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ARTICLES

PEDAGOGY

GLOBAL CORRUPTION AND THE COURTS: ENDING THE FCPA FREE-RIDING

by

John Paul*

INTRODUCTION

After dealing with extensive political corruption, the United States (U.S.) in 1977 sought to regain its tarnished international reputation by passing the Foreign Corrupt Practices Act (FCPA), which criminalized the business bribes of foreign officials.[1] However, the initial FCPA only prosecuted U.S. corporations and individuals and ignored foreign corporations and individuals, which resulted in a competitive disadvantage for U.S. entities operating in the international markets.[2] This led to Congress amending the FCPA in 1998 to extend the FCPA's jurisdiction to foreign corporations and individuals.[3] Under the amended FCPA, U.S. agencies were statutorily authorized to enforce the FCPA against entities and individuals who weren't U.S. citizens.[4]

The amended FCPA led to an increase in the prosecution of both domestic and foreign entities and individuals over the last decade.[5] As a result of the amended FCPA, the U.S. has been vulnerable to criticism from the global community.[6] The problem with the FCPA is the broad language that permits U.S. government agencies to bring charges against entities and

* Associate Professor, Graduate Deputy Chair & Program Director of Accounting, Legal Studies & Taxation, Koppelman School of Business at Brooklyn College of the City University of New York

individuals whose alleged illegal conduct has no connection to the U.S.[7] This problem is exacerbated by the fact that few entities and individuals have challenged the FCPA's broad language, so there is little judicial precedent to limit the U.S. government agencies' authority.[8]

While the growth in enforcement activity has turned FCPA investigation and compliance work into lucrative big business for major U.S. law firms, it has reignited concerns about an adverse impact on U.S. business abroad.[9] Segments of U.S. businesses insist that the FCPA places them at a competitive disadvantage and even the U.S. Chamber of Commerce has called to narrow the FCPA's scope and enforcement.[10] A number of reform advocates have argued that the enforcement of anti-bribery rules by foreign governments has been minimal despite the Organization for Economic Co-operation and Development (OECD) convention.[11]

FCPA compliance costs can be quite large. These costs include the investigation of alleged illicit payments, the costs of prevention programs as well as the costs of the FCPA accounting rules.[12] A large number of these costs entail significant fixed components, making them lower on a per unit basis for larger companies, giving them a competitive advantage over their smaller counterparts.[13] Similarly, larger companies are more likely to employ in-house specialists who can absorb FCPA compliance tasks into their existing work. It becomes more probable that larger companies gain a distinct competitive advantage over small and medium-sized companies as a result of FCPA requirements. Furthermore, many new companies may find that FCPA enforcement creates more entry barriers for them.[14]

The purpose of this Note is to examine the claims that the FCPA has been applied in an aggressive and overbroad manner against entities and individuals, even when their connections to the U.S. have been minimal. A number of FCPA cases were selected and analyzed to determine whether a FCPA prosecution was warranted given the facts and the evidence. Specifically, the slightness of the jurisdictional nexus was examined to determine whether the U.S. had the jurisdiction to investigate and prosecute entities and individuals under the FCPA.

FCPA ENFORCEMENT ABROAD: DOES IT GO TOO FAR?

As the world continues to grow smaller and business expands, corporate executives must become more familiar with the FCPA; otherwise, they face a grave risk. A World Economic Forum survey of 11,232 business managers in 125 nations reveals that nearly one-third of managers report that firms like theirs bribe to secure government contracts.[15] The percentage of firms who supposedly bribe to secure government contracts ranges from 13 percent in high-income OECD nations to 50 percent in low-income nations.[16]

Either internal or external actors can curb foreign corruption in a nation. A nation can prosecute its own bribery cases or it can coordinate cross-border investigations by other nations. The FCPA is an example of the latter.[17] The U.S. is not the only nation that prosecutes foreign corruption cases. The United Kingdom also pursues extraterritorial foreign bribery prosecution under the United Kingdom Bribery Act of 2010. However, due to its longer history, the FCPA provides more cases for analysis.[18]

The FCPA's anti-bribery provision criminalizes bribes to foreign officials.[19] Under the FCPA, foreign bribery in general is the act of offering a foreign official payment in exchange for some type of business advantage.[20] The anti-bribery provision covers three types of actors: issuers, domestic concerns and any person who violates the provision while corruptly using U.S. instrumentalities in U.S. territories.[21]

The coverage of multiple actors has given the U.S. a powerful and flexible tool for prosecuting foreign actors for bribery. As an example, foreign corporations can be issuers for FCPA purposes. Since foreign shares can be traded in U.S. markets as American Depository Receipts (ADR), the issuing foreign corporation becomes an issuer under the jurisdiction of the FCPA.[22] In the absence of ADR, FCPA violations can occur in the U.S. just by routing the funds through a U.S. bank.[23]

Many have claimed that the number of FCPA cases prosecuted with questionable nexus is quite large.[24] Of the thirty-nine OECD member nations, the U.S. has prosecuted the most corruption schemes with 128 cases, which constitutes over 25% of total prosecutions. The second highest is Germany, which has only prosecuted 26 cases.[25]

Here are a number of FCPA cases that have been questioned on their merits:

The Azerbaijan Oil Privatization Case: U.S. v. Kozeny[26]

Frederic Bourke co-founded Dooney & Bourke, the company known for its line of fine handbags and other leather accessories.[27] In the 1990s, Bourke met Viktor Kozeny, known as the "Pirate of Prague," who collected tens of millions of dollars after paying bribes to government officials in relation to the privatization of state-owned industries in the Czech

Republic.[28] It later became clear that Bourke knew of Kozeny's reputation.[29]

After the collapse of the Soviet Union, Azerbaijan reclaimed its independence in 1991 and began to privatize government assets. One target for privatization was the government-owned oil company, State Oil Company of the Azerbaijan Republic (SOCAR) and the method proposed was the voucher-based initiative.[30] The Azerbaijani government provided each citizen a voucher book with four coupons, which could be freely sold and they usually sold for about $12.00. Foreigners interested in participating in the auctions were required to redeem their vouchers with options issued by the State Property Committee.[31]

In 1997, Kozeny invited Bourke to travel to Azerbaijan. Kozeny then created two entities, the Minaret Group, an investment bank, and Oily Rock, which purchased the Azerbaijani government vouchers.[32] Thomas Farrell was recruited by Kozeny to assist in the purchase of the vouchers. Farrell purchased the vouchers with U.S. currency flown in on private jets from Zurich or Moscow and eventually, $200 million worth of vouchers were purchased.[33]

Kozeny and Farrell then met with the son of the Azerbaijani President, Ilham Aliyev, as well as the SOCAR vice president. Aliyev introduced Kozeny and Farrell to Nadir Nasibov, State Property Committee Chair, and Barat Nuriyev, Deputy Chair.[34] Kozeny told Nurivyev that he wanted to purchase SOCAR, which required a presidential decree. As part of the plan to purchase SOCAR, Kozeny and Nuriyev agreed that future voucher purchases would be made through Nurivev and his associates. Nuriyev also wanted an "entry fee" to be paid to Azerbaijani officials, including President Aliyev, in the amount of $8 million to $12 million. Kozemy agreed to pay this "entry fee" and Farrell delivered the cash to Nuriyev.[35]

Nuriyev also demanded that two thirds of Oily Rock's vouchers and options be transferred to Azerbaijani officials so the officials could reap profits from SOCAR's privatization without having to invest any money. To facilitate this transfer, Kozemy instructed his attorney, Hans Bodmer, to set up several holding companies.[36]

President Aliyev then doubled the voucher requirement from one million vouchers to two million vouchers and the vouchers increased in price to $100 each. This forced Kozeny to seek additional investors and he set up a lavish event at his home in Aspen, Colorado, which Bourke attended. Kozeny then escorted a group of potential investors to Azerbaijan, including Bourke.[37]

Bourke questioned the attorney, Bodmer, about the business plan and Bodmer supposedly told Bourke about the bribery scheme. Bodmer report this conversation to Rolf Schmid, an associate at Bodmer's law firm. Schmid summarized the conversation in a memorandum.

After a number of transactions, Kozeny abandoned all hope of SOCAR's privatization in 1998. Kozeny began to wind down the business and the Minaret Group fired most of its employees. Bourke resigned from the advisory boards and Kozeny told the investors that the vouchers were worthless.[38] Around the same time, Bourke entered into a proffer agreement with the U.S. Department of Justice, waived his attorney-client privilege and instructed his attorneys to answer all questions in the investigation. When Bourke was asked if Kozeny made any corrupt payments, transfers or gifts to Azerbaijani officials, Bourke denied all knowledge.[39]

In 2005, Bourke and Kozeny were indicted. Kozeny never faced trial and fled to the Bahamas. After three days of deliberations, the jury convicted Bourke on the FCPA conspiracy and false statements charges. Bourke appealed, insisting that he never had any reason to believe Kozeny had paid bribes but the appellate court found that Bourke's arguments were meritless.[40] However, the trial judge later admitted to having doubts and at the time of Bourke's sentencing, she remarked, "After ten years of supervising this case, it is still not entirely clear to me whether Mr. Bourke was a victim, or a crook, or a little bit of both."[41]

The Nigerian Who is the Bribe-Taker Case: Securities and Exchange Commission v. Jackson[42]

As an international corporation headquartered in Texas, Noble Energy provides offshore drilling equipment and services around the world. From 2003 to 2007, one of Nobel Energy's subsidiaries operated drilling riggs of the coast of Nigeria, where the law requires rig owners to either pay permanent import duties or else obtain a temporary import permit (TIP).[43]

TIPs allowing drilling rigs to operate in Nigerian waters without paying any permanent import duties. The Nigerian Customs Service (NCS) grants TIPs for rigs that will be in Nigeria for up to a year. While the NCS may grant up to three 6-month TIP extensions, once the permit and the extensions expire, the rig must be exported from Nigeria.[44] If the rig operator wants to continue using the rig in Nigeria, s/he can either convert it to permanent status and pay permanent duties or export the rig and re-import it. Since the NCS does not deal directly with rig owners, the owners have to submit an application through a licensed customs agent.[45]

In applying for a TIP or TIP extension, Noble would typically obtain a price proposal from a customs agent and any charges that weren't supported by documentation would be ambiguously labeled as "special handling" or "procurement."[46] Noble did have an FCPA policy, which required all payments made to a foreign government without receipts to be preapproved by Noble's chief financial officer (CFO). Once the CFO approved the payments, the customs agent could pay the government officials. The customs agent would submit an invoice to Noble in reimbursement of the money paid to the Nigerian officials.[47]

The U.S. Securities Exchange Commission (SEC) alleged that Noble authorized a customs agent to pay bribes to Nigerian officials in order to obtain the false documents needed to obtain TIPS. The SEC charged Noble's CFO, Mark Jackson, and Noble's division manager, James Ruehlen with FCPA violations regarding the fraudulent permits they obtained in order to avoid import duties. It was alleged that Jackson and Ruehlen approved numerous payments to the Nigerian government with the knowledge that such payments were bribes.[48]

The SEC alleged that several events put Jackson on notice that the company was violating the FCPA. In 2003, the Nigerian government assessed a penalty against Noble for issuing false documents to obtain TIPs and in 2004, Jackson received a company-wide internal audit report indicating that employees did not understand the FCPA.[49] The SEC also alleged that Ruehlen was on notice that Noble was violating the FCPA. In 2003 and 2004, Ruehlen worked on an audit of the West Africa division, which revealed the use of false documentation and payments of approximately $75,000 every two years in order to obtain TIPs.[50]

In their defense, Ruehlen and Jackson contended that the FCPA requires a plaintiff to allege the identity of the foreign official who has been bribed. They suggested that the SEC must allege by name – or at least by role and job responsibility – the foreign official who was corruptly influenced. The SEC countered that there is nothing in the FCPA that requires pleading of the identity of the foreign official involved with the detail level the defendants advocated.[51]

The court reviewed the FCPA and its legislative history and concluded that the language of the FCPA does not appear to require that the identity of the foreign official involved be pled with specificity. The FCPA terms make it unlawful to authorize payments to any person, knowing that any portion of these payments would be offered to a foreign official. The court found it unnecessary to require the SEC to identify the name, job title and the daily duties of those foreign officials.[52]

Ruehlen and Jackson also argued that the FCPA charges should be dismissed because the SEC has failed to plead sufficient facts that would support the inference that the defendants acted "corruptly" since the facts were equally consistent that with their belief that the payments were permissible facilitating payments.[53] They further argued that the SEC had not pled that they acted corruptly because it failed to plead any violations of Nigerian law, and because both of them had a good faith belief that they were acting lawfully. Specifically, Jackson argued that he had good faith belief that that the payments were legal as facilitating payments and Ruehlen argued that he relied in good faith on the approval of the payments of his supervisors, including Jackson.[54]

The court held that the SEC should amend its complaint to plead sufficient facts to support the claim that in making the payment, Ruehlen and Jackson had a corrupt motive or wrongful purpose of influencing an official to misuse her/his position. The court then dismissed the case without prejudice and allowed the SEC the opportunity to amend its complaint.[55]

The India Retaliatory Discharge Case: Nollner v. Southern Baptist Convention[56]

Ron Nollner is a Tennessee resident with extensive construction business experience. Nollner and his wife, Betty, are members of the Southern Baptist community. In 2008, the International Mission Board (IMB) of the Southern Baptist Convention posted a vacancy for missionary work in New Delhi, India.[57]

The IMB recruited candidates to manage construction of a new office building in Delhi, a job which among other responsibilities, required working with local companies, obtaining the necessary permits and ensuring compliance with engineering standards. This project was to last for a minimum of two years and a maximum of three and the advertisement indicated that the candidate's spouse would also be employed.[58]

The Nollners agreed to take the position after being encouraged by IMB. They thought that the position would last for at least three years. Mr. and Mrs. Nollner both quit their jobs and sold most of their assets in anticipation of moving to India for this extended period.[59]

When the Nollners arrived in New Delhi, they clearly saw that the situation was not as advertised. The planning and permitting phase of the construction project had already been completed and IMB wouldn't allow Mr. Nollner to meet with the architect or contractor until the project was well under way. Over the next several months, Mr. Nollner noticed the following:[60]

- The contractor and architectural firm were controlled by the same individual and were hired without a competitive bidding process and without a written contract;
- The contractor and architect both tried to bribe him;
- The contractor and architect were paying bribes to local Indian officials with IMB funds;
- Sham companies were established to operate the construction project;
- Incomplete job-related invoices;
- Building specifications that weren't immediately available;
- An illegal permit obtained from the Indian government after the IMB represented that the building would be used for residential rather than business purposes; and
- Substandard workmanship and materials.

When Nollner complained about these observations to his supervisors, they didn't seem too concerned indicating that they were potentially complicit in the scam. After complaining constantly about these suspicious activities, Nollner's superiors asked him to resign. When Nollner refused to resign, IMB terminated his employment claiming that his position was no longer necessary.[61]

The Nollners sued IMB, claiming they were liable under Tennessee state law for breach of contract, promissory estoppel and retaliatory discharge as ell as under federal law for violation of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA).[62] The Nollners asserted that IMB violated the FCPA by bribing foreign officials and then retaliating against the Nollners for reporting those violations. They further argued that the FCPA constitutes a statute subject to SEC jurisdiction, that Nollner was required to report the FCPA violations by his employer and that the DFA protected him against retaliation.[63]

The court held that the retaliatory discharge claims did not present a federal question because a state law employment action did not present a substantial federal question over which federal courts may exercise “arising under” jurisdiction.[64] Even if it were shown that the defendants violated the FCPA, a federal statute does not afford the Nollners a private cause of action and the Nollners were protected by Tennessee law against retaliation. The court therefore determined that the FCPA claim must be dismissed.[65]

COMPARING U.S. ANTI-BRIBERY ENFORCEMENT WITH OTHER NATIONS

At the time of the OECD Convention, the U.S., Germany, Japan and France were the largest OECD exporters so if the U.S. is to be compared with other nations with regard to anti-bribery enforcement, it should be with Germany, France and Japan.[66]

Germany, France and Japan depict three different reactions to global anti-bribery commitments.[67] Germany depicts high-compliance, high-enforcement and a cooperative relationship with FCPA prosecutors. France, on the other hand, practices limited anti-bribery enforcement hampered by politics and conflicted relationship with the FCPA. Japan is a nation with little anti-bribery enforcement but an open-minded approach to the FCPA prosecution of its entities.[68]

Germany’s Anti-Bribery Enforcement

On a world-wide scale, Germany is number 2 – after the U.S. – in anti-bribery enforcement. In 2013, the OECD praised Germany for its “robust enforcement efforts.”[69] Transparency International has ranked Germany and the U.S. as active enforcers out of active, moderate, limited, or little/no enforcement. Compliance investigations in Germany are now commonplace and many German entities are withdrawing from nations with high corruption risks.[70]

In 2008, the German company Siemens A.G. agreed to pay $350 million to the U.S. SEC and $450 million to the U.S. Department of Justice (DOJ).[71] The U.S. government found that Siemens had violated the FCPA and the alleged bribes went from a German entity to nations including Iraq, Israel, Mexico and Venezuela, but not to any U.S. officials. Siemens wasn't the only German entity to face FCPA enforcement: Daimler AG in 2010, Deutsche Telekom AG in 2011, and Allianz SE in 2012 all paid millions of dollars in settlements for FCPA violations.[72]

The FCPA enforcement actions in Germany were not the product of unilateral U.S. action. Siemens paid an additional estimated $569 million to the German government, which investigated the entity through the Munich Public Prosecutor's Office.[73] The U.S. Attorney for the District of Columbia announced that the coordination of the U.S. and German law enforcement set the standard for global cooperation in the fight against corruption.[74] The DOJ noted that the OECD Convention legal assistance provisions enabled the collaboration between the DOJ and the Munich Public Prosecutor's Office.[75] All of this evidence indicates that Germany has a positive, working relationship with the FCPA in parallel to its own corruption proceedings.

