17-51063

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellees

v.

INTERNAL REVENUE SERVICE; UNITED STATES DEPARTMENT OF TREASURY; DAVID J. KAUTTER, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF INTERNAL REVENUE; STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE TREASURY,

Defendants-Appellants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

OPENING BRIEF FOR THE APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents questions of significant administrative importance arising from a pre-enforcement challenge to a Treasury regulation. Counsel for the United States believe that oral argument should be heard in this appeal.

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GLOSSARY

AIA	Anti-Injunction Act, I.R.C. § 7421(a)
APA	Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706
Chamber	Chamber of Commerce of the United States of America
Commissioner	Commissioner of Internal Revenue
DJA	Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq*.
I.R.C. or Code	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Plaintiffs	Chamber of Commerce of the United States of America and Texas Association of Business
ROA	Electronic record on appeal
TAB	Texas Association of Business
Regulation or serial acquisition rule	Temporary Treasury Regulation (26 C.F.R.) § 1.7874-8T
Treas. Reg.	Treasury Regulation (26 C.F.R.)
Treasury	Department of the Treasury

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No. 17-51063

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TEXAS ASSOCIATION OF BUSINESS,

Plaintiffs-Appellees

v.

INTERNAL REVENUE SERVICE; UNITED STATES DEPARTMENT OF TREASURY; DAVID J. KAUTTER, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER OF INTERNAL REVENUE; STEVEN T. MNUCHIN, IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF THE TREASURY,

Defendants-Appellants

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

OPENING BRIEF FOR THE APPELLANTS

STATEMENT OF JURISDICTION

The Chamber of Commerce of the United States of America (Chamber) and Texas Association of Business (TAB) (collectively, plaintiffs) brought this suit against the Internal Revenue Service (IRS), the United States Department of the Treasury (Treasury), and the Commissioner of Internal Revenue and the Secretary of the Treasury in their official capacities. (ROA.24-45.) Invoking the District Court's jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 706, plaintiffs sought (i) a declaration that Temporary Treasury Regulation § 1.7874-8T (the "Regulation" or "serial acquisition rule") is invalid and (ii) an injunction against its enforcement. (ROA.28, 44.) As we will explain, however, the District Court lacked subject-matter jurisdiction over this suit, because (i) plaintiffs lacked standing to bring it, and (ii) the Anti-Injunction Act, § 7421(a) of the Internal Revenue Code of 1986 (26 U.S.C.) (the Code or I.R.C.), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), deprived the court of jurisdiction to entertain it. *See* Arguments I and II, *infra*.

On September 29, 2017, the District Court entered judgment in favor of plaintiffs. (ROA.4910-11.) The judgment is a final, appealable order that resolved all claims of all parties. On November 27, 2017, the IRS, the Treasury, the Commissioner, and the Secretary filed a joint notice of appeal, which was timely under 28 U.S.C. § 2107(b) and Fed. R. App. P. 4(a)(1)(B). (ROA.4927-28.) This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether plaintiffs have standing to sue.

2. If so, whether the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act bar plaintiffs' request to have Temporary Treasury Regulation § 1.7874-8T declared invalid and enjoined.

3. Whether the Regulation is entitled to deference.

4. Whether the Regulation may be issued as a Temporary Treasury Regulation under Section 7805(e) of the Code with immediate effect, without prior notice and comment.

STATEMENT OF THE CASE

A. The nature of the dispute and summary of the proceedings

This appeal involves a pre-enforcement challenge to a Treasury regulation limiting the tax benefits of corporate inversions. Inversions occur when a United States firm shifts its tax residence offshore, often with the aim to avoid paying U.S. tax. In this suit, plaintiffs contend that the United States violated the Administrative Procedure Act ("APA") by issuing Temp. Treas. Reg. § 1.7874-8T. (ROA.40-44.) The United States moved to dismiss the case for lack of subject-matter jurisdiction on the grounds (i) that plaintiffs lacked standing to challenge the Regulation and (ii) that their suit was barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act. (ROA.142-177.) Plaintiffs moved for summary judgment. (ROA.179-218.)

The District Court (Judge Lee Yeakel) held that it had subject-matter jurisdiction and therefore denied the Government's motion to dismiss the complaint. (ROA.4912-18.) On the merits, the court held that the Treasury had the authority to issue the Regulation and did not engage in arbitrary and capricious rulemaking. (ROA.4918-21.) The court then held, however, that the Regulation was unlawfully issued without adherence to the APA's notice-and-comment procedures. (ROA.4921-26.) The court therefore granted summary judgment to plaintiffs on that claim, but denied their motion in all other respects. (ROA.4926.)

B. The relevant facts

1. Corporate inversions and the legislative response

For the period at issue, the federal tax treatment of a multinational corporate group depends significantly on whether the top-tier "parent" corporation is domestic or foreign, which turns upon its place of incorporation. I.R.C. § 7701(a)(4), (5). This is true because the United States taxes domestic corporations on worldwide income, but foreign corporations only on income effectively connected with a U.S. trade or business or certain U.S.-source income. I.R.C. §§ 1, 11, 881, 882. In addition, tax on the foreign-source income of a foreign corporation that is controlled by a domestic corporation is generally deferred until it is repatriated.[1] I.R.C. § 951.

Where foreign countries have lower tax rates or territorial-based systems, it may be advantageous for a multinational corporate group to replace the U.S. parent with a foreign parent in what is called an "inversion." This can be done, for example, in a series of transactions: a U.S. parent corporation forms a foreign corporation, which in turn forms a domestic corporation, which merges into the U.S. parent, which survives the merger as a subsidiary of the new foreign corporation. As a result of the merger, the U.S. parent corporation's shareholders receive shares of the foreign corporation and are treated as having

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[1] For post-2018 taxable years, the Tax Cuts and Jobs Act, Pub. L. No. 115-97 (Dec. 22, 2017), makes a number of changes to international taxation provisions other than § 7874 that are solely prospective in effect and do not apply to this case.

exchanged their shares for shares in the foreign corporation. The U.S. corporation may later transfer its foreign subsidiaries to the new foreign parent or other related foreign corporations in order to remove income from foreign operations from the U.S. taxing jurisdiction. Income of the U.S. corporation is often reduced by making deductible payments, such as interest, to the new foreign parent or other related foreign corporations.

Congress was concerned about the erosion in the U.S. tax base resulting from such corporate inversions. It believed that "inversion transactions resulting in a minimal presence in a foreign country of incorporation are a means of avoiding U.S. tax and should be curtailed." S. Rep. No. 108-192, at 142 (2003). Where inversions "permit corporations and other entities to continue to conduct business in the same manner as they did prior to the inversion, but with the result that the inverted entity avoids U.S. tax on foreign operations," Congress believed that "certain inversion transactions (involving 80 percent or greater identity of stock ownership) have little or no non-tax effect or purpose and should be disregarded for U.S. tax purposes." *Id.* Congress also believed that other inversion transactions (involving (as enacted) at least 60 but less than 80-percent identity in stock ownership) "may have sufficient non-tax effect and purpose to be respected, but warrant heightened scrutiny and other restrictions to ensure that the U.S. tax base is not eroded through related-party transactions." *Id.*

In order to "remove the incentives for entering into inversion transactions," H.R. Rep. No. 108-548 (Pt. I), at 244 (2004), Congress enacted § 7874 of the Code, Rules Relating to Expatriated Entities and Their Foreign Parents, as part of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 801(a), 118 Stat. 1418, 1562-66 (Oct. 22, 2004). Section 7874 applies if a U.S. corporation becomes an "expatriated entity" with respect to which a foreign corporation is deemed a "surrogate foreign corporation." I.R.C. § 7874(a)(2). This in turn occurs if, pursuant to a plan or series of related transactions, (i) a U.S. corporation becomes a subsidiary of, or transfers substantially all of its assets to, a foreign corporation; (ii) after the transaction, the former shareholders of the U.S. corporation hold at least 60 percent of the stock of the foreign corporation (by vote or value) by reason of having held stock in the U.S. corporation; and (iii) the foreign corporation, considered together with an expanded affiliated group consisting of all companies connected to it by chains of greater than 50-percent ownership, lacks substantial business activities in its country of incorporation, compared to the total worldwide business activities of the expanded affiliated group. *See* I.R.C. § 7874(a)(2)(B)(i), (ii) & (iii), (c)(1).

If § 7874 applies and the former shareholders of the U.S. corporation own at least 80 percent of the foreign acquirer, the foreign acquirer is deemed a domestic corporation for all federal tax purposes, thereby eliminating all of the tax benefits of the inversion. I.R.C. § 7874(b). If the former shareholders of the U.S. corporation own at least 60 percent but less than 80 percent of the foreign acquirer, the inversion is respected, but the inverted U.S. corporation must pay tax on any "inversion gain" for a 10-year period. I.R.C. § 7874(a)(1), (d)(1). "Inversion gain" means "the income or gain recognized by reason of the transfer . . . of stock or other properties by an expatriated entity, and any income received or accrued . . . by reason of a license of any property by an expatriated entity," either as part of the acquisition or after it, if the transfer or license is to a foreign related person. I.R.C. § 7874(d)(2).

2. Congress empowers the Treasury to write regulations to prevent the manipulation of the ownership percentage

The extent to which the foreign acquirer is owned, after the inversion, by the former shareholders of the acquired U.S. target is therefore important. Congress anticipated that there might be attempts to manipulate this ownership fraction (by keeping it below 60 (or 80) percent) in order to avoid triggering the application of § 7874. As a result, Congress provided, in § 7874(c)(4), that the transfer of properties or liabilities "shall be disregarded if such transfers are part of a plan a principal purpose of which is to avoid the purposes of this section." Under § 7874(c)(6), moreover, the Secretary "shall prescribe such regulations as may be appropriate to determine whether a corporation is a surrogate foreign corporation," including regulations to treat "warrants, options, contracts to acquire stock, convertible debt interests, and other similar interests as stock" and "to treat stock as not stock." I.R.C. § 7874(c)(6)(A), (B). In addition, § 7874(g) directs the Secretary to "provide such regulations as are necessary to carry out this section," including such adjustments "as are necessary to prevent the avoidance of the purposes of this section."

Because the exchange of stock in the foreign acquirer for the stock of the U.S. target takes place at market value, the ownership fraction reflects the relative values of the foreign acquirer and the U.S. target. The more valuable the foreign acquirer, the lower the ownership fraction that reflects the share ownership of the former shareholders of the U.S. target. There is, accordingly, an incentive to artificially increase the value of the foreign acquirer compared to the U.S. target, or to decrease the value of the U.S. target compared to the foreign acquirer, in order to manipulate the ownership fraction. The Treasury has issued regulations designed to thwart such tactics. For example, Treas. Reg. § 1.7874-2(e) provides that when a foreign corporation acquires substantially all of the property of two or more U.S. corporations under the same plan, the ownership stake of the shareholders of those companies will be combined in computing the ownership percentage for purposes of § 7874. T.D. 9591, 77 Fed. Reg. 34788, 34792 (June 12, 2012). In addition, Treas. Reg. § 1.7874-4(c)(1)(i)(2)(iv) provides that if the foreign acquirer issues stock in exchange for property "with a principal purpose of avoiding the purposes of section 7874," that stock will be disregarded in determining the ownership percentage. T.D. 9812, 82 Fed. Reg. 5388-01, 5396 (Jan. 18, 2017). Nor may a foreign acquirer manipulate the ownership fraction by "stuffing" itself with passive assets obtained in exchange for its stock. *Id.* at 5395-98; I.R.C. § 7874(c)(2)(B); Treas. Reg. § 1.7874-4(c)(1)(i), (i)(2), (j).

