



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-109826-17]

RIN 1545–BN89

Exception for Interests Held by Foreign Pension Funds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations regarding the exception from taxation with respect to gain or loss of a qualified foreign pension fund attributable to certain interests in United States real property. The proposed regulations also include rules for certifying that a qualified foreign pension fund is not subject to withholding on certain dispositions of, and distributions with respect to, certain interests in United States real property. The proposed regulations affect certain holders of certain interests in United States real property and withholding agents that are required to withhold tax on certain dispositions of, and distributions with respect to, such property.

DATES: Written or electronic comments and requests for a public hearing must be received by **INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-109826-17), Internal Revenue Service, Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC

20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-109826-17), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-109826-17).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Milton Cahn or Logan M. Kincheloe, (202) 317-6937; concerning submissions of comments or requests for a public hearing, Regina Johnson, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. In General

This document contains proposed amendments to 26 CFR part 1 under sections 897, 1445, and 1446 (the "proposed regulations"). Section 323(a) of the Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114-113, div. Q (the "PATH Act"), added section 897(l) to the Code, and Section 101(q) of the Tax Technical Corrections Act of 2018, Pub. L. 115-141, div. U (the "Technical Corrections Act") amended certain aspects of section 897(l). Section 897(l) provides an exemption to the application of section 897(a) on gain or loss on certain dispositions of, and distributions with respect to, United States real property interests ("USRPIs") for certain foreign pension funds and their subsidiaries. The proposed regulations contain rules relating to the qualification for the exemption under section 897(l), as well as rules relating to

withholding requirements under sections 1445 and 1446 for dispositions of USRPIs by foreign pension funds and their subsidiaries.

II. Taxation of Foreign Persons under Section 897

Section 897(a)(1) provides that gain or loss of a nonresident alien individual or foreign corporation from the disposition of a USRPI is taken into account under section 871(b)(1) or 882(a)(1), as applicable, as if the nonresident alien individual or foreign corporation were engaged in a trade or business within the United States during the taxable year and such gain or loss were effectively connected with that trade or business.

Section 897(c)(1)(A) defines a USRPI as an interest in real property (including an interest in a mine, well, or other natural deposit) located in the United States or the Virgin Islands, and any interest (other than solely as a creditor) in any domestic corporation unless the taxpayer establishes that such corporation was at no time a United States real property holding corporation ("USRPHC") during the applicable testing period (generally, the five-year period ending on the date of the disposition of the interest). Under section 897(c)(2), a USRPHC means any corporation if the fair market value of its USRPIs equals or exceeds 50 percent of the total fair market value of its USRPIs, its interests in real property located outside the United States, plus any other assets that are used or held for use in a trade or business. However, section 897(c)(1)(B) generally provides that an interest in a corporation is not a USRPI if the corporation does not hold any USRPIs as of the date its stock is sold and the corporation disposed of all of the USRPIs that it held during the applicable testing period in transactions in which the full amount of gain, if any, was recognized.

Section 897(h)(1) provides that any distribution by a qualified investment entity (QIE) to a nonresident alien individual, a foreign corporation, or other QIE is, to the extent attributable to gain from sales or exchanges by the QIE of USRPIs, treated as gain recognized by such nonresident alien individual, foreign corporation, or other QIE from the sale or exchange of a USRPI, subject to certain exceptions. Under section 897(h)(4)(A), a QIE includes any real estate investment trust (REIT) and certain regulated investment companies.

III. Exception for Qualified Foreign Pension Funds under Section 897(l)

Section 897(l)(1) provides that a qualified pension fund is not treated as a nonresident alien individual or foreign corporation for purposes of section 897. Cf. section 897(a) (subjecting nonresident alien individuals and foreign corporations to tax on gain or loss from the disposition of a USRPI). For this purpose, an entity all the interests of which are held by a qualified foreign pension fund (referred to in this Preamble and the proposed regulations as a “qualified controlled entity”) is also treated as a qualified foreign pension fund.

Under section 897(l)(2), a qualified foreign pension fund is defined as any trust, corporation, or other organization or arrangement (any one of which is referred to in this Preamble and the proposed regulations as an “eligible fund”) that satisfies five separate requirements. Specifically, a qualified foreign pension fund is an eligible fund (A) that is created or organized under the law of a country other than the United States, (B) that is established (i) by such country (or one or more political subdivisions thereof) to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (including self-employed individuals) or persons designated by such

employees, as a result of services rendered by such employees to their employers, or (ii) by one or more employers to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (including self-employed individuals) or persons designated by such employees in consideration for services rendered by such employees to such employers, (C) that does not have a single participant or beneficiary with a right to more than five percent of its assets or income, (D) that is subject to government regulation and with respect to which annual information about its beneficiaries is provided, or is otherwise available, to the relevant tax authorities in the country in which it is established or operates, and (E) with respect to which, under the laws of the country in which it is established or operates (i) contributions to such eligible fund that would otherwise be subject to tax under such laws are deductible or excluded from the gross income of such entity or arrangement or taxed at a reduced rate, or (ii) taxation of any investment income of such eligible fund is deferred or such income is excluded from gross income of such entity or arrangement or is taxed at a reduced rate.

Section 897(l)(3) provides that the Secretary of the Treasury (Secretary) shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of section 897(l).

IV. Applicable Withholding Rules

A. Section 1445 withholding

Section 1445(a) generally imposes a withholding tax obligation on the transferee when a foreign person disposes of a USRPI. Section 1445(e)(6) provides that, if any portion of a distribution from a QIE to a nonresident alien individual or a foreign corporation is treated under section 897(h)(1) as gain realized by such individual or

corporation from the sale or exchange of a USRPI, the QIE must deduct and withhold tax under section 1445(a) on the amount so treated.

A transferee of a USRPI is not required to withhold under section 1445(a) if the transferor furnishes to the transferee a certification that, among other things, states that the transferor is not a foreign person. §1.1445-2(b)(2)(i). Generally, upon a distribution and other transactions subject to withholding, certain entities may treat a holder of an interest in the entity as a U.S. person if that interest holder furnishes to the entity or fiduciary a certification stating that the interest holder is not a foreign person. §1.1445-5(b)(3)(ii)(A). Upon the distribution of any amount attributable to the disposition of a USRPI, a QIE may rely on the same certification, a Form W-9, Request for Taxpayer Identification Number and Certification, or a form that is substantially similar to the Form W-9 to determine whether an interest holder is a U.S. person. §1.1445-8(e).

Section 323(b) of the PATH Act amended section 1445(f)(3) to provide that, for purposes of section 1445, the term “foreign person” means any person other than (A) a United States person, and (B) except as otherwise provided by the Secretary, an entity with respect to which section 897 does not apply by reason of section 897(l). On February 19, 2016, the Department of the Treasury (the “Treasury Department”) and the IRS published final regulations under section 1445 of the Code (“updated section 1445 regulations”) in the **Federal Register** (81 FR 8398-01) to reflect the PATH Act’s amendments to section 1445(f)(3). A correcting amendment to the updated section 1445 regulations was published on April 26, 2016 in the **Federal Register** (81 FR 24484-01). As corrected, the updated section 1445 regulations provide that neither a qualified foreign pension fund nor an entity all of the interests of which are held by a

qualified foreign pension fund is treated as a foreign person, and thus may provide a certification to a transferee. See §§1.1445-2(b)(2)(i) (flush language) and 1.1445-5(b)(3)(ii)(A).

B. Section 1446 withholding

A partnership generally must pay a withholding tax under section 1446 on effectively connected taxable income (“ECTI”) allocable under section 704 to a foreign partner. Section 1446(c) provides that ECTI includes the taxable income of a partnership that is effectively connected (or treated as effectively connected) with the conduct of a trade or business in the United States, subject to certain adjustments. For this purpose, ECTI includes any partnership income treated as effectively connected with the conduct of a trade or business in the United States pursuant to section 897. §1.1446-2(b)(2)(ii).

A foreign partner's allocable share of partnership ECTI does not include income or gain exempt from U.S. tax by reason of a provision of the Code or by operation of any U.S. income tax treaty or reciprocal agreement. §1.1446-2(b)(2)(iii). In the case of income excluded by reason of a treaty provision, such income must be derived by a resident of an applicable treaty jurisdiction, the resident must be the beneficial owner of the item, and all other requirements for benefits under the treaty must be satisfied. To exclude income or gain from ECTI, the partnership must receive from the partner a valid withholding certificate (that is, Form W-8BEN-E, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)) containing the information necessary to support the claim for treaty benefits required in the forms and instructions. Id.

A domestic partnership required to withhold under both sections 1445 and 1446 with respect to income treated as ECTI pursuant to section 897 is deemed to satisfy the withholding requirements of section 1445 if it complies with the requirements of section 1446. §1.1446-3(c)(2)(i).

V. Prior Request for Comments

In the Preamble to the updated section 1445 regulations that were published on February 19, 2016, the Treasury Department and the IRS requested comments regarding what regulations, if any, should be issued pursuant to section 897(l)(3). Twenty-one comments were received, requesting, in particular, guidance on issues related to qualification as a “qualified foreign pension fund” under section 897(l)(2). The comments will be included in the administrative record for this notice of proposed rulemaking. The Treasury Department and the IRS considered all of the comments, and in response to the comments have issued the proposed regulations to provide clarification on the application of section 897(l). Each significant comment, other than any comment rendered moot by the Technical Corrections Act, is discussed in the relevant part of the Explanation of Provisions section of this preamble.

Explanation of Provisions

The proposed regulations provide guidance regarding the scope of the exception described in section 897(l)(1), the application of the requirements described in section 897(l)(2) that an eligible fund must satisfy to be treated as a qualified foreign pension fund, and rules regarding exemptions from withholding under section 1445 or section 1446.

I. Scope of the Exception

A. General rule

As described in the Background section of this Preamble, section 897(a) applies to gain or loss of a nonresident alien individual or a foreign corporation from the disposition of a USRPI. Similarly, section 897(h) generally treats any distribution from a QIE to a nonresident alien individual, a foreign corporation, or other QIE, to the extent attributable to gain from sales or exchanges by the QIE of USRPIs, as gain recognized by such nonresident alien individual, foreign corporation, or other QIE from the sale or exchange of a USRPI for purposes of section 897(a). Section 897(l)(1) provides that, for purposes of section 897, a qualified foreign pension fund is not treated as a nonresident alien individual or a foreign corporation. For this purpose, a qualified controlled entity is treated as a qualified foreign pension fund. Accordingly, section 897(l) excepts from section 897(a) gain or loss of a qualified foreign pension fund or a qualified controlled entity from the disposition of a USRPI, including gain from a distribution described in section 897(h).

Consistent with section 897(l), the proposed regulations provide that gain or loss of a qualified foreign pension fund or a qualified controlled entity (under the proposed regulations, each a “qualified holder”) from the disposition of a USRPI, including gain from a distribution described in section 897(h), is not subject to section 897(a). This exception from section 897(a) applies solely with respect to gain or loss recognized by a qualified holder that is attributable to one or more qualified segregated accounts maintained by the qualified holder. The proposed regulations define a qualified segregated account as an identifiable pool of assets maintained for the sole purpose of funding qualified benefits (generally, retirement, pension, and certain ancillary benefits)

to qualified recipients (generally, plan participants and beneficiaries). See Section II.B of this Explanation of Provisions for a detailed discussion of qualified benefits and qualified recipients.

The proposed regulations provide separate standards for determining whether an identifiable pool of assets constitutes a qualified segregated account depending on whether the pool of assets is maintained by an eligible fund (including an eligible fund that satisfies the requirements to be treated as a qualified foreign pension fund) or a qualified controlled entity. An identifiable pool of assets of an eligible fund is a qualified segregated account if the assets in the pool and the income earned with respect to those assets are subject to legal or contractual requirements requiring that all such income and assets are used exclusively to fund the provision of qualified benefits to qualified recipients or to satisfy necessary reasonable expenses of the eligible fund. A qualified controlled entity is treated as maintaining a qualified segregated account if all of the net earnings of the qualified controlled entity are credited to its own account or to the qualified segregated account of a qualified foreign pension fund or another qualified controlled entity, and all of the assets of the qualified controlled entity, after satisfaction of liabilities to persons having interests in the entity solely as creditors, vest in the qualified segregated account of a qualified foreign pension fund or another qualified controlled entity upon dissolution. In either case, a pool of assets will not be treated as a qualified segregated account if the assets or income associated with such assets may inure to the benefit of a person other than a qualified recipient. For this purpose, the fact that assets or income may inure to the benefit of a governmental unit by operation of escheat or similar laws is ignored.

