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Inversion Subversion: Corporate Inversions and the New Federal Laws Against Them

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Cover Page Footnote

J.D. Candidate, Fordham University School of Law; B.A., New York University; M.P.A., New York University. I am grateful to Professor Richard Squire for his invaluable advice and comments. I also acknowledge the contributions of friends and family throughout this process.

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INVERSION SUBVERSION: CORPORATE INVERSIONS AND THE NEW FEDERAL LAWS

Douglas Chiu

INVERSION SUBVERSION: CORPORATE INVERSIONS AND THE NEW FEDERAL LAWS AGAINST THEM

Douglas Chiu[*]

ABSTRACT

Corporate inversions are the act of American corporations legally re-domiciling to a foreign jurisdiction to lessen their corporate tax burden. While the practice has waxed and waned over the past decades, inversions were on the upswing in 2014, with several of America's leading corporations at various stages of inverting.

In 2014, the federal government responded to the increased corporate inversions with two main renewed legal thrusts originating from the legislative and the executive branches. In Congress, there are now four main bills at the committee stage that propose to restrict the existing statutory loopholes that allow corporate inversions. Concurrently, the United States Department of the Treasury has issued guidelines to reduce the taxation benefits of corporate inversions. In light of these actions, this note will discuss the current legal climate of corporate inversions and the potential impact that the proposed legislation and the administrative interpretations may have on corporate inversions.

Ultimately, this note will argue that absent actual reforms to the underlying push and pull factors in the American tax law, corporate inversions will continue unabated, and the legislative and executive efforts may be inadequate to end altogether the practice of corporate inversions.

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INTRODUCTION

In the summer of 2014, two pharmaceutical companies, AbbVie and Shire, decided to merge.[1] The corporations were based on either side of the Atlantic Ocean.[2] On the American side was AbbVie—a Chicago, Illinois-based company best known for making Humira.[3] On the European side was Shire—a Jersey, Channel Islands-based company best known for making Adderall.[4]

In May 2014, AbbVie made a series of offers for Shire, and on July 18, 2014, the two companies announced a proposed merger, with the Shire board recommending that shareholders adopt the merger eight days later.[5] Under the proposed merger terms, AbbVie would form a

1. David Gelles & Mark Scott, *AbbVie Clinches $54 Billion Deal for Shire in a Move to Reduce Taxes*, N.Y. TIMES, July 18, 2014, http://dealbook.nytimes.com/2014/07/18/abbvie-reaches-deal-to-buy-european-drug-maker-shire/ [hereinafter *AbbVie Clinches $54 Billion Deal*].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

subsidiary in the Channel Island of Jersey, "New AbbVie," which would be the holding company for both AbbVie and Shire post-merger.[6]

Although the merger announcement provided much fanfare for corporate synergies and new product development, one sentence in the press release underlined a major driving force behind the merger: "New AbbVie is a private limited company incorporated in Jersey, being Shire's current place of incorporation, and following completion of the [merger] is expected to be resident in the UK for tax purposes."[7] Displaying high hopes for the future of the deal, AbbVie expected the merger to result in a reduction of the effective tax rate for New AbbVie to approximately 13 percent by 2016.[8]

In late September 2014, the United States Department of the Treasury announced guidelines that purportedly would reduce the tax benefits of American corporations from performing the same re-domiciling merger, as exemplified by AbbVie and Shire.[9] The guidelines provide for an interpretation of provisions of the Internal Revenue Code ("IRC") that would make it less economically lucrative for an American corporation to reorganize in a foreign jurisdiction or create tax deferment or avoidance schemes through foreign corporate subsidiaries.[10]

In October 20, 2014, only a few months after the deal had been announced, AbbVie ended its merger plans with Shire, resulting in a $1.6 billion break-up fee.[11] In discussing the scuttled deal, AbbVie's CEO cited the United States Department of the Treasury for "re-interpret[ing] longstanding tax principles in a uniquely selective manner

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6. Press Release, Shire, Recommended Combination of Shire PLC and AbbVie Inc. 2 (July 18, 2014), *available at* http://www.shire.com/shireplc/uploads/press/ABBV-Announcement-071814.pdf.

7. *Id.* at 13.

8. *Id.* at 9.

9. Press Release, U.S. Dep't of the Treasury*,* Treasury Announces First Steps to Reduce Tax Benefits of Corporate Inversions (Sept. 22, 2014), *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2647.aspx [hereinafter U.S. Dep't of the Treasury Press Release]; *see also* Jim Hamilton, *Treasury Acts to Curb Corporate Merger Inversions*, CORPORATE GOVERNANCE GUIDE UPDATE No. 637, at 1, *available at* 2014 WL 5320818 (Oct. 15, 2014) (providing overview of the Department of the Treasury legislation and analysis).

10. U.S. Dep't of Treasury Press Release, *supra* note 9, at 1.

11. Brian Solomon, *Inversion Implosion: AbbVie-Shire Merger Officially Dead*, FORBES, Oct. 20, 2014, http://www.forbes.com/sites/briansolomon/2014/10/20/inversion-implosion-abbvie-shire-merger-officially-dead/.

designed specifically to destroy the financial benefits of these types of transactions."[12] In discussing "these types of transactions," the CEO was alluding to corporate inversions.[13]

The proposed AbbVie-Shire corporate inversion deal is not an isolated incident in the American corporate landscape.[14] The Treasury Department has defined corporate inversions[15] as "a transaction through which the corporate structure is altered so that a new foreign corporation, typically located in a low- or no-tax country, replaces the existing U.S. parent corporation as the parent of the corporate group."[16] A corporation can invert in two main ways: first, with the creation of a foreign subsidiary that merges or swaps stock with the original domestic parent company;[17] and second, with the merger with a foreign corporation, mostly with the creation of a foreign parent company.[18]

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12. *Id.*

13. Also called "expatriation transactions." *Corporate Inversions: Current Law, Current Events, and Proposals for Change*, FED. TAXES WEEKLY ALERT ART. 1 (Thomson Reuters/Tax and Accounting), May 22, 2014, at 1. However, some scholars refer to expatriation transactions as a wholly separate entity. *See* Michael S. Kirsch, *The Congressional Response to Corporate Expatriations: The Tension Between Symbols and Substance in the Taxation of Multinational Corporations*, 24 VA. TAX REV. 475, 586 (2005) ("The term 'expatriation' derives from the movement of the corporate parent's place of incorporation from within the United States to a foreign country.").

14. *Tracking Tax Runaways*, BLOOMBERG.COM, http://www.bloomberg.com/infographics/2014-09-18/tax-runaways-tracking-inversions.html (last visited Dec. 12, 2014) [hereinafter *Tracking Tax Runaways*] (providing a list of corporations that have inverted in 2014).

