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Offshore Accounts, Corporate Income Shifting, and Executive Compensation

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Offshore Accounts, Corporate Income Shifting, and Executive Compensation

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I. Introduction

The articles that follow arose out of the Villanova Law Review Norman J. Shachoy Symposium hosted at Villanova Law School on September 23, 2011. The symposium brought together some of the nation's leading academics, practitioners, and journalists to discuss issues relating to the taxation of offshore individual offshore accounts and offshore operations of multinational corporations (MNCs), and the role of the tax laws in regulating executive compensation. As I discuss in this introductory essay, all of the articles implicate at some level essential questions of fairness, including questions of both vertical and horizontal equity.[2]

This topic is very timely. The image of millionaires hiding money in undeclared offshore bank accounts has triggered unprecedented administrative and legislative reactions to detect those accounts and deter that type of evasion. Moreover, the fact that some of the largest American MNCs pay no or little tax raises questions about our corporate and international tax policy, and executives' high pay, at companies implicated in corporate scandals and the near meltdown of the financial sector, has contributed to federal legislation meant to influence corporate governance.

Faith in public institutions matters a great deal for those who care about tax administration. This past year has provided a rich real-life case study of the effects on global markets of a country that has a tax system that is riddled with corruption, and a society that has as one of its national pastimes the underreporting of income and differing (though unstated) rules for those with means and those without. The Greek culture of systemic underreporting of income, and the Greek tax authorities' difficulties in detecting and prosecuting tax cheats exploded into the popular media.[3]

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[1] The author is grateful for the excellent research assistance of Catherine Mock, LL.M. in Taxation Candidate 2012, J.D. 2011, Villanova University School of Law. I wish to acknowledge all of the participants at the Symposium, including those who did not present papers but whose participation made the symposium a huge success. The participants (apart from those whose articles I mention in this essay) were Tamara Ashford, John McDougal, Bryan Skarlatos, Rosanne Altshuler, Ed Kleinbard, Fritz Foley, Joseph E. Ronan, Jr. and Lee Sheppard. I am grateful to the Shachoy family for its support of the Law School, and to Villanova Law School for its financial support of my research. I wish to thank Leandra Lederman, Keith Fogg, Joy Mullane, Dick Harvey and Valinda Garcia Latoff for comments on an earlier draft.

[2] A useful summary of the essential role that fairness plays (and has played) in tax policy debates can be found in Joel Slemrod and Jon Bakija, Taxing Ourselves, at 57-98 (4th ed., 2008). Vertical equity considers the appropriate level of tax burdens on households of differing levels of income, and horizontal equity considers tax burdens across households of similar income or well-being. *Id.*, at 59-60

[3] Michael Lewis, *Beware of Greeks Bearing Bonds*, Vanity Fair, Oct. 1, 2010 *available at* http://www.vanityfair.com/business/features/2010/10/greeks-bearing-bonds-201010; James Surowiecki, *Dodger Mania*, The New Yorker, July 11, 2011, *available at* http://www.newyorker.com/talk/financial/2011/07/11/110711ta_talk_surowiecki. For a presentation summarizing the challenges of the Greek tax administration, *see* Basil Manessiotis, Tax Administration in Greece: Problems, recent initiatives and proposals for reform (Oct. 22, 2010),http://www2.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/Events/CONFE

The failure of the Greek tax system contributed mightily to that country's fiscal woes. Greece is not alone in its tax troubles: other countries too have significant tax compliance issues,[4] issues that threaten fiscal stability and raise challenges for tax administrators who generally rely to some degree on voluntary compliance to ensure the integrity of their tax system.[5]

It is common knowledge that those with certain kinds of incomes have an ability to benefit from tax advantages that others do not, and that tax policy has contributed to greater concentration of wealth in the past decade. The Occupy Wall Street movement has highlighted an increasing concentration of wealth among the top earners.[6] In addition, news articles have detailed how the largest and most profitable American MNCs, like GE, pay little or no corporate tax.[7] But concerns about the nation's richest individuals and largest corporations and their taxes highlight a concern beyond that of just class envy or questions regarding the effects of income inequality—even if that inequality is greater now than at almost any other time in our country's history.[8] For example, Mitt Romney's 2010 tax return drew attention to ways that our country's

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RENCE%20-%20Public%20Financial%20Management%20(22102010)/MANESSIOTIS.pdf. *See also* Rachel Donadio. For Greek Tax Reformers, Good Ideas Aren't Enough, N.Y. Times, Feb. 2, 2012, *available at* http://www.nytimes.com/2012/02/03/world/europe/the-powerful-resist-change-to-greek-tax-system.html?pagewanted=1&_r=1&hp (noting sentiment of frustration among Greeks who are convinced that wilier people cut improper deals with tax administrators).