B. Qualified controlled entities

Several comments submitted in response to the updated section 1445 regulations requested clarification concerning the exception under section 897(l) for an entity all the interests of which are held by a qualified foreign pension fund. The proposed regulations define a qualified controlled entity as a trust or corporation organized under the laws of a foreign country all of the interests of which are held directly by one or more qualified foreign pension funds or indirectly through one or more qualified controlled entities or partnerships. The Treasury Department and the IRS have determined that it is unnecessary to treat partnerships as qualified controlled entities because the proposed regulations' exemption from section 897(a) applies to gain or loss earned indirectly through one or more partnerships. Accordingly, the proposed regulations provide that only corporations and trusts may be treated as qualified controlled entities.

1. Indirectly Held Entities

Comments requested that the proposed regulations provide that an entity held indirectly through one or more corporations or partnerships by a qualified foreign pension fund may be treated as a qualified controlled entity. Thus, for example, if a qualified foreign pension fund owned all of the interests of Entity A, and Entity A owned all of the interests of Entity B, the comments indicated that Entity B should be eligible to be treated as a qualified controlled entity. The Treasury Department and the IRS agree that there is no policy reason to distinguish between direct and indirect ownership for purposes of determining whether an entity is a qualified controlled entity. Accordingly,

the proposed regulations provide that a qualified controlled entity may be owned directly or indirectly through one or more qualified controlled entities.

2. Multiple Qualified Foreign Pension Fund Owners

Comments requested that the proposed regulations provide that an entity may qualify as a qualified controlled entity when all of its interests are owned by multiple qualified foreign pension funds. Comments noted that qualified foreign pension funds frequently pool their investments, such that permitting qualified controlled entities to be held by multiple qualified foreign pension funds would be consistent with current investment practices. Further, comments argued that there is no policy rationale for providing the exception of section 897(l) to an investment that benefited one qualified foreign pension fund but not to an investment that benefited multiple qualified foreign pension funds. The Treasury Department and the IRS agree with these comments. Accordingly, the proposed regulations provide that the interests in a qualified controlled entity may be held by one or more qualified foreign pension funds directly or indirectly through one or more qualified controlled entities.

3. Creditor Interests

One comment recommended that, for purposes of determining whether an entity is a qualified controlled entity, only equity interests should be taken into account. Cf. section 897(c)(1)(A) (defining a USRPI as including any interest (other than solely as a creditor) in any domestic corporation unless the taxpayer establishes that such corporation was at no time a USRPHC during the applicable testing period). The comment noted that requiring a qualified foreign pension fund to hold all of the creditor's interests issued by a qualified controlled entity would prevent the use of external

leverage by a qualified controlled entity, even though there is no such restriction on direct leveraged investments by a qualified foreign pension fund. The Treasury Department and the IRS agree that a creditor's interest in an entity should not be an interest taken into account for purposes of determining whether the entity is treated as a qualified controlled entity if the interest does not share in the earnings or growth of the entity. Section 1.897-1(d)(5) provides that, unless otherwise stated, the term "interest" as used with regard to an entity in the regulations under sections 897, 1445, and 6039C, means an interest other than an interest solely as a creditor. Given the absence of an express provision to the contrary in the proposed regulations, the application of §1.897-1(d)(5) results in an interest in an entity solely as a creditor not being taken into account for purposes of determining whether the entity is a qualified controlled entity.

4. Interaction with Section 892

Comments requested clarification that an entity may constitute a qualified controlled entity whether or not the entity constitutes a controlled entity as defined in §1.892-2T(a)(3). The Treasury Department and the IRS have determined that the definition of "qualified controlled entity" in the proposed regulations plainly does not limit qualified controlled entity status to only those entities that would qualify as a "controlled entity" within the meaning of §1.892-2T(a)(3). It is, therefore, unnecessary for these proposed regulations to provide an express rule.

5. De Minimis Ownership

A comment requested that the proposed regulations provide that de minimis ownership of a qualified controlled entity be disregarded under certain circumstances. For instance, the comment indicated that de minimis ownership, including by managers

or directors, may be required by corporate law in certain jurisdictions. The Treasury Department and the IRS have determined that permitting a person other than a qualified foreign pension fund to own an interest in a qualified controlled entity would impermissibly expand the scope of the exception in section 897(l) by allowing taxpayers other than qualified foreign pension funds to avoid tax under section 897. Accordingly, the proposed regulations do not permit ownership of a qualified controlled entity by a person other than a qualified foreign pension fund or another qualified controlled entity.

6. Avoidance of Section 897

One comment recommended that the Treasury Department and the IRS consider rules to prevent a qualified foreign pension fund from indirectly acquiring a USRPI held by a foreign corporation, which would permit the acquired corporation to avoid tax on gain that would otherwise be subject to tax under section 897. For example, assume that FP, a foreign corporation that is not a qualified holder, owns 100 percent of the stock of FS, a foreign corporation, and that FS owns a USRPI with a basis of \$80x and a fair market value of \$200x. Assume that FP sells the stock of FS to a qualified foreign pension fund. If FS were treated as a qualified controlled entity and FS later sold the USRPI for \$200x, neither FP nor FS would be subject to tax under section 897 on the \$120x gain attributable to its investment in the USRPI, even though the gain accrued while FS was owned by FP. Similar issues could arise with entities treated as part of an organization or arrangement that is a qualified foreign pension fund.

To address the inappropriate avoidance of section 897, the proposed regulations provide that a qualified holder does not include any entity or governmental unit that, at any time during the testing period, determined without regard to this limitation, was not a

qualified foreign pension fund, a part of a qualified foreign pension fund, or a qualified controlled entity. For this purpose, the testing period generally means the shortest of (i) the period beginning on the date that section 897(l) became effective (December 18, 2015), and ending on the date of a disposition described in section 897(a) or a distribution described in section 897(h), (ii) the ten-year period ending on the date of the disposition or the distribution, or (iii) the period during which the entity (or its predecessor) was in existence. This limitation does not apply to an entity or governmental unit that did not own a USRPI as of the date it became a qualified controlled entity, a qualified foreign pension fund, or part of a qualified foreign pension fund.

C. Organizations or arrangements

Section 897(l)(2) provides that a qualified foreign pension fund may include any “trust, corporation, or other organization or arrangement” that satisfies certain requirements. Congress intended the term “arrangement” to be a flexible term that accommodates a broad range of structures. See STAFF OF THE JOINT COMM. ON TAX'N, General Explanation of Tax Legislation Enacted in 2015 (JCS-1-16) (General Explanation) 283, n. 967 (2016) (“Foreign pension funds may be structured in a variety of ways, and may comprise one or more separate entities. The word ‘arrangement’ encompasses such alternative structures.”).

Several comments submitted in response to the updated section 1445 regulations described the multiple ways that foreign retirement and pension systems -- particularly those that are administered entirely or in part by a foreign government -- could be organized. The comments described structures involving multiple entities, one

or more accounts on government balance sheets, foreign legal structures, and a combination of the foregoing. Although such pension and retirement plans are often not organized as a single trust or corporation, the organizations or arrangements, when viewed as a whole, may satisfy the requirements set forth in section 897(l)(2). Based on the General Explanation's indication that foreign pension funds may be structured in a variety of ways, and may be comprised of separate entities, the comments recommended that the proposed regulations permit a broad range of alternative structures to be treated as a qualified foreign pension fund.

The Treasury Department and the IRS have determined that the purpose of section 897(l) is best served by permitting a broad range of structures to be eligible to be treated as a qualified foreign pension fund. Accordingly, the proposed regulations provide that, for purposes of section 897(l), the term "organization or arrangement" means one or more trusts, corporations, governmental units, or employers. The proposed regulations provide that the term "governmental unit" means any foreign government or part thereof, including any person, body, group of persons, organization, agency, bureau, fund, instrumentality, however designated, of a foreign government. The proposed regulations include several examples illustrating the application of the requirements of section 897(l) and the proposed regulations to different types of organizations and arrangements, including organizations and arrangements that include governmental units.

The proposed regulations permit an employer to be part of an organization or arrangement to address cases in which an employer is organized as an entity other

than a trust or corporation but operates as part of an organization or arrangement to provide pension or retirement benefits.

II. Requirements Applicable to a Qualified Foreign Pension Fund

A. Created or organized

Section 897(l)(2)(A) and the proposed regulations require that a qualified foreign pension fund must be created or organized under the law of a country other than the United States. Comments indicated that many foreign pension funds are created or organized under the laws of states or political subdivisions of a foreign country and requested that the proposed regulations clarify that those pension funds would satisfy section 897(l)(2)(A). The Treasury Department and the IRS agree that it is appropriate to allow such foreign pension funds to be considered qualified foreign pension funds. Accordingly, the proposed regulations provide that references to a foreign country include references to a state, province, or political subdivision of a foreign country, subject to an exception described in part II.E.4 of this Explanation of Provisions.

B. Established to provide retirement or pension benefits

Section 897(l)(2)(B) requires that an eligible fund be established either (i) by the country in which it is created or organized (or one or more political subdivisions thereof) to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (including self-employed individuals), or persons designated by such employees, as a result of services rendered by such employees to their employers; or (ii) by one or more employers to provide retirement or pension benefits to participants or beneficiaries that are current or former employees (including self-

employed individuals) or persons designated by such employees in consideration for services rendered by such employees to such employers.

1. Pension Funds Eligible for Section 897(l)(2)(B)

Several comments requested that the regulations clarify that multi-employer pension funds and government-sponsored public pension funds that provide pension and pension-related benefits may satisfy section 897(l)(2)(B). These comments are consistent with the General Explanation, which noted that “[m]ulti-employer and government-sponsored public pension funds that provide pension and pension-related benefits may still satisfy [section 897(l)(2)(B)]. For example, such pension funds may be established for one or more companies or professions, or for the general working public of a foreign country.” General Explanation at 283, n. 968.

The Treasury Department and the IRS agree that it is appropriate to allow such multi-employer pension funds and government-sponsored public pension funds to be considered qualified foreign pension funds. Accordingly, the proposed regulations provide that an eligible fund must be established by either (i) the foreign country in which it is created or organized to provide retirement or pension benefits to participants or beneficiaries that are current or former employees or persons designated by such employees as a result of services rendered by such employees to their employers, or (ii) one or more employers to provide retirement or pension benefits to participants or beneficiaries that are current or former employees or persons designated by such employees in consideration for services rendered by such employees to such employers.

Under the proposed regulations, qualified recipients generally include persons eligible to participate in the retirement or pension plan. Therefore, with respect to an eligible fund established by one or more employers, the term “qualified recipient” includes a current or former employee or any person designated by such current or former employee to receive qualified benefits. With respect to an eligible fund established by a foreign country to provide qualified benefits to qualified recipients as a result of services rendered by such qualified recipients to their employers, the term includes any person eligible to be treated as a participant or beneficiary of such eligible fund and any person designated by such person to receive qualified benefits. In response to comments, the proposed regulations provide that a person is treated as designating another person to receive qualified benefits if such other person is entitled to receive benefits under the contractual terms applicable to the eligible fund or under the laws of the foreign country in which the eligible fund is created or organized, whether or not the first person expressly designated such person as a beneficiary.

In response to comments, the proposed regulations clarify that a retirement or pension fund that is organized by a trade union, professional association, or similar group may be treated as a qualified foreign pension fund by providing that an eligible fund is treated as established by any employer that funds, in whole or in part, the eligible fund. In addition, the proposed regulations clarify that, for purposes of the requirement in section 897(l)(2)(B), a self-employed individual is treated as both an employer and an employee.

2. Benefits Other than Retirement or Pension Benefits

Comments noted that many foreign pension funds provide a limited amount of other benefits, including death, disability, survivor, medical, unemployment, and similar benefits, to participants and beneficiaries. Comments requested guidance on whether a qualified foreign pension fund could provide certain benefits other than retirement and pension benefits, and whether there is any limitation on the amount of those benefits that a qualified foreign pension fund may provide to participants and beneficiaries. Some comments recommended that the proposed regulations set forth a specific limitation on the percentage of benefits other than retirement or pension benefits that a qualified foreign pension fund may provide, while other comments recommended a facts and circumstances test or another subjective standard.

The Treasury Department and the IRS have determined that section 897(l) was not intended to exclude common foreign pension arrangements that provide a relatively small amount of ancillary benefits to participants and beneficiaries. The Treasury Department and the IRS have also determined that a specific limit on the percentage of ancillary benefits that a qualified foreign pension fund may provide to its participants and beneficiaries is more administrable and provides more certainty to taxpayers than a subjective standard. Accordingly, the proposed regulations require that all of the benefits that an eligible fund provides are qualified benefits to qualified recipients, and that at least 85 percent of the present value of the qualified benefits that the eligible fund reasonably expects to provide in the future are retirement or pension benefits. For this purpose, qualified benefits include retirement, pension, or ancillary benefits. The proposed regulations define ancillary benefits as benefits payable upon the diagnosis of a terminal illness, death benefits, disability benefits, medical benefits, unemployment

benefits, or similar benefits. The Treasury Department and the IRS request comments on whether the regulations should also define retirement or pension benefits (for example, with reference to whether there are penalties for early withdrawals).

