAVENS 10 (2009).

[155] *Testimony of Treasury Acting International Tax Counsel John Harrington Before the Senate Finance Committee on Offshore Tax Evasion*, U.S. DEP'T OF THE TREASURY (May 3, 2007), http://www.treasury.gov/press-center/press-releases/Pages/hp385.aspx.

[156] *See id.*

[157] Schottenstein, *supra* note 31, at 371-72. This means that a shot in the dark will not be permitted. The requesting authority must have a specific investigation in mind and request information relevant to that case. *See id.*

[158] Lee & Smiley, *supra* note 49, at 35.

[159] *Confidentiality of Tax Havens: Information Exchange*, *supra* note 64.

[160] *Id.*

[161] *Id.*

[162] Tax havens negotiate and structure each TIEA so that the exchange of information is regulated by its domestic law. Laura Szarmach, *Piercing the Veil of Bank Secrecy? Assessing the United States' Settlement in the UBS Case*, 43 CORNELL INT'L L.J. 409, 420-21 (2010).

[163] Schottenstein, *supra* note 31, at 371.

[164] *See* Addison, *supra* note 6, at 717-18.

[165] *See* Lee & Smiley, *supra* note 49, at 34.

protected and cannot be disclosed.[166] Third, there must be a "well-grounded" belief that there is a connection to fraudulent taxing practices.[167] As such, the IRS cannot simply "go fishing" in an attempt to discover a U.S. citizen with a bank account in Switzerland. TIEAs are a tool for investigating specific instances and are not for exploratory investigation to uncover tax evasion. Fourth, and most importantly, countries are permitted to deny the request for information.[168] One listed reason for denying a request is because it would be against public policy.[169] Maintaining the secrecy of clients is one of the strongest beliefs among citizens in Switzerland, Liechtenstein, and other tax havens, erecting another barrier of protection from disclosure.[170]

As such, the IRS faces an informational deficit necessary to get the investigation started, but is unable to acquire any because it is stored in a foreign country that will not disclose it without the evidence they hope to uncover, often resulting in a Catch-22. The U.S. has recently amended the tax treaty, but this new version also suffers from drawbacks. It will reportedly make it easier to identify tax evaders by forcing Swiss entities to disclose information on taxpayers who show certain "behavioral patterns."[171] This kind of boilerplate language provides the Swiss banks with the opportunity to argue that certain instances do not fall under the "behavioral patterns."[172] Despite this obstacle, the IRS has found a temporary solution to this problem.

### C. Whistleblowers

The IRS encourages whistleblowers by awarding the informant up to 30% of the amount the IRS collects as a result of their information.[173] Under the whistleblower provisions the informant must expose people who "fail to pay the tax that they owe."[174] By definition, anyone who is hiding their money in an offshore account with the intent of paying reduced taxes is failing to pay the tax they owe.

However, there are a few limitations to this program. The people who would be whistleblowers are often the private bankers that the U.S. has already begun to prosecute for

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[166] *Id.* at 35. This includes information that is covered under the attorney-client privilege as well as trade secrets.

[167] Burns & McConvill, *supra* note 42, at 216. As a result of these conditions, the standard OECD TIEAs serve little purpose and are often ineffective. *See* David Spencer, *Cross-Border Tax Evasion and Bretton Woods II (Part 6)*, 20 J. INT'L TAX'N 44, 50 (2009).

[168] Lee & Smiley, *supra* note 49, at 35-36.

[169] *Id.*

[170] *See* Mathiason, *supra* note 27.

[171] Laura Saunders & Goran Mijuk, *Swiss Amend U.S. Tax Treaty*, WALL ST. J., Mar. 6, 2012, at C3, *available at* http://online.wsj.com/article/SB10001424052970204276304577263710813499528.html.

[172] *See id.*

[173] *Whistleblower- Informant Award*, INTERNAL REVENUE SERV., http://www.irs.gov/uac/Whistleblower---Informant-Award (last updated Aug. 23, 2012). Birkenfeld was recently awarded $104 million in a whistleblower payout, representing 26% of the $400 million UBS paid to the IRS. Despite receiving this very generous payoff, Birkenfeld still had to serve a 40 month sentence, which he is currently finishing up in home confinement. This award, given to a felon, indicates the IRS's determination to increase pressure on tax evasion. Laura Saunders & Robin Sidel, *Whistleblower Gets $104 Million*, WALL ST. J., Sept. 12, 2012, at C1, *available at* http://online.wsj.com/article/SB10000872396390444017504577645412614237708.html.

[174] *Whistleblower- Informant Award*, *supra* note 173.

aiding tax evasion.[175] The incentive for this group of whistleblowers is avoiding prison time rather than collecting 30% of the recovered assets.

The effectiveness of using whistleblowers has produced varied results. Bradley Birkenfeld offered to raise the curtain on Swiss banking by disclosing personal contact information for private bankers and wearing a wire to meetings.[176] Despite this generous offer, the Department of Justice did not follow through.[177] As a result, it represented a missed opportunity to conduct an investigation that could have disclosed the names of U.S. clients hiding assets offshore.[178]

On the other hand, since Birkenfeld, the U.S. has indicted other bankers and pulled the curtain a bit further back on bank secrecy.[179] The biggest break came when UBS banker Renzo Gadola made a deal with the U.S.[180] Gadola, similar to Birkenfeld, assisted American citizens in evading taxes.[181] With his cooperation, the U.S. was able to prosecute two private bankers who participated in assisting tax evasion and learned a great deal about U.S. clients hiding assets abroad.[182] In addition to bringing to light new information about tax evasion, Gadola testified against these bankers.[183] Under the terms of the plea agreement, Gadola had to appear at "such grand jury proceedings, hearings, trials, and otherjudicial [sic] proceedings, and at meetings, as may be required by the United States."[184]

Thanks to his cooperation and feelings of remorse, Gadola avoided prison time and received five years probation.[185] His prosecution led to the end of his twenty-five year banking career and likely his ability to live in Switzerland.[186] Although agreeing to a deal

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[175] *See supra* Part II.C.

[176] Ken Stier, *U.S. vs. Swiss Tax Cheats: A Whistleblower Ignored*, TIME (Feb. 13, 2010), http://www.time.com/time/business/article/0,8599,1960391,00.html.

[177] *See* Defendant Bradley Birkenfeld's Motion to Extend Report Date For Purposes of Continued Cooperation With U.S. Government Authorities and For Hearing On Reconsideration of Sentence, United States v. Birkenfeld, No. 08-60099-CR-ZLOCH (S.D. Fla. 2009), *available at* http://www.kkc.com/files/Mtn%20to%20Delay%20reporting%20Date%20FINAL%203%20with%20Govt%20 Position.pdf. The motion states that Mr. Birkenfeld is ready to cooperate with the government and willing to assist any investigations against UBS clients. Despite this offer, the government has yet to make contact with Mr. Birkenfeld or even ask him "a single question about UBS, Swiss private banking, or any of Mr. Birkenfeld's former U.S. clients." *Id.*

[178] *See* Stier, *supra* note 176.

[179] *See supra* Part II.C.i.

[180] *See* David Voreacos & Susannah Nesmith, *Ex-UBS Banker Gadola Avoids Prison for Helping Tax Cheats*, BLOOMBERG BUSINESSWEEK (Nov. 20, 2011), http://www.businessweek.com/news/2011-11-20/ex-ubs-banker-gadola-avoids-prison-for-helping-tax-cheats.html; *see also* Plea Agreement, United States v. Gadola, No. 10-20878-CR-KING, 2010 WL 5474189 (S.D. Fla. Dec. 22, 2010) [hereinafter *Gadola* Plea Agreement] (stating the terms of the plea agreement entered into by Mr. Gadola).

[181] *See* Voreacos & Nesmith, *supra* note 180.

[182] Mark Daly, an attorney for the Justice Department described Gadola's participation as "extremely helpful" and said that Gadola "went through client by client, colleague by colleague, laying out their participation in tax evasion schemes." *Id.* Additionally Gadola recorded conversations he had with clients to assist in the investigation. Gray, *supra* note 116.

