

## FIRPTA Town Hall

February 23, 2016

Host: Linda Monaco

Panelist: John St. Lawrence



### Rate Hike

- December 16, 2015 signed into law
  - Protecting Americans From Tax Hikes Act
    - AKA PATH Act
- FIRPTA withholding rate changed to 15%
- Included carve out for 10% if
  - Amount realized is \$1,000,000 or less
  - Buyer is one or more individuals
  - Property to be used a residence

## Definitions

- Foreign Investment in Real Property Tax Act - FIRPTA
  - Tax act passed in 1980
  - Presumes all sellers are foreign sellers
  - Creates duty of buyer to withhold funds
  - Creates duty of buyer to remit withheld funds to IRS
  - Applies to all U.S. real estate, some personal property, includes rents

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## Definitions

- Foreign Person is
  - Nonresident alien individual, or
  - Foreign corporation, etc.
  - But, not a resident alien (legal permanent resident)
- Withholding Agent – (buyer) person required to withhold funds under IRC § 1445(a)

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## Definitions

- Withholding – amount to be withheld from seller – for individuals - 15% of amount realized
- Note that the withholding rate can be different for certain organizations
- Amount Realized
  - Sum of:
    - Cash paid or to be paid
    - FMV of other property
    - Amount of debt assumed by buyer
  - Usually contract price

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## Review Of Exceptions

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## Exemption

- Most common – sellers are not foreign persons
  - U.S. citizens with a Social Security Number
  - Resident aliens –
    - Legal permanent resident, or
    - Meets substantial presence test
- Treaty
- Amount realized is zero
- Property acquired by:
  - U.S.
  - U.S. state or possession
  - U.S. political subdivision
  - District of Columbia

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### **Purchase of residence for \$300,000 or less.**

One or more individuals acquire U.S. real property for use as a residence and the amount realized (in most cases the sales price) is not more than \$300,000. A U.S. real property interest is acquired for use as a residence if you or a member of your family has definite plans to reside in the property for at least 50% of the number of days the property is used by any person during each of the first two 12-month periods following the date of transfer. Do not take into account the number of days the property will be vacant in making this determination. No form or other document is required to be filed with the IRS for this exception; however, if you do not in fact use the property as a residence, the withholding tax may be collected from you.

This exception applies whether or not the transferor (seller) is an individual, partnership, trust, corporation, or other transferor. However, this exception does not apply if the actual transferee (buyer) is not an individual, even if the property is acquired for an individual.

## Exemption

- Sale price \$300,000 or less
- Buyers, or a member of their family, intend to reside in the property at least 50% of the time in which it is occupied for first two 12 months after acquisition
  - See I.R.S., Pub. 519, U.S. Tax Guide for Aliens 42 (2016)
  - See I.R.C. § 1445 (b)(5)
  - Treas. Reg. § 1.1445-2 (d)

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## Exemption Requirements

- Limited use needs to pass 50% test (do not count vacant days in 50% test)
- Can use if family member to occupy
- Cannot be vacant land
- Cannot be used for “teardown”
- Cannot be used for company purchase
- Cannot be used for commercial property
  - See Treas. Reg. § 1.1445-2 (d)

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## Exemption Requirements

- Buyers must sign an affidavit, under penalties of perjury that they (buyers) meet the requirements of the exemption
  - For your records
- If buyers do not comply with occupancy after sale, buyer could be liable for 15% of sale price, plus penalties and interest to the IRS

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## \$300,000 Exemption WARNING

- Provides **NO BENEFIT** for buyer
- Subjects buyer to  
**SUBSTANTIAL  
EXPOSURE FOR  
LIABILITY**
  - I.R.S., Pub. 519, U.S. Tax Guide for Aliens (2012)



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# BREAKING NEWS!

## Instructions For Form 8288 Have Been Updated



### New Addition

#### Exceptions

**Purchase of residence for \$1,000,000 or less.** Withholding is required at a reduced rate of 10% in the case of a disposition of:

- A property which is acquired by the transferee for use by the transferee as a residence, and
- The amount realized for such property does not exceed \$1,000,000.

But see *Purchase of residence for \$300,000 or less* immediately following. You are **not** required to withhold if any of the following applies.



## Exceptions

- Purchase price of residence of \$1,000,000 or less
- Withholding rate is 10% if
  - Buyer or member of family to use as residence
    - With occupancy 50% of time occupied for first two 12 month periods following date of acquisition
  - Buyer must be one or more individuals



## Handy Chart

Residence	Individual(s) buyer to use as their residence	Entity buyer or individual buyer not used as their residence	Non-residential	Individual(s) buyer	Entity buyer
Sale Price	Withholding Rate	Withholding Rate	Sale Price	Withholding Rate	Withholding Rate
\$300,000 or less	0%	15%	\$300,000 or less	15%	15%
More than \$300,000, and up to \$1,000,000	10%	15%	More than \$300,000, and up to \$1,000,000	15%	15%
More than \$1,000,000	15%	15%	More than \$1,000,000	15%	15%





## \$1,000,000 Exemption WARNING

- Provides **NO BENEFIT** for buyer
- Subjects buyer to

### **SUBSTANTIAL EXPOSURE FOR LIABILITY**

- I.R.S., Pub. 519, U.S. Tax Guide for Aliens (2012)



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## Example 1

- Bobby Builder is purchasing for \$250,000 a single family home
- Heidi Schulze from Germany is the seller
- What is the withholding rate?
  - A. 15%
  - B. 10%
  - C. 0%
- What exemptions might be available?
  - Residence for Bobby – 0%
  - Flip for Bobby – 15%
  - Could it ever be 10%?

