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Report No. 1515
October 20, 2025

The Honorable Scott Bessent
Secretary
Department of the Treasury

and

Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

The Honorable Kenneth Kies
Assistant Secretary (Tax Policy)
Department of the Treasury

and

Acting Chief Counsel
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Re: <u>Comments and Recommendations on Notice 2025-45</u>

Dear Secretary Bessent and Assistant Secretary Kies:

The Tax Section of the New York State Bar Association is pleased to submit comments and certain recommendations, discussed below, on Notice 2025-45, released on August 19, 2025 (the "**Notice**" or "**Notice 2025-45**"), announcing that the Treasury Department and IRS intend to issue proposed regulations ("**Forthcoming Proposed Regulations**") under Sections 897(d) and (e) to modify the rules under Treasury Regulations sections 1.897-5T and 1.897-6T, Notice 89-85, and Notice 2006-46.

The Forthcoming Proposed Regulations would apply to inbound reorganizations under Section 368(a)(1)(F) ("**F reorganizations**") involving the transfer of United States real property interests ("**USRPIs**") and in which the transferor corporation is a publicly traded foreign corporation and the resulting corporation is a publicly traded domestic corporation.[1] Taxpayers may, if they follow the rules in their entirety and in a consistent manner, generally rely on the rules described in the Notice for covered transactions before the Forthcoming Proposed Regulations are published.

The Notice modifies the application of Section 897 and related guidance, collectively known as the Foreign Investment in Real Property Tax Act ("**FIRPTA**"), in three ways for covered (*i.e.*, public to public) inbound F reorganizations:

1. A "toll charge" is ordinarily imposed on inbound reorganizations to the extent of dispositions by foreign persons of shares in the foreign corporation during the 10-year period before the reorganization. Under the Notice, the toll charge does not apply to transactions by foreign persons holding 5% or less of the foreign corporation's publicly traded stock (as provided under Section 897(c)(3)) during the 10-year lookback period.

2. FIRPTA generally subjects the foreign corporation to U.S. income tax with respect to the inbound F reorganization if stock of the resulting domestic corporation becomes owned by foreign persons not subject to U.S. income tax. Under the Notice, a publicly traded foreign corporation would not become subject to U.S. income tax with respect to the inbound F reorganization because stock of the resulting publicly traded domestic corporation is owned by foreign persons holding

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[1] The principal drafter of the comments in this letter was Libin Zhang, with assistance from Jihyun Lee. Helpful comments were received from Kimberly Blanchard, Stephen Land, Stephen M. Massed, Richard Nugent, Michael Schler, Vikram Sharma, Andrew Walker, Arvind Ravichandran, Jason Sacks, and Gordon Warnke.

Unless otherwise noted, references herein to "**Section**" are to sections of the of Internal Revenue Code of 1986, as amended (the "**Code**"). This letter may be cited as New York State Bar Association Tax Section Report No. 1515, "Comments and Recommendations on Notice 2025-45" (October 20, 2025).

5% or less of the domestic corporation's publicly traded stock (as defined under Section 897(c)(3)).

3. FIRPTA generally prevents otherwise applicable nonrecognition provisions from applying when a foreign person exchanges a USRPI for an asset that is not a USRPI. Under the Notice, a publicly traded foreign corporation will nevertheless be treated as having engaged in a nonrecognition transaction when it is it deemed to contribute a USRPI to a domestic corporation in the covered inbound F reorganization, even if the domestic corporation's stock is not a USRPI.

We commend Treasury and the IRS for issuing pragmatic, targeted guidance in the Notice that will facilitate an important class of transactions, encourage domestication of foreign corporations and is aligned with the policy objectives of Section 897. We respectfully submit the comments and recommendations discussed in more detail below that Treasury and the IRS may wish to consider for the Forthcoming Proposed Regulations or other interim guidance to further refine and expand the scope of the Notice in a manner consistent with FIRPTA's underlying policy objectives. In summary, we suggest that Treasury and the IRS consider whether:

- The public trading requirements for both the foreign corporation and the domestic corporation need be prerequisites to benefit from the Notice's guidance. The exceptions for foreign persons holding 5% or less of a corporation's publicly traded stock could apply when a public foreign corporation becomes a private domestic corporation, a private foreign corporation becomes a public domestic corporation, or a private foreign corporation becomes a private domestic corporation, perhaps in anticipation of later going public.

- The Notice's guidance could be broadened to include other foreign investors exempt under FIRPTA, such as qualified foreign pension funds exempt under Section 897(l), foreign governments exempt under Section 892, and foreign tax-exempt organizations under Section 501(a).

- Denying the advantages of the Notice where non-cash distributions occur after the inbound reorganization should be reconsidered. At a minimum, the one-year presumption should be rebuttable, and the scope of "non-cash property" should be narrowed to target FIRPTA-relevant assets.

