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The Protecting Americans from Tax Hikes ("PATH") Act

President Obama signed the PATH Act into law on December 18, 2015. The extenders component of H.R. 2029 makes permanent several lapsed business, individual, and charitable giving incentives, such as the research credit, the subpart F exception for active financing income, and tax-free IRA distributions for charitable contributions by individuals age 70-1/2 and older. It also renews a handful of provisions – such as bonus depreciation, the work opportunity and new markets credits, and production and investment tax credits for wind and solar energy – for five years. Other provisions were extended through 2016. See *Tax News & Views*, December 18, 2015 for more detailed information.
URL: http://newsletters.usdbriefs.com/2015/Tax/TNV/151218_1.html

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PATH Act Makes Major Changes to FIRPTA

The "PATH Act," enacted December 18, 2015,[1] made permanent, or extended, most of the Code provisions that for many years have had built-in expiration dates (the "expiring

[1] "PATH Act" is short for "Protecting Americans from Tax Hikes Act of 2015," a small part ("Division Q") of the "Consolidated Appropriations Act, 2016," Pub. L. No. 114-113, the omnibus bill that allowed the Congress to end its 2015 session in 2015. The primary legislative

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provisions”). But it does more. Buried in subtitle B of title III of the PATH Act (which makes extensive changes to the treatment of real estate investment trusts (REITs)) are major changes to Code section 897 (the “Foreign Investment in Real Property Tax Act of 1980” or FIRPTA) and section 1445 (the withholding rules for enforcing FIRPTA), not all of which are limited to foreign shareholders of REITs. Because of the PATH Act:

- Funds exempt from FIRPTA – FIRPTA is now inapplicable to United States real property interests (USRPIs) held by “qualified foreign pension funds.”
- Publicly traded REIT stock excluded from USRPI – The percentage of publicly traded REIT stock that a person can hold without the stock being treated as a USRPI with respect to that person has been increased from five percent to 10 percent.

These changes have generally already taken effect, and it appears that they are estimated to lose the Treasury (relative to prior law) between $2 billion and $4 billion in revenue in the next 10 years.[2] The PATH Act also is estimated to raise about $0.5 billion in that period by making the following changes:

- **Withholding rate increased:** The general withholding tax rate on the proceeds of dispositions and distributions of USRPIs (historically, 10 percent) will increase to 15 percent.
- **Cleansing rule repealed for REITs or RICs:** The holder of the stock of a corporation that is or has been a REIT or a regulated investment company (RIC) can no longer treat the stock as “cleansed” of its USRPI status once the REIT or RIC sells all of its USRPIs.

While the second of these changes has already taken effect, the increase in the withholding rate will only apply to dispositions after February 16 of this year.

The PATH Act also adds new rules and presumptions to the Code for determining whether a REIT or RIC is “domestically controlled” when its stock is publicly traded or is held by another REIT or RIC. Finally, the PATH Act provides a new exception from the definition of USRPI for REIT stock held by certain publicly traded foreign collective investment vehicles.

This alert provides a summary and preliminary observations on these FIRPTA- related changes and their practical consequences.

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history for the PATH Act appears to be Joint Committee on Taxation, *Technical Explanation of the Protecting Americans from Tax Hikes Act of 2015, House Amendment #2 to the Senate Amendment to 2029 (Rules Committee Print 114-40)*, (JCX-144-15), December 17, 2015 (hereinafter, “JCT TE”).

[2] The qualified foreign pension fund provision listed above was estimated to cost the Treasury $1,953 million over 10 years, while the published Congressional revenue estimate of the PATH Act combined the cost of the publicly traded REIT stock provision listed above and a number of other revenue-losing provisions discussed below; in combination, they were estimated to cost $2,297 million over 10 years. See Joint Committee on Taxation, *Estimated Budget Effects of Division Q of Amendment #2 to the Senate Amendment to H.R. 2029 (Rules Committee Print 114-40)*, (JCX-143-15), December 16, 2015, page 6. At this point, then, we only speculate on the separate estimated cost of the change in the treatment of publicly traded REIT stock.

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USRPI gains (which may include stock gains) are “effectively connected” income

With some exceptions, the United States generally taxes nonresident alien individuals and foreign corporations on their gains from sales or exchanges of property if and only if the gains are effectively connected with the conduct of a trade or business in the United States (“effectively connected income” or ECI). However, FIRPTA automatically deems the gains of such persons from the disposition of USRPIs to be ECI, regardless of whether the person actually engaged in any US trade or business.

The term “USRPI” encompasses not only an interest (other than solely as a creditor) in real property located in the United States,[3] but also stock of a domestic corporation (or other interest in the corporation other than solely as a creditor), unless the taxpayer establishes that the corporation was not a US real property holding corporation (USRPHC) at any time during the shorter of the five- year period ending on the date of disposition or the period during which the taxpayer held the stock of the corporation (the “relevant holding period”).

Effect of FIRPTA on foreign shareholders of REITs (and RICs)

In general, any distribution by a “qualified investment entity” (any REIT and certain RICs[4]) to a foreign person or another qualified investment entity (QIE) shall, to the extent attributable to gain from sale or exchange by the QIE of USRPIs, be treated as gain recognized by such foreign person or other QIE from the sale or exchange of USRPI. This rule does not apply, however, if any class of stock of the QIE is regularly traded on an established securities market located in the United States and if the foreign person did not own more than five percent of such class of stock at any time during the one-year period ending on the date of such distribution.

The term USRPI does not include any interest in a “domestically controlled” QIE. This term refers to any QIE in which, at all times during the testing period[5] less than 50 percent in value of the stock was held directly or indirectly by foreign persons.

