



# Introduction to the Taxation of Foreign Investment in U.S. Real Estate



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# Introduction

## The Impact of Taxes on Real Estate

Real estate is very much a tax-driven industry. As a result, changes in U.S. tax policy have an impact on the relative attractiveness of real estate as an investment class for non-U.S. investors. Increases to the U.S. tax rates on capital gains, the taxation of the disposition of real estate, and U.S. tax reporting requirements are often cited as examples of such policies that create obstacles to investment. Over the years, real estate organizations in the U.S. have offered proposals which would provide some relief and have sought clarification of existing rules. These efforts have met with various degrees of success. For example, in recent years there have been numerous improvements and clarifications to tax rules governing the operations of Real Estate Investment Trusts (“REIT”). Additionally, the taxation of certain transactions involving the origination and modification of indebtedness has been somewhat relaxed to respond to the concerns of the impact of taxes on an already distressed economy.

On the other hand, recent proposals to reduce or repeal the taxation of the disposition of real estate by non-U.S. investors have not resulted in any substantive changes as of the printing of this Guide. Finally, recent proposals by the current Obama administration seek to further tighten the U.S. tax reporting requirements associated with cross border payments and transfers. While the ultimate impact of such proposals is unclear, it is important that investors have an understanding of the tax rules currently in place in order to effectively develop a U.S. real estate strategy.

The following is an introduction to some of the more significant tax issues that should be considered by non-U.S. investors in this regard.

**Any tax advice included in this written communication was not intended or written to be used, and it cannot be used by the taxpayer, for the purpose of avoiding any penalties that may be imposed by any governmental taxing authority or agency.**

# Taxation of Income from U.S. Real Estate

U.S. taxation of international investors is imposed by the Internal Revenue Code (the “Code”), and in some cases the tax imposed by the Code can be reduced under income tax treaties that the United States has entered into with other nations. Thus, international investors normally structure their investments to take advantage of treaty benefits whenever possible.

## Taxation of U.S. Entities and Individuals

The United States taxes its citizens, residents, and domestic corporations and trusts on all their income regardless of where it is earned, i.e., on a worldwide basis. Noncitizens lawfully admitted to the United States as permanent residents (green card holders) or physically present in the United States for at least 183 days during any year, or a greater number of days over a three-year testing period, are considered U.S. residents. The tax is imposed on net income, i.e., gross income from all sources reduced by allowable deductions, such as interest expense, taxes, and depreciation. In general, business losses in excess of income are first carried back two years and then may be carried forward 20 years to reduce income in those years, although a business may elect to waive the carryback period. Currently, U.S. corporate income tax rates range from 15% to 35% which apply to ordinary business income as well as to capital gains. The U.S. income tax rates for individuals and trusts are separated into six tax brackets and range from 10% to 35% through 2010, and to 39.6% thereafter. Capital gains are taxed at a maximum rate of 15% through 2010. Certain “qualified dividends” are taxed like capital gains.

## Taxation of Foreign Entities and International Investors

Foreign corporations and trusts, and individuals who are neither U.S. citizens nor U.S. residents (“international investors”) are subject to U.S. income tax only on income that either is effectively connected with a U.S. trade or business (“effectively connected income,” or “ECI”), regardless of source, or, if not ECI, is still U.S. source income.

Rental income and gain from the sale of real estate located in the United States is U.S. source income. As a general rule, interest and dividends paid by a U.S. corporation are U.S. source income. In some cases, interest paid by a foreign corporation or a foreign or domestic partnership is also U.S. source income.

## U.S. Trade or Business

In general, a foreign corporation or international investor that engages in considerable, continuous, or regular business activity in the United States is considered to be engaged in trade or business within the United States. Mere ownership of unimproved real property or residential property held for personal use (for instance, an apartment or condominium) does not create a U.S. trade or business. Further, ownership of a single piece of property rented to one tenant on a net lease basis (i.e., where the tenant is required to pay all expenses connected with the real estate) does not give rise to a U.S. trade or business. Leasing commercial buildings on a

net lease basis may or may not create a U.S. trade or business. Where, however, a foreign corporation, international investor, or agents of either actively manage commercial properties and pay all expenses, taxes, and insurance, then the activities constitute a U.S. trade or business.

A partner of a partnership that is engaged in a U.S. trade or business under the above-mentioned guidelines will also be considered to be engaged in a U.S. trade or business. Conversely, an investor who owns shares in a corporation which is engaged in a U.S. trade or business will not be considered to be engaged in a U.S. trade or business by virtue of the investor's share ownership.

## Effectively Connected Income

The effectively connected income of a foreign corporation or international investor is taxed on a net basis at graduated rates like those applicable to U.S. corporations, citizens, and residents.

Generally, U.S. source income is ECI if one of two alternative tests, the business-activities test and the asset-use test, is met. The business-activities test looks to whether the activities of the U.S. business are a material factor in generating the income. The asset-use test looks to whether the income is derived from assets used or held for use in the conduct of a U.S. business. Both tests are applicable to income from real estate. For example, rental income earned on a building used in a U.S. trade or business is ECI under these tests.

Under a special set of rules for gains on dispositions of real property interests (the "Foreign Investment in Real Property Tax Act of 1980," or "FIRPTA") gains from the sale of a U.S. real property interest (a "USRPI"), such as real estate, or interests in partnerships, trusts, and U.S. corporations that own primarily U.S. real estate, are taxed as ECI regardless of whether the taxpayer is actually engaged in a U.S. trade or business. The same treatment may also apply to a distribution by a U.S. Real Estate Investment Trust (REIT) attributable to the REIT's gains from the disposition of U.S. real property.

## Noneffectively Connected Income

A 30% tax is generally imposed by the Code on a foreign corporation's or nonresident alien individual's gross amount of most types of income that is not ECI but that is U.S. source income. (The one type of U.S. source income that is generally not covered by this tax is income from the sale of property.) The rate of this "gross-basis" tax can in some cases be reduced by treaty, or the tax can be eliminated by treaty or by a specific statutory exemption. For example, "portfolio interest," bank deposit interest, and interest on certain short-term obligations is exempt from this tax under internal U.S. law.

The portfolio interest exemption applies to qualified interest payments made to nonbank entities where the foreign lender owns no more than 10% of the U.S. borrower. The debt must be either in registered form (i.e., transferable by one holder to another only when the transferee is identified to the issuer) or in a "bearer" form that precludes ownership by U.S. holders.

The tax on U.S. source income that is not ECI ("non-ECI") is generally collected by withholding at source, i.e., when the income is paid to a foreign person. For this reason, the gross-basis tax is sometimes referred to as "withholding tax."

Where applicable, the gross-basis tax is likely to apply to U.S. source income in the form of dividends, interest, royalties, and certain rental income that is earned by a foreign corporation or international investor who is not engaged in a U.S. trade or business.

