

MEMO# 30998

January 2, 2018

IRS Temporarily Suspends New Withholding Rules on Sales of Publicly Traded Partnerships

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January 2, 2018 TO: ICI Members
ICI Global Members

Tax Committee SUBJECTS: Tax RE: IRS Temporarily Suspends New Withholding Rules on Sales of Publicly Traded Partnerships

In [Notice 2018-08](#), the Internal Revenue Service (“IRS”) and the Treasury Department have temporarily suspended the new withholding rules on sales of partnership interests with respect to publicly traded partnerships (“PTPs”). This withholding requirement, in new section 1446(f), was added to the Internal Revenue Code by section 13501 of the recently enacted tax bill (the “Act”).[\[1\]](#)

New Withholding Requirements

The Act added new section 864(c)(8), which provides that a nonresident alien individual or foreign corporation’s gain or loss from the sale, exchange, or other disposition of a partnership interest is effectively connected with the conduct of a US trade or business (“ECI”) to the extent that the person would have had effectively connected gain or loss had the partnership sold all of its assets at fair market value. This rule applies to sales, exchanges, or other dispositions occurring on or after November 27, 2017.

New section 1446(f) generally provides that if any of the gain on a disposition of an interest in a partnership would be treated as ECI under new section 864(c)(8), then the transferee must withhold tax equal to 10 percent of the amount realized on the disposition, unless the transferor furnishes an affidavit to the transferee stating that the transferor is not a foreign person. The Act authorizes the IRS and Treasury Department to issue regulations or other guidance necessary to implement the new withholding provisions on partnership interests.

Temporary Suspension

Notice 2018-08 recognizes the practical problems raised by this new provision with respect to PTPs in the absence of regulatory guidance. Transferees likely will not be able to determine whether the transferor is foreign or domestic or whether any of the gain is ECI because PTPs generally are held in street name by a broker and transferred through a clearinghouse. Further, although the Conference Report indicates that the IRS and

Treasury Department may issue guidance permitting brokers to withhold on behalf of the transferee, the Notice recognizes that brokers will not be able to do so until regulatory guidance is issued and new withholding and reporting systems are developed.

The IRS and Treasury Department thus have determined that withholding under new section 1446(f) should not be required with respect to any disposition of a PTP (within the meaning of section 7704(b)) until regulations or other guidance has been issued. Future guidance will be prospective and will include transition rules to allow sufficient time to prepare systems and processes for compliance. This temporary suspension only applies to interests that are publicly traded and does not apply to non-publicly traded partnership interests.

Request for Comments

The IRS and Treasury Department have requested comments on the guidance to be issued under new section 1446(f). Specifically, they have asked for comments regarding: (i) the application of new section 1446(f) to interests in PTPs, including the role of brokers in collecting the tax; (ii) rules for determining the amount realized taking into account section 752(d); and (iii) procedures for requesting a reduced amount required to be withheld, including how to determine an appropriate reduced amount and whether such procedures should be automatic or require approval by the IRS. They also have requested comments on whether a temporary suspension of new section 1446(f) is needed for interests in non-publicly traded partnerships and what additional guidance, or forms and instructions, are necessary for taxpayers to comply with new sections 846(c)(8) and 1446(f).

Please provide any comments on Notice 2008-08 to the undersigned no later than **Tuesday, February 20, 2018.**

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endnotes

[1] See Institute Memorandum No. 30991, dated December 21, 2017, which can be found at: https://www.ici.org/my_ici/memorandum/memo30991.