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THE RISE OF ESG INVESTING: HOW AGGRESSIVE TAX AVOIDANCE AFFECTS CORPORATE GOVERNANCE & ESG ANALYSIS

❖ ARTICLE ❖

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i. Abstract

Environmental, Social, and Governance (ESG) investing is arguably the most popular and fastest growing investment strategy of the twenty-first century. This rise in sustainable investing has coincided with an increasing scrutiny of companies that utilize aggressive tax avoidance strategies. In response to this growing scrutiny, ESG rating agencies and institutional investors have penalized companies that pursue these strategies, although the direct effect that these strategies have on ESG scores and analysis remains empirically unclear. First, this paper explains the history of and surge in ESG investing and its place in today's markets. Second, it details one of the most prominent aggressive tax avoidance strategies used by U.S. corporations—the "Double Irish, Dutch Sandwich." With the recent closure of this strategy via tax reform, this paper examines the past use of the Double Irish, as well as the replacement strategies employed by large U.S. technology firms, such as the "Single Malt" and the "Green Jersey" strategies. Finally, this paper explores the negative effects that aggressive tax avoidance may have on a company in a time when socially conscious investing is at an all-time high.

I. Introduction

Environmental, Social, and Governance (ESG) Investing has emerged as one of the most exciting investment strategies of the past two decades. Since its evolution from the social impact investment movement of the 1980s, ESG investment and its rise to prominence has fundamentally impacted laws, regulations, corporate policies, and business practices. In essence, an ESG investment strategy analyzes company value by taking into account a list of factors that fall under three categories: environmental, social, and governance. Recently, the Governance category has grown in relevance due to an increased public scrutiny of corporate tax avoidance strategies used by some of the largest U.S. companies. The primary method in which companies are able to avoid taxes and achieve an effectively low tax rate is through the manipulation of the complex legal and tax relationships between the U.S. tax code, international tax laws, and bilateral tax treaties.

Ireland, for example, is synonymous with aggressive tax avoidance strategies because of its favorable tax laws, and it has continued to play an important role in tax avoidance strategies. Perhaps the most well-known strategy is called the Double Irish, Dutch Sandwich ("Double Irish") which once allowed multinational corporations to shift money through multiple subsidiaries to lower their tax burden and store money in offshore accounts. Despite new Irish tax laws ending the Double Irish strategy officially in 2020, recent reports suggest that companies have enacted replacement strategies that provide alternative means of tax avoidance. One industry in particular, U.S. Big Tech, has received the brunt of public scrutiny due to its ubiquitous use of aggressive tax strategies.

The public scrutiny of a company's obligation to pay taxes has caused ESG rating agencies and institutional investors to penalize companies that pursue aggressive tax avoidance strategies. Although it is not yet known how these strategies have affected ESG analysis and scoring, the mere use of any tax avoidance strategy can negatively impact companies as a result of public disapproval and censure. Furthermore, with the increase in public scrutiny of multinational firms and their aggressive tax avoidance strategies, companies such as the U.S.'s big technology firms may begin to see negative financial consequences in the form of lower sustainability ratings, less investments inflow, and removal from institutional investment pools.

II. ESG Investing: History & Definition

A. History

ESG investing is the integration of environmental, social, and governance factors into the investment process and analysis. This investment strategy was born out of the Social Responsibly Investing (SRI) movement that rose to prominence in the 1980s and 1990s.[1] The origins of SRI can be traced back to ancient biblical times when religious law would provide

1. Blaine Townsend, *From SRI to ESG: The Origins of Socially Responsible and Sustainable Investing*, Bailard Wealth Management (June 2017) https://www.bailard.com/wp-content/uploads/2017/06/Socially-Responsible-Investing-History-Bailard-White-Paper-FNL.pdf?pdf=SRI-Investing-History-White-Paper.

followers with guidelines for ethical investment.[2] In North America, the proponents of SRI investing were the civil rights activists, women's rights activists, and religious organizations that became growingly concerned with the issues of the late 1960s and 1970s such as the Vietnam War, the mistreatment of African Americans, and women's inequality.[3] The few investment firms that took part in SRI investing at the time did so with the intention of avoiding the so-called "sin stocks," which included industries that were considered unethical or immoral.[4] For example, companies that may have mistreated women, refused to sell to African Americans, or supported the war in Vietnam would be barred from these SRI firms' investment pools.

In 1971, two United Methodist Church members named Luther Tyson and Jack Corbett founded the Pax World Funds, the first socially responsible mutual fund in the United States.[5] Over a decade later, shareholders pressured corporate firms to divest from South African investments due to the anti-apartheid movement, and growing environmental concerns led to the founding of the U.S. Sustainable Investing Forum in 1984.[6] By 1994, twenty-six sustainable funds were available to investors, and world leaders signed the Kyoto Protocol in an attempt to address climate change, which signaled a growing concern over society's impact on the environment.[7] As societal issues evolved with the start of the new millennium, so too did SRI investing. Global warming, the gender wage gap, workforce diversity, LGBTQ rights, shareholder rights, and executive pay are just some of the issues that are now at the forefront of society's mind.

ESG investing was born in 2004 when the UN Secretary, General Kofi Annan, launched the Global Compact Initiative ("GCI" or "Initiative"), which continues to be "a voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals."[8] In that same year, the Initiative produced a report titled: "Who Cares Wins."[9] It was in this report that the acronym "ESG" was first used; the report made recommendations on how to "better incorporate environmental, social and governance ESG factors" into the research, analysis, and management of investments.[10] A year later, members of the UN Environmental Programme Financial Initiative, along with the international law firm, Freshfields Bruckhaus Deringer, co-authored a report widely referred to as the "Freshfields Report."[11] This report argued that ESG factors were relevant in investment analysis "so as to more reliably predict financial performance."[12] Together, the

2. *Id*.

3. Jess Liu, *ESG investing Comes of Age*, MORNINGSTAR (Feb. 13, 2020), https://www.morningstar.com /features/esg-investing-history

4. *Id*.

5. *Id*.

6. I*d*.

7. I*d*.

8. UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/about.

9. UNITED NATIONS GLOBAL COMPACT, *Who Cares Wins* (August 2004), https://www.unepfi.org/fileadmin /events/2004/stocks/who_cares_wins_global_compact_2004.pdf.

10. *Id* at 2.; George Kell, *The Remarkable Rise of ESG*, FORBES (July, 11 2018) https://www.forbes.com /sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/#14bb83491695.

