Legislative Foundation of the United States' New International Tax System

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ABSTRACT

This Note begins with commentary on the United States' former worldwide system of taxation. This system taxed multinational corporations' offshore profits at the applicable domestic income tax rate less credits for taxes paid to foreign governments. This tax regime provided for the deferral of income tax due on the profits of multinational corporations' overseas operations until the time of repatriation. This Note considers the issues inherent in this system and analyzes the repatriation tax holiday under the American Jobs Creation Act of 2004. This holiday has been unanimously criticized by both sides of the political aisle and led to large multinational corporations stockpiling offshore profits at an even higher rate, likely in anticipation of more favorable legislation. This Note then contends that subsequent legislation aimed at altering the repatriation tax was viewed warily by members of Congress, who were cognizant of the holiday's many failures. This Note concludes with an analysis of the Tax Cuts and Jobs Act, which replaced the United States' former worldwide taxation system with a territorial taxation system. This new system, which does not tax multinational corporations' foreign profits, rightly worries many commentators. However, anti-base erosion measures, a lower corporate income tax rate, and an influx of foreign-held cash may quell any negative effects this transition may have.

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INTRODUCTION

Multinational corporations (MNCs) are not a modern phenomenon. In the seventeenth century, firms such as the East India Company spearheaded intercontinental economic expansions, creating

unprecedented wealth in their home countries.[1] The structure of what would become modern MNCs became even more apparent with the emergence of the nineteenth century industrial capitalist system.[2] Since then, technology, deregulation, and market liberalization have continued to advance the global economic structure in which MNCs prosper.[3]

Over time, MNCs have grown dramatically in number and power. At the beginning of the Second World War there were an estimated seven thousand MNCs; by the end of the twentieth century, an estimated sixty-three thousand.[4] Today, MNCs account for roughly 80% of global trade.[5] This increase in the number and power of MNCs has resulted in novel issues; one unresolved issue contemplates how an MNC's domestic jurisdiction should tax foreign-sourced income.

The United States has subjected MNCs domiciled within its borders to a tax on income "from whatever source derived."[6] Accordingly, the United States assessed a tax on MNCs' foreign-sourced income just as it did on their domestic income. This system of taxation is referred to as a "worldwide" system of taxation, which is not the norm elsewhere; less than ten countries employ some form of this system.[7] In conjunction with this worldwide system, the U.S. tax regime provided for the indefinite deferral of the income tax on MNCs' offshore income until it was repatriated—commonly referred to as Subpart F deferral.[8]

MNCs have stockpiled cash offshore because the tax on foreign-sourced income can be deferred until the time of repatriation.[9] The Subpart F deferral regime has allowed large companies that do not require immediate domestic access to their offshore earnings (Google, Pfizer, etc.)

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1. *See generally* NICK ROBINS, THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL (2012).

2. *See* Bruce Mazlish, *Three Factors of Globalization: Multinational Corporations, Non-Governmental Organizations, and Global Consciousness*, GLOBALITY STUD. J. (Mar. 1, 2012), https://gsj.stonybrook.edu/view/three-factors-of-globalization-multinational-corporations-non-governmental-organizations-and-global-consciousness/ [https://perma.cc/3MT4-R42A].

3. John Stopford, *Multinational Corporations*, FOREIGN POL'Y, Winter 1998–1999, at 12, 12 ("Recent advances in information technology, coupled with deregulation and market liberalization worldwide, have fueled an unprecedented surge in the growth of [MNCs].").

4. Mazlish, *supra* note 2.

5. *See* Press Release, United Nations Conference on Trade & Dev., 80% of Trade Takes Place in "Value Chains" Linked to Transnational Corporations, UNCTAD Report Says (Feb. 27, 2013), http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=113 [https://perma.cc/6R53-K2A9].

6. I.R.C. § 61(a) (2012) (defining gross income).

7. Kyle Pomerleau, *Worldwide Taxation is Very Rare*, TAX FOUND. (Feb. 5, 2015), https://taxfoundation.org/worldwide-taxation-very-rare/ [https://perma.cc/LHQ4-4KQC].

8. *See* I.R.C §§ 951–965 (Subpart F).

9. *See* Lynnley Browning, *IRS Issues Tax Rate Guidance for Stockpiled Foreign Income*, BLOOMBERG (Dec. 29, 2017), https://www.bloomberg.com/news/articles/2017-12-29/irs-issues-guidance-on-tax-rates-for-stockpiled-foreign-income [https://perma.cc/NR5K-3GZK].

to keep large sums of money in low-tax jurisdictions and delay repatriation.[10] This strategy not only stymies MNCs' domestic cash holdings but also costs the United States up to $111 billion each year.[11] That is roughly a third of the $320.7 billion the United States collected from corporate income taxes during fiscal year 2014.[12]

The billions in revenue gained through assessment of tax on foreign-held corporate dollars would be a welcome addition to our constrained federal budget. For example, the federal education budget may not have suffered a 13% decrease in funding in 2018 if the government had access to this revenue.[13] Further, the MNCs themselves could use repatriated cash domestically for many positive ends, such as job creation, investments, and shareholder dividends. Both public and private sectors benefit when MNCs repatriate; consequently, repatriation avoidance became an issue in need of a legislative solution.

A change to the repatriation tax scheme was inevitable. This Note explores how and why the worldwide system was replaced with a territorial system of taxation, wherein foreign sourced income is offset by a deduction of equal amount.[14]

For decades, both sides of the political aisle have attempted to bring the trillions of dollars MNCs held offshore back home by restructuring the repatriation tax. However, until the passing of the Tax Cuts and Jobs Act, legislative efforts to entice MNCs to repatriate have been largely unsuccessful. Congress has attempted other short-term answers; the results of which have been, in effect, to reward MNCs that avoided the repatriation tax.

Part I of this Note will provide an overview of the former worldwide system, including how the repatriation tax operated and the results of MNCs' avoidance and evasion. Part II of this Note will discuss the American Jobs Creation Act of 2004, legislation that included a short-term repatriation tax holiday. Additionally, this section will provide a general overview of the holiday, the rationale behind its enactment, and how it failed to meet its goals, thereby affecting future attempts at repatriation

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10. *See* Jesse Drucker, *How Tax Bills Would Reward Companies That Moved Money Offshore*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/business/taxes-offshore-repatriation.html.

11. Kimberly A. Clausing, *The Effect of Profit Shifting on the Corporate Tax Base in the United States and Beyond*, 69 NAT'L TAX J. 905, 930 (2016).

12. Media Briefing, Oxfam Am., Broken at the Top: How America's Dysfunctional Tax System Costs Billions in Corporate Tax Dodging 9 (Apr. 14, 2016), https://www.oxfamamerica.org/static/media/files/Broken_at_the_Top_4.14.2016.pdf.

13. DEP'T OF EDUC., PRESIDENT TRUMP'S FY 2018 BUDGET 1, https://www2.ed.gov/about/overview/budget/budget18/budget-factsheet.pdf (last visited Jan. 8, 2018) (the estimated yearly revenue from repatriation is nearly twice the federal education budget).

14. *See infra* Part IV.

legislation. Part III of this Note will explore selected repatriation tax proposals since the 2004 holiday: the American Recovery and Reinvestment Act of 2009, the Partnership to Build America Act, and the border adjustment tax proposal. This Note will provide an analysis about what these proposals aimed to do and why they failed. Part IV will look prospectively at the new territorial tax system by analyzing how the Tax Cuts and Jobs Act operates and critiquing the consequences of its implementation. This Note concludes that negative effects of this transition may be quelled by anti-base erosion measures, a lower corporate income tax rate, and an influx of foreign-held cash.

I. Overview of the Worldwide System's Repatriation Tax

Before the territorial system, the United States was unique in that it taxed income earned outside of its borders by MNCs domiciled within.[15] Importantly, MNCs could defer the income tax indefinitely per the deferral rules in Subpart F.[16] This repatriation tax subjected MNCs' foreign-sourced income to the same rate as their domestic income, which was one of the highest corporate income tax rates in the industrialized world at 35%.[17]

These three former features of the U.S. tax system—a relatively high statutory rate applied worldwide, intricate deferral rules in Subpart F, and an eventual tax on repatriated earnings—help illuminate why Fortune 500 companies stockpiled an estimated $2.6 trillion offshore.[18] Studies show that the magnitude of the cash held abroad is a consequence of tax costs associated with repatriating foreign income.[19]

A. The Repatriation Tax Treatment

MNCs' foreign subsidiaries were still subject to income taxation in the jurisdiction where they were domiciled.[20] Therefore, foreign subsidiaries' earnings were subject to double taxation: the applicable tax in both the foreign jurisdiction where they were domiciled and the U.S.

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15. *See* I.R.C. § 61(a) (2012); JANE G. GRAVELLE, CONG. RES. SERV., R42624, MOVING TO A TERRITORIAL INCOME TAX: OPTIONS AND CHALLENGES 2–6 (2012).

16. *See* I.R.C. § 951(a).

17. DELOITTE, CORPORATE TAX RATES 2017 (2017), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-corporate-tax-rates.pdf (this statutory rate does not reflect bracket, marginal, or effective rates, which are beyond the scope of this Note).

18. *Fortune 500 Companies Hold a Record $2.6 Trillion Offshore*, INST. TAX'N & ECON. POL'Y (Mar. 28, 2017), https://itep.org/fortune-500-companies-hold-a-record-26-trillion-offshore/.

19. C. Fritz Foley et al., *Why Do Firms Hold So Much Cash? A Tax-Based Explanation*, 86 J. FIN. ECON. 579, 579 (2007) ("[F]irms facing higher repatriation taxes hold higher levels of cash, hold this cash abroad, and hold this cash in affiliates that trigger high tax costs when repatriating earnings.").