15. This note will not discuss other so-called types of corporate expatriations, such as spinoffs (where a division of a previously inverted corporation becomes independent), or where a domestic corporation obtains a foreign address through other means, such as a sale to a leveraged-buyout firm.

16. Rueven S. Avi-Yonah, *For Haven's Sake: Reflections on Inversion Transactions* 95, TAX NOTES, no. 12 1793, 1793 (2002) (citing to U.S. Treasury, Office of Tax Policy, Corporate Inversion Transactions: Tax Policy Implications, Doc. 2002-12218, 2002 TNT 98-49 (May 21, 2002)).

17. D. Kevin Dolan et al., U.S. Taxation International Mergers, Acquisitions & Joint Ventures ¶ 24.02 EXPATRIATION STRUCTURING ALTERNATIVES, 2002 WL 1004074, 2 (2014).

18. Zachary R. Mider, *Bloomberg QuickTake: Tax Inversion: How U.S. Companies Buy Tax Breaks*, BLOOMBERG QUICK TAKE (Jan. 13, 2015, 4:48 PM), http://www.bloombergview.com/quicktake/tax-inversion.

The practice has waxed and waned over the past couple of decades, but is currently on an upswing.[19] In 2014 alone, over 12 corporations proposed such corporate inversions, completed the inversion process, or were in the process of consummating the act of inversion, all with varying success in inverting.[20] Within the 2014 class of inverting corporations are some of America's most well-known brand names, including Pfizer, Chiquita Brands International, Medtronic, and Burger King.[21]

Historically, both the legislative and executive branches of the federal government have developed legislation and administrative rules that seek to make the practice of corporate inversions less favorable for the American corporation.[22] While there have been several enactments of legislation and tax code interpretations over the past few decades, none has fully curtailed the trend of corporate inversions.[23]

In 2014, there were two main renewed legal thrusts against the practice of corporate inversions, originating from the legislative and the executive branches.[24] In Congress, there are now four bills at the committee stage.[25] The most prominent of these is the Stop Corporate Inversions Act of 2014, which seeks to reform IRC § 7874.[26] However,

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19. *See Tracking Tax Runaways*, *supra* note 14 (containing a complete table of corporations that have inverted abroad since McDermott International Inc. in 1982).

20. *Id.*

21. *Id.*

22. Bret Wells, *Corporate Inversions and Whack-a-Mole Tax Policy*, 143 TAX NOTES 1429, 1429 (2014).

23. Samuel C. Thompson, Jr., *New Inversions, the 'Joe Frazier Left Hook,' the IRS Notice, and Pfizer*, TAX NOTES, June 23, 2014, at 1414 (on file as Penn. St. U. Legal Studies Research Paper No. 37-2014).

24. *See, e.g.*, Stop Corporate Inversions Act of 2014, H.R. 4679, 113th Cong. (2014) (federal legislation intended to curb practice of corporate inversions); No Federal Contracts for Corporate Deserters Act of 2014, H.R. 5278, 113th Cong. (2014) (same); Stop Corporate Expatriation and Invest in America's Infrastructure Act of 2014, H.R. 4985, 113th Cong. (2014) (same); American Jobs for American Infrastructure Act of 2014, S. 2489, 113th Cong. (2014) (same in part); Federal Employee Pension Fairness Act 2014, H.R. 5338, 113th Cong. (2014) (same in part); U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1 (executive action intended to reduce the financial rewards of corporate inversions).

25. Stop Corporate Inversions Act of 2014, H.R. 4679; No Federal Contracts for Corporate Deserters Act of 2014, H.R. 5278; Stop Corporate Expatriation and Invest in America's Infrastructure Act of 2014, H.R. 4985; Federal Employee Pension Fairness Act 2014, H.R. 5338.

26. Stop Corporate Inversions Act of 2014, H.R. 4679.

largely due to the legislative gridlock in Washington, the executive branch, through the Treasury Department, has taken the initiative and reinterpreted administrative tax code to make it less economically favorable to invert.[27]

This note will discuss the current legal climate of corporate inversions and the potential impact that the proposed legislation and the administrative interpretations may have on corporate inversions.

The note is divided into three parts. The first part will describe and discuss corporate inversions in the context of American corporate taxation, what benefits corporations derive from inverting, and how the legislative and executive branches of the federal government responded to the challenges of corporate inversions prior to 2014. The second part will outline and detail the current anti-inversion legislation and administrative law from both the legislative and executive branches of the federal government from 2014 onward. Finally, the third part will argue that absent actual reforms to the underlying push and pull factors in American tax law, corporate inversions will continue unabated, and the legislative and executive efforts may be inadequate to end altogether the practice of corporate inversions.

I. CORPORATE INVERSIONS AND ANTI-INVERSION LEGISLATION

A. BRIEF OVERVIEW OF AMERICAN CORPORATE TAX: THE TERRITORIAL SYSTEM VERSUS THE WORLDWIDE SYSTEM

Although this note will not discuss the American tax system in depth, it is worth discussing the circumstances that drive American corporations to invert to foreign shores. The discussion mainly centers on how the American approach to corporate taxation differs from that of other countries.

In the United States, the taxation system is the worldwide system,[28] which means that the federal government will tax an American corporation no matter where in the world it makes money, so long as it "resides" in the United States.[29] For the "residing" part of the definition,

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27. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.

28. Congressional Budget Office, Options for Taxing U.S. Multinational Corporations (2013), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/02-28-2013-MultinationalTaxes_One-Col.pdf.

29. Hale E. Sheppard, *Fight or Flight of U.S.-Based Multinational Businesses: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend*,

the United States government uses the "place-of-incorporation rule," which holds that the corporation is considered domestic for taxation purposes so long as it is incorporated in or under the jurisdiction of the United States.[30] Thus, to vastly oversimplify, whether the American corporation makes money from selling widgets in New Jersey or the Bailiwick of Jersey in the Channel Islands, the American corporation is liable for taxes on any and all income gained worldwide.[31]

However, there is a major complication: currently, the corporate tax rate is around 35 percent on income earned in the United States.[32] American corporations that operate abroad are liable for 35 percent of income earned abroad, but, in the interests of not taxing twice, the corporation can credit the amount of foreign taxes paid to other governments against the liability.[33] However, the total liability would amount to 35 percent.[34]

In contrast with the worldwide system, many other countries—including many of the inversion target countries—employ the territorial system.[35] Under this system, the government taxes only the corporate income of the domestic corporation that is earned within the given jurisdiction.[36] Thus, a Channel Islands corporation would only be liable for taxes on income derived from business activities conducted solely within in the Channel Islands.[37]

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23 NW. J. INT'L L. & BUS. 551, 552 (2003); *see also* I.R.C. §§ 7701(a)(4)-(5) (2014) (defining what is a "domestic" corporation, as compared to what is a "foreign" corporation).