The Treasury also became concerned that a single foreign acquirer could avoid the application of § 7874 by acquiring several U.S. targets over a relatively short period of time, and where § 7874 would have applied had the acquisitions been made at the same time or pursuant to a plan providing for a series of related transactions. Because the value of the foreign acquirer increases to the extent that it issues stock in connection with each successive acquisition of a U.S. target, the foreign acquirer becomes enabled to acquire another, and potentially larger, U.S. target in a transaction to which § 7874 will not apply. Each acquisition serves as a platform to acquire successively larger U.S. targets without triggering § 7874, while at the same time permitting the multinational group to conduct business in the same way it did prior to the inversions. T.D. 9761, 81 Fed. Reg. 20,858, 20,865 (Apr. 8, 2016). Moreover, a U.S. target may not "skinny down" by making unusually large distributions before the inversion. T.D. 9761, 81 Fed. Reg. 20,867.

To counteract this problem, the Treasury promulgated Temp. Treas. Reg. § 1.7874-8T, which applies to "multiple domestic entity acquisitions" and is generally referred to herein as the "serial acquisition rule." T.D. 9761, 81 Fed. Reg. at 20,865-66, 20,902-04. For purposes of the ownership percentage calculation, the Regulation generally disregards stock that the foreign acquirer issued in connection with an inversion in the past 36 months. Temp. Treas. Reg. § 1.7874-8T(a), (b), (c)(1) & (g)(4). The amount of stock excluded from the ownership percentage calculation is generally equal to the number of shares issued to the shareholders of the U.S. target in the previous inversion, multiplied by the fair market value of a single share of stock on the date of the current inversion. Temp. Treas. Reg. § 1.7874-8T(c)(1) & (2).

This regulation, which was published in the Federal Register on April 8, 2016, was made effective for acquisitions completed on or after April 4, 2016. T.D. 9761, 81 Fed. Reg. at 20,859. Sections 7805 and 7874(c)(6) and (g) were invoked as the basis for rulemaking. *Id.* at

20,861, 20,882. The preamble stated in pertinent part that "[i]t has been determined that sections 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) do not apply to these regulations." *Id*. at 20,882.

3. The proceedings in the District Court

Plaintiffs filed this suit, seeking (i) a declaration that the serial acquisition rule of Temp. Treas. Reg. § 1.7874-8T is invalid, and (ii) an injunction against its enforcement. (ROA.24-44.) They sought to have the Regulation struck down on both procedural and substantive grounds, contending that they lacked any other effective remedy. (ROA.40-44.)

According to the complaint, Pfizer, Inc., a U.S. corporation, was a member of both the Chamber and TAB. (ROA.40.) Allergan plc, an Irish company, was a member of the Chamber and the Greater Waco Chamber of Commerce, which was in turn a member of TAB. (ROA.40.) Pfizer and Allergan had planned to enter into an inversion transaction, but abandoned the plan because it ran afoul of the serial acquisition rule, which stripped the deal of its tax benefits.[2] (ROA.35-39.)

The complaint alleged that members of both the Chamber and TAB "have been and continue to be injured by" the serial acquisition rule, which allegedly "precludes" them from entering into transactions similar to the proposed Pfizer-Allergan merger and also "chill[ed]" members "from considering other inversions that are currently permissible under Section 7874 for fear of similar targeting." (ROA.39.) The complaint alleged that Allergan and Pfizer "were injured" by the Regulation's disruption of their merger plans. (ROA.40.) It further alleged that, "[b]ut for" the Regulation, "Allergan would actively explore merger opportunities with large U.S. pharmaceutical companies, and Pfizer would actively explore merger opportunities with foreign

[2] The previous inversions were (i) the acquisition of Actavis, Inc., by Warner Chilcott plc, which resulted in the ownership of both entities by Actavis plc, an Irish company, in October 2013; (ii) the acquisition of Forest Laboratories, Inc. by Actavis in June 2014; and (iii) the acquisition of Allergan by Actavis in March 2015. (ROA.37-38.) Because in 2015, approximately 361 million shares of stock previously issued by Allergan in connection with these earlier transactions were required to be disregarded under the serial acquisition rule, Allergan shareholders, who would have owned 44 percent of the stock in the new corporation following the merger with Pfizer, would have been deemed to own less than 20 percent. (ROA.38.)

pharmaceutical companies that have recently acquired U.S. corporations or may acquire such corporations; and if the Rule were set aside, then Allergan would actively pursue merger opportunities otherwise burdened by the Rule." (ROA.40.)

The United States moved to dismiss the suit for lack of subject-matter jurisdiction on two grounds. (ROA.142-77.) First, the Government argued that neither plaintiff had associational standing because none of their members had standing to sue to obtain pre-enforcement relief. (ROA.157-68.) The vague allegation that the Regulation chilled or even precluded plaintiffs' members from entering into conjectural future inversions was not a sufficiently concrete and imminent injury, the Government argued, to justify prospective relief. (ROA.159-62.) Second, the Government argued that, in any event, the injunctive and declaratory relief plaintiffs sought was barred by the Anti-Injunction Act, I.R.C. § 7421(a), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a). (ROA.168-76.) It argued that this suit fell within the ambit of those statutes as clearly one for the purpose of restraining the assessment or collection of a tax –

the tax due on inversions that would be avoided if the Regulation were stricken. (ROA.170-72.)

Plaintiffs moved for summary judgment. (ROA.179-80.) They contended that the Treasury lacked the statutory authority to issue the serial acquisition rule (ROA.199-211) and engaged in arbitrary and capricious rulemaking in issuing the Regulation (ROA.211-14). Finally, plaintiffs asserted that the Regulation should be set aside because the Treasury failed to follow the notice-and-comment procedures of the APA. (ROA.214-17.) In response, the Government defended the Treasury's authority to issue the Regulation, pointed out that the Treasury provided a reasoned basis for the Regulation in its preamble, and argued that prior notice and comment was not required. (ROA.251-88.)

4. The District Court's decision

The District Court held that plaintiffs have associational standing to sue because at least one of their members – Allergan – has standing. (ROA.4915-16.) The court acknowledged that Allergan "is unable to point to a specific transaction it would be able to consummate if successful in its lawsuit." (ROA.4915.) But, in the court's view, it was sufficient that Allergan "identified a specific transaction that was thwarted by the Rule and asserted that it would actively pursue other inversions if this court were to set aside the challenged Rule." (ROA.4915.) The court further concluded that, although "the rule may be [a] facially neutral rule of general application," plaintiffs had adduced proof that Allergan, due to its proposed merger with Pfizer, "was a targeted object" of the regulation, which the court held was "sufficient to establish an injury in fact." (ROA.4915-16.)

The court went on to conclude that the suit was not barred by the Anti-Injunction Act. (ROA.4916-18.) The court reasoned that "the Rule is not a tax, but a regulation determining who is subject to taxation under provisions of the Internal Revenue Code." (ROA.4917.) The court stated that plaintiffs "do not seek to restrain assessment or collection of a tax against or from them or one of their members," but "challenge the validity of the Rule so that a reasoned decision can be made about whether to engage in a potential future transaction that would subject them to taxation under the Rule." (ROA.4917.) Relying on *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015), the court stated that "[a]lthough the Rule may improve the government's ability to assess and collect taxes, enforcement of the Rule does not involve the assessment or collection of a tax." (ROA.4917-18.)

The District Court then held that the Regulation was valid in substance, pointing out that § 7874(c)(6) and (g) authorize the Treasury to make rules to "treat stock as not stock" and to "prevent the avoidance of the purposes" of the statute, respectively. (ROA.4918-19.) The court further held that the Treasury "provide[d] a thorough explanation and basis for the Rule in the preamble to the notice of proposed rulemaking published in the Federal Register" that was "plausible" in light of the "evidence" before it. (ROA.4920-21.) Nor, in the court's view, did the Treasury "rely on factors that Congress did not intend" to be considered "or fail to consider an important aspect of the issue" before it. (ROA.4921.)

The court, however, set aside the Regulation for being promulgated without prior notice and comment and 30 days' advance publication in the Federal Register. (ROA.4921-26.) It rejected the Government's argument that the Treasury may publish a Temporary Regulation under I.R.C. § 7805(e) – with immediate effect for three years – without notice and comment. (ROA.4922-24.) The court noted that 5 U.S.C. § 559 provides that a subsequent statute does not supersede or modify the APA unless it does so expressly. (ROA.4922.) In its view, § 7805(e) did not do so. (ROA.4923.)

The United States appealed. (ROA.4927-28.)

SUMMARY OF ARGUMENT

Congress enacted § 7874 of the Code to curtail corporate inversions, which result in the erosion of the U.S. tax base. The statute expressly authorized the Treasury to issue regulations, among other things, to "treat stock as not stock" and to make such "adjustments . . . as are necessary to prevent the avoidance of the purposes of" § 7874. The Treasury exercised that authority to issue Temp. Treas. Reg. § 1.7874-8T, which addresses the problem of serial inversions, *i.e.*, multiple acquisitions over a relatively short period of time that avoid the ownership percentage test of § 7874 by inflating the value of the foreign acquirer. Plaintiffs' pre-enforcement challenge to the serial acquisition rule fails, for a number of reasons.

1. To begin with, plaintiffs lack standing to sue. Allergan's abandonment of its proposed merger – and of all efforts to find a suitable merger partner – deprived it – and plaintiffs – of standing.

The profession of a general intent to look for merger partners if the Regulation is invalidated is insufficient to constitute a live dispute over the application of the serial acquisition rule.

2. But even if plaintiffs have standing, their suit is barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act, which ban the issuance of declaratory and injunctive relief against the assessment or collection of federal taxes. Plaintiffs cannot have it both ways: their contention that they have standing because their members are threatened with increased tax liabilities would necessarily mean that their suit falls squarely within the AIA's prohibition against suits "for the purpose of restraining the assessment or collection of any tax." The District Court erred in its overly restrictive construction of the AIA. The AIA's prohibition on injunctive relief applies broadly, reaching not only actions directly involving assessment or collection, but also those that might affect assessment or collection indirectly. The AIA clearly bars attempts, such as this one, to enjoin a Treasury Regulation affecting the existence or amount of a tax liability.

3. To the extent the District Court had jurisdiction over this case, the court correctly held that the Treasury had the authority to issue the

serial acquisition rule. Congress gave the Treasury express authority to issue regulations interpreting § 7874, and the serial acquisition rule is a permissible construction of the statute. Far from being arbitrary and capricious, the Regulation sensibly precludes the "stuffing" of foreign acquirers by acquiring multiple U.S. corporations within a relatively short period of time. The Regulation is entitled to deference.

4. The District Court erroneously concluded, however, that the Treasury was required to follow the APA's notice-and-comment procedures in this case. Section 7805 of the Code makes those procedures inapplicable to this Temporary Regulation. The Treasury did all that was needed in this case by issuing the Temporary Regulation under § 7805(e) simultaneously with identical proposed regulations providing notice and an opportunity for public comment. The District Court's contrary holding should be reversed.

ARGUMENT

I

Plaintiffs lack standing to bring this suit

Standard of review

This Court examines standing de novo. *NAACP v. City of Kyle, Tex.*, 626 F.3d 233, 236 (5th Cir. 2010).

