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The Double Irish Sandwich: Reforming Overseas Tax Havens.

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RECENT DEVELOPMENT

THE DOUBLE IRISH SANDWICH: REFORMING OVERSEAS TAX HAVENS

STEPHEN C. LOOMIS

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I. INTRODUCTION

The recent Occupy Wall Street movement brought the public's attention to how many United States corporations are able to report little corporate income tax for overseas operations.[1] Conversely, Republican presidential candidates rail against the 35% maximum marginal corporate tax rate.[2] However, this

1. *See* Frankie, *When You're Making Up the List of Who's Not Paying Their "Fair Share"*, OCCUPY WALL STREET (Oct. 13, 2011, 2:51 AM), http://occupywallst.org/forum/when-youre-making-up-the-list-of-whos-not-paying-t/ (bemoaning that many companies are able to "use complex schemes to . . . shelter huge profits offshore"); *see also* J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/ (describing various tax schemes that domestic corporations use to mitigate U.S. taxes). This movement has even caused a stir in Congress as some Democrats have proposed a bill to tax "transactions like stock trades, credit swaps[,] and derivatives." Michael McAuliff & Max J. Rosenthal, *Occupy Wall Street's Message Gains Momentum In Congress*, HUFFINGTON POST (Nov. 2, 2011, 4:15 PM), http://www.huffingtonpost.com/2011/11/02/occupy-wall-street-congress_n_1071745.html. Indeed, President Obama emphasized making changes to the Internal Revenue Code to favor companies that keep and/or bring jobs back to domestic soil, in the 2012 State of the Union Address. President Barack Obama, State of the Union Address (Jan. 24, 2012) (transcript available at http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address) ("[I]f you're a business that wants to outsource jobs, you shouldn't get a tax deduction for doing it. . . . That money should be used to cover moving expenses for companies like Master Lock that decide to bring jobs home."); *see also* Beenish Ahmed, *A Comparison of Candidates' Tax Plans*, NPR (Feb. 9, 2012), http://www.npr.org/2012/02/09/146652190/a-comparison-of-candidates-tax-plans (follow the "President Obama" hyperlink) (noting that President Obama plans to "[p]revent U.S. companies from using overseas shelters for profits on intangible property such as royalties").

2. *See* Calvin Woodward, *Republican Presidential Candidates on the Issues*, YAHOO! (Jan. 23, 2012), http://news.yahoo.com/republican-presidential-candidates-issues-090356348.html (reporting that all of the Republican presidential candidates advocate cutting the current corporate tax rate of 35%). Rick Santorum, a Republican presidential candidate in 2012, proposed cutting corporate taxes to a highest marginal rate of 17.5%.

ignores the fact that many companies "manage to pay almost no corporate tax at all" due to their manipulation of international tax loopholes.[3] For example in 2009, Google, Inc. was able to use

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Howard Gleckman, *The Santorum Plan: Tax Cuts for (Nearly) All*, TAX VOX (Jan. 19, 2012, 11:52 AM), http://taxvox.taxpolicycenter.org/2012/01/19/the-santorum-plan-tax-cuts-for-nearly-all/. His proposed cuts go further: "Domestic manufacturing companies would owe no taxes at all. [Multinational corporations] could bring profits back to the U.S. at a 5.25 [%] tax rate. [They would] owe no taxes at all on repatriated earnings they invest in plant[s] and equipment." *Id.* Another 2012 Republican candidate, Mitt Romney, proposed allowing for a holiday to enable companies to repatriate foreign corporate profits with no tax consequences. Beenish Ahmed, *A Comparison of Candidates' Tax Plans*, NPR (Feb. 9, 2012), http://www.npr.org/2012/02/09/146652190/a-comparison-of-candidates-tax-plans (follow the "Mitt Romney" tabbed hyperlink). The concept that the United States charges too much in corporate taxes has caused even President Obama to suggest lowering the corporate tax rate. *See id.* (reporting that President Obama intends to lower the corporate rate "to somewhere in the high 20 [%] range") (follow the "President Obama" hyperlink). However, unlike the Republican candidates, President Obama proposes that lowering the corporate rate should be accompanied by closing many loopholes in the tax code. *See id.* (stating that President Obama is suggesting that the loopholes surrounding tax shelters need to be closed).

3. *Corporate Taxes: How Low Can You Go?*, NPR (Sept. 10, 2011), http://www.npr.org/2011/09/10/138867588/corporate-taxes-how-low-can-you-go. In *The Ideologies of Taxation*, Louis Eisenstein made several statements in his opening chapter that are just as relevant today as they were fifty years ago when the book was first published:

> We are about to consider the unpleasant subject of taxes. Few things are viewed with as much distaste and distress as these coerced contributions to our general welfare. Even in time of war, when civilization itself trembles in the balance, we are expected to part more readily with our lives than our money .... Hence the evasion of the draft is usually deemed less dignified and respectable than the evasion of taxes.

LOUIS EISENSTEIN, THE IDEOLOGIES OF TAXATION 4 (Harvard Univ. Press 2010) (1961). Thus, even if international corporations are abusing loopholes in the Internal Revenue Code, there is a question whether the public would generally support reform or celebrate these corporations' ability to skillfully and legally outmaneuver the government's attempts at taxation. *See* Tim Fernholz, *Does a "Dutch Sandwich" Make Google Evil?*, AM. PROSPECT (Oct. 22, 2010), http://prospect.org/article/does-dutch-sandwich-make-google-evil (stating that a supporter of Google's use of tax-evasion schemes questioned whether evading taxes was morally wrong). It is questionable whether Google should be permitted to transfer overseas the intellectual property that was developed by research "at Stanford University and funded by the National Science Foundation." Jesse Drucker, *The Tax Haven That's Saving Google Billions*, BLOOMBERG BUSINESSWEEK (Oct. 21, 2010, 8:00 AM), http://www.businessweek.com/magazine/content/10_44/b4201043146825.htm. However, it should not be construed that this Recent Development is advocating that use of tax schemes like the Double Irish is evil. On the contrary, *failure* to use these schemes may be morally wrong because tax attorneys engaged in tax planning owe a duty to their corporate clients to legally reduce those companies' tax liability as much as possible. This Recent Development is instead stating that the effects of these tax schemes are undesirable, and it is the duty of the government to close loopholes so that tax lawyers can faithfully represent their corporate clients without costing the United States billions of dollars each year.

various exotic tax schemes, known as the Double Irish and the Dutch Sandwich, to reduce its overseas tax rate to 2.4% and its U.S. tax liability to 22.2%.[4] The disconnect between a comparatively high corporate tax rate[5] and the exploitation of international tax loopholes makes it difficult to decipher whether the system needs reform in either direction.

This problem exists due to the extremely complex field of international taxation. Hardly any cohesion is present in this area[6] by virtue of the many different jurisdictions with competing tax policies and methods.[7] Adding to the complexity, Congress and

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4. Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2010, 5:00 AM), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html/. Google is not the only company willing to implement this legal, but perhaps morally questionable, tax strategy. Apple, Inc., Facebook, Inc., Microsoft Corp. and Oracle Corp. have all used, or intend to use, a version of the Double Irish. *Id.* However, Google has most effectively used this scheme among other technology companies. *Id.* A Google spokeswoman acknowledged that "Google's practices are very similar to those at countless other global companies operating across a wide range of industries." Jacob Goldstein, *Google's Tax Tricks: 'Double Irish' and 'Dutch Sandwich'*, NPR (Oct. 21, 2010, 3:15 PM), http://www.npr.org/blogs/money/2010/10/21/130727655/google-s-tax-tricks-double-irish-and-dutch-sandwich (internal quotation marks omitted).

5. *See* Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2010, 5:00 AM), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html/ ("U.S. Representative Dave Camp of Michigan, the ranking Republican on the House Ways and Means Committee, and other politicians say the 35 [%] U.S. statutory rate is too high relative to foreign countries.").

