

Revised Timeline and Other Guidance Regarding the Implementation of New Section 1446(f)

Notice 2018-08

SECTION 1. OVERVIEW

This notice announces that the Department of the Treasury (“Treasury Department”) and the Internal Revenue Service (“IRS”) are suspending the application of new section 1446(f) of the Internal Revenue Code (“Code”) in the case of a disposition of certain publicly traded partnership interests. New section 1446(f) was added by section 13501 of “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018,” P.L. 115-97 (the “Act”), which was enacted on December 22, 2017. Section 13501 of the Act also added new section 864(c)(8). Section 2 of this notice provides background on new sections 864(c)(8) and 1446(f). Section 3 of this notice describes the revised timeline for the application of new section 1446(f) to a disposition of certain interests in publicly traded partnerships. Section 4 of this notice requests comments and provides contact information.

SECTION 2. BACKGROUND

In general, new section 864(c)(8) provides that a nonresident alien individual’s or foreign corporation’s gain or loss from the sale, exchange, or other disposition of a partnership interest is effectively connected with the conduct of a trade or business in the United States to the extent that the person would have had effectively connected gain or loss had the partnership sold all of its assets at fair market value. New section 864(c)(8) applies to sales, exchanges, or other dispositions occurring on or after November 27, 2017. See Revenue Ruling 91-

32, 1991-1 C.B. 107, for the IRS's position with respect to sales, exchanges, or other dispositions of an interest in a partnership occurring before November 27, 2017.

In general, new section 1446(f)(1) provides that if any portion of the gain on any disposition of an interest in a partnership would be treated under new section 864(c)(8) as effectively connected with the conduct of a trade or business within the United States ("effectively connected gain"), then the transferee must withhold a tax equal to 10 percent of the amount realized on the disposition. Under an exception in new section 1446(f)(2), however, withholding is generally not required if the transferor furnishes an affidavit to the transferee stating, among other things, that the transferor is not a foreign person.

New section 1446(f)(6) authorizes the Secretary to issue such regulations or other guidance as may be necessary to carry out the purposes of new section 1446(f), including regulations providing for exceptions from the provisions of new section 1446(f). Furthermore, new section 1446(g) authorizes regulations that are necessary to carry out the purposes of new section 1446 generally, including regulations providing for the application of new section 1446 in the case of publicly traded partnerships. New section 1446(f) applies to sales, exchanges, or other dispositions occurring after December 31, 2017.

SECTION 3. TIMING OF APPLICATION OF NEW SECTION 1446(f) TO DISPOSITIONS OF CERTAIN PUBLICLY TRADED PARTNERSHIP INTERESTS

Stakeholders have indicated that, in the case of a disposition of a publicly traded partnership interest, applying new section 1446(f) without guidance

presents significant practical problems. For example, stakeholders stated that a transferee of an interest in a publicly traded partnership typically will not be able to determine whether the transferor partner is foreign or domestic or whether any portion of a transferor partner's gain would be treated under new section 864(c)(8) as effectively connected gain. This may be the case because publicly traded partnership interests are generally held in street name by a broker and transferred through a clearinghouse. Moreover, a particular sale may be aggregated with other sales and purchases of partnership interests by other customers of the same broker. As a result, it may be difficult for a transferee to determine whether it must withhold under new section 1446(f). Furthermore, although the Conference Report suggests the Treasury Department and the IRS provide guidance providing that in the case of a publicly traded partnership interest sold by a foreign partner through a broker, the broker may deduct and withhold on behalf of the transferee, H.R. Rep. No. 115-466, at 511 (2017), until guidance is provided and new withholding and reporting systems are developed, it would not be possible for brokers to perform any such withholding.

In consideration of these concerns and others raised by stakeholders, and to allow for an orderly implementation of the requirements of new section 1446(f), the Treasury Department and the IRS have determined that withholding under new section 1446(f) should not be required with respect to any disposition of an interest in a publicly traded partnership (within the meaning of section 7704(b)) until regulations or other guidance have been issued under new section 1446(f). This temporary suspension is limited to dispositions of interests that are publicly

traded and does not extend to non-publicly traded interests. The Treasury Department and the IRS intend to issue future regulations or other guidance on how to withhold, deposit, and report the tax withheld under new section 1446(f) with respect to a disposition of an interest in a publicly traded partnership. Future guidance under new section 1446(f) with respect to a disposition of an interest in a publicly traded partnership will be prospective and will include transition rules to allow sufficient time to prepare systems and processes for compliance.

The rules described in this notice suspending withholding under new section 1446(f) do not extend to new section 864(c)(8), which remains applicable.

SECTION 4. REQUEST FOR COMMENTS AND CONTACT INFORMATION

The Treasury Department and the IRS request comments on the rules to be issued under new section 1446(f). Comments are specifically requested regarding: (i) the application of new section 1446(f) to interests in publicly traded partnerships, including the role of brokers in collecting the tax; (ii) rules for determining the amount realized taking into account section 752(d); and (iii) procedures for requesting a reduced amount required to be withheld, including how to determine an appropriate reduced amount and whether such procedures should be automatic or require approval by the IRS. The Treasury Department and the IRS also request comments on whether a temporary suspension of new section 1446(f) for partnership interests that are not publicly traded partnership interests is needed and what additional guidance, or forms and instructions, may be needed to assist taxpayers in applying new sections 864(c)(8) and 1446(f).

Written comments may be submitted to the Office of Associate Chief Counsel (International), Attention: Ronald M. Gootzeit, Internal Revenue Service, IR-4569B, 1111 Constitution Avenue, NW, Washington, DC 20224. Alternatively, taxpayers may submit comments electronically to Notice.comments@irs.counsel.treas.gov. Comments will be available for public inspection and copying.

The principal author of this notice is Mr. Gootzeit of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Mr. Gootzeit at (202) 317-6937 (not a toll free call).