20. I.R.C. § 61(a) (2012).

corporate income tax. To offset this burden, the United States used a tax-credit system.[21] In this system, an MNC's domestic and foreign income were taxed at the same rate; however, the rate applied to foreign income was offset by tax credits received for taxes paid to foreign governments.[22] Tax credits were not given for all taxes paid to foreign governments; they were only given for the foreign tax paid on the money being repatriated.[23] These tax credits could only be used on an MNC's tax obligations arising from the repatriation of foreign profits; they could not be used for domestic obligations.[24] Thus, the tax-credit system prevented MNCs' foreign subsidiaries from being subjected to double taxation.

The worldwide system allowed for the deferral of domestic tax obligations on foreign income until the time of repatriation.[25] Deferral was generally available on income produced in a foreign country by controlled-foreign-corporations (CFCs).[26] If a foreign affiliate firm was simply a branch of an MNC incorporated in the United States (i.e., not separately incorporated in the foreign jurisdiction) its profits were taxed immediately at the U.S. rate less applicable tax credits.[27] An MNC's opportunities to defer the tax on foreign income from their CFCs were limited by Subpart F of the Internal Revenue Code (I.R.C.).[28] Under Subpart F, types of passive foreign income, such as interest and dividends, were exempt from deferral and taxed immediately.[29]

A simple example of how an MNC would use the credit system can be illustrated by considering a U.S. corporation earning money in Ireland, the world's sixth "worst" tax haven according to OxFam International.[30] For the purposes of this example, the MNC is subject to a U.S. corporate income tax rate of 35%, Ireland has a corporate income tax rate of 12.5%, and the exchange rate between the two countries is 1:1. The U.S. MNC has an affiliate firm incorporated in Ireland that has earned $800,000.

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21. *See Id.* § 960; GRAVELLE, *supra* note 15, at 4.

22. GRAVELLE, *supra* note 15, at 4.

23. *See* Foley et al., *supra* note 19, at 582–83.

24. *Id.* at 583.

25. *Id.* at 582.

26. *Id.* A corporation is considered a CFC when it is incorporated in a foreign jurisdiction and when either 50% of its voting power or 50% of the total value of its stock are owned by U.S. shareholders. *See* I.R.C. § 957(a) (2012).

27. Foley et al., *supra* note 19, at 582.

28. *See* I.R.C. §§ 951–965 (Subpart F). *See generally* U.S. DEP'T OF TREASURY OFFICE OF TAX POLICY, THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS (2000), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-SubpartF-2000.pdf.

29. Foley et al., *supra* note 19, at 582.

30. OXFAM, TAX BATTLES: THE DANGEROUS GLOBAL RACE TO THE BOTTOM ON CORPORATE TAX 3 (2016), https://www.oxfam.org/sites/www.oxfam.org/files/bp-race-to-bottom-corporate-tax-121216-en.pdf.

The Irish affiliate defers U.S. tax liability on this money per Subpart F. The Irish firm must first pay $100,000 in taxes to the Irish government (12.5% of $800,000). It then repatriates $70,000 to the U.S. firm, triggering the repatriation tax. The Irish affiliate is eligible for a tax credit of $100,000 multiplied by the ratio of dividends to after-tax profits (70,000/700,000). Therefore, there are $10,000 in tax credits to offset the $24,500 repatriation tax. The MNC can get the $70,000 to the U.S. by paying $14,500 more in U.S. repatriation taxes—a net increase of $55,500 in domestically accessible capital.

The remaining foreign income, $630,000 ($800,000 less $100,000 in Irish taxes and $70,000 repatriated), can be invested and grow tax-free so long as it remains overseas.[31] If the MNC is not in need of liquid assets for use in its home country, the best business decision would be to allow that money to grow abroad until it is advantageous to repatriate (e.g., a tax holiday is enacted).[32]

B. The Result of Multinational Corporations Avoiding Repatriation

In 2017, there was an estimated $2.6 trillion being held offshore by U.S. MNCs that wished to avoid the repatriation tax.[33] That is only one troubling number. Roughly $77 billion to $111 billion in tax revenue was lost annually from such profit-shifting.[34] This revenue could have been instrumental in strengthening infrastructure, improving education, or providing healthcare.

Of course, when foreign income is held offshore, MNCs cannot invest it domestically. The effect repatriating $2.6 trillion would have on the U.S. economy is substantial; for reference, that amount is roughly equal to the gross market capitalization of France.[35]

Other problematic results from MNCs avoiding the repatriation tax were subtler. For example, one may assume that an MNC holding billions of dollars in cash or assets offshore could not benefit from it. This is not

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31. This example is heavily drawn from Kimberly A. Clausing & Kevin A. Hassett, *The Role of U.S. Tax Policy in Offshoring*, *in* BROOKINGS TRADE FORUM: 2005: OFFSHORING WHITE-COLLAR WORK 457, 458–59 (Susan M. Collins & Lael Brainard eds., 2006).

32. As will be discussed later in this Note, MNCs can and do tap into these profits to meet their domestic cash flow needs through complex financing transactions and other intricate arrangements. Corporate finance is rarely so simple as transferring large sums of cash to meet cash flow demands. There are other ways MNCs can access value and deploy it around the world without ever actually transferring the cash itself. The IRS has closed some of these loopholes, but many are still available.

33. INST. TAX'N AND ECON. POL'Y, *supra* note 18.

34. Clausing, *supra* note 11, at 906.

35. *See Market Capitalization of Listed Domestic Companies (Current US$)*, WORLD BANK, https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?locations=FR&year_high_desc=true [https://perma.cc/3H7M-WT5Y] (showing France's gross domestic capital was roughly $2.2 trillion in 2016).

true. MNCs used offshore cash and assets as collateral to borrow money domestically, thus freeing up untaxed foreign capital for use in the United States.[36] An MNC could also simply choose to reinvest foreign capital into a foreign state's economy. This would result in a complete loss of potential domestic tax revenue and the inability of the MNC to use that money domestically.

C. Inversions and Earnings Stripping

A common form of repatriation tax avoidance was a corporate inversion.[37] The United States Department of the Treasury defines a corporate inversion:

> [A] transaction in which a U.S.-parented multinational group changes its tax residence to reduce or avoid paying U.S. taxes. More specifically, a U.S.-parented group engages in an inversion when it acquires a smaller foreign company and then locates the tax residence of the merged group outside the U.S., typically in a low-tax country.[38]

Frequently, the effect of a corporate inversion on the business of an MNC is minimal—rarely do operations relocate.[39] The Department of the Treasury has issued regulations that make these inversions expensive and difficult,[40] yet corporate inversions continue.[41] Tightening the rules on corporate inversions did not fix the reasons why MNCs left the United States: the corporate income tax rate and the repatriation tax.[42]

After an inversion, MNCs frequently engage in "earnings stripping."[43] In this scheme, an MNC that is based in a foreign country will loan large amounts of money between its U.S. subsidiaries after a corporate inversion.[44] The debt from these loans is then issued to the U.S.

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36. Oxfam Am., *supra* note 12, at 3.

37. MICHELLE CLARK NEELY & LARRY D. SHERRER, FED. RES. BANK ST. LOUIS, A LOOK AT CORPORATE INVERSIONS, INSIDE AND OUT (2017), https://www.stlouisfed.org/publications/regional-economist/first_quarter_2017/a-look-at-corporate-inversions-inside-and-out [https://perma.cc/2SPZ-J758].

38. Press Release, U.S. Dep't of Treasury, Fact Sheet: Treasury Issues Inversion Regulations and Proposed Earnings Stripping Regulations (Apr. 4, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0404.aspx [https://perma.cc/W24X-YQ3D].

39. NEELY & SHERRER, *supra* note 37.

40. *See, e.g.*, I.R.C. § 7874 (2012) (imposing a tax on the inversion gain of expatriated entities).

41. *See* NEELY & SHERRER, *supra* note 37; U.S. Dep't of Treasury, *supra* note 38.

42. *How to Stop the Inversion Perversion*, THE ECONOMIST (July 26, 2014), https://www.economist.com/news/leaders/21608751-restricting-companies-moving-abroad-no-substitute-corporate-tax-reform-how-stop [https://perma.cc/D5HN-TZZ4].

43. Gary Clyde Hufbauer & Ariel Assa, *Rules Against Earnings Stripping: Wrong Answer to Corporate Inversions*, INT'L ECON. POL'Y BRIEFS, May 2003, at 1, 8. https://piie.com/sites/default/files/publications/pb/pb03-7.pdf [https://perma.cc/4939-VHZM].

44. *Id.*

subsidiary's low-tax foreign parent company.[45] The subsidiary then deducts the resulting interest expense on its U.S. income tax return from its overall earnings.[46] Earnings stripping continued despite attempts to curb the practice.[47]

In 2017, the U.S. Public Interest Research Group Education Fund released a report detailing the massive amount of offshore tax loopholes and exceptions attorneys and accountants have taken advantage of, mostly for Fortune 500 companies.[48] This report found that "[a]t least 366 companies, or 73% of the Fortune 500, operate one or more subsidiaries in tax haven countries."[49] Of these companies, just thirty hold $1.76 trillion offshore—68% of the total dollar amount.[50] Those thirty companies collectively operate 2,213 tax haven subsidiaries.[51]

These numbers beg important questions: Why does the United States continue to allow wealthy Fortune 500 companies to get a pass on their duly owed repatriation taxes, while smaller MNCs pay their fair share? Why are large MNCs who ship assets (and typically at least some jobs) offshore and out of the U.S. economy rewarded, while corporations who remain domestic are forced to shoulder a larger share of our federal tax revenue burden?

II. THE AMERICAN JOBS CREATION ACT OF 2004

Congressman William Thomas (R-CA-22), Chairman of the House Ways and Means Committee, introduced The American Jobs Creation Act of 2004 (AJCA), which President George W. Bush signed into law on October 22, 2004.[52]

At its inception, the AJCA was to be an economic bill that would repeal the United States' extraterritorial income exclusion, which was found to have violated the World Trade Organization's (WTO) policies on

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45. *Id.*

46. U.S. Dep't of Treasury, *supra* note 38.

47. *See* I.R.C. § 163(j) (2012) (limiting deductions when a corporation's debt to equity ratio exceeds 1.5).

