RECONSIDERING CORPORATE TAX PRIVACY

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For over a century, politicians, government officials and scholars in the United States have debated whether corporate tax returns, which are currently subject to broad tax privacy protections, should be publicly accessible. The ongoing global discussion of base erosion and profit shifting by multinational corporations has generated calls for greater tax transparency. Throughout this debate, participants have focused exclusively on the potential reactions of a corporation's managers, shareholders and consumers to a corporation's disclosure of its own tax return information. There is, however, another perspective: how would the ability of a corporation's stakeholders and agents to observe other corporations' tax return information affect the corporation's compliance with the tax law?

This Article examines the relationship of corporate tax privacy and tax compliance from this new vantage point, which it terms the "intercorporate perspective." The primary claim of this Article is that corporate tax privacy may limit the pressure to engage in more aggressive tax planning and reporting that corporate tax directors face from significant shareholders, non-tax managers, and even themselves. Specifically, tax privacy provides the government with valuable strategic defenses by restraining the ability of a corporation's stakeholders and agents to engage in benchmarking and reverse engineering, behaviors that would likely cause some tax directors to pursue more aggressive tax planning and reporting. Yet increased public access would also enrich public awareness and debate of corporate tax reform issues, which could motivate legislators to act.

The result of this analysis, thus, is not a recommendation that all corporate tax return information should receive tax privacy protections. Rather, the Article offers a set of guidelines, including consideration of the strategic defenses of corporate tax privacy, which will better equip policymakers to evaluate specific proposals to make corporate tax return information public.

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I. INTRODUCTION

As one of its core missions, Google strives to empower its users to navigate vast quantities of information, whether web pages, family photos or alternative driving routes, as quickly and as easily as possible.[1] An emphasis on achieving creative and efficient solutions pervades Google's business operations[2]—including its own tax planning. For example, during the past decade, while Google earned billions of dollars in online advertising revenue in the United States and abroad, it also minimized its global tax liabilities by deploying labyrinthine-like legal structures such as the "Double Irish Dutch Sandwich," in which the company's earnings in Europe, the Middle East and Africa were distributed from an Irish subsidiary to a Dutch subsidiary to the Bermuda branch of another Irish subsidiary, where the tax rate on corporate income was zero.[3] Google is by no means alone in pursuit of lower taxes, as many other household name corporations, including Apple,[4] Starbucks,[5] and Amazon,[6] among others,[7] have deployed similar tax strategies. But because the tax returns of corporations, like all tax returns in the United States, are protected by broad tax privacy rules,[8] the surprisingly low tax burdens and specific tax avoidance techniques of Google and a handful of other multinational corporations have entered the public consciousness not as a result of voluntary disclosures by the corporations themselves, but rather, through a combination of legislative hearings, whistleblower reports and investigative journalism.[9]

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[1] Google, Inc., *Ten things we know to be true*, *available at* http://www.google.com/about/company/philosophy/ (last visited June 21, 2014).

[2] *See, e.g.*, STEVEN LEVY, IN THE PLEX: HOW GOOGLE THINKS, WORKS AND SHAPES OUR LIVES (2011) 9-69 (describing Google business culture).

[3] *See* Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, BLOOMBERG.COM, Oct. 21, 2010. For detailed discussion, *see* Edward D. Kleinbard, *Stateless Income*, 11 FL. TAX. REV. 699, 701-714 (2011).

[4] *See* Senators Carl Levin and John McCain, Offshore Profit Shifting and the U.S. Tax Code – Part 2 (Apple Inc.), Memorandum to the Members of the Permanent Subcommittee on Investigations, May 21, 2013.

[5] *See, e.g.*, Edward D. Kleinbard, *Through a Latte, Darkly: Starbucks's Stateless Income Planning*, 139 TAX NOTES 1515 (Jun. 24, 2013).

[6] Reuters, *In Europe's Tax Race, It's the Base, Not the Rate, That Counts*, Feb. 18, 2013 (describing Amazon's tax planning).

[7] *See, e.g.*, Jesse Drucker, *U.S. Companies Dodge $60 Billion in Taxes With Global Odyssey*, BLOOMBERG.COM, May 13, 2010.

[8] I.R.C. § 6103.

[9] *See, e.g.*, Drucker, *supra* note 3; House of Commons Committee of Public Accounts, Tax Avoidance-Google, June 10, 2013.

Policymakers in the United States and around the globe have intensified their focus on corporate tax avoidance strategies in recent years. In 2013 and 2014, for example, the U.S. Senate Permanent Subcommittee on Investigations held high-profile hearings on profit shifting from high-tax to low-tax jurisdictions by multinational corporations,[10] estimated to cost the United States at least $90 billion in lost tax revenue annually,[11] as well as the reporting of earnings of U.S. multinational corporations outside of the reach of the U.S. tax system, estimated at as much as $2 trillion.[12] Internationally, in 2013, leaders of the Group of Twenty nations committed to develop an action plan through the Organization for Economic Cooperation and Development (OECD) for combatting base erosion and profit shifting (BEPS), strategies that allow multinational corporations to pay little or even no taxes to *any* government.[13] In the midst of this global examination, policymakers, commentators and scholars have increasingly issued calls for greater tax transparency by multinational corporations. Many have posed a familiar question: should the tax returns of corporations be publicly accessible?[14]

The arguments for and against public disclosure of corporate tax returns have remained remarkably consistent throughout the past century. While the Corporate Excise Tax of 1909 required corporate tax returns to be open to public inspection,[15] under current law, the Internal Revenue Service (IRS) is prohibited from releasing any return information of a corporation publicly.[16] Proponents of public disclosure, ranging from President William Howard Taft[17] to present-day scholars such as Reuven Avi-

[10] *See, e.g.*, U.S. Senate Permanent Subcommittee on Investigations, Offshore Profit Shifting and the U.S. Tax Code Part 2, May 21, 2013; U.S. Senate Permanent Subcommittee on Investigations, Caterpillar's Offshore Tax Strategy, April 1, 2014.

[11] *See* Kimberly A. Clausing, *The Revenue Effects of Multinational Firm Income Shifting*, 130 TAX NOTES 1580 (Mar. 28, 2011).

[12] *See* Testimony of Edward D. Kleinbard, Tax Reform: Tax Havens, Base Erosion and Profit-Shifting, U.S. House of Representatives Committee on Ways and Means, June 13, 2013.

[13] OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING (2013), *available at* http://www.oecd.org/ctp/BEPSActionPlan.pdf.

[14] *See, e.g.*, Bruce Bartlett, *Can publicity curb corporate tax avoidance?*, FIN. TIMES, Jan. 31, 2013; Allison Christians, *Do We Need to Know More About Our Public Companies?*, 66 TAX NOTES INT'L 843 (May 28, 2012); Felix Salmon, *Why public companies should have public tax returns*, Reuters.com, Feb. 18, 2014; Editorial Board of Bloomberg View, *On Corporate Taxes, Put the Public in Publicly Traded: View*, Bloomberg.com, Oct. 5, 2011; Catherine Rampell, *Shareholders, public deserve tax transparency*, WASH. POST, Aug 21, 2014.

[15] Act of Aug. 5, 1909, ch. 6, § 38, 36 Stat. 11, 112.

[16] I.R.C. §§ 6103(a), (b)(2), (c).

[17] President William Howard Taft, Message to Congress, 44 CONG. REC. 3344 (June 16, 1909). For discussion, *see* Marjorie Kornhauser, *Corporate Regulation and*

Yonah,[18] Richard Pomp,[19] Joseph Thorndike[20] and Marjorie Kornhauser,[21] assert that mandated public disclosure of corporate tax returns would increase the detection capabilities of the IRS, introduce shaming as a powerful abuse deterrent, and enhance public education regarding corporate tax issues. In response, opponents typically argue that such disclosure measures would violate equity principles by treating corporate taxpayers differently from individual taxpayers, lead to information overload rather than enlightenment and expose proprietary information which could diminish corporations' willingness to cooperate with the IRS.[22] Several of these defenses are not convincing justifications for corporate tax privacy as a result of their questionable theoretical and empirical foundations.[23]

Throughout this debate, participants have focused exclusively on the potential reactions of a corporation's managers, shareholders and consumers to a corporation's disclosure of its own tax return information. They have questioned, for instance, whether managers would be hesitant to deliver information to the IRS or decline to participate in tax avoidance strategies if they knew others—shareholders, advocacy groups, consumers, non-U.S. governments—could also observe these actions. There is, however, another perspective, which neither policymakers nor scholars have considered thus far: how would the ability of a corporation's stakeholders and agents to observe *other* corporations' tax return information affect the corporation's compliance with the tax law?

This Article examines the relationship of corporate tax privacy and tax compliance from this new vantage point, which it terms the "intercorporate perspective."[24] The primary claim of this Article is that corporate tax

the Origin of the Corporate Income Tax, 66 IND. L.J. 96 (1990); STEVEN A. BANK, FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT, 68-74 (Oxford U. Press, 2010).

[18] Reuven S. Avi-Yonah & Ariel Siman, *The One Percent Solution: Corporate Tax Returns Should Be Public (And How to Get There)*, 2014 WORLDWIDE TAX DAILY 32-11 (Feb. 18, 2014).

[19] Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 CAP. U. L. REV. 373 (1993).

[20] Joe Thorndike, *Promoting Honesty by Releasing Corporate Tax Returns*, TAX NOTES (Jul. 15, 2002).

[21] *See, e.g.*, Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN J.L. & JURIS. 95, 113 (2005). *See also* Mark W. Everson, *A Reform Tool: Tax Returns*, WASH. POST., Oct. 18, 2008.

[22] *See*, *e.g.*, Tax Executives Institute, *TEI Opposes Public Disclosure of Corporate Tax Returns*, 44 TAX EXECUTIVE 300 (1992); Tax Executives Institute, *TEI Opposes Public Disclosure of Corporate Tax Returns*, 58 TAX EXECUTIVE 241 (2006).

[23] *See infra* notes 124–143 and accompanying text.

[24] I have considered the interaction of individual tax privacy and voluntary compliance in previous work. *See* Joshua D. Blank, *In Defense of Individual Tax*

privacy may limit the pressure to engage in more aggressive tax planning and reporting that corporate tax directors face from significant shareholders, non-tax managers, and even themselves. Corporate tax aggressiveness occurs where corporations use complex transactions that appear to comply with the literal text of the Internal Revenue Code to obtain valuable tax benefits that Congress did not intend.[25] Corporate tax privacy provides the government with valuable strategic defenses by restraining the ability of a corporation's stakeholders and agents to engage in benchmarking and reverse engineering, behaviors that would likely cause some tax directors to pursue more aggressive tax planning and reporting. Yet increased public access to certain return information would also enrich public awareness and debate of corporate tax reform issues, which could motivate legislators to act. The result of this analysis, thus, is not a recommendation that all corporate tax return information should receive tax privacy protections. Rather, the Article offers a set of guidelines, including consideration of the strategic defenses of corporate tax privacy, which will better equip policymakers to evaluate specific proposals to make corporate tax return information public.[26]

Corporate tax directors routinely navigate grey areas of the tax law.[27] A corporation's willingness to pursue aggressive tax strategies, however, is not dependent solely on the risk or uncertainty tolerance of the tax director. Influential shareholders, notably activist investment funds, have played a significant role in attempting to influence the tax strategies of corporations.[28] Additionally, as several studies have shown, the influence of the board of directors and non-tax management, which ultimately answer to shareholders, can affect the tax planning decisions of the tax department.[29] And tax lawyers and accountants also facilitate aggressive corporate tax planning by designing novel tax avoidance strategies and issuing tax opinions that can protect corporations from tax penalties.

Privacy, 61 EMORY L.J. 265 (2011); Joshua D. Blank, *United States National Report on Tax Privacy*, in TAX SECRECY AND TAX TRANSPARENCY – THE RELEVANCE OF CONFIDENTIALITY IN TAX LAW (Peter Lang GmbH – Internationaler Verlag der Wissenschaften, Frankfurt, Germany) (2013).

[25] *See, e.g.,* Mary M. Frank et al., *Tax Reporting Aggressiveness and its Relation to Aggressive Financial Reporting*, 84 ACC'TING. REV. 437 (defining aggressive tax reporting as "downward manipulation of taxable income through tax planning that may or may not be considered fraudulent tax evasion"); Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance,* 25 VA. TAX REV. 339 (discussing "aggressive exploitation of unintended loopholes"); DANIEL N. SHAVIRO, CORPORATE TAX SHELTERS IN A GLOBAL ECONOMY 25 (2004) (discussing aggressive tax planning).

[26] *See infra* Part IVA.

[27] *See infra* notes 144 – 148 and accompanying text.

[28] *See infra* notes 167 – 170 and accompanying text.

[29] *See infra* note 152 and accompanying text.

Corporate tax privacy, I argue, provides the government with two strategic defenses against increased corporate tax aggressiveness.

First, corporate tax privacy constrains the ability of the stakeholders and agents of a corporation to establish benchmarks of aggressiveness in several tax compliance areas.[30] For example, public disclosure of complete corporate tax returns, a position advocated by several scholars and policymakers, would reveal specific documents that would show whether a corporation's competitors had engaged in certain related party transfer pricing structures or had moved businesses offshore to avoid U.S. taxation.[31] Significant shareholders of corporations that do not engage in such strategies could use this newly available information to pressure management to pursue more aggressive transfer pricing planning.[32] With access to "red flag" disclosure forms that corporations are required to file with the IRS, activist investment funds, non-tax management, significant shareholders and corporate tax directors could also evaluate their own corporation's relative tax aggressiveness in pursuing potentially abusive tax strategies and in disclosing the transactions to the IRS.[33] They could use other corporations' disclosures to urge the corporate tax director to engage in more aggressive tax planning, including specific strategies attempted by competitors. And, as past experience indicates, tax advisors, such as the "Big Four" accounting firms, would likely be eager to utilize tax return information to establish benchmarks in specific tax compliance areas and solicit business from overly conservative corporate tax directors.[34]

Second, corporate tax privacy hampers the ability of sophisticated advisors and, ultimately, corporate tax directors to observe documents that would allow them to reverse engineer IRS's enforcement strategies.[35] Public disclosure of certain corporate tax return information would enable sophisticated analysts to observe controversies where the IRS asserted tax deficiencies, applied tax penalties and entered into settlements with other corporations.[36] For example, while many corporate managers and their advisors have expressed uneasiness regarding the potential application by the IRS of a 40% strict liability tax penalty for transactions that lack economic substance,[37] under current law, these managers cannot see whether and why any of their competitor firms have been subject to this tax penalty. With public access to information that would reveal the IRS's use

[30] *See infra* Part IVC.2.

[31] *See infra* notes 293 – 299 and accompanying text.

[32] *See infra* notes 300 – 301 and accompanying text.

[33] *See infra* notes 312 – 318 and accompanying text.

[34] *See infra* notes 179 - 180 and accompanying text.

[35] *See infra* Part IVC.3.

[36] *See infra* notes 322 - 331 and accompanying text.

[37] I.R.C. § 6662(b)(6).

of the tax penalty, on the other hand, corporate tax directors could determine which corporations received the penalty and the types of tax positions that caused the IRS to apply it.[38] Most importantly, if complete corporate tax returns were publicly accessible, tax advisory firms and other sophisticated analysts would gain an increased ability to apply quantitative rather than anecdotal methods to model the statistical likelihood that certain tax positions and filing actions would result in detection and challenge by the IRS.[39] With the aid of statistical analysis of publicly available information, corporate tax directors could adjust their behavior to engage in strategies with the lowest probability of IRS detection, deficiency challenges and tax penalties.

Despite the strategic defenses of corporate tax privacy, however, there are also significant potential benefits to public awareness and debate that would result from requiring some corporate tax return information to be publicly accessible.[40] Without the identities of specific taxpayers involved, the public shows little interest in anonymous statistics or arcane statutory provisions. Public access, by contrast, would enable the media to publicize specific corporations' annual federal tax liability, the amount of cash taxes (actual dollars) paid to the U.S. government and the amount of tax owed and paid to governments other than the U.S. federal government.[41] Public access to corporate tax returns could also highlight the existence of corporate tax expenditure provisions of the Internal Revenue Code by revealing examples of well-known corporations that have benefited from them. With increased public debate, legislators might make corporate tax legislation and reform a higher priority than they do currently.

What corporate tax return information, if any, should be publicly accessible? Participants in this debate often reach the conclusion that corporate tax returns either should remain completely confidential or should become completely accessible by the public.[42] In contrast to this all-or-nothing approach, I propose that policymakers should consider the effect of each public disclosure proposal on: (1) the strategic defenses of corporate

[38] *See infra* notes 361 – 367 and accompanying text.

[39] *See infra* notes 203 – 213 and accompanying text.

[40] *See infra* Part IVA.3.

[41] *See id.*

[42] Others take a more restrained approach. *See, e.g.*, David Lenter, Joel Slemrod & Douglas Shackelford, *Public Disclosure of Corporate Tax Return Information: Accounting, Economics, and Legal Perspectives*, 56 NAT'L TAX J. 803 (2003) (advocating for limited public disclosure); Edward D. Kleinbard & Peter C. Canellos, *IRS Should Release Schedules M-3, Not Entire Corporate Tax Returns*, 110 TAX NOTES 1485 (2006) (advocating for public release of IRS Schedule M-3 only); Daniel N. Shaviro, *The Optimal Relationship Between Taxable Income and Financial Accounting Income: Analysis and a Proposal*, 97 GEO. L.J. 423, 427, n. 11 (2009) (advocating for public release of IRS Schedule M-3).

tax privacy; (2) exposure of proprietary information of corporate taxpayers; and (3) public awareness and debate of corporate tax issues.[43] An advantage of this approach is that policymakers can apply these three factors to evaluate options from a menu of corporate tax return public access possibilities. For example, after taking these factors into account, I describe several examples of corporate tax return information, consisting primarily of schedules and forms that disclose the details of specific tax positions or IRS enforcement actions, that *should not* be publicly accessible: complete tax returns; payment of economic substance tax penalties; and base erosion and profit shifting reporting proposed by the OECD.[44] At the same time, however, I suggest several types of corporate tax return information, including significant portions of corporate tax returns themselves, that *should* be public accessible: IRS Form 1120 only (the annual U.S. corporate tax return); IRS Schedule M-3 (book/tax reconciliation form) and corporate "pink slips."[45]

This Article reviews several specific corporate tax return documents that could facilitate benchmarking and reverse engineering and draws on studies of taxpayer behavior in other contexts.[46] It also considers examples of recent actions by management in response to proposals from influential shareholders, including in the tax context.[47] While this Article does not report the results of empirical analysis or experiments conducted directly as part of this investigation, it seeks to stimulate empirical and experimental studies of the effects of the intercorporate perspective.[48] In addition, as the

[43] *See infra* Part IVA.

[44] *See infra* Part IVB.

[45] *See infra* Part IVC.

[46] *See infra* notes 294 - 299, 322 - 329.

[47] *See infra* notes 89, 152, 158, 165, 185, 200, 291, 341 and 361 and accompanying text.

[48] Empirical scholarship regarding publicity of corporate tax return information has focused largely on non-U.S. jurisdictions and has not considered the intercorporate perspective. *See, e.g.*, Scott Dyreng, Jeffrey L. Hoopes & Jaron H. Wilde, *Public Pressure and Corporate Tax Behavior*, working paper, Jul. 29, 2014 (examining response of U.K. firms to subsidiary disclosure requirement); Makoto Hasegawa, Jeffrey L. Hoopes, Ryo Ishida & Joel Slemrod, *The Effect of Public Disclosure on Reported Taxable Income: Evidence from Individuals and Corporations in Japan*, 66 Nat'l Tax J. 571 (2013) (reporting results from study involving Japanese public disclosure of corporate tax returns). Empirical scholars could conduct experiments involving the intercorporate perspective similar to those conducted in the individual tax context. *See, e.g.*, Stephen Coleman, The Minnesota Income Tax Compliance Experiment: State Tax Results, Minnesota Dep't of Revenue (Apr. 1996), *available at* http://www.taxes.state.mn.us/. The IRS also offers a limited number of researchers the ability to review confidential tax return data for research purposes. *See, e.g.*, Jeffrey Mervis, *How Two Economists Got Direct Access to IRS Tax Records*, Science, May 22, 2014 (describing Raj Chetty and Emmanuel Saez research).

debate has focused on publicly traded corporations,[49] which are already subject to requirements to disclose significant business and financial information, including limited tax information,[50] in public filings, I restrict my analysis to publicly traded corporations.

The remainder of this Article proceeds as follows. Part II describes the evolution of corporate tax privacy, the limited corporate tax return information publicly observable today and common arguments presented in the corporate tax privacy debate. Part III presents the strategic defenses against increased corporate tax aggressiveness that corporate tax privacy provides to the government. Part IV offers guiding principles that should enable policymakers to determine whether corporate tax return information should be publicly accessible and applies these principles to several examples. Part V concludes.

II. WHY CORPORATE TAX PRIVACY?

Since the birth of the corporate income tax in the United States, policymakers have debated whether the tax returns of corporations should be accessible by the public. Should the tax return information of corporations be treated differently from that of individuals? Does the public's "right to know" outweigh a corporation's "right to privacy"? And what social good or harm would result from providing the public with access to corporate tax return information? This Part briefly reviews the evolution of corporate tax privacy in the United States, describes corporate tax information that is observable from public sources today and considers the traditional arguments for and against public disclosure of corporate tax return information.

A. *The Evolution of Corporate Tax Privacy*

The public's ability to observe tax return information of U.S. corporations, from Standard Oil to Google, has fluctuated throughout the history of the corporate income tax. This Subpart discusses major events in the evolution of corporate tax privacy.