[4] For example, the pope took up the cause of worldwide tax evasion, with some linking his efforts to the significant tax compliance problems Italy faces. *See* Pope to Denounce Tax Evasion, AccountingToday, Aug. 20, 2007, http://www.accountingtoday.com/news/25103-1.html.

[5] Erich Kirchler, The Economic Psychology of Tax Behaviour 160 (Cambridge University Press 2007) (discussing various models of tax compliance and noting that behavioral models that implicate "psychological and sociological variables such as demographic characteristics (e.g., education, income level, income source, occupation) social representations and attitudes (e.g., tax ethics, and social norms, fairness perceptions), and structural characteristics (e.g., complexity of the system, audit probability and detection probability, sanctions, and tax rates") contribute to understanding tax compliance across cultures).

[6] Graphic detail, http://www.economist.com/blogs/dailychart/2011/10/income-inequality-america (Oct. 26, 2011, 15:34 EST). *See also* Avi Feller & Chad Stone, Ctr. on Budget Policy Priorities, Top 1 Percent of Americans Reaped Two-Thirds of Income Gains in Last Economic Expansion (Sept. 9, 2009), http://www.cbpp.org/files/9-9-09pov.pdf.

[7] *See* David Kocieniewski, *G.E.'s Strategies Let It Avoid Taxes Altogether*, N.Y. Times, Mar. 24, 2011, *available at* http://www.nytimes.com/2011/03/25/business/economy/25tax.html?pagewanted=all; Kevin Drawbaugh, *Thirty companies paid no U.S. income tax 2008-2010: report*, Nov. 3, 2011, http://www.reuters.com/article/2011/11/03/us-usa-tax-corporate-idUSTRE7A261C20111103; David Kocieniewski, *Biggest Public Firms Paid Little U.S. Tax, Study Says*, N.Y. Times, Nov. 3, 2011, *available at* http://www.nytimes.com/2011/11/03/business/280-big-public-firms-paid-little-us-tax-study-finds.html.

[8] *See* Posting of Isabel V. Sawhill to Up Front Blog, *2011: The Year that Income Inequality Captured the Public's Attention*, http://www.brookings.edu/opinions/2011/1219_inequality_2011_sawhill.aspx (Dec. 19, 2011), Posting of Laura D'Andrea Tyson to Economix, *Tackling Income Inequality*, http:// http://economix.blogs.nytimes.com/2011/11/18/tackling-income-inequality/ (Nov. 18, 2011, 6:00 EST), Robert Pear, Top Earners Doubled Share of Nation's Income, Study Finds, Oct. 25, 2011, *available at* http://www.nytimes.com/2011/10/26/us/politics/top-earners-doubled-share-of-nations-income-cbo-says.html?_r=2&hpw, Posting of Catherine Rampell to Economix, *Income Inequality Reached High in 2009*, http://economix.blogs.nytimes.com/2010/09/28/income-inequality-reached-high-in-2009/ (Sept. 28, 2010, 11:57 EST); Income Inequality Is At An All-Time High: STUDY,http://www.huffingtonpost.com/2009/08/14/income-inequality-is-at-a_n_259516.html (Sept. 14, 2009, 06:12 EST). *See also* Richard Wilkinson & Kate Pickett, The Spirit Level: Why Greater Equality Makes Societies Stronger (2009) (consequences of income inequality extend beyond economics and provide leading indicator on societal well-being).

wealthiest can take advantage of "perfectly legal"[9] mechanisms to reduce effective tax rates to below what many middle and upper-middle Americans pay.

