FACTCOALITION
Financial Accountability & Corporate Transparency

To: The Biden-Harris 2020 Presidential Transition Team
From: The Financial Accountability and Corporate Transparency (FACT) Coalition
Re: Advancing Financial Transparency and Tax Fairness to Build Back Better
Date: November 9, 2020

Summary

To advance core aims of the Biden platform — including building a stronger and fairer American economy, restoring American leadership on the global stage, defending our national security, strengthening our health sector, and combating the existential threat of climate change — we must advance corporate and financial transparency and tax reforms to ensure everyone is doing their part to move America forward. Implementing these Biden reforms requires:

1. **Ending anonymous shell companies** that facilitate tax evasion, money laundering, global corruption, health care fraud, environmental crimes, proliferation financing, sanctions evasion, opioid trafficking, and human trafficking;
2. **Strengthening U.S. anti-money laundering (AML) and global anti-corruption initiatives** to safeguard the financial system, combat illicit finance, protect American families, and build a safer world;
3. **Exposing aggressive tax strategies** by multinational corporations that book profits in tax havens;
4. **Closing offshore tax loopholes** abused by multinational corporations and the wealthy to avoid paying tax; and
5. **Boosting enforcement** of existing laws across all sectors;
6. **Staffing the Administration with experts** who will prioritize anti-money laundering, tax, and anti-corruption reforms.

1. End Anonymous Shell Companies

Day One

Announce an intention to end the formation of U.S. corporations with hidden owners and to require greater transparency for legal entities seeking to do business in or with the United States. Include a description of the Biden Administration's intention to use regulations, executive orders, and support for new laws to increase corporate transparency within the United States.

Appoint White House, Treasury Department, State Department, and Department of Justice officials who will seek to align U.S. anti-money laundering and corporate transparency frameworks with those

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of our allies. Nominees should commit to placing a priority on improving existing beneficial ownership regulations, establishing a directory at Treasury of the beneficial ownership information of all entities formed or operating in the U.S., working with allies to establish beneficial ownership disclosure as the global standard and encouraging other jurisdictions to implement beneficial ownership directories, and strengthening enforcement efforts to stop the misuse of anonymous companies within the United States and globally. The United Kingdom, the European Union, and several other jurisdictions have already adopted directives to increase corporate transparency and end the formation of anonymous companies.

First 100 Days

Mandate beneficial ownership transparency and LEIs for all federal contracts and grants. Require all entities that bid on federal contracts, subcontracts, leases, grants, subgrants, and loans to disclose their beneficial owners – the true, natural persons who ultimately own or control the applicant for federal assistance – when they register on a GSA or federal agency contractor database or schedule, and also post that beneficial ownership information on USAspending.gov so the public knows who is benefiting from taxpayer dollars. Also require all entities who register with GSA to provide a Legal Entity Identifier (LEI) under the existing global LEI system to increase the ability of federal contract officers to understand who is seeking to do business with the United States.

Strengthen the definition of "beneficial owners" in the FinCEN CDD rule. Revise FinCEN's existing definition of "beneficial owners" in its rule requiring financial institutions to identify the natural persons behind legal entities that open U.S. financial accounts. The current definition in its Customer Due Diligence (CDD) rule — which allows trustees and company managers to be named as beneficial owners of an entity even when they hold no ownership interest in that entity — has drawn international criticism. The CDD revision should instead use a definition similar to the one adopted by Congress in section 2876 of the National Defense Authorization Act for Fiscal Year 2018 (Public Law No: 115-91).

Expand the Treasury Department's Geographic Targeting Orders (GTOs) to commercial real estate. Expand FinCEN's existing geographic targeting orders — which already cover residential real estate transactions in 12 large U.S. real estate markets like Miami and New York — to also cover commercial real estate transactions. Evidence is clear that organized crime, corrupt officials, and others are using shell companies with hidden owners to purchase U.S. commercial as well as residential real estate. Federal geographic targeting orders, which rely on third-party title insurers to report the beneficial owners of companies involved in certain purchases, have reduced residential real estate purchases by anonymous shell companies in some markets by as much as 95 percent.[1]

Amend the FinCEN registration form to require disclosure of the beneficial owners of a Money Service Business (MSB). Approximately one-half of all suspicious activity reports (SARs) filed with FinCEN every

[1] Nicholas Nehemas and Rene Rodriguez, "How dirty is Miami real estate? Secret home deals dried up when feds started watching," Miami Herald, July 20, 2018, https://www.miamiherald.com/news/business/real-estate-news/article213797269.html.

year name MSBs. These forms currently only require the registrant to list the legal owner, making it harder for law enforcement to pursue investigations. Strengthen the registration form to include beneficial ownership information.

