INTERNAL REVENUE
BULLETIN

IRS

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2020–51
December 14, 2020

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

ADMINISTRATIVE

REG-123652-18, page 1652.

This notice of proposed rulemaking contains proposed regulations that implement the special enforcement provisions described in section 6241(11) of the centralized partnership audit regime enacted by the BBA in November 2015. The Tax Technical Corrections Act of 2018 (TTCA), which was enacted into law on March 23, 2018 as part of the Consolidated Appropriations Act, 2018, added, among other things, section 6241(11) to the Code. Section 6241(11) provides authority for the Secretary to issue regulations that determine that the centralized partnership audit regime, or portions of it, do not apply to certain items if such items involve special enforcement matters. Section 6241(11) also authorizes the IRS to prescribe regulations adopting special rules related to such items. This notice of proposed rulemaking adds proposed §301.6241-7, provides rules regarding special enforcement matters under section 6241(11). In addition, this notice of proposed rulemaking includes some amendments to some of the final regulations under BBA to conform to the addition of the regulations implementing section 6241(11), to account the addition of section 6232(f) in the TTCA, to implement one of the items in Notice 2019-06, and to make some clarifying amendments to the previously finalized rules.

EMPLOYEE PLANS

NOTICE 2020-85, page 1645.

This notice sets forth the updated mortality improvement rates and static mortality tables that are used for purposes of determining minimum funding requirements under § 430(h)(3) for 2022 and minimum present value under § 417(e)(3) for distributions with annuity starting dates that occur during stability periods beginning in the 2022 calendar year.

EXCISE TAX

NOTICE 2020-84, page 1645.

Sections 4375 and 4376, added to the Code by the Affordable Care Act, impose a fee on issuers of specified health insurance policies and plan sponsors of applicable self-insured health plans to help fund the Patient-Centered Outcomes Research Trust Fund (PCORTF). The fee originally expired on October 1, 2019, but was extended by the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (2019). This notice provides that the adjusted applicable dollar amount that applies for determining the PCORTF fee for policy years and plan years ending on or after October 1, 2020 and before October 1, 2021 is equal to $2.66. This adjusted applicable dollar amount has been determined using the percentage increase in the projected per capita amount of the National Health Expenditures published by HHS in March 2020.

INCOME TAX

T.D. 9926, page 1602.

This document contains final regulations implementing certain sections of the Internal Revenue Code, including sections added to the Internal Revenue Code by the Tax Cuts and Jobs Act, that relate to the withholding of tax and information reporting with respect to certain dispositions of interests in partnerships engaged in the conduct of a trade or business within the United States. The final regulations affect certain foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in such conduct. TD 9926. Published November 30, 2020.

Finding Lists begin on page ii.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

Part I

T.D. 9926

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 1

Withholding of Tax and Information Reporting with Respect to Interests in Partnerships Engaged in a U.S. Trade or Business

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final rule.

SUMMARY: This document contains final regulations that provide guidance related to the withholding of tax and information reporting with respect to certain dispositions of interests in partnerships engaged in a trade or business within the United States. The final regulations affect certain foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in a trade or business within the United States, and persons that acquire those interests. The final regulations also affect partnerships that, directly or indirectly, have foreign persons as partners.

DATES: *Effective date*: These regulations are effective on November 30, 2020.

Applicability dates: For dates of applicability, see §§1.864(c)(8)-2(e), 1.1445-2(e), 1.1445-5(h), 1.1445-8(j), 1.1446-7, 1.1446(f)-1(e), 1.1446(f)-2(f), 1.1446(f)-3(f), 1.1446(f)-4(f), 1.1446(f)-5(d), 1.1461-1(i), 1.1461-2(d), 1.1461-3, 1.1463-1, 1.1464-1(c), 1.6050K-1(h), and 1.6302-2(g).

FOR FURTHER INFORMATION CONTACT: In general, Chadwick Rowland or Ronald M. Gootzeit (202) 317-6937; concerning §1.1446(f)-4, Charles Rioux (202) 317-6933 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 1446(f), which was added to the Internal Revenue Code (the Code) by the Tax Cuts and Jobs Act, Public Law 115-97 (2017) (the Act), provides rules for withholding on the transfer of a partnership interest described in section 864(c)(8). On December 29, 2017, the Department of the Treasury (the Treasury Department) and the IRS released Notice 2018-08, 2018-7 I.R.B. 352, which temporarily suspended the requirement to withhold on amounts realized in connection with the sale, exchange, or disposition of certain interests in a publicly traded partnership that are publicly traded on an established securities market or readily tradable on a secondary market (or the substantial equivalent thereof) (PTP interests). On April 2, 2018, the Treasury Department and the IRS released Notice 2018-29, 2018-16 I.R.B. 495, which provided temporary guidance and announced an intent to issue proposed regulations under section 1446(f) with respect to the sale, exchange, or disposition of certain interests in non-publicly traded partnerships. On May 13, 2019, the Treasury Department and the IRS published proposed regulations (REG-105476-18) primarily under section 1446(f) relating to the withholding of tax and information reporting in the **Federal Register** (84 FR 21198) (the proposed regulations). The proposed regulations implemented section 1446(f) by providing guidance related to the withholding of tax and information reporting with respect to certain dispositions by a foreign person of an interest in a partnership that is engaged in a trade or business within the United States. In general, the proposed regulations provided rules that apply to transfers of interests in non-publicly traded partnerships (non-PTP interests) and transfers of PTP interests.

Section 864(c)(8) was also added to the Code by the Act. On December 27, 2018, the Treasury Department and the IRS published proposed regulations (REG-113604-18) under section 864(c)(8) in the **Federal Register** (83 FR 66647) (the proposed section 864(c)(8) regulations). The proposed section 864(c)(8) regulations provided rules for determining the amount of gain or loss treated as effectively connected with the conduct of a trade or business within the United States (effectively connected gain or effectively connected loss) under section 864(c)(8), including certain rules that coordinate section 864(c)(8) with other relevant sections of the Code. On November 6, 2020, the Treasury Department and the IRS published final regulations (TD 9919) under section 864(c)(8) in the **Federal Register** (85 FR 70958) (the final section 864(c)(8) regulations).

All written comments received in response to the proposed regulations are available at www.regulations.gov or upon request. Additionally, a public hearing was scheduled for August 26, 2019, but it was not held because there were no requests to speak.

Summary of Comments and Explanation of Revisions

I. *Overview*

The final regulations retain the basic approach and structure of the proposed regulations with certain revisions based on comments received. This Summary of Comments and Explanation of Revisions discusses the comments received with respect to the proposed regulations and any revisions made in response to those comments, as well as other revisions made that were not directly in response to those comments. Sections VI.A and VII.C of this Summary of Comments and Explanation of Revisions also describe certain requirements specific to entities acting as qualified intermediaries for section 1446 withholding purposes that are anticipated to be included in a revised qualified intermediary agree-

ment and that are not included in these final regulations.[1]

II. *Reporting Requirements for Foreign Transferors and Partnerships with Foreign Transferors*

Proposed §1.864(c)(8)-2 provided rules that facilitate the transfer of information between a foreign partner and the partnership whose interest is transferred for purposes of determining the transferor's tax liability under section 864(c)(8). These rules required a notifying transferor (generally, any foreign person and certain domestic partnerships that have a foreign person as a direct or indirect partner) that transfers (within the meaning of proposed §1.864(c)(8)-1(g)(5)) an interest in a partnership (other than certain PTP interests) in a transaction described in section 864(c)(8) to notify the partnership within 30 days of the transfer. Proposed §1.864(c)(8)-2(a). After receiving the notification from a notifying transferor, a specified partnership (generally, a partnership that is engaged in a trade or business within the United States or a partnership that owns, directly or indirectly, an interest in a partnership so engaged) is required to furnish to a notifying transferor the information necessary for the transferor to comply with section 864(c)(8) by the due date of the Schedule K-1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.*, for the tax year of the partnership in which the transfer occurred. Proposed §1.864(c)(8)-2(b).

While the final section 864(c)(8) regulations generally require a three-year lookback period for purposes of determining the foreign source portion of deemed sale gain or loss attributable to a partnership's inventory property or intangibles, the regulations also allow, in certain cases, the relevant foreign source portion of deemed sale gain or loss to be determined by reference to the source of the partnership's income occurring after the date, if any, on which a material change in circumstances occurs. §1.864(c)(8)-1(c)(2)(ii)(E). The final regulations provide that a specified partnership must include in the statement provided to the notifying transferor information regarding whether the transferor's deemed sale EC gain or loss (as described in §1.864(c)(8)-1(c)(2)) was determined under the material change in circumstances rule provided in §1.864(c)(8)-1(c)(2)(ii)(E). §1.864(c)(8)-2(b)(2)(ii).

The final regulations also revise the definition of specified partnership to remove unnecessary language on publicly traded partnerships. See §1.864(c)(8)-1(d)(2).

III. *Scope of the Withholding Obligation under Section 1446(f)*

The general approach in the proposed regulations required withholding on the transfer of a partnership interest unless an exception or adjustment to withholding applied. See proposed §§1.1446(f)-2(a) and 1.1446(f)-4(a). Comments suggested that proposed §1.1446(f)-2(a) was overly broad in that it could impose a withholding obligation on any transfer of a partnership interest, regardless of whether the partnership in question has any assets in, or any other connection to, the United States, or whether a transfer of an interest in the partnership would result in tax on gain under section 864(c)(8), and so required a transferee to withhold in a number of circumstances where section 1446(f)(1)'s statutory language does not. To address this issue, the comments suggested various exceptions to withholding.

One comment requested that the final regulations provide that even if a transferee does not obtain a certification allowing an exception to withholding, the transferee should not be considered to have failed to withhold if the transferee demonstrates that the transfer did not result in any gain under section 864(c)(8). The comment also suggested that in such a case, the transferee should be excused from any penalties that would otherwise apply. In addition, the comment suggested an exception to withholding when the transferee can demonstrate that no deemed sale EC gain would be allocated to the transferor. Another comment suggested adding an exception to withholding when the transferee can demonstrate that the partnership is not engaged in a trade or business within the United States.

One comment suggested limiting the scope of withholding by allowing a transferee to rely on a certification from the partnership providing that it has not been required to file a Form 1065, *U.S. Return of Partnership Income*, for some number of past years, and it does not expect to be required to file a Form 1065 for the taxable year in which the transfer occurs. The comment suggested, however, that the partnership should not be required to provide this certification at the time of the transfer.

One comment generally requested that the final regulations expand the scope of the withholding obligation under section 1446(f). Specifically, the comment requested that the final regulations limit the number of exceptions and adjustments to withholding and, for any exception or adjustment to withholding retained in the final regulations, the comment requested that the final regulations increase the requirements necessary to qualify for such an exception or adjustment.

The final regulations retain the general rule in proposed §1.1446(f)-2(a) that requires withholding on the transfer of a partnership interest unless an exception or adjustment to withholding applies. While the statutory language of section 1446(f)(1) imposes a withholding requirement when a portion of the gain from a transfer would be treated under section 864(c)(8) as effectively connected gain, a transferee will not know whether a transfer results in tax on gain under section 864(c)(8) without information from either the transferor or the partnership. These rules, therefore, require that the transferee presume that a transfer is subject to withholding unless it obtains a certification from the transferor establishing otherwise (or, if the partnership is the transferee because it makes a distribution, by relying on information in its books and records to make such determination). A transferee that obtains and

[1] The final regulations also include certain conforming changes to regulations under sections 1445 and 1446 to reflect the rate changes made by section 13001(b)(3)(A)-(D) of the Act and the due date changes made by section 2006 of the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (the Surface Transportation Act), Public Law 114-41 (2015). Although the changes to these regulations are applicable based on the date of publication of this document in the **Federal Register**, the same result applies before that date as of the relevant effective dates of the Act and the Surface Transportation Act.

properly relies on this certification (or, when the partnership is the transferee, its books and records) will generally not be subject to any withholding tax liability, even if the transfer results in tax on gain under section 864(c)(8). See, however, §1.1446(f)-3(a) and section V.A. of this Summary of Comment and Explanation of Revisions regarding a partnership's obligation to withhold on distributions made to a transferee for cases in which the partnership receives a certification from the transferee that it knows, or has reason to know, is incorrect or unreliable.

However, in response to comments, the final regulations add a rule in §1.1446(f)-5(b) that provides that any person required to withhold under section 1446(f) is not liable for failure to withhold, or any interest, penalties, or additions to tax, if it establishes to the satisfaction of the Commissioner that the transferor had no gain under section 864(c)(8) subject to tax on the transfer. Accordingly, while the general scope of the withholding obligation under §1.1446(f)-2(a) is retained in these final regulations, the consequences for failing to comply with the obligation are modified when the transferor had no gain under section 864(c)(8) subject to tax on the transfer. As this rule applies for all purposes of section 1446(f), it also modifies the consequences for a partnership that fails to comply with its withholding obligation under §1.1446(f)-3 or a broker that fails to comply with its withholding obligation under §1.1446(f)-4 on the transfer of a PTP interest. The final regulations also add an exception to withholding if the partnership certifies to the transferee that it is not engaged in a trade or business within the United States. See section IV.A.3.ii of this Summary of Comments and Explanation of Revisions. The same exception is added for a publicly traded partnership that is not engaged in a trade or business within the United States. See section VI.B.2 of this Summary of Comments and Explanation of Revisions.

IV. *Withholding on the Transfer of a Non-PTP Interest*

In general, section 1446(f)(1) provides that a transferee of a partnership interest must withhold a tax equal to 10 percent of the amount realized on any disposition that results in effectively connected gain under section 864(c)(8). Proposed §1.1446(f)-2(a) implemented this rule by providing that a transferee is required to withhold under section 1446(f)(1) a tax equal to 10 percent of the amount realized on any transfer of a partnership interest (other than a PTP interest) unless an exception to withholding, or an adjustment to the amount to withhold, applies under proposed §1.1446(f)-2(b) or (c), respectively. Proposed §1.1446(f)-2(d)(1) provided rules for reporting and paying the amount of any tax withheld and proposed §1.1446(f)-2(e) provided rules regarding the effect of withholding on a transferor. For a discussion of the rules that apply to a transfer of a PTP interest, see section VI of this Summary of Comments and Explanations of Revisions.

A. *Exceptions to withholding*

Proposed §1.1446(f)-2(b)(2) through (7) provided six exceptions to withholding by a transferee under section 1446(f)(1). The applicability of these exceptions was determined in one of three ways: self-certification by the transferor (that is, the transferee relies on a certification received from the transferor); certification by the partnership (for purposes of the exception to withholding provided in proposed §1.1446(f)-2(b)(4)(i)); or reliance on the books and records of the partnership (for cases in which a partnership is a transferee because it makes a distribution). These final regulations modify certain exceptions to withholding in response to comments received.

1. Non-foreign Status Exception

Proposed §1.1446(f)-2(b)(2) provided for an exception to withholding if the transferor of an interest in a partnership provides a certification of non-foreign status to the transferee (the Non-foreign Status Exception). One comment requested that the final regulations expand the Non-foreign Status Exception to match similar rules provided in §§1.1445-2(b) and 1.1446-1(c)(3) that allow for reliance upon means other than a certification or statement to ascertain the non-foreign status of the transferor.

The final regulations do not adopt this recommendation. While the provisions cited in the comment generally allow for reliance on means other than a certification or statement to ascertain non-foreign status, those provisions provide that the transferee or partnership remains liable under section 1461 if the determination of non-foreign status is incorrect. See §§1.1445-2(b)(1) (last sentence) and 1.1446-1(c)(3). As described in section III of this Summary of Comments and Explanation of Revisions, §1.1446(f)-5(b) provides similar flexibility in that it would allow a transferee that did not rely on a certification of non-foreign status to show that the transferor had no gain under section 864(c)(8) subject to tax on the transfer because the transferor is not a foreign person; in such a case, no interest, penalties, or additions to tax will apply under the rules of these final regulations.

The comment also made the same recommendation regarding the Non-Foreign Status Exception provided in proposed §1.1446(f)-4(b)(2) as it applied to transfers of PTP interests. The final regulations do not adopt this recommendation for the reasons described in the preceding paragraph.

2. No Realized Gain Exception

i. In general

Proposed §1.1446(f)-2(b)(3) provided an exception to withholding if the transferee relies on a certification from the transferor that states that the transfer of the partnership interest would not result in any realized gain, including ordinary income arising from the application of section 751 and §1.751-1 (the No Gain Exception). One comment suggested that a transferor realizing an overall loss on a transfer should be eligible for the No Gain Exception, even if the transferor realizes ordinary income under section 751 and §1.751-1. The final regulations do not adopt this comment because the comment is inconsistent with the basic computation of outside gain and outside loss provided in §1.864(c)(8)-1(b)(2). As explained in Section I.B of the Explanation of Provisions in the preamble to the proposed section 864(c)(8) regulations, the amount of gain or loss determined under section

741 (before application of section 751) is not a limitation on the amount of gain or loss characterized as effectively connected with the conduct of a trade or business within the United States. 83 FR 66648; see also §§1.751-1(a) and 1.864(c)(8)-1(i) (Example 3). Thus, because a transferor can realize ordinary income under section 751 that is characterized as effectively connected with the conduct of a trade or business within the United States under section 864(c)(8) even if the transferor realizes an overall loss with respect to the partnership interest, it would be inappropriate for the No Gain Exception to apply merely because the transferor does not realize an overall gain with respect to the transfer of the partnership interest.

ii. Ordinary income arising from the deemed sale of section 751 property

A comment explained that many transferors would be unable to use the No Gain Exception, even if they would otherwise qualify, because transferors need information from the partnership regarding the partnership's unrealized receivables or inventory items (section 751 property) and the relevant deemed sale computations associated with that property. While the proposed regulations require a partnership to provide the information necessary to make these computations on Form 8308, *Report of a Sale or Exchange of Certain Partnership Interests*, proposed §1.6050K-1(c) did not accelerate the date on which the partnership must provide Form 8308 to the transferor.[2] Thus, the comment suggested that a transferor may not have the information necessary at the time of transfer to use the No Gain Exception. To address this issue, the comment requested certain regulatory safe harbors that would allow a transferor to use the No Gain Exception at the time of the deemed sale, including a rule that would allow a transferor to make reasonable assumptions regarding the presence and value of section 751 property based on information at hand (for example, information used by the partnership in preparing a recent Form 8308).

These final regulations modify the No Gain Exception to address the concerns raised in the comment, but do not adopt the solution suggested in the comment. Specifically, §1.1446(f)-2(b)(3)(ii) provides that a transferor may rely on a certification from the partnership stating that, as of the determination date (as determined under the rules of §1.1446(f)-1(c)(4)), the transfer of the partnership interest would not result in any ordinary income arising from the application of section 751 and §1.751-1. This certification, in turn, is attached to, and forms part of, the general certification provided by the transferor to the transferee as part of the No Gain Exception. By adopting this approach, instead of the one suggested by the comment, the underlying issues raised in the comment are addressed in a manner consistent with the rest of the exceptions to withholding provided in §1.1446(f)-2(b), which generally allow determinations regarding the applicability of an exception to be made as of the determination date. This approach allows a partnership that holds section 751 property to provide the same information to transferors that use the same determination date; therefore, this approach provides an administrable, clear solution that taxpayers can consistently apply, while also taking into account the unique nature of section 751 property.

3. 10-percent EC Gain Exception

i. In general

Proposed §1.1446(f)-2(b)(4) provided an exception to withholding if the transferee relies on a certification from the partnership stating that if the partnership sold all of its assets at fair market value on the determination date, the amount of net effectively connected gain resulting from the deemed sale would be less than 10 percent of the total net gain from the deemed sale (the EC Gain Exception). The EC Gain Exception also applied to a partnership that is a transferee because it makes a distribution, in which case the partnership can rely on its books and records as of the determination date to determine if the EC Gain Exception applies. One comment suggested that the EC Gain Exception should refer to the transferor's distributive share of net effectively connected gain and should take into account, when applicable, the transferor's eligibility for benefits under an income tax treaty, rather than the aggregate amount of net effectively connected gain that would be realized by the partnership upon the deemed sale described in section 864(c)(8) and proposed §1.864(c)(8)-1. With respect to treaty benefits, however, the comment acknowledged that the maximum tax liability certification provided in §1.1446(f)-2(c)(4) could provide the same result.

The final regulations adopt this comment in part. Specifically, §1.1446(f)-2(b)(4)(i)(A)(*2*) provides, in relevant part, that a transferee may rely on a certification from the partnership that states that if the partnership sold all of its assets at fair market value on the determination date in the manner described in §1.864(c)(8)-1(c), the transferor's distributive share of net effectively connected gain from the partnership would be either zero or less than 10 percent of the transferor's distributive share of the total net gain from the partnership. Accordingly, this modification applies to situations in which the transferor would not have a distributive share of net effectively connected gain (including by reason of having a distributive share of net effectively connected loss). This modification, therefore, generally adopts the suggestion provided in the comment to account for the transferor's distributive share of net effectively connected gain. Additionally, these final regulations retain the rules provided in proposed §1.1446(f)-2(b)(4)(i)(A) and (B) to allow partnerships to make the relevant determination at the partnership level as of the determination date, without regard to the transferor's distributive share of net effectively connected gain. §1.1446(f)-2(b)(4)(i)(A)(*1*). For this purpose, however, the final regulations simplify the partnership-level exception to withholding by combining proposed §1.1446(f)-2(b)(4)(i)(A) and (B) into a single rule; this simplification is intended to be non-substantive.

[2] Under §1.6050K-1(c), the partnership must provide Form 8308 to the transferor by January 31 of the calendar year following the calendar year in which the relevant exchange occurred or, if later, 30 days after the partnership is notified of the exchange.

These final regulations do not adopt the suggestion in the comment regarding the transferor's eligibility for benefits under an income tax treaty. With respect to treaty benefits, the Treasury Department and the IRS believe that existing exceptions and adjustments, including modifications provided in this rulemaking, adequately address that aspect of the comment. See, e.g., §1.1446(f)-2(b)(7) (exception to withholding when a treaty claim covers all of the gain from the transfer); §1.1446(f)-2(c)(2)(iv) and section IV.B.3 of this Summary of Comments and Explanation of Revisions (modified amount realized procedures for transferors that are foreign partnerships); and §1.1446(f)-2(c)(4) (adjustments to the amount to withhold based on the transferor's maximum tax liability).

ii. Partnership not engaged in a trade or business within the United States

Section 864(c)(8), by its terms, applies only to a transfer of an interest in a partnership that is engaged in a trade or business within the United States (a USTB partnership). See section 864(c)(8)(A); see also §1.864(c)(8)-1(b)(1). When a partnership holds U.S. real property interests and is also subject to section 864(c)(8) because it is engaged in a trade or business within the United States, the computations provided in §1.864(c)(8)-1(c) take into account any U.S. real property interests held by the partnership. §1.864(c)(8)-1(d). Alternatively, for a partnership that is not a USTB partnership (for example, the partnership's only assets consist of foreign business assets and U.S. real property interests that are not used in a trade or business within the United States, such as shares of a United States real property holding corporation), §1.864(c)(8)-1(d) provides that the rules of section 864(c)(8) and §1.864(c)(8)-1 do not apply to a transfer of an interest in that partnership. One comment requested that the final regulations coordinate section 1446(f)(1) withholding with the rule provided in §1.864(c)(8)-1(d) by clarifying that, for a partnership that is not described in §1.1445-11T(d)(1), the EC Gain Exception applies to situations in which the partnership would not have effectively connected gain as of the determination date without the application of section 897(a). The comment noted that under the proposed regulations, no exception to withholding is provided for a transfer that would not be subject to section 864(c)(8) because the partnership is not a USTB partnership.

The Treasury Department and the IRS agree that a transfer of an interest in a partnership that is not engaged in a trade or business in the United States is not subject to section 864(c)(8) and, therefore, should be excepted from withholding under section 1446(f). Accordingly, §1.1446(f)-2(b)(4)(i)(B) provides that the transferee may rely on a certification from the partnership stating that the partnership was not engaged in a trade or business within the United States at any time during the taxable year of the partnership through the date of transfer (that is, the partnership was not a USTB partnership at any time during the period beginning on the first day of the partnership's taxable year in which the transfer occurs and ending on the close of the date of transfer). While this modification takes into account the general scenario described in the comment (that is, the partnership only holds foreign business assets and U.S. real property interests that are not part of a trade or business and thus is not a USTB partnership), this modification also applies to any situation in which a partnership whose interest is transferred is not a USTB partnership during the relevant period, regardless of whether that partnership holds U.S. real property interests. For USTB partnerships that hold U.S. real property interests, deemed sale gain attributable to U.S. real property interests continues to be treated as effectively connected gain for purposes of the 10-percent prong of the EC Gain Exception provided in §1.1446(f)-2(b)(4)(i)(A). Finally, for partnerships that are described in §1.1445-11T(d)(1), see §1.1446(f)-1(d).

Similar changes are made to the EC Gain Exception as it applies to transfers of PTP interests. See section VI.B.2 of this Summary of Comments and Explanation of Revisions and §1.1446(f)-4(b)(3).

4. 10-percent ECI Exception

Proposed §1.1446(f)-2(b)(5) provided an exception to withholding if the transferee relies on a certification from the transferor providing, in relevant part, that the transferor was a partner in the partnership for the immediately prior taxable year and the two preceding taxable years and the transferor's allocable share of effectively connected taxable income (determined under §1.1446-2) (ECTI) was less than 10 percent of the transferor's total distributive share of net income received from the partnership, and less than $1 million, in each of those years. For this purpose, proposed §1.1446(f)-2(b)(5) provided that the transferor's allocable share of ECTI is determined by reference to Form 8805, *Foreign Partner's Information Statement of Section 1446 Withholding Tax*, unless the transferor was allocated an allocable share of loss that is effectively connected with the conduct of a trade or business within the United States, or had deductions that are properly allocated and apportioned to income effectively connected with the conduct of a trade or business within the United States, in which case it is treated as having an allocable share of ECTI for that year of zero. See proposed §1.1446(f)-2(b)(5)(iii). As a result, the exception provided in proposed §1.1446(f)-2(b)(5) could be used only if a transferor was allocated either a positive amount of ECTI (as reported on Form 8805) or an effectively connected loss (such that no Form 8805 was provided) in each year. Additionally, under proposed §1.1446(f)-2(b)(5)(iv), a transferor could not provide the certification required for the exception if the transferor did not have a distributive share of net income from the partnership for each year described in proposed §1.1446(f)-2(b)(5)(i)(A). Finally, the proposed regulations provided that a transferee may not rely on a certification provided by the transferor if the transferor was not a partner in the partnership for each year described in proposed §1.1446(f)-2(b)(5)(i)(A).

Comments explained that in some cases partnership investments are structured to minimize the risk that a foreign partner will have effectively connected income or loss; and, for this purpose, a foreign partner in such a structure will not have an allocable share of ECTI or effectively connected loss under the partnership agreement. As a result, if that foreign partner transfers its interest in the partnership, it would not qualify for the exception to withholding provided in proposed §1.1446(f)-2(b)(5)

because it would not receive a Form 8805 nor have an effectively connected loss for each of the taxable years described in proposed §1.1446(f)-2(b)(5)(i)(A). To address this issue, one of the comments suggested that the final regulations modify proposed §1.1446(f)-2(b)(5) to provide relief to transferors with neither an allocable share of ECTI nor an effectively connected loss.

The same comment suggested that, for situations in which a foreign partner is allocated effectively connected items, the exception should look to allocations of gross amounts rather than net amounts in order to more accurately reflect the partnership's capacity to produce effectively connected income or gain. The comment explained that this change would serve as a more accurate proxy for the tax consequences that would occur under section 864(c)(8) by reason of the transfer. For example, a partnership may generate significant amounts of losses or deductions during the relevant period resulting in small amounts of net ECTI, but nevertheless hold assets with significant amounts of built-in gain that would be treated as effectively connected gain on a deemed sale. In that case, the transferor would be able to use the exception to withholding provided in proposed §1.1446(f)-2(b)(5) even though the transferor may realize a significant amount of gain under section 864(c)(8) by reason of the transfer. Finally, with respect to the period during which the transferor was required to be a partner in the partnership, the comment recommended changing the period provided in proposed §1.1446(f)-2(b)(5)(i)(A) to allow for an exception to withholding when the transferor was not a partner in the partnership for the transferor's immediately prior taxable year and the two preceding taxable years (the look-back period), provided the transferor was a partner in the partnership long enough to receive at least one Schedule K-1 (Form 1065).

In response to comments, these final regulations modify the exception to withholding under §1.1446(f)-2(b)(5). Under the exception in these final regulations (the ECI Exception), a transferor may qualify if its distributive share of gross effectively connected income from the partnership for each taxable year within the look-back period was less than $1 million and less than 10 percent of the transferor's total distributive share of gross income from the partnership for that year, with both amounts reflected on a Schedule K-1 (Form 1065) (or other statement furnished to the partner) received from the partnership for each year. Because the ECI Exception looks to the transferor's share of effectively connected income (as reported on a Schedule K-1 or other statement furnished to the partner), rather than its allocable share of ECTI, a transferor that is not allocated any effectively connected income or loss in any relevant year can still use the exception even if it has not received a Form 8805 for that year. The ECI Exception also adopts the suggestion in the comment to look to gross amounts of income, rather than net amounts of income, for purposes of determining whether the transferor's distributive share of effectively connected income was less than 10 percent of the transferor's total distributive share of income from the partnership. As suggested by the comment, this change is intended to provide a more accurate proxy for the tax consequences that would arise under section 864(c)(8) by reason of the transfer. Consistent with this change, the rule provided in proposed §1.1446(f)-2(b)(5)(iv) is modified to state that a transferor cannot provide the certification required for the ECI Exception if the transferor did not have a distributive share of gross income from the partnership in each of the relevant years. §1.1446(f)-2(b)(5)(iii). Therefore, a transferor will generally be able to use the ECI Exception even if it is allocated a distributive share of net loss from the partnership for the relevant taxable year.

These final regulations do not adopt the recommendation in the comment with respect to the relevant holding period because the Treasury Department and the IRS have determined that reducing a transferor's required length of time to be a partner in a partnership for purposes of the ECI Exception would not provide an adequate indication of the amount of the transferor's effectively connected gain realized in connection with the transfer.

5. Claims for Treaty Benefits

Under the proposed regulations, a transferor may claim an exception or adjustment to withholding when it qualifies for treaty benefits with respect to a transfer of a partnership interest (including a transfer of a PTP interest). See proposed §§1.1446(f)-2(b)(7) and 1.1446(f)-4(b)(6). These rules required that the certification to claim treaty benefits include an applicable withholding certificate that contains the information necessary to support the claim. Comments requested clarification of the information required to be provided on Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*, or Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)* in order to claim treaty benefits for purposes of section 1446(f).

To address the comments, the IRS intends to revise the instructions to Forms W-8BEN and W-8BEN-E to describe the information required to be provided for making a treaty claim for purposes of section 1446(f), including a treaty claim made with respect to a transfer of a PTP interest. To make the rules regarding claims for treaty benefits more administrable, these final regulations allow a transferor to use the applicable withholding certificate as the certification for making a claim for benefits under an income tax treaty.

6. Additional Comments Regarding Exceptions to Withholding

i. Disguised sales

Proposed §1.864(c)(8)-1(g)(5) defined a transfer for purposes of the section 864(c)(8) proposed regulations as including a transfer treated as a sale or exchange under section 707(a)(2)(B) (a disguised sale). One comment requested an exception from section 1446(f) withholding for certain transactions that occur in connection with the formation and initial funding of an investment partnership, as well as redemptions and admissions of new partners over time, that could be characterized as disguised sales of partnership interests. The comment acknowledged that addressing the substantive issue regarding what constitutes a disguised sale of a partnership interest is beyond the scope of this rulemaking. Nonetheless, the comment recommended an exception from section

1446(f) withholding for certain transactions involving the formation and funding of a partnership and redemptions and admissions of new partners over time. The final regulations do not adopt the recommendation provided in this comment. If a contributing partner is treated as acquiring a partnership interest from a foreign person for Federal income tax purposes, it is appropriate to impose a withholding obligation on the contributing partner to ensure the collection of tax on gain under section 864(c)(8). Further, as the comment noted, the issue of what constitutes a disguised sale of a partnership interest and the tax consequences flowing from that treatment are not unique to the application of these final regulations. After studying the issue, the Treasury Department and the IRS have determined that adding an exception to withholding to take certain cases into account would require a determination, at least in part, of what constitutes a disguised sale of a partnership interest in this context, and the issue is, therefore, outside the scope of this rulemaking.

ii. Withholding foreign partnerships and withholding foreign trusts

Comments requested an exception to withholding for transferors that are withholding foreign partnerships (WPs) and withholding foreign trusts (WTs) if they assume withholding under section 1446(f). WPs and WTs are foreign partnerships and trusts that enter into agreements with the IRS to assume primary withholding and reporting responsibilities on payments subject to withholding under chapters 3 and 4 with respect to their partners, owners, or beneficiaries (as applicable). One of the comments suggested that without such a rule, partners of a WP would be subject to duplicative withholding.

The final regulations do not adopt the suggestions contained in these comments. First, a rule allowing WPs and WTs to assume withholding under section 1446(f) would create complexity and require extensive coordination with the existing provisions for withholding and reporting in the agreements that WPs and WTs have entered into with the IRS. The comments do not provide any suggestions on how to address the many issues that would arise if such a rule were adopted. Further, the comments do not indicate that such a rule would have a material impact on taxpayers that would justify the allocation of resources necessary to provide guidance to these taxpayers. Second, any concerns regarding duplicative withholding were already addressed under the proposed regulations, which allow a foreign partnership to credit any withholding under section 1446(f) against its own section 1446(a) withholding liability. See §§1.1446(f)-2(e)(2)(ii) and 1.1446(f)-4(e)(2)(ii).

iii. Earnout payments

A comment noted that a transfer of a partnership interest may be subject to an earnout provision that entitles the transferor to future payments based on the achievement of specific goals. The comment requested guidance clarifying that these future payments will be subject to an exception to withholding to the extent that the original transfer qualified for an exception to withholding. Under the proposed regulations, an exception to withholding in §1.1446(f)-2 eliminates any requirement to withhold on the amount realized from the transfer of a partnership interest. Thus, if an exception to withholding applies at the time of the transfer of a partnership interest, it will also apply to any future payments made to the transferor that are treated as an amount realized from such transfer. As a result, no change is needed in response to this comment.

B. *Determining the amount to withhold*

If an exception to withholding under proposed §1.1446(f)-2(b) does not apply, proposed §1.1446(f)-2(c)(1) provided that a transferee is required to withhold 10 percent of the amount realized on the transfer of the partnership interest. Proposed §1.1446(f)-2(c) provided guidance for determining the amount to withhold and provided certain procedures that allow for adjustments to the amount to withhold that are intended to better reflect the transferor's tax liability on gain under section 864(c)(8). A transferee may use these adjustment procedures when it relies on a certification from the transferor (or, if applicable, from the partnership). The procedures for determining the amount to withhold, therefore, employ the same self-certification procedure provided in proposed §1.1446(f)-2(b). See generally section IV.A of this Summary of Comments and Explanation of Revisions.

1. Definition of Amount Realized

Proposed §1.1446(f)-2(c)(2)(i) provided generally that the amount realized on a transfer of a partnership interest is determined, in part, under section 752 (including §§1.752-1 through 1.752-7); accordingly, the amount realized includes any reduction in the transferor's share of partnership liabilities. One comment requested that the final regulations modify the amount realized definition to exclude any reduction to the transferor's share of partnership liabilities. The comment pointed to the potential liquidity concerns that could occur when the amount of liabilities assumed exceeds the cash or other property exchanged in the transfer. The Treasury Department and the IRS have determined that it is inappropriate to exclude a reduction in a transferor's share of partnership liabilities from amount realized. Further, proposed §1.1446(f)-2(c)(3), which is retained in these final regulations, addresses the liquidity concerns raised in this comment. That provision determines the amount to withhold without regard to any decrease in the transferor's share of partnership liabilities, but only if the amount otherwise required to be withheld would exceed the amount realized (determined without regard to any decrease in the transferor's share of partnership liabilities).

2. Modified Amount Realized for Transfers by Foreign Partnerships

Proposed §1.1446(f)-2(c)(2)(iv) provided a procedure to determine the amount realized when the transferor of a partnership interest is a foreign partnership. Specifically, when a foreign partnership transfers an interest in a partnership, proposed §1.1446(f)-2(c)(2)(iv) provided that the transferee of the interest may rely on a certification provided by the transferor partnership that provides a modified amount realized. The modified amount realized is determined by multiplying the amount realized on the transfer (as deter-

mined under proposed §1.1446(f)-2(c)(2)) by the percentage of the gain from the transfer that would be allocated to presumed foreign taxable persons, which include any direct or indirect partners of the transferor partnership that have not provided a certification of non-foreign status. Proposed §1.1446(f)-2(c)(2)(iv)(B). To make the certification, the transferor partnership must provide to the transferee a Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*, a withholding statement allocating the gain to each partner, and a certification of non-foreign status for each partner that is treated as a U.S. person. See proposed §1.1446(f)-2(c)(2)(iv)(C). If the transferee may rely on the certification, the modified amount realized is treated as the amount realized on the transfer.

One comment recommended that the final regulations expand this approach for determining the modified amount realized on a transfer to take into account situations in which a foreign partner (direct or indirect) in the transferor partnership is eligible for treaty benefits. These final regulations adopt this recommendation. Accordingly, these final regulations modify proposed §1.1446(f)-2(c)(2)(iv) to allow for a reduction of the amount realized when a transferor that is a foreign partnership has a direct or indirect partner that is not subject to tax on gain from a transfer pursuant to an applicable U.S. income tax treaty. Specifically, this modification provides that a treaty-eligible partner is not a presumed foreign taxable person for purposes of determining the modified amount realized under §1.1446(f)-2(c)(2)(iv). A foreign partnership that provides a certification of modified amount realized must include, in addition to the Form W-8IMY and a withholding statement, the certification of treaty benefits (on a Form W-8BEN or Form W-8BEN-E) from each direct or indirect partner that is not a presumed foreign taxable person. §1.1446(f)-2(c)(2)(iv)(C).

Similar changes are made to the modified amount realized procedure for transfers of PTP interests. See section VI.C.1 of this Summary of Comments and Explanation of Revisions and §1.1446(f)-4(c)(2)(ii).

3. Certification of Maximum Tax Liability

Proposed §1.1446(f)-2(c)(4) provided a procedure to determine the amount to withhold under section 1446(f)(1) and proposed §1.1446(f)-2(a) that is intended to estimate the amount of tax that the transferor is required to pay on gain under section 864(c)(8). Specifically, the procedure allows a transferee to withhold based on a certification received from the transferor containing certain information relating to the transferor and the transfer, including the transferor's maximum tax liability (as determined under proposed §1.1446(f)-2(c)(4)(ii)) on the transfer. A transferee may rely on a certification received from a transferor that is a foreign corporation, a nonresident alien individual, or a foreign partnership regarding the transferor's maximum tax liability. Proposed §1.1446(f)-2(c)(4)(i). A transferor that is a foreign partnership is treated as a nonresident alien individual for purposes of determining the transferor's maximum tax liability. Id. A comment pointed out that this rule adopts an entity approach with respect to determining a foreign partnership's maximum tax liability that presumes the partnership is liable for tax on its full distributive share of the effectively connected items from the transfer at individual tax rates, regardless of whether any partners in the partnership are United States persons. The comment suggested that the final regulations modify this rule for determining a foreign partnership's maximum tax liability based on the look-through principles used in proposed §1.1446(f)-2(c)(2)(iv); that is, this modification would allow a foreign partnership to be treated as a United States person to the extent that its partners provide certifications of non-foreign status or to the extent that its partners would be eligible for treaty benefits.

