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Decoding the Code

by Peter E. Boos

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In this report, Boos evaluates the effects of changing the code's language to make it more easily understood and to achieve consistency in style and terminology, without making substantive changes to the underlying legal principles.

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It is time to start over from scratch and develop a new tax system in the United States. It must be a system that is designed on purpose, based on a clear and consistent set of principles, which everyone in the United States can understand.[1]

— William Simon, Treasury secretary 1974-1977

I. Introduction

Presidents bemoan it.[2] Judges struggle to understand it.[3] Journalists criticize it.[4] Interest groups decry its density.[5] Even the national taxpayer advocate has expressed concern about the dangers of its growth.[6] Spanning more than

[1] William Simon, *Blueprints for Basic Tax Reform*, Foreword (1977).

[2] John Klotsche, "Tax Simplification: Congress Passes the Buck," *The Hill*, Nov. 9, 2010 (reporting that George W. Bush referred to the Internal Revenue Code as a "complicated mess," and that President Obama referred to it as a "monster tax code").

[3] *See Lessinger v. Commissioner*, 872 F.2d 519 (2d Cir. 1989) (misapplying the notion of basis in the context of section 357(c)); and *Peracchi v. Commissioner*, 143 F.3d 487 (9th Cir. 1998) (concluding erroneously that a shareholder should get basis in stock for a future investment in the corporation in connection with a section 351 exchange); *see also* Jasper L. Cummings, Jr., "Ninth Circuit Avoids *Lessinger* Misstep, but Makes Another," *Tax Notes*, May 11, 1998, p. 781 (There is a "regrettable tendency of some intermediate general jurisdiction courts deciding tax cases to be jocular while reaching the wrong result.").

[4] "The Joy of Tax: A Futile Plea for Simplicity," *The Economist*, Apr. 8, 2010 ("The federal the code, which was 400 pages long in 1913, has swollen to about 70,000. Americans now spend 7.6 billion hours a year grappling with an incomprehensible tangle of deductions, loopholes and arcane reporting requirements.").

[5] Theodore J. Forstmann and Stephen Moore, "Abolish the code, Not the IRS," CATO Institute (Mar. 9, 2017) (referring to the code as "Frankenstein's Monster").

[6] National taxpayer advocate, "2012 Annual Report to Congress," at 3 (2012) ("The most serious problem facing taxpayers — and the IRS — is the complexity of the Internal Revenue Code.").

four million words, the IRC has ballooned in the last decade and has been subject to more than 5,000 changes since 2001.[7]

With those changes comes a significant increase in the code's complexity — at a cost to the government and taxpayers. The complexity leads to more taxpayer errors, hampered revenue collection, and an inability to close the tax gap. It also obscures the existence of special interest provisions enacted to benefit specific taxpayers at the expense of others. Moreover, complexity has led to higher compliance costs for taxpayers, forcing them to pay billions of dollars annually for return preparation assistance and professional tax advice in what has become an unfunded mandate.

The code's complexity has been the subject of much attention, usually resulting in calls for an overhaul. Almost all simplification proposals involve eliminating aspects of the code. This report, by contrast, explores the viability of restyling the code to address its unwieldy, dense, and sometimes contradictory language. The goal of a restyling would be to amend the statutory language to make it more understandable for taxpayers and to achieve internal consistency in terminology — all without making substantive changes to the provisions.

In some circumstances, restyling could enhance compliance and improve revenue collection. But universal restyling is not a panacea for all the problems of a complex code. Some provisions have propositional logic that could be upset during restyling efforts; there is the risk of unintentionally creating new opportunities for well-informed, well-heeled taxpayers to minimize their tax burdens. Therefore, it's necessary to carefully analyze whether and to what extent restyling the code would benefit the federal government and taxpayers.

II. The Code and Its Complexity

A. The Nature of Tax Complexity

Tax complexity comes in many forms and eludes measurement.[8] Edward J. McCaffery identified three types of tax complexity: technical complexity, structural complexity, and compliance complexity.[9]

Under that framework, technical complexity refers to the intellectual challenge of determining the meaning of tax law. The code's language is implicated because often the wording of a provision cannot be understood without a significant commitment of time or professional advice.

Structural complexity affects tax planning decisions. For example, even if a taxpayer can read and understand a particular statute or regulation, she may have difficulty applying the rules to a specific type of transaction. As McCaffery explained, structural complexity has two primary effects: (1) uncertainty resulting from different applications of the law based on the structure of the transaction; and (2) manipulability, which is when taxpayers can characterize a particular transaction in multiple ways.[10]

As the name suggests, compliance complexity refers to the challenges taxpayers face in attempting to comply with tax laws. There is an assumption that taxpayers understand the statute but must satisfy recordkeeping, documentation, or filing responsibilities to demonstrate compliance. This type of complexity does not directly implicate the code's statutory language; however, there is a positive correlation between technical complexity and compliance complexity: Increased technical complexity often creates a corresponding compliance challenge for taxpayers.[11]

Although it is important to understand this framework of complexity, one needs also to appreciate how the code became so complex. Identifying the causes of the problem should help map the political waterways for any proposed change to the code, including a restyling.

[7] Kelly Phillips Erb, "The code Hits Nearly 4 Million Words, Taxpayer Advocate Calls It Too Complicated," *Forbes*, Jan. 10, 2013.

[8] *See* Boris I. Bittker, "Tax Reform and Tax Simplification," 26 *U. Miami L. Rev.* 1, 1 (1974).

[9] McCaffery, "The Holy Grail of Tax Simplification," 1990 *Wis. L. Rev.* 1267 (1990).

[10] *Id.*

[11] *See generally id.*

B. Hyperlexis and the Government's Role

Concerns about over-legislation are not new. Often referred to as hyperlexis, it has been described as the "pathological condition caused by an overactive law-making gland."[12] With the introduction of more statutes and rules to apply to new and various legal relationships, law is becoming more indefinite. And the increasing difficulty of managing legal relationships between taxpayers and the government has prompted a complex maze of regulations to ensure that federal statutes address the "full sweep" of tax questions.[13] As a result, only taxpayers with the resources to hire experts can navigate the web of interconnected rules to avoid the grasp of some tax laws.[14]

The taxwriting process itself may also promote hyperlexis. The code is the ongoing product of years of legislative addition, subtraction, and modification. What began as a brief set of general rules now captures a variety of complex transactions and relationships.[15] Although the code's complexity would be difficult to grasp even if it were static, it undergoes an average of one change per day,[16] and Congress has enacted an average of one tax bill per year since 1940.[17] This makes continued comprehension even more difficult and fuels the calls for simplification.

The Constitution requires that tax measures officially originate in the House Ways and Means Committee.[18] Although that committee once held closed-door meetings (presumably to shield itself from the undue influence of lobbyists and other special interest groups), it now must generally conduct business in the open.[19] This creates political pressure, which, in an increasingly partisan environment, affects how committee members pass tax legislation. Some have suggested that external pressures have contributed to the size and number of major tax bills.[20]

Increased use of the budget reconciliation process and the repeal of the pay-go rules have also affected taxwriting. Congress established the budget reconciliation power in 1974 as a way to enact tax and entitlement legislation to ensure budget stability.[21] Broadly speaking, reconciliation allows the Senate to avoid the filibuster process by requiring a bare majority to pass some budget-related and tax legislation.[22] Since 1980,[23] the reconciliation process has been used multiple times for tax bills. For example, reconciliation was used for the Taxpayer Refund and Relief Act of 1999 (which was later vetoed), the Marriage Tax Relief Reconciliation Act of 2000 (also later vetoed), the Economic Growth and Tax Relief Reconciliation Act of 2001, the Jobs and Growth Tax Relief Reconciliation Act of 2003, and the Tax Increase Prevention and Reconciliation Act of 2005.[24]

Because the legislative process involves tradeoffs, forcing tax policy under the political constraint of the reconciliation process adds to the incoherence of the resulting law.[25] Although

[12] The term first appeared in Bayless Manning, "Hyperlexis: Our National Disease," 71 *Nw. U. L. Rev.* 767 (1977).

