NATIONAL TAX: a comparative analysis
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The U.S. Department of Justice in March 2002 secured a federal court order in San Francisco compelling Visa International to hand over client records involving offshore credit card accounts held in various Caribbean, Pacific, and European jurisdictions.[1] In an earlier move in Miami, Mastercard had lodged 1.7 million records relating to 230,000 accounts with the Department of Justice. At the same time, the IRS had calculated that up to two million Americans were using offshore credit and debit cards for tax minimization purposes, costing billions of dollars a year in lost annual revenue.[2]

This action was not primarily aimed at the credit card industry per se. The Justice Department was not interested in *all* credit card accounts held outside the United States in *all* countries. Relying on a 1981 study undertaken at the request of the government ("Gordon Report"[3]), it focused on accounts maintained in 30 specified and listed jurisdictions, ranging from Anguilla to Vanuatu.[4] Most of them were small microstate International Finance Centers (IFCs), more commonly known as tax havens. Three were major world financial centers—Hong Kong, Singapore, and Switzerland. The Justice Department targeted these countries not so much because they were part of global credit card networks, but rather based on their nationality. A list was devised and then used as a legal instrument to prescribe specified treatment based on national origin alone. This had the effect of increasing reporting requirements of large U.S. companies engaged in business with those jurisdictions.

The ability of the U.S. government, through the Justice Department, to secure credit card records held by American resident taxpayers is just one example of the widespread use of tax blacklists by countries around the world. The petition submitted to the federal court to secure these credit card details never referred to a blacklist and was a temporary measure rather than a sustained public policy. However, it did result in different treatment for a specified category of transaction (credit card transactions) in specified foreign jurisdictions (the 30 IFCs), thus corresponding to the defining features of several tax blacklisting procedures.

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This article examines processes of blacklisting, compiling lists, and discrepancies in listing procedures. The first section presents an overview of comparative findings taken from 13 countries,[5] while the second looks more closely at U.S. practices in contrast to other countries. Exhibit 1 show the different types of blacklists used. Exhibit 2 demonstrates the relative prevalence of such lists among a selection of 14 OECD and non-OECD countries, showing a selection of the jurisdictions commonly included on such lists.[6] These lists are often characterized by serious flaws in the way that they are compiled, which tends to make them arbitrary and discriminatory.

The United States has been more reluctant than most to use blacklists for strictly fiscal purposes, even in the face of the considerable controversy surrounding tax haven-linked "corporate inversions" and "Benedict Arnold corporations." Although there have been a raft of legislative attempts to rein in such inversions, they have generally avoided the use of blacklists. However, in other ways the United States has been more in line with trends elsewhere, in particular the tendency to replicate lists compiled by international organizations in pursuit of national policy aims. Current thinking among some legislators favors reliance on a list of tax havens drawn up by the OECD in June 2000. In addition, the financial aspects of the 2001 USA PATRIOT Act[7] closely parallel and even explicitly delegate prerogatives to international organizations like the OECD and Financial Action Task Force (FATF). One question that this article raises is whether the United States itself is in danger of being blacklisted by foreign jurisdictions or organizations.

The Blacklists

National tax blacklists are rolls of jurisdictions that have rules, regulations, instructions, and laws that result in negative treatment for transactions with specified jurisdictions. They are one measure that governments use to control tax flight, avoidance, and evasion. Governments seek to maintain their capacity to raise revenue through taxation by restricting or prohibiting transactions undertaken by companies and private individuals using specified countries and territories.

In addition to blacklists, there are two other listing systems that provide for differentiated national tax treatment: (1) "graylists"—jurisdictions that have legislation deeming negative legal consequences for specific kinds of transactions depending on the circumstance of the transaction; and (2) "whitelists"—jurisdictions that give favorable national treatment to transactions with specified jurisdictions.

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A listing state must designate specified jurisdictions, usually labeled as tax havens, in this form of international tax policy. If, on the other hand, a country has general rules imposing restrictions on all third-party states with tax rates lower than 20%, it does not qualify as a blacklist (particularly relevant for the anti-inversion measures discussed below). These blacklists may appear as part of rules relating to controlled foreign companies (CFCs), transfer pricing, deductibility, or specific corporate vehicles. See Exhibit 1 for details of the different kinds of blacklists enforced by Argentina, Brazil, Germany, Italy, Mexico, Portugal, Spain, and Venezuela.

Nearly 100 jurisdictions appear on one blacklist or another. These blacklists focus on small states, including those with substantial IFCs (for example, Bermuda, Cayman Islands, British Virgin Islands, and Luxembourg) and those with basic IFC facilities (e.g., Niue), as well as those with almost no financial facilities at all (such as St. Helena). Exhibit 2 provides details of blacklists, graylists, and whitelists enforced by major listing countries, as well as a selection of the jurisdictions that regularly appear on these lists.