Strengthen FAA aircraft registration rules to require the disclosure of the beneficial owners of entities named in FAA forms authorizing the aircraft to land in the United States. Studies show that one third of U.S. aircraft are registered to corporations, with no requirement to name their true owner, making it a prime avenue for terrorists, drug dealers, and other bad actors to access our airspace with anonymity.[2] U.S. registration is attractive to these actors given its reputational benefits, nondisclosure, and low cost (just $5).[3] Requiring improved disclosure would strengthen the capacity of U.S. officials to know who is operating aircraft within U.S. airspace, and increased fees could fund increased oversight.

Longer Term

Work with Congress to establish a beneficial ownership directory and end the incorporation of anonymous shell companies in the United States. Support legislation (like H.R. 2513/H.R. 2514, S. 2563, and S.Amdt.2198 to S. 4049; 116th Congress) that would require all corporations and limited liability companies formed in the United States to disclose their beneficial owners and update that information on a regular basis. Mandating beneficial ownership disclosure would curb the misuse of U.S. corporate entities to hide dirty money and undermine U.S. interests by terrorists, criminals, tax cheats, kleptocrats, and fraudsters. This legislation enjoys widespread bipartisan support from national security experts, law enforcement, human rights organizations, financial institutions, anti-corruption advocates, state officials, progressive and conservative advocacy groups, labor unions, and both small and large businesses.

Institutionalize the Treasury Department's Geographic Targeting Orders (GTOs). Initiate a rulemaking under Treasury's authority to establish money laundering, real estate and insurance safeguards to make FinCEN's temporary geographic targeting orders — already implemented in 12 cities — nationwide, permanent, and inclusive of commercial real estate.

Work with the SEC to strengthen beneficial ownership rules for entities that register with the SEC.

Initiate an effort to identify and publicly disclose the beneficial owners of all shell entities — domestic and foreign — that own U.S. real estate. This effort would enable government officials, law enforcement, and, for the first time, the public to understand who owns the land under their feet.

2. Strengthen U.S. Anti-Money Laundering (AML) and Anti-Corruption Initiatives

[2] Kelly Carr and Jaimi Dowdell, "Secrets in the Sky," Boston Globe, 2018, https://apps.bostonglobe.com/spotlight/secrets-in-the-sky/series/part-one.
[3] *Ibid.*

Day One

Announce an intention to strengthen U.S. anti-money laundering initiatives to stop the misuse of the U.S. financial system by terrorists, criminals, corrupt officials, tax evaders, and others to hide, move, and invest dirty money. Include a description of the Biden Administration's intention to use regulations, executive orders, and support for new laws to clamp down on money laundering in the United States.

Appoint White House, Treasury Department, Department of Justice, and Department of Homeland Security officials who would place a priority on strengthening U.S. anti-money laundering safeguards. Nominate individuals with a track record of combating white collar crime and pushing for stronger U.S. anti-money laundering laws and regulations.

Convene a task force to modernize U.S. AML strategies to address mobile payment systems. Current AML approaches focus on traditional banks and wire transfer systems, rather than the increasingly popular mobile payment systems which may operate with fewer rules, less transparency, and more tools to route and hide illicit funds. A task force would help develop and institutionalize new strategies to combat this growing threat to the U.S. financial system.

First 100 Days

Finalize the proposed Obama-era rule requiring investment advisers to establish AML programs. Complete work on the proposed 2015 FinCEN rule to impose AML program and suspicious activity reporting requirements on registered investment advisers, including private equity funds and hedge funds that bring millions of offshore dollars into the United States.[4] Finalizing this rule would ensure that these advisers, each of which manages $100 million or more in assets, know their customers, report suspect transactions to law enforcement, and help safeguard the U.S. financial system from terrorists, criminals, and other wrongdoers. Adopting the rule would also bring U.S. AML requirements in closer alignment with international AML standards and plug a key U.S. AML vulnerability. The rule has already undergone the comment process and could be quickly finalized.

End the Treasury Department's "temporary" exemptions to the USA PATRIOT Act's AML program requirements. In 2002, the Patriot Act required all covered financial institutions to set up risk-based AML programs, but the Treasury Department issued regulatory exemptions for a small subset, including investment advisers, sellers of luxury vehicles, and sellers of U.S. real estate.[5] After nearly two decades, it is time to end these exemptions which are still labeled "temporary." All have draft rules that could quickly be published and finalized.

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[4] "Anti-Money Laundering Program and Suspicious Activity Report Filing Requirements for Registered Investment Advisers," Federal Register, September 1, 2015. https://www.federalregister.gov/documents/2015/09/01/2015-21318/anti-money-laundering-program-and-suspicious-activity-report-filing-requirements-for-registered.

[5] "Financial Crimes Enforcement Network; Anti-Money Laundering Programs for Financial Institutions," 67 Federal Register, 21111-21112, April 29, 2002. https://www.sec.gov/about/offices/ocie/aml2007/67fr21110.pdf.

