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## THE 2021 CORPORATE TRANSPARENCY ACT: THE NEXT FRONTIER OF U.S. TAX TRANSPARENCY AND DATA DEBATES

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# THE 2021 CORPORATE TRANSPARENCY ACT: THE NEXT FRONTIER OF U.S. TAX TRANSPARENCY AND DATA DEBATES

*Diane Ring*\*

## I. INTRODUCTION

As we enter the third decade of the twenty-first century, twin revolutions—one in digital data, the other in international tax—are well underway. Both are global phenomena with independent momentum, but in practice they intersect and often find themselves in tension.<sup>1</sup> Increasingly pervasive digital data has prompted major debates over privacy, artificial intelligence, government overreach, and digital crime. The past year has witnessed growing concern and litigation regarding expanded data collection and use in both the private and public sectors, with the COVID-19 pandemic igniting clashes between public health and privacy. At the same time, international tax trends have favored expanded transparency and disclosure to combat fraud, evasion, corruption, and questionable tax policy. Not surprisingly, efforts to pursue tax transparency have bumped up against data-related concerns, and countries struggle to balance competing goals. These uneasy tensions are evident in U.S. international tax policy and practice, where the United States has sometimes actively sought comprehensive tax data while at other times it has resisted data collection and exchange.

In January 2021, the United States enacted new beneficial ownership legislation, the Corporate Transparency Act.<sup>2</sup> The new regime marks a notable shift in the country's approach to international tax transparency and will likely serve as the next major testing ground for U.S. efforts to develop

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<sup>1</sup> See, e.g., Shu-Yi Oei & Diane M. Ring, *When Data Comes Home*, 64 MCGILL L.J. 707 (2019).

<sup>2</sup> The language of the Corporate Transparency Act was included Title LXIV, § 6401 of the National Defense Authorization Act (H.R. 6395), which was passed by Congress on January 1, 2021, over the president's veto. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6401, 134 Stat. 3388, 4604.

a coherent policy frame for the twin revolutions. This Article uses the 2021 legislation as a case study to explore where and how the tensions between data protection on the one hand and transparency and disclosure on the other will likely manifest, the kinds of choices that will need to be made, and the likely risks from these choices. Achieving a satisfactory balance is not easy. As my coauthor Shu-Yi Oei and I have articulated elsewhere, the needs for tax transparency and disclosure can be profound, but so too can the risks of unfettered data access in a digital age.<sup>3</sup>

This Article begins by placing the often-competing transparency and data trends in contemporary context. It then introduces the Corporate Transparency Act and explores how the new legislation's implementation will require the United States to grapple with the demands for meaningful transparency and disclosure while managing the sustained concerns over data risks in a digital world.

## II. THE TWIN REVOLUTIONS

### A. U.S. International Tax Transparency and Disclosure

One of the defining features of international tax policy for the first two decades of this century has been the sharpened focus on transparency, disclosure, and exchange of information. The trajectory of this shift has been well-documented:<sup>4</sup> It typically begins with the emergence of tax information exchange agreements in the early 2000s, followed by their growing use,<sup>5</sup> and

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<sup>3</sup> See, e.g., Oei & Ring, *supra* note 1; Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532 (2018); Shu-Yi Oei & Diane M. Ring, "Slack" in the Data Age, 73 ALA. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3832120](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832120).

<sup>4</sup> See, e.g., Itai Grinberg, *Beyond FATCA: An Evolutionary Moment for the International Tax System* (Georgetown L. Scholarly Commons, Working Paper No. 160, 2012); Susan C. Morse, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*, 57 VILL. L. REV. 529 (2012); Oei & Ring, *supra* note 1; Diane M. Ring, *Corporate Migrations and Tax Transparency and Disclosure*, 62 ST. LOUIS U. L.J. 175 (2017); see also Wei Cui, *Taxation Without Information: The Institutional Foundations of Modern Tax Collection*, 20 U. PA. J. BUS. L. 93 (2017); Michael Keen & Jenny E. Lighthart, *Information Sharing and International Taxation: A Primer*, 13 INT'L TAX & PUB. FIN. 81 (2006).

<sup>5</sup> A listing of bilateral Tax Information Exchange Agreements is available at *Tax Information Exchange Agreements (TIEAs)*, OECD, <https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementsstieas.htm> (last visited Apr. 16, 2021). See also Katarzyna Bilicka & Clemens Fuest, *With Which Countries Do Tax Havens Share Information?*, 21 INT'L TAX & PUB. FIN. 175 (2014).

ultimately the introduction of more extensive measures<sup>6</sup> (including significant third-party reporting<sup>7</sup> and required taxpayer<sup>8</sup> and government disclosures<sup>9</sup>) as the extent of taxpayer avoidance and evasion behaviors garnered international public attention.<sup>10</sup> Collectively, we have seen a range of mechanisms adopted across the globe furthering transparency, disclosure, and the general availability of information to tax authorities. At present, major anchors of this international tax transparency and disclosure system include: (1) the U.S. Foreign Account Tax Compliance Act (FATCA) (with third-party reporting to the United States combined with taxpayer self-

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<sup>6</sup> See, e.g., Hugh J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 BROOK. J. INT'L L. 757 (2009); Miranda Stewart, *Global Tax Information Networks: Legitimacy in a Global Administrative State*, in TAX, LAW AND DEVELOPMENT 316 (Yariv Brauner & Miranda Stewart eds., 2013); Martin A. Sullivan, *Lessons from the Last War on Tax Havens*, 116 TAX NOTES 327 (2007).

<sup>7</sup> In particular, the United States enacted the Foreign Account Tax Compliance Act (FATCA) in 2010 (requiring both self-reporting and third-party reporting by foreign financial institutions). See, e.g., Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L.J. 655 (2018). In a related move, and in a response to a mandate from the G20 in 2013, the OECD supported widespread adoption of the Common Reporting Standard (CRS) by which countries commit to automatic exchange of certain categories of information by specified financial institutions including depository institutions, custodial institutions, investment entities and insurance companies. Information subject to exchange includes identifying information (taxpayer name, address, tax identification number, account number), along with financial account details (gross interest, dividends, and sales proceeds, and account balances). See, e.g., OECD, STANDARD FOR AUTOMATIC INFORMATION EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2014) [perma.cc/3RUC-9NPM].

<sup>8</sup> For example, one of the major, immediate consequences of the OECD BEPS project, which culminated in fifteen action items in 2015, was the introduction of required country-by-country reporting. Under this annual reporting system, most large multinationals must report key financial, operational, and tax-related information on a per-jurisdiction basis, including related-party transactions. *Action 13: Country-by-Country Reporting*, OECD, <https://www.oecd.org/tax/beps/beps-actions/action13/> (last visited Jan. 6, 2021).

<sup>9</sup> The scandal that erupted in 2014 over the circumstances surrounding Luxembourg's issuance of taxpayer-favorable tax rulings resulted in new European Union disclosure requirements. Instituted in 2015, these new rules require EU member states to automatically exchange certain advance taxpayer rulings. See, e.g., Council Directive 2015/2376 of 8 December 2015 Amending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation, 2015 O.J. (L332) 6, 7; Allison Christians, *Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time*, 76 TAX NOTES INT'L 1123 (2014); Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1 (2017).

