THE REVIVAL OF THE CORPORATE ALTERNATIVE MINIMUM TAX:
SOUND POLICY IN THE GLOBAL EFFORT TO COMBAT BASE EROSION
AND PROFIT SHIFTING?

Jacob Hartzler*

I. Introduction

Intellectual property ("IP"), including patents, copyrights, trademarks, and trade secrets, are vital assets for corporations and countries alike.1 In the digital age, IP rights have enabled

---

* J.D. / LLM in Taxation Candidate, Suffolk University Law School, 2023.
1 See What are intellectual property rights?, WORLD TRADE ORG. (Sept. 23, 2022), archived at https://perma.cc/U4UP-JA2K (stating that intellectual property rights are the rights given to persons over the creations of their minds). Types of intellectual property include copyrights, which protect the rights of authors of literary and artistic works and industrial property. Id. Copyrights can be divided into two characterizations, one of which protects distinctive signs such as trademarks, and the other category of protection is designed to stimulate design and the creation of technology. Id. In this category falls inventions, which are protected by patents, industrial designs, and trade secrets. Id. “The social purpose is to provide protection for the results of investment in the development of new technology, thus giving the incentive and means to finance research and development activities.” Id. See Protect Your Intellectual Property, INT’L TRADE ADMIN. (Sept. 23, 2022), archived at https://perma.cc/6QS6-YA6P (defining intellectual property as the creations of the mind such as inventions, literary and artistic works; and symbols, images, names and logos used in commerce); Kathi Vidal, Remarks by USPTO Director Kathi Vidal at the PTAB Pro Bono Fireside Chat, U.S. PAT. AND TRADEMARK OFF. (June 13, 2022), archived at https://perma.cc/4AR9-RDUC (asserting that "[w]e know that increasing

Copyright © 2023 Journal of High Technology Law and Jacob Hartzler
All Rights Reserved. ISSN 1536-7983.
multinational corporations to reduce or outright avoid paying income tax in jurisdictions where they generate substantial revenue.\(^2\) For years, multinational technology corporations have reduced their tax liability through profit shifting—an accounting practice in which a multinational corporation deliberately shifts the source of their income, such as patents and other intellectual property, to low-tax access to the IP system spurs innovation, creates jobs, and improves the welfare of our nation’s citizens, families, and local communities.”).\(^2\) See Miroslav Palanský, How multinationals continue to avoid paying hundreds of billions of dollars in tax, UNITED NATIONS UNIV. (Oct. 2019), archived at https://perma.cc/TF64-TBG3 (estimating that around $420 billion in corporate profits was shifted out of 79 countries every year). See also Bret Wells, Article: “Territorial” Tax Reform: Homeless Income is the Achilles Heel, 12 Hous. Bus. & Tax L. J. 1, 6 (2012) (illustrating that a multinational group can establish an intermediate foreign holding company (“IFHC”) in a low-tax jurisdiction allowing the IFHC to engage in base erosion strategies with affiliates operating in high-tax jurisdictions). Base erosion techniques utilized by the IFHC include: (1) lease-stripping transactions – leasing tangible personal property to foreign affiliates in high-tax jurisdictions and charging rent for the equipment; (2) interest-stripping transactions – making related party loans to fund the working capital and capital investment needs of the various affiliates located in high tax jurisdictions; (3) royalty-stripping transactions – obtaining ownership of intellectual property and licenses in intellectual property to various foreign affiliates located in high-tax jurisdictions for their use of U.S. developed intellectual property; (4) supply chain transactions – obtaining manufactured goods from affiliates that are then resold by the IFHC to other affiliates thereby allowing the IFHC to earn a significant profit due to its insertion into the intercompany trading pattern; and (5) service stripping transactions – charging affiliates for management services, accounting and back office support, risk management services, and technical services. Id. at 7–8. See also ANNE H. GIBSON, TWO MINIMUM TAXES? HOW THE NEW U.S. CORPORATE AMT IS DIFFERENT FROM THE OECD GLOBAL MINIMUM TAX AND WHY IT MATTERS, Wolters Kluwer, 1–2 (2022) (noting that multinationals can reduce their tax bill by shifting some of their easy-to-move intangible assets to jurisdictions that offer lower tax rates).
While a multinational corporation is typically taxed in the jurisdictions in which they generate income on an international scale, income from IP is sourced to where the IP is held—not where the enterprise conducts business. As a result of this practice, countries with higher corporate tax rates, such as the United States (“U.S.”), have seen IP leave their jurisdictions, substantially reducing the tax

---

3 See Jim Tankersley, Tech Giants Shift Profits to Avoid Taxes. There’s a Plan to Stop Them., N.Y. TIMES (Oct. 9, 2019), archived at https://perma.cc/CJM6-UK9M (stating that the traditional method of taxation—requiring countries to pay tax where their economic activity is generated—has allowed firms in the digital economy to “move” the source of their profits—intellectual property—to countries where tax rates are extremely low). See also Palanský, supra note 2 (stating that multinational companies can use various schemes to avoid paying taxes in countries where they make substantial revenue). “There are three main channels that multinationals can use to shift profits out of high-tax countries: debt shifting, registering intangible assets such as copyright or trademarks in tax havens, and a technique known as ‘strategic transfer pricing.’” Id. Debt-shifting is when a company in a high tax jurisdiction artificially borrows money from a wholly owned subsidiary located in a low tax jurisdiction allowing the company located in the high tax jurisdiction to deduct the interest payments paid to the subsidiary therefore reducing their tax liability. Id. In the second channel, a multinational corporation transfers its intangible assets, such as a trademarks or copyright, to a wholly owned subsidiary and then pays royalties to the subsidiary in order to use the assets that are artificially lower than the profit derived from the use therefrom, thus increasing the profit of the lessor taxed subsidiary. Id. Strategic transfer pricing is used in trade between a company and its subsidiary to set prices in a way to deliberately minimize their overall tax liabilities. Id.

4 See Rupert Neate, ‘Silicon Six’ tech giants accused of inflating tax payments by almost $100bn, GUARDIAN (May 31, 2021), archived at https://perma.cc/6UFX-XKLT (noting Amazon, Facebook, Netflix, Apple, Microsoft and Google’s parent company Alphabet were singled out in a report by the campaign group Fair Tax Foundation that reported that the companies paid $96 billion less in tax between 2011 and 2020). The “Silicon Six” handed over $149 billion less to global tax authorities than expected if they had paid the headline rates where they operated. Id. “Income tax is paid on profits, but the researchers said the Silicon Six companies deliberately shift income to low tax jurisdictions to pay less tax.” Id.
base and corresponding tax revenue.\(^5\) In recent years, the U.S. has made domestic and international efforts to curb this practice.\(^6\)

The Tax Cuts and Jobs Act ("TCJA") introduced significant changes to the way multinational corporations are taxed.\(^7\) Among other changes, the act reduced the U.S. corporate tax rate from thirty-five to twenty-one percent, and replaced the previous corporate tax system.

---

\(^5\) See Tankersley, supra note 3 (noting that a plan to combat this practice is a victory for consumption-heavy countries like the United States, China, and much of Western Europe and a loss for tax havens such as Ireland). See Palansky, supra note 2 (estimating that approximately $420 billion in corporate profits is shifted out of 79 countries every year). This results in an estimated loss of $125 billion in lost tax revenues for these countries. Id. See GILTI AND FDII CALCULATIONS (July 2, 2022), LexisNexis (stating that prior to the Tax Cuts and Jobs Act in 2017, U.S. companies would defer repatriating income to the U.S. to sustain a lower effective tax rate). "All of this planning served to incentivize shifting profits offshore." Id. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INT’L BUS. TRANSACTIONS 39 (Rachel E. Barkow et al. eds, 4th ed. 2020) (noting that U.S. multinational enterprises have deferred taxes indefinitely on substantial income earned abroad by avoiding subpart F income and by using various profit-shifting techniques). By 2017, approximately $3 trillion was held offshore by U.S. multinationals as income derived from foreign operations but not currently subject to U.S. taxes. Id. “[V]irtually every U.S. multinational company employed various techniques designed to avoid the high U.S. corporate tax rate.” Id.

\(^6\) See Tankersley, supra note 3 (stating that the Organization for Economic Cooperation and Development published an 18-page framework plan that officials hope will form the basis of an international agreement on digital taxation). “In a digital age, the allocation of taxing rights can no longer be exclusively circumscribed by reference to physical presence . . . [t]he current rules dating back to the 1920s are no longer sufficient to ensure a fair allocation of taxing rights in an increasingly globalized world.” Id. The framework applies only to large multinational entities with annual revenues at or exceeding about $825 million. Id.

\(^7\) See CHOW & SCHOENBAUM, supra note 5, at 40 (outlining generally the changes to the taxation of multinational enterprises by the Tax Cuts and Jobs Act). “A principal goal of the TCJA is to bring back and tax existing offshore corporate earnings.” Id. at 41. See GILTI AND FDII CALCULATIONS, supra note 5 (stating that prior to the TCJA, most of the potential U.S. federal income tax on foreign income could be deferred). U.S. shareholder of foreign corporations were not subject to tax on the earnings of a foreign corporation until they were repatriated as dividends to the U.S. shareholder. Id.
alternative minimum tax ("AMT") on U.S. corporations with a new base erosion and anti-abuse tax ("BEAT"). In addition, the TCJA introduced a tax on global intangible low-taxed income ("GILTI") and provided for a special deduction for foreign-derived intangible income ("FDII"). GILTI was enacted to discourage U.S. multinationals from holding IP outside of the U.S. and conversely, FDII was enacted to encourage U.S. multinational corporations to hold their IP in the U.S., thereby incentivizing technology exports. Despite these provisions, international and domestic pressure to combat profit shifting continued.

---

8 See CHOW & SCHOENBAUM, supra note 5, at 43 (stating that the BEAT is designed to reach and tax base erosion and profit transactions). The BEAT applies only to large companies earning an average of at least $500 million in gross receipts with a ‘base erosion percentage’ of at least 3 percent during the three-year period immediately preceding the applicable tax year.” Id. See JANE G. GRAVELLE & DONALD J. MARPLES, R45186, ISSUES IN INTERNATIONAL CORPORATION TAXATION: THE 2017 REVISIONS (P.L 115-97) 2 (2021) (defining BEAT as a “minimum tax that applies a lower rate to an expanded base, including certain payments to foreign related firms.”). The base erosion and anti-abuse tax (BEAT) was added to existing anti-abuse measures aimed at artificial profit shifting). Id.

9 See CHOW & SCHOENBAUM, supra note 5, at 40-42 (stating the reduction in the U.S. corporate tax rate and introducing several new taxes on U.S. multinationals including GILTI and FDII).

10 See id. at 42 (stating that “[t]he purpose of the GILTI tax is to discourage U.S. multinationals from holding intangible property (intellectual property) outside of the United States.”). “The purpose of [the FDII deduction] is to encourage U.S. multinationals to hold their intellectual property in the United States and to create an incentive to export technology.” Id. See GILTI AND FDII CALCULATIONS, supra note 5, at 42 (stating that the purpose of GILTI “is to tax global intangible income that tax planners may potentially shift offshore to be subject to a lower rate of taxation.”). “GILTI is in essence a global minimum tax whereby the earnings of IP owned by U.S. companies would get taxed by the U.S. regardless of where the IP is located.” Id. FDII is a parallel policy that seeks to incentivize U.S. companies to keep their IP in the United States or to bring IP back to the United States thus providing for a benefit of a lower tax rate of 13.125%. Id.
to mount as arguments ensued in regards to whether the BEAT and FDII provisions of the TCJA violated existing treaties, the World Trade Organization, and the Organization for Economic Co-operation and Development’s (“OECD”) two-pillar solution to combat Base Erosion and Profit Shifting (“BEPS”).

The Inflation Reduction Act (“IRA”) was enacted into law on August 16, 2022, and like the TCJA, significantly changed the way that multination corporations are taxed. The IRA introduced a new corporate AMT on corporations, with an average adjusted financial

---

11 See Chow & Schoenbaum, supra note 5, at 43 (questioning whether the unilateral approach of the BEAT is too broad and imposes a solution that benefits the United States at the expense of other nations). "BEAT may violate antisubsidy and nondiscrimination provisions contained in agreements administered by the [World Trade Organization]. The BEAT and GILTI taxes also may violate provisions of certain double taxation treaties, bilateral investment treaties, and free trade agreements." Id. at 43-44; Gravelle & Marples, supra note 8, at 35 (stating that the primary reason for disagreement over whether BEAT violates tax treaties involves nondiscrimination rules which require the same deductions to be allowed to residents and nonresidents). Nondiscrimination rules may apply to BEAT because BEAT taxes payments to foreign related partners but not domestic ones. Id. “However, BEAT does not disallow deductions but rather includes them in a minimum tax base, leaving this issue uncertain.” Id. The FDII can be viewed in conflict with one of the minimum standards agreed to by the United States in the OECD BEPS – to counter harmful tax practices including patent boxes located in countries where the activities to create intangibles were not reformed. Id.