6. *See* Michael S. Lebovitz & Theodore P. Seto, *Preface: The Fundamental Problem of International Taxation*, 23 LOY. L.A. INT'L & COMP. L. REV. 529, 530 (2001) ("[I]nternational tax law is both excruciatingly complex and fundamentally arbitrary."). In contrast to domestic tax rules, which are "polished to a high sheen against the ideal of a comprehensive tax base," international taxation is "full of traps for the unwary and opportunities for the well-advised." *Id.*

7. Louis Eisenstein remarked that the essence of tax policy is "class politics" and "a continuing struggle among contending interests for the privilege of paying the least." LOUIS EISENSTEIN, THE IDEOLOGIES OF TAXATION 4–5 (Harvard Univ. Press 2010) (1961). With a myriad of countries engaging in this taxation war, it is impossible for there to be a harmonious international body of law when there are different winners and losers in each contest. *See* Michael S. Lebovitz & Theodore P. Seto, *Preface: The Fundamental Problem of International Taxation*, 23 LOY. L.A. INT'L & COMP. L. REV. 529, 530 (2001) ("One of the principal reasons for this irrationality is simple: there is as of yet no consensus as to how the tax base represented by the world economy should be shared among the world's roughly 200 nations."). An example of this lack of consensus is the disparate reactions to a proposed regulation that would require U.S. banks to report to the IRS information about alien bank accounts even though these accounts are not taxed. *Compare* Elizabeth MacDonald, *IRS Rounding Up Offshore Tax Evaders*, FOX BUS. (Sept. 16, 2011), http://www.foxbusiness.com/markets/2011/09/16/irs-rounding-up-offshore-

the Treasury Department correct perceived problems and close loopholes on an ad hoc basis that further frustrates any cohesion.[8] The result is a system of laws that resembles a leaky dyke—Congress plugs one leak only to create another. To further frustrate matters, those charged with interpreting this esoteric area of the law, such as the U.S. Tax Court, are often criticized for their international tax decisions.[9] International tax law also tends to

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tax-evaders/ (supporting the proposal as a method to catch domestic tax evaders by arming the IRS with information that they can exchange with other jurisdictions for information on U.S. tax evaders), *with* Randy Lankford, *At Odds: Bankers and Lawyers Fighting Proposed IRS Regulation That Would Require Nonresident Aliens to Disclose Domestic Accounts*, SAN ANTONIO BUS. J., Sept. 16, 2011, http://www.bizjournals.com/sanantonio/print-edition/2011/09/16/at-odds.html?page=all (reporting domestic dissatisfaction with the proposed regulation because it would hurt the U.S. banking industry), *and Canada Should Protest Unjust U.S. Tax Grab*, VANCOUVER SUN (Sept. 16, 2011) (cached version available at http://www.google.com; then search "Canada Should Protest Unjust U.S. Tax Grab"; place the mouse cursor over the first result hyperlink; click the double-arrow icon hyperlink; observe the page display and follow the "Cached" hyperlink) ("[T]he U.S. Internal Revenue Service has decided to treat [Canadians abroad] as potential criminals with a punitive campaign to crack down on rich Americans who are hiding assets overseas to avoid taxation.").

8. *See, e.g.*, Rev. Rul. 84-152, 1984-2 C.B. 381–83 (attacking the avoidance of withholding tax due to a now-defunct treaty between the U.S. and the Netherlands Antilles). The regulations currently in place to avoid certain tax-avoidance schemes are somewhat more coherent in that they address portions of the code, rather than country specific loopholes. *E.g.*, Treas. Reg. § 1.367(b)-4(b) (as amended in 2009) (frustrating the application of the so-called "Killer B" maneuver).

9. *See* Kimberly S. Blanchard, *What's Good for the* Goosen . . ., 40 TAX MGM'T INT'L. J. 530, 530 (2011), *available at* http://www.bna.com/whats-good-goosen-n12884903410/ (criticizing the U.S. Tax Court for its decision in *Goosen v. Commissioner*, 136 T.C. 27 (2011), because the court erroneously bifurcated a professional golfer's endorsement income into personal services and royalties when "it should have been completely obvious to the Tax Court that all the sponsors were paying Goosen for was the use of his image and likeness, and not for his 'services'"). Blanchard concludes with several statements that illustrate the complexity of international taxation:

> Perhaps the moral is that our rules for taxing the income of foreign persons are simply too arcane for the courts (much less taxpayers) to grasp. But more fundamentally, *Goosen* illustrates how much can go wrong when a court fails to apply the common law to a tax case . . . . So perhaps the real moral is that there is nothing magic about tax cases, and courts should not turn off their normal legal modes of analysis merely because they find themselves in the presence of a code and its regulations.

Id. This criticism of the tax court is significant because the tax court is a federal court specifically created to act as a trial-level court that may also hear agency appeals from the Internal Revenue Service. *See* Burns, Stix Friedman & Co., Inc. v. Comm'r, 57 T.C. 392, 400 (1971) ("In our opinion Congress acted wholly within its constitutional power in creating this [c]ourt as an article I court without regard to the provisions of article III; and this [c]ourt may exercise the jurisdiction conferred upon it by Congress without violating article III."). If these seasoned tax judges cannot navigate the treacherous waters of

break some of the fundamental rules of our domestic system for purposes of convenience and necessity.[10]

This Recent Development will analyze the current international taxation regime along with the Double Irish arrangement and then offer possible solutions to close the loopholes. Part II will introduce and explain some basic international taxation rules, as a foundation for the analysis. The mechanics of the Double Irish will be examined in Part III. Part IV then investigates the congressional intent behind the Internal Revenue Code provisions that allow for the Double Irish, and looks at some of the consequences of allowing the Double Irish scheme to continue existing. Possible solutions to close the loopholes and harmonize the taxation of domestic and international corporations will be discussed in Part V, and Part VI will provide some concluding thoughts.

II. THE PRESENT INTERNATIONAL TAXATION REGIME

Due to the incredible complexity and esoteric nature of international taxation, this section will explain some basic principles of international taxation to provide an operational background for the remainder of the Recent Development.

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international taxation, then other, less-experienced courts, much less taxpayers, cannot possibly hope to avoid crashing against the rocks of confusion in this area of the law.

10. *E.g.*, I.R.C. § 871(a) (2006 & Supp. IV 2010) (requiring that for income not effectively connected with a U.S. trade or business, foreign individuals must pay a 30% tax on *gross* income). This starkly contrasts with the normal procedure of netting gross income with expenses to arrive at taxable income. *See generally* MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION 104 (10th ed. 2005) ("Reducing gross income to a net figure by subtracting the taxpayer's expenses is an unavoidable step . . . ."). This unusual treatment is necessary because the enforcement mechanism to collect this tax uses the payor of the income as a withholding agent for the U.S. government. *See* I.R.C. § 1441 (2006) (providing that generally those who pay items of income to nonresident aliens will be forced to withhold 30% of the amount paid); *see also* CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 229 (4th ed. 2011) ("The rationale for the imposition of a gross income tax derives less from sound tax theory than from the realities of a limited power to enforce tax laws."). Withholding is in turn required because foreign jurisdictions do not open their courts to enforce another country's tax laws. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987) ("Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.").

A. *Fundamental United States Tax Concepts*

1. Worldwide Income Taxation

A fundamental concept in international taxation is that the U.S. taxes its residents and citizens on worldwide income.[11] "Worldwide taxation is the 'price' exacted for the privileges and protections of residing and/or enjoying citizenship in the United States."[12] This extrajurisdictional taxation regime often creates problems of double taxation when other countries assert concurrent jurisdiction to tax the same income.[13] This problem is alleviated through the use of credits or deductions for paid foreign tax and the implementation of tax treaties between the U.S. and foreign countries.[14]

2. Realization Requirement

Another fundamental concept of U.S. taxation is that income is generally not taxed until there is a realization event.[15] This concept proves important in international taxation because companies can and will exploit this rule to prevent income from being taxable in the U.S. by purposefully avoiding a realization

11. *See* I.R.C. § 61 (2006) ("[G]ross income means all income from whatever source derived . . . ."); Treas. Reg. § 1.1-1(b) (as amended in 2008) ("In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the [Internal Revenue] Code whether the income is received from sources within or without the United States.").

12. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRACTICAL US/INT'L TAX STRATEGIES, May 15, 2007, at 2, 2.

13. *See* CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 17 (4th ed. 2011) ("[T]he U.S. approach to taxing international transactions reflects . . . a concern about the possibility that multiple national income tax burdens will accrue to the same taxpayer on the same item of income.").

14. *E.g.*, I.R.C. § 901(b)(1) (2006) (establishing a tax credit for both individuals and corporations for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country").

15. *See* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 559 (1991) ("Rather than assessing tax liability on the basis of annual fluctuations in the value of a taxpayer's property, the Internal Revenue Code defers the tax consequences of a gain or loss in property value until the taxpayer 'realizes' the gain or loss."). This realization requirement is implied by Section 1001(a), which states that gain or loss from a disposition of property is the amount *realized* minus the adjusted basis of the property. I.R.C. § 1001(a) (2006); *Cottage Sav. Ass'n*, 499 U.S. at 559. This requirement is founded upon administrative convenience. *Cottage Sav. Ass'n*, 499 U.S. at 559 (citing Helvering v. Horst, 311 U.S. 112, 116 (1940)).

event.[16] This ultimately creates the deferral problem that will be discussed in the next section.