11. UNITED NATIONS ENVIRONMENT PROGRAMME FINANCE INITIATIVE, *A legal framework for the integration of environmental, social and governance issues into institutional investment* (October 2015) https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf.

12. *Id*.

Who Cares Wins and Freshfields Report identified the three categories of growing societal concerns and argued each category's financial importance in investing. Since then, consumers and firms increasingly made investment decisions based on these three sustainability factors throughout the 2010s. By 2019, ESG investing reached an all-time high, with ESG funds recording a record-breaking inflow of $20.6 billion total new assets, almost four times greater than the previous year.[13]

B. *Definition*

Specific definitions of ESG are wide-ranging since what constitutes an environmental, social, or governance factor can be subjective and highly debatable. However, the financial industry has generally acknowledged a broad and uniform definition of "ESG investing"—i.e. "the research and investment strategy framework that evaluates environmental, social, and governance factors as non-financial dimensions of a security's valuation, performance, and risk profile."[14] Furthermore, most investors accept that ESG factors, although not part of the traditional financial analysis, may have concrete financial relevance, which is evidenced by the increasing use of an ESG score to evaluate company value as well as the overall increase in ESG funds available on the market. As opposed to the SRI strategy of avoiding sin stocks, ESG investing follows traditional financial analysis and tries to find value in companies that may not be immediately apparent.

Today, most public companies are evaluated and given an ESG score by third party providers, such as Bloomberg, MSCI, Thomson Reuters, and DowJones.[15] For example, one third party provider, Sustainalytics, provides ESG scores to the popular financial news website, Yahoo Finance.[16] The ESG rating methodology varies greatly amongst these third-party providers. Most, if not all, of these providers use a range of factors or indicators and collect public information related to ESG factors in order to apply a score to each company.[17] The number of factors used by each provider also varies greatly; for example, MSCI uses thirty seven factors in their analysis, while Bloomberg uses one hundred and twenty factors.[18] However, the most common way in which these factors are conveyed is by grouping them together into the three broader areas of the environment, social, and governance factors.

The "E" in ESG investing considers the wide range of environmental and climate risks that threaten the world. While the concerns are vast, some of the main areas of apprehension regarding the environment include greenhouse gas emissions, waste management, energy

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13. Greg Iacurci, *Money moving into environmental funds shatters previous record*, CONSUMER NEWS AND BUSINESS CHANNEL (Jan. 14, 2020), https://www.cnbc.com/2020/01/14/esg-funds-see-record-inflows-in-2019.html; Akane Otani, *ESG Funds Enjoy Record Inflows, Still Back Big Oil and Gas*, WALL STREET JOURNAL (Nov. 11, 2019), https://www.wsj.com/articles/top-esg-funds-are-all-still-invested-in-oil-and-gas-companies-11573468200

14. MATTHEW SHERWOOD & JULIA POLLARD, RESPONSIBLE INVESTING: AN INTRODUCTION TO ENVIRONMENTAL, SOCIAL, AND GOVERNANCE INVESTMENTS (1st ed. 2018).

15. Betty Huber et al., *ESG Reports and Ratings: What They Are, Why They Matter*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (July 27, 2017) https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/.

16. Leslie P. Norton, *Yahoo Adds Sustainability Company Data*, BARRON'S (Feb. 2, 2018) https://www.barrons.com/articles/yahoo-adds-sustainability-company-data-1517599809.

17. Huber et al., *supra* note 1.

18. *Id*.

sustainability, and biodiversity.[19] Companies that neglect to manage or reduce the negative externalities that their practices and policies have on the environment will likely score poorly in the Environmental portion of their ESG score.

Similar to the environmental factors, there is a wide range of metrics that may constitute social factors of ESG. Some of the more common social factors are human rights standards, workforce diversity, and labor relations.[20] These factors are playing an increasingly important role in the way the public perceives firms. An example of this is that a company's reputation may be harmed if, directly or indirectly, it knowingly benefits from the use of child labor.[21]

Even more important than environmental and social issues is the category of governance, which has become the leading area of concern that institutional investors take into account when making investment decisions.[22] Some of the leading governance issues are executive compensation, lobbying, audit structure, and board composition.[23] Additionally, a company's tax strategy is an issue that falls under the governance analysis.[24] Many have argued that aggressive tax avoidance strategies can "create corporate governance risk, lead to material fines, damage corporate and brand reputation and . . . deprive governments of funding needed to provide services to communities."[25] As news regarding multinational companies and their tax strategies continue to materialize, taxation and its avoidance has become increasingly important in the governance portion of ESG analysis.

C. *Prominence in Today's Markets*

Individual investor demand is the driving force behind ESG Investing. A recent survey by Morgan Stanley showed that 85% of individual investors in the U.S. are interested in sustainable investing.[26] In response to this demand, a growing number of money managers and institutional investors have incorporated ESG criteria into their investment analysis and decision-making processes.[27]

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19. Usman Hayat & Matt Orsagh, *Environmental, Social, and Governance Issues in* Investing*: A Guide for Investment Professionals*, CFA INSTITUTE (Oct 2015) https://www.cfainstitute.org//media/documents/article /position-paper/esg-issues-in-investing-a-guide-for-investment-professionals.ashx.

20. *Id*.

21. An example of this is an ongoing lawsuit against Apple, Google, Microsoft, Dell, and Tesla for the use of child labor in the Democratic Republic of Congo. Michelle Toh, *Apple, Google, Microsoft, Dell and Tesla are sued over alleged child labor in Congo*, CNN (Dec. 18, 2019) https://www.cnn.com/2019/12/17/tech/apple-microsoft-tesla-dell-congo-cobalt-mining/index.html.

22. *Id*.

23. *Id*.

24. Deborah Paul & T. Eiko Strange, *Tax and ESG*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Feb. 22, 2020) https://corpgov.law.harvard.edu/2020/02/22/tax-and-esg/.

25. *Id*.

26. MORGAN STANLEY, *Individual Investor Interest Driven by Impact, Conviction and Choice*, (Sept. 2019) https://www.morganstanley.com/pub/content/dam/msdotcom/infographics/sustainableinvesting/Sustainable_Signals_Individual_Investor_White_Paper_Final.pdf.

