PROPOSED EXECUTIVE ACTIONS BY PRESIDENT BIDEN TO ENSURE TAX FAIRNESS, RACIAL EQUITY, DEFEND THE TAX BASE & RESTORE TAXPAYER TRUST

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Americans for Tax Fairness (ATF) is a diverse campaign of more than 420 national, state and local endorsing organizations united in support of a fair tax system that works for all Americans. It has come together based on the belief that the country needs comprehensive, progressive tax reform that results in greater revenue to meet our growing needs. This requires big corporations and the wealthy to pay their fair share in taxes, not to live by their own set of rules.

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INTRODUCTION

As the Biden Administration pursues a historic opportunity in Congress to rewrite parts of the tax code to help finance long-term investments that will build America back better, Americans for Tax Fairness urges the Administration to aggressively use executive actions—from new regulations to stronger enforcement of existing laws—to increase the effectiveness and fairness of the code, promote racial equity, restore taxpayer trust and raise much-needed revenue.

These goals would be advanced by the following proposed executive actions, which are within the scope of Treasury's authority. Each of these recommendations is made because it is good tax policy and could likely withstand a legal challenge as an executive action.

Highlights of these proposed executive actions include the following:

1. **Reverse regulatory giveaways and reduce tax avoidance.** Among the earliest and most useful regulatory steps the Biden Administration could take are reversals of abusive rules adopted by the Trump administration when it implemented the Tax Cuts and Jobs Act (TCJA) of 2017. Quick success can also be accomplished with proposed regulatory reforms from earlier administrations that have already been drafted—and in some cases have even been through the vetting process—and only await finalization.

   Among the regulations the Treasury Department should reverse are those that expand tax breaks for multinational corporations that shift profits offshore, allow wealthy individuals to exploit tax breaks for pass-through businesses, enable wealthy investors to use Opportunity Zones as tax shelters without regard for community benefit, and allow the super-rich to dodge the estate tax.

2. **Pursue international cooperation to curb global corporate tax dodging.** An early regulatory task confronting the new administration will be negotiating with its trading partners new tax rules for multinational corporations, especially digital firms like Amazon, Facebook and Google. Proposed reforms were released in 2020 by the Inclusive Framework on BEPS (Base Erosion and Profit Shifting) of the Organization of Economic Cooperation and Development (OECD). ATF, Oxfam America and the FACT Coalition have submitted a robust set of proposals that are detailed in Section B, Closing International Corporate Tax Loopholes.

3. **Highlight and reform tax policies that worsen racial and gender economic disparities.** America's reckoning with racism and sexism must include a critical analysis of the role of taxes in widening economic gaps between white people and people of color, especially between white men and women of color. Concrete steps include requesting SOI and Treasury to produce aggregate analysis of tax incidence across demographic groups, including race/ethnicity, gender, disability, income, and veteran status. Routinely including impact studies based on race, ethnicity, gender, and other demographic characteristics should be included in tax analyses, starting with the disparate effects of

"wealth building" incentives and discounted investment tax rates. Enforcement efforts should also be shifted from low-income taxpayers to wealthy households and corporations.

4. **Restore taxpayer trust through tax enforcement actions.** Shocking recent revelations of how much tax goes uncollected each year—especially from the wealthy—argue strongly for beefed up enforcement of tax law. The greatest need is more hiring of experienced auditors and investigators to combat the complex tax-evading schemes of the wealthy and large corporations. The IRS needs substantially more funding to fill enforcement holes created over the past decade through the purposeful draining of the agency's resources by Congress**.**

5. **Prevent OIRA review from impeding tax reform.** A recent change in how proposed tax regulations are reviewed should be reversed to ensure vital reforms are not unnecessarily delayed and or even blocked by an agency that lacks expertise in tax law. Over the past few years, tax regulations, which used to be exempt from regulatory review, have come under the purview of the Office of Information and Regulatory Affairs (OIRA) of the executive branch's Office of Management and Budget. OIRA's ability to clog the reform process simply offers another obstructing tool to powerful actors trying to game the tax system.

A. Closing Individual and Business Tax Loopholes

1. **Close estate and gift tax loopholes by reforming grantor trust rules to prevent avoidance of income and transfer taxes. (Regulations, Other Executive Action)** Ultra-wealthy families avoid estate, gift and generation-skipping taxes through manipulation of trusts and by undervaluing assets donated to such trusts (or transferred outright to family members). They have been able to pass great fortunes down the generations without paying the taxes intended to curb economic dynasties and raise revenue for public services.

   Over the past several decades, advisers to high-net-worth clients have developed a number of strategies that have facilitated the transfer of billions of dollars of wealth across generations without payment of estate or gift taxes. In many cases, taxpayers can execute these wealth-transfer strategies while retaining the income tax benefit of stepped-up basis at death. These strategies typically rely on some or all of the following elements:

   - **Intentionally defective grantor trusts (IDGTs)**, which are excluded from the taxpayer's gross estate for transfer tax purposes but are designed to have a "defect" that results in their treatment as grantor trusts for income tax purposes;
   - **Grantor retained annuity trusts (GRATs)**, which allow taxpayers to avoid estate and gift taxation of future asset appreciation over a low hurdle rate; and

- **Revenue Ruling 85-13**, which allows for income tax-free transactions between a trust and its grantor.

In addition, some taxpayers have taken the dubious position that stepped-up basis applies even to assets in an IDGT, though the IRS has rejected this position in informal guidance (see Chief Counsel Advice 200937028).

The avoidance of both income and transfer taxes through IDGTs and GRATs is indefensible from a policy perspective and inconsistent with congressional intent. To combat it, Treasury and the IRS should take the following steps:

a. Rescind Revenue Ruling 85-13 and apply *Rothstein*. In *Rothstein v. United States*, 735 F.2d 704 (2d Cir. 1984), the Second Circuit—in an opinion by the esteemed Judge Henry Friendly—held that a transaction between an IDGT and its grantor is a taxable event for income tax purposes. Under *Rothstein*, existing strategies for the avoidance of income and transfer taxes through the use of IDGTs and GRATs would become much less attractive. The transfer of appreciated assets to a GRAT in exchange for an annuity would trigger capital gains tax liability; the payment of the annuity with appreciated assets would generate additional capital gains tax liability; and the swap of cash or notes for an IDGT's appreciated assets would generate further capital gains tax liability. Note that under Code section 267, taxpayers still would not be able to generate losses through grantor-trust transactions—only gains.

In Revenue Ruling 85-13, the IRS (then under the Reagan administration) chose not to follow *Rothstein* and instead to treat transactions between a taxpayer and her grantor trusts as tax-free. This decision has had deleterious effects on tax administration for three-and-a-half decades. The IRS should rescind Revenue Ruling 85-13 immediately and then promulgate regulations adopting the holding of *Rothstein*.

b. Rescind Revenue Ruling 2004-64. When a taxpayer makes an outright gift of income-generating assets, liability for income taxes arising from those assets shifts to the recipient. By contrast, when a taxpayer transfers income-generating assets to a grantor trust, the taxpayer remains liable for income tax on income generated by trust assets. In a 1994 private letter ruling (PLR 9444033), the IRS stated that a grantor's payment of income tax with respect to income generated by trust assets would constitute an additional gift to trust beneficiaries. However, the IRS later modified that letter ruling and ultimately reversed its position, holding in Revenue Ruling 2004-64 that a grantor's payment of income tax attributable to trust income does *not* constitute an additional gift.