A. The elements of standing to sue

"[T]he irreducible constitutional minimum of standing" to sue under Article III "contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "[A] plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Defenders of Wildlife*, 504 U.S. at 560-61 (alteration omitted)).

To sustain an injury-in-fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Defenders of Wildlife*, 504 U.S. at 560). Where a plaintiff seeks injunctive relief, "'past exposure'" to allegedly "'illegal conduct'" is not sufficient to show an injury-in-fact absent "'any continuing, present adverse effects.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). An allegation of potential future injury, meanwhile, suffices only if "the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013)). In particular, to establish standing to raise a pre-enforcement challenge, a plaintiff must show "'an intention to engage in a course of conduct'" that is "'arguably affected with a constitutional interest'" and "'proscribed by'" the law, as well as "'a credible threat of prosecution'" under the law. *Susan B. Anthony List*, 134 S. Ct. at 2342 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

The requisite causal link between the injury and the challenged conduct is present for standing purposes only if the injury "fairly can be traced to the challenged action." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). An injury is not fairly traceable to the defendant's action if the plaintiffs "inflict[ ] harm on themselves based on their fears of hypothetical future harm." *Clapper*, 133 S. Ct. at 1151. Finally, "a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

"The party invoking federal jurisdiction" – here, each plaintiff – "bears the burden of establishing" standing. *Defenders of Wildlife*, 504 U.S. at 561. Although standing is assessed "as of the time a suit is filed" (*Clapper*, 133 S. Ct. at 1157), standing must remain "extant at all stages of review" (*Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

As relevant here, an association may sue on behalf of its members if at least one of its members would otherwise have standing to sue in its own right. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Here, the members potentially having standing to sue are Allergan and Pfizer, who abandoned their merger when the Regulation was adopted.

B. The District Court erroneously concluded that plaintiffs have standing to bring this suit

1. If Allergan had completed the Pfizer merger once the serial acquisition rule went into effect, the Regulation would have increased the combined group's tax liability by depriving it of the tax benefits of inversion. But Allergan not only canceled the merger. It also ceased looking for merger partners once the Regulation was adopted. Instead, Allergan alleged no more than that it would resume "actively" looking

for such merger partners only once the regulation was invalidated. (ROA.40.) Suffering harm in the past, however, is not sufficient in and of itself to confer standing to sue for prospective equitable relief. The threat of future injury must be "both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea*, 414 U.S. at 494 (quoting *Golden v. Zwickler*, 394 U.S. 103, 109-10 (1969)). Allergan's abandonment not only of the Pfizer merger, but also of all efforts to find a suitable merger partner, deprived it of standing to sue.

As the Supreme Court explained in *O'Shea*, 414 U.S. at 495-96, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." There, the plaintiffs alleged that unconstitutional discrimination in criminal-law enforcement had been inflicted upon members of their class by the defendant judge and magistrate. But those past wrongs did not furnish a case or controversy for prospective injunctive relief. *Id.* at 493-96. The prospect of future injury depended on the likelihood that the plaintiffs would again break the law, be arrested and charged, and suffer similar discriminatory treatment at the hands of the defendants. *Id.* at 496. But this threatened harm was not "sufficiently real and immediate to show an existing controversy." *Id.* at 497.

Similarly, in *Lyons*, 461 U.S. 95, the plaintiff alleged an injury inflicted by police use of a chokehold without provocation during a traffic stop. *Id.* at 97-98. There was no question that the plaintiff had standing to sue for damages. *Id.* at 105, 109. The Supreme Court held, however, that he lacked standing to seek injunctive relief. *Id.* at 105-07. His past injury did not "establish a real and immediate threat" that he would again be stopped by police and subjected to another illegal chokehold without provocation. *Id.* at 105. "Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles." *Id.* at 111.

Here, then, the question becomes whether Allergan, by alleging that it will resume an active search for merger partners only after the Regulation is invalidated, raises a sufficient likelihood that it will again be "wronged" by the Regulation. The answer is no. There is no continuing or threatened future injury that is sufficiently real and immediate – or certainly impending – to give it standing to challenge the Regulation.

As the Supreme Court explained in *Defenders of Wildlife*, 504 U.S. at 564, the plaintiff's "profession of an 'inten[t]' . . . is simply not enough. Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." The Court added that the concept of imminence "has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control." *Id* at 564 n.2.

The same principles apply here. The Regulation does not prohibit mergers, nor does it impose a criminal sanction or penalty for engaging in one. *Cf. Susan B. Anthony List*, 134 S. Ct. at 2344-46. It simply withdraws tax benefits from serial inversions. Allergan canceled its merger with Pfizer, and it has no concrete, immediate plans to look for another merger partner. As a result, plaintiffs challenge a regulation "in the abstract," which the Supreme Court has said would "fly in the face of Article III's injury-in-fact requirement." *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

In *Summers*, the plaintiffs sought to enjoin Forest Service regulations exempting certain small projects from the notice, comment, and appeal process used for more significant land-management decisions. *Id.* at 490. Although they alleged past harm, the plaintiffs failed "to allege that *any* particular . . . project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan . . . to enjoy the national forests." *Id.* at 495. "[I]n the absence of a live dispute over a concrete application of those regulations," the plaintiffs lacked standing to sue. *Id.*

2. To support its erroneous conclusion that Allergan retained its standing despite abandoning its merger with Pfizer and any present search for other merger partners, the District Court relied on *Clinton v. City of New York*, 524 U.S. 417 (1998), and *Bryant v. Yellen*, 447 U.S. 352 (1980). (ROA.4914-15.) Both decisions are inapposite.

In *City of New York*, the Supreme Court held that a farmer's cooperative seeking to buy a food processing facility had standing to challenge the President's exercise of a line-item veto against a law that provided a tax break for sellers of such facilities to cooperatives. 524 U.S. at 449. But there, unlike here, the plaintiff was not only "currently considering the possible purchase of other processing facilities in Idaho if the President's cancellation is reversed" (*id*. at 427), but it was also "actively searching for other processing facilities for possible future purchase" (*id*. at 432) in that event. The injury in that case was therefore considerably more direct and immediate than the putative injury here, because Allergan has abandoned its merger plans until such time as the Regulation is invalidated. It has neither alleged nor shown that it continues to look for potential transactions, much less transactions to which the serial acquisition rule would actually apply.

Bryant v. Yellen is inapposite for similar reasons. There, the Supreme Court held that a group who wished to purchase excess farmlands that could become available if a reclamation rule applied had standing to defend the application of that rule. 447 U.S. at 367-68. The Court concluded "it being likely that excess lands would become available at less than market prices if [the rule] were applied," the residents "had a sufficient stake in the outcome of the controversy to afford them standing to appeal." *Id*. at 368. The Court therefore found standing after the plaintiffs demonstrated that they would actually attempt to purchase farmlands if the case were decided in their favor. Here, Allergan has made no comparable showing. That difference changes the outcome.

3. Plaintiffs cannot litigate their members' rights in the abstract, as they seek to do here. For example, in *MGM Resorts Int'l Global Gaming Dev., LLC v. Malloy*, 861 F.3d 40, 47-49 (2d Cir. 2017), a casino developer was denied standing to challenge a state law creating a special registration pathway for the state's Indian tribes to build casinos on non-reservation land, where it had "not alleged that there is any specific project that it is prevented from bidding on by the Act." *Id.* at 48. Although the developer had "expressed general interest in the market" and made "preliminary studies of the viability of a project," those steps, in the court's view, did "not indicate that MGM is ready to participate in a specific bidding process, and that it is only prevented in doing so by the alleged benefits provided to the Tribes. Any competitive harm to MGM is therefore too remote and conjectural to support Article III standing." *Id.*

Taken to its logical conclusion, plaintiffs' position, as adopted by the District Court, would grant standing to any party who alleges that it would consider engaging in a particular action but for the potential application of a statute or regulation. Such a construction cannot be squared with the case-or-controversy requirement of Article III.

II

Plaintiffs' claims are barred by the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act

Standard of review

Whether the Anti-Injunction Act and the tax exception to the Declaratory Judgment Act deprived the District Court of subject-matter jurisdiction presents a question of law, reviewable *de novo*. *See United States v. Billingsley*, 615 F.3d 404, 409 (5th Cir. 2010).

A. Plaintiffs' suit falls squarely within the prohibition against suits for the purpose of restraining the assessment or collection of any tax

1. Congress has banned the issuance of declaratory and injunctive relief with respect to federal taxes

If the Court agrees with our argument that plaintiffs lack standing to bring this suit, then that will end the matter. But even if this Court were to hold, instead, that plaintiffs have standing, the

District Court still lacked subject-matter jurisdiction, because this suit is barred by the Anti-Injunction Act, I.R.C. § 7421(a) ("AIA"), and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* ("DJA"). Indeed, plaintiffs' contention that they have standing because their members are threatened with increased tax liabilities (ROA.4914) would necessarily mean that their suit falls squarely within the AIA's prohibition against suits "for the purpose of restraining the assessment or collection of any tax." I.R.C. § 7421(a).

The AIA provides, with statutory exceptions not relevant here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." *Id.* With stated exceptions not relevant here, the DJA likewise expressly bars claims to declaratory relief "with respect to Federal taxes." 28 U.S.C. § 2201(a).[3] The AIA's principal purpose is the "protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference," *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-37 (1974), "'and to require that

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[3] Because the scope of the acts is at least coterminous, *McCabe v. Alexander*, 526 F.2d 963, 965 (5th Cir. 1976), we refer to the AIA for convenience.

the legal right to the disputed sums be determined in a suit for refund.'" *Id.*, quoting *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 543 (2012) (*NFIB*). A suit that runs afoul of this proscription must be dismissed for lack of subject matter jurisdiction. *Alexander v. "Americans United,"* 416 U.S. 752, 758 (1974); *Hotze v. Burwell*, 784 F.3d 984, 986 (5th Cir. 2015).

Here, plaintiffs invoked the waiver of sovereign immunity found in the APA, 5 U.S.C. § 702. Although § 702 waives sovereign immunity for certain claims, it further provides that "[n]othing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." *See also* 5 U.S.C. § 701(a)(1) (providing that the APA's judicial-review chapter does not apply where "(1) statutes preclude judicial review").

It was understood when Congress amended § 702 as part of the Act of October 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721, that the enlarged waiver of sovereign immunity mentioned above could not be used to circumvent the express ban Congress placed on declaratory and injunctive relief against the assessment or collection of federal taxes. *See* H.R. Rep. No. 94-1656, at 12 n.35 (1976). Accordingly, the waiver of sovereign immunity in 5 U.S.C. § 702 does not override the AIA or the tax exception to the DJA. *Smith v. Booth*, 823 F.2d 94, 97 (5th Cir. 1987).

2. Plaintiffs' suit is barred because it seeks to restrain the assessment and collection of tax

The District Court erroneously held that plaintiffs' suit is not barred by the AIA. (ROA.4916-18.) Contrary to the court's conclusion, there is no principled distinction between a rule imposing "a tax" on the one hand, and a rule "determining who is subject to taxation" on the other. (ROA.4917.) If, as the District Court stated, the Regulation "would subject [plaintiffs] to taxation" on "a potential future transaction" (ROA.4917), then their suit to strike down the Regulation aims to foreclose the assessment and collection of those additional taxes. The court's ruling cannot stand.