27. US SIF: THE FORUM FOR SUSTAINABLE AND RESPONSIBLE INVESTMENT, *Report on US Sustainable, responsible and Impact Investing* Trends, (Oct. 31, 2018) https://www.ussif.org/files/Trends/Trends%202018 %20executive%20summary%20FINAL.pdf.

Worldwide sustainable investments—which largely includes ESG investments—rose to over $30 trillion by 2018, marking a 34% increasing from 2016.[28] In the United States, sustainable investments reached $12 trillion by the beginning of 2018 according to a report by the US SIF Foundation.[29] This represents one fourth of the $46.6 trillion in total U.S. assets under professional management.[30] Furthermore, as previously mentioned, ESG investment funds recorded a record inflow of assets the past year, leading to a total of $137.3 billion in funds by the end of 2019.[31] That same year, nine of the largest ESG mutual funds outperformed the popular S&P 500 Index, with three of the funds producing one year total returns over 35%, compared to the S&P 500's one year total return of 31.49%.[32]

ESG investing has become so prominent that it has even prompted some governments to address investment regulation. Due to the rapid growth in ESG and other forms of sustainable investing, most governments have been slow to adapt and the sector remains lightly regulated. However, European Union legislators have recently passed regulations that establish requirements for ESG disclosures. A new EU law coming into effect in 2021 sets uniform rules on how firms should inform investors about the risks and opportunities that ESG investing presents.[33] EU financial firms that claim to pursue ESG strategies will now be required to detail the impact of their investments.[34] This is meant to avoid so-called "greenwashing" whereby asset managers and funds falsely claim to support ESG strategies in order to attract a growing pool of conscious investors.[35]

In contrast to the EU, the U.S. federal government has yet to address ESG regulations and disclosure requirements, despite petitions from institutional investors and academics.[36] Notwithstanding federal action, some state legislatures have begun to address ESG investing. For example, California, New York, Colorado, Connecticut, the District of Columbia, Maine, Maryland and Oregon have all incorporated ESG principles into their pension funds and have instituted guidelines for sustainable investing.[37] Furthermore, some states have gone a step further and created laws regarding ESG investing. In 2019, Illinois signed the Sustainable Investing Act into law, which requires all public state agencies that manage public funds to implement responsible investment policies, of which ESG factors are a part.[38]

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28. GLOBAL SUSTAINABLE INVESTMENT ALLIANCE, *The Global Sustainable Investment Review 2018*, (2019) http://www.gsi-alliance.org/wp-content/uploads/2019/03/GSIR_Review2018.3.28.pdf.

29. US SIF *supra*, note 27.

30. *Id*.

31. Iacurci *supra*, note 13

32. Mathieu Benhamou et al., *The Biggest ESG Funds Are Beating the* Market, BLOOMBERG (Jan. 29, 2020) https://www.bloomberg.com/graphics/2020-ten-funds-with-a-conscience/.

33. Francesco Guarascio, *EU rules on responsible investments to kick in from 2021:* document, REUTERS (Nov. 4, 2019) https://www.reuters.com/article/us-eu-regulations-sustainablefinance/eu-rules-on-responsible-investments-to-kick-in-from-2021-document-idUSKBN1XE1U3.

34. *Id*.

35. *Id*.; https://www.merriam-webster.com/dictionary/greenwashing

36. In 2018, law professors Cynthia Williams and Jill Fisch, along with institutional investors that represented over $5 trillion in combined assets, submitted a petition to the SEC that called for disclosure standards for all U.S. publically traded companies, under which these companies would be obligated to disclose ESG risks tied to their operations. Alana L. Griffin et al., *Institutional Investors Petition the SEC to Require ESG Disclosures*, AMERICAN BAR ASSOCIATION (Jan. 11, 2019) https://businesslawtoday.org/2019/01/institutional-investors-petition-sec-require-esg-disclosures/.

37. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *Retirement Plan Investing*, (May 2018) https://www.gao.gov/assets/700/691930.pdf.

38. Illinois Sustainable Investing Act §5(b), 30 ILCS 238/100 (2020).

III. AGGRESSIVE TAX AVOIDANCE BY CORPORATIONS

A. Defining Tax Avoidance

A distinction is commonly made between *tax mitigation*, *tax evasion*, and *tax avoidance*. *Tax mitigation* refers to the use of existing tax law to achieve tax advantages that are intentionally provided to corporations and are in accordance with the policy behind the legislation.[39] This is often viewed as general tax planning or 'non-aggressive tax planning.' Examples of *tax mitigation* include accruing the tax benefits intentionally given to various forms of business organizations such as the "pass-through deduction" of S corporations in the United States, or the establishing of a business in a Special Economic Zone to receive tax advantages.[40] These opportunities often result in lower tax obligations that are intended by and transparent to the legislative bodies that provided them. Furthermore, *tax mitigation is* generally accepted by the public as a legitimate and ethical tax strategy.

Tax evasion is an act of fraud, concealment, or misrepresentation committed in order to avoid the application of tax laws.[41] For example, corporations that underreport or misrepresent their income to the Internal Revenue Service by falsifying income records, overstating deductions, omitting income, or hiding money through the use of offshore accounts are evading taxation. In contrast to tax mitigation, tax evasion is the use of illegal means to avoid paying taxes and is punishable under Section 7201 of the Internal Revenue Code.[42]

Tax avoidance refers to the use of existing tax law to achieve tax advantages that are not intentionally provided by lawmakers and are not in accordance with the policy behind the legislation.[43] The practice of tax avoidance tends to fall between tax mitigation and tax evasion. In contrast to tax mitigation, tax avoidance is often labelled as an illegitimate and unacceptable practice that is criticized by the public. In contrast to *tax evasion*, *tax avoidance* is achieved through what is mostly considered legal use of tax laws.[44] It should be noted that some commentators label tax avoidance as potentially illegal, though most accept it as a legal practice. For the purposes of this paper, tax avoidance is generally considered to be a legal practice that is viewed negatively by the public and may be considered illegal by those who find it to be a particularly egregious misuse of tax law. In other words, tax avoidance "complies with the letter but not with the spirit of the law and leads to unexpectedly low tax rates."[45]

The topic of this paper revolves around corporate practices collectively known as *aggressive tax avoidance*. Similar to the term tax avoidance, aggressive tax avoidance and its strategies are not clearly defined but may be considered to be corporate activities that "[take]

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39. KAREN BROWN ET AL., A COMPARATIVE LOOK AT REGULATION OF CORPORATE TAX AVOIDANCE 1 (Karen Brown, 2nd ed. 2012).
40. I.R.C. §199A.
41. https://www.amazon.com/Comparative-Regulation-Corporate-Avoidance-Gentium/dp/9400723415
42. I.R.C. §7201.
43. Zoe Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693, 702-03 (2010).
44. *Id*.
45. Partin Petrin*, Corporate Tax Avoidance – The Problem of Aggressive Tax Planning* (2018), 16.

advantage of the technicalities of a tax system or mismatches between two or more tax systems for the purpose of reducing tax liability."[46] As this definition implies, an aggressive tax avoidance strategy may take advantage of a single country's tax system, or of two or more countries' tax systems through their international tax provisions and treaties. Aggressive tax avoidance strategies often consist of profit-shifting schemes, international arbitrage, and tax inversion.