France's Anti-Bribery Enforcement

France has a poor record when it comes to convicting French companies for foreign bribery. Since the OECD Convention, France has prosecuted five foreign bribery schemes but none of them resulted in convictions.[76] Since 2012, France has opened twenty-four foreign corruption proceedings but only three people have been prosecuted as a result. As opposed to Germany, the OECD considers France to be insufficiently compliant with the Anti-Bribery Convention.[77]

Transparency International has categorized foreign bribery prosecution in France a limited enforcement nation, citing a lack of prosecutorial independence.[78] Statutory law hampers anti-bribery enforcement in France. France has a dual criminality requirement for foreign bribery so the bribery must be an offence in both nations in order to enable French prosecution. Furthermore, unless the offender or victim is a French national, France will not assert jurisdiction in bribery schemes so entities get around French criminal liability by dealing with intermediaries that aren't French nationals.[79]

France's relationship with extraterritorial prosecution is strained. The DOJ settled with Total in 2013 while Parisian judges in 2014 just decided that Total should be put on trial in France.[80] Data protection has been problematic for FCPA enforcement. The French Data Protection Act applies to all activity in a French territory and the Commission nationale de l'informatique et des libertes must authorize all personal data transfers to the U.S. These data transfers include information on an individual's personal affiliations, government affiliations and criminal records, which are needed in establishing bribery relationships during FCPA enforcement proceedings.[81] If anyone tries to investigate potential business partners in France, that person may be unable to obtain the information needed to ensure that the business partners aren't involved in corrupt payments.[82]

Japan's Anti-Bribery Enforcement

Japan faced strong OECD criticism for its insufficient anti-bribery enforcement.[83] While Japan has the third largest economy in the world with robust import and export businesses, it has only prosecuted four corruption schemes since the OECD Convention.[84] Transparency International ranked Japan as a "little or no enforcement" nation, which is the lowest category possible.[85]

The OECD identified a number of specific concerns about Japan's approach to foreign corruption. First, there is a lack of resources targeted for the purpose of detecting, investigating and prosecuting bribery cases. Second, Japan's Ministry of Economy, Trade and Industry has not defined what comprises a facilitation payment versus a bribe. Lastly, Japan hasn't ensured that tax inspectors are trained to identify miscellaneous tax return expenses that are actually suspicious payments.[86] While France has problems in obtaining convictions, Japan has problems setting up investigations.

In 2011, the DOJ charged JGC corporation for authorizing a joint venture to hire agents that would pay bribes to Nigerian government officials in order to obtain contracts.[87] Although JDC wasn't an issuer, the U.S. established jurisdiction through a vicarious liability theory through an American joint-venture partner. JGC paid $218.8 million in exchange for a deferred prosecution agreement.[88] It isn't clear whether Japan provided any official support to the U.S. prosecutors during the FCPA enforcement case of JGC. In the JGC case, the U.S. cited significant assistance from France, Italy, Switzerland and the U.K. but no mention of Japan.[89]

Compliance and the Free Rider Problem

Why would the U.S., Germany, France and Japan have such different approaches towards anti-bribery enforcement? Many nations are concerned that by implementing the FCPA, their companies may lose business opportunities to those companies that can offer bribes without any repercussions. While a nation may agree that bribery is bad, it does not want to bear the cost of implementing an anti-bribery legal regime at an economic cost to its companies. But nations that do prosecute bribery can't stop nations that don't prosecute bribery from benefitting from their anti-bribery enforcement and this causes a free rider problem.[90]

Free riding occurs when an actor doesn't have to pay the costs of receiving a non-excludable good. Anti-corruption enforcement creates a non-excludable good because nations that don't spend the money to enforce anti-corruption regimes still benefit from the enforcement by other nations. This benefit is twofold.[91]

First, the non-enforcing nation saves resources while other nations prosecute corrupt entities that affect the non-enforcing nation. Corruption causes economic inefficiencies by shifting resources to the corrupt project with the best bribe rather than the best quality.[92] When the U.S. prosecutes a corrupt company in a non-enforcement nation, the prosecution may force other companies in the non-enforcement nation to consider ceasing their bribery practices or risk FCPA prosecutions.

Second, a non-enforcing nation can giver their companies a competitive edge abroad. These corporations can use bribery to win contracts or avoid legal barriers while corporations from enforcing nations can't pay the bribes out of fear of FCPA prosecution. Once the number of competing nations implement anti-bribery legal structures, the non-enforcing nation can start to prosecute bribery without the fear that its companies will lose competitors paying bribes.[93]

This leads to the question as to whether the U.S. should have investigated and prosecuted the Azerbaijan Oil Privatization, the Nigerian Who is the Bribe-Taker and the India Retaliatory Discharge cases and other such cases involving non-enforcing nations. If Azerbaijan, Nigeria, India, France and Japan won't investigate and prosecute corruption within their borders and won't cooperate with the U.S. when it investigates and prosecutes corruption, why should the U.S. take on the costs of doing the work of other nations?

One way the U.S. can combat corruption is by placing restrictions of foreign assistance. For example, appropriated funds are to be made available for direct assistance to foreign governments only if "no level of acceptable fraud is assumed" and the receiving government cooperates with the U.S. and uses competitive procurement systems and effective monitoring and evaluation processes, among other requirements.[94] Unless the receiving government effectively investigates and prosecutes corruption within its own national borders, that receiving government won't receive any U.S. assistance. This could be a solution to the free rider problem.

CONCLUSION

For two decades, the global community has agreed that nations must combat foreign bribery. But dramatic differences exist in foreign bribery investigations and prosecutions even among nations that have signed the OECD Convention. Many have claimed that the U.S. is too broad when it comes to investigating and prosecuting corruption abroad while other nations are too passive when combating corruption within their own borders.

Enforcement of anti-bribery laws aimed at global corruption remains in infancy outside the U.S. with the notable exception of Germany. Many nations are afraid of losing business opportunities as a result of implementing the FCPA so they are reluctant to investigate and prosecute bribery cases in their own jurisdictions. While there is evidence that initiatives under the OECD Convention are becoming more effective in deterring corruption by signatory nations, more needs to be done.

Inevitably, multi-national cooperation and coordination will be vital to global bribery in the future. There must be a global harmonization of the existing mechanisms that are used to investigate and prosecute corruption. Eradicating bribery and the free-rider problem, which cause the harmful distortion of global markets, is a vital step in creating a less corrupt international business environment.

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[1] *See* Ezekiel Rediker, *The Foreign Corrupt Practices Act: Judicial Review, Jurisdiction, and the Culture of Settlement",* 40 SETON HALL LEGIS. J. 53, 57 (2015) (stating that the U.S. Congress enacted the FCPA as a response to the Watergate Scandal, where U.S.-based multinational corporations created slush funds to make illegal payments to government officials, which included President Richard M. Nixon's campaign).

[2] *Id.* at 60.

[3] Barr Benyamin et al., *Foreign Corrupt Practices Act,* 53 AM. CRIM. L. REV. 1333, 1335 (2016); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

[4] *See* Benyamin, *supra* note 3, at 1335-36.

[5] *See* Annalisa Leibold, *Extraterritorial Application of the FCPA Under International Law,* 51 WILLAMETTE L. REV. 225, 233 (2015) (noting that FCPA matters averaged 3 per year for two decades compared to totals of about 100 in the recent decade).
[6] *See* Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement,* 49 U.C. DAVIS. L. REV. 497, 525 (2015) (international organization articulating a list of several concerns about the FCPA).
[7] *See* Leibold, *supra* note 5, at 235 (stating that U.S. agencies enforce the FCPA as broadly as possible due to the fact the FCPA's jurisdiction language is unclear).
[8] *Id.* at 239.
[9] *See* Andrew Weismann and Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform, Oct. 2010 (available at https://instituteforlegalreform.com/research/restoring-balance-proposed-amendments-to-the-foreign-corrupt-practices-act/).
[10] *Id.*
[11] Rachel Brewster, *The Domestic and International Enforcement of the O.E.C.D. Anti-Bribery Convention,* 15 CHICAGO J. INT' L. 84-109 (2014).
[12] Brad Graham and Caleb Stroup, *Does Anti-Bribery Enforcement Deter Foreign Investment?* 23 APPLIED ECO. LETTERS 63-67 (2015).
[13] *Id.*
[14] *Id.*
[15] Anna D'Souza and Daniel Kaufmann, *Who Bribes in Public Contracting and Why: Worldwide Evidence from Firms,* ECON. OF GOVERNANCE 3 (2013).
[16] *Id.*
[17] Sara Saenz, *Examining International Variance in Foreign Bribery Prosecution: A Comparative Case Study,* 25 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 272 (2015).
[18] Michael Geiger, *220 Years Later and the Commonwealth is Still Imposing Laws on the United States: A Comparative Look at U.S. Antibribery Legislation and the United Kingdom's Bribery Act 2010,* 47 VAND. J. TRANSNAT'L. L. 1405 (2013).
[19] Foreign Corrupt Practice Act, 15 U.S.C. §§ 78dd-1 to -3 (2012). *See* Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-pp (2012).
[20] *Id.*
[21] Id. § 78dd-1. Covered issuers are those with securities registered under §781, or required to file reports; § 78dd-2. Domestic concern is a "citizen,

national or resident of the United States, or which is organized under the laws" of a State, territory, possession, or commonwealth therein.; § 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns.

[22] *See* Mauro Wolfe, *Does the US Government Have Limitless Jurisdiction Enforcing the FCPA?* NEWSL. CRIM. L. SEC. LEGAL PRAC. DIVISION INT'L B. ASS'N (Int'l B. Ass'n. London, U.K.) May 2010. Fiat's American Depositary Receipts were registered pursuant to Section 12(b) of the Exchange Act and listed on the New York Stock Exchange.

[23] *See* Richard Cassin, *With Alstom, Three French Companies Are Now in the FCPA Top Ten,* FCPA BLOG (Dec. 23, 2014, 9:45 AM), https://fcpablog.com/2014/12/23/with-alstom-three-french-companies-are-now-in-the-fcpa-top-t/.

[24] Gieger, *supra* note 18, at 1387.

[25] *Id.*

[26] 667 F.3d 122 (2nd Cir. 2011).

[27] *Id.*

[28] Charles Wallace et al., *The Pirates of Prague: An Exiled Fund Prodigy and His Brash Wall Street Mentor Promised to Teach Czech Industry Western Management Methods; Instead, Investors Learned a Painful Lesson About the Perils OF Emerging Markets,* CNN MONEY (Dec. 23, 1996), https://money.cnn.com/magazines/fortune/fortune_archive/1996/12/23/219833/index.htm.

[29] *Id.*

[30] *United States v. Kozeny*, 667 F.3d 122 (2d Cir. 2011).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Cecile Kuhne III, BUSINESS BRIBES: CORPORATE CORRUPTION AND THE COURTS (2017).

[42] 908 F.Supp.2d 834 (S.D.Tex. 2012).

[43] *Id.*

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] 852 F.Supp.2d 986 (M.D.Tenn. 2012).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 12, Dec. 18. 1997, 37 LL.M.4 (OECD Convention).
[67] Sara Saenz, *Explaining International Variance in Foreign Bribery Prosecution: A Comparative Case Study,* DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 286 (2015).
[68] *Id.*
[69] *See* ORG. FOR ECON. CO-OPERATION & DEV. (OECD), OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF PUBLIC OFFICIALS 31 (2014).
[70] *Exporting Corruption: Germany,* TRANSPARENCY INT'L, http://www.transparency.org/exporting_corruption/Germany.
[71] SEC Charges Siemens AG for Engaging in Worldwide Bribery, SEC. & Exch. Comm'n (Dec. 15, 2008), http://www.sec.gov/news/press/2008/2008-294.htm; *Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million to Combined Criminal Fines,* DEP'T OF JUSTICE (DEC. 15, 2008),

http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

[72] Audrey Kravets, *Introduction to the U.S. foreign Corrupt Practices Act in Germany,* 38 DAJV NEWSL. 32, 33 (2013).

[73] *Supra,* note 71.

[74] *Id.*

[75] *Id.*

[76] *Statement of the OECD Working Group on Bribery on France's Implementation of the Anti-Bribery Convention,* OECD (Oct. 23, 2014), http://www.oecd.org/newsroom/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm.

[77] *Id.*

[78] *Exploring Corruption: France,* TRANSPARENCY INT'L., http://www.transparency.org/exporting_corruption/France.

[79] European Commission, *Annex 10 (France) to the EU Anti-Corruption Report,* at 7, COM (2014) 38 final (Feb. 3, 2014), http://cc.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_france_chaptr_en.pdf.

[80] Inti Landauro, *France to Prosecute Total SA Over Iranian Contracts in the 1990s,* WALL ST. J. (Nov. 25, 2014), http://www.wsj.com/articles/france-to-prosecute-total-sa-over-iranian-contracts-in-the-1990s-1416940041.

[81] GIBSON, DUNN & CRUTCHER LLP, 2013 MID-YEAR FCPA UPDATE 5 (2013).

[82] Paul Berger et al., *Conducting Third Party FCPA Diligence in France,* GLOBAL LEGAL POST (Oct. 24, 2012).

[83] Charles Duross & James Hough, *Japan Discloses New Efforts to Combat Foreign Bribery as OECD Steps Up Pressure on Japan to Increase Enforcement,* MONDAQ (May 20, 2014).

[84] *See* ORG. FOR ECON. CO-OPERATION & DEV. (OECD), OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF PUBLIC OFFICIALS 31 (2014).

[85] *Exploring Corruption: Japan,* TRANSPARENCY INT'L. http://www.transparency.org/exporting_corruption/Japan.

[86] *Japan Follow-Up to the Phase 3 Report & Recommendations*, at 4 (Feb. 2014), http://www.oecd.org/dat/anti-bribery/JapanP3WrittenFollowUpReportEN.pdf.

[87] *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty,* DEP'T OF JUSTICE (Apr. 6,

2011), http://www.justice.gov/opa/pr/jgc-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay.

[88] *See* Deferred Prosecution Agreement at 3, United States v. JGC Corporation, No. 4:11-cr-00260 (S.D. Tex. Apr. 6, 2011).

[89] *Supra,* note 87.

[90] Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 WEEKLY COMP. PRES. DOC. 2290 (Nov. 10, 1998).

[91] Sara Saenz, *Explaining International Variance in Foreign Bribery Prosecution: A Comparative Case Study,* DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 290 (2015).

[92] *Id.*

[93] *Id.*

[94] Congressional Research Service, *Countering Corruption Through U.S. Foreign Assistance* (May 27, 2020), https://sgp.fas.org/crs/row/R46373.pdf.

AVOIDING THE LEGAL LANDMINES ATTENDANT TO THE U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FORM I-9 COMPLIANCE

by

Victor D. López, J.D.[*]

I. INTRODUCTION

The Immigration Reform and Control Act of 1986 (IRCA)[1] provided significant revisions to the Immigration and Nationality Act of 1965 (INA).[2] IRCA is best known for providing the means for most unauthorized aliens in the United States at the time who had not been convicted of serious crimes a process to become legal permanent residents. But it also, *inter alia*, made it illegal for employers to knowingly employ an unauthorized alien or to continue to employ a previously hired employee when it learns such an employee is unauthorized to work in the United States.[3] IRCA imposes an employment verification system that employers must follow when hiring employees in order to help ensure that they are authorized to work.[4] It is from this statutory framework that the current Employment Eligibility Verification Form I-9 that all employers are required to use when hiring new full or part time employees

[*] Cypres Family Distinguished Professor in Legal Studies in Business, Hofstra University, Frank G. Zarb School of Business. The author gratefully acknowledges the summer research grant from the Zarb School that facilitated his research for this and other projects.

was developed by the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS).

The three-page Form I-9 and its attendant instructions appear simple enough to complete.[5] The process, however, provides numerous potential legal landmines for the unwary that can result not only in significant fines and potential civil and criminal penalties attendant to the completion, editing and retention of the form and related documentation after USCIS audits, but also in potential law suits by prospective employees based on Title VII employment discrimination, as well as disparate treatment claims by other individuals protected under both federal and state anti-discrimination laws. This article will first examine the specific requirements for completing, correcting, handling and retaining Form I-9 paperwork and then take a close look at some effective strategies all employers can use to minimize their potential exposure to civil, criminal and employment discrimination related claims. Finally, the article will examine available resources that can help employers, especially small businesses without extensive resources to hire consultants or provide training and support to individuals responsible for completing the I-9 verification process, to avoid civil and criminal penalties.

II. THE FORM I-9 EMPLOYMENT ELIGIBILITY VERIFICATION PROCESS

The specific requirements for employers and employees to complete Form I-9 are relatively straight forward. The first page of the four-page form must be filled out by the employee and submitted to the employer after accepting a job offer but no later than the first day of employment as is clearly noted in both the form itself and its attendant instructions.[6] The employee is required to fill out personally identifiable information that includes their full name, address, date of birth, social security number, email and telephone number.[7] In addition, the employee must attest by checking off the appropriate box and providing additional information as required that they are either a citizen of the Unites States, a non-citizen national, a lawful permanent resident (if so must include alien registration/USCIS number), or an alien authorized to work in the United States (must also include the expiration date of such authorization if applicable). The form must then be signed and dated.[8] If the employee had someone translate or help fill out the form, the individual who translated or provided assistance must also sign and date the form and provide their full name and address, attesting that the information provided is to the best of their knowledge true and correct.[9]

When an employment offer is made, prospective employees should be given a copy of the first page of the form that they need to complete and submit by the first day of employment after they accept the position, as well as the fourth page of the form which lists documents that can be submitted to prove the employee's identity and their authorization to work in the United States. For reasons that will be discussed in Section III, infra, employers must not express a preference for what documents the employee can submit and should only tell the employee that they will be required to submit either one document from Column A or one document from column B and one document from Column C.[10]

Figure 1: List of Acceptable Documents (I-9 Form page 4)

LISTS OF ACCEPTABLE DOCUMENTS
All documents must be UNEXPIRED

Employees may present one selection from List A
or a combination of one selection from List B and one selection from List C.

LIST A **Documents that Establish Both Identity and Employment Authorization**	OR	LIST B **Documents that Establish Identity**	AND	LIST C **Documents that Establish Employment Authorization**
1. U.S. Passport or U.S. Passport Card		1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		1. A Social Security Account Number card, unless the card includes one of the following restrictions: (1) NOT VALID FOR EMPLOYMENT (2) VALID FOR WORK ONLY WITH INS AUTHORIZATION (3) VALID FOR WORK ONLY WITH DHS AUTHORIZATION
2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)		2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address		2. Certification of report of birth issued by the Department of State (Forms DS-1350, FS-545, FS-240)
3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa		3. School ID card with a photograph		3. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal
4. Employment Authorization Document that contains a photograph (Form I-766)		4. Voter's registration card		4. Native American tribal document
5. For a nonimmigrant alien authorized to work for a specific employer because of his or her status: a. Foreign passport; and b. Form I-94 or Form I-94A that has the following: (1) The same name as the passport; and (2) An endorsement of the alien's nonimmigrant status as long as that period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form.		5. U.S. Military card or draft record		5. U.S. Citizen ID Card (Form I-197)
6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI		6. Military dependent's ID card		6. Identification Card for Use of Resident Citizen in the United States (Form I-179)
		7. U.S. Coast Guard Merchant Mariner Card		7. Employment authorization document issued by the Department of Homeland Security
		8. Native American tribal document		
		9. Driver's license issued by a Canadian government authority		
		For persons under age 18 who are unable to present a document listed above:		
		10. School record or report card		
		11. Clinic, doctor, or hospital record		
		12. Day-care or nursery school record		

Examples of many of these documents appear in the Handbook for Employers (M-274).