3. Insuring Qualified Benefits and Similar Activities

One comment requested that the proposed regulations provide that an eligible fund may be treated as a qualified foreign pension fund if it is established by a foreign government to provide qualified benefits to qualified recipients (directly or indirectly) in the event that one or more qualified foreign pension funds that are created or organized in the same foreign country are unable to satisfy their liabilities with respect to the provision of qualified benefits to their own qualified recipients. Although the proposed regulations do not expressly address such plans, the proposed regulations do not differentiate between plans that are primarily responsible for the provision of qualified benefits to qualified recipients, on the one hand, and plans that are secondarily responsible for the provision of qualified benefits to qualified recipients, on the other hand. Therefore, whether a plan is established to provide qualified benefits to qualified recipients is determined without regard to whether such plan has primary responsibility to provide qualified benefits to qualified recipients or rather is established to provide the qualified benefits to qualified recipients only in the event of the default of one or more other plans.

C. Five percent limitation

Consistent with section 897(l)(2)(C), the proposed regulations provide that a qualified foreign pension fund may not have a single participant or beneficiary with a right to more than five percent of its assets or income (the five-percent limitation).

Comments submitted in response to the updated section 1445 regulations indicated that it would be appropriate for the proposed regulations to include attribution rules to prevent a single individual from using related parties to circumvent the five-percent limitation. The Treasury Department and the IRS agree with the comments.

Accordingly, the proposed regulations provide that, for purposes of applying the five percent limitation, an individual is considered to have a right to the assets and income of an eligible fund to which any person who bears a relationship to the individual described in section 267(b) or section 707(b) has a right.

One comment requested guidance on calculating a participant or beneficiary's entitlement to the assets and income of a qualified foreign pension fund for purposes of applying the five-percent limitation. In light of the complexity that any such rule would entail and the relatively few cases in which it would be expected to apply, the proposed regulations do not provide specific rules regarding the computation of the five-percent limitation. Instead, this determination should be made based on the underlying facts and circumstances of each case.

D. Regulation and information reporting

Section 897(l)(2)(D) and the proposed regulations set forth two requirements for a qualified foreign pension fund. First, a qualified foreign pension fund must be subject to government regulation ("regulation requirement"). Second, a qualified foreign pension fund must provide annual information about its beneficiaries to the relevant tax authorities in the country in which it is established or operates, or such information must otherwise be available to those authorities ("information requirement"). Several comments requested that the proposed regulations set forth the specific information that

must be provided or otherwise made available pursuant to the information requirement in section 897(l)(2)(D). The proposed regulations adopt the recommendation included in several comments by providing that an eligible fund is treated as satisfying the information requirement only if the eligible fund annually provides to the relevant tax authorities in the foreign country in which it is established or operates the amount of qualified benefits provided to each qualified recipient by the eligible fund (if any), or such information is otherwise available to those authorities. An eligible fund is not treated as failing to satisfy the information requirement if the eligible fund is not required to provide information to the relevant tax authorities in a year in which no qualified benefits are provided to qualified recipients. The Treasury Department and the IRS request comments as to whether the final regulations should permit other types of information to satisfy the information requirement.

Several comments indicated that foreign government-sponsored retirement and pension plans frequently are not subject to substantial information reporting and regulation compared with private foreign pension or retirement plans, in part because the government administers the pension or retirement program itself. The comments recommended that the proposed regulations treat a government-sponsored retirement or pension plan as automatically satisfying both the regulation and information requirements of section 897(l)(2)(D). The Treasury Department and the IRS agree that, when a government administers a pension or retirement plan itself, the requirements of section 897(l)(2)(D) are effectively satisfied because the government has control over the program and access to the information about the program's beneficiaries. Accordingly, the proposed regulations generally provide that an eligible fund that is

administered by one or more governmental units, other than in its capacity as an employer, is deemed to satisfy the requirements of section 897(l)(2)(D).

Comments noted that many foreign pension funds must provide information to one or more governmental bodies in the country in which the foreign retirement or pension fund is organized, including agencies that are specifically responsible for regulating pensions. In many cases, those governmental bodies may be distinct from the tax authority in that foreign country. In light of the wide range of foreign information reporting regimes that may apply to an eligible fund, the Treasury Department and the IRS agree that a flexible rule is necessary and appropriate to carry out the purposes of section 897(l). Accordingly, the proposed regulations provide that an eligible fund is treated as satisfying the information requirement of section 897(l)(2)(D) if the eligible fund is required, pursuant to the laws of the foreign country in which it is established or operates, to provide the required information to one or more governmental units of the foreign country in which the eligible fund is created or organized, or if such information is otherwise available to one or more governmental units of the foreign country in which the eligible fund is created or organized.

E. Foreign tax treatment

Section 897(l)(2)(E) and the proposed regulations provide that, to be a qualified foreign pension fund, the laws of the foreign country in which the eligible fund is established or operates must provide that either (i) contributions to the eligible fund that would otherwise be subject to tax under such laws are deductible or excluded from the gross income of the eligible fund or taxed at a reduced rate, or (ii) taxation of any

investment income of the eligible fund is deferred or such income is excluded from the gross income of the eligible fund or is taxed at a reduced rate.

1. Countries with No Income Tax

Comments requested clarification that an eligible fund may qualify for the exemption in section 897(l) if it is created or organized in a country that does not have an income tax. The Treasury Department and the IRS have determined that the purposes of section 897(l) would not be served by limiting the availability of the exemption to eligible funds organized in jurisdictions with an income tax. Accordingly, the proposed regulations provide that an eligible fund is treated as satisfying the requirement of section 897(l)(2)(E) if the eligible fund is established and operates in a foreign country that has no income tax.

2. Degree of Reduction

Comments noted that an eligible fund that otherwise satisfies section 897(l)(2)(E) may be subject to current income tax at ordinary rates with respect to a relatively small portion of its income or gain. The comments requested guidance on the percentage of income or contributions that must be eligible for preferential tax treatment in order for an eligible fund to satisfy section 897(l)(2)(E). Other comments requested guidance on the extent to which ordinary income tax rates must be reduced under section 897(l)(2)(E). To address these comments, the proposed regulations provide that an eligible fund is treated as satisfying the requirement of section 897(l)(2)(E) in a taxable year if, under the income tax laws of the foreign country in which the eligible fund is established or operates, at least 85 percent of the contributions to the eligible fund are deductible or excluded from the gross income or taxed at a reduced rate, or tax on at least 85 percent

of the investment income of the eligible fund is deferred or taxed at a reduced rate (including by excluding such investment income from gross income). The 85 percent threshold was chosen based on the best judgment of the Treasury Department and the IRS, and is consistent with suggestions from commenters for an appropriate threshold in an analogous context in the proposed regulations (namely, for the percentage of benefits provided by an eligible fund that must be retirement or pension benefits as opposed to ancillary benefits), but is not based on any specific quantitative analysis. The Treasury Department and the IRS request additional comments regarding whether the 85 percent threshold is appropriate and especially solicit comments that provide data, other evidence, and models that can enhance the rigor of the process by which such threshold is determined.

3. Other Preferential Regimes

Comments requested that the proposed regulations provide that the requirement of section 897(l)(2)(E) may be satisfied if, under the income tax law of the country in which an eligible fund is established or operates, an eligible fund is subject to a preferential tax regime that is, in substance, equivalent to the type of deductions or exclusions specifically described in section 897(l)(2)(E). For example, one comment described a preferential regime in which certain eligible funds taxable as insurance companies are entitled to reserve deductions designed to effectively exclude from gross income investment income earned by the eligible funds. The Treasury Department and the IRS agree that the purposes of section 897(l) are best served by accommodating a broad range of preferential tax regimes applicable to retirement or pension funds. Therefore, the proposed regulations provide that an eligible fund that is not specifically

subject to the tax treatment described in section 897(l)(2)(E) is nonetheless treated as satisfying the requirement of section 897(l)(2)(E) if the eligible fund establishes that it is subject to a preferential tax regime due to its status as a retirement or pension fund, and that the preferential tax regime has a substantially similar effect as the specific tax treatment described in section 897(l)(2)(E).

4. Subnational Tax Exemptions

One comment requested that the proposed regulations provide that preferential treatment with respect to a tax levied by a state, province, or political subdivision (sub-national tax) be sufficient to satisfy the requirement of section 897(l)(2)(E). The Treasury Department and the IRS have determined that the exemption in section 897(l) was not intended to benefit foreign persons that fail to benefit from an exemption from an otherwise applicable national income tax. Sub-national taxes generally constitute a minor component of an entity's overall tax burden in a foreign jurisdiction and therefore it would not be appropriate to allow preferential treatment with respect to sub-national taxes to satisfy the requirement of section 897(l)(2)(E) when such preference had only a minimal impact on reducing the fund's overall tax burden. Accordingly, the proposed regulations do not adopt this recommendation, and, to the contrary, provide that for purposes of section 897(l)(2)(E), references to a foreign country do not include references to a state, province, or political subdivision of a foreign country.

F. Application to organizations and arrangements

The proposed regulations provide rules on the application of the requirements described in section 897(l)(2) to an eligible fund that is an organization or arrangement.

1. Single Entity Treatment

The proposed regulations provide that an eligible fund that is an organization or arrangement is treated as a single entity to determine whether the requirements of section 897(l)(2) are satisfied. Notwithstanding the foregoing, the proposed regulations provide that each person or governmental unit that is part of an organization or arrangement must independently satisfy the requirement of section 897(l)(2)(A), such that each component of the organization or arrangement must be created or organized under the law of a country other than the United States.

2. Relevant Income and Assets

As noted in several comments, an eligible fund may be organized in various ways. For example, an eligible fund may be comprised of multiple entities and governmental bodies, one or more of which may conduct activities that are unrelated to the provision of retirement or pension benefits. Applying certain requirements of section 897(l)(2) to an eligible fund requires identifying the specific assets and income of an organization or arrangement that must be tested under the proposed regulations. For instance, under the proposed regulations, an organization or arrangement may include a pension system in which a private employer provides pension benefits to its employees that are funded by the investments of a separate entity, such as a pension trust organized by a foreign government. Assets and income of the private employer that do not fund the provision of pension benefits would generally not be relevant to determining whether the organization or arrangement satisfies the requirements of section 897(l)(2) and the proposed regulations. For instance, income of the employer generally would not be subject to preferential tax treatment, and the assets of the

employer not used to fund the provision of pension benefits would not be relevant for purposes of applying the five percent limitation in section 897(l)(2)(C).

Accordingly, the proposed regulations generally provide that the determination as to whether an eligible fund satisfies the requirements of section 897(l)(2) is made solely with respect to income and assets held by the eligible fund in one or more qualified segregated accounts, the qualified benefits funded by the qualified segregated accounts, the information reporting and regulation related to the qualified segregated accounts, and the qualified recipients whose benefits are funded by the qualified segregated accounts. For this purpose, all qualified segregated accounts maintained by an eligible fund are treated as a single qualified segregated account.

G. Coordination with definition of a pension fund under U.S. income tax treaties

Comments requested that the proposed regulations provide that an entity that qualifies as a pension fund or scheme under a U.S. income tax treaty or as an exempt beneficial owner under an intergovernmental agreement (IGA) is treated as a qualified foreign pension fund under section 897(l). The statute is clear that an exemption from section 897(a) is allowed only for entities meeting the definition of a “qualified foreign pension fund.” There is no indication in the legislative history that Congress intended the Treasury Department and the IRS to expand the exemption to entities that met the definition of a pension fund under a U.S. income tax treaty or IGA. Furthermore, the definitions of pension fund under a U.S. income tax treaty or IGA were designed with policy goals that are unrelated to section 897, and therefore pension funds as defined in those agreements are not necessarily the types of entities for which an exemption from section 897(a) is appropriate. Thus, a foreign pension fund that qualifies for other

benefits under an income tax treaty or IGA must make a separate determination as to whether it is a qualified foreign pension fund under section 897(l)(2).

III. Withholding Rules

Comments requested clarification regarding the documentation a qualified foreign pension fund should provide to a transferee or partnership to claim an exemption under section 897(l) and requested a form for this purpose. Comments suggested modifying existing forms, such as Form W-8EXP, Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding and Reporting, for this purpose. Comments also requested clarification regarding the reporting and withholding responsibilities of transferees and partnerships that receive documentation from a qualified foreign pension fund.

In response to comments, the IRS intends to revise Form W-8EXP to permit qualified holders to certify their status under section 897(l). Prior to the release of revised Form W-8EXP, a certificate of non-foreign status described in §1.1445-5(b)(3) may be used for purposes of both section 1445 and section 1446. In addition to permitting withholding agents and partnerships to rely on revised Form W-8EXP, the proposed regulations also integrate the new exception for qualified holders into existing reporting regimes as described below.