B. The "Double Irish, Dutch Sandwich"

Arguably the most notorious strategy of aggressive tax avoidance is the Double Irish, Dutch Sandwich. This corporate tax strategy was being used by U.S. companies as early as the 1990s. However, in 2014, the EU pressured Ireland to address the abuse of its tax code and close this infamous scheme.[47] Despite the official closure of the Double Irish, Dutch Sandwich in January 2015, existing users of the strategy were given until January 2020 to phase out tax structures affected by the new regulation. For example, Google continued to use the Double Irish, Dutch Sandwich until December 2019.[48]

For analytical purposes, the "Double Irish, Dutch Sandwich" will be broken down into two distinct strategies—the Double Irish and the Dutch Sandwich—that are used together to create the ultimate tax avoidance strategy. The Double Irish strategy begins with a U.S. corporation creating an Irish subsidiary ("S1") that is registered as a tax resident of Bermuda or some other tax-haven country.[49] The S1 is designed to hold intangible property rights, such as intellectual property, which generate substantial income for U.S. technology companies.[50] The U.S. parent company transfers their intangible property to the S1 for an arm's length price to comply with the U.S. tax code.[51] The S1 is then in control of the intangible property rights and agrees to collect all of the parent company's European income attributable to the property.

At this point, the S1 has become a "dual resident"—i.e. a Bermudan tax resident under Irish tax law, and an Irish tax resident under U.S. tax law.[52] The default rule in Ireland is that a company incorporated in Ireland will be treated as an Irish resident for tax purposes.[53] However, under exceptions found in Ireland's Finance Act of 1999, Irish law allows the tax residency of a company to be determined by the jurisdiction in which the company is managed and controlled—in this case, Bermuda.[54] As a result, the S1 would not be subject to any corporate income tax for purposes of Irish taxation because, according to Irish law, it is only subject to corporate tax in Bermuda, where the corporate tax rate is zero.

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46. European Commission, *Commission Recommendation of 6 December 2012 on aggressive tax planning (2012/772/EU)*, Official Journal of the European Union, 2.
47. Sam Shechner, *Ireland to Close Double Irish Tax Loophole*, THE WALL STREET JOURNAL (Oct. 14, 2014) https://www.wsj.com/articles/ireland-to-close-double-irish-tax-loophole-1413295755.
48. Richard Waters, *Google to end use of 'double Irish' as tax loophole set to* close, FINANCIAL TIMES (Jan. 2 2020) https://www.ft.com/content/991f11ae-2c51-11ea-bc77-65e4aa615551.
49. Stephen C. Loomis, *The Double Irish Sandwich: Reforming Overseas Tax* Havens, 43 St. Mary's L. J. 825, 837 (2012).
50. *Id*.
51. I.R.C. § 482 (2006).
52. Loomis *supra*, note 48, at 837-838.
53. Finance Act 1999, S 23A(1)(a) (Ireland).
54. Finance Act 1999, s 23A(3) (Ireland).

In contrast to Irish law, the United States tax code states that the residence of an entity is determined by the jurisdiction in which the entity is formed; owner residence and place of management are irrelevant.[55] Furthermore, nonresidents will only be taxed by the U.S. on their U.S. source income that is effectively connected with a U.S. trade or business.[56] This means that in the above case the U.S. will view the S1 as an Irish resident and would not tax it on any non-U.S. income. There are two relevant rules, however, that were introduced to mitigate U.S. corporations' ability to shift its operations to a foreign subsidiary and avoid being taxed by the U.S. so easily—the Foreign Base Company Sales Income rule and the Foreign Personal Holding Company Income rule.[57] These two rules are part of the Subpart F provisions of the Federal Tax Code, and were established to eliminate the deferral of U.S. tax on certain categories of foreign income.[58]

Under the Foreign Base Company Sales Income rule, any income that a foreign subsidiary earns will be taxable by the U.S. when (1) the subsidiary does not materially participate in the generation of the income; and (2) the subsidiary buys or sells personal property from or to a related party.[59] As a result, the income received by S1 would ordinarily be taxed by the U.S. because it bought the intangible property rights of the parent company.

The second relevant rule of Subpart F is the Foreign Personal Holding Company Income rule. This rule taxes the "dividends, interest, royalties, rents, and annuities" that are earned by a foreign subsidiary.[60] Thus, the subsequent part of this tax strategy would be taxable under U.S. law.

As a single Irish subsidiary that is 'managed and controlled' in a tax haven like Bermuda, our S1 will pay no Irish or Bermudan corporate tax, but it will be subject to U.S. corporate tax under the Foreign Base Company Sales Income rule of Subpart F. This U.S. tax obligation is what necessitates the forming of a second Irish subsidiary by the S1—hence the term, Double Irish.

Unlike the S1, this second subsidiary ("S2") is treated as a resident in Ireland for Irish tax purposes because it is effectively managed and controlled by the main Irish subsidiary, S1.[61] Furthermore, the S2 has the option to *not* be considered an entity under U.S. law through 'check the box' rules.[62] A 'check the box' election is an entity classification that is made to the IRS.[63] For domestic and non-U.S. entities, there is the option to be classified as a "disregarded" entity.[64] This classification allows for the S2 to be disregarded as a separate entity from its sole owner, S1. Therefore, the S1 and S2 are considered a single entity under U.S. tax purposes.[65] As a result, the non-U.S. income generated by the S2 would no longer be

55. I.R.C. § 7701
56. I.R.C. §937
57. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation,* PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2.
58. *Id*.
59. I.R.C. § 881
60. I.R.C. § 954(c)
61. Finance Act, s 23A(1)(a) (Ireland).
62. Internal Revenue Service, *Overview of Entity Classification Regulations (a/k/a Check-the Box)*, (Sept. 24, 2017) https://www.irs.gov/pub/int_practice_units/ore_c_19_02_01.pdf
63. *Id*.
64. *Id*.
65. *Id*.

taxed under the Foreign Base Company Sales rule because it did not buy or sell any property from a related party (i.e. the S1), since both subsidiaries are considered a single entity.