Revenue Ruling 2004-64 supersizes the already substantial transfer tax advantages of IDGTs. It effectively allows taxpayers to make additional annual gifts to their children or other beneficiaries without triggering additional gift tax liability. The IRS should rescind Revenue Ruling 2004-64, and the Treasury should promulgate regulations adopting the position initially stated in Private Letter Ruling 9444033.

c. **Confirm via regulation or revenue ruling that assets in an IDGT do not receive stepped-up basis.** The general view among tax scholars and practitioners is that assets in an IDGT that are outside a decedent's gross estate do not receive stepped-up basis. The IRS has confirmed this view in informal guidance (see Chief Counsel Advice 200937028), but a number of practitioners continue to advise clients that trustees or beneficiaries can claim stepped-up basis for assets in an IDGT at the time of a grantor's death. The IRS should issue a revenue ruling confirming the consensus view, which will trigger penalties under Code section 6662 for taxpayers who continue to claim stepped-up basis for IDGT assets. The IRS also should issue a notice attaching listed-transaction status to any sale or exchange in which a taxpayer claims stepped-up basis for assets in an IDGT at the time of the grantor's death.

d. **Issue regulations applying step transaction treatment to IDGT formations followed by sales of existing life insurance policies**. A common strategy to avoid the application of Section 2035 to transfers of life insurance policies is for a grantor to make a modest cash gift to an IDGT, followed very shortly thereafter by a sale of an existing life insurance policy, where the trust uses the prior gift as the down payment, together with a note for the balance of the purchase price. Currently, there are no regulations addressing the conditions under which those two steps must be collapsed into one transaction. As a result, taxpayers often treat nearly simultaneous steps as separate transactions, thereby allowing the transfer of life insurance policies shortly before the death of the grantor to avoid the reach of Sections 2035 and 2042. Treasury should promulgate regulations establishing a presumption that the gift of property to a trust followed within one year by the trust's use of the property to purchase additional property from the grantor are parts of the same transaction.

e. **Issue regulations to limit the use of zeroed-out GRATs.**
Tax avoidance planners have developed a strategy, based on the holding in *Walton v. Commissioner*, 115 TC 589 (2000), in which the value of the retained annuity in a GRAT is made equal or nearly equal to the value of the assets transferred to the GRAT. This gives rise to tax consequences that are divorced from economic reality, as they assign a zero value for gift tax purposes to gifts that have economic value. The Treasury should promulgate regulations to limit this strategy.

- **Apply regulation § 25.2511-1 and *Estate of Lang* to failed GRATs.** Treasury Regulation section 25.2511-1(a) establishes that the gift tax applies to direct and indirect transfers, including "the forgiving of a debt." Interpreting that provision, the Ninth Circuit held in *Estate of Lang v. Commissioner*, 613 F.2d 770 (9th Cir. 1980), that a taxable transfer occurred under when a taxpayer allowed the statute of limitations to run on the collection of an intra-family loan. According to *Lang*, the expiry of the statute of limitations constituted a taxable transfer because it was—in substance—equivalent to the forgiving of an intra-family debt.

The logic of *Lang* applies with equal force to the failure of a GRAT. A GRAT gives the grantor the right to receive fixed amounts on an annual or more frequent basis. The failure of a GRAT extinguishes that right. Although the release of the grantor's right occurs through the termination of a trust rather than the expiry of the statute of limitations, the effect is the same: the grantor is not paid what she is owed unless the beneficiaries of the trust gratuitously decide to reimburse her.

So far, the IRS has not applied the logic of *Lang* to failed GRATs. As a result, zeroed-out GRATs continue to offer high-net-worth taxpayers a heads-I-win, tails-we-tie wealth transfer opportunity. To align transfer tax results with economic substance, the IRS should announce via revenue ruling or revenue procedure that the termination of a trust without full payment of amounts owed to the grantor will constitute a taxable transfer by the grantor of the unpaid amounts. The Treasury should then codify this position via regulation. Once this has happened, zeroed-out GRATs will carry a potentially significant gift tax downside and will be a much less attractive tax avoidance strategy.[1]

- **Require GRATs to have a minimum value of 25% of assets contributed.** In its fiscal year 2016 budget, the Obama-Biden administration proposed an amendment to section 2702 under which the remainder interest in a GRAT at the time of creation would need to have a minimum value equal to the greater of 25 percent of the value of the assets contributed to the GRAT or $500,000. The first piece of this proposal—the 25 percent minimum—could be accomplished via regulation. Code section 2702(b)(1) requires that a qualified annuity interest must consist of "the right to receive *fixed* amounts payable not less frequently than annually." When the remainder interest in a GRAT at the time of creation is zero or close to zero, the grantor's right to receive fixed payments is chimerical

[1] A more aggressive approach would be to apply the logic of *Estate of Atkinson*, 309 F.3d 1290 (11th Cir. 2002), to GRATs. In *Atkinson*, the Eleventh Circuit held that the failure of an estate to comply with tax regulations regarding annual disbursements from a charitable remainder annuity trust resulted in the complete denial of a charitable deduction. The same logic would suggest that the failure of a GRAT to comply with regulations regarding annual or more frequent annuity payments, see Reg. § 25.2702-3(b)(4), should result in the complete denial of qualified-interest status under section 2702. The upshot would be that the failure of a GRAT would result in a taxable gift not only of unpaid annuity amounts, but of the entire value of the property transferred to the GRAT.

Estate and gift tax practitioners acknowledge that the application of *Atkinson* would be devastating to the GRAT strategy. As between the more aggressive approach of applying *Atkinson* and the more moderate approach of applying *Lang*, Treasury and the IRS should choose based on a weighing of litigation risk. *Atkinson* has not been followed by other courts of appeals, whereas the logic of *Lang* is widely accepted. Either approach would constitute a significant improvement over the status quo.

because any diminution in the value of GRAT assets will reduce the amount of those payments. Treasury should promulgate regulations interpreting the language of section 2702(b)(1) to require a remainder interest of at least 25 percent at the time of a GRAT's creation.[2]

f. **Reissue and finalize family limited partnership regulations.** In August 2016, the Obama-Biden administration issued proposed regulations restricting the abuse of family limited partnerships (FLPs) for transfer tax purposes. The proposed regulations reflected a years-long effort to craft sensible rules limiting valuation discounts that are delinked from economic substance. Rather than building on the Obama-Biden administration's careful work, the Trump administration withdrew the proposed regulations and has taken no subsequent action to limit FLP abuse. The Treasury should reissue and finalize these regulations.

Revenue effects. In 2012, Treasury estimated that a legislative change to FLP rules similar to the 2016 proposed regulations would generate $18 billion in revenue over a ten-year window. In 2016, Treasury estimated that changes to GRAT and grantor trust rules more modest than those proposed here would generate $19 billion in revenue over a ten-year window. In light of inflation, GDP growth, and the greater scope of the GRAT and grantor trust changes, it is likely that the changes proposed here would raise—in combination—more than $50 billion over the FY 2022-2031 period.

2. **Limit abuse of the 2017 tax law's pass-through deduction (Regulations)**

Nearly all American businesses are so-called "pass-through" entities: sole proprietorships, partnerships, and S corporations. These entities do not pay the corporate income tax. Instead, profits and losses are passed through to the individuals who own the business, and they pay any tax due on their personal returns at individual rates. Pass-through businesses run the gamut from corner groceries and independent web designers to billion-dollar real estate developers and high-priced law firms. But even though the business form is broadly shared among different-sized companies, the income flowing to them is not: half of all pass-through income goes to the wealthiest 1% of business owners.

Under the TCJA, owners of pass-through businesses are allowed, with several restrictions, to exclude 20% of their business income from taxation. It has been projected that three-fifths of the value of this tax break, supposedly targeted at "small businesses," will go to the richest 1% of business owners by 2024. Initial data from the JCT shows that two-thirds (66%) of this tax break is accruing to those with household income above $315,000 for joint filers.

