II. Anti-Inversion Rules, the Pfizer-Allergan Merger, and the U.S. Chamber of Commerce's Challenge

A. Introduction: The Pfizer-Allergan Merger Blow-Up

In April, 2016, U.S. pharma-juggernaut, Pfizer, Inc. (Pfizer) and Irish pharmaceutical company Allergan, PLC (Allergan) cancelled both their $160 billion planned merger and relocation of Pfizer to Ireland.[1] The failed merger, according to Bloomberg data, was the largest reported pharmaceutical merger in dollar value.[2] As to what caused the failure, the companies blame the temporary Multiple Domestic Entity Acquisition Rule (Temporary Rule), which modifies the current anti-inversion regulation, 25 I.R.C. § 7874, and implements two intermittent notices, Notice 2014-52 and Notice 2015-79 (together, Notices).[3] The Temporary Rule, released by the Internal Revenue Service (IRS) and the U.S. Department of Treasury (Treasury), was created to halt cross-border tax evasion maneuvers that previously allowed taxpayers to avoid the application of the Section 7874 inversion rules.[4] The Pfizer-Allergan merger, which previously complied with the elements of Section 7874, blew-up when it was deprived of the tax benefits now prohibited by the Temporary Rule.[5] Allergan's CEO, Brent Saunders, stated that the Treasury

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[1] Richard Rubin, *Business Groups Sue U.S. Government Over Tax-Inversion Rules*, WALL ST. J. (Aug. 4, 2016), http://www.wsj.com/articles/business-groups-sue-u-s-government-over-tax-inversion-rules-1470332571 [https://perma.cc/BA7Z-DCBD].

[2] Antoine Gara, *Pfizer and Allergan Merger Ranks As Biggest-Ever Pharmaceutical Deal*, FORBES (Nov. 23, 2015), http://www.forbes.com/sites/antoinegara/2015/11/23/pfizer-and-allergan-merger-ranks-as-biggest-ever-pharmaceutical-deal/#1300f2353332 [https://perma.cc/YAR2-XH7L].

[3] 26 C.F.R. § 1.7874-8T (2016); Additional Rules Regarding Inversions & Related Transactions, 2015-79 I.R.B. 775 (2015); Rules Regarding Inversions & Related Transactions, 2014-42 I.R.B. 712 (2014).

[4] S. REP. No. 108-192 at 142 (2003).

[5] Chamber of Commerce v. I.R.S., No. 1:16-cv-944 (W.D. Tex. filed Aug. 4, 2016) (asserting that Allergan shareholders would have owned roughly 44 percent of the stock of Pfizer, and as such Pfizer shareholders would have owned less than 60 percent of Pfizer stock, thus making Pfizer an "expatriated entity" exempt from U.S. taxes on income earned outside the United States under § 7874(a)(2)(B)(ii)(I)); *see* Rubin, *supra* note 1.

"targeted the [Pfizer-Allergan merger]" and that he felt "blindsided" by the regulation.[6] Botox-maker Allergan experienced plummeting stock prices and consumer reluctance after the merger fell through.[7] Pfizer's CEO, Ian Read, has also criticized the Treasury's shortsightedness in stifling the merger's economic utility.[8]

Section B of this article introduces, in detail, the origins of tax inversion and anti-inversion regulation in the United States. The two most pertinent provisions to this discourse are Section 7874 and the Temporary Rule. Section C hones in on the contentiousness of the Temporary Rule by reviewing the ongoing litigation against the IRS and Treasury and the underlying policy argument over tax reform. In Section D, the article iterates the implications of the Temporary Rule and its resulting litigation, closely examining the immediate impact of the Pfizer-Allergan merger failure. In conclusion, Section E draws lessons from the blighted Pfizer-Allergan merger, predicts the status of tax inversion post-regulation and post-litigation, and recommends certain best practices.

