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Global Tax Alert

US proposed regulations under Section 1446(f) would clarify scope of withholding on transfers of partnership interests

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Executive summary

On 7 May 2019, the United States (US) Treasury and the Internal Revenue Service (IRS) issued proposed regulations (REG-105476-18) under Internal Revenue Code[1] Section 1446(f), which imposes a new withholding tax on transfers by non-US persons of interests in partnerships that are engaged in a US trade or business. Section 1446(f) is an enforcement mechanism for the substantive tax imposed by Section 864(c)(8), which imposes tax on non-US partners that sell interests in such partnerships to the extent the gain is allocable to the partnership's US business assets. The proposed regulations, if issued in final form, would end the suspension currently in force on withholding for transfers of interests in publicly traded partnerships (PTPs), and require banks, brokers and custodians to perform withholding on such transfers by non-US persons of those PTP interests. The proposed regulations also would modify the Notice 2018-29 rules that currently apply to transfers by non-US persons of interests in partnerships that are not publicly traded. The proposed regulations would also activate the provision in Section 1446(f)(4) requiring partnerships to withhold on partnership interests previously transferred by a non-US partner if the correct tax was not withheld at the time of the transfer.

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Background

The *Tax Cuts and Jobs Act* (TCJA)[2] settled an ongoing dispute about whether nonresident aliens and foreign corporations not otherwise engaged in a US trade or business were subject to US tax on gains on sales of interests in partnerships engaged in a US trade or business. Section 864(c)(8) treats gain on the sale of interests in those partnerships as effectively connected with the conduct of a US trade or business (ECI), and subject to tax in the hands of the non-US partners, to the extent the gain was allocable to the partnership's US business assets. Section 1446(f) is an enforcement mechanism for Section 864(c)(8), which requires transferees purchasing interests in such partnerships from non-US transferors to deduct and withhold a 10% tax from the amount realized. Section 1446(f)(4) requires partnerships to withhold tax from future distributions (backstop withholding) to transferees that were previously required to withhold tax on the amount realized by the non-US transferor but did not do so. Backstop withholding would continue until the amount not withheld, plus interest, was recovered.

Although Section 1446(f) was effective for transfers after 2017, the TCJA was enacted so late in 2017 that it was impossible for the IRS to provide guidance before 2018. On 29 December 2017, Treasury and the IRS issued Notice 2018-08, which suspended withholding (but not the substantive tax) for dispositions of PTP interests until the issuance of regulations (or other guidance). A similar delay was not provided for non-PTP interests. Notice 2018-29 was released on 12 April 2018, to provide temporary procedures for withholding and paying over the tax on non-PTP interests and to provide exceptions and limitations under certain circumstances. Additional background on the statutory changes and the notices can be found in EY Global Tax Alert, *US IRS issues interim guidance under new Section 1446(f) for sales of interests in non-publicly traded partnerships*, dated 12 April 2018.

Under existing law, if a PTP earns ECI and has foreign partners, distributions of ECI to foreign partners are subject to withholding at the highest rate of tax applicable to individuals and corporations. Partnerships can earn different types of income with different withholding requirements: some subject to withholding under Section 1446, some subject to withholding under Sections 1441/1442, and some exempt from withholding. Treas. Reg. §1.1446-4(f)(3) provides an ordering rule to determine the source of distributions for this purpose. PTPs were expected to provide the breakdown of distributions under this ordering rule by way of a "qualified notice." Treas. Reg. §.1446-4(b)(4).

Detailed discussion

Withholding is required on 10% of the "amount realized" when a non-US person transfers an interest in a partnership earning ECI. Gain on the sale of a partnership interest is treated as ECI to the extent that a deemed sale of the partnership's assets would produce ECI, under Section 864(c)(8)(B). Section 1446(f)(3) gives Treasury and the IRS the authority to reduce the withholding amount with respect to gain on the sale of a partnership interest that would not be ECI. Both the Notices and the proposed regulations exercise this authority. Thus, the issues are:

- When has there been a "transfer" of an interest in a partnership?
- What is the "amount realized?"
- How do withholding agents determine whether the transferor is non-US?
- What relief might be available to avoid overwithholding, and how is it claimed?
- How is the tax paid and reported to the IRS?
- When might a partnership be required to withhold on subsequent distributions under Section 1446(f)(4)?