48. U.S. PUB. INT. GROUP EDUC. FUND & INST. ON TAX'N AND ECON. POL'Y, OFFSHORE SHELL GAMES 2017: THE USE OF OFFSHORE TAX HAVENS BY FORTUNE 500 COMPANIES 1 (Oct. 17, 2017).

49. *Id.*

50. *Id.* at 12 (The thirty companies are, in descending order by amount held offshore, Apple, Pfizer, Microsoft, General Electric, International Business Machines, Johnson & Johnson, Cisco Systems, Merck, Google, Exxon Mobil, Procter & Gamble, Oracle, Citigroup, Chevron, Intel, PepsiCo, J.P. Morgan Chase & Co., Gilead Sciences, Amgen, Coca-Cola, Qualcomm, Goldman Sachs, United Technologies, AbbVie Inc., Eli Lilly, Wal-Mart Stores, Hewlett Packard Enterprises, Bristol-Myers Squibb, Abbott Laboratories, and Danaher.).

51. *Id.* at 1.

52. American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418–1660 (codified as amended in scattered sections of 26 U.S.C.).

export subsidies.[53] The extraterritorial income exclusion had been a response to the 1999 WTO finding that the United States' foreign sales corporation regime violated two WTO agreements.[54]

The 108th Congress, with Republicans holding 51 seats in the Senate[55] and 229 in the House of Representatives,[56] added section 422 of the AJCA (later codified as I.R.C. § 965),[57] sometimes referred to as the Homeland Investment Act (HIA). The HIA allowed domestic MNCs to claim an 85% dividends-received deduction on certain cash dividends from their foreign subsidiaries for one year.[58] So spawned the 2004 repatriation tax holiday, wherein repatriation of foreign income by U.S. MNCs rose from about $62 billion per year in 2004, taxed at 35%, to $299 billion in 2005 with an effective repatriation tax rate of 5.25%.[59]

A. The Rationale of the Homeland Investment Act

Politicians were already cognizant of the effect repatriation taxes were having on MNCs' tax avoidance when the AJCA was passed. The legislative purpose of the HIA was clear: increase investments in the U.S. economy and in research and development (R&D) and create domestic jobs by incentivizing MNCs to repatriate foreign income held offshore.[60]

Many members of Congress, both Republican and Democrat, voiced strong support of the HIA as a measure that would boost the U.S. economy.[61] Congressman Phil English (R-PA-3) articulated the rationale quite well:

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53. IVINS, PHILLIPS & BARKER, THE AMERICAN JOBS CREATION ACT OF 2004: AN ANALYSIS OF SELECTED PROVISIONS 1, http://www.ipbtax.com/media/publication/39_IPB%20AJCA%20Analysis.pdf [https://perma.cc/QXG2-LNP7].

54. *Id*.

55. *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/2B4N-2LUA].

56. *Party Divisions of the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES, http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ [https://perma.cc/69KC-MPFB].

57. *See* I.R.C. § 965 (2012).

58. *Id*.; IVINS, PHILLIPS & BARKER, *supra* note 53, at 7.

59. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON HOMELAND SEC. AND GOVERNMENTAL AFFAIRS, 112TH CONG., REPATRIATING OFFSHORE FUNDS: 2004 TAX WINDFALL FOR SELECT MULTINATIONALS 1 (Comm. Print 2012) [hereinafter PSI REPORT] (an 85% deduction to the corporate income tax rate was 5.25%); Dhammika Dharmapala et al., *Watch What I Do, Not What I Say: The Unintended Consequences of the Homeland Investment Act*, 66 J. FIN. 753, 753–54 (2011).

60. *See* PSI REPORT, *supra* note 59.

61. *See, e.g.*, 150 Cong. Rec. H8724 (daily ed. Oct. 7, 2004) (statement of Rep. Mark Udall, Democrat) ("I will vote for it because it includes provisions to encourage American corporations doing business abroad to repatriate their overseas earnings for investment here at home. This has great potential to stimulate investment in new plant and equipment as well as in the research and development that support innovation, job creation, and prosperity."); 150 Cong. Rec. S11038 (daily ed. Oct. 7, 2010) (statement of Sen. Chuck Grassley, Republican) ("This bill contains some of the

> I particularly want to draw attention to one particular job-creating provision in this bill . . . [t]his provision, known as the Homeland Investment Act, is one of the strongest stimulus proposals brought before Congress in recent years, and I think it is going to have a huge impact. It temporarily reduces the tax rate on foreign earnings of U.S. companies, when that money is brought back to the United States for investment here at home. The billions of dollars that will be brought back will be used by American employers to hire new workers, invest in top-of-the-line equipment, and build new plants right here at home, instead of in the countries where their earnings are currently stranded.[62]

The support for a legislative repatriation holiday to stimulate the U.S. economy through the introduction of foreign-held corporate capital into the domestic economy was not based solely on wishful thinking. The HIA included the subsection "Requirement to Invest in United States."[63] This provision required that an MNC taking advantage of the 2004 holiday internally[64] approve of a "domestic reinvestment plan" in which the repatriated money would be used for "worker hiring and training, infrastructure, research and development, capital investments, or the financial stabilization of the corporation for the purposes of job retention or creation."[65]

Further, the repatriated dividends were required to be in cash[66] and were limited to "extraordinary" dividends, defined as the excess of repatriations over the average amount of repatriations during the previous five years, excluding the highest and lowest years.[67] Thus, MNCs that had been stockpiling money abroad, with low average amounts of repatriation, would benefit from the HIA more than MNCs that had steadily repatriated in the past.[68] Therefore, the legislative intent behind the HIA was not to give all MNCs a tax break to surge repatriation generally. Rather, the HIA was included within the AJCA merely to bring back some of the capital that was being stockpiled overseas.

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most important international tax reforms in decades, bringing foreign earnings home for investment in the United States instead of investing overseas, hence creating jobs in the United States.").

62. 150 Cong. Rec. H8704 (daily ed. Oct. 7, 2004) (Statement of Rep. Phil English, Republican).

63. I.R.C. § 965(b)(4) (2012).

64. *Id.* § 965(b)(4)(A) (The domestic reinvestment plan was to be approved by "the [MNC's] president, chief executive officer, or comparable official.").

65. *Id.* § 965(b)(4)(B).

66. *Id*. § 965(a)(1).

67. *See Id*. § 965(b)(2); Jennifer Blouin & Linda Krull, *Bringing It Home: A Study of the Incentives Surrounding the Repatriation of Foreign Earnings Under the American Jobs Creation Act of 2004*, 47 J. ACCT. RES. 1027, 1031–32 (2009).

68. *See* Blouin & Krull, *supra* note 67, at 1032.

The Internal Revenue Service (IRS) promptly followed the passing of the AJCA by releasing Notice 2005-10 on February 7, 2005.[69] This guidance generally detailed the parameters and procedures of a domestic reinvestment plan.[70] The IRS prohibited the plans from including executive compensation,[71] dividends and other distributions with respect to stock,[72] stock redemptions,[73] and tax payments.[74] As will be discussed below, the fungible nature of cash made these IRS limitations nearly unenforceable.

A subsequent empirical study has shown that ninety-three MNCs, individually or working as a coalition, spent a total of $282.7 million on lobbying for the AJCA.[75] This lobbying was a good investment: MNCs received a 22,000% return in tax breaks received as a result of the AJCA.[76] A further study reigns in those numbers:

> $1 million in lobbying expenditures is associated with about $32.35 million in taxes saved, an increase in $100,000 of Political Action Committee contributions is associated with about $15.64 million in taxes saved, and that the additional filing of ten tax-related lobbying reports is associated with about $21.08 million in taxes saved.[77]

Notwithstanding the difference between these two studies, MNCs heavily invested in political lobbying for the AJCA because the amount to be saved in taxes offset (and greatly exceeded) their initial political expenditures.

B. The Results and Criticisms of the Homeland Investment Act

The negative results of the repatriation tax holiday began pouring in after it ran its course. MNCs had repatriated roughly $300 billion of foreign earnings during the holiday.[78] However, instead of creating jobs,

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69. I.R.S. Notice 2005-10, 2005-6 I.R.B. (Feb. 7, 2005), https://www.irs.gov/irb/2005-06_IRB [https://perma.cc/UQB4-7YZP].

70. *See id*.

71. *Id*. § 6.02.

72. *Id*. § 6.04.

73. *Id*. § 6.05.

74. *Id*. § 6.08.

75. Raquel Alexander et al., *Measuring Rates of Return on Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J. L. & POL. 401, 404 (2009).

76. *Id.* ("[C]orporations that lobbied for the tax benefit spent $282.7 million on lobbying expenditures and received $62.5 billion in tax savings, resulting in an average return in excess of $220 for every $1 spent on lobbying, or 22,000 percent.").

77. Hui Chen et al., *Return on Political Investment in the American Jobs Creation Act of 2004* 32 (Harvard Bus. Sch. Accounting & Mgmt. Unit, Working Paper No.15-050, 2014).

78. *See, e.g.*, PSI REPORT, *supra* note 59, at 1 ("[C]orporations returned $312 billion in qualified repatriation dollars to the United States . . . ."); Melissa Redmiles, *The One-Time Received Dividend Deduction*, INTERNAL REVENUE SERV. STAT. INCOME BULL., Spring 2008, at 102, 103 ("[C]orporations repatriated almost $362 billion. Of that, $312 billion qualified for the deduction,

funding R&D, and increasing domestic investments, "estimates imply that every extra dollar of repatriated cash was associated with an increase of $0.60 to $0.92 in payouts to shareholders, largely in the form of share repurchases."[79] Not only does this display a sharp contrast between the intended effects of the HIA and its actual result, it raises an important question: how were MNCs able to use dividends repatriated during the 2004 holiday in ways the IRS guidance explicitly disallowed?[80] The answer is surprisingly simple: the fungibility of cash.[81] Critics argue that MNCs could simply claim that the convergence of shareholder payouts and the receipt of repatriated cash was a "mere coincidence" due to the tremendous leeway afforded to MNCs in the HIA.[82]

On October 11, 2011, the bipartisan[83] Permanent Subcommittee on Investigations (PSI), a subcommittee of the Senate Committee on Homeland Security and Governmental Affairs, released the aptly-named report, "Repatriating Offshore Funds: 2004 Tax Windfall for Select Multinationals" (the PSI Report).[84] The PSI initiated a review in 2009 that included a survey of twenty major MNCs, including the fifteen that repatriated the most in 2005.[85] That review resulted in nine findings of fact, which are the focus of the PSI Report:

(1) U.S. jobs were lost, rather than gained.[86] Broad studies found no evidence that repatriated funds increased employment overall.[87] The top fifteen repatriating MNCs reduced their overall U.S. workforce by 20,931

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creating a total deduction of $265 billion."). *But see* Dharmapala et al., *supra* note 59, at 754 ("[R]epatriations increased from an average of $62 billion per year from 2000 to 2004 to $299 billion in 2005 under the tax holiday.").

