February 27, 2023

The Honorable Janet L. Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

**Re: Guidance on the Foreign Government Income Exemption and the Definition of Domestically Controlled Qualified Investment Entities (REG-100442-22)**

Dear Secretary Yellen:

The undersigned organizations commend the Treasury Department for finalizing foreign pension fund tax regulations[1] and issuing a helpful proposed regulation concerning the tax exemption for foreign governments.[2] At the same time, we respectfully request that you withdraw the proposed FIRPTA "Look-Through Rule." The proposed rule is unnecessary, and its retroactive effect and unintended consequences threaten to disrupt real estate markets, values, and investment.

Under the Notice of Proposed Rulemaking[3] released at the end of 2022 (the "Proposed Regulations"), a new Foreign Investment in Real Property Tax Act ("FIRPTA") Look-Through Rule[4] would be used to determine whether an entity qualifies as a "domestically controlled qualified investment entity" within the meaning of Section 897(h)(4)(B) (a "DCQIE"). We believe the proposed rule would reverse decades of well-settled tax law, severely misconstrue the statute, and contradict Congressional intent. Moreover, we are concerned that the Look-Through Rule could impair real estate's access to foreign capital at a critical economic juncture and undermine foreign investors' confidence in the stability and predictability of U.S. tax rules.

The statutory interpretation being advanced by the Look-Through Rule—that the words "directly or indirectly" in Section 897(h)(4)(B) require the upward attribution of QIE stock through a taxable C corporation—is, in its entirety, directly at odds with the language of Section 897(h), the Congressional intent behind Section 897(h) as reflected in its legislative history, basic rules of statutory interpretation, Treasury's own regulations on DCQIEs, and applicable IRS rulings and case law on the constructive

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[1] Treasury, T.D. 9971 (Exception for Interests Held by Foreign Pension Funds) (Dec. 29, 2023).

[2] Prop. Treas. Reg. § 1.892-5(b) appropriately clarifies that foreign governments will not lose their Section 892 tax exemption solely as a result of owning minority interests in U.S. real estate companies. Although we agree with the substance of the rule, our comments include suggestions for a few minor technical clarifications to Prop. Treas. Reg. § 1.892-5(b) following the discussion of the proposed section 897 look-through rule.

We also encourage the Treasury to consider finalizing the 2011 proposed regulations as a whole (with the modifications in the newly issued Proposed Regulations and our minor suggestions contained herein), as those regulations contain a number of helpful clarifications even beyond the rule in Prop. Treas. Reg. § 1.892-5(b).

[3] Treasury Notice of Proposed Rulemaking REG-100442-22 (Dec. 29, 2022).

[4] Prop. Treas. Reg. § 1.897-1(c)(3)(iii)(B).

ownership of stock. Simply put, there is no ambiguity for Treasury to resolve, nor a problem for Treasury to fix.

Part I of this comment letter explains the current legal and policy framework related to FIRPTA and DCQIEs, including the law's appropriate and limited use of look-through rules. Part II examines the mechanics of the proposed Look-Through Rule and its sweeping and hopefully unintended application to common taxpayer situations. Part III describes the reasons why the proposed rule is irreparably flawed under several principles of statutory construction, and how it is inconsistent with widely accepted understandings of key terms and concepts, such as indirect and constructive ownership. Part IV presents the economic risks associated with the proposed Look-Through Rule, while Part V suggests ways to responsibly address Treasury's potential policy concerns. Finally, Part VI offers recommended technical clarifications to the Section 892 proposed regulation.

## I. FIRPTA and Domestically Controlled Qualified Investment Entities (DCQIEs): Law and Policy

### A. The FIRPTA Regime

The FIRPTA regime represents an exception to the general rule that foreign investors are not subject to U.S. tax on capital gains resulting from the sale of stock in U.S. companies.[5] Under Section 897(a)(1), gain on the disposition of a U.S. real property interest (a "USRPI") is generally subject to tax as though it were income effectively connected with a U.S. trade or business ("ECI") (i.e., at the regular rates applicable to U.S. taxpayers), and stock in a U.S. corporation whose assets consist primarily of USRPIs is itself classified as a USRPI under the rule for U.S. real property holding corporations ("USRPHCs") found in Section 897(c)(1)(A)(ii). Because "qualified investment entities" ("QIEs")—which include all real estate investment trusts ("REITs") and certain regulated investment companies ("RICs")—are corporations for U.S. income tax purposes,[6] a QIE whose assets consist primarily of USRPIs is by definition a USRPHC, and stock issued by such a QIE is, subject to certain exceptions, by definition a USRPI.

### B. The FIRPTA Exception for DCQIEs and the Limited, Express Statutory Rules for Looking Through QIEs

If the provisions of Section 897 were to stop there, taxable foreign investors would be significantly discouraged from investing in U.S. real estate companies because the after-tax return on a real estate investment would compare unfavorably to the tax-free return on an equally profitable non-real estate

[5] *See, e.g.*, Section 865 (capital gain recognized by foreign persons generally treated as foreign-source income); Treas. Reg. § 1.1441-2(b)(2)(i) ("[g]ains derived from the sale of property" generally not treated as "fixed or determinable annual or period income" on which foreign investors are generally subject to withholding tax).

[6] *See* Section 856(a)(3) (defining a REIT as an entity that "but for the [REIT rules] . . . would be taxable as a domestic corporation"); Section 851(a)(3) (defining a RIC as a "domestic corporation" that meets certain requirements). REITs and RICs are corporations that are entitled to a deduction for dividends paid and can thereby avoid the "double" (corporate-level and shareholder-level) taxation that normally results from an investment in a corporation. *See* Section 857(b); Section 852(b). They also can pass through certain types of income to shareholders, such as long-term capital gains. *See* Section 857(b)(3) (REIT capital gain dividends); Section 852(b)(3) (RIC capital gain dividends). Thus, although they are corporations for U.S. tax purposes, they bear certain indicia of pass-through entities.

investment or an investment in real estate located outside the United States. Fortunately, the statute does not stop there. Instead, in 1980 when FIRPTA was first enacted, Congress included Section 897(h)(4) as an exception to the general rule, treating the stock of a domestically controlled REIT (later expanded to all DCQIEs) as a non-USRPI.

Section 897(h)(4)(B) states that a QIE will be treated as a DCQIE if less than 50% of its stock (*as measured by value*)[7] was owned, "directly or indirectly," by foreign persons at all times during the specified testing period provided in Section 897(h)(4)(D) (generally, five years).