12 See Inflation Reduction Act of 2022: Corporate Alternative Minimum Tax, Vinson & Elkins (Aug. 23, 2022), archived at https://perma.cc/WTF9-CTPE (stating that the Inflation Reduction Act (the “IRA”) was enacted into law on August 16, 2022). Among other changes to the Internal Revenue Code of 1986, as amended, “the IRA imposes a 15% corporate alternative minimum tax on certain corporations.” Id. See Kevin Pinner, Multinationals Face Most of Inflation Act’s Biz Taxes, Prof. Says (Aug. 12, 2022), LexisNexis (predicting that “multinational corporations would bear most of a 15% minimum tax.”).
statement income (“AFSI”) that exceeds $1 billion annually over the previous three-year period.\textsuperscript{13} By taxing AFSI, also known as book income, in lieu of taxable income, the AMT significantly departs from traditional U.S. tax practices.\textsuperscript{14}

While imposing an AMT on a corporation’s book income may in theory prevent corporations from engaging in aggressive tax avoidance techniques, an AMT based on this figure is an inefficient, complex, and ineffective means to accomplish such a goal. Furthermore, slight reform to the provisions of the TCJA could have

\textsuperscript{13} See Charles R. Zubrycki, Inflation Reduction Act of 2022: Tax Provisions (Aug. 24, 2022), LexisNexis (stating that “[n]ews reports have long claimed that certain well-known corporations generate sizeable financial profits but pay $0 in federal taxes. This situation is about to change, at least for companies that consistently post yearly financial profits of $1 billion or more.”). The IRA imposes the corporate alternative minimum tax on corporations with “average annual adjusted financial statement income’ that exceeds $1 billion annually for the taxable three-year period ending with the current taxable year.” Id. “The amount of the new corporate [alternative minimum tax] is the excess of 15% of the corporation’s adjusted financial statement income for the taxable year . . . over the corporation’s [alternative minimum tax] foreign tax credit for the taxable year.” Id. The new corporate alternative minimum tax will apply to taxable years beginning after December 31, 2022. Id.

\textsuperscript{14} See Analyzing the Corporate Alternative Minimum Tax, Forbes (Aug. 23, 2022), archived at https://perma.cc/H2UA-9MP5 (noting that the alternative minimum tax of 15% will be levied on a corporation's book income whereas the standard tax of 21% will be levied on the corporation’s taxable income). “American corporations essentially keep two sets of books: one for financial reporting purposes and one for tax purposes. . . . That is subsidies for various corporate activities that are reflected for tax, but not for book, because the purpose of book is to accurately reflect the financial picture of the corporation.” Id. Congress grew concerned that large corporations were taking too much advantage of tax expenditures thus causing their effective tax rate to be very low. Id. Thus, a corporation will pay the greater of a tax of 15 percent based on the corporation’s global book income and a tax of 21 percent calculated on a corporation’s taxable income. Id.
brought the U.S. into compliance with the OECD BEPS Agreement without the need for a unilateral fifteen percent AMT that fails to meet the OECD requirements. Lastly, taxing a corporation’s book income, rather than its taxable income, reallocates Congress’s constitutionally enumerated power to levy corporate taxes into the hands of the Financial Accounting Standards Board (“FASB”), a non-profit, private organization not responsible for setting tax policy.

II. History

A. Taxation of Multinational Tech Corporations Prior to the TCJA

Prior to the TCJA, an AMT was imposed on corporate taxpayers with the intent to reduce a corporation’s ability to avoid U.S. taxes.\textsuperscript{15} The original corporate AMT was introduced in the Tax Reform Act of 1986 and eliminated an “add-on” minimum tax imposed on corporations in prior years.\textsuperscript{16} The corporate AMT was a flat twenty percent tax imposed on a corporation’s alternative

\textsuperscript{15} See Changes to Alternative Minimum Tax for Corporations and Individuals, BOWLES RICE (Nov. 18, 2022), archived at https://perma.cc/J7T2-6LNE (explaining the changes to the alternative minimum tax under the Tax Cuts and Jobs Act).

minimum taxable income less an exemption amount. The original AMT was founded on principles of vertical equity to limit a corporation’s ability to use tax preferences, such as deductions and credits, to reduce their ultimate tax liability on retained and distributed earnings below an acceptable amount. Despite intending to prevent corporations from using tax breaks to reduce their tax liability to zero, the corporate AMT received substantial criticism and ultimately affected a small percentage of corporations. Chief among these

17 See id. (defining a corporation’s alternative minimum taxable income as a corporation’s taxable income determined with certain adjustments – primarily related to depreciation – and increased by the disallowance of several preference items, primarily related to extraction activities such as depletion and expensing of intangible drilling costs).

18 See id. (stating that the alternative minimum tax was originally motivated by a concept of vertical equity in which profitable corporations should be required to pay at least some income tax each year). “The AMT attempts to achieve this by denying selected tax benefits to certain taxpayers, which may improve the overall equity of the tax system.” Id. See also Alex Muresianu & Erica York, It Would Be a Mistake to Resurrect Corporate Alternative Minimum Tax, TAX FOUND. (Aug. 4, 2022), archived at https://perma.cc/8MKQ-QKNW (stating that the corporate alternative minimum tax was first introduced in the Tax Reform Act of 1986 in response to arguments that very large firms with significant accounting earnings paid little or no tax).

19 See Muresianu & York, supra note 18 (arguing that all eligible taxpayers should be able to take full advantage of tax breaks and that if tax breaks are poor policy, then they should be repealed directly). “The AMT created economic inefficiencies, increased tax burdens and complexity, and saw declining tax revenues over time.” Id. See also MARPLES, supra note 16 (demonstrating that in both 2003 and 2013, AMT revenues were roughly 1 percent of corporate tax revenues and that in these years, 2 percent of all corporations paid the AMT). The AMT may raise questions of horizontal equity which requires taxpayers with similar abilities to pay similar taxes as unlike the regular tax system which allows “taxpayers with certain characteristics to pay less in taxes than otherwise equivalent taxpayers. The AMTs retain some of these preferences and disallows others.” Id. “Ideally, the regular tax system would fully address the trade-offs between equity, efficiency, and simplicity,
criticisms were that the AMT was inefficient due to its complicated and burdensome nature, it penalized those with large expenses, and was less predictable than the regular tax system. Most important, the AMT saw declining revenues overtime as a corresponding AMT credit allowed corporations to offset their regular taxable income by the amount of AMT they had paid in previous years, leading to concerns that the AMT yielded little to no additional tax revenue.

While the prior AMT was in effect, some of the largest multinational tech corporations—including the “Silicon Six”; Apple, Facebook, Netflix, Microsoft, Amazon, and Google’s parent company Alphabet—utilized digital-aged profit-shifting strategies to legally

along with the need to raise revenue. However, the existence of the AMT—a parallel tax system—suggests that the regular tax system does not achieve the desired balance under all circumstances.” Id.

20 See Thomas Sovereign, Repeal the Alternative Minimum Tax, LEGIS. RECOMMENDATION (2013), archived at https://perma.cc/TL79-AERY (stating that the alternative minimum tax penalizes those with high expenses, treats seemingly similar deductions differently, is complicated and burdensome, and is less predictable than the regular tax system due to its complexity); Gregory S. Dowell, Understanding the Corporate AMT (Alternative Minimum Tax), DOWELL GRP. (June 28, 2017), archived at https://perma.cc/66BT-TBF2 (stating that the AMT complicates record keeping whether or not the corporation is currently exposed to the AMT as the AMT runs parallel to the traditional method of taxation).

21 See Muresianu & York, supra note 18 (discussing how companies that paid the AMT in one year received a credit that could be used to offset future liability under the regular tax code). The primary effect of the alternative minimum tax was to shift tax liability over time allowing firms to move in and out of the alternative tax system to take advantage of credits for prior year AMT to offset portions of their regular tax liability which significantly reduced the net revenue raised. Id.
reduce their income tax liability.\textsuperscript{22} For years, Google, Apple, and other multinational corporations used the “Double Irish Dutch Sandwich,” a highly-effective tax avoidance strategy which involved two companies incorporated in Ireland and a Netherlands conduit company.\textsuperscript{23} The first Irish company held the multinational corporation’s IP and booked the profits of international sales.\textsuperscript{24} The profits were then transferred to a Netherlands conduit company, which then assigned the profits to the second Irish company headquartered in the Cayman Islands,

\textsuperscript{22} See Jean Franco Fernández Clark, \textit{Double Irish Dutch Sandwich Tax Avoidance Explained}, Offshore Aff. (Jan. 10, 2021), archived at https://perma.cc/6QJZ-4HMA (explaining how the biggest tech companies such as Apple, Facebook, Google, and Microsoft legally used the popular tax avoidance scheme and detailing how the process works); Neate, supra note 4 (noting that “silicon six” paid approximately $149 billion less to global tax authorities than the amount they were expected to pay according to the headline rates where they operated).

\textsuperscript{23} See CHOW & SCHÖENBAUM, supra note 5, at 39 (explaining that “[a] favorite technique used by multinational companies to avoid high U.S. corporate taxes is to shift reported profits to low tax jurisdictions.”). According to a 2013 study conducted by the Congressional Research Service, U.S. multinationals reported earning 43 percent of their overseas profits in tax havens such as Bermuda, Ireland, Luxembourg, the Netherlands, and Switzerland. \textit{Id.} See Clark, supra note 22 (explaining that foreign subsidiaries are set up in Ireland because pursuant to the Irish tax system a company can be tax resident by place of management rather than by place of incorporation if the company is controlled by another company residing in a country that has a double tax treaty with Ireland); \textit{‘Double Irish Dutch Sandwich’}, N.Y. Times (Apr. 28, 2012), archived at https://perma.cc/8S65-P3HT (“Numerous companies take advantage of loopholes in international tax laws to move profits around the world, avoiding taxes.”). Many of these techniques rely on transferring profits on patent royalties to places like Ireland such as the case in the “Double Irish Dutch Sandwich” pioneered by Apple and other multinational corporations. \textit{Id.}

\textsuperscript{24} See CHOW & SCHÖENBAUM, supra note 5, at 39 (explaining that the “Double Irish Dutch Sandwich” is a famous example of profit shifting used by Google); \textit{‘Double Irish Dutch Sandwich’}, supra note 23 (explaining that due to “a quirk in Irish law, if the Irish subsidiary is controlled by managers elsewhere, like the Caribbean, then the profits can skip across the world tax free.”).
subjecting the profits to the corporate tax rate of zero, levied by the
Cayman Islands. As a result, large multinational technology
corporations held their IP and profits offshore indefinitely to avoid
U.S. corporate income tax liability.

B. The Tax Cuts and Jobs Act and The Alternative Minimum Tax

The TCJA repealed the corporate AMT and substituted new
provisions designed to make the U.S. a more competitive destination
for IP and to reduce the incentive for multinational corporations to
profit shift. BEPS is combated by two provisions in the TCJA—the

25 See Chow & Schoenbaum, supra note 5, at 39 (explaining that the “Double Irish
Dutch Sandwich” tax avoidance technique results in the profits being taxed at the
rate levied by the Cayman Islands); ‘Double Irish Dutch Sandwich’, supra note 23
(explaining that the money from a sale of the product is sent to the second Irish
subsidiary). The company can then avoid tax by routing profits through the
Netherlands due to Irish treaties that make some inter-European transfers tax-free.
Id. The profits are then routed back to the first Irish subsidiary which then sends the
profits to an overseas tax haven. Id.

26 See Chow & Schoenbaum, supra note 5, at 39 (explaining that the “Double Irish
Dutch Sandwich” allowed multinational corporations to hold profits offshore
indefinitely to avoid paying U.S. taxes); ‘Double Irish Dutch Sandwich’, supra note
23 (stating that the profits from this transaction can land in an overseas tax haven
where they are held for years without being subject to taxation). Had the profit from
the sale to a U.S. consumer stayed in the United States, they would be subject to the
U.S. corporate tax rate, however, if the money is paid to an Irish subsidiary as
royalties on patents the company owns, the company will ultimately be taxed at a far
lower rate. Id.

minimum tax and substituted the Base Erosion and Anti-Abuse Tax (BEAT) in its
place).

The purposes of this new international tax regime include making
the U.S. multinationals more competitive with companies based in
other countries, removing impediments to the repatriation of
first disallows a deduction for certain hybrid payments made to a foreign-related company, and the second imposes the new BEAT tax on large U.S. multinationals. The first provision works by adding payments made to related foreign corporations, such as payments for services, interest, rents, royalties, and deductions for depreciation and amortization, back to a corporation’s taxable income to establish the

profits to the United States, reducing opportunities to shift income offshore to low-tax jurisdictions, incentivizing exports of products and services from the United States, and preventing erosion of the U.S. tax base by foreign companies.

Id. See also Daniel Bunn, *Intellectual Property Came Back to U.S. after Tax Reform, but Proposals Could Change That*, TAX FOUND. (July 21, 2021), archived at https://perma.cc/T7HZ-AVVT [hereinafter *Intellectual Property Came Back to the United States*] (arguing “[t]he Tax Cuts and Jobs Act implemented several policies that made the U.S. more attractive as a location for IP, including lowering the corporate tax rate to 21 percent to be competitive with other countries.”). The Tax Cuts and Jobs Act also introduced a new tax on foreign income in the form of the Global Intangible Low-Tax Income (GILTI) which ensured that companies would pay a 10.5 to 13.125 percent rate (sometimes higher) on income from overseas. Id. GILTI requires companies who move IP out of the U.S. seeking a low tax rate to pay additional taxes to the U.S. government. Id. In addition, the Tax Cuts and Jobs Act reduced the tax rate further on Foreign Derived Intangible Income (FDII)–Income from exports related to IP held in the U.S.–to 13.125 percent. Id. In the five years prior to the Tax Cuts and Jobs Act, the U.S. imported an average of $116 million in IP rights each year and in 2017, that number jumped to $219 million. Id.

28 See CHOW & SCHEINBAUM, supra note 4, at 43 (discussing the TCJA).

[T]he TCJA disallows a deduction for hybrid payments to a foreign related company where, due to a difference in the tax characterization of the payment, the recipient is not subject to tax on the payment in its country of residence or is entitled to an offsetting deduction with respect to the payment.

