



Reporting Transfers of Partnership Interests Subject to Section 1446(f)

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This article summarizes changes made by the 2019 proposed regulations to the reporting, recordkeeping, and notice requirements and penalty provisions under Section 1446(f), governing withholding of tax on gain from sales or exchanges of certain partnership interests held by foreign individuals or corporations, and discusses areas where clarification is still needed.

Treasury and the IRS published proposed regulations¹ for withholding of tax on gain from sales or exchanges of certain partnership interests held by foreign individuals or corporations under Section 1446(f).² The proposed regulations incorporate reporting, notice, and recordkeeping requirements with respect to transfers of partnership interests subject to withholding under Section 1446(f). The proposed regulations apply to domestic and foreign transferors and transferees of partnership interests, partnerships, partners, brokers, and agents. However, some of the existing provisions in Treasury regulations interpreting penalties under the Code for failure to report, notify,

or keep records, which would apply in the context of a transfer subject to Section 1446(f), were not updated.

In part one, this article provides the legislative and administrative background for withholding under Section 1446(f). In part two, this article examines the reporting, notice, and recordkeeping requirements (collectively referenced as reporting requirements in the article, as context requires) for transferors, transferees, withholding agents, publicly traded partnerships (“PTPs”), brokers, non-publicly-traded partnerships (“non-PTPs”), and transferor or transferee agents under Section 1446(f). In part three, this article analyzes the penalties,

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interest, and additions to tax (collectively referenced in the article as penalties or reporting penalties, as context requires), which apply for failure to meet the requirements with respect to transfers of partnership interests subject to Section 1446(f). In conclusion, this article recommends clarifying the applicability of reporting, notification, and recordkeeping rules and resulting liability provisions under the Code to transfers of partnership interests subject to Section 1446(f) in final regulations under Sections 864(c)(8) and 1446(f).

Background

Congress enacted Section 1446(f) as part of the 2017 tax reform legislation commonly known as the Tax Cuts and Jobs Act of 2017.³ Generally, Section 1446(f) requires withholding at the rate of 10% of the amount realized on a transfer of an interest in a partnership if any portion of the gain were deemed effectively connected with the conduct of a trade or business within the U.S.⁴ Effectively connected gain (“EC gain”) is determined under the new Section 864(c)(8).

Under Section 865, if a partner sells the partnership interest, whether the gain or loss is U.S.-source income depends on the residence of the transferor partner. Under Section 865(a)(1), if the transferor partner is a nonresident alien (“NRA”) or foreign corporation, there is no withholding tax. As a special rule, under Section 897(a)(1), gain or loss from the sale of a U.S. real property interest (“USRPI”) is treated as effectively

connected income (“ECI”) subject to withholding tax.

Under Section 875(1), only an NRA or a foreign corporation, which is a partner in a partnership engaged in a U.S. trade or business, is deemed engaged in the U.S. trade or business of the partnership.⁵ The Code does not state that a U.S. person with an interest in a partnership, which engages in a U.S. trade or business, is engaged in the U.S. trade or business for purposes of the income tax provisions.

Under Section 864(c)(8)(A), gain from disposition of an interest in a partnership engaged in a U.S. trade or business is treated as EC gain to the extent of the application of the deemed sale rule codified in Section 864(c)(8)(B), even if an NRA or foreign corporation is an indirect owner of the partnership interest.⁶ By extension, under Section 1446(f)(1), a withholding obligation applies to a disposition by a transferor which is not necessarily an NRA or a foreign corporation, so long as an NRA or a foreign corporation is a direct or indirect owner of the transferred partnership interest.⁷

Under the proposed regulations, a transferor or a notifying transferor is not necessarily the taxpayer.⁸ Rather, these are persons generally subject to withholding or reporting requirements with respect to transfers of partnership interests subject to Section 1446(f). The taxpayer is aligned with the definition of a “foreign transferor” in the 2018 proposed regulations under Section 864(c)(8).⁹

In this article, the terms transferor, foreign partner, seller, selling partner,

or other similar terms as context requires, are used interchangeably and refer to the person being withheld upon under Section 1446(f). For ease of reference, the terms transferee, buyer, and sometimes, withholding agent, as context requires, are used interchangeably to denote the person with the withholding obligation other than secondary withholding under Section 1446(f)(4). Likewise, the terms transfer, sale, disposition, and similar terms as context requires are used interchangeably to refer to a transfer of a partnership interest subject to Section 1446(f).¹⁰

Section 864(c)(8) is broader in scope than Rev. Rul. 91-32¹¹ (the “Ruling”), the principles of which Section 864(c)(8) codifies.¹² The Ruling requires a fixed place of business to trigger withholding on a disposition of partnership interests by a foreign person.¹³ By contrast, Section 864(c)(8) or Section 1446(f) does not require a fixed place of business of a partnership within the U.S. to trigger withholding or reporting, if the partnership otherwise engages in the conduct of a trade or business within the U.S.¹⁴

Under the general rule in Section 1446(f)(1), a transferee of the partnership interest or the partnership must withhold 10% of the amount realized on the transfer if there would be EC gain under Section 864(c)(8).¹⁵ The “look-through” requirement in Sections 864(c)(8) and 1446(f)(1) means that a transferor which is a domestic partnership with an NRA or foreign corporation as a direct or in-

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¹ 84 Fed. Reg. 21,198 (2019).

² Unless context otherwise requires, all references to Sections are referenced to sections of the Internal Revenue Code of 1986, as amended, 26 U.S.C. section 1 *et seq.*

³ P.L. 115-97, 12/22/2017.

⁴ See Section 1446(f)(1).

⁵ See Section 875(1).

⁶ See Section 864(c)(8). There is a distinction between withholding under Section 1446(f), on the one hand, and under Section 1446(a), on the other hand. The latter provision generally requires withholding by a partnership on effectively connected taxable income allocated to one or more foreign partners. See generally Section 1446(a).

⁷ See Prop. Regs. 1.864(c)(8)-2(d)(1), 1.1446(f)-1(b)(11).

⁸ See Prop. Regs. 1.864(c)(8)-2(d)(1), 1.1446(f)-1(b)(11).

⁹ See Prop. Reg. 1.864(c)(8)-1(g)(3).

¹⁰ See Prop. Reg. 1.1446(f)-1(b)(9).

¹¹ 1991-1 CB 107.

¹² Rev. Rul. 91-32.

¹³ See *id.*

¹⁴ See Sections 864(c)(8), 1446(f)(1); see also *Grecian Magnesite Mining, Indus. & Shipping Co.,* 123 AFTR2d 2019-2164, 926 F.3d 819 (CA-D.C., 2019), *aff'g*, 149 TC 63 (2017) (affirming the U.S. Tax Court decision after Section 864(c)(8) was enacted, which codified the Ruling and rendered the Tax Court or the appellate decision holding of little import; holding that, under the pre-amendment version of Section 864, the Ruling did not control, that the “U.S. office rule” under Section 864(c)(5) applied, that, even though in-

come of the partnership was from production activities in the U.S., where the partnership had a fixed place of business, gain from the disposition of the partnership interest was not attributed to the U.S. office of the partnership because the redemption was not an activity regularly carried on by the U.S. office; accordingly, gain from the disposition was not ECI subject to U.S. income tax).

¹⁵ Section 1446(f)(1).

¹⁶ Section 864(c)(8)(A) (applying to the transfer of a partnership interest held directly or indirectly by an NRA or foreign corporation, not to the NRA or foreign corporation as the sole transferor of the partnership interest); Prop. Reg. 1.1446(f)-1(b)(11) (providing that a transferor includes any person, foreign or domestic, that transfers a partnership interest).

¹⁷ See Prop. Regs. 1.1446(f)-2(b), 1.1446(f)-4(b).

direct partner would be subject to withholding.¹⁶ The seller could avoid withholding and reporting if the seller, buyer, and, in some cases, the partnership comply with an affidavit or books and records safe harbor.¹⁷

If the transfer of the partnership interest is not exempt from reporting requirements under Section 1446(f), penalty provisions under the Code may apply to a transferor, transferee, the partnership, a partner in the partnership, a broker effecting a transfer of a PTP interest, a withholding agent, or an agent of a transferor or transferee. Certain Treasury regulations that interpret applicable penalty provisions under the Code, including reporting penalties, were not proposed to be amended in connection with the proposed regulations. Accordingly, ambiguities arise with respect to applying reporting penalties to transfers of partnership interests under Section 1446(f).

Reporting, Recordkeeping, and Notice Requirements Under Section 1446(f)

An examination of reporting, recordkeeping, and notice requirements follows.