<sup>10</sup> See, e.g., Christians, *supra* note 9; Marian, *supra* note 9; Oei & Ring, *Leak-Driven Law*, *supra* note 3; Stewart, *supra* note 6.

reporting);<sup>11</sup> (2) the global Common Reporting Standard (CRS) (third-party reporting and automatic exchange of specified financial account information) in which the United States is not a participant;<sup>12</sup> (3) the OECD's BEPS-based Country-by-Country Reporting (annual reporting to jurisdictions by large multinationals of certain financial and related-party transaction information in aid of transfer-pricing analysis);<sup>13</sup> and (4) beneficial ownership registries.<sup>14</sup>

As the contours of current global transparency and disclosure practices have taken shape, debates have typically questioned: (1) how much self-reporting should be required of taxpayers; (2) how much third-party reporting should be required, by which third-parties, about whom, to whom, and with what penalties; (3) when should tax-related information flow automatically across borders to tax authorities; (4) what tax-related disclosures should be made public (and to what degree and in what form); (5) to what standards of data protection should recipients of tax disclosures be held, and who will assess compliance with such standards; and (6) what are legitimate reasons for departing from otherwise accepted transparency and disclosure standards.

Acknowledgement of this global transparency and disclosure trend masks significant inconsistencies and tensions. For example, the United States arguably played a pioneering role in the widespread adoption of automatic tax information exchange as it pushed jurisdictions to help facilitate FATCA reporting and enforcement and served as “the driver” that made CRS possible.<sup>15</sup> Yet, the United States has remained an unequal participant in exchange of information, receiving more than it has formally

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<sup>11</sup> Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 71, 97 (2010).

<sup>12</sup> *Common Reporting Standard (CRS)*, OECD, <https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/> (last visited Apr. 5, 2021).

<sup>13</sup> See *Action 13*, *supra* note 8.

<sup>14</sup> See, e.g., GLOB. F. ON TRANSPARENCY & EXCH. OF INFO. FOR TAX PURPOSES & INTER-AMERICAN DEV. BANK, A BENEFICIAL OWNERSHIP IMPLEMENTATION TOOLKIT (2019), <https://www.oecd.org/tax/transparency/beneficial-ownership-toolkit.pdf>.

<sup>15</sup> Kristen A. Parillo, *U.S. Position on OECD Standards Problematic for Trusts and Funds*, 148 TAX NOTES 727, 727 (2015) (quoting Pascal Saint-Amans, director of the OECD Centre for Tax Policy and Administration, as characterizing the United States as “more than an early adopter [of CRS]; it’s the driver. It’s the country that made this largely possible”).

committed to providing.<sup>16</sup> While over 100 jurisdictions have embraced CRS and its automatic exchange of specified financial asset and account information,<sup>17</sup> the United States has not done so. The U.S. justification is grounded in the asserted equivalence between the United States' FATCA regime and CRS.<sup>18</sup> But importantly, the United States does not achieve reciprocity in its FATCA information exchange agreements, nor does it contend that it does.<sup>19</sup> Such reciprocity (and correspondingly, any proposed equivalence) remains explicitly aspirational.<sup>20</sup>

Critiques of U.S. participation in the global international tax transparency and disclosure movement are not limited to its policies on

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<sup>16</sup> See, e.g., Letter from Terhi Järvikare, Finnish EU Presidency of the Council, to Steven T. Mnuchin, U.S. Sec'y of the Treasury (Dec. 3, 2019), Tax Notes Doc. No. 2019-46930 [hereinafter "EU Letter"] (stating in part, "We regret to note the lack of equivalent reciprocity in exchange of financial account information between the United States and the EU Member States," and "We regret to note that the United States is the only major financial centre that has not committed to the Common Reporting Standard."). In the U.S. response to concerns about reciprocity in exchange of information, Deputy Assistant Secretary of the Treasury L.G. "Chip" Harter explained, "We are pleased that FATCA has inspired the subsequent adoption of the Common Reporting Standards by EU member states. We share a common goal in promoting the automatic exchange of financial account information between tax authorities. *The U.S. government recognizes its commitments under our reciprocal IGAs and will continue to work towards achieving equivalent levels of reciprocal information exchange.*" Letter from L.G. "Chip" Harter, Deputy Assistant Sec'y, U.S. Dep't of the Treasury, to Terhi Järvikare, Finnish EU Presidency of the Council (Mar. 12, 2020) [hereinafter "Harter Letter"] (emphasis added); see also Noam Noked, *Should the United States Adopt CRS?*, 118 MICH. L. REV. ONLINE 118, 122–23 (2019) (detailing the limits of U.S. reporting under its FATCA intergovernmental agreements (IGAs) and its nonparticipation in CRS); Allison Christians, *What You Give and What You Get: Reciprocity Under a Model 1 Intergovernmental Agreement on FATCA*, CAYMAN FIN. REV. (Apr. 12, 2013), <http://web.archive.org/web/20130609190811/http://www.compasscayman.com/cfr/2013/04/12/What-You-Give-and-What-You-Get-Reciprocity-under-a-Model-1> (detailing the differences between what the U.S. promises and what it receives under various IGAs).

<sup>17</sup> See *CRS by Jurisdiction 2020*, OECD, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/crs-by-jurisdiction-2020.htm> (last visited Apr. 19, 2021).

<sup>18</sup> See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-180, FOREIGN ASSET REPORTING: ACTIONS NEEDED TO ENHANCE COMPLIANCE EFFORTS, ELIMINATE OVERLAPPING REQUIREMENTS, AND MITIGATE BURDENS ON U.S. PERSONS ABROAD 28–34 (2019) [hereinafter "GAO"] (comparing FATCA and CRS, and suggesting limited U.S. upside from replacing FATCA with CRS).

<sup>19</sup> See sources cited *supra* note 16. In part, the limits of U.S. reciprocity under its FATCA IGAs reflect current limitations in U.S. law which do not require U.S. financial institutions to collect some of the information required to be collected and shared by foreign financial institutions. See, e.g., Parillo, *supra* note 15, at 728.

<sup>20</sup> See sources cited *supra* notes 16 and 18.



automatic exchange of financial and account information. Entity transparency and access to beneficial ownership information remains limited in the United States, leading to accusations that the United States effectively facilitates tax evasion engaged in by other countries' taxpayers. In a widely quoted ranking of jurisdictions serving as tax havens, the United States has appeared in recent years as the world's second-biggest tax haven on a financial secrecy index, reflecting U.S. practices on both automatic exchange of information and entity transparency.<sup>21</sup>

The pattern of limited entity transparency in the United States reflects in part the history of the federal system of entity regulation. Each of the fifty states establishes its own rules governing the creation and operation of a wide range of entities, including corporations, limited liability companies, and trusts. The difficulty in tackling such transparency trends in a federal system has been outlined in global reports and other analyses.<sup>22</sup> For example, the Financial Action Task Force, an intergovernmental body organized in 1989 at the behest of the G-7 in response to global money-laundering concerns, observed in its 2006 report on the United States:

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<sup>21</sup> The Tax Justice Network ranked the United States number two in its Financial Secrecy Index for 2020, the same as its 2018 ranking. *See, e.g., Financial Secrecy Index—2020 Results*, TAX JUST. NETWORK, <https://fsi.taxjustice.net/en/introduction/fsi-results> (last visited Apr. 20, 2021); Lynnley Browning, *Report Says U.S. Is World's Second-Biggest Tax Haven*, BLOOMBERG (Jan. 30, 2018), <https://www.bloomberg.com/news/articles/2018-01-30/u-s-seen-as-world-s-second-biggest-tax-haven-after-switzerland>; Oliver Bullough, *The Great American Tax Haven: Why the Super-Rich Love South Dakota*, GUARDIAN (Nov. 14, 2019, 1:00 PM), <https://www.theguardian.com/world/2019/nov/14/the-great-american-tax-haven-why-the-super-rich-love-south-dakota-trust-laws>; Samuel Rubinfeld, *U.S. Becomes World's Second-Biggest Tax Haven*, WALL ST. J. (Nov. 29, 1999), <https://www.wsj.com/articles/u-s-becomes-worlds-second-biggest-tax-haven-1517339589>; *see also* Nicholas Shaxson, *Tackling Tax Havens*, IMF FIN. & DEV., Sept. 2019, at 6, 7 (noting that “most major havens are located in advanced economics or their territories,” and that the Tax Justice Network’s “Financial Secrecy Index ranks Switzerland, the United States, and the Cayman Islands as the top three jurisdictions for private wealth”); TAX JUST. NETWORK, FINANCIAL SECRECY INDEX 2020: NARRATIVE REPORT ON UNITED STATES OF AMERICA (2020), <https://fsi.taxjustice.net/PDF/UnitedStates.pdf>.

<sup>22</sup> *See, e.g., FIN. ACTION TASK FORCE, THIRD MUTUAL EVALUATION REPORT ON ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM: UNITED STATES OF AMERICA* 5 (June 23, 2006); *see also Failures to Identify Company Owners Impedes Law Enforcement: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affs.*, 109th Cong. 2 (2006) (statement of U.S. Senator Norm Coleman, Committee Chairman), <https://www.govinfo.gov/content/pkg/CHRG-109shrg32353/pdf/CHRG-109shrg32353.pdf> (“The absence of ownership disclosure requirements and lax regulatory regimes in many of our States make U.S. shell companies attractive vehicles for those seeking to launder money, evade taxes, finance terrorism, or conduct other illicit activity anonymously.”).

In discussions with the state authorities, it was clear that there was a realization of the threats posed by the current “light-touch” incorporation procedures, including the failure to obtain meaningful information on individuals who effectively control the entities. However, the states primarily see this activity as a revenue-raising enterprise to substitute in part for their partial tax-free environment, and the company formation agents represent a powerful lobby to protect the status quo. Therefore, any proposals to enhance the disclosure requirements have not progressed, with defenders of the status quo arguing that, since the money laundering threat only crystallizes when the company gains access to the financial system, an effective safeguard should already exist in the form of the institutions’ CDD [customer due diligence] obligations.<sup>23</sup>

The net effect of U.S. federal and state policy regarding transparency, disclosure, and exchange of information has been the rise of the United States in the ranks of countries globally viewed as tax havens, all despite the U.S. role as an “early” advocate for automatic exchange through its FATCA regime.<sup>24</sup>

### *B. Digital Data*

Against these transparency trends, there have arisen parallel trends with data. Of course, the tax system has always relied on information—especially self-reported information from taxpayers.<sup>25</sup> But increasingly over the years, third-party information (including reporting of wages, dividends, interest, and financial accounting information under FATCA) has played an expanding role in curbing underreporting, avoidance, and evasion. A host of rules govern the Internal Revenue Service’s (IRS) obligation to protect taxpayer information and delineate the circumstances under which the IRS may share information with other agencies in the United States, and with foreign governments.<sup>26</sup> Long before data began taking a substantially digital form, taxpayers and policy makers grappled with both privacy and data-use worries. Thus, coming into the twenty-first century, the tax system was familiar with the major risks from its reliance on data. But the shifting nature

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<sup>23</sup> FIN. ACTION TASK FORCE, *supra* note 22, at 236.

<sup>24</sup> *Financial Secrecy Index*, *supra* note 21; *see also* Shaxson, *supra* note 21, at 9.

<sup>25</sup> *See, e.g.*, Michael Hatfield, *Cybersecurity and Tax Reform*, 93 IND. L.J. 1161, 1163 (2018) (noting the extensive quantities of information collected by the IRS).

<sup>26</sup> *See, e.g.*, I.R.C. § 6103.



of data—its new digital foundations (along with the new value that can be derived from such data precisely because of the ability to use technology and algorithms to process, manage and evaluate the information)<sup>27</sup>—present pointedly new questions for the IRS and for society more generally. In some cases, these risks are expanded versions of preexisting challenges, and in others, they represent a substantially new kind of data risk, as briefly outlined here.

### 1. Familiar Problems Heightened

Perhaps the somewhat easier task is to pinpoint ways in which long-established concerns about the tax system’s reliance on data, born in a paper world, take new shape in a digital one. For example, in an effort to streamline the tax reporting process for taxpayers and those with third-party reporting obligations, much of the filing and data collection process has shifted to an electronic format.<sup>28</sup> Correspondingly, questions about hacking, access to online data, and security in transmission emerged, and the types of solutions they demanded looked different from the quite tangible protective controls of a paper world.<sup>29</sup> The measures now required—for example, establishing and maintaining cybersecurity protections—can be both expensive and challenging, and the IRS has not been extremely successful in implementing

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<sup>27</sup> Oei & Ring, *supra* note 1, at 712.

<sup>28</sup> See, e.g., *Future State Initiative*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/future-state-initiative> (last updated Jan. 22, 2021) (outlining plans to “take advantage of the latest technology to move the entire taxpayer experience to a new level”); see also Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 2001(a), 112 Stat. 685, 723 (announcing congressional policy of encouraging paperless tax return filing with a goal of eighty percent of federal tax and information returns filed electronically by 2007); *E-file for Large Business and International (LB&I)*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/corporations/e-file-for-large-business-and-international-lbi> (last visited Jan. 17, 2021) (providing guidance on electronic filing). See generally Hatfield, *supra* note 25, at 1165 (detailing government interest in e-filing and online processes for taxpayers); Issie Lapowsky, *Filing Taxes Should Be as Easy as Ordering a Pizza, Obama Says*, WIRED (Oct. 12, 2016), <https://www.wired.com/?p=2104509> (President Obama seeks to implement a system that makes paying taxes “as easy as ordering a pizza”).

<sup>29</sup> See, e.g., *Taxpayer First Act—Cybersecurity and Identity Protections*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/taxpayer-first-act-cybersecurity-and-identity-protections> (last visited Jan. 17, 2021); *Tax Security 2.0: The Taxes-Security-Together Checklist*, INTERNAL REVENUE SERV., <https://www.irs.gov/tax-professionals/tax-security-20-the-taxes-security-together-checklist> (last visited Jan. 17, 2021); TREASURY INSPECTOR GEN. FOR TAX ADMIN., U.S. DEP’T OF TREASURY, REF. NO. 2020-20-073, FISCAL YEAR 2020 EVALUATION OF THE INTERNAL REVENUE SERVICE’S CYBERSECURITY PROGRAM AGAINST THE FEDERAL INFORMATION SECURITY MODERNIZATION ACT 24 (2020).

them.<sup>30</sup> The IRS is not alone. In January 2021, the Judicial Conference of the United States announced new security measures in the face of a stream of private and public sector cybersecurity breaches.<sup>31</sup> At the heart of the Judicial Conference's new controls—a return to paper and disconnected devices. Going forward, highly sensitive federal court documents will be accepted in paper form or in secure electronic form (e.g., a thumb drive) to be stored in stand-alone computers.<sup>32</sup> Despite the gravity of the threats prompting these security measures, the core drivers of these concerns predate the digital age.