[183] *See Gadola* Plea Agreement, *supra* note 180; *see generally* Voreacos, *Ex-UBS Banker, supra* note 26 (stating that Gadola conspired with Martin Lack, who was indicted for conspiracy, from 1995 to 2008 and then cooperated with prosecutors).

[184] *See Gadola* Plea Agreement, *supra* note 180.

[185] *See id.* The terms of the plea agreement mandate the U.S. to recommend a lighter sentence based on Gadola recognizing that he did something wrong and taking personal responsibility for his actions.

[186] *See* Voreacos & Nesmith, *supra* note 180.

with Gadola was effective in revealing information about tax evasion committed by both bankers and American citizens, its long term viability is limited. In order to maintain peaceful terms with Switzerland and other tax havens, the U.S. will not be able to continue prosecuting Swiss citizens and then providing them with immunity, effectively stealing confidential information in violation of Swiss law.

### D. Offshore Voluntary Disclosure Initiative

The Offshore Voluntary Disclosure Initiative was created to persuade U.S. citizens to voluntarily disclose their offshore accounts prior to discovery by the IRS.[187] The incentives include reduced penalties in the form of lower fines and the possibility of avoiding criminal prosecution in return for revenue.[188] When a tax amnesty is implemented, the expectation is that there will be "a substantial windfall" from the collection of previously evaded taxes.[189] In addition to the substantial windfall, the citizens now paying taxes join the tax base and contribute to future tax revenues.[190] The advantage of this type of program is that it turns an adversarial system into one of cooperation. Traditionally, it has been a game of chess; private bankers adapt to the new requirements and structure accounts to avoid disclosure prompting the IRS to come up with new ways to reach the accounts.[191] The benefit of the voluntary disclosure window is that it provides certainty to the citizens evading taxes. For those who come forward during the voluntary disclosure periods the penalties are reduced. The alternative, continuing to evade taxes, may lead to harsh penalties and criminal prosecution.[192]

This program has been utilized in the past with mixed results. Under the 2003 version, taxpayers who came forward had the benefit of avoiding civil fraud, criminal prosecution, and penalties, but still had to pay back taxes plus interest.[193] In 2009, the program was amended, but once again focused on reducing the criminal and civil penalties.[194] With over 14,000 voluntary disclosures, the success of the 2009 version is credited to an increased ability of the U.S. government to identify and investigate individuals who have offshore accounts.[195] This is the result of the prosecution of Bradley Birkenfeld, which led to UBS disclosing the identities of clients.[196]

The risk-reward scenario for wealthy Americans hiding their money offshore no longer tips so precipitously in favor of tax havens.[197] As such, some wealthy clients are more

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187 Cornelius J. O'Reilly, *An Overview of the IRS's 2011 Offshore Voluntary Disclosure Initiative*, 13 NO. 3 BUS. ENTITIES 20, 20, 24 (2011).

188 *Id.*

189 Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 GEO. MASON L. REV. 667, 696 (2007).

190 *Id.* at 696-98.

191 *See supra* Part III.A.

192 *See* O'Reilly, *supra* note 187, at 22-23.

193 Schottenstein, *supra* note 31, at 376-77.

194 *Id.* at 377.

195 O'Reilly, *supra* note 187, at 22; *see also* PROTOCOL TO THE INCOME TAX TREATY, *supra* note 129, at 28. The prior attempts at voluntary disclosure were hampered by the inability of the government to identify non-participating individuals who maintained accounts in tax havens. *Id.*

196 *See* O'Reilly, *supra* note 187, at 22 (discussing the UBS and U.S. agreement).

197 *See id.* at 24; *see also Commissioner Douglas H. Shulman Speaks at the IRS/George Washington University 24th Annual Institute*, INTERNAL REVENUE SERV., http://www.irs.gov/uac/Commissioner-Douglas-H.-Shulman-

likely to act in a risk averse manner and disclose the account to avoid steep penalties. It must be acknowledged that the IRS has limited resources and not every American with an offshore account will be investigated or prosecuted, much less discovered.[198]

A drawback of the program is its limited duration. The 2009 program began in March and was set to last until September.[199] However, after requests from tax practitioners and attorneys, a one time extension was granted, moving the deadline to October.[200] One source stated that over the span of one week "four hundred applicants sought Foreign Bank Account Reporting . . . forms."[201] With so many people coming forward, it is illogical to extend the deadline for only one month. The program does not have to run continuously, but as experienced with the prior deadline, complications can arise from both "logistical and administrative challenges," such as failure to timely file the paperwork.[202] Additional problems arise when the government engages in multiple amnesty periods. If the U.S. government continues its pattern of tax amnesty, tax evaders are likely to expect future amnesty periods and be more resistant to disclosing accounts held overseas. They can continue evading taxes in the short term and then take advantage of amnesty in the future.[203]

The program was amended again in 2011 to provide an incentive for U.S. taxpayers to satisfy the outstanding obligations resulting from offshore accounts.[204] This version has two primary benefits: the taxpayer avoids criminal charges, and the penalties for failing to file a Report of Foreign Bank and Financial Accounts (hereinafter "FBAR") are significantly reduced.[205] The penalties for not filing an FBAR can be quite severe, sometimes even as high as half the amount in the offshore account.[206] Taxpayers are required to file an FBAR disclosing all of their offshore accounts if the aggregate total is above $10,000.[207] Voluntary disclosure is closely linked with FBAR.

### E. Report of Foreign Bank and Financial Accounts (FBAR)

The Bank Secrecy Act requires that U.S. citizens report all financial interests located in a foreign financial account.[208] The requirement to disclose these offshore accounts reaches any "United States person [who] had a financial interest in or signature authority over at least

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Speaks-at-the-IRS-George-Washington-University-24th-Annual-Institute (last updated Aug. 4, 2012) (stating that U.S. clients now understand that the possibility of avoiding suspicion when hiding money overseas has declined).

[198] Lee & Smiley, *supra* note 49, at 40.

[199] *IRS Extends Deadline for Disclosing Hidden Offshore Accounts*, INTERNAL REVENUE SERV., http://www.irs.gov/Spanish/IRS-Extends-Deadline-for-Disclosing-Hidden-Offshore-Accounts (last updated Aug. 3, 2012).

[200] *Id.*

[201] Daly, *supra* note 29, at 149.

[202] *IRS Extends Deadline for Disclosing Hidden Offshore Accounts*, *supra* note 199.

[203] Boise, *supra* note 189, at 703-04.

[204] O'Reilly, *supra* note 187, at 20.

[205] *Id.* at 23.

[206] *See infra* Part III.E. Instead of paying the higher of $100,000 or 50% of the account, there is a one time charge of 25% of the account's highest balance from 2003 to 2010. O'Reilly, *supra* note 187, at 23.

[207] *Report of Foreign Bank and Financial Accounts (FBAR)*, *supra* note 95.

[208] *Id.* Congress created the Bank Secrecy Act to reduce the use of tax havens by U.S. citizens and increase revenue by cutting back on tax evasion. *See* Kevin E. Packman & Andrew H. Weinstein, *FBAR- Foreign Bank Account Reporting Obligations: A Primer for the Practitioner*, 106 J. TAX'N 44, 44 (2007).

one financial account located outside of the United States; and [t]he aggregate value of all foreign financial accounts exceeded $10,000 at any time during the calendar year to be reported."[209] It is intended to assist the IRS in identifying individuals who are using offshore bank accounts to evade U.S. taxes.[210] Foreign banks are not subject to U.S. law and therefore are not subject to reporting requirements.[211] As such, FBAR seeks to put the onus on U.S. citizens to report their offshore bank accounts in accordance with U.S. law.

