



Protecting Americans from Tax Hikes Act of 2015 and related tax legislation

January 2016

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Overview

President Obama on December 18, 2015, signed [Pub. Law 114-113](#), the *Consolidated Appropriations Act, 2016*, which includes tax-related provisions in Division P (hereinafter referred to as the “Omnibus”) and Division Q (the “Protecting Americans from Tax Hikes Act of 2015”—referred to as the “PATH Act”). The new law contains significant policy changes, including, for example:

- It makes permanent some tax incentives that previously had expiration dates, and extends other temporary incentives for varying time periods. Some of the provisions that were extended or made permanent also were modified.
- It temporarily suspends the medical device excise tax and postpones the implementation of the so-called “Cadillac tax” on certain health plans
- It includes significant tax law changes relating to real estate investment trusts (“REITs”), the Foreign Investment in Real Property Act (“FIRPTA”) rules, loss deferral under section 267, the section 199 rules as applied to independent oil refiners, tax-exempt organizations, certain procedural matters, and other issues.
- It includes a temporary extension of the ban on states and localities taxing internet access.

This report summarizes and includes observations about key new tax law provisions. In this report:

\$ = U.S. dollar

% = percent

Legislative Background

Both the PATH Act and the Omnibus moved forward, from being introduced to being enacted, very quickly. Both were introduced early in the week of December 14 and became law on December 18, 2015.

Prior to House passage, the PATH Act and the Omnibus were attached as amendments to H.R. 2029, the *Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2016*. The House approved H.R. 2029, which was renamed the

Consolidated Appropriations Act, 2016. The Senate passed H.R. 2029 without amendment on December 18, and sent it to the president for his signature. The president signed the legislation later that same day.

Revenue estimates

The Joint Committee on Taxation (JCT) estimated that the tax provisions in the PATH Act and the Omnibus will lose approximately \$680 billion in the aggregate over the 10-year scoring window. The revenue estimate does not appear to take into account macroeconomic effects, and the cost of extending tax incentives does not appear to have been offset. However, the new law includes revenue raisers to offset the costs of other measures in the PATH Act.

Read the JCT revenue estimates:

- [JCX-143-15](#) (PATH Act)
- [JCX-142-15](#) (Omnibus)

Other documents

For the statutory language of the new law, read [Pub. Law 114-113](#). For the PATH Act, read a [section-by-section summary](#) [PDF 551 KB] and a 268-page [technical explanation](#) [PDF 953 KB] prepared by the JCT.

Extensions of Expired (or Expiring) Provisions

The new law addresses over 50 temporary provisions in the Internal Revenue Code that either had expired or were scheduled to expire in the near future. As explained in more detail below, the legislation:

- Makes permanent some provisions, including the research credit and the exception under subpart F for active financing income
- Extends certain other expired provisions through 2019
- Extends other expired provisions through 2016
- Extends and phases out certain energy provisions over a defined schedule

Extensions of provisions that already had expired are generally retroactive to the beginning of 2015. The new law also makes modifications to some of the extended provisions.

Permanent extensions (with some modifications)

The new law makes permanent over 20 tax provisions that had expired or that were scheduled to expire. The provisions made permanent are:

- **Research credits.** The credits are reinstated for qualified research expenses (QRE) paid or incurred on or after January 1, 2015. The previous methods of computing the research credit are not changed: i.e., a “traditional” regular credit at a nominal rate of 20%, or the Alternative Simplified Credit (ASC) at a nominal rate of 14%.

Effective for research credits determined for tax years beginning after 2015, certain businesses with average annual gross receipts of \$50 million or less are allowed to offset their alternative minimum tax (AMT) liability with the credits. Also, for tax years beginning after 2015, certain start-up companies with gross receipts for the year of less than \$5 million may elect to apply up to \$250,000 of their research credit against their payroll tax liability, instead of their income tax liability.

KPMG observation: There have been proposals in Congress to raise the rate of the ASC to 20% and to eliminate the traditional credit. Those changes are not included in the new law. Efforts to make those changes are expected to continue.

- **Exception under subpart F for active financing and insurance income**
- **\$500,000 limitation on the amount of depreciable property that may be expensed under section 179** in the year placed in service, which has generally been in effect since 2010. This limitation is reduced when the taxpayer’s total investment in eligible property for the year exceeds \$2 million. This is effective for property placed in service on or after January 1, 2015; the dollar amounts are indexed for inflation in tax years beginning after 2015. Rules allowing a section 179 election for computer software and for up to \$250,000 of qualified leasehold improvement property, qualified retail improvements, and qualified restaurant property are also made permanent, and the \$250,000 limitation is removed for tax years beginning after 2015. A long-standing exclusion for air conditioning and heating units is repealed for tax years beginning after 2015.

- Reduction of **section 1374 built-in gains (BIG) tax recognition period** to five years (with a special rule for distributions to shareholders pursuant to section 593(e))

KPMG observation: The permanent reduction in the BIG tax recognition period provides greater planning certainty to S corporations and REITs with C corporation history that may be considering significant dispositions.

- **Basis adjustment to stock of S corporations** making charitable contributions of property
- **100% exclusion of gain on qualified small business stock** (and elimination of the AMT preference item for such excluded gain)
- **15-year depreciation recovery period for portions of a building that are qualified leasehold improvements, qualified retail improvements, or qualified restaurant property** for property placed in service on or after January 1, 2015. The legislation separately extends bonus depreciation through 2019, with a newly defined category of qualified property called “qualified improvement property”; some of this 15-year property may meet the definition of qualified improvement property and is eligible for bonus depreciation while it is in effect. However, qualified improvement property is not necessarily eligible for 15-year depreciation.
- **Definition of regulated investment company (RIC) as qualified investment entity** under FIRPTA
- Treatment of certain **dividends by RICs** to foreign investors (read the discussion later in this report, under the REIT and RIC section).
- Minimum 9% **low-income housing** credit rate for investments in new buildings that are not federally subsidized. A rule that excludes military housing allowances for purposes of determining whether certain tenants are low-income also was made permanent.
- **Tax-free distributions from individual retirement accounts (IRAs)** for charitable purposes. This provision applies to distributions after the IRA owner attains age 70½ years and is limited to \$100,000 per taxpayer per tax year.

