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## OFFSHORE PILOT QUARTERLY

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#### ***Ali Baba and the Bureaucrats***

This quarter's newsletter includes two quotations from Lord Alfred Tennyson, the Victorian poet, and extracts from my speech at this month's Offshore Investment conference which has been put together by the United Kingdom journal, Offshore Investment, a first for them in Panama. The first Tennyson quote pretty well sums up life's cycles, whether one thinks of politics or (which I suspect has concentrated more minds of late) economics. To wit:

*"The old order changeth, yielding place to new,  
And god fulfills himself in many ways,  
Lest one good custom should corrupt the world."*

Lord Tennyson's words resonate with the Organisation for Economic Co-operation & Development, along with a collection of other official and quasi-official agencies and organizations which believe that one good custom, secrecy, is corrupting the world today. They, not God, want all the commercial and individual business affairs of man to be open to the world. For the purposes of my text I shall collectively refer to them as bureaucrats. We all know who God is, despite being one in three persons, and although some bureaucrats act as if they are.

Anton Chekov tells us that every person lives his real, most interesting life under the cover of secrecy. If the bureaucrats have their way interesting lives will be confined to the home. When is secrecy a bad thing? In the commercial sense it's a matter of who answers the question. My answer to the bureaucrats is this: whenever

secrecy in financial services will be aiding and abetting criminal activity then it's right and proper to eliminate it. Of course, tax evasion in many jurisdictions is classified as criminal activity and where one country agrees to co-operate with another in cases of tax evasion (even if evasion is not classified by either country as criminal) a formal agreement to do so will be entered into in the form of either a double tax agreement (which can be beneficial for the taxpayer's business) or a tax information exchange agreement, where there is no commercial advantage for the taxpayer, only his government. Let me declare my firm belief that in the case of Panama, the jurisdiction has nothing to fear from entering into tax agreements with foreign governments, anymore than it should fret if bearer shares are banned tomorrow. Honest parties, in the meantime, can rely on the confidentiality of Panama's banks which is supported by legislation that will punish breaches. One form of tax agreement has caused a stir; it is the tax information exchange agreement, TIEA for short. It raised, in fact, a degree of alarm in Panama when one (the country's only one so far) was ratified with the United States of America. Its effect, however, is not necessarily the equivalent of the Arabian Nights' Ali Baba commanding a sealed cave to open with the words: "Open Sesame". In fact, it is difficult to predict how effective this streamlined version of a double tax agreement might be because, of course, as many commentators have already pointed out, with no fishing expeditions allowed, the tax authority first has to know what it is looking for before it can ask for it. If not, then you have a blind man in a dark

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room looking for a black hat which isn't there. The cave, in other words, remains sealed.

Interestingly, reports are surfacing that up to now the TIEA programme worldwide has been more successful in spreading fear than recovering unpaid taxes. Despite the Netherlands having signed 28 TIEAs at the end of last October, the Dutch have, to my knowledge, only made 22 requests for information in the last 3 years. According to an ex-employee of the fiscal investigation arm of the Dutch Tax & Customs Administration the main stumbling block was the difficulty in meeting the formal criteria of a request. And of the 22 requests made, 13 were sent to Jersey with 7 responses; a handful of similar requests went to Guernsey and there were 3 replies; only 1 request went to the Isle of Man which has actually had the TIEA in place since the beginning of 2007.

Crucially, when a country wants information under a TIEA it must provide the competent authority in the other country with the reasons for the request: to ask a question, in other words, it must know the answer, a rule applied by astute trial lawyers in court. This explains in large part the Dutch experience and the dismal results. The Dutch also found that carrying out an audit of a suspected tax evader can be exhaustive and might take a team of 7 inspectors up to 2 years. The director of the Centre for Taxation and Public Governance in Amsterdam has said that carrying out a TIEA request properly calls for specialist knowledge; as in most cases tax authorities around the world are short-staffed and specialists are therefore few and far between. In any event, the 2012 issue of the Green Book produced by the International Tax Planning Association says that the US appears to be losing interest in TIEAs now that it is being asked to provide information itself.

### ***The Potter's Wheel***

It is the hurdles, therefore, which must be faced before a TIEA request is successful that are key. On the evidence so far, I am of the opinion that TIEAs do not present a serious threat to IFCs. In any

event, given the requirements, it is likely that it will mostly be only big cases that tax authorities will investigate because of the attendant costs of investigations that must be justified.

I should add that the rule of unintended consequences extends to the US Foreign Account Tax Compliance Act, FATCA as it is known by. It has now dawned on the US Treasury that there will be foreign countries who may require quid pro quo – asking US financial institutions to reciprocate by providing similar information about their own taxpayers.

The US Treasury's Acting Assistant Secretary for Tax Policy, Emily McMahon, has accepted the many problematic issues which FATCA presents. She says that supporting regulations will now minimize the administrative burden and focus on their application towards circumstances that present a higher risk of tax evasion; as with TIEAs, it will be the big cases in the spotlight. She went on to say that the US is "open to exploring an intergovernmental approach to FATCA implementation that would address legal impediments to direct reporting". But beware. When bureaucrats see light at the end of the tunnel they order more tunnel usually. And Milton Friedman, as I have reminded readers before, said that if you put the Federal government in charge of the Sahara Desert, in five years there'd be a shortage of sand. Britain's National Health Service, for example, has hospital trusts buying 21 different forms of A4 file paper and 652 different kinds of surgical gloves. Not for the bureaucrat the simple approach, as illustrated by the late Momofuku Ando, inventor of instant noodles: Peel off lid, pour boiling water, steep for three minutes, stir well and serve.