Although the statute does not define "indirectly" for this purpose, it sets forth a limited set of "special ownership rules" that provide for pure or modified look-through when QIE stock is owned by an entity that is itself a QIE. In particular, Section 897(h)(4)(E) expressly requires look-through of the QIE if the QIE is not publicly traded and treats a publicly traded QIE as a foreign person unless the QIE is itself domestically controlled. Importantly, neither of these rules nor any other rule set forth in Section 897 applies the same or similar principles to regular "C" corporations. The absence of look-through rules for C corporations is striking, because Section 897 itself *expressly incorporates the general constructive ownership rules of Section 318 for other purposes of FIRPTA*.[8] The presence of express look-through/constructive ownership rules for other purposes of FIRPTA, and for testing DCQIE status when stock of a QIE is held by another QIE, is a clear indication that Congress did not intend similar look-through rules to apply to regular C corporations. Indeed, it would make no sense for Congress to have enacted specific look-through rules for only one subset of corporations (QIEs) while relying on the phrase "directly or indirectly" to provide look-through for all other corporations.

Put differently, if the term "indirectly" already required look-through of C corporations, then it would necessarily also require the same of QIEs—which can only be more susceptible than C corporations to look-through given that QIEs, unlike C corporations, bear at least some characteristics of pass-through entities[9]—meaning the special ownership rules would serve no purpose. That Congress felt the need to provide specific rules for QIEs demonstrates that the phrase "indirectly" did not already supply those rules. As described in more detail below, the legislative history only confirms this.

### C. Treasury Guidance and IRS Analysis Confirm No Look-Through of U.S. C Corporations

The current regulatory regime reflects this interpretation of Section 897(h)(4). Treas. Reg. § 1.897-1(c)(2)(i) states that a "domestically-controlled [QIE] is one in which less than 50 percent of the fair market value of the outstanding stock was directly or indirectly held by foreign persons" and that "[f]or purposes of this determination the *actual owners* of stock, as determined under section 1.857-8, must be taken into account" (emphasis added). Treas. Reg. § 1.857-8(b), in turn, provides that the "actual owner of stock of a real estate investment trust [QIE] is the person who is required to include in gross income in his return the dividends received on the stock."

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[7] Given that DCQIE status is based on the value of stock owned by non-U.S. persons, voting power or other decision-making authority is irrelevant to the determination.

[8] *See infra* Part III.B.

[9] *See supra* note 6.

Because these provisions require a QIE to take into account only those persons who are required to include in gross income the dividends paid by the QIE, and because U.S. C corporations are domestic taxpayers that—under longstanding, fundamental tax principles—are separate and distinct from their shareholders and file tax returns and pay taxes in their own right,[10] the current regulations thus support the conclusion that Section 897(h)(4) does not require investors in a QIE to undertake a constructive ownership analysis with respect to QIE shares held by a U.S. C corporation. The IRS confirmed this analysis in PLR 200923001 (the "2009 PLR"), in which it ruled that QIE stock held by a U.S. corporation would be treated as domestically owned for purposes of the DCQIE determination, even if the U.S. corporation was owned primarily by foreign investors—in other words, that there is no look through of domestic C corporations. In the 2009 PLR, the IRS explained, based on Treas. Reg. §§ 1.897-1(c)(2)(i) and 1.857-8(b), that certain domestic C corporations (and not any of their shareholders) were treated as the owners of QIE shares because "fully taxable domestic Subchapter C corporations . . . are the entities which include in income in their returns and actually pay U.S. tax on any distributions from" the QIE.[11]

### D. Congress Considers, Rejects Looking Through U.S. C Corporations

If there was any question in 2009 whether the conclusion of the 2009 PLR was correct, that question was resolved in 2015 when Congress amended Section 897 to create the "special ownership rules." Beyond the clear implication of the text of the amendment itself, the Joint Committee on Taxation ("JCT"), in its explanation of the amendment, expressly cited the 2009 PLR without criticism or any indication that it was attempting to reverse the result in that PLR, and also cited the "actual owner" rule in Treas. Reg. § 1.857-8(b) in a manner suggesting that it read that rule as providing that *only* the actual owners—and not others—are to be taken into account. As JCT explained its understanding of current law:

> If a qualified investment entity is "domestically controlled" (defined to mean that less than 50 percent in value of the qualified investment entity has been owned (directly or indirectly) by foreign persons during the relevant testing period), stock of such entity is not a USRPI and a foreign shareholder can sell the stock of such entity without being subject to tax under FIRPTA, even if the stock would otherwise be stock of a USRPHC. Treasury regulations provide that for purposes of determining whether a REIT is domestically controlled, the actual owner of REIT shares is the "person who is required to include in his

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[10] *Moline Props., Inc. v. Comm'r*, 319 U.S. 436, 438–39 (1943) ("So long as [the purpose of utilizing the corporate form] is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity."). Even minimal business activity, including acting as a holding company, is sufficient to meet the *Moline* standard. *See Britt v. United States*, 431 F.2d 227, 237 (5th Cir. 1970) ("Business activity is required for recognition of the corporation as a separate taxable entity; the activity may be minimal."); FSA 200122007 ("The fact that CorpH is a holding company, should satisfy the *Moline* business activity requirement. (Holding companies must perform various business administrative duties.) Further, the requirement of a business activity under *Moline* is minimal. In addition, all that is required under *Moline* is the holding of a minimal amount of assets by the corporate entity.)").

[11] As discussed below in connection with the recommendations, we believe that, in the case of QIE shares held by a partnership, the actual owners "required to include gross income" on their returns include the partners of the partnership.

> return the dividends received on the stock." The IRS has issued a private letter ruling concluding that the term "directly or indirectly" for this purpose does not require looking through corporate entities that, in the facts of the ruling, were represented to be fully taxable domestic corporations for U.S. federal income tax purposes "and not otherwise a REIT, RIC, hybrid entity, conduit, disregarded entity, or other flow-through or look-through entity."[12]

In fact, prior to the ultimate enactment of the PATH Act, Congress considered addressing the possibility of looking through C corporations expressly with new constructive ownership rules in a 2013 discussion draft released by JCT, but those changes were omitted when many of the discussion draft's other provisions were included in the PATH Act.[13] That Congress, contemporaneously fully aware of the existing administrative authorities, amended Section 897 to specifically provide for look-through rules for QIEs while rejecting a look-through proposal for C corporations is as clear an indication as one could get that Congress did not intend those same (or similar) look-through rules to apply to C corporations.[14]

Based on the foregoing, many non-U.S. investors have invested directly in REIT stock in reliance on the assumption that other stock of that REIT held by a taxable U.S. C corporation is treated as owned

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[12] *See* Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in 2015* ("JCT Bluebook") at 279 (2016).

