Muddled Markets

Investors Increasingly at Risk from Lack of Disclosures about Corporate Tax Practices

November 2018

FACTCOALITION

Financial Accountability & Corporate Transparency

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Founded in 2011, the *Financial Accountability and Corporate Transparency (FACT) Coalition* is a non-partisan alliance of more than 100 state, national, and international organizations working toward a fair tax system that addresses the challenges of a global economy and promoting policies to combat the harmful impacts of corrupt financial practices. More information about the coalition can be found at the back of this report or on the FACT Coalition website at www.thefactcoalition.org.

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Executive Summary

International tax strategies play a significant and growing role in the financial picture of multinational public companies. Companies in today's modern global marketplace often develop complex frameworks to take advantage of different tax rules and rates in different jurisdictions to minimize their tax burdens.

Unfortunately, disclosure requirements for public companies in the U.S. do not provide investors with sufficient tax-related information to (1) accurately determine a company's value, or (2) appropriately assess risks of, among other things, government enforcement actions, tax rule changes in the U.S. or abroad, high-risk strategies employed by company management, or reputational damage arising from growing societal and political focus on these issues. These risks can lead to billions of dollars in gained or lost profits for some companies.

At a minimum, to effectively identify and appreciate the impacts of international tax-related information on a company's performance and valuation, investors need, on a country-by-country basis:

- profit or loss before taxes;
- income tax accrued for the current year;
- revenues from unrelated parties, related parties, and in total;
- income tax paid (on a cash basis);
- effective tax rate;
- stated capital;
- accumulated earnings;
- number of employees; and
- tangible assets other than cash or cash equivalents.

In addition to country-by-country reporting, investors would have a much greater ability to understand a company's international tax strategy and risk profile if U.S. regulators further specified in modest rules changes or, if appropriate, guidance that public companies should:

- divide their domestic U.S. income tax into current, deferred, and cash paid to federal and state governments;
- explain any effective tax rate that is significantly lower than the statutory rate in the countries in which they do business;
- use the company's weighted average statutory rate based on geographic revenue mix instead of home country statutory rate in the tax rate reconciliation schedule (which would help explain the likely effective tax rate, especially as worldwide rules change);
- explain any large or increasing Unrecognized Tax Benefit (UTB) balance and delineate the cost of specific significant benefits in the UTB reconciliation;
- disclose for all non-de minimis intracompany debt transactions, the countries where the debt is held, the amount of the debt, and the average interest rate "paid" by the relevant subsidiary on that debt;

- disclose and explain any material tax incentives or benefits provided by a foreign jurisdiction, including the estimated tax savings, any conditions attached to the incentive or benefit, and the likelihood that the incentive or benefit may be lost; and
- disclose of any legal proceedings by foreign governments related to taxes paid to any such government, regardless of whether such matter is material to the financial position of the corporation.

Collectively, these enhanced disclosures are essential for investors to effectively value and assess the risks related to the public companies in which they have invested.[1]

I. Background on Public Disclosure Requirements

The federal securities laws require any company selling securities to the public to provide comprehensive disclosures about their business, management, finances, and operations at the time of the offering and on an ongoing basis thereafter.[2]

Regulations S-K and S-X, as well as various accounting standards, flesh out the details of these required disclosures.[3] In theory, these disclosures should be relatively close to what investors believe is important.[4] Unfortunately, while investors have increasingly sought more detailed information from public companies, the Securities and Exchange Commission's (SEC) specific disclosure requirements have not kept pace.

Today, more than ever before, investors care about a number of issues that are un- or under-addressed by the existing regulatory framework. These areas range from executive compensation, worker training, corporate stock buybacks, sustainability efforts, and political spending, to, most importantly for our current purposes, international tax practices and subsidiaries.[5]

In the pages that follow, we walk through the large and growing role of international tax strategies on public companies, as well as the growing risks associated with them. We also explore recent changes to key tax laws, as well as efforts to modernize tax-related disclosures. Lastly, we outline what investors really need.

II. Evolution of Tax Law and Policy

In the competitive global marketplace, it should come as no surprise that a number of public companies are increasingly focusing on foreign revenues and international tax strategies to maximize profits. In fact, many of the largest public companies now have more than 85% of their earnings accrue overseas.[6] At the same time, many public U.S. companies are also engaging in complex efforts to shift revenues and profits to foreign jurisdictions or between different foreign jurisdictions in efforts to minimize their taxes.[7]

Table 1: GE's 10 Years of Negligible Total Federal Income Taxes[8] ($-millions)

Year	Pretax U.S. Profit	Federal Income Tax	Federal Tax Rate
2002	$ 11,998	$ -33	-0.3%
2003	10,826	1,244	11.5%
2004	9,103	629	6.9%
2005	10,074	2,755	27.3%
2006	9,911	513	5.2%
2007	8,686	64	0.7%
2008	4,638	-651	-14.0%
2009	1,574	-833	-52.9%
2010	4,248	-3,253	-76.6%
2011	9,156	1,032	11.3%
10 Years:	**80,214**	**1,467**	**1.8%**

Note: At the end of 2011, GE had claimed $3.9 billion in cumulative tax breaks that are not reflected above because GE expects that the IRS will not allow them and GE will have to give the money back.

Source: Citizens for Tax Justice, April 2012

The results of these efforts have been that many large public companies have paid little or no tax in the U.S. in recent years.[9] For example, in 2010, General Electric (GE) claimed a U.S. profit of just over $4 billion. The company's *tax refund* that year was $3.25 billion, largely based on the company's ability to shift profits overseas to lower tax jurisdictions (See Table 1).[10] With such a sizeable percentage of revenue generating from tax strategies, changes in law, interpretations of law, oversight and enforcement — over which the company has no control — increase risks to both short- and long-term profitability and sustainability. American multinationals have recently claimed earnings in Bermuda and the Cayman Islands [known tax havens] totaling 16 times and 13 times each country's entire yearly economic output, respectively (See Table 2).[11]

As complex tax strategies play an increasing role in corporate profits, investors have a growing need to know where their companies operate, how much revenues arise in or are attributed to each country, how these businesses are taxed, and what risks are associated with their tax strategies.

Table 2: The Ten Most Obvious Corporate Tax Havens — 10 Countries with Highest Reported Profits as a Share of GDP in 2014 from Subsidiaries of American Corporations (dollars in billions)[12]

	Reported Profits of U.S.-Controlled Subsidiaries	Gross Domestic Product	Subsidiary Profits as % of GDP	Foreign Income Taxes Paid by Subs*	Foreign Taxes Paid by Subs/Profits of Subs
Bermuda	$ 96	$ 6	1709%	$ 12	13%
Cayman Islands	40	3	1158%	9	23%
British Virgin Islands	8	1	880%	1	8%
Bahamas	17	9	194%	1	9%
Luxembourg	109	66	165%	5	5%
Ireland	148	256	58%	3	2%
Netherlands	140	880	16%	14	10%
Singapore	36	308	12%	1	4%
Hong Kong	20	291	7%	1	5%
Switzerland	46	703	7%	4	8%
Total for Ten Most Obvious Tax Havens	**$ 660**	**$ 2,523**	**26%**	**$ 52**	**8%**
Total for All Other Countries in IRS Data	**$ 429**	**$44,594.56**	**1%**	**$ 76**	**18%**

*Foreign taxes paid to any foreign countries, not just to countries listed.

Source for Profit and Tax Figures: IRS, Statistics of Income Division, April 2014
Source for GDP Figures: World Bank http://data.worldbank.org/indicator/NY.GDP.MKTP.CD, United Nations Statistics Division http://unstats.un.org/

A. Authorities Around the Globe Are Increasingly Cracking Down on Perceived Corporate Tax Abuses

Publicly held companies are increasingly subject to massive tax enforcement actions. In fact, a simple internet search identified significant governmental investigations and actions against several name-brand public companies, including Alphabet (Google),[13] Amazon,[14] Apple,[15] Caterpillar,[16] Gap,[17] Facebook,[18] Hewlett-Packard,[19] McDonalds,[20] Microsoft,[21] Shell,[22] and Starbucks.[23] The disputes in these cases are significant, and have led to massive liabilities for the companies, such as the E.U.'s demand that Apple pay Ireland €13 billion[24] to Chevron's $340 million settlement with Australia[25] to Google's £130 million payment to the United Kingdom.[26] Aside from just the sheer sizes of the liabilities, these settlements reflect significant and growing concerns by regulators on aggressive tax practices.

In addition to their liability for their *own tax activities*, many large public issuers are also facing scrutiny for their work related to *their customers' taxes*. This is especially true for banks and accounting firms that may be viewed as assisting their customers' tax evasion.[27] For example, it was reported in June 2018 that German prosecutors were investigating "dozens of banks, brokerages, accounting companies, and law firms" in tax avoidance deals, including Bank of America, Barclays, BNP Paribas, Deutsche Bank, Goldman Sachs, and Macquarie.[28]

The global crackdown on international tax avoidance means that investors are increasingly exposed to risk from companies that have engaged in aggressive strategies, yet the lack of disclosure means that many of these tax enforcement actions come as a complete surprise to shareholders.

B. Tax Laws Are Changing — Leading to Billions of Dollars in Changes to Companies' Financials

In the United States and abroad, governments are changing the tax rules in ways that are having enormous effects on net incomes and risks for many public companies. As explained in greater detail below, investors need to have a reasonable understanding of a company's income and tax picture (including to which jurisdictions it may be subject to changes) in order to accurately assess the associated risks and magnitudes.

In December 2017, the United States enacted the Tax Cuts and Jobs Act of 2017, which dramatically revised the tax treatment of corporations and other businesses.[29] In particular, the law:

- permanently reduced the statutory C corporation tax rate to 21%;
- repealed the corporate alternative minimum tax;
- modified rules for expensing capital investment;
- limited the deduction for interest expenses; and
- modified the taxation of tax-exempt organizations, insurance businesses, financial institutions, regulated investment companies (RICs), and real estate investment trusts (REITs).[30]

In addition, the law moved the U.S. from a "nominal worldwide tax on all foreign-source income, with a credit against U.S. tax for foreign taxes due, to a nominal territorial system that does not tax foreign-source income."[31] At the same time, the law created a new minimum tax on global intangible low-taxed income (GILTI) and a base erosion and anti-abuse tax (BEAT), both of which further complicate corporate tax strategies and potential liabilities. Further, the new law lowered taxes on foreign-derived intangible income (FDII), while also ending a longstanding doctrine of generally allowing U.S. companies to defer tax payments on income earned abroad. These international tax law changes are significant, novel, and complex.[32]

The impact on public companies, however, was immediate. Days after the law was signed, for example, Bank of America announced a one-time charge of about $3 billion "primarily" as a result of lowered "deferred tax asset" values.[33] Other banks quickly followed suit, with Goldman Sachs,[34] Deutsche Bank, and Morgan Stanley each announcing one-time charges that they took before the end of 2017.[35] Prior to their announcements, no specific data was shared in their financial statements informing investors about the likely impacts of the impending tax law changes, or when those impacts might manifest.

While the 2017 U.S. tax law wiped billions of dollars off of companies' balance sheets in the near term, the net effect of the law over the longer term for many multinational companies was a significant reduction in tax rates. This was also well-illustrated by the reports from some of the largest banks. While the ability of investors to assess the impacts of the tax law changes is nevertheless difficult to quantify, for example, a *Wall Street Journal* analysis found that, as a result of the tax overhaul, the combined earnings of Bank of America, Citigroup, Goldman Sachs, JPMorgan Chase, and Wells Fargo had increased by more than $2.5 billion in just the first quarter of 2018.[36] While this news is positive for current investors, the fact is that until those financial facts played out, investors had little to no idea to help them assess the impact and timing of the changes on the companies they either owned or were considering for investment. For investors who chose to stay out of the market because of excessive uncertainty, the news is not positive.

It also was not just the banks that were impacted. For example, power management company Eaton Corporation plc (NYSE ticker "ETN") referenced how changes from the 2017 U.S. tax law impacted its earnings in the first sentence of the company's press release announcing its financial statements and exhibits for the quarter ended December 31, 2017.[37] Clearly, it was significant for them.

It is also extremely important to note that the United States is not alone in enacting changes to its tax rules.

