Note

Size Matters (Even If the Treasury Insists It Doesn't): Why Small Taxpayers Should Receive a *De Minimis* Exception from the GILTI Regime

Patrick Riley Murray∗

INTRODUCTION

> GILTI will destroy my livelihood in Canada. Renouncing [my U.S. citizenship] won't even help. I am faced with either destroying my livelihood or becoming a tax violator.[1]

∗ J.D. Candidate 2022, University of Minnesota Law School; Managing Editor, *Minnesota Law Review* Volume 106; BBA 2018, Texas A&M University. I extend my most sincere gratitude to Professor Jonathan H. Choi for his guidance and mentorship throughout this process and Note & Comment Editor Casey Epstein, without whom this Note would not have been possible, for his feedback, patience, and friendship. I would like to thank Laura Snyder, Karen Alpert, Andrew Velarde, and Monte Silver for their comments and work in the field of American emigrant taxation. I am grateful to Lead Note & Comment Editors Meredith Gingold and Marra Clay, as well as Lead Managing Editor Mollie Wagoner; Managing Editors Mary Haasl, Kelly Zech, and Jason Leadley; and Staffers Molly Nelson-Regan, Jesse Noltimier, Nick Penn, and Alec Lybik for spending a more-than considerable amount of time preparing this Note for publication. Finally—and most importantly—I would like to thank my wife, Brittney Murray. You are my everything. Thank you so much for inspiring me and always standing by my side.

1. Laura Snyder, *"I Feel Threatened by My Very Identity": Report on US Taxation and FATCA Survey* 52 (Oct. 25, 2019) [hereinafter Snyder, *Threatened by My Identity*], http://www.citizenshipsolutions.ca/wp-content/uploads/2019/10/Part-2-Comments.pdf [https://perma.cc/CW9Y-NTK3] (collecting comments from former U.S. citizens, current U.S. citizens, and green card holders who reside outside of the United States about their experiences with U.S. banking and taxation policies); *see also* Laura Snyder, *Effects of the Extraterritorial Application of U.S. Taxation and Banking Policies*, STOP EXTRATERRITORIAL AM. TAX'N 38–39 (May 4, 2021) [hereinafter Snyder, *Extraterritorial Application of U.S. Taxation*], http://seatnow.org/wp-content/uploads/2021/05/Comments-by-topic.pdf [https://perma.cc/45N3-PUMY] (doing the same); Laura Snyder, *Taxing the American Emigrant*, 74 TAX LAW. 299, 312 (2021) [hereinafter Snyder, *Taxing the American Emigrant*] ("Many American emigrants have felt they had no choice but to renounce their U.S. citizenship, as the only path available to escape the policies. Renouncing was not a cause for celebration: on the day they renounced, they felt 'angry,' 'sad,' 'torn up,' 'grief,' 'sick in my stomach,' 'heavy heart,' 'devastated,' 'fraught,' and 'holding back tears.' One did 'burst into tears,' and another vomited.").

Monte Silver, a U.S. citizen who lives in Israel, owns and operates his own law firm.[2] Thanks to the Tax Cuts and Jobs Act (TCJA),[3] he—like many other small taxpayers who own controlled foreign corporations[4]—must conform with highly complicated international tax statutes aimed at large multinational firms. But how did small taxpayers like Silver get swept up into these labyrinthine regimes under the new international tax system?

President Donald Trump signed the TCJA into law on December 22, 2017.[5] Many consider the TCJA to be the most consequential tax reform law since the Tax Reform Act of 1986.[6] Among its sweeping changes to the U.S. tax system,[7] the TCJA ushered in a new international tax regime.[8] Under this new "territorial" tax regime, foreign income of certain U.S. corporations is exempt from taxation in the United States.[9] The TCJA implemented several offsets to this new rule, including a minimum tax on "global intangible low-taxed income" (GILTI).[10] Congress intended for GILTI to dissuade U.S. business entities from moving intangible assets abroad.[11] In addition

2. *See* Andrew Velarde, *Israeli Entity Alleges 965 Regs Violate Administrative Law*, 93 TAX NOTES INT'L 577, 577 (2019) (describing the first of Mr. Silver's two cases against the Internal Revenue Service).

3. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

4. A controlled foreign corporation (CFC) is any foreign corporation in which more than 50% of the total value of the stock is owned by U.S. shareholders. *See* I.R.C. § 957(a); *see also infra* note 60 and accompanying text.

5. Eileen Sullivan & Michael Tackett, *In Signing Sweeping Tax Bill, Trump Questions Whether He Is Getting Enough Credit*, N.Y. TIMES (Dec. 22, 2017), https://www.nytimes.com/2017/12/22/us/politics/trump-tax-bill.html [https://perma.cc/8F9L-S2NE].

6. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986); *see, e.g.*, Diana S. Doyle, Christopher J. Ohlgart, Samuel R. Weiner, Amanda Varma, Sam K. Kaywood, Ryan J. Kelly, Ellen McElroy & Jay Singer, *The Tax Cuts and Jobs Act: Introduction*, 71 TAX EXEC. 21, 21 (2019).

7. *See generally* David Kamin, David Gamage, Ari Glogower, Rebecca Kysar, Darien Shanske, Reuven Avi-Yonah, Lily Batchelder, J. Clifton Fleming, Daniel Hemel, Mitchell Kane, David Miller, Daniel Shaviro & Manoj Viswanathan, *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439 (2019) (discussing changes to individual and business taxation, state and local taxation, and the international tax regime).

8. *See id.* at 1488–514 (discussing the GILTI, FDII, and BEAT regimes); Rebecca M. Kysar, *Critiquing (and Repairing) the New International Tax Regime*, 128 YALE L.J.F. 339, 339 (2018).

9. *See* Kamin et al., *supra* note 7, at 1489.

10. *See* I.R.C. § 951A; *see also* Kamin et al., *supra* note 7, at 1490–95 (discussing problems with the GILTI regime).

11. ROBERT J. MISEY, JR. & MICHAEL S. SCHADEWALD, PRACTICAL GUIDE TO U.S. TAXATION OF INTERNATIONAL TRANSACTIONS ¶ 502.01, at 208 (Barbara L. Post ed., 12th ed. 2020). For example, a large multinational corporation like Apple may transfer an

to the GILTI tax, the TCJA also implemented a one-time "transition tax" on all unrepatriated[12] earnings between 1986 and 2019.[13]

The TCJA's changes to the international tax system are detrimental to American citizens living and operating small businesses abroad. First, these changes created two entirely new taxes on businesses operating abroad. For large multinational corporations who have an economic footprint in the United States, this is arguably acceptable on account of the U.S. parent corporation's residence. But for small businesses abroad with no economic connection to the United States, they raise an important question: On what grounds does the United States assert the right to tax a business conducted wholly outside the United States, by persons living outside the United States, using resources wholly outside the United States, serving customers wholly outside the United States, and already taxed by the country where the business is located (a country that in all likelihood is not a tax haven)?[14] Second, due to GILTI's and the transition tax's complexities and severe penalties for noncompliance, the new U.S. international tax system creates exorbitant uncertainty and uneasiness for small business owners. Third, with regards to small businesses owned and operated by American citizens living abroad, the new U.S. international tax system has the effect of shrinking the tax base.[15]

Accordingly, in the months following the TCJA's passage some groups began calling for a *de minimis* exception to GILTI for the benefit of small businesses.[16] A *de minimis*[17] exception excuses certain parties from complying with a general rule in marginal situations.[18] For example, the tax code contains a "safe harbor for

intangible asset to a country with low tax rates, reducing the tax liability on the profits produced by that asset. *See infra* notes 77–79 and accompanying text.

12. Many U.S. corporations own foreign subsidiaries. When those foreign subsidiaries send their profits to the U.S. "parent" corporations, the profits are "repatriated." Sean P. McElroy, *The Mandatory Repatriation Tax Is Unconstitutional*, 36 YALE J. ON REGUL. BULL. 69, 72–73 (2018).

13. I.R.C. § 965; *see also* discussion *infra* Part II.B.

14. Another question raised is whether these policies violate the sovereignty of other taxing jurisdictions. *See* Snyder, *Taxing the American Emigrant*, *supra* note 1.

15. *See* discussion *infra* Part II.A.

16. *See, e.g.*, Letter from Sachin N. Shah, President, Am. Chamber of Com. in Japan, to Comm'r (Aug. 28, 2018), available at https://www.taxnotes.com/tax-notes-today-federal/foreign-source-income/group-seeks-gilti-transition-tax-relief-us-citizens-abroad/2018/09/19/28fl6 [https://perma.cc/3P6H-9YQ6].

17. "*De minimis*" is short for "*de minimis non curat lex*" and translated as "the law does not concern itself with trifles." *See* Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 537 n.4 (1947).

18. *See, e.g.*, I.R.C. § 132(a)(4), (e) (allowing taxpayers to exclude any property

certain *de minimis* errors" which disregards errors on certain tax returns that are under $100.[19] Historically, the U.S. legal system has applied the *de minimis* maxim in the litigation, legislative, and administrative contexts to avoid dealing with marginal situations in which strict application of the law would lead to unfavorable results.[20] Take the above example of a *de minimis* safe harbor on certain tax returns. If the tax code required strict compliance down to the nearest cent, the Treasury would *lose* money when processing an amended return to correct a $11.21 error due to administrative costs.

Despite the calls for a *de minimis* exception, the IRS issued its final GILTI regulations on June 21, 2019, dismissing the small taxpayers' concerns.[21] Monte Silver—the U.S. citizen with the law firm in Israel—brought a suit on Administrative Procedure Act, Regulatory Flexibility Act, and Paperwork Reduction Act grounds.[22] His case, along with another challenging the "transition tax," are still pending in the District Court for the District of Columbia.[23]

This Note discusses the incongruity of the GILTI regime's purposes with its effects on small American emigrant[24] taxpayers and argues that (1) Congress should implement a *de minimis* exception to make GILTI a better reflection of its purpose or (2) should Congress fail to do so, the Treasury should implement a *de minimis* exception in the GILTI regulations. It makes two main contributions to the literature on statutory interpretation of the tax code, the literature on emigrant taxation, and the literature on the Tax Cuts & Jobs Act. First, while other commentators have called for a *de minimis* exception to the GILTI regime, these calls are usually brief and do not weigh the possible avenues the U.S. government may take to resolve this issue.[25] Conversely, this Note is the first

---

or service—technically items of income under I.R.C. § 61—given to an employee from their employer from gross income if its value is so small as to make accounting for it "unreasonable or administratively impractical").

19. *See* I.R.C. § 6721(c)(3).

20. *See infra* Part II.C.

21. *See* 84 Fed. Reg. 29,114, 29,127–28 (June 21, 2019).

22. Complaint, Silver v. IRS, No. 1:20-cv-01544 (D.D.C. June 12, 2020).

23. *See* Andrew Velarde, *Silver Wants Stay on GILTI Suit Lifted*, 172 TAX NOTES FED. 1172 (2021) (discussing the latest update in the case).

24. This Note uses the term "American emigrants" to describe all U.S. citizens that permanently reside outside of the United States, ranging from those who were born and raised in America before leaving to those who have never set foot in America but have U.S. citizenship via one of their parents. Former citizens who have renounced their citizenship are not subject to GILTI or U.S. taxation.

25. *See, e.g.*, John Richardson, Laura Snyder & Karen Alpert, *A Simple Regulatory Fix for Citizenship Taxation*, 169 TAX NOTES FED. 275, 287–88 (2020).

work to contextualize the GILTI regime from conception to present and ground a call for a *de minimis* within the statutory interpretation landscape. Second, this Note proposes an analytical framework for the application of *de minimis* exceptions in the regulatory and legislative context. The academic scholarship on *de minimis* exceptions is essentially nonexistent. And the existing scholarship focuses on either the litigation context or nontax contexts.[26]

Part I canvasses the relevant TCJA legislative history and critiques of the TCJA's international tax provisions.[27] Part I concludes with a proposal for a *de minimis* exception framework and a consideration of the legitimacy of *de minimis* exceptions that are not mandated by statute.[28] Part II discusses the calls for the *de minimis* exception for the benefit of small taxpayers and GILTI's regulatory process.[29] Part II concludes by contextualizing Monte Silver's lawsuit against the Treasury and weighing the case's merits.[30] Part III proposes a *de minimis* exception that either Congress or the Treasury should use to make GILTI a better reflection of its purposes.[31]

I. ACT I: THE TAX CUTS AND JOBS ACT AND *DE MINIMIS* EXCEPTIONS

> We plan on opening a small family owned business but I have no choice to renounce [my U.S. citizenship] first . . . . The [TCJA] would place extra burdens on us making it impossible to prosper.[32]

This episode of small taxpayer woes within the U.S. international tax system is a tale told in three parts. It is first crucial to understand the foundation on which the TCJA is built—a seemingly broken tax code that allowed corporate taxpayers to discover games, glitches, and gambits to reduce their tax liability. One gambit large multinational corporations utilize that the TCJA sought to fix was storing profits in low-tax jurisdictions, like Ireland or the Cayman Islands, to defer U.S. taxation until that profit was repatriated into the United States. The proposed fix: GILTI.

Unfortunately, both the TCJA and GILTI are imperfect solutions to their respective problems. The TCJA, rammed through Congress, is rife with its own gaming opportunities and glitches.[33] Because of this,

26. *See* sources cited *infra* note 123.
27. *See infra* Part I.A & B.
28. *See infra* Part I.C.
29. *See infra* Part II.A.
30. *See infra* Part II.B.
31. *See infra* Part III.
32. Snyder, *Threatened by My Identity*, *supra* note 1, at 51.
33. *See* Kamin et al., *supra* note 7.

Congress and President Trump essentially tasked the Treasury with debugging the entire tax code through the regulatory process, bogging the Treasury down for the past four years. GILTI, a victim of both the rushed legislative process and the slow regulatory process, is too complicated to achieve its goals. Both the TCJA and GILTI sweep small taxpayers into the fight between the Treasury and large multinationals.

This Part describes the relevant legislative history behind the TCJA and GILTI and the existing literature on *de minimis* rules. Section A catalogues the TCJA's legislative history. Section B explains the GILTI regime. Section C considers the legitimacy of *de minimis* regulations that are not called for by statute, canvasses the existing literature on *de minimis* rules, and proposes a framework for their application in the modern context.

A. THE LEGISLATIVE HISTORY OF THE TAX CUTS AND JOBS ACT

> Dealing with US taxation is stressful, and limits my opportunities to be entrepreneurial while living abroad. I would like to open a small business but am avoiding doing so due to the current tax issues other US citizens running businesses abroad are facing.[34]

The GILTI regime is nearly incomprehensible. Viewing it, and the new U.S. international tax system, in the context of the TCJA's legislative history[35]—which argues that the TCJA simplifies the tax code, creates jobs, and addresses small taxpayer concerns—only further obfuscates this deeply flawed legislative fix.

The TCJA's legislative history begins with a thirty-five page report titled "A Better Way: Our Vision for a Confident America."[36]

34. Snyder, *Threatened by My Identity*, *supra* note 1, at 55.

35. This Note adopts an expansive usage of the term "legislative history." It would be a stretch to give the explicitly partisan documents discussed herein much weight in court as legislative history. As such, this Note does not argue that a *de minimis* exception is mandated by any statute, legislation, regulation, or judicially created theory. Rather, this Note argues that a *de minimis* exception is normatively preferable and accordingly proffers that the TCJA's "legislative history" supports that assertion.

36. *See* Samuel A. Donaldson, *Understanding the Tax Cuts and Jobs Act* 1 (Ga. State Univ. Coll. L., Legal Stud. Rsch. Paper No. 2018-07, 2018), https://papers.ssrn.com/abstract=3096078 [https://perma.cc/3HV6-CAXF] ("Prior to [the unveiling of the TCJA], there were only three documents offering any suggestion of what the bill would contain. The first was the Republican blueprint for tax reform . . . with the title 'A Better Way: Our Vision for a Confident America.'"); *see also* Paul Ryan & Kevin Brady, Tax Reform Task Force, *A Better Way: Our Vision for a Confident America* (June 24, 2016), https://www.novoco.com/sites/default/files/atoms/files/ryan_a_better_way_policy_paper_062416.pdf [https://perma.cc/PM3F-RRG8]. Obviously, the TCJA's legislative history does not exist in a vacuum. *See, e.g.*, Joshua D. Harms, Note, *Legislative Foundation of the United States' New International*

Republican politicians published this report during the 2016 presidential campaign as their blueprint for tax reform.[37] The report claimed that the U.S. tax code was "completely and totally broken,"[38] identifying five problems as the source of frustration: (1) burdensome paperwork and compliance costs,[39] (2) special interest subsidies and "crony capitalism,"[40] (3) the penalization of savings and investment,[41] (4) the incentive for businesses to move overseas,[42] and (5) a catchall criticism of the IRS as a "broken tax collector."[43] In response to these problems, the blueprint prescribed three goals: (1) create jobs, (2) "simplify the broken tax code and make it fairer and less burdensome," and (3) "transform the broken IRS into an agency focused on customer service."[44]

Tax System, 42 SEATTLE U. L. REV. 211 (2018) (considering the issues inherent in the new international tax system and connecting the TCJA's legislative history to the American Jobs Creation Act of 2004 (Pub. L. No. 108-357 (2004)). But the blueprint is a suitable starting point for this Note.