Work with the SEC to issue a robust rule implementing Section 1504 of the Dodd-Frank Act. The Cardin-Lugar anti-corruption provision, which requires extractive companies to publish payments made to governments as a way to clamp down on bribes, has stalled for years under a decade's worth of pushback by the oil, gas and mining industries to weaken the bipartisan law. It is time to bring this Obama legacy anti-corruption effort over the finish line.

Boost law enforcement access to information reported under the Foreign Account Tax Compliance Act (FATCA). FATCA requires an annual exchange of data between the United States and multiple foreign financial institutions around the world to disclose large-dollar foreign accounts held by U.S. persons. Right now, because the annual reports filed by foreign financial institutions are designated IRS forms, only the IRS can easily review the data and use it to combat unpaid taxes. If the reports were converted to FinCEN forms, a wider range of law enforcement agencies could review the account data to identify U.S. persons involved with terrorism, organized crime, weapons of mass destruction, or other wrongdoing. The Treasury Department has the authority to convert the forms without any action needed from Congress and should take the steps necessary to do so.

Initiate a renewed effort to register money service businesses (MSBs) at the federal level. Though the PATRIOT Act requires MSB registration (and though it is a criminal offense not to register), state licensing does not uniformly capture all MSBs. Likewise, federal registration statistics show that only an estimated one-quarter of MSBs have registered with FinCEN. A renewed campaign to identify unregistered MSBs would plug a major U.S. money laundering vulnerability.

Longer Term

Work with Congress to codify AML due diligence requirements on other "gatekeepers" who expose the United States to money laundering. Urge Congress to pass legislation imposing AML obligations on corporate formation agents, arts and antiquities dealers, and legal service providers, all of whom have been shown to facilitate money laundering. Those AML obligations would require the covered persons to know their clients, establish risk-based AML programs, and report suspicious activity to law enforcement.[6] Enacting these requirements would bring the United States into closer alignment with international AML standards and strengthen U.S. AML safeguards.

Work with Congress to establish a global network of Trade Transparency Units (TTUs) to deter money laundering, corruption, fraud, and tax evasion. Trade-based money laundering has become the primary avenue to shift illicit funds between developing and advanced economies,[7] yet most governments, including the United States, are currently unable to see both sides of a cross-border transaction. Congress should fund an expansion of the Immigration and Customs Enforcement (ICE) existing network of TTUs to more countries, exchange transaction-level trade data with those countries, and partner with

[6] Ben Judah and Nate Sibley, "The Enablers: How Western Professionals Import Corruption and Strengthen Authoritarianism," Hudson Institute, September 2018, https://s3.amazonaws.com/media.hudson.org/files/publications/EnablersFINAL.pdf.
[7] "Illicit Financial Flows to and From 148 Developing Countries: 2006-2015," Global Financial Integrity, January 2019, https://www.gfintegrity.org/wp-content/uploads/2019/01/GFI-2019-IFF-Update-Report-1.29.18.pdf.

other nations to counter trade-based money laundering. TTUs will improve law enforcement's ability to detect and stop the misinvoicing of trade goods.

Work with Congress to make all serious crimes predicate offenses for money laundering prosecutions. The United States is one of only a small number of industrialized countries that enumerates a list of predicate offenses for money laundering, rather than simply referencing all serious crimes as recommended by the Financial Action Task Force (FATF), the international anti-money laundering standard-setting body. Worse yet, the United States uses one list for crimes committed at home and another list for crimes committed abroad. Supporting legislation to amend 18 U.S.C. § 1956(c)(7) to make all U.S. felonies, with certain exemptions, predicate offenses for money laundering would bring the United States in line with international anti-money laundering standards.

Work with Congress to expand U.S. bribery law to criminalize efforts by foreign officials to extort U.S. companies. Right now, U.S. bribery law criminalizes persons who pay bribes to foreign officials, but not persons who demand such bribes. The Biden Administration should work with Congress to amend 18 U.S. 201 via legislation to make it a crime for foreign officials to solicit bribes from U.S companies. This change would enable U.S. prosecutors to target corrupt foreign officials, protect U.S. companies, and strengthen global rule of law and anti-corruption efforts.[8]

Work with Congress to create a State Department action fund for global anti-corruption efforts. Partner with Congress to enact, and then swiftly implement, legislation (like H.R. 3843, 116th Congress) that would create an "action fund" overseen by the State Department to assist in anti-corruption and rule of law initiatives in other countries. This action fund would, in part, be supported by overseas bribery fines collected by the U.S. government.

Work with Congress to increase funding for the Treasury Department's Financial Crimes Enforcement Network. Partner with congressional appropriators to ensure that FinCEN has the appropriate resources to implement and enforce rules, laws, and policies within its jurisdiction.