Once this structure between the parent company and two subsidiaries is established, the S1 grants a sublicense of the intangible property rights it received from the parent company to the S2.[66] This means that all income arising outside of the U.S. from the use or sale of this intangible property will be attributable to the S2. In turn, the S2 then pays substantial royalties to the S1 in exchange for its use of the intangible property.[67] Payments made between the two Irish subsidiaries are then ignored for U.S. tax purposes as being made internally within a single Irish entity; therefore, the Foreign Personal Holding Company rule fails to apply. Only the royalty payments will be subjected to a small Irish withholding tax.

In summary, the S2 generates income from all non-U.S. customers and reduces this income by deducting the royalty payments it makes to S1.[68] All remaining income is taxed at Ireland's 12.5% corporate tax rate and is not taxed by the U.S. under the Foreign Base Company Sales Income rule.[69] Furthermore, the royalty payments made by the S2 to the S1 are not taxed under the Foreign Personal Holding Company rule because the two subsidiaries are viewed as a single entity. Thus, the money the S2 receives from non-U.S. sources is taxed at a relatively low rate and is then moved to the S1 via the royalty payments, where it is parked in its Bermudan offshore bank accounts and remains tax-free until the parent company wishes to use the money.

Users of the Double Irish may add an additional layer of tax avoidance through the use of a third subsidiary—i.e., the Dutch Sandwich. Under this scheme, the parent company incorporates this third subsidiary ("S3") in the Netherlands and uses it solely to funnel royalty payments from the S2 to the S1.[70] Rather than the S1 granting a sublicense to the S2, the S1 grants the sublicense to the S3 who then grants it to the S2.[71] In contrast to the Double Irish, the income from royalties collected by the S2 is transferred first to the Dutch subsidiary, the S3, and is then transferred to the main Irish subsidiary, the S1. The benefit of putting this Dutch subsidiary between the two Irish subsidiaries is the replacement of a higher Irish withholding tax on royalty payments with a lower Dutch withholding tax.[72] In accordance with the EC Directive 2003/49, "interest and royalty payments made by a corporation in one European Union member state to a subsidiary in another European Union member state will not be taxed provided the beneficial owner of the payment is a company or a permanent establish in another member state."[73] Thus, the Double Irish, Dutch Sandwich effectively allows the royalty payments to move from the S2 to the S1, without incurring a higher Irish withholding tax.

66. Loomis *supra*, note 48, at 838-839.
67. *Id*.
68. *Id* at 839.
69. *Id*.
70. *Id*.
71. *Id*.
72. *Id*.; James Fryer, *The Price Isn't Right: Corporate Profit Shifting Has Become Big Business*, THE ECONOMIST (Feb. 14, 2013) https://www.economist.com/special-report/2013/02/14/the-price-isnt-right.
73. Directive 2003/49 on the Taxation of Cross-Border Interest and Fair Royalty Payments in the European Union, OJ L 157, P. 0049—0054, Article 1.

Once a U.S. company wishes to use the profits residing in its offshore bank accounts, the money is repatriated back to the United States. The repatriation of profit by an offshore subsidiary incurs federal income tax under the U.S. Federal Tax Code. However, companies often exploit several loopholes in the tax code to avoid the usual tax consequences of this transaction.[74]

The Double Irish, Dutch Sandwich officially came to an end after years of multinational firms taking advantage of its complex structure. U.S. technology firms, in particular, have benefitted from the lowered tax obligations; and it was their use of the strategy that attracted the increasing amount of political and public concerns that ultimately led to the ending of the Double Irish, Dutch Sandwich. Despite this, these firms only recently ended their use of this strategy, and have since adopted new aggressive tax avoidance strategies that are similar to the Double Irish, Dutch Sandwich.

C. Case Study: U.S. Technology Companies

As mentioned above, the property used by the Irish subsidiary to generate non-U.S. income must be intangible or intellectual property. Due to this, most major U.S. tech companies have been identified as having used the Double Irish, Dutch Sandwich. A report published in December 2019 by the Fair Tax Mark, a tax transparency group advocating for ethical tax policies, accused the Silicon Six—Google, Facebook, Microsoft, Apple, Amazon, and Netflix— of collectively avoiding more than $100 billion in global tax over the past decade.[75] Specifically, the report noted that four companies of the Silicon Six used the Double Irish, Dutch Sandwich (or the simpler Double Irish) strategy to avoid taxes. The four companies were Google, Facebook, Apple, and Microsoft.[76]

The profit-shifting tax strategies of the world's largest advertiser, Google, were so notorious that the term "Google tax" is used to refer to anti-avoidance provisions introduced in the United Kingdom and Australia.[77] Google stood out amongst the other Big Tech firms because it continued to use the Double Irish until January 2020 whereas most companies ended their use of the tax strategy prior to the deadline.[78] The company was rather transparent about its use of the tax strategy, stating in its 2018 10-K, "[s]ubstantially all of the income from foreign operations was earned by an Irish subsidiary."[79] The company has since moved all of its intellectual property back into the United States, suggesting an end to aggressive tax strategies employed by the company. However, it is likely that Google will follow other big tech firms who have since dropped the Double Irish strategy in favor of other

74. *Id*.; I.R.S. § 881

75. Fair Tax Mark, *The Silicon Six and their $100 Billion Global Tax Gap*, (Dec. 2019) https://fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf.; Chloe Taylor, *Silicon Valley giants accused of avoiding over $100 billion in taxes over the last decade*, CONSUMER NEWS AND BUSINESS CHANNEL (Dec. 2 2019)

76. CONSUMER NEWS AND BUSINESS CHANNEL *supra*, note 70.

77. Frank Yan, *The "Google tax": What it is, and Why We Should Be* Cautious, TAX FOUNDATION (Dec. 7, 2015) https://taxfoundation.org/google-tax-what-it-and-why-we-should-be-cautious/.