Corporate Excise Tax of 1909. At the height of the Progressive Era,

[49] *See, e.g.*, Avi-Yonah & Siman, *supra* note 18 ("…if all publicly traded corporations were required to publish their tax returns"); Salmon, *supra* note 14 (referring to "public US companies"); Editorial Board of Bloomberg View, *supra* note 14 ("Put the Public in Publicly Traded"); Rampell, *supra* note 14 ("Require all publicly traded companies to make their tax returns public. Period.").

[50] *See infra* notes 70–91 and accompanying text.

Congress enacted the Corporate Excise Tax of 1909.[51] In its initial form, the legislation imposed a new one percent tax on net corporate income in excess of $5,000.[52] In addition, Congress provided that corporate tax returns "shall constitute public records and be open to inspection as such."[53] President William Howard Taft commended "the publicity feature of the law [as] the only thing which [made] the law of any special value" because it would aid the government's regulation of corporations.[54]

Despite its proclaimed regulatory benefits, public access to corporate tax returns was limited. After deliberation, the Treasury determined that only tax returns themselves and not documents related to tax audits by the IRS were open to inspection.[55] Congress, however, failed to appropriate the funds necessary for the IRS to maintain all corporate tax returns in an organized, searchable form[56] and, ultimately, repealed the provision.[57]

1924 Corporate Tax Return Publicity. The issue of public access to corporate tax return information arose again in 1924, when a group of progressive U.S. Senators spearheaded legislation that permitted the public to view the amount of income tax paid by every taxpayer, including corporations.[58] Newspapers published on their front pages the names of large corporations, such as Ford Motor Company, and celebrities, such as Charlie Chaplin, and the amounts of their corresponding tax payments.[59] After intense lobbying by opponents, Congress revised the law in early 1926 to require only the names and addresses of individuals who filed tax returns, and not their tax payments, to be treated as public record.[60]

The "Pink Slip" Requirement of 1934. In the midst of the Great Depression in 1934, Congress enacted legislation that required all taxpayers, both individuals and corporations, to file with their annual tax returns a "pink slip," which would be open to public inspection.[61] Each pink slip would contain the taxpayer's name and address, total gross

[51] Act of August 5, 1909, ch. 6, § 38, 36 Stat. 11, 112. For histories of the Corporate Excise Tax of 1909, *see* Kornhauser, *supra* note 17; Bank, *supra* note 17.

[52] *Id*.

[53] Act of August 5, 1909, ch. 6, § 38, 36 Stat. at 11, 116.

[54] ROY G. BLAKEY & GLADYS C. BLAKEY, THE FEDERAL INCOME TAX 57 (2006).

[55] *See No Publicity Now in Corporation Tax*, N.Y. TIMES, Feb. 17, 1910.

[56] *See id*.

[57] T.D. 1665, 13 Treas. Dec. Int. Rev. 117 (1910).

[58] Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293; *see also* MARK LEFF, THE LIMITS OF SYMBOLIC REFORM, at 67 (1984).

[59] *See, e.g., Income Revelation Stirs Wall Street*, N.Y. TIMES, Oct. 25, 1924, at 1; *La Follette Hails Publicity of Taxes*, N.Y. TIMES, Oct. 26, 1924, at 3; *New York—Its Big Income*, N.Y. TIMES, Oct. 25, 1924, at 2.

[60] Revenue Act of 1926, ch. 27, § 257(e), 44 Stat. 9, 51 (amended 1934).

[61] Revenue Act of May 10, 1934, ch. 277, § 55(b), 48 Stat. 680, 698 (1934).

income, total deductions, net income, total credits, and tax liability, even if the taxpayer owed no tax liability.[62] Following passage of the legislation, however, the "Sentinels of the Republic," a conservative group of Senators, argued that the pink slip requirement would expose individuals to danger of harassment and even kidnapping and successfully obtained repeal of the law in April 1935 before it ever went into effect.[63]

Present Law. Over forty years later, Congress enacted the Tax Reform Act of 1976.[64] The basic framework of this legislation continues to apply. Under current law, all tax return information and tax returns of individuals *and* corporations are confidential.[65] Section 6103 of the Internal Revenue Code protects the confidentiality of "returns" and "return information" and broadly defines both terms to include "any tax or information return;"[66] any amendments filed with the IRS; and any taxpayer's identity, income, tax deductions, tax credits, audit and penalty history, among many other items. Absent a corporation's voluntary disclosure, only shareholders who own one percent or more of the corporation's stock are legally entitled to review that corporation's tax return.[67]

B. *Corporate Tax Return Information Observable Today*

Extracting information about the tax liabilities, payments and strategies of U.S. corporations from publicly available sources is no easy task.[68] Even though publicly traded corporations are required to disclose voluminous non-tax financial information in a variety of public fora, tax privacy shields nearly all tax return information from public view.

The primary sources of corporate tax return information observable today are documents filed by publicly traded corporations with the U.S. Securities & Exchange Commission (SEC). A corporation's annual Form 10-K includes financial statements, which are governed by generally accepted accounting principles (GAAP), as interpreted by the Financial

[62] *Id*. *See* Marjorie E. Kornhauser, *Shaping Public Opinion and the Law: How a "Common Man" Campaign Ended a Rich Man's Law*, 73 LAW & CONTEMP. PROBS. 123, 129–30 (2010).

[63] *See* Kornhauser, *supra* note 62, at 135–38; Raymond Pitcairn, *The Pink-Slip Strike*, SAT. EVENING POST, June 8, 1935, at 23, 44.

[64] Pub. L. No. 94-455, 90 Stat. 1520.

[65] I.R.C. § 6103(a).

[66] I.R.C. § 6103(b)(1).

[67] I.R.C. § 6103(e)(1)(D)(iii).

[68] *See, e.g.*, Michelle Hanlon, *What Can We Infer About a Firm's Taxable Income from its Financial Statements?*, 56 NAT'L TAX J. 831 (2003).

Accounting Standards Board (FASB).[69] In their financial statements, corporations must include a footnote containing a number of specific disclosures related to their income tax expenses.[70] A description of tax information that publicly traded corporations disclose in their SEC filings is presented below, using a recent Form 10-K of Google for illustration.[71]

Global Effective Tax Rate. Publicly traded corporations are required to disclose their "effective tax rate" each year in their Form 10-K.[72] For example, in its 2011 Form 10-K, Google disclosed an effective tax rate of 21%.[73] For purposes of determining Google's U.S. income tax liability or any tax payment to the U.S., however, this rate is highly ambiguous. The figure is calculated using Google's GAAP income, not its U.S. taxable income, and using a GAAP measure of tax expense, not a cash tax measure.[74] GAAP accounting treats certain significant items, such as municipal bond interest, goodwill and depreciation of tangible property, differently from income tax accounting.[75] In addition, Google reports its effective tax rate on a *global*, rather than U.S., basis.[76]

Cash Taxes Paid. Unless a corporation voluntarily discloses the information, it is extraordinarily difficult for non-expert observers, including journalists, to discern from a corporation's public filings the amount of cash taxes the corporation actually paid to any government. As the vast majority of corporations report on the "indirect method" of cash flow statements, the specific amount of cash taxes paid is not readily apparent from SEC disclosure documents.[77]

Uncertain Tax Positions. In 2006, FASB issued Interpretation 48 of Financial Accounting Standard 109,[78] which prevents corporations from recognizing tax benefits for financial accounting purposes unless they are "more likely than not" to be upheld if audited by the IRS and subject to review by a court of competent jurisdiction.[79] Corporations must disclose

[69] U.S. Securities and Exchange Commission, Form 10-K, *available at* http://www.sec.gov/answers/form10k.htm.

[70] ASC 740-10.

[71] Google Inc., Annual Report (Form 10-K) (Dec. 31, 2011).

[72] ASC 740-10-30.

[73] Google Inc., Annual Report (Form 10-K), at 36 (Dec. 31, 2011).

[74] *Id*. To reach the 21% figure, Google divided its $2.589 billion tax provision for 2011, a GAAP figure, by $12.326 billion of global income, another GAAP figure. *Id.*

[75] For discussion, *see* Shaviro, *supra* note 42; Kleinbard, *supra* note 3 at 741, n. 96.

[76] *See* ASC 740-270-35-3; ASC 740-270-30-19.

[77] *See, e.g.*, CHARLES T. HORNGREN ET AL., INTRODUCTION TO FINANCIAL ACCOUNTING 193 (11th Ed., 2013) (Ch. 5, Statement of Cash Flows).

[78] Fin. Accounting Standards Bd., Accounting for Uncertainty in Income Taxes, FASB Interpretation No. 48 (2006), *later codified* as ASC 740-10-25-6-7, 13.

[79] ASC 740-10-55-3.

their aggregate tax reserves established for uncertain tax positions in their Form 10-K, along with certain other information, but generally are not required to report on specific tax uncertainties.[80] For example, in 2011, Google showed a final balance of $1.56 billion in uncertain tax positions,[81] but provided no explanation of the components of this uncertainty.

Net Operating Loss Carryforwards. One specific U.S. tax item that corporations are required to disclose in SEC filings is the amount of their net operating losses.[82] When a corporation's taxable losses exceed its taxable income, a net operating loss, which can be carried forward to offset taxable income in later tax years, subject to limitations under Section 382 of the Internal Revenue Code, results.[83] In its 2011 Form 10-K, Google reported that as of December 31, 2011, it had federal and state net operating loss carryforwards for income tax purposes of approximately $420 million and $310 million, respectively.[84]

Permanently Reinvested Earnings. Large U.S. multinational corporations defer U.S. tax liability on their non-U.S. earnings by keeping them offshore in non-U.S. subsidiaries. Under normal rules of accounting, a corporation would have to anticipate the ultimate distribution of untaxed foreign subsidiary earnings and thus account for the future U.S. tax consequences today by impacting earnings and establishing a "deferred tax liability."[85] If a corporation makes an election, however, it is not required to establish a deferred tax liability for the U.S. tax that would result upon repatriation of the offshore earnings as long as these earnings are "permanently reinvested earnings."[86] Corporations must disclose the cumulative amount of permanently reinvested earnings for which they did not establish a deferred tax liability and the amount of the estimated deferred tax liability associated with these unrepatriated earnings, unless it is not practicable to do so.[87] For example, in its 2011 Form 10-K, Google reported that its non-U.S. subsidiaries held $21.1 billion of earnings at the end of 2011, but that "determination of the amount of unrecognized deferred tax liability related to these earnings is not practicable."[88] One study has found that many large multinational corporations fail to comply with the requirement to disclose permanently reinvested earnings and that an overwhelming majority of firms (71.6% to 83.1%) either disclose that

[80] ASC 740-10-25-6-7.
[81] Google Inc., Annual Report (Form 10-K), at 81 (Dec. 31, 2011).
[82] ASC 740-10-50-3(a).
[83] I.R.C. § 382.
[84] Google Inc., Annual Report (Form 10-K), at 36 (Dec. 31, 2011).
[85] ASC 830-30-45-21.
[86] ASC 740-10-55-209.
[87] ASC 740-30-50-1, 2.
[88] Google Inc., Annual Report (Form 10-K), at 80 (Dec. 31, 2011).

the calculation of the deferred tax liability is not practicable or fail to address the deferred tax liability at all.[89]

Tax Penalties, Audits and Other Material Risks. Finally, SEC filings describe a corporation's IRS audits and payment of tax penalties in limited circumstances and without much detail. Even if these events meet the SEC's materiality threshold, managers often use vague language to report them. For example, Google's statements regarding its audits in its 2011 Form 10-K range in specificity from "our 2003 through 2011 tax years remain subject to examination by the appropriate governmental agencies for Irish tax purposes"[90] to "we are subject to continuous examination of our income tax returns by the IRS and other tax authorities."[91]

C. *The Corporate Tax Privacy Debate*

As the preceding discussion demonstrates, tax privacy conceals most corporate tax return information from public view. U.S. securities and accounting regulations do little to bring corporate tax return information to light, even for publicly traded corporations. This Subpart outlines the primary arguments offered by proponents and opponents of mandated public disclosure over the course of the past century and considers the merits of each of them.

1. *Arguments For Public Disclosure*

Proponents of mandated public disclosure have argued that providing the public with access to corporations' tax returns would enhance the ability of the government to detect questionable tax positions, deter the managers of a corporation from pursuing aggressive tax strategies as a result the threat of public shaming and educate the public regarding the corporate tax law.

a. *Increased Detection*

Public disclosure proponents assert that by exposing a corporation's tax returns to "[m]illions of eyes," the government would enlist the assistance of the public as a "watchdog", which would aid its tax enforcement

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[89] Benjamin C. Ayers, Casey M. Schwab & Steven Utke, *Noncompliance with Mandatory Disclosure Requirements: The Magnitude and Determinants of Undisclosed Permanently Reinvested Earnings*, ACCOUNTING REVIEW, *forthcoming* 2014.

[90] *Id*.

[91] Google Inc., Annual Report (Form 10-K), at 37 (Dec. 31, 2011). Most large public corporations use similar formulations when discussing audits.

efforts.[92] Some scholars, such as Marjorie Kornhauser and Laurence Kotlikoff, have argued that mandated public disclosure would serve as an "automatic enforcement device"[93] by "increas[ing] the chance of getting caught" due to public scrutiny.[94] Others have argued that enhanced detection is especially likely as a result of the IRS's ability to provide whistleblower rewards to informants.[95] Under current law, the IRS pays informants rewards of up to 30% of the proceeds that it collects using information they have provided to the IRS.[96] In the case of information that originated in news reports, the IRS pays rewards of up to 10% of the proceeds collected.[97]

This rationale for mandated public disclosure depends on several questionable assumptions. The argument first assumes that the IRS would have the audit capacity to investigate the large volume of tips from citizens and reporters that could result from a public access regime, even though many of them may not lead to the discovery of tax noncompliance. A review of the IRS's historic resource weaknesses should cast significant doubt on this assumption.[98] Further, while the IRS has paid rewards to informants, including a $104 million reward to ex-UBS employee Bradley Birkenfeld in 2013,[99] the individuals who are most capable of reporting the most valuable information to the IRS are those who, like Birkenfeld, are already working inside the corporation, often in the tax department.[100] It is unlikely that the participation of the general public in reviewing corporate tax returns would strengthen the IRS's ability to obtain valuable information from informants.

The detection rationale also implicitly assumes that the public would perform a more comprehensive review of corporate tax returns than the IRS. Most of the largest U.S. corporations, however, are already under

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[92] *See, e.g.*, Joseph J. Thorndike, *The Thorndike Challenge*, 122 TAX NOTES 691, 691–92 (2009).

[93] Anna Bernasek, *Should Tax Bills Be Public Information?*, N.Y. TIMES, Feb. 14, 2010, at BU11 (*quoting* Professor Kotlikoff's statement).

[94] Kornhauser, *supra* note 21.

[95] *See, e.g.*, Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357, 385 (2008).

[96] I.R.C. § 7623(b)(1).

[97] I.R.C. § 7623(b)(2)(A).

[98] *See* IRS OVERSIGHT BD., FY2011 IRS BUDGET RECOMMENDATION SPECIAL REPORT 9–11 (2010).

[99] *See* David Kocieniewski, *Whistle-Blower Awarded $104 Million by I.R.S.*, N.Y. TIMES, Sept. 11, 2012.

[100] *See* Lynnley Browning, *The Perks of Being a Whistle-blower*, NEWSWEEK, Jan., 30, 2014.

continuous IRS audit.[101] Through the Coordinated Industry Case program, the IRS audits more than 800 of the largest U.S. corporations' tax returns on an ongoing basis.[102] ExxonMobil Corporation, for instance, provides office space at its Houston headquarters to 35 IRS agents, who engage in a "full-time audit" of the corporation's books and tax returns.[103] In contrast to "cash economy" taxpayers, who engage in transactions not subject to third-party information reporting or withholding, multinational corporations attract significant scrutiny from the IRS. Consequently, the argument that public disclosure would strengthen the IRS's detection capabilities or cause corporate tax directors to perceive an increased probability of detection is unconvincing.

b. *Public Shaming*

Another frequent argument in favor of mandated public disclosure is that it would introduce the threat of public shaming as a deterrent against aggressive corporate tax planning.[104] Several proponents of this view have argued that in a public disclosure regime, managers "might be leery of paying only nominal amounts of tax"[105] out of fear of backlash from shareholders, business partners, and consumers.[106] In contrast to these claims, as I have argued elsewhere, public shaming is not a compelling rationale for mandated public disclosure.[107]

There is little evidence to support the assertion that publicity of a corporation's use of aggressive, or even abusive, tax planning would result in communal ostracism of the corporation. When the press has reported on the tax avoidance strategies of large U.S. multinational corporations, the corporations involved have not suffered significant drops in stock price, widespread boycotts of their products or calls from shareholders for management reform.[108] Michelle Hanlon and Joel Slemrod have found that

[101] *See* Amy S. Elliott, *News Analysis: Audit Proof? How Hedge Funds, PE Funds, and PTPs Escape the IRS*, TAX NOTES TODAY, Jul. 23, 2012.

[102] *See* Int. Rev. Serv., Int. Rev. Man. § 4.46.2.3 (2014).

[103] *See* Steven Mufson, *How much do oil companies really pay in taxes?*, WASH. POST, May 11, 2011.

[104] *See, e.g.*, Kornhauser, *supra* note 21 at 104; Jay A. Soled & Dennis J. Ventry, Jr., *A Little Shame Might Just Deter Tax Cheaters*, USA TODAY, Apr. 10, 2008, at 12A.

[105] Pomp, *supra* note 19, at 444.

[106] *See, e.g.*, Soled & Ventry, Jr., *supra* note 372.

[107] *See* Joshua D. Blank, *What's Wrong With Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539, 581 (2009).

[108] By contrast, consider public reaction when a well-known corporation commits an environmental or public safety offense. *See, e.g.*, Taryn Fuchs-Burnett, *Mass Public Corporate Apology*, 57 DISP. RESOL. J. 26, 31-32 (May-July 2002).

publicity of a corporation's use of tax shelters does not result in drops in stock price as significant as the types of drops that occur following public reports of financial accounting fraud.[109] Another recent study found no evidence that corporations that sell at least one highly rated brand with valuable consumer reputation engage in less tax avoidance than other corporations.[110]

Corporate managers appear to consider potential public reaction when pursuing transactions that implicate patriotism by requiring their corporations to relocate outside the United States. During the "corporate inversion wave" of 2014, where many U.S. corporations pursued transactions that caused them to merge with non-U.S. target corporations, enabling them to escape U.S. taxation,[111] several politicians, including President Obama, decried the transactions as "unpatriotic."[112] Nevertheless, numerous consumer-focused public corporations, from Chiquita Brands International Inc.[113] to Medtronic[114] to Mylan,[115] among many others,[116] still pursued the strategy. By contrast, when the board of directors of Walgreens declined to relocate its corporate headquarters to the United Kingdom as part of its merger with British-based Alliance Boots in 2014—a decision which caused Walgreens to continue to be subject to U.S. corporate income tax on its worldwide income—the corporation's stock price immediately dropped over 14% in value.[117]

Corporate managers routinely respond to attempts by the government to shame corporations that push the envelope, but do not violate explicit tax rules, by noting that their corporations' tax positions are "perfectly legal." For example, in his testimony before the U.S. Senate, Tim Cook, Chief Executive Office of Apple, Inc., articulated this sentiment when he stated,

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[109] Michelle Hanlon & Joel Slemrod, *What Does Tax Aggressiveness Signal? Evidence from Stock Price Reactions to News About Tax Shelter Involvement*, 93 J. PUB. ECON. 126, 128 (2009).

[110] Chelsea Rae Austin & Ryan Wilson, *Are Reputational Costs a Determinant of Tax Avoidance?*, Feb. 2013.

[111] For discussion, *see* Shayndi Raice, *How Tax Inversions Became the Hottest Trend in M&A*, WALL ST. J., Aug. 5, 2014.

[112] *See, e.g.,* Katie Zezima, *Tax loophole that allows companies to leave the U.S. is 'unpatriotic'*, THE WASH. POST, Jul. 24, 2014 (*quoting* President Obama).

[113] *See* David Gelles, *Chiquita Rejects Unsolicited Offer and Will Proceed With Inversion*, N.Y. TIMES, Aug. 14, 2014.

[114] *See* Dana Cimilluca, *Medical Merger Part of 'Tax Inversion' Wave*, WALL. ST. J., Jun. 15, 2014.

[115] *See* Natalie Grover, *Mylan presses on with tax-inversion Abbott deal*, Reuters.com, Aug. 7, 2014.

[116] *See* Raice, *supra* note 111.

[117] *See* Kim Hjelmgaard and Kevin McCoy, *Walgreens stock smacked after tax inversion out*, USA TODAY, Aug. 6, 2014.

"We pay all the taxes we owe – every single dollar."[118] Shaming campaigns often result in similar rebuttals by major corporations.[119] The accepting reactions of these corporations' shareholders and consumers strongly suggest that it is unlikely that public disclosure of corporate tax return information, including aggressive tax planning, would result in meaningful shaming effects.

c. *Public Education*

A final argument in favor of public disclosure of corporate tax returns is that it could serve an educational function by enhancing the public's understanding of the corporate tax law. Proponents of this view have characterized public disclosure of corporate tax returns as a "powerful tool for analysts who follow companies and industries"[120] and as a way to educate the public about "how much corporations actually pay in taxes."[121] In contrast to the rationales of increasing detection or deterring tax avoidance through potential public shaming, the public education rationale seeks to lessen public ignorance of the corporate tax laws rather than address any particular corporate tax planning behaviors.