A. Withholding under section 1445

1. Withholding on Dispositions of USRPIs Under Section 1445(a)

Section 1445(a) requires a transferee to withhold 15 percent of the amount realized on any disposition of a USRPI by a foreign person. Section 1445(b)(2) provides that no withholding is required if the transferor furnishes to the transferee a

certificate of non-foreign status. Section 1445(f)(3)(B) provides that for purposes of section 1445, the term “foreign person” generally does not include an entity described in section 897(l)(1). The proposed regulations revise the updated section 1445 regulations to utilize the definitions in proposed §1.897(l)-1(d) and permit a qualified holder to certify that it is exempt from withholding under section 1445 by providing a certificate of non-foreign status to a withholding agent. The proposed regulations provide that a qualified holder may provide a Form W-8EXP for this purpose, but the transferee, at its option, may request a certification of non-foreign status or Form W-8EXP. Consistent with the approach of current §1.1445-2(b)(1) (permitting a transferee to request documentation satisfactory to the transferee), the transferee may withhold under section 1445 if the requested certification is not provided and will be considered to have been required to withhold for purposes of sections 1461 through 1463.

A transferee must report transactions subject to section 1445(a) using Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests, and Form 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests. §1.1445-1(c). However, because a transferee may treat a qualified holder as not foreign, the transferee is not required to file Form 8288 or Form 8288-A but is subject to the retention and reliance rules generally applicable to certificates of non-foreign status. See § 1.1445-2(b)(3).

2. Withholding on Certain Distributions Under Section 1445(e)

Certain distributions and other transactions involving domestic or foreign corporations, partnerships, trusts, and estates can give rise to a withholding requirement under section 1445(e). However, an entity or fiduciary is not required to

withhold under section 1445(e) with respect to a distribution or transfer to an interest holder that is not a foreign person. Consistent with the changes to the documentation requirements under section 1445(a), the proposed regulations provide that a qualified holder may provide a certificate of non-foreign status or a revised Form W-8EXP to certify its status as a qualified holder. Although providing such documentation will relieve the entity or fiduciary from withholding obligations under section 1445(e), any otherwise applicable reporting requirements (for example, reporting required on Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding) remain applicable.

B. Withholding under section 1446

A partnership determines whether it must withhold tax under section 1446 by first determining whether it has any foreign partners, and, if it does have foreign partners, by determining whether it has ECTI allocable under section 704 to any of its foreign partners. §1.1446-1(b). A partner that is treated as a U.S. person only for certain specified purposes is considered a foreign partner for purposes of section 1446. §1.1446-1(c)(1). Accordingly, a qualified holder is treated as a foreign partner for purposes of section 1446. However, the proposed regulations generally provide that any gain from the disposition of a USRPI, or distribution received from a QIE, that is not otherwise treated as effectively connected with a trade or business in the United States will not be treated as ECTI subject to section 1446 withholding to the extent allocable to a qualified holder.

A partnership may rely on a valid Form W-8 submitted for purposes of section 1441 or section 1442 to establish a partner's foreign status. §1.1446-1(c)(2)(ii). The

proposed regulations update the description of withholding certificates applicable to each type of partner by permitting a partnership to rely on Form W-8EXP both to determine a partner's foreign status and, as appropriate, to exclude any gain from the disposition of a USRPI, including any distribution treated as gain from the disposition of a USRPI under section 897(h), from the determination of such partner's allocable share of ECTI. A partnership may also rely on a certificate of non-foreign status to treat a partner as a qualified holder.

The proposed regulations do not modify general reporting requirements applicable to partnerships. For example, a partnership required to file a partnership return for a taxable year "shall furnish to every person who was a partner" a statement of the partner's distributive share of income, gain, loss, deduction, or credit. §1.6031(b)-1T. The requirement applies regardless of whether the partner is domestic or foreign. As a result, a partnership that is required to file Form 1065, U.S. Return of Partnership Income, and accompanying schedules must report income allocable to a qualified holder on Schedule K-1, Partner's Share of Income, Deductions, Credit, etc., notwithstanding that such income is exempt from section 897.

C. Coordination with sections 1441 and 1442

Sections 1441 and 1442 require withholding agents to deduct and withhold a 30 percent tax on payments of U.S. source fixed or determinable, annual or periodical income to foreign persons, including a U.S. source corporate distribution described in section 301(c)(1). A corporate distribution described in section 301(c)(2) or (c)(3) that is not subject to withholding under section 1441 or section 1442 (for example, because the distributing corporation made the election described in §1.1441-3(c)(1)) may

nonetheless be subject to withholding under section 1445 if the distributing corporation is a USRPHC or QIE. Section 1.1441-3(c)(4)(i)(A) and a similar rule in §1.1441-3(c)(4)(i)(C) coordinate withholding under sections 1441 and 1445 with respect to distributions from USRPHCs and QIEs. Because a qualified holder is treated as foreign for purposes of section 1441 but not for purposes of section 1445, distributions that would otherwise be subject to the coordination rule should be subject exclusively to section 1441 if made to a qualified holder. Accordingly, the proposed regulations provide that distributions made by a USRPHC or QIE to a qualified holder are not subject to the coordination rules under § 1.1441-3(c)(4) and instead are subject only to the requirements of section 1441.

IV. Applicability Dates

The proposed regulations are generally proposed to apply with respect to dispositions of USRPIs and distributions described in section 897(h) occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. However, proposed §§1.897(l)-1(b)(1), 1.897(l)-1(d)(5), 1.897(l)-1(d)(7), 1.897(l)-1(d)(9), 1.897(l)-1(d)(11), and 1.897(l)-1(d)(14) are proposed to apply with respect to dispositions of USRPIs and distributions described in section 897(h) occurring on or after **[INSERT DATE THIS DOCUMENT IS FILED FOR PUBLIC INSPECTION BY THE FEDERAL REGISTER]**. See section 7805(b)(1)(B).

These provisions contain definitions that prevent a person that would otherwise be a qualified holder from claiming the exemption under section 897(l) in situations where the exemption may inure, in whole or in part, to the benefit of a person other than a qualified recipient. See Section I.B.6 of this Explanation of Provisions. The Treasury

Department and the IRS have determined that an immediate applicability date under section 7805(b)(1)(B) is appropriate for these provisions in order to address transactions that are inconsistent with the purposes of section 897(l) that may occur before these rules are adopted as final regulations.

A taxpayer may rely on the proposed regulations with respect to dispositions or distributions occurring on or after December 18, 2015, and prior to the applicability date of the final regulations, if the taxpayer consistently and accurately complies with the rules in the proposed regulations.

Special Analyses

I. Regulatory Planning and Review -- Economic Analysis

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits, including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

These proposed regulations have been designated as a significant regulatory action by the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA") and subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

A. Background

Section 897, more commonly known as the Foreign Investment in Real Property

Tax Act (“FIRPTA”), was enacted in 1980 due to concerns that the Code provided foreign persons an advantage in investing in U.S. real property interests (USRPI) over U.S. taxpayers because, unlike U.S. taxpayers, foreigners were not subject to U.S. capital gains tax on dispositions of USRPI. Under FIRPTA, when a foreign person sells USRPI, any gain on the sale generally is subject to U.S. income tax.

Section 897(l), enacted in 2015 in the Protecting Americans from Tax Hikes Act (“PATH Act”), exempts qualified foreign pension funds (“QFPFs”) from tax under FIRPTA on gain from the sale of USRPI, the so-called “foreign pension fund exemption.” Such an exemption has the effect of encouraging foreign pension fund investment in the United States (through investment in real property) and, in general, provides consistent tax treatment between foreign pension funds and U.S. pension funds, which normally are not taxed at the entity level. This exemption is the subject of the proposed regulations.

The foreign pension fund exemption also affects a related withholding tax levied under section 1445 on the sale of USRPI to help enforce payment of the tax owed by reason of section 897. The rate for this withholding is 15 percent of gross sales. In cases where the gross withholding tax would exceed the tax owed on the net capital gains, foreigners typically request and receive approval for reduced rates of gross withholding tax. If withholding is excessive or insufficient relative to tax owed on the net capital gains, the difference is made up on the foreigner’s U.S. tax return. Thus, guidance that governs the foreign pension fund exemption additionally necessitates guidance over the withholding tax.

IRS tax data for 2015 and 2016 show an average of approximately 160 foreign

pension funds earning income from U.S. real property. Only a fraction of these funds are likely to sell or transfer USRPI in any given year.

B. The need for proposed regulations

Comments received indicate that some foreign pension funds have refrained from investment in U.S. real property, including infrastructure projects, due to ambiguities over their qualification for the foreign pension fund exemption. Affected parties have provided a number of comments requesting clarifications of the statutes. The Treasury Department and the IRS have determined that such comments warrant the issuance of further guidance. The proposed regulations do not specifically aim to increase or decrease foreign pension fund investment in the U.S. Instead, they aim to provide guidance such that investment can be made on an efficient basis consistent with the intents and purposes of the statute.

C. Summary of proposed regulations

The regulations clarify and modify the conditions under which foreign pension funds are exempt from taxation under section 897. In plain language, the proposed regulations provide further clarity over (a) the entities and organizational structures that are eligible for the foreign pension fund exemption; (b) the nature of the benefits, beneficiaries, and foreign taxation of eligible funds; and (c) the documentation rules that apply to exemptions from withholding taxes otherwise required by sections 1445 (these exemptions from withholding taxes flow from the foreign pension fund exemption from tax under section 897). In addition, the proposed regulations provide rules to prevent the inappropriate avoidance of FIRPTA by imposing conditions on the sale of certain investment vehicles wholly owned by a foreign pension fund.

D. Economic analysis

1. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of the proposed regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these proposed regulations.

2. Summary of Economic Effects

In general, a tax system that prioritizes minimization of distortions aims to treat income earned by similar economic activities similarly, subject to considerations of compliance burden and tax administrability and to the intents and purposes of Congress. The proposed guidance adheres to this principle. In plain language, section 897(l) exempts certain foreign pension funds from tax under FIRPTA, and the proposed guidance qualifies the terms of this exemption by further defining the permissible activities, ownership patterns, and other economic decisions undertaken by foreign pension funds. Such guidance helps ensure that the tax system does not favor or disfavor particular QFPF activities over economically similar QFPF activities, a requirement for an economically efficient tax system conditional on the underlying Code.

As a result of the added clarity and reduced compliance burdens relative to the baseline, the proposed regulations have the effect of providing more efficient investment incentives, relative to the baseline and in light of the intents and purposes of the statute. The Treasury Department and the IRS have not estimated the effects of the proposed regulations on the U.S. economy.

3. Economic Analysis of Specific Provisions

The Treasury Department and the IRS identified four provisions in the proposed regulations for which economic analysis might play a meaningful role in selecting the form of the regulations. This part I.D.2 of this Special Analyses describes this analysis. The Treasury Department and the IRS solicit comments on the economics of each of the items discussed subsequently and of any other items of the proposed regulations not discussed in this section. The Treasury Department and the IRS particularly solicit comments that provide data, other evidence, or models that could enhance the rigor of the process by which provisions might be developed for the final regulations.

a. Investing in USRPI directly and using pooled investment vehicles

Foreign pension funds often hold USRPI indirectly through intermediate entities, including entities with multiple foreign pension fund owners. While the statute contains language stating that an entity wholly owned by a QFPF is itself a QFPF, section 897(l) is silent on whether the entity must be wholly owned by a single QFPF (or, alternatively, may be wholly owned by multiple QFPFs).

Because the economic incentives faced by foreign pension funds under these various ownership structures regarding investment in USRPI are similar to the incentives faced by QFPFs with simpler structures, the Treasury Department and the IRS have determined that it would be consistent with the intents and purposes of the statute and minimize the potential for distortionary choices for them to be eligible for the foreign pension fund exemption. Thus, the proposed regulations explicitly allow indirect investments and pooled investments to qualify for the exemption. The Treasury Department and the IRS considered alternative guidance that was more restrictive than the proposed regulations but, under that alternative, foreign pension funds could avail

themselves of an exemption only on a more restricted set of U.S. investment options and would be denied the exemption on economically similar investments, a situation that would generally lead to an economically inferior outcome.

b. Avoidance through use of foreign subsidiary

A foreign person that is not a qualified foreign pension fund (“non-QFPF”) that holds USRPI directly would be taxed under FIRPTA if the non-QFPF sells the USRPI. If the non-QFPF instead holds USRPI indirectly through a foreign subsidiary, the non-QFPF can sell the foreign subsidiary without taxation under section 897, but, in that case, the unrealized gain in the USRPI would remain potentially subject to tax under FIRPTA on disposition of the USRPI. Absent a provision to the contrary in the proposed regulations, if the non-QFPF instead sells the foreign subsidiary to a QFPF, the QFPF could cause the foreign subsidiary to sell the USRPI immediately (or in the future) without incurring tax under section 897, thus eliminating the taxation (or potential for future taxation) of gain in the USRPI. As a result, subject to other provisions and judicial doctrines (for example, the step transaction doctrine and the economic substance doctrine), a QFPF could be used as a conduit for a non-QFPF to sell a USRPI to a purchaser without incurring (or preserving) tax under section 897 on the unrealized gain of the seller. The Treasury Department and the IRS project that such activity would reduce U.S. tax revenue and would not result in an accompanying economic benefit to the U.S. economy.