78. Waters *supra*, note 47.

79. George Turner, *How much profit are Google, Apple, Facebook, Cisco and Microsoft making in the UK*, TAXWATCH (Nov. 6, 2018) https://www.taxwatchuk.org/how_much_profit_are_the_tech5_making/quoting.

aggressive tax avoidance schemes.[80] In the past decade, Google paid approximately 10.2% in taxes on its worldwide accumulate profit of $176.6 billion.[81]

Facebook is the second largest global advertiser and also uses the Double Irish, Dutch Sandwich strategy.[82] In 2012, Facebook paid only €1.9 million in taxes on over €1.7 billion in profit in Ireland and avoided paying any state or federal taxes in the United States, sparking greater controversy regarding corporate use of aggressive tax avoidance strategies.[83] "Public debate on tax avoidance in the UK reached its interim high point in 2013, when 1,062 articles on tax avoidance mentioning Google or Facebook were printed in British newspapers."[84]

Due to political and public pressures, Facebook announced in 2017 that the company would no longer record advertising revenue via its international headquarters in Dublin, Ireland—a move that would end the availability of the Double Irish, Dutch Sandwich.[85] Instead, the company now records revenue locally according to the country to which the revenue is attributable.[86] Facebook's CFO, Dave Wehner, claimed that the decision was meant to provide greater transparency to governments and the public, who have criticized multinational firms and their avoidance of taxes.[87] Despite the apparent move away from aggressive tax avoidance strategies, Facebook reportedly "has the lowest foreign current tax charge ratio of the Silicon Six over the [past] decade, at just 5% of profits."[88] Furthermore, Facebook still faces a lawsuit from the IRS that claims Facebook owes $9 billion in taxes due to the use of the Double Irish.[89]

In 2017, a UK charity called Christian Aid published a report that showed the quick replacement of the Double Irish, Dutch Sandwich with a new tax strategy called the "Single Malt."[90] The charity claimed that "several major multinationals, including Microsoft, were already putting in place alternative structures" to exploit Ireland's tax system and treaties.[91] The Christian Aid report details the Single Malt replacement:

> The new Irish tax residency rules mean that Irish-registered companies can no longer be tax-resident in the 'classic' zero-tax havens like Bermuda and the British Virgin Islands. However, it still allows Irish-registered companies to be tax-resident[s] in other jurisdictions, including European ones, with which

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80. Waters *supra*, note 73.

81. FAIR TAX MARK, *The Silicon Six and their $100 billion global tax* gap, (Dec. 2019) https://fairtaxmark.net/wp-content/uploads/2019/12/Silicon-Six-Report-5-12-19.pdf.

82. *Id.*; CHRISTIAN FUCHS, THE ONLINE ADVERTISING TAX AS THE FOUNDATION OF A PUBLIC SERVICE INTERNET: A CAMRI EXTENDED POLICY REPORT 25 (2018), https://www.jstor.org/stable/j.ctv5vddk0.6?seq=7 #metadata_info_tab_contents.

83. Jamie Smyth, *'Double Irish' limits Facebook's tax bill to 1.9m in Ireland,* FINANCIAL TIMES (Dec. 5, 2013) https://www.ft.com/content/ca64f938-5dc0-11e3-95bd-00144feabdc0

84. FUCHS *supra*, note 81, at 25.

85. Julia Fioretti, *Facebook to book advertising revenue locally amid political pressure*, REUTERS (Dec. 12, 2017) https://uk.reuters.com/article/%20us-facebook-tax/facebook-to-book-advertising-revenue-locally-%20amid-political-pressure-idUKKBN1E61X2.

86. *Id*.

87. *Id*.

88. FAIR TAX MARK *supra*, note 74.

89. Richard Rubin, *Facebook and IRS Prepare for $9 Billion U.S. Tax Court Fight*, WALL STREET JOURNAL (Feb. 8 2020) https://www.wsj.com/articles/facebook-and-irs-prepare-for-9-billion-u-s-tax-court-fight-11581177600

90. CHRISTIAN AID, *'Impossible' structures: tax outcomes overlooked by the 2015 tax Spillover analysis*, (2017) https://www.christianaid.ie/sites/default/files/2018-02/impossible-structures-tax-report.pdf.

91. *Id*.

> Ireland has a tax-treaty. Some of these jurisdictions provide a low or no tax environment for royalty income as effectively as the 'classic' Caribbean tax havens. Moreover, since such structures use jurisdictions with which Ireland has tax treaties lowering or removing withholding taxes on cross-border income, such structures are actually simpler than older Double Irish structures, because they do not require a "Dutch Sandwich" . . . Most of Ireland's double tax treaties reduce or cancel outbound withholding tax on royalties, with the need to exploit the EU rules.[92]

Effectively, the main subsidiary of a parent company, the S1 in our above scenario, switches its tax residence from a tax haven like Bermuda to countries with which Ireland has a favorable tax treaty. This continues to allow the S1 to receive royalties from the S2 with little or no tax imposed. Furthermore, the new tax residency of the S1 allows it to disregard any tax on royalty payments from the S2 to the S1, thereby removing the need for the Dutch Sandwich.

The Christian Aid Report details the use of the Single Malt by Microsoft and its recently purchased company, LinkedIn.[93] Prior to being bought out by Microsoft, LinkedIn operated a Double Irish tax strategy.[94] After Microsoft took over in 2016, LinkedIn created a new structure through the use of Irish subsidiaries to reap the same benefits offered by the Double Irish well past 2020. In March 2017, Microsoft—via LinkedIn—registered LinkedIn IP Holdings I Unlimited Company, an Irish subsidiary.[95] The new Irish subsidiary is directed by the head of international tax at Microsoft, Glenn Coswell, and has claimed its place of business as an office in Valetta, Malta, thereby making LinkedIn IP Holdings I Unlimited Company a tax resident of Malta.[96] A tax treaty between Ireland and Malta then allowed for this new Irish subsidiary, acting as an S1, to receive royalty payments from another subsidiary (the S2) with minimal or no tax.[97] The use of Malta for its tax residency, along with the lack of need for a Dutch Sandwich, is how the term "Single Malt" was coined.

