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SPECIAL REPORT

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Law vs. Accounting Firms: Competing Over Three Decades of Change

by Danielle Higgins Green and Stanley Veliotis

Danielle Higgins Green is an assistant professor and Stanley Veliotis is an associate professor in the Gabelli School of Business at Fordham University. They thank Michael Donohoe, Amy Dunbar, Erin Henry, Alison Iavarone, John Shon, and Mauro Viskovic, as well as participants at the 2021 American Accounting Association's Northeast Regional Meeting, for their helpful comments. They also thank the library and career placement staffs of Cardozo, Fordham, Hofstra, and Yale law schools for access to their back editions of law firm data used in this report. The authors acknowledge funding from Fordham University and research assistance provided by Adarsh Ganeriwalla and Mark Schwartz.

In this report, Green and Veliotis investigate how major regulatory and legislative changes over the past three decades have affected the competitive market for tax services between large U.S. law firms and accounting firms — particularly the supply side of the market for tax services provided to corporations.

I. Introduction

This report examines the competitive market for tax services between large U.S. law firms and accounting firms over the last three decades. In particular, it addresses how three major changes in the regulatory and legislative landscape during that period affected this market, primarily the market for tax services provided to corporations. The first change was brought about by the Sarbanes-Oxley Act of 2002 (SOX). Enacted to help address a string of audit failures by large accounting firms, SOX created the Public Company Accounting Oversight Board[1] (PCAOB) and imposed limits on accounting firms providing services to their audit clients (auditor-provided tax services (APTS)), including requiring clients' audit committees to approve APTS.[2] Anecdotal evidence shortly after the enactment of SOX suggested that the APTS restrictions would alter the market for corporate tax services as clients moved tax services away from their auditors and toward law firms or non-auditor accounting firms.[3] This result would be consistent with audit clients' desire, especially after the Enron audit failure, to signal independence from their auditors and to allow the adviser to provide greater tax advocacy by eliminating perceived or actual independence issues.[4]

On the other hand, Financial Accounting Standards Board Interpretation No. 48 presented a second change that was likely to shift some tax work back to accounting firms after its effective date of December 15, 2006.[5] Anecdotal evidence suggested that FIN 48's uniform recognition, measurement, and disclosure guidelines for the financial statement reserve for uncertain tax positions led companies to engage additional tax advisers from law or accounting firms to assist with FIN 48 implementation and compliance.[6]

[1] 15 U.S.C. section 7211.

[2] 15 U.S.C. section 78j-1(g)-(i). *See infra* Section II.B.

[3] Edward L. Maydew and Douglas A. Shackelford, "The Changing Role of Auditors in Corporate Tax Planning," in *Taxing Corporate Income in the 21st Century* 307, 327-331 (2007).

[4] Brad Cripe and Brian McAllister, "Determinants of Audit/Tax Separation Decisions," 24 *Am. J. Bus.* 47 (2009).

[5] FIN 48, "Accounting for Uncertainty in Income Taxes, an Interpretation of FASB Statement No. 109" (2010). *See infra* Section II.C. Statement No. 109 was later codified in Accounting Standards Codification 740, which is the guidance on the accounting for income taxes. George A. Plesko and Erin E. Henry, "Some Devilish Details of Corporate Tax Reform," 21 *Kan. J. Law & Pub. Pol'y* 382 n.19 (2012).

[6] Financial Accounting Foundation, "Post-Implementation Review Report on FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes (Codified in Accounting Standards Codification Topic 740, Income Taxes)," at 1 and 8 (Jan. 2012).

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However, because of FIN 48's focus on accounting for income taxes, accountants could exploit their competitive advantage over other tax service providers, such as lawyers not trained in accounting matters.

A third change may have increased tax work for *all* tax advisers, be they law firms or accounting firms. The 2017 Tax Cuts and Jobs Act was the largest overhaul to the federal income tax law since the Tax Reform Act of 1986.[7] Among its many changes, the TCJA reduced the corporate tax rate, repealed the corporate alternative minimum tax, modified several existing deductions, and introduced provisions for passthrough and multinational businesses. Anecdotal evidence suggested that its complexity and uncertainty created new opportunities for the tax services market;[8] however, it is unclear whether this favored large law firms or accounting firms and whether one benefited more than the other.

It is an open empirical question whether large law firms increased or decreased their levels of tax services after these changes, especially as compared with large accounting firms and in light of the relative strengths law and accounting firms possess. This report is the first attempt to answer that question. It is also the first to study the effect of regulatory changes on the supply side of the market for tax services, in contrast to prior literature, which has predominantly focused on the effect of regulatory changes on the demand side (use of tax services) and has focused only on accounting firms.

For example, in studies of the demand-side response to SOX, several papers document that audit clients reduced their use of APTS.[9] As to the effect of FIN 48 on demand, there is less clarity. For example, two papers provide some evidence that APTS demand may have increased since FIN 48 because of knowledge-spillover benefits associated with the joint provision of tax and audit services,[10] whereas another paper provides evidence that FIN 48 eliminated APTS' informational advantage, suggesting that demand for those services could decrease after FIN 48.[11]

This empirical report is also one of the first to address competition in general between law and accounting firms, especially as affected by the recent regulatory changes. A 2018 study shows that after SOX, accounting firms have continued to seek to compete with law firms by expanding their legal service offerings (under which some tax services may fall); however, because the study's data is from self-created websites, the authors concede they cannot report the extent to which firms are truly providing the indicated services or have received the associated fees.[12] A 2021 study examines the effect of SOX's prohibition of auditor-provided legal services on revenue per partner (or professional).[13] Unlike these two studies, which address legal services generally, our report takes advantage of unique data sets to focus on tax services provided by both law and accounting firms.[14]

This report also contributes to the stream of empirical literature that examines the economic

[7]*See, e.g.*, Rebecca M. Kysar, "Tax Law and the Eroding Budget Process," 81 *Law & Contemp. Probs.* 61 (2018).

[8]*See, e.g.*, Wolters Kluwer, "Tax New Law Generates an Onslaught of Work for Lawyers," 37 *Of Counsel: Legal Prac. & Mgmt Rep.* 1, 2 (Feb. 2018).

[9]*See, e.g.*, Thomas C. Omer, Jean C. Bédard, and Diana Falsetta, "Auditor-Provided Tax Services: The Effects of a Changing Regulatory Environment," 81 *Acct. Rev.* 1095 (2006); and Maydew and Shackelford, *supra* note 3, at 318-325.

[10]Cristi A. Gleason and Lillian F. Mills, "Do Auditor-Provided Tax Services Improve the Estimate of Tax Reserves?" 28 *Contemp. Acct. Res.* 1484 (2011); Michael P. Donohoe and W.R. Knechel, "Does Corporate Tax Aggressiveness Influence Audit Pricing?" 31 *Contemp. Acct. Res.* 284 (2014).

[11]Gleason, Mills, and Michelle L. Nessa, "Does FIN 48 Improve Firms' Estimate of Tax Reserves?" 35 *Contemp. Acct. Res.* 525 (2017).

[12]David B. Wilkins and Maria J. Esteban Ferrer, "The Integration of Law Into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market," 43 *Law & Soc. Inquiry* 981 (2018).

[13]Keval Amin, Rajiv D. Banker, and Eunyoung Whang, "Tale of Two Professions: The Impact of SOX and the Global Economic Crisis on Public Accounting and Law Firms' Performance," *J. Acct., Auditing & Fin.* (coming 2021).

[14]Two empirical studies examine law firms as a tax service provider. *See* Stevanie S. Neuman, Omer, and Anne M. Thompson, "Determinants and Consequences of Tax Service Provider Choice in the Not-for-Profit Sector," 32 *Contemp. Acct. Res.* 703 (2015); Kenneth J. Klassen, Petro Lisowsky, and Devan Mescall, "The Role of Auditors, Non-Auditors and Internal Tax Departments in Corporate Tax Aggressiveness," 91 *Acct. Rev.* 179 (2016) (using confidential IRS tax return data to examine the relationship between tax aggressiveness (as proxied by FIN 48 reserve) and the type of tax provider used). However, neither paper examines the effect of regulation on the market for tax services, in particular at the supplier level.

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effect of financial regulation.[15] SOX is one of the most important developments in financial regulation this century. There have been many studies of the effects of SOX on particular markets, such as the market for small accounting firm audits,[16] the market for board directors,[17] supply chains,[18] and even the market for whistleblowers.[19] However, as noted earlier, there is almost no related research on the market for tax services. The paucity of research on competition between law and accounting firms for tax work is likely attributable to the fact that publicly available data on law firm revenue by practice area are limited.[20] To fill this void in research on law firms, we hand collect three decades of data on law firm head count by practice areas, including tax, along with publicly available accounting firm data, to examine the competition for tax services as well as changes in light of SOX, FIN 48, and the TCJA.

The empirical results of our work show that the tax practices of large law firms *and* large accounting firms in the United States have grown over the past 30 years; however, the rate of growth for the accounting firms is larger than that of law firms, particularly in recent times. At accounting firms, this growth is primarily driven by increases in non-partner staff, whereas both tax partner/of counsel and associates account for the increase in tax head count at law firms.

We find that SOX generally had little net effect on the market for tax services; neither law firms nor accounting firms experienced any significant increase or decrease in tax head count in the several years following its passage. It is also possible that there was a shuffling of clients among the accounting firms after SOX, rather than work leaking to law firms. We do find that the release of FIN 48 and the recent overhaul of the tax law under the TCJA appear to have had a more significant positive effect on the market for tax services for accounting firms. However, law firms' tax practices apparently were not dramatically affected by these regulatory changes.

II. The Market for Tax Services

A. Competition Since 1990

Large law firms are a primary competitor of large accounting firms for high-end tax services.[21] Historically, accounting firms felt constrained by their limits on providing legal services, and thus, the most law and accounting firms could do was refer clients to one another.[22] However, in the late 1990s, many companies started to demand integrated legal and accounting services from firms, leading to the growth of multidisciplinary practices, with this process beginning in the tax area.[23] For example, one law firm survey respondent noted that many top clients are increasingly demanding: "On the big deals, you need lawyers with corporate grounding providing tax advice. Ideally, one would like to have the lawyers and the accounting firms in the same room, working together."[24] A senior analyst of law firm economics is quoted as follows:

> What we're seeing is indeed a big expansion by the Big Four into legal services. . . . In some areas that is a natural evolution of their existing business lines in audit work, tax, advisory or consulting. That's obvious in places where the Big Four are providing legal services related to tax. It makes a lot of sense to begin packaging lawyers in with their tax advisors or their auditors. That's something the Big Four have been doing

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[15] For a literature review, see Christian Leuz and Peter D. Wysocki, "The Economics of Disclosure and Financial Reporting Regulation: Evidence and Suggestions for Future Research," 54 *J. Acct. Res.* 525 (2016). They report that there is "scant evidence" on the aggregate outcomes of disclosure and reporting regulations, of which reporting of non-audit fees (including for tax services) paid to an audit firm is an example. *Id.* at 559.

[16] Mark L. DeFond and Clive S. Lennox, "The Effect of SOX on Small Auditor Exits and Audit Quality," 52 *J. Acct. Econ.* 21 (2011).

[17] James S. Linck, Jeffry M. Netter, and Tina Yang, "The Effects and Unintended Consequences of the Sarbanes-Oxley Act on the Supply and Demand for Directors," 22 *Rev. Fin. Stud.* 3287 (2009).

[18] Scott S. Nadler and John F. Kros, "An Introduction to Sarbanes-Oxley and Its Impact on Supply Chain Management," 29 *J. Bus. Logistics* 241 (2008).

[19] Richard E. Moberly, "Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers," 2006 *BYU L. Rev.* 1107 (2006).

[20] Maydew and Shackelford, *supra* note 3, at 327.

[21] *See, e.g.*, Adrian Michaels, "Auditors Fight US Rules on Tax Work," *Financial Times*, Dec. 30, 2002.

