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UNDERSTANDING INTERNATIONAL TAX AVOIDANCE AND TAX EVASION POST-TCJA

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Abstract

Late in 2017, Congress passed the Tax Cuts and Jobs Act ("TCJA"). Although the TCJA contained a myriad of provisions that will impact the Internal Revenue Code ("IRC"), this comment will focus on those that were enacted to combat international tax avoidance and evasion. Before the new TCJA provisions are introduced, this comment will explain some of the common tax terminology that frames the need for tax reform; for example, territorial tax system, tax avoidance, tax evasion, and loopholes. This comment will only focus on the TCJA provisions that will impact multinational companies.

The following IRC provisions will be analyzed: IRC 965 One-Time Deemed Repatriation; IRC 245A The Participation Exemption; IRC 951A Global Intangible Low-Taxed Income; IRC 250 Foreign-Derived Intangible Income; IRC 59A Base Erosion and Anti-Abuse Tax. Following an introduction of the new provisions, there will be an analysis including how the new provisions are expected to be applied, their effectiveness, and the new loopholes. Finally, tax reform is only one way to combat tax evasion and tax avoidance that has gone too far. This comment will identify and evaluate solutions that do not rely solely on tax reform.

I. INTRODUCTION

Just before taxes are due, on April 15th[1], there are often news reports regarding people who are under investigation by the Internal Revenue Service ("IRS") for some tax related scandal. In 2018, Amazon.com, Inc. ("Amazon")—a company with a market value exceeding $1 trillion[2]—reported U.S. profits in excess of $11.2 billion.[3] Amazon paid no federal income taxes on that profit.[4] 2018 was not an anomaly—Amazon reported U.S. profits of $5.6 billion

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1. I.R.C. § 6072(a) (2018). Not considering taxpayer requests for extensions, April 15th is the deadline for taxpayers who file using a calendar year as opposed to a fiscal year. *Id.*

2. David Streitfeld, *Amazon Hits $1,000,000,000,000 in Value, Following Apple*, N.Y. TIMES (Sept. 4, 2018), www.nytimes.com/2018/09/04/technology/amazon-stock-price-1-trillion-value.html.

3. Matthew Gardner, *Amazon in Its Prime: Doubles Profits, Pays $0 in Federal Income Taxes*, INST. ON TAX'N & ECON. POL'Y (Feb. 13, 2019), www.itep.org/amazon-in-its-prime-doubles-profits-pays-0-in-federal-income-taxes/.

4. *Id.*

in 2017 and, likewise, paid no federal income taxes on that profit.[5] Outside of the U.S., Amazon was able to pay little to no taxes on its international profits as a result of its entity structure and its allocation of most of its profits to its Luxembourg-based holding company.[6] Amazon is not alone; many corporations and wealthy individuals perceive tax planning as a game, where the objective is to reduce their taxes to as little as possible.[7] Some people commend the ability to pay the lowest amount of taxes and others are troubled by it. This comment will look at how Amazon and other corporations and individuals are able to reduce their tax liabilities and how that has recently changed.

Surprising tax stories might emerge in the next few years given the changes in the Internal Revenue Code ("IRC"), most of which took effect in 2018.[8] On December 20, 2017, Congress passed what is commonly known as the "Tax Cuts and Jobs Act" ("TCJA"), although its official name is "An act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018."[9] The shorter TCJA name was found to be in violation of the Byrd Rule[10] because it was too short, and the Senate petitioned for it to be changed.[11] The TCJA was passed in

5. *Id. See also* Laura Stampler, *Amazon Will Pay a Whopping $0 in Federal Taxes on $11.2 Billion Profits*, FORTUNE (Feb. 14, 2019), www.fortune.com/2019/02/14/amazon-doesnt-pay-federal-taxes-2019/.

6. Brian Mistler, *Taking Action Against Base Erosion Profit Shifting*, 32 ARIZ. J. INT'L & COMP. L. 902, 918 (2015).

7. Sara Dillon, *Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation*, 50 INT'L LAW. 275, 289-90 (2017).

8. The last major tax act was passed in 1986, although there have been other additions to the IRC since 1986. Timothy J. McCormally, *Tax Reform and the IRS: Five Takeaways for Tax Practitioners*, TAX ADVISOR (June 1, 2018), www.thetaxadviser.com/issues/2018/jun/tax-reform-irs-five-takeaways-tax-practitioners.html.

9. Howard Gleckman, *The 2017 Lump of Coal Award: Tax Cuts and Jobs Act Edition*, FORBES (Dec. 22, 2017), www.forbes.com/sites/beltway/2017/12/22/the-tax-vox-2017-lump-of-coal-award-tax-cuts-and-jobs-act-edition/. The Senate decided at the last minute that the abbreviated title "Tax Cuts and Jobs Act" could not be used. *Id.* However, nine sections still refer to the Act as the "Tax Cuts and Jobs Act." *An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018*, PUB. L. NO. 115-97 (2017). Throughout this comment the Tax Act will be referred to as the "TCJA."

10. The Byrd Rule "prohibits the Senate from passing legislation using the budget reconciliation rules if the legislation contains extraneous provisions." Sally P. Schreiber, *Congress Passes Tax Reform*, J. OF ACCT. (Dec. 20, 2017), www.journalofaccountancy.com/news/2017/dec/congress-passes-tax-reform-201718091.html.

11. Naomi Jagoda, *Senate Parliamentarian Rules Against GOP Tax Bill's Name*, THE HILL (Dec. 19, 2017), www.thehill.com/policy/finance/365691-senate-parliamentarian-rules-against-gop-tax-bills-name; Thomas Kaplan & Alan Rappeport, *Republican Tax Bill Passes Senate in 51-48 Vote*, N.Y. TIMES (Dec. 19, 2017), www.nytimes.com/2017/12/19/us/politics/tax-bill-vote-congress.html (explaining the need to change the name).

such a rush that there was not enough time to change the name to a less lengthy and less generic one.[12] Many people believe that in the rush to pass the TCJA, existing tax loopholes were left open—and new ones were created.[13] A major concern with the TCJA is the adequacy of its substantive provisions.[14]

Among the changes to the IRC are new international provisions that apply to corporations, as well as revisions to some of the preexisting provisions.[15] The reason for changing the IRC was partly to incentivize domestic businesses to continue their operations in the U.S.[16] Another reason was to entice domestic businesses who moved abroad to bring back their money and operations to the U.S. to help stimulate the economy.[17] Although there were many reasons for updating the IRC, the focus of this comment will be on its implications for tax evasion and avoidance in the international context.

Apple Inc. ("Apple") is an example of a U.S. corporation that will be significantly impacted by the TCJA. In 2018, Apple became the world's first public company to have a market value of over $1 trillion, which ordinarily would result in a large source of tax revenue for the government.[18] After all, just like individuals who pay taxes on the income they earn, corporations also pay income taxes. Apple's 2017 10-K[19] filing reports that Apple's foreign

12. Paul Starr, *The Tax Act That Lost Its Name*, AM. PROSPECT (June 28, 2018), www.prospect.org/article/tax-act-lost-its-name. The confusion and subsequent explanations required for adequate comprehension and application of the TCJA could result in a "technical corrections" bill from Congress in order to address errors in the legislation. *Id.*

13. *Id.* While some of the errors are only cosmetic, there are some errors that create substantive issues, such as having the potential to void certain provisions. *Id.*

14. *Id.*

15. Kyle Pomerleau, *A Hybrid Approach: The Treatment of Foreign Profits Under the Tax Cuts and Jobs Act*, TAX FOUND. (May 3, 2018), www.taxfoundation.org/treatment-foreign-profits-tax-cuts-jobs-act/ [hereinafter Pomerleau I]. The main international provisions of the TCJA include: The Participation Exemption, Global Intangible Low Tax Income ("GILTI"), Foreign Derived Intangible Income ("FDII"), and The Base Erosion and Anti-Abuse Tax ("BEAT"). *Id.*

16. Philip Wagman, et al., *Tax Reform Implications for U.S. Businesses and Foreign Investments*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 5, 2018), www.corpgov.law.harvard.edu/2018/01/05/tax-reform-implications-for-u-s-businesses-and-foreign-investments/.

17. *Id.*

18. Thomas Heath, *Apple is the First $1 Trillion Company in History*, WASH. POST (Aug. 2, 2018), www.washingtonpost.com/business/economy/apple-is-the-first-1-trillion-company-in-history/2018/08/02/ea3e7a02-9599-11e8-a679-b09212fb69c2_story.html?utm_term=.30616b33da46.

19. "A 10-K is a comprehensive report filed annually by a publicly traded company about its financial performance and is required by the U.S. Securities and Exchange Commission (SEC)." Will Kenton, *10-K*, INVESTOPEDIA (June 1, 2019), www.investopedia.com/terms/1/10-k.asp.

subsidiaries generated approximately $252.3 billion in profits.[20] That amount represents about 10% of the disclosed profits that are being held offshore by U.S. companies.[21] If those profits are distributed back to the parent company in the U.S., Apple will owe about $78.5 billion in taxes to the IRS.[22] However, that estimate is based on the IRC before the TCJA, and the TCJA changes the tax imposed on distributed profits from foreign-affiliated companies.

Apple is one of the many U.S. corporations that will be impacted by the TCJA, specifically with regard to the money it is holding overseas.[23] Early in January 2018, Apple announced it anticipated it would pay about $38 billion in taxes on the revenue generated by its foreign subsidiaries that is held abroad.[24] The reason for its announcement is the fact that the TCJA now requires taxes to be paid on certain foreign-sourced income, regardless of whether the revenue is brought back to the U.S. or not.[25] The estimated $38 billion tax bill represents less than half the amount of tax Apple reportedly owed on the $252.3 billion in profits it keeps outside the U.S.[26] Even though the TCJA will help generate tax revenue from the money and other assets U.S. companies are holding abroad, the TCJA does not require those companies to bring any of the money or assets back.[27] As of 2018, 94% of Apple's cash generated abroad remains there.[28] Courtesy of a new provision in the TCJA, Apple is allowed to make a one-time cash distribution of its foreign-source income to its U.S.-based entity at a new lower tax rate.[29]

This comment will analyze the international business dealings that were created by some corporations to avoid paying U.S. tax, and others, in order to evade U.S. tax. The differences between tax

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20. *Fact Sheet: Apple and Tax Avoidance*, INST. ON TAX'N & ECON. POL'Y (Nov. 5, 2017), www.itep.org/fact-sheet-apple-and-tax-avoidance/.

21. *Id.*

22. *Id.*

23. Daisuke Wakabayashi & Brian X. Chen, *Apple, Capitalizing on New Tax Law, Plans to Bring Billions in Cash Back to U.S.*, N.Y. TIMES (Jan. 17, 2018), www.nytimes.com/2018/01/17/technology/apple-tax-bill-repatriate-cash.html. It is estimated that the new provisions in the TCJA will allow Apple to bring back its overseas profits and result in about $43 billion in tax savings. *Id.*

24. Molly Moses, *Repatriation Tax Has Distribution Loophole, Analyst Says, 2018,* LAW360 TAX AUTH. 19-172 (Jan. 19, 2018), www.law360.com/tax-authority/articles/1004031/repatriation-tax-has-distribution-loophole-analyst-says. In addition to the new tax payments, Apple plans to "contribute more than $350 billion to the U.S. economy over the next five years." *Id.*

25. *Id.*

26. *Fact Sheet: Apple and Tax Avoidance*, *supra* note 20.

