September 2, 2021

The Hon. Ron Wyden, Chair
The Hon. Sherrod Brown
The Hon. Mark Warner

Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Senate Finance Committee Request for Comments on International Tax Proposal

Dear Chair Wyden and Senators Brown and Warner:

We applaud your taking leadership in the reform of international tax law by presenting your International Taxation Overhaul Discussion Draft—or, the "*Draft*." Your plan would raise significant revenue, curb tax-haven abuse, protect American jobs, and begin to meet the challenge set by the Biden Administration to end the international race to the bottom in corporate tax collections. We thank you for this opportunity to comment.

The 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. ATF is a diverse coalition of more than 400 national, state and local endorsing organizations united in support of a fair tax system that works for all Americans.

Please find our below comments ("Comments") to the Draft, which proceed by addressing points raised in or excluded from the Draft and then briefly address false competitiveness concerns more broadly.

<u>Reforms to the Global Intangible Low-Taxed Income (GILTI)</u>

GILTI rate: The Draft does not set a GILTI rate. ***We urge you to equalize the GILTI with the domestic rate.*** Equalization of rates is the best way to attract investment in the United States and create American jobs. A lower GILTI rate creates an explicit incentive to offshore profits, operations and jobs, and it potentially perpetuates the global corporate tax race to the bottom that this Draft can help to end. As your plan leaves open the door to equalizing rates, it is potentially stronger than the corresponding section of President Biden's "Made In America Tax Plan," which proposes a 25% U.S. tax-rate discount for GILTI, creating a 21 percent GILTI rate under the President's plan that should be considered a floor.[1]

[1] Treasury, General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals, https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf [hereinafter, the "Green Book"].

Application of a country-by-country high-tax exclusion in GILTI: The Draft acts to require a jurisdiction-by-jurisdiction determination of the effective tax rate of all jurisdictions in which the taxpayer earns tested income. This determination applies to "tested units" within the foreign jurisdiction, which include controlled foreign corporations (CFCs), foreign branches owned by a CFC, and interests in certain pass-through entities held by a CFC. When a CFC operates in multiple jurisdictions, the operations outside of its country of tax residence would be branches or other separate interests, and each branch or interest is treated as a distinct tested unit from the operations of the CFC in the jurisdiction of its residence. However, such distinct units are ultimately combined with the other tested units within the applicable jurisdiction. Tested units in separate jurisdictions cannot be combined. If the effective tax rate of all tested income in a jurisdiction is equal to or higher than the GILTI rate (applying the Foreign Tax Credit Haircut (defined below)), then the tested income is excluded from the GILTI regime. If a jurisdiction's tested income results in an aggregate loss, then this tested income is also excluded from the GILTI system and considered "high-tax." Jurisdictions determined to have tested income with a lower effective rate than the GILTI rate (as adjusted) are considered to have low-tax income, subject to the GILTI system.

Assuming no material deviation from the Draft on this high-tax exclusion approach, and reform otherwise consistent with these Comments, we note that the approach taken in the Draft does eliminate most problematic cross-crediting that can erode the intended application of GILTI. Nonetheless, we also note that deviations from the Draft may impact this conclusion in unexpected ways. For example, if the "high-tax" exclusion from GILTI applied at a rate that was different than the GILTI rate (as is the case under current law), then this might result in strategic cross-crediting that would allow credits generated in "higher-tax" jurisdictions to inappropriately offset GILTI that should apply in lower-tax jurisdictions. ***Any deviations to the Draft's current approach should therefore be accompanied by a transition to a pure country-by-country application of the GILTI system and related foreign tax credits, precedent for which can be found in the No Tax Breaks for Outsourcing Act (S.714), which we endorse.***

Timing Considerations: The Draft solicits comments on the best way to address timing issues for the country-by-country high-tax exclusion GILTI application. Under current law, timing considerations do not apply, and the GILTI is essentially an annual snapshot. ***We recommend maintaining the current law's approach and do not believe timing issues need to be taken into account under the Draft.*** CFC deficits account for a relatively small share of all earnings and profits and they are concentrated by industry, such that taxpayers that recognize CFC deficits will often not be subject to GILTI or will nonetheless be able to take advantage of tax losses.[2] The Draft's GILTI design further mitigates the need for foreign tax credit carryover as income taxes properly attributable to a CFC with a tested loss after application of the high-tax exclusion may still be considered as tested foreign income taxes under the Draft.