## 2. New Face of Data Risk

In addition to the familiar risks of a predigital world, the rise and reach of digital data carries the potential to create problems of such a different scale or of such a different type from the past that they may not be adequately on our collective radar.<sup>33</sup> That is, although the IRS may face design, resource, and implementation challenges in countering the cyber-related risks typified by hacking, we know these risks exist. But for other kinds of problems, no response is possible until the risks have been sufficiently diagnosed. For example, the very ease in transmitting and processing data that enables both individual and corporate taxpayers to engage with the IRS in a paperless world, means that the scale of harm from breaches of IRS security may be more egregious. The damage that can be caused by seizing the information of a few taxpayers is wholly different from that which might be possible from securing data on thousands, or millions, of taxpayers. The numerous tax leaks over the past decade provide clear evidence of how the modern data age

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<sup>30</sup> See, e.g., Hatfield, *supra* note 25, at 1163–64 (contending that IRS had spent billions of dollars yet “failed to establish a state-of-the-art computer system, or even a searchable database of all taxpayer information” and that after spending \$139 million over four years, it had “failed to upgrade from Windows 2003 to Windows XP”).

<sup>31</sup> *Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records*, U.S. COURTS (Jan. 6, 2021), <https://www.uscourts.gov/news/2021/01/06/judiciary-addresses-cybersecurity-breach-extra-safeguards-protect-sensitive-court>.

<sup>32</sup> *Id.*; see also *Highly Sensitive Document Procedures and Court Orders*, U.S. COURTS (Jan. 25, 2021), <https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links/highly-sensitive-document-procedures> (listing new security procedures orders issued by the various federal district courts and courts of appeal).

<sup>33</sup> See, e.g., Oei & Ring, *supra* note 1, at 720; Oei & Ring, *Leak-Driven Law*, *supra* note 3, at 538.

changes everything.<sup>34</sup> As my coauthor Shu-Yi Oei and I argued in *Leak-Driven Law*, with “centralized and computerized data storage” there is more potential for large caches of data to be grabbed and transferred.<sup>35</sup> Moreover, once acquired, such data can be easily shared with a wide range of actors, and ultimately with the public, through a website.<sup>36</sup> As we contended, a digital world effectively magnifies the power and effects of such data, whether such effects are considered positive (such as unveiling a widespread abuse to the public) or negative (inciting government action without adequate review)—or even whether the data is accurate. And whoever controls the data and the website on which it is posted has significant power in shaping an almost instantaneous and global perspective.

Of course, tax leaks are just one fraction of the multitude of ways in which access to data can be deployed. The potential for digital-data-driven criminal conduct, control of workers, influence over markets and media, intrusions into privacy, and amplification of existing biases along race and socioeconomic lines, constitute a sampling of risks from a world of exponential digital data growth. Although it is beyond the scope of this Article to explore these risks in detail, my coauthor Shu-Yi Oei and I have undertaken such an effort elsewhere.<sup>37</sup>

We can already observe a flood of new U.S. litigation challenging parties’ collection and/or use of data. A quick survey reveals the following sample cases: (1) *Campana v. Nuance Communications, Inc.*, Case No. 2021-CH-00374 (Circuit Court Cook County) (software company engaged in providing speech recognition technology accused of illegally collecting

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<sup>34</sup> See Oei & Ring, *Leak-Driven Law*, *supra* note 3, at 538; see also Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1, 3 (2017) (outlining circumstances of the tax data leak colloquially known as “LuxLeaks,” in which hundreds of advance tax agreements entered into by Luxembourg with taxpayers were ultimately posted publicly by the International Consortium of Investigative Journalists).

<sup>35</sup> Oei & Ring, *Leak-Driven Law*, *supra* note 3, at 542–43.

<sup>36</sup> *Id.* at 550.

<sup>37</sup> *Id.* at 537; Oei & Ring, *supra* note 1, at 748–49; Oei & Ring, “Slack” in the Data Age, *supra* note 3.

client voice biometrics);<sup>38</sup> (2) *Latoya Roberts v. Restaurant Brands International Inc.*, Case No. 2021-CH-00353 (Circuit Court Cook County) (proposed class action against the Popeye’s chain alleging illegal collection and storage of worker fingerprints);<sup>39</sup> (3) *In re Facebook Biometric Information Privacy Litigation*, Case No. 15-cv-03747-JD (U.S. District Court for the Northern District of California) (Facebook agrees to settle class action regarding its use of facial recognition technology);<sup>40</sup> and (4) *In the Matter of Everalbum Inc.*, File No. 1923172 (Federal Trade Commission) (proposed settlement of case alleging that Everalbum, a developer of a photo app, deceived consumers regarding its use of facial recognition technology and its retention practices regarding photos and videos in deactivated accounts).<sup>41</sup> What we can say at this point is that the United States and other countries are still in the early stages of working through the implications of the digital-data world. A few states in the United States have begun enacting biometric privacy laws,<sup>42</sup> and New York is currently considering such legislation.<sup>43</sup>

Biometric data, though, is not unique in spawning litigation: Collection and use of financial, locational, and commercial digital data is also hotly contested. For example, in January 2021, the *New York Times*, citing a Defense Intelligence Agency memo prepared for Senator Ron Wyden of Oregon, reported that the agency “searched for the movements of Americans within a commercial database in five investigations over the past two and a

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<sup>38</sup> See, e.g., Celeste Bott, *Voice Recognition Tech Co. Broke Ill. Privacy Law, Suit Says*, LAW360 (Jan. 27, 2021), [https://www.law360.com/technology/articles/1349304?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=section](https://www.law360.com/technology/articles/1349304?utm_source=rss&utm_medium=rss&utm_campaign=section).

<sup>39</sup> See, e.g., Melissa Angell, *Popeyes Hit with Proposed Class Action over Biometrics*, LAW360 (Jan. 26, 2021), <https://www.law360.com/articles/1348701/popeyes-hit-with-proposed-class-action-over-biometrics->.

<sup>40</sup> *In re Facebook Biometric Info. Priv. Litig.*, No. 15-cv-03747-JD, 2020 U.S. Dist. LEXIS 151269, at \*4–5, \*8, \*11 (N.D. Cal. Aug. 19, 2020).

<sup>41</sup> Press Release, Fed. Trade Comm’n, California Company Settles FTC Allegations It Deceived Consumers About Use of Facial Recognition in Photo Storage App (Jan. 11, 2021).

<sup>42</sup> See, e.g., Natasha Singer & Mike Isaac, *Facebook to Pay \$550 Million to Settle Facial Recognition Suit*, N.Y. TIMES (Jan. 29, 2020), <https://www.nytimes.com/2020/01/29/technology/facebook-privacy-lawsuit-earnings.html> (three states have adopted biometric privacy rules); *Facebook Biometric Info. Privacy Litig.*, 2020 U.S. Dist. LEXIS 151269.

<sup>43</sup> State Assemb. A27, 2021–2022 Legis. Sess. (N.Y. 2021).

half years,” in part by acquisition of bulk smartphone location data.<sup>44</sup> Beyond these debates over arguably legally acquired data, evidence suggests that some explicit hacks have been conducted at the behest of foreign governments. Recently, U.S. global cybersecurity company FireEye, Inc. reported that it was the victim of a hack, one most probably conducted by “a nation with top-tier offensive capabilities.”<sup>45</sup> In 2016 and 2017, high profile hacks of the Democratic National Committee<sup>46</sup> and of the credit bureau Equifax<sup>47</sup> were attributed by U.S. officials to Russia and China, respectively. The potential implications of such hacks require little imagination.