## Net-Basis Elections

Code §§ 871(d) and 882(d) allow a foreign corporation or international investor that derives income from real property, but is not engaged in a U.S. trade or business (e.g., the investment is raw land or net leased property) to elect to be taxed on a net basis at graduated rates as if the income were ECI. This “net-basis election” can be beneficial, because the production of realty income generally involves substantial expense. Upon making the election, the investor is relieved of the 30% tax on gross rents and is allowed to deduct the expenses associated with the real estate, such as depreciation and interest. Often these expenses exceed income and therefore no U.S. tax is due. The Code net-basis election may be revoked only with consent from the Secretary and applies to all U.S. real estate held at the time of the election, as well as to property that may be acquired in the future. Further, the net-basis election applies to all income from real property that is located in the United States and held for the production of income. The election does not, however, apply to certain income, including:

- Interest income on a debt obligation secured by a mortgage on U.S. real property.
- Rental income from personal property.
- Income from real property, such as a personal residence, that is not held for the production of income.

## Branch Profits Tax

The earnings and profits of a foreign corporation that are derived from its ECI are generally taxed when withdrawn from the corporation’s U.S. trade or business (or “branch”). The tax, called the branch profits tax (BPT), is 30% of the corporation’s “dividend equivalent amount,” unless a treaty specifies a lower rate or prohibits the BPT. A foreign corporation may be exempt from the BPT for the taxable year in which it completely terminates all of its U.S. trade or business. A branch will not be deemed to have completely terminated, however, if the foreign corporation has any U.S. assets, or generates any ECI, within three years of the year of termination.

A foreign corporation that is not engaged in a U.S. trade or business generally is not subject to the BPT, unless it makes a net-basis election or is deemed to have ECI because it sells a U.S. real property interest.

Because the BPT is imposed in addition to the net-basis U.S. corporate tax, a foreign corporation subject to BPT may pay a combined U.S. tax on its earnings at an effective rate in excess of 50%, unless the BPT rate is reduced by an applicable treaty. Often, this increased tax liability may make a real estate investment through a foreign corporation uneconomical.

## Tax on Excess Interest

If a foreign corporation has ECI, and deducts interest expense in computing its U.S. tax on its ECI, a tax may be imposed on the corporation as if the amount deducted had been interest income received by it from a subsidiary U.S. corporation. The tax is imposed either at the statutory 30% rate, or at a lesser (or zero) treaty rate if a treaty is applicable. The base of this tax is the excess, if any, of the deduction over the amount of (U.S. source) interest paid by the foreign corporation’s U.S. trade or business.

## U.S. Withholding Tax on Payments Made to the Foreign Investor

**By U.S. Corporations** — If a foreign corporation or international investor establishes a U.S. corporation to hold the real estate investment, dividends, and interest paid by the corporation to the investor, are non-ECI and the the payor must deduct and withhold 30% for payment to the Internal Revenue Service (“IRS”), unless this rate is reduced by treaty, or, in the case of interest, unless the interest qualifies for a statutory exemption, such as the one for portfolio interest.

**By foreign corporations** — If the foreign corporation or international investor creates a foreign corporation to hold the investment, dividends paid by the foreign corporation are not subject to U.S. tax. Interest paid by the foreign corporation’s U.S. trade or business is U.S. source income and taxed and subject to withholding like interest paid by a U.S. corporation.

**By partnerships** — Interest paid by a partnership that engaged in a trade or business in the United States generally is U.S. source income, and generally subject to the tax and withholding rules described above. A U.S. partnership is required to withhold and pay the IRS the gross-basis tax on its own income that is U.S. source non-ECI and that is allocable to its foreign partners. Foreign and U.S. partnerships are also required to withhold tax on a foreign partner’s distributable share of the partnership’s net ECI (e.g., the partnership’s gains from sales of U.S. real estate).

**By REITs** — A REIT is a type of U.S. corporation. The dividends that REITs pay in general are subject to the U.S. withholding rules applicable to dividends paid by any U.S. corporation, with two exceptions. Distributions attributable to the REIT’s disposition of U.S. real estate are subject to withholding tax at 35%, and treaties often provide somewhat less reduction in the U.S. tax imposed on REIT dividends than the treaty-based reduction in the U.S. tax imposed on other corporations’ dividends.

**Documentation** — In almost all situations where income is paid to a non-U.S. investor, some form of pre-payment documentation from the investor will be required in order to determine the proper rates and reporting of withholding taxes. These documentation rules can be complex and need to be considered in conjunction with any proposed investment.

# U.S. Tax Implications of Specific Investment Vehicles

## U.S. Corporations

An international investor may choose to own U.S. real estate indirectly through a U.S. corporation formed to hold the property. When a U.S. corporation holds the real estate investment, both the taxation of the entity and the taxation of the repatriated earnings must be considered. Additionally, gain from the disposition of stock of a U.S. corporation is also subject to U.S. taxation if the stock of the U.S. corporation constitutes a “U.S. real property interest” (a “USRPI”).

**Tax on the U.S. Corporation** — U.S. corporations are taxable on their worldwide income on a net basis with deductions for operating expenses. Unless the corporation is a REIT, it is not allowed a deduction for dividends paid to its shareholders. Currently, the top corporate U.S. tax rate is 35%. State and local income taxes will also apply to income from sources in those jurisdictions. There is not a preferential tax rate for capital gains when earned by a U.S. corporation. Thus, a U.S. corporation selling appreciated real estate is taxable on its gain at 35%. If the regular tax results in little or no U.S. tax liability, corporations may instead be subject to an alternative minimum tax of 20% computed on an alternative tax base which reflects “add-backs” of certain tax preferences, such as accelerated depreciation, and limitations on the use of net operating losses. Because the United States generally imposes tax on dividends paid by U.S. corporations, even when paid to non-U.S. persons, U.S. corporations are not subject to the BPT.

Because international investors may seek to use related-party financing arrangements to reduce a corporation’s taxable income subject to U.S. tax, there are limits on a U.S. corporation’s ability to deduct interest expenses paid to related foreign persons that receive treaty protection from U.S. tax in the interest income, and interest expenses on debt guaranteed by foreign related persons. The “earnings stripping rules” of Code § 163(j) are a type of “thin-capitalization” regime that imposes limits on the current deductibility of such interest in years when the corporation’s net interest expense exceeds 50% of the corporation’s “adjusted taxable income.” A safe harbor is provided if the corporation maintains a debt-equity ratio of 1.5 to 1 or less.

**Repatriation of earnings** — Several methods are available to repatriate earnings of a U.S. corporation. First, the investor can simply receive all or any portion of the corporation’s earnings as a dividend. While dividends are subject to a 30% withholding tax under the Code, treaties generally reduce that rate, when they apply. Dividends received may be subject to more favorable taxation schemes in the investor’s home country than other forms of earnings repatriation.