Id. See also INTERNATIONAL COMPLIANCE AFTER THE 2017 TAX CUTS AND JOBS ACT: EXPANDED FORMS 5471, 8858, AND 1118, (Apr. 22, 2020), LexisNexis [hereinafter INTERNATIONAL COMPLIANCE] (stating that the BEAT works like a minimum tax as corporations pay BEAT to the extent it exceeds its ordinary income tax liability). See also GRACHELLE & MARPLES, supra note 8, at 2 (defining BEAT as a minimum tax that applies a lower rate to an expanded base including payments made to foreign related firms which was aimed at preventing artificial profit shifting).
corporation’s modified taxable income. The second provision then taxes the modified taxable income at a ten percent rate, which is set to increase to twelve point five percent in 2026. The BEAT was introduced as a sort of minimum tax to replace the previous corporate AMT. Like other minimum taxes, BEAT targets large corporations that engage in profit shifting—it applies to U.S. multinational corporations with gross receipts of $500 million or more, whose payments to related foreign corporations exceed three percent of the

29 See INTERNATIONAL COMPLIANCE, supra note 28 (stating that “BEAT is equal to 10% of modified taxable income minus regular corporate income tax liability (not to go below zero). Modified taxable income is calculated by taking ordinary taxable income and adding back base erosion payments made to related foreign corporations. . . ”). Id. In effect, the BEAT disallows a deduction for payments made to foreign corporations which are then added back to the corporation’s taxable income to construct the corporations modified taxable income. Id. Payments for the cost of goods sold, the deductions for GILTI and FDII, and the dividends received deduction are not added back in calculating the corporation’s modified taxable income. Id. See CHOW & SCHÖENBAUM, supra note 5, at 43 (defining modified taxable income as taxable income without regard to any base erosion deduction benefits).

30 See CHOW & SCHÖENBAUM, supra note 5, at 43 (stating that “BEAT is equal to 10 percent (5 [percent] for 2018 and rising to 12.5 [percent] in 2026) of the ‘modified taxable income’”; See also LAST STOP FOR THE TCJA’S INTERNATIONAL TAX PROVISIONS?: THE MADE IN AMERICA TAX TOUR GATHERS STEAM (Apr. 13, 2021), LexisNexis [hereinafter LAST STOP FOR THE TCJA?] (stating that “I.R.C. Section 59A imposes BEAT equal to the excess of 10 [percent] (5 [percent] for tax years beginning in 2018 and 12.5 [percent] for tax years beginning after 2025) of a corporation’s modified taxable income over the corporation’s regular federal income tax liability.”).

31 See LILIAN FAULHABER, WILL THE OECD PLAN FIX INTERNATIONAL TAXATION? (July 7, 2021), LexisNexis (stating that the U.S. already had a form of minimum tax prior to the OECD agreement); INTERNATIONAL COMPLIANCE, supra note 28 (stating that “the BEAT is essentially a 10 [percent] minimum tax that is meant to prevent foreign and domestic corporations operating in the United States from avoiding domestic tax liability by shifting profits out of the United States.”).
total deductions taken by the corporation. The overarching goal of BEAT is to combat profit shifting by taxing profits shifted to foreign-related corporation in excess of an acceptable amount.

The TCJA also introduced the GILTI tax. Prior to GILTI, a U.S. shareholder generally was not subject to U.S. tax on foreign income earned by a foreign subsidiary until the income was distributed in the U.S. in the form of dividends. GILTI changed this and now requires a U.S. shareholder of any controlled foreign corporation to

---

32 See INTERNATIONAL COMPLIANCE, supra note 28 (stating that BEAT is limited in scope to large multinational corporations with gross receipts of $500 million or more). Furthermore, the BEAT does not apply unless payments that United States’ corporations make to related foreign corporations exceed 3 percent of the total deductions taken by a corporation. Id.

33 See CHOW & SCHOPENBAUM, supra note 5, at 43 (stating that I.R.C. § 59A put in place a new tax designed to combat profit shifting). The Beat is designed to tax base erosion and profit shifting (BEPS) transactions. Id. See also LAST STOP FOR THE TCJA?, supra note 30 (stating that the legislation “attempted to combat base erosion, which is generally accomplished by earnings stripping or deductions for interest, rents, or royalties paid to related persons located in a tax haven or low-tax jurisdiction.”); INTERNATIONAL COMPLIANCE, supra note 28 (introducing the BEAT tax). But See GRAVELLE & MARPLES, supra note 8, at 45 (arguing that in the case of companies that have a lot of foreign-source income from high tax countries along with relatively modest base erosion payments, “BEAT acts primarily as a tax on foreign-source income rather than achieving the objective of limiting profit shifting through outbound payments.”).

34 See generally I.R.C. § 951A (providing for a tax on global intangible low-taxed income).

35 See I.R.C. § 951A (levying the GILTI tax). See also LAST STOP FOR THE TCJA?, supra note 30 (stating that “[b]efore the enactment of I.R.C. § 951A, a U.S. person generally was not subject to U.S. tax on foreign income earned by a foreign corporation in which it owns shares until that income is distributed to the U.S. person as a dividend.”).
include their GILTI in their gross income for that taxable year.\footnote{See \textit{Last Stop for the TCJA?}, supra note 30 (explaining that under I.R.C. § 951A requires a U.S. person that is a U.S. shareholder of a controlled foreign corporation must include its GILTI for that year in their gross income). “[A] U.S. shareholder’s GILTI Inclusion is based on the aggregate of the shareholder’s pro rata share of certain items . . . from all of the [controlled foreign corporations] in which the shareholder is a U.S. shareholder for that year.” \textit{Id.}}

GILTI is calculated on an annual basis and is equal to foreign profits in excess of the normal returns to qualified investments.\footnote{See \textit{International Compliance}, supra note 28 (explaining that GILTI is equal to net tested income minus ten percent of Qualified Business Asset Investment (QBAI)). “Net tested income is effectively all foreign profit earned by a U.S. parent firm’s CFC that has not been taxed by the United States. QBAI is equal to the value of all depreciable assets . . . that this U.S. parent’s [controlled foreign corporation] own.” \textit{Id.}} The idea behind GILTI is to tax profits connected to profit shifting through IP licensing schemes.\footnote{See \textit{id.} (specifying that in a competitive market, a ten percent return on profits is an ordinary return or a sufficient return to satisfy investors and that any profits in excess of this amount are “assumed to be connected to the returns to IP or profit shifting.”); \textit{Chow \& Schoenbaum, supra} note 5, at 42 (stating that the purpose of the GILTI tax is to discourage U.S. multinationals from holding intellectual property outside of the United States). \textit{But see Joseph Boris, Consensus on Global Tax Rewrite Gives Way to Legislative Slog, Practitioners Say} (Nov. 8, 2021), \textit{Thomson Reuters} (arguing that The TCJA set the tax at a sub-OECD minimum of 10.5\%, calculated based on all foreign earned income and all foreign taxes paid by U.S. controlled foreign corporations). This effectively allowed multinational corporations to shield income earned in low-tax jurisdictions through taxes paid on income earned in higher tax jurisdictions thus maintaining the incentive to profit shift. \textit{Id.}} However, I.R.C. § 250 allows corporations to deduct fifty percent of GILTI, and the remainder is taxed at the corporate rate of twenty-one percent, thus resulting in an effective tax rate of ten point five percent—a significantly lower rate than the
traditional corporate tax rate. Corporations are also provided with a foreign tax credit equal to the amount of foreign taxes paid in every foreign jurisdiction to reduce their GILTI tax liability, which may vary the overall rate of the tax. The result of the foreign tax credit may entirely offset the GILTI tax and reduce the effective tax rate to zero. Although GILTI can be viewed as a sort of minimum tax on foreign-earned income, by not basing the tax on a country-by-country basis, GILTI did not entirely eliminate the incentive for corporations to profit shift.

39 See INTERNATIONAL COMPLIANCE, supra note 28 (explaining how I.R.C. Section 250 works in tandem with I.R.C. § 951A to set an effective rate of ten and a half percent on GILTI). In addition, corporations are also provided a foreign tax credit to offset foreign taxes already paid on GILTI, however, the foreign tax credit is limited to eighty percent of foreign taxes. Id.  
40 See id. (explaining that the eighty percent foreign tax credit “results in a sliding scale of effective tax rates that vary with the foreign income tax rate.”). “The worldwide GILTI rate is 10.5% when foreign income tax rates are zero and increases by 0.8% for each percentage point increase in the foreign effective tax rate. The effective tax rate on GILTI maxes out at 13.125% when the foreign income tax rate reaches 13.125%.” Id.  
41 See CHOW & SCHÖENBAUM, supra note 5, at 42 (stating that I.R.C. § 960 allows for a foreign tax credit for 80% of any foreign tax paid which in many, if not most, cases will reduce the GILTI tax to zero).  
42 See Steven M. Sheffrin, ARTICLE: A MINIMAL ROLE FOR MINIMUM TAXES, 12 COLUM. J. TAX L. 1, 7 (2020) (stating that the TCJA sought to relieve some of the pressure on the U.S. corporate tax system with its higher statutory rates compared to other countries by allowing a dividend exemption). The TCJA did not allow a full exemption on foreign source income and instead enacted GILTI to provide a basic level of minimum taxes. Id. See also BORIS, supra note 38 (discussing how the GILTI tax was set). The TCJA set the GILTI tax at a sub-OECD minimum of 10.5%, with the taxable base taking into account all foreign income earned and all foreign taxes paid by U.S. controlled foreign corporations. Id. This effectively let “them shield income earned in low-tax jurisdictions through taxes paid on income earned in higher-tax [jurisdictions], maintaining the incentive to profit-shift.” Id. See also
The TCJA also created FDII—a second newly defined category of income related to IP.\textsuperscript{43} FDII is defined similar to GILTI, but unlike GILTI, FDII is income earned due to the use of IP within the U.S. in creating exports.\textsuperscript{44} With the goal of making the U.S. a more attractive destination for corporations to hold IP, FDII is provided a special lower tax rate of thirteen point one hundred twenty-five percent.\textsuperscript{45} This is accomplished by allowing companies to deduct thirty-seven point five percent of their FDII against their taxable income, thus lowering the effective corporate tax rate to thirteen point

\textsuperscript{43} See INTERNATIONAL COMPLIANCE, supra note 28 (stating that the definition of FDII is similar to that of GILTI).

\textsuperscript{44} See id. (clarifying that “FDII is equal to foreign-derived profits in excess of the normal returns to qualified investments.”).

\textsuperscript{45} See INTERNATIONAL COMPLIANCE, supra note 28 (stating that FDII is “supposed to increase the incentive to companies to bring and keep intellectual property and the associated profits in the United States.”); CHOW & SCHOENBAUM, supra note 5, at 42 (clarifying that the purpose of the deduction is “to encourage U.S. multinationals to hold their intellectual property in the United States and to create an incentive to export technology.”).
one hundred twenty-five percent.\textsuperscript{46} The total deduction that companies are allowed to take for both GILTI and FDII is limited to the corporation’s taxable income.\textsuperscript{47}

\textbf{C. The Nondelegation Doctrine}

As mentioned above, the new corporate AMT is based on an applicable corporation’s “adjusted financial statement income,” rather than its taxable income.\textsuperscript{48} This figure is determined by an “applicable financial statement,” which conforms to the generally accepted accounting principles (“GAAP”) promulgated by the FASB.\textsuperscript{49} Although the Constitution grants Congress a broad power to levy and collect taxes, Congress delegated a considerable portion of this responsibility to a private organization by allowing the FASB to determine the taxable base upon which the new corporate AMT is

\begin{footnotesize}
\textsuperscript{46} See \textit{International Compliance}, supra note 28 (explaining how the deduction for FDII affects a corporation’s tax liability); \textit{Chow \& Schoenbaum}, supra note 5, at 42 (stating that after the deduction of 37.5\%\%, the effective tax rate for FDII is 13.125\% in lieu of the 21\% corporate tax).

\textsuperscript{47} See \textit{International Compliance}, supra note 28 (noting that “if the combined deduction [for FDII and GILTI] would bring taxable income below zero, the deduction for FDII and GILTI would both be reduced in proportion to the point that a corporation’s taxable income is zero.”).


\textsuperscript{49} See I.R.C. § 56A (defining “adjusted financial statement income” as the net income or loss of the taxpayer set forth on the taxpayer’s applicable financial statement for such taxable year); I.R.C. § 451(b)(3)(A) (defining an applicable financial statement as a financial statement that is “prepared in accordance with the generally accepted accounting principles . . .”).
\end{footnotesize}
levied. In the past, the Supreme Court has categorically declared that Congress may not delegate its Article I legislative powers. In the mid 1930’s, the Supreme Court strictly adhered to the nondelegation doctrine as it struck down the progressive New Deal legislation as unconstitutional delegations of Article I power. Then in 1937, in

50 See U.S. CONST. art. I, § 1 (providing that “[a]ll legislative [p]owers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”); U.S. CONST. art. I, § 8 (providing that “[t]he Congress shall have [p]ower [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the [d]ebts and provide for the common [d]efence and general [w]elfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States[].”); U.S. CONST. amend. XVI (providing that “[t]he Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”). See also JONI LARSON & DAN SHEAFFER, FED. TAX RSCH. 10 (Carolina Acad. Press, 2nd ed. 2011) (observing that Art. I, § 8 of the United States Constitution has been interpreted as giving Congress a “very broad power of taxation.”); GIBSON, supra note 2, at 2 (recognizing that the calculation of financial statement income is governed by the generally accepted accounting principles). These rules are created by the Financial Accounting Standards Board and are “outside of the scope of tax law and are not governed by Congress or regulated by the Internal Revenue Service.” Id. See JANE G. GRAVELLE, CONG. RSCH. SERV., R47328, THE 15% CORPORATE ALTERNATIVE MINIMUM TAX 2 (2023) (stating that financial statement income and deductions are determined in accordance with Generally Accepted Accounting Principles set by the Financial Accounting Standards Board).


