

CORPORATE INVERSIONS: WILL THE REPO ACT KEEP CORPORATIONS FROM MOVING TO BERMUDA?

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I. Introduction

In the wake of September 11, 2001, several influential lawmakers have questioned a tax reduction practice known as a “corporate inversion,”¹ calling the companies² who undertake such an inversion “unpatriotic.”³ A corporate inversion consists of forming a company in an offshore tax haven and then having the U.S.-based company become a subsidiary of the offshore company.⁴ The result is that the offshore taxing authority does not tax the offshore company on its profits and consequently, the U.S. company is not taxed on its offshore profits.⁵ In addition, the U.S.-based company may also undertake an “earnings stripping” program to have a significant portion of its U.S. generated income redirected to the non-taxable offshore company.⁶ On April 11, 2002, Chairman Max Baucus (D-Montana) and ranking minority member Charles E. Grassley (R-Iowa) released draft

1. The following Senators are on record as co-sponsors of the draft REPO Act: Sen. Charles Grassley (R-IA), Sen. Max Baucus (D-MT), Sen. Jean Carnahan (D-MO), Sen. Thomas R. Carper (D-DE), Sen. Susan M. Collins (R-ME), Sen. Christopher J. Dodd (D-CT), Sen. Tom. Harkin (D-IA), Sen. Tim Johnson (D-SD), Sen. Joseph I. Lieberman (D-CT), Sen. John McCain (R-AZ), Sen. Zell Miller (D-GA), and the late Sen. Paul D. Wellstone (D-MN). See *Bill Summary & Status for the 107th Congress*, S. 2119, at <http://thomas.loc.gov> (last visited Jan. 9, 2003).

2. Some of the companies who have recently undertaken a corporate inversion include Tyco International and Ingersoll-Rand. See Editorial, *The Bermuda Inversion*, WALL ST. J., May 21, 2002, at A18; Carol P. Tello, *Inversion Transactions: New Style Transactions Raise New Policy Issues*, 43 TAX MGMT MEMORANDUM 211, 213 (2002) (discussing the inversion techniques of Stanley Works, Nabors Industries and Ingersoll-Rand). The McDermott and Helen of Troy transactions are seen as the earliest corporate inversion transactions. Tello, *supra*, at 212 n.4. Tello explained:

In 1983, the Panamanian subsidiary of McDermott acquired the shares of its U.S. parent corporation in exchange for its shares and some cash, in a taxable exchange at the shareholder level. In 1994, the shareholders of Helen of Troy Corporation, a U.S. publicly-held corporation, exchanged their Helen of Troy shares for shares of a Bermuda corporation in a § 368(a)(1)(B) transaction. Shareholders with a less than 5% interest in a U.S. corporation were not required to recognize gain and no other regulations under § 367 in effect at the time of the transaction imposed tax on the expatriating corporation. Some later transactions were effected by Triton Energy Corporation in 1998, Fruit of the Loom in 1999, and Transocean Offshore, Inc. also in 1999.

Tello, *supra*, at 212 n.4.

3. John D. McKinnon, *Senators Plan to Curb Relocations to Bermuda, Other Tax Havens*, WALL ST. J., March 22, 2002, at A4.

4. See OFFICE OF TAX POLICY, U.S. DEP'T OF THE TREASURY, PRELIMINARY REPORT, CORPORATE INVERSION TRANSACTIONS: TAX POLICY IMPLICATIONS, available at <http://www.treas.gov/press/releases/docs/inversion.pdf>, reprinted in 2002 TAX NOTES TODAY 98-49 (May 21, 2002), LEXIS, 2002 TNT 98-49 [hereinafter “Inversion Report”].

5. See *id.* at 1.

6. See *id.* at 20–21; see also Michael R. Sesit, *U.S. Tax Proposals May Squeeze Multinationals*, WALL ST. J., Aug. 9, 2002, at C14 (discussing earnings stripping techniques such as intra-company loans and those involving intangibles).

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legislation in the Senate Finance Committee intended to combat corporate inversions.⁷ The draft legislation, cited as the “Reversing the Expatriation of Profits Offshore Act” (hereinafter the “draft REPO Act”),⁸ would amend the Internal Revenue Code of 1986 (“Code”) in several significant ways to prevent companies from setting up mailbox addresses in offshore tax havens to avoid paying substantial U.S. taxes.⁹ The draft legislation would require the Internal Revenue Service (“IRS”), in determining a company’s tax liability, to focus on the location where the company is controlled after it sets up offshore operations.¹⁰ The draft REPO Act seeks to penalize two main types of companies: (1) those who undertake a “pure” (or nearly pure) inversion, and (2) those who undertake a partial inversion.¹¹ The events of September 11, 2001, the Enron bankruptcy, and the worsening deficit each appear to have contributed in putting the draft REPO Act on the front burner of the Senate Finance Committee, which has already reported the draft REPO Act to the full Senate. Currently, the draft REPO Act has been attached to the Charitable Aid, Recovery, and Empowerment Act of 2002 (“CARE Act”)¹² as a tax raising offset¹³ to the tax breaks contained in the CARE Act and awaits a full vote by the Senate. As such, it is an opportune time to analyze the draft REPO Act and determine whether it will successfully prevent corporate inversions.

II. TAX CONSEQUENCES OF A STOCK CORPORATE INVERSION

A. *What is a Stock Corporate Inversion?*

A “pure” (or nearly pure) corporate inversion has the following characteristics:

7. 148 CONG. REC. S2579, 2592 (daily ed. April 11, 2002) (statement of Sen. Grassley).

8. Reversing the Expatriation of Profits Offshore Act, S. 2119, 107th Cong. § 1 (2002) [hereinafter “REPO”].

9. See 148 CONG. REC. S2579, 2592 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley). Senator Grassley clearly stated that Senate Bill 2119 would “place corporate inversions on the endangered species list . . . [because it] requires the IRS to look at where a company has its heart and soul, not where it has a filing cabinet and a mail box.” *Id.*

10. See *id.*

11. *Id.* at 2593.

12. Charity Aid, Recovery, and Empowerment Act of 2002, S.1924, 107th Cong. (2002).

13. Patti Mohr, *Finance Clears Charity Incentives with Tax Shelter, Haven Penalties*, 2002 TAX NOTES TODAY 118-1 (June 18, 2002), LEXIS, 2002 TNT 118-1. It has been estimated that the draft REPO Act will raise \$628 million in the first five years after passage and \$2.1 billion over ten years. *Id.*

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- (1) The U.S. corporation becomes a subsidiary of a foreign corporation or otherwise transfers substantially all of its properties to a foreign corporation;
- (2) The former shareholders of the U.S. corporation end up with eighty percent or more (by vote or value) of the stock of the foreign corporation after the transaction; and
- (3) The foreign corporation, including its subsidiaries, does not have substantial business activities in its country of incorporation.¹⁴

A “non-pure” corporate inversion has the following characteristics:

- (1) The U.S. corporation becomes a subsidiary of a foreign corporation or otherwise transfers substantially all of its properties to a foreign corporation;
- (2) The former shareholders of the U.S. corporation end up with more than fifty percent (by vote or value) but less than eighty percent (by vote or value) of the stock of the foreign corporation after the transaction;
- (3) The foreign corporation, including its subsidiaries, does not have substantial business activities in its country of incorporation.¹⁵

B. Tax Consequences of Undertaking a Stock Inversion Transaction

The tax consequences of an inversion transaction depend on the exact structure involved. However, assuming the transaction is a stock transaction, then it typically may be structured to

14. 148 CONG. REC. S2579, 2593 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley).

15. *Id.*

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qualify as a reorganization within the meaning of I.R.C. § 368.¹⁶ The transaction involves the transfer of property to a foreign corporation, so I.R.C. § 367 is also applicable.¹⁷ The Treasury Regulations under I.R.C. § 367(a) treat the outbound transfer of stock of a U.S. corporation as a taxable event, except where certain conditions are satisfied.¹⁸

In a stock transaction, in which the foreign acquiring corporation is typically a newly-formed entity without significant assets, the Code and the Treasury Regulations require the shareholders to recognize gain on the exchange.¹⁹ However, it should be noted that such an inversion transaction may also be structured in a manner so that no gain is recognized.²⁰ For

16. I.R.C. § 368 (2000); Inversion Report, *supra* note 4, at 7.

17. I.R.C. § 367(a); see also Robert J. Peroni, et al., *Getting Serious About Curtailing Deferral of U.S. Tax on Foreign Source Income*, 52 SMU L. REV. 455, 470–75 (1999) (describing section 367(a) as an anti-deferral measure).

18. The U.S. Department of the Treasury, Office of Tax Policy stated that:

The section 367 regulations permit tax-free treatment of the outbound transfer of stock of a U.S. corporation only if: (i) U.S. shareholders of the U.S. corporation receive 50% or less of the total voting power and total value of stock of the transferee foreign corporation; (ii) 50% or less of the total voting power and total value of stock of the transferee foreign corporation is owned by former officers, directors and 5% shareholders of the U.S. corporation immediately after the transaction; (iii) each 5% shareholder of the U.S. corporation enters into a “gain recognition agreement”; (iv) the transferee foreign corporation satisfies an active trade or business requirement; and (v) certain reporting requirements are satisfied. Treas. Reg. 1.367(a)-3(c)(1). In general, a gain recognition agreement provides that if the stock or substantially all of the assets of the transferred corporation is subsequently disposed of during the five-year period following the initial transfer, the taxpayer must include the realized gain that was not recognized in the original transaction, plus interest. See Treas. Reg. 1.367(a)-8. The active trade or business requirement generally requires that: (i) the transferee foreign corporation must have been engaged in an active trade or business outside the United States for a 36-month period prior to the transaction; (ii) at the time of the transaction, there is no intention to dispose of or discontinue such trade or business; and (iii) the fair market value of the transferee foreign corporation must be equal to or greater than the fair market value of the U.S. corporation. Treas. Reg. 1.367(a)-3(c)(3).