There are exceptions to the reporting requirements, but they are unlikely to affect wealthy individuals using the foreign accounts to evade taxes.[212] The minimal threshold value of $10,000 in aggregate accounts prevents private bankers from dividing up the assets into hundreds of smaller accounts. This threshold is low enough to ensure that anyone moving money overseas with the intent to evade taxes will face reporting requirements. The penalty for not filing is a monetary fine not to exceed $10,000 per violation.[213] However, if there is reasonable suspicion that the failure to file was done willfully, such as with the intent to evade taxes, the penalty increases to the greater value of $100,000 or half of the balance in the account when the violation is discovered.[214]

By imposing a strict penalty, the FBAR requirements serve as a sufficient deterrent for moving money into overseas accounts. However, the IRS recognizes ignorance of the law as a defense by an alleged perpetrator.[215] All the alleged perpetrator must do is supply the IRS with "reasonable cause" for failing to file an FBAR if caught. The taxpayer must simply state that he was not familiar with this requirement. That lack of knowledge combined with the complexity of the filing requirements is sufficient to show reasonable cause.[216]

With such an easy escape, private bankers often take advantage of the system by encouraging their clients not to report these offshore accounts.[217] The worst case scenario when failing to disclose the account is discovery by the IRS and a fine. If the person pleads ignorance of the law and starts filing that year, the penalty will be $10,000. The 50% penalty

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[209] *Report of Foreign Bank and Financial Accounts (FBAR)*, *supra* note 95. For the purposes of this requirement, a financial account "includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit, or other account maintained with a financial institution." A foreign financial account is defined as any financial account that is not located within the U.S. As such, an account with Goldman Sachs that is physically located outside of the U.S. would qualify while an account with UBS located inside the U.S. would not meet the reporting requirements. *Report of Foreign Bank and Financial Accounts*, INTERNAL REVENUE SERV., http://www.irs.gov/pub/irs-pdf/f90221.pdf (last visited Sept. 3, 2012) [hereinafter *FBAR Forms*]. For the purposes of FBAR, a U.S. person includes both citizens and resident aliens. To determine whether an individual is considered a resident, the substantial presence test can be applied. This test looks at the number of days the person was present in the U.S. during the current tax year. *See* Packman & Weinstein, *supra* note 208, at 45. A financial interest is one in which "the individual is the owner of record or has legal title, whether the account is for the owner's benefit or for the benefit of another." *Id.* at 47.

[210] *Report of Foreign Bank and Financial Accounts (FBAR)*, *supra* note 95.

[211] *See id.*

[212] *Id.* The exceptions include certain types of accounts that are owned jointly by spouses, foreign accounts owned by governmental entities or international financial institutions, IRA owners, beneficiaries of tax-qualified retirement plans, and trust beneficiaries among others. *Id.*

[213] *FBAR Forms*, *supra* note 209.

[214] *Id.* The criminal penalties are steeper; the fine is increased to $250,000 and the perpetrator can be imprisoned for up to five years. *See* Packman & Weinstein, *supra* note 208, at 49.

[215] Hale E. Sheppard, *Evolution of the FBAR: Where We Were, Where We Are, and Why it* Matters, 7 HOUS. BUS. & TAX L. J. 1, 25 (2006).

[216] *Id.*

[217] *See, e.g.*, Browning, *Ex-UBS Banker Indicted*, *supra* note 114.

is only present for willfulness and cannot be broached when lack of knowledge is pled.[218] Therefore, it is only logical for a private banker to instruct his client to keep the money in an offshore account free of taxes and, if discovered, plead ignorance, pay the $10,000 fine, and pay the taxes, which he would have been paying all along.

Despite all the alleged scheming, the truth seems to be that most people are in fact completely oblivious of the requirement to file an FBAR.[219] The result is an initiative that has the potential to be successful, but falls short as it is not implemented properly; the regulation is too obscure and the penalty structure is too lenient to dissuade wealthy Americans.

### F. The Stop Tax Haven Abuse Act

The Stop Tax Haven Abuse Act is a proposed bill designed to "restrict the use of offshore tax havens and abusive tax shelters to inappropriately avoid Federal taxation."[220] The bill was introduced by Carl Levin in the Senate and by Lloyd Doggett in the House of Representatives in 2005.[221] The bill has since been reintroduced in numerous iterations over the years but has yet to be passed.[222] If implemented, the legislation has the potential to collect billions of currently evaded tax dollars by stifling the use of tax havens by wealthy individuals.[223] This in turn would lighten the burden on the middle class citizens who have had to bear the weight of paying extra taxes to support the government.[224]

The Stop Tax Haven Abuse Act defines tax havens as countries where the secrecy laws are unreasonably strict and prevent the U.S. from enforcing its laws upon its citizens who are using banks located in these countries.[225] After defining a tax haven, prior versions of the Stop Tax Haven Abuse Act listed nations currently classified as tax havens; a political move to draw negative attention towards them.[226] This has since been discontinued in the current version.[227] That negative attention was precisely the drawback of the Stop Tax Haven Abuse Act. Instead of facilitating cooperation like the other initiatives, the purpose of this measure was to identify and attach a negative reputation to those countries that are not cooperating internationally.[228] However, this proved ineffective because the reputation that is stigmatized as a negative trait was actually the very quality that attracted wealthy clients to those banks and countries.[229] In fact, Singapore is reported to have said that "it will not budge, despite pressure to undo its strict bank secrecy provisions" because that is what brings in capital.[230]

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[218] *See* Sheppard, *supra* note 215, at 25-26.

[219] *Id.* at 26.

[220] Stop Tax Haven Abuse Act, H.R. 2669, 112th Cong. (2011).

[221] *Levin Unveils Stop Tax Haven Abuse Act*, LEVIN.SENATE.GOV (July 12, 2011), http://www.levin.senate.gov/newsroom/press/release/levin-unveils-stop-tax-haven-abuse-act.

[222] *Id.*

[223] Todero, *supra* note 58, at 258-59.

[224] *Id.* at 260.

[225] *See id.* at 263.

[226] *See id.* at 243-44.

[227] *See* Stop Tax Haven Abuse Act, H.R. 2669, 112th Cong. (2011) (noting the absence of black listed countries).

[228] Todero, *supra* note 58, at 242.

[229] *See id.* at 268-69.

[230] *Id.*

A detailed analysis of the Stop Tax Haven Abuse Act is beyond the scope of this Note, however, some of the general provisions focus on giving U.S. authorities more power. Under the Stop Tax Haven Abuse Act, the Treasury would be able to take certain steps that would place a heavier burden on those foreign countries whose actions hinder U.S. tax enforcement.[231] Additional terms of the agreement seek to apply monetary fines to corporations and increase the penalties individuals must pay for aiding tax evasion.[232]

### G. Foreign Account Tax Compliance Act

The purpose of the Foreign Account Tax Compliance Act (hereinafter "FATCA") is to reduce tax evasion committed by U.S. citizens.[233] FATCA places increased burdens on both U.S. citizens and foreign financial institutions.[234] It requires certain U.S. taxpayers to report their foreign held assets to the IRS.[235] It also places more pressure on the foreign financial institutions to disclose pertinent information to the IRS.[236] FATCA is intended to "require[] that virtually every financial institution in the world report any accounts held by Americans."[237] Instead of the threshold of $10,000 applied under the FBAR requirements, FATCA requires reporting when a U.S. citizen holds over $50,000 in foreign markets.[238] However, the penalty for failure to report remains at $10,000.[239]

In order for these requirements to take effect, the foreign institution must enter into an agreement with the IRS by the middle of the year 2013.[240] As a result of the agreement, the institution must conduct due diligence and report to the IRS all the clients who are U.S. citizens.[241] The incentive to enter into the agreement is to avoid the 30% withholding tax on all U.S. transfers.[242]

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[231] *Summary of the Stop Tax Haven Abuse Act of 2011*, LEVIN.SENATE.GOV (July 12, 2011), http://levin.senate.gov/newsroom/press/release/summary-of-the-stop-tax-haven-abuse-act-of-2011.

[232] *Id.*

[233] *Summary of Key FATCA Provisions*, INTERNAL REVENUE SERV., http://www.irs.gov/Businesses/Corporations/Summary-of-Key-FATCA-Provisions (last updated Aug. 4, 2012).