[13] John A. Miller, "Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation," 68 *Wash. L. Rev.* 1, 5 (1993).

[14] Manning, *supra* note 12, at 769.

[15] National taxpayer advocate, "2008 Annual Report to Congress," at 1 (Dec. 31, 2008).

[16] *See id.*

[17] Urban-Brookings Tax Policy Center, "Major Enacted Tax Legislation 1940-2009" (Mar. 9, 2017).

[18] U.S. Constitution, Art. I, section 7, clause 1. *See also* Ways and Means Committee, "Committee Jurisdiction" (Mar. 9, 2017). Usually the Senate does not act on tax legislation until the House has taken action, but the Senate can strip a House-passed bill to substitute its own tax provisions. *See* Allen Schick, *The Federal Budget: Politics, Policy, Process* 167 (3d ed. 2007).

[19] *See* Schick, *supra* note 18, at 165.

[20] *See, e.g., id.* at 166. The nondurable legislation passed in the tax arena can be viewed as a type of gridlock, in which "there is too much of the wrong kind of tax legislative action," resulting in no improvement. Rebecca M. Kysar, "Reconciling Congress to Tax Reform," 88 *Notre Dame L. Rev.* 2121, 2122 (2013). *See also* Pamela Brooks Gann, "What Has Happened to the Tax Legislative Process?" 86 *Mich. L. Rev.* 1196, 1215 (1988).

[21] P.L. 93-344. *See* Anita S. Krishnakumar, "Reconciliation and the Fiscal Constitution: The Anatomy of the 1995-96 Budget 'Train Wreck,'" 35 *Harv. J. Legis.* 589, 592 (1998).

[22] *See* Schick, *supra* note 18, at 146.

[23] *See* Kysar, *supra* note 20, at 2128.

[24] *See* Michael Doran, *Tax Legislation in the Contemporary U.S. Congress* 43 (draft Dec. 11, 2013) (on file with author). For a summary of all uses of the reconciliation mechanism in Congress from 1980 to 2010, see Megan S. Lynch, "Budget Reconciliation Measures Enacted Into Law: 1980-2010," Congressional Research Service R40480 (Jan. 4, 2017).

[25] *See* Harold R. Handler, "Budget Reconciliation and the Tax Law: Legislative History or Legislative Hysteria?" *Tax Notes*, Dec. 21, 1987, p. 1259, 1260-1261; and Charles E. McLure Jr., "The Budget Process and Tax Simplification/Complication," 45 *Tax L. Rev.* 25, 54 (1990).

reconciliation may enable congressional action when it might otherwise be impossible, its use in the tax context results in less clarity and more temporary legislation. Sunset provisions create uncertainty, which is inefficient, and are targeted by special interest lobbying.[26]

The repeal of pay-go has further contributed to the indeterminacy of tax law.[27] Pay-go's requirement that Congress offset any new spending with other spending cuts or revenue increases in the same fiscal year gave lawmakers the opportunity to develop symmetry in the budgeting process. Tax was a lever to accomplish that equilibrium. When Congress allowed pay-go to expire in 2002, it gave lawmakers a blank check to enact legislation that reduced taxes or altered the tax structure. The resulting tax legislation after 2002 was "clean" — that is, nonexclusive to a particular group but applicable to a broad spectrum of taxpayers.[28]

Although the House and Senate had their own versions of pay-go after the 2002 repeal, both chambers had many ways to bypass them and spend or tax freely until the Statutory Pay-As-You-Go Act of 2010 reinstated the 1990 pay-go rules.[29] Significant tax legislation was passed during that period, including the Jobs and Growth Tax Relief Reconciliation Act of 2003,[30] the American Jobs Creation Act of 2004,[31] the Tax Increase Prevention and Reconciliation Act of 2005,[32] and the American Recovery and Reinvestment Act of 2009.[33] By creating an environment that fostered the passage of more broad-based tax provisions for nearly a decade, Congress enabled a system that spawned more complexity for more taxpayers.

Other aspects of the taxwriting process also contribute to the code's complexity. For example, the language of deadline-driven legislation often lacks the refinement and clarity of bills that have undergone multiple drafts.[34]

Practitioners, too, play a role in the complexity of tax law. They constantly seek clarification and administrative guidance on the applicability of particular provisions to specific transactions and relationships.[35] Although the IRS has resisted practitioners' increasing demands for advance guidance,[36] the addition of volumes of regulations on top of already complicated statutes has only increased the code's complexity and failed to solve the hyperlexis problem.[37]

Although some complexity is inevitable, it does not follow that the code's complexity is optimal or efficient. There is broad consensus that the code conveys complex information and must have some intricacy to convey that material coherently. However, the legislative process and other factors have introduced additional technical complexity into the code.

III. Quantifying the Code's Complexity

With limited words to describe a multitude of relationships and transactions, the English language operates insufficiently to capture the true meaning of these connections between individuals and the government, particularly when the interpretation of words varies according to one's own understanding.[38] Despite broad agreement that the code is difficult to comprehend, there is no measurable consensus on the extent of its complexity, and little empirical research has been done to determine it.

There are, however, mechanisms to quantify the nature of this indeterminacy. One way to measure the complexity of the code is in an

[26] *See, e.g.*, Manoj Viswanathan, Note, "Sunset Provisions in the Code: A Critical Evaluation and Prescriptions for the Future," 82 *N.Y.U. L. Rev.* 656, 658 (2007).

[27] The pay-go rules were enacted by the Budget Enforcement Act of 1990, P.L. 101-508. *See* Schick, *supra* note 18, at 58.

[28] *See* Doran, *supra* note 24, at 3.

[29] For example, the House Rules Committee was able to waive points of order on budget legislation, whereas the Senate required a 60 percent vote for setting aside specific budget rules. *See* Schick, *supra* note 18, at 131.

[30] P.L. 108-272.

[31] P.L. 108-357.

[32] P.L. 109-222.

[33] P.L. 111-5.

[34] *See id.*

[35] *See* Richard M. Lipton, "'We Have Met the Enemy and He Is Us': More Thoughts on Hyperlexis," 47 *Tax Law.* 1, 2 (1993).

[36] *See infra* Section III.D.

[37] *See* Lipton, *supra* note 35, at 3-5 (discussing this phenomenon in the context of section 469, noting that the IRS added more than 500 pages of regulations on passive activity losses, which created a snowball effect "in which one set of regulations is issued in response to requests for guidance, which then results in further ambiguities that lead to requests for even more guidance"). *Id.* at 6.

[38] *See, e.g.*, Bittker, *supra* note 8, at 2.

absolute sense — looking at metrics that provide what is effectively a raw complexity score. Another method that can (and often is) used is comparative: How complicated is the code compared with other federal legislation?

A. Absolute Complexity

A common measure of complexity is the Flesch reading ease test. Although there are several other tests that measure complexity, the Flesch test is one of the most accurate.[39] The score is determined through a formula that looks at the average sentence length in a passage of text and the average number of syllables per word in the passage.[40] Various government agencies have incorporated the Flesch test to encourage comprehensibility in legal writing. For example, Florida encourages consideration of the Flesch test in the drafting of insurance policies,[41] and the Department of Defense has used it to ensure its documents are readable.[42]

The resulting score from the Flesch test can be as high as 121.4, but theoretically there is no lower boundary. The following passage from Dr. Seuss's *Green Eggs and Ham* is on the high end, with a score of 114.1: "I do not like green eggs and ham. I do not like them, Sam-I-am." It is easily read by virtually anyone with basic literacy skills.[43] Conversely, a single run-on sentence from Herman Melville's *Moby Dick* has a readability score of -147.3.[44]

Although the dividing lines between scores provide no exact guidepost, the table below outlines various conceptual thresholds.[45]

Flesch Test Scores

Flesch Test Score	Ease of Readability
90 or higher	Very easy, understandable to the average fifth grader
80 – 89	Easy
70 – 79	Fairly easy
60 – 69	Standard, understandable to the average eighth or ninth grader
50 – 59	Fairly difficult
30 – 49	Difficult
29 or lower	Very confusing, understandable only to college graduates

Section 704, which governs the conditions under which the IRS will respect tax allocations among partners in a partnership,[46] illustrates the code's complexity problem. It has a Flesch test score of 24.6, suggesting that only the most educated individuals can understand it. Section 704 is widely recognized as one of the most complicated provisions of the code, and it can frustrate the intentions of honest partnerships if its "substantial economic effect" test is not met.[47] This is concerning, given that partnership tax

[39] *See* Readability Formulas, "The Flesch Reading Ease Readability Formula." Other tests include the Gunning-Fog score, the Coleman-Liau index, the SMOG index, the automated readability index, and the Flesch-Kincaid grade level. Note, however, that section 61(a) — one of the easier code provisions to understand — scores a -47.4. That is largely because its average sentence length is long; it is a serial list containing 15 examples of what constitutes income to the taxpayer. The score may also reflect a weakness of the Flesch test — that it looks only at word length and sentence length as proxies for complexity rather than actual comprehensibility of the terms within the particular section.

