

Part III. Administrative, Procedural, and Miscellaneous

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

Notice 2018-08

SECTION 1. OVERVIEW

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

SECTION 2. BACKGROUND

In general, new section 864(c)(8) provides that a nonresident alien individual’s or foreign corporation’s gain or loss from the sale, exchange, or other disposition of a partnership interest is effectively connected with the conduct of a trade or business in the United States to the extent that the person would have had effectively connected gain or loss had the partnership sold all of its assets at fair market value. New section 864(c)(8) applies to sales, exchanges, or other dispositions occurring on or after November 27, 2017. See Revenue Ruling 91-32, 1991-1 C.B. 107, for the IRS’s position with respect to sales, exchanges, or other dispositions of an interest in a partnership occurring before November 27, 2017.

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

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

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

Stakeholders have indicated that, in the case of a disposition of a publicly traded partnership interest, applying new section 1446(f) without guidance presents significant practical problems. For example, stakeholders stated that a transferee of an interest in a publicly traded partnership typically will not be able to determine whether the transferor partner is foreign or domestic or whether any portion of a transferor partner’s gain would be treated under new section 864(c)(8) as effectively connected gain. This may be the case because publicly traded partnership interests are generally held in street name by a broker and transferred through a clearinghouse. Moreover, a particular sale may be aggregated with other sales and purchases of partnership interests by other customers

of the same broker. As a result, it may be difficult for a transferee to determine whether it must withhold under new section 1446(f). Furthermore, although the Conference Report suggests the Treasury Department and the IRS provide guidance providing that in the case of a publicly traded partnership interest sold by a foreign partner through a broker, the broker may deduct and withhold on behalf of the transferee, H.R. Rep. No. 115-466, at 511 (2017), until guidance is provided and new withholding and reporting systems are developed, it would not be possible for brokers to perform any such withholding.

In consideration of these concerns and others raised by stakeholders, and to allow for an orderly implementation of the requirements of new section 1446(f), the Treasury Department and the IRS have determined that withholding under new section 1446(f) should not be required with respect to any disposition of an interest in a publicly traded partnership (within the meaning of section 7704(b)) until regulations or other guidance have been issued under new section 1446(f). This temporary suspension is limited to dispositions of interests that are publicly traded and does not extend to non-publicly traded interests. The Treasury Department and the IRS intend to issue future regulations or other guidance on how to withhold, deposit, and report the tax withheld under new section 1446(f) with respect to a disposition of an interest in a publicly traded partnership. Future guidance under new section 1446(f) with respect to a disposition of an interest in a publicly traded partnership will be prospective and will include transition rules to allow sufficient time to prepare systems and processes for compliance.

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

SECTION 4. REQUEST FOR COMMENTS AND CONTACT INFORMATION

The Treasury Department and the IRS request comments on the rules to be issued under new section 1446(f). Comments are specifically requested regard-

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

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

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

Guidance on Withholding Rules

Notice 2018-14

I. PURPOSE

This notice: (1) extends the effective period of Forms W-4, Employee's Withholding Allowance Certificate, furnished to claim exemption from income tax withholding under section 3402(n) of the Internal Revenue Code (Code) for 2017 until February 28, 2018, and permits employees to claim exemption from withholding for 2018 by temporarily using the 2017 Form W-4; (2) temporarily suspends

the requirement under section 3402(f)(2)(B)¹ that employees must furnish their employers new Forms W-4 within 10 days of changes in status that reduce the withholding allowances they are entitled to claim; (3) provides that the optional withholding rate on supplemental wage payments under Treas. Reg. § 31.3402(g)-1 is 22 percent for 2018 through 2025; and (4) provides that, for 2018, withholding under section 3405(a)(4) on periodic payments when no withholding certificate is in effect is based on treating the payee as a married individual claiming three withholding allowances.

Sections 11001 and 11041 of "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018," P.L. 115-97 (the "Act"), which was enacted on December 22, 2017, made significant changes to income tax rates, income tax deductions and credits, and federal income tax withholding. The Internal Revenue Service (IRS) is currently working on revising Form W-4 to reflect the changes made by the Act, such as changes in available itemized deductions, increases in the child tax credit, the new dependent credit, and the repeal of dependent exemptions. As a result, the 2018 Form W-4 may not be released until after February 15, 2018.

The Act does not mandate that employees furnish new Forms W-4 for 2018 and expressly permits the IRS to administer income tax withholding under section 3402 for 2018 without regard to the changes in the withholding rules and the suspension of personal exemptions. Accordingly, and in order to minimize burden on employees and employers, the IRS and the Department of the Treasury (Treasury Department) designed the 2018 withholding tables to work with the Forms W-4 that employees have already furnished their employers. *See* Notice 1036, Early Release Copies of the 2018 Percentage Method Tables for Income Tax Withholding, and Publication 15 (Circular E), Employer's Tax Guide, for use in 2018. For employees with simpler tax situations, the new tables are designed to produce the correct amount of tax withholding. The revisions are also aimed at avoiding over-

and under-withholding of tax as much as possible. The IRS is also working on revising the withholding calculator on www.irs.gov to reflect the changes made by the Act. When released, the modified calculator and 2018 Form W-4 can be used by employees who wish to update their withholding in response to the Act or changes in their personal circumstances in 2018. Until a new Form W-4 is issued, employees and employers should continue to use the 2017 Form W-4.

Section II of this notice extends the effective period of Forms W-4 furnished to claim exemption from income tax withholding for 2017 to February 28, 2018, and describes the procedures by which employees may claim exemption from withholding for 2018 under section 3402(n) using the 2017 Form W-4. These procedures expire 30 days after the 2018 Form W-4 is released. They may be relied upon for actions taken in 2017 with respect to the 2018 tax year. Section III of this notice temporarily suspends the requirement that employees must furnish employers new Forms W-4 within 10 days after a change in status that results in reduced withholding allowances under section 3402(f)(2)(B) and Treas. Reg. § 31.3402(f)(2)-1. Section IV of this notice clarifies that the optional withholding rate for supplemental wages is 22 percent for taxable years beginning after December 31, 2017 and before January 1, 2026. Section V of this notice provides that, for 2018, the rules for default withholding under section 3405(a)(4) parallel the rules for prior years and treat the payee as a married individual claiming three withholding allowances.

II. GUIDANCE FOR EMPLOYEES EXEMPT FROM WITHHOLDING

Under section 3402(n), an employee may claim exemption from income tax withholding if the employee certifies on Form W-4 that (1) the employee incurred no liability for income tax for the preceding taxable year; and (2) the employee anticipates that he or she will incur no liability for income tax for the current taxable year. *See also* Treas. Reg. §§ 31.3402(f)(4)-2 and 31.3402(n)-1.

¹All references to sections in this document are to Code sections unless specifically provided otherwise.