[234] *See id.*

[235] *Id.*

[236] *Id.* Whereas FATCA places the pressure on the financial institutions, FBAR focuses instead on the individual taxpayer disclosing his foreign accounts to the IRS. *See Report of Foreign Bank and Financial Accounts (FBAR)*, *supra* note 95. The increased pressure is a result of increasing the due diligence banks must perform to meet the FATCA standards. *See Financial Institutions and Investment Funds Should Prepare Now For FATCA*, *Financial Regulatory Forum Blog*, REUTERS (Apr. 4, 2012), http://blogs.reuters.com/financial-regulatory-forum/2012/04/04/financial-institutions-and-investment-funds-should-prepare-now-for-fatca/ (discussing some of the requirements under FATCA).

[237] Mark Scott, *Tax Haven Crackdown Creates Opportunities for Bankers*, *Dealb%k*, N.Y. TIMES (Apr. 5, 2012, 12:49 PM), http://dealbook.nytimes.com/2012/04/05/crackdown-on-tax-havens-opens-opportunities-for-bankers/.

[238] *Summary of Key FATCA Provisions*, *supra* note 233.

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] O'Reilly, *supra* note 187, at 24.

Five European nations (France, Germany, Italy, Spain, and the United Kingdom) have expressed approval of FATCA.[243] Additionally, those five countries stated their intentions of enacting similar laws.[244] FATCA will be implemented gradually from 2013 to 2017 so that foreign banks do not violate local rules in conforming to the IRS requirements.[245] Since it has yet to be implemented, the effects and success will not be known until after 2013 at the earliest. Some estimates say it will take five years from its passage in 2010 for FATCA to be fully implemented.[246] That estimate assumes that the regulations will not be changed, which is far from certain.[247]

Although FATCA is still in the early stages of its development, many predictions have been made about the possible repercussions once it takes effect. As a result of the more stringent regulations of FATCA, it is estimated that over 6 million Americans currently living outside the U.S. are contemplating denouncing their citizenship.[248] This is based on many foreign banks' concerns that the increased risk of dealing with U.S. citizens through increased disclosures will no longer be worth the benefit.[249] Instead of monitoring all the new strict requirements created by the U.S government, some banks feel that targeting customers in Latin America and Asia is a more efficient use of resources.[250] The downside will be felt more by regular citizens not evading taxes, who will now find it more difficult to live and conduct business abroad.[251]

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[243] John D. McKinnon & Laura Saunders, *Foreign Deal on Tax Dodging*, WALL ST. J., Feb. 9, 2012, at C2, *available at* http://online.wsj.com/article/SB10001424052970203315804577211350573490884.html.

[244] *Id.*

[245] *Id.*

[246] *See* Christopher Chung, *FATCA: The IRS's Very Big Stick*, *Private Equity Beat Blog*, WALL ST. J. (June 14, 2012, 2:06 PM), http://blogs.wsj.com/privateequity/2012/06/14/fatca-the-irs-very-big-stick/.

[247] *Id.* Peter Schuur of Deveboise & Plimpton LLP stated that "[t]he FATCA rules are still very much a moving target." This reflects the uncertainty that practitioners face in attempting to meet the FATCA regulations. *Id.*

[248] *See* Giles Broom, *Rich Americans Give Up Their Passports*, BLOOMBERG BUSINESSWEEK (May 1, 2012), http://www.businessweek.com/printer/articles/59276?type=bloomberg. In the last year alone 1,780 people gave up their citizenship. This is compared to the 235 who did so in 2008. *See* Sanat Vallikappen, *U.S. Millionaires Told Go Away as Tax Evasion Rule Looms*, BLOOMBERG BUSINESSWEEK (May 8, 2012, 11:46 PM), http://www.bloomberg.com/news/2012-05-08/u-s-millionaires-told-go-away-as-tax-evasion-rule-looms.html. The most high profile example is Eduardo Saverin, the co-founder of Facebook, who stands to save $67 million in taxes by renouncing his citizenship. *See* Kathleen Hunter, *Schumer Proposes Tax on People Like Facebook's Saverin*, BLOOMBERG (May 17, 2012, 8:36 PM), http://www.bloomberg.com/news/2012-05-17/schumer-proposes-tax-on-people-like-facebook-s-severin.html.

[249] *See* Broom, *supra* note 248. Certain banks have already terminated accounts held by U.S. citizens after only the announcement of the increased disclosure obligations. Although recent proposals have suggested ways to reduce the burden, for example, by permitting foreign banks to report the information to their own governments instead of the IRS, this is unlikely to convince banks that American clients are now worth the effort. *See* John D. McKinnon, *Treasury Eyes Funds Hidden Overseas*, WALL ST. J., July 27, 2012, at A4, *available at* http://online.wsj.com/article/SB10000872396390444840104577551273844167062.html.

[250] *See* Scott, *supra* note 237; *see also* Vallikappen, *supra* note 248 (stating that Bank of Singapore has already declined millions of dollars from U.S. citizens because of the cost of dealing with FATCA). U.S. citizens are no longer required for banks to grow business; Asia now has the fastest growing number of millionaires looking to invest. *Id.*

[251] *See* Vallikappen, *supra* note 248.

## IV. REGULATING AND PENALIZING CORRESPONDENT BANKS

Tax havens have become so intertwined in U.S. and European economies that terminating them is no longer a plausible objective. The system is too big to fail: "[o]ver half of all world trade passes through tax havens," and the estimated amount of money held offshore by individuals is around $11.5 trillion.[252]

To remedy the revenue drain on the U.S. and other countries, legislation must be passed at the domestic level, targeting domestic actors. Correspondent banks, such as UBS's affiliates in the U.S., operate on behalf of parent banks often located in tax havens.[253] These banks are subject to U.S. jurisdiction and laws, and thus should be the focal point to reducing tax evasion.[254]

The consistent problem with initiatives undertaken to curb the use of tax havens is that they focus on either the individual with the foreign account or the foreign country.[255] The problem with this approach is that private bankers have demonstrated an ability to circumvent disclosure requirements.[256] Additionally, Switzerland and other tax haven countries are not subject to U.S. law. As such, the U.S. can enter into treaties and implement legislation intended to shame the tax havens, but that does not change the fact that this enterprise is extremely profitable and will continue.

Instead, focus and pressure need to be applied to the banks that make these transactions possible.[257] The tools for this solution are already in place, but must be refined and expanded in order to be successful. Currently, the proposed Stop Tax Haven Abuse Act Section 104 requires "U.S. financial institutions that open accounts for foreign entities controlled by U.S. clients or open foreign accounts in non-FATCA institutions for U.S. clients to report the accounts to the IRS."[258] Further, it grants the IRS the authority to place sanctions on foreign financial institutions.[259] Jurisdiction can be conferred on these foreign institutions by treating offshore shell corporations as affiliates to the parent corporation even if there is so-called "independence."[260] The sanctions mentioned are the ability to limit the access to U.S. markets by targeting the correspondent banks operating in the U.S. and by prohibiting these banks from "conducting transactions with such foreign institutions."[261] These initiatives

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[252] *Tax Havens Cause Poverty*, TAX JUSTICE NETWORK, http://www.taxjustice.net/cms/front_content.php?idcatart=2&lang=1 (last visited Sept. 4, 2012).

[253] *See* TAX HAVEN BANKS, *supra* note 3, at 81.

[254] *See Foreign Banks and the Federal Reserve*, FED. RESERVE BANK OF N.Y., http://www.ny.frb.org/aboutthefed/fedpoint/fed26.html (last updated Apr. 2007).

[255] *See supra* Part III.

[256] *See supra* Part III.A.

[257] *See* Indictment, United States v. Weil, No. 08-60322, 2008 WL 4898212 (S.D. Fla. Nov. 12, 2008) (stating that the Swiss Bank operates in the Southern District of Florida as well as other locations in the U.S., thereby conferring jurisdiction).

[258] *See Summary of the Stop Tax Haven Abuse Act of 2011*, *supra* note 231; Stop Tax Haven Abuse Act, H.R. 2669, 112th Cong. § 104 (2011).