Inversion Report, *supra* note 4, at 8 n.7.

19. Treas. Reg. § 1.367(a)-1T (2002); 26 U.S.C. § 1248(a) (2000) (providing that “[f]or purposes of this section, a United States person shall be treated as having sold or exchanged any stock if . . . such person is treated as realizing gain from the sale or exchange of such stock”); see also *Palmer v. Commissioner*, 302 U.S. 63, 69 (1937), *superseded by statute as stated in Redding v. Commissioner*, 630 F.2d 1169 (7th Cir. 1980) (stating that no diminution of the net worth of the distributing subsidiary has occurred simply because the distributed property has been replaced with the exchanged property).

20. The U.S. Department of the Treasury, Office of Tax Policy stated that:

[A]n inversion transaction may be structured in a manner that allows some shareholders to retain an equity interest in the U.S. parent corporation. Such a structure would mean that those shareholders

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taxable inversions, the taxable gain is the amount that the fair market value of the stock exceeds the shareholder's adjusted basis in the stock.²¹ However, in a down market, most inverting companies' shareholders are unlikely to recognize any gain because their share prices are significantly lower than their adjusted tax basis. If a shareholder of an inverting corporation has a loss, as many would have in today's market, then that shareholder does not recognize the loss.²² Rather, the shareholder's loss is carried over to his basis in the foreign parent corporation that he receives as part of the inversion.²³

C. Tax Consequences After Stock Inversion Transaction

1. Pre-Inversion Background

In general, U.S. corporations are taxed on their worldwide income.²⁴ A foreign subsidiary of a U.S. parent corporation is

would not have a taxable exchange in the transaction. The IRS and the Treasury announced in the preamble to the section 367 regulations issued in 1998 that these transactions would be scrutinized on a case-by-case basis using substance over form (or other) principles. T.D. 8770, 1998-27 I.R.B. 4. None of the most recent transactions has used this structure.

Inversion Report, *supra* note 4, at 8 n.8.

21. *See id.* at 8.

22. *Id.* In general, section 367(a) imposes a tax on the gain realized when a U.S. person transfers appreciated assets (including stock) outside the U.S. taxing jurisdiction to a foreign corporation. I.R.C. § 367(a) (2000). This section, however, provides exceptions to the general gain recognition rule for transfers of stock and securities, and gives the Secretary authority to promulgate regulations with respect to transfers of certain property used in the active conduct of a trade or business. *Id.* It also imposes a tax mechanically by providing that, if a U.S. person transfers property (in any type of exchange described in sections 332, 351, 354, 356, or 361) to a foreign corporation, the transferee will not be considered to be a corporation for purposes of determining whether gain will be recognized as a result of the transfer. *Id.* Section 367(a) becomes relevant only if the transaction satisfies the requirements of the reorganization rules of section 368 or the rules governing section 351 exchanges. Essentially, because the corporate reorganization and organization provisions provide an exception to the general rule that gain must be recognized when appreciated property is transferred to another person, section 367(a), by denying corporate status to the foreign transferee, prevents the application of the general non-recognition reorganization provisions. As a result, the general rule under section 1001 that requires the recognition of gain applies. A shareholder who has a paper loss will not be allowed to recognize that loss under section 367(a). However, because the stock received in the exchange will have a carryover basis, the loss could be recognized by the sale of the stock of the foreign corporation received in the reorganization.

23. *See* Inversion Report, *supra* note 4, at 8; S. REP. NO. 107-188, at 4 (2002).

24. Section 11 provides that "[a] tax is hereby imposed for each taxable year on the taxable income of every corporation." I.R.C. § 11 (2000) (emphasis added). In addition, section 63 states that, "[e]xcept as provided in subsection (b), for purposes of this subtitle, the term 'taxable income' means gross income minus the deductions allowed by this

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generally not subject to tax on its foreign operations.²⁵ However, when the foreign subsidiary repatriates its income to the U.S. in the form of dividends, the foreign subsidiary is generally taxed on this repatriated income.²⁶ In addition, a U.S. corporation can also be taxed on certain income earned by its foreign subsidiary, whether or not the income is repatriated to the U.S. corporation.²⁷ A foreign subsidiary of a U.S. parent corporation could also be taxed on its income by the government of the foreign jurisdiction in which the foreign subsidiary operates.²⁸ As such, the income of a foreign subsidiary of a U.S. parent could end up being subject to double taxation.²⁹

In general, the United States permits the U.S.-based parent corporation to take a tax credit for taxes paid to foreign governments as a means to minimize the potential for double

chapter (other than the standard deduction)." I.R.C. § 63 (emphasis added). Finally, section 61 provides: "[e]xcept as otherwise provided in this subtitle, gross income means *all income from whatever source derived* . . ." I.R.C. § 61 (emphasis added). As such, "gross income" includes all worldwide income.

25. Section 301 provides that generally, a distribution of property by a subsidiary to the parent corporation is treated as a taxable dividend of the parent corporation to the extent of the subsidiary's earnings and profits. I.R.C. § 301.

26. See Treas. Reg. § 1.902-3(h) (2002) (providing that "[f]or purposes of section 904(a)(1) (relating to the per country limitation [of the foreign tax credit]), . . . the dividends received by a domestic shareholder from a first tier subsidiary corporation . . . shall be deemed to be derived from sources within the [country in which the first tier corporation is incorporated] . . ."); see also *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 977 (5th Cir. 1977) (discussing per-country limitations).

27. See I.R.C. § 951 (stating that if the subpart F income of a controlled foreign corporation ("CFC") exceeds certain limits, a U.S. shareholder of the CFC is required to include in his taxed income a pro rata share of the CFC's subpart F income whether or not it is distributed).

28. For example, consider what happens when a U.S. firm competes against a Dutch firm for business in Ireland. If the Dutch firm earns money in Ireland, it pays only the Irish corporate tax of 10–16 percent (the Irish corporate tax rate will be a uniform 12½ percent beginning in 2003), but a U.S.-based company must pay both the Irish tax and the 35 percent U.S. corporate income tax on any Irish income. This double taxation can be reduced, at least partially, by the use of foreign tax credits. But even in a best-case scenario, the U.S. company has a tax burden about three times as high as the Dutch company. See NATIONAL FOREIGN TRADE COUNCIL ("NFTC"), TERRITORIAL TAX STUDY REPORT 14 (2002), available at <http://www.nftc.org/taxation.html> (illustrating the effect our current tax scheme has on the global competitiveness of U.S. companies).

29. Double taxation may occur because the interest expense [that] is allocated to foreign-source gross income for purposes of the § 904 foreign tax credit limitation fraction, the smaller the numerator of the limitation fraction becomes. A smaller numerator correspondingly decreases the amount of foreign taxes paid or accrued that may be claimed as a foreign tax credit against U.S. tax on the same income. Additionally, for purposes of the AMT foreign tax credit, only 90% of the regular foreign tax credit is permitted to be claimed against the AMT tax.

Tello, *supra* note 2, at 212. Therefore, "double taxation may occur that will increase the worldwide effective tax rate of a U.S. multinational corporation." *Id.*

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taxation on the foreign-sourced income of the U.S. parent's foreign subsidiary.³⁰ However, the tax credit is only available to offset "net income"³¹ that is foreign-sourced and is declared as taxable in the United States.³² Thus, the U.S.-based parent

30. See I.R.C. § 901. *But see* I.R.C. § 904(a) (discussing specific limitations on the tax credits a corporation can take).

31. "Net income" is different from "gross income" in that taxable net income is gross income reduced by expenses of the foreign subsidiary corporation. See I.R.C. §§ 61, 63 (defining taxable income). As such, the U.S. corporation has a large stake in legitimately allocating as much of its expenses to the foreign subsidiary as possible. See Robert H. Dilworth, *Financing International Operations of U.S. Multinationals*, in TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURING 2002, at 101, 116 (PLI Tax Law & Estate Planning Practice Course, Handbook Series No. J0-005N, 2002).

32. Section 904, concerning limitations on credit, provides in part:

(a) Limitation.

The total amount of the credit taken under section 901(a) shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources without the United States (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

(b) Taxable income for purpose of computing limitation.

(1) Personal exemptions. For purposes of subsection (a), the taxable income in the case of an individual, estate, or trust shall be computed without any deduction for personal exemptions under section 151 or 642(b).

(2) Capital gains. For purposes of this section—

(A) In general. Taxable income from sources outside the United States shall include gain from the sale or exchange of capital assets only to the extent offoreign source capital gain net income.

