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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

REG-106876-00

RIN-1545-AY24

Revision of Income Tax Regulations under Sections 897, 1445, and 6109 to require use of Taxpayer Identifying Numbers on Submissions under the Section 897 and 1445 Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations to require the use of taxpayer identifying numbers on submissions under sections 897 and 1445. The proposed regulations are necessary to properly identify foreign taxpayers for which submissions are made for the reduction or elimination of tax under sections 897 and 1445. The proposed regulations also address miscellaneous items, such as the amendment to section 1445(e)(3) under the Small Business Job Protection Act of 1996. This document also provides notice of a public hearing on these proposed regulations.

DATES: Electronic or written comments and requests to speak (with outlines of oral comments) at the public hearing scheduled for November 13, 2002, must be submitted by October 23, 2002.

ADDRESSES: Send submissions to: CC:ITA:RU (REG-106876-00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:ITA:RU (REG-106876-00), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW.,

Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS internet site at www.irs.gov/regs. The public hearing will be held in room 6718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Robert W. Lorence, (202) 622-3860; concerning submissions, the hearing, and/or to be placed on the building access list to attend the hearing, Treena Garrett, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections 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, W:CAR:MP:FP:S; Washington, DC 20224. Comments on the collections of information should be received by September 24, 2002.

The collections of information in this proposed regulation are in §§1.1445-2(d)(2) and 1.1445-3. The collections of information relate to the requirement that notices of nonrecognition or applications for withholding certificates be filed with the IRS with respect to (1) dispositions of U.S. real property interests that have been used by foreign persons as a principal residence within the prior 5 years and excluded from gross income under section 121 and (2) dispositions of U.S. real property interests by foreign persons in deferred like kind exchanges that qualify for nonrecognition under section 1031. This

collection of information is necessary for the proper performance of the functions of the IRS because it notifies the IRS of dispositions of U.S. real property interests by foreign persons that otherwise are subject to taxation under section 897 and the collection of a withholding tax under section 1445 except as provided in these provisions. The likely respondents will be individuals and business or other for-profit institutions.

Estimated total annual reporting burden: 600 hours.

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

Estimated number of respondents: 150.

Estimated annual frequency of responses: On occasion.

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.

Background

Under section 897, a foreign transferor of a U.S. real property interest (USRPI) is generally taxed on gain from the disposition of the USRPI as if the taxpayer were engaged in a U.S. trade or business and as if such gain were effectively connected with such trade or business under section 871 or 882 (ECI). As a means to ensure the collection of the tax, the transferee of the USRPI generally

has a withholding tax obligation under section 1445, which is generally 10 percent of the amount realized on the disposition. The withholding agent must report and pay over the tax withheld under section 1445 on Form 8288, “U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests”, by the 20th day after the disposition of the USRPI. The foreign transferor also must report the gain subject to tax under section 897 by filing a U.S. income tax return. Any amounts withheld under section 1445 are credited against the foreign transferor’s U.S. tax liability.

Withholding under section 1445 can be reduced or eliminated pursuant to various nonrecognition provisions (e.g., certain reorganizations under section 368(a)), pursuant to an applicable U.S. income tax treaty, by reason of the tax-exempt status of the foreign transferor, or in situations where the transferor’s maximum tax liability under section 897 is less than the withholding tax. To reduce or eliminate the amount to be withheld under section 1445, either the transferor or transferee (acting as the withholding agent) may request a withholding certificate from the IRS citing the grounds for the reduction or elimination of withholding and including any supporting documentation or other evidence substantiating the request.

A withholding certificate that is issued by the IRS prior to the disposition of the USRPI serves to notify the withholding agent that no withholding or reduced withholding is required. If an application for a withholding certificate is submitted before or on the date of the transfer (so it is considered to be pending with the IRS at the time of transfer), the withholding agent is not required to file the withholding tax return and pay over the withholding tax until 20 days after the date the IRS mails the withholding certificate or notice of denial. See §1.1445-1(c)(2)(A). An application for a withholding certificate

after the date of transfer can be combined with an application for an early claim for refund. See §1.1445-3(g).

Under section 6109(a)(1), Treasury and the IRS have the authority to issue regulations requiring taxpayers to obtain taxpayer identifying numbers (TINs) for placement on returns, statements, or other documents for the purpose of securing the proper identification of taxpayers. Under the section 6109 regulations, which govern the extent to which foreign persons must have TINs, a foreign person is not required to have a TIN for inclusion on a return, statement, or other document, unless the foreign person: (1) has ECI at any time during the taxable year, (2) has a U.S. office, U.S. place of business, or a U.S. fiscal or paying agent during the taxable year, or (3) files a tax return, an amended return, or a refund claim, excluding information returns, statements, or other documents. See §301.6109-1(b)(2).

Explanation of Provisions

The sections 897 and 1445 regulations do not require foreign transferors of USRPIs to provide TINs on withholding tax returns, applications for withholding certificates, and other notices and elections unless the foreign transferor otherwise has previously obtained a TIN. The IRS proposes to amend regulations under sections 897 and 1445 (each discussed in greater detail below) to require foreign transferors to include TINs on such documents so that the IRS can better identify the foreign taxpayer and more easily match the applications, withholding tax returns, notices, and elections with the transferor's tax return for compliance purposes. For example, the use of the foreign transferor's TIN to match the withholding tax return with the foreign transferor's income tax return will facilitate verification of the amount of withholding tax that the foreign taxpayer may credit on its return. The use

of the foreign transferor's TIN also will facilitate verification that the foreign transferor files a U.S. tax return reporting the transaction (which could be matched against a withholding tax return and any application for a withholding certificate that has been filed).

