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## Simplicity Lost

Joshua D. Blank

Leigh Z. Osofsky

*University of North Carolina School of Law, osofsky@email.unc.edu*

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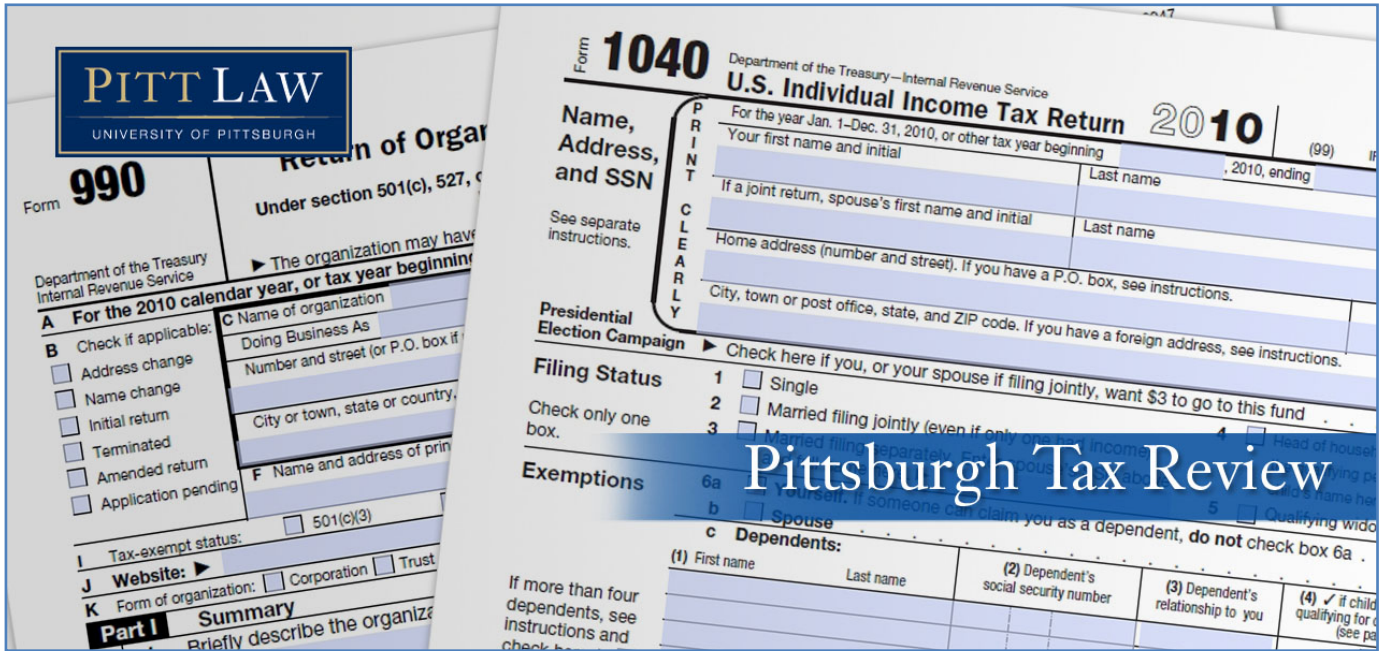


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## SIMPLICITY LOST

*Joshua D. Blank & Leigh Osofsky*



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## SIMPLICITY LOST

*Joshua D. Blank*<sup>\*</sup> & *Leigh Osofsky*<sup>\*\*</sup>

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<sup>\*</sup> Professor of Law and Faculty Director of Strategic Initiatives, University of California, Irvine School of Law.

<sup>\*\*</sup> William D. Spry III Distinguished Professor of Law, University of North Carolina School of Law. We are grateful to Aaron Kirschenfeld and Nicole Downing for their excellent research assistance. We thank Victor Fleischer, Christopher Hanna, Fran Hill, Sarah Lawsky, Leandra Lederman, Nina Olson, and Larry Zelenak for invaluable conversations and feedback as we drafted this article. All errors are our own.

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*Reducing complexity will also restore faith in the tax system. I hope that we heed the call to keep simplification in mind as we pass tax bills in the future.*

—Congressman Amo Houghton, *Hearing on Complexity in Administration of the Federal Tax Laws*<sup>1</sup>

*With shows instead, mere shows of seeming pure,*

*And banished from man's life his happiest life,*

*Simplicity and spotless innocence!*

—John Milton, *Paradise Lost*<sup>2</sup>

## I. INTRODUCTION

Policymakers, government officials, and scholars have long described tax complexity as one of the most serious problems affecting tax administration and tax compliance in the United States.<sup>3</sup> Some of the costs of tax complexity include billions of hours of “paperwork and other headaches”<sup>4</sup> that taxpayers face each year as they attempt to comply with complex tax law, monetary costs that taxpayers bear when they hire advisors and purchase software to report their tax liability and file their tax returns,<sup>5</sup> difficulties that taxpayers encounter when attempting to claim tax credits and

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<sup>1</sup> *Complexity in Administration of Federal Tax Laws: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 116th Cong. 4 (2000) (statement of Rep. Amo Houghton, Chairman, Subcomm. On Oversight of the H. Comm. on Ways and Means) [hereinafter *Complexity in Administration*].

<sup>2</sup> JOHN MILTON, *PARADISE LOST* 94 (Scott Elledge ed., W.W. Norton & Co. 1993).

<sup>3</sup> See, e.g., 1 NAT'L TAXPAYER ADVOC., 2012 ANNUAL REPORT TO CONGRESS, at 5 (2012) [hereinafter NAT'L TAXPAYER ADVOC. 2012 ANNUAL REPORT]; DAVID BRADFORD, *UNTANGLING THE INCOME TAX*, 266–67 (1986); Louis Kaplow, *How Tax Complexity and Enforcement Affect the Equity and Efficiency of the Income Tax*, 49 NAT'L TAX J. 135, 140–47 (1996); Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WISC. L. REV. 1267, 1268–76 (1990); Kathleen DeLaney Thomas, *User-Friendly Taxpaying*, 92 IND. L.J. 1509, 1513 (2017); Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 123–24 (1989).

<sup>4</sup> Press Release, The White House, President Bush Provides Leadership on Tax Reform (Sept. 2, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040902-7.html>.

<sup>5</sup> See NAT'L TAXPAYER ADVOC. 2012 ANNUAL REPORT, *supra* note 3, at 5–6.

other tax benefits,<sup>6</sup> and challenges the Internal Revenue Service (IRS) confronts when attempting to deter tax avoidance and evasion opportunities that tax complexity often creates.<sup>7</sup> Further, the burden of tax complexity, especially related to tax compliance, often falls disproportionately on taxpayers who lack access to sophisticated tax accountants or legal counsel.<sup>8</sup>

To help taxpayers comply with complex tax law, the IRS attempts to communicate the tax law in plain and simple terms. Through IRS publications, frequently asked questions on the IRS website (FAQs), and the IRS's online Interactive Tax Assistant, the IRS attempts to translate a maze of complex statutes and regulations into language that is accessible to the general public.<sup>9</sup> When drafting informal tax guidance, the IRS often includes descriptions that feature a concept we have described previously as “simplicity”—the presentation of complex law as if it is simple.<sup>10</sup> Simplicity helps the IRS communicate with taxpayers, but it also has costs, including reducing transparency regarding the actual tax law, and inequitably offering less reliable law to taxpayers who lack sophisticated advisors.<sup>11</sup>

In light of the costs of simplicity, an important question for the tax system is what alternatives might exist—including simplification of the enacted tax law itself. This possibility is often thought of as the “holy grail” of tax reform.<sup>12</sup> It is highly desirable, but also highly unlikely. This Article examines an often-overlooked moment in time in which Congress seemed to embrace tax simplification as a real possibility, as part of the Internal

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<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> For further discussion, see Joshua D. Blank & Leigh Osofsky, *The Inequity of Informal Guidance*, 75 VAND. L. REV. 1093, 1129–31, 1137 (2022).

<sup>9</sup> See Joshua D. Blank & Leigh Osofsky, *Automated Legal Guidance*, 106 CORNELL L. REV. 179, 208 (2020) [hereinafter *Automated Legal*]; Joshua D. Blank & Leigh Osofsky, *Legal Calculators and the Tax System*, 16 OHIO ST. TECH. L.J. 73 (2020) [hereinafter *Legal Calculators*].

<sup>10</sup> See Joshua D. Blank & Leigh Osofsky, *Simplicity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 202–04 (2017) [hereinafter *Simplicity*].

<sup>11</sup> See *id.*

<sup>12</sup> See generally, e.g., McCaffery, *supra* note 3 (exploring in depth the “holy grail” of tax reform).

Revenue Service Restructuring and Reform Act of 1998 (RRA 98).<sup>13</sup> While RRA 98 has often been described as instituting “fundamental change” in tax administration, primarily as a result of its introduction of taxpayer protections,<sup>14</sup> its tax complexity provisions have received considerably less attention. Yet, RRA 98 contained a number of important tax complexity provisions. First, RRA 98 provides that “front-line technical experts” at the IRS should participate in the tax legislative process in order to offer a tax administration perspective to legislators.<sup>15</sup> Second, the statute requires the IRS to analyze “the sources of complexity in administration of the Federal tax laws” and report the results of such analysis and any recommendations to Congress annually.<sup>16</sup> Third, the statute requires the Joint Committee on Taxation (JCT) to provide to the reporting congressional committee a “tax complexity analysis” for any proposed tax legislation with widespread applicability and, subject to available funding, to provide Congress with a regular report on the overall state of the federal tax system.<sup>17</sup> Taken together, these commitments to reducing tax law complexity were an important acknowledgement by Congress in 1998 of the changes necessary to address tax law complexity.

In this Article, written for a symposium on the twenty-fifth anniversary of RRA 98, we review the fate of the tax complexity provisions of the legislation.<sup>18</sup> Our analysis shows that the IRS and JCT initially complied with the mandate to provide Congress with general reports on the sources of

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<sup>13</sup> Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

<sup>14</sup> SYLVIA MORRISON & GARY GUENTHER, CONG. RES. SERV., IRS: STATUS OF RESTRUCTURING AND REFORM AT THE OPENING OF THE 107TH CONGRESS (2001).

<sup>15</sup> § 4021, 112 Stat. at 785.

<sup>16</sup> *Id.* § 4022(a).

<sup>17</sup> § 4022(b). *Id.* RRA 98 also established the Office of the Taxpayer Advocate, under the direction of the National Taxpayer Advocate (NTA). § 1102 *id.* at 697, codified at I.R.C. § 7803(c). As one of its duties, the NTA was tasked with providing an annual report to the congressional tax committees that, among other things, identified the twenty most serious problems encountered by taxpayers. *Id.* at 698, codified at I.R.C. § 7803(b)(2)(B)(ii)(III). At times, such reports have identified the complexity of the tax law as one of the most serious problems.