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## Example 2

- Bonnie Blue Butler is purchasing a \$795,000 condominium
- Paco Salsa from Mexico is selling
  - Paco is considered a legal permanent resident
- What is the withholding rate?
  - A. 15%
  - B. 10%
  - C. 0%
- What exemptions might be available, if Paco was foreign?
  - Residence for Bonnie – 10%
  - Bonnie intends to offer property on AirBNB only during the winter, residing there the remaining 9 months – 10%
  - Bonnie intends this property as a rental – 15%

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## Example 3

- Bruce Bigshot is purchasing a convenience store for \$299,999
- Sal, LLC is a Florida LLC with Sal Salesman as its only member and he is from Israel
- What is the withholding rate?
  - A. 15%
  - B. 10%
  - C. 0%
- What exemptions might be available?
  - Less than \$300,000 – 15%
  - Bruce intends to live in the store – 15%

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## Example 4

- Bing Lau (from China) is purchasing a single family home for \$295,000 and is planning on taking title in his single member LLC
- Shirley Sanders is a Canadian citizen who has spent the last 20 winters in sunny Florida
- What is the withholding rate?
  - A. 15%
  - B. 10%
  - C. 0%
- What exemptions might be available?
  - Residence for Bing – 15%
  - Rental for Bing – 15%
  - Could it ever be – 0%?



# Questions



## More Fun With FIRPTA!

- On demand Fundinars
  - Passport Required?: Foreign Investment in Real Property Tax Act and the Settlement Agent
    - Free
    - No Credit
  - Trusts, Estates and FIRPTA, Oh My!
    - Free
    - CLE credit



Thank You For Attending



# Instructions for Form 8288

(Rev. February 2016)



Department of the Treasury  
Internal Revenue Service

## U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests

Section references are to the Internal Revenue Code unless otherwise noted.

### What's New

#### The Protecting Americans from Tax Hikes (PATH) Act of 2015, Public Law 114-113, Division Q

The PATH Act sections listed below amend or repeal provisions of the Internal Revenue Code of 1986, except as otherwise expressly provided.

- **Section 133, extension of RIC qualified investment entity treatment under FIRPTA.** The provision permanently extends the treatment of regulated investment companies (RICs) as qualified investment entities for purposes of the Foreign Investment in Real Property Tax Act (FIRPTA). See [Qualified investment entity](#) under [Definitions](#), later.

- **Section 322, exception from FIRPTA for certain stock of REITs.**

This section amends section 897 adding new subsection (k) which contains special rules related to real estate investment trusts (REITs), and amends section 897(h)(4).

- **Section 323, exception for interests held by foreign retirement or pension funds.** This section amends section 897 by adding new subsection (l). See *Transferor is a qualified foreign pension fund or any entity held in its entirety by a qualified foreign pension fund*, later, for more information.

- **Section 324, increase in rate of withholding of tax on dispositions of United States real property interests.** The provision provides that the rate of withholding on dispositions of United States real property interests is increased to 15%. The increased rate of withholding, however, does not apply to the sale of a personal residence where the amount realized is \$1 million or less. The provision is effective for dispositions after February 16, 2016.

- **Section 325, interests in RICs and REITs not excluded from definition of United States real property interests.** The provision amends section 897(c)(1)(B) by adding a new requirement for stock of a corporation to qualify for the exclusion. The new requirement provides that in order for

the exclusion to apply, if neither the corporation nor any predecessor of such corporation was a RIC or REIT at any time during the shorter of (a) the period after June 18, 1980, during which the taxpayer held such stock, or (b) the 5 year period ending on the date of the disposition of the stock. The provision applies to dispositions on or after the date of enactment.

**Future developments.** The IRS has created a page on [IRS.gov](http://IRS.gov) for information about Form 8288 and its instructions at [www.irs.gov/form8288](http://www.irs.gov/form8288). Information about any future developments affecting Form 8288 (such as legislation enacted after we release it) will be posted on that page.

### General Instructions

#### Purpose of Form

A withholding obligation under section 1445 is generally imposed on the buyer or other transferee (withholding agent) when a U.S. real property interest is acquired from a foreign person. The withholding obligation also applies to foreign and domestic corporations, qualified investment entities, and the fiduciary of certain trusts and estates. This withholding serves to collect U.S. tax that may be owed by the foreign person. Use Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests, to report and transmit the amount withheld.



*You are not required to withhold if any of the exceptions apply. See [Exceptions](#), later.*

#### Who Must File

A buyer or other transferee of a U.S. real property interest, and a corporation, qualified investment entity, or fiduciary that is required to withhold tax, must file Form 8288 to report and transmit the amount withheld. If two or more persons are joint transferees, each is obligated to withhold. However, the obligation of each will be met if one of the joint transferees withholds and transmits the required amount to the IRS.