[259] Edward Tanenbaum, *The Annual Stop Tax Haven Abuse Act Show*, BLOOMBERG BNA (Sept. 12, 2011), http://www.bna.com/annual-stop-tax-n12884903413/.

[260] PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS AND SECRECY, STAFF REPORT 10 (2006), *available at* http://www.hsgac.senate.gov/subcommittees/investigations/hearings/tax-haven-abuses-the-enablers-the-tools-and-secrecy.

[261] Tanenbaum, *supra* note 259.

are promising in terms of curbing the use of tax havens; however, they are overly broad and have consequences. The solution must be narrowly tailored to achieve the goal without creating problems in other sectors of the U.S. economy.

### A. Problems with the IRS's Current Approach

The most recent version of the Stop Tax Haven Abuse Act requires that:

> Any financial institution directly or indirectly opening a bank, brokerage, or other financial account for or on behalf of an offshore entity . . . in a non-FATCA institution . . . at the direction of, on behalf of, or for the benefit of a United States person shall make a return according to the forms or regulations prescribed by the Secretary.[262]

This statement is overly broad and leaves the door open for private bankers to create loopholes. The regulation focuses on any financial accounts for offshore entities with a connection to a U.S. citizen. However, the connection to a U.S. citizen is not always clear and often difficult to determine, such as when foundations are set up to hide the identity of the account holder.

Additionally, the proposed penalty of sanctions against these financial institutions, such as limiting access to U.S. markets through correspondent banks or altogether cancelling their business in the U.S., would have the opposite effect of that intended.[263] As of 2006, foreign banking institutions held in excess of $1 trillion worth of assets and "11 percent of the total commercial banking assets in the United States."[264] This level of integration into the U.S. economy simply cannot be removed just to recover $100 billion in lost revenues from tax evasion. It would merely substitute one problem for another.

The substituted problem alluded to is the increased level of unemployment. Take UBS for example. UBS operates correspondent banks in the U.S.[265] The proposed penalty of terminating UBS's operations in the U.S. would significantly hurt UBS considering the U.S. constitutes 34% of UBS AG's total operating income.[266] However, scaling back UBS's access to U.S. markets or terminating that access altogether is simply not tenable. For the year ending 2010, UBS employed over 22,000 people in the U.S.[267] Terminating UBS's involvement in the U.S. would cause 22,000 people to become unemployed.

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[262] H.R. 2669 § 104. A "non-FATCA institution" is defined under the Internal Revenue Code Section 7701(a)(51) as "any financial institution that does not meet the reporting requirements of section 1471(b)." *Id.* § 102. The reporting requirements under Section 1471 of the Internal Revenue Code require that the institution maintain information on the holders of each account to determine whether they fall within the reporting requirements and if so, provide that information to the proper U.S. authorities by conforming to the due diligence procedures. I.R.C. § 1471 (2006).

[263] *See* Tanenbaum, *supra* note 259. A correspondent bank is defined as "a financial institution that provides services on behalf of another, equal or unequal, financial institution." Correspondent banks are most often used when a foreign financial institution wants to expand its business into a foreign country. *Correspondent Bank*, INVESTOPEDIA, http://www.investopedia.com/terms/c/correspondent-bank.asp#axzz1m5SILi3T (last visited Sept. 4, 2012).

[264] *Foreign Banks and the Federal Reserve*, *supra* note 254.

[265] UBS, ANNUAL REPORT, *supra* note 137, at 362-64.

[266] *Id.* at 297.

[267] *Id.* at 54.

This effect will be magnified when the policy is expanded to other financial institutions operating correspondent banks in the U.S. During a period of economic turmoil, implementing this strategy would cripple the U.S. economy at the expense of collecting evaded taxes. Furthermore, the decreased tax revenue from increased unemployment would offset any gains made through this policy. The goal of the Stop Tax Haven Abuse Act is to improve the economic health of the U.S. and implementation along these lines would have the contrary effect.[268]

### B. Alternatives to Terminating Correspondent Banks

To achieve the desired effect, the correspondent banks should face strict financial penalties instead of terminating operations. UBS has a business division entitled Wealth Management Americas that focuses on providing ultra high net worth U.S. citizens with financial advice.[269] This business segment should be regulated and subject to close review because private bankers target these individuals to evade taxes.[270] Therefore, there should be a provision focusing on these ultra high net worth U.S. citizens opening bank accounts with a correspondent bank in the U.S.

For example, the provision would read:

> Any correspondent or affiliate financial institution operating in the United States, opening a bank, brokerage, or other financial account on the behalf of a high net worth United States citizen shall perform due diligence to discover and disclose any foreign accounts that that U.S. citizen has with that financial institution's affiliates located around the world.[271]

The result of this provision would be that when a high net worth U.S. citizen opens an account with a UBS affiliate in New York, that UBS affiliate is required to check the records of every UBS affiliate around the world to determine if that client has any other accounts with the bank, which must then be disclosed to the proper U.S. authorities.[272]

The rationale behind this proposed addition is that when wealthy Americans want to access the offshore market they will utilize a bank that they trust and have patronized before

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[268] *See generally* Stop Tax Haven Abuse Act, H.R. 2669, 112th Cong. (2011) (stating that the bill is designed to stop U.S. citizens from avoiding federal taxation). Reducing the number of people who succeed in avoiding taxes increases the government revenue and helps the economy. *See id.*

[269] UBS, ANNUAL REPORT, *supra* note 137, at 85.

[270] *See* TAX HAVEN BANKS, *supra* note 3, at 97.

[271] *See* Bryan S. Arce, *Taken to the Cleaners: Panama's Financial Secrecy Laws Facilitate the Laundering of Evaded U.S. Taxes*, 34 BROOK. J. INT'L L. 465, 482 (2009). The self-regulation by banking employees can be complicated and extensive and as a result the due diligence would not be performed as meticulously. In order to remedy this, restricting the due diligence to subsidiaries and parent banks would provide more responsibility because the resulting punishment for failing to meet due diligence requirements would fall exclusively on the bank the employee works for. *See id.*

[272] *See generally High Net Worth Individual- HNWI*, INVESTOPEDIA, http://www.investopedia.com/terms/h/hnwi.asp#axzz1mxDpMBO7 (last visited Sept. 4, 2012) (defining a high net worth individual as someone who has more than $1 million in liquid financial assets). Expanding the due diligence requirements to high net worth individuals instead of only ultra high net worth individuals, those with wealth in excess of $50 million, may expand the difficulty in investigating all of these individuals, but it will also cast a wider net to provide the opportunity to discover more people evading taxes. *See id.*

which then forces disclosure.[273] As it stands, UBS Wealth Management Americas could provide a streamline into Wealth Management located in Switzerland and the evasion of taxes with the parent bank. This strategy would require Wealth Management Americas to disclose any accounts that might exist at UBS in Switzerland. This form of disclosure would constrain the due diligence of each private banker to manageable levels. If a private banker is expected to check for any possible accounts in any bank located around the world, the disclosure would be reduced. Other banks, such as LGT for example, have no incentive to cooperate with UBS in disclosing confidential client lists or information.[274] This proposed structure on the other hand would only mandate banks to check with their parent corporation and subsidiaries for accounts.

If the provision is violated, a steep financial penalty should be levied on the correspondent bank. The amount of the penalty should be designed to recover a portion of the $100 billion of lost taxes every year.[275] Therefore, the penalty would serve two functions. It would deter tax evasion by punishing the banks that willfully violate the tax laws and, it would recover money from the banks that facilitate tax evasion.