The AIA's prohibition on injunctive relief applies broadly, reaching not only actions directly involving assessment or collection, but also those that might affect assessment or collection indirectly. The AIA bars any "suit for the purpose of restraining the assessment or collection of any tax." I.R.C. § 7421(a). Based on this language, focusing on the purpose of the suit, the Supreme Court has held that the AIA barred suits to enjoin the revocation of tax-exempt status – suits that did not directly involve tax assessment or collection.

In *Bob Jones*, 416 U.S. at 738-39, the Court held that the AIA barred a request to enjoin the Treasury from revoking the university's status as a tax-exempt charitable organization under I.R.C. § 501(c)(3) due to its racially discriminatory admissions policy, even though the suit did not directly involve assessment or collection. The suit was still one "for the purpose of" restraining assessment and collection, in the Court's view, because an injunction would have precluded collection, not only of income and payroll excise taxes from the university, but also taxes from donors seeking to deduct their contributions. *Id.* at 739. And because the university had the remedy of paying the tax due on revocation and suing for a refund, the Court held that it had "a full, albeit delayed, opportunity to litigate the legality of the . . . revocation of tax-exempt status." *Id.* at 746.

In *"Americans United,"* 416 U.S. at 760, the Court likewise held that the AIA barred a suit to enjoin a revocation of § 501(c)(3) status. It noted that the taxpayer could challenge the ruling in a suit for refund of federal unemployment tax that turned on that same classification. The Court held that the suit fell within the AIA's strictures, even though the organization had volunteered to pay its federal unemployment taxes even if its tax-exempt status were restored. The Court opined that "[u]nder any reasonable construction of the statutory term 'purpose,' the objective of this suit was to restrain the assessment and collection of taxes from respondent's contributors." 416 U.S. at 760. In so holding, the Court described the "sweeping terms" of the AIA and emphasized that the focus should be on the true "objective of [the] suit," no matter how it is framed. *Id*. at 760-61.

Accordingly, in determining whether a suit falls within the AIA's strictures, the courts must conduct "a careful inquiry into the remedy sought, the statutory basis for that remedy, and any implication the remedy may have on assessment and collection." *Maze v. IRS*, 862 F.3d 1087, 1091 (D.C. Cir. 2017). It is well settled, therefore, that the AIA's "ban against judicial interference is applicable not only to the assessment or collection itself, but is equally applicable to activities which are intended to or may culminate in the assessment or collection of taxes." *Smith v. Rich*, 667 F.2d 1228, 1230 (5th Cir. 1982).

This Court has therefore held that attempts to interfere with investigations into the existence of a tax liability, or to strip the IRS of tools and techniques for doing so, are barred. *Smith v. Rich*, *supra* (issuance of internal revenue summonses may not be enjoined); *Kemlon Products & Dev. Co. v. United States*, 638 F.2d 1315, 1320-21 (5th Cir. 1981) (disclosure of return information in connection with canvass of taxpayer's customers during audit could not be enjoined); *Campbell v. Guetersloh*, 287 F.2d 878, 879-81 (5th Cir. 1961) (refusing to enjoin the IRS from using the bank deposits method of calculating unreported income). As the D.C. Circuit has noted, "it has been held that suits that do not directly seek to restrain tax assessment or collection are nonetheless barred if they are directed at the means by which the IRS achieves those ends." *Seven-Sky v. Holder*, 661 F.3d 1, 10 (D.C. Cir. 2011), *abrogated on other grounds*, *NFIB*, *supra*.

This Court has also held that the AIA bars suits that would prevent the IRS from determining that a tax is even due. For example, suits to strike down various provisions of the tax law (or even the income tax in general) on various constitutional grounds have been held barred. In *Melton v. Kurtz*, 575 F.2d 547, 548-49 (5th Cir. 1978) (*per curiam*), the Court held that the AIA and the tax exception to the DJA barred an Equal Protection challenge to graduated income tax rates, as well as a Fifth Amendment self-incrimination challenge to the obligation to file a return. *See also Willis v. Alexander*, 575 F.2d 495, 496 (5th Cir. 1978) (*per curiam*) (precluding a similar Fifth Amendment challenge to filing a return). Similarly, in *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1435-38 (D.C. Cir. 1995), the D.C. Circuit held that a Due Process challenge to a retroactive increase in estate and gift tax rates was barred by the AIA. And in *Wyoming Trucking Ass'n, Inc. v. Bentsen*, 82 F.3d 930, 993-34 (10th Cir. 1996), the court held that the AIA barred an Origination Clause challenge to the constitutionality of the fuel excise tax. If taxpayers had succeeded in invoking the court's power to issue declaratory and injunctive relief in such cases, the result would have been to preclude any assessment of liability under the challenged provisions.

Notably, the AIA also bars attempts to enjoin Treasury Regulations and Revenue Rulings affecting the existence or amount of a tax liability, or a reporting requirement involving such a liability. In *Florida Bankers Ass'n v. U.S. Dep't of Treasury*, 799 F.3d 1065 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2429 (2016), the court held that the AIA barred a challenge to Treasury regulations requiring U.S. banks to report the amount of interest earned by nonresident alien individuals or be subject to a penalty that was expressly treated as a "tax" under I.R.C. § 6671. The court stressed that "in *NFIB*, the Supreme Court unequivocally confirmed that these penalties in Chapter 68, Subchapter B are "treated as taxes under Title 26, *which includes the Anti-Injunction Act*." *Id*. at 1069 (quoting from *NFIB*, 132 S. Ct. at 2583 (emphasis added by court)). The court accordingly held that "[i]nvalidating the regulation would directly bar collection of that tax. This case is therefore at the heartland of the Anti-Injunction Act." *Id*. at 1069-70.

Likewise, in *Foodservice & Lodging Inst., Inc. v. Regan*, 809 F.2d 842, 843-44 (D.C. Cir. 1987), the court held that the AIA barred challenges to two regulations affecting the tip income to be reported by or allocated to employees under I.R.C. § 6053. The violation of those regulations (Treas. Reg. §§ 31.6053-3(f)(1) and 31.6053-3T(j)(9)) was also subject to a penalty under I.R.C. § 6678(a)(3)(E) that, as was the case in *Florida Bankers*, was treated as a "tax" under I.R.C. § 6671. Those regulations, the court in *Foodservice & Lodging* observed, "plainly concern[ed] the assessment or collection of federal taxes."

In *Bob Jones* and *"Americans United,"* of course, challenges to the revocation of private letter rulings granting exemptions were barred by the AIA. Similarly barred are challenges to the application of Revenue Rulings under which taxpayers' tax liabilities would have been increased. *See Investment Annuity, Inc. v. Blumenthal,* 609 F.2d 1, 4 (D.C. Cir. 1979) ("That the suit has had no current effect on the collection of taxes is of no import, for its 'purpose' is clearly restraint."); *Educo, Inc. v. Alexander*, 557 F.2d 617, 620 (7th Cir. 1977) ("If Educo were successful in obtaining an injunction, numerous taxpayers would benefit by receiving a reduction of their tax liability."); *Cattle Feeders Tax Comm. v. Shultz*, 504 F.2d 462, 463 (10th Cir. 1974).

So, too, here, the AIA bars plaintiffs' attempt to invalidate the Regulation and, with it, its interpretation of what constitutes "stock" for purposes of triggering § 7874. Plaintiffs seek to restrain the Treasury from adopting an interpretation of a law that will increase their members' tax liabilities. If they succeed in invalidating the serial acquisition rule, plaintiffs will foreclose the possibility that taxes could be assessed against their members under § 7874 in instances falling within the terms of the Regulation. Plaintiffs cannot plausibly contend that the true "objective of this suit" (*"Americans United,"* 416 U.S. at 760) is not to restrain the assessment or collection of taxes. The AIA therefore bars this suit.

B. Neither *Direct Marketing* nor the judicial exceptions to the Anti-Injunction Act supports the decision below

1. The District Court misplaced its reliance on *Direct Marketing*

Although the District Court relied upon *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124 (2015), that decision does not support the decision below. (ROA.4916-18.) In *Direct Marketing*, the Supreme Court construed a different statute – the Tax Injunction Act (TIA), 28 U.S.C. § 1341. The TIA provides that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law" where "a plain, speedy and efficient remedy" is available in the State's courts. The Court held that the TIA did not bar a suit in federal court to enjoin the enforcement of Colorado laws requiring out-of-state retailers that do not collect Colorado sales or use taxes to notify Colorado customers of their tax liabilities and to report tax-related information to customers and the State. The Court rejected the broad, ordinary meaning of the word "restrain" in the TIA, to "limit, restrict or hold back," in favor of its narrower meaning, "'to prohibit from action; to put compulsion upon . . . to enjoin.'" *Direct Marketing*, 135 S. Ct. at 1132 (citation omitted). The Court looked to the company "restrain" keeps in the TIA, namely the equitable remedies "enjoin" and "suspend," as evidence of its meaning, explaining that "[t]he statutory context . . . lead[s] us to conclude that the TIA uses the word 'restrain' in its narrower sense." *Id.*

Here, by contrast, the text of the AIA, which prohibits a suit in any court "for the purpose of restraining the assessment or collection of any tax," differs from that of the TIA in material respects. Unlike the TIA, the AIA does not also contain the words "enjoin" or "suspend," nor does it prohibit district courts from granting specific forms of equitable relief. Rather, the prohibition contained in the AIA begins with the words "[n]o suit for the purpose of restraining," which, as discussed in Argument II.A., *supra*, puts the focus on the *purpose* of the suit, not the relief requested. That purposive focus, along with the fact that, in the AIA, "restraining" stands alone (rather than being coupled with the words "enjoin" or "suspend," as in the TIA), means that the AIA should not be construed in the same way. *Green Solution Retail, Inc. v. United States*, 855 F.3d 1111, 1119-20 (10th Cir. 2017), *pet. for cert. filed*, No. 17-663.[4]

Moreover, as noted above, the Supreme Court has long recognized that the AIA bars suits that seek to inhibit – even indirectly – the assessment or collection of federal tax. It scarcely can be regarded as having overruled its own jurisprudence regarding the AIA in *Direct Marketing* without even citing any of its opinions on the AIA.

[4] To be sure, the Supreme Court has assumed that words in both acts are "generally" used in the same way. *Direct Marketing*, 135 S. Ct. at 1129. This holds true for terms borrowed from federal tax law, such as "assessment," "levy," and "collection" in the TIA, as to which the Court looked to the Code for guidance. *Id.* at 1129-31. But "restrain" is not a term of art borrowed from the Code. It therefore takes its meaning from the context in which it appears, which markedly differs in the AIA and TIA.

Consequently, the AIA and the TIA cannot be regarded as being linked in the way the District Court here apparently believed. (ROA.4916-18.)

In any event, even though the Court in *Direct Marketing* held that the TIA did not bar a challenge to the notice and reporting requirements imposed on the out-of-state marketer, three concurring justices emphasized that the plaintiff there in no way challenged anyone's tax liability, whereas a "different question" would be posed by "a suit to enjoin reporting obligations imposed on a taxpayer . . . in lieu of a direct challenge to an 'assessment.'" 135 S. Ct. at 1136 (Ginsburg, J., concurring). Plaintiffs' suit here, of course, goes beyond such self-reporting obligations. It affects what their members' own tax liabilities would be, if any were to engage in a serial inversion subject to the Regulation. This suit is therefore well beyond the scope of *Direct Marketing*.