KPMG observation: Making this provision permanent allows individuals over 70½ years of age the ability to plan charitable giving while calculating their annual required minimum distribution.

- Enhanced charitable deduction for **contributions of food inventory** (modified to increase the limit on deductible contributions of food inventory and to provide special rules for valuing food inventory)
- Special rules for contributions of capital gain real property made for **conservation** purposes (modified to permit Alaska Native Corporations to deduct certain donations of conservation easements up to 100% of taxable income)
- Modification of tax treatment of certain **payments to controlling exempt organizations** (i.e., certain payments of interest, annuity, royalty, or rent from a controlled organization pursuant to a binding written contract in effect on August 17, 2006, are excluded from unrelated business taxable income (UBTI))

KPMG observation: This permanent exclusion from UBTI provides certainty to tax-exempt organizations with long-term contracts covering these specified payments. Fiscal year taxpayers that filed returns for tax years ending in 2015 reporting such payments as UBTI may consider amending such returns to exclude such payments from UBTI.

- Modification of tax treatment of certain **payments to controlling exempt organizations**
- Parity for exclusion from income for **employer-provided mass transit and parking** benefits. For 2015, the excludible amount of \$130 is increased to \$250 per month in combined transit pass and vanpool benefits. For 2016, the monthly exclusion limit for both qualified parking and employer-provided mass transit is \$255.

KPMG observation: In subsequent years, the same monthly exclusion amount will apply to both employer-provided mass transit and parking benefits and the exact amount will be announced annually by the IRS.

- Deduction for **state and local general sales taxes**
- The general business credit allowed to certain small employers (generally, with less than 50 employees) that provide differential wage payments to employees while they are on **active duty in the uniformed services**. The credit is made available to all employers in tax years beginning after 2015.

- Deduction for certain **expenses of elementary and secondary school teachers** (modified to index the \$250 cap on expenses for inflation and to include expenses for certain professional development courses for tax years beginning after December 31, 2015)
- Enhanced **child credit**
- **American opportunity** tax credit
- Enhanced **earned income tax credit**

Five-year extensions (with some modifications)

The new law generally extends four expired provisions for five years—retroactively from the beginning of 2015 through 2019.

First, it extends **look-through treatment of payments between related controlled foreign corporations (CFCs)** under foreign personal holding company rules.

Second, it extends authority for the Treasury Department to allocate **new markets tax credits** to qualified community development entities (which then offer the credits to investors in exchange for qualified equity investments in the entity). Amounts of \$3.5 billion of credits are authorized for each year from 2015 through 2019, the same amount that had been authorized for each of 2010 through 2014.

Third, the new law extends the **work opportunity credit**, effective for the wages an employer pays in the first year to targeted employees who begin work after 2014 and before 2020. Beginning in 2016, there is a new category of targeted employees—individuals who have been unemployed at the time they begin work for at least 27 consecutive weeks and who have received federal or state unemployment compensation for some portion of that period.

Fourth, it extends the **50% “bonus depreciation” deduction**. However, the deduction percentage is reduced to 40% for property placed in service in 2018, and to 30% for 2019. Rules that allow certain extended production period property and certain corporate aircraft an extra year to be placed in service will continue, so the 30% rate will apply to that property through 2020.

Beginning in 2016, the allowance of the **bonus for qualified leasehold improvement (QLI) property** is modified. The modified category is called “qualified improvement property.” Under the new rules, improvements to an interior portion of a commercial building will be

bonus-eligible whether or not the improvement is to a leasehold in the building, and improvements will qualify even if they are made before the building has been in service for three years; also, improvements to common areas of a building can qualify. Another provision in the legislation makes permanent the 15-year depreciation treatment of QLI property; not all qualified improvement property is eligible for a 15-year recovery period.

The election allowing a corporation to forgo bonus depreciation (and to use straight-line depreciation) on its qualified property, and instead to accelerate the ability to use additional alternative minimum tax (AMT) credits, also continues through 2019 (through 2020, if a taxpayer has qualified long-production period property in that year). The additional credits continue to be refundable. For qualified property placed in service in 2015, the amount of accelerated AMT credits are, as in the past, based in part on the amount of AMT credits generated before 2006 that are available in the first tax year ending after March 31, 2008 (also limited by reference to the amount of foregone bonus depreciation that will be foregone, and in all cases limited to \$30 million). For tax years ending after 2015, the annual limitation is 50% of the AMT credits generated in tax years ending before January 1, 2016, but not more than the total amount of such pre-2016 credit that has not been previously used as a credit (and also limited by reference to the amount of foregone bonus depreciation). A corporation that owns more than 50% of the capital and profits interests of a partnership can apply the provision to its distributive share of the partnership's qualified property.

Also, a taxpayer can elect to apply the bonus depreciation rules to the basis of certain plants bearing fruits or nuts that are planted or grafted in the United States in the 2016 through 2019 period.

Long-term extensions of energy credits with phase-outs

The new legislation includes long-term extensions to wind and solar tax credits along with a phase-out schedule for each.

With respect to wind facilities, the "begin construction deadline" for the production tax credit is extended five years from the current deadline of December 31, 2014, to December 31, 2019. In addition, the "begin construction deadline" with respect to the election to claim the investment tax credit in lieu of the production tax credit also is extended to December 31, 2019.

The amount of the wind credit is determined by the year in which construction begins.

Period in which construction begins	Reduction to credit
Before January 1, 2017	No reduction
After December 31, 2016, and before January 1, 2018	20% reduction
After December 31, 2017, and before January 1, 2019	40% reduction
After December 31, 2018, and before January 1, 2020	60% reduction

The effective date for these amendments relating to wind facilities under sections 45 and 48 is January 1, 2015.

With respect to the 30% investment tax credit for solar energy facilities under section 48, such facilities are required only to have begun construction by a certain deadline—rather than to be placed in service (i.e., a “begin construction deadline” approach).

The deadline for solar energy property is extended five years from the current deadline of December 31, 2016, to property the construction of which begins on or before December 31, 2021.

Similar to the amendments for wind facilities, the investment tax credit for solar is reduced the later construction begins:

Period in which construction begins	Credit rate
Before January 1, 2020	30%
After December 31, 2019, and before January 1, 2021	26%
After December 31, 2020, and before January 1, 2022	22%

In addition—unique to the amendments for solar energy property—for any project for which the construction begins before January 1, 2022, but is not placed in service before January 1, 2024, the credit rate is 10%.

