

New FIRPTA Exceptions Provide Opportunities for Foreign Pensions and Investment Funds

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The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) authorized the United States to tax foreign persons on the gain from the disposition of U.S. real property or U.S. real property interests (USRPIs). Recently, the Protecting Americans from Tax Hikes Act of 2015 (“PATH Act”) introduced new exceptions from the application of FIRPTA, providing significant opportunities for foreign pension funds and foreign persons who invest in real estate investment trusts (REITs) and in real estate through regulated investment companies (RICs).

Foreign Pensions

Under the PATH Act, “qualified” foreign pension funds (private and governmental) that hold any direct or certain indirect interests in U.S. real property on which they have a gain are no longer subject to taxation under FIRPTA. This exception also applies to qualified foreign pension funds that invest in REITs and receive REIT distributions attributable to real estate-related gains. However, it only applies to real estate-related gains and does not extend to net rental income (if any, after deductions, including depreciation) or to REIT dividends of net rental income. **Foreign Investment in REITs** FIRPTA investment of 10 percent or less (up from 5 percent or less) by other foreign

persons either (i) directly or indirectly in a REIT or RIC that is publicly-traded on a U.S. stock exchange, or (ii) indirectly in a privately-held REIT through a foreign corporation eligible for treaty relief if its shares are regularly traded on an exchange recognized pursuant to that treaty or through a foreign partnership whose units are publicly-traded on a U.S. stock exchange. Foreign shareholders (other than those described above) who invest in “domestically controlled” REITs or certain RICs (in which U.S. persons own at least 50 percent of the shares) and who own less than 10 percent interests themselves are similarly exempt from FIRPTA.

The PATH Act includes numerous adjustments to the application of FIRPTA. Foreign pensions and foreign persons that have already invested in U.S. real estate, or those considering new investments, should contact us to determine whether the investments can be structured or restructured to benefit from the recent changes to the FIRPTA rules.

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