



THE SHELL BANK LOOPHOLE

Billionaire tax evasion scheme exposes how weak enforcement of the Foreign Account Tax Compliance Act enables wealthy tax cheats to hide income offshore.

TABLE OF CONTENTS

Introduction and overview of Senate Finance Committee investigation into Brockman tax evasion scheme.....	3
Committee recommendations.....	7
Robert Brockman’s alleged scheme to hide \$2.7 billion in income from the IRS.....	9
Senate Finance Committee engagement with Banque Mirabaud and Syz Group.....	10
Due diligence and reporting requirements for Swiss banks under Swiss law and FATCA agreements.....	11
The “shell bank” loophole that exempts Swiss banks from reporting accounts held by U.S. persons.....	12
How Brockman and his associates exploited the “shell bank” loophole.....	12
“Reason to know” provision in the U.S. – Switzerland intergovernmental agreement raises questions as to whether Brockman’s accounts should have been identified and reported to IRS.....	14
IRS approval of FATCA registrations for foreign financial institutions.....	16
Cheat Sheet: How to turn your shell company into an IRS approved shell bank.....	18
The failure to audit partnerships and weak reporting rules create a permissive environment for tax evasion.....	19
Conclusion.....	21
Appendix A: IRS approvals of Global Intermediary Identification Numbers (GIIN) in selected tax haven jurisdictions.....	22
Appendix B: Map of key Brockman entities involved in exploiting “shell bank” loophole... 	23

Introduction and overview of Senate Finance Committee investigation into Brockman tax evasion scheme

The Senate Finance Committee holds jurisdiction over federal tax laws, and has long worked to combat the use of hidden offshore bank accounts by U.S. persons to evade taxes. Though the *Foreign Account Tax Compliance Act* (FATCA), enacted in 2010, was intended to crack down on tax evasion by U.S. persons holding accounts and other financial assets offshore, loopholes and limited Internal Revenue Service (IRS) enforcement resources have significantly hindered the law's effectiveness. As a result, wealthy taxpayers continue to use schemes involving offshore entities and secret bank accounts to successfully hide billions in income from the IRS.

As a case study, Senate Finance Committee Chair Ron Wyden's majority staff initiated an investigation into allegations that billionaire Robert Brockman concealed approximately \$2.7 billion in income from the IRS and evaded hundreds of millions in federal taxes. The Justice Department indicted Brockman on 39 counts, including tax evasion, failure to file foreign bank account reports, money laundering and other offenses.¹ As part of the alleged scheme, Brockman used a complex structure involving offshore foreign trusts, foreign and domestic shell companies, nominees and foreign bank accounts to conceal his assets. The allegations against Brockman represent the largest tax evasion case brought against an individual in U.S. history.

The Finance Committee's investigation focused on the regulatory framework to prevent offshore tax evasion, structures allegedly used by Brockman to avoid detection of hidden funds, and the role of two Swiss banks identified in the alleged scheme. According to federal court records, Brockman used several bank accounts at Mirabaud & Cie (Mirabaud) and Syz Group (Syz) to hold more than \$1 billion in undeclared income over the course of a decade.² The committee reviewed due diligence procedures involving several large deposits in accounts at Mirabaud held by Point Investments Ltd. ("Point Investments"), a Bermuda-based entity used by Brockman to invest as a limited partner in funds managed by Vista Equity Partners ("Vista"), a U.S.-based private equity firm. In 2010 alone, Brockman-linked accounts at Mirabaud received two wire transfers for partnership distributions worth \$799 million and \$111 million respectively.³ These large deposits were related to proceeds from the sale of two Vista portfolio companies based in the Atlanta area.⁴

Of additional concern is that it appears Brockman's scheme may have gone undetected by the IRS and federal prosecutors were it not for evidence provided by a whistleblower and the

¹ *CEO of Multibillion-dollar Software Company Indicted for Decades-long Tax Evasion and Wire Fraud Schemes*, U.S. Department of Justice, Oct. 15, 2020, <https://www.justice.gov/opa/pr/ceo-multibillion-dollar-software-company-indicted-decades-long-tax-evasion-and-wire-fraud>.

² 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At Exhibit 2, Robert T. Brockman Jeopardy Recommendation Report filed by Internal Revenue Service, pgs. 10 – 19: "Brockman's use of offshore entities to conduct investment activity"; at Government Exhibit #5: Petition in the Supreme Court of Bermuda by Spanish Steps Holding Ltd.).

³ Id. at Government Exhibit #2 pg. 13.

⁴ Id.

cooperation of several co-conspirators.⁵ A former Vista Director of Finance provided extensive information related to the investigation and filed a formal whistleblower claim with the IRS.⁶ Despite being a central participant in Brockman’s scheme and admitting to engaging in tax evasion by failing to report more than \$200 million in partnership income, Vista CEO Robert Smith avoided federal prosecution by paying fines and agreeing to cooperate with the investigation into Brockman.⁷

The committee’s investigation found Brockman exploited a deeply troubling loophole in the U.S. offshore financial reporting regime. In furtherance of his alleged offshore tax avoidance scheme, Brockman established offshore shell companies which were then dressed up as financial institutions and issued Global Intermediary Identification Number (GIIN) numbers by the IRS. In doing so, Brockman was able to turn his offshore shell company into an IRS-approved “shell bank.” The illicit use of these “shell banks” significantly hinders visibility into offshore accounts secretly held by U.S. persons.

Offshore financial institutions registered with the IRS are required by law to identify and report certain information about U.S. accounts. In order to implement these requirements, the United States entered into intergovernmental agreements with foreign partner jurisdictions to establish reporting requirements on U.S. accounts, including whether and to what extent financial institutions must make efforts to determine if an account is held by a U.S. person. Federal statute, regulations, and FATCA agreements with partner jurisdictions provide that when the account holder is believed to be a non-U.S. financial institution in a partner jurisdiction with an IRS issued GIIN number, “no further review, identification, or reporting is required with respect to the account.”⁸

Due to this carve out, as long as a bank in Switzerland can identify an entity’s GIIN number on an IRS published list of registered foreign financial institutions, it is not required by FATCA to affirmatively investigate whether the account is held by a U.S. person. The financial

⁵ *In re Seizure of All Funds up to \$77,888, 782.62 in Mirabaud Bank Account \$509951 in the Name of Edge Capital Invs., Ltd., Located in Switz.*, No. 1:20-mc-00183-MEH (D. Colo. Oct. 22, 2020), (At pgs. 7-8: The Department of Justice in 2018 granted immunity to Bermuda-based attorney Evatt Tamine in exchange for his cooperation with investigations into Robert Brockman and Robert Smith.)

⁶ *Search and Seizure Warrant filed in U.S. v. Carlos Kepke*, 3:21-cr-00155-JD (Document # 44-3) (S. District of Texas Jun. 3, 2022) (At Exhibit 1 pg. 46: Denise Davis has filed two applications for award for original information, Forms 211 with the IRS; At Exhibit 1 pg. 78: Davis also stated that she learned that Brockman controlled Point Investments from conversations she had with her supervisor at Vista-Vista CFO John Warnken-Brill. Davis claimed she was instructed by Warnken-Brill to never associate Brockman with Point.)

⁷ *Private Equity CEO Enters into Non-prosecution Agreement on International Tax Fraud Scheme and Agrees to Pay \$139 Million, to Abandon \$182 Million in Charitable Contribution Deductions, and to Cooperate with Government Investigations*, U.S. Department of Justice, Oct. 15, 2020, <https://www.justice.gov/opa/pr/private-equity-ceo-enters-non-prosecution-agreement-international-tax-fraud-scheme-and-agrees> (U.S. Attorney David Anderson stated that “Smith’s agreement to cooperate has put him on a path away from indictment”); *How Billionaire Robert Smith Avoided Indictment in a Multimillion-Dollar Tax Case*, Bloomberg, Feb. 3, 2021, <https://www.bloomberg.com/news/features/2021-02-03/how-billionaire-robert-smith-avoided-indictment-in-multimillion-dollar-tax-case>.