Reporting of Transfers of PTP Interests

If a transfer of a PTP interest is effected through one or more brokers, a broker must report the income subject to withholding tax on Form 1042 (Annual Withholding Tax Return for U.S. Source Income of Foreign Persons).¹⁸

The return must be filed generally on or before March 15 of the calendar year following the calendar year in which income from the disposition of the PTP interest was paid.¹⁹ Form 1042 must show generally the aggregate amount of income paid and tax withheld.²⁰ Form 1042 must be filed even if the income from the disposition of a PTP interest was not subject to withholding tax.²¹

A broker also must file an information return for the amount subject

electronically.²⁵ The broker must retain the third copy for the applicable statute of limitations on assessments and collection for amounts reported on Form 1042.²⁶

Reporting of Transfers of Non-PTP Interests by a Transferee

A transferee of a non-PTP interest reports the withheld tax within 20 days of the transfer on Form 8288 (U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real



Under Section 1446(f)(1), a withholding obligation applies to a disposition by a transferor which is not necessarily an NRA or a foreign corporation, so long as an NRA or a foreign corporation is a direct or indirect owner of the transferred partnership interest.

property interests).²⁷ A partnership, which is a transferee by making a distribution, likewise must report on Form 8288.²⁸ In addition, the transferee must file Form 8288-A (Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests).²⁹

There is not yet a customized form to report amounts from the sale of a partnership interest that is not a USRPI subject to Section 1445,³⁰ so Form 8288 and the accompanying form statement are used.³¹ The IRS mails a stamped copy of the withholding statement to the transferor.³² Also, a transferee must include a copy of Form 8288-A, or the amount realized and tax withheld, and any supporting certifications, in a certification to the partnership within ten days of the transfer.³³

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Reporting of Transfers of Non-PTP Interests by the Partnership

A non-PTP, other than a distributing partnership, with a secondary withholding obligation reports the tax on Form 8288, using another form withholding statement.³⁴ The partnership must file Form 8288-C (Statement of Withholding Under Section 1446(f)(4)

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¹⁸ Reg. 1.1461-1(b)(1); Prop. Reg. 1.1446(f)-4(d). See Form 1042.

¹⁹ See Section 6011(a); Reg. 1.1461-1(b)(1); Reg. 1.6011-1(c).

²⁰ Reg. 1.1461-1(b)(1). See Form 1042, section 1.

²¹ Reg. 1.1461-1(b)(1).

²² Reg. 1.1461-1(c)(1)(i); Prop. Regs. 1.1446(f)-4(d), 1.1461-1(c)(2)(i). See Form 1042-S.

²³ Reg. 1.1461-1(c)(1)(i)(A). See 83 Fed. Reg. 64,675 (2018).

²⁴ Prop. Reg. 1.1461-1(c)(ii)(A)(8). See Prop. Reg. 1.1446(f)-4(d) (requirement for a broker to issue Form 1042-S directly to the foreign partnership or to the U.S. branch, which is the recipient of an amount realized on the transfer of a PTP interest).

²⁵ See Section 6050W(f) (requirement to furnish statements to persons with respect to whom an

information return is required); Reg. 1.1461-1(c)(1)(A). See also 83 Fed. Reg. 64,675 (2018).

²⁶ See Section 6501; Regs. 1.1461-1(b)(1), 1.1461-1(c)(1)(i)(A). See also 83 Fed. Reg. 64,757, 64,765 (2018).

²⁷ Prop. Reg. 1.1446(f)-2(d) (general reporting requirements). See Form 8288.

²⁸ Prop. Reg. 1.1446(f)-2(d).

²⁹ *Id.* See Form 8288-A.

³⁰ See generally Section 1445(a).

³¹ See Instructions to Form 8288, Notice 2018-29, 2018-16 IRB 495 (requiring generally to indicate "Section 1446(f)(1) withholding" at the top of the form if applicable).

³² Prop. Reg. 1.1446(f)-2(d)(1).

³³ Prop. Reg. 1.1446(f)-2(d)(2).

³⁴ Prop. Reg. 1.1446(f)-3(d).

for Withholding on Dispositions by Foreign Persons of Partnership Interests).³⁵ A draft Form 8288-C has not been published yet.

Notice of Non-PTP Interest Transfer by a Foreign Partner

The proposed regulations under Section 864(c)(8) require a transferor of a non-PTP interest to notify the specified non-PTP of the transfer in writing within 30 days of the transfer.³⁶ Failure under Section 6050K(c)(1) to provide notice to a partnership of a Section 751(a) exchange would be subject to reporting penalties under Section 6723.³⁷ Under the proposed regulations, notice of a transfer of a non-PTP interest may be provided with the notice under Section 6050K(c).³⁸

Notice by a Non-PTP to a Foreign Partner

In addition, the specified partnership must notify the transferor regarding its distributive share of certain partnership items in connection with the non-PTP interest transfer.³⁹ A non-PTP must provide a statement if it received notice or actually knew of the transfer, and the partner then had a distributive share of deemed sale effectively connected gain or loss.⁴⁰ A partnership must furnish the statement to the notifying transferor on or before the due date for issuing Schedule K-1.⁴¹

Notice of False Certification

Separately, an agent of a transferor or transferee of a partnership interest, who is not a broker, must notify the withholding agent under Section 1446(f) of a false certification.⁴² The agent must provide notice generally

within three days following discovery of a false certification.⁴³ A copy of the notice must be furnished to the IRS on the same date.⁴⁴

Recordkeeping Requirements

Under the proposed regulations, any person who relies on a certification for a withholding exception is subject to recordkeeping requirements.⁴⁵ The person must retain the certification, including documents, for five years, or as long as the certification is relevant to complying with Section 1446(f) or Section 1461.⁴⁶ In addition, a partnership must identify information on which it is relying in its books and records, for a certification or other statement to comply with Section 1446(f).⁴⁷ The partnership must retain the information in its books and records for the period specified for any person relying on a certification.⁴⁸

Related Returns and Statements

In some instances, a transfer of a partnership interest under Section 1446(f) may constitute an exchange for Section 751(a) property.⁴⁹ Section 6050K and the regulations set forth the requirements for filing Form 8308 (Report of Sale or Exchange of Certain Partnership Interests) related to a sale or exchange of a partnership interest for Section 751(a) property.⁵⁰ Upon a Section 751(a) exchange, Section 6050K(b) requires a partnership, in addition to filing a return under Section 6050K(a), to furnish statements or copies of Form 8308 to the transferor and transferee.⁵¹ A partnership must file Form 8308 only after receiving notice of a Section 751(a) exchange.⁵²

In addition, a foreign partner that is a foreign corporation may be required to file an income tax return on Form 1120-F (U.S. Income Tax Return of a Foreign Corporation). A foreign partner who is an NRA may be required to report income tax on Form 1040NR (U.S. Nonresident Alien Income Tax Return). In both instances, filing obligations arise generally if the partner has income for the tax year, which is effectively connected with the conduct of a trade or business within the U.S. or is from sources within the U.S.

Taxpayer Identification Number

Section 6109 requires a filer to include in a return a taxpayer identification number ("TIN"), generally, a Social Security number or employer identification number, of either the filer or of another person.⁵³ Section 6109 also requires a person to furnish a TIN to a filer or to another person.⁵⁴

Furthermore, Treasury regulations under Section 1441 include TIN requirements for withholding certificates provided to a withholding agent by a beneficial owner of the income or by an intermediary, such as a foreign partnership. In turn, the proposed regulations contain TIN requirements applicable to reporting transfers subject to Section 1446(f).

Section 6723 requires compliance with specified information reporting requirements to avoid penalties.⁵⁵ Inclusion of the TIN of the filer or of another person on a return other than an information return or payee statement is a specified information reporting requirement,⁵⁶ as is the furnishing of a TIN to another person for return reporting purposes.⁵⁷

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³⁵ Prop. Reg. 1.1446(f)-2(d).

³⁶ Prop. Reg. 1.864(c)(8)-2(a)(1). A specified partnership for purposes of the notification and reporting requirement is a partnership, the interest in which is transferred subject to Section 864(c)(8). See Prop. Reg. 1.864(c)(8)-2(d)(2).

³⁷ Sections 6050K(c)(1), 6723(a)(1); Reg. 301.6723-1(a)(4)(i).

³⁸ Prop. Reg. 1.864(c)(8)-2(a)(3).

³⁹ Prop. Reg. 1.864(c)(8)-2(b).

⁴⁰ Prop. Reg. 1.864(c)(8)-1(c); Prop. Reg. 1.864(c)(8)-2(b)(1).

⁴¹ Prop. Reg. 1.864(c)(8)-2(b)(3).

⁴² Prop. Reg. 1.1446(f)-5(b)(1).

⁴³ Prop. Reg. 1.1446(f)-5(b)(2).

⁴⁴ *Id.*

⁴⁵ Prop. Reg. 1.1446(f)-1(c)(2)(v).

⁴⁶ *Id.*

⁴⁷ Prop. Reg. 1.1446(f)-1(c)(3).

⁴⁸ *Id.*

⁴⁹ See Section 751(a); Reg. 1.751-1(a) (generally, unrealized receivables or inventory items of the partnership).

⁵⁰ Section 6050K(a); Reg. 1.6050K-1(a).

⁵¹ Sections 6050K(a), 6050K(b). See Form 8308.

⁵² Section 6050K(c)(2).

⁵³ Sections 6109(a)(1), 6109(a)(3); Reg. 301.6109-1(a)(1); Prop. Reg. 1.1446(f)-1(b)(8) (defining the term TIN by reference to Section 6109).

⁵⁴ Section 6109(a)(2).

⁵⁵ Sections 6723, 6724(d)(3) (defining a specified information reporting requirement).

⁵⁶ Regs. 301.6723-1(a)(4)(ii)(A), 301.6723-1(a)(4)(ii)(B).