Refer to the instructions for more information about acceptable receipts.

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If employees provide more documentation than required, they should be told to select which of the acceptable document(s) they would like to submit rather than accepting them all. For example, both a U.S. passport and a permanent resident card or alien registration receipt in and of themselves serve as proof of identity and proof of authorization to work. If an employee provides both a U.S. passport and a permanent resident card, the employer should tell the employee that either is acceptable and let the employee choose which to submit rather than accepting both or asking the employee to submit one rather than the other. Likewise, if an employee offers a passport, a college I.D. with a photograph and an original or certified copy of a birth certificate, the employer should ask the employee which they would like to submit, passport alone (a Column A document) or both the College I.D. (a Column B document) and the birth certificate (a Column C document). All three forms should not be accepted nor should a preference be given by the employer as to which document(s) to submit for reasons that will likewise be discussed in Section III infra.

After the employee provides the completed first page of the form and submits the required documentation, the employer should make copies of the document(s) submitted as proof of identity and right to work and return the originals to the employee. The employer or its authorized representative has three business days from the employee's first day of employment to verify the acceptability of the documents provided by the employee.[11] The relevant information from the accepted document(s) must be noted on page two of the form and the employer or its authorized representative must the sign and date the form including an attestation to the effect that they examined the documents, that the documents appear to be genuine and relate to the employee in question, and that to the best of their knowledge the employee is authorized to work in the U.S. The third page of the form is for use for reverification of an employee’s right to work in some instances when an employee is rehired after a severance of employment.

Recertification is required when, for example, employees obtains an extension on the original expiration date of their work authorization due to a change of immigration status or other valid reason. Recertification must be completed before the original expiration date of the work authorization. The form must also be completed when an employee quits or is terminated and then is rehired within three years of their initial hire date. If more than three years from the original hire date have passed when an employee is rehired, then a new Form I-9 must be completed.[12] In cases where an employee is unable to present acceptable documentation of his/her authority to work in the United States within three days of the first date of employment, he/she must present a receipt for the application for the document within that three-day period and the actual document itself within 90 days of the date of employment.[13] IRCA also imposes on employers a duty to maintain Form I-9 for all employees and make them available for inspection upon three days' notice.[14] Employers must retain I-9 forms for every employee for three years from the original date of hire and for terminated employees at least one year from the date of termination, whichever is longer.[15]

III. LIABILITY EXPOSURE ATTENDANT TO THE I-9 VERIFICATION PROCESS

There are two primary sources of potential liability for employers that arise from the Form I-9 verification process. The first relates to potential criminal and civil penalties that can attach during an I-9 inspection by the U.S. Customs and Immigration Service (ICE). The second relates to potential claims by employees who allege discrimination in violation of federal or state employment or civil rights laws by the employer through disparate treatment or otherwise during the I-9 process of verifying the employee's identity and/or authorization to work in the U.S. Both of these will be briefly addressed next.

A. Potential Liability for Non-Compliance

Any person or entity which engages in a pattern or practice of intentional, repeated violations of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 can be fined up to $3,000 for each unauthorized alien hired, imprisoned for not more than six months, or both, notwithstanding the provisions of any other federal law relating to fine levels.[16] Knowingly hiring or recruiting for a fee an alien unauthorized to work in the U.S. can also result in cease and desist orders and civil penalties under IRCA of not less than $583 and not more than $4,667 for any unauthorized alien after November 2, 2015 for a first offense.[17] Second offenses are punishable after November 2, 2015 from not less than $4,667 and not more than $11,665 for each unauthorized alien with respect to whom the second offense occurred after November 2, 2015.[18] Third and subsequent offenses after November 2, 2015 are punishable by fines ranging from not less than $6,999 to $23,331.[19] Employers are also responsible for the proper completion of Form-I9 and can be subject to penalties for omissions in the employee's portion of the form and for failure to properly inspect and verify the document(s) submitted by the employee within the specified period of time (within three business days of the date of employment).[20] Such violations are subject to penalties of not less than $234 and not more than $2,332 for each individual with respect to whom such violation occurred after November 2, 2015.[21]

B. Potential Liability for Violation of Federal and/or State Anti-Discrimination Laws

In addition to the potential for criminal and civil fines for willful or negligent violations of IRCA in the I-9 verification process, employers can also run afoul of federal and state prohibitions against unlawful discrimination in employment based on sex, race, color, religion, national origin, sexual orientation, age, disability status and similar restrictions.

IRCA itself makes it an unfair immigration-related employment practice to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, recruitment or referral for a fee of the individual for employment, or the discharging of the individual from employment because of the individual's national origin or citizenship.[22] This restriction does not apply to a person or entity that employs three or fewer employees, nor does it apply if the discrimination is otherwise covered under Section 703 of the 1964 Civil Rights Act[23] (e.g., prohibiting discrimination in employment on the basis of race, color, religion, sex or national origin for covered employers[24]). Employers who are engaged in an industry affecting commerce who hire 15 or more employees on a full- or part-time basis for each working day in 20 or more calendar weeks for the current of preceding year are "covered employees" under Title VII of the 1964 Civil Rights Act.[25] Allegations of discrimination based on race, color, religion, sex or national origin against employees of covered employers are investigated by the Equal Employment Opportunity Commission (EEOC).[26] Employers can find themselves on the receiving end of both sanctions for unlawful discrimination in the hiring, promotion and retention of employees under IRCA and under Title VII of the 1964 Civil Rights Act not only in instances of willful discrimination, but also through negligence in failing to observe the timelines dictated by the Form I-9 verification process, by failing to receive and verify the required proof of identity and work authorization of their employees and in failing to observe the requirements of I-9 handling, storage and retention. Moreover, subjecting protected employees to disparate treatment during the I-9 verification process can also result in unfair labor practices charges. In 2013, for example, the Justice Department announced an agreement with Centerplate Inc., one of the largest hospitality companies in the world, resolving allegations that the company violated the anti-discrimination provision of the Immigration and Nationality Act (INA) by engaging in a pattern or practice of treating work-eligible non-U.S. citizens differently than U.S. citizens in requesting from the former specific documents issued by the U.S. Department of Homeland Security that were not required of U.S. citizens.[27] The company agreed to pay a $250,000 fine as part of the settlement.[28]

IV. SIMPLE STRATEGIES FOR AVOIDING LIABILITY ATTENDANT TO THE I-9 VERIFICATION PROCESS

The criminal and civil penalties for employers who fail to comply with the Immigration and Nationality Act by either knowingly hiring unauthorized workers or negligently failing to comply with the Form I-9 verification process can prove very costly, especially for small businesses that may lack the resources to maintain a dedicated, expert human resources manager to handle the process or consult legal counsel when issues arise. The Form I-9 verification process can also result in unintentional violations of federal and state antidiscrimination laws during the hiring and termination of employees who fail to provide the required information on Form I-9 and/or acceptable documents to prove their identity and work authorization when employees or prospective employees claim that they were subjected to disparate treatment because of their age, sex, nationality, color, religion, age, disability or other protected classification. While no single strategy can insulate any employer, large or small, from liability for mishandling the I-9 verification process or claims of unlawful employment discrimination, there are some simple strategies that all employers should employ to minimize the risk.

A. Use Handbook for Employers M-274

USCIS provides detailed instructions for completing Form I-9 online in a 15-page PDF file that provides line-by-line instructions.[29] In addition, all employers and their assignees responsible for completing, verifying and maintaining Form I-9 should be familiar with and refer to the Handbook for Employers M-274 that provides additional detailed guidance on completing the form and issues that may arise during the I-9 verification process.[30] The manual can be printed and/or accessed online.[31] Every employer should make available a printed copy of the manual to the person(s) responsible for handling the I-9 verification process as it is a very useful source of information that can help prevent problems that can arise during the verification process involving the completion of Form I-9 itself, data storage and retrieval and USCIS audits. If questions remain that cannot be clearly resolved by reference to the instructions for completing Form I-9 and the Handbook for Employers M-274, employers should seek guidance from USCIS and/or competent counsel.[32]

B. Avoid Document Abuse Charge

Form I-9 makes clear the types of documentation employees may submit as proof of identity and of authorization to work in the United States. An employer should never suggest what documentation it prefers employees to submit and should not accept more documentation than that required to satisfy Form I-9. The Immigration and Nationality Act specifically prohibits employers requesting more or different documents than are required under section 1324a(b) or refusing to honor otherwise acceptable documents that on their face appear to be valid.[33]

For example, if an employee on the first day of employment submits a valid U.S. Passport, a driver's license issued by any state that contains a photograph and a social security card, the employer should not accept all three forms of identification. The employee should be told that either the U.S. Passport (a Column A document that satisfies both the requirements of proof of identity and authorization to work) or the driver's license (a document from column B that satisfies as proof of identity) and the Social Security Card (a document from Column C that satisfies as proof of work authorization) should be submitted and let the employee decide which to submit.[34] Logging in all three documents and/or making copies of the originals to keep in the Employee's I-9 file can lead to a potential future disparate treatment claim by the employee and/or a claim of document abuse for requiring more documentation than required by the I-9 verification process.

IRCA does not require copies of the documentation submitted by the employee to prove her/his identity and authorization to work to be kept—only that the information from said documents be entered in the Form I-9 as evidence that the employee provided the required information; If copies are made, however, then they must be attached to Form I-9.[35] Making copies of documentation provided by employees as proof of identity and eligibility to work in the United States can be useful during a USCIS audit if the information in the form proves to be invalid, such as in the case when an invalid but official-looking Social Security card is offered as evidence of authorization to work by the employee, as it will show that the employer accurately entered the information on Form I-9 and that the proffered document appeared to be genuine, thereby absolving the employer of liability for hiring an unauthorized worker. But if an employer opts to make and retain copies of proffered documents from employees, it is critically important that it does so for every employee hired and not merely if it suspects that documentation submitted by a given employee may be fraudulent. Making copies of documents of some employees and not others can subject the employer to charges of unlawful discrimination/disparate treatment.

C. Maintain Form I-9 Files Separate from Employee Personnel Files

Employers should always store Form I-9 and its attendant documentation in a dedicated file for each employee separate from the employee's personnel file.[36] Doing so can avoid creating the appearance of making discriminatory employment decisions.[37] As with personnel files, these must be secured and made accessible only to persons who have a bona fide need to access the information. Issues of maintaining confidentiality aside, Form I-9 should be kept separate from personnel files for other legal and practical reasons. IRCA does not require Form I-9 to be kept separate from an employee's personnel file, but maintaining them separate will facilitate HR to more easily monitor compliance, control access, and respond to an audit by the U.S. Citizenship and Immigration Services (USCIS).[38]

D. Follow Appropriate Protocols for Correcting or Adding Information on Form I-9

If errors or omissions are discovered in any Form I-9 by the employer through an internal I-9 audit or otherwise, corrections must be made as follows:

- Corrections to Section 1 of the Form I-9 should be made by the employee and not the employer by drawing a line through the incorrect information, entering the correct or missing information, and initialing and dating the correction.[39] A statement as to the reason for the correction should be attached to the form.[40] If the correction or addition cannot be made by the employee, the employer should leave the error or omission uncorrected and add a statement as to the reason the employee cannot make the change (e.g., no longer works for the employer).[41]

- Corrections or omissions entered by a preparer or translator who assisted the employee in filling out Section 1 of the form can be made either by the preparer/translator, and either the preparer/translator or the employee can then initial and sign the correction(s)/addition(s).[42]
- The employer/agent filling out Sections 2-3 of Form I-9 can make corrections or additions in a similar manner by entering a line through the incorrect information, entering the correct or missing information and initialing the change.[43] Missing dates should not be back dated; rather the date of the correction should be added and initialed.[44] Changes should never be concealed by erasure or otherwise. If multiple changes are needed in any given section, a new form I-9 can be used and that section corrected, dated, and attached to the original Form I-9 with the original information and prior corrections.[45]
- If the electronic version of Form I-9 is used, the audit trail must reflect the changes to Sections 1, 2 and 3 of the form.[46]

E. Internal Form I-9 Audits

Conducting internal Form I-9 audits can allow employers to discover and correct missing or incorrect information in employees' I-9 files to ensure they are correct and up to date should a USCIS audit occur. However, conducting internal audits can raise potential problems of its own for employers if care is not taken to ensure that these are not discriminatory or retaliatory in nature or perceived that way by employees. The U.S. Justice Department though the Office of Special Counsel for Immigration-Related Unfair Employment Practices has issued useful guidelines for employers to use when conducting Form I-9 audits.[47] The guidance includes an admonition against employers conducting Form I-9 internal audits that are discriminatory or retaliatory in nature.[48] If such audits are undertaken, therefore, employers must make certain that employees are not singled out for special scrutiny such as by reviewing only Forms I-9 for employees who are non-citizens, or for employees with whom the employer is displeased for any reason. If done at all, Form I-9 audits must be truly random or must be done for all employees. An exception can be made when an employer has a valid reason to believe that the employee may be unauthorized to work such as when the employer receives a tip that an employee is not work-authorized.[49] Employers may delegate the task of an internal Form I-9 audit to an outside auditor, but if it does so it will still remain liable for any violations committed by the third party with regard to the audit.[50]

F. Using E-Verify During the Form I-9 Verification Process

E-Verify is a free, web-based system provided by the U.S. Department of Homeland Security and USCIS that allows enrolled employers to confirm the eligibility of newly hired employees to work in the United States.[51] "E-Verify employers verify the identity and employment eligibility of newly hired employees by electronically matching information provided by employees on the Form I-9, Employment Eligibility Verification, against records available to the Social Security Administration (SSA) and the Department of Homeland Security (DHS)."[52] Participation in the program is voluntary for employers other than for "employers with contracts that contain the Federal Acquisition Regulation (FAR)" for whom enrollment in the E-Verify program is required.[53] States can also require the use of E-Verify for some or all employers.[54] E-Verify is available in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, and Commonwealth of Northern Mariana Islands, is currently the best means available to electronically confirm employment eligibility."[55]

The U.S. Supreme Court ruled in *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968 (2011) that a state requirement that all employers use of E-Verify in the I-9 verification process for newly hired employees is not preempted by federal law. [56] According to the National Conference of State legislatures, at present 20 states require the use of E-Verify some form as follows:

- Nine states—Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Utah—require E-Verify for all employers (Some states have exemptions for small businesses);

- Eleven states—Colorado, Florida, Idaho, Indiana, Michigan, Missouri, Nebraska, Oklahoma, Texas, Virginia and West Virginia—require E-Verify for most public employers; and

- Minnesota and Pennsylvania require E-Verify for some public contractors and subcontractors.[57]

For employers, use of the free E-Verify system can simplify I-9 verification and limit the risk of fines or criminal liability for failing to verify new hires' authorization to work. Reliance of government-provided data about new hires through E-Verify would satisfy the employer's due diligence requirement in the I-9 verification process since the government itself in its amicus brief to the *U.S. Supreme Court in Chamber of Commerce of the United States V. Whiting* is quoted by Chief Justice Roberts in the Court's opinion as stating that "E–Verify's successful track record ... is borne out by findings documenting the system's accuracy and participants' satisfaction."[58]

One major cautionary note for employers who voluntarily opt to use the E-Verify system is that they must use it for all newly hired employees in order to avoid charges of disparate treatment. Using it in only some selective cases can lead to charges of employment discrimination.[59]

V. CONCLUSION

The Immigration Reform and Control Act of 1986 (IRCA) places the burden of verifying employees' authorization to work in the United States squarely on the shoulders of employers. At first glance, implementation of the Form I-9 verification process may seem relatively straight-forward. Upon closer examination, however, the potential risk of civil and criminal liability for employers when implementing Form I-9 document verification, form completion, record correction and record retention requirements comes into sharp focus. As noted in Section III supra, liability exposure for employers goes far beyond the potential for criminal and civil liability for the willful or negligent failure to comply with the Form I-9 verification process. Employers can also incur liability for violating federal and state anti-discrimination laws if they willfully or negligently subject protected classes of individuals to disparate treatment in the Form I-9 verification or re-verification process. This is an especially onerous burden for small businesses that lack the resources to hire experienced professionals to handle the Form I-9 verification and record keeping process. Small business owners can find themselves in a no-win scenario when faced with the quandary of either accepting documentation as proof of identity and authorization to work that may not prove to be acceptable in an official I-9 audit (e.g., fraudulent documentation that should have raised a question by the employer), or asking for additional documentation from an employee in such circumstances and thereby subjecting itself to a potential civil suit for disparate treatment by the employee.

If Congress were truly interested in preventing unauthorized workers from joining the U.S. workforce, it could require the use of E-Verify for all employers who meet a minimum threshold in the number of employees they hire or the amount of business they do in a given year that can satisfy its Commerce Clause authority.[60] This would greatly decrease the risk of noncompliance by employers who rely on information contained in the E-Verify system that is provided by the federal government and can be presumed to be valid.[61] In the absence of such a mandate, however, all employers can still voluntarily choose to use the E-Verify system in the Form I-9 verification process. As previously noted, however, it is critically important that employers that choose to avail themselves of E-Verify must consistently use it for every new employee hired in order to avoid the potential of disparate treatment claims.[62]

In the absence of federal regulations requiring the use of E-Verify, states should consider following the lead of Alabama, Arizona, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Utah and require E-Verify be used by all employers in the hiring process with the possible exception of some small businesses.[63] This would help ensure both that only authorized workers are hired, which is after all the purpose of the Form I-9 verification process, while at the same time insulating employers from claims of disparate treatment when E-Verify flags potential issues with an employee's identity or authorization to work.

The mandatory use of E-Verify as part of the Form I-9 verification process would ensure that every new employee is treated fairly while at the same time lessen the potential for willful or unintentional instances of disparate treatment by employers with its attendant potential liability. It would make it much harder for unscrupulous employers to discriminate against prospective employees by requiring more or different documentation than that required by Form I-9, or to willfully hire unauthorized workers by "relying" on documentation they should suspect or know to be fraudulent. And it would prevent unauthorized workers from obtaining employment through the use of fraudulent documentation that E-Verify would flag as suspect or invalid. These are, after all, the whole purpose that underlie the Form I-9 verification process. Since Congress has opted to shift the burden for verifying employees' identities and authorization to work to employers as part of the hiring process, is it too much to ask that the best, most reliable and free tool available for employers to fairly and consistently fulfill the verification process while reducing their exposure to civil and criminal liability be required to be used?