If a UBS bank operating in New York opens an account for an American citizen and discovers that the client has an offshore account located in Switzerland, that fact must be reported. Failure to disclose that information would subject that UBS branch in the U.S. to a strict penalty, such as 25% of the revenue of its Wealth Management business segment. A penalty that stringent would force UBS AG, the parent company, to choose between continuing to operate in the U.S. and face the risk of substantial penalties or cut back on assisting wealthy Americans in evading taxes.[276] This essentially would reduce each parent company to the choice of realizing profits from legitimate business in the U.S. or realizing profits from sheltering individuals from taxes in Switzerland. Under this system, the IRS would police the banks because there is no question of jurisdiction and no barriers to disclosure.[277]

From the U.S. government's standpoint, the goal is to reduce tax evasion. However, the alternative is also desirable: there would be increased revenue resulting from the penalties paid by banks that violate the disclosure requirements. Either way, there is a decrease in the $100 billion in lost revenues each year because of tax evasion.

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273 *See generally* Indictment, United States v. Weil, No. 08-60322, 2008 WL 4898212 (S.D. Fla. Nov. 12, 2008) (indicating that bankers were instructed to tell clients of the relationship between the offshore UBS branches and their influence in the U.S.).

274 *See* Cain, *supra* note 23.

275 *See* TAX HAVEN BANKS, *supra* note 3, at 1.

276 *See generally* Tanenbaum, *supra* note 259 (stating that the IRS should limit a banks access to the U.S. market as a penalty). The benefit of allowing a bank to reach a decision on its own is the realization of increased revenue. This method allows the U.S. government to collect the money from the penalty regardless of what actions the parent company takes. Preventing the bank from operating within the U.S. simply reduces the revenue of the U.S. with no perceived benefit.

277 *See generally Bank-Client Confidentiality*, *supra* note 29 (stating that Switzerland only waives bank client confidentiality for criminal matters). The IRS does not have to go through the Swiss government in order to gain access to the accounts because they are located within the U.S. Additionally, in the U.S., tax evasion is a crime so the IRS would have access to the accounts if there is a suspicion that they are being used for tax evasion. *See* Cornell University Law School, *supra* note 28.



 

### C. Implementation

i. *Bank Subsidiaries*

International banks operate subsidiaries around the world with the goal of maximizing profit. Therefore, the way to reduce tax evasion and the use of offshore foreign accounts is to implement a process that makes it unprofitable for the banks to engage in these transactions.

UBS and LGT have a global presence and operate subsidiaries in many major economies.[278] LGT has offices located in Germany, Austria, the United Kingdom, China, Japan, and the U.S., among other smaller financial centers.[279] Similarly, UBS has foreign branches located in France, Japan, Russia, Italy, Austria, Great Britain, Canada, Australia, and the U.S., among others.[280] The governments of these countries have jurisdiction over the subsidiary banks based on their presence in each country and can therefore regulate those subsidiaries under domestic law.[281] The banks that operate in the U.S. and European countries are obligated to abide by those countries' laws. For example, all foreign branches of banks that have locations in the U.S. must abide by Federal Reserve regulations.[282] The result is a network of domestic laws that have a global impact. Targeting tax evasion through a global scale is the only viable solution. As a global problem, tax evasion cannot "be resolved by national means alone. Solutions require regional and even global mechanisms of cooperation and coordination."[283]

Once the U.S. implements the proposed provision above, other countries around the world theoretically would follow by implementing similar domestic laws.[284] The result would be an international system implemented on the domestic level through national laws of participating countries. The foundation for this system has already been laid with five European countries supporting FATCA and pledging to pass similar legislation.[285]

UBS's financial report states that the Wealth Management & Swiss Bank division is the company's most profitable division for the fiscal year 2010.[286] Along with this segment's

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278 LGT GROUP, ANNUAL REPORT 48-49 (2011) [hereinafter LGT, ANNUAL REPORT], *available at* http://www.lgt.com/shared/.content/media_relations/medien-downloads/Geschaeftsbericht_2011_Group_en.pdf; UBS, ANNUAL REPORT, *supra* note 137, at 362-64.

279 LGT, ANNUAL REPORT, *supra* note 278, at 48-49.

280 UBS, ANNUAL REPORT, *supra* note 137, at 362-64.

281 *See generally* Browning & Stempel, *supra* note 79 (stating that the U.S. is arguing that banks that have no formal presence in the country can be subject to jurisdiction through telephone conversations and emails, which would establish a presence within the U.S.).

282 *Foreign Banks and the Federal Reserve*, *supra* note 254.

283 Graham Allison, *The Impact of Globalization on National and International Security*, *in* GOVERNANCE IN A GLOBALIZING WORLD 72, 84 (Joseph S. Nye Jr. & John D. Donahue eds., 2000).

284 *See generally* McKinnon & Saunders, *supra* note 243 (stating that governments of five European nations had the intention of adopting a similar law to FATCA).

285 *Id.*

286 UBS, ANNUAL REPORT, *supra* note 137, at 37. LGT is similar, however for the year 2010 its revenue stream was far less diversified. LGT received a majority of its revenue, just less than 50%, from Liechtenstein. The second most profitable country for LGT was Switzerland. The U.S. was third, representing just over 10% of LGT's revenue. As such, any actions taken by the U.S. to punish LGT located in the U.S. would not have the same effect as those taken against UBS. As it stands now, any action taken by the U.S. to regulate LGT's local businesses may not be a determinative factor in ceasing tax abuses by wealthy U.S. clients. That being said, LGT maintains a majority of its assets, close to 50%, in the Americas and Europe. Consequently, if the result is as intended, and the U.S.'s actions are followed by countries in Europe, then LGT would have to

success, UBS operates a less profitable division in the Americas.[287] This division contributed the second highest operating income for the fiscal year 2010.[288] The total operating income was composed of 40% from Switzerland and 34% from the U.S., while the rest of Europe was much further behind, accounting for only 14%.[289] Clearly, the U.S. is a significant portion of UBS's income and losing business in the U.S. would threaten its viability in the future. A penalty imposed on the revenue from business in the U.S. would certainly put pressure on UBS to rethink its business strategy.

In fact, this strategy may be able to force UBS into reducing its services that target wealthy U.S. citizens and thereby reduce tax evasion in the U.S. According to UBS's most recent financial statement, the Asia Pacific region reported growth in its business from high net worth clients.[290] Additionally, UBS is positioned to increase its market share in Asia, which is considered to be a growing market for high net worth individuals.[291] An increase in penalties and cost of doing business in the U.S. could force some of these companies to focus on the emerging Asian markets and shift away from targeting wealthy clients in the U.S. as the risk may no longer be worth the reward.[292] Although many of the initiatives taken have sought a global effect, it must not be overlooked that the primary objective is to protect the U.S. economy.

ii. *Know-Your-Customer Requirements*

To properly implement the disclosure requirements of correspondent banks operating in the U.S. it is necessary to expand the "know-your-customer" requirements to tax evasion. The purpose of the know-your-customer requirements is to "enable a financial institution to form a reasonable belief that it knows the true identity of each customer and, with an appropriate degree of confidence, knows the types of business and transactions the customer is likely to undertake."[293] This includes following the money to track down the beneficial owner, an important step in discovering if someone is hiding money offshore.[294] The U.S. generally requires that a financial institution obtain the name, address, date of birth, and the Taxpayer Identification Number when opening an account.[295] It is the responsibility of each financial institution to determine what level of due diligence is required for each

rethink its business strategy to continue to be a prominent global actor. *See* LGT, ANNUAL REPORT, *supra* note 278, at 52, 66.

[287] UBS, ANNUAL REPORT, *supra* note 137, at 85.

[288] *Id.* at 297.

[289] *Id.* The United Kingdom alone represents 9% and the rest of Europe contributes 5% to the total operating income. *See id.*

[290] *See id.* at 73; *see also* Browning, *Swiss Banking Secrecy, supra* note 2 (confirming the analysis of UBS that Asia is an emerging market in the offshore world).

[291] UBS, ANNUAL REPORT, *supra* note 137, at 75.

[292] *See* Mathiason, *supra* note 27.

[293] FIN. ACTION TASK FORCE, GUIDANCE ON THE RISK-BASED APPROACH TO COMBATING MONEY LAUNDERING AND TERRORIST FINANCING 26 (2007), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/High%20Level%20Principles%20and%20Procedures.pdf.