Compiling the Lists

There is no discernible worldwide trend toward either establishing or moving away from national tax blacklists. The compilation, maintenance, and enforcement of blacklists are determined by individual governments and revenue authorities. However, this determination draws on trial and error, diffusion between tax administrations, and emulation with multilateral agencies, such as the Inter-American Center for Tax Administrations, the OECD's Committee for Fiscal Affairs and its affiliated anti-money laundering group, the FATF. Most blacklisting states are concentrated in Southern Europe and Latin America. Like the United States offshore credit card operation in 2002, France and Germany tend to use lists periodically for specific purposes.

Although there has not been any systematic increase in the use of tax blacklists, several key fiscal developments have converged to concentrate attention on tax havens. First, the use of havens is growing. In 1968, offshore deposits were valued at US$10.6 billion, half held by banks, half by non-banks. By 1978, this had increased 17 times for non-bank holdings and 30 times for offshore bank deposits.[8] In 1994, the International Monetary Fund (IMF) valued offshore assets at US$2.1 trillion, representing 20% of total global private wealth.[9] By 1998, a British parliamentary report estimated that this had increased to over US$6 trillion.[10]

In his analysis of 2001 data released by the U.S. Department of Commerce, Martin A. Sullivan found that foreign subsidiaries of U.S. corporations domiciled in the top 11 tax havens accounted for 46% of all foreign profits, even though they represented only 13% of foreign capacity and 9% of foreign employment. The total value of U.S. corporate profits domiciled offshore was valued at US $63 billion. Sullivan observed that "a decade ago about a quarter of all foreign profits of U.S. corporations were in tax havens; by 2001 almost half of all foreign profits of U.S. corporations were in tax havens."[11]

Yet the question remains, why do some countries end up on tax blacklists and not others? Sullivan shows that the top 11 tax havens for U.S. firms include not only countries such as the Cayman Islands and Bermuda, but also the

Netherlands, Belgium, and Denmark. Indeed, the top "tax haven" noted by Sullivan was the Netherlands. None of these three countries appears on any list that has been analyzed for this research, not even that of the most prolific of blacklisters, Venezuela.

To gain an understanding of why some jurisdictions are listed and others are not, it is necessary to examine the procedure, rules, and criteria used by states when devising blacklists. In summary, the methodologies used to compile blacklists are often opaque and do not tend to follow any formal procedure.

Tax laws, rates, and compliance regimes change constantly. Unless the time is taken and resources are invested in updating lists as circumstances change, they quickly become obsolete, and thus effectively penalize third-party IFC states in an arbitrary and discriminatory manner. Almost all lists target "tax havens," but it is extremely difficult to actually define a "tax haven." Denmark and Belgium hardly seem to fit the image, but they are used for tax structuring purposes by U.S. firms. In 1987 the OECD observed:

> The concept of a "tax haven" is a relative one as any country can be a tax haven in relation to a particular operation or situation. Attempts to provide a single definition of a "tax haven" are bound to be unsuccessful. It can be argued that the "tax haven" concept is such a relative one that it would serve no useful purpose to make further attempts to define it.[12]

This note of caution did not prevent the OECD from developing its own highly controversial list of 35 tax havens in 2000. Although not called a blacklist, multilateral listings like that of the OECD have been converted into outright blacklists by national governments in a punitive and discriminatory way. For example, since 2000, the FATF has maintained a responsive and flexible list of non-cooperative countries and territories (NCCTs), jurisdictions deemed to be non-cooperative in the fight against money launder-

EXHIBIT 1
National tax blacklists

	Arg	Braz	Ger	Ital	Mex	Por	Spa	Ven
CFC	Yes			Yes		Yes	Yes	Yes
Transfer	Yes	Yes						
Deductions	Yes			Yes	Yes	Yes	Yes	
Withholding		Yes					Yes	
Reporting		Yes			Yes		Yes	Yes
Product	IBC	Lease	Trust			Holding	CIS	
Residence			Yes	Yes				

CFC: The domestic shareholders of companies and other entities incorporated in listed jurisdictions are taxed as if all profits from these entities had been distributed to them, even if this has not occurred.

Transfer pricing: Trading between associated entities across borders is automatically regarded as in violation of the arm's-length principle when the transaction involves listed jurisdictions.

Disallowance of deductions: Tax deductions that normally would be allowed for individuals and companies are disallowed for transactions within or involving listed jurisdictions.

Withholding: Withholding taxes are automatically applied to transactions with listed jurisdictions and the onus is on taxpayers to demonstrate why some or all should be reimbursed.