[40] The formula is: Reading ease (RE) = 206.835 – (1.015 x average sentence length) – (84.6 x average syllables per word). *See* Readability Formulas, *supra* note 39.

[41] Fla. Stat. section 627.4145 (requiring a Flesch test score of 45 or higher for the policy to be readable). Ohio has a similar statute, Ohio Rev. Code Ann. section 3902.04, which requires a score of 40 or higher.

[42] *See* Jennifer Lynn Campbell, *A Quantitative Comparison of the Composition and Linguistic Properties of Introductory Physics Textbooks* 12 (2008) (unpublished MS thesis, University of Arkansas) (on file with author).

[43] Various tools can provide a Flesch test score by merely inputting text. All Flesch test scores throughout this report were derived using a tool provided by readability-score.com.

[44] Herman Melville, *Moby Dick* 306 (1851).

[45] *See* Readability Formulas, *supra* note 39.

[46] Section 704(b) ("A partner's distributive share of income, gain, loss, deduction, or credit (or item thereof) shall be determined in accordance with the partner's interest in the partnership (determined by taking into account all facts and circumstances), if . . . the allocation to a partner under the agreement of income, gain, loss, deduction, or credit (or item thereof) does not have substantial economic effect.").

[47] *See, e.g.*, Alan Gunn, *Partnership Income Taxation* 44 (2d ed. 1995) (commenting that section 704's rules are "so difficult that only a handful of partnership-tax specialists in large firms" can understand and apply them); Andrea Monroe, "Integrity in Taxation: Rethinking Partnership Tax," 64 *Ala. L. Rev.* 289, 292 (2012) ("Over time, [the partnership allocation] rules have become enormously complicated and have strained the voluntary compliance mechanism on which the federal income tax depends. As a consequence, partnership taxation has become utterly dysfunctional."); and George K. Yin, "The Future Taxation of Private Business Firms," 4 *Fla. Tax Rev.* 141, 157 (1999) ("The rules are lengthy and complex, and the burden on those taxpayers who attempt to comply with them is considerable.").

treatment is the default treatment for unincorporated businesses of two or more parties.[48] And the regulations under section 704 only muddy the waters: Reg. section 1.704-1(b)(2)(ii), defining when an allocation has economic effect, and reg. section 1.704-1(b)(2)(iii) (as amended in 2013), defining when the economic effect is substantial, each have Flesch test scores of around 20.

Because the body of tax law continues to grow, one can expect increasing complexity in the code's substantive provisions. Consider the evolution of section 368, governing reorganizations under subchapter C. The original reorganization provision from 1918 was relatively simple,[49] partly because its coverage was more general and it did not contemplate the same number or types of transactions addressed in current section 368. The Flesch test score for the code's definition of reorganization was -34.4 in 1918 but was -288.4 as of 2014.[50]

Ultimately, the complexity of the code has inhibited voters from holding federal legislators accountable for the tax laws they enact. And requiring the extensive use of regulations, publications, and other IRS explanations is a costly undertaking that risks either failing to clarify the state of the law or increasing the associated administrative costs. Neither bodes well for the sustainability of the growing body of tax law.

B. A Comparative Approach

A recent empirical study on the complexity of federal law — one of the few studies of its kind — provides significant insight into the code. The authors, Daniel Katz and Michael Bommarito, focused on the structure, language, and interdependence of each title of the U.S. Code.[51] Structure was measured by how many subparts the statutes contain; language was quantified by the length and diverse meanings of words; and interdependence was measured as the number of citations from one statute to another within the same subject area.

Katz and Bommarito observed that the structural complexity of any given title is driven by its "size, depth, and the relationship between these two figures." The code consists of various chapters, subchapters, parts, sections, subsections, and subparts, each of which constitutes a level of depth. Katz and Bommarito used the term "mean element depth" to convey the average depth of a particular statute based on its specificity. A higher mean element depth indicated a greater level of specificity. Cited as an example, section 501(c)(3) was given a depth level of 7.[52] The code had the highest mean element depth (7.8) — nearly three times the depth of the title with the lowest mean element depth (title 9, dealing with arbitration).[53]

The code fared slightly better in the study's evaluation of language. Katz and Bommarito looked at three distinct aspects of language that contribute to complexity: (1) the number of strings of text in a particular title; (2) the average word length, after removing common words like "and," "or," and "but"; and (3) a measure of entropy, which is designed to "characterize the uncertainty or variance of a signal, message or body of text."[54] On the first measure, the code has the largest number of strings per section,[55] suggesting that many words are used to convey the meaning of various provisions relative to other titles. But the results for the other two metrics suggest that the

[48] *See* reg. section 301.7701-3 (2006).

[49] Revenue Act of 1918, P.L. 65-254, section 202(b).

[50] Section 368(a)(1).

[51] Daniel Katz and Michael Bommarito, "Measuring the Complexity of the Law: The United States Code," 22 *J. Artificial Intelligence & L.* 337, 340 (2014).

[52] *Id.* at section 501(c)(3). The seven levels are subtitle A, chapter 1, subchapter F, Part I, section 501, subsection c, and sub-subsection 3.

[53] Katz and Bommarito, *supra* note 51, at 352.

[54] *Id.* at 353-355. The average word length measure overlaps with the Flesch test's measure, but the Flesch test also incorporates average word length. Another key difference is that the Flesch test does not remove some common phrases, which otherwise increases the Flesch test score. In this respect, one might consider the Katz and Bommarito test to be slightly more accurate, at least in terms of complexity as indicated by average word length. Regarding entropy, a higher score suggests that predicting the concepts within a single title is more difficult. *Id.*

[55] *Id.* at 355. Again, title 9 had the lowest number of strings per section. The code has about six times the number of strings per section as title 9.

code is less complex than other titles: It has the eighth longest average word size, and only the 29th highest entropy score, of any active U.S. title.[56]

The code also ranks as highly complex under the interdependence measure. Its use of cross-references to other sections of title 26 is prevalent. The most extreme example is section 501, which is cross-referenced 679 times by other tax statutes.[57] Katz and Bommarito found that 97 percent of the cross-references in the code as a whole were to other provisions of title 26.[58] While this indicates that the code is fairly self-contained, it also suggests that knowledge of any given provision of the code likely requires an understanding of various other code provisions.

When combining the structure, language, and interdependence of each of the code's titles, Katz and Bommarito arrived at two metrics to measure aggregate complexity. First, they looked at "unnormalized scores." Those scores measured the complexity the end user would encounter in the "knowledge acquisition process" of the entire title and did not control for title size. The study ranked title 26 as the ninth most complex title of the U.S. Code under that measure.[59] However, this metric is of limited value in measuring the complexity of the code, since rarely would circumstances require knowledge of the entirety of title 26. The "normalized" score that Katz and Bommarito developed is a more useful figure because it measures the expected level of complexity of a given provision within a title. Under that metric, the only title more complex than the code is title 42, dealing with public health and welfare.[60]

C. Putting It All Together

By nearly all measures in the Katz and Bommarito study, the code is difficult to comprehend. The Flesch test scores reflect the same conclusion. But these metrics don't tell us whether and to what extent the code is *unnecessarily* complex.