(B) Special rules where capital gain rate differential. In the case of any taxable year for which there is a capital gain rate differential—

(i) in lieu of applying subparagraph (A), the taxable income from sources outside the United States shall include gain from the sale or exchange of capital assets only in an amount equal to foreign source capital gain net income reduced by the rate differential portion of foreign source net capital gain,

(ii) the entire taxable income shall include gain from the sale or exchange of capital assets only in an amount equal to capital gain net income reduced by the rate differential portion of net capital gain, and

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cannot claim a tax credit for taxes paid in a foreign jurisdiction against income that is not declared in the United States in an attempt to offset its other U.S.-sourced income.³³

2. Post-Inversion Subsidiary of a U.S. Corporation

The U.S. corporation generally remains subject to U.S. tax on its U.S.-sourced income even after undertaking a stock corporate inversion.³⁴ In addition, the foreign corporation also remains subject to U.S. tax on its U.S.-sourced income after undertaking the inversion.³⁵ Moreover, the U.S. corporation is also subject to a thirty percent withholding tax on any dividends it distributes to the foreign corporation.³⁶ However, this amount may be reduced under certain tax treaties.³⁷

(iii) for purposes of determining taxable income from sources outside the United States, any net capital loss (and any amount which is a short-term capital loss under section 1212(a)) from sources outside the United States to the extent taken into account in determining capital gain net income for the taxable year shall be reduced by an amount equal to the rate differential portion of the excess of net capital gain from sources within the United States over net capital gain.

I.R.C. § 904 (2000).

33. See *id.*; see also Julie Roin, *Rethinking Tax Treaties in a Strategic World with Disparate Tax Systems*, 81 VA. L. REV. 1753, 1769–81 (1995) (discussing the dilemma of tax credits).

34. See S. REP. NO. 107-188, at 2 (2002) (explaining, “[i]ncome earned by a domestic parent corporation from foreign operations conducted by foreign corporate subsidiaries generally is subject to U.S. tax when the income is distributed as a dividend to the domestic corporation”).

35. Section 301(a) provides that, generally, a distribution of property by a subsidiary to its parent corporation is treated as a taxable dividend of the parent to the extent of the subsidiary's earnings and profits. I.R.C. § 301 (2000). Section 317(a) defines “property” as money, securities, and any other property, except for stock in the corporation making the distribution. I.R.C. § 317(a).

36. See U.S. Dep’t of the Treasury, United States Model Income Tax Convention of September 20, 1996, art. 10, *reprinted in* 1 TAX TREATIES (CCH) ¶ 214 (Dec. 1999) (addressing dividends), and U.S. Dep’t of the Treasury, Technical Explanation of the United States Model Income Tax Convention (Sept. 20, 1996), *reprinted in* 1 TAX TREATIES (CCH) ¶ 214A (Dec. 1999). Section 901(k) provides: In no event shall a credit be allowed under subsection (a) for any withholding tax on a dividend with respect to stock in a corporation if:

- (i) such stock is held by the recipient of the dividend for 15 days or less during the 30-day period beginning on the date which is 15 days before the date on which such share becomes ex-dividend with respect to such dividend, or
- (ii) to the extent that the recipient of the dividend is under an obligation (whether pursuant to a short sale or otherwise) to make related payments with respect to positions in substantially similar or related property.

I.R.C. § 901(k)(1)(A).

37. For example, the U.S. Department of the Treasury, Office of Tax Policy

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An inverted U.S. corporation can undertake several arrangements that allow it to make certain deductible payments to the foreign parent corporation, which results in a shift of income from the taxable U.S. subsidiary corporation to the non-taxable foreign parent corporation. One such arrangement involves the U.S. subsidiary borrowing from the foreign parent and deducting³⁸ the interest payments.³⁹ Another such

declared:

Taxpayers may attempt to obtain benefits, including reduced withholding tax rates on dividends and other payments, under the U.S.-Barbados income tax treaty by having the foreign parent company managed and controlled in Barbados (although incorporated elsewhere). Barbados provides a special income tax regime for such corporations that impose only a nominal income tax, at a rate between 1% and 2.5% depending on the total amount of income subject to tax.

Inversion Report, *supra* note 4, at 12 n.27.

38. Section 163(j) provides for the limitations on such interest deductions:

(1) Limitation –

(A) In general

If this subsection applies to any corporation for any taxable year, no deduction shall be allowed under this chapter for disqualified interest paid or accrued by such corporation during such taxable year. The amount disallowed under the preceding sentence shall not exceed the corporation's excess interest expense for the taxable year.

(B) Disallowed amount carried to succeeding taxable year

Any amount disallowed under subparagraph (A) for any taxable year shall be treated as disqualified interest paid or accrued in the succeeding taxable year (and clause (ii) of paragraph (2)(A) shall not apply for purposes of applying this subsection to the amount so treated).

(2) Corporations to which subsection applies

(A) In general

This subsection shall apply to any corporation for any taxable year if—

(i) such corporation has excess interest expense for such taxable year, and

(ii) the ratio of debt to equity of such corporation as of the close of such taxable year (or on any other day during the taxable year as the Secretary may by regulations prescribe) exceeds 1.5 to 1.

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arrangement involves a U.S. subsidiary insurance company making deductible payments⁴⁰ of reinsurance premiums to its

(B) Excess interest expense

(i) In general

For purposes of this subsection, the term “excess interest expense” means the excess (if any) of—

(I) the corporation’s net interest expense, over

(II) the sum of 50 percent of the adjusted taxable income of the corporation plus any excess limitation carryforward under clause (ii).

(ii) Excess Limitation Carryforward

If a corporation has an excess limitation for any taxable year, the amount of such excess limitation shall be an excess limitation carryforward to the 1st succeeding taxable year and to the 2nd and 3rd succeeding taxable years to the extent not previously taken into account under this clause. The amount of such a carryforward taken into account for any such succeeding taxable year shall not exceed the excess interest expense for such succeeding taxable year (determined without regard to the carryforward from the taxable year of such excess limitation).

(iii) Excess limitation

For purposes of clause (ii), the term “excess limitation” means the excess (if any) of—

(I) 50 percent of the adjusted taxable income of the corporation, over

(II) the corporation’s net interest expense.

I.R.C. § 163(j).

39. The U.S. Department of the Treasury, Office of Tax Policy stated:

For example, many inversion transactions have involved the establishment of intercompany indebtedness to the foreign parent or another foreign affiliate from the U.S. members of the corporate group. Interest paid on such indebtedness generally would be deductible in the United States, subject to the limitations of section 163(j) and certain other provisions. The interest income on the debt typically is received in a jurisdiction that subjects that income to little or no taxation. Although the United States imposes a withholding tax of 30 percent on interest payments to a related party, this withholding tax may be substantially reduced or eliminated under an applicable U.S. income tax treaty.

Inversion Report, *supra* note 4, at 13.

40. Section 845 provides that in the case of a reinsurance agreement between two or more related persons, present law provides the Secretary of Treasury with authority to allocate among the parties or re-characterize “income (whether investment income,

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foreign parent corporation.⁴¹

3. Post-Inversion Foreign Parent Corporation

After a stock corporate inversion has been completed, the U.S. corporation is no longer subject to U.S. tax on its foreign-sourced income⁴² and therefore it will not make use of the U.S. foreign tax credit.⁴³ However, any U.S.-sourced operations of the

premium, or otherwise), deductions, assets, reserves, credits, and other items related to” the reinsurance agreements, or “make any other adjustment,” in order to “reflect the proper source and character” of the items for each party. I.R.C. § 845(a); I.R.C. § 482 (defining “related persons”). The Senate Finance Committee explained that the reason for the change in reinsurance agreements is the concern that:

[they] are being used to allocate income, deductions, or other items inappropriately among U.S. and foreign related persons . . . [and that they] may be a technique for erosion of the U.S. tax base. The Committee believes that the provision of present law permitting the Treasury Secretary to allocate or recharacterize items related to a reinsurance agreement should be applied to prevent misallocation, improper characterization, or to make any other adjustment in the case of such reinsurance transactions between U.S. and foreign related persons.

S. REP. NO. 107-188, at 8 (2002).

41. The U.S. Department of the Treasury, Office of Tax Policy concluded that: Insurance companies may shift insurance risks through reinsurance arrangements between the U.S. members of the corporate group and foreign affiliates in low- or no-tax jurisdictions. Premiums paid on the intercompany reinsurance are deductible in the United States, and the premium and other related income of the foreign affiliates on the reinsurance contract generally is not subject to U.S. taxation unless such income is effectively connected with the conduct of a U.S. trade or business. A U.S. excise tax applies to the premiums, unless this excise tax is eliminated pursuant to an applicable income tax treaty. Unlike intercompany debt, which effectively permits a taxpayer to shift a fixed amount of income from a U.S. corporation to the foreign parent or a foreign affiliate in a low-tax country, a reinsurance arrangement shifts both the profit or loss of any given contract, which will not be known at the time of the agreement. Any reinsurance arrangement between related parties must be established and operate in accordance with the arm’s length transfer pricing principles of section 482 and also may be subject to challenge under section 845.

Inversion Report, *supra* note 4, at 13.

42. Tello, *supra* note 2, at 213 (stating, “[t]he device used in the Ingersoll Rand transactions to remove the value of the controlled foreign corporations from U.S. taxing jurisdiction was the issuance of debt by the former U.S. holding company to the new Bermuda holding company approximately equal to the value of the former CFCs”).