[22] Randall S. Thomas, Stewart J. Schwab, and Robert G. Hansen, "Megafirms," 80 *N.C. L. Rev.* 115 (2001).

[23] *Id.*

[24] Wilkins and Esteban Ferrer, *supra* note 12, at 993.

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for a long time, and it's something that we're seeing organic growth in.[25]

With legal services visible through the tax function, the four largest accounting firms (the Big Four) have "underscored that they could go one step better by putting lawyers and accountants in the same firm."[26]

Accounting firms felt pressure to increase tax fees in the 1990s.[27] Because technological advances decreased the amount of number-crunching billable hours, accounting firms sought to expand business planning services into areas that have been traditionally viewed as legal services.[28] In the late 1990s the Big Four had competitive advantages over law firms because of more rigorous ethical requirements for lawyers and — as noted above — clients' ability to enjoy "one-stop shopping."[29] By 1999 tax lawyers found themselves in a highly competitive, largely unregulated marketplace.[30]

Also during the 1990s, "elite" professionals played a prominent role in the emergence of a substantial market in abusive tax shelters during this period of financial boom.[31] Large law and accounting firms joined investment banks in designing and marketing hundreds of highly lucrative shelters that typically involved complex financing devices, esoteric legal instruments, and multiple layers of entities.[32] Many well-established law firm tax professionals left to join large accounting firms to earn higher incomes designing and marketing shelters, while the tax lawyers who remained at the law firms "proved eager" to provide legal opinions blessing tax schemes.[33] By 2004, after the Senate initiated hearings into the tax shelter industry, the market for individual and corporate shelters was in "disarray."[34] By 2005 the promotion of most of these abusive tax shelters had stopped.[35] Many of the accounting firms studied in this report were involved with tax shelter-related prosecution or other litigation with the U.S. government. The most prominent prosecution involved KPMG LLP, which settled in 2005 for nearly $500 million. Several of its partners were indicted, and some were convicted.[36]

Before SOX, tax departments at accounting firms clearly saw their firms' audit work as a feeder for tax work.[37] Because some clients viewed audits as a commodity — leading to downward price pressure on audit fees — some accounting firms viewed their audit work as loss leaders, contributing to lucrative tax fees.[38] Audit clients are ideal tax marketing targets because of the easy entree arising from auditors' extensive and intimate familiarity with the client's proposed or pending transactions, tax planning opportunities, and ongoing tax concerns, as well as from having the ear and trust of the CFO.[39] However, as discussed next, the strategy of targeting audit

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[25] Michael Cohn, "Big Four Increasingly Competing With Law Firms," *Accounting Today*, Sept. 14, 2007.

[26] Wilkins and Esteban Ferrer, *supra* note 12. PwC's 2017 acquisition of a significant portion of General Electric's large in-house tax law department is a recent example of accounting firms continuing to evolve in order to gain a foothold in the legal market by selling their expertise across a broad range of areas well beyond tax — into compliance, regulatory planning, and other specialties. *See, e.g.*, Gabe Friedman, "PWC's Takeover of the World's Best Tax Law Firm," *Bloomberg Law*, Mar. 15, 2017.

[27] Gary A. Munneke, "Multidisciplinary Practice Symposium Speeches: A Nightmare on Main Street (Part MXL): Freddie Joins an Accounting Firm," 20 *Pace L. Rev.* 1, 4 (1999).

[28] *Id.*

[29] Munneke, "Lawyers, Accountants, and the Battle to Own Professional Services," 20 *Pace L. Rev.* 73, 77 (1999); Peter C. Kostant, "Paradigm Regained: How Competition From Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground," 20 *Pace L. Rev.* 43, 52 (1999).

[30] Munneke, *supra* note 29.

[31] Tanina Rostain, "Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry," 23 *Yale J. Reg.* 77, 78 (2006).

[32] *Id.*

[33] *Id.* at 91 n.64 (citing many articles documenting pay increases to lure tax lawyers to join accounting firms).

[34] Joseph Bankman, "The Tax Shelter Problem," 57 *Nat'l Tax J.* 925, 932 (2004).

[35] Jacob L. Todres, "Bad Tax Shelters — Accountability or the Lack Thereof: Ten Years of Tax Malpractice," 66 *Baylor L. Rev.* 602, 604 (2014).

[36] Andrew R. Finley and James Stekelberg, "The Economic Consequences of Tax Service Provider Sanctions: Evidence From KPMG's Deferred Prosecution Agreement," 38 *J. Am. Tax'n Ass'n* 57, 59-60 (2016); Paul Davies and David Reilly, "KPMG Ex-Tax Partner Pleads Guilty," *The Wall Street Journal*, Mar. 28, 2006.

[37] Karen L. Hooks, Shirley J. Cheramy, and Terry J. Sincich, "Methods Used by Big 6 Auditors in Practice Development," 13 *Auditing* 101, 103 (1994).

[38] Dana R. Hermanson, "How Consulting Services Could Kill Private-Sector Auditing," 79 *CPA J.* 5, 6 (2009).

[39] *See, e.g.*, Maydew and Shackelford, *supra* note 3, at 309 and 328 (quoting a tax director, "It would take years to develop the firm-specific tax and business expertise that currently resides among the tax consultants at the accounting firm that has conducted its audit for decades."); and David E. Hardesty, *Practical Guide to Corporate Governance and Accounting: Implementing the Requirements of the Sarbanes-Oxley Act* para. 1201 (2021) ("sale of tax services to an audit client is a team effort, with the audit partner often leading the team").

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clients for tax work was about to change at the turn of the century.

B. Effect of Sarbanes-Oxley

Following the Enron and WorldCom accounting scandals,[40] in 2002 Congress enacted SOX, which prohibits audit firms from providing several non-audit services.[41] Although APTS are not prohibited under SOX,[42] the law did institute new requirements, including audit committee preapproval of APTS[43] and proxy statement disclosure of APTS fees.[44] Early commentators warned that auditors needed to anticipate that audit committees would be cautious about resolving conflicting interpretations of the nature of a tax service in a manner favorable to the auditor; in appropriate cases requiring clarity, the client would need to solicit SEC approval, a rather involved step to merely enter into a tax engagement.[45]

Because of these new restrictions on APTS, combined with the desire to increase the appearance of independence in the auditor-client relationship, some hypothesized that demand for APTS would decrease.[46] A survey published in 2005 with responses from 133 CFOs, tax directors, and other tax executives revealed a decrease in APTS, with work going to either other Big Four firms or to large law firms.[47] A survey of CFOs published in 2009 found that 58 percent of companies separated tax from audit service providers to signal auditor independence.[48] Academic literature also provides evidence consistent with the conjecture that audit firms would lose some tax service work after SOX. For example, one study provides evidence that clients reduced APTS in 2002 as a preemptive response to impending SOX provisions related to all non-audit services,[49] and another study published a year later similarly finds a decrease in APTS after SOX.[50] A recent study finds that the reduction in APTS is especially the case when accounting financial experts are on the audit committee.[51]

While the discussion immediately above addresses whether an accounting firm would lose APTS previously delivered to its audit clients, it is unclear whether that tax work would move to law firms. Accounting firms, concerned that the newly imposed rules regarding APTS would lead to a restructuring of the market for tax services, lobbied the SEC not to impose these rules, arguing that confusion surrounding the new rules would cause much of their tax work to flow to law firms.[52] SOX not only increased competition from

[40]For background on both cases as well as their direct link to the collapse of Arthur Andersen — one of the then-Big Five accounting firms — see Kathleen F. Brickey, "From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley," 81 *Wash. U. L. Q.* 357 (2003). *See also* John R. Kroger, "Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective," 76 *U. Colo. L. Rev.* 57 (2005).

[41]SOX lists services that audit firms are not allowed to provide to audit clients, including bookkeeping, appraisal or valuation services, actuarial services, internal audit outsourcing, management functions, and human resources and legal services unrelated to the audit. 15 U.S.C. section 78j-1(g).

[42]Even the bankruptcy court in the WorldCom litigation confirmed that "under the applicable statutes and regulations an accounting firm is expressly permitted to act simultaneously as both auditor and tax advisor." *In re WorldCom Inc.*, 311 B.R. 151, 169 (Bankr. S.D.N.Y. 2004).

[43]15 U.S.C. section 78j-1(h)-(i). *See* PCAOB Release No. 2005-014, "Ethics and Independence Rules Concerning Independence, Tax Services, and Contingent Fees" (July 26, 2005) (detailing process of audit committee approval). There must be sufficient specificity in the committee approval. For example, preapproval for "*all* tax advice is likely too broad." Pinney L. Allen and Saba Ashraf, "The Changing Landscape for Tax and Other Services: The Impact of Sarbanes-Oxley, Part 3," 30 *Corp. Tax'n* 19, 23 (2003) (emphasis added).

[44]17 C.F.R. section 240.14a-101 — Schedule 14A, "Information Required in Proxy Statement" (Item 9(e)(3)). This disclosure of APTS led to many empirical studies of that data, some of which we highlight in Sections I and II.

[45]Thomas J. Purcell and David Lifson, "Tax Services After Sarbanes-Oxley," 186 *J. Acct.* 32, 35 (2003). *See also* Hardesty, *supra* note 39 ("Clearly, the audit committee is faced with a formidable task" as to whether independence may appear to be impaired by hiring the audit firm for tax services. "In response, some committees may opt to avoid the entire issue, and refuse to approve any tax services.").

[46]*See, e.g.*, Maydew and Shackelford, *supra* note 3, at 327-331; Cripe and McAllister, *supra* note 4; and Michaels, *supra* note 21. *See also* Hardesty, *supra* note 39 (observing that for management, audit committee approval means a loss of decision-making power to the committee, with a related level of involvement "that may not be practical. The rules may cause auditors to lose lucrative tax work [and/or] force management to purchase tax services from firms that are unaffiliated with the auditors, resulting in potentially costlier, and less effective, tax advice.").

[47]Sed Crest, "How Sarbanes Oxley Is Changing Tax Services," 16 *Int'l Tax Rev.* 1 (Apr. 2005).

[48]Cripe and McAllister, *supra* note 4.

[49]Omer, Bédard, and Falsetta, *supra* note 9.

[50]Maydew and Shackelford, *supra* note 3.

[51]Bédard and Suzanne M. Paquette, "Audit Committee Financial Expertise, Litigation Risk, and Auditor-Provided Tax Services," 20 *Acct. Persp.* 7 (2021).

[52]Michaels, *supra* note 21. *See also* Andrew Parker, "Auditors Urged to Quit Tax Work," *Financial Times*, Mar. 17, 2003 (the Big Four "lobbied the SEC hard last January to ditch proposals to stop them producing novel strategies to minimise audit clients' tax").

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law firms for tax clients but also led to competition for tax experts to serve those clients.[53]

Many articles reported on the frequent departure of tax lawyers from accounting firms to work in law firms in the post-SOX period to follow the work.[54] One tax partner at a prestigious law firm explained why he left the Big Four in light of SOX: "SOX changed the whole ballgame[;] clients were confused, and I asked myself whether I should be associated with an audit firm if I can't leverage its relationships."[55] Another prestigious law firm tax partner moved to a Big Four firm in 2016 because of the perception of the Big Four's vast resources, but he returned to another large law firm because the auditing business was an obstacle to servicing some of his clients.[56] Moreover, shortly after SOX was enacted, a PwC partner said that the firm lost 3 percent of its tax revenue to law firms following SOX.[57]

Companies' desire to increase and maintain the appearance of independence in the auditor-client relationship was a driving factor for the shift of tax work from accounting to law firms.[58] First, by engaging a law firm instead of an accounting firm, a company distanced itself from negative publicity surrounding the accounting industry in the early 2000s, such as the Enron scandal and the tax shelter prosecutions that plagued the tax service provider industry.[59] Second, a company increased the likelihood that it could maintain the appearance of independence from its auditors; in other words, many companies no longer accepted any non-audit services from their audit firm so as to "signal a high-quality audit."[60]

On the other hand, we may not necessarily observe an increase in tax work at law firms post-SOX if there is simply a reshuffling of tax clients among the accounting firms.[61] One author suggested that accounting firms might even enter into arrangements to swap the non-audit work of their respective audit clients.[62] However, if audit clients want to engage another accounting firm for tax services, they risk that the firm may become their new auditor in the future, thereby presenting again the independence issue and other APTS constraints. Extensive research in the auditing literature documents the switching of auditors, either at client initiation or at auditor initiation.[63] Even for companies not contemplating a switch of auditors, they could have been concerned about possible mandatory auditor rotation or joint audits.[64] A debate over whether audit firm rotation should be mandatory existed at the time of SOX's enactment,[65] but it was only in 2014 that the PCAOB decided to no longer pursue a 2011 concept release requiring audit firm rotation.[66]

Further, even if a client wanted to engage a Big Four firm for tax services, it would likely have to discount at least two of the Big Four because they

[53] Neuman, Omer, and Thompson, *supra* note 14, at 703.