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[1] PL 99–603 (1986), 100 Stat. 3359.
[2] PL 89-236 (1965), 79 Stat. 911.
[3] PL 99-603 (1986) Sec. 274A (a)(1)-(2), 100 Stat. 3360.
[4] See PL 99-603 (1986) Sec. 274A (b), 100 Stat. 3361 *et. seq.*
[5] The form and instructions are available online at https://www.uscis.gov/i-9 (last accessed October 19, 2020).
[6] See https://www.uscis.gov/i-9 (last accessed October 19, 2020).

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[7] *Id*. See also Instructions for Form I-9, Department of Homeland Security, U.S. Citizenship and Immigration Services at 2-4. (Available online at https://www.uscis.gov/sites/default/files/document/forms/i-9instr.pdf (last accessed October 19, 2020).

[8] *Id* at 4.

[9] *Id*.

[10] *Id*. at 8-11.

[11] *Id*. at 6.

[12] *Id*. at 12-14.

[13] 8 C.F.R. § 274a.2(b)(vi).

[14] 8 C.F.R. § 274a.2(b)(2)(ii)

[15] See Handbook for Employers M-274, U.S. Citizenship and Immigration Services, 9.0 Retaining Form I-9, available online at https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/90-retaining-form-i-9 (last accessed October 20, 2020).

[16] 8 CFR § 274a.10(a).

[17] 8 CFR § 274a.10(b)(1) (i)-(ii)(A). (Fines range in this section from $275-$2,200 for each unauthorized alien with respect to whom the offense occurred before March 27, 2008 and $375-$3,200 for each unauthorized alien with respect to whom the offense occurred occurring on or after March 27, 2008 and on or before November 2, 2015.)

[18] 8 CFR § 274a.10(b)(1) (i)-(ii)(B). (Fines range in this section from $2,200-$5,500 for each unauthorized alien with respect to whom the offense occurred before March 27, 2008 and $3,200-$6,500 for each unauthorized alien with respect to whom the offense occurred occurring on or after March 27, 2008 and on or before November 2, 2015.)

[19] 8 CFR § 274a.10(b)(1) (i)-(ii)(C). (Fines range in this section from $3,300-$11,000 for each unauthorized alien with respect to whom the offense occurred before March 27, 2008 and $4,300-$16,000 for each unauthorized alien with respect to whom the offense occurred occurring on or after March 27, 2008 and on or before November 2, 2015.)

[20] See 8 CFR § 274a.2(b).

[21] 8 CFR § 274a.10(b)(2). (Fines range from $100- $1,000 for each individual with respect to whom such violation occurred before September 29, 1999 and $110-$1,100 for each individual with respect to whom such violation occurred on or after September 29, 1999 and on or before November 2, 2015.)

[22] 8 U.S.C.A. § 1324b (a) (1) (A)-(B). See also Handbook for Employers M-274, U.S. Citizenship and Immigration Services, 10.6 Penalties for Unlawful Discrimination available online at https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/100-unlawful-discrimination-and-

penalties-for-prohibited-practices/106-penalties-for-unlawful-discrimination (last accessed October 28, 2020).
[23] 8 U.S.C.A. § 1324b (a) (2).
[24] See 42 USC 2000e-2(a).
[25] See 42 USC 2000e (b).
[26] See 42 USC 2000e-5.
[27] See Justice Department Reaches Settlement with South Carolina Food Service Provider to Resolve Immigration-Related Unfair Employment Practices, Justice News, U.S. Department of Justice (January 7, 2013) available online at https://www.justice.gov/opa/pr/justice-department-reaches-settlement-south-carolina-food-service-provider-resolve (last visited October 24, 2020).
[28] *Id*.
[29] Available online at https://www.uscis.gov/sites/default/files/document/forms/i-9instr.pdf (last accessed October 26, 2020).
[30] Available online at https://www.uscis.gov/i-9-central/handbook-for-employers-m-274 (last accessed October 24, 2020).
[31] *Id*.
[32] USCIS ca be contacted by employers with questions about the I-9 verification process by phone at 888-464-4218 (877-875-6028 TTY - For hearing and speech impaired users) and by email at I-9Central@uscis.dhs.gov . See also https://www.uscis.gov/i-9-central/contact-us (last accessed October 24, 2020).
[33] 8 U.S.C.A. § 1324b (a) (6).
[34] See Figure 1 Supra.
[35] See Handbook for Employers M-274 9.2: Retaining Copies of Form I-9 Documents, U.S. Citizenship and Immigration Services available online at https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/90-retaining-form-i-9/92-retaining-copies-of-form-i-9-documents (last accessed October 27, 2020). See also Austin T. Fragomen, Jr., Careen Shannon, and Daniel Montalvo, Immigration Employment Compliance Handbook § 4:118 (August 2020 Update).
[36] See Barbara S. Magill, Esq. and Worklaw Network, Workplace Privacy: Real Answers and Practical Solutions, 2nd Edition, Chapter 17: Personnel Files, Thompson Information Services (2007 Supplement). See also Creating and Maintaining Employee Personnel Files Checklist, Hiring Documents Segregated from Personnel Files, Practical Law Labor & Employment.
[37] *Id*.
[38] HR Series Policies and Practices, 1 Policies and Practices § 7:14 (September 2020 Update).

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[39] U.S. Citizenship and Immigration Services, Handbook for Employers M-274, Section 8.0 Correcting Errors or Missing Information on Form I-9, available online at https://www.uscis.gov/i-9-central/handbook-for-employers-m-274/80-correcting-errors-or-missing-information-on-form-i-9 (last accessed October 27, 2020).
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] Guidance for Employers Conducting Internal Employment Eligibility Verification Form I-9 Audits, U.S. Justice Department, Office of Special Counsel for Immigration-Related Unfair Employment Practices available online at https://www.justice.gov/crt/file/798276/download (last accessed October 28, 2020).
[48] *Id*. at 1.
[49] *Id*. at 5.
[50] *Id*.
[51] About E-Verify, U.S. Department of Homeland Security and USCIS available online at https://www.e-verify.gov/ (last accessed November 13, 2020).
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1987 (2011) [Arizona law required all employers to use E-Verify to verify new employee's authorization to work in the U.S. and penalized employers who failed to do so with suspension or revocation. Of their business license. JJ. Breyer and Ginsburg dissenting; J. Sotomayor took no part in the decision]
[57] National Conference of State Legislatures, State E-Verify Action, available online at https://www.ncsl.org/research/immigration/state-e-verify-action.aspx#:~:text=Eleven%20states%E2%80%94Colorado%2C%20Florida%2C,some%20public%20contractors%20and%20subcontractors (last accessed November 13, 2020)
[58] *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1986 (2011)
[59] See Section III *supra*.

60 U.S. Const., art. I, § 8, cl. 3.
61 See note 51 *supra*.
62 See Section IV(F) *supra*.
63 *Id*.

QUEEN'S GAMBIT 2.0 THE INTERNATIONAL TAX EDITION: *WHAT IF SOMEDAY THE WHOLE GAME CHANGED?*

by

Maria S. Domingo*

I. INTRODUCTION

The Queen's Gambit, a miniseries streaming on Netflix,[1] follows the life of a troubled chess prodigy, Elizabeth "Beth" Harmon, who often used an opening move called the Queen's Gambit in chess tournaments.[2] Long before the popular miniseries, the Queen's Gambit in the world of chess refers to an aggressive opening move by chess players.[3] Gambit is defined as a chess opening where a player risks the loss of one or more pawns or pieces to obtain a tactical advantage in position on the chessboard.[4] "The objective of the queen's gambit is to temporarily sacrifice a pawn to gain control of the center of the board."[5] The countermoves or defenses against the Queen's Gambit are to accept, decline or play various defenses. During the course of the miniseries, Beth is often seen visualizing the chess board in her mind and both playing alternative offensive moves as well as anticipating her opponents' possible countermoves and defenses. This visualization enables Beth to anticipate her opponents' moves and ultimately defeat them in actual gameplay (sometimes multiple opponents within a matter

* Associate Professor, Department of Accounting, School of Business, The College of New Jersey, Ewing, New Jersey

of minutes). Thus, the key to Beth's success in these matches is her ability to anticipate and plan strategies that not only respond to her opponent but eventually outwit them.

And so goes the world of global tax planning, where multinational entities ("MNEs") appear to be one step or "play" ahead of the tax jurisdictions in their visualization of global tax planning while tax jurisdictions have responded defensively to these strategies. As reported by the news, the public's interest in chess has once again exploded because of the popularity of the miniseries.[6] Similarly, the global interest in base erosion profit shifting, and more specifically, taxing digital giants has grown to a fever pitch in recent years as governments struggle to raise much needed tax revenue. Nations have alleged that certain technology companies have not paid their "fair share" of taxes and have done so by implementing aggressive tax strategies or opening moves. Similar to a chess player's response to the Queen's Gambit, the players in the Organisation for Economic Co-operation and Development ("OECD") and G20 Inclusive Framework[7] have argued over whether to accept the status quo, decline or play defensively. Amidst competing interests during negotiations, countries have made concessions to obtain an advantage or remove roadblocks toward a multilateral global tax landscape.[8] According to taxing authorities, U.S. MNEs have been able to avoid tax on profits (now often referred to as "stateless income") through tax planning strategies in jurisdictions where they had a substantial economic presence with no corresponding tax nexus under existing international tax rules (i.e., "scale without mass"). As a result of the digital economy and countries' growing need for tax revenue, nations have clamored and now have agreed in the OECD's Pillar One to significant changes in the fundamental principles of the international tax system. However, finalizing Pillar One globally and domestically may prove challenging as it requires continued multilateral cooperation and domestic legislative approval, which begs the question as to whether countries can move forward from an overarching agreement and implementation plan to actual compliance, administration and collection.

The remainder of this article proceeds as follows: Part II provides background regarding the digital economy (which sparked the movement toward international tax reform). Part III explains the existing international tax principles of nexus and the allocation of profits. Part IV discusses digital services taxes and the U.S.'s response. Part V navigates through the key provisions of Pillar One and compares the Blueprint and OECD Statement versions. Part VI discusses the impact of Pillar One on U.S. tax policy. Lastly, Part VII concludes.

II. DIGITAL ECONOMY: A NEW BOARD AND A NEW SET OF MOVES

Jurisdictions across the world are competing for what pieces? Same pieces, with evolving rules and strategies. The digital economy is defined as "that part of economic output derived solely or primarily from digital technologies with a business model based on digital goods or services."[9] Generally speaking, the digital economy can include a variety of daily activities or transactions that are interconnected by technology such as computers, smart phones or other devices.[10] The OECD identified the following key attributes of the digital economy and its resulting business models that are germane to international tax policy — that is, mobility of intangible assets; users and business functions; reliance on data, particularly, "big data;" network effects (which occur when users' decisions directly affect other users' received benefits); multi-sided business models (i.e., multiple groups interact via an intermediary); monopoly or oligopoly of certain business models; and volatility because of easier entry into the markets and rapidly changing technology.[11] In recent years, a number of jurisdictions have focused on the taxation of certain digital activities and markets, which has led to contentious debates between countries who seek and/or have imposed taxes on digitalized businesses and those that seek to forestall such efforts.

What Are These New Pieces: Common Characteristics of Digitalized Businesses

Traditional brick and mortar stores and face-to-face communication or interactions have given way to digital technology. Most consumers choose the convenience of digital platforms to socialize, share personal news and information and/or shop for items ranging from necessities to luxury items and everything in between. Consumers can make purchases and complete transactions all from the comfort of their homes and have products delivered directly to their doorstep within a matter of hours or a few days. Because of the advances in information and communication technology, digitalized companies can operate different lines of business and reach a significantly broader scale of consumers (than a traditional brick and mortar) all the while surmounting vast global distances to complete transactions.[12] As a result of digital technology, companies have developed digitalized business models in support of these digital markets.

Digitalization has intensified the capacity of MNEs in various industries to locate segments of their production process in different countries across the globe while expanding its access to consumers worldwide.[13] As a result, MNEs have significantly broadened their commercial reach and global customer base via remote technology irrespective of the end users' locale or the MNE's physical headquarters.[14] Neither time nor distance can impede a digital transaction, and, thus, digitalized businesses can achieve “operational scale without local mass”—that is, digitalized businesses can significantly impact the economic life of a jurisdiction without or with limited physical presence in a country.[15] Digitalized businesses have the following key characteristics in common:[16]

Reliance on Intangible Assets:

Digitalized MNEs rely on intangible assets (primarily, intellectual property that the MNE owns or leases from a third party), which play an important role in their firm value and output growth.[17] With emphasis on intellectual property assets, MNEs use software and algorithms to support vital functions of their business models such as platforms and websites.[18] Accordingly, whether the MNE controls or manages its intangible assets significantly impacts the tax jurisdiction of its profits.[19]

Data and User Participation:

Digital companies have increasingly used data collection and analysis to develop their product offerings and services.[20] Data use, collection and analysis is central to a digital MNE’s business model and a key component of its decision-making process.[21] MNEs that analyze comprehensive datasets from their global customer base for key insights into consumer needs, operations, product development and marketing activities could potentially translate this information into real dollars and profitability.[22] For example, digitalized businesses can concentrate certain online advertisements to specific user groups through data collection and analytics.[23]

Digitalized businesses have increasingly used data from user participation to forecast customer demands and market trends. In general, user participation is categorized as either active or passive. In passive user participation, the company collects the users' data on their preferences and behaviors without direct activity on the part of the users to enter information, e.g., cookies, which continue to collect browsing activity even if the user has exited the company's platform.[24] In active user participation, the users' intentional action creates the data, which is restricted by the information the user chooses to share.[25] For example, a user bookmarks a page, rates a product, uploads photos or videos ("user-generated content"), posts reviews, adds friends, creates communities and engages in networking online (socially or professionally).[26] Users may actively transfer their information for goods and/or services in return, e.g., email services or digital entertainment.[27] User-generated content such as reviews aids other platform users in the selection of goods or services and helps build the trust level in the platform and brand itself.[28] Active participation forms the basis of social networks as users add friends, attract other users, form communities and network, and thus, enables the platform's data to grow exponentially and results in increased profitability.[29]

New Pieces, New Rules: The Focus on Selected Markets in the Digital Economy

In recent years, a number of jurisdictions have cited certain user-based, digital activities and markets from which MNEs derived revenue in these countries in deciding to either propose or pass legislation to tax the revenue. The business revenue models of such markets include online advertising, intermediation services, multi-sided marketplaces and data transfer services.[30] Online advertising targets and delivers marketing messages to consumers via the internet.[31] For example, search results or webpages include advertising; a digital platform provides free or discounted content to users in return for viewing advertisements; advertising is provided via mobile devices depending on the user's locale or other factors; and social media websites grow their online community and then generate revenue from this audience through advertising.[32] Meanwhile, data transfer services collect user behavior data for sale or resale primarily for advertising purposes or customized market research such as data brokers and data analytics companies.[33]

Online intermediation services allow users to sell services or communicate with other users on their digital platforms for a fee.[34] Examples include financial services such as brokerages, consulting services, travel agencies, business to business services that act as online intermediaries for web hosting, payment processing, platform access, and social networking and dating websites.[35] Online marketplaces are multi-sided platforms where users can sell tangible goods and/or services for a fee.[36] For example, users purchase or rent digital content such as e-books, videos, apps, music, games. Online retailers sell tangible goods or virtual items; online gaming; subscription fees for digital content such as news, video-streaming, music and software services such as anti-virus software, data storage, customer service, and the license of online content and technology such as publications, journals, cloud-based systems, software, algorithms and artificial intelligence systems.[37]

Specifically, the OECD has identified two digital business categories that have been of particular interest to market jurisdictions for international tax purposes—automated digital services and consumer-facing businesses. Automated digital service businesses provide digital services on a standardized basis to a large customer base or users in multiple jurisdictions throughout the world remotely with minimal or no physical presence.[38] Examples of such business models include "online search engines; social media platforms; online intermediation platforms…; digital content streaming; online gaming; cloud computing services; and online advertising services."[39] Therefore, certain MNEs can generate significant revenue in an automated and standardized basis (not only from sales, but also through the monetization of data) by harnessing customer and user interactions, users' contributions of data and content, and network effects.[40]

Consumer-facing businesses generate their revenue from the sale of consumer products and services to individuals for personal use (i.e., not professional or commercial purposes).[41] Consumer-facing business models include businesses that generate revenue from selling goods and services directly to customers or indirectly to customers via third party resellers or intermediaries, and licensing rights of trademarked consumer goods or a consumer brand. Examples of consumer-facing businesses include "personal computing products (e.g., software, home appliances, mobile phones); clothes, toiletries, cosmetics, luxury goods; branded foods and refreshments; franchise models…; and automobiles."[42] A number of countries have focused on these user-based activities between their residents and large U.S. technology companies as a source of potential and much needed tax revenue.

III. PRESENT LAW — NEXUS AND ALLOCATION OF PROFITS: TOO MANY PLAYERS COMPETING FOR THE SAME PRIZE

International tax law has developed widely accepted principles, which countries have, until recently, followed when conflicts arose between jurisdictions on the issue of taxing authority.[43] Domestic tax law, treaties and other international law instruments govern the tax treatment of cross-border transactions. However, many of these authoritative sources (and their underlying principles) were drafted well before the digital economy of today during a time when cross-border transactions were labor intensive and involved only tangible assets.[44] In general, current international tax law attaches a taxing right to the locale where an MNE derives profits from a physical presence within the jurisdiction.[45] Businesses today, however, have the technological capability to sustain and actively participate in the economy of multiple market jurisdictions (i.e., jurisdictions where the consumers are located rather than the supply or production side) without an actual local physical presence.[46] Inherent from these technological advances, digitalization has challenged two fundamental principles in the taxation of cross-border transactions, i.e., the traditional notions of nexus and profit allocation based on the arm's length principle.

