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New Tax Legislation Enhances Investments in U.S. Real Estate and REITs

Congress recently passed, and President Obama signed into law, the Protecting Americans from Tax Hikes Act of 2015 (the Act), in connection with funding the federal government and extending the availability of a number of expiring tax provisions. Among the many tax law provisions included within the Act, most of which are decidedly pro-taxpayer, there are a number of changes affecting investments in U.S. real estate by foreign persons pursuant to the Foreign Investment in Real Property Tax Act of 1980 (known as FIRPTA), as well as the treatment of real estate investment trusts (REITs), which are popular vehicles used by many domestic and foreign investors for holding real estate investments. Most of these changes took effect at the beginning of 2016, although certain provisions apply as of different dates, as noted below. This document summarizes several of the more noteworthy tax law changes involving U.S. real estate and REITs that were included within Act, and offers some takeaways as to the practical consequences of the new rules.

I. <u>Foreign Investors and FIRPTA</u>

A. FIRPTA Generally

By way of background, FIRPTA serves as an exception to the general rule that foreign investors are not subject to U.S. tax on gains from sales of passive investments in the U.S., such as stocks and bonds (*i.e.*, investments that are not connected with a trade or business in the U.S. conducted by the foreign investor). Where an investment consists of an interest in real property located in the U.S., FIRPTA imposes a tax on gain recognized by foreign investors upon a disposition of that investment. When FIRPTA applies, a foreign investor is required to file a U.S. tax return on which the real estate-related gain is reported, and to pay tax on the gain in the same manner, and at the same rates, as would apply to a U.S. person or entity on such income.

FIRPTA can arise in three situations: (i) where U.S. real estate that is held by a foreign person directly or through an entity which is transparent or treated as a pass-through entity for U.S. tax purposes (*e.g.*, a partnership) is sold,

(ii) where a foreign person sells stock of a corporation (including a REIT) that principally holds interests in U.S. real estate (*i.e*., a United States Real Property Holding Corporation, or USRPHC), or (iii) where a foreign person receives a distribution from a REIT that is attributable to gain recognized by the REIT from a sale of U.S. real estate. There are a limited number of exemptions to FIRPTA under existing law, and the list of exemptions and their scope is expanded by the Act, as described below.

Where FIRPTA applies to a sale of U.S. real estate, collection of the tax is enforced through a withholding obligation on the buyer, distributing corporation, or other responsible withholding agent. The withholding regime does not relieve the foreign investor of its obligation to file a U.S. tax return and pay the actual tax liability, which may be more or less than the amount withheld.

B. **New Exemption for Foreign Pensions**

1. **<u>In general</u>**

In general, U.S. pension funds are not subject to U.S. income tax on the disposition of U.S. real property. In contrast, prior to the Act, foreign pension funds were subject to U.S. income tax and withholding under FIRPTA with respect to gains and proceeds attributable to interests in U.S. real property. The Act generally eliminates this disparity. It provides an exemption from FIRPTA with respect to any United States real property interest held directly (or indirectly through one or more partnerships) by, or any distribution received from a REIT by (i) a "qualified foreign pension fund," or (ii) any entity all of the interests of which are held by a qualified foreign pension fund.

2. **<u>Definition of Qualified Foreign Pension Fund</u>**

The following requirements must be satisfied in order for a fund to be considered a "qualified foreign pension fund." The fund must be a trust, corporation or other organization or arrangement:

(a) created or organized under the law of a country other than the U.S.;

(b) established to provide retirement or pension benefits to participants or beneficiaries who are current or former employees (or persons designated by those employees) of one or more employers in consideration for services rendered;

(c) which does not have a single participant or beneficiary with a right to more than 5 percent of its assets or income;

(d) that is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in the country in which it is established or operates; and

(e) with respect to which, under the laws of the country in which it operates, contributions to such fund which would otherwise be subject to tax under such laws are deductible or excluded from the gross income of such entity or taxed at a reduced rate, or taxation of any investment income of such fund is deferred or such income is taxed at a reduced rate.

Under the above definition it is unclear whether some governmental-established foreign pension plans which do not provide annual information reporting about their beneficiaries to the local tax authorities will qualify for the exemption. It is possible that regulations will clarify this and other related issues.