B. *Controlled Foreign Corporations*

1. Deferral Problem

A special problem arises when a U.S. taxpayer owns a foreign corporation. The foreign income that the foreign corporation realizes will generally not be taxable in the U.S. until the foreign corporation makes a distribution to the U.S. taxpayer.[17] However, this is a problem because a U.S. taxpayer could indefinitely stash the foreign corporation's income overseas.[18] In effect, the U.S. taxpayer would receive an interest-free loan from the U.S. Department of Treasury because the taxpayer is able to manipulate when, if ever, this income is realized.[19] "[T]his deferral principle serves as an incentive for U.S. taxpayers to move their operations and investments abroad to low-tax or tax-free foreign countries as a tax-avoidance maneuver to the detriment of the U.S. Treasury and worldwide economic efficiency."[20]

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16. *See* Mike Butcher, *Twitter's New Dublin Office Will Help it Save 16% in Tax—Maybe More*, TECH CRUNCH (Sept. 26, 2011), http://eu.techcrunch.com/2011/09/26/twitters-new-dublin-office-will-help-it-save-16-in-tax/ (noting that Twitter, LinkedIn, and Paypal also use the Dutch Sandwich to delay realization events).

17. *See* Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRACTICAL US/INT'L TAX STRATEGIES, May 15, 2007, at 2, 2 (explaining that Congress had enacted anti-deferral rules to deter corporations from avoiding taxes in certain areas of income).

18. Generally, taxpayers want deductions as soon as possible and payment of tax to occur as late as possible due to the time value of money. *See* MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION 13–18 (10th ed. 2005) (discussing the time value of money). Simply put, the time value of money relates to "the economic premise that a dollar received today is worth more than a dollar received tomorrow." STEPHEN F. GERTZMAN, FEDERAL TAX ACCOUNTING ¶ 11.01 (Warren Gorham & Lamont ed. 2011).

19. *See, e.g.*, Treas. Reg. § 1.1044(a)-(1)(a) (2006) (allowing tax-free exchanges of publicly traded securities). For example, assume that Wal-Mart owes $1 million in U.S. taxes on income produced domestically while Google owes $1 million that is stashed overseas and avoiding a realization event. Wal-Mart would be forced to pay the million next year on its tax return. Google, on the other hand, is able to determine when, if ever, that million is taxed. Thus, in effect, the U.S. government is loaning Google $1 million owed to the U.S. government until Google decides to pay it. There is no mechanism for increasing the tax depending on when it was repatriated, so Google has no "interest" on this "loan."

20. CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 486 (4th ed. 2011).

2. Anti-Deferral Solution

The IRS uses Subpart F of the Internal Revenue Code and, in particular, the controlled foreign corporation (CFC) rules, to curb this deferral problem.[21] A CFC is defined as a foreign corporation in which a U.S. shareholder owns more than 50% of either the voting interest or total value in the corporation.[22] A U.S. shareholder is, in turn, defined as a U.S. person who owns 10% or more of the total voting stock of the corporation.[23] If there is a CFC, the U.S. taxpayer must include in gross income the pro rata share of some specified types of income from the CFC.[24] Generally, these types of income are active (such as the sale of property) and passive.[25]

However, an exception to the CFC rules exists when the subsidiary manufactures the goods that are sold.[26] A CFC may qualify for this exception if there was either a "[s]ubstantial transformation of property," "[m]anufacture of a product when purchased components constitute part of the property sold," or there is a "[s]ubstantial contribution to manufacturing of personal property."[27] However, whether this exception applies to intangible personal property, like Google's intellectual property, remains an open question.[28] Given this uncertainty, "software

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21. *See* Rodriguez v. Comm'r, No. 13909-08, 2011 WL 6089884, at *2 (U.S. Tax Ct. Dec. 7, 2011) (explaining that Congress's purpose in enacting the statute was "to limit tax deferrals" by any CFC (citing Elec. Arts Inc. v. Comm'r, 118 T.C. 226, 272 (2002))).

22. I.R.C. § 957(a) (2006).

23. *Id.* § 951(b). It is worth noting though that ownership may be either actual or constructive. *See id.* ("'United States shareholder' means . . . a United States person . . . who owns . . . or is considered as owning . . . 10 [%] or more of the total combined voting power . . . .").

24. *Id.* § 951(a).

25. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRACTICAL US/INT'L TAX STRATEGIES, May 15, 2007, at 2, 11. *See generally* I.R.C. § 952 (2006 & Supp. V 2011) (defining Subpart F income).

26. Treas. Reg. § 1.954-3(a)(4) (as amended 2009).

27. *Id.* § 1.954-3(a)(4)(ii)–(iv).

28. *See* Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRACTICAL US/INT'L TAX STRATEGIES, May 15, 2007, at 2, 11 (stating that since these regulations were promulgated in the 1960s, the IRS has not updated them to respond to changes in the prevalence in intangible personal property, such as software rights, and that this inaction has created uncertainty in this area).

companies are reluctant to rely on the manufacturing exception when structuring software sales by a CFC."[29]

C. *Transfer Pricing*

Transfer pricing is the term used to describe "the setting of prices on all types of transactions between related parties."[30] When two related parties engage in a multinational transaction, there is a strong incentive to shift income from a country with a high tax rate to one with a nominal tax rate.[31] This problem is an important issue in international taxation because the U.S. treasury loses billions of dollars each year due to transfer-pricing abuses.[32]

To combat transfer-pricing abuses, Congress enacted Section 482, which allows the Internal Revenue Service (IRS) to "distribute, apportion, or allocate gross income, deductions, credits, or allowances" between related parties if necessary to prevent tax evasion or "to reflect the income" of one of the parties.[33] The purpose of Section 482 is to ensure that prices between related parties are readjusted as if the parties were

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29. *Id.*

30. CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 710 (4th ed. 2011). A complaint with the transfer-pricing system is that it is unenforceable and unrealistic because two related companies will not be able to deal at arm's length. *Fresh Air: How Offshore Tax Havens Save Companies Billions* (NPR radio broadcast Mar. 17, 2011), *available at* http://www.npr.org/2011/03/17/134619750/how-offshore-tax-havens-save-companies-billions. Jesse Drucker explains an even more fundamental problem with transfer pricing:

> [T]he transactions that go on in [the] transfer[-]pricing world are transactions that in the real world—forget about the actual price for a minute—that the transactions themselves would never exist. You would never have a company like Google allocating all of its intellectual property rights to all of the world outside the U.S. to an unrelated subsidiary.... And therefore,... fundamentally, the system is unenforceable.

Id.

31. CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 711 (4th ed. 2011).

32. *See* GORDON C. MILBORN III, U.S. DEP'T OF THE TREAS., THE CONTROLS FOR EXAMINATION PROCESSES FOR INDUSTRY CASES WITH INTERNATIONAL TRANSFER PRICING ISSUES CAN BE IMPROVED 1 (2004), *available at* http://www.treasury.gov/tigta/auditreports/2004reports/200430133fr.pdf (estimating "an annual loss of $2.8 billion" in 1999 (citing INTERNAL REV. SERV., U.S. DEP'T OF THE TREAS., REPORT ON THE APPLICATION AND ADMINISTRATION OF SECTION 482, at iii (1999))).

33. I.R.C. § 482 (2006). Section 482 applies regardless of whether the parties are incorporated, foreign, or "members of an affiliated group." Treas. Reg. § 1.482-1(i)(1) (as amended 2009).

negotiating at arm's length.[34] Section 482 is one of the most complicated sections in the Code,[35] so a detailed analysis is beyond the scope of this Recent Development. Nevertheless, Section 482 is the principal weapon used by the IRS against artificially high or low transfer prices.[36]

D. *Section 367*

There is one last obstacle for users of the Double Irish to consider: application of Section 367. Section 367(d)(2) deems an exchange of intangible personal property a sale, if made "in exchange for payments which are contingent upon the productivity, use, or disposition of such property."[37] "Thus, a significant portion of the sales income recognized by a foreign software subsidiary would be taxable to the U.S. software company through . . . Section 367(d), whether or not the sales in question generated [S]ubpart F income."[38] Fortunately for these companies, careful planning may minimize the impact of, if not completely avoid, application of Section 367(d).[39] For instance, Section 367 does not apply to the creation of intangible property outside of the U.S.[40] A foreign company could develop software in conjunction with its foreign subsidiary and the foreign subsidiary could use the software outside the U.S. The non-U.S. rights will be deemed created in the foreign jurisdictions where it was intended to be used via a cost-sharing agreement, and thus not subject to Section 367.[41]

34. *Id.* § 1.482-1(b)(1).

35. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 2.

36. *Id.* at 11.

37. I.R.C. § 367(d)(2)(A)(i) (2006).

38. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 12.

39. *Id.*

40. *See* I.R.C. § 367(d)(1) (providing deemed sale rules for *transfers* of property outside the U.S., not the *creation* of property).

41. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 12.

III. THE DOUBLE IRISH SANDWICH

The Double Irish is a complicated scheme that has many steps. This Part will provide a superficial glance at the mechanics of the Double Irish and also discuss the repatriation limitation.