Finally, even if "restrain[ ]" in the AIA is read in the limited sense of "stopping" assessment or collection, as under the TIA, that meaning is satisfied here. Unlike the situation in *Direct Marketing*, where the use taxes were still reportable by taxpayers and collectible by the State without the help of the third-party reporting requirements challenged in the action, striking down the Regulation in this case would "have the effect of restraining – fully stopping – the IRS from collecting" taxes under § 7874 in the circumstances prescribed by the regulation. *Maze*, 862 F.3d at 1092. As a result, the AIA still bars the suit.

Notably, no other court has read *Direct Marketing* as broadly as the District Court did here. To the contrary, in *Florida Bankers*, 799 F.3d at 1069, the D.C. Circuit rejected the associations' reliance on *Direct Marketing*, holding that the AIA barred a challenge to Treasury regulations. And in *Green Solution Retail*, 855 F.3d at 1115-20, the Tenth Circuit rejected a marijuana dispensary's reliance on *Direct Marketing*, holding that the AIA barred its suit to enjoin the IRS from investigating its business records. In *Maze*, 862 F.3d at 1093, the court held that the AIA barred an APA challenge to transition rules governing treatment under offshore compliance programs, while in *CIC Services, LLC v. IRS*, 2017 WL 5015510 (E.D. Tenn. Nov. 2, 2017), *appeal docketed*, No. 18-5019 (6th Cir.), the court held that an APA claim challenging reporting requirements was barred by the AIA and the tax exception to the DJA. These decisions, which all post-date

Direct Marketing, reveal the flaws in the District Court's overly broad application of that decision.

2. Neither judicially created exception to the Anti-Injunction Act applies here

Although the District Court did not endorse plaintiffs' reliance on two narrow, judicially created exceptions to the AIA, we note for the sake of completeness that neither exception applies here.

1. In *Williams Packing*, 370 U.S. at 7, the Supreme Court held that the AIA will not prohibit a court's exercise of jurisdiction when the taxpayer demonstrates that (1) the Government has no chance of success on the merits *and* (2) equity jurisdiction otherwise exists. *Id.*

Plaintiffs cannot meet either prong of the *Williams Packing* test. Plaintiffs cannot satisfy the first prong because, as the District Court held (ROA.4918-19), the Regulation is substantively valid. *See* Argument III, *infra*. Further, the Regulation was validly adopted as a Temporary Regulation in accordance with I.R.C. § 7805(e). *See* Argument IV, *infra*. The United States therefore has ample probability of success on the merits. Plaintiffs' failure to satisfy the first prong is sufficient to render the *Williams Packing* exception inapplicable.

At all events, plaintiffs also fail to meet the second prong because they have an adequate remedy at law. Companies can proceed with an inversion, pay the tax due under § 7874 and the Regulation, file a claim for refund, and if that claim is denied or is not acted on within six months, sue for a refund in a district court or the Court of Federal Claims. *See* I.R.C. §§ 6511, 6532(a)(1), 7422; 28 U.S.C. §§ 1346(a)(1), 1491. The availability of a refund suit is a sufficient remedy to foreclose application of the *Williams Packing* exception. *"Americans United,"* 416 U.S. at 761-62; *Hunsucker v. Phinney*, 497 F.2d 29, 34-35 (5th Cir. 1974); *Nat'l Taxpayers Union*, 68 F.3d at (D.C. Cir. 1995). Moreover, if the Commissioner determines a deficiency, plaintiffs also have a prepayment remedy in the Tax Court. I.R.C. §§ 6213(a), 7442. Nor can plaintiffs demonstrate that withholding injunctive relief will cause them irreparable harm. Consequently, plaintiffs fail to meet either prong of the *Williams Packing* test.

2. In *South Carolina v. Regan*, 465 U.S. 367 (1984), the Supreme Court recognized an exception to the AIA "when the plaintiff has no alternative legal avenue for challenging a tax." *Nat'l Taxpayers' Union*, 68 F.3d at 1436 (rejecting application of *South Carolina*). The *South*

Carolina exception is very narrow. *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 408 n.3 (4th Cir. 2003). It does not apply here because plaintiffs' members have adequate alternate remedies. As noted above, they can pay the tax and sue for a refund. Alternatively, they can contest any deficiency determined as a result of the Regulation's application, without first paying the tax, by way of a deficiency proceeding in the Tax Court.

III

The serial acquisition rule is entitled to deference because it is a permissible construction of Section 7874 of the Code

Standard of review

The Court reviews with considerable deference an agency's permissible construction of a statute it administers. *La Union del Pueblo Entero v. FEMA*, 608 F.3d 217, 220-21 (5th Cir. 2010); *Sid Peterson Mem'l Hosp. v. Thompson*, 274 F.3d 301, 306-07 (5th Cir. 2001); *Marcello v. Bowen*, 803 F.2d 851, 855-57 (5th Cir. 1986).

A. Section 7874 authorizes the serial acquisition rule

If this Court should reach the merits, as we explain in this Argument III, the District Court correctly held that the Regulation was issued pursuant to statutory authority and was not arbitrary or capricious. (ROA.4918-4921.) The District Court erred, however, in concluding that the Treasury violated the APA by adopting the Regulation without advance notice and comment. (ROA.4921-4926.) *See* Argument IV, *infra*.

As we have explained, Congress authorized the Treasury to write regulations to prevent the manipulation of the ownership percentage test in § 7874. *See* Statement of the Case, Part B.2, *supra*. The Treasury then identified a problem in the application of the statute. Merging with one or more U.S. corporations could inflate a foreign acquirer's value, enabling it "to complete another, potentially larger, domestic entity acquisition" that avoids § 7874. T.D. 9761, 81 Fed. Reg. 20,858, 20,865 (Apr. 8, 2016). In some cases, a substantial portion of the foreign acquirer's value would be "attributable to its completion of multiple domestic entity acquisitions over the span of just a few years, with that value serving as a platform to complete still larger subsequent domestic entity acquisitions." *Id.* Such transactions, "if the shares of the foreign acquiring corporation issued in prior domestic entity acquisitions are respected as outstanding," abuse the 60-percent safe harbor in the statute to facilitate ever-larger inversions. *Id.*

To address that serious problem, the Treasury drew on an express delegation of authority to issue the serial acquisition rule. *Id.* at 20,861. Subsections (c)(6) and (g) of § 7874 unambiguously confer on the Treasury the authority to interpret the term "stock (by vote or value)" in § 7874(a)(2)(B)(ii). In addition, § 7805(a) authorizes the Treasury to issue regulations necessary for the enforcement of the Code. As the Treasury's exercise of the authority Congress delegated, the Regulation is entitled to deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984); *see also Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52-59 (2011) (according *Chevron* deference to Treasury Regulation).

In *Chevron*, the Supreme Court established a two-step test for determining the validity of an agency's statutory construction. First, a court asks "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, that ends the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But if Congress has not directly addressed the question, the court does not impose its own construction of the statute. Instead, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The agency's interpretation will stand unless it is "arbitrary, capricious, or manifestly contrary" to the statute. *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 740 (5th Cir. 2005).

In this case, the "precise question at issue" under *Chevron*'s first step is what "stock" is to be used in calculating the ownership percentage. The ownership percentage test of § 7874(a)(2)(B)(ii) turns on how much of "the stock (by vote or value)" of the foreign acquirer is held by the former shareholders of the U.S. target. But the statutory text does not answer the question of what stock in the foreign acquirer is counted for purposes of the ownership percentage test.

In two provisions of § 7874, Congress authorized the Treasury to adjust the meaning of the term "stock (by vote or value)." First, Congress directed the Treasury to issue "such regulations as may be appropriate to determine whether a corporation is a surrogate foreign corporation" (§ 7874(c)(6)), including regulations "to treat stock as not stock" (§ 7874(c)(6)(B)). Second, Congress directed the Treasury to issue "regulations as are necessary to carry out this section, including regulations providing for such adjustments to the application of this section as are necessary to prevent the avoidance of the purposes of this section." I.R.C. § 7874(g). The plain terms of § 7874(c)(6) and (g) show that Congress did not "directly address[ ] the precise question at issue" – what stock is to be used in calculating the ownership percentage. *Chevron*, 837 U.S. at 842.

Instead, Congress empowered the Treasury to adjust the meaning of "stock" in § 7874 within the parameters set by the statute. Subsections (c)(6) and (g) expressly authorize the Treasury to issue a regulation determining what "stock" is to be used in calculating the ownership percentage. At the very least, the breadth of subsections (c)(6) and (g) means that § 7874 does not "foreclose[ ]" Treasury's assertion of its authority to issue such a regulation. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 301 (2013); *see Texas Sav. & Cmty. Bankers Ass'n v. Fed. Housing Fin. Bd.*, 201 F.3d 551, 554-55 (5th Cir. 2000). Therefore, *Chevron*'s first step is satisfied.

The Regulation also clearly satisfies *Chevron*'s second step, which asks whether the agency's interpretation is a "permissible construction of the statute." 467 U.S. at 843. For this purpose, the question is whether Treasury's reading is permissible – even if it "differs from what the court believes is the best statutory interpretation." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *see Sid Peterson Mem'l Hosp.*, 274 F.3d at 307 ("We are not empowered to overrule the Secretary's interpretation . . . because we might have interpreted the statute in a different manner."). Under *Chevron*'s second step, the court "may not disturb an agency rule unless it is arbitrary or capricious in substance, or manifestly contrary to the statute." *Mayo*, 562 U.S. at 53 (citations and internal marks omitted).

Congress designed the ownership percentage test of § 7874 as a proxy test for measuring whether an inversion had "sufficient non-tax effect and purpose to be respected," and if so, whether certain benefits of inverting should be limited. S. Rep. No. 108-192, at 142. "Stuffing" transactions prevent that proxy test from working properly because they artificially inflate the value of the foreign acquirer compared to the U.S. target. Congress therefore provided that stuffing transactions undertaken as "part of a plan a principal purpose of which is to avoid the purposes of" § 7874 would be "disregarded." I.R.C. § 7874(c)(4). But Congress also recognized that stuffing transactions *without* such a plan can prevent the test from working properly. *See* I.R.C. § 7874(c)(2)(B) (disregarding stock issued in a public offering related to the acquisition, regardless of intent). And in § 7874(c)(6) and (g), Congress also provided Treasury with the flexibility to address other forms of stuffing. *See, e.g.*, Treas. Reg. § 1.7874-7T.

The serial acquisition of multiple U.S. companies is a form of stuffing. As a foreign acquirer stuffs itself with historically U.S.-resident companies, its market value increases, enabling it to acquire additional U.S. companies while circumventing the ownership percentage test. Serial inversions therefore create precisely the problem that Congress enacted § 7874 to curtail. As such, serial inversions represent an "avoidance of the purposes of" the statute. I.R.C. § 7874(g).

The Treasury properly addressed the serial inversion problem by issuing the Regulation pursuant to an express delegation of authority. The Regulation is entitled to deference.

B. The Treasury's issuance of the serial acquisition rule was not arbitrary and capricious

The serial acquisition rule is not arbitrary and capricious. As the District Court explained (ROA.4919-21), the Treasury provided a thorough basis for the Regulation in its preamble. *See* T.D. 9761, 81 Fed. Reg. at 20,865 (discussed in Argument III.A., *supra*). In short, the value of a foreign acquirer that serially inverts may consist in substantial part of U.S.-based assets that are operated from the United States, were historically owned in the United States, and were until recently subject to U.S. tax laws. The Treasury therefore "concluded that it is not consistent with the purposes of section 7874 to permit a foreign acquiring corporation to reduce the ownership fraction for a domestic entity acquisition by including stock issued in connection with other recent domestic entity acquisitions." 81 Fed. Reg. at 20,865.