<sup>18</sup> *Id.* at 785, Subtitle C (Tax Law Complexity); *see infra* Part II.B.2.

complexity in the federal tax system.<sup>19</sup> Indeed, they even exerted significant and meaningful effort in doing so. However, we find that, since the early 2000s, the IRS, JCT, and Congress have not fulfilled their statutory obligations regarding the tax complexity provisions of RRA 98. We show that, in contrast to RRA 98's expressed "sense" of how tax legislation should be produced, representatives of the IRS have not participated meaningfully in the drafting and evaluation of proposed tax legislation. We further demonstrate that the IRS has failed to deliver annual tax complexity reports to Congress, as required by RRA 98. Last, we show that, although the JCT has delivered tax complexity analyses regarding proposed legislation to Congress, these reports have often contained vague and misleading statements regarding the effect of proposed tax law and have appeared too late in the legislative process to have a significant impact on the legislation.

In addition to our descriptive findings, we also offer potential explanations for the failure of the RRA 98 complexity reforms over time.<sup>20</sup> We explore how Congress itself set the stage, by failing to take some of the most meaningful steps to bring the RRA 98 simplification promises to fruition, and by failing to provide adequate funding to the IRS and the JCT to carry out their roles. In this regard, the difficulties carrying out the tax law complexity provisions may be grouped with broader critiques of RRA 98 as an exercise in scapegoating the IRS. Beyond this lack of political will, we also identify systematic problems with the reforms themselves, such as the fact that JCT can fulfill the requirement to provide complexity analysis of proposed legislation in a perfunctory fashion, which comes too late to influence the legislative process. These explanations suggest that systemic problems with RRA 98's tax complexity provisions rendered them unlikely to be influential.

After reviewing the outcomes of the tax complexity provisions of RRA 98, we explore ways to strengthen these provisions and to address tax complexity more generally.<sup>21</sup> At the outset, Congress would have to recommit to the project by taking seriously its own responsibility for reducing tax complexity, and providing appropriate funding and incentives for the IRS and JCT to fulfill their roles in the process. Once this

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<sup>19</sup> See *infra* Part III.A.

<sup>20</sup> See *infra* Part III.B.

<sup>21</sup> See *infra* Part IV.



recommitment to reducing tax complexity is made, there are also particular reforms that Congress, the IRS, and JCT can adopt to improve the efficacy of the provisions. First, we outline changes to the content and delivery of the annual tax complexity reports produced by the IRS for Congress. Among our recommendations is a proposal that Congress should require the IRS to conduct research regarding how certain taxpayer characteristics, such as income, filing status, and race intersect with complex tax law, and to share the results with Congress. Second, we offer proposals for formalizing the role of the IRS in the legislative process. Third, we explore ways in which Congress could examine deviations between the descriptions of the tax law that the IRS offers to taxpayers and the underlying statutory, regulatory, and judicial authorities. Fourth, we endorse proposals offered by legal scholars for reforming the way in which Congress drafts tax statutes, such as through the formalization of statutory language.

The remainder of this Article proceeds as follows. Part II describes the problem of tax law complexity and the IRS's response, which we describe as simplicity. Part III describes the tax complexity provisions of RRA 98 and presents our evaluation of the efficacy of these provisions since their enactment. Part IV offers policy options for legislators for reviving the tax complexity provisions of RRA 98 and ameliorating the effects of tax complexity on taxpayers and the IRS. Part V concludes.

## II. COMPLEXITY, SIMPLEXITY, AND THE TAX LAW

The complexity of the tax law in the United States is widely known and bemoaned.<sup>22</sup> Even after the 2017 tax reform legislation caused most individuals to claim the standard deduction due to its significant increase,<sup>23</sup> myriad aspects of the tax law remain as complex as ever.<sup>24</sup> This Part II

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<sup>22</sup> Any number of popular press articles express this widespread concern. See, e.g., Joseph Chamie, *America's Taxes—Complex, Incomprehensible and Unfair*, THE HILL (July 27, 2021), <https://thehill.com/opinion/finance/564959-americas-taxes-complex-incomprehensible-and-unfair/> (noting that, "It's widely recognized that the U.S. federal tax code is complex, labyrinthine and interminable."). Tax law experts agree. See, e.g., NAT'L TAXPAYER ADVOC. 2012 ANNUAL REPORT, *supra* note 3, at 5.

<sup>23</sup> Tax Policy Center, *Briefing Book: Key Elements of the U.S. Tax System*, <https://www.taxpolicycenter.org/briefing-book/how-did-tcja-change-standard-deduction-and-itemized-deductions>.

<sup>24</sup> See, e.g., NAT'L TAXPAYER ADVOC., 2020 ANNUAL REPORT TO CONGRESS, at 51 (2020) (describing additional complexities due to COVID-19).

provides an overview of tax complexity and its most prevalent costs, describes the reforms that Congress enacted as part of RRA 98, and, finally, examines some of the IRS's responses to the RRA 98 mandates.

### A. Tax Complexity and Why It Matters

The complexity of the federal U.S. tax law is regularly considered to be one of its defining features. Countless political candidates and government officials have highlighted “superficial proxies” for complexity, such as the number of words and pages in the Code and Treasury Regulations.<sup>25</sup> Others have described the tax law as hopelessly complex as a result of its lack of readability. In one famous example, when campaigning for the enactment of the Tax Reform Act of 1986, President Ronald Reagan read aloud a provision of the Internal Revenue Code that contained multiple cross references to paragraphs within that provision and to other sections of the Code.<sup>26</sup> In addition to focusing on the cosmetic appearance of complexity of the tax law, many government officials and policymakers have highlighted, as evidence of its complexity, the difficulty that taxpayers face in complying with the tax law.<sup>27</sup> As a result of these burdens, the National Taxpayer Advocate (NTA) has suggested that the complexity of the Code is “the most serious problem facing taxpayers—and the IRS.”<sup>28</sup>

#### 1. Types of Tax Complexity

While there is no universally accepted definition of tax complexity, many policymakers and scholars have adopted Professor David Bradford's distillation of tax complexity into “rule complexity,” “compliance

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<sup>25</sup> For discussion, see Emily Cauble, *Superficial Proxies for Simplicity in Tax Law*, 53 U. RICH. L. REV. 329 (2019).

<sup>26</sup> See President Ronald Reagan, Radio Address to the Nation on Tax Reform (June 7, 1986) (“I’d like to read to you from a very famous U.S. Government document: ‘For purposes of Paragraph (3), an organization described in Paragraph (2) shall be deemed to include an organization described in Section 5011(4), (5), or (6) which would be described in Paragraph (2) if it were an organization described in Section 509(a)(3).’”); Joseph J. Thorndike, *Reagan Was Wrong About Tax Complexity*, TAX NOTES (June 16, 2011) (noting error in Reagan’s recitation of Code).

<sup>27</sup> See, e.g., *infra* note 37.

<sup>28</sup> NAT’L TAXPAYER ADVOC. 2012 ANNUAL REPORT, *supra* note 3, at 5.

complexity,” and “transactional complexity,” each of which is described below.<sup>29</sup>

*Rule complexity.* Rule complexity refers to the problems that taxpayers encounter when “interpreting the written and unwritten rules” of the tax law.<sup>30</sup> Some tax rules are so complex that many taxpayers cannot determine how to comply with them. For example, former § 341 addressed “collapsible corporations” and required dozens of calculations to determine whether it applied.<sup>31</sup> Section 341 was often described as one of the most complex rules in the Code.<sup>32</sup> Likewise, the somewhat recently enacted § 199A deduction, applicable for “qualified business income,” contains an inordinate number of steps and tests taxpayers must apply, causing commentators to conclude that it is “difficult to determine when and to what extent it will apply.”<sup>33</sup>

*Compliance complexity.* Compliance complexity occurs when taxpayers face burdens as a result of “keeping records, choosing forms, [and] making necessary calculations” due to the requirements of the Code and Treasury Regulations.<sup>34</sup> Where legislation requires taxpayers and third-party intermediaries to disclose information about transactions and activities, such as the use of offshore bank accounts, to the IRS, an increase in compliance complexity often also results.

*Transactional complexity.* Transactional complexity occurs when taxpayers incur costs in “organizing their affairs so as to minimize their taxes within the framework of the rules.”<sup>35</sup> A tax provision that results in transactional complexity imposes costs in addition to the substantive tax

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<sup>29</sup> See BRADFORD, *supra* note 3, at 266–68.

<sup>30</sup> *Id.* at 266.

<sup>31</sup> I.R.C. § 341 (1954).

<sup>32</sup> I.R.C. § 341(a)(1) (1954). For discussion, see Boris I. Bittker, *The Tax Treatment of Collapsible Corporations*, 13 VAND. L. REV. 129, 129 n.1 (1959) (“Taken literally, the collapsible corporation provisions of the Code would refer to all corporations, foreign and domestic, Western Hemisphere Trade Corporations, and United States Possessions corporations.”).

<sup>33</sup> James R. Repetti, *The Impact of the 2017 Act’s Tax Rate Changes on Choice of Entity*, 21 FLA. TAX REV. 686, 691 (2018).

<sup>34</sup> See BRADFORD, *supra* note 3, at 266.

<sup>35</sup> See *id.*

liability because it causes taxpayers to hire accountants, lawyers, and other advisors to engage in tax planning. Due to the expense of hiring such advisors to comply with the tax law and/or minimize tax liabilities, scholars have described transactional complexity as “the most costly kind of tax complexity.”<sup>36</sup>

## 2. Costs of Tax Complexity

Tax complexity imposes different types of costs on taxpayers and the IRS. Some of the major costs are described briefly below.

*Compliance Costs.* Tax complexity causes taxpayers to spend significant time and money attempting to comply with the law rather than engaging in other personal or business activity. According to the NTA, individuals and business taxpayers spend over six billion hours each year attempting to comply with their federal tax obligations.<sup>37</sup> This figure does not include “millions of additional hours” taxpayers spend responding to IRS notices and audits due to suspected tax noncompliance, including inadvertent errors.<sup>38</sup> High-income and wealthy taxpayers often hire accountants, lawyers, and other advisors to assist them in engaging in tax planning, filing tax returns, and challenging statutory notices of deficiency. Taxpayers who lack the resources to hire advisors, on the other hand, must navigate complex tax law on their own, often with only summaries and other guidance on the IRS website to assist them.