The exemption for foreign pension funds should apply both to the sale or disposition of U.S. real property interests held directly or through partnerships, as well as to capital gains distributions received from a REIT that are attributable to such dispositions at the REIT level. This exemption will serve as an additional exemption to foreign governmental pension plans which currently qualify for exemption from U.S. tax under Section 892 of the Internal Revenue Code with respect to certain types of income (*e.g.,* dividends, interest and certain capital gains). The exemption under Section 892 does not apply to direct investments in U.S. real property. However, the new provision will cover such investments in the case of foreign pension funds, including governmental pension funds that meet the requirements described above. Although the new exemption means that qualified foreign pension funds, like their domestic counterparts, will not be subject to U.S. tax on gains from U.S. real estate, foreign pension funds will nevertheless continue to be subject to U.S. tax from operating income (*i.e*., rents) generated by investments in U.S. real estate, unlike investments by domestic pension funds if properly structured.

This provision applies to dispositions or distributions on or after December 18, 2015.

3. **Continued Need for "Blockers"**

The provision does not remove the need for a REIT or other corporate blocker (*i.e.,* a C corporation) in structuring investments by foreign pension plans, or funds with investors that include foreign pension funds. This is because the FIRPTA exemption does not affect the general rules applicable to a foreign person's investment in a U.S. trade or business, or in a partnership that is engaged in a U.S. trade or business (including a real estate business). The activities of a partnership engaged in a U.S. trade or business are generally attributed to its foreign partners, including foreign pension plans. A foreign person (including a qualified foreign pension plan) that invests in a partnership which is engaged in a U.S. trade or business:

a) is still required to file a U.S. federal (and state) income tax return;
b) is subject to U.S. federal income tax on its distributive share of income effectively connected with a U.S. trade or business;
c) if organized as a corporation, may be subject to the branch tax, which is a 30 percent tax imposed (after imposition of the corporate income tax) on the foreign corporation's share of earnings of the partnership that are not reinvested in permissible assets of a U.S. trade or business; and
d) will, pursuant to a revenue ruling issued by the Internal Revenue Service (IRS), be subject to U.S. federal income tax on gain recognized on the sale of its interest in the partnership to the extent that the gain is attributable to the U.S. business.

In addition, a limited partner that is a foreign sovereign investor may be deemed to be engaged in commercial activities, which can have adverse implications – not only for tax on its distributive share of income from the partnership, but also for its exemption under Section 892 generally – if a blocker entity is not used.[1]

C. **Domestically Controlled REITs**

A foreign person's gain on the disposition of shares in a REIT that primarily holds U.S. real property interests, and therefore is considered to be a USRPHC, is generally subject to U.S. income tax under FIRPTA at the rates applicable to U.S. individuals or corporations. This rule does not apply if the REIT is considered to be "domestically controlled in which case a sale of shares in the REIT is exempt from FIRPTA. A REIT is domestically controlled if, at all times during a specified testing period, less than 50 percent in the value of its shares is held, directly or indirectly, by foreign shareholders. It is sometimes difficult in practice for taxpayers to determine whether a particular REIT is domestically controlled, particularly in the case of publicly traded REITs that may lack information as to the U.S. versus foreign status of small shareholders (*i.e.,* those holding less than 5 percent of the REIT's stock, which are not required to report their

[1] Under Section 892, certain sovereign entities may qualify for a special exemption from U.S. federal income tax with respect to income paid with respect to U.S. debt and equity securities. However, the exemption does not apply to any income derived from the conduct of any commercial activity, or to any income received by or from (or from the disposition of) a controlled commercial entity. In general, the commercial activities of a partnership are attributable to its partners for purposes of Section 892. Thus, if a partnership in which a sovereign entity invests has any commercial activity, the sovereign entity itself is treated as engaging in commercial activities. If the investment is made by legal entities separate from, but controlled by, the foreign government, the sovereign may lose the ability to benefit from the Section 892 exemption for all of its income, whether earned through the partnership from which the commercial activity is attributed or from other investments. (Under proposed regulations, certain limited partners will not lose their general Section 892 exemption merely as a result of their investment in a partnership engaged in commercial activities. However, their distributive share of income will not be exempt under Section 892 and would generally be taxable to them.)

holdings in filings with the Securities and Exchange Commission). The Act prescribes additional rules to clarify this determination.

