

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[REG–105476–18]

RIN 1545–BO60

**Withholding of Tax and Information Reporting With Respect to Interests in Partnerships Engaged in the Conduct of a U.S. Trade or Business****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations implementing certain sections of the Internal Revenue Code, including sections added to the Internal Revenue Code by the Tax Cuts and Jobs Act, that relate to the withholding of tax and information reporting with respect to certain dispositions of interests in partnerships engaged in the conduct of a trade or business within the United States. The proposed regulations affect certain foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in the conduct of a trade or business within the United States, and persons that acquire those interests. The proposed regulations also affect partnerships that, directly or indirectly, have foreign persons as partners.

**DATES:** Written or electronic comments and requests for a public hearing must be received by July 12, 2019.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG–105476–18), Internal Revenue Service, Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–105476–18), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG–105476–18).

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Chadwick Rowland, 202–317–6937; concerning submissions of comments or requests for a public hearing, Regina L. Johnson (202) 317–6901 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:****Background****I. Section 1446(f)**

Section 1446(f), which was added to the Internal Revenue Code (the “Code”) by section 13501 of the Tax Cuts and Jobs Act, Public Law 115–97 (2017) (the “Act”), provides rules for withholding on the transfer of a partnership interest described in section 864(c)(8). Section 1446(f)(1) provides that, except as otherwise provided in section 1446(f), if a portion of the gain (if any) on any disposition of an interest in a partnership would be treated under section 864(c)(8) as effectively connected with the conduct of a trade or business within the United States, the transferee is required to deduct and withhold a tax equal to 10 percent of the amount realized on the disposition.

Section 1446(f)(2)(A) provides an exception to the general withholding requirement described in section 1446(f)(1) if the transferor furnishes an affidavit to the transferee stating, under penalties of perjury, the transferor's United States taxpayer identification number and that the transferor is not a foreign person. Section 1446(f)(2)(B)(i) provides that the exception to withholding described in section 1446(f)(2)(A) will not apply if the transferee has actual knowledge that the affidavit furnished is false, or if the transferee receives a notice from a transferor's agent or transferee's agent that the affidavit is false.

Section 1446(f)(3) provides that, at the request of the transferor or transferee, the Secretary may prescribe a reduced amount to be withheld under this section if the Secretary determines that reducing the amount to be withheld will not jeopardize the collection of tax on gain treated under section 864(c)(8) as effectively connected with the conduct of a trade or business within the United States.

Section 1446(f)(4) provides that if a transferee fails to withhold any amount required to be withheld under section 1446(f)(1) then the partnership must deduct and withhold from distributions to the transferee a tax in an amount equal to the amount the transferee failed to withhold, plus interest.

Section 1446(f)(6) generally provides that the Secretary shall prescribe such regulations as may be necessary to carry out the purposes of section 1446(f), including regulations providing for exceptions from the provisions of section 1446(f). Section 1446(f) is effective for sales, exchanges, and other dispositions after December 31, 2017.

On December 29, 2017, the Department of the Treasury (the “Treasury Department”) and the

Internal Revenue Service (the “IRS”) released Notice 2018–08, 2018–7 I.R.B. 352, which temporarily suspends the requirement to withhold on amounts realized in connection with the sale, exchange, or disposition of certain interests in a publicly traded partnership not treated as a corporation under section 7704 and the regulations thereunder. On April 2, 2018, the Treasury Department and the IRS released Notice 2018–29, 2018–16 I.R.B. 495, which provides temporary guidance and announces an intent to issue proposed regulations under section 1446(f) with respect to the sale, exchange, or disposition of certain interests in non-publicly traded partnerships. Notice 2018–29, and section 1446(f)(1) generally, rely on the principles contained within the section 1445, if a foreign person disposes of a United States real property interest (“U.S. real property interest”), as defined in section 897(c), a withholding obligation is imposed on the transferee of the interest.

On December 27, 2018, the Treasury Department and the IRS published in the **Federal Register** a notice of proposed rulemaking at 83 FR 66647 (REG–113604–18) under section 864(c)(8) (the “proposed section 864(c)(8) regulations”). The proposed section 864(c)(8) regulations provide rules for determining the amount of gain or loss treated as effectively connected with the conduct of a trade or business within the United States (“effectively connected gain” or “effectively connected loss”) described in section 864(c)(8), including rules coordinating section 864(c)(8) with sections 741 and 751 (relating to the character of gain or loss realized in connection with the sale or exchange of an interest in a partnership). They also provide rules for coordination of section 864(c)(8) with section 897 (relating to amounts treated as effectively connected gain or loss with respect to U.S. real property interests), tiered partnerships, and U.S. income tax treaties.

**II. Rules for Withholding Under Section 1446(a) on Distributions by Publicly Traded Partnerships**

Generally, withholding under section 1446(a) is required by a partnership when effectively connected taxable income (“ECTI”) is allocable to a foreign person. See §§ 1.1446–2 and 1.1446–3. However, withholding on ECTI earned by a publicly traded partnership is required when the ECTI is distributed to the foreign person. See § 1.1446–4. Often, an interest in the publicly traded partnership is held by a nominee, such

as a domestic financial institution that holds the publicly traded partnership interest as a custodian for a foreign partner. Section 1.1446-4 provides rules for applying the withholding tax under section 1446(a) to distributions by publicly traded partnerships. Under those rules, when a publicly traded partnership provides a qualified notice (within the meaning of § 1.1446-4(b)(4)), a nominee, which must be a domestic person, may be treated as a withholding agent with respect to a distribution. See § 1.1446-4(b)(4) and 1.1446-4(d). The qualified notice must be given in accordance with notice requirements with respect to dividends under regulations under the Securities Exchange Act of 1934. Section 1.1445-8(f) provides similar qualified notice rules that apply to certain distributions subject to withholding when attributable to the disposition of a U.S. real property interest.

Section 1.1446-4(f)(3) provides an ordering rule for situations in which the distribution is attributable to multiple types of income (such as amounts attributable to income described in section 1441 or 1442 or amounts subject to withholding under section 1446). However, no rule is provided for situations in which a qualified notice does not provide information regarding the types of income being distributed.

#### Explanation of Provisions

The proposed regulations provide rules for withholding, reporting, and paying tax under section 1446(f) upon the sale, exchange, or other disposition of an interest in a partnership described in section 864(c)(8) and proposed § 1.864(c)(8)-1.<sup>1</sup> The proposed regulations would, when finalized, adopt many of the rules that were described in Notice 2018-29, with certain modifications provided, in part, in response to comments. In addition, the proposed regulations provide reporting rules relating to section 864(c)(8) and rules implementing withholding under section 1446(f)(4). They also contain rules clarifying the reporting rules applicable to transfers of partnership interests subject to section 6050K. Further, the proposed regulations provide rules implementing withholding by brokers on transfers of certain interests in publicly traded partnerships subject to section 1446(f)(1), and make related changes to the reporting rules and procedures for adjusting withholding under sections 1461, 1463, and 1464. They also make changes to the rules regarding

withholding on distributions by publicly traded partnerships under § 1.1446-4, including the rules that apply to qualified notices and nominees. Finally, the proposed regulations provide rules coordinating withholding under section 1446(f) with other withholding regimes to prevent overwithholding of tax.

#### I. Reporting Requirements for Foreign Transferors and Partnerships With Foreign Transferors

A partnership that is engaged in the conduct of a trade or business within the United States is required to file an annual information return, Form 1065, *U.S. Return of Partnership Income*, and also provide information to its partners on Schedule K-1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.*, with respect to each partner's distributive share of partnership items and other information. See section 6031 and §§ 1.6031(a)-1 and 1.6031(b)-1T. Domestic partners generally report the information from the Schedule K-1 (Form 1065) on their income tax return, typically Form 1040, *U.S. Individual Income Tax Return*, for an individual, or Form 1120, *U.S. Corporation Income Tax Return*, for a corporation. A foreign partner with a U.S. income tax return filing obligation generally files Form 1040NR, *U.S. Nonresident Alien Income Tax Return*, or Form 1120-F, *U.S. Income Tax Return of a Foreign Corporation*.

A partner (foreign or domestic) that transfers an interest in a partnership in an exchange described in section 751(a) (relating to an exchange of an interest in a partnership that holds unrealized receivables or inventory) generally has an obligation both to inform the partnership of the transfer and to include a statement with respect to the exchange on the partner's income tax return under § 1.751-1(a)(3). See section 6050K(c) and § 1.6050K-1(d). A partnership also has an obligation to provide information with respect to the exchange to the transferee and transferor under section 6050K(c) and § 1.6050K-1(c). See also Form 8308, *Report of a Sale or Exchange of Certain Partnership Interests*.

Because section 864(c)(8) requires a deemed sale at the partnership level to determine a foreign partner's effectively connected gain or loss, a foreign person that transfers its partnership interest generally will not be able to compute its income tax liability under section 864(c)(8) unless the partnership provides certain information to the foreign partner. The proposed regulations therefore provide rules that facilitate the transfer of information

between a foreign partner and the partnership for purposes of section 864(c)(8).

The proposed regulations generally provide that a notifying transferor (generally, any foreign person and certain domestic partnerships that have a foreign person as a direct or indirect partner) that transfers (within the meaning of proposed § 1.864(c)(8)-1(g)(5)) an interest in a partnership (other than certain interests in a publicly traded partnership) in a transaction described in section 864(c)(8) must notify the partnership within 30 days of the transfer by providing a statement that includes information relevant to the partnership for making calculations under section 864(c)(8), including the date on which the notifying transferor transferred its interest, and other identifying information regarding the transferor and transferee. See proposed § 1.864(c)(8)-2(a). This rule generally parallels § 1.6050K-1, including the content of the information and when it must be provided.

Proposed § 1.864(c)(8)-2(b) requires a specified partnership (generally, a partnership that is engaged in the conduct of a trade or business within the United States or a partnership that owns, directly or indirectly, an interest in a partnership so engaged) to furnish to a notifying transferor the information necessary for the transferor to comply with section 864(c)(8) by the due date of the Schedule K-1 (Form 1065) for the tax year of the partnership in which the transfer occurred. Proposed § 1.864(c)(8)-2(b) applies if a specified partnership receives the notification described in proposed § 1.864(c)(8)-2(a), or otherwise knows that a relevant transfer has occurred, and the notifying transferor would have had a distributive share of deemed sale EC gain or deemed sale EC loss (within the meaning of proposed § 1.864(c)(8)-1(c)) at the time of the transfer. For these purposes, a notifying transferor that is a partnership is treated as a nonresident alien. Proposed § 1.864(c)(8)-2(b) provides that, for purposes of the reporting requirements described in proposed § 1.864(c)(8)-2, a partnership that makes a distribution to a transferor that qualifies as a transfer under section 864(c)(8) and proposed § 1.864(c)(8)-1(b) will be treated as having actual knowledge that a transfer occurred, thereby triggering the reporting requirement of proposed § 1.864(c)(8)-2(b) to the extent that the transferee would have had a distributive share of deemed sale EC gain or deemed sale EC loss within the meaning of proposed § 1.864(c)(8)-1(c).

<sup>1</sup> § 1.864(c)(8)-1 was proposed to be added on December 27, 2018; 83 FR 66647, 66651.

Relatedly, the proposed regulations clarify that the information a partnership must provide under section 6050K upon being notified of a transfer includes the information necessary for a transferor to make the transferor's required statement under § 1.751-1(a)(3). See proposed § 1.6050K-1(c)(2).

## II. Definitions and General Rules of Applicability

### A. Definitions

For purposes of the proposed regulations under section 1446(f), the term "transfer" means a sale, exchange, or other disposition, and includes a distribution from a partnership to a partner. See proposed § 1.1446(f)-1(b)(9). A "transferee" is any person, foreign or domestic, that acquires a partnership interest through a transfer. See proposed § 1.1446(f)-1(b)(10). The term "transferor" generally means any person, foreign or domestic, that transfers a partnership interest, and therefore refers to the person that directly owns the interest in the partnership. For a trust, to the extent all or a portion of the trust is treated as owned by the grantor or another person under sections 671 through 679 (such trust, "a grantor trust"), the term "transferor" means the grantor or other person. See proposed § 1.1446(f)-1(b)(11). See also Rev. Rul. 85-13, 1985-1 C.B. 184.

### B. Certifications and Books and Records

Similar to the approach described in Notice 2018-29, the proposed regulations provide various exceptions to withholding and procedures for determining the amount to withhold. Under these rules, the person required to withhold may generally rely on information provided in certifications that it receives or that is contained in its own books and records. The general rules of applicability provide the requirements for providing a valid certification and for retaining certifications or information in books and records. See proposed § 1.1446(f)-1(c)(2). A certification includes any documents associated with the certification, such as statements from the partnership, IRS forms, withholding certificates, withholding statements, certifications, or other documentation. *Id.*

### C. Determination Dates

Notice 2018-29 required determinations to be made as of the date of transfer when applying many of its rules and exceptions. Because it may be difficult to make these determinations on the precise date of transfer, the

proposed regulations generally allow the choice of one of several dates solely for purposes of making determinations under section 1446(f)(1) with regard to a transfer. This date is referred to as the determination date. It is chosen on a transfer-by-transfer basis and must be used for a transfer for all purposes of section 1446(f). The determination date must be one of the following: the date of the transfer, any date no more than 60 days before the transfer, or, with respect to a transferor that is not a controlling partner, the later of either the first day of the partnership's taxable year in which the transfer occurs or the date before the transfer of the most recent revaluation described in § 1.704-1(b)(2)(iv)(f)(5) or 1.704-1(b)(2)(iv)(s)(1). See proposed § 1.1446(f)-1(c)(4). As the determination date applies only for purposes of determining the withholding obligation under section 1446(f), the calculation of tax resulting from the application of section 864(c)(8) and the reporting requirements under proposed § 1.864(c)(8)-2 are determined based on the date of the transfer.

### D. IRS Forms and Instructions

Proposed § 1.1446(f)-1(c)(5) provides that any reference in the proposed regulations to an IRS form includes its successor form and that any form must be filed in the manner provided in the instructions to the forms or in other guidance. The IRS intends to modify publications, instructions and forms (including forms discussed in this Explanation of Provisions) as appropriate to take into account sections 864(c)(8) and 1446(f).

### E. Coordination With Other Withholding Rules

Proposed § 1.1446(f)-1(d) provides a rule coordinating section 1446(f)(1) with section 1445. Specifically, the rule provides that if a transferee is required to withhold under section 1445(e)(5) or § 1.1445-11T(d)(1) and section 1446(f)(1), then the transferee will be subject to the payment and reporting requirements of section 1445 only. This rule clarifies that even though proposed § 1.864(c)(8)-1(d) provides that section 897(g) does not apply to a transfer that is also subject to section 864(c)(8), the withholding regime provided in section 1445 and the regulations thereunder applies under these circumstances, rather than the rules described in section 1446(f)(1). Thus, if a foreign transferor disposes of an interest in a partnership that is engaged in the conduct of a trade or business within the United States (not taking into account the application of section 897(a) and in which fifty percent or

more of the value of the gross assets consist of U.S. real property interests, and ninety percent or more of the value of the gross assets consist of U.S. real property interests plus any cash or cash equivalents, a transferee must generally withhold under section 1445(a) (at 15 percent of the amount realized) and not section 1446(f). However, this rule applies only if the transferor has not applied for a withholding certificate under § 1.1445-11T(d)(1). See proposed § 1.1446(f)-1(d). If the transferor has applied for a withholding certificate, then the transferee must withhold the greater of the amounts required under section 1445(e)(5) or section 1446(f)(1).

Because gain that an upper-tier partnership recognizes on the transfer of an interest in a lower-tier partnership engaged in the conduct of a trade or business within the United States is included when calculating the upper-tier partnership's ECTI, the proposed regulations also provide a coordination rule that allows a partnership that is withheld upon under section 1446(f)(1) (in its capacity as a transferor) to claim a credit for the amount withheld against its withholding tax liability under section 1446(a) (if any). See proposed § 1.1446-3(c)(4). See also § 1.1446-3(d)(2) for rules on how the partnership or its partners may claim a credit or refund for tax paid under section 1446.

## III. Withholding on the Transfer of a Non-Publicly Traded Partnership Interest by a Foreign Person

### A. In General

Under section 1446(f)(1), a transferee of a partnership interest must withhold a tax equal to 10 percent of the amount realized on any disposition when the disposition results in gain that is treated as effectively connected with the conduct of a trade or business within the United States under section 864(c)(8). Proposed § 1.1446(f)-2(a) implements this rule by requiring any transferee to withhold a tax equal to 10 percent of the amount realized on any transfer of a partnership interest (other than certain publicly traded partnership interests) under section 1446(f)(1), unless an exception to withholding applies under proposed § 1.1446(f)-2(b). If an exception does not apply and withholding is required, proposed § 1.1446(f)-2(c) provides rules for determining and adjusting the amount required to be withheld under section 1446(f)(1). The exceptions and determination procedures in the proposed regulations apply solely for purposes of section 1446(f)(1) and do not affect a foreign person's filing obligation under the Code or a foreign

person's tax liability resulting from the application of section 864(c)(8).

### B. Exceptions to Withholding

#### 1. In General

The proposed regulations provide six exceptions to withholding by a transferee under section 1446(f)(1). These exceptions generally allow the transferee to rely on certain certifications that it receives from the transferor or partnership unless it has actual knowledge that the certifications are incorrect or unreliable. See proposed § 1.1446(f)-2(b)(1). When the partnership is a transferee because it makes a distribution, it may instead rely on its books and records unless it knows, or has reason to know, that the information is incorrect or unreliable. *Id.*

#### 2. Certification of Non-Foreign Status by Transferor

Consistent with section 6.01 of Notice 2018-29, proposed § 1.1446(f)-2(b)(2) provides the requirements for a certification of non-foreign status (including the requirement that it include the transferor's TIN), and clarifies that a valid Form W-9, *Request for Taxpayer Identification Number and Certification*, may be used for this purpose, including a Form W-9 for the transferor that is already in the transferee's possession. The proposed regulations also clarify that a Form W-9 may be used to establish non-foreign status of a transferor for purposes of section 1445. See proposed §§ 1.1445-2(b)(2)(v) and 1.1445-5(b)(3)(iv).

#### 3. No Realized Gain by Transferor

Section 1446(f)(1) applies only when there is gain described in section 864(c)(8) on the transfer of a partnership interest. Consistent with section 6.02 of Notice 2018-29, the proposed regulations provide that a transferee is not required to withhold if the transferor provides the transferee with a certification stating that the transferor would not realize any gain on the transfer of the partnership interest determined as if the transfer occurred on the determination date. Proposed § 1.1446(f)-2(b)(3)(i) provides that this certification of no realized gain must take into account any ordinary income arising from application of section 751(a) and the regulations thereunder. Therefore, a transferor may not provide the certification if section 751(a) and the regulations thereunder require the transferor to realize ordinary income, even if the transferor would realize an overall loss on the transfer.

A similar rule in proposed § 1.1446(f)-2(b)(3)(ii) applies to partnership distributions. Section 731 generally provides that if a distribution of money to a partner exceeds the partner's adjusted basis in its interest in the partnership, then gain will be recognized to the extent of the difference between the money distributed and the partner's basis. That gain or loss is considered as gain or loss from the sale or exchange of the partnership interest of the distributee partner. See section 731(a). Consistent with section 9 of Notice 2018-29, proposed § 1.1446(f)-2(b)(3)(ii) provides that for purposes of determining whether withholding is required on a distribution, a partnership is permitted to rely on its books and records or on a certification provided by the transferor (the distributee partner) to determine if there is realized gain to the distributee partner.