[13] *See* Joint Committee on Taxation, *Technical Explanation of the Senate Committee on Finance Chairman's Staff Discussion Draft of Provisions to Reform International Business Taxation* at 84 (2013) ("In order to address uncertainty in the determination of indirect ownership, the provision applies the attribution rules of section 318 for purposes of determining whether a REIT or a RIC that is a qualified investment entity is domestically controlled. Among other things, those rules impose family attribution and also treat stock owned by a corporation as owned by persons with a 50 percent or greater interest in the corporation.").

[14] We note also that, in light of the PATH Act, the question of look-through of C corporations would appear to be a likely case for the application of the "doctrine of legislative reenactment," under which, as described recently by the IRS, "administrative pronouncements are deemed to receive congressional approval whenever Congress reenacts an interpreted statute without substantial change." *See* FSA 202219015 (May 13, 2022). The IRS quoted the Supreme Court's summary of the doctrine as follows:

> In *Lorillard*[, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575 (1978)], Congress had adopted a new law incorporating sections of a prior law that had long been interpreted as containing a jury trial requirement for certain discrimination claims. The Supreme Court held that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change" and when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."

Given the citation to the 2009 PLR in the JCT Bluebook, in this case we do not even need to "presume" that Congress was aware of the administrative interpretation that the PATH Act implicitly confirmed—we know that Congress had actual awareness of that interpretation.

by a U.S. person for purposes of testing DCQIE status. It is these types of investors that are most impacted by the Look-Through Rule.

### E. Guardrails Ensure Taxation of Foreign-Owned Domestic C Corporation

Moreover, under current law,[15] there are substantial guardrails in place to ensure a significant tax is likely to be incurred by the indirect foreign owner of a QIE like the one described in the 2009 PLR. Under the facts of the 2009 PLR, the foreign-owned domestic C corporation that owned the common stock of the QIE was anticipated to sell a portion of its QIE stock for cash in a transaction otherwise subject to tax. Moreover, the domestic C corporation was itself a USRPHC[16] and thus its stock was a USRPI. Therefore, any sale of its stock by the foreign owner would be subject to tax under Section 897. Furthermore, because a sale of such stock to a buyer would not result in an adjustment to the basis of the assets of the domestic corporation (i.e., a "step up"), the buyer likely would reduce its offer price by the tax cost of the lack of a step-up.

## II. Mechanics of the Proposed Look-Through Rule

The Look-Through Rule purports to interpret the words "directly or indirectly" in Section 897(h)(4)(B) and requires that QIE stock held by certain "look-through persons" be attributed to the owners of the entity. The term "look-through persons" means any person other than a "non-look-through person."[17] The term "non-look-through person" includes, among others, individuals, domestic C corporations (other than a foreign-owned domestic corporation), foreign corporations (including foreign governments), publicly traded partnerships (domestic or foreign), and qualified foreign pension funds.[18] The upward attribution process required by Prop. Treas. Reg. § 1.897-1(c)(3)(ii)–(iii) continues until all QIE stock is treated as owned by one or more non-look-through persons. If a domestic corporation is non-public and foreign persons hold directly or indirectly 25% or more of the corporation's stock (by value), then such corporation is a "foreign-owned domestic corporation" under Section 1.897-1(c)(3)(v)(B) of the Proposed Regulations, and is therefore a look-through-person.

In sum, for purposes of determining whether a QIE qualifies as a DCQIE, partnerships, trusts, and non-public U.S. C corporations with foreign ownership of 25% or greater are all treated as look-through persons, such that any QIE stock owned by such an entity, whether directly or by attribution from a lower-tier entity, is attributed upstream through successive look-through entities until all QIE stock is treated as held exclusively by non-look-through persons.[19]

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[15] A domestic C corporation's ability to reduce its tax liability is limited by a number of provisions, including Section 163(j), "BEAT," Section 482, and many others.

[16] Even though DCQIE stock is not a USRPI, for purposes of determining whether a corporation in is a USRPHC, Section 897(c)(5) requires the corporation to take into account its indirect share of the assets held by another corporation (including a DCQIE) in which it owns a "controlling interest" (defined for this purposes as 50% or more by value). Thus, it is likely, based on the statement in the 2009 PLR that the domestic C corporation was a USRPHC, that the domestic C corporation was deemed to own at least 50% of the QIE's stock.

[17] Prop. Treas. Reg. § 1.897-1(c)(3)(v)(C).

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

[19] We note that the Look-Through Rule goes even beyond many other express constructive ownership rules. For example, under Section 318, stock is attributed from a corporation to a shareholder only if the shareholder owns

## A. Three Examples of the Vast and Presumably Unintended Reach of the Proposed Look-Through

The Proposed Regulations cast a wide net, capturing and imposing tax on many non-abusive arrangements commonly used by real estate businesses to attract investment and pool capital from a variety of different sources. Below are but three of many examples:

- Assume a U.S. publicly traded REIT creates a private REIT subsidiary to develop multifamily housing throughout the southwestern United States. To bring in additional capital and free up resources for other real estate investments, the public REIT syndicates a 45% interest in the private REIT subsidiary to a foreign investor that can offer a lower cost of capital and longer investment horizon than prospective U.S. investors that also considered the investment. The public REIT covenants to the foreign investor that the REIT will remain domestically controlled. Years later, the public REIT is taken private by a fund owned by a diverse group of investors, 60% of which are U.S. persons and 40% of which are non-U.S. persons and none of which are the foreign investor already holding a 45% interest in the private REIT subsidiary. Prior to the sale of the publicly traded REIT's stock, the public REIT transfers its 55% interest to a subsidiary domestic C corporation in order not to breach its covenants. After the take-private transaction, the public REIT will be treated 40% as a non-U.S. person, and thus under the Look-Through Rule, the domestic C corporation would be a foreign-owned domestic corporation. As a result, the Look-Through Rule would require the private REIT subsidiary to look through the C corporation to that 40% deemed foreign ownership, thus causing the private REIT subsidiary to lose its DCQIE status and causing the formerly public REIT to breach its contractual covenants.

