RECENT DEVELOPMENTS

TAX REFORM ACT OF 1984 — NETHERLANDS ANTILLES — EFFECT OF THE REPEAL OF THE WITHHOLDING TAX ON PORTFOLIO INTEREST PAYMENTS TO FOREIGN INVESTORS

As part of President Reagan's plan to reduce the burgeoning federal deficit,[1] Congress enacted the Tax Reform Act of 1984.[2] Section 127 of this Act repealed the thirty percent withholding tax imposed on "portfolio interest"[3] earned by foreign persons[4] from United States sources. By passing section 127, Congress sought to provide the United States Treasury, as well as domestic corporate borrowers, direct access to cheaper capital available on the Eurobond market.[5] In addition, Congress sought to increase net revenues[6] by eroding the appeal of the Netherlands Antilles as a

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[1] 24 TAX NOTES 5 (July 2, 1984).

[2] Deficit Reduction Act of 1984, Pub. L. No. 98-369, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 494. This Act is divided into two parts, the Tax Reform Act of 1984 and the Spending Reduction Act of 1984. Together they contain approximately $50 billion in revenue increases and $11 billion in spending cuts. *Id.* at 6.

[3] *See* I.R.C. § 871(h)(2) (CCH 1984). I.R.C. § 871(a) imposed a flat tax of 30% on interest and dividends emanating from United States sources. The tax is to be paid on investment portfolios held by nonresident aliens and foreign corporations (subject to reduction or exemption by bilateral tax treaties), if such income is not effectively connected with the conduct of a trade or business in the United States. I.R.C. § 881 (CCH 1984). For specific rules determining whether income is "effectively connected" with the United States, see Treas. Reg. §§ 1.864-4 - 1.864-7. The tax is a "withholding tax" because the payor of the income withholds a portion on behalf of the Internal Revenue Service. I.R.C. §§ 1441 - 1442 (CCH 1984).

[4] Foreign persons include nonresident alien individuals, foreign corporations, foreign trusts, foreign partnerships, and foreign estates. *See* I.R.C. §§ 7701(a)(1), (4), (5) and (31) (CCH 1985).

[5] The Eurobond market is a network of underwriters and financial institutions which markets corporate and government bonds. These bonds are usually denominated in dollars and sold in countries other than the United States. Francis, *U.S. Tries to Stem Flow of U.S. Tax Revenue Through Antilles 'Haven,'* CHRISTIAN SCI. MON., Jan. 10, 1984, at 4, col. 1. Eurobonds are issued in unregistered, "bearer" form with principal and interest payments made directly to whoever presents the bonds for payment. Thus, the holder of the bond remains anonymous, an arrangement which allows United States citizens as well as foreigners to escape withholding. *See* Jackson, *Antilles 'Firms' Help Many Evade Taxes*, L.A. Times, Apr. 12, 1983, § 1, at 6, col. 2.

[6] In the process, however, the Act forfeits more than $500 million in withholding tax. Hamilton, *Netherlands Antilles Declares War on Tax Proposal*, Wash. Post, Apr. 22, 1984,

popular haven for tax evasion.[7]

Enticed by liberal tax incentives provided by the United States-Netherlands Antilles tax treaty,[8] over 200 United States corporations[9] established as many as 25,000 "paper" corporations in the Antilles to escape withholding taxes.[10] Under the treaty, these financing subsidiaries borrowed from European investors unrestrained by the imposition of the withholding tax on interest payments made to their investors.[11] These subsidiaries in turn reloaned their newly borrowed funds to their parent companies in the United States.[12] As a result, foreign investors accepted a lower

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at G6, col. 1.

[7] *Id.*; *see generally The Antilles Connection*, Wash. Post, May 28, 1984, at A18, col. 1. For general information regarding the use of the Netherlands Antilles as a tax haven, see H. Margolis, INTERNATIONAL TAX PLANNING 31-62 (J. McCord ed. 1982). The primary attraction of the Antilles is the array of substantial tax breaks afforded Antillean residents who own United States real estate. *Id.* at 35.

Two small island groups in the Caribbean Sea form the Netherlands Antilles. These islands were Dutch colonial possessions until 1954, when they became part of the Kingdom of the Netherlands. The "Leeward Islands" of Aruba, Bonaire, and Curacao lie slightly northwest of Venezuela. The "Windward Islands" (St. Eustatius, St. Maarten, and Saba), lie to the east of Puerto Rico. The capital city of Willemstad is located on Curacao, the financial hub of the islands. The Antilles comprise a land area about one-third the size of Rhode Island and host a population of 245,000.