The issues raised by PTPs differ from the issues raised by other partnerships. Partners in PTPs most likely would hold their interests through nominees such as banks, brokers and other custodians. The partnership most likely would not know when transfers of PTP interests happen. Thus, many of the provisions in the proposed regulations for PTPs differ from the provisions for other partnerships.

Transfers. Under the proposed regulations, a "transfer" means a sale, exchange or other disposition of an interest in a partnership. If a partnership distributes money to a partner in excess of the partner's basis in the partnership, Section 731(a)(1) treats the excess as gain from a deemed sale of the partnership. Thus, the proposed regulations would treat distributions as transfers for purposes of Section 1446(f). If a PTP does not distribute more than its net income since the last distribution and publishes a qualified notice to that effect, however, a special rule provides that the distribution is not subject to withholding.

Amount realized. "Amount realized" is determined under general principles of Subchapter K, and 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. When an interest in a PTP is transferred, however, the "amount realized" does not include the transferor's share of partnership liabilities.

Non-PTPs apparently must consider all distributions to be "transfers" and must withhold 10% of the amount realized on the distribution unless an exception applies, such as a distribution to a documented US person.

Determining status of transferor. The proposed regulations provide the welcome clarification that a certification by the transferor of its US status on IRS Form W-9 is sufficient proof that the transferor is US and exempt from withholding. Undocumented transferors are presumed to be foreign. A foreign partnership can be treated on a look-through basis if it certifies its status as such on Form W-8IMY.

Information on transfer. The proposed regulations would require non-US persons and certain domestic partnerships with non-US direct or indirect partners that transfer an interest in a partnership covered by Section 864(c)(8) to provide a statement to that partnership within 30 days of the transfer. The statement must include the date of the transfer and identifying information for the transferor and transferee.

In turn, the partnership that receives such a statement (or otherwise knows that a transfer has occurred) generally must provide information to the transferor partner so that partner may comply with Section 864(c)(8) if that transferor would have had a distributive share of the gain or loss from a deemed sale of the effectively connected assets.[3]

As noted, all distributions by a non-PTP are considered transfers. Accordingly, it appears that the partnership would need to routinely provide the required information whenever there is a distribution.

Determination date. Solely for withholding purposes under Section 1446(f), the proposed regulations would require determinations (such as fair market value) regarding the transfer to be made as of a "determination date." The determination date must be either:

- The transfer date
- A date no more than 60 days before the transfer date

or

- The later of the first day of the partnership's tax year for the year of the transfer or the date of the most recent revaluation event under Section 704 before the transfer (without regard to whether the capital accounts of partners were adjusted)

If the transferor is a controlling partner, the determination date must be determined as described in the last bullet above. For a given transfer, there may be only one determination date for all determinations.

The proposed regulations do not include guidance on who selects the determination date or what to do if the transferor, the transferee or the partnership disagree on which determination date to use.

For purposes of Section 864(c)(8), determinations must be made as of the transfer date, rather than the determination date.

Coordination with Section 1445. When a partnership owns substantial US real property interests (USRPIs), the proposed regulations would generally apply 15% withholding under Section 1445(a) a, rather than 10% withholding under Section 1446(f). If, however, the transferor applies for a withholding certificate to reduce or eliminate Section 1445 withholding, the amount to withhold is the greater of the amounts required under each of the regimes.

Non-PTPs

Exceptions to withholding. The proposed regulations provide six exceptions to withholding and 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. When a partnership is a transferee because it makes a distribution (distributing partnership), it may instead rely on its books and records, unless it knows, or has reason to know, that the information is incorrect or unreliable.