- Many private equity and real estate funds have different feeder funds for different categories of investors. For example, a fund that is investing in a REIT may create two feeders—Feeder 1 for investors who are willing to bear the risk of having to file U.S. tax returns and pay tax at regular U.S. rates in the event the fund's investments generate gains subject to FIRPTA, and Feeder 2 for investors who are not. Typically, most Feeder 2 investors would be foreign, although some foreign investors may choose to invest in Feeder 1. In such a structure, it would be typical for Feeder 1 to hold REIT shares directly while Feeder 2 holds its REIT shares through a U.S. C corporation. The Look-Through Rule would inappropriately require the REIT to take the Feeder 2 investors into account even if, as would be normal in such a case, there is no overlap between the foreign investors in the two feeder funds and all of the foreign investors in Feeder 2 are bearing full corporate U.S. tax through a corporation that files complete U.S. tax returns in order to avoid the cost and complexity of the foreign investors filing U.S. tax returns directly.

- Consider a U.S. life insurance and asset management company that employs thousands of people in the United States, boasts hundreds of billions of dollars in assets under management, and invests for its own account as well. The company is a wholly owned subsidiary of a non-U.S. public company. As a result, any QIE in which the U.S. company invests must treat the

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50% or more of the corporation. By contrast, the Look-Through could apply even if no single foreign shareholder owned even 1% of the applicable C corporation, as long as many foreign shareholders in the aggregate owned 25%.

U.S. company as a look-through person and classify any QIE shares owned by it as foreign owned. There is no reason to view an investment in a QIE by such a company as abusive, and yet that ownership would be caught by a rule that Treasury considers to be anti-abuse in nature.

There is no good reason why Treasury should upend existing law, in the face of clear congressional intent to the contrary, in order to attack these structures.

## III. Principles of Statutory Construction and the Irreparable Flaws of the Proposed Look-Through Rule

Starting with the statute, neither Section 897(h)(4)(B), nor any other section of the Code, defines the term "directly or indirectly," nor does any portion of Section 897 provide for the application of constructive ownership rules to the determination of DCQIE status. Instead, Section 897(h)(4)(E), which was enacted by the PATH Act, provides for "special ownership rules" under which a specific and narrow class of QIE stock—i.e., stock that is held by another QIE—will be treated as domestically owned or foreign owned depending on the nature of the shareholder QIE as public or private and the composition of its shareholders as foreign or domestic.

### A. Statutes Must Not Be Interpreted in a Way that Renders Language Surplus

Because a QIE is by definition a domestic corporation within the meaning of Section 7701(a)(30)(C),[20] the obvious implication of Section 897(h)(4)(E) is that, in the absence of additional special ownership rules, U.S. C corporations would not be subject to look-through treatment. Put differently, if Congress considered the words "directly or indirectly" in Section 897(h)(4)(B) to already incorporate a look-through concept in the case of QIE stock held by a domestic corporation, the special ownership rules in Section 897(h)(4)(E) would not be needed, as the upstream attribution would already have resulted from such a look-through concept.[21] It is a basic maxim of statutory construction that statutes must not be interpreted in a way that renders language surplus, and the interpretation on which Treasury is relying in support of the Look-Through Rule would render the special ownership rules surplus.[22]

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[20] *See supra* note 6.

[21] We note also that Section 897(h)(4)(E) does not itself contain the words "directly or indirectly" in determining the extent to which an upper-tier QIE is treated as a U.S. or foreign person when testing the DCQIE status of a lower-tier QIE, which depends on the ownership of the upper-tier QIE. Thus, even with Treasury's interpretation of the word "indirectly," there is no basis whatsoever for looking through a U.S. C corporation that owns lower-tier QIE stock through an upper-tier QIE. It would be anomalous, therefore, to have a different result when the C corporation owns the lower-tier QIE stock directly.

[22] One of the "longstanding canons of statutory construction" is the "rule that [courts] must normally seek to construe Congress's work 'so that effect is given to all provisions, so that no part will be inoperative or superfluous, void, or insignificant.'" *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. ____, 142 S. Ct. 1929, 1939 (2022) (citing *Corley v. United States*, 556 U.S. 303, 314 (2009). If there is an interpretation of a statute that gives effect to every clause and word of such statute, then such interpretation should generally prevail over a competing interpretation which does not. *Microsoft v. i4i Ltd. Partnership*, 564 U.S. 91, 106 (2011).

### B. A Specific Rule in One Part of a Statute Indicates its Absence in Another Part Was Intentional

The overall structure of Section 897 provides additional support for the conclusion that Section 897(h)(4)(B) does not incorporate any attribution-type rules beyond those contained in Section 897(h)(4)(E). For example, subsections (c)(4) and (c)(5) of Section 897 provide detailed rules of constructive ownership for purposes of determining whether a particular U.S. corporation is a USRPHC, while Section 897(c)(6) mandates the application of the Section 318 constructive ownership rules for purposes of determining whether a foreign investor holds 5% or more of the stock of a publicly traded USRPHC (or 10% in the case of a publicly traded REIT) and for purposes of applying the constructive ownership rules of subsection (c)(5). It is also a basic rule of statutory construction that the presence of a specific rule in one part of a statute indicates that the absence of a similar rule in another part of the same statute was intentional.[23] In other words, Congress knows how to provide for rules of constructive ownership when it wants them to apply. It chose to provide for constructive ownership rules in paragraphs (4), (5), and (6) of Section 897(c) but chose not to include those rules in Section 897(h), which instead contains the special ownership rules in subsection (h)(4)(E).[24] Congress' choice not to incorporate constructive ownership principles into the DCQIE determination beyond Section 897(h)(4)(E) is clear and ought to be respected.

### C. The Look-Through Rule is Inconsistent with the Legislative History Underlying the Statute It Purports to Interpret

Turning to the legislative history underlying Section 897(h)(4), we note that, in enacting the PATH Act, Congress considered the 2009 PLR to be an appropriate description of the status quo with respect to DCQIE determinations, and one it had no desire to change. As discussed above, the IRS adopted the

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[23] *See, e.g.,* Griffith v. United States, 206 F.3d 1389, 1394 (11th Cir. 2000) ("Congress is presumed to know the context of existing, relevant law and … where Congress knows how to say something but chooses not to, its silence is controlling.") (internal citations and quotations omitted).

