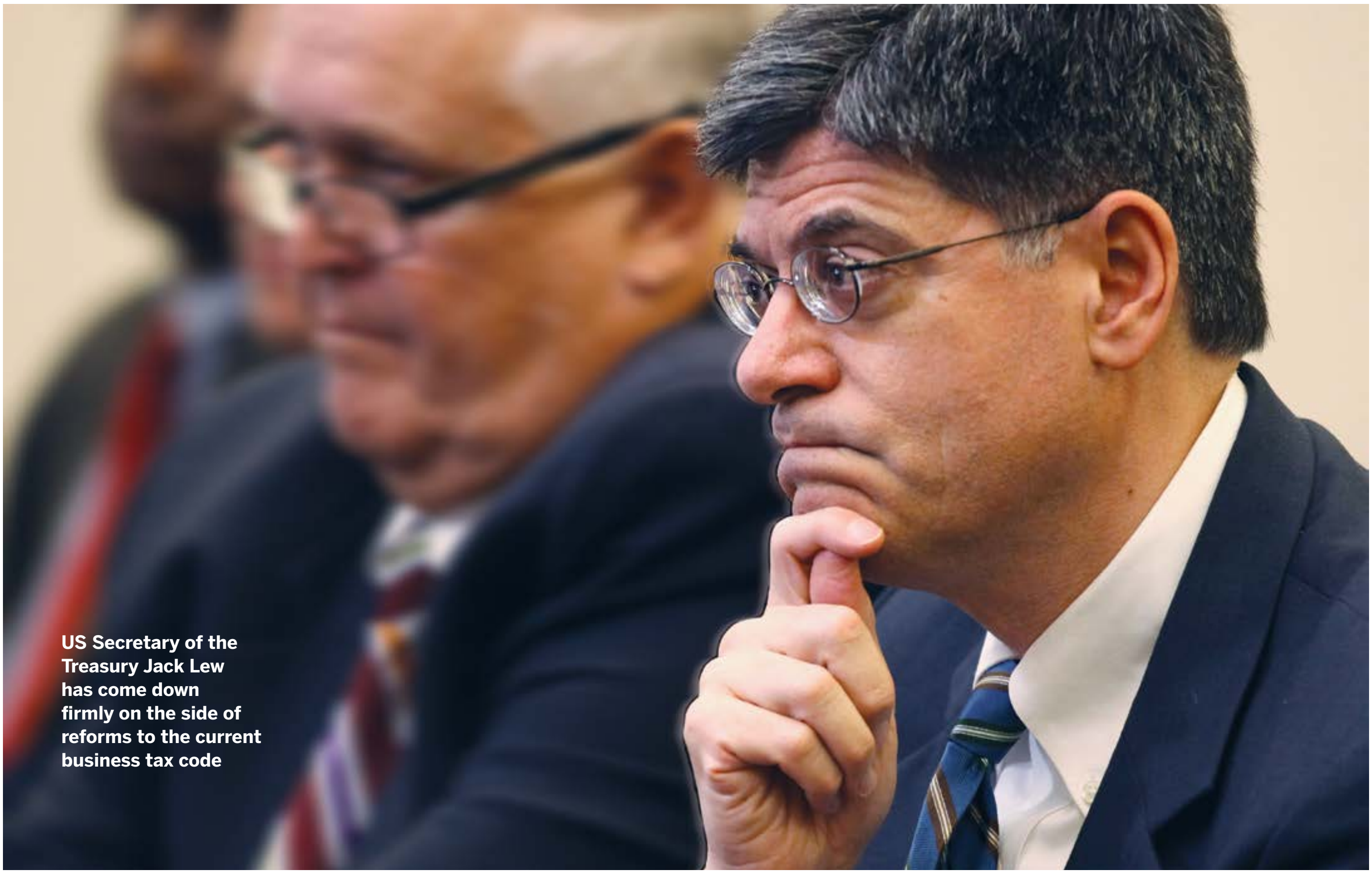

US Secretary of the Treasury Jack Lew has come down firmly on the side of reforms to the current business tax code

THE TAX MAN COMETH

For years, Congress has batted around the possibility of tax reform—and with it, the reduction or elimination of the tax deduction for marketing expenses. Could 2015 be the year that reform comes to pass? **Larry Dobrow** attempts to answer this and other pressing policy questions

When healthcare marketers take their annual year-end glance at the upcoming year's policy agenda, they usually find a handful of items of note—an expected FDA guidance here, a partisan-related government-shutdown threat there, a well-intentioned but ultimately unworkable push to incentivize healthy lifestyles and/or enact an "obesity tax" elsewhere. Sure, many of these items will affect how healthcare organizations go about their business in the months ahead, but almost never do they rise to the level of existential threat.