An alternative to earnings repatriation can be the receipt of interest on loans made to the corporation by its shareholder. This method has two major advantages over repatriation by dividend distributions. First, the corporation may realize an interest deduction for the amount paid to its shareholder as opposed to the lack of deduction for amounts paid as a dividend. This deduction lowers the corporation's U.S. taxable income and its U.S. corporate tax liability. Second, the rate of U.S. gross-basis tax on interest received by a foreign lender is usually limited by U.S. tax treaties, where applicable, to a rate lower than the rate of tax that can be imposed on dividends. Interest may also be exempt under internal U.S. law, e.g., the portfolio interest exemption.

Another alternative to earnings repatriation is the realization of proceeds from the disposition of the corporation's stock. If the corporation is a U.S. Real Property Holding Corporation ("USRPHC"), or was a USRPHC during a five-year lookback period, the gain resulting from the sale is subject to U.S. tax as ECI. However, if the shareholder is a foreign corporation, the gain from the sale of stock is not also subject to the BPT. This method of income realization avoids the gross-basis tax that would be imposed if the earnings were distributed as a dividend.

If the U.S. corporation has never been a USRPHC, U.S. taxation may be avoided altogether when the stock is sold and the seller has no other contacts in the United States. Earnings may also be repatriated by selling off the assets and liquidating the corporation. If a corporation that is a USRPHC disposes of all its property in a taxable transaction in which the full amount of gain is recognized, the stock in the corporation ceases immediately to be a USRPI, and gain realized by foreign shareholders on such stock need not be ECI. Foreign shareholders receiving distributions in liquidation of the U.S. corporation are generally not subject to the gross-basis tax applicable to dividend distributions.

## Foreign Corporations

Foreign corporations owning U.S. real estate are generally taxed under the Code on a gross basis on their non-ECI, and on a net basis, under rules similar to those applicable to U.S. corporations, on their ECI. Foreign corporations are also subject to BPT on their effectively connected earnings and profits that are not considered reinvested in their U.S. trade or business. As noted earlier, when the maximum rate of BPT applies, the earnings of the foreign corporation in any particular year may be subject to a combined effective U.S. tax rate of greater than 50%.

**Repatriation of earnings** — The earnings of foreign corporations can be repatriated in many of the same ways as those of U.S. corporations. Dividends paid by the foreign corporation generally are not subject to further U.S. taxation. However, interest paid by the foreign corporation's U.S. trade or business is U.S. source income, and thus potentially subject to U.S. withholding tax. The stock of a foreign corporation can be sold free of U.S. tax. The stock does not constitute a USRPI under FIRPTA.

## Partnerships

Ownership of U.S. real estate through a partnership involves distinct U.S. tax consequences.

Basically, a partnership, whether domestic or foreign, general or limited, is not a taxpaying entity. Instead, it is an accounting entity or conduit through which the partners are attributed their share of partnership items of income and expense. The partners are taxed directly on their share of the partnership's income annually, regardless of whether the income is actually distributed. Each foreign partner of a U.S. partnership must, therefore, file a U.S.

income tax return. The normal tax rates applicable to U.S. individuals and corporations apply. Because of the conduit nature of a partnership, it is often viewed as an aggregate of individuals investing in common under the aggregate theory. However, a partnership is viewed as an entity distinct from its partners for specific purposes. This entity theory is generally used when a partnership interest is sold.

U.S. taxation of foreign partners depends on how the partnership income is categorized. If the partnership's income is ECI, it is taxed to the partners accordingly. Each item of income or deduction of a partner retains its original character which had been determined at the partnership level. For example, rental income earned by the partnership that is ECI is rental income that is taxed at the partner level as ECI. Foreign corporations as partners may also have BPT liability. Similarly, gain from the sale of a USRPI is taxed at the partner level as ECI. U.S. source non-ECI is also taxed at the partner level on a gross basis, and subject to withholding either at the partnership level or by the payor of the income to the partnership.

Each partner's tax liability is determined by his personal status. For example, similar items of income may be taxed differently in the hands of different partners in the same partnership. Thus, a corporate partner would be treated differently from an individual partner. Different treaties could apply, depending on the residences of the partners. One partner might have losses from another investment, which could be used to shelter his share of the partnership's net positive ECI, while other partners may not have the benefit of such losses.

Since the partners and not the partnership are taxed currently on their share of the partnership income, there is generally no additional U.S. tax on distributions of profits from the partnership as there would be in the case of a corporation. Thus, repatriation strategies are of less concern for investments through partnerships. However, there are withholding provisions designed to ensure collection of the tax owed by foreign partners on their share of the partnership's trade or business income that should be considered. Partnerships are required to withhold on a foreign partner's share of net ECI. This is similar to the partnership making estimated tax payments on behalf of its foreign partners. These payments are applied to the partner's tax liability for the period. Any over-withholding of the foreign partner's regular tax liability has to be recovered by the partner through the filing of his own tax return.

When an international investor sells a partnership interest, the gain from the sale is treated as ECI subject to U.S. tax to the extent it is attributable to the partnership's ownership of U.S. real property. If a partnership sells all of its assets and liquidates, the partners are taxable on their pro rata share of the partnership's gain at their applicable tax rates. No second level of tax is imposed on the liquidating distribution, provided that the amount of cash and fair market value of any property distributed do not exceed the distributee partner's outside basis in his partnership interest.

## **Real Estate Investment Trusts**

The tax regime for Real Estate Investment Trusts, or REITs, was created for the specific purpose of encouraging widespread ownership of real estate by small investors. Basically, a REIT is an entity, otherwise taxable as a U.S. corporation, that meets certain technical requirements and that elects REIT status. The key difference between a conventional U.S. corporation and a REIT is that a REIT is allowed a tax deduction for dividends paid to its shareholders. In order to qualify for this special treatment, a REIT must distribute at least 90% of its net income exclusive of capital gains to its shareholders.

The REIT requirements fall into three categories: ownership, assets, and income. First, there must be 100 or more owners, and no five or fewer individuals may own directly or indirectly more than 50% of the total value of the REIT stock. Second, at least 75% of the total value of the REIT's assets must consist of cash, real estate,

loans secured by real estate or U.S. government securities. Third, at least 95% of the REIT's gross income must be composed of interest, dividends, and rents from real property, plus six other specified sources of income. In addition, 75% of the REIT's gross income must consist of rents from real property, interest on loans secured by real estate, and seven other sources of income.

