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IRS and Treasury Issue Proposed Regulations Narrowing Domestically Controlled REIT Qualification Test and Revising Section 892 Exemption, as Well as Final Regulations Relating to Qualified Foreign Pension Funds

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On December 29, 2022, the IRS and Treasury issued (1) proposed regulations for determining whether a real estate investment trust (a "REIT") or registered investment company (a "RIC") qualifies as a "domestically controlled qualified investment entity" (the "Proposed QIE Regulations"); (2) proposed regulations revising the definition of a "controlled commercial entity" for purposes of section 892[1] (the "Proposed Section 892 Regulations"); and (3) final regulations relating to qualified foreign pension funds ("QFPFs" and the "Final QFPF Regulations") and their exemption from the application of FIRPTA (as defined below).

Proposed QIE Regulations

Background

Subject to certain exceptions discussed below, section 897 and related sections added to the Code by the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") require foreign persons who recognize gain from the sale or disposition of United States real property interests ("USRPIs") to file U.S. federal income tax returns reporting those gains and pay U.S. federal income tax on those gains at regular graduated rates, even if the gains are not otherwise effectively connected with the conduct of a U.S. trade or business.

The definition of USRPIs is broad. In addition to including a wide range of interests in U.S. real estate (defined broadly), USRPIs include equity interests in domestic corporations that are United States real property holding corporations ("USRPHCs") and interests in disregarded entities and certain partnerships that own U.S. real estate. Generally, a USRPHC is any corporation, including a REIT, if the value of its USRPIs represents at least 50 percent of the aggregate value of its real estate (both U.S. and non-U.S.) and business assets.

Domestically Controlled REIT Exception

Notwithstanding that equity interests in domestic USRPHCs generally are treated as USRPIs, section 897(h)(2) provides that an interest in a domestically controlled qualified investment entity (a "QIE") is not a USRPI. A QIE is a REIT or RIC (i.e., mutual fund) that is a USRPHC.[2] Under section 897(h)(4), a QIE is domestically controlled if less than

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50 percent of the value of its stock is held "directly or indirectly" by "foreign persons" at all times during the shorter of (1) the 5-year period ending on the relevant determination date or (2) the period during which the QIE was in existence (the "Testing Period"). Under these rules, gain recognized by a foreign person on the disposition of an interest in a domestically controlled REIT (a "DREIT") is not subject to U.S. federal income tax under FIRPTA, even if the DREIT is a USRPHC.

Foreign persons often seek to invest in U.S. real estate through DREITs because, in these structures, foreign persons can exit the investment via a sale of DREIT stock without being subject to U.S. tax on the gain or being required to file a U.S. tax return.

In the 2015 PATH Act,[3] Congress added section 897(h)(4)(E) to the Code, which treats QIE stock held by another, publicly traded, QIE as held by a foreign person unless that publicly traded QIE is domestically controlled, in which case the QIE stock is treated as held by a U.S. person. Section 897(h)(4)(E) also provides an express look through-rule for QIE stock owned by another, private QIE. Apart from these narrow exceptions, section 897 does not otherwise clarify when QIE stock owned by one person should be treated as owned "indirectly" by another person for purposes of determining DREIT status.[4]

Notwithstanding the lack of guidance, it is our experience that many taxpayers generally look through domestic partnerships for purposes of determining DREIT status and treat the partners of the domestic partnership as indirectly owning the QIE stock owned by the domestic partnership. In contrast, it is our experience that many taxpayers treat stock of a QIE held by a domestic C corporation as held by the domestic C corporation (and not indirectly by its shareholders) for purposes of determining DREIT status, in part because, unlike a domestic partnership or a REIT, a domestic C corporation is fully subject to U.S. taxation on any gain from disposition of its REIT stock.