FIRPTA withholding

When a foreign person disposes of a USRPI, the transferee of the USRPI has generally been required by section 1445(a) to deduct and withhold a tax equal, until the PATH Act, to 10 percent of the amount realized on the disposition.[6]

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[3] Interests in real property located in the US Virgin Islands are also USRPIs. See section 897(c)(1)(A)(i).
[4] The treatment of certain RICs as qualified investment entities was generally an expiring provision, but it was made permanent effective January 1, 2015 by section 133 of the PATH Act.
[5] The testing period generally means the shorter of the 5-year period ending on the date of the disposition or distribution, or the period during which the QIE was in existence. See section 897(h)(4)(D).
[6] Numerous exceptions may apply. Certain other transactions, such as a distribution of property by certain domestic corporations to foreign shareholders (section 1445(e)(3)), taxable

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PATH Act Changes

Exception for interests held by foreign retirement or pension funds: New Code section 897(l) provides that section 897 shall not apply to any USRPI held directly (or indirectly through one or more partnerships) by a "qualified foreign pension fund" (QFPF). Section 897 also does not apply to any distribution received by a QFPF from a REIT. Finally, section 897 does not apply to USRPIs held, and REIT distributions received, by any entity all of the interests of which are held by a QFPF. For purposes of the FIRPTA withholding rules, QFPFs and the QFPF-owned entities referred to above are not treated as "foreign persons." These provisions apply to dispositions and distributions after December 18, 2015.

A QFPF is any trust, corporation, or other organization or arrangement:

1. Which is created or organized under the law of a country other than the United States,
2. 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,
3. Which does not have a single participant or beneficiary with a right to more than five percent of its assets or income,
4. Which is subject to government regulation and provides annual information reporting about its beneficiaries to the relevant tax authorities in its country in which it is established or operates, and
5. With respect to which, under the laws of the country in which it is established or operates, either (i) contributions to it which would otherwise be to subject to tax under such laws are deductible, excluded from gross income or taxed at a reduced rate; or (ii) taxation of its investment income is deferred or such income is taxed at a reduced rate.

Observations: When the Obama Administration proposed a change along these lines in its last three budget proposals, it gave as its "Reason for Change" the fact that gain of a US pension fund from the disposition of a USRPI generally is exempt from US tax.[7] By exempting foreign pension funds' USRPI gains from FIRPTA, this provision seems to be intended to put QFPFs on a comparable footing with US pension funds in order to encourage greater investment in real estate in the United States.[8] But the words used to codify the proposal implicate issues and pose questions that may warrant further guidance:

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distributions by partnerships, trusts or estates (section 1445(e)(4)), and dispositions of partnership interests (section 1445(e)(5)), also trigger the general obligation to withhold a tax equal to 10 percent of the amount realized on the transaction.

[7] Department of the Treasury, General Explanations of the Administration's Fiscal Year 2014 Revenue Proposals 123 (April 2013); Department of the Treasury, General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals 138 (March 2014); Department of the Treasury, General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals 91 (February 2015).

[8] Joint Committee on Taxation, Description of Certain Revenue Provisions Contained in the President's Fiscal Year 2014 Budget Proposal (JSC-4-13), December 2013, at 95.

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- It would appear that a foreign government's fund that provides pensions to persons who were never government employees, but are based in part on employment history (as does the US Social Security system) might be QFPFs, if the benefits provided can be viewed as "in consideration for services rendered." Other situations may also warrant clarification of the definition of QFPF. For instance, certain public or government programs may provide coverage for citizens regardless of employment. Does the term QFPF encompass a foreign government's fund that provides old-age pensions regardless of the recipient's employment history? What about a fund that provides post-retirement pensions to self-employed persons who make contributions to the fund out of their self-employment earnings, so that the benefits are in consideration of services rendered not to a contributing or sponsoring employer, but only to the participants' customers or clients? Nowhere in section 897(l) does it say that a QFPF must be established "exclusively" for the benefit of employees or former employees, as are the pension trusts described in Treas. Reg. §1.892- 2T(c)(1)(i); nor that a QFPF must be for the "exclusive" benefit of employees or their beneficiaries, as are the qualified plans described in section 401(a).
- If a pension fund reports information about its beneficiaries to a government agency, but not to the "relevant tax authorities," it would apparently fail condition (D) above. If information is reported to the relevant tax authorities, does the requirement of annual reporting about beneficiaries refer to information for each individual beneficiary, or for beneficiaries as a group? If each individual beneficiary, then does the term "beneficiaries" in this context include participants who are not yet receiving pension payments, or only those actually receiving benefits currently?
- The exemption from FIRPTA applies to USRPIs held directly (or indirectly through one or more partnerships) by an entity all of the interests of which are held by a QFPF. The legislative history states that such an entity must be "wholly-owned" by "a" QFPF.[9] This seems to exclude entities that are collective investment vehicles exclusively for QFPFs, in contrast, for example, to the entities afforded "exempt beneficial owner" status by Treas. Reg. §1.1471-6T(f)(5) ("Investment vehicles exclusively for retirement funds").
- Because the PATH Act excludes a QFPF (or QFPF-owned entity) from the term "foreign person" for purposes of section 1445 withholding, such QFPF or QFPF-owned entity need not be withheld upon when it transfers a USRPI. The regulations under section 1445 already provide an extensive set of rules for verifying that the transferor is a non-foreign person.[10] Thus, notwithstanding that a QFPF or QFPF-owned entity is, in the generic sense (as well as by the terms of the definition in the current regulations), "foreign," and its US EIN begins with "98-" (the prefix of EINs assigned to foreign persons[11]) it seems to be entitled to provide a non-foreign affidavit to its transferee in

[9] JCT TE at 190.
[10] Section 1445(b)(2), Treas. Reg. §1.1445-2(b), and Treas. Reg. §1.1445-5(b)(3).
[11] See IRM 21.7.13.3.2.7. See also Treas. Reg. §1.1441-1T(b)(3)(iii)(A) (under certain circumstances a withholding agent may presume that a payee is a foreign person and not a US person if the payee's EIN begins with the two digits "98"); Notice of proposed rulemaking, INTL-062-90, INTL-0032-93, INTL-52-86, and INTL-52-94, 61 Fed. Reg. 17614, 17618 (April 22, 1996) ("Over time, the IRS will issue EINs to foreign persons that begin with the two digits '98' to permit instant recognition of foreign status").