B. Origins of Tax Inversion & Anti-Inversion Rules

Tax inversions are transactions through which companies relocate their legal domicile to low-tax countries, generally by merging with smaller companies based in a lower-tax jurisdictions, "in order to minimize U.S. tax on U.S. and non-U.S. income."[9] Inversions are a

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[6] *Allergan Says U.S. Targeted Pfizer Deal*, N. Y. TIMES: TIMESVIDEO (Apr. 6, 2016), http://www.nytimes.com/video/business/dealbook/100000004312422/allergan-says-us-targeted-pfizer-deal.html [http://perma.cc/S9WW-VQ2E].

[7] Tom DiChristopher, *Allergan CEO: Merger with Pfizer was targeted by US government*, CNBC (Apr. 6, 2016), http://www.cnbc.com/2016/04/05/pfizer-allergan-will-mutually-terminate-merger-over-inversion-rule-changes-sources-say.html [http://perma.cc/6XY4-EP26] (reporting Allergan's stock dropped 14.7 percent after the cancelled merger).

[8] *See Chamber of Commerce*, No. 1:16-cv-944 at 12. *See generally* Ian Read, *Treasury Is Wrong About Our Merger and Growth*, WALL ST. J. (Apr. 6 2016), http://www.wsj.com/articles/treasury-is-wrong-about-our-merger-and-growth-1459983997 [https://perma.cc/YTC6-GDDV] (describing the economic utility of tax inversions as including, *inter alia*, expanded reach into global markets, access to intellectual property portfolios, and information sharing).

[9] Rubin, *supra* note 1; *New Inversion Regulations Implement and Expand the Scope of the Anti-Inversion Tax Rules*, SIDLEY AUSTIN (Apr. 7, 2016),

symptom of uncompetitive U.S. tax laws.[10] Law firms across the nation, such as Baker and McKenzie, have provided tax and corporate advice to those corporations electing to indefinitely defer taxes owed by expatriating their profits through inversions.[11] This practice began as early as the 1980s with "mailbox inversions," mergers with shell corporations formed in the tax haven of Bermuda.[12] In response to these "mailbox inversions," Congress passed Section 7874 in 2004, preserving valid and natural inversions while denouncing "shams" that "rob the rest of the tax-paying public."[13] Section 7874 was thus the first anti-inversion rule, a regulation designed to prevent domestic companies from transacting, generally through merger or acquisition, with foreign companies for the purposes of adopting an address in a lower-tax jurisdiction.[14]

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http://www.sidley.com/news/2016-04-07-tax-update [https://perma.cc/27VZ-BHUM].

[10] *Chamber of Commerce*, No. 1:16-cv-944 at 2 (arguing that the 35 percent corporate tax rate in America, as one of the highest in the world, provides a competitive disadvantage to those companies who incorporate domestically and as such companies will choose an inversion to remain competitive); *Corporate Income Tax Rate*, OECD (Nov. 30, 2016), http://stats.oecd.org//Index.aspx?QueryId=58204 [https://perma.cc/4423-Y6BK] (providing data that shows the combined state and federal U.S. tax rate is 39 percent as compared to direct competitors such as Canada at 26.3 percent, the U.K. at 20 percent and Ireland at 12.5 percent).

[11] John McKinnon, *Senators Plan Curbs on Relocating To Bermuda, Other Tax Havens*, WALL ST. J. (Mar. 22, 2002), http://www.wsj.com/articles/SB1016753449115132240 [https://perma.cc/3GAB-RAVR].

[12] *Chamber of Commerce*, No. 1:16-cv-944 at 6; McKinnon, *supra* note 11 ("Relocations to Bermuda and other tax havens have been used sporadically by U.S. companies since the 1980s. Congress and the Internal Revenue Service placed limits on the practice, in the form of higher taxes."); *see* Richard Murphy, *World's Best Tax Havens*, FORBES (July 6, 2010), http://www.forbes.com/2010/07/06/tax-havens-delaware-bermuda-markets-singapore-belgium.html [https://perma.cc/EK6N-R94X] (listing popular tax havens, including London (U.K.), Delaware (U.S.), Luxembourg, Switzerland, Cayman Islands, Ireland, Hong Kong, Singapore, Belgium and Bermuda).