⁵⁷ Reg. 301.6723-1(a)(4)(ii)(C).

⁵⁸ Prop. Reg. 1.1446(f)-5(a).

⁵⁹ *Id.*

⁶⁰ Reg. 1.1461-1(a)(1).

⁶¹ Reg. 1.1461-1(h).

⁶² See Reg. 1.1461-1(h).

Reporting, Recordkeeping, and Notice Penalties Under Section 1446(f)

An analysis of the applicable penalties, interest, and additions to tax follows.

Failure to Report PTP Interest Transfers

The proposed regulations provide that every person required to withhold and pay tax under Section 1446(f), but that fails to do so, would be liable for the tax under Section 1461.⁶³ Furthermore, any person that failed to withhold under Section 1446(f) would in no way be relieved from liability for any interest penalties, or additions to tax that otherwise would apply.⁶⁴ Under the proposed regulations, Reg. 1.1461-1(h) cites penalties in the Code applicable to brokers⁶⁵ “for failure to file returns or furnish statements in accordance with this section.”⁶¹ Reg. 1.1461-1(h) imposes penalties on a broker for failure to file Forms 1042 or 1042-S or to furnish a copy of Form 1042-S to a foreign partner which is the transferor.⁶²

A broker does not have to withhold if it makes a payment to a qualified intermediary or a U.S. branch of a foreign person, knows withholding was effected, or relies on an exception.⁶³ A PTP would have a secondary withholding obligation only if a broker failed to withhold.⁶⁴ The failure of a broker to withhold must have been due to reliance on a qualified notice published by the PTP and later determined to be false.⁶⁵

Treasury and the IRS allowed qualified intermediaries to act as withholding agents with respect to allocations by a PTP under Section 1446(a) to foreign partners.⁶⁶ Analogous relief does not apply to any secondary withholding by a PTP under Section 1446(f)(4) on sub-

sequent distributions to transferees.⁶⁷ Thus, the withholding responsibility of a PTP under Section 1446(f)(4) may not be assumed by a nominee. Accordingly, the PTP may be subject to penalties set forth in Reg. 1.1461-1(h). Application of reporting penalties to a PTP in these narrow circumstances is outside the scope of this discussion.

Section 6651(a)(1) imposes a penalty of 5% per month for failure to file a return, other than certain information returns required under the Code,⁶⁸ within the prescribed time.⁶⁹ The aggregate penalty would not exceed 25% of the amount of the tax.⁷⁰ A penalty does not apply if the failure to file is due to reasonable cause and not due to willful neglect.⁷¹ The penalty is at least \$330 or the amount of tax required to be shown if

Section 6011 includes returns required by Treasury regulations by any person made liable for any tax under the Code or with respect to collection of the tax.⁷² This general provision would include Form 1042-S, a return required solely under Treasury regulations, not under a statute.⁷³

In addition, the 2005 preamble to final Section 1446 regulations states, “Section 6651(a)(1) generally applies to the failure to file any tax return by the due date (including extensions) prescribed therefore and applies in the context of Section 1446 to a failure to file Form 8804.”⁷⁴ Form 8804 is the withholding tax return for reporting effectively connected taxable income of a partnership allocable to foreign partners subject to Section 1446(a).⁸⁰ The pre-



Ambiguities arise with respect to applying reporting penalties to transfers of partnership interests under Section 1446(f).

the return is more than 60 days late,⁷² and is tripled in the event of a fraudulent failure to file.⁷³ Thus, a broker effecting a sale of a PTP interest may be subject to a penalty under Section 6651(a)(1) for failure to timely file Form 1042, an income tax return not excepted under Section 6651(a)(1).

Reg. 1.1461-1(h) does not state that Section 6651(a)(1) applies to Form 1042-S.⁷⁴ Section 6651(a)(1) generally applies to any tax return required under certain parts of the Code, but not to an information return.⁷⁵ Section 6011 sets forth the general requirement of a return.⁷⁶

amble does not mention whether Section 6651(a)(1) applies to Form 8805 (Foreign Partner's Information Statement of Section 1446 Withholding Tax), the accompanying information statement akin to Form 1042-S in relation to Form 1042.⁸¹

However, statutory authority remains unclear under Section 6651(a)(1). On the one hand, by its literal construction, Section 6651(a)(1) applies to Form 1042-S. On the other hand, the 2005 preamble suggests the penalty provisions in Section 1461 regulations apply based on the type of a return.

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⁶³ See Prop. Regs. 1.1446(f)-4(a)(2), 1.1446(f)-4(b)(1).

⁶⁴ Prop. Reg. 1.1446(f)-3(b)(2)(ii) (secondary withholding of amount broker failed to withhold plus interest if PTP determines it has published a qualified notice, on which broker relied, that falsely states that either the 10 percent exception or the qualified current income exception to withholding applies). See Prop. Reg. 1.1446(f)-4(b) (describing withholding exceptions for broker with respect to a transfer of a PTP interest).

⁶⁵ Prop. Reg. 1.1446(f)-3(b)(2)(ii). See Prop. Reg. 1.1446(f)-4(b).

⁶⁶ Prop. Reg. 1.1446-4(d).

⁶⁷ See Prop. Reg. 1.1446(f)-3(b)(2)(ii).

⁶⁸ See Sections 6031(a) (partnership return requirement), 6651(a)(1) (no applicability to certain information returns, including returns required under Section 6031(a)).

⁶⁹ Section 6651(a)(1); P.L. 116-25, title III, subtitle C, section 3201(a), (b), 133 Stat. 1017 (2019); Rev. Proc. 2019-44, 2019-47 IRB 1093, section 3.52 (setting forth minimum penalty for failure to file any return for tax years beginning after Dec. 31, 2019 as \$330).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Section 6651(a). See Rev. Proc. 2019-44, 2019-47 IRB 1093, section 3.52.

⁷³ Section 6651(f).

⁷⁴ Reg. 1.1461-1(h).

⁷⁵ Section 6651(a)(1).

⁷⁶ Section 6011(a).

⁷⁷ *Id.*

⁷⁸ Reg. 1.1461-1(c)(1).

⁷⁹ 70 Fed. Reg. 28,702, 28,709 (2005).

⁸⁰ Reg. 1.1446-3(d)(1)(iii).

⁸¹ See Reg. 1.1446-3(d)(1)(iii); 70 Fed. Reg. 28,702, 28,709 (2005).

Therefore, Form 1042-S would be treated akin to an information return excepted from the failure to file penalties in Section 6651(a)(1). Accordingly, failure to file Form 1042-S or a late filing would not be subject to those penalties. Treasury regulations finalized in 2005 and 2008 confirmed that Form 1042-S is an information return for purposes of Section 6721, and a copy of Form 1042-S furnished to the seller is a payee statement for purposes of Section 6722.⁸²

Section 6721 imposes a penalty of \$280 per return for failure to timely file an information return or to include all of the information required to be reported on the return, or for including incorrect disclosure.⁸³ The penalty is reduced to \$50 per return if the failure is corrected within 30 days of the prescribed filing date.⁸⁴ There is a total liability cap per person per calendar year,⁸⁵ and relief is available for certain other corrections and de minimis errors.⁸⁶

Penalties for failure to file information returns or failure to furnish statements also are subject to a reasonable cause waiver.⁸⁷ However, in the event of intentional disregard of the requirements, the penalty generally is raised to \$560 per return and other relief under Section 6721 does not apply.⁸⁸ Treasury regulations amended in 2005 confirmed Form 1042-S was an information return for purposes of Section 6721. Thus, a broker effecting a transfer of a PTP interest may be liable for failure to file timely or to file a complete or correct Form 1042-S.

Section 6722 imposes a penalty of \$280 per statement for failure to furnish a timely, complete and correct payee

statement. There is a limitation on liability per person per calendar year. Additional relief, intentional disregard, and reasonable cause exceptions similar to those set forth under Section 6721 are available.⁸⁹

Section 6722 does not apply expressly to Form 1042-S on the surface.⁹⁰ However, in addition to the Section 6722 regulations confirming treatment of recipient copy of Form 1042-S as a payee statement, the Section 1461 regulations treat Form 1042-S as a statement under Section 6050W.⁹¹ Consistently, Section 6724(d) enumerates a return for a payment transaction under Section 6050W among payee statements and also, among information returns, to which Section 6722 applies.⁹² Thus, consistent with the 2005 preamble, Section 6722 penalties apply to Form 1042-S.⁹³ Therefore, Section 6722 penalties would apply to a broker for failure to furnish a copy of Form 1042-S to a partner upon a transfer of a PTP interest subject to Section 1446(f).

Transferee Failure to Report Non-PTP Interest Transfers

Unlike Reg. 1.1461-1(h), which sets forth penalties for Forms 1042 and 1042-S, Reg. 1.1461-3 applies generally to transfers of either PTP or non-PTP interests.⁹⁴ Reg. 1.1461-3 broadly refers to “additional penalties and additions to the tax for failure to comply with the regulations under Section 1446.”⁹⁵ The regulation does not say which penalties apply for failure to report on Forms 8288 or 8288-A.

Section 6721 regulations apply to Form 1042-S, an information return under Section 6721. Section 6722 reg-

ulations apply to a copy of Form 1042-S furnished to the foreign partner, a statement under Section 6722. These regulations do not specify treatment of Forms 8288 or 8288-A for purposes of reporting penalties.