[294] *Id.* As mentioned in the LGT case, private bankers created trusts that disguised the ownership of the assets so that clients could avoid paying the taxes they owed in the U.S. *See supra* Part II.A.

[295] John W. Campbell, *'Know Your Customer' Quick Reference Guide United States of America*, PWC, http://www.pwc.com/gx/en/financial-services/assets/know-your-customer-quick-reference-guide.pdf (last updated Jan. 2011).

customer.[296] The IRS maintains a list of the jurisdictions with approved know-your-customer requirements.[297]

After September 11, 2001, banks have increased the scrutiny levels for money laundering, but have yet to do so for tax evasion.[298] The IRS should require that banks operating in the U.S. deem the accounts exceeding a certain threshold value to be high risk for tax evasion and apply increased due diligence. It is reasonable that people with millions of dollars are of a higher risk of evading taxes than those with only thousands of dollars.[299]

In addition to the closer review, financial institutions should be encouraged to file Suspicious Activity Reports for those suspected of tax evasion.[300] The regular use of Suspicious Activity Reports is restricted primarily to money laundering and terrorist financing.[301] The reporting requirements vary by country, but in all countries a report must be filed when a "threshold of suspicion" is attained.[302] The requirements should be amended in the U.S. to reflect the threat of tax evasion. This provision has been proposed in the Stop Tax Haven Abuse Act, but as of yet has not been implemented.[303] If there is a sharp decrease or an unexplained gradual decrease in the amount of funds stored in an account then a Suspicious Activity Report should be filed. The increased taxes resulting from discovering money transfers before they are moved overseas for the purpose of evading taxes would more than offset the slight cost of increased due diligence under the lower threshold.

Under the Bank Secrecy Act and Anti-Money Laundering Act, the reporting requirements focus on money laundering and not tax evasion.[304] The due diligence requirements force all financial institutions that hold accounts for non-U.S. persons to

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[296] FIN. ACTION TASK FORCE, *supra* note 293, at 26.

[297] *Qualified Intermediary Frequently Asked Questions*, *supra* note 142.

[298] *See* Alvin D. Lodish, *How Well Do You Need To "Know Your Customer?"*, BANKTECH (Dec. 2, 2003), http://banktech.com/risk-management/16401323.

[299] *See generally* TAX HAVEN BANKS, *supra* note 3, at 34-74 (listing high net worth U.S. clients who evaded taxes by patronizing LGT).

[300] The Bank Secrecy Act of 1970 encourages the filing of suspicious activity in manners relating to money laundering and tax evasion. *See FinCEN's Mandate From Congress*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/statutes_regs/bsa/ (last visited Sept. 5, 2012).

[301] FIN. ACTION TASK FORCE, *supra* note 293, at 27. The reporting requirements apply to financial institutions that operate in the U.S. This includes U.S. branches of foreign banks; hence UBS would be subject to the reporting requirements. The current requirements specify that a federal criminal violation should be reported but then specifies that the financial institution must believe that it is a victim of such transaction. Therefore, no bank is going to report tax evasion because its parent company will be receiving increased business and the subsidiary will not be perceived as a victim. The instructions to the report specify that transactions of more than $5,000 should be reported if there is a reasonable suspicion that the funds are from some form of illegal activity or the transfer is disguising money from an illegal activity. This would preclude tax evasion, which for the most part is derived from legal activity. *See Suspicious Activity Report*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/forms/files/f9022-47_sar-di.pdf (last updated Mar. 2011).

[302] FIN. ACTION TASK FORCE, *supra* note 293, at 27.

[303] *See* Stop Tax Haven Abuse Act, H.R. 2669, 112th Cong. § 206 (2011). Expanding the use of Suspicious Activity Reports to tax evasion and even civil issues will serve to increase transparency and catch questionable banking practices. *See* JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 34 (2010).

[304] *Bank Secrecy Act and Anti-Money Laundering*, FED. DEPOSIT INS. CORP., http://www.fdic.gov/regulations/examinations/bsa/bsa_13.html (last updated July 8, 2004).

establish policies with the aim of detecting money laundering.[305] These provisions should be expanded to address tax evasion and U.S. citizens.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (hereinafter "USA PATRIOT Act") provides numerous opportunities for the expansion of disclosure to include tax evasion.[306] In the wake of September 11, 2001, the USA PATRIOT Act was passed to enhance the investigation and subsequent prosecution of international money laundering and other criminal abuses resulting from international financial transactions.[307] Title III specifically focuses on international money laundering.[308] Enhanced due diligence is required by a financial institution when certain factors, such as geography and the nature of the business with an emphasis on funds transfers and foreign private banking accounts, make a customer a high risk client.[309] By incorporating tax evasion as a qualification for high risk and enhanced due diligence, the discovery of foreign bank accounts would become more prevalent.

In Section 302, the government notes that correspondent banks are susceptible to the actions of foreign banks in disguising the beneficial owner and thereby facilitating money laundering.[310] Despite being subject to close review, correspondent banks still participate in money laundering. Therefore, it stands to reason that correspondent banks participate in tax evasion, which is subject to lower review and less likely to be discovered.[311] In order to increase the discovery of tax evasion, the procedures for detecting money laundering should be expanded to tax evasion. As such, the purpose of Title III should be amended to include preventing, detecting, and prosecuting tax evasion.[312] The broader legislation should require domestic financial institutions to maintain records and obtain the biographical data, identity, and address of each client, as well as the identity of the beneficial owner, and a description of the transaction.[313] This information which is collected for suspicion of money laundering could easily be expanded to apply to an American client opening a bank account exceeding a certain threshold value that would arouse suspicion.

An area that should not be expanded is Section 311, Prohibitions or Conditions on Opening or Maintaining Certain Correspondent or Payable Through Accounts. Under this section, the U.S. has the power to prevent or hinder the use of correspondent accounts within the country by domestic financial institutions, if a bank in a foreign jurisdiction is suspected of laundering money.[314] As addressed above, this type of action would hinder the U.S.

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305 *Id.*

306 *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified at 31 U.S.C. §§ 5301-5332).

307 *USA PATRIOT Act*, FIN. CRIMES ENFORCEMENT NETWORK, http://www.fincen.gov/statutes_regs/patriot/index.html (last visited Sept. 5, 2012).

308 *See generally* USA PATRIOT Act § 302.

309 Campbell, *supra* note 295.

310 USA PATRIOT Act § 302.

311 *See id.* § 311 (defining a correspondent account as "an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution").

312 Title III is currently designed to "prevent, detect, and prosecute international money laundering and the financing of terrorism." *Id.* § 302.

313 *Id.* § 311.

314 *Id.*

economy.[315] In addition, it would be easier for the U.S. government to police wealthy individuals obtaining wealth management advice from a local bank as opposed to being contacted directly by private bankers in Switzerland. In the latter case, the U.S. would lack jurisdiction and have no remedy.

The due diligence requirements for correspondent accounts as explained in Section 312 of the USA PATRIOT Act specify that financial institutions have to establish enhanced due diligence policies designed to identify instances of money laundering.[316] A section should be added that focuses on financial institutions adopting enhanced due diligence policies when opening an account for a U.S. citizen with a local subsidiary of a foreign bank. The result would be close review over the use of these accounts in an effort to detect tax evasion and movement of large quantities of money offshore. Similarly, Section 312(a)(i)(2)(B)(iii) should be expanded to include tax evasion and narrowly tailored to increase the effectiveness of the due diligence.[317] As it stands now, a financial institution should take reasonable steps to determine if correspondent banks are providing correspondent accounts with other foreign banks.[318] Requiring a financial institution to determine if there are correspondent accounts with any other foreign bank would place a heavy burden on the correspondent banks.[319] For tax evasion, the measure would be effective if the correspondent bank simply performed due diligence with its subsidiaries and parent.[320]

The minimum standards for opening a private bank account under Section 312(a)(i)(3)(A) should be expanded to tax evasion. The identity of the beneficial owner and the source of the funds are important to detect tax evasion.[321] If the source of the funds can be determined, it would reveal whether the individual is of high net worth and whether this is the type of client that foreign banks are likely to target to evade taxes.

