

# Additional Guidance Related to Transfers of Publicly Traded Partnership Interests under Section 1446(f)

Notice 2023-8

## I. PURPOSE

This notice provides additional guidance for brokers to comply with the provisions of the final regulations under section 1446(f) (and certain provisions of the final regulations that apply to section 1446(a)) (final regulations) that relate to withholding on the transfer of an interest in a publicly traded partnership (PTP interest). The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to issue proposed regulations that would amend the final regulations to implement this additional guidance.

## II. BACKGROUND

Sections 864(c)(8) and 1446(f) were added to the Code by the Tax Cuts and Jobs Act, Pub. L. 115-97, on December 22, 2017. Section 864(c)(8) generally provides that gain or loss of a foreign person on the sale or exchange of an interest in a partnership engaged in a U.S. trade or business is treated as effectively connected gain or loss and, therefore, is subject to U.S. tax. Section 1446(f)(1) requires a transferee of an interest in a partnership to withhold 10 percent of the amount realized if any portion of the gain on the disposition would be treated under section 864(c)(8) as effectively connected with the conduct of a trade or business within the United States (unless an exception applies).

On November 30, 2020, the Treasury Department and the IRS published the final regulations (TD 9926) in the Federal Register (85 FR 76910, as corrected at 86 FR 13191), primarily relating to withholding and information reporting under section 1446(f).

The final regulations include withholding requirements under section 1446(f)(1) that generally require a broker that effects a transfer of a PTP interest on behalf of a transferor to withhold on the payment of an amount realized made to the transferor. However, a broker is not required to withhold, or may withhold at a reduced rate, if it can rely on (i) a certification from the transferor that claims an exception or reduction to withholding (generally provided on a valid Form W-8 or W-9) or (ii) a representation made by the publicly traded partnership (PTP) on a qualified notice indicating that the exception under §1.1446(f)-4(b)(3)(ii) applies (ten-percent exception). A broker is also not required to withhold when it makes the payment of an amount realized to a qualified intermediary (QI), or a U.S. branch treated as a U.S. person, that assumes primary withholding responsibility under section 1446(f)(1).

The provisions of the final regulations that relate to a broker's obligation to withhold on the transfer of a PTP interest apply to transfers that occur on or after January 1, 2022. However, on September 7, 2021, the Treasury Department and the IRS released Notice 2021-51, 2021-36 I.R.B. 361, deferring the applicability date of these provisions to transfers that occur on or after January 1, 2023. On May 16, 2022, the Treasury Department and the IRS released Notice 2022-23, 2022-20 I.R.B. 1062, proposing changes to the qualified intermediary agreement (QI agreement), including rules that will apply to QIs required to withhold on the transfer of a PTP interest under section 1446(f) starting January 1, 2023. Subsequently, the Treasury Department and the IRS released Revenue Procedure 2022-43, 2022-52 I.R.B. 570, which provides the final QI agreement effective as of January 1, 2023.

### III. SALES OF INTERESTS IN FOREIGN PUBLICLY TRADED PARTNERSHIPS

Following the publication of the final regulations, taxpayers and other stakeholders raised concerns regarding the difficulty of brokers to determine, for withholding under section 1446(f), whether entities organized outside of the United States are classified as PTPs for U.S. tax purposes. Because the final regulations generally require withholding on the sale of a PTP interest unless the PTP represents on a qualified notice that the ten-percent exception applies, or the transferor provides a certification claiming another exception to withholding under §1.1446(f)-4(b)), a broker that is unable to determine the classification of an entity may be required to withhold on each sale of an interest in such entity. The view of these stakeholders was that it is impractical to identify a complete list of entities organized outside of the United States that are classified as partnerships for U.S. tax purposes and that are traded on a foreign established securities market or foreign secondary market. These stakeholders requested that a broker be able to presume that an entity organized outside of the United States is not a PTP unless it has actual knowledge to the contrary, and that a PTP organized outside of the United States is presumed to not have effectively connected income unless it represents otherwise on a qualified notice.