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Most of the exceptions carry over from Notice 2018-29, but with tighter thresholds in some cases:

Type	When exception applies	Who makes it	Material changes in proposed regulations
Documentation	Non-foreign status (including Form W-9)	Transferor	No material changes
	Treaty exemption	Transferor	New (see discussion on treaty exceptions)
Certifications on gain	No realized gain (including Section 751 income)	Transferor	Clarifies that realization of ordinary income and an overall loss eliminates this certification
	De minimis effectively connected gain on deemed sale under Section 864(c)(8)	Partnership	Threshold reduced from 25% to 10%
Certification on ECTI	De minimis effectively connected taxable income (ECTI) over three years	Transferor	▸ Threshold reduced from 25% to 10% ▸ Transferor's allocable share must be less than $1m each year ▸ Transferor must have filed returns and paid tax for all three years in the test
Certification of nonrecognition	Nonrecognition transaction	Transferor	No material changes

Treaty exception. A transferor (as opposed to owners of an interest in the transferor, including partners in a partnership that is a transferor) may certify that gain from the transfer is not subject to tax under an income tax treaty in effect between the United States and a foreign country. The transferor cannot make this certification, however, if treaty benefits apply to only a portion of the gain from the transfer.

Furthermore, the transferor must include with the certification a Form W-8BEN or W-8BEN-E (or substitute form) containing the information necessary to support the claim for treaty benefits, and the transferee must mail a copy of the certification (including the withholding certificate) to the IRS by the 30th day after the date of the transfer.

Non-US partnerships that lend money in the United States sometimes take the position that the income they receive is effectively connected with a US trade or business, but that the partnership has no US permanent establishment. Under those circumstances, a partner that is transferring its interest in such a partnership may be able to claim an exemption from US tax under an applicable treaty because no permanent establishment can be attributed to the partner.

Given the requirement for partnerships to withhold or verify any withholding exemption (see later section on "Partnership withholding backstop"), and given that the IRS will receive a copy of the Form W-8, transferees should be careful to validate the tax forms. In particular, treaty claims made on Form W-8BEN-E require the partner to specifically identify which limitation on benefit provision applies.

Certification of partnership liabilities. As noted previously, the amount realized includes any partnership liabilities assumed by the transferee and any reduction in the transferor's share of partnership liabilities. To determine the amount of withholding liability, therefore, the transferee must know the transferor's share of partnership liabilities. The proposed regulations follow Notice 2018-29 and would allow the transferee to rely on a certification of the amount from the transferor, as reflected on

the most recent Schedule K-1, provided it was issued for a partnership taxable year ending no more than 22 months before the transfer date. In addition, the transferor must certify that it does not have knowledge of any events occurring after receiving the Schedule K-1 that would cause the amount of liabilities to differ by more than 25% from the amount shown on the Schedule K-1.

The 22-month window is a much-needed improvement over Notice 2018-29, which required the Schedule K-1 to have been issued for a partnership tax year ending no more than 10 months before the transfer, limiting the period when this certification could be used to a window of about six weeks each year, assuming the partnership received an extension to provide Schedules K-1.

A transferee also can rely on a certification from the partnership about the transferor's partnership liabilities. The partnership must make that determination as of the previously described determination date.

If the transferee does not obtain a certification from the transferor or the partnership, it must determine the reduction in the transferor's share of partnership liabilities as of the date of transfer, rather than the determination date.

Non-US partnership with US partners. Section 1446(f) treats a non-US partnership that transfers an interest in a partnership engaged in a US trade or business as a foreign partner. To the extent the non-US partnership has US partners, the proposed regulations would allow the partnership to provide a Form W-8IMY accompanied by Forms W-9 from the US partners (both direct and indirect) and a withholding statement allocating the potential gain. The amount realized would consist of only the portion allocable to non-US ultimate partners.

Limitation on withholding to cash and property. Because the amount realized can include the transferor's share of partnership liabilities, the amount to be withheld could exceed the amount of cash and property to be paid to the transferor if the regulations did not provide relief. For example, if the transferor will receive US$10[4] in cash and the reduction in its share of partnership liabilities is $100, then 10% of the amount realized is $11. Another problem is that the transferee also might not receive information about the transferor's partnership liabilities. In either case, consistent with Notice 2018-29, the amount to be withheld is the entire amount realized, determined without regard to the partner's share of partnership liabilities. Effectively, all the cash and the fair market value of any property must be deposited as tax withheld in such a case. In the example, all $10 of cash consideration would be withheld and deposited, and the transferor would receive no cash in the transfer.