30. I.R.C. § 7701(a)(4) (West 2014).

31. Sheppard, *supra* note 29, at 552-53.

32. Combined with state and local tax, it is generally 39 percent, one of the highest in the Organization for Economic Co-operation and Development grouping of thirty-nine countries. Congressional Budget Office, Options for Taxing U.S. Multinational Corporations, at 2; *cf.* KPMG, *Corporate Tax Rates Table*, http://www.kpmg.com/global/en/services/tax/tax-tools-and-resources/pages/corporate-tax-rates-table.aspx (last visited Dec. 29, 2014) (providing a comparative table of different countries' corporate tax rates).

33. Matt Levine, *Burger King May Move to Canada for the Donuts*, BLOOMBERGVIEW.COM, (Aug. 25, 2014, 5:05 PM), http://www.bloombergview.com/articles/2014-08-25/burger-king-may-move-to-canada-for-the-donuts.

34. *Id.* at 1.

35. *Id.* at 2.

36. *Id.*

37. *Id.*

Under this system, a foreign corporation operating in the United States would only be liable for the 35 percent of income derived from business activities in the United States.[38] Thus, if the corporation were based in the Channel Islands, which has a corporate tax rate of 0 percent,[39] the portion of the corporation operating in the United States would be liable for 35 percent of the income derived in the United States, and 0 percent on the income derived in the Channel Islands.[40]

While this does not look like a major change—especially since the corporation is still paying 35 percent of the income in the United States—the limit of taxation only on income derived in the United States can make a big difference for corporations, especially when they shift their income-deriving operations outside of the United States and into the low-corporate tax jurisdictions.[41] Generally, the biggest beneficiaries are the corporations that make use of intellectual property, such as the pharmaceutical sector, where a corporation can transfer intellectual property rights more easily across national lines than transferring a factory or real estate.[42]

Returning to the hypothetical inverted corporation, the foreign parent has its patents in a Channel Islands-based subsidiary, and has its American subsidiary pay licensing fees to the Channel Islands corporation.[43] In an illustrative over-simplification, the American subsidiary manufactures a drug for $1, and it licenses the patent for the drug from the Channel Islands subsidiary for $9,995.[44] The American subsidiary sells the drug for $10,000.[45] The American subsidiary has $4 of net income, which is taxable at 35 percent to the American tax authorities.[46] The Channel Islands subsidiary has $9,995 of net income, which would be taxed at a rate of zero percent.[47]

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38. *Id.*

39. PricewaterhouseCoopers Channel Islands, *Update on the 0/10 Corporate Tax Regimes*, http://www.pwc.com/jg/en/issues/zero-ten-the-new-tax-regime.jhtml (last visited Dec. 29, 2014).

40. Levine, *supra* note 33, at 2.

41. *Id.*

42. *Id.* at 3 (discussing a hypothetical pharmaceutical corporation which has an American manufacturing subsidiary that pays licensing fees to a Bermuda-based subsidiary).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

The difference between the worldwide system and the territorial system is in large part what drives corporate inversions, as corporations can reduce their American tax liabilities if they re-domicile abroad and shift their income-deriving operations outside of the United States.[48] Corporations with foreign subsidiaries can shift profits from the high-tax United States to a lower-tax foreign jurisdiction, by allowing businesses to maintain their actual investments in high tax countries while reporting profits in low-tax jurisdictions.[49] This would lead to a reduction in American tax liabilities on American-derived income, as they would only be liable for the 35 percent in the United States while also reducing American tax liabilities on foreign income, since the corporation would only be liable for the foreign taxes on the income generated in the foreign jurisdiction.[50]

B. Defining Corporate Inversions

Though corporate inversions can be conducted in several ways, this note will adopt the same definition as that of the Treasury Department: when a domestic corporation becomes a subsidiary of a parent corporation in a foreign jurisdiction.[51] A domestic corporation can invert by creating a foreign subsidiary that will become the foreign parent of the domestic corporation, or through a merger between a domestic corporation and a foreign corporation with the foreign corporation as the new parent.[52]

In either scenario, the only actual change is the place of incorporation and, in some scenarios, a transfer of ownership and assets.[53] The corporate management, shareholder structure, and business activities continue largely undisturbed in the United States.[54] However, as discussed above, the change in place of incorporation has significant tax implications for the corporation and its shareholders.[55]

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48. Sheppard, *supra* note 29, at 554.
49. *Id.* at 554-55.
50. Levine, *supra* note 33.
51. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.
52. Levine, *supra* note 33.
53. *See* Kirsch, *supra* note 13, at 493-95.
54. *Id.*
55. *See supra* Part I.A.

C. ANTI-CORPORATE INVERSION LEGISLATION: THEN

Historically, both expatriated corporations and the federal government have played a cat-and-mouse game in which the government passes legislation intended to respond to and suppress each corporate inversion.[56] In response, corporations have developed different forms of inversions to get through loopholes in the law.[57]

Anti-inversion legislation began in 1981 with McDermott, Inc., an oil and gas corporation originally incorporated in Delaware.[58] In 1983, McDermott, Inc. established McDermott International, a Panamanian company, and shifted shareholders to Panama by exchanging shares in the former American McDermott, for shares of the new Panamanian parent.[59] Largely in response to this action, Congress in 1984 enacted 26 U.S.C. § 1248(i).[60] Under it, the parent corporation had to include dividend income to the extent of its earnings and profits.[61] The Treasury Department also issued Notice 94-93, 1994-2 C.B. 563, which required the parent corporation to recognize gain on its foreign subsidiary stock as if it had distributed that stock to its public shareholders in exchange for its own stock.[62]

Following that, in 1994, Helen of Troy, Ltd.'s shareholders exchanged their stock for that of a new foreign parent company, transferring its corporate domicile from Texas to Bermuda.[63] In response, the Treasury Department issued Notice 94-46, 1994-1 C.B. 356, and eventually promulgated Regulation Section 1.367(a)-3(c), causing the American shareholders to be taxable on their built-in gain if the legacy shareholders of the U.S. parent owned more than 50 percent of the new foreign parent company.[64]

In 2002 Congress passed the Homeland Security Act of 2002, establishing the Department of Homeland Security.[65] Section 835 of that

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56. Wells, *supra* note 22, at 1429.
57. *Id.*
58. Robert J. Staffaroni, *Size Matters: Section 367(a) and Acquisitions of U.S. Corporations by Foreign Corporations*, 52 TAX LAW. 523, 533 (1999).
59. *Id.*
60. Wells, *supra* note 22, at 1429.
61. 26 U.S.C. § 1248(i) (2012).
62. Wells, *supra* note 22, at 1429.
63. Straffaroni, *supra* note 58, at 534.
64. *Id.*
65. Sheppard, *supra* note 29, at 584.