Nexus

Nexus is used to determine whether a country has jurisdiction to tax a non-resident entity. A tax jurisdiction may impose tax on MNEs who have sufficient nexus, or connection, with the country. Nexus can be based on the MNE's nationality (a connection between the MNE and the country), or can be territorial (a connection between the relevant conduct and the country, i.e., the country where the conduct subject to tax occurs).[47] Most tax treaties provide that the country of residence has the exclusive right to tax an MNE's business profits unless the MNE has nexus—carries on a business—through a *permanent establishment* in another jurisdiction (source country).[48] In general, nexus is established if the MNE has a level of physical presence in the tax jurisdiction via a "fixed place of business" or the actions of a "dependent agent."[49] For example, an entity that manufactures or maintains retail stores or runs material operations such as distribution, inventory management and marketing (brick and mortar) in a foreign country has a permanent establishment therein.[50] However, a

U.S. company that exports goods to a country abroad and does not otherwise engage in activities within that foreign country is not subject to tax—that is, the company has no permanent establishment to give rise to an imposition of tax on its profits.[51] Likewise, the actions of a foreign MNE that merely exports goods to a country and does not otherwise manufacture or distribute these goods via a local facility should not give rise to nexus in that country.[52] Thus, under current law, nexus attributes taxing rights to the country where an MNE physically conducts its income-producing activity. As such, the current definition of nexus does not necessarily capture the income generated by MNEs through digital activities.[53]

Allocation of Profits

If a jurisdiction establishes nexus, then sourcing rules must be applied using the "arm's length principle"[54] to determine the amount of an MNE's income allocated to that country for tax purposes. A country determines the amount of source-based taxes on its share of the MNE's profits subject to taxation by where the MNE conducts its activities or where its property is located.[55] A tax jurisdiction applies the arm's length principle to the business profits of a resident taxpayer or business profits attributable to a non-resident taxpayer's permanent establishment by analyzing the factors of relevant transactions that materially contribute to the MNE's profits (e.g., MNE's functions, assets and risks).[56] For U.S. tax purposes, whether income is U.S. source or foreign source is ascertained by several factors including the payor or recipient's nationality and the location of the entity's assets or activities that produce the income.[57] For example, U.S. tax law provides that effectively connected income from an MNE's physical presence or assets used in the United States is subject to U.S. tax.[58] MNEs with nexus in multiple jurisdictions must determine the amount of income allocated, and therefore, subject to tax on a country by country basis.

Residence-based taxes include income taxes based on a person's citizenship, nationality or residence.[59] Until recently, countries resolved conflicts over tax jurisdiction that could result in double taxation through bilateral tax treaties or legislation, which allowed MNEs to claim foreign tax credits for taxes paid to another jurisdiction.[60] In response to the digital economy, a growing number of countries have argued that destination should serve as the basis to determine the appropriate market jurisdiction with taxing rights to certain income.[61] MNEs are no longer limited by physical boundaries and can reach their consumers or provide services in countries where the end user resides. Specifically, taxing rights for cross-border activities in the digital age should be allocated among jurisdictions based on where the economic activities and value creation occur rather than physical presence.[62]

Direct Tax Issues

The OECD has identified key tax policy issues in direct taxation arising from the digital economy including nexus, data and characterization. First, digital technologies have enabled MNEs to access consumers and provide goods and services with relative ease anywhere and at any time in the world. Digital technology has significantly changed the way MNEs perform activities such as market research, marketing and advertising, and customer support by improving the performance of remote activities; increasing the speed of information collection, processing and analysis in cross-border activities; and capitalizing on access to innumerable consumers without the limitation of physical boundaries.[63] MNEs no longer require a local physical presence or personnel to engage in transactions with customers and generate profit in multiple jurisdictions.[64]

Moreover, business models that promote continuing interactions with customers, e.g., websites that enable customers to rate and review products or services, creates network effects that can exponentially increase consumer traffic and the value of the website.[65] A "participative networked platform" where users provide their own content, e.g., Facebook, YouTube, TikTok, increases value in a cyclical fashion as new users join or existing users add more content, which subsequently attracts more users leading to even more content.[66] In light of the prevalence and astronomical growth in technology among businesses that formerly relied on brick and mortar locations, nations have questioned whether the current nexus rules (in tax treaties and domestic tax laws of nonresident entities) should be redefined to reflect the impact of digitalization—little to no physical presence, more valuable intellectual property, increased network effects between customers—and help alleviate the revenue strain experienced by governments worldwide.[67]

Second, digital technology functions without physical boundaries, and, as such, it has allowed businesses to collect, extract and analyze consumer data at unprecedented levels. MNEs, which more often than not operate as multi-sided business models[68] in today's digital economy, can collect user data proactively (i.e., the business requests or requires consumers or users to furnish their information) or reactively (i.e., the consumers or users control the nature and amount of information they submit to the business).[69] MNEs can then sell the user data or use the collected data to add significant value to their operations by customizing offerings, developing products and services and targeting advertisements that align with the data, analyzing results in real-time, streamlining the decision-making process.[70] However, the advantages are not without issues as a number of countries have passed data privacy and protection laws to protect consumers' private data while challenges abound in tracing the data source and allocating profits for tax purposes.[71] As a result, nations have questioned the current nexus rules, valuation and income characterization as these pertain to data—that is, whether an MNE's data collection creates nexus in a jurisdiction where it has no physical presence; how to attribute value to data that MNEs generate through digital goods and services (in essence, a byproduct of digital transactions); and how to characterize an MNE's supply of data for tax purposes.[72]

Finally, the new business revenue models[73] have raised issues about the characterization of certain payments for digital products or delivery of services[74] under tax treaties and domestic law.[75] Specifically, whether jurisdictions characterize these payments as royalties, technical service fees or business profits[76] substantially impacts the treatment for tax purposes. For example, under current international tax law, a jurisdiction imposes taxes on business profits that are attributable to a permanent establishment within the country whereas royalties may be subject to a withholding tax in the payor's country.[77] Accordingly, nations have questioned whether the existing character of income rules, which may produce different tax results for essentially similar transactions, sufficiently captures the reverberating tax effects of the digital economy. The character of income has significant implications not only for purposes of determining the tax treatment of such income but also the allocation of taxing rights between multiple jurisdictions, and of course, nexus.[78] With growing sentiment among nations that certain technology companies must pay their "fair share" of taxes and mounting pressure for government agencies to raise revenue, certain countries declined to wait while nations deliberate and negotiate a consensus, and instead, opted to proceed with self-help measures in the form of digital services taxes.

IV. DIGITAL SERVICES TAXES: PLAYERS DECLINE THE STATUS QUO

Certain countries have taken unilateral measures and imposed a digital services tax on MNEs in certain sectors of the digital economy. Countries have argued in frustration over the global right to tax the profits of MNEs who reach "operational scale without local mass" in their jurisdictions and assert that revenue should be reallocated to the jurisdictions where their customers reside for tax purposes. Countries further argue that because their residents increase the value of the MNEs' business models by contributing content and reviews, purchasing goods and more, these countries have the right to impose digital services tax on certain MNEs.[79] Indeed, some countries have proposed, announced or implemented digital services taxes on the gross revenue of MNEs who reach a requisite level of activity within each country's jurisdiction albeit via digital technology to warrant the countries' assertion of the tax.[80] However, these unilateral measures may impair the international tax regime by their emphasis on non-income taxes, which are not creditable nor subject to tax treaties.[81] Meanwhile, other countries contend that DSTs undermine existing international tax policy and target a disparate number of MNEs who have digital transactions and/or online activities with businesses or consumers in other countries without physical presence therein.[82] Specifically, the U.S. argues that digital services taxes disproportionately target large U.S. technology MNEs (i.e., GAFA), and consequently, impacts U.S. commerce.[83]

For example, the Office of the U.S. Trade Representative ("USTR") investigated the following countries that have adopted a digital services tax ranging from 2% to 10% and generally based on minimum revenue thresholds from digital activities for covered services such as online intermediary or advertising services, online marketplaces, digital interface services and social media: Austria, France, India, Italy, Spain, Turkey, United Kingdom.[84] The following countries are considering a DST: Brazil (1 to 5%), Canada (3%), Czech Republic (7%) and the European Union (3%).[85] As countries grapple with the effects of the pandemic, more countries will certainly look to the digital economy as a source of untapped revenue. In an effort to cease current and prevent future unilateral tax measures that could lead to double taxation, potential animosity and retaliatory responses between jurisdictions, the OECD has developed a "unified approach" under Pillar One to address issues concerning nexus and the allocation of taxing rights. A significant part of this agreement requires jurisdictions to remove all digital services taxes and other relevant similar measures on "all companies" (suggesting not only the companies that are in-scope).[86] Moreover, the jurisdictions must pledge that they will not introduce such unilateral measures in the future.[87] Interestingly, although the United States at the federal level has vehemently opposed digital services taxes as targeting U.S. technology companies, certain states within the union are considering imposing a digital tax on companies (e.g., digital advertising, social media advertising, sale of consumer data), which in and of itself can raise a whole host of legal, administrative and economic issues if not properly designed.[88]

V. OECD PILLAR ONE: MANY PLAYERS UNITE AND COLLABORATE FOR THE GOOD OF THE GAME

On October 12, 2020, the OECD issued its Report on the Blueprint of Pillar One[89] as part of its continued effort in BEPS Action 1[90] to modernize international tax to better align with the changing business models of today's digital economy.[91] As a result of the advances in digital technology, business models have emerged that leverage this technology and enable MNEs to actively participate and generate profits in market jurisdictions without an actual local physical presence.[92] In light of digitalization's resounding impact on the world's economy, a key purpose of Pillar One is to provide a framework toward global agreement in adapting the existing rules of nexus and profit allocation in favor of expanding the taxing rights of market jurisdictions.[93] In essence, Pillar One proposes a paradigm shift from existing fundamental international tax principles to a new taxing right that redefines nexus rules and gives *market* jurisdictions the right to tax an allocated portion of profits generated by in-scope companies. Pillar One consists of three primary elements—that is, Amount A,[94] Amount B,[95] and dispute prevention and resolution mechanisms[96] to bolster tax certainty. Generally speaking, Amount A is the allocated portion of the in-scope MNE's global profit apportioned to the market jurisdiction that exceeds a routine return of baseline activities for marketing and distribution (Amount B).

On July 1, 2021, the OECD/G20 Inclusive Framework reached a historic agreement toward finalizing Pillar One's broad architecture and released its Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy.[97] On October 8, 2021, the Inclusive Framework issued a revised statement, which includes a detailed implementation plan of this agreement.[98] As of November 4, 2021, 137 member countries have agreed to key components of Pillar One and further call for a Multilateral Convention through which countries will implement Amount A.[99] A consensus between most of the Inclusive Framework members is a monumental step toward international tax reform, and was likely no small feat given the varying interests, sense of fairness and political objectives of each country. International tax inherently depends on multilateral cooperation between countries, and the OECD has been pivotal in the establishment of the Inclusive Framework and ongoing negotiations for international tax reform.[100] The OECD anticipates that a Multilateral Convention (through which Amount A is implemented along with changes in domestic law as needed to effectuate the new taxing rights[101]) will be opened for signature in 2022 and Amount A will come into effect in 2023.[102] To provide insight and a deeper understanding of the recent evolution of Pillar One toward a consensus-based solution, the following subsection discusses and compares Amount A's key transformative elements (scope, nexus, reallocation of income, revenue sourcing) of (1) the proposals under the Pillar One Blueprint to (2) the agreement reached (and implicitly the concessions made) in the OECD's Statement on a Two-Pillar Solution for the new taxing right. The remaining subsections then briefly discuss Amount B, Tax Certainty, Implementation and Timeframe. While the OECD statement builds and resolves key issues in the Blueprint proposals, it also highlights significant differences that further underscores the magnitude of this agreement between most of the Inclusive Framework members.

Amount A

Scope:

Amount A pertains to the new taxing right that *market* jurisdictions can impose on the deemed residual profit of an MNE group (or segment, as applicable).[103] This new taxing right is an "overlay" to current nexus rules and profit allocation.[104] To determine Amount A, a formula is applied to allocate a share of an MNE's deemed residual profits to respective market jurisdictions who under Pillar One's new nexus rules have the right to tax the allocation. Importantly, the new taxing right applies only to MNE groups within the defined scope of Amount A. The Pillar One Blueprint used activity tests (in-scope activities) and threshold tests to determine scope, whereas the OECD Statement shifts away from determining scope by activity and instead bases scope on the profitability of the MNEs.

Pillar One Blueprint: Activity Tests — In-scope activities are divided into two categories, i.e., automated digital services and consumer-facing businesses.[105] The purpose (and tax policy objective) of the activity tests is to capture the income of MNEs who participate in the economy of a market jurisdiction remotely in a "sustained and significant manner" including targeted marketing, collection and use of data without a commensurate taxable presence (i.e., local physical presence) under present law.[106]

Automated digital services are generally defined as services that are automated (after set-up, the service requires minimal human involvement by the service provider) *and* digital (via the internet or electronic network).[107] Moreover, Pillar One provides a positive list of automated digital services and a negative list of **non**-automated digital services (therefore, excluded) for clarification.[108] If an activity does not qualify for either list, then the conditions under the general definition is applied.[109] It is important to note that although a service may not be considered an automated digital service under the activity test pursuant to Pillar One's definition, the service may still be in-scope as a consumer-facing business [110]

Consumer-facing businesses are generally defined as businesses that produce revenue from the sale of goods and services of a type commonly sold to consumers, including indirect sales through intermediaries (such as businesses that operate via brokers, third party distributors or other intermediaries) as well as through franchising and licensing.[111] Furthermore, a consumer-facing business is an MNE that (1) owns the consumer product or service and holds the rights to the connected intangible asset including franchisors and licensors or (2) a retailer or contractual party of the consumer.[112] Consumer-facing businesses do not include third party MNEs with no customer relationship, e.g., manufacturers, wholesalers and distributors.[113] The Blueprint provided that certain industries are excluded (out of scope) from Amount A such as certain natural resources; certain financial services; construction, sale and leasing of residential property; and international air and shipping businesses.[114]

Threshold Tests — The Pillar One Blueprint includes two threshold tests, i.e., the global revenue test and de minimis foreign in-scope test.[115] An MNE is in-scope of Amount A only if its consolidated revenue and its foreign in-scope revenue (in other words, the MNE's in-scope revenue earned outside of its domestic market) exceeds certain thresholds. The gross revenue test permits exclusion of "smaller" MNEs from Amount A whose annual consolidated revenue as reported on the MNE's consolidated financial statements is below the threshold and thereby hones in on the largest MNEs with residual profit for reallocation.[116]

The de minimis foreign in-scope test applies to MNEs that surpass the gross revenue threshold, but have only minimal foreign-source revenue that is in-scope.[117] First, an MNE determines whether the total amount of its in-scope revenue from automated digital services and consumer facing business activities exceeds the threshold under this test.[118] MNEs who earn less than the threshold are exempt.[119] Second, the MNE determines whether this in-scope revenue above the threshold amount is derived from foreign in-scope activities — that is, outside the MNE's domestic or home market.[120] Accordingly, the purpose of the de minimis test is to exclude MNEs with a small amount of foreign in-scope revenue because the profits reallocated under Amount A to market jurisdictions would be negligible.[121] In other words, this test excludes an MNE whose revenue is primarily from its domestic market from the scope under Amount A.[122] The Blueprint also provided that certain industries are carved-out[123] and excluded from the reach of Pillar One such as construction, extractives, financial services, international airline and shipping, and sale and leasing of residential property.[124]

Understandably, many jurisdictions were put off by the complexity of the proposed scope rules in the Blueprint, including segmentation by business lines or geography,[125] and recognized the difficulty of defining in-scope automated digital services and consumer-facing businesses. Furthermore, the U.S. criticized these proposals as discriminatory toward U.S. multinational technology companies, which the U.S. views as the direct targets of these measures.

***Two-Pillar Solution Statement*:** <u>Threshold for Large Companies and Profitability</u> — The OECD Statement issued on October 8, 2021 provides the Inclusive Framework's agreement toward seismic changes in global tax policy and fundamental international tax principles (i.e., nexus based on a physical presence establishing the right to tax) that have prevailed over the last one hundred years. The OECD Statement describes a phased approach whereby MNEs with global turnover exceeding twenty billion euros and a profit-to-revenue ratio (i.e., profit before tax divided by revenue on a book basis) greater than ten percent calculated via an "averaging mechanism" are considered in-scope companies.[126] Depending on the successful implementation of Amount A (including dispute prevention and resolution mechanisms), the global threshold is then expected to be reduced to ten billion euros after a relevant review period,[127] thus substantially increasing the number of in-scope companies.

The OECD Statement indicates a drastic shift away from determining scope by types of businesses that are seemingly industry specific (automated digital services or consumer-facing) to instead focusing on profitability and size.[128] Simply put, the "largest and most profitable" MNEs should pay their share of taxes in the jurisdictions where the MNEs sell their goods or services regardless of actual physical presence in the market jurisdiction, industry classification or business model. Certain businesses derive a significant amount of their profits from intangible assets, which do not require a physical presence in market jurisdictions to generate these profits. Accordingly, Amount A should enable market jurisdictions to tax the profits of in-scope businesses. In stark contrast to the Blueprint, the Statement carves-out only extractive industries (i.e., natural resources) and *regulated* financial services as exclusions from Amount A.[129] Commentators have reported that approximately one hundred companies are in-scope under this "largest and most profitable" standard.[130] This change in methodology is based on a proposal put forth by the Biden Administration[131] to limit the scope to the "largest and most profitable" companies irrespective of their activities. The U.S. also sought to minimize the exclusions from Amount A. In recent years, the U.S. has vigorously argued that previous proposals (regarding automated digital services and consumer-facing businesses) and digital services taxes discriminate against U.S. MNEs—in particular, the behemoth U.S. technology companies of Amazon, Alphabet, Apple, Facebook and Microsoft.