[54] *See, e.g.*, Allen and Ashraf, "The Changing Landscape for Tax and Other Services: The Impact of Sarbanes-Oxley," 30 *Corp. Tax'n* 37 (2003); Geanne Rosenberg, "Big Changes in Offing for Big Four; Sarbanes-Oxley Triggers Restructuring in Global Law Networks," 26 *Nat'l L.J.* 8, 10 (Dec. 22, 2003) (one legal profession observer reported that the "migration of prominent tax lawyers into the giant accounting firms appears to have reversed course," with "Big 4 associated tax lawyers . . . displaying more interest in offers from law firms."); and Shannon K. Nash, *Vault Guide to Tax Law Careers* 63 (2004).

[55] Ameet Sachdev, "Corporate Scandals Put Pressure on Audit Firms' Lawyers," *Chicago Tribune*, Nov. 24, 2002.

[56] Dan Packel, "Tax Partner's Move to Mayer Brown Signals Big Four's Limitations," Law.com (Nov. 5, 2018).

[57] Maydew and Shackelford, *supra* note 3, at 327 (also noting that limited empirical data exist to support this conjecture, primarily because of the lack of publicly available data on law firm revenues by practice areas).

[58] Cripe and McAllister, *supra* note 4; Maydew and Shackelford, *supra* note 3.

[59] Maydew and Shackelford, *supra* note 3. *See also* Purcell and Lifson, *supra* note 45, at 35 ("One of the most controversial aspects of the Enron collapse was the alleged involvement of [its] independent auditor in marketing aggressive tax planning ideas the IRS and the courts subsequently found to be abusive.").

[60] Maydew and Shackelford, *supra* note 3, at 309.

[61] *Id.* at 310 and 330.

[62] F. Roy Sedore, "Will the Sarbanes-Oxley Act Change the Way Corporations Purchase Professional Services?" 16 *J. Tax'n & Reg. Fin. Inst.* 5, 12 (2002).

[63] *See, e.g.*, Chad M. Stefaniak et al., "The Causes and Consequences of Auditor Switching: A Review of the Literature," 28 *J. Acct. Lit.* 47 (2009).

[64] Some countries, such as France, already require joint audits. *See, e.g.*, Charles Piot, "Auditor Concentration in a Joint-Auditing Environment: The French Market 1997-2003," 22 *Managerial Auditing J.* 161 (2007). Other countries, such as the United Kingdom, are considering requiring joint audits. *See, e.g.*, Pat Sweet and Sara White, "CMA Wants Big Four Operational Split and Mandatory Joint Audits," *Acct.* (May 2019). In some countries, such as Denmark, joint audits are now voluntary after once being required. *See, e.g.*, Cédric Lesage, Nicole V.S. Ratzinger-Sakel, and Jaana Kettunen, "Consequences of the Abandonment of Mandatory Joint Audit: An Empirical Study of Audit Costs and Audit Quality Effects," 26 *Eur. Acct. Rev.* 311, 314 (2017).

[65] Kam C. Chan, Barbara Farrell, and Patricia Healy, "Audit Firm Rotation — Concerns and Considerations," 30 *J. Applied Bus. Res.* 227 (2014).

[66] Chris Gaetano, "PCAOB Chair Says Board Won't Push on Audit Rotation," 17 *Trusted Prof.* 6 (2014).

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likely provide services for the client's competitors, so the client would be left with one Big Four firm (other than its current auditor) from which to choose.[67] For example, the threat of information transfer to competitors may induce a client to avoid an auditor that audits its competitors.[68] A recent study finds rival companies reluctant to engage the same auditor because of information-spillover concerns.[69] Therefore, clients may have looked to reduce this risk by engaging tax work from law firms, thus causing the post-SOX increased demand for law firm tax services.[70]

C. Effect of FIN 48

Unlike SOX, the predicted effect of FIN 48 on the demand for APTS is less clear. FIN 48 was effective for publicly traded companies' fiscal years beginning after December 15, 2006.[71] FIN 48 seeks to reduce diversity in reporting practices by introducing uniform recognition, measurement, and disclosure guidelines for the reserve for UTPs included in the financial statements.[72] Specifically, FIN 48 introduced a two-step process for measuring and recording the tax reserve.[73] The first step is the recognition test, which requires that the tax position will more likely than not (that is, greater than a 50 percent likelihood) be sustained upon tax authority audit based on its technical merits.[74] If the position meets the "more likely than not" threshold, the next step is measurement: The amount of the tax benefit that is recognized is measured as the largest amount of the benefit that is cumulatively more than 50 percent likely to be realized upon settlement, and the unrecognized portion is recorded as an uncertain tax benefit (UTB) in the financial statements (that is, the tax reserve).[75] FIN 48 also introduced new disclosure requirements for the detailed tax footnote supporting the financial statements, including requiring public disclosure of UTB amounts and the source of UTB changes.[76]

Anecdotal evidence suggested that companies engaged additional outside tax advisers to assist with FIN 48 compliance.[77] A 2008 article cites the American Institute of CPAs as listing an "immediate action item" to "consult outside auditors and tax advisors to coordinate FIN 48 analysis."[78] In 2007 one author suggested that audit firms would need to bring in tax experts from their firms to help on audits because of FIN 48 matters and that this would also provide an opportunity for out-of-scope billings.[79] He also noted that some tax work related to FIN 48, such as updated tax opinions on the probability of success of a challenged tax position, might instead need to be farmed out to firms other than the auditor because of independence issues.[80] In a 2007 primer on FIN 48 for tax lawyers, another

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[67] Allen and Ashraf, *supra* note 43. One author notes it is more likely that clients want to have audit firms that are different from their competitors', reporting the example of Coca-Cola and Pepsi, which were audited by Ernst & Whinney and Arthur Young, respectively. When those two firms merged to become E&Y, Pepsi departed as an audit client. Soo Y. Kwon, "The Impact of Competition Within the Client's Industry on the Auditor Selection Decision," 15 *Auditing: J. Prac. & Theory* 53 (1996).

[68] Brian W. Mayhew and Michael S. Wilkins, "Audit Firm Industry Specialization as a Differentiation Strategy: Evidence From Fees Charged to Firms Going Public," 22 *Auditing: J. Prac. & Theory* 33, 37 (2009).

[69] Daniel Aobdia, "Proprietary Information Spillovers and Supplier Choice: Evidence From Auditors," 20 *Rev. Acct. Stud.* 1504 (2015).

[70] Another change to permissible tax work of audit firms is worth noting, although it is likely not as material as the SOX rules. In 2006 the SEC approved the PCAOB's additional limits by prohibiting contingent APTS fees or providing tax services to audit client executives in a financial reporting role. PCAOB Rule 3521; PCAOB, "SEC Approves PCAOB Rules on Auditor Ethics, Independence and Tax Services" (Apr. 21, 2006). Before this rule, audit firms' tax staff frequently provided tax advice to key executives of their audit clients. A well-known example is one audit firm's aggressive tax advice for Sprint executives' stock option gains. Jonathan Weil, "Ernst & Young Faces Tax-Shelter Inquiry," *The Wall Street Journal*, May 24, 2004.

[71] The effective date was December 15, 2007, for all other firms using U.S. generally accepted accounting principles. FASB, "Effective Date of FASB Interpretation No. 48 for Certain Nonpublic Enterprises," FASB Staff Position No. 48-2, at 1 and 3 (Feb. 1, 2008).

[72] *See* Andrew W. Jones, "FASB — The IRS's New Best Friend: How FIN 48 Affects the Taxpayer-IRS Relationship and Potential Taxpayer Challenges," 25 *Ga. St. U. L. Rev.* 767, 772-774 (2009).

[73] *See, e.g., id.* at 774; and Richard L. Alltizer, Brian P. McAllister, and Bill D. Jarnagin, "FIN 48: Accounting and Auditing Implications," 78 *CPA J.* 44, 45 (2008).

[74] Jones, *supra* note 72, at 774; Alltizer, McAllister, and Jarnagin, *supra* note 73, at 45.

[75] Alltizer, McAllister, and Jarnagin, *supra* note 73, at 45.

[76] Jones, *supra* note 72, at 775.

[77] Financial Accounting Foundation, *supra* note 6.

[78] Reed C. Kirschling and Michael D. Akers, "FIN 48: The Impact on Staffing, Internal Control Processes and Expertise of Privately-Held Companies," 12 *Rev. Bus. Info. Sys.* 9 (2008) (citing American Institute of CPAs, "Practice Guide on Accounting for Uncertain Tax Positions Under FIN 48" (Nov. 29, 2006), which is no longer on the AICPA website).

[79] Howard W. Wolosky, "Accounting for Income Taxes' Dramatic Transformation," 40 *Prac. Acct.* 31 (2007).

[80] *Id.*

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author noted that many companies had begun to engage tax lawyers for tax opinions for FIN 48, even when an opinion would not have been sought for a tax return position, and that this was leading to a "welcome source of billable work."[81]

As to other FIN 48-related work, it is unclear whether companies hired advisers that were also their auditors,[82] a different accounting firm, or another tax service provider, such as a law firm. The empirical accounting literature suggests that APTS demand may have changed after the passage of FIN 48. For example, a study provides evidence that higher APTS fees are associated with a lower audit fee premium in both the pre- and post-FIN 48 periods (although the effect is slightly less negative in the post-FIN 48 period), suggesting a knowledge-spillover benefit from jointly providing services.[83] However, another study does not find a difference in tax reserve adequacy or accuracy after FIN 48 for companies with and without APTS.[84] The authors in this latter study suggest that increased FIN 48 disclosure, combined with heightened auditor scrutiny of tax accounts, reduced the informational advantage of APTS.[85] Their results could suggest that APTS demand may have decreased following FIN 48 because companies no longer recognized an incremental benefit of using their audit firm for APTS.

Based on the above, it is unclear whether after FIN 48 clients would shift their tax work away from their auditor and toward other large accounting firms or instead to law firms. While both types of firms possess tax competencies, each has a distinct set of competitive advantages that will likely prove beneficial in the post-FIN 48 period. The extent to which clients value one service provider's set of skills over the other will ultimately determine FIN 48's effect on the overall market for tax services.

Accounting firms' competitive advantage regarding tax services in the post-FIN 48 period is their understanding of both tax law and the financial reporting of tax planning outcomes under generally accepted accounting principles.[86] A recent study found that Accounting Standards Codification 740 is the second-most difficult topic for tax professionals, be they lawyers or accountants, or internal versus external advisers.[87] Indeed, one author warns that tax lawyers need to steer clear of accusations of the unauthorized practice of *accounting* in their work related to FIN 48.[88] Moreover, another author warns that lawyers who have "accounting ignorance" as compared to accountants may err on the side of supporting clients' aggressive tax-reported financial reporting.[89]

The base of accounting knowledge provides a competitive advantage for accounting firms because optimal tax planning ideally considers all taxes, all parties, and all costs, when "all costs" include financial reporting implications.[90] Moreover, a survey of corporate tax executives finds that financial reporting considerations are a key factor in tax planning.[91] Therefore, the ability to understand the financial reporting consequences of clients' tax planning decisions is even more important in the post-FIN 48 period because FIN 48 specifically relates to the financial reporting of UTPs. Thus, accountants have a

[81] Steven R. Schneider, "FIN 48 for Tax Lawyers — Accounting for Uncertainty in Income Taxes," 48 *Tax Mgmt. Memo.* 139, 143 (2007).