In response to Microsoft and other companies' use of the Single Malt, the Irish government amended their tax treaty with Malta to prevent the continued use of this aggressive tax avoidance strategy.[98] After the closing of the Single Malt, which was Microsoft's initial response to the closing of the Double Irish, the company has reportedly structured itself to benefit from the "Green Jersey"—another tax avoidance strategy that has also been used by Apple since 2014.[99]

Apple claims that it is the world's largest taxpayer; however, the Fair Market Tax report estimates that while Apple paid $93.8 billion in income tax this decade on profits of $548.7

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92. *Id*.
93. *Id*.
94. *Id.*
95. *Id*.
96. *Id*.
97. *Id.*
98. Tom Maguire, *Ireland and International tax after Davos*, DELOITTE (Feb. 10, 2019) https://www2.deloitte.com/ie/en/pages/tax/articles/ireland-and-international-tax-after-davos.html; Hamza Ali, *Ireland Discovers It Isn't So Easy Shake Tax Haven Image*, BLOOMBERG (Sept. 6, 2019) https://news.bloombergtax.com/daily-tax-report-international/ireland-discovers-it-isnt-so-easy-to-shake-tax-haven-image
99. David Chance, *Why Google might still benefit from Irish tax breaks,* INDEPENDENT (Jan. 3, 2020) https://www.independent.ie/business/why-google-might-still-benefit-from-irish-tax-breaks-38830700.html.

billion, "the cash tax paid as a percentage of profit is still a relatively low 17.1% at the time when the federal headline rate of tax in the United States was 35% for seven of the nine years under examination."[100] The tech company was able to pay this relatively low tax rate by taking advantage of the Double Irish during its dying years, and through its subsequent use of the Green Jersey.

In 2017, the German newspaper, *Suddeutsche Zeiting,* received more than 13.4 million leaked documents from the Bermudian law firm Appleby.[101] This group of documents has since been labeled the "Paradise Papers" and exposes hundreds of individuals and companies who use offshore jurisdictions to minimize their tax burden with the help of Appleby.[102] With the International Consortium of Investigative Journalists ("ICIJ") overseeing the investigation, over one hundred media outlets were given the documents to examine and report.[103]

Appleby's clients included "princesses, prime ministers, and Hollywood stars, as well as corporate giants: Apple, Nike, Facebook, and Glencore…"[104] The report was especially revealing in regards to Apple, whose CEO Tim Cook stated before the U.S. Senate Permanent Subcommittee on Investigations in May 2013, "we do not depend on tax gimmicks . . . we do not stash money on some Caribbean island."[105] The Paradise Papers revealed that by the end of 2014, after Ireland announced it would be disallowing the use of the Double Irish structure past 2020, Apple had settled on an island in the English Channel—Jersey—to be its new tax haven in a newer Double Irish tax structure.[106] This was because the grandfathering provisions that allowed companies to continue to use the aggressive tax strategy until 2020 applied "not just to companies in existence….but also any new ones created up until the end of 2014."[107]

Along with the grandfathering of Double Irish users, Apple took advantage of the Capital Allowances for Intangible Assets ("CAIA") profit shifting strategy, which was introduced in Ireland's Finance Act 2009.[108] The CAIA allows companies to claim a tax allowance for the depreciation of intangible assets, such as intellectual property, as a write-off against taxable income over fifteen years.[109] The write-off is capped at 80% of the assets value.[110] The

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100. FAIR TAX MARK *supra*, note 76.

101. BBC, *Paradise Papers: verything you need to know about the* leak, (Nov. 10, 2017) https://www.bbc.com/news/world-41880153; Michael Forsythe, *Paradise Papers Shine Light on Where the Elite Keep Their Money*, NEW YORK TIMES (Nov. 5, 2017) https://www.nytimes.com/2017/11/05/world/paradise-papers.html; Bill Chappell, *The Paradise Papers: Revelations Spring From Leaked Records of World's Wealthy*, NATIONAL PUBLIC RADIO (Nov. 6, 2017) https://www.npr.org/sections/thetwo-way/2017/11/06/562349277/the-paradise-papers-revelations-spring-from-leaked-records-of-worlds-wealthy.

102. Sources *supra* note 99

103. *Id*.

104. Will Fitzgibbon & Dean Starkman, *The 'Paradise Papers' And the Long Twilight Struggle Against Offshore Secrecy*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Dec. 17 2017) https://www.icij.org/investigations/paradise-papers/paradise-papers-long-twilight-struggle-offshore-secrecy/.

105. Simon Bowers, *Leaked Documents Expose Secret tales of Apple's Offshore Island Hop*, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 6, 2017) *https://www.icij.org/investigations/paradise-papers/apples-secret-offshore-island-hop-revealed-by-paradise-papers-leak-icij/.*

106. *Id*.

107. *Id*.

108. Martin Brehm Christensen & Emma Clancy, *Exposed: Apple's Golden Delicious Tax Deals,* EUROPEAN UNITED LEFT – NORDIC GREEN LEFT (June 21, 2018) https://emmaclancy.files.wordpress.com/2018/07/apple-tax-structure-and-rate-post-2014.pdf.

109. *Id.*

110. *Id.*

European United Left/Nordic Green Left group of European Parliament detailed Apple's use of the CAIA in a 2018 report, and they named the aggressive tax avoidance strategy the "Green Jersey."[111]

In 2015, Apple used the CAIA by having its Irish subsidiary purchase approximately $300 billion in intangible assets from a company subsidiary in Jersey.[112] This allowed Apple to write-off the $300 billion expense against its future Irish profits, which essentially constituted all of its international profits. Furthermore, the $300 billion in allowances was effectively doubled because the Irish subsidiary then deducted the interest payments made on intra-group loans that were obtained to purchase the intangible property.[113] These interest payments also allowed large amounts of capital to flow from Apple's Irish subsidiaries to its off-shore Jersey subsidiaries.[114] The result was a company paying for its own intellectual property with its own money, and receiving tax benefits from both the depreciation of the intellectual property and interest payments on the loan. The effect of the CAIA and Green Jersey has been a replication of the "effect of the Double Irish regarding the effective tax rate paid by multinational corporations trading in IP."[115]

IV. Impact on ESG Score & Financial Performance

A. Effect on Governance

An email that was circulated between the senior partners of Appleby noted that "Apple is extremely sensitive concerning publicity."[116] This is not surprising considering the increased scrutiny Apple and other U.S. technology companies have been receiving for their tax practices. For example, Facebook received a shareholder resolution in 2018 that asked the company to "endorse a set of principles to guide its tax policy and ensure that such principles consider the impact of its tax strategies on local economies and public services."[117] This is reflective of not only shareholder concerns, but a broader societal concern that companies are not paying an appropriate amount of taxes. There has also been extensive research done in the past decade that questions the role of corporate social responsibility in aggressive tax avoidance strategies.[118]