This view is consistent with Treasury's previous guidance on the subject. Existing regulations provide that, for purposes of determining DREIT status, the actual owners of stock, as determined under Treas. Reg. § 1.857-8, must be taken into account.[5] Treas. Reg. § 1.857-8(b) provides that the actual owner of stock of a REIT is the person who is required to include the dividends received on the stock in gross income, and that such person generally is the shareholder of record of the REIT. Although this language suggests that a domestic partnership that owns REIT stock should be treated as the actual owner of the stock, as discussed above most practitioners have been unwilling to take this position, partly on the basis that the partnership's partners would also be required to take into account their distributive shares of the REIT dividends on their returns.[6] However, in the case of a domestic C corporation, only the C corporation would take into account the REIT dividends on its return and pay taxes on those dividends. Relying in part on these regulations, in a 2009 private letter ruling (PLR 200923001), the IRS ruled that REIT stock owned by a foreign person through a domestic C corporation is to be treated as owned by the domestic C corporation, and not as owned "indirectly" by the foreign person, to determine DREIT status.

Proposed QIE Regulations Treat Certain Foreign-Owned Domestic C Corporations as Transparent

The Proposed QIE Regulations depart from the guidance discussed above in significant respects. The Proposed QIE Regulations provide a broad look-through rule for purposes of determining DREIT status that applies to various types of pass-through entities, including REITs, partnerships (whether U.S. or non-U.S., other than publicly traded partnerships), S corporations, and RICs, to determine DREIT status (the "Look-Through Rule").[7] The Look-Through Rule is implemented by imputing QIE stock to owners of entities that are "look-through persons" on a *pro rata* basis based on the owners' proportionate interests in the look-through person.[8]

Surprisingly, the Proposed QIE Regulations further extend the Look-Through Rule to "foreign-owned domestic C corporations." A "foreign-owned domestic C corporation" is

defined as any non-publicly traded domestic C corporation if foreign persons hold directly or indirectly 25 percent or more of the value of its outstanding stock, after applying look-through rules analogous to the ones that apply to QIEs.[9]

For instance, assume that 51 percent of the stock of a REIT is owned by a non-publicly traded domestic C corporation and that the remaining 49 percent is owned by foreign individuals. The stock of the non-publicly traded domestic C corporation is owned as follows: 20 percent by a foreign corporation, 5 percent by a foreign individual, and 75 percent by U.S. persons. In this case, the non-publicly traded domestic C corporation is a "foreign-owned domestic C corporation" because 25 percent of its stock is owned by a foreign corporation or foreign individuals. One must therefore look through this domestic corporation to its shareholders. Under these facts, the REIT would not be a DREIT because 61.75 percent of its stock would be treated as owned by foreign persons (10.2 percent by the foreign corporation through the domestic corporation, plus 2.55 percent by the foreign individual through the domestic corporation, plus 49 percent directly by foreign persons).[10]

The preamble to the Proposed QIE Regulations does not mention the contrary view taken by the IRS in the 2009 private letter ruling.[11] The preamble does acknowledge the existing regulations, which provide that the actual owners of a REIT's stock, as determined under Treas. Reg. § 1.857-8, must be taken into account to determine DREIT status. But the preamble explains that, in the government's view, reliance on those regulations for purposes of determining DREIT status is misplaced because "the determination of actual ownership pursuant to §1.857-8 is only intended to ensure the beneficial owner of stock is taken into account when different from the shareholder of record, and §1.897-1(c)(2)(i) does not state or otherwise suggest that the actual owners of QIE stock as determined under §1.857-8 are the only relevant persons for determining whether a QIE is domestically controlled or provide any guidance on the meaning of 'held directly or indirectly by foreign persons.'" In support of that view, the preamble describes an example where foreign persons own REIT stock through a domestic partnership. The preamble explains that looking through the domestic partnership is necessary because otherwise, foreign persons could "dispose of USRPIs held indirectly through certain intermediate entities, such as domestic partnerships, to avoid taxation under section 897(a)."

