

Proposed Regulations of Domestically Controlled REITs

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On December 29, 2022, the Internal Revenue Service (IRS) and the Treasury Department released proposed regulations (Proposed Regulations) under sections 892 and 897 of the Internal Revenue Code (Code).¹ If finalized as proposed, the Proposed Regulations would prevent a non-US person from investing through a wholly-owned US corporation in order to cause a real estate investment trust (REIT) to be “domestically controlled.” The ability of a non-US person to invest through a US corporation to cause a REIT to be domestically controlled had been approved in a private letter ruling and is a structure that is widely used. The Proposed Regulations would also apply to existing REITs that rely on a non-US owned US corporation for their domestically-controlled status, and suggest that the IRS could attack such a structure under current law (i.e., even if the Proposed Regulations are not finalized).

The Proposed Regulations also clarify that, in determining a REIT’s domestically-controlled status, a foreign partnership would be looked through and “qualified foreign pension funds” (QFPFs) and entities that are wholly owned by one or more QFPFs (Qualified Control Entities, or QCEs) would be treated as foreign persons. Lastly, the Proposed Regulations also provide a helpful set of rules for sovereign wealth fund investors that indirectly invest in US real estate.

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