37. *See* Ryan & Brady, *supra* note 36, at 5 ("[This blueprint] is the beginning of our conversation about how to fix our broken tax code."); Donaldson, *supra* note 36, at 1 ("Though not quite a 'contract with America,' the 35-page blueprint outlined how Republicans would seek to reform the Internal Revenue Code in the names of fairness and simplicity.").

38. Ryan & Brady, *supra* note 36, at 7.

39. *Id.* at 7–9 ("While the Internal Revenue Code runs over 2,600 pages, the tax code itself represents only a small fraction of the entire body of Federal tax law. Taxpayers must navigate laws and guidance that include Treasury regulations; IRS forms, instructions, publications, and other guidance; and Federal court decisions. When all of these sources are compiled together, the Federal tax laws today fill approximately 70,000 pages." (citations omitted)).

40. *Id.* at 9 ("The tax code is littered with hundreds of preferences and subsidies that pick winners and losers and create complexity.").

41. *Id.* at 9.

42. *Id.* at 9–10 ("Another disadvantage is that the United States still uses a so-called worldwide tax system, which means we tax the earnings of American companies overseas when those earnings are brought back to the United States, with a credit allowed for foreign taxes paid on those earnings. Meanwhile, virtually all of our major trading partners have adopted territorial tax systems, under which these governments generally do not tax the active business income earned overseas by companies headquartered in their countries.").

43. *Id.* at 10–11 ("Over the past three decades, the IRS has become a prime example of executive branch overreach, blatant misconduct, and government waste. While the structure of the IRS has expanded over the years to create a duplicative, inefficient, and complex bureaucracy with approximately 80,000 employees across the country, the agency continues to fail hard-working American taxpayers. . . . The IRS's mismanagement and lack of accountability have seriously compromised its ability to serve taxpayers and treat them fairly.").

44. *Id.* at 5.

On the ninety-seventh day of Trump's presidency, the White House issued a one-page press release,[45] describing the status of Trump's tax plan.[46] The release echoed the blueprint's goals for tax creation, especially simplification.[47] Five months later, a conglomerate of White House and congressional leaders issued the last official iteration[48] of the impending tax reform.[49] Republican officials reiterated their goals from the previous statements: simplification, increasing take-home pay (by decreasing tax liability) for American workers, and job creation.[50] After the House passed the TCJA on November 16, 2017,[51] with a hopeful promise that the legislation would be signed into law by Christmas,[52] Republicans rammed the tax bill through the Senate.[53] President Trump signed the TCJA into law on December 22, 2017.[54]

---

45. Press Release, The White House, 2017 Tax Reform for Economic Growth and American Jobs (Apr. 26, 2017), https://www.ciab.com/wp-content/uploads/2017/04/2017-Tax-Reform-for-Economic-Growth-and-American-Jobs.pdf [https://perma.cc/VHF4-4ZY6].

46. *See* Press Release, The White House, President Trump Proposed a Massive Tax Cut. Here's What You Need to Know. (Apr. 26, 2017), https://trumpwhitehouse.archives.gov/articles/president-trump-proposed-massive-tax-cut-heres-need-know [https://perma.cc/RY25-9LKM] ("We have a once-in-a-generation opportunity to do something big."); *see also* Julie Hirschfeld Davis & Alan Rappeport, *White House Proposes Slashing Tax Rates, Significantly Aiding Wealthy*, N.Y. TIMES (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/us/politics/trump-tax-cut-plan.html [https://perma.cc/3SN7-8NXZ] ("Mr. Trump's skeletal outline of a tax package, unveiled at the White House in a single-page statement filled with bullet points, was less a plan than a wish list.").

47. *See* Press Release, The White House, *supra* note 45.

48. *Unified Framework for Fixing Our Broken Tax Code*, U.S. DEP'T OF THE TREASURY (2017), https://www.treasury.gov/press-center/press-releases/documents/tax-framework.pdf [https://perma.cc/9Y9W-G8PV].

49. *See* Donaldson, *supra* note 36, at 2.

50. U.S. DEP'T OF THE TREASURY, *supra* note 48, at 2.

51. *$1.5 Trillion Tax Cut Passed by House in Mostly Party-Line Vote*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/us/politics/tax-bill-house-vote.html [https://perma.cc/29QY-2WRW] ("The House passed its version of the $1.5 trillion tax bill by a vote of 227 to 205.").

52. Darlene Superville, *Trump Promises Americans 'Huge Tax Cut' for Christmas*, CHI. TRIB. (Nov. 20, 2017), https://www.chicagotribune.com/nation-world/ct-trump-tax-cut-20171120-story.html [https://perma.cc/53PL-U6Y6] ("Speaking before a Cabinet meeting, Trump said, 'We're going to give the American people a huge tax cut for Christmas — hopefully that will be a great, big, beautiful Christmas present.'").

53. *See* Donaldson, *supra* note 36, at 2 ("[T]he Senate passed by its bill on December 2, 2017, with a 51-49 vote, despite vehement objection from Democrats that the final version of the bill was made available only hours before the vote.").

54. Sullivan & Tackett, *supra* note 5 ("President Trump signed the most consequential tax legislation in three decades on Friday, even as he complained that he has not been given credit for his administration's accomplishments during a

B. THE INTERNATIONAL TAX REGIME OF THE TAX CUTS AND JOBS ACT AND GLOBAL INTANGIBLE LOW-TAXED INCOME

> I own a small business and it has been horribly affected by the repatriation tax and will be going forward by the GILTI –so much so that I am having to figure out how I can pass ownership of it to my spouse. I will soon own nothing on my own due to the bullying US tax system.[55]

There is an age-old tension between tax collectors and taxpayers: the former seek to raise revenues by collecting taxes, while the latter seek to decrease their tax burden through clever tax planning.[56] Each time a taxpayer finds a glitch, game, or gambit that achieves their goal to reduce tax liability—unfairly or not—the tax collector must respond through legislative, regulatory, or judicial action.[57] This paradigm explains the current state of tax law. The

---

turbulent first year."); *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 22, 2017, 6:47 AM), https://www.thetrumparchive.com/?searchbox=%22Our+big+and+very+popular%22 [https://perma.cc/R2M2-RCTE] ("Our big and very popular Tax Cut and Reform Bill has taken on an unexpected new source of 'love' - that is big companies and corporations showering their workers with bonuses. This is a phenomenon that nobody even thought of, and now it is the rage. Merry Christmas!").

55. Snyder, *Threatened by My Identity, supra* note 1, at 53.

56. *See* Peter Fawcett, *"When I Squeeze You with Eisphorai": Taxes and Tax Policy in Classical Athens*, 85 HESPERIA 153, 156 (2016) ("The first literary reference to the *eisphora* [wealth tax] in the Classical period dates from the beginning of the Peloponnesian War. It was a sporadically levied tax imposed by decree of the Assembly. It seems that war was the principal reason for levying the tax, although there is no evidence that it was levied specifically for military purposes." (citations omitted)); *id.* at 158 ("Through liturgies, the wealthy had direct general and financial responsibility for certain public expenditures, principal among which were maintaining a trireme in the navy for a year (*trierarchia*, τριηραρχία), and the provision of a chorus in a dramatic festival (*choregia*, χορηγία)."); *id.* at 176 ("Our understanding of tax compliance in Classical Athens is limited, and comes mainly from the orators. Demosthenes explains how men like Stephanos, who wished to avoid liturgies and the wealth tax, might use their banks to hide their property, and Lysias links 'invisible assets' and tax evasion. Since the *eisphora* and liturgies were imposed only on those who appeared to own the largest amounts of property, the system provided direct motivation for the masking of assets and the growth of the invisible economy." (citations omitted)). *Cf.* PLATO, The REPUBLIC OF PLATO 21 (Allan Bloom trans., BasicBooks 2d ed. 1991) (c. 375 B.C.E.) ("[I]n matters pertaining to the city, when there are taxes, the just man pays more on the basis of equal property, the unjust man less; and when there are distributions, the one makes no profit, the other much.").

57. *See, e.g.*, *The Agency, Its Mission and Statutory Authority*, IRS, https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority [https://perma.cc/2FT6-ZGGP] ("[The IRS's mission is to p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all. . . . In the United States, the Congress passes tax laws and requires taxpayers to comply. The taxpayer's role is to understand and meet his or her tax obligations. The IRS role is to help the large majority of compliant taxpayers with the tax law, while *ensuring that the*

Internal Revenue Code (Code) is full of legislative fixes on top of legislative fixes.[58] The Treasury regulations are incomprehensibly long.[59] This results in constant tax litigation.

One child of the broken marriage between tax collectors and taxpayers is the Controlled Foreign Corporation (CFC).[60] Under current law,[61] a CFC is any foreign corporation with most of its shares[62] held by U.S. shareholders.[63] Two factors complicate—and expand—this seemingly simple definition.

First, the term "corporation" for U.S. international tax purposes is exceedingly flexible. The Treasury automatically classifies certain foreign business entities formed in specific jurisdictions as corporations.[64] Other foreign entities can elect to be taxed as a

---

minority who are unwilling to comply pay their fair share." (emphasis added)).

58. *See* Jonathan H. Choi, *Beyond Purposivism in Tax Law*, 107 IOWA L. REV. (forthcoming 2022) (manuscript at 29) (on file with author) ("The tax code was enacted piecemeal, by many different Congresses over many different periods."); Mary L. Heen, *Plain Meaning, the Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771, 775 (1997) ("Statutes develop over a period of time and in response to the active interrelationship among decisions of the administrative agencies, the courts, and Congress. As Professor Edward Rubin and others point out, some [statutes] are directed to bureaucracies or agencies charged with enforcing complex regulatory provisions. Some are enacted in response to court decisions or with the legislative expectation that courts will fill in statutory gaps when unanticipated questions arise."). For a brief discussion of the Code's history, see JAMES J. FREELAND, DANIEL J. LATHROPE, STEPHEN A. LIND & RICHARD B. STEPHENS, FUNDAMENTALS OF FEDERAL INCOME TAXATION 7–12 (19th ed. 2018).

59. *See* Scott Greenberg, *Federal Tax Laws and Regulations Are Now Over 10 Million Words Long*, TAX FOUND. (Oct. 8, 2015), https://taxfoundation.org/federal-tax-laws-and-regulations-are-now-over-10-million-words-long [https://perma.cc/K3FK-Q3M5] (noting that the federal tax regulations had reached 7,655,000 words two years *before* the passage of the TCJA).

60. *See* I.R.C. § 957(a)(1); *see also* Jasper L. Cummings, Jr., *GILTI Puts Territoriality in Doubt*, 159 TAX NOTES 161, 163 (2018) ("The practical answer is that CFCs are an arbitrary and historic category. And in the rare instances in which Congress has changed the definitions . . . that arbitrariness produces unexpected results.").

61. The statutory definition of a CFC has changed over the years. *See* Cummings, *supra* note 60.

62. Specifically, more than 50% of the total combined voting power of all classes of stock entitled to vote *or* more than 50% of the total value of stock. I.R.C. § 957(a)(1)–(2).

63. *Id.*; Eric T. Laity, *Anatomy of Sections 951(a)(1)(B) and 956 of the Internal Revenue Code*, 14 VA. TAX REV. 71, 77–78 (1994) (defining CFCs and U.S. shareholders).

64. STEPHEN SCHWARZ & DANIEL J. LATHROPE, FUNDAMENTALS OF CORPORATE TAXATION 31 (10th ed. 2019). For example, a *Sociedad Anónima* in Mexico is considered a corporation for U.S. tax purposes. *See* Treas. Reg. § 301.7701-2(b)(8) (listing business entities by country that are considered corporations for U.S. tax purposes).

corporation.[65] In the absence of both an automatic classification and an election, the Treasury considers any foreign business entity with limited liability for all of its members to be a corporation.[66]

Second, to be considered a U.S. shareholder, an individual or business must meet two requirements: they must qualify as a "United States person" and meet a minimum ownership requirement.[67] U.S. citizens, U.S. residents, and domestic partnerships and corporations are considered U.S. persons.[68] Such a "person" must own at least 10% of the foreign corporation to be considered a U.S. shareholder.[69]

The paradigmatic example of a CFC is a foreign subsidiary owned by a domestic corporation.[70] A lesser-known example—and the focus of this Note—is a foreign "corporation" owned by American emigrants.

Congress created the CFC designation as part of a larger international-taxation scheme known as Subpart F in 1962 to address the problem of international tax havens.[71] Taxpayers had discovered a way to reduce their tax liability by placing sources of passive, movable income, like insurance proceeds, in foreign corporations located in countries with low tax rates, like Ireland and

---

65. *See* Treas. Reg. § 301.7701-3 (allowing most unincorporated entities to elect to be taxed as a corporation); *see also* Choi, *supra* note 58, at 21–22 ("Check-the-box elections were introduced in 1996 in order to simplify entity classification, which had previously relied on a complex multi-factor test interpreting the term 'corporation' in the tax code. . . . The old rules therefore required taxpayer acrobatics and provided an advantage to the rich, without substantially altering results compared to an explicitly elective regime."); SCHWARZ & LATHROPE, *supra* note 64, at 30–33 (describing "check-the-box" regulations).

66. Treas. Reg. § 301.7701-3(b)(2)(i)(A) (classifying such entities as associations); *see also* I.R.C. § 7701(a)(3) ("The term 'corporation' includes associations . . . .").

67. *See* I.R.C. § 951(b).

68. *Id.* § 7701(A)(30). Nonforeign estates and certain U.S.-based trusts are also considered U.S. persons. *Id.* There is another caveat when defining a U.S. person, and thus a U.S. shareholder, when in the sphere of international tax: Bona fide citizens of Puerto Rico are not considered U.S. persons with respect to Puerto Rican corporations. *Id.* § 957(c)(1). Additionally, bona fide residents of Guam, America Samoa, or the Northern Mariana Islands are also not considered U.S. persons with respect to certain corporations. *Id.* § 957(c)(2).

69. I.R.C. § 951(b). This creates a curious situation where a foreign corporation owned by eleven or more equal shareholders does not meet the definition of a CFC.

70. *See, e.g.*, Apple Inc., Annual Report (Form 10-K) Exhibit 21.1 (Sept. 26, 2020) (listing out the foreign subsidiaries of Apple).

71. *See* Revenue Act of 1962, Pub. L. No. 87-834 § 12, 76 Stat. 960, 1006–27; *Revenue Act of 1964: Hearings on H.R. 10650 Before the S. Comm. on Finance*, 87th Cong. (1962).

the Cayman Islands.[72] This strategy reduced tax liability in the year the movable income was earned—due to the comparative tax rates between the international locale and the United States—and deferred payment of U.S. taxes until the taxpayer brought back, or repatriated, that income into the United States (if ever).[73] Subpart F taxes, among other things, a CFC's insurance income, foreign base company income, and illegal bribes and kickbacks.[74] Subpart F specifically excludes income effectively connected with the United States.[75] The Subpart F regime eliminated such deferrals and, in effect, lessened the gap between the comparative tax rates by taxing a portion of the movable income earned by CFCs.[76] In other words, the taxpayers gained a tax advantage, and the tax collectors struck back.

Over the next fifty years, taxpayers deduced new strategies to circumvent Subpart F, lessening their tax liability. One such strategy employed by big tech corporations, like Apple, was to transfer *intangible* assets, such as trademarks and patents, to their CFC subsidiaries.[77] This strategy functioned much the same as its predecessor, moving sources of income to low-tax jurisdictions to defer U.S. tax liability. While impossible to pinpoint how much this strategy cost the United States in tax revenues, in 2015 congressional researchers estimated the amount to exceed $10 billion per year.[78]

Once again, the taxpayer found an advantage; once again, the tax collector needed to respond. And Congress did so via the TCJA's

72. C. Richard Baker, *A New Look at Subpart F*, 54 TAXES 572, 572 (1976) (summarizing the historical background of Subpart F).

73. *Id.* ("Licenses, franchises, intangible rights or stock of other corporations could then be transferred to such a corporation, thus producing royalties, dividends, rents, or fees which were not subject to U. S. tax so long as they were not returned as dividends to the U. S. owners.").

74. I.R.C. § 952(a).

75. *Id.* § 952(b).

76. Baker, *supra* note 72, at 574 (describing the structure of Subpart F).

77. *See, e.g.*, Simon Bowers, *Apple's Cash Mountain, How It Avoids Tax, and the Irish Link*, IRISH TIMES (Nov. 6, 2017), https://www.irishtimes.com/business/apple-s-cash-mountain-how-it-avoids-tax-and-the-irish-link-1.3281734 [https://perma.cc/969E-HK2R] ("By quietly transferring trademarks, patent rights and other intangible assets to offshore companies, many other global businesses have also been able to cut their tax bills dramatically."); *see also* Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N.Y. TIMES (Apr. 28, 2012), https://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html [https://perma.cc/D3J9-GYK6] (describing Apple's tax avoidance strategies).