A. *The Double Irish Walkthrough*

1. Transferring Intellectual Property to an Irish Subsidiary in Bermuda

The first step in the Double Irish Sandwich requires the U.S. corporation to transfer some intangible property rights, such as intellectual property, to an Irish subsidiary, *B*, that is a Bermudan tax resident.[42] For technology companies like Google, a substantial amount of income arises from these intangible property rights.[43] As this exchange may be taxable, the U.S. corporation will, ideally, make this transfer before the property greatly

42. *U.S. Double Irish/Dutch Sandwich*, INTELL. PROP. TAX (Nov. 11, 2010, 9:00 AM), http://www.ip-tax.com/2010/11/us-double-irishdutch-sandwich/. There are many reasons why corporations choose Ireland as a foreign base of operations. First, Ireland features a corporate tax rate of 12.5%, which is one of the lowest rates in the world. *10% Rate of Corporation Tax For Manufacturing Enterprises*, OFFICE OF REV. COMM'RS, IRISH TAX AND CUSTOMS, http://www.revenue.ie/en/business/incentives/tax-incentives-investors-ireland.html (last visited Apr. 2, 2012); *see also* Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 12 (noting that the low corporate tax rate, "coupled with the extensive network of Irish tax treaties" provides ripe incentives for foreign business operations). Second, and perhaps obviously, a language barrier does not exist because Ireland is an English-speaking country. CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK: IRELAND, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/ei.html (last updated Dec. 30, 2011). Third, Ireland has not implemented "anti-abuse" rules that are common in other tax systems, and also lacks strong transfer-pricing rules. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 12 (citing ORG. FOR ECONOMIC COOPERATION AND DEV., TRANSFER PRICING COUNTRY PROFILE FOR IRELAND, 1 (2010), *available at* http://www.oecd.org/dataoecd/40/54/37841011.pdf).

43. *See* Eileen Appelbaum, *No Tax Holiday for Multinational Corporations*, TRUTHOUT (June 11, 2011), http://www.truth-out.org/no-tax-holiday-multinational-corporations/1307797781 (reporting that Google was able to reduce its overall tax liability by $3.1 billion through its use of the Double Irish Sandwich from 2007 to 2009); *see also* Lisa O'Carroll, *US Investigates Google Tax Strategies*, GUARDIAN (Oct. 14, 2011, 7:08 AM), http://www.guardian.co.uk/technology/2011/oct/14/us-investigates-google-tax-strategies ("US tax authorities are investigating the strategies used by Google to cut its tax bill by about $1 b[illion] . . . a year by funneling profits from the [U.S.] and Europe to subsidiaries with low tax rates.").

appreciates in value.[44] As part of the exchange, *B* must pay an arm's-length price for the intangible property.[45] The IRS has explicitly approved this step of the scheme.[46] With the foreign subsidiary in control of the intangible property rights, the source of that income is foreign and not subject to U.S. corporate income tax.[47] The foreign subsidiary also agrees to collect income from foreign sources.[48]

The foreign corporation's location and place of incorporation are no accident. Google carefully selected Ireland as the place of incorporation for its foreign subsidiary because Ireland has a low corporate tax rate.[49] Most importantly, Irish law treats the subsidiary as a Bermudan company even though the subsidiary was incorporated in Ireland.[50] However, U.S. law treats the

44. *U.S. Double Irish/Dutch Sandwich*, INTELL. PROP. TAX (Nov. 11, 2010, 9:00 AM), http://www.ip-tax.com/2010/11/us-double-irishdutch-sandwich/. *See generally* I.R.C. § 1001 (2006) (providing that the amount included in income is the amount realized minus the property's adjusted basis).

45. I.R.C. § 482 (2006); *see* Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2010, 5:00 AM), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html/ (illustrating how Google shifts its income to low-tax countries, which under U.S. tax law allows subsidiaries to pay "'arm's[-]length' prices for the rights—or the amount an unrelated company would"); *see also* Treas. Reg. § 1.482-1(b)(1) (as amended in 2009) ("In determining the true taxable income of a controlled taxpayer, the standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer.")

46. Lisa O'Carroll, *US Investigates Google Tax Strategies*, GUARDIAN (Oct. 14, 2011, 7:08 AM), http://www.guardian.co.uk/technology/2011/oct/14/us-investigates-google-tax-strategies. "In 2006, the [IRS] signed off on a 2003 intracompany transaction that moved foreign rights to its search technology to an Irish subsidiary managed in Bermuda called Google Ireland Holdings." *Id.*

47. *See generally* CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 77 (4th ed. 2011) ("[E]xcept in rare circumstances, a foreign person who has no U.S.-source income will have no U.S. income tax liability.").

48. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/. Collection by the foreign subsidiary, rather than the multinational corporation itself, allows the foreign subsidiary to recognize the gain from foreign sources. Otherwise, the multinational corporation would be taxed on these foreign sources because U.S. corporations are taxed on their worldwide income.

49. *See* Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 12 ("Ireland's flat tax rate . . . is one of the lowest in the world.").

50. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM),

subsidiary as Irish.[51] As Bermuda has no corporate income tax, companies like Google are strongly enticed to conduct business there.[52] This tax subterfuge is necessary because simply incorporating the subsidiary in Bermuda would not take advantage of the tax treaties available to Irish corporations.[53]

2. Second Irish Subsidiary

The next step in, and the namesake of, the Double Irish is the creation of a second Irish subsidiary, *I*.[54] *I* then chooses to not be considered a corporation at all to hide its finances from the IRS.[55] "Significantly, transactions between [the foreign subsidiaries] will have no effect for U.S. tax purposes, and the income and activities of [the subsidiaries] will be combined in determining whether sales made by either company result in" Subpart F income to *B*, which is a CFC.[56] *B* then licenses its intellectual property to *I* in exchange

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http://bbs.slate.com/id/2291269/. These favorable Irish tax laws are not without criticism. Polly Toynbee, *No End to Tax Piracy, No Money*, GULF NEWS (Nov. 28, 2010, 12:00 AM), http://gulfnews.com/mobile/business/opinion/no-end-to-tax-piracy-no-money-1.719309. Ireland has been called "Europe's greatest tax haven, helping to cheat tax from the world's treasuries for decades." *Id.* Specifically, Ireland does not have any CFC rules that limit the deferral of tax. *Id.* Polly Toynbee, a columnist for London's *Guardian* newspaper, referred to the Irish system as "tax piracy" that remains out of touch with the rest of the civilized world. *Id.*; *see Polly Toynbee, Columnist, The Guardian*, GUARDIAN, http://www.guardian.co.uk/open-weekend/polly-toynbee?newsfeed=true (last visited Apr. 2, 2012) (summarizing Toynbee's professional career).

51. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/.

52. *Id.*

53. *See id.* (explaining that when money is transferred within the European Union there is not a withholding tax).

54. *Id.*

55. *Id.* Through the "check the box" rules, a company may choose whether to be treated as a corporation or a pass-through entity for tax purposes. Treas. Reg. § 301.7701-3(a) (as amended in 2006). If the subsidiary elects to be a pass-through entity, it is treated as a branch of the parent company for tax purposes. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 12. Perhaps more importantly, this also has the effect of avoiding Subchapter F's CFC anti-deferral rules because the second subsidiary is not a corporation. *See* I.R.C. § 957(a) (2006) (defining a controlled foreign corporation as "any foreign *corporation*" with a U.S. taxpayer holding more than 50% of the total value of the shares or voting interest (emphasis added)).

56. Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 13.

for substantial royalties.[57] *I* must report the income it receives from the license to Ireland, but thanks to the low 12.5% corporate rate and the ability to deduct the royalties to *B*, *I* pays a nominal amount in taxes.[58]

3. Dutch Sandwich

Users of the Double Irish sometimes add a third layer to the scheme with the addition of a third subsidiary, *D*, from the Netherlands.[59] Often referred to as a Dutch Sandwich,[60] the third layer could also be viewed as the cheese in the Double Irish. With this version, *B* licenses its intellectual property rights to *D*, which funnels the income to *I*.[61] This Dutch cheese further reduces tax burdens because Ireland does not tax the transfer from *D* to *I*, and the royalty payment from *D* to *B* is subject to a minimal amount of tax under Dutch law.[62] This has the effect of transferring royalty payments to *B* almost tax free while also getting favorable Irish tax rates.