[13] McKinnon, *supra* note 11 (quoting Senator Charles Grassley of Iowa and Sen. Max Baucus of Montana of the Senate Finance Committee).

[14] Rubin, *supra* note 1.

1. Section 7874

Section 7874 uses stock ownership as a vehicle to prevent the practice of tax evasion through inversion. Congress struck a balance with Section 7874 by permitting legitimate business decisions while disallowing business deals that are merely hollow transactions designed to skirt tax obligations.[15] Under Section 7874, a transaction is considered hollow if a domestic company merges with a foreign company and retains a certain percentage of domestic stock because the transaction is deemed to serve "little to no non-tax effect or purpose and should be disregarded for U.S. tax purposes."[16] Section 7874 applies a categorical approach based on different brackets of stock ownership to determine the amount of U.S. federal tax owed by inverting corporations.[17] Specifically, if a foreign company acquires a domestic company where the shareholders of the domestic company retain at least 60 percent of the combined stock of both companies, the foreign company is treated, at least in part, as domestic for U.S. tax purposes.[18] Put differently, to receive the full tax benefits of an inversion under Section 7874, a foreign company must own at least 40 percent of the domestic company's stock.[19] The same foreign company must own at least 20 percent to enjoy any such tax inversion benefits.[20] In summary, Section 7874 permits tax benefits to be extended to inversions in which less than 60 percent of stock is retained by a domestic company's shareholders, condemns an inversion when 80 percent of stock is retained by the domestic company's shareholders, and affords some benefit to inversions with expatriated entities in the gray area between.[21]

Although Section 7874 directly responded to the growing practice of tax inversion, Congress released a second regulation five years later modifying one of the statute's missed considerations—the pooling of multiple inversion transactions into the same merger.[22]

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[15] S. REP. No. 108-192 at 142 (2003).
[16] *Id*.
[17] *See* I.R.C. § 7874 (2004).
[18] *Chamber of Commerce*, No. 1:16-cv-944 at 7; §§ 7874 (a)–(b).
[19] § 7874(a)(2)(B)(ii).
[20] § 7874(b).
[21] § 7874(a).
[22] *Chamber of Commerce*, No. 1:16-cv-944 at 9; *see* 26 C.F.R. § 1.7874-2(e). *See generally* Guidance Under Section 7874 Regarding Surrogate Foreign Corporations, 74 Fed. Reg. 27,920, 27,922 (June 19, 2009).

However, Congress subsequently encountered one gaping loophole, "serial inversion," the process by which companies leverage the benefits of inversion to grow rapidly.[23] Thus, the path to the Temporary Rule was paved.

2. Notices: The Skinny-Down Rule and Third-Country Transactions

Despite the reach of Section 7874 and its subsequent modification, serial tax inversions became a standard practice, with over a dozen U.S. companies considering inversions in 2014.[24] President Obama described the American companies as not "paying their fair share of taxes here at home."[25] Even so, of the nearly fifty bills have been introduced to modify Section 7874 since 2005, none have been enacted into law.[26] However, in 2014 and 2015, the IRS and the Treasury responded to the rise in serial inversion by releasing two Notices that laid the foundation for the Temporary Rule.[27] Of particular interest are two rules, the Non-Ordinary Course Distributions Rule (Skinny-Down Rule) and the Third-Country Transactions Rule.[28]

The Skinny-Down Rule was written to prevent a domestic company from reducing its market capitalization prior to an

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[23] Rubin, *supra* note 1 (defining the practice of "serial inversions" as one in which foreign companies choose to merge with domestic companies as a *quid pro quo*: the domestic company relocates its incorporation for tax purposes and the foreign company rapidly grows in assets).

[24] *Corporate Tax Inversions*, TAX FAIRNESS BRIEFING BOOKLET (Americans for Tax Fairness, Wash., D.C.), 2014, at 9, http://www.americansfortaxfairness.org/files/7-ATF-Corporate-Tax-Inversions-fact-sheet.pdf [https://perma.cc/XB87-92GJ].