**Do not use Forms 8288 and 8288-A** for the following distributions.

1. A distribution of effectively connected income by a publicly traded partnership is subject to the withholding requirements of section 1446.

2. A distribution with respect to gains from the disposition of a U.S. real property interest from a trust that is regularly traded on an established securities market is subject to section 1445, but is not reported on Forms 8288 and 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests.

3. A dividend distribution by a qualified investment entity to a nonresident alien or a foreign corporation that is attributable to gains from sales or exchanges by the qualified investment entity of U.S. real property interests is not subject to withholding under section 1445 as a gain from the sale or exchange of a U.S. real property interest if:

- a. The distribution is on stock regularly traded on a securities market in the United States, and

- b. The alien or corporation did not own more than 10% (for dispositions and distributions before December 17, 2015, did not own more than 5% of such stock in case of a real estate investment trust (REIT)) of that stock at any time during the 1-year period ending on the date of the distribution.

Use Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, and Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, to report and pay over the withheld amounts.

#### Amount To Withhold

Generally, you must withhold 15% of the amount realized on the disposition by the transferor (see [Definitions](#), later). However, for dispositions prior to February 17, 2016, withhold 10% of the amount realized on the disposition by the transferor.

For information about:

- Withholding at 35%, see [Entities Subject to Section 1445\(e\)](#), later.



- Also see withholding at a reduced rate, [Purchase of residence for \\$1,000,000 or less](#).

For information about applying for reduction or elimination of withholding see [Withholding certificate issued by the IRS](#), later.

**Joint transferors.** If one or more foreign persons and one or more U.S. persons jointly transfer a U.S. real property interest, you must determine the amount subject to withholding in the following manner.

1. Allocate the amount realized from the transfer among the transferors based on their capital contribution to the property. For this purpose, a husband and wife are treated as having contributed 50% each.

2. Withhold on the total amount allocated to foreign transferors.

3. Credit the amount withheld among the foreign transferors as they mutually agree. The transferors must request that the withholding be credited as agreed upon by the 10th day after the date of transfer. If no agreement is reached, credit the withholding by evenly dividing it among the foreign transferors.

## When To File

A transferee must file Form 8288 and transmit the tax withheld to the IRS by the 20th day after the date of transfer.

You must withhold even if an application for a withholding certificate is or has been submitted to the IRS on the date of transfer. However, you do not have to file Form 8288 and transmit the withholding until the 20th day after the day the IRS mails you a copy of the withholding certificate or notice of denial. But if the principal purpose for filing the application for a withholding certificate was to delay paying the IRS the amount withheld, interest and penalties will apply to the period beginning on the 21st day after the date of transfer and ending on the day full payment is made.

**Installment payments.** You must withhold the full amount at the time of the first installment payment. If you cannot because the payment does not involve sufficient cash or other liquid assets, you may obtain a withholding certificate from the IRS. See the instructions for Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests, for more information.

## Where To File

Send Form 8288 with the amount withheld, and copies A and B of Form(s) 8288-A to:

Ogden Service Center  
P.O. Box 409101  
Ogden, UT 84409.

## Forms 8288-A Must Be Attached

Anyone who completes Form 8288 must also complete a Form 8288-A for each person subject to withholding. Copies A and B of Form 8288-A must be attached to Form 8288. Copy C is for your records. Multiple Forms 8288-A related to a transaction can be filed with one Form 8288. You are not required to furnish a copy of Form 8288 or 8288-A directly to the transferor.

The IRS will stamp Copy B of each Form 8288-A and will forward the stamped copy to the foreign person subject to withholding at the address shown on Form 8288-A. To receive credit for the withheld amount, the transferor generally must attach the stamped Copy B of Form 8288-A to a U.S. income tax return (for example, Form 1040NR, U.S. Nonresident Alien Income Tax Return, or 1120-F, U.S. Income Tax Return of a Foreign Corporation) or application for early refund filed with the IRS.

**Transferor's TIN missing.** If you do not have the transferor's taxpayer identification number (TIN), you still must file Forms 8288 and 8288-A. A stamped copy of Form 8288-A will not be provided to the transferor if the transferor's TIN is not included on that form. The IRS will send a letter to the transferor requesting the TIN and providing instructions for how to get a TIN. When the transferor provides the IRS with a TIN, the IRS will provide the transferor with a stamped Copy B of Form 8288-A.

## Penalties

Under section 6651, penalties apply for failure to file Form 8288 when due and for failure to pay the withholding when due. In addition, if you are required to but do not withhold tax under section 1445, the tax, including interest, may be collected from you. Under section 7202, you may be subject to a penalty of up to \$10,000 for willful failure to collect and pay over the tax. Corporate officers or other responsible persons may be subject to a penalty under section 6672 equal to the amount that should have been withheld and paid over to the IRS.

## Definitions

**Transferee.** Any person, foreign or domestic, that acquires a U.S. real property interest by purchase, exchange, gift, or any other transfer.