In most cases, the requirement of including a TIN under the proposed regulations will not impose a new obligation on the foreign person. Such foreign person typically will be required to file a tax return for the year in which the property was sold, which requires the foreign person to obtain a TIN at that time. Accordingly, the proposed regulations simply would accelerate the time by which the foreign person is required to obtain a TIN. The IRS is considering ways to facilitate obtaining TINs in connection with transactions subject to section 897 and 1445. For example, the IRS is considering approaches for combining an application for a reduced withholding certificate under §1.1445-3 with an application for a TIN.

1. Section 6109 Regulations

Under section 6109, every person who makes a return, statement, or other document is required to furnish its TIN as required by regulation. Under the section 6109 regulations, a foreign person generally is required to have a TIN if (1) the foreign person has ECI at any time during the taxable year; (2) the foreign person has a U.S. office or place of business or a U.S. fiscal or paying agent during the taxable year; (3) the foreign person files a tax return, amended return, or a refund claim (excluding information returns, statements, or documents). §301.6109-1(b)(2). A person is required to furnish the TIN of another person (including a foreign person) when filing a return, statement, or other document which requires the TIN of the other person, and the other person is required to have a TIN under the section 6109 regulations. If the person does not know the TIN of the other person, the

first person must request it, and if this request is denied, then the first person must file an affidavit with the filing so stating. See §301.6109-1(c).

The IRS and Treasury propose to amend the section 6109 regulations to include a specific reference to the new provisions requiring TINs for foreign taxpayers under sections 897 and 1445. The section 6109 regulations would be amended to provide that foreign persons will be required to have TINs for placement on any return, statement, or other document required by the regulations under section 897 or section 1445. See §301.6109-1(b)(2). The section 6109 regulations also would be amended to provide that another person (e.g., the transferee as withholding agent) making a return, statement, or other document will be required to furnish the TIN of a foreign person as required by the regulations under section 897 or section 1445. See §301.6109-1(c).

2. Section 1445 Regulations

(a) §1.1445-1

In connection with the withholding requirements under section 1445, the transferee generally must report and pay over any tax withheld by the 20th day after the date of the transfer. §1.1445-1(b)(1). Form 8288 “Withholding Tax Return” and Form 8288-A “Statement of Withholding” are used for this purpose. Form 8288-A serves as a receipt of withholding tax reported and paid over and is stamped by the IRS upon receipt and mailed to the transferor. The transferor must attach the Form 8288-A to its U.S. income tax return to verify the amount of withholding tax creditable on its return.

Under §1.1445-1(d), Forms 8288 and 8288-A only require the TIN of the transferor and the transferee to the extent the transferor and transferee otherwise have TINs. If the transferee is a U.S. person it will have a TIN, and if the transferee is a foreign person, it must have or obtain a TIN under

the section 6109 regulations when filing a Form 8288 (which is considered to be a tax return). A foreign transferor, however, will not have a TIN for placement on the Forms 8288 and 8288-A, unless it is otherwise required to have one under the section 6109 regulations (e.g., the foreign person otherwise has ECI). The section 1445 regulations will be amended to provide that the transferors and transferees must have TINs for placement on the Forms 8288 and 8288-A.

Finally, the section 1445 regulations provide for various documents (including applications for withholding certificates) to be sent to the Assistant Commissioner (International). Section 1.1445-1(g)(10) provides the address of the Assistant Commissioner (International). Because of the restructuring of the IRS, the Office of the Assistant Commissioner (International) no longer exists, and its duties regarding the administration of the section 1445 regulations are performed, in general, by the Philadelphia Service Center. Section 1.1445-1(g)(10) and other provisions in the section 1445 regulations will be amended to reflect this change.

(b) §1.1445-2

Under §1.1445-2(d)(2), a transferee is not required to withhold under section 1445, if, by reason of a nonrecognition provision of the Internal Revenue Code or a U.S. income tax treaty provision, the transferor is not required to recognize gain or loss with respect to the transfer. The transferor must notify the transferee of the nonrecognition provision or treaty provision, and the transferee must provide a copy of the transferor's notice to the IRS by the 20th day after the date of the transfer. Section 1.1445-9T specifies the information the notice must contain, such as identifying information of the transferor, a description of the transaction, and a brief summary of the law and facts supporting the claim of nonrecognition of gain on the transaction. The notice is required to include a

TIN of the transferor only if the foreign transferor otherwise has a TIN. The notice forwarded by the transferee to the IRS must include a cover letter identifying the transferee. The transferee must include its TIN on the cover letter only if it has one.

The proposed regulations would withdraw section 1.1445-9T and incorporate it into §1.1445-2(d)(2). In addition, the information required for inclusion on the notice would be revised to provide that the transferor must have a TIN for inclusion on the notice of nonrecognition. The regulations also would be amended to provide that the transferee must have a TIN for placement on the cover letter.

Certificates of Non-foreign Status Under §1.1445-2

Under §1.1445-2(b), no withholding is required under section 1445 if the transferor of a U.S. real property interest is not a foreign person. If the transferor provides a certificate of non-foreign status to the transferee of the U.S. real property interest prior to or at the time of the transfer, the transferee is not required to withhold under section 1445(a). The certificate of non-foreign status must certify that the transferor is not a foreign person, must set forth the transferor's name, identifying number and address, and must contain the transferor's signature under penalties of perjury.