Certification of maximum tax liability. A transferor's tax liability under Section 864(c)(8) may be considerably less than 10% of the amount realized; it may even be zero. The proposed regulations would allow the transferor to certify its maximum tax liability on the transfer. If the procedures in the regulations are followed, the transferee can rely on the certification and withhold only the maximum tax liability amount.

The transferor would be required to first obtain a certification from the partnership that includes the transferor's deemed ordinary and capital gains from the deemed sale of partnership assets on the determination date. The transferor would provide that certification, along with its own certification calculating the maximum tax liability and stating the amount realized, to the transferee. If the transaction does not result in recognition of some of the gain, the transferor should include the statements necessary to certify a nonrecognition transaction as previously described in the certification of maximum tax liability.

Reporting and depositing. A transferee required to withhold must report and pay any tax withheld by the 20th day after the date of the transfer using Form 8288, *US Withholding Tax Return for Dispositions by Foreign Persons of US Real Property Interests*, and Form 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of US Real Property Interests*. Both Forms 8288 and 8288-A must include the TINs of both the transferor and the transferee. Unlike a payee's copy of Form 1042-S, which is sent directly to the payee, the transferor's copy of Form 8288-A is sent to the IRS. The IRS will stamp a valid Form 8288-A to show receipt and mail a copy to the transferor so that the transferor can use it to claim a credit for amounts withheld. The transferee is generally also required to provide the Form 8288-A or equivalent information to the partnership. The partnership must conduct its own review of the certification provided by the transferee, including any certifications for exception to withholding.

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.

Transferor's tax return. A foreign transferor must file a US tax return and pay any tax due on a transfer that is subject to Section 864(c)(8), regardless of whether the transferee withholds. It must attach to its return the stamped copy of Form 8288-A or "substantial evidence" of withholding to receive credit. A transferor that is a foreign partnership may claim a credit for the amount withheld against its tax liability under Section 1446(a) with respect to its foreign partners.

This section was included as a result of tiered partnership structures, because gain that an upper-tier partnership recognizes on the transfer of an interest in a lower-tier partnership engaged in a US trade or business is included when calculating the upper-tier partnership's ECTI.

Backstop withholding by partnership. Section 1446(f) (4) requires partnerships to withhold tax and interest on subsequent distributions to transferees that fail to withhold under Section 1446(f). The proposed regulations would require the transferee to make a certification to the partnership describing the transaction, providing the amount withheld and describing any exception to withholding. The partnership must review the certification in light of its books and records and other information available to it. If the partnership knows or has reason to know that the transferee's certification (or an underlying certification from the transferor) is unreliable or incorrect, the proposed regulations would require the partnership to withhold under Section 1446(f)(4). The partnership also would be required to withhold if the IRS notified it that the transferee provided incorrect information about the amount withheld or failed to deposit the amount withheld.

Withholding must begin on the date that is the later of (i) 30 days after the transfer, or (ii) 15 days after the partnership acquires actual knowledge of the transfer. The entire amount of any distribution to the transferee must be withheld until (i) the partnership receives a certification on which it can, in fact, rely, (ii) the transferee disposes of its partnership interest (and the successor-in-interest is not related to the transferee or original transferor), or (iii) the tax liability, including applicable interest, has been satisfied.

In determining the tax liability, the partnership may not take into account any adjustments to the amount realized that might otherwise be available, such as a transferor's certification of maximum tax liability. The Preamble states that the IRS intends to provide transferees an additional incentive to comply and to minimize the administrative burden on the partnership. Withholding under Section 1446(f)(4) is not required if withholding would be required under another provision of the Code, for example, withholding on a US-source dividend under Section 1441.

