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Proposed Legislation Would Sweep Certain Offshore Corporations into the U.S. Tax Net and Subject Their Worldwide Income to U.S. Tax

The Stop Tax Haven Abuse Act and the International Tax Competitiveness Act of 2013 are two parts of a package of three bills introduced in the U.S. House of Representatives on April 15 by Rep. Lloyd Doggett. A significant component of this proposed legislation would treat certain offshore corporations as U.S. corporations, thereby subjecting those corporations to U.S. taxation on their worldwide income. In an extraordinary extension of U.S. taxing jurisdiction, the provision would thus eliminate deferral for some offshore corporations, while subjecting the income of other offshore corporations to U.S. taxing jurisdiction for the first time. Significantly, because of the broad language of the proposal, it potentially could apply to offshore holding companies, investment funds, insurance and reinsurance companies, and other less-obvious targets.

The language of the current proposal is identical to prior proposals and would apply to foreign corporations that either are publicly traded or have gross assets of \$50 million or more, if their management and control occur primarily within the United States. Under the proposed legislation, management and control would be considered to occur primarily in the U.S. if substantially all of the executive officers and senior management who exercise day-to-day responsibilities for making decisions involving strategic, financial and operational policies of the corporation are located primarily in the United States. Any individual exercising such day-to-day responsibilities would be treated as an executive officer. The measure would not apply, however, to a controlled foreign corporation that is part of a group whose parent is a U.S. corporation that holds "substantial assets," other than cash and stock in foreign subsidiaries, for use in the active conduct of a U.S. trade or business.

A foreign corporation that would satisfy the threshold gross asset test and whose assets consist primarily of assets managed on behalf of "investors" also would be treated as a U.S. corporation if investment decisions were made in the United States, regardless of whether it satisfied the general management and control test. This provision is aimed most clearly at offshore investment and hedge funds, but it could apply in other cases as well, potentially including offshore insurance and reinsurance companies.

Similar measures have been proposed several times in the past. In January 2005, the Joint Committee on Taxation endorsed such a rule, as did the President's Advisory Panel on Federal Tax Reform later that year. Former Senator John Kerry included a nearly identical provision in the Export Products Not Jobs Act, which he introduced in August 2006, and reintroduced in January 2007. That bill was never brought to a vote in the Senate Finance Committee, nor was an earlier version of the Stop Tax Haven Abuse Act, which was introduced in February 2007. Finally, a prior version of the Stop Tax Haven Abuse Act, with language identical to the current proposal, was introduced in both the House and Senate in March 2009. Given that international enforcement and abusive tax haven use are uppermost in legislators' minds, however, there is a somewhat increased likelihood that this corporate residence provision, or one similar to it, will be enacted by this Congress. However, realistically it is not likely that this type of provision would be enacted other than as part of comprehensive tax reform.

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