



This document is scheduled to be published in the Federal Register on 02/19/2016 and available online at <http://federalregister.gov/a/2016-03421>, and on FDsys.gov

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9751]

RIN 1545-BN22

PATH Act Changes to Section 1445

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations relating to the taxation of, and withholding on, foreign persons upon certain dispositions of, and distributions with respect to, United States real property interests (USRPIs). The regulations reflect changes made by the Protecting Americans from Tax Hikes Act of 2015 (the PATH Act). In addition, the regulations update certain mailing addresses listed in regulations under sections 897 and 1445. These regulations affect certain holders of USRPIs and withholding agents that are required to withhold tax on certain dispositions of, and distributions with respect to, USRPIs. This document also requests comments on certain other aspects of the PATH Act that apply to dispositions of, and distributions with respect to, USRPIs.

DATES: Effective date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability date: For dates of applicability, see §§1.1445-1(h), 1.1445-2(e), and 1.1445-5(h).

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-101329-16), room 5203, Internal Revenue Service, 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-101329-16), 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-101329-16).

FOR FURTHER INFORMATION CONTACT: Milton M. Cahn or David A. Levine, (202) 317-6937; concerning submissions of comments, Regina Johnson, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations were previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under control numbers 1545-0123, 1545-0902, and 1545-1797 in conjunction with Treasury decisions 7999 (49 FR 50689, Dec. 31, 1984), 8113 (51 FR 46620, Dec. 24, 1986), and 9082 (68 FR 46081, Aug. 5, 2003), respectively. There are no proposals for substantive changes to these collections of information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 897(a)(1) provides, in general, that gain or loss of a nonresident alien individual or foreign corporation from the disposition of a United States real property interest (USRPI) shall be 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 to include 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 USRPHC). 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, and 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 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 (the cleansing exception).

Section 1445(a) generally imposes a withholding tax obligation on the transferee when a foreign person disposes of a USRPI. Section 1445(f)(3) provides that a foreign person is any person other than a United States person. Section 1445(e)(3) generally imposes a withholding obligation on a domestic corporation that is a USRPHC on distributions to foreign persons to which section 302 or sections 331 through 346 apply. Section 1445(e)(3) also provides that similar rules are applicable to distributions to foreign persons under section 301 that are not made out of the earnings and profits of the domestic corporation. Section 1445(e)(4) generally requires a domestic or foreign partnership, the trustee of a domestic or foreign trust, or the executor of a domestic or foreign estate to withhold on the distribution of any USRPI to a partner or beneficiary who is a foreign person. Under section 1445(e)(5), the transferee of a partnership interest or of a beneficial interest in a trust or estate is required to deduct and withhold tax to the extent provided in regulations. Any amounts withheld under section 1445 are credited against the foreign transferor's U.S. tax liability. §1.1445-1(f)(1).

Before the enactment of the Protecting Americans from Tax Hikes Act of 2015, Public Law 114-113 (the PATH Act), the withholding rate under sections 1445(a), 1445(e)(3), 1445(e)(4), and 1445(e)(5) was 10 percent of either the amount realized or the fair market value of the interest, as applicable. Section 324(a) of the PATH Act increased the withholding rate under these sections from 10 percent to 15 percent. This new rate applies to dispositions after February 16, 2016. Section 324(b) of the PATH Act, however, retained the 10-percent withholding rate in the case of a disposition of

property that is acquired by the transferee for his or her use as a residence with respect to which the amount realized is greater than \$300,000 but does not exceed \$1 million.

Section 325 of the PATH Act provides that the cleansing exception will not apply to dispositions on or after December 18, 2015, if the corporation or its predecessor was a real estate investment trust or a regulated investment company at any time during the shorter of the period that the shareholder held the interest or the five-year period ending on the date of the disposition of the shareholder's interest in the corporation.

Section 323(a) of the PATH Act added section 897(l), which provides that section 897 does not apply (i) to USRPIs held directly (or indirectly through one or more partnerships) by, or (ii) to distributions received from a real estate investment trust by, a qualified foreign pension fund or an entity wholly owned by a qualified foreign pension fund. Section 897(l)(2) defines a qualified foreign pension fund for purposes of section 897(l), and section 897(l)(3) provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of section 897(l). In addition, section 323(b) of the PATH Act amended the definition of foreign person in section 1445(f)(3) to provide that entities described in section 897(l) are not treated as foreign persons for purposes of section 1445, except as otherwise provided by the Secretary. The amendments in section 323 of the PATH Act are applicable to dispositions and distributions after December 18, 2015.

Explanation of Provisions

These regulations update §1.897-2 and §§1.1445-1 through 1.1445-5, and append an informational footnote to §1.1445-11T(d)(2)(iii), to reflect changes made by the PATH Act.

