

NAREIT Alert (December 8, 2016)

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NAREIT Alert Important Industry Updates from NAREIT

On Dec. 6, 2016, House Ways and Means Chairman Kevin Brady (R-TX), along with incoming Ranking Member Richard Neal (D-MA), introduced [H.R. 6439](#), the [Tax Technical Corrections Act of 2016](#). A companion bill, [S. 3506](#), also was introduced by Finance Committee Chairman Orrin Hatch (R-UT) and Ranking Member Ron Wyden (D-OR). Separately, the Joint Committee on Taxation issued a [technical explanation](#) of the bill.

H.R. 6439 revises and updates the provisions in H.R. 4891, the [Technical Corrections Act of 2016](#), which was introduced on April 11, 2016. As further described below, H.R. 6439 includes a number of technical corrections supported by NAREIT with respect to the Foreign Investment in Real Property tax Act (FIRPTA) and Update and Streamline REIT Act (U.S. REIT Act) provisions in the [Protecting Americans from Tax Hikes Act of 2015](#) (PATH Act) both informally and via [written submission](#). It also includes clarifications to the new partnership audit rules, enacted as part of the Bipartisan Budget Act of 2015.

H.R. 4891

By way of background, H.R. 4891 included two NAREIT-suggested changes. Specifically, Internal Revenue Code (Code) section 897(h)(4)(B) defines the term "domestically controlled qualified investment entity" as any qualified investment entity (e.g., a REIT or certain regulated investment companies) less than 50% of the value in which at all times during the testing period is held by foreign persons. The PATH Act had included special rules relating to this provision that went into effect on Dec. 18, 2015, the PATH Act's date of enactment. H.R. 4891 would clarify the effective date for the determination of domestic control by stating that the rule applies with respect to each testing period ending on or after the date of enactment (not that the rule takes effect on the date of enactment, as stated in the PATH Act). Second, H.R. 4891 would remedy a number of incorrect cross references in Code section 856.

Additionally, H.R. 4891 would modify the definition of a qualified collective investment vehicle that is eligible for benefits of a comprehensive income tax treaty with the United States that includes an exchange of information program (such investment vehicle would be exempt from FIRPTA). As clarified, the definition could be met only if the dividends article in the treaty imposes conditions on the benefits allowable in the case of dividends paid by a REIT.

H.R. 6439

In addition to the changes listed above, H.R. 6439 would make a number of other changes of interest, including several originated by NAREIT.

Ancillary Personal Property Clarifications

H.R. 6439 would modify the rules concerning personal property leased on or mortgaged along with real property. The PATH Act treats ancillary personal property as a real estate asset for purposes of the REIT 75% asset test to the extent that rents attributable to such ancillary personal property are treated as rents from real property. H.R. 6439 would make the following [NAREIT-requested](#) changes. First, it would treat gain from the sale or disposition of such ancillary personal property as gain from the sale or disposition of a real estate asset for purposes of the REIT income tests. Additionally, H.R. 6439 would treat gain from the sale or disposition of certain obligations secured by mortgages on both real property and personal property as gain from the sale or disposition of real property for purposes of the REIT income tests.

FIRPTA/Qualified Foreign Pension Fund Clarifications

Under the PATH Act, the FIRPTA rules of Code section 897 do not apply to any United States real property interest held directly (or indirectly through 1 or more partnerships) by, or to any distribution received from a real estate investment trust by: A) a qualified foreign pension fund; or, B) any entity all of the interests of

which are held by a qualified foreign pension fund. NAREIT had requested a technical correction to confirm that the qualified foreign pension fund exception from FIRPTA applies even if several qualified foreign pension funds own an entity that holds a REIT (rather than just one qualified foreign pension fund owns the entity that itself owns all of the interests in a REIT).

H.R. 6439 would clarify that a qualified foreign pension fund is not treated as a nonresident alien individual or as a foreign corporation. As the Joint Committee explanation points out, "in other words, in determining the U.S. income tax of a qualified foreign pension fund, Code section 897 does not apply." This change appears to address the issue raised by NAREIT above. Additionally, H.R. 6439 would treat an entity all the interests of which are held by a qualified foreign pension fund (e.g., a corporation) as such a fund that is exempt from FIRPTA.

H.R. 6439 would make additional changes to the five-pronged definition of "qualified foreign pension fund." It would clarify that a government-established fund to provide public retirement or pension benefits may qualify, as well as a fund established by more than one employer to provide retirement or pension benefits to their employees (including self-employed individuals), such as a multiple-employer or multiemployer plan. NAREIT had requested a clarification that government funded retirement arrangements (similar to individual retirement accounts in the U.S.) could constitute qualified foreign pension funds notwithstanding that the employer is not the sponsor of the pension fund. In addition, H.R. 6439 would make a number of other clarifying changes to the qualified foreign pension fund definition.

Partnership Audit Changes

H.R. 6439 also would clarify that a partnership may "push out" adjustments to partners through tiered partnerships in lieu of paying tax at the partnership level. The bill also includes provisions related to the calculation of an imputed underpayment as well as new provisions related to penalties.

H.R. 6439 does not mention the REIT deficiency dividend procedure. According to the [General Explanation of Tax Legislation Enacted in 2015](#) (JCT Blue Book), guidance coordinating the new partnership audit adjustments with the deficiency dividend rules is expected to be issued by the Treasury Department.

The legislation is likely not going to pass in the few remaining legislative days this year but can be used by practitioners and the Treasury Department as a basis for construing Congressional intent.

Please contact [Tony Edwards](#), [Cathy Barre](#), or [Dara Bernstein](#) to discuss any questions about this legislation.