These final regulations do not adopt the suggestion contained in this comment. The Treasury Department and the IRS have determined that adopting this suggestion could result in significant complexity and would increase the administrative burden on a transferee that receives a certification of maximum tax liability. The approach suggested in the comment also raises potentially broader issues, including computational issues, that are outside the scope of these final regulations. Finally, the Treasury Department and the IRS have determined that the modifications to §1.1446(f)-2(c)(2)(iv), which allows claims for treaty benefits to be taken into account for purposes of determining the modified amount realized, provide sufficient relief in many of the cases in which the concerns raised in this comment would arise. See section IV.B.2 of this Summary of Comments and Explanation of Revisions.

In response to informal comments, these final regulations modify the proposed regulations to allow transferors that are foreign trusts to use the maximum tax liability procedure in §1.1446(f)-2(c)(4) to reduce the amount to withhold. Similar to the approach taken with respect to foreign partnerships, these rules treat the foreign trust as a nonresident alien individual for purposes of computing its maximum tax liability under §1.1446(f)-2(c)(4).

C. *Other comments and changes to the proposed regulations*

1. Determining Basis

A comment asserted that it is often difficult for the transferor of a partnership interest to know its basis in the transferred interest at the time of transfer; that is, regardless of the §1.706-4 method used, a transferor usually has to wait to receive its Schedule K-1 (Form 1065) for the taxable year of the transfer before determining its basis accurately. As a result, the comment recommended a rule that would allow transferors and transferees to calculate the basis of a transferred partnership interest (solely for purposes of section 1446(f)) by reference to reasonable assumptions that can be made with certainty at the time of the transfer.

The Treasury Department and the IRS have determined that the concern raised by the comment was already sufficiently addressed in the proposed regulations. Specifically, the determination date rules of §1.1446(f)-1(c)(4), which appeared in the proposed regulations and are retained in the final regulations, provide substantial flexibility with respect to making certain determinations under section 1446(f)(1). For example, a transferor (other than

a controlling partner) could determine its adjusted basis in the transferred partnership interest as of the first day of the partnership's taxable year in which the transfer occurs. See §§1.1446(f)-1(c)(4)(i)(C)(*1*) and 1.1446(f)-2(c)(4)(iii)(B). Additionally, the No Realized Gain exception provided in §1.1446(f)-2(b)(3) similarly allows the transferor to make the relevant determinations as of the determination date.

2. Qualified Foreign Pension Funds

Section 1446(f)(5) provides that any term used in both section 1446(f) and section 1445 will have the meaning provided in section 1445. Section 1445(f)(3) defines a foreign person as any person other than (i) a United States person and (ii) except as otherwise provided by the Secretary, an entity with respect to which section 897 does not apply due to section 897(l). Section 897(l), in turn, excludes qualified foreign pension funds (QFPFs) from the application of section 897. Accordingly, QFPFs are not treated as foreign persons under section 1445.

Section 1446(f)(6) provides the Secretary of the Treasury authority to prescribe regulations that are necessary to carry out the purposes of section 1446(f). Pursuant to this authority, the proposed regulations provided a definition of foreign person that applies for purposes of the regulations under section 1446(f). Specifically, proposed §1.1446(f)-1(b)(4) defined a foreign person as a person that is not a United States person. Proposed §1.1446(f)-1(b)(13) defined a United States person as a person described in section 7701(a)(30). Because QFPFs are not persons described in section 7701(a)(30), they are foreign persons for purposes of §§1.1446(f)-1 through 1.1446(f)-5.

One comment requested that these final regulations clarify that QFPFs are foreign persons for purposes of section 1446(f). The Treasury Department and the IRS have determined that the proposed regulations provided sufficient clarity regarding the treatment of QFPFs by specifically defining the term foreign person for purposes of §§1.1446(f)-1 through 1.1446(f)-5. The final regulations, therefore, adopt the relevant definitions provided in the proposed regulations with respect to QFPFs.

3. Valuation of Partnership Property

One comment described a situation in which the transferor and transferee of a partnership interest value partnership assets differently than the partnership does. The comment recommended, where relevant, a clarification to the final regulations allowing for a valuation of partnership assets based on the transferor's amount realized on a per transfer basis, provided that any valuation is supported by an arm's length price on which the transferor and transferee have agreed to execute the transaction. The final regulations do not adopt this recommendation. Valuation issues are not unique to the application of these final regulations; therefore, providing an explicit valuation rule in these final regulations that would take into account the situation described in the comment goes beyond the scope of this rulemaking.

4. Credit for Amounts Withheld on Partnerships, Trusts, or Estates

The proposed regulations provided rules prescribing the manner in which a credit for an amount withheld under section 1446(f) may be claimed by a foreign individual, corporation, or partnership. The proposed regulations provided in §1.1446-3(c)(4) that a foreign partnership that was withheld upon under section 1446(f) could credit the amount withheld against its tax liability under section 1446(a) to the extent the amount is allocable to foreign partners. The Treasury Department and the IRS intend to amend the instructions to Forms 8804, 8805, and 8813 to provide that to obtain a credit against its section 1446(a) liability, a foreign partnership withheld upon under section 1446(f) on the sale of its non-PTP interest must attach to its Form 8804, *Annual Return for Partnership Withholding Tax (Section 1446)*, a stamped copy of Form 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*.

These final regulations provide guidance for foreign trusts or estates that are withheld upon under section 1446(f). Specifically, §1.1446(f)-2(e)(2)(ii) provides that a foreign trust or estate may claim a credit for an amount withheld under section 1446(f) in accordance with §1.1462-1. Thus, the trust or estate may claim a credit to the extent it is ultimately liable for tax on the gain under section 864(c)(8). Similar guidance is provided for foreign trusts or estates claiming credit for amounts withheld on transfers of PTP interests. See §1.1446(f)-4(e)(2)(ii).

5. Certifications Provided by Grantor Trusts

Under proposed §1.1446(f)-1(c)(2)(vii), a certification provided by a transferor that is a grantor or other owner of a grantor trust was required to identify the portion of the amount realized attributable to the grantor or owner. These final regulations retain this rule, but also include a mechanism for the grantor trust to provide the certification on behalf of the transferor to a transferee. Under this allowance, a foreign grantor trust may provide to the transferee a Form W-8IMY, a withholding statement that provides the percentage of the amount realized allocable to each grantor or owner of the trust, and any applicable certification for each grantor or owner. A domestic grantor trust that has a foreign grantor or other owner may provide a similar statement in lieu of Form W-8IMY. The allowance described in this paragraph may also be applied in the context of a grantor or other owner of a grantor trust transferring a PTP interest.

V. *Partnership's Requirement to Withhold under Section 1446(f)(4) on Distributions to Transferee*

Section 1446(f)(4) provides that if a transferee fails to withhold any amount required to be withheld under section 1446(f)(1), the partnership must deduct and withhold from distributions to the transferee a tax in an amount equal to the amount the transferee failed to withhold (plus interest). Proposed §1.1446(f)-3 provided rules that implement a partnership's requirement to withhold under section 1446(f)(4), including rules for determining when a partnership is required to withhold and report under section 1446(f)(4), rules for determining if an exception to withholding applies, and rules for determining the amount required to be withheld (including the computation of interest). Proposed §1.1446(f)-3 also pro-

vided rules regarding the effect of section 1446(f)(4) withholding on the transferee and transferor, including procedures that require the partnership to make any claim (on behalf of the transferee) for credit or refund for amounts overwithheld under section 1446(f)(4).

A. *Scope of withholding obligation under §1.1446(f)-3*

Proposed §1.1446(f)-3(a)(1) provided that if a transferee fails to withhold any amount required to be withheld under proposed §1.1446(f)-2, the partnership whose interest was transferred must withhold from any distributions made to the transferee in accordance with the rules provided in proposed §1.1446(f)-3. To determine its withholding obligation under proposed §1.1446(f)-3, if any, a partnership may rely on information provided in a certification received from the transferee described in proposed §1.1446(f)-2(d)(2) (a certification of withholding) unless it knows, or has reason to know, that the certification is incorrect or unreliable. Proposed §1.1446(f)-3(a)(1). The proposed regulations, therefore, required the partnership to review any certification of withholding received from the transferee, including any underlying certification from a transferor claiming an exception or adjustment to withholding, because the partnership could have information suggesting that the certification is incorrect or unreliable, and that information may not be available to the transferee (for example, if the information was contained in the partnership's books and records). See generally section IV.B of the Explanation of Provisions section of the preamble to the proposed regulations. The transferee must provide the certification of withholding to the partnership within 10 days after the date of the transfer and deposit any tax due under section 1446(f)(1) within 20 days after the date of the transfer. Proposed §1.1446(f)-2(d). If a partnership does not receive, or cannot rely on, a certification of withholding, it must withhold on the entire amount of each distribution made to the transferee until it may rely on a certification of withholding to determine that it has satisfied its section 1446(f)(4) liability. Proposed §1.1446(f)-3(c).

1. Partnership's Review of a Certification of Withholding

A comment stated that the rule in proposed §1.1446(f)-3(a)(1) is problematic as it may require a partnership to withhold under section 1446(f)(4) on a transferee that has fully complied with its withholding obligations under section 1446(f)(1) by properly relying on a certification from the transferor to reduce or eliminate withholding. This situation could occur, for example, if the partnership receives an underlying certification that a transferee has properly relied on, and the partnership has information in its possession indicating that the information contained in the certification is incorrect or unreliable. The comment therefore asserted that this rule is inconsistent with the statute, which imposes section 1446(f)(4) withholding when a transferee fails to withhold any amount required to be withheld under section 1446(f)(1). The comment also stated that the rule in proposed §1.1446(f)-3(a)(1) essentially holds the transferee strictly liable for any underwithholding, which is inconsistent with the approaches taken in other withholding regimes, such as those provided under sections 1441 through 1443 and section 1445. Therefore, the comment recommended that the final regulations eliminate a partnership's requirement to withhold under section 1446(f)(4) when a transferee properly relies on a certification to reduce or eliminate the withholding tax.

The Treasury Department and the IRS have determined that the approach provided in proposed §1.1446(f)-3(a)(1) is consistent with the language and purpose of section 1446(f), and thus the approach is retained in the final regulations. Unlike the withholding regimes under sections 1441 through 1443 and 1445, section 1446(f) explicitly provides a withholding obligation on a secondary party to the transfer, the partnership. Section 1446(f)(4) states that if a transferee fails to withhold any amount required to be withheld under section 1446(f)(1), the partnership must withhold from distributions to the transferee in an amount equal to the amount the transferee failed to withhold (plus any interest). Under section 1446(f)(1), a transferee is generally required to withhold 10 percent of the amount realized on a transfer subject to section 864(c)(8). While the proposed regulations allow the amount required to be withheld under section 1446(f)(1) to be reduced when a transferee relies on a claim for an exception or adjustment to withholding, this allowance is conditioned on proper review and acceptance of the claim by the partnership. If the conditions of the proposed regulations are not met, a transferee is required to withhold at the statutory rate under section 1446(f)(1) or will be subject to withholding under section 1446(f)(4).

To limit when withholding under section 1446(f)(4) is imposed on a transferee that properly relied on a certification from a transferor, the proposed regulations provided sufficient time for a transferee to consult with the partnership regarding the accuracy of the certification. Specifically, the proposed regulations require the transferee to provide a certification of withholding to the partnership within 10 days after the transfer and to deposit any withheld tax with the IRS within 20 days of the transfer. Therefore, a transferee may choose to withhold 10 percent of the amount realized on the transfer, and depending on the outcome of its consultation with the partnership, either repay the withheld amount to the transferor or deposit it with the IRS.

The final regulations adopt these rules from the proposed regulations and add a rule to limit the instances of withholding under section 1446(f)(4) on certain transferees, and to reduce the compliance burden on such transferees. This rule allows a partnership to determine that it does not have a withholding obligation under §1.1446(f)-3 if it already possesses a Form W-9, *Request for Taxpayer Identification Number and Certification*, for the transferor that meets the requirements provided in §1.1446(f)-2(b)(2) to establish non-foreign status, even if the transferee does not provide a certification of withholding to the partnership under §1.1446(f)-2(d)(2). See §1.1446(f)-3(a)(1). Consistent with the general rules for partnerships that rely on information in their books and records, a partnership may not apply this rule when it knows, or has reason to know, that the Form W-9 that it possesses is incorrect or unreliable.

2. Partnership's Discretion to Withhold

A comment also questioned the application of proposed §1.1446(f)-3(a)(1) if the partnership receives a certification from the transferee and the partnership does not know or have reason to believe that the certification is incorrect or unreliable. Specifically, the comment noted that proposed §1.1446(f)-3(a) states that a partnership may rely on a certification of withholding, which suggests that reliance on the certification is permissive and not mandatory. The comment suggested that, as a result, a partnership may choose to disregard a certification received from a transferee, and thus withhold on distributions to the transferee, even if the partnership does not know, and has no reason to believe, that the information contained in the statement is incorrect or unreliable. The comment noted that the resulting burden on the transferee is exacerbated because only the partnership, rather than the transferee, can directly obtain a refund of amounts withheld on distributions to the transferee under section 1446(f)(4). The comment recommended, therefore, that the final regulations clarify that a partnership must (rather than may) rely on a certification received from a transferee if the partnership does not know or have reason to know that the information contained in the certification is incorrect or unreliable.

The final regulations do not adopt this comment. The approach taken in the proposed regulations is consistent with other withholding regimes, which allow a withholding agent discretion in determining whether to rely on documentation that supports a claim for a reduced amount of withholding or an exception to withholding. See, e.g., §1.1441-1(b)(1). This discretion is afforded to the withholding agent because it is generally the party liable for any failure to withhold under section 1461. Further, because a withholding agent is liable under section 1461 only for underwithholding, it is unclear how a withholding agent that failed to reduce (or eliminate) the amount of withholding under such a rule could be held liable. Finally, because transferees are partners in the partnership, partnerships generally would have an incentive to review and accept valid certifications of withholding provided by transferees, rather than withhold unnecessarily on them. For these reasons, the final regulations allow the partnership to determine whether to rely on a certification of withholding for purposes of section 1446(f)(4).

These final regulations do, however, modify the proposed regulations to allow the transferee, rather than the partnership, to obtain a refund of overwithholding for amounts withheld under section 1446(f)(4). As suggested by the comment, this modification mitigates some of the effect of any overwithholding. See section V.C of this Summary of Comments and Explanation of Revisions.

B. *Removal of withholding under section 1446(f)(4) by publicly traded partnerships*

Under proposed §1.1446(f)-4(b)(3) and (4), a broker was not required to withhold on a transfer of a PTP interest when the publicly traded partnership claims on a qualified notice that an exception applies based on either of the following statements: (i) a statement that less than 10 percent of the total gain on a deemed sale of the publicly traded partnership's assets would be effectively connected gain, or no gain would have been effectively connected gain (the 10-percent exception); or (ii) a statement that the entire amount of a distribution is a qualified current income distribution, defined as a distribution that does not exceed the net income of the publicly traded partnership since the date of the last distribution (the qualified current income exception). Under the proposed regulations, a publicly traded partnership was required to withhold under section 1446(f)(4) only if the partnership posted a qualified notice that falsely stated that one of those exceptions to withholding under section 1446(f)(1) applied to a transfer (including a transfer that is a distribution), and a broker underwithheld in reliance on the qualified notice. The requirement for a publicly traded partnership to withhold under section 1446(f)(4) was included to ensure that publicly traded partnerships exercise due diligence when representing information on a qualified notice related to either exception given that a broker may rely on the notice to apply an exception to withholding under section 1446(f)(1).

Comments suggested that publicly traded partnerships would be unlikely to claim the exceptions to withholding on a qualified notice due to the consequences of issuing a false qualified notice, and that this would result in overwithholding on transfers of PTP interests. Further, comments pointed out that it would be difficult for publicly traded partnerships to determine the amount of underwithholding by brokers relying on a false qualified notice because publicly traded partnerships generally do not have information on transfers effected through brokers. A comment noted that a false qualified notice may result in a large amount of underwithholding because a broker may rely on the qualified notice for all transfers made between the time the notice is issued and the date of the next qualified notice (which is usually provided quarterly).

A comment also noted concerns with the rule in proposed §1.1446(f)-3(c)(1)(ii)(C), which requires publicly traded partnerships to continue withholding on distributions under section 1446(f)(4) even when the transferee no longer owns an interest in the partnership. The comment noted that this rule could negatively affect market values of PTP interests because every person acquiring a PTP interest would be subject to the risk that future distributions may be reduced or even eliminated, even if the qualified notice has not yet been declared false. The comment suggested taking the approach in the proposed regulations that applied to transfers of non-PTP interests, which would allow the partnership to stop withholding on distributions when the transferee no longer owns an interest in the partnership, unless the partnership has actual knowledge that any successor to the transferee is related to the transferee or transferor.

In addition, a comment raised a practical concern about the timing of the withholding required under proposed §1.1446(f)-3(c)(1)(i), which requires withholding to begin on the later of the date that is 30 days after the date of transfer, or 15 days after the date on which the partnership acquires actual knowledge that the transfer has occurred. The comment noted that a publicly traded partnership would be unable to withhold until it knows that it has issued a false qualified notice, and the comment therefore re-

quested that any withholding obligation begin after the publicly traded partnership acquires knowledge that the qualified notice is incorrect.

The comments regarding the application of section 1446(f)(4) to publicly traded partnerships also included suggestions to address the concerns raised with respect to the withholding requirement. Several comments suggested removing the requirement for a publicly traded partnership to withhold under section 1446(f)(4) entirely. One comment suggested replacing the withholding requirement for a false qualified notice with an information reporting penalty (or other quantifiable penalty). Another comment suggested instead imposing a penalty on a preparer of a qualified notice if the preparer acts in bad faith or without a requisite standard of care. Other comments requested clarification on whether a "false" qualified notice is limited to a willfully false notice rather than any erroneous qualified notice.

The Treasury Department and the IRS have determined that a publicly traded partnership should not be required to withhold under section 1446(f)(4). This withholding would have necessarily impacted the distributions made to a transferee (or subsequent transferee) who bears no responsibility for the underwithholding resulting from an erroneous qualified notice (unlike the case of a transfer of a non-PTP interest). Rather, as it is the partnership that determines the contents of its qualified notice, the partnership should bear the consequences resulting from its representations on the notice rather than any specific transferee. As a result, these final regulations remove the requirement in the proposed regulations that a publicly traded partnership withhold on a transferee under §1.1446(f)-3 and add instead provisions imposing liability for underwithholding under section 1461 on the partnership that issued the qualified notice. See §1.1446(f)-4(b)(3)(i) and (c)(2)(iii) and sections VI.B.2 and VI.C.2 of this Summary of Comments and Explanation of Revisions. By removing the requirement for the partnership to withhold under section 1446(f)(4) on any transferees, this modification also addresses the comments noting concerns that withholding on specific transferees could negatively affect the market values of PTP interests. This modification also alleviates the need to address those comments concerning when withholding under section 1446(f)(4) would begin to apply.

These final regulations do not apply information reporting penalties in lieu of imposing a section 1461 liability on a publicly traded partnership. The comment to impose an information reporting penalty in lieu of a withholding requirement was not adopted in these final regulations due to concerns that a qualified notice may not be treated as an information return or a payee statement under section 6724(d) for purposes of applying penalties under section 6721 or 6722.

With respect to the comments suggesting that a publicly traded partnership would be unable to obtain the information necessary to determine the underwithholding resulting from a broker's reliance on a qualified notice, for this determination, the Treasury Department and the IRS note that a publicly traded partnership should be able to obtain information on transfers of PTP interests from nominees holding interests in the partnership under §1.6031(c)-1T (generally requiring a nominee to provide certain information about persons for whom it holds interests in the partnership, including information on transfers of partnership interests).

C. *Credits and refunds for amounts withheld under section 1446(f)(4)*

Proposed §1.1446(f)-3(e)(2) provides that a transferee may not obtain a refund if the amount of tax withheld under proposed §1.1446(f)-3 exceeds the transferee's withholding tax liability under proposed §1.1446(f)-2; instead, only the partnership may claim a refund on behalf of the transferee for the excess amount withheld under proposed §1.1446(f)-3. The preamble to the proposed regulations provided that the purpose of this rule is to make the refund process more administrable and requested comments on this issue.

Comments requested that the transferee be allowed to directly claim a refund for the excess amount withheld under §1.1446(f)-3. The comments explained that it would be neither practical, nor reasonable, to expect the partnership to claim the refund on behalf of the transferee in most circumstances. Thus, if the partnership does not seek a refund on behalf of the transferee for the excess amount withheld, the transferee may have no way to obtain the overwithheld amounts from the IRS.

One comment requested clarification regarding the manner in which proposed §1.1446(f)-3(e)(2) measures the excess of the amount of tax withheld under §1.1446(f)-3 over the transferee's withholding tax liability under §1.1446(f)-2. The comment suggested, for example, computing the excess amount as the difference between the sum of any withholding under §§1.1446(f)-2 and 1.1446(f)-3, plus any tax on gain paid by reason of §1.864(c)(8)-1, and the total tax liability of the foreign transferor (as defined in §1.864(c)(8)-1(g)(3)) for the year in which the transfer occurred. Alternatively, the comment suggested computing the excess amount as the difference between the sum of any withholding under §§1.1446(f)-2 and 1.1446(f)-3 and the tax liability of the foreign transferor under §1.864(c)(8)-1 on the transfer.

The Treasury Department and the IRS agree with these comments and modify these final regulations to allow a transferee to directly claim and obtain a refund for the excess amount withheld under §1.1446(f)-3. Specifically, these final regulations modify §1.1446(f)-3, in relevant part, to provide that a transferee may obtain a refund of the excess amount if it has made payments in excess of the tax which is properly due by the transferee for the tax period. Accordingly, under these final regulations, the partnership is not permitted to claim a refund on behalf of the transferee for the excess amount withheld under §1.1446(f)-3.

The final regulations also clarify that the excess amount withheld under §1.1446(f)-3 is the amount of tax and interest withheld under §1.1446(f)-3 that exceeds the transferee's withholding tax liability under §1.1446(f)-2 and any interest owed by the transferee with respect to such liability. §1.1446(f)-3(e)(2). This rule retains the general approach in the proposed regulations that computes the excess amount as the difference between the amount withheld under §1.1446(f)-3 and the transferee's withholding tax liability under §1.1446(f)-2, but clarifies that both amounts are computed by including inter-

est, and a refund may be claimed only to the extent that the excess amount produces an overpayment. While the final regulations do not explicitly adopt either of the specific suggestions made in the comment, this approach is generally consistent with the alternative suggestion described in the comment as the final regulations also allow a transferee to establish that it has a reduced withholding tax liability under §1.1446(f)-2 based on the amount of tax due by the foreign transferor on gain subject to §1.864(c)(8)-1, or that tax has already been paid by the foreign transferor. See §1.1446(f)-5(b) and section IV.A of this Summary of Comments and Explanation of Revisions. In order to coordinate a partnership's obligation to withhold with the transferee's withholding liability, these final regulations modify §1.1446(f)-2(d)(2) to provide that a transferee's withholding tax liability under §1.1446(f)-2 is not satisfied if a partnership knows or has reason to know that a certification relied on by the transferee to reduce or eliminate withholding is incorrect or unreliable. See section V.A.1 of this Summary of Comments and Explanation of Revisions.

D. *Liability of a related person to the transferee*

The proposed regulations generally did not require a partnership to continue withholding under section 1446(f)(4) on distributions made after the transferee disposed of its interest. However, if the interest were transferred to a person that is related to the transferee or the transferor from which the transferee acquired its interest (that is, a subsequent transferee that bears a relationship described in sections 267(b) or 707(b)(1) with respect to the relevant party), and if the partnership had actual knowledge of the subsequent transferee's relationship to the relevant party, proposed §1.1446(f)-3(c)(1)(ii)(C) required the partnership to withhold on distributions made to the subsequent transferee. This rule was intended to prevent a transferee (or any subsequent transferee) from avoiding withholding under section 1446(f)(4) by transferring its interest to a related person. Consistent with this intent, the final regulations clarify that a related person is treated as liable for tax under section 1461 to the same extent to which the transferee is liable under §1.1446(f)-2. This clarification is meant to prevent the related person that is withheld upon under section 1446(f)(4) from making a claim for a credit or refund of the withheld amount. These final regulations, therefore, ensure that a credit or refund is permitted only for an amount that exceeds the amount that the transferee failed to withhold.

VI. Withholding on the Transfer of a PTP Interest by a Foreign Person

Proposed §1.1446(f)-4(a) implemented the withholding requirement under section 1446(f) on transfers of PTP interests. Under this rule, any broker that effects a transfer of a PTP interest on behalf of a foreign partner and receives the amount realized on behalf of the transferor is generally required to withhold a tax equal to 10 percent of the amount realized. Proposed §1.1446(f)-4(b) provided certain exceptions to this requirement, and proposed §1.1446(f)-4(c) provided rules for determining the amount realized for purposes of withholding on a transfer of a PTP interest. Proposed revisions to §1.1461-1 provided rules for a broker to report the amount realized and tax withheld from a transfer of a PTP interest.

A. *Scope of withholding obligation*

1. Qualified Intermediary Agreement

The preamble to the proposed regulations stated that the Treasury Department and the IRS intend to modify the qualified intermediary agreement (QI agreement) set forth in Revenue Procedure 2017-15, 2017-3 I.R.B. 437, to allow qualified intermediaries (QIs) to assume primary withholding responsibilities on amounts realized under section 1446(f) and on distributions by publicly traded partnerships under section 1446(a). Comments requested that the revisions to the QI agreement be set forth in proposed form before the modified QI agreement is published. In response to those comments, this section VI of this Summary of Comments and Explanation of Revisions describes certain requirements specific to QIs to preview several intended revisions to the QI agreement that relate to §1.1446(f)-4. Additionally, section VII of this Summary of Comments and Explanation of Revisions describes certain requirements included in §1.1446-4 of these final regulations that apply to QIs that receive distributions made by publicly traded partnerships. Since the QI agreement expires at the end of the 2022 calendar year, provisions related to these final regulations applicable to QIs will be incorporated into a revised QI agreement effective for the 2023 calendar year. As the provisions of these final regulations that relate to withholding with respect to transfers of PTP interests and distributions by publicly traded partnerships apply to QIs starting January 1, 2022, the requirements for QIs related to section 1446(a) and (f) for the 2022 calendar year will be set forth in a rider to the QI agreement. See section VIII of this Summary of Comments and Explanation of Revisions for a discussion of the applicability dates of these final regulations. A QI will not be required to include in a periodic review for the 2022 calendar year any review procedures with respect to the QI's compliance with sections 1446(a) and (f); therefore, the rider will not include any review procedures related to those sections, nor will the rider include any new certifications or information for purposes of Appendix I of the QI agreement for a QI with a certification period ending December 31, 2022.

2. Transfers of PTP Interests that are Cleared and Settled at a Clearing Organization

The proposed regulations generally defined a broker as any person that, in the ordinary course of business, stands ready to effect sales made by others, and that, in connection with a transfer of a PTP interest, receives all or a portion of the amount realized on behalf of the transferor. Proposed §1.1446(f)-1(b)(1). The proposed regulations provided that the term broker includes a clearing organization that effects the transfer of a PTP interest on behalf of the transferor. Id. In addition, the proposed regulations generally provided that a broker that pays the amount realized to a foreign broker is required to withhold unless the foreign broker is a QI that assumes primary withholding responsibility or is a U.S. branch treated as a U.S. person. Proposed §1.1446(f)-4(a).

The Treasury Department and the IRS received comments requesting various exclusions and special rules for brokers effecting trades that are cleared and settled at a clearing organization. One comment requested that U.S. clearing organizations be excluded from the definition of broker in §1.1446(f)-1(b)(1) in connection with their roles in the clearance and settlement of sales of PTP interests. The comment noted that U.S. clearing organizations perform a critical role in ensuring the functioning of the U.S. capital markets, and that imposing withholding requirements on U.S. clearing organizations may be disruptive to the market for trading PTP interests.

The comment also explained that within U.S. clearing organizations, trades of securities (including PTP interests) are frequently processed through a netting system, whereby each security and related money settlement obligation is netted to one net security and payment position per broker, with the clearing organization as the central counterparty. The netting system creates efficiencies that ensure the prompt clearance and settlement of securities transactions and increases liquidity in the market. The comment noted that this netting process is critical to orderly and efficient trading in the capital markets, and that withholding under section 1446(f) on a gross basis may cause netting to be impacted with respect to the clearance and settlement of PTP interests. The comment also noted that the Treasury Department and the IRS have historically recognized this issue by creating exceptions or special rules for clearing organizations in similar contexts. See §§1.1473-1(a)(3)(i)(C) and 1.6045-1(b), Example 2(vii).

The comment further explained that a U.S. clearing organization may also process bilateral transactions between members of the clearing organization for which the cash and securities exchanged are not netted by the clearing organization as described in the preceding paragraph. These transactions may include, among others, the transfer of cash and securities between a seller's broker and custodian in order to settle a trade. For example, a member broker effecting a sale of a PTP interest for a seller may make a payment of the gross proceeds to the custodian for the seller when the seller engages a broker that is not its custodian to effect the sale of the PTP interest through a clearing organization. The comment requested that withholding on such transactions be the responsibility of the member making the gross payment and not the clearing organization. The comment stated that the members of a U.S. clearing organization are in the better position to withhold on such transactions because they possess the information about the transaction necessary to determine whether withholding is required, whereas the role of the clearing organization in such cases is generally limited to transferring securities and cash based on instructions provided by the members.

Another comment requested a special rule for so-called "delivery versus payment" transactions. The comment noted that regulations under section 6045 (which require reporting by brokers of gross proceeds from sales of securities by U.S. nonexempt recipients) provide that in the case of a sale of securities through a "cash on delivery" or "delivery versus payment" account (or other similar account or transaction), only the broker that receives the gross proceeds from the sale against delivery of the securities sold is required to report the sale. See §1.6045-1(c)(3)(iv). The comment requested that in the case of a "delivery versus payment" transaction, for purposes of section 1446(f), only the custodian for the seller should report and withhold on the sale, and not the broker paying the gross proceeds to the custodian. The comment noted that without such a rule for section 1446(f), certain brokers that are not currently documenting and reporting payments of gross proceeds for purposes of section 6045 would be required to create systems to document and, if necessary, withhold on and report payments to a custodian holding a PTP interest on behalf of a transferor and receiving the amount realized for purposes of section 1446(f).

The comment also noted that because brokers are not currently required to obtain documentation on custodians to which they make payments in connection with "delivery versus payment" transactions, a custodian may not be willing to provide documentation to the broker or accept less than the entire amount of gross proceeds from the sale, causing the trade to "fail" (in other words, the trade would not be settled with respect to the transferor holding the PTP interest through the custodian). However, the comment acknowledged that if the withholding responsibility is only on the custodian, there is a risk that a custodian would be a nonqualified intermediary (NQI) and would not document or withhold on the transferor under section 1446(f). The comment suggested that this risk could be mitigated by requiring a clearing organization to withhold on these sales, and noted that U.S. clearing organizations already collect documentation on their members that are custodians for purposes of meeting other withholding requirements.

These final regulations retain the rule in the proposed regulations that a broker includes a clearing organization. However, the final regulations provide that a broker that is a U.S. clearing organization is not required to withhold on an amount realized on trades of PTP interests that are netted and that have a U.S. clearing organization as the central counterparty. The Treasury Department and the IRS have determined a U.S. clearing organization should not be required to withhold on such transactions under section 1446(f) at this time. The Treasury Department and the IRS understand that withholding by a U.S. clearing organization on a gross basis on such trades may be disruptive to the efficiency and liquidity of the trading of PTP interests in the capital markets. The Treasury Department and the IRS also understand that there are no NQI direct clearing members that participate directly in the net settlement system at a U.S. clearing organization at the present time. Therefore, there is no risk of underwithholding due to this exception based on current market practice. Further, the Treasury Department and the IRS understand that it is highly unlikely that a NQI would become such a member in the future because of restrictions in U.S. securities and banking laws on foreign banks and brokers, as well as the practical barriers to becoming a direct clearing member at a U.S. clearing organization. After carefully weighing the burdens and benefits of the possible approaches, the Treasury Department and the IRS have determined that the risk of any possible market disruption outweighs any benefit of imposing a with-

holding requirement on a U.S. clearing organization in these final regulations at the present time on trades settled through a net settlement system at the U.S. clearing organization.

However, in order to ensure that withholding on sales of PTP interests that have undergone a netting process at a U.S. clearing organization is satisfied by the member brokers and that there are no NQI direct clearing members participating in the net settlement system with respect to PTP interests, a U.S. clearing organization is required in these final regulations to report such sales (on a non-netted basis) for each direct clearing member on Form 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding* (unless an exception applies). If this reporting on Form 1042-S indicates that an NQI is a direct clearing member of a U.S. clearing organization, the Treasury Department and the IRS will issue proposed guidance that would revise these final regulations to require withholding by the U.S. clearing organization on such NQIs.

With respect to transfers of cash and securities on a gross basis by a U.S. clearing organization at the instruction of its members in order to settle a trade of a PTP interest, these final regulations do not require withholding and reporting by the U.S. clearing organization. However, the Treasury Department and the IRS decline to adopt an exclusion from withholding and reporting with respect to brokers (other than U.S. clearing organizations) for "delivery versus payment" transactions. Therefore, under these final regulations, a broker paying an amount realized to a foreign custodian is required to withhold and report on the amount realized (unless an exception applies). This determination follows from concerns with cases in which brokers may pay amounts realized to custodians that are NQIs. To address the concerns raised in the comments about the difficulty of obtaining documentation on custodians in order to determine whether withholding or reporting applies, these final regulations permit a U.S. clearing organization to provide documentation on a member custodian to a member broker paying an amount realized to such custodian, subject to the notification and opt-out requirements described in the final regulations, and a broker may rely on such documentation. See §1.1446(f)-4(a)(4). The Treasury Department and the IRS understand that it is possible for brokers to create a mechanism for imposing withholding on amounts realized paid to custodians that are NQIs (and thus avoiding failed trades).

3. Documentation of Non-foreign Status of Broker

The proposed regulations provided that a broker must treat another broker as a foreign person unless it obtains documentation (including a certification of non-foreign status) establishing that the other broker is a U.S. person. See proposed §1.1446(f)-4(a)(2)(iv).

One comment requested that the presumption rules under §1.1441-1(b)(3)(iii) that apply to a payment subject to withholding under sections 1441 and 1442 also apply for purposes of section 1446(f) when a broker does not obtain documentation on another broker. In certain cases, this change would allow a broker to treat another broker, including a custodian, to which it pays an amount realized as a non-foreign person even when it does not obtain the documentation of non-foreign status required under the proposed regulations. This suggestion is not adopted in these final regulations. The presumption rules in §1.1441-1(b)(3)(iii) are generally aimed at withholding agents that have an ongoing relationship with the payee and make periodic payments to the payee and, therefore, are likely to have some information on the payee in the withholding agent's account files or in documentation associated with a payment. Furthermore, many withholding agents that are required to withhold under sections 1441 and 1442 are generally subject to anti-money laundering/know your customer (AML/KYC) obligations that require the collection of customer information on account opening. Therefore, in most instances where the presumption rules in §1.1441-1(b)(3)(iii) apply, the presumption would be foreign status. Those rules would not be appropriate in a transactional context where a broker may not have an ongoing relationship with another broker to which it pays an amount realized. The application of such rules to brokers required to withhold on sales of PTP interests under section 1446(f) in those cases would generally result in a presumption of U.S. status, which would disincentivize brokers from collecting tax documentation on another broker to which it pays an amount realized. Further, the Treasury Department and the IRS understand that there are a limited number of custodians for which a broker would need to obtain documentation. Accordingly, documenting a broker as a U.S. person would generally be a one-time event because a Form W-9 generally has indefinite validity (absent a change in circumstances).

However, in order to provide additional flexibility in cases in which a broker may have an existing relationship with another broker, these final regulations permit a broker to rely on documentation that it already possesses from the payee broker (rather than requiring new documentation for each transaction when the same payee broker is used). Additionally, these final regulations provide a further allowance for a broker to rely on documentation required for transfers of PTP interests that is collected by a clearing organization. See section VI.A.2 of this Summary of Comments and Explanation of Revisions.

These final regulations also include a technical correction to the definition of foreign person to account for certain QIs that are not foreign entities. The term foreign person is defined in these final regulations to include QI branches of U.S. financial institutions. See §1.1446(f)-1(b)(4). This definition is consistent with the definition of foreign person for purposes of sections 1441 through 1443, 1461, and the regulations under those sections. See §1.1441-1(c)(2)(i).

4. QIs Assuming Section 1446(f) Withholding Responsibility

Under proposed §1.1446(f)-4, a broker was not required to withhold on an amount realized paid to another broker that is a QI that represents on its withholding certificate (as described in §1.1441-1(e)(3)(ii)) its assumption of primary withholding responsibility for chapter 3 withholding. With respect to a distribution made by a publicly traded partnership, the proposed regulations provided a similar allowance for a QI to assume primary withholding responsibility under section 1446(a) by

acting as a nominee for the distribution. See proposed §1.1446-4(b)(3).

The QI agreement generally permits a QI to assume primary withholding responsibilities on an account-by-account basis rather than on all payments made by a withholding agent to a QI. Comments requested generally similar flexibility for QIs assuming withholding responsibilities under sections 1446(a) and 1446(f), noting that the proposed regulations do not clearly state whether a QI would need to assume section 1446 withholding responsibilities as part of its overall withholding responsibilities. One comment noted the different system-related considerations in withholding on sale proceeds as opposed to withholding on payments of periodic income. To better match systems capabilities of withholding agents and QIs and provide for a more efficient withholding process, comments therefore requested that the regulations be clarified to permit a QI to assume primary withholding responsibilities under section 1446(a) and (f) regardless of whether the QI assumes primary withholding responsibilities for other payments subject to withholding under chapters 3 and 4. A comment requested that a QI be permitted to assume withholding responsibility under section 1446(a) but not section 1446(f), and vice versa. Another comment requested that a QI be permitted to assume withholding responsibility under section 1446(f) resulting from a sale of a PTP interest independent of whether the QI assumes primary withholding responsibility under section 1446(f) on distributions made by the publicly traded partnership.

The Treasury Department and the IRS agree that QIs should be permitted appropriate flexibility to make appropriate arrangements to assume, or not assume, certain withholding responsibilities. These final regulations allow a QI to assume primary withholding responsibility under section 1446(f) on a payment-by-payment basis. For example, a QI may assume primary withholding responsibility under section 1446(f) for a sale of a PTP interest but not a distribution, and vice versa. Further, a QI is permitted to assume (or not assume) primary withholding responsibility under section 1446(f) on a sale of a PTP interest regardless of whether the QI assumes primary withholding responsibilities under sections 1441 and 1442. However, under these final regulations a QI that assumes withholding responsibilities on any portion of a distribution from a publicly traded partnership will be required to assume withholding responsibilities for the entire distribution (in other words, a QI must either assume withholding responsibilities on the distribution for purposes of chapter 3 (including section 1446(a) and (f)) and chapter 4, or not assume withholding responsibilities for any of those purposes). See §§1.1446(f)-4(a)(8) and 1.1446-4(b)(3). This requirement will make withholding and reporting on distributions with respect to PTP interests more efficient because one party will perform the withholding and reporting on a distribution. The Treasury Department and the IRS intend for the revised QI agreement to incorporate the requirements for a QI that assumes primary withholding responsibility under section 1446(a) or (f).

Similar changes to those described above for QIs are included in these final regulations with respect to payments of amounts realized made to U.S. branches that agree to act as U.S. persons under section 1446(a) or (f). Additionally, these final regulations clarify in §1.1446(f)-4(a)(2)(i)(B) that the requirements for a U.S. branch withholding certificate under §1.1441-1(e)(3)(v) apply without regard to the requirement that the certificate include a representation that the income is not effectively connected with the conduct of a trade or business within the United States.