**Transferor.** For purposes of this withholding, this means any foreign person that disposes of a U.S. real property interest by sale, exchange, gift, or any other disposition. A disregarded entity cannot be the transferor for purposes of section 1445. Instead, the person considered as owning the assets of the disregarded entity for federal tax purposes is regarded as the transferor.

**A disregarded entity** for these purposes means an entity that is disregarded as an entity separate from its owner under Regulations section 301.7701-3, a qualified real estate investment trust subsidiary as defined in section 856(i), or a qualified subchapter S subsidiary under section 1361(b)(3) (B).

**Qualified substitute.** For this purpose, a qualified substitute is (a) the person (including any attorney or title company) responsible for closing the transaction, other than the transferor's agent, and (b) the transferee's agent.

**Withholding agent.** For purposes of this return, this means the buyer or other transferee who acquires a U.S. real property interest from a foreign person.

**Foreign person.** A nonresident alien individual, a foreign corporation that does not have a valid election under section 897(i) to be treated as a domestic corporation, a foreign partnership, a foreign trust, or a foreign estate. A resident alien individual is not a foreign person.

A qualified foreign pension fund or any entity wholly owned by such fund that disposes U.S. real property interest or receives a distribution from a REIT is not a foreign person. See sections 897(l) and 1445(f)(3) for more information.

**U.S. real property interest.** Any interest, other than an interest solely as a creditor, in:

1. Real property located in the United States or the U.S. Virgin Islands.
2. Certain personal property associated with the use of real property.
3. A domestic corporation, unless it is shown that the corporation was not a U.S. real property holding corporation during the previous 5 years (or during the period in which the transferor held the interest, if shorter).

A U.S. real property interest does not include:

1. An interest in a domestically controlled qualified investment entity.
2. An interest in a REIT that is held by a qualified shareholder. For the definition of a qualified shareholder see section 897(k)(3). But see section 897(k)(2)(B) for the cut-back rule if the qualified shareholder has one or more applicable investors.
3. An interest in a corporation that:
  - Did not hold any U.S. real property interest as of the date the interest in such corporation is disposed,
  - Has disposed of all its U.S. real property interests in transactions in which the full amount of any gain was recognized as provided in section 897(c)(1)(B), and
  - Neither such corporation nor any predecessor of such corporation was a REIT or a RIC at any time during the shorter of the previous 5 years or the period in which the transferor held the interest.
4. An interest in certain publicly traded corporations, partnerships, and trusts.

See Regulations sections 1.897-1 and -2 for more information. Also see [Transferred property that is not a U.S. real property interest](#), later.

**Qualified investment entity (QIE).** A QIE is:

- Any REIT, and
- Any RIC which is a United States real property holding corporation or which would be a United States real property holding corporation.

In determining if a RIC is a U.S. real property holding corporation, the RIC is required to include as U.S. real property interests its holdings of stock in a RIC or REIT that is a U.S. real property holding company, even if such stock is regularly traded and the RIC did not own more than 10% of such stock in the case of a REIT (5% for dispositions before December 17, 2015) or 5% of such stock in case of a RIC, and even if such stock is domestically controlled.

For more information, see Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.

**Domestically controlled qualified investment entity.** A QIE is domestically controlled if at all times during the testing period less than 50% in value of its stock was held, directly or indirectly, by foreign persons. The testing period is the shorter of:

- The 5-year period ending on the date of the disposition (or distribution), or
- The period during which the entity was in existence.

For purpose of determining whether a QIE is domestically controlled, the following rules will apply beginning on December 18, 2015.

1. A person holding less than 5% of any class of stock of a QIE which is regularly traded on an established securities market in the United States at all times during the testing period will be treated as a U.S. person unless the QIE has actual knowledge that such person is not a U.S. person.
2. Any stock in a QIE that is held by another QIE will be treated as held by a foreign person if:
  - Any class of stock of such other QIE is regularly traded on an established securities market, or
  - Such other QIE is a RIC that issues certain redeemable securities.

Notwithstanding the above, the stock of the QIE will be treated as held by a U.S. person if such other QIE is domestically controlled.

3. Stock in a QIE that is held by any other QIE not described above will be treated as held by a U.S. person in proportion to the stock ownership of such other QIE which is (or is treated as) held by a U.S. person.

**Amount realized.** The sum of the cash paid or to be paid (not including interest or original issue discount), the fair market value of other property transferred or to be transferred, and the amount of any liability assumed by the transferee or to which the U.S. real property interest is subject immediately before and after the transfer. Generally, the amount realized for purposes of this withholding is the sales or contract price.

**Date of transfer.** The first date on which consideration is paid or a liability is assumed by the transferee. However, for purposes of sections 1445(e)(2), (3), and (4), and Regulations sections 1.1445-5(c)(1)(iii) and 1.1445-5(c)(3), the date of transfer is the date of distribution that creates the obligation to withhold. Payment of consideration does not include the payment before passage of legal or equitable title of earnest money (other than pursuant to an initial purchase contract), a good-faith deposit, or any similar amount primarily intended to bind the parties to the contract and subject to forfeiture. A payment that is not

forfeitable may also be considered earnest money, a good-faith deposit, or a similar sum.