Over the past decade, European authorities have begun modernizing their tax rules to account for the increasingly global economy. As the European Commission has explained:

> "It has lately become clear to the international community that the current rules for corporate taxation no longer fit the modern context. Generally, corporate income is taxed at the national level, but the economic environment has become more globalized, mobile and digital. Business models and corporate structures are more complex, making it easier to shift profits. Furthermore, the divergence of national corporate tax systems has allowed aggressive tax planning to flourish over the last decade. Thus, when national rules are drafted without considering the cross-border dimension of business activities, mismatches are likely to arise in the interaction between disparate national corporate tax regimes."[38]

As part of their efforts, European authorities have:

- proposed a common consolidated corporate tax base;[39]
- proposed overhauling how digital companies are taxed;[40]
- amended one Directive to address dividend payments between E.U. subsidiaries and E.U. parent companies;[41] and
- adopted an Anti-Tax-Avoidance Directive (ATAD), which is scheduled to be implemented by the end of 2018.[42]

Measures taken by the European Union are having a direct and dramatic impact. In November of 2018, Bloomberg News reported in a headline that, "U.S. Companies Flee No-Tax Caribbean Havens After EU Crackdown." The article went on to say that, "[Companies] are fleeing in response to regulations from the European Union that require them to justify the business purpose for their offshore operations."[43]

Further, the OECD (of which the United States in a member) launched an initiative to combat base erosion and profit shifting (BEPS).[44] The BEPS initiative led to the release of 15 detailed Action Plans to combat corporate international tax strategies (many of which are used by public companies) that are intended to avoid tax liabilities. In addition, other countries have started to take aggressive actions unilaterally, with more than 100 countries reviewing and updating their international tax regimes.[45] These efforts include some significant reforms. Ireland ended the notorious "Double Irish" structure that was widely acknowledged to be a significant tax avoidance strategy, but the change is effective only from 2020 for companies that were using this scheme before 2014. It is impossible for investors to know whether companies will lose billions of dollars or find another equivalent tax strategy and whether that strategy will be sustainable. This year, the United Kingdom has a proposal to tax technology companies based on their revenues.[46] In fact, there appears to be growing global interest in taxing corporate revenues — the E.U. proposed a similar plan in March 2018 — which would be a massive shift in traditional corporate tax assessment.[47]

Collectively, these reforms have already changed[48] — and are poised to continue changing — the landscape of international corporate taxation, altering tax liabilities and posing a variety of compliance and enforcement risks to public companies operating in multiple jurisdictions. These tax rule changes will mean billions of dollars to many public companies.

III. Weaknesses in Public Company Tax Disclosures

Information related to a company's sources of income, tax liabilities, assets, and tax practices is essential to gauging that company's value and risks — core areas of interest to investors and the SEC tasked with protecting them. Although some information relating to corporate taxes is currently disclosed in SEC filings, it is usually very limited. Most of the details necessary for an informed analysis of a multinational public company's value and risks are often absent.

Regulation S-K does not specifically require public companies to disclose how their offshore funds are invested, even when those funds represent a material portion of the company's assets. Most critically, investors often do not generally know where a company's revenues are derived, where profits are booked, where profits are taxed, how those taxes are assessed, and what risks may arise from the company's operations and tax strategies across jurisdictions.

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One illustration of the weaknesses in current public company disclosure is the unique tax and income disclosures by Skechers. In 2014, the SEC sent the company a letter asking for more details on its foreign operations and to break out where it booked its income. The company complied, and the resulting disclosures revealed, that Skechers was almost certainly engaged in a substantial amount of tax avoidance that up to that point was not particularly clear to any outside observer. According to its 2014 10-K filing, Skechers reported that 44 percent of its worldwide income and 72 percent of its foreign income was being booked to the tax haven country of Jersey. Without this additional disclosure, investors would not have known that the company was engaged in such aggressive tax avoidance.[49]

The passage of the 2017 U.S. tax law had the effect of further weakening the adequacy of disclosure required by the SEC. Before the passage of the bill, companies were required to at least disclose their total permanently reinvested earnings offshore. While nowhere near adequate as a measure of a company's total offshore tax avoidance, the number provided some indication of the scale and nature of individual companies' offshore profit shifting. Following the passage of the Tax Cuts and Jobs Act, companies will no longer have to report this figure, and investors will therefore have even less information on possible profit shifting.[50]

Investors need additional tax-related information to (1) accurately determine a company's value, and (2) appropriately assess risks associated with, among other things, tax law changes in the U.S. or abroad, government enforcement actions, high-risk strategies by company management, and reputational damage.

A. Investors Need Additional Tax Information to Accurately Determine a Company's Value

The value of a company is one of the most important data points for investors. International tax strategies play an increasingly central role in the valuation of some of the largest public companies trading in the U.S. markets. Further, many equity investors value companies based on price-to-earnings ratios, which are directly impacted by a company's effective tax rate. Further, many fixed income investors consider a company's cash tax rate in their credit evaluations.

These concerns may be demonstrated by the fact that determinations of tax liabilities and "assets" are increasingly playing roles in valuation disputes. A high-profile shareholder dispute involving Dell Corporation illustrates the key role that international tax information can play in determining a company's value.[51]

The key dispute in the case involved valuing the company in connection with a potential management buyout. The court found that "two highly distinguished scholars of valuation science, applying similar valuation principles, thus generated opinions that differed by 126%, or approximately $28 billion. This is a recurring problem."[52] One of the key drivers of the difference between the two valuations was the scholars' assumptions and findings regarding the company's tax rates on its offshore earnings.[53] One expert concluded that the company would have to pay $2.24 billion in taxes on its offshore income[54] while the other expert determined that the company was extremely unlikely to pay higher repatriation tax rates, and so warranted a higher valuation.[55]

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There was insufficient information in the company's public disclosures to resolve the valuation dispute. Rather, both sides of the dispute relied upon extensive discovery, after which one expert projected the company would have a future effective tax rate of slightly over 35%, while the other projected a future tax rate of just 21%.[56] These different tax rates led to valuations that differed by billions of dollars.

The 2017 U.S. tax law (described above) changed many of the specifics of how U.S. and foreign profits may be taxed, but the differences in treatment between income earned in the U.S. and that earned elsewhere remain significant. Further, in many respects, the new U.S. tax rules have introduced even more complexity, and introduced even more opportunities for different interpretations, possibly leading to even more valuation disputes (See Table 3). Without basic information about where and how a company earns profits and pays taxes, fundamental valuation issues will continue to be impossible for investors to properly assess.

Table 3: An Easier, Fairer, and More Effective Way to Stop Offshore Profit-Shifting is to Equalize the Tax Rates for U.S. and Foreign Profits.[57]	
Tax Cuts and Jobs Act	*An Alternative Proposal*
✓ Creates a Global Intangible Low Tax Income (GILTI) tax which exempts all profits under 10% of a company's overseas tangible investments. As a result, many companies will pay no U.S. taxes on their offshore income. Even when GILTI is subject to taxation, it is taxed at 10.5% (half the domestic rate). The nonpartisan Congressional Budget Office (CBO) says GILTI encourages moving U.S. jobs and factories offshore to get that lower rate. ✓ Creates a Foreign Derived Intangible Income (FDII) tax which provides a 37.5% deduction for foreign sales income minus 10% of U.S. tangible investments. CBO says FDII also encourages moving U.S. jobs and factories offshore to get that deduction. ✓ Creates a Base Erosion and Anti-Abuse Tax (BEAT) which puts a 10% tax on certain payments between U.S. companies and their foreign affiliates. While helpful, the revenue raised by BEAT does not make up for the revenue lost by the other TCJA international provisions. ✓ CBO estimates that $235 billion in corporate income will shift offshore each year.	✓Eliminate the lower rates, deductions, and loopholes for foreign profits, and instead tax foreign profits at the same rate as domestic profits.
Source: "U.S. Should Not Favor Foreign over U.S. Profits: Tax Multinationals the Same as Wholly Domestic Companies." https://thefactcoalition.org/wp-content/uploads/2018/07/FACT-Sheet-Equalizing-Rates-July-2018-FINAL.pdf.	

B. Investors Need Additional Tax-Related Details to Appropriately Assess Several Types of Risks

Public companies' international tax strategies can expose companies (and their investors) to (1) the risk of tax enforcement actions (see footnotes 13 through 23), (2) the risk of changes in tax laws and rules in the various jurisdictions that may be relevant to their finances (as opposed to just their operations), (3) the risk of financial reporting manipulation or window dressing, and (4) the risk of reputational harm and associated impacts, including revenue losses from public disfavor, boycotts, or other actions.

C. International Tax Strategies Expose Shareholders to Risks of Tax Enforcement

Publicly held companies are subject to actions by tax authorities and other civil or criminal law enforcement offices that may have multi-billion-dollar consequences, including litigation costs, tax assessments, fines, hearings before legislators, or other developments. At the same time, detailed information about ongoing or expected tax enforcement is often missing from public companies' filings. Often, companies reported in the news as being under investigation by various taxing authorities do not disclose those investigations in their SEC filings, or their public disclosures only provide cursory information that is inadequate to assess the risks.

Caterpillar has reported, for example, that the Internal Revenue Service (IRS) is seeking significant additional tax payments from the company[58] and prosecutors are investigating its offshore tax practices.[59] Yet, its disclosures neither arm investors nor the public with sufficient information to assess the potential risks involved. Instead, they serve merely as a "heads up" notice that the company may face enormous tax risks — without articulating any of the details as to why or how much is really involved. For that information, investors need to look elsewhere, such as congressional hearings and press reports.[60]

Similarly, Apple's ongoing tax dispute in Europe illustrates how tax issues may impact the companies and their shareholders, as well as the weaknesses of current public disclosures.

On May 21, 2013, a U.S. Senate subcommittee held a hearing examining Apple's aggressive tax planning strategy.[61] Among other facts revealed in that hearing, the public learned that Apple had:

- "quietly negotiated with the Irish government an income tax rate of less than 2 percent, well under the Irish statutory rate of 12 percent as well as the tax rates of other European countries and the United States;"[62]
- established an offshore subsidiary that reported receiving dividends totaling $30 billion over four years, but paid no corporate income taxes on those dividends to any national government anywhere in the world; and
- funneled a total of $74 billion in "sales" income through a low-tier Irish subsidiary over the same four years, but paid almost no taxes on that income.[63]

As a result, Apple avoided tens of billions of dollars in taxes. A few weeks after the hearing, on June 13, 2013, the SEC's accounting staff began its own inquiry into Apple's tax-related disclosures.[64] In particular, the staff asked questions about the adequacy of Apple's most-recent 10K, including the company's disclosures in:

- Item 1A. Risk Factors;
- Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations; and
- Item 8. Financial Statements and Supplementary Data, Note 5 — Income Taxes.[65]

The SEC's accountants asked, for example, for details regarding "consideration [Apple had] given to including a more tailored discussion of any specific risks associated with [Apple's] current tax structure, including any agreements or arrangements that provide material tax benefits."[66] The SEC's accountants also requested certain tax-related information to be provided on a country-by-country basis.[67]

After receiving a couple of responses from Apple,[68] which included the company's commitment to modestly improve its disclosures,[69] the SEC's accounting staff ultimately dropped the matter, and no enforcement action was taken.[70]

The same was not true elsewhere. On August 30, 2016, the European Commission announced that it had "concluded that Ireland granted undue tax benefits" to Apple and that Ireland must collect approximately $14 billion dollars from the company.[71]

Apple's exchange with the SEC accountants demonstrates two critically important points. First, public country-by-country reporting by multinationals of certain profit and tax information is essential to understanding a company's global tax obligations, practices, and risks. Second, the current rules do not clearly require the public disclosures necessary for investors to properly assess risks of significant tax disputes and changes that may have significant impacts on a public company.

Significant risks also relate to the processes used by public companies to reduce their tax liabilities. For example, under the current U.S. tax regime, companies are strongly incentivized to shift — to the extent legally and practically possible — profits offshore, to take advantage of lower tax rates. In general, if those offshore profits are attributable to operations, that income may not be taxed by the U.S. at all, and so could be taxed at rates that may be as low as zero percent. If those offshore profits are attributable to intellectual property, then they might be taxed at rates that may be half the rate it would be if that property had been held in the United States. In either circumstance, much like before the 2017 U.S. tax law, companies are incentivized to shift their profits (and tax exposures) offshore to take advantage of lower tax rates that may apply to foreign income.

In fact, a company may have an even greater incentive to shift income offshore than it did prior to the implementation of the 2017 U.S. tax law. That's because, prior to the current U.S. law, while taxes on foreign income were generally deferred, such income was taxed at the full rate upon repatriation. However, under current U.S. law, the tax consequences are immediate. The profit earned abroad is either never taxed by the United States or taxed at a significantly reduced rate.[72] That immediate lower tax rate provides a significant incentive to book income offshore.

