



The Real Estate Roundtable

Protecting Access to Foreign Investment in U.S. Real Estate

Tax Policy

Summary

Under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), foreign investors are generally subject to U.S. capital gains tax on sales of U.S. real estate and most REIT shares—unlike gains on other U.S. investments. However, an exemption exists for domestically controlled REITs, where less than 50 percent of the shares are held “directly or indirectly” by foreign persons.

In April 2024, the Treasury Department issued final regulations under FIRPTA that changed the previous interpretation of the phrase “directly or indirectly” and introduced a sweeping new “look-through” rule. Though these changes aim to safeguard national security, they risk discouraging essential foreign capital crucial for refinancing and sustaining U.S. commercial real estate markets, particularly given upcoming debt maturities.

At the state level, 20 states have enacted restrictions on foreign investors in real estate and agricultural land, and eight states have considered similar measures.

RER has advocated for the withdrawal of the “look-through” rule and the restoration of a stable, predictable framework for foreign investment in U.S. real estate.

Key Takeaways

- The FIRPTA look-through rule is legally unsound, economically harmful, and inconsistent with congressional intent.
- Foreign investment is a major source of capital for U.S. commercial real estate, leading to job creation and economic growth for communities throughout our nation.
- Many investment funds that are controlled or advised by regulated U.S. asset managers source investment capital in global capital markets.
- With approximately \$1.5 trillion of U.S. commercial real estate debt coming due in the next three years, foreign equity investments in U.S. assets are often an important source of capital as commercial real estate owners seek to restructure, refinance, or sell their properties.
- Discouraging foreign investment weakens U.S. competitiveness, raises the cost of capital for U.S. developers and undermines efforts to revitalize urban cores, modernize infrastructure, and expand the housing supply.

Background

New “Look-Through” Rule

- In April 2024, the Treasury Department issued final regulations under FIRPTA that introduced a “look-through” rule to determine whether a real estate investment trust (REIT) or regulated investment company (RIC) qualifies as a “domestically controlled qualified investment entity” (DCQIE) under Section 897(h)(4)(B) of the Internal Revenue Code.
- For decades, Treasury regulations interpreted the phrase “directly or indirectly” to refer to actual ownership and not constructive ownership through unrelated entities. Domestic C corporations—including those with significant foreign ownership—were treated as U.S. persons for purposes of determining whether a REIT was domestically controlled.
- The 2024 final regulation reverses this position. It requires “look-through” treatment of any non-public domestic C corporation if 50 percent or more of its stock is held (directly or indirectly) by foreign persons.



Protecting Access to Foreign Investment in U.S. Real Estate

The Real Estate Roundtable

- In such cases, the REIT shares held by the domestic C corporation are attributed up to its shareholders and counted as foreign-owned. The rule applies retroactively, including to long-established structures created under the prior legal regime.
- States that have enacted or considered restrictions on foreign investors in real estate and agricultural land include Florida, which enacted Senate Bill 264 in 2023. The law aims to limit and regulate the sale and purchase of certain Florida real property by “Foreign Principals” from “Foreign Countries of Concern.”

Recommendations

Reform FIRPTA and Withdraw the “Look-Through” Rule: The federal government should reform FIRPTA and work to remove tax barriers that deter capital formation and investment in U.S. real estate and infrastructure. Treasury should formally withdraw the “look-through” rule and issue sub-regulatory guidance allowing taxpayers to rely on the forthcoming withdrawal.

- **The rule exceeds Treasury’s authority.** Congress explicitly authorized “look-through” rules for REITs and RICs in Section 897(h)(4)(E) but deliberately excluded domestic C corporations. Treasury’s new interpretation reads into the statute a rule Congress rejected.
- **It reverses decades of well-settled law.** Treasury’s interpretation of the statute is contradicted by the structure and legislative history of Section 897, the only IRS ruling on the topic, and judicial opinions concerning the application of constructive ownership rules generally.
- **The “look-through” rule is retroactive and disruptive.** It imposes the regulations on investment structures in place for years and creates significant uncertainty for foreign investors in REITs and infrastructure.
- **It impedes investment in the U.S. economy.** Foreign capital as a share of total U.S. CRE investment has already fallen from over 16 percent in 2018 to less than 6 percent in 2024. The rule risks further reducing capital formation for job-creating U.S. real estate and infrastructure projects.
- **The legal case against the look-through rule is even stronger today** in the wake of the Supreme Court’s *Loper Bright* decision, in which the Court significantly narrowed the deference to which regulatory agencies are entitled when rulemaking.
- While RER supports efforts to protect national security as well as the integrity of commercial real estate investments, we have concerns about rules that may hinder foreign investment in U.S. real estate by legitimate enterprises and capital formation by law-abiding entities.

Use Caution Around State-Level Rule Changes: States enacting or considering restrictions on foreign investment in real estate should proceed carefully to prevent unintended consequences that could hold back economic growth and capital formation.

- State-level restrictions have national implications and seem to fly in the face of the commerce clause of the Constitution in that they interfere with the free flow of interstate and foreign commerce.