79. Dharmapala et al., *supra* note 59, at 782.

80. *See* I.R.S. Notice, *supra* note 69.

81. *See* DONALD J. MARPLES & JANE G. GRAVELLE, CONG. RESEARCH SERV., R40178, TAX CUTS ON REPATRIATION EARNINGS AS ECONOMIC STIMULUS: AN ECONOMIC ANALYSIS 8 (2011) ("Note that because of the fungibility of money, firms that use part of the repatriation to repurchase shares may not violate the law."); PSI Report, *supra* note 59, at 23 ("The fungibility of dollars and the law's failure to require corporate records tracing the use of repatriated funds make it difficult to determine the extent to which repatriated dividends, or funds freed up by repatriated dividends, contributed to the increase in executive pay.").

82. *Postcards from a Tax Holiday*, N.Y. TIMES (Nov. 12, 2005), http://www.nytimes.com/2005/11/12/opinion/postcards-from-a-tax-holiday.html.

83. At the time of the PSI Report, the PSI consisted of Carl Levin (D-MI) (as Chairman), Thomas Carper (D-DE), Mary Landrieu (D-LA), Claire McCaskill (D-MO), Jon Tester (D-MT), Mark Begich (D-AK), Tom Coburn (R-OK), Susan Collins (R-ME), Scott Brown (R-MA), John McCain (R-AZ), and Rand Paul (R-KY).

84. PSI REPORT, *supra* note 59.

85. *Id*. at 3.

86. *Id*. at 4, 12–16.

87. *Id*. at 4; Dharmapala et al., *supra* note 59, at 769.

jobs after the AJCA holiday.[88] The MNC that repatriated the most, $35.5 billion, cut 11,748 jobs between 2004 and 2007.[89]

(2) R&D expenditures did not accelerate.[90] R&D spending in the top fifteen MNCs was consistent with its gradual increase prior to their repatriation of over $149 billion.[91] Broader studies "concluded that there was no evidence that the 2004 AJCA repatriation led to increased R&D spending overall."[92]

(3) Stock repurchases increased after repatriation.[93] Despite the IRS guidance forbidding repatriated funds being used for stock repurchases,[94] twelve of the top fifteen repatriating MNCs increased their stock repurchases from 2004 to 2009.[95] The results of the PSI review found that stock repurchases decreased 10% from 2002 to 2003, then "increas[ed] 13% from 2003 to 2004, 16% from 2004 to 2005, rising the most, 38%, from 2005 to 2006, and 9% from 2006 to 2007."[96] MNCs claimed that the convergence of stock repurchases and their repatriation of billions of dollars was a "mere coincidence."[97] Therefore, the PSI report shrugs this off as a "disturbing parallel."[98]

(4) Executive compensation increased after repatriation.[99] Again, funds were barred from being used for executive compensation by the IRS guidance.[100] Despite this, the top fifteen repatriating MNCs increased compensation for their top five executives the most after the MNCs repatriated offshore funds.[101] The PSI Report found that executive compensation at those MNCs "decreased 9%, then increased 14% from 2003 to 2004, increased 27% from 2004 to 2005, increased the most, 30%, from 2005 to 2006, and increased 2% from 2006 to 2007."[102] The MNCs

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88. PSI REPORT, *supra* note 59, at 4.
89. *Id*. at 13.
90. *Id.* at 4, 17–19.
91. *Id*. at 17.
92. *Id*. at 19; *see also* Blouin & Krull, *supra* note 67, at 1027; Dharmapala et al., *supra* note 59, at 769.
93. PSI REPORT, *supra* note 59, at 4, 20–23; Dharmapala et al., *supra* note 59, at 771.
94. I.R.S. Notice, *supra* note 69, § 6.04.
95. PSI REPORT, *supra* note 59, at 21.
96. *Id*.
97. N.Y. TIMES, *supra* note 82.
98. PSI REPORT, *supra* note 59, at 20 ("[S]ubsequent research has shown a disturbing parallel between an increase in repatriated funds and an increase in share buybacks at the repatriating corporation.").
99. *Id*. at 4, 23–27.
100. I.R.S. Notice, *supra* note 69, § 6.02.
101. PSI REPORT, *supra* note 59, at 23.
102. *Id.* at 24.

were not found in violation for these empirical trends; the PSI Report calls them "troubling parallels."[103]

(5) Only a narrow sector of multinationals benefited.[104] Just 843 of the roughly 9,700 MNCs with CFCs participated in the AJCA holiday.[105] Of the $312 billion qualifying funds, $157 billion were repatriated by MNCs in two industry sectors: pharmaceuticals and technology.[106] Pharmaceutical and medical manufacturing MNCs were only 3% of the 843 participating MNCs, yet they claimed nearly one-third of the total amount repatriated.[107] MNCs with substantial offshore cash holdings benefitted the most from the repatriation holiday; thus, small businesses have heavily criticized it as an unfair tax benefit for large MNCs while they pay their fair share.[108]

(6) Most repatriated funds flowed from tax havens.[109] Of nineteen MNCs surveyed, seven repatriated between 90% and 100% of funds from tax havens while five repatriated 70% to 89% of such funds.[110] PepsiCo, Inc. repatriated roughly $7.5 billion, 91.1% of which flowed from a CFC in Bermuda that had one full-time employee.[111] PepsiCo disclosed that "the Bermuda holding company held and managed funds generated by a network of its other international subsidiaries."[112] The MNCs that repatriated were those sitting on stockpiled cash overseas—not smaller corporations that actually required the cash for domestic use.

(7) Offshore funds increased after the 2004 repatriation.[113] MNCs that repatriated under the 2004 holiday have since grown their offshore funds at an even greater rate than before.[114] It is suggested that one of the AJCA's lasting effects was "the conditioning of firms to expect future such holidays and to arrange their affairs accordingly."[115] One study contends

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103. *Id*. at 23.
104. *Id*. at 4, 28–30.
105. *Id*. at 28.
106. *Id*.
107. *Id*.
108. *See id*. at 29–30; *see also* letter from Holly Sklar, Exec. Dir., Bus. for Shared Prosperity, to Senators and Representatives of Congress (June 6, 2011), http://businessforsharedprosperity.org/content/letter-congress-no-tax-holiday-us-multinationals ("When powerful large U.S. corporations avoid their fair share of taxes, they undermine U.S. competitiveness, contribute to the national debt and shift more of the tax burden to domestic businesses, especially small businesses that create most of the new jobs.").
109. PSI REPORT, *supra* note 59, at 5, 30–33.
110. *Id*. at 30–31.
111. *Id*. at 31–32.
112. *Id*. at 32.
113. *Id*. at 5, 33–37.
114. *Id*. at 33; Lee A. Sheppard & Martin A. Sullivan, *Multinationals Accumulate to Repatriate*, TAX NOTES INT'L, Feb. 2, 2009, at 376.
115. Thomas J. Brennan, *What Happens After a Holiday? Long-Term Effects of the Repatriation Provision of the AJCA*, 5 NW. J.L. & SOC. POL'Y 1, 17 (2010).

that "the AJCA holiday may have been responsible for the long-term classification of an increased fraction of foreign earnings being labeled as permanently reinvested overseas and also for a long-term increase in the amount of earnings generation that firms carry out overseas rather than in the United States."[116]

(8) More than $2 trillion in cash assets were held domestically by U.S. corporations in 2011.[117] Proponents of the HIA argued that MNCs needed to repatriate offshore funds because they were financially constrained.[118] Professor John Slemrod, former senior tax counsel for President Reagan's Council of Economic Advisors, said the HIA's proponents' assertion "holds no water at all . . . [t]he fact that [corporations] have these cash hoards suggests that investment is not constrained by lack of cash."[119]

(9) The AJCA repatriation holiday was a failed tax policy.[120] The PSI Report found that the 2004 repatriation holiday did not have its intended stimulus effect on the U.S. economy.[121] The repatriation holiday "cost the U.S. Treasury an estimated net revenue loss of $3.3 billion over ten years, produced no appreciable increase in U.S. jobs or research investments, and led to U.S. corporations directing more funds offshore."[122]

Academics and politicians have widely accepted the PSI Report's nine findings while conflicting studies are largely discredited.[123] Many attempts to enact similar repatriation holidays or otherwise modify the repatriation tax scheme have failed because of the bipartisan rebuke of the 2004 repatriation holiday's effects.

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116. *Id.*

117. PSI REPORT, *supra* note 59, at 5, 37–38.

118. *See id.* at 37; Dharmapala et al., *supra* note 59, at 753.

119. Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 9:01 PM), https://www.bloomberg.com/news/articles/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash [https://perma.cc/HX7M-VFG5] (quoting Professor Slemrod).

120. PSI REPORT, *supra* note 59, at 5, 39–41.

121. *Id.* at 39.

122. *Id.* at 5.