#### 4. Effectively Connected Gain Upon a Partnership's Deemed Sale

To make the determination of whether there is a transfer to which withholding applies more administrable for transferors and transferees, proposed § 1.1446(f)-2(b)(4) provides that no withholding is required if the transferee receives a certification from the partnership stating that if the partnership sold all of its assets at fair market value, the amount of net effectively connected gain resulting from the deemed sale would be less than 10 percent of the total net gain. Section 6.04 of Notice 2018-29 provided a similar rule, but at a threshold of 25 percent. Proposed § 1.1446(f)-2(b)(4) lowers the percentage threshold in accordance with section 2 of Notice 2018-29, which stated that the Treasury Department and the IRS intend to provide future guidance reducing the percentage threshold provided in section 6.04 of Notice 2018-29. The proposed regulations also allow a partnership that is a transferee because it makes a distribution to use this exception when it determines that the 10-percent test is satisfied from its books and records.

To make it easier for the partnership to calculate its effectively connected gain from the deemed sale, the proposed regulations allow this amount to be determined as of the determination date. Further, the proposed regulations allow a partnership to make this determination when no gain on the deemed sale would have been effectively connected with the conduct of a trade or business within the United States (for example, when the deemed sale would result in a loss that would

have been effectively connected with the conduct of a trade or business within the United States). See proposed § 1.1446(f)-2(b)(4)(i)(B).

#### 5. Allocable Share of ECTI

Section 6.03 of Notice 2018-29 provided an exception to withholding under section 1446(f)(1) for situations in which a transferor's distributive share of ECTI during the previous three taxable years was less than 25 percent of the transferor's total distributive share of income in each year (the "three-year ECTI exception"). Section 2 of Notice 2018-29 provided that the Treasury Department and the IRS intended to lower the three-year ECTI exception's 25 percent threshold in proposed regulations, and that other limitations for this rule were under consideration. See also section III.B.4 of this Explanation of Provisions (describing modifications to the threshold set forth in section 6.04 of Notice 2018-29).

The three-year ECTI exception was intended to relieve potentially significant overwithholding that could arise when a partner transfers an interest in a partnership, recognizes relatively little effectively connected gain under section 864(c)(8), but cannot obtain information from the partnership at the time of the transfer necessary to qualify for the deemed sale exception described in section III.B.4 of this Explanation of Provisions. The three-year ECTI exception uses a transferor's allocable share of ECTI as a proxy for distributive share of effectively connected gain recognized in connection with a deemed sale described in section 864(c)(8)(B). The Treasury Department and the IRS are aware that the amount of a partner's recent allocable share of ECTI may not accurately indicate whether, and to what extent, the partner would recognize gain taxable under section 864(c)(8) and proposed § 1.864(c)(8)-1. For example, a partnership may recognize relatively little effectively connected income for several years while nonetheless holding assets with significant built-in gain that would be taxable as effectively connected gain. The three-year ECTI exception may in certain cases increase compliance and collection risks if foreign partners with limited connections to the United States and significant tax liability under section 864(c)(8) are not withheld on under section 1446(f)(1).

In the interest of striking the appropriate balance between the risk of noncompliance and the potential for overwithholding, the proposed regulations adopt the three-year ECTI exception from Notice 2018-29 with the

modifications described in this section III.B.5 of this Explanation of Provisions. The Treasury Department and the IRS continue to study whether the three-year ECTI exception is appropriate in light of the risk of noncompliance, and request comments on the utility of the rule and modifications to the rule that would reduce that risk.

Accordingly, proposed § 1.1446(f)-2(b)(5)(i) provides that no withholding is required if a transferee receives a certification from a transferor stating that the transferor was at all times a partner in the partnership for the immediately prior taxable year and the two taxable years that precede it and that the transferor's allocable share of ECTI for each of those taxable years was less than 10 percent of the transferor's total distributive share of the partnership's net income for that year. See proposed § 1.1446(f)-2(b)(5)(i)(A) and (C). In addition, a transferor must certify that, in the immediately prior taxable year and the two that preceded it, the transferor's allocable share of ECTI was less than \$1 million (including ECTI allocated to certain persons related to the transferor). See proposed § 1.1446(f)-2(b)(5)(i)(B). A transferor must also certify that its distributive share of income or gain that is effectively connected with the conduct of a trade or business within the United States or deductions or losses properly allocated and apportioned to that income in each of the taxable years described in proposed § 1.1446(f)-2(b)(5)(i)(A) has been reported on a Federal income tax return (filed on or before the due date (including extensions) for filing the return (and all amounts due with respect to the return are timely paid)) for each of the three preceding taxable years, if required to be filed, before the date on which the transferor furnishes the certification. See proposed § 1.1446(f)-2(b)(5)(i)(D). For this purpose, if the transferor is a nonresident alien individual or foreign corporation, the Federal income tax return is the transferor's Form 1040NR or Form 1120-F; if the transferor is a partnership, the Federal income tax returns are the Forms 1040NR or 1120-F of the direct or indirect partners of the transferor.

For purposes of this rule, the immediately prior taxable year is the transferor's most recent taxable year with or within which a taxable year of the partnership ended and for which a Schedule K-1 (Form 1065) was due or furnished (if earlier) before the date of the transfer. See proposed § 1.1446(f)-2(b)(5)(ii). Consistent with the three-year ECTI exception described in Notice

2018-29, a transferor does not satisfy this requirement if for any of the relevant years it did not receive Form 8805, *Foreign Partner's Information Statement of Section 1446 Withholding Tax*, unless the transferor was allocated an item of deduction or loss that is effectively connected with the conduct of a trade or business within the United States, in which case it is treated as having an allocable share of ECTI for that year of zero. See proposed § 1.1446(f)-2(b)(5)(iii).

When a transferor has had neither ECTI nor a net distributive share of income allocated to it in the previous three taxable years, the composition of the income the partnership allocates to the transferor does not provide any indication of the amount of effectively connected gain realized by the transferor in connection with the transfer. Accordingly, the proposed regulations also provide that a transferor does not qualify for the exception provided in proposed § 1.1446(f)-2(b)(5) if the transferor did not have a net distributive share of income allocated to it in any of its previous three taxable years. See proposed § 1.1446(f)-2(b)(5)(iv).

Section 6.03 of Notice 2018-29 provided that the three-year ECTI exception does not apply when a partnership is a transferee by reason of making a distribution. Comments noted that, particularly in tiered partnership structures, a distributing partnership may not be able to obtain the information necessary to use the deemed sale exception described in section 6.04 of Notice 2018-29, such that the partnership would be required to withhold under section 1446(f)(1) in cases in which there was relatively limited effectively connected income earned by the partnership. In response to the comments, the proposed regulations allow a distributing partnership to use this exception when it determines that the three-year ECTI exception is applicable based on its books and records, provided that it receives a representation from the transferor stating that income tax returns have been filed, and tax has been paid, for each of the relevant years for which the transferor was allocated effectively connected income (or loss). See proposed § 1.1446(f)-2(b)(5)(v).

Finally, proposed § 1.1446(f)-2(b)(5)(vi) provides that a transferor may not make the certification if it has actual knowledge that the information relevant to the certification that is reported by the partnership on any Form 8805 or Schedule K-1 (Form 1065) is incorrect.

## 6. Nonrecognition by Transferor

Section 864(c)(8) and proposed § 1.864(c)(8)-1 provide that gain from the transfer of a partnership interest that is treated as effectively connected with the conduct of a trade or business within the United States is limited to gain otherwise recognized under the Code. If a nonrecognition provision of the Code applies to all of the gain realized on a transfer, withholding under section 1446(f)(1) does not apply. Accordingly, section 6.05 of Notice 2018-29 provided an exception to withholding for certain nonrecognition transactions if the transferee receives a notice from the transferor describing the application of a nonrecognition provision. This exception was based on the rules in § 1.1445-2(d)(2).

Consistent with the rule provided in Notice 2018-29, the proposed regulations generally permit a transferee to rely on a certification of nonrecognition from the transferor. See proposed § 1.1446(f)-2(b)(6). The certification provided by the transferor must include a brief description of the transfer and the relevant law and facts relating to the application of the nonrecognition provision.

If only a portion of the gain realized on the transfer is subject to a nonrecognition provision, an adjustment to the amount required to be withheld may be permitted under proposed § 1.1446(f)-2(c)(4), discussed in section III.C.4 of this Explanation of Provisions (describing the rules in proposed § 1.1446(f)-2(c)(4)(vi) for the certification of maximum tax liability that may be relied upon in these situations).

## 7. Claim of Treaty Benefits

Notice 2018-29 did not contain specific rules addressing the application of income tax treaties, instead including them in section 6.05 by adopting a modified version of § 1.1445-2(d) (providing an exception from withholding under section 1445 when the transferor certifies that it is not required to recognize gain either under a provision of the Code or under a treaty). The proposed regulations provide an exception to withholding under section 1446(f)(1) when a transferor certifies that it is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country. See proposed § 1.1446(f)-2(b)(7)(i). This exception applies only when a transferor (as opposed to owners of an interest in the transferor, including partners in a partnership that is a transferor) qualifies

for the benefits of an income tax treaty in order to reduce the burden on a transferee of reviewing documentation from multiple persons. The certification to the transferee must include a valid Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*, or W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)* (as applicable), that contains the information necessary to support the claim for treaty benefits, and the transferee must mail a copy of the certification to the IRS by the 30th day after the date of the transfer in order to rely upon it. *Id.* See also Form 8833, *Treaty-Based Return Position Disclosure Under Section 6114 or 7701(b)*, and the instructions to the form regarding the requirement for the transferor to disclose a claim for treaty benefits with a return.

To ensure that these procedures are followed for claims involving treaty benefits, this exception is the sole method by which a transferor may claim an exception to withholding by reason of a claim of treaty benefits. See proposed § 1.1446(f)-2(b)(7)(iii). For claims involving transfers with respect to which treaty benefits apply to only a portion of the gain from the transfer, see section III.C.4 of this Explanation of Provisions (describing the rules in proposed § 1.1446(f)-2(c)(4)(vi) for the certification of maximum tax liability that that may be relied upon in these situations).

### C. Determining the Amount To Withhold

#### 1. In General

The proposed regulations provide certain procedures for determining the amount to withhold under section 1446(f)(1). The rules are intended to provide administrable procedures for transferees to determine the amount to withhold, and in some cases, provide procedures intended to better reflect the amount of the transferor's actual tax liability under section 864(c)(8). When applicable, these procedures generally allow the transferee to rely on certifications that it receives from the transferor (or, in certain cases, from the partnership) to determine the amount to withhold unless it has actual knowledge that the certification is incorrect or unreliable. See proposed § 1.1446(f)-2(c)(1). In cases in which a partnership is the transferee because it makes a distribution, it may instead rely on its books and records unless it knows, or has reason to know, that the information is incorrect or unreliable. *Id.*

#### 2. Amount Realized

##### i. In General

The amount required to be withheld under section 1446(f)(1) is determined by reference to the transferor's amount realized on the transfer. See section 1446(f)(1). The proposed regulations provide that the amount realized for purposes of proposed § 1.1446(f)-2 is determined under section 1001 and the regulations thereunder and section 752 and the regulations thereunder. See proposed § 1.1446(f)-2(c)(2)(i); see also §§ 1.752-1(h) and 1.1001-2.

The proposed regulations also clarify that in the case of a distribution, the amount realized is the sum of the amount of cash distributed (or to be distributed), the fair market value of property distributed (or to be distributed), and the reduction in the transferor's share of partnership liabilities. *Id.*

##### ii. Procedures To Determine Share of Partnership Liabilities

Comments stated that the allocation of liabilities to a partner under section 752 is not information that normally would be available to a transferee and may be difficult for a transferor to determine as of the date of transfer. To address these issues, section 7.02 of Notice 2018-29 provided that a transferee may in certain cases rely on a certification from the transferor as to the amount of the transferor's share of partnership liabilities reported on the transferor's most recently received Schedule K-1 (Form 1065), provided that the form was for a partnership taxable year that closed no more than 10 months before the date of transfer and the transferor is not a controlling partner. Section 7.03 of Notice 2018-29 allowed a transferee to rely on a certification from the partnership that provided the transferor's share of partnership liabilities as reflected on the most recently prepared Schedule K-1 (Form 1065).

The proposed regulations provide procedures similar to sections 7.02 and 7.03 of Notice 2018-29 that allow a transferee to rely on a certification from the transferor or the partnership. Proposed § 1.1446(f)-2(c)(2)(ii)(B) provides that a transferee may generally rely on a certification from a transferor that provides the amount of the transferor's share of partnership liabilities reported on the most recent Schedule K-1 (Form 1065) issued by the partnership. In response to comments stating that a transferor may not possess a Schedule K-1 (Form 1065) that satisfies the 10 month requirement in Notice 2018-29 because of the timing of

the extended due date for Schedule K-1 (Form 1065), the proposed regulations provide that a transferee may generally rely on a certification if the last day of the partnership taxable year for which the Schedule K-1 (Form 1065) was provided was no more than 22 months before the date of the transfer. See proposed § 1.1446(f)-2(c)(2)(ii)(B). Consistent with Notice 2018-29, a transferor that is a controlling partner may not provide this certification because it will generally be able to require the partnership to provide a partnership-level certification as to the controlling partner's share of partnership liabilities. *Id.*

Proposed § 1.1446(f)-2(c)(2)(ii)(C) allows a transferee to rely on a certification from the partnership that provides the amount of the transferor's share of partnership liabilities. However, unlike the rule in Notice 2018-29, the partnership is required to make this determination as of the determination date rather than relying on its most recently prepared Schedule K-1 (Form 1065). *Id.* The proposed regulations also provide a new procedure that allows a partnership that is a transferee because it makes a distribution to rely on its books and records to determine the transferor's share of partnership liabilities as of the determination date. See proposed § 1.1446(f)-2(c)(2)(iii).

If a transferee does not use one of these determination procedures, the reduction in the transferor's share of partnership liabilities must be determined as of the date of the transfer for purposes of computing the amount realized.

##### iii. Modified Amount Realized for Foreign Partnerships

As discussed in section III.B of this Explanation of Provisions, section 1446(f)(2) and proposed § 1.1446(f)-2(b)(2) provide an exception to withholding when the transferor is not a foreign person. A transferor that is a foreign partnership may not rely on this exception even though it may have U.S. persons (which are not subject to tax under section 864(c)(8)) as its partners. To avoid overwithholding when a foreign partnership transfers its interest in a partnership, proposed § 1.1446(f)-2(c)(2)(iv) provides a procedure to limit the amount realized for withholding purposes to the portion of the amount realized that is attributable to foreign persons. For this purpose, the portion of the amount realized attributable to a direct or indirect partner is determined based on the percentage of gain allocable to that partner. Any partner that does not provide a valid

certification of non-foreign status (including a Form W-9) is treated as a foreign person for this purpose.

To make the certification for a modified amount realized, the transferor must provide to the transferee a Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*, that includes a certification of non-foreign status for each partner that is treated as a U.S. person. It must also include a withholding statement that provides the percentage of gain allocable to each direct or indirect partner and that indicates whether that person is a U.S. person or is treated as a foreign person.

### 3. Lack of Money or Property or Lack of Knowledge Regarding Liabilities

As described in section 8 of Notice 2018-29, in some cases, a reduction in the transferor's share of partnership liabilities may cause the amount otherwise required to be withheld to exceed the cash or other property that the transferee actually pays to the transferor. In other cases, a transferee may have not received, or cannot rely upon, a certification regarding the transferor's share of partnership liabilities, and may not otherwise know the transferor's share of partnership liabilities. In these situations, the proposed regulations generally provide that the amount required to be withheld is equal to the amount realized determined without regard to the decrease in the transferor's share of partnership liabilities. See proposed § 1.1446(f)-2(c)(3).

### 4. Certification of Maximum Tax Liability

To more closely align the amount to withhold with the transferor's tax liability under section 864(c)(8), the proposed regulations provide a procedure to determine the amount to withhold that is intended to estimate the amount of tax the transferor is required to pay under section 864(c)(8). See proposed § 1.1446(f)-2(c)(4).

For this procedure to apply, a transferee must receive a certification from the transferor containing certain information relating to the transferor and the transfer. See proposed § 1.1446(f)-2(c)(4)(iii). One of the requirements for this certification is for the transferor to identify the amount of outside capital gain and outside ordinary gain that would be treated as effectively connected gain on the determination date. See proposed § 1.1446(f)-2(c)(4)(iii)(E). Further, to provide this certification, the transferor

must represent that it has obtained a statement from the partnership that includes, among other things, information relating to the transferor's distributive share of effectively connected gain in connection with a deemed sale described in section 864(c)(8)(B) as of the determination date. See proposed § 1.1446(f)-2(c)(4)(iii)(G).

When a transferor provides a transferee this information, proposed § 1.1446(f)-2(c)(4)(i) allows the transferee to withhold based on the transferor's maximum tax liability on the transfer. The transferor's maximum tax liability is the amount of the transferor's effectively connected gain multiplied by the applicable percentage. See section 1446(b) and § 1.1446-3(a)(2). The applicable percentage applies the highest rate of tax for each particular type of income or gain allocable to a foreign person. *Id.*

Special rules apply for a transfer in which only a portion of the gain is subject to tax under section 864(c)(8) because a nonrecognition provision of the Code or an income tax treaty in effect between the United States and a foreign country applies (for example, when the partnership carries on one trade or business through a U.S. permanent establishment, and another trade or business that is not carried on through a U.S. permanent establishment). See proposed § 1.1446(f)-2(c)(4)(v) and (vi). These rules provide that the transferor must, in addition to providing the maximum tax liability certification, comply with the procedural requirements that would otherwise apply when claiming a full exception to withholding based on a nonrecognition provision or treaty benefits.

### D. Reporting and Paying Withheld Amounts

#### 1. In General

A transferee required to withhold must report and pay any tax withheld by the 20th day after the date of the transfer. See proposed § 1.1446(f)-2(d)(1). To report and pay the amount withheld, the proposed regulations direct the transferee to use Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, and 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*. The IRS will stamp a valid Form 8288-A to show receipt and mail a copy to the transferor.

#### 2. Transferee's Obligation To Certify the Amount Withheld to the Partnership

As discussed in section IV of this Explanation of Provisions, a partnership must withhold on distributions to a transferee under section 1446(f)(4) to the extent the transferee fails to properly withhold under section 1446(f)(1) and proposed § 1.1446(f)-2(a). See proposed § 1.1446(f)-3. In order for the partnership to determine whether it must withhold under these rules, proposed § 1.1446(f)-2(d)(2) requires a transferee to timely furnish certain information regarding its compliance with section 1446(f)(1) to the partnership.

Specifically, proposed § 1.1446(f)-2(d)(2) requires a transferee (other than a partnership that is a transferee because it makes a distribution) to furnish, no later than 10 days after the transfer, a certification to the partnership that either includes a copy of the Form 8288-A that it files with the IRS, or states the amount realized on the transfer and any amount withheld by the transferee. The certification must also include any underlying certifications that the transferee has relied upon that claim an exception or adjustment to withholding. As discussed in section IV.B of this Explanation of Provisions, the partnership must conduct its own review of the certification provided by the transferee, including any underlying certifications. Therefore, a transferee that has relied on a certification claiming an exception or adjustment to withholding may want to ensure that the partnership has determined the certification to be correct and reliable before the due date for payment of any withheld amounts to the IRS.