Although it may well be impossible to determine the optimal level of complexity in a dynamic system with so many actors, considerable anecdotal evidence suggests that the code's complexity cannot be blamed solely on the subject matter. At least some of the complexity stems from "politicians' efforts to deliver particularized benefits to specific individuals or interest groups," according to Katz and Bommarito.[61] And the inefficiencies of the legislative process play a big role.[62] The bottom line is that the resulting complexity creates compliance problems for taxpayers and the IRS.

D. The IRS's Interaction With Taxpayers

The IRS is one of the few federal agencies that regularly interacts with a significant portion of the citizenry.[63] In 2010 the IRS received 142.8 million individual income tax returns (out of a population of roughly 300 million)[64] and 5.8 million corporate income tax returns.[65] The agency is responsible for enforcing the tax laws and helping taxpayers understand them.[66] It follows that a positive relationship between the IRS and taxpayers is essential to fostering a view that the tax system is legitimate and fair — a perception that affects voluntary compliance.[67]

For many taxpayers, the code's complexity creates a sense that the tax system is rigged against them. This is particularly true given that compliance with federal income tax provisions is

[56] *Id.* at 355. There are 49 active titles in the U.S. Code. *Id.* at 361. This still places the code in the highest quintile of complexity as measured by average worth length.

[57] *Id.* at 364.

[58] *Id.*

[59] *Id.* at 366.

[60] *Id.* at 368.

[61] *Id.* at 339.

[62] *See supra* Section II.B.

[63] Charles H. Gustafson, "Basic Considerations in Tax Simplification — An Overview," in *Federal Income Tax Simplification* 15 (1979) ("The tax system affects almost everyone within society, and therefore, constitute[s] a highly appropriate subject for consideration" of simplification.).

[64] IRS Publication 1304, "SOI Tax Stats — Individual Income Tax Returns," at Table 1.1 (Aug. 12, 2013).

[65] Daniel E. Werfel et al., "2010 Statistics of Income: Corporation Income Tax Returns," IRS, at 2, Figure A (2011).

[66] IRS, "The Agency, Its Mission and Statutory Authority."

[67] H. Plumley, "The Determinants of Individual Income Tax Compliance: Estimating the Impacts of Tax Policy, Enforcement, and IRS Responsiveness," IRS, at 22 (1996) ("For example, if IRS is not responsive to taxpayer needs . . . those taxpayers — and perhaps others influenced by them — may develop unobserved attitudes toward taxpaying . . . that cause them to be less compliant next time around.").

understood to be regressive.[68] Enhanced support services for taxpayers would help mitigate increasing compliance costs associated with the code's complexity;[69] however, Congress has repeatedly slashed the IRS's funding in recent years, leaving far fewer budget dollars dedicated to maintaining staffing levels or improving taxpayer services, despite increasing demand.[70]

With the IRS's reduced services, the potential for error in filing tax returns has steadily grown, partly as a result of the agency's own mistakes.[71] To minimize compliance errors, individual filers are increasingly turning to return preparers and tax software tools, thus raising the annual monetary compliance burden of the median individual taxpayer.[72] All of this points to the viability of restyling the code to address its complexity.

IV. The Impetus for Reform

Across various areas of law, lawmakers have recognized the potential benefits of drafting easier-to-read legislation. Meanwhile, tax law remains mired in language that is difficult to understand. This section of the report outlines two instances in which lawmakers have elected to simplify a body of law or make it easier to understand for the individuals the law is intended to protect. These examples illustrate an apparent larger trend toward plain language and coherence in new laws. They also provide an opportunity to consider whether the impetus behind reform in those other bodies of law presents a justification to consider the same in the tax sphere.

A. Federal Securities Law

Federal securities law has moved toward clearer language for investor protection. One of the primary purposes of the Securities Act of 1933 was to "compel full disclosure of the truth."[73] As part of that goal, an initial public offering must reveal important information about the securities issuer in the registration statement and prospectus.[74]

Securities Exchange Commission Rule 421 requires that the information in the prospectus be provided to investors in a "clear, concise, and understandable manner," and the SEC cautions against "legalistic or overly complex presentations that make the substance of the disclosure difficult to understand."[75] The rule mandates that the language in specific portions of the prospectus be drafted to — at a minimum — substantially comply with the following principles of plain English writing: "(1) short sentences; (2) definite, concrete, everyday words; (3) active voice; (4) tabular presentation or bullet lists for complex material, whenever possible; (5) no legal jargon or highly technical business terms; and (6) no multiple negatives."[76]

The use of plain English principles in this context is based on the notion that parties cannot make informed investment decisions without knowing the nature of the business and the underlying risks associated with purchasing an equity or debt interest in an issuer. An analogous argument can be made regarding taxpayers and compliance: For taxpayers, understanding the obligations that arise from various code provisions is a prerequisite to filing a complete and accurate tax return.

[68] J. Scott Moody et al., "The Rising Cost of Complying With the Federal Income Tax," The Tax Foundation, at 1 (Dec. 2005) ("On the low end, taxpayers with adjusted gross income (AGI) under $200,000 incur a compliance cost equal to 5.9 percent of income while the compliance cost incurred by taxpayers with AGI over $200,000 amounts to just 0.5 percent of income.").

[69] This is particularly so when increased complexity makes issues easier to solve through automated processes. *See* national taxpayer advocate, "2013 Annual Report to Congress, Executive Summary: Preface and Highlights," at 7 (2013).

[70] *See* Howard Gleckman, "IRS Gets Hammered in the 2014 Budget Agreement," *Forbes* (Jan 14, 2014); national taxpayer advocate, *supra* note 69, at 21; and Hal Rogers, "FY 2014 Omnibus – Financial Services Appropriations," House Appropriations Committee, at 1 (2014).

[71] *See* "IRS Answers More Phone Calls, Gets More Tax Law Questions Wrong," *Sioux City Journal*, Apr. 22, 2004. *See also* Treasury Inspector General for Tax Administration, "Correspondence Scan Errors and Image System Limitations Can Delay Resolution of Taxpayer Cases," 2013-40-105, at 4 (Sept. 6, 2013).

[72] National taxpayer advocate, "2010 Annual Report to Congress Executive Summary: Preface and Highlights," at 2 (Dec. 31, 2010). Although the cost of return preparation services is deductible, it is subject to the 2 percent floor. This makes the deduction unavailable for many taxpayers.

[73] *Securities and Exchange Commission v. Universal Service Association*, 106 F.2d 232, 237 (7th Cir. 1939).

[74] 15 U.S.C. section 77e (prohibiting the sale of a security until a registration statement is in effect); s*ee also* 15 U.S.C. section 77b(a)(10) (2012) (defining the term "prospectus").

[75] 17 CFR section 230.421.

[76] *Id.*

B. The Federal Rules of Evidence

On December 11, 2011, after years of work by various academics, practitioners, and judges, the restyled Federal Rules of Evidence debuted. Because the original rules lacked consistency in style conventions, the same ideas were expressed in different ways in different sections, leading to potential variations in interpretation.[77] The restyling was designed to create "restated, plain - language versions of the prior Rules" and to make them "simpler, easier to read, and easier to understand without changing their substance."[78]

Although the Federal Rules of Evidence, unlike the code, remain relatively unchanged year after year and are not nearly as voluminous, the principles behind their restyling could be applied to the code. The code uses various terms of art that have similar meaning throughout some provisions and yet mean different things in other provisions.[79] This lack of internal consistency across the code is a menacing obstacle for taxpayers.

C. Regulatory Considerations

While administrator of the White House Office of Information and Regulatory Affairs,[80] Cass Sunstein oversaw the issuance of thousands of rules proposed by federal agencies. He has concluded that "without a massive reduction in its current functions, government can be far more effective, far less confusing, far less counterproductive, and far more helpful if it opts, wherever it can, for greater simplicity."[81] He argues for the production of clear rules through plain language and optimized disclosure to their intended audience.

Because Treasury and the IRS impose more than 80 percent of the paperwork burden on the average American,[82] making the code simpler could have benefits. Not only might unintentional error rates decrease, but if willingness to pay one's taxes is a function of the IRS's reputation as fair and equitable, the tax gap attributable to intentional understatements of income might also drop.