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order to eliminate the latter's obligation to withhold when the QFPF or QFPF-owned entity transfers USRPI generally, or stock in a domestic corporation.
- Treasury Reg. §1.1445-8(c)(2) generally imposes a 35-percent withholding obligation with respect to a capital gain dividend paid by a REIT to a foreign person. Questions may arise as to how a REIT should handle a situation where it designates after December 18, 2015, all or a portion of a pre-PATH Act distribution to a QFPF (or QFPF-owned entity) as a capital gain dividend distribution. Treasury Reg. §1.1445-8(c)(ii)(C) allows REITs to substitute "catch up" withholding on subsequent distributions for the withholding that would otherwise have been due on the distributions made before the designation. Now, however, a REIT must determine the obligation with respect to post-PATH Act distributions to a QFPF if the REIT designates a pre-December 18, 2015 distribution as a capital gain dividend distribution and the "catch up" withholding on the QFPF would, absent the PATH Act, be made from post-December 18, 2015 distributions.

Finally, although this change may have a major effect on the tax considerations surrounding US investments by QFPFs, QFPFs and their foreign subsidiaries must nevertheless be aware that they are still subject to net-basis US federal income tax on income that is treated, apart from FIRPTA, as effectively connected with a US trade or business in which the QFPF (or other entity) is engaged – either directly, or vicariously through a partnership that is so engaged and in which the QFPF or subsidiary is a partner.

Increase in percentage ownership of publicly traded REIT stock qualifying for exception from USRPI status: If a class of stock in a corporation is regularly traded on an established securities market, then stock of that class is not treated as a USRPI in the hands of a person who does not hold more than five percent of such class at any time during the relevant holding period.[12] Effective for dispositions on or after December 18, 2015, the PATH Act increases this five percent threshold to 10 percent, but only if the stock in question is REIT stock. Hence, foreign owners of a regularly traded class of REIT stock may now hold up to 10 percent of the outstanding shares in that class during the relevant holding period without being subject to FIRPTA on the disposition of the REIT stock.

The PATH Act similarly increases from five percent to 10 percent the ownership threshold above which a distribution to a foreign person with respect to publicly traded QIE stock that is attributable to gain from the disposition of a USRPI by the QIE, is taxed to the shareholder as if it were the shareholder's gain on the sale or exchange of a USRPI.[13] This change was effective for any distribution by a REIT on or after December 18, 2015 and deducted in a taxable year of the REIT ending after December 18, 2015.

Observations: The PATH Act and the legislative history are silent as to whether the increase from five percent to 10 percent will become applicable to non- regularly traded interests in a

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[12] Section 897(c)(3).
[13] Attribution rules for determining whether the 10-percent threshold of publicly traded REIT stock ownership is exceeded are the same as those for determining whether the 5-percent threshold of publicly traded non-REIT stock ownership is exceeded.

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publicly traded REIT (including interests other than stock[14]). Since 1988, regulations have generally extended the publicly-traded exclusion from USRPI status to non-regularly traded interests held by a person, where such interests are of no greater value (generally, on date of acquisition) than five percent of the value of the least valuable class of the corporation's regularly traded stock. Treasury and IRS may wish to indicate an increase in the value of non-publicly traded interests in a REIT that can be excluded from USRPI by reference to their value relative to the REIT's publicly traded stock, commensurate with the statutory increase in the value of publicly traded stock that can be excluded.

New rules for determining whether a REIT or RIC is "domestically controlled":
Regardless whether REIT or RIC stock is or is not publicly traded, stock in a REIT (or a RIC that is a QIE) has never been a USRPI if the REIT or RIC is a "domestically controlled" QIE. The PATH Act made no change to this. "Domestically controlled" QIE was and remains defined as a QIE in which less than 50 percent in value of the stock was held directly or indirectly by foreign persons at all times during the "testing period."

The PATH Act added new "special ownership rules" to section 897(h)(4), effective December 18, 2015, for applying the "domestically controlled" definition to a QIE when stock in the QIE is either publicly traded, or owned by another QIE.[15]

- **Publicly traded QIE stock:** New Code section 897(h)(4)(E)(i) provides that, in the case of a QIE any class of stock of which is regularly traded on an established securities market in the United States, "a person holding less than 5 percent of such class of stock at all times during the testing period shall be treated as a United States person, unless the [QIE] has actual knowledge that such person is not a United States person."
- **Observation:** It seems unlikely that the QIE could know the 5-year history of a particular person's percentage ownership in the QIE without having identified the person (and thus, whether the person is a United States person). However, the language of the statute would seem to make this necessary, as a shareholder that owns less than 5 percent in the current year may theoretically have owned 5 percent or more at some point within the five year testing period. If the QIE has identified each person who at any time in the last five years has owned its stock, and whose percentage ownership has not exceeded five percent, then it has done a fair amount (perhaps in some cases, a tremendous amount) of the work that might otherwise appear to be necessary even if there were no "special ownership rules" added by the PATH Act. The legislative history describes this rule differently than does the statute: a QIE "shall be permitted to presume that holders of less than five percent of a class of stock regularly traded on an

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[14] Pursuant to Treas. Reg. §1.897-1(d)(3), an interest, other than solely as a creditor, in a corporation, includes a direct or indirect right to share in the appreciation in value of an interest in the corporation or a direct or indirect right to share in the appreciation in value of assets of, or gross or net proceeds or profits derived by the corporation. Consequently, a foreign person may have an interest in a domestic corporation the gain on which can be taxed by reason of FIRPTA even where such foreign person does not own stock in such corporation.
[15] Note that PLR 200933001 (February 26, 2009) dealt with the different question of how (for section 897(h)(4)(B) purposes) to treat ownership, by domestic corporations neither of which was "a REIT, RIC, hybrid entity, conduit, disregarded entity, or other flow-through or look-through entity," of stock in a REIT.

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established securities market in the United States are US persons throughout the testing period."[16] Under this language, it might appear to be sufficient for a REIT to identify its greater-than-five-percent owners as of the date of a particular shareholder's disposition of its stock (or perhaps all days in the year of such disposition), and if there are none, to claim domestically controlled status (absent, of course, actual knowledge to the contrary). The difference in these two formulations may be a hint that future administrative guidance could add some additional clarification on the statutory language in section 897(h)(4)(E)(i).