[8] Convention with Respect to Taxes on Income and Certain Other Taxes, Apr. 29, 1948, United States-Netherlands, 62 Stat. 1757, T.I.A.S. No. 1855, *as amended*, Protocol Supplementing the Convention for the Purpose of Facilitating Extension to the Netherlands Antilles, June 15, 1955, United States-Netherlands, 6 U.S.T. 3696, T.I.A.S. No. 3366, *as extended*, Convention on Double Taxation of Income, Extension to Netherlands Antilles of Convention of Apr. 29, 1948, Nov. 10, 1955, United States-Netherlands, 6 U.S.T. 3703, T.I.A.S. No. 3367, *as amended*, Protocol Modifying and Supplementing the Extension to the Netherlands Antilles of the Convention of Apr. 29, 1948, Oct. 23, 1963, United States-Netherlands, 15 U.S.T. 1900, T.I.A.S. No. 5665, *as supplemented*, Convention Modifying and Supplementing the Convention of Apr. 29, 1948, Dec. 30, 1965, United States-Netherlands, 17 U.S.T. 896, T.I.A.S. No. 6061 [hereinafter cited as Convention].

[9] Gerth, *Antilles Fights U.S. Assertions: Debate Grows on Tax Havens*, N.Y. Times, July 4, 1983, at 29, col. 3. Corporations with Antillean subsidiaries include Atlantic Richfield, American Telephone & Telegraph, and Sears. Fialka, *Closing a Loophole: Corporate Tax Haven in Netherlands Antilles Is Bracing for a Disaster*, Wall St. J., Oct. 11, 1982, at 17, col. 1.

[10] Jackson, *supra* note 5.

[11] Convention, *supra* note 8, art. VIII; *see* Jackson, *supra* note 5.

In 1981, $1.37 billion of portfolio interest was paid in the Netherlands Antilles, of which only $1.4 billion (1.5%) was withheld. STAFF OF THE JOINT COMMITTEE ON TAXATION, 98TH CONG., 2D SESS., DESCRIPTION OF TAX BILLS (S. 1066, S. 1550, S. 1557, and S. 1666) 30 (Comm. Print 1983).

[12] The fact that net United States borrowing from affiliates in the Antilles jumped from $1 billion to $16 billion in 1982 alone evidences the surging popularity of the Antilles as a tax haven. *Treasury Reports on Use of Caribbean Tax Havens*, 22 TAX NOTES 165 (Jan. 1, 1984). For a recent ruling on inter-company loans by an Antilles finance subsidiary to its

return in exchange for an avoidance of the withholding tax,[13] United States corporations financed their domestic operations with less expensive Eurobonds,[14] and the Netherlands Antilles reaped substantial dividends from its nearly thirty-year-old treaty.[15] The repeal of the tax, however, circumvents the need to channel funds through the Antilles, seriously threatening the economic and political stability of a group of islands which relies heavily on its status as a tax haven.[16] *Tax Reform Act of 1984, contained in Deficit Reduction Act of 1984*, Pub. L. No. 98-369, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 494.

The Tax Reform Act is not Congress' first attempt to control the use of the Antilles as a conduit for tax evasion. The Foreign Investment in United States Real Property Tax Act of 1980 (FIRPTA)[17] taxed gains realized by foreign investors on disposition of United States real property interests (USRPI).[18] Prior to FIRPTA, Antillean residents who invested in United States real estate received preferential tax treatment because they paid no Antillean tax on income derived from their property. Moreover, all nonresident aliens not engaged in a trade or business in the United States paid no United States capital gains tax upon disposition of USRPI.[19]

United States operating affiliate, see Rev. Rul. 84-152. The Service held that, barring a legitimate business or economic objective, if (1) a foreign parent wholly owns both companies, and (2) the common foreign parent lends funds to the subsidiary which subsequently lends the funds to the United States company, the subsidiary will be deemed merely a conduit for interest payments by the United States company to the common parent. As a result, the Service will withhold tax at a rate applicable to residents of the common parent's country.

[13] According to one Wall Street estimate, American corporations have saved as much as $100 million by selling Eurobonds through Antillean subsidiaries. Francis, *supra* note 5, at 5, col. 3. Even though foreign investors often accept a lower initial return than American investors, many still earn a higher net return because they escape United States estate taxes by operating through what has been dubbed "the Antillean window." Fialka, *supra* note 9, at 1, col. 6.

