Congress of the United States
Washington, DC 20515

July 28, 2023

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

Dear Secretary Yellen,

We write to share our concerns with the IRS's proposed rulemaking under the Foreign Investment in Real Property Tax Act (FIRPTA) (REG-100442-22[1]), which would establish a "look-through" rule to determine whether a qualified investment entity is domestically controlled.

First, we believe Congress specifically declined to create a similar look-through rule during consideration of the bipartisan Protecting Americans from Tax Hikes (PATH) Act[2] in 2015. When the PATH Act was written, there was a 2009 IRS Public Letter Ruling (PLR) [PLR-117760-08] in place that established the current look-through rules regarding domestic C-corporations. While the PATH Act was enacted to provide clarity regarding foreign investment in REITs, it not only left the 2009 IRS PLR in place, but favorably noted the ruling in the law's legislative history.

Second, we have concerns about the Administration's authority to unilaterally re-write existing tax law so long after its original enactment without the benefit of contemporaneous knowledge and understanding of congressional intent and without clear statutory support for the proposed interpretation. FIRPTA's rule regarding domestically controlled REITs has been in place for 43 years, and the rules pertaining to domestic C-Corporation ownership have been settled law for at least 14 years. From the point of view of market participants, such a reinterpretation would upset settled expectations and would be unfairly retroactive in its effect[3].

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[1] Guidance on the Foreign Government Income Exemption and the Definition of Domestically Controlled Qualified Investment Entities, 87 FR 80097 (proposed Dec. 29, 2022).
[2] Text of House Amendment #2 to the Senate Amendment to H.R. 2029, Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2016 (P.L. 114-113).
[3] Courts have been disinclined to defer to agency interpretations of a statute in situations where an agency suddenly reverses a long-standing interpretation of a statute (regardless of attempts to justify actions based on *Chevron* deference). *See Goldstein v. SEC*, 451 F.3d 873, 883 (D.C. Cir. 2006).

The proposed regulation's retroactivity is severely burdensome and is already having a chilling effect on foreign investment, which has been a vital contributor to the economic health of the U.S. commercial real estate market. Unfairly treating those who invested in our communities and helped American businesses flourish for the past several decades sends the message to future investors that U.S. tax law is unreliable and unwelcoming to much-needed foreign capital. If Treasury decides to move forward with this proposal, it is imperative that the retroactivity provisions are removed.

Finally, the proposed change in investment tax structure will limit access to capital at a time when the commercial real estate market is showing signs of destabilization. The declining health of the commercial sector was recently highlighted by Jared Bernstein at his confirmation hearing for Chair of President Biden's Council of Economic Advisors. We fear this proposal could worsen the country's commercial real estate outlook and harm the many Americans who rely on these crucial investments in their communities.

Given these significant concerns, we respectfully call on Treasury and the IRS to reverse course and withdraw the proposed regulation.

Sincerely,

Darin LaHood
Member of Congress

Carol D. Miller
Member of Congress