As discussed above, many taxpayers were already looking through domestic partnerships in determining DREIT status. But the example in the preamble is not analogous to a situation where foreign persons own REIT stock through a domestic C corporation that would be subject to tax on a disposition of DREIT shares. Accordingly the preamble's reasoning is less persuasive in this context. Moreover, even if the reference to the "actual owner" of REIT shares in Treas. Reg. § 1.857-8 is merely intended to ensure that beneficial ownership is taken into account where the shareholder of record is not the beneficial owner, and is not meant to imply that the "actual owner" is the sole owner to take into account to determine DREIT status, there is no suggestion in the existing and long-standing regulations regarding DREITs, or anywhere else in the FIRPTA or REIT rules, that one must look through a domestic C corporation that is the beneficial owner of REIT shares.

Further, given that the phrase "directly or indirectly," has many different meanings under the Code depending on the context, and that Congress declined to explicitly require looking through domestic C corporations despite requiring looking through non-public QIEs, it is far from clear that the preamble's interpretation is consistent with Congressional intent.

The preamble also does not explain the significance, in the absence of any statutory guidance, of the 25 percent foreign ownership threshold for applying the Look-Through Rule to domestic C corporations.

As discussed above, the Look-Through Rule also applies to foreign partnerships and

makes these partnerships “look-through persons.” Before the release of the Proposed QIE Regulations, many practitioners had been unwilling to look through a foreign partnership to determine DREIT status. Thus, in this context, the Look-Through Rule provides a welcome clarification for taxpayers.

Proposed QIE Regulations Also Clarify Status of QFPFs

The Proposed QIE Regulations also provide that a QFPF or a QCE (as defined below) will always be treated as a foreign person for purposes of determining DREIT status. This clarification was in response to a suggestion by some commentators that, because a QFPF or QCE is not treated as a “nonresident alien individual or a foreign corporation” for purposes of being subject to U.S. tax under FIRPTA, it also should not be treated as a foreign person for DREIT purposes.

Effective Date

The Proposed QIE Regulations apply to dispositions of interests in QIEs that occur after the date on which the Proposed QIE Regulations are finalized. However, the preamble indicates that “the IRS may challenge positions” taken by taxpayers that are contrary to the Proposed QIE Regulations prior to the regulations’ being finalized.

Taxpayers may have limited flexibility to seek to restructure investments to reflect the Proposed QIE Regulations. The Testing Period for determining DREIT status extends up to 5 years before the relevant determination date, so if an investor were seeking to sell an interest in a DREIT after the regulations are finalized, the investor would need to prove DREIT status using the finalized regulations for the 5 years prior to the date of sale.

Further Takeaways

In light of the issuance of the Proposed QIE Regulations, sponsors of, and investors in, REITs intended to qualify as DREITs should reevaluate whether those REITs would qualify as DREITs under the proposed regulations. Sponsors should also review the information, representations, and covenants that they request from investors in order to determine whether a REIT will qualify as a DREIT. In that regard, REIT sponsors should also consider any obligations they may have to cause a REIT to qualify as a DREIT.

Any foreign investors who invested in a REIT assuming that it was a DREIT should re-examine their investment to determine whether their assumptions continue to be valid and whether restructuring is advisable before the date that the Proposed QIE Regulations become effective.

Proposed Section 892 Regulations

Background

Section 892(a)(1) exempts from U.S. federal taxation certain income derived by a foreign government. However, this exemption does not apply to income that is (1) derived from the conduct of a commercial activity, (2) received by or from a controlled commercial entity of the foreign government, or (3) derived from the disposition of an interest in a controlled commercial entity of the foreign government.

Generally, a controlled commercial entity is an entity that is controlled by the foreign government and is engaged in commercial activities. Under Temp. Treas. Reg. § 1.892-5T(b)(1), a USRPHC (whether a foreign or domestic corporation) is treated as engaged in commercial activity regardless of its actual activities, and, therefore, any USRPHC that is controlled by a foreign government is treated as a controlled commercial entity. As a result, under the current regulations, an entity controlled by a foreign government is treated as a controlled commercial entity if 50 percent or more of its assets consist of USRPIs, including interests in USRPHCs. This aspect of the current regulations

can be a trap for the unwary and requires foreign governments that seek section 892 benefits for the entities they control to carefully monitor the value of the USRPIs those entities own.