To address the specific problem it identified, Treasury decided to "exclude[ ] from the denominator of the ownership fraction" the portion of the foreign acquirer's stock that was issued in connection with recent mergers with U.S. companies. *Id.* For purposes of the ownership percentage calculation, the Regulation generally disregards stock that the foreign acquirer issued in connection with an inversion in the past 36 months. Temp. Treas. Reg. § 1.7874-8T(g)(4). By eliminating the value of companies that were recently U.S.-based, the Regulation addresses the specific problem that Treasury recognized and outlined in the preamble.

Contrary to plaintiffs' contentions below, the Regulation targeted a practice, rather than a single proposed inversion. (ROA.35-37.) In drafting the Regulation, the Treasury considered public information regarding serial inversions, including news articles and journals regarding other mergers both before and after Pfizer and Allergan announced their proposed merger in late 2015. *See, e.g.*, ROA.4546-54, 4603-05, 4653-54. Requiring the Treasury to ignore such information would require the agency to turn a blind eye to the very practices it is charged with regulating. Plaintiffs' position is fatally flawed.

IV

Section 7805 of the Code authorizes the adoption of Temporary Regulations, such as the serial acquisition rule, without prior notice and comment

Standard of review

This Court reviews the District Court's grant of summary judgment *de novo*. *Hoog-Watson v. Guadalupe County, Tex.*, 591 F.3d 431, 434 (5th Cir. 2009).

The District Court erred in concluding that the Treasury violated the APA by issuing the Regulation without using the pre-promulgation notice-and-comment procedures of 5 U.S.C § 553. (ROA.4921-26.) Although 5 U.S.C. § 553 generally requires notice-and-comment rulemaking (with certain exceptions), those general provisions are made inapplicable to Temporary Regulations by I.R.C. § 7805.

Section 7805(a) grants the Secretary the express statutory authority to "prescribe all needful rules and regulations for the enforcement of this title," *i.e.*, Title 26. The first precursor of this rulemaking authority dates back to 1864. *See* Act of June 30, 1864, ch. 173, § 1, 13 Stat. 223 (granting the Commissioner, under the supervision of the Secretary, the authority to prepare all regulations necessary to effectuate the collection of taxes). The authority granted in § 7805(a) has remained largely unchanged since 1917. *See* War Revenue Act of 1917, ch. 63, § 1005, 40 Stat. 300, 326.

Until 1996, under authority granted by Congress, Treasury Regulations were presumptively retroactive. That authority dates back to at least 1939, *see* Internal Revenue Code of 1939, ch. 2, § 3791(b), 53 Stat. 1, 467, and was later found in § 7805(b) of the 1954 Code, which provided that "[t]he Secretary may prescribe the extent, if any, to which any rule or regulation relating to the internal revenue laws shall be applied without retroactive effect." Indeed, this Court recognized the presumptive retroactivity of Treasury Regulations promulgated under § 7805. *E.g., Snap-Drape, Inc. v. Commissioner*, 98 F.3d 194, 202 (5th Cir. 1996); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972, 979 (5th Cir. 1977). The power to make Treasury Regulations and rulings retroactive could be disturbed only for an abuse of discretion. *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 184 (1957).

Notably, the Treasury's authority to give regulations retroactive effect was extant at the time Congress enacted the APA in 1946. Congress then provided that "[n]othing in this Act shall be held to . . . limit or repeal additional requirements imposed by statute or otherwise recognized by law." Administrative Procedure Act, Pub. L. No. 79-404, § 12, 60 Stat. 237, 244 (1946); *see* 5 U.S.C. § 559. Because Congress is assumed to legislate against the backdrop of the relevant established law, the Treasury's longstanding practices inform the Court's interpretation of the enacted law. *See Disabled Am. Vets. v. Sec'y of Vets. Affairs*, 419 F.3d 1317, 1322-23 (Fed. Cir. 2005). Although the

Treasury engages in notice-and-comment rulemaking before adopting final Treasury Regulations, to the extent such a regulation has retroactive effect, the result is virtually the same as adopting a Temporary Regulation with immediate effect and without prior notice and comment.

As the District Court noted (ROA.4922), subsequent exceptions to the APA must be express. Congress amended § 7805 after enacting the APA in two ways relevant here. As we explain below, both amendments support the validity of the Regulation.

First, in 1988, as part of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6232, 102 Stat. 3342, 3735, Congress added a new subsection (e) ("Temporary Regulations") to § 7805, providing that "[a]ny temporary regulation shall expire within 3 years after the date of issuance of such regulation." I.R.C. § 7805(e)(2). In addition, any Temporary Regulation is also to "be issued as a proposed regulation." I.R.C. § 7805(e)(1).

The legislative history confirms that, in enacting § 7805(e), Congress recognized and approved of the Treasury's practice of issuing Temporary Regulations effective immediately upon publication, provided that (as was done here) they are issued simultaneously with identical Proposed Regulations providing notice and an opportunity for public comment. Committee reports note that the IRS "issues some regulations as temporary regulations," which generally "are effective immediately upon publication and remain in effect until replaced by final regulations. When the IRS issues temporary regulations, it generally also issues those same regulations in proposed form by cross-reference." H.R. Conf. Rep. No. 100-1104, at 217 (1988); S. Rep. No. 100-309, at 7 (1988). Because Congress was "concerned about the length of time that some regulations remain in temporary form," S. Rep. No. 100-309, at 7, it provided that Temporary Regulations would be effective for only three years. The Conference Report, however, stated that "[t]he expiration of temporary regulations at the end of this two-year period [*i.e.*, the length of time proposed by the Senate amendment] *is not to affect the validity of those regulations* during [that] period." H.R. Conf. Rep. No. 100-1104, at 218 (emphasis added).

Second, in 1996, as part of the Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101, 110 Stat. 1452, 1468-69, Congress amended § 7805(b) to limit the Treasury's ability to make regulations retroactive.

Except as otherwise provided, no temporary, proposed or final tax regulation "shall apply to any taxable period ending before the earliest of" any of several events, including, as relevant here, (i) the date the regulation is filed with the Federal Register (§ 7805(b)(1)(A)) or, (ii) in the case of a final regulation, "the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register" (§ 7805(b)(1)(B)). The amendments to § 7805(b) apply to regulations relating to post-enactment statutes, including § 7874, which was enacted in 2004.

Although the amendment to § 7805(b) limited the Treasury's authority to give regulations *retroactive* effect, the amendment did nothing to take away the agency's ability to promulgate Temporary Regulations with *immediate* effect. To the contrary, by permitting final regulations to be retroactive to the date on which a related Proposed or Temporary Regulation was filed (§ 7805(b)(1)(B)), and thereby to take effect for periods before the notice-and-comment process takes place, these rules expressly deviate from the general rulemaking requirements of the APA. Retroactivity of regulations also remains permissible, in derogation of the general provisions of the APA, in certain other situations, including regulations issued within 18 months of enactment (§ 7805(b)(2)) and for the prevention of abuse (§ 7805(b)(3)).

It follows that § 7805 as a whole still permits Temporary Treasury Regulations to be adopted with immediate effect without notice and comment. The enactment of § 7805(e) in 1988 and the amendment of § 7805(b) in 1996 recognized and validated the Treasury's ability to give Temporary Regulations at least immediate effect. It makes no sense to read § 7805 any other way.

To begin with, a Temporary Regulation cannot be both immediately effective on filing with the Federal Register, as § 7805(b)(1)(A) permits, and subject to notice and comment before becoming effective, as the APA generally requires. Nor would the requirement in § 7805(e) that the content of Temporary Regulations also be issued as Proposed Regulations make any sense if the Temporary Regulation must itself be subject to prior notice and comment. Such a reading would place a Temporary Regulation on the same footing as a Proposed Regulation, producing an odd, redundant result – in effect, two Proposed Regulations for the same rule. And if a

Temporary Regulation is to be treated merely as a Proposed Regulation, then § 7805(e) would be rendered surplusage in its entirety. Such a construction would violate the canon that legislatures do not use superfluous words. *Bailey v. United States*, 516 U.S. 137, 145 (1995).

Moreover, if Congress had meant to preclude the Treasury from issuing Temporary Regulations with immediate effect, it would not have placed a three-year expiration date on Temporary Regulations, while declaring that the expiration "is not to affect the validity of those regulations during [that] period." H.R. Conf. Rep. No. 100-1104, at 218. Nor would Congress have separately recognized Temporary Regulations, as it did in § 7805(b)(1) and (f)(2)(A). Congress surely did not authorize – or codify – Temporary Regulations, only to have them declared invalid for violating the APA.

To be sure, § 7805(e) does not expressly state, in so many words, that it constitutes an exception to the APA. But even if exemptions from the APA are not lightly presumed, no "magical passwor[d]" is needed for Congress to modify agency rulemaking procedures. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955). Rather, the question is whether "Congress has established procedures so clearly different from those required by the APA that it must have intended to displace the norm." *Asiana Airlines v. FAA*, 134 F.3d 393, 397 (D.C. Cir. 1998). In *Asiana*, the court concluded that a statute requiring the FAA to publish an interim final rule and then to seek public comment "cannot be reconciled with the notice and comment requirements of § 553." *Id.* at 398. The statute set no specific timetable for adopting the interim final rule, nor did it explicitly provide that the rule would take effect without considering comments. But the court held that prior notice and comment was unnecessary, reasoning that "the resulting process would be so nearly indistinguishable from normal notice and comment as to deprive this special procedural provision of any effect, and to thwart the apparent intent of Congress in enacting the special procedure." *Id.* So, too, here, Congress has deliberately acted in § 7805 to displace the APA.

Moreover, in reconciling the import of two potentially conflicting statutes, the specific statute controls over the general, without regard to priority of enactment. *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). Section 7805 authorizes Temporary Regulations and provides specific rules applicable only to them. Because it is a more specific statute than 5 U.S.C. § 553, it controls.

Congress's choice to exempt Temporary Treasury Regulations from the notice-and-comment procedures is not surprising. Recognizing that "taxes are the lifeblood of government, and their prompt and certain availability an imperious need," Congress gave the Treasury special powers that other agencies do not enjoy. *Bull v. United States*, 295 U.S. 247, 259 (1935). For example, a tax assessment has the force of a judgment, and a taxpayer's property may be seized to satisfy the debt. *Id.*; I.R.C. §§ 6321, 6331. A filed tax lien, for which no judgment is necessary, primes a later-filed judgment lien. *See* I.R.C. § 6323(a).

Indeed, some courts have granted *Chevron* deference to Temporary Treasury Regulations despite the absence of prepromulgation notice-and-comment procedures. *See, e.g., Hospital Corp. of Am. v. Commissioner*, 348 F.3d 136, 144 (6th Cir. 2003); *UnionBanCal Corp. v. Commissioner*, 305 F.3d 976, 985 (9th Cir. 2002). Other courts (including this Court) have given full *Chevron* deference to Temporary Regulations without specifically discussing the lack of notice-and-comment rulemaking. *See, e.g., Alfaro v. Commissioner*, 349 F.3d 225, 229-31 (5th Cir. 2003); *Cinema '84 v. Commissioner*, 294 F.3d 432, 438-39 (2d Cir. 2002); *Redlark v. Commissioner*, 141 F.3d 936, 939-

40 (9th Cir. 1998); *Allen v. United States*, 173 F.3d 533, 537-38 (4th Cir. 1999); *E. Norman Peterson Marital Trust v. Commissioner,* 78 F.3d 795, 798 (2d Cir. 1996); *Miller v. United States*, 65 F.3d 687, 689-91 (8th Cir. 1995). *But see Burks v. United States*, 633 F.3d 347, 360 n.9 (5th Cir. 2011).