27. Erica York, *Evaluating the Changed Incentives for Repatriating Foreign Earnings*, TAX FOUND. (Sept. 27, 2018), www.taxfoundation.org/tax-cuts-and-jobs-act-repatriation/.

28. Wakabayashi & Chen, *supra* note 23.

29. *Id.* "Apple has saved $43 billion in taxes" under the special TCJA provision. *Id.* Even if Apple decided not to bring the money back to the U.S., it would be taxed on its foreign holdings. *Id.*

avoidance, tax evasion, and the impact they have on the IRS's ability to collect income tax will also be analyzed. This comment will focus on the international TCJA provisions that were enacted to help address the problems associated with tax avoidance and tax evasion. Part II of this comment will lay out the new and modified IRC provisions that will impact domestic individuals and businesses with international ties.[30] Part III of this comment will strategically decipher the IRC and how it has resulted in abusive tax schemes,[31] as well as acceptable tax schemes. Part IV of this comment will offer various suggestions for addressing tax evasion and tax avoidance.[32] The proposal will focus on individual and organizational comprehension of the IRC and collaboration. It will also consider requiring taxpayers to evaluate the Congressional intent of the IRC provisions rather than only looking at the words. Finally, the need for an evaluation of IRS efficiency and the IRS's ability to audit more tax returns, in order to increase taxpayer accountability, will be addressed.

II. BACKGROUND

The TCJA adds another layer of complexity to the already confusing and ambiguous IRC.[33] Most businesses and individuals do not like paying taxes, but that does not mean taxpayers can neglect to pay taxes.[34] Additionally, "[t]he losers under this tax

30. "International ties" refer primarily to businesses dealings or other tax strategies that require a domestic corporation or individual to establish a relationship abroad solely for tax purposes. *See Briefing Book: What are the Consequences of the New US International Tax System?*, TAX POL'Y CTR., www.taxpolicycenter.org/briefing-book/what-are-consequences-new-us-international-tax-system (last visited Jan. 8, 2020) (describing the TJCA's impact on multinational corporations).

31. *Overview – Abusive Tax Schemes*, I.R.S., www.irs.gov/compliance/criminal-investigation/overview-abusive-tax-schemes (last updated July 10, 2019). "Abusive tax schemes have evolved from simple structuring of abusive domestic and foreign trust arrangements into sophisticated strategies that take advantage of the financial secrecy laws of some foreign jurisdictions and the availability of credit/debit cards issued from offshore financial institutions." *Id.*

32. It is estimated that in 2012, profit shifting cost the IRS about $77 billion to $111 billion in unpaid taxes. Kimberly A. Clausing, *The Effect of Profit Shifting on the Corporate Tax Base*, TAX NOTES (Jan. 25, 2016), www.taxhistory.org/www/features.nsf/Articles/622F036AA4CAD8DF85257F5D006799D2. While it is important to estimate the amount of unpaid taxes, it is hard to obtain an accurate figure. *Id.* This is because the strategies employed by taxpayers are often implemented so that they do not to report or disclose the income, and without the disclosure, it is hard to obtain an accurate estimate. *Id.*

33. Ray Martin, *Tax Planning 2018: Confusion Under the New Tax Law Can Be Costly*, CBS: MONEYWATCH (July 3, 2018), www.cbsnews.com/news/tax-planning-for-2018-confusing-under-new-tax-law/.

34. Marjorie E. Kornhauser, *People Don't Like Paying Taxes. That's Because They Don't Understand Them.*, WASH. POST (Apr. 14, 2017),

system" argue that winning taxpayers should not be able to avoid taxes in legal, but questionable ways.[35] Terms such as tax evasion, tax avoidance, tax loopholes, and tax planning are frequently used, but what do they really mean? The new TCJA tax provisions might seem like a bunch of catchy acronyms and words on paper, but they are relevant to the future of taxation for both individuals and businesses in the U.S., as well as those with international ties.

Taxes can be imposed by states, the federal government, or even international governments. Some common taxes that impact individuals and businesses include: sales tax, property tax, state income tax, federal income tax, duties, excise tax, etc. Although the focus of this comment will primarily be on the taxes imposed on businesses with international ties, that is only one aspect of tax avoidance and tax evasion. In order to comprehend the magnitude of the issues arising from tax evasion, it is important to remember that there are many different avenues a tax evader can take both domestically and internationally.

This portion of the comment will look at the U.S. tax system and various provisions that play a large role in the structure of international business dealings. In order to do that, it is necessary to unpack some commonly used tax terms that are easily misconstrued. Additionally, this section will focus on the federal tax system and some of the main IRC provisions from the TCJA.

A. Tax Terminology

1. Worldwide vs. Territorial Tax Systems

In every tax system, knowing who has influence over the tax system is important to identify issues and propose solutions. The "power to lay and collect taxes, duties, imposts and excises" comes from the Constitution and is bestowed upon Congress.[36] Additionally, Congress has the power to impose and collect said taxes "on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."[37] Congress used the aforementioned powers to enact the IRC, which is found in Title 26 of the United

www.washingtonpost.com/posteverything/wp/2017/04/14/people-dont-like-paying-taxes-thats-because-they-dont-understand-them/. People are quick to argue that taxes are unfair or too high, but they are often misinformed. *Id.*

35. Matthew Gardner, *The 35 Percent Corporate Tax Myth*, INST. ON TAX'N AND ECON. POL'Y (Mar. 9, 2017), www.itep.org/the-35-percent-corporate-tax-myth/. The losers include: the general public, disadvantaged companies, the U.S. economy, state government and state taxpayers, and "the integrity of the tax system and public trust therein." *Id.*

36. U.S. CONST. art. I, § 8.

37. U.S. CONST. amend. XVI.

States Code.[38] On July 1, 1862, Congress established the IRS.[39] The IRS is not in charge of creating taxes; instead, the IRS is in charge of enforcing and collecting taxes.[40]

It is also important to identify where income is generated. Prior to the enactment of the TCJA, income generated in foreign countries would usually be subjected to U.S. taxation.[41] In other words, before the TCJA, the U.S. tax system was a worldwide tax system, which means income is taxed regardless of where it is earned.[42] If U.S. businesses, with operations abroad, wanted to distribute any profits earned abroad back to the U.S., the distributions were taxed as ordinary income with an allowance for taxes paid abroad.[43] That method of taxation changed when the TCJA was passed. The TCJA arguably[44] converts the U.S. tax system into a territorial system.[45] Under the new system, U.S. businesses generally receive an exemption[46] for all income earned abroad and U.S. tax is never paid.[47]

38. *Facts & Fiction of Frivolous Arguments – Nonfiler Enforcement*, I.R.S., www.irs.gov/compliance/criminal-investigation/facts-fiction-of-frivolous-arguments-nonfiler-enforcement (last updated July 31, 2019).

39. *Id.*

40. Laura Kalick, *Exempt Organizations IRS Priorities*, BDO (Nov. 19, 2015), www.bdo.com/blogs/nonprofit-standard/november-2015/exempt-organizations-irs-priorities.

41. Pomerleau I, *supra* note 15.

42. Alex Trostorff & Trevor Wilson, *Worldwide Tax System vs. Territorial Tax System*, NAT'L L. REV. (Feb. 1, 2017), www.natlawreview.com/article/worldwide-tax-system-vs-territorial-tax-system. Some people argue that even after considering the changes from the TCJA, the U.S. tax system is not a pure territorial system nor is it a pure worldwide system—it is a hybrid. Pomerleau I, *supra* note 15. Regardless of what system prevails, it is clear that extraterritorial profits will be taxed, as the TCJA requires repatriation. *Id.*

43. Wagman, et al., *supra* note 16.

44. The TCJA does not eliminate all instances of taxation on income from countries other than the United States. William G. Gale, et al., *Effects of the Tax Cuts and Jobs Act: A Preliminary Analysis*, TAX POL'Y CTR. 1, 6 (June 13, 2018), www.taxpolicycenter.org/sites/default/files/publication/155349/2018.06.08_tcja_summary_paper_final_0.pdf.

45. John Myrick, *Making Sense of the New, Modernized International Tax Regime*, CPA PRAC. ADVISOR (Apr. 10, 2018), www.cpapracticeadvisor.com/news/12407291/making-sense-of-the-new-modernized-international-tax-regime.

46. The new international TCJA provisions do not eliminate all tax on foreign earnings, but rather there are a series of provisions that allow for new deductions that end up reducing the tax owed. Mindy Herzfeld, *New Analysis: How Some Taxpayers Got Cut Out of the Tax Cuts and Jobs Act*, TAX NOTES (Jan. 22, 2018), www.taxnotes.com/tax-reform/news-analysis-how-some-taxpayers-got-cut-out-tax-cuts-and-jobs-act.

47. *Id.*

2. Tax Evasion

Tax evasion, or tax fraud, is the willful act of a taxpayer deciding not to pay taxes.[48] This occurs when a taxpayer deliberately claims a deduction that the taxpayer is not entitled to, when a taxpayer understates income or overstates expenses, or when a taxpayer fails to report earned income.[49] For example, the former owner of a Texas frozen food business used foreign intermediary companies to sell shrimp to the Texas company at an inflated cost in order to report lower income in the U.S.[50] In that example, the taxpayer overstated the business' expenses—the cost of the shrimp—in order to understate income.[51] As a result, the taxpayer had to pay the IRS over $1.2 million, and was sentenced to fifteen years in prison.[52] While that was an example of a taxpayer who overstated expenses, failure to report income earned abroad may also constitute tax evasion.[53]

The IRS defines "gross income" very broadly, "income from whatever source derived," including[54] income earned overseas.[55] However, the TCJA introduced a few new international tax provisions[56] that eliminate the tax imposed on income generated overseas and brought back to the U.S.[57] Those provisions are subject

48. I.R.C. § 7201 (2018). The penalty is no more than $100,000 for individuals, no more than $500,000 for corporations, or up to 5 years in jail—and in some cases both a fine and imprisonment may be imposed. *Id.*

49. Smith v. Comm'r, 151 T.C. 47, 51-52 (2018) (explaining that a taxpayer who claimed a foreign tax credit from its Hong Kong affiliate should not have because it was not a controlled foreign corporation, resulting in the more than $21 million distribution to the U.S. company being classified as a taxable dividend).

50. *IRS: Criminal Investigation Annual Report 2017*, I.R.S. 55 (Dec. 20, 2017), irs.gov/pub/foia/ig/ci/2017_criminal_investigation_annual_report. pdf.

51. *Id.*

52. *Id.* It is estimated that the entire wire and tax fraud scheme amounted to $5.3 million. *Id.*

53. Jarret Jacinto, *Tax Violations*, 45 AM. CRIM. L. REV. 995, 1024 (2008). The audit process by IRS agents is very cumbersome and often results in an investigation of prominent taxpayers instead of the general population. *Id.* at 997-98.

54. The new TCJA provisions changed the way certain businesses will be taxed on overseas profits in the short-term and the long-term. Pomerleau I, *supra* note 15. This was briefly mentioned in the "Worldwide vs. Territorial Tax System" section above, but it will also be discussed in length in the analysis section.

55. I.R.C. § 61 (2018). The general definition lists fourteen items that are included in gross income, but explicitly states that the list is not exhaustive—leaving discretion at the hands of the IRS. *Id.*

56. The new provisions will be discussed in length in the "Internal Revenue Code Sections" portion of this comment. They include the following: One-time Deemed Repatriation, Participation Exemption, Global Intangible Low Tax Income, Foreign Derived Intangible Income, and Base Erosion and Anti-abuse Tax.