It is not that GE or Romney achieved low tax rates through illegal means—as far as we know, they did not—but that they can do so through legal means when others cannot leads to the conclusion that perhaps some are more "equal" than others when it comes to our tax system. In particular, "the fact that Romney can pay such a small share of his income in taxes and be safely within the law . . . vexes."[10] As one perceptive observer noted, "many Americans—whether they are Tea Party or Occupy Wall Street persuasion, or somewhere in between, increasingly sense that our public institutions do not treat us as equals."[11]

It would be an overstatement to say that the American tax system is in danger of becoming like the Greek tax system: while the tax gap (the difference between what is properly due and what is paid on time) is significant, our compliance rate is holding steady at about 83%.[12] For items of income where there is information reporting and withholding (like wages), compliance is extremely high. Yet, tax administrators and academics know that the seeds of discontent, and potential deep-rooted problems with tax compliance, lie both in opportunity and perceptions.[13] Administrators wish to minimize opportunities for tax cheaters to avoid detection, and squelch a perception that our tax system is unfair, either in design or application. There is a sense of unfairness that arises both when some taxpayers successfully evade taxes through illegal means, and when those or others gain access to tax preferences through legal means that are increasingly unavailable to people without certain kinds of income or business opportunities. It is these issues that the first tranche of papers in the Shachoy symposium address.

II. Overseas Issues: Hiding Money From the Tax Collector and Corporate Income Shifting

The first set of articles in the Norman Shachoy Law Review Symposium address the cat and mouse game of wealthy Americans hiding assets and income in previously undeclared offshore bank accounts. This is not a new problem; as John McDougal, Special Trial Attorney at IRS Office of Chief Counsel, recounted in his presentation at the symposium, in 1937, then-Secretary of the Treasury Henry Morgenthau, in a letter to FDR, explained the lack of income tax receipts in part on the use of offshore accounts and dummy corporations – evidencing both legal avoidance and outright evasion.[14]

For decades, the IRS has had little systemic ability to track this form of cheating. Hiding behind bank secrecy laws and layers of byzantine entities obfuscating beneficial ownership,

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[9] David Cay Johnston, Perfectly Legal: The Covert Campaign to Rig Our Tax System to Benefit the Super Rich – and Cheat Everybody Else (2003) (U.S. tax code allows the "super rich" to minimize tax payments and pass the bill to middle-class Americans). *See also* Leandra Lederman & Stephen W. Mazza, Addressing Imperfections in the Tax System: Procedural or Substantive Reform?, 103 Mich. L. Rev. 1423 (2005) (reviewing "Perfectly Legal").

[10] John Carney, *The Problem With Romney's Taxes*, NetNet with John Carney, Jan. 24, 2012, http:/www.cnbc.com/id/46115106.

[11] *Id.*

[12] *IRS Releases New Tax Gap Estimates; Compliance Rates Remain Statistically Unchanged From Previous Study*, IR-2012-4 (Jan. 6, 2012), *available at* http://www.irs.gov/newsroom/article/0,,id=252038,00.html.

[13] Leslie Book, Freakonomics and the Tax Gap: An Applied Perspective, 56 Am. U. L. Rev. 1163 (2007).

[14] Letter from Henry Morgenthau, Jr., Sec'y of Treasury, to FDR (May 29, 1937).

Americans with the means and will to hide money offshore could do so, largely immune from detection. That has changed dramatically in the past decade. In his article, *Go West: How the IRS Should Foster Innovation in Its Agents*,[15] Professor Keith Fogg identifies and describes in great detail the pioneering work of Joe West, an IRS revenue agent whose doggedness and creativity in the 1980's and early 1990's jump-started the current efforts to detect and deter taxpayers seeking to hide their income overseas. The article is remarkable in its efforts to show how a determined and resourceful IRS employee could gather facts from credit card companies, promoters, bankers and others to help begin the systemic chipping away at the previously walled-off world of offshore banking. Drawing on interviews and review of underlying court documents, Professor Fogg pieces together how a 1980's audit of Wheaton Industries, a New Jersey-based specialty glass manufacturing company, led to the detection of the use by Frank Wheaton, Jr., that company's CEO, of offshore bank accounts to conceal money and income from the IRS in at least three tax haven jurisdictions. What started as an examination of a corporation turned into an almost decade-long effort to gather information about individuals and the shadowy world of tax havens and undeclared bank accounts.

The article not only provides an important historical narrative, it also incudes a prescription: Professor Fogg urges the IRS to "continue to adopt innovative techniques such as the one designed by Revenue Agent Joe West" and suggests "that the IRS must find a way to encourage its agents to approach their jobs with the same inventiveness he brought to the offshore project."[16] His article is a call for the IRS and its leaders to use case studies as a tool to inspire creativity and apply lessons of the most talented and dedicated employees, tasks that are essential to help combat the ingenious and dogged efforts of those who have intentionally flouted their obligations as Americans.