### E. Effect of Withholding on Transferor

Proposed § 1.1446(f)-2(e) states that a foreign person must file a U.S. tax return and pay any tax due with respect to a transfer that is subject to section 864(c)(8) regardless of whether there is withholding under section 1446(f)(1) and proposed § 1.1446(f)-2. To claim a credit under section 33, a transferor that is an individual or corporation must attach to its return the stamped copy of Form 8288-A, as referenced in section III.D of this Explanation of Provisions. See proposed § 1.1446(f)-2(e)(2)(i). If a stamped copy of Form 8288-A has not been provided to the transferor by the IRS, proposed § 1.1446(f)-2(e)(3) provides that a transferor may establish the amount of tax withheld by furnishing substantial evidence of the amount. For a discussion of the rule regarding a transferor that is a foreign

partnership claiming a credit for withholding under section 1446(f)(1), see section II.E of this Explanation of Provisions.

#### **IV. Partnership's Requirement To Withhold Under Section 1446(f)(4) on Distributions to Transferee**

##### *A. In General*

Proposed § 1.1446(f)-3 provides rules under section 1446(f)(4) that would implement the partnership's requirement to withhold on distributions to a transferee on any amount that the transferee failed to properly withhold under section 1446(f)(1), plus any interest on this amount. The rules, when made applicable as final rules, would end the suspension of section 1446(f)(4) withholding provided in section 11 of Notice 2018-29.

##### *B. Requirement To Withhold*

The proposed regulations provide that, if a transferee fails to withhold any amount required to be withheld under proposed § 1.1446(f)-2 in connection with the transfer of a partnership interest, the partnership must withhold from any distributions made to the transferee in accordance with the rules in proposed § 1.1446(f)-3. Under the general rule, a partnership determines whether a transferee has withheld the amount required to be withheld under proposed § 1.1446(f)-2 by relying on the certification described in proposed § 1.1446(f)-2(d)(2) that it receives from the transferee. See proposed § 1.1446(f)-3(a)(1). The partnership may rely on this certification unless it knows, or has reason to know, that the certification is incorrect or unreliable. *Id.* Therefore, the partnership must review the certification received from the transferee, which includes any underlying certifications that the transferee relied on to reduce or eliminate withholding. Because the partnership may have information that may not be available to the transferee (for example, information in its books and records), a partnership may know, or have reason to know, that an underlying certification is incorrect or unreliable even though the transferee properly relied on the certification. In this case, the partnership would be required to withhold on the transferee under section 1446(f)(4) to the extent required in proposed § 1.1446(f)-3.

If the partnership timely receives (within 10 days from the transfer), and may rely on, a certification from the transferee stating that an exception to withholding applies or establishing that the transferee has withheld the amount

required to be withheld under proposed § 1.1446(f)-2, then the partnership is not required to withhold under the general rule in proposed § 1.1446(f)-3(a)(1). See proposed § 1.1446(f)-3(b)(1). For this purpose, the amount required to be withheld may take into account any adjustment procedures under § 1.1446(f)-2(c) (for which any documents, including underlying certifications, are attached to the certification provided by the transferee). The proposed regulations thus reduce the burden imposed by section 1446(f)(4) by allowing transferees and partnerships to rely on the information produced under the regulations implementing section 1446(f)(1).

The proposed regulations provide an additional rule that allows the IRS, in limited circumstances, to require a partnership to withhold under section 1446(f)(4) when the IRS notifies the partnership that it has determined that the transferee has provided incorrect information on the certification described in proposed § 1.1446(f)-2(d)(2) regarding the amount realized or the amount withheld, or that the transferee failed to pay the amounts reported as withheld to the IRS. See proposed § 1.1446(f)-3(a)(2). This rule is meant to induce the transferee to properly determine the amount realized on transfer (in accordance with the rules in proposed § 1.1446(f)-2(c)(2)), and to correctly report to the partnership the amount of tax withheld and paid to the IRS.

Under the proposed regulations, withholding under section 1446(f)(4) does not apply when a partnership is a transferee because it makes a distribution. See proposed § 1.1446(f)-3(b)(3). Section 1446(f)(4) imposes a withholding obligation on a secondary party, the partnership, when the transferee fails to withhold under section 1446(f)(1). When the partnership is the transferee because it made a distribution and failed to withhold under section 1446(f)(1) and proposed § 1.1446(f)-2, imposing a section 1446(f)(4) withholding obligation on it does not provide an additional party to ensure the 1446(f) liability is paid. Furthermore, the partnership remains liable for its failure to withhold in its capacity as a transferee. See section VI.A of this Explanation of Provisions.

A publicly traded partnership generally is also not required to withhold on distributions made to a transferee under section 1446(f)(4). See proposed § 1.1446(f)-3(b)(2)(i). As described in section V of this Explanation of Provisions, it would be administratively difficult for a publicly traded partnership to determine when a

transfer of its interest has occurred, and whether the correct amount has been withheld under section 1446(f)(1). However, the proposed regulations do require a publicly traded partnership to withhold under section 1446(f)(4) in certain limited instances. Specifically, a publicly traded partnership may publish a qualified notice that states that withholding under section 1446(f)(1) does not apply with respect to a distribution. See section V.B.2 and 3 of this Explanation of Provisions. To ensure that publicly traded partnerships exercise due diligence when publishing these qualified notices, proposed § 1.1446(f)-3(b)(2)(ii) provides that the exception from section 1446(f)(4) withholding applicable to publicly traded partnerships does not apply if a publicly traded partnership determines (including by reason of having received notification from the IRS) that it has published a qualified notice that falsely states that an exemption applied. When a publicly traded partnership makes this determination, it must withhold on distributions to the transferees an amount equal to the amount that any brokers failed to withhold under proposed § 1.1446(f)-4 due to reliance on the qualified notice, plus interest.

##### *C. Withholding Rules*

A partnership that does not receive, or cannot rely on, a timely certification from a transferee stating that an exception to withholding applies or that the proper amount has been withheld must begin to withhold under the general rule on distributions made to the transferee on the later of the date that is 30 days after the transfer or the date that is 15 days after the partnership acquires actual knowledge of the transfer. See proposed § 1.1446(f)-3(c)(1)(i).

The partnership must withhold on the entire amount of each distribution made to the transferee until it may rely on a certification from the transferee that states that an exception to withholding applies or that provides the information necessary to determine the amount required to be withheld. See proposed § 1.1446(f)-3(c)(1)(ii). The partnership may rely on this certification to determine its withholding obligation regardless of whether it is provided within the time prescribed in proposed § 1.1446(f)-2(d)(2). If the partnership has not already satisfied the amount required to be withheld, as determined from the certification from the transferee, it must continue to withhold on distributions to the transferee until it has done so. *Id.* However, the partnership may stop withholding if the transferee disposes of all of its interest



in the partnership, unless the partnership has actual knowledge that any successor to the transferee is related to the transferee or the transferor from which the transferee acquired the interest. *Id.*

The amount required to be withheld under proposed § 1.1446(f)-3(a)(1), as determined from the certification provided by the transferee, is a tax equal to 10 percent of the amount realized on the transfer, reduced by any amount already withheld by the transferee, plus any computed interest. *See* proposed § 1.1446(f)-3(c)(2)(i). The proposed regulations provide that a partnership that is required to withhold under proposed § 1.1446(f)-3(a)(1) may not take into account any adjustment procedures that would otherwise affect the amount required to be withheld under proposed § 1.1446(f)-2(c)(2)(i). *See* proposed § 1.1446(f)-3(c)(2)(i)(A). Thus, for example, a partnership may not reduce the amount that it is required to withhold under the procedures described in proposed § 1.1446(f)-2(c)(4) (adjusting the amount subject to withholding based on a transferor's maximum tax liability). The Treasury Department and the IRS have determined that it would be inappropriate to permit adjustments that may reduce the amount required to be withheld under section 1446(f)(4). Withholding on distributions to transferees under section 1446(f)(4) applies only after the transferee has either failed to properly withhold under section 1446(f)(1) or has not complied with the applicable procedural requirements in the proposed regulations. Accordingly, permitting adjustments to the amount a partnership is required to withhold under section 1446(f)(4) would reduce transferees' incentive to comply with their obligations under section 1446(f)(1) while potentially increasing the partnership's administrative burden associated with that withholding.

Proposed § 1.1446(f)-3(c)(2)(ii) provides rules for the partnership to compute interest on the amount that the transferee failed to withhold. Proposed § 1.1446(f)-3(c)(3) provides that any amount required to be withheld on a distribution under any other withholding provision in the Code is not required to be withheld under section 1446(f)(4). For example, if a partnership is required to withhold \$30 under section 1441 on a \$100 distribution, the maximum amount required to be withheld on that distribution under section 1446(f)(4) is \$70.

Proposed § 1.1446(f)-3(d) provides that a partnership required to withhold

under section 1446(f)(4) must report and pay the tax withheld using Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, and 8288-C, *Statement of Withholding Under Section 1446(f)(4) for Withholding on Dispositions by Foreign Persons of Partnership Interests*, as provided in forms, instructions, or other guidance.

#### *D. Effect of Withholding on the Transferor and Transferee*

The withholding of tax under section 1446(f)(4) does not relieve a nonresident alien individual or foreign corporation subject to tax under section 864(c)(8) from filing a U.S. income tax return with respect to the transfer and paying any tax due with the return. *See* proposed § 1.1446(f)-3(e)(1). Because this tax is withheld from the transferee rather than from the transferor, the transferor is not allowed a credit under section 33. *Id.* However, the proposed regulations clarify that tax will not be collected from the transferor to the extent it has already been collected from another person under these rules. *See* section VI.A of this Explanation of Provisions. Therefore, the transferor will not be required to pay tax to the extent the tax (but not any portion treated as interest) has been paid through withholding on the transferee.

A transferee remains liable under section 1446(f)(1) even when the partnership is required to withhold under section 1446(f)(4). However, the transferee is treated as satisfying this withholding tax liability under section 1446(f)(1) to the extent that it is withheld upon under section 1446(f)(4). *See* proposed § 1.1446(f)-3(e)(2). Any amount withheld that is treated as interest is not treated as satisfying the transferee's liability under section 1446(f)(1), but that amount will instead be treated as interest paid by the transferee with respect to its section 1446(f)(1) liability. *Id.* Under the proposed regulations, if the amount of tax withheld from the transferee exceeds its liability under section 1446(f)(1), only the partnership may claim a refund on behalf of the transferee for the excess amount. *Id.* This rule is meant to make the refund process more administrable by having the partnership act on behalf of each of its transferees for purposes of claiming any excess amounts withheld under section 1446(f)(4). The Treasury Department and the IRS anticipate that partnerships and transferees will make arrangements by contract so that the transferees may be reimbursed for amounts refunded to the partnership. The Treasury Department and the IRS request comments on this issue.

#### **V. Withholding on the Transfer of a Publicly Traded Partnership Interest by a Foreign Person**

The proposed regulations provide rules for withholding and reporting on the transfer of an interest in a publicly traded partnership if the interest is publicly traded on an established securities market or is readily tradable on a secondary market or the substantial equivalent thereof (such interests, "PTP interests"). The rules, when made applicable as final rules, would end the suspension of section 1446(f)(1) withholding on the disposition of PTP interests provided in Notice 2018-08.

##### *A. In General*

A transfer of a PTP interest raises unique issues for withholding under section 1446(f). For example, when a transfer of a PTP interest is effected through one or more brokers, the transferee will generally not know the identity of the transferor. Accordingly, the Conference Report for the Act acknowledged that transfers involving PTP interests could require withholding rules different from those that apply to transfers involving non-PTP interests. *See* Conference Report on H.R. 1, Tax Cuts and Jobs Act, H. Rep. No. 115-466, at 511 ("[T]he Secretary may provide guidance permitting a broker, as agent of the transferee, to deduct and withhold the tax . . . such guidance may provide that if an interest in a publicly traded partnership is sold by a foreign partner through a broker, the broker may deduct and withhold the 10-percent tax on behalf of the transferee.").

Consistent with the Conference Report, proposed § 1.1446(f)-4(a)(1) provides that if a transfer of a PTP interest is effected through one or more brokers, the transferee is not required to withhold, and the withholding obligation is instead imposed on certain brokers involved with the transfer. Generally, the proposed regulations define a broker to include any person, foreign or domestic, that in the ordinary course of a trade or business during the calendar year stands ready to effect sales made by others, and that, in connection with a transfer of a PTP interest, receives all or a portion of the amount realized on behalf of the transferor. *See* proposed § 1.1446(f)-1(b)(1). For example, when a transfer of a PTP interest occurs through a cash on delivery account, a delivery versus payment account, or other similar account or transaction, this definition would include a broker that receives an amount realized from the sale against delivery of the PTP interest and any other broker that receives an amount

realized from that broker. Therefore, the withholding obligation under proposed § 1.1446(f)-4 is generally limited to brokers that receive proceeds from the sale and act on behalf of the transferor. The definition of broker also includes any clearing organization that effects a transfer of a PTP interest on behalf of the transferor. While comments have stated that clearing organizations may not have the capability to complete the withholding required under section 1446(f), the Treasury Department and the IRS anticipate that clearing organizations will make arrangements to ensure that, when effecting the transfer of a PTP interest on behalf of foreign brokers, they act on behalf of brokers that assume withholding responsibility when clearing sales of PTP interests (such as a qualified intermediary (“QI”)).

If a transfer of a PTP interest is effected through multiple brokers, proposed § 1.1446(f)-4(a)(2) provides rules that specify which broker or brokers have a withholding obligation. Under proposed § 1.1446(f)-4(a)(2)(i), a broker that pays the amount realized to a foreign broker is required to withhold unless the foreign broker is either a U.S. branch treated as a U.S. person or a QI that assumes primary withholding responsibility for the payment. Consistent with this rule, the Treasury Department and the IRS intend to modify the QI agreement provided in Revenue Procedure 2017-15, 2017-3 I.R.B. 437, to allow QIs to assume primary withholding responsibility on the amount realized. Proposed § 1.1446(f)-4(a)(2)(ii) provides an additional rule requiring the broker that effects a transfer for the transferor as its customer to satisfy the withholding obligation. This rule ensures that withholding will be completed on payment of the amount realized to the transferor when another broker has not already satisfied the withholding.

To avoid withholding by multiple brokers, proposed § 1.1446(f)-4(a)(2)(iii) provides the general rule that a broker is not required to withhold when it knows that the withholding obligation has been satisfied by another broker. Proposed § 1.1446(f)-4(a)(2)(iv) provides that a broker must treat another broker as a foreign person unless it obtains documentation (including a certification of non-foreign status) establishing that the other broker is a U.S. person.

If the transfer of a PTP interest is not effected through one or more brokers, then proposed § 1.1446(f)-4 does not apply, and the general rules of section 1446(f)(1) and proposed § 1.1446(f)-2 apply. A transfer that is effected through a broker includes a distribution with

respect to a PTP interest held through an account with a broker.

### *B. Exceptions to Withholding*

The proposed regulations provide five exceptions to withholding that apply to the transfer of a PTP interest. The exceptions are intended to both reduce the compliance burden placed on brokers and provide rules that are administrable.

#### 1. Certification of Non-Foreign Status

As mentioned in section III.B.2 of this Explanation of Provisions, withholding under section 1446(f)(1) is limited to transfers by foreign partners. Accordingly, a broker is not required to withhold to the extent that it relies on a certification of non-foreign status that it receives from the transferor that claims an exception to withholding. See proposed § 1.1446(f)-4(b)(2). For purposes of proposed § 1.1446(f)-4, a certification of non-foreign status means a Form W-9, or valid substitute form, that meets the requirements of § 1.1441-1(d)(2). A broker may rely on a valid Form W-9 that it already possesses, and in certain cases, may instead rely on a certification that it receives from another broker that states the TIN and status of the transferor when that other broker acts as an agent for the transferor and possesses the Form W-9 (for example, from an introducing broker). A broker will not qualify for the exception provided in proposed § 1.1446(f)-4(b)(2) if it has actual knowledge that the certification is incorrect or unreliable.

#### 2. 10-Percent Exception

The proposed regulations include an exception to withholding that may apply if, on a deemed sale of the assets of the publicly traded partnership the interest in which is transferred, the amount of effectively connected gain would be less than 10 percent of the total gain. Specifically, proposed § 1.1446(f)-4(b)(3) provides that a broker is not required to withhold under proposed § 1.1446(f)-4 if it properly relies on a qualified notice stating that the 10-percent exception applies.

The 10-percent exception applies if a hypothetical sale by the publicly traded partnership of all of its assets at fair market value on a specified date would result in an amount of gain effectively connected with the conduct of a trade or business within the United States that is less than 10 percent of the total gain. The specified date must be a date designated by the publicly traded partnership that is within the 92-day period ending on the date that it posts a qualified notice. Unlike the similar exception described in section III.B.4 of

this Explanation of Provisions that applies to transfers of non-PTP interests, this rule requires a publicly traded partnership to designate a date for this purpose that generally occurs within the most recent calendar quarter. Cf. proposed § 1.1446(f)-2(b)(4) (permitting the deemed sale computation to occur on a determination date, which would allow the deemed sale date to be determined as of the first day of a partnership’s taxable year in which the transfer occurred in certain cases). The Treasury Department and the IRS have determined that it is appropriate to limit the availability of this exception to cases in which a publicly traded partnership has designated a deemed sale date occurring within the most recent calendar quarter because publicly traded partnerships are in a better position to determine the value of their assets, and in some cases determine the basis of their assets, on a quarterly basis. The proposed regulations limit reliance on a qualified notice depending on its date of posting. See proposed § 1.1446(f)-4(b)(3)(iii).

For a discussion of rules regarding when a publicly traded partnership may be liable under section 1446(f)(4) because it falsely states on a qualified notice that this exception applies, see section IV.B of this Explanation of Provisions. For a discussion of the proposed changes to existing qualified notice rules, see section VII of this Explanation of Provisions.

#### 3. Qualified Current Income Distributions

As discussed in section III.B.3 of this Explanation of Provisions, the proposed regulations allow a transferor of a non-PTP interest to provide a certification stating that the transferor would not realize any gain on the transfer. Because it would be administratively difficult for a broker to timely obtain this type of certification from the transferor of a PTP interest, and difficult for the transferor to determine its basis in the PTP interest, the proposed regulations do not provide a similar exception for transfers of PTP interests.

The Treasury Department and the IRS have determined, however, that it would be appropriate to eliminate withholding under section 1446(f)(1) on distributions (the full amount of which is generally treated as an amount realized under the proposed regulations) by a publicly traded partnership when it is likely that the transferor would realize no gain. In general, under section 705(a)(1), a partner’s basis in its interest is increased by its distributive share of income for the taxable year, such that a distribution by the partnership not in

excess of that income generally does not result in the recognition of gain under section 731(a)(1). Accordingly, the proposed regulations provide that when a qualified notice posted by a publicly traded partnership indicates that the distribution does not exceed the net income the partnership earned since the record date of the partnership's last distribution, no withholding is required with respect to the distribution. *See* proposed § 1.1446(f)–4(b)(4).

#### 4. Proceeds Subject to Withholding Under Section 3406

A broker may also be required to withhold on gross proceeds from the transfer of a PTP interest under section 3406 when a payment is treated as being made to a non-exempt U.S. recipient. To prevent withholding twice on the same payment, proposed § 1.1446(f)–4(b)(5) provides an exception to withholding under section 1446(f)(1) if the amount realized is subject to withholding under section 3406.