This type of analysis is not limited to companies evaluating tax rates in the U.S. versus the rest of the world. Many public companies utilize global tax strategies, that use different tax rates, deductions, and benefits in multiple jurisdictions, including those of some countries that may be relevant to the company for tax planning purposes only.[73] A company may seek to move income and income-generating assets to different jurisdictions so as to best minimize its overall tax liabilities. A public company's financial reporting may be heavily influenced by their tax strategies which may involve several, if not dozens of different taxing jurisdictions. Yet little or none of this tax-related information may be reported in detail in their SEC filings, leaving investors and regulators in the dark about a key component of the company's finances, planning, global structure, and operations.

Differences in tax rates, deductions, and benefits across countries incentivize companies to engage in aggressive, complex, multi-jurisdictional tax strategies that not only affect their operations, but also increase their exposure to risks associated with tax enforcement actions.

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Lastly, one unique complication from the 2017 U.S. tax law seems to have exacerbated the risk to investors of aggressive enforcement action. Prior to that law, income that was permanently invested abroad was often kept in liquid securities (See Table 4).[74] Thus, if a company was subject to an enforcement action of any type, including for tax avoidance, the company would likely have readily available liquid securities with which it could pay any assessment, fine, or settlements. The company would likely not have to jeopardize funding for its existing operations or engage in dramatic steps to raise funds. Now, however, public companies have no tax reason to keep such large pools of liquid securities abroad. Thus, if a government (e.g., Ireland) were to send a significant tax bill to a company today, the company's tax liability would be much more likely to exceed its readily available liquid assets. Such an unanticipated tax enforcement action could threaten the operations, and even the viability, of the company.

Table 4: Percentage of Undistributed Accumulated Foreign Earnings Held in U.S. Bank Accounts or U.S. Investments at the End of FY2010[75]

0 - 25%	**26% - 50%**	**51% - 75%**	**76% - 100%**
Bristol-Myers Squibb	Coca-Cola	Oracle	Adobe*
CA Technologies	Devon Energy	Motorola	Apple*
Duke Energy	DuPont*	PepsiCo*	Broadcom
Eli Lilly	Intel		Cisco
Hewlett-Packard			Google
Honeywell			EMC
IBM			Microsoft
Eastman Kodak			Johnson & Johnson
Merck			Qualcomm*
Pfizer			
Procter & Gamble			
* Figures reflect their U.S. dollars and investments as a percentage of their foreign cash.			

Source: Survey Data, U.S. Senate Permanent Subcommittee on Investigations, Dec. 14, 2011.

D. International Tax Strategies Expose Shareholders to Risks of Changes to Tax Rules

As Apple has shown, and has been powerfully demonstrated by the reaction to the 2017 U.S. tax law, changes to tax rules in either the United States or abroad may have significant financial impacts on public companies. Unfortunately, due to weaknesses in current public company disclosure requirements, investors do not have a clear and consistent picture of the magnitude of these changes. For example, following enactment of the 2017 U.S. tax law, some companies provided significantly greater details than others on the law's impact on their finances.[76] Without clear, standardized disclosure requirements, however, investors were left to scour individual company's disclosures, only to find that in many instances, no specific warnings were provided. And worse, in many instances, no details regarding the impacts were provided after the changes were disclosed.

To get a better sense of the universe of information, we reviewed more than 25 large companies' financial filings — selected at random. In each case, we identified no specific details or analyses regarding whether and to what extent the 2017 U.S. tax law changes (or those being adopted around the world) have impacted or would impact the companies, other than boilerplate language that conveyed little useful information. For example, below is an excerpt from Merck & Company, Inc.'s most-recent annual report.

> "**The Company is subject to evolving and complex tax laws, which may result in additional liabilities that may affect results of operations.**
>
> The Company is subject to evolving and complex tax laws in the jurisdictions in which it operates. Significant judgment is required for determining the Company's tax liabilities, and the Company's tax returns are periodically examined by various tax authorities. The Company believes that its accrual for tax contingencies is adequate for all open years based on past experience, interpretations of tax law, and judgments about potential actions by tax authorities; however, due to the complexity of tax contingencies, the ultimate resolution of any tax matters may result in payments greater or less than amounts accrued. In addition, the Company may be affected by changes in tax laws, such as tax rate changes, new tax laws, and revised tax law interpretations in domestic and foreign jurisdictions. Further, on December 22, 2017, the U.S. Tax Cuts and Jobs Act of 2017 (TCJA) became law. The final impact of the TCJA on the Company may differ from the estimates reported, possibly materially, due to such factors as changes in interpretations and assumptions made, additional guidance that may be issued, and actions taken by the Company as a result of the TCJA, among others."[77]

Other than generically identifying changes in U.S. tax laws, the company does not specifically identify any other countries in which tax law changes could affect the company's finances. Nor does it disclose the nature of those potential impacts. For example, if the company has tens of billions of dollars in profits in Ireland, and a law change would lead to a 10% change in taxes due on that amount, then a tax law change in Ireland would be significant. However, if the company has no taxable assets in Ireland, then a change in Irish tax law would likely have no discernable impact at all. Today, investors, the public, and regulators have essentially no way to know the difference.

The vacuous disclosure provided above is akin to saying "we are subject to laws in a lot of countries and they can change their tax rates." That is both intuitively obvious and of no real value. It does not inform investors or the public of anything that is not already known. The purpose of tax disclosures should be, in part, to inform investors about the nature and potential magnitudes of risks faced by the company. Disclosures like the one above do little more than suggest that a company may face a "significant" risk. It leaves investors informed of a big, potentially bad outcome, but then offers no further details about it. How can an investor reasonably appreciate this risk and integrate it into an informed investment decision?

Many in the accounting profession already recognize this weakness in existing tax law-related disclosures. For example, when the Financial Accounting Standards Board (FASB) recently proposed changes to corporate disclosure requirements related to potential tax law changes, a leading global accounting firm recommended "that the [FASB] consider expanding the description of the proposed disclosure requirement to clarify what information should be included in the disclosure (e.g., the nature of legislative changes, quantitative impact, affected financial statement line items)."[78] Implied in this recommendation, of course, is the recognition that investors need to know to which countries a firm may have exposure to changes in tax laws in the first place.

Importantly, tax law changes in one country may also have profound impacts on corporate structures and the advisability of corporate actions. For example, when the U.S. Department of the Treasury revised its rules to remove potential benefits from so-called corporate "inversions," Pfizer's years-long quest to invert was abruptly ended. The company's then-pending merger with Allergan was scrapped,[79] and Allergan's stock price plummeted (See Figure 1).[80] Vast expenditures devoted to that merger were wasted. The entire deal had hinged on a tax rule that was changed. And yet, even for this deal, insufficient details had been disclosed in advance for investors to appropriately understand and quantify these — ultimately realized — risks, including a dramatic change in the companies' values.

Figure 1: Allergan Stock Plummets over 20% Following Treasury Rule that Blocks Inversions[81]

Source: Michelle Cortez, Bloomberg, April 2016.

E. International Tax Strategies Pose Unique Opportunities for Financial Manipulation

Current public company disclosure obligations allow management complete control over nearly all aspects of the determination of what to disclose, and provide no ability for investors to verify the accuracy of the company's financials (or the related disclosures). Essentially, a company may disclose some information related to its offshore assets and taxes, but that information — if any — is often so piecemeal that investors cannot reasonably determine the accuracy or significance.

There is reason for investors to be concerned. Because company management can elect where income may be attributed and may even be able to enter into nonpublic arrangements with governments to modify their tax rates, deductions, or other tax-related matters, the impacts of those choices may have dramatic consequences for a company's tax bill (as could numerous other tax-related decisions), and tax strategies provide ripe opportunities for corporate management to manipulate earnings.[82] Far from a theoretical concern, this type of earnings manipulation already occurs.[83] For example, a 2004 paper found evidence that firms that had missed earnings targets manipulated overseas income to make up shortfalls in future periods.[84]

Prior to the 2017 U.S. tax law, one way for companies to dramatically impact their tax bills was to change the amount of income that was designated as "permanently reinvested" overseas.[85] While this particular method of modifying a company's tax bill is no longer available, companies can still engage in international tax strategies (such as shifting intellectual property offshore) that may have immediate impacts on their bottom lines. Unfortunately, without a better picture of the countries, revenues, profits, and various tax rates involved, investors will not have the ability to assess the risks of various earnings manipulations effectuated through tax strategies. Policymakers may enact reforms without full knowledge of the issues and investors may find, after the fact, they are subject to new unexpected risks.

F. International Tax Strategies May Give Rise to Reputational Risks

Corporate tax avoidance is also an increasingly polarizing issue for the public. Public outrage over corporate tax avoidance has led to social media and physical protests, calls for boycotts of certain companies,[86] and governmental actions (e.g., hearings, enforcement actions, and rules changes) — all of which threaten the reputations and ongoing business of public companies. Unfortunately, investors do not generally have the information with which they can determine whether and to what extent a company's tax strategies may create these risks. In fact, public backlash toward perceived corporate tax "abusers" has typically followed unexpected disclosures that the company had paid little or no taxes on significant incomes over a period of time.

IV. Regulators Around the World Are in the Process of Modernizing Required Disclosures

A. The World is Moving toward Country-by-Country Reporting

As of June 2018, over 40 members of the Organization for Economic Cooperation and Development (OECD) — including the U.S. — have required country-by-country tax reporting to tax authorities, making it the most widely adopted element of the OECD's efforts to stop multinational tax avoidance.[87] But different countries — including OECD members — are taking very different approaches to public disclosures.

For its part, the United States now requires multinational corporations with over $850 million in revenue to file full country-by-country reports with the IRS.[88] While reporting to the IRS is an important first step in allowing the agency — and tax agencies around the world — to monitor for offshore tax avoidance, the U.S. has not taken any significant step so far toward public reporting of this information.

In terms of public disclosure, the SEC and Congress have intensely focused on modernizing corporate disclosures over the past half-dozen years. For example, in 2012[89] and 2013,[90] Congress directed the SEC to review and propose revisions to corporate disclosure obligations under Regulation S-K.

For its part, in April 2016, the SEC issued a Concept Release that sought input on overhauling required disclosure obligations.[91] The Concept Release garnered more than twenty-six thousand comments — significantly more than all but a handful of the hundreds of major rulemakings over the past decade.[92]

A review of the comments to the Concept Release found the following:

> "Taxes and corporate structuring disclosures were the single most commented on area of the Concept Release, where 99 percent of all comments received raised the issue, and nearly all of them expressed clear support for expanded disclosures. This issue was raised in both of the public interest campaign letters, as well as in more than 120 other unique comments. Not a single commenter clearly objected to expanded tax disclosures." (See Table 5)[94]

Table 5: Comments to the SEC on Disclosure Review Show Interested Parties Seek More Information on Tax.[93]

Total comments	Comments in Favor	Comments Opposed	Avg. Comments Since 2008
26,512	26,287	0	45

Source: Towards a Sustainable Economy, 8-9, Sept. 2016.

Widespread complaints about inadequate tax disclosures are not surprising. As the SEC's own Deputy Chief Accountant for the Division of Corporation Finance declared in 2015, companies' international tax disclosures "are not sufficient and certainly cannot be called transparent [because] many of the items included in that foreign tax line are subject to different trends and uncertainties."[95]

While the SEC was still receiving comments back on its Concept Release, on July 26, 2016, the Financial Accounting Standards Board (FASB) released its own proposal to modify corporate disclosure requirements related to income taxes.[96] The proposal specifically asked if "additional income tax disclosures would be useful to investors"[97] and made a handful of proposals.[98] Enhancing tax disclosures received overwhelming support.[99] For example, accounting firm KPMG LLP opined:

> "We generally believe that the proposed amendments would result in more effective, decision-useful information about income taxes, and would be consistent with the Board's objectives for its Disclosure Framework Project" [100]

Across the Atlantic Ocean, regulators are going even further.[101] Following the worldwide financial crisis of 2008, European regulators required banks to publicly report profits and taxes on a country-by-country basis.[102] Similarly, the European Union required companies in the extractive industries to provide similar country-by-country public disclosures. [103] Thus, since 2014, a subset of companies has provided this essential information to investors, the public, and regulators.[104] The affected companies have reported few difficulties in making these disclosures.