The IRS is considering requiring Form W-9 to be used as certificates of non-foreign status under §1.1445-2(b). Form W-9 generally contains the same information as a certificate of non-foreign status and currently is used in the context of section 1441 withholding to determine a taxpayer's non-foreign status. Because Form W-9 is not now required in real estate transactions and because payments with respect to real estate transactions are exempt from backup withholding under §31.3406(g)-2(e) (although Form W-9 can be used to provide the TIN of the seller to the reporting person required to report the transaction on Form 1099 under §1.6045-4(1)), the IRS requests

comments on the use of Form W-9 in real estate transactions to avoid withholding under section 1445.

The IRS believes that the use of Form W-9 could ease compliance with section 1445.

(c) §1.1445-3

Section 1.1445-3 provides procedures for the reduction or elimination of withholding under section 1445 pursuant to a withholding certificate issued by the IRS. A withholding certificate may be issued by the IRS in cases where the transferor is exempt from U.S. tax, the transferor's maximum tax liability under section 897 is less than the withholding tax, or where the transferor or transferee enters into an agreement for the payment of tax with the IRS. A withholding certificate that is applied for prior to or on the date of the transfer notifies the transferee that reduced or no withholding is required. A withholding certificate that is applied for after a transfer has been made may authorize a normal refund or an early refund. Either the transferor or transferee may apply for a withholding certificate.

Section §1.1445-3(b)(2) identifies the information that must be furnished on an application for a withholding certificate. It includes the name and address of the transferee and the transferee's TIN, but only if the transferee has a TIN. It also includes the name and address of all other parties to the transaction (e.g., transferors) and their TINs, but only if they have TINs. The applicant must determine if each party has a TIN, and if none exists for a particular party, the application must so state. The regulations would be amended to provide that the transferee and all other parties (e.g., transferors) must have TINs for placement on an application for a withholding certificate. The regulations would further provide that the application will be denied if the TINs of all the parties are not provided.

(d) §1.1445-5

Under §1.1445-5, special rules are provided concerning withholding required under section 1445(e) on distributions and other transactions involving domestic or foreign corporations, partnerships, trusts, and estates. Paragraph (b)(2) provides that no withholding is required for transfers of a USRPI described in section 1445(e) if no gain or loss is required to be recognized by a foreign person under a nonrecognition provision of the Internal Revenue Code or a provision of a U.S. income tax treaty. The entity or fiduciary otherwise required to withhold must deliver a notice of the nonrecognition transfer to the IRS by the 20th day after the transfer of the USRPI. The entity or fiduciary may obtain a withholding certificate from the IRS to confirm the applicability of a nonrecognition provision, but is not required to do so.

The notice of a nonrecognition transfer delivered to the IRS must contain a description of the transfer and a supporting explanation of the claim of nonrecognition treatment, as well as identifying information of the entity or fiduciary submitting the notice and each foreign person with respect to which withholding would otherwise be required. The TINs of the entity or fiduciary and each foreign person are required to be furnished only if such persons otherwise have TINs. The regulations under §1.1445-5(b)(2)(ii) would be amended to provide that the entity or fiduciary and all foreign persons must have TINs to be furnished on the notice of nonrecognition.

(e) §1.1445-6

Section 1.1445-6 provides procedures for obtaining a withholding certificate for distributions and other transactions involving domestic or foreign corporations, partnerships, trusts, and estates subject to withholding tax under section 1445(e) and §1.1445-5. The procedures for obtaining a withholding certificate are modeled after §1.1445-3, which provides the procedures for obtaining a

withholding certificate under section 1445(a). Hence, the entity or fiduciary (acting as withholding agent) or the foreign taxpayer subject to section 897 can apply for a withholding certificate on the basis that the foreign person is exempt from U.S. tax, the transferor's maximum tax liability under section 897 is less than the withholding tax, or an agreement is entered into by the transferor or transferee for the payment of tax.

Section 1.1445-6(b) identifies the information that must be furnished on an application for a withholding certificate. It includes the name, address of the foreign taxpayer subject to section 897 and the foreign taxpayer's TIN, but only if the taxpayer otherwise has a TIN. The regulations will be amended to require the foreign taxpayer to have a TIN for placement on an application for a withholding certificate.

3. Section 897 Regulations

(a) §1.897-3

Section §1.897-3 provides rules enabling a foreign corporation to make a section 897(i) election to be treated as a domestic corporation for purposes of sections 897 and 1445. A foreign corporation making a section 897(i) election is subject to all of the rules under section 897 and 1445 that apply to domestic corporations. For example, if a foreign corporation that has made the section 897(i) election is a USRPHC, interests in it are USRPIs that are subject to taxation under section 897 and withholding tax under section 1445. A foreign corporation that makes an election under section 897(i) is not treated as a domestic corporation for purposes of any other provision of the Code or regulations, except to the extent that it is required to consent to such treatment as a condition of making the election.

The election under section 897(i) must include the name, address, and place and date of incorporation of the foreign corporation and the foreign corporation's TIN but only if the foreign corporation otherwise has a TIN. The regulations would be amended to require the electing foreign corporation to have a TIN for placement on the election.

(b) §1.897-5T

Section §1.897-5T provides that certain distributions of USRPIs (which otherwise qualify for nonrecognition treatment) are not subject to section 897 if any gain from a subsequent disposition of the USRPIs would be included in gross income of the distributee or transferee receiving the USRPI in the distribution. See, e.g., §1.897-5T(c)(2)(i). An interest will be considered subject to U.S. tax upon its subsequent disposition only if certain reporting requirements are satisfied. See §1.897-5T(d)(1)(i). Under the reporting requirements, the distributor must file an income tax return for the taxable year of the distribution. The person filing the return must attach a document describing the distribution or exchange, including the name and address of the distributee, and its TIN, but only to the extent it has one. See §1.897-5T(d)(1)(iii).