In any event, there should be no loss or credit carryover from any date prior to the effectiveness of final legislation. The current GILTI system allowing for aggregation of all international operations has resulted in perverse incentives to offshore operations and profits, allowing for ample cross-crediting in a way that encourages significant tax planning. In adopting a country-by-country high-tax exclusion GILTI, the Draft remains focused on taxpayer administrability while correcting for prior GILTI flaws; these corrections should not grandfather in prior carryover of losses and credits in a way that would also grandfather in gamesmanship currently encouraged by GILTI.

Application of Deemed Paid Credit and Certain Deductions: ***We believe that only foreign income taxes on tested income less the GILTI deduction, if any, should be available as tested foreign income tax***

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[2] *See* IRS, SOI Tax Stats – Controlled Foreign Corporations, 2016, https://www.irs.gov/statistics/soi-tax-stats-controlled-foreign-corporations.

available as foreign tax credits. This is consistent with the Draft not allowing foreign income taxes on high-tax income excluded from the GILTI system as credits or deductions. It is inappropriate to allow as credits or deductions in the GILTI system foreign income taxes or other deduction on income that is not subject to U.S. taxation within the GILTI system. *As a practical matter, this means that foreign income taxes allowed under the GILTI System should be reduced by an amount equal to the GILTI deduction, if any (the "Foreign Tax Credit Haircut").*

If the GILTI rate is equal to the domestic rate as we recommend, there is no need for a Foreign Tax Credit Haircut. Should the GILTI rate be effectively reduced below the domestic rate, though, the Foreign Tax Credit Haircut should be made equal to this reduction.

In any event, for all purposes, if there is any tax break for foreign income, corporations should not be able to claim deductions or credits against income that was never fully taxed. This should apply uniformly throughout the Code, including any deductions available under section 245A or 250, consistent with the approach taken in the Draft on the GILTI system and the President's plan.[3]

QBAI: The Draft eliminates the exemption of Qualified Business Asset Investment (QBAI) when figuring the U.S. tax on GILTI. As you correctly note, since QBAI is defined as 10% of offshore investments, the QBAI exclusion encourages shifting production out of the United States.

In 2016, both of the tech-giants Alphabet, Inc. (GOOGL) and Facebook, Inc. (FB) invested in long-term assets in the United States at the same rate as they invested in foreign long-term assets.[4] By 2020, GOOGL was growing its investments in foreign long-term assets by 19 percent more than the amount by which it was growing its domestic long-term assets.[5] By 2020, FB was growing its investments in foreign long-term assets by 13 percent more than the amount by which it was growing its domestic long-term assets.[6]The exemption for QBAI is an example of an incentive in the tax code that improperly encourages this increased offshore investment, and the Draft is correct to remove this exemption when figuring GILTI (and, implicitly, as it may increase any deduction for foreign-derived innovation income (discussed below)), or otherwise.

It is also important to note that the QBAI exemption is not equivalent to the substantive carveout currently being contemplated in OECD negotiations. The substantive carveout is meant to ensure that a certain return on *domestic assets* for relevant jurisdictions do not fall under the reach of a global minimum tax. In contrast, the QBAI exemption applies to subsidize foreign investment. There is no reason to subsidize foreign investment at the expense of domestic investment under the tax code.

Allocations to foreign expenses: The Draft states that under the revised GILTI system and conforming amendments to the subpart F system, expenses for research and experimentation (R&E) and for "stewardship" would be treated as 100 percent allocated to U.S. source income if those activities are conducted in the U.S. If these activities are performed outside the U.S., related expenses would be treated

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[3] *See* Green Book.

[4] *See* Facebook, Inc., 2016 Annual Report on Form 10-K, https://s21.q4cdn.com/399680738/files/doc_financials/annual_reports/FB_AR_2016_FINAL.pdf; Alphabet Inc., 2016 Annual Report on Form 10-K, https://www.sec.gov/Archives/edgar/data/0001652044/000165204417000008/0001652044-17-000008-index.html.