78. *See generally* JANE G. GRAVELLE, CONG. RSCH. SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION (2015) (compiling research on various international tax avoidance strategies employed by corporations and the effects of those strategies).

international tax provisions, specifically the GILTI regime.[79] Under the TCJA international tax system, the foreign income of certain U.S. corporations is exempt from taxation in the United States.[80] To counterbalance this lost revenue, the TCJA implemented two "backstops": the transition tax[81] and the global intangible low-taxed income regime.[82] GILTI is a new category of foreign income aimed at low-taxed income from intangible assets held by subsidiary CFCs.[83] Unlike the one-time transition tax, GILTI constitutes a perpetual source of income.[84] Importantly, although the TCJA overhauled the international tax system, it eliminated neither the Subpart F rules nor the CFC designation.[85]

GILTI is based on two assumptions. First, GILTI assumes that a CFC's intangible income source was created in the United States, and accordingly that this income should be taxed in the United States.[86]

---

79. *See* Patricia Cohen, *Haste on Tax Measures May Leave a Trail of Loopholes*, N.Y. TIMES (Nov. 13, 2017), https://www.nytimes.com/2017/11/13/business/economy/corporate-tax.html [https://perma.cc/VBB2-VJCB] ("To reduce their home tax bill, companies like Google and Pfizer, for instance, often relocate patents and copyrights in tax havens and then sell use of that intellectual property back to their American subsidiaries at eye-popping prices. These are the higher-than-normal profits — which Senate bill drafters have cunningly called 'Gilti' . . . — that Republican bills are trying to stop from leaking out of the tax system."); Richard Rubin, *New Tax on Overseas Earnings Hits Unintended Targets*, WALL ST. J. (Mar. 26, 2018), https://www.wsj.com/articles/new-tax-on-overseas-earnings-hits-unintended-targets-1522056600 [https://perma.cc/3SHS-KTNH] ("GILTI is directed at trademarks and patents of technology and pharmaceutical firms, which are easy to transfer to low-tax foreign countries."); Richard Rubin, *Tax Changes Hit Overseas Profits of Some U.S. Companies*, WALL ST. J. (Mar. 27, 2019), https://www.wsj.com/articles/tax-changes-hit-overseas-profits-of-some-u-s-companies-11553679000 [https://perma.cc/L9XH-E2M8] ("The idea: If U.S. companies didn't pay substantial foreign taxes and instead packed profits into low-tax jurisdictions like Bermuda or Ireland, they would face a backstop in a new minimum U.S. tax: GILTI."); Jesse Drucker & Jim Tankersley, *How Big Companies Won New Tax Breaks from the Trump Administration*, N.Y. TIMES (Dec. 30, 2019), https://www.nytimes.com/2019/12/30/business/trump-tax-cuts-beat-gilti.html [https://perma.cc/XEZ8-SS23] ("To reduce the benefit companies reaped by claiming that their profits were earned in tax havens, [GILTI] imposed an additional tax of up to 10.5 percent on some offshore earnings.").

80. *See* Kamin et al., *supra* note 7, at 1489.

81. *See* I.R.C. § 965; *infra* notes 208–21 and accompanying text.

82. I.R.C. § 951A.

83. *See* Kamin et al., *supra* note 7, at 1490.

84. *See* Kyle Pomerleau, *What's Up with Being GILTI?*, TAX FOUND. (Mar. 14, 2019), https://taxfoundation.org/multinational-tax [https://perma.cc/AQ29-DDLL] ("GILTI is a newly-defined category of foreign income added to corporate taxable income each year.").

85. *See* Kamin et al., *supra* note 7, at 1489 n.187.

86. George Callas & Mark Prater, *Is GILTI Operating as Congress Intended?*, 166

In effect, GILTI deems that any intellectual property held by a U.S. taxpayer in low-tax jurisdictions actually originates from the United States. And it taxes that intellectual property under this assumption. So, if Apple Operations Limited, an Apple subsidiary located in Ireland,[87] holds a patent that generates income, the United States taxes that income, regardless of the patent's origins.

Second, GILTI assumes that income not supported by fixed assets—like plant, property, and equipment—comes from intangible assets.[88] In other words, GILTI assumes that a CFC's gross income is equal to its income from tangible assets *plus* its income from intangible assets. GILTI acts on this assumption by asking a CFC to reverse engineer its intangible income by subtracting tangible income from total income.[89]

To vastly simplify things,[90] the GILTI calculation is based on two items: (1) tested income[91] and (2) deemed tangible income return.[92]

TAX NOTES FED. 65, 65 (2020) ("To protect the U.S. tax base, Congress enacted new section 951A, creating the global intangible low-taxed income regime to capture high-return income, often earned from intangible assets *that had migrated to low-tax jurisdictions*." (emphasis added)).

87. Apple, Inc., *supra* note 70.

88. Rebecca Rosenberg, *It's All About the DRD, What's Wrong with Foreign Branches, and a Few Other Things You Should Know About the New International Tax Provisions*, 53 LOY. L.A. L. REV. 95, 153–54 (2019) (explaining that GILTI does not measure intangible income).

89. *Id.*

90. The following explanation assumes two things. It first assumes that the taxpayer is the sole owner of their CFC. It also assumes that the taxpayer only has one CFC. These assumptions have the effect of conflating the following terms: tested income and net tested income; deemed tangible return and net deemed tangible return; and, for GILTI purposes only, taxpayer and CFC. Given that these assumptions are often not true in reality, the GILTI regime ends up becoming much more complicated in practice.

Some examples of how this GILTI calculation can become more complicated include the following: If the taxpayer is not the sole owner of the CFC, they must determine their pro rata share of net tested income and net deemed tangible return. I.R.C. § 951A(b)(2)(A), (c)(1)(A). Pro rata share is determined by the taxpayer's proportionate share of earnings had the CFC distributed its Subpart F income on the last day of the taxable year *less* other dividends. *See* I.R.C. § 951(a)(2).

If the taxpayer only owns one CFC, then (1) the CFC's tested income is necessarily the taxpayer's *net* tested income and (2) that the CFC's deemed tangible income return is the taxpayer's *net* deemed tangible income return. Otherwise, the tested income from each of the taxpayer's CFCs would be combined to determine the taxpayer's net tested income. Likewise, with each CFC's deemed tangible income return. In short, GILTI becomes very complicated, very quickly in practice.

91. Of course, a taxpayer could also have a net tested loss. For simplicity's sake, this Note will assume that every taxpayer has a net tested income—as opposed to a net tested loss—though this is obviously not the case.

92. I.R.C. § 951A(b)(1).

Tested income is a CFC's gross income *less* exceptions[93] and allocable deductions.[94] In other words, tested income is a CFC's earnings that are outside the scope of the Subpart F regime,[95] which taxes other sources of movable income.[96] Deemed tangible income return is 10% of the CFC's Qualified Business Asset Investment (QBAI).[97] QBAI, for GILTI purposes, is the average aggregate adjusted basis of the CFC's depreciable tangible assets.[98] To summarize, the GILTI regime attempts to reverse engineer a CFC's intangible income by subtracting tangible income from total income, where total income is any income not subject to Subpart F taxation or direct U.S. taxation and tangible income is a deemed 10% return on the book value of the CFC's tangible assets.

Once these two items are determined, they must be compared. If the CFC's tested income (i.e., "total income") is greater than their deemed tangible return (i.e., deemed income from tangible assets), then they subtract the deemed tangible return from tested income.[99] This calculation manufactures a CFC's income from intangible assets.

The difference between the CFC's net tested income and their net deemed tangible return is the CFC's GILTI inclusion amount.[100] This "final" sum constitutes the taxpayer's taxable income on

93. *See* Treas. Reg. 1.951A-2(c)(1) (listing the items that tested income is determined "without regard to"); Cummings, *supra* note 60, at 164–65 ("Obviously, gross income otherwise includable in some taxpayers' U.S. tax base should be removed (effectively connected income of a branch of the CFC, and subpart F income). The other exclusions are less obvious: foreign high-taxed income kicked out of subpart F, dividends from related corporations, and oil and gas income.").

94. *See* I.R.C. § 951A(c)(2)(A)(ii) (referring to I.R.C. § 954(b)(5)); Treas. Reg. § 1.951A-2(c)(2)–(3).

95. *Special Report: Global Intangible Low-Taxed Income (GILTI) Regulations Roadmap*, BLOOMBERG TAX & ACCT. 1 (2020), available at https://pro.bloombergtax.com/reports/gilti-regulations-roadmap [https://perma.cc/F6KA-7SZT].

96. Recall that Subpart F taxes movable items of income like insurance income, foreign base company income, and illegal bribes and kickbacks; Subpart F specifically excludes income effectively connected with the United States. *See supra* notes 71–76 and accompanying text.

97. *See* I.R.C. § 951A(b)(2).

98. *Id.* § 951A(d). The Code allows a "depreciation" deduction for the exhaustion and wear and tear of property used in a trade or business or held for the production of income*. Id.* §§ 162, 167, 168. Taxpayers typically take the depreciation deduction for any particular asset over its useful life. *Id.* §§ 167, 168. *But cf. id.* § 168(k) (allowing for the immediate expensing of certain assets). Without taking other adjustments into account, an asset's adjusted basis is its cost less depreciation. *See id.* § 1016.

99. BLOOMBERG TAX & ACCT., *supra* note 95, at 4. At this point in the calculation, the specified return is adjusted for interests paid. Cummings, *supra* note 60, at 168–69.

100. BLOOMBERG TAX & ACCT., *supra* note 95, at 4.

intangible assets, which is ostensibly taxed at the 21% corporate tax rate.[101] Taxpayers that elect to be taxed as a corporation are eligible for a 50% deduction of their GILTI liability[102] and/or a GILTI tax credit,[103] resulting in an effective tax rate of 10.5%. Once a CFC's GILTI liability has been determined, taxpayers should consider its interactions with other Code provisions, business organizations, and business strategies.[104]

To illustrate, consider this example: Anne, an American citizen living in Canada, solely owns and operates Maple Corporation.[105] Maple manufactures and sells one product, Maple's Maple Syrup, exclusively on Prince Edward Island. Maple's gross income for the taxable year is $110. Maple owns three assets: machinery with an adjusted basis[106] of $100, raw materials, and a patent on the Maple Syrup's design process. Maple turns the raw materials into Maple Syrup in her machinery with her patented design.

To calculate Maple's GILTI inclusion amount, Anne must first determine its tested income. If all of Maple's income is neither subject to Subpart F nor specifically excluded from Subpart F,[107] then Maple has a tested income of $110. Next, Maple must determine its deemed tangible return, which is 10% of its Qualified Business Asset Investment. Since Maple only owns one depreciable tangible asset,[108] the machinery, with an adjusted basis of $100, its QBAI is $100. Thus, 10% of Maple's QBAI is $10.

Since Maple's net tested income ($110) is greater than its net deemed tangible return ($10), Maple subtracts the latter from the former. $110 *less* $10 is $100; thus, Anne's GILTI inclusion amount is $100. Effectively, this calculation has determined that Maple's patent

---

101. I.R.C. § 951A(a).

102. *See id.* §§ 250, 962.

103. *Id.* § 960(d).

104. *See* Cummings, *supra* note 60, at 175–78 (describing GILTI's interaction with FDII, FTCs, PTI, BEAT, hybrid payments, interest expenses, dividends, Subpart F, investment earnings in U.S. property, consolidated groups, partnerships, and inversions); JANE G. GRAVELLE & DONALD J. MARPLES, CONG. RSCH. SERV., R45186, ISSUES IN INTERNATIONAL CORPORATE TAXATION: THE 2017 REVISION (P.L. 115-97) 14 (2021) ("GILTI and deemed repatriations may also have foreign tax credits that cannot be immediately used if taxable income is reduced or eliminated. Foreign tax credits have a one-year carryback and a 10-year carryforward, but there is no foreign tax credit carryover for foreign taxes related to GILTI.").

105. Also assume that Anne has no ownership stake in any other business.

106. *See supra* note 98 and accompanying text.

107. *See supra* note 96 and accompanying text.

108. Raw materials and intangible assets are not depreciable. Raw materials are expensed when the product is sold. Treas. Reg. § 1.162-3(a)(1). Intangible assets are amortized over a fifteen-year period. I.R.C. § 197(a).

produced $100 of Maple's taxable income. From there, Anne applies the 21% corporate tax rate to her GILTI inclusion amount of $100 and takes a 50% deduction.[109] Maple's total GILTI liability is $10.50. Because Anne fully owns Maple, Anne effectively owes this $10.50, or 10.5%, tax on Maple's patent.

Commentators have heavily criticized the GILTI regime. Many academics specializing in international taxation believe that, contrary to Congress's intention, the GILTI regime incentivizes firms to shift their profits abroad.[110] These academics also point out that, although the TCJA was intended to usher in a territorial tax system, GILTI is calculated on a global basis, encouraging corporations to locate their investments in low-tax jurisdictions and blend that income with income from high-tax jurisdictions.[111] They also note that GILTI does not accurately measure either intangible-related or low-taxed income,[112] and that it only serves to make the Code more complex.[113] These complaints are illustrated by the Anne example

---

109. Since Anne is an individual, she must elect to be taxed as a corporation under I.R.C. § 962. When she does this, she must take her Canadian tax liability and gross up her corporate income to compute the GILTI inclusion. Then, she offsets the 21% U.S. tax on the net GILTI inclusion with 80% of her foreign tax. I.R.C. § 250. For simplicity's sake, this example assumes this deduction equals 50% of her GILTI inclusion amount.

110. *See* Kysar, *supra* note 8, at 343 ("[T]he current GILTI incarnation problematically incentivizes firms to offshore assets and profit shift . . . ."); Kamin et al., *supra* note 7, at 1490 ("[T]he new GILTI regime, as structured, is highly problematic. This is due to the offshoring incentives that are created by the regime . . . ."); Rosenberg, *supra* note 88, at 169–78 (discussing where to move tangible assets for the maximum U.S. tax benefit, and the interaction with the new 100% first year depreciation).

111. Kamin et al., *supra* note 7, at 1490 ("[T]he new GILTI regime, as structured, is highly problematic [because it] is applied on a global, rather than per-country basis . . . ."). For a primer on territorial versus nonterritorial tax systems, see MISEY & SCHADEWALD, *supra* note 11, ¶ 201.02.

112. Rosenberg, *supra* note 88 ("GILTI . . . does not really measure intangible income—or any type of mobile income. GILTI instead essentially consists of a U.S. shareholder's pro rata share of all of the income from its CFCs (other than excluded types of income, such as subpart F amounts) reduced by 10% of the bases of certain tangible assets of such CFCs. This is not an accurate measure of intangible income, or of mobile income. Even though tangible asset bases are taken into account, there is no proof that 10% of such bases is the correct amount to remove non-mobile income from taxable GILTI treatment (in all circumstances, for all types of income).").

113. *See* Christine A. Davis, *Is the Tax Cuts and Jobs Act GILTI of Anti-Simplification?*, 38 VA. TAX REV. 315, 320 (2019) ("[N]ew taxes were added to protect the U.S. tax base and to generate more revenue. One of these new taxes—the tax on global intangible low-taxed income—is a new Subpart F inclusion, which is not only difficult to calculate, but also impacts the analysis of a number of other taxes, deductions and credits. These factors make the determination of corporate tax liability and cross border investment planning for corporations much more difficult

from above. GILTI neither attempts to measure the actual income from Maple's patent nor offers any justification as to why Anne's return on her tangible assets is 10% of her depreciable assets. Instead, it gives Anne a convoluted, inaccurate roundabout to determine Maple's intangible income. Still more commentators have lamented over GILTI's effects on individual taxpayers like compliance burdens and exorbitant uncertainty.[114]

Once again, certain taxpayers found a way to exploit the tax system, and once again the tax collector responded. But the tax collector unintentionally swept small businesses owned by American citizens living abroad in its rushed response, creating significant problems for these small taxpayers. One possible solution to this problem is a *de minimis* exception that excuses these small businesses from the GILTI regime entirely. A discussion of *de minimis* exceptions follows.

C. *DE MINIMIS* EXCEPTIONS

> There has been no willingness to exempt small businesses from the legislation, despite their not being the intended target and despite representations about the harm they will be caused. Congress simply does not care about Americans who live abroad.[115]

---

after the enactment of the TCJA than it was before." (citation omitted)); Kimberly A. Clausing, *Fixing Five Flaws of the Tax Cuts and Jobs Act*, 11 COLUM. J. TAX L. 31, 60 (2020) ("The U.S. international tax system has often been described as stupefying and mind-numbing in its complexity. However, this new slew of acronyms (GILTI, FDII, and BEAT) together with existing complexities surrounding foreign tax credits, expense allocation, interest deduction limitations, and other provisions, make our international tax system only more complex. In the early days of the legislation, experts at top accounting firms were simply flabbergasted by the intricacies of the new law, and often confessed that they were not certain of its ultimate impact on their client taxpayers. Colorful byzantine flowcharts were generated to try to analyze the net impact of the law, but the sheer complexity made clarity elusive. Even as the effects of the legislation began to clarify, the answer was most often 'it depends[.]'").