⁸ Annex I, Section IV, Paragraph D(3)(a) of the Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, available online at <https://home.treasury.gov/system/files/131/FATCA-Agreement-Switzerland-2-14-2013.pdf>.

institutions holding accounts at offshore banks, such as Point Investments in Brockman’s scheme, can self-certify that they do not hold any U.S. accounts.

Brockman and his associates exploited this “shell bank” loophole to substantial effect in carrying out their alleged tax evasion scheme. Brockman and his associates used offshore shell companies in FATCA partner jurisdictions like Bermuda and Nevis and then registered them with the IRS as financial institutions.⁹ Those entities then made large capital commitments to private equity funds registered in the Cayman Islands managed by Vista Equity Partners. These Vista private equity funds were used to buy and sell software companies in the United States, and then wire Brockman’s share of the profits to bank accounts in Switzerland.

Because the account holders of these accounts in Switzerland were Bermudan and Nevisian entities with IRS issued GIIN numbers, the Swiss banks determined that they were not required by FATCA to independently investigate whether these accounts were held by U.S. persons.¹⁰ By converting these shell companies into shell banks, Swiss financial institutions were able to accept more than \$1 billion from a U.S. client without having to independently determine whether those funds belonged to a U.S. person. The Swiss banks were also not required to report the beneficial owners of these accounts to the IRS because the accounts were held by offshore entities that had registered as financial institutions and as a result could self-certify that they have accurately reported accounts held by U.S. persons to the IRS. This lack of bank reporting heightens the risk that wealthy taxpayers can exploit this loophole to underreport or fail to report offshore income.

In the case of Mirabaud, deposits from Brockman-linked entities in 2010 were almost equal to the net new assets of the entire bank for a typical calendar year, potentially making Brockman one of, if not the, largest clients at Mirabaud.¹¹ The size of Brockman’s accounts at Mirabaud in relation to the global total of assets under management bank-wide raises questions as what level of detail Mirabaud had about the accounts and to whether the bank could have had “reason to know” that there were issues with the entities’ FATCA self-certification.¹² If the bank had reason to know that the accounts were owned by a U.S. person, it would have been required to report the account to U.S. tax authorities. However, Swiss secrecy laws prevented the committee from conducting a full investigation of this issue.

There are hundreds of thousands of entities in FATCA partner jurisdictions with IRS-approved GIIN numbers, creating widespread risks for tax evasion and money laundering of the

⁹ Entities and related Global Intermediary Identification Numbers (GIIN): Point Investments Ltd. (3FIX4F.99999.SL.060) – Bermuda; Edge Capital Investments Ltd. (2MJZVW.99999.SL.659) – Nevis; Cabot Global Investments Ltd. (GSZZ7B.99999.SL.659) – Nevis; Framfield Assets Ltd. (AK07N5.99999.SL.659) – Nevis.

¹⁰ Swiss financial institutions are required by local law to conduct certain due diligence reviews, but the committee was unable to review due diligence efforts specifically as they relate to the Brockman accounts.

¹¹ Email from outside counsel on behalf of client, Mirabaud & Cie Ltd. to Dan Goshorn and Patricio Gonzalez, Majority Staff, Senate Finance Committee April 8, 2022 (Net new money inflows for Mirabaud were 2.4 billion CHF in 2010, negative 102 million CHF in 2011, 147 million CHF in 2012, negative 1.05 billion CHF in 2013 and negative 1.25 billion CHF in 2014).

¹² Annex I, Section IV, Paragraph E(3) of the Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, available online at <https://home.treasury.gov/system/files/131/FATCA-Agreement-Switzerland-2-14-2013.pdf>.

sort allegedly committed by Brockman. For the eight partner jurisdictions where entities linked to Brockman were established, there are more than 128,000 entities with IRS-approved GIIN numbers.¹³ In the Cayman Islands alone, there are more than 84,000 registered entities with IRS-approved GIIN numbers.¹⁴ The IRS simply does not have the personnel or the capabilities to adequately monitor whether these offshore entities are properly identifying and reporting accounts belonging to U.S. persons.

The committee engaged in discussions with the IRS Large Business & International Division and Chief Counsel's Office regarding the process for obtaining a GIIN number from the IRS. The committee found this process to be shockingly easy. An entity must simply fill out a Form 8957 with the IRS, or register via an online portal. Applications are almost always approved without meaningful investigation or due diligence from IRS personnel. Additional structural problems at the IRS have also contributed to lax FATCA enforcement. According to a recent report by the Treasury Inspector General for Tax Administration (TIGTA), the IRS "has not come close" to building out its original FATCA compliance roadmap and has instead taken "limited or no action" on a majority of planned activities due to significant IRS budget cuts following enactment of the law.¹⁵ This has led to significant underreporting of foreign bank accounts by U.S. taxpayers and billions in lost revenue.¹⁶

The U.S. tax system largely relies on voluntary compliance. While FATCA was intended to provide the IRS more tools to address intentional non-compliance with respect to offshore accounts, these compliance efforts necessarily rely on active enforcement action by IRS and law enforcement, as well as compliance and enforcement by partner jurisdictions and foreign financial institutions. Offshore tax evasion poses a unique challenge because the IRS's authority to compel action by financial institutions or take enforcement action is largely limited by the territorial extent of U.S. tax laws.

When it comes to illicit offshore tax evasion, there is no silver-bullet solution. However, Congress and agencies should take additional steps to make it more difficult for tax cheats to stash funds overseas by increasing IRS resources, increasing international coordination with respect to foreign accounts, and improving efforts to monitor and identify noncompliance. The \$80 billion in IRS funding in the *Inflation Reduction Act* (IRA) is a significant step forward in this regard.

¹³ *Declaration of Revenue Agent Damon Paxton Under 28 U.S.C. §1746*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At pg. 3: "Brockman used the tax haven jurisdictions of Belize, Bermuda, Cayman Islands, Malta, Nevis, Switzerland, Singapore, Guernsey, and British Virgin Islands."); Data provided to the Senate Finance Committee by the IRS on April 1, 2022.

¹⁴ Data provided to the Senate Finance Committee by the IRS on April 1, 2022.

¹⁵ *Additional Actions are Needed to Address Non-Filing and Non-Reporting Compliance under the Foreign Account Tax Compliance Act*, Treasury Inspector General for Tax Administration, Apr. 7, 2022, <https://www.treasury.gov/tigta/auditreports/2022reports/202230019fr.pdf>.

¹⁶ *Id.*

The Finance Committee believes Congress and the Treasury Department should consider additional actions, including the following:

- Congress and Treasury should consider imposing additional due-diligence requirements on transfers between foreign financial institutions (FFIs) in situations involving large transfers of funds into relatively-small, closely held FFIs that pose an increased risk of tax evasion.
- Congress and Treasury should consider requiring more rigorous screening of applications for GIIN numbers in situations where there is increased risk of tax evasion, potentially including GIIN number issuances to entities in jurisdictions widely considered tax havens, or entities that appear to be relatively closely-held. For example, the recently-passed U.S. anti-money laundering law, the *Corporate Transparency Act*, focuses on disclosure by entities with fewer than 20 employees in the United States or that lack a physical operating presence in the United States, which represent an increased risk of noncompliance with anti-money laundering laws.
- Congress and Treasury should strengthen the IRS Whistleblower Office and better utilize incentives available for whistleblowers to come forward with information to detect offshore tax evasion. The IRS has lost thousands of revenue officers and examiners, and whistleblowers can serve as effective partners for the federal government to unpack sophisticated tax evasion schemes used by wealthy taxpayers and large corporations.¹⁷ However, the number of criminal tax investigations opened by the IRS CI division from whistleblower claims has declined from 43 in FY14 to six in FY20.¹⁸ Awards to whistleblowers and the amounts collected by the IRS have also dropped sharply over the last four years, particularly for major cases.¹⁹
- Congress should increase IRS enforcement resources to ensure it has the manpower and infrastructure sufficient to audit complex financial structures involving high-net worth individuals, including undeclared offshore accounts. According to a recent GAO report, the IRS employs 40 percent fewer revenue agents than it did in 2011, severely crippling its ability to conduct complex audits of wealthy taxpayers.²⁰ The IRS funding in the IRA is a significant step forward in this regard.