Special reporting requirements: Taxpayers must provide domestic tax authorities with more information concerning transactions with a listed jurisdiction or be charged with an offense.

Product: Particular financial products from listed jurisdictions attract unfavorable treatment, e.g., international business companies (IBC), leasing companies, property holding companies, collective investment schemes (CIS), and trusts (future beneficiaries may be taxed on trust assets even before they have been distributed).

Residence: Citizens moving to reside in a listed jurisdiction are still subject to some tax obligations from their home country even after they have left.

1 In re John Does (DC Calif., No. CV 02-0049 Misc., March 27, 2002). Although there were several later court actions with similar facts (see "IRS Chronology on Credit Cards and John Does Summons," BNA Daily Tax Report, October 16, 2002, TaxCore), the March 2002 case is a particularly good example of the points discussed.

2 In 2001, the IRS estimated that it loses US$70 billion annually due to tax haven activity. See Owens, "The OECD Work on Tax Havens," conference paper presented July 8-9, 2002, New York, page 8.

3 Gordon, *Tax Havens and Their Use by United States Taxpayers: An Overview* (Books for Business, 2002).

4 Anguilla, Antigua and Barbuda, Aruba, Bahamas, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Dominica, Gibraltar, Guernsey/Sark/Alderney, Hong Kong, Isle of Man, Jersey, Liechtenstein, Luxembourg, Malta, Nauru, Netherlands Antilles, Panama, Samoa, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Singapore, Switzerland, Turks and Caicos Islands, and Vanuatu.

5 Argentina, Australia, Brazil, Canada, France, Germany, India, Italy, Mexico, Portugal, Spain, United Kingdom, and Venezuela.

6 This data is drawn from Sharman and Rawlings, "Deconstructing National Tax Blacklists: Removing Obstacles to Cross-Border Trade in Financial Services," Society of Trust and Estate Practitioners conference "Beyond the Level Playing Field?," London, September 20, 2005.

7 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107-56, October 26, 2001.

EXHIBIT 2
Country-Based National Tax Blacklists

Blacklisted	Arg	Aust	Braz	Can	Fran	Ger	Ind	Ital	Mex	Por	Spa	UK	US	Ven
Anguilla	X	#	X		#	#		X	X	X	X		#	X
Bahamas	X	#	X		#	#		X	X	X	X		#	X
Barbados	X		X					X	X		X		#	
Bermuda	X	#	X		#	#		X	X	X	X		#	X
BVI	X	#	X		#			X	X	X	X		#	X
Cayman	X		X		#	#		X	X	X	X		#	X
Cyprus	X	#	X					X	X	X	X			X
Gibraltar	X	#	X		#	#		X	X	X	X	G	#	X
Guernsey	X	#	X		#	#		X	X	X	X	G		X
Hong Kong	X		X					X	X	X	X		#	X
Isle of Man	X	#	X		#	#		X	X	X	X	G		X
Jersey	X	#	X		#	#		X	X	X	X			X
Liechtenstein	X	#	X		#	#		X	X	X	X		#	X
Luxembourg										G	G	G	#	X
Malta	X		X					G	X		X	G		X
Mauritius	X		X					G	X	X	X			X
Monaco	X	#	X		#	#		G	X	X	X		#	X
Neth. Antilles	X	#	X					X	X	X	X			
Panama	X	#	X		#	#		G	X	X	X		#	X
St. Lucia	X	#	X					X	X	X	X		#	
Singapore			X					X				G	#	X
Switzerland					#	#		X			X		#	X
Turks & Caicos	X	#	X		#	#		X	X	X	X		#	X

X = blacklist: Jurisdictions are named as tax havens in legislation, decrees, or regulations in a way that entails negative formal-legal consequences for particular types of transactions.

G = graylist: Jurisdictions are named as potential tax havens in legislation, decrees, or regulations in a way that may entail negative formal-legal consequences for particular types of transactions if certain other conditions are met.

= informal blacklist: Jurisdictions are named as tax havens in legislation, decrees, regulations or other official publications in an illustrative way that does not entail formal-legal consequences.

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8 Picciotto, "Offshore: The State as Legal Fiction," in Hampton and Abbott, eds. *Offshore Finance Centers and Tax Havens: The Rise of Global Capital* (Macmillan, 1999), page 59.

9 Cassard, "The Role of Offshore Centers in International Financial Intermediation," International Banking IMF working paper, WP/94/107 (IMF, 1994).

10 "Review of Financial Regulation in the Crown Dependencies: A Report" (The Edwards Report) (U.K. Home Office, 1998), page 4.