3. Strengthen Corporate Tax Transparency

Day One

Announce an initiative to increase corporate tax transparency to ensure profitable corporations pay their fair share of tax. This announcement could include an intention to use federal regulations to the greatest extent possible as well as support the enactment of new laws.

Appoint personnel to the SEC, IRS, and Treasury that value tax transparency. Nominees should commit to increasing corporate tax transparency and, ideally, should have a track record of promoting tax transparency in both the domestic and international arenas.

[8] Thomas Firestone and Maria Piontkovska, "Two to Tango: Attacking the Demand Side of Bribery," *The American Interest*, Dec. 17, 2018, https://bit.ly/35M6Pi4.

First 100 Days

Work with the SEC to require corporations to publicly report basic financial and tax information on a country-by-country basis in their annual 10-K reports. The required country-by-country (CbC) reporting should be modeled after the CbC standards promulgated by the Global Reporting Initiative, a nonprofit whose voluntary corporate reporting standards have been adopted by most Fortune 500 corporations. Using the GRI standards as a model would help increase global uniformity while making it easier for many corporations to comply.

Work with the Financial Accounting Standards Board (FASB) to include country-by-country reporting requirements in Generally Accepted Accounting Principles (GAAP) for U.S. corporations. FASB has been working for several years on a GAAP project to increase tax transparency in corporate financial statements to assist investors and others to evaluate individual corporations. In February 2020, the FASB chair announced his support for jurisdiction-by-jurisdiction reporting, but few details have followed. The Biden Administration should express to FASB its strong support for quickly finalizing country-by-country reporting in GAAP.

Work with the SEC to require all publicly traded companies to disclose all subsidiaries without exception. SEC rules now require publicly traded corporations to disclose only their "significant subsidiaries," which some corporations have interpreted to permit them to omit many subsidiaries, even those with millions of dollars in assets or revenues. Those omissions have also sometimes disguised corporate tax practices that utilize tax haven subsidiaries. The Biden Administration should revise SEC provision 601(b)(21) to require SEC registrants to disclose all subsidiaries by name, location, Legal Entity Identifier, and relation to parent. As with CbC reporting, this comprehensive subsidiary reporting would improve corporate analysis, assist policy makers considering corporate reporting and tax reforms, and deter egregious tax avoidance strategies.

Work with the Organization for Economic Cooperation and Development (OECD) to improve BEPS Action 13 disclosures. Work with the OECD to align its Base Erosion and Profit Shifting (BEPS) Action 13 framework requiring country-by-country corporate reporting to bring it in line with the Global Reporting Initiative standards that many large corporations favor. The Biden Administration should also urge the OECD to require the BEPS reports to be made public, use consolidated rather than aggregated data, and lower the revenue reporting threshold to $100 million from $850 million to capture the majority of multinationals active in the developed and developing world. Each of these changes would lead to more uniform global reporting and more usable corporate data.

Eliminate an IRS exemption that now allows some firms to skip the requirement to file annual reports with certain country-by-country data. The 2018 Trump Administration action creating this exemption[9]

[9] Internal Revenue Service, "Notice 2018-31: National Security Considerations with Country-by-Country Reporting," March 30, 2018, https://www.irs.gov/pub/irs-drop/n-18-31.pdf.

for "specified national security contractors" provides no written justification for overruling a 2016 decision by the Obama Administration rejecting such an exemption because the Department of Defense had "concluded that [CbC] information reporting generally does not pose a national security concern."[10]

Take steps to convert the IRS forms that some U.S. multinational corporations now use to report annual country-by-country data to the IRS into Treasury forms that can be released to the public. These reports now include such basic per country data as the number of employees on the payroll, revenues and profits earned, and income tax paid. This initiative would also require setting up a system for making those new forms public on an annual basis. Making them public would enable policymakers, investors, and taxpayers to evaluate corporate tax practices and proposed tax reforms. It would also deter egregious corporate tax avoidance.

Require wider use of Legal Entity Identifiers. For years, the United States has been part of a global effort to persuade business entities to obtain, at minimal cost, a 20-character Legal Entity Identifier (LEI). LEIs, by providing unique numerical identifiers, help persons in the public and private sectors to identify specific business entities and their affiliates. The Federal Reserve System, Commodity Futures Trading Commission (CFTC), and National Association of Insurance Commissioners (NAIC) already mandate LEI disclosure in some filings, while the SEC has recommended including this information in disclosures by certain industries.[11] The Biden Administration should increase corporate transparency and facilitate federal enforcement efforts by undertaking a government-wide initiative to require LEI disclosures by publicly traded corporations and other entities subject to federal regulation.

Longer Term

Work with Congress to codify public country-by-country reporting requirements for U.S. corporations. The Biden Administration should partner with Congress to enact legislation (like H.R. 5933/S. 1609, 116th Congress) that would require public country-by-country reporting by large multinational companies registered with the SEC. The CbC information that would be required — number of employees, revenues, profits, and taxes assessed and paid— is already provided by many large corporations to the IRS, thereby reducing the costs of compliance.