*Failure to Claim Tax Credits and Other Benefits.* Numerous studies also show that inadvertent errors cause taxpayers to fail to claim tax credits and other benefits to which they are entitled, such as the earned income tax credit.<sup>39</sup> When tax law complexity causes taxpayers to fail to claim benefits to which they are entitled, there is not only a potential monetary loss to taxpayers; taxpayer confusion may also be undermining taxpayers’ responses

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<sup>36</sup> *Alternatives to the Current Federal Estate Tax System: Hearing Before the Comm. on Fin. U.S. S., 110th Cong., 2d sess. (2008) (quoting Professor Lily Batchelder).*

<sup>37</sup> See NAT’L TAXPAYER ADVOC. 2012 ANNUAL REPORT, *supra* note 3, at 5.

<sup>38</sup> See *id.*

<sup>39</sup> *Complexity and the Tax Gap: Making Tax Compliance Easier and Collecting What’s Due: Hearing Before the S. Comm. on Fin., 112th Cong. 76–77 (2011) (written statement of Nina E. Olson, Nat’l Tax. Advoc.).*

to incentive provisions that were designed to encourage a particular type of behavior.

*Tax Administration Costs.* Tax law complexity not only imposes costs on taxpayers, but also on the IRS and the tax system more generally. As an initial matter, complex tax law is costly for the IRS to administer. The IRS is an enormous organization with an estimated 81,600 employees as of 2021.<sup>40</sup> As former Commissioner of Internal Revenue, Charles Rossotti, explained, tax law complexity “requires providing additional government resources to carry out all of the IRS’s programs, from providing taxpayers telephone and walk-in assistance, as well as easy-to-understand forms and publications, to auditing potentially non-compliant returns.”<sup>41</sup> Following the enactment of RRA 98, Rossotti expressed that reducing tax law complexity would “make it easier for Service employees to do their jobs of providing services to taxpayers and enforcing the law.”<sup>42</sup>

*Revenue Loss.* Aside from administrative costs, complex tax law contributes to the tax gap by causing taxpayer mistakes.<sup>43</sup> With a gross tax gap of approximately \$441 billion annually,<sup>44</sup> to the extent that any reasonable percentage of reduced taxpaying is attributable to taxpayer confusion resulting from complex tax law, tax law complexity is a costly

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<sup>40</sup> I.R.S. Pub. No. 5382, Internal Revenue Service Progress Update: Putting Taxpayers First, Fiscal Year 2021, 9 (2021).

<sup>41</sup> *Complexity in Administration*, *supra* note 1.

<sup>42</sup> I.R.S., OFF. RSCH. ANALYSIS & STAT., ANNUAL REPORT FROM THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE TO CONGRESS ON TAX LAW COMPLEXITY 4-5 (2000) [hereinafter 2000 I.R.S. TAX LAW COMPLEXITY REPORT].

<sup>43</sup> *See, e.g.*, I.R.S., REDUCING THE FEDERAL TAX GAP: A REPORT ON IMPROVING VOLUNTARY COMPLIANCE 6 (Aug. 2, 2007), [http://www.irs.gov/pub/irs-news/tax\\_gap\\_report\\_final\\_080207\\_linked.pdf](http://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf) (“The tax gap does not arise solely from tax evasion or cheating. It includes a significant amount of noncompliance due to tax law complexity that results in errors of ignorance, confusion, and carelessness.”).

<sup>44</sup> I.R.S., THE TAX GAP: TAX GAP ESTIMATES FOR TAX YEARS 2011-2013 (Nov. 2, 2021), <https://www.irs.gov/newsroom/the-tax-gap>.

problem. Complexity may also lower taxpaying morale, potentially encouraging tax avoidance and evasion.<sup>45</sup>

*Tax Noncompliance.* Finally, while complex tax law may result in inadvertent reporting errors, it can also facilitate intentional tax avoidance and evasion. Complex tax laws often contain inconsistencies and ambiguities that can enable taxpayers to claim tax positions that reduce their tax liabilities. High-income and wealthy taxpayers, who often can afford to hire tax accountants and other advisors, enjoy greater tax avoidance and evasion opportunities resulting from complex tax law than other taxpayers. As former National Taxpayer Advocate Nina Olson has commented, when the tax law is complex, “sophisticated taxpayers can exploit arcane provisions to avoid paying their fair share of tax.”<sup>46</sup>

### B. The RRA 98 Reforms

The political atmosphere surrounding passage of the RRA 98 has often been characterized as one in which members of Congress attempted to scapegoat the IRS for problems beyond its control.<sup>47</sup> Prior to enactment of RRA 98, the U.S. Senate Finance Committee held numerous public hearings, in which taxpayers alleged that IRS agents had engaged in abuses.<sup>48</sup> For example, during the hearings, nearly a dozen taxpayers, including a pastor,<sup>49</sup> single mother,<sup>50</sup> and former U.S. Senator,<sup>51</sup> shared their IRS “horror stories.”<sup>52</sup> While many of these accounts were later characterized as

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<sup>45</sup> See, e.g., *Complexity in Administration*, *supra* note 1, at 6 (noting that complexity can yield gray areas, leading to aggressive taxpayer positions and that, additionally, “noncompliance can result from taxpayers’ frustrations with the complexity faced when trying to obey the law”).

<sup>46</sup> See NAT’L TAXPAYER ADVOC. 2012 ANNUAL REPORT, *supra* note 3, at 22.

<sup>47</sup> See, e.g., DAVID CAY JOHNSTON, PERFECTLY LEGAL 145–48 (2003); Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 KAN. L. REV. 971, 979–83 (2003).

<sup>48</sup> *IRS Oversight: Hearings Before the S. Comm. on Fin.*, 105th Cong., 2d Sess. (1998).

<sup>49</sup> *Id.* at 293–97 (statement of Tony Alamo, Pastor, International Coalition for Religious Freedom).

<sup>50</sup> *Id.* at 298 (statement of the National Audit Defense Network).

<sup>51</sup> *Id.* at 182–85 (statement of Hon. Howard H. Baker, Jr., former U.S. Sen. from Tenn.).

<sup>52</sup> *Id.* at 45 (statement of Sen. Orrin Hatch, Member, S. Comm. on Fin.) (“[W]e hear enough of these complaints and enough of these horror stories that literally we want to do something about it and we need your help to help us know what to do.”).

exaggerations, or even fabrications,<sup>53</sup> they nonetheless motivated Congress to pass legislation that hampered the IRS's enforcement capabilities.

In addition to introducing changes that elevated the importance of high-quality customer service by the IRS, RRA 98 also included specific reforms that targeted tax complexity.<sup>54</sup> Indeed, the National Commission on Restructuring the Internal Revenue Service, which produced recommendations that later became the basis for RRA 98, stated that “[s]implification of the tax law is necessary to reduce taxpayer burden and to facilitate improved tax administration.”<sup>55</sup> To achieve this goal, Congress included in RRA 98 provisions that (at least, in form) placed the burden of investigating the sources of tax complexity and pursuing efforts to reduce it on the IRS, the JCT, and Congress itself. Each of these approaches to tax complexity is described in greater detail below.

### 1. IRS Customer Service

In response to the complexity of the tax law and perceived abuses of power by IRS agents who sought to enforce that law, Congress enacted major reforms in RRA 98 to heighten the IRS's emphasis on “customer service.”<sup>56</sup> In the new law, Congress directed the IRS to implement a comprehensive employee training program to ensure “adequate customer service training” of its employees.<sup>57</sup> Following the enactment of these changes, the IRS adopted a new mission statement: “[P]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.”<sup>58</sup> The IRS implemented its new mission by shifting personnel and other resources away from tax enforcement and toward taxpayer service.<sup>59</sup> According to the IRS's

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<sup>53</sup> See JOHNSTON, *supra* note 47.

<sup>54</sup> See *infra* Part II.B.2.

<sup>55</sup> MORRISON & GUENTHER, *supra* note 14.

<sup>56</sup> Section 1205, 112 Stat. at 722; see also Lederman, *supra* note 47, at 971, 992–93.

<sup>57</sup> § 1205(b)(1), 112 Stat. at 722.

<sup>58</sup> I.R.S. News Release IR-98-59, 16 Sand. Fed. Tax Rep. (CCH) ¶ 44,266.112.

<sup>59</sup> I.R.S., THE AGENCY, ITS MISSION AND STATUTORY AUTHORITY (May 31, 2021), <https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority> [hereinafter THE AGENCY, ITS MISSION]. Numerous scholars have suggested that this change has had a negative impact on the IRS's

own description, the mission of the agency is to “help the large majority of compliant taxpayers with the tax law, while ensuring that the minority who are unwilling to comply pay their fair share.”<sup>60</sup> Notably, this mission statement references helping taxpayers comply *before* referencing tax enforcement.<sup>61</sup>

## 2. Tax Complexity Reforms

A separate set of provisions from RRA 98 addressed the problem of tax complexity directly. Title IV of RRA 98 addressed “Congressional Accountability for the Internal Revenue Service.”<sup>62</sup> Title IV made a number of changes, including expansion of JCT responsibilities and coordination of such responsibilities with the Government Accountability Office.<sup>63</sup> But, a major focus of Title IV was addressing tax law complexity.

First, under Subtitle C (“Tax Law Complexity”), RRA 98 stated that, “It is the sense of the Congress that the Internal Revenue Service should provide Congress with an independent view of tax administration, and that during the legislative process, the tax writing committees of Congress should hear from front-line technical experts at the Internal Revenue Service. . . .”<sup>64</sup>

Second, under this same Subtitle, RRA 98 required the IRS to annually analyze “the sources of complexity in administration of the Federal tax laws” and report the results of such analysis to the House Committee on Ways and Means and the Senate Finance Committee.<sup>65</sup>

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enforcement capacity. *See, e.g.*, Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 FLA. L. REV. 1, 117–28 (2004); Lederman, *supra* note 47, at 982–90.

<sup>60</sup> THE AGENCY, ITS MISSION, *supra* note 59.

<sup>61</sup> IR-98-59, *supra* note 59.

<sup>62</sup> 112 Stat. at 783.

<sup>63</sup> 112 Stat. at 783–87. Title IV also addressed the now insignificant, but then significant, issue of how the IRS would handle Y2K. § 4011. *Id.* at 784.

<sup>64</sup> § 4021, *id.* at 785.