[25] Brent Glover & Oliver Levine, *The Cost of Keeping Companies in the United States*, N.Y. TIMES (Sept. 6, 2016), http://www.nytimes.com/2016/09/06/opinion/the-cost-of-keeping-companies-in-the-united-states.html?_r=0 [https://perma.cc/7BKS-JGP3].

[26] *Chamber of Commerce*, No. 1:16-cv-944 at 9.

[27] Additional Rules Regarding Inversions & Related Transactions, 2015-79 I.R.B. 775 (2015); Rules Regarding Inversions & Related Transactions, 2014-42 I.R.B. 712 (2014)

[28] *New Inversion Regulations Implement and Expand the Scope of the Anti-Inversion Tax Rules*, SIDLEY AUSTIN (Apr. 7, 2016), http://www.sidley.com/news/2016-04-07-tax-update [https://perma.cc/27VZ-BHUM].

inversion.[29] Domestic companies would "skinny-down" in order to reduce the relative fraction of ownership allocated to domestic shareholders considered in the ratio calculated pursuant to Section 7874.[30] The Skinny-Down Rule applies to both dividends and stock buybacks and is applied without consideration of whether the "skinny-down" was in fact tied to inversion preparations.[31] The Temporary Rule substantially implemented the Skinny-Down Rule.[32]

Under Section 7874, a foreign acquiring company is treated as a domestic company for purposes of U.S. taxes if domestic shareholders retain 80 percent stock ownership.[33] But what if a domestic company were to merge with an existing foreign company, incorporated in Country A, by forming a new foreign holding company that is a tax resident of a third country, Country B? Under the Third-Country Transactions Rule, the stock issued by the new foreign holding company to the existing foreign company is disregarded for purposes of determining whether 80 percent stock ownership by domestic shareholders is met.[34] Thus, the Third-Country Transactions Rule tourniquets any stock issuance by the foreign holding company that could artificially deflate the relative fraction of ownership allocated to domestic shareholders in the new foreign holding company.[35]

3. The Temporary Rule

Finally, in 2016, the IRS and the Treasury addressed serial inversion head-on by implementing the Notices and instating the Temporary Rule, a regulation requiring three years of company stock growth to be disregarded when calculating stock ownership under the categorical determinations of Section 7874.[36] The Temporary Rule thus instated a look-back policy that does not allow for stock accumulated through a foreign company's U.S. deals over the past three years to count towards the market capitalization required to meet

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] I.R.C. § 7874(b) (2004).
[34] *New Inversion Regulations*, *supra* note 28.
[35] *Id.*
[36] *See generally* 26 C.F.R. § 1.7874-8T (2016) (establishing categorical determinations).

the inversion percentage thresholds, even if the deals were unrelated to each other.[37] This exclusion of accumulated stock from the ownership denominator would slow the ability of a foreign company to inflate the relative fraction of ownership allocated to the foreign company's shareholders through successive acquisitions of domestic companies.[38] Thus, the Temporary Rule's look-back policy freeze on any increase in the ownership fraction's denominator, together with the Skinny-Down and Third-Country Transaction Rules' freeze on any decrease in the ownership fraction's numerator, firewalled any artificial reduction of the ownership fraction allocated to domestic shareholders.

The Temporary Rule raised eyebrows because it was initially released without a notice and comment period.[39] The timing of the Temporary Rule's release also raised concerns of singling-out, as the Pfizer-Allergan merger was the only merger to fail due to this new policy.[40] Six months later, these suspicions ripened into legal claims waging war on anti-inversion regulation.[41]

C. The Chamber's Challenge

The U.S. Chamber of Commerce (Chamber) and the Texas Association of Business (together, Plaintiffs) challenged the authority of the IRS and the Treasury (together, Defendants).[42] The Plaintiffs' complaint (Complaint), filed August 4, 2016, claimed that the Temporary Rule constitutes unauthorized agency action by Defendants in substituting their own judgment for the bright-line ownership percentages outlined in Section 7874 when making determinations about the categorizations of a corporation for federal tax purposes.[43] The Complaint further asserts that the Temporary Rule was created arbitrarily, stunting all permissible forms of inversion and chilling the