5. QIs Not Assuming Section 1446 Withholding Responsibility

Under the current QI agreement, a QI is not required to assume primary withholding responsibilities under chapters 3 and 4. In such cases, a QI provides withholding rate pool information on its account holders that are foreign persons (rather than specific information about each such account holder) to the withholding agent sufficient for the withholding agent to determine the amounts to withhold. The proposed regulations permitted an exception to withholding on an amount realized paid to a QI only when the QI assumes primary withholding responsibility, but provided no special rules for when a QI does not assume withholding responsibility under section 1446(f). Comments requested that a QI be permitted to not assume primary withholding responsibility under section 1446(f) if it provides to the broker paying an amount realized a withholding statement that allocates the amount realized to account holders of the QI selling their PTP interests in withholding rate pools, similar to the allowance for a QI to pass up withholding rate pools for purposes of section 1441. See §1.1441-1(b)(2)(vii)(C) and (e)(5)(v)(C). In addition, for accounts not designated by a QI as accounts for which it acts under the QI agreement, a comment requested that the final regulations also permit a QI not assuming primary withholding responsibility under section 1446(f) to represent its status as a QI and provide to the broker a withholding statement allocating the amount realized to each account holder of the QI selling its PTP interest in the same transaction, along with specific account holder documentation, sufficient for the broker to determine the amount to withhold. This allowance would avoid any additional withholding that might apply were the QI instead required to represent its status as an NQI in those cases, as described in section VI.A.6 of this Summary of Comments and Explanation of Revisions, and would relieve a QI from filing a Form 1042-S in such a case. Comments also requested that a QI be permitted to report on Form 1042-S on a pooled basis (rather than to specific recipients) for section 1446(f) purposes to the same extent permitted for other payments covered by the QI agreement.

In response to these comments, the final regulations provide that a broker may determine the amount to withhold under section 1446(f) on an amount realized paid to a QI that does not assume primary withholding responsibility under section 1446(f) based on aggregate information (in other words, in withholding rate pools) about the account holders of the QI that are transferring PTP interests. See §1.1446(f)-4(a)(7). Under these final regulations, a broker may rely on a QI's allocation of an amount realized to a pool of foreign transferors subject to 10-percent withholding, a pool of foreign transferors that are excepted from withholding under §1.1446(f)-4(b), and, to the extent permitted under chapter 4, U.S. transfer-

ors included in a chapter 4 withholding rate pool of U.S. payees. This allowance provides parity with sections 1441 and 1442 with respect to a QI's requirements for its withholding statements (and associated documentation) and will provide QIs and brokers making payments of amounts realized to QIs greater flexibility in meeting their section 1446(f) requirements. Additionally, under these final regulations a broker may also rely on specific payee information provided by a QI with respect to foreign transferors (rather than pooled information), thereby permitting the broker to withhold based on this information rather than treating the QI as an NQI in such a case (as would generally be the case for other amounts subject to withholding under chapter 3). See §1.1446(f)-4(a)(7)(iii). A broker may also withhold as described in the preceding sentence for purposes of section 1446(a) under these final regulations in order to coordinate the rules applicable to QIs under both sections 1446(a) and (f). See §1.1446-4(e) and section VII.C of this Summary of Comments and Explanation of Revisions. These final regulations also provide that in cases where a QI passes up specific payee information for a partner receiving a distribution or an amount realized, the nominee or broker shall treat the partner (that is, the QI's account holder) as the recipient for purposes of reporting on Form 1042-S. See §1.1461-1(c)(1)(ii)(A)(*8*).

The revised QI agreement incorporates the allowances described in the preceding paragraph, including an allowance relieving a QI from filing a Form 1042-S to the extent that it has provided specific payee information to a broker that has issued a Form 1042-S to one or more account holders of the QI (although such a case will be within the scope of a QI's activities under the QI agreement). In addition, as requested by comments, the revised QI agreement will permit a QI to report on Form 1042-S on a pooled basis (rather than to specific recipients) for amounts subject to withholding under section 1446(a) or (f) to the same extent generally permitted for other payments to foreign account holders under the QI agreement. To ensure that account holders that are foreign partners will have the information necessary to satisfy their own U.S. income tax reporting requirements, the requirements of §1.6031(c)-1T will be incorporated into the QI agreement. See §§1.6012-1(b)(1), 1.6012-2(g)(1), and 1.6031(a)-1. Since foreign partners are required to file U.S. income tax returns to report their effectively connected income and may request Forms 1042-S from QIs to support amounts withheld that are reported on their returns, these partners are able to obtain refunds of taxes overwithheld under section 1446(f) when making their required filings. Therefore, the revised QI agreement will not allow a QI to use the collective refund procedures for amounts withheld under section 1446(a) or (f) with respect to its account holders that are foreign partners.

6. Withholding under Section 1446(f) on Payments to NQIs

As discussed in section VI.A.5 of this Summary of Comments and Explanation of Revisions, these final regulations permit a broker to determine its withholding obligation under section 1446(f) by relying on certain account holder information provided by a QI that does not assume primary withholding responsibility. One comment requested a similar allowance that would permit a broker to rely on a certification from an NQI for calculating the broker's withholding under section 1446(f) in a case in which the NQI provides specific partner information to the broker (thus avoiding withholding on the full amount paid to the NQI in certain cases). The comment noted that requiring withholding on amounts realized allocable to U.S. partners that are NQI account holders would result in excessive withholding. Another comment noted that the requested allowance would relieve an NQI from reporting on Form 1042-S as its broker would have the information to report the amount realized that is allocated to each foreign partner in the publicly traded partnership. See §1.1461-1(c)(1)(ii)(A)(*8*) (requiring reporting of amounts realized paid to foreign partners of publicly traded partnerships).

Even though overwithholding could occur in certain cases absent the requested change, the Treasury Department and the IRS have determined that a broker should not be relieved of withholding at the full amount under section 1446(f) on amounts realized that are paid to NQIs (except when the NQI maintains a U.S. branch that assumes the withholding). This determination reflects the view that in general NQIs are not required to account to the IRS with respect to their compliance with the withholding and reporting requirements of section 1446(f). As in the proposed regulations, therefore, a broker will be required to withhold at the full 10-percent rate on an amount realized paid to an NQI when no exception to withholding applies under these final regulations. However, a partner that is an account holder of an NQI that is subject to withholding under section 1446(f) will be entitled to claim a credit under section 33 for the amount withheld when the partner is provided a Form 1042-S supporting the claim from the NQI (or as otherwise provided in IRS forms or instructions). See §1.1446(f)-4(e)(2).

7. Broker's Determination of Prior Broker Withholding under Section 1446(f)

Under proposed §1.1446(f)-4(a)(2)(iii), a broker is not required to withhold on an amount realized from the sale of a PTP interest when it knows that the withholding obligation has been satisfied by another broker. A comment requested a specific documentation rule (such as a certification from the paying broker) to provide more certainty to the receiving broker that the withholding requirement has been satisfied with respect to the payment.

The regulations under section 1441 provide a standard different than that included in the proposed regulations for when a withholding agent may treat a payment as already subjected to withholding (thus avoiding duplicative withholding). That rule provides that an NQI receiving a payment from a withholding agent is not required to withhold when the NQI has provided a Form W-8IMY, withholding statement, and attached documentation to the withholding agent and does not know or have reason to know that another withholding agent failed to withhold the correct amount. See §1.1441-1(b)(6). In the case of a QI receiving the payment, however, §1.1441-1(b)(6) provides that a QI determines its withholding requirement in accordance with the QI agreement. To address the concern raised in the com-

ment regarding the difficulty for a broker to show that withholding was applied by another broker, these final regulations amend that requirement by incorporating a standard generally similar to that in §1.1441-1(b)(6). See §1.1446(f)-4(a)(4). Therefore, a broker acting as an intermediary for an amount realized is not required to withhold when it receives the amount from another broker unless it knows, or has reason to know, that the paying broker did not withhold on the full amount required (or, in the case of a QI receiving the amount realized, as required in accordance with the QI agreement).

8. Withholding Date for Sales of PTP Interests

A comment requested that the date for withholding with respect to a sale of a PTP interest should be the settlement date (as opposed to the trade date), consistent with the rule in §31.3406(a)-4(b)(1) for when backup withholding under section 3406 is required on certain payments of amounts reportable under section 6045. In response to this comment, these final regulations include a cross-reference to §31.3406(a)-4(b)(1) to clarify the date of withholding under section 1446(f) for a transfer of a PTP interest other than a distribution.

B. *Exceptions to withholding*

Proposed §1.1446(f)-4(b) provided exceptions to the withholding requirement that applies to a broker paying an amount realized from the transfer of a PTP interest, including exceptions that apply to distributions by publicly traded partnerships and exceptions dependent on certifications obtained from transferors. These final regulations modify certain of these exceptions and add an exception for certain transferors (the ECI exception). These final regulations also remove the exception to withholding for a qualified current income distribution in proposed §1.1446(f)-4(b)(4), and replace that exception with a provision for determining the amount realized in the case of a distribution by a publicly traded partnership such that withholding is required only to the extent a distribution is not attributable to net income. A QI will be permitted to apply these same exceptions to withholding under the revised QI agreement.

1. ECI Exception

Comments requested an exception to withholding if a valid Form W-8ECI, *Certificate of Foreign Person's Claim that Income is Effectively Connected with the Conduct of Trade or Business in the United States*, is provided under certain new conditions. The comments explained that certain foreign persons not eligible for the section 864(b) trading safe harbor, such as dealers in securities, buy and sell PTP interests as part of their trade or business in the United States, such that gain or loss on the transfer of the PTP interests would be effectively connected with the conduct of a trade or business within the United States without regard to section 864(c)(8). The comments requested a limited exception for non-U.S. persons that provide a Form W-8ECI and specify on the form that the gain from the sale, exchange, or other disposition of the PTP interest is effectively connected with the conduct of a trade or business within the United States without regard to the application of section 864(c)(8).

The Treasury Department and the IRS have determined that it is appropriate to provide relief from withholding for transferors that certify on a Form W-8ECI that the transferor is a dealer in securities (as defined in section 475(c)(1)) and that any gain from the transfer of a PTP interest is effectively connected with the conduct of a trade or business within the United States without regard to section 864(c)(8). The final regulations add this exception in §1.1446(f)-4(b)(6).

2. 10-Percent Exception

The proposed regulations provided that a broker may rely on a qualified notice stating that the exception to withholding described in proposed §1.1446(f)-4(b)(3) (the 10-percent exception) applies. The proposed regulations required that this exception apply as of the PTP designated date for a transfer of a PTP interest. The PTP designated date was defined as the date for a deemed sale determination that is designated by a publicly traded partnership in a qualified notice, provided that the date is not earlier than 92 days before the date that the publicly traded partnership posts the qualified notice. In addition, the proposed regulations limited reliance on a qualified notice depending on the date of posting. Specifically, a broker may in general only rely on the most recent qualified notice that is posted by the publicly traded partnership within the 92-day period ending on the date of the transfer.

One comment requested that, for purposes of the exception, a broker be permitted to rely on the qualified notice for 183 days from the date of posting by the publicly traded partnership instead of the 92-day period provided in the proposed regulations. This comment noted that qualified notices issued with respect to distributions that are made late in the year complicate the withholding and reporting process.

As noted in the preamble to the proposed regulations, the 92-day period was provided to limit the availability of the 10-percent exception to situations in which a publicly traded partnership has designated a deemed sale date occurring within the most recent calendar quarter given that publicly traded partnerships are in a position to determine the value of their assets quarterly. The proposed regulations limit reliance on a qualified notice to a notice posted within the 92-day period ending on the date of transfer in order to ensure that the broker is using the most recent information available. Therefore, these final regulations retain the 92-day period for purposes of the 10-percent exception.

A comment stated that the 10-percent exception should only account for the publicly traded partnership's effectively connected gain under section 864(c)(8), without taking into account any effectively connected gain under section 897. According to the comment, this would ensure that the transfer of an interest in a partnership that is not engaged in a trade or business within the United States, but that holds U.S. real property interests, is not subject to withholding under section 1446(f). This comment is not adopted because it is appropriate to account for effectively connected gain under section 897 when applying the 10-percent exception. However, to address the concern raised in the comment, these final regulations add an exception to withholding similar to the

one described in section IV.A.3.ii of this Summary of Comments and Explanation of Revisions that applies when a non-publicly traded partnership certifies that it is not engaged in a trade or business within the United States (including when the partnership is not engaged in a trade or business within the United States and only holds U.S. real property interests that are not part of a trade or business). A publicly traded partnership states that this exception applies by providing on a qualified notice that it is not engaged in a trade or business within the United States.

Finally, these final regulations add a provision for certain cases in which a publicly traded partnership is liable under section 1461 for underwithholding by a broker on a transfer when the partnership issues a qualified notice that incorrectly states the applicability of the 10-percent exception. However, this liability applies only when the publicly traded partnership fails to make a reasonable estimate of the amounts required for determining the applicability of the 10-percent exception. See §1.1446(f)-4(b)(3)(i); see also section V.B of this Summary of Comments and Explanation of Revisions.

C. *Determining the amount to withhold*

If an exception to withholding under proposed §1.1446(f)-4(b) does not apply, proposed §1.1446(f)-4(c) provided rules for a broker to determine the amount realized for purposes of computing the amount to withhold on the transfer of a PTP interest. Proposed §1.1446(f)-4(c) included a general rule for determining the amount realized based on the amount of gross proceeds paid on the transfer (as defined in §1.6045-1(d)(5)) and a procedure for modifying the amount realized when the transferor is a foreign partnership that has domestic partners.

1. Modified Amount Realized for Transfers by Foreign Partnerships

Proposed §1.1446(f)-4(c)(2) provided, in the event of a transfer of a PTP interest by a foreign partnership, a procedure that allows a broker to reduce the amount realized on the transfer to the extent the amount realized is allocable to partners that are U.S. persons. A foreign partnership may claim this modified amount realized by providing a Form W-8IMY, a withholding statement allocating the percentage of gain from the transfer allocable to each direct or indirect partner that is a U.S. person or a presumed foreign person, and a certification of non-foreign status for each partner that is a U.S. person. As described in section IV.B.2 of this Summary of Comments and Explanation of Revisions, these final regulations expand the analogous procedure under §1.1446(f)-2(c)(2)(iv) that applies to transfers of non-PTP interests to take into account situations in which a foreign partner (direct or indirect) in the transferor partnership is eligible for treaty benefits. In response to a comment, the same modification is made in these final regulations for transfers of PTP interests.

Another comment requested an allowance for the transferor partnership to provide to the broker the aggregate percentage of gain allocable to its partners that are U.S. persons as opposed to the requirement to include on the withholding statement the percentage of gain allocable to each partner that is a U.S. person. The comment reflects a concern that a broker using the procedure under the proposed regulations may be considered to have actual knowledge of the extent to which proceeds from the transfer are paid to each partner that is a U.S. person, thereby resulting in a requirement for the broker to report these gross proceeds under section 6045. See §§1.6045-1(g)(1)(i) and 1.6049-5(d)(3)(i).

The Treasury Department and the IRS have determined that any additional reporting under section 6045 that results from this requirement is an appropriate consequence of the rule. Additionally, this rule provides information useful to the IRS. See, however, §§1.6049-4(c)(4) and 1.6045-1(g)(1)(iv) (providing coordination of chapter 61 reporting with reporting by certain foreign financial institutions under chapter 4).

Under the revised QI agreement, a QI will be permitted to adjust an amount realized in accordance with the procedures described in this section VI.C.1 of this Summary of Comments and Explanation of Revisions with respect to any direct account holder of the QI that is a foreign partnership or a direct account holder of another QI that is a foreign partnership to which the first-mentioned QI pays the amount realized.

2. Determining Amount Realized with Respect to Distributions

Under the proposed regulations, in the event of a distribution by a publicly traded partnership that is treated as a transfer for purposes of section 1446(f), the entire amount of a distribution was treated as the amount realized. Proposed §1.1446(f)-4(c)(2). In general, under section 731(a), a partner recognizes gain on a distribution from a partnership to the extent that any money distributed exceeds the partner's basis in its interest in the partnership. Under section 705(a)(1), a partner's basis in its interest is increased by its distributive share of income for the taxable year. Proposed §1.1446(f)-4(b)(4) provided an exception to a broker's requirement to withhold on a distribution by a publicly traded partnership if the entire amount of the distribution is designated on the publicly traded partnership's qualified notice (as defined in §1.1446-4(b)(4)) as a qualified current income distribution. The proposed regulations defined a qualified current income distribution as a distribution that does not exceed the net income that the publicly traded partnership earned since the record date of the publicly traded partnership's last distribution. This exception was intended to eliminate withholding under section 1446(f)(1) on a distribution by a publicly traded partnership when the partner would not likely recognize gain from the distribution under section 731(a) due to the basis increase under section 705(a)(1) for partnership income allocable to a partner.

Comments suggested various alternatives to the qualified current income distribution exception. Two comments requested that withholding under section 1446(f) not apply to any distributions by a publicly traded partnership. One of those comments asserted that any unrealized effectively connected gain attributable to assets of the publicly traded partnership would eventually be taxed through withholding under either section 1446(a) when the publicly traded partnership disposes of those assets or section 1446(f) when the partner sells its PTP interest. Certain com-

ments suggested modifying the requirements for the exception. One comment suggested that, for purposes of applying the exception, a broker should be permitted to treat a distribution as made out of current net income unless the qualified notice states otherwise. This comment noted that publicly traded partnerships may not publish qualified notices designating the distribution as a qualified current income distribution due to concerns about liability under proposed §1.1446(f)-3(b)(2)(ii) if the qualified notice is false. Another comment suggested modifying the qualified current income distribution exception so that withholding under section 1446(f)(1) would not apply to the extent that cumulative distributions by a publicly traded partnership do not exceed its cumulative net income earned over time.

Other comments focused on alternatives for coordinating withholding under section 1446(f) on distributions by publicly traded partnerships with withholding under other sections of the Code, noting that a distribution by a publicly traded partnership would be subject to withholding under section 1446(f) as well as withholding under sections 1441, 1442, 1443, and 1446(a) (to the extent applicable) when the qualified current income distribution exception would not apply. For example, a comment suggested reducing the tax liability under section 1446(a) by amounts withheld under section 1446(f) dollar-for-dollar, or exempting distributions from withholding under section 1446(f) to the extent those distributions are subject to withholding under section 1446(a) (or vice versa). Another comment requested more broadly that withholding under section 1446(f) not apply to a distribution made by a publicly traded partnership when withholding under section 1441, 1442, 1443, or 1446(a) applies to the payment.

Section 1446(f)(1) requires withholding if any portion of the gain on a disposition of an interest in a partnership would be treated under section 864(c)(8) as effectively connected gain. Section 1446(f) ensures that tax is collected on gain under section 864(c)(8). The Treasury Department and IRS have determined that eliminating withholding entirely on distributions by publicly traded partnerships would undermine the purpose of section 1446(f) in certain cases. For example, there may not be a subsequent sale of the PTP interest subject to withholding under section 1446(f), particularly if the distribution is in redemption of the PTP interest. Alternatively, the value of a publicly traded partnership's assets (or the amount of unrealized effectively connected gain) may change between the date of a distribution and either the date on which the partnership sells the assets or the date on which the partner sells its PTP interest.

The Treasury Department and the IRS do not agree with the comments requesting an offset against section 1446(f) withholding for amounts withheld under section 1446(a). Section 1446(a) withholding applies to effectively connected taxable income earned by the partnership that is allocated and distributed to its partners. In contrast, section 1446(f) withholding applies to ensure the collection of tax on the built-in gain of the partnership's assets under section 864(c)(8). Thus, each withholding regime applies to a separate item of taxable income.

For these reasons, the final regulations continue to require withholding under section 1446(f) on a distribution made with respect to a PTP interest. However, because the exception for a qualified current income distribution provided relief only when a publicly traded partnership made a distribution entirely out of current net income, these final regulations replace this exception with a procedure in §1.1446(f)-4(c)(2)(iii) for adjusting the amount realized to the amount of a distribution in excess of cumulative net income. Thus, if a portion of a distribution made by a publicly traded partnership is attributable to an amount in excess of cumulative net income, a broker is required to withhold only on this portion for purposes of section 1446(f), rather than on the entire amount of the distribution. Also, in response to a comment, this rule looks to the amount in excess of the cumulative net income, rather than the current net income (as was required under the proposed regulations). The cumulative net income is the net income earned by the partnership since the formation of the partnership that has not been previously distributed by the partnership. As a result of this change, these final regulations remove the general rule included in the proposed regulations that defined the amount realized from a PTP distribution as the amount of cash and the fair market value of property distributed or to be distributed.

Under the final regulations, the publicly traded partnership identifies the portion of a distribution attributable to an amount in excess of cumulative net income on a qualified notice. If a broker properly withholds based on the qualified notice (applying the rules of §1.1446-4(d)(1) to the distribution), the broker is not liable for any underwithholding on any amount attributable to an amount in excess of cumulative net income. Instead, if a publicly traded partnership issues a qualified notice that causes a broker to underwithhold with respect to an amount in excess of cumulative net income, the partnership is liable under section 1461 for any underwithholding on such amount.

D. *Form 1042-S reporting under section 1446(f)*

The proposed regulations included requirements for reporting with respect to transfers of PTP interests on Form 1042-S. As part of these requirements, a broker is generally required to report on Form 1042-S a payment of an amount realized from the transfer of a PTP interest made to a foreign transferor or broker.

One comment requested clarification that reporting on Form 1042-S is performed on an aggregate basis (that is, a broker reports on a single Form 1042-S all transfers of PTP interests with respect to a customer for a calendar year). The proposed regulations added to §1.1461-1(c)(1)(i) the general requirement that a broker report on Form 1042-S amounts realized as determined under section 1446(f). Section 1.1461-1(c)(1)(i) generally provides that a Form 1042-S shall be prepared for each recipient of an amount subject to reporting and for each single type of income payment, in such manner as the form and accompanying instructions prescribe. The IRS intends to amend the instructions to Form 1042-S to clarify that aggregate reporting is used with respect to amounts realized by a transferor on transfers of PTP interests.

As described in section VI.A.6 of this Summary of Comments and Explanation of Revisions, these final regulations re-

quire a broker to withhold on an amount realized paid to an NQI effecting a transfer of a PTP interest for an account holder. A comment requested that the regulations clarify how a broker reports the payment to the NQI, and suggested that the broker report the amount as paid to an unknown account holder, with the NQI reported as an intermediary for the amount (rather than as the recipient). The Treasury Department and the IRS agree with the manner of reporting noted in this comment, which is already generally reflected in §1.1461-1(c)(1)(ii)(B)(*1*) and (c)(4)(ii)(A) (addressing payments to persons that are not recipients, including NQIs) and §1.1461-1(c)(1)(ii)(B)(*5*) (excluding as a recipient a broker withheld upon under §1.1446(f)-4(a)(2)(i)). In response to this comment, the IRS also intends to amend the instructions to Form 1042-S to indicate the reporting that applies in this case.

A comment requested clarification that a foreign partnership subject to withholding under §1.1446(f)-4 may use the Form 1042-S that it receives from the broker to substantiate the foreign partnership's credit of such withholding against its tax liability under section 1446(a). In response to this comment, the Treasury Department and the IRS intend to amend the instructions to Forms 8804, 8805 and 8813 to provide that a foreign partnership withheld upon under section 1446(f) on the transfer of a PTP interest must attach Form 1042-S in order to credit such amount against its liability under section 1446(a).

As discussed in section VI.A.2 of this Summary of Comments and Explanation of Revisions, under these final regulations a U.S. clearing organization will be required to report on Form 1042-S the non-netted amounts realized by a foreign broker with respect to sales of PTP interests that are cleared and settled on a net basis through the clearing organization.

Finally, under §1.1461-1(a)(1), a withholding agent that withholds tax pursuant to chapter 3 is required to deposit the tax as provided in §1.6302-2(a). Consistent with the proposed regulations, these final regulations amend §1.1461-1(a)(1) to incorporate the requirement to deposit tax withheld under section 1446(f). These final regulations include a conforming change to §1.6302-2(a)(1)(i) to provide that the requirement to deposit tax under §1.6302-2 applies to a broker or publicly traded partnership for purposes of section 1446(f), and to a nominee or publicly traded partnership for purposes of section 1446(a).

E. *Synthetic interests*

A comment requested clarification that the proposed regulations apply only to physical interests in publicly traded partnerships and not synthetic interests. A subsequent comment submitted by the same commenter suggested that the final regulations clarify this point by explicitly defining the term "interest" as "an interest as a partner in the partnership." The question of when a contract or other financial instrument denominated as a synthetic interest in a partnership interest may be treated as ownership of a partnership interest is beyond the scope of these regulations.

VII. *Amendments to Existing Section 1446 Regulations Relating to Distributions by Publicly Traded Partnerships*

A. *Method of providing a qualified notice*

The proposed regulations contained changes to the existing qualified notice rules and rules for nominees that apply to distributions of effectively connected income, gain, or loss made by publicly traded partnerships to foreign partners. Proposed §1.1446-4(b)(4) revised the method for a publicly traded partnership to provide a qualified notice to a nominee by requiring that the notice be posted in a readily accessible format in an area of the primary public website of the publicly traded partnership that is dedicated to this purpose. Two comments requested that a requirement be added to require the publicly traded partnership to furnish a copy of the qualified notice to the publicly traded partnership's registered holders that are nominees. PTP interests are generally immobilized at a central depository and registered in the name of the depository's nominee. The comments state that furnishing the qualified notice to the publicly traded partnership's registered holders that are nominees would facilitate the dissemination of information provided on the qualified notice to relevant market participants. Another comment noted the burden on brokers to find qualified notices posted on publicly traded partnerships' websites and suggested requiring all qualified notices to be posted on a central public website.

The Treasury Department and the IRS have determined that the delivery requirements for qualified notices should be aimed at ensuring that all relevant market participants receive the information necessary to comply with their withholding and reporting obligations. Therefore, these final regulations include a requirement for a publicly traded partnership to provide a qualified notice to any registered holder that is a nominee for a distribution. Because the requirements provided will generally ensure that brokers receive the information necessary to meet their withholding obligations under §1.1446(f)-4, these final regulations do not adopt the comment to require publicly traded partnerships to post their qualified notices to a central website.

B. *Default withholding rule*

The proposed regulations also added a default withholding rule (the default withholding rule) for cases in which a qualified notice fails to provide sufficient detail for a nominee to determine the amounts subject to withholding on a publicly traded partnership distribution (a deficient qualified notice). Under this rule, to the extent that a deficient qualified notice fails to specify the type of income from which a distribution is made, the nominee must withhold at the highest rate specified in section 11(b) or 881 for a partner that is a foreign corporation, or the highest rate specified in section 1 or 871 for a foreign partner that is not a corporation. See proposed §1.1446-4(d). One comment requested that a broker be permitted to adjust the rate of withholding under the default withholding rule by considering the status of a partner for purposes of taking into account a lower treaty rate.

The Treasury Department and the IRS have concluded that a nominee applying the default withholding rule should withhold based on the statutory withholding

rates determined under the proposed regulations, without regard to any lower rate that might apply under an applicable income tax treaty. Determinations by nominees of lower rates that might otherwise apply under a treaty would depend on information from publicly traded partnerships about the characterization of the income attributable to the distribution. Because this information would not be provided to the nominee on a qualified notice, these final regulations clarify that a lower treaty rate is not considered for purposes of determining the amount to withhold under the default withholding rule.

The comment also requested that the final regulations clarify that a nominee is required to apply the default withholding rule to a distribution for which no qualified notice is issued. Proposed §1.1446-4(d) modified the existing rule to provide that a nominee is a withholding agent for the entire distribution that it receives from a publicly traded partnership (rather than only to the extent of the amount specified on a qualified notice). These final regulations add language to clarify that a nominee must apply the default withholding rule when a publicly traded partnership fails to issue a qualified notice for a distribution under §1.1446-4(b)(4) of these final regulations.

The default withholding rule in the proposed regulations did not address a case in which a nominee has no information about the status of a partner, including whether the partner is a corporation for determining the withholding rate on effectively connected income paid to the partner. As a result, these final regulations add that if a nominee cannot determine the status of a partner as a corporation, for purposes of the default withholding rule the nominee is required to use the higher of the following rates: (1) the rate of withholding applicable to a foreign person that is a corporation, and (2) the rate of withholding applicable to a foreign person that is not a corporation.

C. *Modifications related to QIs*

The proposed regulations expanded the definition of a nominee to include a QI that assumes primary withholding responsibility for a distribution and a U.S. branch of a foreign person that agrees to be treated as a U.S. person for withholding on a distribution from a publicly traded partnership. To address cases in which a distribution by a publicly traded partnership is paid through multiple nominees that might each be required to withhold under proposed §1.1446-4(d), these final regulations add an exception to withholding for a nominee paying the distribution to a QI or U.S. branch that is also a nominee for the distribution.

Under the QI agreement, a QI may choose not to assume primary withholding responsibilities and in certain of those cases may provide withholding rate pools, rather than specific payee documentation, to the withholding agent that makes a payment to the QI. Because the QI agreement applies only to amounts subject to withholding under chapter 3 (defined as sections 1441 through 1443), chapter 4 (sections 1471 through 1474), or section 3406, the IRS intends to update the QI agreement to extend this treatment to amounts subject to withholding under section 1446(a) to the same extent generally permitted for payments received by QIs on behalf of their foreign account holders under the QI agreement. To coordinate with the intended updates to the QI agreement, these final regulations allow a publicly traded partnership or nominee paying a distribution under section 1446(a) to a QI that does not assume primary withholding responsibilities to rely on an allocation of the distribution to an applicable withholding rate pool provided by the QI by specifying the withholding rate pools permitted for withholding under section 1446(a).

In addition, these final regulations allow a broker to withhold under section 1446(a) based on specific payee documentation provided by a QI. See §1.1446-4(e) and section VI.A.5 of this Summary of Comments and Explanations of Revisions. Additionally, as discussed in section VI.A.4 of this Summary of Comments and Explanations of Revisions, these final regulations require a QI or U.S. branch that acts as a nominee under section 1446(a) for a distribution made by a publicly traded partnership to assume all other required withholding responsibilities with respect to the distribution. These provisions (as applicable to QIs) will be incorporated into the revised QI agreement.

VIII. Applicability Dates

The proposed regulations generally provided that the regulations would apply 60 days after final regulations are issued. Comments requested additional time before withholding on transfers of PTP interests is required, noting that the rules in the proposed regulations would require brokers to update systems, processes, and procedures. The comments generally requested an extension of the applicability date to 18 months following the finalization of all guidance with respect to this requirement. Another comment requested that the same extension apply to QIs, noting the time required for QIs to review the regulations and anticipated revisions to the QI agreement, and to implement the necessary updates to their systems and procedures.

The provisions in these final regulations relating to transfers of PTP interests apply to transfers that occur on or after January 1, 2022. See §§1.1446(f)-4(f), 1.1461-1(i), 1.1461-2(d), and 1.1464-1(c). Similarly, §1.6302-2(g) applies to tax required to be withheld on or after January 1, 2022 with respect to section 1446(f). The provisions included in these final regulations that are applicable to QIs will apply beginning January 1, 2022. See section VI.A.1 of this Summary of Comments and Explanations of Revisions. The Treasury Department and the IRS have determined that this applicability date should provide sufficient time for taxpayers to prepare to implement the regulations relating to transfers of PTP interests. Additionally, certain allowances in the final regulations, such as the allowances for brokers to rely on documentation from clearing organizations in certain cases and documentation already in the broker's possession, should reduce the time needed for brokers to update their systems. See section VI.A.3 of this Summary of Comments and Explanation of Revisions.

Other provisions in the final regulations that require systems adjustments by publicly traded partnerships, such as the procedures for qualified notices, are similarly applicable on January 1, 2022. Specifically, the requirements with respect to publicly traded partnership distributions under §1.1446-4 of these final regulations apply to distributions made on or after January 1, 2022. See §1.1446-7. In addition, the

requirements with respect to distributions that are attributable to dispositions of U.S. real property interests under §1.1445-8(f) apply to distributions made on or after January 1, 2022. See §1.1445-8(j).

Further, in order to provide partnerships with time to implement withholding under section 1446(f)(4), §1.1446(f)-3 applies to transfers that occur on or after January 1, 2022. See §1.1446(f)-3(f).

As contemplated in the proposed regulations, §1.864(c)(8)-2(a) applies to transfers that occur on or after November 30, 2020, §§1.864(c)(8)-2(b) and (c) and 1.6050K-1(c)(2) and (3) apply to returns filed on or after November 30, 2020, and §1.864(c)(8)-2(d) applies beginning on November 30, 2020. See §§1.864(c)(8)-2(e) and 1.6050K-1(h). Sections 1.1445-2(b)(2)(v) and 1.1445-5(b)(3)(iv) apply to the use of Forms W-9 for certifications of non-foreign status provided on or after May 7, 2019, except that a taxpayer may choose to apply those provisions with respect to certifications provided before that date. See §§1.1445-2(e) and 1.1445-5(h).

The conforming changes in §§1.1445-5 and 1.1445-8 resulting from the rate changes made by the Act apply to distributions on or after November 30, 2020. The conforming changes in §§1.1446-3 and 1.1446-4 resulting from the rate changes made by the Act and the change to the due date of Form 8804 made by the Surface Transportation Act apply to partnership taxable years beginning on or after November 30, 2020. Although the applicability date of the changes to the regulations described in this paragraph is based on the date of publication of this document in the **Federal Register**, the same results apply before that date as of the relevant effective dates of the Act and the Surface Transportation Act.

The remaining provisions in these final regulations are generally applicable to transfers that occur on or after January 29, 2021, as contemplated in the proposed regulations. See §§1.1446(f)-1(e), 1.1446(f)-2(f), 1.1446(f)-5(d), 1.1461-3, and 1.1463-1(a).

Effect on Other Documents

Notice 2018-08 (2018-7 I.R.B. 352) is obsolete as of January 1, 2022. Notice 2018-29 (2018-16 I.R.B. 495), other than section 11, is obsolete as of January 29, 2021. Section 11 of Notice 2018-29 is obsolete as of January 1, 2022. Accordingly, the withholding requirements for transfers of PTP interests and withholding under section 1446(f)(4) remain suspended for transfers occurring before January 1, 2022.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, notices, and other guidance cited in this document are published in the Internal Revenue Bulletin and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at http://www.irs.gov.

Special Analyses

I. *Regulatory Planning and Review*

These regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

II. *Paperwork Reduction Act*

The collections of information in these final regulations are in §1.864(c)(8)-2 regarding reporting for transactions described in section 864(c)(8) and §1.864(c)(8)-1; §§1.1446(f)-1 through 1.1446(f)-4 regarding the withholding, reporting, and paying of tax under section 1446(f) following the transfer of an interest described in section 864(c)(8) and §1.864(c)(8)-1; and §1.6050K-1(c) regarding reporting of section 751(a) exchanges. Section II.A of this Special Analyses describes the changes made in these final regulations to the collections of information in the proposed regulations that will be conducted using IRS forms. Section II.B of this Special Analyses describes the changes made in these final regulations to the collections of information in the proposed regulations that will not be conducted using IRS forms.

A. *Collections of Information Conducted Using IRS Forms*

These final regulations include an exception from withholding for amounts realized paid to certain foreign banks and securities dealers. §1.1446(f)-4(b)(6). The collection of information in §1.1446(f)-4(b)(6) is provided by the transferor by submitting a certification as part of Form W-8ECI, *Certificate of Foreign Person's Claim that Income is Effectively Connected with the Conduct of Trade or Business in the United States*, to the broker and is optional. The information will be used by the broker to determine whether an exception to withholding applies if the gain from the transfer of a PTP interest is effectively connected with the conduct of a trade or business within the United States without regard to section 864(c)(8).

The Treasury Department and the IRS intend that the information collection requirement described in this section II.A will be set forth on Form W-8ECI. As a result, for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. (PRA), the reporting burden associated with the collection of information in this form will be reflected in the PRA submission associated with the form. The current status of the PRA submission for Form W-8ECI is provided in the Current Status of PRA Submissions table.

Current Status of PRA Submissions

	Type of Filer	**OMB Number(s)**	**Status**
Form W-8ECI	Business (NEW Model)	1545-0123	Approved 01/30/2019 until 01/30/21.
	https://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1545-0123#		
	All other filers (Legacy system)	1545-1621	Approved 12/19/2018 until 12/31/2021.
	Link: https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-1545-002		

B. *Collections of Information Not Included on IRS Forms*

These final regulations contain collections of information that are not on existing or new IRS forms, and include minor modifications to the collections of information in the proposed regulations relating to certain certifications that may be provided to obtain an exception to withholding or an adjustment to the amount to withhold. See §1.1446(f)-2(b)(4) and (5) and (c)(2). See sections IV.A.3, VI.A.4, and IV.B.2 of the Summary of Comments and Explanation of Revisions for explanations of the changes to these certifications.

Section II.B of the Special Analyses of the proposed regulations provided estimates of the cost of certain collections of information contained in the proposed regulations. A comment suggested that the cost of collections of information for a broker was too high. However, the comment misinterpreted the data provided in section II.B of the Special Analyses of the proposed regulations. The estimated total annual monetized cost provided in section II.B of the Special Analyses of the proposed regulations was the estimated cost of all collections of information not on existing or new IRS forms for all respondents (generally transferors of partnership interests), not the estimated cost of compliance for a broker.

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the PRA under control number 1545-2292.

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.

III. *Regulatory Flexibility Act*

It is hereby certified that these final regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (5 U.S.C. chapter 6).

The final regulations affect (i) foreign persons that recognize gain or loss from the sale or exchange of an interest in a partnership that is engaged in a trade or business within the United States (who are not subject to the Regulatory Flexibility Act), (ii) U.S. persons that are transferors providing Forms W-9 to transferees to certify that they are not foreign persons, (iii) persons who acquire interests in partnerships engaged in a trade or business within the United States, (iv) partnerships that, directly or indirectly, have foreign persons as partners, and (v) brokers that effect transfers of interests in publicly traded partnerships.

The Treasury Department and the IRS do not have data readily available to assess the number of small entities potentially affected by the final regulations. However, entities potentially affected by these final regulations are generally not small entities, because of the resources and investment necessary to acquire a partnership interest from a foreign person or, in the case of a partnership, to, directly or indirectly, have foreign persons as partners. Therefore, the Treasury Department and the IRS have determined that there will not be a substantial number of domestic small entities affected by the final regulations. Consequently, the Treasury Department and the IRS certify that the final regulations will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Code, the proposed regulations preceding these final regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses, and no comments were received.

IV. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. *Executive Order 13132: Federalism*

Executive Order 13132 (titled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

Drafting Information

The principal authors of these regulations are Chadwick Rowland, Subin Seth, Ronald M. Gootzeit, and Charles Rioux, Office of the Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements

Amendments to the Regulations

For the reasons set out in the preamble, 26 CFR part 1 is amended as follows:

PART 1— INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by:

1. Adding a sectional authority for §1.864(c)(8)-2 in numerical order.

2. Revising the sectional authorities for §§1.1445-5 and 1.1445-8.

3. Adding sectional authorities for §§1.1446-3, 1.1446-4, and 1.1446(f)-1 through 1.1446(f)-5 in numerical order.

4. Revising the sectional authority for §1.6050K-1.

The additions and revisions read in part as follows:

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

Section 1.864(c)(8)-2 also issued under 26 U.S.C. 864(c)(8)(E), 6001 and 6031(b).
* * * * *

Section 1.1445-5 also issued under 26 U.S.C. 1445(e)(7).

Section 1.1445-8 also issued under 26 U.S.C. 1445(e)(7).

Section 1.1446-3 also issued under 26 U.S.C. 1446(g).