43. The U.S. Department of the Treasury, Office of Tax Policy stated:

To the extent the ownership of foreign subsidiaries has been shifted out of the former U.S. group to the new foreign parent or a foreign subsidiary thereof, an inversion transaction eliminates the U.S. corporate-level taxation of these foreign operations. Accordingly, the significance of the foreign tax credit limitation (and the related rules concerning the allocation of expenses, including interest) to the inverted corporate group is reduced or eliminated, as foreign-source earnings of

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foreign parent corporation will remain subject to U.S. taxation.⁴⁴

4. Post-Inversion U.S. Shareholders

After the inversion, U.S. individual shareholders of the foreign parent corporation are generally taxed the same as before the inversion.⁴⁵ An exception to this general rule is in the area of dividends distributed with respect to the foreign parent corporation.⁴⁶ Such dividends will generally no longer be deemed U.S.-source income.⁴⁷ Instead, the dividends will generally⁴⁸ be considered foreign-source income.⁴⁹

By contrast, U.S. corporate taxpayers generally⁵⁰ will not be

the corporate group will not be subject to U.S. tax.

Inversion Report, *supra* note 4, at 14.

44. *See id.* (noting that if the foreign operations are still owned by U.S. members of the post-inversion group, income from such operations will remain subject to U.S. taxation).

45. *Id.* (stating that “[n]oncorporate U.S. shareholders generally are taxed in the same manner after the transaction as before, except that any dividends received generally will be foreign-source income”); *see generally* OFFICE OF TAX POLICY, U.S. DEPT’ OF THE TREASURY, THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS 1, 82 (2000), available at <http://www.ustreas.gov/offices/tax-policy/library/subpartf.pfd> (stating that although legislation has been introduced in Congress each year that would address issues related to foreign source income, no serious attempt at passage has been made). The Treasury Department’s Subpart F Study provides a thorough discussion of the history of subpart F and addresses options for change to subpart F. *Id.* at 1–10, 82–95.

46. *See* I.R.C. § 163(j) (2000). The proposed changes to section 163 in Senate Bill 2119 include modifications to the “earnings stripping” rules of section 163(j) (which deny or defer deductions for certain interest paid to foreign affiliates), as applied to inverted corporations. The legislation would eliminate the debt-equity threshold generally applicable under that provision and reduce the fifty percent threshold for “excess interest expense” to twenty-five percent. REPO Act, S. 2119, 107th Cong. § 2(d) (2002).

47. *But cf.* I.R.C. § 904(g) (re-sourcing a portion of dividends from a foreign corporation in certain circumstances).

48. However, Section 904(g)(1) provides that dividends of foreign corporations shall be U.S.-sourced income in the following circumstances:

(A) Any amount included in gross income under—

- (i) section 951(a) (relating to amounts included in gross income of United States shareholders),
- (ii) section 551 (relating to foreign personal holding company income taxed to United States shareholders), or
- (iii) section 1293 (relating to current taxation of income from qualified funds).

I.R.C. § 904(g)(1)(A).

49. Inversion Report, *supra* note 4, at 14.

50. However, section 243(e) provides an exception, stating that:

[A]ny dividend from a foreign corporation from earnings and profits accumulated by a domestic corporation during a period with respect to which such domestic corporation was subject to taxation under this chapter (or corresponding provisions of prior law) shall be treated as a dividend from a domestic corporation which is subject to taxation under

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entitled to the dividends received deduction with respect to the dividends received from the foreign parent corporation.⁵¹

5. Post-Inversion Foreign Shareholders

After the inversion is completed, foreign shareholders will generally not be subject to the U.S. thirty percent withholding tax on dividends distributed from the foreign parent corporation.⁵²

III. THE DRAFT REPO ACT

A. *Proposed Law Changes*

1. Proposed Change to Pure Inversions

The draft REPO Act would attempt to deter corporations from undertaking a pure inversion by denying the intended tax benefits of the inversion.⁵³ The draft REPO Act would attempt to achieve this goal by treating the foreign parent corporation in a pure inversion⁵⁴ as a domestic U.S. corporation for U.S. tax

this chapter.

I.R.C. § 243(e).

51. Inversion Report, *supra* note 4, at 14–15 (stating, “[c]orporate U.S. shareholders will have significantly different tax treatment because they generally will no longer be entitled to a dividends received deduction for dividends from the new foreign parent”).

52. The Office of Tax Policy stated:

Following the inversion, dividends should no longer be subject to U.S. withholding tax. Additionally, any stock of the U.S. corporation held directly by a nonresident alien individual was includible in his or her estate; in contrast, stock of the new foreign parent held by a nonresident alien individual is not subject to U.S. estate tax.

Id. at 15.

53. 148 CONG. REC. S2579, 2592 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley) (stating, “[i]f a company remains controlled in the United States, our bill requires the company to pay its fair share of taxes, plain and simple”).

54. See REPO Act, S. 2119, 107th Cong. § 2 (2002) (proposing I.R.C. § 7874(a)(2)). Section 7874(a)(2) actually refers to “inverted domestic corporations,” but the definition of an “inverted domestic corporation” has the same characteristics as a “pure” inversion. Proposed section 7874(a)(2) provides:

For purposes of this section, a foreign incorporated entity *shall be treated as an inverted domestic corporation* if, pursuant to a plan (or a series of related transactions)—

(A) the entity completes after March 20, 2002, the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a domestic corporation or substantially all of the properties constituting a trade or business of a domestic partnership,

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purposes.⁵⁵ An inverted foreign parent corporation would be subject to U.S. taxation in the same manner as a U.S. corporation where:

- (1) The foreign parent corporation has acquired (directly or indirectly) substantially all of the properties formerly held (directly or indirectly) by the U.S. subsidiary corporation;
- (2) The foreign parent corporation acquires at least eighty percent of the stock (by vote or value) of the U.S. subsidiary corporation from the former shareholders of the U.S. subsidiary corporation; and
- (3) The combination of the foreign parent corporation and the U.S. subsidiary corporation fails to have substantial business activities in the foreign jurisdiction.⁵⁶

The draft REPO Act would apply this change to all pure inversions occurring on or after March 21, 2002.⁵⁷

2. Proposed Change to Non-Pure Inversions

The draft REPO Act treats non-pure inversions⁵⁸ differently

(B) after the acquisition at least 80 percent of the stock (by vote or value) of the entity is held—

(i) in the case of an acquisition with respect to a domestic corporation, by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation . . . and

(C) the expanded affiliated group which after the acquisition includes the entity does not have substantial business activities in the foreign country in which or under the law of which the entity is created or organized when compared to the total business activities of such expanded affiliate group.

Id. (emphasis added).

55. *Id.* (proposing I.R.C. § 7874(a)(1), which provides, “[i]f a foreign incorporated entity is treated as an inverted domestic corporation, then, notwithstanding section 7701(a)(4) . . . , such entity shall be treated for purposes of this title as a domestic corporation”).

56. *Id.* (proposing I.R.C. § 7874(a)(2)(A)–(C)).

57. *See id.* (proposing I.R.C. § 7874(a)(2)(A)).

58. The Senate Finance Committee explained that non-pure inversions are transactions that would meet the definition of a pure inversion transaction, “except that the 80 percent ownership threshold is not met. In such a case, if a greater-than-50

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than pure inversions.⁵⁹ Unlike the rules applicable to pure inversions,⁶⁰ the draft REPO Act would respect the actual inversion of the corporation if it was non-pure.⁶¹ However, the draft REPO Act attempts to deter corporations from undertaking a non-pure inversion by creating a series of negative tax effects for the inverting corporation.⁶² A non-pure inversion triggers the

percent but less than 80 percent ownership threshold is met, then a second set of rules would apply to these inversions.” 148 CONG. REC. S2579, 2593 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley). Under these rules, the inversion transaction is respected (i.e., the foreign corporation is treated as foreign), but: (1) any applicable corporate-level “toll charges” for establishing the inverted structure may not be offset by tax attributes such as net operating losses or foreign tax credits; (2) the IRS is given expanded authority to monitor related-party transactions that may be used to reduce U.S. tax on U.S.-source income going forward; and (3) section 163(j), relating to “earnings stripping” through related-party debt, is strengthened. *Id.*

59. *Id.* (describing the contours of a “pure” inversion).

60. Proposed section 7874(a)(1) provides: “[i]f a foreign incorporated entity is treated as an inverted domestic corporation, then, notwithstanding section 7701(a)(4) . . . , such entity shall be treated for purposes of this title as a domestic corporation.” S. 2119, 107th Cong. § 2(a) (2002).

61. 148 CONG. REC. S2579, 2593 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley) (explaining that a non-pure inversion transaction “would be respected, i.e., the foreign corporation would be respected as foreign . . .”).

62. The draft REPO Act provides:

(b) PRESERVATION OF DOMESTIC TAX BASE IN CERTAIN
INVERSION TRANSACTIONS TO WHICH SUBSECTION (a) DOES
NOT APPLY –

(1) IN GENERAL – If a foreign incorporated entity would be treated as an inverted domestic corporation with respect to an acquired entity if either –

(A) subsection (a)(2)(A) were applied by substituting “on or before March 20, 2002” for “after March 20, 2002” and subsection (a)(2)(B) were applied by substituting “more than 50 percent” for “at least 80 percent,” or

(B) subsection (a)(2)(B) were applied by substituting “more than 50 percent” for “at least 80 percent”, then the rules of subsection (c) shall apply to any inversion gain of the acquired entity during the applicable period and the rules of subsection (d) shall apply to any related party transaction of the acquired entity during the applicable period. This subsection shall not apply for any taxable year if subsection (a) applies to such foreign incorporated entity for such taxable year. . . .