The effective date for these amendments relating to solar energy property under section 48 is the date of enactment of the legislation.

KPMG observation: The “begin construction approach” for solar energy property appears to “level the playing field” between wind and solar with respect to the tax credit eligibility deadlines. However, solar energy property is still not eligible for the production tax credit.

Two-year extensions

The new law extends for two years—generally from January 1, 2015, through December 31, 2016—the following provisions that expired at the end of 2014:

- Exclusion of income from **discharge of qualified principal residence indebtedness** (with a modification for discharges pursuant to a binding written agreement entered into before January 1, 2017)
- Treatment of **premiums paid or accrued for qualified mortgage insurance** in connection with acquisition indebtedness as qualified residence interest for purposes of interest deduction rules
- Shorter **depreciation recovery periods** for tangible property used predominantly in the active conduct of a trade or business (other than gaming) **within an Indian reservation**. For tax years beginning after 2015, a taxpayer is permitted to elect out of the special recovery period for any class of property it places in service during the year.
- The general business credit for certain **wages paid to a member of an Indian tribe** (or the member’s spouse) for services within an Indian reservation, while the employee lives on or near the reservation
- **Nonbusiness energy property credit** (with modifications relating to energy efficiency for property placed in service after December 31, 2015)
- Credit for **alternative fuel vehicle refueling** property
- **Second generation biofuel** producer credit
- Incentives for **biodiesel and renewable diesel**
- Production credit for **Indian coal facilities** (with modifications removing the placed-in-service date limit, removing the nine-year limit, and allowing the credit to be claimed against AMT beginning in 2016)

- **Production tax credit** for certain renewable sources of electricity (for facilities for which construction has commenced by the end of 2016)
- Credit for construction of new **energy efficient homes**
- **Cellulosic biofuels bonus depreciation**
- **Energy efficient commercial buildings** deduction
- Special rule for sales or dispositions relating to FERC or state electric restructuring policy for **qualified electric utilities**
- Credits relating to **alternative fuels**
- Credit for **fuel cell motor vehicles**
- Above-the-line deduction for **qualified tuition**
- The general business credit for amounts paid for the maintenance of certain **railroad track** owned or leased by a Class II or Class III railroad in the United States. For tax years beginning after 2015, the credit is determined for railroad track owned or leased on January 1, 2015, rather than on January 1, 2005.
- The general business credit allowed for certain training costs of a **mine rescue** team worker
- Authorization for credits for state or local **qualified zone academy bonds** used to support a school in an empowerment zone or enterprise zone. The Treasury Department is authorized to allow tax credits for up to \$400 million of such bonds issued each year in 2014 and 2015, the same level that has applied since 2011.
- The three-year depreciation recovery period for any **race horse**, regardless of its age when it is placed in service
- The seven-year depreciation recovery period for **motorsports entertainment complexes**, including land improvements, support facilities, and certain buildings used by the public in attending racing events

- The election to expense 50% of the cost of **advanced mine safety training** equipment in the year it is placed in service
- The election to expense up to \$15 million of the **production costs of a film or television production**, when at least 75% of the compensation of the production is for services performed in the United States by actors, production personnel, directors, and producers. For productions the first performance of which is after 2015, the costs of staging live theatrical productions also are eligible, generally limited to shows in venues with an audience capacity of not more than 3,000. As is the rule for film and television productions, theatrical performances showing actual sexually explicit conduct are not eligible.
- Deduction with respect to income attributable to **domestic production activity in Puerto Rico**
- Temporary increase in **rum cover over** limit
- **American Samoa economic development** credit

In addition, the new law reinstates a 10% credit for the purchase of **electric motorcycles** in 2015 and 2016. The credit, which is capped at \$2,500 per qualifying vehicle, was in place prior to 2014, but was allowed to expire on December 31, 2013. The provision applies only to two-wheel, not three-wheel, electric vehicles.

Moratoria on Certain Healthcare Tax Provisions

The new law includes two-year moratoria with regard to two provisions that were enacted as part of healthcare reform legislation—the medical device excise tax and the so-called “Cadillac tax” on high cost health insurance plans. A separate provision also provides a one-year moratorium (for 2017) on the application of the fee applicable to health insurance providers.

KPMG observation: It is possible that future Congresses might attempt to extend the temporary moratoria with regard to the medical device excise tax and the “Cadillac tax.”

Medical device excise tax

The new law imposes a two-year moratorium on application of the medical device excise tax (“MDET”). Under the legislation, the tax does not apply to sales of taxable medical devices between January 1, 2016, and December 31, 2017.

KPMG observation: Manufacturers and importers of devices that are sold during this time period do not need to make semi-monthly deposits of tax or file the quarterly federal excise tax returns relating to these sales. However, the semi-monthly deposit of MDET for sales made between December 16 and December 31, 2015, is to be made by January 14, 2016, and the return for the fourth quarter of 2015 is due by February 1, 2016. Unlike other legislative proposals related to the repeal of this tax, the moratorium does not provide for a refund of MDET for sales before January 1, 2016.

Taxpayers can still consider whether opportunities exist to claim refunds of previously paid MDET. For example, exports or price readjustments in 2016-2017 of previously taxed devices may give rise to refunds of MDET. It is important to note that the statute of limitations for sales during the first quarter of 2013 expires on May 2, 2016.

“Cadillac tax”

The new legislation delays for two years the so-called “Cadillac tax”—an excise tax on certain high-cost health insurance plans. Under the new law, the tax will not be in effect until January 1, 2020.

REIT and RIC Provisions

The new law makes a number of significant changes to the REIT rules, as well as some changes to the RIC rules. Some of the REIT provisions previously were included in former Ways and Means Chairman Camp’s Tax Reform Act of 2014 (and the *Real Estate and Investment Jobs Act of 2015*).

REIT spin-off transactions

Section 311 of the PATH Act (Division Q of the new law) restricts tax-free spinoffs involving REITs, effective for distributions on or after December 7, 2015, subject to a “grandfather rule”

for certain distributions pursuant to transactions described in ruling requests submitted to the IRS on or before such date. A spin-off involving a REIT generally qualifies for tax-free treatment only if “Distributing” and “Controlled” both were REITs immediately following the spin (or if Controlled had been a taxable REIT subsidiary of the REIT, provided certain other conditions are satisfied). Further, neither Distributing nor Controlled is permitted to elect to be treated as a REIT for 10 years following a tax-free spin-off transaction (other than an election for Controlled when both Distributing and Controlled would be REITs immediately following the spin).