[82] A relatively recent study finds that audit clients incurred significant FIN 48 implementation costs but that ongoing audit pricing of UTBs is similar before and after FIN 48. Matthew J. Erickson, Nathan C. Goldman, and James Stekelberg, "The Cost of Compliance: FIN 48 and Audit Fees," 38 *J. Am. Tax'n Ass'n* 67 (2016).

[83] Donohoe and Knechel, *supra* note 10. *See also* Ananth Seetharaman, Yan Sun, and Weimin Wang, "Tax-Related Financial Statements Restatements and Auditor-Provided Tax Services," 26 *J. Acct., Auditing & Fin.* 677 (2011) (finding a negative association between APTS and tax-related financial statement restatements, suggesting these services manifest themselves in higher-quality tax-related financial statement management assertions).

[84] Gleason, Mills, and Nessa, *supra* note 11.

[85] *Id.*

[86] Maydew and Shackelford, *supra* note 3, at 309-310.

[87] Hughlene A. Burton and Stewart Karlinsky, "Tax Professionals' Perception of Large and Mid-Size Business US Tax Law Complexity," 14 *eJournal Tax Res.* 61 (2016) (noting that the only topic more difficult was foreign mergers and acquisitions). IRS requirements for large business taxpayers to complete Schedule M-3 (reconciling taxable income to income reported for financial accounting purposes) after 2004 further accentuated the comparative advantage for tax advisers with accounting skills. *See, e.g.*, Celia Whitaker, "Bridging the Book-Tax Accounting Gap," 115 *Yale L.J.* 680, 703 (2005) (discussing the then-new Schedule M-3 requirement).

[88] Schneider, *supra* note 81 (emphasis added).

[89] William O. Fisher, "Lawyers Keep Out: Why Attorneys Should Not Participate in Negotiating Critical Financial Numbers Reported by Public Company Clients," 2010 *BYU L. Rev.* 1501, 1547-1550 (2010).

[90] Myron S. Scholes et al., *Taxes and Business Strategy: A Planning Approach* 3 (2014).

[91] John R. Graham et al., "Incentives for Tax Planning and Avoidance: Evidence From the Field," 89 *Acct. Rev.* 991, 994, 1001-1002 (2014).

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better understanding of how to measure and record the benefits of the underlying tax position in the financial statements.[92] If accounting firms' competitive advantage dominates, we expect to see an increase in accounting firm provision of tax services after FIN 48.[93]

On the other hand, law firms have a competitive advantage in the post-FIN 48 period related to high-end legal analysis, such as the drafting of written tax opinions, as well as the ability to cloak advice under the protection of legal privileges.[94] Although these relative advantages for law firms existed even before FIN 48, they are even more advantageous in the post-FIN 48 period for two reasons. First, professionals in law firms are better able to draft FIN 48 opinions, which assess the likelihood of a tax position being sustained upon tax authority audit.[95] Second — and in many cases, more importantly — law firm tax advice (including FIN 48 opinions) may benefit from the attorney-client privilege more than the accountant-client privilege.[96] The attorney-client privilege applies to all matters, tax or otherwise, communicated between a client and its attorney. By contrast, accountants' somewhat analogous privilege under section 7525, the "federal authorized practitioner privilege," extends only to tax advice and is also narrower in that it does not cover criminal matters.[97] For an accounting firm's tax advice to be shielded by attorney-client privilege, the accountant must be assisting the law firm that has been engaged by the client.[98]

As to the work product privilege, work prepared by an attorney for a client in anticipation of litigation may be kept confidential.[99] In the tax context, one author recommends having outside attorneys create or commission documents and including in documentation the thoughts and opinions of counsel that clearly anticipate litigation.[100] In this way, the accrual workpapers will avoid the result of *Textron*,[101] in which the court of appeals held that the tax accrual workpapers prepared by an in-house attorney and showed to the auditor were merely part of the perfunctory role of financial statement presentation.[102] FIN 48 raised the stakes on tax accrual workpapers because they created a roadmap for the IRS that could be compelled in court.[103] Law firms have a competitive advantage in the post-FIN 48 period because FIN 48 more likely than not opinions prepared by law firms do not fall under the IRS's definition of tax accrual workpapers.[104] It is best practice, especially now that the IRS requires Schedule UTP,[105] for highly

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[92] One large law firm partner said that for tax associates, it is "critical to obtain a basic background in accounting and finance." John C. Coates IV, Jesse M. Fried, and Kathryn E. Spier, "What Courses Should Law Students Take? Lessons From Harvard's Biglaw Survey," 64 *J. Legal Educ.* 443, 447 (2015). The Labor Department recommends that those seeking to become tax lawyers obtain extensive knowledge of accounting. Bureau of Labor Statistics, "Occupational Outlook Handbook, 2010-11 Library Edition" at 258 (Jan. 2010). On the other hand, one legal academic advises that law schools "must resist the temptation to reflexively teach students to aggressively enter the accounting process at future clients" in the context of how lawyers might help publicly traded companies in releasing financial statements. Fisher, *supra* note 89, at 1553.

[93] It is also possible that clients reducing APTS may prefer another accounting firm over a law firm as a tax service provider because of the competitive advantage possessed by accounting firms. Accountants have the quantitative skills necessary for optimal tax planning, and those skills are also indispensable in FIN 48 work. Maydew and Shackelford, *supra* note 3, at 309-310.

[94] *Id.* at 310; Jean A. Pawlow, Stephen M. Ryan, and Kevin Spencer, "Hands Off My Tax Accrual Workpapers: *Textron*, FIN 48, and Related Issues," 59 *Tax Exec.* 421 (2007).

[95] Robert P. Rothman, "Tax Opinion Practice," 64 *Tax Law.* 301, 308-310 (2011).

[96] Maydew and Shackelford, *supra* note 3, at 310.

[97] Section 7525; Seth Kossman, "CPAs and Privileged Communications," 44 *Tax Adviser* 712 (2013).

[98] Kossman, *supra* note 97, at 712-713 (noting "*Kovel* arrangements").

[99] For the history and rationale of the work product privilege, see Jeff A. Anderson et al., "Work Product Doctrine," 68 *Cornell L. Rev.* 760, 762-788 (1982-1983).

[100] Linda Burilovich, "Protecting Communications and Documents From IRS Summons Enforcement," 44 *Tax Adviser* 230 (2013).

[101] *United States v. Textron Inc.*, 577 F.3d 21 (1st Cir. 2009).

[102] Despite the broad scope of authority the IRS has been granted, it has historically acted with restraint, declining to request tax accrual workpapers as a standard examination technique. *See* IRS, "Tax Accrual Workpapers Frequently Asked Questions," at Q17 (Feb. 27, 2018).

[103] Robert M. Moise, "Do We Really Have Privilege?" 41 *Tax Adviser* 716 (2010). Although the IRS failed to access KPMG's Wells Fargo FIN 48 workpapers, the court protected the workpapers because KPMG had relied on significant legal opinion in auditing the tax reserves. Roger B. Daniels, Roxane DeLaurell, and Thomas M. Spade, "IRS Schedule UTP and the Legal Privileges of Tax Accrual Workpapers: Understanding the Risks for Auditors," 86 *CPA J.* 46, 50 (2016). The court cautioned that its holding is limited to the case's unique circumstances, including specifically proving anticipation of litigation. The court stated that it does not adopt the view that all tax workpapers, by their very nature, are created "because of" litigation simply because the taxpayer must "assume" under FIN 48 that positions will be litigated. *Wells Fargo & Co. v. United States*, No. 0:10-mc-00057 (D. Minn. 2013).

[104] Pawlow, Ryan, and Spencer, *supra* note 94.

[105] For discussion of Schedule UTP, see Mark A. Luscombe, "The Final 2010 Schedule UTP," 88 *Tax Mag.* 3 (2010).

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material and difficult UTPs to have the auditors work closely with tax attorneys, with only minor clerical duties left to non-attorneys.[106]

It is also possible companies would in-source tax work that otherwise would have been done by their audit firms' tax staff or tax experts at law firms or other accounting firms. However, it has been observed that there is "scant research" on individuals in companies' tax departments.[107] Nonetheless, we can expect that companies would not prefer to in-source tax work. For example, companies with complex tax issues or with more of a tax planning focus are more likely to use external advisers rather than handle those matters in house.[108] Further, after SOX there are new tax-related burdens under the increased audit and corporate governance requirements, such as SOX section 404 internal control work related to the tax function.[109] Also, the increased burdens under FIN 48, Schedule UTP, and Schedule M-3 likely stretched in-house tax staff more after SOX. As one commentator wrote, "Compliance and risk management have meant that [an in-house tax] position has become punishing and complex."[110]

D. Effect of the TCJA

The TCJA was signed into law by former President Trump on December 22, 2017, and was effective on January 1, 2018. It was the largest overhaul to the federal tax code since the passage of the Tax Reform Act of 1986.[111] Among its many changes, the TCJA reduced the corporate tax rate to 21 percent, repealed the corporate AMT, limited the deductibility of business interest expense and prior-period net operating losses, modified bonus depreciation and section 179 expensing for qualified property, and introduced a new 20 percent deduction for some passthrough entities under section 199A.[112] As for multinational companies, the TCJA created a modified territorial tax system, introduced a one-time deemed repatriation tax for previously untaxed earnings of foreign subsidiaries, and created three new provisions to limit the erosion of the U.S. tax base: the global intangible low-taxed income tax, the foreign-derived intangible income deduction, and the base erosion and antiabuse tax.[113]

Because the TCJA is relatively new, its effect on the market for tax services is unclear.[114] Anecdotal evidence suggests that the complexity and uncertainty surrounding the TCJA's provisions created new opportunities for the tax services market,[115] especially uncertainty about the international tax regimes of GILTI, FDII, and the BEAT.[116] Formal research to date has predominately focused on the TCJA's effect on companies, including the personal tax concerns of owners of law firms and accounting firms,[117] rather than the provision of tax services. It is unclear whether the uncertainty and complexity associated with the TCJA disproportionately benefited law firms or accounting firms, or

[106] Daniels, DeLaurell, and Spade, *supra* note 103.

[107] John Barrios and John Gallemore, "Tax-Related Human Capital: Evidence From Employee Movements," Becker Friedman Institute, Working Paper No. 2019-64, at 8 (2019) (studying how companies staff their tax departments).

[108] *See, e.g.*, Amy E. Dunbar and John D. Phillips, "The Outsourcing of Corporate Tax Function Activities," 23 *J. Am. Tax'n Ass'n* 35, 43, 45 (2001). Outsourcing of tax planning (as opposed to insourcing more of the tax compliance) is consistent with the accounting profession's shift from providing less profitable tax compliance services to a focus on more profitable tax consulting service lines. *Id.* at 46.

[109] 15 U.S.C. section 7262.

[110] Catherine Snowdon, "The New Challenges for a Tax Director," 19 *Int'l Tax Rev.* 10 (2008).

[111] Kysar, *supra* note 7.

[112] For a summary of the TCJA, see Urban-Brookings Tax Policy Center, *The Tax Policy Center's Briefing Book* (2020).

[113] For details on the TCJA's international provisions, see Donohoe, Gary A. McGill, and Edmund Outslay, "The Geometry of International Tax Planning After the Tax Cuts and Jobs Act: A Riff on Circles, Squares, and Triangles," 72 *Nat'l Tax J.* 647 (2019); and Madeleine Burnette-McGrath et al., "A Quick and Easy Guide to the New FDII, GILTI, and 100 Percent Foreign DRD International Tax Provisions of the 2017 Tax Cuts and Jobs Act," 38 *Va. Tax Rev.* 181 (2018).