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[315] *See supra* Part IV.A.

[316] USA PATRIOT Act § 312.

[317] *See id.*

[318] *Id.* § 312(a)(i)(2)(B)(iii); *see also* Ross Q. Panko, *Banking on the USA PATRIOT Act: An Endorsement of the Act's Use of Banks to Combat Terrorist Financing and a Response to its Critics*, 122 BANKING L. J. 99, 124 (2005) (stating that Title III permits banks to share customer information with both law enforcement and other banks if the person is suspected of money laundering). Extending this disclosure to tax evasion would likely be met with hostility since banks do not want to infringe on customer privacy unless there are "legitimate risks." *Id.* However, since tax evasion is not a criminal offense in some countries, the risk may not be viewed as legitimate. *See* Mathiason, *supra* note 27.

[319] *See generally* Addison, *supra* note 6, at 722 (stating that foreign governments need information about the individuals before releasing any information). The requirements for a private institution in obtaining private confidential information are likely to be even more onerous if not impossible. *See id.*

[320] *See generally* Indictment, United States v. Weil, No. 08-60322, 2008 WL 4898212 (S.D. Fla. Nov. 12, 2008) (stating that bankers were taught to sell clients on moving money offshore with a UBS account because the network created net benefits for the U.S.). The bankers specifically stated that UBS creates more jobs in the U.S. and has better lobbyists than the other foreign banks. This allowed them to protect the account from disclosure. This suggests a connection between the operations of the correspondent and parent banks. *See id.*

[321] *See generally* USA PATRIOT Act §§ 312(a)(i)(3)(A) (stating that the identity of beneficial owners and the source of funds is useful in detecting and stopping money laundering). Similarly, Section 326 provides procedures that must be adhered to in order to verify that the person is who they claim to be. Verification is important in tax evasion because the goal of private bankers is often to hide the beneficial owner of the account so that it appears to be a non-U.S. entity and then the IRS would have no jurisdiction to collect taxes on that account. *Id.* § 326.

Another provision requires that adequate records be maintained as they have a high degree of utility in tax investigations.[322] The required data includes the biographical information and a description of the transaction.[323] This should be expanded; correspondent banks should be required to maintain records of all accounts opened because the usefulness in an investigation may not be immediately apparent, but determined at a later date.

The U.S. should enforce these proposed amendments and additions for foreign banks operating in the U.S. The enhanced due diligence would reveal more foreign accounts and reduce tax evasion by imposing a substantial penalty if private bankers assist U.S. clients in moving money overseas. Currently, UBS follows a lax know-your-customer policy.[324] The policy is limited to criminal actions and as a result, tax evasion would not be a consideration.[325] Under this policy, banks are required to take reasonable measures to discover the identity of clients and the beneficial owners of the account.[326] That information includes whether the client is acting alone and who provides the funds.[327] This is consistent with the U.S.'s general policy of detecting money-laundering.[328]

Additionally, due diligence includes the reason for opening the account, the expected activity that will be taking place, the net worth of the individual, and the source of the funds.[329] The category of net worth is important and should be included in the U.S.'s standards. Discovering the net worth of an individual assists in determining whether that person has a propensity to hide money overseas. Individuals with hundreds of millions of dollars are much more likely to hide money in a Swiss Bank account than a person with $500,000.[330]

Banks operating under these guidelines are permitted to define what categories of people warrant enhanced review.[331] The U.S. should make it mandatory that high net worth individuals become one such category. If high net worth individuals are omitted from the list then it is extremely unlikely that any of them would face enhanced review, which would allow them to continue evading taxes. Overall, the review and due diligence used by these correspondent banks operating in the U.S. should be amended so that tax evasion is less likely to occur and more likely to be caught when it does occur.

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[322] 12 U.S.C. § 1951(b) (2008).

[323] 31 U.S.C. § 5314(a) (2006).

[324] WOLFSBERG GROUP, THE WOLFSBERG GLOBAL ANTI-MONEY-LAUNDERING GUIDELINES FOR PRIVATE BANKING 1, 2 (2002), *available at* http://www.wolfsberg-principles.com/pdf/Wolfsberg_AML_Guidelines_for_PB_(2002).pdf. These guidelines are common to many of the world's largest international banks including Barclays, Citigroup, Credit Suisse Group, Deutsche Bank AG, Goldman Sachs, JP Morgan, and UBS AG. *Id.* at 1.

[325] *Id.* at 2.

[326] *Id.*

[327] *Id.*

[328] *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 311, 115 Stat. 272 (2001) (codified at 31 U.S.C. §§ 5301-5332).

[329] WOLFSBERG GROUP, *supra* note 324, at 3.

[330] *See generally* TAX HAVEN BANKS, *supra* note 3, at 89-97 (discussing the measures taken to target U.S. high net worth citizens).

[331] WOLFSBERG GROUP, *supra* note 324, at 4.

## V. CONCLUSION

Tax evasion by wealthy individuals has plagued the U.S. economy, especially during the recent economic decline. There has been no shortage of proposals to remedy this problem, but to date there have been no long term successes. Tax evasion is an international predicament and most of the proposed resolutions have targeted a global agenda. The current initiatives that focus on international actors are flawed. Sovereign nations such as Switzerland and Liechtenstein have been able to avoid reporting requirements and disclosures by virtue of strict bank secrecy laws.

To be successful, the answer must be implemented on a domestic level. A senior anti-fraud official at the OECD stated that "[t]he biggest mistake politicians are making is that they think if they dry up an oasis the camel won't walk to the next one."[332] Therefore, provisions must be implemented that dry up the source of revenue for private bankers in the U.S., forcing them to move to the next fertile source of revenue in another part of the world, for example, East Asian locations like Hong Kong or Singapore.[333]

The best way to make the U.S. less attractive to private bankers is to ensure that the foreign banks cannot earn a profit by operating in the U.S. To achieve this objective the U.S. should impose regulations and penalties on correspondent banks operating in the U.S. Correspondent banks are subject to U.S. jurisdiction and must abide by U.S. laws. As a result, the IRS will be able to address the issue of tax evasion by indirectly punishing foreign banks while avoiding the barriers associated with bank secrecy laws.

The current proposition of terminating correspondent bank operations in the U.S. would lead to widespread unemployment and cannot be achieved without bringing substantial changes to the U.S. banking industry.[334] Instead, the correspondent banks should be heavily fined for violating the disclosure requirements. As a result, the parent bank would be forced to make the difficult decision of reducing its Wealth Management segment in the U.S. or continuing operations and face penalties that would severely impair the company's bottom line.

To increase the effectiveness of this proposition, the requirements for disclosure must be clarified and expanded. The information collected from every U.S citizen opening an account with a domestic branch of a foreign bank should mirror that increased scrutiny required for those suspected of money laundering. Additionally, due diligence should be restricted to discovering if that individual has any accounts located in tax havens with the parent or subsidiary banks. These two provisions would place the burden squarely on the shoulders of the bank and remove complications that would arise from attempting to discover any accounts the individual has with any bank anywhere in the world.

Despite not curing the ills of tax evasion, the regulations on correspondent banks would achieve the desired effect; the U.S. government would realize a reduction in the money lost yearly as a result of tax evasion and the foreign banks would likely determine that the

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[332] Mathiason, *supra* note 27.

[333] *See id.*; *see also* Browning, *Swiss Banking Secrecy*, *supra* note 2 (stating that with the increased pressure on Switzerland, high net worth individuals are shifting their attention to Singapore and Hong Kong); *see also* Laura Saunders, *Hiding Money in Havens Isn't as Easy as It Used to Be*, WALL ST. J., Apr. 6, 2012, at A9, *available at* http://online.wsj.com/article/SB10001424052702303302504577325991580102990.html.

[334] *See Foreign Banks and the Federal Reserve*, *supra* note 254 (stating that 11% of the total commercial banking assets are held by foreign institutions).

U.S. restrictions are not worth the trouble and begin targeting ultra high net worth individuals elsewhere.