D. What Does Tax Simplification Look Like?

The goal in restyling the code is to replace existing provisions with new ones that achieve the same ends through simpler statutory language — not to change the substantive law. This calls for several important structural and linguistic considerations.

Structurally, general information in statutory provisions should be located first, followed by specialized information and general exceptions. With this format, most readers can comprehend the key aspects of the provision without having to dig into material that doesn't apply to their particular situation.[83] Current code provisions do a good job of maintaining this hierarchy. However, the code has multiple subsections and layers in any given statute.[84]

A restyling would attempt to reduce the length of material within sections. This would make the material easier to comprehend and help organize it more effectively.[85] As noted earlier, the code has many words per section, and several provisions contain prohibitively long sentences. Also, consistent with the plain English principles mandated by the SEC, restyled statutes would eliminate passive voice, use active verbs, remove superfluous words, reduce legal jargon, reduce abstract words, and minimize unnecessary details (which are better suited to Treasury regulations).[86]

A code restyling would also try to achieve consistent meanings for phrases and terms of art across various code provisions. For example, when two commonly used terms are interpreted to have the same meaning, the drafters of the revised statute should choose the word or phrase

[77] Symposium, "The Restyled Federal Rules of Evidence," 53 *Wm. & Mary L. Rev.* 1435, 1438 (2012).

[78] *Id.* at 1440.

[79] *See infra* discussion regarding the code's corporate reorganization provisions.

[80] From September 10, 2009, to August 21, 2012.

[81] Cass Sunstein, *Simpler: The Future of Government* 2 (2013).

[82] *Id.* at 185.

[83] *See* Plain Language Action and Information Network, "Federal Plain Language Guidelines," at 7 (2011) (federal plain language guide).

[84] *See supra* text accompanying note 54; and federal plain language guide, *supra* note 83, at 8.

[85] *See* federal plain language guide, *supra* note 83, at 15.

[86] SEC, "A Plain English Handbook: How to Create Clear SEC Disclosure Documents," at 17 (1998) (SEC plain language guide).

likely to be more familiar and concrete to the intended audience.[87] There should also be a fix of apparent inconsistencies, such as the treatment of stock-for-assets transactions as tax-free reorganizations under section 368(a)(1)(c) despite their failure to meet the definition of reorganization under section 354(a), which refers to exchanges of stock or securities.

In testing conducted in the 1980s, the IRS found that taxpayers completed plain English sample forms faster than the existing forms, and with fewer errors. It also found that taxpayers had a more positive attitude about the sample forms.[88] These results should be replicated when the language of the code itself is changed.

V. Categories of Simplification and Justifications

It is helpful to evaluate the benefits and costs of code simplification by examining four types of tax provisions: (1) provisions designed to benefit low-income taxpayers, such as the earned income tax credit; (2) provisions designed for corporate combinations and divisions; (3) provisions that confer particular benefits on specific industries; and (4) the familiar personal tax expenditures.

A. Low-Income Taxpayer Provisions

Perhaps the most important tax provision directed toward low-income taxpayers is the EITC.[89] Found in section 32, the EITC provides a refundable credit and tax relief to the working poor while also providing a government subsidy for the cost individuals incur in raising children.[90] Given the importance of the EITC to low-income taxpayers, one would expect section 32 to be written in clear, understandable terms.

Unfortunately, the EITC is one of the most difficult provisions for taxpayers to understand without assistance.[91] This is all the more troubling based on the education profile of EITC-eligible filers: The three most populous states — California, New York, and Texas — have 53.3 percent, 53.7 percent, and 57.4 percent EITC-eligible filers with a high school education or less, respectively.[92] Because of this combination, the EITC is one of the 13 high-error programs listed by the Office of Management and Budget — the EITC paid out nearly 23 percent of its $55 billion payouts inappropriately in 2012.[93] And there is little consensus in the academic literature on the extent to which EITC errors are the result of intentional fraud versus honest mistakes.[94]

The EITC's text flies against the teachings of plain language guides, such as writing for the target audience. The Flesch test scores for section 32 rank it as a highly difficult provision to understand. Moreover, the term "qualifying children" under the EITC is commonly confused with the term "dependent children" used in other parts of the code.[95] These are just two of the problems that make the EITC a ripe target for restyling.

Revising the EITC's text to make it more user-friendly could sow important benefits. It could help ensure that taxpayers participate in the program without fear of misstating their

[87] *See* Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* 165-174 (2006).

[88] *See* Robert W. Benson, "The End of Legalese: The Game Is Over," 13 *N.Y.U. Rev. L. & Soc. Change* 519, 534 (1984-1985).

[89] *See, e.g.*, Stephanie Hoffer, "Adopting the Family Taxable Unit," 76 *U. Cin. L. Rev.* 55, 75 (2007) ("The [EITC] is arguably the most important family-oriented credit in the Internal Revenue Code.").

[90] *See, e.g.*, Regina T. Jefferson, "The Earned Income Tax Credit: Thou Goest Whither?" 68 *Temp. L. Rev.* 143, 145 (1995).

[91] *See id.* at 148 (noting that understanding the EITC definitions would challenge any taxpayer, let alone those with minimal education levels); and Leslie Book, "The IRS's EITC Compliance Regime: Taxpayers Caught in the Net," 81 *Or. L. Rev.* 351, 371 (2002) ("The EITC's complexity makes it more likely that taxpayers, or their preparers, are making innocent mistakes regarding eligibility.").

[92] Brookings Institute, "2010 Profile of the EITC-Eligible Population: California" (2010); Brookings Institute, "2010 Profile of the EITC-Eligible Population: New York" (2010); Brookings Institute, "2010 Profile of the EITC-Eligible Population: Texas" (2010).

[93] "Earned Income Tax Credit," PaymentAccuracy.gov.

[94] *See* Book, "The Poor and Tax Compliance: One Size Does Not Fit All," 51 *U. Kan. L. Rev.* 1145, 1166 n.69 (2003) (noting that determining whether the reason for error is intentional misreporting or taxpayer confusion is "virtually impossible"); and Jennifer Bird-Pollan, "Who's Afraid of Redistribution? An Analysis of the Earned Income Tax Credit," 74 *Mo. L. Rev.* 251, 277 n.118 ("There does not seem to be clear empirical data showing how much of the EITC noncompliance is a result of confusion in the face of the EITC's complexity and how much is intentional fraud.").

[95] *See* Book, *supra* note 94, at 371-372.

eligibility. Because the EITC is the one of the most powerful anti-poverty transfer systems in the United States, improving compliance and encouraging participation could have modest anti-poverty effects. Studies have demonstrated that EITC participation increases the work effort of recipients, improves wage growth, improves educational outcomes, and may even improve the health of infants.[96] Simplifying the EITC regime and providing direct and clear information in the statutory language itself would allow individuals to accurately determine their eligibility.

Removing the confusing language in section 32 would also help clarify the extent of honest errors versus abuse. The IRS could better identify fraudulent claims and isolate the reasons why people file inaccurately. The IRS has acknowledged that reductions in improper EITC payments are unlikely without developing "alternatives to traditional compliance methods."[97] Restyling the EITC would be one such alternative compliance method.

If the modification of section 32's language is successful,[98] the same principles could be applied to many other provisions that benefit low-income households, including the child tax credit,[99] the HOPE scholarship credit and lifetime learning credits,[100] and the so-called saver's credit.[101] Restyling those provisions would put the most economically vulnerable taxpayers in a position to better comprehend statutes that could improve their financial status — something that would arguably benefit the U.S. population as a whole.[102]

B. Corporate Reorganization Provisions

The code's reorganization rules have grown increasingly important. The amount of taxes deferred is significant; yet there appears to be no consistent theory underlying the reorganization provisions. They have been described as "needlessly complex, internally inconsistent, and noted for irrationality."[103]

Section 368, which provides definitions for corporate reorganizations, has a Flesch test score of 21.8. Section 354, which describes the basic tax treatment of a transaction satisfying the reorganization requirements, has a Flesch test score of 37.6. And section 355, dealing with corporate divisions, is similarly difficult, with a Flesch test score of 31.2. In this realm, significant legal advice is needed to ensure compliance with the statutes.