[5] *See* Alphabet Inc., 2020 Annual Report on Form 10-K, https://www.sec.gov/Archives/edgar/data/0001652044/000165204421000010/0001652044-21-000010-index.html.

[6] *See* Facebook, Inc., 2020 Annual Report on Form 10-K, https://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/4dd7fa7f-1a51-4ed9-b9df-7f42cc3321eb.pdf.

as they are under current law. The Draft does not otherwise address current law regarding expense allocation under the subpart F system or the GILTI system. ***We urge you to reconsider this element of your Draft.***

As it relates to R&E and stewardship, the Draft is addressing a perceived problem that does not really exist. Supposedly, by properly allocating expenses like domestic R&E to foreign profits, the availability of foreign tax credits is reduced and the GILTI rate is inadvertently increased, discouraging these types of activities. The opposite is true. Under-allocation (or lack of allocation) of R&E and other expenses to foreign income inappropriately subsidizes a taxpayer's foreign taxes at the expense of the U.S. tax base.[7] This may lead to significant revenue loss. Other R&E incentives in the tax code, such as the R&D tax credit in section 41, or better yet public investments in R&E, are far superior alternatives.

The Draft also observes that the U.S. is home to the most multinational corporations. This evidences that stewardship incentives tied to foreign income are not needed. Stewardship is also not specifically defined in the Draft. If contrary to our recommendation this approach is taken, stewardship should be specifically limited to the definition currently used in applicable Treasury regulations, as:

> "[E]xpenses resulting from 'duplicative activities' … or 'shareholder activities' … that are undertaken for a person's own benefit as an investor in a related entity. Thus, for example, stewardship expenses include expenses of an activity the sole effect of which is to protect the investor's capital investment in the entity or to facilitate compliance by the investor with reporting, legal, or regulatory requirements applicable specifically to the investor."

Otherwise, it is easy to see how stewardship could end up swallowing nearly all general and administrative expenses, dramatically reducing U.S. tax revenues. Viewed another way, this is the same as materially increasing (or improperly creating) a GILTI deduction through expense allocation that is not representative of economic reality.

More broadly, the Draft largely ignores other potential complications and gamesmanship that can result from improper expense allocation rules. For example, under proposed rules that would theoretically apply to the Draft if finalized, the determination of whether a jurisdiction was high-tax or low-tax based on effective tax rate would be made based on assigning expenses as they appear in financial statements. Then, following determination of what jurisdictions are high-tax and low-tax, two different sets of competing rules govern GILTI tested income and the FTC limitation included in the GILTI system.[8] As economist Marty Sullivan has noted, this could lead to confusing results and increase the incentive for tax-motivated numbers massaging.[9] For example, inconsistent allocation under any of the three methods might allow taxpayers to avoid paying GILTI tax on what should be low-tax jurisdiction income and cross-crediting could be made available by reallocating expenses among low-tax jurisdiction income following initial effective tax rate determination.

We recommend revising the Draft to require consistent expense allocation for all expenses (including R&E and stewardship) to domestic and foreign income. The Draft should also require consistent application of expense allocation in determining effective tax rate for the high-tax threshold

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[7] Stephen E. Shay et. al, "Why R&D Should Be Allocated to Subpart F and GILTI," Tax Notes Federal, Jun. 22, 2020, https://dash.harvard.edu/bitstream/handle/1/42674245/167tnf2081-Shay.pdf?sequence=1&isAllowed=y.

[8] *See* Treas. Reg. sec. 1.951A-2; sec. 861.

[9] Martin A. Sullivan, "Wyden's Expense Allocation Dilemma," Tax Notes Federal, Vol. 172, Aug. 30, 2021, https://www.taxnotes.com/tax-notes-federal/global-intangible-low-taxed-income-gilti/wydens-expense-allocation-dilemma/2021/08/30/777mh?highlight=herzfeld.

determination and as it relates to determining tested income and foreign tax credit application and limitations.

