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COVID-19: Revenue Procedure 2021-12 Extension of Treatment of Mortgage Loan Forbearances and Modifications for Mortgage Loans in REMICS and Fixed Investment Trusts and DSTS Used for 1031 Exchanges

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Throughout the United States, periodic and ongoing businesses closures and disruptions continue to occur in response to the coronavirus (COVID-19) pandemic. The resulting economic distress has affected borrowers, including businesses and individuals alike. The 2020 Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) provided new and mandatory debt relief provisions requiring forbearances for some mortgage loans in light of the ongoing national COVID-19 emergency declared on 13 March 2020, which has continued into 2021.

Many mortgages loans are held in real estate mortgage investment conduits (REMICs) and "fixed investment trusts." These entities generally have organizational documents that restrict or prohibit certain types of loan modifications to reflect constraints on loan modifications altering a REMIC's collateral or regular interest terms imposed by various provisions of the Internal Revenue Code of 1986, as amended (the Code). Additionally, the Code prohibits a REMIC from foreclosing on a mortgage loan that was known to be troubled when the REMIC acquired it.

Revenue Procedure 2020-26 described safe harbors under which forbearances and related modifications to certain mortgage loans under the CARES Act provisions and other COVID-19-related programs will not jeopardize the federal income tax status of REMICs and "fixed investment trusts" that hold the loans.

Revenue Procedure 2020-34 described safe harbors involving mortgage loan modifications, lease modifications, and certain cash contributions for Delaware statutory trusts (DSTs) used for 1031 exchanges involving rental real estate.

Both of the 2020 Revenue Procedures contain safe harbor provisions (outlined below) that ended on 31 December, 2020. In light of the continuing COVID-19 pandemic, Revenue Procedure 2021-12 has extended these relief provisions until 30 September 2021.

REVENUE PROCEDURE 2020-26 – SAFE HARBORS FOR FORBEARANCE-RELATED LOAN MODIFICATIONS

The Code generally prohibits mortgage loans held in a REMIC from being “significantly” modified (including many of the modifications envisioned by the CARES Act and the Other Forbearance Provisions) and prohibits the terms of REMIC regular interests from being modified after the REMIC’s start-up date. Additionally, the Code generally prohibits a “fixed investment trust” from having the power to vary the investment of its investors.

The Revenue Procedure describes safe harbors under which modifications to certain mortgage loans that are described in Section 2 of the Revenue Procedure (i.e., forbearances and modifications under CARES Act provisions and Other Forbearance Programs) will not be treated (i) as replacing the unmodified mortgage loan obligation with a newly issued mortgage loan obligation, (ii) as giving rise to prohibited transactions, or (iii) as manifesting a power to vary for purposes of determining the federal income tax status of REMICs and “fixed investment trusts” that hold the loans. Under the safe harbors, these forbearances and modifications should be allowable under the governing documents of REMICs and “fixed investment trusts” and not create adverse tax consequences.

For additional information about this Revenue Procedure, please see our prior alert, here.

REVENUE PROCEDURE 2020-26 – ACQUISITION OF LOANS WITH FORBEARANCES BY A REMIC

The Revenue Procedure also contains a safe harbor under which a REMIC is not treated as having improper knowledge of an anticipated default on the grounds that it acquired a mortgage loan with respect to which the borrower had participated in a CARES Act forbearance or Other Forbearance Program. This safe harbor would allow future REMICs to acquire mortgage loans that previously received a CARES Act or Other Forbearance Program forbearance of modification. Otherwise, a REMIC could deemed to have “improper knowledge” that a default on the mortgage loan would occur and would then be prohibited from foreclosing on such property in the future.

REVENUE PROCEDURE 2020-34 – DSTS USED FOR 1031 EXCHANGES

A DST formed to hold real property subject to a lease under a trust agreement described in the Revenue Ruling 2004-86, 2004-2 C.B. 191, is an arrangement that is classified as a fixed investment trust for federal tax purposes. Each of such DST’s owners is treated, by reason of Code section 677, as an owner of a pro-rata portion of the DST. Because an owner of an undivided fractional interest in the DST owns for federal income tax purposes the assets of the DST attributable to that interest, each owner is considered to own an undivided fractional interest in the rental real property held by the DST. Accordingly, under Code section 1031, a taxpayer may exchange an interest in real property for an interest in a DST without the recognition of gain or loss, if the other requirements of Code section1031 are satisfied.

In light of Revenue Procedure 2020-26, the Treasury Department and the Internal Revenue Service received comments addressing issues faced by DSTs holding rental real property who are experiencing financial hardships due, directly or indirectly, to the COVID-19 pandemic. The trustees of DSTs may need to respond to hardships by modifying the DST’s leases, requesting forbearance program relief with respect to mortgage loans secured by the DST’s real property, or accepting cash contributions to the DST to avoid defaults on the DST’s loan obligations or in connection with a loan modification (among other reasons). Such cash contributions could be pro-rata from owners of the DST or from non-owner investors. Accordingly, this Revenue Procedure creates a safe harbor for CARES Act forbearances (and associated modifications) and forbearances described in Section 2.07

of Revenue Procedure 2020-26, modification of leases, and the acceptance of cash contributions as a result of COVID-19-related hardships, provided that other conditions and requirements in the Revenue Procedure are met. It should be noted that the Revenue Procedure only applies to DSTs and not to trusts performing similar activities and with similar economic distress that are organized under the laws of other states or the District of Columbia.

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