¹⁷ According to IRS data, for every \$1 awarded to whistleblowers, the IRS has collected \$6. Since 2007, the IRS Whistleblower Office has paid awards to whistleblowers totaling more than \$1 billion dollars and has led to the successful collection of \$6.39 billion from noncompliant taxpayers. *Fiscal Year 2021 Annual Report*, IRS Whistleblower Office, Jun. 7, 2022, <https://www.irs.gov/pub/irs-pdf/p5241.pdf>.

¹⁸ Data provided by the IRS Criminal Investigation division to Senate Finance Committee Majority Staff on June 10, 2021.

¹⁹ In FY18, the IRS whistleblower office awarded 423 awards worth \$312 million that led to over \$1.4 billion in collections. In FY21 that number declined to 179 awards worth \$36 million, leading to only \$245 million being collected from noncompliant taxpayers.

²⁰ *Trends of IRS Audit Rates and Results for Individual Taxpayers by Income*, U.S. Government Accountability Office, May 2022, <https://www.gao.gov/assets/gao-22-104960.pdf> (At pg. 28: “As shown in figure 8, since fiscal year 2011, revenue agents, who work on more complex audits, have decreased by more than 40 percent compared to a decrease of about 18 percent for tax examiners, who work on less complex audits.”)

- The steep decline in IRS audits of partnerships, combined with the sharp increase in the number of partnerships and weak FATCA enforcement have created a permissive environment which allows the wealthy to conceal investment income using these entities.²¹ A core component of the alleged scheme carried out by Robert Brockman and Robert Smith was the use of foreign partnerships managed by Vista Equity Partners. The two American billionaires used these partnerships to generate billions in investment income in the United States and then wire it offshore without IRS detection for over a decade. The IRS needs additional resources to increase audits of large partnerships and reverse the last decade's decline.
- Congress should explore efforts to increase disclosure of high-value financial accounts domestically, similar to proposals advanced in the Biden Administration's FY 2022 Budget Request. Congress should also explore opportunities to increase information sharing and coordination between partner jurisdictions and more closely align reporting regimes with the Organization for Economic Cooperation and Development's (OECD) Consistent Reporting Standards, similar to proposals advanced in the Biden Administration's FY 2023 Budget Request.

²¹ *Where in the World Does Partnership Income Go? Evidence of a Growing Use of Tax Havens*, Michael Love, University of California, Berkeley – Department of Economics, Dec. 14, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3985535 (At pg. 11: “Partnerships reported \$2.2 trillion in net income in 2017 (including capital gains), roughly quintupling the amounts from 1996. Partnerships represented 38% of all business net income reported on US tax returns in 2017, doubling their share from 1996.”)

Robert Brockman’s alleged scheme to hide \$2.7 billion in income from the IRS

On October 15, 2020, the Justice Department (DOJ) indicted American business executive Robert Brockman on 39 counts, including tax evasion, failure to file foreign bank account reports, money laundering and other offenses.²² The indictment alleges that Brockman engaged in a decades-long scheme using a web of offshore entities and secret bank accounts to conceal more than \$2 billion in income from the IRS and evade paying hundreds of millions of dollars in federal taxes.²³ According to the indictment, Brockman directed billions of dollars in untaxed capital gains income earned as a result of his investments in private equity funds managed by Vista to undeclared bank accounts in Bermuda and Switzerland over the course of two decades.²⁴ The allegations against Brockman represent the largest tax evasion case brought against an individual in U.S. history.

According to an IRS revenue agent’s report filed in federal court, Brockman from 2004 to 2018 used a complex scheme of offshore foreign trusts, foreign and domestic companies, nominees and numerous foreign bank accounts to conceal his assets and avoid reporting \$2.7 billion in income.²⁵ Brockman established entities in tax haven jurisdictions of Belize, Bermuda, Cayman Islands, Malta, Nevis, Switzerland, Singapore, Guernsey and the British Virgin Islands. Brockman’s offshore structure used numerous foreign bank accounts in Bermuda and Switzerland to hide the funding of investments and purchases.²⁶ These offshore accounts were also used to purchase luxury assets, including a superyacht, luxury real estate and a private jet.²⁷

Key entities in Brockman’s offshore structure included Point Investments Ltd. (“Point Investments”), Edge Capital Investments, and Cabot Global Investments. Of particular interest to the committee’s investigation was Point Investments, an entity allegedly used to avoid U.S. income tax on approximately \$2.3 billion of net capital gains, interest income and dividends. Brockman used Point Investments to make very large capital commitments to fund various Vista fund partnerships based in the Cayman Islands.²⁸ The capital contributed to the Vista funds were made through Point Investments’ foreign bank accounts at Bermuda Commercial Bank and Mirabaud accounts in Switzerland. IRS records and documents filed in Bermuda indicate the Brockman Charitable Trust is the ultimate beneficial owner of all investor shares in Point

²² *CEO of Multibillion-dollar Software Company Indicted for Decades-long Tax Evasion and Wire Fraud Schemes*, U.S. Department of Justice, Oct. 15, 2020, <https://www.justice.gov/opa/pr/ceo-multibillion-dollar-software-company-indicted-decades-long-tax-evasion-and-wire-fraud>.

²³ *Id.*

²⁴ *Id.*

²⁵ *Declaration of Revenue Agent Damon Paxton Under 28 U.S.C. §1746*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At pg. 3).

²⁶ *Id.*

²⁷ *Robert T. Brockman Jeopardy Recommendation Report filed by Internal Revenue Service*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (Brockman used funds from accounts at Mirabaud in Switzerland to spend over \$43 million on a superyacht and approximately \$15 million on a private jet.)

²⁸ *Declaration of Revenue Agent Damon Paxton Under 28 U.S.C. §1746*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At pg. 6: “\$1 billion to Vista Equity Funds II, LP; \$100 million to Vista Equity Partners Fund III (Parallel), LP; \$90 million to Vista Foundation Fund I (Parallel), LP; \$612 million to Vista Equity Partners Fund IV (Parallel), LP; \$150 million to Vista Equity Partners Fund IV, Co-Invest 2-A, LP.”)