57. Eric Toder, *Explaining the TCJA's International Reforms*, TAX POL'Y

to various requirements and exceptions, which will be discussed in detail later.[58]

3. *Tax Avoidance*

Tax avoidance is a method of reducing the amount of tax a taxpayer owes by using "legal maneuvers," such as loopholes in the IRC.[59] As the United States Court of Appeals for the Second Circuit pointed out, "[a]nyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."[60] Tax avoidance results in about $135 billion of uncollected tax revenue every year.[61]

The IRS is unable to, though some argue it should be able to, collect taxes on income that escapes taxation as a result of tax avoidance.[62] Another cost of tax avoidance, that is often hard to monetize, is the cost to the U.S. economy, which results from funds being kept out of the U.S., as well as U.S.-based jobs that are relocated overseas.[63]

4. *Tax Loophole*

The term "tax loophole" is not in the IRC, but its meaning and use is widely known. A loophole is "[a]n ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements; esp., a tax-

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CTR. (Feb. 2, 2018), www.taxpolicycenter.org/taxvox/explaining-tcjas-international-reforms.

58. *Id.*

59. Steven A. Bank, *When Did Tax Avoidance Become Respectable?*, 71 TAX. L. REV. 123 (2017).

60. Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934) (holding that a deficiency was properly assessed on a taxpayer who set up a corporation for the sole purpose of reducing taxes on the sale of stock that an already existing company owned), *aff'd sub nom.* Gregory v. Helvering, 293 U.S. 465 (1935).

61. Michael Cohn, *House Committee Debates Tax Reform Prospects*, ACCT. TODAY (May 18, 2017), www.accountingtoday.com/news/house-committee-debates-tax-reform-prospects. This article was published in the same year the Trump administration's tax overhaul was passed, and the last major tax "reform" was passed over 30 years ago. *Id.*

62. Bank, *supra* note 59, at 128. An investment banker from J.P. Morgan, who was investigated in connection with the stock market crash and subsequent Great Depression, disagreed with the negative light cast on tax avoidance, claiming, "if the government doesn't know enough to collect taxes, a man's a fool to pay them." *Id.* (internal citations omitted).

63. Alexandra Thornton, *11 Ways the Wealthy and Corporations Will Game the New Tax Law*, CTR. FOR AM. PROGRESS (July 25, 2018), www.americanprogress.org/issues/economy/reports/2018/07/25/453981/11-ways-wealthy-corporations-will-game-new-tax-law/ (noting that some costs include a reduction in funding for "infrastructure improvements, education, health care, and more").

code provision that allows a taxpayer to legally avoid or reduce income taxes."[64] Eventually, the IRS may get around to explaining ambiguities and addressing loopholes, but by then new loopholes will be discovered and used, causing the cycle to repeats itself.[65]

Tax loopholes raise many concerns: loss of tax revenue, fairness, distorted economic and business decisions, compliance, and enforcement.[66] For example, tax loopholes are often only available to the wealthy who can hire advisors to sift through the IRC and find opportunities to reduce taxes owed.[67] Fairness is often the biggest gripe with tax loopholes, with people asking, 'Why does everyone have a loophole but me? Why shouldn't I have a window to crawl out of?'[68] In response to that question and other concerns raised by various individuals about taxpayer morale, Congress passed the Tax Reform Act of 1969.[69] However, that Act could not address every concern, as evidenced by the subsequent tax reform attempts.[70]

5. *Tax Planning*

"Tax planning is the analysis of a financial situation or plan from a tax perspective."[71] Taxpayers are free to use tax provisions that have been derived from "policy judgments reached through a democratic process."[72] The charitable deduction is an example of a tax planning deduction, which has been an allowable deduction for many years.[73] Tax planning is one of the many terms used to describe "tax strategies," but it is often viewed more positively than

64. *Loophole*, BLACK'S LAW DICTIONARY (10th ed. 2014).

65. Lily Batchelder & David Kamin, *The GOP Tax Plan Creates One of the Largest New Loopholes in Decades*, L.A. TIMES (Dec. 31, 2017), www.latimes.com/opinion/op-ed/la-oe-batchelder-kamin-tax-deduction-pass-through-income-20171231-story.html.

66. Heather M. Field, *A Taxonomy for Tax Loopholes*, 55 HOUS. L. REV. 545, 565-73 (2018) [hereinafter Field].

67. *Id.* at 555. Even though loopholes are available, taxpayers should not be so quick to utilize them as there could be unintended future problems. *Id.* at 547.

68. Bank, *supra* note 59, at 130.

69. *Id.* (noting, "Joseph Barr, President Lyndon Johnson's Treasury Secretary, warned of a possible 'tax revolt' over 'the inequities in the tax code'" including several loopholes used by the wealthy) (internal citations omitted).

70. *Id.*

71. Julia Kagan, *Tax Planning*, INVESTOPEDIA (June 30, 2019), www.investopedia.com/terms/t/tax-planning.asp.

72. Heather M. Field, *Aggressive Tax Planning & The Ethical Tax Lawyer*, 36 VA. TAX REV. 261, 305 (2017) (internal citations omitted) [hereinafter Field II].

73. Joseph Rosenberg, et al., *The New Debate Over a Charitable Deduction for Nonitemizers*, URB. INST. 1, 2 (Oct. 2016), www.taxpolicycenter.org/sites/default/files/publication/135446/the-new-ebate-over-a-charitable-deduction-for-nonitemizers.pdf. The policy motivation behind the deduction is to encourage charitable giving. *Id.*

other terms that connotate the same ideas.[74] Tax planning is similar to tax avoidance, but without the negative connotation.[75] There seems to be a difference between "permissible tax planning" and "unethical loophole lawyering."[76]

B. Internal Revenue Code Sections

The key to a successful analysis of tax provisions is to look beyond the terminology and determine what exactly the legislature was trying to accomplish.

1. IRC Section 965 Modification – One-Time Deemed Repatriation

The modification of IRC Section 965[77] is one of the TCJA changes that is moving the U.S. tax system towards a territorial system.[78] Prior to the TCJA, U.S. businesses that made profits overseas only paid taxes on that income when it was brought back to the U.S.[79] Post-TCJA, qualifying businesses whose fiscal year began before January 1, 2018 were subject to a mandatory transition tax.[80] The transition tax required certain corporations to pay taxes on any of the deferred foreign-sourced income that was generated from 1986 through December 31, 2017.[81] Given that the accumulated amounts of foreign-sourced income for certain U.S. shareholders will be large, shareholders will have eight years to pay the transfer tax.[82] The transfer tax applies to controlled foreign corporations[83] ("CFCs") and other foreign corporations, but excludes

74. Bank, *supra* note 59, at 124-25.

75. Lauren O'Malley, *Delineating Permissible Tax Planning and Abusive Tax Avoidance: Tax Shelters, Pre-Tax Profit, and the Foreign Tax Credit*, 36 B.U. INT'L L.J. 143, 145 (2018).

76. Field II, *supra* note 72, at 268.

77. I.R.C. § 965(a). The provision is titled "Treatment of deferred foreign income upon transition to participation exemption system of taxation." *Id.*

78. Toder, *supra* note 57.

79. Paul Sczudlo & Megan Lisa Jones, *Bring It Home*, 41 L.A. LAW., Sept. 2018, at 22, 24.

80. *Section 965 Transition Tax*, I.R.S., www.irs.gov/businesses/section-965-transition-tax (last updated June 26, 2018).

81. I.R.C. § 965 (2018).

82. *State Preliminary Assessment of IRS Section 965 Reporting Guidance*, GRANT THORNTON (Apr. 13, 2018), www.grantthornton.com/library/alerts/tax/2018/SALT/General/IRS-Section-965-reporting-guidance.aspx.

83. "A controlled foreign corporation is any foreign corporation in which more than 50 percent of the total combined voting power of all classes of stock entitled to vote is owned directly, indirectly, or constructively by U.S. shareholders on any day during the taxable year of such foreign corporation or more than 50% of the total value of the stock is owned directly, indirectly or constructively by U.S. shareholders on any day during the taxable year of the corporation." IRM 4.61.7.3 (Oct. 8, 2019).

passive foreign investment companies[84].[85]

2. *The Participation Exemption – New Code Section 245A*

In an attempt to entice U.S. companies to bring back their revenue that is located abroad, the "participation exemption" was created.[86] Section 245A allows U.S. corporations with foreign subsidiaries to issue dividends[87] from the foreign subsidiaries without paying U.S. taxes.[88] The U.S. corporation must own at least 10% of the foreign company in order for it to be eligible to receive the deduction that reduces its U.S. tax obligation to $0.[89] In addition to the ownership requirement, there is a holding period requirement for the stock of the foreign corporation.[90] The domestic corporation must hold the stock of the foreign entity for more than 366 days in order to qualify for the participation exemption.[91] Finally, the participation exemption does not apply to dividends that "received a tax benefit in a foreign country" because the purpose of the exemption is to alleviate the double taxation

84. A passive foreign investment company is any foreign corporation where "75 percent or more of the gross income of such income for the taxable year is passive income or the average percentage of assets (as determined in accordance with subsection (e)) held by such corporation during the taxable year which produce passive income or which are held for the production of passive income is at least 50 percent." I.R.C. § 1297(a) (2018). Passive income means any of the foreign personal holding company income defined in I.R.C. § 954(c) including: dividends, certain property transactions, commodities transactions, foreign currency gains, income equivalent to interest, income from notional principal contracts, payments in lieu of dividends, and personal service contracts. I.R.C. § 1297(b).

85. *Section 965 Transition Tax*, *supra* note 80. IRC § 965 states that the transfer tax applies to "specified foreign corporations." I.R.C. § 965.

86. Pomerleau I, *supra* note 15.

87. A dividend is "any distribution of property made by a corporation to its shareholders—(1) out of its earnings and profits accumulated after February 28, 1913, or (2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made." I.R.C. § 316(a) (2018).

88. I.R.C. § 245A (2018). The new provision is titled "Deduction for foreign source-portion of dividends received by domestic corporations from specified 10-percent owned foreign corporations." *Id.*

89. *Id.*

90. Pomerleau I, *supra* note 15. There are various reasons the IRS requires a holding period. *Qualified Dividends*, FIDELITY, www.fidelity.com/tax-information/tax-topics/qualified-dividends (last visited Oct. 26, 2018). For example, to determine the nature of a gain or loss, short-term or long-term, or, in this context, to ensure that the taxpayer qualifies for a deduction. *Id.* Qualified status results in the taxpayer receiving favorable tax treatment by not requiring the taxpayer to pay any income taxes and, as a result, the IRS requires a longer holding period to ensure the qualified deduction is being used as intended. *Id.*

91. I.R.C. § 246 (2018). The provision is titled "Rules applying to deductions for dividends received." *Id.*

burden.[92]

3. *Global Intangible Low Tax Income ("GILTI")*

The TCJA also added a tax on a new type of income known as GILTI.[93] The tax applies to a U.S. shareholder's income from a CFC that exceeds a 10% return on income or depreciable tangible property.[94] The income is treated as Subpart F income[95] and any foreign taxes paid, up to 80%, reduce the amount of taxable Subpart F income.[96] The reference to "intangible" assets in the GILTI name is misleading as IRC Section 951A does not directly mention intangibles.[97] The new tax is supposed to discourage multinational corporations from "transferring" their intellectual property abroad in order to transfer their U.S. profits to lower-taxed jurisdictions.[98]

4. *Foreign Derived Intangible Income ("FDII")*

FDII is defined as income that a U.S. corporation earns from its intangible assets located in the U.S. which is used to make sales to foreign markets.[99] The FDII deduction is 37.5% of the qualifying FDII starting in 2018 and 21.875% for tax years after 2025.[100] The impact of the deduction results in a tax reduction of about 50% on

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92. Pomerleau I, *supra* note 15.