<sup>65</sup> § 4022(a). *Id.*



Third, RRA 98 required JCT, in consultation with the IRS and Treasury, to engage in tax law complexity analyses.<sup>66</sup> RRA 98 stated that, subject to Congress appropriating funds to support the effort, the JCT would “report, at least once each Congress, to the Committee on Finance and the Committee on Ways and Means on the overall state of the federal tax system, together with recommendations with respect to possible simplification proposals and other matters relating to the administration of the Federal tax system.”<sup>67</sup> Moreover, RRA 98 required the JCT, in consultation with the Treasury Department and the IRS, to provide Congress a tax complexity analysis for any tax legislation with widespread applicability to individuals or small businesses and that was reported by the congressional tax writing committees.<sup>68</sup> Indeed, Congress even tied its own ability to pass tax legislation to JCT’s tax complexity analysis. RRA 98 explicitly provided that:

The report of the Committee on Ways and Means on any bill or joint resolution containing any provision amending the Internal Revenue Code of 1986 shall include . . . a Tax Complexity Analysis . . . unless the Committee on Ways and Means causes to have such Analysis printed in the Congressional Record prior to the consideration of the bill or joint resolution.<sup>69</sup>

and that it would not be in order for Congress to consider covered tax legislation without the required JCT tax complexity analysis.<sup>70</sup>

### *C. Simplicity and the IRS*

In response to RRA 98’s emphasis on customer service, as well as other subsequent legislation, such as the Plain Writing Act of 2010,<sup>71</sup> the IRS has confronted the problem of tax complexity through plain language

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<sup>66</sup> Part of these requirements was situated in Subtitle C (titled “Tax Law Complexity”) and part was situated in Subtitle A (title “Expansion of Duties of the Joint Committee on Taxation”). *Id.* at 785 and 783.

<sup>67</sup> § 4002(a)(3)(B), 112 Stat. at 784.

<sup>68</sup> § 4021(b)(1). *Id.* at 785.

<sup>69</sup> § 4022(b)(3). *Id.* at 786.

<sup>70</sup> *Id.*

<sup>71</sup> Plain Writing Act of 2010, Pub. L. No. 111-274, 124 Stat. 2861.

explanations of the tax law to the general public. Using IRS publications, FAQs on its website, and automated legal guidance tools, the IRS attempts to translate complex tax law into rules that nontax experts can understand and follow.<sup>72</sup> However, as this Subpart shows, when offering these explanations of the tax law, the IRS often delivers statements that feature “simplicity”—the presentation of complex formal law as though it is simple and clear, despite the lack of actual simplification of the underlying formal law.<sup>73</sup>

*IRS Publications.* Every year, the IRS revises and distributes dozens of “IRS publications”<sup>74</sup> to help taxpayers understand the tax law. IRS Publication 17, *Your Federal Income Tax*, for example, describes the general rules for filing an individual annual tax return, IRS Form 1040.<sup>75</sup> When the IRS describes the complex tax law using plain language, it often offers clear and simple statements that can present contested formal tax law as a series of clear rules, add administrative gloss to the formal tax law, and omit discussion of statutory and regulatory exceptions to the formal tax law.<sup>76</sup> The IRS’s reliance on simplicity to explain formal tax law in IRS publications often results in deviations between the formal and the informal tax law. Sometimes these explanations, if followed, benefit taxpayers; at other times, they conflict with taxpayers’ interests.<sup>77</sup>

*Frequently Asked Questions.* In addition, the IRS often posts FAQs and answers to its website to help taxpayers.<sup>78</sup> Commentators have criticized the IRS for using the FAQ format to present contested or novel interpretations of the tax law as though they are settled law.<sup>79</sup> In addition, as the IRS posts

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<sup>72</sup> See *Automated Legal*, *supra* note 9.

<sup>73</sup> *Simplicity*, *supra* note 10, at 208.

<sup>74</sup> See I.R.S. *Publications Online*, <https://www.irs.gov/publications> (last updated June 4, 2022). For discussion, see *Simplicity*, *supra* note 10, at 204.

<sup>75</sup> I.R.S. Pub. No. 17, *Your Federal Income Tax* (2021).

<sup>76</sup> See *Simplicity*, *supra* note 10, at 202–04.

<sup>77</sup> For further examples, see *id.*

<sup>78</sup> I.R.S. Pub. No. 4054, *Objectives Report to Congress: Fiscal Year 2021*, 48 n.13.

<sup>79</sup> See, e.g., Alice G. Abreu & Richard K. Greenstein, *NTA Blog Post on “Protecting the Rights of Taxpayers Who Rely on FAQs” Is Timely and Welcome, but Doesn’t Go Far Enough*, PROCEDURALLY TAXING (July 9, 2020), <https://procedurallytaxing.com/nta-blog-post-on-protecting-the-rights-of->

FAQs to its website, it may revise posted questions and answers without providing taxpayers with explanation of the changes. As the NTA has argued, when criticizing the IRS's increasing use of FAQs, "FAQs can be changed, supplemented, and amended without notice and public comment, unlike regulations."<sup>80</sup>

*Automated Legal Guidance.* Since 2010, the IRS has attempted to respond to taxpayer inquiries using a form of automated legal guidance through its website, the "Interactive Tax Assistant" (ITA).<sup>81</sup> When taxpayers access ITA through the IRS website, they select a category of questions, such as "Can I Deduct My Medical and Dental Expenses?" and then answer a series of questions provided by ITA before receiving an "answer" from ITA.<sup>82</sup> While automated legal guidance tools such as ITA can deliver accurate answers to simple questions regarding issues like filing deadlines and types of forms, they can also present answers that differ from the underlying tax law.<sup>83</sup> The IRS's reliance on simplicity to explain complex tax law in automated legal guidance is especially powerful and persuasive because it offers tax guidance that is personalized (specific to the inquiring taxpayer), nonqualified (omitting discussion of contradictory exceptions and other rules), and instantaneous (sparing taxpayers from reading other authorities).<sup>84</sup>

As this Part shows, by shifting the IRS's attention toward customer service to taxpayers, in addition to enforcement, RRA 98 has had long-lasting impact on the IRS's communication of complex tax law to the general public. One way the IRS fulfills its customer service mission is by providing plain language descriptions of complex tax law. In Part III, we consider the relative

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taxpayers-who-rely-on-faqs-is-timely-and-welcome-but-doesnt-go-far-enough/; Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation's Incarcerated Population*, 72 S.C. L. REV. 667 (2021); Nina Olson, *IRS FAQs Can Be a Trap for the Unwary*, TAXCONNECTIONS: TAX BLOG (July 28, 2017), <https://www.taxconnections.com/taxblog/irs-faqs-can-be-a-trap-for-the-unwary/>.

<sup>80</sup> I.R.S. Pub. No. 4054, *supra* note 78, at 67.

<sup>81</sup> I.R.S. *Interactive Tax Assistant (ITA)*, <https://www.irs.gov/help/ita>; *see also TIGTA Publicly Releases Report on IRS Customer Service*, TREAS. INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP'T OF THE TREAS., NO. 2011-46 (Aug. 11, 2011).

<sup>82</sup> *See* I.R.S. Pub. No. 4054, *supra* note 78.

<sup>83</sup> *See Simplicity*, *supra* note 10, at 221–28.

<sup>84</sup> *See id.* at 202–04.

impact of the tax complexity provisions of RRA 98 on the behavior of the IRS, JCT, and Congress.

### III. SIMPLICITY LOST: A REVIEW OF THE RRA 98 TAX COMPLEXITY REFORMS

When the IRS attempts to convey complex tax law to the general public through plain and simple language, it is all too easy to fault the agency for misstatements and other problems that result. But the IRS relies on communication tools such as simplicity, in part, because Congress fails to take seriously its commitment to tax law simplification.

In this Part, we evaluate what happened to the tax complexity reforms of RRA 98. Our analysis shows that the IRS and JCT initially meaningfully complied with the mandate to provide Congress with general reports on the sources of complexity in the federal tax system. However, we find that, in contrast to Congress's intent in RRA 1998, Congress has not routinely or systematically included IRS representatives in the legislative process. We further find that, since its initial reports, the IRS has failed to deliver annual tax complexity reports to Congress. Last, we show that although the JCT has delivered tax complexity analyses regarding proposed legislation to Congress, these reports have often contained vague and misleading statements regarding the effect of proposed tax law and have appeared too late in the legislative process to have a significant impact on the legislation.

#### *A. What Happened to RRA 98's Tax Complexity Reforms*

As Part II discussed, not only did RRA 98 impose new customer service obligations on the IRS to help taxpayers navigate complex tax law, but it also included reforms that addressed tax complexity directly.<sup>85</sup> Specifically, RRA 98 provided that: (1) the IRS should participate in the tax legislative process; (2) the IRS must issue an annual tax complexity report to Congress by March 1 of each year; and (3) the JCT must provide to the reporting congressional committee a "tax complexity analysis" for any proposed tax legislation with widespread applicability and, to the extent of available

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<sup>85</sup> See *supra* Part II.

funding, provide Congress with general reports on the complexity of the tax law.<sup>86</sup>

### 1. Relegation to Statutory Notes

The tax complexity reforms of RRA 98, however, were short-lived. As an initial matter, most were never classified as part of the Code.<sup>87</sup> As described in more detail below, statutory notes are the law. However, statutory notes are physically relegated to an inferior position and many judges, researchers, policymakers, and scholars alike share the incorrect belief that they are a less “real” form of law.<sup>88</sup>

Of the tax complexity reforms from RRA 98 identified above, the only change that appears in the Code is the requirement that JCT report at least once each Congress on the overall state of the federal tax system, including regarding simplification proposals.<sup>89</sup> The provision requiring annual tax law complexity reports to Congress from the IRS appears in the statutory notes to § 7801.<sup>90</sup> The provision requiring JCT complexity analysis to accompany proposed tax legislation appears in the statutory notes to § 8022.<sup>91</sup> The notion that it is out of order for Congress to consider tax legislation without a JCT analysis, as suggested by RRA 98,<sup>92</sup> appears in neither the Code nor the statutory notes. Likewise, the RRA 98 provision stating that, as part of the legislative process, Congress should hear from front-line IRS representatives regarding tax administration issues, is neither included in the Code nor the statutory notes.<sup>93</sup> The commitments that did not make it into the Code, or even into the statutory notes to the Code, remain good law enacted by

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<sup>86</sup> §§ 4021, 4022(a), 4022(b), 112 Stat. at 785–87.

<sup>87</sup> *Infra* discussion accompanying notes 89–93.

<sup>88</sup> Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 LAW LIB. J. 213, 236–44 (2020).

<sup>89</sup> I.R.C. § 8022(3)(B).

<sup>90</sup> I.R.C. § 7801 statutory note (Tax Law Complexity Analysis; Commissioner Study) (West 2022).

<sup>91</sup> I.R.C. § 8022 statutory note (Tax Complexity Analysis to Accompany Certain Legislation) (West 2022).

<sup>92</sup> § 4022(b), 112 Stat. at 785.

<sup>93</sup> § 4021, 112 Stat. at 785.

Congress. However, their absence from the Code obscures them from public view.