In 2015, it is possible that just such a doomsday scenario will come to pass.

Okay, perhaps that's just the tiniest bit dramatic. Nothing that happens in Washington in 2015 will hasten the end of the pharmaceutical business as we know it. But should a bona fide effort to reform the tax code come to pass—and with Republicans seizing control of the Senate in November, there's political momentum for just such an effort— it's possible that pharma companies will feel the sting, in the form of reduced or eliminated deductibility of marketing expenses.

"That's the one that keeps me up at night. That's the one that is keeping a lot of people up at night," says John Kamp, executive director of the Coalition for Healthcare Communication.

It's worth noting that the marketing deduction has come under fire many times in both the recent and the not-so-recent past. Peter Kosmala, SVP, government relations of the American Association of Advertising Agencies, recalls that there was "serious discussion" about eliminating or reducing the marketing deduction during the mid-1980s and that the possibility of a change has never fallen entirely off the radar. In addition, as much as there may appear to be a degree of bipartisan momentum to effect long-overdue change to the tax code (not to mention myriad media reports of a post-election "spirit of cooperation" in Washington), nobody would be all that surprised if the tax-reform momentum devolved into the usual partisan squabbling and sustained gridlock. This could all just be a false alarm.

This time it may be for real

But lobbying entities and policy wonks believe that it will be different this time—that after years of charged banter about the need for tax reform, the political stars are finally aligned in such a manner that the job might actually get done. There are any number of reasons behind this, but the big three are that the mid-term elections have come and gone (hello, political cover); that eliminating or reducing the deduction would raise a non-insignificant amount of revenue (plus allow the people driving the change to dodge accusations that they raised taxes, even though the end result is basically the same); and that tax inversions have D.C. bigs both terrified and, well, royally p.o.'d.

"If a big company leaves US shores due to the tax code, you will see Washington light up," says Matt Giegerich, chairman and CEO of Ogilvy CommonHealth Worldwide and chair of the Coalition for Healthcare Communication's executive committee.

Broadly defined, a tax inversion occurs when a US company relocates its corporate headquarters abroad to avoid paying the higher US tax rates. Pharma-biz deals motivated in no small part by tax inversions include Medtronic's pending acquisition of Covidien and AbbVie's scuttled purchase of Shire; both to-be-acquired companies are based in Ireland, which under the current rules would allow the acquiring firms to become Irish companies and enjoy lower tax rates. In September, the US Treasury department tweaked its regulations to minimize the tax benefits in inversion-type deals, which was a major reason the AbbVie/Shire agreement fell apart. Similarly, London-based AstraZeneca now isn't quite as appealing an acquisition target to Pfizer as it was thought to be earlier in the year.

What does inversion have to do with the tax-deductibility of marketing expenses, you ask? Because companies want lower corporate tax rates and, in order to get them, might use the ad/marketing deduction as a bargaining chip. As part of an exchange for a lower US corporate tax rate, maybe they wouldn't fight the elimination or sharp reduction of the deduction.

Two sides to the story

"Everyone is kind of schizophrenic on the subject," Giegerich says. "On one hand, every company wants to see the [tax] code changed. They're paying 35% and want to pay closer to 20% or 25%. On the other, they realize that they might have to make some concessions to get there. The ad tax deductibility could be one of them."

"If a big company leaves US shores due to the tax code, you will see Washington light up"

The possibility of a bargain along these lines leaves Kosmala and the 4As in somewhat of a precarious position. Companies aching for a reduced corporate tax rate aren't as opposed to using the deduction as a bargaining chip as the marketing companies that do their advertising are. "A lot of these larger advertisers might say, 'We're part of a group that wants tax reform. If [losing] the ad deduction is what it takes, well, that's what it takes,'" he explains. "So far, our partners on the brand side haven't said anything publicly… It's not a friction point just yet."

Predictions of disaster

So while marketers inside and out of the pharmaceutical industry have a clear understanding of the thinking, they're unanimous in their belief that losing the deduction would be disastrous—not merely for the companies themselves, but for everyone in the advertising food chain. "The reality is that advertising is one of the drivers of the economy," says Clark Rector, EVP-government affairs of the American Advertising Federation. "When it gets cut back, the ripples go far beyond the ad industry. Advertising is a great source of information; it creates competition and lowers prices. When you go after advertising, you're almost biting off your nose to spite your face."

Kosmala obviously agrees, noting that his organization's constituency could feel the brunt of the change. "If companies can't deduct the [marketing] expenses anymore, some of them might cut way back on their [marketing] spending. That will hit agencies. It may force them to make fundamental decisions about what kinds of business they can take on, about hiring, about so many other things."