(c) TAX ON INVERSION GAINS MAY NOT BE OFFSET – If subsection (b) applies—

(1) IN GENERAL – The taxable income of an acquired entity for any taxable year which includes any portion of the applicable period shall in no event be less than the inversion gain of the entity for the taxable year

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negative tax effects when:

- (1) The foreign parent corporation has acquired (directly or indirectly) substantially all of the properties formerly held (directly or indirectly) by the U.S. subsidiary corporation;⁶³
- (2) The foreign parent corporation either:
 - (a) Acquires more than fifty percent of the stock (by vote or value) of the U.S. subsidiary corporation from the former

(2) CREDITS NOT ALLOWED AGAINST TAX ON INVERSION GAIN – Credits shall be allowed against the tax imposed by chapter 1 on an acquired entity for any taxable year described in paragraph (1) only to the extent such tax exceeds the product of –

(A) the amount of taxable income described in paragraph (1) for the taxable year, and

(B) the highest rate of tax specified in section 11(b)(1)

(d) SPECIAL RULES APPLICABLE TO RELATED PARTY TRANSACTIONS –

(1) ANNUAL PREAPPROVAL REQUIRED –

(A) IN GENERAL – An acquired entity to which subsection (b) applies shall enter into an annual preapproval agreement under subparagraph (C) with the Secretary for each taxable year which includes a portion of the applicable period.

(B) FAILURES TO ENTER AGREEMENTS – If an acquired entity fails to meet the requirements of subparagraph (A) for any taxable year, then for such taxable year –

(i) there shall not be allowed any deduction, or addition to basis or cost of goods sold, for amounts paid or incurred, or losses incurred, by reason of a transaction between the acquired entity and a foreign related person,

(ii) any transfer or license of intangible property (as defined in section 936(h)(3)(B) . . .) between the acquired entity and a foreign related person shall be disregarded, and

(iii) any cost-sharing arrangement between the acquired entity and a foreign related person shall be disregarded.

S. 2119 § 2(a).

63. *Id.* (proposing I.R.C. § 7874(a)(2)(A)).

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shareholders of the U.S. subsidiary corporation before March 21, 2002, or

- (b) Acquires more than fifty percent of the stock (by vote or value) but not eighty percent of the stock (by vote or value) of the U.S. subsidiary corporation from the former shareholders of the U.S. subsidiary corporation on or after March 21, 2002;⁶⁴ and
- (3) The combination of the foreign parent corporation and the U.S. subsidiary corporation fails to have substantial business activities in the foreign jurisdiction.⁶⁵

The draft REPO Act dictates that a non-pure inversion triggers several negative tax effects, which are dependant on the nature of the non-pure inversion. For example, if there is “inversion gain”⁶⁶ triggered⁶⁷ by any form of a non-pure inversion involving the subsidiary U.S. corporation,⁶⁸ (or other related party)⁶⁹ during the “applicable period,”⁷⁰ then the following

64. *Id.* (proposing I.R.C. § 7874(b)(1)(A)–(B)).

65. *Id.* (proposing I.R.C. § 7874(a)(2)(C)).

66. Proposed Section 7874(c)(4) provides that where you have non-pure inversion, the “inversion gain” equals:

the gain required to be recognized under section 304 . . . , 311(b) . . . , 367 . . . , 1001 . . . , or 1248 . . . , or under any other provision of chapter 1, by reason of the transfer during the applicable period of stock or other properties by an acquired entity –

(A) as part of the acquisition described in (a)(2)(A) to which subsection (b) applies, or

(B) after such acquisition to a foreign related person.

Id. (proposing I.R.C. § 7874(c)(4)). For example, no credits or net operating losses would be permitted to offset the tax on the inversion gain. Additionally, a taxpayer’s alternative minimum tax may not be less than the inversion gains for a taxable year.

67. Proposed section 7874(b)(1) provides that any gain of the U.S. subsidiary corporation triggered by a non-pure inversion during a certain period of time is subject to the rules of proposed section 7874(c). *See id.*

68. Proposed section 7874(b)(1) provides that section 7874(c) would apply to certain circumstances involving an “acquired entity” (see *supra* note). *Id.* Proposed section 7874(b)(2)(A) generally defines an “acquired entity” for purposes of that section as “the domestic corporation or partnership substantially all of the properties of which are directly or indirectly acquired in an acquisition described in subsection (a)(2)(A) to which this subsection applies.” *Id.* (emphasis added).

69. Proposed section 7874(b)(2)(B) provides that “[a]ny domestic person bearing a relationship described in section 267(b) or 707(b) to an acquired entity *shall be treated as an acquired entity* with respect to the acquisition described in subparagraph (A).” *Id.* (emphasis added).

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occurs:

- (1) For any year that includes a portion of the “applicable period,”⁷¹ the taxable income of the subsidiary U.S. corporation⁷² shall be no less than the inversion gain⁷³ for that taxable year;⁷⁴ and
- (2) Tax credits otherwise available to the subsidiary U.S. corporation⁷⁵ shall be severely limited⁷⁶ for any year that includes a portion of the “applicable period.”⁷⁷

Special rules also apply with respect to “acquired entity” partnerships in a non-pure inversion.⁷⁸ In addition, there are certain provisions intended to coordinate the non-pure inversion taxation rules with I.R.C. § 172 and the alternative minimum tax provisions.⁷⁹

70. Proposed section 7874(b)(1) provides that the inverted gain provisions of section 7874(c) shall apply to non-pure inversions that occur during the “applicable period.” *Id.* Proposed section 7874(b)(3)(A) provides that the “applicable period” for purposes of section 7874(b) means the period:

- “(i) beginning on the first date properties are acquired as part of the acquisition described in subsection (a)(2)(A) to which this subsection applies, and
- (ii) ending on the date which is 10 years after the last date properties are acquired as part of such acquisition.”

Id. Also, proposed section 7874(b)(3)(B) states, “[i]n the case of any acquired entity to which paragraph (1)(A) applies, the applicable period shall be the 10-year period beginning on January 1, 2002.” *Id.*

71. *Id.* (proposing I.R.C. § 7874(b)(3)).

72. *Id.* (proposing I.R.C. § 7874(b)(2), which defines the term “acquired entity”).

73. *Id.* (proposing I.R.C. § 7874(c)(4), which defines the term “inversion gain”).

74. *Id.* (proposing I.R.C. § 7874(c)(1), which provides that when there is a non-pure inversion, “[t]he taxable income of an acquired entity for any taxable year which includes any portion of the applicable period shall in no event be less than the inversion gain of the entity for the taxable year”).

75. *Id.* (proposing I.R.C. § 7874(b)(2)).

76. *Id.* Proposed section 7874(c)(2) provides that in cases of non-pure inversions:

- (2) CREDITS NOT ALLOWED AGAINST TAX ON INVERSION GAIN – Credits shall be allowed against the tax imposed by chapter 1 on an acquired entity for any taxable year described in paragraph (1) only to the extent such tax exceeds the product of—

- (A) the amount of taxable income described in paragraph (1) for the taxable year, and
- (B) the highest rate of tax specified in section 11(b)(1)

Id.

77. *Id.* (proposing I.R.C. § 7874(b)(3), which defines the term “applicable period”).

78. *See id.* (proposing I.R.C. § 7874(c)(3)).

79. *Id.* (proposing I.R.C. § 7874(c)(5)).

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Moreover, where there has been a non-pure inversion, if the subsidiary U.S. corporation conducts a related party transaction during the “applicable period,” the following occurs:

- (1) The subsidiary U.S. corporation shall be required to gain annual pre-approval⁸⁰ from the U.S. Treasury Secretary for any such related party transaction occurring during a tax year that includes any portion of an “applicable period” or in general, the positive tax effects of such related party transaction will be denied;⁸¹ and
- (2) The subsidiary U.S. corporation shall be subject to certain limitations⁸² with respect to any interest deduction.

80. *Id.* (proposing I.R.C. § 7874(d)(1)(A)), which states, “[a]n acquired entity to which subsection (b) applies shall enter into an annual preapproval agreement under subparagraph (C) with the Secretary for each taxable year which includes a portion of the applicable period”). Proposed section 7874(d)(1)(C) further defines a “preapproval agreement” as:

- [A] prefilling, advance pricing, or other agreement specified by the Secretary which –
- (i) is entered into at such time as may be specified by the Secretary, and
 - (ii) contains such provisions as the Secretary determines necessary to ensure that the requirements of sections 163(j), 267(a)(3), 482, and 845, and any other provision of this title applicable to transactions between related persons and specified by the Secretary, are met.

Id.

81. *Id.* (proposing I.R.C. § 7874(d)(1)(B), setting forth the following: If an acquired entity fails to meet the requirements of subparagraph (A) for any taxable year, then for such taxable year –

- (i) there shall not be allowed any deduction, or addition to basis or cost of goods sold, for amounts paid or incurred, or losses incurred, by reason of a transaction between the acquired entity and a foreign related person,
- (ii) any transfer or license of intangible property (as defined in section 936(h)(3)(B)) between the acquired entity and a foreign related person shall be disregarded, and
- (iii) any cost-sharing arrangement between the acquired entity and a foreign related person shall be disregarded).

82. *Id.* (proposing I.R.C. § 7874(d)(2), which provides the following limitations: “[I]n the case of an acquired entity to which subsection (b) applies, section 163(j) . . . shall be applied –(A) without regard to paragraph (2)(A)(ii) thereof, and (B) by substituting ‘25 percent’ for ‘50 percent’ each place it appears in paragraph (2)(B) thereof”).