Additionally, for certain filings that are described in regulations under sections 897 and 1445, these regulations provide that the mailing address is the address specified in the Instructions for Form 8288 under the heading “Where To File.”

Applicability Dates

Consistent with the PATH Act, the revisions to §1.1445-2 to incorporate the exemption under section 1445(f)(3) for entities described in section 897(l) apply to dispositions and distributions after December 18, 2015, and the revisions to §1.897-2 regarding the cleansing exception apply to dispositions on or after December 18, 2015. The new withholding rates described in these regulations apply to dispositions of, and distributions with respect to, USRPIs that occur after February 16, 2016.

Beginning after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, taxpayers are required to use the revised mailing address provided in these regulations. However, the IRS will not assert penalties against taxpayers that use the mailing address previously specified in the regulations on or before **[INSERT DATE THAT IS 120 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Any prior timely filings made pursuant to the regulations under sections 897 and 1445 that were mailed to the address specified in the Instructions for Form 8288 under the heading “Where To File,” instead of the address previously specified in the regulations, have been accepted by the IRS.

Request for Comments

The Treasury Department and the IRS request comments regarding what regulations, if any, should be issued pursuant to section 897(l)(3). All comments that

are submitted as prescribed in this preamble under the “Addresses” heading will be available at www.regulations.gov or upon request.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. Because no notice of proposed rulemaking is required, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

The Treasury Department and the IRS have determined that section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. chapter 5) does not apply to these regulations, including because good cause exists under section 553(b)(B) of the APA. Section 553(b)(B) of the APA provides that an agency is not required to publish a notice of proposed rulemaking in the Federal Register when the agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. These regulations are necessary to ensure that existing regulations for transferees and other parties properly reflect the changes implemented by the PATH Act. Because these regulations merely conform the regulations to certain changes made by the PATH Act, and update certain mailing addresses, prior notice and public comment is unnecessary. Accordingly, good cause exists for dispensing with notice and public comment pursuant to section 553(b) of the APA. For the same reasons that section 553(b) of the APA does not apply, including because good cause exists under section 553(d)(3) of the APA, the requirements in section 553(d) of the APA for a delayed effective date are inapplicable.

Drafting Information

The principal authors of these regulations are Milton M. Cahn and David A. Levine of the Office of Associate Chief Counsel (International). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

Par. 2. Section 1.897-2 is amended as follows:

1. By removing “, and” at the end of paragraph (f)(2)(i) and adding a semicolon in its place.

2. By removing the period at the end of paragraph (f)(2)(ii) and adding “; and” in its place.

1. By adding paragraph (f)(2)(iii) before the existing undesignated paragraph.

2. In each of the paragraphs listed in the first column by removing the language in the “Remove” column and adding in its place the language in the “Add” column.

| <u>Paragraph</u> | <u>Remove</u> | <u>Add</u> |
|----------------------------|--|---|
| (h)(2)(v), third sentence | the Director, Philadelphia Service Center, P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586 | the address specified in the Instructions for Form 8288 under the heading “Where To File” |
| (h)(4)(ii), first sentence | the Director, Philadelphia | the address specified in the |

| | | |
|--|---|--|
| | Service Center, P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586 | Instructions for Form 8288 under the heading “Where To File” |
|--|---|--|

The revision and addition reads as follows:

§1.897-2 United States real property holding corporations.

* * * * *

(f) * * *

(2) * * *

(iii) If the disposition occurs on or after December 18, 2015, neither the corporation nor any predecessor of the corporation was a regulated investment company or a real estate investment trust at any time during the shorter of the periods described in section 897(c)(1)(A)(ii).

* * * * *

§1.897-3 [Amended]

Par. 3. Section 1.897-3 is amended in each of the paragraphs listed in the first column by removing the language in the “Remove” column and adding in its place the language in the “Add” column.

| <u>Paragraph</u> | <u>Remove</u> | <u>Add</u> |
|---------------------------------------|---|--|
| (c) introductory text, first sentence | with the Director, Philadelphia Service Center, P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586 | at the address specified in the Instructions for Form 8288 under the heading “Where To File” |
| (d)(1), fourth sentence | the Philadelphia Service Center | the address specified in the Instructions for Form 8288 under the heading “Where To File” |

| | | |
|-------------------------|---|--|
| (f)(1), second sentence | addressed to the Director, Philadelphia Service Center, P.O. Box 21086, Drop Point 8731, FIRPTA Unit, Philadelphia, PA 19114-0586 | delivered to the address specified in the Instructions for Form 8288 under the heading "Where To File" |
| (f)(1), fifth sentence | the Director, Philadelphia Service Center | the address specified in the Instructions for Form 8288 under the heading "Where To File" |

Par. 4. Section 1.1445-1 is amended as follows:

1. By revising the first sentence and removing the last sentence of paragraph (b)(1).
2. By redesignating paragraphs (b)(2) through (4) as paragraphs (b)(3) through (5) respectively.
3. By adding a new paragraph (b)(2).
4. By revising paragraph (g)(10).
5. By revising the heading and adding two sentences after the first sentence in paragraph (h).
6. In each of the paragraphs listed in the first column by removing the language in the "Remove" column and adding in its place the language in the "Add" column.

| <u>Paragraph</u> | <u>Remove</u> | <u>Add</u> |
|---|----------------------|---|
| (a), second sentence | 10 percent | 15 percent (10 percent in the case of dispositions described in paragraph (b)(2) of this section) |
| newly designated (b)(4)(iii), first sentence | 10 percent | 15 percent |
| newly designated (b)(4)(iii), second sentence | §1.1445-1(b)(3)(iii) | paragraph (b)(4)(iii) |
| (c)(2)(i)(A), first sentence | 10 percent | 15 percent (10 percent in the case of dispositions) |

| | | |
|------------------------------|------------|---|
| | | described in paragraph (b)(2) of this section) |
| (c)(2)(i)(B), third sentence | 10 percent | 15 percent (10 percent in the case of dispositions described in paragraph (b)(2) of this section) |

The additions and revisions read as follows:

§1.1445-1 Withholding on dispositions of U.S. real property interests by foreign persons: In general.

* * * * *

(b) Duty to withhold—(1) In general. Except as provided in paragraph (b)(2) and §§1.1445-2 and 1.1445-3, transferees of U.S. real property interests are required to deduct and withhold a tax equal to 15 percent of the amount realized by the transferor if the transferor is a foreign person.* * *

(2) Reduced rate for certain residences. Transferees of U.S. real property interests are required to deduct and withhold a tax equal to 10 percent of the amount realized by the transferor if the transferor is a foreign person and the following requirements are satisfied:

- (i) the property is acquired by the transferee for use by the transferee as a residence;
- (ii) the amount realized for the property does not exceed \$1,000,000; and
- (iii) section 1445(b)(5) does not apply to the disposition. See §1.1445-2(d)(1).

* * * * *

(g) * * *

(10) Address for correspondence. Any written communication to the Internal Revenue Service described in this section is to be mailed to the address specified in the Instructions for Form 8288 under the heading “Where To File.”

(h) Applicability dates. * * * The withholding rates set forth in paragraphs (a), (b)(1), (b)(2), (b)(4)(iii), (c)(2)(i)(A), and (c)(2)(i)(B) of this section apply to dispositions after February 16, 2016. For dispositions on or before February 16, 2016, see paragraphs (a), (b)(1), (b)(3)(iii), (c)(2)(i)(A), and (c)(2)(i)(B) of this section as contained in 26 CFR part 1 revised as of April 1, 2015.

Par. 5. Section 1.1445-2 is amended as follows:

1. By revising the first sentence in the undesignated paragraph following paragraph (b)(2)(i)(C).
2. In paragraph (b)(4)(iv), by adding a sentence after the last sentence.
3. In paragraph (e), by revising the heading and adding two sentences after the first sentence.
4. In each of the paragraphs listed in the first column by removing the language in the “Remove” column and adding in its place the language in the “Add” column.

| <u>Paragraph</u> | <u>Remove</u> | <u>Add</u> |
|--|---|---|
| (b)(4)(iv), second sentence | 10 percent | 15 percent |
| (b)(4)(iv), third sentence | 10 percent | 15 percent |
| (b)(4)(iv), fourth sentence | 10 percent | 15 percent |
| (c)(3)(iii), second sentence | 10 percent | 15 percent |
| (c)(3)(iii), third sentence | 10 percent | 15 percent |
| (c)(3)(iii), fourth sentence | 10 percent | 15 percent |
| (d)(2)(i)(B), first sentence | provides a copy of the transferor’s notice to the Director, Philadelphia Service Center | mails a copy of the transferor’s notice to the Internal Revenue Service |
| (d)(3)(i)(A) introductory text, first sentence | 10 percent | 15 percent (10 percent in the case of dispositions) |

| | | |
|--|------------|--|
| | | described in §1.1445-1(b)(2)) |
| (d)(3)(i)(B) introductory text, first sentence | 10 percent | 15 percent (10 percent in the case of dispositions described in §1.1445-1(b)(2)) |

The additions and revision read as follows:

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

* * * * *

(b) * * *

(2) * * *

(i) * * *

(C) * * *

In general, a foreign person is a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate, but not a qualified foreign pension fund (as defined in section 897(l)) or an entity all of the interests of which are held by a qualified foreign pension fund. * * *

(4) * * *

(iv) * * * For dispositions described in §1.1445-1(b)(2), this paragraph shall be applied by replacing “15 percent” with “10 percent” each time it appears.