More recently, the European Parliament has been looking to expand those disclosure requirements to more companies. On July 24, 2017, the European Parliament approved a proposal (with 554 out of 694 votes cast in favor) for a directive to ultimately require multinationals with worldwide turnover of €750 million or more to publicly disclose how much tax they pay, and where they pay, including taxes paid outside the E.U.[105] As one Danish European Parliament member explained, the E.U. "public country-by-country reporting proposal would boost tax transparency, tax fairness, and is in the best interests of companies and their shareholders."[106] He continued, "It would help companies streamline their operations and it would provide more transparency to investors."[107]

Under the E.U. proposal, large companies would have to publicly disclose for each jurisdiction:

- the name of the firm and, where applicable, a list of all its subsidiaries,
- a brief description of the nature of their activities and their respective location;
- the number of employees on a full-time equivalent basis;
- the amount of the net turnover;
- stated capital;
- the amount of profit or loss before income tax;
- the amount of income tax paid during the relevant financial year by the firm and its branches resident for tax purposes in the relevant tax jurisdiction;
- the amount of accumulated earnings; and
- whether undertakings, subsidiaries, or branches benefit from any preferential tax treatment.

In December 2017, a compromise Directive was proposed to the European Parliament and Council for enhanced disclosure of multinational companies.[108]

V. Investors and Analysts Want Additional Tax Information

In recent years, investors and research analysts have become increasingly focused on international tax considerations as significant factors in their valuations and risk analyses.

Investor groups have sought greater guidance on how to take tax matters into account. In 2015, one organization of investors managing more than $80 trillion in assets found that over 100 of its members viewed tax as a significant concern.[109] Pension funds and other large investors now factor international tax strategies as part of their investment decision-making processes.[110] In fact, the United Nations Principles for Responsible Investment has even prepared a guide for investors looking to "identify the risks in [their] portfolio[s]," which focuses on exploring several "red flags" that could give rise to significant tax-related risks at a particular company.[111]

Similarly, many leading research analysts have focused on international tax strategies when making stock recommendations.[112] For example, in May 2016, analysts at Goldman Sachs sent out a newsletter urging clients to ""Buy stocks with high U.S. sales and high effective tax rates and avoid firms with high foreign sales and low tax rates." This analysis and investment advice were presumably based on perceived risks associated with aggressive corporate tax practices subject to enforcement actions and tax policy changes at home and abroad. Notably, this advice proved remarkably prescient when the United States implemented a territorial tax regime with an immediate "deemed repatriation" at the end of 2017. As discussed above, the 2017 U.S. tax law resulted in billions of dollars in immediate lost profits at some public companies.

Despite the high level of interest in tax information, current disclosures made by many public companies are simply inadequate for investors or analysts to make sufficiently informed decisions. As one analyst from Macquarie Capital USA put it, "there is very little transparency in tax," which "happens to be one of the most opaque areas of accounting."[113]

It is therefore not surprising that the CFA Institute, a global professional association of financial analysts, wrote in support of increased tax disclosure in its 2016 comments to FASB. They note:

> "We strongly support the objectives of enhancing income tax disclosures, as investors depend heavily on these disclosures to understand prior period reported earnings and cash flows and to predict future tax-related cash flows. For example, an investor's assumption regarding the persistent portion of the effective tax rate is a critical input for the valuation of companies, and investors require meaningful granularity of information within the disclosures to arrive at an accurate, economically relevant adjusted effective tax rate…
>
> "In addition to their key role in determining the value of a business, tax disclosures have become of increasing interest to investors due to the widespread use by companies of aggressive tax strategies. An aggressive tax strategy can create operational, reputational, and legal risks. Investor concerns about tax-related risks have intensified of late due to increased corporate tax investigations and enforcement actions around the globe, as well as increased cooperation among governments to curb multinational tax abuse." [114]

A. Investors Are Engaging in Efforts to Obtain Additional Information from U.S. Corporations About Their Tax Strategies

Investors have engaged in numerous initiatives to improve companies' disclosures,[115] including:

- Engaging with companies to improve their disclosures;[116]
- Working through the 14a-8 process to require individual companies to enhance disclosures;
- Proposing new exchange listing standards that would require disclosure of key environment, social, and governance (ESG) factors, one of which relates to "tax strategy/tax avoidance";[117] and
- Proposing revised disclosure obligations.

These efforts have involved dozens of organizations around the globe. Unfortunately, these efforts have resulted in only limited improvements. Particularly disappointing is that, due to the SEC staff's strained interpretations and the limitations of the 14a-8 process, the 14a-8 disclosure reform efforts have been largely thwarted.[118] To date, these efforts have yielded no broad-based reforms or enhancements for investors. Investors still do not have what they want or need.

Separate and apart from the valuation concerns and risk assessments identified above, investors are increasingly seeking information about how companies are using their funds. Some aggressive international tax strategies may allow companies to avoid payment of taxes on their income. However, the cost associated with those strategies may be that the income earned is then not put to its most productive uses, but is instead misallocated to countries with low tax rates rather than those with more profitable investment opportunities. Some investors have begun to openly question whether this result is beneficial to investors or the company.[119]

VI. Recommendations: Tax Disclosure Obligations Should Be Modernized to Include Robust Country-by-Country Reporting, Including for All Subsidiaries

A. Investors Need Country-by-Country Reporting

As described above, current reporting by public companies is wholly inadequate to evaluate a company's tax practices, actual and projected tax liabilities, and potential tax problems. Because existing tax disclosures are so limited, they can be used to hide actual tax payments, exaggerate U.S. or other country-specific tax rates, and overstate tax assets. Poor quality tax disclosures also impede accurate assessments of the value of public companies.

As a practical matter, tax practices, liabilities, and risks can be assessed only on a country-by-country basis, because taxes are assessed by individual jurisdictions. Yet current U.S. tax-related disclosures appear primarily in the footnotes to a corporation's financial statement, and provide only limited disclosures — provisions made for U.S. federal taxes, U.S. state taxes, and "foreign" taxes. The current structure provides tax data on the United States versus the rest of the world combined.

The combined data on foreign taxes is particularly unhelpful given that different corporations operate in different countries which vary widely in their tax rates, credits, and deductions — not to mention their tax enforcement. A combined foreign tax rate or combined foreign tax liabilities are of little practical value. In addition, the combined foreign data obscures rather than illuminates a corporation's tax risks in individual countries. For example, if a corporation maintains significant operations in one country, then a raid by that country's tax officials would matter more to investors than if the raid took place elsewhere.

In addition, some countries base taxes on where a corporation or its subsidiaries are incorporated while others base taxes according to where corporate management and control take place. It should be no surprise that corporations themselves recognize the importance of country-specific information to determining their effective tax rates and other key corporate performance metrics.[120] Under the new U.S. tax law's modified territorial system, tax residence continues to be a critically important question. Investors similarly need country-by-country data to evaluate each corporation's existing and potential tax liabilities and risks.

At a minimum, to effectively identify and appreciate the impacts of international tax-related information on a company's performance and valuation, investors need, on a country-by-country basis:

- profit or loss before taxes;
- income tax accrued for the current year;
- revenues from related parties, unrelated parties, and in total;
- income tax paid (on a cash basis);
- effective tax rate;
- stated capital;
- accumulated earnings;
- number of employees; and
- tangible assets other than cash or cash equivalents.

It is only with a full appreciation of basic facts about a corporation's operations and earnings at a country-by-country level that an investor can meaningfully assess that corporation's international tax practices, liabilities, and risks. As a practical matter, the relevant information could be easily introduced as a slightly-revised version of various Items of Regulation S-K (likely by tweaking Items 101 and 102).

We also note that some have argued that public disclosures would create competitive disadvantages or undermine some companies' intellectual property.[121] Others have argued that country-by-country disclosures could be overly burdensome to prepare and distribute.

However, the evidence suggests that this is not the case. Notably, Deloitte & Touche LLP recently explained that changes (albeit more in the aggregate than country-by-country reporting) proposed by FASB:

> "would [not] require a long transition period because the additional disclosure requirements are generally straightforward; the entity is likely to have the information readily available; and few, if any, changes are likely to be required to the entity's systems." [122]

Further, concern about the alleged burdens of these disclosures appear to ignore that:

- the IRS already requires country-by-country reporting of revenues, profits, taxes paid, and certain operations by larger multinational corporations;
- the European Union already requires this type of information from banks and extractive industry companies, and the EU is in the process of expanding it to all large companies;
- each of the listed factors would provide basic data about a corporation's operations, and none involves inherently proprietary data;
- for prudent management purposes, company management already has access to the information (much of which is necessary for business purposes like payroll and tax payments); and
- some companies are already making similar disclosures now on a voluntary basis.[123]

We find it particularly reassuring that there is no evidence of adverse effects from this reporting on the financial institutions and extractive industry companies that have been providing these types of disclosures for a few years.

B. Investors Deserve Additional Explanations of Tax Disclosures

In addition to country-by-country reporting, investors would have much greater ability to understand international taxes if U.S. regulators further specified in modest rules changes or, if appropriate, guidance that public companies should:

1. divide their domestic U.S. income tax into current, deferred, and cash paid to federal and state governments;
2. explain any effective tax rate that is significantly lower than the statutory rate in the countries in which they do business;
3. use the company's weighted average statutory rate based on geographic revenue mix instead of home country statutory rate in the tax rate reconciliation schedule (which would help explain the likely effective tax rate, especially as worldwide rules change);

4. explain any large or increasing Unrecognized Tax Benefit (UTB) balance and delineate the cost of specific significant benefits in the UTB reconciliation;
5. disclose for all non-de minimis intracompany debt transactions, the countries where the debt is held, the amount of the debt, and the average interest rate "paid" by the relevant subsidiary on that debt;
6. disclose and explain any material tax incentives or benefits provided by a foreign jurisdiction, including the estimated tax savings, any conditions attached to the incentive or benefit, and the likelihood that the incentive or benefit may be lost; and
7. disclose of any legal proceedings by foreign governments related to taxes paid to any such government, regardless of whether such matter is material to the financial position of the corporation.

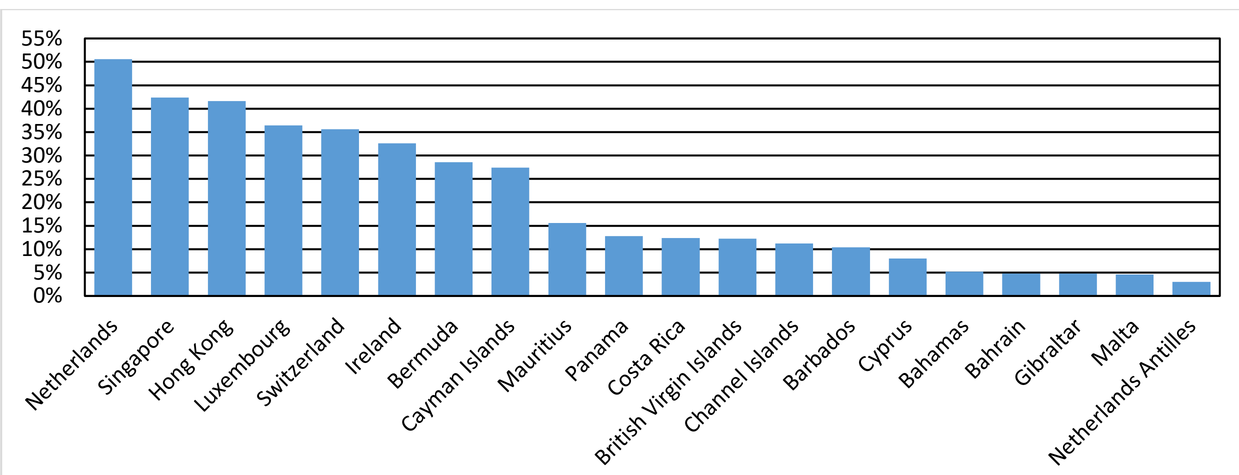
Each of these disclosures would enable investors to identify significant tax-related risks. For example, we note that the first item would have helped investors gauge the impact of changes to U.S. federal tax policy in the Tax Cuts and Jobs Act, items two through six would have likely had a dramatic impact on resolving the valuation discrepancies at issue in the Dell case described earlier, and the last two items would have significantly altered the Apple matter. These changes could be made by revising Items 101, 102, 103, and 303 of Regulation S-K, as well as the instructions to them, to more effectively capture this critical information for investors.