- **QIE stock held by domestically controlled QIEs that are publicly traded or RICs that issue redeemable securities:** Any stock in a QIE that is held by a domestically controlled QIE, (i) any class of stock of which is regularly traded on an established securities market, or (ii) which is a RIC that issues redeemable securities, is treated as held by a US person.
- **QIE stock held by non-domestically controlled QIEs that are publicly traded or RICs that issue redeemable securities:** Any stock in a QIE that is held by another QIE, (i) any class of stock of which is regularly traded on an established securities market, or (ii) which is a RIC that issues redeemable securities, is treated as held by a foreign person if the other QIE is not domestically controlled.
- **QIE stock held by other QIEs:** Any stock in a QIE held by another QIE not described above will be treated as held by a US person in proportion to the stock of the other QIE that is (or is treated as) held by a US person.

Observation: The rules for QIE stock owned by a publicly traded QIE (or a RIC that issued redeemable securities) make the US-vs.-foreign ownership question one with only two possible answers, eliminating the possibility that an infinite number of more graded determinations might otherwise have to be made in order to apply the basic "domestically controlled" definition to the lower-tier QIE. But if the upper-tier QIE is not publicly traded (and is not a RIC that issued redeemable securities), then for the purposes of determining whether a lower-tier REIT is domestically controlled, the PATH Act seems to require looking through to the owners of the upper-tier REIT.

Increased rate of withholding tax on amounts realized from USRPIs: Ever since the FIRPTA withholding rule, section 1445, was enacted in 1984, the rate of withholding has generally been 10 percent. That is, absent an exception, a transferee of a USRPI was generally required to deduct and withhold a tax equal to 10 percent of the amount realized by the transferor on the disposition if the transferor is a foreign person. The PATH Act increased the 10-percent rate to 15 percent, effective for dispositions that occur more than 60 days after enactment, or after February 16, 2016.[17]

However, the legislation makes an exception for property (i) which is acquired by the transferee for use as a residence and (ii) where the amount realized upon disposition is greater than $300,000 (the amount set by section 1445(b)(5) for exemption from FIRPTA withholding)

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[16] JCT TE at 190.

[17] The rate increase also applies to a distribution of property by certain domestic corporations to foreign shareholders; taxable distributions by domestic or foreign partnerships, trusts or estates; and dispositions of interests in partnerships, trusts or estates.

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but does not exceed $1,000,000. In these cases, FIRPTA withholding will remain at 10 percent.

Exclusion of RICs and REITs from recourse to the cleansing rule: Generally, a taxpayer's interest in a domestic corporation is not treated as a USRPI held by the taxpayer if the corporation (i) had no USRPI on the date of the taxpayer's disposition of the interest, and (ii) all of the USRPI held by the corporation during the shorter of the taxpayer's holding period, or the five-year period preceding the date of taxpayer's disposition of the interest, was disposed of by the corporation in a transaction in which gain (if any) was fully recognized (or such USRPIs ceased to be USRPIs by reason of the rule described in this sentence). This exception to the definition of USRPI is commonly referred to as the "cleansing rule." Prior to the PATH Act, this rule applied equally to RICs, REITs, and other corporations.

The PATH Act makes the cleansing rule inapplicable, effective for dispositions made on or after December 18, 2015, where the corporation, or any predecessor to the corporation, was a RIC or REIT at any time during the shorter of (i) the period during which the taxpayer held the relevant interest in the corporation, or (ii) the five-year period ending on the date of the taxpayer's disposition of the interest.

REIT Stock held by qualified collective investment vehicles not treated as USRPI: The PATH Act added another exception from USRPI status for REIT stock, whether publicly traded or not, when the REIT stock is held by a publicly traded foreign collective investment vehicle. This new exception, found in new Code section 897(k), applies only to the extent that the investors in the publicly traded foreign entity are not themselves greater-than-10-percent shareholders (directly or indirectly, including through the publicly traded foreign entity) in the REIT. (Such greater-than-10-percent investors are called "applicable investors.")

- **Qualified shareholders:** The name given to a publicly traded foreign collective investment vehicle that can exclude some or all of its REIT stock from USRPI under this new rule is "qualified shareholder." To be a qualified shareholder, an entity must either be a "recognized exchange"- traded treaty resident, or a US-exchange-traded foreign limited partnership. Either way, the entity must be exchange-traded; the difference is that along with treaty residence goes a greater range of exchanges that will "count" toward qualification.

- **Qualified collective investment vehicles:** To be a qualified shareholder, the entity also must satisfy the definition of a "qualified collective investment vehicle" (QCIV). If the entity is a treaty-country resident, it may achieve QCIV status if it is eligible for a reduced rate of US tax on dividends under the relevant US tax treaty when the entity holds more than 10 percent of the stock of the REIT in question. If the entity is a publicly traded partnership, it may achieve QCIV status if it is a "withholding foreign partnership"[18] and would have been a USRPHC in the five-year period preceding its disposition of its interests in a REIT (or distribution with respect to the partnership's interests in a REIT) if it were a domestic corporation. Finally, if the entity is fiscally transparent, or is required to include dividends in its gross income but is entitled to a deduction for distributions to its investors, then the Secretary of the Treasury has the

[18] See, e.g., Treas. Reg. §1.1441-5T(c)(2)(ii).

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authority simply to designate it as a QCIV.

No collective investment vehicle, whether or not it meets one of the foregoing criteria, will be treated as a "qualified shareholder" unless it maintains records on the identity of each person who, at any time during its taxable year, is the direct owner of five percent or more of the class of its interests that is regularly traded on the relevant exchange.

- **Exclusion of qualified shareholder's REIT stock from USRPI, and of REIT distributions to qualified shareholders from gain on the sale or exchange of USRPI:** Effective for any disposition on or after December 18, 2015, and for any distribution by a REIT on or after December 18, 2015 (and which is treated as a deduction for a taxable year of the REIT ending after such date), a qualified shareholder will exclude all or a portion of its REIT stock from USRPI (and a portion of its REIT stock gains, and its REIT distributions attributable to USRPI gains, from its own USRPI gains).

  Generally, the portion (if any) of the qualified shareholder's REIT stock that will continue to be treated as USRPI is determined by reference to the ratio of (a) the value of the interests in the qualified shareholder treated as held (directly or indirectly) by "applicable investors" to (b) the value of all interests in the qualified shareholder. If the qualified shareholder is a partnership, then the applicable investor's interest in the partnership for this purpose generally is based on the highest share of the partnership's income or gain that such investor may receive during the period in which the applicable investor is a partner in the partnership.