REITs must adopt a calendar year as their tax year. Existing U.S. corporations that wish to elect REIT status must distribute all earnings and profits for tax years beginning after February 28, 1986. If a REIT meets these above-mentioned requirements, it may avoid tax at the corporate level by distributing all net income currently to shareholders, thereby eliminating the normal double taxation of corporate income. Also, REITs are not subject to the BPT and REITs are permitted to have 100% owned subsidiaries.

The taxation of a distribution from a REIT depends upon whether the distribution is attributable to ordinary operating profits or to gain from sales or exchanges of U.S. real property interests. To the extent the REIT makes a distribution to an international investor or foreign corporation attributable to gain from sales or exchanges of U.S. real property interests by the REIT, the distribution is taxed as ECI.

In general, FIRPTA withholding rules apply to require the REIT to withhold 35% of the amount distributed to foreign shareholders that is designated as a capital gain dividend by the REIT. Corporate investors will also be subject to BPT on such distributions. To the extent a distribution is not designated as a capital gain dividend, the distribution generally is treated as a regular dividend of non-ECI subject to the 30% statutory withholding tax rate for dividends or a lower treaty rate.

Generally, international investors or foreign entities that dispose of shares in a REIT are likely to be subject to U.S. tax on their gain if the REIT is foreign controlled; i.e., if 50% or more of the REIT stock is owned by non-U.S. persons (and the REIT stock is otherwise a USRPI). Gain subject to tax is treated as ECI. Thus, the investor must file a U.S. tax return and report the gain. However, if the shares of a foreign-controlled REIT are considered to be "publicly traded" and the investor owns or owned a 5% or less interest, no tax is imposed. A foreign investor disposing of shares in a domestically controlled REIT (i.e., if 50% or more of the REIT stock is owned by U.S. persons) generally is not subject to U.S. tax on the gain.

# Treaty Protection from Taxation

The United States has income tax treaties with many nations that are designed to alleviate double taxation of income from transactions that cross national boundaries and to encourage foreign investment. Accordingly, treaties typically reduce tax rates on certain types of portfolio investment income such as dividends, interest, and royalties. In addition, they limit taxation of other types of business profits of a resident of one country that are generated in the other country. Treaties also generally provide that investors resident in one country carrying on business in the other country are entitled to nondiscriminatory tax treatment in the other country.

The benefits of a treaty are, by its terms, extended only to residents of the contracting states. Over the years, the U.S. Treasury Department and other countries have become increasingly concerned about preventing third-country residents' use of U.S. treaties, or "treaty shopping." As a result, most U.S. treaties now contain a Limitation on Benefits (or "LOB") article, which expressly limits the benefits of the treaty to individual residents of a treaty country, companies primarily owned by individual residents of the treaty partner country, and certain other companies deemed not to be "treaty shopping." Any treaty analysis must ensure that any entities involved qualify under the Limitation on Benefits article or any other provisions limiting the application of a treaty. In addition, internal U.S. law anti-abuse rules, such as Code § 894, dealing with income received by hybrid entities, and Code § 7701 and related regulations, covering back-to-back financing arrangements, must also be addressed. Appropriate documentation on the residency of the payor and entitlement to treaty benefits is required in order to protect withholding agents that withhold tax at a rate less than 30% (e.g., Forms W-8 BEN, W-8 ECI, W-8 IMY).

## Dividend Income

Tax treaties generally provide for a reduced rate of gross-basis tax on dividends paid by U.S. corporations to a resident of the other treaty country. Treaty tax rates on dividend income from U.S. corporations vary from 0% to 15% or higher, in contrast to the 30% statutory withholding rate provided under the Code. The reduced dividend withholding tax rates are generally restricted in the case of dividends paid by REITs. Under some treaties, dividends from REITs to treaty-resident shareholders generally are not eligible for tax rates below 15%, and to be eligible for any treaty benefits, one of three requirements must be met:

- The beneficial owner is an individual or pension fund that owns less than 10% of the REIT
- The stock of the REIT is publicly traded and the owner holds an interest smaller than 5% interest
- The beneficial owner is a person (individual, estate, trust, or company) holding an interest smaller than 10% and the REIT is diversified

## Branch Profits Tax

The BPT was enacted to provide parity between a foreign corporation that operates in the United States through a U.S. subsidiary corporation, on the one hand, and one that operates through a U.S. branch, on the other. While the net income from the business in each case is subject to standard U.S. corporate tax rates, the foreign

corporate parent of the U.S. corporation is subject to an additional 30% tax (which can be reduced by treaty) when it receives dividend distributions. The BPT imposes a similar tax to the extent the U.S. branch's net equity does not increase at the same pace as it generates earnings and profits from ECI. Thus, treaties reduce the rate of BPT in tandem with their reductions in gross-basis tax rate on dividends from wholly-owned subsidiaries.

## Interest Income

Under many U.S. treaties, the U.S. gross-basis tax on U.S. source interest is reduced or eliminated, except that the tax is often imposed at a 15% rate if the interest is contingent on profits, etc., of the payor or a related person.

## Business Profits

Under most of its treaties, the United States may not tax the business profits of a treaty country resident generated in the United States, unless such business is carried on through a permanent establishment ("PE") located in the United States. If a PE exists, the business profits may be taxed only to the extent they are attributable to the U.S. PE.

## Income From Real Property

Most treaties provide that income from real property, including income from the direct use of the real property by the owner and the rental income for use of the property, is taxable in the country in which the property is located. For rental income generated from U.S. real property, a foreign recipient may be subject to a 30% U.S. withholding tax on the gross amount of the rental income, unless a net basis election has been made to tax net rental income at a 35% rate.

## Capital gains

Under internal U.S. law and most U.S. treaties, residents of the treaty country are exempt from U.S. tax on gain from the sale of assets, unless such assets form part of the resident's U.S. PE, or the assets are U.S. real property or are otherwise a USRPI. Gains from the sale of stock or securities are generally taxable exclusively in the country of the seller's residence, except where such stock or securities are USRPIs.

## Third-Country Use of Treaties/Limitation on Benefits (LOB)

In an effort to eliminate treaty shopping, the United States has negotiated the insertion of a strong limitation on benefits provision, similar to Article 22 of the U.S. Model Treaty, into many of its treaties. Under Article 22 of the U.S. Model Treaty, the benefits of the treaty (i.e., reduced withholding tax rates, nondiscrimination, etc.) are granted to a company resident in a treaty country only if certain additional requirements are met—for example, if the stock of the company is regularly and primarily traded on a recognized stock exchange, or at least 50% of the corporation's stock is owned by residents of the treaty country and less than 50% of the income of the company is used to make deductible payments to non-treaty-country-resident persons. A treaty country resident may also be able to satisfy other LOB tests (e.g., the active trade or business test) under an applicable treaty.