## Exceptions

**Purchase of residence for \$1,000,000 or less.** Withholding is required at a reduced rate of 10% in the case of a disposition of:

- A property which is acquired by the transferee for use by the transferee as a residence, and
- The amount realized for such property does not exceed \$1,000,000. But see *Purchase of residence for \$300,000 or less* immediately following. You are **not** required to withhold if any of the following applies.

**Purchase of residence for \$300,000 or less.** One or more individuals acquire U.S. real property for use as a residence and the amount realized (in most cases the sales price) is not more than \$300,000. A U.S. real property interest is acquired for use as a residence if you or a member of your family has definite plans to reside in the property for at least 50% of the number of days the property is used by any person during each of the first two 12-month periods following the date of transfer. Do not take into account the number of days the property will be vacant in making this determination. No form or other document is required to be filed with the IRS for this exception; however, if you do not in fact use the property as a residence, the withholding tax may be collected from you.

This exception applies whether or not the transferor (seller) is an individual, partnership, trust, corporation, or other transferor. However, this exception does not apply if the actual transferee (buyer) is not an individual, even if the property is acquired for an individual.

**Transferor not a foreign person.** You receive a certification of nonforeign status from the transferor, signed under penalties of perjury, stating that the transferor is not a foreign person and containing the transferor's name, address, and identification number (social security number (SSN) or employer identification number (EIN)). The transferor can give the certification to a qualified substitute (defined on this page). The qualified substitute gives you a statement, under penalties of perjury, that the certification is in the qualified substitute's possession. If you receive a certification (or statement), the withholding tax cannot be collected from you unless you knew that the certification (or statement) was false or

you received a notice from your agent, the transferor's agent, or the qualified substitute that it was false. The certification must be signed by the individual, a responsible officer of a corporation, a general partner of a partnership, or the trustee, executor, or fiduciary of a trust or estate.

A disregarded entity may not certify that it is the transferor for U.S. tax purposes. Rather, the owner of the disregarded entity is treated as the transferor of the property and must provide the certificate of nonforeign status to avoid withholding under section 1445.

A foreign corporation electing to be treated as a domestic corporation under section 897(i) must attach to the certification a copy of the acknowledgment of the election received from the IRS. The acknowledgment must state that the information required by Regulations section 1.897-3 has been determined to be complete. If the acknowledgment is not attached, you may not rely on the certification. Keep any certification of nonforeign status you receive in your records for 5 years after the year of transfer.

You may also use other means to determine that the transferor is not a foreign person. But if you do, and it is later determined that the transferor is a foreign person, the withholding tax may be collected from you.

**Late notice of false certification.**

If, after the date of transfer, you receive a notice from your agent, the transferor's agent, or the qualified substitute that the certification of nonforeign status is false, you do not have to withhold on consideration paid before you received the notice. However, you must withhold the full 15% of the amount realized from any consideration that remains to be paid, if possible. You must do this by withholding and paying over the entire amount of each successive payment of consideration until the full 15% has been withheld and paid to the IRS. These amounts must be reported and transmitted to the IRS by the 20th day following the date of each payment.

**Transferred property that is not a U.S. real property interest.** You acquire an interest in property that is not a U.S. real property interest (defined under [U.S. real property interest](#), earlier). A U.S. real property interest includes certain interests in U.S. corporations, as well as direct interests

in real property and certain associated personal property.

No withholding is required on the acquisition of an interest in a domestic corporation if (a) any class of stock of the corporation is regularly traded on an established securities market, or (b) the transferee receives a statement issued by the corporation that the interest is not a U.S. real property interest, unless you know that the statement is false or you receive a notice from your agent or the transferor's agent that the statement is false. A corporation's statement may be relied on only if it is dated not more than 30 days before the date of transfer.

**Late notice of false statement.** If, after the date of transfer, you receive a notice that the statement is false, see [Late notice of false statement](#), earlier.

Generally, no withholding is required on the acquisition of an interest in a foreign corporation. However, withholding may be required if the foreign corporation has made the election under section 897(i) to be treated as a domestic corporation.

**Transferor's nonrecognition of gain or loss.** You may receive a notice from the transferor signed under penalties of perjury stating that the transferor is not required to recognize gain or loss on the transfer because of a nonrecognition provision of the Internal Revenue Code (see Temporary Regulations section 1.897-6T(a)(2)) or a provision in a U.S. tax treaty. You may rely on the transferor's notice unless (a) only part of the gain qualifies for nonrecognition or (b) you know or have reason to know that the transferor is not entitled to the claimed nonrecognition treatment.

No particular form is required for this notice. By the 20th day after the date of transfer, you must send a copy of the notice of nonrecognition (with a cover letter giving your name, address, and identification number) to:

Ogden Service Center  
P.O. Box 409101  
Ogden, UT 84409.

See Regulations section 1.1445-2(d)(2) for more information on the transferor's notice of nonrecognition.