  If a distribution by a REIT is treated as a sale or exchange of stock under section 301(c)(3), 302, or 331 with respect to a qualified shareholder, the portion of the REIT distribution that is excluded from the qualified shareholder's USRPI gain thanks to new section 897(k) is treated as a dividend subject to the 30-percent US gross-basis tax under sections 871(a), 881, 1441, and 1442 even if the distribution would have been a capital gain distribution under the REIT rules.[19]

Observations: In contrast to the US securities exchange laws, the laws of many other countries do not require the maintenance of records with respect to five-percent-or-more owners of publicly traded entities; this may limit the number of entities whose interests are not regularly traded on a US exchange but that, under current practices, still satisfy the "qualified shareholder" definition. In addition, in most of its treaties in which the dividend articles have been revised since 1988, the United States has reserved the right to impose full internal-law (30-percent) tax on REIT dividends received by a resident of the other country that holds more than 10 percent of the stock of the REIT paying the dividends. (The US-Australia treaty

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[19] This provision partially overrides one of the conclusions in AM 2008-003, which found that a liquidating distribution by a publicly traded REIT to a foreign shareholder, which did not own more than five percent of the REIT stock during the one- year period preceding the date of the distribution, was not a dividend, and therefore was not subject to taxation as an ordinary dividend even though it was also exempt from taxation as a gain thanks to the exception from FIRPTA taxation for foreign shareholders of small blocks of publicly traded stock. If the REIT shareholder is not a "qualified shareholder," the conclusion in AM 2008-003 appears not to be affected by the PATH Act.

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provides an exception to some extent for dividends paid by a REIT to a "listed Australian property trust," and the US-Netherlands treaty provides an exception for dividends paid by a REIT and beneficially owned by a "beleggingsinstelling."[20]) Practically speaking, then, it may be a narrowly limited class of entities that satisfy the QCIV definition without being withholding foreign partnerships, or being designated as QCIVs by the Secretary.

Conclusion

For the most part, the PATH Act seems to represent a significant simplification for foreign investors in REIT stock and RIC stock, as well as provide a significant benefit for qualified foreign pension funds owning US real property interests of all kinds. There are, however, plenty of new questions raised by the words added to the Code by the PATH Act. For this reason, we expect the definition of "qualified foreign pension fund," and some of the other contours of the PATH Act, to be clarified as taxpayers and the IRS grapple with these new provisions. In addition, it is unclear if and how the ranks of "qualified shareholders" will fill out as some foreign collective investment vehicles fit themselves into the self-executing parts of the definition, and/or the Treasury Secretary expands the definition, via future designations, to cover collective investment vehicles that would otherwise fail the self-executing definition of "qualified shareholder" in the PATH Act.

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Multistate impact of federal PATH act's "business extenders" provisions

Overview

On December 18, 2015, President Obama signed into law the federal Protecting Americans from Tax Hikes Act of 2015, a component of H.R. 2029 (PATH),[21] which makes permanent

[20] In addition to the US-Australia treaty and the US-Netherlands treaty, the current US tax treaties with China, Cyprus, Egypt, Hungary, Indonesia, Jamaica, South Korea, Morocco, Norway, Philippines, Poland, and Romania may allow in some cases for a reduced US tax rate on dividends paid by a REIT to a resident of the other country even where the resident holds a greater-than-10-percent interest in the REIT paying the dividend.
[21] Protecting Americans from Tax Hikes Act of 2015; P.L. 114-113; 2015 Enacted H.R. 2029. See Deloitte Tax LLP's Tax News & Views (Dec. 18, 2015) for more details on this federal legislation, located online.

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several lapsed business incentives, including the research credit and the subpart F exception for active financing income, as well as renews a handful of provisions – such as bonus depreciation – for five years. Other provisions are extended through 2016. In some cases, provisions are extended with modifications, while certain others are extended subject to a phase out. Among the dozens of provisions that are now made permanent or extended retroactive to the end of 2014 and/or modified prospectively under PATH are the following:

- Credit for certain research and experimentation expenses;
- 50 percent bonus depreciation provisions for qualified property, and the election to accelerate some alternative minimum tax credits in lieu of bonus depreciation;
- Active financing income exception and the application of the controlled foreign corporation look-through rule (the latter of which is extended five years);
- Increased expensing limits for Internal Revenue Code (IRC) § 179 property and the expanded definition of § 179 property;
- 15-year straight-line cost recovery provision that applies to certain leasehold, restaurant, and retail improvements, as well as restaurant buildings;
- Reduced holding period for the S corporation built-in gains tax; and
- Capital gain exclusion on qualified small business stock.

These federal law changes may have a significant effect on state corporate income taxes depending on each state's adoption of the IRC and each state's decoupling provisions. In general, states with automatic or "rolling" IRC conformity would adopt the provisions of PATH unless specific-state legislative action is taken to decouple from some or all of the federal law changes. Some states effectively adopt the IRC by referencing federal taxable income as the state income starting point. Although these states do not specifically adopt the IRC in whole or in part, they would generally be viewed as following provisions of PATH that affect federal taxable income. Other states adopt the IRC as of a specific date; do not adopt the IRC provisions in totality; and/or provide for delineated modifications, variations, or exceptions to certain adopted IRC provisions. For these states, further analysis is needed to determine the extent to which certain provisions of PATH are followed (i.e., does the state adopt the IRC as of December 18, 2015, or include the specific provisions in the state's code?), bearing in mind that many states do not make such conformity updates or decoupling determinations until the tax filing season begins.

For example, the following table outlines how California, Florida, Illinois, New York, and Texas conform to the IRC generally.

State	IRC general conformity
California	Conforms to the IRC as of January 1, 2015,[22] with certain modifications and exceptions.