The regulations would be amended to require that the document attached to the return includes the TIN of the distributee. This is necessary to properly identify the foreign distributee which will be subject to section 897 upon a subsequent disposition of the USRPI.

4. Miscellaneous Items

(a) §1445(e)(3)

Section 1445(e)(3) provides that if a domestic corporation which is a U.S. real property

holding corporation (or at any time during the preceding five year period was a U.S. real property holding corporation) distributes property to a foreign shareholder in redemption of stock under section 302 or in liquidation of the corporation, the corporation must withhold 10 percent of the amount distributed to the foreign shareholder. Withholding is not required if the domestic corporation was “purged” of its U.S. real property holding corporation status by disposing of all of its U.S. real property interests within the prior five-year period and recognizing gain (if any) pursuant to section 897(c)(1)(B).

Section 1445(e)(3) was amended by the Small Business Job Protection Act of 1996 (Public Law 104-188, Sec. 1704(c)) to provide that similar rules apply in the case of any distribution to which section 301 applies and which is not made out of earnings and profits of the domestic corporation. Because a section 301 distribution by a domestic corporation to a foreign shareholder is also governed by section 1441 (or 1442 or 1443), the section 1441 regulations provide coordination rules between withholding under sections 1445 and 1441 (or 1442 or 1443) in the case of section 301 distributions to foreign shareholders by a domestic corporation which is a U.S. real property holding corporation or was one at any time within the prior five-year period. See §1.1441-3(c)(4).

In general, §1.1441-3(c)(4) provides that a domestic corporation may elect to withhold on the entire distribution under section 1441 (or 1442 or 1443), and not under section 1445, regardless of whether a portion of the distribution constitutes a return of basis or capital gain. Alternatively, a domestic corporation may elect to withhold under both sections 1445 and 1441 (or 1442 or 1443), in which case the domestic corporation must withhold under section 1441 (or 1442 or 1443) on the portion of the distribution that is estimated to be a dividend under §1.1441-3(c)(2)(ii)(A) and must withhold under section 1445(e)(3) on the remainder of the distribution. A domestic corporation may

withhold a reduced amount on the distribution under section 1445(e)(3) by obtaining a withholding certificate establishing that the amount of capital gain under section 301(c)(3) is less than the withholding tax otherwise due under section 1445(e)(3).

Section 1.1445-5(e) currently provides that if a domestic corporation, the stock of which is a U.S. real property interest, distributes property to a foreign shareholder in a redemption of stock under section 302 or in liquidation of the corporation, the domestic corporation must withhold 10 percent of the fair market value of the property distributed to the foreign shareholder. Section 1.1445-5(e) would be amended to provide that withholding is required in the case of a distribution of property under section 301(c). A cross-reference to §1.1441-3(c)(4), which provides the coordination rules for withholding between sections 1445 and 1441 (or 1442 or 1443), is provided.

(b) Section 121 exclusion

Prior to the Taxpayer Relief Act of 1997 (Public Law 105-34; 111 Stat. 788) (TRA 97), section 121 provided a one-time exclusion from gross income up to \$125,000 for certain gains from the sale of a principal residence by a taxpayer that was 55 years or older. The amendment of section 121 under TRA 97 expanded the exclusion to all taxpayers (not just those 55 years of age and older) and increased the amount of the exclusion to \$250,000 (or \$500,000, in the case of a husband and wife filing a joint return). Section 121(e) denies the exclusion to nonresident alien taxpayers who expatriated from the United States and are subject to the provisions of section 877(a).

For section 121 to apply, the taxpayer must have owned and used the property as a personal residence for periods aggregating 2 years or more during the 5-year period ending on the date of the sale. Section 121(a). An alien individual who owns and has used a U.S. real property interest as a

personal residence during the 5-year period prior to the date of sale may nevertheless be a nonresident alien at the time of sale and subject to sections 897 and 1445. In addition, certain alien individuals (for example, full-time diplomats or employees of international organizations), who may own and use a U.S. real property interest as a personal residence at the time of sale, are treated as nonresident alien individuals for tax purposes under section 7701(b).

In connection with the amendments to section 121, section 1034 was repealed. Section 1034 had provided for nonrecognition of gain upon the sale of a personal residence provided that another personal residence of greater value was purchased within a specified period of time. Prior to the repeal of section 1034, withholding agents could rely on a notice of nonrecognition under §1.1445-2(b)(2) on certain section 1034 exchanges because section 1034 exchanges were treated as nonrecognition exchanges for purposes of sections 897 and 1445. See §1.897-6T(a)(5). Section 121 is not treated as a nonrecognition exchange for purposes of sections 897 and 1445. See §1.897-6T(a)(2).

Therefore, withholding agents cannot rely on a notice of nonrecognition under §1.1445-2(b)(2) with respect to the section 121 exclusion, and dispositions of personal residences entitled to the section 121 exclusion are not entitled to a reduction in withholding absent a withholding certificate. Accordingly, the withholding certificate provisions of §1.1445-3(c) are proposed to be amended to provide that a claimed adjustment to the maximum tax liability on the disposition of a U.S. real property interest will include the section 121 exclusion if the claim includes information establishing that the transferor is entitled to the benefits of section 121. Because section 1034 has been repealed, the following regulatory provisions concerning section 1034 will be withdrawn effective on the date of its repeal:

§1.897-6T(a)(5), §1.897-6T(a)(7), Examples 2 and 3, and §1.1445-9T(b)(6).