Investments.²⁹ The trust indenture filed in Bermuda for the Brockman charitable trust identified Robert Brockman as one of the beneficiaries of the trust, along with his wife and siblings.³⁰

Court records identified several significant transactions linked to untaxed proceeds from Brockman's investments in Vista funds involving accounts at Mirabaud. Wire transfers from Vista funds for distributions to Point Investments as a limited partner included deposits of approximately \$799 million in June of 2010, \$111 million in December 2010, \$80 million in 2013 and approximately \$41 million to 2016.³¹ The largest deposits in 2010 related to proceeds from the sale of two Vista Equity Funds software companies based in the Atlanta area.³² Brockman maintained an account at Syz in Switzerland that held approximately \$110 million, though the committee was unable to determine the source of those proceeds based on available records.³³

According to federal court records, it appears that Brockman failed for nearly a decade to disclose his financial interest in and control over accounts at Mirabaud and Syz to the Treasury Department and IRS as required by law.³⁴

Senate Finance Committee engagement with Swiss banks

As part of the committee's investigation, Chairman Wyden sent inquiries to Mirabaud and Syz, two Swiss banks identified in relation to Brockman's alleged scheme.³⁵ Mirabaud and Syz are boutique banks that specialize in private wealth and asset management with a more limited international presence compared to their larger competitors. Neither bank maintains a

²⁹ 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At Exhibit 2 Robert T. Brockman Jeopardy Recommendation report filed by Internal Revenue Service pg. 12: "The A. Eugene Brockman Charitable Trust is a trust settled in 1981 by Brockman's father, Alfred Eugene Brockman. Brockman's father died in 1986. The Brockman Charitable Trust is the ultimate beneficial owner of all the investor shares in Point Investments Ltd.")

³⁰ Id. at Exhibit 4, pg. 5: "The beneficiaries of this trust shall be: Robert Theron Brockman, Dorothy Kay Brockman, Thomas David Brockman, Victoria Brockman, and any organization qualifying as a charitable organization under the laws of Bermuda, the United States, or Great Britain."

³¹ *Robert T. Brockman Jeopardy Recommendation Report filed by Internal Revenue Service*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At pg. 13: description of wire transfers to Point Investments Ltd. from Vista Equity Fund II, LP); *U.S. v. Brockman*, 3:20-cr-00371-WHA (Doc., #1), (U.S. District Court Northern District of California, Oct. 1, 2020) Indictment at pgs. 11, 17 and 36.

³² *Robert T. Brockman Jeopardy Recommendation Report filed by Internal Revenue Service*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (at pg. 13 description of wire transfers to Point Investments Ltd. from Vista Equity Fund II, LP).

³³ Id. at Government Exhibit #5, petition in the Supreme Court of Bermuda by Spanish Steps Holding Ltd.

³⁴ *U.S. v. Brockman*, 3:20-cr-00371-WHA, Indictment at pgs. 11, 17 and 36 (Doc., #1) (U.S. District Court Northern District of California, Oct. 1, 2020), (Counts Ten, Eleven, Twelve, Thirteen and Fourteen in indictment allege failure to file a foreign bank account registration (FBAR) by Brockman for accounts held at Mirabaud for tax years 2014 – 2018); *Swiss Freeze More Than \$1 Billion Held by Tech Mogul Robert Brockman*, Bloomberg News Wire, Nov. 6, 2020, <https://www.bnnbloomberg.ca/swiss-freeze-more-than-1-billion-held-by-tech-mogul-robert-brockman-1.1518568>.

³⁵ Letter from Senator Ron Wyden, Chairman, Senate Finance Committee to Mirabaud & Cie Ltd., Sep. 15, 2021, <https://www.finance.senate.gov/chairmans-news/wyden-presses-swiss-bank-mirabaud-on-billionaire-tax-evasion->; Letter from Senator Ron Wyden, Chairman, Senate Finance Committee to Mirabaud & Cie Ltd., Nov. 17, 2021, <https://www.finance.senate.gov/chairmans-news/wyden-continues-to-press-swiss-bank-mirabaud-on-brockman-tax-evasion-schemes>; Letter from Senator Ron Wyden, Chairman, Senate Finance Committee to Syz Group, Dec. 16, 2021.

physical office in the United States and in Mirabaud's case, the bank is privately held and describes itself as family owned.³⁶ In 2020, Mirabaud and Syz's total assets under management were approximately 32.2 billion Swiss francs (CHF) and 26 billion CHF, respectively.³⁷ For comparison, in 2020 Credit Suisse had approximately 1.5 trillion CHF in assets under management, Pictet had 609 billion CHF and Julius Baer had 434 billion CHF.³⁸

The inquiries to Mirabaud and Syz asked detailed questions regarding accounts held by entities linked to Brockman, compliance with FATCA, and know your customer procedures for client relationships. Bank representatives provided Majority staff with their views regarding due diligence and reporting requirements under Swiss law and the Model 2 intergovernmental agreement under FATCA. The banks declined to comment on client specific information, citing Swiss law.

Due diligence and reporting requirements for Swiss banks under Swiss law and FATCA agreements

The U.S. – Switzerland IGA implementing FATCA procedures requires Swiss banks to identify and report accounts held by U.S. persons. This includes conducting anti-money laundering and due diligence procedures, including enhanced due diligence to identify “high-value accounts” with balances exceeding \$1 million belonging to U.S. persons. Swiss banks are required to conduct screenings to identify U.S. indicia and collect detailed information on clients at the time of onboarding and throughout the lifetime of the account, including obtaining the identity of the beneficial owner of the account.³⁹ For accounts held by a trust or foundation, banks are expected to obtain the identity of controlling persons or beneficiaries.⁴⁰

Under Swiss law, Swiss banks are also required to complete a know your customer (KYC) questionnaire that asks for information on individuals and entities controlling the account, information on the source of wealth (including the nature of the activities that generated such wealth, information on the source of funds (i.e., origin and provenance of the funds deposited in the account and/or events that generated the incoming funds deposited in the account); and information on the business/professional activities of the account holder (including the beneficial owner or controlling person of the account).⁴¹

³⁶ Mirabaud Group 2022 Brochure at pg. 16, available online at https://www.mirabaud.com/fileadmin/user_upload_group/publications/Publications_generales/Brochures/Brochure_Corpo/Mirabaud_Brochure_Corporate_2022_EN_web.pdf.

³⁷ Email from outside counsel on behalf of client, Mirabaud & Cie Ltd. to Dan Goshorn and Patricio Gonzalez, Majority Staff, Senate Finance Committee, April 8, 2022; Letter from outside counsel on behalf of client, Syz Group, to Ron Wyden, Chairman, Senate Finance Committee, Jan. 8, 2022.

³⁸ *Was 2021 The Last Record Year For Swiss Banks?*, Finews, Jun. 14, 2022, <https://www.finews.com/news/english-news/50675-swiss-bank-assets-under-management-2021-ubs-credit-suisse>.

³⁹ According to the Federal Act on Combating Money Laundering and Terrorist Financing in the Swiss penal code, also known as the Anti-Money Laundering Act (“AMLA”), Swiss banks are required to obtain a written declaration on the identity of the beneficial owner of an account. Depending on the type of entity, the relationship manager is required to obtain a Swiss Form A, K, S or T from the client.

⁴⁰ Under Swiss law, Swiss banks are required to obtain a Form T for entities owned or controlled by a Trust to understand the structure of a trust and establish the identity of the beneficial owner of assets.

⁴¹ Financial institutions in Switzerland must establish anti-money laundering and know your customer procedures to comply with the Swiss Federal Anti-Money Laundering Act and the Swiss Financial Market Supervisory

The “shell bank” loophole that exempts Swiss banks from reporting accounts held by U.S. persons

The committee’s investigation focused on a provision in the U.S. – Switzerland FATCA IGA that waives obligations for Swiss banks to conduct affirmative due diligence to identify and report accounts owned by U.S. persons, regardless of the size of those accounts.⁴² For purposes of this report, the committee has termed this provision the “Shell Bank” loophole.