URL: http://www2.deloitte.com/content/dam/Deloitte/us/Documents/Tax/us-tax-taxnewsandviews-151218.pdf

[22] Cal. Rev. & Tax code § 23051.5(a)(1) & §17024.5(a). Pursuant to Laws 2015, ch. 349, 2015-2016 Regular Session (A.B. 154), the January 1, 2015 conformity date applies to taxable years beginning on or after January 1, 2015. Prior to this bill, California conformed to the IRC as of January 1, 2009, for taxable years beginning on or after January 1, 2010. See our previously

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State	IRC general conformity
Florida	Presently conforms to the IRC as of January 1, 2015,[23] with certain modifications and exceptions. Each year, the Florida legislature must consider adoption of the current IRC and could conceivably pass legislation this year to retroactively adopt the IRC as of December 18, 2015, or later.
Illinois	Provides for rolling conformity to the IRC, with certain modifications and exceptions.[24]
New York	Effectively provides for rolling conformity to the IRC through reference to federal taxable income (before the special dividends received deduction and net operating loss deduction) as the state income starting point,[25] with certain modifications and exceptions.
Texas	Conforms to the IRC as of January 1, 2007,[26] with modifications for the “margin” tax.

This Tax Alert provides examples of the effect of certain provisions of PATH on state corporate income taxation in general.

State analysis of the federal law changes – some examples

Research and experimentation credit: PATH retroactively makes permanent the modified credit under IRC § 41 for certain research and experimentation expenses. For taxable years beginning after 2015, the credit is modified to allow an eligible small business (as defined in IRC § 38(c)(5)(C)) to claim the credit against both its regular tax and alternative minimum tax (AMT) liabilities. Beginning in 2016, certain small businesses also may claim the credit against the employer portion of their payroll tax liability, rather than against their income tax liability.

States with rolling or automatic conformity and that do not have other specific provisions addressing the research credit may potentially continue to follow the provisions of PATH relating to this credit. States with specific-date conformity will continue to follow the federal rule in effect on that date (i.e., if the conformity date is before December 18, 2015, the new federal provisions may not apply to the state). Finally, states that refer to the rules of IRC § 41 without regard to a specific date will automatically incorporate the changes in the rule and/or may have their own state modifications that may not be impacted.

Bonus depreciation: PATH retroactively extends 50 percent bonus depreciation for certain qualified property placed in service over the next five years (i.e., through 2019), subject to a phaseout schedule: 50 percent bonus depreciation continues for 2015, 2016, and 2017, with the percentage falling to 40 percent in 2018, and 30 percent in 2019. After 2015, PATH also

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issued Multistate Tax Alert, “California updates federal tax conformity to January 1, 2015,” dated October 5, 2015, for more details on this 2015 law change, located online.
URL: http://www2.deloitte.com/us/en/pages/tax/articles/multistate-tax-alert-california-updates-federal-tax-conformity.html?id=us:2em:3na:usic:awa:tax:021516
[23] Fla. Stat. ch. 220.03(1)(n) & (3).
[24] 35 ILCS 5/203.
[25] N.Y. Tax Law §208.9; 208.9(b)(2); 208.9(b)(6).
[26] Tex. Tax Code Ann. §171.0001(9).

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allows bonus depreciation to be claimed on qualified improvement property regardless of whether the property is subject to a lease, and removes the requirement that an improvement be placed in service more than three years after the building was placed in service.

A handful of states that have rolling conformity and that incorporate bonus depreciation without modification may likewise follow these changes. States with a specific date of conformity will continue to follow the IRC rules as of that date and therefore may or may not include bonus depreciation. Many states never conformed to bonus depreciation; these states will continue to follow their own modification provisions and not be affected by this provision of PATH absent additional state legislation.

Alternative minimum tax credit in lieu of bonus depreciation: PATH retroactively extends through 2019 the election to accelerate some AMT credits in lieu of bonus depreciation and, beginning in 2016, increases the amount of unused AMT credits that may be claimed in lieu of bonus depreciation. This election allows corporations to effectively "monetize" a portion of their AMT credits in lieu of claiming bonus depreciation. In general, states with rolling conformity will follow this change.

States with specific-date conformity will continue to follow the IRC rules as of that date and therefore may not follow this change. Finally, some states may not conform to the federal AMT provisions or have state modifications to such provisions, and thus would not be impacted.

Active financing income exception and controlled foreign corporation look-through: The federal exception in subpart F allowing deferral of the active financing income of a controlled foreign corporation (CFC) engaged predominantly in banking, financing, or similar business activity expired at the end of 2014. PATH retroactively makes permanent, without modification, the exception from subpart F for certain foreign income derived in the active conduct of a banking, financing, securities, or insurance business. Similarly, the Internal Revenue Service rules for look-through treatment for payments between related CFCs expired in 2014.

PATH retroactively extends through 2019, without modification, the application of the look-through rule which excludes from subpart F certain payments of interest, dividends, rents, and royalties between related CFCs under the foreign personal holding company rules.

States that start with federal taxable income would automatically follow the federal impact. However, there will be little or no impact to states that require an adjustment or do not follow the federal provisions for subpart F income. Finally, a few states – such as California[27] – generally have distinct rules that might require a separate calculation altogether.

Considerations and ASC 740 treatment: The numerous federal tax law changes contained within PATH may impact state corporate income tax computations depending on each state's adoption of the IRC and/or each state's decoupling provisions, and the timing attributed to such treatment. Pursuant to ASC 740, companies are required to account for the effect of a change in income tax law in the period that includes the enactment date of that law change. In this respect, companies may wish to consult with applicable advisers for state tax guidance regarding the ASC 740 impact of these law changes.

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[27] See Cal. Rev. & Tax. Code § 25116.

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Country Spotlight: France

French finance laws adopted

The French parliament adopted the amended finance bill for 2015 and the finance bill for 2016 on 17 December 2015, which were upheld by the country's constitutional court on 29 December 2015. This article looks at the major measures in both laws that affect companies.

Corporate tax

Decrease in effective corporate income tax rate: Companies subject to corporate income tax whose annual turnover exceeds EUR 250 million are subject to a surtax on the corporate income tax, equal to 10.7% of the company's corporate tax liability. Introduced in 2011, the surtax was intended to apply only until fiscal years ended on or before 30 December 2015, but the date was extended to 30 December 2016 by the amended finance law for 2014. The Minister of Finance now has confirmed that the surtax will be eliminated at the end of 2016. As a result, the maximum effective corporate income tax rate applicable to large companies will decrease to 34.43% from the current 38% (not taking into account the 3% surtax on dividends distributed) for fiscal years ended after 30 December 2016 (fiscal year 2016 for companies having a calendar financial year).