[114] Although the TCJA's changes for individuals sunset in 2026, its corporate tax changes do not sunset. The market for tax services primarily at issue in this report is generally corporate-related because the vast market for individual services is heavily serviced by far smaller accounting firms and face-to-face tax return preparation chain outlets like H&R Block and tax software sellers like Turbotax. *See, e.g.*, H&R Block, "A Little About H&R Block" (noting it prepared one in seven U.S. tax returns in 2019); and Cohn, "Intuit Saw Uptick in Turbotax Sales During Tax Season," *Acct. Today*, Apr. 16, 2018 (noting sales of more than 36 million units during 2018 tax season).

[115] *See, e.g.*, Wolters Kluwer, *supra* note 8 (quoting a tax lawyer: The TCJA created a "massive amount of new work," and clients are "going to need greater access to tax attorneys and tax accountants.").

[116] *See, e.g.*, Lawrence M. Hill, "Managing Uncertainty: A Survival Guide to the Tax Cuts and Jobs Act of 2017," 70 *Tax Exec.* 18 (2018).

[117] *See, e.g.*, Corey Veneziano and Stephen Fuller, "TCJA Tips for Law Firms," 45 *Law Prac.* 56 (2019); Gretchen Guenther-Collins and Benjamin Henderson, "Service Businesses That Qualify for the 20% QBI Deduction," 49 *Tax Adviser* 803 (2018).

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whether the market as a whole saw an increase in tax work.

Some work may have increased for accounting firms as a result of the TCJA's implications for financial reporting. For example, deferred tax assets and liabilities reported on balance sheets under Accounting Standards Codification 740 would have needed to be remeasured at the 21 percent rate, with material implications on financial statements; any valuation allowance reserves against the deferred tax asset would have needed to be reassessed; and the one-time transition tax on overseas earnings would have financial reporting implications, especially for companies' permanently reinvested earnings designation related to overseas subsidiaries.[118]

III. Data and Sample

Market share is typically thought of as a firm's sales as a percentage of the industry's sales.[119] For example, a law firm can be said to have increased its market share if it increased its revenue as a percentage of an entire market's revenue. Many studies use this measure.[120] Ideally, our report would compare tax revenue changes at law firms with tax revenue changes at accounting firms to investigate the changes (total and relative to each other) after the three changes detailed in Section II. However, data on revenue for law firms' tax practices are not publicly available,[121] which likely explains why this report is the first to empirically study law firm participation in the market for tax services.

On the other hand, market share can be measured in different ways based on context (for example, units other than revenue from billing clients or billable hours sold to clients), such as a law firm's share of securities class action lawsuit cases (not revenue from or hours worked on those cases).[122] A primary innovation of our report is the use of hand-collected law firm data to determine the firms' number of available tax lawyers, which can imply a level of revenue from tax services.[123]

Our sample selection period for law and accounting firm annual data begins in 1991 and runs through 2020. For our analysis of the overall market for tax services, we collect our data from several sources. For law firms, we gather their head count data from the annual National Association for Law Placement (NALP) Directory of Legal Employers,[124] a frequently used source of data in empirical studies of law firm demographics in articles published in law journals[125] and other journals.[126] The NALP directory provides potential recruits (law students) extensive details about law firms, including a head count of lawyers by practice area.[127]

[118] *See, e.g.*, Kim Honaker and Paula B. Thomas, "An Analysis of the Initial Financial Statement Impact of the Tax Cuts and Jobs Act," 89 *CPA J.* 56 (2019).

[119] For example, the Marketing Accountability Standards Board defines market share as the percentage of a market, defined in terms of either units or revenue. *See* Common Language Marketing Dictionary (undated) (noting that in a survey of nearly 200 senior marketing managers, 67 percent responded that they found the "dollar market share" metric very useful, compared with 61 percent for "unit market share").

[120] *See, e.g.*, Amin, Banker, and Whang, *supra* note 13; and C.N.V. Krishnan and Ronald W. Masulis, "Law Firm Expertise and Merger and Acquisition Outcomes," 56 *J. Law & Econ.* 189 (2013).

[121] Maydew and Shackelford, *supra* note 3, at 327.

[122] *See, e.g.*, Qiming Wang et al., "Law Firm Market Share and Securities Class Action Litigation Outcomes," *Q. Rev. Econ. & Fin.* 1, 4 (coming 2021).

[123] An approach to estimate revenue per practice area could be to multiply our data of head counts by assumed annual billable hours and assumed billing rates. However, we were unable to find sufficient and consistent publicly available data on those variables. For example, the *National Law Journal*'s annual billing rate survey does not report annually the data for the firms in our report, and it does not list the rates by practice area. *See, e.g.*, "Firm-by-Firm Sampling of Billing Rates Nationwide," *Nat'l L.J.* (Dec. 12, 2005). Even if more sufficient firms' rates were included in the survey, the rates are probably underestimated given that many of the highest-billing national law firms decline to answer this survey. Jonathan M. Barnett, "Certification Drag: The Opinion Puzzle and Other Transactional Curiosities," 33 *Iowa J. Corp. L.* 95, 110 n.58 (2007).

[124] Amin, Banker, and Whang, *supra* note 13, at 9, instead used AmLaw 100's annual reports of law firm revenue. We do not use AmLaw 100 reports because that report lists only aggregate data, not by practice area.

[125] *See, e.g.*, Kevin A. Kordana, "Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model," 104 *Yale L.J.* 1907, 1926 (1995); and Scott Baker and Kimberly D. Krawiec, "Symposium: Uncorporation: A New Age?: The Economics of Limited Liability: An Empirical Study of New York Law Firms," 2005 *U. Ill. L. Rev.* 107, 110 (2005).

[126] *See, e.g.*, Peter D. Sherer, "Leveraging Human Assets in Law Firms: Human Capital Structures and Organizational Capabilities," 48 *Indus. & Lab. Rel. Rev.* 671, 678 (1995); Lauren A. Rivera and Andras Tilcsik, "Class Advantage, Commitment Penalty: The Gendered Effect of Social Class Signals in an Elite Labor Market," 81 *Am. Soc'y Rev.* 1097, 1107 (2016); Alexi Freeman, "Don't Hire Me as a Token: Best Practices for Recruiting and Supporting Externs From Historically Marginalized Backgrounds," 72 *S.C. L. Rev.* 357 (2020). For example, Kordana, *supra* note 125, and Sherer, *id.*, use NALP head count data to study leverage within law firms (*i.e.*, ratio of associates to partners), including by practice areas.

[127] Sherer, *supra* note 126, at 678. This data is reliable and comparable from year to year, firm to firm, and office to office because the questionnaire is standardized. *Id.*

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The NALP directory is primarily composed of large law firms. In this way, we include the firms whose tax departments are more likely to be competitors of large accounting firms for corporate tax work. To further ensure that the NALP listings contain material tax practices, we consult the 2000 to 2020 annual editions of "Vault Guide to the Top 100 Law Firms," which ranks the largest law firm practices based on specific practice areas, such as tax.[128] The Vault tax rankings began in 2000 (with a top six, later increased to a top 10, top 15, and most recently, a top 20). For our analyses, we retain only those firms that appear in the Vault Top 20 at least once because they are the most likely to compete with large accounting firms for corporate tax-related work.[129]

The law firm profiles in the NALP directory typically report data by office, although for some firms, the directory provides only aggregate national data in some years.[130] We collect the head count data for tax practices in the New York and Washington offices (designated as NY and DC, respectively, in the tables). We combine the New York and Washington office data for each law firm for each year when conducting our analyses, unless a firm lacks data for a New York or Washington office.[131]

We focus on New York and Washington for several reasons aside from the fact that laborious hand collection of data — much of which is not amenable to software scraping tools — makes it impractical to input data from the many other cities for which large firms also provide profiles. First, we seek to avoid a comparability problem resulting from different-sized offices in multiple cities. Second, tax services are likely a material source of revenue for these two offices, especially for Washington, where tax is one of many federal regulatory areas benefiting from proximity to the seats of federal government.[132]

Third, New York and Washington — which are also the headquarter cities for almost all the firms on the Vault Top 20 tax list — are popular destinations for newly minted LLMs in tax. Data from the United States' three premier law school LLM tax programs (New York University, Georgetown, and Florida Levin), which students from around the world attend, confirm that New York and Washington are the locations where most of their alumni work after graduating.[133] Further, the annual centralized recruiting and interviewing of tax law graduates occurs in

[128] Vault rankings have been used in law journal studies ranking law firm prestige and reputation. *See, e.g.*, David Zaring, "Against Being Against the Revolving Door," 2013 *U. Ill. L. Rev.* 507, 533 (2013); Andrew Bruck and Andrew Canter, "Supply, Demand, and the Changing Economics of Large Law Firms," 60 *Stan. L. Rev.* 2087, 2116 n.54 (2008); and James S. Ang, Zhiqian Jiang, and Chaopeng Wuet, "Good Apples, Bad Apples: Sorting Among Chinese Companies Traded in the U.S.," 134 *J. Bus. Ethics* 611, 617 (2016). Although the Vault rankings, which are based on anonymous surveys of thousands of attorneys, have been criticized, they are widely viewed and discussed by both the popular press and legal scholars. Adam Bonica, Adam S. Chilton, and Maya Sen, "The Political Ideologies of American Lawyers," 8 *J. Legal Analysis* 277, 310 (2016).

[129] Cleary Gottlieb is frequently one of the top tax practices according to Vault's rankings. However, Cleary is not in our studied sample set because, while it has profiles in the NALP directory, it does not report head count by any practice area. Fenwick & West LLP, which appeared once in the Vault top tax rankings, is also not in our data set because it is a West Coast firm. Fenwick has no Washington office and opened its New York office only in 2016. "Fenwick Opening New York Office to Tap Tech Transactions," Law.com, May 24, 2016. We also exclude McKee Nelson, which had a unique but ultimately dissolved alliance with E&Y. Nathan Carlile, "McKee Nelson: The Richest Guys in Town," *Legal Times*, Aug. 13, 2007 (describing the five-year alliance).

[130] For example, in our data set, Cravath sometimes provides only a national (*i.e.*, "multi-office") profile. Baker and Krawiec, *supra* note 125, at n.54, highlight the same issue with NALP firm profiles.

[131] For two of the six firms used in our main analyses (Baker McKenzie and Mayer Brown), we are missing a trivial amount of data for one of the two city offices. For Baker McKenzie, we are missing data from the Washington office for 1996 and data from the New York office for 2005. For those missing years, we extrapolate from the surrounding years (*i.e.*, we take the average of the years before and after the missing year). For Mayer Brown, we are missing data from the New York office for 1991-1993 and data from the Washington office for 1995-1997. For those years, we take the average of the years before and after the missing years, and thus, head count remains constant for those three years. Because these years for Mayer Brown came long before the three regulatory changes analyzed in this report, we do not believe this approach affects our conclusions.

[132] While Washington is not a largely populated location compared to, say, Chicago, many law firms have large regulatory practices there, and tax is one of those large practice areas. *See, e.g.*, Karen S. Miller, "Cracking the D.C. Job Market," 15 *Barrister* 22, 25 (1988) (reporting that financial-transactional law, including tax, "has become the most lucrative area of Washington legal practice" and that another area of growth is "related to tax reform, an arena in which law firms are becoming increasingly competitive with the major accounting firms."); and Victoria Lee, "DC Lawyers at Home With the Clintons," 12 *Int'l Fin. L. Rev.* 19 (1993) (in "DC there's one industry and that industry is government [and] it is that industry which has underpinned the businesses of [Washington's] major commercial practices with a core of regulatory, litigation, tax, trade, and anti-trust work.").

[133] NYU, Georgetown, and Florida Levin are perennially at the top of LLM tax rankings. Paul L. Caron et al., "Pursuing a Tax LLM Degree: Where?" University of Cincinnati Public Law Research Paper No. 10-18 at 2 (Apr. 28, 2010) (citing *U.S. News & World Report* rankings). *U.S. News & World Report*'s 2021 rankings again list these as the top three schools.