Fossil-Fuel Incentives: Missing from the Draft is language explicitly removing the current exception to the GILTI system for foreign oil and gas extraction income. There is simply no sound justification for this fossil fuel subsidy given the harsh economic realities of climate change and the substantial revenue it costs.[10] ***Senator Wyden's removal of this inappropriate subsidy in the Clean Energy for America Act (S. 1298) should carry through to the Draft***. *Additionally, as proposed by the President in the Green Book, in the case of a dual capacity taxpayer, the amount of any levy that would qualify as a creditable foreign tax should be limited to the amount of tax that the dual capacity taxpayer would have paid to the foreign government if it were a non-dual capacity taxpayer, thereby codifying the safe harbor included in the current Treasury regulations as the sole method for determining the creditable portion of the levy and avoiding inadvertent U.S. subsidization of foreign-oil production. Finally, foreign base company oil related income should be treated as subpart F income, consistent with the law prior to the unnecessary 2017 corporate tax cuts.*

Deduction for Foreign Derived Innovation Income

FDII: The Draft acts to revise the problematic deduction for foreign derived intangible income and replace it with a deduction for foreign derived innovation income ("FDII"). The revised FDII would provide a deduction tied to qualified research and development ("R&D") expenditures, plus qualified worker training expenses, based on the share of foreign-derived deduction eligible income to total deduction eligible income. There is no compelling reason for the FDII deduction in any form. *As noted above, we recommend equalizing the GILTI and domestic rates. Since you recognize that the Foreign Derived Intangible Income (FDII) rate should match the GILTI rate, adopting our recommendation means that FDII would be taxed like domestic income. In other words, there would no longer be any FDII deduction.*

Even if the GILTI rate remains below the domestic rate, we advise eliminating FDII and using the revenue for productivity-enhancing public investments. In both its current and revised forms, FDII discriminates against businesses serving the domestic market, who cannot take advantage of FDII. There is no reason to privilege R&D activities or postsecondary credentials for non-highly compensated employees generating exports over similar investments made across the economy serving domestic demand. Direct public investments in R&D are more effective and beneficial than tax incentives for corporate R&D, much of which would occur in any event. Some of the most critical employee transition training in the coming years will also occur with respect to transitioning to a renewables-based economy—a largely domestically focused industry, which is expected to benefit America's workers and businesses. Moreover, FDII is under OECD review as a possible harmful tax practice and may violate World Trade Organization agreements, and the proposed Draft does not address or eliminate these risks, including possible retaliatory tariffs.

Reforms to Protect the U.S. Tax Base from Paper Profit-Shifting

Base Erosion and Anti-Abuse Tax (BEAT): The Draft recognizes that the BEAT is deeply flawed and proposes correcting these flaws by (a) restoring the full value of section 38 credits regardless of application of the BEAT; (b) adding a second, higher rate to the BEAT system that would apply to "base erosion income"; and (c) soliciting comment on the best way to incorporate purposes and policies in the President's Stop Harmful Inversions and Ending Low-Tax Developments (SHIELD) proposal.

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[10] *See* Greenbook.

The BEAT has four principal flaws:

1. The BEAT only applies to very large corporations with more than $500 million in average gross receipts over the prior three-year period. By comparison, a key provision in section 163(j) of the code that is meant to protect the U.S. tax base from excessive interest deductions, applies to taxpayers with more than $25 million in average gross receipts over the prior three-year period.
2. The BEAT only applies to corporations whose payments to offshore subsidiaries exceed three percent of their overall deductions. This threshold is unnecessary, creates an arbitrary cliff, and incentivizes gamesmanship.
3. The BEAT excludes critical payment or deduction streams relied on in strategic tax planning in calculating BEAT liability. For example, the BEAT excludes payments for cost of goods sold (COGS), which is technically not a deduction under the tax code. As a result of this, taxpayer behavior has visibly changed since the 2017 tax law. Not surprisingly, taxpayers with foreign income have seen their cost of goods sold increase compared to other deductible income streams subject to the BEAT.[11]
4. The BEAT creates a weak disincentive for base-eroding practices. It effectively applies a "penalty" tax on base-erosion payments that is less than half the domestic corporate rate. There is no reason why a corporation would not engage in base-erosion if the consequences for being caught are typically better than following the rules.