With the aid of the news media, public disclosure of corporate tax return information would enable the public to learn about the corporate tax system through vivid specific examples of named corporations. Compared to anonymous statistical information or arcane statutory language, these specific examples would likely stimulate public debate, which could ultimately motivate legislative action.[122] As Part IV will argue, enhancing public awareness and debate of the corporate tax law should serve as the primary objective of measures that would mandate public disclosure of corporate tax return information.[123]

2. *Arguments Against Public Disclosure*

In response to these arguments, public disclosure opponents typically offer familiar defenses of corporate tax privacy. These include assertions that public disclosure would cause corporate taxpayers to be treated

[118] Testimony of Tim Cook, Chief Executive Officer, Apple, Inc., Before the U.S. Senate Permanent Subcommittee on Investigations, May 21, 2013.

[119] *See, e.g.*, Press Release, The Blackstone Group, Blackstone Says The New York Times Inaccurate and Misleading (July 13, 2007).

[120] Everson, *supra* note 21.

[121] Bartlett, *supra* note 14.

[122] *See infra* notes 249 – 259 and accompanying text.

[123] *See infra* Part IV.A.3.

differently from individual taxpayers, result in information overload and expose corporations' proprietary information to competitors. Several of these defenses, as commonly presented, rest on shaky grounds.

a. *Equity with Individuals*

Opponents of proposals to require publicly traded corporations to disclose tax return information often object to these measures on equity grounds, claiming that they rescind tax privacy protections for corporate taxpayers, but not for individuals. For example, in response to proposals to require public disclosure of complete corporate tax returns in the early 1990s, the Tax Executives Institute, an association of in-house business tax professionals, responded, "just as individual taxpayers do not wish to see the nature and extent of their expenditures for medical care, for housing, or charitable purposes disclosed…corporate taxpayers have a legitimate interest in preserving the confidentiality of their myriad expenditures and investments."[124] Other responses from opponents of public disclosure contend that tax privacy is a "core American value"[125] that should be offered to "individuals *and* corporations."[126] The basic argument is that as a matter of equity, corporations should not be subject to public disclosure requirements unless they would also apply to individuals.

But corporate and individual taxpayers *are* different in ways that are relevant to the tax privacy debate. First, unlike individuals, corporations are owned by investors that have an interest in comparing a corporation's income reported for tax purposes against that reported for financial accounting purposes. Indeed, one reason that legislators sought the publicity provision in 1909 was to prevent stock watering and abusive promoter schemes.[127] Second, public disclosure of certain corporation tax return information, such as U.S. tax liability, would not pose the threats to physical safety and theft that individuals might face if this information were public.[128] Third, due to the unfamiliar nature of the substantive corporate tax law to most people, public awareness of basic elements of the tax law is lacking more in the corporate rather than individual context.[129]

As a legal matter, *neither* corporations nor individuals have a right to tax privacy sufficient to prohibit the government from requiring public

[124] Tax Executives Institute, *supra* note 22.
[125] *Id*.
[126] *Id*. (emphasis added).
[127] For discussion, *See* Kornhauser, *supra* note 17.
[128] *See, e.g., Income Publicity Called Kidnap Aid*, N.Y. TIMES, Feb. 25, 1935, at 2.
[129] For discussion, *see infra* Part IVA.3.

disclosure of their tax return information. In *Flint v. Stone Tracy Co.*,[130] decided in 1911, the U.S. Supreme Court upheld the public inspection features of the Corporate Excise Tax of 1909 as constitutional and within Congress's power to secure "the fullness and accuracy" of corporations' tax returns.[131] The Court reached a similar result in 1925 in *United States v. Dickey*,[132] when it held that Congress could direct the IRS to open to public inspection lists of the names of individuals and the amount of income tax paid. While it has the legal authority to require public disclosure of both individual and corporate tax returns, Congress has refrained from public disclosure measures since 1935, primarily as a result of harassment and personal safety concerned voiced by individuals.[133] Again, these concerns do not apply equally to corporations.

b. *Information Overload*

Opponents often argue that mandated public disclosure would result in information overload rather than the delivery of information relevant to investors, policymakers or the general public. For example, the Tax Executives Institute frequently argues that corporate tax returns consist of "multiple volumes" and "thousands of pages of financial and supplemental information, far exceeding the SEC's current annual reporting requirements for public companies."[134] It contends that in a public disclosure regime, "investors may not be able to discern meaning from what would be truckloads of tax return information."[135] Opponents use this concern to conclude that all corporate tax return information should remain private.

This defense of corporate tax privacy is not persuasive as a response to all corporate tax return public disclosure measures. It presumes that if a corporation's tax returns were publicly accessible, individual investors and members of the general public would attempt to interpret corporate tax return information directly. A more plausible characterization is that if corporations' tax returns were public, sophisticated intermediaries, such as journalists, financial advisors and empirical scholars, would comb through the documents and report relevant information.[136] Moreover, as presented above, the defense assumes that the *only* form of public disclosure is one

[130] 220 U.S. 107 (1911).

[131] *Id.*

[132] 268 U.S. 378 (1925).

[133] *See* Act of Apr. 19, 1935, ch. 74, 49 Stat. 158.

[134] Tax Executives Institute, *supra* note 22.

[135] Patti Mohr et al., *Tax Scholars Discuss Corporate Disclosure, Book-Tax Reporting*, 99 TAX NOTES 617 (May 5, 2003) (*quoting* Fred Murray).

[136] *See, e.g.*, John Graham, Jana Raedy and Douglas Shackleford, *Research Accounting for Income Taxes*, 53 J. OF ACC'TING AND ECON. 412.

that would result in the delivery of "truckloads of tax return information" to investors and the public. In reality, as Part IV will demonstrate, policymakers can consider a variety of disclosure measures.[137] As a result of these unrealistic assumptions, the concern over information overload does not justify broad tax privacy protections.

c. *Proprietary Information*

Last, opponents consistently argue that public disclosure of corporate tax return information would expose a corporation's sensitive proprietary information to the public, including to competitors. For instance, the Tax Executives Institute has asserted that public disclosure measures would reveal "confidential and proprietary data not currently contained in consolidated financial statements…to the world."[138] Opponents of public disclosure often argue that public disclosure of proprietary information would threaten tax privacy's function as a "cornerstone of voluntary compliance"[139] by corporate taxpayers. Just as then-Treasury Secretary Andrew Mellon argued in the 1930s, present-day opponents argue that corporations will provide proprietary information to the IRS only if it "stops with the government."[140]

Advocates of public disclosure often reject this concern for several reasons. First, public disclosure opponents have failed to present concrete examples of the types of corporate tax return documents that, if publicly disclosed, would expose proprietary information. Second, public disclosure opponents present this concern in response to nearly all public disclosure measures.[141] This stance has led to skeptical responses from advocates of public disclosure, such as "corporations have never been able to articulate how knowing the amount of tax that a competitor paid reveals anything of competitive value."[142] Finally, opponents of public disclosure have not addressed *how* corporate taxpayers would reduce cooperation with the IRS in response to the threat of public disclosure of proprietary information. Despite these weaknesses, however, as Part IV will discuss,[143] concern regarding exposure of proprietary information is the only compelling argument presented by opponents of public disclosure thus far.

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[137] *See infra* Parts IV.B, C.

[138] *Id*.

[139] Tax Executives Institute, *supra* note 22.

[140] 1 OFFICE OF TAX POLICY, DEP'T OF THE TREASURY, REPORT TO CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE 19 (2000).

[141] *See, e.g.,* Tax Executives Institute, *supra* note 22.

[142] *See* Pomp, *supra* note 19.

[143] *See infra* Part IV.A.2.

III. Corporate Tax Privacy and Corporate Tax Aggressiveness

Participants in the corporate tax privacy debate have focused almost exclusively on the potential reactions of a corporation's managers, shareholders and consumers to a requirement that the corporation publicly disclose its own tax return information. In contrast to this traditional approach, this Part examines public disclosure of corporate tax return information from the intercorporate perspective: how would the ability of a corporation's stakeholders and agents to observe *other* corporations' tax return information affect how the corporation complies with the tax law?

This Part argues that by keeping certain return information from public view, corporate tax privacy may limit the pressure to engage in more aggressive tax planning and reporting that corporate tax directors face from significant shareholders and non-tax managers, and even from themselves. It theorizes how corporate tax privacy provides the government with valuable strategic defenses against increased corporate tax aggressiveness by preventing the use of certain corporate tax return information by interested parties to engage in two specific behaviors—benchmarking and reverse engineering—that would likely cause some tax directors to pursue more aggressive tax planning and reporting.

A. *Sources of Corporate Tax Aggressiveness*

Corporate tax directors regularly must make decisions in the middle of the continuum of potential tax planning opportunities.[144] At one end of the continuum are tax positions that are clearly legal, such as claiming tax deductions related to the purchase of software that are specifically authorized by statute.[145] At the other end are tax positions that are clearly illegal, such as claiming tax deductions for phony salary expenses.[146] In between these two points are tax positions that are neither clearly legal nor illegal, but that can instead be described as "aggressive." As legal scholars and economists have often defined it, corporate tax aggressiveness involves the use of complex transactions that appear to comply with the literal text of the tax law to obtain tax benefits for the corporation—tax deductions, tax credits, tax exemptions, lower tax rates—that Congress did not intend.[147]

[144] For discussion, *see* Lewis R. Steinberg, *Form, Substance and Directionality in Subchapter C*, 52 TAX LAW. 457, 499 (1999); David P. Hariton, *Kafka and the Tax Shelter*, 57 TAX L. REV. 1, 3 (2003).

[145] I.R.C. § 179(d)(1)(A)(ii).

[146] Willful failure to pay taxes is a violation of the law. *See* I.R.C. § 7201.

[147] *See, e.g.*, Frank et al., *supra* note 25; Logue, *supra* note 25; Shaviro, *supra* note 25. The government has lost high-profile corporate tax abuse cases at the trial level, only to win them later on appeal, and vice versa. *See, e.g.*, United Parcel Service of

At first glance, corporate tax aggressiveness appears to cause a number of social harms. From an efficiency standpoint, it distorts behavior by causing non-tax managers, corporate tax directors and tax advisors to devote effort to crafting complex transactions that exploit ambiguities or loopholes in the tax law rather than engaging in other business activities.[148] Second, aggressive corporate tax planning can cause the tax base to shrink unexpectedly, which may cause Congress to increase the tax rates that apply to other taxpayers.[149] Third, aggressive corporate tax planning contributes to the complexity of the tax law as Congress and Treasury must enact anti-abuse measures in response.[150] At the same time, it is not known whether corporations that engage in aggressive tax planning use the tax savings to deliver social benefits that outweigh these costs. Consequently, rather than reach a definitive conclusion about the harms of corporate tax aggressiveness, I will assume, as have many other tax scholars,[151] that the government should prevent corporations from engaging in transactions that are not consistent with Congress's intent.

Several stakeholders and agents of a corporation contribute to its willingness to engage in aggressive tax planning and reporting:

Tax Directors. One determinant of a corporation's willingness to pursue aggressive tax strategies is its tax director, the individual who oversees the corporation's tax compliance and reporting obligations.[152] Some corporate tax directors are more willing to engage in aggressive tax planning than others.[153] Conservative tax directors attempt to comply with

America v. Commissioner, 254 F. 3d 1014 (11th Cir. 2001); Compaq Computer Corp. v. Commissioner, 277 F.3d 778 (5th Cir. 2001); IES Indus., Inc. v. United States, 253 F.3d 350 (8th Cir. 2001).

[148] As David Weisbach has written, when corporations engage in aggressive tax planning, "[n]o new medicines are found, computer chips designed or homeless housed. David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 222 (2002).

[149] *See id.* at 222.

[150] *See* DEP'T OF THE TREASURY, THE PROBLEM OF CORPORATE TAX SHELTERS: DISCUSSION, ANALYSIS AND LEGISLATIVE PROPOSALS, 30, Jul. 1999; ("legislative remedies themselves create complexity").

[151] *See, e.g.,* Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law is Uncertain*, 27. VA. TAX REV. 241, n. 3 (2007) (deferring discussion of social and ethical consequences of aggressive tax planning); Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. PENN. L. REV. 1017, n. 111 (2009) (assuming "unpaid taxes result in societal harm, which might not be true").

[152] For discussion of the role of the tax director and tax department in tax planning, *see* John R. Robinson et al., *Is Aggressive Financial and Tax Reporting Related to the Organization and Orientation of the Corporate Tax Function?*, National Tax Association Annual Meeting (2006).

[153] *See, e.g.,* Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47, 52 (2001).

the tax law in a way that is consistent with its spirit.[154] Aggressive corporate tax directors, however, treat the IRS as an adversary, engaging in tax planning that applies hyper-literalist readings of the tax law,[155] and revealing as little information to the IRS as possible.[156]

Tax Lawyers and Accountants. Related sources of corporate tax aggressiveness are outside advisors, namely tax lawyers and accountants. While most tax lawyers are unwilling to deliver written opinions regarding tax shelters and other aggressive tax strategies (especially in light of the government's recent prosecution of tax lawyers), some are willing to enable aggressive tax planning.[157] As has been chronicled at length,[158] the national accounting firms fueled the corporate tax shelter boom of the late 1990s and early 2000s, where hundreds of large corporations, including blue chip public companies, pursued highly aggressive tax strategies, with colorful names such as COBRA (currency options bring reward alternatives),[159] PICO (personal income company),[160] and Son of BOSS (option position transfers).[161] Advisors, thus, can facilitate corporate tax aggressiveness by designing corporate tax avoidance strategies and issuing opinions that allow tax directors to implement them.

Non-Tax Management. The non-tax management of a corporation can also influence the level of tax aggressiveness of a corporation. As several empirical studies have demonstrated, the board of directors, which ultimately answers to shareholders, can drive managers of the corporation to reduce the corporation's effective tax rate.[162] In response to pressure from the board of directors or the CEO, the chief financial officer may prod the tax director to characterize certain tax strategies as "more likely than not" consistent with U.S. federal tax law in order to allow their corporations

[154] For discussion, *see, e.g.*, Claire A. Hill, *The Law and Economics of Identity*, 32 QUEEN'S L.J. 389 (2007); Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689 (2009).

[155] *See id*.

[156] *See id.* at 1655. *See also* Nanette Byrnes & Louis Lavelle, *The Corporate Tax Game*, BUS. WK., Mar. 31, 2003, at 78.

[157] *See* Canellos, *supra* note 153 (describing tax shelter lawyers as of "a different breed, by experience, temperament, reputation, and calling").

[158] *See* TANINA ROSTAIN & MILTON REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS AND THE TAX SHELTER CRISIS 53-58 (2014); Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 TAX NOTES 1775.

[159] I.R.S. Notice 2002-35, 2002-1 C.B. 992.

[160] I.R.S. Notice 2002-65, 2002-2 C.B. 690.

[161] I.R.S. Notice 2000-44, 2000-36.

[162] *See* John R. Robinson et al., *supra* note 152 (treatment of tax department as profit center by non-tax management contributes to larger book/tax gap of corporation).

to recognize tax benefits for financial accounting purposes.[163] Depending on the composition of the audit committee, corporations may also develop a high tolerance for the risk that the IRS may challenge their tax positions.[164] Some research has even found that personal character traits of key non-tax managers, such as narcissism, are positively associated with the tax aggressiveness of their corporations.[165]

Shareholders. Non-tax management ultimately can face pressure from influential shareholder groups, especially investment funds and banks.[166] Over the past decade, activist hedge funds and private equity funds have purchased sizeable stakes in publicly traded corporations.[167] In many cases, the managers of these funds strive to maximize the economic return on their investment in a short period of time.[168] In recent years, activist hedge funds have played an increasingly visible role in encouraging the boards and management of publicly traded corporation to pursue specific tax-motivated transactions.[169] These short-term investors benefit if a corporation claims a tax benefit it can recognize today, even though it may later face a challenge from the IRS. By the time the corporation engages in the IRS dispute, the short-term investors may be long gone.[170] Investment fund managers are also often immune to the professional standards and norms regarding tax planning that constrain some tax directors and outside advisors.

B. *Strategic Defenses Against Corporate Tax Agressiveness*

1. *Benchmarking*

Tax privacy provides the government with a valuable strategic defense

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[163] *See* Tanina Rostain, *Travails in Tax: KPMG and the Tax-Shelter Controversy*, *in* DEBORAH L. RHODE & DAVID J. LUBAN, LEGAL ETHICS: LAW STORIES (2006) (describing pressure on tax advisors to deliver more-likely-than-not opinions).

[164] *See, e.g.*, Ernst & Young, Audit Committee Bulletin, Oct. 2013 (describing audit committee as developing "clear articulation of business's overall tax risk policy").

[165] Kari Joseph Olsen & James Stekelberg, *CEO Narcissism and Corporate Tax Policies*, June 3, 2014, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446128. *See also* Bill Francis, et al., *Are Female CFOs Less Tax Aggressive? Evidence from Tax Aggressiveness*, J. OF AMER. TAX. ASSOC., *forthcoming*, 2014 (investigating effect of gender of chief financial officer on corporate tax aggressiveness).

[166] *See, e.g.*, Mara Der Hovanesian, *Attack of the Hungry Hedge Funds*, Bus. Wk., Feb. 20, 2006, at 72 (discussing hedge fund investment in blue chip corporations).

[167] *See id.*

[168] *See id.*

[169] *See infra* notes 186 – 191 and accompanying text.

[170] *See* Ananth Madhavan, *Implementation of Hedge Fund Strategies*, in HEDGE FUND STRATEGIES, A GLOBAL OUTLOOK 74 (2002).

against increased corporate tax aggressiveness. As Part IV will discuss in depth, public disclosure of complete corporate tax returns, a position proposed by several public access advocates, would reveal significant information otherwise unobservable today about a corporation's tax planning and reporting practices.[171] By keeping certain corporate tax return information from public view, corporate tax privacy prevents interested parties from establishing benchmarks of aggressiveness in several critical tax compliance areas and from pressuring tax directors to pursue more aggressive strategies to keep pace with their competitors.

Influential shareholder groups, particularly activist investment funds, are among the most likely parties to use publicly available corporate tax return information to apply such pressure. Activist investment funds regularly synthesize information about a corporation's operations and recommend specific actions.[172] In recent years, these funds have delivered detailed proposals related to tax planning, concerning actions such as tax-free spin-off transactions[173] and corporate inversion mergers.[174] With public disclosure, these funds could evaluate their own corporation's relative tax aggressiveness in areas such as transfer pricing, participation in potentially abusive tax strategies and methods of disclosure of specific questionable transactions to the IRS, among others.[175] Access to certain return information, thus, would provide these funds with newfound ability to compare their corporations' tax reporting practices in specific areas to that of other corporations and to utilize the information to urge corporations in which they invest to pursue specific aggressive tax strategies.

Similarly, non-tax managers frequently consider tax avoidance strategies that they believe other corporations are pursuing; public access to corporate tax return information would only increase this comparative analysis. Upon hearing the news that a major competitor has engaged in aggressive tax planning to cut its corporate tax bill, some members of a corporation's board of directors and non-tax management exhibit a reaction

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[171] *See infra* Part IVB.1.

[172] *See* Madhavan, *supra* note 170. *See, e.g.*, Pershing Square Capital Management, L.P., *Perspectives from Allergen's Largest Shareholder*, filed under Rule 425 under the Securities Act of 1933.

[173] *See, e.g.*, Michael J. De La Merced, *Hedge Fund Presses Case for Breakup of Darden Restaurants*, N.Y. Times, Dec. 17, 2013 (describing campaign by Barington Capital Group to force Darden Restaurants, operator of the Red Lobster chain, to divide company through spin-offs); Jim Polson, *Hess Files for Tax-Free Spinoff of Gas-Station Network*, BLOOMBERG.COM, Jan. 8, 2014 (describing Hess spin-off in response to campaign by activist investor Paul Singer).

[174] *See, e.g.*, Kasmira Jefford, *IHG shareholder pushes for tax inversion bid*, CITY A.M., Aug. 5, 2014 (describing campaign by Marcato Capital to force Intercontinental Hotels Group to participate in inversion transaction).

[175] *See infra* notes 293 – 299 and accompanying text.

that has been described as "structure envy,"[176] meaning that they "demand to know why they don't have the same tax savings."[177] With public disclosure, non-tax managers could analyze tax strategies of competitors, such as by reviewing specific documents that corporations are required to file with the IRS to enhance its ability to identify potentially abusive tax strategies—such as IRS Form 8886 (Reportable Transaction Statement), Schedule UTP (Uncertain Tax Positions), and others.[178] Public disclosure of certain corporate tax return information, thus, could lead non-tax management to question why their own tax director has not pursued more aggressive tax planning.

In addition, without the curtain of corporate tax privacy, advisors and other third-party groups could use publicly available corporate tax return data to aid non-tax corporate managers and tax directors in establishing and meeting benchmarks for tax aggressiveness in specific areas of tax planning and compliance. Each of the "Big Four" accounting firms—KPMG, PricewaterhouseCoopers, Deloitte, and Ernst & Young—currently houses a "benchmarking" department.[179] These groups assist corporate clients in measuring their "performance against best-in-class companies to identify improvement"[180] in a variety of areas, such as executive compensation, inventory and staffing costs. With publicly available corporate tax return information, these advisors could easily deliver similar services to encourage overly conservative corporate tax directors to consider alternative tax strategies utilized by their more aggressive competitors.