11 Sullivan, "U.S. Multinationals Move More Profits to Tax Havens," Tax Notes Today 2004 TNT 27-4 (February 10, 2004).

12 "International Tax Avoidance and Tax Evasion: Four Related Studies" (OECD, 1987), page 4.

13 See Gordon, *supra* note 3.

14 Office of Tax Policy, Department of the Treasury, "Corporate Inversion Transactions: Tax Policy Implications" (May 2002), www.treas.gov/press/releases/docs/inversion.pdf?IMAGE.X=0%5C&IMAGE.Y=0.

15 On inversions, see Dubert, "Section 7874 Temporary Regulations: Treasury and IRS Wave Taxpayers Through the Stoplight," 17 JOIT 12 (July 2006).

16 Cloyd, Mills, and Weaver, "Firm Valuation Effects of the Expatriation of U.S. Corporations to Tax Haven Countries" (October 16, 2002), Social Science Research Network, http://ssrn.com/abstract=341141.

17 H.R. 3922, introduced by Rep. Maloney (D-NY), March 11, 2002; H.R. 4756, introduced by Rep. Johnson (R-Conn.), May 16, 2002.

18 P.L. 107-296.

19 For prior coverage, see Blake and Di Santo, "Guidance on Anti-Money-Laundering Compliance Programs Under USA PATRIOT Act," 13 JOIT 35 (August 2002); Blake, Michaels, and O'Donnell, "More Money-Laundering Rules Under USA PATRIOT Act," 13 JOIT 47 (May 2002); Blake, "Stricter Reporting Requirements for Banks Under USA PATRIOT Act Money-Laundering Rules," 13 JOIT 53 (April 2002).

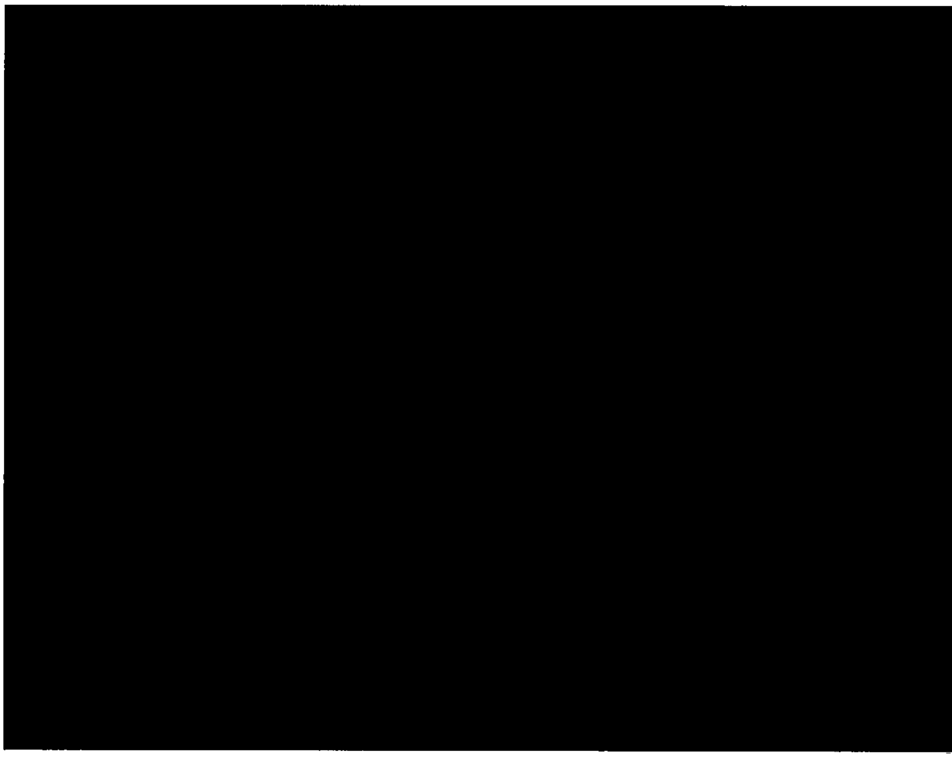
20 "A Bank Run in Macau," Economist (September 22, 2005).

21 "Update on the Global Campaign Against Terrorist Financing," Second Report of an Independent Task Force on Terrorist Financing Sponsored by the Council on Foreign Relations (June 15, 2004), page 25,www.cfr.org/content/publications/attachments/Revised_Terrorist_Financing.pdf.

