

Rev. Proc. 2008-26

SECTION 1. PURPOSE

This revenue procedure sets forth circumstances in which the Internal Revenue Service (Service) will not challenge whether a security is a “readily marketable security” for purposes of section 956(c)(2)(J) of the Internal Revenue Code (Code). No inference should be drawn regarding whether a security would be described in section 956(c)(2)(J) if it falls outside the scope of this revenue procedure. Furthermore, there should be no inference regarding whether securities within the scope of this revenue procedure would be readily marketable or would not be readily marketable for purposes of section 956(c)(2)(J) but for this revenue procedure. In addition, this revenue procedure does not address any United States federal income tax issue arising under any other section of the Code.

SECTION 2. BACKGROUND

Section 951(a)(1) requires that a United States shareholder of a controlled foreign corporation include in gross income for his taxable year in which or with which such taxable year of the corporation ends certain amounts including the amount determined under section 956 with respect to such shareholder for such year. Section 951(a)(1)(B).

The amount determined under section 956 is generally the lesser of (i) the excess (if any) of the United States shareholder’s *pro rata* share of the average of the amounts of United States property held (directly or indirectly) by the controlled foreign corporation as of the close of each quarter of the controlled foreign corporation’s taxable year over the amount of earnings and profits described in section 959(c)(1)(A) with respect to such shareholder or (ii) the United States shareholder’s *pro rata* share of the applicable earnings (as defined in section 956(b)(1)) of such controlled foreign corporation. Section 956(a).

The term United States property includes an obligation of a United States person, excluding, however:

an obligation of a United States person to the extent the principal amount of the obligation does not exceed the fair market value of *readily marketable securities* sold or purchased pursuant to a sale and repurchase agreement or otherwise posted or received as collateral for the obligation in the ordinary course of its business by a United States or foreign person which is a dealer in securities or commodities.

Section 956(c)(2)(J) (emphasis added).

Current market conditions and liquidity constraints are creating some uncertainty regarding whether a security is “readily marketable” for purposes of section 956(c)(2)(J). For example, the market for certain securities that were readily marketable in the past has become severely curtailed. As a result, there is uncertainty whether many securities are readily marketable in the current economic environment even though they are of a type that are readily marketable under ordinary market conditions. In response to taxpayers’ concerns, this revenue procedure provides certainty to taxpayers by setting forth circumstances under which the Service will not challenge whether a security is “readily marketable” for purposes of section 956(c)(2)(J) to the extent that it is of a type that would be readily marketable under ordinary market conditions.

SECTION 3. SCOPE

This revenue procedure applies to determine whether securities are “readily marketable” for purposes of section 956(c)(2)(J) for any day during calendar years 2007 or 2008 for which it is relevant whether securities are readily marketable for purposes of that section.

SECTION 4. APPLICATION

With respect to a determination within the scope of this revenue procedure, the Service will not challenge whether a security is readily marketable for purposes of section 956(c)(2)(J) if the security is of a type that was readily marketable at any time within three years prior to the effective date of this revenue procedure. For example, the Service will not challenge

whether a mortgage-backed security or corporate debt security (whether secured or unsecured) is “readily marketable” if such a security is described in Section 3 of this revenue procedure and is of a type that was readily marketable at any time within three years prior to the effective date of this revenue procedure.

This revenue procedure does not address any other issue relating to the qualification of a transaction under section 956(c)(2)(J) (e.g., whether the transaction is undertaken in the ordinary course of business by a dealer in securities or commodities).

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective May 12, 2008.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is John H. Seibert of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure, contact Mr. Seibert at (202) 622-0171 (not a toll-free call).

26 CFR 1.1445-2: Situations in which withholding is not required under section 1445(a).
(Also: §§ 897; 1445; 1.897-1; 1.897-2; 1.897-5T; 1.897-6T; 1.1445-5.)

Rev. Proc. 2008-27

SECTION 1. PURPOSE

This revenue procedure provides a simplified method for taxpayers to request relief for late filings under sections 1.897-2(g)(1)(ii)(A), 1.897-2(h), 1.1445-2(c)(3)(i), 1.1445-2(d)(2), 1.1445-5(b)(2), and 1.1445-5(b)(4) of the Income Tax Regulations.

SECTION 2. BACKGROUND

.01 Section 897(a)(1) of the Internal Revenue Code treats the gain or loss of a nonresident alien or foreign corporation from the disposition of a U.S. real property interest as if the taxpayer were engaged in a trade or business in the United States, and as if such gain or loss were effectively

connected with such trade or business under sections 871(b) or 882. A U.S. real property interest includes an interest in real property located in the United States or the Virgin Islands and any interest (other than an interest solely as a creditor) in a domestic corporation unless the taxpayer establishes that the corporation was at no time a U.S. real property holding corporation (USRPHC) during the period described in section 897(c)(1)(A)(ii).