Act contained an indirect sanction addressing corporate expatriations, meant to discourage companies from inverting because they could lose lucrative government contracts.[66] That section provides, in general, that "[t]he Secretary [of Homeland Security] may not enter into any contract with a foreign incorporated entity which is treated as an inverted domestic corporation."[67]

Undeterred, corporations inverted abroad—including Cooper Industries,[68] Nabors Industries, Ltd.,[69] Weatherford International,[70] Seagate Technologies,[71] and Herbalife International.[72] This spate of inversions prompted Congress to enact IRC § 7874[73] as part of the American Jobs Creation Act of 2004.[74] This provision treats the post-expatriation foreign-incorporated parent as a domestic corporation, thereby negating the place-of-incorporation rule in the case of inversion transactions, and circumscribing any tax deferral benefit that an inverted corporation may obtain by inverting.[75]

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66. *See* Kirsch, *supra* note 13, at 498.

67. Homeland Security Act of 2002, Pub. L. No. 107-296, § 835(a), 116 Stat. 2135, 2227 (2002) (codified as amended at 6 U.S.C. § 295(a) (2012)).

68. Cooper Industries, Registration Statement, (Form S-4) (Sept. 6, 2002); Cooper Industries, Current Report (Form 8-K) (May 22, 2002) (announcing the completion of the corporate inversion in Bermuda).

69. Nabors Industries Inc., Registration Statement (Form S-4/A) (Apr. 29, 2002) (announcing intended corporate inversion); Nabors Industries, Current Report, (Form 8-K) (June 24, 2002) (announcing favorable shareholder vote and completion of corporate inversion to Bermuda).

70. Wells, *supra* note 22, at 1430 (quoting Weatherford International, Proxy Statement (DEF-14A) (May 22, 2002)) (announcing shareholder vote to approve corporate inversion); Weatherford International, Current Report (Form 8-K) (June 26, 2002) (announcing favorable shareholder vote and completion of corporate inversion).

71. Wells, *supra* note 22, at 1430 (quoting Seagate, Registration Statement, (Form S-4A) (Aug. 30, 2000); Seagate, Current Report (Form 8-K) (Feb. 5, 2001)).

72. Wells, *supra* note 22, at 1430 (quoting Herbalife International, Proxy Statement (PREM-14A) (May 7, 2002); Herbalife International, Current Report (Form 8-K) (July 31, 2002)).

73. 26 U.S.C. § 7874 (2012).

74. *Id.*; *see* Joseph A. Tootle, *The Regulation of Corporate Inversions and "Substantial Business Activities"*, 33 VA. TAX REV. 353, 368 (2013) ("In 2002, Congress began to respond to the then recent wave of inversions with numerous bills designed to deter or eliminate the transactions . . . . Their efforts succeeded when the American Jobs Creation Act of 2004 was passed, which contained . . . section 7874 of the Code.").

75. 26 U.S.C. § 7874.

Further, the Treasury Department issued regulations in June 2006 that defined the substantial business activities standard, providing a facts-and-circumstances test and a 10 percent safe harbor.[76]

D. IRC § 7874

As discussed in the previous section, straightforward corporate inversions were eventually subject to legislation meant to strictly define and curtail the practice.[77] Since 2004, the federal government has regulated corporate inversions under IRC § 7874.[78] Under this administrative provision, the federal government will subject the inverted corporation with a foreign parent, also known as a "surrogate foreign corporation," to the same American tax liabilities as if it were a domestic corporation, if it meets certain thresholds.[79]

IRC 7874 provides that "[t]he taxable income of an expatriated entity for any taxable year [in the ten years following the completion of the inversion transaction] shall in no event be less than the inversion gain of the entity for the taxable year."[80] The statute defines "inversion gain" as "the income or gain recognized by reason of the transfer during the [ten-year] period of stock or other properties by an expatriated entity, and any income received or accrued during the [ten-year] period by reason of a license of any property by an expatriated entity . . . as part of the [inversion transaction], or . . . after [it] if the transfer or license is to a foreign related person."[81] Thus, the government would treat any foreign income derived through a transfer of stock or income-generating licenses to a foreign corporation as if the income were derived by a domestic corporation for tax liability purposes.[82] Under this provision, the hypothetical Channel Islands holder of the drug licenses would be

76. *Id.* The 10 percent safe harbor rule was eventually dropped. Wells, *supra* note 22, at 1431.
77. *See supra* Part I.C.
78. Tootle, *supra* note 74, at 368-69; *see also* 26 U.S.C. § 7874 (providing statutory basis for the federal government to regulate corporate inversions).
79. 26 U.S.C. § 7874.
80. *See id.* § 7874(a)(1)
81. *See id.* § 7874(d)(2).
82. *See id.* (defining domestic corporation for tax liability purposes).

liable for American taxes if it meets the conditions of IRC § 7874.[83] Congress defines an "expatriated entity" in paragraph (a)(2)(A) as a "domestic corporation or partnership . . . with respect to which a foreign corporation is a surrogate foreign corporation."[84]

The statutory definition for "surrogate foreign corporation" is located in paragraph (a)(2)(B).[85] As a surrogate foreign corporation, the federal government will treat a domestic subsidiary of a foreign corporation as a domestic corporation when two thresholds are met.[86] First, a foreign corporation acquires "substantially all" of the domestic subsidiary.[87] Additionally, former shareholders of the domestic corporation hold at least 60 percent of the corporation post-acquisition.[88]

Under 7874(b), the Treasury Department will class a foreign corporation as a domestic corporation for tax liabilities where the former shareholders of the domestic corporation hold 80 percent of the new stock, either by vote or value.[89] The 60 percent to 80 percent thresholds function to catch corporations that fit in either band.[90]

However, if the combined foreign corporation does not have "substantial business activities" in the country of incorporation compared to the total business activities of the combined foreign corporation the foreign corporation will evade the surrogate foreign corporation treatment, and will not be subject to the same tax liabilities as domestic corporations.[91]

There are several areas of ambiguity that corporations have exploited to invert abroad. The major loophole is the 60-80 percent threshold under § 7874.[92] Corporations can manipulate the voting or

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83. 26 U.S.C. § 7874. The Channel Islands corporation would be liable if its shareholder composition meets the 60 or 80 percent thresholds or fails the substantial business test. *See* 26 U.S.C. §§ 7874(A)-(B).

84. *See id.* § 7874(a)(2)(A).

85. *See id.* §§ 7874(a)(2)(B)(i)-(ii).

