GUIDANCE ON QUALIFIED SHAREHOLDERS OF REITS STILL LACKING

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The Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) imposes tax and withholding requirements with respect to gain realized by a foreign person on the disposition of an interest in real property located in the United States. The Protecting Americans from Tax Hikes Act of 2015 created two new exemptions from FIRPTA, one for foreign pension funds and another for “qualified shareholders,” which are essentially foreign publicly traded real estate investment trusts (REITs). In order to qualify for the exemption for qualified shareholders, a foreign REIT would likely need to be designated by the Internal Revenue Service as a “qualified collective investment vehicle,” but no guidance has been provided on how a foreign REIT may obtain such designation. In the absence of such guidance, the exemption for qualified shareholders is effectively unavailable, and as time passes, taxpayers are losing their ability to take advantage of the exemption in current- or prior-year tax returns. The authors suggest that a foreign publicly traded REIT be allowed to “self-designate” as a qualified collective investment vehicle if it meets certain requirements.

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