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Washington.[134] Slightly over half of NYU's most recent LLM tax graduates landed in New York, New Jersey, Pennsylvania, or Washington.[135] From 2016 to 2020, between 63 and 81 percent of Georgetown's LLM tax graduates landed in the Northeast (including New York) and mid-Atlantic (including Washington).[136]

The NALP directory separately lists partners, associates, and of counsel. In the large law firms that we see, of counsel are far fewer than partners. We treat of counsel as partners for our purposes because they generally are far more experienced than the typical associate.[137] We exclude any office-year observation for which the tax head count is combined with another practice (for example, compensation, benefits, ERISA, estate planning, personal financial planning, and similar practices) to avoid the confounding effects of these other practice areas. To reduce potential bias in our law firm sample as a result of non-random missing observations, we conduct our main analysis using a balanced panel of observations and thus delete firms that do not have available data for nearly all 30 years. Our balanced panel contains 180 firm-year observations, corresponding to 30 years for each of the following six firms: Baker McKenzie; Jones Day; Kirkland & Ellis; Mayer Brown; Paul, Weiss, Rifkind, Wharton & Garrison; and Shearman & Sterling.[138]

For accounting firms, we collect their revenue data from the *Public Accounting Report* (PAR) and *Accounting Today* (AT) annual surveys, along with the head count data for the limited number of years head count data is reported. We use PAR data from 1990 until PAR ceased publication of its annual survey with its 2017 report. Accordingly, we then use AT's similar survey for 2018, 2019, and 2020. The PAR and AT surveys report the same information required in our data analysis, and one study reports a 99.9 percent correlation between the five years of PAR data they compared with AT data.[139] PAR revenue data has been used in many law journal[140] and accounting journal[141] studies, including in direct studies of revenue or as a control variable. AT revenue data also has been cited in law journal[142] and accounting journal[143] studies.

[134] The Tax Attorney Recruiting Event (TARE) brings together more than 150 LLM tax students from Florida Levin as well as three other highly ranked law school programs: Boston University, Northwestern Pritzker (in Chicago), and California Irvine. A listed contact at TARE confirms that each of the 14 annual TARE sessions (except for when held virtually because of COVID-19) were held in Washington. The event occurs the day before NYU and Georgetown's similar event, the taxation interview program, which has been occurring annually since 2001.

[135] NYU Law, "Frequently Asked Questions for LLM Taxation Students" (captured June 30, 2021). A "wayback machine" search of this link leads to the earliest snapshot taken (Mar. 7, 2014), in which NYU similarly reports that the largest geographic markets for its graduates are the New York metro area and Washington.

[136] Georgetown University Law Center, "Employment Statistics for U.S. Trained Tax LL.M. Graduates" (Oct. 30, 2020).

[137] *See, e.g.*, American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion 90-357 (May 10, 1990) (noting that "of counsel" is not a partner but is "not the status ordinarily conveyed by the term 'associate,' which is to say a junior non-partner lawyer, regularly employed by the firm"). *See also* Kordana, *supra* note 125, at n.100 (using NALP data and including of counsel in their partner category because many of counsel are semiretired partners).

[138] For Jones Day, we are missing observations for the New York office for 2008-2014. Therefore, to maintain consistency, we use Jones Day data for only the Washington office for the entire sample period. For Kirkland & Ellis, we are missing observations for the Washington office for all years except 2006-2008, and for Paul, Weiss, there are no Washington observations. Therefore, for Kirkland & Ellis and Paul, Weiss, we use data only from the New York offices for the entire sample period.

[139] Banker, Hsihui Chang, and Reba Cunningham, "The Public Accounting Industry Production Function," 35 *J. Acct. & Econ.* 255, 263 (2003).

[140] *See, e.g.*, Dain C. Donelson, "The Potential for Catastrophic Auditor Litigation," 15 *Am. L. & Econ. Rev.* 333, 344 (2013); Stavros Gadinis, "The Politics of Competition in International Financial Regulation," 49 *Harv. Int'l L.J.* 447, n.126 (2008); and James D. Cox, "After the Sarbanes-Oxley Act: The Future Disclosure System: Reforming the Culture of Financial Reporting: The PCAOB and the Metrics for Accounting Measurements," 81 *Wash. U. L.Q.* 301 n.29 (2003).

[141] *See, e.g.*, Banker, Chang, and Cunningham, *supra* note 139; Neuman, Omer, and Thompson, *supra* note 14, at 707; Brian C. Fitzgerald, Omer, and Thompson, "Audit Partner Tenure and Internal Control Reporting Quality: U.S. Evidence From the Not-For-Profit Sector," 35 *Contemp. Acct. Res.* 334, 347 (2018); Magdy S. Farag and Rafik Z. Elias, "Public Accounting Firms' Mix of Service Revenue and Average Productivity," 27 *Managerial Auditing J.* 712 (2012); Deborah Bloomfield and Joshua Shackman, "Non-Audit Service Fees, Auditor Characteristics and Earnings Restatements," 23 *Managerial Auditing J.* 125, 129 (2008); and Mithu R. Dey and Ashok Robin, "Second-Tier Auditing Firms: Developments and Prospects," 81 *CPA J.* 32, 33 (2011).

[142] *See, e.g.*, Gianluca Morello, "Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should Be Permitted in the United States," 21 *Fordham Int'l L.J.* 190 n.2 (1997); and James M. McCauley, "The Delivery of Legal Services Through Multidisciplinary Practices," 4 *Rich. Pub. Interest L. Rev.* 101 n.305 (2000).

[143] *See, e.g.*, Robert K. Elliott, "The Future of Assurance Services: Implications for Academia," 9 *Acct. Horizons* 118 n.1 (1995); Amin, Banker, and Whang, *supra* note 13; Kwon, *supra* note 67, at 56; and Banker, Chang, and Cunningham, *supra* note 139.

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We collect revenue percentage[144] data and head count data (as well as head count details by practice area, which are available only for 2003 to 2008) for the Big Four (Deloitte, Ernst & Young, KPMG, and PwC), as well as two second-tier accounting firms (Grant Thornton and BDO Seidman).[145] The data for PwC is the combined values for PriceWaterhouse and Coopers & Lybrand, which merged in 1998.[146] We do not include Arthur Andersen in our sample for several reasons, primarily because its data ends with 2001.[147] We obtain 180 accounting firm-year-level observations with which to conduct our analysis (six firms for 30 years each).

To examine the change in the market for tax services over time and around the three changes detailed in Section II, we examine three head count-related variables: *taxpartners*, *taxnonpartner*s, and *taxsize*. *Taxpartners* is the number of tax partners (and of counsel) in a law firm and partners in an accounting firm, and *taxnonpartners* is the number of all tax professionals other than partners or of counsel. *Taxsize* is the total size of the tax practice (that is, the sum of *taxpartners* and *taxnonpartners*).

For accounting firms, PAR reports the actual tax head count for only 2003-2008, so we must infer tax head count for the remaining years in our sample. To do so, we multiply the tax revenue percentage of overall firm revenue for each accounting firm year by the total number of partners and non-partners in the accounting firms. To validate our approach, we then compare our inferred tax head count with the reported actual tax head count for 2003-2008. This inferred head count approximates the reported actual tax head count and the trend, as evident in Figure 1. Although on average the inferred approach appears to slightly underestimate the number of tax partners and non-partners, to ensure consistency, we use the inferred head count measure for all years in our sample, including 2003-2008.

IV. Empirical Results

This section describes the results of our analysis, including trends. The data are not easily subjected to sophisticated statistical tests for several reasons, such as the vast size differences between law firms and accounting firms[148] and the difficulty of pinpointing an exact year to treat as the pre- and post-event demarcation points for the three regulatory changes we study. Nonetheless, we can discern and report noticeable patterns and trends with the descriptive results.

In Figure 1, we plot the total tax head count (the sum of tax partners and non-partners) for both accounting and law firms. For head count, the left vertical axis reflects the accounting firm values, and the right vertical axis reflects the law firm values. We also plot two other series for accounting firms. First, because we rely on an inferred tax head count for accounting firms, we plot the actual tax head count for the years the data are available in PAR (2003-2008). Figure 1 reveals that our inferred head count measure approximates the actual tax head count well, although it does slightly underestimate it from 2003-2006. Second, because data on tax non-partners after 2016 are missing for PwC — one of the largest accounting firms in our sample — we also plot total tax head count excluding PwC to

[144] We use U.S. net revenue. Although PAR also provides worldwide revenue, it does not provide worldwide details by type of practice. Also, even if those data were available, our focus on only U.S. data is preferable because it limits the extent to which foreign laws and norms led clients to avoid auditor-provided tax services. Moreover, U.S. net revenues are more comparable to law firm revenues because our law firms' data relate to U.S. practices in Washington and New York.

[145] We do not include the tax practice of RSM McGladrey, even though its data are provided in the PAR reports, because it has a unique alternative structure and is not a typical audit firm. From 1999 to 2011 (when it was sold back to McGladrey), the firm was owned by H&R Block. *See* Tess Stynes, "H&R Block to Sell Advisory Unit," *The Wall Street Journal*, Aug. 23, 2011.

[146] "Big-Name Firms Celebrate Merger," *The Hartford Courant*, July 7, 1998.

[147] Arthur Andersen thus does not present data to include for our tests after the changes we study. The firm shut down operations shortly after November 2001, when it was served with subpoenas in the Enron case. *See* Linda Greenhouse, "Justices Unanimously Overturn Conviction of Arthur Andersen," *The New York Times*, May 31, 2005. PAR reports that the firm had approximately $1.3 billion in tax-related revenue for 2001 (and we estimate approximately 500 tax partners and 5,900 tax staff employees). Many of its tax partners and employees likely were hired into the other six firms, the largest transaction of which appears to be Deloitte's acquisition of 200 partners, most of whom were tax partners. *See, e.g.*, Cassell Bryan-Low, "Who Are Winners at Andersen's Yard Sale? Ernst & Young, Deloitte, KPMG Look to Hire 200 Partners Each; PriceWaterhouse Focuses on Clients," *The Wall Street Journal*, May 30, 2002.

[148] "Even the largest law firms are tiny compared with the Big Four." Maydew and Shackelford, *supra* note 3, at 330. This interferes with our ability to pool law firms with accounting firms in, for example, a regression analysis.