In summary, the age of digital data promises to be one in which society and government must wrestle with sweeping questions of when and how to control collection, storage, and use of data. Our answers are not likely to be static ones, particularly as we gradually understand the burgeoning capacity to use such data. But along the way, data policy will not be a stand-alone issue, but rather one that will find itself regularly intertwined with regulatory fields such as taxation.

### III. THE 2021 CORPORATE TRANSPARENCY ACT

As discussed, we have twin revolutions in progress that will inevitably clash. This Part explores how these tensions play out in the new beneficial ownership legislation, the Corporate Transparency Act (CTA), enacted into law on the first day of 2021.<sup>48</sup> The CTA targets one feature of the U.S. legal

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<sup>44</sup> Charlie Savage, *Intelligence Analysts Use U.S. Smartphone Location Data Without Warrants*, *Memo Says*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/dia-surveillance-data.html>.

<sup>45</sup> E.g., David E. Sanger & Nicole Perlroth, *FireEye, a Top Cybersecurity Firm, Says It Was Hacked by a Nation-State*, N.Y. TIMES (Dec. 31, 2020), <https://www.nytimes.com/2020/12/08/technology/fireeye-hacked-russians.html>.

<sup>46</sup> *United States v. Netyksho*, No. 1:18-cr-00215-ABJ, at 1–2 (D.D.C. July 13, 2018), <https://www.justice.gov/file/1080281/download> (indictment of twelve Russian intelligence officers for their role in hacking the Democratic National Committee during the 2016 presidential election).

<sup>47</sup> *United States v. Zhiyong*, No. 1:20-cv-00046 (N.D. Ga. filed Jan. 28, 2020), <https://www.courtlistener.com/docket/17149745/united-states-v-zhiyong/> (indictment of four Chinese military officials for their role in hacking Equifax in 2017).

<sup>48</sup> William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, §§ 6401–6403, 134 Stat. 3388, 4604–25. An earlier version of this act appeared in 2017. See Corporate Transparency Act of 2017, H.R. 3089, 115th Cong. (2017). The enacted provisions were

system that has bolstered the country's reputation as a growing financial secrecy and tax haven: limited transparency for entity ownership.<sup>49</sup> The language introducing the CTA provisions included a "Sense of Congress" that observed that more than 2 million corporations and LLCs are formed under state law each year, yet "most or all States do not require information about the beneficial owners of" these entities.<sup>50</sup> Some actors rely on this lack of ownership transparency to advance illicit activities ranging from money laundering and terrorism financing to securities fraud and serious tax fraud.<sup>51</sup> Advocates had urged congressional action on corporate transparency for more than a decade,<sup>52</sup> although key actors including the Chamber of Commerce<sup>53</sup> and the State of Delaware<sup>54</sup> resisted such reforms. Ultimately, a confluence of factors<sup>55</sup> (including the impact of the Panama Papers leaks

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first introduced into Congress in 2019. Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019).

<sup>49</sup> § 6402, 134 Stat. at 4604. For an example of earlier efforts at some beneficial ownership reporting (here focused on banks, brokers, and dealers and similar financial institutions), see the Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29,398 (May 11, 2016) (to be codified at 31 C.F.R. pt. 1010, 1020, 1023, 1024, 1026), that took effect in May 2018. *See also* Press Release, Fin. Crimes Enf't Network, FinCEN Reminds Financial Institutions That the CDD Rule Becomes Effective Today (May 11, 2018), <https://www.fincen.gov/news/news-releases/fincen-reminds-financial-institutions-cdd-rule-becomes-effective-today>.

<sup>50</sup> § 6402(1)–(2), 134 Stat. at 4604.

<sup>51</sup> *Id.* § 6402(3).

<sup>52</sup> *See, e.g.*, Incorporation Transparency and Law Enforcement Assistance Act, S. 2956, 110th Cong. (2008) (introduced by Senators Carl Levin, Norm Coleman, and Barack Obama).

<sup>53</sup> *See, e.g.*, Letter from Am. Inst. of Certified Pub. Accts. et al., to Joseph Lieberman, Chairman, Comm. on Homeland Sec. & Governmental Affs., U.S. Senate (July 16, 2012) (objecting to an incorporation transparency bill then before the Senate), [http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2012-7.16-CoalitionLetter\\_S1483\\_Lieberman\\_Collins\\_Senate-2.pdf](http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/2012-7.16-CoalitionLetter_S1483_Lieberman_Collins_Senate-2.pdf); Letter from Neil L. Bradley, Chamber of Com. of the U.S., to Michael Crapo, Chairman, Comm. on Banking, Hous., & Urb. Affs., U.S. Senate, and Sherrod Brown, Ranking Member, Comm. on Banking, Hous., and Urb. Affs., U.S. Senate (Sept. 28, 2017) (objecting to S. 1717, the "Corporate Transparency Act").

<sup>54</sup> *See, e.g.*, *Lawmakers, Markell Administration Spar Over Corporate Transparency Legislation*, DEL. PUB. MEDIA (July 25, 2014), <https://www.delawarepublic.org/post/lawmakers-markell-administration-spar-over-corporate-transparency-legislation> (reporting that Delaware Secretary of State Jeff Bullock sent an email to Rep. Paul Baumbach urging him not to support the "Incorporation Transparency Law Enforcement Act" (H.R. 331) that had been introduced into Congress).

<sup>55</sup> *See, e.g.*, Ian Gary, *Congress Passes a Bipartisan Bill That Actually Fights Corruption. How Did That Happen?*, NBC NEWS (Dec. 18, 2020), <https://www.nbcnews.com/think/opinion/congress-passes-bipartisan-bill-actually-fights-corruption-how-did-happen-ncna1251707>.



regarding shell companies around the world, new support from the State of Delaware and the Chamber of Commerce,<sup>56</sup> and the realization by the banking sector that direct corporate reporting would relieve them of some costly reporting burdens<sup>57</sup>) led Congress to establish this new federal baseline for beneficial ownership reporting.<sup>58</sup>

The new legislation requires that “each reporting company shall submit to FinCEN [the Financial Crimes Enforcement Network of the Department of Treasury] a report that contains” specified information.<sup>59</sup> “Reporting companies” include corporations, LLCs, and similar entities created under state or American Indian tribal law, with limited exceptions.<sup>60</sup> The information that must be provided by the reporting companies in their reports to FinCEN includes the following items for each beneficial owner: full legal name, date of birth, address, and unique identifying number from acceptable documentation.<sup>61</sup> Thus, unlike, for example, FATCA reporting, the new beneficial ownership regime requires no reporting of financial details, nor does it require information about business plans or activities. Importantly, the CTA requires reporting on all beneficial owners otherwise covered by the definition, regardless of their citizenship or residency. For example, the statute anticipates that beneficial owners can document their identity by providing among other possible documents, “a nonexpired passport issued by the United States” or a “nonexpired passport issued by a foreign government.”<sup>62</sup> Although foreign tax authorities might have an interest in beneficial ownership data on U.S. citizens with tax connections to that jurisdiction, it is quite easy to imagine they would have a very powerful

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<sup>56</sup> Letter from Jeffrey W. Bullock, Sec’y of State, State of Del., to Jeb Hensarling, Chairman, Comm. on Fin. Servs., U.S. House of Rep. (June 8, 2018).

