

Proposed extension of FIRPTA to cover infrastructure concessions

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On October 31, 2008, the IRS and U.S. Treasury Department ("Treasury") published an advanced notice of proposed rulemaking ("ANPRM") describing issues they are considering addressing in proposed regulations under the Foreign Investment in Real Property Tax Act of 1980 ("FIRPTA") regarding the definition of an interest in real property. Specifically, the notice announced that the IRS is considering issuing proposed regulations to treat as U.S. real property interests certain intangible property rights granted by a governmental unit primarily in infrastructure contracts (e.g., permit rights to collect tolls) that are related to the lease, ownership, or use of infrastructure, such as toll roads, bridges, ports, airports, and power and utility projects. Formal comments to the IRS and Treasury on the ANPRM are to be submitted by January 29, 2009.

By affirmatively expanding the definition of "U.S. real property interest" to include these intangible contract rights for purposes of the FIRPTA rules, the IRS could be viewed as expanding the universe of U.S. companies that may be treated as U.S. real property holding corporations ("USRPHCs") for purposes of the FIRPTA rules. These changes could, in turn, treat foreign investors

in such U.S. corporations as being engaged in a U.S. trade or business with respect to any gain on a disposition of shares or interests in such U.S. companies and, accordingly, the investors would be subject to U.S. tax on any gain realized on disposition.

Separately, members of the U.S. Congress have signalled in recent weeks that increasing infrastructure spending as a means to stimulate the economy, provide funding to state and local entities, and create jobs in response to the current economic crisis will be a priority in the first 100 days of the new Congress. We expect Congress will be moving to enact legislation to reflect this priority within the next few months. Early statements from spokespersons for incoming President Obama reflect that the funding of roads and bridges has already been identified as a priority as part of the new Administration's economic stimulus plans.

Any firm involved in assembling funding and/or directly participating in these U.S. infrastructure projects needs to be aware of these developments.

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