- The policy rationale for the Notice could apply equally to inbound reorganizations under Section 368 that are not F reorganizations.
- The requirement that the principal class of stock reflect a majority of both vote and value is unduly restrictive. We recommend focusing solely on value, in order to accommodate modern capital structures such as dual-class stock regimes.
- The Notice's provisions could apply if the domesticated entity is a REIT, particularly where the foreign shareholders of the REIT would be exempt from FIRPTA under the 10% ownership threshold in Section 897(k)(1).

I. Introduction

Section 897(a) generally provides that when a nonresident alien or foreign corporation disposes of a United States real property interest as defined in Section 897(c)(1) (a "**USRPI**"), the resulting gain or loss is treated as effectively connected with a U.S. trade or business and subject to U.S. federal income tax under Sections 871(b) or 882. A USRPI includes the stock of a domestic "U.S. real property holding corporation" ("**USRPHC**") as defined in Section 897(c)(2), with a five-year lookback period for USRPHC status under Section 897(c)(1)(A)(ii).

For any class of stock of a USRPHC that is regularly traded on an established securities market,[2] Section 897(c)(3) provides that a USRPI does not include such stock held by any person who holds 5% or less of such class of stock, during the five year period ending on the date of disposition of such stock (or the period that the person held such stock, if shorter) ("**Five Percent or Less Foreign Shareholders**"). The IRS has concluded

[2] Section 897(c)(3) applies to any corporation with any class of stock that is regularly traded on an established securities market, whether in the United States or in a foreign country. By contrast, Section 897(h)(1) provides a FIRPTA exception for certain REIT capital gain dividends, but only for a REIT with any class of stock that is regularly traded on an established securities market located in the United States.

that, in the case of a partnership that owns stock of a publicly traded corporation, the 5% ownership threshold is tested at the partnership level.[3]

Section 897(d)(1) requires, except as otherwise provided in Treasury Regulations and notwithstanding any other Code provision, a foreign corporation to recognize gain when it distributes stock of a USRPHC or other USRPI, including a distribution in liquidation or redemption. The gain is equal to the excess of the fair market value of the USRPI over its adjusted tax basis. Section 897(d)(2)(B) reiterates that gain shall not be recognized under Section 897(d)(1) if Treasury Regulations provide for nonrecognition.

Section 897 was enacted by the Omnibus Budget Reconciliation Act of 1980 (Public Law No. 96-499), in its Title XI Subtitle C, entitled the Foreign Investment in Real Property Tax Act of 1980, or FIRPTA. At the time, foreign persons were generally not subject to U.S. income tax on gain from the disposition of U.S. real property unless the real property and related gain was otherwise treated as effectively connected with a U.S. trade or business under generally applicable principles. For example, "a foreign investor who enters into a single long-term net lease" that did not constitute a U.S. trade business and sold the leased U.S. real property might not be subject (absent FIRPTA) to income tax.[4] The House Ways and Means Committee explained that "it is essential to establish equity of tax treatment in U.S. real property between foreign and domestic investors. The Committee does not intend by the provisions of [FIRPTA] to impose a penalty on foreign investors or to discourage foreign investors from investing in the United States. However, the Committee believes that the United States should not continue to provide an inducement through the tax laws for foreign investment in U.S. real property with affords the foreign investor a number of mechanisms to minimize or eliminate his tax on income from the property while at the same time effectively exempting himself from U.S. tax on the gain realized on disposition of the property."[5]

Reorganizations under Section 368 are generally non-recognition transactions. However, Treasury Regulations section 1.897-5T(c)(4), as modified by Notice 89-85 and Notice 2006-46, generally require a foreign corporation that transfers property to a

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3 AM 2023-003 (May 19, 2023).

4 See H. Rep. 96-1167, at 509 (1980).

5 Id., at 511.

domestic corporation in an exchange under Section 361(a) as part of an A reorganization (including a reorganization under Sections 368(a)(2)(D) or (a)(2)(E)),[6] C reorganization, acquisitive D reorganization, or F reorganization to recognize gain under Section 897(d)(1) on the distribution of USRPHC stock to its shareholders under Section 361(c). A regulatory exception provides that gain is not recognized if the reorganization transaction satisfies three requirements:[7]

1. The foreign corporation pays an amount, commonly called a "**toll charge**," equal to the aggregate U.S. federal income tax (plus underpayment interest under Section 6621) that would have been imposed under Section 897(a) on all persons who disposed of interests in the foreign corporation (or its predecessor under a Section 381 transaction) during the ten years prior to the reorganization, if the foreign corporation had been a domestic corporation at the time of each disposition;[8]

2. The distributee (*i.e.*, the shareholder receiving USRPHC stock in the reorganization under Section 354) would be subject to U.S. taxation on a subsequent disposition of the domestic corporation's stock;[9] and

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6 When Treasury Regulations section 1.897-5T(c)(4) was finalized in 1988, A reorganizations could only occur between domestic entities. In 2003, A reorganizations were expanded to include mergers involving foreign entities. T.D. 9038, T.D. 9242. Notice 2006-46 provides that Treasury Regulations section 1.897-5T(c)(4) applies to an A reorganization.