(c) Section 1031 like-kind exchanges

Section 1031(a) provides for the nonrecognition of gain or loss on the exchange of like-kind property which is held for productive use in a trade or business or held for investment. Section 1031(a)(3) provides for the exchange of like-kind property in deferred exchanges, where the taxpayer has 45 days after it relinquishes the property to the transferee to identify replacement property and the transferee has until the earlier of 180 days or the due date of the tax return for the year of transfer to deliver such property to the transferor. In cases where there is a simultaneous exchange of like-kind U.S. real property interests, the foreign transferor can provide a notice of recognition under §1.1445-2(d)(2) to the transferee, and the transferee can rely on such notice because the like-kind exchange will be fully completed on the day of the exchange.

In the case of a deferred like-kind exchange of U.S. real property interests, the issue has been raised whether the transferee can rely on a notice of nonrecognition under §1.1445-2(d)(2) when the exchange is not completed (because of the 45 day and 180 day rule) and the determination of nonrecognition is not known by the 20th day after receipt of the relinquished property by the transferee (when it has the obligation to pay withholding tax and file a withholding tax return, Form 8288). It has been the view of the IRS and Treasury that the transferee cannot rely on a notice of nonrecognition in the case of a deferred like-kind exchange, because the transferee cannot be assured that the exchange will qualify for nonrecognition treatment under section 1031. Although §1.1445-2(d)(2) does not apply to section 1031 transactions, taxpayers have requested withholding certificates under §1.1445-3 in the case of deferred like-kind exchanges. This practice will be incorporated in the regulations by amending §1.1445-3(c) to provide that taxpayers may obtain withholding certificates in the case of deferred like-

kind exchanges under section 1031(a)(3) (see also the safe-harbor for reverse like-kind exchanges under Rev. Proc. 2000-37, 2000-40 I.R.B. 308).

(d) Transfers by an entity treated as a disregarded entity for U.S. tax purposes

Under §1.1445-2(a), a transferee generally has the duty to withhold under section 1445(a) if the transferor is a foreign person and the transferee is acquiring a U.S. real property interest. A transferee generally is not required to withhold under section 1445(a) if the transferee receives a certificate of non-foreign status from the transferor without actual knowledge (or notice from an agent of the transferor or transferee) that the certificate is false. §1.1445-2(b)(2). While the transferee is not required to request a certificate of non-foreign status and may rely on other means to determine the non-foreign status of the transferor, the transferee will be subject to the liability imposed under section 1445 if the transferor is in fact a foreign person and the transferor has not received a certificate of non-foreign status. §1.1445-2(b)(1). Thus, the transferee may demand a certificate of non-foreign status and is entitled to withhold under section 1445 if a certificate of non-foreign status is not provided. *Id.*

Taxpayers have inquired about the operation of sections 897 and 1445 where the legal entity transferring a U.S. real property interest is disregarded as an entity separate from its owner for U.S. tax purposes, for example, under §301.7701-3 (disregarded entity). If the transferor is a disregarded entity, the owner (and not the entity) is treated as the transferor of property for U.S. tax purposes, including sections 897 and 1445. See, e.g., §301.7701-3(a). Accordingly, if a disregarded entity disposes of a U.S. real property interest and its owner is a foreign person, the foreign person is treated as the transferor of the property and is subject to tax under sections 897 and 1445. If a disregarded

entity disposes of a U.S. real property interest and its owner is a U.S. person, then the U.S. person is the transferor of the property and may provide a certificate of non-foreign status.

In order to clarify the treatment of disregarded entities, the regulations are amended to provide that a disregarded entity may not provide a certificate of non-foreign status because the disregarded entity is not the transferor. The sample certifications which an entity may provide to the transferee with respect to its non-foreign status (as provided in §1.1445-2(b)(2)) are amended to include a certification that the entity is not a disregarded entity for U.S. tax purposes.

Proposed Effective Date

These regulations are proposed to apply to transactions occurring 30 days or more after the date final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on U.S. small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for November 13, 2002, beginning at 10:00 am, in room 6718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit timely written comments and an outline of the topics to be discussed and the time to be devoted to each topic (preferably a signed original and eight (8) copies) by October 23, 2002.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Robert W. Lorence, Jr., of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting, and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, 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 for part 1 continues to read in part as follows:

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

Par. 2. In §1.897-1, paragraph (p), the first sentence is amended by adding the language “or the identification number assigned by the Internal Revenue Service (see §301.6109-1 of this chapter)” immediately after the language “United States social security number”.

Par. 3. Section 1.897-2 is amended as follows:

For each of the paragraphs listed in the first column, remove the language in the second column and add in its place the language in the third column:

Paragraphs	Remove	Add
(g)(1)(i)(B)	Director, Foreign Operations District (“Director”)	Commissioner, Small Business/Self Employed Division (SB/SE)
(g)(1)(i), fourth sentence of concluding text immediately following paragraph (g)(1)(i)(B)	Director	Commissioner

(g)(1)(iii) heading	Director	Commissioner
(g)(1)(iii)(A), first, fourth, and last sentences	Director	Commissioner
(g)(1)(iii)(A), third sentence	Director, Foreign Operations District; 1325 K St. N.W.; Washington, D.C. 20225	Commissioner, Small Business/Self Employed Division (SB/SE); S C3-413 NCFB, 500 Ellin Road, Lanham, MD 20706
(g)(1)(iii)(B) heading	Director's	Commissioner's
(g)(1)(iii)(B) introductory text	Director	Commissioner
(g)(1)(iii)(B) concluding text immediately following (g)(1)(iii)(B)(2)	Director	Commissioner
(g)(1)(iii)(C) both places it appears	Director	Commissioner
(g)(1)(iii)(D) heading	Director	Commissioner
(g)(1)(iii)(D)	Director	Commissioner
(g)(2)(i)(B)	Director	Commissioner
(g)(2)(iii) heading	Director	Commissioner
(g)(2)(iii)(A), first, fourth, and fifth sentence (both places it appears).	Director	Commissioner
(g)(2)(iii)(A), third sentence	Director, Foreign Operations District; 1325 K St. N.W.; Washington, D.C. 20225	Commissioner, Small Business/Self Employed Division (SB/SE); S C3-413 NCFB, 500 Ellin Road, Lanham, MD 20706
(g)(2)(iii)(B) heading	Director's	Commissioner's
(g)(2)(iii)(B) introductory text	Director	Commissioner

