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Update: PATH Act Enacts Notable Changes to REIT and FIRPTA Provisions

On Friday, December 18, 2015, President Barack Obama signed the "Protecting Americans from Tax Hikes Act of 2015" ("PATH Act"). Our December 10, 2015 client alert discussed significant proposed changes to the rules governing real estate investment trusts ("REITs") and the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") that were included in the "Tax Increase Prevention and Real Estate Investment Act of 2015" ("Extenders Bill") introduced by House Ways and Means Committee Chairman Rep. Kevin Brady (R-Texas). The Extenders Bill formed the basis for much of the PATH Act. In particular, the PATH Act included the provisions in the Extenders Bill that effectively put an end to the ability to use a tax-free spin-off to create a so-called OpCo-PropCo structure with a REIT as the PropCo. Except as described below, the changes discussed in our prior client alert were included in the PATH Act.

The PATH Act included two key changes to the proposed measures described in our prior client alert:

- Restrictions on spin-off transactions involving REITs and on the eligibility of parties to a spin-off transaction to elect to be taxable as a REIT transaction were retained, but the effective date was modified to exempt transactions described in a private letter ruling request submitted to the Internal Revenue Service (and not withdrawn) on or before December 7, 2015.

- Proposed limitations on percentage rents and interest, which had been expected to adversely affect existing OpCo-PropCo arrangements, were eliminated.

In addition, the PATH Act contained certain real-estate related provisions that were not included in the Extenders Bill. These provisions include increasing the withholding rate under FIRPTA on the gross proceeds from the disposition of U.S. real property interests by, and certain distributions payable to, non-U.S. persons from 10% to 15%, effective beginning February 17, 2016, and clarifying the rules for determining whether a REIT or other qualified investment entity is "domestically controlled."

In addition to the changes to REIT rules and FIRPTA, the PATH Act also permanently reduced from 10 years to five years the period in which an S corporation, REIT or regulated investment company is subject to corporate tax on any built-in gain following conversion from a C corporation or tax-free acquisition of assets from a C corporation; made permanent the exclusion of the active financing income of controlled foreign corporations ("CFCs") from Subpart F income; extended the look-through rule for certain payments between related CFCs; made permanent the research and development tax credit; made permanent the exemption of certain interest-related and short-term capital gain dividends by regulated

investment companies from U.S. withholding tax; extended bonus depreciation; and extended numerous energy-related tax credits.

The PATH Act includes numerous other provisions and many details this summary does not address.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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