22 Spencer, "OECD Proposals on Harmful Tax Practices: An Update," 15 JOIT 8 (March 2004).

23 "Towards Global Tax Co-operation" (OECD, 2000), page 10.

ing. The FATF regularly updates the list. In 2003, Resolution 7, amending section 124 of the Argentine Companies Act, copied the FATF's list in its own tax blacklist. This added the Cook Islands (a major center for asset protection trusts) to Argentina's national tax blacklist. As of early 2005, the Cook Islands is no longer classified as an NCCT by the FATF (the total number of NCCTs currently numbers just two, Myanmar and Nigeria), but Argentine tax law continues to reflect the earlier, now outdated listing. In line with this example, countries often effectively outsource the task of devising lists to third-party international organizations, but are unresponsive to changes in the original template listing.



Discrepancies in Tax Blacklists

National tax blacklists often include inconsistencies, omissions, and eccentricities that lend credence to the observation that they are compiled by simply copying and pasting from one jurisdiction to another. For example, Argentina, Mexico, Portugal, and Venezuela enforce a blacklisting against the "Pacific Islands." No further details are provided. Yet the "Pacific Islands" is not a state or a legal or fiscal entity. It is a geographical area that includes a wide variety of countries, territories, and tax regimes. This is equivalent to including "Western Europe" or the "Southern Hemisphere" in a compilation of tax havens. The Spanish blacklist of 1991 includes an entry called the "Windward Islands," which has not existed as a jurisdiction since 1960, and now includes half a dozen sovereign countries and the French department of Martinique. Similarly, Spain listed the island of Vanua Levu, which is part of Fiji, not a separate country or an IFC. It seems possible that Vanua Levu was confused with Vanuatu, a South Pacific country 1,000km to the West that is an IFC. This relatively simple mistake was only corrected 12 years later.

These are not isolated examples. National tax blacklists include nonexistent countries, countries that no longer exist, geographical regions incorrectly named as jurisdictions, and territories that do not have any IFC facility whatsoever (in some instances they do not even have banks). They mistake one jurisdiction for two (Antigua and Barbuda), mix up different places with similar names, list dissolved jurisdictions, and misuse FATF and OECD listings. They are decades out of date and confuse domestic and international tax treatment. For example, the Australian Indian Ocean island territories of Christmas Island and the Cocos (Keeling) islands are included in Argentine, Mexican, Portuguese, and Venezuelan lists. There was some evidence that the Cocos Islands were or could have been used for tax planning back in the 1970s, but this came to an end when the islands voted for full integration into Australia in 1984. Australian law, including Australian tax and company law, applies in both of these territories, and they are indistinguishable from Australia in a fiscal sense, yet they continue to be listed as tax havens in four national tax blacklists.

Countries do not always distinguish between exceptional tax concessions and general tax rates. For example, Chile blacklisted Barbados because it taxed companies at a 2.5% rate. In fact, only specified foreign corporations enjoy this concessionary rate; most Barbadian companies are taxed at rates that are ten times higher.

National tax blacklists are characterized by several common trends and features. Because of the kind of mistakes described above, they disproportionately target small states in an arbitrary and discriminatory manner. Cutting and pasting from one list to another ends up damaging the economies of small island states, rather than questioning the exact risk management issues that emerge from tax competition between both small and large countries.

> The top 11 tax havens for U.S. firms include not only countries such as the Cayman Islands and Bermuda, but also the Netherlands, Belgium, and Denmark

The United States: A Comparative Perspective

The United States faces the same problem in defining and distinguishing tax havens as the other countries in Exhibit 2. Returning to the Gordon report, this dilemma is bluntly stated:

> The term "tax haven" has been loosely defined to include any country having a low or zero rate of tax on all or certain categories of income, and offering a certain level of banking and commercial secrecy. Applied literally, however, this definition would sweep in many industrialized countries not generally considered tax havens, including the United States....The term "tax haven" may be defined by "smell" or reputation test: a country is a tax haven if it looks like one and if it is considered one by those who care.[13]

In looking to distinguish between countries with "normal" and "deviant" tax regimes, U.S. legislators and bureaucrats have faced the same problem as tax authorities in other countries. There are hundreds of tax regimes maintained by sovereign states and other fiscally autonomous territories. Even taken individually, these codes are often monstrously complex and subject to frequent updates and revisions. If an accurate blacklist of jurisdictions were drawn up, it would still need constant monitoring and revision to keep pace with the rate of change in tax codes. The prospect of working through each of these to emerge with a dichotomous classification of each at the end is daunting in the extreme.

The United States has been much more reluctant than Latin American and Southern European states to impose blacklists in pursuit of fiscal goals. The tendency to use general rules rather than naming jurisdictions has even weathered the controversy over corporate inversions. However, American exceptionalism in this area goes only so far. Measures designed to counter money laundering and terrorist financing have tended to converge with fiscal priorities in targeting jurisdictions with banking secrecy, lax regulation, and minimal information exchange—features useful for financial crime as well as tax evasion and avoidance. In this area, Washington has evinced a much greater reliance on lists, and a tendency to draw on or directly incorporate the work of international organizations in compiling these lists.