[14] *See* Fialka, *supra* note 9, at 1, col. 6.

[15] The Antilles receives more than $50 million per year in income taxes related to its international finance activities. *Id.* col. 1.

[16] Harold Henriquez, former tax commissioner of the islands, warned that repeal of the withholding tax could trigger social unrest, political instability, and perhaps even an overthrow of the government by groups with "leftist sympathies." *Id.*

[17] Pub. L. No. 96-499, §§ 1121-1125, 94 Stat. 2599, 2682 (codified at I.R.C. §§ 861(a)(5), 897, 6039(c), 6252(g) (1980)).

[18] *See id.* § 1122(c) (codified in I.R.C. § 897) (CCH 1985); *see generally* Maiers, New Tax Withholding Rules For Foreign-Owned United States Real Estate, Ga. J. Int'l & Comp. L., this issue.

[19] *See* Margolis, *supra* note 7, at § 3.24, which sets forth a detailed analysis of FIRPTA-evasion schemes.

During the four years following its enactment, the extent of FIRPTA's enforceability has remained a controversial topic.[20] As a result of this uncertainty, the Tax Reform Act of 1984 replaced the system of voluntary information reporting originally implemented to enforce FIRPTA[21] with a more effective withholding tax.[22]

The Caribbean Basin Initiative (CBI) is another example of congressional attention affecting the economic status of the Netherlands Antilles.[23] President Reagan proposed the CBI in 1983 to stimulate investment and trade activity in developing countries in the Caribbean, Central America, and South America.[24] Rooted in the belief that a strong economy promotes a strong defense against political change,[25] the CBI allows the duty free export of certain items into Caribbean countries,[26] provides tax incentives for

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[20] FIRPTA was subjected to substantial redrafting during a process which included conference discussion (1980), statutory amendments in conference (1981), proposed regulations, temporary regulations, public outcry, repeated extensions of deadlines, reproposed regulations, and recurring press releases. For the legislative history, see H.R. Rep. No. 1150, Part I, 96th Cong., 2d Sess. 5 (1980); H.R. REP. No. 1479, 96th Cong., 2d Sess. 186 (1980) (conference report); *Cong. Rec.*, § 8472 (daily ed. July 24, 1980); H.R. REP. No. 215, 97th Cong., 1st Sess. 274 (1981) (conference report).

[21] Under the information reporting scheme, payors of wages and interest in the aggregate of $10 or more to any one recipient were required to file an annual return listing recipients and the amounts paid. I.R.C. § 6049 (CCH 1985).

[22] Section 129 of H.R. 4170, the Deficit Reduction Act of 1984, adds I.R.C. § 1445. The Senate previously passed a similar withholding tax provision in (1) the original FIRPTA, (2) the Economic Recovery Act of 1981, and (3) the Tax Equity and Fiscal Responsibility Act of 1982.

The new FIRPTA withholding requirements impose a 10% withholding tax on gains realized on the disposition of USRPI. These requirements potentially affect all real estate closings, sales of non-publicly traded corporate stock, and sales of certain partnership, trust, and estate interests. Tax Reform Act of 1984, § 129 (amending I.R.C. § 6039(c) and adding § 1445).

For an exhaustive but practical explanation of the new withholding requirements, see Hudson, *Analysis of the New FIRPTA Withholding Requirements*, 24 TAX NOTES 573 (Aug. 6, 1984).

[23] Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 384 (1983).

[24] Those countries include the Bahamas, Barbados, Belize, Cayman Islands, Costa Rica, Dominican Republic, the Eastern Caribbean (Anguilla, Antigua and Barbuda, British Virgin Islands, Dominica, Grenada, Montserrat, Saint Christopher News, Saint Lucia, Saint Vincent, and the Grenadines), El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Netherlands Antilles, Nicaragua, Panama, Surinam, Trinidad and Tobago, and the Turks and Caicos Islands.

[25] *See* H.R. REP. No. 666, 97th Cong., 2d Sess. 4 (1982), which describes the region's shipping lanes as vital to the United States' defense and prosperity, and emphasizes that two-thirds of all oil imported by the United States, half of United States trade, and many strategic minerals pass through the Panama Canal and the Gulf of Mexico.