To curtail this tax avoidance, the proposed regulations provide a transitory restriction on exemption when a foreign subsidiary that owns USRPI is purchased by a QFPF or qualified controlled entity (“QCE”) of a QFPF from a non-QFPF or a foreign

person that is not a QCE. This transitory restriction, referred to as a testing period, is described in full in part I.B.6 of the Explanation of Provisions of the Preamble. Among other criteria, under the proposed regulations the foreign pension fund exemption generally is not available for gain recognized by an entity from the disposition of a USRPI if such entity was not a QFPF or QCE at any time during the 10-year period prior to the recognition of that gain.

The Treasury Department and the IRS considered as an alternative requiring the controlled entity acquired by the foreign pension fund to account for the gain at the time the entity was acquired by the foreign pension fund (known as mark-to-market) or requiring tracking of the unrealized gain at the time of sale to a QFPF or QCE for later recognition and also considered, under the testing period approach, different lengths for that component of the testing period. The mark-to-market or tracking approaches impose greater compliance and administrative costs relative to the testing period approach without providing any accompanying general economic benefit.

The Treasury Department and the IRS aim, through this testing period approach and accompanying requirements, to minimize tax avoidance while facilitating efficient foreign pension fund investment in USRPI, consistent with the intents and purposes of the statute. The Treasury Department and IRS solicit comments on this proposal, particularly comments that provide data, other evidence, or models that could enhance the rigor of the process by which anti-abuse provisions might be developed for the final regulations.

c. Ancillary benefits

Section 897(l) specifies, along with other qualifications, that the exemption is

available to foreign entities that are “established” to provide retirement or pension benefits. However, many foreign pension funds provide ancillary benefits such as death, terminal health, disability, medical, unemployment, and survivor benefits in addition to retirement and pension benefits. These funds may be reluctant to invest in USRPI due to uncertainty over whether the fund meets this particular statutory criterion.

The Treasury Department and the IRS considered an option to deny the exemption to foreign pension funds that provide any benefits other than retirement and pension benefits. This option runs the risk of effectively eliminating foreign pension fund investment in USRPI because it would deny the exemption to foreign pension funds no matter how close to 100 percent of their benefits were retirement or pension related, or would require funds that wanted to invest in the U.S. under competitive conditions to undergo costly restructuring to eliminate or segregate those benefits, if such options were even feasible under the foreign country’s laws and institutions. Both of these outcomes are economically inefficient relative to the proposed policies and the baseline because relative to these options, they incentivize socially costly tax avoidance choices and/or overly restrict incrementally improving market-driven choices.

The proposed regulations provide a bright-line test limiting the amount of ancillary benefits to 15 percent or lower. Such threshold was chosen in part based on suggestions from comments. The Treasury Department and the IRS aim, through the bright-line approach and this specific percentage test, to facilitate foreign pension fund investment in the U.S. consistent with the intents and purposes of the statute. The Treasury Department and the IRS solicit comments on this proposed standard, and particularly solicit comments that provide data, other evidence, or models that could

enhance the rigor of the process by which the percentage limitation might be developed for the final regulations.

The Treasury Department and the IRS recognize that the threshold approach may result in a small number of foreign pension funds oscillating between qualifying and not qualifying on a year-to-year basis and that such approach requires measurement of ancillary benefits relative to retirement and pension benefits. Thus, the Treasury Department and the IRS further solicit comments on alternatives to the threshold approach and particularly solicit comments that provide data, other evidence, or models that could enhance the rigor of the process by which the tax treatment of foreign pension funds that provide ancillary benefits might be developed for the final regulations.

d. Determination of foreign tax preference

Under the statute, to qualify for exemption a foreign pension fund must be subject to tax laws in the country in which the fund is established or operates such that contributions to the fund are deductible or excluded from the gross income of the fund or taxed at a reduced rate, or tax on investment income of the fund is deferred or that income is taxed a reduced rate.

To provide further specificity over what qualifies as a preferential tax rate on contributions to or income from the fund, the Treasury Department and the IRS considered providing a substantive, analytical test for determining whether a foreign pension fund benefits from a preferential tax rate. This option would prove difficult to administer and require complex rules to determine whether a pension fund benefits from a preferential tax regime in the country in which it is established.

To reduce compliance burden and enhance administrability, the proposed regulations expand the scope of the potential preferential tax regimes and provide a bright-line test for determining preferential treatment by setting a threshold (85 percent) for the percentage of fund contributions/income that is subject to a preferential regime. The 85 percent threshold was chosen in part based on suggestions from comments. The Treasury Department and the IRS aim, through this bright-line approach and this specific percentage test, to facilitate foreign pension fund investment in USRPI consistent with the intents and purposes of the statute while minimizing the costs of tax administrability.

The Treasury Department and the IRS solicit comments on this proposal, and in particular comments that provide data, other evidence, or models that could enhance the rigor of the process by which the 897(l)(2)(E) requirements might be developed for the final regulations.

II. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. (“PRA”), information collection requirements contained in these proposed regulations are in §§1.1441-3(c)(4)(iii), 1.1445-2, 1.1445-4, 1.1445-5, 1.1445-8, and 1.1446-1.

In 2018, the IRS released and took comment on drafts of three forms in order to give members of the public the opportunity to benefit from certain specific revisions made to the Code. The forms were Form 1042-S, “Foreign Person’s U.S. Source Income Subject to Withholding,” Form 1042, “Annual Withholding Tax Return for U.S. Source Income of Foreign Persons” and Form W-8EXP, “Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding or

Reporting.” The IRS received no comments on the forms during the comment period. Consequently, the IRS made the forms available for use by the public on November 30, 2018 (in the case of Form 1042-S), November 21, 2018 (in the case of Form 1042), and July 20, 2017 (in the case of Form W-8EXP). The IRS is contemplating making additional changes to those three forms in connection with these regulations.

The Treasury Department and the IRS request comments on all aspects of information collection burdens related to the proposed regulations, including estimates for how much time it would take to comply with the paperwork burdens described below for each relevant form and ways for the IRS to minimize the paperwork burden. Proposed revisions to these forms that reflect the information collections contained in these proposed regulations will be made available for public comment at www.irs.gov/draftforms [and will not be finalized until after these regulations take effect and have been approved by OMB under the PRA.](#) The Treasury Department and the IRS have not estimated the burden, including that of any new information collections, related to the requirements under the proposed regulations.

A. Information collections contained in § 1.1441-3(c)(4)(iii)

The proposed regulations provide that distributions made by a USRPHC or QIE to a qualified holder are subject only to the requirements of section 1441 and not the coordination rule under §1.1441-3(c)(4). Proposed §1.1441-3(c)(4)(iii). As a result, a USRPHC or QIE making a distribution to a qualified holder would be required to report the distribution on Form 1042-S, “Foreign Person’s U.S. Source Income Subject to Withholding,” and file Form 1042, “Annual Withholding Tax Return for U.S. Source Income of Foreign Persons.” For purposes of this reporting, the IRS is planning to

revise Form 1042-S to include an income code designating payments made to Qualified Foreign Pension Plans. No revisions are being made to Form 1042 in connection with payments made to Qualified Foreign Pension Plans.

For purposes of the PRA, the reporting burden associated with proposed §1.1441-3(c)(4)(iii) will be reflected in the PRA submissions for Form 1042 (OMB control numbers 1545-0123 for business filers and 1545-0096 for all other Form 1042 filers) and Form 1042-S (OMB control number 1545-0096). The PRA submissions for Form 1042 reflect IRS's transition to an updated statistical model that calculates burden based on the taxpayer filing experience as a whole. As such, Form 1042 is in a transition state, as the burden incurred by business filers is captured in OMB control number 1545-0123 (under the updated burden model) and the burden represented incurred by all other filers is represented in 1545-0096 (legacy model).

B. Information collections in §§1.1445-2, 1.1445-4, 1.1445-5, 1.1445-8, and 1.1446-1

Proposed §§1.1445-2, 1.1445-4, 1.1445-5, 1.1445-8, and 1.1446-1 would require a qualified foreign pension fund wishing to claim an exemption under section 897(l) to provide a withholding agent with either a Form W-8EXP, "Certificate of Foreign Government or Other Foreign Organization for United States Tax Withholding or Reporting," or, at a withholding agent's request and in lieu of Form W-8EXP, a certificate of non-foreign status containing the same information as Form W-8EXP. The IRS plans to revise Form W-8EXP for use by qualified foreign pension funds. For purposes of the PRA, the reporting burden associated with proposed §§1.1445-2, 1.1445-4, 1.1445-5, 1.1445-8, and 1.1446-1, will be reflected in the PRA submission for Form W-8EXP (OMB control number 1545-1621).

The reporting burdens associated with the information collections in the proposed regulations are included in the aggregate burden estimates for OMB control numbers 1545-0096 (which represents a total estimated burden time for all forms and schedules of 2.70 million hours) and 1545-1621 (which represents a total estimated burden time, including all other related forms and schedules for other filers, of 25.13 million hours and total estimated monetized costs of \$2.39 billion). The overall burden estimates for the OMB control numbers are aggregate amounts that relate to the entire package of forms associated with the applicable OMB control number and will in the future include, but not isolate, the estimated burden of the tax forms that will be or have been revised as a result of the information collections in the proposed regulations. These numbers are therefore unrelated to the future calculations needed to assess the burden imposed by the proposed regulations. These burdens have been reported for other regulations related to the taxation of cross-border income and the Treasury Department and the IRS urge readers to recognize that these numbers are duplicates and to guard against overcounting the burden that international tax provisions imposed prior to the PATH Act.

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the proposed rule will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act. This certification is based on the fact that foreign entities are not considered small entities. These regulations will affect foreign pension funds and not U.S. pension funds. In addition, based on comments received, the foreign pension funds that are affected are sovereign funds, which are not small entities. Accordingly, a

regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

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

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. In 2018, that threshold is approximately \$150 million. This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

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

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this Preamble under the “Addresses” heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are Joshua Rabon, formerly with the Office of Associate Chief Counsel (International), and Milton Cahn, Office of Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding entries to read in part as follows:

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

Section 1.897(l)-1 also issued under 26 U.S.C. 897(l).

* * * * *

Par. 2. Section 1.897(l)-1 is added to read as follows:

§1.897(l)-1 Exception for interests held by foreign pension funds.

(a) Overview. This section provides rules regarding the exception from section 897 for qualified holders. Paragraph (b) of this section provides the general rule excepting qualified holders from section 897. Paragraph (c) of this section provides the requirements that an eligible fund must satisfy to be treated as a qualified foreign pension fund. Paragraph (d) of this section provides definitions. Paragraph (e) of this section provides examples illustrating the application of the rules of this section. Paragraph (f) of this section provides applicability dates. For rules applicable to a qualified foreign pension fund or qualified controlled entity claiming an exemption from withholding under chapter 3, see generally §§1.1441-3, 1.1445-2, 1.1445-4, 1.1445-5, 1.1445-8, 1.1446-7.

(b) Exception from section 897--(1) In general. Gain or loss of a qualified holder from the disposition of a United States real property interest, including gain from a distribution described in section 897(h), is not subject to section 897(a).

(2) Limitation. Paragraph (b)(1) of this section applies solely with respect to gain or loss that is attributable to one or more qualified segregated accounts maintained by a qualified holder.

(c) Qualified foreign pension fund requirements--(1) In general. This paragraph (c) provides rules regarding the application of the requirements of section 897(l)(2) to an eligible fund. Paragraph (c)(2) of this section provides requirements that an eligible fund must satisfy to be treated as a qualified foreign pension fund. Paragraph (c)(3) of this section provides rules on the application of the requirements in paragraph (c)(2) of

this section, including rules regarding the application of the requirements in paragraph (c)(2) of this section to an eligible fund that is an organization or arrangement.

(2) Requirements applicable to an eligible fund--(i) Created or organized. An eligible fund must be created or organized under the law of a foreign country. For purposes of this paragraph (c)(2)(i), a governmental unit is treated as created or organized in the foreign country with respect to which it is, or is a part of, the foreign government.

(ii) Purpose of eligible fund--(A) In general. An eligible fund must be established by--

(1) The foreign country in which it is created or organized to provide retirement or pension benefits to participants or beneficiaries that are current or former employees or persons designated by such employees as a result of services rendered by such employees to their employers; or

(2) One or more employers to provide retirement or pension benefits to participants or beneficiaries that are current or former employees or persons designated by such employees in consideration for services rendered by such employees to such employers.