Increased pressure from non-tax management and, indirectly, from influential shareholders and third-party advisors would likely affect the tax reporting and compliance decisions of corporate tax directors. Faced with detailed information about the transfer pricing structures of their more aggressive competitor corporations, for example, some tax directors would likely explore the use of specific jurisdictions, including tax havens, or cost-

[176] Ernst & Young, Media Interaction and Reputational Risk: Issues and Strategies, Feb. 2013.

[177] *Id.*; Robinson, *supra* note 152 (chief financial officers who operate tax department as profit center encourage "tax savings to reduce the effective tax rate").

[178] *See infra* notes 302 – 318 and accompanying text.

[179] *See* KPMG, Benchmarking, *available at* http://www.kpmg.com/gr/en/topics/compensation-benefits-survey/pages/benefits-benchmarking.aspx; PricewaterhouseCoopers, Benchmarking Services, *available at* https://www.pmgbenchmarking.com/public/Product/scorecard/benefits.aspx; Deloitte, Global Benchmarking Center, *available at* http://www.deloitte.com/view/en_US/us/Services/consulting/Strategy-Operations; Ernst & Young, Benchmarking performance metrics, *available at* http://www.ey.com/US/en/Industries/United-States-sectors/Health-Care/Benchmarking-performance-metrics.

[180] PricewaterhouseCoopers, *supra* note 179.

sharing structures that lower their own corporation's tax burden. As another example, with public access, corporate tax directors may point to benchmarking reports from accounting firms or information from other corporations' returns to pressure their outside tax lawyers to deliver written opinions regarding aggressive transactions and strategies, which the law firms had previously declined to issue.[181] Public disclosure of corporate tax return information, consequently, could threaten the gatekeeping function that tax lawyers have traditionally played in advising clients that the most aggressive tax strategies are not consistent with the tax law.[182] Indeed, scholars have criticized the tax lawyers who provided tax shelter opinions during the late 1990s tax shelter boom, in response to pressure from corporate tax directors and market pressures, as abdicating their gatekeeping responsibility.[183] Some tax directors may even feel internal pressure to pursue more aggressive tax planning. As reciprocity studies have confirmed,[184] actors may reduce their own contributions toward a public good if they begin to feel like they are complying with the law while others avoid or evade it.[185]

A vivid illustration of the benchmarking effect of publicity of corporate tax avoidance strategies can be observed in the inversion transactions of 2013 and 2014, discussed earlier.[186] In this transaction, a U.S. corporation would merge with a non-U.S. company located in a low-tax jurisdiction, such as Ireland, where, following the merger, the U.S. corporation's shareholders retain up to 79.9% of the combined entity's stock in the merger.[187] After the dust settles, the original shareholders of the U.S. corporation would retain control of the merged entity, which would now pay a lower tax rate. As many high profile consumer-focused public corporations pursued this strategy in 2014,[188] influential shareholder groups

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[181] *See supra* notes 157 – 161 and accompanying text.

[182] For discussion, *see* Rachelle Y. Holmes, *The Tax Lawyer As Gatekeeper*, 49 U. LOUISVILLE L. REV. 185, 192-199 (2010).

[183] *See, e.g., id.*; Rostain & Regan, *supra* note 158 at 70.

[184] *See* Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003); Samuel Bowles & Herbert Gintis, *Is Equality Passé? Homo Reciprocans and the Future of Egalitarian Politics*, BOS. REV., DEC. 1998/Jan. 1999, at 4.

[185] *See id. See, e.g.*, James Andreoni, *Cooperation in Public-Goods Experiments: Kindness or Confusion?*, 85 AM. ECON. REV. 891 (1995); Christina M. Fong et al., *Strong Reciprocity and the Welfare State*, *in* 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY APPLICATIONS 1439, 1447–56 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

[186] *See supra* note 111 and accompanying text.

[187] *See* I.R.C. § 7874(b). For description of inversions, *see* Edward D. Kleinbard, *"Competitiveness" Has Nothing to Do With It*, TAX NOTES, Aug. 5, 2014.

[188] *See supra* notes 113 - 117 and accompanying text.

met with the board of directors and management of their own corporations to argue that they should embrace the strategy as well.[189] For example, William Ackman, managing partner of hedge fund Pershing Square Capital Management, waged a public campaign to convince the board of Allergan, a U.S. pharmaceutical company, in which his fund owned a substantial stake, to pursue an inversion merger with Valeant, a Canadian pharmaceutical firm, "in order to get a better tax rate."[190] In meetings with legislators during mid-2014, corporate executives reported that they "might be forced to [invert] too" in order to match similar moves by competitors.[191]

Unlike nearly all other corporate tax avoidance techniques that take place behind the curtain of corporate tax privacy, the corporate inversion strategy occurred in the public eye. The technique involved a significant business combination and required corporations to obtain shareholder approval and disclose the event publicly under securities regulation.[192] As one corporate manager commented, when corporate executives learned of the inversion technique, it began to "snowball."[193] This reaction is consistent with the characterization of the inversion wave by Ed Kleinbard, a tax law scholar and former law firm partner, as illustrating "herd behavior,"[194] where "CEOs find it difficult to be the only gazelle on the veldt that remains in place when all the others madly gallop off in one direction or another."[195] If all corporate tax returns were publicly accessible, the same types of shareholder groups involved in inversion campaigns could scour this information in order to determine whether their own corporations are pursuing some of the aggressive tax strategies utilized by their competitors. Activist investors could use their considerable resources to analyze this information and, especially in the case of innovative strategies revealed, pressure management to adopt the strategies or modified versions.

For another example of benchmarking that can occur as a result of

[189] *See, e.g.*, Ed Hammond, *Walgreens urged to leave US to gain tax benefit*, FIN. TIMES, Aug 14, 2014 (describing meeting between significant shareholders and Walgreen's board of directors regarding proposed inversion transaction).

[190] Transcript, Fast Money Halftime Report, CNBC, Jul. 21, 2014, *available at* http://www.cnbc.com/id/101853608#.

[191] Lori Montgomery, *U.S. policymakers gird for rash of corporate expatriations*, WASH. POST, Aug. 6, 2014 (*quoting* CVS Caremark CEO Larry Merlo).

[192] *See, e.g.*, Press Release, Chiquita Brands International, Inc., Chiquita Brands International, Inc. and Fyffes PLC to Combine to Create Leading Global Produce Company, Mar. 10, 2014.

[193] David Gelles, *Health Care Deal Is Latest to Seek Corporate Tax Shelter Abroad*, N.Y. TIMES, Nov. 6, 2013.

[194] Kleinbard, *supra* note 187.

[195] *Id*.

public disclosure of tax return information, consider the requirement that tax-exempt organizations publish their annual tax return, IRS Form 990.[196] Managers of non-profit organizations are acutely aware that donors and watchdog organizations, such as the Better Business Bureau,[197] often scrutinize "efficiency ratios" that can be calculated using information on certain lines of this form regarding the organizations' expenses, including fundraising expenses.[198] Critics of the requirement that this information be published have argued that managers of non-profit organizations view the efficiency ratios of their peer organizations as benchmarks that their own corporations must meet or surpass.[199] Several empirical studies have found that tax exempt managers engage in "opportunistic cost shifting" by over-reporting expenses related to program services and under-reporting those related to fundraising expenses to avoid generating less attractive efficiency ratios than those of their peers.[200]

As this discussion reveals, corporate tax privacy offers a significant strategic defense against increased corporate tax aggressiveness by restraining the ability of interested parties, especially influential shareholder groups, to evaluate their own corporations' tax avoidance strategies compared to those of competitor corporations. Further, by preventing both shareholder groups and tax directors from reviewing the corporate tax returns of competitors in search of new tax avoidance strategies, corporate tax privacy inhibits innovation in corporate tax aggressiveness.

2. *Reverse Engineering*

Corporate tax privacy also restricts the ability of sophisticated advisors

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[196] *See* I.R.C. §§ 6033(a); 6104(a).

[197] *See, e.g.*, Better Business Bureau Wise Giving Alliance, *available at* http://www.bbb.org/us/charity/.

[198] These ratios describe the portion of the organization's expenses that are attributable to its charitable purpose and the portion of donations received that the organization retains after subtracting its fundraising expenses. For discussion, *see* Peter Swords, et al., *How to Read the IRS Form 990 & Find Out What it Means*, NPCCNY.org, May 2011, *available at* http://www.npccny.org/Form_990/990.htm.

[199] *See, e.g.*, Center on Nonprofits and Philanthropy, Urban Institute, *The Pros and Cons of Financial Efficiency Standards*, Nonprofit Overhead Cost Project, Aug. 2004.

[200] Ranjani Krishnan, Michelle H. Yetman & Robert J. Yetman, *Financial Disclosure Management by Nonprofit Organizations*, working paper, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=319581. *See also* Ranjani Krishnan, Michelle H. Yetman & Robert J. Yetman, *Expense misreporting in nonprofit organizations*, 81 ACCOUNTING REV. 399 (2006) (finding zero fundraising expense reporting by certain tax-exempt organizations due to inappropriate reporting); Elizabeth K. Keating, et al., *Misreporting Fundraising: How Do Nonprofit Organizations Account for Telemarketing Campaigns?*, 83 ACCOUNTING REV. 417 (2008).

and, ultimately, tax directors to observe documents that would allow them to better predict the likelihood of certain IRS enforcement actions. The IRS engages in cat-and-mouse dynamics with corporate taxpayers that have the upper hand in designing and concealing tax avoidance strategies.[201] When viewed in large quantities over extended periods of time, certain publicly available corporate tax return information would enable sophisticated analysts to identify the types of tax positions that have the greatest probability of resulting in challenges from the IRS. Corporate tax directors would likely respond to this analysis by adjusting their own corporation's tax reporting and planning behavior.

With complete public access, tax advisors and corporate tax directors would observe documents that would reveal the responses of the IRS to the reported tax positions of their competitors, information not otherwise observable today, absent the rare case of litigation. Part IV will describe in detail the specific corporate tax return documents that would allow for reverse engineering—such as IRS Form 5701 (Notice of Proposed Adjustment), IRS Form 870 (Waiver of Restrictions on Assessment) and IRS Form 4549 (Income Tax Discrepancy Adjustments)—which describe the IRS's settlements with corporate taxpayers and assertion of tax penalties.[202] Such information could lead some corporate tax directors to avoid certain strategies that are likely to draw IRS attention, while other information could encourage some corporate tax directors to adopt the more aggressive actions of their competitor corporations that do not appear to have resulted in challenges from the IRS.

More importantly, with complete public access, tax advisory firms would have the ability to conduct empirical analysis, which would reveal, using quantitative rather than anecdotal methods, the types of tax positions and filing actions that are most statistically likely to result in detection and challenge by the IRS.[203] The major accounting firms and other advisory firms that conduct quantitative analysis would have strong economic incentives to use publicly available corporate tax return data to create statistical models that could predict whether certain tax reporting and filing actions in different circumstances would result in the government's use of audits, deficiency assertions and tax penalties. Especially in light of the increased focus on aggressiveness by investors and non-tax managers that would likely result from public disclosure of corporate tax returns, tax directors could exhibit demand for predictive models in the corporate tax enforcement context.

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[201] For discussion, *see* Marvin A. Chirelstein & Lawrence A. Zelenak, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1950 (2005).

[202] *See infra* notes 322 – 331 and accompanying text.

[203] *See id*.

To visualize the possible empirical analysis that public access would allow, consider empirical studies of judicial decision-making.[204] As one example, in prior work, Nancy Staudt and I reviewed all corporate tax abuse cases decided by the U.S. Supreme Court between 1909 and 2011, along with the underlying briefs filed by government lawyers.[205] We coded the data to identify independent variables related to the facts of the case (*e.g.*, whether the transaction involves a third party), procedural aspects of the taxpayer's return (*e.g.,* whether the controversy arose as a result of the taxpayer's request for a refund) and external factors (*e.g.*, whether the economy was expanding, whether the national defense spending was increasing).[206] We then applied a probit model to determine how these factors affected the judicial outcome, the dependent variable, in the corporate tax abuse cases.[207] Others have conducted studies that examine whether certain attributes of judges, such as political preferences and family status, influence judges' decisions in specific types of cases.[208]

For-profit vendors have historically attempted to reverse engineer the IRS's approach to auditing tax returns outside of the corporate tax context. For example, every year, IRS computers assign a Discriminant Function System (DIF) score to individual tax returns, which identifies whether reviews of the tax returns are likely to result in a change, based on the IRS's past experience with similar tax returns.[209] The factors that the IRS uses to calculate the DIF score are not public.[210] Nevertheless, tax preparation software firms, such as TurboTax, have attempted to use information

[204] *See, e.g.,* Theodore Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1183, 1188–89 (2004) (showing that in some circumstances, scientific models outperform individual experts). *See also* John S. Summers & Michael J. Newman, *Towards a Better Measure of Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S.L.W. 393, 394 (2011).

[205] Joshua D. Blank & Nancy Staudt, *Corporate Shams*, 87 N.Y.U. L. REV. 1641 (2012).

[206] *See id.*, at 1667-1668.

[207] *See id.*, at 1684 (Table 3), 1696 (Table 4).

[208] *See*, *e.g.*, Nancy Staudt, Lee Epstein & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1815–21 (2006); Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002); Daniel E. Ho & Kevin M. Quinn, *How Not To Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813 (2010).

[209] *See* Int. Rev. Serv., The Examination (Audit) Process, FS-2006-10, Jan. 2006 (describing DIF score).

[210] *See* I.R.C. § 6103(b)(2). Recently, George Yin has argued that disclosure of "algorithms developed by the agency to identify cases deserving greater scrutiny" would "harm tax administration." George K. Yin, *The Most Critical Issue Facing Tax Administration Today – And What to Do About It*, Working Paper, July. 2014.

collected from their customers to reverse engineer the DIF score in order to predict whether a taxpayer's return will result in an audit.[211] When an individual uses TurboTax after completing a tax return, the software's "Audit Risk Meter" reviews the return and indicates whether the probability of an IRS audit is high or low.[212] Public disclosure of complete corporate tax returns, including those that reveal enforcement actions of the IRS, would likewise enable both researchers and profit-motivated tax advisors to devise similar statistical models.

Given its limited enforcement resources, the IRS must make tactical decisions regarding which potentially abusive tax positions to challenge.[213] By offering corporations and their advisors, which do not face such resource limitations, a window into these tactical decisions, public disclosure of complete corporate tax returns would further hinder the IRS's efforts to detect and challenge aggressive corporate tax strategies.

C. *Current Knowledge*

A potential objection to this analysis is that significant shareholders, non-tax management, tax advisors and tax directors already possess sufficient knowledge of corporate tax affairs necessary to engage in benchmarking and reverse engineering.[214] Mandated public disclosure, some may respond, would do little to encourage additional benchmarking or reverse engineering. This objection is unpersuasive for several reasons.

First, while significant investors may have greater access to corporate management and may even be able to learn about the tax affairs of corporations in which they invest, the curtain of tax privacy prevents them from performing comparative analysis on both a macro and micro level. As Part II illustrated, a tremendous amount of a U.S multinational corporation's tax information, including the amount of U.S. taxable income and cash taxes paid to the U.S., is not observable in SEC filings.[215] Under current law, shareholders who own one percent or more of the outstanding stock of a corporation are entitled to inspect the corporation's tax return.[216]

[211] Intuit TurboTax, Top Five Ways to Avoid a Tax Audit, 2013, *available at* https://turbotax.intuit.com/tax-tools/tax-tips/Tax-Planning-and-Checklists/Top-Five-Ways-to-Avoid-a-Tax-Audit/INF19031.html.

[212] *Id*.

[213] *See* IRS OVERSIGHT BD., FY2011 IRS BUDGET RECOMMENDATION SPECIAL REPORT 9–11 (2010); Press Release, U.S. Senate Comm. on Finance, IRS Budget Cut Translates to Huge Tax Loss, (May 22, 2006).

[214] *See, e.g.*, Lee Sheppard, *Should Corporate Tax Returns Be Disclosed?*, 142 TAX NOTES 1381, 1382 (2014).

[215] *See supra* Part IIB.

[216] I.R.C. § 6103(e)(1)(D)(iii).

While the largest activist hedge funds may meet this threshold, they still cannot access the corporate tax returns of all corporations,[217] including competitors of corporations in which they invest, without meeting the required ownership threshold. Consequently, even investment funds and institutional investors with positions in blue chip corporations are not able to conduct comparisons from the intercorporate perspective.

Second, even though investors, corporate tax directors and advisors may be aware of the tax activities of some of their competitors, this knowledge is based on anecdotal rather than statistical evidence. The lack of access to complete corporate tax return data, consequently, prevents investors from establishing reliable benchmarks. Without access to documents that reveal IRS actions in corporate tax deficiency disputes across an extended period of time, sophisticated analysts possess a limited ability to reverse engineer the IRS's approach to corporate tax enforcement in specific compliance areas. A relevant analogy from another tax context can be found in the limited ability of tax lawyers to view U.S. Tax Court filings of other lawyers, especially those representing the IRS, in an easily accessible online format.[218] As one practitioner has asserted in favor of gaining electronic access to these filings, "it would be great for practitioners representing taxpayers to see how the government argues their positions…"[219] Statements like these illustrate that even experienced tax lawyers desire access to data that would allow them to better predict dispute resolution decisions of the IRS.

Third, even if corporate tax directors are aware that aggressive tax strategies are "percolating,"[220] whether pitched by promoters or developed by in-house tax lawyers and accountants, they do not necessarily know the identity of the corporations that are pursuing specific tax avoidance techniques. As behavioral researchers have demonstrated, individuals are highly influenced by their perceptions of the acts of the "other members of one's in-group."[221] Without public access, however, critical information about the tax activities of a tax director's competitors, which might encourage benchmarking and increased aggressive tax planning, is not visible.

Finally, while some large public corporations engage with common advisors, such as the Big Four accounting firms, these advisors are contractually bound by their own engagement letters not to disclose the

[217] I.R.C. § 6103(a).

[218] *See* William R. Davis, *Limits to Tax Court Online Access Thwart Practitioners,* 144 TAX NOTES 1124 (Sept. 8, 2014).

[219] *Id*.

[220] Sheppard, *supra* note 214, *quoting* Reuven Avi-Yonah.

[221] *See, e.g.,* LYNN STOUT, CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE 144 (2011).

details of their clients' corporate tax returns or ongoing IRS audits, to other corporations.[222] And at the largest multinational corporations, some tax avoidance strategies are "homegrown," the product of a single in-house tax department, consisting of dozens of tax accountants and lawyers, rather than a Big Four accounting firm.[223]

IV. WHAT CORPORATE TAX RETURN INFORMATION SHOULD BE PUBLIC?

A significant, previously unexplored risk of excessive public disclosure of corporate tax return information is that it could encourage, rather than limit, aggressive corporate tax planning. Is the implication of this analysis that all corporate tax return information should remain hidden from public view? As this Part argues, the answer is no. The strategic defenses of corporate tax privacy are not the only factors that policymakers should take into account. This Part offers three guiding principles that policymakers should consider when evaluating proposals to make all or part of corporate tax return information public. It then applies the principles to a variety of specific public disclosure measures that have been the subject of both historic and current debate. This Part concludes by presenting categories of return information that should not be, and that should be, public.

A. *Guiding Principles*

Rather than engage in sweeping "public vs. private" debates over disclosure of corporate tax return information,[224] policymakers should consider several factors when deciding whether to support proposals to make corporations' tax return information publicly accessible. As Part II argued, policymakers should disregard as unpersuasive two traditional arguments in favor of public disclosure, that it would increase the IRS's detection capabilities and achieve deterrence with the threat of public shaming, and two common objections to public disclosure, that it would violate equity principles and result in information overload.[225] In contrast, I

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[222] *See, e.g.*, KPMG, General Terms of KPMG Fiduciaire, *available at* https://www.kpmg.com/BE/en/IssuesAndInsights/ArticlesPublications/Documents/Fiduciaire-general-terms.pdf .

[223] For further discussion, *see* Blank, *supra* note 107.

[224] *See, e.g.*, Salmon, *supra* note 14; Editorial Board of Bloomberg View, *supra* note 14; Allan Sloan, *Hey corporate America: Show us your tax returns*, CNN.com, Nov. 17, 2011. For discussion of similar all-or-nothing dynamics in the debate over consumer product disclosure, *see* Ryan Bubb, *TMI? Why the Optimal Architecture of Disclosure Remains TBD*, 113 MICH. L. REV. __ (2014) (describing "disclosurism" versus "antidisclosurism").

[225] *See infra* Part II.C.

argue that policymakers should consider how each proposal is likely to affect the strategic defenses of corporate tax privacy, exposure of proprietary information and the quality of public awareness and debate of corporate tax issues. Each of these factors is described below.

1. *Would Public Disclosure Diminish Strategic Defenses of Corporate Tax Privacy?*

Policymakers should consider the potential effect of each corporate tax return public disclosure proposal at issue on the strategic defenses of corporate tax privacy. As has been discussed, corporate tax privacy provides the government with two valuable strategic defenses against corporate tax aggressiveness by restraining the ability of a corporation's stakeholders and agents to engage in benchmarking and reverse engineering.[226] Rather than address this concern in the abstract, this Part presents concrete examples of how public exposure of certain return information would be most likely to diminish the strategic defenses of corporate tax privacy.[227]

Some public disclosure advocates may object that by authorizing the government to withhold from the public information about the tax strategies used by specific corporate taxpayers, as well as information about specific enforcement actions of the IRS, policymakers would disregard the democratic value of transparency. Without transparency, citizens may be unable to debate and question the government's actions and hold it accountable.[228] There are several responses to this concern. First, the government can still preserve transparency by releasing statistical data regarding its corporate tax enforcement practices without providing enough detail about specific named corporations to enable benchmarking and reverse engineering. As an example, the IRS annually publishes its "Data Book," which provides aggregate statistics regarding corporate taxpayers' audit rates, tax penalties and taxes paid.[229] Second, policymakers should provide a direct explanation for retaining tax privacy protections for corporate tax return information, whether it relates to tax enforcement or some other concern.[230] For example, to preempt objections that the

[226] *See infra* Part IIIB.