#### 5. Claim of Treaty Benefits

The proposed regulations provide an exception similar to the one described in section III.B.6 of this Explanation of Provisions when a transferor states that it is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country. *See* proposed § 1.1446(f)–4(b)(6). The exception also requires the transferor to furnish a valid Form W–8 with the information necessary to support the claim. *Id.* Unlike the exception for non-PTP interests, a broker is not required to mail the certification to the IRS because under the proposed regulations brokers are required to file a Form 1042–S, *Foreign Person's U.S. Source Income Subject to Withholding*, to report a transfer of a PTP interest that includes information about the claim of treaty benefits. *See* section V.D of this Explanation of Provisions for reporting requirements with respect to transfers of PTP interests.

#### C. Determining the Amount To Withhold

##### 1. Amount Realized

###### i. In General

A broker that is required to withhold under proposed § 1.1446(f)–4(a) must withhold 10 percent of the amount realized on the transfer of a PTP interest. As explained in section III.C.2 of this Explanation of Provisions, a reduction in a partner's share of partnership liabilities is treated as an amount realized under proposed § 1.1446(f)–2(c). However, because of

the difficulties involved with requiring a broker to timely determine a transferor's share of partnership liabilities, proposed § 1.1446(f)–4(c)(2)(i) provides a special rule that treats the amount realized on the transfer of a PTP interest as the amount of gross proceeds (as defined in § 1.6045–1(d)(5)) paid or credited to the customer or another broker (as applicable). If a publicly traded partnership makes a distribution to a partner, the amount realized is the amount of cash distributed (or to be distributed) and the fair market value of property distributed (or to be distributed).

###### ii. Modified Amount Realized for Foreign Partnerships

Consistent with the rule described in section III.C.2.iii of this Explanation of Provisions that applies to transfers of non-PTP interests, the proposed regulations include a rule that allows brokers to rely on a certification from a foreign partnership to modify the amount realized based on the extent to which the amount realized is attributable to persons who are (or are presumed to be) foreign partners. *See* proposed § 1.1446(f)–4(c)(2)(ii).

#### D. Reporting and Paying Withheld Amounts

A broker required to withhold under § 1.1446(f)–4 must pay the withheld tax pursuant to the deposit rules in § 1.6302–2, and report the withholding on Forms 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*, and 1042–S pursuant to the procedures in § 1.1461–1(b) and (c). The proposed regulations treat as a recipient for Form 1042–S reporting purposes a partner that receives an amount realized from a transfer of a PTP interest subject to § 1.1446(f)–4. *See* proposed § 1.1461–1(c)(1)(ii)(A)(8). This rule also clarifies that a foreign partnership is treated as a recipient for this purpose to ensure that the foreign partnership receives a Form 1042–S that it may use to claim credit for any withholding under proposed § 1.1446(f)–4 against its tax liability under section 1446(a). *See* section II.E of this Explanation of Provisions for discussion of the general coordination rule.

To implement the reporting requirements, the proposed regulations add to the list of amounts subject to reporting on Form 1042–S an amount realized on the transfer of a PTP interest subject to § 1.1446(f)–4 (with limited exceptions). *See* proposed § 1.1461–1(c)(2). The proposed regulations also add to this list any distributions of

effectively connected income by a publicly traded partnership subject to § 1.1446–4 to clarify that these amounts are reportable on Form 1042–S. *Id.*

#### E. Effect of Withholding on Transferor

As mentioned in section III.E of this Explanation of Provisions, the proposed regulations neither relieve a transferor of its substantive tax liability under section 864(c)(8), nor relieve a transferor subject to section 864(c)(8) from its filing obligation. *See* proposed § 1.1446(f)–4(e)(1). However, a transferor is allowed a credit under section 33 for the amount withheld under section 1446(f)(1) and proposed § 1.1446(f)–4. *Id.* To claim the credit, the transferor must attach to its return a copy of the Form 1042–S that includes the transferor's TIN. *Id.* For a discussion of the rules regarding a transferor that is a foreign partnership claiming a credit for withholding under section 1446(f)(1), see section II.E of this Explanation of Provisions.

#### F. Procedures To Adjust Overwithholding

Section 1.1461–2(a) allows a withholding agent that overwithheld under chapter 3 of the Code, and made a deposit of tax as provided in § 1.6302–2(a), to adjust the overwithheld amount using either a reimbursement or a set-off procedure. Because these rules are meant to allow withholding agents to adjust overwithholding for any deposited amounts that are reportable on Forms 1042 and 1042–S, the proposed regulations modify § 1.1461–2(a) to allow use of the adjustment procedures for amounts withheld by a broker pursuant to proposed § 1.1446(f)–4 (which are reported on Forms 1042 and 1042–S, as noted in section V.D. of this Explanation of Provisions).

#### G. Procedures To Adjust Underwithholding

In general, § 1.1461–2(b) allows a withholding agent that underwithheld on a beneficial owner under chapter 3 of the Code to withhold from future payments made to the beneficial owner, or satisfy the tax from property or additional contributions of the beneficial owner, before the earlier of the due date for filing Form 1042 or the date on which the form is actually filed. The proposed regulations amend this provision to allow the use of this procedure by brokers that underwithheld under proposed § 1.1446(f)–4 on the transfer of a PTP interest.

### H. Refunds and Credits

Section 1.1464–1 generally provides that if an overpayment of tax has actually been withheld from the beneficial owner of the income, any refund or credit will be made to that beneficial owner. If, however, the tax was not withheld at source, but was instead paid by the withholding agent, the refund or credit will be made to the withholding agent. The proposed regulations clarify that these rules apply for purposes of section 1446(f). See proposed § 1.1464–1(a).

### VI. Liability for Failure To Withhold

#### A. In General

Proposed § 1.1446(f)–5(a) provides that every person required to deduct and withhold tax under section 1446(f), including under proposed §§ 1.1446(f)–2 through 1.1446(f)–4, but that fails to do so is liable under section 1461. If the tax required to be withheld is paid by another person required to withhold, or by the nonresident alien individual or foreign corporation subject to tax under section 864(c)(8), section 1463 and the proposed regulations clarify that the tax will only be collected once. However, the satisfaction of this liability does not relieve a person that failed to withhold under section 1446(f) from any interest, penalties, or additions to tax that would otherwise apply. The proposed regulations also provide that a partnership that fails to withhold under proposed § 1.1446(f)–3 is liable under section 1461 only for the amount of tax that it failed to withhold, and not any interest computed under § 1.1446(f)–3(c)(2)(ii). This rule ensures that interest will be computed and assessed only once with respect to the same underlying tax liability.

#### B. Liability of Agents

Proposed § 1.1446(f)–5(b) provides rules for the liability of agents, which generally require an agent of a transferor or transferee to notify the transferee (or other person required to withhold) if it has knowledge that a certification furnished to that person is false. A person that receives notice from an agent may not rely on the certification to apply an exception to withholding or for determining the amount to withhold. Proposed § 1.1446(f)–5(b)(2) provides procedural rules regarding the timing and content of the notice, and requires the agent to furnish a copy of the notice to the IRS. An agent that fails to provide the required notice is liable for the tax that the person that should have received the notice would have been required to withhold under section 1446(f). However, under proposed

§ 1.1446(f)–5(b)(4), this liability is limited to the amount of compensation that the agent derives from the transaction (and any civil or criminal penalties that may apply). The proposed regulations clarify that brokers required to withhold under § 1.1446(f)–4 are not treated as agents for purposes of this rule, and are instead liable for any failure to withhold under the rules described in section V of this Explanation of Provisions.

### VII. Amendments to Existing Section 1446 Regulations Relating to Distributions by Publicly Traded Partnerships

In response to comments received outside the context of section 1446(f), the proposed regulations also contain changes to the existing qualified notice rules that apply to distributions that publicly traded partnerships make to foreign partners. The Treasury Department and the IRS are aware that in certain cases nominees receive notices of distribution from publicly traded partnerships that do not provide detailed information regarding the amounts of income comprising the distribution as specified in § 1.1446–4(f)(3) (such as amounts described in section 1441 or section 1442 or subject to withholding under section 1446). The term “qualified notice” under § 1.1446–4(b)(4) is currently defined by reference to the reporting requirements of 17 CFR 240.10b–17(b)(1) or (3), which do not include a requirement to report information regarding the types of income comprising the distribution. Unless a notice provides that information, however, a nominee will not have the information necessary to apply the ordering rule of § 1.1446–4(f)(3) to the distribution for purposes of determining the amount required to be withheld.

The proposed regulations make two changes to resolve this issue. First, proposed § 1.1446–4(b)(4) revises the method for a publicly traded partnership to provide a nominee a qualified notice by requiring that the notice be posted in a readily accessible format in an area of the primary public website of the publicly traded partnership that is dedicated to this purpose. Second, proposed § 1.1446–4(d) creates a default withholding rule subjecting gross distributions to the higher of the withholding percentage required under sections 1441 and 1442 or the applicable percentage under section 1446(b)(2), unless a qualified notice provides the nominee sufficient detail to determine the types of income distributed and the appropriate withholding rates to apply. Thus, if a

publicly traded partnership is unable to determine the makeup of a distribution when it is made, the nominee must withhold at the highest applicable rate.

The proposed regulations also expand the definition of a nominee for withholding under § 1.1446–4 to include certain foreign persons that agree to assume primary withholding responsibility. Therefore, a QI or a U.S. branch treated as a U.S. person that assumes primary withholding responsibility for a distribution by a publicly traded partnership under proposed § 1.1446–4(b)(3) can act as a nominee with respect to the distribution. The Treasury Department and the IRS intend to modify the QI agreement provided in Revenue Procedure 2017–15 to allow QIs to assume primary withholding responsibility for distributions by publicly traded partnerships under section 1446(a).

The proposed regulations also make changes to the qualified notice rules applicable to publicly traded partnerships, publicly traded trusts, and real estate investment trusts (“REITs”) under section 1445 that conform to proposed § 1.1446–4(b)(4) so that those rules also provide more readily available information for nominees. See proposed § 1.1445–8(f).

As discussed in sections V.F and V.G of this Explanation of Provisions, the proposed regulations modify § 1.1461–2(a) and (b) to allow use of procedures to adjust overwithholding and underwithholding for amounts withheld by a broker pursuant to proposed § 1.1446(f)–4. The proposed regulations also amend § 1.1461–2(a) to allow the use of reimbursement and set-off procedures with respect to amounts withheld under section 1446(a) on distributions of ECTI by publicly traded partnerships (which are reported on Forms 1042 and 1042–S, as opposed to Forms 8804, *Annual Return for Partnership Withholding Tax (Section 1446)*, and 8805 used by non-publicly traded partnerships to report withholding on ECTI allocable to foreign partners). They also amend § 1.1461–2(b) to clarify that the existing reference to “distributions of effectively connected income under section 1446” is meant to apply only to those distributions that are made by publicly traded partnerships.

### Applicability Dates

Proposed § 1.864(c)(8)–2(a) and proposed § 1.6050K–1(d)(3) apply to transfers that occur on or after the date that these regulations are published as final regulations in the **Federal Register** (the “finalization date”). Proposed

§ 1.864(c)(8)–2(b) and (c) and proposed § 1.6050K–1(c)(2) and (c)(3) apply to returns filed on or after the finalization date. Proposed § 1.864(c)(8)–2(d) applies beginning on the finalization date.

Proposed §§ 1.1445–2(b)(2)(v) and 1.1445–5(b)(3)(iv) apply to certifications provided on or after May 7, 2019, except that a taxpayer may apply those provisions with respect to certifications provided before that date. A taxpayer may rely on the proposed amendments to §§ 1.1445–2 and 1.1445–5 with respect to any period before the finalization date. Proposed § 1.1445–8(f)(1) applies to distributions made on or after the date that is 60 days after the finalization date.

Proposed § 1.1446–3(c)(4) applies to partnership taxable years that include transfers that occur on or after the date that is 60 days after the finalization date. Proposed § 1.1446–4(b)(2), (b)(3), (c), (d), and (f) apply to distributions made on or after the date that is 60 days after the finalization date.

Proposed §§ 1.1446(f)–1 through 1.1446(f)–5 apply to transfers that occur on or after the date that is 60 days after the finalization date. For transfers that occur before the date that is 60 days after the finalization date, taxpayers may apply the rules described in Notice 2018–08 and Notice 2018–29. Alternatively, instead of applying the rules described in Notice 2018–29, taxpayers and other affected persons may choose to apply §§ 1.1446(f)–1, 1.1446(f)–2, and 1.1446(f)–5 of the proposed regulations in their entirety to all transfers as if they were final regulations.

The proposed amendments to § 1.1461–1(a)(1), (c)(1)(i), (c)(1)(ii), (c)(2)(i) and (c)(4) apply with respect to returns for transfers occurring on or after the date that is 60 days after the finalization date. The proposed amendments to § 1.1461–2(a)(1) and (b) apply to transfers occurring on or after the date that is 60 days after the finalization date. The proposed amendments to § 1.1461–3 apply to returns for transfers occurring on or after the date that is 60 days after the finalization date.

The proposed amendments to § 1.1463–1(a) apply to transfers that occur on or after the date that is 60 days after the finalization date.

The proposed amendments to § 1.1464–1(a) apply to transfers that occur on or after the date that is 60 days after the finalization date.

The Treasury Department and the IRS intend to obsolete Notice 2018–08 and Notice 2018–29 effective on the date that is 60 days after the finalization date.

## Special Analyses

### I. Regulatory Planning and Review

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

### II. Paperwork Reduction Act

The collection of information in these proposed regulations is in proposed § 1.864(c)(8)–2 regarding reporting for transactions described in section 864(c)(8) and proposed § 1.864(c)(8)–1, and proposed §§ 1.1446(f)–1, 1.1446(f)–2, 1.1446(f)–3, and 1.1446(f)–4 regarding the withholding, reporting, and paying of tax under section 1446(f) following the transfer of an interest described in section 864(c)(8) and proposed § 1.864(c)(8)–1. Section II.1 of this Special Analyses discusses the collections of information that will be conducted using IRS forms. The information collections that will not be conducted through IRS forms are discussed in section II.2 of this Special Analyses.

#### A. Collections of Information—Forms 1042, 1042–S, 8288, 8288–A, 8288–C, W–8IMY, W–8BEN, and W–8BEN–E

Under proposed §§ 1.1446(f)–2(b)(2) and 1.1446(f)–4(b)(2), a transferor qualifies for an exception from withholding if it provides to the transferee or broker (as applicable) a certification of non-foreign status, which includes a valid Form W–9 (at the transferor's option). The IRS has determined that Form W–9 is not a collection of information under 5 CFR 1320.3(h)(1) and is exempt from the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) (“PRA”).

The collection of information in proposed § 1.1446(f)–2(b)(7) is provided by the transferor by submitting a certification and Form W–8BEN or W–8BEN–E to the transferee and is optional. The information will be used by the transferor to determine whether an exception to withholding applies based on an income tax treaty.

The information in proposed § 1.1446(f)–2(c)(2)(iv)(C) by the transferor to the transferee is provided on Form W–8IMY and is optional. This information will be used by the transferee to determine the modified amount realized.

The collection of information in proposed § 1.1446(f)–2(d)(1) will be provided on Forms 8288 and 8288–A by the transferee to the IRS and is

mandatory if the transferee withholds tax under section 1446(f)(1). These forms will be used by the transferee to report and pay any tax under section 1446(f)(1) and proposed § 1.1446(f)–2.

The information provided in proposed § 1.1446(f)–3(d) by the partnership to the IRS will be used by the partnership to report and pay any tax under section 1446(f)(4) and proposed § 1.1446(f)–3 and will be provided on new Form 8288–C. The IRS anticipates that the burden associated with this collection of information will be reflected in OMB control number 1545–0902.

The collection of information provided in proposed § 1.1446(f)–4(a)(2)(i) from certain U.S. branches of foreign persons and qualified intermediaries to the broker that effected the transfer of an interest described in section 864(c)(8) and proposed § 1.1446(f)–4 will be provided on Form W–8IMY. This information will be used by the broker to determine its withholding obligation under section 1446(f)(1) and proposed § 1.1446(f)–4.

The collection of information in proposed § 1.1446(f)–4(b)(6) is provided by the transferor by submitting a certification and Form W–8BEN or W–8BEN–E to the broker and is optional. The information will be used by the broker to determine whether an exception to withholding applies based on an income tax treaty.

The information in proposed § 1.1446(f)–4(c)(2)(ii)(C) by the transferor to the broker is provided on Form W–8IMY and is optional. This information will be used by the broker to determine the modified amount realized.

The information in proposed § 1.1446(f)–4(d) will be provided on Forms 1042 and 1042–S submitted by the broker to the IRS and is mandatory if the broker withholds tax under section 1446(f)(1) or if it applies the exception described in proposed § 1.1446(f)–4(b)(6). These forms will be used to report and pay any tax under section 1446(f)(1) and proposed § 1.1446(f)–4.

The information in proposed § 1.1446(f)–4(e)(2) provided by the transferor to the IRS will be used to claim a credit for an amount withheld under section 1446(f)(1) and proposed § 1.1446(f)–4, and will be satisfied by submitting Form 1042–S with an income tax return (Form 1040NR or 1120–F) to the IRS.

The Treasury Department and the IRS intend that the information collection requirements described in this section II.1 will be set forth in the forms and instructions identified in the Revision of

Existing Forms and New Forms table. collections of information in those submissions associated with those forms. As a result, for purposes of the PRA, the forms will be reflected in the PRA reporting burdens associated with the forms.

REVISION OF EXISTING FORMS AND NEW FORMS

	New	Revision of existing form	Number of additional respondents (estimated, rounded to nearest 1,000)
Form 1042-S	.....	Y	<6,000
Form 8288	.....	Y	<70,000
Form 8288-A	.....	Y	<70,000
Form 8288-C	Y	.....	<70,000
Form W-8BEN	.....	Y	<70,000
Form W-8BEN-E	.....	Y	<70,000
Form W-8IMY	.....	Y	<70,000

Source: RAAS:CDW and SOI.

The numbers of respondents in the Revision of Existing Forms and New Forms table were estimated by the Research, Applied Analytics and Statistics Division of the IRS from the Compliance Data Warehouse and Statistics of Income, using tax years 2013 through 2015. Data for each of the Forms 1042, 1042-S, 8288, 8288-A, W-8BEN, W-8BEN-E, and W-8IMY represent preliminary estimates of the total number of additional taxpayers that are expected to file these forms. The tax data for 2016 and 2017 are not yet available. Data for Forms 8288, 8288-A, W-8BEN, W-8BEN-E, and W-8IMY represent preliminary estimates of the total number of interests in partnerships, other than publicly traded partnership interests, engaged in the conduct of a trade or business in the United States that will be transferred by foreign persons. Data for Form 8288-C represent preliminary estimates of the

total number of transferees on whom partnerships must withhold tax under section 1446(f)(4) if the transferees do not fully withhold tax under section 1446(f)(1). Data for Form 1042-S represent preliminary estimates of the total number of interests in publicly traded partnership engaged in the conduct of a trade or business in the United States that will be transferred by foreign persons.

The current status of the PRA submissions related to the tax forms that will be used to conduct the information collections in the proposed regulations is provided in the Current Status of PRA Submissions table. The overall burden estimates provided for the OMB control numbers below are aggregate amounts that relate to the entire package of forms associated with the applicable OMB control number and will in the future include, but not isolate, the estimated burden of the tax forms that will be

created or revised as a result of the information collections in the proposed regulations. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the proposed regulations. No burden estimates specific to the forms affected by the proposed regulations are currently available. The Treasury Department and the IRS have not estimated the burden, including that of any new information collections, related to the requirements under the proposed regulations. The Treasury Department and the IRS request comments on all aspects of information collection burdens related to the proposed regulations, including estimates for how much time it would take to comply with the paperwork burdens described above for each relevant form and ways for the IRS to minimize the paperwork burden.