(g)(2)(iii)(B) concluding text immediately following (g)(2)(iii)(B)(2)	Director	Commissioner
(g)(2)(iii)(C), first and second sentences	Director	Commissioner
(g)(2)(iii)(D) heading	Director	Commissioner
(g)(2)(iii)(D)	Director	Commissioner
(g)(2)(iv), fourth sentence	Director	Commissioner
(h)(2)(v), third sentence	Assistant Commissioner (International), Director, Office of Compliance, OP:I:C:E:666, 950 L'Enfant Plaza South, SW, COMSAT Building, Washington, D.C. 20024	Director, Philadelphia Service Center, P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586
(h)(4)(ii), first sentence	Assistant Commissioner (International), Director, Office of Compliance, OP:I:C:E:666, 950 L'Enfant Plaza South, SW, COMSAT Building, Washington, D.C. 20024	Director, Philadelphia Service Center, P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586

Par. 4. Section 1.897-3 is amended as follows:

1. For each of the paragraphs listed in the first column, remove the language in the second column and add in its place the language in the third column:

Paragraphs	Remove	Add
(c), introductory text	Director of the Foreign Operations District, 1325 K St., N.W., Washington, D.C. 20225	Director, Philadelphia Service Center, P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586
(c)(1), introductory text, last sentence	which must set forth	which must contain all the following information

(d)(1), fourth sentence	Foreign Operations District	Philadelphia Service Center
(d)(2)(i), penultimate sentence	Director, Foreign Operations District	U.S. Treasury
(f)(1), second sentence	Director, Foreign Operations District, 1325 K St., N.W., Washington, D.C. 20225	Director, Philadelphia Service Center, P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586
(f)(1), fifth sentence	Foreign Operations District	Philadelphia Service Center
(g)(1), second sentence	Director of the Foreign Operations District	Director, Philadelphia Service Center

2. In paragraph (c)(1)(i), remove the parenthetical “(if any)” after the words “identifying number”.

Par. 5. Section 1.897-5 is added to read as follows:

§1.897-5 Corporate Distributions.

(a) through (d)(1)(iii)(E) [Reserved]. For further guidance, see §1.897-5T(a) through (d)(1)(iii)(E).

(d)(1)(iii)(F) Identification by name and address of the distributee or transferee, including the distributee’s or transferee’s taxpayer identification number;

(d)(1)(iii)(G) through (d)(4) [Reserved]. For further guidance, see §1.897-5T(d)(1)(iii)(G) through (d)(4).

(e) Effective date. This section is applicable to transfers and distributions after 30 days after publication of final regulations in the **Federal Register**.

Par.6. In §1.897-5T, paragraph (d)(1)(iii)(F) is revised to read as follows:

§1.897-5T Corporate distributions (temporary).

* * * * *

(d) * * * (1) * * *

(iii) * * *

(F) [Reserved]. For further guidance, see §1.897-5(d)(1)(iii)(F).

* * * * *

§1.897-6T [Amended]

Par. 7. Section 1.897-6T is amended as follows:

1. In paragraph (a)(2), second sentence, the language “, 1034” is removed.
2. Paragraph (a)(5) is removed and reserved.
3. Paragraph (a)(7), Example 2 and Example 3 are removed and reserved.

Par. 8. Section 1.1445-1 is amended as follows:

1. In paragraph (c)(1), second sentence, remove the language “filed with the Internal Revenue Service Center, Philadelphia, PA 19255” and add in its place the language “filed at the location as provided in the instructions to Forms 8288 and 8288-A”.

2. In paragraph (c)(2)(i)(B), second sentence, remove the phrase “,if any,” after the words “taxpayer identification number”.

3. In paragraphs (d)(1)(i) and (d)(1)(ii), remove the parenthetical “(if any)” after the words “identifying number”.

4. In paragraphs (d)(2)(i), (d)(2)(iv)(B), and (d)(2)(vi)(B), remove the parenthetical “(if any)” after the words “identifying number”.

5. Paragraphs (g)(9) and (g)(10) are revised.

The revisions read as follows:

§1.1445-1 Withholding on dispositions of U.S. real property interests by foreign persons: In general.

* * * * *

(g) * * *

(9) Identifying number. Pursuant to §1.897-1(p), an individual's identifying number is the social security number or the identification number assigned by the Internal Revenue Service (see §301.6109-1 of this chapter). The identifying number of any other person is its United States employer identification number.

(10) Address of the Director, Philadelphia Service Center. Any written communication directed to the Director, Philadelphia Service Center is to be addressed as follows: P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586.

Par. 9. Section 1.1445-2 is amended as follows:

1. Paragraph (b)(2)(iii) is redesignated as paragraph (b)(2)(iv), and new paragraph (b)(2)(iii) is added.

2. Newly designated paragraph (b)(2)(iv)(B) is revised.

3. In paragraph (d)(2)(i)(B), the language "Assistant Commissioner (International)" is removed, and "Director, Philadelphia Service Center" is added in its place, and the parenthetical "(if any)," is removed after the words "identifying number".