## 2. IRS's Role in the Legislative Process

Regarding the RRA 98's recommendation that frontline IRS experts participate in the legislative process in order to allow them to express administrability concerns, the legislative process appears to have moved in the opposite direction. Information about exactly who participates in the tax legislative process is hard to acquire. However, extensive interview research with tax legislation drafters, conducted by one of us, indicates that the role of the IRS, as well as Treasury, has substantially diminished in the tax legislative process.<sup>94</sup> The research indicates, in relevant part,

[O]ver time and all other things being equal, the Treasury and the IRS [have become] less engaged in legislating. Representatives from the IRS Legislation and Regulations Division of the office of Chief Counsel used to routinely offer comments on draft language. This division no longer exists. Interviewees indicated that IRS participation in the process is more muted now. The IRS may participate in decisions that implicate tax administration directly, but the IRS does not necessarily have a seat at the drafting table, and is not necessarily routinely consulted about how a new provision will be administered, or how particular drafting decisions might affect tax administration.<sup>95</sup>

Indeed, in the last major tax reform, in 2017, which yielded sweeping changes to the Code, Dana Trier, Deputy Assistant Treasury Secretary for Tax Policy during the reform, indicated that, “[c]ompared to earlier periods, Treasury’s on-the-ground role in this tax legislation was circumscribed; it was not large.”<sup>96</sup> Some interviewees in this interview study also suggested that the shift in power away from groups with tax administration expertise, such as the IRS and other tax law experts in Treasury, has moved tax policy influence to outside lobbyists.<sup>97</sup>

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<sup>94</sup> Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291 (2019).

<sup>95</sup> *Id.* at 1333.

<sup>96</sup> Thomas D. Greenaway, *Interview with Dana Trier*, 37 ABA TAX TIMES 6, 8 (2018).

<sup>97</sup> Oei & Osofsky, *supra* note 94, at 1332.

### 3. IRS Complexity Reports to Congress

As for RRA 98's requirement that the IRS make annual tax law complexity reports to Congress, the IRS did initially make several tax law complexity reports, which were heralded as important, promising, and impactful. Specifically, shortly after the passage of RRA 98, in June 2000, the IRS made a tax law complexity report to Congress,<sup>98</sup> and Congress held a hearing on the matter.<sup>99</sup> The IRS explained that the report's "short-term objective is to respond to the immediate issues suggested in the legislation; the long-term objective is a systematic examination of complexity in tax administration that correlates with both taxpayer burden and taxpayer compliance issues."<sup>100</sup> In announcing the hearing, Chairman Houghton, of the Oversight Subcommittee of the House Committee on Ways and Means, called the tax law complexity provisions of RRA 98 "one of the most important provisions" in the legislation, expressed his hope that Congress would "heed the call to keep simplification in mind as we pass tax bills in the future," and that the Ways and Means Committee would work in its traditional, bipartisan manner to make this happen.<sup>101</sup>

During the hearing, then-Commissioner, Charles Rossotti, detailed the burdens that tax law complexity creates, not just for taxpayers, but also for the IRS, and for the interactions between the IRS and taxpayers.<sup>102</sup> For instance, Commissioner Rossotti explained that frequent tax law changes, especially with short time frames or retroactive dates, challenge and frustrate the IRS's efforts to issue "clear guidance and tax forms," and "can result in the forms being more difficult for taxpayers to understand or complete."<sup>103</sup> Commissioner Rossotti further emphasized that, "With short lead times, both the IRS and taxpayers have little time or opportunity to become knowledgeable about the changes to the Code."<sup>104</sup> Commissioner Rossotti

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<sup>98</sup> 2000 I.R.S. TAX LAW COMPLEXITY REPORT, *supra* note 42.

<sup>99</sup> *Complexity in Administration*, *supra* note 1.

<sup>100</sup> *Id.* at 8.

<sup>101</sup> *Id.* at 4.

<sup>102</sup> *See id.*

<sup>103</sup> *Id.* at 9.

<sup>104</sup> *Complexity in Administration*, *supra* note 1, at 9.

concluded with his hope that “this first report represents an important initial step in identifying, analyzing and explaining some of the most fundamental problems related to tax law complexity and providing options for reducing undue and unnecessary complexity.”<sup>105</sup> The IRS followed up on these efforts by making another tax law complexity report in 2002.<sup>106</sup>

Both of the IRS’s tax law complexity reports appeared to have been effective. In her 2014 Annual Report to Congress, National Taxpayer Advocate Nina Olson noted that the IRS’s two tax law complexity reports served as “data driven road map[s] to highlight the areas of complexity that are causing the most problems for taxpayers and the IRS,”<sup>107</sup> and that, even though they were each relatively moderate in length, they prompted Congress to enact many key recommendations, yielding critical tax law simplification.<sup>108</sup>

More generally, in the wake of RRA 98, the IRS showed meaningful commitment to analyzing complexity and burden under the tax law. For instance, the IRS’s Office of Program Evaluation and Risk Analysis (“OPERA”) created a detailed and thoughtful questionnaire to analyze the burden that tax legislation, regulation, and guidance places on taxpayers.<sup>109</sup> The questionnaire included questions such as, “Does the legislation require new information that may not have been collected by taxpayers before its enactment?”<sup>110</sup> (with accompanying rankings in terms of how burdensome any new information collection from legislation would be); “Is a worksheet required to determine whether the taxpayer qualifies for the tax, credit, or exemption?”<sup>111</sup> (again with accompanying rankings of how burdensome any worksheet requirements are); and, “Do[es] the court[s] state that case dealing

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<sup>105</sup> *Id.* at 10.

<sup>106</sup> 2000 I.R.S. TAX LAW COMPLEXITY REPORT, *supra* note 42.

<sup>107</sup> 1 NAT’L TAXPAYER ADVOC., 2014 ANNUAL REPORT TO CONGRESS, at 103 (2014) [hereinafter NAT’L TAXPAYER ADVOC. 2014 ANNUAL REPORT].

<sup>108</sup> *Id.* at 106.

<sup>109</sup> I.R.S., Off. Program Evaluation & Risk Analysis, Questions—Taxpayers’ Activities (Sept. 8, 1999) (on file with Nina Olson).

<sup>110</sup> *Id.* at 1, Question 1.

<sup>111</sup> *Id.* at 5–6, Question 25.



with this rule/provision are ‘fact-specific’?”<sup>112</sup> (with another accompanying ranking of possibilities, and an explanatory admonishment that “This creates no precedent and leads to increased litigation.”).<sup>113</sup> Accompanying this questionnaire was other analysis by the IRS suggesting that the organization was committed to seriously analyzing both tax law complexity and burden after the enactment of RRA 98.<sup>114</sup>

However, the IRS’s dedication to such efforts was only temporary. After 2002, the IRS stopped making such reports to Congress.<sup>115</sup> In response to criticism by the NTA for failing to make annual tax law complexity reports, the IRS argued that it was fulfilling the spirit of the tax complexity reports in other ways, including, for instance, by having IRS officials testify before Congress on the state of the tax system and tax complexity.<sup>116</sup> The IRS also argued that other outside organizations, like the Treasury Inspector General for Tax Administration, have issued reports regarding the complexity of the tax system.<sup>117</sup> However, the NTA concluded that none of these somewhat “vaguely described” alternatives fulfill the statutory requirement that the IRS, as the tax administrator itself, produce annual tax law complexity reports.<sup>118</sup> The NTA explained that such reports are distinct from the alternatives the IRS mentioned, including, for instance, occasional

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<sup>112</sup> *Id.* at 12, Question 56.

<sup>113</sup> *Id.* at 1, 5–6, 12.

<sup>114</sup> I.R.S., Off. Program Evaluation & Risk Analysis, Taxpayer Complexity/Burden/Compliance: Putting the Pieces Together, Briefing to the ABA (Sept. 9, 1999) (on file with Nina Olson).

<sup>115</sup> *Id.* at 102; *The National Taxpayer Advocate: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 115th Cong. 23 (2017) (statement of Nina E. Olson, Nat’l Taxpayer Advoc.).

<sup>116</sup> NAT’L TAXPAYER ADVOC. 2014 ANNUAL REPORT, *supra* note 107, at 102; 2 NAT’L TAXPAYER ADVOC., FISCAL YEAR 2016 OBJECTIVES REPORT TO CONGRESS: IRS RESPONSES AND NATIONAL TAXPAYER ADVOCATE’S COMMENTS REGARDING MOST SERIOUS PROBLEMS IDENTIFIED IN THE 2014 ANNUAL REPORT TO CONGRESS, at 37 (2016) [hereinafter 2 NAT’L TAXPAYER ADVOC. FY 2016 OBJECTIVES REPORT]. The NTA concluded instead that, “[t]he IRS has unilaterally decided complexity reports, as required by Congress, are no longer necessary. Thus, it is violating the law and making its job more difficult by withholding from Congress and the public vital information and recommendations that could improve tax administration.” *Id.* at 38.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

congressional testimony by IRS officials,<sup>119</sup> which had already existed prior to RRA 98.<sup>120</sup> The NTA concluded that “the IRS’s decision to discontinue the reports has likely contributed to tax complexity, which burdens taxpayers and the IRS alike.”<sup>121</sup>

#### 4. JCT’s Complexity Reports to Congress

While the JCT initially engaged in a significant effort to deliver a report to Congress on tax law complexity, the energy behind this effort quickly faded. In 2001, JCT issued a “Study of the Overall State of the Federal Tax System and Recommendations for Simplification, Pursuant to Section 8022(3)(B) of the Internal Revenue Code of 1986.”<sup>122</sup> This almost 1,000-page report represented a herculean effort by JCT, which marshalled resources from present as well as prior staffers of the JCT, academics, and other congressional bodies (such as the General Accounting Office (GAO) and the Congressional Research Service) to produce a comprehensive overview of the federal tax law, focusing in particular on complexity in such law, and resulting in extensive and specific recommendations by the JCT to simplify the tax law.<sup>123</sup> Since the 2001 report, JCT made several other reports pursuant to § 8022(3)(B) of the Code, or referencing it.<sup>124</sup> For instance, JCT has more recently issued a sixteen-page “tax law complexity” report, in order to provide background on the topic as part of a Senate Finance hearing on

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> NAT’L TAXPAYER ADVOC. 2014 ANNUAL REPORT, *supra* note 107, at 102.

<sup>122</sup> JOINT COMM. ON TAX’N, 107TH CONG., STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION, PURSUANT TO SECTION 8022(3)(B) OF THE INTERNAL REVENUE CODE OF 1986, REP. NO. JCS-3-01 (1st Sess. 2001).

<sup>123</sup> *See id.* at Volume 1(ii)–(x) (detailing who worked on the report and providing table of contents for all three volumes).

<sup>124</sup> *See, e.g.*, JOINT COMM. ON TAX’N, 107TH CONG., REPORT OF THE JOINT COMMITTEE ON TAXATION RELATING TO THE INTERNAL REVENUE SERVICE AS REQUIRED BY SECTION 8022 OF THE INTERNAL REVENUE CODE, REP. NO. JCX-35-05 (2005) (reviewing IRS strategic plans and budget and mentioning tax law complexity only in passing).

complexity.<sup>125</sup> However, JCT did not again marshal anywhere near the resources from its 2001 focus on tax law complexity.