B. *Repatriation Limitation*

The downside of using the Double Irish is that once the income is repatriated back to the United States, it is includible in the income of the U.S. parent company.[63] However, this has not

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57. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* The third subsidiary's sole purpose is to funnel money from the second subsidiary to the first. *Id.*

62. *Id.*

63. *Id.* Interestingly, U.S. corporations have recently lobbied for a tax holiday that would allow corporations to repatriate cash stashed in tax havens. Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html#. These companies argue that such a tax-free holiday would allow for domestic investment. *Id.* However, many of these companies are already achieving this goal though manipulation of various loopholes in the Internal Revenue Code. *See id.* (illustrating assorted minimally taxed or tax-free repatriation techniques such as the "Killer B"). Joel B. Slemrod, a University of Michigan economics professor, discounted this argument for a tax holiday because U.S. corporations "are already sitting on a record pile of cash—$1.9 trillion in liquid assets, according to Federal Reserve data." *Id.* However, this remains a significant issue because over $1 trillion is located overseas, awaiting repatriation. *Id.*

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deterred clever tax planners from finding loopholes.[64] Three methods are used to avoid including the repatriated revenue in income: (1) the Killer B; (2) the Deadly D; and (3) the Outbound F.[65]

1. The Killer B

The first method takes its name from Section 368(a)(2)(B) of the Internal Revenue Code.[66] This subparagraph provides that a domestic parent corporation may exchange stock for the cash that a foreign subsidiary has been accumulating overseas.[67] When combined with the nonrecognition rules for reorganizations in Section 361,[68] the parent corporation does not have to include the

64. *See, e.g.*, Eileen Appelbaum, *No Tax Holiday for Multinational Corporations*, TRUTHOUT (June 11, 2011), http://www.truth-out.org/no-tax-holiday-multinational-corporations/12077981 (highlighting Google's successful use of these tax loopholes to save over $3.1 billion in taxes within a three year period); *Fresh Air: How Offshore Tax Havens Save Companies Billions*, (NPR radio broadcast Mar. 17, 2011), *available at* http://m.npr.org/news/Business/134619750?singlePage=true. ("[C]ompanies like Google, Pfizer, Lilly, Oracle, Facebook, and Microsoft have managed to reduce their tax rates by hundreds of millions—and in some cases, billions—of dollars by taking advantage of offshore tax havens."); Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, BLOOMBERG (Oct. 21 2010), http://www.bloomberg.com /news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html/ (analyzing Facebook's tax-saving strategies which funnel earnings from Ireland to the Cayman Islands).

65. Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html#. All of these methods exploit loopholes in Internal Revenue Code Section 368(a)(2). I.R.C. § 368(a)(2)(B), (D), (F) (2006).

66. *Id.* § 368(a)(2)(B); Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html#.

67. I.R.C. § 368(a)(2)(B). The tax-avoidance mechanism works by having the foreign subsidiary purchase stock with cash acquired abroad. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/. The parent company is free to do what it wishes with the cash, and the foreign subsidiary can use the stock of the parent company to make new acquisitions. *Id.*

68. *See* I.R.C. § 361(a) (2006) ("No gain or loss shall be recognized to a corporation if such corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."); *see also* J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/ ("Because of the 'investment' nature of the exchange, no taxes are levied.").

repatriated income. However, the IRS has been largely successful in fighting this method since 2006.[69]

2. The Deadly D

The second method exploits the rules for acquiring new companies under Section 368(a)(2)(D).[70] Under this loophole, the parent acquires some other corporation, and the subsidiary buys this company from the parent with cash payments equal to the original purchase price.[71] This "allows the parent to free up money it already had, and get a new property, tax-free."[72] The Obama Administration recently attempted to change the provision that allows this maneuver.[73]

3. The Outbound F

Finally, some tax planners use Section 368(a)(2)(F) to achieve a tax-free repatriation of income.[74] This maneuver is on the

69. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/; *see* I.R.S. Notice 2006-85, 2006-41 IRB 677, 678, *available at* http://www.irs.gov/pub/irs-irbs/irb06-41.pdf (declaring that the Department of the Treasury will issue regulations for Section 368(a)(2)(B) to close the loophole because the Killer B maneuver "raises significant policy concerns" due to its ability to repatriate revenue without characterizing it as a taxable dividend). The Treasury Department promulgated Regulation Section 1.367(b)-4 to close the loophole by creating a deemed dividend when a company uses the Killer B to attempt a tax-free repatriation of revenue. Treas. Reg. § 1.367(b)-4(b) (as amended 2009).

70. I.R.C. § 368(a)(2)(D).

71. *See id.* (providing that when a corporation exchanges substantially all of its property for the stock of another corporation, such exchange is not disqualified from being a reorganization).

72. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/.

73. Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html#. Additionally, previous efforts to eviscerate the Deadly D have successfully frustrated the willingness of taxpayers to undertake such a maneuver, though not so far as to make the maneuver ineffective. *See* Hal Hicks & David J. Sotos, *The Empire Strikes Back (Again)—Killer Bs, Deadly Ds and Code Sec. 367 As the Death Star Against Repatriation Rebels*, INT'L TAX J., May–June 2008, at 37, 55 (discussing at length the effect of IRS Notice 2008-10, an initial effort to close the Deadly D loophole).

74. *See* I.R.C. § 368(a)(2)(F) (excepting certain transactions between investment companies from qualifying as reorganizations unless such companies satisfy a list of statutory requirements).

cutting-edge of tax avoidance schemes.[75] First, the parent company acquires another U.S. company and forces that company to promise to give a future large cash transfer.[76] The newly acquired company then becomes a subsidiary in another country and borrows cash from an existing foreign subsidiary.[77] The new subsidiary sends the parent that money. The "repayment" is tax-free because when the new subsidiary originally promised to make this transfer, it was a domestic company.[78]

IV. IS REFORM NEEDED?

Before any solutions to combating these schemes are explored, the actual need for reform should be determined. Due to the high U.S. corporate income tax rate,[79] it is possible that Congress intended for tax-minimizing methods to exist to ease this burden. Alternatively, Congress may have intended for multinational corporations to have a tax advantage over domestic corporations so that the former are able to compete against foreign companies that are using similar tax practices. Even if Congress did not intend for any of these effects, it must be asked whether reform is necessary.

75. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/; *accord* Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html# (reporting that the Outbound F is just another variation of efforts to avoid U.S. corporate taxes on repatriated funds).

76. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/. This would be an intra-corporation transfer, so it is tax free. *Id.*

77. *Id.*; *accord* Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html#.

78. J. Bryan Lowder, *The Double Irish and the Dutch Sandwich: The Explainer's Field Guide to Exotic Tax Dodges*, SLATE (Apr. 14, 2011, 6:00 PM), http://bbs.slate.com/id/2291269/; *accord* Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html# ("[W]hen the payment pursuant to the note is made, it comes from overseas. That means the foreign cash is treated as a nontaxable payment under the note, instead of a taxable dividend.").

79. I.R.C. § 11(b)(1) (2006) (listing the current marginal corporate tax rates ranging from 15% at the lowest margin to 35% at the highest).

A. *Congressional Intent*

With the enactment of the Subpart F anti-deferral rules for CFCs, it appears that Congress would not approve of the Double Irish's tax-deferral nature.[80] In fact, the Internal Revenue Code is littered with deterrents to owning foreign assets that could defer tax.[81] Yet, what makes the Double Irish potent is its ability to manipulate the CFC anti-deferral rules and Irish deductions at the same time.[82] Section 954(c)(6) could be interpreted to indicate that Congress intended for corporations to be able to have tax structures such as the Double Irish, as this paragraph provides a look-through rule that effectively gives Double Irish users their intended tax treatment without the check-the-box election.[83] This paragraph's purpose seems to be that the foreign-sourced income should not be susceptible to U.S. taxation under the CFC regime if that income was not subject to U.S. tax in the hands of the first subsidiary.[84] Section 954(c)(6)(A) explicitly provides that the

80. *See* OFFICE OF TAX POLICY, U.S. DEP'T OF TREASURY, THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS: A POLICY STUDY 3 (2000), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/subpartf.pdf (justifying the need for anti-deferral rules due to the potential for foreign corporations in avoiding taxes). The report admits that the incentives for corporations to avoid taxes are rooted in features of the existing U.S. tax regime, namely the treatment of corporations as separate taxpayers, and the taxation on income earned anywhere in the world. *Id.* at 1–2.

81. *E.g.*, I.R.C. § 1291 (2006 & Supp. IV 2010) (requiring a U.S. resident or citizen to pay interest when receiving a distribution from or selling stock at a gain in a passive foreign investment company to counter any deferral).

82. *See supra* Part III.A (explaining the mechanics of the Double Irish).

83. *See* I.R.C. § 954(c)(6) (2006 & Supp. IV 2010) (providing a pass-through-esque exemption to personal holding of income for certain transfers between related parties); *see also* Joseph B. Darby III & Kelsey Lemaster, *Double Irish More than Doubles the Tax Savings: Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation*, PRAC. U.S./INT'L TAX STRATEGIES, May 15, 2007, at 2, 16 n.49 (explaining that the exception provided under Section 954(c)(6) allows the Double Irish even without the check-the-box maneuver); Thomas A. Butera, *Extension of the Look-Through Exception and Active Finance Exception to Subpart F*, TAX STRINGER (June 2011) http://www.nysscpa.org/taxstringer/2011/june/butera.htm ("While check-the-box planning is still a viable option to eliminate the subpart F income inclusion, it may not be necessary while the look-through rule of Section 954(c)(6) continues to apply."). Section 954(c)(6) was first enacted in 2005 and included a sunset provision that would make the exception expire in 2008. Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, § 103, 120 Stat. 345, 346–47. The sunset provision was extended to 2012, but corporations organized after 2010 are not grandfathered into this exception. I.R.C. § 954(c)(6)(C).