CURRENT STATUS OF PRA SUBMISSIONS

	Type of filer	OMB No.(s)	Status
Form 1042, Form 1042-S	All filers (Legacy Model)	1545-0096	Approved 12/27/2016 until 12/31/2019.
	<i>Link: <a href="https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201606-1545-025">https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201606-1545-025</a>.</i>		
Form 8288, Form 8288-A	All filers (Legacy system)	1545-0902	Approved 1/2/2017 until 1/31/2020.
	<i>Link: <a href="https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201608-1545-015">https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201608-1545-015</a>.</i>		
Form W-8BEN, Form W-8BEN-E, Form W-8IMY.	Business (NEW Model)	1545-0123	Approved 12/21/2018 until 12/31/2019.
	<i>Link: <a href="https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201805-1545-019">https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201805-1545-019</a>.</i>		
	All other filers (Legacy system)	1545-1621	Approved 12/19/18 until 12/31/2021.
	<i>Link: <a href="https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-1545-002">https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-1545-002</a>.</i>		

*B. Collections of Information—Proposed §§ 1.864(c)(8)–2(a) and (b), 1.1446(f)–1(c)(3), 1.1446(f)–2(b)(2) Through (7), (c)(2), and (c)(4), 1.1446(f)–4(b)(2) and (6), 1.1446(f)–4(b)(3) and (4), and 1.1446(f)–2(d)(2)*

These proposed regulations contain collections of information that are not on existing or new IRS forms. These collections of information include:

- (a) Notification by a transferor to a partnership that a transfer has occurred (proposed § 1.864(c)(8)–2(a));
- (b) Statement provided by a partnership to a transferor necessary for the transferor to calculate its tax liability (proposed § 1.864(c)(8)–2(b));
- (c) Retention of information by partnership in its books and records (proposed § 1.1446(f)–1(c)(3));
- (d) Certifications from a transferor (or partnership) to a transferee for an exception from withholding or adjustment to amount realized (proposed § 1.1446(f)–2(b)(2) through (7), (c)(2), and (c)(4));
- (e) Certification from a transferee to partnership regarding the transferee's withholding (proposed § 1.1446(f)–2(d)(2)).
- (f) Certifications from a transferor to a broker to apply an exception from withholding (proposed § 1.1446(f)–4(b)(2) and (6)); and
- (g) Information provided by a publicly traded partnership to a broker (proposed § 1.1446(f)–4(b)(3) and (4)).

The collections of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the PRA. Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by July 12, 2019. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (including underlying assumptions and methodology);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collections of information provided in proposed § 1.864(c)(8)–2 will be used by both the partnership engaged in the conduct of a trade or business in the United States and the foreign partner that transfers an interest in the partnership and are mandatory. The notification provided to the partnership by the foreign transferor in proposed § 1.864(c)(8)–2(a) will serve as notice to the partnership that a transfer described in section 864(c)(8) and proposed § 1.864(c)(8)–1 occurred. The statement provided to the foreign transferor by the partnership in proposed § 1.864(c)(8)–2(b) is necessary for the foreign transferor to determine its effectively connected gain or loss as described in proposed § 1.864(c)(8)–1(b) and (c).

The collection of information provided in proposed § 1.1446(f)–1(c)(3) requires a partnership to retain certain identified information in its books and records regarding its obligation to withhold under section 1446(f). The identified information will be used by a partnership to determine the application, and the extent, of withholding under section 1446(f).

The collections of information provided in proposed § 1.1446(f)–2(b)(2) through (7), (c)(2), and (c)(4) from the transferor of an interest described in section 1446(f), or from the partnership whose interest is transferred, to the transferee of the interest will be used by the transferee to determine whether an exception applies or to determine the amount realized. These collections of information are optional. The certification in proposed § 1.1446(f)–2(b)(7) includes the submission of Form W–8BEN or W–8BEN–E and is also discussed in section II.1 of this Special Analyses.

The information provided in proposed § 1.1446(f)–2(d)(2) by the transferee to the partnership will be used by the partnership to determine whether it has a withholding obligation under section 1446(f)(4) and proposed § 1.1446(f)–3.

The collection of information provided in proposed § 1.1446(f)–4(b)(6) by the transferor to the broker will be used by the broker to determine if an exception applies that relieves the broker from its withholding obligation

under section 1446(f)(1) and proposed § 1.1446(f)–4. The certification in proposed § 1.1446(f)–4(b)(6) includes the submission of Form W–8BEN or W–8BEN–E and is also discussed in section II.1 of this Special Analyses.

*Estimated total annual reporting burden:* 50,920 hours.

*Estimated average annual burden hours per respondent:* Approximately 0.67 hours (40 minutes).

*Estimated cost per respondent (\$2016):* \$26.00.

*Estimated total annual monetized cost (\$2016):* \$1,827,938.00.

*Estimated number of respondents:* 76,000.

*Estimated annual frequency of responses:* 0.4 (as the collections of information do not occur on an annual basis).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### III. Regulatory Flexibility Act

It is hereby certified that this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

The proposed regulations affect (i) foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in the conduct of a trade or business within the United States, and who are not subject to the Regulatory Flexibility Act, (ii) U.S. persons that are transferors providing Forms W–9 to transferees to certify that they are not foreign persons, (iii) persons who acquire those interests, (iv) partnerships that, directly or indirectly, have foreign persons as partners, and (v) brokers that effect transfers of interests in publicly traded partnerships.

The Treasury Department and the IRS do not have data readily available to assess the number of small entities potentially affected by the proposed regulations. However, entities potentially affected by these proposed regulations are generally not small entities, because of the resources and investment necessary to acquire a

partnership interest from a foreign person or to directly, or indirectly, have foreign persons as partners. Therefore, the Treasury Department and the IRS do not believe that a substantial number of domestic small entities will be subject to the proposed regulation's information collections. Consequently, the Treasury Department and the IRS certify that the proposed regulations will not have a significant economic impact on a substantial number of small entities. The IRS invites the public to comment on the impact of these regulations on small entities.

Pursuant to section 7805(f) of the Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

### Comments and Requests for Public Hearing

Before the proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

### Drafting Information

The principal authors of the proposed regulations are Subin Seth, Ronald M. Gootzeit, and Chadwick Rowland, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

### Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, notices, and other guidance cited in this document are published in the Internal Revenue Bulletin and are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding sectional authorities for §§ 1.864(c)(8)–2, 1.1445–5, 1.1445–8, 1.1446–3 through 1.1446–4, 1.1446(f)–1 through 1.1446(f)–5, and 1.6050K–1 in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

Section 1.864(c)(8)–2 also issued under 26 U.S.C. 864(c)(8)(E), 6001 and 6031(b).

\* \* \* \* \*

Section 1.1445–5 also issued under 26 U.S.C. 1445(e)(7).

\* \* \* \* \*

Section 1.1445–8 also issued under 26 U.S.C. 1445(e)(7).

\* \* \* \* \*

Section 1.1446–3 also issued under 26 U.S.C. 1446(g).

\* \* \* \* \*

Section 1.1446–4 also issued under 26 U.S.C. 1446(g).

\* \* \* \* \*

Section 1.1446(f)–1 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

\* \* \* \* \*

Section 1.1446(f)–2 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

\* \* \* \* \*

Section 1.1446(f)–3 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

\* \* \* \* \*

Section 1.1446(f)–4 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

\* \* \* \* \*

Section 1.1446(f)–5 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

\* \* \* \* \*

Section 1.6050K–1 also issued under 26 U.S.C. 6050K(a).

\* \* \* \* \*

■ **Par. 2.** Section 1.864(c)(8)–2 is added to read as follows:

#### § 1.864(c)(8)–2 Notification and reporting requirements.

(a) *Notification by foreign transferor—*

(1) *In general.* Except as provided in paragraph (a)(2) of this section, a notifying transferor that transfers an interest in a specified partnership must notify the partnership of the transfer in writing within 30 days of the transfer. The notification must include—

(i) The names and addresses of the notifying transferor and the transferee or transferees;

(ii) The U.S. taxpayer identification number (TIN) of the notifying transferor and, if known, of the transferee or transferees; and

(iii) The date of the transfer.

(2) *Exceptions—*(i) *Certain interests in publicly traded partnerships.* Paragraph (a)(1) of this section does not apply to a notifying transferor that transfers an interest in a publicly traded partnership if the interest is publicly traded on an established securities market or is readily tradable on a secondary market (or the substantial equivalent thereof).

(ii) *Certain distributions.* Paragraph (a)(1) of this section does not apply to a notifying transferor that is treated as transferring an interest in a specified partnership because it received a distribution from that specified partnership.

(3) *Section 6050K.* The notification described in paragraph (a)(1) of this section may be combined with or provided at the same time as the notification described in § 1.6050K–1(d), provided that it satisfies the requirements of both sections.

(4) *Other guidance.* The notification described in paragraph (a)(1) of this section must also include any information required in forms, instructions, or other guidance.

(b) *Reporting by specified partnerships with notifying transferor—*

(1) *In general.* (i) A specified partnership must provide to a notifying transferor the statement described in paragraph (b)(2) of this section if—

(A) The partnership receives the notice described in paragraph (a) of this section, or otherwise has actual knowledge that there has been a transfer of an interest in the partnership by a notifying transferor; and

(B) At the time of the transfer, the notifying transferor would have had a distributive share of deemed sale EC gain or deemed sale EC loss within the meaning of § 1.864(c)(8)–1(c).

(ii) *Distributions.* For purposes of paragraph (b)(1)(i)(B) of this section, a partnership that is a transferee because it makes a distribution is treated as having actual knowledge of that transfer.

(2) *Contents of statement.* The statement required to be furnished by the specified partnership under paragraph (b)(1) of this section must include—

(i) The items described in § 1.864(c)(8)–1(c)(3)(ii) (foreign transferor's aggregate deemed sale EC items, which includes items derived from lower-tier partnerships); and

(ii) Any other information as provided in forms, instructions, or other guidance.

(3) *Time for furnishing statement.* The specified partnership must furnish the required information on or before the due date (with extensions) for issuing



Schedule K-1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.*, or its successor, to the transferor for the year of the transfer. See § 1.6031(b)-1T(b).

(4) *Manner of furnishing statement.* No specific format is required for the information except as provided in any forms, instructions, or other guidance.

(5) *Partnership notifying transferor.* For purposes of this paragraph (b), a specified partnership must treat a notifying transferor that is a partnership as a nonresident alien individual.

(c) *Statement may be provided to agent.* A partnership may provide a statement required under paragraph (b)(2) of this section to a person other than the notifying transferor if the person is described in § 1.6031(b)-1T(c).

(d) *Definitions.* The following definitions apply for purposes of this section.

(1) *Notifying transferor.* The term *notifying transferor* means any foreign person, any domestic partnership that has a foreign person as a direct partner, and any domestic partnership that has actual knowledge that a foreign person indirectly holds, through one or more partnerships, an interest in the domestic partnership.

(2) *Specified partnership.* The term *specified partnership* means a partnership that is engaged in the conduct of a trade or business within the United States or that owns (directly or indirectly) an interest in a partnership that is engaged in the conduct of a trade or business within the United States, and may include a publicly traded partnership as defined in section 7704 and §§ 1.7704-1 through 1.7704-4, but does not include a publicly traded partnership treated as a corporation under that section.

(3) *Transfer.* The term *transfer* has the meaning provided in § 1.864(c)(8)-1(g)(5).

(e) *Applicability dates.* Paragraph (a) of this section applies to transfers that occur on or after the date that these regulations are published as final regulations in the **Federal Register**. Paragraphs (b) and (c) of this section apply to returns filed on or after the date that these regulations are published as final regulations in the **Federal Register**. Paragraph (d) of this section applies beginning on the date that these regulations are published as final regulations in the **Federal Register**.

■ **Par. 3.** Section 1.1445-2 is amended by adding paragraph (b)(2)(v) and a sentence to the end of paragraph (e) to read as follows:

**§ 1.1445-2 Situations in which withholding is not required under section 1445(a).**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(v) *Form W-9.* For purposes of paragraph (b)(2)(i) of this section, a certification of non-foreign status includes a valid Form W-9, *Request for Taxpayer Identification Number and Certification*, or its successor, submitted to the transferee by the transferor.

\* \* \* \* \*

(e) *Applicability dates.* \* \* \* Paragraph (b)(2)(v) of this section applies to certifications provided on or after May 7, 2019, except that a taxpayer may apply it with respect to certifications provided before that date.

■ **Par. 4.** Section 1.1445-5 is amended by adding paragraph (b)(3)(iv) and a sentence to the end of paragraph (h) to read as follows:

**§ 1.1445-5 Special rules concerning distributions and other transactions by corporations, partnerships, trusts, and estates.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(iv) *Form W-9.* For purposes of paragraph (b)(3)(i) of this section, a certification of non-foreign status includes a valid Form W-9, *Request for Taxpayer Identification Number and Certification*, or its successor, submitted to the transferee by the transferor.

\* \* \* \* \*

(h) *Applicability dates.* \* \* \* Paragraph (b)(3)(iv) of this section applies to certifications provided on or after May 7, 2019, except that a taxpayer may apply it with respect to certifications provided before that date.

■ **Par. 5.** Section 1.1445-8 is amended by revising paragraph (f) to read as follows:

**§ 1.1445-8 Special rules regarding publicly traded partnerships, publicly traded trusts and real estate investment trusts (REITs).**

\* \* \* \* \*

(f) *Qualified notice*—(1) *In general.* A qualified notice for purposes of paragraph (b)(3)(iv) of this section is a notice provided in the manner described in § 1.1446-4(b)(4) by a partnership, trust, or REIT regarding a distribution that is attributable to the disposition of a United States real property interest. In the case of a REIT, a qualified notice is only a notice of a distribution, all or any portion of which the REIT actually designates, or characterizes in accordance with paragraph (c)(2)(ii)(C) of this section, as a capital gain dividend in the manner described in § 1.1446-4(b)(4), with

respect to each share or certificate of beneficial interest. A deemed designation under paragraph (c)(2)(ii)(A) of this section may not be the subject of a qualified notice under this paragraph (f). A person described in paragraph (b)(3) of this section is treated as receiving a qualified notice when the notice is provided in accordance with § 1.1446-4(b)(4).

(2) *Applicability dates.* Paragraph (f)(1) of this section applies to distributions made on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

\* \* \* \* \*

■ **Par. 6.** Section 1.1446-3 is amended:  
 ■ 1. In the first sentence of paragraph (a)(2)(i), by removing “section 11(b)(1)” and adding in its place “section 11(b)”.  
 ■ 2. By adding paragraph (c)(4).  
 The addition reads as follows:

**§ 1.1446-3 Time and manner of calculating and paying the 1446 tax.**

\* \* \* \* \*

(c) \* \* \*

(4) *Coordination with section 1446(f).* A partnership that is directly or indirectly subject to withholding under section 1446(f)(1) during its taxable year may credit the amount withheld under section 1446(f)(1) against its section 1446 tax liability for that taxable year only to the extent the amount is allocable to foreign partners.

\* \* \* \* \*

■ **Par. 7.** Section 1.1446-4 is amended by:  
 ■ 1. By revising paragraphs (b)(3) and (4).  
 ■ 2. By removing the second sentence of paragraph (c).  
 ■ 3. By revising paragraphs (d) and (f)(3).

The revisions and additions read as follows:

**§ 1.1446-4 Publicly traded partnerships.**

\* \* \* \* \*

(b) \* \* \*

(3) *Nominee.* For purposes of this section, the term *nominee* means a person that holds an interest in a publicly traded partnership on behalf of a foreign person and that is either a U.S. person, a qualified intermediary (as defined in § 1.1441-1(e)(5)(ii)) that assumes primary withholding responsibility for a payment, or a U.S. branch of a foreign person that agrees to be treated as a U.S. person (as described in § 1.1441-1(b)(2)(iv)) with respect to a payment.

(4) *Qualified notice.* For purposes of this section, a qualified notice is a notice posted by a publicly traded partnership that states the amount of a

distribution that is attributable to each type of income described in paragraphs (f)(3)(i) through (v) of this section. A qualified notice may also include the information described in § 1.1446(f)-4(b)(3), relating to an exception from withholding under section 1446(f)(1) for transfers of certain partnership interests. The notice must be posted in a readily accessible format in an area of the primary public website of the publicly traded partnership that is dedicated to this purpose. A qualified notice must be posted by the date required for providing notice with respect to dividends described in 17 CFR 240.10b-17(b)(1) or (3) (or any successor regulation) issued pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a) and contain the information described therein as it would relate to the distribution. The publicly traded partnership must keep the notice accessible to the public for ten years on its primary public website or the primary public website of any successor organization. No specific format is required unless provided in forms, instructions, or other guidance. See paragraph (d) of this section regarding when a nominee is considered to have received a qualified notice.

\* \* \* \* \*

(d) *Rules for designation of nominees to withhold tax under section 1446.* A nominee that receives a distribution from a publicly traded partnership subject to withholding under this section, and which is to be paid to (or for the account of) any foreign person, may be treated as a withholding agent under this section. A nominee is treated as receiving a qualified notice on the date that the notice is posted in accordance with paragraph (b)(4) of this section. When a nominee is treated as a withholding agent with respect to a foreign partner of the partnership, the obligation to withhold on distributions to the foreign partner in accordance with the rules of this section is imposed solely on the nominee. A nominee responsible for withholding under the rules of this section is subject to liability under sections 1461 and 6655, as well as all applicable penalties and interest, as if the nominee were a partnership responsible for withholding under this section. A nominee may rely on a qualified notice that meets the requirements in paragraph (b)(4) of this section to determine the amounts on which it must withhold. If a notice a publicly traded partnership issues relating to its distribution does not meet the requirements in paragraph (b)(4) of this section, the nominee must withhold on the distribution with respect to—

(1) Foreign partners that are corporations, at the greater of the highest rate of tax specified in section 11(b) or section 881; and

(2) Foreign partners that are not corporations, at the greater of the highest rate of tax specified in section 1 or section 871.

\* \* \* \* \*

(f) \* \* \*

(3) *Ordering rule relating to distributions.* Distributions from publicly traded partnerships are deemed to be paid out of the following types of income in the order indicated—

(i) Amounts attributable to income described in section 1441 or 1442 that are not effectively connected with the conduct of a trade or business in the United States but are subject to withholding, before taking into account any treaty exemptions;

(ii) Amounts attributable to income described in section 1441 or 1442 that are not effectively connected with the conduct of a trade or business in the United States and are not subject to withholding because of an exemption under a provision of the Code;

(iii) Amounts attributable to income effectively connected with the conduct of a trade or business in the United States that are not subject to withholding under §§ 1.1446-1 through 1.1446-6 (for example, amounts exempt by treaty);

(iv) Amounts subject to withholding under §§ 1.1446-1 through 1.1446-6; and

(v) Amounts not listed in paragraphs (f)(3)(i) through (iv) of this section.

\* \* \* \* \*

■ **Par. 8.** Section 1.1446-7 is amended by revising the section heading and adding two sentences at the end of the section to read as follows:

**§ 1.1446-7 Applicability dates.**

\* \*\* The addition of § 1.1446-3(c)(4) applies to partnership taxable years that include transfers that occur on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**. The revisions to § 1.1446-4(b)(3) and (4), the removal of the second sentence of § 1.1446-4(c), and the revisions to § 1.1446-4(d) and (f)(3) apply to distributions made on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

■ **Par. 9.** Sections 1.1446(f)-1 through 1.1446(f)-5 are added to read as follows: Sec.