114. *See, e.g.*, Mindy Herzfeld, *How Some Taxpayers Got Cut Out of the Tax Cuts and Jobs Act*, 89 TAX NOTES INT'L 277, 279 (2018) ("U.S. individual shareholders of foreign companies are triply hit by the GILTI inclusion."); E-mail from Monte Silver, Owner, Silver & Co. Att'ys at Law, to Steven Mnuchin, Sec'y, U.S. Treasury (Aug. 14, 2018), available at https://www.taxnotes.com/tax-notes-today-international/controlled-foreign-corporations-cfcs/gilti-regs-will-hit-small-businesses-hard-attorney-says/2018/08/22/28cby [https://perma.cc/HKH3-9GCX]; Letter from Sachin N. Shah to Comm'r, *supra* note 16, at 4; Monte Silver, *MNEs Get Easy Ride Under US Repatriation and GILTI Regimes as US Expats Pick Up the Bill*, INT'L TAX REV. (May 22, 2018), https://www.internationaltaxreview.com/article/b1f7n3z5zcdwyj/mnes-get-easy-ride-under-us-repatriation-and-gilti-regimes-as-us-expats-pick-up-the-bill [https://perma.cc/L3RJ-CNXG].

115. Snyder, *Threatened by My Identity*, *supra* note 1, at 29–30.

De minimis, fully written out as *de minimis non curat lex*,[116] is a legal maxim roughly meaning "the law do[es] not regard trifles."[117] Originating in the English legal system,[118] the maxim was first used in a purely litigious setting: first in waste cases,[119] then in mining disputes,[120] and then in other property claims.[121] Historically, courts used the maxim as "an interpretive tool to inject reason into technical rules of law and to round-off the sharp corners of our legal structure."[122] Perhaps due to its versatility, *de minimis* is difficult to define, and the scholarship around the maxim is limited and focuses entirely on its litigation usages.[123]

---

116. Though modernly shortened to "*de minimis*," the full phrase—existing in its legal form since at least the fourteenth century—has some historical controversy as to its accurate longform. *See* Veech & Moon, *supra* note 17, at 537 n.3 (listing the various longform versions of the phrase).

117. *See id.* at 537–38, 537 n.4. Unsurprisingly there is also some historical controversy as to the phrase's accurate translation. *Id.*

118. *See generally id.* at 537–44 (elucidating the history of the maxim).

119. *See, e.g.*, York v. York, Y.B. 9 Henry 6, at 66 (1431); CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 458 (1745) ("No action lies of a waste but to the Value of a penny, for de minimis non Curat Lex.").

120. *See, e.g.*, The Case of Mines, 75 Eng. Rep. 472, 499 (1568) ("And therefore . . . the plaintiff shall not have judgment, for *de minimis non curat lex* . . . . And so in the said commissions or leases of base mines, in which *aliquid auri vel argenti habetur*, the intent of the King and of the words are, where the gold or silver is worth more than [or the same as] the base mine . . . for otherwise it shall not destroy the thing of greater value. So that they are only to be taken . . . where there is a great plenty of gold or silver in the mines.").

121. *See, e.g.*, Taverner v. Dominum Cromwell, 78 Eng. Rep. 601, 602 (1594) ("For Walmsley said, there is a difference between a prescription for freehold land and for customary land; for custom which concerneth freehold ought to be throughout the county, and cannot be in a particular place . . . . But a prescription concerning copyhold land is good in a particular; for *de minimis non curat lex*; and the law is not altered thereby; and it may be there is but one copyholder there, for which he might prescribe." (citation omitted)).

122. Veech & Moon, *supra* note 17, at 543–44. *But see* R. Vashon Rogers, Jr., *De Minimis Non Curat Lex*, 21 ALB. L.J. 186, 186 (1880) ("Justice — though said by the poets to be blind (another exploded fiction, by the way) — has an eye both telescopic and microscopic, and a most comprehensive mind, which, while considering nothing as too great to intermeddle with, yet deems many of the smallest things as not only worthy of, but demanding her attention."). Rogers, Jr. goes on to list several cases where the law did, in fact, concern itself with trifles. *See id.* at 186–88.

123. *See* Veech & Moon, *supra* note 17; Frederick G. McKean, Jr., *De Minimis Non Curat Lex*, 75 U. PA. L. REV. 429 (1927) (discussing *de minimis* as applied in various types of cases); Jeff Nemerofsky, *What Is a "Trifle" Anyway?*, 37 GONZ. L. REV. 315 (2002) (discussing *de minimis* as applied in various types of cases); Andrew Inesi, *A Theory of De Minimis and a Proposal for Its Application in Copyright*, 21 BERKELEY TECH. L.J. 945 (2006) (developing a *de minimis* theory and applying it in the copyright realm). It also should not be ignored that the existing *de minimis* scholarship views taxpayer litigants as the losers in the application, or lack thereof, of the maxim. *See*

This Section explores *de minimis* rules from two angles. Subsection 1 explores the limited existing *de minimis* literature and proposes an analytical framework for the application of *de minimis* exceptions in both the legislative and regulatory contexts. Subsection 2 examines existing literature focusing on statutory interpretation and argues that *de minimis* regulations that are neither mandated nor prohibited by statute can be legitimate under almost any theory of statutory interpretation.

1. An Analytical Framework for the Application of *De Minimis* Exceptions in the Legislative and Regulatory Contexts

There is little scholarship on *de minimis* exceptions in the tax context. But take a step back, and there is some scholarship on *de minimis* exceptions in general. In the most comprehensive analysis of *de minimis* law to date, law professors Max L. Veech and Charles R. Moon attempted to define the maxim by the factors that courts considered when applying *de minimis* exceptions in the litigation context.[124] They argued that courts, when determining whether to grant a *de minimis* exception to a litigant, weighed five factors: purpose, practicality, intent, mutuality, and value.[125]

Purpose—the most important factor in Veech and Moon's mind—is the intent behind the statutory phrase, contractual clause, or common law rule sought to be interpreted and applied.[126] Practicality encapsulates convenience and necessity, both for private and governmental actors.[127] Intent, not to be confused with purpose, is the motivation behind the parties' actions.[128] Mutuality is "the availability of the principle to either party."[129] Value, often expressed in quantitative terms such as money, is the real-world worth of a *de minimis* exception to either party.[130]

Veech & Moon, *supra* note 17, at 547 ("[T]ax statutes . . . statutes which are by tradition strictly construed, it is found that *de minimis* is used sparingly, or not at all."); McKean, *supra*, at 439 ("A modern American court is not likely to attribute to the law-making power a statutory intent that an authority conferred by it to assess or levy taxes is an elastic one, and that such limits as are laid down by the legislature could be passed; for if overstepping the authority laid down in a tax act were left to the discretion of tax assessors and collectors, the question of abuse thereof would rest largely upon the personal equation of the membership of the courts and make for confusion in lieu of a desirable certainty." (citation omitted)).

124. *See* Veech & Moon, *supra* note 17, at 544–60.

125. *Id.*

126. *Id.* at 545.

127. *Id.* at 551.

128. *Id.* at 554.

129. *Id.* at 556.

130. *Id.* at 558–60.

This Note contends that this analytical framework applies to other *de minimis* situations, namely in the legislative process and the regulatory process.

In the legislative context, consider the exclusion of *de minimis* fringe benefits from gross income.[131] In general, the Code defines gross income as "all income from whatever source derived" unless "otherwise provided."[132] The Code explicitly includes fringe benefits in gross income.[133] Fringe benefits are any "benefit (other than direct salary or compensation) received by an employee from an employer."[134] This includes anything from a company car to a cup of coffee.[135] Congress realized the impracticability of forcing every suit in corporate America to account for every free cup of coffee they consume and thus introduced a *de minimis* fringe benefit exclusion.[136] Under this *de minimis* exclusion, if a fringe benefit provided from an employer to an employee is so small that accounting for it would be unreasonable or administratively impracticable, then it is excludable from gross income.[137] Thus, employees receive employer-provided coffee as a tax-free *de minimis* employer benefit.

Congress implicitly considered the Veech and Moon factors in making this decision. The purpose of the Sixteenth Amendment is to allow the federal government to raise revenue rather than find the exact amount of the population's income.[138] Practicality is the driving force behind the exclusion, allowing taxpayers to focus on their jobs rather than track the number of pens they take from the storage room. Congress also realized that, in failing to report how many pieces of paper that taxpayers used at work for personal purposes, taxpayers were not trying to reduce their tax liability. Similarly, there is a mutual benefit to the exclusion: taxpayers do not have to track and determine the value of *de minimis* fringe benefits received and the IRS does not have to verify this information. Finally, Congress weighed that the dollar value of the additions to the tax

---

131. *See* I.R.C. § 132(a)(4), (e).

132. *Id.* § 61(a).

133. *Id.* § 61(a)(1).

134. *Benefit-Fringe Benefit*, BLACK'S LAW DICTIONARY (11th ed. 2019).

135. *See id.*; FREELAND ET AL., *supra* note 58, at 89 ("For example, employer has an office coffee maker and employees are allowed to consume all the free coffee they want. Technically, each cup is income.").

136. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 531, 98 Stat. 494, 877–86.

137. I.R.C. § 132(a)(4), (e).

138. U.S. CONST. amend. XVI.

base of *de minimis* fringe benefits against the detriment of the administrative burden in tracking and collecting them.

In the regulatory context, consider the Treasury's *de minimis* safe harbor exception in its tangible property regulations.[139] The Code allows taxpayers to deduct all ordinary and necessary expenses incurred in carrying on a trade or business, such as repair costs.[140] The Code also requires taxpayers to capitalize the costs of acquiring, producing, and improving tangible property.[141] Differentiating between an ordinary and necessary expense and a capital expenditure is often difficult, and "any attempt to harmonize all of the cases and authorities dealing with that distinction would . . . be 'a futile task.'"[142] This tension led the Treasury to introduce a *de minimis* safe harbor exception, even though none is statutorily available.[143] The *de minimis* safe harbor exception allows certain taxpayers to immediately expense amounts paid for tangible property up to a certain dollar amount.[144]

To illustrate, take Terry Taxpayer, who has a leaky roof on the roof of her business's building. If Terry simply patches the leak, the cost to do so would clearly be a repair cost, and thus an ordinary and necessary business deduction. If Terry replaces the entire roof, the cost to do so would clearly be a capital expenditure. But what if Terry only replaces the section of the roof that is leaking? So long as the repair costs do not exceed $2,500, those costs fall within the *de minimis* safe harbor exception, allowing Terry to immediately expense the replacement costs.

---

139. *See* Treas. Reg. § 1.263(a)-1(f).

140. *See* I.R.C. § 162(a). Generally, these expenses directly reduce a taxpayer's Adjusted Gross Income, thus decreasing their tax liability in the year the cost is incurred (for accrual method taxpayers) or paid for (for cash method taxpayers). *See id.* § 63(a).

141. *See id.* § 263(a). Generally, these costs increase the basis, or value, of the tangible property acquired, produced, or improved; the costs influence a taxpayer's tax liability gradually through the recognition of depreciation expenses (which are a § 162 expense) and take full effect when the tangible property is sold or otherwise disposed. *See id.* §§ 1001(a), 1011, 1016.

142. *See* FREELAND ET AL., *supra* note 58, at 314 (quoting Welch v. Helvering, 290 U.S. 111, 116 (1933)). *Compare* Midland Empire Packing Co. v. Comm'r, 14 T.C. 635, 642–43 (1950) (holding that the steps taken to oilproof the basement of a meatpacking plant were a repair expense), *with* Mt. Morris Drive-In Theatre Co. v. Comm'r, 25 T.C. 272, 275 (1955), *aff'd* 238 F.2d 85 (6th Cir. 1956) (holding that the money spent on a drainage system to stop the flow of water from the taxpayer's land to its neighbor's land was a nondeductible capital expenditure).

143. *Compare* I.R.C. § 263, *with* Treas. Reg. § 1.263(a)-1(f).

144. *See* Treas. Reg. § 1.263(a)-1(f).

The Veech and Moon factors are also present in the Treasury's decision-making process. Differentiating between deducting for ordinary and necessary expenses and capitalizing expenditures serves the purpose of measuring a taxpayer's income—and later tax liability—for the taxable year.[145] The Treasury recognized the deductions' purpose, providing "a general framework" including a *de minimis* safe harbor for distinguishing between the two.[146] This framework serves the practical purpose of giving taxpayers a bright-line rule to follow as opposed to "decades of often conflicting case law [and] administrative rulings on specific factual situations,"[147] thus rewarding well-intentioned taxpayers like Terry, who may not have the capacity and know-how to accurately make the differentiation. Finally, and perhaps most importantly, the litigation, time, and administrative costs avoided by *de minimis* safe harbor has mutual value to Terry and the Treasury, who would rather not see each other in tax court, litigating over Terry's Home Depot receipts and wasting administrative time and resources.

---

145. The U.S. income tax system attempts, in theory, to tax a taxpayer's net income in any given year. *See* STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 3 (1985) ("The tax expenditure concept posits that an income tax is composed of two distinct elements. The first element consists of structural provisions necessary to implement a normal income tax, such as the definition of net income . . . . These provisions compose the revenue-raising aspects of the tax."). Net income is typically defined using the Schanz-Haig-Simons theory: where one's income is equal to change in net economic wealth *plus* consumption. SURREY & MCDANIEL, *supra*, at 4 (describing the Schanz-Haig-Simons theory). *See generally* Georg Schanz, *Der Einkommensbegriff und die Einkommensteuergesetze* [*The Concept of Income and the Income Tax Laws*], 13 FINANZ-ARCHIV 1 (1896) (advocating the theory originally); Robert Murray Haig, *The Concept of Income—Economic and Legal* Aspects, *in* THE FEDERAL INCOME TAX 7 (Robert Murray Haig, ed., 1921) ("Income is the *money value of the net accretion to one's economic power between two points in time*." (emphasis in original)); HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938). The tension between expenses and capital expenditure rests in timing—does the money spent by the taxpayer offset this year's income or another year's income? *See supra* notes 140–41 and accompanying text.

146. Guidance Regarding Deduction and Capitalization of Expenditures Related to Tangible Property, 78 Fed. Reg. 57,686 (Sept. 19, 2013); *see also Tangible Property Regulations - Frequently Asked Questions*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/tangible-property-final-regulations [https://perma.cc/5EAB-MG8D] ("The final tangibles regulations combine the case law and other authorities into a framework to help you determine whether certain costs are currently deductible or must be capitalized. The final tangibles regulations also contain several simplifying provisions that are elective and prospective in application (for example, the election to apply the de minimis safe harbor, the election to utilize the safe harbor for small taxpayers, and the election to capitalize repair and maintenance costs in accordance with books and records).").

147. IRS, *supra* note 146; *see also* sources cited *supra* note 142.

These two examples are necessarily demonstrative of a typical application of a *de minimis* exception. When crafting such a law or regulatory scheme, legislatures should consider the law's purpose as well as the exception's purpose in the larger statutory scheme. Similarly, *de minimis* exceptions are almost always used as a means of increasing administrative practicality—why else would they exist? In considering whether to implement a *de minimis* exception, any responsible decision maker would weigh the relief given to good-faith actors against the possibility of "gaming." Finally, the mutual costs and benefits to the affected parties and agencies must also be considered.

2. What Legitimates *De Minimis* Regulations that Are Neither Mandated nor Prohibited by Statute?

Strict textualists argue that congressional purpose is irrelevant to statutory interpretation and that only the statute's language matters.[148] Strict purposivists argue that statutory language should be read and interpreted to advance the congressional purpose in enacting that language.[149] The two sides are at war on the issue of whether *de minimis* regulations that are *not* mandated by statute are legitimate.[150]

On the one hand, the most stringent textualist would argue that if a *de minimis* exception is not mandated in the statute, then the administrative agency has no right to issue regulations containing one. And further, the strictest textualist would argue that any discussion of the statute's purpose is superfluous. On the other hand, the strictest purposivist would retort that the statutory text itself is irrelevant and that the only relevant consideration is whether a *de minimis* exception aligns with Congress's purpose in enacting the statute. But what about schools of thought that fall between these polar opposites? After all, most interpreters are neither *strict* textualists nor *strict* purposivists.[151] And perhaps reasonable interpreters within each school of thought may disagree.

148. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 22 (3d ed. 2017).

149. *Id.* Of course, purposivism and textualism represent the two ends of the statutory interpretation spectrum. Most purposivists will rely on the text of the statute where it is unambiguous; most textualists will resort to statutory intent or other methods of interpretation when the text of a statute is ambiguous.

150. At the outset of this discussion, it is important to note that § 951A does not mandate a *de minimis* exception. *See* I.R.C. § 951A.

151. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621 (1990) ("The statute's text is the most important consideration in statutory interpretation, and a clear text ought to be given effect. Yet the meaning of a text

Formalistic textualism, an immediate relative of strict textualism, dissects the statutory language, focusing primarily on "semantic context" while deemphasizing normative concerns.[152] Thus, when a statute employs universal language, administrative agencies should not regulate *de minimis* exceptions.[153] But this brand of textualism also emphasizes the decision maker's role; for example, judges should strictly adhere to their Article III duties.[154] Considering this role-based angle of formalistic textualism in the regulatory context would mean that administrative agencies can find refuge in their enabling statute. In the tax context, the Treasury must adhere to Code § 7805, which enables the Treasury to "prescribe all *needful* rules and regulations for the enforcement of [the Code.]"[155] Should the Treasury successfully argue that a *de minimis* exception is "needful" for the enforcement of the Code, then the exception is legitimate.