In response to the committee’s inquiry, both Mirabaud and Syz took the position that in instances where the account holder is a non-U.S. entity with an IRS issued GIIN number, they are not required to identify or report whether accounts are owned or controlled by U.S. persons. The banks cited a provision in the U.S. – Switzerland IGA stating that once a Swiss bank can establish that the account holder is a non-U.S. entity in a FATCA partner jurisdiction with a valid GIIN number issued by the IRS, “no further review, identification, or reporting is required with respect to the account.”⁴³

The banks stated that as long they can identify the entity’s GIIN number on an IRS published list of registered foreign financial institutions, under FATCA they are not required to affirmatively investigate whether accounts are owned or controlled by any U.S. persons or report those accounts to the IRS. In the case of Brockman’s alleged scheme, the entities identified as holding accounts at Mirabaud and Syz were all offshore entities with valid GIIN numbers approved by the IRS:

Accountholder entity	IRS-issued GIIN number
Point Investments Ltd. (Bermuda)	3FIX4F.99999.SL.060
Edge Capital Investments Ltd. (Nevis)	2MJZVW.99999.SL.659
Cabot Global Investments Ltd. (Nevis)	GSZZ7B.99999.SL.659
Framfield Assets Ltd. (Nevis)	AK07N5.99999.SL.659

How Brockman and his associates exploited the “shell bank” loophole

Brockman and his associates exploited the “shell bank” loophole to substantial effect in carrying out their alleged tax evasion scheme. Brockman opened up accounts at banks in Switzerland using shell companies registered as financial institutions with the IRS and used his attorney Evatt Tamine and another nominee as the signatories.⁴⁴ While the accounts were not

Authority’s Anti-Money Laundering Ordinance. Swiss banks also follow guidelines established by the Swiss Bankers Association Code of Conduct with regard to the exercise of due diligence.

⁴² There are similar loopholes in FATCA agreements the United States has signed with well-known tax haven jurisdictions central to Brockman’s scheme, including Bermuda, the British Virgin Islands, the Cayman Islands and St. Kitts and Nevis.

⁴³ Annex I, Section IV, Paragraph D(3)(a) of the Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, available online at <https://home.treasury.gov/system/files/131/FATCA-Agreement-Switzerland-2-14-2013.pdf>.

⁴⁴ *U.S. v. Brockman*, 3:20-cr-00371-WHA (Doc. #1) (N. District of California, Oct. 1, 2020) (At pg. 10: “ On or before April 30, 2010, Brockman directed Individual One, together with a second nominee, to open a bank account at Mirabaud & Cie Banquiers Prives, Geneva, Switzerland in the name of Point Investments, account number ***463. Brockman further directed that Individual One was to be a signatory on this bank account); *U.S. v.*

opened explicitly in Brockman's name, filings indicate Brockman controlled these accounts and the Brockman family trust was the ultimate beneficial owner.⁴⁵ Trust documents identified Robert Brockman as one of the beneficiaries of the trust, along with his wife and siblings.⁴⁶

As a result of this loophole, the banks in Switzerland were able to accept massive wire transfers from the United States without being required to ask questions as to whether the funds belonged to U.S. persons or report the accounts to the IRS. At the time, Evatt Tamine, who operated a small consulting firm in Bermuda named Tangarra Consultants, served as a trustee and/or corporate director of Brockman's various offshore trusts and companies.⁴⁷ Several offshore entities where Tamine served as a trustee or director were also the investment vehicles that owned and controlled Brockman's highly successful automobile dealership software companies based in Ohio and Texas.

In its indictment of Brockman and related documents, DOJ describes how Brockman worked with Tamine to execute his offshore scheme. While Tamine took efforts to conceal Brockman's involvement, nothing in Tamine's professional history as an attorney at a mid-sized law firm specializing in offshore trust structures and subsequent operation of an independent, boutique consulting firm would suggest that he had the kind of wealth to invest more than \$1 billion in private equity funds. It appears that when Tamine opened the Point Investments account at Mirabaud while working on Brockman's behalf, Tamine was being paid a salary of approximately \$400,000 for as a director of St. John's Trust Company.⁴⁸ It appears his compensation package was just \$205,000 and \$235,000 in 2005 and 2006 respectively.⁴⁹

According to an IRS agent's affidavit filed in Brockman's case, Tamine in 2013 opened an account at Mirabaud in the name of a Brockman related entity named Edge Capital Investments.⁵⁰ According to the affidavit, it appears a new account was needed to be set up for Edge Capital Investments outside of Bermuda because another Bermuda bank, Butterfield Bank, had made a connection between Brockman and the offshore structures. Brockman did not like this discovery and directed Tamine to "extricate" themselves from Butterfield Bank.⁵¹ After

Brockman, 3:20-cr-00371-WHA (Doc. #76) (N. District of California, Jan. 4, 2021) (At pg. 7: "The government identified 'individual one' in the indictment as Evatt Tamine.")

⁴⁵ *Robert T. Brockman Jeopardy Recommendation Report filed by Internal Revenue Service*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At pg. 12: "The Brockman Charitable Trust is the ultimate beneficial owner of all the investor shares in Point Investments Ltd.")

⁴⁶ 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At Exhibit 4 pg. 5: "The beneficiaries of this trust shall be: Robert Theron Brockman, Dorothy Kay Brockman, Thomas David Brockman, Victoria Brockman, and any organization qualifying as a charitable organization under the laws of Bermuda, the United States, or Great Britain.")

⁴⁷ *Declaration of Revenue Agent Damon Paxton Under 28 U.S.C. §1746*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At pg. 9: "From 2004 – 2018, Tamine primarily resided in Bermuda and served as nominee trustee and/or corporate director of various offshore trusts and companies.")

⁴⁸ *U.S. v. Brockman*, 4:21-cr-0009-GCH, United States' opposition to Tangarra's motion to strike (Doc., #104-1) (At pg. 38).

⁴⁹ *Id.* (At pgs. 18-19: "Mr. Brockman set my annual remuneration for 2005 at USD 155,000 plus a bonus of USD 50,000 and he determined that my annual remuneration for 2006 would be increased to USD 175,000 plus a bonus opportunity of USD 60,000.")

⁵⁰ *In re Seizure of All Funds up to \$77,888, 782.62 in Mirabaud Bank Account \$509951 in the Name of Edge Capital Invs., Ltd., Located in Switz.*, No. 1:20-mc-00183-MEH (D. Colo. Oct. 22, 2020), at pg. 45

⁵¹ *Id.* at pg. 45.

Tamine established the account for Edge Capital at Mirabaud and deposited \$80 million, Brockman told to Tamine that he was “surprised and happy that you were able to transfer such a large sum with so little hassle.”⁵²

It is concerning that Tamine’s activity on behalf of Brockman at Mirabaud was able to be conducted with “so little hassle.” At one point Tamine and Brockman deposited \$799 million in the Point Investments account at Mirabaud, and it is unclear whether reasonable scrutiny by Mirabaud could have uncovered Brockman’s ties to Point Investments as Butterfield had with regard to other Brockman controlled entities. According to Evatt Tamine’s personal notes, included as evidence in federal court, Tamine in 2009 “met with bankers from Mirabaud who will be happy to open an account. The process will be straightforward since discretionary trusts are understood and accepted.”⁵³

FATCA was intended to place reporting requirements on both accountholders and foreign financial institutions. The Brockman case study suggests loopholes in federal law, regulations, and FATCA agreements allow non-genuine financial entities to establish offshore bank accounts for U.S. persons, without scrutiny from foreign banks and wealthy U.S. taxpayers are easily able to falsely self-certify reporting of their offshore accounts. This reliance on self-certification creates opportunities for wealthy taxpayers to withhold reporting of vast amounts of income by hiding their assets in one of the hundreds of thousands of tax haven financial entities.

Barring a costly audit or a whistleblower coming forward with information, it is very difficult for the IRS to detect the hidden beneficial ownership in an offshore bank account of a wealthy U.S. taxpayer if it is layered using shell companies with valid GIIN numbers. In Brockman’s case, it is unclear whether the IRS would have detected Brockman’s interest in the accounts had it not been for the cooperation of various co-conspirators .