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[2] A more moderate approach would be to limit the use of the section 7520 valuation tables to GRATs which have a remainder interest at the time of creation equal to or greater than 25 percent of the amount contributed. See I.R.C. § 7520(b) (section 7520 valuation tables shall not apply where specified by regulation). Taxpayers establishing zeroed-out or close-to-zeroed-out GRATs would then be required to obtain an appraisal of the fair market value of the remainder interest.

Moreover, the final regulations issued by the Trump Administration in 2019 narrowly interpreted several of the law's so-called "guardrails"—restrictions in the law aimed at limiting certain high-income owners from claiming the deduction—effectively expanding the scope of the pass-through deduction and likely enabling more high-income people to avoid taxes.

Though the Biden administration should pursue full legislative repeal of the pass-through deduction, the administration should also consider withdrawing portions of the Trump regulations and issuing new rules that more robustly construe and apply the statutory guardrails to limit the ability of high-income people to avoid tax using pass-through entities. For example:

- New regulations should revoke the special exemptions in the 2019 regulations that allow high-income real estate brokers, insurance brokers, and businesses that conduct banking activities to qualify for the pass-through deduction despite statutory limitations on "brokerage services" and "financial services." New regulations should also revise other service-business definitions in the current regulations to better limit high-income owners from claiming the pass-through deduction for income that is predominantly derived from their own labor rather than their business ownership.

- New regulations should overhaul the existing regulations' formulation of the "principal asset test" in Section 199A(d), which excludes from the deduction any high-income business whose "principal asset" is the "reputation or skill of 1 or more of its employees or owners." This restriction was enacted in part to prevent a professional tennis player or movie star from forming herself into an LLC to dodge taxes on 20% of the income that derives from her individual skills and not from being a job-creating business owner.

  The Trump administration eviscerated this exclusion by interpreting it to mean only income from endorsement, licensing, or appearance fees was disqualified from enjoying the 20% deduction. The Treasury department should consider using one or more of the New York State Bar Association recommendations to reform this limitation and prevent vast amounts of high-end labor income from qualifying for the deduction.

- Treasury should use its authority to extend Section 199A(c)(4)(A), which excludes "reasonable compensation" from the deduction, to partnership income (instead of limiting it to that of S corporations). Similarly, new regulations should enact an anti-abuse rule that prevents partnerships from recharacterizing "guaranteed payments" to partners—which do not qualify for the deduction—as "priority allocations" of income that may qualify.

3. **Revise the capitalization regulations for both tangible and intangible assets (Regulation)**
   Through two sets of expansive regulations, the Treasury Department has made it easy for business taxpayers, including wealthy individuals owning and operating investment businesses, to write off immediately ("expense") most costs associated with acquiring intangible assets (such as formulas and copyrights), and many of the costs associated with acquiring tangible assets (such as buildings and vehicles). These regulations depart from the statutory rules requiring the costs of acquisition be added to the "basis" of the asset ("capitalization"), delaying any tax benefit to the reduced capital gains realized on the asset's sale. Specifically, these regulations ignore a major Supreme Court decision (INDOPCO) requiring capitalization of such costs.

   Because businesses covered by these Treasury rules enjoy both full expensing and the ability to deduct interest payments, this regulatory stance invites abusive tax shelters. Taxpayers can borrow to fund investments that are only profitable because of the tax benefits. At least until Congress more fully limits business-interest deductibility, the regulations should be revised to better correspond with the intent and interpretation of the law by requiring capitalization for most expenses that produce lasting benefits.

4. **Reform opportunity zones (Regulation and Executive Action)**
   The TCJA created the "Opportunity Zone" (OZ) tax break, but the law left many important implementation decisions to the Treasury Department. Almost all of these decisions, however, were made in ways that favor investors, likely expand the cost of the provision, and largely fail to use the Treasury's authority to limit tax shelter activity or to help protect the communities where investments are made. Under current law, the OZ tax break expires after 2026. The program should not be extended absent clear evidence that it is benefiting communities in ways that are more cost effective than other policy approaches. The tax break should also be improved by administrative action while it is still in effect. For example:
   - The Treasury should enact robust information reporting requirements and compile the information in a publicly searchable database.
   - OZ properties can be owned by funds with multiple investors, which also own other properties not located in the special zones. But for fund investors to qualify for the OZ tax break, the IRS requires that "substantially all" of the fund's investments be in OZ properties. Treasury regulations now define "substantially all" as 70%—that share should be raised to 90%.
   - New regulations should require the Treasury Department annually to certify that OZ funds fulfill all the program's requirements. (This would replace the current "self-certifying" system. The new certification process should apply similar standards as those used to assess Community Development Entities under the New Markets Tax Credit.
   - New regulations should enact anti-abuse rules to limit the ability of firms to game the system and claim tax benefits without increasing economic activity in an opportunity zone.

5. **End the cherry-picking of cost basis to minimize taxable capital gains (Regulation)**
When an investor sells a portion of her holdings in a stock, mutual fund or other financial security that's been purchased in parts over time, she can use one of three methods to determine the cost of the part sold and therefore the gain or loss realized from the sale. She may use the average cost of all the parts of her holding; she may presume that she is selling the earliest-purchased part ("First In, First Out," or FIFO); or she may claim to be specifically identifying the part she is selling.

These methods may generate very different results. Consider for example an investor who purchased 100 shares of a mutual fund at $10 per share in 2010; 100 shares of the same fund for $15 per share in 2015; and made a third purchase of 100 shares at $20 per share on June 30, 2020. If on July 1, 2021, the investor sells 100 shares of the fund for $15 per share, she could either declare no gain, based on the average cost method; a gain of $500, based on FIFO; or a *loss* of $500, based on specific identification (assuming she identified the lot sold as the most expensive one).

Specific identification is a profitable fiction for investors in securities. Unlike, say, collectibles, shares in a stock or fund are all identical and so claiming to differentiate among them is simply a way to dodge taxes.

Treasury regulations should require investors to use FIFO to calculate their gains and losses for their securities, revoking the right to use average cost, specific identification, or any other method (i.e., revoke Treas. Reg. sec. 1.1012-1(c)(2), (3), and (4)). Investors would use FIFO for each of their accounts separately, which would mean brokers could calculate gains and losses without reference to any other account.

FIFO has been widely used for many decades in determining the cost of items sold. It is currently the default choice for investors who have not elected another method. FIFO simplifies determination of the holding period of securities: those held over a year are considered long-term and obtain preferential tax treatment when sold for a profit.

Adopting FIFO as the single allowable method for determining cost basis would make capital gains taxes fairer, simpler and a greater source of revenue from those best able to pay, since over 80% of stock holdings are owned by the wealthiest 10% of Americans.

6. **IRS crackdowns on phony land valuations (Enforcement)**
Some high-net-worth taxpayers have claimed large charitable contribution deductions for grants of easements restricting the upward development of buildings even though such development is already restricted under local zoning or historical-preservation laws. The Obama-Biden administration proposed legislation to end these deductions, but Congress never acted. The change can be accomplished by regulation—see Hemel, The President's Power to Tax, 102 Cornell Law Review 633, 671-73 (2017). The IRS should initiate notice-and-comment proceedings promptly to end this abuse. The FY 2017 Green Book estimated it would raise $174 million over 10 years.

7. **Curb valuation abuse in retirement-account contributions (Regulation)**
   Retirement plans receiving tax-favored treatment are meant to guarantee working people a secure and dignified old age. They are not meant to allow the wealthy to further enhance their fortunes, which is a way many are now exploited. By limiting the ability of high-paid employees and other wealthy people to abuse the tax breaks offered by retirement systems, we can better provide for the later years of those who are not wealthy because they were not born rich or, despite years of hard work, never hit the professional jackpot, or because they belong to a group that has historically faced barriers to wealth accumulation, including women and people of color.