\* \* \* \* \*

1.1446(f)-1 General rules.

1.1446(f)-2 Withholding on the transfer of a non-publicly traded partnership interest.

1.1446(f)-3 Partnership's requirement to withhold under section 1446(f)(4) on distributions to transferee.

1.1446(f)-4 Withholding on the transfer of a publicly traded partnership interest.

1.1446(f)-5 Liability for failure to withhold.

\* \* \* \* \*

**§ 1.1446(f)-1 General rules.**

(a) *Overview.* These regulations provide rules for withholding, reporting, and paying tax under section 1446(f) upon the sale, exchange, or other disposition of certain interests in partnerships. This section provides definitions and general rules of applicability that apply for purposes of section 1446(f). Section 1.1446(f)-2 provides withholding rules for the transfer of a non-publicly traded partnership interest under section 1446(f)(1). Section 1.1446(f)-3 provides rules that apply when a partnership is required to withhold under section 1446(f)(4) on distributions made to the transferee in an amount equal to the amount that the transferee failed to withhold plus interest. Section 1.1446(f)-4 provides special rules for the sale, exchange, or disposition of publicly traded partnership interests, for which the withholding obligation under section 1446(f)(1) is generally imposed on certain brokers that act on behalf of the transferor. Section 1.1446(f)-5 provides rules that address the liability for failure to withhold under section 1446(f) and rules regarding the liability of a transferor's or transferee's agent.

(b) *Definitions.* This paragraph (b) provides definitions that apply for purposes of §§ 1.1446(f)-1 through 1.1446(f)-5.

(1) The term *broker* means any person, foreign or domestic, that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales made by others, and that, in connection with a transfer of a PTP interest, receives all or a portion of the amount realized on behalf of the transferor. The term broker also includes any clearing organization (as defined in § 1.1471-1(b)(21)) that effects the transfer of a PTP interest on behalf of the transferor. The term broker does not include an escrow agent that effects no sales other than such transactions that are incidental to the purpose of escrow (such as sales to collect on collateral).

(2) The term *controlling partner* means a partner that, together with any person that bears a relationship described in sections 267(b) or 707(b)(1) to the partner, owns directly or indirectly a 50 percent or greater

interest in the capital, profits, deductions, or losses of the partnership in the 12 months before the determination date.

(3) The term *effect* has the meaning provided in § 1.6045-1(a)(10).

(4) The term *foreign person* means a person that is not a United States person.

(5) The term *PTP interest* means an interest in a publicly traded partnership if the interest is publicly traded on an established securities market or is readily tradable on a secondary market (or the substantial equivalent thereof).

(6) The term *publicly traded partnership* has the same meaning as in section 7704 and §§ 1.7704-1 through 1.7704-4 but does not include a publicly traded partnership treated as a corporation under that section.

(8) The term *TIN* means the tax identifying number assigned to a person under section 6109.

(9) The term *transfer* means a sale, exchange, or other disposition, and includes a distribution from a partnership to a partner.

(10) The term *transferee* means any person, foreign or domestic, that acquires a partnership interest through a transfer, and includes a partnership that makes a distribution.

(11) Except as otherwise provided in this paragraph, the term *transferor* means any person, foreign or domestic, that transfers a partnership interest. In the case of a trust, to the extent all or a portion of the income of the trust is treated as owned by the grantor or another person under sections 671 through 679 (such trust, a grantor trust), the term transferor means the grantor or other person.

(12) The term *transferor's agent* or *transferee's agent* means any person who represents the transferor or transferee (respectively) in any negotiation with another person relating to the transaction or in settling the transaction. A person will not be treated as a transferor's agent or a transferee's agent solely because it performs one or more of the activities described in § 1.1445-4(f)(3) (relating to activities of settlement officers and clerical personnel).

(13) The term *United States person* or *U.S. person* means a person described in section 7701(a)(30).

(c) *General rules of applicability*—(1) *In general*. This paragraph (c) provides general rules that apply for purposes of §§ 1.1446(f)-1 through 1.1446(f)-5.

(2) *Certifications*—(i) *In general*. This paragraph (c)(2) provides rules that are applicable to certifications described in §§ 1.1446(f)-1 through 1.1446(f)-5, except as otherwise provided therein, or

in forms, instructions, or other guidance. A certification must provide the name and address of the person providing it. A certification must also be signed under penalties of perjury and, if the certification is provided by the transferor, must include a TIN if the transferor has, or is required to have, a TIN. A transferee (or other person required to withhold) may not rely on a certification if it knows that a transferor has, or is required to have, a TIN, and that TIN has not been provided with the certification. A certification includes any documents associated with the certification, such as statements from the partnership, IRS forms, withholding certificates, withholding statements, certifications, or other documentation. Documents associated with the certification form an integral part of the certification, and the penalties of perjury statement provided on the certification also applies to the documents. A certification (other than the certification described in § 1.1446(f)-2(d)(2)) may not be relied upon if it is obtained earlier than 30 days before the transfer or any time after the transfer.

(ii) *Penalties of perjury*. A certification signed under penalties of perjury must provide the following: “Under penalties of perjury, I declare that I have examined the information on this document, and to the best of my knowledge and belief, it is true, correct, and complete.”

(iii) *Authority to sign certifications on behalf of a business entity*. A certification provided by a business entity must be signed by an individual who is an officer, director, general partner, or managing member of the entity, or, if the general partner or managing member is itself a business entity, an individual who is an officer, director, or managing member of the entity that is the general partner or managing member.

(iv) *Electronic submission*. A certification may be sent electronically, including as text in an email, an image embedded in an email, or a Portable Document Format (.pdf) attached to an email. An electronic certification, however, may not be relied upon if the person receiving the submission knows that the certification was transmitted by a person not authorized to do so by the person required to execute the certification.

(v) *Retention period*. Any person that relies on a certification pursuant to §§ 1.1446(f)-1 through 1.1446(f)-5 must retain the certification (including any documentation) for the longer of five calendar years following the close of the last calendar year in which it relied on

the certification or for as long as it may be relevant to the determination of its withholding obligation under section 1446(f) or its withholding tax liability under section 1461.

(vi) *Submission to IRS*. Except as provided in § 1.1446(f)-2(b)(7) and 1.1446(f)-2(c)(4)(vi) (involving certifications relating to an income tax treaty), or in any forms, instructions, or other guidance, the recipient of a certification is not required to mail a copy to the IRS.

(vii) *Grantor trusts*. A certification provided by a transferor that is a grantor or other owner of a grantor trust must identify the portion of the amount realized that is attributable to the grantor or other owner.

(3) *Books and records*. A partnership that relies on its books and records pursuant to §§ 1.1446(f)-1 through 1.1446(f)-5 (including for purposes of providing a certification or other statement) must identify in its books and records the date on which the transfer occurred, the information on which the partnership relied, and the provisions of §§ 1.1446(f)-1 through 1.1446(f)-5 supporting an exception from, or adjustment to, the partnership's obligation to withhold. The identification required by this paragraph (c)(3) must be made no later than 30 days after the date of the transfer. The partnership must retain the identified information in its books and records for the longer of five calendar years following the close of the last calendar year in which it relied on the information or for as long as it may be relevant to the determination of its withholding obligation under section 1446(f) or its withholding tax liability under section 1461.

(4) *Determination date*—(i) *In general*. This paragraph (c)(4) provides rules for the determination date. The same determination date must be used for all purposes with respect to a transfer. Any statement, certification, or books and records with regard to a transfer must state the determination date. The determination date of a transfer must be one of the following—

- (A) The date of the transfer;
- (B) Any date that is no more than 60 days before the date of the transfer; or
- (C) The date that is the later of—
  - (1) The first day of the partnership's taxable year in which the transfer occurs, as determined under section 706; or

- (2) The date, before the date of the transfer, of the most recent event described in § 1.704-1(b)(2)(iv)(f)(5) or § 1.704-1(b)(2)(iv)(s)(1) (revaluation event), irrespective of whether the capital accounts of the partners are

adjusted in accordance with § 1.704–1(b)(2)(iv)(f).

(ii) *Controlling partner.* The determination date for a transferor that is a controlling partner is determined without regard to paragraph (c)(4)(i)(C) of this section.

(5) *IRS forms and instructions.* Any reference to an IRS form includes its successor form. Any form must be filed in the manner provided in the instructions to the forms or in other guidance.

(d) *Coordination with section 1445.* A transferee that is otherwise required to withhold under section 1445(e)(5) or § 1.1445–11T(d)(1) with respect to the amount realized, as well as under section 1446(f)(1), will be subject to the payment and reporting requirements of section 1445 only, and not section 1446(f)(1), with respect to that amount. However, if the transferor has applied for a withholding certificate under the last sentence of § 1.1445–11T(d)(1), the transferee must withhold the greater of the amounts required under section 1445(e)(5) or section 1446(f)(1). A transferee that has complied with the withholding requirements under either section 1445(e)(5) or section 1446(f)(1), as applicable under this paragraph (d), will be deemed to satisfy the other withholding requirement.

(e) *Applicability date.* This section applies to transfers that occur on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

**§ 1.1446(f)–2 Withholding on the transfer of a non-publicly traded partnership interest.**

(a) *Transferee's obligation to withhold.* Except as otherwise provided in this section, a transferee is required to withhold under section 1446(f)(1) a tax equal to 10 percent of the amount realized on any transfer of a partnership interest. This section does not apply to a transfer of a PTP interest that is effected through one or more brokers, including a distribution made with respect to a PTP interest held in an account with a broker. For rules regarding those transfers, see § 1.1446(f)–4.

(b) *Exceptions to withholding—(1) In general.* A transferee is not required to withhold under this section if it properly relies on a certification or its books and records as described in this paragraph (b). A transferee may not rely on a certification if it has actual knowledge that the certification is incorrect or unreliable. A partnership that is a transferee because it makes a distribution may not rely on its books and records if it knows, or has reason

to know, that the information is incorrect or unreliable.

(2) *Certification of non-foreign status by transferor.* A transferee may rely on a certification of non-foreign status from the transferor that states that the transferor is not a foreign person, states the transferor's name, TIN, and address, and is signed under penalties of perjury. For this purpose, a certification of non-foreign status includes a valid Form W–9, *Request for Taxpayer Identification Number and Certification*. For purposes of this paragraph (b)(2), a transferee may rely on a valid Form W–9 from the transferor that it already possesses if the form meets these requirements.

(3) *No realized gain by transferor—(i) In general.* A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from the transferor that states that the transfer of the partnership interest would not result in any realized gain (including ordinary income arising from application of section 751 § 1.751–1) to the transferor as of the determination date. See paragraph (b)(6) of this section for rules that apply when the transferor realizes gain but is not required to recognize the gain under a provision of the Internal Revenue Code.

(ii) *Partnership distributions.* A partnership that is a transferee because it makes a distribution may rely on its books and records, or on a certification from the transferor, to determine that the distribution would not result in any realized gain to the transferor as of the determination date.

(4) *Less than 10 percent effectively connected gain—(i) In general.* A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from the partnership that states that if the partnership sold all of its assets at fair market value as of the determination date in the manner described in § 1.864(c)(8)–1(c), either—

(A) The amount of net gain that would have been effectively connected with the conduct of a trade or business within the United States would be less than 10 percent of the total net gain; or

(B) No gain would have been effectively connected with the conduct of a trade or business within the United States.

(ii) *Partnership distributions.* A partnership that is a transferee because it makes a distribution may rely on its books and records to determine that as of the determination date either paragraph (b)(4)(i)(A) or (B) of this section is satisfied.

(5) *Less than 10 percent effectively connected taxable income—(i) In general.* A transferee (other than a

partnership making a distribution) may rely on a certification from the transferor that states that—

(A) For the transferor's immediately prior taxable year and the two preceding taxable years, the transferor was at all times a partner in the partnership;

(B) The transferor's allocable share of effectively connected taxable income determined under § 1.1446–2 (as provided on Form 8805, *Foreign Partner's Information Statement of Section 1446 Withholding Tax*) (ECTI), including any ECTI allocable to a partner that bears a relationship to the transferor described in sections 267(b) or 707(b)(1), was less than \$1 million in each of the taxable years described in paragraph (b)(5)(i)(A) of this section;

(C) The transferor's allocable share of ECTI in each of the taxable years described in paragraph (b)(5)(i)(A) of this section was less than 10 percent of the transferor's total distributive share of net income from the partnership for that year as determined under subchapter K of the Internal Revenue Code (as provided on Schedule K–1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.*); and

(D) The transferor's distributive share of income or gain that is effectively connected with the conduct of a trade or business within the United States or deductions or losses properly allocated and apportioned to that income in each of the taxable years described in paragraph (b)(5)(i)(A) of this section has been reported on a Federal income tax return (either filed by the transferor or, in the case of transferor that is a partnership, filed by its direct or indirect nonresident alien individual or foreign corporate partners) on or before the due date (including extensions), and all amounts due with respect to the reported amounts has been timely paid to the IRS, provided that the return was required to be filed when the transferor furnishes the certification (taking into account any extensions of time to file).

(ii) *Immediately prior taxable year—*

(A) *In general.* The transferor's immediately prior taxable year is the transferor's most recent taxable year—

(1) With or within which a taxable year of the partnership ended; and

(2) For which a Schedule K–1 (Form 1065) was due (including extensions) or furnished (if earlier) before the transfer.

(B) *Limitation.* A transferee may not rely on a certification that is provided before the transferor's receipt of the Schedule K–1 (Form 1065) described in paragraph (b)(5)(ii)(A) of this section.

(iii) *No Form 8805—(A) In general.* Except as provided in paragraph (b)(5)(iii)(B) of this section, a transferor that does not receive Form 8805 because

it had no ECTI for which the partnership paid section 1446 tax (within the meaning in § 1.1446-2(a)) in any of the years described in paragraph (b)(5)(i)(A) of this section may not make the certification provided in this paragraph (b)(5).

(B) *Exception.* If, in any of the years described in paragraph (b)(5)(i)(A) of this section, a transferor has an allocable share of loss that is effectively connected with the conduct of a trade or business within the United States, or has deductions properly allocated and apportioned to income that is effectively connected with the conduct of a trade or business within the United States from the partnership, paragraph (b)(5)(iii)(A) of this section does not apply by reason of a lack of Form 8805 with respect to that year, and the transferor is treated as having an allocable share of ECTI of zero in that year for purposes of paragraph (b)(5)(i)(C) of this section.

(iv) *No net distributive share of income.* A transferor that did not have a net distributive share of income in any year described in paragraph (b)(5)(i)(A) of this section cannot provide the certification described in this paragraph (b)(5).

(v) *Partnership distributions.* A partnership that is a transferee by reason of making a distribution may rely on its books and records to determine that the requirements in paragraphs (b)(5)(i)(A) through (C) of this section have been satisfied (subject to the rules in paragraphs (b)(5)(ii) through (iv) of this section). The partnership must also obtain a representation from the transferor stating that the requirement in paragraph (b)(5)(i)(D) of this section has been satisfied.

(vi) *No certification when reporting is incorrect.* A transferor may not make the certification described in this paragraph (b)(5) if it has actual knowledge that the information relevant to the certification that is reported by the partnership on any Form 8805 or Schedule K-1 (Form 1065) is incorrect.

(6) *Certification of nonrecognition by transferor—(i) In general.* A transferee may rely on a certification from the transferor that states that by reason of the operation of a nonrecognition provision of the Internal Revenue Code the transferor is not required to recognize any gain or loss with respect to the transfer. The certification must briefly describe the transfer and provide the relevant law and facts relating to the certification.

(ii) *Partial nonrecognition.* Paragraph (b)(6)(i) of this section does not apply if only a portion of the gain realized on the transfer is subject to a

nonrecognition provision. However, see paragraph (c)(4)(v) of this section for rules applicable to a transferor's claim for partial nonrecognition.

(7) *Income tax treaties—(i) In general.* A transferee may rely on a certification from the transferor that states that the transferor is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country if the requirements of this paragraph (b)(7) are met. The transferor must include with the certification a withholding certificate (on a Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*, or Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*) that meets the requirements for validity under § 1.1446-1(c)(2)(iv) (or an applicable substitute form that meets the requirements under § 1.1446-1(c)(5)) and that contains the information necessary to support the claim for treaty benefits. A transferee may rely on a certification of treaty benefits only if, within 30 days after the date of the transfer, the transferee mails a copy of the certification to the Internal Revenue Service, at the address provided in § 1.1445-1(g)(10), together with a cover letter providing the name, TIN, and address of the transferee and the partnership in which an interest was transferred.

(ii) *Treaty claim for less than all of the gain.* Paragraph (b)(7)(i) of this section does not apply if treaty benefits apply to only a portion of the gain from the transfer. However, see paragraph (c)(4)(vi) of this section for rules applicable to situations in which treaty benefits apply to only a portion of the gain.

(iii) *Exclusive means to claim an exception from withholding based on treaty benefits.* A transferor claiming treaty benefits with respect to all of the gain from the transfer must use the exception in this paragraph (b)(6) and not any other exception or determination procedure in paragraphs (b) and (c) of this section to claim an exception to withholding by reason of a claim of treaty benefits.

(c) *Determining the amount to withhold—(1) In general.* A transferee that is required to withhold under this section must withhold 10 percent of the amount realized on the transfer of the partnership interest, except as otherwise provided in this paragraph (c). Any procedures in this paragraph (c) apply solely for purposes of determining the amount to withhold under section

1446(f)(1) and this section. A transferee may not rely on a certification if it has actual knowledge that the certification is incorrect or unreliable. A partnership that is a transferee because it makes a distribution may not rely on its books and records if it knows, or has reason to know, that the information is incorrect or unreliable.

(2) *Amount realized—(i) In general.* The amount realized on the transfer of the partnership interest is determined under section 1001 (including §§ 1.1001-1 through 1.1001-5) and section 752 (including § 1.752-1 through 1.752-7). Thus, the amount realized includes the amount of cash paid (or to be paid), the fair market value of other property transferred (or to be transferred), the amount of any liabilities assumed by the transferee or to which the partnership interest is subject, and the reduction in the transferor's share of partnership liabilities. In the case of a distribution, the amount realized is the sum of the amount of cash distributed (or to be distributed), the fair market value of property distributed (or to be distributed), and the reduction in the transferor's share of partnership liabilities.

(ii) *Alternative procedures for transferee to determine share of partnership liabilities—(A) In general.* A transferee (other than a partnership that is a transferee because it makes a distribution), as an alternative to determining the share of partnership liabilities under paragraph (c)(2)(i) of this section, may use the procedures of this paragraph (c)(2)(ii) to determine the extent to which a reduction in partnership liabilities is included in the amount realized.

(B) *Certification of liabilities by transferor.* Except as otherwise provided in this section, a transferee may rely on a certification from a transferor, other than a controlling partner, that provides the amount of the transferor's share of partnership liabilities reported on the most recent Schedule K-1 (Form 1065) issued by the partnership. If the transferor's actual share of liabilities at the time of the transfer differs from the amount reported on that Schedule K-1 (Form 1065), the certification will not be treated as incorrect or unreliable if the transferor also certifies that it does not have actual knowledge of any events occurring after receiving the Schedule K-1 (Form 1065) that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount shown on the Schedule K-1 (Form 1065). A transferee may not rely on a certification if the last

day of the partnership taxable year for which the Schedule K-1 (Form 1065) was provided was more than 22 months before the date of the transfer.