Under the 2005 preamble, Form 8804 was treated as an income tax return subject to Section 6651(a)(1) penalty provisions. Analogously, Form 8288 would be treated as an income tax return subject to Section 6651(a)(1). Thus, a transferee required to file Form 8288 may be subject to penalties under Section 6651(a)(1) for failing to file an income tax return or for a late filing.

Additionally, a withholding statement on Form 8288-A is akin to a Section 1446 withholding tax statement on Form 8805. Form 8805 is an information return for purposes of Section 6721. Therefore, by analogy, Form 8288-A filed with the IRS would be an information return subject to Section 6721. Accordingly, a transferee may be subject to penalties under Section 6721 for failing to file Form 8288-A or for a late filing.

Furthermore, a recipient copy of a withholding statement on Form 8805 is analogous to a recipient copy of a withholding statement on Form 8288-A. A recipient copy of Form 8805 is a statement for purposes of Section 6722. However, unlike Form 8805, a withholding agent does not furnish a copy of Form 8288-A to a foreign partner.⁹⁶ Instead, the IRS mails a copy to the transferor.⁹⁷ Thus, Form 8288-A may be an information return under Section 6721 but not a payee statement subject to Section 6722. Therefore, a transferee would not be subject to penalties under Section

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⁸² See Sections 6721, 6722; Regs. 301.6721-1(g)(4), 301.6722-1(d)(3).

⁸³ Section 6721(a); Rev. Proc. 2019-44, 2019-47 IRB 1093, section 3.57 (penalty per return for tax years beginning in 2020). There is a numeric threshold for exempting a filer from the electronic filing requirements applicable to information returns. See Sections 6011(e), 6724(c).

⁸⁴ Section 6721(b)(1).

⁸⁵ Sections 6721(b)(1), 6721(d).

⁸⁶ Sections 6721(a)(1), 6721(b)(2), 6721(c).

⁸⁷ See Section 6724(a).

⁸⁸ Section 6721(e); Rev. Proc. 2019-44, 2019-47 IRB 1093, section 3.57(3).

⁸⁹ Section 6722(a); Rev. Proc. 2019-44, 2019-47 IRB 1093, section 3.58. See Sections 6722(b) (re-

lief for corrections), 6722(c) (de minimis safe harbor), 6722(d) (lower maximum liability limitation for certain persons), 6722(e) (higher penalty for intentional disregard).

⁹⁰ Compare Section 6651(a)(1) (not including expressly Form 1042 within the definition of a return) with Section 6724(d)(1)(A) (not including expressly Form 1042-S within the definition of a statement that qualified as an information return). See also Section 6722(a)(1).

⁹¹ Reg. 1.1461-1(c)(1).

⁹² Section 6724(d)(1)(A)(xxiii), (d)(2)(FF).

⁹³ See 70 Fed. Reg. 28,702, 28,709 (2005).

⁹⁴ Reg. 1.1461-3. See Prop. Reg. 1.1461-3 (including proposed Treasury regulations under Section 1446(f) within the scope of Section 1446 with-

holding rules, to which Section 1461 Treasury regulations apply).

⁹⁵ Reg. 1.1461-3.

⁹⁶ See Prop. Reg. 1.1446(f)-2(d).

⁹⁷ *Id.*

⁹⁸ See, e.g., Prop. Reg. 1.864(c)(8)-2(a)(1).

⁹⁹ Reg. 1.1461-3; Prop. Reg. 1.1461-3.

¹⁰⁰ See 70 Fed. Reg. 28,702, 28,709 (2005).

¹⁰¹ See Reg. 1.1461-3 (2005).

¹⁰² See Reg. 1.1461-3 (2005).

¹⁰³ Sections 6050K(c)(1), 6723; Reg. 301.6723-1(a)(4)(i) (1991); Prop. Reg. 1.864(c)(8)-2(a)(1).

¹⁰⁴ Section 6724(d)(3)(A).

¹⁰⁵ See, e.g., Section 6723.

¹⁰⁶ See Sections 6722(a), 6724(d)(2)(P) (statement under Section 6050K(b) included within

6722 for failure to timely furnish a correct copy of Form 8288-A.

Failure of a Partnership to Report Non-PTP Interest Transfers

Form 8288-C that would be filed with Form 8288 and furnished by a non-PTP withholding under Section 1446(f)(4), akin to Form 8288-A is a statement like Form 8805. Thus, Form 8288-C filed with the IRS would be subject to Section 6721 reporting penalties for an information return. Conversely, a recipient copy of Form 8288-C, which a partnership would not furnish to a partner, may not be subject to Section 6722 penalties for a payee statement. Therefore, a partnership with a secondary withholding obligation that fails to file timely a correct Form 8288-C would be subject to penalties under Section 6721 but not under Section 6722.

Penalties for Failure to Notify of Partnership Interest Transfers

The IRS has not clarified whether penalties enumerated in Reg. 1.1461-3 would apply to the proposed regulations under Section 864(c)(8) or other Code sections.⁹⁸ Section 1446 regulations would include the proposed regulations under Section 1446(f).⁹⁹ The 2005 preamble applied a penalty to the requirements in the proposed regulations by analogy to returns or notices actually covered by the penalty statute.¹⁰⁰ In addition, penalties for noncompliance with the proposed regulations may apply independently of authority in Reg. 1.1461-3.¹⁰¹

Failure of a foreign partner to notify a non-PTP. There is no stated penalty in Section

6723 regulations or in Reg. 1.1461-3 for failure of a foreign partner to notify the specified partnership of a non-PTP interest transfer.¹⁰² Under the 2005 preamble, the notice requirement in Prop. Reg. 1.864(c)(8)-2(a) may be subject to Section 6723 analogously to the similar rule under Section 6050K(c)(1).¹⁰³ However, the specified information reporting requirement for a Section 751(a) exchange is statutory.¹⁰⁴ By contrast, there is no statutory authority to apply Section 6723 liability to a notice of a non-PTP interest transfer under Section 864(c)(8). Thus, the transferor would not be subject to a Section 6723 penalty for failure to notify the non-PTP.

nership. Moreover, a statement by a specified partnership is not a payee statement in the manner that it includes only deemed sale effectively connected items, not actual allocations to partners.¹⁰⁸

Therefore, absent legislative action or further IRS guidance, failure by a specified partnership to furnish a statement to a notifying transferor would not be subject to Section 6722. Absent applicability of Section 6722, however, there is a lack of clarity regarding how the statement requirement would be enforced.

Failure to provide notice of false certification. Failure of an agent of a transferor or transferee to provide notice of



The proposed regulations provide that every person required to withhold and pay tax under Section 1446(f), but that fails to do so, would be liable for the tax under Section 1461.

Accordingly, Section 6723 liability may not apply to a notifying transferor, unless the sale of the non-PTP interest also is subject to Section 6050K(c)(1).

Failure by a non-PTP to notify a foreign partner. Similarly to a notifying transferor, the proposed regulations do not specify Code penalties outside of a Section 751(a) exchange which would apply to a non-PTP.¹⁰⁵ On the one hand, failure to furnish copies of Form 8308 to a transferor and transferee is subject to penalties for failure to furnish correct payee statements under Section 6722.¹⁰⁶ Also, under the principle in the 2005 preamble, a statement to a notifying transferor issued by a specified partnership may by analogy be treated in the same manner as a recipient copy of Form 8308.

On the other hand, similarly to notice provided by a notifying transferor, furnishing a statement to a notifying transferor is not a statutory, specified information reporting requirement.¹⁰⁷ Thus, akin to the notifying transferor notice, there is no statutory authority for extending applicability of Section 6722 to a notice provided by the specified part-

a false certification to a withholding agent may result in tax liability up to the amount of compensation from the transaction.¹⁰⁹ In addition, Prop. Reg. 1.1446(f)-5(b)(4) states that 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.”¹¹⁰ The proposed regulations do not clarify whether the penalties listed in Reg. 1.1461-3 are exhaustive with respect to Section 1446(f).¹¹¹

Reg. 1.1461-3, which enumerates applicable penalties, was added among other provisions “to coordinate the Section 1446 withholding regime with existing regulations” related to withholding of tax on foreign persons.¹¹² There is no mention in any of the preambles to Section 1446 regulations that the list of penalties was intended to be exhaustive. Therefore, additional penalties under the Code may apply for violating Section 1446 requirements.

Separately, failure to provide notice of a false certification of non-foreign status of transferor under Section 1445 similarly would subject the agent to civil or criminal penalties.¹¹³ There is

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payee statements subject to penalties under Section 6722(a)); Reg. 301.6722-1(d)(2)(xvii) (as amended in 2014). See also 2018 IRS Form 8308.

¹⁰⁷ See Sections 6050K(b), 6724(d)(3); Reg. 301.6723-1(a)(4)(i) (1991); Prop. Reg. 1.864(c)(8)-2(b)(1).

¹⁰⁸ See Prop. Reg. 1.864(c)(8)-2(b)(1)(i)(B).

¹⁰⁹ Prop. Reg. 1.1446(f)-5(b)(4).