[24] Similarly, numerous other Code sections, such as Sections 267(c), 304(c)(3), 707(b)(3), 544(a) 856(d)(5), 958(a) and (b), and 856(d)(5), clearly indicate that Congress expressly provides for the application of constructive ownership rules when it wants such rules to apply, and in most of these cases, it has done so even when the operative provisions to which those constructive ownership rules apply already cover "direct and indirect" ownership. *See infra* note 27 and accompanying text; *see also, e.g.,* Section 267(b)(2) ("An individual and a corporation more than 50 percent in value of the outstanding stock of which is owned, *directly or indirectly*, by or for such individual . . . ." (emphasis added)); Section 267(b)(8) (similar); Section 542(a)(2) ("At any time during the last half of the taxable year more than 50 percent in value of its outstanding stock is owned, *directly or indirectly*, by or for not more than 5 individuals." (emphasis added)); Section 707(b)(1), (2) (applying to transactions between "a partnership and a person owning, *directly or indirectly*, more than 50 percent of the capital interest, or the profits interest, in such partnership," or between "two partnerships in which the same persons own, *directly or indirectly*, more than 50 percent of the capital interests or profits interests" (emphasis added)); Section 856(d)(5) ("any amount received or accrued directly or indirectly from [a tenant] if the real estate investment trust owns, *directly or indirectly*" 10% or more of the tenant (emphasis added)); Section 956(c)(2) ("any corporation . . . with respect to which a bank holding company . . . or financial holding company . . . owns *directly or indirectly* more than 80 percent by vote or value of the stock of such corporation" (emphasis added)); *cf.* Section 957(a)(2) (applying to "any foreign corporation if more than 50 percent of . . . [its stock] is owned . . . or *is considered as owned by applying the rules of ownership of section 958(b)*, by United States shareholders" (emphasis added)).

view in the 2009 PLR that a "fully taxable domestic Subchapter C corporation," would not be viewed as a "look-through entity" (the precise term the IRS used in the ruling) for purposes of calculating the foreign ownership of a QIE in which that corporation was a shareholder. The legislative history to the PATH Act indicates that Congress presumed, consistent with the 2009 PLR, that taxable C corporations were not (and would not be) subject to look-through treatment. It is obvious that if Congress disagreed with, rather than assumed the ongoing correctness of, the 2009 PLR, Congress would have said so and would have drafted a rule that expressly overturns the 2009 PLR. Congress did not do that, which creates irreconcilable tension between the legislative history to the PATH Act and the Proposed Regulations. We are unable to determine how Treasury resolved this tension when issuing the Proposed Regulations; the Preamble to the Proposed Regulations does not mention the PATH Act or its legislative history nor the 2009 PLR, despite the potential for retroactive application of the Proposed Regulations as discussed below. But however the tension may have been resolved inside Treasury, the fact remains that the Look-Through Rule is inconsistent with the legislative history underlying the statute the Proposed Regulations purport to interpret.[25]

While not part of the PATH Act legislative history, we think it is critical to bear in mind that JCT put forward a legislative proposal in 2013 that would have incorporated the constructive ownership rules of Section 318 into the DCQIE determination process, including for C corporations.[26] This is further evidence that Congress was aware of the fact that it might want to consider adding constructive ownership rules to the DCQIE determination process and made a deliberate decision in 2015 not to incorporate the Section 318 rules into that process.

### D. Indirect Ownership Does Not Mean Constructive Ownership

We also note that, while there may be some ambiguity about what the words "direct or indirect" ownership encompass, there is no ambiguity on what those words *do not encompass*—constructive ownership. Multiple provisions of the Code that address constructive ownership treat constructive ownership as something different than indirect ownership—the two concepts may appear in the same Code section, but they are never used interchangeably because they do not mean the same thing.[27]

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[25] The legislative history to the PATH Act also references the existing Treasury regulations, described above, which the Look-Through Rule would violate. As noted, Treas. Reg. § 1.897-1(c)(2)(i) provides that a "domestically-controlled [QIE] is one in which less than 50 percent of the fair market value of the outstanding stock was directly or indirectly held by foreign persons. . ." and that "[f]or purposes of this determination the actual owners of stock, as determined under section 1.857-8, must be taken into account," and Treas. Reg. § 1.857-8(b) provides that the "actual owner of stock of a [QIE] is the person who is required to include in gross income in his return the dividends received on the stock." As discussed above, a domestic C corporation would be precisely such a person, and yet the Proposed Regulations are inconsistent with this approach, notwithstanding that Congress specifically cited its analysis in the legislative history.

[26] *See supra* note 13.

[27] For example, although Section 958(a) contains the heading "direct and indirect ownership," Congress apparently did not think it could rely on the phrase "indirect" to effect look-through and thus, in contrast to Section 897(h)(4)(B), it instead expressly provided a specific constructive ownership rule looking through foreign corporations and other foreign entities in Section 958(a)(2). Importantly, Section 958(a)(2) itself applies the express constructive ownership rule to "stock owned, *directly or indirectly*, by or for a foreign corporation." The reference to "indirectly" owned stock cannot mean stock deemed owned via constructive ownership, since the second sentence of Section 958(a)(2) already provides that stock constructively owned is considered actually owned for purposes of reapplying the constructive ownership rule. Numerous other Code and regulation sections

Indeed, the IRS has clearly espoused this view in TAM 200733024, where it stated: "'Direct or indirect' ownership rules do not include constructive ownership. When Congress intends constructive ownership rules to apply, it will expressly so state." Courts have reached the same conclusion, holding again and again that the various constructive ownership rules in the Code are inapplicable absent a specific statutory provision requiring their application.[28] The enactment of the special ownership rules in Section 897(h)(4)(E), coupled with the *absence* of any express authorization for the use of constructive ownership rules in making DCQIE determinations, is by itself a clear indication that Congress did not intend any constructive ownership to apply. Treasury cannot credibly assert statutory ambiguity in order to apply constructive ownership rules where they have not been authorized by Congress.

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likewise apply express constructive ownership rules in situations where the statute also references "indirectly" owned stock. *See, e.g.*, Treas. Reg. § 1.871-14(g)(2)(ii) (for purposes of determining whether a recipient of interest is related to the payer for purposes of the portfolio interest exemption, "stock owned means stock directly or indirectly owned *and* stock owned by reason of the attribution rules of Section 318(a)" (emphasis added)); *see also supra* note 24. In each case, the attribution of subsidiary stock from a corporation to its shareholders, whether by cross reference to section 318(a) or otherwise, would be unnecessary if the words "directly or indirectly" were sufficient, standing alone, to cause that attribution to occur. Moreover, an interpretation of the phrase "indirectly" to mean broad constructive ownership can simply not be squared with the fact that the constructive ownership rules themselves often only apply if certain ownership thresholds are met—such as Section 318's attribution of ownership from a corporation to its shareholders, which applies only if the shareholder owns more than 50% of the corporation. *See* Section 318(a)(2)(C). Again, look-through based on the term "indirectly" would render the 50% limitation meaningless. Instead, in distinguishing between "actual ownership" and "constructive ownership," section 318 uses the terminology "directly and indirectly" to refer only to stock that is actually owned by a person, either directly or (indirectly) through a nominee or fiduciary. *See* Bittker and Eustice, *Federal Income Taxation of Corporations and Shareholders* at ¶ 9.02 (7th ed. 2015 & Supp. 2022-3) ("Real ownership is referred to in various places in § 318 as stock owned 'directly or indirectly' — stock titled in the name of the owner (direct ownership) or for example, held by an agent (indirect ownership). *Indirect ownership is distinct from constructive ownership*." (emphasis added)).