[227] *See id.*

[228] *See, e.g.,* JOHN RAWLS, A THEORY OF JUSTICE 14–15 (rev. ed. 1999).

[229] *See* IRS, PUB. 55B, INTERNAL REVENUE SERVICE DATA BOOK, 2012 (2013).

[230] For example, government officials have commented publicly that they deliberately litigate cases involving high-profile taxpayers to deter individual tax noncompliance and enhance taxpayer confidence. Kristen A. Parillo, *Korb: Tax Press Plays Key Role in IRS Communications Strategy*, 118 TAX NOTES 478, 478–79 (2008) (*quoting* former IRS Chief Counsel Donald Korb).

government is not acting transparently, the Treasury Department could describe such a rationale in the preamble to regulations that address the type of corporate tax return information that is subject to mandatory public disclosure. Finally, the government should maintain institutions that oversee the operation of the IRS and report their findings to the public. Under current law, this oversight is provided by several bodies, including the Treasury Inspector General for Tax Administration,[231] the IRS Oversight Board[232] and Congress itself.[233]

2. *Would Public Disclosure Expose Proprietary Information?*

Policymakers should also consider the potential exposure of a corporation's proprietary information when evaluating public disclosure measures. Significant flaws in the traditional articulation of this concern are that public disclosure opponents have neither offered examples of tax return documents that contain this information nor illustrated why exposure of this information would diminish voluntary compliance.[234] In contrast, this Subpart argues that several unintended adverse consequences could result if policymakers embraced a public disclosure measure without considering the possibility that it would expose proprietary information.

Before proceeding, a definition of "proprietary" information is necessary. One possibility is that it is information that is (1) economically valuable, (2) subject to reasonable measures by the corporation to keep it secret and (3) not readily obtainable from public sources. This definition is derived from employment law.[235] Regardless of its source, the key point is that proprietary information in the corporate tax context is that which has economic value because its disclosure could harm the corporation or benefit a competitor.[236] As this Part will illustrate, some corporate tax return documents indeed contain sensitive information about the inner workings of a corporation that is not otherwise publicly available. Certain tax forms, for example, reveal a corporation's business structure, trading strategy, compensation of high-level employees and research expenditures.[237] At the

[231] *See* Treasury Inspector General for Tax Administration, TIGTA's Mission, *available at* http://www.treasury.gov/tigta/about.shtml#2.

[232] *See* U.S. Dep't of Treasury, IRS Oversight Board, *available at* http://www.treasury.gov/irsob/Pages/default.aspx.

[233] *See* I.R.C. § 6103(f).

[234] *See supra* notes 141-143.

[235] *See* AMERICAN LAW INSTITUTE, RESTATEMENT OF LAW THIRD EMPLOYMENT LAW, TENTATIVE DRAFT NO. 4, § 8.02, 67 (2011) and UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985).

[236] For further discussion, *see id*. at 69.

[237] *See infra* notes 332-335.

same time, other tax return information, such as the aggregate amount of tax paid to the U.S. government in a particular tax year, does not reveal proprietary information.[238]

An adverse consequence that could result from public disclosure of a corporation's proprietary information is that some tax directors may reduce the quality and quantity of disclosure they make to the IRS regarding specific expenses and transactions if they perceive that competitors would benefit from viewing this information. Corporate tax directors regularly use their discretion in revealing information to the IRS regarding certain tax positions and transactions, through submissions such as reportable transaction forms, Schedule UTP and dozens of other forms.[239] In addition, tax directors often voluntarily provide written explanations of certain deductions and other items.[240] In these cases, where tax directors can apply their own judgment regarding the amount of detail to provide to the IRS, a public disclosure regime could cause some corporations to withhold details regarding transactions and expenses that would benefit competitors if exposed. The resulting harm is that reduced voluntary disclosure would further strain tax enforcement resources, as IRS agents would now need to seek information that corporations would otherwise offer to them.

Another adverse consequence of public disclosure is that where corporate managers have little or no ability to avoid disclosing information to the IRS, exposure of proprietary information would disadvantage U.S. publicly traded corporations compared to other U.S. and non-U.S. legal entities. For example, as some public disclosure measures would require corporations to reveal publicly their complete organizational structure, trades of portfolio investments, compensation of many of their most valuable employees and future business plans regarding their intellectual property, these measures would cause corporations to face a competitive obstacle compared to other business organizations.[241] This disadvantage is not consistent with any of the stated rationales underlying arguments in favor of public disclosure of corporate tax return information, or the corporate income tax itself.[242] No one has argued, for instance, that an objective of public disclosure is to reduce a corporation's ability to succeed in pursuing profit-maximizing business strategies unrelated to tax planning.[243] Yet without some limitation, public disclosure of certain corporate tax return information could have this unintended effect.

[238] *See infra* notes 409-412.
[239] *See infra* notes 302 – 318 and accompanying text.
[240] *See, e.g.* Int. Rev. Serv., Instructions for Form 1120, 3 (2014).
[241] *See infra* notes 332-335; 391-397.
[242] *See supra* Part II.C.1.
[243] *See id*.

A frequent response to the proprietary information concern is that public disclosure would "create a level playing field"[244] among corporations. However, unless policymakers apply the public disclosure measure to all businesses operated through other legal entities, such as closely held corporations, partnerships, limited liability corporations, public access could place U.S. publicly traded corporations at a significant disadvantage by requiring only these corporations to reveal their proprietary information to others.[245] Even if the U.S. federal government could publish the tax returns of all U.S. entities, it still would not eliminate the disadvantage these entities would face compared to competitors outside the United States that would not be required to reveal proprietary information.

3. *Would Public Disclosure Enhance Public Awareness and Debate?*

Finally, policymakers should consider the potential effects of each measure on public awareness and debate of corporate tax issues. An informed public is an essential element of democracy.[246] While proponents of public interest, public choice and other theories differ on the motivations underlying the legislative process,[247] public awareness and debate of specific tax issues can motivate legislators to act.[248] One of the rationales for making corporate tax return information public, therefore, should be that this disclosure would result in a better informed public, aided by the news media and empirical research, which in turn, could have the positive effect of encouraging legislators to debate and seek legislative change.

As behavioral research has long shown, specific examples can have a more profound effect on individuals' perceptions than anonymous statistics.[249] Specific examples include a description of the identifying traits of a person or thing, which may include a name, occupation or physical

[244] *See, e.g.,* Avi-Yonah & Siman, *supra* note 18.

[245] I.R.C. § 6103.

[246] *See, e.g.,* Thomas Jefferson, Letter to Charles Yancey, 1816 ("If a Nation expects to be ignorant and free in a state of civilization, it expects what never was and never will be.").

[247] *See, e.g.,* George J. Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. Sci. 3 (1971); GORDON TULLOCK, THE POLITICS OF BUREAUCRACY (1965).

[248] *See, e.g.,* Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1 (1990).

[249] *See generally* STEPHEN M. KOSSLYN ET AL., THE CASE FOR MENTAL IMAGERY 3–23 (2006); Stephen M. Kosslyn & William L. Thompson, *When Is Early Visual Cortex Activated During Visual Mental Imagery?*, 129 PSYCHOL. BULL. 723 (2003).

features.[250] The name "Apple", for instance, is more likely to trigger a memorable image than the term "consumer electronics corporation." Cognitive psychologists have demonstrated that specific examples cause individuals to create mental images, which, in turn, can help them understand concepts or arguments.[251] Neuroscientists have even shown that brain activity is affected by the vividness of a specific example of a person or thing.[252] For this reason, as Daniel Levin and I have shown in prior empirical analysis, as April 15th, the filing deadline for U.S. individual tax returns, nears, the government creates memorable images of tax enforcement by disproportionately publicizing specific examples of individuals who have been convicted of tax offenses.[253]

Similarly, past tax reform experiences in the United States illustrate that tax issues, including those involving corporations, can attract significant public interest and lead to legislative change when the public learns about them through the vehicle of specific examples of named corporations. The 1980s are a storied period in American tax history, when Congress generated enough bipartisan legislative support to enact multiple major pieces of tax legislation, including the landmark Tax Reform Act of 1986.[254] During this period, Congress enacted major changes to the corporate tax law, including the repeal of *General Utilities*[255] and a number of significant base-broadening measures.[256]

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[250] *See* Phillip J. Mazzocco & Timothy C. Brock, *Understanding the Role of Mental Imagery in Persuasion: A Cognitive Resources Model Analysis*, in CREATING IMAGES AND THE PSYCHOLOGY OF MARKETING COMMUNICATION 65-79 (2006).

[251] *See, e.g.*, Nick Ellis, *Word meaning and the links between the verbal system and modalities of perception and imagery*, in ROBERT H. LOGIE & MICHAEL DENNIS, MENTAL IMAGES IN HUMAN CONDITION 313 (1991).

[252] *See* K.M. O'Craven & N. Kanwisher, *Mental Imagery of Faces and Places Activates Corresponding Stimulus-Specific Brain Regions*, 126 J. COG. NEUROSCIENCE 1013, 1013-1023.

[253] *See* Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1, 8 (2010). For the time window from April 1 to April 15, we found that the government issued 128% more tax-enforcement press releases per week than during the rest of the year. *Id.* "The p-value was only .0000013 (meaning a one-in-791,637 chance of randomness). *Id*.

[254] Tax Reform Act of 1986, Pub.L. No. 99-514, 100 Stat. 2085 (1986); Tax Equity and Fiscal Responsibility Act of 1982, Pub.L. No. 97-248, 96 Stat. 324 (1984); Economic Recovery Tax Act of 1981, Pub.L. No. 97-34, 95 Stat. 172 (1982); Deficit Reduction Act of 1984, Pub.L. No. 98-369, 98 Stat. 494 (1986).

[255] Prior to 1986, corporations could distribute appreciated property to shareholders without recognizing corporate-level gain. *See* Gen. Utils. & Operating Co. v. Helvering, 296 U.S. 200 (1935). In 1986, Congress overruled the *General Utilities* doctrine by enacting a statute that required corporations to recognize gain on the distribution of appreciated property. I.R.C. § 311(b).

[256] Tax Reform Act of 1986, Pub.L. No. 99-514, 100 Stat. 2085 (1986).

Commentators have cited public awareness of specific examples of corporate tax avoidance as having a significant impact on Congress's decision to act on tax legislation during this period.[257] In the years immediately preceding the Tax Reform Act of 1986, Citizens for Tax Justice, an advocacy group, published a list of major corporations that had paid no income tax as a result of safe harbor leasing and other tax planning techniques.[258] As one scholar has characterized it, this revelation had a "profound effect on educating the public and on shaping public opinion."[259]

Public access to corporate tax return information could provide even more vivid examples of the tax affairs of household name corporations. If public awareness of corporate tax issues grows significantly as a result of the many specific examples that the media would publicize following the release of corporate tax returns, some members of Congress could pursue corporate tax legislation and reform more aggressively. In rejecting the pure public choice theory explanation of the events that led to the enactment of the Tax Reform Act of 1986, Dan Shaviro has argued that, in response to public outcry, members of Congress proposed and enacted legislation as "a means of symbolic communication with members of the general public" and "as a means of exercising and demonstrating one's power."[260] For a more recent example, consider the reaction from politicians to the publicly observable examples of multi-billion dollar corporate inversion transactions in 2014.[261] The flurry of media attention surrounding this tax avoidance strategy appeared to stimulate national politicians to pursue measures ranging from targeted anti-inversion statutes to a comprehensive overhaul of U.S. international tax rules.[262] Common features of these examples, from

[257] *See, e.g.,* Richard Pomp, *State Tax Expenditure Budgets – And Beyond*, *in* THE UNFINISHED AGENDA FOR STATE TAX REFORM 74 (1988).

[258] CITIZENS FOR TAX JUSTICE, CORPORATE INCOME TAXES IN THE REAGAN YEARS (1984); CITIZENS FOR TAX JUSTICE, CORPORATE TAXPAYERS & CORPORATE FREELOADERS (1985); CITIZENS FOR TAX JUSTICE, MONEY FOR NOTHING: THE FAILURE OF CORPORATE TAX INCENTIVES, 1981-1984 (1986); AND CITIZENS FOR TAX JUSTICE, 130 REASONS WHY WE NEED TAX REFORM (1986).

[259] Pomp, *supra* note 19. According to former Treasury Secretary Donald Regan, when he reported to President Reagan that "your secretary paid more in federal taxes last year than General Electric, Boeing, General Dynamics, and 57 other big corporations," President Reagan responded, "I didn't realize things had gotten that far out of line," and focused attention on corporate tax reform. DONALD T. REGAN, FOR THE RECORD: FROM WALL STREET TO WASHINGTON (1989).

[260] Shaviro, *supra* note 248 at 9.

[261] *See supra* notes 186 – 191 and accompanying text.

[262] *See, e.g.,* Katie Zezima, *Tax loophole that allows companies to leave the U.S. is 'unpatriotic'*, THE WASH. POST, Jul. 24, 2014 (*quoting* President Obama). In September 2014, the Treasury Department issued proposed regulations that contain a number of provisions designed to limit the economic benefits of tax-motivated inversion transactions. I.R.S. Notice 2014-52. This example illustrates the difficulty that the

both the 1980s and today, are that they involved specific corporations and tax issues that were easy to understand (*e.g.*, expatriation, zero effective tax rate, etc.).

Targeted public disclosure proposals could enable the public to learn fundamental information about a corporation's tax affairs that is otherwise unobservable today. Specifically, public access could enable the media to publicize a large multinational U.S. corporation's federal tax liability (for tax, not GAAP purposes) each year, the amount of cash taxes it paid to the U.S. government and the amount of tax it owed and paid to governments other than the U.S. federal government.[263] In addition, public access would enable the public to learn about the extent to which the U.S. government subsidized the corporation's payment of taxes to non-U.S. governments through the foreign tax credit.[264]

Depending on the scope of the proposal, public access could also enable the media to raise public awareness of corporate "tax expenditures," where Congress essentially embeds spending provisions in the tax law, by describing named corporations who have used them to reduce their U.S. tax liability. In 2011, for example, U.S. corporations utilized tax expenditure provisions that cost the U.S. government over $180 billion.[265] As the General Accounting Office reported in 2013, this foregone tax revenue resulted from the dozens of tax expenditure provisions that corporations utilize each year.[266] Some of these tax expenditures account for a large portion of the foregone revenue, namely accelerated depreciation and deferral of income from controlled foreign corporations.[267] Others involve much more obscure tax issues such as the tax credit that certain corporations receive when they produce barrels of non-conventional fuel

government faces in responding to increased use of new tax avoidance strategies. First, the new proposed regulations are not retroactive, which helps explain why certain tax avoidance strategies "snowball"—as corporations expect that the government may attempt to counteract the new strategy, many rush to engage in the strategy before the announcement of preventative rules. Second, the ability of the government to stem the flourishing avoidance strategy is constrained as a result of the Treasury's limited legal authority. The proposed regulations, for instance, lack rules regarding tax deductible interest payments from U.S. corporations to foreign parents following the inversion merger, causing some commentators to describe the regulations as "modest" and "tepid." *See, e.g.*, Victor Fleischer, *Treasury Takes a Modest Step on Inversions*, N.Y. TIMES, Sept. 23, 2014; Richard Rubin, et al., *Pfizer Seeking Inversions Shows Companies Unfazed by Lew*, Bloomberg.com, Sept. 24, 2014 (*quoting* Bret Wells).

[263] *See* IRS Form 1120, Lines 30-36.

[264] *See* IRS Form 1118 (Foreign Tax Credit).

[265] Gen. Acc. Office, Corporate Tax Expenditures: Information on Estimated Revenue Losses and Related Federal Spending Programs (March 2013).

[266] *Id.*

[267] *Id.* at 11.

sources or when they produce agri-biodiesel fuel.[268] It is often difficult to determine which corporations benefit from certain corporate tax expenditures simply by reviewing the statutory language and legislative history.[269] Public access to certain corporate tax return information could raise public awareness of these expenditures and encourage members of Congress to review their performance more regularly.

Reporters, politicians and advocacy groups often attempt to utilize the little corporate tax information that is publicly available to reveal the tax affairs of well-known U.S. corporations.[270] These attempts frequently result in inaccurate statements about a corporation's tax positions.[271] In addition, the limited data available today causes the public to pay attention to corporations that are reported to pay no, or nearly no, annual tax to the U.S. government[272] rather than on other corporations that have engaged in aggressive tax planning to reduce an otherwise high global effective tax rate.[273] Public access to certain corporate tax return information could enable both nonpartisan research institutions[274] and tax advocacy groups[275] to conduct more sophisticated empirical analysis of specific corporations' tax affairs, such as their use of tax expenditure provisions and international tax treaty provisions to avoid U.S. taxation. If properly designed, public access to corporate tax return information could result in greater clarity in public discussions of corporate tax issues.

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[268] *Id.* at 30.

[269] *See, e.g.*, CITIZENS AGAINST GOVERNMENT WASTE, 2012 CONGRESSIONAL PIG BOOK (2012).

[270] *See, e.g.*, Tim Worstall, *Bloomberg's Getting In A Mess With This Apple Taxes Story*, Forbes.com, May 30, 2013; Elizabeth MacDonald, *NY Times Gets Apple's Effective Tax Rate Wrong*, FoxBusiness.com, Apr. 20, 2012.

[271] For instance, in 2010, British Petroleum created a $20 billion fund to compensate individuals and businesses that suffered harm as a result of its Gulf of Mexico oil spill. When British Petroleum revealed that it would claim these amounts as a tax deduction and use the deduction to offset taxable income from a prior year, the mainstream media and the general public characterized British Petroleum as though it had engaged in an abusive tax shelter transaction. *See, e.g.*, Jia Lynn Yang, *BP to Cut Its U.S. Tax Bill by $10 Billion*, WASH. POST, July 28, 2010, at A4. The tax position of British Petroleum, however, was clearly intended by Congress. *See* I.R.C. §§ 165, 172.

[272] *See, e.g.*, Citizens for Tax Justice, The Sorry State of Corporate Taxes, *available at* http://ctj.org/corporatetaxdodgers/.

[273] *See* Shaviro, *supra* note 248, at 60.

[274] *See, e.g.*, The Tax Foundation, About Us, *available at* http://taxfoundation.org/about-us.; Tax Policy Center, About Us, *available at* http://www.taxpolicycenter.org/aboutus/index.cfm.

[275] *See, e.g.*, Citizens for Tax Justice Citizens for Tax Justice, Background and History, *available at* http://ctj.org/about/background.php; Tax Justice Network, Who We Are, *available at* http://www.taxjustice.net/about/.

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How should policymakers take these three guiding principles into account when evaluating specific public disclosure measures? One approach would be to place dollar values on the costs and benefits of public disclosure, using the principles presented above. While cost-benefit analysis is a tool that the government has utilized when analyzing health, environmental and safety regulations,[276] it is unlikely to be useful in this context. Some of the costs, such as lost tax revenue due to increased use of certain aggressive tax strategies, may be measurable over time. Yet other costs, such as advantages to business competitors or harm to the IRS's enforcement efforts, and benefits, such as increased public debate, may not be quantifiable even with simplifying assumptions.

Instead, given the importance of public awareness and debate in a democracy, policymakers should start with a baseline of transparency, that as much corporate tax return information as possible should be publicly accessible. They should then analyze the specific documents that would be subject to a public disclosure requirement under the proposed measure and exempt items that would (1) encourage benchmarking and reverse engineering, (2) expose proprietary information of corporations to competitors or (3) result in confusion rather than clarity regarding corporate tax issues. Rather than assigning weights to each individual principle or attempting to put a number on the unquantifiable, this approach will enable policymakers to enhance public awareness and debate of the corporate tax law without generating the potential adverse consequences discussed above.

B. *Return Information that Should Not Be Publicly Accessible*

Mandated public disclosure of certain types of corporate tax return information would likely lead to increased aggressive corporate tax planning and distorted business decisions without enhancing public awareness and debate of corporate tax issues. The potential for public disclosure to encourage corporate tax aggressiveness escalates as the level of detail about a corporation's tax planning, interactions with the tax authority and business operations increases. Applying the three guiding principles presented above, this Subpart describes several examples of corporate tax return information that should *not* be publicly accessible: complete tax returns; economic substance tax penalties; and base erosion and profit shifting reporting.

[276] *See, e.g.,* Office of Management and Budget, Circular A-4, September 17, 2003; *see generally* RICHARD L. REVESZ & MICHAEL LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008).