Segmentation — Segmentation (i.e., identifying and segmenting in-scope businesses) was a key open issue[132] during the Blueprint stage and contributed to the potential complexity of the proposal. The Statement, however, indicates that segmentation will occur only in "exceptional circumstances" and if a segment itself meets the revenue and profitability scope thresholds[133] based on the segments disclosed in the MNE's financial statements.[134] In other words, an MNE that does not meet the revenue and profitability thresholds on a consolidated basis may, nonetheless, be subject to Pillar One if a segment itself exceeds the thresholds. The OECD found that MNEs operate digital and non-digital business lines and therefore, segmentation is required to determine the profit associated with the digital business lines. Pursuant to U.S. Generally Accepted Accounting Principles ("GAAP"), publicly traded companies are required to report a segment that accounts for ten percent of their total revenue, total profits or total assets.[135] International Financial Reporting Standards ("IFRS") follows similar reporting rules for segments.[136]

Nexus:

The special nexus rule to determine the market jurisdictions' new taxing right under Pillar One is a significant departure from existing law based on physical presence. The sole purpose of the new nexus rules is to determine a market jurisdiction's taxing right to an allocation of Amount A.[137] The new nexus rules are a standalone provision and do not alter nexus for other tax or non-tax purposes—that is, jurisdictions cannot use the new nexus rules to establish nexus for any other taxes, non-tax purposes or customs duties.[138] The new nexus rules are based on indicators to evaluate whether an in-scope MNE has a significant and sustained engagement with market jurisdictions such that a portion of the group's profits should be reallocated to such countries under Amount A.[139]

Pillar One Blueprint: The proposed nexus rules contained in the Blueprint distinguished between nexus for automated digital services and nexus for consumer-facing businesses. The Blueprint determines nexus for automated digital services solely by applying a market revenue threshold to the MNE group's in-scope revenue (e.g., revenue in excess of EUR X million per year).[140] Because the very nature of automated digital services enables MNEs to provide these services remotely to a market jurisdiction in a significant and sustained manner without a physical presence, the Blueprint provides that only the revenue threshold test should be required to determine nexus for automated digital services.[141] In contrast, the Blueprint places a higher nexus standard for consumer-facing businesses because their ability to engage remotely in market jurisdictions is less evident.[142] The Blueprint determines nexus for consumer-facing businesses by applying a market revenue threshold to the MNE group's in-scope revenue (e.g., revenue in excess of EUR X million per year) *and* a "plus factor" beyond market revenue in a jurisdiction to determine nexus.[143] The Blueprint identifies examples of plus factors such as a subsidiary or permanent establishment that carries out activities related to in-scope sales in the market jurisdiction.[144] Moreover, if an MNE group segments its business lines to determine Amount A, then nexus is determined at the segment level.[145]

Amount A — Quantum — The Blueprint describes a complex three-step formula (that does **not** apply the arms-length principle) to calculate the Amount A quantum, which can be applied either through a profit-based approach (e.g., Amount A tax base as an absolute profit of EUR 10 million) or a profit-margin approach (Amount A tax base as profit before tax to revenue of 15%).[146] Step 1 is a profitability threshold based on a profit before tax to revenue ratio, which is intended to isolate the residual profit subject to reallocation. Step 2 is a reallocation percentage used to identify the allocable tax base, i.e., a fixed percentage share of residual profit (actual profits less the profitability threshold) allocated to the market jurisdictions. Lastly, Step 3 employs an allocation key based on locally sourced in-scope revenue to distribute the allocable tax base among the market jurisdictions with nexus.[147] The Amount A tax base is calculated using profit before tax from the MNE group's consolidated financial statements prepared under IFRS or GAAP that produce equal or comparable outcomes to IFRS.[148] The following simplified formula of Amount A from the OECD provides insight into its calculation under the Blueprint and OECD Statement as well.[149]

Tax Revenue Change in Jurisdiction A equals:

A		B		C		D		E		F
Global residual profit in-scope	x	Reallo-cation %	x	(Jurisdiction A Share of destination based sales	x	Tax rate applied by Jurisdic-tion A on received profit	-	Share of residual profit in Jurisdic-tion A	x	Rate of) double tax relief in Jurisdic-tion A

Amounts C and D pertain to the tax revenue a country receives because of the reallocation of residual profit, whereas E and F pertain to the tax revenue a country loses in the reallocation.[150]

***Two-Pillar Solution Statement*:** For the purpose of determining nexus, the OECD Statement pivots from the Blueprint's distinction between automated digital services and consumer-facing businesses (e.g., plus factors) to only a threshold test based on the sales of an MNE within the market jurisdiction.[151] The Statement provides a new special purpose nexus—that is, a market jurisdiction is deemed to have taxable presence — nexus — when an in-scope MNE derives at least EUR 1 million in revenue from that market jurisdiction.[152] In other words, a market jurisdiction can impose tax on an in-scope nonresident company if it meets the EUR 1 million threshold. Therefore, a portion of the MNE's residual profit (Amount A) will be allocated to that market jurisdiction. This new special nexus that relies on consumer activities in market jurisdictions is a drastic departure from traditional international tax rules for nexus based on physical presence. For smaller jurisdictions with gross domestic product lower than EUR 40 billion, this threshold is lowered to EUR 250,000 in revenue.[153] This lower revenue threshold supports the argument that smaller economies may require different thresholds. The special purpose nexus applies solely to decide whether a market jurisdiction is entitled to the Amount A allocation and cannot otherwise establish nexus for other tax purposes.[154]

Amount A — Quantum — Once nexus is established for an in-scope MNE, the quantum of Amount A allocated to market jurisdictions (that possess the special nexus) is twenty-five percent of residual profits, and therefore, effectively places a floor on Amount A.[155] The Statement defines residual profit as profit in excess of ten percent of the MNE's revenue (on a total or segmented basis) based on financial accounting income.[156] Furthermore, Amount A will be allocated to market jurisdictions via a "revenue-based allocation key."[157] It is important to note that an MNE group's financial statements with a limited number of book-to-tax adjustments will be a key determinant of scope and applying Amount A.[158] Either the exemption method or the credit method will be used to provide relief from double taxation of profits allocated to a market jurisdiction under Amount A.[159] Otherwise, two jurisdictions (residence jurisdiction under existing tax rules and market jurisdiction via the new taxing right) could subject one taxpayer to tax on the same income in Amount A.[160] Where an in-scope MNE already has residual profits taxed in a market jurisdiction, a safe harbor mechanism will cap the Amount A quantum allocated to the market jurisdiction.[161]

Revenue Sourcing:

The revenue sourcing rules determine which specific market jurisdiction the revenue is derived from for purposes of applying scope, nexus and the Amount A allocations. The sourcing rules attempt to balance the need for accuracy with the in-scope MNEs ability to comply without significant compliance costs.

Pillar One Blueprint: The Blueprint provides detailed revenue sourcing rules that distinguish in treatment between automated digital services and consumer-facing businesses. These two broad categories are then further differentiated between business models and ultimately by revenue streams. The specific sourcing principles for each in-scope activity is supplemented by a hierarchy of indicators that the MNE can use to locate the source jurisdiction,[162] e.g., geolocation, IP address, viewer's billing address and mobile country code of viewer's phone number.[163] The Blueprint also provides guidance for documentation that the MNEs maintain information at the systemic level data via a robust internal control framework (not a record of all data points for every transaction's indicators).[164] The MNE's approach to revenue sourcing and its supporting documentation is subject to review by tax administrations.[165]

Two-Pillar Solution Statement: In contrast to the Blueprint's sourcing rules based on automated digital services and consumer-facing businesses (indicators and hierarchy of methods), the OECD Statement provides that revenue will be sourced to the end market jurisdictions — that is, the location where the end users use or consume the goods or services.[166] Detailed source rules will be developed for categories of transactions to facilitate this broad principle.[167] During this challenging time of increased competition for tax revenue, these sourcing rules may become a point of contention between tax authorities as each vies for a larger piece of the pie. Moreover, the in-scope MNEs must use a "reliable method" to apply the sourcing rules based on each MNE's own facts and circumstances.[168]

Amount B

Amount B would apply to MNEs with existing traditional nexus (i.e., physical presence, thereby, excluded from the new taxing right under Amount A) in the market jurisdiction.[169] The purpose of Amount B is to standardize intercompany pricing of related party distributors that perform "baseline marketing and distribution activities" in the market jurisdiction.[170] The distributors perform such activities in a manner that is consistent with the arms-length principle.[171] The framework of Amount B would assign a fixed return for certain baseline distribution and marketing functions.[172] In other words, Amount B is an allocation based on the arms-length principle to in-country marketing and distribution activities. The OECD Statement provides that the application of Amount B will be simplified and streamlined and sets a different timetable from Amount A — that is, the end of 2022 — to finalize this technical work.[173]

Tax Certainty

Dispute prevention and resolution mechanisms (mandatory and binding in nature) will be available to in-scope MNEs for issues pertaining to Amount A such as transfer pricing and business profits disputes.[174] Disputes about whether an issue relates to Amount A will be resolved through mandatory and binding arbitration without delaying the substantive dispute process.[175] Although the dispute resolution mechanism is generally mandatory, certain developing countries can instead *elect* this binding dispute resolution mechanism only for issues related to Amount A.[176]

Implementation and Timeframe

The Inclusive Framework released an implementation plan that describes the work required to implement Pillar One.[177] The Inclusive Framework will develop a Multilateral Convention and its Explanatory Statement, which provides a multilateral framework of rules to calculate and allocate Amount A and eliminate double taxation and the processes for administration, exchange of information, and mandatory and binding dispute prevention and resolution.[178] Lastly, the OECD Statement puts forth an aggressive timetable by any standards to implement Pillar One. Critics argue that Pillar One does not accomplish enough for developing countries, does not ensure tax certainty for MNEs and remains overly complex.[179] Although the OECD issued an implementation plan of the Inclusive Framework's agreement on October 8, 2021, anticipates the text of the Multilateral Convention and its Explanatory Statement in 2022, and Amount A's taking effect in 2023, there is still considerable work to flesh out the particulars of Pillar One's framework.[180] Both sides — taxing jurisdictions and MNEs — must grapple with the complexity and impact of Pillar One's resulting changes in domestic tax law and multilateral agreements including the additional costs associated with implementation, compliance, administration and collection.

VI. U.S. TAX POLICY: WHO MAKES THE RULES NOW, AND WHAT IF NO ONE AGREES?

Digital technology and the corresponding success of U.S.-based technology companies have strained U.S. relations with other developed nations that have failed to capitalize on their own technology industry and where the digital economy remains largely untapped.[181] Pillar One can be detrimental to the U.S.'s business interests and tax base because the U.S. is the resident country of the largest technology companies in the world and allows a foreign tax credit. [182] Accordingly, the U.S. (under the prior administration) had originally proposed to the Inclusive Framework an elective safe harbor that would enable MNEs to opt-in for purposes of Pillar One to protect the U.S.'s taxing rights as MNEs' residence country.[183] However, this safe harbor, unsurprisingly, was met with much resistance from other countries.[184] In April 2021, the U.S. under the new administration reversed course from the safe harbor proposal and instead put forth a new proposal for "comprehensive scoping."[185] As proposed by the U.S. Treasury Department to the Inclusive Framework, comprehensive scoping would be based on a revenue threshold and profit margins such that only the "largest and most profitable" MNEs are in-scope under Pillar One irrespective of industry or business model, and therefore, would not solely target U.S.-based digital giants.[186] The purpose of comprehensive scoping would be to ensure that MNEs with the most profit, intangible assets and inclination to shift profits from high-tax to low- or no-tax jurisdictions are in-scope for purposes of Pillar One.[187] Ultimately, as discussed above, the Inclusive Framework appears to have adopted this concept of comprehensive scoping as well as commitment to binding dispute prevention and resolution mechanisms.[188] Although the Biden Administration submitted proposals to the Inclusive Framework that moved Pillar One forward beyond the safe harbor impasse, the Biden Administration's revenue proposals did not address legislative implementation of Pillar One from a domestic tax perspective.[189]

A key element of the U.S.'s ongoing discussions with the Inclusive Framework is the removal of certain countries' unilateral measures that have resulted in heightened trade tensions, particularly the digital services taxes, which the U.S.

views as directly targeted against U.S. technology companies and spurred by the all too obvious political impetus of jurisdictions to increase their tax revenues.[190] The USTR concluded its investigations of digital services taxes in certain countries (i.e., Austria, France, India, Italy, Spain, Turkey and the United Kingdom) and determined that these digital services taxes are “unreasonable or discriminatory and burdens or restricts U.S. commerce.”[191] The USTR initially planned to impose a tariff of twenty-five percent on the products of these countries by November 29, 2021.[192] Pursuant to the Inclusive Framework’s agreement in Pillar One, the USTR has since terminated actions from its investigations of Austria, France, India, Italy, Spain, Turkey and United Kingdom based on each country’s commitment to remove its DSTs.[193] However, the USTR will continue to monitor the removal of DSTs, implementation of the Two-Pillar Solution and associated measures.[194]

The OECD estimates that approximately $100 billion of profit could be reallocated to market jurisdictions pursuant to the new taxing right of Pillar One.[195] As a result, the OECD projects a modest increase in global tax revenues, and more specifically, it estimates that low, middle and high income economies on average will acquire revenue gains,[196] whereas “investment hubs”[197] will forego tax revenues.[198] United States Treasury Secretary Janet Yellen has indicated that Pillar One will be “largely revenue neutral” for the United States because the U.S. “will be on both the receiving and giving end of the proposed profit reallocations.”[199] A commentator, however, estimates that Pillar One will cost the U.S. $10.3 billion in revenue per year (i.e., revenue gain of $12.6 billion less $22.9 billion from credit offsets).[200] Another commentator argued that Pillar One’s scope requirements (largest and most profitable companies) will "disproportionately impact" U.S. MNEs as well as the U.S. Treasury because these MNEs will pay less to the Internal Revenue Service and more to foreign governments.[201] According to a policy brief from the Oxford Centre for Business Taxation, commentators suggest that Pillar One will impact only seventy-eight of the five hundred largest companies globally.[202] Furthermore, they estimate that the total reallocation for Amount A is $87 billion[203] from these companies, and of which, U.S.-based companies will generate approximately $56 billion; technology companies will generate approximately $39 billion of the total; and the five largest U.S. technology companies (i.e., Alphabet, Apple, Facebook, Intel and Microsoft) will generate approximately $28 billion of the total.[204] Nonetheless, the scope rules described in the OECD Statement will subject more European companies and more businesses across sectors to tax than the Blueprint version.[205]

At the time of writing, Pillar One's implementation may prove challenging in the U.S. Congress as certain members have expressed opposition to its policies, and thus, creates political uncertainty.[206] Because Pillar One will impact existing bilateral treaties, commentators have argued that its implementation will require Congressional support of the Inclusive Framework's Multilateral Convention and potentially a new international tax treaty by Senate ratification (two-thirds majority vote).[207] U.S. Treasury Secretary Yellen has indicated that the current administration is contemplating "alternative means to modify existing bilateral treaties" and Pillar One's new taxing right should generate bipartisan support because it replaces DSTs.[208] Consequently, the U.S. still finds itself in a precarious balancing act as it joins the OECD's efforts to reform international tax via a paradigm shift that aligns with today's digital economy meanwhile resolutely protecting the sizable tax base generated by U.S.-based digital giants.[209]

VII. CONCLUSION

At the time the international tax framework was established a century ago, no one envisioned the technological capabilities of present day (the drafters certainly did not anticipate Facebook, TikTok, YouTube, Instagram and so forth) along with the vast opportunities afforded to businesses as a result. The digital economy has raised a number of issues and challenges in the area of international tax. Because the digital economy relies heavily on intangible assets, the collection and use of data (particularly, personal data), user-generated content and participation, and multi-sided business models, the fundamental international tax concepts of source and residence and/or the character of income are more challenging to apply and increase the risks of base erosion and profit shifting.[210] The OECD and G20 have grappled in more recent years with the fundamental questions the digital economy has raised in terms of source and residence, nexus, and the characterization of income (formerly, widely accepted principles) for international tax purposes. Meanwhile, certain countries have acted unilaterally to impose digital services taxes under mounting pressure to raise tax revenue and a growing sentiment that certain MNEs pay nations their "fair share" of taxes.[211]

The OECD Statement puts forth an aggressive timetable by any standards to implement Pillar One. Pillar One, in essence, proposes drastic departures (a new taxing right, new nexus and reallocation of profits to *market* jurisdictions) from traditional international tax principles toward a much needed evolution of the international framework. Although the OECD provided an implementation plan of this agreement on October 8, 2021 (anticipates a Multilateral Convention in 2022 and effective date in 2023), there is still considerable work to flesh out the particulars of Pillar One's framework, which will reallocate much needed income to market jurisdictions while impacting a relatively small quantity of MNEs. Both sides — taxing jurisdictions and MNEs — must grapple with the complexity and impact of Pillar One's resulting changes in domestic tax law and multilateral agreements including the additional costs associated with compliance, administration and collection. Although the agreement between most members of the Inclusive Framework is a monumental accomplishment, there is still considerable work that remains (including negotiations with the remaining holdout countries) and continued multilateral cooperation required before the "perfect play" manifested in the new taxing right, new nexus and tax allocation rules take effect and enable tax jurisdictions to reap the benefits around the globe.

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[1] The miniseries is based on the novel, *The Queen's Gambit*, by Walter Tevis originally published in 1983. *Netflix Orders Limited Series The Queen's Gambit From Scott Frank* (Press release), NETFLIX MEDIA CENTER (Mar. 19, 2019), https://about.netflix.com/en/news/netflix-orders-limited-series-the-queens-gambit-from-scott-frank.

[2] Wikipedia, *The Queen's Gambit (miniseries)*, *at* https://en.wikipedia.org/wiki/The_Queen%27s_Gambit_(miniseries) (last visited December 30, 2021); Judy Berman, *Netflix's Marvelous The Queen's Gambit Is the Kind of Prestige Drama TV Doesn't Make Anymore*, TIME (Oct. 20, 2020), https://time.com/5901699/queens-gambit-review-netflix/.

[3] Wikipedia, *Queen's Gambit*, *at* https://en.wikipedia.org/wiki/Queen%27s_Gambit (last visited December 30, 2021); The Chess Website, *Queens Gambit*, *at* https://www.thechesswebsite.com/queens-gambit/ (last visited December 30, 2021).

[4] Wikipedia, *Gambit*, at https://en.wikipedia.org/wiki/Gambit (last visited December 30, 2021).

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[5] The Chess Website, *Queens Gambit*, *at* https://www.thechesswebsite.com/queens-gambit/ (last visited December 30, 2021). Specifically, the opening moves begin with 1. d4 d5, 2. c4.

[6] Kent Babb, *The Pandemic Sparked Interest in Chess. "The Queen's Gambit" Made It Explode*, THE WASHINGTON POST (Nov. 27, 2020), https://www.washingtonpost.com/sports/2020/11/27/queen-gambit-chess-interest/.

[7] The OECD/G20 Inclusive Framework is comprised of approximately 141 countries that have committed to monitoring and peer reviewing the implementation of minimum standards and setting standards required to address tax avoidance from base erosion and profit and shifting. *See* Members of the OECD/G20 Inclusive Framework on BEPS (Updated Nov. 2021) *at* https://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.

[8] For example, the U.S. recently reversed its position on Pillar One as an elective safe harbor and instead agreed to scope based on the "largest and most profitable" countries in exchange for the removal of unilateral measures such as the digital services tax. *See* Part VI, *infra* (U.S. Tax Policy: Who Makes the Rules Now, and What If No One Agrees?).

[9] UNCTAD, *Digital Economy Report 2019* (Sept. 4, 2019), https://unctad.org/webflyer/digital-economy-report-2019.

[10] LOWRY, SEAN, CONGRESSIONAL RESEARCH SERV., R45532, DIGITAL SERVICES TAXES (DSTS): POLICY AND ECONOMIC ANALYSIS (2019), at Pg. 1.

[11] OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report* (Sept. 16, 2014), at 64–74, 143, https://www.oecd.org/ctp/addressing-the-tax-challenges-of-the-digital-economy-9789264218789-en.htm [hereinafter OECD, *Action 1 - 2015 Final Report*].

[12] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 142.

[13] OECD, *Tax Challenges Arising from Digitalization—Interim Report 2018* (Mar. 16, 2018), at 24, 51–52, https://www.oecd.org/ctp/tax-challenges-arising-from-digitalisation-interim-report-9789264293083-en.htm [hereinafter OECD, *Interim Report 2018*].