#### 5. JCT Complexity Analysis for Proposed Legislation

Finally, there has been mixed compliance with the requirement that proposed tax legislation contain JCT complexity analysis. Formally, this requirement seems to have been satisfied. The legislative history of applicable tax legislation since RRA 98 generally includes at least some mention of the required JCT complexity analysis. For instance, the Conference Report accompanying the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) includes a “tax complexity analysis” by JCT. Like many such analyses that would follow in future legislation, it states that it is:

provided pursuant to section 4022(b) of the Internal Revenue Service Reform and Re-structuring Act of 1998, which requires the staff of the Joint Committee on Taxation (in consultation with the Internal Revenue Service (“IRS”) and the Treasury Department) to provide a complexity analysis of tax legislation reported by the House Committee on Ways and Means, the Senate Committee on Finance, or a Conference Report containing tax provisions.<sup>126</sup>

And, as was the case with the other requirements from RRA 98, the early JCT complexity analysis for proposed legislation showed some promise of living up to RRA 98’s commitments. In particular, the analysis for EGTRRA was specific about how many taxpayers would be affected by the legislation and offered some useful indications regarding how the legislation would affect tax administration. For instance, with respect to EGTRRA’s creation of a new 10% income tax bracket, as well as acceleration of such bracket via advance payments to taxpayers for the change, the JCT explained that, “It is estimated that the provision will affect approximately 100 million individual tax returns.”<sup>127</sup> The JCT cautioned that the legislative provision may increase questions to the IRS, “such as when taxpayers would receive their checks,” which may “have an adverse impact on other elements of IRS’s operations, such as the levels of taxpayer service.”<sup>128</sup> The analysis then went on to

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<sup>125</sup> JOINT COMM. ON TAX’N, 114TH CONG., COMPLEXITY IN THE FEDERAL TAX SYSTEM, REP. NO. JCX-49-15 (2015).

<sup>126</sup> H.R. REP. NO. 107-84, at 326 (2001) (Conf. Rep.).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 327.

provide, with some specificity, how the provision would impact IRS forms, withholding tables, and employer administration. Specifically, the analysis stated,

The IRS will need to add to the individual income tax forms package a new worksheet so that taxpayers can reconcile the amount of the check they receive from the Department of the Treasury with the credit they are allowed as an acceleration of the 10 percent income tax rate bracket benefit for 2001. This worksheet should be relatively simple and many taxpayers will not need to fill it out completely because they will have received the full amount by check.

The Secretary of the Treasury is expected to make appropriate revisions to the wage withholding tables to reflect the proposed rate reduction for calendar year 2001 as expeditiously as possible. To implement the effects of the rate cuts for 2001, employers would be required to use a new (second) set of withholding rate tables to determine the correct withholding amounts for each employee. Switching to the new withholding rate tables during the year can be expected to result in a one-time additional burden for employers (or additional costs for employers that rely on a bookkeeping or payroll service).<sup>129</sup>

However, the utility of the tax law complexity analysis for proposed legislation has been inconsistent. For instance, for the American Jobs Creation Act of 2004, the Committee on Ways and Means issued a report for the proposed legislation on June 16, 2004.<sup>130</sup> At this time, the proposed legislation contained numerous proposed changes with widespread application across many areas of individual and business taxation (including, to name only a few, proposed changes to depreciation and expensing rules, proposed changes to the state and local tax deduction, and new rules for nonqualified deferred compensation plans).<sup>131</sup> The Committee report nonetheless stated that, “The staff of the Joint Committee on Taxation has determined that a complexity analysis is not required under section 4022(b) of the IRS Reform Act because the bill contains no provisions that amend the Internal Revenue Code and that have ‘widespread applicability’ to individuals or small businesses.”<sup>132</sup> Without complexity analysis, the House of Representatives then passed the bill on June 17, 2004, shortly after release

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<sup>129</sup> *Id.*

<sup>130</sup> H.R. REP. NO. 108-548 (2004).

<sup>131</sup> *Id.* at 341.

<sup>132</sup> *Id.* at 399.

of the Committee on Ways and Means Report.<sup>133</sup> On July 15, 2004, the Senate passed the bill by voice vote.<sup>134</sup>

Months later, on October 7, 2004, shortly before the bill was signed into law by the President (but months after the House and Senate voted to approve the bill), the Conference Committee issued a report with an updated JCT complexity analysis.<sup>135</sup> This time, the JCT did issue a complexity analysis for the bill.<sup>136</sup> The tax complexity analysis addressed one aspect of the bill—a deduction attributable to certain qualified production activities in the United States.<sup>137</sup> To comply with the requirements of RRA 98, the analysis stated that, “[i]t is estimated that the provision will affect more than 10 percent of small businesses.”<sup>138</sup> Yet, this exceedingly wide range could presumably cover anywhere between 10 and 100% of small businesses. The analysis went on to warn of many potential administrative difficulties that would flow from the provision, including additional recordkeeping, disputes, and guidance, among other things.<sup>139</sup> However, the analysis struggled at times to say exactly what would be changed, instead, warning that, “[d]ue to the detailed calculations required by the pvision [sic], it is anticipated that the Secretary of the Treasury will have to make appropriate revisions to several types of income tax forms, schedules, spreadsheets and instructions.”<sup>140</sup> Moreover, the JCT had to look to Canada as an example of what might follow, explaining that:

It should be noted that a similar provision in the Canadian tax laws was found to be highly complex and difficult to administer, which led to numerous disputes and litigation between affected taxpayers and the Canadian tax authorities. Canada

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<sup>133</sup> *Roll Call 259: Bill Number: H.R. 4520*, CLERK OF U.S. HOUSE OF REPRESENTATIVES, <https://clerk.house.gov/Votes/2004259>.<https://www.congress.gov/bill/108th-congress/house-bill/4520/actions>.

<sup>134</sup> S. CONG. REC., 108th Cong., 2d Sess. S8281 (2004), <https://www.congress.gov/crec/2004/07/16/CREC-2004-07-16-pt1-PgS8281.pdf>.

<sup>135</sup> H.R. REP. NO. 108-755, at 802.

<sup>136</sup> H.R. 4520 at 802–03.

<sup>137</sup> *Id.* at 802.

<sup>138</sup> *Id.* at 803.

<sup>139</sup> *Id.* at 803–04.

<sup>140</sup> *Id.* at 803.

recently repealed the provision and provided a general reduction in corporate tax rates.<sup>141</sup>

Over a decade later, when the 2017 overhaul of the Code (often referred to as the Tax Cuts and Jobs Act (“TCJA”))<sup>142</sup> occurred, the JCT complexity analysis for the proposed legislation was not only incomplete, but it was also misleading in some places. For instance, Urban Institute Fellow, Eugene Steuerle, describes how JCT’s complexity analysis for the qualified business income deduction, one of the most significant provisions of the TCJA, “falls far short of telling the real story of how challenging this provision will be for many business owners.”<sup>143</sup> As mentioned previously, commentators have deemed this provision to be inordinately complicated.<sup>144</sup> As one law firm has described, its rules “are replete with complicated multi-step calculations, terms and definitions, and new acronyms that taxpayers must learn and understand to accurately calculate their deduction.”<sup>145</sup> For instance,

Computing the amount of the deduction can require an individual business owner to determine his or her qualified trade or business income (“QBI”); whether he or she falls above or below certain threshold amounts; whether he or she falls within a phase-out range, a W-2 wage limitation, an unadjusted basis immediately after acquisition limitation (“UBIA”), or a taxable income limitation; whether he or she is engaged in a specified service trade or business (“SSTB”); and applicable real estate investment trust (“REIT”) dividends and distributions from publicly traded partnerships (“PTP”). Additional challenges apply to business owners with multiple businesses who must consider aggregation, allocation, and netting rules.<sup>146</sup>

JCT’s complexity analysis of the qualified business income deduction was as follows,

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<sup>141</sup> H.R. 4520, 108th Cong. at 803 (2004).

<sup>142</sup> Pub. L. No. 115-97, 131 Stat. 2054 (2017).

<sup>143</sup> C. Eugene Steuerle, *The TCJA Will Create More Complexity for U.S. Taxpayers Than It Claims* (Jan. 5, 2018), <https://www.taxpolicycenter.org/taxvox/tcja-will-create-more-complexity-taxpayers-it-claims>.

<sup>144</sup> See, e.g., Repetti, *supra* note 33 (providing one such assessment).

<sup>145</sup> Mary Burke Baker et al., *Section 199A (to Z): Simplifying the Tax Code for Small Businesses is Complicated* (Aug. 16, 2018), <https://www.klgates.com/Section-199A-to-Z--Simplifying-the-Tax-Code-for-Small-Businesses-is-Complicated-08-16-2018>.

<sup>146</sup> *Id.*

*It is not anticipated that individuals will need to keep additional records due to the provision. It should not result in an increase in disputes with the IRS, nor will regulatory guidance be necessary to implement this provision.* It may, however, increase the number of questions that taxpayers ask the IRS, such as how to calculate qualified business income and how to apply the phase-ins of the W-2 wage (or W-2 wage and capital) limit and of the exclusion of service business income in the case of taxpayers with taxable income exceeding the threshold amount of \$157,500 (twice that amount or \$315,000 in the case of a joint return), indexed. This increased volume of questions could have an adverse impact on other elements of IRS's operation, such as the levels of taxpayer service. *The provision should not increase the tax preparation costs for most individuals.*<sup>147</sup>

At times, this analysis is implausible, such as when it claims that “regulatory guidance will not be needed to implement the provision.”<sup>148</sup> This claim was not credible at its making, and it was shortly thereafter belied by voluminous regulations and other guidance that were necessary to carry out the complex and entirely new provision.<sup>149</sup> Further, as Steuerle explains, sometimes the analysis is just downright misleading, such as when it claims that “[t]he provision should not increase the tax preparation costs for most individuals.”<sup>150</sup> This claim is true as far as it goes (in that most individual taxpayers are not business owners), but misleadingly misses the critical point that the provision would almost certainly increase tax preparation costs for the millions of taxpayers to whom the provision applies.<sup>151</sup> Moreover, this cursory complexity analysis was not unique to this important provision of the TCJA, but rather appeared throughout.<sup>152</sup>

As Steuerle hastens to add, it is hard to criticize JCT for this cursory analysis.<sup>153</sup> Congress notoriously rushed the TCJA through Congress,

<sup>147</sup> H.R. REP. NO. 115-466, at 678 (2017) (Conf. Rep.) (emphasis added).

<sup>148</sup> *Id.*

<sup>149</sup> Steuerle, *supra* note 143; see also Shu-Yi Oei & Leigh Osofsky, *Legislation and Comment: The Making of the § 199A Regulations*, 69 EMORY L.J. 209 (2019) (exploring the extensive process of making the qualified business income deduction regulations, and the lobbying behind it, which began with the enactment of the legislation).