86. *Id.*

87. *Id.*

88. *Id.*

89. *See id.* § 7874(b).

90. *See id.* ("[A] foreign corporation shall be treated for purposes of this title as a domestic corporation if such corporation would be a surrogate foreign corporation if [26 U.S. Code § 7874] (a)(2) were applied by substituting "80 percent" for "60 percent."); *see also* Tootle, *supra* note 74, at 369-71 (discussing the 60 and 80 rules).

91. Tootle, *supra* note 74, at 371; *see* 26 U.S.C. § 7874(a)(B)(iii).

92. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1-2.

value of shares to evade the purview of § 7874.[93] This can be done in several ways, such as by counting passive assets that are not part of the entity's daily business functions in order to inflate the new foreign parent's size and therefore evade the 80 percent rule,[94] by reducing the erstwhile parent's pre-inversion size by making extraordinary dividends in order to meet the 80 percent threshold,[95] and by inverting a portion of the parent corporation's operations by transferring assets[96] to a newly formed foreign corporation that it spins off to its shareholders.[97]

The Treasury Department amended the definition of substantial business presence in the regulations to prospectively require that 25 percent of the employees, sales, and assets of the combined company be located in the jurisdiction of incorporation of the ultimate parent entity.[98] However, the threshold rule did not stop corporations from inverting: corporations such as Liberty Global successfully inverted by manipulating the "substantial business presence" exemption.[99]

II. PUSH TOWARDS RESTRICTIONS

A. ANTI-CORPORATE INVERSION LEGISLATION: NOW

Many corporate inversions today find a loophole in the requirements of § 7874.[100] For example, if the inverted corporation can keep its original legacy shareholders owning less than 60 percent of the combined company, then the corporation can invert.[101]

An inverted corporation that moved its place of incorporation outside of the United States will be considered a domestic corporation for tax liabilities when both of the following are met: (1) the former owners of the original domestic corporation, by reason of their foreign ownership, own at least 60 percent of the stock of the foreign corporation; and (2) the corporate group controlled by the foreign

93. *Id.* at 1.
94. Known as "cash box transactions." *Id.* at 2.
95. Known as issuing "skinny down dividends." *Id.*
96. Known as "spinversions." *Id.*
97. *Id.* (addressing different types of corporate tax loopholes).
98. *Id.*
99. Wells, *supra* note 22, at 143 (citing Proxy Statement of Liberty Global Inc., filed on Schedule 14A, at 168 (May 1, 2013)).
100. *Id.*
101. 26 U.S.C. § 7874(a)(2) (2012).

corporation after the inversion does not have significant business activities in the foreign corporation's country of incorporation that are substantial when compared to the total business activities of the group worldwide.[102]

In mid-2014, corporate inversions became a renewed target of legislative efforts.[103] Congress proposed three separate bills the Stop Corporate Inversions Act of 2014,[104] the No Federal Contracts for Corporate Deserters Act of 2014,[105] and the Stop Corporate Expatriation and Invest in America's Infrastructure Act of 2014[106]—as well as two omnibus bills with proposed legislation reforming corporate inversions—the American Jobs for American Infrastructure Act[107] and the Federal Employee Pension Fairness Act[108]—in the 113th Congressional session.[109]

B. Stop Corporate Inversions Act of 2014

Of the proposed bills, the flagship effort is the Stop Corporate Inversions Act of 2014. Representative Sander Levin[110] in the House of Representatives introduced the Act on May 20, 2014.[111] The main thrust

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102. *See id.* § 7874.

103. *See, e.g.*, Kieran Sharpe, *Sen. Brown Broils Burger King's Flip to Canada*, Congressional Quarterly Roll Call, Aug. 25, 2014, 2014 WL 4179416 (discussing Senator Sherrod Brown, D-OH, and his proposals to address corporate inversions).

104. Stop Corporate Inversions Act of 2014, H.R. 4679, 113th Cong. (2014).

105. No Federal Contracts for Corporate Deserters Act of 2014, H.R. 5278, 113th Cong. (2014).

106. Stop Corporate Expatriation and Invest in America's Infrastructure Act of 2014, H.R. 4985, 113th Cong. (2014).

107. American Jobs for American Infrastructure Act of 2014, S. 2489, 113th Cong. (2014).

108. Federal Employee Pension Fairness Act of 2014, H.R. 5338, 113th Cong. (2014).

109. In addition to the aforementioned legislation, there are other proposals in Congress that are intended to limit or eliminate corporate inversions, but are not discussed in this note. *See* Donald J. Marples & Jane G. Gravelle, CONG. RESEARCH SERV., R43568, CORPORATE EXPATRIATION, INVERSIONS, AND MERGERS: TAX ISSUES 3-5 (2014) (outlining different anti-inversion proposals in omnibus bills or in Congressional debates).

110. Congressman Levin is a member of the Democratic Party representing Michigan's 9th Congressional District in the House of Representatives. CONGRESSMAN SANDY LEVIN, http://levin.house.gov/ (last visited Dec. 20, 2014).

111. Stop Corporate Inversions Act of 2014, H.R. 4679, 113th Cong. (2014).

of the act is to change the threshold definitions of inverted domestic corporations under §7874.[112]

Under the proposed Act, the threshold for surrogate foreign corporations would lower the threshold of stock ownership by legacy shareholders from 60 percent to 50 percent.[113] Further, the Act would lower the general threshold of 7874(b) from 80 percent to 60 percent.[114]

The Act also includes limitations on American management and control of the new foreign corporation: if "the management and control of the expanded affiliated group . . . occurs, directly or indirectly, primarily within the United States, and such expanded affiliated group has significant domestic business activities," then the foreign corporation would be considered an inverted domestic corporation.[115] The statute defines "significant domestic activities" under a 25 percent test for the new foreign corporation—either 25 percent of (a) employees are based in the United States, (b) employee compensation incurred with respect to employees based in the United States,[116] (c) assets are located in the United States, [117] or (d) the total income is derived from the United States.[118]

The Act would preserve the exception for corporations with "substantial business activities" in the foreign country of organization.[119] The federal government has several competing interests in defining "substantial business activities." One main concern here is that a loose definition of "substantial business activities" will result in the parent corporation domiciled in a foreign jurisdiction that conducts absolutely no business activities in that jurisdiction except for collecting licensing fees or income.[120] However, another concern is that there are genuine domestic or foreign corporations that want to invest abroad or in the United States through subsidiaries.[121] However, to ensure that inversions do not run rampant, the Act expands the term "substantial business activities" to include a provision that the Secretary of the Treasury

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112. *See id.* § 2.
113. *See id.* § 2(b)(2)(b)(i).
114. *See id.* § 2(b)(1)(A).
115. *See id.* § 2(b)(2)(b)(ii).
116. *See id.* §§ 2(b)(5)(A)-(B).
117. *See id.* § 2(b)(5)(C).
118. *See id.* § 2(b)(5)(D).
119. *See id.* § 2(b)(3).
120. Marples & Gravelle, *supra* note 109.
121. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.