7 This regulatory exception is distinct from the statutory exception in Section 897(d)(2)(A), that gain is not recognized under Section 897(d)(1) if (i) the distributee would be subject to U.S. income taxation on a subsequent disposition of the distributed property at the time of the distributed property's receipt and (ii) the distributed property's basis in the hands of the distributee is no greater than the distributed property's adjusted basis before the distribution, increased by any gain recognized by the distributing corporation.

8 The foreign corporation is deemed to be a domestic corporation, so that if it is also a USRPHC, tax would have been imposed under Section 897(a) on the dispositions by foreign persons of the corporation's stock. This toll charge applies regardless of whether the disposing shareholder is domestic or foreign, but it takes into account only tax imposed on nonresident aliens and foreign corporations under Section 897(a). The toll charge may also include tax on indirect dispositions by foreign persons of interests in entities that own the foreign corporation's stock.

9 Treasury Regulations section 1.897-5T(d)(1)(i) provides: "Gain is considered subject to U.S. taxation if the gain is included on the income tax return of a U.S. tax paying entity even if there is no U.S. tax liability (for example, because of net operating losses or an investment tax credit). Gain is not considered subject to U.S. taxation if the gain is derived by a tax exempt entity. A real estate investment trust is considered to be a pass-through entity for purposes of the rule of taxability of this

3. The foreign corporation complies with the filing requirements of Treasury Regulations section 1.897-5T(d)(1)(iii).

The lookback period for the toll charge was originally, under Notice 89-85, the entire period after June 18, 1980, the date of enactment of FIRPTA. This lookback period may have been inspired by similar lookback concepts that applied when a foreign corporation was permitted under Treasury Regulations to elect under Section 897(i) to be treated as a domestic corporation, solely for purposes of Sections 897, 1445, and 6039C. The legislative history relating to the Section 897(i) election explained: "ordinarily, the election would be made before the first disposition of stock in a foreign corporation which would be taxable if the election had been made before that first disposition. Where it deemed it to be appropriate, however, the IRS could permit the election to be made after the first disposition, provided satisfactory arrangements were made for the payment of an amount equal to the tax on any dispositions made prior to the election which would have been owing on the dispositions (if the election had been made prior to the first disposition) and an appropriate interest charge for the period since the time at which that tax would have been required to be paid."[10] Notice 2006-46 shortened the lookback period to ten years for both the toll charge and the Section 897(i) election.

Treasury Regulations section 1.897-6T(a)(1) provides that any nonrecognition provision applies to a transfer by a foreign person of a USRPI, on which gain is realized, only to the extent that the transferred USRPI is exchanged for a USRPI which would be subject to U.S. taxation on its disposition immediately following the exchange. Certain filing requirements also apply.

Notice 2025-45 revises the requirements described above in three respects for covered inbound F reorganizations, in which a foreign corporation that has been publicly traded for at least three years domesticates in an F reorganization into a domestic corporation that will be publicly traded after the reorganization for at least one year (*i.e.*, in a "covered" F reorganization):

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paragraph (d)(1)(i). Thus, for example, a tax exempt entity holding an interest in a real estate investment trust is not subject to tax."

10 H. Conf. Rep. 96-1479, at 187 (1980).

1. For purposes of calculating the toll charge during the 10-year lookback period, dispositions by Five Percent or Less Foreign Shareholders of the foreign corporation are excluded.[11] As a result, trading by Five Percent or Less Foreign Shareholders during the ten-year lookback period does not give rise to any toll charge liability for the domesticating foreign corporation. (We refer to this below as the Notice's "**toll charge provision**".)

2. In determining whether the distributee shareholder would be subject to U.S. taxation on a subsequent disposition of the domestic corporation's stock, a distributee shareholder is deemed to satisfy this requirement if it qualifies for the same exemption under Section 897(c)(3) for Five Percent or Less Foreign Shareholders. In other words, no gain is recognized by the foreign corporation under Section 897(d)(1) when USRPHC stock is distributed to Five Percent or Less Foreign Shareholders, even though such shareholders would not be subject to U.S. taxation when later disposing of that stock. (We refer to this below as the Notice's **"tax-free distribution provision**".)

3. When the foreign corporation is deemed to contribute its USRPI and other assets to the domestic corporation in the covered inbound F reorganization, nonrecognition treatment under Section 361(a) applies even if the domestic corporation's stock is not a USRPI. (We refer to this below as the Notice's **"tax-free contribution provision**".)

The Notice indicates that to qualify as a "covered inbound F reorganization" for this purpose, the resulting domestic corporation must not be a regulated investment company ("**RIC**") or real estate investment trust ("**REIT**").

Moreover, the Notice does not apply in cases where, pursuant to a plan or series of related transactions, the domestic corporation makes a non-cash distribution to its shareholders after the F reorganization. Distributions occurring within one year of the reorganization are treated presumptively as occurring pursuant to such a plan, subject to a narrow de minimis exception.