¹¹⁰ *Id.*

¹¹¹ See *id.*

¹¹² 68 Fed. Reg. 52,466, 52,4667 (2003) (preamble to proposed Section 1446 regulations). See generally Sections 1441 through 1445 (requirements for withholding of tax on NRAs and foreign corporations).

¹¹³ Reg. 1.1445-4(e).

no analogous requirement to provide notice of false certification to a partnership or a withholding agent under Section 1446(a) regulations. Under Section 1446(a), a foreign partner may provide a certificate to the partnership to reduce withholding on Form 8804-C.¹¹⁴ The IRS may notify a partnership that a certification could not be relied on and would provide a copy of the notice to a partner.¹¹⁵ Thus, the principle of applying penalties for analogous returns or notices under Section 1446(a)¹¹⁶ is not relevant to notice of a false certification under the proposed regulations.

Accordingly, Section 7203, listed in Reg. 1.1461-3 among penalties for failure to comply with Section 1446 regulations, may impose liability for willful failure to supply information.¹¹⁷ Also, a fraud penalty under Section 7206(1) for making and executing a statement or document not believed to be true or correct in every material respect also may apply to the agent.¹¹⁸ In addition, the agent may be subject to strict liability under Section 7206(2) for assisting in preparing a materially false or fraudulent statement or other document.¹¹⁹ Moreover, a fraud penalty up to \$10,000, or \$50,000 for a corporate agent, and additional penalties under Section 7207 may apply for willfully delivering or disclosing to the IRS a statement or other document the agent knows to be materially false or fraudulent.¹²⁰

Recordkeeping Penalties for Partnership Interest Transfers

Section 1446(a) regulations do not discuss applicability of recordkeeping penalties.¹²¹ The authority in Reg. 1.1461-3 sets forth the penalties that apply under Section 1446.¹²² Section 7203 imposes a penalty up to \$25,000, or \$100,000 for corporate actors, and possible criminal liability for willful failure to keep any records required by the Code or regulations.¹²³ Thus, Section 7203 penalties may apply for willful failure to retain a certification or identified information in books and records, respectively, under the proposed regulations.¹²⁴ The recordkeeping penalties may be imposed on a transferee for failure to retain certifications relied on as exceptions to withholding or in determining the amount of withholding tax.¹²⁵

The recordkeeping penalties also may apply to a transferor that fails to retain a certification from the non-PTP, on which a transferor relied to certify to the transferee regarding maximum tax liability.¹²⁶ In addition, a partnership may be subject to Section 7203 penalties for failure to retain the books and records on which the non-PTP relied as a transferee for determining maximum tax liability.¹²⁷ A non-PTP also may be liable for failure to retain certification from a transferee of the extent to which the transferee satisfied its withholding obligation.¹²⁸

Likewise, a broker effecting a transfer of a PTP interest may be liable for a

knowing, voluntary, and intentional failure¹²⁹ to file Form 1042 or Form 1042-S under Section 7203. In addition, a broker may be subject to a Section 7203 penalty for a like failure to retain copies of Forms 1042 and 1042-S for the applicable statutes of limitation.¹³⁰ Furthermore, a broker relying on a certification from the transferor for a withholding exception¹³¹ or the amount realized¹³² may be liable under Section 7203 for failure to retain the certification for the prescribed period.¹³³

Penalties Relating to Section 1446(f) Transfers

A discussion of penalties for failure to furnish required information follows.

Failure to file or furnish related returns or statements. The respective penalties under Section 6721 or Section 6722 apply to information returns on Form 8308 for reporting exchanges under Section 751(a).¹³⁴ Thus, a transferor may be subject to penalties under Section 6722(b) for failure to notify the partnership of the exchange as provided in Section 6050K(c) and the regulations.¹³⁵ The partnership may be liable under Section 6722(a) for failure to furnish any statement to transferor required under Section 6050K(b) and the regulations.¹³⁶ The partnership also may be liable for Section 6721 additions to tax for failure to file Form 8308.¹³⁷

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¹¹⁴ See Reg. 1.1446-6(c)(2)(i); 73 Fed. Reg. 23,069, 23,070 (2008) (preamble to final regulations discussing development of standard form of certificate for reduced withholding); Form 8804-C.

¹¹⁵ Regs. 1.1446-6(c)(3) (notice to partnership), 1.1446-6(c)(4) (notice to partner).

¹¹⁶ See 70 Fed. Reg. 28,702, 28,709 (2005).

¹¹⁷ Section 7203.

¹¹⁸ Section 7206(1).

¹¹⁹ Section 7206(2).

¹²⁰ Section 7207.

¹²¹ See Reg. 1.1446-6(d)(2)(ii) (reference to reasonable cause exceptions to liability under Sections 6651 and 6721 for the Section 1446(a) tax under Section 1461 of a partnership that reasonably relied on a defective certificate); 73 Fed. Reg. 23,069, 23,073 (2008) (no discussion of any record keeping penalties applicable under Section 1446(a)); cf. Reg. 1.1446-3(b)(2)(i) (discussing general principles applicable to underpayment of estimated withholding tax penalty under Section 6655).

¹²² Reg. 1.1461-3.

¹²³ Section 7203.

¹²⁴ See Prop. Regs. 1.1446(f)-1(c)(2), 1.1446(f)-1(c)(3).

¹²⁵ See generally Prop. Regs. 1.1446(f)-2(b) (setting forth the exceptions to withholding for transferee of a non-PTP interest, which require transferee reliance on certifications), 1.1446(f)-2(c) (transferee reliance on certifications for determining withholding tax liability).

¹²⁶ See Prop. Reg. 1.1446(f)-2(c)(4)(iv).

¹²⁷ Prop. Reg. 1.1446(f)-2(c)(2)(iii).

¹²⁸ Prop. Reg. 1.1446(f)-2(d)(2).

¹²⁹ See, e.g., *Cheek*, 498 U.S. 192, 67 AFTR2d 91-344 (1991) (defining "willful" failure).

¹³⁰ See Regs. 1.1461-1(b)(1), 1.1461-1(c)(1)(i)(A). See also 83 Fed. Reg. 64,757, 64,765 (2018).

¹³¹ See Prop. Reg. 1.1446(f)-4(b)(2).

¹³² See Prop. Reg. 1.1446(f)-4(c)(2)(ii).

¹³³ See Prop. Reg. 1.1446(f)-1(c)(2)(v).

¹³⁴ Section 6724(d)(1)(B)(viii).

¹³⁵ Reg. 1.6050K-1(g)(1) (1987). See Prop. Reg. 1.6050K-1(c)(2).

¹³⁶ Reg. 1.6050K-1(g)(2). See Prop. Reg. 1.6050K-1(c)(2).

¹³⁷ Reg. 1.6050K-1(g)(3). See Prop. Reg. 1.6050K-1(c)(2).

¹³⁸ Reg. 1.6050K-1(f).

¹³⁹ See Prop. Regs. 1.1446(f)-2(e)(1) (effect of withholding on transfers of non-PTP interests), 1.1446(f)-3(e)(1) (secondary withholding with respect to transfers of non-PTP interests), and 1.1446(f)-4(e)(1) (PTP interests).

¹⁴⁰ Sections 6031(a) (general partnership return filing requirement), 6031(b) (requirement to furnish copies of statements to partners), 6031(e) (filing requirement for a foreign partnership); Regs. 1.6031(a)-1(a)(4) (applicable penalties applicable to domestic partnerships or foreign partnerships with U.S.-source or effectively connected income for failure to file); 1.6031(b)-1T(d) (applicable penalties for failure to furnish statements to partners).

¹⁴¹ See Sections 6012, 6651(a)(1).

¹⁴² Section 6723.

¹⁴³ Section 6724(a)(1).

¹⁴⁴ See Sections 6109(a), 6724(d)(3); Regs. 1.1461-1(d) (requirement to attach to Form 1042 a list of TINs and names provided to withholding agent

The partnership must attach Form 8308 to the partnership return on Form 1065.¹³⁸ Whether or not there is a Section 751(a) exchange, withholding under Section 1446(f) would not relieve a foreign person, including a foreign partnership, foreign corporation, or NRA from filing a U.S. income tax return with respect to the transfer of a PTP or non-PTP interest.¹³⁹ Thus, if Form 8308 is required in addition to filing Form 1065 or furnishing Schedule K-1, penalties pursuant to Section 6031 may apply.¹⁴⁰ Likewise, a foreign corporation or NRA with a tax return filing obligation would be subject to Section 6651 penalties for failure to file a U.S. income tax return with respect to the transfer.¹⁴¹

Penalties for failure to include or furnish TIN. Section 6723 imposes a penalty of \$50 per person per failure to timely comply with a specified information reporting requirement, with a liability limitation per person per calendar year.¹⁴² The penalty is waived on a showing of reasonable cause and absence of willful neglect.¹⁴³ Section 6724(d)(3) and Treasury regulations include, within specified information reporting requirements, a requirement to provide a taxpayer identification number (“TIN”) of either the filer, the recipient of the income, or other applicable person on a return other than an information return or payee statement as required under Section 6109.¹⁴⁴ The penalty also applies to a person for failure to furnish the TIN to another person for return reporting pur-

poses.¹⁴⁵ Sections 6721 and 6722 also may apply to failure to furnish a TIN on a return, statement, or other document.¹⁴⁶

Failure to include or furnish a TIN for a PTP transfer. Form 1042 is a tax return, and not an information return or a payee statement for purposes of the penalty provisions under the Code.¹⁴⁷ Thus, a broker required to file Form 1042 for a sale of a PTP interest would be liable under Section 6723 for failure to include its TIN.¹⁴⁸ On the other hand, Form 1042-S is an information return for purposes of Code penalties.¹⁴⁹

In general, a broker as a withholding agent must furnish the TIN of a transferor on a Form 1042-S.¹⁵³ Thus, a broker would incur a penalty under Section 6721 for failure to include the TIN of a foreign partner, the income of which is reported on a Form 1042-S.¹⁵⁴ Section 6722 also may apply to a broker for failure to furnish a complete Form 1042-S to a transferor.¹⁵⁵

If a broker does not know the TIN of a foreign transferor¹⁵⁶ of the PTP interest, the broker must request the TIN.¹⁵⁷ If the transferor fails to provide the TIN upon request, a broker must



Section 6722 penalties would apply to a broker for failure to furnish a copy of Form 1042-S to a partner upon a transfer of a PTP interest subject to Section 1446(f).