Proposed Section 892 Regulations Relax the "Per Se" Rule for USRPHCs

The proposed regulations would modify current Temp. Treas. Reg. § 1.892-5T(b)(1). Under the Proposed Section 892 Regulations, the *per se* rule that treats a USRPHC as being engaged in commercial activity would be modified to include an exception for any corporation that is a USRPHC solely by reason of its direct or indirect ownership in one or more other corporations not controlled by the relevant foreign government. As a result, the Proposed Section 892 Regulations would prevent entities from being treated as controlled commercial entities solely because they are USRPHCs as a result of their ownership of minority interests in other USRPHCs.

Prop. Treas. Reg. § 1.892-5(b)(1) also would exempt foreign USRPHCs that are QFPFs or are wholly owned by one or more QFPFs from being treated as engaged in commercial activity solely as a result of their USRPHC status.

The Proposed Section 892 Regulations are proposed to apply to taxable years ending on or after December 29, 2022. Taxpayers may rely on the Proposed Section 892 Regulations until they are finalized.

Additional Notice on Section 892 Regulations

In addition to releasing the Proposed Section 892 Regulations, the IRS and Treasury published a notice on December 29, 2022 stating that they are considering finalizing regulations proposed under section 892 in 2011 that provide additional guidance on what constitutes commercial activities. Treasury and the IRS are accordingly reopening the comment period with respect to the 2011 proposed regulations through February 27, 2023.[12]

Final QFPF Regulations

Background

Under section 897(l), QFPFs and their wholly owned subsidiaries are exempt from having to file U.S. federal income tax returns and pay U.S. federal income tax on gain attributable to the disposition of USRPIs, unless that gain is otherwise effectively connected with the conduct of a U.S. trade or business.

In 2019, the IRS and Treasury published proposed regulations containing rules relating to the qualification for the exemption under section 897(l), as well as rules relating to withholding requirements under sections 1441, 1445, and 1446 for dispositions of USRPIs by QFPFs (the "2019 Proposed Regulations"). The Final QFPF Regulations finalize these 2019 Proposed Regulations with certain changes, some of which are discussed below.

A QCE Must Be a Wholly Owned Subsidiary of a QFPF

The 2019 Proposed Regulations had provided that gain or loss from the disposition of a USRPI by a "qualified holder" is not subject to tax under FIRPTA. A "qualified holder" is either a QFPF or a qualified controlled entity ("QCE") that, in each case, satisfies the "qualified holder" rules under Treas. Reg. § 1.897(l)-1(d). A "QCE" is defined as a trust or corporation that is organized under the laws of a foreign country and all of the interests of which are held directly or indirectly by one or more QFPFs. The 2019 Proposed Regulations would have required that all of the interests in a QCE be held, directly or indirectly, by one or more QFPFs, with no exceptions. Commentators had suggested that Treasury include certain *de minimis* exceptions to this strict requirement, for example an exception for small ownership interests awarded to management of the QCE.

In promulgating the Final QFPF Regulations, the IRS and Treasury rejected those comments. Accordingly, the Final QFPF Regulations require that, for a trust or corporation to qualify as a QCE, all of the interests in the QCE must be held, directly or indirectly, by one or more QFPFs. For this purpose, an "interest" is defined as an interest other than an interest solely as a creditor and includes (but is not limited to) stock of a corporation, an interest in a partnership as a partner, an interest in a trust or estate as a beneficiary, and certain option instruments. The IRS and Treasury declined to provide express guidance as to whether a non-economic interest[13] held by a non-QFPF in an entity that otherwise qualifies as a QCE would cause that entity not to qualify as a QCE. Instead, in the preamble to the Final QFPF Regulations, the IRS and Treasury indicated that the determination as to whether such a non-economic interest would be an interest in the entity (and thus render that entity a non-QCE) would be made on the facts and circumstances, taking into account general tax principles.