<sup>57</sup> See, e.g., Neil Haggerty, *Congress About to Relieve Banks of a Key AML Burden*, AM. BANKER (Nov. 20, 2020), <https://www.americanbanker.com/news/congress-about-to-relieve-banks-of-a-key-aml-burden>.

<sup>58</sup> William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 6402(5), 134 Stat. 3388, 4604.

<sup>59</sup> *Id.* § 6403(a), 134 Stat. at 4605.

<sup>60</sup> *Id.* (adding 31 U.S.C. § 5336(a)(11)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* (adding 31 U.S.C. § 5336(a)(1)).

interest in learning whether their citizens own or control stakes in U.S. entities.

For purposes of the CTA, beneficial owners generally include any individual who “directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—(i) exercises substantial control over the entity; or (ii) owns or controls not less than 25 percent of the ownership interests of the entity.”<sup>63</sup> Reporting is required on formation of the entity and must be updated for changes in beneficial ownership. Willful failure to comply with the reporting requirements risks civil and criminal penalties that include fines of up to \$10,000 and two years in prison.<sup>64</sup>

Responding to significant reservations about access to this newly required data, the legislation provides that except as otherwise authorized in the CTA, the beneficial ownership information reported under the regime shall be confidential and not disclosed. Permitted disclosures include those based on receipt of a request from (1) federal agencies pursuing national security, intelligence, or law enforcement activity; or (2) from state, local, or tribal law enforcement if a court has authorized them to seek the information in a criminal or civil investigation.<sup>65</sup> Additionally, disclosure will be made on receipt of a request from a federal agency on behalf of foreign law enforcement, judiciary, or prosecutors “including a foreign . . . competent authority . . . under an international treaty, agreement, convention, or official request” from “trusted foreign countries when no treaty, agreement, or convention is available.”<sup>66</sup>

The United States is far from the first jurisdiction to adopt such corporate transparency rules,<sup>67</sup> and the Financial Action Task Force has been

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<sup>63</sup> *Id.* (adding 31 U.S.C. § 5336(a)(3)).

<sup>64</sup> *Id.* (adding 31 U.S.C. § 5336(h)(3)(A)).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* (adding 31 U.S.C. § 5336(c)(2)(A) and (B)(i), (ii)). Certain other limited disclosures are also provided. *Id.* (adding 31 U.S.C. § 5336(c)(2)(B)(iii), (iv)).

<sup>67</sup> *See, e.g.,* MORAN HARARI ET AL., OWNERSHIP REGISTRATION OF DIFFERENT TYPES OF LEGAL STRUCTURES FROM AN INTERNATIONAL COMPARATIVE PERSPECTIVE: STATE OF PLAY OF BENEFICIAL OWNERSHIP—UPDATE 2020 (2020), <https://www.taxjustice.net/wp-content/uploads/2020/06/State-of-play-of-beneficial-ownership-Update-2020-Tax-Justice-Network.pdf>; B20, INTEGRITY & COMPLIANCE:

evaluating a range of reporting systems across the globe and identifying best practices in beneficial ownership regimes.<sup>68</sup> Of course, the roll out of the United States' new CTA awaits implementing regulations, and some observers have already identified potential complications and loopholes.<sup>69</sup> That said, the enactment of the CTA marks a noted shift in the U.S. stance on transparency and disclosure in the global holding of assets, entities, and ultimately financial resources.<sup>70</sup>

#### IV. REVOLUTIONS IN TENSION: THE CORPORATE TRANSPARENCY ACT

Not surprisingly, any effort to adopt or expand tax transparency, disclosure, or exchange of information practices, raises questions, critiques, and doubts, most of which focus on data protection and use. While some questions about the new CTA may reflect self-interested perspectives (such as those of taxpayers currently benefiting from limited transparency in pursuing their tax avoidance or tax minimization), others evince serious systemic concerns regarding the collection, storage, and sharing of what can often be important financial data. Thus, the new legislation offers a valuable case study for mapping and appraising how the interests in transparency and disclosure are likely to intersect and come in tension with concerns regarding digital data. To that end, this Part identifies three common scenarios under the CTA in which such tensions would likely manifest, delineates the choices at stake, and outlines the potential risks.

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POLICY PAPER 2020, at 20–23 (2020), <https://www.b20saudiArabia.org.sa/wp-content/uploads/2020/09/B20-Integrity-Compliance-Policy-Paper-30092020.pdf>.

<sup>68</sup> FIN. ACTION TASK FORCE, BEST PRACTICES ON BENEFICIAL OWNERSHIP FOR LEGAL PERSONS (2019), <https://www.fatf-gafi.org/media/fatf/documents/Best-Practices-Beneficial-Ownership-Legal-Persons.pdf>.

<sup>69</sup> See, e.g., Leigh-Alexandra Basha et al., *Congress Passes the Corporate Transparency Act with Veto-Proof Majority*, NAT'L L. REV. (Dec. 15, 2021), <https://www.natlawreview.com/article/congress-passes-corporate-transparency-act-veto-proof-majority>. Similarly, gaps have also been identified in the regimes of other jurisdictions. See, e.g., OLIVER BENNETT, HOUSE OF COMMONS LIBR., BRIEFING PAPER NO. CBP 9013, ECONOMIC CRIME IN THE UK: A MULTI-BILLION POUND PROBLEM (2020) (noting gaps in the UK reporting regime).

<sup>70</sup> See, e.g., Jeanne Whalen, *Congress Bans Anonymous Shell Companies After Long Campaign by Anti-Corruption Groups*, WASH. POST (Dec. 11, 2020), <https://www.washingtonpost.com/us-policy/2020/12/11/anonymous-shell-company-us-ban/>.

### A. The Risky Recipient

Under the CTA's statutory framework, foreign jurisdictions will be able to make requests through their U.S. federal counterparts for beneficial ownership information collected under the new legislation.<sup>71</sup> Therefore, it can be readily anticipated that, for example, a foreign competent authority under a bilateral tax treaty with the United States might make a request for beneficial ownership information on its own citizens or residents.<sup>72</sup> Such requests may elicit few legitimate data-protection concerns where the jurisdiction is a long-standing trade and treaty partner with an established record of appropriate data use and protection, although even such data recipients face hacking risks. However, the same request may trigger more serious concerns where it involves a jurisdiction with a treaty connection but a more checkered record, or perhaps a jurisdiction making a request, per the CTA's own terms, outside of a treaty context.<sup>73</sup> Although the OECD oversees an entire peer-review process for countries' compliance with best practices in information exchange and data protection,<sup>74</sup> it is not unreasonable to foresee disagreement on the appropriateness of the proposed recipient, at least with respect to the specific data and taxpayer at issue. This could arise, for example, in regards to a country with a more tenuous record that is experiencing current political turmoil.

Of course, the information to be collected in this new beneficial ownership database lacks the direct financial dimension of say, FATCA or CRS reporting, but it could be an important first step in gathering more information once an ownership connection has been established. In particular, the increasing ability to pair data with additional sources of data to generate heretofore unexpected results, insights, or uses, marks a growing

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<sup>71</sup> See § 6403(a), 134 Stat. at 4605.

<sup>72</sup> *Id.* (adding 31 U.S.C. § 5336(c)(2)) (“FinCEN may disclose beneficial ownership information reported pursuant to this section only upon receipt of . . . (ii) a request from a Federal agency on behalf of a law enforcement agency, prosecutor, or judge of another country, including a foreign central authority or competent authority (or like designation), under an international treaty, agreement, convention . . .”).