“Reason to know” provision in the U.S. – Switzerland IGA raises questions as to whether Brockman’s accounts should have been identified and reported to IRS.

Consistent with the FATCA framework, a provision in the U.S. – Switzerland FATCA IGA requires Swiss banks to identify and report U.S. accounts to the IRS when they have “reason to know” that the “self-certification or other documentation with an account is incorrect or unreliable.”⁵⁴ These knowledge standards are vague and hard to prescribe. However, the size of the accounts involved in the Brockman case raises important questions as to whether Mirabaud and Syz could have had reason to know the accounts were linked to Brockman and suspect that they were not being properly disclosed to the IRS.

In response to the committee’s inquiry, Mirabaud stated it was “not aware that Brockman had an interest in the accounts at the Bank that he allegedly owned and controlled” and that he

⁵² Id. at pg. 46.

⁵³ *U.S. v. Brockman*, 4:21-cr-0009-GCH, United States’ opposition to Tangarra’s motion to strike (Doc., #104-5) (At pg. 2).

⁵⁴ Annex I, Section IV, Paragraph E(3). of the Agreement between the United States of America and Switzerland for Cooperation to Facilitate the Implementation of FATCA, available online at <https://home.treasury.gov/system/files/131/FATCA-Agreement-Switzerland-2-14-2013.pdf>.

(Brockman) was “never a ‘Client’ of the Bank.”⁵⁵ Mirabaud also attributed its lack of awareness regarding Brockman’s alleged interest in or control over the accounts due to “deceptive actions” taken by Evatt Tamine, a Bermuda-based attorney Brockman used as a nominee and signatory for accounts at Mirabaud used to carry out the scheme.

It is clear from the DOJ indictment and related filings that Brockman and Tamine took deceptive actions to shield their scheme from financial intuitions such as Mirabaud holding Brockman’s accounts. Furthermore, the fact that the accounts in question were IRS-registered financial institutions with valid GIINs relieved the Swiss banks of the obligation to conduct rigorous diligence under FATCA. However, information obtained by the committee suggests that Brockman’s account opened at Mirabaud in the name of Point Investments may have made Brockman an absolutely essential client, and one of the largest, if not the largest, clients of the bank. The sheer size of the transactions involved raises questions as to whether the basic due diligence questions required under Swiss law related to the source of wealth of a client’s account, or the standard relationship management practices of the private banking sector, would have generated indications that Tamine was acting as a strawman on behalf of a U.S. person.

In 2010, Mirabaud’s net new money inflows for the entire bank were approximately \$2.3 billion.⁵⁶ In 2011, that figure was a loss of \$100 million.⁵⁷ In the period between June 2010 and June 2011, over \$943 million was deposited in Brockman’s account held in the name of Point Investments at Mirabaud. Brockman in just three transactions amounted to almost half of the entire net new money inflows of the bank in 2010 and 2011. Public reports suggest that around that time the “typical” Mirabaud client had assets worth around 1.5 million CHF (approximately \$1.5 million at today’s exchange rate), suggesting that Brockman’s Point Investments account was more than 600 times larger than the average Mirabaud client.⁵⁸

Many financial institutions require enhanced due diligence and ask additional questions regarding the source of funds in response to large transactions. For example, in response to the committee’s inquiry, Syz stated that “should a deposit above \$1 million be made into accounts at Syz, such transaction would be considered as high-risk according to SYZ’s AML Directive and would trigger enhanced due diligence requirements.”⁵⁹ Mirabaud represented they have similar procedures. For perspective, the individual deposits in 2010 and 2011 into the Point Investments account at Mirabaud ending in #7463 were \$799 million on June 2, 2010; \$111 million on December 27, 2010; and \$32 million on January 3, 2011. For private banking standards, these are enormous deposits for investment income from a partnership, especially for a bank of Mirabaud’s size.

⁵⁵ Letter from outside counsel on behalf of client, Mirabaud & Cie Ltd. to Ron Wyden, Chairman, Senate Finance Committee, October 1, 2021.

⁵⁶ Email from outside counsel on behalf of client, Mirabaud & Cie Ltd. to Dan Goshorn and Patricio Gonzalez, Majority Staff, Senate Finance Committee, April 8, 2022.

⁵⁷ Id.

⁵⁸ *Yves Mirabaud: Head of Mirabaud & Cie’s Growing Empire*, Citywealth, Jun. 24, 2013, <https://www.citywealthmag.com/news/yves-mirabaud-head-mirabaud-%C2%A0cies-growing-empire>.

⁵⁹ Letter from outside counsel on behalf of client, Syz Group, to Ron Wyden, Chairman, Senate Finance Committee, Jan. 8, 2022.

Additionally, it appears Mirabaud had expressed reservations regarding transfers of funds involving Brockman’s accounts opened in the name of Cabot Global Investments. According to federal court records, Tamine stated in an email to Brockman that “It took some time, but Mirabaud are comfortable with the explanations.”⁶⁰ Brockman in turn replied to Tamine that he was happy Tamine was able to transfer such large funds out of Bermuda Commercial Bank “with so little hassle.”⁶¹ While it is unclear what questions Mirabaud asked Tamine as he sought to open accounts for Brockman linked entities, it appears that Tamine was able to shift substantial funds from accounts at banks in Bermuda to Mirabaud with relative ease.

Swiss secrecy laws prevented the committee from conducting a full investigation into Mirabaud’s due diligence of accounts identified by U.S. authorities as linked to Brockman. Mirabaud claimed it could not answer questions regarding specific accounts due to several provisions in the Swiss penal code, including Article 47, which criminalizes even acknowledging the existence of a relationship between a bank and a client; and Article 271, the primary Swiss blocking statute which prohibits cooperation with foreign governments without the consent of Swiss authorities.⁶² Syz also cited these Swiss statutes in declining to provide client-specific information.⁶³

IRS approval of FATCA registrations for foreign financial institutions

As part of its investigation, the committee’s majority staff held several discussions with representatives from the IRS Large Business & International Division (LB&I) and the IRS Chief Counsel’s office. These discussions focused on understanding the process for approving GIIN numbers and any oversight or enforcement activities the IRS conducts once a foreign entity receives a GIIN and becomes a registered foreign financial institution.

The committee found the process for obtaining a GIIN number is alarmingly simple. According to representatives from the IRS LB&I division and Chief Counsel’s office, all that is required to obtain a GIIN is that an entity fill out a Form 8957, *Foreign Account Tax Compliance Act (FATCA) Registration* with the IRS (or file via an online portal). The application is almost always approved without significant investigation from IRS personnel. IRS representatives told committee staff the IRS does not contact the FATCA Responsible Officer for the registering

⁶⁰ *Robert T. Brockman Jeopardy Recommendation Report filed by Internal Revenue Service*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At pg. 48: “(Evatt) Tamine stated that he was working on opening an account for Cabot in Bank Mirabaud and that as far as the bank was concerned, Brockman’s controlled entity, Addington LLC (entity holding 100% of Cabot Global Investments) was held by charitable trusts and that ‘It took some time, but Mirabaud are comfortable with the explanations.’ Brockman replied to Tamine that he was happy Tamine was able to transfer such large funds out of Bermuda Commercial Bank ‘with so little hassle.’”)

⁶¹ *Id.*

⁶² Presentation by outside counsel on behalf of client, Mirabaud & Cie Ltd., to Senate Finance Committee staff, Jan. 28, 2022.

⁶³ Letter from outside counsel on behalf of client, Syz Group, to Ron Wyden, Chairman, Senate Finance Committee Mar. 27, 2022.

financial institution prior to issuance of the GIIN, nor ask questions about the entity's assets, source of funds or wealth, beneficial ownership or business and investment activities. The IRS indicated that resource issues at the agency, as well as the sheer volume of financial institutions makes it extraordinarily difficult to do meaningful due diligence with regard to entities who are seeking or have obtained GIIN number approvals.