Work with Congress to strengthen statutory provisions related to the Public Company Accounting Oversight Board (PCAOB). Among other changes, the Biden Administration should support legislation (like S. 1256, 116th Congress) amending the statute to allow the PCAOB to file public reports on misconduct and auditing deficiencies by an auditor without having to wait a year or longer to see if the auditor will cure the identified problems. Likewise, legislation (like HR. 3625, 116th Congress) could also incentivize whistleblowers to come forward when they suspect violations of the Sarbanes-Oxley Act, PCAOB rules, and other laws, rules, and professional standards governing the audits of public

[10] "Country-by-Country Reporting," 81 Federal Register 42484, June 30, 2016, https://www.govinfo.gov/content/pkg/FR-2016-06-30/pdf/2016-15482.pdf.
[11] "Legal Entity Identifiers: Frequently Asked Questions," Office of Financial Research, https://www.financialresearch.gov/data/legal-entity-identifier-faqs.

companies, brokers, and dealers. Congress should also clarify the responsibility of auditors to audit for fraud and require the PCAOB to oversee that auditing effort.

4. Close Offshore Tax Loopholes

Day One

Announce an initiative to close offshore tax loopholes exploited by corporations and the wealthy and ensure profitable corporations and wealthy individuals pay their fair share of tax.

Appoint senior personnel to Treasury and the IRS who value a fair, inclusive tax system and want to ensure that profitable corporations and wealthy individuals pay tax. Nominate individuals who are willing to prioritize tax enforcement efforts involving large profitable corporations and have a track record of opposing offshore tax loopholes that shift the tax burden to small business and lower income individuals.

Freeze all pending tax regulations and guidance and initiate a comprehensive review of all Trump Administration tax regulations, including those implementing the Tax Cuts and Jobs Act (TCJA). Additionally, consider the use of the Congressional Review Act to nullify recent tax regulations and guidance.

Initiate immediately the IRS notice-and-comment periods for all past tax-shelter designations to preempt an unfavorable Supreme Court decision. In a case before the Supreme Court (CIC Services v IRS), the IRS is fending off a claim by the tax-shelter industry that the IRS list of tax shelter designations is invalid because it did not go through the administrative process of notice-and-comment; and that therefore, taxpayers and their advisors should not be mandated to disclose tax-shelter transactions. Tax shelter designations are critical to the IRS' ability to combat abusive tax practices, including hiding assets and overclaiming deductions. Get ahead of the legal challenge and start notice-and-comment to shore up the vulnerability of these designations.

First 100 Days

Close loopholes that allow corporations to "invert" their structures and strip earnings to minimize their U.S. tax payments. Require that a company be treated as a U.S. corporation if it is still controlled in the United States or if the majority of its shareholders has not changed. Amend the earnings stripping rule to make the debt-to-equity ratio more stringent and to cut off use of this profit shifting method.

Work with the OECD and international allies to establish a strong global minimum tax for corporations. Strengthen existing OECD and international safeguards against offshore corporate tax avoidance by working with allies to institute a strong, global corporate minimum tax that is no less than the U.S. domestic corporate tax rate, does not exempt routine profits, and is applied on a per-country basis, rather than as a global average.

Use Treasury's regulatory authority to revoke the "check-the-box" rule for foreign affiliates. End the Clinton-era change to Subpart F of the U.S. tax code that allows multinational enterprises to elect whether their entities overseas should be treated as foreign subsidiaries or separate corporations and whether those foreign entities may be disregarded for tax purposes. Making this change would prevent corporations from exploiting differences in the tax systems of the United States and other jurisdictions.

Work with the OECD and international allies, using Treasury's existing statutory authority, to harmonize the disclosure requirements for financial institutions reporting information on accounts to tax authorities under the Foreign Account Tax Compliance Act (FATCA) and the global Common Reporting Standard (CRS), keeping the strongest requirements of each regime. Bringing U.S. financial institution reporting into alignment with non-U.S. financial reporting of account information and making FATCA fully reciprocal will remove a source of irritation that now hinders international cooperation. It will also streamline account information exchanges and reduce compliance burdens on financial institutions by allowing them to use either system when reporting on U.S. account holders. In doing so, the Biden Administration should ensure the new, harmonized standard maintains the citizenship-based aspect of FATCA for U.S. tax collection purposes, and also advocate for a stronger CRS by urging addition of the 30 percent withholding tax penalty for non-compliance now available under FATCA.

Expand information sharing with allies under FATCA. To assist developing countries to combat tax evasion, Treasury should use its existing authorities to send them FATCA-related information on a non-reciprocal basis for a limited time. In addition, Treasury should immediately expand technical assistance programs to low-income countries to ensure that they have the capacity to fully safeguard and utilize the exchanged information, and boost their ability to eventually begin reciprocating the exchange of information with the U.S.