52 See A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495, 537 (1935) (stating that “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.”); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) (declaring that “Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”).

Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of
what became known as the “switch in time that saved nine,” in response to President Roosevelt’s plans to “pack the court,” Justice Owen Roberts, a conservative appointed by President Hoover, changed course and began to uphold progressive New Deal legislation. As a result, the Court relaxed the nondelegation doctrine which led to the development of the administrative state today, where administrative agencies exercise legislative, executive, and judicial powers. The court reasoned that in our increasingly complex society, flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

See John Q. Barrett, Attribution Time: Cal Tinney’s 1937 Quip, “A Switch in Time’ll Save Nine”, 73 OKLA. L. REV. 229 (2021) (describing Justice Roberts as a Republican appointed by President Hoover in 1930 who became a generally conservative justice who often sided with a narrow majority to hold New Deal statutes and related state laws unconstitutional). In early February of 1937, President Roosevelt proposed to pack the Court and within eight weeks of that announcement Justice Roberts appeared to change course as he began to side with the majority to uphold the constitutionality of progressive New Deal legislation. Id. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, ASPEN CASEBOOK CONSTITUTIONAL LAW 292 (Rachel E. Barkow et al. eds., 6th ed. 2020) (stating that federal agencies “exercise all of the powers of government: legislative, executive, and judicial.”). The combination of all powers of government in the same hands is troubling as according to James Madison “[t]he accumulation
Congress is simply unable to do its job absent an ability to delegate power.55 Since 1937, the Court has followed the general rule that a Congressional delegation of power is permissible so long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is directed to conform.”56

In Gundy, the most recent case regarding the non-delegation doctrine, some Justices on the Supreme Court signaled a willingness to revisit the non-delegation doctrine.57 The plurality decision, written of all powers legislative, executive, and judiciary, in the same hands... may justly be pronounced the very definition of tyranny.” Id. Moreover, controlling and checking administrative agencies poses an important constitutional problem unaddressed by the text or the framers intent. Id. The non-delegation doctrine is one solution to the problems posed by administrative agencies; as it forces a politically accountable Congress to make policy choices rather than leaving this to unelected administrative officials. Id. at 292–93.

55 See Mistretta v. United States, 488 U.S. 361, 372 (1989) (understanding that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).
56 See J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (declaring the current rule that so long as Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”); Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (emphasizing that “we have held, time and again, that a statutory delegation is constitutional as long as Congress ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.’”).
57 See Gundy, 139 S. Ct. at 2130 (Alito, S., concurring) (stating that Article 1, § 1 of the Constitution “confers on Congress certain ‘legislative [p]owers,’... and does not permit Congress to delegate them to another branch of the Government.”); Id. at 2131 (Gorsuch, N., dissenting) (arguing that the Court should not wait to revisit the nondelegation doctrine).
by Justice Kagan and joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, upheld the Constitutionality of a Sex Offender Registration and Notification Act ("SORNA"), which authorized the Attorney General to specify the applicability of the law and to prescribe rules for sex offender registration. 58 Justice Kagan reasoned that the text of the statute, considered alongside its context, purpose, and history, made it clear that the Attorney General’s discretion extended only to considering and addressing feasibility issues and therefore, the act did not violate the Constitution as it supplied an intelligible principle to guide the Attorney General’s discretionary use of the delegated power. 59 In a concurring opinion, Justice Alito reasoned that because he could not conclude that the statute lacked a discernable standard adequate with the approach the Court has taken for many years, he could not say that the statute violated the

58 See id. at 2129 (holding that the SORNA easily passes Constitutional muster under the courts intelligible principle test). “Indeed, if SORNA’s delegation is unconstitutional, then most of Government is unconstitutional – dependent as Congress is on the need to give discretion to executive officials to implement its programs.” Id. at 2130.

59 See id. at 2123–24 (reasoning that “[t]he text, considered alongside its context, purpose, and history, makes clear that the Attorney General’s discretion extends only to considering and addressing feasibility issues.”). Statutory interpretation is a holistic endeavor which determines meaning by looking not to the isolated words but to the text in context, along with purpose and history. Id. at 2126.
Constitution. However, Justice Alito noted that he would support an effort to reconsider the Court’s approach if a majority of the Court were willing to do so. In a dissenting opinion authored by Justice Gorsuch and joined by Chief Justice Roberts and Justice Thomas, Justice Gorsuch argued that the court should not wait to reconsider the non-delegation doctrine.

---

60 See Gundy, 139 S. Ct. at 2131 (Alito, S., concurring) (holding that “[b]ecause I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.”).
61 See id. (Alito, S., concurring) (signaling that he is willing to reconsider the Court’s approach to the nondelegation doctrine).
62 See Gundy, 139 S. Ct. at 2131 (Gorsuch, N., dissenting) (arguing that the Court should revisit the nondelegation doctrine). “The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation’s chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens.” Id.
III. Facts

A. Global Efforts to Combat Asset Draining and Tax Evasion by Multinational Corporations: Where we are now

Base erosion and profit shifting attributable to IP licensing schemes has caught the attention of global policymakers. The OECD is an international organization committed to fighting international tax evasion techniques. The “Double Irish Dutch Sandwich” tax avoidance strategy outlined above, is just one example that, according to the OECD, has resulted in countries losing an estimated one-hundred to two-hundred and forty billion in annual tax revenue.

---

63 See Keith E. Maskus, Intellectual Property Rights in the Global Economy, COLUM. UNIV. PRESS (Aug. 2000), archived at https://perma.cc/3SNU-D6QW (stating that over the past 15 years, intellectual property rights including patents, copyrights, and trademarks have moved to the forefront of global economic policymaking).

64 See Who we are, OECD (Oct. 21, 2022), archived at https://perma.cc/HQ4C-3YCU (stating that the goal of the OECD is to shape policies that “foster prosperity, equality, opportunity and well-being for all.”). The OECD works together with governments, policymakers, and citizens to establish international standards for a range of social, economic, and environmental challenges ranging from improving economic performance, fostering strong education, and fighting international tax evasion. Id.

65 See What is BEPS?, OECD (Sept. 24, 2022), archived at https://perma.cc/M2YU-X82M (stating that “[b]ase erosion and profit shifting (BEPS) refers to tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax.”). “BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity or to erode tax bases through deductible payments such as interest or royalties.” Id. This process affords multinational corporations a competitive advantage over domestic enterprises and undermines voluntary compliance by all taxpayers who see multinational corporations legally avoid paying tax. Id. BEPS practices cost countries an estimated $100—$240 billion in lost revenue annually. Id. See CHOW & SCHOENBAUM, supra note 5, at 43 (defining BEPS as broad and encompassing “any deductible payment to a foreign-
Within the framework of the OECD and G-20, over 135 countries and jurisdictions worked toward an agreement to combat BEPS practices by multinational corporations.\textsuperscript{66}

On October 8, 2021, over 135 Inclusive Framework members agreed on a two-pillar solution to address tax challenges presented by a digitalized, global economy to ensure that multinational corporations pay their “fair share” of tax wherever they generate profits.\textsuperscript{67} Pillar One allocates income generated by large multinational corporations to related party; BEPS therefore includes royalty payments made to an offshore related entity holding intellectual property and interest payments made to an offshore-related company from which the U.S. company borrowed money.”).\textsuperscript{66} See What is BEPS?, supra note 65 (stating that “[w]orking together within OECD/G20 Inclusive Framework on BEPS, over 135 countries and jurisdictions are collaborating on the implementation of 15 measures to tackle tax avoidance, improve the coherence of international tax rules and ensure a more transparent tax environment.”). See also Edward Helmore, Google says it will no longer use ‘Double Irish, Dutch sandwich’ tax loophole, GUARDIAN (Jan. 1, 2020), archived at https://perma.cc/54VN-XWD2 (stating that Google’s parent company, Alphabet, announced it will no longer use the “Double Irish, Dutch sandwich” tax loophole). A spokesman for Google confirmed that the company would scrap the intellectual property licensing structure. \textit{Id.} “This will simplify Google’s tax arrangements in line with efforts by the Organisation [sic] for Economic Co-operation and Development to limit international tax avoidance, following changes to US and Irish tax law.” \textit{Id.}

\textsuperscript{67} See FAULHABER, supra note 31 (stating that “[o]n July 1, the Organization for Economic Cooperation and Development issued a press release announcing that 130 countries had agreed to a two-pillar international tax plan that the OECD billed as a ‘solution to address the tax challenges arising from the digitalization of the economy.’”). \textit{See also} Tax Challenges Arising from the Digitalisation of the Econ.—Glob. Anti-Base Erosion Model Rules (Pillar Two): Inclusive Framework on BEPS 3 (OECD/ORG. FOR ECON. COOP. & DEV. 2021), (stating that the two-pillar solution is a “major step forward” to address the tax challenges arising from the digitalization of the economy).
countries where their consumers are based.\textsuperscript{68} Pillar Two establishes rules for a global minimum tax of fifteen percent or more.\textsuperscript{69} The international plan has been heralded as an unprecedented step forward in the global tax-reform effort to ensure that multinational corporations—multinational tech companies in particular—pay an

\textsuperscript{68} See Faulhaber, supra note 31 (clarifying that Pillar One is “all about where income is allocated and what country gets to tax that income.”). Pillar One attempts to address the growing criticism that the international tax system in which income is allocated to countries where a taxpayer has a physical presence has allowed tech companies to earn significant money from users or consumers in a jurisdiction without ever paying any taxes to that jurisdiction. \textit{Id}. Pillar One attempts to address this criticism by allocating a portion of residual profits—profits that exceed ten percent of revenue—to certain jurisdictions. \textit{Id}. However, few large multinational corporations will be subject to this new allocation rule as only those with global revenues that exceed $23.58 billion in global revenues will be subject to this tax. \textit{Id.} See also \textit{Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy}, OECD (Oct. 8, 2021), archived at https://perma.cc/B6XE-F32U [hereinafter Two-Pillar Solution] (stating that the scope of Pillar One covers multinational enterprises that have a global revenue of more than 20 billion euros and greater than ten percent profitability). Profitability is defined as profit before tax divided by the firm's revenue. \textit{Id}. This is calculated using an averaging mechanism. \textit{Id.}

\textsuperscript{69} See Faulhaber, supra note 31 (stating that in contrast to Pillar One, Pillar two is concerned with what rate of tax is paid). \textit{See also Two-Pillar Solution, supra note 68} (stating that Pillar Two consists of two interlocking domestic rules together with Global anti-Base Erosion Rules (GloBE rules)). The first is an Income Inclusion Rule (IIR), which imposes a top-up tax on a parent entity in respect of the low-taxed income of a constituent entity. \textit{Id.} The second is an Undertaxed Payment Rule (UTPR), which denies deductions or requires an equivalent adjustment to the extent the low income of a constituent entity is not subject to tax under the Income Inclusion Rule. \textit{Id.} Pillar Two also consists of the Subject to Tax Rule (STTR)—a treaty-based rule that allows source jurisdictions to impose limited source taxation on certain related party payments subject to tax below a minimum rate. \textit{Id.} The STTR will be creditable as a covered tax under the GloBE rules. \textit{Id.} The minimum tax rate used for purposes of IR and UTPR is fifteen percent. \textit{Id.}
appropriate amount of tax in each jurisdiction where they conduct business.\textsuperscript{70}

\textit{B. The Biden Administration and the OECD}

To fund its domestic policies, the Biden administration sought to change many of the tax provisions contained in the Trump administration’s TCJA with respect to the taxation of large multinational corporations.\textsuperscript{71} The Biden administration and Treasury Secretary Janet Yellen believed that the BEAT and GILTI provisions of the TCJA allowed multinational corporations to shift profits overseas, leading to concerns that large multinational corporations did not pay the appropriate amount of tax in each jurisdiction where they conduct business.\textsuperscript{70}

\textsuperscript{70} \textit{See Faulhaber, supra note 31} (summarizing that Pillar One is designed to solve the problem that allows large multinational enterprises to escape tax in countries where they earn income by not having a physical presence in that country and Pillar Two is designed to solve the problem of tax competition). Tax experts a few years ago would not have been able to envision 130 countries signing a new rule allocating income to market jurisdictions and providing for a minimum tax. \textit{Id.} The 130 countries that signed the agreement represent ninety percent of the world’s gross domestic product (GDP). \textit{Id.}

\textsuperscript{71} \textit{See Last Stop for the TCJA?, supra note 30} (stating that “[t]he goal of the Made in America Tax Plan is to promote economic equality and raise revenue for Biden’s infrastructure project, framed by some as the ‘New New Deal.’”). To fund the undertaking, Biden and top Congressional Democrats eye changing how the United States and other countries tax U.S. and other multinational corporations.” \textit{Id.} Analysis of the TCJA shows that the United States only raises about sixteen percent of gross domestic product in federal tax revenue—a four percent decline over the past two decades. \textit{Id.} “The Biden administration believes the United States can recoup approximately $2 trillion in corporate profits into the U.S. currently derived overseas.” \textit{Id.}
not pay enough in federal income tax. Yellen led the U.S. effort within the OECD framework and touted that the Pillar Two agreement would “end the race to the bottom of corporate taxation.”