Testing for Qualified Holder Status

Under the Final QFPF Regulations, a QFPF or a QCE must satisfy one of two tests on the relevant determination date to be a qualified holder. Under the first test, a QFPF or a QCE is a qualified holder if it owned no USRPIs as of the date it became a QFPF or QCE and has remained qualified as a QFPF or QCE since then. Under the second test, if a QFPF or a QCE held USRPIs when it became a QFPF or QCE, it is a qualified holder if it was a QFPF or QCE during the entire "testing period" applicable to the entity. This testing period is the shortest of (i) the period beginning on December 18, 2015 and ending on the determination date, (ii) the ten-year period ending on the determination date, and (iii) the period beginning on the date the entity (or its predecessor) was created or organized and ending of the determination date. Although the Final QFPF Regulations reformulated the description of this test, these requirements generally are substantively unchanged from the 2019 Proposed Regulations.

The Final QFPF Regulations provide a limited transition period safe harbor for determining whether a QFPF or a QCE is a qualified holder: with respect to any period from December 18, 2015 to December 29, 2022 (for a QFPF) or to June 6, 2019 (for a QCE), the QFPF or QCE is deemed to be a qualified holder if the QFPF or QCE satisfies the requirements under section 897(l)(2) (which generally defines and describes a QFPF) based on a reasonable interpretation of those requirements. The Final QFPF Regulations further provide that, in determining whether a QCE is a qualified holder from December 18, 2015 to February 27, 2023,[14] a QCE is permitted to disregard a 5 percent or smaller interest owned by any person that provides services to the QCE. This safe harbor does not apply to disregard a 5 percent or smaller interest in the QCE at the time the QCE disposes of a USRPI; instead, the safe harbor only provides that an entity that otherwise would have failed to qualify as a QCE (and therefore as a qualified holder) during the transition period as a result of a 5 percent or smaller interest owned by a service provider will not be treated as having failed to qualify as a QCE if that owner is divested from its ownership in such entity no later than February 27, 2023. Accordingly, QCEs that have *de minimis* service provider ownership should consider causing those service providers to dispose of their interests in the QCE before February 27, 2023 and not disposing of any USRPIs in the interim.

Treatment of Eligible Fund as a QFPF

In general, a trust, corporation, or other organization or arrangement that maintains segregated accounts for retirement or pension benefits to participants or certain other beneficiaries (such as current or former employees) is treated as a QFPF (and, therefore, an "eligible fund") if both (i) all of the benefits that the entity provides are qualified benefits for qualified participants (the "100 percent threshold") and (ii) at least 85 percent of the present value of the benefits that the eligible fund reasonably expects to provide in the future are retirement or pension benefits (the "85 percent threshold").

The 2019 Proposed Regulations would have required that an eligible fund must measure

the present value of benefits to be provided during each year of the entire period during which the fund is expected to be in existence. The Final QFPF Regulations retain this requirement but add a taxpayer-friendly alternative 48-month test as another means to meet the 85-percent threshold. The 48-month alternative calculation test is satisfied if the weighted average of the present values of the retirement and pension benefits that the eligible fund reasonably expects to provide over its life, as determined by the valuations performed over the 48 months preceding (and including) the most recent present valuation, satisfies the 85-percent threshold. If an eligible fund has been in existence for fewer than 48 months, the 48-month alternative calculation is applied to the period the eligible fund has been in existence.

Withholding Related to Qualified Holders

The Final QFPF Regulations provide that a foreign partnership that is owned solely by qualified holders is not treated as a foreign person for purposes of withholding under section 1445 and, to the extent applicable under FIRPTA, section 1446 (such a foreign partnership, a "withholding qualified holder"). In addition, even if a qualified holder is a partner in a foreign partnership that is not a withholding qualified holder (because the partnership has partners that are not qualified holders), the qualified holder is still eligible for exemption from taxation on its distributive share of USRPI items.