   One way higher-income taxpayers avoid retirement-plan contribution limits is by undervaluing assets they place in their accounts. A regulation could end this undervaluation abuse by limiting non-cash contributions to publicly traded securities for which the price is set every day. If instead taxpayers are allowed to continue contributing assets for which there is no publicly determined value, they should be required to supply "qualified appraisal reports" of such contributions, just as they now must for charitable contributions of property valued by the taxpayer at over $5,000. (These charitable-contribution appraisals are regulated by IRC § 170(f)(11) and Treas. Reg. § 1.170A-13(c).) We also urge the Treasury Department to work with Congress to cap the size of tax-free/tax-deferred retirement accounts.

8. **Ensure continued tax shelter monitoring by preempting a potentially disruptive Supreme Court decision (Executive Action)**
   As part of its effort to curb tax dodging, the IRS requires tax-shelter promoters and their clients to self-report questionable tax-avoidance strategies. Promoters have sued the agency in a case now before the Supreme Court (CIC Services v. IRS), claiming this reporting requirement did not receive necessary administrative and public review before it was put in place—what's known as the "notice-and-comment" process. To preempt a potentially unfavorable Supreme Court ruling, the IRS should immediately initiate notice-and-comment proceedings for all past tax-shelter-designation requirements. Since such proceedings will likely take months to complete the IRS should start immediately to reduce the potential damage to tax-shelter identification and monitoring if the Supreme Court strikes down existing reporting rules.

B. Closing International Corporate Tax Loopholes

1. **Recommendations for BEPS2 international tax negotiations (Executive Action)**
   Domestically, it is imperative to make the global economy work for American workers, rather than just corporations. Building a fair tax system that adequately taxes mobile capital and the profits of large multinational corporations is central to that effort. The current OECD international tax negotiations create a political window of opportunity and provide external pressure to enact a long-lasting structural tax reform and deliver positive change for American workers. The United States under President Biden and

Secretary Yellen's leadership can play the key role in ending the standstill in the negotiations and ensuring that the project comes to fruition.

We are very pleased that the Biden administration is engaging positively thus far, including by dropping the Trump administration's ill-advised "safe harbor" proposal on Pillar 1, suspending trade sanctions against countries that adopt digital services tax, making a constructive proposal on Pillar 1 (taxing the digital economy), and most importantly raising the bar on Pillar 2 (global minimum tax) to seize this historic moment to end the race to the bottom on corporate taxes.

Americans for Tax Fairness, the Financial Accountability and Corporate Transparency (FACT) Coalition, and Oxfam America have provided a detailed set of recommendations for the President to fulfil his campaign pledges to raise more revenue from corporations, protect American jobs from outsourcing, and reduce the use of tax havens. Below are summarized the policies we believe should be prioritized during the ongoing international corporate tax negotiations being conducted under the OECD's auspices:

a. Decouple Pillar 2 from Pillar 1. Pillar 2, which seeks to set a minimum global corporate tax rate referred to as GloBE, offers more potential to raise revenue, reduce tax avoidance, and protect U.S. jobs. Pillar 1 is a set of proposals to revisit tax allocation rules in a changed economy so that a portion of multinationals' residual profits are taxed in the jurisdiction where revenue is sourced. We understand that, to maintain leverage in the negotiations, the Administration has thus far tied its new proposal on Pillar 1 to an ambitious deal on Pillar 2 and vice versa. In the end, though, the Administration should not let a failure on Pillar 1 kill Pillar 2.
b. Drop the Trump Administration's threat of trade sanctions against countries that adopt digital services taxes. Again, we understand that the sanctions, though suspended, are still on the table to maintain leverage in the negotiations. In the end, though, it does not hurt U.S. revenue if other countries tax digital giants as long as the U.S. doesn't offer tax credits for foreign digital taxes. Rather than punishing other countries for taxing Big Tech, we should consider doing it ourselves, as some states are exploring.
c. Drop the Trump Administration's insistence to grandfather the GILTI and BEAT into Pillar 2 (provided that GloBE is strengthened along the lines of recommendations (e) to (j)). Pillar 2/GLoBE is a global standard for the taxation of multinational corporations' foreign profits, which would be similar to the U.S. GILTI and BEAT taxes that were enacted under TCJA. Aligning the GILTI and BEAT to a strong global standard would increase their long-term sustainability while putting all multinationals on a level playing field.
d. Shun tax havens in GloBE negotiations.
e. Set the GloBE tax rate to at least 21%.
f. Recognize countries' rights to unilaterally raise their minimum rate above the global minimum.
g. Apply GloBE on a per country basis.

h. Prevent GloBE from having a substance carveout.
i. Ensure GloBE prevents the risk of corporate inversion.
j. Eliminate the size threshold for GloBE.

2. **Eliminate or restrict "Check the Box" (Regulation)**
American corporations with ownership interests in foreign corporations can avoid paying U.S. taxes on those companies' passive earnings (e.g., interest and royalties) simply by checking a box on an IRS form to make offshore subsidiaries and their passive income invisible for tax purposes. The "Check the Box" regulation instituted in 1996 was among the tax rules that encouraged U.S. corporations to accumulate nearly $3 trillion of profits in low tax jurisdictions—much of it shifted from the U.S.—by the time the TCJA was enacted at the end of 2017.

The TCJA changed the treatment of offshore corporate profits and the ways in which Check the Box can help American corporations dodge taxes. By letting firms manipulate their reported number of foreign subsidiaries and their relationship to one another, Check the Box can lower the tax due on the TCJA's Global Intangible Low-Taxed Income (GILTI) and increase foreign-tax credits. Attempts to curb Check the Box began in 1998, soon after the regulation was promulgated, then continued through proposed Obama administration budgets. We urge the Biden Administration to finally remedy the situation.

NOTE: The legislatively created Controlled Foreign Corporations (CFC) Look-Through Rule similarly excludes from taxation certain passive income transferred between related offshore entities. The CFC Look-Through Rule (Code 954(c)(6)) was adopted as a temporary measure in 2006 and has been extended since then, most recently in 2020 through 2025. It codifies Check the Box and should be eliminated legislatively.

3. **Reform transfer pricing (Regulation)**
If separate subsidiaries controlled by the same corporation trade with one another or the parent firm and hope to have their reported profits and losses from such transactions respected for tax purposes, they are supposed to act like unrelated parties in demanding fair prices from each other—conducting what are known as "arms-length" transactions. This "transfer pricing" rule applies to both domestic LLM and foreign subsidiaries.

Corporations can evade this rule through the use of so-called "cost sharing agreements" with their foreign subsidiaries. These agreements facilitate the transfer from the U.S. of valuable intangible assets, such as drug formulas and software code, to low- or no-tax foreign countries, from which they are licensed back to the American parent company at inflated prices. This price padding lowers the reported profit, and therefore tax bill, of the parent firm in the relatively high-tax U.S., while artificially pumping up profits in the offshore tax haven where little or no tax is due. (The transferred assets can also be used to manufacture goods exported to the U.S. and other nations.)

Because the rules for cost-sharing agreements are so lax, the federal government has lost important international transfer-pricing cases, including against Amazon in 2017. The government likely would have won the Amazon case if it had come to trial after enactment of a relevant rule change included in the TCJA passed late that year. The 2017 rule change only addressed transfer pricing stemming from intellectual property (IP) transferred offshore post-TCJA. But the huge amount of IP already resting offshore before the new tax law came into effect continues to be central to profit-shifting strategies by multinationals like Apple, Amazon, Microsoft and Facebook.