Special social contribution: Companies currently are liable to a special social solidarity contribution equal to 0.16% of their turnover. This contribution is being phased out and will be replaced with a rebate, the amount of which will increase annually; the rebate will be increased to EUR 19 million for 2016 (EUR 3,250,000 for 2015).

Tax treatment of dividends in a tax consolidated group: The amended finance bill for 2015 modifies the tax treatment of dividends received by members of a French tax-consolidated group to bring French law in line with jurisprudence of the Court of Justice of the European Union (CJEU) for financial years open as from 1 January 2016. The CJEU ruled on 2 September 2015 in the Steria case that the French tax consolidation rules violate the freedom

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of establishment principle in the Treaty on the Functioning of the European Union because a domestic tax group of French companies can obtain certain tax benefits for dividends that are not available to tax-integrated parent companies with subsidiaries established in other EU member states (for prior coverage, see France tax alert, 2 December 2015). The amended finance bill for 2015 provides as follows:
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-france-2-december-2015.pdf

- The full exemption provided for under the existing tax consolidated group regime rules is abolished. Dividends received within a tax group will be entitled to the standard participation exemption under the normal rules, i.e. a fixed percentage of deemed expenses still will be taxable.
- The percentage of deemed taxable expenses is reduced from 5% to 1% if certain conditions are fulfilled. The 1% deemed expenses will be available when companies that are members of a tax consolidated group receive dividends from (1) French companies within the same tax consolidated group (i.e. intragroup dividends); or (2) EU companies or companies incorporated in the European Economic Area (EEA) that have concluded a tax treaty with France, provided the payer company would satisfy the conditions for being a member of the French tax group if it were established in France. To qualify for the 1% deemed expenses, the distributing company must meet the following requirements:
  - Be subject to a corporate income tax in its country of residence that is equivalent to the French corporate income tax;
  - Be at least 95% directly or indirectly owned by the French head of the tax consolidated group, for the entire fiscal year concerned;
  - Have a 12-month fiscal year; and
  - Open and close its fiscal year at the same time as the members of the French tax consolidated group.

Participation exemption and withholding tax on dividends: Several changes are made to the domestic participation exemption and withholding tax on dividends in the context of both domestic and cross-border distributions:

- The general anti-abuse clause (GAAR) in the amended EU parent-subsidiary directive (PSD) is implemented into French domestic tax law. The GAAR requires EU member states to refrain from granting the benefits of the PSD if one of the main purposes of an arrangement is to obtain a tax advantage that would defeat the object or purpose of the PSD, and the arrangement is not genuine.
- In such cases, the GAAR will operate to deny the withholding tax exemption on dividends paid by French companies to certain EU entities and to disallow the benefits of the domestic participation exemption on dividends paid to French parent companies. The GAAR applies to fiscal years opening on or after 1 January 2016.
- The domestic withholding tax exemption for dividends paid to EU companies is extended to companies located in the EEA.
- The participation exemption and the exemption on dividends paid to EU parent companies will apply to the bare ownership of shares.
- The withholding tax exemption for dividends paid to EU parent companies, as outlined in the CJEU's 2006 decision in the Denkavit case, is codified in the French tax code.

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The court held in that case that France's rules imposing withholding tax on outbound dividends, while almost totally exempting domestic distributions from withholding tax, were incompatible with EU law. Since the Denkavit decision, the French tax authorities have adopted the practice of granting the exemption on dividends paid to an EU parent company that meets the requirements for a French parent to benefit from the exemption, provided the recipient of the dividends is unable to offset the corresponding tax credit in its state of residence against the local tax due on the dividends.

- A new withholding tax exemption has been introduced in the tax code for dividends paid to certain nonresident EU or non-EU companies (other than collective investment funds), to bring French law in line with EU rules. The exemption applies to distributions made as from 1 January 2016 where the recipient of the dividends is (1) located in the EU, or in a non-EU country that has signed an administrative assistance agreement with France; (2) in a tax loss position; and (3) is under a liquidation procedure on the date of the distribution. It should be noted that the exemption may be useful only in cases where the participation exemption for outbound dividends to EU companies (described above) does not apply. Thus, it mainly will be relevant for distributions to EU companies holding less than 5% of the distributing entity, or distributions to non-EU companies located in a country that has signed an administrative assistance agreement with France.
- Provisions regarding certain distributions that do not qualify for the domestic participation exemption, which were eliminated at the end of 2014 following a decision of the French constitutional court, are reinstated (for prior coverage, see *World Tax Advisor*, 23 January 2015). The French tax code previously excluded from the participation exemption dividends derived from profits of a subsidiary that related to certain activities that were not subject to the French corporate tax or an equivalent foreign tax (which meant that dividends paid by a real estate investment company were excluded from the participation exemption). The constitutional court struck this exclusion down. The reinstatement of these provisions under the amended finance law applies to fiscal years ending as from 31 December 2015, so there is no time period during which the exclusions will not apply.
  URL: http://newsletters.usdbriefs.com/2015/Tax/WTA/150123_1.html
- A safe harbor clause is introduced to allow the participation exemption to apply to dividends received from companies located in noncooperative states and territories (NCST), provided the French recipient company can demonstrate that the distributing entity carries on real activities and that the location of the entity does not aim at, or result in, the entity benefiting from a favorable tax regime in the NCST. The list of NCST was updated on 21 December 2015, with retroactive effect from 1 January 2015, and the British Virgin Islands and Montserrat have been removed from the list.

Country-by-country reporting: The amended finance law for 2015 implements a country-by-country (CbC) reporting requirement in France, based on the recommendations of the OECD's final report on action 13 of the base erosion and profit shifting (BEPS) project, with the government's full support. It should be noted that two amendments calling for public publication of the CbC reports were rejected.

The precise data to be included in the French CbC report will be defined by an administrative decree, but is expected to include economic, accounting and tax information on groups within

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the scope of the measure, and information on the activities of group entities and their location, in line with the final report on BEPS action 13.

According to the amended finance law, companies within the scope of the CbC reporting requirement include French companies fulfilling all of the following four conditions:

- Companies with consolidated accounts;
- Companies that control, directly or indirectly, subsidiaries located abroad, or that have branches located abroad;
- Companies with annual consolidated group revenue equal to, or in excess of, EUR 750 million; and
- Companies not owned by another French entity already within the scope of the measure, or by a foreign entity within the scope of a similar provision under its local legislation.