---

72 See MOLLY F. SHERLOCK & JANE G. GRAVELLE, CONG. RSCH. SERV., R46887, MINIMUM TAXES ON BUSINESS INCOME: BACKGROUND AND POLICY OPTIONS 1 (2021) (arguing that despite reporting significant profits to shareholders, some large corporations pay little or no U.S. tax). See also LAST STOP FOR THE TCJA?, supra note 30 (stating that the American Jobs Plan proposed an increase in the minimum tax on U.S. corporations to twenty-one percent calculated on a country-by-country basis to target profits in tax haven jurisdictions to combat the practice of shifting profits offshore). There have been substantive Senate Finance Committee Hearings with comprehensive testimony on the GILTI and BEAT regimes negative impact on the U.S. tax base and income equality. Id. In support of Biden’s American Jobs Plan, the administration cited a study conducted by the Institute on Taxation and Economic Policy which found that “91 Fortune 500 companies paid $0 in federal corporate taxes on U.S. income in 2018.” Id. See also Jean Ross, Build Back Better and OECD Corporate Tax Agreement Would Discourage Offshoring Jobs and Profits, CAP (Nov. 1, 2021), archived at https://perma.cc/WF2D-2DEN (arguing that the TCJA exacerbated the erosion of corporate tax collections by moving the United States toward a territorial tax system that permanently excludes from taxation certain income of multinationals). The GILTI established a minimum tax on foreign income at a rate of 10.5 percent, however, the tax maintained the incentive to profit shift as it is calculated by taking all the foreign earned income and foreign taxes paid by U.S. companies which effectively allows companies to shield income earned in low-tax jurisdictions with foreign taxes paid on income earned in higher-tax jurisdictions. Id. Draft legislation was released which would shift the calculation to a country-by-country basis as required by the OECD agreement. Id. See also BORIS, supra note 38 (discussing a key change to GILTI). A change made by a draft of the Build Back Better bill would have reduced the deemed return of qualified business asset investments owned abroad by controlled foreign corporations of U.S. businesses to five percent from the current ten percent and would redefined what counted as tested income while excluding this from the tax on GILTI. Id. “At the same time, U.S. [controlled foreign corporations] would be required to aggregate business operations within the same foreign jurisdiction, establishing a country-by-country determination for tested income.” Id. See also GRAVELLE & MARPLES, supra note 8, at 44 (arguing that “[i]f GILTI were also imposed on a per-country basis, the incentive for locating intangibles [intellectual property] abroad would be largely eliminated, especially now that the United States has tax rates at or below those of most developed countries.”).

73 See GIBSON, supra note 2, at 2 (describing Secretary of the Treasury Janet Yellen as a “stalwart proponent” of Pillar 2 of the OECD agreement who declared that with the agreement signed by over 135 jurisdictions, “virtually the entire global economy
the U.S. agreed to the OECD framework, the IRA did not make the U.S. compliant with Pillar Two of the agreement.\textsuperscript{74} The IRA did not change GILTI, BEAT, or FDII tax regimes, instead it imposed a new corporate AMT of fifteen percent on large corporations.\textsuperscript{75} The Pillar Two AMT and the new corporate AMT share similar goals as they both target profits of large multinational corporations that may have decided to end the race to the bottom on corporate taxation.”). See also Ross, \textit{supra} note 72 (recognizing that the OECD agreement was “secured with the diplomatic leadership of U.S. Treasury Secretary Janet Yellen . . . .”). See also LAST STOP FOR THE TCJA?, \textit{supra} note 30 (describing Treasury Secretary Yellen’s commitment to work with the OECD and G20—the international forum that brings together the world’s major economies—to multinational corporations from exploiting gaps and mismatches in tax rules to avoid paying tax). “Treasury Secretary Yellen’s wish is to end the race to the bottom and establish a global minimum tax.” \textit{Id.}

\textsuperscript{74} See BORIS, \textit{supra} note 38 (recognizing that the OECD agreement on Pillar Two and the administration’s anticipation thereof led Biden to propose a minimum corporate tax in an earlier version of the Build Back Better bill – The Made in America Tax Plan – differs from GILTI as introduced in the TCJA). The Build Back Better bill’s proposed changes to elevate the GILTI tax rate to 15% and to treat controlled foreign corporations on a country-by-country basis are “based on the view that they were necessary to comply with Pillar Two and avoid other countries imposing undertaxed-payment rules against [American] [controlled foreign corporations].” \textit{Id.} See also GIBSON, \textit{supra} note 2, at 1 (identifying a significant difference between the new U.S. corporate AMT and Pillar Two). The U.S. corporate AMT aims to “ensure that large U.S. multinational corporations are paying an acceptable amount of tax in the United States [whereas] Pillar Two aims to ensure that large multinational corporations pay an acceptable amount of tax everywhere that they operate.” \textit{Id.}

\textsuperscript{75} See Muresianu & York, \textit{supra} note 18 (recognizing that the IRA is smaller than the proposed Build Back Better legislation from 2021); Daniel Bunn & Sean Bray, \textit{The Latest on the Global Tax Agreement: The EU Adopts Pillar Two, TAX FOUND.} (Dec. 15, 2022), \textit{archived at} https://perma.cc/TH4E-QUGY (stating that so far, Congress has chosen not to implement changes in line with the OECD agreement on BEPS). See also Raymond Wynman, \textit{The US corporate alternative minimum tax in light of the Pillar Two rules, WTS GLOB.} (Nov. 21, 2022), \textit{archived at} https://perma.cc/AXT9-NXV4 (noting that Inflation Reduction Act represents a significantly scaled back version of the Build Back Better Bill which was not passed by Congress).
otherwise have avoided tax through profit shifting.\footnote{See Press Release, White House, FACT SHEET: The Inflation Reduction Act Supports Workers and Families (Aug. 19, 2022) (on file with the White House Record Briefing Room) (explaining that the inflation reduction act goes after “tax dodgers, ensuring the wealthy and large corporations pay the taxes they already owe.”). The act does this by “[c]racking down on the largest profitable corporations that currently get away with paying little to no federal income tax, [by] instituting a minimum corporate tax of 15%.” \textit{Id. But see} PINNER, supra note 12 (arguing that a book income tax is not a necessary component for Pillar Two as the U.S. could meet Pillar Two’s requirements without using financial statement income to compute a minimum tax on corporations); \textit{See also} ALAN K. OTA CORP. MINIMUM TAX LIKELY TO BE IN 2022 BUDGET BILL, (July 12, 2021), LexisNexis (referencing Senator Elizabeth Warren’s statement that “a [fifteen percent] minimum tax was needed to address the fact that some big tech companies have paid little in federal taxes in recent years.”).} However, despite this similarity, the tax regimes are fundamentally different as the U.S. corporate AMT imposes a U.S. tax on all profits earned by a corporation throughout the world, while Pillar Two imposes a minimum tax on corporations in each jurisdiction where it generates economic activity.\footnote{See Daniel Bunn, \textit{How Does the Inflation Reduction Act Minimum Tax Compare to Global Minimum Tax?} TAX FOUND. (AUG. 2, 2022), archived at https://perma.cc/N9D4-AD76 (arguing that although the alternative minimum tax contained in the IRA may seem like it was inspired by the global minimum tax as both taxes are aimed at large corporations, use financial accounting rules for the tax base, and apply a 15% rate, there are multiple differences between the policies and in some areas, the policies take direct opposite approaches). “In general, the Inflation Reduction Act does not reflect the rules of the global minimum tax, but rather represents an additional layer of tax on large companies.” \textit{Id. See also} GIBSON, supra note 2, at 1 (recognizing that the taxing regimes have fundamentally different goals). “The [new corporate AMT] aims to ensure that large U.S. multinational corporations are paying an acceptable amount of tax in the United States. Pillar 2 aims to ensure that large corporations pay an acceptable amount of tax everywhere that they operate.” \textit{Id.}}
C. The Inflation Reduction Act and the New Corporate AMT

The new corporate AMT is the key to funding the IRA.\(^78\) An “applicable corporation” is one whose “average annual adjusted financial statement income” exceeds $1 billion annually for the taxable three-year period ending with the current taxable year.\(^79\) If the corporation has a foreign parent who has over $100 million in U.S. domestic revenue, then the financial statement income of all related foreign institutions must be included in making the $1 billion determination.\(^80\) Once a corporation is determined to be an “applicable corporation,” it remains subject to the corporate AMT, even if its

---

\(^{78}\) See ZUBRZYCKI, supra note 13 (stating that the new corporate alternative minimum tax is the key to funding the Inflation Reduction Act’s provisions which focuses on energy security and climate change activities).

\(^{79}\) See I.R.C. § 55(b)(2) (imposing a tentative minimum tax for the taxable year in the excess of 15% of an applicable corporation’s adjusted financial statement income for the taxable year over the corporate alternative minimum foreign tax credit for the taxable year); I.R.C. § 59(k)(1)(A) (defining an “applicable corporation” as any corporation other than an S corporation, a regulated investment company, or a real estate investment trust which meets the average annual adjusted financial statement income test); I.R.C. § 59(k)(1)(B)(i) (defining a corporation that meets the average annual adjusted financial statement income test as a corporation whose adjusted financial statement income for the three-year period ending with the current taxable year exceeds $1 billion).

\(^{80}\) See I.R.C. § 59(k)(2)(A) (imposing a special rule for foreign-parented multinational groups in which the adjusted financial statement income of such corporation for a taxable year shall include the adjusted financial statement income of all members of the group); I.R.C. § 59(k)(2)(B) (defining a foreign-parented multinational group as two or more entities if at least one entity is a domestic corporation and another entity is a foreign corporation and such entities are included in the same applicable financial statement in that taxable year and either the common parent of such entities is a foreign corporation or the entities are treated as having a common parent which is a foreign corporation). See also GIBSON, supra note 2, at 2 (defining an applicable corporation).
financial statement income later drops below the threshold (unless one of several limited exceptions applies).\(^81\) Once a corporation pays the alternative minimum tax, it then generates a minimum tax credit for that amount which can be used to reduce its regular tax liability in future years (not to go below the AMT amount).\(^82\)

Whereas the previous corporate AMT was based on a corporation’s “alternative minimum taxable income,” the new corporate AMT imposes a minimum tax a corporation’s “average annual adjusted financial statement income.”\(^83\) The key distinction is that unlike the previous corporate AMT, the new corporate AMT is

\(^81\) See GIBSON, supra note 2, at 2 (explaining that “[o]nce a corporation meets the applicable corporation test, it remains an applicable corporation, even if its financial statement income drops beneath the threshold, unless one of several limited exceptions applies.”).

\(^82\) See generally I.R.C. § 59(I) (providing for a corporate AMT credit). See also Corporate book minimum tax to be effective for 2023, PwC (Aug. 2022), archived at https://perma.cc/HPJ3-439X (noting that in a year where a corporation pays the alternative minimum tax because tentative minimum tax exceeds regular tax plus BEAT, the taxpayer will generate a minimum credit). This may be used to reduce the corporation’s tax regular income tax liability in the future to the extent that the regular tax exceeds the alternative minimum tax plus BEAT. Id.

\(^83\) See I.R.C. § 59(k)(1)(A) (defining an “applicable corporation” as any corporation other than an S corporation, a regulated investment company, or a real estate investment trust which meets the average annual adjusted financial statement income test). See also GRAVELLE, supra note 50, at 7 (explaining the alternative minimum tax that was repealed in 2017 was based on regular income tax base with various preferences added back and not on financial statement income). See also New Law Puts “Book Income” in the Crosshairs, DOEREN MAYHEW (Sept. 8, 2022), archived at https://perma.cc/KLU4-Q759 (recognizing that unlike previous calculations of corporate AMT that started in taxable income, the new corporate AMT starts with a corporations book income).
Whereas taxable income is determined by Congress via the Internal Revenue Code and regulated by the Internal Revenue Service ("IRS"), book income reporting standards are set by the FASB, who has publicly stated that "matters of public policy, including tax policy, are outside of our mission." While proponents
of taxing a corporation’s book income argue that it is a politically feasible means of preventing corporations from engaging in aggressive tax avoidance measures, opponents argue that an AMT is a second-best practice to reforming the corporate tax code directly to eliminate provisions that allow corporations to legally reduce their tax liability below an acceptable amount.\textsuperscript{86} Opponents also argue that discrepancies between book income and taxable income do not necessarily indicate inequity in the tax system, as book income and taxable income serve fundamentally different purposes and that such
determination of a portion of the corporate tax base to an unelected financial accounting body.").  See also GIBSON, supra note 2, at 2 (recognizing that the calculation of financial statement income is governed by the generally accepted accounting principles created by the Financial Accounting Standards Board). “These rules are outside the scope of tax law and are not governed by Congress or regulated by the Internal Revenue Service.” \textit{Id.} The FASB and the Financial Accounting Foundation “have themselves publicly stated that ‘matters of public policy, including tax policy, are outside of our mission’ and that they remain focused on their existing goal of creating accounting and reporting standards.” \textit{Id.}