<sup>73</sup> *Id.* (allowing disclosure on an “official request made by law enforcement, judicial, or prosecutorial authorities in *trusted* foreign countries when no treaty, agreement, or convention is available” (emphasis added)).

<sup>74</sup> See, e.g., *Global Forum on Transparency and Exchange of Information for Tax Purposes: Peer Reviews*, OECD, [https://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews\\_2219469x](https://www.oecd-ilibrary.org/taxation/global-forum-on-transparency-and-exchange-of-information-for-tax-purposes-peer-reviews_2219469x) (last visited Apr. 5, 2021).

risk in a world of big data, AI, and expanding computational capacity. Whether there is any more serious risk attached to the sharing of the information available under the CTA as compared to what is already reported (and in some cases shared with foreign jurisdictions) under FATCA or CRS remains to be debated. It is not obvious that the risks are new, but one can envision ways in which such ownership details could convey information not readily ascertained through current disclosure avenues. However, the current U.S. track record for exchange of tax information under FATCA, as noted above, is not one characterized by a pattern of extensive disclosure. The fear may be substantially in advance of the reality.

### *B. Public Disclosure*

Even before the United States has issued regulations under its new corporate transparency regime, pressure has been mounting around the world for public disclosure of beneficial ownership registries. For example, nongovernmental organizations seek<sup>75</sup> the inclusion of such registries under the European Union's (EU) open data directive that was adopted in June 2019.<sup>76</sup> Although the EU explains that the primary mission of the open data directive is "focus[ing] on the economic aspects of the re-use of information rather than on access to information by citizens," it nonetheless "requires the adoption by the Commission (via a future implementing act) of a list of high-value datasets to be provided free of charge."<sup>77</sup> Transparency advocates want the beneficial ownership registries of EU members states to be on that list of datasets.<sup>78</sup>

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<sup>75</sup> See, e.g., Elodie Lamer, *NGOs Want Beneficial Ownership Registries in Open Data Directive*, 101 TAX NOTES INT'L 1312 (2021); *Call to Protect EU's Number One Anti-Corruption Instrument: Open Company Registers!*, ACCESS INFO EUR. (Dec. 9, 2020), <https://www.access-info.org/blog/2020/12/09/eu-open-company-reg/>.

<sup>76</sup> Directive 2019/1024, of the European Parliament and of the Council of 20 June 2019 on Open Data and the Re-Use of Public Sector Information, 2019 O.J. (L 172) 56.

<sup>77</sup> *European Legislation on Open Data*, EUR. COMM'N, <https://digital-strategy.ec.europa.eu/en/policies/open-data> (last updated Apr. 15, 2021).

<sup>78</sup> See Whalen, *supra* note 70.

The United Kingdom, itself, led the way by establishing its public beneficial ownership registry in 2016.<sup>79</sup> Subsequently, the U.K. announced that all U.K. Overseas Territories (including the Cayman Islands and the British Virgin Islands) will be establishing publicly accessible beneficial ownership registries by the end of 2023.<sup>80</sup> Public disclosure of beneficial ownership databases is not inherently an all-or-nothing choice. A disclosure regime could be designed to: (1) provide limited access to certain members of the public (e.g., those with an authorized purpose, or only citizens); (2) be limited to paying users; (3) prevent bulk searches; (4) include only a portion of the beneficial ownership data received by the government; and/or (5) provide data on a more aggregated basis.<sup>81</sup> Clearly, a digital-data world both facilitates some of those options (e.g., by enabling design of a reporting system for entities that feeds only certain categories of data reported by entities directly into the public system) and also provides grounds for some concerns (i.e., bulk, rapid, and continuous searches of the database are easy in a digital world as compared to one of individual paper records). It should be expected that the next battleground in the United States over beneficial ownership registries will be over the degree to which some or all of the information should be made public (contrary to the terms of the authorizing legislation, the CTA).

### C. *The Warning: Beneficial Owner Alerts*

Emerging data privacy trends around the globe have acknowledged various ways in which data should be within the control of its subjects. This vision underlies, for example, the EU's General Data Protection Regulation

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<sup>79</sup> See, e.g., *PSC Requirements for Companies & Limited Liability Partnerships*, GOV.UK (Jan. 27, 2016), <https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships> (providing guidance on compliance with the new requirements for the "People with Significant Control" register). The UK emphasized the significance of its decision, as the "first country in the G20 to create a public register of this kind." *"People with Significant Control" Companies House Register Goes Live*, GOV.UK (June 30, 2016), <https://www.gov.uk/government/news/people-with-significant-control-companies-house-register-goes-live>.

<sup>80</sup> See, e.g., ALI SHALCHI & FEDERICO MOR, HOUSE OF COMMONS LIBR., BRIEFING PAPER NO. 8259, *REGISTERS OF BENEFICIAL OWNERSHIP 15–20* (2021).

<sup>81</sup> See generally Dominic Kavakeb, *Patchy Progress in Setting Up Beneficial Ownership Registers in the EU*, GLOB. WITNESS (Mar. 20, 2020), <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/anonymous-company-owners/5amld-patchy-progress/>.



(GDPR), which among other requirements, provides “[p]ersonal data shall be: (a) processed lawfully, fairly and in a transparent manner in relation to the data subject.”<sup>82</sup> Of course, the context-specific application is critical. With beneficial ownership registries, data subjects presumably know that the law requires their entities to provide specified information to the government at certain points in time or on the occurrence of listed events. Beyond that, however, should these owners be informed when their data has been searched or requested by any domestic or foreign government body? In a public registry, should such owners receive an alert when someone has accessed their information? If so, should that alert simply note the time of access, or also the identity of the accessor? These questions may not be hypothetical. Technology makes such alerts possible and automatic, and one nonprofit has identified Greece as a jurisdiction that will notify beneficial owners when someone has searched for them.<sup>83</sup>

#### *D. Moving Forward*

How can the United States proceed effectively towards meaningful international tax transparency and disclosure while remaining attentive to risks in a digital-data world? Can the tensions between the need for transparency and disclosure and the potentially legitimate concerns about access to beneficial ownership data, the risks and advantages of a public registry, or recognition of data rights be sensibly navigated? A best-practices answer lies in a bundle of steps, none of which independently would prove sufficient, but which in combination may lead towards a sustainable system of transparency and disclosure that is sufficiently sensitive to the digital-data age:

*Acknowledge and address real digital-data concerns:* Most taxpayer concerns mirror those of the predigital age, including fears of inappropriate

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<sup>82</sup> Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, 35.

<sup>83</sup> See Kavakeb, *supra* note 81 (“At least one country—Greece—state [sic] that the beneficial owners of companies will be informed if someone has searched for them (apart from if the search was carried by public authorities).”). *But see, e.g.*, Elien Claeys, *The Implementation of the UBO Register in Belgium*, WHITE & CASE (Sept. 20, 2018), <https://www.whitecase.com/publications/alert/implementation-ubo-register-belgium> (“[B]eneficial owners will not be informed of any searches made in the [beneficial ownership] register regarding them.”).

foreign government use of acquired data (e.g., political reprisals, unofficially sanctioned kidnapping, sharing of data with local competitors) or mere incompetence in protecting data. Although the United States has erred on the side of too little transparency, taxpayers in other countries have questioned their country's own tax information exchange partners, especially where decisions with whom to share tax data may not match more conservative information-sharing decisions outside of the tax arena. Adoption of a coherent and defensible tax transparency and disclosure policy does not require unfettered access to U.S. data; but neither can it treat data risks as universally perilous when data is requested *from* us, but manageable when sought *by* us. Certainly, predigital risks may be exacerbated in a digital world, perhaps due to the scale with which tax data can now be parsed, combined, and analyzed for useful information. That said, just as the harms from data collection may have become outsized over time, so too have the potential for cross-border evasion and avoidance through the same underlying technologies.