[28] *See, e.g.*, *Yamamoto v. Commissioner*, T.C. Memo. 1986-316, 51 T.C.M. (CCH) 1560, 1565 (1986) ("[The constructive ownership rubric of] Section 318 attributes a proportionate share of the stock held by a corporation to its shareholders who hold 50 percent or more of its stock. Section 318 applies, however, only '[f]or purposes of those provisions of [subchapter C] to which the rules contained in this section are expressly made applicable.' . . . Neither section 368(c) nor section 351 state that the attribution rules of section 318 apply." (emphasis added and citations omitted)); *see also Berghash v. Commissioner*, 43 T.C. 743 (1965), aff'd, 361 F.2d 257 (2d Cir. 1966) (refusing to apply the option attribution rule of section 318 to determine whether a taxpayer was in control of a corporation within the meaning of section 368(c), because section 368(c) did not specifically incorporate the attribution rules of section 318; "Section 318 is not expressly made applicable to part III of subchapter C. . . . Consequently, the stock attribution rule of section 318(a)(4) relating to the ownership of stock subject to an option is not applicable to the stock ownership requirement regarding corporate control as defined by section 368(c)"); Rev. Rul. 56-613, 1956-2 C.B. 212 (the acquiring corporation in a purported B reorganization did not possess control of the target corporation through direct stock ownership, but would have possessed control if it were allowed to include stock owned by its subsidiary corporation; it was ruled, that the acquiring corporation is not treated as owning target stock held by its subsidiaries, because section 368(c) does not incorporate constructive ownership rules).

### E. Lack of Ambiguity in the Statute Raises Doubts About the Look-Through Rule's Legal Validity

Although an extended analysis of administrative law is outside the scope of this comment letter, we do believe that the approach of the Proposed Regulations calls into question whether they are even a valid exercise of Treasury's regulatory authority. In particular, although Treasury, in general, has the authority to resolve ambiguities in statutes in reasonable ways,[29] the statute here, for the reasons described above, is not ambiguous and the resolution in the Proposed Regulations is not a reasonable interpretation of that statute.[30] We therefore believe a court, if faced with the question, would likely invalidate the Proposed Regulations if they are finalized in their current form.

## IV. The Look-Through Rule Could Result in Less Investment, Lower Property Values, and Reduced Economic Activity—Creating Unnecessary Risks at a Time of Uncertainty

Over the past 20 years, the United States has been a preferred location for foreign capital seeking to invest in real estate due to its stability, its resilient economy, and the certainty regarding the flow and taxation of capital into and out of U.S. real estate investments. Total cross-border investment in U.S. real estate was $91.9 billion in 2021 and 2022 combined.[31] Foreign capital is a vital source of equity investment for transformational real estate and infrastructure projects and a growing contributor to real estate financing in smaller, regional markets. Cities such as Charlotte, Tampa, Memphis, Austin, Orlando, Seattle, Phoenix, Philadelphia, Seattle, and a dozen others each attracted over $1 billion in foreign real estate investment over the last two years.[32]

When invested in U.S. real estate, foreign capital puts contractors, tradesmen, and others to work constructing, upgrading, and improving properties. Pooled with U.S. partners and their expertise, foreign investment helps create productive assets, such as shopping centers and apartment buildings,

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[29] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 468 U.S. 837 (1984) (establishing the doctrine of "Chevron deference").

[30] In addition, we note that Treasury has not been granted specific authority under Section 897 to issue regulations on determining DCQIE status and instead is relying on its general regulatory authority under Section 7805 of the Code. Given the significant impact that finalization of the Proposed Regulations is likely to have to the U.S. real estate markets (as described in Part II), Treasury should consider whether Proposed Regulations could pass scrutiny under the "major questions doctrine," which was recently reaffirmed by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–2608 (2022), and states that if an agency seeks to decide an issue of major national significance, its action must be supported by clear congressional authorization. Moreover, as described under Part III, the effective date of the Proposed Regulations makes them effectively retroactive by applying them to structures created prior to the issuance of the Proposed Regulations, arguably in violation of the restrictions in Section 7805(b) that, with narrow exceptions not applicable here, prohibit retroactive regulations.

[31] CBRE Research, *Foreign Capital Flows* (Feb. 2023) (*see* attachment).

[32] *Id.* Other cities, while attracting less in total volume of foreign investment, have leveraged foreign capital to support additional housing, commercial development, and economic growth in their communities. Cities that have seen foreign real estate investment more than double in the past five years include: Albany, Savannah, Orlando, Allentown, Fort Myers, Provo, Trenton (NJ), Colorado Springs, Jacksonville (FL), Winston-Salem, Tulsa, Rochester, and Huntsville.

which revitalize communities and increase the supply of affordable housing. Foreign investment is a critical source of financing for new multifamily housing that brings down costs for working families. In 2021 and 2022, foreign sources invested $27.3 billion in multifamily housing in the United States.[33] Foreign institutional investors, in particular, are ideal partners for ambitious real estate and infrastructure projects because they have the capital for large-scale initiatives and the time horizon necessary for the long-term returns associated with the upfront investment. The health of U.S. real estate is critical to the overall economy. The U.S. real estate industry supports 13.6 million well-paying jobs.[34] Property taxes generate over 70 percent of local tax revenue.[35] U.S. pension funds, educational endowments, and charities have over $900 billion invested in U.S. commercial real estate.[36]

Now, various factors—such as the rapid rise in interest rates, concerns about a global economic slowdown, and the trailing impacts of the pandemic (e.g., work from home and increasing vacancies in urban centers and elsewhere)—have combined to put considerable pressure on the U.S. real estate industry. This combined pressure creates challenges for the industry that require readily available capital sources if the industry is to meet and overcome these challenges.