Use Treasury's regulatory authority to reverse the "high-tax exclusion" to the GILTI. The Biden Administration should repeal the Treasury rule under Sections 951A allowing "high-tax exclusions," which allow multinational corporations to deduct their overseas operational expenses from U.S. profits.[12] Further, Treasury should abstain from finalizing rules that do not allow for research and development expenditures to be allocated to GILTI and Subpart F income.[13]

Narrow exemptions to the Base Erosion and Anti-Abuse Tax. Close a loophole created under Treasury Reg. 1.59A-3 that expanded an exclusion from the BEAT to include services payments that have a markup component. Issue regulations that would prevent BEAT payments like royalties from being included in cost of goods sold payments that are exempt from BEAT.

[12] "Guidance Under Sections 951A and 954 Regarding Income Subject to a High Rate of Foreign Tax," 85 Federal Register 44620, July 23, 2020, https://www.federalregister.gov/documents/2020/07/23/2020-15351/guidance-under-sections-951a-and-954-regarding-income-subject-to-a-high-rate-of-foreign-tax.

[13] Stephen E. Shay, Reuven S. Avi-Yonah, Patrick Driessen, J. Clifton Fleming Jr. & Robert J. Peroni, "Why R&D Should Be Allocated To Subpart F and GILTI," 167 Tax Notes Fed. 2081, June 22, 2020, https://dash.harvard.edu/handle/1/42674245.

Longer Term

Revise the Global Intangible Low-Taxed Income (GILTI). The GILTI provisions of the Tax Cuts and Jobs Act allow corporations to pay tax on their foreign profits at half the rate of their domestic profits—10.5 percent versus 21 percent respectively. Even worse, GILTI allows corporations to pay a 0 percent tax rate if they move production offshore. The Administration should encourage Congress to consider legislation (like H.R.1711/S.780, and S.1610; 116th Congress) to equalize the GILTI foreign tax rate with the domestic U.S. tax rate, apply the GILTI on a per-country-basis, and eliminate the deduction based on tangible assets held offshore.

Repeal the Foreign-Derived Intangible Income (FDII) tax break. The FDII deduction under TCJA also increases corporate incentives to move real assets offshore. Functionally, the tax preference rewards companies that reduce their U.S. assets. It also creates a new loophole to move corporate intellectual property to the United States to dodge taxes around the world, undermining the tax base of our allies and contributing to a global race to the bottom on corporate taxation. In addition, FDII may violate the World Trade Organization's rule against export subsidies and risks trade retaliation. The Biden Administration should support congressional efforts (like H.R 1711/S. 780, 116th Congress) to repeal FDII. The Joint Committee on Taxation estimates that repealing FDII would increase U.S. tax revenue by nearly $127 billion over 10 years.[14]

Work with Congress to amend the Base Erosion and Anti-Abuse Tax (BEAT) to increase covered activity and remove arbitrary exemptions. In the definition of "applicable taxpayer" under Section 59A(e), work with Congress to lower the gross receipts exemption level from $500 million to $100 million to make more companies subject to the BEAT tax. Eliminate Section 59A(e)(C) so that all base erosion payments are taken into account, while removing the arbitrary exemption of less than 3 percent payments that has incentivized aggressive tax strategies.

Work with Congress to block corporate inversions through legislation. Partner with Congress to enact legislation (like S. 2140, 116th Congress) that would change the percent ownership tests for tax treatment. The legislation would likewise narrow the IRS definition of a foreign corporation and redefine as a domestic corporation any merged entity that is still controlled in the United States or has kept the majority of its shareholders unchanged.

Work with Congress to eliminate the GILTI exemption for foreign oil and gas income. The TCJA established the GILTI tax, but then exempted Section 907(c)(1) foreign oil and gas extraction income. The Biden Administration should work with Congress to repeal that exemption and hold foreign oil and gas income to the same standard as other foreign income.[15]

[14] "Estimated Budget Effects of the Conference Agreement for H.R. 1, the "Tax Cuts and Jobs Act," Joint Committee on Taxation, https://www.jct.gov/publications.html?func=startdown&id=5053.
[15] Carrie Brandon Elliott, "News Analysis: TCJA's Effects on Oil and Gas Investments," Tax Notes, July 20, 2018, https://www.taxnotes.com/featured-analysis/news-analysis-tcjas-effects-oil-and-gas-investments/2018/07/20/28854.