Department may issue regulations increasing the threshold percentage in any of the current legislated tests for determining if business activities constitute substantial business activities.[122]

C. ADDITIONAL ANTI-INVERSION BILLS

Introduced in the House of Representatives on June 26, 2014, the Stop Corporate Expatriation and Invest in America's Infrastructure Act of 2014 is intended to "amend the Internal Revenue Code of 1986 to modify the rules relating to inverted corporations and to transfer the resulting revenues to the Highway Trust Fund."[123] To that end, the Act adopts the proposed threshold changes from the Stop Corporate Inversions Act of 2014, but adds a section that allocates appropriated funds to the Highway Trust Fund.[124]

Introduced on July 30, 2014, in the House, The No Federal Contracts for Corporate Deserters Act of 2014 is similar to previous attempts by Congress to limit the ability for inverted corporations to obtain government contracts.[125] To define an "inverted company," the No Federal Contracts for Corporate Deserters Act of 2014 uses the definitions and language in the Stop Corporate Inversions Act of 2014.[126]

D. OMNIBUS BILLS WITH ANTI-INVERSION PROVISIONS

In addition, two omnibus bills, the American Jobs for American Infrastructure Act[127] and the Federal Employee Pension Fairness Act[128], contain provisions that seek to reform the practice of corporate

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122. *Id.*
123. Stop Corporate Expatriation and Invest in America's Infrastructure Act of 2014, H.R. 4985, 113th Cong. (2014).
124. *Id.*
125. No Federal Contracts for Corporate Deserters Act of 2014, H.R. 5278, 113th Cong. (2014).
126. *Compare* No Federal Contracts for Corporate Deserters Act of 2014, H.R. 5278, 113th Cong. (2014), *with* Stop Corporate Inversions Act of 2014, H.R. 4679 (using the same language in both proposed statutes to define an "inverted company").
127. American Jobs for American Infrastructure Act of 2014, S. 2489, 113th Cong. (2014).
128. Federal Employee Pension Fairness Act 2014, H.R. 5338, 113th Cong. (2014).

inversions.[129] Like the two additional anti-inversion bills in the House of Representatives, the omnibus bills contain language from the Stop Corporate Inversions Act of 2014.[130]

Introduced on June 18, 2014, in the Senate, the American Jobs for American infrastructure Act proposes to "amend the Internal Revenue Code of 1986 to ensure that sufficient funding is made available for the Highway Trust Fund, and for other purposes."[131] To meet that goal, Section 402, "Modifications to rules relating to inverted corporations," copies verbatim the proposed reforms of the Stop Corporate Inversions Act of 2014.[132]

Similarly, the Federal Employee Pension Fairness Act has an alternative purpose to regulate pensions, but includes a provision against corporate inversions.[133] The stated purpose of the Act is "[t]o repeal the revised annuity employee and further revised annuity employee categories within the Federal Employees Retirement System, and for other purposes."[134] However, regarding corporate inversions, this Act has Section 5, which is a direct copy of the Stop Corporate Inversions Act of 2014.[135]

E. EXECUTIVE BRANCH ACTIONS AGAINST INVERSIONS

Both major political parties in America dislike corporate inversions, but currently there is no consensus as to how to deal with them, and the parties' differences on other political issues make it highly

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129. *Compare* American Jobs for American Infrastructure Act of 2014, S. 2489 (preventing inverted corporations from American infrastructure-related contracts) *and* Federal Employee Pension Fairness Act 2014, H.R. 5338 (using the same language as the Stop Corporate Inversions Act of 2014), *with* Stop Corporate Inversions Act of 2014, H.R. 4679 (providing, *inter alia*, corporate inversion reform).

130. American Jobs for American Infrastructure Act of 2014, S. 2489; Federal Employee Pension Fairness Act 2014, H.R. 5338.

131. American Jobs for American Infrastructure Act of 2014, S. 2489.

132. *Id.* § 402.

133. Federal Employee Pension Fairness Act 2014, H.R. 5338 § 5.

134. *See id.*

135. Press Release, House Comm. on Ways and Means, Camp Releases Tax Reform Plan to Strengthen the Economy and Make the Tax Code Simpler, Fairer and Flatter: Plan Closes Loopholes to Lower Tax Rates for Families and Job Creators (Feb. 26, 2014), *available at* http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=370987.

unlikely that the legislation will pass.[136] The Republican Party's position is that corporate inversions are a symptom of a complicated and flawed corporate tax system, and the only solution is a revision of the tax code to lower the corporate tax rate and limit taxes on foreign profits.[137]

Although there is some consensus on the need for structural reforms to the corporate tax code, the Democratic Party does not follow the Republican opinion on tax reform.[138] However, partisan proposals are unlikely to pass through a divided Congress.[139] Given the legislative branch's inability to agree on many issues, none of the aforementioned proposed legislation has advanced past the committee stage.[140]

In the meantime, the Obama Administration and the Treasury Department have tightened rules to make inversion deals less attractive, but warned that only legislation could stop them completely.[141] However, without any legislation being passed, the executive branch has taken the opportunity to act.[142]

In September 2014, the Treasury Department promulgated guidelines that are akin to the proposed legislation pending in Congress, but go much further in closing loopholes that enable corporations to invert.[143]

First, the Treasury Department guidelines clearly state that the lowered thresholds would subject an inverted corporation to the same tax liabilities as if it were a domestic corporation:

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136. Mider, *supra* note 18.
137. *Id.*
138. *Id.*
139. *Id.*
140. *See, e.g.*, Stop Corporate Inversions Act of 2014, H.R. 4679, 113th Cong. (2014) (waiting in the House Ways and Means Committee); No Federal Contracts for Corporate Deserters Act of 2014, H.R. 5278, 113th Cong. (2014) (waiting in the House Committee on Armed Services and Committee on Oversight and Government Reform); Stop Corporate Expatriation and Invest in America's Infrastructure Act of 2014, H.R. 4985, 113th Cong. (2014) (waiting in the House Committee on Ways and Means); American Jobs for American Infrastructure Act of 2014, S. 2489, 113th Cong. (2014) (read twice and referred to the Senate Committee on Finance); Federal Employee Pension Fairness Act 2014, H.R. 5338, 113th Cong. (2014) (waiting in the House Committee on Ways and Means).
141. *See* U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.
142. *Id.*
143. *Id.*