4. Paragraphs (d)(2)(iii) and (d)(2)(iv) are added immediately following the concluding text following paragraph (d)(2)(ii)(B).

5. In paragraphs (d)(3)(iii)(A)(2) and (d)(3)(iii)(A)(3), the parenthetical “(if any)” is removed after the words “identifying number”.

The revision and additions read as follows:

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

* * * * *

(b) * * *

(2) * * *

(iii) Disregarded entities. A disregarded entity may not certify that it is the transferor of a U.S. real property interest, as the disregarded entity is not the transferor for U.S. tax purposes, including sections 897 and 1445. Rather, the owner of the disregarded entity is treated as the transferor of property and must provide a certificate of non-foreign status to avoid withholding under section 1445. A disregarded entity for these purposes means an entity that is disregarded as an entity separate from its owner under §301.7701-3 of this chapter, a qualified REIT subsidiary as defined in section 856(i), or a qualified subchapter S subsidiary under section 1361(b)(3)(B). Any domestic entity must include in its certification of non-foreign status with respect to the transfer a certification that it is not a disregarded entity.

(iv) * * *

(B) Entity transferor.

“Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. For U.S. tax purposes (including section 1445), the owner of a disregarded entity (which has legal title to a U.S. real property interest under local law) will be the transferor of the property and not the disregarded entity. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by [name of transferor], the undersigned hereby certifies the following on behalf of [name of the transferor]:

1. [Name of transferor] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);
2. [Name of transferor] is not a disregarded entity as defined in §1.1445-2(b)(2)(iii);
3. [Name of transferor]'s U.S. employer identification number is _____; and
4. [Name of transferor]'s office address is -----
-----.

[Name of transferor] understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of [name of transferor].

[Signature(s) and date]

[Title(s)]"

* * * * *

(d) * * *

(2) * * *

(iii) Contents of the notice. No particular form is required for a transferor's notice to a transferee that the transferor is not required to recognize gain or loss with respect to a transfer. The notice must be verified as true and signed under penalties of perjury by the transferor, by a responsible officer in the case of a corporation, by a general partner in the case of a partnership, and by a trustee or equivalent fiduciary in the case of a trust or estate. The following information must be set forth in paragraphs labeled to correspond with the designation set forth as follows—

(A) A statement that the document submitted constitutes a notice of a nonrecognition transaction or a treaty provision pursuant to the requirements of §1.1445-2(d)(2);

(B) The name, identifying number, and home address (in the case of an individual) or office address (in the case of an entity) of the transferor submitting the notice;

(C) A statement that the transferor is not required to recognize any gain or loss with respect to the transfer;

(D) A brief description of the transfer; and

(E) A brief summary of the law and facts supporting the claim that recognition of gain or loss is not required with respect to the transfer.

(iv) No notice allowed. The provisions of this paragraph (d)(2) do not apply to exclusions from income under section 121 and to non-simultaneous like-kind exchanges under section 1031 where the transferee cannot determine that the exchange has been completed and all the conditions for nonrecognition have been satisfied at the time it is otherwise required to pay the section 1445 withholding tax and file the withholding tax return (Form 8288, “U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests”). In these cases, the transferee is excused from withholding only upon the timely application for and receipt of a withholding certificate under §1.1445-3 (see §1.1445-3(b)(5) and (6) for specific rules applicable to transactions under sections 121 and 1031).

* * * * *

Par.10. Section 1.1445-3 is amended as follows:

1. For each of the paragraphs listed in the column below, remove the language “Assistant Commissioner (International)”, and add “Director, Philadelphia Service Center” in its place.

Paragraphs

(b)(1), first sentence

(f)(1), first sentence

(f)(2)(iii), heading

(f)(2)(iii), first sentence

(g), third sentence, introductory text

2. In paragraph (b)(1), last sentence, remove the language “of this section” and add “, and to the extent applicable, paragraph (b)(5) or (6) of this section” in its place.

3. Paragraph (b)(2) is revised.

4. Paragraphs (b)(5) and (b)(6) are added.

5. In paragraphs (f)(3)(i) and (g)(1), remove the parenthetical “(if any)” after the words “identifying number”.

The revision and additions read as follows:

§1.1445-3 Adjustments to amount required to be withheld pursuant to withholding certificate.

* * * * *

(b) * * *

(2) Parties to the transaction. The application must set forth the name, address, and identifying number of the person submitting the application (specifying whether that person is the transferee or transferor), and the name, address, and identifying number of other parties to the transaction (specifying whether each such party is a transferee or transferor). The Service will deny the application if complete information, including the identifying numbers of all the parties, is not provided. Thus, for example, the applicant should determine if an identifying number exists for each party, and, if none exists for a

particular party, the applicant should notify the particular party of the obligation to get an identifying number before the application can be submitted to the Service. The address provided in the case of an individual must be that individual's home address, and the address provided in the case of an entity must be that entity's office address. A mailing address may be provided in addition to, but not in lieu of, a home address or office address.

* * * * *

(5) Special rule for exclusions from income under section 121. A withholding certificate may be sought on the basis of a section 121 exclusion as a reduction in the amount of tax due under paragraph (c)(2)(v) of this section. The application must include information establishing that the transferor, who is a nonresident alien individual at the time of the sale (and is therefore subject to sections 897 and 1445) is entitled to claim the benefits of section 121. For example, a claim for reduced withholding as a result of section 121 must include information that the transferor occupied the U.S. real property interest as his or her personal residence for the required period of time.