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[37] § 1.7874-8T(g)(4).
[38] *See id*.
[39] Chamber of Commerce v. I.R.S., No. 1:16-cv-944 at 20–21 (W.D. Tex. filed Aug. 4, 2016).
[40] *Id.* at 12.
[41] *See id.*
[42] *See id*.
[43] *Id*. at 17 ("Section 7874 does not give Treasury authority to determine whether a corporation is a foreign, domestic, or surrogate foreign corporation for federal tax purposes."); 5 U.S.C. § 706(2)(C) (1966) (forbidding agency action "in excess of statutory jurisdiction, authority, or limitations").

economic benefits of the practice.[44] Lastly, the Complaint asserts that the Temporary Rule failed to provide notice and an opportunity for comment.[45]

Although the outcome of this case is directly tied to Defendants' rulemaking power, the lawsuit's broader implications are related to the usage of tax inversions.[46] The Complaint against the IRS and Treasury is grounded in the narrow issue of whether the IRS and Treasury, as administrative agencies bound by the Administrative Procedures Act (APA), have violated rulemaking procedures outlined in the APA by ordering the Temporary Rule.[47] However, the Complaint makes policy arguments about the proper venue for tax reform and the broad detriments to domestic commerce that anti-inversion rules stake.[48]

D. Relevance, Trends, & Implications for Financial Services

The Chamber's lawsuit and analysis of the Temporary Rule is substantively significant because inversion is a hotly debated business decision. Inversion had become a common practice with more than a

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[44] *Chamber of Commerce*, No. 1:16-cv-944 at 18–19 ("If an agency fails to provide a reasoned explanation for its action, that action is arbitrary and capricious and must be set aside."); § 706(2)(A) (forbidding agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

[45] *Chamber of Commerce*, No. 1:16-cv-944 at 20; §§ 553(b)–(d) ("(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with the law. . . . (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation . . . ."); § 706(2)(D) (1966) (forbidding agency action that is "without observance of procedure required by law").

[46] *See generally Chamber of Commerce*, No. 1:16-cv-944.

[47] *Id*. at 3.

[48] *Id.* at 1–2 ("this action is a clear case of federal Executive Branch officers and agencies bypassing Congress and short-circuiting legislative debate over a hotly contested issue by unilaterally imposing the Administration's preferred policy result in violation of clear statutory limits . . . . [I]f the Defendants' rule is permitted to stand, it is not just mergers that will suffer—it is the rule of law, and the certainty and stability required for effective commerce, markets, and economic growth . . . .").

dozen companies in active inversion negotiations pre-Temporary Rule.[49] Additionally, tax evasion, loopholes, and reform are topics that pervade political lexicon and deal with, in part, anti-inversion rules.[50]

On the one hand, the Temporary Rule forces companies to pay their fair share of domestic taxes.[51] The Temporary Rule also prevents against fraudulent or hollow transactions designed to skirt tax responsibilities.[52] Additionally, it firewalls against creative maneuvers—such as "hopscotch loans," the process of reinvesting untaxed offshore earnings in the new foreign company without triggering domestic taxes, or "offshoring jobs," the moving domestic business operations to a foreign location due to lower cost operations—with close nexuses to tax inversion loopholes.[53] And, on a basic level, the Temporary Rule is designed to increase the federal income tax base.[54]

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[49] *See Corporate Tax Inversions*, *supra* note 24.