One way to partially restore the rightful U.S. share of taxes on profits from this legacy offshore IP is to fully apply a 1986 amendment to Code section 482 that allows a look-back approach to correct transfer pricing of intangible assets. Weak regulations and enforcement watered down the effect of this amendment and new regulations should make clear that cost sharing is subject to its standards.

Another transfer-pricing problem is that regulations have been misread and misapplied by corporations and the courts to say that related companies have the same scope of permissible action in their transactions as unrelated parties do. This faulty interpretation of the law supported aggressive transfer pricing, only a portion of which is curbed through enforcement.

Transfer-pricing regulations should be updated and strengthened to prevent pricing practices used to shift profits to tax havens. The tax reform of 1986 tightened the rules on transfer pricing of intangible assets, and new regulations should make clear that cost sharing is subject to the standards adopted by that amendment. The applicability of Section 482 to transfer pricing was recently confirmed in a federal appeals court, a decision that represents current law since the Supreme Court declined to review it.

4. **Prevent earnings stripping (Regulation)**
Earnings stripping, like transfer pricing, is a way of avoiding taxes by reducing reported corporate income in a relatively high-tax jurisdiction while increasing it in a relatively low-tax area. Typically, the foreign-based parent of an American subsidiary funds its subsidiary with high-interest loans. The pricey interest payments delivered by the subsidiary to its parent decrease net income for the American firm, while harmlessly increasing profits in the no- or low-tax foreign jurisdiction. The tax-dodging payments can also take the form of royalty payments from subsidiary to parent. Making the scheme worse, the “foreign” corporation is often really an American one that’s swallowed a foreign firm and taken its foreign headquarters address strictly to avoid U.S. taxes (what’s known as an “inversion”).

The Treasury should curb this offshore corporate tax avoidance by expanding existing anti-abuse regulations into a full anti-earnings-stripping rule that would prohibit the use of excessive debt or royalty payments to reduce U.S. corporate taxes.

There are related regulatory reforms the Treasury should also make. First, it should reverse its position on the so-called "services cost method," an accounting method meant to demonstrate that certain transactions between related parties are really "arm's length." The Treasury currently holds that in applying the Base Erosion and Anti-Abuse Tax (BEAT) to such arrangements, the BEAT should apply only to the markup charged on the transactions. Instead, the BEAT should apply to the entire amount of the transactions. Another reform would be to clarify that the "anti-conduit rule" (Code section 7701(l) and the regulations implementing it under section 881) applies for BEAT purposes, so that taxpayers cannot avoid the BEAT by making payments to unrelated parties who then pass them on to related parties.

5. **Protect and expand U.S. source taxation base (Regulation)**
   Even though much business is now international, taxation remains local. A company can be subject to taxation in a particular jurisdiction if it is deemed to have a "taxable presence" in that locale. The Biden administration should modernize regulations governing when the U.S. activity of foreign-based firms constitutes a taxable presence in America. The updated definition should include remote offshore sales of services to American companies by "platform companies" with little physical U.S. presence. Since the Tax Code does not define what constitutes a U.S. trade or business subjecting a foreign entity to U.S. taxes, the Biden administration has the latitude to adopt by regulation something like the "substantial digital presence" threshold used by the European Union (EU) to evaluate the taxability of foreign online companies. Adopting this rule will also help in negotiations with the EU over proposals from the Organization for Economic Cooperation and Development (OECD) for how to allocate the taxable income of digital companies working across national borders (the OECD "Pillar 1" proposals).

6. **Standardize with other nations the disclosure requirements for financial institutions reporting customer information to taxing authorities (Executive Action)**
   The Treasury Department should work with the OECD and international allies to establish standard requirements for when and how financial institutions report to government authorities' accounts opened by customers. Treasury and its international partners should use as their framework the Foreign Account Tax Compliance Act (FATCA) and the global Common Reporting Standard (CRS), adopting the strongest requirements of each regime.

   By bringing U.S. financial-institution account-information reporting into alignment with overseas standards and making FATCA fully reciprocal between the United States and its foreign partners, the U.S. will remove a source of irritation that now hinders international cooperation. It will also streamline account information exchanges and reduce compliance burdens on financial institutions by allowing them to use either FATCA or CRS when reporting on U.S. account holders. The Biden Administration should take care that the new, harmonized standard maintains the citizenship-based aspect of FATCA for U.S. tax collection purposes, and also advocate for a stronger CRS by urging addition of the 30% withholding tax penalty for non-compliance now available under FATCA.

7. **Expand information sharing with allies and law enforcement under FATCA (Executive Actions)**
   To help developing countries combat tax evasion, the Treasury should use its existing authority to send them FATCA-related information on a non-reciprocal basis for at least a limited time. In addition, the Treasury should expand technical assistance programs to low-income countries to ensure that they have the capacity to fully safeguard and utilize the exchanged information and boost their ability to eventually reciprocate by supplying similar information on American entities to the U.S. government.

   In addition, the Treasury should use its existing authority to redesignate FATCA disclosure forms, currently labeled IRS forms, as FinCEN forms. That would enable law enforcement to access them as part of their efforts to combat money laundering, terrorist financing, organized crime, corruption, and other civil and criminal misconduct.

8. **Require investment advisers to guard against money laundering (Regulation)**
   Investment advisers are not currently covered by the program and reporting requirements imposed on banks and other financial institutions meant to deter money laundering and terrorist financing. Placing investment advisers to hedge funds, private equity, and other pooled investment vehicles under those same programs and reporting requirements would force them to screen their customers and report large cash transfers and suspicious financial activities to law enforcement. Covering investment advisors would also conform U.S. anti-money laundering (AML) rules more closely to international AML standards and plug a key U.S. AML vulnerability. In 2015, the Obama administration proposed this change for larger advisory firms (those managing over $100 million in client funds) and that proposal went through the necessary public review. The Treasury should update and repromulgate the rule.

9. **Reform U.S.-controlled offshore corporations (Executive Action)**
   When a foreign financial entity like a trust or partnership opens a U.S. bank, brokerage or other account, the institution offering the account is not required to supply the same information about that account to the IRS as the institution must supply on the accounts of U.S. taxpayers. Because this is true even if a U.S. taxpayer has a financial interest in the foreign entity opening the account, the current rules facilitate offshore tax dodging. The Treasury should reduce offshore tax abuse by aligning IRS reporting rules with FATCA and anti-money laundering rules to require financial institutions hosting accounts for offshore entities controlled by U.S. persons to report those accounts to the IRS as U.S. (rather than foreign) accounts.

10. **Prevent excess foreign tax credits for American corporations (Regulation)**
    American corporations with foreign operations are allowed to deduct from their U.S. tax bill any foreign taxes paid. This credit is supposed to be reserved for taxes only, not

payments to foreign governments in exchange for an economic benefit, such as royalties on the extraction of natural resources. But enforcement of this rule has been weakened over the years by unfavorable court rulings, especially in regard to the oil and gas industry. The Treasury should promulgate a rule that restricts foreign tax credits to the rate paid under the general income tax of the other nation, thereby excluding royalties and other ineligible payments.