C. Disclosure of International Subsidiaries

As the OECD guidelines on country-by-country reporting recognize, there is substantial value to investors in requiring public companies to disclose all of their subsidiaries. Companies are currently required to publicly disclose a list of "significant" subsidiaries only.[124] Unfortunately, by not requiring disclosure of all subsidiaries, there is a possibility that investors may not have "a complete understanding of a company's structure and leaves open the possibility of undisclosed pockets of meaningful firm-specific and systemic risk."[125]

The use of corporate subsidiaries has sky-rocketed in recent years. At the same time, the use of offshore subsidiaries in complex international tax strategies is also very high. For example, the vast majority of Fortune 500 companies have at least one subsidiary in a country identified as a tax haven (See Figure 2).[126]

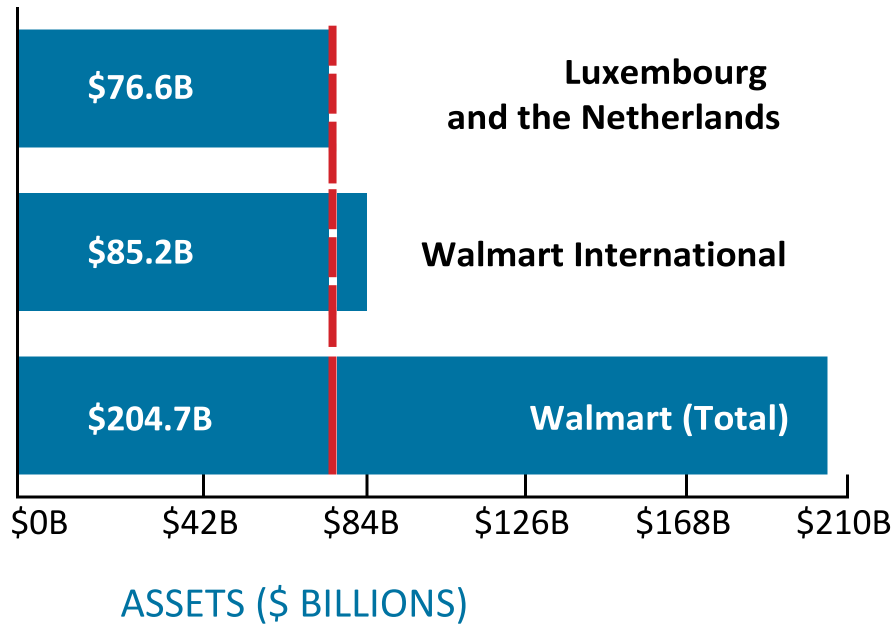
Figure 2: Percent of Fortune 500 Companies with 2016 Subsidiaries in 20 Top Tax Havens[127]



Source: Offshore Shell Games: The Use of Offshore Tax Havens by Fortune 500 Companies, U.S. Public Interest Research Group and Institute on Taxation and Economic Policy, 1, Oct. 2017.

Today, some issuers fail to disclose (or fully identify) subsidiaries that control billions of dollars. For example, a study by American for Tax Fairness found that a U.S. issuer, Walmart, had 78 previously unknown subsidiaries in tax havens.[128] According to the study, Walmart owns at least $76 billion in assets through subsidiaries domiciled in the tax havens of Luxembourg ($64.2 billion) and the Netherlands ($12.4 billion), accounting for a stunning 90 percent of the assets in Walmart's international division ($85 billion) or 37 percent of its total assets ($205 billion) (See Figure 3).[129] Yet Walmart does not list these subsidiaries in its SEC filings, apparently on the theory that they are not significant enough to warrant disclosure.

Figure 3: Walmart Assets in Luxembourg and the Netherlands vs. Walmart International and Walmart Corporate Total[130]



Source: Wal-Mart Stores, Inc., SEC Form-10K for FY 2014, Exhibit 13

In this argument, investors are right to be concerned. This would appear to raise the specter of larger companies being permitted to hide potentially aggressive tax practices that would not be so hidden by smaller companies.

Further, because the SEC does not require full disclosure of all subsidiaries, investors have no way of really knowing how many subsidiaries are missing from the public filings, or the risks associated with them. Interestingly, unlike the SEC, entities that are regulated by the Federal Reserve Board of Governors are required to make more meaningful disclosures about their respective subsidiaries. One recent study by the Institute on Taxation and Economic Policy found that, for 25 firms regulated by both the SEC and Federal Reserve, the firms reported 11 times more subsidiaries to the Federal Reserve than in their SEC filings (See Table 6).[131] If their primary regulator thinks these disclosures are important, it should not be unreasonable for an investor to think so too. Unfortunately, for firms that are not regulated by the Federal Reserve, investors have almost no ability to collect any of this information.

Table 6: Comparison of Subsidiary Data Presented to the Federal Reserve and the SEC for 25 Large Companies[132]

Company	Unique Institutions Reported to Federal Reserve	Subsidiaries Reported to SEC	Tax Haven Subsidiaries Reported to Federal Reserve	Tax Haven Subsidiaries Reported to SEC
Ally Financial	72	10	3	0
American Express	417	135	31	25
Bank of America	1,407	100	91	21
Bank of New York Mellon	792	41	177	6
BB&T	973	122	2	3
Capital One Financial	258	2	0	0
Charles Schwab	43	4	4	0
Citigroup	1,049	107	137	17
Citizens Financial Group	39	35	0	0
Discover Financial Services	30	23	2	2
Fifth Third Bancorp	911	57	1	4
First American	114	25	6	0
Goldman Sachs Group	2,748	79	905	17
J.P. Morgan Chase & Co.	1,175	39	170	3
KeyCorp	90	1	2	0
Macy's	50	23	6	2
Morgan Stanley	2,558	39	619	12
Nordstrom	24	1	0	0
PNC Financial Services Group	860	11	86	0
Raymond James Financial	103	122	1	3
Regions Financial	51	126	0	0
State Street	181	32	52	8
SunTrust Banks	73	19	1	0
U.S. Bancorp	92	96	6	11
Wells Fargo	604	79	88	5
TOTALS	**14,714**	**1,328**	**2,390**	**139**

Source: ITEP analysis of companies' 10-K and Federal Reserve reports

Perversely, as the importance of information about offshore activities and taxes has increased, the amount of disclosures has decreased. Today, investors are actually receiving less information than they used to.

One academic study looking at the subsidiaries disclosed by Google and Oracle found that 98 and 99 percent of these companies' subsidiaries disappeared from exhibit 21 between 2009 and 2010, even though most of those subsidiaries appeared to be active a year later.[133] Similarly, after Citizens for Tax Justice highlighted Nike's numerous subsidiaries in Bermuda in a report in 2013, the following year, half of those subsidiaries disappeared from its SEC filing.[134]

These large U.S. corporate issuers thought these subsidiaries were important enough to disclose one year, but as scrutiny on tax havens and their potential tax liabilities increased, these leading U.S. corporations decided that the disclosures were no longer important. Not one has explained why. The resulting decrease in information available to investors and regulators appears to be a clear failure for public policy.

Public companies should disclose all of their subsidiaries, rather than just "significant" ones, providing the name, jurisdiction where it was formed, jurisdiction where it is tax resident, Legal Entity Identifier number,[135] and relation to the parent entity. This information is critical for investors to understand how companies are structured and operate, including whether they are operating in high risk jurisdictions, may have actual or potential tax liabilities, or may be engaged in other types of unknown or ill-understood corporate activities. The SEC could require this information be provided by making a modest tweak to Item 601 of Regulation S-K.

VII. Conclusion

Robust capital markets demand that investors are armed with sufficient information to accurately assess the value and risks facing U.S. public companies. As multinational corporations have increasingly relied upon complex, international tax strategies to affect their bottom lines, the public disclosure framework has not kept pace.

It's time for U.S. public company disclosure rules to catch up.

References

[1] In many instances, of course, the capital is being invested by professional investment advisers on behalf of retirees, health benefit plans, university endowments, and other beneficial owners.

[2] See, e.g., Adoption of Integrated Disclosure System, Sec. and Exch. Comm'n, 47 Fed. Reg. 11380 (Mar. 16, 1982). In many instances, of course, the capital is being invested by professional investment advisers on behalf of retirees, health benefit plans, university endowments, and other beneficial owners.

[3] Securities Act of 1933, Pub. L. 73-22, 48 Stat. 74 (1933), ("Securities Act"), available at http://legcounsel.house.gov/Comps/Securities%20Act%20Of%201933.pdf and Securities Exchange Act of 1934, Pub. L. 73-291, 48 Stat. 881 (1934), ("Exchange Act"), available at https://www.sec.gov/about/laws/sea34.pdf.

[4] In practice, the securities laws have generally developed wherein information should be disclosed if it is something that a "reasonable investor" would find could significantly alter the total mix of information available about the company. Potential billion-dollar tax enforcement actions or tax law changes facially meet this bar.

[5] See Tyler Gellasch, Towards a Sustainable Economy, Sept. 2016, available at https://www.citizen.org/sites/default/files/sustainableeconomyreport.pdf.

[6] Niall, McCarthy, *The U.S. Companies With The Highest Overseas Earnings*, Statista, Oct. 26, 2017, *available at* https://www.statista.com/chart/11619/the-us-companies-with-the-highest-overseas-earnings/.

[7] See generally, Richard Phillips, Matt Gardner, Alexandria Robins, Michelle Surka, *Offshore Shell Games 2017*, U.S. P.I.R.G. and Institute for Taxation and Economic Policy, at 2, Oct. 2017, *available at* https://itep.org/wp-content/uploads/offshoreshellgames2017.pdf.

[8] Citizens for Tax Justice. "The U.S. Has a Low Corporate Tax." http://www.ctj.org/pdf/businessroundtable.pdf.

[9] Matthew Gardner, Robert S. McIntyre, and Richard Phillips, *The 35 Percent Corporate Tax Myth: Corporate Tax Avoidance by Fortune 500 Companies, 2008 to 2015*, Institute for Taxation and Economic Polity, March 2017, *available at* https://itep.org/wp-content/uploads/35percentfullreport.pdf (reflecting more than 90 companies paid no tax in years in which they earned more than $300 billion in profits). We note there may be significant differences between cash taxes paid and effective tax rates.

[10] Matt Gardner, *GE Just Lost a Tax Break — and Congress Will Probably Fix That*, Tax Justice Blog, Jan. 7, 2014, *available at* http://www.taxjusticeblog.org/archive/2014/01/ge_just_lost_a_tax_break_-_and.php#.V2wvbzkrKu4.

[11] IRS, Statistics of Income Division, April 2014; World Bank http://data.worldbank.org/indicator/NY.GDP.MKTP.CD, United Nations Statistics Division http://unstats.un.org/

[12] IRS, Statistics of Income Division, April 2014; World Bank http://data.worldbank.org/indicator/NY.GDP.MKTP.CD, United Nations Statistics Division http://unstats.un.org/

[13] In May 2016, the Paris offices of Google were raided by tax officials, amid reports that the French government is seeking tax payments of 1.6 billion euro (about $1.8 billion). Chris Arnold, *Google's Paris Offices Raided In Tax Investigation*, NPR, May 24, 2016, *available at* http://www.npr.org/sections/thetwo-way/2016/05/24/479297435/googles-paris-offices-searched-in-tax-investigation; see also Jamie Robertson, *Google tax row: What's behind the deal?*, BBC News, Jan. 28, 2016, *available at* https://www.bbc.com/news/business-35428966 (reflecting £130 million payment to the U.K. to resolve a tax dispute, as well as reports that the company could owe another €227m in additional taxes to Italy); see also Renae Merle, Why McDonalds and Google are in trouble in Europe, Washington Post, May 31, 2016, *available at*

https://www.washingtonpost.com/business/economy/why-mcdonalds-and-google-are-in-trouble-in-europe/2016/05/31/78d091c0-2417-11e6-aa84-42391ba52c91_story.html.

[14] Arjun Kharpal and Silvia Amaro, *Amazon is ordered to pay nearly $300 million by EU over 'illegal tax advantage'*, CNBC, Oct. 4, 2017, *available at* https://www.cnbc.com/2017/10/04/amazon-eu-tax-bill-luxembourg-deal.html. This payment followed revelations that, in 2011, Amazon had sales in the U.K. of 3.35 billion pounds, yet reported a "tax expense" of 1.8 million. See Vanessa Barford and Gerry Holt, *Google, Starbucks, Amazon: The Rise of 'Tax Shaming'*, BBC News, May 21, 2013, *available at* http://www.bbc.com/news/magazine-20560359.

[15] Press Release, *State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion*, European Commission, Aug. 30, 2016, *available at* http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

[16] Elisabeth Butler Cordova, *Caterpillar's $2 billion tax fight with the IRS could change how U.S. companies do business*, CNBC, Jan. 2, 2018, *available at* https://www.cnbc.com/2018/01/01/caterpillars-2-billion-tax-fight-with-the-irs-could-change-how-us-companies-do-business.html.