1. *Complete Tax Returns*

In the name of increased tax transparency, policymakers, tax scholars and journalists frequently argue that the "tax returns" of publicly traded corporations should be publicly accessible.[277] Their statements, which often respond directly to corporate representatives who argue that the public would be confused by "truckloads" of tax return information,[278] strongly suggest that some advocates of this position believe that all corporate tax returns should be public. For example, Reuven Avi-Yonah, an advocate of the use of the corporate income tax as a regulatory tool, has proclaimed, "I do not believe in corporate tax privacy."[279] Other commentators have similarly asserted that corporations have "no legitimate privacy interests."[280] Participants in this debate thus often contemplate proposals that would "make the entire corporate tax return public."[281]

When public disclosure advocates argue that complete corporate "tax returns" should be publicly accessible, they are referring, knowingly or not, not just to one document, but to many documents, which, in the aggregate, can consist of thousands of pages each year. The complete annual tax return of a corporation, IRS Form 1120, sets forth a multinational corporation's gross income, deductions, taxable income and taxes owed, but also dozens of attached forms, schedules and explanatory documents.[282] For example, if General Electric's 2010 annual tax return were printed on paper, it would consist of 57,000 pages.[283] In addition to the annual return, publicly traded corporations file numerous returns with the IRS throughout the year, such as required disclosure forms regarding potentially abusive transactions, forms related to changes in capital structure and forms that

[277] *See, e.g.*, Avi-Yonah & Siman, *supra* note 18 ("corporate tax returns should be public"); Thorndike, *supra* note 20 (advocating for disclosure of "corporate tax returns"); Bruce Bartlett, *Effective Corporate Tax Rates*, N.Y. Times, Nov. 26, 2013 (advocating for publicity of "corporate tax returns"); Editorial Board of Bloomberg View, *supra* note 14 (arguing for disclosure of "corporate tax returns"); Salmon, *supra* note 14 ("why not at least require all public US companies to file their federal tax returns with the SEC"); Rampell, *supra* note 14.

[278] *See* Mohr, *supra* note 135.

[279] Lee Sheppard, *supra* note 214 (*quoting* Avi-Yonah).

[280] Lee Sheppard, *OECD BEPS Action Plan: Trying to Save the System*, 140 TAX NOTES 283 (July 22, 2013).

[281] Statement of Dr. Edmund Outslay, U.S. Senate, Committee on Finance, Enron: The Joint Committee on Taxation's Investigative Report, S. Hrg. 108-117. *See also* Tax Executives Institute, *supra* note 22; Canellos & Kleinbard, *supra* note 42.

[282] *See* Int. Rev. Serv., Instructions for Form 1120.

[283] *See* John McCormack, *GE Filed 57,000-Page Tax Return, Paid No Taxes on $14 Billion in Profits*, THE WEEKLY STANDARD, Nov. 17, 2011.

describe adjustments to prior year's returns, among many others.[284]

This Subpart addresses the proposition that complete corporate tax returns should be open to public inspection. Drawing from statements of advocates of this position, I apply the definition of "return" contained in the Internal Revenue Code, which refers to "any tax or information return"[285] filed with the IRS. As I will argue, complete corporate tax returns should not be publicly accessible.

Strategic Defenses. With unfettered access to complete corporate tax returns of other corporations, significant shareholders, non-tax managers and corporate tax directors could establish, and then attempt to meet, benchmarks of aggressiveness in several tax compliance areas. Access to complete corporate tax returns would also arm tax advisors and corporate tax directors with otherwise unobservable information about the actions of the IRS in corporate tax enforcement, which could cause tax directors to alter their own tax planning and reporting practices.

Benchmarking. For an example of the potential benchmarking effects that could stem from public disclosure of complete corporate tax returns, consider tax compliance related to transfer pricing. A major current threat to the U.S. corporate income tax base is abusive transfer pricing,[286] which commentators have estimated costs the United States tens of billions of dollars of tax revenue each year.[287] Transfer pricing is a method of allocating profits from a multinational corporation among the various jurisdictions where the corporation and its subsidiaries operate.[288] Transfer pricing arrangements create the potential for abuse because they involve transactions between related parties that may not feature market prices.[289]

The transfer pricing structures and strategies of large multinational corporations are not publicly observable, including by the shareholders and managers of competing corporations. SEC regulations require corporations to identify subsidiaries by name and their jurisdiction of incorporation

[284] *See* Int. Rev. Serv., Tax Information for Corporations, *available at* http://www.irs.gov/Businesses/Corporations.

[285] I.R.C. § 6103(b)(1).

[286] For discussion, *see* Joint Committee on Taxation, Present Law and Background Related to Possible Income Shifting and Transfer Pricing (JCX-37-10), July 20, 2010.

[287] *See* Clausing, *supra* note 11; Testimony of Prof. Edward D. Kleinbard, Tax Reform: Tax Havens, Base Erosion and Profit-Shifting, U.S. House of Representatives Committee on Ways and Means, Jun. 13, 2013.

[288] I.R.C. § 482; I.R.C. § 1.482-1. For further general description *see*, MARC M. LEVEY, STEVEN C. WRAPPE, ET AL., TRANSFER PRICING RULES AND COMPLIANCE HANDBOOK, ¶100 (CCH, 2006).

[289] For discussion, *see* Joint Committee on Taxation, *supra* note 286; Reuven S. Avi-Yonah, *The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation*, 15 VA. TAX REV. 89 (1995).

unless the subsidiaries are not considered to be "significant," defined as greater than 10% of consolidated assets or pretax income.[290] Large multinational corporations, however, have reduced their disclosure of their own subsidiaries significantly over time.[291] As an example, in 2011, Google disclosed in its Form 10-K the existence of only two Irish subsidiaries, despite its ownership of many other subsidiaries.[292]

Public access to complete corporate tax returns, however, would enable significant shareholders, non-tax managers and corporate tax directors to observe whether competitor corporations had engaged in certain related party transactions or had moved businesses offshore. For instance, with access to complete corporate tax returns, a corporation's stakeholders could view other corporations' IRS forms that describe related party transactions, including loans, services and transfers of goods, such as IRS Form 5471 (filed by U.S. corporations with non-U.S. subsidiaries)[293] and IRS Form 5472 (filed by U.S. corporations with non-U.S. parent corporations).[294] As another example, public access to complete corporate tax returns would enable a corporation's stakeholders to observe the "cost sharing agreement statement," which describes a corporation's intangible development cost sharing arrangements with other related corporations and their respective countries of organization,[295] and which corporations must update annually.[296] This information would reveal whether a corporation engages in tax planning involving specific jurisdictions.[297] With access to complete tax returns, a corporation's stakeholders could also observe the details of the cost sharing agreements themselves, if a corporation files the agreement with the IRS.[298] They could learn further about other corporations' transfer pricing arrangements by reviewing descriptions of uncertain tax positions disclosed on Schedule UTP (Uncertain Tax Position Statement).[299]

There are several potential adverse tax compliance consequences to providing a corporation's stakeholders with so much information about the transfer pricing strategies of their competitors. With access to complete

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[290] 17 CFR 210.1-02, Regulation S-X, §210.1-02(w).

[291] *See, e.g.*, Michael P. Donohoe et al., *Through a Glass Darkly: What Can We Learn About a U.S. Multinational Corporation's International Operations From Its Financial Statement Disclosures?*, 65 NAT. TAX. J. 961 (2012).

[292] Google Inc., Annual Report (Form 10-K), n. 15 (Dec. 31, 2011). For discussion, *see* Donohoe, et al., *supra* note 291.

[293] IRS Form 5471 (Rev. Dec. 2012).

[294] IRS Form 5472 (Rev. Dec. 2012).

[295] Treas. Reg. § 1.482-7(k)(4).

[296] Treas. Reg. § 1.482-7(k)(4)(iii)(B).

[297] *See* Treas. Reg. § 1.482-7(k)(4)(ii)(C).

[298] Treas. Reg. § 1.482-7(k)(2)(iii)(B).

[299] Int. Rev. Serv., Instructions for Schedule UTP (Form 1120).

corporate tax return information, significant shareholders may pressure management to pursue more aggressive transfer pricing planning to lower their global effective tax rate.[300] Access to the cost sharing agreement statement, for instance, could lead influential shareholder groups and non-tax management to push corporate tax directors to explore transfer pricing arrangements involving low-tax jurisdictions, including tax havens, which they had previously rejected. Other documents, such as cost sharing arrangements, could enable tax directors themselves to discover a new strategy for allocating income from intangible assets.[301]

Another example of the potential benchmarking effects of complete public access can be illustrated by considering the effect of making "red flag" disclosure forms, which corporations file with the IRS, publicly accessible. The IRS routinely creates special disclosure forms that corporations must file, along with their annual tax returns, to alert the IRS that it should investigate specific tax positions.[302] For example, the IRS requires corporations to file Form 8886 (Reportable Transaction Statement) whenever it engages in a transaction that the IRS has specifically designated as a "listed transaction", which it will challenge as abusive,[303] and "transactions of interest," which are transactions that it suspects may be abusive.[304] Typically, once the IRS designates a transaction as a listed transaction or transaction of interest, corporations cease using this strategy and move on to pursue others.[305] However, even if the corporation has already participated in the transaction by the time the IRS designates it as a listed transaction or transaction of interest, it must still file Form 8886 with the IRS retroactively[306] or face significant nondisclosure tax penalties[307] and an open-ended statute of limitations.[308] In addition, corporations must file Form 8886 whenever they engage in a transaction that generates a tax loss of $10 million or more[309] or when they engage in a transaction where the adviser prohibits the corporation from revealing the tax advice to others.[310]

[300] *See supra* notes 192 - 193 and accompanying text.

[301] *See* Treas. Reg. § 1.482-7 (describing cost sharing arrangement requirements).

[302] For discussion *see* Sheryl Stratton, *Inside OTSA: A Bird's-Eye View of Shelter Central at the IRS*, 100 TAX NOTES 1246, 1246–47 (2003); Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629, 1637–42 (2009). *Id.* Treas. Reg. § 1.6011-4(e)(1).

[303] Treas. Reg. § 1.6011-4(b)(2).

[304] Treas. Reg. § 1.6011-4(b)(6).

[305] For discussion, *see* Blank, *supra* note 302.

[306] Treas. Reg. § 1.6011-4(e)(2)(i).

[307] I.R.C. § 6707A(b)(1)(B).

[308] I.R.C. § 6501(c)(10).

[309] Treas. Reg. § 1.6011-5(i)(A).

[310] Treas. Reg. §§ 1.6011-4(b)(3), (4).

When filing the form, the corporation must describe the transaction disclosed, including "all information known" to the corporation.[311]

While many red flag disclosure forms would not provide detailed descriptions of tax avoidance transactions if observable, they would offer investors, non-tax management and tax directors the ability to gauge degrees of tax aggressiveness among corporations. Experts, including tax advisory firms, could review these publicly disclosed red flag disclosure forms to identify the type of tax strategy employed by the disclosing corporation. (For an example of experts' exhaustive review of Form 8886, consider the in-depth coverage of then-Presidential candidate Mitt Romney's 2012 release of his individual tax returns, which included several Form 8886 submissions).[312] By reviewing the red flag disclosure forms of competitors, a corporation's stakeholders and agents could determine that certain competitors have been more willing to engage in aggressive tax planning than their own corporation. While it is unlikely that the result of these observations would be that a corporation's significant shareholders or non-tax managers would direct their corporation's tax director to participate in listed transactions or transactions of interest used by competitors in the past (since the IRS will likely challenge these transactions now),[313] a more probable result is that these stakeholders would pressure a conservative tax director to pursue more aggressive tax planning.

Further, some red flag disclosure forms could enable sophisticated investors to determine that their corporations' competitors have engaged in novel tax avoidance strategies, which the IRS has not declared as abusive, but that nonetheless must be disclosed. For example, public disclosure of Form 8886 could enable sophisticated analysts to uncover the details of a homegrown strategy of a single in-house corporate tax department, which generated a tax loss of at least $10 million, [314] but which is not a "listed transaction" or "transaction of interest." In addition, corporations meeting asset thresholds are also required to file Schedule UTP (Uncertain Tax Positions) along with their annual tax returns,[315] which requires them to identify tax positions for which they have established a reserve for financial accounting purposes, positions where the corporation believes it cannot

[311] Int. Rev. Serv., Instructions for Form 8886 (Rev. Mar. 2011).

[312] When Mitt Romney released his 2010 federal income tax return in January 2012, hundreds of journalists, political consultants and tax experts reviewed the lengthy documents and distilled the information into a format digestible by the general public. *See, e.g.*, Nick Baumann and Adam Serwer, *9 Things to Know About Mitt Romney's Tax Returns*, MOTHERJONES, Sept. 21, 2012; Floyd Norris, Nicholas Confessore and Stephanie Strom, *Inside the Romney Tax Returns*, N.Y. TIMES, Jan 24, 2012.

[313] For discussion, *see* Blank, *supra* note 302.

[314] Treas. Reg. § 1.6011-5(i)(A).

[315] IRS Schedule UTP (Uncertain Tax Positions).

meet the more likely than not standard described earlier, or the corporation has not established a reserve because it expects to litigate the issue if challenged.[316] When filing this form, corporations must describe its uncertain tax positions (for financial accounting purposes) and also include a concise description of the position, which would enable the IRS to ask follow-up questions during an audit.[317] If sophisticated investors and non-tax management could review these forms to learn of new tax avoidance strategies, they could pressure their own tax director to consider pursuing these strategies as well.[318]

In addition, if a corporate tax director could observe the red flag disclosure forms of other corporations, especially those of corporations with aggressive tax directors, he could determine that his corporation has disclosed *too much* information to the IRS compared to his competitors. Because the IRS has designed these disclosure forms to provide it with as much information as possible about potentially abusive tax positions of corporations, as opposed to all of a corporation's tax positions, the forms are over-inclusive by design.[319] As a result, corporate tax directors have expressed concern regarding the level of detail they are required to provide to the IRS on these forms, especially as a result of the significant increased tax penalties that can result if the IRS determines that a corporation's disclosure form is not adequate.[320] For example, corporate tax directors and their advisors have argued that many aspects of Schedule UTP are ambiguous, including the meaning of a "concise" description of the disclosed transaction.[321] With access to complete tax returns, a tax director could observe that several of his counterparts at other corporations have included vague descriptions of their uncertain tax positions or included

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[316] *See id*.

[317] Int. Rev. Serv., Instructions for Schedule UTP (Form 1120), *available at* http://www.irs.gov/pub/irs-pdf/i1120utp.pdf.

[318] With public disclosure, analysts could compare a corporation's publicly disclosed tax reserves for uncertain tax positions (also noted on Schedule UTP) and match these positions to reportable transaction forms that may provide additional detail. A study by Petro Lisowsky, Leslie Robinson and Andrew Schmidt in 2013 found a correlation between a corporation's publicly disclosed tax reserves for uncertain tax positions and their submission of reportable transaction forms. Petro Lisowsky, Leslie Robinson & Andrew Schmidt, *Do Publicly Disclosed Tax Reserves Tell Us About Privately Disclosed Tax Shelter Activity?*, 51 J. OF ACC'TING RES. 583 (2013).

[319] For discussion, *see* Blank, *supra* note 302.

[320] *See id*.

[321] *See, e.g.*, William Garofalo, *Schedule UTP Issue Descriptions—How Much Disclosure Is Best?*, 91 PRAC. TAX STRAT. 223 (Nov. 2013); Glen Cheney, *Internal Revenue Service Meets FIN 48*, FIN. EXEC., Apr. 2010, 14-15; Ilya A. Lipin, *Uncertain Tax Positions and the New Tax Policy of Disclosure Through The Schedule UTP*, 30 VA. TAX REV. 663 (2011).

extraneous references to the Internal Revenue Code on the required line on Schedule UTP. The tax director could respond by adjusting his own corporation's submission of Schedule UTP to reduce the amount of detail it provides to the IRS. The result of this response would be to weaken the ability of the IRS to use red flag disclosure forms, such as Form 8886 or Schedule UTP, to detect and challenge abusive tax strategies.

Reverse Engineering. A further consequence of offering the public access to such a broad category of information as complete corporate tax returns is that this action would also allow profit-motivated tax advisors and corporate tax directors to observe documents that would reveal important aspects of the IRS's corporate tax enforcement strategies.

First, complete corporate tax returns include forms that would enable sophisticated analysts to observe controversies where the IRS asserted deficiencies and entered into settlements with other corporations. For example, at the end of an audit, if the taxpayer owes additional tax liability or tax penalties, the IRS prepares IRS Form 5701 (Notice of Proposed Adjustment)[322] and IRS Form 870 (Waiver of Restrictions on Assessment).[323] A corporation that has settled a dispute with the IRS countersigns and files these forms with the IRS. On the face of IRS Form 5701, the IRS must provide a written narrative that describes the reasons for the proposed adjustment.[324] Public access to complete corporate tax returns, including these forms, would thus reveal IRS challenges and settlements that occur in controversies related to transfer pricing and reportable transactions, among many others.

Second, another source of valuable information regarding the IRS's enforcement practices are amended tax returns. In addition to the forms that summarize the reasons for adjustments following IRS audit, corporations frequently file amended tax returns in order to revise previously claimed positions.[325] By examining amended corporate tax returns, where corporations have revised previously claimed positions, analysts could reveal adjustments that may have resulted from IRS challenges, especially if they determine that these changes occur consistently among a large group of corporate taxpayers.

Third, public access to complete corporate tax returns could reveal that the IRS did *not* challenge certain tax positions of specific corporations as a result of the statute of limitations on assessment. With access to several years' worth of tax returns, a sophisticated analyst could determine that a

[322] Int. Rev. Serv., Form 5701 (Notice of Proposed Adjustment).

[323] Int. Rev. Serv., Form 870 (Waiver of Restrictions on Assessment).

[324] Int. Rev. Serv., Form 5701 (Notice of Proposed Adjustment); *See also* Int. Rev. Serv., Form 4549 (Income Tax Discrepancy Adjustments).

[325] *See* Int. Rev. Serv., Form 1120X.

corporation had claimed a questionable tax position (such as by observing the reporting of a listed transaction or transaction of interest).[326] As a result of the expiration of the statute of limitations regarding the position and an absence of any forms that reveal deficiency disputes related to it, that the IRS did not challenge the position. For example, if a corporation fails to disclose a listed transaction, such as the intermediary corporation tax shelter, the statute of limitations remains open.[327] But as long as the corporation files the disclosure statement regarding the abusive tax strategy, the statute of limitations may expire within as little time as three years from the filing of the corporation's tax return.[328] Once the statute of limitations clock stops, absent fraud or another special exception, the IRS will not be able to challenge tax benefits the corporation has claimed using the abusive tax shelter.[329] With access to complete tax returns, corporate tax directors and advisors would gain the ability to observe tax positions that the IRS has determined not to challenge.

Finally, with access to complete corporate tax returns, spanning several years, third-party advisors could develop quantitative, rather than qualitative, methods of analysis that would enable corporate tax directors and tax advisors to gain far greater knowledge of the IRS's tax enforcement techniques than they possess currently.[330] Corporate tax directors, for example, could determine whether inter-company arrangements involving specific countries (such as certain tax haven jurisdiction) and business activities (such as location of customer lists), among many other factors, are statistically more likely than others to result in IRS scrutiny and challenge. Likewise, empirical analysis of corporate tax return data would enable corporate tax directors to determine the minimum level of disclosure, in terms of specificity and quantity of description, that the IRS accepts without subjecting corporate taxpayers to otherwise enforceable tax penalties for failing to make required disclosures to the IRS.[331]

Proprietary Information. Public disclosure of complete corporate tax returns would result in significant exposure of proprietary information. The following is a sampling of proprietary information contained in complete corporate tax returns: Public access would require a large corporation to reveal its trading strategy by requiring it to publish IRS Form 1120,

[326] *See supra* notes 303-304.

[327] I.R.C. § 6501(c)(10).

[328] *Id.* § 6501(a).

[329] *Id.*

[330] For discussion, *see supra* notes 203 – 212 and accompanying text.

[331] *See, e.g.*, I.R.C. §§ 6707A(b)(2)(A) ($200,000 penalty for failure to disclose listed transaction); 6707A(b)(2)(B) ($50,000 penalty for failure to disclose other reportable transactions).

Schedule D,[332] which describes the capital gains and losses of a corporation.[333] In addition, certain accompanying documentation could reveal insights about a corporation's future business plans, such as supporting documents that describe the components of a corporation's deduction for advertising expenses. Publication of IRS Form 1125-E would require corporations to disclose the compensation it pays to its 25 highest compensated officers by name, information which is far in excess of the number of officers required to be disclosed in SEC filings.[334] Several schedules and forms would provide detailed information regarding the structure and ownership of a large corporation.[335] Public access, in its most comprehensive form, consequently, would expose a wealth of information that a corporation's competitors could use to their advantage.

A frequent response from public access proponents is that these concerns could easily be resolved by allowing corporations to redact proprietary information.[336] Yet even if corporations bear "the burden…to argue that particular information should be kept private by redactions," a likely response is that many of the schedules and forms should be redacted in their entirety. For example, a corporation may argue that an IRS Form 8832 (Entity Classification Election),[337] which would reveal whether a corporation "checked the box" to treat an entity as a corporation or as a disregarded entity, would reveal sensitive information to competitors about the corporation's organizational structure and future business plans. Under current law, the IRS releases private letter rulings in redacted form.[338] Taxpayers regularly request significant redactions of material from these background file documents.[339] A similar response from corporations is likely in the case of public access to complete tax returns.

In light of the significant amount of proprietary information contained in the pages of a complete corporate tax return, some large corporations could reduce their cooperation with the IRS if all documents filed with the annual tax return were public record.[340] Empirical studies involving

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[332] Int. Rev. Serv., Form 1120, Schedule D (2014).

[333] *Id*.

[334] Int. Rev. Serv., Form 1125-E (2014).

[335] *See, e.g.*, Int. Rev. Serv., Form 1120, Schedule N (2014) (revealing non-U.S. jurisdictions in which a U.S. corporation owns subsidiaries); Int. Rev. Serv., Form 1120, Schedule G (2014) (identifying certain significant owners of the corporation's voting stock); Int. Rev. Serv., Form 5472 (identifying 25% non-U.S. owners).

[336] *See, e.g.*, Avi-Yonah & Siman, *supra* note 18; Pomp, *supra* note 19.