\textsuperscript{86} See Pomerleau, \textit{supra} note 84 (arguing that an alternative minimum tax based on book income has drawbacks that may be more trouble than it is worth). “The proposed tax could prompt firms to adjust their book income to minimize tax liability, which could reduce the informational value of book income.” \textit{Id.} See also Muresianu & York, \textit{supra} note 18 (arguing that the 30-year experience with a corporate AMT demonstrates that an alternative minimum tax is not a good solution to combatting corporate tax avoidance). “[I]f tax breaks are poor policy, they should be repealed directly; if they are sound policy, all eligible taxpayers should be able to take full advantage of them.” \textit{Id.} See also Garrett Watson, \textit{Biden’s Minimum Book Income Tax Proposal Would Create Needless Complexity}, TAX FOUND. (Dec. 13, 2019), archived at https://perma.cc/Y9D7-42KU (arguing that rather than creating a complex set of tax rules on different tax bases, “policymakers [should] consider direct changes to the tax code that drive the differences between book income and taxable income.”). “Instead of creating a tax on book income, policymakers should weigh the merits of provisions like full expensing versus creating a complex set of tax rules and two different tax bases.” \textit{Id.}
discrepancies are often due to tax incentives deliberately placed in the Internal Revenue Code by Congress.\footnote{See Pomerleau, supra note 84 (arguing that “[b]ook income and taxable income differ because they are prepared for different purposes and audiences – and the differences are not inherently bad.”). “Although some commentators express concern that large book-tax differences are caused by aggressive tax avoidance and earnings management, the research is inconclusive. Some of the differences are caused by shifts away from taxing worldwide corporate income and toward other tax bases.” Id. See also DENISE LUGO, INFLATION REDUCTION ACT COULD IMPACT FUTURE ACCOUNTING RULES, FASB CHAIR SIGNALS (Aug. 24, 2022), Westlaw WGL-ACCTALERT Vol. 16, No. 162 (quoting FASB Chair Richard Jones, “we are not focused on nor do we set tax policy. . . . [O]ur mission is focused on providing investors and other allocators of capital with information to make investment decisions[,]”); Book Income, TAX FOUND. (Nov. 19, 2022), archived at https://perma.cc/U9C6-9SEN (defining book income as “the amount of income corporations publicly report on their financial statements to shareholders.”). “This measure is useful for assessing the financial health of a business but often does not reflect economic reality and can result in a firm appearing profitable while paying little or no income tax.” Id. See also Watson, supra note 86 (explaining why taxable income and book income are calculated differently). When calculating taxable income, a firm may deduct from their gross income such as the cost of investment to ensure that the tax code targets net profits and not the cost of investment. Id. Similarly, in computing taxable income a firm may carry over net operating losses from prior years to ensure that the income tax is assessed on a firm’s average profitability. Id. See also Bunn, supra note 77 (stating that book income is what companies report to their shareholders and is calculated using accounting rules established by the FASB whereas taxable income is calculated using different rules as defined in Title 26 of the U.S. Code); Nicole Kaeding, Taxable Income vs. Book Income: Why Some Corporations Pay No Income Tax, TAX FOUND. (May 2, 2019), archived at https://perma.cc/R73J-UPPH (clarifying that the definitions of taxable income and book income are different); Julia Kagan, Business Tax Credits, INVESTOPEDIA (Jan. 21, 2021), archived at https://perma.cc/9RQS-67EA (stating that “[b]usiness tax credits are designed by the government to encourage a particular type of corporate behavior.”).}

D.  The Alternative Minimum Tax: Who is going to pay?

The Joint Committee on Taxation estimates that the new corporate AMT is expected to generate approximately $222 billion in
tax revenue over the next ten years. Approximately 470 U.S. companies currently meet the threshold requirement of the AMT, however, only about 150 of those companies are expected to pay the AMT. Companies likely to pay the AMT are those that have large book-tax discrepancies, such as Amazon. The net result of the new corporate AMT burden is not spread evenly across industries and disproportionately affects firms that invest heavily in research and

---


89 See Brosy, supra, note 88 (explaining that about 470 U.S. companies currently have an average annual adjusted financial statement income that exceeds $1 billion over the past three years although many already pay more in taxes than the minimum amount). “The Joint Committee on Taxation reported that about 150 companies will be subject to the minimum tax.” Id.

90 See Cody Kallen & Garrett Watson, Who Gets Hit by the Inflation Reduction Act Book Minimum Tax?, TAX FOUND. (Aug. 12, 2022), archived at https://perma.cc/E7BJ-S3PN (explaining that industries that are heavily hit by the new corporate AMT are those at the intersection of different book-tax gaps targeted by the book minimum tax). This includes firms with “permanent discrepancies between the two measures from firms paying low taxes . . . ; temporary timing differences between financial and taxable income; [who utilize] deliberate tax incentives created by Congress and special items that show up [as income]” for book purposes but not for taxable income purposes. Id. See also Jennifer Williams-Alvarez, Companies Seek Guidance on New U.S. Minimum Tax as Launch Date Nears, WALL ST. J. (Oct. 26, 2022), archived at https://perma.cc/F344-86FQ (stating that researchers from the University of North Carolina’s Tax Center found fewer than eighty publicly traded U.S. companies would have been required to pay the corporate minimum tax in 2021). The tax would have applied to Amazon, Berkshire Hathaway, and Ford Motor Co. Id.
Although the Joint Committee on Taxation has projected that the new corporate AMT directly affects about 150 companies, the effects of the tax change could be much broader.

IV. Analysis

Base erosion and profit shifting in the digital age has deprived countries across the world of substantial tax revenue. While the U.S. was heavily involved in talks with the OECD to combat global profit shifting, the U.S. failed to live up to the agreement and opted instead to unilaterally enact its own new corporate AMT. In doing so, the

---

91 See Kallen & Watson, supra note 90 (noting that some of the hardest hit industries include steel works, the automobile and truck industry, along with the aircraft, ship, and railroad equipment industries).

92 See Williams-Alvarez, supra note 90 (predicting that the universe of affected business could go well beyond the 150 companies that the corporate AMT is projected to hit). “Among the concerns from businesses is that reorganizations could cause a company to become subject to minimum tax, or increase their tax liability.” Id.

93 See Tankersley, supra note 3 (stating that taxing companies where their economic activity is generated allows multinational corporations to shift the source of their profits to countries with lower tax rates); Palanský, supra note 2 (stating that multinational companies are able to transfer intangible assets such as copyrights or trademarks to a wholly owned subsidiary located in a low-tax jurisdiction). Under this method, the parent company pays artificially low royalty rates to the subsidiary for the use of the intangible assets thereby increasing the profit of the lesser taxed subsidiary. Id. See also What is BEPS?, supra note 65 (stating that BEPS refers to tax planning strategies that exploit gaps in international tax rules that allow multinational companies to shift profits to low or no tax jurisdictions where there is little or no economic activity). BEPS practices have cost countries an estimated $100-$240 billion in annual lost tax revenue. Id.

94 See Pinner, supra note 12 (stating that a book income tax is not a necessary component for Pillar Two of the OECD Agreement on Base Erosion and Profit Shifting and that the United States could meet Pillar Two’s requirements without using financial statement income to compute a minimum tax on corporations).
U.S. now finds itself in a precarious position in which lawmakers will soon be forced to decide whether to amend the new corporate AMT to comply with the OECD agreement, to repeal the new corporate AMT and enact a new provision in accordance with Pillar Two standards, or to do nothing and allow U.S. multinational corporations to face a complicated web of minimum taxes. Furthermore, by enacting a tax on a corporation’s financial statement income, Congress has given the FASB considerable power to determine the ultimate revenue generated by the corporate AMT. Lastly, laws enacted in the TCJA already incentivize corporations to keep their IP in the U.S. and have disincentivized profit shifting thereby mitigating the impact that the new corporate AMT will have on profit shifting.

95 See Bunn, supra note 77 (arguing that although the new corporate AMT may look like it was inspired by Pillar Two of the OECD agreement on BEPS, the new tax does not reflect the rules of the global minimum tax and instead presents an additional layer of tax on large companies).

96 See About the FASB, supra note 85 (describing the Financial Accounting Standards Board as the independent, private sector not-for-profit organization that establishes the accounting and reporting standards for public and private companies that follow the Generally Accepted Accounting Principles). See also Lautz, supra note 85 (warning that conforming taxable income to the book income standards effectively set by the FASB could politicize a non-profit, privately run organization); Pomerleau, supra note 84 (arguing that using book income to calculate the corporate AMT outsourcing the calculation of an applicable corporation’s taxable to an unelected financial accounting body).

97 See BLANCHARD, supra note 27 (recognizing that the purpose of the international taxation regime under the TCJA was to make the U.S. more competitive with companies based in other countries, to reduce opportunities to shift income offshore to low-tax jurisdictions, and to prevent base erosion of the U.S. tax base by foreign companies). See also INTERNATIONAL COMPLIANCE, supra note 28 (stating that the
A. How the New Corporate AMT Relates to Pillar Two’s Global Minimum

Complaints that multinational corporations—big tech corporations in particular—have unfairly avoided taxes by shifting easy-to-move intangible assets to low-tax jurisdictions have fueled international action to combat profit shifting. The OECD BEPS agreement will fundamentally change the way that multinational corporations are taxed throughout the world by ensuring that large corporations pay a minimum fifteen percent tax in each jurisdiction it generates economic activity. Although the Biden administration

BEAT is essentially a minimum tax intended to prevent foreign and domestic corporations operating in the U.S. from avoiding domestic tax liability through profit shifting). See also Intellectual Property Came Back to the U.S., supra note 27 (arguing that the Tax Cuts and Jobs Act made the United States a more attractive location for IP). U.S. imports of IP rights increased from an annual average of $116 million in the five years prior to 2017 to $219 million in 2017 when the TCJA was enacted. Id.

98 See Ota, supra note 76 (stating that Senator Elizabeth Warren had called for a fifteen percent minimum tax to address the fact that some tech companies have paid little or no federal income tax). See also Gibson, supra note 2, at 1 (noting that both the new corporate AMT and Pillar Two are aimed to prevent large profitable corporations from paying little or no tax and shifting profitable intangible assets to jurisdictions that offer low tax rates). See also Faubel, supra note 31 (stating that large multinational tech corporations have been able to pay low rates of taxes or, in some cases, outright avoid taxes in jurisdictions where they earn significant revenue). “These claims have led to digital services taxes, threats of retaliatory tariffs, and fears of trade wars and cascading taxes.” Id.

99 See Two-Pillar Solution, supra note 68 (providing a fifteen percent minimum tax rate for both the “Income Inclusion Rule (IIR), which imposes a top-up tax on a parent entity in respect of the low-taxed income of a constituent entity; and … an Undertaxed Payment Rule (UTPR), which denies deductions or requires an equivalent adjustment to the extent the low tax income of a constituent entity is not
shared a similar goal in implementing the new corporate AMT, there are several key differences that question the U.S.’s resolution to combat international profit shifting.\textsuperscript{100}

To eliminate the incentive to profit shift, Congress should amend the current tax laws to bring the U.S. into compliance with Pillar Two.\textsuperscript{101} This includes reforming the GILTI to be (1) calculated on a country-by-country basis and (2) levied at the OECD agreed upon fifteen percent rate, rather than the current ten point five percent rate.\textsuperscript{102} Likewise, Congress should increase the BEAT from ten

subject to tax under an IIR”). \textit{See also} Ross, \textit{supra} note 72 (discussing the “Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy . . . ”). This solution would “establish a global minimum tax that applies to the world’s largest corporations and make other changes to limit the incentive to shift profits to low-tax jurisdictions and ensure that countries where economic activity actually occurs receive tax revenues commensurate with that activity.” \textit{Id.} \textsuperscript{100} See Bunn & Bray, \textit{supra} note 75 (stating that so far, Congress has chosen not to implement changes in line with the OECD agreement on BEPS). The European Union has unanimously voted to adopt the OECD agreement on BEPS thus creating pressure for other countries to adopt some version of the rules or make other changes to their tax codes. \textit{Id.} “If U.S. policy does not shift, U.S. companies will be caught in a confusing web of minimum taxes . . . .” \textit{Id. See also} Bunn, \textit{supra} note 77 (stating that the new alternative minimum tax does not reflect the rules of Pillar Two’s global minimum tax and instead represents an additional layer of tax). \textit{See also} Gibson, \textit{supra} note 2, at 1 (clarifying that the U.S. corporate AMT aims to ensure that large U.S. multinational corporations pay an acceptable amount of tax in the U.S. whereas Pillar Two aims to ensure that large multinational corporations pay an acceptable amount of tax in the jurisdictions where they operate). \textsuperscript{101} See Ross, \textit{supra} note 72 (arguing that the GILTI regime currently maintains the incentive to shift profits to low-tax jurisdictions).

\textsuperscript{102} See \textit{id.} (arguing that amending the GILTI calculation of the minimum tax on a country-by-country basis would satisfy the requirements of Pillar Two and eliminate the incentive to profit shift that exists under the current GILTI regime). Additionally, increasing the GILTI rate from the current rate of ten and one-half percent to a minimum of fifteen percent would satisfy the requirements of Pillar Two. \textit{Id.}
percent to the fifteen percent as required by Pillar Two.\textsuperscript{103} Although the new corporate AMT ensures that large corporations will pay some tax in the U.S., it does so at the cost of the U.S.’s commitment to eliminate global profit shifting incentives.\textsuperscript{104}

Notwithstanding the U.S.’s reluctance to enact legislation in compliance with Pillar Two, the European Union (“EU”) has unanimously agreed to implement Pillar Two, therefore U.S. multinational corporations will soon be caught in a confusing web of minimum taxes including GILTI, BEAT, the new corporate AMT, and likely some portion of the Pillar Two minimum tax.\textsuperscript{105} While the existing GILTI, BEAT, and FDII provisions reduce the incentive to

\textsuperscript{103} See id. (arguing that BEAT needs to be reformed). The TCJA’s BEAT was intended to limit profit shifting by imposing a tax on payments to foreign subsidiaries made out of U.S. earnings, acting as a form of alternative minimum tax. However, this provision has failed to work as intended and can create an uneven playing field that disadvantages U.S.-based corporations relative to counterparts headquartered in low-tax jurisdictions.

\textsuperscript{104} See Gibson, supra note 2, at 1 (noting that although the U.S. agreed to the OECD framework, there is likely a lack of political will to pass legislation required to bring the U.S. into compliance with Pillar Two).