[26] All products except textiles, apparel, footwear, handbags, luggage, work gloves, tuna, petroleum, and watches or watch parts are to receive duty free treatment until 1995. Carib-

trade,[27] and affords direct financial assistance to these countries.[28]

To benefit from the CBI, however, a country must first enter a bilateral exchange of information agreement with the United States.[29] Under such an agreement, the developing country must provide the United States with any available information that could assist the United States in enforcing its tax laws.[30] These agreements, therefore, present a conflict of allegiances for tax havens such as the Netherlands Antilles. In short, these countries must choose between benefiting from trade alliances with the United States and protecting the identity of third party nationals who benefit from tax treaties between the tax haven country and the United States.[31] The Netherlands Antilles faced just such a dilemma in the recent renegotiation of its current treaty with the United States.[32] The Antilles' reluctance to include exchange of information provisions in the renegotiated treaty[33] was a major stumbling block delaying a bilateral agreement.

The current tax treaty between the United States and the Netherlands Antilles is an extension of the Income Tax Convention (Convention) between the United States and the Kingdom of

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bean Basin Economic Recovery Act, §§ 213, 218, 97 Stat. at 395.

[27] The CBI distributes all excise taxes collected on rum imported into the United States to Puerto Rico and the Virgin Islands. *Id.* § 221, 97 Stat. at 395.

[28] In keeping with this objective, Congress has approved at least $350 million in supplemental aid for the region. *See supra* note 25.

[29] Caribbean Basin Economic Recovery Act, § 222(a)(6)(c).

[30] Information available to the United States includes information which might otherwise be subject to Antillean non-disclosure laws, such as provisions relating to bank secrecy and bearer shares. *Id.*

[31] Field, *Treasury Spells Out New Caribbean Tax Incentives*, 14 TAX NOTES 775 (Mar. 22, 1982). These third-party nationals are commonly referred to as "treaty shoppers" because they actively seek to benefit from other countries' tax treaties with the United States. The United States loses more than $1 billion a year in tax revenues to treaty shoppers because Antillean secrecy laws shield their identity from the I.R.S. Letter from Representative Doug Barnard to Treasury Assistant Secretary for Tax Policy John E. Chapoton (Feb. 2, 1984), *reprinted in* 23 TAX NOTES 739, 740 (Feb. 20, 1984) [hereinafter cited as Barnard Letter].

[32] The United States Treasury Department announced reconsideration of the treaty in 1979. Announcement 79-117, 1979-35 I.R.B. 19. Actual renegotiation, however, did not commence until October, 1982.

[33] Only recently had the Netherlands Antilles changed its position. By modifying its bank secrecy and bearer share laws, and accepting extensive policing and enforcement provisions, the Antilles may have conceded to the farthest reaching and most effective information exchange provisions ever contained in a United States tax treaty. *The Netherlands Antilles Makes Major Concessions in the Treaty Negotiations*, 12 TAX MGMT. INT'L J. 161 (1984)(citing letter from Dr. D.F. Martina, Minister of the Netherlands Antilles, to Vice President Bush).

the Netherlands.[34] The treaty was drafted shortly after World War II, during a period in which the United States dominated economic relations with the European Netherlands. Despite the unequal bargaining positions of the two countries, the United States responded to the Antilles' need to attract foreign capital by using the Convention to grant United States citizens tax incentives to invest in the Antilles.[35] In 1963, however, the United States and the Netherlands Antilles negotiated a Protocol to the Convention (Protocol)[36] in response to criticism that the Convention and the Antilles tax code provided too many tax benefits.[37] Nevertheless, the Convention and its Protocol effectively eliminated any tax burdens associated with investing in United States corporations through Antillean subsidiaries. For example, under article VIII of the Convention, interest on indebtedness derived from United States sources by a resident or corporation of the Netherlands Antilles is tax free.[38] Under article VII, the rate of United States tax on dividends derived from a United States source by an Antillean resident or corporation is limited to fifteen percent.[39] Furthermore, most financing subsidiaries pay a reduced tax on their net income of only 2.4% to 3.0%.[40]

The 1984 Act effectively negates these provisions, however, by removing the major incentive for utilizing Antillean subsidiaries. Section 127 of the Act repealed the thirty percent withholding tax imposed by the United States on portfolio indebtedness of United States borrowers to nonresident aliens and foreign corporations, effective July 18, 1984.[41] The repeal applies to interest paid on two

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[34] *See* Convention, *supra* note 8.

[35] Recent Development, *Taxation—Renegotiation of the United States-Netherlands Antilles Tax Treaty*, 18 TEX. INT'L L.J. 400, 402 (1983).