The Act allows a publicly traded REIT (*i.e.,* shares of which are regularly traded on an established securities market) to presume that a person holding less than 5 percent of such class of stock at all times during the testing period is a U.S. person, absent actual knowledge to the contrary. In addition, where stock of a lower-tier REIT is owned by a shareholder which itself is a REIT (the upper-tier REIT), if the upper-tier REIT is publicly traded and is domestically controlled, then in determining whether the lower-tier REIT is domestically controlled, it may treat the shares owned by the upper-tier REIT as owned entirely by U.S. persons (even if the upper-tier REIT happens to have some foreign owners). Conversely, if the upper-tier REIT is publicly traded but is not domestically controlled, the Act requires that in determining the status of the lower-tier REIT, the upper-tier REIT must be treated as entirely foreign (notwithstanding that some of its shareholders may be U.S. persons). Finally, in a third possible tiered REIT scenario where the upper-tier REIT is not publicly traded, a determination of the status of the lower-tier REIT as domestically controlled requires looking through to the owners of the upper-tier REIT, rather than applying a simplifying assumption. These provisions are effective as of December 18, 2015.

D. **Limitation of the "Cleansing Rule"**

The so-called "cleansing rule" provides that an interest in a corporation held by a foreign investor is not a not subject to FIRPTA if, as of the date of disposition of the interest, the corporation owns no interests in U.S. real estate, and all such interests held by the corporation during the applicable testing period were disposed of in fully taxable transactions. The Act clarifies that the cleansing rule is only applicable if neither the corporation nor any predecessor of the corporation was a REIT or a regulated investment company at any time during the applicable testing period, effective for dispositions on or after December 18, 2015.

E. **Expanded Exemption for Portfolio Investors in Certain Public REITs**

While FIRPTA generally applies to a foreign person's disposition of stock of a corporation that is a USRPHC, there has been a limited exemption from FIRPTA for certain relatively small shareholders of public corporations (including REITs). Under this exemption, FIRPTA did not apply to a shareholder who owned, during a specified holding period, not more than 5 percent of the shares of a corporation whose shares were regularly traded on an established securities market. The specified holding period is generally the lesser of (i) the shareholder's holding period; or (ii) the five-year period ending on the date of disposition. A similar exemption applied with respect to certain distributions (which would otherwise be subject to FIRPTA) by a publicly traded REIT to a non-U.S. shareholder owning 5 percent or less of the REIT's stock during the one-year period prior to such distributions.

For publicly traded REITs, the Act raises the percentage ownership limit for these exemptions from 5 percent to 10 percent. The exemption remains at 5 percent for public corporations which are not REITs.

F. **Other FIRPTA Exemption for Certain Investors in REITs**

The Act also provides a new FIRPTA exemption for certain "qualified shareholders" with respect to dispositions of REIT shares, as well distributions received from a REIT that are attributable to gains from sales of U.S. real estate by the REIT. Although the new statutory rules defining qualified shareholders are rather technical and complex, in general, such investors (i) are publicly traded entities, (ii) that are subject to certain exchange of information provisions pursuant to a tax treaty between the United States and their home country and, for certain types of investors, are also eligible for benefits under an income tax treaty with the United States (*e.g.,* which reduces the U.S. withholding tax rate on ordinary dividends), (iii) must maintain records identifying large equity holders in the entity (*i.e.,* holders of 5 percent or more of the publicly traded class), and (iv) are "qualified collective investment vehicles" which meet certain other specified requirements.

Where the above requirements are met, this new FIRPTA exemption applies without regard to whether the REIT in question is publicly traded, or whether the qualified shareholder holds more than 10 percent of the REIT's stock. However, the exemption is cut back for qualified shareholders whose investors hold (directly or indirectly – *i.e.,* not necessarily through the qualified shareholder) more than 10 percent of the REIT's shares.

Listed Australian property trusts and certain publicly traded partnerships are among the foreign investors that are apt to benefit from the new exemption. These provisions apply to dispositions or distributions occurring on or after December 18, 2015.