KPMG observation: In Rev. Rul. 2001-29, 2001-1 C.B. 1348, the IRS concluded that a REIT could satisfy the active trade or business requirement in section 355 for tax-free spin-off transactions. In recent years, a few publicly traded companies have spun off entities that elected REIT status in tax-free transactions. This provision prevents these transactions in the future (except for those grandfathered under the legislation).

Alternative three-year averaging prohibited transaction safe harbor

Section 313 of the PATH Act modifies the safe harbor for certain sales not to constitute prohibited transactions by permitting a REIT to sell a maximum of 20% of its property in a tax year (determined by reference either to tax basis or to value), provided that the average of its total sales over a three-year period does not exceed 10% (determined by reference either to tax basis or to value). This provision applies to tax years beginning after the date of the enactment of the legislation (i.e., tax years beginning after December 18, 2015).

Section 313 of the PATH Act also makes clear that the safe harbor applies, irrespective of the property’s classification as dealer property under Code section 1221(a)(1). This provision applies with respect to sales made after July 30, 2008.

KPMG observation: To prevent a REIT from retaining any profit from dealer activities, a REIT is subject to a 100% tax on any net gain realized from the sale of “dealer property.” Under the prior safe harbor provisions, a REIT could engage in up to seven sales or, alternatively, sell up to 10% of its portfolio (determined by reference either to tax basis or to value) in a given year. The new three-year “averaging option” is helpful to a REIT that historically has fewer, or smaller, sales but is expecting more or larger sales in connection with, for instance, exiting certain markets or property classes or otherwise rebalancing its portfolio.

Also, section 313 of the PATH Act clarifies that the safe harbor is solely an exception to the imposition of the 100% prohibited transaction tax and that it does not mean (or imply) that a transaction results in ordinary income. Thus, while a REIT may be assured it is not subject to the prohibited transaction tax by satisfying the terms of the safe harbor, the gain on the transaction nevertheless may be treated as ordinary (dealer) income rather than capital gain, if the transaction is in substance an ordinary income transaction under section 1221.

Repeal of preferential dividend rules for publicly offered REITs

Under section 314 of the PATH Act, the preferential dividend rule (under Code section 562(c)) does not apply to distributions by a publicly offered REIT in tax years beginning after December 31, 2014. For this purpose, a “publicly offered REIT” is a REIT that is required to file annual and periodic reports with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

KPMG observation: The *Regulated Investment Company Modernization Act of 2010* repealed the preferential dividend rule for publicly offered RICs. A similar repeal proposal for public REITs was included recently in both the administration’s FY 2016 revenue proposals and the *Update and Streamline REIT Act of 2012* (H.R. 5746). This repeal was estimated as having negligible revenue effect. However, it eliminates a significant source of potential REIT qualification “foot faults” for public REITs. Public REITs include all REITs that file reports with the SEC. Thus, both listed and non-listed REITs may be entitled to rely on this rule, so long as they are SEC filers.

Distribution failures by private REITs

Under section 315 of the PATH Act, with respect to distributions in tax years beginning after December 31, 2015, the Treasury Secretary has the authority to provide an appropriate alternative remedy to cure a preferential distribution in lieu of disallowing the dividends paid deduction. This applies if the Secretary determines that: (1) the preferential distribution is inadvertent or is due to reasonable cause and not due to willful neglect; or (2) the failure is a type identified by the Secretary as being so described.

KPMG observation: Even though repealed for public REITs, the preferential dividend rule remains relevant to private REITs. The new rule permits the IRS

to restore a REIT's dividend paid deduction after a REIT violates the preferential dividend rule, provided the REIT can demonstrate the error was inadvertent or due to reasonable cause and not wilful neglect.

Dividend designations by REITs

Under section 316 of the PATH Act, the aggregate amount of capital gain dividend and qualified dividend income designated by a REIT with respect to distributions in a tax year beginning after December 31, 2015, is limited to the aggregate amount of dividends paid by the REIT with respect to such year.

Further, the Secretary can prescribe regulations or other guidance requiring the proportionality of the designation of particular types of dividends among shares or beneficial interests of a REIT.

KPMG observation: In Rev. Rul. 2005-31, 2005-1 C.B. 1084, the IRS ruled that, in making the dividend designations permitted by Code section 852(b)(3)(C) and (b)(5)(A), section 854(b)(1) and (2), and section 871(k)(1)(C) and (2)(C), a RIC may designate the maximum amount permitted under each provision even if the aggregate of all of the amounts so designated exceeds the total amount of the RIC's dividend distributions.

Rev. Rul. 2005-31 was referenced in the JCT's *Description of Revenue Provisions Contained in the President's Fiscal Year 2012 Budget Proposal* with respect to discussions concerning both RICs and REITs. Thus, presumably, Rev. Rul. 2005-31 was the source of the concern prompting the proposed limitation on a REIT's overall designation of special character dividends.

Debt of publicly offered REITs and certain secured debt

Section 317 of the PATH Act treats debt instruments (that do not otherwise qualify as real estate assets) issued by publicly offered REITs as qualified real estate assets, subject to an overall cap of 25% of the REIT's total assets. In addition, the law expands the definition of real estate assets to include mortgages on "interests in real property," as well as mortgages on real property. These provisions apply to tax years beginning after December 31, 2015.

KPMG observation: Although the legislation treats debt instruments issued by publicly offered REITs as real estate assets, it does not change the rule that income from such instruments (if not secured with a mortgage) is not

qualifying income for the REIT 75% gross income test (which generally relates real estate-sourced gross income). Further, unlike other qualified real estate assets, the legislation provides that these REIT debt instruments are not permitted to account for more than 25% of a REIT's total assets.

Under previous law, a REIT was generally permitted to hold non-mortgage debt securities of another REIT, provided they did not exceed 25% of the REIT's assets when aggregated with other non-real-estate securities held by the REIT, and provided the securities of a single issuer did not represent more than 5% of the REIT's assets. Thus, the practical effect of treating public REIT debt securities as real estate assets is that such instruments are no longer subject to the single-issuer 5% limitation and are subject to the 25% limitation without aggregation with other nonqualifying assets of the REIT.