(6) Special rule for like-kind exchanges under Section 1031. A withholding certificate may be requested with respect to a like-kind exchange under section 1031 as a transaction subject to a nonrecognition provision under paragraph (c)(2)(ii) of this section. The application must include information substantiating the requirements of section 1031. The IRS may require additional information during the course of the application process to determine that the requirements of section 1031 are satisfied. In the case of a deferred like-kind exchange, the transferee is excused from withholding only if the transferee or transferor submits an application for a withholding certificate prior to or on the date of transfer, in which case the withholding tax will be placed in escrow pursuant to

procedures established by the IRS and ultimately paid to the IRS if the withholding certificate is denied or released for the benefit of the taxpayer if the withholding certificate is granted. See §1.1445-1(c)(2) for rules concerning delayed reporting and payment where an application for a withholding certificate has been submitted to the IRS prior to or on the date of transfer.

* * * * *

§1.1445-4 [Amended]

Par.11. In §1.1445-4, paragraph (c)(2), second sentence, is amended by removing the language “Assistant Commissioner (International)” and adding “Director, Philadelphia Service Center” in its place.

Par.12. Section 1.1445-5 is amended as follows:

1. In paragraph (b)(2)(ii), first sentence, remove the language “Assistant Commissioner (International)” and add “Director, Philadelphia Service Center” in its place.
2. In paragraphs (b)(2)(ii)(B) and (b)(2)(ii)(C), remove the parenthetical “(if any)” after the words “identifying number”.
3. Paragraph (b)(8)(iii) is revised.
4. In paragraph (c)(3)(v), first and fifth sentences, remove the language “Assistant Commissioner (International)” and add “Director, Philadelphia Service Center” in its place.
5. Paragraph (e)(1)(ii) is revised.
6. Paragraph (e)(2) is redesignated as paragraph (e)(3), and new paragraph (e)(2) is added,

7. In newly designated paragraph (e)(3)(iii)(B), remove the language “§1.1445-5(e)(2)(iii)(B)” and add “§1.1445-5(e)(3)(iii)(B)” in its place; and remove the language “paragraph (e)(2)(iii)(B)” and add “paragraph (e)(3)(iii)(B)” in its place.

The revisions and additions read as follows:

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

* * * * *

(b) * * *

(8) * * *

(iii) Distributions by certain domestic corporations to foreign shareholders. The provisions of section 1445(e)(3) and paragraph (e)(1) of this section, requiring withholding upon distributions in redemption of stock under section 302(a) or liquidating distributions under Part II of subchapter C of the Internal Revenue Code by U.S. real property holding corporations to foreign shareholders, shall apply to distributions made on or after January 1, 1985. The provisions of section 1445(e)(3) and paragraph (e)(1) of this section requiring withholding on distributions under section 301 by U.S. real property holding corporations to foreign shareholders shall apply to distributions made after August 20, 1996. The provisions of paragraph (e) of this section providing for the coordination of withholding between sections 1445 and 1441 (or 1442 or 1443) for distributions under section 301 by U.S. real property holding corporations to foreign shareholders apply to distributions after December 31, 2000 (see §1.1441-3(c)(4) and (h)).

* * * * *

(e) * * * (1) * * *

(ii) There is a distribution of property in redemption of stock treated as an exchange under section 302(a), in liquidation of the corporation pursuant to the provisions of Part II of subchapter C of the Internal Revenue Code (sections 331 through section 341), or with respect to stock under section 301 that is not made out of earnings and profits of the corporation.

(2) Coordination rules for Section 301 distributions. If a domestic corporation makes a distribution of property under section 301 to a foreign person whose interest in such corporation constitutes a U.S. real property interest under the provisions of section 897 and the regulations thereunder, then see §1.1441-3(c)(4) for rules coordinating withholding obligations under sections 1445 and 1441 (or 1442 or 1443)).

* * * * *

Par.13. Section 1.1445-6 is amended as follows:

1. The section heading and paragraph (b)(3) are revised.
2. For each of the paragraphs listed in the column below, remove the language “Assistant Commissioner (International)” and add “Director, Philadelphia Service Center” in its place.

Paragraphs

(f)(1), first sentence

(f)(2)(iii), heading

(f)(2)(iii)

(g), introductory text, second sentence

3. Paragraphs (f)(3)(i) and (g)(1) are amended by removing the parenthetical “(if any)” after the words “identifying number”.

The revision reads as follows:

§1.1445-6 Adjustments pursuant to withholding certificate of amount required to be withheld under section 1445(e).

* * * * *

(b) * * *

(3) Relevant taxpayers. An application for withholding certificate pursuant to this section must include all of the following information: the name, identifying number, and home address (in the case of an individual) or office address (in the case of an entity) of each relevant taxpayer with respect to which adjusted withholding is sought.

* * * * *

§1.1445-9T [Removed]

Par.14. Section 1.1445-9T is removed.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 15. The authority for part 301 continues to read in part as follows:

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

Par. 16. Section 301.6109-1 is amended as follows:

1. In paragraph (b)(2)(v), remove the word “and”.

2. In paragraph (b)(2)(vi), remove the period at the end of the paragraph and add “; and” in its place.

3. Paragraph (b)(2)(vii) is added.

4. In paragraph (c), first and third sentences, remove the language “or (vi) of this section” and add “(vi), or (vii) of this section” in its place.

The addition reads as follows:

§301.6109-1 Identifying numbers.

* * * * *

(b) * * *

(2) * * *

(vii) A foreign person whose taxpayer identifying number is required to be furnished on any return, statement, or other document as required by the income tax regulations under section 897 or 1445.

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.