(C) *Certification of liabilities by partnership.* A transferee may rely on a certification from a partnership that provides the amount of the transferor's share of partnership liabilities on the determination date. If the transferor's actual share of liabilities at the time of the transfer differs from the amount on the certification, the certification will not be treated as incorrect or unreliable if the partnership also certifies that it does not have actual knowledge of any events occurring after the determination date that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount shown on the certification by the partnership for the determination date.

(iii) *Partnership's determination of partnership liabilities for distributions.* A partnership that is a transferee because it makes a distribution may rely on its books and records to determine the extent to which the transferor's share of partnership liabilities on the determination date are included in the amount realized. The information in the books and records will not be treated as incorrect or unreliable unless the partnership has actual knowledge, on or before the date of the distribution, of any events occurring after the determination date that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount determined by the partnership as of the determination date.

(iv) *Certification by a foreign partnership of non-foreign status of its partners—(A) In general.* When a transferor is a foreign partnership, a transferee may use the procedures of this paragraph (c)(2)(iv) to determine the amount realized. For this purpose, the transferee may rely on a certification from the transferor providing the modified amount realized, and may treat the modified amount realized as the amount realized.

(B) *Determining modified amount realized.* The modified amount realized is determined by multiplying the amount realized (as determined under this paragraph (c)(2), without regard to this paragraph (c)(2)(iv)) by the aggregate percentage computed as of the determination date. The aggregate percentage is the percentage of the gain (if any) arising from the transfer that would be allocated to presumed foreign persons. For this purpose, a presumed

foreign person is any direct or indirect partner of the transferor that has not provided a certification of non-foreign status that meets the requirements of paragraph (b)(2) of this section. For purposes of this paragraph (c)(2)(iv), an indirect partner is a person that owns an interest in the transferor indirectly through one or more foreign partnerships.

(C) *Certification.* The certification is made by providing a withholding certificate (on Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*) and a withholding statement that provides the percentage of gain allocable to each direct or indirect partner and that provides whether each such person is a United States person or presumed foreign person. The certification must also include a certification of non-foreign status that meets the requirements of paragraph (b)(2) of this section from each of the United States persons that are direct or indirect partners of the transferor that are identified as a United States person on the withholding statement.

(3) *Lack of money or property or lack of knowledge regarding liabilities.* The amount to withhold equals the amount realized determined without regard to any decrease in the transferor's share of partnership liabilities if—

(i) The amount otherwise required to be withheld under this paragraph (c) would exceed the amount realized determined without regard to the decrease in the transferor's share of partnership liabilities; or

(ii) The transferee is unable to determine the amount realized because it does not have actual knowledge of the transferor's share of partnership liabilities (and has not received or cannot rely on a certification described in paragraph (c)(2)(ii)(B) or (C) of this section).

(4) *Certification of maximum tax liability—(i) In general.* A transferee may use the procedures of this paragraph (c)(4) for determining the amount to withhold for purposes of section 1446(f)(1) and paragraph (a) of this section. A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from a transferor that is a foreign corporation, a nonresident alien individual or a foreign partnership regarding the transferor's maximum tax liability as described in paragraph (c)(4)(ii) of this section. A partnership that is a transferee because it makes a distribution may instead rely on its books and records to determine the

transferor's maximum tax liability if the books and records includes the information required by paragraphs (c)(4)(iii) and (c)(4)(iv) of this section. A transferor that is a foreign partnership is treated as a nonresident alien individual for purposes of determining the transferor's maximum tax liability.

(ii) *Maximum tax liability.* For purposes of this paragraph (c)(4), the term *maximum tax liability* means the amount of the transferor's effectively connected gain (as determined under paragraph (c)(4)(iii)(E) of this section) multiplied by the applicable percentage, as defined in § 1.1446-3(a)(2).

(iii) *Required information.* The certification must include—

(A) A statement that the transferor is either a nonresident alien individual, a foreign corporation, or a foreign partnership;

(B) The transferor's adjusted basis in the transferred interest on the determination date;

(C) The transferor's amount realized (determined in accordance with paragraph (c)(2) of this section) on the determination date;

(D) Whether the transferor remains a partner immediately after the transfer;

(E) The amount of outside ordinary gain and outside capital gain that would be recognized and treated as effectively connected gain under § 1.864(c)(8)-1(b) on the determination date (effectively connected gain);

(F) The transferor's maximum tax liability on the determination date;

(G) A representation from the transferor that the transferor determined the amounts described in paragraph (c)(4)(iii)(E) of this section based on the statement described in paragraph (c)(4)(iv) of this section; and

(H) A representation from the transferor that it has provided the transferee with a copy of the statement described in paragraph (c)(4)(iv) of this section.

(iv) *Partnership statement.* A transferor may make the representation in paragraph (c)(4)(iii)(G) of this section only if the partnership provides to the transferor a statement (that meets the requirements for a certification under the general rules for applicability in § 1.1446(f)-1(c)) that includes—

(A) The partnership's name, address, and TIN; and

(B) The transferor's aggregate deemed sale EC ordinary gain, within the meaning of § 1.864(c)(8)-1(c)(3)(ii)(A) (if any) and the transferor's aggregate deemed sale EC capital gain, within the meaning of § 1.864(c)(8)-1(c)(3)(ii)(B) (if any), in each case, on the determination date.

(v) *Partial nonrecognition*. If a nonrecognition provision applies to only a portion of the gain realized on the transfer, a certification described in this paragraph (c)(4) may be relied upon only if the certification also includes the information required in paragraph (b)(6) of this section.

(vi) *Income tax treaties*. If only a portion of the gain on the transfer is not subject to tax pursuant to an income tax treaty in effect between the United States and a foreign country, a certification described in paragraph (c)(4)(i) of this section may be relied upon only if the certification also complies with the requirements of paragraph (b)(7) of this section, including the requirement that the determination that gain from the transfer is not subject to tax pursuant to an income tax treaty be made with respect to the transferor, and that the transferee mail a copy of the relevant certification described in this paragraph (c)(4) to the IRS.

(d) *Reporting and paying withheld amounts*—(1) *In general*. A transferee required to withhold under this section must report and pay any tax withheld by the 20th day after the date of the transfer using Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, and 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*, in accordance with the instructions to those forms. The IRS will stamp Form 8288-A to show receipt and mail a stamped copy to the transferor (at the address reported on the form). See paragraph (e)(2) of this section for the procedures for the transferor to claim a credit for amounts withheld. Forms 8288 and 8288-A must include the TINs of both the transferor and the transferee. If any required TIN is not provided, the transferee must still report and pay any tax withheld on Form 8288.

(2) *Certification of withholding to partnership for purposes of section 1446(f)(4)*. A transferee (other than a partnership that is a transferee because it makes a distribution) must certify to the partnership the extent to which it has satisfied its obligation to withhold under this section no later than 10 days after the transfer. The certification must either include a copy of Form 8288-A that the transferee files with respect to the transfer, or state the amount realized and the amount withheld on the transfer of the partnership interest. The certification must also include any certifications that the transferee relied on to apply an exception to withholding under paragraph (b) of this section or to determine the amount to withhold

under paragraph (c) of this section. See § 1.1446(f)-3 for rules regarding a partnership's obligation to withhold on distributions to a transferee when this certification establishes only partial satisfaction of the required amount, is not provided, or cannot be relied upon.

(e) *Effect of withholding on transferor*—(1) *In general*. The withholding of tax by a transferee under this section does not relieve a foreign person from filing a U.S. tax return with respect to the transfer. See §§ 1.6012-1(b)(1), 1.6012-2(g)(1), and 1.6031(a)-1. Further, the withholding of tax by a transferee does not relieve a nonresident alien individual or foreign corporation subject to tax under section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding.

(2) *Manner of obtaining credit*—(i) *Individuals and corporations*. Except as provided in paragraph (e)(3) of this section, an individual or corporation may claim a credit under section 33 for the amount withheld under this section by attaching to its applicable return the stamped copy of Form 8288-A provided to it under paragraph (d)(1) of this section. See also § 1.1462-1.

(ii) *Partnerships*. For a rule allowing a foreign partnership that is a transferor to claim a credit for the amount withheld under this section against its tax liability under section 1446(a), see § 1.1446-3(c)(4).

(3) *Failure to receive Form 8288-A*. If a stamped copy of Form 8288-A has not been provided to the transferor by the IRS, the transferor may establish the amount of tax withheld by the transferee by attaching to its return substantial evidence of the amount. The transferor must attach to its return a statement that includes all of the information otherwise required to be provided on Form 8288-A.

(f) *Applicability date*. This section applies to transfers that occur on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

**§ 1.1446(f)-3 Partnership's requirement to withhold under section 1446(f)(4) on distributions to transferee.**

(a) *Partnership's obligation to withhold amounts not withheld by the transferee*—(1) *In general*. If a transferee fails to withhold any amount required to be withheld under § 1.1446(f)-2, the partnership in which the interest was transferred must withhold from any distributions made to the transferee pursuant to this section. To determine its withholding obligation under this paragraph (a)(1), a partnership may rely on a certification received from the

transferee described in § 1.1446(f)-2(d)(2) unless it knows, or has reason to know, that the certification is incorrect or unreliable.

(2) *Notification by IRS*. A partnership that receives notification from the IRS that a transferee has provided incorrect information regarding the amount realized or amount withheld on the certification described in § 1.1446(f)-2(d)(2), or has failed to pay the IRS the amount reported as withheld on the certification, must withhold the amount prescribed in the notification on distributions to the transferee made on or after the date that is 15 days after it receives the notification. For this purpose, the amount realized is not treated as incorrect if the transferee properly relied on a certification to compute the amount realized pursuant to § 1.1446(f)-2(c)(2).

(b) *Exceptions to withholding*—(1) *Withholding has been satisfied by transferee*. A partnership is not required to withhold under paragraph (a)(1) of this section if it relies on a certification described in § 1.1446(f)-2(d)(2) received from the transferee (within the time prescribed in that section) that states that an exception to withholding described in § 1.1446(f)-2(b) applies or that the transferee withheld the full amount required to be withheld (taking into account any adjustments under § 1.1446(f)-2(c)) under § 1.1446(f)-2.

(2) *PTP interests*—(i) *In general*. Except as provided in paragraph (b)(2)(ii) of this section, a partnership is not required to withhold under this section on distributions made with respect to a PTP interest.

(ii) *Exception for a false qualified notice*. If a publicly traded partnership determines (including by reason of notification from the IRS) that it has published a qualified notice that falsely states that either the exception described in § 1.1446(f)-4(b)(3) (the 10-percent exception) or the exception described in § 1.1446(f)-4(b)(4) (the qualified current income exception) applies, the publicly traded partnership must withhold under this section on distributions to the transferee in an amount equal to the amount that a broker failed to withhold under § 1.1446(f)-4 due to reliance on the qualified notice, plus interest.

(3) *Distributing partnerships*. A partnership that is a transferee because it makes a distribution is not required to withhold under this section.

(c) *Withholding rules*—(1) *Timing of withholding*—(i) *In general*. A partnership required to withhold under paragraph (a)(1) of this section must withhold on distributions made to the transferee beginning on the later of—

(A) The date that is 30 days after the date of transfer; or

(B) The date that is 15 days after the date on which the partnership acquires actual knowledge that the transfer has occurred.

(ii) *Satisfaction of withholding obligation.* A partnership is treated as satisfying its withholding obligation under paragraph (a)(1) of this section and may stop withholding on distributions to the transferee on the earlier of—

(A) The date on which the partnership completes withholding and paying the amount required to be withheld under paragraph (c)(2) of this section;

(B) The date on which the partnership receives and may rely on a certification from the transferee described in § 1.1446(f)–2(d)(2) (without regard to whether the certification is received by the time prescribed in that section) that claims an exception to withholding under § 1.1446(f)–2(b); or

(C) If a partnership interest is not a PTP interest, the date on which the transferee no longer owns an interest in the partnership, unless the partnership has actual knowledge that any successor to the transferee is a person that bears a relationship described in section 267(b) or 707(b)(1) with respect to the transferee or the transferor from which the transferee acquired the interest.

(2) *Amount to withhold*—(i) *In general.* A partnership required to withhold under paragraph (a)(1) of this section must withhold the full amount of each distribution made to the transferee until it has withheld—

(A) A tax of 10 percent of the amount realized (determined solely under § 1.1446(f)–2(c)(2)(i) or, in the case of a publicly traded partnership, solely under § 1.1446(f)–4(c)(2)(i)) on the transfer, reduced by any amount withheld by the transferee, plus

(B) Any interest computed under paragraph (c)(2)(ii) of this section.

(ii) *Computation of interest.* The amount of interest required to be withheld under paragraph (a)(1) of this section is the amount of interest that would be required to be paid under section 6601 and § 301.6601–1 if the amount that should have been withheld by the transferee was considered an underpayment of tax. For this purpose, interest is payable between the date that is 20 days after the date of the transfer and the date on which the tax due under paragraph (a)(1) of this section is paid to the IRS.

(iii) *Certifications required.* For purposes of paragraph (c)(2)(i)(A) of this section, a partnership must determine the amount realized on the transfer and any amount withheld by the transferee

based on a certification from the transferee described in § 1.1446(f)–2(d)(2), without regard to whether the certification is received by the time prescribed in that section. A partnership that does not receive or cannot rely on a certification from the transferee described in § 1.1446(f)–2(d)(2) must withhold tax equal to the full amount of each distribution made to the transferee until it receives a certification that it can rely on.

(3) *Coordination with other withholding provisions.* Any amount required to be withheld on a distribution under any other provision of the Internal Revenue Code is not also required to be withheld under section 1446(f)(4) or this section.

(d) *Reporting and paying withheld amounts.* The partnership must report and pay the tax withheld using Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, and 8288–C, *Statement of Withholding Under Section 1446(f)(4) for Withholding on Dispositions by Foreign Persons of Partnership Interests*, as provided in forms, instructions, or other guidance.

(e) *Effect of withholding on transferor and transferee*—(1) *Transferor.* The withholding of tax by a partnership under this section does not relieve a foreign person from filing a U.S. income tax return with respect to the transfer. See § 1.6012–1(b)(1), 1.6012–2(g)(1), and 1.6031(a)–1. Further, the withholding of tax by a partnership does not relieve a nonresident alien individual or foreign corporation subject to tax under section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding. An individual or corporation is not allowed a credit under section 33 for amounts withheld on distributions to the transferee under this section. See, however, §§ 1.1446(f)–5(a) and 1.1463–1(a), which generally provide that tax will not be recollected if paid by another person.

(2) *Transferee.* A transferee is treated as satisfying its withholding tax liability under § 1.1446(f)–2 to the extent that a partnership withholds tax (which does not include interest) from the transferee under this section. Interest computed under paragraph (c)(2)(ii) of this section that is withheld by the partnership from the transferee is treated as interest paid by the transferee with respect to its withholding tax liability under § 1.1446(f)–2. A transferee may not obtain a refund when the amount of tax withheld under this section exceeds the transferee's withholding tax liability under § 1.1446(f)–2. Instead, only the partnership may claim a refund on

behalf of the transferee for the excess amount under this section.

(f) *Applicability date.* This section applies to transfers that occur on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

**§ 1.1446(f)–4 Withholding on the transfer of a publicly traded partnership interest.**

(a) *Broker's obligation to withhold on a transfer of a PTP interest*—(1) *In general.* If a transfer of a PTP interest is effected through one or more brokers, the transferee is not required to withhold under section 1446(f)(1) and § 1.1446(f)–2. Rather, any broker required to withhold under paragraph (a)(2) of this section must withhold a tax equal to 10 percent of the amount realized (as defined in paragraph (c)(2) of this section) on the transfer of a PTP interest, except as otherwise provided in this section. For rules regarding the application of section 1446(f)(4) and § 1.1446(f)–3 to a publicly traded partnership, see § 1.1446(f)–3(b)(2).

(2) *Broker's requirement to withhold*—(i) *Payments to foreign brokers.* A broker that pays the amount realized from the transfer of a PTP interest to another broker that is a foreign person must withhold under this section unless the foreign person is—

(A) A qualified intermediary (as defined in § 1.1441–1(e)(5)(ii)) that provides a valid qualified intermediary withholding certificate (as described in § 1.1441–1(e)(3)(ii)) that states that it assumes primary withholding responsibility under chapter 3; or

(B) A U.S. branch of a foreign person (as described in § 1.1441–1(b)(2)(iv)) that provides a valid U.S. branch withholding certificate (as described in § 1.1441–1(e)(3)(v)) that states that it agrees to be treated as a U.S. person with respect to any payment associated with the certificate.

(ii) *Brokers with customer relationship with transferor.* A broker that effects the transfer for the transferor as its customer (as defined in § 1.6045–1(a)(2)) is required to withhold under this section.

(iii) *Exception.* A broker is not required to withhold under this section if it knows that the withholding obligation has already been satisfied.

(iv) *Determination of foreign broker's status.* For purposes of paragraph (a)(2)(i) of this section, a broker must treat another broker as a foreign person unless it obtains documentation (including a certification of non-foreign status) establishing that the other broker is a U.S. person.

(b) *Exceptions to withholding*—(1) *In general.* A broker is not required to



withhold under this section if it properly relies on a certification described in paragraph (b)(2) or (b)(6) of this section, a qualified notice described in paragraph (b)(3) or (b)(4) of this section, or if the exception described in paragraph (b)(5) of this section applies. A broker may not rely on a certification described in this paragraph (b) if it has actual knowledge that the certification is incorrect or unreliable.

(2) *Certification of non-foreign status.* A broker may rely on a certification of non-foreign status that it obtains from the transferor. A certification of non-foreign status under this section means a Form W-9, *Request for Taxpayer Identification Number and Certification*, or valid substitute form, that meets the requirements of § 1.1441-1(d)(2). For this purpose, a broker may rely on a valid form that it already possesses from the transferor. A broker may instead rely on certification from a second broker (as defined in § 1.6045-1(a)(1)) that acts as an agent for the transferor when the second broker does not receive the amount realized from the transfer of the PTP interest. This certification must state that the second broker has collected a valid certification of non-foreign status (within the meaning of this paragraph (b)(2)) from the transferor, and it must include the transferor's TIN and status as a foreign or U.S. person.

(3) *Less than 10 percent effectively connected gain by partnership—(i) In general.* A broker may rely on a qualified notice described in paragraph (b)(3)(iii) of this section that states that the 10-percent exception applies, as determined under paragraph (b)(3)(ii) of this section.

(ii) *10-percent exception—(A) In general.* The 10-percent exception applies to a transfer if, on the PTP designated date described in paragraph (b)(3)(ii)(B) of this section, had the publicly traded partnership sold all of its assets at fair market value in the manner described in § 1.864(c)(8)-1(c), either—

(1) The amount of gain that would have been effectively connected with the conduct of a trade or business within the United States would be less than 10 percent of the total gain; or

(2) No gain would have been effectively connected with the conduct of a trade or business within the United States.

(B) *PTP designated date.* The PTP designated date for a transfer is any date for a deemed sale determination that is designated by the publicly traded partnership in a qualified notice described in paragraph (b)(3)(iii) of this section, provided that the PTP

designated date occurs on or after the date that is 92 days before the date on which the publicly traded partnership posted the qualified notice naming the PTP designated date.

(iii) *Qualified notice—(A) In general.* Except as provided in paragraph (b)(3)(iii)(B) and (C) of this section, a qualified notice described in this paragraph (b)(3)(iii) is the most recent qualified notice (within the meaning of § 1.1446-4(b)(4)) posted by the publicly traded partnership.