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[11] The foreign corporation is treated as a domestic corporation for purposes of applying the Five Percent or Less Foreign Shareholder rule.

We commend Treasury and the IRS for issuing pragmatic guidance that is also aligned with the policy objectives of Section 897(c)(3). The Notice appropriately reflects the statutory framework and underlying principles of Section 897(c)(3), which is intended to shield portfolio-level foreign investment in publicly traded corporations from U.S. federal income taxation under Section 897(a). We also believe the Notice reflects a policy judgment that it is generally beneficial to the United States and the federal fisc to encourage domestication of foreign corporations, which is also consistent with the approach of U.S. tax legislation beginning with the Tax Cuts and Jobs Act of 2017 and subsequent regulatory guidance such as Notice 2024-16 (inbound nonrecognition transactions and Section 961(c)) and Treasury Regulations section 1.59A-3(b)(3)(viii) (inbound nonrecognition transactions in connection with the BEAT tax in Section 59A).[12] In the interest of furthering consistent and equitable application of these rules, we respectfully offer the following comments and recommendations aimed at clarifying and expanding the scope of the Notice in future interim guidance or the Forthcoming Proposed Regulations.[13]

We note that, in order to provide timely comments, our comments and recommendations in this Report focus on the Notice's specific provisions. If Treasury and IRS would find it helpful, we would be glad to provide in a subsequent report a more comprehensive analysis of the FIRPTA implications of a wider range of inbound reorganization transactions, as well as analysis of issues other than FIRPTA under Section 367, Section 1248, and other provisions of the Code. Such a report could examine the original intent of FIRPTA, how FIRPTA's impact may have changed after the repeal of the *General Utilities* doctrine and the enactment of the Section 884 branch profits tax in the Tax Reform Act of 1986 (Public Law No. 99-514), and evaluate the continuing relevance of certain FIRPTA rules that originally were designed to address the domestication of USRPI-owning Netherland Antilles corporations, after the repeal of the income tax treaty between the United States and the Netherland Antilles in 1987.

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12 See also NYSBA Report No. 1463, *An Analysis of Potential Design Changes to the Section 1.367-3(b) Regulations in Light of the Tax Cuts and Jobs Act* (June 28, 2022).

13 This report does not address the Notice's proposed changes to Treasury Regulations section 1.368-2(m)(1)(ii), that the F reorganization's identity of stock ownership requirement is not affected by a disposition of stock that is not included in the plan of reorganization.

II. Detailed Comments

1. Public Trading as a Prerequisite

While the Notice is currently limited to inbound F reorganizations involving foreign and domestic corporations that are publicly traded (for the required periods set forth in the Notice), we believe that its provisions reflect broader FIRPTA policy considerations that may warrant expanding of the Notice's general approach beyond the narrow "public-to-public" fact pattern.

The Notice's toll charge provision (*i.e.*, excluding trading activity by Five Percent or Less Foreign Shareholders from the toll charge calculation) is consistent with the general policy underlying Section 897(c)(3), which is to exempt portfolio stock investments by foreign persons from FIRPTA taxation.[14] However, the Notice's toll charge provision may also have been motivated by the practical reality that is difficult, or even impossible, for a publicly traded foreign corporation to identify and quantify all direct and indirect dispositions by its foreign shareholders over the preceding ten years. These challenges are particularly acute when shares are held in "street name" or through pass-through entities, making it nearly impossible to track indirect ownership changes. Similar FIRPTA concerns arise in other contexts have occasioned similar administrative relief. For example, all public trading of a corporation's shares is exempt from FIRPTA withholding under Section 1445, even by shareholders who own more than 5% of the corporation's stock,[15] presumably due to these administrative difficulties. The Notice's toll charge provision could also be viewed as a clarification of the toll charge rule consistent with its purpose, to take into account only those dispositions during the ten-year lookback period that would otherwise have been subject to FIRPTA taxation had the foreign corporation been domestic. From that perspective, the toll charge provision may not have been intended to take into

14 See H. Rep. 96-1167, at 512 ("An exception is made for portfolio stock investments in publicly-traded corporations.")

15 Treasury Regulations section 1.1445-2(c)(2). FIRPTA withholding does apply if a single transferor (or related transferors) transfers more than 5% of the corporation's stock in a single transaction or related transactions.

account dispositions by shareholders who would have been entitled to the Section 897(c)(3) exemption for Five Percent or Less Shareholders.

We believe similar policy and administrative considerations apply to a publicly traded foreign corporation that becomes a private domestic corporation through a domestication transaction (*i.e.*, a public to private domestication) or even a private-to-private domestication transaction.