Expanding the definition of real estate assets to include mortgages on interests in real property (in addition to mortgages on real property) conforms the definition of mortgage assets with that of real property assets.

Treatment of ancillary personal property

Under section 318 of the PATH Act, ancillary personal property leased with real property (applying the 15% personal property test applicable to characterizing rental income) is treated as a real estate asset for purposes of the REIT asset tests.

Further, for purposes of characterizing as a real estate asset an obligation secured by a mortgage on both real property and personal property, the personal property-collateral is treated as real estate provided the value of the personal property does not exceed 15% of the total collateral. These amendments are effective for tax years beginning after December 31, 2015.

KPMG observation: Under previous Code section 856(d)(1)(C), rents attributable to personal property, which were leased under or in connection with a lease of real property, were generally treated as qualifying real estate rents provided the average value(s) of the personal property did not exceed 15% of the value of the personal and real property combined. There is no analogous provision for personal property under the REIT qualifying asset tests. In the case of mortgages that are secured by both real and personal property, the rules in Reg. section 1.856-5(c) generally require that interest income from such a mortgage be apportioned between a qualifying amount

(attributable to the portion of the loan secured by real property) and a non-qualifying amount attributable to the personal property. Rev. Proc. 2014-51, 2014-37 I.R.B. 543, provides rules for applying principles similar to those in Reg. section 1.856-5(c) to determine the portion of a loan treated as secured by real property and the portion treated as secured by personal property for purposes of the REIT asset tests.

Under the new provision, personal property that is leased under or in connection with a lease of real property may itself be treated as a real estate asset, as long as the 15% test is satisfied. Similarly, if both real property and personal property are used to secure a loan, and the fair market value of the personal property does not exceed 15% of the real and personal property combined, then all the interest income from the loan is treated as qualifying income under the REIT's 95% and 75% gross income tests, and the loan itself is treated as a qualified mortgage under the REIT asset tests.

Hedging provisions

Under previous law, income from qualifying hedging was excluded from the REIT income tests. Under section 319 of the PATH Act, effective for tax years beginning after December 31, 2015, income from counteracting hedges is similarly excluded for purposes of the income tests.

Specifically, if (1) a REIT enters into qualifying liability hedges or qualifying currency hedges with respect to qualifying property; (2) any portion of the liabilities is extinguished or any portion of the property is disposed of; and (3) in connection with such extinguishment or disposition, the REIT enters into hedging transactions (i.e., counteracting hedges) with respect to the original hedges, any income from the original and counteracting hedges does not constitute gross income for purposes of the income tests.

Further, a conforming amendment is made to reference the identification provision (including a reference to curative regulations dealing with inadvertent failures to identify).

KPMG observations: A REIT may use a counteracting hedge to effect, economically, either a partial or complete termination of an original hedge at potentially reduced costs. In PLR 201406009, the IRS ruled that: (1) pursuant to Code section 856(c)(5)(G), a REIT's gross income from the original hedges would not constitute gross income for purposes of the income tests; and (2) pursuant to section 856(c)(5)(J)(i), a REIT's gross income from the

counteracting hedges would not constitute gross income for purposes of the income tests.

Section 319 of the PATH Act allows a REIT to manage its interest rate and currency risks more effectively without the need to secure letter rulings.

Modification of REIT earnings and profits to avoid double taxation

Section 320 of the PATH Act makes technical modifications to Code sections 857(d) and 562(e)—provisions primarily intended to ensure that the REIT has sufficient earnings and profits (“E&P”) to support its required dividend distribution.

Because E&P and taxable income may be computed differently, REITs can be deemed under these Code sections to have higher E&P than their actual cumulative earnings. In some situations in which section 857(d) creates additional earnings to support a dividend paid deduction, the additional earnings may be reflected in the amount of dividend income reported to shareholders, resulting in double reporting by the shareholders of the same earnings over time. Section 320 of the PATH Act preserves the ability to create enough earnings to support the REIT’s dividend paid deduction, while eliminating the potential for double taxation.

KPMG observation: The disparate E&P treatment that section 320 of the new law addresses generally is that attributable to accelerated or bonus depreciation, when the deductions for E&P purposes are different from the amount allowed for taxable income purposes. The provision applies to tax years beginning after December 31, 2015.

Taxable REIT subsidiary (TRS) provisions

The new law includes two provisions relating to taxable REIT subsidiaries (TRSs).

Limitation on TRSs

Section 312 of the PATH Act limits the value of taxable REIT subsidiary securities that a REIT may own to no more than 20% of the REIT’s total assets. This provision applies for tax years beginning after 2017.

KPMG observation: When originally enacted, the taxable subsidiary limitation was 20% of a REIT’s assets. This limit was increased to 25% in 2008. The new law reduces the limit to its pre-2008 level.

Certain services by TRSs

Under section 321 of the PATH Act, a REIT is permitted to use its TRS (in addition to an independent contractor) with respect to the marketing and development expenditures under the prohibited transaction safe harbor (Code section 857(b)(6)(C)(v)) and the foreclosure property provisions (Code section 856(e)(4)(C)).

Furthermore, a new category of transactions between a REIT and its TRS is subject to the 100% excise tax—redetermined TRS service income, which means the TRS's gross income attributable to services provided to, or on behalf of, its REIT (less deductions properly allocable thereto) to the extent the amount of such income (less such deductions) is increased on distribution, apportionment, or allocation under section 482. The provision generally does not apply to income and expenses associated with services provided to a REIT's tenants, which are already subject to the 100% excise tax as redetermined rents.

These provisions are effective for tax years beginning after December 31, 2015.

KPMG observation: For purposes of the prohibited transaction safe harbor, if a REIT has more than seven sales of property during a year, the statute requires the use of independent contractors for substantially all of the marketing and development expenditures with respect to the property. Similarly, an independent contractor is required if a foreclosure property is used by a REIT in a trade or business after 90 days following the acquisition of the property. A REIT with internal expertise is not forced to outsource these functions and incur additional costs. Instead, the REIT could use a taxable REIT subsidiary to perform these activities (though the TRS would need to be compensated at an arm's length rate, enforced by the new 100% excise tax).