(B) Established to provide retirement or pension benefits. An eligible fund is treated as satisfying the requirement of paragraph (c)(2)(ii)(A) of this section if and only if--

(1) All of the benefits that an eligible fund provides are qualified benefits provided to qualified recipients; and

(2) At least 85 percent of the present value of the qualified benefits that the eligible fund reasonably expects to provide are retirement or pension benefits.

(C) Certain employers and employees. For purposes of this section, the following rules apply:

(1) A self-employed individual is treated as both an employer and an employee;

(2) Employees of an individual, trust, corporation, or partnership are treated as employees of each member of the employer group that includes the individual, trust, corporation, or partnership; and

(3) An eligible fund established by a trade union, professional association, or similar group is treated as established by any employer that funds, in whole or in part, the eligible fund.

(iii) Single participant or beneficiary--(A) In general. An eligible fund may not have a single qualified recipient that has a right to more than five percent of the assets or income of the eligible fund.

(B) Constructive ownership. For purposes of paragraph (c)(2)(iii)(A) of this section, an individual is considered to have a right to the assets and income of an eligible fund to which any person who bears a relationship to the individual described in section 267(b) or 707(b) has a right.

(iv) Regulation and information reporting--(A) In general. An eligible fund must--

(1) Be subject to government regulation, and

(2) Provide annual information about its beneficiaries to the relevant tax authorities in the foreign country in which it is established or operates, or such

information must otherwise be available to the relevant tax authorities in the foreign country in which it is established or operates.

(B) Information to be provided. An eligible fund is treated as satisfying the requirement of paragraph (c)(2)(iv)(A)(2) of this section only if the eligible fund annually provides to the relevant tax authorities in the foreign country in which it is established or operates the amount of qualified benefits provided to each qualified recipient by the eligible fund (if any), or such information is otherwise available to such relevant tax authorities. An eligible fund is not treated as failing to satisfy the requirement of paragraph (c)(2)(iv)(A)(2) of this section as a result of the eligible fund not being required to provide information to the relevant tax authorities in a year in which no qualified benefits are provided to qualified recipients.

(C) Relevant tax authorities. An eligible fund is treated as satisfying the requirement of paragraph (c)(2)(iv)(A)(2) of this section if the eligible fund is required, pursuant to the laws of the foreign country in which it is established or operates, to provide the information described in paragraph (c)(2)(iv)(B) of this section to one or more governmental units of the foreign country in which the eligible fund is created or organized, or if such information is otherwise available to one or more governmental units of the foreign country in which the eligible fund is created or organized.

(D) Treatment of certain governmental units. An eligible fund that is described in paragraph (c)(2)(ii)(A)(1) of this section, but is not also described in paragraph (c)(2)(ii)(A)(2) of this section, is deemed to satisfy the requirements of paragraph (c)(2)(iv)(A) of this section.

(v) Tax treatment--(A) In general. The laws of the foreign country in which the eligible fund is established or operates must provide that, due to the status of the eligible fund as a retirement or pension fund, either--

(1) Contributions to the eligible fund that would otherwise be subject to tax under such laws are deductible or excluded from the gross income of the eligible fund or taxed at a reduced rate; or

(2) Taxation of any investment income of the eligible fund is deferred or excluded from the gross income of the eligible fund or such income is taxed at a reduced rate.

(B) Income subject to preferential tax treatment. An eligible fund is treated as satisfying the requirement of paragraph (c)(2)(v)(A) of this section in a taxable year if, under the income tax laws of the foreign country in which the eligible fund is established or operates--

(1) At least 85 percent of the contributions to the eligible fund are subject to the tax treatment described in paragraph (c)(2)(v)(A)(1) of this section, or

(2) At least 85 percent of the investment income of the eligible fund is subject to the tax treatment described in paragraph (c)(2)(v)(A)(2) of this section.

(C) Income not subject to tax. An eligible fund is treated as satisfying the requirement of paragraph (c)(2)(v)(A) of this section if the eligible fund is exempt from the income tax of the foreign country in which it is established and operates or the foreign country in which it is established and operates has no income tax.

(D) Other preferential tax regimes. An eligible fund that does not receive the tax treatment described in either paragraphs (c)(2)(v)(A)(1) or (2) of this section is nonetheless treated as satisfying the requirement of paragraph (c)(2)(v)(A) of this

section if the eligible fund establishes that each of the conditions described in paragraphs (c)(2)(v)(D)(1) and (2) of this section is satisfied:

(1) Under the laws of the country in which the eligible fund is established and operates, the eligible fund is subject to a preferential tax regime due to its status as a retirement or pension fund; and

(2) The preferential tax regime described in paragraph (c)(2)(v)(D)(1) of this section has a substantially similar effect as the tax treatment described in paragraphs (c)(2)(v)(A)(1) or (2) of this section.

(E) Subnational jurisdictions. Solely for purposes of this paragraph (c)(2)(v), a reference to a foreign country does not include a reference to a state, province, or political subdivision of a foreign country.

(3) Rules on the application of the requirements in paragraph (c)(2) of this section--(i) In general. Except as provided in paragraph (c)(3)(ii) of this section, an organization or arrangement is treated as a single entity for purposes of determining whether the requirements of paragraph (c)(2) of this section are satisfied.

(ii) Foreign status determined independently. Each person or governmental unit that is part of an organization or arrangement must independently satisfy the requirement of paragraph (c)(2)(i) of this section.

(iii) Relevant income, assets, and functions. The determination of whether an eligible fund satisfies the requirements of paragraphs (c)(2)(ii) through (v) of this section is made solely with respect to the income and assets held by the eligible fund in one or more qualified segregated accounts, the qualified benefits funded by the qualified segregated accounts, the information reporting and regulation related to the qualified

segregated accounts, and the qualified recipients whose benefits are funded by the qualified segregated accounts. For this purpose, all qualified segregated accounts maintained by an eligible fund are treated as a single qualified segregated account.

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

(1) Ancillary benefits. The term ancillary benefits means benefits payable upon the diagnosis of a terminal illness, death benefits, disability benefits, medical benefits, unemployment benefits, or similar benefits.

(2) Eligible fund. The term eligible fund means a trust, corporation, or other organization or arrangement that maintains one or more qualified segregated accounts.

(3) Employer group. The term employer group means all individuals, trusts, partnerships, and corporations with a relationship to each other specified in section 267(b) or section 707(b).

(4) Foreign country. The term foreign country means a country other than the United States. Except for purposes of paragraph (c)(2)(v) of this section, references in this section to a foreign country include references to a state, province, or political subdivision of a foreign country. Solely for purposes of this section, the Commonwealth of Puerto Rico and any possession of the United States are treated as a foreign country.

(5) Governmental unit. The term governmental unit means any foreign government or part thereof, including any person, body, group of persons, organization, agency, bureau, fund, or instrumentality, however designated, of a foreign government.

(6) Organization or arrangement. The term organization or arrangement means one or more trusts, corporations, governmental units, or employers.

(7) Qualification date. The term qualification date means, with respect to an entity or governmental unit, the earliest date during an uninterrupted period ending on the date of the disposition or the distribution, as the case may be, in which the trust, corporation, governmental unit, or employer is a qualified foreign pension fund or a qualified controlled entity.

(8) Qualified benefits. The term qualified benefits means retirement, pension, or ancillary benefits.

(9) Qualified controlled entity. The term qualified controlled entity means a trust or corporation organized under the laws of a foreign country all of the interests of which are held by one or more qualified foreign pension funds directly or indirectly through one or more qualified controlled entities or partnerships.

(10) Qualified foreign pension fund. The term qualified foreign pension fund means an eligible fund that satisfies the requirements of paragraph (c) of this section.

(11) Qualified holder--(i) In general. The term qualified holder means a qualified foreign pension fund or a qualified controlled entity.

(ii) Limitation. Notwithstanding paragraph (d)(11)(i) of this section, a qualified holder does not include any trust, corporation, governmental unit, or employer that, at any time during the testing period, determined without regard to this paragraph (d)(11)(ii), was not a qualified foreign pension fund, a part of a qualified foreign pension fund, or a qualified controlled entity. The preceding sentence does not apply to an entity that owned no United States real property interests as of the qualification date.

(12) Qualified recipient--(i) In general. The term qualified recipient means--

(A) With respect to an eligible fund described in paragraph (c)(2)(ii)(A)(1) of this section, any person eligible to be treated as a participant or beneficiary of such eligible fund and any person designated by such participant or beneficiary to receive qualified benefits, and

(B) With respect to an eligible fund described in paragraph (c)(2)(ii)(A)(2) of this section, a current or former employee or any person designated by such current or former employee to receive qualified benefits.

(ii) Special rule regarding automatic designation. For purposes of paragraph (d)(12)(i) of this section, a person is treated as designating another person to receive benefits if the other person is, by reason of such person's relationship or other status with respect to the first person, entitled to receive benefits pursuant to the contractual terms applicable to the eligible fund or pursuant to the laws of the foreign country in which the eligible fund is created or organized, whether or not the first person expressly designated such person as a beneficiary.

(13) Qualified segregated account--(i) In general. The term qualified segregated account means an identifiable pool of assets maintained for the sole purpose of funding qualified benefits to qualified recipients.

(ii) Assets held by eligible funds. For purposes of paragraph (d)(13)(i) of this section, an identifiable pool of assets of an eligible fund is treated as maintained for the sole purpose of funding qualified benefits to qualified recipients only if the contractual terms applicable to the eligible fund or the laws of the foreign country in which the eligible fund is established or operates require that all the assets in the pool, and all the income earned with respect to such assets, be used exclusively to fund the provision of

qualified benefits to qualified recipients or to satisfy necessary reasonable expenses of the eligible fund, and that such assets or income may not inure to the benefit of a person other than a qualified recipient. For this purpose, the fact that assets or income may inure to the benefit of a governmental unit by operation of escheat or similar laws is ignored.

(iii) Assets held by qualified controlled entities. For purposes of paragraph (d)(13)(i) of this section, the assets of a qualified controlled entity are treated as an identifiable pool of assets maintained for the sole purpose of funding qualified benefits to qualified recipients only if both of the following requirements are satisfied:

(A) All of the net earnings of the qualified controlled entity are credited to its own account or to the qualified segregated account of a qualified foreign pension fund or another qualified controlled entity, with no portion of its income inuring to the benefit of a person other than a qualified recipient; and

(B) All of the assets of the qualified controlled entity, after satisfaction of liabilities to persons having interests in the entity solely as creditors, vest in a qualified segregated account of a qualified foreign pension fund or another qualified controlled entity upon dissolution.

(14) Testing period. The term testing period means, with respect to a trust, corporation, governmental unit, or employer and a disposition described in section 897(a) or a distribution described in section 897(h), as the case may be, the shortest of-

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(i) The period beginning on December 18, 2015, and ending on the date of the disposition or the distribution;

(ii) The ten-year period ending on the date of the disposition or the distribution;

and

(iii) The period during which the entity (or its predecessor) was in existence.

(e) Examples. This paragraph (e) provides examples that illustrate the rules of this section. The following examples do not illustrate the application of the applicable withholding rules, including sections 1445 and 1446 and the regulations thereunder. For the purposes of the examples in this paragraph (e), unless otherwise stated, the following facts are presumed. No person is entitled to more than five percent of any eligible fund's assets or income, taking into account the constructive ownership rules in paragraph (c)(2)(iii)(B) of this section. The limitation described in paragraph (d)(11)(ii) of this section does not apply to any entity.

(1) Example 1. No legal entity--(i) Facts. Country A establishes Retirement Plan for the sole purpose of providing retirement benefits to all citizens of Country A aged 65 or older. Retirement Plan is comprised of Asset Pool and Agency. Asset Pool is a group of accounts maintained on the balance sheet of the government of Country A. Pursuant to the laws of Country A, income and gain earned by Asset Pool is used solely to support the provision of retirement benefits by Retirement Plan. Agency is a Country A agency that administers the provision of benefits by Retirement Plan and manages Asset Pool's investments. Under the laws of Country A, investment income earned by Retirement Plan is not subject to Country A's income tax. In Year 1, Agency sells Property, which is an interest in real property located in the United States owned by Asset Pool, recognizing \$100x of gain with respect to Property that would be subject to tax under section 897(a) unless paragraph (b) of this section applies with respect to the gain.

(ii) Analysis. (A) Retirement Plan, which is comprised of Asset Pool and Agency, is comprised of one or more governmental units described in paragraph (d)(5) of this section. Accordingly, Retirement Plan is an organization or arrangement described in paragraph (d)(6) of this section. Furthermore, Retirement Plan maintains a qualified segregated account in the form of Asset Pool, an identifiable pool of assets maintained for the sole purpose of funding retirement benefits to beneficiaries of the Retirement Fund (qualified recipients as defined in paragraph (d)(12)(i)(A) of this section). Therefore, Retirement Plan is an eligible fund within the meaning of paragraph (d)(2) of this section.