.02 Section 1.897-2 provides requirements to establish that a corporation is not a USRPHC. Unless these requirements are satisfied, it is presumed that a domestic corporation is a USRPHC.

.03 Section 1445(a) generally requires the transferee of a U.S. real property interest to withhold 10 percent of the amount realized by the foreign person on the disposition of the U.S. real property interest. Section 1445(b) and the regulations thereunder provide several exceptions to this general requirement. In addition, section 1445(e) provides special rules for certain dispositions and distributions. Section 1445(e)(1) requires withholding on certain dispositions of U.S. real property interests by a domestic partnership, domestic trust, or domestic estate. Section 1445(e)(2) requires withholding on certain distributions by foreign corporations. Section 1445(e)(3) requires withholding on distributions by certain domestic corporations to foreign shareholders. Section 1445(e)(4) addresses taxable distributions by domestic or foreign partnerships, trusts, or estates, and section 1445(e)(5) provides rules relating to dispositions of interests in such entities. Section 1445(e)(6) addresses certain distributions by a regulated investment company or real estate investment trust.

.04 One exception to section 1445 withholding involves nonrecognition transactions. Pursuant to section 1.1445-2(d)(2), a transferee is not required to withhold if the transferee provides notice that, by reason of the operation of a nonrecognition provision of the Internal Revenue Code or the provisions of any United States treaty, the transferor is not required to recognize any gain or loss with respect to the transfer. Under section 1.1445-2(d)(2)(i)(A), the transferor may provide a notice to the transferee that the transferor is not required to recognize gain or loss. The notice must include the information described

in section 1.1445-2(d)(2)(iii). The transferee must provide a copy of the notice to the IRS within 20 days of the transfer. § 1.1445-2(d)(2)(i)(B). Similarly, in transfers described in section 1445(e), an entity or fiduciary otherwise required to withhold is not required to withhold if, by reason of the operation of a nonrecognition provision of the Internal Revenue Code or the provisions of any United States treaty, no gain or loss is required to be recognized by the foreign person with respect to which withholding would otherwise be required. § 1.1445-5(b)(2)(i)(A). Withholding is not required if, within 20 days of the transfer, the entity or fiduciary delivers a notice to the IRS that includes the information described in section 1.1445-5(b)(2)(ii). § 1.1445-5(b)(2)(i)(B).

.05 Another exception to withholding involves the transfer of an interest in a domestic corporation which is not a USRPHC. Because section 897(a)(1) does not apply to the gain (or loss) from a foreign person's disposition of stock in a domestic corporation that is not a USRPHC, section 1445 does not require the transferee to withhold upon a foreign person's disposition of stock in a domestic corporation that is not a USRPHC. To establish that an interest in a domestic corporation was not a U.S. real property interest as of the date of the disposition, the foreign person must either obtain a statement from the corporation or a determination from the IRS. To qualify for the rule permitting a statement from the corporation, a foreign transferor must obtain from the transferred domestic corporation a statement that the domestic corporation is not a USRPHC as of the date of the disposition. This statement must be obtained no later than the date, including any extensions, on which a tax return would otherwise be due with respect to the foreign transferor's disposition. § 1.897-2(g)(1)(ii)(A). The domestic corporation must mail a notice of the statement to the IRS within 30 days after it is provided to the foreign transferor, unless it meets the requirements of section 1.897-2(h)(4)(i). §§ 1.897-2(h)(2) and 1.897-2(h)(4)(i). If the IRS has been so notified, and the transferee receives a copy of the statement, then the transferee is not required to withhold. §§ 1.897-2(g)(1)(ii)(B) and 1.1445-2(c)(3)(i). Similarly, in

transactions involving the transfer of an interest in a domestic corporation which is not a USRPHC under section 1445(e), where the transferor or its fiduciary obtains a statement that the domestic corporation is not a USRPHC, and timely notice of such statement is provided to the IRS pursuant to section 1.897-2(h), section 1.1445-5(b)(4)(iii) provides that no withholding is required.

.06 Under section 301.9100-1(c), the Commissioner may grant a reasonable extension of time to make a regulatory election or certain statutory elections under all subtitles of the Code, except subtitles E, G, H, and I, if the taxpayer demonstrates to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting the relief will not prejudice the interests of the government. § 301.9100-3(a). Section 301.9100-1(b) defines the term "regulatory election" as an election whose due date is prescribed by a regulation, a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin. The statements and notices described in sections 1.897-2(g)(1)(ii)(A), 1.897-2(h), 1.1445-2(c)(3)(i), 1.1445-2(d)(2), 1.1445-5(b)(2), and 1.1445-5(b)(4) all fall within the definition of a regulatory election.