The Draft only explicitly addresses the fourth flaw. In contrast, the SHIELD proposal from the President addresses all of these flaws but the first. However, we would note that there is no reason not to broaden the scope of SHIELD or any reformed BEAT to apply to a larger swath of corporations. A single dollar of base-eroding payments or deductions has the same negative impact on fiscal revenue regardless of the size of the taxpayer engaging in such activities, and there is no logical reason to consider the availability of base-eroding payments as a national competitive advantage. Rather, base-eroding payments are properly viewed as improper payments that should be curbed. The same is true regardless of whether any varying revenue turnover limitations apply for the income inclusion rule currently contemplated under Pillar 2 of the OECD negotiations.[12]

In addition to protecting the U.S. tax base, the SHIELD proposal creates a strong incentive for other nations to reduce abusive tax-haven arrangements, whether or not they agree to the OECD global minimum tax. Multinational corporations seeking to access the largest economy in the world (ours) would need to pay their fair share under the SHIELD proposal regardless of their corporate headquarter address. We strongly support that effort.

Accordingly, a comprehensive base-erosion regime should be put into place via SHIELD or otherwise that addresses each of the BEAT flaws by, at a minimum: (a) applying the regime to corporations with more than $100 million in annual gross receipts, (b) eliminating the BEAT's current three percent offshore payment threshold, (c) removing the BEAT's current exemption for excluded payments like cost of goods sold, and (d) ensuring that the regime applies to base-eroding payments that are subject directly or indirectly to an effective tax rate that is less than the GILTI rate. As a starting point for many of these reforms, please consider the Stop Tax Haven Abuse Act (S. 725).

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[11] Stacey Kelley LaPlante et. al, "Just BEAT It' Do firms reclassify costs to avoid the base erosion and anti-abuse tax (BEAT) of the TCJA?," WU International Taxation Research Paper Series No. 2021-03, Feb. 1, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784739.

[12] OECD, "Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalisation of the Economy, Jul. 1 2021, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf.

Anti-inversion provisions: Missing from the Draft are anti-inversion provisions, which should accompany an increase in the GILTI rate. ***We support the anti-inversion provisions in the Made in America Tax Plan and the No Tax Breaks for Outsourcing Act, which hold that any so-called "inverted" corporation still majority-owned by its pre-inversion shareholders and effectively controlled in the United States should be treated as an American corporation***. Similar provisions are in the Stop Corporate Inversions Act of 2019 (S. 2140), sponsored by Sen. Durbin and cosponsored by 12 senators.

Excess-interest deduction provisions: Missing from the Draft are provisions that directly address excessive interest deductions taken against U.S. income. The No Tax Breaks for Outsourcing Act (S. 714) includes a provision to limit interest deductions for U.S. subsidiaries of a multination corporation in cases where a disproportionate share of the worldwide group's debt is located in the U.S. entity. Disallowed interest with respect to this provision and the existing limitation under section 163(j) could be carried forward for five years. ***The Draft should include these provisions.***

Reporting and Compliance

Public Country-by-Country Reporting:

In connection with adopting the Draft's country-by-country high-tax exclusion GILTI system and reforms consistent with the SHIELD proposal, disclosure currently reported to the IRS for certain multinational corporations on profits, taxes, employees, tangible assets, and other information consistent with IRS Form 8975 should be made public for the benefit of investors, policymakers and the public. Investors need access to this decision-critical information to identify risky tax-behavior that can have material effects on allocated capital. In recent years, risky tax strategies have resulted in billions of dollars of additional taxes owed for corporations like Coca-Cola, Apple, and Caterpillar. Public disclosure of these strategies may have alerted investors to these behaviors and influenced investment decisions.

Policymakers and the public likewise need this information to evaluate the efficacy of our international tax laws. While the information to be made public is already made available to the IRS, the scope of IRS audit review does not involve critical analysis of our international tax laws from the public benefit perspective. The limited tax data available on an industry-by-industry basis, or as a result of current public reporting norms and accounting principles, cannot inform the public debate in a meaningful way, and, in fact, can often lead to misinformed or misleading conclusions.[13] Instead, making this information public can allow policymakers and the public to better understand whether tax laws are applying as intended, and if not, what fixes may be needed to address frequent or material abuses. Further, these policies are in line with a growing trend toward tax transparency.[14] The Disclosure of Tax Havens and Offshoring Act (S. 1545) can provide a framework for including this public reporting, and it was recently passed in the House of Representatives. We also understand that the JCT has communicated to certain offices that appropriately drafted measures requiring public disclosure of this information should be able to be scored.