Section 1.1446-4 also issued under 26 U.S.C. 1446(g).

Section 1.1446(f)-1 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

Section 1.1446(f)-2 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

Section 1.1446(f)-3 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

Section 1.1446(f)-4 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).

Section 1.1446(f)-5 also issued under 26 U.S.C. 1446(f)(6) and 1446(g).
* * * * *

Section 1.6050K-1 also issued under 26 U.S.C. 6050K(a).
* * * * *

Par. 2. Section 1.864(c)(8)-2 is added to read as follows:

§1.864(c)(8)-2 Notification and reporting requirements.

(a) *Notification by foreign transferor*—(1) *In general*. Except as provided in paragraph (a)(2) of this section, a notifying transferor that transfers an interest in a specified partnership must notify the partnership of the transfer in writing within 30 days after the transfer. The notification must include—

(i) The names and addresses of the notifying transferor and the transferee or transferees;

(ii) The U.S. taxpayer identification number (TIN) of the notifying transferor and, if known, of the transferee or transferees; and

(iii) The date of the transfer.

(2) *Exceptions*—(i) *Certain interests in publicly traded partnerships*. Paragraph (a)(1) of this section does not apply to a notifying transferor that transfers an interest in a publicly traded partnership if the interest is publicly traded on an established securities market or is readily tradable on a secondary market (or the substantial equivalent thereof).

(ii) *Certain distributions*. Paragraph (a)(1) of this section does not apply to a notifying transferor that is treated as transferring an interest in a specified partnership because it received a distribution from that specified partnership.

(3) *Section 6050K*. The notification described in paragraph (a)(1) of this section may be combined with or provided at the same time as the notification described in §1.6050K-1(d), provided that it satisfies the requirements of both sections.

(4) *Other guidance*. The notification described in paragraph (a)(1) of this section must also include any information prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§601.601(d)(2) and 601.602 of this chapter).

(b) *Reporting by specified partnerships with notifying transferor*—(1) *In general*—(i) *Requirement to provide statement*. A specified partnership must provide to a notifying transferor the statement described in paragraph (b)(2) of this section if—

(A) The partnership receives the notice described in paragraph (a) of this section, or otherwise has actual knowledge that there has been a transfer of an interest in the partnership by a notifying transferor; and

(B) At the time of the transfer, the notifying transferor would have had a distributive share of deemed sale EC gain or deemed sale EC loss within the meaning of §1.864(c)(8)-1(c).

(ii) *Distributions*. For purposes of paragraph (b)(1)(i)(B) of this section, a specified partnership that is a transferee because it makes a distribution is treated as having actual knowledge of that transfer.

(2) *Contents of statement*. The statement required to be furnished by the specified partnership under paragraph (b)(1) of this section must include—

(i) The items described in §1.864(c)(8)-1(c)(3)(ii) (foreign transferor's aggregate deemed sale EC items, which includes items derived from lower-tier partnerships);

(ii) Whether the items described in paragraph (b)(2)(i) of this section were determined (in whole or in part) under §1.864(c)(8)-1(c)(2)(ii)(E) (material change in circumstances rule for determining deemed sale EC gain or deemed sale EC loss from a deemed sale of the partnership's inventory property or intangibles); and

(iii) Any other information as may be prescribed by the Commissioner in forms, instructions, publications, or guidance published in the Internal Revenue Bulletin (see §§601.601(d)(2) and 601.602 of this chapter).

(3) *Time for furnishing statement*. The specified partnership must furnish the required information on or before the due date (with extensions) for issuing Schedule K-1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.*, or other statement required to be furnished under §1.6031(b)-1T, to the notifying transferor for the year of the transfer. *See* §1.6031(b)-1T(b).

(4) *Manner of furnishing statement*. The statement required to be furnished under paragraph (b)(1) of this section must be provided on Schedule K-1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.*, or other statement required to be furnished under §1.6031(b)-1T.

(5) *Partnership notifying transferor*. For purposes of this paragraph (b), a specified partnership must treat a notifying transferor that is a partnership as a nonresident alien individual.

(c) *Statement may be provided to agent*. A specified partnership may provide a statement required under paragraph (b)(2) of this section to a person other than the notifying transferor if the person is described in §1.6031(b)-1T(c).

(d) *Definitions*. The following definitions apply for purposes of this section.

(1) *Notifying transferor*. The term *notifying transferor* means any foreign person, any domestic partnership that has a foreign person as a direct partner, and any domestic partnership that has actual knowledge that a foreign person indirectly holds, through one or more partnerships, an interest in the domestic partnership.

(2) *Specified partnership*. The term *specified partnership* means a partnership that is engaged in a trade or business with-

in the United States or that owns (directly or indirectly) an interest in a partnership that is engaged in a trade or business within the United States.

(3) *Transfer*. The term *transfer* has the meaning provided in §1.864(c)(8)-1(g)(5).

(e) *Applicability dates*. Paragraph (a) of this section applies to transfers that occur on or after November 30, 2020. Paragraphs (b) and (c) of this section apply to returns filed on or after November 30, 2020. Paragraph (d) of this section applies beginning on November 30, 2020.

Par. 3. Section 1.1445-2 is amended by adding paragraph (b)(2)(v) and a sentence to the end of paragraph (e) to read as follows:

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

* * * * *

(b) * * *

(2) * * *

(v) *Form W-9*. For purposes of paragraph (b)(2)(i) of this section, a certification of non-foreign status includes a valid Form W-9, *Request for Taxpayer Identification Number and Certification*, or its successor, submitted to the transferee by the transferor.

* * * * *

(e) * * * Paragraph (b)(2)(v) of this section applies to certifications provided on or after May 7, 2019, except that a taxpayer may choose to apply paragraph (b)(2)(v) of this section with respect to certifications provided before May 7, 2019.

Par. 4. Section 1.1445-5 is amended by:

1. Adding paragraph (b)(3)(iv).

2. In each paragraph listed in the first column in the table, removing the language in the second column and adding in its place the language in the third column as set forth below:

Paragraph	Remove	Add
(c)(1)(ii) first sentence	A partnership must withhold a tax equal to 35 percent (or the highest rate specified in section 1445(e)(1))	A partnership must withhold a tax equal to the rate specified in section 1445(e)(1) multiplied by the amount
(c)(1)(iii)(A) third sentence	The fiduciary must withhold 35 percent (or the highest rate specified in section 1445(e)(1))	The fiduciary must withhold a tax equal to the rate specified in section 1445(e)(1) multiplied by the amount
(c)(1)(iv)	The trustee or equivalent fiduciary of a trust that is subject to the provisions of subpart E of part 1 of subchapter J (sections 671 through 679) must withhold a tax equal to 35 percent (or the highest rate specified in section 1445(e)(1))	The trustee or equivalent fiduciary of a trust that is subject to the provisions of subpart E of part 1 of subchapter J (sections 671 through 679) must withhold a tax equal to the rate specified in section 1445(e)(1) multiplied by the amount
(c)(3)(ii)	A partnership or trust electing to withhold under this § 1.1445–5(c)(3) shall withhold from each distribution to a foreign person an amount equal to 35 percent (or the highest rate specified in section 1445(e)(1))	A partnership or trust electing to withhold under this paragraph (c)(3) shall withhold from each distribution to a foreign person an amount equal to the rate specified in section 1445(e)(1) multiplied by
(d)(1) first sentence	A foreign corporation that distributes a U.S. real property interest must deduct and withhold a tax equal to 35 percent (or the rate specified in section 1445(e)(2))	A foreign corporation that distributes a U.S. real property interest must deduct and withhold a tax equal to the rate specified in section 1445(e)(2) multiplied by

3. Adding a sentence to the end of paragraph (c)(1)(iii)(B) introductory text.

4. Adding two sentences to the end of paragraph (h).

The additions read as follows:

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

* * * * *

(b) * * *

(3) * * *

(iv) *Form W-9*. For purposes of paragraph (b)(3)(i) of this section, a certification of non-foreign status includes a valid Form W-9, *Request for Taxpayer Identification Number and Certification*, or its successor, submitted to the transferee by the transferor.

* * * * *

(c) * * *

(1) * * *

(iii) * * *

(B) * * * In 1994, the relevant rate of withholding (that is, the rate specified in section 1445(e)(1)) was 35%.

* * * * *

(h) * * * Paragraph (b)(3)(iv) of this section applies to certifications provided on or after May 7, 2019, except that a taxpayer may choose to apply paragraph (b)(3)(iv) of this section with respect to certifications provided before May 7, 2019. Paragraphs (c) and (d) of this section apply to distributions on or after November 30, 2020.

Par. 5. Section 1.1445-8 is amended by revising paragraphs (c)(2)(i) and (f) and adding paragraph (j) to read as follows:

§1.1445-8 Special rules regarding publicly traded partnerships, publicly traded trusts and real estate investment trusts (REITs).

* * * * *

(c) * * *

(2) * * *

(i) *In general*. The amount to be withheld with respect to a distribution by a REIT, under this section shall be equal to the highest rate specified in section 1445(e)(1) multiplied by the amount described in paragraph (c)(2)(ii) of this section.

* * * * *

(f) *Qualified notice*. A qualified notice for purposes of paragraph (b)(3)(iv) of this section is a notice provided in the manner described in §1.1446-4(b)(4) by a partnership, trust, or REIT regarding a distribution that is attributable to the disposition of a United States real property interest. In the case of a REIT, a qualified notice is only a notice of a distribution, all or any portion of which the REIT actually designates, or characterizes in accordance with paragraph (c)(2)(ii)(C) of this section, as a capital gain dividend in the manner described in §1.1446-4(b)(4), with respect to each share or certificate of beneficial interest. A deemed designation under paragraph (c)(2)(ii)(A) of this section may not be the subject of a qualified notice under this paragraph (f). A person described in paragraph (b)(3) of this section is treated as receiving a qualified notice when the notice is provided in accordance with §1.1446-4(b)(4).

* * * * *

(j) *Applicability dates*. Paragraph (c)(2)(i) of this section applies to distributions on or after November 30, 2020. Paragraph (f) of this section applies to distributions made on or after January 1, 2022. For distributions made before January 1, 2022, see §1.1445-8(f) as contained in 26 CFR part 1, revised as of April 1, 2020.

Par. 6. Section 1.1446-0 is amended by:

1. Adding an entry for §1.1446-3(c)(4).
2. Revising the entry §1.1446-4(d).
3. Adding entries for §1.1446-4(d)(1) and (2).
4. Revising the entry §1.1446-7.

The additions and revisions read as follows:

§1.1446-0 Table of contents.

* * * * *

§1.1446-3 Time and manner of calculating and paying over the 1446 tax.

* * * * *

(c) * * *

(4) Coordination with section 1446(f).

* * * * *

§1.1446-4 Publicly traded partnerships.

* * * * *

(d) Rules for nominees required to withhold tax under section 1446.

(1) In general.

(2) Exception to nominee's withholding.

* * * * *

§1.1446-7 Applicability dates.

Par. 7. Section 1.1446-3 is amended:

1. In the first sentence of paragraph (a)(2)(i), by removing "section 11(b)(1)" and adding in its place "section 11(b)".
2. By adding paragraph (c)(4).
3. In paragraph (d)(2)(vi), by designating *Examples 1* through *3* as paragraphs (d)(2)(vi)(A) through (C), respectively.
4. In each newly designated paragraph listed in the first column in the table, by removing the language in the second column and adding in its place the language in the third column as set forth below:

Paragraph	Remove	Add
(d)(2)(vi)(A) tenth, twelth, and thirteenth sentences	$35	$37
(d)(2)(vi)(B) first sentence	*Example 1*	paragraph (d)(2)(vi)(A) of this section (*Example 1*)
(d)(2)(vi)(C) first sentence	*Example 1*	paragraph (d)(2)(vi)(A) of this section (*Example 1*)
(d)(2)(vi)(C) fifth sentence	$35	$37

5. In newly designated paragraph (d)(2)(vi)(A), by revising the eighth sentence.
6. In newly designated paragraph (d)(2)(vi)(B), by revising the third and fourth sentences.
7. In newly designated paragraph (d)(2)(vi)(C), by revising the sixth sentence.
8. In paragraph (e)(4), by designating *Examples 1* through *3* as paragraphs (e)(4)(i) through (iii), respectively.
9. In newly designated paragraphs (e)(4)(i) through (iii), by further redesignating the paragraphs in the first column in this table as the paragraphs in the second column as set forth below:

Old Paragraphs	New Paragraphs
(e)(4)(i)(i) through (viii)	(e)(4)(i)(A) through (H)
(e)(4)(ii)(i) through (v)	(e)(4)(ii)(A) through (E)
(e)(4)(iii)(i) through (v)	(e)(4)(iii)(A) through (E)

10. In each newly redesignated paragraph listed in the first column in this table, by removing the language in the second column and adding in its place the language in the third column as set forth below:

Paragraph	Remove	Add
(e)(4)(i)(B) second sentence	$8.75 (.25 X ($100 X .35))	$9.25 (.25 X ($100 X .37))
(e)(4)(i)(B) fifth sentence	$35	$37
(e)(4)(i)(E) third sentence	$8.75	$9.25
(e)(4)(i)(F) first sentence	$35	$37
(e)(4)(i)(G) second sentence	$35	$37
(e)(4)(ii) introductory text	*Example 1*	paragraph (e)(4)(i)(A) of this section (*Example 1*)
(e)(4)(iii) introductory text	*Example 2*	paragraph (e)(4)(ii) introductory text of this section (*Example 2*)
(e)(4)(iii) introductory text	April	March
(e)(4)(iii)(A)	April	March
(e)(4)(iii)(B) first sentence	*Example 1* and *Example 2*	paragraphs (e)(4)(i) and (ii) of this section (*Examples 1* and *2*), respectively,
(e)(4)(iii)(B) second sentence	April	March
(e)(4)(iii)(C) first and second sentences	April	March
(e)(4)(iii)(D) first through third sentences	April	March
(e)(4)(iii)(D) first sentence	$35	$37

11. By removing paragraph (g).

The addition reads as follows:

§1.1446-3 Time and manner of calculating and paying over the 1446 tax.

* * * * *

(c) * * *

(4) *Coordination with section 1446(f)*. A partnership that is directly or indirectly subject to withholding under section 1446(f)(1) during its taxable year may credit the amount withheld under section 1446(f)(1) against its section 1446 tax liability for that taxable year only to the extent the amount is allocable to foreign partners.

(d) * * *

(2) * * *

(vi) * * *

(A) * * * PRS pays installments of 1446 tax based upon its estimates and timely pays a total of $37 of 1446 tax over the course of the partnership's taxable year ($100 ECTI × .37). * * *

(B) * * * Pursuant to paragraph (d)(2)(iii) of this section, FT may claim a $14.8 credit under section 33 for the 1446 tax PRS paid ($40/$100 multiplied by $37). NRA is required to include the $60 of the ECTI in gross income under section 652 (as ECTI) and may claim a $22.2 credit under section 33 for the 1446 tax PRS paid ($37 less $14.8 or $60/$100 multiplied by $37).

(C) * * * NRA is required to include $100 of the ECTI in gross income under section 662 (as ECTI) and may claim a $37 credit under section 33 for the 1446 tax paid by PRS ($37 less $0).

* * * * *

Par. 8. Section 1.1446-4 is amended by:

1. Revising paragraphs (b)(3) and (4).

2. Removing the second sentence of paragraph (c).

3. Revising paragraphs (d) and (e).

4. Revising the last seven sentences of paragraph (f)(1).

5. Revising paragraph (f)(3).

The revisions and addition read as follows:

§1.1446-4 Publicly traded partnerships.

* * * * *

(b) * * *

(3) *Nominee*. For purposes of this section, the term nominee means a person that holds an interest in a publicly traded partnership on behalf of a foreign person and that is either a U.S. person, a qualified intermediary (as defined in §1.1441-1(e)(5)(ii)) that assumes primary withholding responsibility for the distribution, or a U.S. branch of a foreign person that agrees to be treated as a U.S. person (as described in §1.1441-1(b)(2)(iv)) with respect to the distribution. For purposes of this paragraph (b)(3), a U.S. branch or a qualified intermediary is a nominee only if it assumes primary withholding responsibility for the distribution for all purposes of chapters 3 and 4 of subtitle A of the Code.

(4) *Qualified notice*. For purposes of this section, a qualified notice is a notice from a publicly traded partnership that states the amount of a distribution that is attributable to each type of income described in paragraphs (f)(3)(i) through (v) of this section. A qualified notice may also include the information described in §1.1446(f)-4(b)(3) (relating to the 10-percent exception to withholding under section 1446(f)(1)) and the information described in §1.1446(f)-4(c)(2)(iii) (relating to an adjustment to the amount realized for withholding under section 1446(f)(1)). The notice must be posted in a readily accessible format in an area of the primary public website of the publicly traded partnership that is dedicated to this purpose, and a copy of the notice must be delivered to any registered holder that is a nominee. A qualified notice must be posted and delivered to the registered holder by the

date required for providing notice with respect to distributions described in 17 CFR 240.10b-17(b)(1) or (3) issued pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a) and contain the information described therein as it would relate to the distribution. The publicly traded partnership must keep the notice accessible to the public for ten years on its primary public website or the primary public website of any successor organization. No specific format is required unless otherwise prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§601.601(d)(2) and 601.602 of this chapter). See paragraph (d) of this section regarding when a nominee is considered to have received a qualified notice.

* * * * *

(d) *Rules for nominees required to withhold tax under section 1446*—(1) *In general*. A nominee that receives a distribution from a publicly traded partnership (or another nominee) that is to be paid to (or for the account of) any foreign person is treated as a withholding agent under this section. A nominee that fails to withhold pursuant to this section is subject to liability under section 1461, as well as applicable penalties and interest, as if the nominee were the partnership responsible for withholding. A nominee that receives a qualified notice that meets the requirements in paragraph (b)(4) of this section must withhold based on the amounts specified on the qualified notice. A nominee is treated as receiving a qualified notice on the date that the notice is posted to the publicly traded partnership's website or is received by the nominee in accordance with paragraph (b)(4) of this section. If a nominee properly withholds based on the amounts specified on a qualified notice, the nominee is not liable for any underwithholding on amounts that are effectively connected income, gain, or loss. Rather, the publicly traded partnership that issued the qualified notice is liable under section 1461 for underwithholding on such amounts. If a nominee does not receive a qualified notice that meets the requirements in paragraph (b)(4) of this section, or to the extent the qualified notice does not specify an amount, the nominee must withhold on the full amount of the distribution with respect to—

(i) A foreign partner that is a corporation, at the greater of the highest rate of tax specified in section 11(b) or 881 (without regard to any reduction in the rate of tax permitted under an applicable income tax treaty);

(ii) A foreign partner that is not a corporation, at the greater of the highest rate of tax specified in section 1 or 871 (without regard to any reduction in the rate of tax permitted under an applicable income tax treaty); or

(iii) A foreign partner whose classification cannot be determined, at the higher of the rate determined under paragraph (d)(1)(i) or (ii) of this section.

(2) *Exception to nominee's withholding*. A nominee is not required to withhold under paragraph (d)(1) of this section to the extent that it makes a payment of a distribution to a qualified intermediary or U.S. branch that is also a nominee for the distribution under paragraph (b)(3) of this section. For purposes of the preceding sentence, a nominee may treat a qualified intermediary or U.S. branch as a nominee for a distribution based on, respectively, a valid qualified intermediary withholding certificate described in §1.1441-1(e)(3)(ii) or a valid U.S. branch withholding certificate described in §1.1446(f)-4(a)(2)(ii)(B) on which the qualified intermediary or U.S. branch represents that it assumes primary withholding responsibility with respect to the distribution.

(e) *Determining foreign status of partners*. Except as provided in this paragraph (e), the rules of §1.1446-1 shall apply in determining whether a partner of a publicly traded partnership is a foreign partner for purposes of the 1446 tax. A partnership or nominee obligated to withhold under this section shall be entitled to rely on any of the forms acceptable under §1.1446-1 that it receives from persons on whose behalf it holds interests in the partnership to the same extent a partnership is entitled to rely on such forms under those rules. If a partnership or nominee pays a distribution to an entity that provides a valid qualified intermediary withholding certificate described in §1.1441-1(e)(3)(ii) indicating that the entity does not assume primary withholding responsibility for the distribution, for withholding under this section the partnership or nominee may instead rely on a withholding statement that allocates the distribution to—

(1) A chapter 3 withholding rate pool (as described in §1.1441-1(e)(5)(v)(C)) consisting of account holders that are foreign persons subject to withholding at the highest rate of tax specified in section 1;

(2) A chapter 3 withholding rate pool (as described in §1.1441-1(e)(5)(v)(C)) consisting of account holders that are foreign persons subject to withholding at the highest rate of tax specified in section 11(b);

(3) A chapter 3 withholding rate pool (as described in §1.1441-1(e)(5)(v)(C)) consisting of account holders that are foreign persons not subject to withholding; or

(4) Each account holder for which a form acceptable under §1.1446-1 is provided.

(f) * * *

(1) * * * LTP makes a distribution subject to section 1446 of $100 to UTP during its taxable year beginning January 1, 2020, and withholds 37 percent (the highest rate in section 1) ($37) of that distribution under section 1446. UTP receives a net distribution of $63 which it immediately redistributes to its partners. UTP has a liability to pay 37 percent of the total actual and deemed distribution it makes to its foreign partners as a section 1446 withholding tax. UTP may credit the $37 withheld by LTP against this liability as if it were paid by UTP. See §§1.1462-1(b) and 1.1446-5(b)(1). When UTP distributes the $63 it actually receives from LTP to its partners, UTP is treated for purposes of section 1446 as if it made a distribution of $100 to its partners ($63 actual distribution and $37 deemed distribution). UTP's partners (U.S. and foreign) may claim a credit against their U.S. income tax liability for their allocable share of the $37 of 1446 tax paid on their behalf.

* * * * *

(3) *Ordering rule relating to distributions*. Distributions from publicly traded partnerships are deemed to be paid out of the following types of income in the order indicated—

(i) Amounts attributable to income described in section 1441 or 1442 that are not effectively connected with the conduct of a trade or business in the United States and are subject to withholding under §1.1441-2(a);

(ii) Amounts attributable to income described in section 1441 or 1442 that are not effectively connected with the conduct of a trade or business in the United States and are not subject to withholding under §1.1441-2(a);

(iii) Amounts attributable to income effectively connected with the conduct of a trade or business in the United States that are not subject to withholding under §§1.1446-1 through 1.1446-6;

(iv) Amounts subject to withholding under §§1.1446-1 through 1.1446-6; and

(v) Amounts not listed in paragraphs (f)(3)(i) through (iv) of this section.

* * * * *

Par. 9. Section 1.1446-6 is amended by adding a sentence after the first sentence of paragraph (e)(1) to read as follows:

§1.1446-6 Special rules to reduce a partnership's 1446 tax with respect to a foreign partner's allocable share of effectively connected taxable income.

* * * * *

(e) * * *

(1) * * * In 2008, the relevant rate of withholding for foreign partners that were not corporations (that is, the highest rate in section 1 as specified in §1.1446-3(a)(2)(i)) was 35%, and the due date for filing Form 8804 for domestic calendar year partnerships (that is, the date specified in §1.1446-3(d)(1)(iii)) was April 15. * * *

* * * * *

Par. 10. Section 1.1446-7 is amended by revising the section heading and adding six sentences at the end of the paragraph to read as follows:

§1.1446-7 Applicability dates.

* * * Section 1.1446-3 generally applies to returns filed on or after January 30, 2020 and §1.1446-3T (as contained in 26 CFR part 1, revised as of April 1, 2019) generally applies to returns filed before January 30, 2020. The addition of §1.1446-3(c)(4) applies to transfers of partnership interests that occur on or after January 29, 2021, except that a taxpayer may choose to apply §1.1446-3(c)(4) to transfers of partnership interests that occur on or after January 1, 2018. Sections 1.1446-3(a)(2)(i), (d)(2)(vi), and (e)(4) and 1.1446-4(f)(1) apply to partnership taxable years beginning on or after November 30, 2020. For partnership taxable years beginning before November 30, 2020**,** see those sections as in effect and contained in 26 CFR part 1, revised as of April 1, 2020. Section 1.1446-4(b)(3) and (4), (c), (d), (e), and (f)(3) apply to distributions made on or after January 1, 2022. For distributions made before January 1, 2022, see §§1.1446-4(b)(3) and (4), (c), (d), (e), and (f)(3), as contained in 26 CFR part 1, revised as of April 1, 2020.

Par. 11. Sections 1.1446(f)-1 through 1.1446(f)-5 are added to read as follows:

§1.1446(f)-1 General rules.

(a) *Overview*. This section and §§ 1.1446(f)-2 through 1.1446(f)-5 provide rules for withholding, reporting, and paying tax under section 1446(f) upon the sale, exchange, or other disposition of certain interests in partnerships. This section provides definitions and general rules that apply for purposes of section 1446(f). Section 1.1446(f)-2 provides withholding rules for the transfer of a non-publicly traded partnership interest under section 1446(f)(1). Section 1.1446(f)-3 provides rules that apply when a partnership is required to withhold under section 1446(f)(4) on distributions made to the transferee in an amount equal to the amount that the transferee failed to withhold plus interest. Section 1.1446(f)-4 provides special rules for the sale, exchange, or disposition of publicly traded partnership interests, for which the withholding obligation under section 1446(f)(1) is generally imposed on certain brokers that act on behalf of the transferor. Section 1.1446(f)-5 provides rules that address the liability for failure to withhold under section 1446(f) and rules regarding the liability of a transferor's or transferee's agent.

(b) *Definitions*. This paragraph (b) provides definitions that apply for purposes of this section and §§ 1.1446(f)-2 through 1.1446(f)-5.

(1) The term *broker* means any person, foreign or domestic, that, in the ordinary course of a trade or business during the calendar year, stands ready to effect sales made by others, and that, in connection with a transfer of a PTP interest, receives all or a portion of the amount realized on behalf of the transferor. The term broker includes a clearing organization (as defined in §1.1471-1(b)(21)). In the case of a U.S. clearing organization clearing or settling sales of PTP interests, however, see §1.1446(f)-4(a)(3) for an exception from the requirement to withhold on a sale of a PTP interest. The term broker does not include an escrow agent that does not effect sales other than transactions that are incidental to the purpose of escrow (such as sales to collect on collateral).

(2) The term *controlling partner* means a partner that, together with any person that bears a relationship described in section 267(b) or 707(b)(1) to the partner, owns directly or indirectly a 50 percent or greater interest in the capital, profits, deductions, or losses of the partnership at any time within the 12 months before the determination date (see paragraph (c)(4) of this section).

(3) The term *effect* has the meaning provided in §1.6045-1(a)(10).

(4) The term *foreign person* means a person that is not a United States person, including a QI branch of a U.S. financial institution (as defined in §1.1471-1(b)(109)).

(5) The term *PTP interest* means an interest in a publicly traded partnership if the interest is publicly traded on an established securities market or is readily tradable on a secondary market (or the substantial equivalent thereof).

(6) The term *publicly traded partnership* has the same meaning as in section 7704 and §§1.7704-1 through 1.7704-4 but does not include a publicly traded partnership treated as a corporation under that section.

(7) The term *TIN* means the tax identifying number assigned to a person under section 6109.

(8) The term *transfer* means a sale, exchange, or other disposition, and includes a distribution from a partnership to a partner, as well as a transfer treated as a sale or exchange under section 707(a)(2)(B).

(9) The term *transferee* means any person, foreign or domestic, that acquires a partnership interest through a transfer, and includes a partnership that makes a distribution.

(10) Except as otherwise provided in this paragraph, the term *transferor* means any person, foreign or domestic, that transfers a partnership interest. In the case

of a trust, to the extent all or a portion of the income of the trust is treated as owned by the grantor or another person under sections 671 through 679 (such trust, a grantor trust), the term transferor means the grantor or such other person.

(11) The term *transferor's agent* or *transferee's agent* means any person who represents the transferor or transferee (respectively) in any negotiation with another person relating to the transaction or in settling the transaction. A person will not be treated as a transferor's agent or a transferee's agent solely because it performs one or more of the activities described in §1.1445-4(f)(3) (relating to activities of settlement officers and clerical personnel).

(12) The term *United States person* or *U.S. person* means a person described in section 7701(a)(30).

(c) *General rules of applicability*—(1) *In general*. This paragraph (c) provides general rules that apply for purposes of this section and §§ 1.1446(f)-2 through 1.1446(f)-5.

(2) *Certifications*—(i) *In general*. This paragraph (c)(2) provides rules that are applicable to certifications described in this section and §§ 1.1446(f)-2 through 1.1446(f)-5, except as otherwise provided therein, or as may be prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§601.601(d)(2) and 601.602 of this chapter). A certification must provide the name and address of the person providing it. A certification must also be signed under penalties of perjury and, if the certification is provided by the transferor, must include a TIN if the transferor has, or is required to have, a TIN. A transferee (or other person required to withhold) may not rely on a certification if it knows that a transferor has, or is required to have, a TIN, and that TIN has not been provided with the certification. A certification includes any documents associated with the certification, such as statements from the partnership, IRS forms, withholding certificates, withholding statements, certifications, or other documentation. Documents associated with the certification form an integral part of the certification, and the penalties of perjury statement provided on the certification also applies to the associated documents. A certification (other than the certification described in §1.1446(f)-2(d)(2)) may not be relied upon if it is obtained earlier than 30 days before the transfer or any time after the transfer.

(ii) *Penalties of perjury*. A certification signed under penalties of perjury must provide the following: "Under penalties of perjury, I declare that I have examined the information on this document, and to the best of my knowledge and belief, it is true, correct, and complete."

(iii) *Authority to sign certifications on behalf of a business entity*. A certification provided by a business entity must be signed by an individual who is an officer, director, general partner, or managing member of the entity, or other individual that has authority to sign for the entity under local law.

(iv) *Electronic submission*. A certification may be sent electronically, including as text in an email, an image embedded in an email, or a Portable Document Format (.pdf) attached to an email. An electronic certification, however, may not be relied upon if the person receiving the submission knows that the certification was transmitted by a person not authorized to do so by the person required to execute the certification.

(v) *Retention period*. Any person that relies on a certification pursuant to this section and §§ 1.1446(f)-2 through 1.1446(f)-5 must retain the certification (including any documentation) for as long as it may be relevant to the determination of its withholding obligation under section 1446(f) or its withholding tax liability under section 1461.

(vi) *Submission to IRS*. The recipient of a certification is not required to mail a copy to the IRS, except as provided in §1.1446(f)-2(b)(7) and (c)(4)(vi) (involving certifications relating to an income tax treaty), or as may be prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§601.601(d)(2) and 601.602 of this chapter).

(vii) *Grantor trusts*. A certification provided by a transferor that is a grantor or other owner of a grantor trust must identify the portion of the amount realized that is attributable to the grantor or other owner. A certification provided by a foreign grantor trust on behalf of a transferor that is a grantor or owner must also include a Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*), (or similar statement for a domestic grantor trust with a foreign grantor or owner), that includes a withholding statement that provides the percentage of the amount realized allocable to each grantor or owner of the trust, and any applicable certification for each grantor or owner. In the case of a certification so provided, a grantor or owner of the trust is treated as having provided the certification to the transferee (or broker).

(3) *Books and records*. A partnership that relies on its books and records pursuant to this section and §§ 1.1446(f)-2 through 1.1446(f)-5 (including for purposes of providing a certification or other statement) must identify in its books and records the date on which the transfer occurred, the information on which the partnership relied, and the provisions of this section and §§ 1.1446(f)-2 through 1.1446(f)-5 supporting an exception from, or adjustment to, the partnership's obligation to withhold. The identification required by this paragraph (c)(3) must be made no later than 30 days after the date of the transfer. The partnership must retain the identified information in its books and records for the longer of five calendar years following the close of the last calendar year in which it relied on the information or for as long as it may be relevant to the determination of its withholding obligation under section 1446(f) or its withholding tax liability under section 1461.

(4) *Determination date*—(i) *In general*. This paragraph (c)(4) provides rules for the determination date. The same determination date must be used for all purposes with respect to a transfer. Any statement, certification, or books and records with regard to a transfer must state the determination date. The determination date of a transfer must be one of the following—

(A) The date of the transfer;

(B) Any date that is no more than 60 days before the date of the transfer; or

(C) The date that is the later of—

(*1*) The first day of the partnership's taxable year in which the transfer occurs, as determined under section 706; or

(*2*) The date, before the date of the transfer, of the most recent event described in §1.704-1(b)(2)(iv)(*f*)(*5*) or (b)(2)(iv)(*s*)(*1*) (revaluation event), irrespective of whether the capital accounts of the partners are adjusted in accordance with §1.704-1(b)(2)(iv)(*f*).

(ii) *Controlling partner*. The determination date for a transferor that is a controlling partner is determined without regard to paragraph (c)(4)(i)(C) of this section.

(5) *IRS forms and instructions*. Any reference to an IRS form includes its successor form. Any form must be filed in the manner prescribed by the Commissioner in forms or instructions or in publications or guidance published in the Internal Revenue Bulletin (see §§601.601(d)(2) and 601.602 of this chapter).

(d) *Coordination with section 1445*. A transferee that is otherwise required to withhold under section 1445(e)(5) or §1.1445-11T(d)(1) with respect to the amount realized, as well as under section 1446(f)(1), will be subject to the payment and reporting requirements of section 1445 only, and not section 1446(f)(1), with respect to that amount. However, if the transferor has applied for a withholding certificate under the last sentence of §1.1445-11T(d)(1), the transferee must withhold the greater of the amounts required under section 1445(e)(5) or 1446(f)(1). A transferee that has complied with the withholding requirements under either section 1445(e)(5) or 1446(f)(1), as applicable under this paragraph (d), will be deemed to satisfy the withholding requirement.

(e) *Applicability date*. This section applies to transfers that occur on or after January 29, 2021.

§1.1446(f)-2 Withholding on the transfer of a non-publicly traded partnership interest.

(a) *Transferee's obligation to withhold*. Except as otherwise provided in this section, a transferee is required to withhold under section 1446(f)(1) a tax equal to 10 percent of the amount realized on any transfer of a partnership interest. This section does not apply to a transfer of a PTP interest that is effected through one or more brokers, including a distribution made with respect to a PTP interest held in an account with a broker. For rules regarding those transfers, see §1.1446(f)-4.

(b) *Exceptions to withholding*—(1) *In general*. A transferee is not required to withhold under this section if it properly relies on a certification or its books and records as described in this paragraph (b). A transferee may not rely on a certification if it has actual knowledge that the certification is incorrect or unreliable. A partnership that is a transferee because it makes a distribution may not rely on its books and records if it knows, or has reason to know, that the information is incorrect or unreliable.

(2) *Certification of non-foreign status by transferor*. A transferee may rely on a certification of non-foreign status from the transferor that states that the transferor is not a foreign person, states the transferor's name, TIN, and address, and is signed under penalties of perjury. For purposes of this paragraph (b)(2), a certification of non-foreign status includes a valid Form W-9, *Request for Taxpayer Identification Number and Certification*. For purposes of this paragraph (b)(2), a transferee may rely on a valid Form W-9 from the transferor that it already possesses if the form meets the requirements of this paragraph (b)(2).

(3) *No realized gain by transferor*—(i) *In general*. A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from the transferor that states that the transfer of the partnership interest would not result in any realized gain (including ordinary income arising from the application of section 751 and §1.751-1) to the transferor as of the determination date (see §1.1446(f)-1(c)(4)). See paragraph (b)(6) of this section for rules that apply when the transferor realizes gain but is not required to recognize the gain under a provision of the Internal Revenue Code.

(ii) *No section 751 income*. For purposes of paragraph (b)(3)(i) of this section, a transferor may rely on a certification from the partnership stating that the transfer of the partnership interest would not result in any ordinary income arising from the application of section 751 and §1.751-1 to the transferor as of the determination date. The certification from the partnership must be attached to, and forms part of, the certification of no realized gain that the transferor provides to the transferee.

(iii) *Partnership distributions*. A partnership that is a transferee because it makes a distribution may rely on its books and records, or on a certification from the transferor, to determine that the distribution would not result in any realized gain to the transferor as of the determination date.

(4) *Less than 10 percent effectively connected gain*—(i) *In general*. A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from the partnership that states that—

(A) If the partnership sold all of its assets at fair market value as of the determination date in the manner described in §1.864(c)(8)-1(c), either—

(*1*) The partnership would have no gain that would have been effectively connected with the conduct of a trade or business within the United States, or, if the partnership would have a net amount of such gain, the amount of the partnership's net gain that would have been effectively connected with the conduct of a trade or business within the United States would be less than 10 percent of the total net gain; or

(*2*) The transferor would not have a distributive share of net gain from the partnership that would have been effectively connected with the conduct of a trade or business in the United States, or, if the transferor would have a distributive share of such gain from the partnership, the transferor's distributive share of net gain from the partnership that would have been effectively connected with the conduct of a trade or business within the United States would be less than 10 percent of the transferor's distributive share of the total net gain from the partnership; or

(B) The partnership was not engaged in a trade or business within the United States at any time during the taxable year of the partnership through the date of transfer.

(ii) *Partnership distributions*. A partnership that is a transferee because it makes a distribution may rely on its books and records to determine that paragraph (b)(4)(i)(A) of this section is satisfied as of the determination date or paragraph (b)(4)(i)(B) of this section is satisfied for the

taxable year of the partnership through the date of transfer.

(5) *Less than 10 percent effectively connected income*—(i) *In general*. A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from the transferor that states that—

(A) The transferor was a partner in the partnership throughout the look-back period described in paragraph (b)(5)(ii) of this section;

(B) The transferor's distributive share of gross effectively connected income from the partnership, as reported on a Schedule K-1 (Form 1065), *Partner's Share of Income, Deductions, Credits, etc.*, or other statement required to be furnished under §1.6031(b)-1T, including any gross effectively connected income included in the distributive share of a partner that bears a relationship to the transferor described in section 267(b) or 707(b)(1), was less than $1 million for each of the taxable years within the look-back period described in paragraph (b)(5)(ii) of this section;

(C) The transferor's distributive share of gross effectively connected income from the partnership, as reported on a Schedule K-1 (Form 1065), or other statement required to be furnished under §1.6031(b)-1T, for each of the taxable years within the look-back period described in paragraph (b)(5)(ii) of this section, was less than 10 percent of the transferor's total distributive share of gross income from the partnership for that year as determined under subchapter K of the Internal Revenue Code (as provided on a Schedule K-1 (Form 1065) or other statement required to be furnished under §1.6031(b)-1T); and

(D) The transferor's distributive share of income or gain from the partnership that is effectively connected with the conduct of a trade or business within the United States or deductions or losses properly allocated and apportioned to that income in each of the taxable years within the look-back period described in paragraph (b)(5)(ii) of this section has been reported on a Federal income tax return (either filed by the transferor or, in the case of transferor that is a partnership, filed by its direct or indirect nonresident alien individual or foreign corporate partners) on or before the due date (including extensions), and all amounts due with respect to the reported amounts have been timely paid to the IRS, provided that the return was required to be filed when the transferor furnishes the certification (taking into account any extensions of time to file).

(ii) *Look-back period*—(A) *In general*. The transferor's look-back period is the transferor's immediately prior taxable year and the two preceding taxable years.

(B) *Immediately prior taxable year*. The transferor's immediately prior taxable year is the transferor's most recent taxable year–

(*1*) With or within which a taxable year of the partnership ended; and

(*2*) For which a Schedule K-1 (Form 1065) was due (including extensions) or furnished (if earlier) before the transfer.

(C) *Limitation*. A transferee may not rely on a certification that is provided before the transferor's receipt of the Schedule K-1 (Form 1065) described in paragraph (b)(5)(ii)(B) of this section.