IV. WILL THE DRAFT REPO ACT DETER CORPORATIONS FROM TRANSACTIONS LIKE INVERSIONS?

The draft REPO Act will be successful in deterring the types of corporate inversions discussed in this article. However, the inversion problem solved by the draft REPO Act are only a small part of a larger problem the proposed Act leaves unaddressed. The underlying problem is the U.S. taxation system itself, which makes U.S. corporations less competitive against their foreign corporate competitors.⁸³

A. Deterrence

The draft REPO Act should deter corporations from undertaking a pure inversion by denying the intended tax benefits of the inversion.⁸⁴ This proposed Act would deter the pure inversion by treating the foreign parent corporation as a domestic U.S. corporation for U.S. tax purposes.⁸⁵ An inverted foreign parent corporation would be subject to U.S. taxation in the same manner as a U.S. corporation, thus defeating the primary purpose of the pure inversion. The draft REPO Act should succeed in contravening this narrow purpose. However, as discussed below, this solution does not solve the overall systematic problems that give rise to corporate inversions. As such, it is likely that advisors to inverting corporations will create new methods to achieve the same result without triggering the draft REPO Act provisions. Some commentators have already discussed the likelihood that the current draft REPO Act would require future amending to deal with new forms of transactions that circumvent the draft REPO Act provisions.⁸⁶

83. 148 CONG. REC. S2579, 2592 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley) (stating that flaws in the U.S. international tax rules undermine the ability of U.S. companies "to compete in the global marketplace").

84. See 148 CONG. REC. S2579, 2593 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley) (asserting that "[t]he legislation would deny the intended tax benefits of this type of inversion").

85. REPO Act, S. 2119, 107th Cong. § 2(a) (2002) (proposing I.R.C. § 7874(a)(1), which provides, "[i]f a foreign incorporated entity is treated as an inverted domestic corporation, then, notwithstanding section 7701(a)(4) . . ., such entity shall be treated for purposes of this title as a domestic corporation").

86. See, e.g., Inversion Report, *supra* note 4, at 2; Veronique de Rugby, Runaway Corporations: Political Band-Aids vs. Long-Term Solutions, 9 TAX & BUDGET BULL. 1, 2 (July 2002); Samuel C. Thompson, Jr., Law Professor's Written Testimony at W & M Panel Hearing on Corporate Inversions, 2002 TAX NOTES TODAY 123-42 (June 26, 2002), LEXIS, 2002 TNT 123-42 (reporting the content of University of Miami law professor Samuel C. Thompson, Jr.'s written testimony to the House Ways and Means Committee regarding corporate inversions). Professor Thompson writes:

If creative lawyers and accountants come up with new inversion schemes

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Although the draft REPO Act would allow the actual inversion of the corporation if the inversion was classified as non-pure, it would still deter the corporation from undertaking a non-pure inversion by creating a series of negative tax effects for the inverting corporation.⁸⁷ Once again, the draft REPO Act should prove successful in effectuating this narrow goal. However, as with pure inversions, the non-pure inversion solution does not completely solve the overall systematic problems that give rise to corporate inversions. Thus, it is probable that corporate advisors will invent new transactions that achieve the same result without running afoul of the draft REPO Act provisions, thereby necessitating further action to close these new loopholes.

B. *Not Really Solving the Problem*

Corporate inversions are a symptom of a much larger problem that is not addressed by the draft REPO Act, which is how the U.S. taxation system makes U.S. corporations less competitive against their foreign corporate competitors. The U.S. tax system is based on taxing corporations on their worldwide income, regardless of whether the income is generated in the U.S. or in a foreign jurisdiction.⁸⁸ As such, in a situation in which a

not covered by the legislation, which is certainly a possibility, Congress should act to shut down such transactions. Indeed, this has been the pattern with legislation dealing with tax shelters. For example, during the Ford Administration in 1976, Congress enacted the “at risk” rules under Section 465 to address real estate tax shelters. These rules proved ineffective, and as a response during the Reagan Administration in 1986 Congress enacted the very effective passive loss rules under Section 469. Also, during the Reagan Administration, in 1981 Congress enacted the disallowance of loss rules under Section 1092 and the mark to market rules under Section 1256 to eliminate tax sheltering in futures straddles transactions, and in 1983 Congress extended those rules to stock option straddles transactions, which had become a new market for such sheltering. These are examples of what some may refer to as ‘deal chasing’ by Congress. *I believe that in view of the very creative tax bar we have in this country, it is necessary for Congress to be prepared to ‘chase deals.’ Otherwise, tax planners will find ways to undermine the tax system.*

Id. (emphasis added).

87. See 148 CONG. REC. S2579, 2594 (Apr. 11, 2002) (statement of Sen. Baucus) (commenting on the tax costs for corporations choosing to undergo a non-pure inversion, and disclosing that “[t]he company won’t be able to use tax attributes, such as net operating losses and foreign tax credits, to offset the gain incurred upon inverting”).

88. Section 11 provides: “A tax is hereby imposed for each taxable year on the taxable income of every corporation.” I.R.C. § 11 (2000) (emphasis added); see also Fred Feingold, *Certain Tax Issues Relating to International Commercial Agreements*, at 205, 211–12 (PLI Commercial Law & Practice Course, Handbook Series No. A4-4437, 1993). Section 63 provides: “Except as provided in subsection (b), for purposes of this subtitle, the term ‘taxable income’ means *gross income* minus the deductions allowed by this chapter (other than the standard deduction)” I.R.C. § 63 (emphasis added). Finally,

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U.S. corporation has a foreign subsidiary, the foreign subsidiary is subject to tax both in the U.S. and in the foreign jurisdiction.⁸⁹ A system of foreign tax credits is intended to reduce the tax burden to the U.S. corporation.⁹⁰ However, the U.S. foreign tax credit scheme limits the effectiveness of these credits because the scheme requires the categorization of income into baskets⁹¹ to which the foreign tax credit rules are separately applied and reduces the income that the foreign tax credits can be applied against in order to reflect a broad allocation of U.S.-sourced expenses.⁹²

Subpart F also complicates this scenario by sometimes requiring current taxation of income from active foreign business operations,⁹³ even though income earned through a foreign subsidiary corporation of a U.S. parent corporation is generally otherwise not taxable until it is distributed to the U.S. parent by the foreign subsidiary.⁹⁴

By contrast, many foreign jurisdictions⁹⁵ have corporate tax

section 61 provides: "Except as otherwise provided in this subtitle, gross income means *all income from whatever source derived*" I.R.C. § 61 (emphasis added). As such, "gross income" includes all worldwide income of the U.S. corporation.

89. Terrence R. Chorvat, *Ending the Taxation of Foreign Business Income*, 42 ARIZ. L. REV. 835, 838 (2000) (explaining foreign business income is subject to taxation from the residence country and the source country). Sections 301 and 316 provide that, generally, a distribution of property by a subsidiary to the parent corporation is treated as a taxable dividend of the parent corporation to the extent of the subsidiary's earnings and profits. See I.R.C. §§ 301, 316.

90. Tello, *supra* note 2, at 219 (noting that:

[T]he application of § 163(j) to a U.S. subsidiary in an inverted structure would be modified so that the debt to equity ratio safe harbor of 1:1.5 would not apply for purposes of § 163(j) and the limitations on current deductibility of interest would be lowered so that any net interest expense greater than 25% of adjusted taxable income . . . would be deferred until a subsequent year).

91. See Chorvat, *supra* note 89, at 851–53 (commenting that the creation of baskets was intended to prevent the abuse of the use of credits "generated in an active business to offset taxes that would be paid on passive income"); see also NFTC, *supra* note 28, at 14 & n.28 (stating that the U.S. "foreign tax credit system lacks domestic loss recapture rules (i.e., rules similar to the Section 904(f) foreign loss recapture rules)").

92. See NFTC, *supra* note 28, at 14 & n.28; see also Daniel N. Shaviro, *Does More Sophisticated Mean Better? A Critique of Alternative Approaches to Sourcing the Interest Expense of U.S. Multinationals*, 54 TAX L. REV. 353, 363–64 (2001) (observing that the basket system "tightens the foreign tax credit by reducing foreign source income and thus the ceiling on the U.S. taxes that currently can be offset by foreign tax credits").

93. See I.R.C. § 951(a)(1) (providing that, under certain conditions, a U.S. shareholder of the foreign corporation is required to include in his taxed income a pro rata share of the corporation's subpart F income whether or not it is distributed).