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[13] Patrick Driessen, "EY's GILTI Study Flawed on Data and Tax Rates," Tax Notes International, Vol. 103, Aug. 30, 2021, https://www.taxnotes.com/tax-notes-international/global-intangible-low-taxed-income-gilti/eys-gilti-study-flawed-data-and-tax-rates/2021/08/30/777bt.

[14] *See Global Reporting Initiative,* "GRI 207: Tax 2019," https://www.globalreporting.org/search/?query=GRI+207; The FACT Coalition, "European Action on Multinational Tax Transparency Requirements Underscores Need for Strong U.S. Action," June 2, 2021. https://thefactcoalition.org/european-action-on-multinational-tax-transparency-requirements-underscores-need-for-strong-u-s-action/.

Financial Account Reporting:

Additionally, absent from the Draft were details regarding the comprehensive financial account reporting regime proposed by the President that may concern international financial accounts. We noted Senator Wyden's S. Amdt 3365, which indicated that reporting under this regime may only apply to "large financial accounts." We understand that the amendment is not necessarily binding; yet, ***we would recommend that this regime not except any accounts larger than the $600 proposed in the President's plan***.[15]

IRS Funding: The Draft did not make any mention of IRS funding. Presumably, this is as a result of the narrow focus of the Draft. ***We would only note that adequate funding for the IRS, in line with the recommendations put forth by the President, is critical to ensuring compliance with the necessary international tax reforms put forth in the Draft, as modified by our Comments***.[16]

Competitiveness Concerns Around the Draft and these Comments

Concerns raised around "competitiveness" for U.S. multinational corporations as a result of equalizing the GILTI Rate with the domestic rate and other Comments included in this letter are either overstated or intentionally misleading. Even prior to the 2017 Tax Cuts and Jobs Act, there was no serious threat to the profitability or competitiveness of American corporations as a result of tax policy.[17] U.S. multinational corporations pay lower effective tax rates than their competitors, and they will continue to do so even following implementing comprehensive international tax reform in line with the Draft, as modified by these Comments.[18]

While the 2017 reform did increase U.S. profits for some large multinational corporations, these profits were not reinvested in a way that spurs meaningful domestic economic growth. Instead, the same corporations that "moved profits" back to the United States enjoyed lower effective global tax rates than prior to the 2017 reforms and focused reinvestment offshore (in line with the perverse QBAI tax reduction incentives deleted by the Draft).[19]Further, increased U.S. profits were used on increasing executive compensation and share buybacks, not creating better paying American jobs.[20] In contrast, the nearly $1 trillion the Treasury Department estimates might be raised as a result of international tax reform in line with these Comments will directly fund investments in infrastructure, American workforce advancement, and combatting climate change—investments that will yield increased economic returns shared by investors, domestic businesses, and working families alike.[21]

The OECD process to create a global minimum tax being pursued by the Department of Treasury is an important complement to the reforms in the Draft, as modified by our Comments. The OECD process is not a gating issue nor a substitute for the reforms in the Draft, as modified by our Comments, and the two

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[15] *See* Green Book.
[16] *See Id.*
[17] Kimberly A. Clausing, "Does tax drive the headquarters locations of the world's biggest companies?," Transnational Corporations, Vol. 25, 2018, https://unctad.org/system/files/official-document/diae2018d4a4.pdf.
[18] Tom Bergin, "Even after Biden tax hike, U.S. firms would pay less than foreign rivals," Reuters, June 2021, https://reut.rs/3AhwmMh.
[19] Patrick Driessen, "A Picture of Whose TCJA Success?," Tax Notes Federal, Vol. 172, Aug. 30, 2021, https://www.taxnotes.com/tax-notes-today-federal/tax-cuts-and-jobs-act/picture-whose-tcja-success/2021/08/30/777m9.
[20] Nicholas Cohen & Manoj Viswanathan, "Corporate Behavior and the Tax Cuts and Jobs Act," University of Chicago Law Review, Vol. Online, Sept. 7, 2019 (last revised Mar. 11, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3449860.
[21] Mark Zandi & Bernard Yaros, "Macroeconomic Consequences of the Infrastructure and Budget Reconciliation Plans," July 2021, https://bit.ly/3Cmpjnc; *see* Green Book.