[337] Int. Rev. Serv., Form 8832 (2014).

[338] *See* I.R.M. 7.28.4.4 (Guidelines for Deletion (Redaction).

[339] I.R.C. 6110(c).

[340] The permits, but does not require corporations to submit attachments with Form 1120. *See* Int. Rev. Serv., Instructions for Form 1120, 3 (2013).

corporate tax return information provide additional support for this hypothesis. For example, in a 2013 study, Erin Towery examined confidential corporate tax return and financial accounting documents to determine the effect of the IRS's requirement that corporations file Schedule UTP with the IRS on the corporation's financial accounting reserves.[341] Towery found that some firms adjusted their financial accounting reporting in order to avoid describing issues as uncertain tax positions, which would otherwise be required to be reported on Schedule UTP.[342] As this example illustrates, corporate managers are capable of manipulating information they are required to report on tax return documents.[343]

Public Awareness and Debate. Public access to complete corporate tax returns would certainly reveal specific examples of how the corporate tax law operates in practice in the United States and could stimulate public debate. By viewing complete corporate tax returns, the public could learn the amount of a multinational corporation's gross income and deductions, its U.S. tax liability, its uncertain tax positions, and background information regarding the reason for specific line items on the corporation's tax return (to the extent this information is not redacted).

At the same time, public disclosure of complete corporate tax returns could cause the media to focus on information revealed in these returns and supporting documents that is unrelated to the corporation's use of specific tax provisions or tax avoidance strategies. For example, if a high-profile corporation's tax return reveals that it has been investing in research and development of a new product line or is increasing its marketing and promotion expenses related to a particular product,[344] the media could highlight these items more prominently than the corporation's substantive tax positions. Media attention on these issues is tangential to, and possibly in conflict with, what should be the primary objective of public disclosure of corporate tax return information, to stimulate public debate about the design and operation of the corporate tax law. In addition, the media could focus excessively on a corporation's filing of a required reportable transaction form, which, as has been discussed, is over-inclusive and may

[341] Erin M. Towery, *How do disclosures of tax uncertainty to tax authorities affect reporting decisions?: Evidence from Schedule UTP*, May 2013, *available at* http://repositories.lib.utexas.edu/handle/2152/21819.

[342] *Id*.

[343] *See id. See also* Hasegawa, et al., *supra* note 48 (reporting results from study involving Japanese corporate tax returns showing that where there was a threshold for disclosure tied to taxable income, a non-trivial number of corporate taxpayers whose tax liability would otherwise have been close to the threshold engaged in underreporting of income to avoid public disclosure).

[344] *See, e.g.,* Form 1120, Line 22 (Advertising).

not necessarily signal abuse.[345] For example, corporations must file a reportable transaction statement whenever they engage in transactions that result in a tax loss of $10 million or more,[346] even though in many cases, the transaction may not be abusive.[347] Given the incentive of the media to report stories that will attract interest, it is not clear that providing public access to complete tax return information would necessarily result in more coherent public debate and discussion of corporate tax issues. As I will discuss, there are alternative disclosure possibilities that could more effectively enhance public awareness and debate of corporate tax issues.

2. *Economic Substance Tax Penalty*

A more targeted public access possibility, which policymakers and academics have suggested,[348] would require corporations to publicly disclose instances in which they have paid an "economic substance" tax penalty to the IRS[349] and to describe the reason for the tax penalty.[350] To deter taxpayers from pursing abusive tax shelters, in 2010, Congress enacted a special tax penalty that applies when a taxpayer loses a tax benefit as a result of the application of the economic substance doctrine or "any similar rule of law."[351] Under the statute, a taxpayer's transaction possesses economic substance only if it changes the taxpayer's economic position in a meaningful way, apart from tax effects, and if the taxpayer has a substantial purpose, apart from tax reasons, for entering into the transaction.[352] The economic substance tax penalty is significant compared to other tax penalties; it is equal to 20% of the underpayment of tax, increasing to 40%

[345] For discussion, *see* Blank, *supra* note 302.

[346] Treas. Reg. § 1.6011-5(i)(A).

[347] *Id.* *See also* Rev. Proc. 2004-66, I.R.B. 2004-50 (describing reportable loss transactions).

[348] *See, e.g.*, Press Release, Senator Charles Grassley, Grassley Highlights Corporate Loophole Closers in New Tax Bill (Oct. 14, 2004).

[349] I.R.C. § 6662(b)(6).

[350] Current law does not require public disclosure when a corporation pays a tax penalty for engaging in reportable transactions or transactions lacking economic substance. However, under current law, corporations are required to disclose in SEC filings instances in which they have paid tax penalties to the IRS for failure to *disclose* to the IRS certain reportable transactions. IRC § 6707A(e)(2). When making this disclosure in SEC filings, the IRS requires corporations to describe the reason for the payment of the tax penalty, including applicable provisions of the Internal Revenue Code. *See* Rev. Proc. 2005-51, 2005-2 C.B. 296.

[351] *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1409, 124 Stat. 1029, 1067–68 (codified at I.R.C. § 7701(o)).

[352] I.R.C. § 7701(o)(1).

in the case of non-disclosed transactions,[353] and cannot be waived as a result of a reasonable cause defense.[354] The IRS can assert this tax penalty following an audit;[355] it does not need to pursue litigation in order to conclude that a transaction lacks economic substance. Similar publicity measures have been proposed by both government officials and scholars,[356] and to a limited extent, appear in other related contexts under current law.[357] For example, the original draft of the legislation containing the economic substance tax penalty, which the Senate passed in 2004, would have obligated corporations to disclose in SEC public filings their payment of any penalties for engaging in non-economic substance transactions[358] and would have also required the IRS "to make public the name" of any corporation that paid the tax penalty.[359] Despite the potential appeal of this publicity measure as a reputational sanction, policymakers should not require corporations to publicly disclose payment of the economic substance tax penalty.

Strategic Defenses. One of the primary strengths of the economic substance tax penalty is that its application is uncertain; corporate tax directors do not know in advance whether the IRS or the courts will apply the tax penalty to a particular tax strategy. Congress appears to have contemplated the value of this uncertainty when designing the tax penalty.[360] By allowing corporate tax directors and their advisors to observe all instances in which other corporations paid this particular tax penalty to the IRS, this public disclosure measure would have the unintended effect of *reducing* the uncertainty associated with the economic substance tax penalty.

Reverse Engineering. The primary danger of this publicity measure is

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[353] I.R.C. § 6662(b)(6).

[354] I.R.C. § 6664(c).

[355] *See* Int. Rev. Serv., Guidance for Examiners and Managers on the Codified Economic Substance Doctrine and Related Penalties, Jul. 15, 2011.

[356] *See, e.g.,* Press Release, Senator Charles Grassley, *supra* note 348; Jay A. Soled & Dennis J. Ventry, Jr., *A Little Shame Might Just Deter Tax Cheaters*, USA TODAY, Apr. 10, 2008, at 12A; Kornhauser, *supra* note 20 at 104; Linda M. Beale, *Putting SEC Heat on Audit Firms and Corporate Tax Shelters: Responding to Tax Risk with Sunshine, Shame and Strict Liability*, 29 J. CORP. L. 219, 222 (2004), at 247.

[357] *See* IRC § 6707A(e)(2) (SEC disclosure requirement for corporations that pay tax penalty for failure to disclose reportable transaction to IRS).

[358] Jumpstart our Business Strength (JOBS) Act, S. 1637, 108th Cong. § 402, 150 Cong. Rec. S. 5622, 5643 (May 18, 2004) (requiring SEC disclosure when taxpayer "is required to pay a penalty…with respect to any noneconomic substance transaction.")

[359] *Id*.

[360] Joint Committee on Tax'n, *Technical Explanation Of The Revenue Provisions Of The "Reconciliation Act Of 2010," As Amended, In Combination With The "Patient Protection And Affordable Care Act"*, Mar. 21, 2010, 155.

that it would reduce the legal and enforcement uncertainty associated with the economic substance penalty. This uncertainty can deter some taxpayers from engaging in risky tax planning and reporting behavior.[361] In response to the economic substance tax penalty, corporate tax directors and their advisors have widely expressed "uncertainty,"[362] "concern,"[363] and "anxiety"[364] that they cannot predict whether the economic substance tax penalty should apply to certain transactions as a legal matter and whether the IRS will seek to apply it in specific situations.

If corporations were required to disclose instances in which the IRS has asserted the economic substance tax penalty against them and summarize the underlying transaction, however, corporate tax directors and their advisors could observe the specific transactions of other corporations that led the IRS to apply the tax penalty. Put differently, this publicity measure would reveal the IRS's precise application of the economic substance tax penalty. Responding to the uncertain nature of this new tax penalty, in 2011, the IRS issued a directive to its field agents and examiners that described the factors that the IRS would consider in determining whether to seek application of the tax penalty.[365] These include factors such as whether the transaction at issue "is highly structured," "includes unnecessary steps," and "is outside the taxpayer's ordinary business operations."[366] By reviewing actual transactions where the IRS sought the tax penalty, including by applying quantitative methods of analysis, corporate tax directors and their advisors could gain significantly more concrete insights into the IRS's approach.[367] An unintended effect of this measure, consequently, is that it could weaken the potential deterrent effect of the economic substance tax penalty.

[361] *See, e.g.*, Jeff T. Casey & John T. Scholz, *Boundary Effects of Vague Risk Information on Taxpayer Decisions*, 50 ORG. BEHAV. & HUM. DEC. PROCESSES 360 (1991); Mark P. Gergen, *Uncertainty and Tax Enforcement: A Case for Moderate Fault-Based Penalties*, 64 TAX L. REV. 453 (2010); Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443 (2004). For further discussion, *see* Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 STAN. L. REV. 241, 244 (2013).

[362] Crystal Tandon, *Too Many Unlisted Transactions Being Reported, IRS Officials Say*, 113 TAX NOTES 203, 203 (describing uncertainty regarding disclosure rules).

[363] Jodi J. Schwartz, *Economic Substance Doctrine and Subchapter C: What, Me Worry?*, TAXES, Mar. 2011.

[364] Jeffrey T. Sheffield, *Corporate Transactions and the Economic Substance Doctrine*, TAXES, Mar. 2011.

[365] Int. Rev. Serv., *supra* note 355.

[366] *Id*.

[367] *See, e.g.*, Yoram Keinan & Jasper L. Cummings, *The Economic Substance Doctrine: Where Are We Now and What to Do About It?*, ABA Section of Taxation, Oct. 21, 2011 (criticizing 2011 IRS guidance on codified economic substance doctrine).

Proprietary Information. This publicity measure would be unlikely to reveal sensitive non-tax proprietary information of a corporation unless corporations were required to provide lengthy, detailed descriptions of the underlying transactions. Nevertheless, some corporate tax directors in the U.S. appear to fear adverse tax shelter publicity (a fear I have argued is unfounded).[368] Under current law, when faced with a deficiency finding from the IRS, a tax director can settle the dispute with the IRS behind the curtain of tax privacy or the tax director can choose to pursue litigation in public.[369] The IRS has explicitly emphasized this distinction in order to encourage "publicity-averse" corporate tax directors to choose to settle potential tax shelter disputes rather than litigate.[370] By removing the option of tax privacy from disputes that may involve application of the economic substance doctrine—either way, payment of the tax penalty would become publicly observable—this publicity measure could encourage some corporate tax directors to opt to litigate rather than settle disputes. Litigation would certainly require a corporation to reveal its involvement in a potentially abusive tax strategy. Yet, in contrast to the public disclosure of payment of an economic substance tax penalty to the IRS, litigation would allow the corporation to tell its side of the story in the sunlight of a public trial. Moreover, the possibility of a judicial victory could encourage some tax directors to pursue litigation in economic substance disputes rather than accept IRS branding as a tax shelter participant.[371]

Public Awareness and Debate. An obvious rationale for requiring public disclosure of the economic substance tax penalty is to publicly shame corporations that engage in abusive tax planning.[372] The distinguishing characteristic of state-sponsored shaming sanctions is that the government condemns an actor for violating a shared moral norm and issues the condemnation in a dramatic and public fashion.[373] By requiring corporations that pay the economic substance tax penalty to reveal this fact publicly, proponents of this measure would likely argue that it would achieve deterrence objectives that the exclusive application of the monetary tax penalty cannot. Senator Charles Grassley, then-Senate Finance Committee Chairman and a chief advocate of the publicity feature, declared in 2004 that this publicity measure would deter corporate tax abuse by causing a corporation's current and future shareholders to reconsider

[368] *See supra* notes 108-119; Blank, *supra* note 223.

[369] See I.R.C. §§ 6213, 7422.

[370] Press Release, IRS, IRS Settlement Initiative (Oct. 2005), *available at* http://www.irs.gov/irs/article/0,,id=150073,00.html.

[371] For discussion, *see* Blank, *supra* note 223, at 591.

[372] *See, e.g.,* Kornhauser, *supra* note 20 at 104; Soled & Ventry, *supra* note 372.

[373] *See* ROLAND MULLER, HONOR AND SHAME: UNLOCKING THE DOOR 53 (2000).

"whether they want to invest in a company with clouded business ethics."[374] Several public access proponents have offered similar shaming proposals.[375]

As Part II discussed earlier, there are significant reasons to doubt the efficacy of public shaming measures such as the requirement that corporations publicly disclose their payment of the economic substance tax penalty.[376] Aside from a lack of empirical support showing that a corporation's shareholders, business partners, and consumers would ostracize the corporation upon learning of its participation in an abusive tax strategy,[377] it is even possible that this sanction could send an unintended *positive* signal to the members of a corporation's community. Again, short-term investors, such as private equity and hedge funds, are often attracted to, rather than repelled by, corporations with tax directors who claim tax positions that "push the envelope."[378] For example, a study of market reactions to corporations' public disclosures of uncertain tax positions in SEC filings has shown that investors positively value uncertain tax avoidance, suggesting they view tax-related contingent liabilities "very differently from other liabilities."[379] These studies should cause policymakers to pause before accepting shaming as a rationale for embracing a corporate tax publicity proposal.[380]

3. *Base Erosion and Profit Shifting Reporting*

At the heart of the ongoing global discussion of how to combat aggressive transfer pricing practices, where multinational corporations pay little or no taxes on their global profits to either their home government or any government, is a vigorous debate over whether organizational structure information of large multinational corporations should be accessible by the public. Supported by the leaders of the Group of Twenty nations, the OECD has pursued a multi-step action plan by for combatting base erosion and profit shifting (BEPS).[381] To provide taxing authorities with uniform

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[374] Press Release, Senator Charles Grassley, *supra* note 348.

[375] Kornhauser, *supra* note 20 at 104. *See, e.g.*, Soled & Ventry, *supra* note 356; Beale, *supra* note 356.

[376] *See supra* Part II.C.1.b.

[377] *See id*.

[378] *See Nanette Byrnes & Louis Lavelle*, *The Corporate Tax Game*, BUS. WK., Mar. 31, 2003, at 78.

[379] Allison Koester, *Investor Valuation of Tax Avoidance Through Uncertain Tax Positions*, Jan. 2011.

[380] For discussion of possible reasons for lack of ostracism from consumers and shareholders, *see* Blank, *supra* note 223.

[381] OECD, ACTION PLAN ON BASE EROSION AND PROFIT SHIFTING (2013), *available at* http://www.oecd.org/ctp/BEPSActionPlan.pdf.

information that could enable them to challenge abusive transfer pricing, the BEPS initiative would require each corporation to deliver a "master file" to every participating country.[382] The BEPS master file, as currently proposed, would consist of several items, including an organizational structure chart showing all legal entities that comprise the corporate group; a "country-by-country" report, which would list taxes paid by each entity in the corporate group to its country of organization and to all other countries; a list of material intangibles of the corporate group and which entities own them; and the number of employees of each entity in the corporate group.[383]

The OECD has explicitly stated that the BEPS master file should be protected by tax privacy, commenting that tax administrations should "ensure there is no public disclosure of confidential information (trade secrets, scientific secrets, etc.) and other commercially sensitive information contained in the documentation package."[384] Such assurances respond to widespread calls from industry to the OECD to develop a "stringent confidentiality regime,"[385] along with "real sanctions for countries that violate confidentiality provisions."[386] In contrast, representatives of organizations representing labor unions have argued that the master file should be publicly accessible because, otherwise, exchange of information requests would slow access by some taxing authorities.[387] In addition, commentators have argued that the master file should be public in the interest of legitimacy and transparency.[388]

Applying the guiding public access principles outlined above, this Subpart proposes that access to the BEPS master file of multinational corporations should be restricted to participating taxing authorities rather than provided to the general public.

Strategic Defenses. To achieve its primary objective, the BEPS master file would provide taxing authorities with a roadmap to the transfer pricing strategies of multinational corporations. At the same time, public access would likely also encourage benchmarking by enabling significant shareholders, non-tax managers and corporate tax directors to observe more aggressive, possibly novel transfer pricing strategies of their competitors,

[382] OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING 27, September 2014.

[383] *Id.* at 35.

[384] *Id.* at 24.

[385] PricewaterhouseCoopers LLP, *BEPS Action Plan: Action 13 – Transfer pricing documentation.*

[386] *Id.*

[387] *See* Stephanie Soong Johnston, *Stakeholders Lock Horns Over OECD's CbC Reporting Proposal*, 143 TAX NOTES 906 (2014) (*quoting* Maria Villanueva Serrano).

[388] *See, e.g.*, Yariv Brauner, *What the BEPS?*, 16 FL. TAX REV. 55, 106 (2014); Sheppard, *supra* note 280.

which could rival structures like the now-famous Double Irish Dutch Sandwich.[389] Likewise, the country-by-country report could cause a corporation's stakeholders to learn that competitors of their corporation have paid lower tax bills to certain jurisdictions. A response from corporate tax directors could be to attempt to lobby these jurisdictions for increased tax incentives.[390] And if the master file is available to everyone, tax advisory firms, as well as tax haven jurisdictions, could exploit the information to pitch new tax avoidance strategies to corporations whose tax departments appear to be lagging compared to those of their competitors in terms of global tax liabilities.

The short-term potential for reverse engineering the IRS's approach to transfer pricing based solely on the BEPS master file is limited because the file would not directly reveal actions of the IRS or other taxing authorities. However, if corporations release the file publicly each year, analysts could utilize quantitative methods to determine whether corporate tax directors have abandoned, maintained or increased certain transfer pricing strategies in response to IRS challenge or lack thereof.

Proprietary Information. The core deliverables in the BEPS master file, as currently proposed, represent the essence of proprietary information. The BEPS master file would contain the complete organizational structure chart of a large multinational corporation.[391] Corporations typically do not voluntarily reveal charts that reveal their complete structure, including all legal entities, to competitors or in public filings unless they are required to do so.[392] While proponents of requiring public access to the BEPS master file have argued that this action would not reveal commercially sensitive information "especially if every multinational is doing it,"[393] this claim ignores the reality that multinational corporations utilize different, competing corporate structures as part of their overall business strategy. A corporation's use of entities in certain jurisdictions may result from significant motivations other than tax avoidance, such as jurisdictions' corporate laws, labor standards, natural resources, among many other factors.[394] Similarly, the OECD's proposed country-by-country report would also require each corporation to reveal the number of employees of

[389] *See supra* note 3.

[390] *See*, OECD, *supra* note 382.

[391] *See id.* at 27-29.

[392] *See* Donohoe, *supra* note 291; Jessica Holzer, *From Google to FedEx: The Incredible Vanishing Subsidiary*, WALL ST. J., May 22, 2013.

[393] Johnston, *supra* note 387 (*quoting* Maria Villanueva Serrano).

[394] For discussion, *see* Victor Fleischer, *Despite Tax Rules, Companies Stick With U.S.*, N.Y. TIMES, Jun. 6, 2013; Eric J. Allen & Susan C. Morse, *Tax Haven Incorporation for U.S. Firms: No Exodus Yet*, 66 NAT'L TAX J. 395 (2013).

each entity in its group, organized by geographic region.[395] Public exposure of this information would enable competitors to observe potentially valuable information about a multinational corporation's plans to sell or manufacture products or otherwise expand business operations in a market.[396] The BEPS master file instructions even require corporations to reveal this information explicitly, such as by describing their "*overall strategy* for the development, ownership and exploitation of intangibles, including location of principal research and development facilities and location of research and development management."[397]

A potential consequence of public disclosure of the BEPS master file, including proprietary information that could be exploited by a corporation's U.S. and non-U.S. competitors, is that multinational corporations may limit their participation in the BEPS initiative. For instance, corporate tax directors may deliver structure charts that do not contain significant detail regarding every subsidiary corporation, a tactic they have used in the past, such as in response to SEC filing requirements[398] and requests for information by congressional committees.[399] The initiative, as currently conceived, lacks credible enforcement mechanisms.[400] Without disclosure by complex multinational corporations, the primary objectives of the BEPS initiative are unlikely to be fulfilled.

Public Awareness and Debate. A requirement that all multinational corporations publicly file their BEPS master file could enhance public awareness and debate of global corporate tax avoidance, as public access proponents have argued.[401] With access to this information, the media and academic researchers could scrutinize which specific jurisdictions have enabled highly recognizable corporations to pursue abusive transfer pricing strategies. However, as the preceding discussion has illustrated, this increased awareness would also result in significant drawbacks, which could ultimately increase profit shifting by certain corporations.

Rather than require multinational corporations to publish the BEPS

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[395] *See*, OECD, *supra* note 382 at 35.

[396] *See id*.

[397] OECD, *supra* note 382 at 28 (emphasis added).

[398] *See supra* note 293 and accompanying text.