Failure to include the TIN of the filer on an information return or payee statement is not a specified information reporting requirement under Section 6723.¹⁵⁰ Thus, a broker may have a Section 6721 liability, but may not incur a Section 6723 penalty for failure to include its own TIN on Form 1042-S.¹⁵¹ Likewise, a broker may incur a Section 6722 penalty for failure to include its own TIN on the copy of Form 1042-S furnished to the foreign partner who is the transferor.¹⁵²

sign an affidavit of compliance on the transmittal form for Form 1042-S.¹⁵⁸ However, in the settlement of a trade of a PTP interest, a broker for a transferee generally cannot identify the seller. Consistent with the mechanics of such an exchange and the Section 6109 regulations, the proposed regulations exempt a broker from having to include the TIN of a transferor on Form 1042-S. Thus, absent actual knowledge, penalties under Section 6721 or Section 6722 would not apply to a broker for failure to include the TIN of the recipient of Form 1042-S.

The proposed regulations do not clarify whether an affidavit under the Section 6109 regulations is required if a broker does not have actual knowledge of the TIN.¹⁵⁹ A broker must not actually know the TIN of the transferor at the time of issuance of Form 1042-S to qualify for the TIN exception under the proposed regulations.¹⁶⁰ Furthermore, the exception appears to apply only with respect to a recipient copy of Form 1042-S, which is issued directly to the transferor.¹⁶¹ Thus, Form 1042-S filed with the IRS remains subject to the affidavit requirement in the Section 6109 regulations.¹⁶²

Conversely, in limited circumstances, a transferor of a PTP interest may have to include or furnish its own TIN to avoid

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as required by the IRS, on which it is relying other than TINs reported on Form 1042-S or under Section 1461 regulations), 301.6723-1(a)(4)(ii).

¹⁴⁵ Reg. 301.6723-1(a)(4)(ii)(C).

¹⁴⁶ Sections 6109(a)(1) to 6109(a)(3), 6721(a)(2)(B), 6722(a)(2)(B); Reg. 301.6109-1(b)(1).

¹⁴⁷ See Reg. 1.1461-1(b).

¹⁴⁸ Sections 6109(a)(1), 6723; Regs. 301.6109-1(b)(1), 301.6109-1(b)(2)(iv), 301.6723-1(a)(4)(ii)(A). See Form 1042.

¹⁴⁹ Reg. 1.1461-1(c).

¹⁵⁰ Regs. 301.6109-1(b)(2)(iv) (no requirement to furnish own TIN by a foreign person making a return that is an information return), 301.6723-1(a)(4)(ii)(A) (requirement to furnish own TIN on a return other than an information return).

¹⁵¹ See Section 6721(a); Reg. 1.1461-1(c)(3)(vi) (TIN of recipient of income if actually known to withholding agent to be disclosed on Form 1042-S); Prop. Regs. 1.1461-1(c)(1)(ii)(A)(8) (partner receiving income from a transfer of a PTP interest subject to withholding included in the definition of recipient for Form 1042-S purposes), 1.1446(f)-4(d) (stating 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); cf. Sections 6109(a)(1), 6109(a)(3), 6723; Reg. 301.6723-1(a)(4)(ii).

¹⁵² Section 6722(a)(2)(B).

¹⁵³ Section 6109(a)(3); Reg. 301.6109-1(c).

¹⁵⁴ Sections 6109(a)(3), 6721(a)(2)(B); Reg. 301.6721-1(g)(4).

¹⁵⁵ Section 6722(a)(2)(B); Reg. 301.6722-1(d)(3).

¹⁵⁶ See Regs. 301.6109-1(b)(2)(i), 301.6109-1(b)(2)(viii), 301.6109-1(c) (providing that a foreign person that had ECI, or that furnished a withholding certificate under Section 1446, is a person from whom a withholding agent would be required to request a TIN for purposes of filing an information return or statement).

¹⁵⁷ Reg. 301.6109-1(c) (requirement to request the TIN of certain persons for purposes of filing an information return or a statement).

¹⁵⁸ *Id.*

¹⁵⁹ See *id.*

¹⁶⁰ Prop. Reg. 1.1446(f)-4(d).

¹⁶¹ See *id.*

Section 6723 liability.¹⁶³ Any foreign person that furnishes a withholding certificate under the Section 1446(a) regulations is a transferor under this rule.¹⁶⁴ A foreign partner selling a PTP interest in a transaction other than a redemption by the PTP would not provide a withholding certificate under Section 1446(a) to reduce Section 1446(f) withholding, unless there also is withholding by the PTP under Section 1446(a).¹⁶⁵ The regulation does not mention certificates under Section 1446(f).

A transferor is also any foreign person whose TIN is required to be furnished on any return, statement, or other document under Section 1446 regulations.¹⁶⁶ Form 1042-S must be filed and furnished for a transferor, unless an exception to reporting an amount realized on Form 1042-S applies.¹⁶⁷ A non-foreign status certification exempts a broker from Form 1042 filing.¹⁶⁸ The exception involves issuance by a transferor of a valid Form W-9 (Request for Taxpayer Identification Number and Certification) to a broker, which must include the TIN of the transferor.¹⁶⁹

This rule would trigger the Section 6109(a)(1) requirement for a U.S. partner to include its own TIN on the certificate to avoid Section 6723 penalties.¹⁷⁰ The reason is that a withholding certificate is neither an information return nor a payee statement exempt from specified information reporting under Section 6723.¹⁷¹ In other words, the certificate is the document that may cause a transferor Section 6723 liability for failure to include its own TIN.

If a broker must file and furnish Form 1042-S, a transferor must furnish the TIN only if the TIN must be included on a document filed by another person.¹⁷² The TIN of a transferor is not required on a Form 1042-S that is furnished directly to the transferor, provided the broker did not have actual knowledge of the TIN at issuance.¹⁷³ Therefore, under these facts, a transferor would not violate Section 6723 by not furnishing its TIN to a broker.¹⁷⁴

In sum, a transferor may be subject to Section 6723 for failure to include its TIN on a withholding certificate. However, generally, a transferor would not incur Section 6723 penalties for abstaining from providing its TIN to a broker for Form 1042-S reporting, consistent with industry practice. Likewise, a broker would not be liable under Section 6723 for not including the TIN of a transferor on Form 1042-S absent actual knowledge. A broker must, however, provide its own TIN on a required Form 1042 to avoid Section 6723 penalties.

Failure to include or furnish the TIN for a non-PTP transfer. Generally, unlike Form 1042-S, Forms 8288 and 8288-A must include the TIN of both transferor and transferee.¹⁷⁵ Thus, the buyer of a non-PTP interest must provide its own TIN on Form 8288 and Form 8288-A to avoid penalties under Section 6723.¹⁷⁶ The transferee also must include the TIN of the selling partner on Form 8288-A to avoid penalties under Section 6721.¹⁷⁷ Additionally, the foreign partner

must furnish its TIN to the buyer for inclusion on Form 8288-A.¹⁷⁸ Section 6723 requires the foreign partner to furnish the TIN to the transferee to avoid penalties, even though Form 8288-A is an information return.¹⁷⁹ On the other hand, since Form 8288-A is not furnished by a withholding agent to the partner and instead is mailed to the partner by the IRS, it would not be a payee statement under Section 6722. Therefore, the transferee would not be liable for failure to furnish the TINs on Form 8288-A under Section 6722.¹⁸⁰

If a non-PTP purchases a non-PTP interest from a foreign partner in a redemption, the partnership as a transferee must file Forms 8288 and 8288-A, including its TIN and the TIN of the selling partner.¹⁸¹ If the distributing partnership fails to include its TIN on Form 8288, it would be subject to penalties under Section 6723.¹⁸² If the partnership fails to include the TIN of the transferor on Form 8288, the partnership likewise would be subject to Section 6723 penalties.¹⁸³ If the non-PTP fails to include the TIN of the transferor on Form 8288-A, the non-PTP would be subject to penalties under Section 6721 but not under Section 6722.¹⁸⁴

A non-PTP and, to a significantly lesser extent, a PTP may have a secondary withholding obligation with respect to a transfer of a partnership interest under Section 1446(f)(4).¹⁸⁵ If the transferee fails to withhold under Section 1446(f)(1), the partnership would have

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¹⁶² Reg. 301.6109-1(c).