(B) In determining whether or not Retirement Plan is an eligible fund that satisfies the requirements of paragraph (c)(2) of this section and is treated as a qualified foreign pension fund, the rules of paragraph (c)(3) of this section apply. Accordingly, the activities of Asset Pool and Agency are integrated and treated as undertaken by a single entity to determine whether the requirements of paragraphs (c)(2)(ii) through (v) of this section are met. However, Asset Pool and Agency must independently satisfy the requirement of paragraph (c)(2)(i) of this section.

(C) Retirement Plan is comprised of Asset Pool and Agency, each of which is a governmental unit and treated as created or organized under the law of Country A for purposes of paragraph (c)(2)(i) of this section. Accordingly, Retirement Plan satisfies the requirement of paragraph (c)(2)(i) of this section.

(D) Retirement Plan is established by Country A to provide retirement benefits, which are qualified benefits described in paragraph (d)(8) of this section, to all citizens of Country A, who are qualified recipients described in paragraph (d)(12)(i)(A) of this section because they are eligible to be participants or beneficiaries of Retirement Plan. In addition, all of the benefits that Retirement Plan provides are qualified benefits provided to qualified recipients, and at least 85 percent of the benefits that Retirement Plan reasonably expects to provide are retirement or pension benefits. Accordingly, Retirement Plan satisfies the requirement of paragraph (c)(2)(ii) of this section.

(E) Retirement Plan provides retirement benefits to all citizens of Country A aged 65 or older, with no citizen entitled to more than five percent of Retirement Fund's assets or to more than five percent of the income of the eligible fund. Accordingly, Retirement Plan satisfies the requirement of paragraph (c)(2)(iii) of this section.

(F) Retirement Plan is comprised solely of governmental units within the meaning of paragraph (d)(5) of this section. Accordingly, under paragraph (c)(2)(iv)(D) of this section, Retirement Plan is treated as satisfying the requirements of paragraph (c)(2)(iv)(A) of this section.

(G) Investment income earned by Retirement Plan is not subject to income tax in Country A. Accordingly, Retirement Plan satisfies the requirement of paragraph (c)(2)(v) of this section.

(H) Because Retirement Plan satisfies the requirements of paragraphs (c)(2)(i) through (v) of this section, Retirement Plan is a qualified foreign pension fund as defined in paragraph (d)(10) of this section. Because Retirement Plan is a qualified foreign pension fund and the limitation described in paragraph (d)(11)(ii) of this section does not apply, Retirement Plan is a qualified holder. Retirement Plan's gain with respect to Property is attributable solely to Asset Pool, a qualified segregated account maintained by Retirement Plan. Accordingly, under paragraph (b) of this section, the \$100x gain recognized by Retirement Plan attributable to the disposition of Property is not subject to section 897(a).

(2) Example 2. Fund established by an employer--(i) Facts. Employer, a corporation organized in Country B, establishes Fund to provide retirement benefits to current and former employees of Employer and S1, a Country B corporation that is wholly owned by Employer. Fund is established as a trust under the law of Country B, and Employer retains discretion to invest assets and to administer benefits on Fund's behalf. Fund receives contributions from Employer and contributions from employees that are beneficiaries of Fund. All contributions to Fund and all of Fund's earnings are separately accounted for on Fund's books and records and are required by Fund's organizational documents to exclusively fund the provision of benefits to Fund's beneficiaries, except as necessary to satisfy reasonable expenses of the Fund. Fund currently has over 100 beneficiaries, a number that is reasonably expected to grow as Employer expands. Fund will pay benefits to employees upon retirement based on years of service and employee contributions, but, if a beneficiary dies before retirement, Fund will pay a death benefit to the beneficiary's designee (or deemed designee under local law if the beneficiary fails to identify a beneficiary). It is reasonably expected that such death benefits will account for less than fifteen percent of the present value of the qualified benefits that Fund expects to provide in the future. Fund annually provides to the tax authorities of Country B the amount of qualified benefits distributed to each participant (or designee). Country B's tax authorities prescribe rules and regulations governing Fund's operations. Under the laws of Country B, Fund is not taxed on its investment income.

(ii) Analysis. (A) Fund is a trust that maintains an identifiable pool of assets for the sole purpose of funding retirement and ancillary benefits to current and former employees of Employer (qualified recipients as defined in paragraph (d)(12)(i)(B) of this section). All assets held by Fund, and all income earned by Fund, are used to provide such benefits. Therefore, Fund is a trust that maintains a qualified segregated account within the meaning of paragraph (d)(13) of this section. Accordingly, Fund is an eligible fund within the meaning of paragraph (d)(2) of this section.

(B) Because Fund is created or organized under the law of Country B, Fund satisfies the requirement of paragraph (c)(2)(i) of this section.

(C) All of the benefits provided by Fund are qualified benefits because the only benefits that Fund provides are pension or retirement benefits or ancillary benefits described in paragraph (d)(1) of this section, which are qualified benefits described in paragraph (d)(8) of this section, to qualified recipients. Furthermore, Fund reasonably anticipates that more than 85 percent of the present value of benefits paid to qualified participants will be retirement or pension benefits. Accordingly, Fund is established by Employer to provide retirement or pension benefits to qualified recipients in consideration for services rendered by such qualified recipients to such employers, and Fund satisfies the requirement of paragraph (c)(2)(ii) of this section.

(D) No single qualified recipient has a right to more than five percent of the assets or income of the eligible fund. Accordingly, Fund satisfies the requirement of paragraph (c)(2)(iii) of this section.

(E) Fund is regulated and annually provides to the relevant tax authorities in the foreign country in which it is established or operates the amount of qualified benefits provided to each qualified recipient by the eligible fund. Accordingly, Fund satisfies the requirements of paragraph (c)(2)(iv) of this section.

(F) Fund is not subject to income tax on its investment income. Accordingly, Fund satisfies the requirement of paragraph (c)(2)(v) of this section.

(G) Because Fund meets the requirements of paragraph (c)(2) of this section, Fund is treated as a qualified foreign pension fund described in paragraph (d)(10) of this section. As a qualified foreign pension fund with respect to which the limitation described in paragraph (d)(11)(ii) of this section does not apply, Fund is a qualified holder. All of Fund's assets are held in a qualified segregated account within the meaning of paragraph (d)(13) of this section. Consequently, under paragraph (b) of this section, any gain or loss of Fund from the disposition of a United States real property interest, including any distribution treated as gain from the disposition of a United States real property interest under section 897(h), is not subject to section 897(a).

(3) Example 3. Employer controlled group--(i) Facts. The facts are the same as in Example 2, except that S2, a Country B corporation that is wholly owned by Employer, performs all tax compliance functions for Employer, S1, and S2, including information reporting with respect to Fund participants.

(ii) Analysis. For purposes of testing the requirements of paragraph (c)(2) of this section, Fund and S2 are an organization or arrangement that is treated as a single entity under paragraph (c)(3)(i) of this section and an eligible fund under (d)(2) of this section with respect to the qualified segregated account held by Fund. Because the eligible fund comprised of Fund and S2 satisfies the requirements of paragraph (c)(2) of this section (including the requirement under paragraph (c)(3)(ii) of this section that each entity satisfy the foreign organization requirement of paragraph (c)(2)(i) of this section), the eligible fund that is comprised of Fund and S2 constitutes a qualified foreign pension fund described in paragraph (d)(10) of this section. Thus, under paragraph (b) of this section, gain or loss of Fund from the disposition of a United States real property interest, including any distribution treated as gain from the disposition of a United States real property interest under section 897(h), is not subject to section 897(a).

(4) Example 4. Third-party assumption of pension liabilities--(i) Facts. The facts are the same as in Example 2, except that Fund anticipates \$100x of qualified benefits will be paid each year beginning in Year 5. Fund enters into an agreement with Guarantor, a privately held Country B corporation, which provides that Fund will, in Year 1, cede a portion of its assets to Guarantor in exchange for annual payments of \$100x beginning in Year 5 and continuing until one or more previously identified participants (and their designees) ceases to be eligible to receive benefits. Guarantor has discretion to invest the ceded assets as it chooses, subject to certain agreed upon investment

restrictions. Pursuant to its agreement with Fund, Guarantor must maintain Segregated Pool, a pool of assets securing its obligations under its agreement with Fund. The value of Segregated Pool must exceed a specified amount (determined based on an agreed upon formula) until Guarantor's payment obligations are completed, and any remaining assets in Segregated Pool (that is, assets exceeding the required payments to Fund) are retained by Guarantor. Guarantor bears all investment risk with respect to Segregated Pool. Accordingly, Guarantor is required to make annual payments of \$100x to Fund regardless of the performance of Segregated Pool. In Year 2, Guarantor purchases stock in Company A, a United States real property holding company that is a United States real property interest, and holds the Company A stock in Segregated Pool. In Year 4, Guarantor sells the stock in Company A, realizing a gain of \$100x.

(ii) Analysis. The Segregated Pool is not a qualified segregated account, because it is not maintained for the sole purpose of funding qualified benefits to qualified recipients, and because income attributable to assets in the Segregated Pool (including the Company A stock) may inure to Guarantor, which is not a qualified recipient. Accordingly, Fund and Guarantor do not qualify as an organization or arrangement that is an eligible fund with respect to the Company A stock. Therefore, Guarantor is not exempt under paragraph (b) of this section with respect to the \$100x of gain realized in connection with the sale of its shares in Company A.

(5) Example 5. Asset manager--(i) Facts. The facts are the same as in Example 4 except that instead of ceding legal ownership of the assets to Guarantor, Fund transfers assets to Guarantor to be held in Trust on behalf of Fund. Guarantor has exclusive management authority over the assets, and is entitled to a reasonable fixed management fee which it withdraws annually from Trust's assets.

(ii) Analysis. Assets held by Fund, including its interest in Trust, are treated as held by Fund, a qualified holder within the meaning of paragraph (d)(11) of this section, in a qualified segregated account within the meaning of paragraph (d)(13) of this section. Paragraph (d)(13)(ii) of this section provides that the assets of the qualified segregated account may be used to satisfy reasonable expenses of the eligible fund, such that the reasonable fixed management fee paid to Guarantor does not cause the assets held in Trust to fail to be treated as held in a qualified segregated account. Consequently, the limitation of paragraph (b)(2) of this section does not apply and Fund Guarantor is exempt under paragraph (b) of this section with respect to the \$100x of gain realized in connection with the sale of its shares in Company A.

(6) Example 6. Partnership--(i) Facts. The facts are the same as in Example 4 except that instead of ceding legal ownership of the assets to Guarantor, Fund contributes the assets to a partnership (PRS) formed with Guarantor. Guarantor contributes nominal capital to the partnership, but receives a profits interest in the partnership that is reasonable in light of the Guarantor's management activity. Guarantor serves as the general partner of PRS and has discretionary authority to buy and sell PRS assets without approval from Fund.

(ii) Analysis. All of Fund's assets, including the partnership interest, are held in a qualified segregated account within the meaning of paragraph (d)(13) of this section. See Example 2, paragraph (ii)(A) of this section. Accordingly, Fund is exempt under paragraph (b) of this section with respect to gain or loss from the disposition of a United States real property interest, including any distribution treated as gain from the disposition of a United States real property interest under section 897(h), that is allocable to Fund from PRS. Guarantor is not exempt under paragraph (b) of this section with respect to gain or loss allocable to Guarantor from PRS.

(7) Example 7. Wholly-owned entity--(i) Facts. Fund is a qualified foreign pension fund organized in Country C that meets the requirements of paragraph (c)(2) of this section. Fund owns all the outstanding stock of OpCo, a manufacturing corporation organized in Country C, in a qualified segregated account maintained by Fund. Fund originally formed OpCo on January 1, 2016, for the purpose of conducting the manufacturing business and utilizing the business profits to fund pension liabilities. OpCo either retains or distributes to Fund all of its net earnings, and upon dissolution, must distribute all of its assets to stockholders after satisfaction of liabilities to its creditors. Fund has held all of the stock of OpCo since OpCo was formed. On June 1, 2017, OpCo realizes \$100 of gain on the disposition of Property A, a United States real property interest.

(ii) Analysis. (A) A qualified holder described in paragraph (d)(11) of the section includes a qualified controlled entity described in paragraph (d)(9) of this section. A qualified controlled entity includes any corporation organized under the laws of a foreign country all the interests of which are owned by one or more qualified foreign pension funds directly or indirectly through one or more qualified controlled entities. Fund is a qualified foreign pension fund that wholly owns OpCo. Accordingly, OpCo is a qualified controlled entity.