> An inverted company is subject to potential adverse tax consequences if, after the transaction: (1) less than 25 percent of the new multinational entity's business activity is in the home country of the new foreign parent, and (2) the shareholders of the old U.S. parent end up owning at least 60 percent of the shares of the new foreign parent. If these criteria are met for an inverted company, the tax consequences depend on the continuing ownership stake of the shareholders from the former U.S. parent. If the continuing ownership stake is 80 percent or more, the new foreign parent is treated as a U.S. corporation (despite the new corporate address), thereby nullifying the inversion for tax purposes.[144]

Further, like the proposed Stop Corporate Inversions Act of 2014, the Treasury Department's guidelines also make it harder for U.S. entities to invert by strengthening the requirement that the former owners of the U.S. entity own less than 80 percent of the new combined entity.[145]

The Treasury Department guidelines also restrict the amount of tax-free funds that a domestic corporation or an inverted corporation can access through current tax law under IRC §§ 7874, 304(b)(5)(B), 367, 956(e), and 7701(l).[146]

1. Actions Under IRC § 7874

The Treasury Department guidelines prevent "cash box" transactions, "skinny-down" dividends, and "spinversions," in an attempt to address the ability of corporations to manipulate the ownership structure to pass the 80 percent rule.[147] Each will be discussed in turn.

A "cash box" refers to the practice of a foreign acquiring corporation manipulating asset value in order to inflate the foreign shareholders' share size of the combined foreign parent and therefore evade the 80 percent rule under § 7874.[148] In particular, the Treasury Department is concerned with the foreign parent counting passive assets

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144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

in its calculation of shares for the 80 percent rule.[149] In response, the Treasury Department will disregard these passive assets in the calculation for the 80 percent rule.[150]

Further, inverted corporations can reduce their pre-inversion size by making extraordinary dividends, also known as "skinny-down" dividends, in order to meet the 80 percent threshold.[151] The Treasury Department regulations disregard these pre-inversion extraordinary dividends for purposes of the ownership requirement, thereby raising the domestic corporation's ownership, possibly above the 80 percent threshold.[152]

Finally, the Treasury Department guidelines are intended to prevent a U.S. entity from "spinverting."[153] A "spinversion" is the act of inverting a portion of the domestic corporation's operations by transferring assets to a newly formed foreign corporation that the domestic corporation spins off to its shareholders, thereby avoiding the associated American tax liabilities.[154] This transaction operates under a loophole that was intended to permit purely internal restructurings by multinationals.[155]

Under the Treasury Department guidelines, the spun-off foreign corporation would not benefit from these internal restructuring rules, as the spun off company would be treated as a domestic corporation, thereby "eliminating the use of this technique for these transactions."[156]

2. Action under IRC § 304(b)(5)(B)

Another concern of the Treasury Department is inverted corporations' moving assets and property from the American subsidiary to a foreign subsidiary.[157] Under 304(b)(5)(B) the new foreign parent

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149. *See id.* ("[The new actions would] make[] it more difficult for U.S. entities to invert by strengthening the requirement that the former owners of the U.S. company own less than 80 percent of the new combined entity.").

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 1-2.

155. *Id.*

156. *Id.* at 2.

157. *Id.* at 1-2; *see generally* INTERNAL REVENUE SERVICE, RULES REGARDING INVERSIONS & RELATED TRANSACTIONS, 2014-42 I.R.B. 712 (2014) [hereinafter RULES

can sell stock in the former domestic parent corporation to a foreign subsidiary with deferred earnings in exchange for cash or property of the foreign subsidiary.[158] This creates a scenario in which the foreign subsidiary gains the cash or property without any American tax liabilities.[159] The Treasury Department guidelines prevent an inverted corporation from transferring cash or property from a foreign subsidiary to the new foreign parent to avoid U.S. tax.[160]

3. Action under IRC § 956(e)

Under IRC § 956(e), corporations can engage in "hopscotch loans,"[161] which are loans that inverted companies use to access their foreign subsidiary's earnings while deferring their American tax liabilities.[162]

Under IRC § 956(e), American corporations would be liable for American tax on the profits of their foreign subsidiary corporations.[163] However, they would generally not pay the tax until the profits were repatriated to the American firm as a dividend.[164] If a foreign subsidiary tries to avoid this dividend tax by investing in American property—such as by making a loan to, or investing in stock of, its domestic parent or one of its domestic affiliates—the domestic parent is treated as if it received a taxable dividend from the foreign subsidiary.[165]

Inverted companies can get around this rule by having the foreign subsidiary make the loan to the new foreign parent instead of its

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REGARDING INVERSIONS] (discussing concerns of The Department of the Treasury and the Internal Revenue Service regarding corporate inversions).

158. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1-2.

159. *Id.*; *see generally* RULES REGARDING INVERSIONS, *supra* note 157 (discussing how § 304(b)(5)(B) has been used for corporate inversion purposes).

160. U.S. Dep't of the Treasury Press Release*, supra* note 9, at 1.

161. *Id*.

162. *Id.*; *see also* STAFF OF J. COMM. ON TAXATION, 113 CONG., DESCRIPTION OF CERTAIN REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2015 BUDGET PROPOSAL: PART VIII–OTHER REVENUE CHANGES AND LOOPHOLE CLOSERS, 2014 WL 7342575, at *12 (discussing earning and profit manipulation, including hopscotch loans).

163. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.

164. *Id.*

165. *Id.*; *see generally* RULES REGARDING INVERSIONS, *supra* note 157, at 717-18 (discussing basis for change in policy under IRC § 956(e)).

erstwhile domestic parent.[166] In the past, the federal government did not consider a "hopscotch" loan as domestic property for taxation purposes and did not tax it as a dividend.[167] Under the new interpretations, Treasury Department will consider the loans as "U.S. property" for purposes of applying the anti-avoidance rule.[168] The same dividend rules will now apply as if the foreign subsidiary had made a loan to the U.S. parent prior to the inversion.[169]

4. Action under IRC § 7701(l)

Another objective is to prevent inverted companies from engaging in "de-controlling."[170] Under this system, the new foreign parent would buy enough stock in a foreign subsidiary to take control of the foreign subsidiary away from the former domestic parent.[171] This process will allow the foreign parent corporation to access the deferred earnings of the foreign subsidiary without having to incur American tax liabilities.[172]

Under the new promulgation, the Treasury Department treats the new foreign parent as owning stock in the former U.S. parent, rather than the foreign subsidiary, to curtail the tax avoidance "de-controlling" strategy.[173] Thus, the foreign subsidiary would remain a foreign subsidiary and would continue to be subject to American tax on its profits and deferred earnings.[174]

III. IMPACT OF THE LEGISLATION

A. MOVING FORWARD: REAL REFORM?

The purpose of the Treasury Department's effort is to take the language of the Stop Corporate Inversions Act of 2014 and related bills and implement them.[175] However, the executive effort goes further than