A French subsidiary of a foreign group also will be subject to French CbC reporting when it is held or controlled, directly or indirectly, by a foreign company not established in an “effectively transparent country,” that would be subject to the French reporting requirement if it were established in France, provided that:

- The French company is designated by the group to fulfill the CbC reporting requirement for the group, and has informed the French tax authorities of this; or
- The French company cannot prove that any other entity of the group located in France or in a listed country or territory has been designated to fulfill the reporting obligation for the group.

The government will publish a list of countries and territories that are regarded by France as “effectively transparent countries,” i.e. countries that have a similar CbC reporting requirement and have concluded with France an agreement on the automatic exchange of CbC reports and related obligations. The government also will specify the reporting format, which will be based on international standards.

The annual CbC report will have to be filed with the French tax authorities within 12 months after a group’s fiscal year end. The report will be exchanged automatically between affected tax administrations in accordance with applicable tax treaties and/or EU regulations under a condition of reciprocity, but will remain confidential.

Failure to comply with the CbC measures will trigger penalties that will not exceed EUR 100,000.

The CbC provisions will be applicable to fiscal years open as from 1 January 2016.

Other measures

Temporary “additional depreciation” mechanism: The Growth and Economic Activity Law (also called the “Macron law”), enacted in July 2015, provided for an “exceptional additional

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depreciation” mechanism (i.e. a “super deduction”), which is extended by the amended finance bill for 2015.

Under the initial measure, companies subject to corporate income tax are entitled to an additional deduction from their taxable income, equal to 40% of the original cost (excluding financial expenses) of eligible assets that are used for the company’s business and that are acquired or manufactured by the company between 15 April 2015 and 14 April 2016. The extra deduction will be spread over the normal useful life of the assets on a straight-line basis.

This mechanism can result in tax savings of approximately 13% to 15.2% of the investment cost (depending on the size of the company).

Eligible assets must be eligible for depreciation under the declining-balance method and must fall within one of the five categories specifically listed in the law:

- Equipment and tools used for industrial manufacturing or processing operations;
- Facilities used for water purification and air quality improvement;
- Handling equipment;
- Equipment used for the production of steam, heat or energy (except for facilities for the production of electrical energy subject to regulated tariffs); and
- Materials and tools used for scientific or technical research activity.

This notional deduction also is available to a company that rents an eligible property under a finance lease or a lease with an option to purchase, provided the leasing contract is concluded between 15 April 2015 and 14 April 2016.

The amended finance bill for 2015 extends the mechanism to apply to:

- Optic fiber installations and equipment acquired between 1 January 2016 and 31 December 2016;
- Natural gas or bio-methane functioning heavy trucks acquired between 1 January 2016 and 31 December 2017; and
- Ski lift installations acquired between 15 April 2015 and 31 December 2016.

Special amortization: Subscriptions made by companies in the capital of innovative small and medium-sized enterprises (SMEs) benefit from a special amortization allowance over five years. In response to negotiations with the European Commission, the amended finance law for 2015 restricts the scope of the incentive to innovative SMEs in existence for less than 10 years. The effective date for this measure will be set by a special decree.

Special depreciation allowance: Industrial robotics manufactured or purchased by certain companies between 1 October 2013 and 31 December 2015 may be amortized over 24 months, starting from the placed-in-service date. The special depreciation is extended for an additional year by the finance law for 2016, until 31 December 2016. This benefit remains subject to compliance with the *de minimis* provisions under EU law.

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Film tax credit: Film producers may benefit from a tax credit for certain expenses incurred on films produced in the French territory. To further enhance the attractiveness and competitiveness of the film industry in France, the tax credit may be granted regardless of whether the film is presented in French:

- The rate is increased up to 30% in certain circumstances (in particular, for films in French); and
- The global ceiling for all tax credits applicable to one cinematographic work is increased from EUR 4 million to EUR 30 million.

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Calendars to watch

Each edition, be sure to mark your calendars for some of the more important events (recent and upcoming) as well as tax developments making in impact on businesses investing into the United States.

Recent and Upcoming Activities

March 8 — **Dbriefs webcast:** Subchapter C update: Recent developments and opportunities
Register
URL: http://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/march/2016/dbriefs-subchapter-c-update-recent-developments-and-opportunities.html?id=us:2em:3na:usic:awa:tax:021516

March 1 — **Dbriefs webcast:** State income taxation of pass-through entities: Navigating the complexities
Register
URL: http://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/march/2016/dbriefs-state-income-taxation-of-pass-through-entities-navigating-complexities.html?id=us:2em:3na:usic:awa:tax:021516

February 24 — **Dbriefs webcast:** BEPS Update: Navigating a new global tax landscape
Register
URL: http://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/february/2016/dbriefs-beps-update-navigating-new-global-tax-landscape.html?id=us:2em:3na:usic:awa:tax:021516

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February 11 **Dbriefs webcast archive:** PATH Act of 2015: What does it mean for multinational investors?
Watch
URL: http://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/february/2016/dbriefs-path-act-of-2015-what-does-it-mean-for-multinational-investors.html?id=us:2em:3na:usic:awa:tax:021516

January 28 **Dbriefs webcast archive:** Analytics: New fuel to power international tax planning
Watch
URL: http://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/january/2016/dbriefs-analytics-new-fuel-to-power-international-tax-planning.html?id=us:2em:3na:usic:awa:tax:021516

January 12 **Dbriefs webcast archive:** Understanding and implementing the Common Reporting Standard Requirements
Watch
URL: http://www2.deloitte.com/us/en/pages/dbriefs-webcasts/events/january/2016/dbriefs-understanding-and-implementing-common-reporting-standard-requirements.html?id=us:2em:3na:usic:awa:tax:021516

Recent Tax Developments

January 27 **Global Transfer Pricing Alert:** US Issues Country-by-Country Reporting Regulations
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-transfer-pricing-alert-16-001-6-january-2016.pdf

January 12 **United States Tax Alert:** Sixth Circuit Holds Over-the-Counter Foreign Currency Option Contracts are Section 1256 Contracts
URL: http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-united-states-12-january-2016.pdf

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