84. *See id.* § 954(c)(6)(A) (excluding income from Subpart F's CFC rules if the income was not Subpart F income or connected to a U.S. trade or business in the hands of the payor).

Secretary of the Treasury "shall prescribe such regulations as may be necessary or appropriate to carry out this paragraph, including such regulations as may be necessary . . . to prevent the abuse of the purposes of this paragraph."[85] It could be argued that such a scheme is an abuse because it effectively eviscerates the CFC anti-deferral regime.[86] Yet whether the Double Irish is truly an abuse of this section is debatable.[87]

B. *Effect of Tax Avoidance*

Although Congress may not have intended for the present loopholes in the tax laws to exist, one may argue that the effect of exotic tax planning such as the Double Irish is to reduce the high U.S. corporate tax rate.[88] This argument continues to a salient point by stating that at a time of economic hardship, one should not close the loopholes and effectively raise taxes on the companies using these schemes.[89]

However, the United States, like many other countries,[90] faces a debt crisis and is struggling to find ways to reduce government spending and increase revenue.[91] While the U.S. has looked to

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85. *Id.*

86. *Cf.* I.R.S. Notice 2007-9, 2007-5 I.R.B. 401, 404, *available at* http://www.irs.gov/pub/irs-irbs/irb07-05.pdf (stating that avoidance of Section 956 is an abuse of Section 954(c)(6)).

87. *See id.* at 403–04 (listing some general anti-abuse principles such as avoiding a reduction in U.S. tax and maintaining the integrity of Section 956).

88. *Cf.* John Sokatch, *Transfer-Pricing with Software Allows for Effective Circumvention of Subpart F Income: Google's "Sandwich" Costs Taxpayers Millions*, 45 INT'L LAW. 725, 729–30 (2011) (comparing the United States' 35% top marginal rate to other countries, and concluding that the United States features one of the highest corporate tax rates in the world).

89. *Cf. Obama Flashback: 'You Don't Raise Taxes in a Recession'*, FOX NEWS (July 11, 2011), http://nation.foxnews.com/politics/2011/07/11/obama-flashback-you-dont-raise-taxes-recession (recalling that in 2009, President Obama denounced the idea of raising taxes during a recession).

90. *See* Henry Chu, *In Europe Debt Crisis, Markets and Masses Wait for Merkel to Blink*, L.A. TIMES (Nov. 29, 2011), http://articles.latimes.com/2011/nov/29/world/la-fg-europe-euro-rescue-20111130 (reporting the debt crisis in Greece, Italy, and Portugal that threatens to destroy the Euro and has claimed the jobs of six governmental leaders in Europe). The debt crisis continues to be widely reported almost daily, so much so that institutions have established blogs to monitor and report on it. For example, *The Euro Crisis*, provides "[r]eal-time updates and analysis of Europe's debt crisis." *The Euro Crisis*, WALL ST. J. BLOG, http://blogs.wsj.com/eurocrisis/ (last visited Apr. 2, 2012).

91. *See* Jeanne Sahadi, *Payroll Tax Cut Problem: Paying for It*, CNN MONEY (Nov. 30, 2011, 8:42 AM), http://money.cnn.com/2011/11/30/news/economy/payroll_tax_cut/index.htm?iid=SF_BN_Lead (stating that Congress is grappling with whether to extend

increasing revenue through better enforcement of tax law,[92] the Double Irish continues to cost the U.S. billions of dollars each year.[93] Although multinational corporations greatly benefit from the use of the Double Irish, it is questionable whether these benefits are shared with the American public.[94] Further, the existence of loopholes, such as the Double Irish, creates undeniable temptations for U.S. companies to do business overseas rather than domestically. The Double Irish also creates disparate tax treatment between largely domestic, retail-driven companies like Wal-Mart Stores, Inc. and intellectual-property-driven companies like Google that do business overseas.[95] Given these concerns, the effect of the Double Irish is clearly more negative than positive, and reform is needed to close the loophole.

V. POSSIBLE SOLUTIONS

Recognizing the negative impact of the Double Irish and Dutch Sandwich on domestic tax revenue, it is necessary to analyze

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payroll tax cuts). Due to Congress's inability to agree on debt reduction, there will be negative effects on the deficit regardless of the ultimate decision. *Id.*

92. *See, e.g.*, *IRS Realigns and Renames Large Business Division, Enhances Focus on International Tax Administration*, INTERNAL REV. SERV. (Aug. 4, 2010), http://www.irs.gov/newsroom/article/0,,id=226284,00.html (announcing the realignment of the Large Business and International division, which "will strengthen international tax compliance").

93. Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2010, 5:00 AM), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html/ ("[I]ncome shifting costs the U.S. government as much as $60 billion in annual revenue . . . ."). Google's scheme alone is costing taxpayers billions each year. *See id.* (reporting that Google was able to reduce its taxes by $3.1 billion for a three-year period).

94. *See* Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, Bloomberg (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html# ("U.S. companies are already sitting on a record pile of cash."). This implies that a repatriation of the stranded overseas revenue will not necessarily generate a domestic stimulus. *Id.*

95. *See* Suzy Khimm et al., *Experts React to Obama's Corporate Tax Proposal*, WASHINGTON POST (Feb. 22, 2012, 3:04 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/experts-react-to-obamas-corporate-tax-proposal/2012/02/22/gIQAdaSjTR_blog.html (reporting that Daniel Shaviro, a tax law professor at New York University, stated that a major problem of the current international tax regime is that there is not "a level playing field between [multinational corporations] and other businesses with regard to the tax they face on earning income in the U.S.").

various possible solutions and discuss the advantages and disadvantages of each.

A. *Transfer-Pricing Stopgap*

One method of fixing this problem is for the IRS to use one of the most potent tools available to attack tax evasion—Section 482.[96] As discussed above,[97] the IRS has broad powers under Section 482 to reallocate income, deductions, and credits between related parties to prevent tax evasion.[98] The IRS's Section 482 power is especially potent because courts have been deferential to the IRS in previous applications.[99] Thus, this method seems to be especially appealing because it is effective and is already in the IRS's toolbox to thwart tax evasion.

There are some issues with this solution that prevent it from being the panacea to the Double Irish problem. First, the IRS has agreed to transfer-pricing arrangements on prior occasions, namely with Google.[100] It bears noting though that the IRS may

96. I.R.C. § 482 (2006) (granting broad powers to the government to make reallocations between subsidiaries in order to avoid tax evasion).

97. *See supra* Part II.C (discussing transfer pricing).

98. I.R.C. § 482.

99. *See* Peck v. Comm'r, 752 F.2d 469, 472 (9th Cir. 1985) ("Section 482 gives the Commissioner broad discretion to place controlled taxpayers in the same position as uncontrolled taxpayers dealing at arm[']s-length." (citing Phillipp Bros. Chems., Inc. v. Comm'r, 435 F.2d 53, 57 (2d Cir. 1970); Aristar, Inc. v. United States, 553 F.2d 644, 646 (Ct. Cl. 1977))); Am. Terrazzo Strip Co., Inc. v. Comm'r, 56 T.C. 961, 971 (1971) (stating that a taxpayer who challenges the assertion of Section 482 has a "heavy burden" that requires the taxpayer to show that the IRS's determination was arbitrary or capricious (citing Spicer Theatre, Inc. v. Comm'r, 346 F.2d 704, 706 (6th Cir. 1965); Aiken Drive-In Theatre, Corp. v. United States, 281 F.2d 7, 10 (4th Cir. 1960))). Even if the taxpayer does satisfy this monumental burden, the taxpayer must still show that the underlying transfer-pricing arrangement met the arm's-length standard. *See, e.g.*, Perkin-Elmer Corp. v. Comm'r, No. 28860-89, 1993 WL 338983, at *34 (T.C. Sept. 8, 1993) ("This holding [of an arbitrary and capricious adjustment], however, does not relieve petitioner of its burden of proving that the transactions between P–E and PECC meet the arm's-length standard; if it fails to do so, the Court must decide the proper allocations of income between P–E and PECC.").