Permanent extension and reinstatement of interest-related dividends and short-term capital gain dividends paid by a RIC to foreign persons

As indicated earlier in this report, the new legislation permanently extends and reinstates the ability of a RIC to designate and distribute interest-related dividends and short-term capital gain dividends to foreign investors. Previously, this so-called "flow-through" treatment had only been extended by Congress retroactively on a one-year or two-year basis.

KPMG observation: This is a significant and favorable change for RICs, including business development companies, with foreign investors. In general, interest income and short-term capital gains realized by a RIC with respect to

its U.S. and non-U.S. portfolio securities are treated as ordinary U.S.-source dividends when distributed by a RIC to its investors, including foreign investors. Absent “flow-through” treatment, this means that foreign investors may incur U.S. withholding tax that would not otherwise apply if the investors directly held certain underlying investments of the RIC. As a result of the permanent extension and reinstatement provided by the PATH Act, foreign investors in a RIC should not incur U.S. withholding tax on interest-related dividends and short-term capital gain dividends, provided that documentation and certain other requirements are met. In addition, a RIC will no longer be faced with the dilemma of whether to withhold tax on such dividends paid to foreign investors at a time during the year when the special tax rule permitting flow-through treatment has expired and has not yet been extended by Congress.

Changes to the FIRPTA Regime

The new legislation makes several taxpayer-favorable amendments to the FIRPTA rules that are designed to encourage foreign investment in U.S. real property. The legislation also includes several revenue-raising provisions to offset the cost of the favorable amendments.

Exemption from FIRPTA for foreign pension funds

The new law adds Code subsection 897(l), which provides that section 897 shall not apply to any United States real property interest (“USRPI”) held directly (or indirectly through one or more partnerships) by, or to any distribution received from a REIT by a qualified foreign pension fund or any entity all of the interests of which are held by a qualified foreign pension fund. The law also exempts “qualified foreign pension funds” from FIRPTA withholding under section 1445 by amending the definition of “foreign person” in section 1445(f)(3) to exclude an entity described in new section 897(l).

A “qualified foreign pension fund” means any trust, corporation, or other organization or arrangement:

- (A) which is created or organized under the law of a country other than the United States,
- (B) which is established to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (or persons designated by such employees) of one or more employers in consideration for services rendered,

(C) which does not have a single participant or beneficiary with a right to more than five percent (5%) of its assets or income,

(D) 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

(E) with respect to which, under the laws of the country in which it is established or operates, (i) contributions to such organization or arrangement that 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 organization or arrangement is deferred or such income is taxed at a reduced rate.

The legislation directs the Treasury to prescribe such regulations as may be necessary or appropriate to carry out the purposes of this provision. The provision is effective for dispositions and distributions after the date of enactment of the law.

KPMG observation: The FIRPTA foreign pension exception was first suggested by the Obama Administration in its proposal for the FY 2014 budget. The original proposal was carried forward in the budget proposals for FY 2015 and FY 2016. The Obama Administration's proposals do not contain any proposed legislative language, but the Obama Administration's stated goal in its proposals was to create parity between U.S. pension funds and similar foreign pension funds vis-à-vis investments in U.S. real property.

While the JCT's description of the new foreign pension fund exception does not state Congress's goals in enacting the provision, the legislative language appears to effectuate the Obama Administration's stated policy goal of providing parity between U.S. pension funds and similar foreign pension funds. In so doing, the drafters of the statutory language may have been too precise because the exception is narrowly drafted and may not apply to many foreign pension funds that are part of very different pension systems. The statute does provide broad regulatory authority, but the statutory provisions may not leave sufficient room to expand the provision to many foreign pension funds. A technical correction seems to be a better means by which to provide a more meaningful exception, if that is what Congress had originally intended.

Exception from FIRPTA for certain REIT stock

The FIRPTA regime contains an exemption for dispositions of minority interests (5% or less) in publicly traded corporations, and a similar rule for distributions from publicly traded RICs or REITs that are subject to section 897(h)(1). The new law increases the ownership threshold for the exemption from 5% to 10% for dispositions of stock of, or distributions from, publicly traded REITs.

The law also exempts from the definition of a USRPI stock of a REIT that is held by a “qualified shareholder,” except to the extent that an investor in the qualified shareholder (other than an investor that itself is a qualified shareholder) actually or constructively holds more than 10% of the REIT stock (the “10-percent investor rule”). If the 10-percent investor rule applies, a portion of the qualified shareholder’s REIT stock would constitute a USRPI. The new law also turns off section 897(h)(1) on a distribution from a REIT to a qualified shareholder, except to the extent of the 10-percent investor rule. A qualified shareholder includes certain foreign entities that are publicly traded, are eligible for the benefits of a comprehensive U.S. tax treaty, are treated as partnerships for U.S. federal income tax purposes, would be treated as U.S. real property holding corporations if they were domestic corporations, and satisfy certain additional requirements. The new legislation provides the Secretary with authority to expand the class of eligible qualified shareholders to include certain other types of entities.

These provisions apply to any disposition of REIT stock on or after the date of enactment, and to any distribution by a REIT on or after the date of enactment that is treated as a deduction for a tax year of the REIT ending after such date.

Determination of domestically controlled RIC or REIT status

A USRPI does not include any interest in a domestically controlled RIC or REIT (collectively, “qualified investment entities” or “QIEs”). A QIE is domestically controlled if foreign persons directly or indirectly own less than 50% of the value of the entity’s stock. It often is difficult, however, for QIEs to determine, with certainty the U.S. or foreign status of all of their direct and indirect investors, particularly in the context of publicly traded entities.

The new law provides three new rules and presumptions for purposes of determining whether a QIE is domestically controlled. First, a publicly traded QIE is permitted to presume (absent actual knowledge to the contrary) that a person that holds less than 5% of a class of publicly traded stock is a U.S. person. Second, any stock in a QIE that is held by a publicly traded QIE (or a RIC that issues redeemable securities) is treated as held by a foreign person, unless the other QIE is domestically controlled, in which case the stock is treated as held by

a U.S. person. Lastly, stock in a QIE that is held by any other QIE not described above is treated as held by a U.S. person only to the extent the stock of the other QIE is (or is treated as) held by a U.S. person.

This provision is effective on the date of enactment.

KPMG observation: Apart from these new rules and presumptions, the new legislation does not address the larger uncertainty regarding the meaning of “indirect” ownership for this purpose (i.e., whether “indirect” ownership includes constructive ownership principles).