\textsuperscript{105} See Bunn & Bray, supra note 75 (recognizing that U.S. companies will be subject to the GILTI and BEAT in addition to the new corporate AMT and the global minimum tax rules). See also Wynman, supra note 75 (stating that there are several differences between the new corporate AMT and the Pillar Two rules set forth by the OECD). “Given the significant amount of uncertainty around the interaction of the AMT with Pillar Two, added to an already existing lack of clarity on the interaction between the U.S. GILTI rules and Pillar Two, taxpayers should closely follow developments from Treasury as it works to implement the AMT.” Id.
profit shift, Congress should have amended these provisions to eliminate the incentive altogether, in accordance with Pillar Two before it added another non-conforming layer of minimum tax.\(^{106}\)

Although there are cognizable policy goals in both refusing to enact policy in line with Pillar Two and in enacting an AMT on large U.S. corporations when viewed in isolation, to refuse the former and enact the latter when they share similar goals—to ensure that corporations pay their fair share in tax—makes little sense.\(^{107}\) Nonetheless, as the U.S. has adopted the new corporate AMT and the EU has unanimously voted to enact legislation to implement Pillar Two, large U.S. corporations now find themselves in a confusing web of minimum taxes as to how these taxes will work in tandem.\(^{108}\) In

\(^{106}\) See Gravelle & Marples, supra note 8, at 42 (recognizing that because GILTI isn’t imposed on a per-country basis and allows for cross-crediting over all countries, corporations are still able to shield income from U.S. tax).

\(^{107}\) See Gibson, supra note 2, at 1 (stating that both the new corporate AMT and Pillar Two aim to prevent large, profitable corporations from paying little to no tax). Companies can come to owe little or no tax through several mechanisms such as utilizing tax deductions and credits. Id.

Although lawmakers chose to put these deductions and credits in place and the companies are using them lawfully, these legislators, or their constituents, may be unhappy with the result. This is the common motivation for a domestic minimum tax - to set a minimum tax rate on a broader tax base, without having to revisit popular tax deductions and credits that may be difficult to repeal. Id.

\(^{108}\) See id. (recognizing that although the U.S. has agreed to work within the OECD framework, “it currently seems unlikely that the political will exists to pass Pillar [Two] rules domestically.”). “A concern is that U.S.-based multinational corporations could get caught between the two systems and, due to their differences,
order to mitigate this confusion and avoid the competitive
disadvantage of double taxation in jurisdictions with a Pillar Two
minimum tax, it is imperative that the IRS issues regulations
specifying that minimum taxes imposed under Pillar Two are
creditable against the new corporate AMT.\textsuperscript{109}

\textbf{B. The Delegation of Taxation Power to the Financial
Standards Accounting Board and the Issues that May Arise}

Book income and taxable income are prepared for
fundamentally different audiences and purposes.\textsuperscript{110} Book income
provides information to investors and creditors about the corporation’s
performance, whereas taxable income determines a corporation’s tax
liability.\textsuperscript{111} While taxable income is determined by Congress and

---

\textsuperscript{109} See Gibson, supra note 2, at 4 (presuming that foreign tax credits could
potentially alleviate problems of double taxation).

However, recent U.S. regulations have reinforced the limitation of
foreign tax credits to those taxes that conform closely to general
principles of U.S. tax law, including tax-nexus and sourcing
related rules. If the foreign tax is not similar enough to a U.S.-type
of tax, no credit will be allowed.

\textsuperscript{110} See Gravelle, supra note 50, at 2 (clarifying that “[t]he objective of financial
statement income (also known as ‘book income’) is to measure the profitability of a
company.”).

\textsuperscript{111} See Pomerleau, supra note 84 (recognizing that the book income and taxable
income prepared by corporations each year serve different purposes and are intended
for entirely different audiences). “Because of differences in book income and taxable
income, a corporation can report profits on its financial statement while reporting no
regulated by the IRS, book income is determined by the Generally Accepted Accounting Principles ("GAAP") set by the FASB.\textsuperscript{112} Unlike the Internal Revenue Code, which provides little leeway for taxpayers in determining their taxable income, GAAP provides corporations with some leeway in how to account for their expenses and revenues.\textsuperscript{113} Therefore, by using GAAP to determine the taxable base for the AMT, Congress has given large corporations discretion in determining their ultimate tax liability.\textsuperscript{114} Moreover, by taxing book income, Congress has incentivized corporations to limit their book income, which could reduce its informational value.\textsuperscript{115} If corporations choose to minimize their book income to decrease their AMT liability, the reduced informational value of a corporation’s book income could have an adverse effect on investment as such distortions will

\textsuperscript{112} See id. (clarifying that book income follows the generally accepted accounting principles as set by the FASB, whereas taxable income is set by the Internal Revenue Code).

\textsuperscript{113} See id. (recognizing that “[a]lthough the FASB prescribes many specific standards, corporations have some leeway in how to account for some expenses and revenues.”).

\textsuperscript{114} See id. (recognizing that if the changes to the GAAP standards by the FASB would affect corporate income tax revenue without considering Congress’s fiscal goals).

\textsuperscript{115} See Pomerleau, supra note 84 (predicting that corporations that have enjoyed low effective tax rates in years past will now have an incentive to alter book income).
undermine investor and creditor confidence in the once critical figure.\textsuperscript{116}

Furthermore, the power to levy taxes is vested in Congress by the U.S. Constitution.\textsuperscript{117} It is questionable policy to shift the power to determine a corporation's AMT in the hands of a non-profit organization for two reasons.\textsuperscript{118} First, the FASB may now become the target of corporate and congressional lobbyists.\textsuperscript{119} Second, the Supreme Court has recently signaled a willingness to revisit the

\textsuperscript{116}See id. (citing evidence that taxing book income could reduce the informational quality of book income). “For example, there is evidence that firms shifted sales outside of the 1987 and 1989 window during which the corporate AMT applied to book income.” Id.

\textsuperscript{117}See U.S. CONST. art. I, § 8, cl. 1 (stating that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense [sic] and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States . . . .”).

\textsuperscript{118}See About the FASB, supra note 86 (describing the FASB as the independent, private-sector not-for-profit organization that establishes the accounting and reporting standards for public and private companies that follow the Generally Accepted Accounting Principles). See also Lautz, supra note 86 (arguing “that conforming taxable income to the book income standards effectively set by FASB could politicize a non-profit, privately run organization . . . ”). See also Pomerleau, supra note 84 (arguing that “using book income to calculate taxable income outsources the determination of a portion of the corporate tax base to an unelected financial accounting body.”). See also New Law Puts “Book Income” in the Crosshairs, supra note 83 (recognizing that the FASB is a rulemaking body that is designed to be independent of influence by corporations and Congress). “The book minimum tax rule could potentially give the FASB significant influence over some of the revenue the federal government collects – with potentially significant financial implications for U.S. companies.” Id. See also Pomerleau, supra note 84 (questioning whether the FASB should have the power to amend the corporate income tax). “That role seems to be in tension with the Constitution’s grant of the legislative power of the United States to Congress.” Id.

\textsuperscript{119}See generally New Law Puts “Book Income” in the Crosshairs, supra note 84 (identifying the competing interests that corporations and Congress will have regarding the GAAP).
nondelegation doctrine, which could render the delegation unconstitutional.\textsuperscript{120}

The power delegated to the FASB by the new corporate AMT has made the FASB—a once independent body—a target for corporate and congressional lobbyist.\textsuperscript{121} From a tax standpoint, some of the largest and most powerful corporations in the world now face an incentive to minimize their book income in years in which they expect to be subject to the corporate AMT.\textsuperscript{122} Moreover, as a result of relinquishing its power to the FASB, Congress now has an acute interest in the FASB’s operations as changes to the GAAP could directly impact the amount of revenue brought in by the corporate

\textsuperscript{120} See Pomerleau, \textit{supra} note 84 (questioning whether the FASB should have the power to amend the corporate income tax). “That role seems to be in tension with the Constitution’s grant of the legislative power of the United States to Congress.” \textit{Id. See also} Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (Alito, S., concurring) (signaling that he would support revisiting the nondelegation doctrine if a majority of the court were willing to do so). \textit{See also} (Gorsuch, N., dissenting) (arguing that the Court should not wait to revisit the nondelegation doctrine). \textit{Id. at} 2131.

\textsuperscript{121} See New Law Puts “Book Income” in the Crosshairs, \textit{supra} note 83 (predicting that “changes made to financial accounting rules could have a direct impact on federal tax revenue.”). “Accounting standards could become targets for special interests and lobbyists.” \textit{Id. See also} Pomerleau, \textit{supra} note 84 (recognizing that “creating a direct link between FASB’s actions and federal revenue could increase the incentive for Congress to lobby FASB. Congress may pressure the board to make, or refrain from making, changes to financial accounting standards because of revenue concerns.”).

\textsuperscript{122} See Pomerleau, \textit{supra} note 85 (noting that a tax grounded in book income “could prompt firms to adjust their book income to minimize tax liability, which could reduce the informational value of book income.”).
AMT. Should the FASB cater to such interests, the new corporate AMT will impact every business organization that follows the GAAP—an impact well beyond the largest corporations targeted by the corporate AMT.

Article I, Section 8 of the Constitution states that Congress shall have the authority “to lay and collect Taxes, Duties, Imposts and Excises.” This provision has been interpreted as giving Congress a very broad power of taxation. Moreover, the Sixteenth Amendment to the U.S. Constitution explicitly gives Congress the right to lay and collect income taxes. Although both of these provisions provide that the Congress shall have such powers, Congress has outsourced this

---

123 See New Law Puts “Book Income” in the Crosshairs, supra note 83 (noting that because Congress grounded the new corporate AMT in book income, “Congress may take more interest in the FASB’s work in the future and lobby for or against certain changes.”).
124 See id. (stating that “[a]ny resulting rule changes could extend to all entities that follow [the Generally Accepted Accounting Principles], not just large corporations with more than $1 billion in AFSI.”).
125 See U.S. CONST. art. I § 1 (providing that “[a]ll legislative [p]owers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”); U.S. CONST. art. I § 8 (providing that “[t]he Congress shall have [p]ower [t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the [d]ebts and provide for the common [d]efence and general [w]elfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).
126 See LARSON & SHEAFFER, supra note 50 (observing that Art. I § 8 of the United States Constitution has been interpreted as giving Congress a “very broad power of taxation.”).
127 See U.S. CONST. amend. XVI (providing that “[t]he Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).
power by allowing the FASB to determine the taxable base upon which the AMT is levied. In enacting the new corporate AMT, Congress has invited the Supreme Court to do just what Justice Alito alluded to in his concurring opinion in Gundy: an opportunity to revisit the non-delegation doctrine with a majority that may be willing to do so.

Since the Gundy decision, the makeup of the Supreme Court has undergone a substantial transformation. Justice Kavanaugh has been confirmed and Justice Ginsburg, who sided with Justice Kagan’s

---

128 See I.R.C. § 56A (defining adjusted financial statement income as the net income or loss of the taxpayer set forth on the taxpayer’s applicable financial statement for such taxable year); I.R.C. § 451(b)(3) (defining an applicable financial statement).

(A) a financial statement which is certified as being prepared in accordance with generally accepted accounting principles and which is—(i) a 10–K (or successor form), or annual statement to shareholders, required to be filed by the taxpayer with the United States Securities and Exchange Commission, (ii) an audited financial statement of the taxpayer which is used for— (I) credit purposes, (II) reporting to shareholders, partners, or other proprietors, or to other beneficiaries, or (III) any other substantial nontax purpose, but only if there is no statement of the taxpayer described in clause (i), or (iii) filed by the taxpayer with any other Federal agency for purposes other than Federal tax purposes, but only if there is no statement of the taxpayer described in clause (i) or (ii).[.]

Id. See also GIBSON, supra note 2, at 2 (noting that “the calculation of financial statement income is governed by generally accepted accounting principles (GAAP) rules created by the Financial Accounting Standards Board (FASB).”). “These rules are outside of the scope of tax law and are not governed by Congress or regulated by the Internal Revenue Service.” Id. 129 See Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (Alito, S., concurring) (signaling that he would support revisiting the nondelegation doctrine if a majority of the court were willing to do so).

130 See CHEMERINSKY, supra note 54, at 295 (noting that “[m]any have predicted a revival of the nondelegation doctrine”).
plurality decision, has been replaced by Justice Amy Coney Barrett.\footnote{See Justices 1789 to Present, supra note 61 (noting that Justice Brett Kavanaugh was sworn into office on October 6, 2018 and that Justice Amy Coney Barrett was sworn into office on October 27, 2020 following the death of Justice Ruth Bader Ginsburg on September 18, 2020).} If these two conservative Justices are persuaded by Justice Gorsuch’s dissent, and Justice Thomas and Chief Justice Roberts maintain their stance in the Gundy dissent, then there may be a majority willing to revisit the nondelegation doctrine.\footnote{See CHERERINSKY, supra note 54, at 295 (noting there may be a majority willing to reconsider the nondelegation doctrine). “Justice Alito’s brief concurring opinion expresses a willingness to reconsider [the nondelegation doctrine]. In light of the dissent and the confirmation of Justice Kavanaugh, there might be a majority willing to do so.” Id.} Although this case differs from previous cases involving the nondelegation doctrine, in that here Congress is delegating its authority to a non-profit private organization rather than a governmental agency, a strong argument can be made that Congress’ delegation violates the Article I’s mandate that Congress alone has the power to make laws and set taxes.\footnote{See id. at 292 (noting that the combination of legislative, executive, and judicial power in the hands of agencies poses a constitutional problem not addressed by the Constitution); Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) (declaring that “Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”).} The Constitution simply does not grant Congress the authority to allow a non-profit, private body the power to determine taxes as according to the Constitution, this is a power that Congress \textit{shall} have.\footnote{See U.S. CONST. art. I § 8 (declaring that Congress \textit{shall} have the power to lay and collect taxes).}
C. Taxing Book Income: A Second-Best Practice

While proponents of the new corporate AMT argue that disparities between a corporation’s book income and taxable income indicate that corporations unfairly take advantage of tax loopholes, this is not necessarily the case. Corporations keep track of their taxable income for tax purposes whereas they keep track of their book income to report profits to shareholders. While in the past some of these disparities have been fairly attributable to IP licensing schemes, the GILTI and BEAT taxes were specifically designed to combat this practice without the need for an AMT imposed on book income.