[17] Simon Neville and Jonathan Prynn, *U.S. fashion giant Gap embroiled in British tax bill row*, The Evening Standard, Feb. 10, 2016, *available at* https://www.standard.co.uk/news/uk/us-fashion-giant-gap-embroiled-in-british-tax-bill-row-a3177126.html (reflecting the company had paid almost no taxes from 2011-2015, despite earning about £1 billion in sales during that period).

[18] Richard Phillips, *Facebook Facing Shareholder Scrutiny for Its Offshore Tax Avoidance, Institute on Taxation and Economic Policy*, May 30, 2018, *available at* https://itep.org/facebook-facing-shareholder-scrutiny-for-its-offshore-tax-avoidance/.

[19] See, e.g., Lynnley Browning, *HP loses $190 million tax case against IRS, Reuters*, May 15, 2012, *available at* http://www.reuters.com/article/us-hp-tax-idUSBRE84E0L820120515; see also *Hewlett-Packard Company and Consolidated Subs v. IRS*, U.S. Tax Court, Docket Nos. 21976-07, 10075-08, T.C. Memo. 2012-135, May 14, 2012, available at https://www.ustaxcourt.gov/InOpHistoric/HEWLETTPACKARD.TCM.WPD.pdf; Offshore Profit Shifting and the U.S. Tax Code - Part 1 (Microsoft and Hewlett-Packard) before the U.S. Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, S. Hrg. 112-781, 112th Cong. (2012), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-112shrg76071/pdf/CHRG-112shrg76071.pdf.

[20] Rochelle Toplensky, *McDonald's faces prospect of EU order to pay $500m in back taxes*, Financial Times, Sept. 18, 2016, *available at* https://www.ft.com/content/6346575e-7d90-11e6-8e50-8ec15fb462f4; see also Renae Merle, Why McDonalds and Google are in trouble in Europe, Washington Post, May 31, 2016, *available at* https://www.washingtonpost.com/business/economy/why-mcdonalds-and-google-are-in-trouble-in-europe/2016/05/31/78d091c0-2417-11e6-aa84-42391ba52c91_story.html.

[21] Offshore Profit Shifting and the U.S. Tax Code - Part 1 (Microsoft and Hewlett-Packard) before the U.S. Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, S. Hrg. 112-781, 112th Cong. (2012), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-112shrg76071/pdf/CHRG-112shrg76071.pdf.

[22] *Shell facing €7bn bill for 'anti-competitive' tax avoidance deal*, Dutch News, June 18, 2018, available at https://www.dutchnews.nl/news/2018/06/shell-facing-e7bn-bill-for-anti-competitive-tax-avoidance-deal/.

[23] Starbucks has had multiple brushes with European tax authorities. Most notably, the company faced significant backlash in 2012 following revelations that the company was earning significant revenues, but paying effectively no tax, in the U.K. See, e.g., Simon Neville and Jill Treanor, *Starbucks to pay £20m in tax over next two years after customer revolt*, The Guardian, Dec. 6, 2012, *available at* https://www.theguardian.com/business/2012/dec/06/starbucks-to-pay-10m-corporation-tax; see also Press Release, *Commission decides selective tax advantages for Fiat in Luxembourg and Starbucks in the Netherlands are illegal under EU state aid rules*, European Commission, Oct. 21, 2015, *available at* http://europa.eu/rapid/press-release_IP-15-5880_en.htm.

[24] Press Release, *State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion*, European Commission, Aug. 30, 2016, *available at* http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

[25] Jamie Smyth, *Chevron settles landmark Australia case on transfer pricing*, Financial Times, Aug. 18, 2017, *available at* https://www.ft.com/content/813fb836-83cf-11e7-a4ce-15b2513cb3ff.

[26] Jamie Robertson, *Google tax row: What's behind the deal?*, BBC News, Jan. 28, 2016, *available at* https://www.bbc.com/news/business-35428966.

[27] In recent years, UBS and Credit Suisse settled actions with the U.S. government for helping their clients evade their U.S. taxes. UBS paid $780 million and Credit Suisse paid $1.9 billion. Unfortunately, it appears that UBS has subsequently come under continues scrutiny for these issues. See, e.g., Robert W. Wood, *New UBS Tax Evasion Probe, Again Over Americans*, Feb. 5 2015, *available at* https://www.forbes.com/sites/robertwood/2015/02/05/new-ubs-tax-evasion-probe-again-over-americans/#641db14a547d.

[28] Karin Matussek, *Employees at Dozens of Leading Banks Face German Probe*, Bloomberg, June 29, 2018, *available at* https://www.bloomberg.com/news/articles/2018-06-29/employees-at-dozens-of-leading-banks-said-to-face-german-probe.

[29] Tax Cuts and Jobs Act, 131 Stat. 2054, (2017).

[30] KPMG, Tax Reform-KPMG Report on New Tax Law: Analysis and Observations, at 3, Feb. 6, 2018, available at https://home.kpmg.com/content/dam/kpmg/us/pdf/2018/02/tnf-new-law-book-feb6-2018.pdf. For a useful "plain English" primer on the impacts of the reforms enacted, please see this report by the Tax Policy Center. William G. Gale, Hilary Gelfond, Aaron Krupkin, Mark J. Mazur, and Eric Toder, *Effects of the Tax Cuts and Jobs Act*, Tax Policy Center, June 13, 2018, *available at* https://www.brookings.edu/wp-content/uploads/2018/06/ES_20180608_tcja_summary_paper_final.pdf

[31] Jane G. Gravelle and Donald J. Marples, *Issues in International Corporate Taxation: The 2017 Revision (P.L. 115-97)*, Cong. Res. Service, (May 1, 2018), *available at* https://fas.org/sgp/crs/misc/R45186.pdf.

[32] In many respects, these changes appear to have offsetting effects. For example, while foreign-source income would generally not be taxed at all, the generally applicable 10.5% minimum GILTI would appear to reduce the incentives of U.S.-based multinationals to shift intangible income to ultra-low tax jurisdictions. See, e.g., Gravelle and Marples, at 32-33.

[33] See, e.g., Michael Rapaport, *The Biggest U.S. Banks Made $2.5 Billion From Tax Law — in One Quarter*, Wall St. Journal, Apr. 17, 2018, *available at* https://www.wsj.com/articles/the-four-biggest-u-s-banks-made-2-3-billion-from-tax-lawin-one-quarter-1523984836) (reflecting Bank of America had net income growth of nearly $800 million and JPMorgan enjoyed another $470 million in net income growth as a result of the tax law changes). Around the end of 2017 and early 2018, several large companies revised their calculations of so-called "deferred tax assets." Deferred tax assets are potential offsets against future tax bills, typically associated with offshore profits. By eliminating taxation of those foreign profits, the values of those "assets" decreased dramatically. As a result, many large multinational companies with offshore profits incurred one-time losses associated with writing down the values of those assets.

[34] Goldman Sachs Group, Inc., Form 8-K, Dec. 27, 2017, *available at* https://www.sec.gov/Archives/edgar/data/886982/000119312517381960/d510945d8k.htm (stating that "the enactment of the Tax Legislation will result in a reduction of approximately $5 billion in the firm's earnings for the fourth quarter and year ending December 31, 2017, approximately two-thirds of which is due to the repatriation tax. The remainder includes the effects of the implementation of the territorial tax system and the remeasurement of U.S. deferred tax assets at lower enacted corporate tax rates.").

[35] Ben McLannahan, Laura Noonan, and Olaf Storbeck, *More banks warn of U.S. tax reform charges*, Financial Times, Jan. 5, 2018, *available at* https://www.ft.com/content/306e51ce-f215-11e7-b220-857e26d1aca4.

[36] Michael Rapaport, *The Biggest U.S. Banks Made $2.5 Billion From Tax Law — in One Quarter*, Wall St. Journal, Apr. 17, 2018, *available at* https://www.wsj.com/articles/the-four-biggest-u-s-banks-made-2-3-billion-from-tax-lawin-one-quarter-1523984836.

[37] Eaton Corp. plc, Form 8-K, Feb. 1, 2018, *available at* https://www.sec.gov/Archives/edgar/data/1551182/000115752318000183/a51751988.htm.

[38] *Explanatory Memorandum: Proposal for a Council Directive on a Common Corporate Tax Base*, European Commission, 2016/0337(CNS), Oct. 25, 2016, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0685.

[39] *Ibid.*

[40] Press Release, *Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the E.U.,* European Commission, March 21, 2018, *available at* *http://europa.eu/rapid/press-release_IP-18-2041_en.htm*.

[41] Press Release, *Clamping down on corporate tax avoidance: Council adopts anti-abuse clause (E.U. Council Directive 2015/121)*, European Council, January 27, 2015, *available at* *https://www.consilium.europa.eu/en/press/press-releases/2015/01/27/council-adopts-anti-abuse-clause/*.

[42] Press Release, *Corporate tax avoidance: New rules adopted (E.U. Council Directive 2016/1164)*, European Council, July 12, 2016, *available at* *https://www.consilium.europa.eu/en/press/press-releases/2016/07/12/corporate-tax-avoidance/*.

[43] Laura Davison, *U.S. Companies Flee No-Tax Caribbean Havens After EU Crackdown*, Bloomberg, November 15, 2018. https://www.bloomberg.com/news/articles/2018-11-15/corporate-america-flees-zero-tax-caribbean-havens-post-crackdown

[44] Press Release, Closing tax gaps — OECD launches Action Plan on Base Erosion and Profit Shifting, OECD, July 19, 2013, *available at* http://www.oecd.org/tax/closing-tax-gaps-oecd-launches-action-plan-on-base-erosion-and-profit-shifting.htm; see also Cécile Remeur, *Understanding the OECD tax plan to address 'base erosion and profit shifting' — BEPS*, European Parliamentary Research Service, Apr. 2016, *available at* http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/580911/EPRS_BRI(2016)580911_EN.pdf. The last of the 15 total reports were published in 2015.

[45] See *Tax Challenges Arising from Digitalisation — Interim Report 2018*, OECD, Mar. 16, 2018, *available at* https://read.oecd-ilibrary.org/taxation/tax-challenges-arising-from-digitalisation-interim-report_9789264293083-en#page1.

[46] Madison Marriage and Alisa Ram, *Big Tech faces U.K. tax on revenues, not profits*, Financial Times, Feb. 22, 2018, *available at* https://www.ft.com/content/9bd2c65a-17fb-11e8-9e9c-25c814761640.

[47] Press Release, *Digital Taxation: Commission proposes new measures to ensure that all companies pay fair tax in the E.U.,* European Commission, March 21, 2018, *available at* *http://europa.eu/rapid/press-release_IP-18-2041_en.htm*.

[48] See, e.g., Simon Bowers, *Amazon to begin paying corporation tax on U.K. retail sales*, The Guardian, May 22, 2015, *available at* https://www.theguardian.com/technology/2015/may/23/amazon-to-begin-paying-corporation-tax-on-uk-retail-sales.

[49] Citizens for Tax Justice, "Skechers' Sketchy Corporate Tax Disclosure Illustrates Need for Country-by-Country Reporting" May 1, 2015, *available at* https://www.ctj.org/skechers-sketchy-corporate-tax-disclosure-illustrates-need-for-country-by-country-reporting/

[50] Gary Kalman and Clark Gascoigne, “Comments on the Exposure Draft for the Proposed Accounting Standards Update to Income Taxes,” *The FACT Coalition*, May 3, 2018, *available at* https://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175835872940&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=574546&blobheadervalue1=filename%3DDISFR_TAX.ED.057.FACT_COALITION_GARY_KALMAN_CLARK_GASCOIGNE.pdf&blobcol=urldata&blobtable=MungoBlobs.

[51] *In re Appraisal of Dell Inc.*, C.A. No. 9322, 105 (Del. Ch. May 11, 2016), *available at* http://www.potteranderson.com/media/experience/706_Appraisal%20of%20Dell%205%2011%2016.pdf.

[52] *Dell*, 99-100.

[53] *Dell.*, 105.

[54] *Dell*, 110. Under then-existing law, corporations were able to avoid U.S. taxation on foreign income if the income was categorized as indefinitely invested abroad. So this is what many U.S. corporations did. This hyper-technical accounting determination did not necessarily always line up with the actual practices of the firms, however.

[55] *Dell*, at 110.

[56] *Dell Inc.*, 105. The Court ultimately sided with the expert who projected the lower rate. *Id*.