G. **Increase in FIRPTA Withholding Rate**

Prior to the Act, a disposition of a U.S. real property interest was generally subject to a 10 percent withholding tax on the amount realized (*i.e.,* the sales proceeds), regardless of the amount of gain realized on the transaction. Under the Act, this withholding rate is increased to 15 percent. The 10 percent withholding rate remains effective where the transferee acquires a personal residence and the purchase price does not exceed $1 million. This provision is effective for dispositions after February 16, 2016.

II. **<u>Changes Specific to REITs</u>**

A. **REITs Generally**

Many REITs and foreign investors in REITs are keenly aware of, and will be directly affected – mostly in a positive way – by the FIRPTA changes described above. In addition, a number of other changes contained in the Act, many of which are more subtle technical changes in the tax law, will have an impact that is specific to REITs on certain transactions or on their day-to-day operations. Some of these provisions are noted below. As with the FIRPTA-related changes, most, but not all, of the REIT-specific changes are also favorable.

A REIT is a type of corporation that receives specialized tax treatment. Unlike regular taxable "C corporations," REITs are generally permitted to deduct dividends that they pay, and are required to distribute nearly all of their income each year. As a result of these features, REITs typically pay little if any U.S. federal income tax. To qualify for this favorable treatment, REITs must satisfy a number of requirements, including requirements relating to the nature of their gross assets and gross income, the composition of their shareholders, minimum distribution requirements, and a number of other highly technical tax rules that are intended to ensure that REITs invest primarily in rental real estate and/or mortgage-related assets, and that their shares are not too closely held or illiquid. REITs are also subject to various specialized penalties and taxes which serve to regulate their activities.

B. **Expanded Safe Harbor Relief for Certain Property Sales**

In an effort to ensure that REITs function primarily as long-term investors, they are subject to a punitive 100 percent tax on gains from sales of inventory or dealer property (*i.e.,* property held for sale to customers in the ordinary course of business). Existing law provides certain safe harbors that allow REITs to have certainty, if various requirements are met, that a particular sale will not be subject to the penalty tax. One set of requirements relates to the maximum percentage of the REIT's assets (10 percent) that may sold in a given tax year. The Act expands the availability of the safe harbor by allowing for sales of up to 20 percent of the REIT's assets in a particular tax year provided that the average of annual sales during the three-year period which includes that year does not exceed 10 percent.

C. **Repeal of Preferential Dividend Restrictions for Public REITs**

REITs are required to distribute at least 90 percent of their ordinary taxable income annually and are subject to a corporate level tax to the extent less than 100 percent of taxable income is distributed. In addition, a REIT that distributes less than 85 percent of its ordinary income plus 95 percent of its net capital gain in a particular year is subject to a 4 percent excise tax on the income that is not distributed. Under the law in effect prior to the Act, distributions would not satisfy these requirements if they were considered to be "preferential." For these purposes, a distribution is generally treated as preferential unless (1) each shareholder within a class of stock receives its proportionate share of the distribution (*i.e.*, pro rata), and (2) no class receives a distribution which is not in accordance with its rights and entitlements relative to other stock classes as set forth in the REIT's organizational documents.

The Act repeals the "preferential dividend" rule for "publicly offered" REITs (defined as REITs that are required to file annual and periodic reports with the SEC under the Securities Exchange Act of 1934), effective for distributions made with respect to taxable years beginning after December 31, 2014.

Although the preferential dividend rule continues to apply with respect to non-publicly offered REITs, the Act authorizes the Secretary of the Treasury to provide an alternative remedy to a REIT that pays a preferential dividend. The remedy would be available to a REIT if the Secretary determines that the preferential dividend was inadvertent, or due to reasonable cause and not willful neglect. This provision provides the Secretary with the opportunity to allow REITs to correct inadvertent preferential dividends without jeopardizing REIT status or requiring the payment of a second dividend, known as a deficiency dividend, which might otherwise be prohibitively expensive.