[399] For example, in 2013, in response to requests from the U.S. Senate Permanent Subcommittee on Investigations inquiry, Apple provided several structure charts that depicted the corporate structure in summary form without delineating all of the legal entities that comprise Apple's corporate structure. U.S. Senate Permanent Subcommittee on Investigations, Offshore Profit Shifting and the U.S. Tax Code Part 2 (Apple Inc.), Exhibits, May 21, 2013, at Exhibit 1d.

[400] *See* Lee A. Sheppard, *U.S. Opposes BEPS Blunt Instruments*, 143 TAX NOTES 157 (2014) (*quoting* Robert Stack).

[401] *See, e.g.,* Brauner, *supra* note 388.

master file, policymakers should pursue alternative measures that would stimulate meaningful debate over the taxation of global corporate income without diminishing the strategic defenses of corporate tax privacy and exposing proprietary information. One possibility is that multinational corporations could be required to publicize the taxes paid on a cash basis by the corporate group to the United States and the taxes paid by the corporate group to all other countries in the aggregate. The guiding objective should be to avoid publicity measures that would provide enough detail, such as the information contained in the BEPS master file, to result in benchmarking or the exposure of significant proprietary information.

C. *Return Information that Should Be Publicly Accessible*

Despite the probable responses to mandated public disclosure of certain return information, which would likely encourage increased corporate tax aggressiveness, these effects would not necessarily result from all public disclosure measures. Some public disclosure measures could stimulate valuable public awareness and debate without exposing information that would increase corporate tax aggressiveness or reveal sensitive proprietary information of corporations to their competitors. This Subpart provides three examples of return information that should be subject to public disclosure: Form 1120 only; Schedule M-3; and corporate "pink slips."

1. *Form 1120 Only*

While there are several strong reasons to reject proposals to require public disclosure of complete corporate tax returns, policymakers should require publication of a publicly traded corporation's IRS Form 1120, the annual U.S. corporate income tax return, without any accompanying schedules, forms or attachments. Compared to the 57,000-page complete annual tax return for 2010 of General Electric, the Form 1120, absent any attached schedules, is substantially shorter: it is one single-sided page.[402]

Strategic Defenses. The chance that publication of Form 1120 only would have benchmarking effects is far lower than in a regime where complete corporate tax returns, including forms, schedules and supporting documentation, were publicly accessible. Access to the single-page Form 1120 of all publicly traded corporations would enable a corporation's significant shareholders and non-tax management to observe whether other corporations made lower tax payments and paid lower effective U.S. tax rates on income subject to U.S. tax than their own corporation. However, lower taxes and lower effective tax rates of competitor corporations often

[402] Int. Rev. Serv., Form 1120 (2014).

do not reveal that these competitors are more aggressive in their tax planning, defined by engaging in transactions that yield tax benefits Congress did not intend.[403] For instance, a corporation with an effective U.S. tax rate, measured by dividing U.S. tax liability by U.S. taxable income, of 12% is not necessarily more aggressive in its tax planning than a corporation with an effective U.S. tax rate of 15%. Low effective tax rate are often due to a corporations' use of foreign tax credits on income earned outside of the U.S.[404] or the corporations' use of special tax credits, such as the nonconventional fuel credit.[405] Similarly, low tax payments by corporations are often the result of the corporation's use of net operating loss carryforwards,[406] accelerated depreciation[407] and other tax benefits that are explicitly intended by Congress. Without access to the many documents underlying the single-page Form 1120, a corporation's significant shareholders and non-tax management would have little ability to determine whether competitor corporations reduced their tax burden using specific aggressive tax strategies. Form 1120 reveals a corporation's ultimate annual taxable income and tax liability, among other items, but does not reveal the specific tax planning techniques, such as transfer pricing structures involving tax haven jurisdictions, that the corporation used to achieve these results.[408] Moreover, as Form 1120 would not reveal the results of IRS audits, imposition of tax penalties or IRS guidance issued directly to the taxpayer, corporate tax directors and their advisors would have little ability to use this form to reverse engineer the IRS's approach to corporate tax enforcement.

Proprietary Information. A requirement that corporations publish Form 1120 only would reveal little proprietary information compared to a regime that would require corporations to publish complete returns. While the one-page Form 1120 states a corporation's items of gross income, such as gross profit, gross rents, and capital gains, and its tax deductions, such as interest payments, salary expenses and depreciation, all of the figures are reported in the aggregate.[409] By reviewing the Form 1120 only, a corporation's competitors would be unable to determine the inner workings of the corporation, including its future business plans. If necessary, the proposal could be amended to allow corporations to request redaction of specific lines that could reveal proprietary information, such as Line 22,

[403] *See supra* note 147.
[404] I.R.C. § 901(a).
[405] I.R.C. § 45K.
[406] I.R.C. §§ 165, 172. *See supra* notes 82 - 84.
[407] I.R.C. §§ 167, 168.
[408] Int. Rev. Serv., Form 1120 (2014).
[409] *Id*.

Advertising.[410] But since these lines do not reveal detailed information about specific expenses, the threshold for redaction should be high.

Further, without the risk of exposure of proprietary information, a proposal to require publication of Form 1120 only is unlikely to discourage corporations from cooperating with the IRS. As opposed to a measure that would result in publication of an entire corporate tax return, publication of the Form 1120 would not reveal proprietary details underlying the items on each line. One minor cooperation risk is that corporate tax directors could limit disclosure of information on the required schedules, forms and accompanying documents out of concern that the move to publish Form 1120 only signifies the beginning for a push in the United States to require publication of all corporate tax return information. Policymakers could address this concern explicitly in legislation or in the debates leading up to the enactment of the legislation by stating that public access applies only to Form 1120 and not to other related documentation.[411]

Public Awareness and Debate. Publication of the single-page Form 1120 would present the pubic and investors with significantly more information about a corporation's tax liabilities and payments than is available today. Form 1120 reveals a corporation's taxable income, its net operating losses for that year, and its total tax or refund.[412] Publication of Form 1120 would reveal in clear and concise terms, information that would inform the public and investors and stimulate public debate. For example, rather than requiring the public to decipher GAAP figures presented in publicly filed financial statements, which are often mischaracterized in reports by the media,[413] Form 1120 would reveal a corporation's effective tax rate for a single year, calculated using federal income tax concepts.[414] As another example, the public could compare the tax liability and payments of corporations within different industries. Scholars could consider trends among corporations in different industries, such as technology versus manufacturing, which could educate the public and policymakers regarding the relative tax burdens of different types of corporations.[415] Finally, by matching the new information revealed about a corporation's U.S. tax liability with its global cash taxes paid (reported in its financial statements, though using GAAP concepts),[416] commentators could highlight the portion of a corporation's total taxes that are paid the

[410] Int. Rev. Serv., Form 1120, Line 22 (2014).

[411] *See, e.g.*, I.R.C. § 6103(b)(2)(c).

[412] Int. Rev. Serv., Form 1120, Lines 28, 29(a), 30-36 (2014).

[413] *See supra* note 271.

[414] Int. Rev. Serv., Form 1120 (2014).

[415] *See, e.g.*, Jennifer C. Gravelle, *Corporate Tax Incidence: A Review of Empirical Estimates and Analysis*, Congressional Budget Office, June 2011.

[416] *See supra* note 77 and accompanying text.

U.S. government and to non-U.S. governments. In contrast to publication of complete tax returns, therefore, requiring publicly traded corporations to publish their Form 1120 annually would reveal valuable information to the public without exacerbating corporate tax aggressiveness or harming the IRS's enforcement efforts.

2. *Schedule M-3*

Policymakers should also support, either as a stand-alone measure or in addition to required public disclosure of Form 1120 only, a requirement that publicly traded corporations disclose their Schedule M-3, Net Income (Loss) Reconciliation.[417] Since its re-release in 2004, Schedule M-3 has been described as a "Rosetta Stone,"[418] a "vital roadmap"[419] and "landmark achievement."[420] For years, IRS agents could not determine the elements of the difference between a corporation's financial accounting (book) and U.S. taxable income, which in the aggregate exceeded $200 billion in some years, without pursuing a thorough audit of corporations' financial statements and tax returns.[421] Upon its re-release in 2004, the IRS proclaimed that this form would enable it to identify taxpayers that "engaged in aggressive transactions and therefore should be audited."[422]

Schedule M-3 is a three-page document that large corporations, those with assets of $10 million or more, file with the IRS along with their annual tax returns, which requires them to reconcile the differences between their book and U.S. taxable income on a consolidated basis.[423] The schedule highlights book/tax differences in reporting in specific areas such as deductions for stock option exercises, charitable contributions of intangible property, meal expenses, deferred compensation, foreign income tax expense, corporate owned life insurance, among many other items.[424] Schedule M-3 specifically requires corporations to highlight book/tax differences resulting from reportable transactions, those potentially abusive transactions that the IRS requires corporations to disclose to the IRS using

[417] Int. Rev. Serv., Schedule M-3 (2014).

[418] Testimony of Edward D. Kleinbard Before the U.S. Senate Finance Committee, Jun. 13, 2006.

[419] Shaviro, *supra* note 42.

[420] Charles E. Boynton, et al., *A First Look at 2007 Schedule M-3 Reporting by Large Corporations*, TAX NOTES, Aug. 15, 2011.

[421] Testimony of Edward D. Kleinbard, *supra* note 418.

[422] IRS Announces Release of Schedule M-3 for Corporations, 2004 TAX NOTES TODAY 131-16 (Jul. 8, 2004).

[423] Int. Rev. Serv., Instructions for Schedule M-3 (2014).

[424] Int. Rev. Serv., Schedule M-3, Part III.

separate forms.[425] As a result of the lucidity provided by Schedule M-3 regarding a corporation's financial and taxable income, several commentators have called on policymakers to require publicly traded corporations to publicly disclose this schedule.[426]

Strategic Defenses. Mandatory publication of Schedule M-3 would pose minimal risk to the strategic defenses of corporate tax privacy. Schedule M-3 itself, without any supporting explanatory documents, would not reveal whether the corporation engaged in specific potentially abusive transactions or aggressive transfer pricing structures. The schedule requires corporations to report the aggregate book/tax difference resulting from reportable transactions, but does not require the corporation to describe amounts attributable to any specific transaction or strategy.[427] Again, certain significant reportable transaction statements, such as those involving losses of $10 million or more or that are subject to confidentiality provisions,[428] may involve non-abusive tax strategies. Nor would it reveal whether the IRS challenged specific tax strategies or applied tax shelter penalties against the corporation. As long as the accompanying documents, which would reveal more information,[429] are not required to be published, the risk that a corporation's stakeholders and advisors would engage in benchmarking or reverse engineering after reviewing competitors' publicly available Schedule M-3's is low.

Proprietary Information. While Schedule M-3 reveals a corporation's income and expenses from specified items, it requires the corporation to report this information using aggregate figures.[430] The accompanying explanatory documents that are filed with Schedule M-3 contain much more detailed information about the corporation's business operations, in both the U.S. and abroad, which, if accessible, competitors could use to their advantage. If corporations are only required to publish Schedule M-3 and not these accompanying documents, they do not subject themselves to significant risk of exposing sensitive proprietary information.

As Schedule M-3 does not reveal significant proprietary information, a public disclosure requirement would be unlikely to discourage cooperation by corporate taxpayers. Corporations already report financial income (loss) to shareholders using GAAP principles; they report taxable income to the IRS using U.S. federal income tax principles. Additionally, IRS officials have implied that failure to file the required Schedule M-3 could result in

[425] Int. Rev. Serv., Schedule M-3, Part II, Line 12.
[426] *See, e.g.*, Canellos & Kleinbard, *supra* note 42; Shaviro, *supra* note 42.
[427] Int. Rev. Serv., Instructions for Schedule M-3 (2014).
[428] *See, e.g.*, Treas. Reg. § 1.6011-5(i)(A).
[429] *Id.*
[430] *Id.*

increased tax penalties on non-disclosed reportable transactions and transactions that lack economic substance,[431] as well as tax penalties for failure to file a tax return.[432] If investors could observe a corporation's failure to file the Schedule M-3, they would also likely speculate about the reasons for this failure. Given these incentives, there is little reason to expect that a publication requirement would diminish corporations' willingness to complete and file Schedule M-3 with the IRS. The opportunities for corporations to mask book/tax differences in the face of a Schedule M-3 public disclosure requirement are limited. Corporations strive to report the greatest book income possible to shareholders. To obfuscate the book/tax difference, corporations would have to increase their reporting of taxable income, such as by forgoing non-abusive tax deductions, such as accelerated depreciation, or otherwise avoiding other strategies that result in tax losses.

Public Awareness and Debate. A requirement that corporations publish Schedule M-3 would create a unique platform for educating policymakers, investors, the media and the general public and for stimulating public debate. Compared to Form 1120, which focuses only on taxable income and tax liability, Schedule M-3 shows why a corporation's financial accounting and U.S. taxable income differ from one another. Thus, access to the publicly available Schedule M-3 filings could encourage debate about specific items that lead to these differences. For instance, after reviewing the Schedule M-3 of specific consumer corporations and observing some of the most significant book/tax differences, commentators might question why Congress bestows special depreciation deductions on investment in certain assets[433] or allows special tax benefits for corporate-owned life insurance.[434] Conversely, commentators might question why financial accounting rules treat certain items as income, where the tax law does not. Again, the introduction of high profile, named corporations into the public forum would likely stimulate interest from journalists and commentators in ways that technical statutory and regulatory language does not.

Publication of Schedule M-3 would attract media attention, but importantly, would also result in more accurate communication regarding corporate tax issues by journalists to the general public. One incentive for the media to focus on Schedule M-3 is that the schedule requires corporations to report income (loss) stemming from reportable transactions.[435] While the media may focus on this item, again, it does not

[431] I.R.C. §§ 6662(i); 7701(o).
[432] Int. Rev. Serv., FAQ for Form 1120 Schedule M-3.
[433] Int. Rev. Serv., Schedule M-3, Part III, Line 31.
[434] *Id*., Part III, Line 33.
[435] *Id*., Part II, Line 12.

necessarily reveal that a corporation has engaged in shady tax planning. Yet, faced with media scrutiny of this line, representatives of a large multinational corporation could feel compelled to provide additional voluntary explanation publicly. More importantly, today, journalists report on the tax affairs of household name corporations using publicly available financial statements only, disregarding important differences between financial and tax accounting.[436] With the Schedule M-3's of these same corporations, journalists could begin to recognize these differences and deliver better analysis of corporations' financial state and tax activities. Public access to Schedule M-3 thus has tremendous potential to facilitate public discussion and debate of the differential financial and tax accounting treatment of large corporations, taxation of corporations with significant overseas operation and the legitimacy of corporate tax expenditures.

3. *Corporate Pink Slips*

Finally, instead of requiring corporations to publish specific pages from their corporate tax returns or related schedules, policymakers could consider an alternative route to public disclosure: a corporate "pink slip," similar to the concept envisioned by Congress in 1934.[437] What could a corporate pink slip contain? The answer to this question depends on the preferences of policymakers and the public's demand for information. Since 1934, U.S. corporations have vastly increased their global operations and the number of corporate tax expenditure provisions in the Internal Revenue Code has grown substantially.[438] As an illustration, the corporate pink slip could present, on a consolidated basis, a publicly traded corporation's (1) U.S. tax liability; (2) U.S. deferred tax liability; (3) U.S. taxable income; (4) U.S. cash taxes paid; (5) taxes paid to state and local governments in the U.S.; (6) taxes paid to non-U.S. governments (as discussed earlier);[439] (7) global taxable income; and (8) specific tax credits, such as the foreign tax credit and the research and development credit, claimed. This document would be based on information contained in corporate tax returns and could be publicly filed either as part of the tax footnote in financial statements in Form 10-K or as a separate attachment.[440]

Strategic Defenses. Like the proposals to require publication of Form 1120 only and the Schedule M-3, the corporate pink slip proposal poses

[436] *See supra* note 270.

[437] Revenue Act of May 10, 1934, ch. 277, § 55(b), 48 Stat. 680, 698 (1934).

[438] For discussion, *see* Harry Grubert, *Foreign Taxes and the Growing Share of U.S. Multinational Company Income Abroad: Profits, Not Sales, Are Being Globalized*, U.S. Dep't of Treasury, Office of Tax Analysis, Feb. 2012.

[439] *See supra* note 401 and accompanying text.

[440] *See* ASC 740-10.

little risk to the strategic defenses of corporate tax privacy. The figures reported would be aggregate figures. Stakeholders could observe a competitor's low payment of taxes or significant amounts of foreign tax credits, but this information would not reveal whether the competitor had complied with IRS disclosure requirements, engaged in reportable transactions or pursued aggressive transfer pricing techniques. Again, even if a corporation's pink slip reveals that its U.S. tax liability or tax rate for the year are low compared to other corporations, this information does not necessarily show that the corporation's tax director has achieved that result by pursuing aggressive tax strategies.[441] And as the pink slip would not describe specific deficiency disputes or settlements, it would not enable corporate tax directors or advisors to draw conclusions regarding tax enforcement strategies of the IRS.

Proprietary Information. The corporate pink slip would not reveal proprietary information of a corporation other than the amount of the aggregate figures required to be reported, such as taxes paid to the U.S., state and local and foreign governments. Corporations could continue to share information with the IRS on required schedules and forms and in cooperative settings, such as the Compliance Assurance Program, without the threat of public exposure of this information.[442] As a statutory matter, the corporate pink slip could be treated as separate from "return information"[443] that is protected by tax privacy. Corporations thus would still receive the protection of tax privacy with respect to their tax returns and all information provided to the IRS.

Public Awareness and Debate. In contrast to certain tax forms and schedules, policymakers could design the corporate pink slip with the explicit objective of providing comprehensible corporate tax information to the public as opposed to the IRS. For example, by requiring corporations to disclose both their annual U.S. tax liability, which would flow directly from the Form 1120, and taxes paid to non-U.S. governments, the pink slip could provide a straightforward guide to a specific corporation's relative tax burdens in the U.S. versus in other jurisdictions. With this information, analysts could report both U.S. and global effective tax rates using actual tax, as opposed to GAAP, concepts. And rather than focus only on the tax credits and deductions listed on any individual tax form or schedule, such as Schedule M-3, the corporate pink slip would enable policymakers to highlight corporations' use of specific tax expenditures, such as the research and development credit.[444]

[441] *See supra* notes 404-408.
[442] *See* Int. Rev. Serv., Compliance Assurance Process, 2014.
[443] I.R.C. § 6103(b)(1).
[444] I.R.C. § 41 (expired on Dec. 31, 2013).

A significant potential drawback of this approach is that it is susceptible to attempts by corporations to lobby the drafters of the pink slip to design it in a way that does not cast corporations as making low or no annual U.S. tax payments. For example, representatives of corporations could propose that the pink slip report a corporation's taxable income, even though it paid no cash taxes as a result of net operating losses. When Congress has required corporations to disclose items in SEC filings in the past, the SEC has faced pressure from industry as it formulated the specific terms of the disclosure. For example, critics have argued that after Congress enacted legislation in 2010 that required publicly traded corporations to disclose the ratio between the total compensation of a company's chief executive officer and the median compensation of all other employees,[445] a campaign to influence the SEC's disclosure rules by industry associations "effectively brought the agency's work on the rule to a standstill."[446] A response to the concern is that the corporate pink slip should at least contain the precise figures that the corporation reports on its tax returns, such as U.S. taxable income[447] and U.S. tax liability.[448] The drafters of the corporate pink slip could also provide a narrative explanation of the calculation of each reported item. By design, the corporate pink slip would present key corporate tax information in a concise and intelligible manner.

V. CONCLUSION

By examining the relationship of corporate tax privacy and tax compliance from a new perspective, this Article has offered three contributions to the corporate tax privacy debate.

First, this Article has proposed that corporate tax privacy may limit the pressure to engage in more aggressive tax planning and reporting practices that corporate tax directors face from external sources, such as significant shareholders and non-tax managers, and even from themselves. Specifically, corporate tax privacy provides the government with valuable strategic defenses by restraining the ability of a corporation's stakeholders and agents to engage in benchmarking and reverse engineering, behaviors that would likely cause some tax directors to engage in more aggressive tax planning and reporting.

Second, this Article has offered guiding principles that policymakers

[445] Public Law No. 111-203, sec. 953(b), 124 Stat. 1376, 1904 (2010), *as amended* by Public Law No. 112-106, sec. 102(a)(3), 126 Stat. 306, 309 (2012).

[446] *See e.g.*, Jerry Markon and Dina ElBoghdady, *Dodd-Frank executive pay rule still in limbo amid pushback from corporate America*, WASH. POST, Jul. 6, 2013. I am grateful to Louis Kaplow for helpful discussions regarding this point.

[447] IRS Form 1120, Line 30.

[448] IRS Form 1120, Line 31.

should consider when evaluating proposals to make all or part of corporate tax return information publicly accessible. As this Article has argued, policymakers should assess each corporate tax return public disclosure proposal separately by considering its potential effects on: (1) the strategic defenses of corporate tax privacy; (2) exposure of proprietary information of corporate taxpayers; and (3) public awareness and debate of corporate tax issues.

Last, this Article has evaluated several concrete corporate tax return public disclosure measures that have been the subject of debate among policymakers. Applying the principles described above, it has described several types of return information, which disclose details of specific tax positions or IRS enforcement actions and should not be publicly accessible, and other types of return information, including significant portions of corporate tax returns themselves, which should be publicly accessible.

The answer to the question of whether the public's "right to know" should outweigh corporations' tax privacy interests is neither simple nor universal. The more nuanced analysis of corporate tax privacy presented in this Article should have important implications for legislators, empirical and legal scholars, government officials and practitioners.