<sup>150</sup> H.R. REP. NO. 115-466, at 678 (2017) (Conf. Rep.).

<sup>151</sup> Steuerle, *supra* note 143.

<sup>152</sup> See, e.g., H.R. REP. NO. 115-466, at 680–82 (for similarly cursory analysis for the changes to the depreciation and expensing rules by the TCJA).

<sup>153</sup> Steuerle, *supra* note 143.

leaving little time for careful analysis.<sup>154</sup> However, whether because Congress wanted to pass tax legislation quickly, or needed to avoid bipartisan review and potential roadblocks, or for whatever other reason, the TCJA exemplifies how the incentives simply did not remain in place to carry out RRA 98's simplicity commitments in a meaningful fashion. As other priorities and difficulties surfaced, Congress, the IRS, and JCT all turned their attention away from the tax complexity provisions of RRA 98.

### *B. Why Has Simplicity Been Lost?*

Stepping back from the individual RRA tax complexity commitments, we can see that in some cases the provisions were not satisfied at all; in other cases, they were satisfied, but in a manner that was vague or even misleading; and, in still other cases, they were satisfied in a manner unlikely to be influential on Congress, or, relatedly, they were satisfied by the IRS or JCT, but ignored by Congress. While we cannot say for certain why the IRS, JCT, and Congress collectively abandoned RRA 98's concern with tax complexity, we believe that Congress itself failed to take some of the most meaningful steps to bring the RRA 98 simplification promises to fruition and failed to provide adequate funding to the IRS and JCT to carry out their roles. In this regard, the difficulties carrying out the tax law complexity provisions may be tied in more generally with broader critiques of RRA 98 as an exercise in scapegoating the IRS. Beyond this lack of political will, we also identify systemic problems with RRA 98's tax complexity provisions, which rendered them unlikely to be influential.

Most importantly, Congress did not show sustained political will for carrying out RRA 98's tax complexity provisions over time. Congress did not meaningfully carry out the provisions that applied to Congress itself, resulting in more complexity and signaling Congress's lack of commitment to the RRA 98 complexity provisions more generally. This is most apparent with the provision providing that, "[i]t is the sense of the Congress that the Internal Revenue Service should provide Congress with an independent view of tax administration, and that during the legislative process, the tax writing committees of Congress should hear from front-line technical experts at the

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<sup>154</sup> See, e.g., Oei & Osofsky, *supra* note 149, at 217–18 (discussing the “hasty” nature of the 2017 tax legislation).



Internal Revenue Service. . . .”<sup>155</sup> As Jarrod Shobe has explained, “[s]ense of Congress provisions are often expressly precatory, voicing a general congressional desire for something to be done without much description of how.”<sup>156</sup> Congress’s use of this expressly precatory language with respect to the IRS’s role in the tax legislative process ensured that future Congresses would not be bound by this Congress’s “sense.” Congress did not, in fact, ensure that the IRS had a seat at the tax legislating table after RRA 98.<sup>157</sup> Carrying out this commitment arguably would have been one of the least costly, and most impactful, ways to ensure that Congress enacted administrable tax legislation.<sup>158</sup> Congress’s failure to take seriously even this change in the tax legislative process suggested that Congress did not remain dedicated to the RRA 98 tax complexity concerns. Likewise, the fact that Congress did not structure the legislative process to enable JCT’s complexity analysis of proposed legislation to be impactful<sup>159</sup> sent a signal that tax complexity was not a high priority.

To be sure, Congress is not alone in its failure to follow through on the RRA 98 tax complexity provisions. With respect to the legislative process, for instance, the IRS has also contributed to the failure to ensure the participation of front-line technical experts in the tax legislative process. In 2014, the NTA detailed how the IRS has no process in place to ensure that front-line technical experts respond to congressional information requests about tax legislation, or even any process in place to identify front-line technical experts in response to such requests.<sup>160</sup> Thus, while Congress has certainly failed to ensure the inclusion of the IRS in the legislative process,

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<sup>155</sup> H.R. REP. NO. 105-599, at 104 (1998) (Conf. Rep.).

<sup>156</sup> Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 724 n.28 (2019).

<sup>157</sup> *Supra* Part III.A.2.

<sup>158</sup> *Cf., e.g.,* NAT’L TAXPAYER ADVOC., THE MOST SERIOUS PROBLEMS (MSPs) ENCOUNTERED BY TAXPAYERS 50–51 (2014) (explaining that, “When legislation is crafted with smooth tax administration in mind, and is informed by discussions with the front-line employees who may have to explain it to taxpayers, it is likely to be simpler, less burdensome, more taxpayer-focused, and easier to administer.”).

<sup>159</sup> *See, e.g.,* Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROBS., 61, 61, 64 (2018) (exploring significance of budget process in tax legislation and vice versa).

<sup>160</sup> NAT’L TAXPAYER ADVOC., *supra* note 158, at 50–51.

the IRS, in turn, also has not seriously considered how to be prepared for potential inclusion.

However, even if the IRS and JCT have failed to follow through on some of their commitments, part of the reason is because Congress did not adequately incentivize them to carry out their RRA 98 tax law complexity duties. Congress did not hold the IRS or JCT accountable for failure to issue meaningful tax law complexity reports as required. The absence of any penalties on the IRS and JCT for failure to fulfill their tax complexity reporting requirements under RRA 98 undermined future incentives to abide by the requirements. Likewise, under the terms of RRA 98, the JCT can technically comply with its statutory obligation to provide tax complexity analysis on proposed legislation to Congress by offering superficial discussion.

Perhaps even more importantly, Congress did not provide the funding needed for the IRS and JCT to carry out their roles. As indicated previously, both the IRS and JCT invested significant resources in the immediate aftermath of RRA 98 to produce lengthy and thoughtful tax complexity analysis and reports.<sup>161</sup> However, JCT's ability to produce such reports was explicitly contingent on Congress providing funding for JCT to do so.<sup>162</sup> Congress's failure to continue to support this commitment undermined its continued fulfillment. In the IRS's case, until recently, the IRS has faced chronic and serious underfunding, interfering with its ability to carry out basic aspects of its mission.<sup>163</sup> The increased funding that Congress provided to the IRS in 2022 through the Inflation Reduction Act offers the IRS a new opportunity to reconsider the possibility of engaging in tax complexity analysis, along with other significant tax administration and enforcement initiatives.

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<sup>161</sup> See *supra* Part III.A.3 and 4.

<sup>162</sup> See *supra* note 17.

<sup>163</sup> See, e.g., Charles P. Rettig, Comm'r of IRS, *Written Testimony Before the Sen. Fin. Comm. on the Filing Season and IRS Budget* (Apr. 7, 2022), <https://www.irs.gov/newsroom/written-testimony-of-charles-p-rettig-commissioner-internal-revenue-service-before-the-senate-finance-committee-on-the-filing-season-and-the-irs-budget> (explaining that "Because of our current funding and staffing limitations across our enforcement functions, we are forced to make difficult decisions regarding priorities, the types of enforcement actions we employ, and the service we offer.").

#### IV. CAN CONGRESS CONTROL TAX COMPLEXITY?: REFORM POSSIBILITIES

The realization that Congress has failed to achieve the goals of the tax complexity provisions of RRA 98 should reorient our discussions about the tax legislative process and the administration of the tax system. What steps, if any, can legislators in Congress take to control the continued growth of tax complexity in the tax law? First and foremost, the discussion above reveals that, in order to make any progress, Congress must recommit to the project of tax simplification and take seriously its own role in the process. This means, at a minimum, following through on its own tax complexity commitments and providing the IRS and JCT adequate funding and incentives to fulfill their roles in the process. This also means ensuring that Congress is equipped to respond to analysis of tax complexity, for instance by seeking complexity analysis from JCT regarding proposed provisions with enough time to respond to the analysis. Instead of describing a single recommended approach, this Part presents legislators with a menu of possibilities for reducing tax complexity and the burdens and inequities it creates, and for sustaining a commitment to these values.

##### *A. Reform of the IRS Annual Reports*

One of the most basic steps that Congress should take is to provide the IRS with adequate funding necessary to produce annual tax complexity reports, and then hold the IRS accountable for submitting these reports to Congress, as required by the RRA 98.<sup>164</sup> The IRS has issued only two tax complexity reports since the enactment of RRA 98 and has not issued any since 2002.<sup>165</sup> In response to criticism for its failure to deliver annual tax complexity reports to Congress, the IRS has offered vague explanations, such as that it delivered tax complexity reports during the first few years after enactment of RRA 98 and that it established the National Research Program (NRP) to collect data on tax reporting, payment and filing compliance.<sup>166</sup> As

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<sup>164</sup> Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 4022(a), 112 Stat. 685, 785 (1998).

<sup>165</sup> NAT'L TAXPAYER ADVOC. 2014 ANNUAL REPORT, *supra* note 107, at 102 (noting IRS has only issued two reports since 2002).

<sup>166</sup> *See id.*; NAT'L TAXPAYER ADVOC., *supra* note 158, at 45.

discussed previously, these responses do not address the failure of the IRS, as the tax administrator itself, to issue annual tax complexity reports.

Congress could mandate that the IRS provide it with an annual report that addresses several tax complexity issues, including: questions frequently asked by taxpayers with respect to return filing; common tax reporting errors; areas of law which frequently result in disagreements between taxpayers and the IRS; major areas of law lacking published guidance or in which the law is uncertain; areas in which revenue officers make frequent errors interpreting or applying the law; the impact of recent legislation on complexity; and an accounting of IRS forms, including the time it takes for taxpayers to complete and review forms, the number of taxpayers who use each form, and the effect of new legislation on these forms. Each of these issues is delineated explicitly in the text of RRA 98.<sup>167</sup> Congress has many options for mandating and supporting the production of this report, including through the annual IRS budget request process.<sup>168</sup>

Further, as part of the annual complexity report, Congress should require the IRS to report on how tax complexity affects taxpayers with varying personal characteristics, including, among others, income, filing status, and race. As Professors Dorothy Brown<sup>169</sup> and Jeremy Bearer-Friend<sup>170</sup> have shown, the IRS does not collect or publish data that describes tax liabilities, tax audits, and tax penalties, among many other items, disaggregated by race of taxpayers. As a result of the “cascading effects” of this lack of data, in 2021, President Biden issued an executive order that established an “Interagency Working Group on Equitable Data” that includes the Assistant Secretary of the Treasury for Tax Policy.<sup>171</sup> To better “measure and advance equity,” Congress should require the IRS to extend this research to include

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<sup>167</sup> See Restructuring and Reform Act of 1998, Pub. L. No. 105–206, § 4022(a), 112 Stat. 685, 785 (1998).