D. **Expansion of the Categories of Assets and Income Qualifying Under REIT Tests**

In order to maintain qualification as a REIT, a REIT must satisfy two gross income tests annually. First, at least 75 percent of a REIT's gross income for each taxable year must be derived from investments relating to real property (including mortgages on real property) and from certain other types of qualifying income. Second, at least 95 percent of a REIT's gross income each taxable year must be derived from some combination of income that qualifies under the 75 percent income test described above, as well as other dividends, interest, and gain from the sale or disposition of stock or securities, which need not have any relation to real property. Additionally, at least 75 percent of the value of a REIT's total assets must be represented by some combination of "real estate assets," cash, cash items, and U.S. government securities.

The Act provides that debt instruments issued by publicly offered REITs are now treated as qualifying real estate assets for purposes of the 75 percent asset test, even if they are not secured by mortgages on real property owned by the issuer. However, gain from the disposition of such a debt instrument will not be treated as qualified income of the recipient for purposes of the 75 percent income test, notwithstanding its status as a real estate asset (although it would qualify for purposes of the 95 percent income test, which generally treats gains from sales of securities as qualifying income, without regard to whether they are real estate-related). In addition, not more than 25 percent of the value of a REIT's assets is permitted to consist of such debt instruments that are not secured by real property.

The Act also expands the definition of qualified real estate assets to now include not only interests in mortgages on real property, but also "interests in mortgages on real property or on interests in real property."

Furthermore, the Act provides that certain ancillary personal property that is leased with real property is treated as real property for purposes of the 75 percent asset test. This provision aligns the 75 percent asset test with the 75 percent income test. In addition, an obligation secured by such ancillary personal property is treated as real property for purposes of the 75 percent income and asset tests. Personal property is considered to be ancillary to real property that either is leased or secures a mortgage loan held by a REIT, provided the fair market value of the personal property does not exceed 15 percent of the total fair market value of the combined real and personal property.

E. **Provisions Involving Taxable REIT Subsidiaries**

To the extent that the gross asset, income and other requirements applicable to REITs constrain their operational flexibility, they are generally permitted (with limitations) to use taxable REIT subsidiaries, or "TRSs," to hold certain assets or engage in certain activities that would be problematic from a tax perspective if held or engaged in directly by the REIT. For example, TRSs may provide certain non-customary services to a REIT's tenants that might otherwise jeopardize the parent's qualification as a REIT if provided directly by the parent. In addition, a TRS may engage in sales of inventory or dealer property (*e.g.,* condo units) that would be subject to a punitive 100 percent tax if done by the REIT directly. While TRSs thereby shield the parent REIT from certain undesirable tax consequences, the TRS itself is a C corporation that is subject to regular corporate tax on its income.

1. **Reduction in the Permitted Size of TRSs Relative to the Parent REIT**

Under the law in effect prior to the Act, a REIT's ownership of securities of one or more taxable REIT subsidiaries was limited to 25 percent of the gross value of the REITs assets. The Act reduces this limit to 20 percent, effective for taxable years beginning after December 31, 2017.

2. **Other Changes Affecting TRSs**

The Act provides that a TRS is permitted to provide certain services to a REIT, such as marketing, that typically are done by a third party. A TRS will now be allowed to operate foreclosed real property, and engage in marketing and development activities for purposes of the safe harbor for the 100 percent tax on dealer gains (see II.B. above) in the same manner as independent contractors.

However, the Act also expands the 100 percent excise tax on non-arm's length transactions to include services provided by the TRS to its parent REIT. This means that when a REIT is determined to underpay a TRS for services, the effect of which is to minimize the amount of income reported by the TRS (which is an entity fully subject to corporate income tax), the difference between the amount paid and the fair value of the services will be subject to a new 100 percent tax.

F. **REITs and Spin-off Transactions**

A small number of well-publicized transactions in recent years have involved a taxable C corporation engaged in an active business (of which real estate is an important component) that restructures into two separate companies, with the real estate placed in a REIT which is then separated from the C corporation in a tax-deferred spin off or similar transaction. The REIT thereafter holds the real estate and leases it back to the C corporation, which continues to engage in the active operating business and takes a tax deduction for the rent payable to the REIT (thereby typically reducing the aggregate tax liability as compared with that of the combined enterprise prior to the spin-off transaction). Such transactions face numerous technical hurdles in order to be effectuated on a tax-deferred basis. For example, there must be a non-tax business purpose for the divisive transaction, and both the distributing parent and the distributed subsidiary must have historically engaged in an active trade or business. In addition, the presence of a single large (*i.e.,* 10 percent or greater) shareholder that owns interests in both the REIT and the C corporation will effectively prevent the REIT's rental income from satisfying the gross income requirements necessary for qualification as a REIT.