Not only are the statutes written in a difficult-to-comprehend manner, but they also contain much formalism. Taxpayers seeking to qualify for preferential treatment must satisfy several rigid and seemingly arbitrary rules under which a single day's difference in a sequence of events can destroy the tax-free nature of a transaction. This formalism can be problematic because of taxpayers' ability to manipulate rules to "produce results clearly not intended by the drafters."[104] But the reorganization provisions contain a hybrid form of formalistic rules supported by more soft standards — including the requirements that

[96] Chuck Marr and Chye-Ching Huang, "EITC and Child Tax Credit Promote Work, Reduce Poverty, and Support Children's Development, Research Finds," Center on Budget and Policy Priorities (Mar. 5, 2014).

[97] Treasury Inspector General for Tax Administration, "The Internal Revenue Service Is Not in Compliance With Executive Order 13520 to Reduce Improper Payments," 2013-40-084, at 6 (2013).

[98] It is admittedly difficult to determine to what extent a restyling might affect voluntary EITC filings and curb illegitimate claims.

[99] Section 24.

[100] Section 25A.

[101] Section 25B.

[102] Embedded in this claim is a normative assumption about what constitutes fairness in the code. Although much complexity of law is justified in the name of fairness, I contend that a less complicated system produces more equitable and fairer results for low-income taxpayers, which ultimately benefits the entire population. For a discussion on fairness, see Joel Slemrod and Jon Bakira, *Taxing Ourselves: A Citizen's Guide to the Debate Over Taxes* 55-95 (3d ed. 2004).

[103] Glenn E. Coven, "Taxing Corporate Acquisitions: A Proposal for Mandatory Uniform Rules," 44 *Tax L. Rev.* 145, 203 (1989).

[104] *See* David A. Weisbach, "Formalism in the Tax Law," 66 *U. Chi. L. Rev.* 860 (1999) (observing that this behavior can cause inefficiency and revenue loss).

there be a business purpose for the transaction[105] and a continuity of a proprietary interest in the enterprise.[106]

Textual formalism's goal is to prevent advantageous behavior by taxpayers from getting out of control. Yet that formalism does not solve the problem entirely. The creation and frequent use of judicial doctrines is evidence that merely using the text of the code as a guide may not achieve the government's desired tax outcome. The argument that a plain language approach would reverse the intent of a formalistic tax law is undermined when judicial standards that one would associate with a plain language approach serve as a backstop to the formalistic law.

Still, the IRS has increasingly made taxpayer-favorable decisions regarding corporate reorganization provisions. In several revenue rulings with potentially far-reaching implications, the IRS permitted tax-free treatment for specific transactions that fit the spirit of the law without necessarily complying with all the technical rules associated with the reorganization provisions.[107] Those rulings may reflect a substance-over-form view, a cornerstone principle of tax law. If that is the case, a restyling of the reorganization provisions might duplicate the IRS's efforts to clarify this area for taxpayers seeking advance rulings.

Another argument against restyling the corporate reorganization provisions is that taxpayers are willing to pay significant amounts of money to find advantageous technical flaws in the rules.[108] Even though a restyling would not be designed to make substantive changes, it might inadvertently do so and have unintended consequences, such as exposing a never-before-litigated issue that could cause significant financial loss to the government.

Taxpayers seeking tax-free treatment will continue to pay for legal advice in the mergers and acquisitions area regardless of the statutes' language, and they will pay high prices for it.[109] Given taxpayers' willingness to find creative ways around the law in this area, disrupting settled expectations with modified language would likely do more harm than good.

C. Corporate Tax Expenditures

Special interests play a considerable role in the development and creation of legislation — so much so that lobbyists outnumber members of Congress by a ratio of 20 to 1. Lobbying efforts increase the length and complexity of the code because targeted benefits are arguably buried in otherwise hard-to-understand provisions. This, in turn, erodes taxpayer confidence in the tax system.[110]

These benefits span various industries and provide several distorting incentives for specific corporations. For example, credits are granted for the construction of energy-efficient homes, for producing unconventional fuels, for nuclear decommissioning costs, and for the purchase of some agricultural chemicals.[111]

The complexity of the corporate tax expenditure provisions may prevent taxpayers from realizing that these benefits are concentrated while the costs are diffuse. For example, section 41, which provides a credit for some research and development expenditures, has a Flesch test score of 37; section 42, which provides a credit to construct low-income housing, scores a 36.3; and some parts of the depreciation statute — section 168 — governing reuse and recycling properties,

[105] *See Gregory v. Helvering*, 293 U.S. 465 (1935).

[106] *See Le Tulle v. Scofield*, 308 U.S. 415 (1948).

[107] *See* Rev. Rul. 81-247, 1981-2 C.B. 87 (permitting a drop-down of assets after a merger to qualify as a reorganization under section 368(a)(1)(A)); Rev. Rul. 2001-25, 2001-1 C.B. 1291 (expanding the type of transactions that qualify as a reverse triangular merger); and Rev. Rul. 2001-26, 2001-1 C.B. 1297 (expanding the ability to acquire control in a reverse triangular merger in a multistep process).

[108] *See, e.g., Black & Decker Corp. v. United States*, 436 F.3d 431 (4th Cir. 2006) (leading to the enactment of section 357(h) to eliminate similar transactions).

[109] *See* David Lat, "When $1,000 an Hour Is Not Enough," *The New York Times*, Oct. 3, 2007 (observing that the highest-paid corporate M&A attorneys charge hourly billing rates exceeding $1,000).

[110] *See* "What's Gone Wrong With Democracy," *The Economist*, Mar. 1, 2014, at 49 ("This leads to the impression that American democracy is for sale and that the rich have more power than the poor, even as lobbyists and donors insist that political expenditure is an exercise in free speech. The result is that America's image — and by extension that of democracy itself — has taken a terrible battering.").

[111] *See generally* Joint Committee on Taxation, "Estimates of Federal Tax Expenditures for Fiscal Years 2012-2017," JCS-1-13 (Feb. 1, 2013).

score a 30.4.[112] Those scores are representative of other corporate tax expenditure provisions.

That complexity may be unavoidable because of the technical subject matter of the provisions. However, it is also possible that the drafters deliberately buried these expenditures in complex language to avoid the scrutiny of taxpayers and other lawmakers.[113] As with the corporate reorganization provisions, entities seeking to take advantage of the corporate tax expenditure provisions typically engage highly skilled attorneys and accountants to ensure that they qualify for these special credits and deductions. But these expenditure provisions are provided for only a narrow subset of businesses and are more vulnerable to fraud than the reorganization provisions.[114]

Making the corporate tax expenditure provisions easier to comprehend would allow informed decisions on behalf of the American public. It might also force the federal government to address whether the IRS is the appropriate agency to administer those benefits.[115] Ultimately, restyling the language of these provisions would not eliminate corporate tax expenditures or reallocate agency resources, but it could be a first step in that direction. At the very least, the modified provisions would resemble something coherent to all taxpayers — a goal that has remained elusive in this realm.

D. Individual Tax Expenditures

Tax expenditures for individuals dwarf those available to corporate filers. Perhaps the two most salient are the mortgage interest deduction and the tax-free contribution toward employer-sponsored health insurance. Between 2013 and 2017, these provisions were expected to result in net revenue reductions to the government of $379 billion and $760 billion, respectively.[116] So prevalent are these two tax expenditures that the mortgage interest deduction is believed to affect home values,[117] and the health insurance exemption has created distortions in both the labor market and the insurance market.[118]

Although the text of the individual tax expenditure provisions is generally less complex than the text found in the other three categories of provisions,[119] there are exceptions: Section 121, which exempts a portion of the income from the sale of one's home, has a Flesch test score of 43.9; section 163, the mortgage interest deduction provision, scores a 35.3; and section 170, which provides for the deductibility of some charitable contributions, is even more challenging, with a score of 26.9.