Many moving parts

Nobody's willing to venture a concrete prediction as to the deduction's ultimate fate, mostly owing to the myriad moving parts involved. For instance, a lot depends on the politicians who spearhead the imminent tax-reform push. Will they be practical, compromise-minded individuals like House Ways and Means Committee Chairman Dave Camp (R-MI) and Senate Finance Committee Chairman Max Baucus (D-MT), who headed the most recent efforts to this end? (Baucus now serves as the Ambassador to China, while Camp chose not to run for reelection in November.) Or will more extreme elements in both parties take the lead? "Generally people acknowledge that you have to simplify the tax code and reduce the corporate rate, but who in Washington wants to decrease revenues? They're working on nickels as is, at a time when we have a blossoming deficit," Giegerich says. "If you forced me to guess how this will play out? More stalemate is the safest bet, on this and other things."

"A lot of the privacy protections from the desktop world don't work as well with mobile"

While the imminent tussle over tax reform will provide the most nightmare fuel for pharma marketers in the months ahead, it's not the only issue or event likely to spark debate in Washington during 2015. Others include:

• Proposed legislation in the wake of the 21st Century Cures initiative: When House Energy and Commerce Committee Chairman Fred Upton (R-Mich.) announced the launch of 21st Century Cures in April, health pundits were unsure about what could be expected from it. While nobody had a problem with its ambitious goal—"to accelerate the pace of cures and medical breakthroughs in the United States," per a press release from Upton's office—it was questioned how much of an impact the initiative could ultimately make.

After months of testimony, including repeat appearances by FDA and NIH higher-ups, healthcare experts now expect significant legislation to be proposed in its wake, likely having to do with extending the ability of pharma firms to communicate more freely. "One of the questions [the initiative] got at was, 'How can companies that develop innovative medical treatments communicate about them?'" reports Jeff Francer, VP and senior counsel for the Pharmaceutical Research and Manufacturers of America (PhRMA). "Once medicines are out there being used, there's so much data being generated. But companies are not allowed to share that information with physicians unless it's in the PI. That's a problem."

• FCC investigation of the so-called "Internet of Things": To date, the FCC hasn't much concerned itself with the Internet of Things – broadly defined, connectivity/connection among physical objects, like cars and appliances and whatnot. Nobody expects the FCC to weigh in with guidance anytime soon, but there are growing concerns about how data generated through connected devices will be deployed.

"There are ad and marketing issues around this, especially if you're talking about data that could be considered health data," Kosmala says. "It's important enough to the FCC that they got a bunch of experts in the room to talk about it [at a workshop held in the second half of 2014]."

He advises healthcare organizations—and specifically those that market connected devices—to start self-regulating via the creation of industry-wide best practices. "Even in health, if you ask consumers for permission and tell them about what you'll do with the information—'we're hoping to use the information to help you and others treat a condition'—they'll be okay with it. If you don't communicate right up front, you could get into some scary situations."

• More discussion about consumer data: But this time around, expect the conversation to focus less on how data is being used and more on how it's being secured. Pharma companies can thank Home Depot, Target, JPMorgan Chase and a host of other hacking victims for that.

"Prior to those breaches, you got a sense that people had a sense of what the rules were—who has access to what, who can share what, that kind of stuff," Giegerich says. "But the reality has come across that nothing is truly secure. It's opened eyes in Washington."

Kosmala notes that the turbo-quick adoption of mobile devices by consumers has changed the privacy/security calculus for any number of entities. "A lot of the privacy protections from the desktop world don't work as well with mobile," he says. "Geolocation data, photos and contacts—the FTC is looking at that. California is issuing guidance around mobile for children. There's always more attention given to health and financial data as special classes that demand more protection."

• Waiting on the FDA: For much of the last five years, pharma marketers have been asking—pleading, really—for the FDA to give specific guidance on the use of social media. When the FDA finally weighed in, the industry was underwhelmed, to put it mildly. But while the organization has shown some inclination to revisit its off-label speech policies, it has evinced no such willingness to provide clarity on the social-media rules of the game.

Might that change in 2015? "You'd have to ask the FDA what its intentions are, but there are millions of Americans who are getting information about treatment using social media. The government has shown that technology can be used in a responsible way," Francer says.

Giegerich puts it even more bluntly. "Social media is now the coin of the realm. This is how people get and gather information and make very important life decisions," he explains. "Health is either the most-searched topic or second to porn. For [health marketers] to not have a clear sense of purpose and path forward on social media, well, that doesn't make a whole lot of sense." ■