123. *See, e.g.*, Scott Dyreng & Robert Hills, *Evidence that Corporate Repatriations Under the American Jobs Creation Act of 2004 Benefited the Domestic Economy*, DUKE U. FUQUA SCH. BUS. (May 29, 2017) (in which the authors find job growth in the geographic region immediately surrounding the headquarters of some repatriating MNCs); Allen Sinai, *Macroeconomic Effects of Reducing the Effective Tax Rate on Repatriated Foreign Subsidiary Earnings in a Credit- and Liquidity-Constrained Environment*, DECISIONS ECON. (Nov. 2008, revised Jan. 30, 2009), https://www.heartland.org/_template-assets/documents/publications/30322.pdf (in which the author used computer simulations, rather than actual economic data, to support his assertions).

III. Selected Legislation Proposed Between the AJCA and the Tax Cuts and Jobs Act

After the failure of the HIA, Congress struck down every attempt at repatriation tax reform until the passage of the Tax Cuts and Jobs Act. This section will consider three selected proposals: The Boxer–Ensign amendment to the American Recovery and Reinvestment Act, the Partnership to Build America Act, and the border adjustment tax proposal.

A. The Boxer–Ensign Amendment to the American Recovery and Reinvestment Act

The American Recovery and Reinvestment Act (ARRA), also called the Stimulus Legislation, was a response to the Great Recession of 2008.[124] Its purpose was to make "supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization."[125] President Obama signed the ARRA into law on February 17, 2009.[126]

On February 3, 2009, only weeks before the bill was to become law, Senator Barbara Boxer (D-CA) proposed an amendment, on behalf of herself and Senator John Ensign (R-CA), to the ARRA (the Boxer–Ensign Amendment), which would "allow the deduction for dividends received from controlled foreign corporations for an additional year."[127] The Boxer–Ensign Amendment would substitute new dates for those codified in I.R.C. § 965 (the HIA).[128] It further substituted language regarding what investments MNCs could use repatriated funds for: "(i) worker hiring and training, (ii) research and development, (iii) capital improvements, (iv) acquisitions of business entities for the purpose of retaining or creating jobs in the U.S., and (v) clean energy initiatives."[129] In response to the critiques of the 2004 holiday, the Boxer–Ensign Amendment required that an audit be performed on each repatriating MNC to ensure the repatriated funds were used appropriately.[130]

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124. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 16 U.S.C. and 42 U.S.C.); Michael Levy, *American Recovery and Reinvestment Act*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/American-Recovery-and-Reinvestment-Act [https://perma.cc/55J6-FU68].

125. American Recovery and Reinvestment Act of 2009, Pub. L. No.111-5, 123 Stat. 115.

126. Levy, *supra* note 124.

127. 155 Cong. Rec. S1408 (daily ed. Feb. 3, 2009) (the Boxer–Ensign Amendment appears on page S1408).

128. *Id*. ("substituting 'January 1, 2010,' for 'the date of the enactment of [§ 965]'" and "substituting 'June 30, 2009' for 'June 30, 2003'").

129. *Id*. (see § (a)(2)(B)(i)-(v) of the Boxer–Ensign Amendment) (internal quotation marks omitted).

130. *See id*. at S1408–09 (see § (a)(3) of the Boxer–Ensign Amendment).

The Boxer–Ensign Amendment was sold to Congress as a bipartisan approach to repatriation that could stimulate the economy after the Great Recession.[131] Senator Boxer acknowledged that the 2004 repatriation holiday did not meet its goals; however, she argued that the audit of MNCs would adequately address the issue of the fungibility of cash that impeded the success of the HIA.[132]

Although Senators Boxer and Ensign attempted to tighten the ropes of the HIA, the Boxer–Ensign Amendment was not included in the ARRA.[133] It was rejected by a vote of forty-two YEAs to fifty-five NAYs on the day it was proposed.[134] The votes show a party split despite the bipartisan nature of the bill: 79% of the YEAs were Republican votes and 86% of the NAYs were Democrat votes.[135] At the time of this vote, nine of the eleven senators that would later author the PSI Report were in office.[136] Of those nine senators, seven voted NAY and two voted YEA.[137]

B. The Partnership to Build America Act

The Partnership to Build America Act (PBAA) was the brainchild of Congressman John Delaney (D-MD-6).[138] He proposed the Partnership to Build America Act of 2013 on May 22, 2013 (PBAA 2013),[139] and proposed identical bills in 2015 and 2017: The Partnership to Build America Act of 2015 (PBAA 2015)[140] and The Partnership to Build America Act of 2017 (PBAA 2017).[141]

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131. *Id.* (Boxer argued, "We have a number of cosponsors, so this is truly a bipartisan amendment, and I think it is worthy of everyone's consideration.").

132. *Id*. at S1409 ("Now, what you are going to hear from some of my colleagues is that some of the companies did not live up to the spirit of the amendment. The spirit of the amendment was to bring the money home and invest it here at home in job-producing activity. It is true . . . I tell you what we do, we guarantee that there will be an audit of these companies. Now, I would say to any of my colleagues who oppose it, show another case where we pass a tax break and we require every company that takes advantage of it to get audited. As a matter of fact, I think it is a fantastic precedent to set around here . . . . We address the issue of fungibility. We require that foreign funds must be spent in addition to the current spending level, not to displace money. We require that. We assure transparency and accountability.").

133. American Recovery and Reinvestment Act of 2009: Roll Vote No. 36, 155 Cong. Rec. S1420 (daily ed. Feb. 3, 2009).

134. *Id*.

135. *Id*.

136. *See id*. (Sen. Brown (R-MA) and Sen. Paul (R-KY) joined the Senate in 2010 and 2011, respectively.).

137. *Id*. (The two YEAs were from Senator Coburn (R-OK) and Senator McCain (R-AZ).).

138. *See Information on the Partnership to Build America Act*, CONGRESSMAN JOHN DELANEY, www.delaney.house.gov/infrastructure/information-on-congressman-delaneys-infrastructure-bill [https://perma.cc/92NB-5RNJ].

139. Partnership to Build America Act of 2013, H.R. 2084, 113th Cong. (2013).

140. Partnership to Build America Act of 2015, H.R. 413, 114th Cong. (2015).

141. Partnership to Build America Act of 2017, H.R. 1669, 115th Cong. (2017).

All iterations of the PBAA attempted to establish a wholly owned government corporation: the American Infrastructure Fund (AIF).[142] The AIF was to sell $50 billion of fifty-year infrastructure bonds to MNCs through a competitive bidding process.[143] The MNCs investing in these bonds would be allowed a foreign earnings tax exclusion, which would be a multiple of their investment, for the purpose of repatriating money from their CFCs.[144] The MNCs would be bidding on how low of a multiplier they would accept;[145] in no case could the multiplier be greater than six.[146] The AIF would then leverage the $50 billion in bonds at a 15:1 ratio to provide up to $750 billion in loans or guarantees.[147]

Under this scheme, if an MNC were to purchase $1 million in bonds with a multiplier of four, the MNC could then repatriate $4 million tax free. Unlike the HIA, the funds repatriated under the PBAA would not be subject to a domestic reinvestment plan; thus, a participating MNC could use its repatriated foreign income freely.[148]

According to Congressman Delaney's website, the AIF would "finance the rebuilding of our country's transportation, energy, communications, water, and education infrastructure through the creation of an infrastructure fund using repatriated corporate earnings."[149] This infrastructure-funding-based-mechanism's purpose was warranted by the American Society of Civil Engineer's 2013 Report Card for America's Infrastructure, which gave it a "D+ G.P.A." and estimated that an investment of $3.6 trillion would be needed by 2020.[150]

PBAA 2013 was quickly supported by both Democrats and Republicans in the House of Representatives.[151] The media also reported positively on PBAA 2013; one editorial identified the attractiveness of the bill as follows:

> What makes [PBAA 2013] so appealing is that it hits two birds with one stone. The fund would be financed by borrowing money privately—allowing private companies to repatriate foreign profits

142. *See* H.R. 1669; H.R. 413; H.R. 2084.

143. H.R. 1669 § (2)(d)(5); H.R. 413 § (2)(d)(5); H.R. 2084 § (2)(d)(5).

144. H.R. 1669 § (2)(d)(5); H.R. 413 § (2)(d)(5); H.R. 2084 § (2)(d)(5).

145. H.R. 1669 § (2)(d)(5)(A)(ii); H.R. 413 § (2)(d)(5)(A)(ii); H.R. 2084 § (2)(d)(5)(A)(ii).

146. H.R. 1669 § (2)(d)(5)(B); H.R. 413 § (2)(d)(5)(B); H.R. 2084 § (2)(d)(5)(B).

147. *Information on the Partnership to Build America Act*, *supra* note 138.

148. *See* H.R. 1669; H.R. 413; H.R. 2084.

149. *Information on the Partnership to Build America Act*, *supra* note 138.

150. *2013 Report Card for America's Infrastructure*, AM. SOC'Y OF CIV. ENG'RS, http://2013.infrastructurereportcard.org/ [https://perma.cc/3SRP-YP69].

151. COSPONSORS: H.R. 2084—113TH CONGRESS (2013–2014), www.congress.gov/bill/113th-congress/house-bill/2084/cosponsors?q=%7B"search"%3A%5B"Partnership+to+Build+America+Act+of+2013"%5D%7D [https://perma.cc/AB4G-JB3P] (This bill eventually had seventy-five cosponsors. Thirty-nine are republican and thirty-six are democrat.).

> by purchasing $50 billion in 50-year bonds that will pay for the badly-needed road, transit, water, sewer, energy and other projects . . . . Most in Congress understand that the nation has an enormous infrastructure backlog . . . and many probably also recognize that the billions of dollars in profits American-based multinational companies have parked off-shore pose a challenge, too.[152]

It is no surprise that there was initial excitement about a bill that could, in theory, provide $750 billion in financing for U.S. infrastructure with zero federal appropriations. Senator Michael Bennet (D-CO) then proposed the Senate version of the bill (PBAA 2014) on January 16, 2014.[153]

PBAA 2014 was met with criticism despite the initial positive reaction to PBAA 2013. On February 10, 2014, not even a month after PBAA 2014 was proposed, the Economic Policy Institute (EPI) released a memo finding that PBAA 2014 would cost the government between $70 billion and $100 billion in lost revenue and that using a direct appropriation of $50 billion would save the government money and avoid incentivizing MNCs' tax-dodging behavior.[154] A coalition of thirty-six organizations cited the EPI memo and the PSI Report in a letter to Senators urging them to reject PBAA 2014 because it would reward MNCs that kept profits offshore.[155]

Every PBAA proposal has disappeared into various subcommittees.[156] The most recent proposal, PBAA 2017, had twenty-seven cosponsors in the House of Representatives; that is about one-third

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152. *A New Way to Rebuild*, BALT. SUN (Jan. 21, 2014), http://www.baltimoresun.com/news/opinion/editorial/bs-ed-infrastructure-20140121-story.html [https://perma.cc/8VA2-VN73].