11. **Make it easier to prove control of foreign assets by U.S. taxpayers (Regulation)**
    Legal proceedings begin with certain presumptions—such as the presumption of innocence of criminal defendants—that are only supposed to change in the face of credible evidence (these are known as "rebuttable presumptions"). The Treasury should establish a rebuttable presumption that any foreign account a U.S. taxpayer opens, sends money to, or receives money from is controlled by that taxpayer. This new rule would be targeted at institutions not already covered by the reporting requirements of FATCA, including insurance companies, whose products can be used to cloud financial transparency. The same rebuttable presumption on control should apply to foreign entities that a U.S. taxpayer forms, sends money to, or receives money from. This sensible shift in the burden of proof would make it easier to curb offshore tax evasion. [This reform is included in the Stop Tax Haven Abuse Act of 2021 (S. 725, Section 202(g))]

12. **Expand heightened scrutiny of all-cash real estate purchases to include commercial properties (Regulation)**
    The Treasury's Financial Crimes Enforcement Network (FinCEN) combats money laundering, tax evasion and other white-collar crimes by, among other methods, requiring banks and other financial institutions to report suspicious customer activities. In May 2020, it strengthened the reporting requirements for all-cash purchases by businesses of residential properties in the nation's biggest and hottest real estate markets, including New York, Chicago and Los Angeles. Such cash deals, which currently have to be reported by real estate title companies to FinCEN, ease the ability of the true buyer to conduct the purchase through an intermediary like a shell company. The Treasury should expand its new requirement to include commercial real estate as well, since organized crime figures, corrupt officials, and others use shell companies to purchase U.S. commercial as well as residential properties. Such enhanced reporting requirements have proven to be effective, having reduced residential real estate purchases by anonymous shell companies in some markets by as much as 95%.

13. **End exemptions of certain industries from financial reporting (Regulation)**
    In the wake of the terrorist attacks of 2001, Congress attempted to choke off terrorist financing by imposing stricter anti-money laundering program and reporting requirements on a broad range of businesses that routinely deal with large sums of money. But the Treasury soon after used its discretion to temporarily exempt certain of those businesses—such as real estate brokers, investment advisers, and dealers in luxury vehicles—from the new rules. After nearly two decades, it is time to end these exemptions, which are still labeled "temporary," since it's clear that criminals can use

high-end properties and expensive cars, yachts and aircraft as well as bank and brokerage accounts to launder dirty money. Regulations to end the temporary exemptions have already been drafted; they could quickly be updated, published, and finalized.

C. Closing Financial Industry Tax Loopholes

1. End private equity's abuse of the tax system (Regulation)

"Private equity" refers to hedge funds and other entities that pool rich people's money and are allowed to make riskier investments than, say, mutual funds, which are marketed to small investors and are more heavily regulated. The industry's most famous tax abuse is "carried interest": private equity traders, who are compensated in part based on the returns they deliver to investors, pretend that what is in fact a salary for work performed is instead a capital gain, which is taxed at a much lower rate.

The glaring injustice of taxing carried interest as capital gains continues after the loophole-ridden, industry-drafted Sec.1061 of 2017's Tax Cut and Jobs Act failed to curb the abuse in any substantial way. Treasury should replace existing revenue procedures (Rev. Proc. 93-27 & 2001-43), which allow for the tax-dodging treatment of carried interest, with new ones promulgated pursuant to its authority under Sec. 707(a)(2)(A) that would close the loophole.

Treasury should also consider other regulatory fixes, including treating carried interest as a below-market-rate loan (as described in Sec. 7872), which would make the interest savings taxable; treating portfolio companies as inventory, which would make their sale equivalent to the sale of merchandise in a store, subjecting any profits, like those of store sales, to ordinary income-tax rates; or treating carried interests as a derivative subject to mark-to-market taxation.

The carried interest loophole is only one way that private equity fund managers game the tax code. The administration should strengthen and finalize regulations (Prop. Treas. Reg. § 1.707-2(c)) to prevent managers from using "fee waivers" to camouflage management fees as lower-taxed capital gains.

2. Prohibit disguising dividends paid to private equity funds as monitoring fees (Enforcement)

Private equity funds pool the money of wealthy investors to buy and sell companies not yet traded on a public stock exchange. One way a private equity fund makes money is by forcing the companies it buys—its "portfolio companies"—to pay it a so-called "monitoring fee," supposedly for management or consulting services offered by the private equity firm. Such payments are claimed as deductions by the portfolio company on its taxes, lowering net income and therefore taxes due. But the private equity firm sets the terms of these monitoring-fee agreements, which are often vague and typically don't require the fund to provide any minimum level of service. Therefore, under current tax law, the monitoring fee payments from the portfolio companies should be re-characterized as dividends, which are not deductible.

As further proof that these monitoring fees are unrelated to any actual services performed, if the management agreement is terminated prematurely the firm is often entitled to a lump sum payment representing the present value of future periodic fees—fees for services that will never be provided. Many of these termination payments are for tens of millions of dollars. In some cases, the private equity firm can unilaterally terminate the management agreement and still receive the full present value of the contract.

Monitoring fees are often particularly high when a group of private equity firms collectively buy a company (a so-called "club deal"). Another indicator that the payments flowing from the acquired company are dividends and not fee payments is that the money is split among the members of the "club" according to their share of the investment, not any share of purported services performed.

Improper deductions taken on dividends disguised as monitoring fees deprive the federal government of hundreds of millions if not billions of dollars of tax revenue annually. They also facilitate the private equity industry's business model of stripping large amounts of capital out of their portfolio companies, which impedes growth, increases the risk of financial failure and imperils jobs.

Effective enforcement of current tax law would force private equity to cease disguising dividends as deductible service-fee payments. Yet, despite the abuse being reported in the Wall Street Journal in 2014, the private equity industry has continued to include monitoring fees in new deals. The IRS should act aggressively to end this blatant tax evasion.

3. **Require derivatives to be marked-to-market (Regulation)**
Derivatives are financial instruments that derive their value by reference to other assets, liabilities or indexes of securities. Derivatives include futures, options, forward contracts, notional principal contracts, and many other arrangements. Investors can invest in derivatives either on an exchange or off (i.e., over the counter or "OTC").

The current taxation of derivatives is complicated and inconsistent: there are different tax rules for different derivatives, for different uses of the same derivative, and for different taxpayers owning the same derivative. Taxpayers as a result often use derivatives to manipulate their tax liability. For example, investors can use exchange-traded "notes" to wrap derivatives around investment strategies in order to convert ordinary income and short-term capital gains into long-term capital gains, thus deferring taxes and paying lower rates.

Derivatives should be "marked to market." That is, a derivative should be treated as if sold for its fair market value at the end of the year, with the taxpayer recognizing the gain or loss and paying any tax due. Any gain or loss from the deemed sale would be considered regular income, not a capital gain, and therefore subject to the rules and rates covering regular income.

The accounting profession has largely shifted to the mark-to-market system to value derivatives. In 1998, the Financial Accounting Standards Board (FASB), the industry's rule maker, issued "Statement of Financial Accounting Standards No. 133, Accounting for Derivative Instruments and Hedging Activities." It was meant to address two key problems: (1) the economic effect of derivatives was not transparent in basic financial statements; and(2) the accounting guidance for derivative instruments and hedging activities was incomplete, inconsistent, and difficult to apply. The FAS 133 rules required companies to measure all derivatives on their balance sheet at "fair value," which is very similar to fair market value for tax purposes.

The IRS already requires mark-to-market for securities dealers and owners of regulated futures contracts. Treasury should, by regulations, require the mark-to-market method of accounting for the taxation of all derivatives. The new regulations (revising Treas. Reg. sec. 1.446-3) would require taxpayers to account for a derivative as if it were sold at the end of each year and would require any gains or losses to be recognized annually (subject to other rules, like those for hedges). These gains and losses would be ordinary.

Taxing derivatives on a mark-to-market basis is also crucial for denying wealthy taxpayers access to schemes that avoid other tax increases on capital gains. Rich investors have used derivatives to mask what are for all practical purposes profitable sales in order to dodge capital gains taxes for years on end.