[57] "U.S. Should Not Favor Foreign over U.S. Profits: Tax Multinationals the Same as Wholly Domestic Companies." https://thefactcoalition.org/wp-content/uploads/2018/07/FACT-Sheet-Equalizing-Rates-July-2018-FINAL.pdf.

[58] Caterpillar Inc., 10-K, Exhibit 13, at A-30 (Feb. 17, 2015) (fiscal year ending Dec. 31, 2014), *available at* https://www.sec.gov/Archives/edgar/data/18230/000001823015000061/cat_exx13x12312014.htm.

[59] Caterpillar Inc., 10-K, 21 (Feb. 17, 2015) (fiscal year ending Dec. 31, 2014), *available at* https://www.sec.gov/Archives/edgar/data/18230/000001823015000061/cat_10-kx12312014.htm.

[60] *Caterpillar’s Offshore Tax Strategy*, hearing before U.S. Senate Permanent Subcommittee on Investigations, S. Hrg. 113-408, 113th Cong. (2013), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-113shrg89523/pdf/CHRG-113shrg89523.pdf; see also Shruti Date Singh and Richard Rubin, *Caterpillar Faces IRS Penalties, More Taxes on Swiss Parts Unit*, Bloomberg, Feb. 18, 2015, *available at* http://www.bloomberg.com/news/articles/2015-02-18/caterpillar-faces-irs-penalties-more-taxes-on-swiss-parts-unit.

[61] Offshore Profit Shifting and the U.S. Tax Code - Part 2 (Apple Inc.) before the Permanent Subcommittee on Investigations, Committee on Homeland Security and Government Affairs, S. Hrg. 113-90, 113th Cong. (2013), (“Apple Senate Hearing”), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-113shrg81657/pdf/CHRG-113shrg81657.pdf.

[62] Apple Senate Hearing (Statement of Carl Levin, U.S. Senator).

[63] Apple Senate Hearing.

[64] Letter from Kathleen Collins, SEC to Peter Oppenheimer, Apple, June 13, 2013, available at https://www.sec.gov/Archives/edgar/data/320193/000000000013032308/filename1.pdf (June 13th SEC Letter to Apple).

[65] June 13th SEC Letter to Apple (citing to Apple Inc., Form 10-K, For the fiscal year ended September 29, 2012, *available at* http://files.shareholder.com/downloads/AAPL/6372660600x0xS1193125-12-444068/320193/filing.pdf.).

[66] June 13th SEC Letter to Apple, at 1.

[67] June 13th SEC Letter to Apple, at 2 (requesting "[t]o the extent that a material amount of such funds are held in certain countries, tell us the names and tax rates of such countries").

[68] Letter from Peter Oppenheimer, Apple, to Kathleen Collins, SEC, June 24, 2013, *available at* https://www.sec.gov/Archives/edgar/data/320193/000119312513269419/filename1.htm; Letter from Peter Oppenheimer, Apple, to Kathleen Collins, SEC, July 22, 2013, *available at* https://www.sec.gov/Archives/edgar/data/320193/000119312513297312/filename1.htm (July 22nd Letter from Apple to the SEC).

[69] See, e.g., July 22nd Letter from Apple to the SEC, at 2, (specifying that if tax rates increased in the U.S. or Ireland, "the Company's operating results, cash flows, and financial condition could be adversely affected.").

[70] Letter from Kathleen Collins, SEC to Peter Oppenheimer, Apple, Sept. 5, 2013, *available at* https://www.sec.gov/Archives/edgar/data/320193/000000000013048900/filename1.pdf.

[71] Press Release, *State aid: Ireland gave illegal tax benefits to Apple worth up to €13 billion*, European Commission, Aug. 30, 2016, *available at* http://europa.eu/rapid/press-release_IP-16-2923_en.htm. Notably, because Ireland initially failed to mandate Apple pay it the money within the time called for by the European rules, the European Commission subsequently referred the case to the Court of Justice. Press Release, *State aid: Commission refers Ireland to Court for failure to recover illegal tax benefits from Apple worth up to €13 billion*, European Commission, Oct. 4, 2017, *available at* http://europa.eu/rapid/press-release_IP-17-3702_en.htm.

[72] Richard Phillips, *Understanding and Fixing the New International Corporate Tax System*, Institute on Taxation and Economic Policy, July 17, 2018, *available at* https://itep.org/understanding-and-fixing-the-new-international-corporate-tax-system/.

[73] See generally, Robert W. Wood, *How Google Saved $3.6 Billion Taxes From Paper 'Dutch Sandwich'*, Forbes, Dec. 22, 2016, *available at* https://www.forbes.com/sites/robertwood/2016/12/22/how-google-saved-3-6-billion-taxes-from-paper-dutch-sandwich/#63b837501c19 (explaining how Google used the "Double Irish" strategy to minimize its taxes).

[74] Notably, prior to the 2017 U.S. tax law, some investors expressed concerns that companies were not effectively utilizing their assets precisely because so much of their assets were "trapped" in low-return, liquid assets, such as U.S. treasury securities.

[75] Offshore Funds Located Onshore, Addendum to Repatriating Offshore Funds, Majority Staff Report by the U.S. Senate Permanent Subcommittee on Investigations, Comm. on Homeland Sec. and Gov't Affairs, 112 Cong., Dec. 14, 2011, available at https://www.hsgac.senate.gov/subcommittees/investigations/issues/tax-havens-and-abusive-tax-schemes.

[76] Michael Rapaport, *The Biggest U.S. Banks Made $2.5 Billion From Tax Law — in One Quarter*, Wall St. Journal, Apr. 17, 2018, *available at* https://www.wsj.com/articles/the-four-biggest-u-s-banks-made-2-3-billion-from-tax-lawin-one-quarter-1523984836.

[77] Merck & Co., Inc., Form 10-K, For the fiscal year ended December 31, 2017, at 27, *available at* http://s21.q4cdn.com/488056881/files/doc_financials/2017/Q4/2017-Form-10-K_FINAL-wo-Exhibits_Filed-022718.pdf.

[78] Letter from Deloitte & Touche LLP, to Susan M. Cosper, FASB, at 5, Sept. 30, 2016, *available at* https://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175834003053&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=608008&blobheadervalue1=filename%3DDISFR_TAX.ED.0032.DELOITTE_%26_TOUCHE_LLP.pdf&blobcol=urldata&blobtable=MungoBlobs.

[79] See David Crow and Andrew Ward, *Pfizer chief's long quest for tax inversion ends in failure*, Financial Times, Apr. 6, 2016, *available at* https://next.ft.com/content/bc90afe6-fc10-11e5-a31a-7930bacb3f5f.

[80] Rachel Graf, *Allergan (AGN) Stock Tanks on Tax Inversion Rules, Jim Cramer: 'Screaming Buy' Below $220*, The Street, Apr. 5, 2016, *available at* https://www.thestreet.com/story/13518623/1/allergan-agn-stock-tanks-as-tax-inversion-rules-threaten-pfizer-merger.html.

[81] Cortez, Michelle. "Allergan Falls After Treasury Rules Announced; Pfizer Gains." *Bloomberg*, April 4, 2016. http://www.bloomberg.com/news/articles/2016-04-04/allergan-plunges-after-treasury-rules-announced-pfizer-gains.

[82] Donohoe, M., McGill, G., and Outslay, E. *Through the looking glass darkly: what can we learn about a U.S. multinational corporation's international operations from its financial statement disclosures?* National Tax Journal 65 (4), 2012, *available at* http://www.ntanet.org/NTJ/65/4/ntj-v65n04p961-84-through-glass-darkly-what.pdf.

[83] Linda K. Krull, *Permanently Reinvested Foreign Earnings, Taxes, and Earnings Management*, The Accounting Review, Vol. 79, 745-767, July 2004, *available at* https://www.jstor.org/stable/3203277?seq=1#page_scan_tab_contents.

[84] Linda K. Krull (2004).

[85] Dave Michaels and Alan Katz, *Foreign Tax Surprise Like Disney's Have SEC Seeking Sunlight*, Bloomberg, Mar. 5, 2015, *available at* http://www.bloomberg.com/news/articles/2015-03-05/foreign-tax-surprises-like-disney-s-have-sec-seeking-sunlight.) ("In 2013, Disney nearly tripled to $1.5 billion the amount of foreign earnings exempt from U.S. taxes from a year earlier. Part of that was revenue from 2012. In a Feb. 2014 letter to Disney, the SEC questioned why the company had reclassified earnings from an earlier year and why the overall tax rate had declined even though the company had earned less money in lower-tax countries. In its reply, Disney said it made the moves because it needed more money for its media business, theme parks and resorts outside of the U.S. The company also said the decision to reclassify earnings from a prior year was appropriate under accounting rules. The regulator has not sought additional answers from the company. The media company announced a similar move Feb.3, when it again raised the amount of income it holds abroad. The move helped to lower its tax rate for the fiscal first quarter of 2015 to 33.3 percent from 35.2 percent a year earlier. Once again, Disney did not explain to investors why it made the move.").

[86] See, e.g., Juliette Garside, *Amazon U.K. boycott urged after retailer pays just £4.2m in tax*, The Guardian, May 9, 2014, *available at* https://www.theguardian.com/business/2014/may/09/margaret-hodge-urges-boycott-amazon-uk-tax-starbucks.

[87] Joe Kirwin, *OECD Warns EU About Public Tax Reporting Plan for Multinationals*, Bloomberg BNA, Apr. 9, 2018, *available at* https://www.bna.com/oecd-warns-eu-n57982090920/ (citing remarks by Achim Pross, head of the OECD International Cooperation and Tax Administration Division).

[88] See IRS, "Frequently Asked Questions (FAQs) - Country-by-Country Reporting," May 18, 2018. https://www.irs.gov/businesses/international-businesses/frequently-asked-questions-faqs-country-by-country-reporting

[89] Jumpstart our Business Startups Act, Pub. L. 112–106, Sec. 108, 126 Stat. 306 (2012) (focused on just "emerging growth companies").

[90] FAST Act, Pub. L. 114–94, 129 Stat. 1312 (2015).

[91] Business and Financial Disclosure Required by Regulation S-K, Securities and Exchange Commission, 81 Fed. Reg. 23921 (Apr. 22, 2016), available at https://www.gpo.gov/fdsys/pkg/FR-2016-04-22/pdf/2016-09056.pdf ("Concept Release").

[92] *Towards a Sustainable Economy: A Review of Comments to the SEC's Disclosure Effectiveness Concept Release*, American Federation of Labor-Congress of Industrial Organizations, et. al., at 8-9, Sept. 2016, ("Concept Release Comment Summary"), *available at* https://www.citizen.org/sites/default/files/sustainableeconomyreport.pdf.

[93] *Towards a Sustainable Economy: A Review of Comments to the SEC's Disclosure Effectiveness Concept Release*, American Federation of Labor-Congress of Industrial Organizations, et. al., Sept. 2016, ("Concept Release Comment Summary"), *available at* https://www.citizen.org/sites/default/files/sustainableeconomyreport.pdf.

[94] Concept Release Comment Summary, at 21.

[95] Statement of Nili Shah, Deputy Chief Accountant, Division of Corporation Finance (reported by Dave Michaels and Alan Katz, *Foreign Tax Surprise Like Disney's Have SEC Seeking Sunlight*, Bloomberg, Mar. 5, 2015, *available at* http://www.bloomberg.com/news/articles/2015-03-05/foreign-tax-surprises-like-disney-s-have-sec-seeking-sunlight.).

[96] *Disclosure Framework — Changes to the Disclosure Requirements for Income Taxes*, FASB, July 26, 2016, *available at* https://www.fasb.org/jsp/FASB/Document_C/DocumentPage?cid=1176168335332&acceptedDisclaimer=true.

[97] *Ibid.*

[98] *Ibid.*

[99] The proposal received 57 comment letters. The comment file is available at https://www.fasb.org/jsp/FASB/CommentLetter_C/CommentLetterPage&cid=1218220137090&project_id=2016-270.

[100] Letter from KPMG LLP, to Technical Director, FASB, Sept. 28, 2016, *available at* https://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175833985128&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=532465&blobheadervalue1=filename%3DDISFR_TAX.ED.0006.KPMG_LLP.pdf&blobcol=urldata&blobtable=MungoBlobs.

[101] While enhancing public disclosures has been stalled at the European Council amidst pushback from some countries, efforts to enhance tax-related public disclosures have moved swiftly in the European Parliament.

[102] Bas Castelijn et al., *Country-by-Country reporting for the financial services industry: Capital Requirements Directive IV*, Deloitte, July 2013, *available at* https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/financial-services/deloitte-nl-country-by-country-reporting-for-the-financial-services-industry.pdf.