153. Partnership to Build America Act of 2014, S. 1957, 113th Cong. (2014).

154. Thomas L. Hungerford, *How Not to Fund an Infrastructure Bank*, ECON. POL'Y INST. 3 (Feb. 10, 2014), http://www.epi.org/files/2014/how-not-to-fund-infrastructure-bank.pdf.

155. Letter from 9to5 et al., to Senators of Congress, https://americansfortaxfairness.org/issues/tax-havens/oppose-s-1957-sen-bennets-partnership-to-build-america-act/ [https://perma.cc/T9YT-FFN2].

156. *See, e.g.*, ALL ACTIONS EXCEPT AMENDMENTS H.R. 1669—115TH CONGRESS (2017–2018), https://www.congress.gov/bill/115th-congress/house-bill/1669/all-actions-without-amendments?q=%7B%22search%22%3A%5B%22Partnership+to+Build+America+Act+of+2017%22%5D%7D&r=1 [https://perma.cc/SM7G-Z4X2]; ALL ACTIONS EXCEPT AMENDMENTS H.R. 413—114TH CONGRESS (2015–2016), https://www.congress.gov/bill/114th-congress/house-bill/413/all-actions-without-amendments [https://perma.cc/23MM-WVMU]; ALL ACTIONS EXCEPT AMENDMENTS H.R. 2084—113TH CONGRESS (2013–2014), https://www.congress.gov/bill/113th-congress/house-bill/2084/all-actions-without-amendments?q=%7B%22search%22%3A%5B%22Partnership+to+Build+America+Act+of+2013%22%5D%7D [https://perma.cc/DU84-9F2D]; ALL ACTIONS EXCEPT AMENDMENTS S.1957—113TH CONGRESS (2013–2014), https://www.congress.gov/bill/113th-congress/senate-bill/1957/all-actions-without-amendments [https://perma.cc/P7TL-2JVM].

the 2013 proposal amassed.[157] Now, the implementation of a territorial tax system has ended Congressman Delaney's vision of funding U.S. infrastructure with a repatriation tax holiday.

C. The Border Adjustment Tax Proposal

In January 2016, House Republicans, led by Ways and Means Committee Chairman Representative Kevin Brady (R-TX-8), formed the Tax Reform Task Force (TRTF).[158] The TRTF's goal was "to deliver a strategy to create jobs, grow the economy, and raise wages by reducing rates, removing special interest carve-outs, and making our broken tax code simpler and fairer."[159] The TRTF released a blueprint of their tax reform proposal on June 24, 2016, which summarized the legislation they were to formally propose to Congress.[160]

The TRTF blueprint included a call for the replacement of the United States' worldwide tax system with a territorial tax system.[161] The TRTF blueprint would subject foreign earnings that had already accumulated offshore (about $2.6 trillion)[162] to a reduced repatriation tax. Cash and cash-like equivalents would be subject to an 8.75% tax while other assets would be subject to a 3.5% tax.[163] The TRTF blueprint claimed that MNCs would use their foreign earnings repatriated under this scheme "to create American Jobs and grow their U.S. operations."[164] That claim seems to run contrary to the results of the 2004 holiday, which offered a comparable repatriation tax rate but added restrictions to what the repatriated funds could be used for.[165]

In addition to the territorial tax system, the TRTF blueprint called for the implementation of a border adjustment tax (BAT).[166] The BAT would have changed the way corporations are taxed in the U.S. by replacing the tax scheme at the time, which subjected corporate income to a tax rate of

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157. *Compare* COSPONSORS: H.R. 1669—115TH CONGRESS (2017–2018), www.congress.gov/bill/115th-congress/house-bill/1669/cosponsors [https://perma.cc/YSH7-QHDV] *with* COSPONSORS: H.R. 2084—113TH CONGRESS (2013–2014), *supra* note 151.

158. TAX REFORM TASK FORCE, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA 6 (2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf [https://perma.cc/7TUG-KFLB].

159. *Id.*; *Task Force on Tax Reform Releases Mission Statement*, U.S. HOUSE OF REPRESENTATIVES COMM. WAYS & MEANS 6 (Mar. 2, 2016), https://waysandmeans.house.gov/task-force-on-tax-reform-releases-mission-statement/ [https://perma.cc/Q5SF-BHPT].

160. *See* TAX REFORM TASK FORCE, *supra* note 158.

161. *Id.* at 28; KYLE POMERLEAU, TAX FOUND., UNDERSTANDING THE HOUSE GOP'S BORDER ADJUSTMENT 3 (2017).

162. INST. ON TAX'N & ECON. POL'Y, *supra* note 18.

163. TAX REFORM TASK FORCE, *supra* note 158, at 28–29.

164. *Id.* at 29.

165. *See* I.R.C. § 965 (2012) (the HIA).

166. TAX REFORM TASK FORCE, *supra* note 158, at 27–28.

35%, with a destination-based-cash-flow tax, which would have imposed a tax rate of 20%.[167] The BAT would have disallowed businesses from deducting the cost of purchases abroad or from imports.[168] Further, the BAT would not have imposed any tax on business revenue attributable to sales abroad or to exports.[169] Simply put, the BAT was to create a tax jurisdiction that followed the location of consumption rather than the location of production.[170]

For an example of how the BAT would operate, consider a U.S. MNC that ships shoelaces to Mexico where they will be used to make shoes. The profits the MNC makes on the shoelaces it exports will not be subject to the 20% tax and the MNC may still deduct its costs related to the production of the shoelaces. However, if the MNC were to purchase shoelaces from Mexico for use in shoes made in the United States, the 20% tax rate would apply to the profits from the shoes (including the shoelaces) and the MNC could not deduct the cost of the shoelaces because of their foreign-based origin of production.

The BAT would further align the U.S. tax system with the rest of the industrialized world; only seven of the thirty-five countries in the Organisation for Economic Co-operation and Development (OECD) do not have a border tax.[171] Border adjustments are common and are considered natural components of most consumption-based tax systems.[172] They are already incorporated in the U.S. tax system through state-level retail sales tax regimes.[173]

In addition to not subjecting MNCs' foreign profits to a repatriation tax, the BAT would make many profit-shifting techniques used by MNCs impossible.[174] In the United States, an MNC may import goods from its

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167. *See id.*; POMERLEAU, *supra* note 161, at 2.

168. *See* TAX REFORM TASK FORCE, *supra* note 158, at 27–28; POMERLEAU, *supra* note 161, at 3.

169. *Id.*

170. *See* TAX REFORM TASK FORCE, *supra* note 158, at 27.

171. *Will the BAT Fly?*, MERRILL LYNCH (Apr. 4, 2017), https://olui2.fs.ml.com/Publish/Content/application/pdf/GWMOL/GWIMCIOWeeklyLetter04042017.pdf [https://perma.cc/GT2W-52DC].

172. POMERLEAU, *supra* note 161, at 3; William P. Orzechowski, *Border Tax Adjustments and Fundamental Tax Reform*, TAX FOUND. (Nov. 1, 2001), https://taxfoundation.org/border-tax-adjustments-and-fundamental-tax-reform/ [https://perma.cc/448W-SB3N]. *See generally* ORG. FOR ECON. COOP. & DEV., CONSUMPTION TAX TRENDS 2016 (2016).

173. William G. Gale, *A Quick Guide to the 'Border Adjustments' Tax*, TAX POL'Y CTR. (Mar. 3, 2017), http://www.taxpolicycenter.org/taxvox/quick-guide-border-adjustments-tax [https://perma.cc/PC9F-LHAR] ("While explicit border adjustments may seem like a strange concept to Americans, implicit border adjustments are already present in state-level retail sales taxes. Goods produced in state A and exported to and sold in state B do not face state A's sales tax. Goods produced in state B and imported to state A do face state A's sales tax.").

174. POMERLEAU, *supra* note 161, at 3, 11.

CFC and deduct the cost against taxable income.[175] If the CFC is in a low-tax jurisdiction, it is incentivized to overprice the import it sells to its parents to maximize its deduction.[176] Similarly, the same MNC would be incentivized to underprice goods it exports to its CFC to minimize its income.[177] Both of these maneuvers reduce the MNC's worldwide tax burden and lower the tax revenue the United States could otherwise collect.[178] The BAT would have disallowed deductions from imports and make exports have no bearing on taxes; therefore, these profit-shifting transactions would have no effect on domestic tax liability.[179]

At the time of the TRTF blueprint, the BAT had appreciable momentum, but its support subsided. A study by the Tax Foundation estimated that corporate tax revenue would fall by $1.2 trillion over the next decade if the TRTF blueprint was implemented.[180] Those opposed to the BAT felt that it would give tax breaks to big corporations while working class Americans got tax hikes on everything they buy. This sentiment is understandable; it seems unfair that MNCs would receive a substantial tax break while prices for imported goods would increase.[181]

The Institute on Taxation and Economic Policy released an analysis on two large corporate lobbying coalitions that focused on the BAT.[182] The two coalitions are the pro-BAT American Made Coalition,[183] which includes Boeing, General Electric, and Oracle, and the anti-BAT Americans for Affordable Products,[184] which includes Costco, Nike, and Walmart.[185] Interestingly, the companies in the pro-BAT group paid an

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*; TAX REFORM TASK FORCE, *supra* note 158, at 27–28.