The Treasury Department and the IRS have determined that the burden on brokers to determine whether a foreign entity that trades on a foreign market is a PTP for U.S. tax purposes would likely be disproportionate to the amount of gain subject to section 864(c)(8) on transfers of interests in such entities. The Treasury Department and the IRS intend to issue proposed regulations that would amend the final regulations to provide withholding relief to brokers on the sale of an interest in an entity that is organized outside of the United States and that trades solely on a foreign established

securities market or foreign secondary market (foreign-traded entity). This proposed amendment would allow a broker that effects a sale of an interest in a foreign-traded entity to presume that the entity is not a PTP for U.S. tax purposes unless the broker has actual knowledge otherwise.

However, the Treasury Department and the IRS have determined that it is inappropriate to allow a broker that knows that a foreign-traded entity is a PTP for U.S. tax purposes to presume that the PTP does not have effectively connected income, and therefore do not intend to include such a presumption in the proposed regulations. Thus, in such a case, a broker would be required to withhold under section 1446(f) on the sale of an interest in the PTP unless the PTP has indicated on a qualified notice that the ten-percent exception applies or the broker receives a certification from the transferor claiming another exception or reduction to withholding.

#### IV. RELIANCE ON LATE CERTIFICATIONS

Under the final regulations, a broker may rely on a certification from a transferor that claims an exception or reduction to withholding. However, a broker may not rely on a certification if it is received earlier than 30 days before a transfer (unless an allowance applies in the final regulations to allow a broker to rely on documentation that it already possesses) or at any time after a transfer. Taxpayers and other stakeholders have requested an allowance for brokers to rely on late certifications that claim an exception or reduction to withholding on the transfer of a PTP interest. These stakeholders noted that for other types of payments, brokers that are withholding agents are allowed to rely on late documentation for purposes of reducing withholding (for example, under the regulations under sections 1441 and 1471), and thus requested that the final regulations

be amended to provide that those same provisions apply for purposes of applying section 1446(f) on the transfer of a PTP interest.

The Treasury Department and the IRS have determined that it is appropriate to allow brokers to rely on late certifications for purposes of withholding under section 1446(f) in order to reduce overwithholding and claims for refund and to better coordinate with the documentation rules under sections 1441 and 1471. The Treasury Department and the IRS intend to issue proposed regulations that would amend the final regulations to allow brokers to rely on late certifications when certain requirements are met. A broker would be permitted to rely on a valid certification that it receives within 30 days of the date of payment. If the certification is received more than 30 days after the date of payment but within one year of the date of the payment, a broker would be permitted to rely on the certification if it contains a signed affidavit stating that the information and representations on the certification were accurate as of the time of payment. If a certification is received more than one year after the date of payment, the broker would be permitted to rely on the certification if it contains the signed affidavit and, in the case of a claim for treaty benefits under §1.1446(f)-4(b)(5), documentary evidence described in §1.1441-6(c)(4)(i) or (ii) to support the treaty claim made on the certificate.

The allowance for late certifications would apply to any certification used to claim an exception or reduction to withholding on the transfer of a PTP interest under §1.1446(f)-4. For example, a broker may rely on a late Form W-8IMY from a foreign partnership to claim a modified amount realized pursuant to §1.1446(f)-4(c)(2)(ii) if the form meets the requirements for late certifications. A broker may also rely on any underlying certifications provided by the foreign partnership on behalf of its partners to

establish a claim of non-foreign status or a claim of treaty benefits to the extent that those certifications separately meet the requirements for late certifications.

The Treasury Department and the IRS also intend to issue proposed regulations that would amend the final regulations that relate to withholding under section 1446(a) to provide the same allowance for late certifications that are received by nominees treated as withholding agents under §1.1446-4 on PTP distributions subject to section 1446(a).