An additional limitation on treaty benefits is imposed by Code § 894(c), and treaty provisions that restrict treaty benefits for payments to partnerships or other fiscally transparent entities. These provisions have the effect of denying treaty benefits on certain payments made to "hybrid entities," or entities that are seen as flow-through entities for U.S. tax purposes (e.g., LLCs, partnerships, disregarded entities), but whose income is not treated for tax purposes by the other treaty country as in the income of a resident.

# Dispositions of U.S. Real Estate Investments

## U.S. Real Property Interests

In general, the FIRPTA treats the gain or loss of an international investor or a foreign entity from the disposition of a USRPI as income or loss effectively connected with a U.S. trade or business. Consequently, such gain or loss will be included with the international investor's other effectively connected income (if any) and subjected to U.S. income tax on a net basis.

A USRPI includes an interest in real property located in the United States and the Virgin Islands. Real property includes land, real property improvements (e.g., buildings), leasehold interests, and un-severed natural products of land (e.g., growing crops, timber, mines, wells, and other natural deposits). It also includes certain personal property "associated" with the use of real property, such as moveable walls, furnishings, mining equipment, farm tractors, drilling rigs, and other personal property associated with the use of real property.

USRPIs also include shares and other equity interests in a U.S. corporation (other than solely as a creditor) that was considered to be a USRPHC at any time during the five-year period ending on the disposition of the interest. A corporation is considered to be a USRPHC if its assets are primarily USRPI (but see the more detailed discussion below). Therefore, it is not possible to avoid U.S. tax on the disposition of real property by holding the property indirectly through a U.S. corporation and selling its stock. As an exception to this rule, the term USRPI does not include an interest in a publicly traded domestic corporation unless the investor owned more than 5% of the fair market value of such stock at any time during the five-year period ending on the date of the investor's disposition of such stock. Also, an interest in a domestically controlled REIT does not constitute USRPI.

An interest in real estate that is solely a creditor's interest is not considered to be USRPI, and thus is not subject to FIRPTA. Such interest may include a right of foreclosure on real property under a mortgage, a financing statement, or other instrument securing a debt. If the interest in the real estate goes beyond that of a creditor, however, FIRPTA may come into play, and the exception is defined in narrow terms. In addition, any right to share in the appreciation in value of real property or in the gross or net proceeds or profits generated by real property is a USRPI. For example, a loan with an "equity kicker" is treated as a USRPI.

## Definition of a USRPHC

A corporation is considered to be a USRPHC if on specified dates during the testing period (i.e., the shorter of the international investor's holding period or the five-year period ending on the date of disposition of the stock of the corporation) the fair market value of its USRPI is 50% or more of the sum of the fair market values of its USRPIs, foreign real property interests, and U.S. or foreign trade or business assets (including financial assets, depreciable property, inventories, and intangibles). Determination of USRPHC status can sometimes be difficult because of uncertainties over the characterization of corporate assets for these purposes.

A foreign entity or international investor is not subject to U.S. tax on the disposition of its interest in a corporation that was not a USRPHC on any of the specified dates during the testing period. To establish a presumption that a corporation is not a USRPHC, an optional book value test may be used, whereby if the book value of the corporation's aggregate USRPI is less than 25% of the total book value of the corporation's assets, that corporation will be presumed not to be a USRPHC. The stock of any domestic corporation will be presumed to be a USRPHC unless the taxpayer establishes that such corporation was at no time a USRPHC during the previous five years. Otherwise, any domestic corporation is presumed to be a USRPHC, so particular pressure is placed on contemporary reporting and documentation rules in almost all transactions involving US corporations.

In determining whether a corporation is a USRPHC, if a corporation owns less than 50% of the shares of another corporation, these shares are treated as a USRPI if that corporation itself is a USRPHC. If a corporation owns 50% or more of the shares of another corporation, the shares of the subsidiary are ignored and a look-through rule applies, and the upper-tier corporation is deemed to own a proportionate share of all the subsidiary's assets for purposes of USRPHC testing. A similar look-through rule applies with respect to a corporation's ownership of partnerships, estates, and trusts, except that no minimum ownership requirements apply. Accordingly a corporation's pro rata share in the assets of a partnership, estate, or trust of which it is a partner, owner, or beneficiary is taken into account in the determination of the corporation's USRPHC status.

Only a U.S. corporation can be a USRPHC. The disposition of a foreign corporation can never constitute the disposition of a USRPI. Nevertheless, for the purposes of determining whether an upper-tier U.S. corporation is a USRPHC, the stock in a domestic or foreign USRPHC may be treated as USRPI.

The "taint" of USRPHC status can be removed if the corporation disposes of all of its USRPIs in taxable transactions prior to the disposition of its stock. In this situation, U.S. tax on all appreciation in USRPIs will have been paid and there is no longer a need to capture that appreciation in the stock value.

### **Why is USRPHC Status Important?**

For the international investor owning shares in a U.S. company, it is important to determine whether the corporation is or was a USRPHC on the applicable determination date, in order to determine whether or not the sale of his shares will result in U.S. tax, whether or not the disposition will trigger U.S. tax withholding, what documentation and reporting will be required at the time of the disposition, and whether he will be required to file a U.S. tax return.

If the U.S. Corporation is not a USRPHC during the testing period, the sale of its shares by an international investor may not be subject to U.S. tax. Moreover, if the corporation provides the buyer and the IRS with the required statements establishing that it was not a USRPHC during the testing period, the foreign seller is not subject to withholding and is not required to file a U.S. tax return.

### **U.S. Tax Consequences of Investing in USRPIs Through Foreign Corporations**

The gain from the sale of an interest in a foreign corporation is not subject to tax under FIRPTA. Thus, a foreign person may own U.S. real property indirectly through a foreign corporation and ultimately sell the shares of that foreign corporation and avoid U.S. tax on the gain from the sale. Of course, if the foreign corporation holding the USRPI disposes of the USRPI directly, the gain from the sale will be subject to tax under FIRPTA. At the same time, the transfer of a USRPI by a foreign corporation to another entity in a transfer or reorganization that would otherwise be nontaxable under the Code is generally taxable under FIRPTA unless the interest it receives back in exchange for the USRPI is also USRPI and strict reporting requirements are met.

Also, a distribution of a USRPI held by a foreign company to its shareholders will be subject to U.S. tax to the extent of the appreciation in value of the USRPI unless the distributee takes the same basis in the USRPI as the distributing foreign company. The distributee will be subject to U.S. tax on any subsequent disposition of the USRPI. Consequently, any person purchasing the stock of a foreign corporation should take into account the difference between company's tax basis in the USRPI and its value, as this difference may result in future tax, either upon liquidation of the company or the disposition of the USRPI from the foreign company. Again, contemporaneous reporting and documentation will be crucial.