Congress understood the importance of foreign capital when it crafted a modified FIRPTA statute in 2015 that included only limited DCQIE look-through rules and created and expanded other exceptions to FIRPTA. The Senate Finance Committee stated at the time that "[i]t is essential to increase foreign investment in U.S. real estate."[37]

The Look-Through Rule would change longstanding tax law and effectively impose new taxes on investment structures that have been used for decades by foreign governments, insurance companies, and other institutional or large foreign investors when deploying capital in the United States. Large, long-term investments can take years to properly organize and finance. Surprising investors with sudden, retroactive changes to well-settled tax rules is a recipe to discourage business and investment in the United States, not only now but for years to come.

Moreover, by applying retroactively—and in certain ways, applying before it is even finalized—the rule is grossly unfair to current real estate investors who played by the rules and sends a damaging message to potential future investors that U.S tax law is neither stable nor predictable.

## V. Recommendations: Responsibly Addressing Treasury Concerns

The language of Section 897(h)(4)(B) is unambiguous—the DCQIE determination is made without regard to any rules of constructive ownership or attribution other than those contained in the special

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33 *Id.*

34 The Real Estate Roundtable, *Building a More Resilient and Dynamic Future* (2022) (aggregating data from the U.S. Bureau of Labor Statistics, National Occupational Employment and Wage Estimates and the National Association of REALTORS® Monthly Membership Report (for self-employed real estate agents)).

35 Tax Foundation, *To What Extent Does Your State Rely on Property Taxes?* (2021).

36 Meredith Despins, *The Role of Real Estate in Pension Funds*, Nareit Developments (Nov. 2021)

37 Senate Finance Committee Report on the Protecting Americans from Tax Hikes Act at 2.

ownership provisions of Section 897(h)(4)(E). That interpretation of the statute is supported by the structure and legislative history of Section 897 and is consistent with current regulations, the only IRS ruling on the topic, and judicial opinions concerning the application of constructive ownership rules generally. It also would support the most recent congressional statement of policy concerning FIRPTA and domestically controlled REITs, namely the need to increase foreign investment in real estate. A coherent, rational, and stable system for the taxation of real estate assets would support job creation and facilitate sound, environmentally responsible real estate investment and development, while also contributing to strong property values and well-served, livable communities. In enacting the PATH Act, Congress clearly understood the importance of, and expressed clear intent to promote, a tax regime that would be fair and consistent for foreign investors, and did not intend to create a rule that would discourage foreign investment in U.S. real property. For these reasons, it is our strong recommendation that the Look-Through Rule be withdrawn.

In making this recommendation, we acknowledge Treasury's concern that foreign partners in a private U.S. partnership might assert that QIE stock held by the partnership is domestically owned because the partnership is domestic. While this concern is legitimate, our recommendation should not be viewed as affecting Treasury's ability to appropriately address such an assertion. As a preliminary matter, we are not aware of anyone having taken the position on a tax return that a U.S. partnership or trust with foreign owners is treated as a domestic U.S. holder for purposes of Section 897(h)(4)(B). In other words, if a U.S. partnership owning QIE stock has one or more foreign partners, advisors generally recommend treating the QIE stock as foreign owned to the extent of the foreign partners' interest in the QIE. We thus do not think this is a problem that frequently arises in practice. But even in the rare situation it may, the existing regulations, by referencing Treas. Reg. § 1.857-8(b), could provide a basis for the IRS to challenge any position that a private U.S. partnership with foreign owners counts entirely as a U.S. owner for DCQIE purposes.[38] In any event, if the Look-Through Rule were to be withdrawn, we would support the adoption of a new Section 897 regulation clarifying that a REIT must look-through partnerships to their partners in testing DCQIE status.[39] Assuming Treasury were to adopt a

[38] We also note that the IRS may be able to challenge such a position in appropriate circumstances under the general partnership anti-abuse rule of Treas. Reg. § 1.701-2(e), which permits the IRS to treat a partnership as an aggregate of its partners to the extent necessary to carry out of the purposes of the any provision of the Code.

[39] Although we think the statute is unambiguous on the question of look-through of C corporations, we think it is sufficiently ambiguous on look-through of partnerships that a regulatory clarification would be valid and appropriate. Partnerships are distinguishable from C corporations in three important respects: First, partnerships are, for many purposes, treated as aggregates of their partners rather than as separate entities, whereas C corporations are never so treated, meaning there is a basis in the common law for looking through partnerships without a specific look-through rule that does not exist for C corporations. *See, e.g.*, Casel v. Commissioner, 79 T.C. 424 (1982) ("[W]hether an aggregate or entity theory of partnerships should be applied to a particular Code section depends upon which theory is more appropriate to such section. . . . If we were to apply an entity theory of partnerships to [section 267], then [a] loophole would . . . exist whenever an individual partner interposed his partnership between himself and his related corporation in transactions encompassed by section 267(a)."). Second, because partnerships are true pass-through entities, whereas QIEs are corporations with certain pass-through features, it would be illogical—and one would expect Congress would not intend—for partnerships to be subject to lesser look-through than QIEs are under 897(h)(4)(E). No such inconsistency exists with C corporations, however, which bear no pass-through indicia. Third, in a similar vein, the explicit look through of only certain corporations in Section 897(h)(4)(E) indicates that Congress did not believe that one looks through taxable C corporations generally, but there is no such implication for partnerships. Fourth, the legislative history does not contain evidence that Congress intended partnerships to be treated as non-look-through entities the way it does for corporations. In contrast to its reference to the 2009 PLR (which expressly based its conclusion on

specific look-through rule for partnerships, we think it is appropriate for the same rule to apply to both U.S. and foreign partnerships, because the basis for looking through partnerships—whether common-law aggregate principles, Treas. Reg. § 1.857-8(b), or the mere fact that the partners in the partnership are the ones bearing the incidence of taxation, including under FIRPTA—apply equally to U.S. and foreign partnerships.