The remainder of the article compares the reluctance to use blacklists in fighting corporate inversions with the much greater reliance on this kind of measure in pursuing financial crime, before addressing the question of whether the United States itself might appear on national tax blacklists.

Corporate Inversion

A 2002 Treasury report[14] lays out the basic features and tax consequences of corporate inversions. The report defines such a move as "a transaction through which the corporate structure of a U.S.-based multinational group is altered so that a new foreign corporation, typically located in a low- or no-tax country, replaces the existing U.S. parent company as the parent of the corporate group." The motivation behind these transactions is generally to put foreign subsidiaries of the new tax haven-based parent company beyond the reach of U.S. worldwide taxation.[15]

Barbados has been a popular destination because of the combination of low taxes for offshore companies (a maximum of 2.5%) and its tax treaty with the United States, which provides for a reduction from 30% to 5% in the withholding tax applied to dividends paid to U.S. shareholders. Ingersoll-Rand and Coopers Industries have both moved their headquarters to Bermuda, with anticipated annual tax savings of US$40 million and US$54 million, respectively.[16]

In response, members of Congress were quick to introduce bills to combat corporate inversion, their titles testifying to the sometimes emotive tone of the debate, from the "Save America's Jobs Act of 2002" to the "Uncle Sam Wants You Act of 2002."[17] A common theme running through these countermeasures has been to bar corporations fleeing U.S. jurisdiction from bidding for public contracts. Thus, from 2002 there have been many attempts to attach provisions to particular appropriations bills to preclude firms that have performed inversions from receiving funds authorized by the bill. These provisions had some success in the Senate but were generally defeated in the House. When they did succeed, as in the 2002 and 2004 appropriations for the Department of Homeland Security, they generally contained the important qualification that the restrictions could be waived at the discretion of the executive, which is partly why the actual punitive effect on the firms targeted has been minor.

The model for this sort of restriction is in the Homeland Security Act of 2002,[18] which prohibits "corporate expatriates" or their subsidiaries from being awarded contracts involving money appropriated under the Act. An "inverted domestic corporation" is defined as a foreign incorporated entity that, in a transaction or series of transactions, acquired substantially all of the properties of a domestic corporation or partnership, where after the acquisition 80% of the stock of the entity is held by former shareholders or partners of the domestic corporation or partnership and a new "expanded affiliated group" (generally the same as an "affiliated group" as defined in Section 1504(a)) that includes this entity "does not have substantial business activities in the foreign country in which or under the law of which the entity is created or organized when compared to the total business activities of such expand affiliated group."

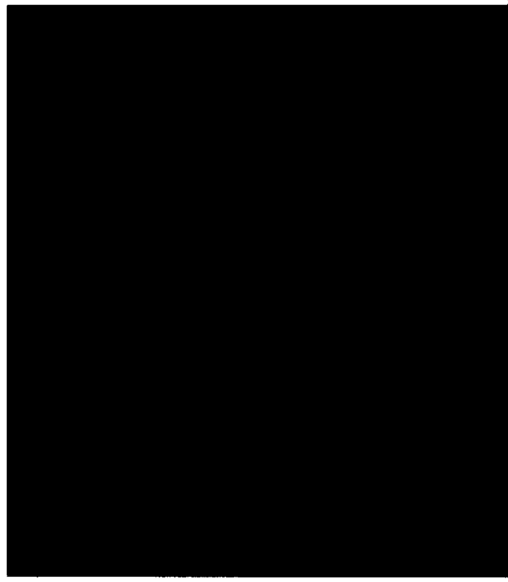
Despite the tendency for such inversions to occur in a relatively small number of tax haven jurisdictions, especially Barbados and Bermuda, thus far counter-measures have been designed in terms of the general rules adumbrated above rather than the lists used by many Latin American and Southern European countries.

The issue of corporate inversion has become somewhat less pressing since 2003. As the general economy and share prices have picked up, the tax penalties associated with foreign reincorporation, for shareholders and the corporation, have loomed larger. There is also strong suspicion that many start-up firms, observing the negative publicity for Ingersoll-Rand, Foster-Wheeler, Cooper Industries, and especially Stanley Works, have simply incorporated offshore from the outset to avoid future relocation difficulties.

PATRIOT Act

The most far-reaching new blacklisting powers have come as part of the USA PATRIOT Act,[19] though in some ways the prerogatives extended to Treasury to blacklist foreign jurisdictions are a logical outgrowth of measures taken in the late 1980s as part of the "war on drugs," and the International Emergency Economic Powers Act of 1970. Although terrorist financing may seem a long way from the fiscal goals that countries seek through the use of CFC blacklists and the like, there is a tendency for policymakers to conflate a whole range of disparate problems to do with financial crime, portraying them as different facets of the same underlying problem.