(iii) *No distributive share of gross income*. A transferor that did not have a distributive share of gross income in any year described in paragraph (b)(5)(ii)(A) of this section cannot provide the certification described in this paragraph (b)(5).

(iv) *Partnership distributions*. A partnership that is a transferee by reason of making a distribution may rely on its books and records to determine that the requirements in paragraphs (b)(5)(i)(A) through (C) of this section have been satisfied (subject to the rules in paragraphs (b)(5)(ii) and (iii) of this section). The partnership must also obtain a representation from the transferor stating that the requirement in paragraph (b)(5)(i)(D) of this section has been satisfied.

(6) *Certification of nonrecognition by transferor*—(i) *In general*. A transferee may rely on a certification from the transferor that states that by reason of the operation of a nonrecognition provision of the Internal Revenue Code the transferor is not required to recognize any gain or loss with respect to the transfer. The certification must briefly describe the transfer and provide the relevant law and facts relating to the certification.

(ii) *Partial nonrecognition*. Paragraph (b)(6)(i) of this section does not apply if only a portion of the gain realized on the transfer is subject to a nonrecognition provision. However, see paragraph (c)(4)(v) of this section for rules applicable to a transferor's claim for partial nonrecognition.

(7) *Income tax treaties*—(i) *In general*. A transferee may rely on a certification from the transferor that states that the transferor is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country if the requirements of this paragraph (b)(7) are met. The transferor makes the certification on a withholding certificate (on a Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*, or Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*) that meets the requirements for validity under §1.1446-1(c)(2)(iv) (or an applicable substitute form that meets the requirements under §1.1446-1(c)(5)) and that contains the information necessary to support the claim for treaty benefits. A transferee may rely on a certification of treaty benefits only if, within 30 days after the date of the transfer, the transferee mails a copy of the certification to the Internal Revenue Service, at the address provided in §1.1445-1(g)(10), together with a cover letter providing the name, TIN, and address of the transferee and the partnership in which an interest was transferred.

(ii) *Treaty claim for less than all of the gain*. Paragraph (b)(7)(i) of this section does not apply if treaty benefits apply to only a portion of the gain from the transfer. However, see paragraph (c)(4)(vi) of this section for rules applicable to situations in which treaty benefits apply to only a portion of the gain.

(iii) *Exclusive means to claim an exception from withholding based on treaty benefits*. A transferor claiming treaty benefits with respect to all of the gain from the transfer must use the exception in this paragraph (b)(7) and not any other exception or determination procedure in paragraphs (b) and (c) of this section to claim an exception to withholding by reason of a claim of treaty benefits.

(c) *Determining the amount to withhold*—(1) *In general*. A transferee that is required to withhold under this section

must withhold 10 percent of the amount realized on the transfer of the partnership interest, except as otherwise provided in this paragraph (c). Any procedures in this paragraph (c) apply solely for purposes of determining the amount to withhold under section 1446(f)(1) and this section. A transferee may not rely on a certification if it has actual knowledge that the certification is incorrect or unreliable. A partnership that is a transferee because it makes a distribution may not rely on its books and records if it knows, or has reason to know, that the information is incorrect or unreliable.

(2) *Amount realized*—(i) *In general*. The amount realized on the transfer of the partnership interest is determined under section 1001 (including §§1.1001-1 through 1.1001-5) and section 752 (including §§1.752-1 through 1.752-7). Thus, the amount realized 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. In the case of a distribution, the amount realized is the sum of the amount of cash distributed (or to be distributed), the fair market value of property distributed (or to be distributed), and the reduction in the transferor's share of partnership liabilities.

(ii) *Alternative procedures for transferee to determine share of partnership liabilities*—(A) *In general*. A transferee (other than a partnership that is a transferee because it makes a distribution), as an alternative to determining the share of partnership liabilities under paragraph (c)(2)(i) of this section, may use the procedures of this paragraph (c)(2)(ii) to determine the extent to which a reduction in partnership liabilities is included in the amount realized.

(B) *Certification of liabilities by transferor*. Except as otherwise provided in this section, a transferee may rely on a certification from a transferor, other than a controlling partner, that provides the amount of the transferor's share of partnership liabilities reported on the most recent Schedule K-1 (Form 1065) issued by the partnership. If the transferor's actual share of liabilities at the time of the transfer differs from the amount reported on that Schedule K-1 (Form 1065), the certification will not be treated as incorrect or unreliable if the transferor also certifies that it does not have actual knowledge of any events occurring after receiving the Schedule K-1 (Form 1065) and before the date of the transfer that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount shown on the Schedule K-1 (Form 1065). A transferee may not rely on a certification if the last day of the partnership taxable year for which the Schedule K-1 (Form 1065) was provided was more than 22 months before the date of the transfer.

(C) *Certification of liabilities by partnership*. A transferee may rely on a certification from a partnership that provides the amount of the transferor's share of partnership liabilities on the determination date. If the transferor's actual share of liabilities at the time of the transfer differs from the amount on the certification, the certification will not be treated as incorrect or unreliable if the partnership also certifies that it does not have actual knowledge of any events occurring after the determination date and before the date on which the partnership provides the certification to the transferee that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount shown on the certification by the partnership for the determination date.

(iii) *Partnership's determination of partnership liabilities for distributions*. A partnership that is a transferee because it makes a distribution may rely on its books and records to determine the extent to which the transferor's share of partnership liabilities on the determination date are included in the amount realized. The information in the books and records will not be treated as incorrect or unreliable unless the partnership has actual knowledge, on or before the date of the distribution, of any events occurring after the determination date that would cause the amount of the transferor's share of partnership liabilities at the time of the transfer to differ by more than 25 percent from the amount determined by the partnership as of the determination date.

(iv) *Certification by a foreign partnership of modified amount realized*—(A) *In general*. When a transferor is a foreign partnership, a transferee may use the procedures of this paragraph (c)(2)(iv) to determine the amount realized. For purposes of this paragraph (c)(2)(iv)(A), the transferee may treat the modified amount realized as the amount realized to the extent that it may rely on a certification from the transferor providing the modified amount realized.

(B) *Determining modified amount realized*. The modified amount realized is determined by multiplying the amount realized (as determined under this paragraph (c)(2), without regard to this paragraph (c)(2)(iv)) by the aggregate percentage computed as of the determination date. The aggregate percentage is the percentage of the gain (if any) arising from the transfer that would be allocated to presumed foreign taxable persons. For purposes of this paragraph (c)(2)(iv)(B), a presumed foreign taxable person is any direct or indirect partner of the transferor that has not provided either a certification of non-foreign status that meets the requirements of paragraph (b)(2) of this section or a certification of treaty benefits that states that the partner is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country. A valid certification of treaty benefits must meet the requirements of paragraph (b)(7) of this section (as applied to the partner claiming treaty benefits), including the requirement that the transferee mail a copy of the certification to the IRS within the time prescribed. For purposes of this paragraph (c)(2)(iv), an indirect partner is a person that owns an interest in the transferor indirectly through one or more foreign partnerships.

(C) *Certification*. The certification is made by providing a withholding certificate (on Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*) that includes a withholding statement that provides the percentage of gain allocable to each direct or indirect partner and that provides whether each such person is a United States person, a foreign partner eligible for treaty benefits,

or a presumed foreign taxable person. The certification must also include the certification of non-foreign status or the certification of treaty benefits from each direct or indirect partner that is not a presumed foreign taxable person.

(3) *Lack of money or property or lack of knowledge regarding liabilities*. The amount to withhold equals the amount realized determined without regard to any decrease in the transferor's share of partnership liabilities if—

(i) The amount otherwise required to be withheld under this paragraph (c) would exceed the amount realized determined without regard to the decrease in the transferor's share of partnership liabilities; or

(ii) The transferee is unable to determine the amount realized because it does not have actual knowledge of the transferor's share of partnership liabilities (and has not received or cannot rely on a certification described in paragraph (c)(2)(ii)(B) or (C) of this section).

(4) *Certification of maximum tax liability*—(i) *In general*. A transferee may use the procedures of this paragraph (c)(4) for determining the amount to withhold for purposes of section 1446(f)(1) and paragraph (a) of this section. A transferee (other than a partnership that is a transferee because it makes a distribution) may rely on a certification from a transferor that is a foreign corporation, a nonresident alien individual, a foreign partnership, or a foreign trust regarding the transferor's maximum tax liability as described in paragraph (c)(4)(ii) of this section. A partnership that is a transferee because it makes a distribution may instead rely on its books and records to determine the transferor's maximum tax liability if the books and records includes the information required by paragraphs (c)(4)(iii) and (iv) of this section. A transferor that is a foreign partnership or a foreign trust is treated as a nonresident alien individual for purposes of determining the transferor's maximum tax liability.

(ii) *Maximum tax liability* For purposes of this paragraph (c)(4), the term *maximum tax liability* means the amount of the transferor's effectively connected gain (as determined under paragraph (c)(4)(iii)(E) of this section) multiplied by the applicable percentage, as defined in §1.1446-3(a)(2).

(iii) *Required information*. The certification must include—

(A) A statement that the transferor is either a nonresident alien individual, a foreign corporation, a foreign partnership, or a foreign trust;

(B) The transferor's adjusted basis in the transferred interest on the determination date;

(C) The transferor's amount realized (determined in accordance with paragraph (c)(2) of this section) on the determination date;

(D) Whether the transferor remains a partner immediately after the transfer;

(E) The amount of outside ordinary gain and outside capital gain that would be recognized and treated as effectively connected gain under §1.864(c)(8)-1(b) on the determination date (effectively connected gain);

(F) The transferor's maximum tax liability on the determination date;

(G) A representation from the transferor that the transferor determined the amounts described in paragraph (c)(4)(iii)(E) of this section based on the statement described in paragraph (c)(4)(iv) of this section, if applicable; and

(H) A representation from the transferor that it has provided the transferee with a copy of the statement described in paragraph (c)(4)(iv) of this section.

(iv) *Partnership statement*. A transferor may make the representation in paragraph (c)(4)(iii)(G) of this section only if the partnership provides to the transferor a statement (that meets the requirements for a certification under the general rules for applicability in §1.1446(f)-1(c)) that includes—

(A) The partnership's name, address, and TIN; and

(B) The transferor's aggregate deemed sale EC ordinary gain, within the meaning of §1.864(c)(8)-1(c)(3)(ii)(A) (if any) and the transferor's aggregate deemed sale EC capital gain, within the meaning of §1.864(c)(8)-1(c)(3)(ii)(B) (if any), in each case, on the determination date.

(v) *Partial nonrecognition*. If a nonrecognition provision applies to only a portion of the gain realized on the transfer, a certification described in paragraph (c)(4)(i) may be relied upon only if the certification also includes the information required in paragraph (b)(6) of this section (substituting "a portion of the gain or loss" for "any gain or loss" in paragraph (b)(6)(i) of this section).

(vi) *Income tax treaties*. If only a portion of the gain on the transfer is not subject to tax pursuant to an income tax treaty in effect between the United States and a foreign country, a certification described in paragraph (c)(4)(i) of this section may be relied upon only if the requirements of paragraph (b)(7)(i) of this section have been met, including the requirement to obtain the applicable withholding certificate indicating that the gain from the transfer is not subject to tax pursuant to an income tax treaty (substituting "a portion of the gain" for "any gain" in paragraph (b)(7)(i) of this section), and the requirement to mail a copy of the withholding certificate to the IRS.

(d) *Reporting and paying withheld amounts*—(1) *In general*. A transferee required to withhold under this section must report and pay any tax withheld by the 20th day after the date of the transfer using Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, and 8288-A, *Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests*, in accordance with the instructions to those forms. The IRS will stamp Form 8288-A to show receipt and mail a stamped copy to the transferor (at the address reported on the form). See paragraph (e)(2) of this section for the procedures for the transferor to claim a credit for amounts withheld. Forms 8288 and 8288-A must include the TINs of both the transferor and the transferee. If any required TIN is not provided, the transferee must still report and pay any tax withheld on Form 8288.

(2) *Certification of withholding to partnership for purposes of section 1446(f)(4)*. A transferee (other than a partnership that is a transferee because it makes a distribution) must certify to the partnership the extent to which it has satisfied its obligation to withhold under this section no later than 10 days after the transfer. The certification must either include a copy of Form 8288-A that the transferee files with respect to the transfer, or state the amount realized and the amount withheld on the transfer.

The certification must also include any certifications that the transferee relied on to apply an exception to withholding under paragraph (b) of this section or to determine the amount to withhold under paragraph (c) of this section. A transferee that relied on a certification to apply an exception or adjustment to withholding remains liable under this section when the partnership knows, or has reason to know, that the certification is incorrect or unreliable. See §1.1446(f)-3 for rules regarding a partnership's obligation to withhold on distributions to a transferee when this certification establishes only partial satisfaction of the required amount, is not provided, or cannot be relied upon.

(e) *Effect of withholding on transferor*—(1) *In general*. The withholding of tax by a transferee under this section does not relieve a foreign person from filing a U.S. tax return with respect to the transfer. See §§1.6012-1(b)(1), 1.6012-2(g)(1), and 1.6031(a)-1. Further, the withholding of tax by a transferee does not relieve a nonresident alien individual or foreign corporation subject to tax on gain by reason of section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding.

(2) *Manner of obtaining credit*—(i) *Individuals or corporations*. Except as provided in paragraph (e)(3) of this section, an individual or corporation may claim a credit under section 33 for the amount withheld under this section by attaching to its applicable return the stamped copy of Form 8288-A provided to it under paragraph (d)(1) of this section.

(ii) *Partnerships, trusts, or estates*. For a rule allowing a foreign partnership that is a transferor to claim a credit for the amount withheld under this section against its tax liability under section 1446(a), see §1.1446-3(c)(4). For the rule providing the extent to which a foreign trust or estate may claim a credit for an amount withheld under this section, see §1.1462-1. Except as provided in paragraph (e)(3) of this section, a foreign partnership, trust, or estate claiming a credit for an amount withheld must attach to its applicable return the stamped copy of Form 8288-A provided to it under paragraph (d)(1) of this section. A foreign trust or estate must also provide any other information required in forms or instructions to any beneficiary or owner that is liable for tax on any of the gain under section 864(c)(8).

(3) *Failure to receive Form 8288-A*. If a stamped copy of Form 8288-A has not been provided to the transferor by the IRS, the transferor may establish the amount of tax withheld by the transferee by attaching to its return substantial evidence of the amount. The transferor must attach to its return a statement that includes all of the information otherwise required to be provided on Form 8288-A.

(f) *Applicability date*. This section applies to transfers that occur on or after January 29, 2021.

§1.1446(f)-3 Partnership's requirement to withhold under section 1446(f)(4) on distributions to transferee.

(a) *Partnership's obligation to withhold amounts not withheld by the transferee*—(1) *In general*. If a transferee fails to withhold any amount required to be withheld under §1.1446(f)-2, the partnership in which the interest was transferred must withhold from any distributions with respect to the transferred interest pursuant to this section. To determine its withholding obligation under this paragraph (a)(1), a partnership may rely on a certification received from the transferee described in §1.1446(f)-2(d)(2) unless it knows, or has reason to know, that the certification is incorrect or unreliable. A partnership that already possesses a certification of non-foreign status (including a Form W-9) for the transferor that meets the requirements provided in §1.1446(f)-2(b)(2) may instead rely on this certification to determine that it has no withholding obligation under this paragraph (a)(1) unless it knows, or has reason to know, that the certification is incorrect or unreliable. A partnership that receives a certification described in §1.1446(f)-2(d)(2) that is inconsistent with the information on the certification of non-foreign status in its possession is treated as having actual knowledge, or reason to know, that the certification of non-foreign status is incorrect or unreliable.

(2) *Notification by IRS*. A partnership that receives notification from the IRS that a transferee has provided incorrect information regarding the amount realized or amount withheld on the certification described in §1.1446(f)-2(d)(2), or has failed to pay the IRS the amount reported as withheld on the certification, must withhold the amount prescribed in the notification on distributions with respect to the transferred interest made on or after the date that is 15 days after it receives the notification. The IRS will not issue a notification on the basis that the amount realized on the certification described in §1.446(f)-2(d)(2) is incorrect if it determines that the transferee properly relied on a certification that included the incorrect information to compute the amount realized pursuant to §1.1446(f)-2(c)(2).

(3) *Subsequent transferees*. A partnership is not required to withhold under paragraph (a)(1) or (2) of this section on distributions that are made after the date on which the transferee disposes of the transferred interest, unless the partnership has actual knowledge that any person that acquires the transferee's interest in the partnership is a related person, i.e., a person that bears a relationship described in section 267(b) or 707(b)(1) with respect to the transferee or the transferor from which the transferee acquired the interest. A related person that acquires the transferee's interest is treated as liable for tax under section 1461 to the same extent that the transferee is liable for its failure to withhold under §1.1446(f)-2.

(b) *Exceptions to withholding*—(1) *Withholding has been satisfied by transferee*. A partnership is not required to withhold under paragraph (a)(1) of this section if it relies on a certification described in §1.1446(f)-2(d)(2) received from the transferee (within the time prescribed in §1.1446(f)-2(d)(2)) that states that an exception to withholding described in §1.1446(f)-2(b) applies or that the transferee withheld the full amount required to be withheld (taking into account any adjustments under §1.1446(f)-2(c)) under §1.1446(f)-2.

(2) *PTP interests*. A partnership is not required to withhold under this section on distributions made with respect to a PTP interest.

(3) *Distributing partnerships*. A partnership that is a transferee because it makes a distribution is not required to withhold under this section.

(c) *Withholding rules*—(1) *Timing of withholding*—(i) *In general*. A partnership

required to withhold under paragraph (a)(1) of this section must withhold on distributions made with respect to a transferred interest beginning on the later of—

(A) The date that is 30 days after the date of transfer; or

(B) The date that is 15 days after the date on which the partnership acquires actual knowledge that the transfer has occurred.

(ii) *Satisfaction of withholding obligation*. A partnership is treated as satisfying its withholding obligation under paragraph (a)(1) of this section and may stop withholding on distributions with respect to a transferred interest on the earlier of—

(A) The date on which the partnership completes withholding and paying the amount required to be withheld under paragraph (c)(2) of this section; or

(B) The date on which the partnership receives and may rely on a certification from the transferee described in §1.1446(f)-2(d)(2) (without regard to whether the certification is received by the time prescribed in §1.1446(f)-2(d)(2)) that claims an exception to withholding under §1.1446(f)-2(b).

(2) *Amount to withhold*—(i) *In general*. A partnership required to withhold under paragraph (a)(1) of this section must withhold the full amount of each distribution made with respect to the transferred interest until it has withheld—

(A) A tax of 10 percent of the amount realized (determined solely under §1.1446(f)-2(c)(2)(i)) on the transfer, reduced by any amount withheld by the transferee; plus

(B) Any interest computed under paragraph (c)(2)(ii) of this section.

(ii) *Computation of interest*. The amount of interest required to be withheld under paragraph (a)(1) of this section is the amount of interest that would be required to be paid under section 6601 and §301.6601-1 of this chapter if the amount that should have been withheld by the transferee was considered an underpayment of tax. For purposes of this paragraph (c)(2)(ii), interest is payable between the date that is 20 days after the date of the transfer and the date on which the tax due under paragraph (a)(1) of this section is paid to the IRS.

(iii) *Certifications required*. For purposes of paragraph (c)(2)(i)(A) of this section, a partnership must determine the amount realized on the transfer and any amount withheld by the transferee based on a certification from the transferee described in §1.1446(f)-2(d)(2), without regard to whether the certification is received by the time prescribed in §1.1446(f)-2(d)(2). A partnership that does not receive or cannot rely on a certification from the transferee described in §1.1446(f)-2(d)(2) must withhold tax equal to the full amount of each distribution made with respect to a transferred interest until it receives a certification that it can rely on.

(3) *Coordination with other withholding provisions*. Any amount required to be withheld on a distribution under any other provision of the Internal Revenue Code is not also required to be withheld under section 1446(f)(4) or this section.

(d) *Reporting and paying withheld amounts*. The partnership must report and pay the tax withheld using Forms 8288, *U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests*, and 8288-C, *Statement of Withholding Under Section 1446(f)(4) for Withholding on Dispositions by Foreign Persons of Partnership Interests*, as provided in forms, instructions, or other guidance.

(e) *Effect of withholding on transferor and transferee*—(1) *Transferor*. The withholding of tax by a partnership under this section does not relieve a foreign person from filing a U.S. income tax return with respect to the transfer. See §§1.6012-1(b)(1), 1.6012-2(g)(1), and 1.6031(a)-1. Further, the withholding of tax by a partnership does not relieve a nonresident alien individual or foreign corporation subject to tax on gain by reason of section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding. An individual or corporation is not allowed a credit under section 33 for amounts withheld on distributions to the transferee under this section. See, however, §§1.1446(f)-5(a) and 1.1463-1(a), which generally provide that tax will not be recollected if paid by another person.

(2) *Transferee*. A transferee is treated as satisfying its withholding tax liability under §1.1446(f)-2 to the extent that a partnership withholds tax (which does not include interest) under this section. Interest computed under paragraph (c)(2)(ii) of this section that is withheld by the partnership from the transferee is treated as interest paid by the transferee with respect to its withholding tax liability under §1.1446(f)-2. An excess amount under this section is the amount of tax and interest withheld under this section that exceeds the transferee's withholding tax liability under §1.1446(f)-2 plus any interest owed by the transferee with respect to such liability. A transferee may claim a refund for the excess amount if payments have been made in excess of the tax which is properly due by the transferee for the tax period.

(f) *Applicability date*. This section applies to transfers that occur on or after January 1, 2022.

§1.1446(f)-4 Withholding on the transfer of a publicly traded partnership interest.

(a) *Obligation to withhold on a transfer of a PTP interest*—(1) *In general*. If a transfer of a PTP interest is effected through one or more brokers (as defined in §1.1446(f)-1(b)(1)), the transferee is not required to withhold under section 1446(f)(1) and §1.1446(f)-2. Rather, any broker required to withhold under paragraph (a)(2) of this section must withhold a tax equal to 10 percent of the amount realized (as defined in paragraph (c)(2) of this section) on the transfer of a PTP interest, except as otherwise provided in this section. For cases in which a publicly traded partnership is liable for withholding under this section, see paragraphs (b)(3)(i) and (c)(2)(iii) of this section.

(2) *Broker's requirement to withhold*—(i) *In general*. Except as otherwise provided in this section, a broker is required to withhold under this section if it pays an amount realized to another broker that it is required to treat as a foreign person, or if a broker pays an amount realized to a foreign transferor that is its customer.

(ii) *Payments to foreign brokers*. A broker that pays an amount realized from the transfer of a PTP interest to another broker that it is required to treat as a foreign person must withhold under this section unless the first-mentioned broker obtains documentation on which it may rely establishing that the second-mentioned broker is described in paragraph (a)(2)(ii)(A) or (B) of this section. A broker must treat any broker to which it pays an amount re-

alized from the transfer of a PTP interest as a foreign person unless it obtains, or already possesses, documentation (including a certification of non-foreign status) on which it may rely that establishes that the other broker is a U.S. person. A broker may rely on documentation described in this paragraph (a)(2)(ii), or in paragraph (a)(2)(ii)(A) or (B) of this section, unless it has actual knowledge that the documentation is unreliable or incorrect.

(A) A broker is described in this paragraph (a)(2)(ii)(A) if it is a qualified intermediary (as defined in §1.1441-1(e)(5)(ii)) that provides a valid qualified intermediary withholding certificate (as described in §1.1441-1(e)(3)(ii)) that states that it assumes primary withholding responsibility for the payment.

(B) A broker is described in this paragraph (a)(2)(ii)(B) if it is a U.S. branch of a foreign person (as described in §1.1441-1(b)(2)(iv)) that provides a valid U.S. branch withholding certificate (as described in §1.1441-1(e)(3)(v), but without regard to the requirement in §1.1441-1(e)(3)(v) that the certificate state that the amount is not effectively connected with a trade or business within the United States) that states that the U.S. branch agrees to be treated as a U.S. person with respect to the payment.

(iii) *Payments to foreign transferors that are customers of the broker*. A broker that pays an amount realized to a foreign transferor that is its customer (as defined in §1.6045-1(a)(2)) from the transfer of a PTP interest is required to withhold under this section unless an exception under paragraph (b) of this section applies.

(3) *Exception from certain withholding by U.S. clearing organizations*. A broker that is a U.S. clearing organization clearing or settling a sale of a PTP interest is not required to withhold on the amount realized from the sale. However, see §1.1461-1(c)(2)(i)(R)(*2*) for the requirement that a U.S. clearing organization acting as a central counterparty report on Form 1042-S sales of PTP interests that it clears and settles on a net basis.

(4) *Exception when withholding already satisfied*. A broker that receives from another broker an amount realized from the transfer of a PTP interest is required to withhold under this section unless the other broker has withheld the full amount required. A broker that receives from another broker an amount realized from the transfer of a PTP interest may treat the withholding as having been satisfied on the full amount required unless it knows or has reason to know that the withholding obligation has not already been satisfied. A broker that is a qualified intermediary determines its withholding requirement for purposes of this paragraph (a)(4) in accordance with its qualified intermediary agreement.

(5) *Documentation obtained from another person to determine a broker's status*. A U.S. clearing organization may act as an agent for a broker receiving an amount realized from another broker that is a member of the clearing organization for purposes of furnishing valid documentation described in paragraph (a)(2) of this section of the first-mentioned broker's status to such other broker, provided the clearing organization notifies the first-mentioned broker and such broker has the ability to opt out. A broker that obtains documentation from a clearing organization under this paragraph (a)(5) for a broker to which the first-mentioned broker is paying an amount realized may rely on such documentation unless it has actual knowledge that the documentation is incorrect or unreliable.

(6) *Date of withholding with respect to a transfer other than a distribution*. For a transfer of a PTP interest that is not a distribution, a broker is required to apply the principles of §31.3406(a)-4(b)(1) of this chapter to determine the date on which to withhold under this section.

(7) *Payments to qualified intermediaries not assuming primary withholding responsibility*. With respect to the transfer of a PTP interest, if a broker pays the amount realized to a foreign person that the broker may treat as a qualified intermediary (as defined in §1.1441-1(e)(5)(ii)) that does not assume primary withholding responsibility for the payment based on a valid qualified intermediary withholding certificate described in §1.1441-1(e)(3)(ii) upon which the broker may rely under paragraph (a)(2) of this section, the broker may withhold as provided in this paragraph (a)(7). Under this paragraph (a)(7), a broker may withhold under this section by reference to the amount of the payment that the broker can reliably determine, based on the withholding statement provided with the withholding certificate, is allocable to—

(i) Foreign transferors included in a chapter 3 withholding rate pool (as described in §1.1441-1(e)(5)(v)(C)) that are subject to a 10 percent rate of withholding on the payment of the amount realized;

(ii) Foreign transferors included in a chapter 3 withholding rate pool (as described in §1.1441-1(e)(5)(v)(C)) that qualify for an exception from withholding on the payment of the amount realized under paragraph (b) of this section;

(iii) Each foreign transferor for which a form acceptable under §1.1446-1 is provided; or

(iv) U.S. transferors, based on a valid Form W-9 provided for each such transferor to the extent that the transferor is not included in a chapter 4 withholding rate pool of U.S. payees (as described in §1.1441-1(e)(5)(v)(C), to the extent permitted for purposes of chapter 4 of the Internal Revenue Code).

(8) *Qualified intermediary or U.S. branch withholding requirement*. A broker that is a qualified intermediary (as defined in §1.1441-1(e)(5)(ii)) or U.S. branch must assume primary withholding responsibility under this section for a distribution from a publicly traded partnership for which the qualified intermediary or U.S. branch acts as a nominee for purposes of section 1446(a). See §1.1446-4(b)(3).

(b) *Exceptions to withholding*—(1) *In general*. A broker is not required to withhold under this section if it properly relies on a certification described in paragraph (b)(2), (5), or (6) of this section, a qualified notice described in paragraph (b)(3) of this section, or if the exception described in paragraph (b)(4) of this section applies. A broker may not rely on a certification described in this paragraph (b) if it has actual knowledge that the certification is incorrect or unreliable.

(2) *Certification of non-foreign status*. A broker may rely on a certification of non-foreign status that it obtains from the transferor. A certification of non-foreign status under this section means a Form W-9, *Request for Taxpayer Identification Number and Certification*, or valid substitute form, that meets the requirements of §1.1441-1(d)(2). For purposes of this paragraph (b)(2), a broker may rely on a

valid form that it already possesses from the transferor. A broker may instead rely on certification from a second broker (as defined in §1.6045-1(a)(1)) that acts as an agent for the transferor when the second broker does not receive the amount realized from the transfer of the PTP interest. This certification must state that the second broker has collected a valid certification of non-foreign status (within the meaning of this paragraph (b)(2)) from the transferor, and it must include the transferor's TIN and status as a foreign or U.S. person.

(3) *Less than 10 percent effectively connected gain by partnership*—(i) *In general*. A broker may rely on a qualified notice described in paragraph (b)(3)(iii) of this section that states that the 10-percent exception applies, as determined under paragraph (b)(3)(ii) of this section. In a case in which a broker properly relies on a qualified notice under paragraph (b)(1) of this section that results in underwithholding on a transfer of a PTP interest, the publicly traded partnership that issued the notice is solely liable for the underwithheld tax under section 1461. A publicly traded partnership's liability referenced in the preceding sentence, however, applies only when the publicly traded partnership fails to make a reasonable estimate of the amounts required for determining the applicability of the 10-percent exception.

(ii) *10-percent exception*—(A) *In general*. The 10-percent exception applies to a transfer if, on the PTP designated date described in paragraph (b)(3)(ii)(B) of this section—

(*1*) If the publicly traded partnership sold all of its assets at fair market value in the manner described in §1.864(c)(8)-1(c), either—

(*i*) The amount of net gain that would have been effectively connected with the conduct of a trade or business within the United States would be less than 10 percent of the total net gain; or

(*ii*) No gain would have been effectively connected with the conduct of a trade or business in the United States; or

(*2*) The partnership was not engaged in a trade or business within the United States at any time during the taxable year of the partnership through the PTP designated date.

(B) *PTP designated date*. The PTP designated date for a transfer is any date for a deemed sale determination that is designated by the publicly traded partnership in a qualified notice described in paragraph (b)(3)(iii) of this section, provided that the PTP designated date occurs on or after the date that is 92 days before the date on which the publicly traded partnership posted the qualified notice naming the PTP designated date.

(iii) *Qualified notice*—(A) *In general*. Except as provided in paragraphs (b)(3)(iii)(B) and (C) of this section, a qualified notice described in this paragraph (b)(3)(iii) is the most recent qualified notice (within the meaning of §1.1446-4(b)(4)) posted by the publicly traded partnership.

(B) *Qualified notice posting date requirement*. A qualified notice is described in this paragraph (b)(3)(iii) only if the publicly traded partnership has posted it within the 92-day period ending on the date of the transfer. For a transfer that is a distribution by the publicly traded partnership, the qualified notice is described in paragraph (b)(3)(iii) of this section only if the qualified notice is posted with respect to the distribution.

(C) *Recent posting of qualified notice*. If the most recent qualified notice posted by the publicly traded partnership was posted during the 10-day period ending on the date of the transfer, a broker may instead rely on the immediately preceding qualified notice (within the meaning of §1.1446-4(b)(4)) posted by the publicly traded partnership, provided that it satisfies the condition described in paragraph (b)(3)(iii)(B) of this section.

(4) *Amount subject to withholding under section 3406*. A broker is not required to withhold under this section if the amount realized from the transfer of the PTP interest is subject to withholding under §31.3406(b)(3)-2 of this chapter.

(5) *Income tax treaties*. A broker may rely on a certification from the transferor that states that the transferor is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country if the requirements of this paragraph (b)(5) are met. The transferor makes the certification on a withholding certificate (on a Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*, or Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*) that meets the requirements for validity under §1.1446-1(c)(2)(iv) (or an applicable substitute form that meets the requirements under §1.1446-1(c)(5)) and that contains the information necessary to support the claim for treaty benefits. For purposes of this paragraph (b)(5), a broker may rely on a withholding certificate that it already possesses from the transferor that meets the requirements of this paragraph (b)(5) unless it has actual knowledge that the information is incorrect or unreliable. The exception in this paragraph (b)(5) does not apply if treaty benefits apply to only a portion of the gain from the transfer.

(6) *Foreign dealers that provide Form W-8ECI*. A broker may rely on a certification provided by a transferor that certifies that it is a dealer in securities (as defined in section 475(c)(1)) and that any gain from the transfer of the PTP interest is effectively connected with the conduct of a trade or business within the United States without regard to the provisions of section 864(c)(8). The certification described in the preceding sentence is made on a Form W-8ECI, *Certificate of Foreign Person's Claim That Income Is Effectively Connected With the Conduct of a Trade or Business in the United States*, that meets the requirements for validity under §1.1446-1(c)(2)(iv) (or an applicable substitute form that meets the requirements under §1.1446-1(c)(5)) and that contains any other information required in the instructions to the form. A broker may rely on a withholding certificate that it already possesses from the transferor that meets the requirements of this paragraph (b)(6) unless it has actual knowledge that the information is incorrect or unreliable.

(c) *Determining the amount to withhold*—(1) *In general*. A broker that is required to withhold under this section must withhold 10 percent of the amount realized on the transfer of the PTP interest, except as provided in this paragraph (c). Any procedures in this paragraph (c) apply solely for purposes of determining the amount to withhold under section 1446(f)(1) and this section. A broker may not rely on a certification described in this para-

graph (c) if it has actual knowledge that the certification is incorrect or unreliable.

(2) *Amount realized*—(i) *In general*. Solely for purposes of this section, the amount realized is the amount of gross proceeds (as defined in §1.6045-1(d)(5)) paid or credited upon the transfer to the customer or other broker (as applicable), or, in the case of a distribution, the amount determined under paragraph (c)(2)(iii) of this section.

(ii) *Certification by a foreign partnership of modified amount realized*—(A) *In general*. When a transferor is a foreign partnership, a broker may use the procedures of this paragraph (c)(2)(ii) to determine the amount realized. For purposes of this paragraph (c)(2)(ii)(A), the broker may treat the modified amount realized as the amount realized to the extent it may rely on a certification from the transferor providing the modified amount realized.

(B) *Determining modified amount realized*. The modified amount realized is determined by multiplying the amount realized (as determined under this paragraph (c)(2), without regard to this paragraph (c)(2)(ii)) by the aggregate percentage computed as of the determination date (see §1.1446(f)-1(c)(4)). The aggregate percentage is the percentage of the gain (if any) arising from the transfer that would be allocated to presumed foreign taxable persons. For purposes of this paragraph (c)(2)(ii)(B), a presumed foreign taxable person is any direct or indirect partner of the transferor that has not provided either a certification of non-foreign status that meets the requirements of paragraph (b)(2) of this section or a certification of treaty benefits that states that the partner is not subject to tax on any gain from the transfer pursuant to an income tax treaty in effect between the United States and a foreign country. A valid certification of treaty benefits must meet the requirements of paragraph (b)(5) of this section (as applied to the partner claiming treaty benefits). For purposes of this paragraph (c)(2)(ii), an indirect partner is a person that owns an interest in the transferor indirectly through one or more foreign partnerships.

(C) *Certification*. The certification is made by providing a withholding certificate (on Form W-8IMY, *Certificate of Foreign Intermediary, Foreign Flow-Through Entity, or Certain U.S. Branches for United States Tax Withholding and Reporting*) that includes a withholding statement that provides the percentage of gain allocable to each direct or indirect partner and that provides whether each such person is a United States person, a foreign partner eligible for treaty benefits, or a presumed foreign taxable person. The certification must also include the certification of non-foreign status or the certification of treaty benefits from each direct or indirect partner that is not a presumed foreign taxable person. For purposes of this paragraph (c)(2)(ii), a broker may rely on a withholding certificate and withholding statement that it already possesses from the partnership unless it has actual knowledge that the information is incorrect or unreliable.

(iii) *Determination of amount realized on a distribution*. The amount realized on a distribution from a publicly traded partnership is the amount of the distribution reduced by the portion of the distribution that is attributable to the cumulative net income of the partnership. The cumulative net income is the net income earned by the publicly traded partnership since its formation that has not been previously distributed by the partnership. A publicly traded partnership identifies such excess portion of the distribution as an amount in excess of cumulative net income on a qualified notice (within the meaning of §1.1446-4(b)(4)) posted with respect to the distribution. If a broker properly withholds based on the qualified notice (applying the rules of §1.1446-4(d)(1) to the distribution), the broker is not liable for any underwithholding on any amount attributable to an amount in excess of cumulative net income. Rather, the publicly traded partnership that issued the qualified notice is solely liable for the underwithheld tax under section 1461 on such amount that results from a broker's reliance on the notice.

(d) *Reporting and paying withheld amounts*. A broker that is required to withhold under this section must pay the withheld tax pursuant to the deposit rules in §1.6302-2. For rules regarding reporting on Forms 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*, and 1042-S, *Foreign Person's U.S. Source Income Subject to Withholding*, that apply to a broker that withholds under this section, see §1.1461-1(b) and (c). For rules regarding when an amount realized on the transfer of a PTP interest is reportable on a Form 1042-S (including in certain cases in which withholding is not required), see §1.1461-1(c)(2)(i)(Q) and (R). A broker that pays the amount realized to a foreign partnership must issue a Form 1042-S directly to the partnership rather than issuing a form to each of the partners of the partnership. *See* §1.1461-1(c)(1)(ii)(A)(*8*) (treating the foreign partnership as a recipient for reporting purposes). A broker making a payment to a U.S. branch treated as a U.S. person must not treat the branch as a U.S. person for purposes of reporting the payment made to the branch. Therefore, a payment to that U.S. branch must be reported on Form 1042-S. *See* §1.1461-1(c). A Form 1042-S issued directly to the transferor must include the TIN of the transferor unless the broker does not know the TIN at the time of issuance.

(e) *Effect of withholding on transferor*—(1) *In general*. The withholding of tax under this section does not relieve a foreign person from filing a U.S. tax return with respect to the transfer. *See* §§1.6012-1(b)(1), 1.6012-2(g)(1), and 1.6031(a)-1. Further, the withholding of tax by a broker does not relieve a nonresident alien individual or foreign corporation subject to tax on gain by reason of section 864(c)(8) from paying any tax due with the return that has not been fully satisfied through withholding.

(2) *Manner of obtaining credit*—(i) *Individuals and corporations*. An individual or corporation may claim a credit under section 33 for the amount withheld under this section by attaching to its applicable return a copy of a Form 1042-S that includes its TIN (or as otherwise provided in IRS forms or instructions).

(ii) *Partnerships, trusts, or estates*. For a rule allowing a foreign partnership that is a transferor to claim a credit for the amount withheld under this section against its obligation to withhold under section 1446(a), see §1.1446-3(c)(4). For the rule providing the extent to which a foreign trust or estate may claim a credit for an amount withheld under this section, see §1.1462-1. A foreign partnership, trust, or estate claiming a credit for an amount withheld must attach to its applicable return the Form 1042-S provided to

it under paragraph (d) of this section (or as otherwise provided in IRS forms or instructions). A foreign trust or estate must also provide any information required in forms or instructions to any beneficiary or owner that is liable for tax on any of the gain under section 864(c)(8).

(f) *Applicability date*. This section applies to transfers that occur on or after January 1, 2022.

§1.1446(f)-5 Liability for failure to withhold.

(a) *Liability for failure to withhold*. Every person required to withhold and pay tax under section 1446(f), but that fails to do so, is liable for the tax under section 1461, plus any applicable interest, penalties, or additions to tax. A partnership that failed to withhold and pay tax under §1.1446(f)-3 is liable only for the amount of tax that it failed to collect (but not any interest computed on that amount under §1.1446(f)-3(c)(2)(ii)), plus any interest, penalties, or additions to tax with regard to the partnership's failure to withhold.