As a result of increased scrutiny, rating agencies like MSCI have reduced the ESG scores of companies that face legal action regarding tax issues, pay lower effect tax rates than estimated, or have obscure tax structures.[119] Furthermore, institutional investors have

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. BBC, *Paradise Papers: Apple's secret tax bolthole revealed*, (Nov 6, 2017) https://www.bbc.com/news/world-us-canada-41889787.
117. Richard Phillips, *Facebook Facing Shareholder Scrutiny for Its Offshore Tax Avoidance*, Institute on Taxation and Economic Policy (May 30, 2018) https://itep.org/facebook-facing-shareholder-scrutiny-for-its-offshore-tax-avoidance/.
118. Kayal Munisami, *The Role of Corporate Social Responsibility in Solving the Great Corporate Tax Dodge*, 17 Fla. St. U. Bus. Rev. 55 (2018); Christina HJI Panayi, *Is Aggressive Tax Planning Socially Irresponsible*, 43 Intertax 544 (2015).
119. Aliya Ram, *MSCI takes aim at corporate tax avoidance*, Financial Times (Nov. 13, 2016) https://www.ft.com/content/b12b120c-a80b-11e6-8b69-02899e8bd9d1.

integrated taxation issues into their own ESG analysis using sustainability reports, annual reports, online publications, leaked documents, and ESG scores from rating agencies.[120] Although society may view corporate tax practices as legally acceptable, the public may not consider such activity responsible, sustainable, or ethical. But, while aggressive tax avoidance practices have affected ESG scores and rating analysis, the extent of this effect is unclear.

The direct relationship between taxation and sustainable investing, and more specifically ESG investing, is an "unexplored area of research."[121] In an interview with several institutional investors, researchers found that all investors expect companies to meet a minimum requirement to comply with the tax laws of its state of incorporation. However, while some investors monitor the effective tax rate of companies in their ESG analysis, it was unclear how far aggressive tax planning could go "before [such activities] would adversely affect investments in the firm or lead it to be excluded from the investors' portfolio."[122]

Although the direct consequences remain empirically unclear, "the role of taxation is expected to increase in ESG analysis carried out" by rating agencies and institutional investors.[123] The negative impact that aggressive tax avoidance may have on a company's image and reputation is one of the driving forces behind poor ESG scores and analysis; this is even more true of companies that lack transparency in their tax strategies.[124] For the Silicon Six—which are constantly scrutinized by the public, the media, and U.S. state and federal government and are continually threatened by negative press via headlines, research, and lawsuits—aggressive tax avoidance schemes are dangerous practices that pose serious risks to a company's brand and value.

B. Correlation between ESG Score & Financial Performance

There is significant data suggesting a relationship between ESG ratings and financial performance of companies. A research study in 2015 analyzed over two thousand academic empirical studies on this relationship; the report found that approximately 90% of the studies supported the argument that "the business case for ESG investing is empirically very well founded."[125] Institutional investors and rating agencies share this belief as well; Goldman Sachs stated in a report that "there is a growing consensus that integrating material ESG factors correlated to long-term financial returns." Furthermore, MSCI has found that companies with higher ESG ratings produced a higher average return over the last five years.[126] Additionally, when attempting to identify which ESG categories have a dominate

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120. Reijo Knuutinen & Matleena Pietilainen, *Responsible Investment: Taxes and Paradoxes*, 2017 Nordic Tax J. 135, 142 (2017).

121. *Id* at 135.

122. *Id* at 142.

123. *Id* at 144.

124. *Id*.

125. Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from more than 2000 Empirical Studies*, 5 J. OF SUSTAINABLE FIN. & INV. 210, 210.

126. GOLDMAN SACHS, *Sustainable Finance Innovation Forum 2018*, (Nov. 2018) https://www.goldmansachs.com/insights/pages/sfi/key-takeaways-2018.pdf; Panos Seretis & Meggin Thwing Eastman, *Enhancing Economic Value with ESG*, MSCI (Feb. 2018) https://chicorywealth.com/wp-content/uploads/2018/05/Enhancing-Economic-Value-with-ESG.pdf.

influence on corporate financial performance, Governance factors had the highest positive correlation, followed by Environment and then Social.[127]

Rating agencies and institutional investors are increasingly considering tax planning and strategies as a crucial part of their ESG scoring analysis. As mentioned above, the extent to which aggressive tax avoidance strategies directly affect Governance scores and ESG analysis is empirically uncertain. However, societal concerns and the possibility of superior financial performance are driving the growth of investor interest in ESG investing, and Governance—which includes taxation criteria—is the most important catalyst for this trend. Ultimately, aggressive tax avoidance strategies negatively affect companies in two ways—it's 'bad publicity' and, more concretely, it leads to lower ESG ratings. As a result, companies should be urged to reconsider their use of such strategies, particularly now, as ESG investing is growing exponentially as the world's one of the most important investing strategies.

V. Conclusion

ESG investing has risen in the past decade as one of the most popular forms of sustainable investing. Furthermore, a growth in public concern over aggressive corporate tax avoidance practices has coincided with ESG's rise to prominence. Despite the closing of one of the most notorious tax avoidance schemes—the Double Irish, Dutch Sandwich—U.S. companies have found new ways to avoid their tax obligations for their international profits. Specifically, U.S. technology companies have used new strategies, such as the Single Malt and Green Jersey, to save billions in taxes and hold it in offshore accounts in countries like Bermuda or Jersey.

Society's concern with these companies and their illusive tax practices is reflected through ESG ratings and analysis implemented by rating agencies and institutional investors. The exact effect that these practices have on ESG scores and investment decisions remains unclear and is an area that requires greater research. However, considering the popularity of ESG investing and its strong ties to financial performance, it is possible that firms such as Google, Facebook, Microsoft, and Apple may face adverse effects for their aggressive tax avoidance practices in the form of lower investment inflow or exclusion from ESG-driven portfolios. As a result, Big Tech should carefully weigh their use of aggressive tax avoidance by prudently balancing the short-term gain of tax savings with the long-term damage that such strategies can have on public image and ESG scores.

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127. Principles for Responsible Investment, ESG & Corporate Financial Performance: Mapping the global landscape, (Dec. 2015) https://institutional.dws.com/content/_media/K15090_Academic_Insights_UK_EMEA_RZ_Online_151201_Final_(2).pdf.