4. **Deny deductions for interest that is unlikely to be paid (Regulation)**
Taxpayers that use the "accrual" method of accounting may deduct their obligation to pay interest as it arises, regardless of when, or even whether, they actually pay the amount due. Yet on the other side of the loan, the holders of distressed debt may avoid reporting any interest income from that debt under the "doubtful collectability" doctrine (Corn Exchange Bank v. U.S., 37 F.2d 34 (2d Cir. 1930)). The same rules should apply to both sides of a loan: taxpayers that are unlikely to make an interest payment should not be able to take an interest deduction until the payment is made or the holder of the debt reports the unpaid interest payment as accrued income.

This ability to deduct unpaid interest may have contributed significantly to Donald Trump's eye-popping $916 million loss reported on his 1995 tax return that probably wiped out any tax liability for years. Trump's failing Taj Mahal casino was able to deduct the interest payments on its bonds for federal income tax purposes, even though it never actually made the payments. Meanwhile, the bondholders probably stopped reporting the interest income.

5. **Demand true compliance with REIT qualification rules (Guidance)**
   A Real Estate Investment Trust (REIT) is a mutual fund for real estate. Investors pool their money so that instead of each owning individual properties, they all own shares in a company that invests in rent-generating office buildings, apartment houses, shopping malls and more, then distributes that rent income to shareholders as dividends. A REIT offers investors several tax advantages: it is exempt from corporate taxes, and its shareholders are allowed (subject to exceptions) to subtract 20% of their REIT dividend income before figuring their taxes.

   Among the criteria a real-estate investment company must meet to qualify as a REIT is that it have at least 100 shareholders. To meet this requirement, many REITs with only a handful of substantive investors issue two classes of stock: voting and non-voting, with the non-voting issued in private placements to just enough "investors" to meet the 100 shareholders requirements. These non-voting investors usually have very little financial interest in the REIT; many times, they are simply a bunch of names provided by so-called "REIT Service Companies" in exchange for an annual payment.

   This dodge allows a small group of wealthy taxpayers to enjoy all the tax advantages of a REIT without fulfilling the system's original intent of opening up real estate investment to middle-income households. The only determination by the IRS that such schemes satisfy the 100-shareholder requirement came in a private letter ruling (I.R.S. P.L.R. 8342016 (July 13, 1983)). According to the I.R.C., taxpayers may not rely on PLRs as precedent (I.R.C. 6110(k)(3)). The IRS should clarify that this REIT PLR is not the IRS position, and issue official guidance stating that such nominal holdings do not meet the 100 shareholders requirement.

6. **End mutual fund dodging of legal limits on speculation in risky commodities (Executive Action)**
   IRC 851(b)(2) allows mutual funds to avoid paying corporate-level tax only if they derive at least 90% of their income from "securities" and no more than 10% from other sources, including commodities. These restrictions encourage mutual funds to invest in U.S. corporations, jobs and innovation, rather than simply bet on changes in commodity prices. But since 2006, IRS private letter rulings have eviscerated the limit on commodity speculation by authorizing mutual funds to claim that owning offshore vehicles and financial instruments investing in commodities are really "securities" investments under the tax code—thereby unleashing a flood of commodity speculation and market volatility, while depriving U.S. securities markets of stable investment pools. A 2011 bipartisan Levin-Coburn letter cited a Senate investigation into this issue and recommended withdrawing the IRS private letter rulings, but the IRS has not taken any action and mutual funds have continued to derive disproportionate income from commodity speculation. An example is here. The IRS can stop circumvention of the statutory limit on allowable investments by tax advantaged mutual funds by

withdrawing the permissive IRS private letter rulings. [Taken from 2012 Levin-Coburn Senate hearing]

7. **Prevent hedge funds from using accounting tricks to cut capital gains taxes (Enforcement)**
   Hedge funds are investment partnerships for wealthy investors that use trading strategies in search of lucrative returns. Through manipulative accounting of the profits from the sale of assets, hedge funds can reduce reportable capital gains of partners and thus capital-gains taxes due.

   Capital gains are normally allocated among hedge fund investors in proportion to their investments. But when a partner cashes out of the partnership, a disproportionate share of capital gains realized in the year of the redemption can be assigned to the departing partner, decreasing the capital-gains taxes due from the remaining partners. These disproportionate assignments of gains are known as "stuffing allocations." The departing partner owes no more tax because her total gain from her investment in the fund stays the same, the source of the profit having simply been reallocated. (She realizes more profit from the fund's successful investment that year, but less from cashing out her long-term investment in the fund.)

   Stuffing allocations are not allowed under partnership tax rules, yet are pervasive in the hedge-fund industry. The IRS should shut down stuffing allocations by hedge funds through stronger enforcement.

D. Restoring Taxpayer Trust and Promoting Racial Equity

1. **Ensure strong and equitable tax enforcement (Enforcement)**
   Shocking recent revelations of how much tax goes uncollected each year—especially from the wealthy—argue strongly for beefed up enforcement of tax law. Fair and strong tax enforcement is critical to ensuring a tax system and economy that works for ordinary Americans, not just the wealthy and powerful. But due in large part to budget cuts in recent years, IRS enforcement has been slashed, to the particular benefit of tax-dodging millionaires and large corporations. The United States is losing $600 billion per year to $1 trillion in unpaid taxes that could be dedicated to urgent national priorities, with high-income taxpayers responsible for the bulk of the loss. Wealthy tax cheats are overwhelmingly responsible for the tax gap; they evade about $400 billion in taxes every year.

   The IRS's current enforcement priorities are also inequitable: because audit rates for high-income taxpayers have plummeted, low-income workers claiming the Earned Income Tax Credit are audited at about the same rates as the richest one percent. This has profound implications for economic, social, racial, and gender justice.

Accordingly, while fighting for a large, multi-year funding investment from Congress, the Biden administration should prioritize enforcement resources to ensure high-income Americans and large corporations pay what they owe. Specifically, we recommend that the Biden administration:

a. **Announce a policy commitment to stronger and fairer tax enforcement.**
   Though improving tax enforcement will be a multi-year effort, it will be important early on to set a public marker on the issue and begin the necessary work at the IRS. Therefore, we recommend that President Biden issue an executive order as early as possible that would:

   - Contain a policy statement that strong and fair tax enforcement is important to a fair economy; that the current state of tax enforcement is unjust and unacceptable; and that it is the policy of the Administration to achieve fairness for workers and honest taxpayers by improving tax enforcement and prioritizing enforcement resources toward wealthy individuals (including the pass-through business entities that they own) and large corporations.

   - Direct the IRS to develop a plan to strengthen its ability to enforce the tax laws with regard to wealthy individuals, pass-through businesses, and large corporations; address the disproportionate auditing of low-income workers relative to high-income individuals; and identify gaps in information reporting and withholding that enable noncompliance.

b. **Prioritize audits of high-income individuals and large corporations.**
   The IRS's loss of resources has resulted in a drastic decline of audits of millionaires. The audit rate for taxpayers with income over $1 million was down 81% in 2019 compared with 2011. The audit rate for the largest corporations has dropped in half. The largest corporations, those with assets over $20 billion, used to be audited every year. In 2019, only about half were audited. The IRS now audits low-income workers receiving tax credits at about the same rate as the top 1%, even though the vast majority of unpaid taxes are attributable to wealthy tax cheats. According to ProPublica, in 2019 "the top 1% of taxpayers by income were audited at a rate of 1.56%. EITC recipients, who typically have annual income under $20,000, were audited at 1.41%."

