



# TaxNewsFlash

United States



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## Notice 2023-8: Guidance regarding withholding on transfers of publicly traded partnership interests

The IRS today released an advance version of [Notice 2023-8](#) [PDF 107 KB] providing additional guidance for brokers to comply with the final regulations under section 1446(f) (and certain provisions of the final regulations that apply to section 1446(a)) that relate to withholding on the transfer of an interest in a publicly traded partnership (PTP).

### Background

Sections 864(c)(8) and 1446(f) were added to the Code by the 2017 tax law (Pub. L. No. 115-97)—the law that is often referred to as the “Tax Cuts and Jobs Act” (TCJA).

- Section 864(c)(8) provides rules for determining the amount of gain or loss that is treated as effectively connected with a U.S. trade or business when a non-U.S. person sells an interest in a partnership that is engaged in a trade or business in the United States.
- Section 1446(f) provides withholding and reporting rules applicable to the transfer of partnership interests described in section 864(c).

Final regulations promulgated in November 2020 concern the withholding and reporting obligations with respect to dispositions of certain partnership interests under section 1446 and other Code sections. Read [TaxNewsFlash](#)

The final regulations include withholding requirements under section 1446(f)(1) that generally require a broker that effects a transfer of a PTP interest on behalf of a transferor to withhold on the payment of an amount realized made to the transferor. However, a broker is not required to withhold, or may withhold at a reduced rate, if it can rely on (1) a certification from the transferor that claims an exception or reduction to withholding (generally provided on a valid Form W-8 or W-9) or (2) a representation made by the PTP on a qualified notice indicating that the exception under Treas. Reg. §1.1446(f)-4(b)(3)(ii) applies (ten-percent exception). A broker is also not required to withhold when it makes the payment of an amount realized to a qualified intermediary (QI), or a U.S. branch treated as a U.S. person, that assumes primary withholding responsibility under section 1446(f)(1).

The provisions of the final regulations that relate to a broker’s obligation to withhold on the transfer of a PTP interest apply to transfers that occur on or after January 1, 2022. However, on September 7, 2021, the IRS

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released Notice 2021-51, deferring the applicability date of these provisions to transfers that occur on or after January 1, 2023. Read [TaxNewsFlash](#)

Further, on May 16, 2022, the IRS released Notice 2022-23, proposing changes to the QI agreement, including rules that will apply to QIs required to withhold on the transfer of a PTP interest under section 1446(f) starting January 1, 2023. Read [TaxNewsFlash](#)

Subsequently, the IRS released Revenue Procedure 2022-43, which provides the final QI agreement effective as of January 1, 2023. Read [TaxNewsFlash](#)

### **Notice 2023-8**

Following the 2020 final regulations, taxpayers and other stakeholders raised concerns regarding the difficulty of brokers to determine, for withholding under section 1446(f), whether entities organized outside of the United States are classified as PTPs for U.S. tax purposes. Because the final regulations generally require withholding on the sale of a PTP interest unless the PTP represents on a qualified notice that the ten-percent exception applies, or the transferor provides a certification claiming another exception to withholding under Treas. Reg. § 1.1446(f)-4(b)), a broker that is unable to determine the classification of an entity may be required to withhold on each sale of an interest in such entity. These taxpayers and stakeholders thus requested that a broker be able to presume that an entity organized outside of the United States is not a PTP unless it has actual knowledge to the contrary, and that a PTP organized outside of the United States is presumed to not have effectively connected income unless it represents otherwise on a qualified notice.

Today's notice states that the Treasury Department and the IRS have determined that the burden on brokers to determine whether a foreign entity that trades on a foreign market is a PTP for U.S. tax purposes would likely be disproportionate to the amount of gain subject to section 864(c)(8) on transfers of interests in such entities. The Treasury Department and the IRS intend to issue proposed regulations that would amend the final regulations to provide withholding relief to brokers on the sale of an interest in an entity that is organized outside of the United States and that trades solely on a foreign established securities market or foreign secondary market (foreign-traded entity). This proposed amendment would allow a broker that effects a sale of an interest in a foreign-traded entity to presume that the entity is not a PTP for U.S. tax purposes unless the broker has actual knowledge otherwise. However, the Treasury Department and the IRS have determined that it is inappropriate to allow a broker that knows that a foreign-traded entity is a PTP for U.S. tax purposes to presume that the PTP does not have effectively connected income, and therefore do not intend to include such a presumption in the proposed regulations. Thus, in such a case, a broker would be required to withhold under section 1446(f) on the sale of an interest in the PTP unless the PTP has indicated on a qualified notice that the ten-percent exception applies or the broker receives a certification from the transferor claiming another exception or reduction to withholding.

Today's notice also states that the Treasury Department and the IRS intend to issue proposed regulations that would amend the final regulations to allow brokers to rely on late certifications from a transferor of a PTP interest that claims an exception or reduction to withholding, when certain requirements are met. The same allowance would be provided for late certifications received by nominees treated as withholding agents under Treas. Reg. § 1.1446-4 on PTP distributions subject to section 1446(a).

Finally, today's notice states that the Treasury Department and the IRS intend to issue proposed regulations that would amend the final regulations to provide an exception to withholding under section 1446(f) on short sales of PTP interests, subject to certain limitations.

### **Applicability date and taxpayer reliance**

Notice 2023-8 states that the Treasury Department and IRS intend to issue proposed regulations that would amend the final regulations to implement this additional guidance, applicable to transfers or distributions made on or after January 1, 2023. Before the promulgation of the proposed regulations, a broker required to withhold under section 1446(a) or 1446(f) may rely on the provisions of the notice regarding the proposed regulations,

and a QI applying the provisions of the QI agreement (as in effect on January 1, 2023) may also rely on the provisions of the notice.

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