<sup>168</sup> See, e.g., I.R.S., *Congressional Budget Justification & Annual Performance Report and Plan, Fiscal Year 2022* (2022).

<sup>169</sup> Dorothy A. Brown, *Tales from a Tax Crit*, 10 PITT. TAX REV. 47, 52 (2012); Dorothy Brown, *Race and Tax: Colorblind No More*, JOTWELL (Feb. 25, 2021), <https://tax.jotwell.com/race-and-tax-colorblind-no-more/>.

<sup>170</sup> Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1 (2019).

<sup>171</sup> Exec. Order No. 13,985, 86 Fed. Reg. 7009, 7011-12 (Jan. 20, 2021).

information in the annual tax complexity report regarding the types of taxpayers, based on race, ethnicity, gender, disability, and other characteristics, that are benefited and burdened by tax complexity.<sup>172</sup>

### *B. The Role of the IRS in Legislative Process*

Another step that Congress can take to address tax complexity is to elevate the role of the IRS in the tax legislative process. RRA 98 codifies the “sense of the Congress” that the IRS should provide Congress with an independent tax administration perspective on proposed tax legislation, including through the comments from front-line technical experts at the IRS.<sup>173</sup> And while RRA 98 only requires JCT to issue a report regarding complex proposed tax legislation, it does not require a similar analysis from the IRS. Instead, it only requires JCT to issue its analysis “in consultation with” the IRS and Treasury.<sup>174</sup>

Congress could amend RRA 98 to require a separate written report from the IRS on the administrability of complex tax law prior to its enactment. Current law requires a prospective report from the JCT on proposed tax legislation, and annual retrospective reports from the IRS on tax complexity in general.<sup>175</sup> One reason why the JCT report may contain vague or misleading statements under current law, as Part III shows, is because the JCT is not required to solicit analysis of any particular issues from IRS officials.<sup>176</sup> In contrast, a separate IRS report would allow IRS officials to provide their own prospective analysis of Congress’s proposed new tax statutes and changes to existing statutes, with a goal of avoiding tax complexity and tax administration challenges. To better understand the impact of proposed tax legislation on taxpayers and tax administration, Congress could require a separate report from the IRS that addresses specific, relevant tax administration topics. The IRS could be required to include in its report on proposed tax legislation analysis of the impact of the legislation on

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<sup>172</sup> *Id.*

<sup>173</sup> Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 4021, 112 Stat. 685, 785 (1998).

<sup>174</sup> *Id.* at § 4022(b)(1).

<sup>175</sup> *Id.* at §§ 4022(b), 4021(a).

<sup>176</sup> *See supra* notes 126–54 and accompanying text.

IRS forms, administrative guidance, likely controversies between the IRS and taxpayers, and IRS budgetary needs. It is also imperative that Congress structures the legislative process to enable both the IRS analysis and JCT analysis to be an impactful part of the process. This would mean involving IRS and JCT in the process as early as possible, so that legislative changes could be made in response to their feedback.

### *C. Review of IRS Communication of Legislation*

Congress should also consider mechanisms for reviewing the IRS communication of the formal tax law to the general public. As discussed earlier, when the IRS uses plain and clear language to explain complex tax law to the public in IRS publications, FAQs, and automated legal guidance, simplicity results.<sup>177</sup> When the IRS issues such informal guidance to taxpayers without being subject to objective outside review, the IRS may present contested tax law as clear tax rules, add administrative gloss to the formal tax law, and fail to fully explain the tax law.<sup>178</sup> Meanwhile, the IRS simplifications mask the underlying complexity of the tax law to the general public and even some tax practitioners.

As an alternative to the IRS's current approach, Congress could pass legislation requiring IRS publications, FAQs, and statements provided by automated legal guidance tools to be reviewed regularly by an external entity. For example, in the early 1990s, the GAO reviewed IRS publications, but did not identify the need for any substantive changes.<sup>179</sup> The GAO's methodology, however, was limited and the agency reviewed only four IRS publications.<sup>180</sup> A different approach could be for Congress to direct the NTA to review IRS publications, FAQs, and statements provided by automated legal guidance tools to identify incorrect, incomplete, or misleading statements of the underlying formal tax law.

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<sup>177</sup> See *supra* notes 63–86 and accompanying text.

<sup>178</sup> *Simplicity*, *supra* note 10, at 189.

<sup>179</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GGD-93-72, TAX ADMINISTRATION: SELECTED IRS FORMS, PUBLICATIONS, AND NOTICES COULD BE IMPROVED (1993).

<sup>180</sup> See *id.* at 1, 4, 16.

By creating greater oversight of IRS simplifications, Congress could achieve multiple goals related to tax complexity. First, Congress could ensure that the IRS is subject to meaningful oversight of its simplification of complex tax law. Further, Congress could encourage the IRS to red-flag its own publications and other informal statements in situations where the applicable formal tax law is unsettled, enabling taxpayers to reconsider their reliance on IRS simplifications.<sup>181</sup> Finally, where the IRS omits exceptions or otherwise deviates from the formal tax law when communicating with the general public, Congress may use this occurrence as a proxy for complexity of the underlying tax statutes and regulations. By creating greater oversight of IRS communications, Congress could thus increase its ability to identify tax statutes that are especially complex or ambiguous.

#### *D. Formalization of Statutory Drafting*

Another possibility for controlling complexity of future tax legislation is to formalize the statutory drafting of the Code.<sup>182</sup> As a result of ambiguity resulting from drafting defects, tax legislation often features errors or omissions that Treasury and the IRS must then address.<sup>183</sup> In 2020, for example, the IRS attempted to address ambiguities regarding the first round of economic impact payments under the CARES Act by providing multiple FAQs and other guidance on topics such as whether a taxpayer must return a payment received on behalf of deceased taxpayers or children who turned seventeen shortly after the taxpayers received economic impact payments.<sup>184</sup> One response to such drafting errors is for congressional staffs to formalize the drafting of statutory language prior to enactment by translating it into logical terms.<sup>185</sup> As Professor Sarah Lawsky has argued, this approach could

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<sup>181</sup> See *Simplicity*, *supra* note 10, at 252–56.

<sup>182</sup> For discussion of formalization, see Sarah B. Lawsky, *Formalizing the Code*, 70 TAX L. REV. 377, 377 (2017); Sarah B. Lawsky, *A Logic for Statutes*, 21 FLA. TAX REV. 60 (2017); and Stephanie Hoffer, *What If Tax Law's Future Is Now?*, 16 OHIO ST. TECH. L.J. 67 (2020).

<sup>183</sup> For discussion, see Lawsky, *supra* note 182; Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U.L. REV. 811 (2016); and Anuj C. Desai, *The Dilemma of Interstatutory Interpretation*, 77 WASH. & LEE L. REV. 177 (2020).

<sup>184</sup> See Blank & Osofsky, *supra* note 8, at 1118, 1131.

<sup>185</sup> See Lawsky, *supra* note 182.

enable legislative drafters to avoid “unintentional ambiguity and refine the language used in the statute.”<sup>186</sup>

By drafting statutory text in a format that computers could understand, formalization could improve statutes involving delivery of benefits to low-income individuals. For example, many commentators have described the earned income tax credit (“EITC”) as one of the most complex set of rules in the Code.<sup>187</sup> Most individuals are not capable of calculating the amount of benefits to which they are entitled under the EITC without assistance from an IRS-provided or third-party resource.<sup>188</sup> In addition to the EITC, Congress could consider formalization of statutory drafting as a way to simplify other complex tax statutes, especially those that affect low-income taxpayers, including the child tax credit<sup>189</sup> and the childcare credit.<sup>190</sup>

An objection to the introduction of formalization as a means of drafting tax statutes is that it would not necessarily make the tax law more comprehensible to average taxpayers, defeating the goal of reducing complexity.<sup>191</sup> However, if legislators can draft and enact statutes that are less complex than current law from the perspective of computers, the IRS could then offer free automated tools that are able to apply these statutes accurately and efficiently. Formalized statutes are less likely to result in incorrect interpretations and calculations than current law tax statutes that contain standards and other requirements involving taxpayer purpose. By making tax statutes more comprehensible to computers and accessible through free IRS calculation tools, such as the IRS’s Free File Program, Congress could alleviate the burden that many taxpayers bear when they must seek help from accountants, tax lawyers, and other third-party advisors.

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<sup>186</sup> *Id.* at 379.

<sup>187</sup> See, e.g., Robert Greenstein, John Wancheck & Chuck Marr, *Reducing Overpayments in the Earned Income Tax Credit*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/federal-tax/reducing-overpayments-in-the-earned-income-tax-credit> (last updated Jan. 31, 2019) (“The EITC is one of the most complex elements of the tax code that individual taxpayers face.”).

<sup>188</sup> See *id.*

<sup>189</sup> I.R.C. § 24.

<sup>190</sup> I.R.C. § 21.

<sup>191</sup> See, e.g., Lawrence Zelenak, *Complex Tax Legislation in the TurboTax Era*, 1 COLUM. J. TAX L. 91, 94–95 (2010).



## V. CONCLUSION

The perpetual complexity of the tax law in the United States imposes significant and pervasive costs on taxpayers and tax administration. This Article has provided an analysis of whether RRA 98 has achieved the goals of reducing tax complexity through the requirements it imposed on the IRS, JCT, and Congress.

This Article has shown that the tax complexity provisions of RRA 98 have not been effective, in large part as a result of Congress's failure to support and enforce them. After the enactment of RRA 98, the IRS and JCT initially attempted to comply with the mandate to provide Congress with general reports on the sources of complexity in the federal tax system. However, as we have documented, since the early 2000s, the IRS, JCT, and Congress have failed to fulfill their statutory obligations regarding tax complexity provisions of RRA 98. In contrast to Congress's intent in RRA 98, representatives of the IRS have not participated meaningfully in the drafting and evaluation of proposed tax legislation. We further have demonstrated that the IRS has failed to deliver annual tax complexity reports to Congress, as required by RRA 98. Finally, we have shown that although the JCT has delivered tax complexity analysis regarding proposed tax legislation to Congress, these reports have often contained vague and misleading statements regarding the effect of proposed tax law and have appeared too late in the legislative process to have a significant impact on the legislation.

After showing that the tax complexity provisions of RRA 98 have failed over time, this Article has offered several reforms that Congress could adopt to strengthen these provisions and to address tax complexity more generally. In addition to redoubling its political will for simplification, the reforms included: changes to the content and delivery of the annual tax complexity reports by the IRS to Congress, integration of the IRS into the legislative process, examination of deviations between the descriptions of the tax law that the IRS offers to taxpayers and the underlying tax law, and changes to the way in which Congress drafts tax statutes, such as through the formalization of statutory language. Redoubling efforts and adopting some of these reforms, may help recover some of the simplicity lost with the abandonment of RRA 98's tax complexity commitments.