should not be viewed as in competition with one another. The OECD process will set a floor for a global minimum tax that will end tax-planning that takes advantage of jurisdictions that compete solely on the basis of a lower corporate tax rate for allocation of profits—not allocation of investment. ***This means that the U.S. corporate and GILTI rates can and should be higher than the "at least 15 percent" currently in the preliminary global agreement.*** Even with needed federal tax reform and the OECD reforms, the U.S. will likely have a lower effective tax rate than our top-ten trading partners, with whom we principally compete for investment.[22]

Rather, with our Comments, the Draft will create a more competitive environment for investment than exists today. The U.S. tax system currently employs a 21 percent corporate rate and a 10.5 percent rate on foreign profits; foreign multinationals may not be subject to any tax on their foreign earnings at all. By this measure, relying on headline rates, a U.S. multinational might enjoy a 10.5 percent competitive advantage by investing offshore versus investing domestically. A foreign multinational might enjoy a 10.5 percent advantage investing offshore compared to a U.S. multinational investing offshore. If instead, the domestic corporate rate and the GILTI were both 25 percent, then a U.S. multinational would appropriately no longer enjoy a comparative perverse incentive for investing offshore irrespective of the outcome of the OECD negotiations on minimum tax rate. Critically, this would create tax fairness for domestic businesses that cannot engage in tax-planning afforded to multinationals.

Further, under any likely outcome at the OECD, with a domestic rate and a GILTI rate at 25 percent, any foreign rate advantage of a foreign multinational would be less than the 10.5 percent advantage currently in place. If the OECD minimum rate is finally implemented at 18 percent, for example, the advantage falls to 7 percent; if the OECD minimum rate finally implemented is only 15 percent, the advantage falls to 10 percent (which is still less than 10.5 percent). It is worth reiterating that this tax comparison fails to take into account the competitive advantage created by investing in our infrastructure and workforce, as well as the fight against climate change. This alone likely also justifies an even higher U.S. rate.

Not only is there no reason to "wait and see" on OECD negotiations, there is a critical reason that U.S. international tax reform should occur now—by doing so, the U.S. will maintain its position as a leader in the negotiations. The OECD negotiations were nearly dead before Biden proposed his plans.[23] A higher GILTI and strengthened base-erosion provisions positions the U.S. to negotiate for a higher global minimum rate and stricter base-erosion provisions in OECD negotiations from a position of strength and transparency. And efforts to increase the global minimum rate above 15 percent should continue in earnest. In contrast, failing to enact domestic international tax reform hobbles the United States in OECD negotiations and creates unnecessary political risks for federal and global tax reform. Delaying federal international tax reforms also means delaying investments funded by these reforms that can curb *serious* existential threats to investor capital costs (such as climate change).[24]

Conclusion

This process presents an historic opportunity, complemented by a potential agreement at the OECD level, to reform the international tax system and curb multinational corporate tax avoidance, which starves

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[22] *See* Joint Committee on Taxation, "U.S. International Tax Policy: Overview and Analysis," Mar. 25, 2021, https://www.jct.gov/publications/2021/jcx-16r-21/.

[23] Associated Press, "OECD Head: Biden's Global Tax Proposal 'A Game Changer," June 2021, https://bit.ly/3fCIi34.

[24] Chris Lafakis et. al, "The Economic Implications of Climate Change," Moody's Analytics, June 2019, https://www.moodysanalytics.com/-/media/article/2019/economic-implications-of-climate-change.pdf.

governments around the world of the revenues they need to address investment deficits, economic inequality, global pandemics, and the climate crisis. Concerns about "competitiveness" and how the global negotiations under OECD may interact with U.S. international tax are overstated or—worse—misleading. ***Rather, Congress should act now to implement these Comments into the Draft prior to its final passage to ensure that the critical investments comprising part of the President's Build Back Better agenda are fully funded in a manner that ensures that tax-dodging corporations that also stand to benefit from these investments pay their fair share*****. Critically, d**oing so will ***improve competitiveness for American working families and domestic businesses*****, while simultaneously ensuring the most favorable OECD agreement is reached.**

Your continued strong leadership is imperative to achieve these outcomes. We thank you for considering these comments.

Sincerely,

Ian Gary
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FACT Coalition

Frank Clemente
Executive Director
Americans for Tax Fairness