**Note.** A notice of nonrecognition cannot be used for the exclusion from income under section 121, like-kind exchanges that do not qualify for nonrecognition treatment in their entirety, and deferred like-kind exchanges that have not been completed when it is time to file Form

8288. In these cases, a withholding certificate issued by the IRS, as described next, must be obtained.

**Withholding certificate issued by the IRS.** A withholding certificate may be issued by the IRS to reduce or eliminate withholding on dispositions of U.S. real property interests by foreign persons. Either a transferee or transferor may apply for the certificate. The certificate may be issued if:

- Reduced withholding is appropriate because the 10%, 15%, or 35% amount exceeds the transferor's maximum tax liability,
- The transferor is exempt from U.S. tax or nonrecognition provisions apply, or
- The transferee or transferor enters into an agreement with the IRS for the payment of the tax.

An application for a withholding certificate must comply with the provisions of Regulations sections 1.1445-3 and 1.1445-6 and Rev. Proc. 2000-35, 2000-35 I.R.B. 211. You can find Rev. Proc. 2000-35 on page 211 of Internal Revenue Bulletin 2000-35 at <http://www.irs.gov/pub/irs-irbs/irb00-35.pdf>. In certain cases, you may use Form 8288-B to apply for a withholding certificate. The IRS will normally act on an application by the 90th day after a complete application is received.

If you receive a withholding certificate from the IRS that excuses withholding, you are not required to file Form 8288. However, if you receive a withholding certificate that reduces (rather than eliminates) withholding, there is no exception to withholding, and you are required to file Form 8288. Attach a copy of the withholding certificate to Form 8288. See [When To File](#), earlier, for more information.

**No consideration paid.** The amount realized by the transferor is zero (for example, the property is transferred as a gift and the recipient does not assume any liabilities or furnish any other consideration to the transferor).

**Options to acquire U.S. real property interests.** No withholding is required with respect to any amount realized by the grantor on the grant or lapse of an option to acquire a U.S. real property interest. However, withholding is required on the sale, exchange, or exercise of an option.

**Property acquired by a governmental unit.** The property is acquired by the United States, a U.S. state or



possession or political subdivision, or the District of Columbia.

For rules that apply to foreclosures, see Regulations section 1.1445-2(d)(3).

**Applicable wash sale transaction.** A distribution from a domestically controlled qualified investment entity is treated as a distribution of a U.S. real property interest only because an interest in the entity was disposed of in an applicable wash sale transaction. See section 897(h)(5).

## Late Filing of Certification or Notices

You may be eligible for relief for a late filing if a statement or notice was not provided to the relevant person or the IRS by the specified deadline and if you have reasonable cause for the failure to make a timely filing. Once you become aware that you have failed to timely file certain certificates or notices, you must file the required certification or notice with the appropriate person or the IRS. Also include the following.

- A statement at the top of the document(s) that it is "FILED PURSUANT TO REV. PROC. 2008-27."
- An explanation describing why the failure was due to reasonable cause. Within the explanation, provide that you filed with, or obtained from, an appropriate person the required certification or notice.

The completed certification or notice attached to the explanation must be sent to:

Ogden Service Center  
P.O. Box 409101  
Ogden, UT 84409.

For more information, see Rev. Proc. 2008-27, 2008-21 I.R.B. 1014, available at [http://www.irs.gov/irb/2008-21\\_IRB/ar14.html](http://www.irs.gov/irb/2008-21_IRB/ar14.html).

## Liability of Agents

If you (or the qualified substitute) received: (a) a transferor's certification of nonforeign status or (b) a corporation's statement that an interest is not a U.S. real property interest, and the transferee's or transferor's agent, or the substitute, knows the document is false, the agent (or substitute) must notify you. If notification is not provided, the agent (or substitute) will be liable for the tax that should have been withheld, but only to the extent of the agent's (or substitute's) compensation from the transaction.

If you (or the substitute) receive a notice of false certification or statement from your agent, the transferor's agent, or qualified substitute, you must withhold tax as if you had not received a certification or statement. See [Late notice of false certification](#), earlier.

An "agent" is any person who represents the transferor or transferee in any negotiation with another person (or another person's agent) relating to the transaction or in settling the transaction. For purposes of section 1445(e), a transferor's or transferee's agent is any person who represents or advises an entity, a holder of an interest in an entity, or a fiduciary with respect to the planning, arrangement, or completion of a transaction described in sections 1445(e)(1) through (4).

A person is not treated as an agent if the person only performs one or more of the following acts in connection with the transaction:

1. Receiving and disbursing any part of the consideration.
2. Recording any document.
3. Typing, copying, and other clerical tasks.
4. Obtaining title insurance reports and reports concerning the condition of the property.
5. Transmitting documents between the parties.
6. Functioning exclusively in his or her capacity as a representative of a condominium association or cooperative housing corporation. This exemption includes the board of directors, the committee, or other governing body.

## Entities Subject to Section 1445(e)

Withholding is required on certain distributions and other transactions by domestic or foreign corporations, qualified investment entities, trusts, and estates. A domestic trust or estate must withhold 35% of the amount distributed to a foreign beneficiary from a "U.S. real property interest account" that it is required to establish under Regulations section 1.1445-5(c)(1)(iii). A foreign corporation that has not made the election under section 897(i) must withhold 35% of the gain it recognizes on the distribution of a U.S. real property interest to its shareholders. Certain domestic corporations are required to withhold tax on distributions to foreign shareholders.