### **Election to be Treated As a Domestic Corporation**

A foreign corporation is entitled to make an election to be treated as a U.S. corporation for FIRPTA tax purposes while remaining a foreign corporation for all other purposes of the Code. The election to be treated as a domestic corporation may be useful in certain planning situations to avoid the impact of FIRPTA with respect to sales of USRPIs made by the foreign corporation.

### **Use of Real Estate Investment Trusts**

Domestically controlled (less than 50% foreign ownership by value) REITs are not considered to be USRPIs under FIRPTA. Consequently, foreign investors who hold an interest in domestically controlled REITs will not be subject to tax under FIRPTA upon the sale of their shares. Nevertheless, dividend distributions made by a REIT to foreign investors and attributable to the REIT's gains from sales or exchanges of USRPI are subject to U.S. tax under FIRPTA.

### **FIRPTA Withholding**

Generally, any disposition of USRPI by an international investor requires the purchaser to withhold 10% of the gross sale price (or 10% of the fair market value of the property exchanged). Certain exemptions may apply or the IRS may agree to a reduced withholding amount. However, in general the 10% withholding is required regardless of the actual amount of tax due or the amount of cash received.

There are special withholding rules that apply to distributions and dispositions by corporations, partnerships, trusts, or estates.

Amounts withheld by the purchaser must be promptly reported and paid to the IRS. The withholding tax is reported on Forms 8288 and 8288-A; the return is filed and the tax paid within 20 days after the transfer. If the purchaser fails to withhold the correct tax amount, the purchaser has liability for entire amount of the tax, plus interest and penalties. Accordingly, it is very important that the purchaser of U.S. real property determine whether there is a withholding obligation.

### **Withholding Exceptions**

There are exceptions to the above withholding requirements, including:

- The transferor may provide the seller with an affidavit affirming its status as nonforeign.
- The transferor may provide the seller and the IRS with an affidavit stating that the corporation the stock of which is being transferred is not a USRPHC.
- The transferor may provide the transferee an affidavit stating that the transfer is pursuant to a nonrecognition event.

- A nonpublicly traded domestic corporation may furnish an affidavit to the transferee (or alternatively to the transferor, who then gives it to the transferee) that its stock is not a USRPI either because it has not been a USRPHC during the relevant period or it has cleansed its taint.
- Shares in publicly traded corporations where the transferor's ownership does not exceed 5%.
- If a USRPI is acquired by an individual transferee to be used for residential purposes, there is no withholding requirement as long as the amount realized does not exceed \$300,000.
- The withholding amount is reduced or eliminated as evidenced by a withholding certificate obtained from the Internal Revenue Service.
  - Either the transferor or transferee may request a withholding certificate.
  - Withholding certificates are available when the required withholding exceeds transferor's maximum tax liability, the IRS determines that reduced withholding would not jeopardize tax collection, the transferor's gain is exempt from U.S. tax and has no withholding liability, or the transferor or transferee has entered into agreement with the IRS to pay the tax or has provided adequate security.

# Sovereign Wealth Funds

Sovereign Wealth Funds (“SWFs”) are wholly owned government funds which invest a nation’s surplus wealth. The Treasury Department has defined a SWF as “a government investment vehicle which is funded by foreign exchange assets, and which manages those assets separately from the official reserves of the monetary authorities.” SWFs may make investments in their home country or abroad.

## § 892 Exemption

Under Section 892, the income earned by a foreign government through certain investments in the United States is exempt from U.S. income tax. Three specific conditions must be met to qualify for the exemption:

- The income must be derived by a “foreign government;”
- The income must be derived from only certain types of investments; and
- The income must not be derived from “commercial activities.”

Temporary regulations issued under Section 892 provide additional details for application of the statutory language.

## Foreign Government

A foreign government for purposes of the Section 892 exemption only includes the “integral parts” or “controlled entities” of a foreign sovereign.

### Integral Part

An integral part of a foreign sovereign is any person, body of persons, organization, agency, bureau, fund, instrumentality, or other body, however designated, that constitutes a governing authority of a foreign country. All of the net earnings of the governing authority must be credited to the governing authority’s own account or to other accounts of the foreign sovereign with none of the income inuring to the benefit of a private person. Generally, the integral part must exercise functions traditionally undertaken by governments. An individual who is a sovereign, official, or administrator acting in a private or personal capacity will not be considered an integral part of a foreign sovereign.

### Controlled Entity

A controlled entity of a foreign sovereign is an entity that is separate from a foreign sovereign or otherwise constitutes a separate juridical entity if:

- It is wholly owned and controlled by a foreign sovereign either directly or indirectly through one or more controlled entities;
- It is organized under the laws of the foreign sovereign the entity is owned by;

- Its net earnings are credited to its own account or other accounts of the foreign sovereign, with no portion of its income inuring to the benefit of any private person; and
- Its assets vest in the foreign sovereign on dissolution.

A controlled entity does not include partnerships or any other entity owned and controlled by more than one foreign sovereign.

### **Income Inuring to Private Persons**

If earnings of an otherwise integral part or controlled entity of a foreign sovereign inure to the benefit of private persons then such integral part or controlled entity will not be considered part of a foreign government for purposes of § 892. Accordingly, the income earned will not be granted an exemption from U.S. tax.

Income is considered to inure to the benefit of a private person in two cases. First, if the income benefits private persons through such persons' use of the governmental entity as a conduit for their own personal investment then the income is considered to inure to the benefit of private persons. Second, the income of a governmental entity will be considered to inure to the benefit of private persons if the private persons' use, influence or control that is implicitly or explicitly approved of by the foreign sovereign to divert the income of the governmental entity from such entity's intended use of such income. However, income is presumed not to inure to the benefit of private persons when such persons are the intended beneficiaries of a governmental program carried on by the foreign sovereign when the activities of such program constitute governmental functions (for example, a generally available social welfare system).

### **Exempted Income**

The § 892 exemption only applies to income earned from the following sources:

- Income from the foreign government's investments in the United States consisting of stocks, bonds, or "other securities;"
- Income from the foreign government's investments in the United States consisting of financial instruments held in the execution of the government's financial or monetary policy; and
- Interest earned by the foreign government from its deposits of funds in U.S. banks.

Income from investments includes the gain from their disposition. Further, "other securities" includes any note or other evidence of indebtedness but does not include partnership or trust interests.

The exemption afforded to foreign governments is also circumscribed by the FIRPTA rules described above. The interaction between these two sets of tax rules is complex and must be examined case by case.

### **Commercial Activities Exclusion**

If income is earned from commercial activities or from a controlled commercial entity, whether or not the income is derived from one of the sources described above, then § 892 will not apply to such income. The § 892 exemption will not apply to the whole of the income earned by a controlled entity while only the portion of the income related to the commercial activities earned by an integral part of the foreign government will not be exempted from U.S. tax. This distinction can be of paramount importance in structuring U.S. investments by foreign governments.