Personally, I see both tax information exchange and FATCA as clay on the potter's wheel. We don't know the final shape of things to come: will TIEAs really gain traction and will FATCA prove to be the monster many fear? The potter's wheel is still spinning and his hands remain busy. Harbingers of doom (and there are many) have, in the meantime,



already decided that IFCs have been dealt a fatal blow. There's no shortage of onshore lawyers exploiting the situation, I am afraid to say, and one whose outcome which they cannot themselves be certain of; the only certainty is that fat fees will be made from FATCA. Fear and panic flourish in the land of lemmings, all of them being members of a large group following an unthinking course towards mass destruction. Unthinking; I shall return to that subject.

And just as secrecy conjures up different meanings, depending on the individual, it would seem that so does transparency. Is it not a wonderful piece of irony to reflect that contributors to the coffers of this year's US presidential candidates can remain anonymous by contributing not directly but, if they choose, indirectly through a shell company to which they need not be connected? So a president can benefit by such means to get elected and once he does so, he can stand behind legislation that demands complete transparency from the individual. It would seem to be a case of demockery within a democracy.

### ***The Unreadable, Unaccountable and Untraceable***

Let's now turn specifically to one of this year's US presidential hopefuls, Mitt Romney. The US television network, ABC, back in January reported how Mr. Romney has invested over \$30 million in untaxed Cayman vehicles. Since then it has been established that the network's report strayed from the facts; it certainly doesn't know its offshore ABCs. At the risk of punnery let me say that there are mitigating circumstances. Inevitably, the usual slurs were repeated, with the Cayman Islands described as "a notorious Caribbean tax haven, where secrecy is the rule".

There's that word "secrecy" again, the finest of fodder for some journalists doubtless whom Oscar Wilde had in mind when he said: "The difference between literature and journalism is that journalism is unreadable and literature is not read". In wartime, said Winston Churchill, the truth must be surrounded by a dense thicket of

lies. This seems to be the aim of those mischievous journalists and politicians who have launched a war against the offshore industry. In fact, the Romney story illustrated the legitimate use and advantage of running investments through an International Finance Centre.

Let's pause at this point and consider the words of John Milton, an English poet from the seventeenth century: "neither man nor angel can discern hypocrisy, the only evil that walks invisible". Well today it can most certainly be discerned in the onshore/offshore arena, and until it is eradicated, the offshore world will never willingly fall in line with the dictates of developed countries while distortions continue to exist.

A footnote to the Romney story. In one instance a corporation called W Spann LLC donated \$1 million to his campaign and then was immediately dissolved. The LLC was formed in Delaware, which comes as no surprise to me or any of my regular readers who, like myself, feel that the state's prevailing secrecy, given all the circumstances, is an outrage. Stephen Colbert, American satirist, has his own opinion about the role hidden money could play (I thought I'd try a different word to "secret") in all presidential and congressional elections. He said that it has created "an unprecedented, unaccountable, untraceable cash tsunami". You would think that Colbert's comment was about "a notorious Caribbean tax haven..." but, then again, you would think a lot of things to be other than they are unless you have read lots of Lewis Carroll. No wonder Robert Frost surmised that education is the ability to listen to (and, I suggest, also read) almost anything without losing your temper or your self-confidence.

What, however, is education without an independent mind? When, I wonder, does one realise that perhaps you have joined the league of lemmings, the guild of the gullible? Many of us have surrendered our thoughts to those assumed to know better, or perhaps trusted, in matters of governance and economics. But just glance back only four or five years to see how the road



travelled is strewn with folly, misjudgement and worse.

Chuck Prince, former Chairman of Citigroup, who became a dark prince, spoke during the financial frenzy that centred in Wall Street, the banker's ground zero, of dancing until the music stopped. But whose tune was he dancing to as the pillars of profligacy tumbled to the ground? It was certainly not his own; he had become a hostage of the harmonies of others – much in the same way many of us did, and still do.

Returning to the unthinking course of lemmings; a bit more independent thought on the part of many

of us would be no bad thing. Henry David Thoreau pondered: "If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music he hears, how ever measured or far away".

A little distance and measured thought is never a bad thing and as this is the first issue in the new year, I think that my second quotation from Lord Tennyson, kept for the end, is most apt, even although a drummer is absent from the poem's basic rhythm:

"Ring out the old, ring in the new...,  
Ring out the false, ring in the true."

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*Offshore Pilot Quarterly has been published since 1997 by Trust Services, S. A. which is the British face of trust business in Panama where it is licensed under the fiduciary laws. It is written by Derek Sambrook, our Managing Director, who is a former member of the Latin America and Caribbean Banking Commission as well as a former offshore banking, trust company and insurance regulator. He has over 45 years private and public sector experience in the financial services industry about which he has written extensively and our website provides a broad range of related essays including his Latin Letter column which appears in every issue of Offshore Investment.com, a British professional journal published since 1986.*

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