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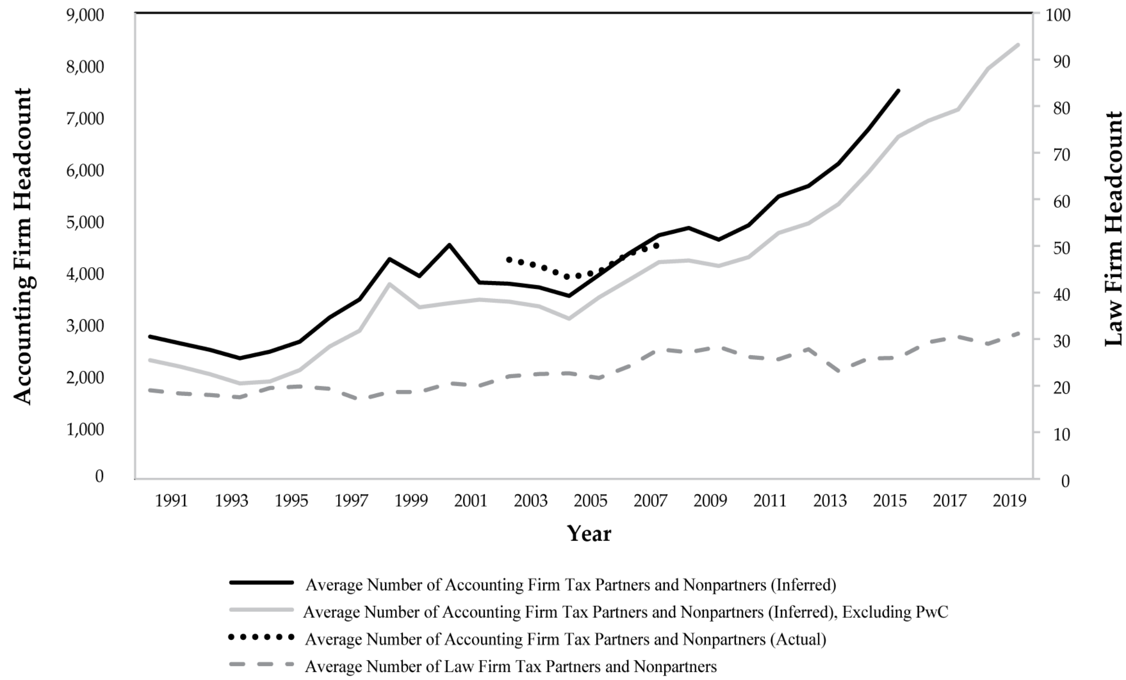
Figure 1. Total Tax Headcount, Law vs. Accounting Firms, 1991-2020



Notes: All accounting firm data is obtained from the *Public Accounting Report* (PAR) and *Accounting Today* (AT). All law firm data is obtained from *NALP Directory*. This figure plots the average combined number of tax partners and non-partners at accounting firms (on the left-hand side vertical axis) and at law firms (on the right-hand side vertical axis). For law firms, partners include of counsel. For accounting firms, we report inferred tax headcount, computed as the annual tax fee percentage times the total number of partners and non-partners for all years, and the actual tax headcount for the years in which the data is available in PAR. Because of missing non-partner-level data in AT for PwC for the years 2017-2020, this figure also presents the accounting firm tax headcount excluding PwC.

ensure that those missing values do not influence our conclusions.

Figure 1 suggests that the tax practices of both accounting firms and law firms have grown over the three decades, although accounting firms' tax practices appear to be growing at a faster rate, particularly after 2010. We also observe large growth in the late 1990s for accounting firms, which coincides with the growth in the tax shelter industry during that time.[149] Around the enactment of SOX in 2003, we see a slight increase in law firm tax head count, while accounting firms' tax head count slightly decreased. The decrease for accounting firms would likely be even larger had the accounting firms (for example, Deloitte) not acquired many tax professionals from Andersen after its closure.[150] This suggests that SOX did not have as drastic an effect on accounting firms' market share of corporate tax services as anecdotal evidence indicated.[151]

When we look at the trends shortly after the release of FIN 48 in late 2006, we observe an increase in both accounting and law firm tax head count. This is consistent with a likely increase in tax work at both accounting and law firms after FIN 48, although the type of work likely differed between the types of firms. As discussed in Section II.C, law firms probably saw increases in work related to the drafting of FIN 48 opinions to help clients determine the likelihood of a tax position being sustained upon tax authority audit, whereas accounting firms probably saw increases in work related to the recording of FIN 48 for financial reporting purposes. Finally, the passage of the TCJA in late 2017 appears to have had a

[149] *See supra* notes 31-33 and accompanying text.

[150] *See, e.g.*, Bryan-Low, *supra* note 147.

[151] It is also possible the loss of tax shelter work from the late 1990s contributed to decreased overall tax work. *See supra* notes 31-33 and accompanying text.

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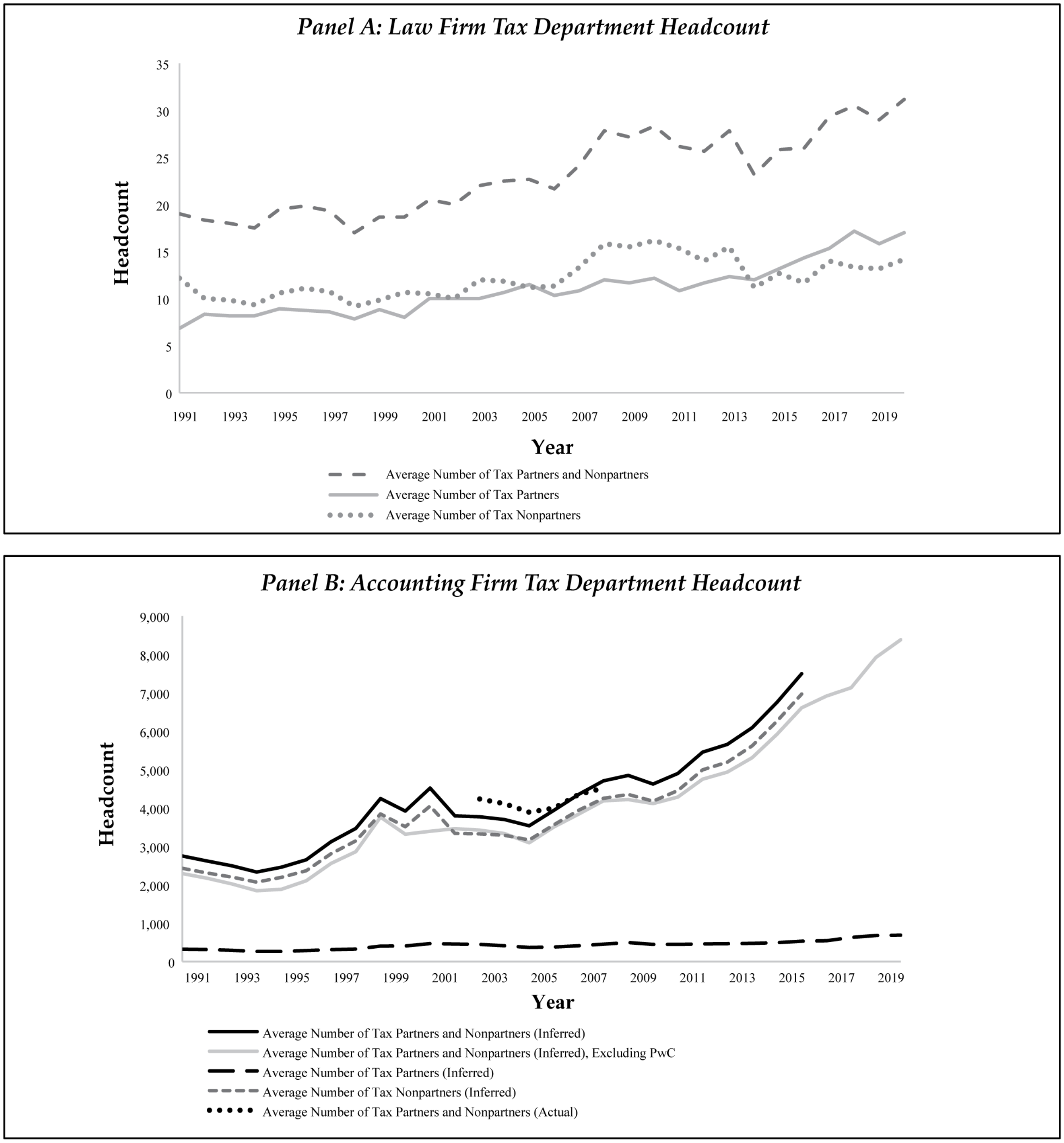
Figure 2. Tax Headcount Detail, Law vs. Accounting Firms, 1991-2020



Notes: All accounting firm data is obtained from the *Public Accounting Report* (PAR) and *Accounting Today* (AT). All law firm data is obtained from *NALP Directory*. This figure plots the average number of tax partners and non-partners at accounting firms and at law firms. For law firms, partners include of counsel. For accounting firms, we report inferred tax headcount, computed as the annual tax fee percentage times the total number of partners and non-partners for all years, and the actual tax headcount for the years in which the data is available in PAR. Because of missing non-partner-level data in AT for PwC for the years 2017-2020, this figure also presents the accounting firm tax headcount excluding PwC. Law firms are shown in Panel A and accounting firms in Panel B. Unlike Figure 1, this figure separately shows partners and non-partners.

significant effect on the tax practices of the accounting firms: We find that the tax head count at accounting firms continued to increase after passage of the TCJA. Law firms' tax practices also

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grew during that period, although apparently not as dramatically as those of accounting firms.

In Figure 2, we present additional detail regarding the change in tax head count over time. In Panel A, we include the total number of tax partners and non-partners over time for law firms (from Figure 1) and also separately plot the total number of tax partners and non-partners. We observe that the increase in tax head count at law firms is generally driven by changes at both the partner and non-partner levels; however, we do observe a decline in tax associates (that is, non-partners) from 2013 to 2014 (most of which is driven by Shearman & Sterling's reduction of tax associates from 20 in 2013 to nine in 2014). The number of tax partners generally increased over time.

In Panel B, we include the inferred number of accounting firm tax partners and non-partners (separately depicting them with and without PwC because of the data limitation described earlier) and the actual number of tax partners and non-partners (both from Figure 1), and we separately plot the total number of tax partners and non-partners. At accounting firms, the growth appears to be driven almost exclusively by non-partners. Panel B suggests that when tax work increases at accounting firms, the firms respond by hiring additional associates.

In Table 1, Panel A, we present the descriptive statistics related to the three tax head count variables (*taxsize*, *taxpartners*, and *taxnonpartners*) and the total head count variable (*size*) for both accounting and law firms. Overall, as expected, the head count for our sample's six largest accounting firms is larger than the head count for the large law firms. This observation is not surprising because we rely on head count at the national level for accounting firms, whereas we use the sum of office-level head count for only two offices (New York and Washington) for law firms, for the reasons discussed in Section III.

In Table 1, Panel B, we examine law firms' change in tax and total head count across the three regimes (pre- and post-SOX, pre- and post-FIN 48, and pre- and post-TCJA). The results for tax head count are consistent with what is presented in figures 1 and 2: Law firms appear to exhibit increasing growth in their tax practices, but they also show increases in their entire firms as captured by the variable *size*.[152] When we examine the subperiods before and after SOX, we observe that the mean tax head counts (*taxsize*, *taxpartners*, and *taxnonpartners*) increased. This suggests that law firms captured some tax market share from accounting firms after SOX. When we compare the pre- and post-FIN 48 periods and pre- and post-TCJA periods, we also observe an increase in the mean tax head count.

In Table 1, Panel C, we examine the accounting firms' change in tax head count and total head count across the three regulatory regimes.[153] As with law firms, accounting firms exhibit increasing growth over time, which is consistent with what is observed in figures 1 and 2. For the post-SOX subperiod, it appears that the accounting firms have grown, but that is an artifact of the pre-SOX subperiod including data from as far back as 1991, before the increases in tax fees in the late 1990s. For example, the mean *taxsize* for accounting firms for the period 1999-2002 (the four years immediately before SOX) was 4,118, not 3,196, thus suggesting a *decrease* in tax work after SOX, when we show mean *taxsize* of 3,735. We do find that the tax practices of accounting firms increased after FIN 48, and that increase was primarily driven by increases at the non-partner level, suggesting that firms hired additional tax staff following an inflow of tax work in the post-FIN 48 period. The TCJA appears to have had the greatest effect on the tax practices of accounting firms because both the mean number of tax partners and tax non-partners significantly increased in the post-TCJA period. Our observation is consistent with accounting firms hiring additional tax staff to manage the increase in tax-related workflow resulting from the TCJA while also creating a business case for the promotion and hiring of additional tax partners.

[152]The size results are not inconsistent with Amin, Banker, and Whang, *supra* note 13, whose study finds that law firms exhibited an increase in revenue per partner in the post-SOX era.

[153]Note that the pre-SOX period dates to 1991 only because we have data from 1991. Because the firms are growing over time (as clearly shown in the figures, especially in the late 1990s), the mean shown in the pre-SOX subperiod is distorted upward, as it is compared with the future subperiods.