[50] *See* Richard Rubin & Kathleen Hunter, *Treasury Exploring Limits on Inversions Without Congress*, BLOOMBERG (Aug. 5, 2014), http://www.bloomberg.com/news/articles/2014-08-05/treasury-said-exploring-inversion-limits-without-congress [https://perma.cc/T6J2-4GXZ] (quoting Treasury Secretary Jacob J. Lew, stating "If we have to wait for what is the likely period of time before business tax reform can be enacted, we're all going to regret the number of inversions that have occurred in the interim."); Rubin, *supra* note 1 (quoting Thomas Donohue, the Chamber's President and CEO, asserting "Instead of breaking the rules to punish companies engaged in lawful transactions, Washington should just do its job and comprehensively reform the tax code."); Press Release, White House, Remarks by the President on the Economy (July 24, 2014), https://www.whitehouse.gov/the-press-office/2014/07/24/remarks-president-economy-los-angeles-ca [https://perma.cc/Z8T3-9C3C] (acknowledging that although corporate inversions were "legal" the President declares "I don't care if it's legal—it's wrong.").

[51] *See Corporate Tax Inversions*, *supra* note 24.

[52] S. REP. No. 108-192 at 142 (2003).

[53] *See e.g.,* Americans for Tax Fairness, Comment Letter on Inversions and Related Transactions (July 12, 2016), https://www.regulations.gov/document?D=IRS-2016-0015-0125 [https://perma.cc/5HVZ-3CBE]; AFSCME, AFSCME Comment Letter on Inversions and Related Transactions (July 12, 2016), https://www.regulations.gov/document?D=IRS-2016-0015-0133 [https://perma.cc/W3AE-S9WY] (suggesting that "a loss to the Treasury of $41 billion over the next 10 years," from tax inversions is money "needed for priorities that can improve our local communities, fund public services and rebuild our crumbling infrastructure").

[54] *See* S. REP. No. 108-192 at 142; *Corporate Tax Inversions*, *supra* note 24.

On the other hand, tax savings from inversion allow companies to invest and employ domestically.[55] Crushing taxes are likely to prevent domestic investment and employment opportunities, causing a competitive disadvantage.[56] This process may even lead to corporations leaving the United States.[57] Some suggest that the Temporary Rule targets individual shareholders and investors rather than corporate executives.[58] Lastly, the Temporary Rule may prevent the flow of money from foreign companies into the United States via federal income taxes.[59]

Although the Temporary Rule is currently "temporary," since its enactment, the rule has finished its *ex post* notice and comment period.[60] The Chamber's suit may also uphold the IRS and Treasury's authority promulgated under the Temporary Rule.[61] If so, the Temporary Rule could become a permanent firewall for those corporations attempting to expatriate their incorporation.[62] Conversely, if the Court determines the rule is invalid, the status quo will be returned, as some suggest is likely to happen given the more than fifty prior unsuccessful attempts to modify Section 7874.[63]

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[55] Chamber of Commerce v. I.R.S., No. 1:16-cv-944 at 2 (W.D. Tex. filed Aug. 4, 2016).
[56] *Id.*
[57] Brian Garst, *U.S. anti-inversion regulations badly miss target*, CAYMAN FIN. REV. (Nov. 1, 2016), http://www.caymanfinancialreview.com/2016/11/01/u-s-anti-inversion-regulations-badly-miss-target/ [https://perma.cc/R3LR-MSLR] ("Perversely, the debt equity regulations aimed at preventing inversions will likely lead to more corporations leaving U.S. shores.").
[58] *See* Glover & Levine, *supra* note 25 (stating "[p]erversely, the inversion rules are more likely to punish American investors and long-term investors to the benefit of senior executives, recent investors and tax-exempt investors, including those overseas" and "[15%] to 20[%] of shareholders in the deals we studied were made worse off from inversion").
[59] *See generally Chamber of Commerce*, No. 1:16-cv-944.
[60] Gina Chon, *Plan to Curb Tax- Inversion Deals Could Go Too Far*, N. Y. TIMES: DEALBOOK (July 7, 2016), http://www.nytimes.com/2016/07/08/business/dealbook/plan-to-curb-tax-inversion-deals-could-go-too-far.html [https://perma.cc/Y6B3-Q6V8].
[61] *See generally Chamber of Commerce*, No. 1:16-cv-944.
[62] *See generally id*.
[63] *See e.g.*, S. 2667, 114th Cong. (2d Sess. 2016); H.R. 3959, 109th Cong. (1st Sess. 2005).