*Separate legitimate taxpayer concerns from those more appropriately characterized as advocacy positions:* The debate surrounding country-by-country reporting, including the prospect of making such reporting public (in part), elicited numerous objections during the BEPS project. Corporate taxpayers challenged the value of these reports against the cost of preparation, advocated for a reduced number of reporting items, and resisted any publication of the data on the view that it would reveal business information to competitors and would be misinterpreted by the public.<sup>84</sup> Some of these complaints may be more aptly characterized as prioritizing business and competition rather than distinctly data-specific concerns. Arguably, none of these issues is inherently a question about digital data—country-by-country reports could be required in an analog world, and their results published for public review. But for the same reasons that tax leaks have a different power in a digital world, tax authorities should be attentive to how the power of data may shift as holders acquire more data and more potential to extract value from big data.

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<sup>84</sup> See, e.g., Teri Sprackland, *McDonald's, Nike Defend Compliance Records to EU Tax Committee*, 90 TAX NOTES INT'L 1541 (2018).

*Track efforts by U.S. and foreign authorities to acquire data from third-party vendors:* Tax and other authorities increasingly have the potential to purchase data in ways that may be unforeseen.<sup>85</sup> Not only can reliance on such data alter the value and use of data received through standard government information exchange mechanisms, it can, in some circumstances, serve as an alternative path. The legal issues surrounding third-party purchased data remain disputed, will vary by jurisdiction, and may need to be reevaluated as the number of sources increases and as the capacity to extract value continues to grow.

*Encourage a more frank and comprehensive public policy conversation:* Several competing, overlapping, and opposing trends run through and alongside U.S. discussions of international tax transparency and disclosure practices. These include the historic underfunding of the IRS, the reality that data is being amassed by private-sector actors and foreign governments, widespread taxpayer reliance on a technologically supported global flow of assets in their tax avoidance and evasion, the limits of a unidirectional data-exchange policy by the United States, and the recognition that a tax system in which taxpayers with a global reach can more readily escape tax liabilities contains the seeds of its own destabilization. Thus, critics of IRS security measures must be willing to support adequate agency budget allocations; those who challenge IRS data collection must acknowledge the implications of its failure to do so at a time when other actors (both government and private sector) are; and those who favor U.S. information gathering efforts need to consider the longer-term ramifications of discounting comparable legitimate interests of other countries.

## V. CONCLUSION

The current U.S. status, as a country widely perceived to be a financial secrecy haven for taxpayers (not to mention criminal actors) from other countries, is not a tenable one. It is not consistent with the country's regularly

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<sup>85</sup> For example, the *Washington Post* has reported that U.S. Immigration and Customs Enforcement (ICE) has accessed the private database CLEAR, which is run by a media and data corporation, is updated daily, and includes billions of records on individuals (e.g., utility customer data). Drew Harwell, *ICE Investigators Used a Private Utility Database Covering Millions to Pursue Immigration Violations*, WASH. POST (Feb. 26, 2021), <https://www.washingtonpost.com/technology/2021/02/26/ice-private-utility-data/>.

articulated goals within tax (e.g., the aim of ensuring that U.S. taxpayers cannot escape taxation through use of offshore assets and accounts) or beyond tax (e.g., efforts to counter money laundering and terrorism financing).<sup>86</sup> Against this backdrop, the newly enacted CTA marks a major step for the United States in joining other countries in adopting beneficial ownership reporting and registries. Though not primarily a tax-driven regime, the CTA's role in international tax enforcement and in tax transparency and disclosure practices could prove pivotal. The economic and social value of ensuring that cross-border taxpayers and their transactions do not elude the tax system reminds us that digital data is often *part* of a solution. As international tax reveals, digital data can find itself on both sides of a problem. A major factor in the rise of cross-border activity over the past forty years has been technology, which has dramatically eased communication and the movement of information across borders.<sup>87</sup> Given private-sector uses of digital technology having generated many of the cross-border business and tax planning opportunities available today, it seems implausible that government could wholly retreat from the enforcement capabilities that those same technologies make possible. Of course, the specific design details of the CTA (which are forthcoming in regulations), along with any future developments such as a public registry or shared government registry, will be the product of competing policy goals, advocacy, and lobbying. Thus, the CTA serves as a case study ideally situated for revealing tensions between tax transparency and disclosure goals on the one hand and the data concerns of a digital age on the other.

At the same time that expectations for global tax transparency and disclosure are rising, so too is public appreciation of the power of data in a digital world. Assessments of data risks will likely feature prominently in taxpayer objections, government criteria for transparency, and international standards for exchange (such as those of the OECD's Global Forum on

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<sup>86</sup> See, e.g., U.S. DEP'T OF THE TREASURY, NATIONAL STRATEGY FOR COMBATING TERRORIST AND OTHER ILLICIT FINANCING: 2020, at 3 (2020), <https://home.treasury.gov/system/files/136/National-Strategy-to-Counter-Illicit-Financev2.pdf> (The United States "has the world's most comprehensive and effective anti-money laundering and countering the financing of terrorism (AML/CFT) regime. It includes a strong legal foundation; robust interagency and intergovernmental coordination and information sharing; active and well-resourced operational, supervisory, and enforcement mechanisms; and extensive collaboration between the public and private sectors.").

<sup>87</sup> See, e.g., Ring, *supra* note 4.

Transparency and Exchange of Information for Tax Purposes).<sup>88</sup> But what of a view recommending that the United States strategically maintain its current course: a somewhat lopsided international tax transparency and disclosure policy, where the United States seeks what it needs but exercises great restraint in what it provides? The CTA, which currently requires foreign countries to run requests through a U.S. government body, retains the potential for imbalanced data access. But this policy position does little to protect U.S. taxpayers. Their information is being collected outside the United States and shared with U.S. tax authorities; thus, other countries acquire and hold the information. Additionally, any U.S. reticence in sharing tax information will benefit foreign taxpayers against their foreign tax authorities. That trade-off may be warranted with jurisdictions possessing questionable data-protection track records, but it is not justified for most other trading partners. Third, the residual winners in a one-sided U.S. data-exchange policy are the U.S. businesses built on providing a secrecy haven for foreign taxpayers. Embracing a transparency and disclosure policy that results in the United States procuring information needed for its own tax enforcement while not exchanging comparable data (and hence securing a competitive advantage for the United States as a haven destination) is an unprincipled approach. It can be sustained for a period of time, but it also introduces fissures in any vision of a shared international tax system. A policy maker need not be naïve about international tax relations to be concerned about the impact of unprincipled positions on the continued ability to negotiate in an international tax system. And, given the potentially transformative negotiations currently underway under the aegis of the OECD's Pillar 1 and Pillar 2, or their successors, maintaining negotiating power carries immediate and material consequences.

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<sup>88</sup> *Global Forum on Transparency and Exchange of Information for Tax Purposes*, OECD, <http://www.oecd.org/tax/transparency/> (last visited Apr. 5, 2021).