93. Kyle Pomerleau, *What's Up With Being GILTI?*, TAX FOUND. (Mar. 14, 2019), taxfoundation.org/gilti-2019/ [hereinafter Pomerleau II].

94. Andrew Velarde & Alexander Lewis, *Practitioners Bristle at GILTI Antiabuse Provision*, TAX NOTES (Sep. 18, 2018), www.taxnotes.com/editors-pick/practitioners-bristle-gilti-antiabuse-provision.

95. Subpart F Income refers to "certain types of income and investments of earnings of a foreign corporation controlled by US shareholders . . . deemed distributed to the US shareholders and subject to current taxation." Lowell D. Yoder, et al., *Expansion of Subpart F Under the Tax Reform Act*, MCDERMOTT WILL & EMERY (Feb. 6, 2018), www.mwe.com/en/thought-leadership/publications/2018/02/expansion-of-subpart-f-under-the-tax-reform-act. The specific types of Subpart F Income include: insurance income, foreign base company income, illegal bribes, kickbacks, or other payments, or income derived from any foreign country. I.R.C. § 952 (2018).

96. Sczudlo & Jones, *supra* note 79, at 25. Generally speaking, a controlled foreign corporation is a foreign corporation where more than 50% of its stock is owned by U.S. shareholders. I.R.C. § 957(a) (2018).

97. Martin A. Sullivan, *Economic Analysis: More GILTI Than You Thought*, TAX NOTES (Feb. 13, 2018), www.taxnotes.com/tax-reform/economic-analysis-more-gilti-you-thought.

98. Pomerleau II, *supra* note 93.

99. Rufus V. Rhoades & Cindy Brittain, *2017-17 Federal Tax Legislative Analysis § 2.02* (2015). FDII is supposed to work in tandem with GILTI and entice U.S. corporations to bring back profits and intellectual property to the U.S. *Id.*

100. Sczudlo & Jones, *supra* note 79, at 26. After considering the FDII deduction, the effective tax rate is 13.125% for FDII from 2018 to 2025 and 16.4% starting in 2026. *Id.*

qualifying FDII.[101] There is no carryover provision, which means if the deduction exceeds the taxable income for the year, the excess amount is forfeited.[102] Like GILTI, the FDII deduction only applies to C corporations[103].[104] The intent is to even the playing field for U.S. businesses without CFCs and entice those who have moved abroad for tax reasons to come back to the U.S.[105]

5. The Base Erosion and Anti-Abuse Tax ("BEAT")

The BEAT targets large multinational corporations, and it imposes a 10% minimum tax on corporations with gross receipts in excess of $500 million.[106] For the BEAT to apply, the U.S. corporation needs to own 25% of the foreign business.[107] The tax will not apply unless the payments made by U.S. corporations to foreign corporations exceed 3% of allowable deductions.[108] The BEAT limits the reduction of U.S. taxes through the use of intercompany payments.[109]

The purpose of BEAT is to prevent U.S. corporations with foreign affiliates from paying those affiliates arbitrarily inflated

101. Thornton, *supra* note 63.

102. Frank J. Vari, *Foreign-Derived Intangible Income Deduction: Tax Reform's Overlooked New Benefit for U.S. Corporate Exporters*, TAX ADVISER (Aug. 2, 2018), www.thetaxadviser.com/newsletters/2018/aug/foreign-derived-intangible-income-deduction.html.

103. A C corporation is a corporation that elects to be taxed, for federal income tax purposes, "as a separate taxpaying entity." *Forming a Corporation*, I.R.S. (July 29, 2019), www.irs.gov/businesses/small-businesses-self-employed/forming-a-corporation. "The profit of a [C] corporation is taxed to the corporation when earned, and then is taxed to the shareholders when distributed as dividends." *Id.* An S corporation does not require the corporation to pay income taxes—all income is taxed to the shareholders of the corporation at individual income tax rates. *Id.*

104. *Three Ways U.S. International Tax Reform Could Level the Playing Field*, CPA PRAC. ADVISER (Feb. 22, 2018), www.cpapracticeadvisor.com/news/12399419/three-ways-us-international-tax-reform-could-level-the-playing-field.

105. *Id.* To calculate the FDII savings, start by adding deduction-eligible income to foreign-derived deduction eligible income to get the Qualified Business Asset Investment ("QBAI") and then take 10% of QBAI and subtract it from the deduction-eligible income to arrive at deemed intangible income. *Id.* Then to calculate taxable FDII, multiply the deemed intangible income by the percentage ratio of deduction eligible income and foreign derived deduction eligible income and take that amount multiplied by 37.5% and reduce it to get FDII. *Id.*

106. Pomerleau I, *supra* note 15. In 2018 the BEAT tax will be reduced to 5%. *Id.*

107. Rebecca M. Kysar, *Critiquing (and Repairing) the New International Tax Regime*, 128 YALE L.J. F. 339, 355 (2018).

108. *Id.* It is important to note that the tax code is complex and there are often exceptions depending on the type of business form or industry. *Id.* The limitations further support the notion that the BEAT tax is limited in application and its ability to bring foreign-sourced income back to the U.S. *Id.*

109. Sczudlo & Jones, *supra* note 79, at 26.

amounts for services or products.[110] That results in "earnings-stripping," which shifts the U.S. corporations' U.S. profits to the foreign affiliate.[111] The following payments are limited: "interest, royalties, rents, service fees, the acquisition of property from a related party subject to depreciation or amortization, a premium paid among related parties for reinsurance payments, and the cost of goods sold for a company that inverted to become foreign after November 9, 2017."[112]

There is a lot of uncertainty regarding how the aforementioned portions of the TCJA will impact existing domestic and international relations. There is also concern that in the haste to pass the TCJA, new loopholes were created.[113] The next section of this comment will analyze pre-TCJA and post-TCJA tax strategies and the resulting impact of the TCJA on multinational corporations and other taxpayers who are impacted by tax evasion and tax avoidance.

III. ANALYSIS

The TCJA was labeled as being the answer to the flawed tax system, in part, because it would address taxpayers who took advantage of tax loopholes and it would simplify tax returns.[114] In order to understand the TCJA's impact, it is important to look at the issues and benefits of the tax system pre-TCJA. It is equally important to get a sense of what the future holds and what problems are likely to arise post-TCJA. However, proper interpretation of and decision-making based on the IRC is limited, due to the IRC's complexities and the necessity of legal and judicial interpretation of

110. Martin A. Sullivan, *Economic Analysis: Can Marked-Up Services Skip the BEAT?*, TAX NOTES (Feb. 6, 2018), www.taxnotes.com/tax-reform/economic-analysis-can-marked-services-skip-beat.

111. *Id.* "The BEAT is expected to raise $149.6 billion over the 2018-2027 period, with nearly two-thirds of that amount collected in the last five years. *Id.*

112. *Id.*

113. Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 L. & CONTEMP. PROB. 61, 94 (2018). *See also* Ron Wyden, *Trump's Tax Law and International Tax: More Complexity, Loopholes and Incentives to Ship Jobs Overseas*, S. FIN. COMM. 1, 2 (July 18, 2018), www.finance.senate.gov/imo/media/doc/Wyden%20Report%20-%20Trumps%20Tax%20Law%20and%20International%20Tax%20071818.pdf (explaining the myth that "Trump's tax law closes corporate loopholes").

114. The TCJA was supposed to make "the tax system fairer, as well as simpler and more efficient where possible." Alexandra Thornton, *Broken Promises: More Special Interest Breaks and Loopholes Under the New Tax Law*, CTR. FOR AM. PROGRESS (Mar. 1, 2018), www.americanprogress.org/issues/economy/reports/2018/03/01/447401/broken-promises-special-interest-breaks-loopholes-new-tax-law/ [hereinafter Thornton II]. Simplification and fairness were to be accomplished via closing loopholes and "eliminating special interest tax breaks." *Id.*

the IRC.[115]

To begin, this section will address the issues that arise when multinational corporations engage in tax evasion and tax avoidance and why analyzing both are important to society. Next, this section will analyze the newly enacted international tax provisions, which deal with tax avoidance and tax evasion of multinational corporations, and the likely benefits and problems that may arise as a result of their enactment.

A. What is the Problem with Tax Evasion and Tax Avoidance?

The concepts "tax evasion" and "tax avoidance" are not new, and the easiest way to distinguish between the two is that the former is illegal, and the latter is not always illegal.[116] Tax avoidance can become illegal if it goes too far, but determining when it has gone too far is not always straightforward.[117] Adding to the lack of clarity in tax avoidance and evasion is the issue of the morality[118] of aggressive tax planning decisions, which is often raised by the public.[119] However, when it comes to deciding whether an action is legal or illegal, morality does not always come into play.[120]

1. The Tensions Between Laws, Economics, and Ethics

Tax avoidance, although technically legal, impacts corporations and shareholders because it "skews the allocation of tax burdens," diverts funding from other public interests, burdens developing nations, and creates externalities.[121] Keeping profits in foreign corporations reduces the ability of U.S.-affiliated corporations to invest in the U.S. economy.[122] Also problematic, is

115. Alexander J. Morgenstern, *Corporate Tax Avoidance: Addressing the Merits of Preventing Multinational Corporations from Engaging in the Practice and Repatriating Overseas Profits*, 16 J. INT'L BUS. & L. 333 (2017).

116. Jasmine M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility*, 94 B.U. L. REV. 337, 341 (2014).

117. Paul Sullivan, *Navigating Between Tax Avoidance and Evasion*, N.Y. TIMES (Feb. 11, 2013), www.nytimes.com/2013/02/12/business/crossing-the-line-between-tax-avoidance-and-evasion.html.

118. "Morality" refers to the fairness argument that is often raised when people hear that large businesses or wealthy individuals are able to avoid paying certain taxes via various deductions and other tax strategies. *See* Hans J.L.M. Gribnau & Ave-Geidi Jallai, *Good Tax Governance: A Matter of Moral Responsibly and Transparency*, 1 NORDIC TAX 70 (2017) (discussing the moral implications of tax strategies).

119. *Id.*

120. Bank, *supra* note 59, at 127-28.

121. Fisher, *supra* note 116, at 338-39.

122. James McBride, *How Will the Tax Overhaul Affect U.S. Competitiveness?*, COUNCIL ON FOREIGN REL. (Jan. 15, 2018),

that the line between tax evasion and tax avoidance is not clear and the ambiguities in the IRC lead to "loopholes."[123] This is especially problematic when those loopholes encourage business transactions, such as "transferring" intellectual property overseas or engaging in corporate inversions, which reduces the amount of taxable income that can be collected by the IRS.[124] The reduced collection of taxable income results in lost revenue for the federal government and U.S. citizens. As a result, the lost tax revenue needs to be collected from someone, and it is usually in the form of increased taxes in future years or budget cuts in areas, such as education and healthcare.[125]

Tax avoidance was not always accepted in society.[126] Morally suspect tax decisions were attacked by the public and federal authorities until 1934, when Judge Learned Hand stated that taxpayers can act to pay the lowest amount of taxes.[127] Historically, the tax rates imposed on wealthy individuals were significantly higher than they are today, leading some taxpayers to use the high rates as a justification for tax avoidance.[128] The high tax rates originated in response to the burdens created by war and the belief that the wealthy were in a better position to contribute to societal needs.[129] However, when tax rates stayed the same after World War II, tax avoidance was used by wealthy individuals to reduce the amount of taxes they paid.[130] This was done through the use of tax loopholes and the creation of special exemptions, new deductions, and new tax credits—all of which reduced the amount of taxable income.[131]

In 1956, the Supreme Court offered the following principle, "[w]e recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder."[132] The Court emphasized the importance of substance over form when it comes

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www.cfr.org/backgrounder/how-will-tax-overhaul-affect-us-competitiveness.