Flexible textualism, while still looking first to the statute's text, gives stronger deference to normative concerns.[156] Flexible textualism notably departs from formalistic textualism by utilizing the absurdity doctrine.[157] The absurdity doctrine holds that interpreters should reject interpretations that lead to absurd results.[158] So, even if a statute utilizes universal language, an extrastatutory *de minimis* exception is legitimate where strict literal interpretation of the statute would lead to absurd results.

Formalist purposivism features several subgenres, including a form that prioritizes the interpreter as a faithful agent of Congress

---

critically depends upon its surrounding context.").

152. Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 290 (2020); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 913 (2013) ("Textualists, in turn, argue that their version of faithful agency hews more closely to legislative supremacy and that 'texts should be taken at face value.'" (quoting John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005))).

153. *Cf.* I.R.C. § 951A(a) ("*Each* person who is a United States shareholder of any controlled foreign corporation for any taxable year of such United States shareholder *shall include* in gross income such shareholder's global intangible low-taxed income for such taxable year." (emphasis added)).

154. Grove, *supra* note 152, at 290–91.

155. I.R.C. § 7805(a) (emphasis added).

156. Grove, *supra* note 152, at 279.

157. *Id.* at 286.

158. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 460 (1892) ("If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.").

and another that adopts strict construction.[159] Though markedly similar to formalist textualism, each subgenre has its distinctive characteristics. The former employs substantive canons of statutory interpretation to achieve Congress's purpose;[160] the latter simply prioritizes statutory purpose before statutory text.[161] When determining whether a *de minimis* exception is legitimate, formalist purposivists will inquire whether Congress itself implicitly meant for there to be a *de minimis* exception.

Pragmatic purposivism prioritizes normative concerns.[162] It first asks what Congress's intent was in passing the statute and then asks what the consequences of any particular interpretation will be.[163] So, when considering the legitimacy of a *de minimis* exception, pragmatic purposivists will inquire as to a reasonable legislator's stance on the issue and then supplement that stance with the consequences of a *de minimis* exception.

Practically, whether an extrastatutory *de minimis* tax regulation is legitimate depends almost entirely on whether the Treasury implements it. Consider first the scenario where the Treasury chooses to implement a *de minimis* exception. Who will challenge a taxpayer-friendly rule? Taxpayers do not have standing to force the IRS to collect taxes.

Consider second the scenario where the Treasury chooses *not* to implement a *de minimis* regulation. If challenged by a taxpayer, textualist courts can simply rely on the statutory text to invalidate the challenge. And absent clear guidance in the legislative history, purposivist courts can do the same. The only scenario in which a court would invalidate a decision not to implement a *de minimis* exception would be one in which the statutory text or the legislative history *clearly* calls for one. But if a *de minimis* exception was clearly called for, it would be hard to imagine the Treasury not implementing one. And even if the Treasury did not, it would be hard

159. *See* Choi, *supra* note 58, at 26–30 (exploring structural purposivism).

160. *See* Gluck & Bressman, *supra* note 152 ("Purposivists, for instance, make faithful-agent-based arguments that judicial reliance on legislative history helps to cabin judicial discretion and effectuate congressional intent."). For an in-depth discussion of substantive canons in the tax realm, see Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195 (2020).

161. Choi, *supra* note 58, at 36.

162. Robert J. Pushaw, Jr., *Talking Textualism, Practicing Pragmatism: Rethinking the Supreme Court's Approach to Statutory Interpretation*, 51 GA. L. REV. 121, 124 (2016) ("[Pragmatist] judges must consider all of [the] evidence and choose the construction that will have the most beneficial practical consequences, especially by furthering the policy aims of the enacting Congress.").

163. Choi, *supra* note 58, at 37.

to imagine a small taxpayer having the resources necessary to successfully litigate the case against the Treasury. Because of this, the agency's decision is almost always legitimate.

Unfortunately, tax collectors and taxpayers do not always agree when and how *de minimis* exceptions should be enacted. After the former enacted GILTI, taxpayers cried out for a *de minimis* exception for the benefit of small businesses.[164] Despite the pleas of small businesses, the Treasury refused to implement a *de minimis* exception, leading to frustration, anger, and litigation.[165] A discussion of the calls, the Treasury's refusal, and the resulting litigation follows.

II. ACT II: GILTI UNINTENTIONALLY BURDENS SMALL BUSINESSES, YET THE TREASURY REFUSES TO IMPLEMENT A *DE MINIMIS* EXCEPTION

> I've had a downturn in my business in the last year that I'm trying to recover from, and right now I simply cannot afford to hire an international tax attorney, nor do I know who I could trust to successfully navigate the inevitable traps and trip wires in this legislation. The risks associated with [American emigrant] small business ownership seem to have grown exponentially. It seems to me that nobody knows how we will be treated yet under these new laws. The consultants of course want to paper this uncertainty over and assure potential clients that they know how to handle these taxes. Otherwise they will lose business. It's become a potentially very dangerous situation for people like me.[166]

The second act in this tale of small taxpayer woes with the international tax system involves Congress's governmental counterparts, the Executive and Judicial branches. At first blush, the TCJA's international tax system fails the goal of simplification laid out by its lawmakers and sweeps small taxpayers—namely U.S. citizens residing abroad with closely-held corporations—into the ongoing war between large multinational corporations and the Treasury. The first resort for interested parties who feel they have been failed by Congress is the regulatory process. Through participating in the notice-and-comment rulemaking process, interested parties point out the unintended consequences of Congress's actions, hoping that the executive agency will acquiesce to the parties' proposed fixes. When these interested parties feel that they have not been given a fair shake in this regulatory process, their last resort is the judiciary.

This Part discusses GILTI's regulatory process and the resulting lawsuit. Section A catalogs the Treasury's responses to small

164. *See infra* Part II.A.
165. *See infra* Part II.B.
166. Snyder, *Threatened by My Identity*, *supra* note 1.

taxpayer GILTI qualms. Section B contextualizes *Silver v. IRS* and weighs the merits of Silver's case against the IRS.

A. GILTI'S NOTICE-AND-COMMENT REGULATORY PROCESS

> Remaining a US citizen costs me thousands of dollars a year in tax preparation fees, though I end up owing no taxes, as well as double taxation of some revenue. But more so, it severely restricts my ability to function in the society where I live . . . . My US citizenship currently represents only fear, embarrassment, and harassment. If there is no change to CBT, FATCA, FBAR, GILTI, etc. (which I do not expect to happen) I will renounce [my citizenship] the first opportunity I have.[167]

After Congress amends the U.S. Code, the administrative state must interpret those changes and issue regulations that guide citizens towards compliance with the law.[168] The TCJA is no different. What is distinct, however, is that the nature of tax legislation puts the onus almost completely on one agency to issue its attendant regulations, the Treasury.

And once President Trump signed the TCJA into law in late 2017, the Treasury rolled up its sleeves and got to work, issuing 1,025 pages of TCJA-related regulations within two years.[169] Naturally, tax practitioners and large multinational firms eagerly awaited those regulations relating to the TCJA's international

---

167. *Id.* at 17.

168. Agencies must comply with the Administrative Procedure Act (APA) in this process. 5 U.S.C. §§ 500–596. The APA "imposes procedural requirements on agencies for the purpose of protecting the interests of parties affected by agency action." Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727, 1728 (2007). When the Treasury, for example, interprets the Code and implements regulations for its enforcement, it is bound to follow the procedures laid out in APA § 553. One of these procedures is known as "notice-and-comment rulemaking." § 553. Aptly named, notice-and-comment rulemaking consists of two steps. First, the administrative agency will publish a general notice of proposed rulemaking in the *Federal Register*. § 553(b). Interested parties are then welcome to comment on the proposed regulations. § 553(c). After taking the comments into consideration, the agency will either implement the proposed regulations or repeat the process. The thrust of notice-and-comment rulemaking is simple—it encourages the public to participate in the rulemaking process. *See* Hickman, *supra*, at 1728.

169. *See* Garrett Watson, *Two Years After Passage, Treasury Regulations for the Tax Cuts and Jobs Act Surpass 1,000 Pages*, TAX FOUND. (Dec. 12, 2019), https://taxfoundation.org/treasury-regulations-for-the-tcja [https://perma.cc/99HS-GDJK]. For a compiled list of every TCJA-related Treasury Regulation passed in the two years following the bill's passage, see Annette Nellen, *Federal Tax Regulations Issued in 2018*, SAN JOSÉ ST. UNIV. (Feb. 27, 2019), https://www.sjsu.edu/people/annette.nellen/website/2018regs.html [https://perma.cc/58N4-389Z]; Annette Nellen, *Federal Tax Regulations Issued in 2019*, SAN JOSÉ ST. UNIV. (Mar. 17, 2020), https://www.sjsu.edu/people/annette.nellen/website/2019regs.html [https://perma.cc/C39J-QT65].

provisions.[170] But these practitioners were not only concerned about these provisions' effects on Apple and Google.[171] They were also worried about the effects on small business, namely small controlled foreign corporations owned by individuals.[172]

Among the most alarming provisions in the TCJA was the GILTI regime.[173] As enacted, GILTI applies to "[e]ach person who is a United States shareholder of any controlled foreign corporation," regardless of size.[174] This means that, for example, any American emigrant who owns their own business and has elected the corporate form must comply with GILTI's complex reporting requirements even if they end up not owing any GILTI tax.[175] While large multinational firms have relationships with resource-heavy accounting firms and accounting divisions dedicated to determining and reducing their tax liabilities, small businesses do not, prompting fears that small entities would not be able to readily compute or comply with GILTI.

---

170. *See* Andrew Velarde, *GILTI Regs Clear OMB Review*, TAX NOTES (Sept. 11, 2018), https://www.taxnotes.com/tax-notes-today-international/controlled-foreign-corporations-cfcs/gilti-regs-clear-omb-review/2018/09/11/28drw (last visited Nov. 21, 2021) ("Practitioners are anxiously awaiting guidance on [GILTI,] one of the most complex provisions to come out of the TCJA."); Andrew Velarde, *Critiques Fly Over GILTI, BEAT Mechanisms*, TAX NOTES (May 7, 2018), https://www.taxnotes.com/tax-notes-today-international/base-erosion-and-profit-shifting-beps/critiques-fly-over-gilti-beat-mechanisms/2018/05/07/280zv (last visited Nov. 21, 2021) ("If businesses are generally pleased with changes enacted by the Tax Cuts and Jobs Act, they have proven themselves bold in hurling criticism at the mechanics behind two of the law's most notable international reforms. Both the global intangible low-taxed income provision and the base erosion and antiabuse tax provision suffer from shortcomings in their implementation, according to former and current executives of large multinational companies.").

171. Some academics have suggested that the TCJA focused primarily on the needs of large multinational taxpayers and domestic passthrough business taxpayers. *See, e.g.*, Herzfeld, *supra* note 114, at 277.

172. *See id.* at 277–80.

173. *See id.* at 279 ("[The] GILTI tax — the most onerous of the new international provisions — . . . imposes a cost on both U.S. individual shareholders and corporate shareholders."); Erik Christenson & Monte Silver, *US Tax Reform: GILTI Uncertainties*, INT'L TAX REV. (Feb. 27, 2018), https://www.internationaltaxreview.com/article/b1f7n2v7j95n13/us-tax-reform-gilti-uncertainties [https://perma.cc/53D3-DEWL] ("For individuals with CFCs, GILTI is an unmitigated disaster, because no credit at all is allowed for foreign taxes 'deemed paid' with respect to the GILTI inclusion. For individuals, GILTI always results in incremental US tax, even if the CFCs pay an effective rate of tax in excess of the amount contemplated by Congress in the legislative history.").

174. I.R.C. § 951A(a).

175. *Id.* § 951A.

These concerns prompted practitioners and taxpayers to call on the Treasury to relieve small businesses of GILTI's burdens.[176] The argument was simple: (1) GILTI entails a significant and perpetual reporting obligation; (2) GILTI applies from the first dollar of income, so *all* American emigrant CFC owners must comply with GILTI; and (3) GILTI's complexity disproportionately burdens small businesses, their owners, and their tax professionals, who do not have the resources to comply.[177]

The circumstances typically render small business owners with four options: (1) become tax noncompliant,[178] (2) close or reduce their business, (3) pay for larger or more-competent accounting firms to keep their business tax compliant,[179] or (4) renounce their citizenship.[180] Alternatively, taxpayers may opt to circumvent or lessen GILTI's impact through undesirable means. Potential business owners could choose not to open shop.[181] Business owners can select disadvantageous business structures.[182] Owners of online businesses

176. *See, e.g.*, E-mail from Monte Silver to Steven Mnuchin, *supra* note 114; Letter from Sachin N. Shah to Comm'r, *supra* note 16, at 4 ("[A] *de minimis* exception could be introduced that would effectively mitigate the impact on Americans running small businesses who may not have the resources or the tax fluency to fully address and comply with their new GILTI . . . obligations.").

177. *See* E-mail from Monte Silver to Steven Mnuchin, *supra* note 114; Letter from Sachin N. Shah to Comm'r, *supra* note 16, at 4; Silver, *supra* note 114 ("[E]xpats and their tax professionals are either wholly unaware of the tax, or at best in no position at all to understand its complexities or make the incredibly complex calculations required to actually establish the amounts due. In essence, the repatriation law has created an entire class of non-compliant taxpayers.").

178. *E.g.*, Snyder, *Extraterritorial Application of U.S. Taxation*, *supra* note 1, at 234 ("Being an owner of a small business is one of the reasons why it is not possible for me to file. There is no-one available in my home country to prepare the necessary forms (e.g. 5471). I may also be subject to GILTI or Subpart-F, but I cannot know for sure, due to the previous point. I cannot engage with a CPA for US tax filing that is not also very familiar with tax filing and accounting rules in my home country.").

179. Some Americans abroad have expressed doubt in their current tax advisors in the wake of the TCJA. *E.g.*, *id.* at 49 ("[The American tax system gives me t]oo many [problems] to count: [I] do not really trust the accountant I use to do everything correctly –[the] rules are too complex and he does not fully understand them.") This American emigrant went on to say that they had considerable GILTI tax liability, and that they live in constant dread that they unknowingly make a mistake resulting in serious repercussions. *Id.* at 49–50.

180. E-mail from Monte Silver to Steven Mnuchin, *supra* note 114; *Taxing the American Emigrant*, *supra* note 1.

181. *E.g.*, Snyder, *Extraterritorial Application of U.S. Taxation*, *supra* note 1, at 313 ("[R]ecent US tax law (GILTI) seems to have excluded this possibility [of opening a business], or at least it has rendered the corresponding tax filing obligations so onerous and penalty-laden that I would be crazy to open a business unless it would make me a very handsome income, which is unlikely for part-time work.").

182. *E.g.*, *id.* at 319 ("Faced with all the risks and unreasonable costs of

may also be discouraged from opening brick-and-mortar enterprises.[183] U.S. citizens might also be tempted to transfer their businesses to noncitizens.[184] In short, GILTI's residual effects could lead to the reduction of the U.S. tax base through the loss of compliance, income, or taxpayers.

The Treasury issued its first set of proposed regulations for the GILTI regime in September of 2018.[185] Instead of responding to comments about GILTI's disproportionate effect on small businesses, the Treasury utilized the Regulatory Flexibility Act (RFA) to skirt the discussion altogether.[186] The Treasury, who rarely complies with the

---

incorporation, I have been forced to run a consultancy as a non-incorporated 'sole trader'. Although this simplifies US taxation, it is not the best business structure as it creates financial risk for me as I cannot separate my business activities from my personal assets. One fortuitous advantage was that I missed being subject to the punishing retrospective GILTI and transition taxes."); *id.* at 330 ("I made a check the box election on my company to avoid GILTI. It's not ideal but the tax compliance cost for reporting for GILTI is just too much. . . . If I didn't make the tax election, then the GILTI rules would mean I would have to pay someone thousands of dollars to do my returns."). Recall that the choice of business entity has a direct impact on whether GILTI applies. *See supra* notes 64–66 and accompanying text.

183. *E.g.*, Snyder, *Extraterritorial Application of U.S. Taxation*, *supra* note 1, at 322 ("My company is online, so generally I put money through my US business account instead and pay only US taxes on it, and I am so glad I did it that way because of [GILTI]. But it deters me now from opening a real business where I am!").

184. *E.g.*, *id.* at 326 ("I gave the company to my daughter after she renounced. No 5471 or other issues since then. . . . We lucked out on TT and GILTI I suppose.").

185. *See* Press Release, Internal Revenue Serv., IRS Issues Proposed Regulations on Global Intangible Low-Taxed Income for U.S. Shareholders (Sept. 13, 2018), https://www.irs.gov/newsroom/irs-issues-proposed-regulations-on-global-intangible-low-taxed-income-for-us-shareholders [https://perma.cc/Z87H-7R7D]; Guidance Related to Section 951A (Global Intangible Low-Taxed Income), 83 Fed. Reg. 51,072 (Oct. 10, 2018).