Ask a taxpayer about the mechanics of section 163, and you'll likely receive a blank stare. But if that taxpayer were asked instead whether she was eligible to receive the mortgage interest deduction, and, if so, how much it was worth to her, she would likely instantly rattle off answers. The mortgage interest deduction is one of several individual tax expenditures for which affected

[112] Section 168(m).

[113] *See* Louis Brandeis, *Other People's Money and How the Bankers Use It* 92 (1914) (suggesting that sunlight operates as the best of disinfectants); and Sunstein, *supra* note 81, at 79.

[114] This is at least partially because of the existence of the judicial backstops of the step transaction doctrine, the sham transaction doctrine, and the business purpose requirements in the corporate reorganization context. *See supra* Section V.B.

[115] *See, e.g.*, Chris Edwards et al., "Cool Code: Federal Tax Incentives to Mitigate Global Warming," 51 *Nat'l Tax J.* 465, 467 (1998). Perhaps some expenditures would run more efficiently and be less costly if operated by a federal agency with institutional knowledge of a specific industry. Not only could those bills be originated by the congressional committee with greater oversight of the funds (as compared with taxwriting committees), but the agencies in charge of regulation and administration of those programs also likely know the industry better than the IRS. *Id.* at 476.

[116] *See* JCS-1-13, *supra* note 111, at Table 1.

[117] At least according to some housing-related interest groups. *See* Howard Gleckman, "This May Be the Ideal Time to Reform the Mortgage Interest Deduction," *Forbes*, Mar. 28, 2013 ("Housing industry lobbyists often make the case that, whatever you think of the mortgage interest deduction, now would be a terrible time to eliminate or restructure the subsidy. After all, they say, the housing market remains so shaky that ending the deduction would send home prices back into a tailspin.").

[118] Jeremy Horpedahl and Harrison Searles, "The Tax Exemption of Employer-Provided Health Insurance," George Mason University Mercatus Center, at 1 (2013).

[119] Section 103, which provides that interest paid on state and local taxes is exempt from federal income tax, has a Flesch test score of 63 and is among the easiest of all federal income tax provisions to comprehend.

industries provide taxpayers promotional material clearly and concisely explaining the basics of the provision.[120]

Some of the individual tax expenditure provisions have become so ubiquitous that taxpayers take the time to understand them.[121] Although taxpayers may have incomplete knowledge, leading to errors and mistakes, the familiarity with these expenditures undoubtedly plays an important role in decision-making for most taxpayers. Modifying the language of these provisions might have limited use — not only are expectations fairly settled, but understanding is high relative to other code provisions. The effort to change this field would likely have little impact relative to the costs of changing the code. Thus, restyling the individual tax expenditures is not a promising opportunity.

Restyling is not a cure-all. As the above analysis suggests, there are parts of the code for which the costs of restyling would exceed the benefits. In those areas, comprehension of the provisions has reached a tipping point, or advanced tax planning would mitigate any of the potential benefits. Fixing the language of these most complicated provisions would do little good.

A wholesale restyling of the code is too blunt a tool to address the complexity in our tax laws. But targeting specific types of provisions has an intuitive appeal. In the proper context, restyling can make complicated provisions more understandable. That in turn could allow eligible taxpayers to more easily obtain benefits, could reduce taxpayer fraud, could shine a light on obscure and concentrated benefits, and could serve as a catalyst for much-needed substantive reform. For provisions that appear to be viable candidates for a restyling, challenges remain.

[120]For an example of this in the housing area, see the National Association of Realtors, "Mortgage Interest Deduction."

[121]*See* Jacob Goldin and Yair Listokin, "Tax Expenditure Salience," 15 *Am. L. & Econ. Rev.* 1, 13-16 (2012) (observing that taxpayers in a survey understood their eligibility to receive charitable deductions and the mortgage interest deduction 72 percent and 71 percent of the time, respectively). Although the authors found that result low, *id.* at 25, this level of understanding is likely higher than that for many other code provisions. These numbers are relatively less problematic than one might think. Similarly, some errors involved the magnitude of the benefit rather than the taxpayer's eligibility for the benefit.

VI. Challenges

There are several potential drawbacks or challenges to implementing a restyling. The concerns below are not exhaustive but instead represent the most common arguments against stylistically simplifying the code.

A. Categorizing Tax Provisions

The lines between the categories of tax provisions described above are not clearly defined. For example, there are instances in which a corporate tax expenditure benefits individual taxpayers, and vice versa. Because the analysis above suggests that corporate tax expenditures should be restyled but individual tax expenditures should not, it is critically important to determine whether a particular provision is intended more for individuals or for corporate entities. A guiding principle should be whether most of the allocated funds benefit individuals or corporations.

For example, entities and individuals both can exclude the interest income on state and local private activity bonds for some transportation facilities; individual taxpayers exclude somewhere between two to three times the amount of money that corporations do once the total dollars are aggregated, however.[122] Here, the results would slightly favor retaining the current statutory language.

Yet another factor would be whether, even when all the tax expenditure dollars go toward individuals, some industries stand to benefit. With the deduction for student loan interest, loan providers benefit due to the distorting benefit to individuals who accrue student loans. Because these entities have an incentive to maintain this individual tax benefit, Congress must consider the extent to which one would expect special interests reaping indirect benefits to maintain the status quo. The larger the effort on behalf of these interest groups, the less likely Congress should be to maintain the existing statutory language.

Ultimately, Congress must balance these potentially competing interests. It should consider restyling a tax expenditure statute only

[122]JCS-1-13, *supra* note 111, at Table 1.

after looking at the salience of the particular benefit, the allocation of the expenditure between individual and non-individual taxpayers, and determining whether specific industry groups have an indirect interest in the expenditure. The balance of those interests will differ based on the particular provision, giving Congress the flexibility to consider the important elements of a provision to determine whether to pursue a particular course of action.

B. Oversimplification

The code may already be in its simplest form.[123] It is also possible that although further simplification is needed, a restyling of the code would eliminate some necessary complexity and upset the balance of revenue collection in unfavorable ways.

Congress must strike a balance.[124] Language that is too broad risks the application of an ambiguous statute (which raises many problems), and language that is too specific risks the statutory scheme losing the forest for the trees.[125] Oversimplification may inadvertently expose the government to unintended interpretations of the restyled statute. As Katz and Bommarito put it, "Make things as simple as possible, but not simpler."[126]

Complexity is often justified because it supposedly yields the fairest outcomes. This is true, but only to a point. First, not all complexity is introduced in the name of equity.[127] Some tax formalists assert that our tax system, by operating as a closed and complete system, is perfectly logical. Underlying that belief is the assumption that tax law, while perhaps more complicated than other parts of the law, is also more precise.[128] The code, they argue, contains statements of propositional logic having an airtight quality. Particularly in areas in which taxpayers engage in aggressive interpretation to attempt to minimize their tax burdens, modifying the text of the code to be more understandable might poke holes in that hermetic system. Even though simplification might be an attractive principle in theory, relying on it as a guiding premise in reality can make the situation worse.

Even with this set of formal rules and purportedly closed system, our tax laws cannot perfectly account for all facts and circumstances that taxpayers present.[129] Despite the desire to make a closed system, uncertainty inevitably creeps in, undercutting the argument that the tax system maintains its order and internal consistency. Revising statutes to their plain language interpretations opens up the possibility of some of our tax laws existing more as standards than as rules.

But standards, at least when combined with antiabuse backstops, can be simpler to administer than rules-based laws and can capture the situations of general applicability that most taxpayers fall under.[130] This would enable most taxpayers to bypass much of the code's complexity — those with more complicated circumstances (which would necessitate that the taxpayer be responsible for further comprehension) would have to inform themselves of how their circumstances affect their tax liability. For most filers, though, moving to a plain language regime in some provisions would not be an oversimplification, but an improvement in an otherwise broken system.

C. The Process Is Costly

Transitioning some provisions from their current complex language into plain language would not be a costless undertaking. Committees must meet. Drafts must be circulated. Revisions must be considered. All of this takes time and money and forces lawmakers to divert their attention from other important matters. The restyling of the Federal Rules of Evidence — a much smaller undertaking relative to the code —

[123] *See infra* Section VI.C.