135 See FACT SHEET: The Inflation Reduction Act Supports Workers and Families, supra note 62 (insisting that “the [IRA] will raise revenue by: [g]oing after tax dodgers, ensuring the wealthy and large corporations pay the taxes they already owe[,]” by instituting a minimum corporate tax to prevent corporations paying little to no federal income tax); Pomerleau, supra note 84 (arguing that the differences between book income and taxable income are not inherently bad as the two numbers are prepared for different audiences and for different purposes).

136 See New Law Puts “Book Income” in the Crosshairs, supra note 83, (defining book income as the amount of income that corporations publicly report on their financial statements to shareholders); Taxable Income vs. Book Income: Why Some Corporations Pay No Income Tax, supra note 87 (arguing that while taxable income and book income should be similar, they can vary widely for many companies).

137 See Neate, supra note 4 (noting that the “Silicon Six” — Amazon, Apple, Facebook, Netflix, Microsoft and Google’s parent company Alphabet — had deliberately shifted income to low-tax jurisdictions to pay less tax); GIBSON, supra note 2, at 2–3 (clarifying that in addition to taking advantage of credits and deductions, large multinationals can reduce their tax bill by shuffling some of their profitable operations—easy to move intangible assets in particular—to jurisdictions with lower tax rates); CHOW & SCHOENBAUM, supra note 5, at 41 (noting that “[a] principal goal of the TCJA [was] to bring back and tax existing offshore corporate earnings.”). “The purpose of the GILTI tax is to discourage U.S. multinationals from holding intangible property outside of the United States.” Id. at 42. The BEAT is designed to reach and tax base erosion and profit shifting transactions by large
Disparities between a corporation’s book income and taxable income are most commonly due to provisions within the Internal Revenue Code, such as credits and deductions that not only allow, but encourage corporations to reduce their ultimate tax liability.\textsuperscript{138} Each credit and deduction in the Internal Revenue Code serves a distinct purpose as they are provided by Congress to incentive certain corporate behaviors.\textsuperscript{139} By enacting a minimum tax based on a corporation’s companies. \textit{Id.} at 43. See also Gravelle \& Marples, supra note 8, at 45 (defining BEAT as a minimum tax which includes payments made to foreign related firms which was aimed at preventing artificial profit shifting); GILTI AND FDII CALCULATIONS, supra note 5 (stating that the purpose of GILTI is to tax global intangible income that tax planners may potentially shift offshore to be subject to a lower tax rate).

\textsuperscript{138} See New Law Puts “Book Income” in the Crosshairs, supra note 83 (recognizing that “a company’s book income as reported on its income statement may differ significantly from its taxable income for federal income tax purposes.”). Corporations subject to the tax which may have lowered their tax rate below fifteen percent of their adjusted financial statement income may be subject to additional tax liability under the new law. \textit{Id.} See also Kaeding, supra note 87 (examining that deductions for net operating losses and capital investment are two factors within the Internal Revenue Code responsible for disparities between a corporation’s taxable income and book income). A net operating loss allows a corporation to carry forward losses from a prior year to reduce their tax liability in the current year allowing firms to smooth out their taxable income to better reflect their actual economic profits. \textit{Id.} In the TCJA, lawmakers moved to allow firms to immediately deduct short-lived capital assets allowing capital-intensive industries to have little to no taxable income while their book income still appeared quite large. \textit{Id.}

\textsuperscript{139} See Kagan, supra note 87 (explaining that business tax credits are a powerful incentive for governments).

Business tax credits can come in many forms, but some of the common business tax credits are aimed at activities like hiring employees who face barriers to employment, investing in research, upgrading a building to be more efficient, and so on. The fact that a business tax credit exists for an activity means that the government is seeking to reward and encourage that activity.
book income, Congress has handicapped its own power to incentivize the behavior of the largest U.S. corporations, since book income generally fails to take into account many of the deductions and credits that Congress has provided for in the Internal Revenue Code.\textsuperscript{140}

Proponents of the new AMT argue that an alternative minimum tax is a more feasible means of closing the gap on book-tax discrepancies than revisiting existing credits and deductions in the Internal Revenue Code.\textsuperscript{141} Assuming, arguendo, that this is true, any new AMT should have remained grounded in a corporation’s taxable income, as the previous alternative minimum tax was so as to eliminate any risk to the integrity of GAAP.\textsuperscript{142} A properly designed minimum

\textit{Id.} While a business tax credit reduces a corporation’s tax liability directly by the amount of the credit, a business tax deduction reduces a corporation’s taxable income thus reducing the corporation’s ultimate tax liability by way of reducing the amount of income subject to taxation. \textit{Id.}

\textsuperscript{140} \textit{See also} Muresianu & York, \textit{supra} note 18 (stating alternative minimum taxes are not a good solution). “[I]f tax breaks are poor policy, they should be repealed directly; if they are sound policy, all eligible taxpayers should be able to take full advantage of them.” \textit{Id.}

\textsuperscript{141} \textit{See} GIBSON, \textit{supra} note 2, at 1 (recognizing that ensuring that corporations pay some tax without having to revisit popular tax incentives that may be difficult to repeal is the common motivation for a domestic minimum tax).

\textsuperscript{142} \textit{See New Law Puts “Book Income” in the Crosshairs, supra} note 83 (quoting Mary Cowx, Assistant Professor at the W. P. Carey School of Accountancy at Arizona State University).

What is concerning at this point is that tying the new minimum tax to financial statement income creates incentives for companies to report lower book income, which may be at odds with the overall purpose of financial statements (and the goal of the FASB) to be a source of information that is useful to current and potential investors and creditors.\textsuperscript{[.]} \textit{Id.}
tax should be limited in scope and designed to prevent deliberate profit shifting activities, and should not create uncertainty for investors and creditors by undermining the integrity of book income.143

D. Industry Impact: The Effect on Research and Development

While large tech corporations have been the focal point of claims by the OECD and the Biden administration in implementing minimum taxes, research indicates that, similar to the previous AMT, specific industries that invest heavily in physical capital will take the hardest hit.144 Ironically, the five industries expected to be hit the hardest by the new corporate AMT are retail, manufacturing, wholesale trade, the information industry, and the management industry.145 Conspicuously absent from this list are technology

---

143 See id. (warning that it is currently uncertain whether the new corporate AMT will lead to unintended changes in the generally accepted accounting principles and that the Financial Accounting Foundation is committed to maintaining FASB’s independence and avoiding any adverse effects on investor confidence in capital markets); GIBSON, supra note 2, at 2 (noting concern among experts about the “potential pressure that FASB members could face from lobbyists and others to alter the accounting rules in a ways that would affect the Book Tax.”).

144 See Muresianu & York, supra note 18 (analyzing the new corporate alternative minimum tax in comparison to the previous AMT). The previous AMT disproportionately affected firms in industries that rely heavily on physical capital investment, like manufacturing. Id. The new corporate AMT is likely to hit a similar set of industries creating disparate treatment of firms in different industries and of different sizes thus leading to economic inefficiencies. Id.

145 See Lautz, supra note 85 (stating that the five industries most likely to be hit by the alternative minimum tax are retail, manufacturing, wholesale trade, the information industry, and the management industry). These five industries collectively employ approximately one fourth of the civilians employed in the U.S.
companies who have received the most attention from lawmakers calling for an alternative minimum tax.\textsuperscript{146} Although corporations will be able to take general business credits including the research and development credit, the new corporate AMT will substantially increase the tax burden for corporations engaged in research and development in the U.S.\textsuperscript{147} As approximately 150 companies will be subject to the AMT and the tax is projected to raise $313 billion in tax revenue over the next decade, and each company subject to the AMT will incur a $2 billion tax hike each year for the next decade—a significant loss of revenue for these corporations.\textsuperscript{148}

\textsuperscript{146} See \textit{OTA}, \textsuperscript{supra} note 76 (recognizing calls by Senator Elizabeth Warren to institute a fifteen percent minimum tax because some big tech companies have paid little in federal taxes).

\textsuperscript{147} See \textit{Gravelle}, \textsuperscript{supra} note 50, at 4 (noting that general business credits, including credits for research and experimentation are allowed to offset the corporate AMT). These credits can offset up to 75 percent of the combined regular and minimum tax. \textit{Id.} See \textsuperscript{Lautz}, \textsuperscript{supra} note 85 (referencing data compiled by the National Science Foundation regarding manufacturing and information). “[M]anufacturing and information – two of the industries most impacted by the book minimum tax – were responsible for 80 percent of all research and development (R&D) spending in 2019, a total of $396 billion in R&D (out of an estimated $493 billion total).” \textit{Id.} Thus, the book minimum tax is poised to siphon revenues away from companies heavily involved in research and development and redistribute it into government coffers. \textit{Id.}

\textsuperscript{148} See \textsuperscript{Lautz}, \textsuperscript{supra} note 85 (arguing that the U.S. tax code should feature low rates and broad bases). The book minimum tax has an extremely narrow base as it will target approximately 150 corporations out of the 1.5 million active corporations in the U.S. \textit{Id.} Approximately 150 companies will be responsible for all $313 billion in tax revenue the new corporate AMT is projected to raise over the next 10 years. \textit{Id.}
These industries are expected to be the hardest hit by the new AMT because they lie at the book-tax gaps targeted by the new AMT.\textsuperscript{149} By allowing some deductions and not others, the new corporate AMT picks winners and losers in the tax code.\textsuperscript{150} To say that capital investment will decline because of the new AMT is likely a an oversimplification of the economic issues created by the new AMT.\textsuperscript{151} This is because applicable corporations will not pay the AMT every year and will instead move between the AMT and the traditional corporate tax.\textsuperscript{152} In the past, the AMT credit helped companies limit their tax exposure as they moved in and out of the

\textsuperscript{149} See Kallen & Watson, supra note 90 (explaining that industries that are heavily hit by the new corporate AMT are those at the intersection of different book-tax gaps targeted by the book minimum tax).

\textsuperscript{150} See Lautz, supra note 85 (arguing that the book minimum tax favors certain credits and deductions that have bipartisan support and denying companies others thus creating an unfair playing field).

\textsuperscript{151} See Pomerleau, supra note 84 (stating that “[t]he effect of the book minimum tax on investment incentives will depend on how a corporation interacts with the tax.”). A corporation that makes an investment under the ordinary tax, but then expects to be taxed on the AMT in future years will face an increased incentive to invest in assets relative to the ordinary corporate tax rate. \textit{Id.} In contrast, corporations that make investments while subject to the book tax and then expect to switch to the ordinary tax would face a higher overall tax burden on new investment than under the ordinary corporate tax rate. \textit{Id.}

\textsuperscript{152} See \textit{id.} (recognizing that corporations are not perpetually subject to either the book tax or the ordinary corporate tax but would instead move between the two systems). A corporation may make an initial investment while under the ordinary income tax and then later be subject to the minimum tax or make an investment under the minimum tax and then be subject to ordinary income tax in later years. In those cases, the book tax can have counterintuitive effects on investment incentives. \textit{Id.}
AMT, which led to the AMT generating peak revenues in 1990 and thereafter declining significantly. As corporations generate AMT credits in the near future, they will likely resume this practice and utilize the credit to reduce their ordinary tax liability in years in which they would otherwise have had a large amount of taxable income, thereby minimizing the overall revenues generated by the new corporate AMT.

Conclusion

Concern that large multinational technology corporations have been able to unfairly reduce their tax liability by shifting intangible assets to low tax jurisdictions has sparked a global movement to combat aggressive tax avoidance techniques employed by the world’s largest corporations. Although the U.S. supports Pillar Two of the OECD agreement to combat base erosion and profit shifting, the Biden administration was unable to pass legislation to bring the U.S. into alignment with that agreement. Instead, Congress opted to revive the

---

153 See Muresianu & York, supra note 18 (stating that the previous AMT “created economic inefficiencies, increased tax burdens and complexity, and saw declining tax revenues over time.”). “As firms built up and used tax credits for prior year AMT to offset their regular tax liability, the net revenue raised from the AMT system fell . . .” Id.

154 See id. (noting that companies that paid the AMT in one year received a credit that could be used to offset future liability under the regular tax code but not below their alternative minimum tax liability).
corporate AMT, and in doing so, has seemingly abdicated its agreement to enact legislation in accordance with Pillar Two. While the new corporate AMT will guarantee that the largest corporations pay some U.S. tax, it will do little to combat profit shifting. If the U.S. wishes to address profit shifting, it must do so at the source by reforming the GILTI and BEAT taxes to bring them into compliance with Pillar Two. Moreover, by grounding the new corporate AMT in book income, Congress has delegated its Constitutional authority to levy taxes to the FASB. Notwithstanding any potential Constitutional violation that such a delegation poses, the delegation has undermined the independence of the FASB by placing it in the crosshairs of corporate and congressional interests thereby threatening the informational value of GAAP figures. Finally, the new corporate AMT may prove to be an ineffective revenue raiser in the long run as corporations that pay the AMT will likely use their AMT credit to reduce their taxable income in future years. This will incentivize corporations to anticipate whether they will be subject to the AMT or regular tax liability each year and make investment decisions accordingly.