(b) *Tax liability otherwise satisfied*. Under section 1463, if the tax required to be withheld under section 1446(f) is paid by another person required to withhold under section 1446(f), or by the nonresident alien individual or foreign corporation subject to tax on gain resulting from section 864(c)(8), the tax will not be recollected. The person required to withhold must establish proof of payment by another person required to withhold or by the nonresident alien individual or foreign corporation subject to the tax on gain resulting from section 864(c)(8). The person required to withhold may show that a reduced rate of withholding was appropriate by establishing the amount of tax due by the foreign transferor (as defined in §1.864(c)(8)-1(g)(3)) on gain resulting from section 864(c)(8). The person required to withhold under section 1446(f) is not relieved from liability for any interest, penalties, or additions to tax that would otherwise apply. However, if the person required to withhold establishes to the satisfaction of the Commissioner that no gain on the transfer is treated as effectively connected with the conduct of a trade or business within the United States under section 864(c)(8), no interest, penalties, or additions to tax will apply.

(c) *Liability of agents*—(1) *Duty to provide notice of false certification*. A transferee's or transferor's agent (other than a broker required to withhold under §1.1446(f)-4) must provide notice to a transferee (or other person required to withhold) if that person is furnished with a certification described in §§1.1446(f)-1 through 1.1446(f)-4 that the agent knows is false. A person required to withhold may not rely on a certification if it receives the notice described in this paragraph (c)(1).

(2) *Procedural requirements*. Any agent who is required to provide notice under paragraph (c)(1) of this section must do so in writing (including by electronic submission) as soon as possible after learning of the false certification. If the agent first learns of the false certification before the date of transfer, notice must be given by the third day following that discovery but no later than the date of transfer (before the transferee's payment of consideration). If an agent first learns of a false certification after the date of transfer, notice must be given by the third day following that discovery. The notice must also explain the possible consequences to the recipient of a failure to withhold. The notice need not disclose the information on which the agent's statement is based. The agent must also furnish a copy of the notice to the IRS by the date on which the notice is required to be given to the recipient. The copy of the notice must be delivered to the address provided in §1.1445-1(g)(10) and must be accompanied by a cover letter stating that the copy is being filed pursuant to the requirements of this paragraph (c)(2).

(3) *Failure to provide notice*. Any agent who is required to provide notice under paragraph (c)(1) of this section, but fails to do so in the manner required in paragraph (c)(2) of this section, is liable for the tax that the person who should have been provided notice in accordance with paragraph (c)(2) of this section was required to withhold under section 1446(f) if the notice had been given.

(4) *Limitation on liability*. An agent's liability under paragraph (c)(3) of this section is limited to the amount of compensation that the agent derives from the transaction. In addition, an agent that assists in the preparation of, or fails to disclose knowledge of, a false certification may be liable for civil and criminal penalties.

(d) *Applicability date*. This section applies to transfers that occur on or after January 29, 2021.

Par. 12. Section 1.1461-1 is amended:

1. By revising the fourth and fifth sentences of paragraph (a)(1) and removing the sixth sentence.

2. By revising the second sentence and removing the third sentence of paragraph (c)(1)(i).

3. By revising paragraph (c)(1)(ii)(A)(*8*).

4. By removing the word "and" at the end of paragraph (c)(1)(ii)(B)(*3*).

5. By removing the period at the end of paragraph (c)(1)(ii)(B)(*4*) and adding "; and" in its place.

6. By adding paragraph (c)(1)(ii)(B)(*5*).

7. In paragraph (c)(2)(i) introductory text, by revising the first sentence and removing the second sentence.

8. In paragraph (c)(2)(i)(N), by removing the word "and" from the end of the paragraph.

9. In paragraph (c)(2)(i)(O), by removing the period at the end of the paragraph and adding a semicolon in its place.

10. By adding paragraphs (c)(2)(i)(P), (Q), and (R).

11. By adding a sentence at the end of paragraph (c)(4)(ii)(A).

12. Revising paragraph (i).

The revisions and additions read as follows:

§1.1461-1 Payment and returns of tax withheld.

(a) * * *

(1) * * * With respect to withholding under section 1446, this section shall apply only to publicly traded partnerships and nominees that withhold under §1.1446-4 and brokers and publicly traded partnerships that withhold (or are otherwise liable for underwithholding) under §1.1446(f)-4 on transfers of publicly traded partnership interests. See §1.1461-3 regarding withholding tax liabilities under sections 1446(a) and 1446(f) and penalties that apply for failure to withhold under either of those sections.

* * * * *

(c) * * *

(1) * * *

(i) * * * Notwithstanding the preceding sentence, any person that withholds or is required to withhold an amount under section 1441, 1442, or 1443 or §1.1446-4(a) (applicable to publicly traded partnerships required to pay tax under section 1446(a) on distributions) or §1.1446(f)-4(a) (applicable to brokers required to withhold on transfers of publicly traded partnership interests) must file a Form 1042-S for the payment withheld upon whether or not that person is engaged in a trade or business and whether or not the payment is an amount subject to reporting. * * *

(ii) * * *

(A) * * *

(*8*) A partner (including a foreign partnership or a partner for which a qualified intermediary provides partner-specific documentation under §1.1446-4(e)) receiving a distribution from a publicly traded partnership subject to withholding under section 1446(a) and §1.1446-4 on distributions of effectively connected income, and a partner (including a foreign partnership or a partner for which a qualified intermediary provides partner-specific documentation under §1.1446(f)-4(a)(7)) receiving an amount realized from a transfer of a publicly traded partnership interest under section 1446(f)(1) and §1.1446(f)-4.

* * * * *

(B) * * *

(*5*) A foreign broker withheld upon under §1.1446(f)-4(a)(2)(ii) by another broker paying an amount realized from the transfer of a PTP interest.

* * * * *

(2) * * *

(i) * * * Subject to the exceptions described in paragraph (c)(2)(ii) of this section, amounts subject to reporting on Form 1042-S are amounts paid to a foreign payee or partner (including persons presumed to be foreign) that are amounts subject to withholding as defined in §1.1441-2(a), distributions of effectively connected income under §1.1446-4, or amounts realized from transfers of PTP interests under §1.1446(f)-4. * * *

(P) The amount of any distribution made by a publicly traded partnership that is an amount subject to withholding under §1.1446-4, or that is paid to a qualified intermediary or a U.S. branch of a foreign person that agrees to be treated as a U.S. person;

(Q) Except with respect to a broker that is a U.S. clearing organization, an amount realized on the transfer of a PTP interest under §1.1446(f)-4 (unless an exception to withholding applies under §1.1446(f)-4(b)(2) through (4)); and

(R) In the case of a broker that is a U.S. clearing organization—

(*1*) An amount realized (as determined under §1.1446(f)-4(c)(2)(iii)) on a distribution made by a publicly traded partnership for which withholding is required under §1.1446(f)-4(a); and

(*2*) An amount realized on the sale of a PTP interest cleared and settled through a net settlement system maintained by the clearing organization acting as a central counterparty in the sale (with the reporting on the non-netted amount), unless an exception to withholding would apply under §1.1446(f)-4(b)(2) or (3).

* * * * *

(4) * * *

(ii) * * *

(A) * * * For a payment to a foreign partnership on the transfer of a publicly traded partnership interest subject to §1.1446(f)-4(a), see paragraph (c)(1)(ii)(A)(*8*) of this section (treating the foreign partnership as a recipient).

* * * * *

(i) *Applicability date*. This section applies to payments made on or after January 1, 2022. For payments made before January 1, 2022, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2020.

Par. 13. Section 1.1461-2 is amended by:

1. Revising paragraph (a)(1).

2. Revising the first sentence and removing the last sentence of paragraph (b).

3. Revising paragraph (d).

The revisions read as follows:

§1.1461-2 Adjustments for overwithholding or underwithholding of tax.

(a) * * *

(1) *In general*. Except as otherwise provided in this paragraph (a)(1), a withholding agent that has overwithheld under chapter 3 of the Internal Revenue Code, and made a deposit of the tax as provided in §1.6302-2(a), may adjust the overwithheld amount either pursuant to the reimbursement procedure described in paragraph (a)(2) of this section or pursuant to the set-off procedure described in paragraph (a)(3) of this section. The rules in the preceding sentence do not apply to partnerships or nominees required to withhold under section 1446(a), other than on a distribution by a publicly traded partnership subject to withholding under §1.1446-4(a) and a payment of an amount realized on the transfer of an interest in a publicly traded partnership subject to §1.1446(f)-4.

* * * * *

(b) * * * A withholding agent may withhold from future payments (including distributions of effectively connected income subject to withholding under §1.1446-4 and the amount realized from the transfer of an interest in a publicly traded partnership subject to §1.1446(f)-4) made to a beneficial owner the tax that should have been withheld from previous payments to that beneficial owner under chapter 3 of the Code. * * *

(d) *Applicability date*. This section applies to payments made on or after January 1, 2022. For payments made before January 1, 2022, see this section as in effect and contained in 26 CFR part 1, as revised April 1, 2020.

Par. 14. Section 1.1461-3 is amended by revising the first sentence and last sentence of the paragraph to read as follows:

§1.1461-3 Withholding under section 1446.

For rules relating to the withholding tax liability of a partnership, nominee, or transferee under section 1446, see §§1.1446-1 through 1.1446-7 and 1.1446(f)-1 through 1.1446(f)-5. * * * The references in this section to §§1.1446-1 through 1.1446-7 apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§1.1446-1 through 1.1446-5 apply by reason of an election under §1.1446-7, and the references in this section to §§1.1446(f)-1 through 1.1446(f)-5 shall apply with respect to returns for transfers that occur on or after January 29, 2021.

Par. 15. Section 1.1463-1 is amended by revising the fourth and fifth sentences of paragraph (a) to read as follows:

§1.1463-1 Tax paid by recipient of income.

(a) * * * See §§1.1446-3(e) and (f) and 1.1446(f)-5(a) for application of the rule of this paragraph (a), and for additional rules, in which the withholding tax was required to be paid under section 1446. The references in the previous sentence to §1.1446-3(e) and (f) apply to partnership taxable years beginning after May 18, 2005, or such earlier time as the regulations under §§1.1446-1 through 1.1446-5 apply by reason of an election under §1.1446-7, and the reference in the previous sentence to §1.1446(f)-5(a) shall apply to the tax required to be withheld under section 1446(f) for transfers that occur on or after January 29, 2021.
* * * * *

Par. 16. Section 1.1464-1 is amended by revising the last sentence of paragraph (a) and paragraph (c) to read as follows:

§1.1464-1 Refunds or credits.

(a) * * * With respect to section 1446(a), this section applies only to a publicly traded partnership or nominee described in §1.1446-4 and, with respect to section 1446(f), only to a publicly traded partnership or broker described in §1.1446(f)-4.
* * * * *

(c) *Applicability date*. The last sentence of paragraph (a) of this section applies to nominees and publicly traded partnerships described in §1.1446-4 for partnership taxable years beginning after April 29, 2008, and to brokers required to withhold and publicly traded partnerships liable for underwithholding under §1.1446(f)-4 on transfers that occur on or after January 1, 2022.

Par. 17. Section 1.6050K-1 is amended by:

1. Redesignating paragraphs (c) introductory text and (c)(1) through (3) as the paragraphs (c)(1) introductory text and (c)(1)(i) through (iii), respectively.

2. Adding a heading to newly redesignated paragraph (c)(1).

3. Adding paragraphs (c)(2) and (3), (d)(3), and (h).

The additions read as follows:

§1.6050K-1 Returns relating to sales or exchanges of certain partnership interests.

* * * * *

(c) * * *

(1) *In general*. * * *

(2) *Information to be provided to transferors*. The statement a partnership must provide to a transferor partner pursuant to paragraph (c)(1) of this section must also include the information necessary for the transferor to make the transferor's required statement under §1.751-1(a)(3).

(3) *Transfers of partnership interests by foreign persons*. For additional information required to be provided by the partnership if section 864(c)(8) applies to the transfer of a partnership interest by a foreign person, see §1.864(c)(8)-2(b).

(d) * * *

(3) *Transfers of partnership interests by foreign persons*. For notifications required by foreign transferors of partnership interests, see §1.864(c)(8)-2(a).
* * * * *

(h) *Applicability date*. Paragraphs (c)(2) and (3) of this section apply to returns filed on or after November 30, 2020. Paragraph (d)(3) of this section applies to transfers that occur on or after November 30, 2020.

Par. 18. Section 1.6302-2 is amended by:

1. Revising the last sentence of paragraph (a)(1)(i).

2. Revising the heading and second sentence of paragraph (g).

The revisions read as follows:

§1.6302-2 Deposit rules for tax withheld on nonresident aliens and foreign corporations.

(a) * * *

(1) * * *

(i) * * * With respect to section 1446(a), this section applies only to a publicly traded partnership or nominee described in §1.1446-4 and, with respect to section 1446(f), only to a publicly traded partnership or broker described in §1.1446(f)-4.
* * * * *

(g) *Applicability dates*. * * * In the last sentence of paragraph (a)(1)(i) of this section, the reference to §1.1446-4 shall apply to partnership taxable years beginning after April 29, 2008, and the reference to §1.1446(f)-4 shall apply to tax required to be withheld on or after January 1, 2022.

Sunita Lough,
Deput-y Commissioner for Services and Enforcement.

Approved: October 1, 2020.

David J. Kautter,
Assistant Secretary of the Treasury (Tax Policy).

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Part III

Sections 4375 & 4376 – Insured and Self-Insured Health Plans

Adjusted Applicable Dollar Amount for Fee Imposed by §§ 4375 and 4376

Notice 2020-84

I. PURPOSE

This notice provides the adjusted applicable dollar amount to be multiplied by the average number of covered lives for purposes of calculating the fee imposed by §§ 4375 and 4376 of the Internal Revenue Code for policy years and plan years that end on or after October 1, 2020, and before October 1, 2021.

II. BACKGROUND

Section 4375 imposes a fee on the issuer of a specified health insurance policy for each policy year ending after September 30, 2012, and before October 1, 2029. Section 4376 imposes a fee on the plan sponsor of an applicable self-insured health plan for each plan year ending after September 30, 2012, and before October 1, 2029. The fee originally expired on October 1, 2019, but was extended by the Further Consolidated Appropriations Act, 2020, Pub. L. 116-94, 133 Stat. 2534 (2019). The fee imposed by §§ 4375 and 4376 helps to fund the Patient-Centered Outcomes Research Trust Fund (PCORTF) and is calculated using the average number of lives covered under the policy or plan and the applicable dollar amount for that policy year or plan year. Under §§ 4375(a) and 4376(a), the applicable dollar amount is $2 for policy and plan years ending on or after October 1, 2013, and before October 1, 2014.[1] Treas. Reg. §§ 46.4375-1(c)(4) and 46.4376-1(c)(3).

Under §§ 4375(d) and 4376(d) and Treas. Reg. §§ 46.4375-1(c)(4) and 46.4376-1(c)(3), the applicable dollar amount for policy years and plan years ending in any Federal fiscal year beginning on or after October 1, 2014 is increased based on increases in the projected per capita amount of National Health Expenditures.

Specifically, the applicable dollar amount is the sum of –

(i) The applicable dollar amount for the policy year or plan year ending in the previous Federal fiscal year; plus

(ii) The amount equal to the product of –

(A) The applicable dollar amount for the policy year or plan year ending in the previous Federal fiscal year; and

(B) The percentage increase in the projected per capita amount of the National Health Expenditures most recently released by the Department of Health and Human Services (HHS) before the beginning of the Federal fiscal year.

Notice 2020-44, 2020-26 I.R.B. 989, provides that the adjusted applicable dollar amount for policy years and plan years that end on or after October 1, 2019, and before October 1, 2020, is $2.54.

III. ADJUSTED APPLICABLE DOLLAR AMOUNT

The applicable dollar amount that must be used to calculate the fee imposed by §§ 4375 and 4376 for policy years and plan years that end on or after October 1, 2020, and before October 1, 2021, is $2.66. The increase from the prior amount is calculated by multiplying the adjusted applicable dollar amount for policy years and plan years ending in the previous Federal fiscal year, $2.54, by the percentage increase of the projected per capita amount of National Health Expenditures published by HHS on March 19, 2020. See: https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsProjected.html, Table 3. The percentage increase is calculated after adjustment to reflect updates to the data used to calculate the prior amount, $2.54, which was based on the per capita amounts of National Health Expenditures for 2019 and 2020 published by HHS on February 19, 2019.

IV. EFFECTIVE DATE

This notice is effective for policy years and plan years ending on or after October 1, 2020.

V. DRAFTING INFORMATION

The principal author of this notice is William Fischer of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, contact Mr. Fischer at (202) 317-5500 (not a toll-free number).

Updated Mortality Improvement Rates and Static Mortality Tables for Defined Benefit Pension Plans for 2022

Notice 2020-85

PURPOSE

This notice specifies updated mortality improvement rates and static mortality tables to be used for defined benefit pension plans under § 430(h)(3)(A) of the Internal Revenue Code (Code) and section 303(h)(3)(A) of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, as amended (ERISA). These updated mortality improvement rates and static tables, which are being issued pursuant to the regulations under § 430(h)(3)(A), apply for purposes of calculating the funding target and other items for valuation dates occurring during the 2022 calendar year.

[1] The applicable dollar amount is $1 for policy and plan years ending before October 1, 2013.

This notice also includes a modified unisex version of the mortality tables for use in determining minimum present value under § 417(e)(3) of the Code and section 205(g)(3) of ERISA for distributions with annuity starting dates that occur during stability periods beginning in the 2022 calendar year.

BACKGROUND

Section 412 of the Code provides minimum funding requirements that generally apply for defined benefit plans. Section 412(a)(2) provides that § 430 sets forth the minimum funding requirements that apply to defined benefit plans that are not multiemployer plans or CSEC plans. Section 430(a) defines the minimum required contribution for such a plan by reference to the plan's funding target for the plan year. Under § 430(d)(1), a plan's funding target for a plan year generally is the present value of all benefits accrued or earned under the plan as of the first day of that plan year.

Section 430(h)(3) provides rules regarding the mortality tables that generally are used under § 430. Under § 430(h)(3)(A), except as provided in § 430(h)(3)(C) or (D), the Secretary is to prescribe by regulation mortality tables to be used in determining any present value or making any computation under § 430. Those tables are to be based on the actual experience of pension plans and projected trends in that experience. Section 430(h)(3)(B) requires the Secretary to revise any table in effect under § 430(h)(3)(A) at least every 10 years to reflect the actual experience of pension plans and projected trends in that experience.

Section 430(h)(3)(C) provides that, upon request by a plan sponsor and approval by the Secretary, substitute mortality tables that meet the applicable requirements may be used in lieu of the standard mortality tables provided under § 430(h)(3)(A). Section 430(h)(3)(D) provides for the use of separate mortality tables with respect to certain individuals who are entitled to benefits on account of disability.

Mortality Tables for Purposes of § 430

Section 1.430(h)(3)-1 provides rules regarding the mortality tables used under § 430(h)(3)(A) for plan years beginning on or after January 1, 2018. The mortality tables used under § 430(h)(3)(A) are based on the tables in the RP-2014 Mortality Tables Report,[1] adjusted for mortality improvement. Section 1.430(h)(3)-1(d) sets forth base mortality tables with a base year of 2006.

Section 1.430(h)(3)-1(a) permits plan sponsors to apply the projection of mortality improvement in either of two ways: through use of static tables that are updated annually to reflect expected improvements in mortality or through use of generational tables. Section 1.430(h)(3)-1(a)(2)(i)(C) provides that, for valuation dates occurring in years after 2018, updated mortality improvement rates that take into account new data for mortality improvement trends of the general population, along with static mortality tables that reflect those updated mortality improvement rates, will be provided through guidance published in the Internal Revenue Bulletin. Notice 2019-26, 2019-15 I.R.B. 943 and Notice 2019-67, 2019-52 I.R.B. 1510, provide mortality improvement rates and static mortality tables that apply for valuation dates occurring during 2020 and 2021, respectively.[2]

Section 1.430(h)(3)-2 provides rules for the use of substitute mortality tables that are based on the mortality experience of the plan. Pursuant to § 1.430(h)(3)-2(c)(3)(ii), substitute mortality tables are developed using the mortality improvement rates used under § 1.430(h)(3)-1.

Application of These Tables for Other Funding Rules

Section 431 provides the minimum funding standards for multiemployer plans described in § 414(f) that are subject to § 412. Section 431(c)(6)(D)(iv) provides that the Secretary may by regulation prescribe mortality tables to be used in determining current liability for purposes of § 431(c)(6)(B). Section 1.431(c)(6)-1 provides that the same mortality assumptions that apply for purposes of § 430(h)(3)(A) and § 1.430(h)(3)-1(a)(2) are used to determine a multiemployer plan's current liability for purposes of applying the full-funding rules of § 431(c)(6). For this purpose, a multiemployer plan may apply either the static mortality tables or the generational mortality tables (as updated pursuant to §1.430(h)(3)-1(a)(2)(i)(C) and (a)(3)).

Section 433 provides the minimum funding standards for CSEC plans described in § 414(y). Section 433(h)(3)(B)(i) provides that the Secretary may by regulation prescribe mortality tables to be used in determining current liability for purposes of § 433(c)(7)(C). Section 1.433(h)(3)-1(a) provides that the mortality tables described in § 430(h)(3)(A) are to be used to determine current liability under § 433(c)(7)(C).

Application of Mortality Tables for Minimum Present Value Requirements under § 417(e)(3)

Section 417(e)(3) generally provides that the present value of certain accelerated forms of benefit under a qualified pension plan (including single-sum distributions) must not be less than the present value of the accrued benefit using applicable interest rates and the applicable mortality table. Section 417(e)(3)(B) defines the term "applicable mortality table" as the mortality table specified for the plan year under § 430(h)(3)(A) (without regard to § 430(h)(3)(C) or (D)), modified as appropriate by the Secretary.

Rev. Rul. 2007-67, 2007-2 CB 1047, provides that, except as otherwise stated in future guidance, the applicable mortality table under § 417(e)(3) is a static mortality table set forth in published guidance that is developed based on a fixed blend of 50 percent of the static male combined mortality rates and 50 percent of the static female combined mortality rates used under § 1.430(h)(3)-1. Rev. Rul. 2007-67 also provides that the applicable mortality table for a calendar year applies to distributions with annuity starting dates that

[1] The RP-2014 Mortality Tables Report, as revised November 2014, is available at https://www.soa.org/Files/Research/Exp-Study/research-2014-rp-report.pdf.
[2] Notice 2018-2, 2018-2 I.R.B. 281, provides mortality improvement rates and static mortality tables that apply for valuation dates occurring during 2019.

occur during stability periods that begin during that calendar year.

MORTALITY IMPROVEMENT RATES FOR 2022

The mortality improvement rates for valuation dates occurring during 2022 are the mortality improvement rates in the Mortality Improvement Scale MP-2020 Report (issued by the Retirement Plans Experience Committee (RPEC) of the Society of Actuaries and available at https://www.soa.org/globalassets/assets/files/resources/experience-studies/2020/mortality-improvement-scale-mp-2020.pdf).

STATIC MORTALITY TABLES FOR 2022

The static mortality tables that apply under § 430(h)(3)(A) for valuation dates occurring during 2022 are set forth in the appendix to this notice. The mortality rates in these tables have been developed from the methodology and base mortality rates set forth in § 1.430(h)(3)-1(c) and (d) using the mortality improvement rates specified in the previous section of this notice.

The static mortality table that applies under § 417(e)(3) for distributions with annuity starting dates occurring during stability periods beginning in 2022 is set forth in the appendix to this notice in the column labeled "Unisex." The mortality rates in this table are derived from the mortality tables specified under § 430(h)(3)(A) for 2022 in accordance with the procedures set forth in Rev. Rul. 2007-67.

Drafting Information

The principal authors of this notice are Arslan Malik and Linda S. F. Marshall of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, contact Arslan Malik or Linda Marshall at (202) 317-6700 (not a toll-free number).

APPENDIX

Mortality Tables for 2022

Valuation Dates Occurring During 2022 and Distributions Subject to § 417(e)(3) with Annuity Starting Dates During Stability Periods Beginning in 2022

	Male	Male	Male	Female	Female	Female	Unisex
Age	2022 Non-Annuitant Table	2022 Annuitant Table	2022 Optional Combined Table for Small Plans	2022 Non-Annuitant Table	2022 Annuitant Table	2022 Optional Combined Table for Small Plans	2022 Table for Distributions Subject to § 417(e)(3)
0	0.002678	0.002678	0.002678	0.002344	0.002344	0.002344	0.002511
1	0.000157	0.000157	0.000157	0.000147	0.000147	0.000147	0.000152
2	0.000108	0.000108	0.000108	0.000098	0.000098	0.000098	0.000103
3	0.000091	0.000091	0.000091	0.000074	0.000074	0.000074	0.000083
4	0.000072	0.000072	0.000072	0.000056	0.000056	0.000056	0.000064
5	0.000064	0.000064	0.000064	0.000051	0.000051	0.000051	0.000058
6	0.000058	0.000058	0.000058	0.000048	0.000048	0.000048	0.000053
7	0.000052	0.000052	0.000052	0.000045	0.000045	0.000045	0.000049
8	0.000044	0.000044	0.000044	0.000042	0.000042	0.000042	0.000043
9	0.000036	0.000036	0.000036	0.000040	0.000040	0.000040	0.000038
10	0.000031	0.000031	0.000031	0.000038	0.000038	0.000038	0.000035
11	0.000033	0.000033	0.000033	0.000039	0.000039	0.000039	0.000036
12	0.000050	0.000050	0.000050	0.000046	0.000046	0.000046	0.000048
13	0.000067	0.000067	0.000067	0.000053	0.000053	0.000053	0.000060
14	0.000084	0.000084	0.000084	0.000059	0.000059	0.000059	0.000072
15	0.000101	0.000101	0.000101	0.000065	0.000065	0.000065	0.000083
16	0.000119	0.000119	0.000119	0.000071	0.000071	0.000071	0.000095
17	0.000138	0.000138	0.000138	0.000076	0.000076	0.000076	0.000107
18	0.000159	0.000159	0.000159	0.000081	0.000081	0.000081	0.000120
19	0.000181	0.000181	0.000181	0.000084	0.000084	0.000084	0.000133
20	0.000202	0.000202	0.000202	0.000085	0.000085	0.000085	0.000144
21	0.000230	0.000230	0.000230	0.000088	0.000088	0.000088	0.000159
22	0.000258	0.000258	0.000258	0.000091	0.000091	0.000091	0.000175
23	0.000279	0.000279	0.000279	0.000096	0.000096	0.000096	0.000188
24	0.000294	0.000294	0.000294	0.000101	0.000101	0.000101	0.000198
25	0.000288	0.000288	0.000288	0.000105	0.000105	0.000105	0.000197
26	0.000287	0.000287	0.000287	0.000111	0.000111	0.000111	0.000199
27	0.000291	0.000291	0.000291	0.000118	0.000118	0.000118	0.000205
28	0.000300	0.000300	0.000300	0.000126	0.000126	0.000126	0.000213
29	0.000314	0.000314	0.000314	0.000135	0.000135	0.000135	0.000225
30	0.000331	0.000331	0.000331	0.000147	0.000147	0.000147	0.000239
31	0.000353	0.000353	0.000353	0.000160	0.000160	0.000160	0.000257
32	0.000376	0.000376	0.000376	0.000175	0.000175	0.000175	0.000276
33	0.000401	0.000401	0.000401	0.000191	0.000191	0.000191	0.000296
34	0.000423	0.000423	0.000423	0.000206	0.000206	0.000206	0.000315

Age	Male 2022 Non-Annuitant Table	Male 2022 Annuitant Table	Male 2022 Optional Combined Table for Small Plans	Female 2022 Non-Annuitant Table	Female 2022 Annuitant Table	Female 2022 Optional Combined Table for Small Plans	Unisex 2022 Table for Distributions Subject to § 417(e)(3)
35	0.000443	0.000443	0.000443	0.000222	0.000222	0.000222	0.000333
36	0.000460	0.000460	0.000460	0.000236	0.000236	0.000236	0.000348
37	0.000477	0.000477	0.000477	0.000251	0.000251	0.000251	0.000364
38	0.000495	0.000495	0.000495	0.000268	0.000268	0.000268	0.000382
39	0.000516	0.000516	0.000516	0.000286	0.000286	0.000286	0.000401
40	0.000539	0.000539	0.000539	0.000304	0.000304	0.000304	0.000422
41	0.000565	0.000572	0.000565	0.000324	0.000322	0.000324	0.000445
42	0.000597	0.000650	0.000597	0.000346	0.000366	0.000346	0.000472
43	0.000637	0.000771	0.000639	0.000371	0.000434	0.000371	0.000505
44	0.000685	0.000932	0.000689	0.000400	0.000527	0.000400	0.000545
45	0.000741	0.001133	0.000750	0.000433	0.000645	0.000435	0.000593
46	0.000808	0.001375	0.000823	0.000471	0.000790	0.000476	0.000650
47	0.000882	0.001660	0.000907	0.000514	0.000965	0.000525	0.000716
48	0.000967	0.001991	0.001004	0.000562	0.001172	0.000582	0.000793
49	0.001062	0.002375	0.001115	0.000615	0.001416	0.000649	0.000882
50	0.001168	0.002817	0.001243	0.000677	0.001701	0.000728	0.000986
51	0.001287	0.003017	0.001373	0.000746	0.001799	0.000808	0.001091
52	0.001423	0.003234	0.001547	0.000828	0.001924	0.000910	0.001229
53	0.001566	0.003450	0.001746	0.000920	0.002076	0.001029	0.001388
54	0.001729	0.003683	0.001981	0.001026	0.002262	0.001173	0.001577
55	0.001915	0.003939	0.002333	0.001146	0.002479	0.001399	0.001866
56	0.002137	0.004232	0.002802	0.001278	0.002731	0.001693	0.002248
57	0.002400	0.004564	0.003218	0.001422	0.003017	0.001965	0.002592
58	0.002714	0.004939	0.003693	0.001578	0.003339	0.002261	0.002977
59	0.003088	0.005365	0.004223	0.001745	0.003695	0.002595	0.003409
60	0.003525	0.005842	0.004830	0.001920	0.004081	0.002991	0.003911
61	0.004029	0.006369	0.005512	0.002106	0.004500	0.003496	0.004504
62	0.004606	0.006951	0.006272	0.002302	0.004947	0.004047	0.005160
63	0.005268	0.007603	0.007113	0.002515	0.005432	0.004709	0.005911
64	0.006016	0.008325	0.007945	0.002748	0.005961	0.005332	0.006639
65	0.006838	0.009097	0.008833	0.002997	0.006525	0.006014	0.007424
66	0.007666	0.009956	0.009801	0.003338	0.007159	0.006822	0.008312
67	0.008565	0.010888	0.010774	0.003716	0.007858	0.007596	0.009185
68	0.009565	0.011934	0.011848	0.004144	0.008651	0.008436	0.010142
69	0.010687	0.013119	0.013049	0.004634	0.009557	0.009373	0.011211
70	0.011935	0.014446	0.014381	0.005189	0.010584	0.010401	0.012391
71	0.013338	0.015949	0.015888	0.005824	0.011755	0.011574	0.013731
72	0.014932	0.017667	0.017610	0.006552	0.013094	0.012917	0.015264
73	0.016722	0.019609	0.019556	0.007379	0.014605	0.014434	0.016995
74	0.018752	0.021824	0.021776	0.008329	0.016336	0.016173	0.018975
75	0.021054	0.024357	0.024314	0.009412	0.018300	0.018149	0.021232

Age	Male 2022 Non-Annuitant Table	Male 2022 Annuitant Table	Male 2022 Optional Combined Table for Small Plans	Female 2022 Non-Annuitant Table	Female 2022 Annuitant Table	Female 2022 Optional Combined Table for Small Plans	Unisex 2022 Table for Distributions Subject to § 417(e)(3)
76	0.023644	0.027236	0.027199	0.010650	0.020546	0.020411	0.023805
77	0.026553	0.030506	0.030475	0.012070	0.023128	0.023015	0.026745
78	0.029813	0.034224	0.034201	0.013689	0.026091	0.026007	0.030104
79	0.033446	0.038433	0.038420	0.015528	0.029489	0.029442	0.033931
80	0.037495	0.043205	0.043205	0.017621	0.033405	0.033405	0.038305
81	0.039505	0.048455	0.048455	0.019445	0.037744	0.037744	0.043100
82	0.043221	0.054438	0.054438	0.022907	0.042712	0.042712	0.048575
83	0.048705	0.061254	0.061254	0.028059	0.048410	0.048410	0.054832
84	0.056015	0.069037	0.069037	0.034957	0.054932	0.054932	0.061985
85	0.065213	0.077849	0.077849	0.043647	0.062332	0.062332	0.070091
86	0.076335	0.087785	0.087785	0.054166	0.070704	0.070704	0.079245
87	0.089390	0.098933	0.098933	0.066518	0.080086	0.080086	0.089510
88	0.104499	0.111447	0.111447	0.080754	0.090528	0.090528	0.100988
89	0.121619	0.125357	0.125357	0.096904	0.102107	0.102107	0.113732
90	0.140833	0.140833	0.140833	0.114981	0.114981	0.114981	0.127907
91	0.157151	0.157151	0.157151	0.128861	0.128861	0.128861	0.143006
92	0.173972	0.173972	0.173972	0.143553	0.143553	0.143553	0.158763
93	0.190904	0.190904	0.190904	0.158968	0.158968	0.158968	0.174936
94	0.207816	0.207816	0.207816	0.174835	0.174835	0.174835	0.191326
95	0.224497	0.224497	0.224497	0.191051	0.191051	0.191051	0.207774
96	0.242547	0.242547	0.242547	0.208375	0.208375	0.208375	0.225461
97	0.261141	0.261141	0.261141	0.226441	0.226441	0.226441	0.243791
98	0.280240	0.280240	0.280240	0.245068	0.245068	0.245068	0.262654
99	0.299987	0.299987	0.299987	0.264378	0.264378	0.264378	0.282183
100	0.320071	0.320071	0.320071	0.284200	0.284200	0.284200	0.302136
101	0.340347	0.340347	0.340347	0.304364	0.304364	0.304364	0.322356
102	0.360686	0.360686	0.360686	0.324658	0.324658	0.324658	0.342672
103	0.380747	0.380747	0.380747	0.345105	0.345105	0.345105	0.362926
104	0.400380	0.400380	0.400380	0.365197	0.365197	0.365197	0.382789
105	0.418680	0.418680	0.418680	0.384873	0.384873	0.384873	0.401777
106	0.436427	0.436427	0.436427	0.403996	0.403996	0.403996	0.420212
107	0.453325	0.453325	0.453325	0.422170	0.422170	0.422170	0.437748
108	0.469018	0.469018	0.469018	0.439466	0.439466	0.439466	0.454242
109	0.483920	0.483920	0.483920	0.455749	0.455749	0.455749	0.469835
110	0.497670	0.497670	0.497670	0.470892	0.470892	0.470892	0.484281
111	0.502469	0.502469	0.502469	0.484985	0.484985	0.484985	0.493727
112	0.501660	0.501660	0.501660	0.497956	0.497956	0.497956	0.499808
113	0.500904	0.500904	0.500904	0.503166	0.503166	0.503166	0.502035
114	0.500151	0.500151	0.500151	0.501303	0.501303	0.501303	0.500727
115	0.499300	0.499300	0.499300	0.499550	0.499550	0.499550	0.499425
116	0.499600	0.499600	0.499600	0.499750	0.499750	0.499750	0.499675

Age	Male	Male	Male	Female	Female	Female	Unisex
	2022 Non-Annuitant Table	2022 Annuitant Table	2022 Optional Combined Table for Small Plans	2022 Non-Annuitant Table	2022 Annuitant Table	2022 Optional Combined Table for Small Plans	2022 Table for Distributions Subject to § 417(e)(3)
117	0.499800	0.499800	0.499800	0.499850	0.499850	0.499850	0.499825
118	0.499950	0.499950	0.499950	0.500000	0.500000	0.500000	0.499975
119	0.500000	0.500000	0.500000	0.500000	0.500000	0.500000	0.500000
120	1.000000	1.000000	1.000000	1.000000	1.000000	1.000000	1.000000

Part IV

26 CFR Part 301

Notice of Proposed Rulemaking

Treatment of Special Enforcement Matters

REG-123652-18

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations to except certain partnership-related items from the centralized partnership audit regime that was created by the Bipartisan Budget Act of 2015, and sets forth alternative rules that will apply. The centralized partnership audit regime does not apply to a partnership-related item if the item involves a special enforcement matter described in these regulations. Additionally, these regulations propose changes to the regulations to account for changes to the Internal Revenue Code (Code). Finally, these proposed regulations also make related and clarifying amendments to the final regulations under the centralized partnership audit regime. The proposed regulations would affect partnerships and partners to whom special enforcement matters apply.

DATES: Written or electronic comments must be received by January 25, 2021.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-123652-18) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG-123652-18), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Jennifer M. Black of the Office of Associate Chief Counsel (Procedure and Administration), (202) 317-6834; and concerning submissions of comments and/or requests for a public hearing, Regina Johnson, (202) 317-5177 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301) regarding special enforcement matters under section 6241(11) of the Code and the collection of amounts due under the centralized partnership audit regime pursuant to section 6241(7) of the Code. Section 6241(11) was enacted by section 206 of the Tax Technical Corrections Act of 2018, contained in Title II of Division U of the Consolidated Appropriations Act of 2018, Public Law 115-141 (TTCA). This document also contains several proposed amendments to the final regulations on the centralized partnership audit regime published in TD 9844 (84 FR 6468) on February 27, 2019.

Section 1101(a) of the Bipartisan Budget Act of 2015, Public Law 114-74 (BBA) amended chapter 63 of the Code (chapter 63) by removing former subchapter C of chapter 63 effective for partnership taxable years beginning after December 31, 2017. Former subchapter C of chapter 63 contained the unified partnership audit and litigation rules enacted by the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248 (TEFRA) that were commonly referred to as the TEFRA partnership procedures or simply, TEFRA. Section 1101(b) of the BBA removed subchapter D of chapter 63 and amended chapter 1 of the Code (chapter 1) by removing part IV of subchapter K of chapter 1, rules applicable to electing large partnerships, effective for partnership taxable years beginning after December 31, 2017. Section 1101(c) of the BBA replaced the TEFRA partnership procedures and the rules applicable to electing large partnerships with a centralized partnership audit regime that determines adjustments and, in general, determines, assesses, and collects tax at the partnership level. Section 1101(g) of the BBA set forth the effective dates for these statutory amendments, which are effective generally for returns filed for partnership taxable years beginning after December 31, 2017. On December 18, 2015, section 1101 of the BBA was amended by the Protecting Americans from Tax Hikes Act of 2015, Public Law 114-113 (PATH Act). The amendments under the PATH Act are effective as if included in section 1101 of the BBA, and therefore, subject to the effective dates in section 1101(g) of the BBA.

Enacted on March 23, 2018, the TTCA made a number of technical corrections to the centralized partnership audit regime, including adding sections 6241(11) (regarding the treatment of special enforcement matters) and 6232(f) (regarding the collection of the imputed underpayment and other amounts due from partners of the partnership in the event the amounts are not paid by the partnership) to the Code. The amendments to subchapter C of chapter 63 included in the TTCA are effective as if included in section 1101 of the BBA, and therefore, subject to the effective dates in section 1101(g) of the BBA.

On January 2, 2018, the Treasury Department and the IRS published in the **Federal Register** (82 FR 28398) final regulations under section 6221(b) providing rules for electing out of the centralized partnership audit regime (TD 9829).