[14] *Id.*

[15] *Id.*

[16] *Id*.

[17] OECD, *Interim Report 2018*, *supra* note 13, at 24, 52–53.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

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[22] *Id.*
[23] *Id.*
[24] OECD, *Interim Report 2018*, *supra* note 13, at 24, 52–53.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] LOWRY, *supra* note 10, at 1.
[31] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 58.
[32] *Id.* at 64.
[33] LOWRY, *supra* note 10, at 1; OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 64.
[34] LOWRY, *supra* note 10, at 1.
[35] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 64.
[36] LOWRY, *supra* note 10, at 1.
[37] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 64.
[38] OECD, *Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Jan. 29-30, 2020), at 10, https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps.htm [hereinafter OECD, *OECD/G20 Statement on BEPS*].
[39] OECD, *OECD/G20 Statement on BEPS*, *supra* note 38, at 10.
[40] OECD, *Tax Challenges Arising from Digitalisation – Report on Pillar One Blueprint: Inclusive Framework on BEPS* (Oct. 14, 2020), at 19, https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-report-on-pillar-one-blueprint-beba0634-en.htm [hereinafter OECD, *Report on Pillar One Blueprint*].
[41] OECD, *OECD/G20 Statement on BEPS*, *supra* note 38, at 10.
[42] *Id.*
[43] Joint Committee on Taxation, *Present Law and Selected Policy Issues in the U.S. Taxation of Cross-Border Income*, JCX-51-15, Mar. 16, 2015, at 2.
[44] OECD, *Interim Report 2018*, *supra* note 13, at 167.
[45] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 19.
[46] *Id*.
[47] Joint Committee on Taxation, *U.S. International Tax Policy: Overview and Analysis*, JCX-16R-21, Apr. 19, 2021, at 2 [hereinafter JCX-16R-21].
[48] OECD, *Interim Report 2018*, *supra* note 13, at 168. *See also* Itai Grinberg, *The New International Tax Diplomacy*, 104 GEO. L.J. 1137 (2016), at 1187–1189.
[49] OECD, *Interim Report 2018*, *supra* note 13, at 168.

[50] JANE G. GRAVELLE & DONALD J. MARPLES, CONGRESSIONAL RESEARCH SERV., R45186, ISSUES IN INTERNATIONAL CORPORATE TAXATION: THE 2017 REVISION (P.L. 115-97) (2021), at 6; OECD, *Interim Report 2018*, *supra* note 13, at 168.
[51] GRAVELLE & MARPLES, *supra* note 50, at 6.
[52] OECD, *Interim Report 2018*, *supra* note 13, at 168.
[53] LOWRY, *supra* note 10, at 2.
[54] For a discussion of the arm's-length principle and its decline, *see* Itai Grinberg, *International Taxation in an Era of Digital Disruption: Analyzing the Current Debate*, TAXES (Mar. 2019), at 88–91.
[55] JCX-16R-21, *supra* note 47, at 2.
[56] OECD, *Interim Report 2018*, *supra* note 13, at 168.
[57] I.R.C. §§ 861–865.
[58] JCX-16R-21, *supra* note 47, at 2.
[59] *Id*.
[60] JCX-16R-21, *supra* note 47, at 3.
[61] *Id*.
[62] *Id*.; OECD, *Interim Report 2018*, *supra* note 13, at 167, 169.
[63] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 100.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 99.
[68] *See* Part II, *supra* (New Pieces, New Rules: The Focus on Selected Markets in the Digital Economy).
[69] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 102.
[70] *Id.*
[71] *Id.* at 103.
[72] *Id.* at 99.
[73] *See* Part II, *supra* (New Pieces, New Rules: The Focus on Selected Markets in the Digital Economy).
[74] E.g., commercial equipment, industrial equipment or scientific equipment rentals, cloud-computing payments.
[75] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 99.
[76] *Id.* at 104.
[77] OECD, *Action 1 - 2015 Final Report*, *supra* note 11, at 106.
[78] *Id.* at 106.
[79] LOWRY, *supra* note 10, at 1.
[80] SCHWARZENBERG, ANDRES B., CONGRESSIONAL RESEARCH SERV., IF11564, SECTION 301 INVESTIGATIONS: FOREIGN DIGITAL SERVICES TAXES (DSTS) (Mar. 1, 2021), at 1.

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[81] Reuven S. Avi-Yonah, *A Positive Dialectic: BEPS and the United States*, 114 AJIL UNBOUND 255 (2020), at 258.
[82] SCHWARZENBERG, *supra* note 80, at 1.
[83] *Id.*
[84] *Id*. at 2; *see also* KPMG TAXATION OF THE DIGITALIZED ECONOMY, DEVELOPMENTS SUMMARY, *at* https://tax.kpmg.us/content/dam/tax/en/pdfs/2021/digitalized-economy-taxation-developments-summary.pdf (last visited December 30, 2021).
[85] SCHWARZENBERG, *supra* note 80, at 2.
[86] OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Oct. 8, 2021), at 3, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.htm [hereinafter OECD, *Two-Pillar Solution Statement*].
[87] *Id* at 3, 7.
[88] *See* Jared Walczak, *States Consider Digital Taxes Amidst Conflicting Rationales*, TAX FOUNDATION (May 10, 2021), https://taxfoundation.org/state-digital-taxes/; Ruth Mason and Darien Shanske, *INSIGHT: The Time Has Come for State Digital Taxes*, BLOOMBERG TAX (May 29, 2020), https://news.bloombergtax.com/daily-tax-report-state/insight-the-time-has-come-for-state-digital-taxes-55.
[89] Pillar One is part of the OECD's two-pillar approach to address tax challenges arising from the digital economy. Pillar One focuses on the allocation of taxing rights (in particular, nexus and profit allocation). Pillar Two focuses on a global minimum tax to address issues of base erosion profit shifting where countries have not exercised their taxing right or imposed a low-level of taxation. OECD, *OECD/G20 Statement on BEPS*, *supra* note 38, at 27.
[90] OECD, *Action 1 - 2015 Final Report*, *supra* note 11. For more background on the OECD's work including the Task Force on the Digital Economy, *see* Lilian V. Faulhaber, *Taxing Tech: The Future of Digital Taxation*, 39 VA. TAX REV. 145 (2019); Yariv Brauner, *Thinking Like a Source State in a Digital Economy*, 18 PITT. TAX REV. 225 (2021), at 234–238.
[91] OECD, *Report on Pillar One Blueprint*, *supra* note 40.
[92] *Id.* at 8.
[93] *Id.*
[94] *Id*. at 19–133.
[95] *Id*. at 155–164.
[96] *Id*. at 168–197.
[97] OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Jul.1, 2021), at 1, https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-

address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.htm.

[98] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 1.

[99] *Id.*

[100] Allison Christians, *BEPS and the New International Tax Order*, 2016 B.Y.U. L. REV. 1603 (2016), at 1609, 1644.

[101] The Task Force on the Digital Economy is expected to develop model rules for domestic law in early 2022. OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 7.

[102] *Id.* at 3, 6.

[103] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 11.

[104] *Id.* at 12.

[105] *See* Part II, *supra* (New Pieces, New Rules: The Focus on Selected Markets in the Digital Economy).

[106] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 20, 22.

[107] *Id.* at 20.

[108] The positive list, which are per se automated digital services includes online advertising services; sale or other alienation of user data; online search engines; social media platforms; online intermediation platforms; digital content services; online gaming; standardized online teaching services; and cloud computing services. While the negative list of non-automated digital services includes customized professional services; customized online teaching services; online sale of goods and services other than automated digital service; revenue from the sale of a physical goods irrespective of network connectivity; and services providing access to the Internet or another electronic network. *Id.*

[109] *Id*.

[110] *Id*.

[111] *Id*. at 21.

[112] *Id*.

[113] *Id*.

[114] *Id*. at 22.

[115] *Id*. at 58.

[116] *Id*.

[117] *Id*. at 59.

[118] *Id*. at 60.

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id.*

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[123] The Inclusive Framework members discussed which industries should be excluded based on the nature, regulation, and existing special tax regimes of the specific industry.
[124] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 47.
[125] The Blueprint provides the following segmentation framework: (1) MNE groups determine their revenue between automated digital services, consumer-facing businesses and out of scope activities; (2) if revenue is less than a certain threshold, then the MNE group calculates that tax base of Amount A on a group basis; and (3) any remaining MNE groups would then apply "segmentation hallmarks" to determine if they must segment by business line or geography. *Id.* at 106–110.
[126] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 1.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] David. D. Stewart & Stephanie Soong Johnston, *The Biden and Wyden Tax Plans*, TAX NOTES TALK (Apr. 21, 2021), https://www.taxnotes.com/tax-notes-talk/podcast/biden-and-wyden-tax-plans/4v9q2; David Morse, *OECD Tax Negotiations Offer Chance for New Approach*, BLOOMBERG TAX (May 21, 2021), https://news.bloomberglaw.com/daily-tax-report/oecd-tax-negotiations-offer-chance-for-new-approach. Economists have found that approximately one-third to one-half of the largest and most profitable companies are U.S. headquartered businesses. Daniel Bunn, *Treasury's Latest Pillar 1 Proposal: A Strategy to Split the Riches or Give Away the Store?*, TAX FOUNDATION (Apr. 14, 2021), https://taxfoundation.org/treasury-pillar-1-proposal/. Presumably, these companies will include "GAFA," if not on a consolidated basis then by segmentation under Pillar One.
[131] Stewart & Johnston, *The Biden and Wyden Tax Plans*, *supra* note 130.
[132] Specifically, questions were raised as to how Pillar One should apply to profitable segments such as Amazon's cloud business. David. D. Stewart and Stephanie Soong Johnston, *The Beginning of the End? An Update on the OECD Tax Reform Plan*, TAX NOTES TALK (Jul. 27, 2021), https://www.taxnotes.com/tax-notes-talk/podcast/beginning-end-update-oecd-tax-reform-plan/76x6s.
[133] *See* Part V, *supra* (Two-Pillar Solution Statement: Threshold for Large Companies and Profitability).
[134] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 2.
[135] FASB ASC 280-10-50-12.
[136] IFRS 8, ⁋ 13.
[137] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 64.
[138] *Id.* at 65.

[139] *Id.*
[140] *Id.* at 64.
[141] *Id.*
[142] *Id.* at 64–67.
[143] *Id.*
[144] *Id.* at 66–67.
[145] *Id.* at 65.
[146] *Id.* at 120.
[147] *Id.*
[148] *Id.* at 98.
[149] OECD, *Tax Challenges Arising from Digitalisation – Economic Impact Assessment: Inclusive Framework on BEPS* (Oct. 12, 2020), at 29, https://www.oecd.org/tax/beps/tax-challenges-arising-from-digitalisation-economic-impact-assessment-0e3cc2d4-en.htm [hereinafter OECD, *Economic Impact Assessment*].
[150] *Id.* at 29.
[151] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 1.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 2.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 148.
[161] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 2.
[162] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 71, 81–93.
[163] *Id.* at 73.
[164] *Id.* at 71.
[165] *Id.* at 94–95.
[166] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 2
[167] *Id.*
[168] *Id.*
[169] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 155.
[170] *Id.*
[171] *Id.*
[172] OECD, *Report on Pillar One Blueprint*, *supra* note 40, at 156–163.
[173] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 3.
[174] *Id.* at 2.
[175] *Id.*
[176] *Id.*

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[177] *Id.* at 6.
[178] *Id*.
[179] Stewart & Johnston, *An Update on the OECD Tax Reform Plan*, *supra* note 132.
[180] OECD, *Two-Pillar Solution Statement*, *supra* note 86, at 3, 6.
[181] Brauner, *supra* note 90, at 238–239.
[182] Avi-Yonah, *supra* note 81, at 258.
[183] Stewart & Johnston, *An Update on the OECD Tax Reform Plan*, *supra* note 132.
[184] *Id.*
[185] Stewart & Johnston, *The Biden and Wyden Tax Plans*, *supra* note 130; Morse, *OECD Tax Negotiations*, *supra* note 130.
[186] *Id.*
[187] Stewart & Johnston, *The Biden and Wyden Tax Plans*, *supra* note 130.
[188] *See* Part V, *supra* (OECD Pillar 1, Scope, Two-Pillar Solution Statement).
[189] *See* Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals* (May 2021) available at https://home.treasury.gov/policy-issues/tax-policy/revenue-proposals.
[190] SCHWARZENBERG, *supra* note 80, at 1.
[191] Office of the United States Trade Representative, *Notice of Action in the Section 301 Investigation of Austria's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of India's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of Italy's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of Spain's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of Turkey's Digital Services Tax* (Jun. 7, 2021), *Notice of Action in the Section 301 Investigation of the United Kingdom's Digital Services Tax* (Jun. 7, 2021) available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes.
[192] *Id.*; Office of the United States Trade Representative, *Notice of Modification of Section 301 Action: Investigation of France's Digital Services Tax* (Jan. 12, 2021), https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice_of_Modification_France_DST_January_2021.pdf.
[193] Office of the United States Trade Representative, *Termination of Actions in the Section 301 Digital Services Tax Investigations of Austria, France, Italy, Spain, and the United Kingdom and Further Monitoring* (Nov. 18, 2021), *Termination of Action in the Section 301 Digital Services Tax Investigation of Turkey and Further Monitoring* (Nov. 24, 2021), *Termination of Action in the Section 301 Digital Services Tax Investigation*

of India and Further Monitoring (Nov. 26, 2021) available at https://ustr.gov/issue-areas/enforcement/section-301-investigations/section-301-digital-services-taxes.

[194] *Id.*

[195] OECD, *Economic Impact Assessment*, *supra* note 149, at 10.

[196] *Id.*

[197] Defined as countries with total inward foreign direct investment position greater than 150% gross domestic product. OECD, *Economic Impact Assessment, supra* note 149, at 18.

[198] *Id.* at 10.

[199] Colin Wilhelm, *Yellen Says Global Tax Plan 'Largely' Revenue Neutral for U.S.*, BLOOMBERG TAX (Jun. 8, 2021), https://news.bloombergtax.com/daily-tax-report/yellen-says-global-tax-plan-largely-revenue-neutral-for-u-s; Stephanie Soong Johnston, *U.S. Pillar 1 Tax Pitch Is Largely Revenue Neutral, Yellen Says*, TAX NOTES TODAY (Jun. 14, 2021), https://www.taxnotes.com/tax-notes-federal/politics-taxation/us-pillar-1-tax-pitch-largely-revenue-neutral-yellen-says/2021/06/14/76l86.

[200] Robert Goulder, *The Price of Tax Reform: Pillar 1 Reduced to the Back of a Napkin*, TAX NOTES (Jul. 1, 2021), https://www.taxnotes.com/featured-analysis/cost-change-pillar-1-reduced-back-napkin/2021/07/01/76qdb.

[201] Bunn, *Treasury's Latest Pillar 1 Proposal*, *supra* note 130.

[202] Martin Simmler & Michael P. Devereux, *Who will pay Amount A?*, OXFORD CENTRE FOR BUSINESS TAXATION (Jul. 5, 2021), https://oxfordtax.sbs.ox.ac.uk/article/who-will-pay-amount-a.

[203] This amount assumes that the quantum of Amount A allocated to market jurisdictions is twenty percent (from the twenty to thirty percent range) of residual profits. *Id*. For a discussion of Amount A, *see* Part V, *infra* (OECD Pillar 1, Nexus, Amount A — Quantum, Two-Pillar Solution Statement).

[204] Simmler & Devereux, *supra* note 202.

[205] Ruth Mason, *The 2021 Compromise*, 172 TAX NOTES FED. 569 (2021).

[206] William Horobin, *Global Minimum Tax Nears Reality as OECD Sets Model Rule*, BLOOMBERG BUSINESS TAXES (Dec. 20, 2021), https://www.bloomberg.com/news/articles/2021-12-20/global-minimum-tax-nears-reality-as-oecd-sets-out-model-rules.

[207] David Lauder & Doina Chiacu, *Yellen Confident U.S. Congress will Pass Minimum Global Corporate Tax* (Oct. 10, 2021), https://www.reuters.com/business/finance/us-treasurys-yellen-confident-congress-will-pass-global-minimum-tax-2021-10-10/; *see also* David. D. Stewart & Stephanie Soong Johnston, *The End is Nigh: An Update on the OECD Reform Plan*, TAX NOTES TALK (Oct. 19, 2021),

https://www.taxnotes.com/opinions/interview-end-nigh-update-oecd-tax-reform-plan/2021/10/19/7bclt.

[208] *Id*.

[209] Brauner, *supra* note 90, at 238–244.

[210] Joint Committee on Taxation, *Background*, *Summary, and Implications of the OECD/G20 Base Erosion and Profit Shifting Project*, JCX-139-15, Nov. 30, 2015, at 11.

[211] LOWRY, *supra* note 10, at 1.

PEDAGOGY

BEYOND THE TEXTBOOK: INCORPORATING POPULAR NON-FICTION BOOKS INTO THE BUSINESS LAW CURRICULUM FOR TEACHING DIVERSITY, EQUITY AND INCLUSION

by

Dr. Sean J. Shannon*

ABSRACT

This article addresses the experience of incorporating legal issues of diversity, equity and inclusion (DEI) into the business law curriculum by having students read popular non-fiction books which directly address salient DEI issues on race and sex discrimination. The purpose of utilizing popular non-fiction books is to create a common read experience across course sections and provide a shared touchstone for business law students in which to facilitate dialogue and create further pedagogical opportunities to address issues related to DEI.

*J.D., Ph.D., Assistant Professor of Law, State University of New York, College at Oneonta, School of Liberal Arts and Business.

Presented at the SUNY Business School Deans Conference on Diversity, Equity and Inclusion in the Classroom, "Business Disciplines Leaning into

the Future: Tips, Tools and Practices for Incorporating Diversity, Equity and Inclusion into Business School Classes" session. April 30, 2021

During the 2020-2021 academic year, all students enrolled in Legal Environment of Business courses were required to read *The Color of Law: A Forgotten History of How Our Government Segregated America* by Richard Rothstein in which they explored DEI issues as they related to business law subjects including, but not limited to, real estate and zoning, banking and insurance, and housing discrimination. The upper-division Commercial Law class read *Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work* by Gillian Thomas to better understand employment law, sexual harassment, discrimination, equal opportunity, and the legal challenges and progress women have made in the workplace since the passage of Title VII of the Civil Rights Act of 1964.

INTRODUCTION

A cursory review of business law textbooks designed for undergraduate Legal Environment of Business law courses are comprehensive and cover a broad range of legal subject matters that even a law student may not cover in three years of their legal education, let alone 15 weeks in a regular undergraduate semester. Business law faculty are left in the unenviable position of having to cover the canonical topics of contracts, torts, business entities and either eliminate material or provide a relatively superficial discussion of other non-canonical legal topics, which can limit pedagogical creativity and prevent the inclusion of new material. This is an issue not simply confined to business law faculty and, like many disciplines, the course material to be covered in a class has to be prioritized with the hopes that the material not addressed might be offered in future classes.