123. Amy Carpenter-Holmes & Ken Gazzaway, *Global Financial Institutions and the Risks of International Tax Evasion*, 29 J. TAX'N F. INST. 29 (2016).

124. *Id.*

125. Thornton II, *supra* note 114.

126. Bank, *supra* note 59, at 129.

127. *Id.*; *Helvering*, 69 F.2d at 810.

128. Bank, *supra* note 59, at 129. In 1944, the income tax rate for the highest income bracket was 94% and it stayed at that rate through World War II. *Id.*

129. *Id.* at 125.

130. *Id.*

131. *Id.* at 129.

132. United States v. Phellis, 257 U.S. 156, 168 (1921) (explaining that substance, not form, must be considered when looking at the applicability of tax laws enacted under the 16th Amendment). The Court, in interpreting the tax code, stated that the following language: "gains, profits, and income derived from . . . dividends" meant "not that everything in the form of a dividend must be treated as income, but that income derived in the way of dividends shall be taxed." *Id.* at 168-69.

to analyzing business strategies with potential tax consequences.[133] That case dealt with a corporate reorganization—where a new company was formed and the old company sold its assets in exchange for, among other things, stock in the new company.[134] The old company then distributed the stock to its shareholders, and one shareholder argued the stock distribution was not a taxable dividend.[135] Acknowledgement
of substance over form—with regards to taxation—is not limited to the United States. The Organisation for Economic Co-operation and Development ("OECD") urges taxpayers to "comply with both the letter and the spirit of tax laws."[136] That would require taxpayers' consideration and use of congressional intent in their interpretation of the IRC.[137] Only a small percentage of the Tax Court cases go to trial.[138] Even so, knowing the Supreme Court's stance on substance over form is valuable because tax avoidance strategies often ignore substance and focus on form.[139]

The other side of the morality argument is that taxpayers should not be expected to be morally fair with regards to tax planning if the government is not held to the same standard.[140] The U.S. Treasury did nothing to stop the creation of tax shelters, which directly aided in their popularity and eventual commonplace in tax planning.[141] Additionally, Judge Learned Hand stated, "[a taxpayer] is not bound to choose the pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's

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133. *Id.* at 168.

134. *Id.* at 166-67.

135. *Id.* In holding that the stock dividend was taxable income the Court said,

> [i]t thus appears that in substance and fact, as well as in appearance, the dividend received by claimant was a gain, a profit, derived from his capital interest in the old company, not in liquidation of the capital but in distribution of accumulated profits of the company; something of exchangeable value produced by and proceeding from his investment therein, severed from it and drawn by him for his separate use. Hence it constituted individual income within the meaning of the income tax law . . .

Id. at 175.

136. Daniel T. Ostas & Axel Haling, *Global Tax Shelters, the Ethics of Interpretation, and the Need for a Pragmatic Jurisprudence*, 53 AM. BUS. L.J. 745, 760 (2016) (citing OECD Guidelines for Multinational Enterprises).

137. *Id.*

138. U.S. Tax Court: About the Court, U.S. TAX CT. (Aug. 6, 2019), www.ustaxcourt.gov/about.htm.

139. Kelly Phillips Erb, *Taxes from A to Z (2017): U is For United States Tax Court*, FORBES (Apr. 12, 2017), www.forbes.com/sites/kellyphillipserb/2017/04/12/taxes-from-a-to-z-2017-u-is-for-united-states-tax-court/#51673f226833.

140. Bank, *supra* note 59, at 129.

141. *Id.*

taxes."[142] The IRC is ambiguous, which allows taxpayers some legal flexibility in their tax planning.[143] While some individuals think tax avoidance maneuvers are unfair, fairness does not override the legality of the maneuvers.[144] Instead, it is up to the legislature to address the fairness concerns.[145]

2. *Treaties with Other Countries and Information Disclosures are Inadequate to Address Tax Evasion Concerns.*

Treaties and other information disclosure requirements imposed on foreign countries might not be as effective as one would think. After all, the foreign countries and organizations who will make the disclosures are the same parties that stand to lose the most from adequate disclosures.[146] Foreign countries entice U.S.-based companies to invest and start businesses in their country by promising low tax rates or other favorable treatment in order to increase their tax revenue.[147] In 2010, the Foreign Account Tax Compliance Act ("FATCA") was enacted, "requiring non-U.S. financial institutions to disclose to the [IRS] the identities of account holders who are presumed to be subject to U.S. reporting based on a wide range of so-called indicia that demonstrate some link to the United States."[148] FATCA has allowed the IRS to collect data from over 77,000 foreign financial institutions.[149]

The OECD created Common Reporting Standards, which allow certain bank information to be shared internationally.[150] Given the frequency and ease of engaging in financial transactions in other countries, being able to access foreign financial records is helpful to catch tax evaders.[151] Access to those records is also important because the U.S. tax system is self-enforced.[152] Although there have been concerns about foreign disclosures, it appears there has been recent progress that seeks to hold financial institutions

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142. *Helvering*, 69 F.2d at 810 (stating that taxpayers can use the tax provisions to legally reduce the taxes owed to the government).

143. Ostas & Haling, *supra* note 136, at 752.

144. Bank, *supra* note 59, at 128.

145. *Id.*

146. Lilian V. Faulhaber, *The Trouble with Tax Competition: From Practice to Theory*, 71 TAX L. REV. 311, 312-13 (2018).

147. *Id.* at 311-12.

148. Carpenter-Holmes & Gazzaway, *supra* note 123, at 29.

149. Karie Davis-Nozemack & Sarah J. Webber, *Lost Opportunities: The Underuse of Tax Whistleblowers*, 67 ADMIN. L. REV. 321, 325 (2015).

150. *Id.*

151. *Foreign Account Tax Compliance Act (FATCA): A Critical Anti-Tax Evasion Tool*, INST. ON TAX'N & ECON. POL'Y (May 2, 2017), itep.org/foreign-account-tax-compliance-act-fatca-a-critical-anti-tax-evasion-tool/.

152. Jeremias Ramos, *Is the U.S. Tax System Voluntary*, THE DAILY CPA (May 31, 2018), www.thedailycpa.com/2018/05/31/is-the-u-s-tax-system-voluntary/.

responsible if they assist with reporting tax evasion.[153]

B. TCJA Impacts on Tax Evasion and Tax Avoidance

The TCJA will impact the way in which U.S. companies structure their international relationships and domestic operations. Companies will look at how they can take advantage of or avoid the negative impacts of the new and modified IRC provisions. The longstanding question of whether there is a better way to structure tax laws in order to prevent the illogical structuring of companies—a mechanism designed to help companies use or avoid certain tax provisions—is still unanswered. This section will look at the specific ways the TCJA will impact tax avoidance and tax evasion.

1. Moving Towards a Territorial System by Utilizing the New Participation Exemption and the Transition Tax.

As previously mentioned, the transition tax was created to help transition the U.S. tax system from a worldwide system to a territorial system.[154] It is estimated that there is about $2.6 trillion in foreign-sourced income that has not been repatriated into the U.S., allowing U.S. companies—often parent companies—to avoid paying U.S. taxes.[155] The transition tax requires U.S. corporations to pay a one-time transition tax, regardless of whether foreign funds are actually brought back to the U.S.[156] The goal is to entice U.S. companies to send the foreign funds to the U.S. and then invest them in the U.S., stimulating the U.S. economy.[157] While the transition tax will help increase the amount of taxable income for fiscal years ending in 2017, it is also a way to mitigate the financial impact of the participation exemption.[158]

The participation exemption can be considered phase two of the move towards a territorial tax system, although it is not available to all taxpayers.[159] The biggest concern is that the participation

153. *Id.* The Swiss Bank Program is an example of a new reporting regulation that will hold financial institutions responsible. *Id.*

154. *Id.* at 24.

155. Gary Clyde Hufbauer, *Corporate Tax Reforms Will Lead to International Tax Battles*, PETERSON INST. FOR INT'L ECON. (Dec. 14, 2017), www.piie.com/blogs/realtime-economic-issues-watch/corporate-tax-changes-will-lead-international-tax-battles.

156. *Id.* It is estimated that the transition tax will raise about $200 billion, which would partly come from the taxes charged on the amount brought back to the U.S. and the new taxes on any profits made if the money brought back is invested. *Id.*

157. Sczudlo & Jones, *supra* note 79, at 24. Apple is one company that indicated it would be utilizing the TCJA in order to bring back its profits and invest in the U.S. economy. Wakabayashi & Chen, *supra* note 23.

158. Hufbauer, *supra* note 155.

159. *Id.*

exemption will incentivize businesses to continue operating overseas and even start to shift their operations overseas.[160] Even without the repatriation tax on CFCs, there is still an incentive for U.S. corporations to keep operations overseas. This is because the foreign regulations and taxes are still less stringent than the ones in the U.S. and U.S. companies can use the new participation exemption to bring the profits back, tax-free.[161] That concern is addressed by some of the other international TCJA provisions, which will be discussed later in the comment.[162] Another concern is the estimated $223.6 billion revenue loss that is expected to occur over a period of ten years from distributions qualifying for the participation exemption starting in 2018.[163]

One benefit of the participation exemption is that it could stop businesses from forming disjointed corporate relationships, also known as inversions.[164] Corporate inversions were created to get around the repatriation tax, but that tax is no longer in effect for most corporations.[165] To illustrate how inversions work, entities set up a business structure where there is a U.S. business that acquires a foreign business, that in turn has a U.S. subsidiary, all of which is done in order to avoid the repatriation tax.[166] That structure is no longer necessary because of the elimination of the repatriation tax.[167] The elimination of the tax means that certain qualifying entities can bring back new,[168] foreign-sourced income into the U.S. without worrying about being taxed on the dividends.[169] However, just because the income can be brought back into the U.S. does not mean it will be.[170] Corporations will likely analyze the benefits of

160. Elizabeth V. Zanet & Stanley C. Ruchelman, *A New Tax Regime for CFCs: Who is GILTI?*, 31 J. TAX'N F. INST. 17 (2018).

161. Hufbauer, *supra* note 155.

162. *Id.*

163. *Tax Reform – KPMG Report on New Tax Law: Analysis and Observations*, KPMG 1, 13 (Feb. 6, 2018), www.home.kpmg.com/content/dam/kpmg/us/pdf/2018/02/tnf-new-law-book-feb6-2018.pdf.

164. Kyle Pomerleau, *Inversions Under the New Tax Law*, TAX FOUND. (Mar. 13, 2018), www.taxfoundation.org/inversions-new-tax-law/. A corporate inversion involves a U.S. corporation locating its parent company abroad and basing its subsidiary in the U.S. *Id.*

165. Emily L. Foster, *Participation Exemption System Changes Paradigm for CFC Spinoffs*, TAX NOTES (Mar. 13, 2018), www.taxnotes.com/editors-pick/participation-exemption-system-changes-paradigm-cfc-spinoffs.

166. *Id.* The disjointed business structures are referred to "as sandwich structures" and usually have two U.S. businesses with a foreign entity in between or two foreign entities with a U.S. business in between. *Id.* Throughout this comment, the terms "business," "company," and "entity" refer generally to "business" structures, whereas, "corporations" denotes a specific structure that has certain tax ramifications.