186. The RFA—once considered a stunning achievement for the small business community—requires administrative agencies to be sensitive to small business concerns. Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213, 215–16. Its main goal is to protect small entities from unduly taking on the burden of administrative regulations, particularly those found in the Code. Verkuil, *supra*, at 221 ("Laws and regulations, intended for both large and small firms, are having an increasingly negative effect on the growth of small business. . . . Tax laws and regulations are a particular problem. . . . The complexity of tax laws inevitably seems to favor larger businesses."); *see also* Doris S. Freedman, Barney Singer & Frank S. Swain, *The Regulatory Flexibility Act: Orienting Federal Regulation to Small Business*, 93 DICK. L. REV. 439, 442–43 (1989) ("The major goals of the Act are: first, to increase federal agency awareness and understanding of the impact of regulations on small entities by requiring agencies to identify and explain those impacts; second, to require agencies to communicate and explain their findings to the public, including notification beyond the traditional notice requirement of the APA; third, to analyze alternatives available to small entities in order to minimize impact on those entities; and finally, to provide regulatory relief for small entities."). These burdens include those brought on by mandatory reporting: the volume and complexity of reporting,

RFA,[187] simply certified that the GILTI regulations would not have "a significant economic impact on a substantial number of small entities."[188]

Though it did not have the data necessary to make this certification,[189] the Treasury did so anyways, asserting that "businesses that are U.S. shareholders of CFCs are generally not small businesses because the ownership of sufficient stock in a CFC in order to be a U.S. shareholder generally entails significant resources and investment."[190] As a result, the Treasury avoided the burden of preparing an Initial Regulatory Flexibility Analysis (IRFA)—which would include, among other things, a description of the small entities to which the proposed rule will apply; the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and the type of professional skills necessary for preparation of the report—as required by the RFA.[191] But the Treasury's reasoning

---

the lack of clarity in reporting, and the need to seek professional help from accountants and lawyers. Verkuil, *supra*, at 222–23. And, as the economy globalizes, these burdens only increase. Sarah E. Shive, *If You've Always Done It That Way, It's Probably Wrong: How the Regulatory Flexibility Act Has Failed to Change Agency Behavior, and How Congress Can Fix It*, 1 ENTREPRENEURIAL BUS. L.J. 153, 155 (2006) ("As the economy has become increasingly global, the effect of regulatory agencies' activities on small business and industry has steadily increased.").

187. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-720, REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE 22 (2016) ("We found that Treasury and IRS rarely perform a regulatory flexibility analysis assessing a regulation's impact on small businesses and other small entities as generally required by the Regulatory Flexibility Act (RFA). In our review of over 200 tax regulations issued from 2013 to 2015, only two regulations' preambles included a regulatory flexibility analysis.").

188. Guidance Related to Section 951A, 83 Fed. Reg. at 51,807.

189. *Id.* ("Data about the number of domestic small business entities potentially affected by these regulations are not readily available.").

190. *Id.*

191. Under the RFA, an agency must prepare and publish an Initial Regulatory Flexibility Analysis (IRFA) along with the Notice of Proposed Rulemaking. 5 U.S.C. § 603. But a significant exception to this analysis requirement exists. If "the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities," then the agency need not prepare and publish the IRFA. *Id.* § 605(b). At its best, this exception allows an agency, such as the Treasury trying to keep up with crafty CPAs and tax attorneys, to dispel a time-consuming and expensive step in the regulation process, rendering the agency more efficient. *See* Jeffrey J. Polich, Note, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power Over Federal Regulatory Agencies*, 41 WM. & MARY L. REV. 1425, 1437 (2000) ("[Section 605(b)] was intended to operate as an escape clause to avoid waste in the promulgation of rules and regulations that had nothing to do with the small entities."). At its worst, this exception allows the agency to forgo the crux of the RFA process: actually determining whether small businesses will be unfairly

misidentified the issue altogether. The issue raised by practitioners and taxpayers was not the burden of GILTI on domestic businesses that own CFCs abroad; rather, the issue is GILTI's burden on the CFCs abroad—and their U.S. citizen shareholders—themselves.

The proposed regulations were met with mixed results.[192] Commentators immediately noted the proposed regulations' lack of consideration for small business concerns.[193] In the months that followed, interested parties sent comments to the Treasury asking for relief from GILTI for small businesses.[194] Two such comments asked for the bare minimum: a *de minimis* exception to permit small CFCs to substitute one factor of the GILTI equation that would require yearly calculation with a value that tax-compliant CFCs would already have on their books.[195] Monte Silver (the solo

---

burdened by the regulation. *See* 2 AM. JUR. 2D *Administrative Law* § 169 (2021) (first citing Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 415 F.3d 1078 (9th Cir. 2005); and then citing Nat'l Tel. Co-op Ass'n v. F.C.C., 563 F.3d 536 (D.C. Cir. 2009)) ("The RFA imposes no substantive requirements on an agency . . . ."). *See generally* Shive, *supra* note 186, at 160–65 (discussing the successes and failures of the RFA).

192. *See*, *e.g.*, William Hoke, *GILTI, Debt Crisis Put Puerto Rican Federal Tax Credits at Risk*, 92 TAX NOTES INT'L 151, 153 (2018) ("[University of Michigan international tax professor Reuven S.] Avi-Yonah said Treasury's delay in issuing regulations on GILTI and FTCs is problematic . . . . 'The batch of regs that came out doesn't include what everybody wants to know, which is how to calculate the foreign tax credit for GILTI and also how to apportion expenses, which determines the amount of foreign-source income, which also relates to the calculation of the credit.'").

193. *See* Mindy Herzfeld, *Looming GILTI Battles*, 161 TAX NOTES 16, 20 (2018) ("Most of the topics discussed [in the GILTI regulations] involve large multinationals; a different set of questions concerns individual and small businesses with overseas investments, which the TCJA uniquely penalizes.").

194. *See, e.g.*, Info. Tech. Indus. Council, Comment Letter on Guidance Related to Section 951A (Global Intangible Low-Taxed Income) 3 (Nov. 20, 2018), available at https://beta.regulations.gov/comment/IRS-2018-0013-0019 [https://perma.cc/RNK6-8EZ9].

195. *Id.* ("Calculating tested income or loss will require taxpayers to maintain a third set of books (in addition to local statutory books, which must be recalculated under U.S. GAAP before being converted to E&P). This makes sense for larger CFCs, but will be unduly burdensome for very small CFCs as compared to the benefits. Very small CFCs generally do not have significant items of income or deductions that would cause a substantial difference between E&P and tested income or loss. We recommend creating a de minimis exception to permit small CFCs to make an annual election to use E&P as a substitute for tested income or loss. . . . A de minimis exception would significantly reduce the administrative burden of calculating tested income and loss for these small CFCs for both the IRS and taxpayers."); Corning, Inc., Comment Letter on Guidance Related to Section 951A (Global Intangible Low-Taxed Income) 6–7 (Nov. 26, 2018), available at https://beta.regulations.gov/comment/IRS-2018-0013-0026 [https://perma.cc/4FWS-8GE4] (advancing a similar argument).

practitioner from Israel) submitted a comment pointing out the administrative burdens on small businesses resulting from GILTI.[196]

After taking these comments and others into consideration, the Treasury rejected each in its final GILTI regulations[197] and again certified that the final regulations would not have a significant effect on small businesses.[198] First, the Treasury claimed that "foreign corporations are not considered small entities."[199] Then, the Treasury confoundingly asserted that because small businesses make less money, they contribute an insignificant amount of tax revenue, and therefore they are not affected by the GILTI regime:

> [T]he Treasury Department and the IRS have determined that the tax revenue from [all businesses subject to] section 951A estimated by the Joint Committee on Taxation for businesses of all sizes is less than 0.3 percent of gross receipts . . . . Based on data for 2015 and 2016, total gross receipts for all businesses with gross receipts under $25 million is $60 billion while those over $25 million is $49.1 trillion. Given that tax on GILTI inclusion amounts is correlated with gross receipts, this results in businesses with less than $25 million in gross receipts accounting for approximately 0.01 percent of the tax revenue. . . . Based on this analysis, smaller businesses are not significantly impacted by these final regulations.[200]

Finally, the Treasury argued that "U.S. citizens living abroad are not small entities; thus, no small entity is affected" in situations where an emigrant U.S. citizen owns a CFC.[201]

The Treasury's analysis again misses the mark. First, the "small entity" classification does not turn on location; rather, it turns on whether the business is "independently owned and operated" and whether the business is "dominant in its field of operation."[202]

196. Monte Silver, Comment Letter on Guidance Related to Section 951A (Global Intangible Low-Taxed Income) 6–12 (Sept. 12, 2018), available at https://beta.regulations.gov/comment/IRS-2018-0013-0011 [https://perma.cc/VAV7-PZFK].

197. *See* Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits, 84 Fed. Reg. 29,288, 29,302 (June 21, 2019) (rejecting the request for a more administratively feasible calculation for small businesses); *id.* at 29,323 (rejecting the assertion that Treasury did not comply with the RFA).

198. *Id.* at 29,333–34.

199. *Id.* at 29,333.

200. *Id.*

201. *Id.*

202. The RFA uses "small entity" as a catch-all term for any "small business," "small organization," and "small governmental jurisdiction." 5 U.S.C. § 601(6). The RFA defines "small business" by reference to the Small Business Act. 5 U.S.C. § 601(3). *See* Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232 (codified at 15 U.S.C. §§ 631–657). According to the Small Business Act, a "small business concern . . . [is] one which is independently owned and operated and which is not dominant in its field of operation." 15 U.S.C. § 632(a)(1). Accordingly, the RFA defines a "small organization" as "any not-for-profit enterprise which is independently owned and

Second, the question of whether a business is affected by a certain taxation regime does not turn on its ultimate tax liability. Again, the problem raised by small taxpayers and other interested parties was not that the GILTI liability is too high,[203] the problem is the compliance burden—the more time that a CFC owner-operator must spend to learn, calculate, and comply with the GILTI regime, the less time that they can spend their finite resources on growing their business, which arguably decreases the U.S. tax base in the long run. Finally, while the Treasury may rely on the formalist interpretation that a corporation and its shareholders are separate entities, though legally they are, this ignores the economic reality of a small, independently held corporation. Commentators were predictably displeased with the final regulations,[204] as were the American emigrants who are affected by the regulations.[205]

In short, the Treasury's regulatory process for the GILTI regime failed small taxpayers. The Treasury assumed without merit that American citizens residing abroad and owning CFCs would not be "significantly" impacted by the GILTI regime. And the Treasury neglected to do its homework to find out whether its assertion was accurate. Because of this, taxpayers resorted to the judicial system.

B. *SILVER V. IRS*

> I plan to launch a small business very soon. My tax preparer tells me that when I do this my tax returns will be even more complicated and as a result her fees will go up [from] €3500 to €5000 per year. I will have to pay that even when the business has limited to no income – my competitors will not incur this expense. And if I'm lucky enough that the business succeeds then

---

operated and is not dominant in its field . . . ." 5 U.S.C. § 601(4). Finally, the RFA defines a "small governmental jurisdiction" as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand . . . ." 5 U.S.C. § 601(5).

203. *See, e.g.*, Snyder, *Extraterritorial Application of U.S. Taxation*, *supra* note 1, at 317 ("My UK company loses money every year but I have to pay thousands to file forms with the US. GILTI just doubled that bill. It is outrageously unfair."). *But see id.* at 45 ("GILTI caused [me] significant stress, and I ended up owing money in the US due to GILTI, in addition to the taxes I already pay in Canada. Cross-border tax professionals are REALLY expensive.").

204. *See, e.g.*, Jacqueline Bugnion, *A Double Taxation Nightmare Disguised as Tax Reform*, 163 TAX NOTES 723, 729 (2019) ("Treasury provides no evidence to back up these statements, which fly in the face of common sense and logic.").

205. *See, e.g.*, Press Release, Am. Citizens Abroad, ACA Update: The Torturous Road Leading to TCJA and Its Progeny, the Transition Tax and GILTI (Aug. 6, 2020), https://www.americansabroad.org/news/aca-update-the-torturous-road-leading-to-tcja-and-its-progeny-the-transition-tax-and-gilti [https://perma.cc/NMX7-TWT3].

> I'll also have to pay additional tax, as a result of GILTI. Again, my competitors will not incur this expense.[206]

When Congress passes unpopular, leaky legislation and Executive agencies cannot—or will not—plug up the holes, what do Americans do? They sue. Enter Monte Silver. Silver is a U.S. citizen who immigrated to Israel and opened his own law firm that specializes in U.S. taxation.[207] Since Congress passed the TCJA, Silver has been at odds with the Treasury over the effects of the TCJA's international tax regime on small businesses abroad. In particular, two provisions have caught his ire: the transition tax[208] and GILTI.

The story of Silver's battle with the Treasury cannot be told without some discussion of § 965. Section 965 requires U.S. shareholders[209] to pay a "transition tax" on the untaxed foreign earnings of specified foreign corporations[210] as if those earnings had been repatriated to the United States.[211] Some commentators have raised concerns about whether the transition tax is constitutional,[212]

---

206. Snyder, *Threatened by My Identity*, *supra* note 1, at 5.

207. *See Annual Report to Congress*, NAT'L TAXPAYER ADVOC. 179 (2020) https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_FullReport.pdf [https://perma.cc/5SAH-22W7].

208. *See* I.R.C. § 965.

209. U.S. shareholders own 10% or more of the total combined voting power of all classes of stock entitled to vote of such foreign corporation, or 10% or more of the total value of shares of all classes of stock of such foreign corporation. I.R.C. § 951(b). This definition includes U.S. citizens regardless of where they reside. *See* Henry Ordower, *Abandoning Realization and the Transition Tax: Toward a Comprehensive Tax Base*, 67 BUFF. L. REV. 1371, 1373–74 (2019) ("Since the U.S. taxes U.S. citizens . . . on their income from all sources worldwide, the foreign source income of a domestic corporation is subject to current U.S. taxation.").

210. Specified foreign corporations include CFCs and any foreign corporation that has one or more domestic corporate shareholder. I.R.C. § 965(e)(1); *see also supra* notes 4, 60 and accompanying text. The tax is imposed on greater of earnings between 1987 (i.e., "post-1986") and November 2, 2017, or earnings between 1987 and December 31, 2017. I.R.C. § 965(a).

211. I.R.C. § 965; *see also* Ordower, *supra* note 209, at 1377–81 (describing the operation of the transition tax). Taxpayers may elect to pay the resulting tax liability over eight years with no interest. I.R.C. § 965(h)(1).

212. *See* McElroy, *supra* note 12 (arguing that Congress lacks the power to directly tax wealth and that the transition tax is a wealth tax, and alternatively arguing that taxing earnings over nearly three decades raises due process concerns); Ordower, *supra* note 209, at 1381–89 (2019) (arguing that the transition tax does not respect either the realization or the income requirement of *Eisner v. Macomber*, 252 U.S. 189 (1920)); Mark E. Berg & Fred Feingold, *The Deemed Repatriation Tax — A Bridge Too Far?*, 158 TAX NOTES 1345, 1360 (2018) ("If section 965 were to be upheld, would anything be left of the explicit constitutional prohibition against unapportioned direct taxes, and if not, what might that portend for other explicit constitutional limitations on governmental power that some might consider to be equally anachronistic?"); Hank Adler & Lacy Willis, *The Worst Statutory Precedent in*

while those operating small businesses abroad have described it as devasting.[213] Despite this, a federal court ruled that the tax was constitutional in a recently appealed decision.[214]

There is another transition tax lawsuit that is still currently pending in the judiciary. After the Treasury released its proposed regulations on the transition tax, which again asserted that the Regulatory Flexibility Act did not apply,[215] commentators immediately expressed concern about the tax's effects on small businesses.[216] Interested parties expressed dismay.[217] Yet the

Over 100 Years, 160 TAX NOTES 1413, 1423 (2018) ("Section 965 should be questioned as unconstitutional as a direct tax; it is both unconstitutional and poorly considered in terms of law and precedent. To repeat, section 965 reads far more like a settlement agreement than income tax law."). *But see* Benjamin M. Willis, *The TCJA's Repatriation Tax Is Constitutional*, 165 TAX NOTES FED. 107, 108 (2019) ("The code is filled with provisions that impose tax on decades of appreciation and disallow the deferral of earnings and gains.").

213. Snyder, *Taxing the American Emigrant*, *supra* note 1, at 337–38 (noting that the transition tax dealt a devasting blow to citizen-emigrants' retirement savings).

214. The Western District of Washington recently ruled against a Washington couple who challenged the transition tax. *See* Order at 6, Moore v. United States, No. 2:19-cv-01539 (W.D. Wash. Nov. 19, 2020) ("Given the cabining of *Macomber* by the Supreme Court and the clear departure from it by other courts, there is no reason for this Court to conclude that *Macomber* currently controls whether the [transition tax] is an income tax. Accordingly, the [transition tax] does not violate the Apportionment Clause, as it is a tax on income rather than a direct tax."); *see also* Willis, *supra* note 212 (discussing Moore v. United States, No. 2:19-cv-01539 (W.D. Wash. Sept. 26, 2019)); Paul Jones & Annagabriella Colón, *Washington Couple's Suit Challenges Repatriation Tax*, 165 TAX NOTES FED. 164 (2019) (discussing the same case). For a dissection of the appeal, see Annagabriella Colón, *Washington Couple Take Second Swing in Repatriation Tax Dispute*, 102 TAX NOTES INT'L 108 (2021).