Work with Congress to restore the inclusion of foreign-base company oil-related income (FBCORI) in Subpart F. Pursue a legislative proposal that requires foreign-base company oil-related income to be taxed under Section 954, thereby undoing the 2017 TCJA repeal that gave oil and gas companies new opportunities to defer tax payments on oil-related income, defined in Sections 907(c) (2) and (3). The Joint Committee on Taxation estimates that this TCJA repeal costs taxpayers $4 billion over a ten-year budget window.[16]

Work with Congress to increase funding to the Internal Revenue Service and Department of Justice for tax investigations and enforcement actions targeting profitable corporations and wealthy individuals that pay little or no tax. Work with congressional appropriators to provide additional funds to hire and train auditors to focus on profitable corporations and wealthy individuals using tax loopholes to circumvent tax, while also curbing audits of low-income individuals and small businesses. Work with appropriators to provide additional funds to DOJ's Tax Division to target banks, accounting firms, investment advisers, and others helping U.S. taxpayers use offshore strategies to avoid payment of tax.

Work with Congress to block dual capacity taxpayers from abusing the foreign tax credit to minimize their U.S. tax liability. Current laws allow U.S. multinational corporations (e.g. extractive companies) to disguise royalties in foreign income tax payments and claim foreign tax credits in excess of what is needed to avoid double taxation.[17] The inflated foreign tax credit gives these companies a competitive advantage over wholly domestic corporations. Work with Congress to pass a provision (like Sec. 3 of S. 586, 115th Congress) closing the loophole to ensure U.S. multinational corporations only are credited for amounts equaling their corresponding U.S. tax liability.

Use Treasury's existing regulatory authority to reform the Arm's Length Standard governing transfer pricing. Regulators and U.S. courts have at times interpreted the current Arm's Length Standard (ALS) — a standard that supposedly ensures transactions between related corporate entities are consistent with those between unrelated parties for the purpose of assessing tax obligations — in a way that at times has upheld transactions that were commercially irrational. Treasury should strengthen IRS Reg. 1.482-1(b) by requiring use of a "rational actor" standard when evaluating transfer pricing arrangements.

5. Boosting Enforcement of Existing Laws

Day One

Announce an intention to strengthen U.S. anti-money laundering enforcement efforts through the Department of Justice, Treasury, financial regulators, and others. Demonstrate the Administration's

[16] Daniel Mulé, "Big Oil Strikes It Rich in Tax Overhaul," Oxfam, January 12, 2018, https://politicsofpoverty.oxfamamerica.org/big-oil-strikes-it-rich-in-tax-overhaul-and-looks-to-repeal-landmark-transparency-law.

[17] "General Explanation of the Administration's Fiscal Year 2017 Revenue Proposals," Department of the Treasury, pp.16-17, February 2016, https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2017.pdf.

resolve to reform the antiquated U.S. AML framework in the wake of the FinCEN Files exposé.[18] Stronger rules would help enforce sanctions on rogue nations, financial institutions, and criminals; clamp down on dirty money seeking entry to the U.S. financial system; and seize more suspect funds.

Announce an initiative to prioritize tax enforcement efforts targeting profitable corporations and wealthy individuals that pay little or no tax.

Announce an intention to work with Congress to increase funding of IRS and Department of Justice investigations and realign enforcement efforts targeting corporate nonpayment of tax. Use existing authorities to reprogram funding, personnel, and resources to focus on profitable corporations that pay little or no tax and curb tax audits of low-income individuals and businesses. Also, work with congressional appropriators to provide additional funds to hire and train relevant auditors and enforcement personnel.

First 100 Days

Hold individuals accountable for corporate misconduct. Ensure that senior officials in the Justice Department, Treasury, and financial regulatory agencies commit to holding individuals at financial institutions, accounting firms, and law firms personally accountable for the actions of their organizations. A 2015 DOJ memorandum outlined steps it was taking to ensure that where corporate misconduct was identified, the individuals responsible were also held accountable.[19] In addition to criminal prosecutions, regulators can take action against individuals by requiring personnel changes, suspending or debarring them from regulated industries, or suspending or revoking their licenses to engage in certain types of business.

In light of the FinCEN Files scandal, increase the number of anti-money laundering financial examiners and strengthen requirements to review correspondent banking portfolios and SAR activities. This increased enforcement focus will help curb billions in dirty money moved through the U.S. financial system.

Initiate a DOJ and SEC analysis to evaluate the deterrent effect of FCPA non-prosecution (NPA) and deferred prosecution agreements (DPA) and the number of referrals provided to and received from other countries. Investigators have come to rely on alternative resolution vehicles like NPAs and DPAs to enforce the Foreign Corrupt Practices Act. While this has generally increased the number of enforcement actions, it is not clear that they have had a qualitative impact in deterring U.S. companies from engaging in corrupt activity abroad.[20]

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[18] "The FinCEN Files," International Consortium of Investigative Journalists (ICIJ), September 20, 2020, https://www.icij.org/investigations/fincen-files.
[19] Individual Accountability for Corporate Wrongdoing, Memorandum from Deputy Attorney General Sally Q. Yates, September 9, 2015, https://www.justice.gov/dag/file/769036/download.
[20] Mike Koehler, "Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement," 49 U.C. Davis Law Review 497 (2015), December 10, 2015, https://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf.