100. *See* Linda M. Beale, *Google, Repatriation and Advanced Pricing Agreements: US, and France, Looking into Offshoring*, A TAXING MATTER (Oct. 13, 2011), http://ataxingmatter.blogs.com/tax/2011/10/more-on-repatriation-irs-auditing-googles-offshoring.html (noting that the IRS approved Google's 2003 transfer of intellectual property to an Irish subsidiary (quoting Jesse Drucker, *IRS Auditing How Google Shifted Profits Offshore to Avoid Taxes*, BLOOMBERG (Oct. 13, 2011, 12:24 AM), http://www.businessweek.com/news/2011-10-13/irs-auditing-how-google-shifted-profits-offshore-to-avoid-taxes.html)). These agreements, known as advance-pricing

have changed its stance regarding future transfer-pricing agreements, as it is currently auditing Google's international tax practices.[101] The effect of this agreement between Google and the IRS upon other companies' transfer-pricing arrangements is unclear, but presumably, the IRS weakened its ability to attack those arrangements if they are similar to Google's. Second, attacking the transfer-pricing arrangement does not solve the underlying problem of tax deferral. If the Double Irish users carefully plan their transactions so that the transfer of intellectual property meets the arm's-length requirement, the IRS would not be able to utilize Section 482 to stop the Double Irish deferral.[102]

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arrangements, have been criticized because the taxpayer requesting the arrangement is much more likely to anticipate the effects of the agreement while the IRS may "lack expertise or in-depth understanding of the issues sufficient to challenge the taxpayer's assumptions." *Id.* Thus, such ex-ante arrangements are likely less favorable to the IRS than an ex-post examination of the transfer-pricing arrangement.

101. *See* Jesse Drucker, *IRS Auditing How Google Shifted Profits Offshore to Avoid Taxes*, BLOOMBERG (Oct. 13, 2011, 12:24 AM), http://www.businessweek.com/news/2011-10-13/irs-auditing-how-google-shifted-profits-offshore-to-avoid-taxes.html (reporting that the IRS is auditing Google's overseas profit shifting). This increased focus on Google's activities may be a result of the 2010 restructuring of the IRS that created a division for investigating offshore tax evasion. *See IRS Realigns and Renames Large Business Division, Enhances Focus on International Tax Administration*, INTERNAL REV. SERV. (Aug. 4, 2010), http://www.irs.gov/newsroom/article/0,,id=226284,00.html (realigning organizational divisions to strengthen monitoring and administration of international tax compliance). Such increased compliance measures include:

- [r]emoving geographic barriers, allowing for the dedication of IRS experts to the most pressing international issues[;]
- [i]ncreasing international specialization among IRS staff by creating economies of scale and improving IRS international coordination[;] . . .
- [c]onsolidating oversight of international information reporting and implementing new programs, such as the Foreign Account Tax Compliance Act . . . [; and]
- [c]oordinating the Competent Authority more closely with field staff that originate cases, especially those dealing with transfer pricing.

Id.

102. *Cf.* Treas. Reg. § 1.482-1(a) (as amended in 2009) ("The purpose of [S]ection 482 is to ensure that taxpayers clearly reflect income attributable to controlled transactions and to prevent the avoidance of taxes with respect to such transactions. Section 482 places a controlled taxpayer on a tax parity with an uncontrolled taxpayer . . . ."). The regulation goes on to state that tax parity is achieved via Section 482 by ensuring that the transaction between the related entities occurs at an arm's length standard. *Id.* § 1.482-1(b)(1). Presumably however, if the underlying transaction between the parent and the first Irish subsidiary is at arm's-length (recall that the transactions between the Irish subsidiaries are ignored for U.S. income tax purposes), then the requirements of Section 482 would be satisfied, and the Double Irish user may then freely defer the overseas income.

B. *Closing the Repatriation Loopholes*

Another method of combatting the Double Irish is to prevent the tax-free repatriation of overseas income. The IRS could close the loopholes in various subparagraphs of Section 368(a)(2) by promulgating regulations that prevent the abuse of the Code.[103] These regulations could provide that if the predominant purpose of a transaction is tax avoidance, then the IRS has the authority to ignore the application of the Code.[104] Such a test would disturb these arrangements because tax avoidance is often the *only* purpose.

This approach is also subject to some disadvantages. These new regulations will be susceptible to challenge in court.[105] When faced with such a challenge, courts must first decide if the regulation is consistent with the language of the statute and then, if the statute is silent, whether the agency's interpretation is a permissible construction of the statute.[106] Courts are generally very deferential to agency interpretations, so it is likely that these new regulations, if carefully drafted, would survive any challenges.[107] Also troubling is the fact that these regulations

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103. *Cf. supra* Part III.B.1 (mentioning that the IRS has been successful in preventing the Killer B with the promulgation of Treasury Regulation section 1.367(b)-4(b)).

104. *Cf.* Alan Gunn, *The Use and Misuse of Antiabuse Rules: Lessons from the Partnership Antiabuse Regulations*, 54 SMU L. REV. 159, 160 (2001) ("For most of our tax history, attempts by taxpayers to exploit the wording of particular Code provisions have been struck down on various grounds: substance over form, lack of business purpose, lack of non-tax substance, and the ubiquitous if obscure 'step-transaction doctrine.'"). This suggested predominate-purpose-test language would be consistent with previous anti-abuse provisions. *Id.* at 159–60. Furthermore the wording would avoid the criticism of recent anti-abuse regulations targeted against partnership tax abuses. *See id.* at 159–60 & n.6 (describing the criticism of regulations like Treasury Regulation section 1.701-2, that added the concept of abuse to traditional means of fighting tax evasion, as "vague, ambiguous, overbroad . . . and badly drafted" (citing Sheldon I. Banoff, *Anatomy of an Antiabuse Rule: What's Really Wrong with Reg. Section 1.701-2*, 66 TAX NOTES (1995))).

105. *Cf., e.g.*, Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162, 165 (3d. Cir. 2009) (resolving challenges asserted by taxpayers against Treasury Regulation section 1.882-4(a)(3)(i), which established filing deadlines for certain real property activity tax deductions); Khan v. United States, 548 F.3d 549, 551–54 (7th Cir. 2008) (discussing a taxpayer's challenge to a treasury regulation that allowed for a summons).

106. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

107. *See* Cottage Sav. Ass'n v. Comm'r, 499 U.S. 554, 561 (1991) (explaining that Congress had delegated such powers to the Commissioner, and thus courts will defer to the Commissioner's reasonable interpretations). However, if administrative constructions are contrary to a clear congressional intent, the judiciary must reject them. *Chevron, U.S.A., Inc.*, 467 U.S. at 843 n.9.

would not solve the underlying problem of deferral, but rather simply ensure that corporations cannot avoid U.S. taxes when repatriating income. Double Irish users will still use the scheme and, if no Internal Revenue Code section is readily available to repatriate the income, continue lobbying for a tax holiday to achieve the same result.[108]

C. *Strengthening the CFC Rules*

The best solution to the Double Irish is to strengthen the CFC rules to avoid the major advantage of the Double Irish deferral. As mentioned earlier, the CFC rules were developed to prevent deferral of U.S. taxation by keeping revenue from overseas subsidiaries from being repatriated.[109] The problem with the current CFC regime is that Double Irish users are able to use the check-the-box rules to avoid the application of the constructive dividend from a CFC.[110] A possible answer to this problem is to promulgate an anti-abuse regulation, which states that if a foreign company owned by a U.S. person chooses pass-through treatment but receives corporate treatment from its home country, the IRS may treat the entity as a corporation for the purpose of the CFC regime, if shown that the predominant purpose of the entity classification was tax evasion.

However, this solution is not without some drawbacks. As discussed previously, taxpayers may challenge agency regulations in court.[111] Further, this solution arguably seems to ignore the

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108. *See* Jesse Drucker, *Dodging Repatriation Tax Lets U.S. Companies Bring Home Cash*, BLOOMBERG (Dec. 28, 2010, 11:01 PM), http://www.bloomberg.com/news/2010-12-29/dodging-repatriation-tax-lets-u-s-companies-bring-home-cash.html# (reporting that many U.S. business leaders have lobbied the President for a tax holiday to repatriate overseas income). Such tax holidays have occurred in the past, so companies clearly are able to lobby successfully. For example, with the 2004 JOBS Act, Congress included Internal Revenue Code Section 965 that provided for a temporary 85% dividends-received deduction for U.S. corporations wishing to repatriate income from a CFC. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 422, 118 Stat. 1418, 1514–19.

109. *See* CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS: MATERIALS, TEXT AND PROBLEMS 492 (4th ed. 2011) (declaring the CFC rules as "the most important of these anti-deferral regimes").

110. *See* I.R.C. § 957(a) (2006) (defining a controlled foreign corporation as "any foreign *corporation*" with a U.S. taxpayer holding more than 50% of the total value of the shares or voting interest (emphasis added)).

111. *See, e.g.*, Cohen v. United States, 578 F.3d 1, 5 (D.C. Cir. 2009) (reciting the appellant's challenge to IRS Notice 2006-50, which addresses the relatively innocuous

right of taxpayers to select their business form (and corresponding method of taxation). However, the CFC rules already ignore the choice of entity rights to a certain extent because the CFC regime ignores the corporate form and passes income through to the U.S. shareholders.[112] A major weakness to such an approach is that companies may be able to use Section 954(c)(6) to obtain the same result without the check-the-box election.[113] Thus, such a regulation would only affect those unable to take advantage of this election. If Congress allows this exception to expire in 2012,[114] then the regulation would have teeth. If not, Congress may need to directly solve the problem via legislation that strengthens the CFC rules.