In her article, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*,[17] Professor Leandra Lederman also considers the problems of tax evasion through the use of offshore accounts, and examines the advisability of continued use of voluntary disclosure initiatives as a tool in the fight against international tax evasion. She discusses the history of IRS voluntary disclosure programs and their contexts, including the IRS's earlier offshore credit card initiative (which Professor Fogg sets in its historical context) and that program's connection to the 2003 voluntary disclosure program that grew out of its study of Americans' use of offshore credit cards to help conceal the presence of unreported income. The article also describes the voluntary disclosure initiatives of 2009, 2011 and 2012, following the Justice Department's high-profile indictment of UBS private banker Bradley Birkenfeld.[18]

Following her description of this series of voluntary disclosure programs in the 2000s, Professor Lederman evaluates the government's approach to voluntary disclosure of offshore evasion in light of the literature on optimal tax amnesties (including insightful work by Dean Craig Boise),[19] identifying the costs and benefits of those amnesties. Applying Dean Boise's analysis, she describes an optimal amnesty as one that will (1) be accompanied by reform that

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[15] Keith Fogg, *Go West: How the IRS Should Foster Innovation In Its Agents*, _ Vill. L. Rev. _ (2012).
[16] *Id.* at _.
[17] Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, _ Vill. L. Rev. _ (2012).
[18] *See* J. Richard Harvey, Jr., *Offshore Accounts: Insider's Summary of FATCA and Its Potential Future*, _ Vill. L. Rev. _ (2012) (Professor Harvey notes that one of FATCA's goals was to enhance participation in the voluntary compliance programs, in that its implementation heralded a greater likelihood that the US would detect previously noncompliant taxpayers, thus incentivizing participation).
[19] Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 Geo. Mason L. Rev. 667 (2007).

will discourage evasion in the future; (2) be accompanied by greater enforcement; (3) be offered only once; (4) minimize perceptions of unfairness by not being offered to known tax evaders and waiving few penalties, ideally only criminal prosecution; and (5) not be relied on principally to raise revenue. Professor Lederman then applies that framework to current IRS efforts and concludes that the offshore tax amnesties meet some but not all of the optimal amnesty elements. She convincingly argues that there are likely to be diminishing returns unless the government continues to emphasize and publicize criminal prosecutions as part of its overall enforcement strategy.

Next, in his article, *Offshore Accounts: Insider's Summary of FATCA and Its Potential Future*,[20] Professor J. Richard Harvey, who was heavily involved in the IRS's efforts to address offshore accounts, describes the origins of the Foreign Account Tax Compliance Act (FATCA), including prior efforts to address the longstanding problem surrounding the use of offshore accounts to evade detection. Professor Harvey describes efforts such as the adoption of the qualified intermediary withholding regime, the use of John Doe summonses[21] to ferret out U.S. accounts at foreign financial institutions and the IRS's adoption of voluntary disclosure initiatives to incentivize compliance. FATCA's architects, including Professor Harvey himself when he was the Senior Advisor to IRS Commissioner Doug Shulman, knew full well that the existing regime was inadequate due to the IRS's inability to identify foreign source income and determine an account's beneficial ownership (rather than legal ownership). Moreover, prior efforts fell short of requiring foreign financial institutions to review all customer accounts within the affiliated group in order to identify U.S. taxpayers. FATCA, as Professor Harvey describes, addresses these deficiencies, but creates major compliance costs for foreign financial institutions, which will face the threat of withholding tax on U.S.-source payments, including gross sale proceeds.

Professor Harvey proceeds to describe some technical issues that the IRS and financial institutions are grappling with (including the challenges associated with potentially burdensome due diligence requirements that may apply irrespective of how few U.S. accounts are held by (?)a foreign financial institution), and then raises the important questions as to whether FATCA will achieve its intended general goal of making it more difficult for Americans to hide assets offshore. Professor Harvey notes that the FATCA regime was adopted unilaterally, and that "the major weakness of FATCA is that the U.S. is attempting to unilaterally require [foreign financial institutions] to report information to the U.S. When FATCA was being conceptualized, it was this author's hope that the US would aggressively market the FATCA concept to other major countries. It is not clear whether this has been occurring."[22] To enhance the chances of broader adoption, Professor Harvey counsels Treasury to balance its desire to craft tight due diligence rules and restrictive rules regarding the ability of U.S. taxpayers to indirectly invest in U.S.-source assets with an understanding that its efforts to make matters airtight may minimize the chances for broader adoption. Thus, underlying Professor Harvey's recommendation is that when it comes to sniffing out tax cheaters, "the best is the enemy of the good,"[23] and that proceeding unilaterally may jeopardize the entire endeavor.