167. *Id.*

168. The elimination of the tax on foreign-source dividends applies to foreign-source dividends distributed after December 31, 2017. I.R.C. § 965.

169. Foster, *supra* note 165.

170. York, *supra* note 27.

using the funds as equity in the U.S. versus acquiring debt in the U.S. and keeping the funds abroad.[171]

2. *If It Sounds Too Good to be True, it Probably is: GILTI's Limiting Effect on the "Territorial"[172] Tax System.*

The preceding sections of this comment laid out major changes to the U.S. tax system, but there are other tax provisions that limit and condition the new tax benefits. For example, any qualifying dividends distributed to domestic corporations from CFCs or other qualifying foreign corporations are no longer taxed in the U.S.[173] However, the new tax imposed on GILTI will result in a tax on income earned overseas from intangible assets that exceeds a 10% return.[174] The tax rate imposed on the foreign income is 10.5%, which is significantly lower than the tax that used to be imposed on repatriations.[175] This is contrary to a territorial tax system because a purely territorial tax system would not tax any income earned from another territory.[176]

There is a lot of uncertainty regarding how other foreign tax credits[177] and business expenses[178] can be utilized to reduce the tax owed on GILTI.[179] There is a formula to calculate the tax, but the variables and qualifications under each component of the formula is still in question.[180] There is also a concern about timing differences between the laws in the U.S. and abroad, which could lead to a mismatch of tax credits and payments.[181] The IRS issued

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171. Robert E. Holo, et al., *Not So Fast: 163(j), 245A, and Leverage in the Post-TCJA World*, 128 YALE L.J. F. 383, 398-99 (Oct. 25, 2018).

172. While the TCJA provisions move the U.S. towards a territorial tax system, it is not without exceptions, which is what makes it more of a "quasi-territorial" regime. *Id.* at 393.

173. Todd C. Lady, *The New GILTI and Repatriation Taxes: Issues for Flowthroughs*, TAX ADVISOR (June 1, 2018), www.thetaxadviser.com/issues/2018/jun/gilti-repatriation-taxes-issues-flowthroughs.html.

174. Sczudlo & Jones, *supra* note 79, at 25.

175. Zanet & Ruchelman, *supra* note 160. The tax rate for GILTI will increase to 13.125% in tax years beginning after December 31, 2025. *Id.*

176. Toder, *supra* note 57.

177. The foreign tax credit, "[i]n the case of a citizen of the United States and of a domestic corporation, [is allowed for] the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States." I.R.C. § 901 (2018).

178. The IRC allows businesses to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." I.R.C. § 162 (2018). Other sections of the code deal with the particularities of what is deductible and what is not, but there is room for taxpayer discretion. *Id.*

179. Laura Davison, et al., *Corporate America 'in limbo' as IRS Punts on Foreign Tax Issue,* ACCT. TODAY (Sep. 14, 2018), www.accountingtoday.com/articles/corporate-america-in-limbo-as-irs-punts-on-foreign-tax-issue.

180. *Id.*

181. Sczudlo & Jones, *supra* note 79, at 25.

157 pages of guidance for the new provision, exhibiting the complexity involved.[182] However, the guidance was limited in scope; it did not address the application of the foreign tax credit and other business expenses in the calculation of the tax owed on GILTI.[183] This is very concerning for multinational corporations because the new tax provisions are interconnected and the "piecemeal guidance" is resulting in the inability to timely estimate quarterly tax installments and determine what aspects of the existing IRC can be utilized in the calculation of the new provisions.[184]

Another concern with the tax on GILTI is that the reduced 10.5% tax rate is an inadequate incentive to get U.S. businesses with established foreign presence to move operations to the U.S.[185] Even though the new corporate tax rate, now 21%, is significantly lower than it had been, the tax on GILTI must also be considered.[186] The goal of the new tax on GILTI was to get U.S. pharmaceutical and technology businesses to bring their valuable intellectual property back to the U.S.[187] The uncertainty of the new tax is resulting in businesses waiting for more guidance before they include GILTI in their quarterly tax installments, which could result in penalties.[188]

182. Kirsten Weilobob, *Guidance Related to Section 951A (Global Intangible Low-Taxed Income)*, I.R.S. FED. REG. (Oct. 10, 2018), www.federalregister.gov/documents/2018/10/10/2018-20304/guidance-related-to-section-951a-global-intangible-low-taxed-income.

183. David Morgan, *U.S. Treasury Proposes GILTI Rules Minus Foreign Tax Credit Guidance*, REUTERS (Sep. 13, 2018), www.reuters.com/article/us-usa-tax-gilti/us-treasury-proposes-gilti-rules-minus-foreign-tax-credit-guidance-idUSKCN1LT38J. Although the IRS indicated they would provide clarity on the foreign tax credit in the future, many companies are in disarray and unable to move forward with planning, which could result in lost tax opportunities or tax penalties. *Id.*

184. Davison, et al., *supra* note 179. Once the IRS issues its guidance on the GILTI tax, that will not end the confusion because of the interconnectedness of the other new tax provisions with GILTI. *Id.* Treasury officials at the IRS stated they are planning to issue further regulations for the FDII deduction and BEAT later in 2018. *Id.*

185. Zanet & Ruchelman, *supra* note 160.

186. *Id.* GILTI is not the only tax that will be imposed on foreign-sourced income and there are other credits and allowances that must be considered when analyzing which option yields the lowest tax owed. *Id.* Another consideration would be foreign tax rates, which might change in light of the TCJA and actions taken by businesses. Faulhaber, *supra* note 146, at 346.

187. Davison, et al., *supra* note 179.

188. *Id.* On September 13th, 2018, treasury officials stated more guidance would be released in about 60 days, but in the meantime businesses with foreign ties are waiting to see what the new provision means for their bottom line. *Id.*

3. *FDII Deduction to the Rescue: Will It be Enough to Keep Businesses in the U.S. and Bring Foreign Affiliates Home?*

The FDII deduction can be thought of as the opposite of GILTI because instead of acting as an added tax, it acts as a tax deduction.[189] The goal is to reward U.S. businesses who use "intangible"[190] assets to create products in the U.S. that are subsequently sold abroad.[191] The FDII deduction was designed to even the playing field for U.S. businesses that export their goods and services, but did not have the means to create foreign ties in order to price competitively.[192]

The impact of the TCJA depends on the type of business a company is engaged in, meaning taxpayers will be disproportionately impacted.[193] The industries expected to benefit the most include: technology, software, and pharmaceutical companies because those businesses generate income from foreign sales using "intellectual property" held in the U.S.[194] There are a few concerns that the FDII deduction is counterproductive and more problematic than anticipated.[195]

For example, a U.S. company can artificially increase its FDII deduction by selling more of its products to an unrelated company overseas.[196] Following the sale, the foreign subsidiary of the U.S. company purchases the products from the foreign company the U.S. company sold to.[197] Finally the subsidiary sells those products to someone in the U.S.[198] Although this seems like a round-about way to sell a product, companies are willing to engage in "round-tripping" transactions in order to maximize tax savings.[199] Another concern is that the FDII deduction is an export subsidy[200] that might violate U.S. obligations under its World Trade Organization

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189. Tax deductions are subtracted from gross income to arrive at the taxable income that is used to compute the amount of tax owed. Julia Kagan, *Tax Deduction*, INVESTOPEDIA (June 29, 2019), www.investopedia.com/terms/t/tax-deduction.asp.

190. FDII is not derived directly from intangible assets, but rather it is the income generated from products produced in the U.S. and sold abroad or services conducted outside the U.S. Sczudlo & Jones, *supra* note 79, at 26.

191. *Id.* at 25-26.

192. Vari, *supra* note 102.

193. *Id.*

194. *Id.*

195. Thornton, *supra* note 63.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. "Export subsidies are subsidies given to traders to cover the difference between internal market prices and world market prices." *Glossary of Statistical Terms: Export Subsidies*, OECD (Mar. 5, 2013), www.stats.oecd.org/glossary/detail.asp?ID=915.

commitments.[201] Companies must also keep in mind that the effective tax rate resulting from the deduction will be increased to just over 16% starting in tax years beginning after December 31, 2025.[202]

The disadvantages of the FDII deduction have resulted in people questioning whether the FDII deduction should be repealed.[203] More specifically, multinational corporations' ability to take advantage of the deduction makes it counterintuitive to its purpose of leveling the playing field for U.S. based businesses.[204] However, repealing the deduction would create a disjointed tax system, as it was intended to work along with the tax on GILTI.[205] In other words, the tax on GILTI is supposed to penalize multinational corporations and the FDII deduction is supposed to reward them.[206]

4. BEAT Is Not Expansive Enough, Most Taxpayers Can "BEAT" It

BEAT will not impact the amount of taxes owed by many taxpayers because it only applies to U.S. businesses with "average annual gross receipts in excess of $500 million over three years."[207] However, it is estimated that BEAT will result in about $149.6 billion in tax revenue between 2018 and 2027.[208] While its scope is

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201. Kysar, *supra* note 107, at 352. Additionally, research notes:

> [b]ecause the FDII regime benefits exports, it likely violates Article 3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), which prohibits (a) subsidies that are contingent, in law or fact, upon export performance, and (b) subsidies that are contingent upon the use of domestic over imported goods. Article 1 of the SCM Agreement defines a subsidy as a financial contribution by a government, including the non-collection or forgiveness of taxes otherwise due.

Id.

202. Sczudlo & Jones, *supra* note 79, at 26.

203. Kysar, *supra* note 107, at 354.

204. *Id.* It has been said, "[i]f GILTI is the stick that discourages earning income from intangibles abroad, then FDII is the carrot that encourages earning that income in the United States." *Id.* at 350. However, the FDII deduction as currently interpreted leaves room for multinational corporations to qualify for the deduction even though that was not the intent. Martin A. Sullivan, *Economic Analysis: What Economic Purpose Does FDII Serve?*, TAX NOTES (Oct. 16, 2018), www.taxnotes.com/tax-reform/economic-analysis-what-economic-purpose-does-fdii-serve.

205. Vari, *supra* note 102.

206. Kartikeya Singh & Aparna Mathur, *The Impact of GILTI and FDII on the Investment Location Choice of U.S. Multinationals*, AEI ECON. WORKING PAPER (May 17, 2018), www.aei.org/wp-content/uploads/2018/05/GILTI-and-FDII-Working-Paper-Final.pdf.

207. Kysar, *supra* note 107, at 356.

208. Sullivan, *supra* note 110.

not expansive, the estimated tax revenue to be collected is significant.[209] Another important consideration is that the minimum tax rate will increase starting in 2018 as follows: 10% in 2017[210], 5% in 2018, 10% from 2019 to 2025, and 12.5% starting in 2026.[211] Large multinational companies will have to consider restructuring their operations, but the exact impact of the BEAT is still unknown.[212] One possible way to restructure the tax is by changing the recipient of the payment from the U.S. corporation to the foreign affiliate.[213] Instead of eliminating the tax, structuring it with different threshold requirements and phase-outs could result in a more uniform application that actually results in tax collection.[214]

Like the FDII deduction, there is a possibility that the BEAT violates certain international tax treaties.[215] Also concerning is that the BEAT could result in double taxation, once in the recipient's jurisdiction and then again in the U.S. without any deductions for the amounts paid in the other jurisdiction.[216] It could result in foreign businesses that operate in the U.S. to completely eliminate their U.S. presence to avoid potentially large tax payments to the IRS.[217]

The final sections of this comment will explore various suggestions regarding the confusion and uncertainty created by the TCJA. The comment will also review other methods that could be employed to ensure tax avoidance does not turn into tax evasion. Finally, there will be a brief summary of the main items from the comment and a future outlook.

