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BENEFITS BRIEF

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Qualified Non-US Pension Funds Exempt from FIRPTA Tax Withholding

There has long been a proposal to exempt foreign pension fund investment in US real estate from the tax withholding requirements of the Foreign Investment in Real Property Tax Act (FIRPTA). We have written about this previously here: http://www.groom.com/media/publication/1242_US_Administration_Proposes_to_Exempt_NonUS_Pension_Funds.pdf. This exemption has finally been enacted as part of H.R. 2029, the recent budget bill signed into law by President Obama.

Section 323 of the Protecting Americans From Tax Hikes (PATH) Act adds an exemption from FIRPTA for any US real property held directly (or indirectly through one or more partnerships) by, or to any distribution received from a real estate investment trust by a qualified foreign pension fund, or any entity all of the interests of which are held by a "qualified foreign pension fund." For this purpose, a qualified foreign pension fund means any trust, corporation, or other organization or arrangement (1) which is created or organized under the law of a country other than the US, (2) which is established to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (or beneficiaries designated by such employees) of one or more employers in consideration for services rendered, (3) which does not have a single participant or beneficiary with a right to more than 5% of its assets or income, (4) which 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 (5) with respect to which, under the laws of the country in which it is established or operates, either (i) contributions to such trust, corporation, organization, or arrangement 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 (ii) taxation of any investment income of such trust, corporation, organization or arrangement is deferred or such income is taxed at a reduced rate. The exemption will apply to dispositions and distributions after the date of enactment, Dec. 18, 2015.

The new exemption may make US real estate investments more attractive to non-US pension funds. Those familiar with the FATCA exemptions for non-US pension funds, however, may note one common concern. One of the requirements for non-US pension funds to be exempt from both laws is that the fund provides annual information reporting about its beneficiaries to the relevant tax authorities in the country in which it is established or operates. What this means for purposes of exemption from FATCA has already been a matter of debate. Few, if any, pension funds report on every single plan participant to the tax authorities every year. Thus, how narrowly the US Treasury will interpret this language remains at issue. It may be advisable to seek clarification in connection with making such investments.