In § 7805(e), Congress codified the Treasury's policy and practice of issuing Temporary Regulations, as long as they are issued simultaneously with identical proposed regulations providing notice and an opportunity for public comment, as was done here. The Treasury therefore did all that was needed in this case.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be vacated, and the case remanded for entry of judgment dismissing the complaint for lack of subject-matter jurisdiction. If this Court concludes that the District Court had jurisdiction over this case, the judgment setting aside the Regulation should be reversed.

Respectfully submitted,

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MARCH 2018

STATUTORY AND REGULATORY ADDENDUM

Internal Revenue Code of 1986 (26 U.S.C.):

Sec. 7421. Prohibition of suits to restrain assessment or collection

(a) Tax.--Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * *

Sec. 7805. Rules and regulations

(a) Authorization.--Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of regulations.--

(1) In general.--Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:

(A) The date on which such regulation is filed with the Federal Register.

(B) In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulation relates was filed with the Federal Register.

(C) The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.

(2) Exception for promptly issued regulations.--Paragraph (1) shall not apply to regulations filed or issued within 18 months of the date of the enactment of the statutory provision to which the regulation relates.

(3) Prevention of abuse.--The Secretary may provide that any regulation may take effect or apply retroactively to prevent abuse.

(4) Correction of procedural defects.--The Secretary may provide that any regulation may apply retroactively to correct a procedural defect in the issuance of any prior regulation.

(5) Internal regulations.--The limitation of paragraph (1) shall not apply to any regulation relating to internal Treasury Department policies, practices, or procedures.

(6) Congressional authorization.--The limitation of paragraph (1) may be superseded by a legislative grant from Congress authorizing the Secretary to prescribe the effective date with respect to any regulation.

(7) Election to apply retroactively.--The Secretary may provide for any taxpayer to elect to apply any regulation before the dates specified in paragraph (1).

(8) Application to rulings.--The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

* * *

(e) Temporary regulations.--

(1) Issuance.--Any temporary regulation issued by the Secretary shall also be issued as a proposed regulation.

(2) 3-year duration.--Any temporary regulation shall expire within 3 years after the date of issuance of such regulation.

* * *

Sec. 7874. Rules relating to expatriated entities and their foreign parents

(a) Tax on inversion gain of expatriated entities.--

(1) In general.--The taxable income of an expatriated entity for any taxable year which includes any portion of the applicable period shall in no event be less than the inversion gain of the entity for the taxable year.

(2) Expatriated entity.--For purposes of this subsection--

(A) In general.--The term "expatriated entity" means-

(i) the domestic corporation or partnership referred to in subparagraph (B)(i) with respect to which a foreign corporation is a surrogate foreign corporation, and

(ii) any United States person who is related (within the meaning of section 267(b) or 707(b)(1)) to a domestic corporation or partnership described in clause (i).

(B) Surrogate foreign corporation.--A foreign corporation shall be treated as a surrogate foreign corporation if, pursuant to a plan (or a series of related transactions)--

(i) the entity completes after March 4, 2003, the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a domestic corporation or substantially all of the properties constituting a trade or business of a domestic partnership,

(ii) after the acquisition at least 60 percent of the stock (by vote or value) of the entity is held--

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

(II) in the case of an acquisition with respect to a domestic partnership, by former partners of the domestic partnership by reason of holding a capital or profits interest in the domestic partnership, and

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

An entity otherwise described in clause (i) with respect to any domestic corporation or partnership trade or business shall be treated as not so described if, on or before March 4, 2003, such entity acquired directly or indirectly more than half of the properties held directly or indirectly by such corporation or more than half of the properties constituting such partnership trade or business, as the case may be.

(3) Coordination with subsection (b)--A corporation which is treated as a domestic corporation under subsection (b) shall not be treated as a surrogate foreign corporation for purposes of paragraph (2)(A).

(b) Inverted corporations treated as domestic corporations.--Notwithstanding section 7701(a)(4), a foreign corporation shall be treated for purposes of this title as a domestic corporation if such corporation would be a surrogate foreign corporation if subsection (a)(2) were applied by substituting "80 percent" for "60 percent".

(c) Definitions and special rules.--

(1) Expanded affiliated group.--The term "expanded affiliated group" means an affiliated group as defined in section 1504(a) but without regard to section 1504(b)(3), except that section 1504(a) shall be applied by substituting "more than 50 percent" for "at least 80 percent" each place it appears.

(2) Certain stock disregarded.--There shall not be taken into account in determining ownership under subsection (a)(2)(B)(ii)--

(A) stock held by members of the expanded affiliated group which includes the foreign corporation, or

(B) stock of such foreign corporation which is sold in a public offering related to the acquisition described in subsection (a)(2)(B)(i).

(3) Plan deemed in certain cases.--If a foreign corporation acquires directly or indirectly substantially all of the properties of a domestic corporation or partnership during the 4-year period beginning on the date which is 2 years before the ownership requirements of subsection (a)(2)(B)(ii) are met, such actions shall be treated as pursuant to a plan.

(4) Certain transfers disregarded.--The transfer of properties or liabilities (including by contribution or distribution) shall be disregarded if such transfers are part of a plan a principal purpose of which is to avoid the purposes of this section.

(5) Special rule for related partnerships.--For purposes of applying subsection (a)(2)(B)(ii) to the acquisition of a trade or business of a domestic partnership, except as provided in regulations, all partnerships which are under common control (within the meaning of section 482) shall be treated as 1 partnership.

(6) Regulations.--The Secretary shall prescribe such regulations as may be appropriate to determine whether a corporation is a surrogate foreign corporation, including regulations--

(A) to treat warrants, options, contracts to acquire stock, convertible debt interests, and other similar interests as stock, and

(B) to treat stock as not stock.

(d) Other definitions.--For purposes of this section--

(1) Applicable period.--The term "applicable period" means the period--

(A) beginning on the first date properties are acquired as part of the acquisition described in subsection (a)(2)(B)(i), and

(B) ending on the date which is 10 years after the last date properties are acquired as part of such acquisition.

(2) Inversion gain.--The term "inversion gain" means the income or gain recognized by reason of the transfer during the applicable period of stock or other properties by an expatriated entity, and any income received or accrued during the applicable period by reason of a license of any property by an expatriated entity--

(A) as part of the acquisition described in subsection (a)(2)(B)(i), or

(B) after such acquisition if the transfer or license is to a foreign related person.

Subparagraph (B) shall not apply to property described in section 1221(a)(1) in the hands of the expatriated entity.

(3) Foreign related person.--The term "foreign related person" means, with respect to any expatriated entity, a foreign person which--

(A) is related (within the meaning of section 267(b) or 707(b)(1)) to such entity, or

(B) is under the same common control (within the meaning of section 482) as such entity.

(e) Special rules.--

(1) Credits not allowed against tax on inversion gain.--Credits (other than the credit allowed by section 901) shall be allowed against the tax imposed by this chapter on an expatriated entity for any taxable year described in subsection (a) only to the extent such tax exceeds the product of--

(A) the amount of the inversion gain for the taxable year, and

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

For purposes of determining the credit allowed by section 901, inversion gain shall be treated as from sources within the United States.

(2) Special rules for partnerships.--In the case of an expatriated entity which is a partnership--

(A) subsection (a)(1) shall apply at the partner rather than the partnership level,

(B) the inversion gain of any partner for any taxable year shall be equal to the sum of--

(i) the partner's distributive share of inversion gain of the partnership for such taxable year, plus

(ii) gain recognized for the taxable year by the partner by reason of the transfer during the applicable period of any partnership interest of the partner in such partnership to the surrogate foreign corporation, and

(C) the highest rate of tax specified in the rate schedule applicable to the partner under this chapter shall be substituted for the rate of tax referred to in paragraph (1).

(3) Coordination with section 172 and minimum tax.--Rules similar to the rules of paragraphs (3) and (4) of section 860E(a) shall apply for purposes of subsection (a).

(4) Statute of limitations.--

(A) In general.--The statutory period for the assessment of any deficiency attributable to the inversion gain of any taxpayer for any pre-inversion year shall not expire before the expiration of 3 years from the date the Secretary is notified by the taxpayer (in such manner as the Secretary may prescribe) of the acquisition described in subsection (a)(2)(B)(i) to which such gain relates and such deficiency may be assessed before the expiration of such 3-year period notwithstanding the provisions of any other law or rule of law which would otherwise prevent such assessment.

(B) Pre-inversion year.--For purposes of subparagraph (A), the term “pre-inversion year” means any taxable year if--

(i) any portion of the applicable period is included in such taxable year, and

(ii) such year ends before the taxable year in which the acquisition described in subsection (a)(2)(B)(i) is completed.

(f) Special rule for treaties.--Nothing in section 894 or 7852(d) or in any other provision of law shall be construed as permitting an exemption, by reason of any treaty obligation of the United States heretofore or hereafter entered into, from the provisions of this section.

(g) Regulations.--The Secretary shall provide such regulations as are necessary to carry out this section, including regulations providing for such adjustments to the application of this section as are necessary to prevent the avoidance of the purposes of this section, including the avoidance of such purposes through--

(1) the use of related persons, pass-through or other noncorporate entities, or other intermediaries, or

(2) transactions designed to have persons cease to be (or not become) members of expanded affiliated groups or related persons.

Title 28. Judiciary and Judicial Procedure

Sec. 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section

516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * *

Treasury Regulations (26 C.F.R.):

§ 1.7874–8T Disregard of certain stock attributable to multiple domestic entity acquisitions (temporary).

(a) Scope. This section identifies stock of a foreign acquiring corporation that is disregarded in determining an ownership fraction by value because it is attributable to certain prior domestic entity acquisitions. Paragraph (b) of this section sets forth the general rule regarding the amount of stock of a foreign acquiring corporation that is excluded from the denominator of the ownership fraction by value under this section, and paragraphs (c) through (f) of this section provide rules for determining this amount. Paragraph (g) provides definitions. Paragraph (h) of this section provides examples illustrating the application of the rules of this section. Paragraph (i) of this section provides dates of applicability, and paragraph (j) of this section provides the date of expiration. This section applies after taking into account § 1.7874–2(e).

(b) General rule. This paragraph (b) applies to a domestic entity acquisition (relevant domestic entity acquisition) when the foreign acquiring corporation (including a predecessor) has completed one or more prior domestic entity acquisitions. When this paragraph (b) applies, then, for purposes of determining the ownership percentage by value (but not vote) described in section 7874(a)(2)(B)(ii), stock of the foreign acquiring corporation is excluded from the denominator of the ownership fraction in an amount equal to the sum of the excluded amounts computed separately with respect to each prior domestic entity acquisition and each relevant share class.

(c) Computation of excluded amounts. With respect to each prior domestic entity acquisition and each relevant share class, the excluded amount is the product of—

(1) The total number of prior acquisition shares, reduced by the sum of the number of allocable redeemed shares for all redemption testing periods; and

(2) The fair market value of a single share of stock of the relevant share class on the completion date of the relevant domestic entity acquisition.

(d) Computation of allocable redeemed shares—(1) In general. With respect to each prior domestic entity acquisition and each relevant share class, the allocable redeemed shares, determined separately for each redemption testing period, is the product of the number of redeemed shares during the redemption testing period and the redemption fraction.