Increased withholding on dispositions of USRPIs

The new law generally increases the rate of withholding tax under section 1445(a) on dispositions of USRPIs by foreign persons from 10% to 15%. The new law also increases the rate of withholding under section 1445(e)(3), (e)(4), and (e)(5) from 10% to 15% with respect to certain distributions from current or former USRPHCs to foreign shareholders, certain distributions of USRPIs by partnerships, and dispositions of interests in partnerships by foreign persons.

This provision is effective for dispositions occurring more than 60 days after the date of enactment.

Denial of “cleansing” exception to shareholders in RICs and REITs

Section 897(c)(1)(B) generally excludes from the definition of a USRPI an interest in a domestic corporation that has sold all of its USRPIs in taxable transactions. Thus, if a domestic corporation that is or was a USRPHC sells all of its USRPIs in taxable transactions (and pays any U.S. tax due), the stock will cease to be a USRPI, and a foreign shareholder, therefore, may sell the stock without triggering FIRPTA. The new legislation, however, precludes a RIC or REIT (or a predecessor of the RIC or REIT) from qualifying for this exception. This rule is effective for dispositions on or after the date of enactment.

Denial of dividends received deduction for certain RIC and REIT dividends

The new legislation amends section 245 to provide that RICs and REITs are not treated as domestic corporations for purposes of section 245(a)(5)(B). As a result, a U.S. shareholder that receives a dividend distribution from a foreign corporation cannot claim a dividends

received deduction with respect to any portion of the distribution attributable to dividends received by the foreign corporation from RICs or REITs.

Modification to Section 267 Rules

Prior to the enactment of the new law, section 267(d) generally provided that, if a loss on a sale or exchange of property to certain related parties or controlled partnerships had been disallowed under section 267(a)(1) or section 707(b), the transferee could reduce any gain that the transferee later recognizes on a disposition of the property by the amount of the loss disallowed to the transferor. Thus, section 267(d) shifts the benefit of the loss to the transferee.

The new law prevents the principles of Code section 267(d) from applying to the extent gain or loss with respect to property that has been sold or exchanged is not subject to U.S. income tax in the hands of the transferor immediately before the transfer but any gain or loss with respect to the property is subject to U.S. income tax in the hands of the transferee immediately after the transfer. This provision of the new law was estimated to raise approximately \$1.24 billion over the 10-year scoring window.

The new provision applies to sales and other dispositions of property acquired after December 31, 2015, by the taxpayer in a sale or exchange to which section 267(a)(1) applied.

KPMG observation: This provision represents continued policing of the importation of built-in losses, covering related-party situations that may not already have been covered by the anti-loss importation rules in section 362(e).

Tax-Exempt Organizations

The new law modifies and adopts numerous provisions specifically affecting tax-exempt organizations.

First, the legislation changes the reporting requirements for Form 1098-T, *Tuition Statement*, requiring educational institutions to report qualified tuition and expenses **paid** as opposed to providing the option to report amounts paid *or billed*. This change is effective for expenses paid after December 31, 2015, for education furnished in academic periods beginning after such date.

KPMG observation: The administration's budget proposals have regularly recommended this change. For educational institutions that currently report "amounts billed" on Forms 1098-T, it is important to use this time to evaluate systems and implement necessary changes to comply with the new "amounts paid" requirement for reporting in January 2017.

Second, the new law requires Treasury and the IRS to prescribe procedures under which a section 501(c) organization may request an administrative appeal of certain adverse determinations to IRS Appeals.

Third, the legislation requires a section 501(c)(4) social welfare organization to provide notice of its existence to the IRS within 60 days of formation. In addition, the IRS has 60 days from receiving such notice to acknowledge its receipt to the taxpayer. Failure to comply with this notification requirement will result in the imposition of a penalty not to exceed \$5,000. A penalty may also be imposed on organization managers that fail to comply with the IRS's demand to make such notice.

KPMG observation: Prior to the change in the law, section 501(c)(4) organizations could merely "self-declare" their tax-exempt status by timely filing Forms 990, *Return of Organization Exempt from Income Tax*, without otherwise notifying the IRS of the organization's intent to operate as a section 501(c)(4) organization. This new provision does not require section 501(c)(4) organizations to apply for recognition of exemption (although they may continue to do so on Form 1024). Instead, Treasury and the IRS must implement a mechanism for new section 501(c)(4) organizations to notify the government that they exist.

A section 501(c)(4) organization in existence as of December 18, 2015, is not required to comply with the notice provision if it either applied for recognition of its exempt status or filed at least one Form 990 prior to such date. Any other section 501(c)(4) organization in existence as of December 18, 2015, must provide notice to the IRS no later than June 15, 2016 (180 days from the date of enactment).

Fourth, the legislation expands declaratory judgment jurisdiction to include all organizations claiming to be described in sections 501(c) or 501(d) and exempt from tax under section 501(a).

Fifth, the new law treats transfers to tax-exempt organizations described in sections 501(c)(4), 501(c)(5) or 501(c)(6) as exempt from gift tax.

Finally, the legislation establishes **agricultural research organizations** as a new type of per se public charity. A deductible charitable contribution can be made to such organizations subject to the limits applicable to public charities.

KPMG observation: This provision classifies agricultural research organizations that are directly engaged in the active conduct of agricultural research in conjunction with a land grant college or university or a non-land grant college of agriculture as public charities without the need to meet a public support test. Prior to the change in the law, such organizations would be classified as private foundations unless they otherwise met a public support test.

The provision also allows for the higher charitable contribution deductibility limit (50% of adjusted gross income) to apply to contributions that are expended within five years of being made.

Temporary Rule for Oil Refiners

The new law temporarily creates a special rule for independent oil refiners with respect to the section 199 domestic manufacturing deduction. Specifically, the legislation allows an independent refiner to reduce transportation costs allocable to qualified production activities income ("QPAI") by 75%, thus generally increasing the amount of deduction. The rule is applicable for tax years beginning between 2016 and 2021.

KPMG observation: The amendment to section 199 for oil-related activities was intended to benefit independent refiners who may see reduced revenue due to the lifting of the embargo on the exportation of domestic crude. Unfortunately, given the technical language, the amendment might not provide the benefit independent refiners are expecting and, in limited situations, might even *reduce* a company's section 199 deduction. This seems to be an ideal situation for a technical correction, and it is hoped that one will be forthcoming so that independent refiners can realize the anticipated benefit.