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[20] Harvey, *supra* note 16.
[21] *See* I.R.C. § 7609(f) (IRS has broad powers to seek "John Doe summons" for information from third parties on unknown taxpayers if the IRS determines there is a significant pocket of non-compliance that warrants an investigation on such taxpayers). *See also* Fogg, *supra* note 13 at _.
[22] Harvey, *supra* note 16.
[23] Voltaire, Dictionnaire Philosophique (1974) (translated from the French "Le mieux est l'ennemi du bien.")

Professor Susan C. Morse's article, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*~~*Don't Go It Alone, Uncle Sam: The Future of Global Tax Reporting*~~,[24] also analyzes FATCA but focuses on how to enforce it. She describes the U.S. approaches to the problem of offshore accounts and cross-border information reporting, and compares our efforts with European approaches. Professor Morse details how American efforts to combat offshore evasion arose from an increased understanding following the unraveling of UBS and other banks' efforts to assist i wealthy Americans in avoiding detection under existing laws. The FATCA regime has quickly brought "remarkable innovations," namely withholding penalties, disclosure requirements, due diligence requirements, and an expanded beneficial owner concept.[25]

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Like Professor Harvey, Professor Morse identifies the deficiencies of unilateralism in FATCA's implementation, and highlights the importance of gaining non-U.S. government cooperation to ensure FATCA's success.[26] Identifying specifically how FATCA lacks a good enforcement mechanism (because, for example, the U.S. lacks jurisdiction over the non-U.S. banks and other foreign financial institutions), ~~Professor Morse~~ Professor Morse recommends that the U.S. continue to use tools of simplicity, reciprocity and/or side payments to seek cooperation from other nations in the enforcement of FATCA.~~recommends that the U.S. (1) keep FATCA's diligence and reporting requirements simple, (2) seek cooperation through reciprocity, and (3) consider the European approach of incentivizing foreign governments through the use of side payments~~.

The final paper in this set shifts the focus from individuals to corporations. In *Some Suggestions For Tax Reform*[27] Michael C. Durst considers the ways that American MNCs have legally shifted their incomes to low-tax or no-tax overseas jurisdictions. Unlike the wealthy individuals described in the first series of papers in the Shachoy symposium, some of whom have shifted assets outside the U.S. in order to intentionally evade taxes while avoiding the detection of American tax authorities, American corporations' income-shifting actions, while aggressive, are within the letter of the law. Yet, Durst identifies how these actions, while legal, can undermine the trust and respect that tax systems depend upon to succeed:

> [T]he most serious harm from our current international tax rules, I think, is not a tendency to erode the tax base, or to skew investment and employment away from the United States. The most serious harm is not economic at all. The income shifting that I have described is "perfectly legal," as the phrase goes, but the image that it presents to the public -- an image that has been made available to the public by leading journalists -- is, I think, deeply harmful. The public sees our most important business corporations, and policy-makers in Congress and elsewhere in Washington, colluding, albeit legally, to shift hundreds of billions of dollars of income to mailbox companies in countries where the companies perform little if any business activity. Institutions in our society which should be among the most worthy of respect appear to be engaged in a kind of behavior that typically would be associated with society's least savory actors. This spectacle cannot possibly be failing to contribute to what is already an unhealthy erosion of public respect for governmental and business institutions.[28]

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[24] Susan C. Morse, *Don't Go It Alone, Uncle Sam: The Future of Global Tax Reporting*, _Vill. L. Rev. _ (2012).
[25] *Id.* at _.
[26] *Id.* at _.
[27] Michael C. Durst, *Some Suggestions For Tax Reform*, _ Vill. L. Rev. _ (2012).
[28] *Id.* at _.

Durst, a former advisor for the IRS and now a columnist for Tax Notes, sketches a way out of our current mess, suggesting a combination of international tax reform and a substantial reduction in corporate income taxes. Mindful of the net revenue effects of such a proposal, Durst notes the reform that he suggests will have to be accompanied by sources of additional revenue, linking his ideas to reforming our international tax system to an overall, comprehensive, reform.