[36] Protocol Modifying and Supplementing of the Convention of Apr. 29, 1948, Oct. 23, 1963, United States-Netherlands, 15 U.S.T. 1900, T.I.A.S. No. 5665.

[37] Specifically, several Latin American states complained that many of their nationals were investing scarce capital in the United States via Antilles corporations. Recent Development, *Taxation: Renegotiation of the United States-Netherlands Antilles Tax Convention*, 23 HARV. INT'L L.J. 472, 474 (1983).

[38] There is one exception to this provision: if an Antilles corporation controls more than 50% of a United States corporation's stock, the subsidiary pays the normal United States income tax of 30%. Convention, *supra* note 8, art. VIII; *see* Recent Development, *supra* note 37, at 475.

[39] If, however, the Antillean corporation directly or indirectly controls at least 95% of the voting power in the United States corporation, the rate falls to five percent. Convention, *supra* note 8, art. VII, § 1.

[40] The normal rate of corporate tax in the Antilles ranges from 27% to 35%. Margolis, *supra* note 7, at 49; Convention, *supra* note 8, art. XI.

[41] Although a proposed Senate amendment phased out the tax over a four-year period,

groups of obligations. First, no interest will be withheld on unregistered, "bearer" obligations which meet three requirements: (1) those designed to be originally issued only to foreign persons; (2) those on which the interest is payable only outside the United States; and (3) those which contain a statement on their face warning that any United States holder will be subject to United States tax.[42] Second, the repeal applies when the United States person,[43] who would otherwise be required to withhold tax from the interest on the obligation, has received a verified statement that the beneficial owner of the obligation is not a United States person.[44] This statement must be made either by the beneficial owner or by a securities clearing organization, or other financial institution that holds customers' securities in the ordinary course of its business.[45]

Several other portions of the repeal are also signficant. The tax on interest received by foreign corporations was repealed in the same manner as the tax on income received by nonresident alien individuals.[46] In addition, the Act exempts certain obligations of nonresident aliens from United States estate taxes.[47] The with-

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the conference agreement repeals the tax with respect to interest paid on obligations entered into after July 18, 1984.

[42] I.R.C. §§ 871(h)(2)(A), 163(f)(2)(B) (CCH 1984). Meeting these criteria also exempts the obligation from registration requirements imposed by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982).

[43] The term "United States person" refers to citizens and residents of the United States, domestic partnerships and corporations, and any estate or trust (other than a foreign estate or trust as defined in I.R.C. § 7701(a)(31)). I.R.C. § 7701(a)(30) (CCH 1985).

[44] I.R.C. § 871(h)(2)(B) (CCH 1984).

[45] Such statements are ineffective, however, if at least one month before the payment of interest on the applicable obligation, the Secretary of the Treasury publishes a determination that any statement from such person(s) is ineffective. I.R.C. § 871(h)(4) (CCH 1984). The Secretary further has the authority to withdraw the withholding exemption of countries from which the United States is receiving inadequate information to prevent evasion of federal taxes by United States persons. *Id.* § 871(h)(5) (CCH 1984).

[46] *See* Tax Reform Act of 1984, § 127(b) (redesignating I.R.C. § 881(c)). The Act includes special rules for controlled foreign corporations (CFCs). *See id.* § 127(c)(4). Payments of interest on a United States affiliate's obligation to an applicable CFC are treated as payments to a resident of the country in which the applicable CFC is incorporated. The terms "applicable CFC" and "United States affiliate obligation" generally have the same meaning as under I.R.C. §§ 131(b)(2)(D) and 131(b)(2)(F), respectively. *Id.* §§ 127(g)(2)(A), 127 (g)(2)(c) (CCH 1984).

[47] Obligations exempted include: (1) amounts described in I.R.C. § 861(c)—generally, deposits with banks and insurance companies, the interest on which would be treated as income from non-United States sources if the decedent had received it before his death; (2) deposits with foreign branches of domestic corporations or partnerships engaged in the commercial banking business; and (3) obligations which would be exempt from the 30% withholding tax had the decedent received it before his death. I.R.C. § 127(d) (CCH 1984) (amending I.R.C. § 2105).

holding tax remains applicable, however, to interest paid on bearer and registered obligations owned by "ten-percent" shareholders.[48]