.07 The Commissioner has authority under sections 301.9100-1 and 301.9100-3 to grant an extension of time if a taxpayer fails to file a timely election under sections 1.897-2(g)(1)(ii)(A), 1.897-2(h), 1.1445-2(c)(3)(i), 1.1445-2(d)(2), 1.1445-5(b)(2), or 1.1445-5(b)(4). Section 301.9100-3 provides that the Commissioner will grant an extension of time when the taxpayer provides the evidence to the satisfaction of the Commissioner that the taxpayer has acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

SECTION 3. SCOPE

This revenue procedure provides a simplified method to request relief for certain late filings under sections 1.897-2(g)(1)(ii)(A), 1.897-2(h), 1.1445-2(c)(3)(i), 1.1445-2(d)(2), 1.1445-5(b)(2), and 1.1445-5(b)(4). This procedure is in lieu of the letter ruling

procedure that otherwise would be used to obtain relief under section 301.9100-3. Accordingly, user fees do not apply to corrective action under this revenue procedure, and a taxpayer can request relief by applying for a letter ruling under section 301.9100-3 only if the taxpayer is denied relief by the IRS pursuant to this revenue procedure.

SECTION 4. APPLICATION

.01 *Eligibility for Relief.* A taxpayer is eligible for relief under section 4.03 of this revenue procedure for a late filing under sections 1.897-2(g)(1)(ii)(A), 1.897-2(h), 1.1445-2(c)(3)(i), 1.1445-2(d)(2), 1.1445-5(b)(2), or 1.1445-5(b)(4) if a statement or notice described in one or more of those sections was not provided to the relevant person or the IRS by the specified deadline and the taxpayer has reasonable cause for the failure to make a timely filing.

.02 *Procedural Requirements for Requesting Relief.* Once the taxpayer becomes aware of the failure to file the statements or notices required by sections 1.897-2(g)(1)(ii)(A), 1.897-2(h), 1.1445-2(c)(3)(i), 1.1445-2(d)(2), 1.1445-5(b)(2), or 1.1445-5(b)(4), the taxpayer must file the completed statement or notice with the appropriate person or the IRS, as applicable. The completed statement or notice filed with the appropriate person or the IRS must state at the top of the document that it is "FILED PURSUANT TO REV. PROC. 2008-27." With respect to a completed statement or notice required to be filed with the IRS under sections 1.897-2(h), 1.1445-2(d)(2), or 1.1445-5(b)(2), as applicable, the taxpayer must attach an explanation describing why the taxpayer's failure to timely file the statement or notice was due to reasonable cause. Additionally, within the explanation, the taxpayer must provide that it filed with, or obtained from, an appropriate person the statements or notices required

under sections 1.897-2(g)(1)(ii)(A), 1.1445-2(c)(3)(i), 1.1445-2(d)(2)(i)(A), or 1.1445-5(b)(4)(iii)(A), as applicable. The completed statement or notice attached to the taxpayer's explanation must be sent to the Ogden Service Center, P.O. Box 409101, Ogden, UT 84409.

.03 *Relief for Late Filing.* Upon receipt of a completed application requesting relief under this revenue procedure, the IRS will determine whether the requirements for granting additional time have been satisfied. The IRS will notify the taxpayer in writing within 120 days of the filing of the completed application if the IRS determines that the failure to comply was not due to reasonable cause, or if additional time will be needed to make a determination. For this purpose, the 120-day period shall begin on the date the taxpayer is notified in writing that the request has been received and assigned for review. If, once such period commences, the taxpayer is not again notified within 120 days, then the taxpayer shall be deemed to have established reasonable cause.

SECTION 5. EFFECTIVE DATE

This revenue procedure applies to all requests for relief received after June 26, 2008. Taxpayers that have ruling requests pending as of May 27, 2008, are not required to use the procedures of this revenue procedure. However, if taxpayers have not received a determination of their request as of May 27, 2008, they may withdraw their request consistent with the procedures in Rev. Proc. 2008-1, 2008-1 I.R.B. 1, (or any succeeding document). In that event, the IRS will refund the taxpayer's user fee.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office

of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2098.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid OMB control number.

The collection of information in this revenue procedure is in section 4.02. This information is required to be submitted to the applicable service center in order to obtain relief for late filings under sections 1.897-2(g)(1)(ii)(A), 1.897-2(h), 1.1445-2(c)(3)(i), 1.1445-2(d)(2), 1.1445-5(b)(2), or 1.1445-5(b)(4). This information will be used to determine whether the eligibility requirements for obtaining relief have been met. The collection of information is required to obtain a benefit. The likely respondents are businesses or other for-profit institutions.

The estimated annual burden per respondent varies from 3 to 5 hours, depending on individual circumstances, with an estimated average of 4 hours. The estimated number of respondents is 200.

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.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Jeffrey P. Cowan of the Office of Associate Chief Counsel (International). For further information regarding this revenue procedure, contact Jeffrey P. Cowan at (202) 622-3860 (not a toll-free call).