III. Executive Compensation

The excessive pay of executives, and Congress' interest in (?)curbing certain types of pay and limit salaries, touches on different issues than in the first group of papers dealing with offshore taxation and international taxation. The following articles principally address the use of the tax system to tackle issues of corporate governance. These authors tackle the use of our tax system to control pay that Congress, for various reasons and at different times, has regarded as excessive or improper.

In her article, *Perfect Storms: Congressional Regulation of Executive Compensation*,[29] Professor Joy Sabino Mullane takes an historical approach, and examines the factors that have triggered legislation regulating executive compensation following the expansion of federal powers at the time of the New Deal. In examining the myriad efforts, Professor Mullane argues "that legislation regulating executive pay is enacted when three factors coalesce: economic turmoil (i.e., a recession), rising unemployment, and an executive pay controversy."[30] The explanation helps explain how economic turmoil, on its own, is generally insufficient to drive additional Congressional action, and how Congress, at certain times (and in light of a coalescing of opinions calling for federal action to control pay), is compelled to "do something" about executive pay, but typically legislates deeply flawed provisions.[31] Drawing on the deep bench of criticism of Congress' actions in this area, Professor Mullane suggests that in light of the inevitability of Congress to inject complexity and unintended consequences, that its provisions to regulate pay be accompanied by sunset provisions. These provisions will provide a shelf life for the legislation, and also provide opportunities for Congress and the public to cool off and dispassionately examine the consequences of the legislation.

In *The Use of Federal Law to Curb Excessive Executive Compensation: Lessons in Past Failures and Lessons for the Future*,[32] Professor Kathryn J. Kennedy discusses the use of tax law and, in recent times, federal securities laws, to curb excessive compensation. After describing how state laws typically address only the process by which boards set pay, and not the amount of pay, she concludes that it is not surprising that Congress "dabbles" in the area of corporate governance. She details the panoply of tax provisions meant to curb pay, and notes both their complexity and unintended consequences and how Congress tends to legislate by reacting to specific news events.

For example, Professor Kennedy describes the Code's limits on golden parachute payments following a bevy of mergers and acquisitions in the early 1980's. Congress attended to what it thought were excessive severances and byzantinely complex limits on deferred compensation

[29] Joy Sabino Mullane, *Perfect Storms: Congressional Regulation of Executive Compensation*, _Vill. L. Rev. _, _ (2012).
[30] *Id.* at _.
[31] *Id.* at _.
[32] Kathryn J. Kennedy, *The Use of Federal Law to Curb Excessive Executive Compensation: Lessons in Past Failures and Lessons for the Future*, _ Vill. L. Rev. _ (2012).

following news of Enron executives dipping into their deferred compensation arrangements at the same time that the firm itself was spiraling toward bankruptcy.[33] Professor Kennedy also explores the relatively recent push toward the use of federal securities laws to address governance issues relating to pay, including more robust disclosure rules and shareholder "say-on-pay" provisions. While noting that the full measure of some of these provisions is not clear (due mainly to their relative recent vintage), she anticipates continued corporate backlash and is skeptical of the provisions' ability to control or meaningfully influence pay.

Professor Andrew C.W. Lund, drawing on a longstanding strand of critical scholarship, argues in *Tax's Triviality As a Pay-Reforming Device*[34] that when it comes to executive compensation, tax interventions of the kind that Professor Kennedy catalogues (such as the limitation of Section 162(m) on the deductibility of certain compensation "have trivial effects on board decision-making regarding executive pay."[35] He argues that, compared to gains associated with hiring the perceived best executives, the tax interventions are minor. Accordingly, corporations and their boards will accept the penalty and compliance costs associated with Congress' efforts to use the tax law and pay what they wish to compete for perceived managerial talent and value. To have real effect, the use of the tax system to regulate compensation would have to be connected with far more serious and adverse consequences than currently structured. Yet, Professor Lund suggests that coercive regulation through the tax system is too blunt and ill-fitting in a diverse world, and suggests that using the tax system to try to attain corporate governance outcomes is ill-advised.