With respect to the knowledge standards and “reason to know” provisions for Swiss banks in the U.S. – Switzerland FATCA IGA, a representative from the IRS Office of Chief Counsel indicated they were “hard to prescribe” and subjective. As written, it is unclear in what kinds of circumstances a Swiss bank is expected to know that a large account is owned and controlled by a U.S. person and that the account holder has fulfilled their reporting obligations with the IRS.

There are hundreds of thousands of entities in FATCA partner jurisdictions with IRS approved GIIN numbers, creating widespread risks for tax evasion and money laundering of the sort allegedly done by Brockman. In the eight partner jurisdictions where entities linked to Brockman were established, there are more than 128,000 entities with IRS approved GIIN numbers.⁶⁴ In the Cayman Islands alone, there are more than 84,000 registered entities with IRS approved GIIN numbers.⁶⁵ The British Virgin Islands (BVI), a country with a population of 30,000, has more than 15,000 entities with GIIN numbers.⁶⁶ An inquiry conducted by the British government in response to systemic public corruption issues in the BVI even went so far as to say that the “BVI companies are regularly used in the laundering of colossal amounts of illicit funds.”⁶⁷ The IRS does not have the personnel or capabilities to adequately monitor whether these offshore entities are properly identifying and reporting accounts belonging to U.S. persons.

According to a recent TIGTA report, as a result of significant IRS budget cuts following the enactment of FATCA, the IRS “has not come close” to building out its original FATCA compliance roadmap and has instead taken “limited or no action” on a majority of planned activities.⁶⁸ This has led to significant underreporting of foreign bank accounts by U.S. taxpayers and billions in lost revenue.⁶⁹ For example, IRS data identified more than 330,000 U.S. taxpayers from 2016 to 2019 that failed to file required forms to report foreign bank accounts with a balance more than \$50,000.⁷⁰ The IRS has failed to act on this information, leaving at least \$3.3 billion in uncollected revenue on the table.⁷¹

⁶⁴ Data provided to the Senate Finance Committee by the Internal Revenue Service on April 1, 2022.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ *British Virgin Islands Commission of Inquiry*, Report of the Rt Hon Sir Gary Hickinbottom, Apr. 4, 2022, available online at <https://bvi.public-inquiry.uk/sites/default/files/2022-05/BVI%20Commission%20of%20Inquiry%20Report%20%284%20April%202022%29.pdf>.

⁶⁸ *Additional Actions are Needed to Address Non-Filing and Non-Reporting Compliance under the Foreign Tax Account Compliance Act*, Treasury Inspector General for Tax Administration, Apr. 7, 2022, www.treasury.gov/tigta/auditreports/2022reports/202230019fr.pdf.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id at pg. 15 (Failure to file a form 8938, *Statement of Specified Foreign Financial Assets*, carries a penalty \$10,000 (and a penalty up to \$50,000 for continued failure after IRS notification). FATCA requires individual of U.S.

In addition to under-enforcement of FATCA, many of the 330,000 U.S. taxpayers identified by TIGTA may have also failed to file a Report of Foreign Bank and Financial Accounts (FBAR) with the Financial Crimes Enforcement Network. The penalty for a willful FBAR violation, a felony offense, may be up to \$100,000 or 50 percent of the aggregate value of the accounts at the time of the violation, whichever is greater. In instances of large undeclared accounts, this can lead to significant penalties. For example, business professor Dan Horsky paid an FBAR penalty of \$100 million after pleading guilty to concealing over \$200 million in assets in offshore accounts.⁷²

Cheat Sheet: How to turn your shell company into an IRS approved “shell bank”

The key steps:

1. Establish a shell company in a FATCA partner jurisdiction (even those in well-known tax haven jurisdictions such as Bermuda or the British Virgin Islands)
2. Fill out form 8957 with the IRS to register the shell company as a foreign financial institution and obtain a GIIN number.
3. Open account at a bank in Switzerland or other FATCA partner jurisdiction in the name of the shell company now registered as a financial institution. Use an attorney or other intermediary as the signatory of the account.
4. Invest in private equity firms or other investment vehicles and direct the fund manager to wire proceeds from investment activities in U.S. to the shell company’s account in Switzerland or elsewhere.

The results:

- The Swiss bank is no longer required to report that the account is held by U.S. persons because the account is held in the name of an entity with a valid GIIN number. The Swiss bank is also no longer required to conduct due diligence to determine whether the account has a U.S. nexus.
- The shell company is now operating as a “shell bank” and can self-certify reporting offshore accounts to IRS for FATCA purposes.
- In the absence of an audit or other federal investigation, is it highly unlikely the IRS will detect whether these accounts are concealing or underreporting assets held by U.S. persons.

taxpayers to file a form 8938 to report foreign financial accounts with an aggregate value exceeding \$50,000. The form 8938 must be attached to the taxpayer’s annual income tax return. TIGTA assessed that if the minimum penalty amount of \$10,000 to the population identified that had failed to file a form 8938, the IRS could have assessed at least \$3.3 billion in penalties).

⁷² *Former Business Professor Pays \$100 Million Penalty in Tax Fraud Case*, Department of Justice, Nov. 4, 2016, <https://www.justice.gov/usao-edva/pr/former-business-professor-pays-100-million-penalty-tax-fraud-case>

The failure to audit partnerships and weak reporting rules create a permissive environment for tax evasion

A core component of the scheme carried out by Brockman and Smith was the use of foreign partnerships managed by Vista Equity Partners.⁷³ The two American billionaires used these partnerships to generate billions in investment income in the United States and then wire it offshore without IRS detection for over a decade. The steep decline in IRS audits of partnerships, combined with the sharp increase partnerships and weak FATCA enforcement have created a permissive environment that allows the wealthy to conceal investment income using these entities.⁷⁴

As pointed out in Brockman’s indictment, Brockman strategically “only invested in Vista funds that were organized outside the United States.”⁷⁵ Brockman invested more than \$1 billion in private equity funds managed by Vista organized as limited partnerships in the Cayman Islands. Those funds in turn would buy and sell U.S. software companies and distribute the profit to each investor, including Brockman. According to federal prosecutors, Brockman’s share of the profits was wired from Vista’s bank accounts in California and elsewhere in the U.S. to bank accounts offshore.⁷⁶ Approximately \$943 million in distributions were paid by wire from a Vista fund to Brockman’s account at Mirabaud in Switzerland between June 2010 and June 2011.⁷⁷

In Brockman’s case, there were numerous forms he would have likely been required to file to report his partnership income from Vista funds, depending on the structure:

- Form 8865, *Return of U.S. Persons with respect to certain foreign partnerships*
- Form 8938, *Statement of specified foreign financial assets*
- Form 5471, *Information return of U.S. persons with respect to certain foreign corporations*
- Form 3520-A, *Annual information return of foreign trust with a U.S. owner.*

⁷³ *How Billionaire Robert Smith Avoided Indictment in a Multimillion-Dollar Tax Case*, Bloomberg, Feb. 3, 2021, <https://www.bloomberg.com/news/features/2021-02-03/how-billionaire-robert-smith-avoided-indictment-in-multimillion-dollar-tax-case> (Federal prosecutors claimed that Brockman’s alleged scheme “involved continuous contacts with Vista employees”).

⁷⁴ *Where in the World Does Partnership Income Go? Evidence of a Growing Use of Tax Havens*, Michael Love, University of California, Berkeley – Department of Economics, Dec. 14, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3985535 (At pg. 11: “Partnerships reported \$2.2 trillion in net income in 2017 (including capital gains), roughly quintupling the amounts from 1996.)