D. *Reducing the Corporate Tax Rate*

One commentator has proposed that a solution to the Double Irish is to reduce the U.S. corporate tax rate so that there is less of an incentive for multinational corporations to shift income overseas.[115] However, this solution also has problems. As noted

issue of taxation of duration-based toll telephone services), *vacated in part*, 599 F.3d 652 (D.C. Cir. 2010). Recall, a regulation is valid if "(1) it is not contrary to the unambiguously expressed intent of Congress, and (2) the [r]egulation is a reasonable construction of the statute." Richard M. Lipton, *Third Circuit Rejects Tax Court's Application of Administrative Law in* Swallows Holding, 108 J. TAX'N 284, 285 (2008) (citing *Chevron U.S.A., Inc.*, 467 U.S. at 842–43).

112. *See generally* I.R.C. § 951(a) (2006) (including in the shareholder's income his pro rata share of the CFC's Subpart F income).

113. *See generally id.* § 954(c)(6) (2006 & Supp. IV 2010) (creating the "[l]ook-thru rule for related controlled foreign corporations").

114. *See id.* § 954(c)(6)(C) ("Subparagraph (A) shall apply to taxable years of foreign corporations beginning after December 31, 2005, and before January 1, 2012, and to taxable years of United States shareholders with or within such taxable years of foreign corporations end.").

115. *See* John Sokatch, Comment, *Transfer-Pricing with Software Allows for Effective Circumvention of Subpart F Income: Google's "Sandwich" Costs Taxpayers Millions*, 45 INT'L LAW. 725, 744 (2011) (arguing that one solution "would be to . . . lower the tax rate for all U.S. corporations to a level on par with, or lower than, other developed nations."). The idea that the U.S. corporate rate is too high has received wide acceptance from both sides of the aisle, making implementation of this solution likely. *See* Beenish Ahmed, *A Comparison of Candidates' Tax Plans*, NPR (Feb. 9, 2012), http://www.npr.org/2012/02/09/146652190/a-comparison-of-candidates-tax-plans (comparing the presidential candidates' corporate tax plans, which all call for lowering the highest marginal rate). *But see* Kim Dixon, *Obama Calls for Cut in Corporate Tax, Loopholes*, REUTERS (Jan. 25, 2011, 11:54 PM), http://www.reuters.com/article/2011/01/26/us-obama-speech-tax-id USTRE70P0B720110126 ("[W]hile Republicans and Democrats agree the top corporate rate is too steep, they clash over how to fund a rate cut."). Currently, the Obama

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earlier, the job of tax planners is to minimize, as much as possible, their client's tax liability. Because the Double Irish exploits the low tax rates of Ireland and Bermuda,[116] simply lowering the tax rate would not vitiate the incentive to use the Double Irish to achieve an even lower tax rate.[117] Further, with the United States in a debt crisis, lowering the corporate rate would only serve to exacerbate the problem.

E. *International Minimum Tax*

An interesting solution that has been recently proposed by the Obama Administration is to impose a minimum tax upon offshore profits.[118] Under this proposal, subsidiaries of U.S. corporations would be subject to a minimum tax for their earned income.[119] However, this minimum tax is only effective up to a rate of 14%.[120] Thus, companies can still defer tax abroad if their tax haven is in a country with a tax rate above 14%.[121]

Administration is proposing to lower the corporate rate to 28% while at the same time broadening the tax base by reducing or eliminating many deductions. Zachary A. Goldfarb, *Obama Proposes Lowering Corporate Tax Rate to 28 Percent*, WASHINGTON POST (Feb. 22, 2012), http://www.washingtonpost.com/business/economy/obama-to-propose-lowering-corporate-tax-rate-to-28-percent/2012/02/22/gIQA1sjdSR_story.html?tid=pm_business_pop. However, this proposal has gotten mixed reviews from experts and is unlikely to pass during an election year. *See* Suzy Khimm et al., *Experts React to Obama's Corporate Tax Proposal*, WASHINGTON POST (Feb. 22, 2012, 3:04 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/experts-react-to-obamas-corporate-tax-proposal/2012/02/22/gIQAdaSjTR_blog.html (reporting the mixed responses to the proposal from a variety of experts).

116. *See generally supra* Part III (describing the mechanics of the Double Irish).

117. *See* Daniel Gross, *Should the U.S. Adopt an Alternative Minimum Tax for Companies?*, DAILY TICKER (Apr. 20, 2011, 9:00 AM), http://finance.yahoo.com/blogs/daily-ticker/u-adopt-alternative-minimum-tax-companies-130008133.html (arguing that lowering the tax rate will not prevent companies from funneling profits overseas because "[s]o long as companies have tax bills, they will have incentives to find ways to reduce them."). In fact, "American companies are world-class [tax] evaders [that] drive semi-trucks through loopholes." *Id.*

118. WHITE HOUSE & U.S. DEP'T OF TREASURY, THE PRESIDENT'S FRAMEWORK FOR BUSINESS TAX REFORM 14 (2012), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/The-Presidents-Framework-for-Business-Tax-Reform-02-22-2012.pdf.

119. *Id.*

120. Robert Goulder, *Obama's Corporate Minimum Tax*, TAX.COM (Feb. 29, 2012, 5:18 PM), http://www.tax.com/taxcom/taxblog.nsf/Permalink/RGOR-8RSM95?OpenDocument.

121. *Id.* As an example of how this new minimum operates, assume Google's Bermudan subsidiary makes $100 in foreign profits. As discussed earlier, Bermuda has no corporate income tax. Under President Obama's proposal, the Bermudan subsidiary

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It is unclear how effective or realistic such a measure might be. More substantive details are necessary to determine how this proposal would affect the Double Irish. For example, how will this plan affect the second Irish subsidiary that is a pass-through entity? Presumably, this entity would be hit with this minimum tax because its parent is also subject to the corporate tax reform. Thus, this proposal should theoretically make the Double Irish very unattractive. However, the current political climate seriously threatens the viability of this proposal because such a measure calls for legislative action in a partisan culture of deadlock. Ultimately, the first three methods suggested above may be a better course to take because those are ideas that the executive can unilaterally enact.[122]

VI. CONCLUSION

With the outcry from the Occupy Wall Street movement and the stark facts of the debt crisis, reducing corporate exploitation of the U.S. tax laws is now more of a necessity than ever. The government has recognized this with the addition of anti-abuse regulations[123] and the reorganization of the IRS to better enforce international tax compliance.[124] Nevertheless, many companies are still "getting away with murder" by exploiting loopholes in the Internal Revenue Code with the Double Irish Sandwich.[125]

A perfect escape from this quagmire is difficult to envision due

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would owe $14 in current taxes (14% of $100). *Id.* If that subsidiary was in Ireland, the tax would be $1.50 ($14 minus $12.50, which represents the tax paid to Ireland under its 12.5% rate). *Id.* If Google decided to funnel the funds to a German subsidiary, then the minimum tax would not be paid because Germany has a rate higher than 14%. *Id.*

122. *Supra* Part V.A–C.

123. *E.g.*, Treas. Reg. § 1.367(b)-4(b) (as amended in 2009) (closing the Killer B loophole).

124. *IRS Realigns and Renames Large Business Division, Enhances Focus on Tax International Administration*, INTERNAL REV. SERV. (Aug. 4, 2010), http://www.irs.gov/newsroom/article/0,,id=226284,00.html.

125. Jesse Drucker, *Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes*, BLOOMBERG (Oct. 21, 2010, 5:00 AM), http://www.bloomberg.com/news/2010-10-21/google-2-4-rate-shows-how-60-billion-u-s-revenue-lost-to-tax-loopholes.html/ (internal quotation marks omitted). Professor Reuven S. Avi-Yonah, who leads the University of Michigan's international tax program, stated that "[t]he system is broken and needs to be scrapped [because] . . . [c]ompanies are getting away with murder." *Id.* Although the international tax system is flawed, such a complete overhaul is unlikely due to the current political deadlock and the fact that international tax, by its very nature, is complicated and imperfect due to the mingling of disparate tax regimes.

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to the complicated structure of the Double Irish. In many ways, the Double Irish is a microcosm of the problems of international taxation—conflicting international tax laws, ad hoc solutions to loopholes that do not completely solve the problem, and highly sophisticated corporations that are constantly one step ahead of the tax law. A prudent course to take would be to combine the solutions proposed in Part V because, individually, all have drawbacks.[126] Implementing all of these solutions will ensure that, at least in some form, corporations are discouraged from abusing the loopholes in the international tax system to escape billions of dollars of tax liability.

126. *Supra* Part V.

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