180. KYLE POMERLEAU, TAX FOUND., DETAILS AND ANALYSIS OF THE 2016 HOUSE REPUBLICAN TAX REFORM PLAN, 4 (2016), https://files.taxfoundation.org/legacy/docs/TaxFoundation_FF516.pdf [https://perma.cc/46E7-BXPY].

181. *See* TAX REFORM TASK FORCE, *supra* note 158, at 27–28.

182. Richard Phillips, *A Comparative Analysis: Tax Rates Paid by Companies for and Against the Border Adjustment Tax*, INST. ON TAX'N AND ECON. POL'Y (Mar. 30, 2017), https://itep.org/a-comparative-analysis-tax-rates-paid-by-companies-for-and-against-the-border-adjustment-tax/ [https://perma.cc/VEF7-PA9N].

183. AMERICAN MADE COALITION, www.americanmadecoalition.org (last visited Jan. 8, 2018); David Shepardson & Ginger Gibson, *GE, Boeing, Oracle Form Coalition to Support Republican Border Tax*, REUTERS (Feb. 2, 2017), https://www.reuters.com/article/us-usa-trump-companies-tax/ge-boeing-oracle-form-coalition-to-support-republican-border-tax-idUSKBN15H2VV [https://perma.cc/SZ44-T8QM].

184. AMERICANS FOR AFFORDABLE PRODUCTS, www.keepamericaaffordable.com (last visited Jan. 8, 2018); *Well Over 100 Businesses & Trade Associations Launch Americans for Affordable Products to Stop Border Adjustment Tax*, PR NEWSWIRE (Feb. 1, 2017), https://www.prnewswire.com/news-releases/well-over-100-businesses—trade-associations-launch-americans-for-affordable-products-to-stop-border-adjustment-tax-300400668.html [https://perma.cc/ARS4-T3L7].

185. Phillips, *supra* note 182.

average effective tax rate of just 14.5%, while companies in the anti-BAT group paid an average effective tax rate of 30.6%.[186] The author of the analysis notes, "What is surprising is that so many lawmakers in Congress are pushing a policy that would make our tax code more unfair by heaping even more tax breaks on profitable corporations that aren't even paying half the federal statutory tax rate."[187]

The proposed BAT was dead within a year of the introduction of the TFTR blueprint.[188] Without the support of President Trump and other Republican leaders, there was little chance that a tax reform plan that included the BAT would pass the Senate.[189] Perhaps the omission of a BAT from the Tax Cuts and Jobs Act was one of the keys to its successful enactment.

IV. THE TAX CUTS AND JOBS ACT

On December 22, 2017, President Trump signed into law the most sweeping tax reform legislation in recent history: The Tax Cuts and Jobs Act (TCJA).[190] The bill was proposed by Representative Kevin Brady on November 2, 2017, less than two months before it was signed into law.[191] The TCJA was politically divisive; it passed the December 2nd Senate vote with fifty-one YEAs to forty-nine NAYs.[192] Every YEA vote was that of a Republican senator.[193] Of the forty-nine NAYs, forty-six were from Democrat senators, two were from Independent senators, and one was from Senator Bob Corker (R-TN).[194]

The TCJA makes macro-level reforms to both individual and corporate taxation. With respect to corporate taxation, among other provisions the TJCA permanently reduced the corporate income tax rate

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186. *Id.*

187. *Id.*

188. Naomi Jagoda & Scott Wong, *Border-Adjustment Tax Proposal at Death's Door*, THE HILL (May 24, 2017 9:23PM), http://thehill.com/homenews/house/335038-border-adjustment-tax-proposal-at-deaths-door [https://perma.cc/3LHG-WJ7W] ("Asked [May 24, 2017] if he thinks the border-adjustment tax is completely dead, Freedom Caucus Rep. Mark Sanford (R-S.C.) simply replied: 'I do.'").

189. *See, e.g.*, *id.*; Don Lee, *Trump and GOP Leaders Agree to Drop Border-Adjustment Tax from Reform*, L.A. TIMES (July 27, 2017 4:35 PM), http://www.latimes.com/business/la-fi-tax-reform-border-20170727-story.html [https://perma.cc/K4PD-TQFL].

190. An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended in scattered sections of 26 U.S.C.).

191. SUMMARY: H.R. 1—115TH CONGRESS (2017–2018), https://www.congress.gov/bill/115th-congress/house-bill/1 [https://perma.cc/NP7C-5QHR].

192. Tax Cuts and Jobs Act: Roll Vote No. 303, 163 Cong. Rec. S7712 (daily ed. Dec. 1, 2017) (voting was held at 1:36 AM).

193. *Id.*

194. *Id.*

to 21%, replaced the worldwide taxation system with a territorial taxation system, and enacted base erosion rules.[195]

A. The Tax Cuts and Jobs Act's Effect on Repatriation

The TCJA added § 245A to the I.R.C., which reads as follows: "In General.—In the case of any dividend received from a specified 10-percent owned foreign corporation by a domestic corporation which is a U.S. shareholder with respect to such foreign corporation, there shall be allowed as a deduction an amount equal to the foreign-source portion of such dividend."[196]

This section effectuates a territorial tax in the United States by allowing a domestic corporation (the MNC) to deduct the equivalent of dividends it receives from a 10% owned foreign corporation (the CFC).[197]

The TCJA refers to this system as a "participation exemption system of taxation."[198] Participation exemptions are the provisions that create a territorial tax system; they allow companies to exclude or deduct income they receive from CFCs.[199] A worldwide tax system may have some participation exemptions, but those exemptions would not exclude or deduct the entirety of domestic taxes on foreign income.[200] A territorial system is created when participation exemptions allow for MNCs to exclude or deduct all or nearly all of their foreign income from their taxable base.

Of course, billions of dollars in tax revenue are currently deferred on the trillions of dollars in profits stockpiled offshore.[201] The TCJA does not retroactively apply to those deferred taxes.[202] Rather, the TCJA amends I.R.C. § 965 to enact a deemed repatriation of those currently deferred

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195. *See* TAX FOUND., TAX CUTS AND JOBS ACT; PRELIMINARY DETAILS AND ANALYSIS OF THE TAX CUTS AND JOBS ACT 4–5 (2017), https://files.taxfoundation.org/20171220113959/Tax Foundation-SR241-TCJA-3.pdf [https://perma.cc/K6AW-KH2K].

196. 26 U.S.C.A. § 245A(a) (Westlaw through Pub. L. No. 115-237).

197. 10% refers to a single shareholder's interest in a CFC. *See* 26 U.S.C.A. § 245(a)(2) ("[T]he term 'qualified 10-percent owned foreign corporation' means any foreign corporation . . . if at least 10 percent of the stock of such corporation . . . is owned by the taxpayer."); *see also* 26 U.S.C.A. § 957(a) ("[T]he term 'controlled foreign corporation' means any foreign corporation if more than 50 percent of—(1) the total combined voting power of all classes of stock of such corporation entitled to vote, or (2) the total value of the stock of such corporation, is owned . . . by United States shareholders on any day during the taxable year of such foreign corporation.").

198. *See* 26 U.S.C.A. § 965.

199. Kyle Pomerleau, *Designing a Territorial Tax System: A Review of OECD Systems*, TAX FOUND. 1, 4 (Aug. 1, 2017, updated Aug. 16, 2017), https://files.taxfoundation.org/20170822101918/Tax-Foundation-FF554-8-22.pdf.

200. *Id.*

201. *See* 26 U.S.C.A. § 901; GRAVELLE, *supra* note 15.

202. *See* 26 U.S.C.A. § 965(a).

profits.[203] Simply put, currently deferred foreign profits are mandatorily subjected to "a rate of 15.5 percent for cash and cash-equivalent profits and 8 percent for reinvested foreign earnings."[204]

Although the stockpiled cash is still subject to a tax, the TJCA made the rate MNCs would pay on this cash (previously 35% less tax credits and deductions) drop dramatically. Thus, large MNCs that had the ability to stockpile cash offshore and patiently wait for beneficial tax legislation were rewarded for avoiding taxes that other corporations, which lacked domestically available capital, were required to pay.

The TCJA includes several anti-base erosion provisions. As the name suggests, these rules prevent domestic tax base erosion and profit-shifting.[205] It is important that base erosion rules do not overly burden legitimate foreign business operations; they should focus on "taxing passive or highly mobile foreign income which may represent profits that were actually earned in the United States."[206]

One such anti-base erosion measure is the inclusion of MNCs' subsidiaries' low-taxed foreign income in MNCs' taxable bases.[207] Under this provision, MNCs must include 50% of their foreign subsidiaries' income above a "normal return" in their base.[208] The TCJA does not define low-taxed foreign income, but does exclude some forms of income, such as Subpart F income.[209] It does, however, allow for MNCs to use up to 80% of their foreign tax credits related to the included income against their domestic tax liability.[210] MNCs receiving dividends from high-tax jurisdictions will likely have enough credits to offset any tax on their foreign earnings; MNCs receiving dividends from low-tax jurisdictions may not.[211] Thus, this provision may impose a tax on foreign income dividends from low-tax jurisdictions.

Another anti-base erosion measure the TJCA enacts is the "inbound rule."[212] It effectively acts like an alternative minimum tax for MNCs that do business with foreign subsidiaries.[213] The inbound rule requires that

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203. *Id.*

204. TAX FOUND., *supra* note 195, at 5.

205. Kyle Pomerleau, *The Careful Balance of Anti-Base Erosion Rules*, TAX FOUND. (Aug. 22, 2017), https://taxfoundation.org/balance-anti-base-erosion-rules/ [https://perma.cc/G8A9-U2X4].

206. *Id.*

207. *See* 26 U.S.C.A. § 951A(a)–(d).

208. Gavin Ekins, *International Provisions in the Senate Tax Cuts and Jobs Act*, TAX FOUND. (Nov. 28, 2017), https://taxfoundation.org/international-provisions-senate-bill/ [https://perma.cc/G8A9-U2X4] ("The provision defines normal returns as 10 percent of all the tangible, depreciable assets held by all foreign subsidiaries within the parent's network.").