A withholding qualified holder may submit a certification of non-foreign status to establish withholding qualified holder status. This certificate must state that the transferor is not a foreign person because it is a withholding qualified holder, and the transferor may provide its foreign taxpayer identification number if it does not have a U.S. taxpayer identification number. The preamble to the Final QFPF Regulations clarifies that, once a revised IRS Form W-8EXP is released, this revised IRS Form W-8EXP can be used to make this certification by a withholding qualified holder.

Effective Dates

The Final QFPF Regulations generally apply with respect to dispositions of USRPIs occurring on or after December 29, 2022, although certain provisions (including the qualified holder rule) apply as of June 7, 2019 (the date the 2019 Proposed Regulations were published). An eligible fund may choose to apply the Final QFPF Regulations with respect to dispositions and distributions occurring on or after December 18, 2015 and before the effective date of the Final QFPF Regulations, if the eligible fund and all persons bearing a relationship to the eligible fund described in section 267(b) or 707(b) consistently apply all of the rules in the Final QFPF Regulations for all relevant years.

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[1] Unless indicated otherwise, all "section" references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §" references are to the Treasury regulations promulgated under the Code.

[2] Even though the rules discussed below apply to both REITs and RICs, our discussion focuses on REITs and DREITs given that foreign persons are more likely to invest in U.S. real estate through REITs than RICs.

[3] Protecting Americans from Tax Hikes Act of 2015, § 133, Pub. L. No. 114-113 (Dec. 18, 2015).

[4] The expression "directly or indirectly," used to qualify ownership, is used throughout the Code and the regulations with a variety of intended meanings in different contexts. For example, in subpart F (sections 951-965), "indirectly" does not imply ownership by attribution but rather beneficial ownership. Likewise, sections 318, 544, 881, and 883 provide for attribution rules that apply to stock held "directly or indirectly" by or for a person but, because those sections contain specific attribution provisions, the implication

is that “indirect” ownership does not include ownership by attribution other than as a result of the specific attribution rules. By contrast, under section 447(d)(2)(B) (before repeal in 2017), “indirect” ownership was interpreted to include ownership by attribution, even absent specific attribution rules.

[5] Treas. Reg. § 1.897-1(c)(2)(i).

[6] *See* § 702(a)(5); Treas. Reg. § 1.702-1(a)(5).

[7] Prop. Treas. Reg. § 1.897-1(c)(3)(ii)(B); Prop. Treas. Reg. § 1.897-1(c)(3)(v)(D). Note that the Look-Through Rule does not override the 2015 look-through rule for QIEs previously mentioned.

[8] Prop. Treas. Reg. § 1.897-1(c)(3)(ii)(B).

[9] Prop. Treas. Reg. § 1.897-1(c)(3)(v)(D); Prop. Treas. Reg. § 1.897-1(c)(3)(v)(B).

[10] Prop. Treas. Reg. § 1.897-1(c)(3)(vi)(B), Ex. 2.

[11] The IRS and Treasury sometimes acknowledge contrary private letter rulings when issuing regulations. *See, e.g.,* T.D. 9932 (regarding final regulations under section 162(m)), fn. 12 (Dec. 30, 2020) (acknowledging a conflicting private letter ruling).

[12] *See* 87 FR 80108 (Dec. 29, 2022) (The IRS Notice may be found here: https://www.federalregister.gov/documents/2022/12/29/2022-27969/income-of-foreign-governments-and-international-organizations-comment-period-reopening); REG-146537-06 (Nov. 3, 2011) (The 2011 Proposed Regulations may be found here: https://www.govinfo.gov/content/pkg/FR-2011-11-03/pdf/2011-28531.pdf).

[13] For example, a noneconomic general partner interest in a foreign partnership that elects to be classified as a corporation for U.S. federal income tax purposes.

[14] The Final QFPF Regulations noted that this period concludes 60 days after the date the Final QFPF Regulations were published in the Federal Register. Because the Final QFPF Regulations were published on December 29, 2022, the 60-day time frame concludes on February 27, 2023.

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