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166. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.
167. *Id.*; *see also* Hamilton, *supra* note 9, at 1 (discussing hopscotch loans).
168. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*

the legislative efforts.[176] This arguably might curb corporate inversions by reducing the number of tax law loopholes through which domestic corporations can reduce their tax burdens.[177]

However, one of the outstanding issues in moving forward is the impact that the Treasury Department guidelines will have on corporate inversions.[178] Certainly, the Treasury Department has circumscribed many of the tax-deferral methods previously employed by domestic corporations to reduce or defer their tax liabilities.[179] Although examples of failed inversions specifically attributed to the changes in the Treasury Department policies are limited, proposed inversions such as the Pfizer-AstraZeneca merger, which would move Pfizer to the United Kingdom, would not have likely passed the new 50% threshold test given the disparity between the sizes of Pfizer and AstraZeneca.[180]

Thus, the Treasury Department guidelines may be more effective than the previous iterations of IRC § 7874 and related regulations at curbing inversions because they are stricter on defining corporate inversions than the current statute.[181] However, historically speaking, since neither the legislation nor the administrative law leaves room for loopholes, especially in the area of the thresholds, corporate inversions could theoretically continue so long as they observed the lowered thresholds and the closure of the loopholes enumerated by the Treasury Department guidelines.[182]

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176. In comparing the Treasury Department's policy changes with the proposed legislation, the Treasury Department provides a much more comprehensive set of reforms to regulate corporate inversions. *See* U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1 (discussing regulatory changes to corporate inversion policy); *see also* Stop Corporate Inversions Act of 2014, H.R. 4679, 113th Cong. (2014) (expanding existing legislation).

177. Marples & Gravelle, *supra* note 109.

178. *Id.* at 9-10.

179. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.

180. Wells, *supra* note 22, at 1432.

181. *Compare* U.S. Dep't of the Treasury Press Release, *supra* note 9 (providing expansive changes to the current regulatory law pertaining to corporate inversions), *with* 26 U.S.C. § 7874 (2012) (modifying parts of statute pertaining to corporate inversions).

182. Wells, *supra* note 22, at 1433-34.

B. A CONTINUATION OF THE CAT-AND-MOUSE GAME?

Although the post-Treasury Department guidelines period saw the cancellation of several corporate inversions, many tax law scholars believe that without true corporate tax reform, the legislative and executive efforts and modifications will not curtail corporate inversions altogether, based on past legislative and executive efforts' rates of success, or lack thereof.[183]

The federal government wants to promote legitimate cross-border mergers and foreign investments in American companies.[184] In the same notice outlining the new policy guidelines against inversion loopholes, the Treasury Department stated that "[g]enuine cross-border mergers make the U.S. economy stronger by enabling U.S. companies to invest overseas and encouraging foreign investment to flow into the United States . . . . But these transactions should be driven by genuine business strategies and economic efficiencies, not a desire to shift the tax residence of the parent entity to a low-tax jurisdiction simply to avoid U.S. taxes."[185]

Yet a large part of the problem is the disparity in the treatment of American and foreign corporations' tax liabilities.[186] The differences in the territorial system and the worldwide system of taxation push corporations to invert abroad because the corporations then receive tax benefits in line with those of their foreign peers.[187] As stated by University of Houston Law Center professor Bret Wells, "[t]he United States cannot have a tax system that treats similarly situated competitors in the U.S. marketplace differently and not expect the disfavored competitor, the U.S.-owned [multinational corporation], to try to transform itself into the more favorable foreign-owned [multinational corporation]."[188]

Another significant factor is the substantial benefits corporations can realize if they invert.[189] A recent report argued that a hypothetical inversion of The Walgreen Company, which owns the ubiquitous drugstore chain Walgreens, could reduce its tax liabilities in the United

183. *See id.* at 1429.
184. U.S. Dep't of the Treasury Press Release, *supra* note 9, at 1.
185. *Id.*
186. Wells, *supra* note 22, at 1432-34.
187. *Id.*
188. *Id.* at 1432.
189. *Id.* at 1432-34.

States by $4 billion over a five-year period if it were to invert to a lower-tax jurisdiction.[190] Potential tax savings of these magnitudes make tax-planning strategies and the lure of corporate inversions almost inevitable.[191]

Thus, it could be reasonably argued that absent a means to address the push-and-pull factors underlying the incentive to invert, corporations can find ways to evade the Treasury Department guidelines and continue to invert so long as they observe the guidelines.[192]

CONCLUSION

At the close of 2014, several proposed inversions failed to consummate.[193] However, corporations in the process of merging cited the new regulations as a reason why the parties should not merge, including AbbVie-Shire[194] and Chiquita-Fyffes.[195] For the latter merger, a third party interested in acquiring Chiquita warned the shareholders of both Chiquita Brands International and Fyffes Plc that the merger would never see the proposed tax benefits due to the new regulations.[196]

Although the legislation will change and challenge current and future corporate inversions, they will invariably continue on, albeit to a lesser extent and in different forms than in the past, because there is no proposed legislation to address the underlying issues that prompt such actions.[197] It should be noted that, although hobbled, corporate

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190. AMERICANS FOR TAX FAIRNESS & CHANGE TO WIN RETAIL INITIATIVES, REPORTING ON OFFSHORING AMERICA'S DRUGSTORE I-II (June 11, 2014).

191. Wells, *supra* note 22, at 1432-34.

192. *Id.*

193. *See* David Gelles, *U.S. Tax Crackdown Is Said to Sink AbbVie Deal*, N.Y. TIMES, Oct. 15, 2014, http://dealbook.nytimes.com/2014/10/15/u-s-tax-crackdown-is-said-to-sink-abbvie-deal/ (discussing the attempted inversions-by-merger of AbbVie, Chiquita Brands International, Pfizer, and Salix Pharmaceuticals).

194. *See* Solomon, *supra* note 11 (quoting AbbVie CEO attributing the AbbVie-Shire merger's demise to the Treasury guidelines).

195. *See* Guillermo Parra-Bernal, *Safra, Cutrale question Chiquita's decision to stick to Fyffes deal*, REUTERS, Aug. 27, 2014, http://www.reuters.com/article/2014/08/27/cutrale-safra-chiquita-idUSL1N0QX1XE20140827 ("[O]ne aspect that could play in [the third-party bidders'] favor is the U.S. government's unease with the so-called tax inversion structure that is at the core of the Chiquita-Fyffes merger[.]").

196. *See id.*

197. Wells, *supra* note 22, at 1434.

inversions continue to occur, with Steris Corporation and Medtronic among the notable corporations soldiering on.[198]

198. *See* Gelles, *supra* note 193.