In the case of a public to private domestication, the general policy underlying Section 897(c)(3), to exempt portfolio stock investments by foreign persons from FIRPTA taxation and the administrative challenges of tracking shareholder dispositions to determine the toll charge, arguably apply whether the resulting domestic corporation is public or private. In the public to private domestication context, we would note that the Notice's tax-free distribution provision could potentially be available (at least for domestications structured as F reorganizations) with respect to the Five Percent or Less Shareholders of the resulting private domestic corporation, who would be exempt from FIRPTA under Section 897(c)(3) with respect to a disposition of the domestic corporation's stock immediately after the domestication, because under Treasury Regulations section 1.897-1(c)(2)(iii), a corporation is considered publicly traded if its shares are publicly traded at any time during the calendar year.

In private-to-public F reorganizations (*i.e.*, a private foreign corporation, or one that recently went public, becomes a publicly traded domestic corporation), distinct FIRPTA concerns could arise if the Notice's tax-free distribution provision is not available. The resulting public domestic corporation's Five Percent or Less Foreign Shareholders would not be subject to FIRPTA taxation on future dispositions of the domestic corporation's stock under Section 897(c)(3). Under the Notice, the domesticating corporation must recognize gain under Section 897(d)(1) with respect to the distribution of USRPHC stock to such shareholders, because the predecessor foreign corporation was not publicly traded as required by the Notice.

Yet, if a private domestic corporation becomes a public domestic corporation, its Five Percent or Less Foreign Shareholders are not subject to FIRPTA taxation in the public offering, and they may subsequently sell their stock and never be subject to FIRPTA taxation. There does not appear to be any reason to reach different results as to the tax-free distribution requirement when a private foreign corporation becomes a public domestic corporation.

In private-to-public and private-to-private F reorganizations (*i.e.,* a private foreign corporation becomes a private domestic corporation), FIRPTA concerns could arise in the absence of an ability to rely on the Notice's toll charge provision. Dispositions by foreign persons of the private foreign corporation's stock during the ten year lookback period would typically be subject to the toll charge, because the dispositions would have been subject to FIRPTA taxation if the foreign corporation had been a (private) domestic corporation at that time, due to the unavailability of the Section 897(c)(3) exemption for Five Percent or Less Foreign Shareholders of public corporations (subject to our discussion in the next section about other FIRPTA exemptions).[16] However, in some cases it is possible that the private foreign corporation may have been a public corporation at some point during the 10-year lookback period. Any public trading during that period implicates the same policy and administrative concerns that led to the creation of the Notice's toll charge provision for public-to-public F reorganizations.

We believe that the purpose of FIRPTA, as evidenced by its 1980 legislative history, was to level the playing field between domestic and foreign entities and investors, but not to further penalize foreign persons when they invest in the United States. In context, with respect to the toll charge, generally that purpose is achieved if the toll charge takes into account only dispositions that would under equivalent circumstances have been taxable under FIRPTA had the foreign corporation been domestic. Similarly, as to the tax-free distribution requirement, that purpose generally is achieved if the non-U.S. distributees in an inbound domestication reorganization transaction are treated for FIRPTA purposes comparably to non-U.S. distributees in a purely domestic reorganization. That overall result may be reached in a wider range of transactions than just the narrow public-to-public F reorganization context covered by the Notice.

A more flexible approach would reflect the practical reality that some private foreign corporations may choose first to domesticate as private domestic corporations and

[16] The Notice's toll charge provision may also be relevant to the private-to-public F reorganization, for dispositions of the foreign corporation's stock prior to the reorganization but in the same taxable year as the reorganization. Under Treasury Regulations section 1.897-1(c)(2)(iii), a corporation is considered publicly traded if its shares are publicly traded at any time during the calendar year.

later pursue an initial public offering. Conditioning the Notice's provisions on a one-year public trading history after the reorganization may create timing distortions and misaligned incentives, such as forcing a corporation to go public prematurely if it wishes to avoid FIRPTA taxation on its domestication. Relaxation of the strict public-to-public requirement would provide a more pragmatic and administrable framework and introduce fewer tax-related frictions to business transactions, while remaining consistent with the purpose of FIRPTA.

We ask that Treasury and the IRS consider, in future interim guidance or the Forthcoming Proposed Regulations, expanding the availability of the Notice's provisions beyond the narrow "public-to-public" framework. Equivalent tax results arguably should be available whenever the underlying broader policy objectives, such as FIRPTA exemptions for Five Percent or Less Foreign Shareholders, are implicated in comparable transactions. Some reorganizations may benefit from the Notice's toll charge provisions while others may benefit from the Notice's tax-free distribution provision, but application of the two provisions could be decoupled and applied separately to transactions to reach appropriate results. Most reorganizations would also benefit from the Notice's tax-free contribution provision if applicable. Providing consistent treatment across inbound F reorganizations with varying fact patterns would further the overarching tax policy goals of encouraging the domestication of foreign corporations while minimizing their administrative burdens.