¹⁶³ Section 6109(a)(2); Regs. 301.6109-1(b)(1), 301.6109-1(b)(2), 301.6109-1(c).

¹⁶⁴ Reg. 301.6109-1(b)(2)(viii).

¹⁶⁵ See generally Section 1446(a); Reg. 1.1446-1(a). Cf. Section 1446(f)(1).

¹⁶⁶ Reg. 301.6109-1(b)(2)(viii). In other words, the transfer of a PTP interest under Section 1446(f) must be reported on Forms 1042 and 1042-S, the latter of which generally requires the TIN of a transferor, if the TIN is required on a certain withholding certificate. See Regs. 1.1441-1(e)(4)(vii) (as amended in 2020); 1.1461-1(c)(3)(vi).

¹⁶⁷ Prop. Regs. 1.1446(f)-4(b)(2) through 1.1446(f)-5 (exceptions to withholding on a PTP interest transfer), 1.1446(f)-4(d), 1.1461-1(c)(2)(i)(Q) (generally providing that an amount realized on a PTP interest transfer must be reported on Form 1042-S unless an exception to withholding applied).

¹⁶⁸ Prop. Reg. 1.1446(f)-4(b)(2). There also is a treaty benefits certification exception, but reliance on this exception does not exempt a broker from Form 1042 reporting requirements. See Prop. Reg. 1.1461-1(c)(2)(i)(Q) (amount realized on a

transfer of a PTP interest generally required to be reported unless one of the first five exceptions under the proposed regulations applies, excluding the treaty benefits withholding tax exception from Form 1042 reporting exceptions).

¹⁶⁹ Prop. Reg. 1.1446(f)-4(b)(2). Generally, all certifications furnished by a transferor under the proposed regulations must include the TIN of the transferor if it has a TIN or is required to have a TIN. Prop. Reg. 1.1446(f)-1(c)(2)(i).

¹⁷⁰ See Regs. 301.6109-1(b)(1), 301.6723-1(b), Ex. 2.

¹⁷¹ See Reg. 301.6723-1(a)(4)(ii).

¹⁷² Reg. 301.6109-1(b)(1).

¹⁷³ Prop. Reg. 1.1446(f)-4(d).

¹⁷⁴ See Reg. 301.6723-1(a)(4)(ii)(C).

¹⁷⁵ Prop. Reg. 1.1446(f)-3(d). Only the TIN of the transferee is required on Form 8288, whereas both TINs are required on the attachment. See Form 8288. Cf. Form 8288-A.

¹⁷⁶ See Sections 6109(a)(1), 6723; Regs. 301.6109-1(b)(1), 301.6723-1(a)(4)(ii)(A), 301.6723-1(a)(4)(ii)(B) (TIN requirement with respect to a tax return, in this case, Form 8288).

¹⁷⁷ Section 6721(a)(2)(B); cf. Regs. 301.6723-1(a)(4)(ii)(A), 301.6723-1(a)(4)(ii)(B).

¹⁷⁸ Section 6109(a)(2); Reg. 301.6109-1(b)(2)(viii).

¹⁷⁹ Section 6723; Regs. 301.6721-1(g)(4), 301.6722-1(d)(3), 301.6723-1(a)(4)(ii)(C).

¹⁸⁰ Cf. Section 6722(a)(2)(B).

¹⁸¹ Sections 1446(f)(1), 6109(a)(1), 6109(a)(3); Prop. Reg. 1.1446(f)-1(b)(10).

¹⁸² Section 6723; Reg. 301.6723-1(a)(4)(ii)(A).

¹⁸³ Reg. 301.6723-1(a)(4)(ii)(B).

¹⁸⁴ Section 6721(a)(2)(B); Regs. 301.6721-1(g)(4), 301.6722-1(d)(3). Cf. Section 6722(a)(2)(B).

¹⁸⁵ Section 1446(f)(4); Prop. Regs. 1.1446(f)-3(a)(1), 1.1446(f)-3(b)(2)(ii).

¹⁸⁶ Prop. Reg. 1.1446(f)-3(d).

¹⁸⁷ Section 6723; Reg. 301.6723-1(a)(4)(ii)(A).

¹⁸⁸ Reg. 301.6721-1(g)(4). Cf. Reg. 301.6722-1(d)(3).

¹⁸⁹ Prop. Reg. 1.1446(f)-2(d)(1).

¹⁹⁰ Reg. 301.6723-1(a)(4)(ii)(C).

¹⁹¹ See Prop. Regs. 1.1446(f)-3(d), 1.1446(f)-4(d) (no stated requirement for Form 8288-C to furnish the TIN of transferor of a PTP interest, exception

to file and furnish Forms 8288 and 8288-C.¹⁸⁶ Thus, akin to a non-PTP as a transferee, the partnership would have to furnish its own TIN on Form 8288 to avoid Section 6723 penalties.¹⁸⁷

Likewise, the partnership would have to include its own TIN on Form 8288-C to avoid penalties under Section 6721, but akin to Form 8288-A, Section 6722 may not apply.¹⁸⁸ Similarly, if required, a partnership would have to furnish the TIN of the transferor on Form 8288-C to avoid Section 6721 penalties.¹⁸⁹ In addition, the transferor would have to furnish its TIN to the withholding partnership for Form 8288-C to avoid liability under Section 6723.¹⁹⁰ In the absence of draft Form 8288-C, there is lack of clarity on whether the statement would require the TIN of a transferor of a PTP interest.¹⁹¹ Form 1042-S generally does not require the TIN of the transferor.¹⁹² Final regulations and the issuance of Form 8288-C by Treasury and the IRS may clarify this reporting requirement.

A transferee may not have to withhold on a transfer of a non-PTP interest if certain exceptions in the proposed regulations apply.¹⁹³ Generally, every certification provided by a transferor under the proposed regulations must state the TIN of the transferor if it has, or is required to have, a TIN.¹⁹⁴ Two withholding exceptions for non-PTP interests have additional TIN requirements.¹⁹⁵ The first excep-

tion, certification of non-foreign status of transferor, requires the selling partner to furnish its own TIN by submitting Form W-9.¹⁹⁶ Thus, akin to a transferor of a PTP interest under a similar exception, the seller of a non-PTP interest must include its TIN in the certification to avoid Section 6723 liability.¹⁹⁷

Under the second exception, the treaty benefits withholding exception, a seller must furnish a certification to the buyer that the seller is not subject to tax on any gain from the transfer.¹⁹⁸ All gain¹⁹⁹ from the transfer of the non-PTP interest must be exempt from income tax pursuant to a tax treaty in effect between the U.S. and a foreign country.²⁰⁰ The seller must provide a valid withholding certificate with the certification.²⁰¹ A transferee may rely on a certification of a transferor only if the buyer mails, within 30 days of the transfer, a copy of the certification to the IRS.²⁰² The copy has to be accompanied by a cover letter including the name, address, and TIN of both the transferee and the specified partnership.²⁰³

Under the treaty benefits withholding exception, both the buyer and the seller must report or furnish a TIN to avoid penalties under Section 6721, Section 6722, or Section 6723.²⁰⁴ Like the certification in the non-foreign status exception, the treaty benefits certification is not an information return or a payee statement.²⁰⁵ Regulations under Sections 6721 and 6722

include within information returns forms, statements, or schedules filed with the IRS.²⁰⁶ A copy of the treaty benefits certification must be mailed to the IRS together with supporting documentation.²⁰⁷ However, a copy of the treaty benefits certification is not filed in the same manner as Form 1042-S or Form 8288-A.²⁰⁸

Thus, absent further IRS guidance, Section 6723 penalties would not apply to failure by a transferor to include its TIN in the treaty benefits certification provided to the transferee.²⁰⁹ Moreover, the withholding certificates on Forms W-8BEN (Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)) or W-8BEN-E (Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)) for foreign individuals or entities may not require a TIN. Thus, penalties under Section 6721, Section 6722, or Section 6723 may not apply to failure by a transferor to include a TIN that is not required on either withholding certificate.²¹⁰

Conversely, the transferee must furnish the TINs of both the buyer and the partnership in the transmittal letter to the IRS. Absent definitive guidance, the certification copy is not an information return or payee statement. Thus, the withholding agent is not liable under Section 6721 or Section 6722 for failure to include the required TIN in the cover letter.²¹¹ Unlike with Form 1042-S, there is no exception for excluding the TIN of either the partnership or the seller from the cover letter.²¹² Thus, a withholding agent may incur Section 6723 penalties for failure to include the TIN of the transferor or the partnership in the transmittal to the IRS.²¹³

Also, the cover letter does not resemble an information return or payee statement, but may qualify as a document filed with the IRS, on which a TIN has to be provided under Section 6109.²¹⁴ Thus, the transferor may have an obligation to furnish the TIN to the transferee.²¹⁵ Therefore, the seller may be liable under Section 6723 for failure to furnish its TIN to

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for furnishing TIN of a transferor of a PTP interest on Form 1042-S absent actual knowledge of broker as withholding agent).