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Table 1. Descriptive Statistics, Law vs. Accounting Firms

Panel A: Law Firms vs. Accounting Firms

variable	Law Firms, 1991-2020						Accounting Firms, 1991-2020					
	N	mean	std. dev.	p25	median	p75	N	mean	std. dev.	p25	median	p75
Taxsize	180	23.2	14.6	12.5	20	31	176	4,549.7	3,481.2	1,256	4,289	6,630.5
taxpartners	180	11	7.8	6	9	13	180	430.1	274.1	146.5	454	606
taxnonpartners	180	12.2	8.1	5	11	18	176	4,131.1	3,236.1	1,104	3,848	6,002
Size	180	318.7	179.5	182	297	423.5	176	18,467.5	16,574	4,518.5	16,199.5	24,500.5

Panel B: Law Firm Head Count by Regime

variable	Pre-SOX			Post-SOX, Pre-FIN 48			Post-FIN 48, Pre-TCJA			Post-TCJA		
	1992-2002			2003-2006			2007-2017			2018-2020		
	N	mean	median	N	mean	median	N	mean	median	N	mean	median
Taxsize	72	18.9	14.5	24	22.2	17.5	66	26.5	21	12	30.1	25
taxpartners	72	8.5	7	24	10.6	8	66	12.4	10	12	16.4	11
taxnonpartners	72	10.3	7.5	24	11.6	10.5	66	14.1	13	12	13.7	12
Size	72	243.8	160.5	24	327.4	269.5	66	362.3	346	12	449.8	409

Panel C: Accounting Firm Head Count by Regime

variable	Pre-SOX			Post-SOX, Pre-FIN 48			Post-FIN 48, Pre-TCJA			Post-TCJA		
	1992-2002			2003-2006			2007-2017			2018-2020		
	N	mean	median	N	mean	median	N	mean	median	N	mean	median
Taxsize	72	3,196.2	3,371	24	3,735.1	4,604	65	5,596.7	6,541	10	8,152.6	9,135.5
taxpartners	72	342.1	375	24	399.8	530	66	473.3	537.5	12	681.6	832.5
taxnonpartners	72	2,854.1	2,967.5	24	3,335.3	4,049	65	5,128.9	5,828	10	7,538.5	8,466.5
Size	72	13,128.9	12,805	24	14,105.8	15,851	65	22,309.2	21,800	10	35,848.9	31,502.5

Notes: All accounting firm data is obtained from the *Public Accounting Report* and *Accounting Today*. All law firm data is obtained from the NALP directory. Panel A reports the descriptive statistics (the mean, standard deviation, 25th percentile (p25), median, and 75th percentile (p75)) for the three tax head count variables and the total head count variable (*size*) for both accounting and law firms. Descriptive statistics across the three regimes (pre- and post-SOX, pre- and post-FIN 48, and pre- and post-TCJA) are reported in Panel B for law firms and in Panel C for accounting firms. N is the number of firm-year observations. *Taxsize* is the sum of all tax partners and non-partners, *taxpartners* is the number of tax partners, and *taxnonpartners* is the number of tax non-partners. *Size* is the sum of all tax and nontax partners and non-partners at a firm. For accounting firms, *taxpartners* (*taxnonpartners*) is inferred by multiplying the firm's annual tax fee percentage by the total number of annual partners (non-partners). *Taxsize* is inferred for accounting firms by summing *taxpartners* and *nonpartners*. For law firms, partners include of counsel.

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Table 2. Beginning and End of Sample Tax Head Count, All Vault Top Tax Firms

Firm Name	Office	First Year in Sample	*taxsize*	Last Year in Sample	*taxsize*	% Change
Firms With 30 Annual Observations:						
Baker McKenzie	Combine	1991	23	2020	70	204%
Jones Day	Combine	1991	22	2020	27	23%
Kirkland & Ellis	NY only	1991	1	2020	34	3,300%
Mayer Brown	Combine	1991	6	2020	24	300%
Paul, Weiss	NY only	1991	38	2020	29	-23%
Shearman & Sterling	Combine	1991	31	2020	16	-48%
Firms Missing Annual Observations:						
Alston & Bird	Combine	2005	24	2020	11	-54%
Caplin & Drysdale	DC only	1993	25	2007	39	56%
Cravath	NY only	1991	19	2013	25	31%
Davis Polk	NY only	1991	43	2011	43	0%
Debevoise & Plimpton	NY only	1994	33	2020	40	21%
Latham & Watkins	Combine	1991	11	2019	43	291%
McDermott	Combine	1991	10	2012	40	300%
Miller & Chevalier	DC only	1991	43	2016	29	-33%
Morgan Lewis	Combine	1991	20	2020	35	75%
Morrison & Foerster	Combine	1992	11	2020	25	127%
Roberts & Holland	NY only	1991	28	2019	25	-11%
Ropes & Gray	DC only	1995	1	2017	3	200%
Sidley Austin	Combine	2012	19	2017	20	5%
Simpson Thacher	NY only	1991	28	2020	30	7%
Skadden	Combine	2008	113	2020	76	-33%
Sullivan & Cromwell	Combine	2003	35	2007	29	-17%
Sutherland	Combine	2008	51	2014	72	41%
Wachtell Lipton	NY only	1993	6	2020	10	66.7%
Weil	Combine	1991	33	2005	51	54.5%

Notes: All accounting firm data is obtained from the *Public Accounting Report* and *Accounting Today*. All law firm data is obtained from the NALP directory. This table reports *taxsize* for the 25 firms that appear on the Vault Top 20 list at least once during the sample period. *Taxsize* is the sum of all tax partners and non-partners. This table includes the six firms that have observations for each (or nearly each) year from 1991-2020 ("balanced panel"). The remaining 19 firms have enough missing firm-year observations during the 1991-2020 period to make extrapolation for missing years unfeasible. This table includes *taxsize* in the first and final year in which a firm has sufficient data to compute this variable for its DC and NY offices ("Combine"). If a firm does not have observations for an office for both DC or NY during the sample period, this table reports single office data ("NY only" or "DC only"). For our primary analyses, we only report data for Jones Day's DC office to maintain consistency over time; however, for this table, we report the combined DC/NY data for Jones Day because it is available in 1991. For law firms, partners include of counsel.

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Taken together, the results in panels B and C of Table 1 suggest that the market for tax services for these six accounting firms and six law firms has grown in the past 30 years; however, it does not appear to have been as drastically affected by SOX as previously speculated. The recent overhaul of the tax law under the TCJA and the passage of FIN 48 appear to have had a greater and more positive effect on the market for tax services for accounting firms as compared with law firms.

In figures 1 and 2 and Table 1, we rely on data for the six law firms that have data for each — or nearly each — of the 30 years studied. In Table 2, we present data for the entire set of 25 law firms that appears in the Vault Top 20 at least once during 2000-2020. Table 2 presents *taxsize* for the first and last year in which a firm appears in the sample and has data for both its New York and Washington offices. However, if a firm is missing New York or Washington office-level data, we report data for the New York or Washington office only. We also compute the percentage change in tax head count from the first year to the last year in which the firm appears in the sample.

The top of Table 2 lists the six firms that appear in the sample each year (that is, the firms included in figures 1 and 2 and in Table 1). Kirkland & Ellis's New York tax practice exhibited the largest percentage growth since 1991 (3,300 percent), although much of this is likely driven by the fact that it opened the New York office in 1990.[154] Mayer Brown's combined New York and Washington tax practice also grew significantly during this time (300 percent). Two tax practices — Paul, Weiss's New York office and Shearman & Sterling's combined New York and Washington offices — declined since 1991.

The remaining firms in Table 2 had too many missing annual observations between 1991 and 2020 to allow for reasonable extrapolation for missing values and thus inclusion in the balanced panel of six firms on the top part of Table 2 (and in figures 1 and 2 and Table 1). Of these firms, Latham & Watkins and McDermott experienced the greatest growth in their combined New York and Washington tax practices during the time in which they appeared in our sample (291 percent and 300 percent, respectively). Alston and Bird experienced the largest decline in its combined New York and Washington tax practice between 2005 and 2020.

We note a few data limitations that should be considered when evaluating our findings. First, in our main analyses (figures 1 and 2 and Table 1), we focus on the six law firms for which we have sufficient data for the last 30 years. Although these firms represent likely competitors for accounting firms, we may have excluded some law firms that did pick up tax work from accounting firms, including the law firms on the bottom of Table 2. Second, because of collection constraints in using the NALP directory, we can focus only on the New York and Washington offices. Thus, our analyses fail to capture tax work in the firms' other offices. Third, some of the firms in Table 2 might have changes as a result of merger activity. For example, in 2014 Morgan Lewis absorbed the New York and Washington offices of large Boston firm Bingham.[155] (The main six law firms we report on in figures 1 and 2 and Table 1 do *not* have relevant merger activity.) Fourth, because of data limitations in PAR and AT, we must infer the tax head count for accounting firms; therefore, the accounting firm tax head count may be inaccurate. Finally, the data is insufficient to perform rigorous statistical analyses, including the ideal setting of pooling law firms and accounting firms into one regression model.

V. Conclusion

The annual global market for tax services is more than $30 billion,[156] and the U.S. market is certainly a large portion of that amount. For example, our data show that the six studied accounting firms have U.S. revenue of $17 billion for 2020 (although this likely also includes

[154] *See* Funding Universe, "Kirkland & Ellis LLP History."

[155] Chris Mondics, "Morgan Lewis Acquires Boston's Bingham McCutchen," *The Philadelphia Inquirer*, Nov. 14, 2014. In 2009 Bingham had a presence in New York and Washington by acquiring McKee Nelson (a Vault firm not in our sample, see *supra* note 129). Sarah Mui, "Bingham McCutchen, McKee Nelson to Merge on Aug. 1," *ABA Journal*, July 6, 2009.

[156] Cohn, "Tax Advisory Market Lost $3B Globally in 2020 Due to Coronavirus," *Accounting Today*, Jan. 11, 2011.

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revenue for the portion of fees paid out to the firms' overseas affiliates on cross-border projects).

This report details three major regulatory and legislative changes that were expected to affect the market for tax services provided to corporations by the large law firms and accounting firms in the United States. Through the novel use of three decades of hand-collected data of tax professional head count, this report demonstrates important trends. Large law firms have increased their tax head count but not as much as the large accounting firms. It appears that the concerns some had that SOX and PCAOB constraints on the provision of tax services by accounting firms to audit clients did not materialize, although there was a slight period shortly after SOX during which the accounting firms' tax work was not growing. Accounting firms have seen their tax work steadily and annually increase over the last 15 years as they outpace law firms.

Rarely do academics have an opportunity to study both the internal operations of law firms and the interaction of firms in an industry.[157] This report adds to the limited literature. Besides being of interest to tax lawyers and accountants — as well as policymakers — in the United States, this report may also interest such parties in other countries. For example, some countries are concerned about potential conflicts caused by the joint provision of tax and audit services by the same accounting firm, and they have considered requiring tax firms to be spun off from accounting firms that do audits.[158] This article may also be of interest to corporate tax advisers not now working in law firms or accounting firms. For example, some large tax consulting firms have many accountants as owners and staff yet do not provide audit services and are thus less constrained by SOX and PCAOB rules.[159] ■

[157] George P. Baker and Rachel Parkin, "Empirical Studies of the Legal Profession: What Do We Know About Lawyers' Lives?: The Changing Structure of the Legal Services Industry and the Careers of Lawyers," 84 *N.C. L. Rev.* 1635, 1636 (2006).

[158] *See, e.g.*, Paul D. Paton, "Rethinking the Role of the Auditor: Resolving the Audit/Tax Services Debate," 32 *Queen's L.J.* 135 (2006) (analyzing Canada); and Josh White, "Companies See No Gain in Splitting Big 4 Tax and Audit Functions," *International Tax Review*, May 29, 2018 (analyzing the United Kingdom).

[159] For example, Andersen Tax LLC was founded in 2002 by 23 former Arthur Andersen tax partners under the name WTAS. They bought the rights to the Andersen name in 2014. Aside from overseas staff, Andersen Tax now has more than 1,000 personnel in the United States in 17 cities. Another tax firm without audit firm constraints is Alvarez & Marsal Taxand LLC. It has more than 5,000 employees around the world and operates in 26 cities in the United States.

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