2. Extend Notice to Other FIRPTA-Exempt Foreign Investors

In addition to the FIRPTA exemption provided for portfolio stock investments under Section 897(c)(3), several other categories of foreign investors are not subject to FIRPTA taxation under the Code. These include foreign tax-exempt organizations described in Section 501(a), foreign governments and their controlled organizations eligible for the exemption under Section 892, certain collective investment vehicles under Section 897(k)(2), and qualified foreign pension funds under Section 897(l).

The Notice's provisions do not directly address these other FIRPTA exemptions. The toll charge, in light of its purpose, ought not apply to these FIRPTA-exempt shareholders because there would not have been any FIRPTA taxation on their dispositions of the foreign corporation's stock during the ten-year lookback period if the foreign corporation had been a domestic corporation. However, a domesticating foreign corporation arguably may have to recognize gain under Section 897(d)(1) in connection with inbound F reorganizations involving these other types of FIRPTA-exempt distributees. For instance, if a qualified foreign pension fund owns a 20% interest in a foreign corporation, and the foreign corporation undergoes an inbound F reorganization and becomes a domestic corporation (and USRPHC) owned 20% by the same qualified foreign pension fund, the foreign corporation may be required to recognize 20% of the gain in the domestic corporation's stock when the stock is deemed distributed to the qualified foreign pension fund.

We note that if the qualified foreign pension fund were to sell its stock of the foreign corporation before the inbound F reorganization to a buyer that is a U.S. person, and then the qualified foreign fund acquires stock in the resulting domestic corporation after the F reorganization, no additional U.S. income taxation would apply (assuming the transactions are respected as separate). The qualified foreign pension fund would not have been subject to U.S. income tax on the sale even if the foreign corporation had already been domestic, so the disposition by the qualified foreign pension fund would not cause the foreign corporation to be subject to the toll charge. Additionally, the foreign corporation would not recognize gain under Section 897(d)(1) when distributing the domestic corporation's stock to the new U.S. shareholder.

To facilitate consistent treatment of similar transactions and to avoid penalizing inbound F reorganizations involving FIRPTA-exempt entities, we suggest that Treasury and the IRS consider in future interim guidance or the Forthcoming Proposed Regulations expanding the Notice's provisions to expressly include these FIRPTA-exempt foreign shareholders, particularly the Notice's tax-free distribution provision.

3. Anti-Distribution Rule Should Be Reconsidered or Narrowed

The Notice's provisions are unavailable for transactions that would otherwise qualify as covered inbound F reorganizations if, pursuant to a plan (or series of related transactions), the resulting domestic corporation transfers any property (other than cash) to its shareholders with respect to their stock of the resulting domestic corporation. Furthermore, any such distribution occurring within one year following the reorganization is presumed to be made pursuant to such a plan, subject to a limited de minimis exception for aggregate distributions of less than 1% of the domestic corporation's assets as of the time of the F reorganization.

This anti-distribution rule represents a departure from the general treatment of F reorganizations under the Code and Treasury Regulations. Specifically, Treasury Regulations section 1.368-2(m)(3)(iii) provides that post-reorganization distributions from the resulting corporation are to be treated as separate, unrelated transactions, even when formally connected to the reorganization itself. The policy rationale for deviating from this conventional framework in the context of the Notice is not obvious.

A taxable distribution of property does not appear to present meaningful opportunities for abuse, as the corporation could have alternatively sold the asset to a third party or the shareholder for cash in a fully taxable transaction. If the Notice's primary concern was with Section 355 tax-free spinoffs or Section 332 liquidations involving the domesticated public corporation and a corporate parent, we believe such concerns could be better addressed through a more narrowly tailored anti-avoidance rule specific to those types of non-taxable transactions that present the potential for abuse. For comparison, in the context of tax-free outbound corporate liquidations under Section 332, Treasury Regulations section 1.367(e)-2(b)(2)(iii)(C)(1) has an anti-abuse rule that applies only when there is "a principal purpose" of "the avoidance of U.S. tax" that would have been imposed on a taxable liquidation to an unrelated party.

The Notice's anti-distribution rule applies to all non-cash property, including assets that are not USRPIs, such as debt instruments or stock of non-USRPHC corporations. It is unclear how these types of assets implicate the FIRPTA anti-avoidance policy concerns that may have motivated the rule's introduction. These assets usually could have been distributed by the foreign corporation before the F reorganization without any U.S. federal income tax consequences if the distribution is either a taxable dividend or a return of basis under Section 301(c)(2). Accordingly, we believe that the scope of the anti-distribution rule, if it is retained, should more narrowly target only those distributions that raise FIRPTA avoidance concerns. In any event, greater clarity as to the purpose of, and concerns motivating the anti-distribution rule would be helpful.