215. *See* Guidance Regarding the Transition Tax Under Section 965 and Related Provisions, 83 Fed. Reg. 39,514, 39,540–41 (Aug. 9, 2018) ("First, the average burden is five hours, which is minimal, particularly in comparison to other regulatory requirements related to owning stock in a specified foreign corporation. Second, the requirements apply only if a taxpayer chooses to make an election or rely on a favorable rule. Third, the collections of information apply to the owners of specified foreign corporations. Because it takes significant resources and investment for a foreign business to be operated in corporate form by a United States person, specified foreign corporations will infrequently be small entities.").

216. *See, e.g.*, Bugnion, *supra* note 204, at 724 ("Calculating the amount of the tax is highly complicated and may raise unsurmountable accounting issues, such as determining the amount of retained earnings taxable under the TCJA, translating foreign books into U.S. generally accepted accounting principles, and dealing with the 10-year statute of limitations applicable in many countries.").

217. *See, e.g.*, Marilyn Glover, Comment Letter on Guidance Regarding Transition Tax Under Section 965 and Related Provisions (Sept. 19, 2018), available at https://beta.regulations.gov/comment/IRS-2018-0019-0055 [https://perma.cc/SYA4-MMZ8] ("I am a U.S. Person with an interest in a small business. . . . [T]he Repatriation tax . . . will continue to be[] a nightmare for me, my business and my family. I am unable to understand the 250-page [Proposed Regulations] at all."); Am.

Treasury remained unbothered,[218] defining away the issue in its final regulations:

> As an initial matter, foreign corporations are not considered small entities. Nor are U.S. taxpayers considered small entities to the extent the taxpayers are natural persons or entities other than small entities. Although the Treasury Department and the IRS received a number of comments asserting that a substantial number of small entities would be affected by the proposed regulations, those comments were principally concerned with U.S. citizens living abroad that owned foreign corporations directly or indirectly through other foreign entities. *No small entity is affected in this scenario*. Thus, the final regulations generally only affect small entities if a U.S. taxpayer that is a 10-percent shareholder of a foreign corporation is a small entity.[219]

Before the final regulations could even be published in the *Federal Register*, Silver filed suit, alleging violations of the Administrative Procedure Act and the Regulatory Flexibility Act.[220] After surviving a motion to dismiss for lack of standing,[221] the D.C. Circuit District Court granted the government's motion for summary judgment in

Citizens Abroad, Comment Letter on Guidance Regarding Transition Tax Under Section 965 and Related Provisions (Oct. 8, 2018), available at https://beta.regulations.gov/comment/IRS-2018-0019-0121 [https://perma.cc/XMX9-RCYN] ("[T]ransition tax, GILTI, the pass-through deduction, all of these flew by without thought being given to how they sat with Americans abroad. Americans abroad get almost none of the benefits but all of the detriments — including detrimental transition tax treatment, which is the subject of this submission.").

218. *See* Andrew Velarde, *Chorus of Complaints, Official Silence at Transition Tax Hearing*, 92 TAX NOTES INT'L 550, 550 (2018) ("Four IRS and Treasury officials sat in silence behind microphones amid a barrage of criticism from three interested parties who took the podium at a hearing on the section 965 transition tax October 22 in Washington. . . . The speakers found shortcomings in how the [proposed regulations] . . . do not include a de minimis rule for individuals living abroad.").

219. *See* Regulations Regarding the Transition Tax Under Section 965 and Related Provisions, 84 Fed. Reg. 1,838, 1,873 (Feb. 5, 2019) (emphasis added).

220. Siri Bulusu, *IRS, Treasury Sued Over Repatriation Tax Rules*, BLOOMBERG TAX: DAILY TAX REPORT: INTERNATIONAL (Jan. 30, 2019), https://news.bloombergtax.com/daily-tax-report-international/irs-treasury-sued-over-repatriation-tax-rules [https://perma.cc/2KT8-ELAZ]; *see* Complaint at 1–2, Silver v. IRS, No. 1:19-cv-00247 (D.D.C. Jan. 30, 2019). Though not discussed in this Note, *Silver* also alleged violations of the Paperwork Reduction Act. *See id.* at 1.

221. *See* Andrew Velarde, *Silver Strikes Gold for Taxpayer Administrative Law Challenges*, 97 TAX NOTES INT'L 146, 146 (2020). For a discussion of taxpayer standing in pre-enforcement APA Treasury challenges, see Casey N. Epstein, Note, *Standing Up to the Treasury: Applying the Procedural Standing Analysis to Post-*Mayo*, Pre-Enforcement APA Treasury Challenges*, 105 MINN. L. REV. 1947 (2021).

Silver's transition tax case in March 2021.[222] Silver promptly filed an appeal, which is still pending.[223]

Though Silver, who fancies himself David against the Treasury's Goliath,[224] had already brought one challenge against the Treasury, the Treasury persisted in its assertions that the TCJA's international tax regime does not affect small businesses.[225] In light of the Treasury's apathy, Silver promised to sue again.[226] Which brings this discussion back to the case at hand: Silver's GILTI suit against the Treasury.

Silver filed his GILTI suit in the D.C. Circuit on June 12, 2020.[227] Again, he alleged that the Treasury violated the APA and the RFA.[228] As Silver has advanced an ostensibly identical legal theory in his second lawsuit, the government has also followed a similar game plan, arguing again that the D.C. District Court lacks jurisdiction and that Silver lacks standing.[229] Accordingly, the District Court issued a stay order in the GILTI suit while it decides a jurisdictional issue in the transition tax suit.[230]

Should Silver survive these jurisdictional and standing challenges, this Note contends that he should prevail on the merits of his case. The Treasury had almost every reason not to conduct an IRFA.[231] And by certifying that the proposed GILTI regulations would

---

222. Andrew Velarde, *Silver Loses Transition Tax Suit on Standing*, 171 TAX NOTES FED. 119, 119 (2021).

223. *See* Andrew Velarde, *Silver Files Transition Tax Appeal with Reconsideration Pending*, 102 TAX NOTES INT'L 1260, 1260 (2021).

224. *See* Monte Silver, Silver *and* Altera*: Modern-Day Tales of David and Goliath*, 99 TAX NOTES INT'L 767, 768 (2020).

225. *See infra* Part II.A.1.

226. Andrew Velarde, *Israeli Resident Who Sued Over 965 Regs Promises GILTI Suit Next*, 93 TAX NOTES INT'L 677, 677 (2019).

227. *See* Complaint at 1, Silver v. IRS, No. 1:20-cv-01544 (D.D.C. June 12, 2020); *see also* Andrew Velarde, *Suit Against GILTI Regs Alleges Administrative Law Violations*, 98 TAX NOTES INT'L 1433, 1433 (2020) (reporting on the case).

228. *See* sources cited *supra* note 227.

229. *See* Andrew Velarde, *Government Files Replies in Silver GILTI, Transition Tax Suits*, 168 TAX NOTES FED. 2517, 2519 (2020) ("That the government's reply in the GILTI suit strongly resembles its transition tax filing is perhaps unsurprising since both suits are brought under a similar legal theory. In fact, portions of the two briefs are identical. The government in *Silver II* again focuses on the lack of jurisdiction and standing to entertain the RFA claim and, like its reply in *Silver I*, looks to the SBA reg for support.").

230. Order, Silver v. IRS, 1:20-cv-01544 (D.D.C. Feb. 16, 2021); *see also* Andrew Velarde, *Court Stays Silver's GILTI Reg Challenge Suit*, 101 TAX NOTES INT'L 1048, 1048 (2021).

231. First, there is little risk of litigation when an agency chooses not to issue an IRFA. *See* Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV.

not have a significant effect on small businesses,[232] the Treasury blatantly ignored its statutory duty to conduct one.

65, 94–99 (2015) (noting that the incidence of RFA cases is declining). There are likely several reasons for this. For one, the RFA was designed to protect small entities who may not have the resources, not to mention the desire, to go toe-to-toe with administrative agencies in court. *See* Verkuil, *supra* note 186, at 215–16. After all, litigation is risky no matter the size of the plaintiff, and though small businesses may not have formalized risk-management processes, they still engage in risk-management decisions. *See* Robert C. Bird & Stephen Kim Park, *Legal and Regulatory Aspects of Enterprise Risk Management for Small and Medium-Sized Enterprises* 2 (June 16, 2015), https://ssrn.com/abstract=2538050 [https://perma.cc/P7ZD-MJEJ] ("Small and medium-sized enterprises (SMEs) may have few or [no risk management] systems formally in place or, at best, they may only exist in the minds of a few key executives that develop the vision for the organization."). Additionally, the likelihood of success at trial likely prevents potential plaintiffs from suing. Plaintiffs prevailed in only 15% of RFA suits between 1996 and 2012. Raso, *supra*, at 96–98. Courts have ruled against plaintiffs for various reasons. Some courts have held that the decision whether to issue an IRFA is not even subject to judicial review. *See, e.g.*, Blue Water Fisherman's Ass'n v. Mineta, 122 F. Supp. 2d 150 (D.D.C. 2000). Other courts have held that noncompliance with the RFA may be, *but does not have to be*, grounds for overturning an agency rule. *See, e.g.*, Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 538 (D.C. Cir. 1983). Finally, even when a plaintiff does prevail on the issue of RFA compliance, the remedy may be unappealing. Raso, *supra*, at 98–99.

Second, while the RFA is mainly concerned with costs incurred by small entities due to agency rulemaking, one must also consider the costs incurred by agencies due to RFA compliance. While it may be impossible to pinpoint how much an IRFA costs, it is fair to assume that the analysis is not cheap. There is also the time-cost of preparing the analyses to consider. These costs are compounded in the instant case; the TCJA included 119 tax provisions that affect individual and business taxpayers. *See Agency Financial Report: Fiscal Year 2018*, DEP'T OF THE TREASURY 170 (2018), https://home.treasury.gov/system/files/236/AFR_Full%20111518_clean_508.pdf [https://perma.cc/L8CX-8FN2]. The Treasury is responsible for enacting the regulations on each of these tax provisions, all of which arguably have a significant economic impact on a substantial number of small entities.

Also consider the effects of the TCJA on the Treasury. Even before considering the TCJA, the "Treasury annually adopts, modifies, and removes hundreds of pages of Treasury regulations interpreting the [I.R.C.]" Hickman, *supra* note 168, at 1729. Now, in completely overhauling the rules for taxing both individuals and businesses, the deductibility of state and local taxes, and the international tax regime, Congress and President Trump tasked the Treasury with keeping up as "tax lawyers and accountants discover new games, roadblocks, and glitches." *See* Kamin et al., *supra* note 7, at 1520–21 ("Some of the problems . . . can and should be solved through relatively minor legislative or regulatory fixes. But many of the problems . . . do not have easy solutions."). The Treasury must do so while complying with the APA, even if it has struggled to in the past. *See* Hickman, *supra* note 168, at 1731 ("[A]lthough Treasury usually does solicit public comment in the course of promulgating final regulations, Treasury's rulemaking practices are frequently inconsistent with APA requirements, or at least skirt doctrinal lines.").

232. *See supra* note 188 and accompanying text.

This decision was arbitrary and capricious.[233] First, the Treasury argued in its certification that the regulations only applied to "domestic" small business entities.[234] This distinction has no basis in the statute. GILTI applies to "each person who is a United States shareholder of any controlled foreign corporation . . . ."[235] A United States shareholder is defined as "a United States person . . . who owns . . . 10 percent or more [of a foreign corporation]."[236] And included in the definition of "a United States person" is any "citizen . . . of the United States . . . ."[237] Thus, GILTI applies to American emigrants, among many other taxpayers, who own at least 10% of a foreign corporation, rather than solely domestic entities.

Second, the Treasury argued in its certification that the IRFA was not necessary because "*businesses* that are U.S. shareholders of CFCs are generally not small businesses because the ownership of sufficient stock in a CFC in order to be a U.S. shareholder generally entails significant resources and investment."[238] This distinction is nonsensical. As stated above, the GILTI regime applies to real persons as well as businesses. Critics may astutely argue that the RFA applies not to real persons but only to businesses, but this argument ignores the economic reality of the situation. Small businesses are often small economic units. When the members of the business must take the time to (1) learn the ins and outs of the GILTI regime, not to mention the rest of the TCJA's tax law changes; (2) make the necessary accounting changes to adequately comply with GILTI come reporting time; and (3) comport with GILTI's filing requirements, they are necessarily less able to attend to the other needs of the business. In other words, due to the finite resources of a small business, GILTI's effects on an individual person necessarily impacts that person's small business.

---

233. The Hard Look doctrine is a judicial approach to challenges based on the APA requirement that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983).

234. Guidance Related to Section 951A (Global Intangible Low-Taxed Income), 83 Fed. Reg. 51,072, 51,087 (Oct. 10, 2018) ("The *domestic* small business entities that are subject to section 951A and this notice of proposed rulemaking are those *domestic* small business entities that are U.S. shareholders of a CFC." (emphasis added)).

235. I.R.C. § 951A(a).

236. *Id.* § 951(b).

237. *Id.* § 7701(a)(30)(A).

238. Guidance Related to Section 951A (Global Intangible Low-Taxed Income), 83 Fed. Reg. at 51,087 (emphasis added).

Finally, the Treasury's certification ignores the obvious situation that gave rise to this controversy—any person who is a U.S. citizen living abroad that opens and owns an incorporated business. The numbers do not exist to account for the incidence of this situation; the Government does not even count the number of citizens living abroad, let alone those who own businesses.[239] But that is precisely the reason why an IRFA would have been necessary.

The distinctions made by the Treasury in the certification that the proposed GILTI regulations would not affect small businesses were arbitrary and capricious because they had no basis in the statutory text.[240] Moreover, the Treasury's certification was arbitrary and capricious because it ignored the obvious situation to which the GILTI regulations would apply.[241] Thus, the decision to not conduct an IRFA should be invalidated.

In short, GILTI as applied to American emigrants residing abroad and operating small businesses is extortionate, leading to stress, anxiety, and the reduction of the U.S. tax base. The hasty legislative process cast a net that swept up unintended targets, and the regulatory process violated the RFA, shafting these small taxpayers. So where do the Government and taxpayers go from here? There are three plausible endgames. Each is explored below.

III. ACT III: CONGRESS SHOULD IMPLEMENT A *DE MINIMIS* EXCEPTION FOR THE BENEFIT OF SMALL TAXPAYERS

> I don't live or work in the US, do no business there and yet I have all these reporting obligations to the IRS and the Treasury Department every year. It

239. *See* Joe Costanzo & Amanda Klekowski von Koppenfels, *Counting the Uncountable: Overseas Americans*, MIGRATION POL'Y INST. (May 17, 2013), https://www.migrationpolicy.org/article/counting-uncountable-overseas-americans [https://perma.cc/9WGW-YPR4] ("The U.S. government does not formally track how many Americans leave the United States, whether temporarily or permanently, meaning that one has to rely on estimates to get a sense of how many U.S. citizens live overseas, in addition to the 289 million U.S. citizens (out of the total population of 311.6 million) who live in the United States. As the Census Bureau reported to Congress in 2001: 'No accurate estimate exists of the total number of Americans living abroad or of the other components of this population. At this time, we cannot estimate accurately the size of the universe of the overseas population.'").

240. *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

241. *Cf. id.* ("Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem . . . .").

> is not fair and it places an unfair burden on US citizens and their families who live abroad.[242]

The third act in this episode of small taxpayer woes with the international tax system is yet to be completed. Since tax reform is on President Joe Biden's agenda, there's a chance for American emigrant taxpayers to find relief.[243] But if Congress and President Biden fail these taxpayers again, relief may be found in a favorable *Silver* decision. No matter the mode of relief, there are at least three plausible endgames that favor small American emigrant taxpayers: (1) the introduction of legislation that changes GILTI to better reflect its original goals, (2) the Treasury conducting an IRFA to determine the extent of GILTI's effect on small entities, and (3) the regulatory implementation of a *de minimis* exception in the GILTI regulations.

This Note contends that the first solution—a legislative fix to the GILTI regime—is the most optimal solution for both the tax collectors and the taxpayers. But in the absence of a legislative fix to the GILTI regime, the third solution, a *de minimis* exception to GILTI, would suffice. This Part sketches out a proposal for each solution and discusses the pros and cons for each in turn.

A. A LEGISLATIVE FIX TO THE GILTI REGIME

> I have been complaining to my representations in Congress since 2013 about this situation. The answers (if they do answer) are apathetic. The final straw was the GILTI tax. This extraterritorial interference by the US government without any taxable event or direct jurisdiction was last insult.[244]

President Joe Biden has floated the idea of amending the GILTI regime.[245] Unfortunately, President Biden's current proposals to amend the GILTI regime will only serve to hurt small taxpayers. President Biden first expressed that he wants to raise the corporate tax rate to 28%.[246] Since GILTI utilizes the corporate tax rate as its benchmark, this would also raise the GILTI tax.[247] He also proposed eliminating the 50% GILTI deduction under Code § 250, which would

242. Snyder, *Threatened by My Identity*, *supra* note 1, at 25.

243. *See, e.g.*, Erica York, Tyler Parks & Alex Muresianu, *Tracking the 2021 Biden Tax Plan and Federal Tax Proposals*, TAX FOUND. (June 16, 2021), https://taxfoundation.org/biden-tax-plan-tracker [https://perma.cc/K7BM-M7FG].