   New enforcement resources should be dedicated to the most neglected and potentially lucrative targets—high-income individuals (including the pass-through businesses, trusts and estates they control) and large corporations—so that low-income tax credit recipients are not disproportionately targeted for audits. The IRS Commissioner should also be required to assess racial and gender disparities in enforcement actions and guarantee that tax enforcement actions do not vary by race, ethnicity, or gender.

c. **Improve IRS's enforcement tools, both through legislation and by making aggressive use of regulatory and administrative authority to close the tax gap.**
The Biden administration should direct the IRS to identify areas in which legislative changes would enable better tax enforcement, including requiring expanded information reporting and withholding, and propose any changes requiring legislation to Congress. An example would be Commissioner Rossotti's proposed new information reporting regime for business bank accounts. At the same time, the Biden Administration should make full use of its authority under existing law, including by reallocating resources toward audits and other enforcement actions for high-income individuals and large corporations, promulgating new regulations, improving forms to collect more financial information, and prioritizing criminal tax cases.

d. **Improve knowledge and awareness of the tax gap.**
The Biden administration should also direct Treasury and/or the IRS to:
- Publish distributional estimates of the tax gap, showing which income groups are most responsible for revenue losses.
- Report on the tax gap annually in Treasury's yearly Agency Financial Report.
- Analyze the revenue lost to offshore tax evasion, which is not currently reflected in the official tax gap estimates.
- Recommend that IRS explore employing new audit methods to help it detect evasion using reported offshore accounts and evasion using passthrough businesses.

2. **Assess the impact of the tax code on racial and gender inequities and the racial and gender wealth gap (Executive Action)**
The tax code and specific provisions within it can have powerful impacts on equity, including by race, gender, and across other dimensions. The 2017 tax law worsened the racial income and wealth gaps, as do many pre-existing provisions of the tax code. Misguided tax enforcement priorities—including underfunding that has resulted in plummeting audit rates among the wealthiest filers and profitable corporations—also result in inequities. The Biden administration should take steps to better assess these faults and remedy them, including by:
- Directing the Statistics of Income Division of the IRS and the Office of Tax Analysis at Treasury to include race, ethnicity, gender, and other demographic groups in their tax data analysis, including regular releases describing returns filed, sources of income, exemptions, and itemized deductions.
- Directing those offices to study how "upside-down" tax expenditures meant to build household wealth—including savings incentives, homeownership subsidies, and preferential tax rates on investment income—widen the racial and gender wealth gap.
- Prioritizing IRS enforcement resources toward the largest sources of unpaid taxes—high-income individuals and businesses—so that low-income tax credit recipients are not disproportionately targeted for audits.

- Requiring the IRS Commissioner to guarantee, in consultation with the Office of the Taxpayer Advocate and the Department of Justice (DOJ) Office of Civil Rights, that tax enforcement actions do not vary by race, ethnicity, or gender, except in proportion to amount of taxes owed and relative amount of taxes evaded. The analysis supporting this guarantee should include the rates and amounts of settlements reached in disputes with taxpayers by the race, ethnicity, and gender of the taxpayers involved, as recorded by the IRS Chief Counsel.
- Include racial and gender equity analyses in the annual Green Book proposals.

3. **Prevent OIRA review from impeding tax reform (Executive Action)**

To effectively pursue an agenda of tax reform through executive action, we recommend that the Biden administration reverse a Trump-era policy that allows the Office of Information and Regulatory Affairs (OIRA) to review proposed tax regulations and require cost-benefit analysis of those regulations. OIRA lacks expertise in tax policy and uses the wrong framework to judge the value of tax regulations. The result is analysis biased against regulations that raise revenues and reduce inequality, impeding the Biden administration's ability to close regulatory loopholes and make the tax code fairer.

The Biden administration should eliminate the requirement that the IRS conduct inappropriate cost-benefit analyses of proposed tax regulations and revoke OIRA's authority to review those regulations. Indeed, the President's announced commitment to purge the regulatory review process of "harmful anti-regulatory or deregulatory effects" requires the elimination of cost-benefit analyses for tax regulations.

OIRA was created in 1980 and soon charged by President Ronald Reagan with overseeing agency analyses of whether proposed regulations would cost more in time, effort and expense than they would benefit society. OIRA has been criticized for bending to industry lobbying by weakening useful regulations. Tax rules were generally exempt from the agency's oversight, but the Trump administration changed that in 2018.

A major problem with OIRA's review of tax regulations is that standard "cost-benefit" analysis does not work when evaluating such regulations.

- The main purpose of taxes is to raise revenue, yet OIRA instructs agencies to give no weight to whether regulations raise or lose money. As a result, a loophole-closing tax regulation could be judged unnecessary because it increases administrative costs while the revenue raised is largely ignored; but a weakened tax rule could be favored because it reduces paperwork, even though it loses billions of dollars in revenue.

- The different ways a proposed tax regulation would impact different income, racial or other groups is completely ignored in determining a regulation's "net benefits," as OIRA defines them. That a proposed regulation would increase taxes on low-income minority families while cutting them for rich white people is not considered in this assessment.

- OIRA instructs agencies to judge the merits of regulations implementing recently enacted laws by comparing their assessment of what would happen if the regulation were issued to what would have happened if Congress had never passed the law. But because taxpayers must obey new tax laws even if the Treasury Department and the IRS do not provide regulatory guidance, such analysis uselessly conflates the impact of the regulation with the impact of the underlying legislation. Comparing proposed regulations with possible alternatives would be a better method of evaluation but doing so runs contrary to OIRA's standard instructions.

OIRA is peculiarly ill-suited to pass judgment on tax regulations because the purpose of taxes is to raise revenue from the private sector while OIRA views its job as trying to reduce private-sector costs. Congress and the Treasury Department, which share the revenue-raising goal of the IRS, are better equipped to make and evaluate tax policy decisions.

4. **Increase corporate transparency (Regulation)**
One key to improving the U.S. corporate tax system is better information. Requiring America's largest multinational corporations to file public rather than confidential country-by-country (CbC) reports with the IRS will enable policymakers, academics, and the public to better understand where U.S. multinationals pay tax and how much. Requiring multinationals to file public Advanced Pricing Agreements (APA) will enable policymakers, academics, and the public to better understand how those multinationals are moving profits offshore. Making those filings public is within the existing regulatory authority of the IRS and would also encourage U.S. allies to support similar actions as part of the ongoing OECD effort to curb multinational corporate tax avoidance and abuse. Providing more accurate, timely and comprehensive corporate data would lead to improved tax policies and procedures.

5. **Require increased disclosure by any special interest seeking to lobby the IRS, Treasury, or other Executive Branch office (including the White House) for Tax Relief (Executive Order)**
The IRS, Treasury, and other Executive Branch offices—such as the Office of Information and Regulatory Affairs and the Council of Economic Advisers—are regularly lobbied by special interests seeking tax relief, special tax treatment or some other type of tax benefit that may collectively cost taxpayers billions of dollars in revenues. In addition, the actual beneficiaries of these special breaks—the so-called "true parties in interest"—may be hidden behind a trade association, lobbying group, or tax-exempt organization that has agreed to lead the lobbying effort.

The U.S. House of Representatives requires submission of a Truth-in-Testimony form before a party can testify before a committee to ensure Congress and the public know who is actually offering policy recommendations. The Executive Branch should require a Truth-in-Lobbying disclosure form before any party can discuss, suggest, or submit a proposal for tax relief or special tax treatment to the IRS, Treasury, or other Executive Branch office (including the White House). The party would have to submit the form in advance of a meeting or in connection with a written comment on a proposed change to the tax code, disclosing any potential personal stake in the policy under discussion. These disclosures should be posted on an easily accessible part of an agency's website.

An individual, corporation, or other entity recommending the tax proposal would be required to disclose:

- How that person, or the people they represent, would benefit from the proposal; and
- Provide a dollar estimate for each such person's potential tax savings from the proposal using the following brackets: Under \$10,000; \$10,000 - \$100,000; \$100,000 - \$500,000; \$500,000 - \$2,500,000; \$2,500,000 - \$10,000,000; \$10,000,000 - \$100,000,000; \$100,000,000 - \$1 billion; over \$1 billion.