For several years the sale of United States corporate bonds through Antillean affiliates has strengthened foreign capital markets, particularly the Eurobond market. The effect has been especially distressing to the New York financial industry.[49] From 1980 to 1982, the proportion of the world's capital sales comprised of Eurobonds and foreign bond issues[50] increased from 47% to 61%.[51] Any revitalization in the New York capital market which might result from the 1984 repeal, however, would only serve to further weaken the United States' relations with the Netherlands Antilles.[52] Throughout congressional debates over the 1984 Act, the Antilles forcefully advocated that a repeal of the withholding tax would wreak havoc on its economy,[53] and cause the islands to surrender to communism.[54] In light of these objections, the 1984 repeal indicates either that Congress is more immediately concerned with financing its national debt than securing its southern border,[55] or that it simply discounts such threats as "diplomatic

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[48] A "ten-percent" shareholder is any person who owns 10% or more of the total combined voting power of all classes of voting stock, or in the case of a partnership, 10% of the capital or profits. I.R.C. § 871(h)(3) (CCH 1984). Stock ownership is determined according to § 871(h)(3)(C).

[49] For the first time since World War II, foreign capital markets have become more important to United States corporations than New York. Francis, *supra* note 5.

[50] Foreign bond issues are underwritten by institutions from a country other than the United States, denominated in the currency of that country (unlike Eurobonds which are denominated in dollars), and sold in that country.

[51] In 1982, $69.7 billion in bonds were sold in the Eurobond and foreign currency markets; $43.7 billion were sold in the domestic public market. This recent emphasis on Eurofinancing has created thousands of investment banking positions in London, some of which may now return to New York as a result of the withholding tax repeal. Francis, *supra* note 5; *see generally* Sheppard, *Tax Reform Act Permits Eurobond Investors to Buy from New York*, 24 TAX NOTES 6 (July 2, 1984).

[52] Revitalization of the New York market should also strain relations with United States allies who suffer from economies weaker than that of the United States. Many foreign bankers already think the United States drains too much capital from the rest of the world. Wash. Post, *supra* note 7, at col. 2.

[53] Hamilton, *supra* note 6, at col. 3. Investment activities on the islands provide 17% of foreign exchange earnings, 7% of employment, and almost one-third ($50 million) of annual tax revenues. Fialka, *supra* note 9, at 1, col. 6; Francis, *supra* note 5.

[54] Antillean representatives in Washington have reportedly argued that the 1984 repeal makes the islands an easy target for communist aggression from Cuba. Hamilton, *supra* note 6, at 5, col. 2; *see also supra* note 16 (warning by Harold Henriquez of a possible overthrow by groups with "leftist sympathies"); *supra* note 33 and accompanying text.

[55] In passing the Caribbean Basin Initiative, Congress recognized the Caribbean as strategic to the defense of the United States. *See supra* note 25. As a result, some observers view the 1984 repeal as inconsistent with the CBI's efforts to stabilize the area. *See* Francis,

blackmail."[56]

From the United States' standpoint, one of the most desirable effects of the repeal will be a long-range reduction in the cost of corporate and Treasury borrowing.[57] At present, however, this objective may be more illusory than real. The Public Securities Association has predicted that a repeal of the withholding tax may in fact narrow the spread between the cost of United States-source issues in the Eurobond market and similar foreign-source issues.[58] Should this narrowing be the result of an increase in Eurobond rates, much of the corporate savings realized from bypassing financing subsidiaries in the Antilles will be eroded, negating the major incentive behind the repeal. Corporate Eurobond offerings made since the repeal, however, have realized savings comparable to those formerly realized only through Antillean channels.[59] In spite of this immediate reaction to the repeal, much of the Treasury's savings may in the long run come from an overall relaxing of pressure on the domestic capital market rather than an immediate drop in the cost of borrowing.[60] This relaxation should occur even though a number of foreign investors find security more enticing than a high return on their investment, and accept the lower yield traditionally offered by more stable United States issues.[61]

Another benefit of the Tax Reform Act accruing to United States corporations will be a shift from short-term to long-term investments,[62] further increasing opportunities to raise capital.

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supra note 5, at 5-6; Hamilton, *supra* note 6, at col. 3 (quoting Harold Henriquez).

[56] *See* Francis, *supra* note 5, at 6, col. 2.

[57] By borrowing directly on the Eurobond market, American corporations should save even more than the $100 million they have saved already by channeling loans through financing subsidiaries in the Antilles. *See id.* at 5, col. 3.

[58] Letter from Jack Runnion, Jr., Chairman of the Public Securities Association's Committee on Government and Federal Agencies Securities, to Beryl W. Sprinkel, Under Secretary of the Treasury for Monetary Affairs (July 11, 1984), *reprinted in* 24 TAX NOTES 431 (July 30, 1984) [hereinafter cited as Runnion Letter].