The Act further restricts – in fact, largely eviscerates – the availability of tax-deferred divisive transactions involving REITs. The legislation generally prevents a tax-deferred separation transaction if either the distributed entity or the distributing parent is a REIT (*i.e.,* under the legislation, such a transaction will be taxable to both the distributing parent entity and to its shareholders), and prevents either from electing to qualify as a REIT within 10 years following a tax-deferred spin-off transaction. An exception allows a REIT to distribute a TRS in a tax-deferred transaction (provided that all of the other requirements are met for such a transaction) if the REIT has held the TRS for at least three years at the time of the spin off. In addition, a REIT may spin off another REIT (e.g., separating on the basis of different property types or geographically), and parties to certain spin-off transactions that had been completed (or for which a ruling request with the IRS was pending) on December 7, 2015, are grandfathered from the application of these provisions.

G. **Designation of Dividends by REITs**

A REIT that recognizes a net capital gain for a taxable year may designate dividends as capital gain dividends, and shareholders will be taxed on such dividends as if they recognized such capital gain on the sale or exchange of a capital asset held for more than one year. A REIT that receives dividends from taxable C corporations may also designate dividends paid by the REIT as qualified dividend income, which will be taxed at the same rate as capital gains.

The Act provides that the aggregate amount of REIT dividends that can be designated as capital gain dividends and qualified dividends for a taxable year cannot exceed the total amount of dividends paid by such REIT for such year, effective for taxable years beginning after December 31, 2015.

H. **REIT Earnings and Profits**

A REIT's current earnings and profits, which is relevant in determining the tax treatment of distributions paid to its shareholders, is not reduced by any amount unless the REIT can deduct such amount from its current year's taxable income. A REIT with items that are deductible from taxable income in years prior to the year taken into account for determining earnings and profits would have effectively increased current earnings and profits, and, as result, increased the measure of taxable dividends and reduced return of capital at the shareholder level.

The Act conforms tax deductibility with deductibility for purposes of computing earnings and profits. The Act also clarifies that on the sale or exchange of real property, earnings and profits of the REIT for purposes of computing the dividends paid deduction is increased by the amount of includible gain for such tax year.

I. **REIT Hedging Provisions**

Income earned by REITs from clearly identified hedging transactions that: (1) hedge any indebtedness incurred or to be incurred by the REIT to acquire or carry real estate assets, or (2) manage risk of currency fluctuations relating to any item that qualifies for the 95 percent or 75 percent income tests, is excluded from gross income for purposes of the 75 percent and 95 percent income tests. That is, the hedging income is not treated as either "good" income or as "bad" income, but rather, is excluded altogether from the calculations of compliance with the REIT gross income tests, which is generally a satisfactory outcome from the REIT's perspective.

The Act adds an additional category of excluded hedging income. If a REIT enters into a qualifying hedge, but later repays or otherwise extinguishes all or a portion of the indebtedness that is hedged, or disposes of all or a portion of the underlying property that is hedged, the REIT may enter into a new hedge of the original qualifying hedge (thereby reducing or nullifying the economic effect of the original hedge, which has by that time outlived its original purpose). In that circumstance, the Act provides that any income thereafter recognized on either the original hedge or the subsequent hedge will not be included in income for purposes of the 75 percent and 95 percent income tests.

III. **Recap**

As summarized above, the Act contains a number of provisions that should have a meaningful, and mostly favorable, impact on investments by foreign persons in U.S. real estate, and on the operations of the popular REIT vehicle for holding U.S. real estate investments. Certain of the provisions may be subject to technical correction or clarification through further legislation or future administrative guidance by the IRS. If you have questions or would like to discuss any of these changes in greater depth, and how they might affect your particular circumstances, please call any of the undersigned attorneys, or the other members of Greenberg Traurig's tax department.

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