The criteria for identifying "jurisdictions of special money laundering concern" to be targeted with "special measures" in the PATRIOT Act (section 311, which introduced 31 U.S.C. section 5318A) are an example. Included in these indicators are jurisdictions that provide banking secrecy or special regulatory concessions for nonresidents or nondomiciliaries (31 U.S.C. section 5318A(c)(2)(A)(ii)), and that have a large financial sector relative to the



overall economy (31 U.S.C. section 5318A(c)(2)(A)(iv)). Most revealing is the clause identifying problem jurisdictions by "the extent to which that jurisdiction is characterized as an offshore banking or secrecy haven by credible international organizations or multilateral groups" (31 U.S.C. section 5318A(c)(2)(A)(v)). Of these, the former two criteria closely parallel those used by the OECD to construct its tax haven list (discussed below), while the last seems to rely directly on this list.

So far these measures have been applied to a Syrian bank and its Lebanese subsidiary and a Macau bank, Banco Delta Asia, accused of laundering money for North Korea. Banco Delta Asia was formally listed by U.S. Financial Crimes Enforcement as an institution of "special money laundering concern" for its alleged role in facilitating North Korean counterfeiting and drug smuggling. The listing caused a run on the bank, which lost 10% of its deposits in one weekend, and was saved only by a declaration of support from Macau's government.[20] However, the U.S. government has been repeatedly criticized by domestic groups, such as the Council on Foreign Relations, for its reticence in not making wider use of these punitive measures.

It is unlikely that foreign countries would be brave or foolhardy enough to blacklist the United States or even individual states

In 2003, use of these special measures had been threatened against the tiny Pacific island state of Nauru and the Ukraine. These two countries had initially refused to introduce the reforms demanded of them by the FATF as part of the NCCT initiative. Subsequently, these measures were threatened against Myanmar on the same ground.[21] More generally, the United States has proved a faithful supporter of the FATF in acting on its Recommendation 21, which states:

> Financial institutions should give special attention to business relationships and transactions with persons, including companies and financial institutions from countries which do not or insufficiently apply FATF Recommendations....Where such a country continues not to apply or insufficiently applies the FATF Recommendations, countries should be able to apply appropriate countermeasures.

OECD Tax Haven List

The source of choice for the financial aspects of the USA PATRIOT Act and other measures currently under consideration has been the OECD's list of tax havens released in June 2000, which features 35 jurisdictions. An example of the other measures is S. 779 (April 13, 2005), a bill that Senators Dorgan (D-N.Dak.) and Levin (D-Mich.) introduced to strengthen the application of the U.S. CFC rules. The bill would treat U.S. CFCs set up in tax-haven countries as domestic companies for U.S. tax purposes, i.e., as if they never left the United States. The 40 tax havens specified replicate the jurisdictions considered for inclusion on the OECD list with the sole exception of the U.S. Virgin Islands.

The list was compiled as part of the OECD Harmful Tax Competition initiative[22] and is based on four key factors: (1) no or only nominal tax is levied on geographically mobile activities; (2) special "ring-fenced" tax concessions are available to foreign investors but barred to locals and foreign investment that lacks economic substance; (3) lack of effective information exchange with foreign tax authorities; and (4) lack of transparency relating to tax rules and their application. Additional factors mentioned were a lack of a financial services sector relative to the size of the total economy, and whether the jurisdiction "offers or is perceived to offer itself as a place where non-residents can escape tax in their country of residence."[23] Jurisdictions on the list were to be given 12 months to reform the offending features of their tax codes before facing a range of "defensive measures," but doubts that former Treasury Secretary Paul O'Neill expressed publicly in May 2001 led to this ultimatum being dropped.

The OECD's list was subject to considerable criticism, much of it predictably coming from those 35 jurisdictions that were included. However, there are additional problems in using this OECD list of tax havens for U.S. national tax policies.

First, it excludes jurisdictions that can be presumed to be of considerable interest to the United States, in particular the Cayman Islands and Bermuda. These U.K. overseas territories (along with Cyprus, Malta, Mauritius, and San Marino) agreed to make "advance commitments" to undertake the OECD's specified reforms in return for staying off the list. Second, the OECD later implicitly admitted that at least a couple of jurisdictions should not have been placed on the list at all (e.g., Barbados and the Maldives), while Tonga repealed all of its offshore financial legislation shortly after the list was published. Third, the OECD has clearly asked states to refrain from penalizing jurisdictions on the 2000 "tax havens" list pending the release of an "uncooperative tax havens" list. This explicitly condemnatory list, featuring those among the 35 jurisdictions that failed to commit to the OECD reform program of transparency, included only five jurisdictions from 2004 (Andorra, Monaco, Liechtenstein, Liberia, and the Marshall Islands). The others have all agreed to the principle of exchanging criminal and civil tax information on request.