¹⁹² See Prop. Reg. 1.1446(f)-4(d).

¹⁹³ Prop. Regs. 1.1446(f)-2(b)(2) through 1.1446(f)-2(b)(7).

¹⁹⁴ Prop. Reg. 1.1446(f)-1(c)(2)(i). This general rule also applies to withholding exceptions for PTP interests, including the non-foreign status and treaty benefit exceptions that also are available for transferors of non-PTP interests. See Prop. Regs. 1.1446(f)-4(b)(2), 1.1446(f)-4(b)(6).

¹⁹⁵ Prop. Regs. 1.1446(f)-2(b)(2), 1.1446(f)-2(b)(7). The remaining non-PTP withholding exceptions are, briefly: certification from the non-transferee partnership of less than 10% effectively connected gain, certification by transferor of less than 10% effectively connected taxable income, and certification of nonrecognition of gain or loss by the transferor. See Prop. Regs. 1.1446(f)-2(b)(3) through 1.1446(f)-2(b)(6).

¹⁹⁶ Prop. Reg. 1.1446(f)-2(b)(2).

¹⁹⁷ See Section 6723; Reg. 301.6723-1(a)(4)(ii)(A).

¹⁹⁸ Prop. Reg. 1.1446(f)-2(b)(7)(i).

¹⁹⁹ Prop. Reg. 1.1446(f)-2(b)(7)(ii).

²⁰⁰ Prop. Reg. 1.1446(f)-2(b)(7)(i).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See Prop. Regs. 1.1446(f)-2(b)(7), 1.1446(f)-4(b)(6).

²⁰⁵ See Regs. 301.6721-1(g)(4), 301.6722-1(d)(3).

²⁰⁶ *Id.*

²⁰⁷ Prop. Reg. 1.1446(f)-2(b)(7)(i).

²⁰⁸ See Regs. 301.6721-1(g)(4); 301.6722-1(d)(3).

²⁰⁹ See Reg. 301.6723-1(a)(4)(ii)(A).

²¹⁰ See Sections 6721(a)(2)(B), 6722(a)(2)(B), 6723.

²¹¹ See Sections 6721(a)(2)(B), 6722(a)(2)(B).

²¹² *Cf.* Prop. Reg. 1.1446(f)-4(d).

²¹³ See Reg. 301.6723-1(a)(4)(ii)(B).

²¹⁴ See Reg. 301.6109-1(b)(1).

²¹⁵ See Regs. 301.6109-1(b)(1), 301.6109-1(b)(2)(viii). Technically, the requirement to furnish the TIN for the cover letter to the IRS also would apply to the partnership, in which the interest, the income from which was subject to a claim of treaty benefits, was transferred. See Reg. 301.6109-1(b)(1).

the transferee for inclusion in the mailing.²¹⁶

When a transferor of a partnership interest is a foreign partnership, it may certify to the withholding agent regarding the non-foreign status of its partners to reduce the amount subject to withholding.²¹⁷ The certification from the transferor partnership must include its TIN if the foreign partnership has or is required to have a TIN.²¹⁸ The accompanying withholding certificate that must be provided by a foreign non-PTP in the certification also may require its TIN.²¹⁹

In addition, each of the partners identified as U.S. persons in the certification by the foreign partnership must provide individual certification of their respective non-foreign status.²²⁰ That partner certification must comply with the non-foreign status certification and the TIN requirement.²²¹ Thus, a direct or indirect partner of the foreign transferor partnership must furnish its TIN in a certification to the partnership.²²² Therefore, a U.S. direct or indirect partner that fails to furnish its TIN to the transferor partnership may be liable under Section 6723.²²³

On the one hand, the foreign transferor partnership does not file or furnish the certification for reduced withholding for any individual U.S. partner. On the other hand, the amount subject to withholding would be reduced in accordance with the percentage of the partners who are identified and certified U.S. persons. Thus, the certification by the foreign partnership may be deemed as a document made with respect to each such U.S. person under Section 6723 regulations.²²⁴ In that case, the transferor partnership may be liable under Section 6723 for failure to furnish the TIN of each U.S. partner in its certification to the transferee.²²⁵

On the transfer of a non-PTP interest, a notifying transferor must notify the specified partnership within 30 days of the transfer.²²⁶ The notification must include the names and addresses of the transferor and any transferees, the TIN of the notifying transferor, and if known, the TIN of transferees.²²⁷ Thus, a seller would have to include its own TIN in the notification to the specified partnership.

A notification is not an information return or a payee statement.²²⁸ Thus, penalties under Section 6721 or Section

6722 would not apply to a failure of a transferor to include the TIN.²²⁹ However, a notification is a document made by the transferor which is required to include its TIN.²³⁰ Therefore, a notifying transferor would be subject to penalties under Section 6723 for failure to include its own TIN in the notification to the specified partnership.²³¹

On the other hand, the TIN of a transferee is required on the notification only if known to the transferor.²³² Thus, there is no affirmative requirement on a transferee to furnish its TIN to the notifying transferor for purposes of the notice to the specified partnership.²³³ Therefore, a transferee would not be liable under Section 6723 solely for failing to furnish the TIN to the transferor for purposes of the notice to the non-PTP.²³⁴

Conclusion

The penalties under the Code for failure to report, notify, or retain records apply to transferors, transferees, partnerships, partners, brokers, and agents subject to Section 1446(f) withholding rules. Some of the Treasury regulations interpreting the penalty provisions were not updated in connection with the proposed regulations. Final regulations may confirm that the requirement for a notifying transferor to notify the specified partnership of a transfer of a non-PTP interest is not a specified information reporting requirement under Section 6723. Treasury and the IRS also may either confirm that a statement provided by the specified partnership to a notifying transferor is not subject to Section

6722 penalties, or amend Section 6722 regulations to include a statement by a specified partnership within the definition of a payee statement.

Final regulations may clarify that Form 8288 is a tax return for purposes of Section 6651(a)(1). Treasury and the IRS also may confirm that Form 8288-A, furnished by the IRS to the recipient, is an information return subject to Section 6721 but not a payee statement subject to Section 6722. Final rules further may confirm that forthcoming Form 8288-C likewise is an information return for purposes of Section 6721 and not a payee statement under Section 6722. Treasury and the IRS also may clarify that Form 8288-C would not require the TIN of a transferor of a PTP interest.

Furthermore, final regulations may provide that a partner who is a U.S. person would not be subject to Section 6723 for failure to provide its TIN to the partnership which is furnishing a certificate for reduced withholding to a transferee of an interest in the partnership. Moreover, a copy of a treaty benefits certification mailed to the IRS would not be an information return. Finally, Treasury and the IRS may set forth the applicability of Section 7203 or Section 7206 under Section 1446(f). Clarity under final regulations would assist buyers and sellers of partnership interests held directly or indirectly by an NRA or a foreign corporation to determine the applicability of, and ensure compliance with, reporting requirements initially promulgated outside of Section 1446(f). ●

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²¹⁶ See Reg. 301.6723-1(a)(4)(ii)(C).

²¹⁷ See Prop. Reg. 1.1446(f)-2(c)(2)(iv)(A) (non-PTP interest transfers), 1.1446(f)-4(c)(2)(ii)(A) (PTP interest transfers).

²¹⁸ Prop. Reg. 1.1446(f)-1(c)(2)(i).

²¹⁹ See Prop. Reg. 1.1446(f)-2(c)(iv)(C).

²²⁰ *Id.*

²²¹ See *id.*; Prop. Reg. 1.1446(f)-2(b)(2).

²²² See Prop. Reg. 1.1446(f)-1(c)(2)(i). Generally, a U.S. person has a TIN.

²²³ See Section 6723; Reg. 301.6723-1(a)(4)(ii)(C).

²²⁴ See Section 6723; Reg. 301.6723-1(a)(4)(ii)(B).

²²⁵ See *id.* See similar exception for transfers of PTP interests under Prop. Reg. 1.1446(f)-4(c)(2)(ii).

²²⁶ Prop. Regs. 1.864(c)(8)-2(a)(1) (notification requirement); 1.864(c)(8)-2(d)(1) (notifying transferor defined generally as any foreign person, any domestic partnership with a foreign person

as a direct partner, and any domestic partnership with actual knowledge that it has a foreign person as an indirect partner); 1.864(c)(8)-2(d)(2) (defining a specified partnership generally as a partnership engaged in the conduct of a trade or business within the U.S. or that owns directly or indirectly an interest in a partnership that is engaged in the conduct of a trade or business within the U.S.).

²²⁷ Prop. Reg. 1.864(c)(8)-2(a)(1).

²²⁸ See Regs. 301.6721-1(g)(4), 301.6722-1(d)(3).

²²⁹ See Sections 6721(a)(2)(B), 6722(a)(2)(B).

²³⁰ See Regs. 301.6109-1(b)(1), 301.6109-1(b)(2)(viii), 301.6723-1(a)(4)(ii)(A).

²³¹ See Reg. 301.6723-1(a)(4)(ii)(A).

²³² Prop. Reg. 1.864(c)(8)-2(a)(1)(ii).

²³³ See Reg. 301.6109-1(b)(1).

²³⁴ See Reg. 301.6723-1(a)(4)(ii)(C).