[59] For example, Coca-Cola saved almost one percent on its Eurobond offering compared to the cost of domestic capital. Sheppard, *Treasury Reassures Foreign Investors But Not Congress About Targeted Issue*, 24 TAX NOTES 1103, 1104-05 (Sept. 17, 1984) [hereinafter cited as Sheppard, *Targeted Issues*].

[60] *Id.* at 1104.

[61] Sheppard, *supra* note 51, at 7; *see also* Recent Development, *supra* note 35, at 405; Letter from Bob Dole, Senate Finance Committee Chairman, to Secretary of the Treasury Donald T. Regan (July 16, 1984), *reprinted in* 24 TAX NOTES 430 (July 30, 1984)(emphasizing that United States Treasury obligations are among the most secure in the world) [hereinafter cited as Dole Letter].

[62] Although the value of the dollar rose in Europe and Asia upon passage of the Act, analysts expect only a change in the way the dollar market operates, not a permanent shift

This transition should occur since the Internal Revenue Code imposes no withholding tax on interest paid to foreigners on short-term investments.[63] As a result, foreign investors have historically found short-term financing more attractive than long-term investments. The repeal, however, allows investors to earn the higher returns which often accompany long-term investments without being subject to withholding, and therefore should cause a reversal in investors' preference for short-term instruments.[64]

Despite these benefits, the Treasury continues to find itself in a dilemma. Its "financial conscience" wants to issue unregistered bearer bonds to encourage foreign financing of the national debt at rates lower than the Treasury paid before the repeal; at the same time, its "tax conscience" wants to prevent tax evasion by United States persons masquerading as foreigners.[65] In an effort to resolve both concerns, the Treasury authorized the offering of "targeted issues" by corporate borrowers.[66] Under a targeted issue, registered book-entry bonds are sold to United States persons, while unregistered bearer instruments are "targeted" to investors abroad.[67] Targeted issues give the Treasury some control over the amount of obligations held by foreigners in comparison to Americans.[68] In addition, targeted issues could yield a lower return to foreigners enticed by the security of United States issues.[69] From a corporate standpoint, targeted issues provide the desired access to cheaper foreign capital, while avoiding the appearance of domestic tax evasion. Realistically, however, targeted issues do not conclusively prevent American taxpayers from securing bearer bonds abroad and repatriating them. In fact, those taxpayers intent on evading the tax on interest could simply retain their bonds in portfolios

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in the dollar's value. Sheppard, *supra* note 51, at 7.

[63] I.R.C. § 861 (CCH 1984) includes a set of statutory rules for determining what constitutes United States-source income. Certain items of gross income are considered wholly derived from United States sources, while other items are apportioned. In both cases, deductions from gross income are allowed to determine total taxable income from United States sources.

[64] *See* Sheppard, *supra* note 51, at 7.

[65] Sheppard, *The United States as a Tax Haven*, 24 TAX NOTES 325 (July 23, 1984) [hereinafter cited as Sheppard, *Tax Haven*].

[66] *See supra* notes 42 and 44 and accompanying text.

[67] Book-entry bonds require registration of the bond-holder before redemption; bearer bonds can be redeemed anonymously by whoever possesses them. In an effort to prevent abuse, foreign underwriters would be required to certify that no bearer-instrument purchaser is a United States person. *See supra* note 65 and accompanying text.

[68] Sheppard, *supra* note 51, at 7.

[69] *Id.*; *see also* Recent Development, *supra* note 35.

offshore.[70]

The use of bearer bonds in a targeted issue also raises a proprietary question because it encourages the anonymity of foreigners, while requiring registration of United States investors.[71] In light of this potential inequity, the Public Securities Association overwhelmingly recommended that all bearer securities be prohibited.[72] The Treasury, at least with respect to its own issues, may have agreed with the Association; it announced on September 7, 1984, that no United States government-backed securities will be issued in bearer form.[73] Nevertheless, allowing corporate issues of bearer instruments indicates that the Treasury recognizes the predominantly bearer-oriented nature of the Eurobond market.[74]