Withdrawal of the Look-Through Rule is, therefore, the correct course of action. If, however, Treasury decides to disregard this recommendation and proceed with finalization of the Proposed Regulations, it nevertheless should at the very least modify the effective date provisions to ensure that the change of law effected by the Look-Through Rule is not applied retroactively. In particular, the Proposed Regulations would apply to existing QIE stock that is disposed of after the regulations are finalized, and Treasury indicated in the preamble that it may challenge existing QIE structures to the extent such structures are inconsistent with the Proposed Regulations. Given the structure of the DCQIE rules—namely that a QIE must be domestically controlled for the entirety of a five-year look-back period for its shareholders to benefit from the FIRPTA exemption for gain on DCQIE shares—the effective date provisions in the Proposed Regulations effectively would make them retroactive and applicable to structures created well before the issuance of the Proposed Regulations. Given that the Proposed Regulations are inconsistent with current law, we think that any application of those regulations to structures in existence at the time of finalization is highly inappropriate. Accordingly, we recommend that any final regulations apply the Look-Through Rule only to QIE stock acquired by a "foreign-owned domestic corporation" after the date on which the regulations are finalized, or on a similar basis that is actually prospective. This recommendation does not alter our primary recommendation that the Look-Through Rule be withdrawn entirely, but it would be necessary to avoid the harshest and most unfair consequences of a finalized Look-Through Rule.

## VI. Technical Clarifications to the Proposed Section 892 Regulations

The Proposed Regulations contain a sensible clarification of the existing regulations under Section 892. Those existing regulations deem an entity to be engaged in "commercial activity" under Section 892 if it is a USRPHC. The effect of this rule is that the USRPHC cannot qualify for the Section 892 exemption from tax on investments in securities even if it is a foreign government entity that otherwise meets the requirements of that exemption, nor is income from such a USRPHC eligible for the exemption in the hands of any foreign government that controls that USRPHC. Prop. Treas. Reg. § 1.892-5(b)(1)(ii)(B) provides an exception to this "deemed commercial activity" rule for a corporation that is a USRPHC "solely by reason of its direct or indirect ownership interest in one or more other corporations that are not controlled by the foreign government" (the "New Deemed CA Exception"). An example would be a foreign government entity whose only assets consist of minority interests in USRPHCs. Although the foreign government entity would itself be a USRPHC, it would not, under the Proposed Regulations, be deemed to be engaged in commercial activity and thus would maintain its Section 892 eligibility. This result is not only sensible—it is hard to conceive of a different result under the statute, since the foreign government entity in that case is doing exactly, and only, what Section 892 says is exempt from U.S. taxation.

the fact that the C corporation there was not a flow-through entity of any type), the legislative history did not reference any existing guidance providing for non-look-through of partnerships (likely because no such guidance exists).

We thus fully support Prop. Treas. Reg. § 1.892-5(b). Nevertheless, the drafting of the New Deemed CA Exception creates a few technical, and we assume unintended, ambiguities that we recommend Treasury clarify.

**Meaning of "Solely."** As noted above, the New Deemed CA Exception provides that an entity will not be deemed to be engaged in commercial activity if its USRPHC status results "solely by reason of its direct or indirect ownership interest in one or more other corporations that are not controlled by the foreign government." The word "solely" in this context creates an ambiguity in a situation where a USRPHC owns a small amount of USRPIs other than non-controlling interests in other corporations. For example, assume FC, a foreign corporation that otherwise qualifies as a "foreign government," owns $999 of minority interests in USRPHCs and a $1 controlling interest in a separate USRPHC. In this case, because the $1 interest is in a controlled entity, and this $1 contributes to FC's status as a USRPHC (by being in the numerator for the test), a literal application of the "solely" standard could mean that FC is deemed to be engaged in commercial activity even though FC would not be a USRPHC if its minority interests were treated as non-USRPIs and even though FC's only activities consist of investing in securities whose income clearly is intended to be exempt by Section 892.[40]

This would not be a sensible result, nor one we would expect was intended by Treasury.[41] Accordingly, we recommend that Treasury revise the New Deemed CA Exception to clarify that it will apply to a USRPHC that would not be a USRPHC if its non-controlling interests in other USRPHCs were treated as non-USRPIs.

**Ownership of Minority Interests through Controlled Corporation.** The New Deemed CA Exception is also ambiguous in a situation where a foreign government entity owns a controlling interest in a corporation whose only assets consist principally of minority interests in other USRPHCs. For example, assume FC, a foreign corporation that otherwise qualifies as a "foreign government," owns as its only asset 100% of USC, a U.S. C corporation. Assume further that USC's only assets are minority interests in USRPHCs. In this case, it is reasonably clear that USC is not deemed to be engaged in commercial activity under the New Deemed CA Exception. But because FC's status as a USRPHC results from its *controlling* interest in USC—through which it indirectly owns the minority USRPHC interests—it is not perfectly clear that FC qualifies for the New Deemed CA Exception.

We interpret the New Deemed CA Exception as applying to FC in this example. This is supported by the fact that, under the general rules for determining USRPHC status, FC's interest in USC is ignored and instead FC is treated as owning the underlying minority interests.[42] Moreover, there is no reason why a foreign government entity should lose its Section 892 eligibility for holding, indirectly through

[40] To be clear, income from the $1 controlling investment would not be eligible for the Section 892 exemption given that the controlled USRPHC would be a "controlled commercial entity" of FC (assuming that USRPHC did not itself qualify under the New Deemed CA Exemption), and our suggestion is not intended to imply otherwise. Our suggestion merely clarifies that FC will not lose its Section 892 exemption on all of its assets (including the minority interests) as a result of being deemed to be engaged in commercial activity.

[41] It would be anomalous if, for example, FC lost its Section 892 exemption entirely while another company whose assets consisted of a $499 controlling interest in a USRPHC and $501 of non-controlling (or even some controlling) interests in non-USRPHCs maintained its Section 892 exemption with respect to any non-controlling investments.

[42] *See* Section 897(c)(5); Treas. Reg. §§ 1.897-1(e)(1)(i)(B), 1.897-2(e)(3).

a controlled corporation, the exact same minority interests that it could have held directly without losing its status—nor is there a basis for such disparate treatment in the statute. Nevertheless, it would be helpful for Treasury to clarify that an entity will not fail to qualify for the New Deemed CA Exception as a result of owning non-controlling USRPHC interests through a corporation controlled by the applicable foreign government. It may be easiest to do so by adding to the regulations, when finalized, a simple example similar to the one set forth above, though we would not be opposed to also (or instead) clarifying this point in the operative language.

* * *

Thank you in advance for your consideration of these issues. If you have any questions or would like to discuss further these comments, please contact Ryan McCormick of The Real Estate Roundtable (rmccormick@rer.org, PH: 202-639-8400) or Brad Bailey of the American Investment Council (bbailey@investmentcouncil.org, PH: 202-465-7700). We appreciate your thoughtful attention to our concerns.

Sincerely,

American Investment Council
ICSC
Institute for Portfolio Alternatives
Managed Funds Association
Nareit
The Real Estate Roundtable

Attachment