1. Return to the Pfizer-Allergan Merger

Allergan was affected and perhaps targeted by the Temporary Rule due to its past mergers, which include a $66 billion merger with Actavis, PLC, a $25 billion purchase of Forest Laboratories, and a $5 billion takeover of Warner Chilcott.[64] This behavior makes Allergan a "serial inverter" and causes Pfizer to be treated as an "expatriated entity" under the former terms of the merger agreement.[65] The deal would have dropped Pfizer's tax rate from 25 percent to 17–18 percent, saving the corporation $1 billion annually.[66] Instead, Pfizer was required to pay Allergan $400 million in termination fees.[67]

2. Implications for Financial Services & Legal Services

Broker-dealers participating in the Pfizer-Allergan deal, including Guggenheim Partners, LLC, Goldman Sachs Group, Inc., Centerview Partners Holdings, LLC, and Moelis & Co, lost a substantial $94 million in fees.[68] Allergan's advisors, JPMorgan Chase & Co and Morgan Stanley, lost $142 million.[69] According to one analyst, these financial services might only receive 10 percent of the fees they would have otherwise received.[70] Although the financial services losses from the Pfizer-Allergan merger were not the first losses due to anti-inversion rules, they were the largest.[71]

In providing legal services, counsel must inform clients of the risks of inversion. Even though it is unlikely Congress will pass legislation outright banning inversion, attempting to use mechanisms

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[64] Caroline Humer & Ransdell Pierson, *Obama's Inversion Curbs Kill Pfizer's $160 billion Allergan Deal*, REUTERS (Apr. 6, 2016), http://www.reuters.com/article/us-allergan-m-a-pfizer-idUSKCN0X21NV [https://perma.cc/R34F-5GRG].
[65] *Id.*
[66] *Id.*
[67] DiChristopher, *supra* note 7.
[68] Humer & Pierson, *supra* note 64.
[69] *Id.*
[70] *Id.*
[71] *See*, *e.g.*, David Gelles, *After Tax Inversion Rules Change, AbbVie and Shire Agree to Terminate Their Deal*, N. Y. TIMES: DEALBOOK (Oct. 20, 2014, 6:05 PM), http://dealbook.nytimes.com/2014/10/20/abbvie-and-shire-agree-to-terminate-their-deal/ [https://perma.cc/5HYT-CFMG]; *Corporate Tax Inversions*, *supra* note 24.

of tax inversion still poses a few risks to companies going forward: (1) companies require tax and corporate legal advisors who have experience and current knowledge in executing inversions in the specific country of foreign incorporation, (2) companies must assess and inform shareholders of the possible tax consequences of inversions that may result, and (3) companies must consider the risk associated with conducting a highly political, albeit legal, practice that is sometimes portrayed as "unpatriotic or unfair" in the media.[72] Tax lawyers have noted the Treasury's "strong record in court" and that lawyers challenging the Treasury would "face an uphill battle."[73] Thus, although more litigation is expected in the months ahead, it seems unlikely that the Temporary Rule will be extinguished.[74]

E. Conclusion: Pfizer & Allergan Post-Merger Blow-Up

Pfizer has engaged Medivation, producer of prostate cancer treatment drug Xtandi, with a $14 billion acquisition agreement[75] Xtandi is Medivation's only marketed product, generating $2.2 billion in global sales for the last four quarters.[76] However, compared to Pfizer's aborted attempts to takeover AstraZeneca and to merge with Allergan, the deal with Medivation is a small transaction with a low risk of disruption.[77]

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[72] Mike Periu, *What Is Tax Inversion—and How Can It Help or Hurt Your Business?* AMERICAN EXPRESS OPEN FORUM (Sept. 23, 2014), https://www.americanexpress.com/us/small-business/openforum/articles/how-establishing-a-foreign-presence-can-save-you-millions-in-taxes/ [https://perma.cc/7TXX-V6YW] (coining the terms "expertise risk," "shareholder risk," and "headline risk" to describe the current inversion affair).