[103] Memo, *New disclosure requirements for the extractive industry and loggers of primary forests in the Accounting (and Transparency) Directives (Country by Country Reporting) – frequently asked questions*, European Commission, June 12, 2013, *available at* http://europa.eu/rapid/press-release_MEMO-13-541_en.htm.

[104] Joe Kirwin, *OECD Warns EU About Public Tax Reporting Plan for Multinationals*, Bloomberg BNA, Apr. 9, 2018, *available at* https://www.bna.com/oecd-warns-eu-n57982090920/ (citing Manon Aubry, Oxfam).

[105] Press Release, *Multinationals should disclose tax information in each country they operate*, European Parliament, July 4, 2017, *available at* http://www.europarl.europa.eu/news/en/press-room/20170629IPR78639/multinationals-should-disclose-tax-information-in-each-country-they-operate.

[106] Joe Kirwin, *OECD Warns EU About Public Tax Reporting Plan for Multinationals*, Bloomberg BNA, Apr. 9, 2018, *available at* https://www.bna.com/oecd-warns-eu-n57982090920/ (citing remarks by Jeppe Kofod).

[107] Ibid.

[108] *Proposal for Directive of the European Parliament and the Council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches (CBCR)*, Council of the European Union, Interinstitutional File: 2016/0107 (COD), Dec. 19, 2017, *available at* http://data.consilium.europa.eu/doc/document/ST-13685-2017-REV-1/en/pdf.

[109] Engagement Guidance on Corporate Tax Responsibility, UN Principles for Responsible Investment, at 5, 2015.

[110] In November 2014, 45 union-affiliated organizations from 19 countries called upon pension funds to incorporate tax risks as a core part of responsible investment policies. In the U.S., members of the Council of Institutional Investors have expressed concerns with aggressive international tax strategies and corporate inversions based on broad policy concerns, as has the Church of England abroad. The Church of England's Investment Advisory Group has argued that "companies should eschew aggressive tax planning, aggressive tax avoidance and abusive tax arrangements for both ethical and business risk reasons." See Madison Marriage, *Investor Complacency over Tax Avoidance Wanes*, Financial Times, Nov. 16, 2014, *available at* https://next.ft.com/content/fe8e7fcc-6b2f-11e4-be68-00144feabdc0).

[111] Why And How To Engage With Your Investee Companies on Corporate Tax Responsibility, United Nations Principles for Responsible Investment, 2015, *summary available at* http://i.emlfiles1.com/cmpdoc/2/0/5/9/7/files/334837_pri_tax-guidance-2015_summary_final.pdf (noting that a "large, persistent tax gap", "large or growing unrecognised tax benefits", and "media stories or governments inquires" are "red flags." The guide notes that "the company's response may also be a good proxy for the board's risk tolerance" and further identifies as indicators of potential concerns "the foreign effective tax rate (applicable primarily for companies based in a jurisdiction with a worldwide taxation system, such as the U.S); new disclosures or changes in language used in tax footnotes; opaque disclosure of geographic revenue mix; lack of a tax policy; and multiple subsidiaries in tax havens."). Id.

[112] David Zion, Ravi Gomatam, and Ron Graziano, Credit Suisse, *Parking A-Lot Overseas*, Mar. 17, 2015, *available at* https://doc.research-and-analytics.csfb.com/docView?language=ENG&format=PDF&source_id=em&document_id=1045617491&serialid=jHde13PmaivwZHRANjglDIKxoEiA4WVARdLQREk1A7g%3D (noting that a research report by equity research analysts at Credit Suisse found that for many major U.S. companies, including Mattel, HP, Xerox, and Western Union, potential offshore tax liabilities represented over 10 percent of the company's total market capitalization.).

[113] Statement of Tim Nollen, an analyst at Macquarie Capital USA (reported in Dave Michaels and Alan Katz, Foreign Tax Surprise Like Disney's Have SEC Seeking Sunlight, Bloomberg, Mar. 5, 2015, *available at* http://www.bloomberg.com/news/articles/2015-03-05/foreign-tax-surprises-like-disney-s-have-sec-seeking-sunlight.).

[114] Letter from Vincent Papa and Tony Sondhi, CFA Institute, to Chairman Russell Golden, FASB, Oct. 25, 2016, *available at* https://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175834119493&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=833120&blobheadervalue1=filename%3DDISFR_TAX.ED.0046.CFA_INSTITUTE_CDPC_VINCENT_PAPA_TONY_SONDHI.pdf&blobcol=urldata&blobtable=MungoBlobs.

[115] Statement by Fiona Reynolds (reported in Madison Marriage, *Investor Complacency over Tax Avoidance Wanes*, Financial Times, Nov. 16, 2014, *available at* https://next.ft.com/content/fe8e7fcc-6b2f-11e4-be68-00144feabdc0).

[116] For example, the United Nations Principles on Responsible Investment, with more than 1,300 signatories managing $45 trillion, has created an initiative to provide guidance for investors on how to engage with investee companies on corporate tax issues. See, e.g., Why And How To Engage With Your Investee Companies on Corporate Tax Responsibility, United Nations Principles for Responsible Investment, 2015, *summary available at* http://i.emlfiles1.com/cmpdoc/2/0/5/9/7/files/334837_pri_tax-guidance-2015_summary_final.pdf. Further, UN PRI has recently brought together a subgroup to directly engage companies on tax issues.

[117] In March 2014, investors with assets totaling more than $10 trillion called upon stock exchanges to propose listing standards for ESG issues. *Recommendations for Stock Exchange Requirements on Corporate Sustainability Reporting*, Ceres/Investor Network on Climate Risk, Mar. 2014, *available at* http://www.ceres.org/resources/reports/investor-listing- standards-proposal-recommendations-for-stock-exchange-requirements-on-corporate-sustainability-reporting.

[118] For example, in 2011, the SEC issued a no-action letter to Lazard Ltd., effectively permitting the company to exclude a proposal to "annually assess the risks created by the actions Lazard takes to avoid or minimize U.S. federal, state, and local income taxes, and that it provide a report to shareholders on the assessment." In granting Lazard's request, the SEC noted that the proposal relates to "decisions concerning the company's tax expenses and sources of financing." *Lazard Ltd. No-Action Letter,* Feb. 16, 2011, *available at* http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/afscme021611-14a8.pdf.

[119] Adam Kanzer, before the Independent Commission for the Reform of International Corporate Taxation, Mar. 18, 2015, *available at* http://www.icrict.org/wp-content/uploads/2015/04/Adam-KANZER-statement.pdf (Kanzer Statement).

[120] *See, e.g.*, Hewlett-Packard Company, Form 10-K, Dec. 17, 2014, 50, *available at* http://h30261.www3.hp.com/~/media/Files/H/HP-IR/documents/reports/2015/hp-10-k-as-filed.PDF, (fiscal year 2014) (explaining that HP considers "future market growth, forecasted earnings, future taxable income, the mix of earnings in the jurisdictions in which we operate and prudent and feasible tax planning strategies" when assessing its valuation).

[121] Joe Kirwin, *OECD Warns EU About Public Tax Reporting Plan for Multinationals*, Bloomberg BNA, Apr. 9, 2018, *available at* https://www.bna.com/oecd-warns-eu-n57982090920/ (citing Achim Pross, head of the OECD International Cooperation and Tax Administration Division as saying "[t]here are number of concerns. These involve double taxation, especially in countries like China and India where western countries are required to undertake joint ventures. There are also concerns among countries that public data could be used to undercut competitors.").

[122] Letter from Deloitte & Touche LLP, to Susan M. Cosper, FASB, at 6, Sept. 30, 2016, *available at* https://www.fasb.org/cs/BlobServer?blobkey=id&blobnocache=true&blobwhere=1175834003053&blobheader=application%2Fpdf&blobheadername2=Content-Length&blobheadername1=Content-Disposition&blobheadervalue2=608008&blobheadervalue1=filename%3DDISFR_TAX.ED.0032.DELOITTE_%26_TOUCHE_LLP.pdf&blobcol=urldata&blobtable=MungoBlobs.

[123] *See, e.g.*, Vodafone, *Tax and our total contribution: country by country*, 2017, *available at* https://www.vodafone.com/content/dam/sustainability/pdfs/vodafone_2017_tax_country_by_country.pdf.

[124] Regulation S-K, Item 601(b)(21). The term "significant" is defined by Regulation S-X.

[125] Letter from the SEC Investor Advisory Committee to Division of Corporation Finance, SEC, 4, June 15, 2015, *available at* https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-approved-letter-reg-sk-comment-letter-062016.pdf.

[126] Offshore Shell Games: The Use of Offshore Tax Havens by Fortune 500 Companies, U.S. Public Interest Research Institute on Taxation and Economic Policy, 17, Oct. 2017, available at https://itep.org/wp-content/uploads/offshoreshellgames2017.pdf.

[127] Offshore Shell Games: The Use of Offshore Tax Havens by Fortune 500 Companies, U.S. Public Interest Research Institute on Taxation and Economic Policy, 17, Oct. 2017, available at https://itep.org/wp-content/uploads/offshoreshellgames2017.pdf.

[128] Americans for Tax Fairness, *The Walmart Web: How the World's Biggest Corporation Secretly Uses Tax Havens to Dodge Taxes*, June 2015, *available at* http://www.americansfortaxfairness.org/files/TheWalmartWeb-June-2015-FINAL1.pdf.

[129] Ibid.

[130] Ibid.

[131] Offshore Shell Games: The Use of Offshore Tax Havens by Fortune 500 Companies, U.S. Public Interest Research Institute on Taxation and Economic Policy, 17, Oct. 2017, available at https://itep.org/wp-content/uploads/offshoreshellgames2017.pdf.

[132] Ibid.

[133] Jeffrey Gramlich and Janie Whiteacre-Poe, *Disappearing Subsidiaries: The Cases of Google and Oracle*, Mar. 6, 2013, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2229576.

[134] Matt Gardner, *Nike's Disappearing Tax Haven Subsidiaries: Lost at the Beach?*, Citizens for Tax Justice Blog, July 28, 2014, *available at* http://www.taxjusticeblog.org/archive/2014/07/nikes_disappearing_tax-haven_s.php#.V3A42VJiO8U.

[135] The legal entity identifier (LEI) is a unique, 20-digit alpha-numeric code assigned to distinct legal entities. See generally Global Legal Entity Identifier Foundation, *Introducing the Legal Entity Identifier (LEI), available at* https://www.gleif.org/en/about-lei/introducing-the-legal-entity-identifier-lei.

About the FACT Coalition

Who We Are

The Financial Accountability and Corporate Transparency (FACT) Coalition is a non-partisan alliance of more than 100 state, national, and international organizations working toward a fair tax system that addresses the challenges of a global economy and promoting policies to combat the harmful impacts of corrupt financial practices.

Our Goals

- End the use of anonymous shell companies as vehicles for illicit activity;
- Strengthen, standardize, and enforce anti-money laundering laws;
- Require greater transparency from multinational corporations to promote informed tax policy;
- Ensure that the U.S. constructively engages in global financial transparency initiatives; and
- Eliminate loopholes that allow corporations and individuals to offshore income and avoid paying their fair share of taxes.

Why It Matters

There is untold wealth hidden in secrecy jurisdictions around the globe. The wealth stripping from corrupt practices and regimes, illegal activity, and legal-but-ethically-bankrupt tax avoidance schemes is larger than most can possibly imagine. Because of the secret nature of the financial flows, it is impossible to know precisely the amount of money, but economist Gabriel Zucman estimates at least $7.6 trillion is in tax havens and secrecy jurisdictions. The Boston Consulting Group estimates $11 trillion. And the Tax Justice Network estimates between $21 and $32 trillion dollars. More than $2 trillion is from U.S. corporate entities, and the annual cost to U.S. taxpayers is between $111 billion and $150 billion in lost tax revenue each and every year.

We seek a larger conversation about how specifically certain interests are manipulating the tax system and undermining our ability to act collectively to solve problems. The secrecy, in particular, allows certain entities to play by a different set of rules than the rest of us. Internationally, the secrecy facilitates corruption and impoverishes developing countries. In the U.S., we are complicit in the draining of wealth of other nations and fueling the austerity movement in our own.

Learn More

Interested in learning more about the FACT Coalition or becoming a member? Visit our website at www.thefactcoalition.org or contact Jacob Wills at jwills@thefactcoalition.org or +1 (202) 827-6401.

FACTCOALITION

Financial Accountability & Corporate Transparency

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