(B) *Qualified notice posting date requirement.* A qualified notice is described in this paragraph (b)(3)(iii) only if the publicly traded partnership has posted it within the 92-day period ending on the date of the transfer.

(C) *Recent posting of qualified notice.* If the most recent qualified notice posted by the publicly traded partnership was posted during the 10-day period ending on the date of the transfer, a broker may instead rely on the immediately preceding qualified notice (within the meaning of § 1.1446-4(b)(4)) posted by the publicly traded partnership, provided that it satisfies the condition described in paragraph (b)(3)(iii)(B) of this section.

(4) *Distribution made from current income—(i) In general.* A broker is not required to withhold under this section on a distribution by a publicly traded partnership if the entire amount of a distribution is designated, on a qualified notice (within the meaning of § 1.1446-4(b)(4)) posted with respect to that distribution, as a qualified current income distribution (within the meaning of paragraph (b)(4)(ii) of this section).

(ii) *Qualified current income distribution.* A qualified current income distribution is a distribution that does not exceed the net income of the publicly traded partnership since the record date (within the meaning of 17 CFR 240.14a-1(h) or its successor provision) of the immediately preceding distribution made by the publicly traded partnership.

(5) *Amount subject to withholding under section 3406.* A broker is not required to withhold under this section if the amount realized from the transfer of the PTP interest is subject to withholding under § 31.3406(b)(3)-2 of this chapter.

(6) *Income tax treaties.* A broker may rely on a certification from the transferor that states that the transferor is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country if the requirements of this paragraph (b)(6) are met. The transferor must include with the

certification a withholding certificate (on a Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*, or Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*) that meets the requirements for validity under § 1.1446-1(c)(2)(iv) (or an applicable substitute form that meets the requirements under § 1.1446-1(c)(5)) and that contains the information necessary to support the claim for treaty benefits. For purposes of this paragraph (b)(6), a broker may rely on a withholding certificate that it already possesses from the transferor unless it has actual knowledge that the information is incorrect or unreliable. This exception does not apply if treaty benefits apply to only a portion of the gain from the transfer.

(c) *Determining the amount to withhold—(1) In general.* A broker that is required to withhold under this section must withhold 10 percent of the amount realized on the transfer of the PTP interest, except as provided in this paragraph (c). Any procedures in this paragraph (c) apply solely for purposes of determining the amount to withhold under section 1446(f)(1) and this section. A broker may not rely on a certification described in this paragraph (c) if it has actual knowledge that the certification is incorrect or unreliable.

(2) *Amount realized—(i) In general.* Solely for purposes of this section, the amount realized is the amount of gross proceeds (as defined in § 1.6045-1(d)(5)) paid or credited upon the transfer to the customer or other broker (as applicable), or, in the case of a distribution, the amount of cash distributed (or to be distributed) and the fair market value of property distributed (or to be distributed).

(ii) *Certification by a foreign partnership of non-foreign status of its partners—(A) In general.* When a transferor is a foreign partnership, a broker may use the procedures of this paragraph (c)(2)(ii) to determine the amount realized. For this purpose, the broker may rely on a certification from the transferor providing the modified amount realized, and may treat the modified amount realized as the amount realized.

(B) *Determining modified amount realized.* The modified amount realized is determined by multiplying the amount realized (as determined under this paragraph (c)(2)), without regard to this paragraph (c)(2)(ii) by the aggregate percentage computed as of the determination date. The aggregate percentage is the percentage of the gain

(if any) arising from the transfer that would be allocated to presumed foreign persons. For this purpose, a presumed foreign person is any direct or indirect partner of the transferor that has not provided a certification of non-foreign status that meets the requirements of paragraph (b)(2) of this section. For purposes of this paragraph (c)(2)(ii), an indirect partner is a person that owns an interest in the transferor indirectly through one or more foreign partnerships.

(C) *Certification.* The certification is made by providing a withholding certificate (on Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*) and a withholding statement that provides the percentage of gain allocable to each direct or indirect partner and that provides whether each such person is a United States person or presumed foreign person. The certification must also include a certification of non-foreign status that meets the requirements of paragraph (b)(2) of this section from each of the United States persons that are direct or indirect partners of the transferor that are identified as a United States person on the withholding statement. For purposes of this paragraph (c)(2)(ii), a broker may rely on a withholding certificate and withholding statement that it already possesses from the partnership unless it has actual knowledge that the information is incorrect or unreliable.

(d) *Reporting and paying withheld amounts.* A broker that is required to withhold under this section must pay the withheld tax pursuant to the deposit rules in § 1.6302-2. For rules regarding reporting on Forms 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*, and 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, that apply to a broker that withholds under this section, see § 1.1461-1(b) and (c). For rules regarding when an amount realized on the transfer of a PTP interest is an amount subject to reporting, see § 1.1461-1(c)(2)(i)(Q). A broker that pays the amount realized to a foreign partnership must issue a Form 1042-S directly to the partnership rather than issuing a form to each of the partners of the partnership. See § 1.1461-1(c)(1)(ii)(A)(8) (treating the foreign partnership as a recipient for reporting purposes). A broker making a payment to a U.S. branch treated as a U.S. person must not treat the branch as a U.S. person for purposes of reporting the payment made to the branch. Therefore, a payment to that U.S. branch must be

reported on Form 1042-S. See § 1.1461-1(c). A Form 1042-S issued directly to the transferor must include the TIN of the transferor unless the broker does not know the TIN at the time of issuance.

(e) *Effect of withholding on transferor—(1) In general.* The withholding of tax under this section does not relieve a foreign person from filing a U.S. tax return with respect to the transfer. See §§ 1.6012-1(b)(1), 1.6012-2(g)(1), and 1.6031(a)-1. Further, the withholding of tax by a broker does not relieve a nonresident alien individual or foreign corporation subject to tax under section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding.

(2) *Manner of obtaining credit—(i) Individuals and corporations.* An individual or corporation may claim a credit under section 33 for the amount withheld under this section by attaching to its applicable return a copy of a Form 1042-S that includes its TIN.

(ii) *Partnerships.* For a rule allowing a foreign partnership that is a transferor to claim a credit for the amount withheld under this section against its obligation to withhold under section 1446(a), see § 1.1446-3(c)(4).

(f) *Applicability date.* This section applies to transfers that occur on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

#### **§ 1.1446(f)-5 Liability for failure to withhold.**

(a) *Liability for failure to withhold.* Every person required to withhold and pay tax under section 1446(f), but that fails to do so, is liable for the tax under section 1461. Under section 1463, if the tax required to be withheld is paid by another person required to withhold under section 1446(f) or by the nonresident alien individual or foreign corporation subject to tax under section 864(c)(8), the tax will not be recollected. However, any person that failed to withhold under section 1446(f) is in no case relieved from liability for any interest, penalties, or additions to tax that would otherwise apply. A partnership that failed to withhold and pay tax under § 1.1446(f)-3 is only liable for the amount of tax that it failed to collect (but not any interest computed on that amount under § 1.1446(f)-3(c)(2)(ii)), plus any interest, penalties, or additions to tax with regard to the partnership's failure to withhold.

(b) *Liability of agents—(1) Duty to provide notice of false certification.* A transferee's or transferor's agent (other than a broker required to withhold under § 1.1446(f)-4) must provide

notice to a transferee (or other person required to withhold) if that person is furnished with a certification described in §§ 1.1446(f)-1 through 1.1446(f)-4 and the agent knows that the certification is false. A person required to withhold may not rely on a certification if it receives the notice described in this paragraph (b)(1).

(2) *Procedural requirements.* Any agent who is required to provide notice under paragraph (b)(1) of this section must do so in writing (including by electronic submission) as soon as possible after learning of the false certification. If the agent first learns of the false certification before the date of transfer, notice must be given by the third day following that discovery but no later than the date of transfer (before the transferee's payment of consideration). If an agent first learns of a false certification after the date of transfer, notice must be given by the third day following that discovery. The notice must also explain the possible consequences to the recipient of a failure to withhold. The notice need not disclose the information on which the agent's statement is based. The agent must also furnish a copy of the notice to the IRS by the date on which the notice is required to be given to the recipient. The copy of the notice must be delivered to the address provided in § 1.1445-1(g)(10) and must be accompanied by a cover letter stating that the copy is being filed pursuant to the requirements of § 1.1446(f)-5(b)(2).

(3) *Failure to provide notice.* Any agent who is required to provide notice under paragraph (b)(1) of this section, but fails to do so in the manner required in paragraph (b)(2) of this section, is liable for the tax that the person who should have been provided notice in accordance with paragraph (b)(2) of this section was required to withhold under section 1446(f) if the notice had been given.

(4) *Limitation on liability.* An agent's liability under paragraph (b)(3) of this section is limited to the amount of compensation that the agent derives from the transaction. In addition, an agent that assists in the preparation of, or fails to disclose knowledge of, a false certification may be liable for civil and criminal penalties.

(c) *Applicability date.* This section applies to transfers that occur on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

■ **Par. 10.** Section 1.1461-1 is amended:  
 ■ 1. As proposed to be amended December 18, 2018, at 83 FR 64757:

■ i. Paragraph (a)(1) is further amended by revising the sixth, seventh, and eighth sentences.

■ ii. Paragraph (c)(1)(i)(A) is further amended by revising the second and third sentences.

■ 2. By revising paragraph (c)(1)(ii)(A)(8).

■ 3. By adding paragraph (c)(1)(ii)(B)(5).

■ 4. In paragraph (c)(2)(i) introductory text, by revising the first and second sentences.

■ 5. In paragraph (c)(2)(i)(N), by removing the word “and” that follows the semi-colon.

■ 6. In paragraph (c)(2)(i)(O), by removing the period at the end of the paragraph and adding “; and” in its place.

■ 7. By adding paragraphs (c)(2)(i)(P) and (Q).

■ 8. By adding a sentence at the end of paragraph (c)(4)(ii)(A).

■ 9. Revising paragraph (i).

The revisions and additions read as follows:

**§ 1.1461-1 Payment and returns of tax withheld.**

(a) \* \* \*

(1) *Deposits of tax.* \* \* \* With respect to withholding under section 1446, this section shall apply only to publicly traded partnerships and nominees that withhold under § 1.1446-4 and brokers that withhold under § 1.1446(f)-4 on transfers of publicly traded partnership interests. See § 1.1461-3 for penalties that apply for failure to withhold under section 1446(a) on effectively connected taxable income allocable to foreign partners or under section 1446(f) on transfers of partnership interests by foreign partners. The references in the previous two sentences to § 1.1446(f)-4 and section 1446(f) shall apply to transfers of partnership interests that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) \* \* \*

(A) *In general.* \* \* \* Notwithstanding the preceding sentence, any person that withholds or is required to withhold an amount under sections 1441, 1442, 1443, § 1.1446-4(a) (applicable to publicly traded partnerships required to pay tax under section 1446(a) on distributions), or § 1.1446(f)-4(a) (applicable to brokers required to withhold on transfers of publicly traded partnership interests) must file a Form 1042-S for the payment withheld upon whether or not that person is engaged in the conduct of a trade or business and

whether or not the payment is an amount subject to reporting. The reference in the previous sentence to § 1.1446(f)-4(a) shall apply with respect to returns for transfers that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

\* \* \*

\* \* \* \* \*

(ii) \* \* \*

(A) \* \* \*

(8) A partner (including a foreign partnership) receiving a distribution from a publicly traded partnership subject to withholding under section 1446(a) and § 1.1446-4 on distributions of effectively connected income, and a partner (including a foreign partnership) receiving an amount realized from a transfer of a publicly traded partnership interest subject to withholding under section 1446(f)(1) and § 1.1446(f)-4. The references in this paragraph (c)(1)(ii)(A)(8) to section 1446(f)(1) and § 1.1446(f)-4 shall apply with respect to returns for transfers that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

\* \* \* \* \*

(B) \* \* \*

(5) A foreign broker withheld upon under § 1.1446(f)-4(a)(2)(i) by another broker paying an amount realized from the transfer of a PTP interest.

\* \* \* \* \*

(2) \* \* \*

(i) *In general.* Subject to the exceptions described in paragraph (c)(2)(ii) of this section, amounts subject to reporting on Form 1042-S are amounts paid to a foreign payee or partner (including persons presumed to be foreign) that are amounts subject to withholding as defined in § 1.1441-2(a), § 1.1446-4(a) (addressing publicly traded partnerships required to pay withholding tax under section 1446(a) on distributions of effectively connected income), or § 1.1446(f)-4(a) (addressing brokers required to withhold and pay tax on the amount realized on the transfer of an interest in a publicly traded partnership). The reference in the previous sentence to withholding under § 1.1446-4(f) shall apply with respect to returns for transfers that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

\* \* \* \* \*

(P) The amount of any distribution made by a publicly traded partnership that is an amount subject to withholding under § 1.1446-4, or that is paid to a qualified intermediary that assumes

primary withholding responsibility for the payment or a U.S. branch of a foreign person that agrees to be treated as a U.S. person described in § 1.1446-4(b)(2); and

(Q) An amount realized on the transfer of a publicly traded partnership interest subject to § 1.1446(f)-4 (unless an exception to withholding applies under § 1.1446(f)-4(b)(2) through (5)).

\* \* \* \* \*

(4) \* \* \*

(ii) \* \* \*

(A) *Amounts paid to a nonqualified intermediary, a flow-through entity, and certain U.S. branches.* \* \* \* For a payment to a foreign partnership on the transfer of a publicly traded partnership interest subject to § 1.1446(f)-4(a), see paragraph (c)(1)(ii)(A)(8) of this section (treating the foreign partnership as a recipient).

\* \* \* \* \*

(i) *Applicability date—(1) In general.* Except as provided in paragraph (i)(2) of this section, this section applies to returns required for payments made on or after January 6, 2017. For payments made after June 30, 2014, and before January 6, 2017, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2016. For payments made after December 31, 2000, and before July 1, 2014, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2013.

(2) *Exceptions.* Paragraphs (a)(1), (c)(1)(i)(A), (c)(1)(ii)(A)(8), (c)(2)(i), and (c)(2)(iii) of this section apply as provided in those paragraphs. Paragraphs (c)(1)(ii)(A)(1), (c)(1)(ii)(B)(5), (c)(2)(i)(P) and (Q), and (c)(4)(ii)(A) apply with respect to returns for transfers that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

■ **Par. 11.** Section 1.1461-2 is amended:

■ 1. By revising paragraph (a)(1).

■ 2. As proposed to be amended April 13, 2016, at 81 FR 21795, by revising the first and last sentences of paragraph (b).

The revisions and addition read as follows:

**§ 1.1461-2 Adjustments for overwithholding or underwithholding of tax.**

(a) \* \* \*

(1) *In general.* Except as otherwise provided in this paragraph (a)(1), a withholding agent that has overwithheld under chapter 3 of the Internal Revenue Code, and made a deposit of the tax as provided in § 1.6302-2(a), may adjust the overwithheld amount either pursuant to the reimbursement procedure described in paragraph (a)(2) of this section or pursuant to the set-off procedure

described in paragraph (a)(3) of this section. These rules do not apply to partnerships or nominees required to withhold under section 1446(a), other than on a distribution by a publicly traded partnership subject to withholding under § 1.1446-4(a) and a payment of an amount realized on the transfer of an interest in a publicly traded partnership subject to § 1.1446(f)-4. The reference in the previous sentence to withholding under § 1.1446-4(f) shall apply with respect to returns for transfers that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

\* \* \* \* \*

(b) \* \* \* A withholding agent may withhold from future payments (including distributions of effectively connected income subject to withholding under § 1.1446-4 and the amount realized from the transfer of a partnership interest subject to § 1.1446(f)-4) made to a beneficial owner the tax that should have been withheld from previous payments to that beneficial owner under chapter 3 of the Code. \* \* \* The reference in this paragraph (b) to withholding under § 1.1446-4(f)-4 shall apply with respect to returns for transfers that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

\* \* \* \* \*

■ **Par. 12.** Section 1.1461-3 is amended by revising the first sentence and last sentences to read as follows:

**§ 1.1461-3 Withholding under section 1446.**

For rules relating to the withholding tax liability of a partnership, nominee, or transferee under section 1446, see §§ 1.1446-1 through 1.1446-7 and 1.1446(f)-1 through 1.1446(f)-5. \* \* \* The references in this section to §§ 1.1446-1 through 1.1446-7 apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446-1 through 1.1446-5 apply by reason of an election under § 1.1446-7, and the references in this section to § 1.1446(f)-1 through 1.1446(f)-5 shall apply with

respect to returns for transfers that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

■ **Par. 13.** Section 1.1463-1 is amended by revising the fourth and fifth sentences of paragraph (a) to read as follows:

**§ 1.1463-1 Tax paid by recipient of income.**

(a) \* \* \* See §§ 1.1446-3(e), 1.1446-3(f) and 1.1446(f)-5(a) for application of the rule of this paragraph (a), and for additional rules, in which the withholding tax was required to be paid under section 1446. The references in the previous sentence to § 1.1446-3(e) and 1.1446-3(f) apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§ 1.1446-1 through 1.1446-5 apply by reason of an election under § 1.1446-7, and the reference in the previous sentence to § 1.1446(f)-5(a) shall apply to the tax required to be withheld under section 1446(f) for transfers that occur on or after 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

\* \* \* \* \*

■ **Par. 14.** Section 1.1464-1 is amended by revising the last sentence of paragraph (a) and by revising paragraph (c) to read as follows:

**§ 1.1464-1 Refunds or credits.**

(a) *In general.* \* \* \* With respect to section 1446 (other than section 1446(f)), this section applies only to a publicly traded partnership described in § 1.1446-4.

\* \* \* \* \*

(c) *Applicability date.* The last sentence of paragraph (a) applies to publicly traded partnerships described in § 1.1446-4 for partnership taxable years beginning after April 29, 2008, and to brokers required to withhold under § 1.1446(f)-4 on transfers that occur on or after the date that is 60 days after the date that these regulations are published as final regulations in the **Federal Register**.

■ **Par. 15.** Section 1.6050K-1 is amended by:

■ 1. Redesignating the introductory text of paragraph (c) and paragraphs (c)(1) through (3) as the introductory text of paragraph (c)(1) and paragraphs (c)(1)(i) through (iii), respectively.

■ 2. Adding a subject heading to newly-redesignated paragraph (c)(1).

■ 3. Adding paragraphs (c)(2) and (3), (d)(3), and (h).

The revision and additions read as follows:

**§ 1.6050K-1 Returns relating to sales or exchanges of certain partnership interests.**

\* \* \* \* \*

(c) *Statements to be furnished to transferor and transferee—(1) In general.* \* \* \*

(2) *Information to be provided to transferors.* The statement a partnership must provide to a transferor partner pursuant to paragraph (c)(1) of this section must also include the information necessary for the transferor to make the transferor's required statement under § 1.751-1(a)(3).

(3) *Transfers of partnership interests by foreign persons.* For additional information required to be provided by the partnership if section 864(c)(8) applies to the transfer of a partnership interest by a foreign person, see § 1.864(c)(8)-2(b).

(d) \* \* \*

(3) *Transfers of partnership interests by foreign persons.* For notifications required by foreign transferors of partnership interests, see § 1.864(c)(8)-2(a).

\* \* \* \* \*

(h) *Applicability date.* Paragraphs (c)(2) and (3) of this section apply to returns filed on or after the date that these regulations are published as final regulations in the **Federal Register**. Paragraph (d)(3) of this section applies to transfers that occur on or after the date that these regulations are published as final regulations in the **Federal Register**.

**Kirsten Wielobob,**

*Deputy Commissioner for Services and Enforcement.*

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