[73] David Ingram & David Morgan, *Business Groups Sue Over New U.S. Limit On Tax-Driven Foreign Buyouts*, REUTERS (Aug. 4, 2016), http://www.reuters.com/article/us-usa-tax-inversions-idUSKCN10F20W [https://perma.cc/8U5G-MSJ5].

[74] *See id*.

[75] Andrew Pollack & Leslie Picker, *Pfizer to Buy Cancer Drug Maker in $14 Billion Deal*, N.Y. TIMES: DEALBOOK (Aug. 22, 2016), http://www.nytimes.com/2016/08/23/business/dealbook/medivation-pfizer-14-billion-deal.html [https://perma.cc/P8GH-QT2D].

[76] *Id*.

[77] *Id*.

Allergan has caught the interest of a billionaire activist inventor, Carl Icahn, who "deplored Pfizer's proposed takeover" of Allergan.[78] Following the Temporary Rule, Icahn bought "a large position" in Allergan.[79] Icahn's support for Allergan was not his first interaction with the anti-inversion movement; in a letter to Congress in October, 2015, Icahn urged the lawmakers to prevent companies from inverting and announced a $150 million political action fund to finance such action.[80] Since the end of June, however, Icahn has sold $700 million of Allergan stock.[81]

However, the implications of anti-inversion regulation extend beyond the Pfizer-Allergan merger blow-up. The fact that fifty bills to modify Section 7874 have been abandoned in Congress seems to suggest legislative action limiting inversions is unforeseeable.[82] However, the Temporary Rule has undergone *ex post* notice and comment, which ended on July 7, 2016.[83] Moreover, the Temporary Rule may survive Plantiffs' lawsuit. For this reason, it is irresponsible to assume the current practice of tax inversion is safe.

For domestic companies looking to invert, the domestic company must relinquish at least 40 percent of domestic stock ownership to the foreign company to satisfy Section 7874.[84] To avoid the reach of the Temporary Rule, financial services, legal services, and domestic companies alike should seek to merge only with those foreign companies with whom the domestic company has had substantial business activity. These services and companies should avoid foreign companies that have participated in frequent and recent

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[78] Michael J. de la Merced, *Carl Icahn Takes Stake in Allergan*, N.Y. TIMES: DEALBOOK (May 31, 2016), http://www.nytimes.com/2016/06/01/business/dealbook/carl-icahn-takes-stake-in-allergan.html [https://perma.cc/5T55-5Q45].

[79] *Id.*

[80] *Id.*

[81] David Benoit, *Carl Icahn Sells Down Most of Allergan Bet*, WALL ST. J.: MONEYBEAT (Nov. 14, 2016, 4:28 PM), http://blogs.wsj.com/moneybeat/2016/11/14/carl-icahn-sells-down-most-of-allergan-bet/ [https://perma.cc/4WH9-B3WK].

[82] Chamber of Commerce v. I.R.S., No. 1:16-cv-944 at 9 (W.D. Tex. filed Aug. 4, 2016).

[83] Gina Chon, *Plan to Curb Tax- Inversion Deals Could Go Too Far*, N. Y. TIMES: DEALBOOK (July 7, 2016), http://www.nytimes.com/2016/07/08/business/dealbook/plan-to-curb-tax-inversion-deals-could-go-too-far.html [https://perma.cc/RQ4G-DSRT].

[84] *See generally* S. REP. No. 108-192 at 142 (2003).

cross-border merger and acquisition activity. Domestic companies can safeguard themselves through due diligence, such as determining a foreign company's merger and acquisition activity as may be evidenced in their financial statements. In conclusion, if domestic companies are planning to invert on or after April 4, 2016, they should consult specialists to tax plan, as close compliance with the provisions outlined in Section 7874 and the Temporary Rule may become standard practice.

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