When the partnership is a transferee because of a distribution (including a redemption of a partnership interest), the proposed regulations would clarify that withholding under Section 1446(f)(4) does not apply. However, the partnership is liable for withholding under the general rule of Section 1446(f)(1) because it is treated as the transferee.

In general, Section 1446(f)(4) does not require a PTP to withhold. However, if the PTP receives a notice from the IRS indicating that its qualified notice falsely stated that an exemption from withholding applies, or the PTP makes that determination on its own, the PTP must withhold an amount equal to the underwithholding by brokers, plus interest.

Withholding under Section 1446(f)(4) should be reported on Form 8288, *US Withholding Tax Return for Dispositions by Foreign Persons of US Real Property Interests*, and new Form 8288-C, *Statement of Withholding Under IRC Section 1446(f)(4) for Withholding on Dispositions by Foreign Persons of Partnership Interests*.

PTPs

For interests in PTPs defined in Section 7704(b) (also known as master limited partnerships or MLPs), the seller's broker is responsible for the withholding, rather than the transferee. The amount of withholding is generally limited to the gross proceeds paid (or credited) to a customer or another broker (rather than taking into account partnership liabilities). If a foreign broker sells a PTP interest on behalf of its customer, its US broker must withhold unless either (i) the foreign broker is a US branch that has elected to be treated as a US person for withholding tax purposes, or (ii) the foreign broker is a "qualified intermediary" (QI) that assumes primary withholding responsibility. The QI Agreement will be updated to permit QIs to do so.[5]

For multiple brokers effecting a transfer of a PTP interest, a broker must obtain a Form W-9 from US brokers, or treat them as foreign and apply withholding. Further, if there are multiple brokers, a broker is not required to withhold when it knows the withholding obligation has been satisfied by another broker.

As indicated previously, foreign partnerships with US partners can provide a documentation to modify the amount realized to limit withholding to the proceeds allocable to foreign partners.

Existing rules do not require a US broker to look through a foreign partnership with respect to gross proceeds, or to allocate gross proceeds among partners. US brokers will need to build systems and procedures to comply with this rule.

Exceptions to withholding. The PTP withholding rules contain certain exceptions to withholding:

Type	When exception applies	Who provides
Documentation	Transferor provides a valid Form W-9 (or substitute)	Transferor
	Transferor provides Forms W-8BEN or W-8BEN-E with a valid 0% treaty claim	
Qualified notice	Effectively connected gain on hypothetical sale of PTP assets is less than 10% of total gain, or there is no such gain	Posted online by PTP
	Distribution does not exceed the net income the partnership earned since the record date of last distribution	
Backup withholding	Transferor is already subject to backup withholding (i.e., undocumented and presumed as US non-exempt recipient)	Applied by broker

A broker can rely on a qualified notice if it has been posted by the PTP within a 92-day period ending on the transfer date. If a new notice is posted within a 10-day period ending on the transfer date, however, a broker can rely on the immediately preceding notice.

Brokers will file and furnish Forms 1042-S reporting the gross proceeds and withholding, and will include the amounts on Form 1042. Deposits of the withholding tax follow the existing schedules under chapters 3 and 4. Adjustments for underwithholding and overwithholding allowed under chapters 3 and 4 also generally apply.

Transferor's tax return. A transferor of a PTP interest may have a substantive tax liability and corresponding tax return filing obligation. The transferor can claim a credit for the amount withheld by attaching a copy of the Form 1042-S to its return. A US taxpayer identification number (TIN) must be included on the Form 1042-S so that the IRS can match the credit reported on the Form 1042-S with the transferor's tax return.

Transferors need to ensure they have obtained a US TIN and included it on the Form W-8 provided to brokers, even if the brokers have no other use for the information. Brokers should also be prepared to receive requests for amended Form 1042-S copies if a US TIN is provided after the original Form 1042-S is furnished. Brokers may wish to consider requiring non-US customers to provide a US TIN before allowing trading in PTPs.