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209. *Id.*

210. Pomerleau I, *supra* note 15.

211. Sam Schechner & Nina Trentmann, *Beat Up? U.S. Tax Provision May Sting Foreign Firms*, WALL STREET J. (Feb. 13, 2018), www.wsj.com/articles/beat-up-u-s-tax-provision-may-sting-foreign-firms-1518526800. The fact that the tax rates will increase in the coming years is not the only thing businesses will need to worry about, "many of the provisions of the TCJA will sunset on January 1, 2027, although some provisions are permanent." Jerald D. August, *Tax Act First Look: The Complex New World of the Qualified Business Deduction Rule: Implications for Partnerships, S Corporations, and Sole Proprietorships*, CPA J. (2018), www.cpajournal.com/2018/01/22/tax-act-first-look-complex-new-world-qualified-business-deduction-rule/. This furthers the point that corporations who use tax provisions for purposes that conflict with Congressional intent could later be adversely impacted if the IRC is not renewed or is changed. *Id.*

212. August, *supra* note 211.

213. Richard Rubin, *Companies Hope to Beat a New Tax Called the BEAT,* WALL STREET J. (June 26, 2018), www.wsj.com/articles/companies-hope-to-beat-a-new-tax-called-the-beat-1530005401.

214. Kysar, *supra* note 107, at 358.

215. Hufbauer, *supra* note 155.

216. Sczudlo & Jones, *supra* note 79, at 26.

217. Schechner & Trentmann, *supra* note 211.

IV. PROPOSAL

Like most complex issues, there is not a single solution to reducing international tax evasion or avoidance. The multitude of possible approaches does not render progress towards a solution unattainable. Instead, the approaches allow for flexibility and the implementation of multiple strategies. The problems will not be solved overnight, but by considering multiple approaches there could be meaningful change.

International tax evasion and avoidance impact more than just the U.S. economy; they impact business strategies and employment, development and growth, and political tensions.[218] There have been countless domestic and international efforts to combat tax evasion and tax avoidance that have gone too far.[219] A lot of these proposed solutions sound feasible, yet the problem still exists and is featured in various news articles and broadcasts year after year.

This section will explore the various ways that tax avoidance and tax evasion in the international context can be addressed. This section will not focus on one solution because that approach can be easily ignored through taxpayers' utilization of one of many existing strategies to evade or avoid taxes. Instead, this section will propose a few strategies that can help build a more transparent and comprehensive approach addressing the many facets of tax evasion and tax avoidance.

Knowledge and comprehension are key to addressing tax evasion and tax avoidance. Before any solution is effective, individuals need to be able to grasp the basic tax concepts and role of international tax planning strategies. The solution cannot rely solely on U.S. efforts, but rather requires communication with other countries and programs that will lead to the effective exchange of information. The legislative intent behind the IRC should also be considered by taxpayers and their advisors when deciding the most efficient and legal tax strategy. The IRS budget should be reviewed and adjusted based on the need and the efficiency of the IRS. Finally, the impact of the TCJA provisions on international tax evasion and tax avoidance should be analyzed.

A. Comprehension is the Key to Working Towards a Resolution

Many taxpayers dread tax season or anything to do with taxes,

218. Emmanuele Bobbio, *The Forgotten Cost of Tax Evasion*, WORLD ECON. F. (Nov. 8, 2016), www.weforum.org/agenda/2016/11/the-forgotten-cost-of-tax-evasion/.

219. Reuven Avi-Yonah, *International Tax Evasion: What Can Be Done?*, AM. PROSPECT (May 26, 2016), www.prospect.org/article/international-tax-evasion-what-can-be-done.

but that fear is inhibiting comprehension of important tax issues.[220] Numerous global efforts have been created to address international tax avoidance and evasion, but without the participation and understanding of taxpayers, those efforts will only go so far.[221] Instead of focusing primarily on organizational efforts, individuals should obtain a general understanding of tax avoidance and evasion. Tax accountants and other community groups can volunteer their time and knowledge of the tax system to their community. Even though the tax system is complex and can lead to frustration and confusion, there are certain principles that can be easily taught and understood.[222] For example, taxpayers can be educated about where their tax dollars are spent and the general differences between individuals who pay taxes and businesses that pay taxes.

While educating taxpayers will not solve the overarching problem of tax evasion, education will provide a strong base understanding of tax, which is needed before any other solution can be explored. The more people who understand the tax system, the more people there will be to come up with creative solutions to bridge the disconnect between tax collection and international tax planning. The first paragraph of this comment revealed that Amazon—a company with a market value of over $1 trillion[223]—did not pay any federal income taxes.[224] That information alone will prompt certain individuals who pay federal income taxes to question what is going on or how that could be possible. Education, especially when it comes to tax, does not have to be formal or in the form of an educational degree. Although some individuals may choose to become experts in the industry, others can learn a great deal by asking questions and calling out situations that do not make sense.

Regardless of the methodology, education is crucial to future success and it is important to start educating people when they are young.[225] There are already a variety of free educational resources

220. Kelly Phillips Erb, *5 Things Taxpayers Are Irrationally Afraid Of - And Shouldn't Be*, FORBES (Apr. 12, 2015), www.forbes.com/sites/kellyphillipserb/2015/04/12/5-things-taxpayers-are-irrationally-afraid-of-and-shouldnt-be/#3be7cbcf2954.

221. *The Platform for Collaboration on Tax*, WORLD BANK 1, 4 (Apr. 19, 2016), www.documents.worldbank.org/curated/en/801891468196141038/pdf/104902-SECOND-REVISION-concept-note-platform-for-collaboration-on-tax.pdf. The following organizations launched the Platform for Collaboration on Tax in April of 2016: International Monetary Fund, Organization for Economic Co-operation and Development, United Nations, and World Bank Group. *Id.*

222. *Briefing Book: A Citizen's Guide to the Fascinating (Though Often Complex) Elements of the US Tax System*, TAX POL'Y CTR., www.taxpolicycenter.org/briefing-book/why-are-taxes-so-complicated (last updated 2016).

223. Streitfeld, *supra* note 2.

224. Gardner, *supra* note 3.

225. Valerie Strauss, *What's the Purpose of Education in the 21st Century?*,

available for students and teachers.[226] While knowledge is powerful, tax is a complex topic that has fostered an entire industry dedicated to tax planning. In other words, early education and comprehension alone will not fix the flaws in the tax system, but they can help prompt collaboration and put pressure on taxpayers who cross the line and become tax evaders.[227] The educational opportunities are endless and whether they involve explaining how the tax system works or tax terminology, the goal is to get everyone talking. Informed collaboration is the key to widespread ideas and feedback.[228]

B. Global Exchange of Information and Mandatory Disclosures

As previously mentioned, education at the individual level is important, but there also needs to be international cooperation and collaboration. The voluntary reporting system used for multinational corporations' foreign profits is not effective, whether that is because they are not as concerned about getting caught or they do not want to support the U.S. via their tax dollars.[229] The U.S. has already been communicating with other countries regarding potential tax evaders for some time, but more needs to be done.[230] It is understandable that there will be some red tape that needs to be crossed before foreign countries are willing to give up the financial information of U.S. taxpayers in their jurisdiction. However, foreign countries' willingness to work with the U.S. has already been exemplified in "Country-by-Country Reporting and Common Reporting Standard initiatives."[231]

WASH. POST (Feb. 12, 2015), www.washingtonpost.com/news/answer-sheet/wp/2015/02/12/whats-the-purpose-of-education-in-the-21st-century/.

226. The IRS has a site for teachers and students that provides a variety of information and tools that can be used to educate students. *Understanding Taxes: The Quick and Simple Way to Understand Your Taxes*, I.R.S., apps.irs.gov/app/understandingTaxes/index.jsp (last visited Jan. 8, 2020). The American Institute of Certified Public Accountants also provides tax resources for educational purposes. *Tax Education Resources for Students and Teachers*, AICPA (Aug. 2, 2018), www.aicpa.org/interestareas/tax/careers/tax-education-resources-for-students-and-teachers.html.

227. Davida Connon, *Corporate Tax Avoidance in an Era or Changing Firms*, WORLD BANK (Nov. 12, 2018), www.blogs.worldbank.org/developmenttalk/corporate-tax-avoidance-era-changing-firms.

228. *Supporting the Development of More Effective Tax Systems: A Report to the G-20 Development Working Group by the IMF, OECD, UN and World Bank*, OECD 1, 12 (2001), www.oecd.org/ctp/48993634.pdf.

229. *Filing Requirements - International Individual Taxpayers*, I.R.S. (NOV. 9, 2018), www.irs.gov/businesses/the-tax-gap-and-international-taxpayers.

230. Alan I. Appel, *Expanded Reporting Obligations for Financial Institutions in the New World of Tax Transparency*, 30 J. TAX'N F. INST. 17 (2017).

231. Arthur J. Cockfield, *Shaping International Tax Law and Policy in*

One concern is determining whether monitoring compliance with international tax agreements is worth the necessary resources, such as money and time.[232] Given the amount of money that is kept overseas to avoid taxes, the answer to that question appears to be that it is worth the effort. Another concern would be the longevity of international collaboration and disclosures, particularly in the event that political tensions get in the way and foreign countries stop complying with agreements. While those are valid future concerns, there does not appear to be any immediate harm in continuing to cooperate with other countries. Instead, international collaboration will help Congress and the IRS better understand and combat illegal international tax planning strategies.

Mandating disclosure will be hard to do because of privacy concerns, but there should still be an attempt to work with foreign countries to see what they are willing to do. On the other hand, it cannot be forgotten that the foreign countries receive taxes from businesses who are "sheltered" in their country.[233] However, there has been a recent and ongoing effort by the European Commission to collect taxes from multinational corporations, such as Apple and Amazon.[234] This is based on the assertion that those corporations are avoiding and evading not just U.S. taxes, but also foreign taxes.[235] In the end, collaborating with other countries and organizations that focus on international tax transparency is key to identifying and remedying tax evasion and avoidance that have gone too far.

C. Require the Policy Motivations Behind the IRC to be a Part of the Interpretation of What is and What is Not Allowed Under the IRC

Aside from increasing collaboration at the individual and organizational level, reevaluating the IRC is also important. Just because the IRC does not explicitly forbid a tax strategy or action does not mean that strategy or action is legal.[236] The IRC is complex

Challenging Times, 54 STAN. J. INT'L L. 223, 225 (2018).

232. Appel, *supra* note 230.

233. Andres Knobel, *It's Time for Countries to Start Publishing the Data They're Collecting Under OECD's Common Reporting Standard*, TAX JUST. NETWORK (July 11, 2018), www.taxjustice.net/2018/07/11/its-time-for-countries-to-start-publishing-the-data-theyre-collecting-under-oecds-common-reporting-standard/.

234. Patricia Cohen, *U.S. and Europe May Collide on Taxing Apple and Amazon*, N.Y. TIMES (Oct. 13, 2017), www.nytimes.com/2017/10/13/business/economy/corporate-tax.html.

235. Chantal C. Renta, *A Cute Cowboy Stole Our Money: Apple, Ireland, and Why the Court of Justice of the European Union Should Reverse the European Commission's Decision*, 24 SW. J. INT'L L. 177, 179, 203 (2018).