It is not clear from the Notice whether the one-year presumption is rebuttable, although we believe that it should be rebuttable by a corporation engaging in legitimate business transactions without any principal purpose of tax avoidance, or by a corporation engaging in transactions that were not planned or reasonably foreseeable at the time of the completion of the F reorganization. By comparison, the proposed Treasury Regulations for the 1% stock buyback tax in Section 4501 has a two-year presumption in the context of certain foreign transactions that is a rebuttable presumption, if facts and circumstances clearly establish that there was not a principal purpose of avoiding the buyback tax.[17]

If the one-year presumption is indeed rebuttable, the ability to rebut the presumption would be more administrable both for taxpayers and the IRS if the underlying policy concerns motivating the anti-distribution rule were more clearly articulated. It would be helpful to understand the various factors that may rebut or support the presumption, similar to those listed in other tax contexts such as in Treasury Regulations sections 1.355-7(b) and 1.707-3(b)(2).

4. Extend the Notice to Other Types of Reorganizations

While the general FIRPTA taxation rules under Treasury Regulations sections 1.897-5T(c)(4) and 1.897-6T(a) apply broadly to a variety of inbound reorganizations, the Notice's provisions are currently limited to inbound F reorganizations. This leaves unaddressed a broader set of reorganization transactions that may raise the same underlying concerns as to the toll charge and the foreign corporation's recognition of gain under FIRPTA in the reorganization. We note that other guidance that favor inbound transactions, such as Notice 2024-16 (for Section 961(c)) and Treasury Regulations section 1.59A-3(b)(3)(viii) (for the BEAT), were not limited to inbound F reorganizations.

We believe Treasury and the IRS should consider whether the Notice's provisions should be more generally applicable to other types of reorganizations. Otherwise, the result may be different treatment of similar domestication transactions.

For example, a public foreign corporation might first domesticate and become a public domestic corporation. Subsequently a domestic corporate target might merge with and into the domesticated corporation, with the domesticated corporation surviving. The domestication transaction would qualify under the Notice, and the subsequent merger would not affect that qualification because the domesticated U.S. corporation would

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[17] Proposed Treasury Regulations section 58.4501-7(e)(2).

continue in existence. However, the Notice might not apply if the direction of the subsequent merger were reversed, and a domestic acquiror acquired the domesticated corporation in the merger; the domesticated corporation would fail to be publicly traded for one year after the F reorganization, as required by the Notice, and furthermore the domesticated corporation would potentially have violated the anti-distribution rule by its deemed distribution of acquiror stock in the subsequent merger. The Notice's provisions also might not apply if the domestication and the merger (in either direction) were considered in combination to be a single non-F reorganization.

Given the prevalence of inbound non-F reorganizations, which may raise similar policy and administrative considerations as inbound F reorganizations, we suggest that Treasury consider in future interim guidance or the Forthcoming Proposed Regulations expanding the scope of the Notice to cover all inbound reorganizations subject to FIRPTA under Treasury Regulations sections 1.897-5T(c)(4) and 1.897-6T(a)(1). A broader approach would promote consistent treatment across reorganization types and reduce opportunities for structuring distortions that exploit technical distinctions between transaction forms. We recognize that expanding the scope of the Notice to other categories of reorganization may raise additional issues and concerns that may need to be considered more fully and we would be glad to address these in more detail in a future report.

5. Modify the "Principal Class of Stock" Definition

The Notice imposes a "publicly traded" requirement as a condition for eligibility. Specifically, the foreign corporation must have been publicly traded for the three-year period preceding the reorganization, and the resulting domestic corporation must remain publicly traded for one year thereafter.

For purposes of satisfying this requirement, a corporation is treated as "publicly traded" only if its "principal class of stock" was regularly traded on an established securities market throughout the applicable period, three years for the foreign corporation prior to the F reorganization and one year for the domestic corporation following the transaction. The term "principal class of stock" refers to the corporation's common stock, but only if that class represents a majority of both the aggregate voting power and value of the corporation.

If the Notice's provisions continue to be limited to public corporations, we believe the requirement that the principal class reflect a majority of both vote and value may be unduly restrictive and may undermine the intended policy objectives. If the goal is to facilitate the domestication of publicly traded foreign corporations and expand the United States tax base, it is not clear why voting power and "control" should be a relevant metric. Some publicly traded foreign companies maintain dual-class stock structures in which a minority class of high-vote shares is not publicly traded, while a low-vote, high-value class is regularly traded and represents the bulk of the economic interest in the corporation. We do not see a reason why the domestication of such foreign corporations should be discouraged through FIRPTA taxation.

Accordingly, whether or not our other suggestions in the Report are adopted, we recommend that Treasury consider revising the definition of "principal class of stock" to focus solely on the aggregate value of the corporation's shares that are traded, rather than also their vote.