Enhance transparency and accountability around DOJ and SEC enforcement of the Foreign Corrupt Practices Act (FCPA). Regularly update FCPA statistics in a central location that show the number of investigations commenced, ongoing, and concluded without enforcement action. For cases resolved by non-prosecution and deferred prosecutions agreements, detail the reasons a particular type of agreement was chosen, its terms and duration, and how the company has satisfied or failed to satisfy those terms.

Require the Department of Labor to enforce criminal and civil penalties without exception against financial actors convicted of felonious mishandling of pension funds. In addition to holding responsible individuals personally accountable, enforce existing DOL regulations that disqualify affiliates and related parties of a company convicted of certain felonies from enjoying the privileged exemption status of Qualified Professional Asset Managers (QPAMs).[21] A 2015 DOL decision to allow Credit Suisse's affiliates to continue doing business after being convicted of tax crimes highlights DOL's failure to enforce the QPAM disqualification.

Longer Term

Build state and local capacity to investigate money laundering and financial crimes. Criminal activity takes place at the local level, but state and local law enforcement professionals often have not undergone the proper training to recognize suspicious activity or common money laundering methodologies. According to a recent report by the Government Accountability Office (GAO), local law enforcement does not utilize Bank Secrecy Act reports for investigations as much as their federal counterparts, partially due to a lack of FinCEN protocols to promote their use.[22] The Department of Justice should set aside funds for anti-money laundering training to the 93 U.S. Attorneys' offices and use grants under the State and Local Anti-Terrorist Training (SLATT) initiative to help state and local law enforcement investigate and prosecute money laundering crimes.

Increase transparency and accountability of the PCAOB's inspections and enforcement proceedings. A recent report by the nonpartisan watchdog the Project On Government Oversight found that in the board's 16-years of operations, the PCAOB has only brought cases in approximately 2 percent of instances in which it found misconduct.[23] Despite its mission, the PCAOB falls short of holding the Big Four accounting firms and their employees accountable for the plethora of botched audits that give a company's financial statements, internal controls, or both a clean bill of health where there is clear evidence to the contrary. To strengthen the audit industry and protect investors, the Biden Administration should take steps to increase PCAOB enforcement actions and issuance of penalties,

[21] "Adoption of Amendment to PTE 84-14," 75 Federal Register 38842, Jul. 6, 2010, https://www.federalregister.gov/documents/2010/07/06/2010-16302/amendment-to-prohibited-transaction-exemption-pte-84-14-for-plan-asset-transactions-determined-by.
[22] "Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Cost to Comply with Act Varied," Government Accountability Office, p. 14, September 2020, https://www.gao.gov/assets/710/709547.pdf.
[23] David Hilzenrath and Nicholas Trevino, "How an Agency You've Never Heard Of Is Leaving the Economy At Risk," Project on Government Oversight, September 5, 2019, https://bit.ly/3mYRa5h.

where appropriate, and make clear to auditors that they could be held personally accountable for failure to report violations. The Administration should likewise step up PCAOB transparency by publishing current statistics on the total pending and resolved enforcement actions, when compared against total violations; identifying in disciplinary orders which companies had defective audits; and incentivizing and protecting whistleblowers who suspect violations of the Sarbanes-Oxley Act.

6. Appoint Senior Personnel Who Will Prioritize AML, Tax, and Anti-Corruption Measures

Ensure the appointment of senior personnel at the White House, Treasury, State, Justice, Homeland Security, Labor, the SEC, and other agencies who are committed to carrying out the AML, tax, and anti-corruption priorities described in this document. Look for evidence of past accomplishments and secure explicit policy commitments to advance this agenda. Refrain from appointing people who have made careers in tax planning for multinational corporations. See the attached Annex 1 for recommendations on personnel.

Create a team at the Executive Office of the President to combat malign finance. Create a "malign finance" unit, which would report to both the National Security Council and the National Economic Council, to develop policies to counter foreign financial threats and to coordinate reforms with allies.

Place a priority on quickly appointing senior personnel in offices focused on AML, tax, and anti-corruption enforcement to ensure robust enforcement leadership. For example, during the Obama Administration, the Department of Justice Tax Division operated without a senior leader for 6 of 8 years.

Review the Public Company Accounting Oversight Board (PCAOB) to ensure its leadership and staff support greater corporate transparency. The PCAOB oversees the auditors of publicly traded corporations and plays a key role in ensuring that those auditors police corporate compliance with tax transparency requirements. In recent years, PCAOB board members and executive staff have sometimes hindered rather than supported efforts to oversee auditor standards and conduct. Also, consider new ways to prevent agency capture by the auditing firms subject to examination and conduct a review of the large salaries being paid to PCAOB members and staff.

Contact

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