Changes to qualified notice and QI regimes. The proposed regulations would make several changes to the "qualified notice" system used by PTPs to inform brokers (referred to as "nominees") of effectively connected income distributions and, now, effectively connected gain. First, rather than following SEC regulations, the partnership would post the notice on its website. Second, PTP distributions would be subjected to the highest withholding rate in Sections 1441, 1442 or 1446 unless a qualified notice provides the nominee sufficient detail to determine the types of income distributed and the appropriate withholding rates. Finally, the regulations would expand the definition of "nominee" to include a QI and a US branch of a foreign person that elects to be treated as a US person.

Certain conformation changes are also proposed to the qualified notice rules covering publicly traded trusts and real estate investment trusts.

Non-PTPs and PTPs

Liability for underwithholding. The parties responsible for Section 1446(f) withholding (discussed previously) would be liable for any missed withholding tax on a transfer. If the required withholding tax were ultimately paid by someone else (e.g., the foreign partner), the tax would not be collected twice. Interest, penalties, and any additions to the tax, however, would still apply.

In addition, an agent that acts on behalf of a transferor or transferee and knows of a false certification but fails to notify the party responsible for withholding would itself be liable for any resulting underwithholding. The liability, however, would be limited to the amount of compensation the agent received related to the transaction and any civil or criminal penalties.

Effective dates

The effective dates of the proposed regulations vary. Generally, the notification requirements for the foreign transferor of a partnership interest would apply to transfers occurring on or after the date the regulations are published as final regulations in the Federal Register (the finalization date). The provisions allowing a transferor to demonstrate its US status on Form W-9 generally apply to certifications provided on or after 7 May 2019, but taxpayers may apply them to Forms W-9 provided before that date. The qualified notice rules for PTPs and the rules for designating nominees to withhold tax under Section 1446 would apply to distributions made on or after the date that is 60 days after the finalization date. Similarly, other generally applicable rules for withholding, reporting and paying over the tax would apply to transfers that occur on or after the date that is 60 days after the finalization date. The Preamble notes that Treasury and the IRS intend to obsolete Notices 2018-08 and 2018-29 effective on the date that is 60 days after the finalization date.

Implications

The extension of Section 1446(f) withholding to interests in PTPs was anticipated. There is no exemption for transfers of portfolio interests in PTPs, as there is under the *Foreign Investment in Real Property Tax Act* (FIRPTA) rules of Sections 897 and 1445, on which much of the guidance in Notice 2018-29 was based. Treasury and the IRS presumably did not find any room in the statute as enacted to provide such a simplifying rule. The proposed rules for withholding on transfers of interests in PTPs take some notice of how securities markets operate. The Preamble assumes that foreign banks, brokers, and custodians will agree to accept full withholding responsibilities under the QI rules to avoid "upstream" withholding. Time will tell if this assumption is correct.

The proposed rules that provide relief from overwithholding avoid the necessity to go to the IRS to obtain an advance clearance, unlike the FIRPTA rules of Sections 897 and 1445. Providing the necessary certifications, however, will require assembling detailed information and documentation in a relatively short period.

The change to the qualified notice rules on how banks, brokers and custodians are to determine the withholding tax characteristics of distributions by PTPs may make it easier for those withholding agents to obtain that information, and thereby avoid overwithholding. Whether the revised procedures will be an improvement upon the current procedures remains to be seen.

Comments on the proposed regulations, as well as requests for a public hearing, are due by 12 July 2019.

Endnotes

1. All "Section" references are to the Internal Revenue Code (IRC) of 1986, and the regulations promulgated thereunder.
2. The Act of December 22, 2017, P.L. 115-97.
3. The disclosure requirements are modeled on those for transfers of interests in partnerships with so-called hot assets under Sections 751(a) and 6050K. The current Section 6050K regulations obligate a partnership to report a sale or exchange under Section 751(a) on Form 8308 by 31 January of the following year. The proposed Section 6050K regulations would require the partnership to also report the transferor's gain on the sale, including both ordinary and capital gain, but do not provide for a revised due date.
4. Currency references in this Alert are to US$.
5. A general discussion of the issues that arise when a non-US person invests in a PTP that generates ECI, or a non-US broker holds such interests in custody for either a US or a non-US customer, is beyond the scope of this Alert.

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