Partnership Audit Provisions

The new law makes a few amendments to the partnership audit reform measures that were recently enacted as part of the *Bipartisan Budget Act of 2015* (Pub. L. 114-74). These changes include modifications to the general rules for determining the amount of an “imputed underpayment” to take into account: (1) capital gains rates in the case of C corporation partners; and (2) passive activity losses in the case of publicly traded partnerships (“PTPs”). The law also includes a clarification to the period of limitations on making adjustments and other technical changes.

KPMG observation: Under the law, in the case of an audit of a publicly traded partnership (PTP) that results in an adjustment, if the PTP does not elect to push the adjustment to its partners within 45 days under section 6226, the PTP could take its partners’ suspended passive losses under section 469(k) into account in calculating its imputed underpayment. Partnerships other than PTPs are not entitled to a similar reduction of the partnership’s imputed underpayment.

The new law does not address a number of other significant issues that have been raised about the new partnership audit regime. However, there is still time for additional clarification to be provided; the recently enacted partnership audit reform measures do not take effect until returns filed for partnership tax years beginning after 2017 (unless a partnership elects to apply them sooner). Read KPMG’s description of the partnership audit reform provisions in [TaxNewsFlash-United States](#) [PDF 155 KB]

New Rules for Individual Taxpayer Identification Numbers

The new law modifies the rules concerning the issuance and duration of “individual taxpayer identification numbers” (ITINs). ITINs are the identification numbers used by individuals to file tax returns, or to be claimed as a dependent on another individual’s tax return, if they are not eligible for a social security number.

Under previous IRS policy, an ITIN would expire after five consecutive years of non-use. Under the new statutory rules, all ITINs issued prior to January 1, 2013, will expire on a staggered schedule between 2017 and 2020, or earlier if they are not used on an individual tax return for three consecutive tax years. ITINs issued after December 31, 2012, will remain in effect unless they are not used on an individual tax return for three consecutive years.

An individual whose ITIN expires under these provisions must apply for a new ITIN under the procedures established by the new law, which authorizes the IRS to issue guidance on the documentation required to support an application for an ITIN. As with existing procedures, only original documents or copies certified by the issuing agency are acceptable.

The new law also authorizes the IRS to maintain a program for training and approving acceptance agents to process ITIN applications. Acceptance agents can include financial institutions, colleges and universities, federal agencies, state and local governments, tax preparers, and other persons authorized by the IRS. For those individuals residing outside the United States, an approving acceptance agent cannot be used; the application must either be made via mail or in person to an employee of the IRS or designee at a U.S. diplomatic mission or consulate.

In addition, the new law requires the IRS to implement a system that distinguishes ITINs issued solely for purposes of claiming benefits under an income tax treaty from other ITINs.

Other Procedural and Compliance Provisions

The new law includes a “program integrity” title that includes a host of procedural and compliance changes (most of which are scored as raising revenue). One of the provisions in this title relates to modification of **filing dates of certain returns and statements relating to employee wage information and nonemployee compensation**.

KPMG observation: The new law accelerates the filing date of Form W-2 with the IRS to January 31—the same date for furnishing W-2 forms to employees. The ability to make corrections, before submission to the IRS, possible with the March 31 due date for electronically filed forms W-2 (and the February 28 due date for paper-filed returns) will essentially no longer be available. This change is effective for calendar year 2016 Forms W-2 required to be filed in 2017.

The new law also contains a **safe harbor for certain penalties for *de minimis* errors** on information returns and payee statements.

KPMG observation: The legislation provides much-welcomed relief to information return filers that discover errors of \$100 or less (or withholding tax errors of \$25 or less). This provision removes the administrative burden of filing corrected information returns without exposure to information reporting penalties. This relief applies to information returns and statements required to

be filed after December 31, 2016 (i.e., calendar year 2016 information returns filed in 2017).

The new law also includes provisions that generally relate to the following:

- Expansion of certain penalties and due diligence requirements relating to the earned income tax credit, the child credit, and the American Opportunity tax credit
- Changing penalty rules applicable to erroneous claims with respect to refundable credits
- Changing the standard for avoiding the erroneous refund claim for refund or credit penalty from “having a reasonable basis” to “is due to reasonable cause”

KPMG observation: The change in standard to reasonable cause should be helpful to some taxpayers. Often there is no specific authority or guidance on a position that a taxpayer can cite to show a reasonable basis, but the taxpayer can demonstrate that it had reasonable cause for its position. The legislation does not provide a specific date for this change. Hopefully, guidance will be provided clarifying the effective date.

Internet Access Tax Moratorium

The new law includes an extension through October 1, 2016, of the ban on states and localities taxing internet access or placing multiple and discriminatory taxes on internet commerce.

Other Significant Changes

The new legislation also includes a host of other significant tax law changes. Some of these changes are revenue raisers that may have been included to offset the costs of provisions not related to extending provisions that expired or that were scheduled to expire. These provisions include the following:

- Updated standards for the energy efficient commercial buildings deduction (estimated to raise approximately \$8 million over the 10-year scoring window)
- Excise tax credit equivalency for liquefied petroleum gas (LPG) and liquefied natural gas (LNG) (estimated to raise approximately \$63 million over the 10-year scoring window)

- Exclusion from gross income of certain clean coal power grants to non-corporate taxpayers (estimated to raise approximately \$6 million over the 10-year scoring window)
- Clarification of value rule for early termination of certain charitable remainder unitrusts (estimated to raise approximately \$113 million over the 10-year scoring window)
- Treatment of certain persons as employers for motion picture projects (estimated to raise approximately \$45 million over the 10-year scoring window)
- Special tax rate for certain timber gains of C corporations for tax years beginning in 2016
- An amendment to the section 831(b) election for small nonlife insurance companies to: (1) increase the annual premium limitation from \$1.2 million to \$2.2 million; and (2) add a “diversification” rule under which no single policyholder may be responsible for more than 20% of net written premium (or direct written premium, if greater)
- Rollovers permitted from other retirement plans into simple retirement accounts
- Provisions relating to taxpayer access to, and the administration of, the U.S. Tax Court.

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