⁷⁵ *U.S. v. Brockman*, 3:20-cr-00371-WHA (Doc. #1) (N. District of California, Oct. 1, 2020) (At. Pg. 4: “Brockman only invested in Vista funds that were organized outside the United States.”)

⁷⁶ *Id.* at pg. 8: “It was further part of the conspiracy and scheme and artifice to defraud that the capital gains distributed by Vista to Point for Brockman’s benefit were directed by Brockman and his nominees, including Individual One, to be wired from Vista’s bank accounts in the Northern District of California and elsewhere, to bank accounts in Point’s name in Bermuda and Switzerland.”

⁷⁷ *Robert T. Brockman Jeopardy Recommendation Report filed by Internal Revenue Service*, 4:22-cv-00202 (Document # 21-5) (S. District of Texas Jan. 31, 2022) (At pg. 13: description of wire transfers to Point Investments Ltd. from Vista Equity Fund II, LP).

The inability of the IRS to detect Brockman’s scheme in a timely fashion raises important questions as to whether sophisticated partnership structures like the one used in Brockman’s scheme need to be audited more frequently and reporting rules need to be reformed. IRS Commissioner Rettig recently noted that the IRS was “outgunned” when it came to the enforcement of large partnerships.⁷⁸ The IRS simply does not have enough qualified personnel to conduct complex audits of sophisticated partnership structures used by wealthy taxpayers to conceal billions of dollars in undeclared income. Although computers can check a wage earner’s return, the IRS needs highly-skilled specialists to audit partnerships. An individual earning less than \$25,000 a year was twelve times as likely to be audited as a partnership in 2020, despite the fact that 60-70 percent of partnership income accrues to the top 1 percent of taxpayers.⁷⁹

A recent TIGTA report revealed that the number of partnership returns examined has dropped dramatically while the number of partnership returns filed has increased.⁸⁰

FY	Partnership returns filed	Partnership returns examined	Actual percentage examined	Change in Percentage From Prior Year
2018	4,043,349	8,945	0.22%	(42%)
2019	4,223,801	7,478	0.18%	(18%)
2020	4,470,095	4,969	0.11%	(39%)

⁷⁸ *Full Committee Hearing: The IRS’s Fiscal Year 2022 Budget*, U.S. Senate Finance Committee, Jun. 8, 2021 (Response by Commissioner Rettig to question from Chairman Wyden: “Our highest rates of attrition are at our most specialized senior examiners. The president’s budget, not only under the discretionary budget, which has funding for enforcement and services, but under the PIA as well as the mandatory provisions, specifically provide for increased resources, specialized agents looking at partnerships, wealthy individuals, corporations. And I believe that it was at this hearing in April, if I’m not mistaken, where I indicated that, in those arenas, we are outgunned, that the resources outside the service on a particular case, more often than not, far exceed the resources we are able to devote.”)

⁷⁹ *Where in the World Does Partnership Income Go? Evidence of a Growing Use of Tax Havens*, Michael Love, University of California, Berkeley – Department of Economics, Dec. 14, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3985535 (At pg. 12-13: “an individual making less than \$25,000 was 12 times more likely to be audited than a partnership in 2020.” At pg. 24: “Of the partnership income flowing to households, roughly two-thirds (60-70%, depending on the year) flows to the top 1%.”)

⁸⁰ *Centralized Partnership Audit Regime Rules Have Been Implemented; However, Initial No-Change Rates Are High and Measurable Goals Have Not Been Established*, Treasury Inspector General for Tax Administration, Mar. 17, 2022, <https://www.treasury.gov/tigta/auditreports/2022reports/202230020fr.pdf> (At pg. 15).

Conclusion

The committee's investigation into the Brockman matter uncovered a deeply troubling loophole in FATCA, the federal law that requires foreign banks to report offshore accounts held by U.S. persons. Under the current system, a wealthy taxpayer can create an offshore shell company, and quickly register that shell company as a financial institution with the IRS. By registering as a financial institution with the IRS, that shell company is now operating as a "shell bank" and can self-certify reporting of offshore accounts to the IRS for FATCA purposes. As a result of this arrangement, Swiss banks can open accounts for shell companies controlled by U.S. persons worth hundreds of millions of dollars, even billions, without reporting those accounts to the IRS.

As evidenced by the scale and duration of the Brockman scheme, this "shell bank" loophole creates widespread risks for offshore tax evasion and money laundering. There are hundreds of thousands of possible shell banks in countries widely considered tax haven jurisdictions. For the eight partner jurisdictions where entities linked to Brockman were established, there more than 128,000 entities registered with the IRS as financial institutions under FATCA. In the Cayman Islands alone, there are more than 84,000 IRS approved financial institutions, more than that nation's entire population. Due to persistent budget cuts and decade-long campaign to gut the IRS, the agency does not have the personnel or the capabilities to adequately monitor whether these offshore entities are properly reporting accounts belonging to U.S. persons.

The committee's investigation also exposes how the failure to audit partnership structures incentivizes tax evasion by the wealthiest taxpayers. The steep decline in IRS audits of partnerships, combined with the sharp increase in the number of partnerships and weak FATCA enforcement have created a permissive environment which allows the wealthy to conceal investment income using investment partnerships and offshore shell companies. A core component of the alleged scheme carried out by Robert Brockman and Robert Smith was the use of foreign partnerships managed by Vista Equity Partners, a major U.S. private equity firm. The two American billionaires used these partnerships to generate billions in investment income in the United States and wire it offshore without IRS detection for over a decade

The committee strongly supports immediate action to make it more difficult for wealthy tax cheats to stash funds overseas in secret offshore accounts. This report outlines several recommendations that the committee believes would help crack down on this kind of abuse, including stricter due diligence requirements for foreign banks, enhanced scrutiny of offshore entities registering with the IRS as financial institutions and a sharp increase in IRS enforcement resources to conduct complex audits involving high-net worth accounts and partnerships. It is clear that urgent steps need to be taken to ensure that the wealthy taxpayers are not abusing this "shell bank" loophole and other weaknesses with FATCA enforcement to hide their assets offshore and evade paying their fair share.

APPENDIX A: IRS approvals of Global Intermediary Identification Numbers (GIIN) in selected tax haven jurisdictions

Country	2014	2015	2016	2017	2018	2019	2020	2021	2022	Grand Total*	Current**
BELIZE	260	127	400	129	42	54	22	15	2	1,051	382
BERMUDA	2,046	616	1,423	578	442	387	301	474	65	6,332	4,177
CAYMAN ISLANDS	27,249	8,476	14,469	10,130	10,081	9,404	9,583	11,111	1,652	102,155	84,713
GUERNSEY	4,592	1,200	1,531	1,156	971	892	639	1,123	262	12,366	9,394
MALTA	721	331	276	217	215	130	266	164	9	2,329	1,716
SAINT KITTS AND NEVIS	147	129	146	91	88	47	29	26	5	708	565
SINGAPORE	1,752	729	1,014	636	829	741	1,053	1,459	256	8,469	6,147
SWITZERLAND	4,779	786	1,625	744	772	913	419	561	67	10,666	6,847
VIRGIN ISLANDS (BRITISH)	4,846	2,217	3,923	2,359	1,926	1,949	1,779	1,889	308	21,196	15,218
Grand Total	46,392	14,611	24,807	16,040	15,366	14,517	14,091	16,822	2,626	165,272	129,159

*The count includes GIINs issued to all entity types by countries (FFIs, Branches, Sponsored Entities, etc.)

** Indicates the number of entities that are on the IRS Published FFI List as of March 1, 2022.

Map of key Brockman linked entities involved in exploiting Shell Bank loophole