* * * * *

(e) Applicability dates. * * * The exclusion of entities described in section 897(l) from the definition of foreign person in paragraph (b)(2)(i) of this section applies to dispositions and distributions after December 18, 2015, and the withholding rates set forth in paragraphs (b)(4)(iv), (c)(3)(iii), and (d)(3)(i) of this section apply to dispositions after February 16, 2016. For dispositions on or before February 16, 2016, see

paragraphs (b)(4)(iv), (c)(3)(iii), and (d)(3)(i) of this section as contained in 26 CFR part 1 revised as of April 1, 2015.

§1.1445-3 [Amended]

Par. 6. Section 1.1445-3 is amended in each of the paragraphs listed in the first column by removing the language in the “Remove” column and adding in its place the language in the “Add” column.

| <u>Paragraph</u> | <u>Remove</u> | <u>Add</u> |
|---------------------------------------|--|--------------------------|
| (b)(1), first sentence | to the Director, Philadelphia Service Center, at | to |
| (f)(1), first sentence | to the Director, Philadelphia Service Center, at | to |
| (f)(2)(iii), heading | by the Director, Philadelphia Service Center, | on behalf of the Service |
| (f)(2)(iii), first sentence | by the Director, Philadelphia Service Center or his delegate | on behalf of the Service |
| (g) introductory text, third sentence | addressed to the Director, Philadelphia Service Center, at | delivered to |

§1.1445-4 [Amended]

Par. 7. Section 1.1445-4 is amended in each of the paragraphs listed in the first column by removing the language in the “Remove” column and adding in its place the language in the “Add” column.

| <u>Paragraph</u> | <u>Remove</u> | <u>Add</u> |
|------------------------|---|--|
| (c)(1), tenth sentence | from a foreign person must withhold a tax equal to 10 percent | from a foreign person after February 16, 2016, must withhold a tax equal to 15 percent (10 percent in the case of dispositions described in §1.1445-1(b)(2)) |

| | | |
|-----------------------------|--|--|
| (c)(1), thirteenth sentence | 10 percent tax | 15 percent tax (10 percent tax in the case of dispositions described in §1.1445-1(b)(2)) |
| (c)(2), second sentence | to the Director, Philadelphia Service Center, at | to |

Par. 8. Section 1.1445-5 is amended as follows:

1. In each of the paragraphs listed in the first column, by removing the language in the “Remove” column and adding in its place the language in the “Add” column.

| <u>Paragraph</u> | <u>Remove</u> | <u>Add</u> |
|---|--|------------|
| (b)(2)(ii) introductory text, first sentence | to the Director, Philadelphia Service Center, at | to |
| (c)(3)(iv) introductory text, second sentence | 10 percent | 15 percent |
| (c)(3)(v), first sentence | with the Director, Philadelphia Service Center, at | at |
| (c)(3)(v), fifth sentence | with the Director, Philadelphia Service Center, at | at |
| (e)(1) introductory text, first sentence | 10 percent | 15 percent |

2. In paragraph (h), by revising the heading and adding two sentences after the first sentence.

The revision and additions read as follows:

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

* * * * *

(h) Applicability dates. * * * The withholding rates set forth in paragraphs (c)(3)(iv) and (e)(1) of this section apply to distributions after February 16, 2016. For distributions

on or before February 16, 2016, see paragraphs (c)(3)(iv) and (e)(1) of this section as contained in 26 CFR part 1 revised as of April 1, 2015.

§1.1445-6 [Amended]

Par. 9. Section 1.1445-6 is amended in each of the paragraphs listed in the first column by removing the language in the “Remove” column and adding in its place the language in the “Add” column.

| <u>Paragraph</u> | <u>Remove</u> | <u>Add</u> |
|--|---|--------------------------|
| (f)(1), first sentence | to the Director, Philadelphia Service Center, at | to |
| (f)(2)(iii), heading | by the Director, Philadelphia Service Center | on behalf of the Service |
| (f)(2)(iii), first sentence | by the Director, Philadelphia Service Center, or his delegate | on behalf of the Service |
| (g) introductory text, second sentence | addressed to the Director, Philadelphia Service Center, at | delivered to |

§1.1445-11T [Amended]

Par. 10. Section 1.1445-11T is amended in paragraph (d)(2)(iii) by adding footnote “1” after the last sentence to read as follows:

§1.1445-11T Special rules requiring withholding under §1.1445-5 (temporary).

* * * * *

(d) * * *

(2) * * *

(iii) * * *

¹ Section 324(a) of the Protecting Americans from Tax Hikes Act of 2015 (Public Law 114-113) increased the withholding rate under section 1445(e)(5) to 15 percent, applicable to dispositions after February 16, 2016.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: February 12, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).