## V. SHORT SALES OF PTP INTERESTS

The Treasury Department and the IRS have received requests for clarity on the application of section 1446(f) to transactions described by requestors as short sales of PTP interests (PTP shorts). In a PTP short, a taxpayer obtains a PTP interest from a third party (original PTP interest owner), subject to an obligation to deliver an identical PTP interest to the original PTP interest owner in the future. The taxpayer immediately sells the PTP interest to an unrelated market participant for cash (sale to market). To satisfy its obligation to deliver an identical PTP interest to the original PTP interest owner, the taxpayer may buy a replacement PTP interest and deliver it to the original PTP interest owner. As an economic matter, the taxpayer will profit from the transaction if the value of the PTP interest has declined during the term of the PTP short. Alternatively, the taxpayer may instead deliver a PTP interest that it holds at that time to the original PTP interest owner. In the latter case, the taxpayer may have owned the PTP interest when it enters into the PTP short, or it may have acquired the PTP interest during the term of the PTP short. Taxpayers typically carry out these transactions

through a broker, who has the legal relationship with both the taxpayer and the original PTP interest owner.

Taxpayers and other stakeholders have requested that guidance be issued to the effect that no withholding applies to PTP shorts. In response, the Treasury Department and the IRS intend to issue proposed regulations that would amend the final regulations to provide an exception to withholding under section 1446(f) on a PTP short (PTP short exception). The PTP short exception would apply to a PTP short effected by a broker on behalf of a taxpayer that obtained the PTP interest from another party (including the broker or a customer of the broker) for sale to market. No withholding would be required on the sale to market of the PTP interest or on the later transfer by the taxpayer of an identical PTP interest to the original PTP interest owner. The proposed regulations would not address the treatment of the PTP short to the original PTP interest owner.

The Treasury Department and the IRS have determined that the PTP short exception should not apply in certain situations in which there may be gain arising from the PTP short that is subject to section 864(c)(8). Therefore, the PTP short exception would not apply if on the date that the sale to market is entered on the books of the broker (i) the taxpayer holds substantially identical property (within the meaning of section 1233) in an account with the broker or (ii) the broker has actual knowledge that the taxpayer holds substantially identical property in an account with another broker. In such cases, the taxpayer may realize gain from delivery of such substantially identical property to the original PTP interest owner or from a constructive sale under section 1259. Because any such gain would be attributable, in whole or in part, to the

taxpayer's ownership in the substantially identical PTP interest, it is inappropriate to provide relief from withholding under section 1446(f). This limitation to the PTP short exception would apply regardless of whether the taxpayer delivers to the original PTP interest owner the substantially identical PTP interest held on the date of the sale to market or a PTP interest acquired during the term of the PTP short.

The proposed regulations would also clarify existing guidance to brokers regarding withholding and reporting associated with PTP shorts that do not qualify for the PTP short exception. The date of transfer for purposes of withholding and reporting on a PTP short under §1.1446(f)-4 would be the date on which the sale to market of the PTP interest is entered on the books of the broker, but the broker would not be required to satisfy its withholding liability until payment is made. This would allow a broker to withhold from the proceeds of the sale to market when it knows that the PTP short exception does not apply because it holds (or knows that another broker holds) substantially identical property for the taxpayer at the time of such sale. A broker would be required to deposit any withheld amounts with the IRS in accordance with §1.6302-2.

## VI. APPLICABILITY DATE AND TAXPAYER RELIANCE

The proposed regulations would apply to transfers or distributions made on or after January 1, 2023. Before the promulgation of the proposed regulations, a broker required to withhold under section 1446(a) or 1446(f) may rely on the provisions of this Notice regarding the proposed regulations described in sections III through V. A QI applying the provisions of the QI agreement (as in effect on January 1, 2023) may also rely on the provisions of this Notice regarding the proposed regulations described in sections III through V.



## VII. DRAFTING INFORMATION

The principal author of this notice is Subin Seth of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Mr. Seth at (202) 317-5003 (not a toll-free call).