94. See *id.*

95. See NFTC, *supra* note 28, at 9–12 (discussing the corporate tax systems of France, the Netherlands and Germany). In France, "French resident corporations carrying on a trade or business outside [of] France . . . are generally not taxed in France on the related profits . . ." *Id.* at 9. In the Netherlands, "Dutch resident companies may

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systems that are based on taxing income in the jurisdiction where the income is earned.⁹⁶ As a result, a foreign parent corporation having its main office in the foreign parent's jurisdiction but having a subsidiary in a different foreign jurisdiction will not be taxed by the foreign parent's jurisdiction on its foreign subsidiary's income.⁹⁷ For example:

A Bermuda corporation that is managed and controlled in Barbados qualifies as a Barbados corporate resident under Article 4(1)(a)(ii) of the [U.S.-Barbados income tax treaty ("Treaty")] because it is managed and controlled in Barbados. Such corporation would not be treated as a U.S. resident under the Treaty because under Article 4(1)(b)(ii) of the Treaty, the term "resident of the United States" means a company created under the laws of the United States or a political subdivision of the United States. Although an inverted foreign corporation may be classified as a "domestic" corporation under § 7701, it would not meet the Treaty requirements of a U.S. resident because it is not created under the laws of the United States or a state [therein]. Furthermore, the 'saving' clause of Article 1(3) would not apply to subject the Bermuda/Barbados corporation to U.S. tax because the clause applies only to residents of the United States as determined under Article 4 . . . [which], as explained above, does not treat the Bermuda/Barbados corporation as a U.S. resident.⁹⁸

This system allows the foreign corporation to reinvest all the

qualify for a 100 percent exclusion of foreign branch profits. Furthermore, under the Dutch participation exemption, dividends received from foreign subsidiaries, and capital gains realized on the disposal of such shares, are exempt from Dutch corporate tax." *Id.* at 10. In Germany, "German resident corporations are [generally] taxed on foreign source income. [However, f]oreign branch income is fully exempt from gross income." *Id.* at 11. See also Patti Mohr, *Corporate Inversions Reveal Deeper Tax Code Flaws*, *Cato Analysts Say*, 2002 TAX NOTES TODAY 124-7 (June 27, 2002), LEXIS, 2002 TNT 124-7 (commenting that "'there is something wrong' when the United States imposes the fourth highest rate of corporate taxation among members of the Organization for Economic Cooperation and Development [OECD]").

96. See Thompson, *supra* note 86 (discussing the advantages of a territorial system of taxation).

97. See Tello, *supra* note 2, at 212 (describing the two steps to convert "the U.S. holding company into a subsidiary of a foreign holding company").

98. Tello, *supra* note 2, at 220-21.

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income from its subsidiary and, consequently, out-compete its U.S. competitors.⁹⁹ U.S. corporations will be at a distinct disadvantage because it will have allocated this reinvestment money toward the payment of U.S. taxes.¹⁰⁰

The draft REPO Act will not resolve this inequity in the worldwide tax system. There are several proposals,¹⁰¹ most notably one by Chairman Thomas of the House Ways and Means Committee,¹⁰² that intend to fix this problem. However, until one of these solutions becomes readily acceptable to a divided Congress, the problem will continue to generate adventurous tax planning (*e.g.*, corporate inversions).

V. THE SEPTEMBER 11, ENRON, AND BUDGET FACTORS

On April 11, 2002, the draft REPO Act was introduced in the Senate.¹⁰³ Less than three months later, the bill had cleared the Senate Finance Committee.¹⁰⁴ A number of factors contributed to the bill's rapid passage through the Senate Finance Committee. First, as we are all too aware, the events of September 11, 2001, sent the U.S. government into a flurry of single-purposed actions relating to the War on Terrorism.¹⁰⁵ One issue that was moved to

99. See 148 CONG. REC. S2579, 2594 (daily ed. Apr. 11, 2002) (statement of Sen. Baucus) (stating that "international tax rules create[] an incentive for U.S. corporations to shift their operations abroad in order to remain competitive" and that U.S. corporations that do so are, "in effect, renouncing their U.S. citizenship to cut their tax bill"). *But see* Thompson, *supra* note 86 (opining that nothing in the Treasury Report indicates that inversions are employed to address competitiveness problems overseas, and that while inversions reduce overall tax liability for U.S. companies, there is no evidence that these companies face a greater tax liability than their foreign competitors).

100. See NFTC, *supra* note 28, at 14 (asserting that "the foreign tax credit system lacks domestic loss recapture rules (*i.e.*, rules similar to the Section 904(f) foreign loss recapture rules)").

101. Other legislators who have introduced bills designed to stop corporate inversions include Representatives Doggett, Johnson, Neal, McInnis, and Maloney. Thompson, *supra* note 86; *see also* International Tax Simplification and Fairness for American Competitiveness Act of 2002, H.R. 4047, 107th Cong. (2002); International Tax Simplification and Fairness for American Competitiveness Act of 1999, H.R. 2018, 106th Cong. (1999), introduced by Rep. Houghton on behalf of himself and several other representatives.

102. American Competitiveness and Corporate Accountability Act of 2002, H.R. 5095, 107th Cong. (2002).

103. 148 CONG. REC. S2579-01, 2592 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley).

104. *Id.*

105. See Press Release, McInnis Takes Floor Urging Colleagues to Close Growing Tax Loophole (Mar. 13, 2002), *available at* <http://www.house.gov/mcinnis/pro203.htm> [hereinafter "McInnis"]; 148 CONG. REC. H847, 870-71 (daily ed. Mar. 13, 2002) (statement of Rep. McInnis) (stating, "[w]hile young men and women are serving and dying for the United States in Afghanistan, I'm appalled that companies are placing more value on earnings over patriotism").

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the forefront of the congressional calendar by the War on Terrorism was a response to corporate inversions.¹⁰⁶ In the Senate Finance Committee the response took the form of the draft REPO Act.¹⁰⁷

Another factor contributing to the possible enactment of the draft REPO Act is the debacle involving corporate meltdowns, such as occurred with Enron. Senator Charles E. Grassley (R-Iowa), the ranking Republican member of the Senate Finance Committee, is on record as stating that passage of the draft REPO Act is necessary in the wake of corporate scandals such as Enron.¹⁰⁸

A third factor that appears to be driving the refocus on the draft REPO Act is the increasing federal budget deficit.¹⁰⁹ Investigating interest revenue activities was not the legislature's priority during the period when the economy was booming.¹¹⁰ However, with the current extended economic downturn, the U.S.

106. See Mohr, *supra* note 95 (reporting House Ways and Means Committee ranking member Charles B. Rangel (D-N.Y.) declared that companies "flee[ing] the country" to avoid paying taxes are unpatriotic, especially when the nation is at war"); see also McInnis, *supra* note 105 (reporting comments by Rep. Scott McInnis (R-Colorado), who stated that corporate inversions are an irresponsible and unpatriotic tax loophole which allows companies to avoid paying taxes merely by renting a P.O. Box and filing some papers overseas and, further, that it is inexcusable for these companies to place a higher value on earnings than patriotism during a time when men and women are dying for the United States in the War on Terrorism).

107. See Patti Mohr, *Baucus, Grassley to Introduce Tax Shelter, Corporate Inversion Bill in April*, 2002 TAX NOTES TODAY 56-1 (March 22, 2002), LEXIS, 2002 TNT 56-1 (reporting on the purpose behind the Senate bill that eventually became the draft REPO Act:

Leaders from both the House and the Senate tax committees have shown interest in moving quickly to enact legislation to penalize reincorporating corporations. . . . Baucus and Grassley, the lead sponsors of a Senate bill currently being assembled, expressed anger that some companies would set up headquarters consisting of nothing more than "a file cabinet" in a jurisdiction like Bermuda to avoid paying their fair share of taxes and to escape regulatory oversight).

108. See Mohr, *supra* note 13, detailing comments by Senator Grassley:

Grassley praised committee passage of the CARE bill, specifically the REPO act, and said corporate expatriation schemes wear down the domestic tax base by creating "phony" deductions in the United States. "Recent corporate actions, such as Enron and its financial dealings, show the need for greater congressional oversight of some unacceptable corporate activities," Grassley said. "The average individual taxpayer can't skip out on his tax bill. He doesn't have the luxury of setting up a filing cabinet and a mailbox overseas to escape his federal taxes. The same should be true for corporations."

109. Inversion Report, *supra* note 4, at 1 (stating that "[m]arket conditions have been a factor in the recent increase in inversion activity," and that "tax liability may be less significant because of current economic and market factors").

110. Beckett G. Cantley, *The Tax Shelter Disclosure Act: The Next Battle in the Tax Shelter War*, 22 VA. TAX REV., 105, 132 (2002).

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Government is in need of ways to balance the budget (or at least come closer to this goal).¹¹¹ Preliminary estimates of the impact of the draft REPO Act indicate it could raise as much as \$628 million over five years and \$2.1 billion over the span of ten years.¹¹² Discussing the potential for a renewed interest in revenue raising tax legislation,¹¹³ one of Senator Grassley's spokespersons stated, "[f]rom what I'm hearing about the budget, we may need offsets."¹¹⁴

VI. Conclusion

Many powerful lawmakers have questioned the tax reduction practice known as a "corporate inversion,"¹¹⁵ often referring to the companies¹¹⁶ who undertake such a transaction as "unpatriotic."¹¹⁷ These corporations have been contrasted with the men and women of the U.S. military who are faithfully serving their country in Afghanistan.¹¹⁸ A corporate inversion consists of a U.S. corporation forming another corporation in an offshore tax haven and then transforming the U.S.-based

111. Representative James H. Maloney, Testimony Before the Subcommittee on Select Revenue Measures, House Committee on Ways and Means (June 25, 2002), 2002 WL 1375786 (noting that "[c]orporate expatriates contribute to the growing, long-term budget deficit problem," especially now that "[c]ritical programs like Social Security and Medicare are in serious jeopardy").

112. Mohr, *supra* note 13.

113. See Patti Mohr & Warren Rojas, *Enron Investigation Generates New Tax Shelter, Pension Legislation*, 2002 TAX NOTES TODAY 13-1 (Jan. 18, 2002), LEXIS, 2002 TNT 13-1 (noting that the proposed bill "would raise about \$10 billion by closing corporate loopholes . . .").