Commercial activities are activities that are ordinarily conducted by the taxpayer or any other persons with a view toward the current or future production of income or gain. This definition applies whether the activities are conducted within or without the United States. Investments in income-producing real estate are considered

commercial activities, however the holding of net leases on real property that does not produce income is specifically excepted from the definition of commercial activities.

A controlled commercial entity is any entity engaged in commercial activities, even to a very limited extent, if the foreign government holds (directly or indirectly) a 50% or more interest in the entity or if the foreign government holds (directly or indirectly) other types of interests that provide it with effective control of such entity. Again, this definition applies whether the activities are performed within or without the United States

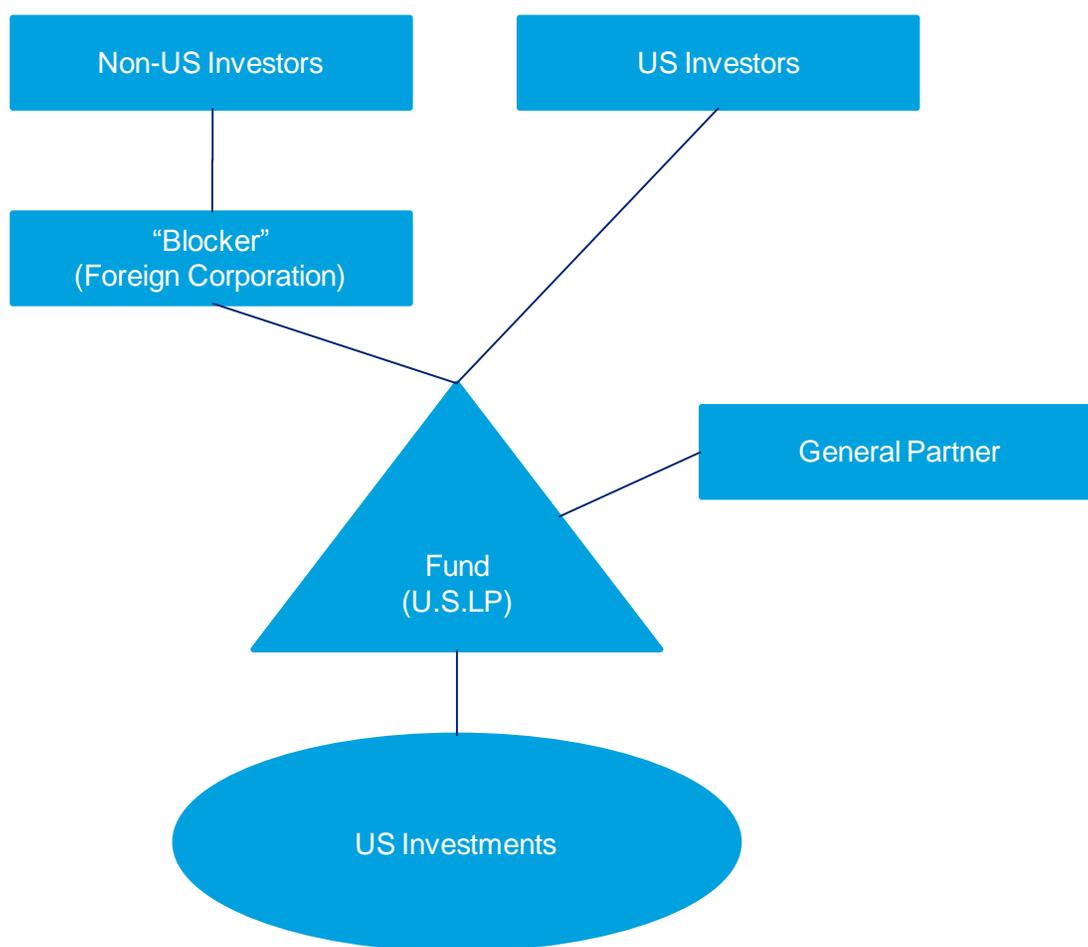
### **REIT Issues and Notice 2007-55**

A real estate investment trusts ("REIT") is a special purpose entity for U.S. federal income purposes. Provided that certain conditions with respect to ownership, composition of assets and income, and distributions are met, REITs are allowed to deduct dividends paid to their shareholders so that their earnings are not subject to corporate-level tax. As suggested by their name, but also largely dictated by the various conditions imposed on them, REITs are generally U.S. real property holding corporations ("USRPHC") for U.S. federal income tax purposes. Because of this, the §892 exemption rules overlap with U.S. tax legislation specific to gains from the sale of U.S. real property interests ("USRPI").

REITs can be very tax favorable investment entities for foreign governments which qualify under § 892. Dividends and gains on disposition of REIT shares can be exempt from U.S. tax while the REIT itself is also not subject to U.S. tax.

Historically, taxpayers have taken the position that capital gain distributions from REITs are also exempt under § 892. However, in Notice 2007-55, the IRS stated its position that § 892 is not applicable to capital gain distributions and that it will challenge any such assertions. The IRS also intends to issue new regulations to support this view.