On August 9, 2018, the Treasury Department and the IRS published in the **Federal Register** (83 FR 39331) final regulations under section 6223 providing rules

relating to partnership representatives and final regulations under §301.9100-22 providing rules for electing into the centralized partnership audit regime for taxable years beginning on or after November 2, 2015, and before January 1, 2018. Corresponding temporary regulations under §301.9100-22T were also withdrawn (TD 9839).

On February 27, 2019, the Treasury Department and the IRS published in the **Federal Register** (84 FR 6468) final regulations implementing sections 6221(a), 6222, and 6225 through 6241 of the centralized partnership audit regime (TD 9844).

Under section 6241(11), in the case of partnership-related items involving special enforcement matters, the Secretary of the Treasury or his delegate (Secretary) may prescribe regulations providing that the centralized partnership audit regime (or any portion thereof) does not apply to such items and that such items are subject to special rules as the Secretary determines to be necessary for the effective and efficient enforcement of the Code. For purposes of section 6241(11), the term "special enforcement matters" means: (1) failure to comply with the requirements of section 6226(b)(4)(A)(ii) (regarding the requirement for a partnership-partner or S corporation partner to furnish statements or compute and pay an imputed underpayment); (2) assessments under section 6851 (relating to termination assessments of income tax) or section 6861 (relating to jeopardy assessments of income, estate, gift, and certain excise taxes); (3) criminal investigations; (4) indirect methods of proof of income; (5) foreign partners or partnerships; and (6) other matters that the Secretary determines by regulation present special enforcement considerations.

Explanation of Provisions

On January 14, 2019, the IRS published in the Internal Revenue Bulletin Notice 2019-06, 2019-03 IRB 353 (Notice 2019-06), informing taxpayers that the Treasury Department and the IRS intended to propose regulations addressing two special enforcement matters under section 6241(11). These regulations propose the rules addressed in Notice 2019-06 and several other rules regarding special enforcement matters under section 6241(11).

These regulations also propose several changes to regulations finalized in TD 9844 to provide clarity regarding certain provisions. Changes are required to the regulations finalized in TD 9844 to address the treatment of chapter 1 taxes, penalties, additions to tax, additional amounts, and any imputed underpayments previously reported by the partnership adjusted as part of an examination under the centralized partnership audit regime to correspond to the addition of proposed §301.6241-7(g), which is discussed in part 5.F of this Explanations of Provisions. Additional edits are proposed to modify the rules implementing section 6241(7) regarding the treatment of adjustments when a partnership ceases to exist to account for the addition of section 6232(f) to the Code. Finally, minor clarifying edits are proposed.

In addition to the changes listed above, certain regulations have been reordered or renumbered, typographical errors have been corrected, and nonsubstantive editorial changes have been made.

1. *Election Out of the Centralized Partnership Audit Regime*

Certain partnerships may elect out of the centralized partnership audit regime under section 6221(b). Section 301.6221(b)-1 provides the rules for electing out of the centralized partnership audit regime, including determining whether a partnership is eligible to elect out of the centralized partnership audit regime. A partnership is eligible to make an election out if it has 100 or fewer partners for the taxable year, each partner in the partnership is an eligible partner, the election is timely made in the manner prescribed by the Secretary, and the partnership notifies its partners of the election in the manner prescribed by the Secretary. Section 301.6221(b)-1(b)(2)(i) generally provides that a partnership has 100 or fewer partners if the partnership is required to furnish 100 or fewer statements under section 6031(b) for the taxable year. As part of determining whether a partnership has 100 or fewer partners, section 6221(b)(2)(A) and §301.6221(b)-1(b)(2)(ii) require a partnership with a partner that is an S corporation (as defined in section 1361(a)(1)) to take into account each statement required to be furnished by the S corporation to its shareholders under section 6037(b) for the taxable year of the S corporation ending with or within the partnership's taxable year.

Eligible partners are those persons prescribed in section 6221(b)(1)(C) and §301.6221(b)-1(b)(3)(i). Under §301.6221(b)-1(b)(3)(ii)(D) a partner is not an eligible partner if the partner is a "disregarded entity described in §301.7701-2(c)(2)(i)." Proposed §301.6221(b)-1(b)(3)(ii)(D) changes "disregarded entity described in §301.7701-2(c)(2)(i)" to "a wholly-owned entity disregarded as separate from its owner for Federal income tax purposes" and would include, for example, a qualified REIT subsidiary (as defined in section 856(i)(2)) or grantor trust. This change is made to be consistent with the description of a disregarded entity used elsewhere in the regulations under the centralized partnership audit regime. *See, e.g.*, §§301.6225-2; 301.6226-3; 301.6241-1.

The proposed regulations also add §301.6221(b)-1(b)(3)(ii)(G), which addresses partnerships with qualified subchapter S subsidiaries (QSubs) as partners to remove any ambiguity regarding whether a partnership with a QSub as a partner can elect out of the centralized partnership audit regime. A QSub is defined in section 1361(b)(3)(B) as any domestic corporation that is not an ineligible corporation (as defined in section 1361(b)(2)) if 100 percent of the stock of such corporation is held by an S corporation and the S corporation elects to treat such corporation as a QSub. *See* §1.1361-4(a)(1). However, section 1361(b)(3)(A) provides that, "[e]xcept as provided in regulations prescribed by the Secretary, for purposes of *this title*" (that is, the Code): (i) a corporation that is a QSub is not treated as a separate corporation, and (ii) all assets, liabilities, and items of income, deduction, and credit, of a QSub are treated as assets, liabilities, and such items (as the case may be) of its parent S corporation. Further, section 1361(b)(3)(E) provides that, except to the extent provided by the Secretary, the rules of section 1361(b)(3) do not apply with respect to the provisions of part III of subchapter A of chapter 61 of the Code (relating to information re-

porting). That is, a QSub is treated as a separate corporation for information reporting purposes. *See* §1.1361-4(a)(9). Section 6031(b), one of the provisions of part III of subchapter A of chapter 61, provides that each partnership required to file a return must furnish to each person who is a partner or who holds an interest in the partnership as a nominee for another person at any time during a partnership taxable year a copy of the information required to be shown on the return as may be required by regulations. Thus, if a QSub is treated as a partner in a partnership, then under section 6031(b) the partnership is required to furnish a statement containing its return information to the QSub.

Notice 2019-06 states that partnership structures with QSubs as partners present special enforcement concerns because allowing a partnership with a QSub partner to elect out of the centralized partnership audit regime would enable a partnership to elect out in situations where there are over 100 ultimate taxpayers. If a partnership elects out of the centralized partnership audit regime, any adjustments must be made in examinations of the ultimate taxpayers who own interests in the partnership. To limit the number of examinations the IRS must conduct, Congress determined that only partnerships with 100 or fewer partners could elect out of the centralized partnership audit regime. Section 6221(b). In addition, under section 6221(b), partnerships with partners that are flow-through entities, except for partners that are S corporations, are ineligible to elect out of the centralized partnership audit regime. For partnerships with S corporation partners, the shareholders of the S corporation partner are counted in determining if the partnership has 100 or fewer partners. Section 6221(b)(2)(A). Accordingly, if such partnerships elect out of the centralized partnership audit regime, this will generally result in there being less than 101 ultimate taxpayers to potentially examine. However, as described above, if partnerships with QSubs as partners are eligible to elect out, this may result in the IRS having to examine more than 100 ultimate taxpayers for a particular partnership.

For example, in contrast to S corporations, if a QSub was an eligible partner for purposes of section 6221, because a QSub is not an S corporation, the special rules for S corporations under section 6221(b)(2)(A) and §301.6221(b)-1(b)(2)(ii) would not apply to a QSub partner. These special rules require the partnership to count the number of statements required to be furnished by the S corporation partner in determining if the partnership has 100 or fewer partners for the taxable year. Therefore, in a situation where a partnership that has a QSub as a partner and 99 other individual partners for purposes of section 6031(b), the stock of the S corporation that wholly owned the stock of the QSub could be owned by well over 100 ultimate taxpayers who satisfy the requirements of section 1361(b)(1)(A) (limiting the number of shareholders of an S corporation to 100) by reason of section 1361(c)(1) (treating members of a family as one shareholder for purposes of section 1361(b)(1)(A)). Allowing such a partnership to elect out of the centralized partnership regime would clearly frustrate the efficiencies the regime was intended to create.

To avoid this result and the attendant special enforcement concerns, Notice 2019-06 states that the Treasury Department and the IRS intend to propose regulations under section 6241(11)(B)(vi) providing that the ability to elect out of the centralized partnership audit regime under section 6221(b) generally does not apply to a partnership with a QSub as a partner. Notice 2019-06 states that the proposed regulations would apply a rule similar to the rules for S corporations under section 6221(b)(2)(A), which would require an S corporation holding the QSub stock to disclose the name and taxpayer identification number of each person with respect to whom the S corporation is required to furnish a statement under section 6037(b) for the taxable year of the S corporation ending with or within the partnership taxable year. Such statements are treated as if they were furnished by the partnership. *See* section 6221(b)(2)(A)(ii). Therefore, under Notice 2019-06, each statement furnished by the partnership to the S corporation, and by the S corporation to its shareholders, would be included in determining if the partnership has 100 or fewer partners for the taxable year for purposes of the election out of the centralized partnership audit regime.

In determining whether a QSub is an eligible partner under section 6221(b), Notice 2019-06 cites to section 1361(a)(2), which provides that a corporation, other than an S corporation (as defined in section 1361(b)(1)), is a C corporation. Comments to the centralized partnership audit regime and Notice 2019-06 revealed a lack of consensus regarding how section 1361 should be interpreted.

A comment relating to rules for electing out of the centralized partnership audit regime requested guidance confirming that a partner's status as a QSub does not prevent a partnership from electing out of the centralized partnership audit regime based on the belief that current law under section 1361 treats a QSub as an eligible partner (that is, a C corporation) and so requires this result. Further, the comment stated that a QSub is not a disregarded entity as described in §301.7701-2(c)(2)(i) and even if a QSub is ignored for most Federal tax purposes, such treatment is afforded by section 1361(b)(3)(A)(i) and not §301.7701-2(c)(2)(i). Section 301.7701-2(c)(2)(i) provides that a business entity that has a single owner and is not a "per se" corporation under §301.7701-2(b) is disregarded as an entity separate from its owner. Thus, the comment concluded that a QSub could never be the type of disregarded entity that Treasury regulations identify as an ineligible partner.

In contrast, another comment in response to Notice 2019-06 stated that Notice 2019-06 incorrectly states that, because a QSub is not an S corporation, it is a C corporation and therefore, an eligible partner under section 6221(b). The comment provided the rationale that, when a corporation makes a QSub election, it is treated under section 1361(b)(3)(A) as if it liquidated into its parent S corporation and accordingly, no longer exists, for purposes of the Code, as a separate entity for Federal tax purposes (even though for state law purposes, such as limited liability, it still exists). Therefore, the comment stated that a QSub is not a partner under section 6221(b) and concluded that the parent S corporation is treated as the partner and that the S corporation, not the QSub, should provide its shareholder information to the partnership under section 6221(b)(2) for purposes of determining whether the partnership may elect out of the centralized partnership audit regime.

Although Notice 2019-06 states that the proposed regulations would have applied a rule similar to the rules for S corporations under section 6221(b)(2)(A) to partnerships with a QSub as a partner, the Treasury Department and the IRS have reconsidered that approach. Under §301.6221(b)-1(b)(3)(ii), partnerships that have disregarded entities as partners may not elect out of the centralized partnership audit regime. QSubs are treated similarly to disregarded entities for most purposes under the Code in that both QSubs and disregarded entities do not file income tax returns but instead report their items of income and loss on the returns of the person who wholly owns the entity. Thus, as described earlier in this part and in Notice 2019-06, the Treasury Department and the IRS have determined that partnership structures with QSubs as partners present special enforcement concerns because allowing a partnership with a QSub partner to elect out of the centralized partnership audit regime would enable a partnership to elect out in situations where there are over 100 ultimate taxpayers, thereby frustrating the efficiencies the regime was intended to create. To make clear to taxpayers that a QSub cannot be used to facilitate the election out of the centralized partnership audit regime by a partnership with greater than 100 ultimate taxpayers, the Treasury Department and the IRS have determined it is necessary for the proposed regulations to address such a special enforcement concern by treating QSubs as ineligible partners for purposes of section 6221. Accordingly, proposed §301.6221(b)-1(b)(3)(ii)(G) provides that a QSub is not an eligible partner for purposes of making an election out of the centralized partnership audit regime under section 6221(b). Therefore, if a QSub is a partner in a partnership and required to be furnished a statement by the partnership under section 6031(b), that partnership will not be eligible to make an election under section 6221(b) to elect out of the centralized partnership audit regime.

2. *Imputed Underpayments, Chapter 1 Taxes, Penalties, Additions to Tax, and Additional Amounts*

If the IRS adjusts a partnership's chapter 1 taxes, penalties, additions to tax, or similar amounts utilizing the centralized partnership audit regime, there must be a mechanism for including these amounts in the imputed underpayment and accounting for these amounts if the partnership elects to push out the adjustments under section 6226. In addition, there must also be a mechanism to account for any adjustments to a previously determined imputed underpayment. Accordingly, these proposed rules apply to the calculation of the imputed underpayment during an IRS examination and to adjustments to the imputed underpayment as calculated by the partnership. For example, the rules apply to the filing of an administrative adjustment request (AAR) when the partnership-partner computes and pays an imputed underpayment. For proposed changes related to §301.6241-3, see part 4, Cease to Exist.

A. *Inclusion of Adjustments to an Imputed Underpayment and the Partnership's Chapter 1 Taxes, Penalties, Additions to Tax, or Additional Amounts in an Imputed Underpayment*

Section 301.6225-1 provides rules for how to calculate the imputed underpayment. First, all adjustments are placed into groups of similar adjustment types and netted appropriately, resulting in net positive or negative adjustments (as described in §301.6225-1(e)(4)(i)). Most net positive adjustments to items of income, gain, loss, and deduction are then added together to create a total netted partnership adjustment and a tax rate is then applied. That amount is then increased or decreased by any adjustments to credits. Credits are not included in earlier steps of the imputed underpayment calculation because credits generally adjust a taxpayer's amount of tax owed on a dollar-for-dollar basis after a tax rate has been applied. If adjustments to credits were taken into account as part of the total netted partnership adjustment before the tax rate was applied, the value of the credits would be reduced by the tax rate applied and, because of that reduction, would no longer operate as an increase or decrease in tax on a dollar-for-dollar basis.

Proposed §301.6225-1 modifies the final regulations under §301.6225-1 to provide a mechanism for including the partnership's chapter 1 taxes, penalties, additions to tax, or additional amounts, as well as any adjustment to a previously determined imputed underpayment (chapter 1 liabilities), in the calculation of the imputed underpayment. Under proposed §301.6225-1(c)(3), any adjustments to the partnership's chapter 1 liabilities will be placed in the credit grouping and treated similarly to credit adjustments for purposes of calculating the imputed underpayment. Adjustments to these amounts are placed into the credit grouping because, similar to credits, they change the amount the partnership owes on a dollar-per-dollar basis. Multiplying these adjustments to chapter 1 liabilities by a tax rate after the amount has been calculated would be inappropriate because, like credits, these amounts increase or decrease the amount owed on a dollar-per-dollar basis. If these chapter 1 liabilities were included with the other partnership adjustments, they would be multiplied by a tax rate, which would inappropriately reduce the amount of the partnership's chapter 1 liabilities. Thus, treating adjustments to chapter 1 liabilities similarly to credit adjustments allows for appropriate increases or decreases to the imputed underpayment.

The proposed addition to §301.6225-1(d)(2)(ii) provides that a decrease in a chapter 1 liability is treated as a negative adjustment. Because §301.6225-1(d)(2)(iii) provides that a positive adjustment is any adjustment that is not a negative adjustment as defined in §301.6225-1(d)(2)(ii), the proposed addition to the definition of a negative adjustment has the result of making an increase in a chapter 1 liability a positive adjustment. Because §301.6225-1(e)(4) defines net positive adjustments and net negative adjustments with respect to the definitions of positive and negative adjustments, the proposed addition to §301.6225-1(d)(2)(ii) affects those definitions as well.

In general, net positive adjustments are used to calculate the imputed underpayment, and net negative adjustments are adjustments that do not result in an imputed underpayment as described in §301.6225-1(f). An exception to that rule is the treatment of credit adjustments. Both net positive and net negative adjustments to credits may be included in the calculation of the imputed underpayment to increase

or decrease the imputed underpayment amount after the tax rate is applied to other adjustments. *See* §301.6225-1(b)(1)(v) and (e)(3)(ii). If a net negative adjustment applied to the imputed underpayment reduces the amount of the imputed underpayment to zero or below zero, the imputed underpayment adjustments are treated as adjustments that do not result in an imputed underpayment under §301.6225-1(f)(1)(ii). These adjustments would then be taken into account by the partnership on the adjustment year return pursuant to §301.6225-3 or by the reviewed year partners pursuant to §301.6226-3.

This rule does not operate well, however, when the adjustment that has reduced the imputed underpayment below zero is a net negative adjustment to chapter 1 liabilities because the chapter 1 liabilities at issue are adjustments to the liability of the partnership, not the partners, and they are thus neither properly allocated to the partners after they are reported on the partnership's next filed return nor properly pushed out to the partners under section 6226. These amounts could be used to offset another chapter 1 liability of the partnership, but partnerships may not have those types of items on their returns each year because partnerships are often not liable for tax under chapter 1. Treating these amounts similarly to other adjustments could result in an amount reported on the partnership's return that would not result in an overpayment to the partnership and for which there may not be an item to offset in the adjustment year. Accordingly, for partnerships to take advantage of a net negative adjustment to these chapter 1 liabilities, a special rule is required.

The proposed addition to §301.6225-1(e)(3)(ii), along with proposed §301.6225-1(f)(1)(ii) and (f)(3), provides two special rules for the treatment of a net negative adjustment to chapter 1 liabilities. Under the first rule, a net negative adjustment to a credit is normally treated as an adjustment that does not result in an imputed underpayment under §301.6225-1(f)(1)(i), unless the IRS makes a determination to have it offset the imputed underpayment. The proposed addition to §301.6225-1(e)(3)(ii) states that a net negative adjustment to one of the chapter 1 liabilities is not an adjustment described in §301.6225-1(f).

The second rule creates an exception to §301.6225-1(f)(1)(ii), which provides that if the calculation of the imputed underpayment under §301.6225-1(b)(1) results in a number that is zero or less than zero, the partnership adjustments associated with that calculation are treated as adjustments that do not result in an imputed underpayment. Proposed §301.6225-1(f)(3) provides a new method for calculating the imputed underpayment if the imputed underpayment calculation results in zero or less than zero and includes a net negative adjustment to one of the chapter 1 liabilities at issue. This new calculation provides that the imputed underpayment be recalculated using all partnership adjustments under §301.6225-1(b)(1) except for the net negative adjustments to the chapter 1 liabilities. Once that calculation is complete, if the imputed underpayment is a number greater than zero, the imputed underpayment may be reduced, but not below zero, using the net negative adjustment to the chapter 1 liabilities at issue. If this happens, the adjustments that went into the calculation are not adjustments that do not result in an imputed underpayment because the partnership has effectively paid the imputed underpayment calculated on these adjustments through the application of the net negative adjustment to chapter 1 liabilities (or a portion thereof). Any remaining portion of the net negative adjustment to chapter 1 liabilities is not an adjustment that does not result in an imputed underpayment. If, however, the imputed underpayment is already zero or less than zero, the net negative adjustments to the chapter 1 liabilities are not added back to the imputed underpayment calculation, and the net negative adjustments to the chapter 1 liabilities are not treated as adjustments that do not result in an imputed underpayment.

If there is an additional amount of the net negative adjustment to chapter 1 liabilities that was not included in the imputed underpayment calculation (that is, there was excess after the imputed underpayment was reduced to zero or if the imputed underpayment was zero or less than zero regardless of the net negative adjustment to chapter 1 liabilities), the partnership may be able to recoup that amount to offset a prior payment. For instance, if the adjustment related to an amount previously paid by the partnership, the partnership may file a claim for refund of the amount in accordance with section 6511. Alternatively, if the amount has not been previously paid by the partnership, the remaining net negative adjustment to a chapter 1 liability will reduce the amount of chapter 1 tax, penalty, additional amount, addition to tax, or imputed underpayment owed by the partnership.

B. *Exception to the Section 6226 Push Out Election*

Proposed §301.6226-2(g)(4) provides that a partnership that makes an election under section 6226 (sometimes called a "push out election") must pay any chapter 1 taxes, penalties, additions to tax, and additional amounts or the amount of any adjustment to an imputed underpayment at the time statements are furnished to its partners in accordance with §301.6226-2. Because these amounts are the partnership's liability, partnerships are not permitted to push out any adjustments to these items when making the push out election.

3. *Adjustments to Items that are Not Items of Income, Gain, Loss, Deduction, or Credit*

The final regulations implementing section 6225 do not expressly explain how adjustments to items that are not items of income, gain, loss, deduction, or credit (collectively referred to as "non-income items") are taken into account 1) in the calculation of the imputed underpayment; 2) as adjustments that do not result in an imputed underpayment; or 3) if the partnership elects to push out the adjustments to its reviewed year partners. Examples of non-income items include the partnership's assets, liabilities, and capital accounts. Accordingly, amendments are proposed to the final regulations to clarify the treatment of adjustments to non-income items.

Under section 6241(2)(A) and §301.6241-1(a)(6)(i), a partnership adjustment is any adjustment to a partnership-related item. Under section 6241(2)(B) and §301.6241-1(a)(6)(ii), a partnership-related item is any item or amount that is relevant in determining the chapter

1 liability of any person that is reflected, or required to be reflected, on the partnership's return under section 6031 for the taxable year or required to be maintained in the partnership's books and records, any partner's distributive share of such items, and the imputed underpayment. Accordingly, adjustments to non-income items that meet this definition are partnership-related items. *See, e.g.*, §301.6241-1(a)(6)(ii)(C)-(E). Under §301.6225-1(a)(1), all partnership adjustments, including adjustments to non-income items, are taken into account in determining whether the adjustments result in an imputed underpayment.

In some cases, adjustments to non-income items will be related to adjustments to items of income, gain, loss, deduction, or credit (for example, if an item was expensed that was required to be capitalized). Under §301.6225-1(b)(4), the IRS may treat an adjustment as zero solely for purposes of calculating an imputed underpayment if that adjustment is reflected in one or more partnership adjustments. Accordingly, the IRS could, if appropriate, treat an adjustment to a non-income item as zero solely for purposes of calculating the imputed underpayment if the effect of the adjustment is already reflected in an adjustment to an item of income, gain, loss, deduction, or credit. However, §301.6225-1(b)(4) only provides this authority to the IRS. Accordingly, an addition is proposed to §301.6225-1(b)(4) to provide that, generally, an adjustment to a non-income item that is related to, or results from, an adjustment to an item of income, gain, loss, deduction, or credit is treated as zero as part of the calculation of an imputed underpayment unless the IRS determines that the adjustment should be included in the imputed underpayment. This proposed addition not only clarifies the rule in §301.6225-1(b)(4) but also extends the rule in §301.6225-1(b)(4) to persons other than the IRS. Consequently, when filing an AAR a partnership may treat an adjustment to a non-income item as zero if the adjustment is related to, and the effect is reflected in, an adjustment to an item of income, gain, loss, deduction, or credit unless the IRS subsequently determines, in an examination of the AAR, that both adjustments should be included in the calculation of the imputed underpayment.

As discussed in part 2.A of this Explanation of Provisions, §301.6225-1(d)(2)(iii)(A) defines a "positive adjustment" as any adjustment that is not a negative adjustment. An adjustment to a non-income item, by definition, is not an adjustment to an item of income, gain, loss, deduction, credit, or chapter 1 liability, therefore, and is a positive adjustment. However, as with any other adjustment, an adjustment to a non-income item may be an adjustment that does not result in an imputed underpayment, as defined in §301.6225-1(f), if the adjustment is included in a calculation that results in an amount that is zero or less than zero.

Proposed §301.6225-3(b)(8) clarifies the rules for taking into account adjustments to non-income items if they are adjustments that do not result in an imputed underpayment. Under proposed §301.6225-3(b)(8), a partnership takes into account adjustments to non-income items in the adjustment year by adjusting the item on its adjustment year return to be consistent with the adjustment (for example, in amount, character, or classification). However, this only applies to the extent the item would appear on the adjustment year return without regard to the adjustment. If the item already appears on the partnership's adjustment year return as a non-income item or the item appeared as a non-income item on any return of the partnership for a taxable year between the reviewed year and the adjustment year, the partnership does not create a new item on the partnership's adjustment year return. For example, if the adjustment results in the addition of a liability in the reviewed year but the partnership had reported the liability on its return for the year immediately following the reviewed year and the liability was paid off prior to the adjustment year, then the adjustment to the liability does not create a new liability in the adjustment year and the adjustment is disregarded when the partnership takes into account the adjustments that did not result in an imputed underpayment on its adjustment year return. Accordingly, the partnership takes into account the adjustment to the non-income item by, for example, changing the character or amount of the item on the adjustment year return consistent with the adjustment to the non-income item. Proposed §301.6225-3(d)(3) provides an example of the application of this rule.

4. *Cease to Exist*

Section 6241(7) provides that if a partnership ceases to exist prior to the partnership adjustments taking effect, the adjustments are taken into account by the former partners of the partnership. To utilize the provisions of section 6241(7) the partnership must first have ceased to exist, as defined in proposed §301.6241-3(b), prior to the adjustments taking effect. In addition to the provisions of section 6241(7), if a partnership has ceased to exist, section 6232(f) provides rules that allow the IRS to assess a former partner for that partner's proportionate share of any amounts owed by the partnership under the centralized partnership audit regime.

A. *When Partnership Adjustments Take Effect*

Section 301.6241-3(c) provides that the partnership adjustments take effect when there is full payment of the tax and other amounts owed as a result of the partnership adjustments. If the partnership ceases to exist prior to the amounts due being fully paid, the former partners must take into account the adjustments. This interpretation could potentially preclude the use of section 6232(f) because if there is an amount due from the partnership any determination that a partnership has ceased to exist will trigger the rules under section 6241(7) as it would occur prior to the adjustments taking effect (i.e., full payment).

Section 6232(f) expressly provides for rules that govern the use of section 6232(f) in situations when a partnership has ceased to exist. Accordingly, it would be inconsistent with the intent of Congress to define when the adjustments take effect in a way that precludes the use of section 6232(f) when a partnership has ceased to exist. Therefore, proposed §301.6241-3 amends §301.6241-3(b) to provide that a partnership adjustment takes effect when the adjustments become finally determined as described in §301.6226-2(b)(1); when the partnership and IRS enter into a settlement agreement regarding the adjustment; or, for adjustments reflected in

an AAR, when the AAR is filed. After this amendment, the rules under section 6241(7) would apply prior to the adjustments taking effect and the rules under section 6232(f) would apply once the adjustments have taken effect.

As a result of this change, the proposed regulations contain additional conforming changes to other provisions in §301.6241-3. Proposed §301.6241-3(b)(1)(ii) was modified to provide that a partnership ceases to exist if the IRS determines that the partnership does not have the ability to pay in full any amount that the partnership may become liable for under the centralized partnership audit regime. Previously, §301.6241-3(b)(1)(ii) provided that the partnership ceases to exist if the IRS determines that the partnership does not have the ability to pay any amounts due under the centralized partnership audit regime. As proposed §301.6241-3 only applies prior to the adjustments becoming finally determined, the partnership would not have an amount due under the centralized partnership audit regime at that time. Because the partnership would not have an amount due, §301.6241-3 is incompatible with section 6232(f). Accordingly, proposed §301.6241-3 reconciles section 6232(f) with section 6241(7) in a way that gives meaning to both sections.

Additionally, proposed §301.6241-3 would remove §301.6241-3(b)(2). Section 301.6241-3(b)(2) provides situations for when the IRS will not determine that a partnership ceases to exist. Under §301.6241-3(b)(2), the IRS would not make such determination if the partnership has a valid election under section 6226 in effect, if a pass-through partner receives a statement under section 6226 and furnishes statements to its partners, or if the partnership has not paid any amount due under the centralized partnership audit regime, but was able to pay such amount. As all these exceptions cover situations where the partnership adjustments have already been finally determined, this provision is no longer necessary. Similarly, §301.6241-3(c)(2) regarding partial payments by the partnership is also proposed to be removed because it is impossible to have an amount due until after the adjustments become finally determined. Accordingly, after the changes introduced by proposed §301.6241-3, there would be nothing upon which to make a partial payment before the adjustments take effect.

Finally, §301.6241-3(e)(2)(ii) is proposed to be modified to provide that statements under §301.6241-3 must be furnished to the former partners and filed with the IRS no later than 60 days after the later of the date the IRS notifies the partnership that it has ceased to exist or the date the adjustments take effect, as described in §301.6241-3(c). Section 301.6241-3(e)(2)(ii) provides that statements must be furnished no later than 30 days after the date the IRS notifies the partnership that the partnership has ceased to exist. Now, with the proposed change to when adjustments take effect, the IRS may determine that a partnership has ceased to exist prior to the date the adjustments become finally determined. To prevent confusion, statements should not be issued until the adjustments become final. Section 301.6241-3(e)(2)(ii) is proposed to be adjusted accordingly. The proposed change from 30 days to 60 days for furnishing statements is intended to conform the rules for statements in §301.6241-3 with those in §301.6226-2.

B. *Former Partners*

As described previously, if a partnership ceases to exist prior to the adjustments taking effect, the former partners of the partnership must take the adjustments into account. Section 301.6241-3(d) defines former partners as the partners from the adjustment year of the partnership or, if there were no adjustment year partners, the partners from the partnership taxable year for which a final partnership return is filed. Proposed §301.6241-3(d) modifies the definition of former partners to be partners of the partnership during the last taxable year for which a partnership return or AAR was filed or the most recent persons determined to be the partners of the partnership in a final determination (for example, final court decision, defaulted notice of final partnership adjustment (FPA), or settlement agreement). As discussed previously, proposed §301.6241-3 applies prior to the adjustments taking effect. Because the adjustment year does not exist until the adjustments become final, proposed §301.6241-3 would not apply after that point. Accordingly, the definition of former partners is modified to reflect the partners that are the partners of the partnership before the partnership adjustments take effect.

Finally, the examples under §301.6241-3(f) are modified to reflect the changes to §301.6241-3 previously described in this Explanation of Provisions.

5. *Miscellaneous Amendments to Regulations Finalized in TD 9844*

In addition to the amendments described above, two other miscellaneous clarifications to the regulations finalized in TD 9844 are being proposed in these regulations.

First, under §301.6225-2(d)(2)(vi)(A), as part of a request for modification of an imputed underpayment a pass-through partner may file an amended return, take into account its share of the partnership adjustments, and determine and pay an amount calculated in the same manner as the amount computed under §301.6226-3(e)(4)(iii). In calculating the amount due under §301.6225-2(d)(2)(vi)(A), a pass-through partner may, as described in §301.6225-2(d)(2)(vi)(B), take into account any modifications approved with respect to its direct and indirect partners. Under §301.6226-3(e)(4)(iii), a pass-through partner calculates an imputed underpayment on its allocable share of the adjustments, taking into account any modifications approved with respect to its direct and indirect partners. Accordingly, §301.6225-2(d)(2)(vi)(B) is redundant in that, under §301.6225-2(d)(2)(vi)(A), a pass-through partner computes the amount due by reference to §301.6226-3(e)(4)(iii), which also allows a pass-through partner to take into account modifications approved with respect to its direct and indirect owners when computing its amount due. Therefore, the proposed regulations propose to remove §301.6225-2(d)(2)(vi)(B) as in the final regulations and replace it as described below. Also, additional language is added to the end of §301.6225-2(d)(2)(vi)(A) by the proposed regulations to clarify the reference to §301.6226-3(e)(4)(iii) for the needs of a partnership-partner pursuing modification under section 6225.

Section 301.6225-2(d)(2)(vi)(A) is silent as to how the pass-through partner would take into account any adjustments

that do not result in an imputed underpayment. Under §301.6226-3(e)(4)(v), a pass-through partner who pays an imputed underpayment takes into account any adjustments that did not result in an imputed underpayment in accordance with §301.6225-3 in the taxable year of the pass-through partner that includes the date the imputed underpayment is paid. Under §301.6226-3(e)(4)(v), if there are only adjustments that do not result in an imputed underpayment, the pass-through partner takes into account those adjustments in the taxable year of the pass-through partner that includes the date the statement under section 6226 is furnished to that pass-through partner.

The Treasury Department and the IRS have determined that a pass-through partner that pays an amount as part of an amended return submitted for purposes of modifying an imputed underpayment should take into account any adjustments that do not result in an imputed underpayment in the taxable year the amount is paid by the pass-through partner. However, unlike under §301.6226-3(e)(4)(v), a pass-through partner should not be able to take adjustments that do not result in an imputed underpayment into account as part of a request for modification unless the partnership pays an amount on the corresponding adjustments that resulted in an imputed underpayment. If there are solely adjustments that do not result in an imputed underpayment, those adjustments should be subject to modification by the ultimate taxpayers who reported the original amounts and not by any new partners of the pass-through partner. Accordingly, proposed §301.6225-3(d)(2)(vi)(B) provides that a pass-through partner that is paying an amount as part of an amended return filed during modification takes into account any adjustments that do not result in an imputed underpayment in the taxable year of the pass-through partner that includes the date the payment is made. This provision, however, does not apply if no payment is made by the partnership because no payment is required.

Finally, under §301.6225-3(b)(1), a partnership adjustment that does not result in an imputed underpayment is taken into account as a reduction in non-separately stated income or as an increase in non-separately stated loss for the adjustment year. However, not all adjustments that do not result in an imputed underpayment are negative adjustments. For example, adjustments may not result in an imputed underpayment because, after the application of adjustments to credits, the imputed underpayment is zero or less than zero. In those cases, it would be inappropriate for a positive adjustment to reduce non-separately stated income or increase non-separately stated loss. Accordingly, the proposed change to §301.6225-3(b)(1) clarifies that adjustments that do not result in an imputed underpayment, except as provided in §301.6225-3(b)(2) through (7), can increase or decrease non-separately stated income or loss, as appropriate, depending on whether the adjustment is to an item of income or loss.

6. *Special Enforcement Matters*

Proposed §301.6241-7(a) provides the general rule that the partnership-related items described in proposed §301.6241-7 involve special enforcement matters.

A. *Partnership-Related Item Components of Non-Partnership-Related Items*

Section 6221(a) requires that any adjustment to a partnership-related item must be determined at the partnership level under the centralized partnership audit regime, except to the extent otherwise provided in subchapter C of chapter 63. Section 6241(2)(B) defines a partnership-related item as any item or amount with respect to the partnership which is relevant in determining the tax liability of any person under chapter 1, including any distributive share of such an item or amount.

Generally, adjusting partnership-related items in a centralized proceeding at the partnership level is the most efficient way to determine adjustments to partnership-related items. Under the centralized partnership audit procedures, the IRS can then efficiently assess and collect any tax associated with the adjustments. Requiring the IRS to adjust certain partnership-related items at the partnership level in a centralized proceeding, however, would interfere with the efficient enforcement of the Code. These circumstances present special enforcement considerations.

Specifically, the Treasury Department and the IRS have determined that special enforcement considerations are presented where the partnership's treatment of a partnership-related item on its return or in its books and records is based in whole, or in part, on information provided by a person other than the partnership. In these circumstances, it is more efficient for the IRS and the partner if the IRS makes an adjustment to a partnership-related item during an examination of the partner rather than opening a separate examination of the partnership to first adjust the partnership-related item at issue in the examination of the partner. It also is likely that the partnership is not in the best position to substantiate the information upon which the partnership's treatment of that partnership-related item is based and may not have detailed or adequate records regarding the information. In situations in which the number of partners potentially impacted by an adjustment is limited, adjusting the partnership-related items in direct examinations of those partners does not raise inefficiency or inconsistency concerns that the centralized partnership audit regime is designed to alleviate. As a result, it may be a more efficient use of both IRS and taxpayer resources to examine and adjust that partnership-related item in an examination of the person who provided this information. The IRS anticipates making these adjustments in cases in which the adjustments are likely only relevant to a single partner or a small group of partners and are unlikely to involve items that are allocable to all partners generally or that impact the partnership as a whole.

For example, if a partner contributes a non-depreciable asset to a partnership in exchange for a partnership interest, any issues regarding the basis in the asset may be more easily identified in an examination of the partner who contributes the asset than in an examination of the partnership. Because the asset is not depreciable the partnership does not take any depreciation deductions with respect to the asset. Proper deductions are likely to be the focus of an examination of the partnership, but the basis of the asset is not until the partnership disposes of the asset. In contrast, the contribution of the asset itself is a partnership-related item, and the basis of the asset that is contributed is

taken into account in determining the partner's basis in the partnership interest (not a partnership-related item). The partner's basis in the partnership interest may affect the ability of the partner to claim a distributive share of deductions or losses or the computation of gain or loss the partner would recognize on the sale of the partnership interest, items that are commonly reviewed in an examination of a partner. These types of partnership-related items are therefore more likely to be identified during examinations of a single partner or a small group of partners, not during an examination of the partnership alone.

The ability to adjust certain partnership-related items at the partner level under these circumstances should be beneficial to partnerships and partners, as well as the IRS. For partnerships, this special rule alleviates the need to open an examination of the partnership under the centralized partnership audit procedures solely to adjust the partnership-related items based on information provided by the partner who is already independently under examination. This relieves the partnership from having to expend resources during an examination for items related primarily to the partner who provided the information.

This rule allows those partners whose non-partnership-related items are being adjusted during an examination of their return to more fully control and participate in any adjustments or determinations that need to be made to partnership-related items that underlie or affect the non-partnership-related item that is being adjusted. Further, after adjustments to certain partnership-related items impacting a single partner or a small group of partners are made there are cases in which it may not be necessary to adjust any other partnership-related item of the partnership, and an examination at the partnership level would be unnecessary. Adjusting these partnership-related items (or portions thereof) outside of subchapter C of chapter 63 also allows the IRS to effectively and efficiently focus on a single partner or a small group of partners with respect to a limited set of partnership-related items without unduly burdening the partnership.

Therefore, under proposed §301.6241-7(b), the IRS may determine that subchapter C of chapter 63 does not apply to an adjustment or determination of a partnership-related item if an adjustment or determination of that partnership-related item is part of, or underlies, an adjustment to a non-partnership-related item during an examination of a person other than the partnership. However, this rule only applies if the treatment of the partnership-related item on the return of the partnership (or in its books and records) is based in whole or in part on information provided by the person under examination. Accordingly, if the IRS determines that subchapter C of chapter 63 (of a portion thereof) does not apply, the IRS may adjust, or make determinations regarding, partnership-related items that underlie, or are part of adjustments or determinations regarding a non-partnership-related item of the person under examination. Proposed §301.6241-7(b)(2) provides an example that illustrates this provision.

B. *Termination and Jeopardy Assessments*

Section 6241(11)(B)(ii) provides that assessments under section 6851 (relating to termination assessments of income tax) or section 6861 (relating to jeopardy assessments of income, estate, gift, and certain excise taxes) are special enforcement matters. Consequently, the Secretary may prescribe rules under which subchapter C of chapter 63 (or a portion thereof) does not apply to partnership-related items allocable to a partner or indirect partner subject to a termination or jeopardy assessment and those partnership-related items are subject to special rules as is necessary for the effective and efficient enforcement of the Code. Section 6241(11)(A).

In termination and jeopardy assessment situations, the IRS makes an immediate assessment against a taxpayer to collect tax where the collection of tax is in jeopardy. In these special circumstances, the IRS needs to be able to make a full assessment of any amounts determined to be owed or risk being unable to collect tax in the future.