209. *See id.*

210. *See* 26 U.S.C.A. § 960(d).

211. Ekins, *supra* note 208.

212. *See id.*; *see also* 26 U.S.C.A. § 59A.

213. Ekins, *supra* note 208.

MNCs calculate their taxes in two ways: (1) calculate taxes owed with the statutory 21% tax rate and deduct income from CFCs and (2) calculate taxes owed with a 10% tax rate but do not deduct income from CFCs.[214] If the second calculation is greater than the first calculation, the inbound rule requires the MNCs pay the difference between the two calculations in additional taxes.[215]

Setting its sights on corporate inversions and earnings stripping, the TJCA includes a limit on interest deductions a corporation parented by an MNC can claim.[216] The parent corporation does not have to be domiciled in the United States for this provision to apply; it applies to subsidiaries and affiliates of MNCs domiciled elsewhere.[217] This provision limits the deduction these corporations can claim to a portion of the total interest paid by the MNC, based on the share of the corporation's income to that of the MNC's total income.[218] The Tax Foundation provides the following example:

> [A] U.S. subsidiary of a foreign [MNC] has $10 million of income within a group with a total income of $100 million. The subsidiary has $5 million in interest payments, but the group only has a total of $20 million in interest payments. In this case, the subsidiary would only be allowed to deduct $2 million in interest payments, (10/100)*20.[219]

The ramifications of this massive policy shift are yet to be seen. Although this positions the U.S. tax regime to further discourage corporate inversions and earnings stripping, MNCs have and surely will find ways to continue these practices.

B. Critique of a Territorial Tax System in the United States

The United States' decision to switch its international tax policy to that of a territorial system of taxation is not surprising. At the beginning of the twentieth century the worldwide system of taxation was popular: thirty-three countries used it.[220] Now, thirty of the thirty-five OECD members offer some participation exemption for foreign income.[221]

Many critics have reacted negatively to the implementation of a system of taxation wherein a U.S. MNC's profits made in other countries

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214. 26 U.S.C.A. § 59A(b)(1)–(2).
215. *Id.* § 267A(a)–(b).
216. *Id.*
217. *Id.*
218. Ekins, *supra* note 208.
219. *Id.*
220. Pomerleau, *supra* note 7.
221. Pomerleau, *supra* note 199, at 5.

are not subject to a domestic tax. These critics tend to think of a territorial tax as loosening the collar of already suspect MNCs by allowing them to move investments and jobs to low-tax jurisdictions.[222]

The actual impact a territorial system will have on the practices of MNCs is more complicated. Studies on this topic agree that switching to a territorial system will generally not have the detrimental effects these critics claim.[223] This is not because the lower corporate tax rate and anti-base erosion measures will persuade MNCs to keep money and jobs in the United States. Rather, it is because deficiencies in the worldwide system already allowed MNCs freedom to use foreign income while taxes were deferred.

During the worldwide system, MNCs took advantage of techniques that allowed them to effectively use foreign income without repatriating it. One such technique was simply to use a consolidated financial statement to facilitate domestic loans from third parties.[224] The worldwide system was so malleable that it allowed many MNCs to achieve tax results more favorable than those under a territorial system.[225]

The techniques MNCs used to achieve favorable results under a worldwide system were not trade secrets.[226] Although complex and costly, these methods were frequently used to exploit deficiencies in the worldwide system, allowing MNCs access to their foreign income without being subjected to the repatriation tax.[227]

Many MNCs use a tax-aligned supply chain structure (TASC) to separate a company's profits into components by business process.[228] To put it another way, an MNC will concentrate the most profitable functions

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222. *See, e.g.*, CHYE-CHING HUANG ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, THE FISCAL AND ECONOMIC RISKS OF TERRITORIAL TAXATION (2013); *Fact Sheet: The Consequences of Adopting a Territorial Tax System*, INST. ON TAX'N & ECON. POL'Y (Sept. 18, 2017), https://itep.org/territorial_factsheet [https://perma.cc/VET6-KSCK]; *"Territorial Tax" Is a Zero Rate on U.S. Multinationals' Foreign Profits, Threatens U.S. Revenues and Wages*, CTR. BUDGET & POL'Y PRIORITIES (Oct. 6, 2017), https://www.cbpp.org/research/federal-tax/territorial-tax-is-a-zero-rate-on-us-multinationals-foreign-profits-threatens [https://perma.cc/9THG-MLE9].

223. *See, e.g.*, Rosanne Altshuler & Harry Grubert, *Where Will They Go if We Go Territorial? Dividend Exemption and the Location Decisions of U.S. Multinational Corporations*, 54 NAT'L TAX J. 787 (2001); Michael P. Donohoe et al., *Back to the Drawing Board: The Structural and Accounting Consequences of a Switch to a Territorial Tax System*, 66 NAT'L TAX J. 713 (2013); J. Clifton Fleming Jr. & Robert J. Peroni, *Exploring the Contours of a Proposed U.S. Exemption (Territorial Tax System)*, 41 TAX NOTES INT'L 217 (2006); Lawrence Lokken, *Territorial Taxation: Why Some U.S. Multinationals May Be Less than Enthusiastic about the Idea (and Some Ideas They Really Dislike)*, 59 SMU L. REV. 751 (2006).

224. Fleming & Peroni, *supra* note 223, at 230.

225. *See* Lokken, *supra* note 223, at 757.

226. Donahoe et al., *supra* note 223, at 18; Fleming & Peroni, *supra* note 223, at 230.

227. Donahoe et al., *supra* note 223, at 725 (Such transactions included the "'killer B," the "deadly D," and the "Shanghai Lady.").

228. *Id.* at 717–22.

of their business in low-tax jurisdictions.[229] A TASC may have the research and development of intangible property occur in the United States, but the intangibles will migrate (through a complex and costly process) to a low-tax jurisdiction to create profits.[230] Although the territorial tax system may cause the need for TASCs to be modified to minimize tax obligations, "[a] transition to a . . . participation exemption system is unlikely to dramatically impact a U.S. [MNC's] TASC."[231]

A 2001 study attempts to predict how moving to a territorial tax system would affect U.S. MNCs' incentives to invest in certain locations.[232] The study comes to an interesting conclusion: "Overall we cannot make any firm prediction of how location behavior would change if the United States were to adopt a dividend exemption system. However, the analysis provides no consistent or definitive evidence that dividend exemption would induce a large outflow of investments to low-tax locations."[233] The lack of definitive evidence quells some worry, despite the uncertainty.

The prior deficiencies that allowed MNCs to bend the rules of a worldwide system were not inherent; they could have been corrected by legislation that would not have changed the fundamental premises of U.S. international income taxation as the TCJA.[234] A study of a "model" worldwide taxation resulted in a finding that it is "superior to a territorial system, on simplicity, efficiency, and equity grounds."[235] The issue was creating a worldwide tax system that could not be so easily abused by MNCs and survive political scrutiny.

Although critics highlight potential consequences of a territorial tax system, they are speculative. MNCs have had the opportunity to move investments and jobs offshore while avoiding U.S. taxes on substantial portions of their worldwide income. Although the process for doing so may now be less complex and costly, anti-base erosion measures coupled with a significantly decreased domestic corporate income tax rate may help suppress these issues.

Likewise, the idea that MNCs will use large amounts of repatriated funds for domestic investment and job creation is speculative. Permitting MNCs to repatriate foreign income with an offsetting deduction may not have a significant effect on the U.S. economy considering many MNCs

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229. *See id.* at 717.
230. *See id.* at 717–22.
231. *Id.* at 722.
232. Altshuler & Grubert, *supra* note 223.
233. *Id.* at 807.
234. *See* Lokken, *supra* note 223, at 770.
235. Paul R. McDaniel, *Territorial vs. Worldwide International Tax Systems: Which is Better for the U.S.?*, 8 FLA. TAX REV. 283, 301 (2007).

were able to effectively use their foreign income domestically prior to the territorial system. Also, as the fallout from the HIA evidences, MNCs bringing new cash into the country may simply result in stock dividends, redemptions, and repurchases and increased executive compensation. Finally, MNCs may not be incentivized to repatriate their money because, unlike the HIA, the offsetting deduction is permanent; thus, MNCs may choose to use their foreign income in other jurisdictions indefinitely.

CONCLUSION

The former worldwide system of taxation was broken: MNCs were reducing their U.S. income tax obligations by stockpiling foreign income in offshore tax havens and using quasi-legal techniques to access that foreign cash domestically. Congress set a dangerous precedent when it enacted a repatriation tax holiday in 2004. MNCs used their repatriated money for stock redemptions and buybacks and executive compensation rather than job creation and domestic investments. MNCs then began stockpiling money offshore at a higher rate than before in hopes of another windfall.

Other repatriation proposals in Congress were shot down as the amount in tax havens grew. Some proposals, such as the border adjustment tax proposal and the Partnership to Build America Act, offered novel solutions to the repatriation problem. However, the lasting effect of the 2004 holiday was to apprise Congress of legislation that would most benefit the worst corporate actors. Therefore, the repatriation problem remained in flux for several years.

Congress's answer was to completely change the way the United States approaches international taxation. With the passage of the Tax Cuts and Jobs Act, the United States will use a territorial system of taxation, which essentially removes any domestic taxes on an MNC's foreign income. Although many fear that removing the domestic corporate income tax from MNCs' foreign profits will incentivize large U.S. companies to move investments and jobs offshore, that fear is generally unfounded. Most literature suggests that the transition from a worldwide to a territorial system will have a negligible effect on the way that MNCs do business. In addition, anti-base erosion measures, a reduced corporate income tax, and an influx of MNCs' foreign cash into the U.S. economy may help suppress the potentially adverse consequences of the transition. The effect on domestic employment is also an unknown; one may consider the negative effect the AJCA had on repatriating MNCs' employment to foreshadow the results of the TCJA. Regardless, it will likely take decades to fully understand the lasting effects the territorial tax will have on MNCs' offshore operations and the U.S. economy at large. But the unstable and

easily manipulated worldwide tax regime under which the U.S. tax policy previously resided was due for substantial change.