236. The IRS has published various resources explaining various frivolous tax arguments that are based on misunderstandings of the IRC or other

and usually requires multiple IRC sections to be read together in order to fully understand what a taxpayer can and cannot do.[237] As explained earlier, multinational corporations have resorted to creating arguably illogical and convoluted business structures.[238] Those structures are formed in order to take advantage of ambiguities in the IRC that do not expressly forbid certain actions, but that also do not expressly allow them.[239]

One way to bridge the gap between the IRC and multinational corporation's actions is by mandating taxpayers to comply with the "spirit of tax laws."[240] Some IRC sections are in place to prevent certain behavior (cigarette tax IRC Section 5701 and other excise taxes), while others are in place to encourage and reward behavior (charitable contributions and gifts IRC Section 170). It would be extremely taxing and inefficient to require the IRC to be written in a way that addresses every ambiguity that may be exploited.[241] Instead, Congress could enact a new IRC section that explicitly addresses taxpayers use of loopholes that lead to tax planning that is contrary to the intent of the IRC.[242] Additionally, even though the flexibility in the IRC allows for strategic tax planning, taxpayers can be adversely impacted in the long-term if the IRC is later amended to close a loophole or clarify an ambiguous provision.[243] When there is a legitimate purpose for structuring business transactions in a way to legally minimize taxes, there likely will not be any major compliance issues if the IRC is later amended.[244]

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schemes to avoid paying taxes. Some of the scams include: offshore tax avoidance, frivolous tax arguments, abusive tax shelters, inflated refund claims, etc. *IRS Concludes "Dirty Dozen" List of Tax Scams for 2019: Agency Encourages Taxpayers to Remain Vigilant Year-Round*, I.R.S. (Mar. 20, 2019), www.irs.gov/newsroom/irs-concludes-dirty-dozen-list-of-tax-scams-for-2019-agency-encourages-taxpayers-to-remain-vigilant-year-round.

237. Gregory Korte, *Even the IRS Chief Says Tax Code is Too Complex*, USA TODAY (Apr. 2, 2014), www.usatoday.com/story/news/politics/2014/04/02/irs-commissioner-urges-congress-to-simplify-tax-code/7215107/.

238. Thornton, *supra* note 63; *see supra* Section III.B.1.

239. Thornton, *supra* note 63

240. Ostas & Haling, *supra* note 136, at 760.

241. It is important to note that describing taxpayers tax planning strategies as exploitative is only one way to classify taxpayers who take advantage of ambiguities in the IRC. Others believe that there is nothing wrong with paying the lowest amount of taxes, as long as their actions do not cross the line into tax evasion. Bank, *supra* note 59, at 129. Additionally, requiring Congress to address every loophole in the IRC is impractical because it takes time and money to address loopholes. *Id.* Also, as noted earlier, as one loophole is closed, another is opened. *Id.* That does not mean loopholes should not be addressed, but rather, they need to be addressed strategically.

242. The issue with creating a new IRC provision is that it would need to be broad enough to deal with a variety of the tax evasion concerns, but it also would need to be narrow enough so that it could be applied.

243. Batchelder & Kamin, *supra* note 65.

244. Thornton, *supra* note 63. Depending on the way loopholes are addressed, a taxpayer that structures their business in a way to use the loophole could face adverse impacts when the loophole is closed. For example, the

Requiring taxpayers to consider the Congressional intent[245] behind the IRC may lead to more confusion, but it would shift the burden away from Congress and onto taxpayers. In other words, instead of requiring Congress to expressly incorporate their intent into the IRC or create less ambiguous provisions, taxpayers would have the burden of determining and considering Congressional intent. Taxpayers would need to spend extra time and money aligning their reason for utilizing an IRC provision with their best interpretation as to why it was enacted. This will not solve all problems because at the end of the day the IRS enforces the laws. Therefore, unless the IRS receives more resources, the IRS may not be able to enforce the IRC, which would disincentivize taxpayers from considering Congressional intent.

D. Increase the IRS Budget in Order to Allow for More Audits and Tax Collection

In 2017 "[t]he I.R.S. audited almost 1.1 million tax returns, approximately 0.5% of all returns filed in Calendar Year 2016."[246] Although only a small percentage of the tax returns filed are audited, the IRS is efficient when it comes to collecting taxes.[247] The IRS continues to be "one of the most efficient tax administrators in the world. For every $100 collected in taxes, the IRS spends only thirty-five Cents."[248] The IRS budget in the next fiscal year will be $11.4 billion, which is lower than the $12.1 billion budget in 2010.[249] Although Congress announced that it would give the IRS an

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taxpayer might have a hard time justifying their business structure after the loophole is closed.

245. Ostas & Haling, *supra* note 136**Error! Bookmark not defined.**.

246. *I.R.S. Data Book: Enforcement: Examinations*, I.R.S. (Mar. 29, 2018), www.irs.gov/statistics/enforcement-examinations.

247. *Congressional Justification for Appropriations and Annual Performance Report and Plan*, DEP'T. OF THE TREASURY (2018), www.treasury.gov/about/budget-performance/CJ18/FY%202018%20Treasury%20CJ%20FINAL.PDF [hereinafter Congressional Justification]. *See also* James Thorne, *Years of Budget Cuts Shrink the IRS, and Corporations are the Big Winners*, CNBC (May 12, 2018), www.cnbc.com/2018/05/11/budget-cuts-shrink-the-irs-and-corporations-are-the-big-winners.html (explaining IRS efficiency).

248. Congressional Justification, s*upra* note 247. *See also* Doyle McManus, *Republicans Love to Hate the IRS, but It's a Model of Efficiency*, L.A. TIMES (Mar. 31, 2015), www.latimes.com/nation/la-oe-0401-mcmanus-irs-20150401-column.html.

249. Jeff Stein, *The IRS Gets Help from Congress as it Tries to Implement the New GOP Tax Law*, WASH. POST (Mar. 27, 2018), www.washingtonpost.com/news/wonk/wp/2018/03/27/the-irs-gets-help-from-congress-as-it-tries-to-implement-the-new-gop-tax-law/?utm_term=.286b8e5d54f5. The IRS budget has, for the most part, been trending down each year since 2010, which seems counterintuitive given all the recent changes to the IRC and the likely need for more funding in order to staff more employees and train them on the new laws. *I.R.S. Data Book: I.R.S. Budget and Workforce*, I.R.S. (Mar. 29, 2018), www.irs.gov/statistics/irs-budget-and-workforce.

additional $320 million to help with the implementation of the TCJA, that may not be enough.[250] Not only will the IRS need more resources to help taxpayers understand the TCJA, more resources will be required to implement policies, train employees, and hire new staff.

Increasing the budget would not be wise, unless certain safeguards are implemented to make sure the funds are used to help address the issues associated with international tax evasion.[251] Given that less than 1% of all tax returns filed in 2017, for 2016 income, were audited, the tax system is largely self-enforced by taxpayers.[252] Because of the reported and recognized efficiency of the IRS, it makes sense to strategically allocate more resources to training. This would allow the IRS to audit more tax returns and possibly implement new policies or software that recognizes certain tax evasion patterns and trends. The increased IRS budget would have to come from somewhere and it is important to be mindful that it might come from all taxpayers by increasing certain taxes. A cost benefit analysis would be important to make sure that raising the IRS budget does not hinder the ultimate goal of reducing international tax evasion and increasing the collection of taxes.

E. Wait for More Guidance on the New Tax Provisions Before Acting

The aforementioned approaches to combatting international tax evasion, although not exhaustive, are key to obtaining more accountability when it comes to paying taxes. The primary focus of this comment was on multinational corporations and the TCJA provisions that will impact those corporations. However, timing is everything in this context. For example, multinational companies, such as Apple, have decided to bring back large amounts of cash—which for the longest time was kept out of the U.S. to avoid the repatriation tax—as a result of the TJCA.[253] Even though the participation exemption could incentivize taxpayers to bring foreign-sourced income back to the U.S., there are other taxpayers who will not have the same incentive.[254] However, those other

250. Stein, *supra* note 249.

251. Throwing money at a problem usually is not the best solution, but in this case, the IRS is very efficient in its spending to collect taxes. While it is likely that giving more money to the IRS would result in the IRS collecting more taxes, there is no guarantee that the money will be used in that way. As a result, the IRS should be required to use the money for a specific purpose and issue quarterly reports on their spending/collection ratio.

252. Ramos, *supra* note 152.

253. Wakabayashi & Chen, *supra* note 23.

254. Wealthy individuals also are part of the international tax evasion problem and they will not be directly incentivized by the new international TCJA provisions. Additionally, the new TCJA provisions do not completely change the U.S. tax system to a territorial one. Profits made overseas will still

taxpayers might change their position as more TCJA provisions are interpreted and loopholes are closed.

Also, although the participation exemption eliminates the tax on repatriated profits, the BEAT and the GILTI tax act as extra safeguards and tax certain income generated overseas regardless of whether it is brought back to the U.S.[255] The provisions work simultaneously to entice U.S. multinational corporations to bring revenue back to the U.S. and tax abusive strategies.

It is important to monitor multinational corporations' response to the TCJA and, based on that response, see if the proposed solutions need to be adjusted. Even more important than the solutions, is strategically determining the amount and nature of the resources to be allocated because an abundance of tax issues continue to be prevalent. Just like the saying "it takes money to make money," it also takes money to combat international tax evasion. Money should not be a reason to ignore the problem, but it should be factored into proposed solutions.

V. CONCLUSION

The TCJA resulted in various changes to the IRC and nothing suggests taxes will be abolished in the near future. Keeping that in mind, the TCJA and IRC cannot be ignored. International tax avoidance and evasion impact the U.S. in ways other than loss of tax revenue. The Supreme Court wrote in its opinion that, "[w]hile it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[256] Companies are in the business of making money and maximizing profits for shareholders, but that cannot be the central focus when it clashes with the IRC.[257]

There are a variety of reasons why tax loopholes are continuously exploited, allowing multinational corporations to avoid paying significant taxes in the U.S. Every year as the IRS

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be subject to taxation, although the tax rate is significantly lower than what it used to be. As a result, relying on the TCJA to solve international tax evasion would not be wise; however, it is wise to see how it changes taxpayer accountability before more resources are allocated. Again, this does not mean that Congress and the IRS should wait to see what happens before expending resources to help combat the issue, but rather the resources should be allocated strategically.

255. Pomerleau I, *supra* note 15.

256. Burwell v. Hobby Lobby Stores, 573 U.S. 682, 711-12 (2014) (analyzing the Religious Freedom Restoration Act of 1993 and a for-profit business' right to refuse healthcare coverage for contraceptives).

257. Lynn Stout, *Corporations Don't Have to Maximize Profits*, N.Y. TIMES (Apr. 16, 2015), www.nytimes.com/roomfordebate/2015/04/16/what-are-corporations-obligations-to-shareholders/corporations-dont-have-to-maximize-profits.

works to close the loopholes, new ones are opened.[258] The TCJA provided various provisions to help close loopholes and bring back taxable and nontaxable revenue from foreign countries. The TCJA is only one aspect of taxation. Without efforts from corporations, tax advisors, attorneys, international institutions, other taxpayers, and the IRS, the loopholes will be never ending.

The solution to combatting tax evasion and avoidance that goes too far requires a collaborative and multifaceted approach. Not only should individuals comprehend the magnitude of the issue and demand change, but there should also be international participation. Once there is a better understanding, policy motivations behind the IRC should be written into the IRC or taxpayers should be required to account for those motivations as they engage in tax planning. There also needs to be increased IRS audits or technology that can identify potential issues to increase taxpayer accountability. Finally, the TCJA should be evaluated and any significant changes that are made by taxpayers should be analyzed and addressed.

258. Thornton, *supra* note 63.