In light of this recognition, the Treasury's targeted security features traits which are more familiar to foreign investors, but which do not sacrifice the Treasury's concerns about domestic tax evasion. Although registered through the Federal Reserve Bank of New York, the Treasury's security offers an annual coupon similar to most Euro-financing instruments, rather than the semiannual coupon favored in the United States. The security will also be offered by public auction at the same time as domestic Treasury securities. Due to the Treasury's compliance concerns, however, only foreigners, or foreign offices of United States financial institutions, may initially purchase the security. In addition, the Treasury security cannot be resold to United States persons, other than foreign branches of United States financial institutions, until forty-

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[70] Representative Doug Barnard has raised serious doubts about the efficiency of regulations designed to prevent United States citizens from posing as foreigners, and the efficacy of the present "self-certification" system: "A tax evader has probably committed a felony already, so the possibility of perjuring himself in self-certification isn't going to stop him." Letter to Treasury Secretary Donald T. Regan and I.R.S. Commissioner Roscoe L. Eggar, Jr. (July 11, 1984), *quoted in* Sheppard, *Tax Haven*, *supra* note 65, at 326.

Other criticisms of targeted issues exist as well. First, it is unlikely that the Treasury could reimpose registration requirements once the practice of issuing bearer debt is initiated due to investor, corporate, and Treasury reliance on such financing. Dole Letter, *supra* note 61. Second, the resulting interest savings could easily be negated by the combination of a switch from short-term to long-term Treasury bills and even a slight increase in Treasury bill rates. Runnion Letter, *supra* note 58, at 432.

[71] This concern is shared by Senator Bob Dole: "A perceived collusion by the U.S. Treasury with tax evaders is of even greater concern to me than a similar potential use of private U.S. corporate securities by such persons." Dole Letter, *supra* note 61; *see* Runnion Letter, *supra* note 58.

[72] *See* Runnion Letter, *supra* note 58, at 432.

[73] Treasury News, 24 TAX NOTES 338 (July 23, 1984); Sheppard, *Targeted Issues*, *supra* note 59, at 1103.

[74] Treasury News, 24 TAX NOTES 1107 (Sept. 17, 1984).

five days after original issuance.[75] Ultimately, however, the Treasury must await the passage of time before it can ascertain whether its security truly strikes an effective balance between preventing domestic tax evasion and facilitating domestic access to international capital.[76]

An alternative to targeted issues might be the implementation of a withholding tax at a very low rate. This strategy would assuage both the Treasury's compliance and trade concerns. Interest income would be reported by payors, and the value of the dollar would stabilize lower than under total repeal of withholding because only an incremental number of foreign investors who demand complete anonymity would invest elsewhere.[77] Fortunately for United States corporations, however, Congress chose a course of total repeal, freeing American corporations to sell debt in the same tax-free manner as their counterparts overseas.[78]

As the repeal takes effect, American corporations should fully utilize their new access to cheaper Euro-financing.[79] As a result, Antillean financing subsidiaries will be deemed unprofitable, and will silently fade in the name of fiscal efficiency. In addition, the Treasury will demand its share of the market in its continuing effort to finance the staggering deficit.[80] In fact, as the Treasury's share of the bond market expands American corporations and the Treasury may eventually find themselves in competition with each other, eliminating all savings realized from the 1984 repeal.

In addition, the Netherlands Antilles will feel the weakening of its tax haven status as a result of the repeal, but not to the devastating extent it sought Congress to believe.[81] In the last thirty years, the Netherlands Antilles has earned billions of dollars with limited resources. By focusing this creativity on circumventing the effects of the repeal, the islands should remain a leading center of international finance. Through capitalizing on its strong ties with the United States and the Netherlands, in conjunction with its convenient position in the Caribbean, the Antilles could perhaps

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[75] *Information Concerning Issue by U.S. Treasury Department of Registered Securities Targeted to Foreigners*, TREAS. DEP'T REP. (Sept. 10, 1984), *excerpted in* 24 TAX NOTES 1110-11 (Sept. 17, 1984).

[76] See *id.* at 1107.

[77] Sheppard, *Tax Haven*, *supra* note 65, at 327.

[78] *See* Barnard Letter, *supra* note 31.

[79] Sheppard, *supra* note 51, at 7.

[80] *See* Hamilton, *supra* note 6.

[81] *See supra* notes 53, 54 and accompanying text.

supplant Panama as the center of Central American finance.[82] In any event, the 1984 repeal indicates that the United States has effectively renounced its treaty with the Antilles, partially undermining the favorable initiatives made toward the Caribbean in the CBI. Additionally, Treasury and corporate borrowers have gained access to cheaper capital, but not without increasing their dependence on volatile international markets.

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[82] *See* Recent Development, *supra* note 35, at 407.