In his article, *Fixing Section 409A: Legislative and Administrative Options*,[36] Professor Gregg D. Polsky takes aim at the legislative effort in Section 409A to curtail a type of executive pay, deferred compensation. That section penalizes deferred compensation arrangements that do not meet its numerous technical requirements. Professor Polsky argues that Section 409A is an "unqualified mistake," noting that Section 409A "simply provided more hoops to jump through to get the tax benefit of deferred compensation and everyone is jumping through them rather than opting out."[37] Detailing the additional complexity and costs (and great potential for inadvertent noncompliance) added by Section 409A, Professor Polsky argues that Congress should repeal the provision and, in the absence (?) of overall reform in the area, grant Treasury explicit authority to promulgate rules and regulations based upon doctrines of constructive receipt and economic benefit. If Congress does not act, Professor Polsky urges the IRS to take matters in its own hands and administratively limit its applicability to compensation paid by public companies to their employees or directors.

Concluding this series of articles is Professor David I. Walker's article, *Who Bears the Cost of Executive Compensation (And Other Agency Costs)?*[38] Professor Walker discusses how many "commentators and analysts believe that executive pay at U.S. public companies reflects systematic market failure, and, as a result, executives receive more compensation than they would in a well-functioning market."[39] Professor Walker analogizes the excess pay to an additional (?) corporate tax on publicly traded companies, and argues that in light of recent research on the

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[33] *Id.* at _.
[34] Andrew C.W. Lund, *Tax's Triviality As A Pay-Reforming Device*, _ Vill. L. Rev. _ (2012).
[35] *Id.* at _.
[36] Gregg D. Polsky, *Fixing Section 409A: Legislative and Administrative Options*, _ Vill. L. Rev. _ (2012).
[37] *Id.* at _.
[38] David I. Walker, *Who Bears the Cost of Executive Compensation (And Other Agency Costs)?*, _ Vill. L. Rev. _ (2012).
[39] *Id.* at _.

incidence of corporate tax, the "cost of systematically excessive executive pay is likely to be shifted from shareholders to other investors and/or labor."[40] The implications of this insight are significant, with, for example, differences in progressivity depending on the incidence of the cost. That is, to the extent costs are borne by parties other than shareholders, it is likely that these costs are more regressive than traditionally identified in the corporate governance literature.[41] Professor Walker extends his insights beyond incidence analysis, however, noting the social costs of the inefficiencies, including how, under various models, excessive executive pay may distort the allocation of capital both between the corporate sector and the domestic non-corporate sector and between domestic and foreign investments.

The implications of Professor Walker's insights are far reaching; for example, the incidence and effects of executive compensation may justify additional regulation because the stakes are perhaps "greater, or at least different"[42] if tlabor and non-corporate capital may bear some of the burden of excessive compensation. To the extent that the cost of excessive pay is borne solely by shareholders (which Professor Walker's insights suggest not to be the case), regulatory responses aimed at increasing shareholder power vis-à-vis management, such as mandating shareholder "say on pay," may be reasonable and effective.[43] But shareholder-centric approaches to improving pay processes may be less compelling to the extent that shareholders are able to pass the costs on to other stakeholders.

IV. Conclusion

The implications of Professor Walker's paper bring us back to questions of fairness directly addressed in the first series of articles in the symposium, which dealt with offshore tax noncompliance. That those in positions of power, through legal or other means, can continue to perpetuate advantages not generally available contributes to dissatisfaction with institutions. When institutions that should be among our most respected can exacerbate and perpetuate inequalities, especially at times of economic uncertainty, there is bound to be both a public and legislative backlash. While there is a great deal of disagreement in tax policy about how to calibrate the trade-off between limiting incentives to create wealth on the one hand, and the ill-effects of income and wealth inequality on the other, there is general agreement that those with positions of power should not abuse that power by extracting rents from the market or hiding assets in an undeclared bank account so as to evade taxes.

Likewise, when some of our most profitable MNC's or richest Americans have an effective tax rate below that of many with modest incomes, those trade-offs inherent in the discussion about the degree of vertical equity become visible, and likely to generate political attention. How our tax system will address these questions in the future remains to be seen. There is no doubt, however, that policymakers and academics interested in issues of offshore evasion, international income-shifting and executive compensation will find the series of articles that follows essential reading.

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[40] *Id.* at _.
[41] *Id.* at _ (costs are more regressive when shifted to labor than when shifted to shareholders, thus, the costs are more regressive as they are not borne entirely by shareholders).
[42] *Id.* at _.
[43] *Id.* at _.