6. Allow Domesticating Foreign Subsidiaries to Join Parent's F Reorganization

If the Notice's provisions continue to be available only to publicly traded foreign corporations, we believe that the wholly owned or controlled non-public foreign subsidiaries of a qualifying foreign parent corporation should be permitted to domesticate as part of the same inbound F reorganization. For example, a publicly traded foreign corporation might own one or more non-public foreign subsidiaries that hold USRPIs. In a typical inbound reorganization, the parent and its subsidiaries may seek to domesticate together under a single F reorganization plan. However, if the Notice applies only to the publicly traded parent, the non-public subsidiaries would be forced either to liquidate into the parent prior to the reorganization, triggering potential taxes and creating other legal complexities, or to remain owned within a less efficient "sandwich" structure, where a domestic corporation is interposed between two foreign entities, post-domestication, due to their ineligibility for the Notice's tax-free distribution provision and tax-free contribution provision. Such an outcome would impose unnecessary administrative burdens and structural inefficiencies without advancing a clear FIRPTA policy objective.

Allowing such subsidiaries to participate in the same domestication transaction would be consistent with the Notice's goals and would provide taxpayers with a more practical and administrable path to full U.S. redomestication.

7. Extend Notice to REITs Where Consistent with FIRPTA Policy

The Notice's provisions are unavailable if the resulting domestic corporation is a REIT. We suggest that Treasury reconsider whether this exclusion for REITs is warranted. Excluding REITs from the scope of the Notice arguably undercuts the Congressional goal of shielding portfolio foreign investment in publicly traded domestic corporations from gain recognition, which is of heightened concern in the case of publicly traded REITs. Section 897(k)(1)(A) generally exempts foreign shareholders who hold 10% or less of a publicly traded REIT, which is a greater threshold than the 5% ownership limit for publicly traded non-REIT corporations. If a foreign corporation domesticates and becomes a publicly traded REIT, and a foreign shareholder holds 9% of its stock, the foreign corporation arguably should not be required to recognize gain under Section 897(d)(1) merely because of the REIT status, when those foreign shareholders would not be subject to U.S. federal income tax on a subsequent disposition of REIT shares.

By comparison, if a privately held (domestic) REIT becomes a publicly traded REIT, or if a publicly traded non-REIT domestic corporation becomes a publicly traded REIT, a foreign shareholder who holds 9% of its stock would not be subject to FIRPTA taxation on dispositions after the transition.

We recognize that, insofar as a REIT generally does not pay substantial tax at the corporate level, such a domestication transaction on its face provides less obvious benefits to the fisc from expanding the U.S. tax base. However, a domesticated REIT would be subject to the five-year built-in gains tax regime under Section 1374 and Treasury Regulations section 1.337(d)-7, in the same manner as a domestic non-REIT corporation that elects REIT status. The five-year built-in gains tax period, which was permanently reduced from a longer ten-year built-in gains tax period by the Protecting Americans from Tax Hikes (PATH) Act of 2015 (Public Law No. 114-113 Division Q), reflects Congress's policy-based judgment that corporate assets should be permitted (in an otherwise tax-free reorganization or upon election) to transfer to REIT ownership on a tax free basis, as long as the assets remain exposed to the corporate built-in gains tax for five years, and not to impose additional burdens on moving assets into REIT ownership.

If a foreign corporation cannot domesticate tax-free to become a REIT directly, we note that the same result can also be achieved if the foreign corporation first domesticates as non-REIT domestic corporation, and later elects REIT status after the reorganization. The REIT election may occur after the one-year public trading period as provided in the Notice, or even potentially during that one-year period, as it is not clear whether the public trading requirement is met by a publicly traded REIT. As noted above, as a policy matter, Congress has chosen to police preservation of the corporate tax base in the REIT context through the five-year built-in-gains tax rules. We see no policy reason why the "direct" REIT domestication is more objectionable than what can be achieved indirectly. Accordingly, we suggest that Treasury consider in future interim guidance or the Forthcoming Proposed Regulations extending the benefits of the Notice to foreign corporations that domesticate as REITs where the relevant conditions are met.

Future interim guidance or the Forthcoming Proposed Regulations might also consider expanding the Notice provisions to cover domestication reorganizations involving domestically controlled REITs. FIRPTA taxation does not apply under Section 897(h)(2) to a foreign person's dispositions of the stock or securities of a "domestically controlled" REIT, which is a REIT that has been less than 50% owned (directly or indirectly) by certain foreign persons,[18] during the lesser of (i) the five year period ending on the date of disposition of the REIT's stock or securities or (ii) the period during which the REIT was in existence. We believe that the Notice's provisions could reasonably apply when a foreign corporation undergoes a domestication and becomes a domestically controlled REIT, whether publicly traded or private. By comparison, if a non-REIT domestic corporation converts in a tax-free manner into a domestically controlled REIT, the REIT's foreign shareholders would not be subject to FIRPTA taxation on subsequent sales of the REIT's shares. If the REIT's domestic control status is not measured merely during the period of REIT status and were to require a five-year lookback to include the foreign and domestic

[18] Treasury Regulations section 1.897-1(c)(3) provides various rules in measuring direct and indirect foreign ownership for purposes of domestically controlled REIT status.

ownership of its non-REIT predecessor corporation, the same lookback rule would apply to both a foreign predecessor and a domestic predecessor.

Respectfully submitted,

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