The murder of George Floyd in the summer of 2020 brought front and center the ongoing challenges of institutional racism and an increasing awareness in higher education for the necessity to address issues of diversity, equity and inclusion (hereinafter "DEI") in the classroom. Many law courses address DEI issues in a peripheral manner, but this may not be sufficient for the moment and it is necessary to reprioritize the curriculum and step outside the pedagogical comfort zone to address DEI issues. In order to help facilitate conversation in respects to legal issues related to DEI, two popular non-fiction books were incorporated into the business law curriculum for the 2020-2021 academic year to create a critical mass of business law students who have read the books with the goal of facilitating a broader DEI dialogue in business law.

All students taking Legal Environment of Business were required to read *The Color of Law: A Forgotten History of How our Government Segregated America*[1] (hereinafter *The Color of Law*) by Richard Rothstein and the upper-division Commercial Law class, traditionally designed to prepare accounting majors for the CPA, read *Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work*[2] (hereinafter *Because of Sex*) by Gillian Thomas to help facilitate a dialogue of DEI issues related to employment law, sexual harassment and discrimination. The book also created an opportunity to discuss gender and transgender issues in light of the Supreme Court's recent decision, *Bostock v. Clayton County* (2020), which expanded the definition of "sex" under Title VII of the Civil Rights Act of 1964 to include gender and transgender protection in the workplace.[3]

There are a number of excellent non-academic popular non-fiction books available for business law faculty to incorporate into their curriculum which focus on the larger narrative of an issue, rather than its constituent legal parts, which can provide important educative value for undergraduate students studying business law by facilitating a more holistic legal and socio-economic understanding of important contemporary legal and public policy issues. Utilizing non-fiction popular texts can address important business law subjects and can be useful in creating a dialogue for developing students' ethical and critical legal thinking skills, preparing students for a diverse society and workforce, both domestically and internationally, and equip them with the skills necessary as future leaders.[4] Addressing DEI issues in the curriculum and classroom are part and parcel of the larger business school role in educating leaders of tomorrow who can address the needs of a rapidly changing world.

Popular non-fiction texts that address issues of DEI also present opportunities to enhance our efforts teaching ethical frameworks by addressing salient and challenging issues. Not all issues can be resolved by the law. The late Chief Justice Earl Warren said that, "In a civilized life, the law floats in a sea of ethics.[5]" Much of our society's behavior is shaped by normative and ethical principles, not simply by the law. The required books focus on the law, but they also provide opportunities to discuss the ethics of DEI issues and where the law may be incapable or inappropriate to address such issues.[6] Adding DEI issues to the business law curriculum will not only help our students to develop the ethical foundations necessary to address these issues, but will also enhance the importance of business law in higher education.

THE COLOR OF LAW

Introduction

Our students are faced with a difficult quandary: they have inherited a society and legal framework that was neither of their making or choosing. Our students will spend much of their lives learning to navigate society's laws and legacy issues, but rarely have the opportunity to spend time to explore and understand the reasons such laws came into being in the first place except while in school. Business law is one avenue to assist in explaining the legal framework the students have inherited and the steps necessary to change it. Perhaps the most obvious set of laws and legacy issues in which students must spend a lifetime navigating is residential housing.

Most undergraduate business law classes will not address insurance and banking and may only address real estate in respects to local zoning laws, but rarely do they spend much time delving into real estate law to appreciate the geographic parameters in which the students reside. There are many good books that address the topic of residential development in the United States[7], but *The Color of Law* is timely, particularly in explaining the legal foundations for contemporary residential segregation in the United States and its impact on other contemporary social and legal issues. Housing is central to our students' lives and it is one area that they can all personally relate.

In his Pulitzer Prize winning book, *Evicted: Poverty and Profit in the American City,* Matthew Desmond points out that, "The home is the center of life. It is a refuge from the grind of work, the pressure of school, and the menace of the streets. We say that at home, we can be ourselves. Everywhere else, we are someone else. At home, we remove our masks. The home is the wellspring of personhood. It is where our identity takes root and blossoms, where as children, we imagine, play and question, and as adolescents, we retreat and try. As we grow older, we hope to settle into a place to raise a family or pursue work. When we try to understand ourselves, we often begin by considering the kind of home in which we were raised." He goes on further to discuss the important role that residential housing plays in a democratic society noting that, "Civic life too begins at home, allowing us to plant roots and take ownership over our community, participate in local politics, and reach out to neighbors in a spirit of solidarity and generosity.[8] In some respects *Evicted* is an even more timely popular non-fiction book. As the United States addresses the COVID-related eviction crisis, *Evicted* may be another non-fiction title business law faculty may consider incorporating into their curriculum and classroom discussion.

The basic premise of Rothstein's arguments in *The Color of Law* is that the residential segregation in the United States is assumed to be the product of *de facto* segregation; residential segregation is just the way it is through the actions of private actors and that the law did not play a role. In fact, Rothstein argues that it was *de jure* action, with local, state, and federal government, in conjunction with private actors, which helped to create the residential segregation and a host of other DEI-related issues confronting society today.

Educational Objectives and Integrating into the Curriculum

Due to the breadth of the material in Legal Environment of Business courses, it is challenging to incorporate additional content into the curriculum, but not impossible. In order to successfully integrate *The Color of Law* into the curriculum, the class read the book one chapter at a time over 12 weeks. The class spent 30 to 45 minutes a week discussing the book, usually during the second half of the last class of the week. Although it may not seem like a great deal of time to address the many DEI issues and legal topics the book raises, it did permit at least six hours of class time discussing the book over the 12 weeks. This required prioritizing the content in *The Color of Law* for class discussion by focusing on many of the legal issues the book raised such as redlining, zoning, restrictive covenants in deeds, banking, insurance, and legal enforcement.

For many, the topics raised may be difficult to discuss or, more importantly, unless properly prepared, faculty may feel uncomfortable discussing the issue raised due to a lack of specialization in DEI. Having an open and candid dialogue on issues of race, poverty, and privilege presents unique challenges in a classroom of 45 students; even more so when students are online, cameras are off, and students submit comments in the chat box. It takes sensitivity, compassion, patience, and practice in order for the conversation to be productive. Approaching the material from a conical business law perspective provides a relatively neutral approach, but only to some degree.

Approaching issues of DEI requires business law faculty to spend some class preparation time focusing and reflecting upon their own personal bias and history. Fortunately, there are numerous articles, texts, and trainings to help develop the self-awareness necessary to teach sensitive topics addressing DEI. Two books which proved helpful in addressing concerns about discussing DEI topics are *How to Be an Antiracist*[9] by Ibram X. Kendi and *White Fragility, Why It's So Hard for White People to Talk About Racism*[10] by Robin Diangelo.

Diangelo is direct in her analysis of the issue and states unequivocally the problem and failure for dialogues is because, "White people in North America live in a society that is deeply separate and unequal by race, and white people are the beneficiaries of that separation and inequality. As a result, we are insulated from racial stress, at the same time that we come to feel entitled to and deserving of our advantage. Given how seldom we experience racial discomfort in a society we dominate, we haven't had to build our racial stamina. Socialized into a deeply internalized sense of superiority that we either are unaware of or can never admit to ourselves, we become highly fragile in conversations about race. We consider a challenge to our racial worldviews as a challenge to our very identities as good, moral people."[11] The process of preparing to teach and address DEI issues is as much an education for the instructor as it is for the students.

It is important to be candid and honest, and preparatory remarks before engaging in the material are appropriate and necessary. Explaining to the class that these are difficult topics for many to discuss and appreciating, understanding, and respecting the relative different starting points from which the students are approaching the topic helps to provide an environment that is safe, engaging, and respectful.

Understanding the role of racism in residential segregation is necessary to understand the *de jure* policies that have led to the present situation. Kendi writes in *How to Be an Antiracist*, "A racist idea is any idea that suggest one racial group is inferior or superior to another racial group in any way. Racist ideas argue that the inferiorities and superiorities of racial groups explain racial inequalities in society. An antiracist idea is any idea that suggest the racial groups are equals in all their apparent differences – that there is nothing right or wrong with any racial groups. Antiracist ideas argue that racist policies are the cause racial inequalities." He goes on further to explain that it is important to "[u]nderstanding the differences between racist policies and antiracist polices, between racist ideas and antiracist ideas, allows us to return to our fundamental definitions. Racism is a powerful collection of racist policies that led to racial inequality and are substantiated by racist ideas. Antiracism is a powerful collection of antiracist policies that lead to racial equality and are substantiated by antitracist ideas."[12] Rothstein makes the argument that the only way of resolving the problem of residential segregation is by first recognizing the problem of racism and the laws that created the existing situation.[13]

Some students may be reluctant to speak up in class. In addition to questions on the periodic exams in the class, a writing assignment was created to permit the students the opportunity to reflect and analyze some of the issues in the book. There are numerous resources available to assist in the discussion of the book including videos and discussion questions,[14] which were utilized in the class. The essay assignment was designed to provide students with flexibility and ample opportunity to express their thoughts on the subject. Students were allowed to select two questions from a list of four questions provided and, at minimum, responses should be at least 500 words. The following questions were provided:

1) What surprised you as you read *The Color of Law*?

2) The author sets forth several challenges to undoing residential segregation. Which do you believe is the most pernicious? What steps would you take to address residential segregation?

3) Chief Justice John Roberts wrote that residential segregation "is a product not of state action but of private choices, it does

not have constitutional implications." Do you agree or disagree with this statement? Explain your decision with supporting evidence.

4) If the municipality in which you presently reside, or one in which you have lived, has an online website where you can view the zoning map for the municipality, in which zone do you live or have lived, and can you observe any unique zoning features on the zoning map that supports Rothstein's arguments on neighborhood segregation? Please explain. If possible, include a copy or link to the zoning map.

Student Responses

The general consensus by the students in response to reading *The Color of Law* is shock and surprise. They did not understand or appreciate the extent of the problem. But the book also provided an explanation for institutional racism and residential segregation of which many who have had, and continue to have, direct personal experience.

Perhaps the most interesting response was from a student who chose to answer the question regarding zoning and researched the zoning of her neighborhood in Rosedale, Queens and compared it to the neighboring community in Valley Stream located in Nassau County on Long Island. Having grown up in Rosedale, Queens, she was completely unaware of the racial hostility in her community in the 1970s. African American families, who had recently moved into the Rosedale section, had their homes bombed and a group of white residents, opposed to integration of their community, created ROAR, Return Our American Rights, an organization committed to preventing the integration of the community.

She discovered the tensions were the center of a documentary titled, “Rosedale: The Way It Is,” produced and narrated by Bill Moyers in 1976.[15] The student was shocked to learn about her community, but also came to understand the *de jure* underpinnings that have created two very different communities: Rosedale, Queens and Valley Stream, two municipalities that share the same border but have very different demographics and racial composition. Students also found similar trends in rural and suburban communities. Although primarily focused on racial segregation, the book also addressed segregation of communities based on income, nationality, and religion and the inter-connectedness of these issues in segregated residential housing patterns that exist to this day.

BECAUSE OF SEX

Introduction

Legal issues related to DEI are not simply limited to race. An important area of the law addressed in Legal Environment of Business is the area of Employment Law and sex discrimination in the workplace. In light of the recent Supreme Court decision in *Bostock v. Clayton* (2020)[16] in which the Court held that “sex” under Title VII of the Civil Rights Act of 1964 includes gay and transgender protection, most people are unfamiliar with how “sex” came to be included in Title VII and the long legal fight to give “sex” meaning and enforcement against discrimination “because of sex.”[17] Gillian Thomas’ book, *Because of Sex, One Law, Ten Cases, and Fifty Years That Changed American Women’s Lives at Work* addresses the subject by first discussing the last-minute addition of “sex” to the legislation and the subsequent Supreme Court jurisprudence over the next 50 years to provide legal protection for women in the workplace.

Educational Objectives and Integrating into the Curriculum

Since some of the students had already read *The Color of Law* in the Fall of 2020 in their Legal Environment of Business class, an alternative popular non-fiction book was required. Commercial Law is an upper-level course offered in the spring semester traditionally intended to prepare students who wish to take the CPA exam and enter the accounting profession, although there are many students who take the class because of their interest in law. As future professionals, *Because of Sex* is an opportunity to explore topics of employment law, particularly as it relates to sexual harassment and equal opportunity, and to prepare the students for their professional careers in which they may encounter some of the legal issues addressed in the book. The ten cases discussed all address employment discrimination "because of sex" and the evolution of the Supreme Court's jurisprudence on the subject.

Due to the time constraints and need to cover a great deal of material in the semester, the course follows the same pattern of instruction used to teach *The Color of Law*; the class reads a chapter a week, which covers one landmark case in detail, over 10 weeks for 30 to 45 minutes a week. Due to the nature of the cases, some of the facts and circumstances women encountered in the ten cases are quite disturbing and it is necessary to prepare students by giving them warning that the book contains stories of sexual harassment and violence that may be upsetting to some students.

Even though some might consider residential segregation and employment discrimination and sexual harassment as unrelated, in respects to issues of DEI, they are quite connected. Title VII of the Civil Rights Act of 1964 addresses discrimination in the workplace based on race, color, ethnicity, religion, and sex and the 1968 Fair Housing Act was added to the 1964 Civil Rights Act to address the same discrimination, but in residential housing. The two civil rights acts are also an opportunity to explain the difference between common law and statutory law to the students.

The students were assessed via questions in periodic exams and were provided ample opportunity to express their thoughts on the subject and book by responding to two of three questions from the following list:

1) Which case(s) surprised you and why as you read *Because of Sex*?

2) In light of Title VII of the 1964 Civil Rights Act, compare and contrast the Supreme Court Justices' legal analysis in two cases discussed in the book and how the Court addressed discrimination "…because of sex."

3) The Supreme Court recently ruled that "sex" also includes gay and transgender protection under Title VII. How does the case of *Bostock v. Clayton County* (2020) fit within the precedential cases discussed in the book?

Student Responses

There were a variety of responses by the students to the book, but interestingly, being surprised or shocked was not one of them. Whereas many of the students were shocked by the content in *The Color or Law*, *Because of Sex* did not elicit the same responses from the students. Perhaps it was a reflection of the recent Me Too movement and the high profile conviction of celebrities for sexual harassment and assault. The different responses to the two books are worthy of further study and may shed some light on our responses to certain systemic DEI issues and not others.

CONCLUSION

Faculty are limited in the content they can cover in a semester and utilizing popular non-fiction books are one pedagogical approach of addressing both business law related topics and exposing students to issues of DEI. *The Color of Law* and *Because of Sex* are not only interesting books for the students to read, but they also created opportunities to discuss DEI further on a host of issues. Students were not only engaged by the content of the books, but also appreciative of the opportunity to learn something they might not otherwise have read in a traditional business law course. Time is limited, but assigning such general non-fiction books to the curriculum, even if only certain chapters, enhances the courses and provides an opportunity to explore important DEI issues in the classroom.

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[1] Richard Rothstein, The Color of Law, A Forgotten History of How Our Government Segregated America (Liveright Publishing Corporation 2017).
[2] Gillian Thomas, Because of Sex, One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work (St. Martin's Press 2016).
[3] Bostock v. Clayton County, Georgia, 590 U.S. ___ (2020), 140 S. Ct. 1731; 207 L. Ed. 2d 218; 2020 WL 3146686; 2020 U.S. LEXIS 3252
[4] Johan Roos, *The Renaissance We Need in Business Education,* Har. Bus. Rev., July 2, 2014

https://hbr.org/2014/07/the-renaissance-we-need-in-business-education. Johan Roos reflected on the need to change business education and stressed that, "Business leaders who will succeed in the coming decade will be notable for their holistic thinking, global perspectives, international experience, multilingual capabilities, technological familiarity, entrepreneurial mindset, creativity, and ability to deal productively with complexity and chaos. Many corporations already say they cannot find the type of employees they need, so we must begin acting now to transform our business schools. It is our job as educators to produce graduates who can thrive in a radically changing world, and who can shape it in positive ways. We must educate a new generation of renaissance leaders."

[5] *Warren Favors Profession to Give Advice on Ethics*, N.Y. Times, November 12, 1962 at Page 1, Col. 3.

[6] Robert C. Bird, On the Future of Business Law, Journal of Legal Studies in Education, Vol. 35, No. 2 (Summer 2018). "Business ethics are moral values and principles that guide the conduct of business toward promotion of the common good. This simple explanation of business ethics belies a deeper and broader understanding of how business ethics evolves. Business ethicists are not cordoned by discipline, but rather share a common application of critical thinking and analysis to challenge established norms and values in society." At pp. 301-302.

[7] There are excellent books on residential development in the United States, but they tend to be assigned outside the legal discipline in areas such as architecture and planning. Two titles stand out for additional information: Kenneth T. Jackson, Crabgrass Frontier, The Suburbanization of the United States (Oxford University Press1985) and James Howard Kunstler, The Geography of Nowhere, The Rise and Decline of America's Man-Made Landscape (Touchstone 1993).

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[8] Matthew Desmond, Evicted, Poverty and Profit in the American City (Crown Publishers 2016) at pp. 293-294.
[9] Ibram X. Kendi, How To Be An Antiracist (One World 2019) at p. 20.
[10] Robin Diangelo, White Fragility, Why It's So Hard for White People to Talk about Racism (Beacon Press 2018).
[11] *Id.* at pp. 1-2.
[12] *Kendi* at p. 20.
[13] *Rothstein* at pp. XIV – XV.
[14] This list is not exhaustive, but some websites with information that will be helpful to facilitate discussion include the following: W.W. Nortion & Company, the parent company of the publisher - https://wwnorton.com/books/The-Color-of-Law/about-the-book/reading-guide; California State PTA - https://capta.org/book-club-discussion-the-color-of-law/
[15] Rosedale: The Way It Is (Bill Moyers Journal1976). https://vimeo.com/33669898. Since many of my students are from Long Island and the metropolitan area, although somewhat dated, I show them the first part of the video.
[16] Bostock v. Clayton County, Georgia, 590 U.S. ___ (2020) 140 S. Ct. 1731; 207 L. Ed. 2d 218; 2020 WL 3146686; 2020 U.S. LEXIS 3252 Another topic to discuss with the class is statutory language and that the Opinion was written by Justice Neil Gorsuch, appointed to the Supreme Court by President Trump. Justice Gorsuch focuses on the statutory language: "Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law." At 33.

[17] Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, § 7, 42 U.S.C. § 2000e et seq (1964).