244. Snyder, *Threatened by My Identity*, *supra* note 1, at 76.

245. Nancy Cook & Laura Davison, *Biden Eyes First Major Tax Hike Since 1993 in Next Economic Plan*, BLOOMBERG (Mar. 15, 2021), https://www.bloomberg.com/news/articles/2021-03-15/biden-eyes-first-major-tax-hike-since-1993-in-next-economic-plan [https://perma.cc/4U7W-GTXQ].

246. *Id.*

247. Benjamin M. Willis & Jed Bodger, *Biden and Harris's High Hopes for International Tax Fairness*, 101 TAX NOTES INT'L 1385, 1392 (2021).

effectively double GILTI's rate.[248] Instead of paying an effective rate of 10.5%, all taxpayers would be subject to a 28% effective rate. And though these policies are aimed at large multinational companies,[249] they once again will affect citizen small business owners.

But since legislation has not been proposed yet, there is still hope for American emigrant taxpayers. Recall the strict purposivist and strict textualist from above.[250] The two are also at war on the issue of whether small taxpayers should be swept up into the GILTI regime as enacted (and likely as proposed going forward). The strict purposivist would argue that Congress clearly implemented the GILTI regime to tax large multinational corporations that were off-shoring profits by putting their intangible assets in low-tax jurisdiction, and that Congress did not even consider the effect it would have on mom-and-pop shops owned by American emigrants. The strict textualist, unimpressed with externalities of the situation, would counter that the statutory text is unambiguous—GILTI taxes U.S. shareholders, and, since they are considered U.S. persons within the definition of U.S. shareholders, American emigrants that own CFCs must comply with the GILTI regime. Both arguments have merit. On the one hand, the GILTI regime, and the TCJA's international tax provisions, sought to reduce off-shoring and bring both jobs and tax revenue back to the United States.[251] On the other hand, that's not what § 951A and its definitional counterparts reflect.[252]

Because of this incongruity, it would seem that there is only one way to keep both sides and, more importantly, small taxpayers happy—Congress amending GILTI. In this solution, Congress would amend § 951A(a) to read as follows:

> Each person who is a United States shareholder of a controlled foreign corporation *with gross receipts exceeding $25 million* for any taxable year of such United States shareholder shall include in gross income such shareholder's global intangible low-taxed income for such taxable year.

---

248. *Id.*; *see also* Jennifer Epstein, *Biden to Target Tax-Avoiding Companies Like Amazon with Minimum Federal Levy*, BLOOMBERG (Dec. 4, 2019), https://www.bloomberg.com/news/articles/2019-12-04/biden-to-target-tax-avoiding-companies-with-minimum-federal-levy [https://perma.cc/VX58-UW6S] ("Biden's plan [is] to double the global intangible low tax income rate, known as [GILTI] . . . .").

249. Epstein, *supra* note 248 ("Democratic presidential candidate Joe Biden plans to pay for $3.2 trillion in policy proposals with new and higher taxes on the wealthy and corporations, including a measure targeting companies like Amazon.com Inc. and Netflix Inc. that have reported paying no federal income taxes in recent years.").

250. *See supra* Part I.C.1.

251. *See supra* note Part I.A.

252. *See supra* notes 60–70 and accompanying text.

(emphasis indicating amended language). This solution's benefits are obvious. This statutory language better reflects Congress's intent. Congress intended the GILTI regime to prevent multinational corporations from storing intangible profits abroad.[253] Since small businesses owned and operated by American emigrant taxpayers are not likely to be operating in multiple countries, much less shifting their profits to tax havens, they are not committing the harms that GILTI seeks to remedy. Their profits are not being kept out of the United States.

Consider the analytical framework first proposed by Veech and Moon and applied in the legislative context by this Note.[254] First, the purpose of GILTI was not to increase the tax liability of small taxpayers but to prevent profit shifting via intangible assets abroad. Second, a *de minimis* exception provides a more practical and convenient approach for both taxpayers and the Government;[255] small taxpayers can focus less on burdensome compliance requirements and more on growing their business, and the Government can spend less on international audits. Third, these small taxpayers are not seeking a *de minimis* exception to reduce their tax liability for nefarious purposes; they often have neither the intangible assets to which GILTI theoretically applies nor foreign subsidiaries to shift those assets to. Rather they are seeking an easier way to effectively comply with the law. Finally, a *de minimis* exception is far more valuable to small taxpayers than it is harmful to the Government. On the taxpayer's side, complying with GILTI entails substantial resources and potentially decreases the tax base. The Government also benefits by spending less money on ensuring compliance and litigation, mitigating the lost revenues by *de minimis* exception.

Ultimately, amending GILTI legislatively satisfies all parties, including the most ardent purposivists and textualists. Small taxpayers are also happy because their yearly compliance burden is greatly reduced. The Treasury now how has one less problem to worry about; it need not spend precious resources on conducting an IRFA or on litigation with disgruntled taxpayers.

While this solution may seem like a win-win-win scenario,[256] it is not without its drawbacks. First, while this solution benefits small

253. *See supra* note 110 and accompanying text.

254. *See supra* Part I.C.

255. This impacts both the practicality and mutuality considerations of the potential *de minimis* exception.

256. *See The Office: Conflict Resolution* (NBC television broadcast May 4, 2006), https://getyarn.io/yarn-clip/08176b5a-ca96-4b82-bd15-336295ec7d14 [https://

taxpayers, it also superficially reduces the U.S. tax base.[257] But this superficial reduction does not stand up to scrutiny. GILTI as applied to American emigrant taxpayers operating small businesses, who usually end up not owing substantial GILTI amounts, actually reduces the tax base. These taxpayers will either become noncompliant, close up shop, pay the exorbitant costs to become compliant (thus decreasing revenues in the long run), or renounce their citizenship. Of course, even if a legislative *de minimis* exception did reduce the tax base, it could be made up in different ways. Congress could increase someone else's tax liability,[258] lower the *de minimis* exception's threshold amount, or increase GILTI's taxation rate as Biden has proposed.[259] And, as always, the IRS could take steps to improve its enforcement abilities.[260]

Second, this solution, as with any tax law containing a hard cutoff, presents a gaming opportunity. Adept tax planners near the threshold will seek to optimize their end of day return; in some scenarios, they could configure their affairs to lessen gross receipts to an amount just under the cutoff.

Third, a *de minimis* exception violates the principle of horizontal equity at the threshold. Horizontal equity demands that two similarly situated taxpayers should have similar tax burdens.[261] But under a GILTI regime with a *de minimis* exception, a CFC that makes $25,000,001 in gross receipts incurs much more compliance burden

---

perma.cc/G7HR-5R95].

257. *But see supra* note 180 and accompanying text (suggesting that maintaining the GILTI regime will lead to the reduction of the tax base by itself because small-business owners will renounce their citizenship).

258. *E.g.*, Alexandria Ocasio-Cortez (@AOC), TWITTER (Oct. 15, 2019, 7:48 PM), https://twitter.com/AOC/status/1184269930704916481 [https://perma.cc/ZK7V-3AGU] ("Tax the rich.").

259. *See* Kamin et al., *supra* note 7, at 1497–98 ("Still another option would be to set the deemed return on foreign tangible asset basis at a lower rate than 10%. Congress presumably chose the 10% hurdle rate so that the GILTI regime would capture income only from intangibles, since these generate higher rates of return. *The rate Congress chose, however, is arbitrary*. The deemed return on tangible assets is set relatively high at 10% as compared to the risk-free return on Treasury yields. This allows a great deal of a company's return on investments in real assets abroad to be completely exempt from U.S. taxation. Instead, the deemed normal return could be the short-term risk-free rate or such rate as adjusted by a variable, contemporaneous measure of market performance." (emphasis added)).

260. *See* Laura Davison, *IRS Failed to Collect $2.4 Billion in Taxes from Millionaires*, BLOOMBERG (Mar. 15, 2021), https://www.bloomberg.com/news/articles/2021-03-15/irs-failed-to-collect-2-4-billion-in-taxes-from-millionaires [https://perma.cc/J72Y-JR8L].

261. David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL'Y REV. 43, 43 (2006).

than a CFC that makes $24,999,999 in gross receipts. But zoom out, and a *de minimis* exception upholds the principle of vertical equity. Large taxpayers like Apple are much more able to adapt to the GILTI regime due to their internal accounting structures and relationships with large accounting firms. Thus, large taxpayers should take on a heavier compliance burden. There is no right answer as to whether horizontal equity or vertical equity is more important.[262] But here the vertical equity considerations help far more people than the horizontal equity considerations, which apply at the margins. Despite these arguments, a legislative *de minimis* exception to the GILTI regime benefits both the U.S. Government and American citizens.

B. A Middle Ground Solution: An Initial Regulatory Flexibility Analysis

> I want to comply with the law and have made several attempts to do so and sort out all of my tax filing obligations. But I cannot afford the fees and most accountants have told me they are unsure of how to proceed with new tax code laws and for my specific situation.[263]

With helpful congressional action unlikely, the Treasury could choose to comply with the RFA and conduct an IRFA. This would remedy several problems. First, it would signal that the Treasury is actually concerned with small taxpayers, showing both good faith and satisfying the intent behind the RFA. Second, the discussion of the impact on small business abroad would become grounded in data rather than on mere assumption, as it is currently. With a proper IRFA, the Treasury would know the projected reporting, recordkeeping, and other compliance costs associated with the GILTI regime.[264] Thus, the decision whether to implement a *de minimis* exception would become an informed one.

Naturally, this solution is not without its own drawbacks. First, absent a favorable ruling for Monte Silver in his GILTI suit, the Treasury may have altruistic reasons to follow the RFA, but they have nary an economic reason to do so. The main concern is time and

---

262. *But see* Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice 163–64 (2002) ("[T]he traditional idea of horizontal equity . . . embodies a mistake. The mistake is to take pretax income or consumption or wealth as the moral baseline and then try to formulate a standard of fairness by saying how much tax different individuals should pay as a function of their position on this baseline. The real question of fairness should be about after-tax results, not about their relation to the pretax situation."); Louis Kaplow, The Theory of Taxation and Public Economics 396–401 (2008) (arguing that the horizontal equity norm—though it possesses intuitive appeal—suffers from definitional and practical problems and should be viewed with caution).

263. Snyder, *Threatened by My Identity*, *supra* note 1, at 64.

264. *See, e.g.*, *supra* note 188 and accompanying text.

resources. Conducting an IRFA takes a long time and costs a lot of money. This problem is twofold; the Treasury must spend these resources, and in the meantime small taxpayers must continue to comply with GILTI's burdensome requirements.[265] This problem is also scalable. If the Treasury is going to conduct an IRFA for its GILTI regulations, should it not also be doing so for each of TCJA's regulations? Does not almost every tax provision have a substantial effect on small entities? And ultimately, while valuable data would be gleaned from the analysis, it may be a fruitless exercise for small taxpayers. The Treasury could choose to ignore foreign CFCs, thus skirting the issue once again. This would just lead to more noncompliant taxpayers and costly litigation, which would likely also be fruitless. Small taxpayers simply do not have the resources to keep fighting this losing battle.

C. A Regulatory De Minimis Exception

> When I first went abroad, I was surprised at how intensely patriotic I felt toward the USA. But over the past ten years, these feelings have reversed. I am angry, resentful, and ashamed to be an American. The USA has lost a formerly strident unofficial ambassador, at no gain to the US [T]reasury.[266]

Even if Congress will not fix the GILTI regime and the Treasury is not willing to conduct an IRFA, there is still hope for small taxpayers. The Treasury could acquiesce, simply implementing new regulations that provide a *de minimis* exception for the benefit of small taxpayers.

Consider again the analytical framework first proposed by Veech and Moon and applied in the regulatory context by this Note.[267] First, the purpose of GILTI was not to increase the tax liability of small taxpayers but to prevent profit shifting via transferring intangible assets abroad. Second, a *de minimis* exception provides a more practical and convenient approach for both taxpayers and the Treasury;[268] small taxpayers can focus less on burdensome compliance requirements and more on growing their business, and the Treasury can spend less on international audits. Third, these small taxpayers are not seeking a *de minimis* exception to reduce their tax liability for nefarious purposes; they often have neither the intangible assets to which GILTI theoretically applies nor foreign subsidiaries to shift those assets to. Rather they are seeking

265. That is, unless the Treasury implements temporary regulations allowing for a *de minimis* exception while it completes an IRFA. *See* I.R.C. § 7805(e).

266. Snyder, *Threatened by My Identity*, *supra* note 1, at 27.

267. *See supra* Part I.C.

268. This impacts both the practicality and mutuality considerations of the potential *de minimis* exception.

an easier way to effectively comply with the law. Finally, a *de minimis* exception is far more valuable to small taxpayers than it is harmful to the Treasury. On the taxpayer's side, complying with GILTI entails substantial resources and potentially decreases the tax base. The Treasury also benefits by spending less money on ensuring compliance and litigation, mitigating the lost revenues by *de minimis* exception.

Further, almost any form of statutory interpretation can forcefully argue that a *de minimis* exception is legitimate in this scenario. While the formalistic textualist could argue that because GILTI applies to American emigrants operating small businesses abroad, the Treasury cannot implement a *de minimis* exception. But the formalistic textualist could rely on Code § 7805, arguing that given the international nature of GILTI and the consequences associated with the regime, the Treasury needs a *de minimis* exception to adequately enforce the tax code. The flexible textualist could rely on the absurdity doctrine to argue that a regulatory *de minimis* exception is legitimate: Congress intended GILTI to increase the U.S. tax base, but GILTI as applied to American emigrants operating small businesses actually reduces the tax base. The formalistic purposivist could argue that Congress intended GILTI to tax large multinational corporations from Apple to Zoom, and that the Treasury, acting as a faithful interpreter, should implement a *de minimis* exception. Pragmatic purposivists would simply point to GILTI's effects on small taxpayers to argue that a *de minimis* exception is legitimate. Because GILTI forces taxpayers to either become noncompliant, close their business, pay exorbitant prices to effectively comply, or renounce their citizenship, there is no reason *not* to implement a *de minimis* exception. Thus, under almost any school of statutory interpretation, an extrastatutory *de minimis* exception is appropriate for the GILTI regime.

No solution is perfect, and a regulatory *de minimis* exception is no exception. First, the problems addressed with a legislative fix also apply here: a regulatory *de minimis* exception superficially reduces the U.S. tax base and opens the door to gaming opportunities. When it comes to the tax base, the Treasury is less able to make the difference. The Treasury cannot directly raise tax rates like Congress can; however, it can change the regulatory scheme to increase tax liability where appropriate. But when it comes to gaming, the Treasury is in a better position to ensure compliance. After all, the Treasury is the enforcement arm of the U.S. tax system.

Second, *de minimis* exception to the GILTI regime opens the door to taxpayers demanding similar exceptions to all sorts of tax regimes. But the fact that the U.S. tax system is complex is not the fault of small taxpayers. The tax system's complexity is the result of the centuries-long war between tax gamers, which typically are larger taxpayers, and the tax collectors. Small taxpayers have just been caught up in the battle, forced to comply with an increasingly complex tax system through no fault of their own. Perhaps small taxpayers *should* be exempted from more taxation regimes and large taxpayers be tasked with making up the difference.

Despite the meritorious arguments raised above, a legislative *de minimis* exception for small taxpayers who make less than $25 million in gross receipts in a taxable year is the most favorable outcome. But a regulatory *de minimis* exception would also suffice. Either solution benefits nonresident citizens without drastically harming the Treasury's bottom line. Both solutions also benefit the Treasury, freeing up the resources currently being spent fighting the little guy to pick on someone its own size.

CONCLUSION

> If the process were easier to fulfill and understand, that would be a wonderful improvement for Americans living outside the U.S.A. who are happy to comply with tax requirements but challenged by what is required to do so.[269]

The TCJA drastically altered the U.S. international taxation system. Through a rushed legislative process, it sweeps up small taxpayers into GILTI, a regime aimed at large multinational firms. Because of this, American emigrants who own and operate their own CFCs are forced to comply with this burdensome, complex statutory scheme. And though they sought relief from the Treasury, the Treasury apathetically dismissed them, violating the RFA. Current litigation is trying to hold the Treasury accountable, but the outcome is far from certain.

Notwithstanding the result of this litigation, the Government has several options that would assuage the burdens felt by small businesses abroad caught up in the everlasting battle between the large taxpayers and the tax collectors. First, Congress could implement legislation that would either excuse small taxpayers from the GILTI regime or make complying with the regime easier. Second, the Treasury could comply with the RFA and conduct an IRFA, potentially indicating good faith and a willingness to work with small taxpayers to ensure compliance and fairness. Finally, the Treasury could implement a regulatory *de minimis* exception. Either a legislative or a regulatory *de minimis* exception would adequately

269. Snyder, *Threatened by My Identity*, *supra* note 1, at 27–28.

assuage the harmful effects of the GILTI regime, benefiting both taxpayers and the U.S. Government. The Government has an opportunity to bury the hatchet with small taxpayers; it should take this opportunity and make the most of it.