114. *Id.*

115. The following Senators are on record as co-sponsors of the draft REPO Act: Sen. Max Baucus, Sen. Jean Carnahan, Sen. Thomas R. Carper, Sen. Susan H. Collins, Sen. Christopher J. Dodd, Sen. Tom Harkin, Sen. Tim Johnson, Sen. Joseph I. Lieberman, Sen. John McCain, Sen. Zell Miller and Sen. Paul D. Wellstone. See *Bill Summary & Status for the 107th Congress*, S. 2119, at <http://thomas.loc.gov> (last visited Jan. 9, 2003).

116. Two of the companies who have undertaken a corporate inversion are Tyco International and Ingersoll-Rand. See Editorial, *The Bermuda Inversion*, WALL ST. J., May 21, 2002, at A18. See also Tello, *supra* note 2, at 213 (discussing the inversion techniques of Stanley Works, Nabors Industries and Ingersoll-Rand). "The McDermott and Helen of Troy transactions are believed to be the earliest inversion transactions. In 1983, the Panamanian subsidiary of McDermott acquired the shares of its U.S. parent corporation in exchange for its shares and some cash, in a taxable exchange at the shareholder level. In 1994, the shareholders of Helen of Troy Corporation, a U.S. publicly-held corporation, exchanged their Helen of Troy shares for shares of a Bermuda corporation in a § 368(a)(1)(B) transaction. Shareholders with a less than 5% interest in a U.S. corporation were not required to recognize gain and no other regulations under § 367 in effect at the time of the transaction imposed tax on the expatriating corporation. Some later transactions were effected by Triton Energy Corporation in 1998, Fruit of the Loom in 1999, and Transocean Offshore, Inc. also in 1999." *Id.* at 212 n.4.

117. McKinnon, *supra* note 3, at A4.

118. See McInnis, *supra* note 105.

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corporation into a subsidiary of the offshore parent corporation.¹¹⁹ The result is that the foreign jurisdiction does not tax the offshore parent corporation on its profits and, thus, the U.S. subsidiary corporation will not be taxed on its offshore profits. In addition, the U.S. corporation may use any number of strategies to have significant U.S. income redirected to the non-taxable offshore parent corporation.¹²⁰ On April 11, 2002, Chairman Max Baucus (D–Montana) and ranking minority member Charles E. Grassley (R–Iowa) introduced the draft REPO Act in the Senate Finance Committee for the purpose of combating these inversion transactions.¹²¹ The draft REPO Act would amend the Internal Revenue Code in several significant ways to prevent companies from setting up mailbox addresses in offshore tax havens simply to avoid paying significant U.S. taxes.¹²² The proposed Act would require the IRS to look at where a company is controlled after setting up offshore operations, when determining the company's tax liability.¹²³ The draft REPO Act seeks to penalize two main types of company inversions: (1) "pure" (or nearly pure) inversions and (2) non-pure inversions.¹²⁴ The events of September 11, 2001, the Enron bankruptcy, and the worsening deficit appear to each have contributed toward putting the draft REPO Act on the immediate agenda of the Senate Finance Committee, which has already reported this bill to the full Senate. Currently, the draft REPO Act is attached to the CARE Act of 2002¹²⁵ as a tax raising offset¹²⁶ to the tax breaks contained in the CARE Act and awaits a full vote by the Senate.

The draft REPO Act should effectively deter corporations from undertaking a pure inversion by denying the intended tax benefits of this type of inversion¹²⁷ through the treatment of the foreign parent corporation as a domestic U.S. corporation for U.S.

119. Inversion Report, *supra* note 4, at 1.

120. See Sesit, *supra* note 6, at C14 (describing the earnings-stripping techniques a company may employ).

121. REPO Act, S. 2119, 107th Cong. (2002).

122. See 148 CONG. REC. S2579, 2592 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley).

123. *Id.* (stating that the IRS will "look at where a company has its 'heart and soul,' not where it has a filing cabinet and a mail box").

124. See 148 CONG. REC. S2579, 2593–94 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley).

125. Charity Aid, Recovery, and Empowerment Act of 2002, S. 1924, 107th Cong. (2002).

126. The draft REPO Act is estimated to raise \$628 million over five years and \$2.1 billion over ten years. See Mohr, *supra* note 13.

127. See 148 CONG. REC. S2579, 2594 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley).

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tax purposes.¹²⁸ An inverted foreign parent corporation would be subject to U.S. taxation in the same manner as a U.S. corporation, thus defeating the purpose of the pure inversion.

Although the draft REPO Act would respect the actual inversion of the corporation if the inversion was classified as non-pure,¹²⁹ it would still deter corporations from undertaking this type of inversion by creating a series of negative tax effects for the inverting corporation.¹³⁰

However, this solution does not solve the overall systematic problems that give rise to corporate inversions. Inversions are symptomatic of a much larger problem that is not addressed by the draft REPO Act – how the U.S. taxation system makes U.S. corporations less competitive against their foreign corporate counterparts. The U.S. tax system is based on taxing corporations on their worldwide income.¹³¹ Thus, if a U.S. corporation has a foreign subsidiary, the foreign subsidiary is subject to tax both in the U.S. and in the foreign jurisdiction.¹³² Although a system of foreign tax credits is intended to reduce the tax burden on U.S. corporations,¹³³ the U.S. foreign tax credit system limits the effectiveness of the tax credits because it requires the categorization of income into baskets to which the foreign tax credit rules are separately applied and reduces the income the foreign tax credits can be applied against in order to reflect a broad allocation of U.S.-sourced expenses.¹³⁴ In addition, subpart F sometimes requires current taxation of income from active foreign business operations,¹³⁵ even though income earned through a foreign subsidiary corporation of a U.S. parent

128. See REPO Act, S. 2119, 107th Cong. § 2(a) (2002) (proposing section 7874(a)(1) which provides: “[i]f a foreign incorporated entity is treated as an inverted domestic corporation, then, notwithstanding section 7701(a)(4), such entity shall be treated for purposes of this title as a domestic corporation”).

129. See 148 CONG. REC. S2579, 2593 (daily ed. Apr. 11, 2002) (statement of Sen. Grassley).

130. See REPO Act, S. 2119, 107th Cong. § 2(a) (2002) (proposing I.R.C. § 7874(b), (c) and (d)).

131. I.R.C. § 11(a) (2000) (providing that “[a] tax is hereby imposed for each taxable year on the *taxable income* of every corporation”) (emphasis added); I.R.C. § 63(a) (stating that “[e]xcept as provided in subsection (b), for purposes of this subtitle, the term ‘taxable income’ means *gross income* minus the deductions allowed by this chapter (other than the standard deduction)”) (emphasis added); I.R.C. § 61(a) (2000) (stating that “[e]xcept as otherwise provided in this subtitle, gross income means *all income from whatever source derived*”) (emphasis added). As such, “gross income” includes all worldwide income.

132. I.R.C. § 301(a) (providing that generally a distribution of property by a subsidiary to the parent corporation is treated as a taxable dividend of the parent corporation to the extent of the subsidiary’s earnings and profits).

133. See NFTC, *supra* note 28, at 8.

134. See NFTC, *supra* note 28, at 14.

135. I.R.C. § 951.

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corporation is generally otherwise not taxable until it is distributed to the U.S. parent by the foreign subsidiary.¹³⁶ By comparison, many foreign jurisdictions¹³⁷ have corporate tax systems that are based on taxing income solely in the jurisdiction where the income is earned – a territorial system.¹³⁸ As a result, a foreign parent corporation that has its main office in the foreign parent jurisdiction, but a subsidiary in another foreign jurisdiction, will not be taxed by the foreign parent jurisdiction on its foreign subsidiary's income.¹³⁹ This system allows the foreign corporation to reinvest the income from its subsidiary and, consequently, out-compete its U.S. competitors.¹⁴⁰ The U.S. corporation will be at a distinct disadvantage because it will have allocated this reinvestment money to the payment of U.S. taxes.¹⁴¹ While the draft REPO Act will not resolve this inequity in the worldwide tax system, there are several proposals designed to fix this problem,¹⁴² most notably the one by Chairman Thomas of the House Ways and Means Committee.¹⁴³ However, until one of these solutions becomes readily acceptable to a divided Congress, the problem will continue to generate adventurous tax planning, resulting in, for example, a corporate inversion. As such, it is likely that advisors to inverting corporations will create new methods to achieve the same result without triggering the draft REPO Act provisions.

136. *Id.*

137. *See* NFTC, *supra* note 28, at 9–12; *see also* Mohr, *supra* note 95.

138. *See* Thompson, *supra* note 86.

139. *See* NFTC, *supra* note 28, at 9–10.

140. *See* NFTC, *supra* note 28, at 5–6 n.7. *But see* Thompson, *supra* note 86 (indicating that the Treasury Report does not support the idea that companies utilize inversions to address competition problems overseas).

141. *See* NFTC, *supra* note 28, at 14 (describing the ineffectiveness of current foreign tax credit rules to avoid double taxation).

142. *See* Thompson, *supra* note 86; *see also* International Tax Simplification and Fairness for American Competitiveness Act of 2002, H.R. 4047, 107th Cong. (2002); International Tax Simplification for American Competitiveness Act of 1999, H.R. 2018, 106th Cong. (1999).

143. American Competitiveness and Corporate Accountability Act of 2002, H.R. 5095, 107th Cong. (2002).