To address this special enforcement matter, proposed §301.6241-7(c) provides that for any taxable year of a partner or indirect partner for which an assessment of income tax under section 6851 or section 6861 is made, the IRS may adjust any partnership-related item with respect to such partner or indirect partner as part of making that assessment without regard to subchapter C of chapter 63. When making a termination or jeopardy assessment against a partner or indirect partner, the IRS will be able to protect the government's interest quickly with respect to a particular partner or indirect partner without having to conduct a proceeding under subchapter C of chapter 63 at the partnership level.

C. *Criminal Investigations*

Section 6241(11)(B)(iii) provides that criminal investigations constitute a special enforcement matter. As such, the Secretary may prescribe rules under which subchapter C of chapter 63 (or a portion thereof) does not apply to partnership-related items with respect to a taxpayer subject to criminal investigation and these partnership-related items are subject to special rules as is necessary for the effective and efficient enforcement of the Code. Section 6241(11)(A). The IRS needs to preserve flexibility in addressing potential adjustments so as to not interfere with criminal investigations.

To address this special enforcement matter, proposed §301.6241-7(d) provides that the IRS may adjust any partnership-related item with respect to any partner or indirect partner for any taxable year of a partner or indirect partner for which the partner or indirect partner is under criminal investigation without regard to subchapter C of chapter 63.

D. *Indirect Methods of Proof*

Section 6241(11)(B)(iv) provides that indirect methods of proof of income constitute a special enforcement matter. As such, the Secretary may prescribe rules under which subchapter C of chapter 63 (or a portion thereof) does not apply to partnership-related items with respect to a taxpayer whose income is subject to an indirect method of proof and these partnership-related items are subject to special rules as is necessary for the effective and efficient enforcement of the Code. Section 6241(11)(A).

When using an indirect method of proving a person's income, the IRS may not be able to determine whether the in-

come is derived from partnership-related items of a partnership subject to the centralized partnership audit regime. Accordingly, the IRS must be able to determine a person's income without determining whether any of the income identified using an indirect method of proof are partnership-related items that must be adjusted under the centralized partnership audit regime. Requiring the IRS to determine what amount of income identified using an indirect method of proof is attributable to a partnership-related item would frustrate the administration of the Code by making it nearly impossible to utilize an indirect method of proof because the source of the specific income is generally not readily apparent when an indirect method of proof is being utilized.

To address this special enforcement matter, proposed §301.6241-7(e)(1) provides that the IRS may adjust any partnership-related item as part of a determination of any deficiency (or portion thereof) of the partner or indirect partner that is based on an indirect method of proof without regard to subchapter C of chapter 63.

E. *Controlled Partnerships and the Partner's Period of Limitations*

Under section 6221, any adjustments to partnership-related items must be made at the partnership level. Section 6235 sets the period of limitations in which those adjustments to partnership-related items must be made. Although the items of a partnership are reported on the partnership's return, a partnership itself does not pay income tax. *See* section 701. The true tax impact and completeness of the partnership's reporting may not be apparent except by reviewing the partners' returns that report the partnership-related items. Additionally, in allocating resources and determining whether to open an examination, the IRS may identify issues either by reviewing the partners' returns or the partnership's return. Certain partnership issues may only become apparent at a future date or during an examination of a partner, which can frustrate the IRS's ability to allocate resources and examine taxpayers timely, especially in situations where the partnership structure includes many related and controlled entities.

Many partnerships, through many related and controlled entities, are ultimately controlled by a single or small number of individuals. The ultimate tax impact of the partnership's reporting would not be evident until the items were traced through a network of entities until they reach the single, or small group, of ultimate taxpayers. Many of these structures are examined as a group or as part of an examination of the controlling individual. In these situations, the existence of the partnership or the ultimate tax impact may not be known until the period of limitations on making adjustments to the partnership has expired, even though the controlling taxpayer may still be under examination. In those cases, the most efficient way to examine the partnership's reporting might be as part of a consolidated examination or during the examination of the controlling individual. In these cases, all of the related and controlled entities and their transactions can be considered together, benefiting both the IRS and the taxpayer by eliminating the need for separate examinations. These situations also present special enforcement considerations.

Specifically, the Treasury Department and the IRS have determined that special enforcement considerations are presented when the period of limitations on making adjustments to the partnership has expired for a taxable year but a controlling partner's period of limitations on assessment of chapter 1 tax has not expired or where the partner has voluntarily agreed to extend the period of limitation. When examining a partner that has control of a partnership through multiple tiered entities it may not be evident that an adjustment to an item on the controlling partner's return requires an adjustment to a partnership-related item until the controlling partner's interest is finally traced to a partnership. It may not be possible for this tracing to be completed before the period of limitations to make adjustments to the partnership has expired. In these circumstances, it is necessary for the effective and efficient enforcement of the Code to make adjustments or determinations regarding partnership-related items at the partner level during an examination of the controlling partner who has an open period to assess chapter 1 tax with respect to that item or amount. The same principles apply with respect to a partner who has consented to extend the period of limitations.

Under proposed §301.6241-7(f), the IRS may only make adjustments or determinations as to partnership-related items without regard to subchapter C of chapter 63 if the partner has control of the partnership or if the partner has voluntarily agreed to extend his or her period of limitations on making assessments under section 6501. The extension agreement must expressly provide that the partner is extending the time to adjust and assess any tax attributable to partnership-related items for the taxable year.

To determine if a direct or indirect partner has control of the partnership, proposed §301.6241-7(f)(1) incorporates the rules under sections 267(b) and 707(b). Accordingly, a direct or indirect partner will be deemed to be in control of the partnership if the partner is related to the partnership under sections 267(b) or 707(b).

F. *Penalties and Taxes Imposed on the Partnership Under Chapter 1*

Except as otherwise provided under subchapter C of section 63, under section 6221(a), adjustments to partnership-related items and the applicability of any penalty, addition to tax, or additional amount that relates to an adjustment to partnership-related items must be determined at the partnership level. To be a partnership-related item, the item must be relevant in determining the tax liability of any person under chapter 1. Section 6241(2)(B)(i); §301.6241-1(a)(6)(iv). A tax, penalty, addition to tax, or additional amount that is imposed on, and which is the liability of, the partnership under chapter 1 could qualify as a partnership-related item that would need to be adjusted under the centralized partnership audit regime.

The purpose of the centralized partnership audit regime is to create a centralized and efficient means of examining partnerships instead of examining partners. This purpose would not be served if these chapter 1 taxes and penalties were adjusted in an examination under this regime because these taxes and penalties are imposed on the partnership itself and are not the liability of the partners. As a liability of the partnership, these chapter 1 penalties and taxes are incompatible with the cen-

tralized partnership audit regime, which is designed to approximate the chapter 1 liability on the adjustments that would have been owed by the partners, not the partnership. On the other hand, when a liability is owed by the partnership itself, the partnership's exact liability should be determined and paid by that partnership. As such, the centralized partnership audit regime is generally not compatible with chapter 1 penalties and taxes imposed on partnerships. However, there could be situations where an adjustment to a chapter 1 tax or penalty owed by the partnership would be more appropriately adjusted at the partnership level, such as when the adjustment relates to, or results from, other adjustments being made at the partnership level. Accordingly, for the reasons stated above, the Treasury Department and the IRS have determined that special enforcement considerations are presented where a tax, penalty, addition to tax, or additional amount is imposed on, and is the liability of, a partnership under chapter 1.

Therefore, under proposed §301.6241-7(g), the IRS may determine that the centralized partnership audit regime does not apply to any taxes, penalties, additions to tax, or additional amounts imposed on a partnership under chapter 1 and to any determination made to determine whether the partnership meets the requirements for the tax or penalty, addition to tax, or additional amount. Accordingly, these taxes and penalties may be determined outside the centralized partnership audit regime in the same manner as they would be determined and imposed for entities not subject to the centralized partnership audit regime, such as corporations. Additionally, if the IRS is determining any chapter 1 tax or penalty imposed on the partnership outside of the centralized partnership audit regime, the IRS may also adjust any partnership-related item, outside of the centralized partnership audit regime, as part of any determination necessary to determine the amount and applicability of the chapter 1 tax or penalty. This rule does not apply to determinations surrounding the actual payment of the chapter 1 tax or penalty, such as whether the payment is deductible and any determinations regarding how the payment must be allocated amongst the partners. For the rules for when a chapter 1 tax or penalty is determined under the centralized partnership audit regime, see part 2 of this Explanation of Provisions.

G. *Determining that Subchapter C of Chapter 63 Does Not Apply*

Proposed §301.6241-7(h)(1) provides that if the IRS determines that all or some of the rules under the centralized partnership audit regime do not apply to a partnership-related item (or portion thereof) under the rules described in paragraphs (b) (partnership-related items underlying adjustments to non-partnership-related items), (c) (termination and jeopardy assessments), (d) (criminal investigations), (e) (indirect methods of proof of income), (f) (controlled partnerships and extensions of the partner's period of limitations), or (g) (penalties and taxes imposed on the partnership under chapter 1), then the IRS will notify, in writing, the taxpayer to whom the adjustments are being made. The Treasury Department and the IRS request comments on the timing of notices to be provided under proposed §301.6241-7(h)(1) including comments regarding whether the timing should be different based on the specific provision that is applicable.

Proposed §301.6241-7(h)(2) provides that any final decision with respect to any partnership-related item adjusted outside of the centralized partnership audit regime is not binding on the partnership, any partner, or any indirect partner that is not a party to the proceeding because there is no provision which would make them liable for any adjustments in a proceeding to which they are not a party.

H. *Coordination with Adjustments Made at the Partnership Level*

If the IRS makes adjustments to partnership-related items in an examination of a person other than the partnership and adjustments are made to the same partnership-related items in an examination of the partnership, there is a potential for the same adjustments to be subject to tax at both the partner and partnership level. Proposed §301.6241-7(i) sets forth a rule that would prevent taxing the same partnership-related item twice. Under this rule, if a deficiency is calculated or an adjustment is proposed by the IRS that includes amounts based on adjustments to partnership-related items and the person can establish that specific amounts included within the deficiency or adjustment were previously taxed to the partner in one of two sets of circumstances, the amounts will not be included in the deficiency or adjustment.

First, the partner or indirect partner can exclude amounts previously taken into account by the partner or indirect partner under the centralized partnership audit regime. For example, the partner could demonstrate that the amounts were taken into account through an amended return modification, the alternative to amended return modification, or through a push out election.

Second, a partner can exclude amounts included in an imputed underpayment that was paid by a partnership (or pass-through partner) in which the partner was a reviewed year partner or indirect partner. The amounts included as part of an imputed underpayment may only be excluded from the deficiency or adjustment if the amount included in the imputed underpayment exceeds the amount reported by the partnership to the partner (for example, on a Schedule K-1 or statement under section 6227) or is otherwise included in the deficiency or adjustment determined by the IRS (for example, as part of the deficiency based on a means other than an indirect method of proof). In other words, a partner may only exclude amounts included in an imputed underpayment paid by a partnership if the partner was taxed on the original amounts reported by the partnership to the partner. This puts the partner in parity with other partners in the partnership that are not subject to a special rule. Those partners are required to report consistently with the statements furnished by the partnership to the partner and are not taxed on any additional amounts included in an imputed underpayment paid by a partnership.

I. *Applicability Dates*

If this proposed rule is finalized, the revisions to the regulations finalized in TD 9829 and TD 9844 will be applicable on November 20, 2020.

Proposed §301.6241-7(j) provides the applicability dates for the rules con-

tained in proposed §301.6241-7. Proposed §301.6241-7(j) provides that, except for the rules contained in proposed §301.6241-7(b) (partnership-related items that underlie non-partnership-related items), the rules contained in proposed §301.6241-7 apply to partnership taxable years ending after November 20, 2020 or any examination or investigation beginning after **[DATE THE FINAL RULE IS FILED FOR PUBLIC INSPECTION AT THE OFFICE OF THE FEDERAL REGISTER]**. Proposed §301.6241-7(j) provides that the rules contained in proposed §301.6241-7(b) apply to partnership taxable years beginning after December 20, 2018, or to any examinations or investigations beginning after **[DATE THE FINAL RULE IS FILED FOR PUBLIC INSPECTION AT THE OFFICE OF THE FEDERAL REGISTER].**

Section 7805(b)(7) permits the Secretary to allow taxpayers to elect to apply a regulation retroactively. Accordingly, proposed §301.6241-7(j) contains a provision that provides that, notwithstanding the applicability dates provided in proposed §301.6241-7(j), the IRS and a partner may agree to apply any provision of proposed §301.6241-7 to any taxable year of a partner that corresponds to a partnership taxable year that is subject to the centralized partnership audit regime.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.) it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities.

The proposed rules directly affect any partnership subject to the centralized partnership audit regime under subchapter C of chapter 63. As all partnerships are subject to the centralized partnership audit regime unless they make a valid election out of the regime, the proposed rules are expected to affect a substantial number of small entities. However, the IRS has determined that the economic impact on small entities affected by the proposed rule would not be significant.

The proposed rules under §301.6241-7 implement section 6241(11) and allow the IRS, for partnership-related items that involve special enforcement matters, to provide that the centralized partnership audit regime (or a portion thereof) does not apply to such partnership-related items and that such items are subject to special rules as is necessary for the efficient and effective enforcement of the Code. As such, except for one circumstance, the proposed rules provide for certain situations where partnership-related items may be adjusted outside of the centralized partnership audit regime. In all but one of these situations, if the rules in proposed §301.6241-7 were utilized, then the adjustments would be made to partners of the partnership, rather than the partnership itself and, thus, utilizing the proposed rules would not have an impact on small entities. Additionally, many small entities may be eligible to elect out of the centralized partnership audit regime under section 6221(b). Accordingly, if a small entity is eligible to elect out, they may choose to elect out of the regime at which point the rules contained in proposed §301.6241-7 would be inapplicable to those entities.

Finally, the proposed rules under §301.6241-7 address the process for conducting an examination and do not have a significant economic impact on small entities as the rules do not affect entities' substantive tax, such as the requirement to include items in income or the deductibility of items. The proposed rules promulgated under other Code sections simply clarify sections of regulations previously published. Accordingly, any significant economic impact on small entities will result from the application of the substantive tax provisions and will not be as a result of the procedural rules contained in proposed §301.6241-7.

The Secretary hereby certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. The Treasury Department and the IRS invite comment from members of the public about potential impacts on small entities.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices, and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *www.irs.gov*.

Comments and Requests for Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the "**ADDRESSES**" section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at *www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, 2020-17 I.R.B 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Drafting Information

The principal author of these proposed regulations is Jennifer M. Black of the Associate Chief Counsel (Procedure and Administration). However, other person-

nel from the Treasury Department and the IRS participated in the development of the proposed regulations.

List of Subjects in 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 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Par. 1. The authority citation for part 301 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.6221(b)-1 also issued under sections 6221 and 6241.

* * * * *

Section 301.6241-7 also issued under section 6241.

* * * * *

Par. 2. Section 301.6221(b)-1 is amended by revising paragraphs (b)(3)(ii)(D) and (F), adding paragraph (b)(3)(ii)(G), and adding a sentence to the end of paragraph (f) to read as follows:

§301.6221(b)-1 Election out for certain partnerships with 100 or fewer partners.

* * * * *

(b) * * *

(3) * * *

(ii) * * *

(D) A wholly owned entity disregarded as separate from its owner for Federal income tax purposes,

* * * * *

(F) Any person who holds an interest in the partnership on behalf of another person, or

(G) A qualified subchapter S subsidiary, as defined in section 1361(b)(3)(B).

* * * * *

(f) * * * Notwithstanding the preceding sentence, paragraph (b)(3)(ii)(D), (F), and (G) of this section are applicable on November 20, 2020.

§301.6223-1 [Amended]

Par. 3. Section 301.6223-1 is amended by removing "B" and "B's" and adding "PR" and "PR's" in its place, respectively, wherever either appears in Examples 1 and 2 in paragraph (e)(8).

Par. 4. Section 301.6225-1 is amended:

1. By revising the paragraph (b)(3) subject heading;

2. By adding a sentence to the end of paragraph (b)(4);

3. By adding a sentence to the end of paragraph (c)(3);

4. By revising paragraph (d)(2)(ii);

5. By removing reserved paragraph (d)(3)(iii)(C);

6. By adding a sentence to the end of paragraph (e)(3)(ii);

7. By revising paragraph (f)(1)(ii);

8. By adding paragraph (f)(3);

9. By adding paragraphs (h)(13) and (14); and

10. By adding a sentence to the end of paragraph (i)(1).

The revisions and additions read as follows:

§301.6225-1 Partnership adjustment by the Internal Revenue Service.

* * * * *

(b) * * *

(3) *Adjustments to items for which tax has been collected under chapters 3 and 4 of the Internal Revenue Code (Code)*. * * *

(4) * * * If an adjustment to an item of income, gain, loss, deduction, or credit is related to, or results from, an adjustment to an item that is not an item of income, gain, loss, deduction, or credit, the adjustment to the item that is not an item of income, gain, loss, deduction, or credit will generally be treated as zero solely for purposes of calculating the imputed underpayment unless the IRS determines that the adjustment should be included in the imputed underpayment.

* * * * *

(c) * * *

(3) * * * Each adjustment to any tax, penalty, addition to tax, or additional amount for the taxable year for which the partnership is liable under chapter 1 of the Code (chapter 1) and each adjustment to an imputed underpayment calculated by the partnership is placed in the credit grouping.

* * * * *

(d) * * *

(2) * * *

(ii) *Negative adjustment*. A *negative adjustment* is any adjustment that is a decrease in an item of income; a partnership adjustment treated under paragraph (d)(2)(i) of this section as a decrease in an item of income; an increase in an item of credit; a decrease in an item of tax, penalty, addition to tax, or additional amount for which the partnership is liable under chapter 1; or a decrease to an imputed underpayment calculated by the partnership for the taxable year.

* * * * *

(e) * * *

(3) * * *

(ii) * * * A net negative adjustment to a tax, penalty, addition to tax, or additional amount for which the partnership is liable under chapter 1 or an adjustment to any imputed underpayment calculated by the partnership for the taxable year is not an adjustment described in paragraph (f) of this section.

* * * * *

(f) * * *

(1) * * *

(ii) The calculation under paragraph (b)(1) of this section results in an amount that is zero or less than zero, unless paragraph (f)(3) of this section applies.

* * * * *

(3) *Exception to treatment as an adjustment that does not result in an imputed underpayment*—(i) *Application of this paragraph (f)(3)*. If the calculation under paragraph (b)(1) of this section results in an amount that is zero or less than zero due to the inclusion of a net negative adjustment to a tax, penalty, addition to tax, or additional amount for which the partnership is liable under chapter 1 or an adjustment to any imputed underpayment calculated by the partnership for the taxable year, this paragraph (f)(3) applies, and paragraph (f)(1) of this section does not apply except as provided in paragraph (f)(3)(ii)(C) of this section.

(ii) *Recalculation if paragraph (f)(3) of this section applies*—(A) *In general*.

If this paragraph (f)(3) applies, the imputed underpayment is recalculated under paragraph (b)(1) of this section without regard to a net negative adjustment to a tax, penalty, addition to tax, or additional amount for which the partnership is liable under chapter 1 or an adjustment to any imputed underpayment calculated by the partnership for the taxable year. The net negative adjustment that was excluded from the imputed underpayment recalculation is then treated in one of two ways under paragraphs (f)(3)(ii)(B) and (C) of this section depending on the results of the recalculation.

(B) *Recalculation is greater than zero*. If the result of the recalculation under paragraph (f)(3)(ii) of this section is greater than zero, the IRS may apply the portion of the net negative adjustment(s) that was excluded from the recalculation to reduce the imputed underpayment to zero, but not below zero. In this case, the imputed underpayment is zero but the adjustments included in the recalculation and the remaining net negative adjustment(s) excluded from the recalculation under paragraph (f)(3)(ii)(A) of this section are not adjustments that do not result in an imputed underpayment subject to treatment as described in paragraph (f)(2) of this section. See paragraph (h)(13) of this section (*Example 13*).

(C) *Recalculation is zero or less than zero*. If the result of the recalculation under paragraph (f)(3)(ii) of this section is zero or less than zero, the adjustments included in the recalculation are treated as adjustments that do not result in an imputed underpayment under paragraph (f)(1)(ii) of this section. The net negative adjustment(s) that was excluded from the recalculation is not an adjustment that does not result in an imputed underpayment subject to treatment as described in paragraph (f)(2) of this section. See paragraph (h)(14) of this section (*Example 14*).

* * * * *

(h) * * *

(13) *Example 13*. The IRS initiates an administrative proceeding with respect to Partnership's 2019 partnership return and makes adjustments as follows: net positive adjustment of $100 ordinary income, net negative adjustment of $20 in credits, and a net negative adjustment of $25 to a chapter 1 tax liability of the partnership. The IRS determines that the net negative adjustment in credits should be taken into account in the calculation of the imputed underpayment in accordance with paragraph (b)(1)(v) of this section. Pursuant to paragraph (b)(1) of this section, the $100 net positive adjustment to ordinary income is multiplied by 40 percent (highest tax rate in effect), which results in $40. The adjustments in the credits grouping are then applied, which include the adjustment to credits and the adjustment to the chapter 1 tax liability. Applying the credits results in an amount less than zero as described in paragraph (f)(3)(i) of this section ($40 - $20 -$25 = -$5). Pursuant to paragraph (f)(3)(ii) of this section, the imputed underpayment is recalculated without regard to the adjustment to the chapter 1 tax liability, resulting in a recalculation amount greater than zero as described in paragraph (f)(3)(ii)(B) of this section ($40 - $20 = $20). Pursuant to paragraph (f)(3)(ii)(B) of this section, the IRS may apply a portion of the adjustment to chapter 1 tax liability to reduce the recalculation to zero but not below zero. In this case, the recalculation amount would be reduced to zero using $20 of the $25 adjustment to chapter 1 tax liability. Because the imputed underpayment was reduced to zero, pursuant to paragraph (f)(3)(ii)(B), the adjustments that went into the recalculation are not adjustments that do not result in an imputed underpayment. These adjustments are the $100 adjustment to ordinary income and the $20 adjustment to credits. The remaining $5 adjustment to the chapter 1 tax liability of the partnership is an adjustment that is treated as described in paragraph (e)(3)(ii) of this section and is therefore not taken into account on the partnership's adjustment year return.

(14) *Example 14*. The facts are the same as in paragraph (h)(13) of this section (*Example 13*), but the negative adjustment to credits is $50 instead of $20. Applying the credits results in an amount less than zero as described in paragraph (f)(3)(i) of this section ($40 - $50 -$25 = -$35). Pursuant to paragraph (f)(3)(ii) of this section, the imputed underpayment is recalculated without regard to the adjustment to the chapter 1 tax liability, resulting in a recalculation amount less than zero as described in paragraph (f)(3)(ii)(C) of this section ($40 - $50 = -$10). Pursuant to paragraph (f)(3)(ii)(C) of this section, the partnership adjustments resulting in the -$10 recalculation amount are adjustments that do not result in an imputed underpayment treated in accordance with paragraph (f)(1)(ii) of this section, and the $25 adjustment to chapter 1 tax liability is not treated as such an adjustment and is therefore not taken into account on the partnership's adjustment year return.

(i) * * *

(1) * * * Notwithstanding the preceding sentence, paragraphs (b)(4), (c)(3), (d)(2)(ii), (d)(3)(iii)(C), (e)(3)(ii), (e)(3)(iii)(B), (f)(1)(ii), (f)(3), and (h)(13) and (14) of this section are applicable on November 20, 2020.

Par. 5. Section 301.6225-2 is amended:

1. In paragraph (d)(2)(vi)(A), by removing the period and the end of the paragraph and adding in its place ", by treating any approved modifications and partnership adjustments allocable to the pass-through partner as items reflected on the statement furnished to the pass-through partner.";

2. By revising paragraph (d)(2)(vi)(B); and

3. By adding a sentence to the end of the paragraph (g)(1).

The additions and revisions read as follows:

§301.6225-2 Modification of imputed underpayment.

* * * * *

(d) * * *

(2) * * *

(vi) * * *

(B) *Adjustments that do not result in an imputed underpayment*. If a pass-through partner takes into account its share of the adjustments by paying an amount described in paragraph (d)(2)(vi)(A) of this section and there are any adjustments that do not result in an imputed underpayment (as defined in §301.6225-1(f)), those adjustments are taken into account by the pass-through partner in accordance with §301.6225-3 in the taxable year of the pass-through partner that includes the date the payment described in paragraph (d)(2)(iv)(A) of this section is paid. This paragraph does not apply if, after making the calculation described in paragraph (d)(2)(iv)(A) of this section, no amount exists and therefore no payment is required under paragraph (d)(2)(iv)(A) of this section.

* * * * *

(g) * * *

(1) * * * Notwithstanding the preceding sentence, paragraph (d)(2)(vi)(B) of this section is applicable on November 20, 2020.

Par. 6. Section 301.6225-3 is amended:

1. In paragraph (b)(1) by removing "a reduction in non-separately stated income or as an increase in non-separately stated loss" and adding in its place "part of non-separately stated income or loss";

2. By adding paragraphs (b)(8) and (d)(3); and

3. By adding a sentence to the end of paragraph (e)(1).

The additions read as follows:

§301.6225-3 Treatment of partnership adjustments that do not result in an imputed underpayment.

* * * * *

(b) * * *

(8) *Adjustments to items that are not items of income, gain, loss, deduction, or credit*. The partnership takes into account an adjustment that does not result in an imputed underpayment that resulted from an adjustment to an item that is not an item of income, gain, loss, deduction, or credit by adjusting the item on its adjustment year return but only to the extent the item would appear on the adjustment year return without regard to the adjustment. If the item is already reflected on the partnership's adjustment year return as an item that is not an item of income, gain, loss, deduction, or credit, or in any year between the reviewed year and the adjustment year, a partnership should not create a new item in the amount of the adjustment on the partnership's adjustment year return.

* * * * *

(d) * * *

(3) *Example 3*. On its partnership return for the 2020 taxable year, Partnership placed Asset into service, reporting that Asset, a non-depreciable asset, had a basis of $100. During an administrative proceeding with respect to Partnership's 2020 taxable year, the IRS determines that Asset has a basis of $90 instead of $100. The IRS also determines that Partnership has a negative adjustment to credits of $4. There are no other adjustments for the 2020 partnership taxable year. Under paragraph (d)(2) of this section, the adjustment to the basis of an asset is not an adjustment to an item of income. Therefore, the $10 adjustment to the basis of Asset is treated as a $10 positive adjustment. The IRS determines that the net negative adjustment to credits should be taken into account as part of the calculation of the imputed underpayment. The total netted partnership adjustment is $10, which, after applying the highest rate and decreasing the product by the $4 adjustment to credits results in an imputed underpayment of $0. Accordingly, both adjustments are adjustments that do not result in an imputed underpayment under paragraph (f) of this section. The adjustment year is 2022 and Partnership still owns Asset. Under paragraph (b)(8) of this section, the partnership takes into account the $10 adjustment to Asset on its 2022 return by reducing its basis in Asset by $10.

(e) * * *

(1) * * * Notwithstanding the preceding sentence, paragraphs (b)(8) and (d)(3) of this section are applicable on November 20, 2020.

* * * * *

Par. 7. Section 301.6226-2 is amended by removing "Internal Revenue" from the paragraph (g)(3) subject heading, adding paragraph (g)(4), and adding a sentence to the end of paragraph (h)(1).

The additions read as follows:

§301.6226-2 Statements furnished to partners and filed with the IRS.

* * * * *

(g) * * *

(4) *Liability for chapter 1 taxes and penalties*. A partnership that makes an election under §301.6226-1 with respect to an imputed underpayment must pay any taxes, penalties, additions to tax, additional amounts, or the amount of any adjustments to any imputed underpayment calculated by the partnership that is determined under subchapter C of chapter 63 for which the partnership is liable under chapter 1 of the Code or subchapter C of chapter 63 at the time the partnership furnishes statements to its partners in accordance with paragraph (b) of this section. Any adjustments to such items are not included in the statements the partnership furnishes to its partners or files with the IRS under this section.

(h) * * *

(1) * * * Notwithstanding the prior sentence, paragraph (c)(1) of this section is applicable on November 20, 2020.

* * * * *

Par. 8. Section 301.6241-3 is amended:

1. By revising paragraph (b)(1)(ii);

2. By removing paragraph (b)(2);

3. By redesignating paragraphs (b)(3) and (4) as paragraphs (b)(2) and (3) respectively; and

4. By revising paragraphs (c), (d), (e)(2)(ii), (f)(1) and (2), and (g).

The revisions read as follows:

§301.6241-3 Treatment where a partnership ceases to exist.

* * * * *

(b) * * *

(1) * * *

(ii) The partnership does not have the ability to pay, in full, any amount that may be due under the provisions of subchapter C of chapter 63 for which the partnership is or may become liable. For purposes of this section, a partnership does not have the ability to pay if the IRS determines that the partnership is currently not collectible based on the information the IRS has at the time of such determination.

* * * * *

(c) *Partnership adjustment takes effect*. For purposes of this section, a partnership adjustment under subchapter C of chapter 63 takes effect when the adjustment becomes finally determined as described in §301.6226-2(b)(1); when the partnership and the IRS enter into a settlement agreement regarding the adjustment; or, for adjustments appearing on an administrative adjustment request (AAR), when the request is filed.

(d) *Former partners*—(1) *In general*. Except as described in paragraph (d)(2) of this section, the term *former partners* means the partners of the partnership during the last taxable year for which a partnership return under section 6031 or AAR was filed for such partnership or the most recent persons determined to be partners of the partnership in a final determination (for example, a defaulted notice of final partnership adjustment, final court decision, or settlement agreement) binding upon the partnership.

(2) *Partnership-partner ceases to exist*. If any former partner is a partnership-partner that the IRS has determined ceased to exist, the former partners for purposes of this section are the partners of such partnership-partner during the last partnership taxable year for which a partnership return of the partnership-partner under section 6031 or AAR was filed or the most recent persons determined to be partners of the partnership-partner in a final determination (for example, a defaulted notice of final partnership adjustment, final court decision, or settlement agreement) binding upon the partnership-partner.

(e) * * *

(2) * * *

(ii) The partnership must furnish statements to the former partners and file the statements with the IRS no later than 60 days after the later of the date of the notification to the partnership that the IRS has determined that the partnership has ceased to exist or the date the adjustment takes effect, as described in paragraph (c) of this section.

* * * * *

(f) * * *

(1) *Example 1*. The IRS initiates a proceeding under subchapter C of chapter 63 with respect to the 2020 partnership taxable year of Partnership. During 2023, in accordance with section 6235(b), Partnership extends the period of limitations on adjustments under section 6235(a) until December 31, 2025. However, on July 31, 2024, Partnership terminates within the meaning of section 708(b)(1). Based on the prior termination under section 708(b)(1), the IRS determines that Partnership ceased to exist, as defined in paragraph (b) of this section, on September 16, 2024. On February 1, 2025, the IRS mails Partnership a notice of final partnership adjustment (FPA) that determines partnership adjustments that result in a single imputed underpayment. Partnership does not timely file a petition under section 6234 and does not make a valid election under section 6226. Partnership files its final return of partnership income on October 15, 2024 listing A and B, both individuals, as the partners for its final taxable year ending July 31, 2024. Accordingly, under paragraph (d)(1) of this section, A and B are former partners. Therefore, A and B are required to take their share of the partnership adjustments determined in the FPA into account under paragraph (e) of this section.

(2) *Example 2*. The IRS initiates a proceeding under subchapter C of chapter 63 with respect to the 2020 partnership taxable year of P, a partnership. G, a partnership that has an election under section 6221(b) in effect for the 2020 taxable year, is a partner of P during 2020 and for every year thereafter. On February 3, 2025, the IRS mails P an FPA that determines partnership adjustments that result in a single imputed underpayment. P does not timely file a petition under section 6234 and does not make a timely election under section 6226. On March 21, 2025, the IRS determines that P has ceased to exist because P did not make an election under section 6226, P is currently not collectible, and the IRS does not expect P will be able to pay any imputed underpayment. G terminated under section 708(b)(1) on December 31, 2024. On March 3, 2025, the IRS determines that G ceased to exist in 2024 for purposes of this section in accordance with paragraph (b) of this section. J and K, individuals, were the only partners of G during 2024. Therefore, under paragraph (d)(2) of this section, J and K, the partners of G during G's 2024 partnership taxable year, are the former partners of G for purposes of this section. Therefore, J and K are required to take into account their share of the adjustments contained in the statement furnished by P to G in accordance with paragraph (e) of this section.

(g) *Applicability date*. This section applies to any determinations made after November 20, 2020.

Par. 9. Section 301.6241-7 is added to read as follows:

§301.6241-7 Treatment of special enforcement matters.

(a) *Items that involve special enforcement matters*. In accordance with section 6241(11)(B) of the Internal Revenue Code (Code), the partnership-related items (as defined in §301.6241-1(a)(6)(ii)) described in this section have been determined to involve special enforcement matters.

(b) *Partnership-related items underlying non-partnership-related items*—(1) *In general*. The Internal Revenue Service (IRS) may determine that the rules of subchapter C of chapter 63 of the Code (subchapter C of chapter 63) do not apply to an adjustment to a partnership-related item of a partnership if—

(i) An examination is being conducted of a person other than the partnership;

(ii) A partnership-related item is adjusted, or a determination regarding a partnership-related item is made, as part of, or underlying, an adjustment to a non-partnership-related item of the person whose return is being examined; and

(iii) The treatment of the partnership-related item on the return of the partnership under section 6031(b) or in the partnership's books and records is based in whole or in part on information provided by the person whose return is being examined.

(2) *Example*. The following example illustrates the provisions of paragraph (b) of this section. For purposes of this example, the partnership has no liabilities, is subject to subchapter C of chapter 63, and the partnership and partner each has a calendar year taxable year. On June 1, 2018, A acquires an interest in Partnership by contributing Asset to Partnership in a section 721 contribution (Contribution). Partnership claims a basis in Asset of $50 under section 723 equal to A's purported adjusted basis in Asset as of June 1, 2018, based on information A provided to Partnership. There is no activity in Partnership that gives rise to any other partnership-related items between June 1, 2018 and June 2, 2019. On June 2, 2019, A sells A's interest in Partnership to B for $100 in cash and reports a gain of $50 based on A's purported adjusted basis in Partnership of $50 under section 722 (reflecting solely A's purported adjusted basis in Asset immediately prior to the Contribution). The IRS opens an examination of A and determines that A's adjusted basis in Asset immediately prior to the Contribution should have been $30 instead of the $50 claimed by A. As a result, A's basis in Asset immediately prior to the Contribution is reduced from $50 to $30 and A's adjusted basis in A's interest in Partnership under section 722 is reduced from $50 to $30. Because A's adjusted basis in A's interest in Partnership is reduced to $30, the total gain from the sale of A's interest in Partnership is increased to $70 ($50 as originally reported plus $20 as adjusted by the IRS). The amount of Partnership's adjusted basis in Asset, which is the property transferred by A in the Contribution, is based on information provided by A to Partnership; the adjustment to A's pre-Contribution adjusted basis in Asset, which is a non-partnership-related item, results in an adjustment to the adjusted basis of the property (that is, Asset) transferred to Partnership in the Contribution, which is a partnership-related item; and the Contribution underlies the adjustment to A's basis in A's interest Partnership, which is a non-partnership-related item. As a result, the IRS may determine that the rules of subchapter C of chapter 63 do not apply to the Contribution and may adjust, during an examination of A, the Contribution as it relates to the adjusted basis in Asset transferred in the Contribution.

(c) *Termination and jeopardy assessment*. For any taxable year of a partner or indirect partner for which an assessment of income tax under section 6851 or section 6861 is made, the IRS may adjust any partnership-related item with respect to such partner or indirect partner as part of making an assessment of income tax under section 6851 or section 6861 without regard to subchapter C of chapter 63.

(d) *Criminal investigations*. For any taxable year of a partner or indirect partner for which the partner or indirect partner is under criminal investigation, the IRS may adjust any partnership-related item with respect to such partner or indirect partner without regard to subchapter C of chapter 63.

(e) *Indirect methods of proof of income*. The IRS may adjust any partnership-related item as part of a determination of any deficiency (or portion thereof) of the partner or indirect partner that is based on an indirect method of proof of income without regard to subchapter C of chapter 63.

(f) *Controlled partnerships and extensions of the partner's period of limitations*. If

the period of limitations under section 6235 on making partnership adjustments has expired for a taxable year, the IRS may adjust any partnership-related item that relates to any item or amount for which the partner's period of limitations on assessment of tax imposed by chapter 1 of the Code (chapter 1) has not expired for the taxable year of the partner or indirect partner, without regard to subchapter C of chapter 63 if—

(1) The direct or indirect partner is deemed to have control of a partnership if such partner is related to the partnership under sections 267(b) or 707(b); or

(2) Under section 6501(c)(4), the direct or indirect partner agrees, in writing, to extend the partner's section 6501 period of limitations on assessment for the taxable year but only if the agreement expressly provides that the partner is extending the time to adjust and assess any tax attributable to partnership-related items for the taxable year.

(g) *Penalties and taxes imposed on the partnership under chapter 1*. The IRS may adjust any tax, penalties, additions to tax, or additional amounts imposed on, and which are the liability of, the partnership under chapter 1 without regard to subchapter C of chapter 63. The IRS may also adjust any partnership-related item, without regard to subchapter C of chapter 63, as part of any determinations made to determine the amount and applicability of the tax, penalty, addition to tax, or additional amount being determined without regard to subchapter C of chapter 63. Any determinations under this paragraph (g) will be treated as a determination under a chapter of the Code other than chapter 1 for purposes of §301.6241-6.

(h) *Determination that subchapter C of chapter 63 does not apply*—(1) *Notification*. If the IRS determines, in accordance with paragraph (b), (c), (d), (e), (f), or (g) of this section, that some or all of the rules under subchapter C of chapter 63 do not apply to any partnership-related item (or portion thereof), then the IRS will notify, in writing, the taxpayer to whom the adjustments are being made.

(2) *Effect on adjustments made under subchapter C of chapter 63*. Any final decision with respect to any partnership-related item adjusted in a proceeding not under subchapter C of chapter 63 is not binding on any person that is not a party to the proceeding.

(i) *Coordination with adjustments made at the partnership level*. This section will not apply to the extent the partner can demonstrate adjustments to partnership-related items included in the deficiency or an adjustment by the IRS were—

(1) Previously taken into account under subchapter C of chapter 63 by the person being examined; or

(2) Included in an imputed underpayment paid by a partnership (or pass-through partner) for any taxable year in which the partner was a reviewed year partner or indirect partner but only if the amount included in the deficiency or adjustment exceeds the amount reported by the partnership to the partner that was either reported by the partner or indirect partner or is otherwise included in the deficiency or adjustment determined by the IRS.

(j) *Applicability date*—(1) *In general*. Except for paragraph (b) of this section, this section applies to partnership taxable years ending after November 20, 2020, or any examination or investigation begun after November 20, 2020. Notwithstanding the preceding sentence, any provision of this section except for paragraph (b) of this section may apply to any taxable year of a partner that relates to a partnership taxable year subject to subchapter C of chapter 63 that ended before November 20, 2020, upon agreement between the partner under examination and the IRS.

(2) *Partnership-related items underlying non-partnership-related items*. Paragraph (b) of this section applies to partnership taxable years beginning after December 20, 2018, or any examination or investigation begun after November 20, 2020. Notwithstanding the preceding sentence, paragraph (b) of this section may apply to any taxable year of a partner that relates to a partnership taxable year subject to subchapter C of chapter 63 that ended before December 20, 2018, upon agreement between the partner under examination and the IRS.

Sunita Lough,
Deputy Commissioner for Services and Enforcement.

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Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2019–27 through 2019–52 is in Internal Revenue Bulletin 2019–52, dated December 27, 2019.

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Internal Revenue Service
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We Welcome Comments About the Internal Revenue Bulletin

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