(2) Redemption fraction. The redemption fraction is determined separately with respect to each prior domestic entity acquisition, each relevant share class, and each redemption testing period, as follows:

(i) The numerator is the total number of prior acquisition shares, reduced by the sum of the number of allocable redeemed shares for all prior redemption testing periods.

(ii) The denominator is the sum of—

(A) The number of outstanding shares of the foreign acquiring corporation stock as of the end of the last day of the redemption testing period; and

(B) The number of redeemed shares during the redemption testing period.

(e) Rules for determining redemption testing periods—(1) In general. Except as provided in paragraph (e)(2) of this section, a redemption testing period with respect to a prior domestic entity acquisition is the period beginning on the day after the completion date of the prior domestic entity acquisition and ending on the day prior to the completion date of the relevant domestic entity acquisition.

(2) Election to use multiple redemption testing periods. A foreign acquiring corporation may establish a reasonable method for dividing the period described in paragraph (e)(1) of this section into shorter periods (each such shorter period, a redemption testing period). A reasonable method would include a method based on a calendar convention (for example, daily, monthly, quarterly, or yearly), or on a convention that triggers the start of a new redemption testing period whenever a share issuance occurs that exceeds a certain threshold. In order to be reasonable, the method must be consistently applied with respect to all prior domestic entity acquisitions and all relevant share classes.

(f) Appropriate adjustments required to take into account share splits and similar transactions. For purposes of this section, appropriate adjustments must be made to take into account changes in a foreign acquiring corporation's capital structure, including, for example, stock splits, reverse stock splits, stock distributions, recapitalizations, and similar transactions. Thus, for example, in determining the total number of prior acquisition shares with respect to a relevant share class, appropriate adjustments must be made to take into account a stock split with respect to that relevant share class that occurs after the completion date with respect to a prior domestic entity acquisition.

(g) Definitions. In addition to the definitions provided in § 1.7874–12T, the following definitions apply for purposes of this section.

(1) A **binding contract** means an instrument enforceable under applicable law against the parties to the instrument. The presence of a condition outside the control of the parties (including, for example, regulatory agency approval) does not prevent an instrument from being a binding contract. Further, the fact that insubstantial terms remain to be negotiated by the parties to the contract, or that customary conditions remain to be satisfied, does not prevent an instrument from being a binding contract. A tender offer that is subject to section 14(d) of the Securities and Exchange Act of 1934, (15 U.S.C. 78n(d)(1)), and Regulation 14D (17 CFR 240.14d–1 through 240.14d–103) and that is not pursuant to a binding contract, is treated as a binding contract made on the date of its announcement, notwithstanding that it may be modified by the offeror or that it is not enforceable against the offerees.

(2) A **relevant share class** means, with respect to a prior domestic entity acquisition, each separate legal class of shares in the foreign acquiring corporation from which prior acquisition shares were issued. See also paragraph (f) of this section (requiring appropriate adjustments in certain cases).

(3) Total number of prior acquisition shares means, with respect to a prior domestic entity acquisition and each relevant share class, the total number of shares of stock of the foreign acquiring corporation that were described in section 7874(a)(2)(B)(ii) as a result of that acquisition (without regard to whether the 60 percent test of section 7874(a)(2)(B)(ii) was satisfied), adjusted as appropriate under paragraph (f) of this section.

(4) A prior domestic entity acquisition—(i) General rule. Except as provided in this paragraph (g)(4), a prior domestic entity acquisition means, with respect to a relevant domestic entity acquisition, a domestic entity acquisition that occurred within the 36–month period ending on the signing date of the relevant domestic entity acquisition.

(ii) Exception. A domestic entity acquisition is not a prior domestic entity acquisition if—

(A) The ownership percentage described in section 7874(a)(2)(B)(ii) with respect to the domestic entity acquisition was less than five (by vote and value); and

(B) The fair market value of the stock of the foreign acquiring corporation that was described in section 7874(a)(2)(B)(ii) as a result of the domestic entity acquisition (without regard to whether the 60 percent test of section 7874(a)(2)(B)(ii) was satisfied) did not exceed $50 million, as determined on the completion date with respect to the domestic entity acquisition.

(5) A **redeemed share** means a share of stock in a relevant share class that was redeemed (within the meaning of section 317(b)).

(6) A **signing date** means the first date on which the contract to effect the relevant domestic entity acquisition is a binding contract, or if another binding contract to effect a substantially similar acquisition was terminated with a principal purpose of avoiding section 7874, the first date on which such other contract was a binding contract.

(h) Examples. The following examples illustrate the rules of this section.

Example 1. Application of general rule—(i) Facts. Individual A wholly owns DT1, a domestic corporation. Individual B owns all 100 shares of the sole class of stock of FA, a foreign corporation. In Year 1, FA acquires all the stock of DT1 solely in exchange for 100 shares of newly issued FA stock (DT1 acquisition). On the completion date with respect to the DT1 acquisition, the fair market value of each share of FA stock is $1x. In Year 3, FA enters into a binding contract to acquire all the stock of DT2, a domestic corporation wholly owned by Individual C. Thereafter, FA acquires all the stock of DT2 solely in exchange for 150 shares of newly issued FA stock (DT2 acquisition). On the completion date with respect to the DT2 acquisition, the fair market value of each share of FA stock is $1.50x. FA did not complete the DT1 acquisition and DT2 acquisition pursuant to a plan (or series of related transactions) for purposes of applying § 1.7874–2(e). In addition, there have been no redemptions of FA stock subsequent to the DT1 acquisition.

(ii) Analysis. The DT1 acquisition is a prior domestic entity acquisition with respect to the DT2 acquisition (the relevant domestic entity acquisition) because the DT1 acquisition occurred within the 36–month period ending on the signing date with respect to the DT2 acquisition. Accordingly, paragraph (b) of this section applies to the DT2 acquisition. As a result, and because there were no redemptions of FA stock, the excluded amount is $150x (calculated as 100, the total number of prior acquisition shares, multiplied by $1.50x, the fair market value of a single share of FA stock on the completion date with respect to the DT2 acquisition). Accordingly, the numerator of the ownership fraction by value is $225x (the fair market value of the stock of FA that, with respect to the DT2 acquisition, is described in section 7874(a)(2)(B)(ii)). In addition, the denominator of the ownership fraction is $375x (calculated as $525x, the fair market value of all shares of FA stock as of the completion date with respect to the DT2 acquisition, less $150x, the excluded amount). Therefore, the ownership percentage by value is 60.

Example 2. Effect of certain redemptions—(i) Facts. The facts are the same as in paragraph (i) of Example 1 of this paragraph (h), except that in Year 2 FA redeems 50 shares of its stock (the Year 2 redemption).

(ii) Analysis. As is the case in paragraph (ii) of Example 1 of this paragraph (h), the DT1 acquisition is a prior domestic entity acquisition with respect to the DT2 acquisition (the relevant domestic entity acquisition), and paragraph (b) of this section thus applies to the DT2 acquisition. Because of the Year 2 redemption, the allocable redeemed shares, and thus the redemption fraction, must be calculated. For this purpose, the redemption testing period is the period beginning on the day after the completion date with respect to the DT1 acquisition and ending on the day prior to the completion date with respect to the DT2 acquisition. The redemption fraction for the redemption testing period is thus 100/200, calculated as 100 (the total number of prior acquisition shares) divided by 200 (150, the number of outstanding shares of FA stock on the last day of the redemption testing period, plus 50, the number of redeemed shares during the redemption testing period), and the allocable redeemed shares for the redemption testing period is 25, calculated as 50 (the number of redeemed shares during the redemption testing period) multiplied by 100/200 (the redemption fraction for the redemption testing period). As a result, the excluded amount is $112.50x, calculated as 75 (100, the total number of prior acquisition shares, less 25, the allocable redeemed shares) multiplied by $1.50x (the fair market value of a single share of FA stock on the completion date with respect to the DT2 acquisition). Accordingly, the numerator of the ownership fraction by value is $225x (the fair market value of the stock of FA that, with respect to the DT2 acquisition, is described in section 7874(a)(2)(B)(ii)), and the denominator of the ownership fraction is $337.50x (calculated as $450x, the fair market value of all shares of FA stock as of the completion date with respect to the DT2 acquisition, less $112.50x, the excluded amount). Therefore, the ownership percentage by value is 66.67.

Example 3. Stock split—(i) Facts. The facts are the same as in paragraph (i) of Example 2 of this paragraph (h), except as follows. After the Year 2 redemption, but before the DT2 acquisition, FA undergoes a stock split and, as a result, each of the 150 shares of FA stock outstanding are converted into two shares (Year 2 stock split). Further, pursuant to the DT2 acquisition, FA acquires all the stock of DT2 solely in exchange for 300 shares of newly issued FA stock. Moreover, on the completion date with respect to the DT2 acquisition, the fair market value of each share of FA stock is $0.75x.

(ii) Analysis. As is the case in paragraph (ii) of Example 1 of this paragraph (h), the DT1 acquisition is a prior domestic entity acquisition with respect to the DT2 acquisition (the relevant domestic entity acquisition), and paragraph (b) of this section thus applies to the DT2 acquisition. In addition, as is the case in paragraph (ii) of Example 2 of this paragraph (h), the redemption testing period is the period beginning on the day after the completion date with respect to the DT1 acquisition and ending on the day prior to the completion date with respect to the DT2 acquisition. To calculate the redemption fraction, the total number of prior acquisition shares and the number of redeemed shares during the redemption testing period must be appropriately adjusted to take into account the Year 2 stock split. See paragraph (f) of this section. In this case, the appropriate adjustment is to increase the total number of prior acquisition shares from 100 to 200 and to increase the number of redeemed shares during the redemption testing period from 50 to 100. Thus, the redemption fraction for the redemption testing period is 200/400, calculated as 200 (the total number of prior acquisition shares) divided by 400 (300, the number of outstanding shares of FA stock on the last day of the redemption testing period, plus 100, the number of redeemed shares during the redemption testing period), and the allocable redeemed shares for the redemption testing period is 50, calculated as 100 (the number of redeemed shares during the redemption testing period) multiplied by 200/400 (the redemption fraction for the redemption testing period). In addition, for purposes of calculating the excluded amount, the total number of prior acquisition shares must be adjusted from 100 to 200. See paragraph (f) of this section. Accordingly, the excluded amount is $112.50x calculated as 150 (200, the total number of prior acquisition shares, less 50, the allocable redeemed shares) multiplied by $0.75x (the fair market value of a single share of FA stock on the completion date with respect to the DT2 acquisition). Consequently, the numerator of the ownership fraction by value is $225x (the fair market value of the stock of FA that, with respect to the DT2 acquisition, is described in section 7874(a)(2)(B)(ii)), and the denominator of the ownership fraction is $337.50x (calculated as $450x, the fair market value of all shares of FA stock as of the completion date with respect to the DT2 acquisition, less $112.50x, the excluded amount). Therefore, the ownership percentage by value is 66.67.

(i) Applicability dates. This section applies to domestic entity acquisitions completed on or after April 4, 2016, regardless of when a prior domestic entity acquisition was completed.

(j) Expiration date. The applicability of this section expires on or before April 4, 2019.

CERTIFICATE OF SERVICE

It is hereby certified that, on this 16th day of March, 2018:

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/s/ Deborah K. Snyder
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Attorney for the appellants

Dated: March 16, 2018