(B) A qualified controlled entity is a qualified holder under paragraph (d)(11) of this section, but only if the qualified controlled entity was a qualified controlled entity throughout the entire testing period. The testing period under paragraph (d)(14) of this section is the shortest of the period beginning on December 18, 2015, and ending on the date of the disposition or the distribution; the ten-year period ending on the date of the disposition or the distribution; or the period during which the entity was in existence. Thus, the testing period is January 1, 2016 (the date of formation) to June 1, 2017 (the date of the disposition). Because OpCo was a qualified controlled entity as defined in paragraph (d)(9) of this section at all times during that period, the limitation in paragraph (d)(11)(ii) of this section does not apply to OpCo, and OpCo is a qualified holder under paragraph (d)(11) of this section.

(C) Under paragraph (b)(2) of this section, only gain or loss attributable to a qualified segregated account is exempt under section 897(l). All of OpCo's net earnings are credited to its own account or distributed to Fund and credited to Fund's qualified segregated account. Upon dissolution, all of OpCo's assets, after satisfaction of liabilities to persons having interests in the entity solely as creditors, would be

distributed to OpCo's sole shareholder, Fund, and credited to Fund's qualified segregated account. Accordingly, all of OpCo's assets constitute a qualified segregated account. Therefore, the limitation in paragraph (b)(2) of this section does not apply, and the \$100x gain realized by OpCo, a qualified holder, from the disposition of Property A on June 1, 2017, is not subject to tax under section 897(a).

(8) Example 8. Not a qualified holder--(i) Facts. The facts are the same as in Example 7, except that Opco was formed by a person other than Fund on January 1, 2016, and Fund acquired all the stock of OpCo on November 1, 2016. During the period from January 1, 2016, and October 31, 2016, Opco was not a qualified foreign pension fund, a part of a qualified foreign pension fund, or a qualified controlled entity. OpCo owned Property A before November 1, 2016.

(ii) Analysis. Under paragraph (d)(11)(ii) of this section, a qualified holder does not include any entity that was not a qualified foreign pension fund, a part of a qualified foreign pension fund, or a qualified controlled entity at any time during the testing period. The testing period with respect to OpCo is the period from January 1, 2016 (the date of formation of OpCo) to June 1, 2017 (the date of the disposition). Because OpCo was not a qualified foreign pension fund, a part of a qualified foreign pension fund, or a qualified controlled entity from January 1, 2016 to November 1, 2016, OpCo was not a qualified foreign pension fund, a part of a qualified foreign pension fund, or a qualified controlled entity at all times during the testing period. Accordingly, OpCo is not a qualified holder with respect to the disposition of Property A, and the \$100x of gain recognized by OpCo is not exempt from tax under section 897(l), regardless of the amount of unrealized gain in Property A as of November 1, 2016.

(f) Applicability date--(1) In general. Except as otherwise provided in paragraph (f)(2) of this section, this section applies to a disposition of a United States real property interest, or a distribution described in section 897(h), occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

(2) Certain Provisions. Paragraphs (b)(1), (d)(5), (7), (9), (11), and (14) of this section apply with respect to dispositions of United States real property interests and distributions described in section 897(h) occurring on or after **[INSERT DATE THIS DOCUMENT IS FILED FOR PUBLIC INSPECTION BY THE FEDERAL REGISTER]**.

Par. 3. Section 1.1441-3 is amended by adding paragraph (c)(4)(iii) to read as follows:

§1.1441-3 Determination of amounts to be withheld.

* * * * *

(c) * * *

(4) * * *

(iii) Special rule for qualified holders--(A) In general. Any corporate distribution made by a USRPHC or a QIE to a payee that is a qualified holder (as defined in §1.897(l)-1(d)(11)) shall not be subject to the rules of this paragraph (c)(4) but shall be subject to the requirements of paragraphs (c)(1) through (3) of this section.

(B) Applicability date. Paragraph (c)(4)(iii)(A) of this section applies to distributions made by a USRPHC or a QIE occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

* * * * *

Par. 4. Section 1.1445-2 is amended by revising paragraphs (b)(1) and (b)(2)(i)(C) and adding paragraph (b)(2)(v) and a new sentence at the end of paragraph (e) to read as follows:

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

* * * * *

(b) * * *

(1) In general. No withholding is required under section 1445 if the transferor of a U.S. real property interest is not a foreign person. Therefore, paragraph (b)(2) of this

section provides rules pursuant to which the transferor can provide a certification of non-foreign status to inform the transferee that withholding is not required. A transferee that obtains such a certification must retain that document for five years, as provided in paragraph (b)(3) of this section. Except to the extent provided in paragraph (b)(4) of this section, obtaining this certification excuses the transferee from any liability otherwise imposed by section 1445 and §1.1445-1(e). However, section 1445 and the rules of this section do not impose any obligation upon a transferee to obtain a certification from the transferor; thus, a transferee may instead rely upon other means to ascertain the non-foreign status of the transferor. If, however, the transferee relies upon other means and the transferor was, in fact, a foreign person, then the transferee is subject to the liability imposed by section 1445 and §1.1445-1(e).

(i) A transferee is in no event required to rely upon other means to ascertain the non-foreign status of the transferor and may demand a certification of non-foreign status or Form W-8EXP in the case of a qualified holder (as defined in §1.897(l)-1(d)(11)). If the certification or form is not provided, the transferee may withhold tax under section 1445 and will be considered, for purposes of sections 1461 through 1463, to have been required to withhold such tax.

(ii) [Reserved]

(2) * * *

(i) * * *

(C) (1) Is signed under penalties of perjury.

(2) In general, a foreign person is a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate, except that a qualified

holder (as defined in §1.897(l)-1(d)(11)) is not a foreign person. Additionally, a foreign corporation that has made a valid election under section 897(i) is generally not treated as a foreign person for purposes of section 1445. In this regard, see §1.1445-7. Pursuant to §1.897-1(p), an individual's identifying number is the individual's Social Security number and any other person's identifying number is its U.S. employer identification number (EIN). A certification pursuant to this paragraph (b) must be verified as true and signed under penalties of perjury by a responsible officer in the case of a corporation, by a general partner in the case of a partnership, and by a trustee, executor, or equivalent fiduciary in the case of a trust or estate. No particular form is needed for a certification pursuant to this paragraph (b), nor is any particular language required, so long as the document meets the requirements of this paragraph (b)(2)(i). Samples of acceptable certifications are provided in paragraph (b)(2)(iv) of this section.

* * * * *

(v) Qualified holders. As an alternative to a certification of non-foreign status described in paragraph (b)(2)(i) of this section, a qualified holder (as defined in §1.897(l)-1(d)(11)) may provide a Form W-8EXP to certify that it is treated as not foreign for purposes of section 1445. A Form W-8EXP provided for this purpose is subject to the general requirements of a certification of non-foreign status. For example, a Form W-8EXP provided for this purpose must be retained for the five-year period described in paragraph (b)(3) of this section regardless of whether it is required to be retained for purposes of section 1441 and the regulations thereunder.

* * * * *

(e) * * * Paragraphs (b)(1), (b)(2)(i) and (v) of this section, as revised by the Treasury decision adopting these rules as final regulations, apply with respect to dispositions of U.S. real property interests and distributions described in section 897(h) occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 5. Section 1.1445-4 is amended by revising paragraphs (a)(2) and (b)(2) and adding paragraph (g) to read as follows:

§1.1445-4 Liability of agents.

(a) * * *

(2) The transferee is furnished with a non-foreign certification pursuant to §1.1445-2(b)(2) or a certification regarding qualified holder status provided on Form W-8EXP and either:

(i) The agent knows that the certification is false; or

(ii) The agent represents a transferor that is a foreign corporation that is not a qualified holder. An agent that represents a transferor that is a foreign corporation is not required to provide notice to the transferee if the foreign corporation provided a non-foreign certification or certification regarding qualified holder status provided on Form W-8EXP, as applicable, to the transferee prior to such agent's employment and the agent does not know that the corporation did so.

(b) * * *

(2) The entity or fiduciary is furnished with a non-foreign certification pursuant to §1.1445-5(b)(3)(ii) or a certification regarding qualified holder status provided on Form W-8EXP and either:

(i) The agent knows that such certification is false; or

(ii) The agent represents a foreign corporation (other than a qualified holder) that made such a certification.

* * * * *

(g) Certain applicability dates. Paragraphs (a)(2) and (b)(2) of this section, as revised by the Treasury decision adopting these rules as final regulations, apply with respect to dispositions of U.S. real property interests and distributions described in section 897(h) occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 6. Section 1.1445-5 is amended by revising paragraph (b)(3)(ii)(A) and adding a new sentence at the end of paragraph (h) to read as follows:

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

* * * * *

(b) * * *

(3) * * *

(ii) * * *

(A) In general. For purposes of this section, an entity or fiduciary may treat any holder of an interest in the entity as a U.S. person if that interest-holder furnishes to the entity or fiduciary a certification stating that the interest-holder is not a foreign person, in accordance with the provisions of paragraph (b)(3)(ii)(B) of this section. In general, a foreign person is a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate, except that a qualified holder (as defined in §1.897(l)-1(d)(11)) is not a foreign person.

* * * * *

(h) * * * Paragraph (b)(3)(ii)(A) of this section, as revised by the Treasury decision adopting these rules as final regulations, applies with respect to dispositions of U.S. real property interests and distributions described in section 897(h) occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 7. Section 1.1445-8 is amended by revising paragraph (e) and adding paragraph (j) to read as follows:

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

* * * * *

(e) Determination of non-foreign status by withholding agent. A withholding agent may rely on a certificate of non-foreign status pursuant to §1.1445-2(b), a Form W-9, a Form W-8EXP (in the case of a qualified holder (as defined in §1.897(l)-1(d)(11)), or a form that is substantially similar to such forms, to determine whether an interest holder is not a foreign person. Reliance on these documents will excuse the withholding agent from liability imposed under section 1445(e)(1) in the absence of actual knowledge that the interest holder is a foreign person. A withholding agent may also employ other means to determine the status of an interest holder, but, if the agent relies on such other means and the interest holder proves, in fact, to be a foreign person, then the withholding agent is subject to any liability imposed pursuant to section 1445 and the regulations thereunder for failure to withhold.

* * * * *

(j) Certain applicability dates. Paragraph (e) of this section, as revised by the Treasury decision adopting these rules as final regulations, applies with respect to dispositions of U.S. real property interests and distributions described in section 897(h) occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 8. Section 1.1446-1 is amended by revising the second sentence of paragraph (c)(2)(ii)(G) and revising paragraph (c)(2)(ii)(H) to read as follows:

§1.1446-1 Withholding tax on foreign partners' share of effectively connected taxable income.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

(G) * * * However, except as set forth in §1.1446-2(b)(2)(iii)(B) (regarding certain qualified holders described in §1.897(l)-1(d)(11)) and §1.1446-3(c)(3) (regarding certain tax-exempt organizations described in section 501(c)), the submission of Form W-8EXP will have no effect on whether there is a 1446 tax due with respect to such partner's allocable share of partnership ECTI. * * *

(H) Foreign corporations, certain foreign trusts, and foreign estates. Consistent with the rules of this paragraph (c)(2) and (3) of this section, a foreign corporation, a foreign trust (other than a foreign grantor trust described in paragraph (c)(2)(ii)(E) of this section), or a foreign estate may generally submit any appropriate Form W-8 (e.g., Form W-8BEN-E or Form W-8IMY) to the partnership to establish its foreign status for purposes of section 1446. In addition to Form W-8BEN-E, a foreign entity may also

submit Form W-8EXP or a certification of non-foreign status described in §1.1445-5(b)(3) for purposes of documenting itself as a qualified holder (as defined in §1.897(l)-1(d)(11)).

* * * * *

Par. 9. Section 1.1446-2 is amended by adding paragraph (b)(4)(iii) to read as follows:

§1.1446-2 Determining a partnership's effectively connected taxable income allocable to foreign partners under section 704.

* * * * *

(b) * * *

(4) * * *

(iii) Special rule for qualified holders. With respect to a foreign partner that is a qualified holder (as defined in §1.897(l)-1(d)(11)), the foreign partner's allocable share of partnership ECTI does not include gain or loss that is not taken into account by the qualified holder under §1.897(l)-1(b) and that is not otherwise treated as effectively connected with a trade or business in the United States. The partnership must have received from the partner a valid certificate of non-foreign status or Form W-8EXP. See §1.1446-1(c)(2)(ii)(G) and (H) regarding documentation of qualified holders.

* * * * *

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

§1.1446-7 Effective/Applicability date.

* * * Sections 1.1446-1(c)(2)(ii)(G) and (H) and 1.1446-2(b)(2)(iii)(A) and (B), as revised by the Treasury decision adopting these rules as final regulations, apply with respect to dispositions of U.S. real property interests and distributions described in section 897(h) occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Kirsten Wielobob

Deputy Commissioner for Services and Enforcement.

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