[124] For an in-depth review of this debate, see Louis Kaplow, "Rules Versus Standards: An Economic Analysis," 42 *Duke L.J.* 557 (1992).

[125] *See* Miller, *supra* note 13, at 44.

[126] Katz and Bommarito, *supra* note 51, at 370.

[127] *See* McCaffery, *supra* note 9, at 1284 (noting that partnership allocation rules, mortgage interest deduction allocations, and passive activity losses are examples of technical complexity with no corresponding equity gains).

[128] *See* Miller, *supra* note 13, at 50.

[129] *See* Miller, *supra* note 13, at 52.

[130] *See generally* Stanley S. Surrey, "Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail," 34 *Law & Contemp. Probs.* 673 (1969); and Weisbach, *supra* note 104.

"involved multiple levels of drafting and review by a style consultant, the Advisory Committee on Evidence Rules, and the Style Subcommittee of the Standing Committee, as well as substantial input from judges, lawyers, and academics."[131] One could expect a similar process for any code restyling.

The costs of that undertaking would be mostly short-term, but the benefits would accrue and grow over a longer period. Quantifying benefits would require measurement of the long-term impact on taxpayer comprehension. Taxpayers' cost of compliance would be reduced because it would take them less time to read and understand tax material. Moreover, taxpayers' likelihood of compliance would increase because they would have more confidence that their returns have been filed correctly. And the burden on the IRS would likely decrease because the agency would receive fewer taxpayer requests for answers to complicated questions.[132] Although this prediction is admittedly not empirical, there are good reasons to believe that the long-term benefits of a restyling would far outweigh some of the short-term costs.

D. Complexity Is Inevitable

Academics sometimes note that complexity in our tax system is inevitable.[133] Various reasons have been cited for this inevitable complexity: Tax laws affect taxpayer behavior; tax laws are frequently changed; the economy is complex; complexity breeds certainty rather than vagueness; courts' interpretations add to the volumes of law; there is no easy way to measure income; and the political process adds to complexity.[134] The unstated assumption is that none of these factors can be changed to minimize the difficulty in interpreting our tax laws.

Restyling the code as proposed could address some of those causes of complexity. For example, using plain language to expose corporate tax expenditures to sunlight could be the first step in minimizing some types of expenditures and thereby reducing the distortive effects of the federal income tax. Moreover, the claim that rules provide certainty is far from definitively established.[135] And although some key terms evade clear definition, plain writing techniques could make many individual tax provisions, such as the EITC, easier for taxpayers to understand.

The justifications that academics provide for complexity are grounded in normative arguments for the foundations of our taxing system rather than how those principles are articulated to taxpayers. Progressivity might be a reason for tax complexity.[136] Once a nation adopts a taxing system with embedded progressivity, however, the tax laws can make the progressive system as easy to comprehend as possible. Even those who acknowledge the need for complexity in our tax system acknowledge that the system could be made simpler.[137] The goal of a restyling is not to eliminate complexity but instead to provide as much clarity to taxpayers as possible when they're navigating an otherwise difficult field.

E. Political Obstacles

Several influential interest groups would likely oppose a restyling, since they benefit from the obscurity associated with their tax-favored status. Also, the return preparation industry has grown tremendously in recent years, particularly after the development of online tools for taxpayers. Simplifying the code would provide a modest challenge to the significance of tools provided by the likes of Intuit and H&R Block — businesses that have historically resisted efforts to make filing less costly and easier for taxpayers

[131] "The Restyled Federal Rules of Evidence," *supra* note 77, at 1439.

[132] The SEC made similar arguments with the adoption of Rule 421. *See* Plain English Disclosure, Exchange Act Release No. 34-39593, 66 SEC Docket 777 (Jan. 28, 1998).

[133] *See, e.g.*, Samuel A. Donaldson, "The Easy Case Against Tax Simplification," 22 *Va. Tax Rev.* 645, 655 (2003); and R. George Wright, "The Illusion of Simplicity: An Explanation of Why the Law Can't Just Be Less Complex," 27 *Fla. St. L. Rev.* 715 (2000).

[134] Donaldson, *supra* note 133, at 654-672.

[135] *See supra* text accompanying note 131.

[136] *See* Jeffrey Partlow, "The Necessity of Complexity in the Tax System," 13 *Wyo. L. Rev.* 303, 312-315 (2013).

[137] *See id.* at 318 (concluding that "complexity is inevitable," but noting that "it does not mean that the system cannot be simplified or made fairer for the collective population").

and have thus spent millions of dollars lobbying to prevent IRS simplification activity.[138] Simplification of the code could cut down on the significant costs of outsourcing return preparation[139] and would redirect those funds to more productive uses.

Congress itself may oppose the enactment of simpler tax laws. For lawmakers to be held accountable, constituents must understand the particulars of the legislation that their representatives have supported, and constituents must vote for their representatives based on that information.[140] Because changes in tax law are generally highly salient to taxpayers,[141] the second condition is likely satisfied. But the complexity of tax legislation prevents the first condition from being met,[142] allowing political actors to control the agenda while they seek reelection rather than forcing them to run based on a clear understanding of their own record.[143] If members of Congress are motivated by their ability to obtain reelection (and there is reason to assume they are), they might oppose any efforts to make the code clearer.

The benefits reaped from maintaining the code's complexity remain in the hands of the most sophisticated, the most powerful, and those with the best lobbyists.[144] These groups pay back their gains by contributing to the reelection campaigns of the officials who provided these benefits, and the cycle repeats itself.[145] This is unquestionably not a Pareto-optimal outcome, and the waste present in this rent-seeking activity hurts all taxpayers.[146]

A more effective and efficient system — something that politicians claim to seek regularly — is one that is more coherent. Taxpayers footing the bill for many special interests can make their voices heard. But for them to better understand the tax system, it must first be made comprehensible.

VII. Conclusion

Language matters. Changing the code through a restyling has great promise but comes with a minefield of obstacles. If Congress can overcome its inertia on tax reform matters, a restyling would unearth many potential improvements in our system. If successful, the code restyling could serve as an effective model for revisions to complex state and local tax provisions.[147] And making laws easier to understand can help engage the citizenry in the democratic process and improve accountability.

For whatever reason, many taxpayers focus just as much on the administrative burden of a tax scheme as on the tax liability itself. This burden presents particular challenges to many taxpayers, costs billions of dollars in taxpayer money, and swallows untold hours of taxpayer time. Congress can and should do better. The prospect for meaningful tax reform has stalled in Congress during the Trump administration's first year. When legislators are prepared to take up the issue again, they should contemplate a restyling of the code to their list of potential reforms. ■

[138] *See* "Filing Taxes: It Shouldn't Be So Hard," *The Economist*, Apr. 2, 2013 (noting that the return preparation industry "has spent millions lobbying the federal government, opposing bills that would allow the IRS to send you pre-filled-in returns").

[139] *See* Lori Montgomery, "Volcker-Led Economic Panel Pushes Lawmakers to Simplify U.S. Tax Code," *The Washington Post*, Aug. 27, 2010; and "The Burden of Filing," *The Washington Post*, Aug. 28, 2010.

[140] *See* Karla W. Simon, "Congress and Taxes: A Separation of Powers Analysis," 45 *U. Miami L. Rev.* 1005, 1016 (1991).

[141] Larry M. Bartels, *Unequal Democracy: The Political Economy of the Gilded Age* 106 (2010).

[142] *See* Simon, *supra* note 140 (suggesting that Congress should write more broad tax legislation to remain accountable to taxpayers).

[143] *See* McCaffery, *supra* note 9, at 1302-1304 (characterizing the complexity attributable to political reasons as existing in a suboptimal prisoner's dilemma state).

[144] *See id.* at 1304.

[145] *See supra* Section III.B and Section V.C.

[146] It particularly hurts future generations of taxpayers, who become responsible for the tax burdens left to them by previous generations.

[147] *See* Jerome R. Hellerstein, "State Taxation Under the Commerce Clause: An Historical Perspective," 29 *Vand. L. Rev.* 335, 351 (1976) (referring to some state tax statutes as "technical and complex").