No withholding is required on the transfer of an interest in a domestic

corporation if any class of stock of the corporation is regularly traded on an established securities market. Also, no withholding is required on the transfer of an interest in a publicly traded partnership or trust.

No withholding will be required with respect to an interest holder if the entity or fiduciary receives a certification of nonforeign status from the interest holder. An entity or fiduciary may also use other means to determine that an interest holder is not a foreign person, but if it does so and it is later determined that the interest holder is a foreign person, the withholding may be collected from the entity or fiduciary.

## Section 1445(e)(1) Transactions

**Partnerships.** A domestic partnership that is not publicly traded must withhold tax under section 1446 on effectively connected income allocated to its foreign partners and must file Form 8804, Annual Return for Partnership Withholding Tax (Section 1446), and Form 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax. A publicly traded partnership or nominee generally must withhold tax under section 1446 on distributions to its foreign partners and must file Forms 1042 and 1042-S. Because a domestic partnership that disposes of a U.S. real property interest is required to withhold under section 1446, it is not required to withhold under section 1445(e)(1).

**Trusts and estates.** If a domestic trust or estate disposes of a U.S. real property interest, the amount of gain realized must be paid into a separate "U.S. real property interest account." For these purposes, a domestic trust is one that does not make the "large trust election" (explained below), is not a qualified investment entity, and is not publicly traded. The fiduciary must withhold 35% of the amount distributed to a foreign person from the account during the tax year of the trust or estate in which the disposition occurred. The withholding must be paid over to the IRS within 20 days of the date of distribution. Special rules apply to grantor trusts. See Regulations section 1.1445-5 for more information and how to compute the amount subject to withholding.

**Large trust election.** Trusts with more than 100 beneficiaries may make an election to withhold upon distribution rather than at the time of transfer. The amount to be withheld from each distribution is 35% of the amount

attributable to the foreign beneficiary's proportionate share of the current balance of the trust's section 1445(e)(1) account. This election does not apply to any qualified investment entity or to any publicly traded trust. Special rules apply to large trusts that make recurring sales of growing crops and timber.

A trust's section 1445(e)(1) account is the total net gain realized by the trust on all section 1445(e)(1) transactions after the date of the election, minus the total of all distributions made by the trust after the date of the election from such total net gain. See Regulations section 1.1445-5(c)(3) for more information.

### Section 1445(e)(2) Transactions

A foreign corporation that distributes a U.S. real property interest must generally withhold 35% of the gain recognized by the corporation. No withholding or reduced withholding is required if the corporation receives a withholding certificate from the IRS.

### Section 1445(e)(3) Transactions

Generally, a domestic corporation that distributes any property to a foreign person that holds an interest in the corporation must withhold 15% (10% for distributions before February 17, 2016) of the fair market value of the property distributed if:

- The foreign person's interest in the corporation is a U.S. real property interest under section 897, and
- The property is distributed in redemption of stock under section 302, in liquidation of the corporation under sections 331 through 341, or with respect to stock under section 301 that is not made out of the earnings and profits of the corporation.

No withholding or reduced withholding is required if the corporation receives a withholding certificate from the IRS.

### Section 1445(e)(4) Transactions

No withholding is required under section 1445(e)(4), relating to certain taxable distributions by domestic or foreign partnerships, trusts, and estates, until the effective date of a Treasury Decision under section 897(e)(2)(B)(ii) and (g).

### Section 1445(e)(5) Transactions

The transferee of a partnership interest must withhold 15% (10% for dispositions before February 17, 2016)

of the amount realized on the disposition by a foreign partner of an interest in a domestic or foreign partnership in which at least 50% of the value of the gross assets consists of U.S. real property interests and at least 90% of the value of the gross assets consists of U.S. real property interests plus any cash or cash equivalents. However, no withholding is required under section 1445(e)(5) for dispositions of interests in other partnerships, trusts, or estates until the effective date of a Treasury Decision under section 897(g). No withholding is required if, no earlier than 30 days before the transfer, the transferee receives a statement signed by a general partner under penalties of perjury that at least 50% of the value of the gross assets of the partnership does not consist of U.S. real property interests or that at least 90% of the value of the gross assets does not consist of U.S. real property interests plus cash or cash equivalents. The transferee may rely on the statement unless the transferee knows it is false or the transferee receives a false statement notice pursuant to Regulations section 1.1445-4.

### Section 1445(e)(6) Transactions

A qualified investment entity must withhold 35% of a distribution to a nonresident alien or a foreign corporation that is treated as gain realized from the sale or exchange of a U.S. real property interest. No withholding under section 1445 is required on a distribution to a nonresident alien or foreign corporation if the distribution is on stock regularly traded on a securities market in the United States and the alien or corporation did not own more than 10% (for distributions before December 17, 2015, did not own more than 5% of such stock in case of a REIT) of that stock at any time during the 1-year period ending on the date of distribution.

A distribution made after December 17, 2015, by a REIT generally is not treated as gain from the sale or exchange of a U.S. real property interest if the shareholder is a qualified shareholder (as described in section 897(k)(3)).