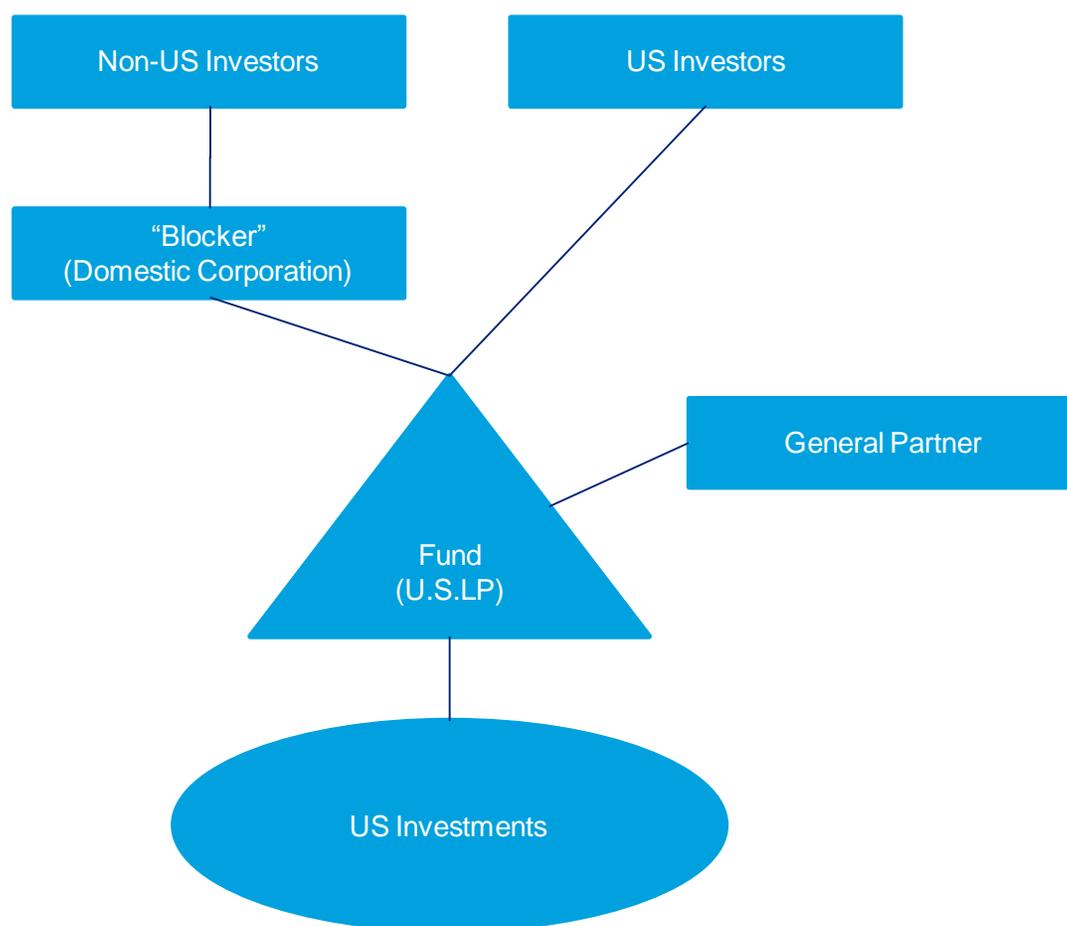
# Appendix A: Foreign Corporate Blocker Structure



## Key Characteristics of Structure

- Income flows from the U.S. investments through the fund to investors
- Foreign corporation serves as a blocker to the Non-U.S. investors preventing them from being engaged in a U.S. trade or business, if the fund is so engaged.
- No withholding tax on distributions from Blocker to Non-U.S. investors.
- Blocker may be subject to branch profits tax, unless reduced by treaty.

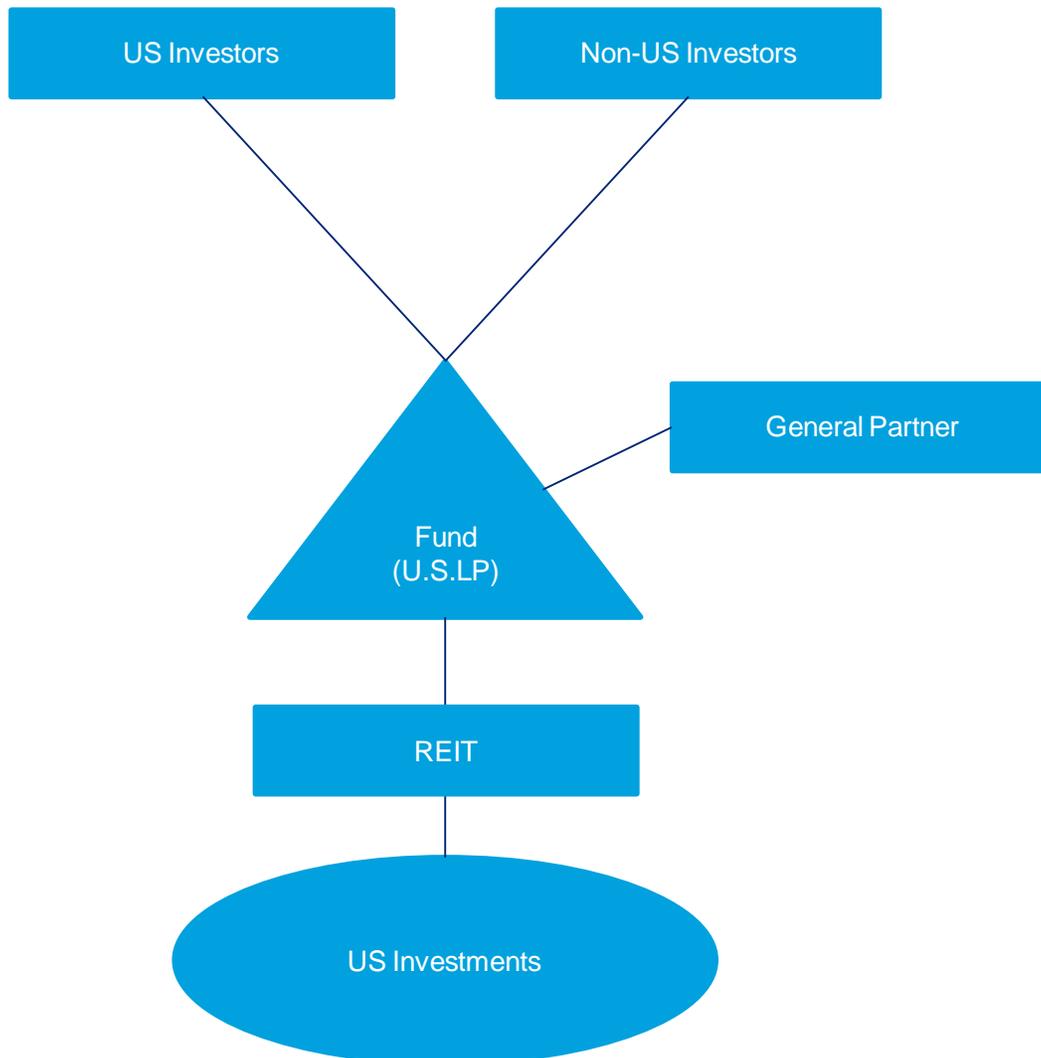
# Appendix B: Leveraged Corporate Blocker Structure



## Key Characteristics of Structure

- Income flows from the U.S. investments through the fund to investors
- U.S. corporation serves as a blocker to the Non-U.S. investors preventing them from being engaged in a U.S. trade or business, if the fund is so so engaged.
- U.S. corporation is subject to U.S. and state income tax on its net income.
- Blocker may be leveraged to reduce U.S. taxable income.
- Withholding taxes on distributions to Non-U.S. investors will apply at various rates depending on treaty application and other particular facts.

# Appendix C: REIT Structure



## Key Characteristics of Structure

- Income flows from the U.S. investments through the REIT to the Fund.
- The REIT serves as a blocker to the Non-U.S. investors preventing them from being engaged in a U.S. trade or business, if the fund is so engaged.
- The REIT will not be taxed on its income so long as the REIT distributes its income to its shareholders.
- Withholding tax on distributions to non-U.S. investors applies to operating dividends and distributions of capital gains.
- Non-U.S. investors are subject to U.S. tax on capital gains distributed by REIT.

# Contacts

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