Finally, because this list was drawn up for OECD purposes six years ago, it does not include salient information on bilateral arrangements between the United States and listed jurisdictions that have been reached in the interim. The U.S.-Barbados income tax treaty explicitly provides *(Continued on page 64)*

Blacklists

(Continued from page 47) for the exchange of information. Since 2000, other listed IFCs, such as the Isle of Man, Netherlands Antilles, British Virgin Islands, and Panama, have signed tax information exchange agreements with the United States that either meet or exceed OECD requirements.

Thus, in summary, although the United States has been much more reluctant to apply permanent blacklists for purely fiscal purposes, there are nevertheless close parallels in the use of blacklists with the other states in Exhibit 2. The inherent complexity of assessing a multitude of foreign tax codes creates pressures to rely on lists by international organizations like the FATF and OECD. Because such lists

[redacted]

date quickly, and often reflect goals only partially consistent with U.S. national policy objectives, they are vulnerable to the same flaws discussed earlier in relation to Latin American and Southern European tax blacklists.

Blacklisting the United States?

The discussion above focused on blacklisting as an actual or potential instrument of U.S. government policy, or as a prerogative of international organizations of which the United States is the most powerful member. Either way, it is a question of sanctions being applied to foreign jurisdictions, financial institutions, and individuals. But what about the possibility of the United States being on the receiving end of such blacklisting?

In 2005, for the first time, a range of U.S. government agencies (e.g., Treasury, the Justice Department, Department of Homeland Security) produced a joint report, "U.S. Money Laundering Threat Assessment," which contained frank criticism of the failures within American borders to counter financial crime. The report noted that "[a] handful of U.S. states offer company registrations with cloaking features—such as minimal information requirements and limited oversight—that rival those offered by offshore financial centers....The competition among certain states [Delaware, Nevada, and Wyoming are the three discussed] to attract legal entities to their jurisdictions has created a 'race to the bottom,' and a real money laundering threat."[24]

These same features have been criticized for years by offshore jurisdictions in the cross-hairs of various regulatory initiatives.[25] International organizations like the OECD and the FATF, on the other hand, have tended to ignore these problems, but this may be changing. The concluding document from the OECD Global Forum contained an oblique public reference to the problems of Delaware, Nevada, and Wyoming. Although the public phrasing was elliptical ("political subdivisions" that "market themselves as places where anonymity from foreign tax authorities is assured" are to be encouraged to "desist from doing so"), the private discussion was explicitly couched in terms of these U.S. states.[26]

Although it is unlikely that foreign countries would be brave (or foolhardy) enough to blacklist the United States or even individual states, there is a growing divergence between the ratcheting up in international regulatory standards and the "race to the bottom" among American states identified in the 2005 report. This divergence can be expected to put an increasing premium on creativity among foreign jurisdictions looking to maintain blacklists of jurisdictions that provide secrecy and lax regulatory supervision. This will only tend to exacerbate the problems of inconsistency, bias, and arbitrariness that already mar so many national tax blacklists.

Conclusion

National tax blacklists of jurisdictions with rules and laws that prescribe negative treatment for transactions carried out with specified foreign jurisdictions are widely used by onshore states to target small-island IFCs suspected of facilitating tax evasion, tax avoidance, and financial crime. Because of the number, complexity, and constantly changing nature of foreign tax regimes, such lists tend to be out of date, inaccurate, and arbitrary. The United States has been largely reluctant to use blacklists for fiscal purposes, but has been a keen supporter of similar lists in countering money laundering and terrorist finance. Because of the strict secrecy provisions afforded by corporate vehicles formed in Delaware, Nevada, and Wyoming, logic and the demands of policy consistency would suggest that the United States should be at risk of appearing on some countries' national tax blacklists. ●

24 "U.S. Money Laundering Threat Assessment" (December 2005), pages 47-48, www.ustreas.gov/offices/enforcement/pdf/mlta.pdf.

25 Stikeman Elliott, "Towards a Level Playing Field: Regulating Corporate Vehicles in Cross-Border Transactions," report commissioned by the Society of Trust and Estate Practitioners and the International Tax and Investment Organization (ITIO) (2001). Second edition available at www.itio.org/documents/Towards-A-Level-Playing-Field-Second%20Edition.pdf.

26 "OECD Progress Towards a Level Playing Field: Outcomes of the OECD Forum on Global Taxation," Melbourne, November 15-16, 2005.