**Example 1.** B, a corporation, purchases a U.S. real property interest from F, a foreign person. On settlement day, the settlement agent pays off existing loans, withholds 15% of the amount realized on the sale (after February 16, 2016), and disburses the remaining amount to F. B, not the agent, must complete Part I of Form 8288 and Form 8288-A.

**Example 2.** C, a domestic corporation, distributes property (after February 16, 2016) to F, a foreign shareholder whose interest in C is a U.S. real property interest. The distribution is in redemption of C's stock (section 1445(e)(3) transaction). C must withhold 15% of the fair market value of the property distributed to F. C must complete Part II of Form 8288, and Form 8288-A.

**Lines 1.** In Part I, enter the name, address, and identifying number of the buyer or other transferee responsible for withholding under section 1445(a). Do not enter the name, address, and identifying number of a title company, mortgage company, etc. unless it happens to be the actual buyer or transferee.

In Part II, enter the name, address, and identifying number of the entity or fiduciary responsible for withholding under section 1445(e). Do not enter the name, address, and identifying number of a title company, mortgage company, etc. unless it happens to be the actual entity responsible for withholding under section 1445(e).



*The IRS will contact the person or entity listed on line 1 to resolve any problems that may arise concerning underwithholding and/or penalties.*

**Name and address.** If you are a fiduciary, list your name and the name of the trust or estate. Enter the home address of an individual or the office address of an entity.

**Identifying number.** For a U.S. individual, the identifying number is a social security number (SSN). For any entity other than an individual (for example, corporation, qualified investment entity, estate, or trust), the identifying number is an employer identification number (EIN). If you do not have an EIN, you can apply for one online at [www.irs.gov/smallbiz](http://www.irs.gov/smallbiz) or by telephone at 1-800-829-4933. Also, you can file Form SS-4, Application for Employer Identification Number, by fax or mail.

## Specific Instructions



*Complete only Part I or Part II.*

For a nonresident alien individual who is not eligible for an SSN, the identifying number is an IRS individual taxpayer identification number (ITIN). If the individual does not already have an ITIN, he or she should complete Forms 8288 and 8288-A and mail the forms along with any payment to the address shown under [Where To File](#), earlier. In a separate package mail a completed Form W-7, Application for IRS Individual Taxpayer Identification Number, with supporting documentation and a copy of Forms 8288 and 8288-A to the IRS at the address given in the Form W-7 instructions.

**Lines 2.** Enter the location and a description of the property, including any substantial improvements (for example, “12-unit apartment building”). In the case of interests in a corporation that constitute a U.S. real property interest, enter the class or type and amount of the interest (for example, “10,000 shares Class A Preferred Stock XYZ Corporation”).

**Line 4.** Enter the number of Forms 8288-A attached to Form 8288. Copies A and B of each Form 8288-A should be counted as one form.

**Line 6b.** Reduced rate on purchase of residence after February 16, 2016, for \$1,000,000 or less. When a property is acquired by the transferee for use by the transferee as a residence and the amount realized by the foreign transferor is more than \$300,000, but does not exceed \$1,000,000, the transferee generally must withhold 10% of the amount realized by a foreign person.

**Part II, line 3.** If you are a qualified investment entity, domestic trust or estate, or you make the large trust

election, enter the date of distribution for the date of transfer.

### Paid Preparer

Generally, anyone you pay to prepare Form 8288 must sign it and include their Preparer Tax Identification Number (PTIN) in the space provided.

**Privacy Act and Paperwork Reduction Act Notice.** We ask for the information on this form to carry out the Internal Revenue laws of the United States. Section 1445 generally imposes a withholding obligation on the buyer or other transferee (withholding agent) when a U.S. real property interest is acquired from a foreign person. Section 1445 also imposes a withholding obligation on certain foreign and domestic corporations, qualified investment entities, and the fiduciary of certain trusts and estates. This form is used to report and transmit the amount withheld.

You are required to provide this information. Section 6109 requires you to provide your identification number. We need this information to ensure that you are complying with the Internal Revenue laws and to allow us to figure and collect the right amount of tax. Failure to provide this information in a timely manner, or providing false information, may subject you to penalties. Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions for administration of their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law

enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file these forms will vary depending on individual circumstances. The estimated average times are:

	Form 8288	Form 8288-A
<b>Recordkeeping</b>	6 hr., 13 min.	2 hr., 52 min.
<b>Learning about the law or the form</b>	5 hr., 13 min.	30 min.
<b>Preparing and sending the form to the IRS</b>	6 hr., 46 min.	34 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making these forms simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Forms and Publications, SE:W:CAR:MP:TFP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the forms to this address. Instead, see [Where To File](#), earlier.

Residence	Individual(s) buyer to use as their residence	Entity buyer or individual buyer not used as their residence	Non-residential	Individual(s) buyer	Entity buyer
Sale Price	Withholding Rate	Withholding Rate	Sale Price	Withholding Rate	Withholding Rate
\$300,000 or less	0%	15%	\$300,000 or less	15%	15%
More than \$300,000, and up to \$1,000,000	10%	15%	More than \$300,000, and up to \$1,000,000	15%	15%
More than \$1,000,000	15%	15%	More than \$1,000,000	15%	15%